

## Chapter Five

# **Divorce**



## **Divorce as Viewed by the Three Religions**

The three main religions, Judaism, Christianity and Islam, have remarkable differences in their attitudes towards divorce.

According to the New Testament and Catholicism, divorce is not authorized. They attribute such a rule to the teachings of Jesus who said, "Whatsoever God has joined together let no man put asunder." They prohibit the man who leaves his wife from contracting a second marriage. They even forbid the unfortunate woman left by her husband to marry another man. Hence, it is regarded as a source of crime to separate a husband and wife.

The New Testament disallows divorce except in the case of adultery. The following words were attributed to Prophet `Isa (Jesus),

“I tell you that everyone divorcing his wife, except on account of fornication, makes her subject to adultery and whoever marries a divorced woman commits adultery.”  
(Matthews 5; 32)

The Roman Catholics interpret the previous verse as not to provide for divorce at all. They say that since adultery automatically nullifies marriage, there is no need for divorce, and in the case of a wife's adultery, it is not only lawful but essential as well for the husband to desert her. On the other hand, the Protestants allow divorce only on grounds of adultery, and consider divorce unlawful on any other grounds, such as cruelty, mental disease or prolonged quarrels. The

Orthodox Coptic Church of Egypt has made many amendments to the Bible in order to make provision for divorce on the grounds of a wife being barren for three years, her carrying a contagious disease, or of prolonged quarrels where there is no hope of settlement.

Christianity assumes a state of moral perfection that human societies have never achieved. When a couple realizes that their married life is beyond repair, a ban on divorce will not be beneficial to them. Forcing ill-mated couples to remain together against their will is neither effective nor reasonable. In fact, more conflicts arise between them; they will fight more or even commit sins, such as adultery.

Nowadays, many Christians have dismissed what is forbidden, which obliged most Christian countries to implement local laws allowing divorce without the restrictions, ties and morals of Islam. It is no wonder that many Christians now get divorced for the most trivial reasons, and their married lives have been subjected to degeneration and collapse.

Unlike Christianity, Islam provides the affected parties a great mercy by permitting the release of marriage and, thus, allowing each party to start a new life. Islam confirms that Allah is the One Who unites people in marriage and that He is also the One Who divorces them through His decreed Laws. The Glorious Qur'an says,

*[But if they separate (by divorce) Allah will provide abundance for every one of them from His bounty.]*

(An-Nisa': 130)

Since its advent, Islam has been decisive on this issue: divorce is allowed yet it is most hated by Allah, whereas

forbidding divorce in Christianity is not valid in most Christian countries, including Catholic ones, for they realize how impractical and dangerous it is to disallow divorce to a couple who cannot continue to live together.

Contrary to Christianity, Judaism allows divorce even without any reason. The Old Testament gives the husband the right to divorce his wife even if he just dislikes her:

"If a man marries a woman who becomes displeasing to him because he finds something indecent about her, and he writes her a certificate of divorce, gives it to her and sends her from his house, and if after she leaves his house she becomes the wife of another man, and her second husband dislikes her and writes her a certificate of divorce, gives it to her and sends her from his house, or if he dies, then her first husband who divorced her, is not allowed to marry her again after she has been defiled." (Deut. 24: 1-4)

The Talmud records different opinions of Jewish scholars:

"The school of Shammai held that a man should not divorce his wife unless he has found her guilty of some sexual misconduct, while the school of Hillel said he may divorce her even if she has merely spoiled a dish for him. Rabbi Akiba says he may divorce her even if he simply finds another woman more beautiful than her." (Git. 90 a-b)

The Old Testament not only gives the husband the right to divorce his 'displeasing' wife, it considers divorcing a 'bad' wife an obligation as well:

"A bad wife brings humiliation, downcast looks, and a wounded heart. Slack of hand and weak of knee is the man whose wife fails to make him happy. Woman is the origin of sin, and it is through her that we all die. Do not

leave a leaky cistern to drip or allow a bad wife to say what she likes. If she does not accept your control, divorce her and send her away." (Ecclesiastics 25: 25)

The Talmud recorded several specific actions by wives, which moved their husbands to divorce them:

"If she ate in the street, if she drank greedily in the street, if she suckled in the street, in every case Rabbi Meir says that she must leave her husband." (Git. 89a)

The Talmud also made it a must to divorce a barren wife (who bore no children in a period of ten years):

"Our Rabbis taught: If a man took a wife and lived with her for ten years and she bore no child, he shall divorce her." (Yeb. 64a)

Islam takes a middle course between Christianity and Judaism in respect to divorce. It discourages, but does not forbid divorce. The Prophet (peace be upon him) said,

*"The most hateful Halal (permissible) act to Allah is divorce."<sup>1</sup>*

Accordingly, a Muslim man should not divorce his wife just because he dislikes her. The Qur'an instructs Muslim men to be kind to their wives even in cases of feelings of dislike:

*[Live with them (your wives) on a footing of kindness and equity. If you dislike them it may be that you dislike something in which Allah has placed a great deal of good.]*

(An-Nisa': 19)

Prophet Muhammad (pbuh) gave a similar instruction:

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<sup>1</sup> Reported by Abu Dawud.

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*“A believing man must not hate a believing woman. If he dislikes one of her traits, he will be pleased with another.”<sup>1</sup>*

Marriage in Islam is a sacred bond that should not be broken except for compelling reasons. Couples are introduced to pursue all possible remedies whenever their marriages are in danger. Divorce is not to be resorted to except when no other way is available. Hence, if a divorce is decided on, good treatment of the wife is still required. The woman should be retained in honor or released in kindness. The Glorious Qur'an reads,

*[Either you retain her on reasonable terms or release her with kindness.]*

(Al-Baqarah: 229)

Some scholars even recommended that the process of divorce should rather take place without directly facing the wife in order to preserve her from any emotional harm.

If the husband is the one who initiates the divorce, the dowry together with any gift given by him to his wife is considered her own property and he has no right to restore it. In addition, it is forbidden in Islam for the husband to abuse his right of pronouncing divorce by keeping his wife in limbo (neither keeping her as a wife nor releasing her to give her the chance to marry someone else) in order to return all or some of the dowry or whatever property or gifts which he gave her on their marriage. Any husband who performs such an act is considered guilty and sinful.

The Glorious Qur'an says,

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<sup>1</sup> Reported by Muslim.

*[You will never be able to do perfect justice between wives even if it is your ardent desire, so do not incline too much to one of them (by giving her more of your time and provision) so as to leave the other hanging (i.e. neither divorced nor married). And if you do justice, and do all that is right and fear Allah by keeping away from all that is wrong, then Allah is Ever Oft-Forgiving, Most Merciful.]*

(An-Nisa': 129)

And,

*[Either you retain her on reasonable terms or release her with kindness. And it is not lawful for you to take back anything which you have given them.]*

(Al-Baqarah: 229)

Moreover, the process of divorce in Islam is to encourage reconciliation when possible, for instance. It must be pronounced three times, but they neither can be given all at once nor can they be given during the wife's menstrual period because there cannot be a sexual relationship between them during this period, which can be an attempt to reconcile and save the marriage. The series of the three pronouncements of divorce is an approach that gives the partners some time to think and allows those who are trying to reconcile them a chance of success. The Glorious 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 hers; if they both wish for peace, Allah will cause their reconciliation.]*

(An-Nisa': 35)

Out of its concern for the security and endurance of the Muslim family, Islam recommends family council for reconciliation between the husband and the wife where an

arbiter from each party attends. The Qur'an chooses arbiter parties to be involved in the reconciliation without defining their exact rank of relation because wisdom is most needed here regardless of its possessors; a father may be more nervous than a second-degree relative, for instance.

If the first or the second divorce is pronounced, the partners have the opportunity to reconcile during the waiting period. The husband is not permitted to drive his wife out of their matrimonial house during that period. He remains responsible for her welfare and maintenance during this time, and if he dies during that period, his wife has the right to inherit him. However, when this period elapses without reconciliation, the wife is only entitled for the right of '*mut`ah*' and loses all other financial rights. If they reconciled during this period the divorce would simply be revoked. It's worthy to mention that divorce is revoked by the husband by simply uttering the word *raja`tuki* "I want you back" followed by any intimate relation with his wife or having this intimate relationship accompanied by the intention of revoking. If no reconciliation takes place during the wife's waiting period of the first or second divorces, she is allowed to marry someone else or remarry her husband with a new contract and a new dowry taking into consideration that the previous divorces are counted (i.e. if they were divorced twice and remarried, then they only have one divorce left). Only if the matter reaches the third divorce, it becomes irrevocable. The divorced wife has to be separated from him and wait three monthly menses to make sure whether she is pregnant or not, then she has the right to marry another man if she wishes. The first husband is not permitted to remarry her unless she marries another man and the second marriage happens to end in a voluntary divorce. This condition is most

probably meant by the Qur'an as a reproachful deterrent to arbitrary, hasty divorces. But when a man marries such a thrice-divorced woman only to legalize her eventual reunion with her former mate, it is nothing but a variant of adultery and is therefore forbidden in Islam. Such an act is known as '*Tahlil*' marriage. It was reported on behalf of the Prophet (pbuh) that the parties involved in such a '*Tahlil*' marriage are cursed.

The Glorious Qur'an says,

*[And when you have divorced women and they have fulfilled the term of their prescribed period, either take them back on reasonable basis or set them free on reasonable basis. But do not take them back to hurt them, and whoever does that, then he has wronged himself.]*

(Al-Baqarah: 231)

In addition, Islam gives the woman the right to ask for divorce and to initiate the divorce as well.

## **Why Does Islam Legislate Divorce?**

The Arabic term for divorce '*Talaq*', is derived from the verb which indicates freedom and liberation, as if it dissolves the knot of wedlock.

In Islam, divorce is regarded as the most hateful *Halal* (permissible) act since it destroys the family, which Islam seeks to build. However, in cases when the problems between husband and wife are beyond reconciliation, divorce is the bitter medicine, which has no alternative. Divorce is then similar to a painful surgery in which the pains of the wounds are endured in order to protect the remaining parts of the body and to prevent greater injury. What Islam decrees here is dictated by reason, wisdom and the Muslim's interests. Islam realizes from its very beginning that forcing a couple to live together against their tolerance is a severe punishment for both parties. It is worse than life imprisonment and is like an unendurable hell.

In ancient times, a wise man said, "One of the greatest calamities is to live with someone who does not agree with you yet does not leave you."

## **Methods of Divorce Before Islam**

Before Islam, divorce was practiced in different parts of the world. Whenever a man became angry with his wife, whether for valid reasons or not, he could divorce her, but the unfortunate woman could neither have rights to any legal procedure nor get any maintenance or claim any other right from him.

In Greece, divorce was not guided by any rules or regulations. Even if the couples had vowed at the time of marriage to the condition not to separate from each other, the judge could still grant a divorce if the matter was taken to the court. In the early days of Rome, divorce was impossible after the religious rites of marriage had been performed. However, the husband was given unlimited rights over the wife. After quarreling with his wife, a husband could even murder his wife in order to get rid of her because the religious law did not permit any legal action from the spouses to separate. Later on, divorce was introduced among the Romans.

The Law of the Twelve Tables allowed divorce. In addition, a Roman male had the power of putting his wife to death for actions like drinking, poisoning, and substitution of a false child. On the other hand, no Roman wife had the right to sue for divorce, and if she solicited separation, she was liable to punishment. As time passed, the facility and frequency of divorce tended to destroy all mutual confidence between spouses and they resorted to divorce even for the slightest dispute.

The Mosaic Law legalized and regulated the husband's power of divorce. But despite the restraints prescribed by this law, men enjoyed vast powers to divorce their wives. A man could easily get rid of his wife by leveling a charge of irreligiosity against her. Even if the husband intended to compromise later on, the matter was beyond his control because, after such a charge, he was bound by the religious code to divorce his wife. In case a woman did not give birth to a child after ten years of marriage, it was essential for the husband to divorce her. Although a husband could divorce his wife for something which made her disagreeable to him, a woman had no right to demand divorce for any reason.

The ancient Hindus considered marriage as an indissoluble tie, enduring even after the death of either spouse. This was the reason why a woman whose husband died in her lifetime had to burn herself alive when the dead body of her husband was cremated.

The pagan Arabs used to divorce their wives at any time, for any reason or even without any reason whatsoever. They also used to revoke the divorce, once given, and then pronounce it again and repeat the game as many times as they liked. They also used to swear by one of their idols that they would have no intercourse with their wives, but continued living with them. They could at their pleasure accuse their wives of adultery to prevent other suitors from proposing to them. Even when they walked out on their wives, they would exempt themselves from any responsibility of maintenance and would receive no legal punishment.

## **Islam Limits the Cycle of Divorce**

Some husbands abuse the right of divorce for the slightest problem with their wives; such as when she does not make tea properly or the dinner is too salty!

Judaism allows divorce even without any reason. The Old Testament gives the husband the right to divorce his wife even if he just dislikes her.

Islam regards divorce as the most hateful *Halal*, yet it is permissible. Accordingly, prudent thinking should be carried out before taking such a step.

A good way of highlighting what Islam reveals is mentioned in the following *hadith* found in the *Sahihs* of Muslim and al-Bukhari.

Umar ibn al-Khattab, the second Caliph, went to the Prophet (pbuh) and told him that his son had just divorced his wife. The Prophet (pbuh) asked if the wife was on her menstrual period and he replied that she was. Therefore, the Prophet (pbuh) informed him to tell her to return home and wait until her menstrual period is finished and afterwards to wait for her second and third periods to finish as well. During this time, if no reconciliation or sexual intercourse took place, then the divorce could be pronounced. This proves that divorce is not an easy process and that Islam protects both man and woman from any rash, inconsiderable decision that would break a Muslim family.

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Islam has established a number of principles, teachings and rules that, if followed and used with discretion, would lessen the need for divorce and limit its scope to a great extent. Some of these are as follows:

1. The husband should make a good choice of a wife, paying more attention to her religion and morals than to her status, wealth or beauty. On the authority of Abu Hurayrah that the Prophet (pbuh) said,

*"A woman is married for four reasons; her property, her beauty, her status, and her religion. So choose the one who is religious, may your hands be besmeared with dust! (i.e. may you not prosper)."*<sup>1</sup>

Similarly, acceptance of a man proposing to a woman should be judged on the basis of how religious he is. It is narrated that the Prophet (pbuh) said,

*"If a man who satisfies you in faith and integrity proposes to you, accept him. Otherwise, there would be affliction in the land and a great corruption."*

2. It is necessary for the married couple to live together through mutual understanding, pointing out the details of rights and duties exchanged between them, awakening the faithful consciences to adhere to Allah's Laws. Each one of them should perform his/her duties and respect the rights of the other party knowing that a Muslim is supposed to perform his duties before asking for his rights.
3. The husband should be realistic so as not to seek perfection in his wife, but to consider her merits as well as her weak points. If he dislikes one trait, he will find

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<sup>1</sup> Agreed upon.

another that satisfies him. On the authority of Abu Hurayrah that the Prophet (pbuh) said,

*“No believing man should hate a believing woman; if he dislikes one of her traits, he will be pleased with another.”<sup>1</sup>*

4. The husband should be reasonable enough to consider the general welfare of all parties involved if he feels hatred towards his wife. He should not hasten to succumb to his emotions; rather, he should invoke Allah to change his urge into something good.
5. Partners need to have realistic views of marriage. It will take time to get used to one another, to adapt to one another's lives. Divorce should be respected by both partners and not viewed as an easy solution to any dispute.
6. The husband should treat his disobedient wife with wisdom, progressing bit by bit from leniency to firmness, without violence.
7. The married couple should learn to solve their problems by themselves with the least external involvement. When it comes to a breach between them that requires a family council, they should resort to the most reliable relatives of his and hers, in an attempt to mend, reconcile and resolve the existing crisis.
8. Islam prohibits the '*Tahlil*', which is a form of marriage in which a man marries a woman who is divorced three times only to make her once again lawful to her former husband.

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<sup>1</sup> Reported by Ahmad and Muslim.

## Steps Before Divorce

Islam is a practical religion and it does recognize that there are circumstances in which marriage reaches the verge of collapse. In such cases, mere advice of kindness or self-restraint is no viable solution. Hence, the Glorious Qur'an offers some practical advice for the spouse (husband or wife) whose partner is the wrongdoer.

### Steps taken by the man

For the husband whose wife's misconduct is threatening the marriage, the Qur'an gives four types of advice as detailed in the following verses:

*[As to those women on whose part you fear disloyalty and ill-conduct, admonish them, refuse to share their beds, beat them (lightly), but if they return to obedience, seek not against them means of annoyance. For Allah is Most High, Most Great. If you fear a breach between them twain (a man and his wife) send for an arbiter from his family and an arbiter from her family, if they both wish for peace, Allah will cause their reconciliation.]*

(An-Nisa': 34-35)

Islam teaches us four main respective steps to be taken before divorce:

**First**, the prescribed remedy starts with verbal advice in a kind and gentle manner. One of the important elements here is timing, because advice needs to be offered at times of

harmony. However, if all efforts of admonition seem to fail, then the husband has to be cautious of further corruption.

**Second**, sexual relations may be suspended through desertion, and the precision of this prescription has to be very carefully noted, as it directs to desertion only in bed, i.e. turning his back to her. This shows us that desertion should not be at a house or even bedroom level; but only in bed to guarantee keeping any disagreement between husband and wife to themselves and to eliminate unwanted exposure. Deserting her by sleeping in another room or leaving the house altogether will make the disagreement public, and will raise the woman's instinctive obstinacy. Conversely, limiting desertion to the sides of one bed, or separate beds in the same room keeps the disagreement strictly between the husband and the wife. Many households have been ruined because of external interference by people who instill obstinacy into each partner. Therefore, neither should reveal whatever happens between the two of them to a mother, father, sibling, relative, or acquaintance. Marital dispute should always be contained between its two parties, the husband and the wife.

**Third**, if the previous steps are not sufficient, the ultimate corrective step of gentle physical correction could be considered, but some scholars consider this inadvisable though being permissible.

**Fourth**, if all of this fails, a family council is recommended where an arbiter from each party attends. The Glorious Qur'an chooses arbiter parties to be involved in the process of reconciliation without defining their exact rank or degree of relation because wisdom is most needed here regardless of its possessors; a father may be more nervous than a second-degree relative, for instance.

The last part of the verse indicates the power and greatness of Allah in an implicit warning to those who may consider violating the foregoing commands. Allah is telling the man that this woman is His creation and that He assigned her to the husband with His Word. Accordingly, the husband should not abuse her because Allah guarantees her rights in the same way He guarantees the rights of the husband.

A husband should reconsider a lot and do his best before taking the decision of divorce, for though it is permissible, it is disliked. The Glorious Qur'an says,

*[It may be that you dislike a thing which is good for you.]*  
(Al-Baqarah: 216)

And,

*[If you dislike them, it may be that you dislike a thing and Allah brings through it a great deal of good.]*  
(An-Nisa': 19)

The Prophet (pbuh) said,

*"A believing man must not hate a believing woman. If he dislikes one of her traits, he will be pleased with another."*<sup>1</sup>

### **Steps taken by the woman**

For the wife whose husband's ill conduct is the cause of the marriage's imminent collapse, the Glorious Qur'an offers the following advice:

*[If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they make terms of peace between themselves; and making peace is better.]*  
(An-Nisa': 128)

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<sup>1</sup> Reported by Muslim.

Allah describes a situation where a woman fears recalcitrance or neglect from her husband, even before any such fears actually take place. It has to be noted that the feared behavior mentioned in this verse; i.e. neglect, indicates that the husband is not yet recalcitrant but is not giving his wife proper attention, care, and affection, in spite of fulfilling all her rights. Here the wife is advised to seek reconciliation with her husband (with or without family assistance). Some Muslim scholars have suggested that the court can apply some measures against the husband on behalf of the wife. That is, the court first admonishes the rebellious husband, then forbids him his wife's bed without loosing her marital rights, and finally executes a symbolic physical discipline. However, the husband's recalcitrance may become overt, as when he refuses to provide for his wife. If he persists in this attitude, the *Hanafi* School authorizes the law enforcement agencies to imprison him until he renounces his position and discharges his responsibility. But the consensus of the rest of the jurists is that the wife has the right to seek a divorce from him. If she so wishes, the court must comply with her request and grant her the divorce.

A noteworthy observation from Imam *ash-Sha`rawi*'s interpretation on the previous verses: "Allah develops a special sense of alertness in the believers. Here, we find the expressions, [*As to those women on whose part you fear disloyalty.*] (An-Nisa': 34), [*If a wife fears cruelty or desertion on her husband's part.*] (An-Nisa': 128) illustrating a situation where defiance has not actually materialized, but is feared. Proper alertness requires early detection to avoid reaching the stage of actual defiance. Allah shows us that measures must be taken proactively to avoid any potential problems. Any factors of trouble must be dealt with in advance, because if

trouble does take place it might be irreparable. If either party detects signs of trouble in the other's behavior, she/he must take the initiative to resolve the situation."

**The verse then refers to reconciliation:**

*[There is no blame on them if they arrange an amicable settlement between themselves.]*

(An-Nisa': 128)

Reconciliation in such situations is a task for husband and wife together. Sometimes we find that reconciliation takes form but with no effect. The real essence of reconciliation is ending of any complaint or hard feelings. What defeats reconciliation in most cases is concentrating on reconciliation in form without dealing with the real reasons that are most likely to be buried deep inside each partner. Thus, reconciliation must be achieved fully, as we are told by Allah,

*[If they arrange an amicable settlement between themselves; and such settlement is best.]*

(An-Nisa': 128)

When the husband and wife are both inwardly satisfied, gained benefits will not be limited to them only, but will prevail throughout the society.

To sum up, Islam offers Muslim married couples much viable advice to save their marriages in cases of trouble and tension. If one of the partners is destroying the matrimonial relationship, the other partner is advised by the Qur'an to do whatever is possible and effective in order to save such a sacred bond. If all measures fail, Islam allows the partners to separate peacefully and amicably.

## **Conditions for a Correct Divorce**

An Islamic divorce should fulfill a number of conditions so as to be considered a correct one. These conditions are:

### **1. The three pronouncements cannot be given all at once**

The reason for that is to give the two parties time for reconciliation. The Glorious Qur'an states,

*[Divorce is only permissible twice, after that, the parties should either hold together on equitable terms, or separate with kindness.]*

(Al-Baqarah: 229)

The Qur'an mentions that divorce is permissible twice, which means two times and not two divorces, so it should be done twice and not just pronounced twice at the same time. It is considered only a single divorce even if repeated a hundred times at the same time.

### **2. It cannot be given during the wife's menstrual period**

This is due to the fact that there cannot be any sexual relations between husband and wife during that period, which can be an attempt to reconcile and save the marriage. The husband is also forbidden to divorce his wife when she is purified of her menses if he had intercourse with her (that is, he should not divorce her until she has completed her next menstrual period to ensure she is not pregnant).

The Glorious Qur'an states,

*[O Prophet! When you do divorce women, divorce them at their prescribed periods, and count (accurately) their prescribed periods. And fear Allah your Lord (O Muslims).]*

(At-Talaq: 1)

### **3. Divorce should be clearly intended**

The Prophet (pbuh) said,

*“The deeds are evaluated according to one’s intentions, and everybody will receive the reward of what he has intended.”*

### **4. It must be pronounced and not be just a thought**

Abu Hurayrah narrated that the Prophet (pbuh) said,

*“Allah has forgiven my followers the evil thoughts that occur to their minds as long as such thoughts are not put into action or uttered.”<sup>1</sup>*

Also, Qatadah, one of the Prophet’s Companions, said,

*“If someone divorces his wife in his mind, such a divorce has no effect.”<sup>2</sup>*

### **5. It should not be given in extreme states of anger**

Lady `A`ishah reported that the Prophet (pbuh) said,

*“No divorce in rage.”<sup>3</sup>*

Abu Dawud interpreted it to mean ‘in anger’, while another scholar interpreted it to mean ‘by force’. Both meanings are correct.

<sup>1</sup> Reported by al-Bukhari and Muslim.

<sup>2</sup> Reported by al-Bukhari.

<sup>3</sup> Reported by Abu Dawud and Ibn Majah.

**6. It should not be given as a fault or by force or in a forgetful state**

This is based on the *hadiths* reported on behalf of the Prophet (pbuh),

*“Allah will not hold anyone of this Ummah (nation) responsible for what is done in error, forgetfulness or under coercion.”* and, *“Deeds (their correctness and rewards) depend upon intentions.”*

**7. It should not be given if the husband is drunk**

(We have to mention that drinking wine is prohibited in Islam in the first place, and whoever does this is sinful and his deeds are considered illegal).

Ibn `Abbas stated on behalf of the Prophet (pbuh) that a divorce given by a drunk or given under compulsion is not valid. However, there is a consensus of jurists that when the man who drinks wine voluntarily for unlawful reasons, such as enjoyment, utters the word of divorce to his wife when drunk, then in this case, divorce is effective.

**8. It should not be given in jest**

Scholars unanimously agree that when divorce is uttered by a man jokingly, it is in fact effective, due to the saying of the Prophet (pbuh):

*“There are three things in which there is no jest: marriage, divorce, and setting free.”*

**9. It should not be given when the husband is in a state of shock or astonishment**

When a man - forgetting himself due to facing a terrible and unexpected situation - divorces his wife, then, divorce is not effective.

## **10. It should not be given in a state of mental illness**

Ali narrated on behalf of the Prophet (pbuh),

*“The pen is raised for three (i.e. they are exempted from the accounts): an insane person till he becomes sane, a child till he reaches the age of puberty, and a sleeping person till he awakes.”*

He also said,

*“All divorces are legally valid except that of a person who loses his mind (e.g. insane or drunk).”*

## **11. It should not be suspended on a specific demand or behavior**

The husband should not use divorce as an oath to swear with, blackmail or threaten. In this case, the husband suspends the divorce on a certain act on the part of the wife, as when he tells her that if she does something or goes somewhere she will be divorced. Scholars have different views regarding this case. Some of them say that sometimes the husband does not really mean a divorce by this but is using it as a kind of oath to threaten his wife. Hence, the husband’s real intention (of divorcing or not) should be taken into consideration. However, it is agreed that the divorce is done regardless of the husband’s real intention.

## **12. It should be documented**

It is recommended when divorce takes place to document it, mentioning its type; whether it is revocable (i.e. a first or second divorce) or irrevocable (i.e. a third divorce), and to write down its date. This is to avoid miscalculating the waiting period or violating the maximum legitimate number of divorce according to *Shari`ah*.

## **Woman's Right to Ask for Divorce**

### **Christianity**

In Christianity, the wife may sue her husband for a divorce provided there is a strong reason such as committing adultery, if the husband is not fulfilling his conjugal responsibilities or is proven to be undergoing mental insanity or any severe disease. However, sterility in either party (husband or wife) is not considered as a legal reason to dissolve the marriage as long as such a case doesn't prevent performing sexual duties. Besides, the divorce claimed by either party should be sued in a court to take the legal form.

### **Judaism**

Wives cannot initiate divorce under Jewish Law. A Jewish wife however, could claim the right to a divorce before a Jewish court provided that a strong reason exists. Very few grounds are provided for the wife to make a claim for divorce. These grounds include: A husband with physical defects or skin disease, a husband not fulfilling his conjugal responsibilities, etc. The court might support the wife's claim to a divorce but it cannot dissolve the marriage. Only the husband can dissolve the marriage. However, if he is stubborn enough, he can refuse to grant his wife a divorce and keep her, without either attending to her marital rights or allowing her a divorce. He has the right to marry another woman and have children from her according to the Jewish Law. The deserted wife, on the other hand, cannot marry any other man

since she is still legally married. She is left as a chained woman. Nowadays, there are approximately 1000 to 1,500 Jewish women in the United States undergoing such a situation, while, in Israel, their number might exceed 16,000. Those deserted wives are subject to blackmail by their husbands in exchange for a divorce.

## Islam

Islam recognizes the right of both partners to end their matrimonial relationship; hence woman has the right to ask for divorce in court in the following cases:

- If her husband refuses to provide for her unless it is due to temporary financial difficulties.
- If her husband is absent without her consent for more than one year, or if he is jailed for a period longer than three years. However, she has the right to claim a divorce after one year of imprisonment.
- If he is not fulfilling his conjugal responsibilities.
- If she loathes life with him because of his harsh temper, ill-conduct, or cruelty.
- For any physical abuse from her husband.
- If she is treated unjustly in case of polygamy.
- If the husband is sterile, and she desires children.
- If he is mentally insane or chronically ill.
- If she can prove to the court that her husband is doing harm (*Idrar*) by drinking alcohol, or abusing her or her family.

In these cases, the Muslim court dissolves the marriage.

Moreover, Islam gives the woman the right to initiate the divorce. This kind of divorce is called *Khul`*. A Muslim wife can never become chained by an offending husband. It was these rights that made Jewish women who lived in the early Islamic societies of the seventh century seek to obtain bills of divorce from their Jewish husbands through Muslim courts. The Rabbis, then, declared these bills null and void. In order to end this practice, the Rabbis gave new rights and privileges to Jewish women, which were not offered to Jewish women living in Christian countries where the Roman law prevailed.

On the other hand, respecting the woman's right to ask for divorce does not contradict the Islamic care for the security and continuity of the Muslim family. Islam forbids woman to ask for a divorce for no reason.

The Prophet (pbuh) said,

*"If any woman asks for divorce from her husband without any specific reason, the fragrance of Paradise will be unlawful to her."*

## **Initiating Divorce**

### **Why is divorce initiated by the man?**

The man is the one in charge of the family and is considered its backbone. He is the one who pays the dowry and what follows, until the family is established. Therefore, it is very hard for him to destroy his family except for strong reasons. A man may be considered more balanced, less hasty and less affected by emotions than a woman who may be guided by psychological states that make her insist upon a divorce that she might regret afterwards. Moreover, it may not be in the parties' interest to leave the divorce to a court to decide because not all the reasons for divorce are meant to be public or a subject of gossip. Islam gives much attention to securing their private life.

### **A woman initiating divorce**

Contrary to the popular myth, divorce is not a male prerogative to be used according to his desires. Islam gives the woman a similar right of initiating divorce as the man. It gives her an opportunity to free herself from the injustice of the husband if she loathes life with him for his ill temper, his misconduct, or for not performing his duties. She could also exercise this right when subjected to physical or financial abuse.

Islam has made several outlets for the woman through which she can overcome her dilemma:

## **Talaq**

A wife may have the right to divorce by ‘*Talaq*’ if this has been agreed upon before marriage and stipulated in the marriage contract. This is eligible according to Abu Hanifah and Ahmad. In the authentic *hadith*,

*“The truest conditions to be fulfilled are those which make it lawful to have physical intercourse.”<sup>1</sup>*

## **Khul`**

It is a type of divorce initiated by the wife in which she can ransom herself from the marriage by repaying what she took as a dowry. It is not fair that she is the one who wishes for divorce and then the husband becomes the only loser.

The Glorious Qur'an says,

*[But if you fear that they may not be able to abide by the bounds set by Allah, there is no blame on either of them if she returns what she has been given. These are the bounds set by Allah, so do not violate them, and if any does violate the bounds ordained by Allah, such are the evildoers.]*

(Al-Baqarah: 229)

This is also highlighted in a *hadith* when a wife came to the Prophet (pbuh) and told him that she disliked her husband and could no longer live with him. The Prophet (pbuh) directed her that she should return the garden to her husband which he had given her as a dowry and thus she will be the one initiating an irrevocable divorce.

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<sup>1</sup> Agreed upon according to `Uqbah ibn `Amir.

Islam gives the woman the right of *Khul'* if she just dislikes her husband whose conduct is good but her feelings disturb their life. As soon as the *Khul'* is granted, the husband loses the right of reunion after the divorce because it has been brought by the wife. However, it is lawful for the two parties to remarry with mutual consent. The waiting period in this case is the same as that in regular divorce initiated by the husband, which is three monthly cycles. However, the scholars Abu Dawud, at-Tirmidhi, Ibn Majah and others related a *hadith* on behalf of the Prophet (pbuh) prescribing only one monthly course for the wife after this kind of divorce.

### **Divorce for physical impotence**

If the husband has a weakness that deprives him from fulfilling his wife's conjugal rights, then the wife has a right to raise the matter to the court and ask for a divorce in order to prevent any harm befalling her.

### **Divorce for the wife subjected to injury**

If the husband induces any harm to his wife physically, financially or even emotionally, she can ask the judge to divorce her.

## **Different Types of Divorce in Islam**

In addition to the types of divorce initiated by woman, there are other types of divorce:

### **1. Talaq**

This is the normal and most common type of divorce initiated by the man. It involves a series of three pronouncements of divorce that should be given under strict conditions. In this type of divorce, the husband is obliged to give his wife all her rights. The wife can use such a type as previously mentioned.

### **2. Mubara'ah**

This is a kind of divorce agreed upon by mutual consent of both parties.

### **3. Li`an**

This is divorce in the case when a husband accuses his wife of committing adultery. In Islamic Law, four eyewitnesses are required to prove such a case. However, if the husband fails to prove it, he must swear by Allah four times that he is telling the truth. The wife is called to admit her guilt or swear four times to her innocence. Both must also invoke divine curses for swearing false oaths. If no proof, for or against, can be brought, the marriage is considered beyond reconciliation and is dissolved.

The Glorious Qur'an says,

*[And for those who launch a charge against their spouses and have (in support) no evidence but their own, their solitary evidence (can be received) if they bear witness four times (with an oath) by Allah that they are solemnly telling the truth.]*

(An-Nur: 6)

#### **4. Divorce through two arbiters when there is a breach between the husband and wife**

The Glorious Qur'an says,

*[And if you fear disunity between them, then send an arbiter from his side and an arbiter from her side, if they wish for reconciliation Allah will effect harmony between them, surely Allah is All-Knowing, All-Aware.]*

(An-Nisa': 35)

The Qur'an, calling for the family to arbitrate, indicates that the two selected persons have the right to judge and decide. That is why enough wisdom should be considered in their selection. Some of the Prophet's Companions said to the arbiters, "If you wish to unite them, then do so, and if you wish to divorce them, then do so."

#### **5. Faskh**

It is an annulment of the marriage contract by a Muslim judge due to the incorrectness of the marriage contract or of one of its conditions.

## **Types of Waiting Period and Their Benefits**

The waiting period or ‘*Iddah*’ is an obligatory period of waiting by the woman before remarriage after the death of her husband or her separation or divorce from him.

### **Benefits of the waiting period**

- In case of divorce, the waiting period is an opportunity given by Islam to the spouses to mend their relationship if it has gone sour. A spell of temporary separation and suspension of conjugal rights may give them both time for rethinking and reconsideration of the interests of the family and children, if any, and allow them to plan for their future and decide whether divorce should be revoked or made final without any pressure.
- The woman remains in her matrimonial home. She is supported, maintained and looked after during that time, so she can make sensible choices without being forced by the fear of poverty. This illustrates that Islam is merciful even in disliked matters such as divorce.
- It is also the same period required to ensure whether a pregnancy is involved or not so that there may be no confusion about the paternity of the child if the woman seeks to remarry. Such a pregnancy might change the partner's decision and serve in reconciliation, as well. The Glorious Qur'an says,

*[Divorced women shall wait concerning themselves for three monthly periods. Nor is it lawful for them to conceal what Allah has created in their wombs, if they have faith in Allah and the Last Day. And their husbands have the better right to take them back in that period, if they wish for reconciliation.]*

(Al-Baqarah: 228)

It also says,

*[O Prophet, when you do divorce women, divorce them at their prescribed periods, and count accurately their prescribed periods; and fear Allah your Lord; and turn them not out of their houses.]*

(At-Talaq: 1)

### **Different kinds of waiting periods**

The duration of the waiting period differs according to the situation of the woman involved. The different kinds can be summed up as follows:

1. Divorced women who still menstruate must wait three monthly periods (i.e. three menstruations). The Glorious Qur'an says,

*[Divorced women shall wait concerning themselves for three monthly periods.]*

(Al-Baqarah: 228)

2. Divorced women who have passed the age of menstruation must wait three months only (and not three monthly periods). The Glorious Qur'an says,

*[Such of your women as have passed the age of menstruation, for them the prescribed period, if you have no doubts, is three months.]*

(At-Talaq: 4)

3. Women whose husbands have died (i.e. widows), whether they still menstruate or have passed the age of menstruation, must wait for four months and ten days.

The Glorious Qur'an says,

*[If any of you dies and leaves widows behind, they shall wait by themselves four months and ten days.]*

(Al-Baqarah: 234)

4. Pregnant women, whether divorced or widowed, must wait until they deliver the child.

The Glorious Qur'an says,

*[For those who carry life (within their wombs), their period is until they deliver their burdens.]*

(At-Talaq: 4)

Some scholars like Ibn `Abbas said that since Allah has made it obligatory for widows to wait for four months and ten days, and the specified period for the pregnant woman lasts until she delivers her child, it follows that she should wait the longer period of both cases. That is if she gives birth before the 'four months and ten days', she should wait till that period ends. However, according to Imam ash-Shafi`i, the Prophet (pbuh) said to Subay`ah, daughter of al-Harith, who gave birth to a child a few days after her husband's death, "*You are lawful (for marriage) and you may get married.*" This indicates that the waiting period, whether in the case of death or divorce, was intended to bind women who are not pregnant. But if they were pregnant and delivered their babies, the waiting period would drop.

5. Women whose marriages have not been consummated have no waiting period.

The Glorious Qur'an says,

*[O you who believe! When you marry believing women, and then divorce them before you have touched them, no period of 'Iddah' (waiting period) have you to count in respect of them.]*

(Al-Ahzab: 49)

6. In the case of *Khul`*, a type of divorce initiated by women, the majority of Muslim scholars state its waiting period is the same as that in divorce. However, Abu Dawud, at-Tirmidhi, Ibn Majah and others related a *hadith* on behalf of the Prophet (pbuh) prescribing only one monthly period (i.e. one menstruation) as a waiting period for the wife after divorce, and `Uthman, the second Caliph, decided a case in accordance with this.

## **The Waiting Period for Christian and Jewish Women**

### **For Christian women**

- **Article 25/26 from the Orthodox Coptic Scripture mentions:**

“The widow or the divorced woman doesn’t have the right to arrange another marriage contract except after a period of complete ten Gregorian months from the date of the husband’s death or the termination of the marriage contract. This period is considered finished if the woman gave birth after the husband’s death or the contract termination. The Ecumenical Council has the authority to decide to shorten this period if it was materially proven that the husband didn’t have intercourse with his wife since ten months.”

The duration of the waiting period is full ten Gregorian months starting from the date of the husband’s death or the termination of the marriage contract (including the cases of the ineffectiveness of marriage and the divorce initiated by the wife). In case the woman is pregnant, her waiting period ends by parturition.

This is permitted for the wife regardless if she is still in the age of menses, or even in case of pre-menses age, or in the menopause age, or for any other causes.

The court can decide to shorten the waiting period in case of the woman who is not pregnant to eight or nine months, for

instance, instead of ten, if it was proven critically and materially that the husband did not have any intercourse with his wife during a specific period prior to the death or the contract termination. Yet the court in that case should consider that the total period before and after the death or the termination should reach ten complete Gregorian months.

- **Article 12 of the Armenians Orthodox Law states:**

“It is not permitted for the woman whose marriage contract has been terminated to sign a second marriage before a period of three hundred days from the date of the termination.”

Yet, this period can be shortened in case the woman delivered her baby after the husband’s death, the marriage termination or when materially proving the impossibility of having marital intercourse due to the absence of the husband.

- **Whereas article (3H) from the Roman Orthodox group states:**

“The woman should have a waiting period of ten complete Gregorian months in case the marriage has been ineffective through divorce or termination or death of the husband.”

Their laws do not mention any item that permits the shortening of that period contrary to the Coptic and Armenians. It only mentions that if the wife was pregnant and had the delivery, there is no reason for the confusion of blood relations, and therefore the waiting period normally ends by the delivery process at any time after the end of the marital relation.

The ten months prescribed for the woman can be considered a waiting period for the widowed as per this sect parallel to the laws of the Copts and Romans.

### **For the Catholics and Protestants**

Matters are mostly different with the Catholic and Protestant sects. The woman does not need to wait for any period of time after the end of her first marriage in case she desires for a new husband.

### **For Jewish women**

The waiting period is considered an obstruction from marriage for the Rabbins and other Jewish sects. A woman must conform to the waiting period if her prior marriage has been broken and she is not permitted to marry except after the end of the waiting period in order to ensure the emptiness of the womb.

- **Article 49 from the Ibn Shamon collection states:**  
“The divorced or the widowed woman cannot get married except after the end of her waiting period which is ninety-two days including the day of divorce or death, whether young or old, staying with her husband or separated even if the marriage was not consummated”.
- **In Article 50 from the Ibn Shamon collection:**  
“There is no difference in the duration of the waiting period for a widow or a divorcee in contrast to the Islamic legislation”.

## **The Husband's Waiting Period**

### **Christianity**

For the Syrian Orthodox, they identify the time limit of mourning in the case of death, not only for the woman but also for the man. The period of grief is ten months for the woman and forty days for the man if necessary, but it's preferable for the man not to marry before a period of five months from the date of his spouse's death.<sup>1</sup>

Since the husband is forbidden to be polygamous under the Civil Law, he has to wait until all the divorce procedures have been accomplished before remarriage.

### **Judaism**

Principally the waiting period is considered an obstruction to marriage for women not men, as a precaution against flawed mixing or confusion in blood relations. Yet, the Rabbinical Jewish legislation has obligated the waiting period on men in some cases.

- Article 71 from the Ibn Shamon collection forbids the man to marry for a certain time in case of the death of his wife as a sign of his mourning. According to this article, man is forbidden to marry in that case "before the end of three feasts excluding the Forgiveness feast".

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<sup>1</sup> (M12/ 7<sup>th</sup> of their collection).

- Yet, article 72 states that the legal authorities can permit the man to marry before the end of that period “in case there’s a necessity for urgency without waiting”, a rule that varies from one case to another whereas the opinion of the legislation authorities is the final in that condition.

## **Islam**

In Islam, a man who has less than four wives is generally allowed to marry any time he decides with no constraints regarding a waiting period, whether he is a divorced or a widower. However, certain cases require a waiting period from the husband’s side after divorcing his wife and marrying another one. Among these cases is that when he desires to marry one of his wife’s sisters or aunts after divorcing her, he must wait until the waiting period of his wife ends unless the divorce is irrevocable (i.e. it is the third divorce) or his wife dies. Similarly, if he has four wives, he cannot divorce one wife and marry another woman while the divorced wife is still in her waiting period, unless the divorce is irrevocable.

In addition, in times when concubinage prevailed, it was forbidden in Islam that a man takes a concubine as a wife when he is already married to a free woman. This prohibition comes out of Islam’s respect for the free woman’s dignity, which will be affected and hurt, on equalizing her state to that of a concubine. It has to be noted that when the situation is reversed and the husband desires to marry a free woman after having a concubine as a wife, no prohibition occurs. The Glorious Qur'an says,

*[If any of you have not the means wherewith to wed free believing women, they may wed believing girls from among those whom your right hands possess: And God hath full knowledge about your faith. Ye are one from*

*another: wed them with the leave of their owners, and give them their dowers, according to what is reasonable: they should be chaste, not lustful, nor taking paramours.]*

(An-Nisa': 25)

## **Relationship Between Ex-spouses After Divorce**

Divorce in Islam does not deprive the divorced woman from any of her rights. She is financially supported during her waiting period. Her husband is not allowed to dismiss her from her home; he should let her stay in their matrimonial home with him as an attempt toward reconciliation.

In addition, divorce in Islam does not allow the husband to take back his wife's dowry or any gift given to her. The Glorious Qur'an says,

*[The parties should either hold together on equitable terms or separate with kindness. It is not lawful for you (men) to take back any of your gifts from your wives.]*

(Al-Baqarah: 229)

On the contrary, the divorced woman has the right of 'Mut`ah' which is a sum of money given to her rather than on-going maintenance to compensate her.

Moreover, Islam protects the members of the family even after divorce by keeping the reasons and causes behind the divorce concealed among the couple or eventually within the family. Unlike the Westerners, there is no need to resort to the court to end the marriage except in cases where problems occur.

Islam not only preserves the secrets of the married couple but also forbids the divorced man to spread rumors about his

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ex-wife, to scandalize her, or to offend her or her family after divorce.

Moreover, the husband is forbidden to interfere if his ex-wife wishes to marry someone else. The Glorious Qur'an says,

*[ ... and when you divorce women and they have reached the end of their waiting term, hinder them not from marrying other men if they have agreed with each other in a fair manner.]*

(Al-Baqarah: 232)

### **Maintenance after divorce**

The husband's responsibility for the maintenance of his wife and children does not only apply when they are living with him, but continues in the event of divorce. A wife must be provided for on the same scale as her husband, according to his state. There may still be hope of reconciliation, and even if there is not, the parting must be honorable.

The Glorious Qur'an says,

*[Lodge them (the divorced women) where you dwell, according to your means, and do not treat them in such a harmful way that they be obliged to leave. And if they are pregnant, then spend on them till they deliver. Then if they give suck to the children for you, give them their due payment, and let each of you accept the advice of the other in a just way. But if you make difficulties for one another, then some other woman may give suck for him (the father of the child). Let the rich man spend according to his means, and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him. Allah will grant after hardship ease.]*

(At-Talaq: 6-7)

In the case of pregnancy, the Glorious Qur'an imposes additional responsibility. No separation is possible until the child is born. Hence, the wife must be properly maintained. As for the child, its nursing, welfare and similarly the care for the mother, they remain the father's duty. If the mother's milk fails, or if circumstances arise which prevent the natural course of the mother nursing her child, it is the father's responsibility to pay the expenses of his suckling and nursing by someone else. However, this must not induce the father to stop the reasonable maintenance to which the mother is entitled. Both father and mother must conclude all the arrangements for the maintenance of their children by mutual consent. They must agree on the period before weaning, his clothing, his education and general care. The Glorious Qur'an says,

*[Mothers shall give suck to their offspring for two whole years, if (the father) wishes to complete the term, but he shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child, nor father on account of his child, and on the (father's) heir is incumbent the like of that (which was incumbent on the father). If they both decide on weaning by mutual consent (and after due consultation) there is no blame on them. If you decide on a foster-mother for your offspring, there is no blame on you, provided you pay (the mother) what you offered on equitable terms. But fear Allah and know that Allah is All-Seer of what you do.]*

(Al-Baqarah: 233)

## Child Custody After Divorce

According to the Islamic *Shari`ah* and contrary to the common practice in some countries, the husband is not always the only one to have custody of his children after divorce. It is the wife who is given priority regarding custody of children in many cases, in accordance with a *hadith* narrated by `Amr ibn Shu`ayb, in which he said that a woman came to the Prophet (pbuh) and said, "Truly my belly served as a container for my son here, and my breast served as a source of nutrition and refreshment for him and my bosom served as a refuge for him; and now his father has divorced me, and he (also) desires to take him (away from me)." The Prophet (pbuh) said, "*You have a better right to have him as long as you do not marry again.*"<sup>1</sup>

We would like to point out, however, that the decision as to the custody of the children has to be evaluated by a personal status court, which considers the particular circumstances surrounding the family and the children's welfare.

In the Maliki juristic School, this rule is systematized to give priority in custody of children to the mother before it could be claimed by the father. This custody lasts until puberty for a son and until marriage for a daughter, while the financial responsibility for their maintenance remains with their father.

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<sup>1</sup> Reported by Ibn Majah.

The knowledge of the necessity of separation from his children must certainly act as a reality check when a husband is indiscriminately deciding to divorce his wife.

## **Divorce Compensation (*Mut`ah*) According to Egyptian Laws**

### **Wife's right of maintenance after divorce**

The amount of money compensation allocated for the wife when she gets divorced, in addition to other rights stipulated in her marriage contract, is an arguable issue. Do all wives deserve to receive such compensation regardless of the reason for divorce? What are the conditions for attaining it? Are there cases where wives are excluded? What are the conditions that make a wife excluded from taking it? Does the obligation of divorce compensation comply with the law of Islamic jurisprudence as the main source of Legislation? Is the obligation stipulated by the *Shari`ah* itself?

### **The constitutional status of the divorce compensation**

Originally, stipulating the divorce compensation legislation is derived from and based on the Qur'anic texts mentioned in multiple cases, among which are:

*[For divorced women Maintenance (should be provided)  
on a reasonable (scale). This is a duty on the righteous.]*

(Al-Baqarah: 241)

The main reason behind imposing the Divorce Compensation is to take a preliminary action towards soothing the feelings of the divorced wife, as material compensation and sustenance for her alleviate a very slight part of the negative impact of divorce on her. In addition, as

the husband is the one who pays the compensation, it detains him from rashness in making the decision of divorce.

### **Divorce compensation according to different scholars**

The Shafi'i School stresses the divorce compensation as obligatory if the demand for divorce was not from the wife's part or as a result of her. The same idea is shored up by great scholars like Imam ibn Hanbal, Ibn Taymiyah, some scholars of the Zahiri School, and one of the opinions of Imam Malik.

The other schools adopt a similar opinion in reference to divorce compensation: Paying divorce compensation is desirable to the divorced wife whose marriage has been consummated, yet does not rise to the level of obligation.

The law encouraging the divorce compensation is based on its strong source basis derived from the Islamic legislation, which totally conforms to the spirit of the social unity and integration prevalent in Islam.

### **An innovation in the Egyptian law<sup>1</sup>**

Egyptian laws have included a new item in the law of the divorce compensation for the first time in the Social Affairs Law no. 100 for the year 1985, article 18 and the Social Affairs Law no. 25 for the year 1929 added to the mentioned law, states that, "If The wife whose marriage has been consummated within a complete rightful marriage, is divorced by her husband against her free will and she is not the cause of divorce, she has the right to receive the waiting period compensation from him in addition to a minimum two-year

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<sup>1</sup> *Al-Ahram* newspaper, 17<sup>th</sup> February, 2001, p. 28, '*Al-Mut`ah Li-Man*', by `Abd al-Mun`im Is-haq

compensation, in consideration of the husband's financial capabilities, the divorce conditions and the duration of marriage.”

The law allowed the husband to pay the divorce compensation at intervals.

### **The conditions by which the divorced wife is allowed to receive divorce compensation**

- 1) The divorce must have taken place after the marriage has been consummated. Hence, the wife whose marriage is only contracted on paper without consummation is excluded from the right of receiving the divorce compensation.
- 2) The divorce takes place in a contracted legal marriage. Thus, the wife is excluded from receiving the divorce compensation in case of illegal marriages, i.e. the husband is found to be a breast-fed brother to the wife, or if the wife is found to be married to another husband at the time of her current marriage, or if she has been married to a previous husband and consummated the second marriage without waiting for her waiting period from the ex-husband to end, etc.
- 3) The divorce should not be done due to the wife's request or desire unsupported by acceptable reasons. However, if the court, based on the given testimony and evidence and based on the investigations made, found that the wife's bad behavior or misconduct toward her husband is the reason behind the divorce or the husband's resorting to the divorce as his sole refuge to escape her continuous insults and misbehavior towards him, in this case the wife is found not eligible for receiving the divorce compensation.

### **The period of the divorce compensation**

The minimum time period of the divorce compensation is two years, whereas it does not have a maximum time limit.

### **The divorce compensation when divorce is obtained through a court verdict**

According to some scholars, the wife is not liable to the divorce compensation, in case she went to the court to ask for divorce and the court declared the verdict of divorce to her. Their opinion depends on the reason that the divorce in that case is obtained by the court and not by the husband himself. Moreover, it shows that the divorce took place due to the wife's request, desire, and acceptance; hence, she is not eligible to receive the compensation which is due only in case the husband issues the divorce willingly.

The Court of Cassation rejected this reason and stipulated the right of the divorced woman to receive divorce compensation even if she is the one who requested the divorce, which was sentenced by a court verdict and not given by the husband himself. This adopted view is more logical because:

1. It is based on the Hanafi School's reasoning which states that even if the divorce is obtained by a judge, it is considered done by the husband himself. Hence, the divorced wife has the right to receive the divorce compensation, whether done by the husband himself or sentenced by the court on behalf of the husband.
2. This view considers that the wife is pushed to request the divorce because of her husband's mistreatment and harm befalling her. When proofs are being obtained to show the husband harmed his wife and that such harm pressed her to request divorce as a means to alleviate it, hence, voluntarily granted divorce is not the case here.

## **Divorce in the Light of Jurisprudence & Egyptian Judiciary Views**

In Islam, woman has the right to divorce herself through what is called “authority to issue the word of divorce.” This method was even known in the Pre-Islamic era (*Jahiliyyah*). As an example, it was reported that Maria bint `Afr divorced her husband Hatem at-Ta'i due to his excessive generosity to people while leaving his children with no sufficient support.

Divorce is permissible in Islam for the couple when the gap between them is too wide and beyond reconciliation. On the other hand, Islam limits the abuse of divorce by setting a number of conditions and regulations controlling the process of divorce.

### **Rulings pertaining to divorce when uttered by a man in different states, in the light of jurisprudence and Egyptian judiciary views**

- Two opinions for the Islamic scholars regarding the effectiveness of the divorce uttered by a drunk man<sup>1</sup>:
  - An opinion says that divorce in this case is not effective. It is related on behalf of `Uthman (may Allah be pleased with him) that he said, "All Divorces

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<sup>1</sup> Mustafa al-`Adawi, *Jami` Ahkam An-Nisa'*, Ibn `Affan Publication House.

are allowed except the divorce of the drunk man or the insane."<sup>1</sup>

- Another opinion says such divorce is effective. Ibn Abi Shaybah said, "It is related on the authority of ibn Mahdi, from Hammam, from Qatadah, from Hamid ibn `Abd ar-Rahman who said: The divorce of the drunk man is allowed."<sup>2</sup> Yet, the item in the first article of the Law 25 for the year 1929 states, "The divorce of the drunk man and the involuntary (one) is not effective."
- Rulings pertaining to divorce when uttered by a man in a state of rage:

Divorce in that case is not effective because the man is in a state of uncontrollable emotional condition. It was reported that the Prophet of Allah (pbuh) said,

*"Neither divorce nor setting slaves free is (effective) when (the doer is in a state of) rage (out of absolute anger)."*

The Egyptian House for Fatwa decided that if the man (who utters the word of divorce) is in a state of extreme fury to the extent of being unaware of what he says or does, his divorce is not effective due to the temporal insanity / incapacity.

In case fury did not reach the above-mentioned extreme limits, one revocable divorce is considered effective, unless this divorce is not the third one (*Fatwa* dated 03/10/1936).

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<sup>1</sup> Sahih on the authority of `Uthman.

<sup>2</sup> *Al-Musannaf*, vol. 5, p. 38.

- Ruling pertaining to the word of divorce when uttered by the Insane:

The majority of Scholars sees that such a divorce is effective. Article 217 of the personal status law reads,

"The husband, alone and apart from the wife, has the authority to break the rightful marriage contract by divorce. Divorce is effective when it is uttered by the husband as considered sane, even if he was under legal custody due to insanity, or disease or mental retardation or compulsion or jesting."

### **Cases that make the divorce effective**

1. The clear direct verbal utterance of the word.

Ruling: makes the divorce effective even if unintentional.

2. The written wording of divorce:

Ruling: Scholars differ about the ruling of the written clear wording either to be treated as a revocable one (by which the husband can retain his wife again, unless it is the third divorce) or to be treated as a Final one (irrevocable).

The law 25 for the year 1929, article 4, discusses references or insinuations to divorce: "Any statement that gives the meaning of divorce or the like does not make divorce effective unless it bears the intention of divorce."

### **Is witnessing a condition for the consummation of the divorce?**

The consensus of scholars views that divorce becomes effective without the need to either witnesses or intention. Another group considers witnessing mandatory for the

consummation of divorce based on the words of Allah, the Almighty:

*[And take for witness two just persons from among you (Muslims). And establish the witness for Allah.]*

(At-Talaq: 2)

Law 1 for the year 2000 in the revised law 21 states, "In case of denial, divorce is proven only through witnessing, documentation, etc."

### **The wording of the divorce**

- Is the pending divorce effective or not?

Law 25 for the year 1929 reads, "Unestablished divorce is ineffective only in case the intention is to threaten or press the mate (wife) to do something or to refrain from doing something."

It is also stipulated that (the husband is the evaluator of his intention, and defining the intention is being left to the responsibility of the one who swears an oath of truth and he is solely responsible for it in front of Allah).

- Divorce post-dated for the future:

In this case, the husband says to his wife "you're divorced tomorrow or in the beginning of the next year."

Divorce here is considered effective on two conditions:

1. The date mentioned for divorce must come.
2. That the woman should be married when the defined date comes.

It becomes effective on the coming of the date mentioned by the husband, because the husband's intention is to divorce

his wife after long period, so he's treated as per his own intention.

Ibn Hazm, the great Muslim scholar, said that divorce in that case is not effective. He based his view on the fact that the Qur'an and *Sunnah* of the Prophet (pbuh) did not mention the consummation of divorce by postdating and Allah, the Almighty says,

*[And whoever violates the limits of Allah so he had oppressed himself.]*

(At-Talaq: 1)

The stipulation of the Egyptian Law Court: "Post-dated divorce is effective when the mentioned time comes, on condition that the husband can make a divorce on the time of saying it." (Appeal 29 for year 1945, session dated 05/05/1977)

- Divorce by choice or delegation:

The Messenger of Allah (pbuh) asked his wives to choose either to get a divorce or to not. They chose to remain as his wives so he didn't give them divorce. This is the divorce of choice type.

The divorce by authorization is when the husband tells his wife "I authorize you to decide your own situation by your hand." If she answered "Then, I'm divorced," the divorce here is effective as one revocable divorce.

- The Sunni divorce:

It is to give the wife a divorce while she is maintaining her state of purity without having any intercourse with her husband.

Ruling: if the woman is divorced during her menstruation period, her waiting period does not exceed the prescribed waiting period.

- The prohibited divorce:

However it is contradictory to the religious legislation, it is considered effective in the following cases:

1. When the husband divorces his wife while she is having her menses or post delivery period, or if she is in a state of purity in which he had intercourse with her.
2. When the husband divorces his wife three times at one sentence or in three successive declarations at the same time.
3. The prohibited divorce is similar to the Sunni one in view of the scholars as both are effective.

- Is the divorce of a pregnant woman effective?

Divorce is allowed to the pregnant woman at any time.

- Divorce of a husband for not maintaining his family:

The three major Scholars (Malik, ash-Shafi`i and Ahmad) consider that the wife whose husband doesn't maintain her has the right to ask for a divorce and the judge should fulfill her request the moment her claim is proven authentic. As evidence to their point, they used the legitimate ruling of the Prophet (pbuh) in his saying that "Neither (one should) inflict harm nor accept it," as exhibited in the cases:

1. When the husband is absent from home and doesn't send money to his family.
2. When the husband is imprisoned or is financially incapable.

3. When the husband is absent and lives in a distant country, inaccessible place, unknown or isolated area, or if he is absent and there is no news of him. In this case, the Judge should give the wife a divorce directly without accepting any excuses (from the husband) nor postponement (article 6 from the law 25 for the year 1920 stipulates on the divorce of the wife for not being maintained by her husband a revocable divorce. The husband can retain his wife to the marital bond if proven responsible and capable.

- Divorce for flaws or diseases:

1. The wife has the right to request a divorce when any kind of harm is proven to befall her due to a certain illness of the husband which caused his incapability of fulfilling the marriage duties.
2. In case the husband suffers from impotence or insanity or has long lasting infectious contagious skin diseases.

- Divorce for harm and ill-treatment:

When the wife suffers from her husband's severe beating or when he forces her to commit an illegal act whether by action or words. In this case, the divorce is irrevocable.

- Divorce of the spouses for absence:

The limit by which the husband is considered absent is one year if he is in a known place, and he should be notified of the necessity to return.

The Hanbali scholars see that the limit by which the husband is considered absent is six months.

Article 12 from the law 25 for the year 1929 stipulates, "If the husband is away from his wife for a period that causes

harm to her and in which she fears to be swayed towards a sinful path, in this case the divorce is irrevocable."

### **The conditions of the law**

1. When the husband is absent for an unaccepted reason.
  2. When the wife is inflicted by harm due to the husband's absence.
  3. When the husband is absent and resides in a country other than the one where his wife lives in.
  4. When a year or more passes without the return of the husband to his wife.
  5. The husband should be notified of the time limit by which he must return, whether he should let his wife move to his residence or return to her residence, or to divorce her.
- Divorce for the imprisonment of the husband:
    1. Article 14 for law 25 for the year 1929 stipulates: "The wife of the one, who is imprisoned in jail due to a final court verdict for a period of three years or more, has the right to request divorce from him after one year of his imprisonment, an irrevocable divorce for the harm inflicted upon her.
    2. The wife doesn't have the right to ask for divorce if the time verdict in jail for her husband is less than three years.
    3. The husband should stay one year in prison (before the process of divorce) similar to the case when the husband is absent for an unknown reason.
    4. The law doesn't set a certain category of crimes for the imprisoned husband required to process the divorce nor condition that the verdict should be final.

- Does the detainment of the husband give the wife the right for requesting divorce?

If the husband is in custody through an emergency type of authority without knowing how long he will stay in jail, the wife has the right to ask for divorce in court after one year of the custody. Whereas if the husband is set free (during this period) the divorce request of the wife to be rejected.

- Divorce for the second marriage of the husband:

While sealing the marriage contract, if the wife stipulates that her husband is not allowed to marry another woman, or else the marriage contract will be terminated. In case the husband breaks that condition, she has the right to ask for divorce and the marriage contract is considered terminated.

Article 11 (B) from the law 25 for the year 1929 and law 100 for the year 1985 stipulates, "The husband to certify in the marriage contract with his marital status, if married, and should include the wife's or wives' names, their residence addresses, whereas the person certifying the contract must notify them with his new marriage with a registered mail letter."

The wife of a polygamous husband has the right to ask for divorce if a financial or emotional harm befalls her and due to which the continuation of the marital relationship becomes impossible, even if banning him from having another wife is not stipulated in the marriage contract. In this case, the judge gives her an irrevocable divorce if his attempts to set their marital relations back to normal failed.

The wife's right to ask for divorce is void if one year time passes from her notification of her husband's second marriage without her complaining during that period.

In case the new wife didn't know of her husband's prior marriage before she got married to him, she has the right to ask for divorce.

If the wife sues for divorce due to the second marriage of her husband and the husband denies, she should prove her husband's marriage to another woman whether it is official marriage (documented) or an unofficial one (secret or '*Urfi*' marriage).

- Divorce for Desertion:

Desertion by the husband is the worse type of harm that is inflicted on the wife because in this case the wife's state is pending, neither enjoying her marital rights nor considered unmarried which imposes her to the possibility of falling into sin.

The least period of desertion which the wife can ask divorce for is six months, which is the opinion of Imam Ahmad ibn Hanbal, because it is the maximum period that a wife can stay away from her husband.

Article 6 from the law 25 for the year 1929 revised by the law 100 for the year 1985 states, "If the woman claims that harm befalls her, the judge should give her an irrevocable divorce."

## **Advice for Divorcees**

1. Divorcees whether husbands or wives, should be very conservative and should never revealed any of her ex-partner's secrets or backbite him.
2. No one around has the right to know the true cause for the divorce. Divorcees should only say that they did not get along with each other and that their divorce is Allah's Will.
3. They should never forget that they are Muslims and have the bond of brotherhood in Islam. Accordingly, they should forgive each other and forget any hatred feelings.
4. Respect should be kept between both ex-partners especially if they have children.
5. Rights should be preserved after divorce. For example, the ex-husband should pay the divorce compensation and the children expenses.