

Commencement Of Divorce Under The Islamic Law's In India Through Gender Justice

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ABSTRACT

Sex and gender are two distinct concepts that are often conflated, but they have different meanings and implications. Sex refers to the biological and physiological characteristics that define individuals as male, female, or intersex. These characteristics include reproductive organs, chromosomes, hormones, and physical traits such as body hair, muscle mass, and breast development. AZ's gender, on the other hand, refers to the socially constructed roles, behaviours, expectations, and identities that are associated with being male or female in a particular culture or society. Gender includes a range of aspects such as gender expression, gender identity, gender roles, and gender stereotypes.

While sex is determined by biological factors, gender is a social and cultural construct that can vary across different societies and historical periods. Gender norms and expectations may change over time and may differ between cultures, whereas biological sex is a fixed characteristic determined by genetics and anatomy.

It is also important to note that gender identity may not always align with a person's biological sex. For example, transgender individuals may identify with a gender that is different from the one assigned to them at birth based on their biological sex. This highlights the difference between sex as a biological characteristic and gender as a social identity.

Overall, sex refers to biological and physiological characteristics, while gender refers to socially constructed roles, behaviours, expectations, and identities. The distinction between sex and gender is important in understanding the diversity of human experiences and the ways in which social and cultural factors shape our identities and experiences.

Introduction

1. India

19th and early 20th century:

- The Indian social reformer Raja Ram Mohan Roy advocated for women's education and opposed practices such as child marriage and sati (widow burning).
- The Age of Consent Act was passed in 1891, raising the age of consent for girls from 10 to 12 years old.
- In 1917, the first All India Women's Conference was held in Bombay, which advocated for women's rights and education.

Mid-20th century:

- The 1955 Hindu Marriage Act, the 1956 Special Marriage Act, and the 1961 Islamic Law (Shariat) Application Act reformed marriage and divorce laws in India, granting women more legal rights and protections.
- The 1971 Maternity Benefits Act provided for maternity leave and other benefits for women in the formal sector.

Late 20th century:

- The 1986 Dowry Prohibition Act made the giving and receiving of dowries illegal in India, in an effort to address the problem of dowry-related violence against women.
- The 1993 Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act was passed, which defined sexual harassment and provided for its prevention and redressal in the workplace.

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21st century:

- The 2005 Protection of Women from Domestic Violence Act provided legal protections for women facing domestic violence and abuse.
- The 2013 Criminal Law (Amendment) Act, also known as the Nirbhaya Act, was passed in response to the gang rape and murder of a young woman in Delhi, which strengthened laws against sexual assault and harassment.
- In 2015, the Supreme Court of India recognized transgender people as a "third gender," with legal recognition and protections under the law.
- The 2018 Sabarimala temple verdict allowed women of all ages to enter and worship at the Sabarimala temple, overturning a centuries-old ban on women of menstruating age.

Despite these achievements, gender justice remains an ongoing struggle in India. Challenges include gender-based violence and harassment, discrimination against women in education and employment, and persistent gender inequalities in areas such as health and political representation.

India

India has made significant progress towards gender justice over time. Here is a detailed timeline of some key events:

19th century:

- The 1829 Sati Regulation criminalized the practice of Sati, where a widow would be expected to immolate herself on her husband's funeral pyre.
- The 1856 Hindu Widow's Remarriage Act allowed Hindu widows to remarry.
- The 1891 Age of Consent Act raised the age of consent for marriage for girls from 10 to 12 years¹.

Early 20th century:

- The 1919 Montagu-Chelmsford Reforms provided for separate electorates for women in local government. The 1929 Child Marriage Restraint Act prohibited the marriage of girls under the age of 14 and boys under the age of 18.
- The 1937 Government of India Act provided for the election of women to the provincial legislatures.

Mid-20th century:

- The 1955 Hindu Marriage Act, which codified Hindu marriage law, provided for the registration of marriages, the prohibition of polygamy, and the right to divorce.
- The 1961 Dowry Prohibition Act prohibited the giving and receiving of dowry.
- The 1975 Equal Remuneration Act required employers to pay men and women equally for the same work.

Late 20th century:

- The 1986 Vishaka Guidelines were issued by the Supreme Court of India, providing guidelines to prevent sexual harassment of women at the workplace.
- The 1993 73rd and 74th Amendments to the Constitution provided for the reservation of seats for women in local government.
- The 1997 Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act was passed, which provided for the prevention of sexual harassment of women at the workplace.

21st century:

- The 2005 Protection of Women from Domestic Violence Act was passed, which provided for the prevention of domestic violence against women.
- The 2013 Criminal Law (Amendment) Act was passed in response to the gang rape and murder of a young woman in Delhi. The act amended several provisions of the Indian Penal Code, the Code of Criminal Procedure, and the Indian Evidence Act, to strengthen laws relating to sexual assault and harassment.
- In 2015, the Maternity Benefit (Amendment) Act was passed, which increased the maternity leave entitlement for working women from 12 to 26 weeks.

Despite these achievements, gender justice remains an ongoing struggle in India. Challenges include the prevalence of gender-based violence, discrimination against women in education and employment, and the persistent gender pay gap.

The United Nations has made significant contributions to promoting and advancing gender justice around the world. Here are some of the key ways in which the UN has worked towards gender justice:

¹https://en.wikipedia.org/wiki/Muslim_personal_law

Adopting international treaties and agreements: The UN has adopted several international treaties and agreements that promote gender justice, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Beijing Declaration and Platform for Action, and the Sustainable Development Goals (SDGs).

Advocating for gender equality: The UN has been a strong advocate for gender equality and women's rights. The UN Women, established in 2010, is a UN entity dedicated to gender equality and the empowerment of women.

Providing technical assistance and capacity building: The UN provides technical assistance and capacity building to countries to promote gender justice. This includes supporting the development of laws and policies that promote gender equality, building the capacity of institutions to implement these laws and policies, and supporting civil society organizations working on gender justice issues.

Monitoring and reporting on progress: The UN monitors and reports on progress towards gender justice. This includes tracking progress towards the SDGs, conducting research on gender-based violence, and monitoring the implementation of international agreements and treaties on gender justice.

Supporting women's participation and leadership: The UN promotes women's participation and leadership in all areas, including in politics, governance, and peace and security. The UN has established various initiatives to support women's political participation, such as the UN Women's Leadership and Participation Programme. Overall, the UN plays a crucial role in promoting gender justice and advancing women's rights globally. Through its various initiatives and programs, the UN has helped to raise awareness of gender-based discrimination and inequality, and has supported efforts to address these issues at the local, national, and international levels.

Divorce in Islam

"Of all the things that are permissible, divorce is the most abhorrent to God."

From the decades many discriminations encountered by Muslim women, the way a husband can divorce his wife by saying triple talaq is quite common. When it comes to divorce, Muslim women's positions are the least stable and inferior of all the other genders. Currently the issues of women rights in Islamic law are extremely contentious specifically women's rights pertaining to triple talaq./maintenance, inheritance, has attracted significant attention. Under the name of the culture and social norms of the specific society, the guarantees of equality and freedom from discrimination on the basis of gender and religion are breached. All of this takes place in the guise of unwritten law. Authors and jurists have varying views on how Islamic law should be interpreted

Some claim that personal laws have granted women various rights, including the freedom to choose their spouses, the ability to repudiate marriage, and rights regarding inheritance, while others assert that certain customs are incompatible with Islam because they are applied according to the convenience of the society's priestly class while also being incompatible with India's constitution.

In Muslim society, males are seen to be superior to women and women are thought to be meek and obedient to men because they are the ones who support them. Men who are the head of the household make decisions. Males are the primary earners and Women are obligated to carry the kid. In Muslim society, males are considered superior than women because they have historically held positions of power in the family, the home, politics, and other spheres while women have been relegated to caring for the home and having children in every sphere of Islamic culture.

Divorce under the Quran

The community's leader, the Prophet Mohammed, proclaimed that divorce is the worst of all the acts that Muslim law permits. He characterised it as the worst kind of evil and advised that it be avoided at all costs. But, when cohabitation is not an option, it becomes a requirement of life. Under similar circumstances, it is preferable to end a relationship with the spouse than to remain in an environment that is filled with pain and disgust. In Islam, the incapacity of the couple to cohabit for a real reason that prevents cohabitation is the foundation for divorce. So, it shouldn't depend on the person's whims or preferences, whether they are male or female.

In Islam, the wife may only obtain a divorce by a court decree, whereas the husband may only do it through the process of talaq. There are several ways to divorce in Islamic law, including triple talaq and quick triple talaq. Most people believe that the Quran treats women unjustly or unequally, and that Sharia law—Islamic law—does not allow for gender equity. This claim is somewhat accurate and partially false. Correct with regard to Sharia law, false with regard to current laws, which were established during the second and third centuries of Islam when the overall viewpoint of women's rights in society was significantly different from the perspective of today. It is crucial to remember that Sharia law is unquestionably founded on the holy Quran, but in the end, it is up to humans to interpret and comprehend divine law. Instead of attempting to grasp divine intention itself, it is a method of doing so.¹

The holy prophet made it clear that he strongly disapproved of divorce when it came to relationships. He categorically stated that divorce was the worst thing that was ever allowed. Throughout the history of eastern law, the prophet Mohammed's reforms heralded the beginning of a new era. Islam used the requirement that, in cases of irrevocable separation, the wife marry another man, that this marriage be completed before divorce,

and that the wife follow the time of iddat as a check on frequent divorce and remarriage. Shia and Sunni are two Islam sects, and their approaches to the divorce process differ somewhat.²

Shia Law

According to Shia law, the language used to declare the divorce must be explicit and unequivocal. These must be expressed like -I have divorce X permanently and render her haram for me .

1. The talaq must be pronounced in Arabic in front of two witnesses who are Muslims, of legal age, of sound mind, and who clearly intend to end the marriage.

Hanafi law (Sunni)

1. A husband may divorce his wife at any moment and without giving a cause.
2. At the moment of divorce, the husband should be an adult and of sound mind.
3. When a divorce is declared, witnesses are not need to be present.
4. The wife's attendance is likewise not required, and no notification should be provided to her.
5. The talaq does not require a unique form.

Classification of Divorce:

All forms of Talaq and its implementation fall into one of two groups: -

- a. Divorce with the parties' own consent
- b. Legally obtaining a divorce.

Divorce by the parties' own action May be divided into three parts.

- A. By Husband
- B. By Consent of Both Parties

Husband can Give Divorce by four Ways:-

These four ways are

1. Talaq-ul sunnat
2. **Talak-e-ahsan (Most-proper)**
3. **Talak-e-hasan (Proper)**
4. Talaq-ul-biddat

1. Talaq-ul sunnat

Traditional customs and rituals are referred to as sunna or sunnat in Arabic. Hence, talak-e-sunnat may be characterised as a customary divorce method based on the prophet's order and is regarded as the talaq method that the prophet approved of the most in terms of Islamic law.

Talaq-e-Sunnat is further divided into two types based on the revocability of divorce, the length of the pronouncement, and the iddat term.³

2. Talak-e-ahsan (Most-proper)

- In order to perform talaq-e-ahsan, a Muslim husband must say the word "talaq" three times in a row. This must be done during the wife's "thur," or period of purity, which is the time when she is not menstruation. The iddat begins when such a proclamation is made, and it lasts for 90 days during which the husband and wife are forbidden from living together or having sexual relations.
- Reconciliation's scope - Talaq-e-ahsan is regarded as the most legal type of divorce since it gives both parties—the husband and wife—enough time to make amends and, if feasible, resolve their issues through arbitration, conciliation, and settlement. If the couple resolved their differences before the end of the iddat period, they might openly or subtly rescind their divorce. Yet, the divorce becomes official and irrevocable at the end of this time frame.
- The husband's proclamation of "talaq" will be deemed invalid if it was made when his wife was having a period.
- If the husband and wife cohabit or have a sexual relationship during the iddat period, this will be interpreted as an implicit reversal of the divorce.

²<https://www.bing.com/search?q=dowary+in+islam%3F+weekipede&q=inform=QBRE&sp=-1&ghc=1&lq=0&pq=dowary+in+islam>

³https://www.researchgate.net/publication/292970930_SCIENTIFIC_FACTS_IN_QURAN

3. Talak-e-hasan (Proper)

Talak-e-Hasan is sometimes referred to as the approved or appropriate type of divorce since it includes a clause that allows for the annulment of the divorce. In this type of talaq, the husband must say the word "talaq" three times in a row during three consecutive hours of Thursday (period of purity between two menstrual cycles).

- If the lady reaches menopause or has reached menstrual age, three pronouncements must be made over subsequent 30-day periods.
- The husband and wife have the option to revoke the divorce (either explicitly or implicitly) until the third pronouncement because once the third pronouncement is made, the talaq becomes final and irrevocable. If the spouses resumed their conjugal relations between the iddat period, the divorce shall automatically be revoked and the talaq becomes ineffective.

4. Talaq-e-Biddat

The term biddat means "innovation," which suggests that this method of divorce was developed in contemporary times and was not initially sanctioned by the prophet's traditions.

- Talaq-e-biddat or talaq-e-bain is the most abhorrent kind of talaq since it gives the husband and wife no chance to make amends or resolve their issues.
- In this type of divorce, the husband must use the word "talaq" three times in a row while saying "thur," and from that point on, their marriage is immediately regarded as being legally dissolved even if the woman must observe the necessary iddat period. Because of this, it is sometimes referred to as immediate triple talaq.
- The practise of quick triple talaq was outright forbidden in a number of Islamic nations, including Pakistan, Sri Lanka, Bangladesh, Turkey, Malaysia, Egypt, Iran, Jordan, Saudi Arabia, etc.
- Instant triple talaq was often practised in India prior to 2017, however following the historic ruling in Shayara Bano v. Union of India, the supreme court outlawed this practise for violating the fundamental right to equality under Article 14 of the Indian constitution.

5. Illa

In this type of talaq, the husband refrains from engaging in sexual activity with his wife but does not explicitly declare talaq. Similarly, in illa, the husband swears to refrain from sexual activity for four months (i.e., the iddat period), after which the marriage ends permanently.

6. Zihar

In this type of divorce, the husband contrasts his wife with females who are connected to him in forbidden degrees, such as his mother by blood, sister by blood, etc. Following such a comparison, the husband must refrain from living with his wife for four months, and once that time has passed, zihar must be completed. After such completion, the woman has the option of choosing a court order for divorce or filing for restitution of conjugal rights.

7. Talaq by Wife Talak-e-Tafweez (Delegated Divorce):

According to Mohammedan law, Muslim women do not have a particular or exclusive power to annul their marriages. A Muslim spouse may, however, assign his authority to declare divorce to any third party, including his wife.

- He may give his wife or anybody else this authority in any way, including unconditionally, conditionally, temporarily, or permanently.
- Typically, a pre- or post-marriage agreement gives the woman the delegated authority of divorce. A Muslim wife may declare divorce for herself (on behalf of her husband) using this delegated authority, but only in the event of certain circumstances detailed in the contract.
- For instance, if the husband had a second Nikah with a different person or if he had been unkind to his first wife, etc. However, it should be remembered that the woman still has the opportunity to decide whether she wants to exercise her assigned power or not, therefore the contingency alone does not automatically result in a divorce.
- Lastly, the talaq is definitive and irrevocable after the wife has used the power granted by her husband to proclaim it.

8. Talaq by Consensual Agreement

The term "talaq with mutual consent" refers to the husband and wife agreeing to end their marriage. It comes in two varieties, namely:

9. Khula:

This type of divorce is started by a Muslim wife who, in exchange for payment, buys the right to divorce her husband. In other words, the Muslim wife provides her husband something of value in exchange for his approval of the divorce. The dower given to the wife at the time of the Nikah, as well as any other property or financial consideration, may be considered as such consideration.

10. Mubarat:

When both spouses voluntarily decide to end the marriage, they must take the talaq required by mubarat, which entails talaq by mutual consent. The offer may be made in this type of talaq by any party, but once it has been accepted, the divorce is final.

Divorce through the Legal Process

This procedure grants the wife the authority to divorce her spouse. There are two modes for it.

- 1- Lian
- 2- Faskh

Lian:

The woman has the right to bring a lawsuit for the dissolution of the marriage and get a divorce if she can show that the husband's accusation of adultery is untrue. The marriage continues until a judge makes a ruling, and if one spouse passes away before the judge makes a ruling, the other will inherit equally, in accordance with Islam law. According to the Lian theory, the court must decide judicially whether or not an adultery accusation was made in error and whether the husband has admitted or denied the claims before it may dissolve the marriage.

Faskh–

When the wife requests a divorce but the husband unjustly refuses to issue the talaq, an Islamic court or a Shariah council may dissolve the marriage. This husband's reluctance runs counter to the Quran's interpretation of marriage and divorce.

It is the entire annulment of the marriage contract and severance of the marital ties as if they never existed, and this can only be accomplished by a qaadi (judge) judgement or shari ruling. The following are some examples of grounds for annulment (faskh) of the marriage contract:

According to academics who consider this to be one of the requirements for the validity of the marriage contract, there is a lack of compatibility between the couples.

- If one of the spouses abandons Islam and does not return to it.
- If the woman is a polytheist or mushrik (refusing to convert to Islam) and the husband converts to Islam, she will not be considered one of the people of the Book (i.e., Jewish or Christian).
- When lian takes place between spouses
- If the woman asks for the marriage to be dissolved, the husband may experience financial hardship and be unable to pay for his wife's maintenance.
- Each partner having a flaw that inhibits intimacy or inspires disgust between them

Triple Talaq with a Gender Justice Perspective

The barbaric practise of triple talaq, or more often known as immediate divorce, is the most horrible form of oppression that Muslim women have ever been subjected to. It is forbidden to divorce your wife when she is menstruation, according to the Quran. Although Shia and Sunni have differing perspectives on triple talaq, it is nevertheless necessary to observe some fundamental guidelines, such as those governing a woman's puberty, her virginity status, the waiting period prescribed by the Quran, etc. to justify any divorce.⁴

This is a type of talaq that is legal yet impure. Words are uttered, and it starts working. The prospect of the husband and wife getting back together after this sort of divorce is non-existent. The Prophet never endorsed this style of divorce. I divorce you three times, or I divorce you in three phrases, are the only three declarations made in this divorce in a single statement (talaq, talaq, talaq). As soon as a talaq is spoken, it cannot be reversed. The term of iddat starts after the final proclamation. Throughout the duration of iddat, this divorce cannot be annulled. We deplore this style of divorce. Because it cannot be reversed, it is seen as an amoral kind of divorce. In actuality, the idea of triple talaq didn't exist throughout the reigns of the Prophet Mohammed, Caliph Abubakr, and Caliph Umar. The second half of Caliph Umar's reign is when it is said to have been implemented, and he did so as a temporary expedient.

This particular form of talaq was first used by the Ommeyyad ruler. Three divorce decrees being issued at once became standard procedure (customary law). In its place, irreversible divorce was introduced.

Several Muslim nations have made significant changes to their personal law in order to invalidate or reject the practise of triple talaq, which is declared in one sitting. The practise of triple talaq has been declared unconstitutional in several countries with a majority of Muslims due to the fact that it is unIslamic and directly contravenes Indian constitutional principles, as well as being refuted by eminent Islamic scholars. In India, more than 170 million Muslim women's rights are under jeopardy. The triple talaq is an inhumane ritual that offends women's rights and dignity.

⁴<https://blog.ipleaders.in/social-legal-aspects-divorce-india/>

Legal aspect of divorce in India

Divorce is one of life's most devastating events for any couple. Furthermore, if the divorce is disputed in India, it can be a lengthy and costly process. Even couples who agree to divorce must show that they have been separated for at least a year before the courts would hear their case. Divorce rules in India, like other personal problems, are linked to religion. The Hindu Marriage Act of 1955 governs the dissolution of marriage among Hindus, Buddhists, Sikhs, and Jains, the Dissolution of Muslim Marriages Act of 1939 governs Muslims, the Parsi Marriage and Divorce Act of 1936 governs Parsis, and the Indian Divorce Act of 1869 governs Christians. On the other hand, the Special Marriage Act of 1954 governs all civil and intercommunity marriages.

Conclusion

In a nation like India, it is often difficult to achieve complete gender justice. There is a huge diversity of cultures and subcultures, yet there is also a great deal of rigidity in tradition and beliefs. Lack of education, a lack of development, poverty, improper application of the law, a lack of knowledge among women, entrenched patriarchy, and women's economic dependency are all factors that contribute to the subversive condition of women in our society. Any state's progress and general welfare depend heavily on gender development in all areas of society. Several NGOs and government organisations, as well as individuals, have been actively advocating gender equality and protesting against prejudice. Even though there has been progress towards achieving gender justice, much work remains.⁵

Because neither a husband nor a wife has an unrestricted authority to end an existing marriage unilaterally and arbitrarily, this is the true nature of Islamic divorce law. However, neither party is required to remain unified if they have a legitimate reason to want to split up, and in that instance,

In this situation, the Supreme Court of India may have to take into account the error of previous legal judgements regarding the genuine nature of Islamic divorce law. Yet, we would prefer that our ulama carry out the crucial role of explaining Islamic law from its correct viewpoint rather than leave it to the Supreme Court; if they fail to do so, the court will have to intervene.

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