

Analysis of Divorce under Sharia Law and the Modern Muslim Legislations: A Comparative Study in Focus

Sadia Binte Rahman

Lecturer, Department of Law, Bangladesh University of Professionals (BUP), Dhaka, Bangladesh.

*Email: sadia.rahman@bup.edu.bd

Abstract

The classified aspects of Muslim family law deals with several issues among them divorce has significantly talked about. The traditional Muslim sharia law had defined the charter, process and prospects in that way which have been abided by throughout for about a longer period in the muslim majority countries. The modern muslim world believes in the necessary reformations on every sphere of family issues. This paper dealt with the recent modern modifications in divorce to accumulate sharia law in this regard. Challenges may come over, yet few recommendations might assist for the overall betterment of the current scenario of divorce under muslim law. This comparison shows over a state pointing what needs to be altered, what needs to be rescinded and what to be adapted to keep pace between the traditional sharia legislation with the modern view on the right to divorce. As the voice on being the unilateral right has been abolished long ago in Islam, the traditional one and the modern legislation should implement together.

Key words: Divorce, Sharia law, Modern Muslim Legislation, Comparative Study.

DOI: 10.7176/JLPG/142-02

Publication date: September 30th 2024

1.Introduction

Islam has allowed both man and woman their right of divorce emphasizing the happiness of both husband and wife. Divorce is no longer considered as a unilateral right of the husband, though the divergent school of laws expresses their several opinions (Huq 1995).

Sharia law has a respectable number of concepts of family law. Marriage, dower, maintenance, inheritance among them dissolution of marriage or divorce is significant as the application of this act is less encouraged in Muslim law. In Sharia law, the laws and provisions respecting the dissolution of marriage accumulates the directions of Quran and Hadith where first divorce is a wrongful act. This act has been spelled out in Sharia law about all the necessities, preventions together with keeping pace with the modern Muslim world that have explored and exercised it in their way. In this regard, we can cite Hedaya,

"a dangerous and disapproved procedure as it dissolves marriage, an institution which involves many circumstances as well of a temporal as a spiritual nature; nor is it propriety at all admitted, but on the ground of urgency of relief from an unsuitable wife" (Hamilton, 1957)

This appraisal shall investigate the process named by the sharia law, four madhabs accompanying the applicability of the provisions in modern world along with their ijihad and reforming conceptualization.

2.Comparative Study of Laws-

To know the comparative study, the laws of Sharia together with modern provisions we need to go through the complete study of laws, in such manner we can provide some recommendations.

Sharia Law on Divorce:

When a situation comes in a state of divorce then the first rule is to make conciliation between husband and wife, subsequently the other procedures shall proceed. Throughout the concept Talaq is not illegal but a wrongful representation according to Sharia.

At the bottom, let us know the forms of talaq in Sharia law, there are some forms of talaq that the Khul talaq where the woman can seek talaq from her husband and if he does not agree upon it then an amount of compensation can be offered to the husband instead of giving talaq. If the Khul process is not executed properly then the process of judicial khul will interpret with the interference of judiciary in case of granting talaq with the compensation process. Here one thing most importantly is that this compensation money has no relation to the

dower money. Along with there is Mubarak talaq, a formation of mutual talaq between husband and wife. The faskh talaq is a ground based talaq, there are some grounds on which both husband and wife can seek divorce from each other.

In Sunnah, the divorce procedure of *Hasan* and *Ahsan* is followed, where one refers to an irrevocable divorce and the other is revocable within three months.

The process of pronouncing talaq by the husband depends on time, number, and nature, if someone does not comply with these conditions that talaq will be called Talaq-al-bida. Nevertheless, it is a *bida* talaq but can be effective. For example, under this specific a pregnant woman can be given divorce through would be a wrongful act. The state of act under the Sharia is that not to divorce a woman in her pregnancy which is under Shraia policy; yet have not get recognized a law. The application of irrevocable talaq in Sharia law where an option of ambiguity results that no one knows what will happen afterwards, then why there is a provision of irrevocable talaq notwithstanding existed in Sharia law.

About the wife's power to talaq, the condition is absolutely delivered upon the man. The Kabinmah of marriage where under clause 18 it is reflected that the patriarchal form of divorce conditions for woman. In Sharia Law, a woman does not have a right to divorce her husband, if she can thus power would be delegated to her by her husband with or without conditional aspects called *Talaq-e- tawfid*.

The Hanafi view of law refers if the husband is drunk, insane, or not having in a proper mental state pronounces talaq it will be effective. In such wise the traditional Hanafi view has that sort of inconvenience. Even anything said in vague regarding divorce by the husband can make it operative as well. The Sharia and its four madhabs where the strict adhering to one form has let these flow with several issues where one madhab follows one, other does not. The best option from the four is not appreciated, each of them having their own best form prevailing in general.

Following our Holy Quran there the directions of Haad and Tajir where the punishment for invalid talaq pronouncement can be provided following the verse of Quran. The application of Tajir is required in such a state of matter.

Modern Muslim Legislations on Divorce:

The modern legislation has brought about changes in this respect. Some of them have introduced some provisions, explanations using the knowledge of *ijtihad*. The discretion of mind to recognize the better welfare of mankind is known as the *ijtihad*. The Muslim world have implemented their own *ijtihad* with respect to our Quran directions and some of them have altered in a way not executing the theme of this religion.

Whereas the Sharia provisions refer a limited power of woman to give talaq to her husband, the conditional form of delegation yet, here the modern legislation tried to put up with an equal form of rights of woman towards them. Here we can mention the Convention on the Elimination of all Forms of Discrimination against Women, 1981 where 99 signatory states being there along with Bangladesh. The power of divorce there is given equal in both for man and woman. So, the modern legislation has an international obligation (Convention on the Elimination of all Forms of Discrimination Against Women, 1981). There are some more international conventions where the equality of woman in all spheres has been established within the member states.

Whereas the traditional provision of Hanafi law where husband can give talaq at any state of mind, there the Egyptian Law brought a development that without a proper state of mind such pronouncement of talaq cannot be allowed. They are the first country which brought into these issues of reformation in the matter of divorce, which is later followed by Sudan, Syria, and Jordan. Under the Egyptian law, they made the unrestricted pronouncement of talaq in restricted form in article 4 under their legal provision. Even at the issue of notifying the talaq they had imposed provisions (*Egypt's Personal Status of Laws, 1985*)

In Turkey the power of divorce of man and woman has no distinction, having the equal power and this process is allowed as the last resort (Turkish Civil Code, 1926) The Moroccan law has under their law when the woman has on her period, the husband shall be bound to revoke the divorce, and even the court shall put an effort here (The Moroccan Family Code (Moudawana), 2004) In case of pronouncement of talaq at any state whether sane or insane which is permitted in Hanafi school has been abolished by the Egyptian law. This specific era is adopted

by Syria by allowing the wide interpretation of *ijtihad* ensuring the rights of the woman¹ Syrian Personal Status of Law, 1953)

The Jordan law also allowed the same in their law in 1951² *Jordanian Law of Personal Status, 1951*)

Khul

The form of *talaq* of *Khul* has certain diversities under the modern legislation. In Egypt they enacted *Khul* provision without paying any of the compensation. There is no scope of *Khul* without the interference of the court. They maintained the verse of Quran that when such relationship between and wife comes to a position when it becomes crossing the limits of Allah. So, they incorporated *Khul* in one single form which is judicial *khul* (Egyptian Act No 31, 1910) Syria also followed the form of *khul* without any compensation giving to the husband. In Morocco they permitted *khul* with the intervention of the court. They incorporated the provision that such dissolution shall not affect the children which is no doubt a praiseworthy measure under their *Moudawana*. Additionally, if the amount of compensation is not fixed mutually then the court shall fix it at its discretion (The Moroccan Family Code (*Moudawana*), 2004) In Qatar the provisions concerning *khul* which will be made first in mutually, then with the court's intervention if that fails, there is one more provision of general *khul* through judicial process but not judicial *khul* (*Qatar's Family Law 22 of 2006*) In Malaysia in case of *khul* husband's consent can be obtained through court's conciliation paying an only minimal amount by the wife (*Malaysian Law Reform (Marriage and Divorce) Act 1976*)

Faskh

The *faskh* or ground based *talaq* under the modern legislation is concerned through *Moudawana* in 2004 there, altogether six factors have been described in order to obtain by *faskh* provision. The provisions relating if the *talaq* is sought due to harm there is an option of compensation (The Moroccan Family Code (*Moudawana*), 2004). Kuwait's provision regarding *faskh* included of husband's dissertation and violent treatment (*Kuwaiti Personal Status Law No. 51/1984*). In UAE there the direction is upon whether the husband does inhumane treatment, abandoned or not provided her any children due to impotency (UAE Personal Status Law, 2005) In Egypt they follow the Maliki rule instead of Hanafi as the Hanafi School is least favorable to woman is case of divorce (Egyptian Law no 25 of 1920 and 25 of 1929)

Judicial Khul

About the Judicial *khul* the event has some statutory provisions along with case references. Starting with the case of *Balquis Fatimah vs. Nazm-ul-Qureshi* where the occurrence of crossing the limits of Allah in a marital relationship was mentioned and as follows dissolution was permitted (*Balquis Fatimah vs. Nazm-ul-Qureshi, 1959*). Another case of *Khursid Bibi* where *khul* was regarded as right of the woman specifically (*Khurshid Bibi vs. Mohammed Amin, 1967*).

As earlier stated, the Egyptian law has a mixture of *khul* and judicial *khul* and no extra judicial *khul* is maintained. This law is supported by the modern and woman rights activist. But sometimes it leads to poor woman to give compensation to her husband (Egyptian Law no 1 of 2000). The present Egyptian law is considered as gender friendly and within international standards. The Jordanian law has two forms of judicial *khul*, one is before consummation where wife must give it back all the benefits she took from her husband and the latter is after consummation of *khul* and judicial *khul* where only to prove the crossing of limits of Allah (Jordan Law of Personal Status, 1976). In Algeria, the basic provision of *khul* and judicial *khul* is referred that to pay some amount not exceeding the dower money amount (The Algerian Code, 1984). One of the very notable points that Mauritanian Law permits that is if the wife demands *khul* to get of her husband paying the

¹ Syrian Personal Status of Law, 1953

² *Jordanian Law of Personal Status, 1951*

compensation due to his ill treatments towards her hence the court shall return the money to her³The Mauritanian Personal Status Code (PSC), 2001). UAE has adopted both the khul and judicial khul and another point they have included that khul amount to judicial dissolution (UAE Personal Status Law, 2005). In Tunisia, they provided they right to khul or judicial khul both open and equal for man and woman (The Tunisian Code of Personal Status, 1957).

In case of registering the talaq not mentioned by the Sharia, if it is registered, it may guard the sharia system. In Sri Lanka and in Brunei they have provided the registering system but that would not invalidate the talaq itself (Sri Lankan *Muslim Marriage and Divorce Act, 1951*).

The matter of investigation of knowing the reason that why the husband demands a divorce that initiative is very appreciated in Syrian law, the Algerian Law puts the provision if the husband pronounce talaq arbitrarily to give compensation to the wife. All these provisions of Muslim states have given a way to the legislative developments in Sharia law about divorce.

Within their ijthihad or discretionary aspects there are certain reforms they brought which are reformation de novo that means those are not amounting to be the appropriate one accords with Quran and Hadith. Syria mentioned about compensating the wife for one year in case of divorce that cannot be properly said sharia based. Also, some states had put the registration of talaq to be mandatory otherwise it may invalidate the talaq which is another form of reformation de novo.

3. Bangladesh Perspective-

In Bangladesh, the modern legislation is adapted and some of them still working in progress. Here the Hanafi view of pronouncing talaq by husband at any state of mind has been still accommodated in our national legislation of Muslim Family Law Ordinance, 1961 where the other states have already reformed the provision. In the same Act where under section 7 (1), where it needs the application of one dated notice to chairman for divorce, also the word 'whatsoever' is no doubt a dangerous application including all sorts of divorce even the Bida Talaq, section 7 (3) (4) (5) where the chairman to whom the proceeding is given for negotiation, generally these people have less knowledge regarding divorce also the divorce during pregnancy is allowed without intervening any penal provisions (The Muslim Family Law Ordinance, 1961). Under this law, the process of giving notice to the chairman is necessary to allow the opportunities of reconciliation, though a case has proved that not specifying the notice still can hold the talaq (*Sirajul Islam v Helana Begum, 1996*).

The same Act where it allows the registration of marriage, does not incorporate the necessity of registering the divorce as well. In case of Faskh talaq the Dissolution of Muslim Marriage Act provides ten grounds on which the talaq can be seek (The Dissolution of Muslim Marriage Act, 1939)

Some other practices that here; the concept of divorce has been altered in separate way. In the case of *bidah* talaq the state can impose punishments, but it does not allow doing so. In the kabinnamah of marriage most of our woman do not know the aspects within clause 18 due to their illiteracy and the unconsciousness of their parents. The judicial khul process is mostly ignored in our country. The traditional Hanafi view is still blindly pursued and no vast applicability of choosing the best option from the madhabs. The applicability of irrevocable talaq Hasan is applied mostly in courts where the Ahsan form would be more beneficiary for all.

Apart from the national legislations, the Constitution of the People Republic of Bangladesh where articles provide the equality before all along with equal protection of law referred the event of gender equality. The preamble of our constitution having the fundamental human rights has also been permitted the ahsan form of talaq. The international obligations of Bangladesh being signatory of some of the human rights-based treaties and conventions have certain necessity to implementation.

4. Few Observations:

The comparative study of the Sharia and modern world legislations along with Bangladeshi perspective, some recommendations can be initiated-

- Punishment procedure for bida talaq at any state should be provided in addition to reformations.
- Not allowing divorce in pregnancy, which is a disgraceful act mentioned in Sharia policy, should be

³ The *Mauritanian Personal Status Code (PSC), 2001 ar-93*

- accumulated under Sharia law.
- The Ijtihad should promote the Quran and Hadith with all the discretions. Reformation de novo should not be incorporated.
 - The best solution should be taken from any school of Muslim, not adhering to any one only. Gender Equality should be emphasized in case of dissolution of marriage to elevate the dignity.
 - International law standards should be upheld doing such reformations. Reformations mentioned under Hanafi school can be referred to.

5. Conclusion-

The comparative study of the laws regarding divorce in Muslim Sharia law and modern Muslim world have established it in a way that there are differences, there needs reformations-amendments, there shall not require any contradictory concepts. Throughout it has provisions, it has remedy but with the changes of time some more advancement is required thereupon the Sharia law along with its concepts should be modified as accord with generation and situation but unquestionably within the knowledge of Quran and Hadith. Let us not sphere the wife at a level of insecurity due to divorce, added to not letting her consume the thought that divorce is her absolute right (Huq, 1995) The balance must be maintained while the Sharia law and modern world legislation can possess a meaningful placement.

Therefore, a proper and codified standard law on Muslim family on particularly divorce should be enacted to maintain Sharia basis and national-international obligations. The equality and dignity of man and woman would be ennobled, as apparently.

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