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DILEMMA OF MUSLIM WOMEN REGARDING DIVORCE IN INDIA**Pranav Saini¹ and Maanvi Trivedi²****ABSTRACT**

Muslim women in India often face plight in the media, in the politics and sometimes in academic areas too. Divorce, grounds of divorce, polygamy and Muslim personal laws dealing with women are some of the main problems which create a chaos in the Muslim community itself or in the country as a whole. This article will be exploring the problems faced by Muslim women in terms of divorce in the past as well as at the present time and also the problems which Muslim women are going to face in the nearby future if these problems are not going to be resolved. The following article will be looking at the ways in which Muslim woman can seek divorce from her husband, looking at the statutes and provisions made by the law for it, the legal effects of divorce on Muslim women and also the inequality Muslim women are facing though India provides equality under the Constitution still this article will be discussing the ways and recommendations in which this inequality may be eradicated and how the status of a Muslim woman can be uplifted from backward group to and upward recognized group. Also many case laws will be discussed for the better and easy understanding of the readers.

INTRODUCTION

Today the issue of women's rights is extremely controversial in Muslim personal law. To be specific, the rights of Muslim women in the triple talaq divorce, succession, maintenance has gained a lot of popularity. The Indian constitution, however, allowed equal rights on grounds of gender or religion, but still there are practices which are unconstitutional.³ We know that the Muslim personal law is uncodified and the legal decisions by the courts are based on the rules and norms mentioned in Quran and Hadith⁴. This research paper is an attempt to analyse the dilemma that Muslim women face in regard of divorce in India, Muslim Personal Law and giving some suggestions to empower Muslim women.

As stated earlier Muslim personal law is uncodified so the muslim women face a disadvantage position. It is so because the people don't have a proper knowledge of the various rights and

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³ M. Ismail Faruqui v. Union of India, AIR 1994 6 SCC 360.

⁴ Alka Singh, *Women in Muslim Personal law*, Rawat publication New Delhi, 1992.

interpretation written in Quran. Muslim women remain the economically and socially most deprived section in the muslim community itself. The personal laws in India are the statutes which are applicable to the citizens of various faiths and different religions. Muslim women have been fighting for equality in Islamic law since many years specially in the fields of divorce, marriages and the property rights. The issue of Muslim personal law is quite debatable, political and controversial. This issue more came into limelight after the 1986 Shah Bano case⁵ and enactment of the Muslim Women (protection of Rights on Divorce).⁶

Marriage is a contract whose object is procreation and legislation of children under Muslim Law.⁷ Marriage contracts are usually reduced to writing in a Kabinnama. But if one fails to prove the Kabinama then it cannot be held to disprove marriage. Under Muslim marriages, one thing to keep in mind is that neither writings or religious ceremony is must. What is necessary is that there should be a proposal and an acceptance in the presence of witness.⁸ Nikah is considered as one of the most significant and well-established concept. Bride's free consent is important and Nikah cannot be said to be taken place if there is no free consent.⁹ The bride has been given the right to agree or disagree on specified marriage terms and conditions. The point here is most of the families force the women to marriage against their will and hence women cannot disagree at the time of the Nikah and it is difficult to recognize whether there was free consent at the time of marriage or not.

DISCUSSION AND RESULT

Divorce is considered as a sin in Islamic law, but this divorce sometimes is a necessity when the person wanting the divorce are not happy with their life partners due to many reasons.¹⁰ In India both husband and wife have been given the different ways of divorce. At first, we will be discussing the ways in which Muslim women can give divorce to her husband. There are two customary ways in which Muslim women can seek a divorce from their husband in India. First one is through their personal Sharia law through **Tafweez and Lian**. The other being the statutory provision which is given in Dissolution of Muslim Marriage Act,1938.

⁵ Mohm. Ahmed Khan v. Shah Bano Begum and ors., 1985 AIR 945.

⁶ Razia Patel, *Indian Muslim Women -Politics of Muslim personal Law and struggle for life with dignity*, 44 ECONOMIC AND POLITICAL WEEKLY, 44(2009).

⁷ Shoharat Singh v. Jafri Begum,1915 (17) BOM. L.R 13.

⁸ Dr. Nanda Chiranjeevi Rao, *Presumption of marriage under Muslim Law*, 39 INDIAN BAR REVIEW,133(2012).

⁹ Parsoon Shekhar, *Essentials of Valid Marriage under Muslim Law*, BLOGPLEADER. <https://blog.ipleaders.in/essentials-of-valid-marriage-under-muslim-law/>.

¹⁰ Kitab Al- Talaq, *Transaltion of Sahih Mulsim, Book*, Chapter 1 , Number 3473.

Talaq-i-Tafweez

Islam has given right to the wife to seek divorce on various grounds. One such method is Talaq-i-tafweez. This form of divorce is recognized both in the Shia and the Sunnis.¹¹

“In this husband delegates the right of giving divorce to any person, as an agent even to his wife, and that person or agent is possessed with the right of pronouncing a divorce on behalf of the husband. A permanent delegation of power is delegated but a temporary delegation of power is not. It means wife is bound to seek the husband’s consent for tafweez.”

Upon analysing it can be inferred that the right of the women given here is basically dependent on the husband. What if the husband don’t give the consent? This is the problem which Muslim women face in India their right is purely dependent on the husband however this right delegated by the husband is irrevocable.¹²

“Talaq-i-tafweez is specified in prenuptial agreements. In *Md. Khan v Shahmai*, under a prenuptial agreement, a husband, who was a Khana Damad, had to pay some amount of marriage expenses which was incurred by the father in law when he has to leave the house and delegated power of divorce to wife but at the time of leaving the house he didn’t pay the amount. So upon exercising the right to divorce herself court held that it is a valid divorce.¹³”

It can be inferred from the case that where if in an agreement it is stipulated and the husband is failing to pay the wife maintenance or taking a second wife then the wife has the right of pronouncing a divorce on herself. So the women should be aware that she has the power to exercise even in the case of contingency. This form of divorce in itself is very tricky wherein the wife has the power of giving divorce not like giving divorce to her husband but she can divorce herself on husband’s behalf.

Ameer Ali gives three kinds of tafweez:

- Ikhtiar giving wife the authority to talaq herself,
- Amr- Bayed leaving the matter in her own hand;
- Mashiat giving wife the option to do whatever she likes.¹⁴

¹¹ Somepalli Alekhya, *Comparative Analysis of Islamic Divorce Laws: Socio-legal Analysis*, 2 JOURNAL OF FAMILY AND ADOPTION LAW, 20-22(2019).

¹² Mohd. Naseem Bhat v Bilquees Akhtar and ors., 2015.

¹³ Md. Khan v Shahmai, AIR1970 J&K 154.

¹⁴ Aqil Ahmad, *Mohammedan Law*, 184,(Prof. Iqbal Kahan 26th ed. 2016).

According to one scholar- “This form of delegated divorce is perhaps the most potent weapon in the hands of Muslim wife to obtain her freedom without the intervention of any court and is now beginning to be fairly common in India.”¹⁵

Lian

According to this, if the husband puts the false charges or ever blame his wife of adultery (zina) then the wife is entitled to file a suit against the husband for dissolving their marriage. Such way of giving divorce is called lian.¹⁶ Until the judgement of the court the marriage is said to be existed. But here it is important to note that if the allegations put forth by the husband against his wife is proved to be true than Lian way of seeking divorce shall be declared as invalid. This was seen in the case of Nurjahan v. Kazim Ali¹⁷ and the decision was given in favour of husband. So it can also be inferred that the women are blamed and are subjected to such false allegations in the country(sometimes).

DISSOLUTION OF MARRIAGES ACT 1939

Apart from Tafweez and Lian that confers the Muslim women in seeking divorce is DMMA. Dissolution of Muslim Marriage Act, 1939 (DMMA) is a sole document which grant women more rights which make easier for the women of the Muslim community to get out of their vulnerable marriages. A woman married under Muslim law shall be entitled to obtain a decree for divorce for the dissolution for her marriage on any decree. To be more specific Section 2 of this particular act gives the special grounds ¹⁸or decrees on which the wife can obtain the decree of divorce. Following are some of the grounds which are mentioned in section 2 of DMMA under which Muslim woman can seek divorce:

- If after a period of four years it is not known where the husband is then wife may call off her marriage. The husband is said to be missing if the wife has no knowledge of him after a period of four years. After all of this the wife has to give the addresses of all the possible heirs where the state can find the husband even after that he is missing then the court issues the decree but this decree shall be made in effect only after 6 month and even if husband comes back within these 6 months the court has the power to revoke this notice and then marriage shall not be broken.

¹⁵ A.A.A Fyzee, *Outlines of Muhammadan Law*, OXFORD UNIVERSITY PRESS DELHI, 158-159(1974).

¹⁶ Setu Gupta, *The Concept of Divorce Under Muslim Law*, 2016

¹⁷ Nurjahan Bibi v Md. Kajim Ali, AIR 1977 CAL 90.

¹⁸ Dissolution of Muslim Marriage Act 1939 S 2.

- The husband if not providing maintenance then also the wife has the power to seek divorce. Even if the husband doesn't maintain her wife either because he is neglecting or if he thinks he has no right to provide her the maintenance the result would be the same that the wife can seek divorce. But suppose if the divorce took place then also the husband has to pay for the maintenance of the wife or not? In a recent case, when the the wife left her husband on the grounds of cruelty her plea of divorce was accepted and during this period she was given the maintenance as in mahr only for iddat period.¹⁹This decision was upheld when appeared before the apex court and the bench of Justices Dipak Mishra and Vikramjit Sen held that the wife should be given the maintenance even after divorce and iddat period.²⁰
- A Muslim wife can also demand the decree of divorce if her husband has comitted some sort of crime and he has been sentenced for seven or more than seven years then she can also use this as a ground of divorce.
- The husband after the marriage becomes subjected to some obligations which if doesn't perform for a period of three years then wife can take divorce.²¹
 1. Impotent: If the Muslim wife is able to prove that her husband was impotent since the time of marriage and impotent till date then also she can file a suit for divorce but the court has the power to give one year to the husband to prove his potency if he makes or applies for the same in the court²².
 2. If the wife seeks divorce on the basis of the mental health i.e if her husband is mentally ill or is suffering from leprosy or any disease which is incurable or chronic in nature then this would amount to a valid ground of divorce.

Apart from all the above decrees or grounds mentioned the wife can sue husband and seek divorce if the husband does or perform cruelty with her in any manner. Just like other matrimonial laws in India Muslim law has no such difference in regard to the legal cruelty. It is purely based on universal and humanitarian grounds by the husband which cause body or mental pain and threatening the wife's health.²³

In case there are two wives and one husband. The wives are subjected to discrimination by their husband and one of the wife is subjected to cruelty. In case of co wives if the husband

¹⁹ Shamim Bano v Asraf Khan, AIR 2014 SCC 188.

²⁰ Sanjay K Singh, *Muslim women entitled to maintenance after iddat*, ET, December 5, 2014, at 4.

²¹ Dissolution of Muslim Marriage Act, S 2(4).

²² Gul Mohd. Khan v Hasina AIR 1988 J&K 62. (The court allowed the husband to prove his potency).

²³ Shamsunnisa Begum v G. Subban Basha 1994 (2) ALT Cri 143.

provides maintenance to only one wife then the other wife's life is destroyed. In case of *Umat-Ul-Hafiz v. Talib Hussain*, the wives were living in India and the husband went abroad. He was only maintaining his one wife and not the other, the court then granted divorce to wife as she was ill-treated and neglected.²⁴

In the Muslim law, if the husband takes the property of the wife and sells it at any value or disposes it without the wife's consent and then the wife has no legal right over it then also it will amount to cruelty.²⁵ In these cases it becomes very difficult for the court too to find out that whether the use of the property by the husband is for the goodwill of the family or the children or for his own personal needs and wasted it. So while deciding the case of cruelty the court has to see or consider the different circumstance like the mental and physical condition, the environment of the family and many more and then giving the verdict.

There are other provisions also in which divorce can be done under Muslim Law-

Zihar- In this the husband can say that from today the wife is like his mother or sister (that is of course prohibited relationship). After four months from the date when he started comparing his wife, the wife may go to the court and seek divorce. This is also a dilemma and unfairness which the women is facing. When the period of 4 month ends then the wife is given certain rights like she can, as the court then for the divorce, also ask for the restitution of conjugal rights. But then again, there are certain conditions where the Muslim wife cannot ask the court for the judicial decree of divorce if the husband wants to revoke Zihar, and there are certain ways in which he can revoke it like if for the period of two months the husband is on fast, if he serves food to atleast sixty people or if he frees the slave.²⁶ This concept of divorce, however, is widely criticised and ofcourse it should be, the mother gave birth to the child and the same child is saying to his wife that you are like my mother to me and that does not make sense and hence criticised. Zihar as a divorce is virtually very non-existent in India.²⁷

Khula- Though this way of divorce is mutual agreement, but still in the law it is mentioned that the wife would pay compensation to her husband out of her property.²⁸ So it is basically a mutual agreement in which if the husband leaves the wife from his marital rights and for the agreement the consideration is paid or to be paid by the wife to the husband, and if the husband

²⁴ *Umat-Ul-Hafiz v. Talib Hussain* AIR 1945 Lah. 56.

²⁵ *Zubaidaa v. Sardar Shah* AIR 1943 Lah. 310.

²⁶ *Supra* Note 14. At pg 5.

²⁷ *Masoor Ahmed v State (NCT of Delhi)* 2007 (2), ILR(Del).

²⁸ *Parzana Parveen V Shakil Khan* 2005 HC 7504.

accepts this then there will be divorce and it is irrevocable then. ²⁹It is also necessary in this case that the desire of separation is made by the wife. Or even if the separation is mutual then also the consideration is to be paid by the wife to the husband and is lawful. if the wife is unable to pay the consideration it doesn't mean that the divorce is invalid, however, the husband can then sue the wife for the same.

SHAH BANO CASE

This is one the most controversial case in the history of Muslim law in India. In this case there were many ups and downs faced by the Muslim wife. This is the case in which women had struggled for their rights and freedom. Shah bano, who was married in 1932 was forced to leave the house after her husband gave her instant talaq by the utterings of Talaq Talaq Talaq. Later on her husband married to some other woman. Shah bano initially went to the court and filed a petition for the maintenance under section 123 of the Crpc,1973. Initially she won the maintenance case and the husband was directed to pay the maintenance. However, The husband claimed that Muslim Personal Law in India required only providing maintenance till iddat period after divorce. Then again after sometime Sah bano went to the High Court of MP and she wanted to alter the amount of maintenance to be more specific wanted to increase the amount of maintenance. Then the husband argued that having connections with the divorced wife or any form of connection is termed as Haram and hence he is legally not responsible to maintain the wife. So now when the question was put forth in the Supreme court the main issue was that whether section 125 of Crpc³⁰ is concerned with Muslims or not , whether he is liable to maintain her or whether UCC applies to all religions or not. So, the Supreme court in the final verdict stated that if the woman is not financially stable and not able to maintain herself and the children then the husband has to pay alimony under section 125, but if the woman is able to maintain herself then the Husband is not liable to pay maintenance to the divorced wife. ³¹

Shah bano not only won the case but won the hearts of many other Muslim women as the case gave rise to the enactment of the "Muslim women (Protection of Rights on Divorce) Act, 1986."

²⁹Hidayatullah, Mulla's Principle of Mohemdan Law, Section 319, 18th ed.

³⁰ Criminal Procedure Code,1973 S 125.

³¹ Mohd. Ahmed Khan v Shah Bano Begum AIR 1985 SC 945.

TRIPLE TALAQ CASE

Before this judgement the husband had the power to give instant divorce by speaking of three times word 'Talaq'. This form of Talaq is called Talaq-e-biddat in Islam.³² Shayara Bano was living with her husband for 15 years and later on divorced by this mode. She then challenged this form of divorce and believed that it is against the articles 14,15, 21 and 25 or basically infringing the fundamental rights of the Muslim women. To support this cause many NGO's and even the Union Government of India joined hands. The court held that:

“the practice of Triple Talaq is unconstitutional³³ and yes, it violates fundamental rights of the Muslim women. So it was held that Triple Talaq was not to be protected under article 25 of the Indian constitution as it is not an essential elements of the religion.”

Again this case and infact Shayara Bano proved that the Constitution will remain the supreme law in the country and the law will not change its mind even in the cases of religion.

CONCLUSION AND RECOMMENDATIONS

The legal effects of divorce upon the women is quite critical and depressing. This research helps us to get an idea that though India is known for its social equality but it is truly not because the caste disadvantage is still prevalent even after providing the fundamental rights. Religious minorities face oppression which leads to the community gap and inequality in most spheres of life in India. In modern India, the status of Muslim women socially economically and politically are causes of concern and need attention. Muslim women also face considerable challenges as the wives. The Muslim women are backward educationally too and this needs to be fixed because not of the Muslim women are not aware of their rights and are becoming the victims of the cruelty and inhumanity.

After all the discussion it is quite evident that the Muslim women are facing the hardships in their married life and even after the marriage life that is divorce. Though they have been given rights but they don't know how to use them properly and even we can say that they are not aware of it. So first thing which is recommended is that **awareness** is very important suppose if a doctor gives the medicine to the patient but the patient doesn't know in which way and how many times he has to take the medicine then what is the point in this. Similarly even if the Muslim women have rights but if they are not known about the same then there is no point.

³² Pushpit Singh, Shayara Bano v UOI, April 27 2020, <https://5thvoice.news/legalnews/NzIzMA==/Shayara-Bano-v-Union-of-India-Case-Analysis>.

³³ Shayara Bano v UOI and ors. AIR 2017 9 SCC 1.

Secondly, it should also be kept in mind that if any law or legislation which is in relation to the Muslim marriages and its related matters then it should undergo the constitutionality test and there should be acceptance of that legislation or law in the Muslim community as well otherwise there may be conflicts inside the communities as to why there is interference in their personal laws so this test should be done otherwise it will be recognised only as a paper law and there is no implementation as such. More severe acts for the Protection of Muslim women should be made. The role of judiciary is quite important if talking about the recommendations because at the end of the day it is only the judiciary which has to decide who is wrong and who is right. Though there are recent judgements which were in favour of the Muslim women but still there are no movements in the past or in the present to make some reforms in the Muslim law nor there is any form of voice raising for codifying it. So reform is the necessity to uplift the position of Muslim women in India. We have seen that NGOs have supported Muslim women in many of the cases so there should be more and more support given by different organisations. In the end it is suggested that there should be a demand of a reformed gender just codified Muslim law.