

## Divorce Foreseen in Islamic Sharia Law

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### Abstract

The Islamic law doesn't prohibit strictly the divorce, because doing so would be contrary to human nature and its spirit of marriage, but also not exactly liberal on the issue of divorce, this conclusion can be prepared by saying of the Prophet Muhammad who said: "by lawful things more hateful to God is divorce." So, we realize that Islamic law has an average attitude regarding the issue of divorce.

Instead of seeking the impossible or the intolerable, Islam took a stand that is characterized by some scholars in different ways, as "weak" and liberated, "rude", or as demure and perfect, from others. Divorce or resignation in Islam is spread along a continuum that surrounds all floors religion - legal listed categories ranging from one extreme to the other ordering detention. For example, divorce is necessary where there is no conceivable way for reconciliation or hope for peace between the parties. It is highly advisable or even mandatory if a woman is unfaithful or indifferent or oblivious to her religious duties. Divorce is legally and religiously prohibited during monthly period of the woman and also during a time when it was committed relationship. It is quite undesirable or even prohibited divorce becomes when there is no good reason for that, because it would be harmful, while Muslims and their religion forbids them to harm or to hurt each other. Finally, divorce is permissible when there are grounds to sound as repeated disregard or failure in meeting the goals of marriage.

In the Qur'an it is stated that a man must go well with women in marriage, even if they do not like something to their wife's. If so, what is tolerant husband wife dislikes, according to what is stated in the holy book of Muslims, the Lord has given something like this a great boon for the couple.

**Keywords:** *Islam, Qur'an, divorce, family, divorce methods.*

### General overview of divorce

The Islamic law did not strictly ban the divorce, because it would have been in contrary to human nature and its spirit of marriage, but also it was not exactly liberal on the issue of divorce, which conclusion can be drawn from a saying of the Prophet Muhammad, who said: "*Of all the things permitted in law, divorce is the most hateful thing in the Sight of Allah.*" Thus, we realize that Islamic law has an average attitude regarding the issue of divorce.

Islam has taken an average attitude between the categorical prohibition and unskilled liberalization of divorce. Islam neither settled this practice, neither ignored its reality and its appearance. A complete prohibition would certainly remain as "ideal" or simply as a state of mind, but hardly as an example for actual behavior, because the absolute self-control is not always attainable. In that case, that kind of prohibition would be incompatible with Islamic ideology, which, in terms of principle, determines only what is achievable in human ways. At the other side, any unregulated liberalization of divorce is socially unconceivable and probably would result in chaos, risk and features that are as destructive as they are unbearable. Instead of searching the impossible or the unbearable, Islam took a stand, which, by some researchers, was characterized in various ways, such as "weak" and released, "rude" and unstinting, or as restrained and perfected from the others. Divorce or resignation in Islam, is distributed along a continuity that surrounds all religious-legal categories, ranging from one extreme ordering, to the other of banning. For example, divorce is necessary where there is no conceivable way or hope for reconciliation of spouses. It is a lot advisable, or even obligatory if the woman is unfaithful or negligent or inadvertent to her religious duties. During the woman's monthly period and during the time when it is committed to a relation, divorce is legally and religiously prohibited. Divorce is quite undesired or even prohibited, when there is no good reason for it, because it would be harmful, while their religion forbids Muslims to harm or injure each-other. At the end, divorce is permitted

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when it has solid grounds, as it is the repeated neglect or the failure to fulfill the purposes of marriage.

There are certainly many reasons for secession of marriage, as much as there are reasons for its contracting. Those reasons are multiple and different.<sup>166</sup> If between the spouses harmony, love, easement and mercy are not dominating, than God allowed divorce as the best solution. This is done in order of the spouses to not spend a gloomy life and with permanent problems. Islam has in consideration divisions, disagreements and mistakes that can arise between the spouses, which is why it allowed the divorce, which responds to all classes, types and traditions of the people. If divorce would be forbidden, than each party would subject to suffering and permanent problems. Respectively, in those cases, women would be most harmed. So, Islam allowed divorce for the spouses, where among them is concluded that in absence of genuine love and spiritual resting, cannot be achieved the ultimate goal. In this case willingly comes to divorce, without having to intrude or to intervene judge.<sup>167</sup> Under Islamic principles, marriage is considered and ordered to be permanent, but at the same time those principles do not foresee marriage as a prison, as a labyrinth from which can only come up killed or dead.<sup>168</sup>

In the Qur'an it is stated that, a man must go well with women in marriage, even if they do not like something about their spouses. So, if the husbands endures what he does not likes about his wife, according to what is stated in the Holy Book of Muslims, and in something like this God has given such a great compassion for the couple. When people do not have the same limbs and bodies, they have also different spiritual world and wishes. Neither the wife from the husband, neither the husband from the wife should not require from other party to have the same opinion as his own. Agreement and satisfaction arise with sacrifice, and only by sacrifice can be continued.

### Types of divorce

Sometimes the conflict cannot be avoided, even though are done efforts with good intentions. In this case, the family and the house turn into real hell. Such concern caused to the human being, does not coincide with mercy. In the holy book of Muslims - the Qur'an, after highlighting the measures and methods for reconciliation of spouses, appointment of arbitrators and then their work, it is said:

*„ But, if they separate from each other, Allah will enrich with His goodness each one of them. Allah is Great Generous, omniscient ”.*<sup>169</sup>

Considering Sharia Law as most advanced of all the religious laws, I am doing an extensive explication about the dissolution of marriage regulated by this religious law.

The expression “divorce” - Et-Telak in Islamic law means the termination of the contract of marriage through a concrete or implicit act.<sup>170</sup>

The lawyers of Islamic Sharia law, had divided divorce into two types:

➤ *Divorce with the right to take back the wife-* is a type of divorce which does not avoid the provisions that regulate the marriage community and neither suspends the right of the spouse. Marriage still continues to remain, while the wife (divorced) is in *iddah* period (waiting days)<sup>171</sup>, and the husband should take his wife back, before the period expires. If the husband does not take his wife back within *iddah* period, then the woman is

<sup>166</sup> Ibid, pp.224

<sup>167</sup> Islam the screening of secrets did not left in the hands of the judge, which usually occurs in legal positive systems. Did so for many reasons, and above all, for non disclosure of household secrets in the presence of the judge.

<sup>168</sup> Grup autorësh, E drejta familjare në Islam, Shkup 1996, pp. 303.

<sup>169</sup> Kurani 4:130, Translation of this verse is taken from h. Sherif Ahmeti, KUR'AN-i, Translation with commentary in Albanian, Medine 1413 h. (according to the Islamic calendar).

<sup>170</sup> Grup autorësh, E drejta familjare në Islam, Shkup 1996, pp. 299.

<sup>171</sup> Once the separation process takes place, there exists a waiting period or probationary period, which normally lasts 3 months, during which the divorced woman is still maintained and supported by her ex-husband. She is not allowed to marry once again, before this period exceeds.

divorced from her husband, in which case the husband does not have the right to take her back, except with the prior consent of the woman and establishing a new legal contract. This type of divorce can be done with words that contain obvious significance for divorce, such as "You are divorced", or "I have divorced you".

➤ *The final divorce* is another type of divorce which is predicted by the Islamic rights and which is divided into two categories<sup>172</sup>, for which we give the following clarifications:

✚ If the period *Iddah* exceeds to the divorced woman with the right to return and her husband does not take her back, or divorces her again after he has returned her, then this type of divorce becomes a small divorce, which means that the husband does not have the right to return again the woman without a new contract. Before repeating the new contract, their meeting and staying in the desert is prohibited.

✚ If the husband does not take his wife back, after issuance of the type mentioned above, and while passing the period *Iddah*, or he returns her twice and divorces her again, or if in an assembly the husband repeats three times the phrase: „Divorced”, even with a sign that gives a meaning to divorce three times, for example he repeats her three times that she is released, or while he says her that she is released, he raises three fingers of the hand, then this divorce is considered final divorce.<sup>173</sup> This type of divorce does not allow recovery, even with a new contract. In this case, the return can be expressed only after the released woman, marries for the third time and put crown with another man with which she has complete sexual relations and if she is released even by this husband, only after the *iddah* period expires, the previous husband can return her, even if she wants to turn back with her own free will.

This is according to the Qur'an quotation: "And if he (the husband) releases her (for the third time), then after that (the release) it is not allowed, until she marries another man. And if he (the second husband) releases her, then for those two, if they think that they will implement the provisions of Allah, there is no obstacle to return (in marriage). These are the limits of Allah which He explains to those who understand."<sup>174</sup>

### **Manners of divorce according to Islamic law**

Divorce can be expressed in two manners or forms: a) through the expression that directly signals the complete separation, and b) through allegorical or indirect expression.

#### a) The direct manner of divorce

If the separation or the release is expressed directly, in this case divorce is effective, even if that is done without any reason. This means, if the husband says to his wife: "You are divorced!" even though in this case there is not any reason for it, divorce is considered effective. In this case, if this subject is reviewed in court, despite the efforts of the husband to clarify that he had not intended to divorce, the judge won't accept this and he will separate them, of course if the woman manages to prove the words with which her husband expressed divorce.

#### b) The indirect manner of divorce

At the other side, divorce can be achieved even if it is expressed allegorically or indirectly. Let us suppose, the phrase: "Go to your family", although at the first sight this means something else, if it is expressed with nervousness or arrogance, essentially it means an intention for divorce<sup>175</sup>. So in this type of divorce, it is viewed also the purpose of man.

### **Operational elements of divorce**

<sup>172</sup> Ibid, pp. 272.

<sup>173</sup> Grup autorësh, mentioned above, pp. 309-310.

<sup>174</sup> Kurani, Translation of this verse is taken from h. Sherif Ahmeti, KUR'AN-i, Translation with commentary in Albanian, Medine 1413 h. (according to the Islamic calendar), Chapter el-Bekare, verse 230.

<sup>175</sup> Grup autorësh, mentioned above., pp. 311-312.

It is certainly a serious misunderstanding to say that divorce is a right that belongs to the husband only, as it is understood by some Western and especially the Muslim feminists. Also, it is a misunderstanding to be considered, as some Muslim scientists would like to say, that such as men also women have the equal rights for divorce, in every aspect. What seems to be equally gifted to them is the right to require and to gain the session of an unsuccessful marriage. Certainly, mechanisms or channels change in type and case by case approach. Some channels are opened for men only, others to women only, with or without legal intervention; and some others are opened for both of them; in direct manner or through the judicial process, with or without consent of the partners.<sup>176</sup>

a) The rights of the husband to divorce

It is fair or not fair, the nature of men is such that he wants to settle down with a woman. In terms of human relations, usually man starts the marriage by proposing the woman. In Islam, he further determines a dowry for her, he maintains her and undertakes the care about the family. In recognition of these factors, in some cases he is allowed to start or to announce the disconnection of the marital connection. But, he is ordered to do this with caution, courtesy and knowledge.

According to the following facts, it's less likely that a man would require to divorce his wife for trivial reasons:

1. General hatred for divorce in Islam
2. Description of the Prophet Muhammad that: The good wife is the greatest happiness in life.
3. The husband's investment in marriage
4. Increasing the percentage of divorces, partly as a result of women's right to divorce in modern times.

In any case, the right of a Muslim in this respect is not absolute, nor he dares to misuse it.

b) The right of women to divorce and termination of marriage. Since marriage, according to the Qur'an, is described as an accompaniment of peace and mercy and, since each right corresponds to a duty; the woman same as husband, has the right to independently initiate and actually to terminate the conjugality. In some cases, she can do this without the permission of the court or without the consent of her husband.

These cases are:

1. It is commonly called "vicarious divorce", in which the husband in the marriage contract agrees irrevocably, to transfer to his wife the right for divorce, and thus he empowers her to release herself from the marital community, if she wants so and when she wants so; and

2. 2) It is also called "suspended" or "conditional" divorce, in which the husband, at the time of contracting the marriage, stipulates that if he does something contrary to the desire of his wife, she will be free to divorce him. The consent of her husband for her request is negligible, if she has valid reasons for divorce. In this case, it becomes the duty of certain powers to enable her to gain freedom from the marital community.

3.

**The reasons that Islamic law considers base for divorce**

**Consent of the spouses for dissolution of the marriage**

Here, both husband and wife personally agree to terminate the marital community peacefully and in this case the marriage must be resolved by the court. Based on this reason, this solution can take one of two forms:

a) Khula (its redemption or deprivation), which is initiated by the woman, possibly with consent of the husband; and

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<sup>176</sup> Abdul'ati dr. H., *Struktura familjare në Islam*, Shkup 1995. Pp. 242.

b) Mubarah, a bilateral mutual agreement for termination of marriage and to release each other from the marital community. The court will impose their conditions and will intervene only if it has illegal foreclosure.

### **Divorce or annulment of marriage through litigation**

In this category falls the detachment of marriage through the court's decision, with or without the consent of the parties. In this case, the termination of the marital relationship is not a private concern of main culprits, but it also withdraws the judicial and executive authorities. This situation is mainly provided by Lian's case<sup>177</sup>, witnessing double or mutual curse between spouses.

### **The consequences of divorce under Islamic law**

Different types of divorce and marriage breakup produce different consequences. On this occasion, we will present the general consequences of divorce, leaving aside the specific forms:

#### a) Iddah (waiting days)

A direct consequence of divorce or termination of marriage is the beginning of the waiting period or probation time. This usually lasts for three months, to allow three monthly courses. If there is a pregnancy, the period lasts as long as the pregnancy lasts. The typical explanation of this rule is that it is required to be proved that the woman is pregnant. If there is no such thing, with the expiration of this period, she becomes suitable for remarriage. But, if she is pregnant, she must wait until the child be born, in order to ensure the legitimacy and identity of child. The waiting period is a time of testing, review and passage. Perhaps a longer period would be excruciating, while the short one would be very rushing. In any case, it allows the person a gradual release from the marriage community and a relatively comfortable passage from one status to another new, without much rudeness. So, the waiting period can be considered as an additional preventive measure and as a last check point.

#### b) Maintenance in the waiting period

The fact that the waiting period is at least a partial expansion of the marital relationship, certainly, it is one of the rules of maintenance during that period. The woman, whose divorce is initiated and promulgated by the husband, is entitled to full maintenance, is complete while the waiting period, she is fully entitled for a complete maintenance during the waiting period. She has the right to continue to live in the same place as before divorce, or to be supplied with the conform equipment for township. She should not be ruled out of her house, not to get out of her house, unless she has committed any clearly embarrassing offense. Along with this power, the renounced husband is fully responsible for her food, for her clothing and for the service, if it is necessary, same as if the marriage was completely intact, in which time she would probably be adapted to new changes in her life.

#### c) Custody of children

Young children remain in the custody of their divorced mother, unless if she is not capable, divorce does not disqualify her and does not affect her right to custody of children. While she feeds the children and cares for the others, is the responsibility of the father to bear all the costs of this care and to fairly reward the mother of his children for this. Additionally, he is the only one responsible for their housing, clothing and food, even if they are under the custody of the mother or in her house. While this may be a possible source of tension and lawsuit, it can also be a measure of reconciliation and harmony.

#### d) Appointment of bridal fairing – mahr

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<sup>177</sup> Lian (Proof / dual lawsuit): When a man accuses his wife for adultery, but no witnesses except himself, he must swear to God four times that he is right and the fifth time that the curse of God falls on him, if he is a liar. To remove the heavy punishment, she should testify four times by swearing in God that he is a liar, and the fifth time that the curse of God falls on her (wife), if he is from the righteous. At this point, the marriage becomes detached and absolutely irrevocable; it is not possible to expect them to live in peace, after they have reached such an extreme.

If the divorce takes place after fulfillment of marriage, the divorced wife must accept her full dowry, or any particular part of it. In addition of this inalienable right of woman, is highly advisable that it be treated by the resigned husband in the most generous and the most polite way. The whole issue about the decision after the divorce is described in terms of generosity, piety, courtesy, mercy and goodwill. When this kind of principles will be accomplished, they clearly exceed the legal formalities and give divorce a moral color. This is better explained in the Quran, „*There is no sin on you, if you divorce women without contact (marriage) with them nor appointed unto them any portion. But bestow on them ( a suitable gift), the rich according to his means, and the poor according to his means, a gift of reasonable amount is a duty on the doers of good.*”<sup>178</sup>; and the other verse: „*For devotees is obligatory to make a supply ordinary for the divorced women*”.<sup>179</sup>

### Conclusion

Islam has taken a categorical prohibition average between liberalizing and unqualified divorce. He even named this practice nor ignored reality and its appearance. A complete prohibition would certainly remain as "ideal" or simply as a state of mind, but hardly as an example for actual behavior, because the absolute self-control is not always attainable. In that case, such a prohibition would be incompatible with Islamic ideology, which, in terms of principle, determines just what is achievable in human. On the other hand, any unregulated liberalization of divorce, is inconceivable and certainly would result in chaos, danger and features that are as devastating as they were intolerable.

So Islam allow husband and wife to each division, where among them concluded that in the absence of genuine love and spiritual resting cannot achieve the ultimate goal. In this case willingly mate comes to divorce without having to intrude on that partition or judge to intervene. Islam screening of secrets not left in the hands of judges, as in positive legal systems. Really considered marriage under Islamic principles and ordered to be permanent, but at the same time these principles in any way not foresee marriage as a prison, as a labyrinth from which they can only come up killed or dead.

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<sup>178</sup> Kuran, Translation of this verse is taken from h. Sherif Ahmeti, *KUR'AN-i, Translation and commentary in Albanian*, Medine 1413 h. (according to the Islamic calendar), Chapter el-Bekare, verse 236-237.

<sup>179</sup> Kuran, Translation of this verse is taken from h. Sherif Ahmeti, *KUR'AN-i, Translation and commentary in Albanian*, Medine 1413 h. (according to the Islamic calendar), Chapter el-Bekare, verse 241.