CHAPTER-6

DIVORCE
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Islamic social system provides a provision to breakout of marital relations. This provision is known as divorce 'Talaqe'. The provision of divorce gives marriage in Islam a nature of social contract, unlike Hindu marriages where divorce is not possible.

The critics of Islam argue that, by allowing divorce, Islam opens a way to exploit women. But Islamists defend and argue that in some situations this provision of divorce becomes functional for both the partners and plays a crucial role in resolving acute problems regarding family life. A times a situation may arise where a husband and wife may find it difficult to live together because of their unmatched personalities, thoughts, habits etc. In such a situation, if they are forced to live together, the very aim of marriage will not be achieved.

6.1 Right to Divorce

Islam gives the right to divorce to the husband. It is only husband who can divorce the wife not the other way round. Wives were given a procedure of Khula that will be discussed latter. The right is reserved for husband because whenever Qur'an talks about divorce it addresses men, such as:
“O Prophet[^1], When you divorce women, divorce them at their Iddah (prescribed periods)”

“And when you have divorced women and they have fulfilled the term of their prescribed period, do not prevent them from marrying their (former) husbands”[^2].

“And if you divorced them before you have touched them, and you have appointed unto them the Mahar”[^3].

Jalaluddin Omeri, an Islamist who has written many books, writes that only men are given the right to divorce because they have higher position in family life. Qur’an also explains the upper position of men in family and says: “men are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means”[^4].

While writing the note on the above verse Jalaluddin Omeri has written that it is the man who bears all the responsibilities of family whether it is related to earning livelihood, education or bringing of children etc. So it is he who should has the right to decide that either he is able to discharge his duties as a husband or not.[^5]

At one hand Islam grants this authority to men and on the other, it frames laws in such a way that a man does not dare to use the provision of divorce easily. Because after divorce he will may face acute financial crisis. He will has to pay the Mahar to his wife, will be denied the marriage ornaments, and whatever he may has spent till now for his wife will not be
given back to him. Besides, he has to pay Mahar for his next marriage and will has to go under expenditure of new marriage.  

6.2 Legal Position of Divorce

Marriage is a lifetime contract. This contract is not made just to satisfy biological needs, but to inculcate love, affection and harmony for a lifetime, as Qur’an says, “And now could you take it (back) while you have gone in unto each others, and they have taken from you a firm and strong covenant”?  

So marriage as well as its dissolution is not something that can be taken easy by individuals. In fact, Islam permits divorce but it always discourages it. The following Hadith clearly shows the legal position of divorce, in which Prophet has disliked and discouraged divorce “The worst among the permitted things is Talaqe, in the eyes of Allah”. In another saying which is narrated by Maharib bin Dasar Prophet says, “Allah did not allow anything more displeasing than Talaqe”. Further in another narration Prophet says “O Maaz! Allah did not created upon the surface of earth any thing more favourite than setting free a slave, and in the same way He did not created any thing upon the surface of the earth more displeasing than Talaqe”. In the same continuation Prophet addressed women and said that “Any woman who asks for divorce from
her husband without any compulsion, the fragrance of heaven is Haram (Prohibited) upon her “.11

Islam also advocates about the sensitivity of Talaqe. No one can play a prank or joke with it. Highlighting the sensitivity of Talaqe Prophet\(^{\text{PBH}}\) says that, “There are three things which will be taken seriously and can never be joked. These are Nikah (Marriage) Talaqe (divorce) and Rujoo (Revocation of divorce)”.12

The analysis of these sayings shows that the provision of divorce is not common with other laws. It is only to tackle emergency situations. It can not be applied anytime anywhere, its application is conditional.

### 6.3 Limitations of Divorce

Islam, as above mentioned, not only discourages the use of divorce it also frames laws through which its frequent use can be checked. Conflicts may occur at any level and group, so in a family as well. For the resolution of family conflicts between husbands and wives, Islam gives certain stages and at last it suggests the use of divorce.

At first Islam preaches men and says that they should try to adjust in the time of conflict and should not use divorce frequently, and even in the troubled situations should continue good behaviour with their wives. Qur’an clearly says, “And live with them honourably. If you dislike them,
it may be that you dislike them, and Allah brings through it a great deal of
good".\textsuperscript{13}

At the next stage Islam says that, if the conflict is acute and not
adjustable, even then avoid the use of divorce. In order to resolve the acute
conflicting situations, Islam gives some special powers to men and allows
them to adjust the conflict by force. Qur'anic verses talk about it and say
that "As to those women on whose part you see ill-conduct admonish them
(first), (next), refuse to share their beds (and last) beat them (lightly if it is
useful), but if they return to obedience, seek not against them means (of
annoyance).\textsuperscript{14}

According to the verse, the first thing a man should do to resolve the
conflict is admonishing. He should preach his wife about the fear of Allah,
should make her understand her responsibilities and rights. In a way they
should work it out through mutual discussion. If she agrees then it is better
and if the preaching does not bring forth the desired goal then, going one
step forward, Islam asks men to avoid sexual relations with her. If the
avoidance of sexual relation does not help in resolving the conflict and
doesn't bring the wife into the obedience of the husband, Islam grants the
permission to beat her.\textsuperscript{15} But Prophet\textsuperscript{PBH} limits the beating by saying that
"do not beat them as such that it leaves marks (on their body)".\textsuperscript{16}

Beside these steps and procedures, Islam, to avoid divorce, preaches
women that they should not ask for divorce on small matters and should
not stand before their husbands to fight for their rights, but should try their
best for reconciliation. Women should give up their rights, at times, to avoid conflict. Qur'an says: “And if a woman fears cruelty or desertion on her husband's part there is no sin on them both if they make terms of peace between themselves and making peace is better”.\textsuperscript{17} The verse shows that one should try his/her best to avoid divorce even if it involves some personal sacrifices.

After the failure of all above mentioned methods for avoiding divorce, Islam finally involves the responsible persons of both the sides in order to seek ways of reconciliation. Qur'an says: “if you fear a breach between them twain (the man and his wife) appoint (two) arbitrators, one from his family and the other from her's”.\textsuperscript{18}

Islam suggests the use of divorce when the people of both the parties completely fail to seek reconciliation.

6.4 Protection of Women from Exploitation

Islam took steps in order to protect women from the exploitations which are possible by divorce. Islam destroyed the big social evil that was prevalent in pre Islamic period in the Arabs. They used to have a multi divorce and revocation system and used it at will. This nature of divorce was very exploitative for women.\textsuperscript{19} In order to protect women from this exploitation Islam gives only two chances for revocation. Qur’an says “The
divorce is twice after that, either you retain her on reasonable terms or relieve her with kindness”.20

The second step towards the protection of women against any exploitation is fixation of time for divorce. A man while using his right of divorce can exploit a woman. He may use his right after long gaps to keep the women hanged, neither discharging his duties towards her not setting her free. To protect from this kind of exploitation, Islam fixed a particular period of time within which a man has to take final decision about his wife. This period is called Iddah (waiting period). After the completion of the period the divorced woman will automatically be free.21

6.5 Iddah (waiting period)

In Islam a divorced woman has to pass a particular period of time before she is allowed to marry to someone else. Islam is very sensitive about this period. In Qur’an the followers of Islam has been asked to calculate this period very clearly “O ProphetPBH! When you divorce women, divorce them at their Iddah (prescribed period) and count (accurately) their Iddah (period)”22

The divorce may be given to a woman either after having sexual relation as well as before it. If the divorce is given after having sexual relation, then in such cases the waiting period is three menstruations.
Qur'an says: "And divorced women shall wait (as regards their marriages) for three menstrual periods".23

The period of three menstruations is for those women who are able to menstruate. But for those who are unable to menstruate either due to menopause or due to their young age, their Iddah (waiting period) is three months. Qur'an says: "And those of your women as have passed the age of monthly courses, for them the Iddah (prescribed period), if you have doubts (about their periods) is three months, and for those who have no courses (their Iddah is also three months likewise)".24

The waiting period (Iddah) of a pregnant woman is until she delivers. Qur'an says: "And for those who are pregnant their Iddah is until they deliver".25 And if the divorce is given before the sexual relation then no Iddah is required. Qur'an says: "O you who believe! When you marry believing women, and then divorce them before you have sexual intercourse with them, no Iddah have you to count in respect of them".26

6.6 How to Divorce

Islam, as above mentioned, discourages the use of divorce. It also suggests that the provision of divorce should not be used in anger, rage or depression. Islam has given clear instructions in regard of its use, through which the anger, hence any wrong decision, can be avoided.
A woman should not be divorced during menstruation. This is the period in which a woman passes through mental as well as physical stress, loses her vigour and sometimes becomes peevish. In this period a situation may arise which may lead to divorce.27

A famous saying of Prophet٠٠٠٠٠، about Abdullah bin Umer in which Prophet٠٠٠٠٠ prohibited people from giving divorce during menstruation, is enough in its support. “Narrated Nafa that Abdullah bin Umer divorced his wife during menstruation. Umer asked the Prophet٠٠٠٠٠ about it, Prophet٠٠٠٠٠ replied that order him to revoke and to keep her until she purifies herself from menstruation. Then, if he wants, may keep her or divorce her without having sexual relation with her".28

The second instruction about divorce is that one should make sure that he had no sexual relation in the period (that is a pure one, not menstrual) in which he is divorcing his wife. He should divorce once at a time. The second divorce (if required) should be in the second pure period without having sexual intercourse and the third divorce will be in the same manner in the third pure period.29

The third instruction in this regard is that, during Iddah, the divorced woman will remain in the same house with her husband except that she has committed some unforgivable crimes. Qur’an says “and turn them not out of their (husbands) homes nor shall they (themselves) leave, except in case they are guilty of some open illegal sexual intercourse”.30
The aim of all these instructions are to provide them, (husband and wife) more chance of reconciliation and to come back again in marital ties.\textsuperscript{31} If a person abides all these instructions while using divorce, rarely he will regret on it.

6.7 Revocability of Divorce

A man is allowed to revoke his divorce within Iddah, if he has used the option of single or double divorce. The revocation can be oral or by having sexual intercourse. After the expiry of Iddah he can not revoke it except by a new Nikah (marriage) and new Mahar (bride Price).\textsuperscript{32}

But if a person has used the option of triple divorce, he can not revoke the divorce. A reunion is possible only if the woman marries with another man and that man either divorces her after having sexual intercourse with her, or dies. Qur’an says “And if he has divorced her (the third time), then she is not lawful unto him thereafter until she has married another husband. Then, if the other husband divorces her, it is no sin on both of them that they reunite”.\textsuperscript{33}

But intentionally arranging a man who can marry with the divorced and after having sexual intercourse, can divorce her again so that the previous husband can marry her is strictly prohibited. This is called Halala. Prophet\textsuperscript{PBH} says: “The curse of Allah be on the man who commits Halala and on the woman for whom Halala is commited.”\textsuperscript{34}
6.8 Khula

It is a provision for women to ask for divorce. Some people mistake it as a right of women to divorce. But it is not true. Islam provides the option of Khula for women to come out from the marital ties. But it happens to be a tool for women to express their desire to be divorced rather than divorce. Khula is also the right of husband. Khula denotes that husband after taking back the bride price, gives up all his rights towards her and sets her free.\(^{35}\)

Jurists explain that since Khula is a kind of divorce, and right to divorce is given only to men, so only they can use divorce as well as Khula. It is said about Khula that “when the word Khula is used, it implies divorce”\(^{36}\). Hanafi and Shafai schools back the same expression.\(^{37}\) Some people are of the opinion that Khula is a provision that can be used by a husband to exploit his wife and to make money out of it. But jurists have tried to block this possibility. Ahnaf say that “if a husband forces his wife to ask for Khula, then he won’t be entitled to any sort of money from his wife. The payment of wealth to the husband and lapse of bride price will be based on the willingness of wife”.\(^{38}\)

A kind of debate exists among jurists of Islam whether the right of Khula should be handed over to the government or not? Some jurists are in favour of giving the right of Khula in the hands of the government, so the ambiguities could be cleared and a sound judgement could be taken
accordingly. Hasan Basari, Mohd bin Sairain, Abu Obaida etc. are among those who favour a government intervention. They cited the evidences from Qur'an: “then if you fear that they would not be able to keep their limits ordained by Allah then there is no sin on either of them if she gives back (the Mahar)”\textsuperscript{40} “if you fear a break between them twain appoint arbitrators one from his family and the other from her's”\textsuperscript{41}

They say that in both the verses Qur'an addressed responsible men for Khula so it should be decided by a ruler or by a government appointed authority.

But those who oppose government intervention argue that it is a personal matter of both the partners and should be decided by themselves. Imam Maalik, Imam Shafai and Imam Ahmed bin Hambel fall in this category.

In support of their view they argue that:

- Like divorce Khula is also the right of husband. A man can divorce without the permission of any ruling authority. So he can also decide about Khula on his own.

- Husband takes compensation from his wife in Khula and there is no need to take permission of a ruler for taking compensation.

- When Allah has given the right of divorce to men, no one has the right to give this right in the hands of government.\textsuperscript{42}
6.9 References

1- Qur'an, Talaqe, 1

2- Qur'an, Baqrah, 232

3- Qur'an, Baqrah, 237

4- Qur'an, Nisa, 34

5- Omeri, Jalaluddin, Musulman Aurat ke Hogooq aur Unper Ieteraz ka Jaiza, Tahqeeq-o-Tasneef Islami, Aligarh, 1986, p.102

6- Ibid., p.103

7- Qur'an, Nisa, 21

8- Khattavi, Maalim-us-Sunan, Vol.3 p.234


10- Abul Hassan, Ali bin Umer, Sunan Al-Darul Qutani Ma-a-Taleeq-ul-Mughni, Dar Ahyaut-Turas Alarabi, Bairoot, 1993, Kitab-ut-Talaqe

11- Waliuddin, Abu Abdullah Mohd. bin Abdullah Alkhatib, Mishkat-ul-Masabih, 1271h., Kitabul-n-Nikah

12- Al-Sajistani, op.cit., Abwab-un-Nikah

13- Qur'an, Nisa,19

14- Qur'an, Nisa,34

15- Omeri, op.cit., p.109

16- Sahih Muslim, Kitab-ul-Hajj

17- Qur'an, Nisa,128

18- Qur'an, Nisa,35


20- Qur'an, Baqrah, 229

21- Omeri, op.cit., p.112
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1- Qur'an, Talaqe, 1
2- Qur'an, Baqrah, 232
3- Qur'an, Baqrah, 237
4- Qur'an, Nisa, 34
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14- Qur'an, Nisa, 34
15- Omeri, op.,cit., p.109
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