

*Divorce
or
Dissolution
of*

MARRIAGE
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Chapter 1

Divorce or Dissolution of Marriage

Marital life ought to begin with earnestness and should continue happily under the shadow of love, tolerance and self-sacrifice. But practically speaking marriage contract and conjugal relations do not in all cases continue to exist till the end of life. In certain cases it becomes impossible for two parties to live together in peace and harmony for various reasons such as their emergence of deep rooted differences. In such circumstances, there must be a suitable way of dissolving a marriage legally, otherwise if the parties are forced to continue to live together, their life is likely to become unbearable. In many cases, the consequences may be most regrettable and even tragic. Anyway, it is evident that as marriage in itself is a social need, in certain circumstances its dissolution is also a social necessity. The social compulsions have forced even the Christians to frame and enforce laws concerning divorce, though their present religious book forbids it except in the case of unchastely and though their Church has for long opposed it vehemently. But I say unto you, that whosoever shall put away his wife, saving for the cause of fornication, causeth her to commit adultery: and whosoever shall marry her that is divorced committeth adultery. (Matthew, V:32). The divorce act is even passed in Italy, which is the seat of the Pope.

Chapter 2

Divorce in Islamic Law

Divorce is the dissolution of permanent marriage resulting in the end of all responsibilities of the husband and the wife in regard to the rights and obligations connected with it.

From the Islamic point of view the disintegration of family bond is very undesirable on principle. It is the worst and the most detestable act in the eyes of Allah.

The Holy Prophet (s.a.w.) has said:

- The most detestable thing before Allah is divorce.
- Allah likes most, the house which is inhabited in the wake of a marriage and dislikes most the house which is abandoned in the wake of separation.

In fact divorce may be regarded as an unpleasant and bitter pill which has to be taken in the case of need. Resort to it should not be made unnecessarily and for the sake of caprice. Islamic traditions have described unnecessary divorce as a cause of remoteness from the blessings of Allah.

Islam has suggested certain precautionary measures to ward off divorce as far as possible. For example:

- Much stress has been laid on the careful selection of the wife.
- Repeated recommendations have been made to treat her well and connive at her minor mistakes which are common in life.
- Self-control against sudden outbursts of rage and hasty actions.
- Formation of an internal family court to resolve the differences arising between husband and wife.

It is possible that the relations between the husband and the wife might sometimes become strained consequent on differences and scolding remarks. Islam suggests that in such cases a suitable way should be found at the earliest to resolve the differences and there should be no talk of separation so easily. All cases of strained relations are not such

that we should be disappointed of the restoration of love and affection. In most cases it is possible to rectify the position.

Whenever it is not possible for the husband and wife to sort out their differences themselves, their case should be considered by a family court consisting of two arbiters, one selected from the family of the husband and the other from the wife. The arbiters should be sympathetic and experienced so that they may listen to the point of view of both the parties, and try to reconcile them.

In this respect the Qur'an says:

If you fear a breach between the two (husband and wife), appoint an arbiter from his people and another from hers. If they desire amendment, Allah will make them of one mind. (Surah al-Nisa, 4:35)

Obviously an arbiter should be a trust worthy person, a good conversationalist and fit for making a just arbitration. The two arbiters are to be selected from among the members of the two families because as such they are expected to have a knowledge of the temperament of the husband and wife as well as of their domestic affairs; and also because they will normally be interested in settling their differences.

Chapter 3

Effects of divorce

From the psychological, legal and social point of view, divorce produces varied effects, some of them being related to the husband and wife themselves and some of them to their families. If there are children, separation between their parents will affect their position also in many ways.

In view of these results, special conditions have been visualized for divorce so that it may be warded off as far as possible, for if it is taken easy, the future of children will certainly be threatened.

What should be the condition of a woman to be divorced:

- * Her periods must not be on.
- * After the last sexual intercourse, she must have had her periods at least once.
- * If the woman having been pregnant has been delivered of a child, her rest period after delivery (ceremonial purification from child birth) must have come to an end.

Of course if a woman is pregnant or does not menstruate, the above conditions do not apply to her. In cases other than these two, the question of divorce should be postponed till these conditions materialize.

Conditions of the effectiveness of divorce

Divorce is valid and operative only if the following conditions are fulfilled:

- * The husband who divorces must be of mature age and must be possessed of understanding. Divorce pronounced by a minor, a lunatic or an idiot is invalid.

- * The husband must be exercising his own free will. Divorce under compulsion is not valid.

- * Presence of two witnesses.

According to the Shiah school of thought and as expressly mentioned in the Qur'an (second verse of Surah al-Talaq), divorce must be pronounced in the presence of at least two trustworthy and righteous witnesses.

This condition automatically implies that two righteous persons should become aware of the decision of the spouses to dissolve marriage. In many cases their intervention and help may save the situation, and they may find a suitable way of reconciling the husband and wife. Further, their knowledge and presence may be helpful in settling financial and other questions and finding a most appropriate arrangement for looking after the children.

Chapter 5

Kinds of divorce

After the enforcement of divorce it is possible to resume conjugal relations in some cases without contracting marriage anew. In some other cases a fresh marriage is required before the resumption of these relations. Hence divorce is of two kinds; revocable and irrevocable.

In the case of revocable divorce if the man regrets and wants to resume conjugal relations, the tie is automatically restored and there is no need of contracting marriage again, provided he revokes his act within the period of probation (iddah) which is normally three months.

In the case of irrevocable divorce it is not possible to resume conjugal relations in this way.

Chapter 6

Kinds of irrevocable divorce

There are several kinds of irrevocable divorce.

(1) If the husband agrees to dissolve the marriage at the request of the wife, it is called khul'a.

(2) If the marriage is dissolved because both the husband and the wife have asked each other to terminate it, it is called mubarat, that is mutual release.

(3) The divorce pronounced by the husband on his own is regarded as irrevocable in the following circumstances:

(a) If the dissolution of marriage has been brought about before its consummation.

(b) If the divorcee is a girl whose periods have not commenced or an old woman who does not menstruate, because she has reached the age of menopause i.e. is no longer capable of bearing children.

(c) If the divorce has been pronounced for the third time.

In all these cases if the two parties decide to resume conjugal partnership, they should remarry, for the first marriage is no longer effective.

NOTES:

(1) Remarriage with a woman, who has been divorced three times, by her former husband who divorced her is possible only on the condition that she is married to another man first and that such second marriage is terminated after consummation. (This condition precedent to reunion has been laid down to deter and discourage the people from taking the question of divorce too easy.) If divorces take place between the husband and wife again, and again (till nine times) they cannot remarry under any circumstances. This restriction also ensures that as far as possible divorces on frivolous grounds may be avoided.

2) In the case of khul'a and mubarat reunion is possible only if the woman demands back what she had surrendered to the husband. Such demand must be made before the period of probation expires.

In other cases, if they are inclined to resume conjugal partnership, they should remarry in accordance with the conditions they agree to.

Chapter 8

Iddah of divorce

In the case of separation between the husband and the wife an important question is to find out whether she is pregnant by her former husband. To ascertain this point, the Islamic law has laid down that during a period of probation the woman should not marry another person. This period is called iddah.

Chapter 9

Period of Iddah

The period of iddah for a woman who is not pregnant is the period covered by three menstrual courses, which is normally three months. The iddah of a pregnant woman is till she is delivered.

Chapter 10

Rules regarding the period of iddah

During the period of iddah the woman cannot take a new husband, and nobody should make an offer of marriage to her. She is to be maintained by her former husband like a married woman.

In the case of revocable divorce if the husband or the wife dies during the period of probation, the survivor will inherit the deceased.

Chapter 11

Right of guardianship of children

One of the important questions that crop up on the dissolution of marriage is that of the guardianship of the children which is called the right of hizanah.

The Islamic law gives the custody and care of the children in the early years of their life to the mother, even if the father is competent enough and willing to look after them. The limit for a boy is two years and for a girl, seven years.

In case the mother is not capable or fit to take care of the child, the responsibility of guardianship devolves on the father. In both cases the father has to bear the expenses of the child, As the right of guardianship is recognized solely for the benefit of the infant, it should be in the custody of the person who can look after it the best. On this principle the Islamic law has given priority in the matter to the mother in the first years of the life of the child. If both the parents are unable to look after it, some other suitable arrangements should be made to ensure the welfare of the child. If the father and the mother agree, the infant may be given in the custody of a third person under whose guardianship it can, in their view, make proper physical and spiritual progress.

(Taken from Philosophy of Islam by Dr. Behishti and Dr. Bahonar)