



Rights of the Divorcee women in India and Pakistan: A Review

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ABSTRACT

The Indian and Pakistani constitutions provide equality for all, yet the rights of citizens from different religious groups in matters such as marriage, divorce, maintenance and succession, depend on religious identity. A Muslim man can practise polygamy but this is denied to men from other faiths. Muslim women in India are unable to claim substantive maintenance from their former husbands after divorce whereas women from other religions do. In Pakistan, it is more difficult for Hindu and Christian couples to divorce than Muslim couples. Post Muhammad Zia-ul-Haq's regime in Pakistan, there has been slow but steady progress on improving women's rights in the domestic sphere through legislation, but this has left out women from the country's religious minorities. Successive governments in Pakistan have either ignored the matter or attempted to appease members of the ruling male elite from religious minorities, who have wanted to hang on to patriarchal rules on religious pretexts. Hence, women from religious minorities face the patriarchal standards of their own religious leaders as well as exploitation from right-wing elements in the majority community. The right of men to terminate marital agreement or nikah is called Talaq in Islam. In some religions by law and in Islam by the order of Allah if a married couple fails to solve their different disputes they can go for separation through the right of talaq or divorce. In every country there is a law of divorce. There is some proper procedure that a married must follow if they want to discontinue their marital relation. In some countries this procedure and law has been imposed in the light of Islamic orders and in some of the countries they have law according to their own will.

Introduction: -

In both countries, judges of the superior courts led the reform efforts. Indian and Pakistani judges tried to ensure gender equality under Islamic divorce law, but adopted entirely different approaches. Whereas the Pakistani judges *extended* women's limited right to divorce (*khul'*), Indian judges *restricted* husband's unlimited right to divorce (*talāq*). According to the Pakistan Hindu Council, lack of official recognition of marriage also made it easy for miscreants to forcibly marry Hindu girls. Hindu marriage, divorce remarriage and right to maintenance are now regulated by the Sindh Hindu Marriage Registration Act, 2016, and the Hindu Marriage Act, 2017. While the law was hailed as a positive step by most, for others it was too little too late. As with Christians, divorce could only be obtained on narrow fault-based grounds requiring evidence. In 2017, in a landmark judgement, then Lahore High Court Chief Justice Mansoor Ali Shah, observed that the Christian Divorce Act 1869 fell foul of the fundamental rights guaranteed to minorities under the Constitution. The law prescribed strict fault-based rules including proving adultery for Christian couples to obtain a divorce. The judge stated: "The limited grounds of divorce under the state divorce law when compared with the rights enjoyed by Christians in the world, amounts to discriminating against the Christian minority in Pakistan." Perhaps one did not need to look outside the country – the law for Muslim couples in Pakistan to obtain a divorce has been amended a few times so that fault no longer remains relevant. Regrettably, the matter did not become a judicial precedent as the case was appealed and is pending adjudication.

Women's Right to Divorce under Islamic Law in Pakistan and India

A post-graduate in sociology, Shayara Bano has taken up the cause of Muslim women in India by filing a petition before the Supreme Court asking for a declaration for the invalidity of triple *talāq*. She contends that a Muslim husband's unilateral right to no-fault divorce violates the constitutionally protected right of women against gender discrimination. While her petition is pending adjudication, in a judgment the Allahabad High Court described *triple talāq* as "cruel" and "most demeaning". Shayara Bano represents the hapless Indian Muslim wives who live their lives always dreading divorce as a Muslim husband can divorce his wife unilaterally and without assigning any reason. Ms Bano had been married for the past 15 years when one day her worst fears became a reality as her husband sent her a divorce deed at her parents' home address while she was visiting them. Not surprisingly, the issue of gender discrimination under Islamic divorce law has been raised before the Supreme Court of India. In 2002, while deciding Shamim Ara's petition, the Supreme Court held that a Muslim husband must have a reasonable cause to divorce his wife. In this way, the Supreme Court tried to equalize the spousal right of divorce by restricting a husband's unilateral right to divorce under Islamic law. The genesis of this principle can be traced back to the judgment of Justice Krishna Iyer in *Yousuf Rawther v Sowramma*. After referring to verse 4:35 of the Qur'an, which prohibits husbands from seeking a way against their obedient wives, Justice Iyer held that under Islamic law a man could divorce his wife only when there was a justification for doing so. A decade later, Justice Baharul Islam of the Gauhati High Court endorsed this view in *Rukia Khatun v Abdul Khalique Lascar*. The Supreme Court affirmed the *Shamim Ara* case in *Iqbal Bano v State of UP*. The above-mentioned precedents illustrate that the Indian Supreme Court has already removed gender discrimination under Islamic divorce law. Shayara Bano's husband cannot unilaterally divorce her without establishing that he has a "reasonable

cause". The divorce by her husband must also be preceded by reconciliation efforts by two arbiters from the side of either spouse and must also be properly evidenced in the form of formal declaration by the husband. This is the Indian model of gender equality under Islamic divorce law. In contrast to the Indian model of gender equality, Pakistani judges did not limit a husband's unilateral right to no-fault based divorce by requiring a "reasonable cause" for divorce. Instead, they recognised a similar right for a Muslim wife. As early as 1959 in the *Balqis Fatima* case, the Lahore High Court acknowledged that a Muslim wife had a right to obtain a judicial *khula* without the consent of her husband. In this judgment, the court observed that it does not seem reasonable that only a husband should be given a right to divorce in a marriage contract. The court held that the words in verse Al-Baqara: 229 "if you fear that they will not observe limits of God" are addressed to the state or a judge and permit them to dissolve a marriage when a wife is willing to return her dower, even if the husband does not provide his consent. The court endorsed this view with reference to verse Al-Nisa: 35 which deals with *shiqaq* (irretrievable breakdown of marriage) and has been relied upon by the Maliki school to authorise arbiters (*Hakam*) to dissolve a marriage without the consent of the husband. Eight years later, the Supreme Court of Pakistan confirmed this principle in the *Khurshid Bibi* case by observing that the Qur'an has placed both the husband and wife on an equal footing with regard to their mutual rights and obligations. A majority of religious scholars (*ulama*) criticised the Supreme Court judgment. However, the Federal Shariat Court sanctioned this principle in its decision in the *Saleem Ahmad* case in 2014. Justice Fida Muhammad observed that the injunctions of Islam regarding gender are based on "equality without any discrimination". He supported this view by referring to various Pakistani judges have been consistently following this principle since the 1960s and superior courts have developed new principles to ensure gender equality in Islamic divorce law. The judiciaries in India and Pakistan have performed a remarkable job by organically reforming Islamic divorce law within their respective socio-political and communal contexts. If the Supreme Court of India rules in Shayara Bano's favour by declaring her *talāq* invalid, the question remains whether the courts will force Rizwan Ahmed, Ms Bano's husband, to take her to their matrimonial home? Will the couple live happily thereafter? Ms. Bano is willing to give her husband another chance for reforming himself and she is willing to live with him for the sake of her two children. For the past 15 years, her married life has not been a pleasant experience. Soon after her marriage, her husband, a property dealer, demanded a car and money from her parents. He forced her to undergo several abortions, which led to her mental breakdown. It is the plight of women like her that persuaded the Pakistani judges to extend wives right to unilateral no-fault divorce under Islamic law. Had she been in Pakistan, she could have obtained judicial *khula* years ago. It is this aspect of Islamic divorce law that is missing from all the media coverage that her case has attracted ever since she filed her petition before the Supreme Court of India. The Dissolution of Muslim Marriages Act 1939 provides a fault-based right to divorce to Muslim wives who can prove any of the listed grounds to get a decree of dissolution of marriage. These grounds include: cruel treatment, disappearance of husband for four years, husband's failure to perform marital obligations for three years, husband's failure to provide maintenance for two years; husband's imprisonment for seven years; and impotency and insanity of husband. This Act was passed during the colonial period and still applies upon Muslims in India and Pakistan. In Pakistan under the Muslim Family Law Ordinance 1961, second marriage of a husband was added as an additional ground for the dissolution of marriage. This Ordinance also required mandatory reconciliation in cases of no-fault based divorce.

Types of Divorce

Emotional Divorce: A conjugal breakdown is occurring giving the underlying driving force to thinking about chance of separation. Struggle as of now has caused significant damage and the accomplices, somehow, have pulled back from the giving of themselves to one another. In spite of the fact that they may seem to work satisfactorily in the social measurements, they have stopped to help each other's development and are engaged with expanding measures of disparate criticism. In passionate separation, in any case, two individuals grind upon one another just in light of the fact that they decipher whatever reliance stays between them as loathed proof of reliance. Tragically, two individuals can remain sincerely separated from one another for a lifetime while never getting a legitimate separation.

Legal Divorce: A sincerely separated from couple may look for a lawful separation. The courts in each state indicate the justification for separate; in other words, they have figured out what will be worthy reasons under the steady gaze of the law for getting divorce. Since the lawful grounds are habitually not quite the same as the genuine reasons a couple have for needing a separation. Couples regularly need to deceive exaggerate charges against one another so as to get in lawful separation.

Economic Divorce: Divorce must include a property settlement. The advantage of the couple must be isolated in two. Since the division is confused by charge laws, the separation legal counselor must know a lot about these guidelines. Outrage and disappointment frequently block a fair settlement. Changing sorts of passionate and once in a while unreasonable choices are made. Albeit most things are clear as far as isolating the family products, different things of significant worth to which either accomplice may have an enthusiastic connection can get basic, clash inciting issues. Associated with the financial settlement is, obviously, the matter of divorce settlement. As a rule, the spouse is required to pay provision, the measure of which is set up by the court. Some ongoing choices, notwithstanding, keep up that in given monetary circumstances the spouse might be very fit for looking after herself. Support is normally founded on the spouse's needs and husband's capacity to pay.

Causes of Divorce

The examination writing on separate recommends that there are three general gatherings of factors related with conjugal disintegration. One identifying with the characteristics of the individual accomplices, including different segment and financial characteristics, which separate between individuals as far as their inclination to separate. A subsequent gathering identifying with family structure and the inside elements of a relationship that may prompt organization breakdown. Furthermore, a third gathering of relevant factors that shape the structure of limitations, motivating forces and openings that influence choices to end an association (South, 2001)

Family Structure and Divorce: Joint family or family units are found in many networks of India. It has the instances of conjugal interruptions in various level and proportion. The reasons of separation under the family unit are sexual or socially hole between the spouses because of the activity separation, issue in living together, opportunity, crazy from their family, equivalent status and modification issue, training and mindfulness. There are various conventions, esteem frameworks, and job performing practices are practiced in joint family structure. New couple may not be fulfilled and felt uncomfortable to alter and embrace in the joint family guided by customary practices and worth framework.

Occupation and Divorce: The nature of occupations of the individuals is deciding the social and financial status. It influences the individual conduct. The word related versatility of the spouses makes relations expansive. "Separation is moderately high among people occupied with occupation requiring regular nonappearance from home, including, cozy contact with the contrary sex, and controlled generally little by the network".

India has one of the lowest divorce rates in the world with around 1% of marriages ending in divorces. That being said, a lot of individuals split without choosing to go through the process of divorce. In fact, a large number of marriages are not registered and thus, a dissolution in such partnership would not be shown in the divorce statistics.^[82] Additionally, divorce is still stigmatized and seen as taboo amongst many families in India.

The Hindu Marriage Act is an act of the parliament of India enacted in ,1955. Three other important acts were also enacted as part of the Hindu Code Bills during this time: the Hindu Succession Act (1956), the Hindu Minority and Guardianship Act (1956), the Hindu Adoptions and Maintenance Act (1956). Divorce under various acts in India: The Parsi Marriage and Divorce Act, 1936 The dissolution of Muslim Marriage Act, 1939 The Special Marriage Act, 1956 The Foreign Marriage Act, 1969 Dissolution of Muslim Marriages Act, 1939 The Dissolution of Marriage and Judicial separation (under the Indian Divorce Act, 1869). Due to the existence of diverse religious faiths in India, the Indian Judiciary has implemented laws separately for couples belonging to different religious beliefs. Mutual consent divorce procedure is relatively easier and fast while contested divorce procedure takes longer and depends on the religions of the couples. In the first major family law reform in the last decade, the Supreme Court of India banned the Islamic practice of "Triple Talaq" (divorce by uttering of the "Talaq" word thrice by the husband). The landmark Supreme Court of India judgment was welcomed by women activists across India.

Official figures of divorce rates are not available, but it has been estimated that 1 in 100 or another figure of 11 in 1,000 marriages in India end up in divorce.

Various communities are governed by specific marital legislation, distinct to Hindu Marriage Act, and consequently have their own divorce laws:

- The Parsi Marriage and Divorce Act, 1936
- The Dissolution of Muslim Marriage act, 1939
- The Foreign Marriage Act, 1969
- The Muslim Women (Protection of Rights on Divorce) Act, 1986

An amendment to the marriage laws to allow divorce based on "irretrievable breakdown of marriage" (as alleged by one of the spouses) is under consideration in India. In June 2010, the Union Cabinet of India approved the Marriage Laws (Amendment) Bill 2010, which, if cleared by Parliament, would establish "irretrievable breakdown" as a new ground for divorce. Under the proposed amendment, the court before proceeding to the merits of the case must be satisfied by the evidences produced that parties have been living apart for a continuous period of not less than three years immediately preceding the presentation of the petition.

The Impact of Divorce on Women In Pakistan

Nikah is a sacred contract between a man and a woman subject to the payment of dower. This sacred trust can be rescinded when the spouses feel that they cannot discharge their marital obligations within the limits prescribed by Allah. In this regard, the man has the absolute right to put the marriage to an end by pronouncing *talaq* without any justification or court approval, while the woman who wishes to be free from marital tie either has to seek a divorce from the family court or ask her husband to declare the divorce. In the former case, the husband is under an obligation to give deferred dower to his wife while in the latter case, the wife is to leave her dower as a payment of compensation to her husband for setting herself free from the marriage bond.

The wisdom behind bestowing the right to declare divorce upon the husband is that the maintenance of wife is a divine injunction upon the husband. He is required to bear all the expenses of his wife i.e. food, clothing, lodging etc. according to his earning capacity and to pay dower to his wife. Thus he has to think twice before pronouncing divorce as he would have to suffer financial loss thereafter. Secondly, if the wife was given such a right, she could declare divorce immediately after receiving all the gifts and dower etc. But what if the husband for no reason divorces his wife? This article is basically intended to analyze the impact of divorce upon the women in our society, keeping in view the relevant laws prevailing in Pakistan.

The majority of women in Pakistan are unskilled mainly for the reason of mobility restrictions and thus not being able to earn their livelihoods. Traditionally, a woman in Pakistan is supposed to learn everything to make her husband happy. Hence, a woman after marriage serves her husband and does everything like taking care of the house and doing other household things like cooking etc in order to make her husband happy. If such a woman who has dedicated her life to serving the husband is divorced at the age when she has lost her youth, she has very limited options left given that women remain financially dependent on men in our society. The dower for which she is entitled is not enough to establish a business and the liability of husband to pay the maintenance is only extended till the observance of iddah. Under these circumstances, she has to seek the shelter for which she goes to her relatives who either refuse to keep her or draw her to Edhi Centre, Chipa Centre etc.

Under Islamic law, a woman cannot be left financially helpless. The husband is liable to pay maintenance to the divorced woman till the observance of Iddah. Thereafter, her children/relatives are liable to maintain her and if there are no children/relatives, the state is liable to provide for her fair and reasonable maintenance. Unfortunately, in our so-called Islamic country, the **Muslim Family Laws Ordinance 1961** is prevailing which provides nothing for the alimony of divorced women. It may be pointed out here that in India **The Muslim Women (Protection of Rights on Divorce) Act** came into force in 1986 whereby the divorced women have been made entitled to the reasonable and fair provision of maintenance by her relatives after Iddah and in case there are no relatives, by the State Waqf Board. The magistrate has been empowered to make an order in this regard. No such law exists in Pakistan.

Religion and divorce

In some countries (commonly in Europe and North America), the government defines and administers marriages and divorces. While ceremonies may be performed by religious officials on behalf of the state, a civil marriage and thus, civil divorce (without the involvement of a religion) is also possible. Due to differing standards and procedures, a couple can be legally unmarried, married, or divorced by the state's definition, but have a different status as defined by a religious order. Other countries use religious law to administer marriages and divorces, eliminating this distinction. In these cases, religious officials are generally responsible for interpretation and implementation.

Rights of Spouses to Custody of Children

Upon dissolution of a same-sex marriage, legal questions remain as to the rights of spouses to custody of the biological children of their spouses. Unresolved legal questions abound in this area. Child custody policies include several guidelines that determine with whom the child lives following divorce, how time is divided in joint custody situations, and visitation rights. The most frequently applied custody guideline is the *best interests of the child* standard, which takes into account the parents' preferences, the child's preferences, the interactions between parents and children, children's adjustment, and all family members' mental and physical health.

Conclusion:

The present socio-legitimate examination on the improvement of laws on Dissolution of Hindu Marriage and the degree for unification is principally founded on explorative and diagnostic fact discovering one which gives a guide for choosing about whether this crucial part of individual laws of various religious networks can be made uniform or not. Disintegration of Hindu marriage' in any case called 'separate' is the last and legitimate end of marriage. It is viewed as one sort of instrument for managing the weights and issues brought about by marriage. The impact of this has a more extensive dynamic from the end purpose of the general public. The mental injury, the offspring of a messed up home, or a broke down marriage experience goes a long ways for stable marriage. This was the situation before the Hindu Marriage Act, 1955 appeared when marriage was insoluble among Hindus. However, it is made solvent now in the Act of 1955 and even made disintegration progressively simpler after 1976 change of the Act'. Though Islam doesn't highly recommend divorce, it gives couples the right to decide whether they want to live with each other or not. Now it is the duty of husband and wife to protect the rights of their children by giving them justified attention and love that is possible in entirety if they show patience and tolerance in their marital relation-ship. But all over the world and especially in Pakistan the dominance of males as they try to establish their supremacy over woman does not give women their equal rights that spoil the nuptial bond.

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