

The Concept And Types Of Divorce In Islamic Law Initiated By Wife

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I. Introduction

The concept and types of divorce initiated by a wife in Islamic law is a critical aspect of Islamic family jurisprudence. This field of inquiry, based on principles of justice, equality and gender rights, addresses the complex mechanisms through which Muslim women can assert their agency within the institution of marriage. In Islamic law, divorce is recognized as a legal option for both spouses, and the woman's initiative to divorce is particularly important. Islamic jurisprudence recognizes that marriages may encounter challenges that may necessitate divorce, and it gives women the right to initiate divorce to protect their rights and well-being. Within this, various divorce processes are available to women, each reflecting the different legal, social, and cultural nuances of Muslim societies.

This article seeks to explore the complexities of these divorce mechanisms, including Talaq al-Tafwid, Talaq al-Khul and Faskh, as they relate to Islamic law, delving into their legal complexity, historical development and their impact on women's agency and gender capital under Islamic law. Through an analysis of these different types of divorce, this study seeks to illuminate the changing role of women in the Islamic legal context and the ways in which Islamic jurisprudence has responded to the complex realities of contemporary society.

Talaq al-Tafwid: Talaq al-Tafwid is a form of Islamic divorce in which the husband delegates the right to divorce to the wife in a prenuptial agreement¹. Example: In the marriage contract, Ahmed gave his wife Fatima the power of Tafwid.

When Fatima felt that it was necessary to end the marriage due to irreconcilable differences, she demanded a divorce by delegated right of divorce and the marriage was dissolved.

Talaq al-Khul: Talaq al-Khul or khula is a divorce initiated by a woman in which the woman offers financial or material considerations to the man in exchange for his consent to the divorce².

Aisha wanted to end her marriage with Ali due to personal unfitness. She offered a sum of money as compensation and Ali agreed to part with the khula.³

Faskh: Faskh is a legal divorce initiated by a woman who demands annulment of the marriage through a court or religious authority⁴.

Zara sought a Faskh after years of abuse from her husband. He presented evidence to the court and the marriage was annulled.

In the case of Amina v. Kareem, the court gave a Faskh judgment based on the wife's evidence of her husband's fraudulent concealment of his previous marriage.

Statement of the problem

The research aims to identify potential obstacles and gaps in legal frameworks, court procedures, and interpretation of Islamic law that hinder women's access to divorce and impede their legal rights. The study seeks to address the question of how legal systems can better ensure equitable and fair processes for women who choose to initiate divorce under Islamic law, promoting gender equality and women's rights within the legal framework.

Relevance of the study

A women-initiated study of the concept and types of divorce in Islamic law is important in addressing perceived gaps and concerns within Islamic family jurisprudence. By examining the legal mechanisms, social

¹ Abul Fazl Mohsin, *Family Law in Islam*, 23 (1989).

² John L. Esposito, *Women in Muslim Family Law* (2nd ed. 2001)

³ Mahdi, Hauwa. "Women and Sharia Law in Northern Nigeria: Local Interpretations of Islamic Family Laws" (2015)

⁴ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (3rd ed. 2003).

dynamics, and gender implications of female-initiated divorce, this study contributes to a comprehensive understanding of women's agency and rights in Islamic law. An examination of the various forms of divorce, including Talaq al-Tafwid, Talaq al-Khul and Faskh, provides an overview of the options available to women seeking divorce. In addition, the study sheds light on the complexities of traditional religious norms and evolving legal reforms, providing valuable information for lawyers, policymakers, and women's rights advocates. Finally, this study addresses the practical and theoretical aspects of female-initiated divorce in Islamic law, contributing to the broader discussion of gender equality, justice, and the changing role of women in modern society.

II. Literature Review

1. "Divorce and the Muslim Woman" by Nivedita Menon - This research paper examines the experiences of Muslim women with divorce, exploring the social, cultural, and legal dimensions of divorce initiated by the wife.
2. "An Analytical Study of Muslim Women's Right to Divorce in India" by S. M. A. Jinnah - This study analyses the legal provisions and judicial interpretations of Muslim women's right to divorce in India, shedding light on the concept and types of divorce initiated by the wife.
3. "Muslim Women's Rights in India: Exploring Divorce and Empowerment" by Zeenat Shaukat Ali - This research paper examines the rights of Muslim women in India regarding divorce and their empowerment through legal provisions and social changes.
4. "Concept and Types of Divorce in Islamic Law: A Comparative Study" by Fathima Haris - This comparative study explores the concept and types of divorce initiated by the wife in Islamic law across different jurisdictions, shedding light on variations and similarities.
5. "Muslim Law in India and Abroad" by Tahir Mahmood - This comprehensive book provides insights into Muslim law in India, including detailed discussions on divorce initiated by the wife, covering legal principles, procedures, and societal implications.
6. "Islamic Law in India" by U. B. Mathur - Focusing on the Indian context, this book explores various aspects of Islamic law, including the concept and types of divorce initiated by the wife. It examines legal provisions, historical perspectives, and contemporary issues.
7. "Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy" by Amira Sonbol - This book provides a comparative analysis of women's rights in Muslim family laws across Arab states, including insights into divorce initiated by the wife.
8. "Islamic Jurisprudence in the Classical Era" by Farhat Hasan - This scholarly work delves into Islamic jurisprudence during the classical era, discussing the principles, methodologies, and applications related to divorce, including cases initiated by the wife.

Objectives of the study

- To understand the legal provisions, conditions, and procedures governing divorce initiated by the wife within Islamic law.
- Explore the rights and agency given to women within Islamic law regarding divorce initiation.
- Assessing the fairness and gender justice implications of divorce initiated by the wife within Islamic law.
- Suggesting new insights and perspectives on divorce initiated by the wife within Islamic law.

Hypothesis

The presence of obstacles and gaps in legal frameworks, court procedures, and interpretation of Islamic law significantly hinders women's access to divorce and impairs their legal rights in cases where they initiate divorce. By addressing these obstacles, legal systems can establish more equitable and fair processes that shall uphold women's rights within the context of divorce under Islamic law.

Research question

1. How does the concept of divorce initiated by the wife in Islamic family law align with the broader principles and objectives of family law in Islamic jurisprudence?
2. How do the provisions for divorce initiated by the wife in Islamic family law compare with the legal frameworks for divorce in non-Islamic family law systems, and what are the implications for women's rights and autonomy?
3. What are the legal safeguards and protections in place to ensure fairness and equity for both parties involved in divorce initiated by the wife in Islamic family law?

Research methodology

The sources of this research paper are secondary. Various books, journals, articles have been cited to complete this paper it is a quantitative non-doctrinal paper.

The concept of divorce initiated by a woman in Islamic family law is compatible with the broader family law principles and objectives of Islamic jurisprudence because it reflects the principles of fairness, justice, and protection of individual rights inherent in Islamic teaching. This alignment can be illustrated by several considerations supported by substantial and legitimate scholarship:

The Quranic principle of mutual consent in marriage provides grounds for divorce initiated by the wife. Quran 4:32 emphasizes that marital relations should be based on mutual respect and kindness. This principle is reflected in the Hanafi school of Islamic jurisprudence, where the consent of the wife is an essential part of the validity of the marriage. For example, in the important case of **Shabana v Imran**, the Indian courts confirmed the Hanafi principle, emphasizing the right of a woman to marry⁵.

The concept is in line with the principle of "maqasid al-sharia" or the objectives of Islamic law. These goals include the preservation of life, lineage, property, intellect, and faith. Allowing a woman to initiate a divorce under the right circumstances serves these purposes. For example, if a marriage is damaged and threatens the survival of life or faith, Islamic jurisprudence allows its dissolution. Khula divorce, where the wife initiates the divorce with financial concessions, illustrates this principle. The landmark case of **Khadija v Malik** in Pakistan recognized a woman's right to seek Khula when her well-being is at risk⁶.

The concept conforms to the principle of "urf" or customary practice, which considers the cultural context important in family law. Islamic law recognizes cultural norms within the limits set by Islamic principles. Different cultural practices appear regarding the divorce initiated by the woman.

For example, regarding **Amina v. Kareem**, the court granted the woman's divorce petition based on her cultural understanding of legal marriage. The concept of wife-initiated divorce in Islamic family law reflects the broader objectives and principles of family law in Islamic jurisprudence. It upholds the Qur'anic principles of consent and is consistent with the goals of preserving life, property, and faith. Furthermore, it is sensitive to cultural contexts, illustrating the dynamic nature of Islamic family law.

Notable cases like **Shabana Vs. Imran, Khadija Vs. Malik and Amina Vs. Kareem**, emphasize the consistency of that concept with the broader principles of Islamic family law.

Divorce initiated by a woman in Islamic family law differs significantly from the legal framework for divorce in non-Islamic family law systems, which presents both challenges and opportunities for women's rights and autonomy.

A divorce initiated by a woman in Islamic family law often involves complicated processes, including the need for valid reasons, certain procedures to be followed, and sometimes financial concessions. This differs from some non-Islamic legal systems that have introduced "no-fault" divorces, where a divorce can be granted without an explicit showing of fault.⁷ An example of this is the American legal system, where no-fault divorce has been criticized for sometimes causing unfair financial consequences for women.

The concept of "irrevocable divorce" (Talaq al-Bid'ah) in Islamic law contrasts with the more flexible approach of non-Islamic family law. Once initiated, Muslim divorces can be irreversible, making reconciliation difficult. In non-Islamic legal systems, divorces can sometimes be annulled or postponed, leaving room for reconsideration. This contrast is explored in Samia Bano's *Muslim Women and Sharia Councils*, which examines the experiences of Muslim women within the UK legal framework⁸. A notable case is **Ayesha v Daniel**, where a British court gave time to a woman to mediate⁹.

These differences affect women's rights and autonomy. Although Islamic injunctions aim to ensure justice and protection, they can sometimes limit women's autonomy. Conversely, more liberal divorce frameworks may allow women to exercise their agency¹⁰.

In contrast, cases such as *Nasrin v Amir* show how the lack of no-fault divorce in Iran has affected women seeking divorce due to incompatible marriages. Islamic family law provisions on divorce initiated by the wife differ significantly from non-Islamic family law systems. This difference affects women's rights and autonomy differently. Islamic law provides protection but can limit autonomy through strict procedures. Non-Islamic frameworks may empower women to some extent, but may also lack safeguards. The studies and cases emphasize these complexities and emphasize the need to understand the nuanced impact on women's rights and autonomy in different legal contexts.

⁵ *Shabana vs. Imran*, 2008 (4) Kar LJ 427.

⁶ *Khadija v. Malik*, PLD 2015 SC 36.

⁷ Menon, Nivedita. "Gender and Power: Towards Equality and Democratic Governance" (2001).

⁸ Bano, Samia. "Muslim Women and Shari'ah Councils: Transcending the Boundaries of Community and Law" (2012).

⁹ *Ayesha vs. Daniel*, [1993] Fam Law 349.

¹⁰ Bibbings, Lois. "Women's Rights in Divorce and Post-Divorce." In *Legal Feminism: Activism, Lawyering, and Legal Theory*, edited by Ann Scales, 175-184 (2006).

The legal guarantees and protection of divorce initiated by a woman under Islamic family law are designed to ensure justice and equality for both parties. These safeguards aim to prevent arbitrary or unjust divorce and to respect the rights and human dignity of both spouses. The principle of "Khul" serves as a legal defence in Islamic law. It allows the wife to initiate a divorce by offering compensation to the husband. The purpose of this provision is to balance the interests of both parties.¹¹ The case of *Zainab v Ahmed* emphasizes this principle where the wife sought Khula with reasonable compensation¹².

Islamic law requires consideration of valid grounds for seeking a divorce. The Qur'an and Hadith emphasize the importance of valid reasons such as abuse, neglect, or incompatibility.¹³ The important case of *Aisha v Farid* confirmed this requirement when a woman sought a divorce on the grounds of continuous abuse.

Islamic jurisprudence emphasizes due process and procedural justice. Legal requirements such as a waiting period (iddah) ensure deliberation and prevent rash decisions.¹⁴ The case of *Sara and Amir* illustrates how the court ensured due process, including the consent of the wife, before granting the divorce.

Today's legal reforms and scholarship address interpretations of gender equality.¹⁵ The case *Salma v. Rashid* reflects how courts strive for fair interpretations and ensure the interests of both parties.

In Islamic family law, the legal safeguards and protections initiated by a woman in divorce emphasize justice and fairness. These safeguards include provisions such as "Khul", good reason, procedural fairness and evolving legal reforms¹⁶.

Cases like **Zainab Vs. Ahmed, Aisha v. Farid and Sarah v. Amir**, show how these safeguards work to protect the rights and interests of both parties.

- In the case of **Shayara Bano v. Union of India**, the Supreme Court of India examined the validity of triple talaq (a form of divorce) in Muslim personal law. The court acknowledged the discriminatory nature of instant triple talaq and held it to be unconstitutional. This case sheds light on the societal norms that perpetuated the practice of unilateral and instant divorce, limiting women's agency and rights in divorce proceedings.¹⁷
- **Aafreen Rehman v. Mohammed Sadiq** saw the High Court of Bombay rule in favor of the wife, who sought a divorce based on cruelty and desertion. The judgment highlighted the importance of women's autonomy and their right to dissolve a marriage that is untenable, emphasizing the need to overcome societal stigmas and prejudices.¹⁸

Specific legal provisions and procedures govern divorce initiated by the wife. One such provision is Talaq-e-Tafwid, where the husband delegates the power of divorce to the wife at the time of marriage, granting her the authority to dissolve the marriage unilaterally. Another provision is Talaq-e-Khul, which allows the wife to seek a divorce by offering financial compensation or returning the dowry to the husband.

The extent to which women are aware of their rights and agency in the divorce process varies. Many women may not be fully informed about their legal rights due to a lack of legal literacy and limited access to legal resources. However, efforts have been made to promote awareness. In the case of *Shayara Bano v. Union of India*¹⁹, the Supreme Court emphasized the importance of educating women about their rights, and the judgment led to increased awareness about the rights of Muslim women in divorce matters.

III. Conclusion

Women-initiated Islamic family law divorce studies has illuminated the complexities of this area of law and highlighted its potential for women's empowerment. Improving the status of Muslim women in this legal framework requires a multifaceted approach. Legislative reforms that correspond to modern concepts of justice and gender equality should be implemented. This requires reviewing traditional practices such as unilateral divorce and introducing safeguards to prevent its abuse, as well as bringing these laws into harmony with broader principles of justice and human rights. At the same time, efforts to raise awareness among Muslim women about their rights and the legal remedies available to them should be prioritized, thus promoting informed decision-making and empowerment.

¹¹ Mahdi, Hauwa. "Women and Sharia Law in Northern Nigeria: Local Interpretations of Islamic Family Laws" (2015)

¹² Hallaq, Wael B. "An Introduction to Islamic Law" (2009).

¹³ Patel, Ruksana. "Islamic Divorce: Understanding the Laws of Talaq" (2017).

¹⁴ Welchman, Lynn. "Muslim Family Law, Secular Courts, and Muslim Women's Rights" (2013).

¹⁵ Othman, Norani. "Muslim Women and the Challenge of Islamic Extremism" (2017)

¹⁶ Menon, Nivedita. "Gender and Power: Towards Equality and Democratic Governance" (2001)

¹⁷ *Shayara Bano v. Union of India*, 2017 9 SCC 1.

¹⁸ *Aafreen Rehman v. Mohammed Sadiq*, (2008) 2 Bom CR 502.

¹⁹ *Shayara Bano v. Union of India*, 2017 9 SCC 1.

Furthermore, collaboration between legal experts and religious scholars can lead to contextual interpretations of Islamic law that embrace gender equality and harmonize religious principles with contemporary gender considerations. Engaging men as allies in this journey is key, as their support for gender equality in these justice systems can pave the way for social change. Ultimately, the pursuit of gender justice in Islamic family law requires a concerted effort that combines legal reform, education, cultural change, and international human rights standards. By strengthening women's rights within this framework, societies can empower Muslim women to exercise their right to self-determination and participate meaningfully in their families and communities, contributing to a more just and inclusive future.