
THE EVOLUTION OF DIVORCE LAWS IN ISLAMIC JURISPRUDENCE: HISTORICAL PERSPECTIVES AND CONTEMPORARY DEBATES

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ABSTRACT

Through this article the authors will trace the evolution of divorce laws in Islamic jurisprudence in both historical perspective & ongoing contemporary debates which aim to examine key aspects of divorce in Islamic law, including the forms of divorce, the role of religious authorities, and the ongoing efforts to reform and modernize divorce laws in different contexts. Initially focusing on the pre-Islamic conditions and advent of Islam this article covers historical perspective in detail mentioning all about the lack of legal framework in the society of those times, the situation of family, religion and divorce then, and the thought processes of the prophet himself and the leaders of different schools and sects relating to divorce. Further it traces the evolution process involved in reference to divorce in the historical, medieval and contemporary times. The authors then shift their focus on contemporary debates be it the traditionalist side or reformist side, comparing both and presenting their views, narrating why each have their own pros and cons. Finally, before concluding, the current scenario of divorce in Islamic jurisprudence including both judicial and extra judicial divorce and their types which hold value and relevance in India to this day are discussed. The authors then conclude with the fact at hand that the Muslim world of jurisprudence just as others continues to evolve and change with changes in thought processes of people, society and need of the hour.

Keywords: *Divorce, Evolution, jurisprudence, contemporary debates, judicial, extra judicial, current scenario*

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I. INTRODUCTION

Although divorce is recognized in many religions, Islam is likely the first religion in the world to explicitly recognize the breakup of marriage through divorce. Divorce was first legalized in England only a century ago. The term 'divorce' is derived from the Latin word 'divortium', which means to turn aside or separate. Divorce is known as 'Talaq' in Islamic law. It is more than just a word that intrigues others; it destroys the most sacred connection between a husband and wife. Talaq originally meant repudiation or rejection of marriage', but in Islam it refers to the immediate termination of the marital contract.

II. CONDITIONS IN PRE-ISLAMIC ERA IN RESPECT TO DIVORCE

Before the advent of Islam, divorce in the Arabian Peninsula was governed by customs and traditions prevalent in pre-Islamic society. Women had limited rights and protections in divorce proceedings, and the process was often arbitrary and devoid of legal safeguards. Divorce was largely unilateral, with men holding significant power and authority in dissolving marriages. This led to the exploitation of women, who were often left vulnerable and stigmatized. The pre-Islamic era was characterized by a lack of formal legal frameworks and protections for women in divorce cases.

III. THE ORIGIN OF ISLAMIC LAW

In the first place, Mohammed propagated the evolution of the Islamic religion. Prophet Mohammed continued to receive revelations and he built an ever-expanding community around a new faith. After Prophet Mohammed's death in 632, he did not select a successor, hence one side claimed that only a person having direct ancestry to the Prophet could properly manage the Muslim community. They have traditionally been referred to as Shias. They agreed that Ali, Mohammed's closest surviving blood male relative, should be their future leader. The other factions of people believed that the Prophet's successor should be chosen by consensus, and they picked three of his most trusted friends as leaders of the Muslim community. These people were known as Sunnis. As a result, the Islamic society was divided into two groups: Sunnis and Shias.

The Sunnis are further divided into four sub-schools, namely Hanafi , Maliki , Shafei & Hanbali School and the Shias are divided into three sub-school namely Ithna Ashari , Zaidya & Ismailiya. Both of them have their own books & authorities.

This division of Islamic community, people were Governed by Quran, the holy book, Sunna, Ijma and Qiyas. All these are considered as sources of laws.

IV. HISTORICAL PERSPECTIVE

The historical evolution of divorce laws in Islamic jurisprudence can be traced back to the time of the Prophet Muhammad and the early Islamic community. During this period, divorce was recognized as a lawful and legitimate means of ending a marriage, and the Quran and Hadith provided guidance on the procedures and conditions for divorce. The Quranic verses and Prophetic traditions laid down the principles and regulations governing divorce, emphasizing the importance of justice, fairness, and compassion in the dissolution of marital bonds.

In the early Islamic period, divorce laws were based on the principles of mutual consent, fairness, and the protection of women's rights. The Quranic injunctions and Prophetic traditions emphasized the ethical and moral dimensions of divorce, and sought to ensure that the rights and welfare of both parties were upheld during the dissolution of marriage. The early Islamic jurists, known as the companions of the Prophet, played a crucial role in interpreting and applying the Quranic teachings and Prophetic traditions to develop a comprehensive legal framework for divorce.

V. EVOLUTION

The development of divorce laws in Islamic jurisprudence continued throughout the medieval period, as Muslim scholars and jurists elaborated on the Quranic principles and Prophetic traditions to address the diverse social and cultural contexts in which divorce occurred. The emergence of different schools of Islamic law, such as the Hanafi, Maliki, Shafi'i, and Hanbali schools, led to the formulation of diverse legal opinions and methodologies regarding divorce. These schools of law developed their own interpretations of the Quranic verses and Prophetic traditions, and established specific rules and procedures for divorce within their respective legal frameworks.

The medieval period also witnessed the codification of Islamic legal principles and the compilation of legal manuals and treatises on family law, including divorce. Prominent jurists such as Imam Abu Hanifa, Imam Malik, Imam Al-Shafi'i, and Imam Ahmad ibn Hanbal contributed to the development of Islamic family law, including the regulation of divorce. Their

legal writings and rulings provided detailed guidance on the grounds for divorce, the procedures for divorce, and the rights and obligations of the parties involved. These legal texts reflected the evolving social and cultural dynamics of the Muslim world, and sought to address the complexities of marital dissolution within the framework of Islamic jurisprudence.

Furthermore, contemporary debates on divorce laws in Islamic jurisprudence also intersect with broader discussions on gender equality, human rights, and social justice within the Muslim community. The evolving roles and rights of women in Muslim societies have led to critical reflections on the implications of divorce laws for gender equality, women's empowerment, and the protection of women's rights within marriage and divorce. These debates have prompted calls for legal reforms and advocacy efforts aimed at addressing the discriminatory practices and barriers that women may face in the context of divorce, and promoting a more equitable and just legal framework for marital dissolution.

VI. DEBATES

Some scholars and jurists advocate for a traditionalist approach to divorce laws, emphasizing the preservation of classical Islamic legal principles and methodologies in addressing marital dissolution. They argue for the continued relevance of the Quranic injunctions and Prophetic traditions in guiding the legal framework for divorce, and emphasize the importance of upholding the ethical and moral dimensions of divorce within an Islamic context. This traditionalist perspective seeks to maintain the integrity of Islamic family law and resist the influence of external legal systems and ideologies in shaping divorce laws.

On the other hand, there are scholars and activists who advocate for a reformist approach to divorce laws in Islamic jurisprudence, calling for a re-examination and reinterpretation of the classical legal texts and methodologies in light of contemporary realities. They argue for a more flexible and inclusive approach to divorce, which takes into account the diverse social and cultural dynamics of the modern Muslim world, as well as the rights and welfare of women and marginalized groups. This reformist perspective seeks to address the challenges and complexities of divorce within a framework that is responsive to the needs and concerns of contemporary society.

Another area of contemporary debate pertains to the legal and procedural aspects of divorce within Islamic jurisprudence. The diverse legal traditions and practices within the Muslim world have led to variations in the rules and procedures governing divorce, including the

grounds for divorce, the methods of pronouncing divorce, and the rights and obligations of the parties involved. These variations have given rise to debates regarding the harmonization and standardization of divorce laws across different legal systems and jurisdictions, as well as the need for legal reforms to address issues such as unilateral divorce, marital reconciliation, and the financial rights of women upon divorce.

VII. CURRENT SCENARIO OF DIVORCE IN ISLAMIC JURISPRUDENCE

Islamic jurisprudence recognizes different forms of divorce, The existence of multiple forms of divorce reflects the complexity and diversity of situations that may arise in marital relationships.²

Divorce under Muslim Law is of two types: -

1. Extra Judicial Divorce
2. Judicial Divorce

The Extra-judicial divorce relies on the husband or wife's will or mutual consent. Both spouses have distinct rights. In the majority of instances, the husband is granted the right to divorce, whereas the wife gets a lower status in this context. Extrajudicial divorce comprises of several parts:

1. By Husband- Talaq-Ul-Sunnat, Talaq-Ul-Biddat, Ila and Zihar
2. By Wife- Talaq-i-Tafweez, Lian and Khula
3. My Mutual Agreement- Mubarat

1. By Husband

a) Talaq-Ul-Sunnat

Talaq-ul-Sunnat is also called as Talaq-ul-raje. It is a reversible form of talaq because the repercussions of talaq are not finalized immediately. There is a potential of compromise and reconciliation between husband and wife. Talaq-ul-Sunnat is recognized as the acceptable form

² <https://tripakshalitigation.com/types-of-talaq-under-muslim-law/>

of Talaq. Sunnis and Shias both recognize this form of Talaq. Talaq-ul-Sunnat could be expressed in either the Ahasan or Hasan form

i) Ahasan

This is the proper way to repudiate a marriage. The rationale is twofold. First, the pronouncement can be revoked before the Iddat period expires. Second, the evil words of Talaq must only be spoken once. Being evil, it is preferable that those phrases are not repeated.

ii) Hasan

This Talaq is also regarded as the correct and acceptable form of Talaq. This form includes a provision for revocation. However, it is not the most effective method as the evil words of Talaq must be spoken three times in consecutive Tuhrs.

b) Talaq-ul-Biddat

Talaq-ul-Biddat is additionally known as Talaq-ul-Bain. It is an unapproved method of divorce. This Talaq is unique in that it takes effect immediately and cannot be reversed due to the absence of reconciliation between the parties. This form of talaq is mainly recognized and practiced by Sunni Muslims commonly practice this form of talaq, while Shia Muslims do not. Talaq-ul-Biddat may be spoken as a single or triple proclamation.

i) Single Declaration Procedure: During the period of purity, the husband might make a single declaration stating his decision to divorce the wife irrevocably, such as "I divorce thee irrevocably" or "I divorce thee in Bain". After Once the pronouncement is made, the talaq becomes irreversible and permanent. After this period, the wife will observe the iddat period.

ii) Triple Declaration Procedure: During a period of purity (Tuhr), the husband might make three pronouncements stating "I divorce thee, I divorce thee, and I divorce thee." He may declare his triple Talaq in a single sentence, such as "I divorce thee thrice" or "I pronounce my first, second, and third Talaq." Once declared, the wife must respect the iddat period, making the decision irreversible. However, The Supreme Court declared talaq-ul-biddat unconstitutional in *Shayara Bano vs Union of India*³. The court ruled that this form of talaq is arbitrary and can be used to break marital ties without due process & A Muslim man acted

³ *Shayara Bano v. Union of India and Ors* AIR 2017 9 SCC 1 (SC)

whimsically, with no attempt at reconciliation for saving it. This form of Talaq violates the fundamental right under Article 14⁴ of the Indian Constitution.

In our opinion, therefore, the 1937 Act, in so far as it tries to recognize and implement Triple Talaq, comes within the meaning of the word "laws in force" in Article 13(1)⁵ and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq." The Government of India now prohibits triple talaq and punishes husbands who do it with up to 3 years in prison.

c) Ila

In Ila, the husband swears not to have sexual intercourse with his wife. Following the oath, there is no consummation for four months. After the end of the fourth month, Marriage ends irrevocably. However, if the husband resumes cohabitation after four months, Ila is annulled and the marriage remains intact. For Sunnis, the husband's actions will result in a single irrevocable divorce and the marriage will end immediately after 4 months. while Shia marriages do not dissolve automatically; instead, the wife can seek judicial divorce under Section 2(ix)⁶ of the Dissolution of Muslim Marriages Act 1939.

d) Zihar

In this mode, the husband compares his wife to a lady from a prohibited relationship, such as his mother or sister. The husband would argue that since today, the wife is like his mother or sister. If In such comparison, the husband does not cohabit with his wife for four months. Upon the Zihar is complete when the specified time period expires. After the fourth month, the wife has the following rights:

She can request the court for a judicial divorce. And can ask the court to grant the decree of restitution of conjugal rights. Where the husband desires to renounce Zihar by resuming cohabitation within the specified term, The wife cannot seek a judicial divorce. It can be withdrawn if husband fasts for two months, feeds at least sixty people, or frees a slave.

In *Masroor Ahmed vs. State (NCT of Delhi)*⁷, the High Court of Delhi ruled that "Ila and Zihar as methods for divorce are virtually non-existent in India." However, Ila is sometimes used. If a man accuses his wife of adultery (zina) but can't establish it, according to the

⁴ The Constitution of India, art. 14

⁵ The Constitution of India, art. 13(1)

⁶ The Dissolution of Muslim Marriages Act 1939, s.2(ix)

⁷ *MASROOR AHMED VS. STATE (NCT OF DELHI)*, 2007 (2) ILR(Del) 1329

allegations, the wife has the right to request the Qazi for the dissolution of her marriage. In India, standard suits need to be filed. If the wife initiates a suit, the husband can withdraw the claim of adultery, which will result in the suit being dismissed. If he persists, he must take four oaths supporting the charge. The wife takes four swears of innocence, and the court dissolves the marriage. This is the process of dissolution of marriage by Lian.

2. By Wife

a) Talaq-i-Tafweez

It is known as the delegated form of divorce and is recognized by both Shias and Sunnis. Muslim husbands can transfer their right to divorce to their wives or anyone else.

He may allocate power absolutely, conditionally, for a while, or permanently. A permanent Delegation of power is revocable, whereas interim delegation of power is not. Delegation of power must be clearly pronounced in favor of the person who will receive it and for a specific purpose. A pre- or post-marriage agreement granting the wife the right to divorce under certain conditions is adequate provided that the conditions laid out are fair and are not in contradiction with public policy. In the middle of a circumstances, it is up to the wife to decide whether or not to exercise the power. Contingency does not necessarily lead to divorce.

b) Khula

Khula is a kind of divorce when the wife agrees to pay some consideration to her husband in exchange for her release from the marriage.

The following conditions are required for a legitimate Khula:

1. The wife must make an offer.
2. She gives or promises to give consideration to the spouse for her release.
3. The husband accepts the offer.

The wife can withdraw her proposal before the husband accepts it. Jurists in Muslim personal law has allowed both husbands and wives three days' time. The moment the husband accepts the offer, it becomes single irreversible. Divorce occurs when the husband accepts the offer.

3) By mutual agreement

It is also referred to as Mubarat. Mubarat refers to the termination of a marriage contract. It represents a mutual release from the marital claims. Mubarat is characterized by mutual dislike and a desire for separation. Thus, mutual consent is required. In this.

The offer for divorce might come from either the wife or the husband. Accepting an offer Mubarat results in an irrevocable divorce and requires iddat.

VIII. JUDICIAL DIVORCE

Judicial divorce is an official separation between both spouses where the court separates them based on existing customs or laws, without direct involvement from either party. In such circumstances, Divorce is not based on the husband's will or pleasure. The Dissolution of Muslim Marriage Act of 1939 allows for divorce based on the wife's application. There are numerous grounds on which judicial divorce can be granted.

Females can seek a divorce based on the following grounds:

1. Unknown whereabouts of the husband.
2. Failure to sustain for two years.
3. The husband was condemned to prison.
4. Failure to meet marital commitments.
5. Impotence.
6. Insanity, leprosy, or severe venereal illnesses.
7. Renunciation from marriage.
8. Cruelty.
9. False allegations of adultery.
10. The conversion of their partner into a different religion.

IX. CONCLUSION

In conclusion, the evolution of divorce laws in Islamic jurisprudence has been shaped by historical, cultural, and social dynamics, and has given rise to a range of contemporary debates within the Muslim community. The historical perspectives on divorce laws in Islamic

jurisprudence reflect the rich and diverse legal traditions and methodologies that have developed over time, while the contemporary debates highlight the complexities and challenges of addressing divorce within the framework of Islamic jurisprudence. As the Muslim world continues to navigate the complexities of divorce laws, it is essential to engage in informed and inclusive dialogues that draw on the diverse perspectives and interpretations within the Muslim community, and seek to uphold the principles of justice, fairness, and compassion in the regulation of divorce.

