

Divorce (Talaq) in Islam: The nuances therein

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Abstract

The recent verdict (17th August 2017) of Supreme Court of India on Triple Talaq has brought to limelight the issue of rights and status of women in Islam. Some have welcomed the verdict while others had guarded response. So what is the canonical position of Islam on women's marriage and divorce? How far is she treated on equal footing in marriage rights with her male counterpart? The aim of the present article is to describe the issues in some detail with reference to the primary sources of Islam.

Keywords: Islam, marriage, divorce, triple Talaq, Qur'an, Sunnah, hadith

Introduction

The recent verdict of Supreme Court of India on triple Talaq^[1] has brought to attention the issue of rights and status of women in Islam, besides spawning misperceptions. So what is the canonical position of Islam on marriage and divorce? How far is the claim of Islam on equality of sexes grounded? The focus of the present article is to describe the issue in detail viz-a-viz the primary sources of Islam i.e., the Qur'an and Sunnah.

At the outset to understand and appropriate the status and rights of women in Islam a brief sketch of the position of women in the pre-Quran'ic times is inevitable. The pre-Qur'anic times is also referred, in history of Islam, as the *Jahiliyah* period^[2]. In classical usage, the term *Jahiliyah* refers to the period of time and the condition of society in Arabia before the advent of Islam^[3].

The position of women in pre-Qur'anic times was worse than that of her fellow beings. The then Arabs regarded their women as chattels and looked upon them with contempt. Her status was pitiable and most dreadful offense was inflicted on her.

The Killing of Daughters

In some tribes female infanticide was common. There are many instances recorded in the history that the father buried their daughters alive in spite of her soul-harrowing cries. The little girls were buried in the sands of desert and left to die^[4]. Both the pride and poverty were responsible for this heinous crime^[5].

No Share in Inheritance

The women had no share in the property left over by their fathers, be it movable or immovable. She had no legal right on the property left by her husband^[6].

The Re-marriage of Widows

After the death of her husband, the widow was left at the mercy of her nearest male relation, who would cover her with

his mantle and become her husband^[7]. There was a tradition of marrying step-mothers and some-times sisters too^[8]. There was also a custom of marrying two sisters during their lifetime.

Polygamy and Divorce

There was no restriction on the number of wives. A man married as many wives as he liked. The women were divorced at the will of the men folk, as there were no laws regulating marriage and divorce. A man had to say to his wife, "Thou are to me as the back of my mother"^[9] and she was divorced but could not re-marry.

Fornication and Adultery

The male-female relation in the pre-Qur'anic times was not controlled by any social or religious law. The women were as lawless as the men. Women put on their best ornaments and clothes and went out singly or in parties, to the outskirts of the desert to satisfy their desires. There they met young men, and would indulge in most lustful deeds and indecent talks to satisfy their desires. Neither fornication nor adultery was considered a sin or a crime.

Post-Qur'anic Period

With the beginning of the revelation, the Qur'an laid down such rules and regulations that the position and status of women changed drastically. Female infanticide was banned, she was given right to inherit, polygamy was restricted to four wives that too under certain conditions, and all the indecent acts involving women were so regulated that the social status of women reached great heights.

The status of women in Islam is unique and novel, something that has no similarity in any other civilization^[10]. In order to understand the status of women in Islam, one important distinction is to be kept in mind. That the rights and responsibilities of women are equal to those of men but they are not necessarily identical with them. Equality and sameness are two different things^[11]. This distinction between equality

and sameness is of paramount importance. With only this distinction in mind, Islam provides women equal status. A brief of rights of women in Islam will also be relevant before going in detail on Rights of marriage and divorce:

1. A woman enjoys the same status as that of a man. The Qur'an says, "*Humankind, fear your Lord who created you from one soul and created man's mate from the same soul, from these two scattering on earth many men and women*" ^[12]. According to this verse of the Qur'an, woman is recognized as a full and equal partner of man in the pro-creation of humankind. He is the father; she is the mother, and both are essential for life. Both have been created from the same substance; 2. She is equal to man in bearing personal and common responsibilities and in receiving rewards for her deeds; 3. "Seeking Knowledge is obligatory for every Muslim woman and man in Islam". She has equal right to be educated and knowledgeable. "Islam is among the earliest heralds of female education" says Parveen S. Ali; 4. She, like man, has equal right to express herself freely and without restraint. Her opinions are to be given due consideration. "You are members, one of another", says the Qur'an; ^[13] 5. The history of Islam bears witness to the fact that women participated in public life with the early Muslims. Women used to accompany the Muslim armies engaged in battles to nurse the wounded, serve the warriors and prepare supplies; 6. Women, like men, are given a share of inheritance. The Qur'an says, "*God thus directs you as regards your children's (inheritance). To the male a portion equal to that of two females*"; ^[14] 7. Islam grants woman equal rights to contract, to enterprise, to earn and possess independently; 9. Islam gives women certain privileges and concessions which a man is deprived of. In such cases women have superiority over men ^[15].

"The women are the other half of men", said the Prophet Muhammad (SAW).

Freedom in Marriage

Islam looks upon marriage as a social institution and considers it to be one of the essential duties of a Muslim. Marriage is a relation based on kindness, equality, love and politeness. It is a decent human companionship, authorized and supervised by God. It is a sign of His blessings and abundant mercy as He says in the Qur'an: "*And among His signs is this, that He created for you mates from among yourselves, that you may dwell in tranquility with them, and He has put love and mercy between your (hearts): Verily in that are signs for those who reflect*" ^[16].

In Islam marriage is a civil contract and in deliberating this contract, consent of both the man and woman is very essential ^[17]. "*Do not prevent them (women) from marrying their husbands if they mutually agree on equitable terms*", is the command of the Qur'an. A woman is therefore allowed to have a husband of her own choice. The Prophet (S) said, "No widow should be married without consulting her and no virgin without consent and consent is her silence". Thus she has right to reject the proposal of a man whom she finds below her level. She has right to cancel the marriage, if it has been forced upon her by the parents or guardians. A Hadith from Abu Dawud says, "Ibn Abbas reported that a virgin grown-up girl came to the Prophet of Allah and said that her father had

given her in marriage to a person whom she disliked. The Prophet gave her freedom to cancel the marriage." Another Hadith says, "Khans bint Khejan reported that her father gave her in marriage, after she had become a widow. She disliked it and came to the Prophet. He cancelled the marriage" ^[18].

So, a woman has the right to choose a suitable match who will give her respect, love and keep her happy. She also has right to acquire a fair knowledge of each other before marriage. A. D. Ajijola in his book *The Concept of Family in Islam* points out that the Prophet insisted in a number of times that a man should look at the figure and face of woman he wants to marry and the jurists agree that the woman has the same right. She also has right to demand a dower (*mahr*) from her aspirant according to her standards. She can forfeit this right and accept him with little or no dower. The injunction of dower on man is to assure the woman that she is wanted, needed, and that man is prepared and willing to undertake his responsibilities. It is duty of husband to make available all the necessities of life. Wife has been exempted from this burden. Even if a wife has any property of her own that will be hers before and after the marriage and husband will have no claim whatsoever over it.

Divorce in Islam

Islam also gives women a right to seek or give divorce. The Qur'an says, "*If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they disagree and must part, God will provide abundance for all from His All-reaching bounty*" ^[19]. The holy Prophet gave many decisions of divorce in favour of women which shows that the woman has freedom to get a divorce and, her rights in this matter are no less or different from that of man. Thabit bint Qais had two wives. One of his wives Jamila bint Abu Salt, complained that her husband was very ugly. She came to the Prophet and said: "by God I do not dislike his morals or behaviour, but I cannot bear his ugliness". The Prophet then ordered Thabit to divorce her ^[20].

Now let's go in some detail on the nuances of Talaq. Talaq is the word, used in Islamic law for Divorce. It is an Arabic word and means: to set free. It is only in unavoidable circumstance that Talaq is permitted in Islam as a lawful method to bring marriage contract to an end.

The Shari'ah takes a very reasonable and realistic view of such a sad situation where marriage becomes impossible to continue and all means fail to bring the couples together, by permitting divorce as a last resort. It is true that the sanctity of marriage is the essential basis of family life, but it is also true that the two incompatible individual cannot be kept together in a life of hell, for life.

It is therefore necessary to give due allowance for human weakness and allow such people to give part for good.

Islam Discourages Divorce

The Prophet (SAW) is reported to have said: "Of all the things permitted in law, divorce is the most hateful thing in sight of Allah;" ^[21] "Marry and do not divorce undoubtedly the Throne of the Beneficent Lord shakes to divorce"; ^[22] "A Women seeking divorce unnecessarily will be deprived from the scent of paradise." ^[23] So Islam permits divorce as a last option when there are serious obstacles in the way and a situation

which cannot be prevailed over by reconciliation.

Types of Divorce ^[24]

1. *Talaq ar-Raj'i* (Revocable Divorce)

In this type of divorce the husband pronounces Talaq once or at the most twice. After the pronouncement of divorce the wife's period of Iddah starts. Before the period of Iddah expires, the husband may, if he desires, take his wife back. This is called Raja' or Ruju' (return). But the right of Raja' will be lost as soon as the Iddah is complete and then the Talaq will cease to be revocable. However the husband and wife can still reconcile with a new Nikah. After such a new Nikah in future only one or two divorces (not three) will be counted as an absolute/irrevocable divorce.

It will be worthwhile to define the term Iddah. The word Iddah, in the terminology of Shari'ah, means a period of waiting for a woman before remarriage after the death of her husband. Muslim jurists have unanimously agreed on its essentiality (*wajib*), since the injunction of the Qur'an is quite explicit on the subject: *The divorced women shall wait concerning themselves for three monthly periods* ^[25].

The provision of Iddah carries two purposes: 1. To give spouse time for rethinking and reconsideration the interests of the family and children (if any); 2. To make it known whether the woman is having the child of the former husband, so that there may be no confusion about the paternity of such a child if the woman remarries ^[26].

2. *Talaq al-Ba'in* (Irrevocable Divorce)

Talaq al-Ba'in is a divorce with three pronouncements of divorce by the husband in successive sittings or at the same sitting or divorce before the consummation of marriage.

If a husband divorces his wife three times, he cannot remarry her until after she has married another man and that husband has divorced her. This is called Halalah.

A pre-planned Halalah is a grave sin. Halalah applies only in a typical change when it happens by chance.

The prophet (peace be upon him) said: "The curse of Allah be on the man who commits Halalah and the man for whom the Halalah is committed." ^[27]

3. *Kula* (Divorce at the instigation of wife)

A wife can demand divorce from her husband. In return she might have to pay back the dower (*mahr*), money, jewelry etc. that she received from her husband at the time of marriage.

The principles of KULA have been derived from the Holy Qur'an:

And if they separate [Kula], God will enrich each from His abundance. God is Bounteous and Wise ^[28].

"If a woman fears maltreatment or desertion from her husband, there is no fault in them if they reconcile their differences, for reconciliation is best. Souls are prone to avarice; yet if you do what is good, and practice piety—God is Cognizant of what you do" ^[29].

In one of the Hadith is reported that: "A woman came to Prophet (SAW) and said 'I hate my husband and want separation from him', the Prophet (SAW) replied, 'would you return the orchard he gave you in dower', she replied, 'Yes even more than that'. The Prophet (SAW) said, 'You should not return more than that'" ^[30].

4. *Faskh* (Annulment of marriage)

A Muslim wife can also obtain a divorce through dissolution of marriage by applying for it in a Muslim court. She will be required to prove that her husband has behaved unreasonably and has not fulfilled his obligations to her as a husband. If the Qadhi (Muslim judge) is satisfied that the woman is prejudiced by her marriage, he will annul the marriage.

In this type of divorce the husband and wife with mutual consent, can reunite within the period of Iddah. After the Iddah has expired, they can still reconcile with a new Nikah only.

Divorces in 1 Sitting (Triple Talaq)

This is the type of Talaq that in general parlance is termed Triple Talaq i. e., 3 divorces pronounced in one sitting. And it is this form of Talaq where there is difference of opinion among Muslim scholars and Schools. According to one school of thought 'there is consensus among all Sahaba, the four Imams of Sunni Jurisprudence (*fiqh*) and other scholars, Imams and Muftis during the last 1400 years, that 3 divorces pronounced in one sitting are counted as three and constitute an irrevocable divorce.' ^[31] They blame it on Ibn Taimiyah for "this grossly incorrect concept of counting 3 Talaq as 1 while pronounced in one sitting, and also claim that only Ghair Muqallideen (Salafi or Ahl al-Hadith) follow him" ^[32].

But Imam Ahmad bin Hanbal and Imam Ibn Taimiyah differ from this opinion and say that three divorces, must come at the end of a certain interval of time. This opinion is correct says A D Ajijola, because there are strong reasons why three divorces at one sitting should not be allowed.

"The intention of the holy Prophet in fixing three divorces separated by certain intervals of time was to leave the way open for reconciliation between husband and wife and give them an opportunity for patching up their quarrels. If the three divorces are given all at once at a single sitting, this intention cannot be fulfilled and the wife and the husband cannot come together if they want to reconcile" ^[33].

The historical evidence also proves that the Companions of the holy Prophet (SAW) regarded three divorces in one sitting as sin. Hadrat 'Umr used to punish such persons who gave three divorces in one sitting. Ibn Abbas, another Companion of the holy Prophet (SAW) was asked about a person who acted in this way towards his wife. He said, "The man is guilty of disobedience to the commands of God". Hadrat Ali is reported to have said, "If the people faithfully observed the conditions of divorce no one would feel sorry for the separation of his wife".

Ajijola unhesitatingly concludes that 'all these things show that those jurists have made a *great mistake* who allow three divorces at a single sitting. Particularly one who writes letter of divorce to the wife.' ^[34] Dr Zakir Naik, one among the most popular public orators, and author also, seems to be well grounded when he puts forward his opinion on the pronouncement of 3 divorces in one sitting. In a video lecture ^[35] he refers to a Hadith related by Ibn Abbas that during the times of Prophet Muhammad, Hadrat Abu Bakr and in the first two years of Hadrat 'Umr three divorces in one sitting were considered only one. Later Hadrat 'Umr, under particular circumstances did accept three in one sitting as three but then, according to some scholars, he returned (*ruju'*) from it.

To substantiate his view Dr Zakir quotes Ibn Taimiyah who opined that the hadith of Prophet (SAW) has preference over the opinion of 'Umr. He then details the procedure of Talaq as recommended by the Qur'an. Quoting verses from the Qur'an^[36] he says that in case of a dispute among the spouses they should reconcile within. If the dispute persist they should appoint a Hakm (arbitrator) from either side to resolve the differences. If the differences still persist the man can pronounce first Talaq and wait for a period of 3 months. This is known as Talaq Ahsan (most appropriate). If they do not reconcile then the Talaq is completed. Now after some time if they want to repent and come together again they can do so with a fresh Nikah and Mehr. Then, if the difference rise again the same procedure will be followed, so can be third time. Now when the third Talaq is completed there is no return and if there is, it is only through Halalah^[37].

There is no doubt that times have changed drastically and has posed fresh and some very tough situations and questions to the present Ummah. The contemporary jurists will have to come up with contemporary answers for the earlier were influenced and constrained by their time and space. Azizah Y. al-Hibri rightly points out that "the ijtihaad of jurists on matters of marriage and divorce was significantly influenced by their milieu. Often local gender, class and political preferences filtered into Islamic consciousness and were incorporated as part of regional Islamic legal tradition."^[38] The notion that following a particular school of jurists cannot be overlapped has to be shunned for it is not obligatory to follow a particular school. What is essential is whether the problems of women are addressed amicably and to the best of satisfaction of the two parties. What is also important is whether the Objectives of Shari'ah (*Maqasid Shari'ah*) are achieved or not. Also, whether the Talaq Bidah or Talaq Bayin has relevance anymore and is compatible with the rights and status provided by Islam to women, has to be kept in mind. The binary of Ahl al-Hadith versus Ahl al-Fiqh also needs to be revisited.

References

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<http://www.ndtv.com/india-news/triple-talaq-unconstitutional-says-supreme-court-in-majority-verdict-1740381>
2. It is called so as in the period Arabia had no dispensation, no inspired prophet and no revealed book.
3. The Oxford Encyclopedia of the Modern Islamic World. 1995. J L Esposito (ed). Vol 2. Oxford University Press, p. 352.
4. M Fethullah Gulen. 2012. The Infinite Light. New Delhi: Adam Publishers, p. 4.
5. The Qur'an states: And kill not your children for fear of poverty. We provide them with livelihood and you also; surely killing them is a heinous crime. (Al-Qur'an 17:31)
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7. John Esposito. 2002. *What Everyone Needs To Know About Islam*. Oxford Press. p. 80.
8. The Qur'an abolished this custom: And marry not those women whom your fathers have married. (*al-Qur'an* IV/22).
9. This is known as Zihar.
10. Dr Afroz Ahmad Bisati. 2009. Some Aspects of Islamic Studies. New Delhi: Adam Publishers, pp. 52-53.
11. Hamid Waqar. "We are Equal but Not Same". <http://www.aimislam.com/we-are-equal-but-not-the-same/>
12. Al-Qur'an IV/1.
13. Al-Qur'an III/195.
14. Al-Qur'an IV/7.
15. Such privileges are: (i) She is exempt from some religious duties like prayers and fasting, in her regular periods and at the time of confinement (pregnancy); (ii) She is exempt from attending the obligatory Friday prayers; (iii) She is exempt from all financial liabilities; (iv) As a mother, she enjoys more recognition and higher honour in the sight of Allah; (v) As a wife she is entitled to demand of her prospective husband a suitable dowry that will be her own; (vi) She is free to retain, after marriage, whatever she possessed before it, and the husband has no right, whatsoever, to her belongings.
16. Al-Qur'an 30/21.
17. According to the tenets of Hinduism, marriage is a sacred relationship, a sacrament, and a divine covenant meant for procreation and the continuation of family lineage.
18. *Sahih Bukhari*.
19. Al-Qur'an IV/128.
20. *Sahih Bukhari*
21. *Abu Dawud*.
22. *Tafsir al-Qurtubi*, Vol. 10).
23. *Abu Dawud; Tirmidhi*.
24. This portion is generally the adaptation of Maulana M S Raza, Leicester Central Mosque ...
<http://www.islamiccentre.org/presentations/divorce.pdf>
25. Al-Qur'an 2:228.
26. Types of Iddah: 1. Iddah of a women who still menstruates: 3 menstruations; 2. Iddah of a women who has passed the age of menstruation: 3 months; 3. Iddah for a women whose husband has died: 4 months and 10 days; 4. Iddah of a women who is pregnant: until she delivers the child. Supra f n 24.
27. *Ibn Majah*.
28. Al-Qur'an, Ibid., 4:130.
29. Ibid., 4:128. Also "If you wish to replace one wife with another, and you have given one of them a fortune, take nothing back from it. Would you take it back fraudulently and sinfully?" 4:20
30. *Al-Baihaqi*.
31. <http://www.islamiccentre.org/presentations/divorce.pdf>
32. Ibid.
33. Alhaji A D Ajijola. 2002. *The Concept of Family in Islam*. New Delhi, Adam Publishers, p. 130.
34. Ibid., p. 131.
35. https://video.search.yahoo.com/yhs/search?fr=yhs-pty-pty_extension&hsimp=yhs-pty_extension&hspar=pty&p=zakir+naik+AND+triple+talaq#id=1&vid=afb49e8366652465c556be2eb227aa56&action=click

36. Al-Qur'an, 2:228-240; 65:1-7; 4:35; 2:232.
37. Halalah means that the divorced woman marries another man and consummates the marriage with him, and then he either dies or divorces her for some reason. She now becomes free to marry her first husband after her Iddah (waiting period) is completed. ,Explaining Halalah, Maulana Qamar Zaman says, one must remember that for the woman to enter into marriage with another man on the condition that he divorce her after consummating the marriage, is extremely disliked.
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