

DIVORCE- The Dissolution of a Marriage in Muslim Personal Laws in Nigeria

BAOBAB FOR WOMEN'S HUMAN RIGHTS LEGAL LITERACY SERIES

DIVORCE-THE DISSOLUTION OF A MARRIAGE In Muslim personal laws in Nigeria (Baobab legal Literacy Leaflet No.2)

Baobab is a not for profit, non-governmental organisation working on the women's human and legal rights in religious laws, statutory laws and customary laws

Baobab works with women, legal professionals and paralegals, policy makers, women and human rights groups, other NGOs, and members of general public:

- to promote human rights education, particularly regarding women's human rights.
- to sponsor training and education programs that further the appreciation and observance of women's human rights and
- to enhance the knowledge and understanding of women's and human rights with a view to determining policies, which can best promote all human rights

This is one of a series of leaflets aimed at enabling people to know what their rights are and how to protect them.

The topics of the leaflets include: Divorce, Child Custody and Guardianship, Violence Against Women, Early Marriage, Inheritance, Maintenance, Rights and Responsibilities of spouses, Rights of widows, Economic Rights, Female Genital Mutilation, Citizenship, Voting and politics, Marriage.

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Divorce-The Dissolution of a Marriage
(Baobab Legal Literacy Leaflet No.2)

INTRODUCTION

This leaflet set out the form of divorce available under Muslim personal laws in Nigeria, where the Malik School of law is followed. Muslim personal laws in Nigeria are often referred to as Sharia. The leaflet also discusses the Conditions and consequences of each type of divorce in Muslim Personal Laws.

There are also other systems of law. Statutory Law is applied to persons who marry under the marriage act of 1914 (i.e. in a registry office, although some Christian priests may also perform this kind of marriage). Different systems of native or customary laws may be applied to people from different ethnic groups.

APPLICABILITY OF MUSLIM PERSONAL LAW

Muslim personal laws of divorce apply where both husband and wife are Muslim, and where both husband and wife (even if not Muslim) agree that Muslim Personal Law should be applied to them. In addition where both Parties contract the Marriage in accordance with Muslim law as stated under s242 (2)(a) of the 1979 constitution of the federal Republic of Nigeria. It must be noted that Muslim law presently applies only in Northern Nigeria.

BEFORE THE DIVORCE

RECONCILIATION

In principle, Husbands and wives should not seek for divorce without making serious efforts at reconciliation amongst themselves. They are expected to sit and discuss together. Attempts at reconciliation may involve arbitration, whether formal or informal because Muslim law prefers reconciliation to adjudication.

ARBITRATION

Arbitration or mediation is asking people to try and make peace between the married couple. Usually it would be a relative on the wife's side and a relative on the husband's side or someone appointed as their Waliyi or guardian.

THE DIVORCE ITSELF

There are five main forms of divorce in Muslim Personal Laws in Nigeria

1. **Talaq** where the husband repudiates the marriage. However a woman who has dictated certain terms with her potential husband before the formalisation of her marriage has the right to demand that the husband pronounces talaq when he breaches any of the terms.

2. **Mubarah**, where both parties decide to put the marriage to an end.
3. **Khul'u** where the wife offer ransom to obtain her release.
4. **Tadriq** or **Faskh** where the wife seek her release on the ground of violation of the marriage terms by her husband.
5. **Zihar, Ila** and **Lia'n**

(1) TALAQ SUNNI

A talaq that is given properly is known as Talaq Sunni. This is dissolution of marriage in an orthodox manner. There are 4 laid down conditions for talaq.

CONDITIONS FOR A VALID TALAQ

1. The husband must
 - (a) be an adult
 - (b) be sane
 - (c) not acting under any sort of coercion (external pressure).
2. The woman must be in a 'state of purity' (free from menstrual blood and the blood of child birth)
3. There should be no cohabitation between the two after being 'clean'
4. He should not give it more than once; that is, it should be pronounced in a manner leaving room for reconciliation. This is known as Talaq Raj'i.
5. He should not give another divorce within the time of the three months awaiting period.
6. The intention to divorce must be clear. Intention can be shown by speaking, clear signs or writing.
7. Each statement of divorce must have at least two witnesses
8. The divorce that is pronounced once or twice is a revocable divorce.

This is known as Bid'i.

 - (a) This means that if the husband and wife decide to reconcile before the end of the waiting period (iddah) they may do so.
 - (b) But, if they mutually reconcile after the end of the waiting period, they must go through another marriage contract. This is known as talaq ba'in bainuna sugra.
9. A divorce that is given three times is irrevocable. This is known as talaq ba'in kubra. A talaq ba'in kubra means that the husband and wife cannot reconcile and be married again, after the wife has been married to and divorced from another man. This should not be a marriage done for the purpose of being able to remarry with the former husband.

A divorce Bid'i is a pronouncement of divorce that does not fulfil the conditions mentioned above. This renders the divorce unorthodox but valid, i.e. legal but not morally correct.

A wife may challenge her divorce in court if the proper conditions for a divorce Sunni have not been carried out.

EFFECT OF TALAQ

The wife does not have to reimburse her mahr (dower) or any marriage expenses. (The mahr is the marriage gift that a groom makes to his bride on marriage. Muslim Marriage is not valid without mahr.)

DELEGATED TALAQ (TALAQ-TAFEEZ)

CONDITIONS

The husband can assign his right to Talaq (repudiation) to his wife. This is usually agreed upon at the time of the marriage contract, either in writing or with two witnesses present.

The husband cannot legally delegate his right of talaq to any person except the wife herself.

EFFECTS

If the state condition occurs, then the divorce is automatic, unless the wife chooses not to exercise the right.

The wife does not have to reimburse her *mahr* (dower).

(2) DIVORCE BY MUTUAL CONSENT (MUBARAH)

CONDITIONS

Mubarah is a divorce by mutual consent of the husband and the wife. This is usually initiated by the woman and decided by a court. However, if both husband and wife wish, they can agree to it between themselves, or with *walis* (guardians).

EFFECTS

The husband and wife agree on a divorce. The wife does not have to pay for her freedom from the marriage.

(3) DIVORCE BY RANSOM (KHUL'U)

Khul'u is a divorce initiated by a court. Where there is dispute over the 'ransoms' the case will be decided by the court, which would fix a 'ransom.'

In *khul'u* divorce, the wife usually does not give a reason for wanting a divorce. Where reasons (or complaints) are the cause of seeking a divorce then court-decided divorce (*tafriq* or *faskh*) should be the procedure (see below).

CONDITIONS AND EFFECTS OF KHUL'U DIVORCE

The husband and wife agree on a divorce and the wife agrees to pay the husband an agreed sum for her freedom. Unfortunately, often the husband is greedy and demands large sums of money.

Khul'u is a negotiation. They negotiate in the way dower is negotiated. Some recent Sharia court cases have found that the *Khul'u* payment should not be more than the original value of the *mahr* received or promised at marriage. For example, Babajo vs. Dontsho, the sharia Appeal court found that the maximum *Dantsobo* should pay her husband is the amount of

the *mahr* she had received, which in this case was N100 and that to demand for more was unjust and amounted to promoting immorality.

(4) COURT DECIDED DIVORCE (TAFRIQ OR FASKH)

This is the form of divorce where the court arbitrates and can pronounce a divorce. Cases of this sort are usually brought by women since men have the right to talaq (unilateral divorce). Where a complaint is made, the court is obliged to investigate its truth by independent investigation, by hearing witnesses, or by accepting an oath sworn by husband and wife.

CONDITIONS

Either the wife or husband must bring application for court-decided divorce on one or more of the following grounds (complaints):

- 1. The failure of the husband to provide maintenance** (shelter, food, medical expenses, clothing). For example in *Yahaya vs. Adama Salusy* the wife called witnesses to prove lack of provision of food or adequate medical care. The Sharia court of Appeal, Kano, affirmed the divorce.
- 2. Defect on the part of the husband or wife**-for example, if the husband or wife is insane, or impotent or frigid, this can be a reason for divorce. However, where the wife or husband knew about the defect in advance but remain silence they can no complain afterwards. If the complaint is one of impotence or insanity, the case may be adjourned for a year.
- 3. Prolonged absence** -for example, *Aisha Umar* complained to Area court 1 Sokoto that her husband had left her for 2years and 3 months. She produced Witnesses and was granted the divorce.
- 4. Injury or discord between the wife and husband** - for instance, *Luba Mamaman* complained to the Area court, Sokoto that her husband often verbally abuses her father and accuse her of commuting adultery. The husband, *Tukur Ibrahim*, protested against the divorce. Finally the Sharia court of Appeal ruled that the wife could have the divorce on the grounds of cruelty and destruction of property. The Area Court Zaria granted the divorce.
- 5. Failure to provide sexual satisfaction**- in the case of *Modu Fugurambe vs. Amina Alirambe*, *Amina* complained that her husband was 'not her match sexually' to *Lamisula* Area Court 11 Maduguri. Eventually she swore on the Holy Qur'an that her complaint was true and the marriage was dissolved.
- 6. Refusal of the husband to enable wife to undertake her religious obligations.** For instance, if the husband refuses to allow his wife to go on pilgrimage, this can be a reason for divorce, if she wishes.

EFFECTS

If the court grants any of the divorce for any of the reasons above, then the wife does not have to make any of the payment to the husband or reimbursement of *mahr*.

Unfortunately, often women have to resort to *Khul'u*, divorces and pay for their freedom, even when they have good complaints for a court-decided divorce. This may be because they do not know that in a court-decided divorce they do not have to pay the husband. Or, it can be because of the delays in the judicial system or proceedings that a wife feels she would rather pay and be released, than wait.

(5) ZIHAR, ILA, AND LIA'N

These forms are rarely found nowadays.

CONDITIONS

Zihar is divorce when a man compares his wife to his mother.

Ila is divorce when the husband has made an oath that he will abstain from sexual intercourse for four months or more and he carries it out. Lia'n divorce is where a husband accuses his pregnant wife of committing adultery and therefore disowns paternity. Husband and wife will be asked to swear to the truth.

EFFECTS

In Zihar, Ila or Lia'n divorce, the wife does not have to make any payment to the husband or reimbursement of mahr.

AFTER THE DIVORCE

IDDAH

After any divorce, iddah or a waiting period must be observed, before a woman can remarry.

CONDITIONS

1. During the iddah, the husband is responsible for the wife's maintenance when there is room for reconciliation-i.e. before an irrevocable divorce.
2. The length of the waiting period is three months (or three menstrual cycle) unless the woman is pregnant in which case it is until after delivery.
3. Following a revocable divorce, the wife is entitled to remain in her marital home during the iddah time.

CUSTODY AND GUARDIANSHIP OF CHILDREN AND MAINTENANCE

The custody of children may be granted either to the wife or another person. The mother of the children is preferred principle. Guardianship is often granted to the father or waliyi. The father of the children remains responsible for their maintenance and education. See Baobab leaflet on 3 for more details.