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MARRIAGE AND DIVORCE UNDER MUSLIM LAW

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Abstract

In the Pre-independent India, the British Raj enacted an exclusive legislation i.e., Muslim Personal Law (Shariat) Application Act, 1937 with the purpose of enacting and governing laws applicable to Muslim Community in the Indian Subcontinent. The Act was fairly based upon doctrines derived from the Islamic Scriptures mainly from the Holy Qur'an and commentaries from the Prophet. The enactment of this Act made formal classification of the family law functions performance of the people of the community to the Govt. of India (British Raj). The Act stated that the parties eligible under Section 11 of the Indian Contract Act, 1872 which talks about eligible parties to enter into a contract are eligible under the Act² as well since the marriage under Muslim Law is basically a contract. The legislation also enacted an Act for resolving matrimonial disputes for the Muslim community and dissolving the marriage between the husband and wife. This study aims to highlight essentials conditions under the marriage and divorce Acts and find conclusiveness in instances where there is a clash between performance under Personal law and Common law. It is up to the discretion of the legislators and adjudicators to set the precedent depending upon the situation.

Keywords – Muslim marriages (Nikah), Divorce (Talaq), Muslim Personal Law (Shariat) Application Act, 1937, Dissolution of the Muslim Marriage Act, 1939, Muslim Women (Protection of Rights on Divorce) Act, 1986, The Muslim Women (The Protection of Rights on Marriage) Act, 2019

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² Section 3(b), The Muslim Personal Law (Shariat) Application Act, 1937

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Introduction

Family laws deal in matters relating to family matters like marriage, divorce, inheritance etc. Where marriage and divorce laws are primarily governed as per the rituals, rites, ceremonies and customs traditionally followed by the families of whichever community, ethnicity, religion they belong to. The same principle applies in case of inheritance and succession of property as well wherein children inherit property and land from their forefathers generally, as per the laws laid down in their religious scriptures. All the religious rights are fundamentally protected and preserved under the Indian Constitution where all people including citizens are enshrined to be granted several laws that includes “Right to follow, propagate and profess any religion.”³ This article spotlights on the marriage laws of the Muslim community and descriptive features of the Acts governing the Personal Law. As per Muslim Personal Law, marriage is considered as a matrimonial contract rather than a sacramental bond of Hindu tradition.

Essentials of a Nikah/ Marriage:

As per the laws, the bridegroom is required to compulsorily provide dower money which is pre decided by the marrying parties in exchange the bride will live along with the bridegroom. This dower money is a must fulfilment by the bridegroom otherwise the marriage is not considered as Sahih or regular (without impediments) which may be invalidated afterwards if not regularly performed. The wife is entitled to dower amount even if the separation or divorce takes place between them or the death of the husband⁴ i.e., it is a fundamentally provided financial right to the wife by the Islamic principles which a husband must fulfil at any cost.⁵

Iddat or idda period refers to the period which forbids a woman from getting married again. Polyandry is per se forbidden as per the Shariah the remarriage here refers to the marriage performed wife either after dissolution of earlier marriage, becoming widow. Iddat period extends to a period of 3 menstrual cycles of the woman after dissolution of the marriage and after becoming a widow, it is up to 4 cycles and ten days. The reasoning behind this concept is to ascertain paternity of any offspring the woman may have. The iddat period extends till the delivery of the child if in case the woman is ascertained to be pregnant at the time of dissolution

³ Article 25, The Constitution of India

⁴ Hamira Bibi v. Zubaida Bibi, [1916] 43 IA 294

⁵ Section 5, Dissolution of the Muslim Marriage Act, 1939

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of the marriage or after she becomes a widow. A marriage with a Muslim woman undergoing her Iddat period is irregular.⁶

Nikah is an Arabic origin word that means ‘marriage contract’ and is used by Muslims to refer to marriage. As per the Islamic principles, marrying parties must be competent to enter into this contract, similar conditions like a contract under Indian Contract Act are required here as well. There must be an offer (ijab) made by a party, and that offer is to be accepted (qubool) by the other party, mano a mano in presence of witnesses to constitute the marriage as Sahih and valid. The witnesses shall be two males, or one male and two female witnesses. The husband must compulsorily pay the dower/ mahr (consideration) to the wife in exchange of marrying her. A valid marriage constitutes two compliant adults who have contented all the legal requirements with all the necessary formalities.

Dower or Mahr: Dower/ Mahr is the consideration value paid by the bridegroom to the bride/ her parents/ guardians in exchange for marriage. The same was held in the case of SayedSabirHussain v. FarsandHussain⁷, that the dower is the husband’s obligation to pay the wife. Traditionally, it used to be in gold and silver kind when they both were used as a legalised currency for exchange but as of now it is usually money or property or any kind which is generally redeemable for a considerable value. The wife can refuse to cohabit with the husband if the husband refuses to pay the dower amount and any suit for restitution of conjugal rights is not maintainable and void per se before the consummation of their marriage.⁸ In Sunni Muslim Law, the minimum dower amounts to 10 dirhams but the amount is fixed in Shia Muslim Law to be at 500 dirhams.

Dower is an essential part under Muslim marriage and differs from the dowry in other traditions. Moreover, the Dowry Prohibition Act clearly excludes mahr from the definition of dowry⁹.

Sahih: Sahih marriage is also known as a valid marriage. It determines the rights and duties of the partners, the legality of sexual bond, legitimacy of the children, and inheritance rights of both the parties.

⁶Jhandu v. Mst. HussainBibi, (1923) 4 Lah. 1921

⁷ AIR 1938 PC 80

⁸Nasra Begum v. Rizwan Ali AIR 1980 All 118

⁹ Deepak Kumar vs. State of U.P. (01.08.2019 - ALLHC): MANU/UP/4336/2019

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Batil: Batil marriage is also known as invalid marriage or void marriage. A void marriage is performed without any necessary customs and regards which are essential to make a marriage valid and sahibh and is in violation of all the legal requirements. A void marriage lets legal consequences such as rights or duties, inheritance.

Examples: 1. Marriage between people who come within the prohibited degrees of relationship meaning marrying those who are prohibited to marry under “prohibited degree of relationship” like brother and sister, or Nephew and Aunt, etc. 2. A married Muslim woman remarrying while her marital status remains to be “married”.

Fasid: Fasidmarriage is also known as irregular marriage. An irregular/ fasid marriage under Muslim law is ineffective until the time of consummation. The marriage may be terminated at any time, either before or even after realisation, by implied intention to assent by either party. A fasid marriage can be converted into a sahibh marriage.¹⁰

MutaMarriage- A muta marriage is a concept originated in Shia Muslim School of law where there a definite time period is mentioned for the married couples after whose expiration, the marital bond between the husband and wife ceases to exist.

Polygamy: Another unique feature of Islamic personal law is that a Muslim man is allowed to lawfully take up to 4 wives and cohabit with them on condition if put under Nikahnama that the previous wife / wives do not have an objection and can continue to live in the same house. A woman who refuses to live together with her husband objecting against bigamy/ polygamy is not disqualified to receive maintenance. However, when the husband initiates the divorce, he has to pay up the due Dower/ Mahr amount to the wife. If the wife initiates the divorce, and her husband at fault, she does not lose her Dower/ Mahr. In case she does not establish proof that her husband is at fault, it is obligatory upon her to give back Mahr amount to her husband. If she calls for divorce without reasons, it is known as ‘khula’ in this case she is obliged to return the mahr consideration to the husband.

A Muslim wife has absolute right over the shares and cannot be deprived of property rights, even in case the husband went into bigamy or polygamy. The same is derived from the verses of the Holy Qur'an that states, “If ye fear that ye shall not be able to deal justly with the

¹⁰Ata Mohammed. v. SaiqulBibi 1910 8 ALJ 953

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orphans, marry women of your choice (two, or three, or four); but if ye fear that ye shall not be able to deal justly (with them), then marry only one.”¹¹

Nikah Halala: It is a practice in which a divorced woman is married to a man temporarily and after the consummation of their marriage, she is divorced in order to remarry her previous husband. This is primarily done in cases of women who are divorced via talaq-ul-biddat and in order to rearrange their union to the previous husband they must undergo through nikah halala. The rationale behind the same is to prevent the husbands from denouncing triple talaq to their wives however, practice of triple talaq is now penalised and mere denouncing triple talaq to wife can land the husband in prison for up to 3 years and will be held liable to pay fine.¹²

Dissolution of marriage

Dissolution of marriage under Muslim Law is observed as the legal method of termination of marriage between the husband and wife considering some grounds or reasonable excuses to obtain divorce from their spouses. Divorce in Arabic means Talaq which means “freeing or undoing the knots”. As per the Islamic doctrines, it is conveyed by the Prophet Muhammad that divorce is the least liked of all the lawful things to the God¹³. Considering the commentary, it is observed the spouses should resolve the matrimonial disputes between them and prefer a married family life but certainly the divorce remains a conclusive alternative to remedy. Divorce can be of two types Judicial and Extra Judicial. The Extra Judicial types contains different grades under spouses can opt for divorce. The grades under this category are as follows:

1. By Husband (talaq, ila, zihar)
2. By Wife (lian, talaq-e-tafweez)
3. By Mutual Consent (mubaraat, khula)

Talaq-ul-Sunnat (preferred form of divorce) – talaq-ul-sunnat consists of talaq-ul-Ahsan which is the most acceptable and preferred mode of divorce and talaq-ul-Hasan which is less preferred than talaq-ul-Ahsan but approved as an opt. for divorce.

¹¹ Chapter 4, Verse 3: The Holy Qur'an

¹² Section 4, The Muslim Women (The Protection of Rights on Marriage) Act, 2019

¹³ Hadith 3, Book 10, The Chapters on Divorce

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Talaq-ul-biddat (not preferred way or innovative form of divorce) – talaq-ul-biddat is the most unfavoured form of talaq which is considered as an innovation to Islamic rulings regarding divorce. In the case of *Shayara Bano vs. Union of India*¹⁴, the 5 Judge Bench of the Supreme Court on 22nd August 2017 declared that the practise of triple talaq was unconstitutional arbitrary to principles defying fundamental rights by a 3:2 majority. The court determined that triple talaq usage comes under the ambit of talaq-ul-biddat meaning innovation in the Islamic divorce system hence it is per se void and unconstitutional.

The judicial type of divorce lays down the method of divorcing as well as the grounds for divorce/ dissolution of marriage are laid down under The Dissolution of Muslim Marriage Act, 1939.

Grounds for decree for dissolution of marriage.¹⁵

Conditions under which a Muslim woman is entitled to obtain a decree for divorce in case:

1. The husband appears to be missing or his whereabouts remain to be unknown for a period of four years;
2. The husband fails, intentionally or unintentionally to provide her maintenance for a period of two years;
3. The husband is convicted or has been sentenced up to seven years or more of imprisonment;
4. The husband fails to fulfil his marital obligations for continuous three years without reasonable cause;
5. The husband could not procreate at the time of the marriage and remains to be so (impotent);
6. The husband has been declared as unsound mind (insane) for over two years or is suffering from an incurable disease or a STD;
7. Though the wife disapproved the marriage before reaching the age of majority (18 years) yet was made to marry by her father/ guardian before she attained the age of fifteen years; if the marriage has not been consummated;

¹⁴MANU/SC/1031/2017

¹⁵ Section 2, The Dissolution of Muslim Marriage Act, 1939

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8. The husband treats her with cruelty, that is to say¹⁶frequently assaults her or makes her life abject by cruelty, it is to be noted that cruelty includes physical as well as mental assault.¹⁷

9. The husband befriends with women of immoral character or leads a notorious life, or tries to force her to lead a sinful life, or disposes of her property or impedes her exercising her rights over it, or hampers her freedom in the adherence of her religious preaching or practice,

10. If the husband has more wives than one, does not treat her justifiably in accordance with the decrees of the Qur'an¹⁸; the list containing grounds is not exhaustive for example conversion to other faith can also be recognised as valid ground for the dissolution of marriages under Muslim law¹⁹. However, the court held that mere conversion does not end the marital ties unless a decree for divorce on that ground is obtained from the court.²⁰

Maintenance:

Under the Muslim Personal Law, the maintenance is granted to wife, children and parents. As per the Islamic point of view, the wife is entitled to receive maintenance from her previous husband till the iddat period expires. However, in the case of Mohd. Ahmed Khan vs. Shah Bano Begum²¹, the Supreme Court held that though the Muslim Personal law allows maintenance for a limited time period, the aggrieved women can claim maintenance under Section 125 of Cr.P.C. This precedent carries the perpetual spirit of Indian legislation indicating harmonious construction between Common laws and Personal laws. Forming an edge over the Personal laws that India as a secular democracy has respect for both Common and Personal laws and provides equity to the people when one of them fails to overlook the rights of the people. The Supreme Court held the constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 concluding that under certain reasonable grounds the woman can claim maintenance exclusive of Dissolution of Muslim Marriage Act, 1939.²²

¹⁶Shahana Bibi v. Nadeem Shah and Ors., [2015] MLD 1623

¹⁷Ramla vs. Abdul Rahuf, MANU/KE/3148/2021

¹⁸Begum Subanu alias Saira Banu v. A.M Abdool Gafoor 1987 AIR 1103

¹⁹ Section 4, The Dissolution of Muslim Marriage Act, 1939

²⁰ Lily Thomas v. Union of India (2000) 6 SCC 224

²¹ AIR 1985 SC 945

²²Danial Latifi and others v. Union of India (2001) 7 SCC 740

Conclusion:

Muslim law has been least amended because of its nature, which provides straightforward fatwa/ruling to the issues and literal texts contained in their scriptures. It is because Muslim Law retains most of the text and clarification of the period when its religious texts were written. The laws are observed as the manifestation of God's command for believers. When transgressed, penal provisions are too provided however, penalizing the offenses are absolutely manifested by provisions laid down in Penal Statutes i.e., Indian Penal Code, 1860 and Code of Criminal Procedure, 1973 and other substantive and statutory provisions laid down as per Constitution of India which describes India as Sovereign, Socialist, Secular and Democratic Republic. The Constitution protects the rights of people in protection their religious freedoms however when it comes to punishing the offenders and providing compensation, the Common laws of the State supersede. It is the onus upon the court to step in, in instances where there is a clash of provisions between Common law and Personal law. The court adjudicates the precedent depending upon the facts and principles of natural justice, conscience, fairness and equity.

