

DIVORCE (TALAQ)

Excerpt from "Dictionary of Islam" by Thomas Patrick Hughes © 1886

In its primitive sense, the word *talaq* means dismissal [to dismiss], but in law it signifies a release from the marriage tie.

The Muhammadan law of divorce is founded upon express injunctions contained in the Qur'an, as well as in the Traditions, and its rules occupy a very large section in all Muhammadan works on jurisprudence.

I. The teaching of the Qur'an on the subject is as follows:

Surah ii. 226 "They who intend to abstain from their wives shall wait four months; but if they go back from their purpose, then verily God is Gracious, Merciful.

[2:227] "And if they resolve on a divorce, then verily God is He who Heareth, Knoweth.

[2:228] "The divorced shall wait the result, until they have had their courses thrice, nor ought they to conceal what God hath created in their wombs, if they believe in God and the last day; and it will be more just in their husbands to bring them back when in this state, if they desire what is right. And it is for the women to act as they (the husbands) act by them, in all fairness; but the men are a step above them. God is Mighty, Wise.

[2:229] "Ye may give sentence of divorce to your wives twice: Keep them honourably, or put them away with kindness. But it is not allowed yon to appropriate to yourselves aught of what ye have given to them, unless both fear that they cannot keep within the bounds set up by God. And if ye fear that they cannot observe the ordinances of God, no blame shall attach to either of you for what the wife shall herself give for her redemption. These are the bounds of God: therefore overstep them not; for whoever oversteppeth the bounds of God, they are evil doers.

[2:230] "But if the husband give sentence of divorce to her a *third time*, it is not lawful for him to take her again, until she shall have married another husband; and if he also divorce her then shall no blame attach to them if they return to each other, thinking that they can keep within the bounds fixed by God. And these are the bounds of God; He maketh them clear to those who have

knowledge.

[2:231] "But when ye divorce women, and the time for sending them away is come, either retain them with generosity, or put them away with generosity: but retain them not by constraint so as to be unjust towards them. He who doth so, doth in fact injure himself. And make not the signs of God a jest; but remember God's favour towards you, and the Book and the Wisdom which He hath sent down to you for your warning, and fear God, and know that God's knowledge embraceth every-thing.

[2:232] "And when ye divorce your wives, and they have waited the prescribed time, hinder them not from marrying the husbands when they have agreed among themselves in an honourable way. This warning is for him among yon who believeth in God and in the last day. This is most pure for you, and most decent. God knoweth, but ye know not.

[2:233] " Mothers, when divorced, shall give suck to their children two full years, if the father desire that the suckling be completed; and such maintenance and clothing as is fair for them, shall devolve on the father. No person shall be charged beyond his means. A mother shall not be pressed unfairly for her child, nor a father for his child; And the same with the father's heir. But if they choose to wean the child by consent and by bargain, it shall be no fault in them. And if ye choose to have a nurse for your children, it shall be no fault in you, in case ye pay what ye promised her according to that which is fair. Fear God, and know that God seeth what ye do. $\frac{1}{2} \frac{1}{2} * \frac{1}{2} \frac{1}{2}$

[2:236] " It shall be no crime in you if ye divorce your wives so long as ye have not consummated the marriage, nor settled any dowry on them. And provide what is needful for them ùhe who is in ample circumstances according to his means, and he who is straitened, according to his means – with fairness: This is binding on those who do what is right.

[2:237] " But if ye divorce them before consum- mation, and have already settled a dowry on them, ye shall give them half of what ye have settled, unless they make a release, or he make a release in whose hand is the

marriage tie. But if ye make a release, it will be nearer to piety."

Surah lxv. 1

[65:1]"O Prophet! when ye divorce women, divorce them at their special times. And reckon those times exactly, and fear God your Lord. Put them not forth from their houses, nor allow them to depart, unless they have committed a proven adultery. This is the precept of Qod; and whoso tranagresaeth the precept of God, assuredly imperilleth his own self. Thou knowest not whether, after this, God may not cause something new to occur which may bring you together again.

[65:2]"And when they have reached their set time, then either keep them with kindness, or in kindness part from them. And take upright witnesses from among yon, and bear witness as unto God. This is a caution for him who believeth in God and in the latter day. And whoso feareth God, to him will He grant a prosperous issue, and will provide for him whence he reckoned not upon it.

[65:3]"And for him who putteth his trust in Him will God be all-sufficient. God truly will attain His purpose. For everything hath God assigned a period.

[65:4]" As to such of your wives as have no hope of the recurrence of their times, if ye have doubts in regard to them, then reckon three months, and let the same be the term of those who have not yet had them. And as to those who are with child, their period shall be until they are delivered of their burden. God will make His command easy to Him who feareth Him.

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[65:6]"Lodge the divorced wherever ye lodge, according to your means; and distress them not by putting them to straits. And if they are pregnant, then be at charges for them till they are delivered of their burden; and if they suckle your children, then pay them their hire and consult among yourselves, and act generously. And if herein ye meet with obstacles, then let another female suckle for him."

II. The teaching of Muhammad on the general subject of Divorce is expressed in the Traditions as follows:

" The thing which is lawful but disliked by God is divorce."

" The woman who asks her husband to divorce her without a cause, the smell of Paradise is forbidden her."

"There are three things which, whether done in joke or in earnest, shall be considered serious and effectual, namely, marriage, divorce, and taking a wife back."

"Every divorce is lawful except a madman's."

" Cursed be the second husband who makes the wife (divorced) lawful for her first husband, and cursed be the first husband for whom she is made lawful." (Mishkat, xiii. c. xv.)

III. Sunni Muhammadan Doctors are not agreed as to the Moral Status of Divorce. The Imam ash-Shafi'i, referring to the three kinds of divorce (which will be afterwards explained), says: " They are unexceptionable and legal because divorce is in itself a lawful act, whence it is that certain laws have been institute respecting it; and this legality prevents any idea of danger being annexed to it. But, on the other hand, the Imam Abu Hanifah and his disciples say that divorce is in itself a dangerous and disapproved procedure, as it dissolves marriage, an institution which involves many circumstances both of a spiritual as well as of a temporal nature. Nor is its propriety at all admitted, but on the ground of urgency of release from an unsuitable wife. And in reply to ash-Shafi'i, they say that the legality of divorce does not prevent its being considered dangerous, because it involves matters of both a spiritual and temporal character.

The author of the *Sharhu 'l- Wiqayah*, p. 108, says : " Divorce is an abominable transaction in the sight of God, therefore such an act should only take place from necessity, and it is best to only make the one sentence of divorce (i.e. *talaqu 'l-ahsan*).

IV. **The Sunni Law of Divorce:** Divorce may be given either in the present time or may be referred to some future period. It may be pronounced by the husband either before or after the consummation of the marriage. It may be either given in writing or verbally.

The words by which divorce can be given are of two kinds: *Sarih*, or "express," as when the husband says, "Thou art divorced "; and *kinayah*, or " metaphorical," as when he says, "Thou art free; thou art cut off; veil yourself! Arise! seek for a mate," etc. etc. Divorce is divided into *talaqu 's-sunnah*, or that which is according

to the Qur'an and the Traditions, and *talaqu 'l-badi'*, or a novel or heterodox [unorthodox] divorce, which, although it is considered lawful, is not considered religious.

Talaqu 's-sunnah is either the *ahsan*, or "the most laudable," or *hasan*, the "laudable" method. *Talaqu 'l-ahsan*, or the "most laudable" method of divorce, is when the husband once expressly pronounces to his enjoyed but unpregnant wife the sentence, "Thou art divorced!" when she is in *tuhr* or a state of purity, during which he has had no carnal connection with her, and then leaves her to complete the prescribed *'iddah*, or "period of three months." Until the expiration of the *'iddah*, the divorce is revocable, but after the period is complete, it is irreversible, and if the husband wishes to take his wife back, they must go through the ceremony of marriage. But it must be observed that after the *falaqu 'l-ahsan*, the woman is not, as in the other kinds of divorce, compelled to marry another man, and be divorced before she can return to her former husband. All that is required is a re-marriage. The author of the *Hidayah* says this mode of divorce is called *ahsan*, or "most laudable," because it was usually adopted by the Companions of the Prophet, and also because it leaves it in the power of the husband to take his wife back, and she thus remains a lawful subject for re-marriage to him. Some European writers on Muhammadanism have overlooked this fact in condemning the Muslim system of divorce. The *talaqu 'l-hasan*, or "laudable divorce," is when the husband repudiates an enjoyed wife by three sentences of divorce, either express or metaphorical, giving one sentence in each *tuhr*, or "period of purity." Imam Malik condemns this kind of divorce, and says that it is irregular. But Abu Hanifah holds it to be *hasan*, or "good."

The *talaqu 'l-badi'*, or "irregular form of divorce," is when the husband repudiates his wife by three sentences, either express or metaphorical, giving them one at a time: "Thou art divorced! Thou art divorced! Thou art divorced!" Or, "Thou art free! Thou art free! Thou art free!" Even holding up three fingers, or dropping three stones, is held to be a sufficiently implied divorce to take legal effect. The Muslim who thus divorces his wife is held, in the *Hidayah*, to be an offender against the law, but the divorce, however irregular, takes legal effect.

In both these kinds of divorce, *badi'* and *hasan*, the divorce is revocable (*raji*) after the first and second

sentences, but it is irrevocable (*ba'in*) after the third sentence. After both *hasan* and *badi'* divorces, the divorced wife cannot, under any circumstances, return to her husband until she has been married, and enjoyed, and divorced by another husband. Muhammadan doctors say the law has instituted this arrangement in order to prevent divorces other than *talaqu 'l-ahsan*.

A husband may divorce his wife without any misbehaviour on her part, or without assigning any cause. The divorce of every husband is effective if he be of a sound understanding and of mature age; but that of a boy, or a lunatic ... or one talking in his sleep, is not effective.

If a man pronounce[s] a divorce whilst in a state of inebriety from drinking fermented liquor, such as wine, the divorce takes place. Repudiation by any husband who is sane and adult, is effective, whether he be free or a slave, willing, or acting under compulsion; and even though it were uttered in sport or jest, or by a mere slip of the tongue, instead of some other word. (*Fatawa-i-'Alamgiri*, vol. 1. p. 497.)

A sick man may divorce his wife, even though he be on his death-bed. An agent or agents may be appointed by a husband to divorce his wife. In addition to the will and caprice of the husband, there are also certain conditions which require a divorce.

The following are causes for divorce, but generally require to be ratified by a decree from the *Qazi* or "judge":

(1) **Jubb**. That is, when the husband has been by any cause deprived of his organ of generation. This condition is called *majbub*. In this case the wife can obtain instant divorce if the defect occurred before marriage. Cases of evident madness and leprosy are treated in the same way. Divorce can be obtained at once.

(2) **'Unnah, or "impotence"**. (This includes *ratq*, "*vulva impervia coeunti*", and *qarn*, "*vulva anteriore oarte enascens*.") In cases of impotency in either husband or wife, a year of probation can be granted by the judge.

(3) **Inequality of race or tribe**. A woman cannot be compelled to marry a man who belongs to an inferior tribe, and, in case of such a marriage, the elders of the superior tribe can demand a divorce; but if the divorce is not demanded, the marriage contract remains.

(4) **Insufficient dower.** If the stipulated dowry is not given when demanded, divorce takes place.

(5) **Refusal of Islam.** If one of the parties embrace Islam, the judge must offer it to the other three distinct times, and if he or she refuse to embrace the faith, divorce takes place.

(6) **La'n or "imprecation."** That is, when a husband charges his wife with adultery, the charge is investigated, but if there is no proof, and the man swears his wife is guilty, and the wife swears she is innocent, a divorce must be decreed.

(7) **Ila or "vow."** When a husband makes a vow not to have carnal intercourse with his wife for no less than four months, and keeps the vow unviolat[e], an irreversible divorce takes place.

(8) **Reason of property.** If a husband become the proprietor of his wife (a slave), or the wife the proprietor of her husband (a slave), divorce takes place.

(9) **An invalid marriage** of any kind, arising from incomplete *nikah*, or " marriage ceremony," or from affinity, or from consanguinity.

(10) **Difference of country.** For example, if a husband flee from a *daru 'l-harb*, or " land of enmity," i.e. " a non-Muslim country," to a *daru 'l-Islam*, or "country of Islam," and his wife refuse to perform *hijrah* (flight) and to accompany him, she is divorced.

(11) **Apostasy from Islam.** The author of the *Raddu 'l-Mukhtar* (vol. ii. p. 643) says : "When a man or woman apostatises from Islam, then an immediate dissolution (*faskh*) of the marriage takes place, whether the apostasy be of the man or of the woman, without a decree from the Qazi." And again, (p. 645), "If both husband and wife apostatise at the same time, their marriage bond remains; and if at any future time the parties again return to Islam, no re-marriage is necessary to constitute them man and wife; but if one of the parties should apostatise before the other, a dissolution of the marriage takes place *ipso facto*."

Mr. J. B. S. Boyle, of Lahore, says: "As relevant to this subject, I give a quotation from Mr. Currie's excellent work on the *Indian Criminal Codes*, p. 446. The question is as to the effect of apostasy from Islam upon the marriage relation, and whether sexual intercourse

with the apostate renders a person liable to be convicted for adultery under Section 497 of the Indian Penal Code. A. and B. Mohammedans, married under the Mohammedan law, are converted to Christianity.

The wife, B., is first converted, but continues to live with her husband; subsequently the husband A. is converted. Subsequent to the conversion of B., a. and B., still living together as husband and wife, both professing Christianity, B. has sexual intercourse with C. Will a conviction hold against C. under Section 497? Both Macnaughten and Baillie say the marriage becomes dissolved by apostasy of either party, and Grady, in his version of Hamilton's *Hidayah*, p. 66, says: " If either husband or wife apostatize from the faith, a separation takes place, without divorce; according to Abu Hanifa and Abu Yusuf. Imam Mahommed alleges if the apostasy is on the part of the husband.

"Apostasy annuls marriage in Hanifa's opinion, and in apostas, separation takes place without any decree of the magistrate. Cases which might decide this point have been lately tried both at Lucknow and Allahabad : at the former place *in re Afzul Hosein v. Hadi Begum*, and at the latter *Zuburdust Khan v. Wife*. But from certain remarks to be found in the judgement of the High Court, N.W.P., the Courts of Oudh and N.W.P., appear to differ on the most essential point. The point before the Oudh Court was (Hadi Begum's plea) that her marriage contract was dissolved by reason of her own apostasy, a sufficient answer to a suit brought by her Mohammedan husband for restitution of conjugal rights; i.e. Does the apostasy of a Muhammedan wife dissolve a marriage contract against the express wish of a Mohammedan husband in *dar-ul-harb* (land of war)? for India, it is contended, is not, under its present administration, *dar-ul-Islam* (land of safety).

The Oudh Court held (admitting that apostasy by the husband dissolved the marriage and freed the wife) that apostasy by the wife did not free her if her husband sued for restitution of conjugal rights. They argued that apostasy by the wife, without the wish of the husband, could not be entertained; in fact, that as regards [to] her husband's volition, the apostasy could not exist, and would not be recognised. That a suit for restitution of conjugal rights before the competent court of the time, seemed to them to be equivalent of the suit before the Qazi (Judge). The Oudh judges, in the absence of distinct precedent, say they fell back on the customs of the people amongst whom they lived. The Oudh Court

evidently considered [that] there was an essential difference between apostasy of a man and apostasy of a woman, of the husband or the wife; also between apostasy to a faith in a book and apostasy to the idol worship Mohammed and his followers renounce.

Does such an essential difference exist? The point before the High Court N.W.P. was: Can a Mohammedan professing Christianity subsequent to his marriage with a Mussulmani, according to the Mohammedan law, obtain a decree for dissolution of that marriage under Act IV. of 1869, his wife having subsequently to him professed Christianity, and they under their new faith having lived together as man and wife? Or whether the wife's contention is sound, that her marriage was cancelled by her husband's apostasy?

They held [that] the apostasy of the husband dissolved the marriage tie. This the Oudh Court admits, but the point before the Oudh Court was not before the High Court, N.W.P.; nevertheless from comments made by the High Court, N.W.P., on the Oudh decision, they evidently did not agree with the finding come to by the latter Court, on the point before it."

"Now, Mr. Currie asks in the above extract, does such an essential difference exist between apostasy to a book – that is, to a *kitabī* faith – and apostasy to idol worship? Answering this question necessitates a few remarks upon the judgements above mentioned. According to Mohammedan law, a man may lawfully marry *akitabiah*, but marriage with a pagan or polytheist is unlawful. But the principle in Mohammedan law is, that when one of the parties turns to a state of religion that would render the marriage contract illegal if it were still to be entered into, what was legal before is made void. A Mohammedan woman, becoming a *kitabiah*, does not render the marriage void, for there is nothing to render the marriage contract illegal if it were still to be entered into; but if the Mohammedan woman becomes an idolatress, the marriage is void, for the woman has turned to a state of religion that would render the marriage contract illegal if it were still to be entered into. A Mohammedan woman, becoming a Christian, consequently, would not be separated from her husband, because she belongs to the religion of the book, that is, a *kitabī* faith. If a *kitabiah* becomes an idolatress, the marriage is dissolved, but if she change from one religion to another, and still remain a *kitabiah*, the marriage is not vitiated.

So far the Oudh Court is correct in its decision, that the Mohammedan wife's conversion to Christianity did not render the marriage null and void, but that a suit for restitution of conjugal rights would lie; and taking the case of C. having sexual intercourse with B, the wife of A. converted to Christianity, a conviction under Section 497, *Indian Penal Code*, would hold good. But with all deference, I do not think that the Oudh Court is correct when it states that apostasy by the wife without the wish of the husband could not be entertained; in fact, that as regards her husband's volition, the apostasy could not exist, and would not be recognised.'

"So far as a woman's apostatising to a *kitabī* faith this holds good; but if a woman turns to paganism, *ipso facto* the marriage is void, and does not depend upon the volition of the husband (having regard to the principle we have adverted [turned our attention to] to above), so that the husband under such circumstances could not maintain a suit for conjugal rights, nor would a conviction hold good against C. under Section 407, *Indian Penal Code* for sexual intercourse with B., the wife of A., who has apostatised to paganism. The decisions of the two Courts, however, seem correct, on the principles of Mohammedan law, as to the effect of the husband apostatising from Islam.

By Mohammedan law, a marriage by a female Moslem with a man not of the Mohammedan faith is unlawful: applying the principle quoted before, the man having turned to a state of religion that would render the contract illegal if it were still to be entered into, the marriage is void. The apostasy of the husband dissolves the marriage tie; consequently there does exist an essential difference between apostasy of a man and of a woman, of the apostasy of the husband or the wife; also between apostasy to a faith in a book, that is, a revealed religion having a book of faith, and apostasy to the idol worship Mohammed and his followers renounce."

3. Manual of Laws relating to Mohammedans and their Relations of Life.

V. In addition to the forms of divorce already explained, there are three others of a peculiar nature, called *khula*, *mubara'ah*, and *nihar*.

The form of divorce known as *khula*, is when, a husband and wife [are] disagreeing, or for any other cause, the wife, on payment of a compensation or ransom to her husband, is permitted by the law to obtain from him a

release from the marriage tie. The *khula* is generally effected [achieved] by the husband giving back the dower or part thereof. When the aversion is on the part of the husband, it is generally held that he should grant his wife's request without compensation; but this is purely a matter of conscience, and not of law.

Mubara'ah is a divorce which is effected by a mutual release.

Zihar, from *zahr*, "back," is a kind of divorce which is effected by a husband likening his wife to any part or member of the body of any of his kinswomen within the prohibited degree. As for example, if he were to say to his wife, "Thou art to me like the back of my mother." The motive of the husband in saying so must be examined, and if it appear that he meant divorce, his wife is not lawful to him until he have made expiation by freeing a slave, or by fasting two months, or by feeding sixty poor men. (See Qur'an, Surah 53:4.)

(For the Sunni Law of Divorce, see the *Hidayah* and its Commentary, the *Kifayah*; *Durru 'l-Mukhtar* and its Commentary, the *Raddu 'l-Mukhtar'*, the *Fatawa-i-'Alamgiri'*, Hamilton's English Edition, *Hidayah, Tagore Law Lectures, 1878*)

VI. **The Shi'ah law of Divorce** differs only in a few particulars from that of the Sunnis. According to Shi'ah law, a man must be an adult of understanding, of free choice and will, and of design and intention, when he divorces his wife ... Nor can the Shiah divorce be effected in any language of a metaphorical kind. It must be express and be pronounced in Arabic (if the husband understand that language), and it must be spoken and not written. A divorce amongst the Shi'ahs does not take effect if given implicatively or ambiguously, whether intended or not. It is also absolutely necessary that the sentence should be pronounced by the husband in the presence of two just persons as witnesses, who shall hear and testify to the wording of the divorce. (For the Shi'ah law of divorce, see *Shir'atu 'l-Islam*; *Tariru 'l-Ahkam*; *Mafatih*; Mr. Neil Baillie's *Digest of Muhammadan Law*; *Imamah Code*; *Tagore Law Lectures, 1874*.) . . .