

REVISITING THE DISSOLUTION OF MARRIAGE UNDER ISLAMIC LAW IN NIGERIA*

Abstract

The purpose of marriage is to ensure tranquility, love and compassion but when this is not achieved and parties are inclined to go their separate ways, same should be done according to laid down procedures. Divorce is a very fundamental aspect in Islamic jurisprudence because the Holy Quran has provided expressly the mode and exceptional circumstances of obtaining it. This paper seeks to ascertain the modes of obtaining divorce in Nigeria by examining their essential provisions. It finds out that marriage dissolution is not encouraged in Islam as it is only explored as last resort when the marriage has broken down irretrievably. However, before parties opt for divorce, it is advised they make attempt to reconcile their differences as this has been expressly provided in the Holy Quran. This paper advocates that Islamic marriages in Nigeria should adopt the system of marriage registration and the Islamic legal system in Nigeria should prohibit extra judicial marriage dissolution so as to control the rate of divorce and to ensure that it is only granted for justifiable reasons or on reasonable grounds.

Keywords: *Talaq, Iddah, Mahr, Nikah, Islamic law.*

1. INTRODUCTION

Marriage as a social institution births the family unit and its incidence is regulated by laws. In Islam, the institution is symbolic as it unites the couple, emphasizes interdependence, mutual affection and love.¹ However, there are times in an individual's life when it becomes impossible to continue with the institution of marriage as good preaching and wise counsel may not work. In such situations, it is better to separate amicably rather than drag on indefinitely and make the home hell on earth. Where the family life brings excruciating pain instead of exhilarating joy, parties involved may decide to free themselves from difficult marriages whose lot cannot be changed or improved upon.

People do not generally get married with the expectation that they will divorce but the odds are good that it will happen to them.² As a matter of fact in Islam, there is an insistence on the subsistence of marriage because it is regarded as one of the signs of abundant blessings of God³ and considered as completing half of the *deen* (faith).⁴ However, depending on the presented circumstances; divorce is permitted as a last option for troubled marital relationships where reconciliation fails. Even though the Prophet (SAW) is reported to have said 'of all the things permitted in law, divorce is the most hateful

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¹ A, Said. 'An examination of *Nikah* (marriage) as an institution under Islamic Law' (2018) (5) (1) *Unimaid Journal of Public Law*, 228.

² D. H., Olson and J. Defrain, *Marriage and Family: Diversity and Strengths*. (2nd ed. Mayfield Publishing Co, California. 1997) 508.

³ 'and among His signs is that He created for you, of yourselves, spouses that you may dwell in tranquility with them, and Has set love and mercy between you, surely in that are indeed signs for those who reflect. He also says it is He who have created man from water, and made him kindred of blood and marriage, your Lord is All powerful.' Holy Qur'an 30:21.

divorce is said to be 'hated by Allah' and His throne is reported to 'shake due to divorce'

⁴ S. Banoo, 'The Islamic Concept of Divorce (Talaq)' *Muslim Mirror* March 3, 2018. <http://muslimmirror.com/eng/islamic-concept-divorce-talaq/> (accessed 27 September, 2020).

thing in the sight of Allah' and His throne is reported to shake due to divorce,⁵ divorce is still allowed only if there are sufficient grounds for it and same is exercised only under exceptional circumstances. Although many writers have published books and papers on this topic as well as other related issue, this paper shall revisit some of the known assertions on Islamic jurisprudence with its focus on marriage dissolution under Nigerian Islamic law and the lessons drawn therefrom.

2. THE CONCEPT OF FAMILY AND MARRIAGE IN ISLAM

The "Family" is a concept open to multiple interpretations. As every human being has a family or can be linked to one, it could be described as the smallest unit of the society. Because the family in which an individual grow up in forms part of his or her life, it is easy to believe that is the natural form all families take.⁶ It is important to note that as one of the most enduring social relationships found in the society, families greatly influence lives of individuals from birth till death. A family could therefore refer to a group of people related by blood, marriage, law or custom. It is usually characterized by common residence, economic cooperation and reproduction.

On the other hand, marriage is a universal institution recognized and respected worldwide which enjoys remote antiquity. It is the root of the family and by implication, the society.⁷ Major religions in the world recognise the place of marriage and its impact in the society cannot be over emphasized. Islam is not an exception as marriage is given pride of place with no room for a celibate and an ascetic view of life as permitted in other religions like Christianity or Buddhism. It was attributed to the Prophet (PBUH) that '...Marriage is my *sunnah*, and he who abstains from my *sunnah* is not of me.' Every Muslim therefore is expected to get married, raise a decent family and fulfill his responsibilities towards them.⁸ In addition, entering the marriage contract is considered as fulfilling half of the religion of any Muslim faithful as it is said to shield such individual from promiscuity, adultery and the life which may lead to many other crimes.⁹

Muslim adherents are therefore expected to identify with a family, enter into marital relationships and be able to keep a home. However despite the initial good intentions of parties who came together and got married, situations may present itself where the marital relationship breaks down and parties become 'irreconcilable, incompatible, incongruous and implacable.' Where the relationship becomes irredeemably bad that it cannot even benefit from any 'artificial life support' parties tend to let it die.¹⁰ In Islam, taking steps aimed at dissolving difficult marriages are permitted especially where attempts at reconciliation have failed leaving parties at liberty to seek love elsewhere or perhaps get married to a new partner. The various methods of invoking divorce in Islamic jurisprudence will thus be discussed.

3. DISSOLUTION OF ISLAMIC MARRIAGE IN NIGERIA

As earlier indicated, divorce is allowed in Islam where there are sufficient grounds for it but the right is to be exercised only under exceptional circumstances. The Holy Prophet (SAW) has said: 'Of all things which have been permitted, divorce is the most hated by Allah.'¹¹ In another Hadith, the Prophet (PBUH)

⁵ A.A., Bisati., 'Divorce (Talaq) in Islam: The Nuances Therein' (2) (5) (2017) *International Journal of Academic Research and Development*, 119.

⁶ M.F. Brinig, C.E., Schneider, and L.E., Teitelbaum, *Family Law in Action: A Reader* (Anderson Publishing Co, Ohio, 1999) 45.

⁷ E.I. Nwogugu., *Family Law in Nigeria* (Heinemann Books, Ibadan. 1999) Ixxviii.

⁸ Said, A. *op cit*, 229.

⁹ S.O. Bakare, 'Marital Rights and Obligations in Islamic Law: A Critical Analysis of its Practice in Northern Nigeria' (Unpublished Master's Thesis for Award of LL.M in Ahmadu Bello University Zaria, 2015)19.

¹⁰ See Per Eko, JCA dictum in *Okoro v. Okoro* (2011) All FWLR (Pt.572) 1749 at 1786.

¹¹ Abu Daud 13 v 3, SunanIbnMajahvol 318.

was reported to have said ‘marry and do not divorce, undoubtedly the throne of the beneficent Lord shakes due to divorce.’¹² These words as with many others will always act as a strong check on the hasty recourse to and the abuse of the permissibility of divorce.

In principle, Husbands and Wives should not seek for divorce without making serious effort at reconciliation. They are expected to sit and discuss together. The Qur’an further declares that when there is a rift between husband and wife, an attempt should be made to appoint a *hakam* (arbitrator) to effect reconciliation. “And if you fear a breach between the two, appoint an arbiter from his people and an arbiter from her people, if they both desire an agreement, Allah will effect harmony between them”.¹³

Although Islamic law encourages reconciliation between spouses rather than the severance of their marital relations, but where this is not feasible, parties will not be kept tied with a loathsome marital chain to a painful and agonizing relationship. Under Islamic law, divorce may take any of these two major forms: Extra judicial divorce and Judicial divorce. Extra judicial divorce creates a situation where marital relationship is severed without necessarily approaching the court or any formal institutions while for judicial divorce, marriage is brought to an end by a *Qadi* after duly taking evidence from parties. Marriage severance whether judicial or extra judicial may be manifested in any of the under listed modes:

3.1 *Talaq*

Talaq is an Arabic word derived from *itlaq* which means to send away or untie the knot of marriage i.e. to be released from a covenant.¹⁴ It is used in *shariah* to denote the process whereby a marriage is brought to an end.

Talaq which is the universal repudiation of a marriage by the husband is the most prevalent form of divorce in Nigeria especially among northern Muslims. It has been said its informal character has contributed to its popularity.¹⁵ In effecting this type of marriage dissolution, the word *talaq* may not necessarily be used, but unambiguous words or phrases such as ‘I divorce you, ‘I separate from you’ ‘you are cut off’ ‘you are a free woman’ or other statements which reveals an unequivocal intention of terminating the marital contract are sufficient and constitute valid pronouncement of *talaq*.¹⁶ Where ambiguous words are however used, the intention of the parties must be proved for a valid *talaq* to be established. The mere pronouncement of *talaq* by a husband without the requisite intention of divorcing his wife is void.¹⁷

It is important to state that the communication of *talaq* may be oral, in writing, in sign language or communicated through a messenger (where both parties live in different locations). Irrespective of the mode adopted, it is expected that a valid *talaq* takes place in the presence of witnesses.¹⁸ The effectiveness of the pronouncement of *talaq* may differ amongst the various schools of thought.

¹²Kashf al- Khafavol 2-302, Tafsir al- Qurtabivol 18, 149.

¹³ Qur’an 4 v 35.

¹⁴ A.A. Engineer, *Rights of Women in Islam* (3rdedn, Sterling Publishers Ltd 2008) 146.

¹⁵A, Ahmad. ‘Resolution of Civil Disputes in Formal and Informal Forums in Jigawa State’ (2003) [http://www.africa.wes.org/printable version](http://www.africa.wes.org/printable%20version) (accessed 16 August 2020).

¹⁶ L. M. Bani, and H. A. Pate. ‘Dissolution of Marriage (Divorce) under Islamic Law’ (2015) (42) *Journal of Law, Policy and Globalisation*, 139.

¹⁷ The intention may be put to test where the husband is coerced, pressurized, threatened or forced to make the pronouncement. According to the *Maliki, Shafi and Hanbali* Schools of thought, this type of *talaq* usually under duress is invalid.

¹⁸ Holy Qur’an 65 v 2.

However, it is important to state that triple *talaq* at one and the same time,¹⁹ pronouncement in anger, by an intoxicated person, in *nifas* (after child birth) are all not valid.

After *talaq* is pronounced, the woman has to observe *Iddah* (waiting period)²⁰ in her husband's house. For women who still have their monthly flow, the waiting period is three menstrual periods, for women who have reached menopause, it is three months and for a pregnant woman it is until she gives birth. For all categories of women, it is expected that the *iddah* is observed while still in the husband's house.

Although the purpose of the waiting period is to give the parties ample opportunity for reconciling their differences and reconsider their actions, sexual relations are not expected to take place. Where the couple engages in sex during the waiting period, the *talaq* is deemed revoked. However, if a husband decides to take back his wife after the end of the waiting period then he would have to marry the wife again by conducting another *Nikkah*. Where the husband does not take back his wife during the waiting period, she becomes free to remarry if she so desires.

3.2 *Ila*

This is a constructive way of dissolving a marriage available to the husband. In adopting this mode of marriage dissolution, the husband does not expressly say that he has divorced his wife but his actions are pointers to that fact. In doing this, he takes an oath not to have any sexual relations with his wife for a period of four months. According to the Maliki School of thought, for a declaration of *Ila* to be valid, the husband has to be a sane adult Muslim and the woman in respect of whom the oath is made should not be a nursing mother.

If at the expiration of four months there is still no sexual relations between the couple, the woman can apply to the court to dissuade her husband from continuing to abstain from any sexual relation with her. Where the man fails to comply with the order to reconstitute conjugal rights, the marriage is dissolved irrevocably.²¹ If within four months there is sexual relations between them, then the oath is conceived and the marriage would not be dissolved.

It is important to state that where the couple resume sexual relations within the four months, then the oath previously taken by the husband is cancelled. *Ila* in reality was meant to trouble a woman by keeping her hanging in the air. However, there are dissenting views among the Islamic jurists.

3.3 *Zihar*

This mode of dissolution is available only to a man. The word *Zihar* is derived from the word *Zahr* which means back. *Zihar* is pronounced whenever a man compares his wife with other women within his prohibited relationship by saying 'you are to me as the back of my mother' or similar words are pronounced.

With *Zihar*, the wife is denied all conjugal rights due to her and still being made to live with the husband. The practice has been described as capable of degrading the position of the wife. As a matter of fact,

¹⁹ Holy Qur'an 2 v 229. In India for example, triple *talaq* is prohibited with up to three years imprisonment. See Muslim Women (Protection of Rights on Marriage) Bill 2019.

²⁰ *Iddah* is a form of 'waiting period' before a divorce proceeding is finalized. For those who are still bearing children or menopausal women, *iddah* is three menstrual periods and three months respectively while for pregnant women, it is until she gives birth.

²¹ The Concept of Divorce under Muslim Law www.legalserviceindia.com (accessed 27 October, 2020).

the Holy Quran has clarified the practice of Zihar saying that using the word ‘mother’ to qualify a wife is not only iniquitous but also false.’²²

A man who had pronounced *Zihar* and thereafter chooses to denounce it can do so by making reparations (*kaffarah*)²³ Apart from *kaffarah*, the wife can sue for restitution of conjugal rights, a grant of judicial divorce, maintenance for herself and her children but her husband cannot claim his conjugal rights. If the pronouncement of Zihar by the husband was a hasty act which he repented from, he cannot claim his conjugal right until the performance of his penalty.²⁴

3.4 Li’an

This is where a husband accuses his wife of adultery and cannot prove his allegation of adultery. As required under Islamic law, he would be required to swear four times stating that his accusation is true and then a fifth time invoking the wrath of God upon himself if he is lying. If the wife asserts that his accusation is false, she is required to also swear asserting her innocence and then the fifth oath should be inviting the wrath of God on herself if her husband is telling the truth.²⁵ When she swears to an oath of innocence, she can be divorced from him on this ground.

In Li’an where the husband institutes the matter in court, he will have two alternatives. He may retract or withdraw the charge before the end of the trial which will immediately bring the case to an end. But if he persists in his attitude and takes the oath followed by the oath of innocence of the wife, the suit for li’an will be deemed complete. There will be no need of pronouncement of divorce by the Qadi i.e. judge according to Imam Ahmad bin Hanbal and Imam Malik.

According to Imam Abu Hanifah, it will be essential for the Qadi to pronounce divorce and dissolve the marriage. However, Imam Shafi has a different view from other Imams. He is of the view that once the husband finish taking his oath of imprecation, declaring that his wife had committed adultery and invoking the urge of Allah upon himself if he were a liar, he has given a heavy blow to the love and confidence that he had in his wife. Then li’an is complete the moment the husband finish taking his five oaths.²⁶

Once marriage is dissolved by the Qadi after the due process of li’an as stipulated in the Qur’an, it will result into an irrevocable divorce according to all the school of Islamic jurisprudence with the exception of Imam Abu Hanifah who opines that if later the husband declares that he had lied while taking oaths of imprecation and that everything happened in the moment, that husband will be punished and thereafter he can re marry his wife and the child will be given to him.²⁷

3.5 Khul

Khul literally means to disown or to repudiate. It is a mode of termination of marriage where the woman can repudiate her marriage by paying back what she received from her husband at the time of their marriage. It has been said that Islam is probably the first religion in the world to have recognized this

²² Qur’an 58 v 2.

²³ *Kaffarah* can be carried out by the man by doing any of the following: setting a slave free, fasting for two months or feeding sixty poor people. See Holy Qur’an 33 v 4.

²⁴ *Ibid.*

²⁵ Qur’an 24 v 6-9.

²⁶ AbdurRahman I. Doi, *Shari’ah The Islamic Law*, Centre of Islamic Legal Studies Ahmadu Bello University Zaria, Nigeria, Rabi al- Awal (1404 A.H) p 170.

²⁷ *Ibid.*

right of divorce.²⁸ The right is absolute and no one can prevent the wife from exercising it especially where she ‘cannot keep within the limits of Allah.’²⁹ The wife can seek for divorce where she is habitually maltreated by the husband, where the husband is insane, incurably incompetent, leaves the family uncatered for or similar circumstances.

In *Haliru Usman v. Hajara Usman*,³⁰ the court described *Khul* as the relinquishment of the ownership of marriage and the instance of and on payment of consideration by the wife to the husband. As a form of divorce, it is perfected on payment by the wife to the husband a certain amount that does not exceed what was given to her as dower (*mahr*). It is the dissolution of marriage obtained by the wife with the consent of the husband in return for payment of compensation to him for his material and moral loss.³¹ The compensation represents the dower and some other payments which the husband made in respect of the marriage.

The compensation to be returned is a matter of arrangement between the husband and the wife. The wife may return the whole or a portion of the dower, but not anything more than the dower or she may make any other agreement for the benefit of the husband, such as to nurse their child during its two years of sucking, or to keep and maintain the child for a fixed period at her own expense after weaning it. *Khul* must only be asked in extreme circumstances and not resorted to on flimsy grounds. It is predicted that the fragrance of paradise will be unlawful to any woman who ask for divorce from her husband without any specific reason.³²

In the case of *Salamatu Wapanda v Abubakar Wapanda*,³³ the petitioner filed a petition for divorce against her husband at the Upper Area Court on the grounds that she could no longer live with him within the bounds of Allah. The trial court dissolved the marriage between the parties. Dissatisfied with the judgment, the Respondent appealed to the Sharia Court of Appeal. The Kadis set aside the judgement of the trial court and reinstated the marriage of the parties with an order that the wife should return to the husband’s house. The wife was dissatisfied with the decision of the court and then appealed to the Court of Appeal. The court set aside the decision and affirmed the decision of the trial court that the parties should get separated as husband and wife through the process of *khul*. It further held that, the matter be sent to another Upper Area Court to determine the marriage between the spouses through *Khul* as may be agreed upon by the spouses or as the court may use its judicial powers to fix the amount of *Khul* reasonably without causing undue harm to any of the parties.

The question also arises as to whether a woman who has demanded for *khul* is entitled to maintenance during the *iddah* period. It is maintained that as long as *khul* is repudiation, the woman is not entitled to maintenance during the *iddah* except when she is pregnant. She is also not entitled to clothing during *iddah* but has a right to accommodation.

3.6 Tafriq or Faskh

Tafriq or *faskh* means divorce by court: This mode of marriage termination is usually initiated by the wife (men also). Where cases are pending before the court, the court is duty bound to investigate the

²⁸ A.A. Engineer, *opcit.* (3rd edn. Sterling Publishers Ltd 2008) 163.

²⁹ Qur’an 4 v 229.

³⁰ (2003) 11 NWLR (Pt. 830) 109.

³¹ A.M. Gurin, ‘Dissolution of Marriage and Women’s Rights under Islamic Law.’ (2007) (7) (1) *University of Benin Law Journal*, 21.

³² Al-Shaukani, Fath al-Qadr, p 214.

³³ (2006) LPELR - CA/J/241S/1999.

allegation(s) of the wife or petitioner (as the case may be) and must hear evidence of witnesses and that of the parties. *Tafriq* can be initiated on the following ground: failure of the husband to provide maintenance, defect on the part of the husband or wife (insanity or impotence- where the defence was known before hand, parties cannot turn around to complain), prolong absence, failure to provide sexual satisfaction, refusal of the husband to allow the wife perform her religious obligation like going on pilgrimage.³⁴ Petitioner can also lead evidence to the fact that the respondent behaviour has been unreasonable which he or she can no longer cope with. After evaluation of the evidence before the court if the judge finds merit in the case, marriage will be annulled. In that instance, the wife does not have to make any payment to the husband or reimbursement of her *mahr*.³⁵

In Nigeria, there is no formal mechanism or laws regulating dissolution of marriages as a husband may divorce his wife by pronouncing *talaq* without giving any reason. However, in some other jurisdictions,³⁶ dissolution of marriage under Islamic Law is codified to some extent. In the case of *K.C. Moyin v. Nafeesa*,³⁷ it was held that a Muslim woman cannot repudiate her marriage outside the provisions of the Dissolution of Muslim Marriage Act 1939 (which is *imparimateria* with the Dissolution of marriage Act 1999 Act). The Muslim Women Act makes provision for maintenance to be paid to the divorced Muslim woman for a given period.

4. CONCLUSION

It is obvious from the foregoing that divorce is not encouraged under Islamic law. It is regarded as the last alternative to explore when the marriage has broken down irretrievably. However, before parties opt for divorce, it is advised that parties should make an attempt to reconcile their differences as this has been expressly provided in the Holy Qur'an. Furthermore, litigation or the court system should be made the last resort.

5. RECOMMENDATIONS

It is advocated that Islamic marriages in Nigeria should adopt the system of Malaysia, Pakistan, and Indonesia whereby marriages are being registered and reduced into writing. This is of great importance as many Muslim women in Nigeria are faced with difficulties and injustices melted out on them by their husband. It also provides an avenue for the wife to enforce her rights when the need arises. These rights include the right to seek for divorce when the marriage becomes unbearable, right of maintenance after the *iddah* period, right to work etc. Furthermore, the marriage contract in these countries usually consist of a number of conditions which if contravened enables one to seek redress in the court. The courts are also empowered to order the husband to pay compensation where divorce is for no just cause.

The unilateral divorce by husbands should also be looked into as it tends to disfavor the wife and has been grossly abused. It is recommended that the Islamic legal system in Nigeria should adopt the procedure of other Muslim jurisdictions which prohibit extra judicial divorce. Where divorce still passes through formal institutions like the court even where they are extra judicially done greater justice is more likely to be achieved and the rate of divorce is monitored ensuring that it is only granted on reasonable grounds.

³⁴ DIVORCE- The Dissolution of a Marriage in Muslim Personal Laws in Nigeria (Baobab Legal Literacy Leaflet No.2) 6. <http://edojudiciary.gov.ng/wp-content/uploads/2016/10/Divorce-The-Dissolution-Of-A-Marraige-In-Muslim-Personal-Laws-In-Nigeria.pdf> (accessed 28 September 2020).

³⁵ *Ibid*.

³⁶ Like India.

³⁷ AIR [1973] Ker. 176.