

The Judgment of Testimony on Divorce in Islamic Jurisprudence and Iraqi Law

¹Bazaar Ghafoor, ²Reza Nikkhah Sarnaghi, ³Mohammad Hasan Javadi

¹PhD Student in Private Law, Department of Islamic law and jurisprudence, Urmia University, Urmia, Iran

^{2,3}Department of Islamic law and jurisprudence, Urmia University, Urmia, Iran

Abstract

The current study aims to identify divorce from the lexical, idiomatic perspective of Iraqi law, as well as its comprehensive and precise definition, which is accepted by well-known schools of thought. This study states the arguments cited by scholars from Islamic sources such as the Qur'an, tradition, consensus and analogy regarding the judgment of testimony as obligatory or mustahab. In other words, scholars have compared the views of Islamic jurists as well as Iraqi law on the issue of testimony in divorce in detail.

Keywords: Divorce, Testimony, Islamic jurisprudence, Iraqi law.

INTRODUCTION

God has paid special attention to the tradition of marriage. As He says in Surah Rom verse 21:

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا
وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ
يَتَفَكَّرُونَ؛

And again, one of His verses (grace) is to create for you a couple of your own kind, who rested beside him and became acquainted with each other, and established kindness between you. Also, in this issue, it is obvious to people with the thought of evidence (from the knowledge and wisdom of the truth). Marriage is a sacred bond between a man and a woman, according to which the parties are legally lawful to each other. Its purpose is to create a family and preserve humanity. Divorce is an important step in ending a marriage. The study of divorce will be significant, because divorce has become a serious and widespread issue in all societies, especially in Iraqi society. Despite the fact that Islam has introduced divorce as the most hated law, to the extent that the throne of

God Almighty is shaken by its occurrence. Islam has regulated the issue of divorce in several verses of the Holy Qur'an and narrations from the Messenger of God, peace and blessings of God be upon him, his companions, Ahl al-Bayt, peace be upon them, and their followers. The study of divorce has been considered among Muslim jurists that they disagree on some of its rulings. One of the topics on which there are many views is the issue of testimony in divorce. One group of jurists believed that the testimony of divorce is obligatory and divorce is not valid without it. On the other hand, another group believed that testimony is mustahab and each of them provided reasons and documents to prove their opinion.

Definition of Divorce in Islamic Jurisprudence and Iraqi Law

Divorce in word means to raise, leave, send and evacuate. It is said that divorce is the removal of sensory or spiritual restraint and is expressed in the form of divorce. If divorced alone and unconditionally. It is said that "Atlaqat al-Asir" means I untied his rope and released him, and it

is said that "Atlaq al-Fars" means that he freed the horse (Khalaf, 1978, 1/131; Al-Jaziri, 1422, 4, 248)

The jurists have stated many definitions of divorce that are similar in meaning and close to each other. Here are some of them:

- According to the Hanafis, divorce means the immediate termination of a marriage in the form of irrevocable or the termination in the future in a referential manner with a specific phrase. (Al-Hasakafi, V 1, p: 205).

- Also, divorce is considered by the Imamiye Shiites to be the removing of the marriage bond with the divorce formula or like that (Helli, V 1, P 15).

- According to Malekiyan, divorce is a religious characteristic which deprives the husband's pleasure of his wife (Al-Maliki, vol. 4 /p. 42).

- Also, according to Hanbale, divorce is something that terminates all or part of the contract (Al-Jaziri, vol. 2, vol. 4, p. 248) and from the point of view of the Shafi'is, divorce is known to remove the bond of marriage with the formula of divorce or the like. (Al-Qaliubi and Al-Barlasi Amira, vol. 3/ p 324).

According to previous definitions, scholars believe that divorce destroys the infallibility of marriage immediately or in the future with a specific phrase prescribed to him, whether it is explicit or ironic, or whatever is in their position that is expressed with intention. Article 34 of the Iraqi Personal Status Law No. 188 of 1959 defines divorce as follows. The removing of the marriage bond is by Igha by the husband or wife - in case of power of attorney or delegation to him- or by the judge, and it is not done except with the form prescribed by the Shari'a.

The judgment of testimony on divorce in Islamic jurisprudence and Iraqi law

Testimony in the word is definite news, evidence and supervision (Al-Razi, 1420 AH/ 1999 AD, p. 170) and in jurisprudential terms, jurists have several definitions for testimony and according to the restrictions that govern it,

they have differed in its definition. The following are the most important of them:

- The Hanafi school has defined testimony as follows: it is a word based on intuition and vision, not on conjecture (Zeilai, 1934, 4/207).

- Malekeye have defined it as; Informing the ruler through the witness of news that comes from awareness, not from doubt.

- Al-Sawi, one of Maliki's jurists, has defined it as follows: to inform the ruler fairly of what the witness is aware of, even if it is a general matter, so that the ruler can issue a ruling on this basis (Al-Batun, 2010, pp. 18-19).

- Imamiye have defined it as follows; Expressing the documents of definite consciousness either by hearing or observing it and bringing it to the hearing and opinion of the judge. This removes news that is not based on definitive science or is based on speculation that comes from hearing or observing.

And it is observed that a special word is mentioned for testimony (Al-Batun, Bitu, 22). Also, testimony in divorce, according to this sect, is the presence of two witnesses who hear the concubine, whether they are told to testify or not. And hearing a concubine is a condition for the validity of a divorce, so with the testimony of one person, even if it is just, or with the testimony of two lecher people, it does not happen, but two witnesses who are just must be present. Among the jurists are those who are bound to be Muslim witnesses, and if one of them testifies to the genesis and the other testifies individually, no divorce will be happened. But if it is witnessed by affirmation, consensus is not conditioned, and if one is witnessed by genesis and the other by affirmation, it is not accepted. The testimony of a woman in a divorce is not accepted alone or in the attachment of a man, and if the divorce took place and no one testified to it and they testified to it later, the divorce that took place first will be annulled and the divorce will take place after the testimony and its valid form should be existed (Al-Hali, 1983, 3/21).

Shafi'i also defines it as informing others of the right of others in the judiciary or informing others of what he knew to be a witness, with a specific sentence: I testify or have been a witness, or whatever comes in their place (Al-Mawardi, 1419, 1/422). Al-Bahouti, one of the Hanbali jurists, also defines testimony as follows: Informing others of what the witness knew with a specific word, such as I was a witness or I testify (Al-Bahouti Al-Hanbali, 1414 AH, 3/575). Zaheriye sect also states that by examining Ibn Hazm's Al-Mahali book, a special definition of testimony is obtained, but it is clear from the generality of his words in testimony that he agrees with the jurists. That testimony is to tell the truth, but without the need for a specific word to testify, differs from others. He says: If a witness tells the judge that I testify or I tell you or does not say "I", all this is complete testimony that the ruler is obliged to rule according to them because it is not in the Qur'an, nor in the Sunnah, nor in the word of companions. And testimony according to the narration of Ibn Hazm Zaheri: Expressing and informing about the rights of others is a correct and complete news that something that invalidates it has not reached him and they judge according to it. (Al-Batun, previous source, 21). In the field of women, the issue of women's testimony is also significant, in this regard, in the opinion of jurists, women's testimony alone is not acceptable (Sobhani, Amir Hosseini, Roshan, 2016, 22) In Iraqi legal texts, testimony is true news that is for the right of others or against others by observation and certainty and in the form of testimony in the Judiciary (Al-Batun, previous source, 28)

The judgment of testimony in Islamic jurisprudence

The jurists have not differed in the legitimacy of divorce, neither in the revocation of divorce nor in divorce, but they disagree on the extent of its legitimacy:

Imamiyeh Shiites and Ibn Hazm believe that it is obligatory (Ibn al-Hazm, 11/ 291-293, and Kashif al-Ghatta , 195-196) and the majority of Hanafi, Maliki, Shafi'i, Hanbali and Zahiriya, Zaydi and Ebaziye jurists agree that testimony of divorce is not obligatory, but it is

recommended (Ibn Najim al-Masri, 4/55. Al-Marghinani, 7/2 and Al-Gharnati, no date, 155). Therefore, most jurists believe that divorce takes place without testimony and is the right of the husband and he has the right to possess it as he wishes (Al-Tabari, 1420 AH 12/121, and Al-Sarkhsi, 6/19. And Ibn Najim Al-Masri, Source Previous 4/55, Al-Ru'ini Al-Maleki 1412 AH, 5/37, and Al-Ramli, Hijri, 7/59). The quorum of intuitions in proving the divorce is two men or one man and two women (Abu al-'Aynin, 1966, 3/290). And for their promise, they cite arguments from the Holy Quran and tradition of the Prophet, and consensus and analogy.

But the reason for them in the Holy Quran is verse 282 of Surah Al-Baqarah which says:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَىٰ أَجَلٍ مُّسَمًّى فَاكْتُبُوهُ وَلْيَكْتُب بَيْنَكُمْ كَاتِبٌ بِالْعَدْلِ؛

And testify whenever you trade). That divorce is recommended not obligatory and they say that as testimony is recommended in sale and not obligatory, so it is such this in divorce (Al-Qurtabi, 2005, 10/184). And the Almighty has said: "When they have completed the period of 'iddah, either keep them good or leave them alone with good manner and (to their divorce) testify from two righteous Muslim men (divorce/ 2) and believe that verse indicates that testimony is recommended, not obligatory. The following is:

a. The matter in the holy verse does not indicate the obligation, but it indicates that it is recommended, because it has a parallel which leads it from necessity to recommending, which is the divorce of the Prophet (peace and blessings of Allaah be upon him) from his wife Hafsa and Asma Bint al-Na'man Juniya without testimony (Al-Sarakhsi, previous source, 6/19/19).

b. Testimony refers to the revocation to divorce, not to divorce, and even his revocation to divorce is through recommending not obligation (Al-Qurtabi, former source, 8/104 Al-Sarkhsi, previous source, 6/19).

c. God Almighty has compared the revocation with separation and God Almighty says:

فَإِذَا بَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ وَأَشْهِدُوا ذَوَيْ عَدْلٍ مِّنْكُمْ وَأَقِيمُوا الشَّهَادَةَ لِلَّهِ ذَلِكَ يُوعِظُ بِهِ مَنْ كَانَ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَمَنْ يَتَّقِ اللَّهَ يَجْعَلْ لَهُ مَخْرَجًا؛

Either keep them in goodness, or leave them in good manner, and witness (to their divorce) by two righteous Muslim men is required” (Divorce: 2). Then he commanded the testimony of both, and commanded two things in two sentences, and then in each of them, he commanded to testify with one word, and this is what God Almighty has said; (and also (on their divorce) two righteous Muslim men should testify). And this single word has not been asked for its real meaning, that is, obligation, and its virtual meaning, that is, recommending. If one of the two meanings is proved in relation to one of the two commands, it is necessary to include the same meaning in the other, and it is obligatory to generalize the word in both real and virtual meanings, and this is forbidden to us (Abu al-'Aynin, the former, 369).

d. Divorce means in the words of God Almighty (or leave them with good behavior) (Divorce: 2). The release of a woman is at the end of her Edda period, and this is neither divorce nor revocation nor marriage, so it is known that testimony is only about revocation (Ibn Tamimah, 3/52).

Evidence of tradition and consensus

One of the companions divorced his wife during the time of the Messenger of God, peace and blessings be upon him, while she was menstruating, so her father asked the Messenger of God, peace and blessings be upon him, about it. The Holy Prophet, peace and blessings be upon him, said: "Command him to bring his wife back and hold her until she is clean, for that is the time God has commanded." (Ibn Malik al-Madani, 186) This hadith indicates that testimony is not necessary in divorce, because the Messenger of God (peace and blessings of Allaah be upon him) explained to the father of the Companions who

had divorced his wife how to divorce in tradition. He did not explain that if his son wanted to divorce her, he would have to testify against her.

But their reason for the consensus is that the jurists believe that the Messenger of God, peace and blessings of God be upon him, did not mention testimony in his statement (order him to return his wife) and one of the reasons why it is not obligatory is that consensus is on lack of necessity of testimony in divorce, and besides, we do not know that a person who has divorced and has not witnessed, divorce is necessary for him, and the consensus is that testimony is not obligatory for divorce, and those who say that divorce testimony is not obligatory, it is recommended (Al-Shukani, 1413 AH - 1993 AD, 6/300, and Ibn al-Qattan, 1424 AH - 2004 AD, 2/32). Regarding analogy, the proponents of this view have argued that testimony is not necessary in matters that man creates for himself, and divorce is one of these matters, therefore, testimony is not necessary in it (Al-Shukani, previous source, 6/300).

The result of this difference is the validity of the divorce for those who believe that testimony is recommended in divorce, and the invalidity of the divorce is for those who believe in the necessity of testimony, because in their view, testimony is a condition for the validity of divorce. It is based on the fact that Ibn Hazm believes that whoever divorces and does not have witness in his divorce is obliged to divorce, but he has exceeded the divine limits, unlike the Imamiyah who believe that the presence and hearing of the word divorce with a special religious form by two witnesses is a condition of the occurrence and validity of divorce, and if there is no testimony, the divorce is void and the marriage between them remains.

Accordingly, the best means has been created to achieve harmony and end the conflict between spouses, and righteous people have a place and influence in souls, and it is their duty to correct and preach, and they usually create peace and tranquility between husband and wife (Al-Hali, Previous source, 195-196, and Ibn Hazm, previous source 11/1180). Those

who believe in this view have argued for the Holy Qur'an, tradition of the Prophet, the works and analogies and rationales. Their evidence from the Holy Quran:

فَإِذَا بَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ وَأَشْهِدُوا ذَوِي عَدْلٍ مِنْكُمْ وَأَقِيمُوا الشَّهَادَةَ لِلَّهِ ذَلِكَ يُوعَظُ بِهِ مَنْ كَانَ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَمَنْ يَتَّقِ اللَّهَ يَجْعَلْ لَهُ مَخْرَجًا؛

Either keep them by good behavior or leave them in good manners, and testify (to their divorce) by two righteous Muslim men” (Divorce: 2). God Almighty has commanded testimony in this verse: "Also (on their divorce) two righteous Muslim men should be witness." And the appearance of the matter in the Shari'a requires its obligation and what its appearance is obligatory. Considering it as recommending is leaving from obligatory without any reason. (Al-Murtaza, 1415, 299).

Imamiye jurists have agreed on the need for two just witnesses in the validity of divorce, and if this is not achieved and other conditions are achieved, they have ruled that it is invalid and cited many narrations have been received from the Imams of the Ahl al-Bayt (as) and all these are after the implication of the Book of God Almighty for its conditional, which states in its promise, "Also (on their divorce) two righteous Muslim men testify." Testimony returns to divorce. God Almighty said: "If you divorce women, divorce them in a certain period and take witnesses ...". And the appearance of the law indicates the obligation, so testimony is necessary (Shams al-Din, Bitā, 258).

It is stated in the preceding verse that divorce occurs only in certain period that God has commanded to divorce, in it and it is not permissible to transgress the limits of God, and whoever transgresses it has wronged himself. And the context is mentioned in revocation or separation, then immediately after that he seeks testimony, so he has made testimony in divorce obligatory according to the verse of the Qur'an (Kamal al-Din, 1966, 234). God has separated revocation, divorce and testimony. Therefore, it is not permissible to separate some of these from others. And whoever is divorced and a

just man has not testified to it has exceeded the limits of God Almighty (Ibn Hazm- previous source, 10/17).

As for their reason in the tradition of the Prophet: The followers of this belief have mentioned the reason for it in this hadith: The Messenger of God, peace and blessings of God be upon him, said: someone who consider something heresy in our matter will be rejected, "(Al-Bukhari, 1422 AH, 3/184) and they say that this hadith indicates that divorce without a witness is against the tradition of the Prophet and is a rejected action (Shaykh al-Ameli, 1/281). It is narrated by Muhammad ibn Yahya by Ahmad ibn Muhammad from Ali ibn al-Hakam from Musa ibn Bakr from Zararah from Abu Ja'far (as) that when it was asked about a woman, he heard that a man divorced her and denied it. Should he live with her and stay with her? He said: Yes, and divorce without a witness is not divorce, and divorce without a certain period is not divorces and it is not permissible to divorce her without a witness and other than the certain period that God Almighty has commanded (Klini, 59, Tusi, 1985, Shamsi, 149).

There is also a narration from Muhammad ibn Ya'qub from his father from Ibn Abi Amir from Umar ibn Azbanah from Yakir from A'ir, etc. from Abi Ja'far (as) who said in a hadith (Without two just witnesses, divorce does not take place and the testimony of women is not permissible in it) (Shaykh al-Ameli, previous source, 2/283) (Al-Ameli, previous source, 2/283). It is also narrated from Aba Abdullah PBUH that he said: "Whoever divorces without a witness, nothing will happen" (Al-Ameli, previous source, 2/283). And a reasonable analogy is proved in two ways:

- First: Those who do not believe in the necessity of testifying in divorce believe in the necessity of testifying in writing divorce. They say that if a husband sends a divorce certificate to his wife in another country, divorce will not be accepted from him unless two people witness on his writing. Ibn Qadameh says in this regard in the book of Al-Mughni: The writing of divorce with only two just witnesses who testify is his writing is proved. Ahmad

says: In a war narration about a woman that her husband's divorce certificate was received in his handwriting and the divorce seal was on it (Ibn Qadameh, 2009, 7/488).

- Second: The conditionality of the divorce testimony limits its scope to the limits of the Shari'a, the Shari'a that wants divorce to be a solution in times of necessity, and its conditionality does not limit the will of the husband. Because he is free to express his will within the bounds of sharia. However, testimony delays divorce, prevents men from rushing, and gives them a chance to find the right path, and the two witnesses should advise him to reduce his inner anger and dissuade him from divorce. (Al-Sabooni, 1968, 482).

The judgment of testimony in Iraqi law

In the previous contents, we mentioned the opinions of the jurists about the witnesses of divorce and based on what documents they have argued in their opinions, and now we will deal with the position of the Iraqi law regarding the testimony in divorce. Amendment to Personal Status Law No. 188 of 1959 regulates divorce in Articles 34 to 39 and does not mention the conditionality of testimony in divorce Igha. But it can be said that testimony is the reason for proving divorce, not a condition of its conditions, and this can be understood from the Supreme Court and proves that a litigation like any other lawsuit acts in terms of proof and application and the law of proof in terms of presence and absence. And if there is a dispute between them, the proof of divorce or revocation to the oath may be suspended. Therefore, it can be stated that the amendment of Proof Law No. 107 in 1979 applies to financial matters related to personal status. However, non-financial matters can be applied in the absence of legal evidence related to them or a text that proves otherwise in the law. Also, if there are not religious evidence related to them, non-financial matters are included or the law stipulates opposite of it. (Proof Law No. 107 of 1979, Article 11).

Therefore, the courts of personal status in Iraq decide on disputes based on the religion of marriage and the legal arguments of its

religion, and Article 34 of the Code of Personal Status states that divorce does not take place except in the formula determined by law. (Personal Status Law No. 188 of 1959, Article 34) Thus, the legislator has not specified the proof of divorce and the divorce can be proven for any reason. However, one of the practical pillars of divorce from the religious point of view is testimony during its creation, so that if he does not testify to his divorce, it is void. This is what the Imamiye jurists have unanimously agreed on the necessity of testimony in divorce, without which divorce is void, all this is if the evidence is proven. Doubt causes that divorce does not take place, because the two witnesses are the pillar of divorce and are part of it, and doubt in the part will require its non-occurrence, and testimony is not a condition of divorce to say that it is incorrect but because it has not lost its pillar or part of it (Bahr al-Ulum, 1977, 1911).

Since most divorces take place outside the court and then the testimony of two divorce witnesses is confirmed in court by hearing the testimony, there are conditions that must be observed in the witness and in the testimony. In the case of a witness, intellect, maturity, freedom, Islam, speech, and justice are conditional, and since the issue of justice is a relative matter, it is only necessary for the witness to perform his duties and not be known for immorality and be a man because a woman's testimony in divorce is not accepted, and the Republic of jurists have added this to them: "What men often find out, such as marriage, revocation, divorce and testimony, etc.!" All this is proven by the testimony of two men in divorce, revocation and will (Hilal Sarhan, no date, 81). And the Almighty said:

فَإِذَا بَلَغَ الْأَجَلُ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ وَأَشْهَدُوا ذَوِي عَدْلٍ مِنْكُمْ وَأَقِيمُوا الشَّهَادَةَ لِلَّهِ ذَلِكَ يُوعَظُ بِهِ مَنْ كَانَ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَمَنْ يَتَّقِ اللَّهَ يَجْعَلْ لَهُ مَخْرَجًا؛

Either keep them with goodness or leave them in good manners, and testify (to their divorce) by two righteous Muslim men” (Divorce: 2). In conclusion, what is required of testimony is that it should be clear, explicit and unambiguous, and corresponded to the issue

and the testimony of two witnesses be in the same sense, or that it taken place within the heart, however the conviction is that testimony should be based on certainty, not on doubt and probability, and the judge issued a verdict in the Judiciary based on knowledge and certainty.

Conclusion

As stated, divorce, which should be considered as the removal of the marriage bond in sharia law. Iraqi law also defines it as the lifting of the marriage bond with the consent of the husband or wife, of course, if it has been delegated to the wife. However, divorce must be affected by a formula determined by the Shari'a. Muslim jurists disagree about the testimony of divorce, some of them consider it recommended and some of them consider it obligatory, which is due to the arguments they have cited in this regard. The Iraqi Personal Status Law in Articles (34-46) of the Personal Status Law (188) adopted in 1959 does not mention the testimony of divorce in the discussion of divorce. The legislature did not explain which of the two views are in Islamic jurisprudence, and assigned the matter to the Iraqi judiciary. The Iraqi judiciary has registered several decisions, from which it is clear to us that the judiciary considers testimony in divorce as one of the pillars of divorce, of course, if the marriage is in accordance with the rules of the Ja'fari school, but if the marriage is in accordance with the rules of the Hanafi School. In this case, testimony is not one of the pillars of divorce.

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