
AN OVERVIEW OF DIVORCE AND DISPUTE RESOLUTION IN ISLAMIC LAW

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There exists a common perception among both Muslims and others that the right to divorce rests solely in the hands of the husband, which is often executed capriciously and to the wife's detriment. The purpose of this contribution is not necessarily to dispel this perception, but to cast some light on the extent to which this may be true. In terms of the Islamic law (*Shari'a*) of divorce in general and the Hanafi school of law in particular, divorce at the behest of the husband is common and easy, but this does not mean that Islam treats divorce as commendable. On the contrary, divorce initiated by the wife is uncommon and difficult but it remains a basic principle of Islamic law that it is better to terminate a marriage that does not function anymore.

Islam adopts, as in many other matters, the 'middle way' approach to divorce. It does not prohibit it nor makes it too easy. The Prophet Muhammad said that of all permitted things, the most detestable in the sight of God is divorce and also that divorce 'is an act which shakes the throne of God as it were'.

Nonetheless, Islam recognises the non-permanence of human relationships and permits divorce at the behest of both men and women when the continuance of a marriage becomes impossible. In this sense it recognises divorce as a necessary and sometimes inevitable social evil.

This article aims to outline the Islamic law of divorce in order to provide a basic understanding of the procedures that are followed. Common misconceptions about Islamic divorce law are dispelled and the rationale

for certain perceived inequalities between the spouses are explained. In addition, this article aims to outline the role of alternatives modes (to adjudication) of resolving disputes between spouses.

It is useful to summarise at the outset both the general requirements of *talaq* and its legal implications. The reasons for doing this are twofold: first, *talaq* is the most common of the divorce procedures and, secondly, its requirements and legal implications have a general impact on all the other forms of divorce.

Islamic law allows for various forms of dissolution of a marriage, that is, at the initiative of the husband, the wife, by mutual agreement or by judicial process. What must, however, be clarified at the outset, and which to a large extent is responsible for the 'common perception' referred to above, is that divorce as a process is provided to the spouses in different forms.

General requirements of *talaq*

Islamic law (*Shari'a*) defines *talaq* as:

'the dissolution of a valid marriage contract forthwith or at a later date by the husband, his agent, or his wife duly authorised by him to do so, using the word *talaq*, a derivative or a synonym thereof.'

This definition apparently includes all the conditions for repudiation to be valid, binding and effective, namely a valid marriage contract, with a sane, adult husband who pronounces the *talaq* and the oral, written or gesture formula used. 'Forthwith or at a later date' refers to an instantaneous (irrevocable) and a consequential (revocable) divorce respectively.

There are no fixed formalities in classical *Sunni* law prescribing the manner in which the *talaq* is to be

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pronounced. There is no requirement for witnesses and the wife need not even be present or indeed informed. The *talaq* can furthermore be oral or in writing and any words can be used.

The consent of the wife is not required and the pronouncement or declaration of *talaq* is extra-judicial and entirely at the discretion of the husband. A *talaq* is furthermore not subject to any external check. A *talaq* issued by the husband for no apparent reason, in the absence of his wife and without justification (or even notification to her) is perfectly valid. However, Prophetic dictum reports that it is forbidden for a woman to request her husband to divorce her without good reason. Modern personal law legislators have therefore stepped up their legislation to curb the indiscriminate power of the husband to the extent that under some legislation no divorce shall be effective or allowed outside the court.

Islam limited the number of pronouncements of *talaqs* to three and made certain provisions as regards the timing of *talaq*. Islam also introduced a waiting period called *idda* which, regardless of the type of *talaq*, albeit revocable or irrevocable, a wife is bound to observe. *Idda* plays an important role in divorce proceedings and will for this reason be detailed.

Idda starts after the first 'divorce' is pronounced. This means that in the case of a revocable (as opposed to irrevocable) divorce, the woman is still the legal wife of the husband as the *talaq* only becomes effective upon completion of this waiting period by the wife. The *Qur'an* imposes this period on women (not men) whose consummated marriage has been terminated by divorce or death of their husbands. For women, *idda* constitutes a temporary prohibition to remarry until the expiry of this period. *Idda* has a threefold purpose, it provides time to, first, effect reconciliation between spouses in revocable divorces, secondly, determine whether or not the wife is pregnant in order to determine paternity of the child and, thirdly, mourn the dead in the case of the widow.

In two forms of *talaq*, namely, the *talaq al-hasan* and the *talaq al-bid'a* (instant divorce), the waiting period

is only observed after the marriage is irrevocably dissolved. This clearly defeats one of the primary purposes of *idda* by depriving spouses of an opportunity to reconcile. The length of this *Qur'anic* waiting period varies with regard to women's menstrual status. The (revocable) divorce only becomes effective once the wife has completed three successive menstrual cycles or, if she was pregnant, with the termination of the pregnancy. The *idda* of a wife who has not yet begun to or does not menstruate, or if she has reached menopause or has irregular periods is 3 lunar months. In all these instances the divorce can be revoked at any time prior to completion of the waiting period and no remarriage between the spouses is necessary. However, once the waiting period has been completed and even without the pronouncement of a second or third divorce, the divorce will be final and irrevocable.

If the marriage has not been consummated, there is no need to serve the waiting period and in this instance the divorce is always irrevocable regardless of the number of pronouncements.

One of the ways parties can reconcile during *idda* is to be sexually intimate. Divorce must be pronounced while the wife is not menstruating. One of the reasons for this is that in terms of *Qur'anic* injunction, spouses are not allowed to have sexual intercourse with each other while the wife is menstruating as menstruation, apart from being a physical impurity, is considered to be an illness.

Legal Implications: revocable and irrevocable divorces, inheritance, maintenance, dower and remarriage

Revocable and irrevocable marriages

An irrevocable (*ba'in*) divorce dissolves the marriage with immediate effect and leaves no room for the husband to change his mind. The marital relationship is deemed to be over and indeed any intercourse will be regarded as adultery (*zina*). Children born as a result of such intercourse are illegitimate. A revocable (*raj'i*) *talaq* is one that does not immediately dissolve the marriage in that it does not become effective until the end of

the waiting period (*idda*). The woman is therefore still the legal wife of the husband in this case. She may not remarry until the expiry of this period. However, because polygyny is allowed in Islam, her husband may marry another woman.

Inheritance

While spouses may inherit from each other if their divorce is revocable, this is not the case in an irrevocable divorce except in one instance: if either spouse dies during the *idda* following a revocable divorce, each may inherit from the other.

Maintenance

The husband is obliged to provide maintenance (*nafaqa*) during the *idda* as the divorce is theoretically still revocable. The duty to maintain lasts until the expiration of the *idda* or, in the case of a pregnant wife, until the birth of the child or the end of the nursing period. The waiting period for a widow is 4 months and 10 days, and her maintenance is thus limited to this period. As far as an irrevocable divorce is concerned, schools of law have divergent opinions as to what maintenance the wife is entitled. The whole question as to whether maintenance should be extended to the period beyond *idda* is also subject to interpretation.

Dower

Divorce is further discouraged through strong deterrents such as Dower or *mahr*. This is considered a form of security and a precautionary measure against the husband's arbitrary power of divorce. While there are variations in the schools of law, dower is a sum of money or other property which becomes payable by the husband to the wife as an effect of marriage. A dower may be prompt (paid at the time of marriage or on demand) or deferred (payable on dissolution of marriage by death or divorce). Once a divorce is final and if the marriage had been consummated, the husband has to immediately settle in full any unpaid portion of the wife's dower. If the marriage was not consummated the wife is only entitled to half of the specified dower and if no amount was specified, she is entitled to a gift.

Halala/intervening marriage

As a further deterrent, former spouses are prevented from becoming reconciled once their divorce becomes final and irrevocable. The opportunity to reconcile during *idda* must be taken seriously because once it passes the divorce becomes final and permanent. Before a man can be reconciled with his former wife, she must undergo a very trying process known in classical law as *halala* (intervening marriage). This means that, she must first marry someone else, consummate this other marriage and then either be granted a divorce from this other person or he dies. If granted a divorce or he dies, she has thereafter still to undergo another waiting period. This process highlights that the latter marriage should be bona fide and not one of mere convenience. An exception does, however, exist: the *ahsan* mode of *talaq* makes allowances for reconciliation by allowing remarriage to take place between the same spouses after an irrevocable divorce without the need to undergo the process of *halala*. That is why it is called an irrevocable divorce of a minor degree (*sughra*). The reason for *halala* not being necessary is that divorce was either only pronounced once or at the most twice. There is also *Qur'anic* support for the fact that former spouses can remarry each other after the waiting period has elapsed and without the wife having to go through the process of *halala*. *Halala* highlights the gravity of divorce and has some merit in that it provides a woman with an opportunity to remarry which she would otherwise not have had (at least not until she was released by the husband in whose hands the unilateral right to divorce vests in the first place).

Forms of divorce

Divorce by the husband

A *talaq* may also be effected in one of a number of forms, some being more meritorious than others. These in turn are generally grouped into two methods and followed by *Sunni* Muslims. One method is recommended by the primary sources and is known as *talaq al-Sunna*. The second method, known as the *talaq al-bid'a*, is not so recommended and has long been subject to much controversy. *Talaq al-Sunna* is further

divided into two kinds of divorce namely, *talaq al-ahsan* and *talaq al-hasan*. Both are approved methods of repudiation, accepted by all schools and both forms allow for revocation. The *talaq al-bid'a* is commonly known as the 'three-in-one', 'triple' or instant divorce. This form of *talaq* is also basically of two kinds as regards time and number. Apart from *talaq*, there are two other forms of repudiation called *ila* (vow of continence) and *zihar* (injurious assimilation). Although they are described by classical jurists and regulated in the *Qur'an*, they are considered to have little practical relevance today. There is another form of divorce called *li'an* (mutual imprecation) which is usually grouped with these two divorces but which is not entirely obsolete.

Divorce by the wife

The *talaq al-tafwid* or delegated divorce is typically a female-instigated divorce. This form of divorce, although underutilised for lack of awareness, is a very effective tool (more so than the *khul'*, explained below) at the disposal of a wife trapped in an unhappy marriage. Without, however, depriving the husband of his inalienable right to *talaq*, it allows the wife to terminate her marriage in order to obtain her freedom expeditiously and without the intervention of any court, and furthermore without having to relinquish her right to claim the full dower. Support for it is found in both the *Qur'an* and *Sunna*.

Divorce by mutual agreement of the spouses

This form of divorce includes *khul'* and *mubara'a* (mutual discharge). While there are variations in the four schools of law, *khul'* is where the aversion is on the side of the wife and is concluded by offer (from the wife) and acceptance (by the husband). In *mubara'a* aversion is mutual. The husband, however, is the one who makes the initial offer of a mutually agreed divorce. He may not take back his offer before the wife has given him an answer. If the wife accepts the offer the divorce is effective immediately. If the wife, however, initiates this process, she may take back her offer at any time prior to acceptance by the

husband.

Judicial Process (*tafriq*)

Islamic law also recognises divorce by judicial intervention. A suit for a judicial order of separation can be brought by the husband or wife. The two methods of judicial dissolution of a marriage are *li'an* and *faskh*. *Li'an* (mutual imprecation) is generally classified under this category although it is not strictly speaking a judicial termination of the marriage. *Faskh* is the term used to denote the formal judicial rescission of a Muslim marriage. It is the only way a wife can obtain a divorce without her husband's consent and participation and is allowed by all the schools but schools differ in their opinions on both the grounds of dissolution as well as the procedure to be followed.

Option of puberty

A minor may, on reaching puberty, repudiate a marriage if contracted by a ward, father or paternal grandfather to his detriment.

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There are various modes of revocable or irrevocable *talaq*, some being more meritorious than others and yet other modes that are considered not to be of much importance today and therefore simply treated as virtually non-existent.

The least meritorious form of *talaq* is the controversial *talaq al-bid'a* or instant divorce. This mode of *talaq* dissolves the marriage immediately, irrevocably and in one sitting. Because the primary sources of Islam frown upon this form of divorce and most countries have outlawed it, it is not uncommon for people to dismiss this form as no longer applicable. However, it is still practised and recognised by the common man and indeed certain religious authorities as a valid Islamic law (*Shari'a*) form of divorce and often exercised to the detriment of Muslim women.

Talaq is the unilateral and exclusive right of the husband which he may opt to forego. While he may delegate the power to pronounce the *talaq* to some other person (agent), or indeed the wife, divorce at the latter's initiative has not been portrayed as particularly difficult

without good reason. While knowledge on the part of women of the various forms of divorce at their disposal can certainly be used to their advantage, practical realities indicate otherwise. The delegated divorce (*talaq al-tafwid*), for example, is under-utilised. Many Muslims, especially women, are not aware of this possibility and it is not used in popular local contracts. What is more, in some countries where a stipulation to this effect is automatically incorporated in a marriage contract, it is not uncommon for this particular clause to be deleted at the inception of the marriage and to the detriment of the wife.

There are yet other forms of divorce which require women to have the financial capacity to literally buy their freedom. A typical example being the *khul'* form of divorce whereby the parties mutually agree that the husband forego his right to divorce for a certain compensation by the wife to him. So while it is true that certain forms of divorce can be initiated by women, it is just as true that in most of these instances women literally need the co-operation of men to effectively do so. This also adds weight to the common perception referred to above.

The *talaq* of the wife (by the husband) ultimately remains the basis of an Islamic divorce. It is therefore contended that the notion of a husband's unilateral right to divorce goes contrary to the real and ethical spirit of equality, evident in the Islamic law of marriage and divorce.

This contention is further supported by the fact that state legal systems have sought to exercise some, if not much, control over the Islamic law of divorce and its consequences, and further that the trend for reforms in Islamic law have been towards reducing the ease and facility by which the process of *talaq* has been customarily practised while women's rights to divorce have been both strengthened and expanded in various countries.

Alternative modes of dispute resolution

Arbitration

Two arbiters, one representing each spouse, must be appointed in a bid to reconcile the spouses during divorce

proceedings. Arbitration, utilised before the marriage is dissolved, therefore plays an important role in the Islamic law of divorce. The *Qur'an* calls for two witnesses to the divorce to facilitate proof thereof.

Mediation

Mediators attempt to reconcile disputants through compromise and parties normally choose mediation because they wish to maintain their relationship with each other. Sometimes, however, mediation results in the termination of a relationship, for example, when parties are assisted in accepting the inevitability of a divorce. Third party mediators merely mediate the dispute in informal alternatives to courts. They do not pass judgement and act as 'debate regulators'. A mediator assists the parties to reach agreement by appealing to their own interests. A mediator may come from the local community but in order to ensure impartiality he is normally required to be a stranger to the disputants:

'Mediators are characterised by a number of traits that are consistent cross-culturally. Mediators are respected, indigenous to the community, generous, even-handed, and not young. They are also invariably men, at least in the public aspects of the process.'

There are therefore many similarities between the attributes of *qadis* (Islamic judges) and mediators. There are numerous *Qur'anic* references to mediation in family disputes that can be considered.

Mediation and negotiation are viable alternatives to adjudication. These modes are all representative of institutionalised responses to interpersonal conflict and in all three instances a third party intervenes in the dispute. A common point in all three of these modes of dispute settlement is that both parties/disputants to the dispute participate in the process. The expertise required from a judge is obviously different to that required of a mediator. While a judge relies on rules and is bound by form, pattern and structure, a mediator assesses the social, cultural and religious context of the dispute - a context which he,

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unlike the judge, shares and is sometimes (though not necessarily) familiar with. A judge is not interested in reconciling the parties but wants to reach a decision or pass judgment as to which of them is right.

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In Muslim countries, where Muslims are obliged to abide by their personal laws, informal methods of dispute resolution also co-exist with formal judicial systems. Disputants often find themselves in a position of having to exercise a choice between using the state courts of the national legal system (which either incorporates *Shari'a* courts or where they exist independently) and alternative dispute-resolving mechanisms. Although *Shari'a* courts have become the main centres of dispute resolution alongside other mechanisms of conflict resolution, Muslims often resort to using the alternative mechanisms as a first step to dispute resolution.

Alternative dispute resolution mechanisms provide an (cost) effective first step or link in the chain of dispute resolution. The inadequacy on the part of some secular courts to deal with disputes of a religious nature (such as divorce) and the fact that litigation is a costly business, results in courts not always being readily accessible to ordinary people. The possible symbiotic relationship of these alternative mechanisms with other informal methods of dispute resolution, like the (Muslim) religious tribunals in various Muslim and non-Muslim countries, could also reinforce the need to use these alternative methods of dispute resolution as a first avenue of recourse in disputes such as divorce.

The arguments that co-operation with secular courts is not religiously permissible or that secular courts cannot adjudicate on religious disputes of a community are refuted by the fact that state courts have on occasion been called upon to resolve matters of Muslim personal law as well as those of a Muslim doctrinal nature. Instances of co-operation between state courts and the religious tribunals in some countries give positive indication that state courts and religious tribunals can work together amicably and even complement each other.

Muslims, including women, often do not understand or know much about Islamic law and, more specifically, what their options are regarding alternatives methods of dispute resolution. They therefore group themselves, often quite instinctively, around local religious leaders and depend on them for assistance in resolving conflicts. There is, therefore, an increasing need for lawyers to be taught the skills of negotiation and mediation at university level in order that the principles of alternative methods of dispute resolution are understood as viable alternatives to adjudication.

Conclusion

This overview highlights some of the complexities of the Islamic law of divorce, which provides women with equitable but not equivalent rights. These rights are further diminished by interpretations of the *Sunni* schools of law, which is sometimes at variance with the spirit of equality inherent in Islam, although positive innovations in this field in certain Muslim countries have benefited women.

In a bid to focus on reconciliation rather than separating spouses, more emphasis needs to be placed on the fact that the integration of mediation and adjudication, especially in disputes around divorce, is not something novel to Islamic law and should therefore be given the recognition it deserves.