

# The Parameter for Oral Divorce Considered a Means of Effecting Divorce in the four Schools of Thought

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## Abstract

Divorce is a frequent phenomenon that occurs in varying degrees in every civilization. It has been a part of human history since ancient times, and all major faiths have accepted it in various forms and in different contexts. The practical significance is demonstrated by the thoroughness of the research, the presentation of opposing viewpoints, the evidence for each trend, the discussion, and the weighting of the jurisprudential trends that are closest to acceptance in divorce cases. The issue of witnessing divorce is one on which ancient and modern scholars disagreed: should one testify to divorce and reversion, or should one return without divorce? The investigation provided an answer to the question of whether the passage about witnessing divorce and returning to the obligation or the scar held any truth.

**Keywords:** Divorce, Testimony, Documentation, Islamic Law, Principles

## Introduction

With its distinguished standing, Islam has accepted divorce with consideration for all individuals notwithstanding their circumstances and social contexts. Without legalized divorce, life would have been harsh and unjust, and it is believed that if a law requires spouses to remain together, despite their distance from one another, resentment will consume their hearts and they will take every action to eradicate it. Even if one spouse insists that the other should stay with him, one can choose to enjoy the other and ignore the owner.

The question of whether it is better to bind the couple to an irreversible bond, so that resentment eats their hearts, each attacking the other and exposing the family to problems, or preventing it from maintaining the bond, may arise if the occurrence of aversion and the persistence of discord and hostility are not far off. Alternatively, each can build a new house on solid foundations. It is not better to replace one husband with another than to marry a concubine to a neglected woman, or a lover to an irritating husband (Bentham, 1998).

Since marriage is primarily based on the idea of full consent between its two parties, one does not need to complete it without the other; rather, it continues to be consensual between them. Such consensualness does not exist unless one of them wants to be patient

with the other, the law of God Almighty responds to man's instincts and does not stand in the way of responding to its requirements. The Prophet (Peace Be Upon Him) said, "A believer should not rub a believing woman; if he dislikes one of them, another will be pleased with her.", narrated by Abu Hurayrah (may Allah be pleased with him). (Muslim, 1091: 1469).

### ***First: Divorce Testimony***

Scholars have discussed the subject of divorce testimony at many points in history, including both the ancient and modern periods. They disagreed on whether testimony should focus just on reconciliation and not on divorce, or on divorce and its aftermath. They have also argued over whether the verse's instruction regarding divorce and reconciliation testimony is required or advised. Reviewing the verse from the Quran, which is the Almighty's declaration, is where we must start:

" O Prophet, when you [Muslims] divorce women, divorce them for [the commencement of] their waiting period and keep count of the waiting period, and fear Allah, your Lord. Do not turn them out of their [husbands'] houses, nor should they [themselves] leave [during that period] unless they are committing a clear immorality. And those are the limits [set by] Allah. And whoever transgresses the limits of Allah has certainly wronged himself. You know not; perhaps Allah will bring about after that a [different] matter. And when they have [nearly] fulfilled their term, either retain them according to acceptable terms or part with them according to acceptable terms. And bring to witness two just men from among you and establish the testimony for [the acceptance of] Allah. That is instructed to whoever should believe in Allah and the Last day. And whoever fears Allah - He will make for him a way out" (Surat Al-Talaq, verses 1-2).

### ***Editing the Subject of Dispute in the Certificate of Divorce***

*First:* scholars of law agreed that divorce is affected by word and testimony, as demonstrated by the Almighty's statement to "bear witness to those who are just among you, due to both divorce and reversion mentioned in the Holy Verse."

*Second:* The legitimists disagreed on whether testifying about a divorce is required, if seeing a divorce is a requirement for its legality, and whether it is a condition or not. Their disagreement stemmed from the verse's mention of testimony: is it required in cases of divorce or for scarring?

*Third:* The causes of the variations.

#### **1. Conflict between apparent and measurement**

This is what is apparent in the words of God Almighty: 'And bear witness to the sound of justice from you' requires obligation. However, comparing this right to other rights that a person receives requires that it is not necessary to testify, so it was necessary to combine the analogy with the verse that the verse bears the scar.

2.The context of the Qur'anic text in the Almighty's saying: 'And witness the sound of justice from you' is due to reversion or divorce or to both to return and divorce?

3.The command mentioned in the text and bear witness, is it for obligatory or for assignment and guidance?

*The Sayings of the Jurists in the Certificate of Divorce*

Jurists have two sayings on the certificate of divorce

The first view is that the certificate of divorce is desirable and delegated, which is what the majority of jurists agreed upon (Alsarkhsi, D.T. , p. 6/19) (Abn Najim, D.T., p. 4/55) (Bin Qudamah, 2004, p. 7/283) (Ibn Alhammam, 1997, p. 3/16) (Ramli, 1984, p. 7/59) (Albahooti, 1983, p. 5/342). It is not necessary for the divorce to be valid, though, therefore if someone files for divorce without any witnesses, the divorce can still proceed.

*The scholars who made this statement were*

i. Al-Qurtubi: 'The Almighty's saying, 'and bear witness' is ordered to testify to divorce and it was said to return, and it appears that it is due to return not to divorce. It was said and testify when the return and separation are all, and this testimony is delegated to him when Abu Hanifa for saying: And bear witness if you pledge allegiance' (Surah Al-Baqarah, verse: 282). The benefit of witnessing is that there is no unbelief between them, and that he is not accused of holding it, and lest one of them die, so the rest claims to prove the marriage to inherit. (Alqurtubi, 1964, p. 18/158).

ii. Al-Nasafi: 'And bear witness' signifies that when you go back and split up, this testimony is given to him, preventing any disputes amongst those who are 'just' among you Muslims (Alnasafi, 1998, p. 3/440).

iii. Al-Jassas: 'He gave the order to testify on the return and the division, as he did not stipulate that the testimony was required in order for the return, and that the division is legitimate even in the absence of subsequent witnesses and testimonies.' (Alrazi, 1994, p. 5/250).

iv. Ibn 'Abidin said in the footnote 'His saying and the scarring of martyrdom as a precaution in the arrogance and from falling into the sites of accusations, because people knew him at all. So, they are accused of sitting with her, even if he did not witness true, and the matter in the words of the Almighty: 'And witness the sound of justice' for scarring. (Abn Abdeen, 1404H, p. 3/401).

v. According to Ibn Taymiyyah: "And bear witness to the sound of justice". He was given instructions to attest to the return, and the nation's accord mandates that he witness it. There have been claims that it is both positive. However, there are many who believe that divorce does not occur when it is not observed, which runs counter to popular belief." (Taymiyyah, 2004, p. 33/33).

vi. Al-Ramli of the Shaafa'is said: 'And bear witness to those who are just among you, that is, to the constipation, which is in the sense of return, and to the paradox, and I answer by carrying that on the scar and witnessing it on the two sayings, which is mustahabb, i.e. what is required by Sharia.' (Ramli M. B., D.T.)

*The second opinion regarding testimony in divorce states that it is obligatory*

According to this view, if a man divorces his wife without witnesses, the divorce does not take effect. The Zahiri school of thought holds this opinion. This perspective asserts that testimony is a necessary condition for the validity of divorce. If a man divorces his wife without witnesses, the divorce is not considered valid. This opinion is specifically attributed to the

Zahiri School of Islamic jurisprudence. (Abn Hazm, D.T. , p. 10/17) «Zaidis and Shiites, (Almortada, 1947 , p. 4/326) and Imamate. (At-tabarsi, 1985, p. 2/330).

*Opinions of Other Jurists and Scholars*

al-Tabari: Quoting a narration from Ibn 'Abbas who said

If the spouse wants to review it before its waiting period expires, I will testify two men as Allah said (and witness the sound of justice from you) at the time of divorce and at the time of revision. He also quoted Al-Saadi's saying (and bear witness) on divorce and return (Tabari, 2000, p. 28/137).

1. Al-Saadi: 'And bear witness' to her divorce and her return (the sound of justice from you), i.e. two just Muslim men, because in the aforementioned testimony there is a barrier to the door of the dispute and the secrecy of each of them what is necessary to be explained (Alsaadi, 2000, p. 870).
2. Al-Baghwi: 'And bear witness to the sound of justice from you' on the return and separation He ordered the testimony of the return and the divorce. (Albaghwi, 1407H, p. 8/150).
3. Ibn Hazm: 'The difference between revision, divorce and witnessing, so it is not permissible to separate some of that from each other, and it was divorced and did not witness those with justice or review, and those with justice did not witness transgressing the limits of God Almighty.' (Abn Hazm, D.T. , p. 11/613).

Here are a few quotes from intellectuals who addressed the topic of witnessing divorce and who were living at the time:

According to the late scholar Sheikh Ahmed Ibrahim Bey, "the court, in accordance with the text of Article (21) of Law No. 2000 referred to, will rule to reject her lawsuit because the law stipulated and required to prove her claim for divorce upon denial that the divorce be established by testimony and documentation." This holds true if the husband explicitly divorces his wife in front of a group of people and then refuses to document the divorce. The wife then resorts to proving the divorce and claims that she relied on proving her claim to evidence, which the husband denies (Bey, 2003, p. 343).

i. Badran Abu Al-Enein: The opinion of the Imami Shiites is the most correct as it narrows the circle of divorce, which has now widened a lot, and it is easy to prove if there is a dispute between the spouses in the divorce. It is taking place in Egypt that the notary (the authorized person) must conduct the divorce in the presence of two witnesses who prove them in the divorce certificate, and they sign the divorce document by certificate. (Abou El, 1998, p. 378).

ii. Imam Abu Zahra: After mentioning the opinion of the Imami Shiites that divorce does not take place without the testimony of two justices. He said: 'This is reasonable in meaning, and it is necessary to coordinate between the establishment and termination of marriage, as the presence of the two witnesses is a condition in the establishment, it must be a condition for termination. If we were to choose what is applicable in Egypt, we would have chosen that opinion, so the presence of two witnesses is required for the divorce to occur.' (Abu Zahra, 1950, page 369) (Abou El, 1998, p. 378).

*A Legal Document Addressing the Matter*

Every party based their position on the following arguments

Below is a proof supporting the first proverb which states that it is preferable to see divorce:

-The requirement for divorce witnesses was unaffected by the Messenger (peace and blessings of Allah be upon him) and his companions (may Allah be pleased with them), even if witnessing a divorce was a prerequisite for quoting them. This is because divorce incidents were common in their era, so they were quoted, and it was not mentioned that witnessing them was a requirement for the validity of their occurrence. (Page 368, Abu Zahra, 1950).

-The command contained in the verse, bear witness to the sound of justice from you 'is to lament, as is the case in the verse', and bear witness if you pledge allegiance (Surah al-Baqarah, verse: 282).

Therefore, if the matter is for assignment and not for obligation, there is no requirement to witness divorce for it to take place (Taymiyyah, 2004, p. 33/33) (Abou El, 1998, p. 378).

-The statement that divorce is required is required to increase without substantiating evidence. (Abu Zahra, 1950, p. 368).

-The saying of the Prophet (peace and blessings of Allaah be upon him) 'Every condition that is not in the Book of Allah is invalid' (Bukhari, 1422 AH, page 5/353)

-The requirement to witness divorce is not mentioned in the Book of Allah and the Sunnah of His Messenger, and Ibn Taymiyyah said (it was said that it is positive and it was said that it is preferable. Some people thought that witnessing is divorce and thought that divorce that is not witnessed does not occur and this is contrary to consensus. (Taymiyyah, 2004, p. 33/33).

*Evidence on the Second View*

-Allah Almighty says: " O Prophet! When ye do divorce women, divorce them at their prescribed periods, and count (accurately), their prescribed periods: And fear Allah your Lord: and turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness, those are limits set by Allah: and any who transgresses the limits of Allah, does verily wrong his (own) soul: thou knowest not if perchance Allah will bring about thereafter some new situation. Thus, when they fulfil their term appointed, either take them back on equitable terms or part with them on equitable terms; and take for witness two persons from among you, endued with justice, and establish the evidence (as) before Allah. Such is the admonition given to him who believes in Allah and the Last Day. And for those who fear Allah, He (ever) prepares a way out," (Surat At-Talaq, verses: 1-2).

-The order to testify came after mentioning the establishment of divorce and the permissibility of return, so it was appropriate to be due to them, and the explanation of the testimony that it is preached by those who believed in God and the Last Day is nominated for that and strengthens it. Because the presence of witnesses is not without a good sermon that they send to the spouses, so that they have a way out of divorce, which is the most hateful halal with God (Almighty) (Abu Zahra, 1950, p. 368).

-Allah (Almighty) mentioned in the verse both divorce and reversion, and followed that by mentioning witnessing them, and accordingly it is not permissible to single out some of that

from others, and the one who divorced and did not witness those with justice, or reviewed and did not witness those with justice, transgressed the limits of Allah Almighty. (Ibn Hazim, D.T., p. 11/613). Accordingly, the obligation to testify is due to both divorce and reversion, and that the distinction by singling out the testimony of reversion without divorce in it is considered to be within the limits of God Almighty (Abou El, 1998, p. 378).

-The testimony contained in the verse of divorce mentioned and bear witness to those who are just among you', came directly after mentioning divorce and its provisions, and previously talked about in the testimony to explain the rulings, divorce and it is reprehensible that the request for testimony returns to the return, because it was mentioned consequentially and by extension. If we are talking about divorce and its provisions, given that the latter are seen as a type of revocation, it was obligatory to testify to the origin and the dependency together. Imam Abu Zahra says: As for this reasonable, it is necessary to coordinate between the establishment of a marriage and its termination, as the presence of the two witnesses is a condition in the establishment, it must be a condition for termination (Abu Zahra, 1950, p. 369).

-The matter is to certify the divorce as a precaution against quarrelling and disagreement between the heirs that the testator died and was divorced, as well as paying the charge, as stated by the author of the footnote. Beware of being ungrateful and from falling into the sites of accusations, because people have ever known him, so they are accused of sitting with her' with the conclusion of his saying, even if he does not testify to the truth' (Ibn Abdeen, 1404H, p. 3/401).

-The statement of witnessing in it pays the danger that threatens families, and the interest requires testimony so as not to get unbelief, and the difference in times as it is common in societies to deny rights. If he denies the occurrence of divorce and the wife could not prove and swear an oath, he analyses it for himself against her will by the judiciary and that is driven by witnessing. Al-Qurtubi said in his commentary on the verse of divorce mentioned: The benefit of testifying is that there is no ungodliness between them, and that he should not be accused of holding it, and lest one of them die, the rest claim to prove the marriage in order to inherit. (Alqurtubi, 1964, p. 18/158).

-Imran ibn Husayn (may Allah be pleased with him) reported that he was asked about a man who divorces and then revises, and does not testify, and he said: I testify to her divorce and her return. (Al-San'ani, 2005, page 3/253). The hadith indicates what is indicated by the verse in Surat At-Talaq, which is interpreted 'And bear witness to those who are just among you, after mentioning divorce, and it seems that it is obligatory to testify. (Al-San'ani, 2005, page 3/253).

-'Abd al-Razzaq and 'Abd ibn Hamid narrated from 'Ata' who said: Marriage with witnesses, divorce with witnesses, and reviewing witnesses. (Al-Suyuti, Al-Durr Al-Manthur fi Tafsir Bal-Ma'athur, d.t., page 6/232).

## Discussion and Preference

### *First: Discussion of the First Party's Evidence*

Below are the most prominent challenges to the opinions of the first party

Regarding their inference that it did not affect the Prophet (PBUH) and his companions (may Allah be pleased with them) from the requirement of witnesses, it is answered:

It is not suitable to invoke it because those who have other opinions incidents that indicate the necessity of witnessing divorce have conveyed it to us, and it is also opposed by the verse that stipulates the testimony of return and divorce. (Al-Sabouni, 1982, p. 1/474). Regarding their reasoning that the matter is for assignment and not for obligation, it is answered that the principle of the matter is that it is obligatory and there is no clear presumption to distract him from that. (Al-Sabouni, 1982, p. 1/474)

In addition, there is a command that says that the scar is not Muslim, and we have seen the disagreement of the commentators in their interpretation of the verse, and most of them said that the testimony is for return and division together. Regarding their statement that the requirement of testimony is increased without evidence, and it is answered that the original is its requirement with the evidence of the text of the verse, that the non-requirement needs evidence, as a distinction was made between reversion and divorce without evidence.

### *Regarding the inference that every condition is not in the Holy Qur'an:*

It is answered what is meant by the condition is the invalid condition that is contrary to the Holy Qur'an and the Sunnah of His Messenger (PBUH). The requirement to witness the return and divorce is attested to by the Book of God (Almighty) with the evidence of the verse in Surat Al-Talaq and witness the sound of justice from you). In response to the claim that martyrdom defies consensus, the writers of the first perspective cite evidence showing that this consensus did not arise because Ibn Abbas (may Allah be pleased with him) disagreed with them and others (may Allah glorify his face).

Answering the question about the sale analogy, it is said that it is an analogy of differences because the sale involves many individuals, positive testimony slows down transactions, and the sale is an agreement between two wills. Divorce, on the other hand, is a unilateral act whose significance affects the entire society because the family is the foundation of society (Al-Sabouni, 1982, page 1/475). Additionally, the divorce and return involve the dissolution of the alleviation other than the sale.

### *Second: Discussion of the Second Party's Evidence.*

Several objections were raised against the second party's evidence, the most significant of which are as follows: Although the verse's original form is required, as it had no bearing on the Prophet (PBUH) or his companions (may Allah be pleased with them). Even if it was among them, the need for witnesses during their divorce process suggests that what is intended is preferable and not mandatory.

Concerning the assumption of consistency between the formation of a marriage and its dissolution, the response is as follows: "In Islamic law, there is no contract that necessitates the validity of witnesses; the marriage contract is the only exception, as it holds a special place and significance in relation to symptoms and genealogy, and the provisions of time survival are based on it. However, divorce is the most despised halal by God Almighty, so there is no need to publicize it as a requirement for the validity of its occurrence" (Al-Raqab, d.t., p. 102). Regarding the remaining inferences, they have been addressed as they relate to responsibility and scarring. I also respond to them by quoting Ibn Taymiyyah: Contrary to popular belief,

some people believed that divorce that is not witnessed does not occur (Taymiyyah, 2004, p. 33/33).

It also has been answered the inferences of the second statement: You also permitted the deferred sale and others if it is not witnessed, and Allah says: 'Martyred two of your men' (Surat Al-Baqarah, verse 282). Why did you pay the orphan his money if he reached a special age without a certificate? Allah (the Almighty) says: 'If you pay them their money, bear witness against them' (Surat An-Nisa, verse 6).

### *Preferences*

After considering the statements of the two parties and the evidence of each of them, the researcher believes that the chosen opinion in this matter is the requirement that divorce must be witnessed for the following reasons:

*First:* The objections raised to the evidence of the second party that divorce must be attested are answered by the following:

Regarding the permission of deferred sale and payment to the orphan, Ibn Hazm replied: We did not fulfill his claim to pay until he came with evidence, and we ruled by oath on the orphan if the mawla did not bring evidence that he had paid him his money, but we made him disobey God Almighty if he swore only a sin. We also made the woman who did not have evidence for her husband to divorce her or her return disobeying Allah (Almighty) if she swore an oath, knowing that he had divorced her and returned her (Ibn Hazim, d.t., pp. 11/613-614).

The permission of the deferred sale and others, even if they do not bear witness to it, then the Prophet (peace and blessings of Allah be upon him) said: "The two sales are by option unless they are separated, or one of them says to its owner to choose". Which is from all of that he disobeyed Allah Almighty if he did not testify in the deferred sale and others.

Islamic law hence requires testimony in any occurrence of marriage, which means that testimony is necessary due to the marriage importance and holiness. This relates to symptoms and genealogy, and the provisions of the remaining survival of time are built on it, to require that the contract terminating a contract of this status confirmed that the testimony of it, as marriage is based on love, satisfaction and permanence, and all provisions are often given for love and consent, unlike divorce. It is often on the dispute, arrogance and denial, and such behavior as divorce to arrange the provisions for the rest of time, as it entails the solution and sanctity in the alleviation and the proof of lineage and other provisions.

The distinction between the positive testimony regarding the return without divorce, although the original is the statement of the provisions of divorce, including the return of a distinction without evidence, which is expressed by Ibn Hazm 'that it is not permissible to individuals some of that from each other. Everyone who divorced and did not witness those with justice or reviewed and did not witness those with justice transgressive to the limits of God Almighty. (Ibn Hazim, D.T., pp. 11/613-614).

Ibn Farhun says, "Witness" came after mentioning divorce and holding the return, and the irony of the expiration of the waiting period requires that this be due to everyone in one return, either obligatory or scarring' (Ibn Farhoun, 1986, p. 1/179).

*Second:* The statement of witnessing divorce is consistent with the general system of the marriage and divorce contract and is consistent with the legitimate purposes of marriage and divorce, because both are equally important for arranging rights and rulings.



*Third:* The statement of martyrdom is a fulfillment of a great interest in this era, as expressed by the scholar Mustafa Al-Zarqa, who said:

'This diligence in requiring the testimony of divorce is narrated from Ibn Abbas and Ataa, and Al-Saddi, which is also the doctrine of the virtual, and the consensus of the front and his enemy is one of the pillars of divorce. However, the front neither went to the fact that the testimony here does not accept women at all, individually nor affiliated with the man without disagreement with them in that, for the Almighty says: And bear witness to those who are just. 'Of you, the verse was limited to two just witnesses with the masculine word, so this is considered an exception to the general rule concerning the permissibility of women's testimony. As for men, it has been decided that the requirement of witnessing to divorce according to this jurisprudence is of great interest in this era.

It also indirectly leads to reducing any haste in divorce as much as possible and mitigating the motivated anger and emotions that motivate haste, because the petition of witnesses often requires some time, during which the rebellious nerves calm down, and the sunken blood cools. So that it does not reach Divorce is only for the Egyptian who is determined by thinking and appreciation, and this is what necessitates the adoption of the doctrines that say that witnessing is required. (Abou El, 1998, p. 379).

*Fourth:* The legislator wants to reduce the occurrence of divorce and separation by increasing its restrictions and conditions based on the well-known rule, that if the thing has many restrictions Almighty, or less existence. For this reason, the two witnesses considered the two justices to adjust first, and to delay secondly, hoping that until the two witnesses attend or the couple or one of them attends, then remorse occurs and returns to familiarity and refers to this saying: 'You don't know, maybe Allah will do something after that' (Surat At-Talaq, verse 1).

*Fifth:* it has been taken this saying, which is the testimony of divorce some contemporary jurists, who reassure the soul them in their fatwa and testify to them with knowledge and piety. Such as the scholar Mustafa Al-Zarqa and Ahmed Muhammad Shaker, and Imam Abu Zahra, and Badran Abu Al-Enein, Abdul Rahman Al-Sabouni and Ali Al-Khafif and Mahmoud Sartawi and many others, and that because of the benefit and narrowing of the circle of divorce, the researcher has cited the great phrases made by Sheikh Mustafa Al-Zarqa in support of this opinion.

Abu Zahra says: 'If we were to choose what is in force in Egypt, we would have chosen that opinion, so the divorce requires the presence of two adult witnesses who can review the spouses and narrow the circle. So that the husband is not a prey to his passion, and so that it can be proven in the future so that the quarrel does not take place, and the divorced person is denied if he does not share religion with her in light of her awareness. If the wife cannot prove it, so she will be in severe religious dilemma (Abu Zahra, 1950, p. 369).

'Abd al-Rahman al-Sabouni says: 'What I see is that the requirement of martyrdom at the time of divorce is a great advantage that is consistent and compatible with the wisdom of the divorce legislation in Islam and that it is the most hated thing that is permissible to Allah' (Al-Sabouni, 1982, p. 479).

Ali Al-Khafif says: 'The requirement to witness divorce is the closest opinion to achieving the interest and keeping it away from being the result of anger or temporary emotion, thus narrowing the circle of divorce.' (Janem, 2009, p. 376).

Accordingly, the researcher believes that witnessing in divorce achieves the legitimate purposes of the divorce legislation, and achieves the absence of closure, and when the husband knows that his words are just rhetoric does not occur divorce, he stays away from those words, and does not utter them except when the legal notary and in front of witnesses. Therefore, the aforementioned explanation refutes any disagreement on issues of proof of divorce, and the husband's evasion before the judiciary by swearing falsely when remorse occurs in it, and the woman's feeling that she lives in haram with a divorced husband and could not prove Divorce him and the husband's oath not to divorce.

*Second: The Legitimate Purposes of Witnessing Divorce.*

We know that the rules governing personal status in general, and the family in particular are derived from Islamic law and the jurisprudence of different schools of thought, and that most of these rules are formulated in the form of organized legal rules, especially marriage and divorce. It appears that the extent of compatibility between these legal rules with the original from which they were taken, which are the provisions of the true Sharia (Attia, 2011, p. 141).

The family is the nucleus of society, and an important link of human organization in general throughout history, which is not matched in importance by any other unit of society such as parties, unions, associations, and others. (Raissouni, 1992, p. 287)

'What is known and taken for granted that many interests change with the change of times and the change of conditions, and this change would affect the legal provisions entrusted to those interests. Here it is necessary for the mujtahid to be vigilant, insightful, and deep consideration in order to distinguish what are the interests and evils that have changed their conditions and effects in a real way? Does this change warrant a revision of its provisions and require amendment? How far should that amendment go?

While it is true that this is a challenging opinion, scholars must accept that without it, the goals of Sharia may not even be achieved. Additionally, avoiding this obstacle, and then closing the door of ijihad has confused Islamic jurisprudence, disrupted its natural course, and prevented Islamic jurisprudence from dominating Islamic societies, absorbing their issues and developments, and defending their needs and interests. This has also caused, among other things, the disruption of numerous public and private life facilities from Sharia's provisions.

There is no doubt that the wise legislator has legislated divorce because of the need of some people to it, if there is a dispute between spouses, and marital life between them is impossible. There is no room but to get the band, and that through what drew the wise street, where he proceeded to pay this need means of divorce, but it is a means governed and disciplined by the provisions of the street, and as drawn by him, God Almighty legislated marriage and made it based on two wills. The will of the husband and the will of the wife, the contract was from two parties. It makes direct between them, did not make the marriage in real experimental stages, and for this it was appropriate to facilitate and expand them, but it is disciplined by controls for the seriousness of this contract, so he made the guardian, witnesses, advertisement, etc.

As for the dissolution of the contract, it was suitable for tightening, restrictions and obstacles before the unilateral will decided to destroy the institution of marriage, but rather to destroy one of the building blocks of society, especially since this decision is a word from the decision-maker with the unilateral will.

It was reasonable to agree that the marriage contract is carried out by the parties' desire, based on love, affection, mercy, indulgence, and overcoming all difficulties and challenges, since the legislator is the expert knower of the souls of creation. In order to strike a peculiar and unusual balance between the creation of the contract and its termination, the owner of the unilateral will may terminate it in light of the difficulties and problems he faces. Hence the restrictions in front of the husband that make divorce times and not once, and there were Heterodox Divorce, Sunni and other restrictions that achieve that unique balance.

The researcher supports that the interest should not be presented over the text, but the text must be implemented with accurate and insightful understanding, and this confirms what Dr. Muhammad Ramadan Saeed Al-Bouti went to... These four issues, the mayor of those who claim today that Umar (may Allah be pleased with him) violated the text of the book in favor of interest, to infer that if the interest contradicts with the text, it is okay to outweigh it. It has been shown from what we have mentioned that these issues are only evidence of the severity of his adherence (may Allah be pleased with him) to the Qur'an and Sunnah, but careful observance of the text, may seem to those who have no accuracy in understanding that it is contrary to Allah. (Al-Bouti, 1397 AH, page 143).

Consequently, Imam Ibn Rushd used one word to end the dispute over the three divorces: "It's as though the public used the harsh divorce laws as a pretext, nullifying the legal license and the kindness intended in that. As expressed in the Almighty's statement that "Perhaps Allah will make something happen after that"(Surat At-Talaq verse: 1). (Al-Hafeed, 2004, p. 2/62).

This helps us understand that witnessing divorce is a subject of assignment and guidance, that it is mandatory and necessary, and that it is one of the topics that govern the termination of the marriage contract on both accounts.

Should divorce witnessing fulfill this objective, why is there no justification for accepting it? Were we to interpret this text—which is found in the Book of Allah (Almighty)—as a question of duty and obligation rather than as a text that is not heretical but rather serves as guidance and scarring?

Surely the Islamic Sharia placed constraints on the husband by making the divorce three and making him Sunni and creative, so that the husband would be slow to act until the divine promise was fulfilled, saying, 'May Allah make something happen after that?'

Does the Sharia simply observe? Are the males not appreciating what Allah has given them if they choose to sever the marital contract and allow the family to disintegrate on their own? When a person makes a thoughtless choice that impacts not only themselves but also their partner, children, family, and society at large, does Sharia law not step in to correct the situation? Isn't it more proper and equitable to give the husband some time to think things through before making the divorce announcement, allowing him to give it careful thought?

And should witnesses be there, as they were when the marriage was consummated, if that's the correct decision? Do we not have a duty to arbitrate conflicts between spouses, and does God arbitrate disagreements between spouses at their request? If that's the case, if the husband talks at the first issue, where will all these implications end when everything is settled with one word?

Sheikh Mustafa Al-Zarqa states in this: Since the writer has now recorded and documented the best witness, what is legally disagreeable as a divorce witness, or who is substituted by the guardian's order in the official documentation?

Instead, this action eliminates suspicions and makes up for issues while fully implementing the noble verse in the testimony. The contemporary pursuit of witness justice, which is seen by all jurists who recognize the goals of Sharia as beneficial for upholding the law rather than altering or subverting it.

This principle of indirectly witnessing divorce is based on the desire to reduce haste and anger, which is the scourge of divorce. This is achieved by making the official notary the witness completely. Going to his official department for the purpose of divorce in his presence is enough not to reach the angry husband unless he is calm and cold in his nature. This is one of the advantages of this good measure in the application of the noble verse in accordance with the doctrines described above.

Sharia law's goal of preventing divorces unless a man has a need arising from thoughtful consideration and appreciation is fully fulfilled, as evidenced by the murky river that flows through wealthy refineries and emerges from them carrying clear albumen for drinkers (Zarqa, 1996, pp. 159-160).

To the question, Sheikh Mustafa al-Zarqa answers. It is no secret that going to the notary for a divorce only hinders the hasty, angry man in a limited way, and does not hinder the man determined to divorce for a positive reason; this designer, for a calm, natural thinking to get rid of his wife, is not consistent with her equals has to divorce her after an hour or a day, and an hour or a day before and one day is a period in which every person can reach the notary department or from here. In addition, he claimed that nothing changed as a result of his visit to the notary. For now, he fills his void.

If the need for this documentation for the divorce process just serves to impede the hurried and irrational, then it is beneficial to religion and family, and the hurried person has the small impediment that causes him to act against his will in accordance with Sharia law. (Zarqa, 1996, pp. 159-160) The Shaikh responded to the query by stating that he did not know why this restriction was in place to prevent divorce-related rage because divorce does not result in divorce.

The answer is that, as he stated in his statement, there are three degrees of anger, and that the lowest degree did not stop the jurists or the previous article from divorcing within it. However, this measure—the documentation requirement—also finalizes the liquidation of anger by not nullifying the divorce within it but rather by indirectly affecting the divorce certificate.

People are presented with a peaceful agreement in the contract and the dissolution of the marital bond with this thought, which is the Notary's prerequisite for the divorce. To govern and control reality and stop people from playing with the limits of God Almighty, the law requires that the judge or his authorized person document the marriage contract. Similarly, the dissolution of the marriage by the man's will is also documented before the official notary (Zarqa, 1996, pp. 159-160).

The researcher quotes from the letter of dissemination of custom to achieve his goal: Many rulings vary over time due to changes in a people's customs, the occurrence of necessity, or the corruption of the people over time. If the ruling had remained the same, it would have required hardship and harm to people as well as a violation of Sharia law based on mitigation, facilitation, and payment of damage and corruption.

*Third:* on Claiming that Testimony does not comply with Sharia.

After extrapolating the evidence of the people who own this saying, we find that the researchers relied on the argument that divorce is for preferable and does not affect the Prophet (peace and blessings be upon him and his companions, may God be pleased with them). The researcher referred to the evidence of those who say that witnessing divorce is for preferable and not for obligation. Witness requirements for divorce. "It seems from the context of the two verses that his saying and testifying is due to divorce and to return together," he responded to him as he passed by with us.

"The matter is obligatory, because its real meaning does not go to anything other than obligation, such as scarring, except with a presumption, and there is no presumption here that distracts it from obligation. But the evidence here supports making it obligatory, because divorce is an exceptional act that the man who is one of the parties to the contract, whether the woman agrees with him or not," he replied. "But let us consider what Sheikh Ahmad Muhammad Shakir said."

He brought divorce in the manner prescribed by him, and whoever bears witness to the return is also the same, and whoever does not do so has exceeded the limit of Allah that He has prescribed for him, and his deed is null and void, without any of its effects. This is what we have said is the saying of Ibn Abbas, it was narrated by al-Tabari in the interpretation if he wants to review it before it expires. I testify two men as Allah said, and witness those who are just among you when divorce and when reviewing, which is also a tender saying, it was narrated by Abd al-Razzaq and Abd ibn Hamid who said, 'Marriage with witnesses, divorce with witnesses, and review with witnesses'. (Shakir, 1998, pp. 118-119).

The ban on attending a divorce is one of the main restrictions imposed by laws intended to reduce the possibility of divorce. The recently passed Jordanian Personal Status Law has included another important restriction: divorce cannot occur when the spouse is needed to sign the legal waiting period for divorce. This is due to the fact that Islamic law views divorce more narrowly in order to keep the institution of marriage alive and prevent it from collapsing so that it can become permanent and immune to manipulation. when pressed for time or in a situation when crossing it could be regretted.

Alternatively, the husband might have misinterpreted the circumstances, in which case regret might not be helpful because Sharia is predicated on upholding the marriage bond—tightening and strengthening it to create a garment that allows all families to be satisfied through a cohesive society—and it is rejected and alienated in ways that undermine this goal. Even in cases of enmity and hostility, husbands have been specifically chosen by Allah the Almighty for happy cohabitation.

Allah Almighty says: 'O you who believe, it is not permissible for you to see women against your will and not to give them strength to go away with some of what you have brought them, except that they come with a clear obscenity and live with them in kindness, and if you hate them, then may you hate something and Allah will make much good in it' (Surah An-Nisa, verse: 19).

In his interpretation of this passage, Al-Qurtubi stated: (Alqurtubi, 1964, p. 3/97). The speech is for everyone, as every eleven, whether a husband or a guardian, but what is meant by this topic is largely husbands. And they lived with them by virtue, that is, according to what God taught him to do in terms of decent cohabitation. If you detest them for their terrible character—that is, for bad character without engaging in obscenity or disobedience—this bemoans the possibility and, according to our experts, is proof that you detest divorce with its legitimacy.

It should be noted that the question of whether divorce is originally prohibited or permissible? The jurists differed on two points in this matter: Divorce is mainly based on prohibition not permissibility, yet I disagree on this issue on two points:

*The first argument* is that divorce is a prohibition not permissibility. This is the Hanafi saying (Ibn Alhammam, 1997, p. 3/446).

*The second view* is that the principle of divorce is permissible, which is the view of some Hanafis and the majority of jurists (Alsarkhsi, D.T., p. 7/127). (Al-Kharshi, D.T., page 4/447) (Bin Qudamah, 2004, p. 7/66) (Ramli, 1984, p. 6/423).

*Evidence for The First Argument: Which is That The Principle of Divorce is Prohibition, Not Permissibility*

The authors of this statement cited several evidence, the most important of which are  
i. Allah Almighty says: 'Men are the guardians of women by what Allah has favoured over each other and by what they have spent of their wealth, for the righteous women are keepers of the unseen by what Allah has preserved, and those who fear their disobedience, preach to them, abandon them in bed, and beat them, and if I stab you, do not give them a way, for Allah was great to me' (Surat An-Nisa, verse 34).

Indication: If the wife responds to her husband and obeys him after she is disobedient, it is not permissible for the husband to seek her and oppress her by divorcing her.

ii. His saying (peace and blessings be upon him): 'I hate what is permissible to Allah 'divorce' and his saying 'Allah has not permitted anything more hateful to him than divorce. (Al-Qazwini, d.t., p. 3/426). Divorce is permissible only for necessity and need, which indicates that the original prohibition is not permissible.

This is evidenced by what Ibn Abdeen said

'Because it involves cutting off the marriage to which religious and worldly interests are attached, and if it is for no reason in the first place, there is no need for salvation, it is foolishness and foolishness of opinion, and merely an atonement for the grace and sincerity of harming her, her family, and her children. (Ibn Abdeen, 1404H, p. 3/228). Evidence for the second argument: which is that the principle of divorce is permissibility.

The proponents of this statement cited evidence, the most important of which are:

- The Almighty says: 'There is no right for you if you divorce women unless you touch them or lend them an obligation' (Surat Al-Baqarah, verse 236).

*Indication:* Allah (Almighty) has lifted the embarrassment from the absolute before building and sexual intercourse (Alqurtubi, 1964, p. 2/196), which indicates that the principle of divorce is permissible and not prohibited.

- It was narrated that the Prophet (peace and blessings of Allah be upon him) divorced Hafsa until the revelation came down and he ordered him to return it, for it is a fast of stewardship.

It was narrated from 'Abdullah ibn 'Umar (may Allah be pleased with him) that he divorced his wife while she was menstruating during the reign of the Messenger of Allah (may Allah's peace and blessings be upon him), so 'Umar ibn al-Khattab asked the Messenger of Allah (may Allah's peace and blessings be upon him) about that, and he said: Once, let him review it, then

hold it until it is purified, then menstruate, then purify, and then if he wishes, hold it after and if he wants, divorce before it is touched, for that is the kit in which Allah commanded to divorce women' (Al-Nawawi A., 1392 AH, p. 10/60).

*Indication:* The hadiths explicitly state that divorce is permissible, and it is not mentioned that divorce was based on a specific reason, so it is permissible.

This is the totality of the significance by which the two sayings inferred from what each of them went to, and the evidence is almost the same as suitable for protesting each statement, but the guidance of the evidence differed by the two statements.

### **Discussion and Assessment**

1-The team replied that there is no ward against you, despite the original limitation on inference. The passage did not apply to all divorces; rather, it was intended to describe a particular kind of divorce—that is, divorce that occurs prior to marriage and before dowry designation. (Alqurtubi, 1964, p. 2/196).

2-In response to a question regarding the Prophet's (PBUH) and the Sahaabah's (may Allah be pleased with them) divorce, it was stated that there was no evidence to support the claim that the Prophet's (peace and blessings of Allah be upon him) and the Sahaabah's divorce was unjustified. It is shown from the Prophet's (peace and blessings of Allah be upon him) and his companions' case that their divorce was necessary, since a divorce for reasons other than necessity is concealed by the grace of marriage and causes significant harm to the wife and children (Abou El, 1998p. 311,).

3-The actions of the Prophet (peace and blessings of Allah be upon him) and his companions must be carried out for a purpose or necessity to keep them safe from manipulation. "He will bear what happened from him (peace and blessings of Allah be upon him), from his companions and other imams to protect them from tampering and harm for no reason," stated Ibn 'Abidin, if there is a necessity that is allowed (Ibn Abdeen, 1404H, p. 2/228).

4-As for the hadith that divorce is the most hated halal, the solution is one of the words of permissibility, and the solution corresponds to the sanctity, it includes duty, the delegate and the abhorrent. It was necessary to get him to hate with the presumption of hatred from God, and the duty and the delegate are not described as hateful, and they do not carry on permissibility, because it means the equator of the act and the abandonment, and the hadith indicates the preponderance of the side of the abandonment over the act. So it must be carried to the prohibition in the sense of hatred (Ibn Abdeen, 1404H, p. 2/228).

Accordingly, the researcher believes that the most correct view in the matter is that the origin of divorce is prohibition and not permissibility, and consider what Ibn Abdeen said:

'As for divorce, the original prohibition in the sense that it is forbidden unless an exhibitor permits it, which is the meaning of their saying that the original prohibition and permissibility of the need for salvation, if it is without reason originally there was no need for salvation. But it is foolish and foolish opinion, and just blasphemy grace, and sincerity of harm to her and her family and children, and for this they said that it is caused by the need for salvation when the moral differences and positive hateful remarks that do not define the bounds of God Almighty As said previously, suspicion is far broader (Ibn Abdeen, 1404H, p. 2/228).

For all this, the researcher believes that it is necessary to witness divorce for the following reasons

*First:* It is closer to the spirit of Sharia than saying that witnessing divorce is a matter of *mustahabb*, because Sharia calls for narrowing the circle of divorce, and urges husbands to be patient, endurance and good cohabitation, as the requirement to witness divorce makes the husband stop stations before reaching the decision to end and break the marital bond. Hence, Badran Abu al-Enein says: 'All this clearly indicates that divorce is an exceptional measure, which can only be done, when necessary, but what we see from some people divorcing without fulfilling the need is misapplication, distance from the spirit of Sharia, and contrary to Islamic principles (Abou El, 1998, p. 306).

*Second:* This statement is the opinion of a few commentators, who said that martyrdom is due to both return and divorce.

*Third:* If this is proven, it is necessary for him to say that witnessing divorce is the original, and contrary to this statement must prove that it is contrary to the original, and we have seen that the evidence cited by those who say that it is permissible has been answered.

*Fourth:* The statement of witnessing divorce is not an innovation in religion, because the Holy Qur'an has proven this origin, and made it one of several restrictions placed in front of the collapse of the institution of marriage, as the verse and bear witness to those who are just among you, has come to clarify the provisions of divorce.

Yusuf al-Qaradawi quoted Ibn al-Arabi al-Faqih al-Maliki in the preponderance of the Hanafi saying that zakat in everything that the earth brought out his saying and in the interpretation of the verse 'and they came his right on the day of his harvest' (Surat Al-An'am, verse 141) prolonged the people in supporting the doctrine of Abu Hanifa and responding to other sects. He said: As for Abu Hanifa, he made the verse his mirror, and he saw the truth' (Al-Qaradawi, 2009, p. 1/404). In this regard, the researcher says: Why do not we make the verse of divorce the Almighty's saying: 'And bear witness to those who are just among you' a mirror for us in witnessing divorce, so that we may see the truth?! Especially with the corruption of many people in this era.

*Fifth:* Assuming that witnessing divorce is *mustahabb*, the imam has the right to restrict what is permissible and to take the preferred opinion and oblige it.

Al-Zarqa says, 'The guardian has this restrictive authority in Sharia, when it is required by the interest of returning people to the seriousness of Sharia that they have aside, and the appreciation of this interest is due to the eyes of the trustworthy jurists'. (Zarqa, 1996, p. 164).

## **Conclusion**

The reliance on custom and the predominance of use is the origin that the public of scholars are accustomed to in judging this issue. If the use of the words of the oath of divorce and underestimation and complacency spread to rhythm and was one of the common formulas in the language of the people to divorce the husband and his wife as stipulated by Hanafi and Maliki jurists and the correct phenomenon of the saying of the Shafi'is and the Hanbali audience.



As said before, many of scholars saw that divorce did not require intention. Their statements make it clear that the judgment must be given to him as an oath and not as a divorce if custom changes and usage takes hold and the divorce oath is taken just for taking it. Divorce cannot therefore occur unless he specifically requests it in writing. Additionally, it is violated since Ibn Taymiyyah, Ibn Qayyim al-Jawziyyah, and Ibn Hazm depose these terms for the right abstract and do not treat them as divorced because it appears that these words are the right abstract that is solely considered to be the right. According to Ibn Hazm, the wording used in these lines does not imply any kind of decency or lying. (Alhitami, 1983, p. 8/9) (Abn Rushd, 1988, p. 1/504) (Abn Najim, D.T., p. 4/55) (Albahooti, 1983, p. 5/342).

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