

The Issue Of Divorce And Gender Justice Under Personal Law In India

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Abstract

The issue of divorce and gender justice under personal law in India highlights the complexities surrounding gender equality in marital dissolution within India's pluralistic legal framework. Personal laws, governed by religious customs, regulate divorce rights for various communities, leading to differential treatment based on religious affiliations. While some personal laws have been reformed to enhance gender equality, others continue to uphold patriarchal norms, disproportionately impacting women. The Hindu Marriage Act, the Muslim Personal Law (Shariat) Application Act, and the Parsi Marriage and Divorce Act, among others, each outline unique divorce processes and grounds, reflecting religious principles. However, these laws often restrict women's agency, placing them at a disadvantage in areas such as alimony, child custody, and remarriage. Notably, recent judicial interventions, including the Supreme Court's judgment in the ShayaraBano case, which declared the practice of *triple talaq* unconstitutional, have prompted national discourse on the need for a uniform civil code (UCC) that ensures gender-neutral divorce laws. Yet, the move towards a UCC is contested, as it raises concerns about eroding cultural diversity and religious autonomy. Amidst these debates, feminist legal scholars and activists advocate for reforms within personal laws to prioritize gender justice without sacrificing cultural integrity. The challenge lies in balancing the principles of secularism and gender equality while respecting religious freedoms, ensuring that divorce laws foster justice and empowerment for both genders. This paper explores the intersection of divorce, gender justice, and personal laws in India, examining the implications of ongoing legal reforms and the prospects for achieving equitable and inclusive divorce regulations across communities.

Keywords: Divorce, Gender Justice, Personal Law, India, Religious Freedom, Legal Reforms, Gender Equality, ShayaraBano, Triple Talaq.

Introduction:

The Indian constitution, which takes a secular stance in a multicultural society, allows each religion sufficient freedom to practice and propagate its own set of laws free from interference from the state or from any other religion. One such personal law in Islam is called "Talaq," which is an Arabic term meaning "to release or to set free by undoing the knot." According to Muslim personal law, it denotes the dissolution of marriage or divorce between a husband and wife who were properly wed. According to historical accounts, prophet Muhammad discouraged the use of talaq and advised against doing so except in dire situations.

Before 1939 (when the Muslim Marriage Act, 1939) was passed, it was thought to be virtually impossible for a Muslim wife to file for divorce from her husband. This was because, according to earlier Muslim personal laws, husbands could legally dissolve their marriage by simply saying the word "talaq" three times. Furthermore, men have a great deal of power in Muslim law to reject marriage without even having to give a reason or explanation.

Holy Quran and Status of Muslim Women

The holy Quran reserves a great significance in the Muslim religion as it is considered to be a revelation from God. It is a central religious text of Islam and not practicing it is recognized as a sin among the Muslim community. Though Quran teaches immensely as to how a person should keep faith within almighty and how to live life the right way, etc. it somewhere shows a gender biasness as to the status of women in some of its verses.

For instance – Verse 2:23 “Your wives are as a tilth unto you so approach your tilth when or how ye will;.....”(The Holy Quran, IFTA, p.96). in this verse, women are considered as a land for the purpose of cultivation and males as the owner of that land in a way as if men has complete authority over women.

Further verse 4:3 “If you fear that ye shall not be able to deal justly with the orphans, Marry women of your choice, two, or three, or four;...” (the holy Quran, IFTA p.206), through this verse the Holy Quran permits men to commit polygamy by allowing them to marry four wives. Additionally, verse 2:228 exhorts men to control women by stating that men have a degree over women.

All these verses provoke and encourage men to assume that they are supreme and they have complete authority over women which further stimulate them to exploit and harass women in the name of the Holy Quran.

However, verses such as – Verse 4:34 “Give her food when you take food, clothe her when you clothe yourself, do not revile her face, and do not beat her” and Verse 2:231 “....do not retain them (i.e. your wives) to harm them ...” clearly prohibits Muslim men to physically harm/harass their wives or punish

them by beating. Muslim law on the dissolution of marriage nonetheless, before a divorce becomes final and irreversible, Islamic law allows for enough time for the husband and wife to work things out and reconcile.

Under Muslim personal law, divorce can be classified into two general categories:

1. Extrajudicial process

The customary procedures for ending a marriage that are outlined in Muslim personal laws are included in the category of extrajudicial divorce methods. It was further separated into smaller groups based on which spouse filed for divorce first.

i) Husband's Talaq

A Muslim husband of sound mind may divorce his spouse by just saying the word "talaq" and without giving any explanation, according to Sheriat law. The legitimacy of a talaq declaration is not affected by the wife's presence at the time of the declaration; that is, the husband may express his intention orally or in writing via any medium, such as a letter, words, the mail, WhatsApp, social media, etc

Important considerations for a husband's ability to pronounce a The following are prerequisites for a husband to meet in order to legally pronounce a talaq under Shia law The spouse needs to be influential.

The spouse needs to be mentally stable.

The husband needs to have free will and shouldn't act under duress.

The decision to end such a marriage needs to be made very explicit.

Sunni law regards a husband's dissolution of marriage under drunkenness as a legitimate divorce, whereas Shia law views it as invalid.

The husband may dissolve the marriage in accordance with Mohammedan law in the following ways:

a) Revocable Talaq-e-Sunnat/Talak-ul-Sunnat

Traditional customs and rituals are referred to as sunna or sunnat in Arabic. Talak-e-sunnat, then, is the most permissible type of talaq under Muslim personal law and can be characterized as a customary divorce based on the prophet's command.

Furthermore, talaq-e-sunnat is further divided into two kinds based on the length of the declaration, the iddat period, and the revocability of the divorce.

- Most-proper, or Talak-e-ahsan

The Muslim husband is required by talaq-e-ahsan to utter the word "talaq" three times in a single sentence. This pronouncement must be made when the wife is not menstruating, or during the "thurs" or "purity" period. The iddat begins at that moment and lasts for 90 days, during which the husband and wife are not allowed to live together or have sexual relations.

Range of the reconciliation Talaq-e-ahsan is regarded as the most widely accepted type of divorce since it gives the husband and wife enough time to work things out and reconcile, if at all possible, through mediation, arbitration, and settlement. If the spouses resolved their differences prior to the end of the iddat period, they may explicitly or implicitly rescind after their separation. But after that time has passed, the divorce is complete and irreversible forever.

Should the husband have said the word "talaq" when his spouse was having her monthly period, such statement would be deemed void. A cohabitation or consummation during the iddat time by the husband and wife will be interpreted as an implicit revocation of the divorce.

Proper Talak-e-hasan

Due to its option for revocation of divorce, Talak-e-Hasan is frequently referred to as the authorized or proper form of divorce. The husband must say the word "talaq" three times in a row during three consecutive Thursdays (the period of cleanliness in between menstrual cycles) in order to use this kind of talaq. If the wife has reached menopause or has passed the menstrual age, three announcements must be made in consecutive 30-day intervals.

It is required that the partners refrain from engaging in any sexual activity or conjugal relationships until the third proclamation. Up until the third declaration, the husband and wife may withdraw their divorce (expressly or implicitly). After the third pronouncement, the talaq becomes final and unchangeable. Should the couple decide to get back together after the iddat time, the divorce will be instantly reversed and the talaq will no longer be valid.

b) Instant triple talaq, or Talaq-e-biddat (disapproved)

The word "biddat" means "innovation," indicating that this type of divorce was not initially encouraged by the prophet's customs but rather developed in the modern times. The most disliked kind of talaq, known as talaq-e-biddat or talaq-e-bain, is regarded as wicked since it prevents husband and wife from working out their issues or coming to a reconciliation. In this type of divorce, the wife must still observe the necessary iddat period, but the husband must pronounce the word

"talaq" three times in a single sentence during the "thir" period.

After that, their marriage is immediately deemed legally dissolved. It is sometimes referred to as instant triple talaq for this reason. The practice of quick triple talaq was outright forbidden in a number of Islamic nations, including Saudi Arabia, Egypt, Iran, Jordan, Pakistan, Sri Lanka, Bangladesh, Turkey, Malaysia, and Egypt. Before 2017, quick triple talaq was a common practice in India. However, the Supreme Court's historic ruling in *ShayaraBano v. Union of India*, the practice was outlawed since it violated Article 14 of the Indian Constitution, which guarantees fundamental equality.

b) Ila

In this type of talaq, the husband refrains from having sex with her wife but does not explicitly declare talaq. As a result, in *ila*, the husband swears to refrain from having sex for four months (the *iddat* period), after which the marriage ends irrevocably.

c) Zihar

In this type of divorce, the husband makes comparisons between his wife and other women who are not allowed in his family, such as his sister by blood or his biological mother. Following this comparison, the husband must forgo living with his spouse for a period of four months, and after that time, *zihar* must be finished. Following this completion, the woman has two options: she can ask for the restoration of her conjugal rights or choose to have the marriage dissolved by judicial judgment.

ii) The wife's talaq

iii) Delegated Divorce, or Talak-e-tafweez

Muslim women do not have any particular or unique legal right to divorce in order to renounce their marriages under Mohammedan law. Nonetheless, a Muslim husband is free to assign his authority to file for divorce to anyone, even his spouse. He may give the wife or any other person whole, conditional, temporary, or permanent authority over this. Usually, a pre- or post-marriage agreement gives the woman the assigned authority to file for divorce.

A Muslim wife may use this delegated authority to file for divorce on her own behalf (instead of her husband's), but only in the event that the conditions outlined in the agreement are met.

For example, if the husband has cheated on her (the first wife) or if he has completed *Nikah* with someone else twice, etc. It's also important to remember that the woman still retains the freedom to decide whether or not to exercise her assigned right in the event of a situation. Ultimately, the moment wife

uses the authority granted by her husband to proclaim talaq, it is final and irrevocable.

iv) Mutual consent for talaq

The dissolution of a marriage via mutual permission between a husband and wife is known as talaq by consent. There are two types of it: –

Khula: In this type of divorce, the Muslim wife buys the right to separate from her husband in exchange for a payment. Put another way, the Muslim wife provides her husband something of value in exchange for his permission to the divorce. Such consideration could be any kind of property or money, or it could be the dowry given to the bride at the time of the Nikah.

Mubarat: Since mubarat entails talaq by permission, both spouses must take talaq when they mutually decide to end their marriage. In this instance of talaq, the proposal

2. Legal process (Muslim Marriage Dissolution Act, 1939)

The legal process of talaq involves the official divorce of a husband and wife through a court-issued judgment. Section 2 of the Dissolution of the Muslim Marriage Act, 1939 grants a woman who has been married under Islamic law the right to request a decree for the dissolution of her marriage.

The following nine grounds are listed in Section 2 of the act¹ and allow a Muslim wife to get such a judgment from the court:²

When the husband's whereabouts have been a mystery for four years³

When the wife's husband has neglected her or has not paid her maintenance⁴

for a duration of two years. when the spouse has received a prison sentence of at least seven years⁵

When the husband has neglected to fulfill any marital duties for a duration of three years (without a valid reason)⁶

When the spouse was impotent⁷

When they were married and remained that way⁸

When the spouse has experienced two years of insanity, or when the spouse has leprosy or another sexually transmitted illness. When the wife, before obtaining the age of 15, has been put into marriage by her father or any other guardian and

¹The Muslim personal (Shariat) Application Act, 1937

²Section 2 of the dissolution of the Muslim Marriage Act, 1939

³Section 2(i)

⁴Section 2(ii)

⁵Section 2(iii)

⁶Section 2(iv)

⁷Section 2(v)

⁸Section 2(vi)

repudiated the marriage before gaining the age of 18. as long as she didn't carry out the marriage⁹
When a spouse abuses his wife (either physically or mentally)¹⁰any further justification¹¹
That is accepted by Muslim law as being acceptable for ending a marriage.¹²

The relationship between Islam and international humanitarian laws pertaining to women's protection from discrimination:

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was ratified by 189 member states, including India¹³, Afghanistan, Saudi Arabia, Iraq, Pakistan, and Oman, before being accepted by the UN General Assembly on December 18, 1979. The main goal of the adoption of the CEDAW, or international bill of rights for women, was to eradicate all types of discrimination against women. In order to accomplish this goal, it attempts to - removing all laws that discriminate against people and enacting suitable legislation that forbids discrimination against women. Establishing courts and other government organizations to guarantee women's adequate protection from these injustices ensuring the abolition of any actions taken by individuals, groups, or businesses that discriminate against women.

The only women's rights treaty, CEDAW, upholds women's freedom to procreate and addresses the role of customs and cultures in determining gender norms and family dynamics. It is legally required of the countries that have ratified or acceded to the convention to implement its requirements in their own countries.

Injustice (Gender Disparity) in Muslim Law

Among various other socio-religious communities, the Muslim community is subjectively ill-famed for its oppressive and autocratic customs and laws when it comes to a woman. The segregation as to the status of male and female among Muslims is extremely discriminated and unjust to the interest and well-being of women.

It is significant to note that majority of practices discriminating Muslim women were not originally laid down by the holy Quran but erroneously framed to serve the patriarchal mindsets. Several customs and legislation that expressly

⁹Section 2(vii)

¹⁰Section 2(viii)

¹¹Section 2(ix)

¹²Section 2(x)

¹³https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtid_sg_no=IV-8&chapter=4&lang=en

portray gender discrimination include the following:

- (1) the unilateral divorce privilege enjoyed by men,
- (2) ubiquitous veil
- (3) the entitlement of women to inherit personal property,
- (4) Triple talaq
- (5) Polygamy in Practice
- (6) NikahHalala
- (7) Muslim women face pervasive inequality as a result of these customs.
- (8) Men have the Only Authority to Divorce

The rights of women are severely compromised by Muslim personal law, which gives Muslim males the unrestricted authority to dissolve a marriage without taking the wife's wishes into account. Muslim husbands wield such immense influence that it appears to be blatantly biased against the interests of their spouses, to the point where the wives aren't even allowed to hear the word "talaq" used of the word talaq, the wives are not even entitled to know the reasons for their divorce as the husband are not legally bound to specify it. Supreme Court's historic ruling advancing gender justice under Islamic law.¹⁴

Requester: ShayaraBano

Respondent: Rizwan Ahmed; All India Muslim Personal Law Board; National Commission for Women; Ministry of Law and Justice; Ministry of Women and Child Development; Ministry of Minority Affairs; Union of India

CJI JagdishKhehar, J. Abdul Nazeer, J. Kurian Joseph, J. RohintonNariman, and J. U. Lit make up the Constitutional Bench. Concise facts and arguments: ShayaraBano, the petitioner in this case, was wed to Rizwan Ahmed for nearly 15 years. When she was living at her mother's house later in 2016, her husband announced Triple Talaq via letter. As a result, she challenged the legitimacy of three Muslim customs in a writ case that she filed with the Indian Supreme Court:

- (1) Talaq-e-biddat, or instant triple talaq
- (2) HalalaNikah
- (3) Numerous marriages

When the All India Muslim Personal Law Board was asked to submit a written statement in response to the apex court's request, it stated that since all of these practices are covered by Muslim personal law, the supreme court should not have the authority to get involved in the jurisdiction to interfere in the religious/ personal law matters. The supreme court ultimately defined two key issues, which are as follows:

¹⁴Union of India v. ShayaraBano, 2017 [Triple talaq case]

Whether or not instant triple talaq is a necessary Islamic ritual. Is the Triple Talaq practice a violation of fundamental rights?

Judgement: J. Abdul Nazeer and CJI JagdishKhehar noted

As an aspect of Muslim personal law, instant triple talaq is safeguarded by Article 25 of the Indian Constitution, which guarantees freedom of conscience and the freedom to practice, profess, and propagate one's religion. The Indian Constitution states in Article 13¹⁵ that the Supreme Court cannot get involved in matters of private law pertaining to any religion.

Parliament alone, not the courts, has the authority to determine whether or not a legislation is lawful in these situations. It is therefore preferable to post a stay on this practice for 6 months until the parliament decides whether it is necessary to ban it. However, J. RohintonNariman, J. Kurian Joseph, and J. UU Lalit had different opinions.

According to J. Kurian Joseph, Since instant triple talaq is not a form of talaq that has been traditionally accepted, it is not a necessary component of Muslim personal law and is therefore considered an Un-Islamic practice. Furthermore, this type of divorce did not include arbitration or conciliation, the two main requirements for divorce. J. UU Lalit and J. RohintonNariman have maintained a similar opinion that Whether passed before or after India's constitution, all laws—including personal laws—must be in line with the basic rights. Although Article 13 forbids the Supreme Court from interfering in areas pertaining to private law, in this particular instance Instant triple talaq was challenged under Article 14, 15, 21, 25 of the India Constitution.

Therefore, as per Article 14, the Supreme Court has the power to declare any law unconstitutional which is arbitrary and violative of the fundamental right. The court held that Instant triple talaq is arbitrary and violates the right the of women under article 14 of the India constitution.

Ultimately, the Supreme Court rules by a majority that the practice of instant triple talaq is unconstitutional since it violates the fundamental rights of women as stated in the Indian constitution.

The Act of 2019 that protects Muslim women's right to marriage A Step up towards Legal Gender Justice in Islam numerous cases of triple talaq were reported in different parts of India even after the country's highest court outlawed and revoked the practice in 2017. Thus, in an effort to outlaw the practice of quick triple talaq, the LokSabha enacted the Triple

¹⁵Article 13 – Laws inconsistent with or in derogation of the fundamental rights [Constitution of India]

Talaq bill in December 2017, but the Rajya Sabha allowed it to expire.

Eventually, the law was approved by the president in July 2019 after passing both chambers. The nation as a whole expressed great gratitude for the act, which was seen as a critical step in defending Muslim women's rights against arbitrary and cruel personal laws.

The Muslim Women (Protection of Rights on Marriage) Act of 2019: Key Features

Any declaration of talaq (immediate triple talaq) made by a Muslim husband to his wife, whether orally or in writing, orally or electronically, shall be deemed null and unlawful according to the act.¹⁶

The act makes triple talaq illegal and imposes fines and up to three years in prison as punishments.¹⁷

The act classified the pronouncing of instant triple talaq as a cognizable offence¹⁸ meaning that upon the wife's complaint, the police may arrest the husband without a warrant. If the wife isn't heard, the husband (accused) cannot be freed on bond.¹⁹ Upon her husband's declaration of talaq, the wife will be entitled to the custody of minor child/children.²⁰

In conclusion

The fact that Muslim women endured decades of inhumane treatment and gender inequality is a regrettable reality. With the exception of the delegated right to divorce, which was again provided in accordance with the husband's desire, it was thought to be nearly difficult for a Muslim woman to acquire a divorce from her husband due to the lack of formal legislation (both central and personal laws) until 1939.

Fortunately, however, Muslim women were perceived as slight equals following the enactment of the dissolution of Muslim Marriage Act, 1939. Despite this, Muslim women continued to fear that their husbands would file for divorce in a fit of rage over a small disagreement due to the arbitrary practice of talak-e-biddat, or instant triple talaq. Ultimately, the Muslim Women (Protection of Right on Marriage) Act, 2019 was passed by the parliament as a progressive and deterrent measure to safeguard women's interests against such capricious and discriminatory practices. In 2017, the supreme court outlawed the practice of quick triple talaq.

¹⁶Section 3 of the Muslim Women (protection of right on marriage) Act, 2019

¹⁷Section 4 of the Muslim Women (protection of right on marriage) Act, 2019

¹⁸Section 7 (a) of the Muslim Women (protection of right on marriage) Act, 2019

¹⁹Section 7 (c) of the Muslim Women (protection of right on marriage) Act, 2019

²⁰Section 6 of the Muslim Women (protection of right on marriage) Act, 2019

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