

Rules Related to DIVORCE in Islam

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Verily, all praise is due to Allah, the Lord of the worlds, the compassionate, the Merciful, Master of the Day of Judgement. And peace and blessings of Allah be upon the one sent as a mercy for all the worlds, our beloved Prophet and Messenger Muhammad, and upon his family, his companions and upon all those who follow in his footsteps till the Last Day. To proceed, if a person wishes to worship Allah truly and properly, he must submit to Allah's commands regardless of whether those commands are related to prayers, fasting, business transactions, marriage or divorce. When a person is not equipped with authentic Islamic knowledge or does not translate their knowledge and understanding into action, choosing their own desires and wishes over and above what Allah has prescribed for them in the Qur'an and through the noble guidance of His Prophet (s.a.w), this inevitably leads to problems in many of the affairs of a person, especially in the case of marital relationships. Marital discord is not only exhibited by husbands, but in many cases it is exhibited by wives, especially those who have been influenced by the feminist movement or materialistic West and who fail to turn completely to the Qur'an and Sunnah to see how they should lead their lives. The existence of such attitudes has led to a great deal of marital discord among many couples. It is unfortunate that many times, such couples do not realise that the steps that they must take to bring an end to such discord without hatred and desire for revenge, or for their marriage to return to its proper state have been stipulated in the Qur'an and Sunnah over 1400 years ago.

Allah's Messenger (s.a.w) said: "The lawful thing which Allah hates most is divorce." [1] This hadith goes to show that divorce is among the legal things that are Halal but it is not good. It is Halal because sometimes the situation is so complicated that a man is compelled to divorce, when it is reasonable and there is no way out. Divorce is not good because it is a cause of enmity and also a cause of Satan's delight. As for the commonly quoted hadith: "Marry and do not divorce for verily divorce causes the 'arsh (throne of Allah) to shake", this is a fabricated and da'eef (weak) narration that deserves no consideration. Before we delve into the key areas of divorce, it is worth pointing out that Divorce is a serious matter with no room for treating it lightly. Allah's Messenger (s.a.w) said: "There are three matters in which it is not permissible to joke: marriage, divorce and emancipation (of slave)." [2]

The linguistic definition of Talaaq is the setting free. In the view of Islam, divorce means the immediate and future annulment of the marriage contract, as confirmed in a plain declaration like: "I hereby divorce you!" or indirectly, like saying, "I hereby consider you unlawful to me!" It can also be confirmed by a judge or in the absence of judge, a Muslim leader, on basis of the wife's request. This is known as Khulu'. Divorce sometimes relieves the husband or wife of difficulty, when one of the two has a corrupt nature and a deficient faith; when the two do not agree in temper

and purpose; or when their hearts repel and never go well together. Therefore, without love or agreement, the family structure collapses. The aim of the Sharia'h (Islamic law) is to establish a healthy family unit through marriage, but if for some reasons this purpose fails, there is no need to linger on under false hopes as is the practice among the adherents of some other religions where divorce is not permitted. Islam does not keep a couple tied in a loathsome chain to a painful and agonising position, instead it permits divorce. It should only be resorted to when it becomes humanly impossible and due to unavoidable circumstances.

Causes behind Marital Discord and Divorce

Day after Day divorce rates are increasing. This bitter reality has come about due to many factors that couples are heedless of. Divorce rates have increased first and foremost as a result of not fulfilling the rights and duties of Allah, transgressing the boundaries set by Him. And so Allah punishes a person or a married couple by causing destabilisation within the marital relationship. Divorce rates have increased after one or both of the spouses began treating the rights and obligations of each other and their children lightly. Divorce rates are on the increase as a result of parents getting involved with the affairs of their married children, where they shouldn't be getting involved. Divorce is increasing due to gambling, consuming intoxicants such as alcohol and illicit drugs. Divorce continues to rise as result of engagement in unlawful matters: mixed weddings, music and singing, not adhering to the correct Islamic apparel, purchasing houses and cars through *riba* (usury and interest), in addition to insuring them through prohibited means. Divorce continues to rise as more and more Muslims are refraining from paying *zakaat*, and due to their neglect and abandonment of *Salaat*, which the scholars of Islam said is one of the fundamental contributing factors towards divorce. Divorce is increasing as result of not lowering the gaze from looking at the opposite gender that Allah commanded not to be looked at, whether this happens on the streets, in shopping centers, watching television, on the internet, or other places.

Procedure of Divorce

There are two ways in which divorce takes place. One is known as *Talaaq Bid'i* – an innovated divorce, and the other is known as *Talaaq Sunni* – that is, divorce carried out in accordance with the teachings of Muhammad (s.a.w). As for *Talaaq Sunni*, this entails the man uttering divorce at a time when he has not engaged in any sexual relations with her after her last menstruation, whilst his wife is in a state of purity, that is, she is not menstruating or in a state of *nifaas* – post natal bleeding, and that he declares the divorce once only. And so if one of the previously mentioned conditions is violated, the divorce process is considered as having been carried out in an innovated manner. *Talaaq Bid'i*, is where a man divorces his wife while she is menstruating or is in a state of post natal bleeding, or that he divorces her after having had sexual relations with her after her last menstruation, or that he divorces her by verbalizing the divorce three times in one utterance or one same

sitting. This is the overwhelming opinion of the majority of the scholars, except that Imaam Ash-Shafi' did not consider the utterance of divorce at one time as an act of innovation. Imaam ash-Shafi''s opinion is refuted based on the hadith collected by Bukhari and Muslim whereby ibn 'Umar, the son of 'Umar ibn Al-Khataab (r.a), divorced his wife when she was menstruating. So 'Umar (r.a) asked the Prophet (s.a.w) about his son's actions in which he replied: "Command him to take her back, and keep her till she is purified, then has another period, then is purified. If he wishes he may keep her and if she wishes he may divorce her before having sexual intercourse, for that is the 'iddah (period of waiting) which Allah commanded for the divorce of a woman."

The hadith of ibn 'Umar tells many points and makes them clear. Firstly, that it is prohibited to divorce during menstruation period. Secondly, without the consent of a woman, a man can withdraw his decision within the specified waiting period ('iddah). Thirdly, it is an act of heresy (bid'ah) to divorce a woman in the state of purification after menses, in which sexual intercourse is carried out. The scholars of Islam have differed on the issue of whether divorce uttered while a woman is in menses is actually counted. The majority of the scholars say that the divorce has taken place and it is to be counted. This is the opinion of Abu Hanifa, ash-Shafi', Maalik, Ahmad ibn Hanbal, An-Nawawi, and Al -Zaidiyyah. Those who said that divorce has not taken place include the Dhaahiriyyah (the literalist school of thought), ibn Taymiyyah, his student ibn al-Qayim, and As-Sanaa'ni. The correct opinion and Allah knows best is that of the majority of the scholars, that is, the one who divorces his wife whilst she is in a state of menses is counted as one divorce. This is in light of what ibn 'Umar himself has proclaimed in Saheeh Muslim and Bukhari that it was counted as one divorce against him.

Verbalising Divorce Thrice at One Time

What is the legal status of three divorces given together at a time? There are four famous different opinions on this issue among the scholars. The first opinion is that three divorces given together at a time befall and the woman is divorced. This is the opinion of the four dominant schools of thought. The second opinion is that if the woman has carried out sexual intercourse, then three will befall, and if she hasn't, then only one will happen. The third opinion is that of the Mu'tazilah and Shia' who say that three divorces at a time are nothing and have no legal status at all. The fourth opinion is that this is only to be counted as one divorce. Among these different views the fourth opinion, and Allah knows best is the strongest and most logical. The opinion that three divorces uttered at once is to be only counted as one is the opinion of: Abu Bakr As-Siddiq, 'Umar ibn AL-Khataab during the first two years of his Khilaafah, 'Abdur-Rahmaan ibn 'Awf, one of the ten companions given the glad tidings of Jannah, 'Abdullah ibn Mas 'ud, 'Ali ibn Abi Taalib, ibn 'Abbaas, ibn Taymiyyah and his student ibn al-Qayim, ibn Rajab al-Hanbali, Ash-Shawkaani, ibn Baaz, ibn 'Uthaymeen, the great scholar of hadith Shaikh Al-Albaani, and many others, may Allah shower each and everyone of them with his mercy. The conclusive opinion of these great companions and scholars is in light of authentic texts, which shed light on this controversial issue. The following hadith reported by Muslim is one of the main sources of evidence, whereby ibn 'Abbaas (r.a) narrated:

“In the time of Allah’s Messenger (s.a.w), Abu Bakr, and the first two years of the caliphate of ‘Umar, the three pronouncements of divorce were regarded as one divorce. So ‘Umar said: ‘People have made haste in an affair they used to practice with patience, so supposing we execute it on them’, so he executed it on them.”

Uttering Divorce during Anger

Anger is of three types: The first type is when anger is so intense that a person becomes no longer aware of what he is doing or saying. In this case the divorce does not count according to the majority of the scholars, because he is like one who is insane and mad, one who has lost all power of reason. The second type of anger is when a man is when his anger is intense but he understands what he is saying and doing, however the anger is so intense and he cannot control himself because the argument trading of insults or fighting has gone on too long, so his anger intensifies because of that. In this case there difference of opinion among the scholars. The most correct view, and Allah knows best, is that divorce does not count because the Prophet (s.a.w) said: “There is no divorce and no freeing of slaves when it is done by force or in a state of intense anger.”[3] The third type of anger is mild anger. This is what happens when the husband is upset with his wife, or he is disappointed about something that his wife has done. This mild anger it is not so intense that it makes him lose his power of reasoning or self-control, hence the divorce is valid according to the majority of the scholars. This is the correct answer regarding divorce uttered in anger, as was stated by ibn Taymiyyah and ibn al-Qayyim, may Allah have mercy on them.

Iddaah: Period of waiting

‘Iddah is a period in which a woman waits after the death of her husband or divorce, and she is not allowed to marry during this period. The Muslim jurists have unanimously agreed on it as being waajib (obligatory) due to the explicitness of the Qur’anic injunction whereby Allah says: “The divorced women shall wait concerning themselves for three monthly periods.”[4] There are three types of ‘Iddah: The first type of ‘Iddah is that of birth. That is, a woman must wait until she delivers her child before she can remarry. A common erroneous idea among people is that a pregnant woman cannot be divorced. This is not the case at all. Rather there is a consensus on this point among the scholars, and that this is a Sunnah divorce and not a heresy (bid’ah). There is no dispute regarding its validity. The second type of ‘Iddah is the ‘Iddah of menses. This means a woman is not allowed to marry until she has three menstruation. As soon as the third period ends, ‘Iddah ends. This is the view of many of the elite companions such as ‘Umar, ‘Ali and ibn Masu’d, and it was narrated by ibn al-Qayyim. This is also the view by the majority of contemporary scholars such as ibn Baaz and ‘Uthaymeen. The third type of waiting period is the ‘Iddah of months. This applies to women who have passed the age of menstruation. The ‘Iddah in this case is three months. As for a woman who is divorced by her husband before he has consummated his marriage with her, then there is no waiting period that applies to her based on verse number 49 from Surat Al-Ahzaab (33).

The woman whose husband has divorced her once or twice is instructed to spend her 'Iddah duration within her husband's house. Any woman who leaves her home without the permission of her husband after he has uttered either the first or second divorce is in violation of the injunctions of Allah and His Messenger. A woman whose divorce is revocable (i.e. first or second divorce) may still uncover in front of her husband and adorn herself by applying make-up and perfume. She may speak to him and he may speak to her; she may sit with him and do anything with him apart from intercourse. The only instance in which he may have sexual relations with her is if he takes her back. If the husband kisses and embraces his wife with the intention of taking her back, then that taking back is valid. To be on the safe side however, he should not fondle with his wife until after he has clearly stated that he is taking her back.

In the case where a husband is not sure as to whether he uttered the word of divorce at all, or as to the number of divorces he has uttered, then he should act on the basis of what is certain. So if he is not sure whether he has divorced her or not, the basic principle is that divorce has not taken place, because in this instance marriage is something which is certain, and divorce is something concerning which there is uncertainty. Based on the juristic principle that certainty cannot be overridden by doubt, if the husband is uncertain as to whether he has divorced his wife once or twice, he should assume that he has divorced her once, because this is what is certain.

Khulu: Divorce initiated on the part of the wife

The linguistic definition of khulu' means to take off the clothes or to take out. According to Shari'a terminology, khulu' refers to a woman's right of cancellation of her marriage. Just as a man can divorce if he has a genuine objection, similarly, a woman may also have a khulu' if she has a genuine excuse, and after returning the dowry (mahr or sadaaq). Some of the valid reasons for a woman to ask for a Khulu' include disliking her husband's treatment, such as being hot tempered, over-strict, one who criticizes her and rebukes her for the slightest mistake or shortcoming. Another valid reason is that she may dislike her husband's physical appearance due to some deformity or ugliness, or that one of his faculties is missing. Other reasons a woman may instigate divorce is if her husband is lacking in religious commitment. For example, he doesn't pray, or does not fast in Ramadan without a proper excuse, or he goes to parties, whereby the barriers of Allah are transgressed, such as fornication, drinking alcohol, listening to singing and musical instruments. Another basis a woman may ask for a divorce is if the husband deprives her of her rights of spending on her maintenance, clothing, and other essential needs, when he is able to provide these things. A woman may also ask for a divorce if her husband does not give a woman her conjugal rights and thus keep her chaste due to being impotent, or because he is unfair in the division of his time among co-wives. It is crucial to point out that there must be a valid reason behind asking for a khulu'. The Messenger of Allah (s.a.w) said: "If any woman asks for divorce from her husband without any specific reason, will not smell the fragrance of paradise."

The 'Iddah of a woman divorced by khulu' is not the same as that of a woman who did not instigate the divorce. If the woman divorced by khulu' is pregnant then her

'Iddah lasts until she gives birth, according to scholarly consenses.[5] But if she is not pregnant, the scholars differed concerning her 'Iddah. Most of the scholars said that she should wait for three menstrual cycles, because of the general meaning of the verse: "And divorced women shall wait (as regards their marriage) for three menstrual periods." The correct view and Allah knows best is that it is sufficient for a woman divorced by khulu' to wait for one menstrual cycle only. This is deduced from the hadith whereby the Prophet (s.a.w) told the wife of Thaabit ibn Qays, when she divorced him by Khulu', to wait out the 'Iddah for one menstrual cycle.[6] This hadith refers specifically to Khulu' divorce, whereas the verse quoted above speaks of divorce in general. As for the permissibility of taking back a divorced wife by Khulu' during the 'iddah, ibn Kathir (may Allah have mercy on him said: "There is unanimous agreement that the man who has divorced his wife by Khulu' may take her back during the 'Iddah."[7]

Ar-Raj'a – Taking back a wife after a divorce

If a man divorces his wife and this is the first or second talaq, referred to as talaq raj'i, and she has not ended her 'Iddah, then he can take his wife back by saying: "I am taking you back" or "I am keeping you." Apart from verbalizing that he is taking her back, the husband may do some action intending thereby to take her back, such as having intercourse with the intention of taking her back. The Sunnah is that taking back the wife should be done in the presence of two just Muslims based on verse number 2 from Surat at-Talaq (65). If the 'Iddah has ended following a first or second divorce, there has to be a new marriage contract. In this case he has to propose marriage like any other man, to her guardian and to her. When she and her guardian agree and they agree upon a mahr (dowry), then the marriage contract is completed. That must be done in the presence of two just witnesses. If however, he divorces his wife for a third time, she becomes unlawful to her first husband until she marries a second husband in a genuine marriage which is consummated. Allah the Exalted says (interpretation of the meaning): "The divorce is twice, after that, either you retain her on reasonable terms or release her with kindness..."[8] and He also said: "And if he has divorced her (the third time), then she is not lawful unto him thereafter until she has married another husband."[9]

The last divorce known amongst Muslim Jurists as Talaq Baa-in, refers to the third divorce according to the overwhelming majority of the scholars. This is in light of the hadith collected by Bukhari and Muslim whereby a woman came to the Messenger of Allah and said: "O Messenger of Allah, Riffa'ah divorced me thrice, then I was married to 'Abd al-Rahmaan ibn al-Zubayr al-Qurazi, but he has nothing with him except something like this fringe." The Prophet (s.a.w) said: "Perhaps you want to go back to Riffa'ah? No, (it is not possible), unless and until you enjoy sexual relations with him (i.e. 'Abd al-Rahman), and he enjoys the sexual relation with you." An-Nawawi said: "This hadith indicates that the woman who has been divorced by a third talaq is not permissible to the man who has divorced her until she has been married by another husband, who has intercourse with her then separates from her, and she completes her 'Iddah. Merely drawing up the marriage contract with her does not make her permissible to the first husband. This is the view of all the scholars among the companions, the taabie'n (their direct successors), and those who came after them. Allah the Exalted and the All-Mighty knows best. And May the

peace and blessings of Allah be upon His beloved slave and final Messenger – Prophet Muhammad.

REFERENCES

[1] Reported by Abu Dawud and ibn Majah. Al-Haakim graded it as Sahih (authentic). [2] Sunan at-Tirmidhi. Sheikh al-Albaani declared its chain of narration as hasan (good). [3] Reported by ibn Majah. Sheikh al-Albani declared it as Saheeh (authentic) in Irwaa' al-Ghalil. [4] Al-Baqarah, 2: 228 [5] Al-Mughni, 11/227 [6] Reported by at-Tirmidhi. Sheikh al-Albaani declared it as Saheeh (authentic) in Saheeh at-Tirmidhi. [7] Tafsir ibn Kathir, 1/277 [8] Al-Baqarah, 2: 229 [9] Al-Baqarah, 2: 230