

## CHAPTER VI

### DIVORCE

#### *A. Nature of divorce*

Article 45 of the Muslim Code defines divorce as “the formal dissolution of the marriage bond in accordance with this Code to be granted only after the exhaustion of all possible means of reconciliation between the spouses.”

This may be effected by either of the following forms:<sup>1</sup>

- (1) Repudiation of the wife by the husband (talaq);
  - (2) Vow of continence by the husband (ila);
  - (3) Injurious assimilation of the wife by the husband (zihar);
  - (4) Acts of imprecation (li'an);
  - (5) Redemption by the wife (khul');
  - (6) Exercise by the wife of the delegated right to repudiate (tafwid);
- or
- (7) Judicial decree (faskh or fasakh).

These are the seven forms of divorce sanctioned under the Muslim Code. Four of these may be effected at the instance of the husband (i.e., talaq, ila, zihar and li'an); while the other three may be effected at the instance of the wife (i.e. khul', tafwid and faskh or fasaki).

There is no doubt that divorce law has its bases on the Holy Qur'an and the Sunnah of the Holy Prophet (S.A.W.). In the Holy Qur'an, Surah

al-Talaq (Chapter on divorce) and several ayyat in Surah al-Nisaa (women's chapter) as well as Surah al-Baqara provide for the law of divorce.

Divorce law under the Muslim Code is consistent with the principles laid down by the Shari'ah. Though, it is permitted by law, it shall be granted only by following the procedure provided by law and only after the exhaustion of all possible means of reconciliation between the spouses.

### ***B. Forms of divorce***

#### **1. Divorce by talaq**

The Muslim Code provides the rules to be followed in effecting divorce by talaq. They are as follows:

(a) Divorce by talaq may be effected by the husband in a single repudiation of his wife during her non-menstrual period (tuhr) within which he has totally abstained from carnal relation with her. Any number of repudiation made during one tuhr shall constitute only one repudiation and shall become irrevocable after the expiration of the prescribed 'idda.<sup>2</sup>

The foregoing rule shows that the Muslim Code does not recognize talaq bid'a or irregular divorce. It only recognizes one kind of talaq that is talaq ahsan or the most laudable divorce. It is the kind of talaq where the husband repudiates his wife by making one pronouncement within the term of tuhr within which he has not had sexual intercourse with her, and she is left to observe her 'idda.<sup>3</sup>

This rule is based on the qur'anic ayyah to the effect: "Oh Prophet! when you do divorce women, divorce them at their prescribed periods..."<sup>4</sup>

(b) A Husband who repudiates his wife either for the first or second time, shall have the right to take her back (ruju) within the prescribed 'idda by resumption of cohabitation without need of a new contract of marriage. Should he fail to do so, the repudiation shall become irrevocable.<sup>5</sup>

The foregoing rule shows that talaq under the Muslim Code is a revocable divorce. The husband is allowed to revoke the divorce by the process known in Islamic Law as ruju.<sup>6</sup>

This rule is based on the qur'anic ayyah to the effect:

*A divorce is only permissible twice: after that, the parties should either hold together on equitable terms or separate with kindness.*<sup>7</sup>

(c) A husband who has pronounced a talaq shall, without delay, file with the clerk of court of the Shari'ah Circuit Court of the place where his family resides a written notice of such fact and the circumstances attended thereto, after having served a copy thereof to the wife concerned. The talaq pronounced shall not become irrevocable until after the expiration of the prescribed 'idda. The notice filed shall be conclusive evidence that talaq has been pronounced.<sup>8</sup>

The foregoing rule has a dual purpose: first, it serves as a conclusive evidence that the talaq has been pronounced. This is based upon the idea that the court is the best witness in the pronouncement of talaq and to ensure that no one shall act unjustly or selfishly. Its basis is the qur'anic ayyah to the effect: "... and take for witness two persons from among you, endued with justice, and establish the evidence (as) before Allah."<sup>9</sup> Second, it affords the court's jurisdiction to intervene through the Agama Arbitration Council for possible reconciliation. This shall be explained in the succeeding rule.

(d) Within seven days from receipt of notice, the clerk of court shall require each of the parties to nominate a representative. The representatives shall be appointed by the court to constitute, together with the Clerk of Court as Chairman, an Agama Arbitration Council, which shall submit to the court a report on the result of the arbitration, on the basis of which and such other evidence as may be allowed, the court shall issue the corresponding order.<sup>10</sup>

The task of the Agama Arbitration Council is to work for the possible reconciliation of the spouses. If the Agama Arbitration Council cannot reconcile them, then it will submit to the court a report on the result of the arbitration. This report and other evidence as may be allowed shall be the bases of the court for issuing the corresponding order.

This is based on the ayyah of the Holy Qur'an to the effect:

*If you fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; If they wish for peace, Allah will cause their reconciliation.<sup>11</sup>*

(e) After the repudiation, they have to observe the prescribed 'idda which is three monthly courses or three months for those who have no menses or until delivery for the pregnant woman before the repudiation becomes irrevocable.<sup>12</sup> This will give them an ample time to think and reflect over the matter. This is based on the qur'anic ayyah to the effect: "Divorced women shall wait concerning themselves for three monthly periods..."<sup>13</sup>

## 2. Divorce by ila

Article 47 of the Muslim Code provides that where a husband makes a vow to abstain from any carnal relation (ila) with his wife and keeps such ila for a period of not less than four months, she may be granted a decree of divorce by the court after due notice and hearing.

This law originated from the customary practice of the Arabs before Islam. Sometimes, during those days, for any reason, a husband may vow to abstain from sexual intercourse with his wife for an unspecified period of time. This was regulated by Islam. It prescribed the maximum period of continence for four months. Should the spouses be reconciled within this four months, there is no divorce but the husband is liable to give the prescribed expiation for breaking his oath. Should the four months period

elapse without reconciliation it would take effect as irrevocable divorce.<sup>14</sup>

This law is adopted in the Muslim Code with a little bit of modification. The four months maximum period of continence without dissolution of marriage is retained. However, should the prescription lapse, it does not give effect to irrevocable divorce, but it is only a ground for the dissolution of marriage through court decree at the instance of the wife.

The bases of this law are the following qur'anic ayyat:

*For those who take an oath for a abstention from their wives, a waiting for four months is ordained; if then they return, Allah is Oft-forgiving, Most Merciful. But if their intention is firm for divorce, Allah heareth and know all things.*<sup>15</sup>

*Allah will not call you to account for what is futile in your oaths, but He will call you to account for your deliberate oaths: for expiation, feed ten indigent persons, on a scale of the average for the food of your families; or cloth them; or give a slave his freedom. If that is beyond your means, fast for these days. That is the expiation for the oaths you have sworn. But keep to your oaths. Thus doth Allah make clear to you His Signs, that you may be grateful.*<sup>16</sup>

### 3. Divorce by zihar

Article 48 of the Muslim Code provides that where the husband has injuriously assimilated (zihar) his wife to any of his relatives within the prohibited degrees of marriages, they shall mutually refrain from having carnal relation until he shall have performed the prescribed expiation. The wife may ask the court to require her husband to perform the expiation or to pronounce a regular talaq should he fail or refuse to do so, without prejudice to her right of seeking other appropriate remedies.

Zihar is a form of divorce practiced by the Arabs before Islam. It is done by saying to the wife: "be thou to me as the back of my mother." When Islam came, it condemned that practice and changed it to a mere temporary prohibition of sexual intercourse between the spouses until the proper expiation is performed.<sup>17</sup> Expiation must be done within four months, otherwise it will ripen into irrevocable divorce.<sup>18</sup>

It is based on the following qur'anic ayyat to the effect:

*If any men among you divorce their wives by zihar (calling them mothers), they cannot be their mothers: None can be their mothers except those who gave them birth. And in fact they use words (both) iniquitous and false: but truly Allah is One that blots out (sins), and forgives (again and again).<sup>19</sup>*

*But those who divorce their wives by zihar, then wish to go back on the words they uttered, (it is ordained that such a one) should free a slave before they touch each other: This are you admonished to perform: and Allah is Well-acquainted with (all)<sup>20</sup> that you do.*

*And if any has not (the wherewithal), he should fast for two months consecutively before they touch each other. But if any is unable to do so, he should feed sixty indigent ones. This, that you may show your faith in Allah.<sup>21</sup>*

This law is adopted in the Muslim Code with a little modification. Under the Muslim Code, making a zihar by a husband to his wife shall have the following effects:

(a) They shall mutually refrain from having a carnal relation until he shall have performed the prescribed expiation consisting of (1) freeing a slave, or (2) fasting for two consecutive months, or (3) feeding sixty indigents in that order;<sup>22</sup>

(b) Should the husband fail to perform the prescribed *ḥ*atmation voluntarily, the wife may petition the court to require her husband to perform the expiation or to pronounce a regular talaq;

(c) Should the husband refuse to do either of the above requirements, the wife may petition the court for divorce by faskh (or fasakh) on the ground of unusual cruelty.<sup>23</sup>

#### 4. Divorce by li'an

Article 49 of the Muslim Code provides that where the husband accuses his wife in court of adultery, a decree of perpetual divorce may be granted by the court after due hearing and after the parties shall have performed the prescribed acts of imprecation (li'an).

This is the case of mutual acts of imprecation. When the husband accuses his wife in court of adultery but he cannot produce the four-eye-witnesses as a quantum of evidence to prove his case, except himself, and in order for the husband to be absolved from the "Crime of Qadf" (false accusation against the chastity of woman), Islam provides mutual acts of imprecation as a solution to the above problem.

Mutual acts of imprecation shall be done in the following manner: the Judge shall require the presence of the spouses and order the husband to bear witness four times with an oath to Allah that he is solemnly telling the truth, nothing but the whole truth and to take the fifth oath to Allah that he solemnly invokes the curse of Allah on himself if he tells a lie in his accusation against his wife. Thereafter, he shall order the wife to bear witness four times with an oath to Allah that her husband is telling a lie in his accusation against her and the fifth oath to Allah that she solemnly invokes the wrath of Allah on herself if her accuser is telling the truth. Then, a decree of perpetual divorce is granted to them by the court.<sup>24</sup>

The bases of this law are the following qur'anic ayyat to the effect:

*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;*<sup>25</sup>

*And the fifth (oath) (should be) that they solemnly invoke the curse of Allah on themselves if they tell a lie.*<sup>26</sup>

*But it would avert the punishment from the wife, if she bears witness four times (with an oath) by Allah, that (her husband) is telling a lie;*<sup>27</sup>

*And the fifth (oath) should be that she solemnly invokes the wrath of Allah on herself if (her accuser) is telling the truth.*<sup>28</sup>

## 5. Divorce by khul'

Article 50 of the Muslim Code provides that the wife may, after having offered to return or renounce her dower (mahr) or to pay any other lawful consideration for her release (khul') from the marriage bond, petition the court for divorce. The court shall, in meritorious cases and after fixing the consideration, issue the corresponding decree.

This is the kind of irrevocable divorce initiated by the wife. If she is unhappy in her marriage for her own reasons without the overt fault or guilt of the husband, she may seek a divorce from him.<sup>29</sup> This is an absolute right of the wife to release herself from the marriage tie subject only to the legal obligation that is to renounce or to return her dower (mahr) or to pay any other lawful consideration to compensate the husband for his material or moral losses.<sup>30</sup>

This is based on the qur'anic ayyah to the effect:

*It is not lawful for you, (men), to take back any of your gifts (from your wives), except when both parties fear that they would be unable to keep the limits ordained*

*by Allah. If you (judges) do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she give something for her freedom. These are the limits ordained by Allah.<sup>31</sup>*

A well-known tradition as a basis of khul' is the case of Jamilah bint Abd Allah, the wife of Thabit ibn Qays. She disliked her husband on account of his physical ugliness which was described as short, dark and ugly. Because she disliked him, she feared to transgress the law of Allah (S.W.T.) which ordained to love and respect him. She presented her case before the Holy Prophet (S.A.W.) and demanded a divorce from her husband. After due hearing, the Holy Prophet (S.A.W.) ordained that she should return the garden given to her as dower to Thabit and asked the latter to give her a single divorce.<sup>32</sup>

## 6. Divorce by tafwid

Article 51 of the Muslim Code provides that if the husband has delegated (tafwid) to the wife the right to effect a talaq at the time of the celebration of the marriage or thereafter, she may repudiate the marriage and the repudiation would have the same effect as if it were pronounced by the husband himself.

Under the Muslim Code, the husband has the authority to delegate his right to effect talaq to his wife either at the time to the celebration of marriage or thereafter. Should the wife exercise such right entrusted to her and repudiate the marriage, such divorce would have the same effect as if talaq were pronounced by the husband. However, the legal requirements provided for under Article 46, 161 and 183 of the Muslim Code must be observed.

The basis of the foregoing provision of law is the qur'anic ayyah to the effect:

*Oh Prophet! say to your consorts: if it be that you desire the life of this world, and its glitter, - then come! I*

*will provide for your enjoyment and set you free in a handsome manner.*<sup>33</sup>

## 7. Divorce by faskh (or fasakh)

Faskh (or fasakh) may be define as the dissolution of the marriage bond by judicial decree at the instance of the wife.<sup>34</sup> It must, however, be based in certain specified legal grounds.

Article 52 of the Muslim Code provides that the court may, upon petition of the wife, decree a divorce by faskh (or fasakh) on any of the following grounds:

(a) Neglect or failure of the husband to provide support for the family for at least six consecutive months;

(b) Conviction of the husband by final judgment sentencing him to imprisonment for at least one year;

(c) Failure of the husband to perform for six months without reasonable cause his marital obligation in accordance with this Code;

(d) Impotency of the husband;

(e) Insanity or affliction of the husband with an incurable disease which would make the continuance of the marriage relationship injurious to the family;

(f) Unusual cruelty of the husband as defined under the next succeeding article; or

(g) Any oher cause recognized under Muslim law for the dissolution of marriage by faskh (or fasakh) either at the instance of the wife or the proper wali.

Article 53 of the Muslim Code provides for the so called “unusual cruelty of the husband” as a ground for divorce by faskh (or fasakh). Any

of the following may constitute unusual cruelty:

(a) Habitually assaults her or makes her life miserable by cruel conduct even if this does not result in physical injury;

(b) Associates with persons of ill-repute or leads an infamous life or attempts to force the wife to live an immoral life;

(c) Compels her to dispose of her exclusive property or prevents her from exercising her legal rights over it;

(d) Obstructs her in the observance of her religious practices; or

(e) Does not treat her justly and equitably as enjoined by Islamic law.

The rules of faskh (or fasakh) have been the subject of Muslim law under the heading “khiyar or option.”<sup>35</sup> According to the Shafi’i School of law, the wife may repudiate the marriage by faskh (or fasakh) in any of the following grounds: (1) when the husband is suffering from impotency, or insanity, or leprosy, or elephantiasis; or (2) the husband cannot provide the maintenance to his wife; or (3) he is not equal in *kufu* (marriage equality).<sup>36</sup>

In the modern legislation like the Muslim Code, the grounds for faskh (or fasakh) have been expanded. This is based in the saying of the Holy Prophet (S.A.W.) that “la dharara wa la dhiraar,” which means that “any action should not make harm to the doer or to the object of the action.”<sup>37</sup>

### C. ‘Idda

Under the Muslim Code, ‘idda has been defined as “the period of waiting prescribed for a woman whose marriage has been dissolved by death or by divorce the completion of which shall enable her to contract a new marriage.”<sup>38</sup>

The immediate consequence of divorce is the commencement of 'idda. This usually lasts for three monthly courses or three months or four months and ten days or if the woman is pregnant until her delivery. Its purpose is to give chance for the parties to reconsider the matter and to ensure that the woman is not pregnant. If the dissolution of the marriage is due to the death of the husband, the 'idda is longer for the mourning and respect of the dead husband.<sup>39</sup>

Under the Muslim Code, the rules of 'idda are as follows:<sup>40</sup>

- (1) In case of dissolution of marriage by death, four months and ten days counted from the death of her husband;
- (2) In case of dissolution of marriage by divorce, for three monthly courses;
- (3) In case of a pregnant woman, for a period extending until her delivery; or
- (4) Should the husband die while the wife is observing 'idda for divorce, another 'idda for death shall be observed in accordance with the first paragraph.

The bases of this law are the following qur'anic ayyat:

*If any of you die and leave widows behind, they shall wait concerning themselves four months and ten days: when they have fulfilled their terms, there is no blame on you if they dispose of themselves in a just and reasonable manner...*<sup>41</sup>

*Divorced women shall wait concerning themselves for three monthy periods...*<sup>42</sup>

*... for those who carry (life within their wombs), their period is until they deliver their burdens:*<sup>43</sup>

Although the foregoing provisions of law regarding 'idda is not complete but other rules of 'idda under Muslim law not embodied in the Muslim Code shall also be applicable after they shall have been proven in evidence as a fact.<sup>44</sup>

Therefore, the rules provided in Surah al-Ahzab (33) ayyah 49 and Surah al-Talaq (65) ayyah 4 of the Holy Qur'an and other related matters shall also be applicable in this law after they shall have been proven in evidence as a fact. Surah al-Ahzab (33) ayyah 49 and Surah al-Talaq (65) ayyah 4 of the Holy Qur'an are as follows:

*Oh you who believed! when you marry believing women, and then divorce them before you have touched them, no period of 'idda have you to count in respect of them.*<sup>45</sup>

*Such of your women as have passed the age of monthly courses, for them the prescribed period, if you have any doubt, is three months, and for those who have no courses (it is the same).*<sup>46</sup>

In a nutshell, the law of divorce under the Muslim Code is consistent with Islamic Law.

## Notes

1. Code of Muslim Personal Laws of the Philippines, (otherwise known as Presidential Decree No. 1083 which took effect on February 4, 1977), Art. 45. (to shorten the citation, this Code shall be cited in this dissertation as M.C.).
2. M.C., Art. 46(1).
3. See Muhammad Iqbal Siddiqi, The Family Laws of Islam, 224 (1986).
4. The Holy Qur'an, Surah al-Talaq (65):1. (to shorten the citation, the Holy Qur'an shall be cited in this dissertation as Q.).
5. M.C., Art. 46(2).
6. See Ahmad Ibrahim, Family law in Laysia and Singapore, 221 (1984).
7. Q., Surah al-Baqara (2):229.
8. M.C., Art. 161(1).
9. Q., Surah al-Talaq (65):2.
10. M.C., Art. 161(2).
11. Q., Surah al-Nisaa (4):35.
12. M.C., Art. 57.
13. Q., Surah al-Baqara (2):228.
14. See Hamudda 'Abd al 'Ati, The Family Structure in Islam, 237-238, (1977).
15. Q., Surah al-Baqara (2):226-227.
16. Q., Surah al-Ma'ida (5):92.
17. 'Abd al 'Ati, Supra Note 14 at 238-239.
18. Ibid.

19. Q., Surah al-Mujadila (58):2.
20. Q., Surah al-Mujadila (58):3.
21. Q., Surah al-Mujadila (58):4.
22. Q., Surah al-Mujadila (58):2-4.
23. Jainal D. Rasul and Ibrahim Ghazali, Commentaries and Jurisprudence on Muslim Code of the Philippines, 174 (1984).
24. Saaduddin A. Alauya, The Quizzer in Muslim Personal Law, 65 (1984); Rasul, Supra Note 23.
25. Q., Surah al-Nur (24):6.
26. Q., Surah al-Nur (24):7.
27. Q., Surah al-Nur (24):8.
28. Q., Surah al-Nur (24):9.
29. 'Abd al 'Ati, Supra Note 14 at 239.
30. Ibid.
31. Q., Surah al-Baqara (2):229.
32. Sahih al-Bukhari, (trans. by Muhammad Muhsin Khan) vol. VII, 150 (1984).
33. Q., Surah al-Ahzab (33):28.
34. See Ahmad Ibrahim, Supra Note 6 at 232.
35. Ibid.
36. Id., at 232-233.
37. Sunan ibn Majah, (commentator: Muhammad Mustafa al 'Azami) vol. II, 44 (1984).

38. M.C., Art. 56.
39. 'Abd al 'Ati, supra Note 14 at 345-346.
40. M.C., Art. 57 (1 and 2).
41. Q., Surah al-Baqara (2):234.
42. Q., Surah al-Baqara (2):228.
43. Q., Surah al-Talaq (65):4.
44. M.C., Art. 5.
45. Q., Surah al-Ahzab (33):49.
46. Q., Surah al-Talaq (65):4.