Triple Talaq – An Overview

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Abstract

The paper is an overview of Talaq-ul-Biddat (or Talaq-e-Biddat), popularly known as triple talaq. It presents the modes of divorce in Muslim Law, the legality of triple talaq, the recognition of triple talaq in various schools of Muslim Law, the recent Supreme Court judgment on triple talaq, along with a brief history of judicial pronouncements relating to triple talaq. It examines in detail the Constitutional and Religious arguments both, in favour and against triple talaq.

Keywords: *Muslim Law, Talaq-ul-biddat, Talaq-e-biddat, Triple Talaq, Shayara Bano, Hanafi Law, Shia law*

Paper Type: *Theoretical Paper*

Introduction

They say some rights are universal. Human rights, for example, are rights that every individual is born with. These include the right to life, the right to equality, the right to clean air and water, and so on. The ground reality might not be as rosy as the text in the Universal Declaration of Human Rights, or the Constitution of India, but there is an intention to give these rights to every person in the world. Then there are other rights that an individual has that depend on a variety of factors. For example, if a person is a worker in a factory, he has the right to join a trade union. This same right may not be available to a person working as the Chief Financial Officer at a Multinational Company. Similarily, a Hindu man has the right to divorce the wife under Hindu law. However, he needs to do so according to the procedure mentioned in the Hindu Marriage Act, 1956. A Muslim man, however, need not follow any procedure and can pronounce "talaq" thrice and the divorce is considered final. This provision brings us to the debate surrounding "Triple Talaq" or "Talaq-ul-biddat".

In Muslim Law, marriage is considered a contract. This contract can be dissolved by the husband, without any intervention by the court, without the consent of the wife, and even without her presence. Therein lies the problem. But unlike secular laws, personal laws follow customs, and there is difference of opinion on whether personal laws can be adjudicated upon by the courts of India. Moreover, the State is also reluctant to act on issues relating to religion as it may hurt the sentiments of the community. Muslim women went all the way up to the Supreme Court to challenge the custom of triple talaq, and the Supreme Court, in a five-bench judgment by a majority (3-2), banned Triple Talaq. This article seeks to understand this debate around "Talaq-ul-biddat", and the recent judgment by the Supreme Court[1], which banned Triple Talaq. The article will examine what talaq is, what the modes of talaq in Muslim Law are and will examine Talaq-ul-biddat in particular. It will focus on the debate surrounding triple talaq, it's legality before and after the 2017 judgment banning triple talaq. It will also discuss the Constitutional and religious arguments surrounding triple talaq. However, the paper will refrain from opinionating on the specific verses of the Quran that are submitted in the court in favour of and against triple talaq. The paper will limit itself to referring to the verse, and how the court interpreted the verse.

[1] Shayara Bano v. Union of India MANU/SC/1031/2017

Divorce under Muslim Law

Muslim Law consists of various schools of law such as the Hanafi School, the Maliki School, the Shafei School, the Hanbali School and the Shia School. The Hanafi School is the most famous school of law, and is followed by a majority of the Sunni Muslims in India. Each school recognizes a certain procedure for the divorce. However, all the schools agree that marriage in Muslim law is a contract which may be dissolved in any one of the following ways -

1. by the mutual consent of the husband and wife, without the intervention of the court,
2. by a judicial decree at the suit of a husband or wife,
3. by the husband, at his will, without the intervention of the court[2].

Talaq in Muslim Law may be oral, or in writing. The right to give talaq in Customary Muslim Law is generally given to a man. However, after the passing of the Shariat Act, 1937, a Muslim woman may approach the court to pass a decree of divorce on the grounds mentioned in Section 2.

Modes of Talaq in Muslim Law

1. **Talaq ahsan** - This is a single pronouncement of divorce by the husband, which is made during the period of tuhr, which is the period when the woman is not menstruating, followed by abstinence from sexual intercourse for the period of iddat, that is, three lunar months. Divorce is final and irrevocable after the expiration of the period of iddat.
2. **Talaq Hasan** - This consists of three pronouncements by the husband. However, these pronuncements are not in a single instance, but three successive tuhrs. No intercourse is to take place during these three pronouncements. Talaq Hasan is revocable until the third pronouncement, either expressly, or by intercourse between parties. Divorce is final and irreovacable on the pronouncement of the third instance.
3. **Ila** - Ila is a species of constructive divorce effected by abstinence from sexual intercourse for a period of not less than four months pursuant to a vow.[3] However this does not operate as a divorce per se under Shafei law, but gives the wife the right to ask for a judicial divorce.
4. **Zihar** - When the husband compares his wife to any other female who is within the degrees of prohitibited relationship to the husband, such as his mother, the wife has the right to refuse herself to him until he has performed penance, and if he fails to do so, she can apply for a judicial divorce.
5. **Khula** - It is a divorce at the instance and consent of the wife. The terms of divorce are mutually agreed upon by the husband and wife. It is an offer by the wife to compensate the husband if he releases from the marital ties. If this offer is accepted by the husband, it operates as a single irrevocable divorce. However, though the woman here has the right to divorce, it is not effected until and unless the offer of divorce is accepted by the husband, unlike talaq ahasn or talaq hasan.
6. **Talaq-ul-biddat OR Talaq-e-biddat** - This consists either of three pronouncement in a single instance, for example - "Talaq, talaq, talaq" or "I give you talaq thrice", OR, a single pronouncement made during the period of tuhr clearly indicating an intention to dissolve the marriage irrevocably. For example, if the man says "I divorce thee irrevocably."[4]

[2] Sir Dinshaw Fardunji Mulla, "Principles of Mohamedan Law", Revised by Professor Iqbal Ali Khan, 20th Edition 2014, Page 389
[3] Sir Dinshaw Fardunji Mulla, "Principles of Mohamedan Law", Revised by Professor Iqbal Ali Khan, 20th Edition 2014, Page 402
[4] Sir Dinshaw Fardunji Mulla, "Principles of Mohamedan Law", Revised by Professor Iqbal Ali Khan, 20th Edition 2014, Page 394

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Talaq-ul-biddat

Talaq-ul-biddat is not recognized in Shia Law. It is most popular in the Hanafi School of law. A majority of the Sunni Muslims in India follow this school of law. Under the Hanafi School of law, there are two types of talaq - "talaq-us-sunnat", that is, talaq according to the rules of laid down by the Prophet, and "talaq-ul-biddat", which is irregular talaq. Talaq ahsan is most proper and Talaq hasan is a proper mode of talaq. Talaq-ul-biddat is often described by many as "bad in theology and good in law". While in the case of talaq ahsan and talaq hasan, the husband has the opportunity to reconsider his decision, talaq-ul-biddat is irrevocable as soon as it is pronounced.

The Debate

The debate surrounding Talaq-ul-biddat has many aspects. While the traditionalists say that this is an essential part of religion, and must continue, there are others that argue that this is the only mode of divorce that does not give a chance of reconciliation to the couple. Some look at this as an issue of gender justice, that the provision may be misused by men who divorce their wives even without their knowledge, or even when they are inebriated and might not actually intend to divorce their wives.

Legality of Triple Talaq

Before the judgment given by the Supreme Court in Shayara Bano v. Union of India[5] (insert end note), triple talaq was legally recognized in India. As stated before, it was often said that talaq-ul-biddat is bad in theology, but good in law. Though the court has banned triple talaq in the Shayara Bano case, this was certainly not the first time that the legality of talaq-ul-biddat was challenged in a court. It has been challenged not just on the ground that it violates the Fundamental Rights enshrined in Article 14, 15 and 21 of the Constitution, but it has also been submitted to the court that a lot of countries, including the Islamic countries have banned triple talaq. There is also a religious argument. This paper will examine all the arguments that are given both in favour of, and against triple talaq.

Judicial Pronouncements on "Talaq-ul-Biddat"

This section will examine the highlights of the various judgments given by the High Courts across the country with respect to Talaq-ul-biddat. Talaq-ul-biddat has been challenged in the courts of law before, and the various courts it has been challenged in, have differed in their opinions with respect to Talaq-ul-biddat.

One of the first landmark cases where the validity of Talaq-ul-biddat was challenged was Rashid Ahmad v. Anisa Khatun[6] in the Privy Council. Ghiyas-ud-din, a Sunni Muslim who followed the Hanafi law, married his wife Anisa Khatun on 28.08.1905. He divorced her on or about 13.09.1905 by pronouncing triple talaq, in the presence of witnesses. However, during this pronouncement, Anisa Khatun was absent. She received Rs. 1,000 as payment of 'dower' on the same day, which was confirmed by a registered receipt. A 'talaqnama', which is a decree of divorce, was executed by Ghiyas-ud-din, dated 17.09.1905. It was alleged that the 'talaqnama' was given to Anisa Khatun. Anisa Khatun challenged the validity of the divorce. She stated that the divorce cannot be considered valid as she was not present at the time of pronouncement of divorce. She further said that even after the alleged pronouncement, her husband had

[5]MANU/SC/1031/2017
[6]AIR 1932 PC 25

continued to stay with her for a period of fifteen years, i.e., till the death of Ghiyas-ud-din. Between this period, he fathered five children with her. She said that Ghiyas-ud-din had continued to treat her as his wife, and the children born to her, as his legitimate children. It was further submitted that the payment of Rs 1,000, was a payment of prompt dower, and as such, not payment in continuation of the talaq-ul-biddat.

The Privy Council held that the pronouncement of triple talaq by Ghiyas-ud-din constituted an immediate and effective divorce. It stated that the validity and effectiveness of talaq-ul-biddat would not be affected by one's mental intention. The opinion that it would not be a genuine divorce because Ghiyas-ud-din's actions post the talaqnama may be construed as an intention not to give divorce are contrary to all authority.[7] Thus, the court made it clear that a talaq pronounced under compulsion or in jest without any intention to talaq, is just as valid and effective as a talaq pronounced with the intention to talaq. It did not matter that the talaq was given in her absence, or that he and his wife cohabited for fifteen years, or even that he has five children with Anisa during this period. The divorce was final on the day it was pronounced, whether he intended to give her talaq, or not.

However, the Gauhati High Court differed from the Privy Council. In its judgment in Jiauddin Ahmed v. Anwara Begum[8] placed relied on 'verses' 128 to 130, contained in 'section' 19, of 'sura' IV, and 'verses' 229 to 232, contained in 'sections' 29 and 30 of 'sura' II. They further referred to the commentary of these verses by scholars Abdullah Yusuf Ali and Maulana Mohammad Ali. They also considered the views of jurists Ameer Ali and Fyzee on talaq.

The court stated, that after it had referred to the Quranic verses and the commentaries of eminent scholars, it completely differed from the opinion that a mere whim is sufficient to effect a valid divorce. The court stated, and the author quotes “In my view the correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters-one from the wife's family the other from the husband's. If the attempts fail, talaq may be effected.[9]

The decision above was reiterated in Must. Rukia Khatun v. Abdul Khalique Laskar, [10] here the Gauhati High Court, once again after considering the text in the Holy Quran, as well as the opinions of various experts and jurists, concluded that 'talaq' has to be given due on a reasonable ground. It laid down the following grounds for a valid talaq.

1. Talaq cannot be given by a mere desire, will, whim and caprice of the husband.
2. It must not be a secret. It must be given to the wife.
3. There must be a gap between the pronouncement and finality of divorce so that the passions of the parties may calm down, and reconciliation may be possible.

It is the opinion of the author that this judgment of 1981, that these grounds laid down by the Gauhati High Court are fair. They reinforce the opinions of leading commentators of the subject. However, the Delhi High Court in Masroor Ahmed v. State (NCT of Delhi),[11] while stressing that it is accepted that talaq-ul-biddat is accepted to be sinful by all schools of law, including the Hanafi School of Law, did not ban triple talaq, but instead said that talaq-e-biddat be treated as a single pronouncement of divorce, which would be treated as final and irrevocable on the expiration of the period of iddat. It is submitted that this is the

[7]Baillie's Digest, 2nd edition. Page 208; Ameer Ali's Mohammedan Law, 3rd edition., vol. ii, Page 518; Hamilton's Hedaya, vol. i, Page 211.
[8](1981) 1 Gau. L.R. 358 [9](1981) 1 Gau. L.R. 358 [10](1981) 1 Gau. L.R. 375 [11] 2008 (103) DRJ 137

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most reasonable procedure to a talaq-ul-biddat pronounced by the husband. It is further submitted that some Islamic countries like Iraq and Egypt also follow the same procedure and treat three pronouncements of talaq as a single pronouncement.

The last major case before the Shayara Bano case where the validity of triple talaq was examined was by the Kerala High Court. Though the matter pertained to deleting the name of their spouses from their respective passports, the Kerala High Court[12] still had to examine the issue at hand as the passport authorities declined to accept the request of the women, as the divorce was based on unauthenticated talaqnamas (deeds of divorce). The passport authorities said that in the absence of a formal decree of divorce, the name of the spouse could not be deleted. The High Court ordered the passport authorities, to correct the spouse details (as were sought), based on the admission of the corresponding spouse, that their matrimonial alliance had been dissolved. The High Court came heavily down on the State and questioned why it was so hesitant to reform the law relating to talaq-ul-biddat. The court stated that the resistance to the change in law was only from a small Section of Ulemas. It further added that the reluctance of the State appeared to stem from the fear that the reform of this religious practice would offend the freedom of religion guaranteed under the Constitution of India.[13]

The landmark judgment on the 22.08.2017 of the Supreme Court in Shayara Bano v. Union of India laid to rest all difference of opinions amongst the High Courts in India and laid down the road to the future for the Muslim women in the country. The facts of the case, in brief are that the nikah of Shayara Bano and Rizwan Ahmad took place on 11.04.2001, and were parents to two children from the marriage. It was alleged by the husband that the Shayara Bano performed her matrimonial duties intermittently and kept going back to her parental home, leaving her matrimonial home. He alleges that he made attempts to bring her back from the parental home, but to no avail. He further states that he also approached the Family Court at Allahabad with a prayer to restitute conjugal rights between the two parties. Shayara Bano disputed most of these facts and stated that she was often beaten, and further stated that Rizwan tried to kill her by administering medicines which when examined by a doctor, were revealed to cause mental imbalance, if regularly consumed. She also alleges that Rizwan demanded dowry from her and her family despite knowing that her father was a government employee with a low income, and this income was the only source of income for the family. She further alleges, that Rizwan had asked her family to either fulfill the dowry demands, or take back Shayara to her parental home, and despite this demand, has filed a petition for restitution of conjugal rights. The one fact that both the parties do not dispute is that Rizwan pronounced talaq thrice to Shayara Bano in presence of witnesses. Rizwan states that the talaqnama given to Shayara is valid and fulfills all requirements of a valid divorce under the Shariat. It is the case of Rizwan that the divorce is irrevocable and final. However, Shayara Bano sought a declaration from the honourable court that the Talaq-e-biddat pronounced by her husband be declared void ab initio. It was contended in the petition that the practice of talaq-e-biddat is violative of the Fundamental Rights enshrined under Article 14, 15 and 21 of the Constitution.

Considering all the facts before the court, the Constitutional bench of the Supreme Court, by a majority of 3-2, banned triple talaq in India. The judgment given by the Supreme Court can be examined under the following headings:

1. Constitutional Arguments
2. Religious Arguments

[12]Nazeer v. Shemeema 2017 (1) KLT 300
[13]Article 25, Constitution of India

Constitutional Arguments

Though the Supreme Court banned the practice of triple talaq, the bench itself was divided over the issue. This can be attributed to the various interpretations by the judges of the Articles of the Constitution. This sub head will limit itself to the discussion of whether triple talaq is violative of Articles 13 and 14 of the Constitution. The discussion of whether Article 25 protects the practice of Talaq-ul-biddat will follow under the sub-heading "Religious Arguments" as one cannot determine the protection without examining the religious arguments.

It was contended by Shayara Bano that the practice of triple talaq was violative of Articles 14, 15 and 21 of the Constitution. Laws can be struck down as unconstitutional on the basis of being violative of Fundamental Rights of a citizen. However, the problem arises right from the very word law. It is often argued that protection of Fundamental Rights against a legislation is generally invoked when these laws are "public laws" and not "personal laws." It is argued that personal laws do not come under the purview of Article 13 of the Constitution and cannot be challenged on the ground that they are violative of Fundamental Rights.

Article 13 of the Constitution of India states that "Laws inconsistent with or in derogation of the fundamental rights.-

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) In this article, unless the context otherwise requires,- (a) "law" includes any Ordinance, order, bye law, rule, Regulation, notification, custom or usage having in the territory of India the force of law;"

However, it was submitted by the Attorney General to the Bombay High Court in State of Bombay v. Narasu Appa Mali,[14] that safeguarding personal laws could not be a "pretext for denying women their rightful status and gender equality." It was submitted that a plain reading of Article 13 (3) clearly establishes that personal law is within the scope of "law". Not just personal laws, but also customs and usages are within the scope of "law".

The Supreme Court has taken into consideration these observations of the Bombay High Court. The respondents did submit that the above observations were in the nature of obiter dicta of the Bombay High Court, and moreover, as this was a judgment of the High Court, it was not binding on the Supreme Court.

The Court also considered whether Section 2 of the Shariat Act, 1937, gives a legal recognition to triple talaq, which would automatically make it a part of public law, and thus easy to strike down as violative of Article 14 which advocate equality before law and equal protection of laws irrespective of religion, race, caste, sex or place of birth. It was submitted by the All India Muslim Personal Law Board (hereinafter referred to as AIMPLB), that after reading the Statement of Object and Reasons of the Shariat Act, 1937, the Act was not meant to enforce Muslim Personal Law. By extension of this, Section 2 cannot be deemed to recognize or enforce triple talaq. The judges differed in their opinion of this argument put forth by the AIMPLB. While four out of the five judges agreed with the Board, Justice Rohinton Fali Nariman opines that this would be a very constricted reading of the Act, and reiterated that Section 2 does legalize and enforce triple talaq. It was further pointed out by Justice Nariman that the test for striking down a legislation under Article 14 is whether it is unreasonable and arbitrary, and since triple talaq was unreasonable and arbitrary as the marriage can be broken at the mere whim of a husband, it is violative of the Constitution.

[14]AIR 1952 Bom. 84

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The dissenting judges however stated that personal law, being a matter of religious faith, was not State action. Shariat was a matter of personal law of Muslims and could be traced to four sources, namely, the Quran, the 'hadith', the 'ijma' and the 'qiyas'. Since it was not state action, it could not hence be held violative of Articles 14, 15 and 21 of the Constitution

It is the opinion of the author that the Shariat Act is not a legislation that gives statutory recognition to talaq-ul-biddat. Talaq-ul-biddat, as a term, does not appear in any legislation governing the Muslims in India. However, this does not immunize it from being challenged as violative of the Fundamental Rights of the Constitution. On a plain reading of Article 13 (3) of the Constitution, customs and usages that have the force of law, are within the definition of "law". All personal laws in India, are thus within the scope of "law" in India. In fact, Hindu customs too have acquired the status of law (either by codification by legislature, or because they have been practiced from time immerial), and are thus within the scope of the term law.

The author disagrees with the argument that personal law is not law within the scope of Article 13 of the Constitution, but agrees that personal law is not within the scope of State Action. It cannot be inconsistent with Article 14, 15 and 21 of these grounds, but is inconsistent with them because it is within the ambit of Article 13. Thus, by virtue of Article 13, since the provision of triple talaq, though not found in legislation, is a custom that is followed in the country, and is within the scope of "law" as defined in Article 13 (3) of the Constitution, is therefore inconsistent with Article 14, 15 and 21 of the Constitution of India, and is void.

Religious Arguments

The author agrees with the Kerala High Court in Nazeer v. Shemeema,[15] the Government has been reluctant to legislate on the issue of triple talaq, perhaps in fear of hurting the religious sentiments of the community. While people backing triple talaq argue that though it is bad in theology, it is good in law, they state that triple talaq is an essential practice of the Sunni Muslims who follow the Hanafi School of Law. It is further argued that essential practices of a religion are protected by Article 25 of the Constitution, which gives citizens of India the freedom to freely profess, practice and propagate any religion. While the dissenting judges did express that there was no doubt that the practice of talaq-e-biddat was a part of personal law of the Muslim community, they stopped short of calling it an essential practice. They placed the onus on the State to come up with a legislation which deals with talaq-e-biddat.

The concurring judges stated that talaq-e-biddat was not an essential part of the religious practice of Islam. Justice Nariman pointed out that Islam divides all actions into five kinds which figure differently in the sight of God

(i) First degree (Fard) – where whatever is commanded in the Koran, Hadis or ijmaa must be obeyed. - (Wajib) – Perhaps a little less compulsory than Fard but only slightly less so.

(ii) Second degree (Masnun, Mandub and Mustahab) – These are recommended actions.

(iii) Third degree (Jaiz or Mubah) – These are permissible actions as to which religion is indifferent.

(iv) Fourth degree (Makruh) – That which is reprobated as unworthy.

(v) Fifth degree (Haram) – That which is forbidden.[16]

There is no doubt amongst all schools of law that Talaq-ul-biddat is bad in theology. In fact, the Hanafi School of law which itself provides for the provision of Talaq-ul-biddat states that this is an improper

[15]2017 (1) KLT 300
[16]MANU/SC/1031/2017

method of talaq and that it is Haram in the eyes of the Prophet. Justice Kurian refers to the verses 1-7 contained in Sura LXV, verse 35 of Sura IV, and verses 226-231. He states that these verses are clear, and that there is no doubt that matrimony is attributed to sanctity and permanence. The verses specify that attempts are to be made for reconciliation between the husband and wife. Triple talaq, by making the divorce instantly irrevocable, gives no chance for reconciliation between the estranged husband and wife. Justice Kurian, in very strong words, therefore states that Talaq-ul-biddat violates Shariat. He states that what is bad in theology, is therefore bad in law as well.

The author is of the opinion that if a custom is not essential to the religion, then it cannot warrant protection under Article 25 of the Constitution. The author concurs with Justice Nariman's views. The author also submits that major Islamic nations in the world have long banned triple talaq. A lot of these nations recognize triple talaq as a single pronouncement, followed by the period of Iddat. Egypt and Iraq, for example, does not recognize the effect of intoxication or compulsion. The same rule applies to Lebanon, Kuwait, Jordan and Yemen. Iraq does not recognize a divorce given by a man in death-sickness, or in a condition which, in all probabilities is fatal.[17] The law in Egypt and Iraq further states that divorce, accompanied by a number will be treated as a single pronouncement.[18] This effectively means that even if the husband has said “I divorce thee” thrice, it will be taken as one pronouncement and will be followed by a period of iddat. This rule is also followed in Jordan, Kuwait, Morocco, Sudan, Syria and Yemen. Some countries like Indonesia, Malaysia, Philippines, require a marriage under Muslim law to be dissolved by a decree of the court. Pakistan and Bangladesh require the State to be notified. Failure to do so invokes penalties.

Leading theocratic societies do not provide for Talaq-ul-biddat. Countries such as Pakistan and Bangladesh have a majority of Sunni Muslims, and yet require a notice of the talaq to be given to them. This proves that Talaq-ul-biddat is not an essential practice of Islam. A step towards banning triple talaq will not only bring some gender justice for Muslim women across India in their community, but will also stop the discrimination in law within India for women belonging to different religions. Religion cannot be a barrier to equality when practices are not essential to the religion. A practice that has been declared haram by the Prophet himself cannot be essential to Islam.

Conclusion

Debates are healthy. Aristotle encouraged debates in a society. Of course, back then, he termed it “Politics”. He stayed that a country inches towards progress and reform when people take up Politics (Debates). The debate surrounding triple talaq is so polarized that even the judges of the Constitutional Bench of the Supreme Court did not agree with each other. Even the concurring judges amongst themselves differed on a few points of law. This proves that constant debate throws up more challenges for the country to counter. While the court has given a judgment celebrated by women and legal activists all across India, it must be noted that the dissenting judges too have issued an injunction preventing Muslim men from divorcing their wives by means of Talaq-ul-biddat. They have placed the onus on the State to legislate on the subject matter. However, for the time being in force, the concurrent judges have given a breather to the State by banning triple talaq. Justice Kurian sums it up beautifully – “what is bad in theology, must be bad in law.” The author can't help but agree.

[17] Article 1, Law of Personal Status 1929 Law 25 of 1929 as amended by Law 100 of 1985
Article 35, Code of Personal Status 1959 Law 188 of 1959 as amended by Law 90 of 1987

[18] Tahir Mahmood and Saif Mahmood, 'Muslim Law in India and Abroad',
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