

Testimony in Divorce

الإشهاد بالطلاق

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Abstract:

This research aims to contribute to reducing the divorce rate by proposing to impose the husband's witnessing of it, so his divorce becomes valid and effective against others, especially the wife. In addition, witnessing the divorce guarantees the rights of the ex-wife, as she can know the nature of her relationship with the husband and its reality without doubt or ambiguity, Likewise the rights of society, considering that divorce is part of the public order and it is not permissible to deviate from the scope of Sharia and public morals. The relationship between spouses is governed by Islamic Sharia and it regulates it, and any departure from the framework set by Sharia is a departure from the public order, so the need, while we were dealing with the issue, was to know the possibility of this (mandating testimony in divorce) without contravening Sharia and its objectives.

Keywords: Divorce, testimony, restriction of permissibility, Sharia law.

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An introduction:

The widespread prevalence of divorce requires us to search for legal means that can limit the phenomenon, given the tragedies that it causes to society and affect some of its segments, especially children. Although divorce is legitimate according to Sharia and law, it is a step towards destruction, not construction. What the marriage contract has built over years – the family – can be destroyed by divorce in moments, in most cases, it is due to a trivial reason or without reason. Just in a moment of passing anger, a home can be destroyed and a family can be scattered. However, there are those who respond to such talk - and this is their right - by saying that divorce is permissible and the Sharia has permitted it, and explained its methods, as it has given the right of divorce to the man, and he has to terminate the marriage contract whenever he wants without being blamed or held accountable.

All Islamic schools (of fikh) agree on this, and of course most Arab laws follow them. Divorce of the husband by his sole will is permissible and is the basis for divorce. Accordingly, there should be no talk of establishing mechanisms that limit a man's freedom to terminate the marital bond, because that is considered an infringement on his legitimate right and a clear violation of the texts of Sharia, which fall within what is called public order.

Between what we are witnessing of the spread of the phenomenon of divorce and the negative consequences that result from it, and between what Sharia and Arab laws have called for, we are left wondering: Didn't Sharia come with everything that is good for the individual and society? So why does the legislator not set limits to divorce that reduce its ability to destroy the family and make it as the wise legislator (God Almighty) wanted it to be: A means to solve a problem, renew blood, and revive a new spirit in a new family? God Almighty said, "***And if they separate, God will enrich each of them from His abundance...***" (Surah At-Talaq /Verse 60).

Things are judged by their intentions, and the intention in divorce is to solve a problem, for example, incompatibility between spouses and ongoing disagreements, or the discovery of a flaw or shortcoming in the partner that cannot be addressed, so marital bond is not completely dissolved until all avenues of reconciliation between the two parties have been exhausted. It is not, - as many believe - a mere word uttered by a man as a weapon to threaten woman and subjugate her, fearing that he might utter it and banish her from his life into the clutches of a society that has no mercy for divorced women, It can also cause the loss of innocent children who are not guilty of anything, as they were born into a society that gives men the right to

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dissolve a marriage contract that is often difficult to establish. Our society, and behind it our legislator, has replaced the marriage contract with a special sacred contract and surrounded it with an aura of veneration, as it links it to the honor and status of the family where he placed a fence around it of conditions that make the person who is applying for it completely convinced of what he is doing, so the marriage cannot take place without the consent of both spouses (Article 9 of Family Law No. 84/11 amended and supplemented by Order 05/02) consent that is not flawed by any defect of consent and is not doubtful, in addition to the conditions mentioned in Article 9 bis, which stipulate the presence of guardian (wali) - in the case of a minor - and two witnesses and the dowry, and the spouses enjoy full legal capacity - 19 years - in addition to the absence of legal impediments, and if the pillar of consent is omitted or is tainted by a defect, the contract is invalidated and is dissolved before consummation in the event that one of the conditions is not met.

All these precautions are to preserve the marriage contracts. On the other hand, if we talk about divorce, we find that it is done easily and simply. It is sufficient for the husband to utter the word divorce or something similar in meaning so that the wife becomes considered divorced, even though the husband can take her back before the end of her waiting period. However, as soon as the husband divorces his wife once, the bonds of marriage begin to dissolve, so how can we make a contract so sacred when it is concluded, and then make breaking it so easy and simple?

Through these questions, we wanted to write about the subject from the perspective of witnessing divorce as a legal means and a moral barrier that the legislator places to protect the marriage contract, the idea is not to prevent divorce and prohibit it as Christians do, but rather to put a barrier that the husband must pass through before announcing his divorce, and that is by having his divorce witnessed just as his marriage must be witnessed. It is not hidden what benefit this can be derived from through this research, and a question came to our mind upon which we built the problem of this study, which is: **Is it possible to impose witnessing in divorce legally without violating the texts of Sharia?**

I. The origin of witnessing divorce in Islamic law

Islamic scholars differed on whether witnessing divorce is obligatory or only recommended, due to their difference in interpretation of verse 2,3 of Surat At-Talaq: God Almighty said: *“So when they have reached their term, either keep them according to acceptable terms or part with them according to acceptable terms, and*

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bring to witness just men from among you and establish the testimony for God, this is instructed whoever believes in God and the Last Day, and whoever fears God - He will make for him a way out, and will provide for him from where he does not expect ” (Surah At Talaq /Verse 2-3).

Those who say that witnesses are required are a minority of the Companions (SAHABA) and Followers (TABIIEEN), they see that the matter in the verse is specific to witnesses in divorce and in taking her back, meaning that a man must witness if he takes his ex-wife back (in the case of a revocable divorce) and he must also witness if he does not take her back and intends to divorce her (it becomes an irrevocable divorce). The majority of Oulama believe that this is merely a matter of recommendation, it is recommended that anyone who wishes to witness this should do so, if he do not, then he is no blame on him, whether for a return or for a separation. We will address each party's viewpoint and arguments in this section.

1- The opinion that witnesses are not required and its evidence

The majority of (FOUKAHA) from the Hanbalis, Malikis, Hanafis and Shafi’is (in their last statements) (Sorkhosi EL Mabsout (1993)) went to the fact that what is meant in verse 2 of Surat At-Talaq mentioned above is not an obligatory command to have witnesses for divorce or revocation, but rather the command is for recommendation and is left to the one who divorced. If he wants, he may have witnesses and if he wants, he may not have witnesses (Kassani (1986), In both cases, his divorce is valid and final, because divorce is the husband’s right and he alone has the right to dispose of it. They based their opinion on a set of evidence that can be summarized as follows:

That the presence of witnesses in the verse is recommended and not obligatory, as stated in the Almighty’s saying: “*And bring to witness when you make a transaction...*” (Surah Al-Baqarah /Verse 288) since the presence of witnesses in a sale is recommended and not obligatory, and the same is true for divorce, those who say that witnessing a divorce is not required said that there is evidence that changes it from being obligatory to being recommended, which is the divorce of the Prophet - may God bless him and grant him peace- of his wife Hafsa, and his wife Sawda -may God be pleased with them-, and his taking them back without witnessing, and the Companions did the same, such as Ibn Omar, -may God be pleased with him-, who divorced his wife while she was menstruating, and when the Messenger of God heard of this, he ordered him to take her back. (Ahmed, IbnHanbel (1895))

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- There are other verses in which divorce is mentioned without indicating the necessity of witnesses, such as the Almighty's saying: *"Divorce is twice, then either keep [her] in an acceptable manner or release [her] with good treatment"* (Verse 229 /Surah Al-Baqarah), and the verse: *"But if he divorces her, then she is not lawful to him afterward until she marries a husband other than him"* (Surah Al-Baqarah /Verse 230), also the Almighty said: *"And when you divorce women and they have fulfilled their term, either keep them according to acceptable terms or release them according to acceptable terms."* (Surah Al-Baqarah /Verse 231). The evidence here, according to the proponents of this opinion, is that the verses here mentioned divorce and separation without mentioning witnesses. Even if witnesses were obligatory, they would have been mentioned in conjunction with divorce, Ibn Taymiyyah commented on those who say that witnesses are required in divorce and commented on the second verse of Surat At-Talaq, saying : Some people thought that witnessing is divorce and thought that a divorce that is not witnessed does not take place, this is contrary to consensus and contrary to the Book and the Sunnah. None of the famous scholars said this, Divorce was permitted at first, but witnesses were not required. Rather, witnesses were required when He said: *"And when they have reached their term, either keep them according to acceptable terms or part from them according to acceptable terms."* What is meant here by parting is releasing her if the waiting period has expired, and this is not divorce, marriage, or taking her back, (IbnTaymiya(1995)).

2- The opinion that witnesses are required and its evidence

Although the number of those who said that witnessing a divorce is obligatory among the Companions and Followers is small compared to those who said that it is not obligatory, However, as long as there is a dissenting opinion and the matter is not one that all the predecessors of the nation agreed upon, then the issue is open to study and discussion to come up with an opinion that is suitable for our time, even if it was not suitable in the past. Among the Companions who said that witnessing divorce is obligatory are Ali Ibn Abi Talib, Abdullah Ibn Abbas, and Imran Ibn Husayn, may God be pleased with them, and among the Followers, Ata', Ibn Jurayj, and Ibn Sirin, as he went to that the Shafi'is in their old opinion and the Zahiris, but recently Sheikh Taher bin Ashour (Ibn Achour, Tahar (1983), Sheikh Mustafa Al-Zarqa and Sheikh Muhammad Al-Ghazali, Sheikh Ahmed Shaker (Shaker, Ahmed), may God have mercy on them, have tended towards this opinion, and As an example of this On the authority of Imran bin Husayn, he was asked about a man who divorced his wife without witnesses, and took her back without witnesses. He said: He divorced her in a

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manner other than the Sunnah, and took her back in a manner other than the Sunnah. So let him have witnesses to his divorce and to his taking her back, and seek forgiveness from God (El Sanaani, Abou Baker Aberrazek (2013)).

As we mentioned above, modern Oulamma are the ones who most called for witnessing divorce, because they noticed the spread of the phenomenon of divorce in Arab and Islamic countries. As religious restraint has diminished in our time and is no longer the locomotive that pulls society as it was in the past, divorce has become a normal matter, as well as going back on it, a man can divorce his wife without the news of his divorce reaching the authorities, and then take her back as if nothing had happened. You will find many couples living together as married couples despite the sanctity of the relationship between them because the husband divorced his wife more than three times without taking into account the limits of God and the rights of society, not to mention other violations caused by not having witnesses to the divorce.

3- Weighing between the two opinions

The four “ **Foukaha** ” agreed that having witnesses to a divorce is not obligatory, but rather recommended. Whoever if a man wants to have witnesses to his divorce, let him have them, and whoever does not do so, his divorce is binding and permissible. The evidence from the verse is out of place, as Ibn Taymiyyah explained, This is because the testimony mentioned in the second verse of Surat At-Talaq mentioned above is not related to divorce, but rather it is related to what comes after the divorce, that mean : before the end of the waiting period. The choice here is for the man between divorcing her or taking her back, and in both cases, he witnesses to his action and there is no connection here to divorce.

The evidence presented by the first team is conclusive and leaves no room for doubt that witnessing the divorce is not obligatory, but at the same time it is not forbidden. Whoever wants to witness his divorce may do so. And from here came the opinion of the second group, which says that witnessing is obligatory in divorce, not based on a definitive text, but because necessity requires it, and bringing about interest here is apparent, so requiring witnessing in divorce will inevitably reduce the number of its cases, and even if this matter did not constitute a problem in the time of the “ **Oulama**” who did not say that it was obligatory, today it is a social problem that has harms, that require searching for a solution for it.

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Contemporary “**Foukaha**” have suggested requiring to witness divorce only because they have observed its widespread prevalence, sometimes for the most trivial reasons. registration divorce is desirable to prevent misunderstandings and preserve rights. It usually occurs after the divorce has been completed. What prevents witnessing at the time of divorce? We don't need registration afterward, as both serve the same purpose.

II - Testimony on divorce from the restriction on permissibility:

Witnessing a divorce can be included in the topics of what is called the restriction of what is permissible. We are commanded to obey God and His Messenger in what is mentioned in the Qur'an and Sunnah of rulings (avoiding what is forbidden and performing what is obligatory). We are also commanded to obey our authority in what they have commanded and forbidden, within the limits of the obligatory rulings that came with the Sharia. God Almighty said, “*O you who have believed, obey God and obey the Messenger and those in authority among you...*” (Surah An-Nisa /Verse 59).

Obedience to God and His Messenger is in avoiding what is forbidden and performing what is obligatory. As for obedience to our authority, it is in what they restrict of what is permissible or what they establish of laws regarding what has not been revealed or mentioned in the Qur'an or Sunnah, they do not have the authority to prohibit or permit, but they have the authority to restrict what is permissible only if necessity and need call for that. Of course, what is permissible can only be restricted with conditions. Through this section, we will try to define the restriction of what is permissible, and clarifying its legitimacy and conditions first, then we explain how the requirement of witnesses in divorce can be a restriction of the permissible.

1- The restriction of the permissible in Sharia

In this section, we review the definition of what is permissible as a mandatory command. We then address the definition of what is permissible as an action performed by the Authority (the Governor) that compels the subjects to obey him. Al-Mawardi defined what is permissible as: "It is every action that the doer is permitted to perform, with no reward for doing it and no punishment for not doing it" (Soulieman, AL Mardawi Ibn Ali (2000)).

Also, Al-Razi defined it as: "It is that which the doer is informed of or has been shown to be free from blame for doing or omitting it." Permissible acts can be defined as any act for which the doer is not rewarded for doing it or held accountable for omitting it. It is something that is not explicitly stated, with no explicit prohibition

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or obligation. The permissible is the most comprehensive of all the legal obligations, and it is from God's expansion upon His servants. God Almighty said, ***“Say, ‘Who has forbidden the adornment of God which He has produced for His servants and the good things of provision?’”*** (Surah Al-A'raf /Verse 32).

However, as we speak about obeying the Authority (Governor) in matters of religious obligations, a question comes to mind: What is the degree of obedience to him if he cannot forbid or permit? The answer is that (Governor) has the authority to prohibit or restrict what is permissible, and he can impose it on the people. People must obey the (Governor) in this matter because Allah the Almighty has commanded obedience to him.

Before we discuss the authority of the (Governor) to restrict what is permissible, we must discuss the meaning of restricting what is permissible:

Restricting what is permissible means placing conditions and restrictions on it so that it moves from its wide circle to a narrow circle, and it is either by preventing it or by imposing it. We have examples of this in the Sharia. Selling is permissible, but it is forbidden on Friday. God Almighty said: ***“O you who have believed, when the call is made for the prayer on the day of Jumu'ah, then proceed to the remembrance of God and leave trade. That is better for you, if you only knew.”*** (Surat Al-Jumu'ah /Verse 9), and Hunting is permissible, but it is forbidden during ihram (pilgrimage): God Almighty said, ***“O you who have believed, fulfill contracts. Lawful to you are the animals of grazing livestock, except what is recited to you. Not lawful is hunting while you are in a state of ihram. Indeed, God decrees what He wills.”*** (Surah Al-Ma'idah /Verse 1).

There are many examples of the restrictions on what is permissible, Many, the most prominent of which is what the second Caliph of the Muslims, Omar Ibn Al-Khattab, may God be pleased with him, did in his capacity as the guardian of the matter. He enacted many laws that restricted what was permissible in his time without the majority of the Companions opposing him, for example: Preventing some of the senior Companions from marrying women of the People of the Book, such as Hudhayfah Ibn Al-Yaman, and preventing the sale of the mothers of children (Ibn Qayyim al-Jawziyya (1991)), even though they had been sold before him.

2 - The Governor's authority to restrict what is permissible

The Guardian (Governor) has the right to restrict what is permissible, and this must be within the limits of the public interest. This restriction is not permanent, but rather temporary and linked to the necessity of bringing about an interest or warding

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off harm, if the necessity is no longer present, what is permissible returns to what it was.

In this regard, (the guardian) has the right to prohibit something that was permissible, or to impose something that was permissible that people did not do, or to reduce the right to use it, this applies to everything that is permissible, from food, drink, and clothing to what is permissible in customs of joy and sorrow, and to everything that affects society.

But this is subject to conditions, as a governor (the guardian) does not have absolute authority to restrict, and the most important conditions are that the restriction relates to the organization of public funds and facilities, and that the restriction be after consulting people with experience, knowledge, and science about the issue to be restricted (Abdeselem, khader Ahmed (2019), pp. 504-468, in:

https://mksq.journals.ekb.eg/article_245735_39ff203e1caa9fb9b54a7fe7e87e9f65.pdf).

3- Restricting divorce by Witnesses

Divorce is permissible and is a legitimate right for the husband to use without restrictions and even without the judge asking him about the reason. However, there are other parties in the relationship who may be affected by the husband's use of his right, namely the wife and children.

Even if we cannot prevent the husband from using his right to dissolve the marital bond, we must limit his arbitrary use of it by placing restrictions on his use of this right to ensure that the rights of others are not infringed upon. Among these restrictions is that the guardian (Governor) - with the powers he has been given to restrict what is permissible - impose the husband's witnessing of his divorce.

If a husband wants to divorce his wife, he must have witnesses to that. Divorce is in fact permissible, and a man can resort to it to dissolve the marital bond and thus end the marriage contract, that sacred bond between the spouses, which was completed through witnesses, as it is a pillar in it, and marriage cannot take place without it. So how can a contract whose pillar is witnesses end without witnesses, despite its seriousness and the rights of others attached to it?

If we go back to Sharia, it imposes witnessing in the marriage contract, but in return it does not impose witnessing in the divorce, nor does it reject it. The matter remains with the guardian, who can impose witnessing on the divorce until it is completed, and this is either in front of two just witnesses who can present their testimony later in order to prove the divorce in the court , Or it may be at a notary

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who documents the divorce and provides both spouses with an official certificate documenting their divorce that they can use at the court and at the civil status officer.

Conclusion:

Through this research, we tried to show the relationship between witnessing a divorce and what is called restricting what is permissible. We reached the conclusion that witnessing a divorce does not conflict with the principles of Sharia, as it falls within what is called restricting what is permissible, what is considered an essential function of the guardian (governor), who does not have the right to prohibit or permit, but does have the right to restrict, is restricting what is permissible. Here, in the matter of divorce, it is considered permissible and a legitimate right for the husband to use whenever he wishes, giving him the authority to dissolve the marital bond without supervision does more harm than good, in addition to reducing the divorce rate by placing a barrier in the husband's way, there are other advantages to requiring witnesses in divorce, which are regulating divorce and avoiding problems regarding the number of divorces and quarrels over whether or not there is a divorce, which facilitates the work of judges. This can only be achieved by amending the articles of the Family Law so that it includes the requirement to witness the divorce and provide a document proving it before resorting to the court to prove it.

Some Arab countries have preceded this in their legislation, as the Tunisian Personal Status Code included a condition that divorce may only take place at the court, and any divorce outside of it is not valid. This is a method of witnessing, as the Tunisian legislator made the judge who decides on the matter a witness to the divorce. As for the Algerian legislator, he can resort to other methods of witnessing, such as announcing the divorce before a notary, for example, as is customary in marriage contracts, or simply having two just witnesses who can present their testimony on the divorce at the judge.

-Practical suggestions:

1. Amend Article 49 of the Family Law to stipulate that divorce may only be valid in the presence of two just witnesses.
2. Grant notaries the right to witness divorces, just as they have the right to witness marriages
3. The amended Family Law should include a broader role for the family court judge in investigating divorces outside the Courtroom.

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4. The necessity of stipulating that divorces be witnessed and disseminating family.

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