

Dissolution of Marriage (Divorce) under Islamic Law

Lawal Mohammed Bani

Department of Shariah and Civil Law, College for Legal Studies Yola, Adamawa state, Nigeria

Hamza A. Pate

Lecturer Department of Management Technology, School of Management and Information Technology,
Modibbo Adama University of Technology, Yola, Adamawa State, Nigeria

Abstract

The aim of this paper is to be acquainted with the modalities of separation in marriage under Islamic law. The Holy Prophet (SAW) declared that among the things which have been permitted by law, divorce is the worst. Divorce being an evil, it must be avoided as far as possible. But in some occasions this evil becomes a necessity, because when it is impossible for the parties to the marriage to carry on their union with mutual affection and love then it is better to allow them to get separated than compel them to live together in an atmosphere of hatred and disaffection. The basis of divorce under Islamic law is the inability of the Spouses to live together rather than any specific cause (or guilt of a party) on account of which the parties cannot live together. A divorce may be either by the act of the husband or by the act of the wife. There are several modes of divorce under the Muslim law. Which will be discussed hereafter. In Islam, the husband pronounces the phrase "I divorce you" (in Arabic, talaq) to his wife. A man may divorce his wife three times, taking her back after the first two (reconciling). After the third talaq they can't get back together until she marries someone else. Some do a "triple talaq", in which the man says in one sitting "I divorce you" three times (or "I divorce you, three times", "you're triple divorced"). Many Islamic scholars believe there is a waiting period involved between the three talaqs, pointing to various hadiths. However the practice of "triple talaq" at one sitting has been "legally recognized historically and has been particularly practiced in Nigeria.

INTRODUCTION

Firm union of the husband and wife is a necessary condition for a happy family life. Islam therefore, insists upon the subsistence of a marriage and prescribes that breach of marriage contract should be avoided. Initially no marriage is contracted to be dissolved but in unfortunate circumstances the matrimonial contract is broken. One of the ways of such dissolution is by way of divorce. Under Islamic law the divorce may take place by the act of the parties themselves or by a decree of the court of law. However, in whatever manner the divorce is affected it has not been regarded as a rule of life. In Islam, divorce is considered as an exception to the status of marriage. In the laws of Islam (sharia) there are three kinds of divorce, each with separate rules. When a man has initiated a divorce, the procedure is called talaq.

When a husband accuses his wife of adultery without supplying witnesses and the wife denies it, the process is called li'an. When a woman has initiated a divorce it is called khul'i. Talaq is easily obtained, while obtaining khul'i is typically quite difficult.

TALAAQ: is a verbal noun from Arabic verb talaqa. Which means to untie, to free. Technically, talaq is a unilateral power vested in Muslim husband to repudiate his wife as and when he wishes. The word Talaq is usually rendered as repudiation, it comes from the roots 'Talaq' which means to release (an animal) from the tether. The wife or free her from the bondage marriage in law it signifies the absolute power which the husband possess of divorcing of his wife. The following verse is in support of the husband's authority to pronounce unilateral divorce is often cited: "Men are maintainers of women, because Allah has made some of them to excel others and because they spend out of their property (on their maintenance and dower). When the husband exercises his right to pronounce divorce, technically this is known as Talaq. The most remarkable feature of Muslim law of talaq is that all the schools of the Sunnis and the Shias recognize its differing only in some details. In Muslim world, so widespread has been the talaq that even the Imams practiced it. The absolute power of a Muslim husband of divorcing his wife unilaterally, without assigning any reason, literally at his whim, even in a jest or in a state of intoxication, and without recourse to the court, and even in the absence of the wife, is recognized in Islam. All that is necessary is that the husband should pronounce Talaq; how he does it, when he does it, or in what he does it is not very essential. Among the Sunnis, talaq may be express, implied, contingent constructive or even delegated. The Shias recognize only the express and the delegated forms of talaq.

In Talaq, (divorce) the husband does not have to use the exact words "I divorce thee" or "I divorce you." Shariah law allows for other phrases. Thus, there are two types of talaq declarations:

- **Talaq-Sareeh:** This is a clear declaration of divorce such as "I divorce thee"
- **Talaq-Kinaya:** An unclear or indirect declaration of divorce, using words that are not exclusively

prescribed for issuing divorce, but alludes and hints to it.

Islamic scholar Ibn Abdul-wahhab gives as examples of Talaq kinaya declarations: “you are divorce”, “you are clear”, “you are irrevocable”, “you are cut off”, “you are concluded”, “you are a free woman”, “you are forbidden”.

According to at least one school of Islam Talaq-Kinaya will result in irrevocable divorce (Talaq-Bayyin) if the husband intended to give talaq, but does not count if he did not intend to indicate divorce.

Mode of Divorce:

A husband may divorce his wife by repudiating the marriage without giving any reason. Pronouncement of such words which signify his intention to disown the wife he is sufficient. Generally, this done by talaq. But he may also divorce by Ila and Zihar which differ from ‘Talaq only in form, not in substance. A wife cannot divorce her husband of her own accord. She can divorce the husband only when the husband has delegated such a right to her or under an agreement. Under an agreement the wife he may divorce her husband either by Khul’i or Mubarat. Before 1939, a Muslim wife had no right to seek divorce except on the ground of

False charges of adultery, insanity or impotency of the husband. But the dissolution of Muslim Marriages Act 1939 lays down several other grounds on the basis of which a Muslim wife may get her divorce decree passed by the order of the court.

Shia and Sunni Muslims have different rules for performing a talaq divorce. According to some Sunni schools of jurisprudence, each talaq utterance should be followed by a waiting period of three menstrual periods for women or three month (iddah), when the couple is supposed to try to reconcile with the help of mediators from each family, until the third and final talaq. Some Sunnis who believe the practice of triple talaq in one go to the wrong, nonetheless accept it as final, especially the hanafi schools of jurisprudence.

Shia don’t have the concept of verbal “triple divorce” ie. Just uttering the phrase “I divorce you” three times. Shia practice also has a (iddah) waiting period. When the couple is supposed to try to reconcile with the help of mediators from each family, but requires to witnesses for the declaration of talaq. If the couple breaks the waiting period, the divorce is voided. After the waiting period is over, the couple is divorced and the husband is no longer responsible for the wife’s expenses, but remains responsible for the maintenance of the children, until they are weaned.

Categories of Divorce Under the Islamic law:

1. Extra judicial divorce.
2. Judicial divorce.

The category of extra judicial divorce can be further subdivided into three types, namely:

- Talaq, Ila, and Zihar (by Husband).
- Talaq-i-tafweed and Li’an (by wife).
- Khul’i (by mutual agreement).

Condition for a Valid Talaq:

1. **Capacity:** Every Muslim husband of sound mind, who has attained the age of puberty, is competent to pronounce talaq. It is not necessary for him to give any reason for his pronouncement. A husband who is minor or of unsound mind cannot pronounce it. talaq by a minor or of a person of unsound mind is void and ineffective. However, if a husband is lunatic then talaq pronounced by him during “lucid interval” is valid. The guardian cannot pronounce talaq on behalf of a minor husband. When insane husband has no guardian, the Qadi or a Judge has the right to dissolve the marriage in the interest of such a husband.

2. **Free Consent:** Except under Hanafi law, the consent of the husband in pronouncing Talaq must be a free consent. Under hanafi law, a talaq, pronounced under compulsion, coercion, undue influence, fraud and voluntary intoxication etc., is valid and dissolves the marriage.

Involuntary Intoxication: Talaq pronounced under forced or involuntary intoxication is void even under the hanafi law.

Shia Law: under the Shia law (and also under other schools of Sunnis) a Talaq pronounced under compulsion, Coercion, undue influence, fraud, or voluntary intoxication is void and ineffective.

3. **Formalities:** According to Sunni law, a Talaq, may be oral or in writing. It may be simply uttered by the husband or he may write a talaq. No specific formula or use of any particular word is required to constitute a valid talaq. Any expression which clearly indicates the husband’s desire to break the marriage is sufficient. It need not be made in the presence of the witnesses.

According to Shias, Talaq, must be pronounced orally, except where the husband is unable to speak. If the husband can speak but gives it in writing, the talaq, is void under Shia law. Here Talaq must be pronounced in the presence of two witnesses.

4. **Express words:** The words of Talaq must clearly indicate the husband's intention to dissolve the marriage. If the pronouncement is not express and is ambiguous then it is absolutely necessary to prove that the husband clearly intends to dissolve the marriage.

Express Talaq (by Husband):

When clear and unequivocal words, such as "I have divorced thee" are uttered, the divorce is express. The express Talaq, falls into two categories:

- Talaq-is-sunnah,
- Talaq-il-bid'ah

Talaq-is-sunnah is considered to be in accordance with the dictates of Prophet Mohammad it consists of a single pronouncement of divorce made in the period of tuhr (purity between two menstruations), or at an time, if the wife is free from menstruation, followed by abstinence from sexual intercourse during the period of idda. The requirement that the pronouncement he made during a period of tuhr applies only to oral divorce and does not apply to talaq in writing. Similarly, this requirement is not applicable when the wife has passed the age of menstruation or the parties have been away from each other for a long time, or when the marriage has not been consummated. The advantage of this form is that divorce can be revoked at any time before the completion of the period of iddah, thus hasty, thoughtless divorce can be prevented. The revocation may be effected expressly or impliedly. Thus, if before the completion of iddah, the husband resumes cohabitation with his wife or says "I have retained thee" the divorce is revoked. Resumption of sexual intercourse before the completion of period of iddah also results in the revocation of divorce.

Talaq-il-Bid'ah: It came into vogue during the second century of Islam. It has two forms:

- (i) The triple declaration of talaq made in a period of purity, either in one sentence or in three.
- (ii) The other form constitutes a single irrevocable pronouncement of divorce made in a period of Tuhr (purity) or even otherwise. This type of Talaq is not recognized by the Shias. This Form of divorce is condemned. It is considered heretical, because of its irrevocability.

Completion

After the completion of the talaq procedure, the couple is divorced, and she non-mahram (blood sister) for him and so the must observe the hijab (veil) rules, Shias scholars understand that when the waiting period (iddah) is over, the talaq procedure is completed. Two witnesses are required to witness the completion of the talaq.

The relevant parts of the Qur'an are

- i. "Thus when they fulfill 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, endued with justice, and establish the evidence (as) before Allah. Such is the admonition given to him who believes in Allah and the Last Day. And for those who fear Allah, He (ever) prepares a way out".
- ii. "And when you divorce women and they reach their prescribed time, then either retain them in good fellowship or set them free with liberality, and do not retain them for injury, so that you exceed the limits, and whoever does this, he indeed is unjust to his own soul; and do not take Allah's communications for a mockery, and remember the favour of Allah upon you, and that which He has revealed to you the Book and the wisdom, admonishing thereby; and be careful (of your duty to) Allah, and know that Allah is the knower of all things".

Aftermath: even if divorce separates a man from his wife, he has to seek her help in caring for the child or another female if the mother agrees. A husband who divorces his wife 3 times cannot remarry her until she has married another man and he also divorced her willingly.

In practice: In most Islamic Society, it is generally unacceptable for a divorced woman to live alone (as is usually also the case with unmarried women). In most situations women who bind themselves divorced will return to live with their parents or to the household of another close relative.

The Holy Qur'an states: "And when you have divorced women and they have ended-- their term (of waiting), then do not prevent them from re-marrying their husbands when they agree among themselves in a lawful manner; with this is admonished he among you who believes in Allah and the last day, this is more profitable and purer for you; and Allah knows while you do not know".

"And there is no blame on you respecting that which you speak indirectly in the asking of (such) women in marriage or keep (the proposal) concealed within your minds; Allah knows that you will mention them, but do not give them a promise in secret unless you speak in a lawful manner, and do not confirm the marriage tie until the writing is fulfilled, and know that Allah knows what is in your minds, therefore beware of Him, and know that Allah is forgiving, Forbearing".

"For divorced women Maintenance (should he provided) on a reasonable (scale). This is a duty on the righteous."

Following are some of the cases regarding child custody decided by Holy Prophet Muhammad (SAW):

Abu Hurairah narrates that a woman came to Prophet Muhammad (SAW) and said, "My husband wants to take away from me this child even though he has brought over water for me from the well of Abu Anbah and given me a lot of benefit." Prophet Muhammad SAW replied, "Both of you can cast a lot on this.

When the husband heard, he said, "who will quarrel with me regarding this son of mine?" Muhammad said, "O son! This is your father and this is your mother; grasp the hand of the one you want to hold." the child grasped the mother's hand and she took him away.

ILA:

Besides talaq, a Muslim husband can repudiate his marriage by two other modes, that are, ila and zihar. They are called constructive divorce. In ila, the husband takes an oath not to have sexual intercourse with his wife. Followed by this oath, there is no consummation for a period of four months. After the expiration of the fourth month, the marriage dissolves irrevocable. But if the husband resumes cohabitation within four months, ila is cancelled and the marriage does not dissolve. Under ithna Ashara (Shi'a) School, Ila does not operate as divorce without order of the court of law. After the expiry of the fourth month, the wife is simply entitled for judicial divorce. If there is no cohabitation, even after expiry of four months, the wife may file a suit for restitution of conjugal rights against the husband.

ZIHAR:

In this mode the husband compares his wife with a woman within his prohibited relationship e.g., mother or sister etc. "The husband would say that from today the wife is like his mother or sister. After such a comparison the husband does not cohabit with his wife for a period of four months. Upon the expiry of the said period Zihar is complete. After the expiry of fourth month the wife has following rights:

- (i) She may go to the court to get a decree of judicial divorce
- (ii) She may ask the court to grant the decree of restitution of conjugal rights.

Where the husband wants to revoke Zihar by resuming cohabitation within the said period, the wife cannot seek judicial divorce. It can be revoked if:

- (i) The husband observes fast for a period of two months, or,
- (ii) He provides food for at least sixty people, or,
- (iii) He frees a slave.

According to Shi'a law zihar must be performed in the presence of two witnesses.

Divorce by mutual Agreement:

KHUL'I: Is the right of a woman in Islam to seek a divorce or separation from her husband. A Muslim woman may petition a Qadi (judge), or in non-Islamic areas an Islamic community panel, to grant her divorce if the husband refuses. The wailing period (iddah) of a woman who seeks a divorce is three menstrual cycle or three month if she is post-menopausal, i.e. ceased menstruating. This is to ensure she is not pregnant. If the woman is pregnant, then the waiting period is until she give birth.

Women's right to initiate divorce is very limited compared with that of men. According to sharia law, there are two reasons a wife may be granted divorce:

When she can prove that the husband did not have intercourse with her or more than three months or if the husband does not provide her with what she needs for living such as food and shelter. While men can divorce their spouses easily, women face legal and financial obstacles. For example, in many cases the woman must repay her dowry and marriage expenses. In general she also has to forfeit child custody, if the child is older than seven years. Even if she is granted child custody, she has to give it to the father when the child reaches the age of seven.

DIVORCE BY WIFE:

The divorce by the wife can be categorized under these categories:

- (i) Talaq-it-tafweed
- (ii) Li'an

TALAAQ-IT-TAFWEED: Talaq-it-tafweed or delegated divorce is recognized among both, the Shias and the Sunnis. The Muslim husband is free to delegate his power or pronouncing divorce to his wife or any other person. He may delegate the power absolutely or conditionally, temporarily or permanently. A permanent delegation of power is revocable but a temporary delegation of power is not. This delegation must be made (distinctly in favour of the person to whom the power is delegated, and the purpose of delegation must be clearly stated. The power of talaq may be delegated to his wife and as Faizee observes, "This form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain freedom without the intervention of any court and is now beginning to be fairly common in India". This form of delegated divorce is usually stipulated in prenuptial agreements. Delegation of power to divorce may be made even in the post marriage agreements. Thus where under an agreement it is stipulated that in the event of the husband failing to pay her maintenance or taking a second wife, she will have a right of pronouncing divorce on herself, such an agreement is valid, and such conditions are reasonable and not against public policy. It should be noted that even in the event of

contingency, whether or not the power is to be exercised, depend upon the wife she may choose to exercise it or she may not. The happening of the event of contingency does not result in automatic divorce.

LI'AN

If the husband levels false charges of unchastely or adultery against his wife then this amounts to character assassination and the wife has got the right to ask for divorce on these grounds. Such a mode of divorce is called li'an. However, it is only a voluntary and aggressive charge of adultery made by the husband which, if false, would entitle the wife to get the decree of divorce on the ground of li'an. Where a wife hurts the feelings of her husband with her behavior and the husband hits back an allegation of infidelity against her, then what the husband says in response to the bad behavior of the wife, cannot be used by the wife as a false charge of adultery and no divorce is to be granted under li'an. This type of divorce is based on Qur'anic verses which instruct the husband to "swear four times". Normally, if a man accuses a woman of adultery who is not a relative of his, he is required to prove it with four witnesses, and is subject to the punishment of qazf (false accusation) being flogged with eighty stripes

There are three conditions of Li'an:

- The state of marriage between the spouses should be continuing.
- The marriage contract must be valid. For instance, if there were no witnesses to the couple's marriage, mula'ana is not applied.
- The husband must be liable to be a witness and not to have been given the punishment of qazf (false accusation).

Dowry (Mahr) in Divorce:

A mahr is an agreed upon compensation for the wife that is obligatory on the husband before the act of intercourse occurs, especially in shi'a Islam. In recent years some younger women have agreed to marry with high amounts of mahr with the intention to divorce shortly after for an easy profit. In these cases the Islamic jurisprudence has clear guidance depending on who asks for the divorce and whether or not the wife is still virgin. If the husband asks for a divorce and intercourse has occurred, he pays full mahr if the husband asks for a divorce and the wife is still a virgin, the husband pays half the dowry; if the wife asks for a divorce and she is not a virgin, the husband pays half the mahr; and if the wife asks for a divorce and is still a virgin, then no mahr is required to be paid by the husband. However, there may be other financial obligations depending on the length of marriage, whether there are any kids involved and their ages, and the Property that they own under joint ownership.

Other Financial Obligations in Divorce:

Depending on the length of marriage, whether intercourse occurred or not or if any kids are involved and income levels for either husband or wife, the husband may be required to provide a monthly maintenance support for the children to ensure their well being. However, unlike the American laws where the couple split assets earned during the marriage, Islamic laws does entitle the wife to a split of the husband's assets at divorce.

INCLUSION

In contrast to the Western world where divorce was relatively uncommon until modern times, and in contrast to the low rates of divorce in the modern Middle East, divorce was a common occurrence in the pre-modern Muslim world. In the medieval Islamic world and the Ottoman empire Northern Nigeria inclusive, the rate of divorce was higher than it is today in the modern Middle East. In 15th century Egypt, Al-Sakhawi recorded the marital history of 500 women, the largest sample on marriage in the Middle Ages, and found that at least a third of all women in the Mamluk Sultanate of Egypt and Syria married more than once, with many marrying three or more times. According to Al-Sakhawi, as many as three out of ten marriages in 15th century Cairo ended divorce. In the early 20th century, some villages in western Java and the Malay Peninsula had divorce rates as high as 70%. In practice, in most of the Muslim world today divorce can be quite involved as there may be separate secular procedures to follow as well.

Usually, assuming her husband demands a divorce, the divorced wife keeps her mahr (dowry). Both the original gift and any supplementary property specified in the marriage contract. She is also given child support until the age of weaning, at which point the child's custody will be settled by the couple or by the courts. Women's right to divorce is often extremely limited compared with that of men in most Muslim Communities. While men can divorce their spouses easily, women face a lot of legal and financial obstacles. For example, in Yemen, women usually can ask for divorce only when husband's inability to support her life is admitted while men can divorce at will.

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