

Cruelty of Islamic Law on Divorce towards Unfortunate Wives: A Reality Check

Abstract

Among pre-Islamic Arabs, the powers of divorce possessed by the husband were unlimited. They could divorce their wives at any time, for any reason or without any reason. They could also revoke their divorce, and divorce again as many times as they preferred. Infact, this tendency has even persisted to some extent in Islamic law, inspite of the fact that Prophet Mohammad showed his dislike to it. It was regarded by the Prophet to be the most hateful before the Almighty God of all permitted things; for it prevented conjugal happiness and interfered with the proper bringing up of children.

The liberal view of talaq bringing to an end the marital relationship between Muslim spouses and heavily loaded in favour of Muslim husbands seems to be very perturbing. How long Muslim wives should suffer this tyranny? Should their personal law remain so cruel towards these unfortunate wives? But fortunately the real picture is not that cruel. None of the ancient holy books or scriptures of Muslims mentions in its text such a form of divorce as has been accepted by some of the scholars and honorable courts.

Keywords: Islamic Law, Talaq, Husband, Wife, Prophet Mohammad (Pbuh), Quranic Verses, High Court, Supreme Court, Cruel.

Introduction

The status of women in society is neither a new issue nor is it a fully settled one. Similarly woman's status in islam is one of the most controversial and serious issues of our time, not only among muslim women and those who represent them in the area of women's rights in the Islamic world, but also among fundamentalist muslims.

Islam brought about liberation of women from bondage and gave her equal rights and recognized her individuality as a human being. Islam improved the status of women by instituting rights of property ownership, inheritance, education, marriage (as a contract) and divorce. The Qur'an provides clear-cut evidence that woman is completely equated with man in the sight of God in terms of her rights and responsibilities.¹

All the claims of equality got perturbed when we talk about the law of divorce in islam. Unbridled power of divorce possessed by muslim men, the institution of arbitrary talaq at the sweet will of the husbands, divorcing their wives at any time, for any reason or without any reason, revoking their divorce, and divorce again as many times as they preferred, suddenly comes into the picture. Moreover, they could, if they were so inclined, swear that they would have no intercourse with their wives, though still living with them. They could arbitrarily accuse their wives of adultery, dismiss them, and leave them with such notoriety as would deter other suitors; while they themselves would go exempt free from any formal responsibility of maintenance or legal punishment.²

Among pre-Islamic Arabs, the powers of divorce possessed by the husband were unlimited. They could divorce their wives at any time, for any reason or without any reason. They could also revoke their divorce, and divorce again as many times as they preferred. Moreover, they could, if they were so inclined, swear that they would have no intercourse with their wives, though still living with them. They could arbitrarily accuse their wives of adultery, dismiss them, and leave them with such notoriety as would deter other suitors; while they themselves would go exempt from any formal responsibility of maintenance or legal punishment.

Even though, the provision of divorce was recognized in all religions, Islam is perhaps the first religion in the world which has expressly recognized the dissolution of marriage by way of divorce. In England, divorce was introduced only hundred years back.

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Divorce among the ancient Arabs was easy and of frequent occurrence. Infact, this tendency has even persisted to some extent in Islamic law, inspite of the fact that Prophet Mohammad (pbuh) showed his dislike to it. It was regarded by the Prophet to be the most hateful before the Almighty god of all conditions of society, it was impossible to abolish the custom entirely. The Prophet had to mould the mind of an uncultured and semi-barbarous community to a higher development. Accordingly, he allowed the exercise of the power of divorce to husbands under certain conditions.⁴

The reforms of Prophet Mohammad marked a new departure in the history of Eastern legislation. He restrained the husband's unlimited power of divorce and gave to the woman, the right of obtaining the separation on reasonable grounds. Prophet Mohammad is reported to have said, "if a woman be prejudiced by a marriage, let it be broken off" He pronounced "talaq" to be the most detestable before god of all permitted things for it prevented conjugal happiness and interfered with the proper bringing up of children.⁵

But unfortunately the law of divorce in muslims after all these reforms is very disheartening. The reforms made by the prophet Mohammad (pbuh) is purely guided towards the directions that the equal right should be given to the women as far as the right to pronounciation of divorce is concerned and that when the marriage is being dissolved, a proper hearing to be given to the parties so that it may be saved. Once prophet reported to have said that the divorce is the most detestable things among the permitted things, thus it may be pronounced in dire necessity. All the measures of reconciliation should be adopted so that the marriage may be saved.

The liberal view of talaq bringing to an end the marital relationship between Muslim spouses and heavily loaded in favour of Muslim husbands seems to be very disconcerting. Should muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My conscience is disturbed at this monstrosity.⁶

Divorce signifies the dissolution of the marriage tie. All separations effected for causes directly originating in the husband are termed Talaq, and separations effected otherwise by the decree of the court are known as Farqat. Talaq in its literal sense means "the taking off of any tie or restraint". The right of divorce is conceded in Muslim law, but the law prohibits its exercise by threats of divine displeasure, "it was", says Baillie, originally forbidden and is still disapproved, but has been permitted for the avoidance of greater evils.

The equivalent of the word 'divorce' is 'talaq' in Muslim Law. What is valid 'talaq' in Muslim law was considered by one of us (Baharul Islam, J. as he then was) sitting singly in Criminal Revision No. 199/77 (supra). The word 'talaq' carries the literal significance of 'freeing' or 'the undoing of knot'. 'Talaq' means divorce of a woman by her husband. Under the Muslim law marriage is a civil contract. Yet the rights and responsibilities consequent upon it are of such importance to the welfare of the society that a high

permitted things; for it prevented conjugal happiness and interfered with the proper bringing up of children.³

The Prophet Mohammad looked upon these customs of divorce with extreme disapproval and regarded their practice as calculated to undermine the foundation of society. However, under the existing degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriage tie, Islam recognizes the necessity in exceptional circumstances of keeping the way open for its dissolution.⁷

Mulla states Talak may be oral or in writing. A talak may be effected orally (by spoken words) or by a written document called a talak nama. No particular form of words is prescribed for effecting a talak. If the words are expressed (saheeh) or well understood as implying divorce no proof of intention is required. If the words are ambiguous (kinayat), the intention must be proved. It is not necessary that the talak should be pronounced in the presence of the wife or even addressed to her.⁸ Pronouncement of the word talak in the presence of the wife or when the knowledge of such pronouncement comes to the knowledge of the wife, results in the dissolution of the marriage. The intention of the husband is inconsequential.⁹

If a man says to his wife that she has been divorced yesterday or earlier, it leads to a divorce between them, even if there be no proof of a divorce on the previous day or earlier."

The statement of law by Mulla as contained in para 310 and foot notes there under is based on certain rulings of Privy Council and the High Courts. The decisions of A.P. High Court in MANU/AP/0147/1974 : (1975) 1 APLJ 20 has also been cited by Mulla in support of the proposition that the statement by husband in pleadings filed in answer to petition for maintenance by wife that he had already divorced the petitioner (wife) long ago operates as divorce.

In Dr. Tahir Mahmood's 'The Muslim Law of India' (Second Edition, at pp. 113-119), the basic rule stated is that a Muslim husband under all schools of Muslim Law can divorce his wife by his unilateral action and without the intervention of the Court. This power is known as the power to pronounce a talaq. A few decided cases are noticed by the learned author wherein it has been held that a statement made by the husband during the course of any judicial proceedings such as in wife's suit for maintenance or restitution of conjugal rights, or the husband's plea of divorce raised in the pleadings did effect a talaq.

The most unfortunate part of the story is that its not only the scholars who have propagated the unislamic version of the law of divorce but our learned courts have also time to time enunciated the similar views.

In ILR 5, Rangoon 18, their Lordships of the Privy Council observed: "According to that law (the Muslim Law), a husband can effect a divorce whenever he desires."

In the case of Sarabai V/s Rabiabai¹⁰ regarding the cause of divorce mere whim is sufficient, it was observed that it is good in law though bad in theology.

A Division Bench of the Madras High Court [Munro and Abdur Rahim, JJ.] held: "No doubt as

arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Quran and in the reported saying of the Prophet (Hadith) and is treated as a spiritual offence. But the impropriety of the husbands conduct would in no way affect the legal validity of a divorce duly effected by the husband."¹¹

In the case of "Ahmad Kasim Molla V/s Khatun Bibi"¹² the Court held: "From that point there are a number of authorities and I have carefully considered this point as dealt with in the very early authorities to see whether I am in agreement with the more recent decisions of the Courts. I regret that I have to come to the conclusion that as the law stands at present, any Mahomedan may divorce his wife at his mere whim and caprice."

In the case of "Asmat Ullah V/s Khatun-Unnissa"¹³ it has been held that if an acknowledgment of Talaq is made by a husband, Talaq will be held to take effect at least from the date upon which the acknowledgment is made.

In the case of "Wahab Ali V/s Qamro Bi"¹⁴ it was held that where the husband stated in his written statement to the application under section 488 that he had already divorced his wife and the Court came to the conclusion that the divorce pleaded was not proved, even then, such a statement in the written statement itself operated as an expression of divorce by the husband from that moment.

In the case of Chandbi V/s Balwant Mujawar (supra) it was held (a) that though the husband failed to prove the divorce which he alleged had taken place 30 years ago, he did divorce the wife as from the date on which he filed the written statement viz. 6th April, 1959; (b) even where a divorce is given orally to a wife who has passed the age for periods of menstruation, the condition that oral declaration of divorce, should be made between two periods of Tuhr would not be applicable, because it would be physically impossible to have any such periods between which such a declaration could be made.

In the case of Enamul Haque V/s Bibi Taimunnisa¹⁵ it was held that although the factum of divorce was not proved by the husband, the wife was liable to be saddled with the knowledge of divorce from the date of filing of the written statement and, therefore, the divorce would be final when the wife is informed of it.

In the case of Mohammad Ali V/s Fareedunnissa Begum¹⁶ it was held that on the wives demand of maintenance, if husband issues a notice that she had been divorced on the date of marriage itself in spite of wives denial of divorce, such a notice will operate as a declaration of divorce from its date.

The liberal view of talaq bringing to an end the marital relationship between Muslim spouses and heavily loaded in favour of Muslim husbands seems to be very perturbing. How long muslim wives should suffer this tyranny? Should their personal law remain so cruel towards these unfortunate wives? But fortunately the real picture is not that cruel. None of the ancient holy books or scriptures of Muslims mentions in its text such a form of divorce as has been accepted by the High Court and the Family Court. No such text has been brought to our notice which provides that a recital in any document,

whether a pleading or an affidavit, incorporating a statement by the husband that he has already divorced his wife on an unspecified or specified date even if not communicated to the wife would become an effective divorce on the date on which the wife happens to learn of such statement contained in the copy of the affidavit or pleading served on her.¹⁷

"It is a popular fallacy that a Muslim male enjoys, under the Quranic Law, unbridled authority to liquidate the marriage." The whole Quran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, "if they (namely, women) obey you, then do not seek a way against them'." (Quran IV:34). The Islamic "law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously."¹⁸

But before dwelling into the details of the various decisions given by the high courts and the Supreme Court regarding the validity of the verses of the Quran related to the various aspects of talaq, arbitration regarding talaq, reconciliation among couples, and divorcing and freeing the wife by the husband on equitable terms and the wife's right to divorce her husband through the khula procedure. Now lets see the the views of the Holy Quran on this issue. Quranic verses relevant for this subject are given below.

"If you fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; If they wish for peace, God will cause their reconciliation: For God has full knowledge, and is acquainted with all things."¹⁹

"And if a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best; even though men's souls are swayed by greed. But if you do good and practise selfrestraint, God is well acquainted with all that you do."²⁰

"But if they disagree (and must part) God will provide abundance for all from His all-reaching bounty; For God is He that cares for all and is Wise."²¹

"Divorced women shall wait concerning themselves for three monthly periods. Nor is it lawful for them to hide what God has created in their wombs, if they have faith in God and the Last Day. And their husbands have the better right to take them back in that period, if they wish for reconciliation; and women shall have rights similar to the rights against them according to what is equitable."²²

"A divorce is only permissible twice: after that parties should either hold together on equitable terms or separate with kindness. It is not lawful for you (men) to take back (from your wives) any of your gifts, except when both parties fear that they would be unable to keep the limits ordained by God. If you (judges) do indeed fear that they would be unable to keep the limits ordained by God, there is no blame on either of them if she gives something for her freedom.

These are the limits ordained by God; so do not transgress them. If any do transgress the limits ordained by God, such persons wrong (themselves as well as others).²³

“So if a husband divorces his wife (irrevocably), he cannot, after that, remarry her until after she has married another husband and he has divorced her. In that case there is no blame on either of them if they reunite, provided they feel that they can keep the limits ordained by God.”²⁴

“When you divorce women, and they fulfil the term of their (iddat), either take them back on equitable terms or set them free on equitable terms; but do not take them back to injure them, (or) to take undue advantage. If anyone does that, he wrongs his own soul . . .”²⁵

“When you divorce women, and they fulfil the term of their (iddat), do not prevent them from marrying their (former) husbands, if they mutually agree on equitable terms. This instruction is for all amongst you, who believes in God and the Last Day...”²⁶

“There is no blame on you if you divorce women before consummation or the fixation of their Dower; but bestow on them (a suitable gift), the wealthy according to his means, and the poor according to his means—a gift of a reasonable amount is due from those who wish to do the right thing. And if you divorce them before consummation, but after the fixation of a Dower for them, then the half of the Dower (is due to them), unless they remit it or (the man’s half) is remitted by him in whose hands is the marriage tie; and the remission (of the man’s half) is the nearest to righteousness and do not forget liberality between yourselves. For God sees well all that you do.”²⁷

“O Prophet! When you divorce women, divorce them at their prescribed periods, and count (accurately) their prescribed periods: and fear God your Lord: and turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness, those are limits set by God: and any who transgresses the limits of God, does verily wrong his (own) soul . . .”²⁸

“Thus when they fulfil their term appointed, either take them back on equitable terms or part with them on equitable terms; and take for witness two persons from among you, endowed with justice, and establish the evidence (as) before God . . .”²⁹

“Such of your women as have passed the age of monthly courses, for them the prescribed period, if you have any doubts, is three months, and for those who have no courses (it is the same): for those who carry (life within their wombs), their period is until they deliver their burdens: and for those who fear God, He will make their path easy.”³⁰

“Let the women live (in iddat) in the same style as you live, according to your means: annoy them not, so as to restrict them. And if they carry (life in their wombs), then spend (your substance) on them until they deliver their burden: and if they suckle your (offspring), give them their recompense: and take mutual counsel together, according to what is just and reasonable. And if you find yourselves in difficulties, let another woman suckle (the child) on the (father’s) behalf.

Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what God has given him. God puts no burden on any person beyond what He has given him. After a difficulty, God will soon grant relief.”³¹

“For divorced women maintenance (should be provided) on a reasonable (scale). This, is a duty on the righteous.”³²

“But if you decide to take one wife in place of another, even if you had given the latter a whole treasure for Dower, take not the least bit of it back; would you take it by slander and a manifest wrong? And how could you take it when you have gone in unto each other, and they have taken from you a solemn covenant?”³³

“O you who believe! When you marry believing women, and then divorce them before you have touched them, no period of iddat have you to count in respect of them: so give them a present, and set them free in a handsome manner.”³⁴

“Those of you who die and leave widows should bequeath for their widows a year’s maintenance and residence; but if they leave (the residence), there is no blame on you for what they do with themselves, provided it is reasonable. And God is Exalted in Power, Wise.”³⁵

“And give the woman (on marriage) their Dower as a free gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer.”³⁶

The verses of the Quran quoted above relate to the various aspects of talaq, iddat, dower, and maintenance. Verses 4:35, 4:128, 2:228, and 2:231 deal with arbitration regarding talaq divorce, reconciliation among couples, and divorcing and freeing the wife by the husband on equitable terms. Verses 2:229, 2:236, 2:237, 4:4, 4:20–21, 33:49, 65:6, and 65:7 deal with dower and suitable gifts and presents to be given to the divorced wife by the husband. Verses 2:229 and 2:230 address the situation when talaq is irrevocable. Verse 2:229 also deals with the wife giving something to her husband for her release from the matrimonial tie. The wife’s right to divorce her husband through the khula procedure is based on 2:229. Verse 2:232 deals with the right of the divorced wife to marry a different person other than the divorcer after the irrevocable talaq.

Verse 2:230 deals with the procedure for re-marrying the divorced wife after the irrevocable talaq. Verses 2:228, 33:49, 65:1, and 65:4 deal with iddat or the prescribed period of waiting to be completed by the divorced wife.

Verse 2:241 deals with the maintenance of the divorced woman by the divorcing husband. Verse 65:6 addresses the maintenance of the divorced wife by the divorcing husband until the termination of pregnancy, if any, and until the child is weaned.

Verse 2:240 deals with the maintenance of a widow by the deceased husband’s estate (for a limited period in particular circumstances) through the provisions in a will.

It is clear, then, that Islam discourages divorce in principle, and permits it only when it has become altogether impossible for the parties, to live

together in peace and harmony. It avoids, therefore, greater evil by choosing the lesser one, and opens a way for the parties to seek agreeable companions and, thus, to accommodate themselves more comfortably in their new homes.

The Dissolution of Muslim Marriage Act, 1939 lays down several other grounds on the basis of any one of which, a Muslim wife may get her marriage dissolved by an order of the court. Islam provides a modern concept of divorce by mutual consent. Today, this is known as the break-down theory of divorce. The modern concept of break-down theory of divorce does not want the court to go into the causes of break-down of marriage. The policy of Islam has been that, as far as possible, the divorce cases shall not go to the courts. The reason is that, unequivocally declaring divorce to be the worst of all permitted things, the Holy Prophet warned his people to keep away from it. In spite of the fact that, a substantial reform in the pre-Islamic system of divorce was introduced by the Holy Prophet with a view to prevent the exploitation of women and give them a status equal to men as well as a moral, social and economic security right from the childhood to motherhood.³⁷

The dissolution of marriage under Muslim law can be studied under three heads:

1. Extra judicial divorce. It can be again divided into three:

i) Divorce at the instance of husband (talaq) In this, there are two types of dissolutions:

a) talaq pronounced by the husband himself;
b) talaq delegated by the husband (talaq-i-tafweez).

ii) Divorce at the instance of wife: Under this head, falls

a) khula; b) ila; c) zihar; d) Lian.

iii) Divorce by mutual consent (mubaraat).

2. Judicial separation.

3. Judicial divorce.

Having considered the relevant provisions, as applicable to Talaq under the Muslim Personal Law, let us now go to the views of eminent Muslim Scholars/ Jurists in that regard.

Maulana Mohammad Ali in his commentary on the Holy Quran has stated: "Divorce is one of the institutions in Islam regarding which much misconception prevails, so much so that even the Islamic Law, as administered in the Courts, is not free from these misconceptions."

Maulana Muhammad Ali in his book further has this to say: The Islamic law has many points of advantage as compared with both the Jewish and Christian laws as formulated in Deut, and Matt. The chief feature of improvement is that the wife can claim a divorce according to the Islamic law, neither Moses nor Christ (nor Manu, may I add) conferring that right on the woman..... (Page 96).

The Prophet, however, warned:

of all things which have been permitted divorce is the most hated by Allah (A-D. 13:3).

Dealing with divorce, the Holy Quoran says:

And women have rights similar to those against them in a just manner.....

This statement, Muslim doctors of law assert, was a revolutionalising one' for the Arabs of those days and almost equated women with men!³⁸

"Some Muslim jurists and scholars point out that from the very beginning of the recognition of the principle of unilateral divorce, forces had been at work which has restricted and limited its free and unnecessary use."

On the meaning and scope of Sura IV verse 35 of the Holy Quran the said author has commented as under: "This verse lays down the procedure to be adopted when a case for divorce arises.

It is not for the husband to put away his wife; it is the business of the judge to decide the case. Nor should the divorce case be made to public. The Judge is required to appoint two arbitrators, one belonging to the wife's family and the other to the husband's. These two arbitrators will find out the facts but their objective must be to effect a reconciliation between the parties. If all hopes of reconciliation fail, a divorce is allowed. But the final decision rests with the Judge who is legally entitled to pronounce a divorce. Cases were decided in accordance with the directions contained in this verse in the early days of Islam."

"From what has been said above, it is clear that not only must there be a good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure. The impression that a Muslim husband may put away his wife at his mere caprice, is a grave distortion of the Islamic institution of divorce."

"The principle of divorce spoken of in the Holy Quran and which in fact includes to a greater or less extent all causes, is the decision no longer to live together as husband and wife. In fact, marriage itself is nothing but an agreement to live together as husband and wife and when either of the parties finds him or herself unable to agree to such a life, divorce must follow. It is not, of course, meant that every disagreement between them would lead to divorce; it is only the disagreement to live any more as husband and wife."

"Though the Holy Quran speaks of the divorce being pronounced by the husband, yet a limitation is placed upon the exercise of this right."

"Where divorce for mutual incompatibility is allowed, there is danger that the parties might act hastily, then repent, and again wish to separate. To prevent such capricious action repeatedly, a limit is prescribed. Two divorces (with a reconciliation between) are allowed. After that the parties must united make up their minds, either to dissolve their union permanently, or to live honourable lives together in mutual love and forbearance to hold together on equitable terms, neither party worrying the other nor grumbling nor evading the duties and responsibilities of marriage."

"All the prohibitions and limits prescribed here are in the interest of good and honourable lives for both sides, and in the interests of a clean and honourable social life, without public or private scandals."

"If the man takes back his wife after two divorces, he must do so only on equitable terms, i.e. he must not put pressure on the woman to prejudice her rights in any way, and they must live clean and honourable lives, respecting each others personalities."

"After quoting from the Quran and the

Prophet, Dr. Galwash concludes that "divorce is permissible in Islam only in cases of extreme emergency. When all efforts for effecting a reconciliation have failed, the parties may proceed to a dissolution of the marriage by 'Talaq' or by 'Khola' Consistently with the secular concept of marriage and divorce, the law insists that at the time of Talaq the husband must pay off the settlement debt to the wife and at the time of Khola she has to surrender to the husband her dower or abandon some of her rights, as compensation." ³⁹

There are various judicial opinions of the High Courts and the Supreme Court of India wherein the legal aspects of divorce have been elaborately discussed. All the below mentioned decisions reflect the clear picture of Islamic law of divorce. Two decisions of Gauhati High Court recorded by Baharul Islam, J. (later a Judge of the Supreme Court of India) sitting singly in Sri Jiauddin Ahmed v. Mrs. Anwara Begum⁴⁰ and later speaking for the Division Bench in Must. Rukia Khatun v. Abdul Khaliq Laskar.⁴¹ In Jiauddin Ahmed's case a plea of previous divorce, i.e. the husband having divorced the wife on some day much previous to the date of filing of the written statement in the Court was taken and upheld. The question posed before the High Court was whether there has been valid talaq of the wife by the husband under the Muslim law? The learned Judge observed that though marriage under the Muslim law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriage-tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution. (Para 6). Quoting in the judgment several Holy Quranic verses and from commentaries thereon by well-recognized scholars of great eminence, the learned Judge expressed disapproval of the statement that "the whimsical and capricious divorce by the husband is good in law, though bad in theology" and observed that such a statement is based on the concept that women were chattel belonging to men, which the Holy Quran does not brook. The correct of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters -- one from the wife's family and the other from the husband's; if the attempts fail, talaq may be effected. (Para 13). In Rukia Khatun's case, the Division Bench stated that the correct law of talaq as ordained by Holy Quran, is: (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay view which, in their opinion, did not lay down the correct law.

In an illuminating judgment, virtually a research document, the eminent judge and jurist V.R. Krishna Iyer, J., as His Lordship then was, has made extensive observations. The judgment is reported as A. Yousuf Rawther v. Sowramma,

MANU/KE/0059/1971. It would suffice for our purpose to extract and reproduce a few out of the several observations made by His Lordship:-

"The interpretation of a legislation, Obviously intended to protect a weaker section of the community, like women, must be informed by the social perspective and purpose and, within its grammatical flexibility, must further the beneficent object. And so we must appreciate the Islamic ethos and the general sociological background which inspired the enactment of the law before locating the precise connotation of the words used in the statute.

"Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglian judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture -- law is largely the formalized and enforceable expression of a community's cultural norms -- cannot be fully understood by alien minds. The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions." ⁴²

"It is a popular fallacy that a Muslim male enjoys, under the Quaranic Law, unbridled authority to liquidate the marriage. "The whole Quoran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, "if they (namely, women) obey you, then do not seek a way against them'." (Quaran IV:34). The Islamic "law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously."

The Honourable Bombay High Court in Dagdu pathan v. Rahimbi Dagdu pathan observed that Plea taken by the husband in the written statement that he had given divorce (Talaq) to his wife in the presence of Qazi and two witnesses. One witness was muslim and the other was a Hindu. Mere pronouncement of Talaq not sufficient. Husband required to satisfy the preconditions of arbitration for reconciliation and the reasons for Talaq and required to prove them when the wife disputes the factum or effectiveness or legality of Talaq before a Court of law. Mere statement in writing before the Court not sufficient to held that the husband has divorced his wife. If any of the witness does not profess Islam the Talaq given in his/her presence is invalid and inoperative.⁴³

The Honourable Supreme Court in Shamim Ara v. State of UP & Another has once again discussed elaborately the Islamic law on divorce and observed following things; valid talaq in Islamic law must be for reasonable cause and be preceded by attempts at reconciliation between husband and wife by two arbiters, one from the wife's family and the other from the husband's; if the attempts fail talaq

may be effected. Talaq to be effective has to be pronounced. Plea of talaq taken on written statement cannot be at all treated as pronouncement of talaq by evidence. The talaq to be effective has to be pronounced. The term 'pronounce' means to proclaim, to utter formally, to utter rhetorically, to declare, to utter, to articulate (see Chambers 20th Century Dictionary, New Edition, p. 1030).⁴⁴

We are in respectful agreement with the abovesaid observations made by the learned Judges of the Supreme Court and the High Courts. We must note that these observations were made in the light of quranic texts, traditions of the prophet, statutory provisions and the decisions given by the Honourable High Courts and the Supreme court.

To conclude it can be said that Divorce in itself is, therefore, an undesirable act. After advent of Islam, the prophet Mohammad showed his dislike to it. Prophet regarded it to be the most hateful before the Almighty God of all permitted things; for it prevents happiness and interfered with the proper bringing up of children. Islam put a check upon the arbitrary powers of the husband. Now, after third pronouncement, the marriage dissolves irrevocably and it is not possible to revoke easily. An effective check placed by Islam on frequent divorce and remarriage was that, in case of irrevocable separation, it is essential for remarriage that the wife should marry another man, and this marriage should be consummated before divorce, and the wife should observe iddat period. This was a measure which rendered separation rarer.

However, it is also true that if there is no temperamental compatibility between the parties, or the man feels that he cannot as husband fulfil the women's rights, or because of mutual difference of nature God limits cannot be maintained, keeping the marriage intact in such situations or to compel the parties by legal restrictions to continue in the marital bond may be more harmful for the society. The Shariat, therefore, regards divorce as permissible although it is an undesirable act.

After passing of the Dissolution of Muslim Marriage Act, 1939, the position of Muslim women is further improved. This is the most progressive enactments passed by the legislature. Now she can release from an unhappy marital tie on various grounds recognized by Islam and also by legislation, through judicial process. Thus, with these changes, the position of Muslim women is improved. These are welcome changes which are desirable in the present day society.

Thus, uncontrolled use of divorce without regard to the restrictions established by the Shariat is a sin. Similarly, imposing such restrictions on the right of divorce due to which the man is compelled not to divorce the wife despite his feeling that he cannot live a happy life with her is also not lawful.

References

1. "Every soul will be (held) in pledge for its deeds" (Qur'an 74:38).
"So their Lord accepted their prayers, (saying): I will not suffer to be lost the work of any of you whether male or female. You proceed one from another" (Qur'an 3: 195).
"Whoever works righteousness, man or woman, and has faith, verily to him will We give a new life that is

husband on wife on date of filing written statement. Affidavit regarding talaq by husband in some judicial proceedings not inter parte cannot be read in good and pure, and We will bestow on such their reward according to their actions". (Qur'an 16:97, see also 4:124).

At one occasion Prophet said; "None but a noble man treats women in an honourable manner. And none but an ignoble treats women disgracefully". (At-Tirmidi).

2. Ibrahim Abdel Hamid- "Dissolution of Marriage", Islamic Quarterly, 3 (1956) 166-75, 215-223; 4 (1957)3-10, 57-65, 97-113; cf: Syed Khalid Rashid- Muslim law, 4th edn. 2004, p.98, Eastern Book Co., Lucknow.
3. Syed Khalid Rashid- Muslim law, 4th edn. 2004, p.98, Eastern Book Co., Lucknow.
4. Ameer Ali- The Spirit of Islam, 243-44 (London, 1965) cf: Syed Khalid Rashid- Muslim law, 4th edn. 2004, p.98, Eastern Book Co., Lucknow.
5. Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.163, Central Law Agency, Allahabad.
6. Shamim Ara v. State of UP & Another, MANU/SC/0850/2002
7. Must. Rukia Khatun v. Abdul Khaliq Laskar MANU/GH/0031/1979 :(1981) 1 GLR 375; para 7.
8. Mulla on principles of Mahomedan Law (Nineteenth (SIC) 1990) states vide para 310
9. Ghansi Bibi v. Ghulam Dastagir (1968) 1 M.L.J. 566
10. ILR 30 Bom 537
11. ILR 33 Madras 22
12. ILR 59 Calcutta 833
13. MANU/UP/0079/1939 : AIR1939All592
14. AIR 1951 Hyd117
15. MANU/BH/0104/1967: AIR1967Pat344.
16. MANU/AP/0101/1970: AIR1970AP298.
17. Shamim Ara v. State of UP & Another, MANU/SC/0850/2002.
18. Shamim Ara v. State of UP & Another, MANU/SC/0850/2002 (para 7)
19. (4:35)
20. (4:128)
21. (4:130)
22. (2:228)
23. (2:229)
24. (2:230)
25. (2:231)
26. (2:232)
27. (2:236-237)
28. (65:1)
29. (65:2)
30. (65:4)
31. (65:6-7)
32. (2:241)
33. (4:20-21)
34. (33:49)
35. (2:240)
36. (4:4)
37. Dr. M.A. Qureshi- Muslim Law, 2nd edn. 2002, p.68, Central Law Publications, Allahabad.
38. Yousuf Rowther v. Sowramma, MANU/KE/0135/1970, Para 7 & 8.
39. A.Yousuf Rawther v. Sowramma, MANU/KE/0059/1971 (para 7)
40. MANU/GH/0033/1978 : (1981) 1 GLR 358
41. MANU/GH/0031/1979 : (1981) 1 GLR 375
42. Shamim Ara v. State of UP & Another, MANU/SC/0850/2002 (para 13)
43. MANU/MH/0187/2002
44. MANU/SC/0850/2002