

## **Chapter- VI**

# **THE CHANGES IN THE LAW OF DIVORCE- UNDER MUSLIM LAW**

This chapter deals with the changes brought in the Muslim law of divorce. It deals with extra judicial divorce, judicial separation and judicial divorce. In extra judicial divorce, the topics discussed are- unilateral divorce (talaq), divorce at the instance of wife (khula), divorce by mutual consent (mubaraat), delegated divorce (talaq-i-tafweez). In constructive divorce, it covers the topics of ila and zihar. The effects of conversion (apostasy) are also discussed. It also deals with the grounds of judicial separation and grounds of divorce on which a Muslim wife can apply for divorce.

*Position before advent of Islam:*

Among pre-Islamic Arabs, the powers of divorce possessed by the husband were unlimited. They could divorce their wives at any time, for any reason or without any reason. They could also revoke their divorce, and divorce again as many times as they preferred. Moreover, they could, if they were so inclined, swear that they would have no intercourse with their wives, though still living with them. They could arbitrarily accuse their wives of adultery, dismiss them, and leave them with such notoriety as would deter other suitors; while they themselves would go exempt from any formal responsibility of maintenance or legal punishment.<sup>1</sup>

Even though, the provision of divorce was recognized in all religions, Islam is perhaps the first religion in the world which has expressly recognized the dissolution of marriage by way of divorce. In England, divorce was introduced only hundred years back.

Divorce among the ancient Arabs was easy and of frequent occurrence. Infact, this tendency has even persisted to some extent in Islamic law, inspite of the fact that Prophet Mohammad showed his dislike to it. It was regarded by the Prophet to be the most hateful before the Almighty god of all permitted things; for it prevented conjugal happiness and interfered with the proper bringing up of children.<sup>2</sup>

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<sup>1</sup>. Ibrahim Abdel Hamid- "Dissolution of Marriage", Islamic Quarterly, 3 (1956) 166-75, 215-223; 4 (1957)3-10, 57-65, 97-113; cf: Syed Khalid Rashid- Muslim law, 4<sup>th</sup> edn. 2004, p.98, Eastern Book Co., Lucknow.

<sup>2</sup>. Syed Khalid Rashid- Muslim law, 4<sup>th</sup> edn. 2004, p.98, Eastern Book Co., Lucknow.

*Position after advent of Islam:*

The institution of arbitrary talaq at the sweet –will of the husband exists since the pre-Islamic days. In those days, there were no restraints whatsoever. The husband was at liberty to pronounce talaq any number of times and to revoke it by taking the women back and resuming marital connection. This power of divorce was recognized by the Prophet but he imposed certain restrictions, moral and legal which constitute some checks on the husband’s powers. Morally, talaq was declared to be the most detestable before God of all permitted things, according to a hadis<sup>3</sup>. The legal restraints imposed are the following:

1. the fixing of dower;
2. provision for revocation of talaq in some cases; and
3. restraints on re-marriage between the parties.

The Prophet Mohammad looked upon these customs of divorce with extreme disapproval and regarded their practice as calculated to undermine the foundation of society. However, under the existing conditions of society, it was impossible to abolish the custom entirely. The Prophet had to mould the mind of an uncultured and semi-barbarous community to a higher development. Accordingly, he allowed the exercise of the power of divorce to husbands under certain conditions. He permitted to divorced parties, three distinct and separate periods within which, they might endeavour to become reconciled; but should all attempts at reconciliation prove unsuccessful, then in the third period, the final separation became effective.<sup>4</sup>

The reforms of Prophet Mohammad marked a new departure in the history of Eastern legislation. He restrained the husband’s unlimited power of divorce and gave to the woman, the right of obtaining the separation on reasonable grounds. The Prophet Mohammad is reported to have said, “if a woman be prejudiced by a marriage, let it be broken off”<sup>5</sup> He pronounced “talaq” to be the

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<sup>3</sup>. Jung- Muslim Law of Marriage, p. 46; Asha Bibi Ibrahim ILR 33 Mad 22 at p.25; cf: B.R. Verma- Islamic Law, 6<sup>th</sup> edn. 1986, p.203, Law Publishers (India) Private Limited.

<sup>4</sup>. Ameer Ali- The Spirit of Islam, 243-44 (London, 1965) cf: Syed Khalid Rashid- Muslim law, 4<sup>th</sup> edn. 2004, p.98, Eastern Book Co., Lucknow.

<sup>5</sup>. Aqil Ahmad- Mohammedan Law, 21<sup>st</sup> edn. 2004, p.163, Central Law Agency, Allahabad.

most detestable before god of all permitted things for it prevented conjugal happiness and interfered with the proper bringing up of children.

An effective check placed by Islam on frequent divorce and remarriage was that, in case of irrevocable separation, it is essential for remarriage that the wife should marry another man, and this marriage should be consummated before divorce, and the wife should observe iddat period. This was a measure which rendered separation rarer. Certain critics accuse this procedure as “a disgusting ordeal” and “revolting”, but they ignored that among a proud, jealous and sensitive race like the Arabs, such a condition was one of the strongest antidotes for the evil. It intended to control one of the most sensitive nations of the earth, by acting on the strongest feeling of their nature, the sense of honour.<sup>6</sup>

Divorce signifies the dissolution of the marriage tie. All separations effected for causes directly originating in the husband are termed Talaq, and separations effected otherwise by the decree of the court are known as Farqat.<sup>7</sup> Talaq in its literal sense means “the taking off of any tie or restraint”. The right of divorce is conceded in Muslim law, but the law prohibits its exercise by threats of divine displeasure, “it was”, says Baillie, originally forbidden and is still disapproved, but has been permitted for the avoidance of greater evils.<sup>8</sup>

A divorce may be effected by the act of the husband, but in certain special circumstances, also by wife or by mutual agreement or by the operation of law. The law of nullity of marriage was practically unknown in Muslim law. Some thing akin to annulment of marriage existed: in cases where a minor has a right to repudiate the marriage or to exercise the option of puberty, an annulment of marriage could be sought from the Kazi. The term Faskh means annulment or abrogation. The matrimonial reliefs of restitution of conjugal rights and the judicial separation were totally unknown. The remedy of restitution of conjugal rights by way of a civil suit was made available by the British government in India at an early date of Muslims as it was made available to others, and in modern India, a

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<sup>6</sup>. Ameer Ali- *The Spirit of Islam*, 244 (London, 1965) cf: Syed Khalid Rashid- *Muslim law*, 4<sup>th</sup> edn. 2004, p.99, Eastern Book Co., Lucknow.

<sup>7</sup>. Al-Haj Mahomed Ullah ibn S. Jung: *Anglo Muslim Law*, p.25, cf: Mahesh Prasad Tandon, *Muslim Law*, 11<sup>th</sup> edn.1999, p.116, Allahabad Law Agency, Faridabad (Haryana).

<sup>8</sup>. Baillie's digest p.205; cited *ibid*.

Muslim spouse can still seek restitution of conjugal rights by a civil suit. A Muslim husband and wife can separate from each other as any other spouses by a separation agreement under the general law of contract.<sup>9</sup>

Where a marriage terminates by act of parties, the dissolution is called divorce. Under Muslim law, the divorce may take place by the act of parties themselves or through a decree of the court of law. In Islam, divorce is considered as an exception to the status of marriage. The prophet declared that among the things which have been permitted by law, divorce is the worst.<sup>10</sup>

The Gauhati High Court in *Musst. Rebun Nessa v. Musstt. Bibi Ayesha & others*,<sup>11</sup> has observed that the correct law of Talaq as ordained by the Holy Quran is that (i) Talaq must be for a reasonable cause; (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one from the wife's family and the other from the husband. If an attempt fails, talaq may be effected.

The dissolution of marriage may be either by the act of husband or by act of the wife. A husband may divorce his wife by repudiating the marriage without giving any reason. Pronouncement of such words which signify his intention to disown the wife is sufficient; generally, this is done by talaq. But he may divorce the wife also by ila and zihar which differ from a talaq only in form not in substance.<sup>12</sup>

A wife cannot divorce her husband of her own accord. She can divorce the husband only where husband has delegated such right to her or under an agreement. Under an agreement, a wife may divorce her husband either by Khula or Mubaraat. Before passing of the Dissolution of Muslim Marriage Act 1939, a Muslim wife had no right to seek divorce except on the ground of false charge of adultery by the husband (lian), Insanity or impotency of husband.<sup>13</sup>

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<sup>9</sup>. Dr. Paras Diwan- Muslim Law in Modern India, 9<sup>th</sup> edn. 2005, p.81, Allahabad Law Agency, Faridabad (Haryana).

<sup>10</sup>. Tyabji- Muslim Law, Ed.,IV, p.143, cf: Dr. R.K. Sinha, Muslim Law, 5<sup>th</sup> edn., 2003, p.81, Central Law Agency, Allahabad.

<sup>11</sup>. AIR 2011 Gauhati 36.

<sup>12</sup>. Dr. R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.81, Central Law Agency, Allahabad.

<sup>13</sup>. Ibid. p.82.

But the Dissolution of Muslim Marriage Act, 1939 now lays down several other grounds on the basis of any one of which, a Muslim wife may get her marriage dissolved by an order of the court. Islam provides a modern concept of divorce by mutual consent. Today, this is known as the break-down theory of divorce. The modern concept of break-down theory of divorce does not want the court to go into the causes of break-down of marriage. The policy of Islam has been that, as far as possible, the divorce cases shall not go to the courts. The reason is that, unequivocally declaring divorce to be the worst of all permitted things, the Holy Prophet warned his people to keep away from it. In spite of the fact that, a substantial reform in the pre-Islamic system of divorce was introduced by the Holy Prophet with a view to prevent the exploitation of women and give them a status equal to men as well as a moral, social and economic security right from the child hood to mother hood.<sup>14</sup>

The dissolution of marriage under Muslim law can be studied under three heads:

1. Extra judicial divorce.

It can be again divided into three:

i) Divorce at the instance of husband (talaq)

In this, there are two types of dissolutions:

- a) talaq pronounced by the husband himself;
- b) talaq delegated by the husband (talaq-i-tafweez).

ii) Divorce at the instance of wife:

Under this heads, falls-

- a) khula
- b) ila
- c) zihar
- d) Lian.

iii) Divorce by mutual consent (mubaraat).

2. Judicial separation.

3. Judicial divorce.

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<sup>14</sup>. Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.68, Central Law Publications, Allahabad.

1. Extra judicial divorce:

a) *Unilateral divorce:*

(i) *Divorce at the instance of the husband:*

a) talaq:

Under Muslim law, husbands possess power to dissolve his marriage as and when he likes it necessary. It is an arbitrary act of a Muslim husband who may repudiate his wife at his own pleasure with or without showing any cause. He can pronounce talaq at any time. It is not necessary for him to obtain the prior approval of his wife for the dissolution of marriage. The talaq may be pronounced on mere whim or caprice without any reason.<sup>15</sup> Talaq can be pronounced by the husband without the intervention of court.

Talaq is an Arabic word and its literal meaning is “to release”. Under Muslim law, talaq means ‘repudiation of marriage by the husband’.<sup>16</sup> The word talaq comes from a root (tallaqa) which means “to release (an animal) from a tether”; hence, to repudiate the wife or free her from the bondage of marriage.<sup>17</sup>

According to Hedaya, Talaq in its primitive sense means ‘dismissal’; in law, it signifies the dissolution of marriage or the annulment of its legality by certain words<sup>18</sup>. Talaq is defined as the exercise of the right of pronouncing unilateral divorce on the wife by the husband, arbitrarily without any cause, at any time during the subsistence of a valid marriage including the period of iddat, is known as talaq.<sup>19</sup>

Muslim law does not require the existence of any fault or matrimonial offence as an excuse for talaq. The Muslim concept of divorce is that, where it is impossible for the spouses to live together, they must separate peacefully. The law gives to the husband, an absolute authority to terminate the marriage by pronouncing talaq; because, the society is a male dominated.

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<sup>15</sup>. Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.68, Central Law Publications, Allahabad.

<sup>16</sup>. Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.82, Central Law Agency, Allahabad.

<sup>17</sup>. Asaf A.A. Fyzee- Outlines of Muhammadan law, 4<sup>th</sup> edn. 2005, p.150, Oxford University Press, New Delhi.

<sup>18</sup>. Hedaya, 72; cf: B.R. Verma- Islamic Law, 6<sup>th</sup> edn. 1986, p.202, Law Publishers (India) Private Limited.

<sup>19</sup>. DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.183, Orient Publishing Company, Allahabad.

Whenever a husband finds that the marriage cannot be continued happily (either because of the misconduct of the wife or because of his own fault), he is empowered to dissolve the marriage. But this absolute authority of pronouncing talaq should not be misused by the husband. In Islam, "talaq is permitted only when the wife by her conduct or her words, does injury to the husband or happens to be impious".<sup>20</sup>

The Islamic policy has never been to confer an absolute authority of talaq upon a husband to be misused by him. But unfortunately, the unrestricted right of talaq has been misunderstood and Islamic guidelines for it have been ignored by the society and the courts of law. The result is that, there is no legal control over the unfettered right of a Muslim husband to dissolve the marriage by uttering few words. However, an indirect check upon this right is the obligation of a husband to pay the dower upon the dissolution of a marriage.<sup>21</sup>

About more than hundred years back, the Privy Council in *Moonshee Bazloor Raheem v. Shamsoonissa Begum*<sup>22</sup>, said that matrimonial law of the Muhammadan like that of every ancient community favours the stronger sex where the husband can dissolve the marital tie at his will.

In *Moonshee Buzul-ul-Rahim v. Lateef-un-Nissa Begum*<sup>23</sup>, the court said that a divorce by talaq is more arbitrary act of the husband who may repudiate his wife with or without any cause. This attitude of the court continued even after the advent of independence. In *Mohammad Yusuf commissioner, Quetta Division v. Syed Ali Nawaz Gardezi*<sup>24</sup>, on the 4<sup>th</sup> December, 1906, the petitioner, who was domiciled in Scotland, married Ghulam Mohammad Ebrahim, who was a Sunni Muhammadan, domiciled in India, at the General Registry Office in Edinburgh.

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<sup>20</sup>. Ameer Ali- Mohammedan Law, vol. II, Ed. III, p. 512; cf: Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.82, Central Law Agency, Allahabad.

<sup>21</sup>. Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.82, Central Law Agency, Allahabad.

<sup>22</sup>. (1867)11 MIA 551 (610); cf: Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.68, Central Law Publications, Allahabad.

<sup>23</sup>. (1918)8 M.I.A. 397 (395); cf: Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.68, Central Law Publications, Allahabad.

<sup>24</sup>. P.L.D. 1965 (W.P.) Lah. 141 at 173-74; cf: B.R. Verma- Islamic Law, 6<sup>th</sup> edn. 1986, p.203, Law Publishers (India) Private Limited.

In 1912, the petitioner converted to Islam and continued to profess that religion up to the middle of April 1923. Between 1914 and 1923, Ghulam Mohammad Ebrahim permanently resided at Secunderabad. On 27<sup>th</sup> June 1922, Ebrahim pronounced talaq against the petitioner in accordance with Muslim law at Secunderabad. On 10<sup>th</sup> April 1923, the petitioner made a declaration in the District Court at Secunderabad that she was no longer the wife of Gulam Mohammad Ebrahim. On 24<sup>th</sup> April 1923, the petitioner was married to the respondent under the Special Marriage Act, 1872.

It was held that, at the time of the marriage, Ebrahim was domiciled in British India and that in 1912, when the petitioner embraced Islam, both Ebrahim and the petitioner were domiciled in British India. Since she converted to Islam, Muslim personal law applies. In the circumstances, it was held that, the marriage was dissolved. In *Mohd. Ahmad Khan vs. Shah Bano Begum*<sup>25</sup>, the Supreme Court again said that “undoubtedly, the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so for reasons good, bad or indifferent even for no reason at all”.

The following verse of the Quran in support of husband’s authority to pronounce unilateral divorce (talaq) is:

“Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in (the husband’s) absence what Allah would have them guard. As to those women on whose part you fear disloyalty and ill-conduct, admonish them (first), (next) refuse to share their beds, (and last) beat them (lightly); but if they return to obedience, do not seek against them means (of annoyance): for Allah is Most High, Great (above you all)”<sup>26</sup>

Abdul Rahim says that, with a view to regulating the matrimonial relations, Muslim law allows predominant position to the husband “because generally speaking, he is mentally and physically superior of the two; and some theorists

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<sup>25</sup>. (1985)2 SCC 556.

<sup>26</sup>. The Holy Quran IV, 34; translated by Abdullah Yusuf Ali, edn. 2004, p.50, Ayman Publications, New Delhi.

would treat the dower payable to the wife as consideration for the alienation of her matrimonial freedom”<sup>27</sup>.

According to Baillie<sup>28</sup>, the term divorce includes all separation originating from the husband and repudiation for talaq in the limited sense, namely, of separation effected by use of appropriate words. In Islam, the term ‘talaq’ means, absolute power which the husband possesses of divorcing his wife at all times.<sup>29</sup>

*Capacity:*

Every Muslim husband of sound mind, who has attained the age of puberty, is competent to pronounce talaq, whenever he likes. He need not give any reason for his pronouncement. This absolute right is given to him by Muslim law itself and does not depend on any condition or cause.

A minor or unsound mind can not pronounce talaq. Talaq by minor or insane husband is void and ineffective. However, if the husband is lunatic, the talaq pronounced by him during lucid interval is valid. The guardian cannot pronounce talaq on behalf a minor husband. According to Tyabji, guardian of a husband of unsound mind may pronounce talaq on behalf of such insane husband if such talaq is in the interest of the husband.<sup>30</sup> A person is said to be of sound mind if he is sane and not a lunatic or suffering from some disease similar to lunacy.<sup>31</sup> A dumb man may also effect divorce by intelligible signs.<sup>32</sup>

Regarding the capacity of the wife against whom, divorce is pronounced, Ameer Ali observes: “.....when she is of such tender age (minor) as to be unable to comprehend the legal consequences flowing from the act of

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<sup>27</sup>. Abdul Rahim, 327, cf: Dr. Paras Diwan- Muslim Law in Modern India, 9<sup>th</sup> edn. 2005, p.82, Allahabad Law Agency, Faridabad (Haryana).

<sup>28</sup>. Baillie- Digest of Mohammadan Law, Part I, p.204; cf: Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.67, Central Law Publications, Allahabad.

<sup>29</sup>. Encyclopaedia of Islam, pp.636-640; Wilson: Anglo-Indian Muslim Law; cf: Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.67, Central Law Publications, Allahabad.

<sup>30</sup>. Tyabji- Muslim Law, Ed. IV, p.153; cf: Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.83, Central Law Agency, Allahabad.

<sup>31</sup>. Dur-ul-Mukhtar, 125,126 cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.188, Orient Publishing Company, Allahabad.

<sup>32</sup>. Dr. Jung- Anglo-Muslim Law, 25; cf: Dr. Mohammad Nazmi- Mohammadan Law, 2<sup>nd</sup> edn. 2008, p.68, Central Law Publications, Allahabad.

repudiation, or does not possess discretion, a valid talaq cannot be effected against her”<sup>33</sup>.

*Free consent:*

Except under Hanafi law, the consent of the husband at the time of pronouncing talaq must be free. Under Hanafi law, a talaq pronounced under coercion, compulsion, fraud, voluntary intoxication and undue influence etc, is valid and dissolves the marriage. The basis of this rule is the tradition of the Prophet where he is reported to have said thus:

“There are three things which whether done in joke or earnest, shall be considered as serious and effectual: one, marriage; the second, divorce and the third, taking back”<sup>34</sup> Divorce given under the influence of intoxication is valid according to Hanafi law; where as Shias do not recognize it.<sup>35</sup>

*Involuntary intoxication:*

Talaq pronounced under involuntary intoxication or force is void even under Hanafi law. Under Hanafi law, where a husband is made to drink some intoxicant (wine) by force or takes it as drug and then pronounces talaq, the talaq is not valid.<sup>36</sup>

The divorce operates from the time of the pronouncement of talaq. The presence of the wife is not necessary, nor need notice be given to her. Under Hanafi law, no special form is necessary; whereas, Ithna Ashari law insists on a strict formula being used.<sup>37</sup>

The words used must indicate a clear and unambiguous intention to dissolve the marriage. They must be express, eg.”Though art divorced” or “I have divorced thee”; in which case, no proof of intention is necessary.

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<sup>33</sup>. Ameer Ali- Mohammedan Law, Vol. II, Ed. III, p.533; cf: Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.83, Central Law Agency, Allahabad.

<sup>34</sup>. Tyabji- Muslim Law, Ed. IV, p.53; (quoting ‘Miscut-ul-Musabeeh’); cf: Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.83, Central Law Agency, Allahabad.

<sup>35</sup>. Syed Khalid Rashid- Muslim law, 4<sup>th</sup> edn. 2004, p.103, Eastern Book Co., Lucknow.

<sup>36</sup>. Tyabji: Muslim Law, Ed. IV, p.152; cf: Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.83, Central Law Agency, Allahabad.

<sup>37</sup>. Asaf A.A. Fyzee- Outlines of Muhammadan law, 4<sup>th</sup> edn. 2005, p.150, Oxford University Press, New Delhi.

But if the words are ambiguous, the intention must be proved. If the expression is ambiguous, talaq will not take place even if the husband intended to divorce<sup>38</sup>.

For instance, "Thou art my cousin, the daughter of my uncle, if thou goest" or I give up all relations and would have no connection of any sort with you"<sup>39</sup>. No School of the Sunnis prescribes any formalities for talaq. On the other hand, the Shias insist that divorce must be pronounced orally and in the presence of two competent witnesses. But the Shias do not require the presence of witnesses for marriage. While the Sunnis do not require any witnesses for divorce, though insist on the presence of two competent witnesses at the time of marriage.

The Sunnis permit divorce in writing too; but the Shias insist that talaq should be oral; unless the husband is physically incapable of pronouncing it orally.<sup>40</sup> The Ithna Asharis also require that, certain Arabic words must be used in the formula of divorce.<sup>41</sup> So long as the intention is clear, no specific form is necessary. Any words may be used.

In the proceedings for maintenance or in written statement in the wife's suit for restitution of conjugal rights or in the proceedings under Section 488 Cr.P.C. (in the new code, this is Section 125), if the husband takes the plea that, he had pronounced talaq on his wife, that is enough and results in divorce.<sup>42</sup>

In *Waj Bibee v. Azmat Ali*<sup>43</sup>, the Calcutta High Court held that, an instrument of divorce signed by the husband in the presence of and given to the wife's father was valid, notwithstanding that it was not signed in the presence of the wife. In *Asha Bibi v. K.Ibrahim*<sup>44</sup>, the husband pronounced talaq in the absence of his wife. The Madras High Court held; such talaq as valid.

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<sup>38</sup>. Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.71, Central Law Publications, Allahabad.

<sup>39</sup>. Tyabji, IOC, cit; Mulla, 310; cf: Asaf A.A. Fyzee- outlines of Muhammadan law, 4<sup>th</sup> edn. 2005, p.151, Oxford University Press, New Delhi.

<sup>40</sup>. Dr. Paras Diwan- Muslim Law in Modern India, 9<sup>th</sup> edn.,2005, p.76, Allahabad Law Agency, Faridabad (Haryana).

<sup>41</sup>. Baillie, II, 113-115; *ibid*.

<sup>42</sup>. *Ali v. Rehmani* (1972)74 PLR 869; *Md. Hanceefa v. Pattermmal* 1972 KLT 512; cf: Dr. Paras Diwan- Muslim Law in Modern India, 9<sup>th</sup> edn. 2005, p.76, Allahabad Law Agency, Faridabad (Haryana).

<sup>43</sup>. (1867)8 WR 23; Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.71, Central Law Publications, Allahabad.

<sup>44</sup>. (1909) ILR 33 Mad.22; cited *ibid*.

*Talaq under compulsion:*

If the words of talaq used by the husband are express, the talaq is valid, even if it is pronounced under compulsion. Under Hanafi law, the intention is unnecessary, and mere use by the husband of a formula of talaq even in jest, or under compulsion or in voluntary drunkenness, is valid. The reason given for this is that, a man must not be allowed to plead the illegal condition of drunkenness as an excuse for the detestable act of talaq.<sup>45</sup>

According to Shia School<sup>46</sup> and Shafii sub-School of Sunni law<sup>47</sup>, a talaq pronounced under compulsion, intoxication or jest is not valid.

While enumerating the reasons for giving validity to a talaq pronounced under coercion or threat, the Hedaya provides that, “the foundation of this is that, the man alluded to have the choice of two evils; one, the thing with which he is threatened or compelled; and the other, talaq upon compulsion; and in viewing both, he makes choice of that which appears to him the easiest, namely, talaq; and this proves that, he has an option, though he be not desirous that its effect should be established, or in other words, that divorce should take place upon it; nor does this circumstance forbid the efficiency of his sentence; as in the case of a jester; that is to say, if a man pronounce a talaq in jest, it takes effect, although he be not desirous that it should; and so likewise the divorce of one who is compelled”<sup>48</sup>.

*Talaq may be oral or in writing:*

*Oral talaq:*

A talaq may be effected orally or by a written document called “Talaqnama”. A person who is not able to speak can also terminate his marriage by positive and intelligible signs. An oral divorce must be addressed to someone. Among Hanafis, no special form of talaq is recognized. All that is necessary is

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<sup>45</sup>. Fitzgerald: Mohammad Law, 1931 edn. 73; cf. Dr. Mohammad Nazmi- Mohammadan Law, 2<sup>nd</sup> edn. 2008, p.69, Central Law Publications, Allahabad.

<sup>46</sup>. Baillie: Digest of Mohammedan Law, Vol. II, 108; cf. Dr. Mohammad Nazmi- Mohammadan Law, 2<sup>nd</sup> edn. 2008, p.69, Central Law Publications, Allahabad.

<sup>47</sup>. Hedaya, 76; cf. Dr. Mohammad Nazmi- Mohammadan Law, 2<sup>nd</sup> edn. 2008, p.69, Central Law Publications, Allahabad.

<sup>48</sup>. Hedaya (Grady’s edn.), 75; cf. Dr. Mohammad Nazmi- Mohammadan Law, 2<sup>nd</sup> edn. 2008, p.69, Central Law Publications, Allahabad.

that, the words of talaq should show an intention to dissolve the marriage. But under Shia law, there is a prescribed formula which must be recited orally in the presence of two competent witnesses in order to effect the talaq.

The formula of talaq is in Arabic, but if the man is ignorant of Arabic, then he may use any language known to him.<sup>49</sup> A talaq communicated only in writing is not valid unless the husband is incapable of pronouncing it orally. According to Shia jurists, “As a marriage being a chaste or protected condition favoured by the law, and in its own nature, not admitting of being dissolved, in taking off the tie, it is necessary to adhere strictly to the terms of the legal permission”.<sup>50</sup>

In *Dilshada Masood v. Gh. Mustaffa*<sup>51</sup>, the divorce has not been pronounced in Arabic. The respondent in this case, has told the Magistrate that, he has divorced his wife and at that time, two lawyers were present. Prior to that, he had sent a written divorce to the petitioner. Both such divorces are unknown to Shia law and would not operate as divorce. He told before Magistrate that, the divorce pronounced on his wife was not in Arabic and also not in the presence and hearing of two “Aadil” witnesses; therefore it would not operate as divorce under Shia law.

The divorce in writing without its pronouncement in Arabic in a specified form is also unknown to Shia law. If the divorce is put into writing, even then, it is to be pronounced in Arabic in the specified form by the husband or by his appointed agent in the presence of two witnesses. The divorce allegedly given by the respondent either before the Magistrate or in writing is both violative of Shia law, and therefore not valid. Aadil has been defined as one who follows strictly the commandments of God as provided in the Quran and Shariat, and refrains from all actions forbidden therein.

Shia law has prescribed the following formula for pronouncing a talaq-

i) by the husband using the words “though art repudiated”; or- “this person is repudiated” or “such person is repudiated-“; or

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<sup>49</sup>. Dr. Jung: Anglo-Muslim Law, 26; cf: Dr. Mohammad Nazmi- Mohammadan Law, 2<sup>nd</sup> edn. 2008, p.68, Central Law Publications, Allahabad.

<sup>50</sup>. Baillie: Digest of Mohammadan Law, Vol. II, 113. cited *ibid*.

<sup>51</sup>. AIR 1986 J&K 80 at 82, 83.

ii) by the husband answering in the affirmative in replying to a question, “is thy wife divorced” or “hast thou divorced by wife”?

Talaq will not take place where ambiguous expressions are used except by intention or circumstantial proof.<sup>52</sup>

*Notice of talaq:*

For the validity of talaq, neither the notice nor communication to the wife is not necessary. The talaq becomes effective from the moment of its pronouncement and not from the date on which, the wife comes to know about it. However, knowledge of talaq is required for claiming dower and maintenance from her former husband.<sup>53</sup>

*Kinds of written talaq:*

Written talaq may be of two types; i) Customary and ii) Non-Customary.

i) Customary or Marsoom or Manifest Talaq:

When the writing of Talak (Talaqnama) is properly made so as to be legible and clearly indicating to whom and by whom it is addressed, it is customary, also known as Marsoom or Manifest Talaq; and a talaq will be effected immediately and irrevocably even if the husband had no intention of making it<sup>54</sup> and it is not brought to the knowledge of the wife.<sup>55</sup>

ii) Non-Customary or Unusual Talaq:

If the Talaqnama is not written in the customary form and is not addressed to anyone, the intention to divorce has to be proved.<sup>56</sup> Such talaq is known as Non-Customary or Unusual Talaq.

*Communication of talaq:*

Though talaq may be pronounced in the absence of the wife, yet its communication to the wife is required for some purposes, e.g. on divorce, Dower

<sup>52</sup>. Hedaya, pp. 84-85; cf: Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.72, Central Law Publications, Allahabad.

<sup>53</sup>. Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.85, Central Law Agency, Allahabad.

<sup>54</sup>. Sarabai v. Rabiabai, ILR Bom 537; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.191, Orient Publishing Company, Allahabad.

<sup>55</sup>. Ahmad Kasim v. Khatun Bibi, 1933, Cal 27 at p.32; cited ibid.

<sup>56</sup>. Rasul Baksh v. Mst. Bhalan, AIR. 1932 Lah 498 at 500; cited ibid.

becomes payable and the wife has to undergo Iddat<sup>57</sup>. In *Mohd. Shamsuddin v. Noor Jehan Begum*<sup>58</sup>, it was held that, 'There is nothing in law to support the position that the talaq takes effect from the time when the wife comes to know of it. The iddat would begin to run immediately. Similarly, the period of limitation for the purpose of recovery of her deferred dower will start running only from the date when she had knowledge of talaq<sup>59</sup>. The wife can also claim maintenance from her husband till such time the communication of talaq reaches her.

*Conditional and Contingent talaq:*

A talaq may be either absolute (unconditional) or subject to a condition or contingency. Contingency means an uncertain future event. Where the talaq is without any condition, it takes effect immediately. A conditional or contingent talaq becomes effective only upon the fulfillment of the condition or happening of the future event. Under Sunni law, conditional and contingent talaq is recognized. Shia law does not recognize conditional or contingent talaq<sup>60</sup>.

Under Sunni law, the conditions must not be un-Islamic. If a condition is against the principles of Islam, the condition is void and a talaq cannot take place. For example, if the condition is that, whenever the wife would demand her Prompt Dower, there would be talaq by husband, the condition is void and talaq does not take place.

Where the condition is valid, it becomes effective only upon the fulfillment of the condition or happening of the specified event. Further pronouncement is not necessary. In *Bachchoo v. Bismillah*<sup>61</sup>, the husband in writing, promised to pay a maintenance allowance to the wife for certain period. On failure of the husband to do so, the writing was to operate as Talaqnama. The Allahabad High Court held that, it was a conditional talaq. The condition was non-payment of maintenance allowance to the wife during the agreed period. On default of the

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<sup>57</sup>. Foolchand v. Nazib (1909)36 Cal 184; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.192, Orient Publishing Company, Allahabad.

<sup>58</sup>. AIR 1955 Hyd 144.

<sup>59</sup>. Kathiyamma v. Urathel (1931)133 IC. 375; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.192, Orient Publishing Company, Allahabad.

<sup>60</sup>. Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.85, Central Law Agency, Allahabad.

<sup>61</sup>. (1936) All LJ 302; cf: Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.85, Central Law Agency, Allahabad.

husband to pay maintenance allowance to wife, the condition was fulfilled. Thus, the talaq became effective without any further pronouncement.

In *Bilqees Begum v. Manzoor Ahmed*<sup>62</sup>, the husband used to object his wife's frequent visits to her female friends. Once, there was a quarrel between husband and wife on this matter and in anger, the husband declared that, if she went again to her female friends' house, there would be talaq by him. From that date, the wife never went there. The Karachi High Court (Pakistan) held that, the husband's declaration was a conditional talaq. But since the condition was not fulfilled after the declaration, the talaq has not taken place.

In *Mirjan Ali v. Maimuna Bibi*<sup>63</sup>, there was an agreement between husband and wife under which, if the wife lived with her parents for a period of 90 days or more, and the husband failed to take her back within the said period of 90 days, it would result in the husband's irrevocable talaq and the wife would be free to remarry. The husband visited the place of the wife's parents within the stipulated period of 90 days and asked his wife to accompany him. The wife refused to go with him on the ground that, now she had divorced the husband under the authority given to her by the husband. It was argued by the wife that the agreement was a delegated talaq and under this delegated authority, she had divorced her husband. The Assam High Court held that, the agreement written by the husband was not a delegated talaq and she had no authority to divorce the husband.

The court further observed that the above mentioned agreement was that of a contingent talaq and the contingency was 'failure of the husband to take her back within 90 days'. As the contingency did not happen and husband went to take her back within the said period, the talaq by husband could not take place. And the wife's suit was dismissed. As such, the wife was bound to accompany the husband.

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<sup>62</sup>. PLD (1962) Karachi 491; cf: Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.85, Central Law Agency, Allahabad.

<sup>63</sup>. AIR 1949 Ass 14; cited *ibid*.

Shia law: under Shia law, conditional or contingent talaq is void and ineffective. Even if the condition or contingency is lawful, the talaq is not valid. In other words, under Shia law, a talaq must be unconditional.

Talaq is of two kinds:

1. Talaq-ul-Sunnat or revocable talaq.
2. Talaq-ul-Biddat or irrevocable talaq.

The pronouncement of talaq may be either revocable or irrevocable. As the Prophet Mohammad did not favour the institution of talaq, the revocable forms of talaq are considered as the 'approved' and the irrevocable forms are treated as the 'disapproved' forms<sup>64</sup>

### *1. Talaq-ul-Sunnat: (Revocable Talaq)*

It is the talaq, which is effected in accordance with the traditions of Prophet. It is regarded to be the approved form of talaq. Talaq-ul-Sunnat is also called as Talaq-ul-Sunna, which means divorce in accordance with the requirement of the traditions. It is a traditional mode of divorce, and approved by Prophet Mohammad, and is valid according to all Schools and Sub-Schools of Muslim law<sup>65</sup>. As a matter of fact, the prophet always considered talaq as an evil. If at all this evil was to take place, the best formula was one in which, there was possibility of revoking the effects of this evil. With this idea in mind, the Prophet recommended only revocable talaq; because in this form, the evil consequences of talaq do not become final at once. There is possibility of compromise and reconciliation between husband and wife<sup>66</sup>.

It has been further sub-divided into:

#### *i) Talaq Ahsan (most approved form or most proper form):*

This Arabic word 'ahsan' means 'best'. It is also called 'very proper' form of talaq. This signifies that the talaq pronounced in the ahsan form is very best

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<sup>64</sup>. Asaf A.A. Fyzee- Outlines of Muhammadan law, 4<sup>th</sup> edn. 2005, p.151, Oxford University Press, New Delhi.

<sup>65</sup>. Dr. Mohammad Nazmi- Mohammadan Law, 2<sup>nd</sup> edn.2008, p.70, Central Law Publications, Allahabad.

<sup>66</sup>. Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.86, Central Law Agency, Allahabad.

kind of talaq. Ahsan talaq is the most approved and best form of talaq. Ahsan means 'very good'. The best feature this kind of talaq is that, it is revocable. So, hasty divorce can be prevented.

According to Radd-ul-Muhtar, "It is proper and right to observe this form for human nature is apt to be misled and to lead astray the mind far to perceive fault which may not exist and to commit mistakes of which one is certain to feel ashamed afterwards<sup>67</sup>. This type of talaq is less injurious to wife and remarriage between the parties is possible<sup>68</sup>.

According to Hedaya, this method of divorce is the most approved because the companions of the Prophet approved of it, and secondly, because it remains within the power of the husband to revoke the divorce during iddat, which is three months, or till delivery.<sup>69</sup>

This is the most proper form of repudiation of marriage because of two reasons: First, there is possibility of revoking the pronouncement before expiry of the iddat period. Secondly, the evil words of talaq are to be uttered only once. Being an evil, it is preferred that these words are not repeated<sup>70</sup>.

This mode of talaq consists of a single pronouncement of divorce made in a period of tuhr (purity, i.e., the period between two menstruations) or at any time if the wife is free from menstruation, followed by abstinence from sexual intercourse during the period of iddat. In case of a pregnant woman, there must be no sexual intercourse till the birth of the child.<sup>71</sup> The requirement that pronouncement of should be made during a period of tuhr applies only to oral divorce. It does not apply to talaq in writing. Similarly, this requirement is not applicable where the parties have been away from each other for a long time, or when the marriage has not been consummated<sup>72</sup>. This talaq may be revoked

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<sup>67</sup>. The Radd-ul-Muhtar, II, 688, 684; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.193, Orient Publishing Company, Allahabad.

<sup>68</sup>. Hedaya 72; cited ibid.

<sup>69</sup>. Hedaya, 72; cf: Syed Khalid Rashid- Muslim law, 4<sup>th</sup> edn. 2004, p.101, Eastern Book Co., Lucknow.

<sup>70</sup>. Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.87, Central Law Agency, Allahabad.

<sup>71</sup>. DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.193, Orient Publishing Company, Allahabad.

<sup>72</sup>. Dr. Paras Diwan- Muslim Law in Modern India, 9<sup>th</sup> edn. 2005, p.85, Allahabad Law Agency, Faridabad (Haryana).

either by express words or impliedly, by cohabitation within the iddat period. On such revocation, it is not necessary for the wife to undergo intermediary marriage. The husband can simply say 'I have retained you'<sup>73</sup>. If cohabitation takes place even once during this period, the talaq is revoked and it is presumed that the husband has reconciled with the wife. When the period of iddat expires and the husband does not revoke the talaq either expressly or impliedly, through consummation, the talaq becomes irrevocable and final.<sup>74</sup>

The characteristic feature of the Ahsan form of talaq is a single pronouncement followed by no revocation during the period of iddat. Therefore, where a husband makes any declaration in anger, but realizing his mistake afterwards, wants to cancel it, there is sufficient time for him to do so. Single pronouncement of talaq and sufficient opportunity to the spouses for reconciliation are the two reasons for calling this form as the 'most proper' form of talaq.

The relevant verses of the Quran are:

"Divorced women shall wait concerning themselves for three monthly periods. Nor is it lawful for them to hide what Allah has created in their wombs, if they have faith in Allah and the last Day. And their husbands have the better right to take them back in that period, if they wish for reconciliation. And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree (of advantage) over them. And Allah is Exalted in power, wise".<sup>75</sup>

"When you divorce women, and they fulfil the term of their (Iddat), do not prevent them from marrying their (former) husbands, if they mutually agree on equitable terms. This is (the course making for) most virtue and purity amongst you. And Allah knows, and you do not know"<sup>76</sup>.

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<sup>73</sup>. Syed Khalid Rashid- Muslim law, 4<sup>th</sup> edn. 2004, p.101, Eastern Book Co., Lucknow.

<sup>74</sup>. Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.87, Central Law Agency, Allahabad.

<sup>75</sup>. The Holy Quran, Sura-II, Ayat- 228; translated by Abdullah Yusuf Ali, edn. 2004, p.50, Ayman Publications, New Delhi.

<sup>76</sup>. The Holy Quran, Sura-II, Ayat- 232; translated by Abdullah Yusuf Ali, edn. 2004, p.50, Ayman Publications, New Delhi.

Shia law:

The Shias requires the presence of two witnesses at the time of pronouncement of talaq. If a man had sexual intercourse during her Pak (pure) period and wishes to divorce his wife, he should wait till she enters into menstruation and then again becomes Pak, only then she could be divorced. In case a husband had sexual intercourse during Pak period and separated from wife, like, if he proceeded on journey and wishes to divorce, then he should wait for at least one month.<sup>77</sup>

*ii) Talaq Hasan: (Approved form)*

In Arabic, Hasan means “good”. While Ahsan means very good, Hasan means good. This kind of talaq is also regarded to be proper and approved form. In this form also, there is a provision for revocation. But it is not the best mode because evil words of talaq are to be pronounced three times in the successive tuhrs.<sup>78</sup> This is also a kind of Talaq-e-Sunnat but considered less approved than Talaq-e-Ahsan.<sup>79</sup>

In this form, the husband is required to pronounce the formula of talaq (i.e., the utterance of the words, “I divorce thee”) three times during three successive tuhrs. If the wife has crossed the age of menstruation, then the pronouncement of talaq may be made after an interval of 30 days between the successive pronouncements. It is therefore, “a divorce upon a divorce”, where the first and second pronouncements are revoked and followed by a third, only then talaq becomes irrevocable.<sup>80</sup>

It is necessary that no intercourse should have taken place during the period of purity in which, the pronouncement has been made. For instance, when the wife is in tuhr, without having intercourse with her, the husband pronounces talaq. This is the first talaq. Then he revokes it by words or by intercourse. Again when she is in tuhr, and before intercourse, the husband pronounces talaq. This

<sup>77</sup>. Seestani p. 464; cf: Yawer Qazalbash- Principles of Muslim Law, 2<sup>nd</sup> edn. 2005; p.129, Modern Law House, Allahabad.

<sup>78</sup>. Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.87, Central Law Agency, Allahabad.

<sup>79</sup>. Yawer Qazalbash- Principles of Muslim Law, 2<sup>nd</sup> edn. 2005, p. 129, Modern Law House, Allahabad.

<sup>80</sup>. Syed Khalid Rashid- Muslim law, 4<sup>th</sup> edn. 2004, p.102, Eastern Book Co., Lucknow.

is the second pronouncement. Husband again revokes it. Again, when the wife enters her third period of purity and before any intercourse takes place, husband makes a pronouncement of divorce. This is the third pronouncement. The movement the husband utters the third pronouncement, the marriage stands dissolved irrevocably.<sup>81</sup>

When the wife is not subject to menstrual courses, an interval of 30 days is required between each successive pronouncement. Talaq hasan tries to put an end to a barbarous pre-Islamic practice to divorce a wife and take her back several times in order to ill-treat her. Through this method of talaq, the husband has been given two chances of divorcing and then taking the wife back, but the third time he does so, the talaq becomes irrevocable. In this way, the process of divorcing and repudiating cannot be continued indefinitely. Thus, it is a kind of relief to the wife from the harassment and tension on account of uncertainty that the Arabs could cause her by repeated talaq and revocations without any limit. The Prophet restrained them to the limit of three repetitions.<sup>82</sup>

To impose a further deterrent on this arbitrary practice, it was laid down that the parties were not free to remarry unless the wife married another man who had actually consummated the marriage, and then divorced her. On the completion of iddat, the woman could marry her former husband. This is a penal provision meant to chastise the husband who repudiates his wife thoughtlessly.<sup>83</sup>

Quranic commands:

“So if a husband divorces his wife (irrevocably), he cannot, after that, re-marry her until after she has married another husband and he has divorced her. In that case, there is no blame on either of them if they re-unite; provided they feel that they can keep the limits ordained by Allah, which He makes plain to those who understand”<sup>84</sup>

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<sup>81</sup>. Dr. Paras Diwan- Muslim Law in Modern India, 9<sup>th</sup> edn. 2005, p.84, Allahabad Law Agency, Faridabad (Haryana).

<sup>82</sup>. Syed Khalid Rashid- Muslim law, 5<sup>th</sup> edn. 2009, p.108, Eastern Book Co., Lucknow.

<sup>83</sup>. Dr. Paras Diwan- Muslim Law in Modern India, 9<sup>th</sup> edn. 2005, p.84, Allahabad Law Agency, Faridabad (Haryana).

<sup>84</sup>. The Holy Quran, Sura-II, Ayat- 230; translated by Abdullah Yusuf Ali, edn. 2004, Ayman Publications, New Delhi.

In *Ghulam Mohyuddin v. Khizer*<sup>85</sup>, a husband wrote a Talaqnama in which he said that, he had pronounced his first talaq on 15<sup>th</sup> September and the third talaq would be completed on 15<sup>th</sup> November. He had communicated this to his wife on 15<sup>th</sup> September. The Lahore High Court held that this was a Talaq Hasan. The court observed that the Talaqnama was merely a record of the first pronouncement and the talaq was revocable. The court further observed that for an effective and final talaq, the three pronouncements must actually be made in three tuhrs; only a mention of the third declaration is not sufficient.

## 2. *Talaq-ul-Biddat: (irrevocable)*

This is also known as Talaq-ul-Bain. It is a disapproved mode of divorce. It is sinful form of divorce. It is the irregular mode of talaq introduced by omayyads in order to escape the strictness of law.<sup>86</sup> Biddat means disapproved, wrong innovation or to some extent, forbidden. In common parlance, this is also called 'instant triple talaq'.<sup>87</sup> This form of talaq was allowed by second caliph of Islam, Omar.

The Talaq-ul-Biddat has 2 forms:

- a) Triple irrevocable talaq.
- b) Single irrevocable talaq.

It is recognized only under Sunni law. The talaq-ul-biddat in any of its forms is not recognized by the Shias and Malikis. A peculiar feature of this talaq is that it becomes effective as soon as the words are pronounced and there is no possibility of reconciliation between the parties. The Prophet never approved a talaq in which, there was no opportunity for reconciliation. Therefore, the irrevocable talaq was not in practice during his life. The talaq-ul-biddat has its origin in the second century of the Islamic era.

The historical background of this type of talaq depicted by Ameer Ali as:

<sup>85</sup>. AIR 1929 Lah.6; cf: Dr. R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.88, Central Law Agency, Allahabad.

<sup>86</sup>. Aqil Ahmad- Mohammedan Law, 21<sup>st</sup> edn. 2004, p.169, Central Law Agency, Allahabad.

<sup>87</sup>. Yawer Qazalbash- Principles of Muslim Law, 2<sup>nd</sup> edn. 2005; p.130, Modern Law House, Allahabad.

“The Talaq-ul-Biddat, as its name signifies, is the heretical or irregular mode of divorce, which was introduced in the second century of the Mohammedan era. (The Omayyad monarchs finding that the checks imposed by the Prophet on the facility of repudiation interfered with the indulgence of their caprice endeavoured to find an escape from the strictness of law and found a loophole to effect their purpose).

As a matter of fact, the capricious and irregular the power of the divorce which was in the beginning left to the husband was strongly disapproved by the Prophet. It is reported that, when once news was brought to Him that one of his disciples had divorced his wife, pronouncing the three talaqs at one and the same time, the Prophet stood up in anger on his carpet and declared that the man was making the plaything of the words of god and made him to take back his wife”<sup>88</sup>.

*Triple Talaq:*

Triple talaq is a recognized; but it is a disapproved form of divorce and is considered by the Islamic jurists as an innovation within the fold of Shariat. It commands neither the sanction of Holy Quran nor the approval of the holy Prophet (PBUH). It was also not in practice during the life time of first Caliph Abu Bakar and also for more than two years during the second Caliph Omar’s time. Later on, Hazrat Omar permitted it on account of certain peculiar situation.

When the Arabs conquered Syria, Egypt, Persia, etc., they found women there much more beautiful as compared to Arabian women and hence were attracted to marry them. But the Egyptian and Syrian women insisted that in order to marry them, they should divorce to their existing wives instantaneously by pronouncing three divorce in one sitting. The condition was readily acceptable to the Arabs because they knew that, in Islam, divorce is permissible only twice in two separate periods of tuhr and its repetition at one sitting is unislamic, void and shall not be effective.

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<sup>88</sup>. Ammer Ali- Mohammedan Law, II, 514; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.194, Orient Publishing Company, Allahabad.

In this way, they could not only marry the beautiful women but also retain their existing wives. This fact was reported to the second Caliph Hazrat Omar. The Caliph Omar then in order to prevent the misuse of the religion by the unscrupulous husbands decreed that even repetition of the word talaq, talaq, talaq at one sitting would dissolve the marriage irrevocably. It was, however a mere administrative measure of Caliph Omar to meet an emergency situation and not to make it a law permanently. But unfortunately, the Hanafi jurists later on at the strength of this instant administrative order of second Caliph, declared this form of divorce valid and also gave religious sanction to it.

At present, much inconvenience is being felt by the Muslim Community, so far as this law of 'triple divorces' is applied in India. The relevant verse of the Quran can be relied upon:

"A divorce is only permissible twice; after that, the parties should either hold together on equitable terms, or separate with kindness. It is not lawful for you, (men), to take back any of your gifts (from your wives), except when both parties fear that they would be unable to keep the limits ordained by Allah. If you (judges) do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she give something or her freedom. These are the limits ordained by Allah; so do not transgress them, if any do transgress the limits ordained by Allah, such persons wrong (themselves as well as others)<sup>89</sup>.

The tradition of the Prophet reported by Rokanah-b. Abu Yazid that, he gave his wife Sahalmash, an irrevocable divorce, and he conveyed it to the Messenger of Allah and said; by Allah, I have not intended but one divorce. Then the messenger of Allah asked Have you not intended but one divorce. The Messenger of Allah then returned her back to him. Afterwards he divorced her for second time at the time of Hazrat Omar and third time at the time of Hazrat Osman.<sup>90</sup>

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<sup>89</sup>. The Holy Quran, Sura-II, Ayat- 229; translated by Abdullah Yusuf Ali, edn. 2004, Ayman Publications, New Delhi.

<sup>90</sup>. Safia, Iqbal: Women and Islamic Law, p. 187; cf: Aqil Ahmad- Mohammedan Law, 21<sup>st</sup> edn. 2004, p.174, Central Law Agency, Allahabad.

This tradition of the Prophet leaves no doubt that, if a person pronounces one divorce against his wife and then repeats the divorce a second or even third time simply to emphasise the first pronouncement and not with a view to effect a Mughallazah or final divorce, it shall be open to him to explain his intention and to take back his wife; otherwise, how could the wife have been asked by Prophet (PBUH) to return to her husband.

Thus it is clear that, during the Prophet's time and for a period after him, such cases of triple divorce where in divorcing husband swore to his intention of divorcing only once, were termed as cases of single divorce and couples were reunited.<sup>91</sup>

During Caliph Omar's time when people started misusing his facility and indulged in widespread triple divorce, reverting back to the wife after swearing to their intention of giving a single divorce, Caliph Omar decreed that triple divorce would become effective, refusing to allow the couple to revert to each other since the facility of oath taking had been turned into a meaningless game by many.

The object of Caliph Omar in treating it as a Mughallazah divorce was clearly to stop people from wanton repetitions of divorce and from treating the matter of divorce in a light and non-serious way. It must have suited the needs of his own time, but practice in the modern times has resulted in a great deal of harm. People in the excitement of moment, give three divorces to the wife at one and same time without least intention to pronounce a Mughallazah divorce put simply to emphasise the first pronouncement, a step which they grievously repent afterwards when they finds that mischief cannot be undone.<sup>92</sup>

As far as question of Tuhr is concerned, Hedaya has validated this form if the pronouncement is made even during menstruation of wife.<sup>93</sup> Relying on

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<sup>91</sup>. Aqil Ahmad- Mohammedan Law, 21<sup>st</sup> edn. 2004, p.174, Central Law Agency, Allahabad.

<sup>92</sup>. Safia, Iqbal: Women and Islamic Law, p. 187; cf: Aqil Ahmad- Mohammedan Law, 21<sup>st</sup> edn. 2004, p.174, Central Law Agency, Allahabad.

<sup>93</sup>. Hedaya, p. 74; Ghulam Mohiuddin v. Khizar Hussain, AIR, 1929 Lah.6; cf: Yawer Qazalbash- Principles of Muslim Law, 2<sup>nd</sup> edn. 2005; p.130, Modern Law House, Allahabad.

Hedaya, the Patna High Court has held that an irrevocable talaq may be pronounced even during menses period.<sup>94</sup>

In this form, remarriage can take only if the wife undergoes an intermediate marriage as in the case of the hasan talaq. The Quranic injunction regarding this condition is:

“If a husband divorces his wife (irrevocably), he can not, after that, re-marry her until after she has married another husband and he has divorced her. In that case, there is no blame on either of them if they re-unite, provided they feel that they can keep the limits ordained by Allah, which He makes plain to those who understand”<sup>95</sup>.

In the Single irrevocable Talaq, three pronouncements are made in single Tuhr, either in one sentence, “I divorce thee, thrice” or in separate sentences e.g., I divorce thee, I divorce thee, I divorce thee”.

Following are the requirements of a single form of Talaq:

- 1) Marriage must be consummated.
- 2) A single irrevocable pronouncement of talaq may be made. Thus, if a husband says to his wife, “I had divorced thee in Talaq-ul-Biddat form”, it is enough and an irrevocable divorce will come into effect.
- 3) Such pronouncement may be made any time either in a period of tuhr or even during menstruation.<sup>96</sup>
- 4) Such pronouncement may be made even if the husband had sexual intercourse with her since the last menstruation.
- 5) Marriage is dissolved immediately on the irrevocable pronouncement of talaq.

In the Triple irrevocable Talaq, Talaq is pronounced in a single pronouncement, made during Tuhr and with a clear intention to irrevocably dissolving the marriage e.g., “I divorce thee irrevocably”.

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<sup>94</sup>. Sheikh Fazlur v. Mt. Aisha (1929)8 Pat 690; cf: Dr. R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.88, Central Law Agency, Allahabad.

<sup>95</sup>. The Holy Quran, Sura-II, Ayat- 230; translated by Abdullah Yusuf Ali, edn. 2004, Ayman Publications, New Delhi.

<sup>96</sup>. Sheikh Fazlur v. Mst. Aisha AIR 1929 Pat 81 (FB); cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.195, Orient Publishing Company, Allahabad.

Under both the above conditions, talaq so pronounced becomes irrevocable.

Following are the requirements of a triple form of talaq.

- 1) Marriage must be consummated.
- 2) Triple pronouncement of talaq must be made, such as “I divorce thee, I divorce thee, I divorce thee” or such pronouncement may be made in one sentence such as, “I divorce thee thrice or triply” or the husband may say “I release you from the marital bond by giving three Talaqs”.<sup>97</sup>
- 3) Such pronouncement may be made any time, either in a period of tuhr or even during menstruation.
- 4) Such pronouncement may be made even if the husband had sexual intercourse with her since the last menstruation.
- 5) Marriage is dissolved immediately on the irrevocable pronouncement of talaq.

The Talaq-ul-Biddat in any of its forms is not recognized by the Shia Law.<sup>98</sup>

*Revocation of Express Talaq:*

A revocable talaq is called Talaq-i-Razai and an irrevocable talaq is called Talaq-i-Bian. A Talaq-i-Razai becomes Talaq-i-Bian as soon as it becomes irrevocable. In the case of unconsummated marriage talaq becomes irrevocable immediately on its pronouncement. No change of making it revocable is left. But in case of consummated marriage, a change of revoking the talaq is left in the following cases:

- i) In the case of Talaq Ahsan, if the husband expresses to his wife before expiry of the period of iddat, that he wants to retain her, then revocation of Talaq Ahsan comes into effect. This is express form of revocation.
- ii) In the case of Talaq Ahsan, revocation can be made impliedly also (under Hanafi and Shia law, not under Shafii law), e.g., if the husband resumes cohabitation before expiry of the period of Iddat, talaq is revoked.

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<sup>97</sup>. Jarina Akhtar v. Hafiza AIR 1926 Cal 242; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn.1998, p.195, Orient Publishing Company, Allahabad.

<sup>98</sup>. Baillie, II, 118; cited ibid at p.196.

iii) In the case of Talaq Hasan, revocation of it can be made by not making the third pronouncement of talaq, because on the third pronouncement only, talaq becomes irrevocable.<sup>99</sup>

The husband can confer his power of revocation to his authorized agent also. Such revocation will be valid only on the ratification by the husband. Revocation of talaq made even under compulsion or in jest or sport or by mistake would be valid.<sup>100</sup>

Talaq becomes irrevocable (Talaq-i-Bain) in the following manner:

- 1) In the case of an unconsummated marriage, talaq becomes irrevocable immediately on its pronouncement.<sup>101</sup>
- 2) In the case of consummated marriage, Talaq Ahsan becomes irrevocable on the expiry of the period of iddat.<sup>102</sup>
- 3) Talaq-ul-Biddat is irrevocable immediately and cannot be revoked under any circumstances.
- 4) In the case of a consummated marriage, Talaq Hasan becomes irrevocable immediately as soon as the third pronouncement of talaq is made.<sup>103</sup>
- 5) A talaq in writing operates as an irrevocable divorce from the time of its execution unless there are words showing an intention to the contrary.<sup>104</sup>

In *Rashid Ahmad v. Anisa Khatoon*,<sup>105</sup> one Ghayas Uddin, pronounced the triple talaq in the presence of witnesses, though in the absence of the wife. Four days later, the talaqnama was executed which stated that the three divorces were given. It was not proved that there was re-marriage between the parties, or intermediate marriage and a subsequent divorce after actual consummation

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<sup>99</sup>. DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.196, Orient Publishing Company, Allahabad.

<sup>100</sup>. Baillie, I, 289; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.196, Orient Publishing Company, Allahabad

<sup>101</sup>. Baillie, I, 291; Hedaya, 83; cited ibid.

<sup>102</sup>. Baillie, I, 206,207; The Hedaya, 72, 73; cited ibid.

<sup>103</sup>. Baillie, I, 206,207; The Hedaya, 72, 73; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.196, Orient Publishing Company, Allahabad

<sup>104</sup>. Baillie, I, 233; Mst. Hayat Khatun v. Abdulla AIR 1937 Lah 270.

<sup>105</sup>. (1932)59 IA 21 All; AIR 1932 PC 25; cf: Aqil Ahmad- Mohammedan Law, 21<sup>st</sup> edn. 2004, p.170, Central Law Agency, Allahabad.

(Halala). The husband and wife lived together and five children were born to them.

Ghayas Uddin treated Anisa Khatoon as his wife and children as legitimate children. As there was no intermediate marriage, the bar to remarriage created by the divorce was not removed. In these circumstances, remarriage could not be presumed and the children born after the triple divorce were held to be illegitimate.

The words “I divorce Anisa Khatoon for ever and render her haram for me” were repeated by Ghayas Uddin three times (talaq-ul-bian) which clearly showed an intention to dissolve marriage and it was confirmed by divorce deed. Therefore, it was held that, the divorce was valid.

On the point of revocation of divorce, the Privy Council observed: “According to Hanafi law of Sunnis, Ghayas Uddin could not marry Anisa Khatoon after pronouncement of talaq unless she contracted another marriage. Therefore, it was held that, the fact of subsequent treatment of divorced wife as his wife and birth of children during the subsequent period cannot undo the divorce and make children legitimate. Thus, the five children born after the triple divorce were held to be illegitimate”.

In *Yusuf v. Sowramma*,<sup>106</sup> the Kerala High Court observed that, “it is popular fallacy that a Muslim male enjoys, under Quranic law, unbridled authority to liquidate the marriage. The holy Quran expressly forbids a man to seek pretext for divorcing his wife so long as she remains faithful and obedient. He further observed about the state of affairs in India, that Muslim law as applied in India has taken a course contrary to the spirit of what the holy Prophet (PBUH) or the holy Quran laid down and the same misconception vitiates the law dealing with the wife’s right to divorce”.

In *Rahmatullah v. State of U.P. and others*,<sup>107</sup> the Allahabad High Court observed: “Talaq-ul-Biddat or Talaq-i-Bidai, that is, giving an irrevocable divorce at once or at one sitting or by pronouncing it in a tuhr once in an irrevocable

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<sup>106</sup>. AIR 1971 Ker 261.

<sup>107</sup>. 1999 (12) Lucknow Civil decision p. 463; cf: Aqil Ahmad- Mohammedan Law, 21<sup>st</sup> edn. 2004, p.178, Central Law Agency, Allahabad.

manner without allowing the period of waiting for reconciliation or without allowing the will of Allah to bring about reunion, by removing differences or cause, of differences and helping the two in solving their differences or cause, of differences and helping the two in solving their differences, runs counter to the mandate of holy Quran and has been regarded as, by all under Islam-Sunnat, to be sinful”.

The court further observed that the mode of talaq giving unbridled power to the husband cannot be deemed operative as same has the effect of perpetuating discrimination on the ground of sex that is male authoritarianism. The need of the time is that codified law of Muslim marriage divorce should be enacted keeping pace with the aspiration of the constitution.

On the other hand, the respondent (husband) denied all averments made by the wife. He pleaded that, he had divorced her by triple divorce in 1987 before 4-5 witnesses and since then the parties had ceased to be spouses. He also claimed the protection of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and also submitted that he had purchased a house and delivered the same to the wife in lieu of dower and therefore, the wife was not entitled to any maintenance.

The High Court on revision held that the divorce which is alleged to have been given by the husband to the wife was not given in the presence of wife and it is not the case of the husband that the same was communicated to her. But the communication would stand completed on 5<sup>th</sup> December 1990 with the filing of the written statement by the husband. Therefore, the High Court concluded that the wife was entitled for maintenance from 1-1-1988 to 5-12-1990.

Allowing the special Appeal of the wife, the Apex Court held that, talaq to be effective, has to be pronounced. In this case, there was no proof of talaq having taken place on 11-7-1987. A mere plea taken in the written statement of a divorce having been pronounced same time in the past cannot by itself be treated as effectuating talaq on the date of delivery of the copy of written statement to the wife. A plea of previous talaq taken in the written statement cannot at all be treated as pronouncement of talaq by the husband nor the

affidavit filed in some previous case in which, wife was not a party be treated as evidence of any value. Marriage between appellant and respondent not having been dissolved and the husband should continue to be liable for payment of maintenance until the obligation comes to an end in accordance with law.

The court further observed that 'the correct law of divorce as ordained by the Holy Quran is that, talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters, one from the wife's family and the other from the husband; if the attempt fails, talaq may be effected'.

*b) Delegated Divorce: (Talaq-i-Tafweez)*

Talaq-i-tafweez is also known as Talaq-i-Tawhid. Literally, tafweez means 'delegate'. A Muslim husband can delegate his power of pronouncing talaq to his wife or to any other person<sup>108</sup>. But such power does not deprive the husband of his own right to pronounce a talaq.<sup>109</sup> A Muslim husband is entitled to pronounce a talaq. He is also entitled to delegate his power to another person to do so.<sup>110</sup> He may confer the power upon the wife herself or a third party to repudiate the marriage.

Capacity to delegate the power: A husband:

- a) Who is of sound mind, and
- b) Who has attained the age of puberty may delegate his right of pronouncing talaq. If a husband becomes insane after delegating his power, the delegation will not be invalidated.<sup>111</sup> It is not necessary that the wife or any other person, to whom the power is delegated, should also have attained the age of puberty.<sup>112</sup>

A Muslim husband has unrestricted right to divorce his wife whenever he likes. This right is so absolute that he may exercise it either himself or may

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<sup>108</sup>. Baillie, I, 328; Hedaya, 86; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn.1998, p.201, Orient Publishing Company, Allahabad.

<sup>109</sup>. Nag Kyw v. Mi Hia 49 IC 67 (Rang); cited ibid.

<sup>110</sup>. Baillie, I, 246; cf: B.R. Verma- Islamic Law, 6<sup>th</sup> edn. 1986, p.229, Law Publishers (India) Private Limited.

<sup>111</sup>. Baillie, I, 247; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.201, Orient Publishing Company, Allahabad.

<sup>112</sup>. Baillie, I, 246; cited ibid.

delegate his right to another person, including his own wife. Divorce by such person who acts as agent of the husband under his authority, is known as delegated divorce. In the delegated divorce, the talaq pronounced by that other person is as effective as if it was made by the husband himself and the marriage dissolves.<sup>113</sup>

A Muslim husband may delegate the power absolutely or conditionally, temporarily or permanently.<sup>114</sup> A permanent delegation of power is revocable, but a temporary delegation of power is not. The delegation must be made distinctly in favour of the person to whom the power is delegated; and the purpose of delegation must be clearly stated. This form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain freedom without the intervention of any court.<sup>115</sup>

An agreement made with her giving such power will be deemed to be tafweez and binding on the husband. Such a talaq, although made by the wife is, by virtue of the delegation, really a talaq by the husband and operates effectively as a talaq by the husband himself.<sup>116</sup> It does not require any declaration from a court of law. The power given to her is itself sufficient.

*Time for stipulation:*

A stipulation conferring an authority on the wife to exercise her right of divorce may be made either at the time of or after the marriage. In the absence of any stipulation in the contract, such delegated power may be exercised by the wife at the same meeting in which she becomes aware of the power.<sup>117</sup>

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<sup>113</sup>. Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.92, Central Law Agency, Allahabad.

<sup>114</sup>. Baillie, 238 and 109; cf: Dr. Paras Diwan- Muslim Law in Modern India, 9<sup>th</sup> edn. 2005, p.86, Allahabad Law Agency, Faridabad (Haryana).

<sup>115</sup>. Dr. Paras Diwan- Muslim Law in Modern India, 9<sup>th</sup> edn. 2005, p.86, Allahabad Law Agency, Faridabad (Haryana).

<sup>116</sup>. Mohd. Amin v. Mst. Himna Bibi AIR 1931 Lah 134; 132 IC 573; cf: B.R. Verma- Islamic Law, 6<sup>th</sup> edn. 1986, p.229, Law Publishers (India) Private Limited.

<sup>117</sup>. Durr-ul-Mukhtar, 171,172; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.201, Orient Publishing Company, Allahabad.

*Kinds of tafweez:*

The power to pronounce talaq may be conferred in three forms of expressions, two of which are implied forms and the third, an express form. They are:<sup>118</sup>

a) Ikhtiyar (choice of option), e.g., the husband telling his wife, “Choose” or using a similar expression (thereby intending a talaq); delegation of power is implied. By ‘giving the choice’ is meant giving her, the choice to get rid of the matrimonial tie. This delegation of power of divorce to wife may be for a day, a certain period of time or for all the times to come. This delegation may be made subject to certain conditions, such as; a husband may say if the maintenance does not reach you, you are given the choice, etc. However in any case, the delegation of power of divorce must be within the knowledge of wife who had accepted it.<sup>119</sup>

It is also important to note by what words power was delegated to wife by the husband, and similarly at the time when wife divorces herself. Wife must say ‘I am divorced’ or I divorce myself’ and not ‘I divorce thee’ because it is the wife who is divorced and not the husband.<sup>120</sup>

Raddul Mukhtar<sup>121</sup> citing various authorities says, if a husband were to say to his wife ‘if I marry another wife, her business shall be in thy hands’ then the woman becomes his wife under a Fuzooli contract and if he marries again the first wife cannot divorce herself. But if the words of the husband were, ‘if a woman enters into my Nikah, her business will be in thy hands’, “the first would have been entitled to repudiate the second”.<sup>122</sup>

b) Amar-ba-yad (liberty);

It literally means business in hand. This may, for example, be given by the husband telling the wife “thy business is in they hand” (hereby intending a talaq); in case the husband says ‘divorce thyself thrice (or twice)’ and she divorces only once, divorce would take effect.<sup>123</sup>

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<sup>118</sup>. Yawer Qazalbash- Principles of Muslim Law, 2<sup>nd</sup> edn. 2005; p.133, Modern Law House, Allahabad.

<sup>119</sup>. Ibid.

<sup>120</sup>. Ibid.

<sup>121</sup>. Vol. 2, p. 312; cited ibid.

<sup>122</sup>. Yawer Qazalbash- Principles of Muslim Law, 2<sup>nd</sup> edn. 2005; p.134, Modern Law House, Allahabad.

<sup>123</sup>. Ibid.

c) Musheeat (will or pleasure);

This may be given in the imperative mood by which sareeh or express talaq may be given, e.g., by the husband saying to the wife, “give yourself talaq if you please”.

The power to pronounce talaq in the first two forms is impliedly given and can be effective if it is shown that talaq was intended. But the third kind is in the express form and talaq, if pronounced, would be effective even if it is not intended. The use of the term “talaq” being an express form, its use would convert any form of tafweez into musheeat.<sup>124</sup>

The delegation of talaq may be unconditional or subject to certain condition or contingency. Where the delegation is conditional, the authority of giving talaq cannot be exercised until that condition is fulfilled. But the conditions must be of reasonable nature and must not be against the principles of Islam. Where a right of divorce has been conferred upon the wife, she may repudiate the marriage if the husband fails to fulfil that condition or upon the happening of that event. In such cases, the divorce takes place in the same manner as if the husband has himself pronounced the talaq. For example, under an agreement, the husband may authorize his wife to divorce herself whenever his behaviour is cruel towards her or when he refuses to pay her prompt dower.<sup>125</sup> It is to be noted that, even after delegating his authority, the husband himself is not debarred from pronouncing talaq.<sup>126</sup>

In *Mohd. Khan v. Mst. Shahmali*<sup>127</sup>, a husband who was a Khana Damad, under a pre-marriage agreement, undertook to pay certain amount of marriage expenses incurred by his father-in-law, if he leaves the house. The husband left the house without paying the amount of marriage expenses. Then the wife exercised the right and divorced herself. A valid divorce came into effect.

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<sup>124</sup>. Baillie, I, 241, 244; Hed., 89; cf: B.R. Verma- Islamic Law, 6<sup>th</sup> edn. 1986, p.229, Law Publishers (India) Private Limited.

<sup>125</sup>. Dr .R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.93, Central Law Agency, Allahabad.

<sup>126</sup>. Ibid. p.94.

<sup>127</sup>. AIR 1972 J&K 8.

In *Sainuddin v. Latifunnessa*,<sup>128</sup> there was an agreement between husband and wife under which, the husband delegated to the wife, his own power of giving three talaqs in the event of his marrying a second wife without the permission of the first. The husband took second wife without the permission of the first. Accordingly, the first wife gave herself three talaqs under the authority of the tafweez. The court held that as the event upon the happening of which, the wife was given the authority to divorce herself was valid under Muslim law, and since that event has happened, the divorce by the wife was effective and the marriage must dissolve.

If the husband delegates his authority to wife in writing and the wife also puts her signature on that document, the delegation continues to be his own authority given to wife; it does not become divorce by mutual agreement or does not a bilateral delegation. In *Magila Bibi v. Noor Hassain*,<sup>129</sup> the husband had given a written authority to his wife that she may, at her will, divorce him whenever she wanted. The document was signed by both the husband and wife. After some time, when she felt that the husband was cruel to her and also came to know that he was not a medical graduate as she was told before the marriage, she pronounced talaq under the above mentioned written delegated authority. She informed her decision to her husband.

The Calcutta High Court held that, only because wife too had signed the written delegation by the husband, the document does not become 'bilateral delegation'. It continues to be 'unilateral delegation' and talaq by wife is valid even without the consent of husband.

Where a wife is given the option to divorce herself under a tafweez, she cannot be compelled to exercise her right. She may or may not exercise the right. Mere happening of the event under which, the wife is authorized to divorce herself, is not sufficient to dissolve the marriage; the wife must also exercise her right expressly.<sup>130</sup>

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<sup>128</sup>. (1918)46 Cal 141; cf: Dr .R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.93, Central Law Agency, Allahabad.

<sup>129</sup>. AIR 1992 Cal 92.

<sup>130</sup>. Aziz v. Mt. Naro and others AIR 1955 HP 32.

ii) Divorce at the instance of wife:

a) (*khula*)

Khula or redemption literally means “to lay down”. In law, it means laying down by a husband of his right and authority over his wife”<sup>131</sup>. The word Khula literally means “to take off clothes” and thence, to lay down one’s authority over wife.<sup>132</sup> In law, it is laying down by a husband of his right and authority over his wife for an exchange”<sup>133</sup>.

“A divorce by khula is a divorce with the consent and at the instance of the wife in which, she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case, the terms of the bargain are matters of arrangement between the husband and wife, and the wife may, as the consideration, releases her dyn mahr (due dower) and other rights or make any other arrangement for the benefit of the husband”.

Fatwai-i-Alamgiri lays down that “when married parties disagree and are apprehensive that they cannot observe the bounds prescribed by the divine laws, that is, can not perform the duties imposed on them by the conjugal relationship, the woman can release herself from the tie by giving up some property in return in consideration of which, the husband is to give her, a khula; and when they have done this, a talaq-ul-bian would take place.”<sup>134</sup>

Khula signifies an arrangement entered into for the purpose of dissolving a connubial connection in lieu of compensation paid by the wife to her husband out of her property. Khula infact is thus a right of divorce purchased by the wife from her husband.<sup>135</sup> In India, the word khula is also spelt as khoola or khula and even khola. Khula literally means “to take off clothes, and thence, to lay once authority over a wife”<sup>136</sup>.

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<sup>131</sup>. Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.184, Central Law Agency, Allahabad.

<sup>132</sup>. Asaf A.A. Fyzee- Outlines of Muhammadan law, 9<sup>th</sup> impression., 2005, p.163, Oxford University Press, New Delhi.

<sup>133</sup>. Baillie 31; Hedaya, 112; cf: Dr. Paras Diwan- Muslim Law in Modern India, 9<sup>th</sup> edn. 2005, p.91, Allahabad Law Agency, Faridabad (Haryana).

<sup>134</sup>. Fatwa-i-Alamgire, Vol. I, p.669; cited by Ameer Ali, II, 506; cf: Asaf A.A. Fyzee- Outlines of Muhammadan law, 9<sup>th</sup> impression, 2005, p.163, Oxford University Press, New Delhi.

<sup>135</sup>. Aqil Ahmad- Mohammedan Law, 21<sup>st</sup> edn. 2004, p.185, Central Law Agency, Allahabad.

<sup>136</sup>. Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.81, Central Law Publications, Allahabad.

There is no khula in pre-Islamic legislation. The relevant verses of the Quran are:

“If a wife fears cruelty or desertion on her husband’s part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best; even though men’s souls are swayed by greed. But if you do good and practice self-restraint, Allah is well-acquainted with all that you do”<sup>137</sup>.

“It is not lawful for you, (men), to take back any of your gifts (from your wives), except when both parties fear that they would be unable to keep the limits ordained by Allah. If you (judges) do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she give something or her freedom. These are the limits ordained by Allah; so do not transgress them, if any do transgress the limits ordained by Allah, such persons wrong (themselves as well as others)<sup>138</sup>.

*Conditions for khula:*

Both the husband and the wife must be of sound mind and have attained puberty. Under Hanafi law, the guardian of a minor wife may enter into a khula on her behalf; but the guardian of a minor husband cannot enter into a khula on his behalf. A khula may be entered into by any party through an authorized agent who will act within the scope of his authority.<sup>139</sup>

A khula given under compulsion is not valid under the Shia law; but it is valid under the Sunni law. Proposal and acceptance must be made at the same meeting in express words. Under Shia law, the Arabic language must be used in khula and presence of two witnesses is also required. The consent to khula may be conditional or unconditional under the Sunni law; but under the Shia law, conditional khula is not recognized.

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<sup>137</sup>. The Holy Quran, Sura-IV, Ayat- 128; translated by Abdullah Yusuf Ali, edn. 2004, Ayman Publications, New Delhi.

<sup>138</sup>. The Holy Quran, Sura-II, Ayat- 229; translated by Abdullah Yusuf Ali, edn. 2004, Ayman Publications, New Delhi.

<sup>139</sup>. DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.204, Orient Publishing Company, Allahabad.

Once the husband gives his consent to khula, it dissolves as in Talaq-ul-Bian. But in the case of conditional khula under the Sunni law, khula comes into effect only on the fulfillment of the condition.

*Formalities for khula:*

No particular form is required. Proposal may be made either by the use of the use of the word “khula” or by the expressions conveying the sense of sale and purchase.<sup>140</sup> Acceptance must be made at the same meting. If a wife says, “Give me a khul in exchange of my dower” and the husband replies, “I do”, a valid dissolution of marriage comes into effect.<sup>141</sup>

A proposal for khula made by the wife may be retracted by her at any time before its acceptance by the husband and the proposal stands revoked if the wife rises from the meting where the proposal is made.<sup>142</sup> No valid revocation khula will effect, if an option to revoke it is given to the husband.

*Consideration for Khula:*

Everything which may be the subject matter of the dower may be given as consideration for khula. “Whatever is lawful as dower, or capable of being accepted as dower, may lawfully be given in exchange of khula”<sup>143</sup> but something over which, the woman has no right, cannot be the subject to consideration. An increase in the consideration after khula has been entered into is void.<sup>144</sup> But the actual release of the dower or delivery of the property in consideration for khula is not a condition precedent for its validity. Once the husband gives his consideration, an irrevocable divorce as in Talaq-ul-Bian results.

On non-payment of consideration, the husband may sue his wife for its recovery or may set up the plea of non-payment of consideration as a defence in

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<sup>140</sup>. Baillie, I, 306, 311-312; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.205, Orient Publishing Company, Allahabad.

<sup>141</sup>. Ameer Ali- Mohammedan Law, II, 512; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn.1998, p.205, Orient Publishing Company, Allahabad.

<sup>142</sup>. Baillie, I, 316; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn.1998, p.206, Orient Publishing Company, Allahabad

<sup>143</sup>. Fatwai Alamgiri, I, 675; cited ibid.

<sup>144</sup>. Baillie I, 309; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn.1998, p.206, Orient Publishing Company, Allahabad.

a claim for dower by the wife. When consideration for khula is illegal, khula is valid; but the consideration is void.<sup>145</sup> But under Shia law, both are void.<sup>146</sup>

*b) ila: (vow of continance):*

ila means “oath” or “vow”. In law, it means that, when a husband takes an oath that he will not do sexual intercourse with his wife for four months or above on the expiry of four months after making ila, if the husband has abstained from sexual intercourse during this period, the marriage shall stand dissolved.<sup>147</sup> There is no limit prescribed for the longest period. ila made under compulsion or intoxication would be valid as in the case of talaq under similar circumstances.<sup>148</sup>

The words expressing ila are either express or implicative. The express terms are:

- a) "I swear by god that I will not approach you";
- b) "I swear by god that I will not cohabit with you".

The implicative expressions are:

- a) "I swear by god that I will not touch you";
- b) "I swear by god that I will not approach your bed";
- c) "I swear by god that I will not enter upon you".<sup>149</sup>

The shortest period of vow of abstinence must be four months. If the husband swears to abstain for a period of three months, no ila shall take effect. But to say “By God, I will not approach you for two months, and two months after these two months” is ila, because of the definiteness of the period of four months.<sup>150</sup>

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<sup>145</sup>. Baillie II, 312; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn.1998, p.206, Orient Publishing Company, Allahabad.

<sup>146</sup>. Baillie II, 130; cited ibid.

<sup>147</sup>. DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.198, Orient Publishing Company, Allahabad.

<sup>148</sup>. Durr-ul-Mukhtar, 121; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.199, Orient Publishing Company, Allahabad.

<sup>149</sup>. Dr. Mohammad Nazmi- Mohammadan Law, 2<sup>nd</sup> edn. 2008, p.72, Central Law Publications, Allahabad.

<sup>150</sup>. Durr-ul-Mukhtar (Dayal’s English ed.,) 236; cf: Dr. Mohammad Nazmi- Mohammadan Law, 2<sup>nd</sup> edn. 2008, p.73, Central Law Publications, Allahabad.

If a period of more than four months is mentioned, *ila* would be valid even if it is pronounced during menstruation but if it is pronounced to be perpetual, it would be valid only if pronounced during *tuhr*.<sup>151</sup>

Dissolution of marriage on subsequent conduct:

Marriage between the parties may be dissolved only if the oath is followed by subsequent conduct of the husband. In *Bibi Rehana Khatun v. Iqtidar-uddin*<sup>152</sup>, after the marriage ceremony was over, the parents of the bridegroom pushed him into a room where his wife was waiting for him. The husband was not interested in that marriage. Immediately after entering into the room, he took a vow in the presence of his wife that, he would never have sexual intercourse with her. Soon after giving this statement, he came out of the room and repeated the vow in the presence of his mother and his mother's sister. His father then came out of another room and he again repeated that vow. The court refused to accept the version of the husband. The court said that, the husband has failed to establish that there had been a divorce in the *ila* form. A vow is a solemn affirmation. It should not be taken in a moment of excitement.<sup>153</sup>

Under Ithna Ashari law, *ila* can be made only after consummation of marriage. As per Ismaili law, *ila* can be made only during a period of *tuhr* when there was no sexual intercourse during it.<sup>154</sup> Under Ithna Ashari law, *ila* does not operate as divorce without order of the court of law. According to this School, after the expiry of the fourth month, the wife is simply entitled for a judicial divorce. If there is no cohabitation, even after expiry of four months, the wife may file a suit for restitution of conjugal rights against husband. If the husband does not cohabit even then, the marriage is dissolved by a decree of the court.<sup>155</sup> If she does not obtain the decree of the court, the marriage does not dissolve. In Sunni law, legal proceedings are not required.

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<sup>151</sup>. Durr-ul-Mukhtar, 234,236; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.199, Orient Publishing Company, Allahabad.

<sup>152</sup>. AIR 1943 All. 184 cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn.,1998, p.199, Orient Publishing Company, Allahabad

<sup>153</sup>. Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.86, Central Law Publications, Allahabad.

<sup>154</sup>. Baillie, II, 147-151; cited *ibid*.

<sup>155</sup>. Tyabji: Muslim Law, IV edn., p. 175; cf: Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.91, Central Law Agency, Allahabad.

*c) Zihar: (injurious assimilation)*

The term “zihar” is derived from ‘zuhar’, the back. When the husband compares his wife with the back of his female relations within the degrees of prohibited relationship. He may say ‘the back of my wife is as my mother’s back. The woman so addressed was thereby promoted from the subordinate status of a wife to the highly honourable position of an adoptive mother. During the time of ignorance (i.e., before the establishment of the Muslim faith), zihar stood as a divorce; and the law afterwards preserved its nature, but altered its effect to a temporary prohibition, which hold until performance of expiation but dissolving the marriage.<sup>156</sup>

In old Arabia, it was a system that, if the husband did not expiate after zihar, he was imprisoned. In India, The Shariat Act has recognized zihar. After its legislative recognition, the right of wife to claim a divorce on this ground may be granted by courts.<sup>157</sup>

*Capacity to make zihar:*

A husband who is:

- a) Of sound mind, and
- b) Who has attained puberty can make zihar.

Once the husband makes it, the wife gets a right to refuse cohabitation with him until he performs a penance and if the husband refuses to perform the penance, the wife may get a judicial divorce. i.e., she may apply to the court for the penance to be performed by the husband or to pronounce a talaq on her. On the refusal of the husband to do either thing, the court may grant a divorce.<sup>158</sup>

The Quranic verses relating to zihar are:

“Allah has not made for any man two hearts in his (one) body: nor has He made your wives whom you divorce by Zihar your mothers: nor has He made your

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<sup>156</sup>. Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.87, Central Law Publications, Allahabad.

<sup>157</sup>. Hedaya, 117 and 602; cf: Yawer Qazalbash- Principles of Muslim Law, 2<sup>nd</sup> edn. 2005; p.139, Modern Law House, Allahabad.

<sup>158</sup>. DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.200, Orient Publishing Company, Allahabad.

adopted sons your sons. Such is (only) your (manner of) speech by your mouths. But Allah tells (you) the Truth, and He shows the (right) Way”.<sup>159</sup>

“If any men among you divorce their wives by Zihar (calling them mothers), they cannot be their mothers: none can be their mothers except those who gave them birth. And in fact, they use words (both) iniquitous and false: but truly Allah is One that blots out (sins), and forgives (again and again)”.<sup>160</sup>

”But those who divorce their wives by Zihar, then wish to go back on the words they uttered, - (it is ordained that such a one) should free a slave before they touch each other: this you are admonished to perform: and Allah is well-acquainted with (all) that you do”<sup>161</sup>

“And if any has not (the wherewithal), he should fast for two months consecutively before they touch each other. But if any is unable to do so, he should feed sixty indigent ones. This, that you may show your faith in Allah and His Messenger. Those are limits (set by) Allah. For those who reject (Him), there is a grievous penalty.”<sup>162</sup>

The uttering of zihar does not by itself dissolve the marriage. Its legal effects are that sexual intercourse between them becomes unlawful till he has expiated himself by performing penance.<sup>163</sup>

#### d) *Lian*:

The word *lian* literally means “imprecation”. Muslim law provides very severe punishments for adultery and slander. The *hudd* (or specific punishment) for adultery was stoning to death, if the wife was a *moohsin* (i.e., if she was sane

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<sup>159</sup>. The Holy Quran, Sura-33, Ayat- 4; translated by Abdullah Yusuf Ali, edn. 2004, Ayman Publications, New Delhi.

<sup>160</sup>. The Holy Quran, Sura-58, Ayat- 2; translated by Abdullah Yusuf Ali, edn. 2004, Ayman Publications, New Delhi.

<sup>161</sup>. The Holy Quran, Sura-58, Ayat- 3; translated by Abdullah Yusuf Ali, edn. 2004, Ayman Publications, New Delhi.

<sup>162</sup>. The Holy Quran, Sura-58, Ayat- 4; translated by Abdullah Yusuf Ali, edn. 2004, Ayman Publications, New Delhi.

<sup>163</sup>. Syed Khalid Rashid- Muslim law, 5<sup>th</sup> edn. 2009, p.112, Eastern Book Co., Lucknow.

and adult and her marriage was consummated). The punishment was scourging with stripes, if she was not a moohsin.<sup>164</sup>

The word “tuhmat” is an Urdu word; but the word is in common use in Kashmiri also. Whatever its meaning may be in urdu; but the word “tuhmat” means a false accusation and not only an accusation which may or may not be false”<sup>165</sup>

Islamic law punishes the offence of adultery (zina) severely, and so it takes a serious view of an imputation of unchastity against a married woman. If a husband accused his wife of infidelity, he was liable to punishment for defaming his wife unless he proved his allegation. If there was no proof forthcoming, the procedure of lian was adopted.<sup>166</sup>

Under pure Islamic law, where a husband made an accusation of adultery against his wife, he was required to prove his charge by the testimony of four law worthy witnesses, failing which, he was to receive a punishment of 80 stripes for slander.<sup>167</sup> This is so because Islamic law provides very severe punishment to adulterers, sentencing through stoning to death. Therefore, safeguards for such false charges should be provided. Quran condemns a false charge against chaste woman in general and against wife in particular.

The Quranic verses relating to lian are:

“And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations),- flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors” .<sup>168</sup>

“And for those who launch a charge against their spouses, and have (in support) no evidence but their own, - their solitary evidence (can be received) if they bear

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<sup>164</sup>. Baillie, I, 1-2; cf: B.R. Verma- Islamic Law, 6<sup>th</sup> edn.1986, p.248, Law Publishers (India) Private Limited.

<sup>165</sup>. B.R. Verma- Islamic Law, 6<sup>th</sup> edn.1986, p.252, Law Publishers (India) Private Limited.

<sup>166</sup>. Asaf A.A.Fyzee- Outlines of Muhammadan Law, Ninth impression, 2005, p. 166, Oxford University Press, New Delhi.

<sup>167</sup>. Baillie, I, 335; cf: Asaf A.A.Fyzee- Outlines of Muhammadan Law, Ninth impression, 2005, p. 166, Oxford University Press, New Delhi

<sup>168</sup>. Quran, Sura 24; Ayat 4; The Holy Quran, translated by Abdullah Yusuf Ali, edn. 2004, Ayman Publications, New Delhi.

witness four times (with an oath) by Allah that they are solemnly telling the truth”.<sup>169</sup>

“And the fifth (oath) (should be) that they solemnly invoke the curse of Allah on themselves if they tell a lie”.<sup>170</sup>

“But it would avert the punishment from the wife, if she bears witness four times (with an oath) by Allah, that (her husband) is telling a lie”.<sup>171</sup>

“And the fifth (oath) should be that she solemnly invokes the wrath of Allah on herself if (her accuser) is telling the truth”.<sup>172</sup>

Once a charge has been made by the husband, the wife may ask him either to retract the charge or confirm the separation through a divorce of lian. She is entitled to enforce this demand through a court. What so ever remedies are open to wife on the retraction of husband, she would not get a decree of divorce after such retraction. She would not get a decree of divorce after such retraction. It was held, though, that rule of retraction is not applicable after passing of the Dissolution of Muslim Marriage, 1939 because Section 2 (ix) covers all such cases and there is no provision of retraction in the Section.<sup>173</sup>

Section 2 (ix) is a residuary clause under which, a wife may seek dissolution of her marriage on any ground which could not be included in this Section, but is recognized under the Muslim personal law. Before 1939, a false charge of adultery by the husband against his wife (wife) was a sufficient ground for judicial divorce under Muslim law.

In *Zaffar Hussain v. Ummat-ur-Rahman*,<sup>174</sup> the wife of the plaintiff alleged that her husband had stated before several persons that she had illicit intercourse with her brother and imputed fornication to her. Among other

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<sup>169</sup>. Quran, Sura 24; Ayat 6; The Holy Quran, translated by Abdullah Yusuf Ali, edn. 2004, Ayman Publications, New Delhi.

<sup>170</sup>. Quran, Sura 24; Ayat 7; The Holy Quran, translated by Abdullah Yusuf Ali, edn. 2004, Ayman Publications, New Delhi.

<sup>171</sup>. Quran, Sura 24; Ayat 8; The Holy Quran, translated by Abdullah Yusuf Ali, edn. 2004, Ayman Publications, New Delhi.

<sup>172</sup>. Quran, Sura 24; Ayat 9; The Holy Quran, translated by Abdullah Yusuf Ali, edn. 2004, Ayman Publications, New Delhi.

<sup>173</sup>. Tufail Ahmad v. Jamila Khatun AIR 1962 All 570; cf: Yawer Qazalbash- Principles of Muslim Law, 2<sup>nd</sup> edn. 2005; p.139, Modern Law House, Allahabad.

<sup>174</sup>. AIR 1919 All 182; cf: Dr. M.A. Qureshi- Muslim Law, 3<sup>rd</sup> edn. 2007, p.96, Central Law Publications, Allahabad.

grounds, a plea was taken that the law of lian had no place in Anglo-Mohammadan law and must be considered obsolete. It was held that Qazi of the Muslim law was replaced by the court. It was held that a Muslim wife is entitled to bring a suit for divorce against her husband and obtain a decree on the ground that the latter falsely charged her with adultery.

If the charge is proved to be false, she is entitled to a decree; but not if it is proved to be true. No such suit will lie if the marriage was irregular. The husband can apologise for the false charge made by him against his wife. In case the husband shrinks back before the commencement of the hearing, the wife will not have the right to dissolution of marriage.<sup>175</sup>

It is necessary that the wife must be a Muslim and not Kitabia. Lian is not incumbent on a Jew or a Christian wife married to a Muslim.<sup>176</sup> She should not be below 9 years of age and should also not be notorious for loose life.<sup>177</sup> The charge must be made during the subsistence of the marriage or during the iddat of revocable divorce.<sup>178</sup> It is also not permitted in the case of a muta.<sup>179</sup>

It is not necessary for the husband to make the charge of adultery specifically. If he says that he is not the father of the child, it is sufficient for the wife to go to the court of law for the dissolution of marriage on the ground of lian. There must be actual act of adultery on the part of wife. In one Pakistani case, it was held that wife's intimacy of love with another will not amount to adultery and therefore, no divorce can be granted.<sup>180</sup> The false allegation by the husband of a chaste woman as to chastity cuts to the heart.<sup>181</sup>

Capacity for lian;

Lian can be between a husband and a wife who:

<sup>175</sup>. Dr. M.A. Qureshi- Muslim Law, 3<sup>rd</sup> edn. 2007, p.97, Central Law Publications, Allahabad.

<sup>176</sup>. Hedaya, 124; cf: B.R. Verma- Islamic Law, 6<sup>th</sup> edn. 1986, p.250, Law Publishers (India) Private Limited.

<sup>177</sup>. Baillie, I, 336-37; Hedaya, 123; Baillie II, 152; cited *ibid*.

<sup>178</sup>. Baillie, I, 339, 34; Durr., 263,266; Baillie, II, 152-53; cf: B.R. Verma- Islamic Law, 6<sup>th</sup> edn. 1986, p.250, Law Publishers (India) Private Limited.

<sup>179</sup>. Baillie, II, 152-53; cited *ibid*.

<sup>180</sup>. A. Khatun v. Mahib-ur-Rahman PLD (1963) Dacca 602; cf: Dr. M.A. Qureshi- Muslim Law, 3<sup>rd</sup> edn. 2007, p.97, Central Law Publications, Allahabad.

<sup>181</sup>. Muhammad Shariful Islam Khan v. Mst. Suraya Begum PLD 1963, Dacca 947; cf: B.R. Verma- Islamic Law, 6<sup>th</sup> edn. 1986, p.253, Law Publishers (India) Private Limited.

- a) are of sound mind, and
- b) have attained puberty.

Under Sunni law, dumbness of either party is a disqualification. If either of the parties becomes dumb before the decree for separation is passed, lian would drop.<sup>182</sup>

Under the Shia and Shafii laws, the charge of adultery made by signs by a dumb person would give rise to lian.<sup>183</sup> The wife should be chaste and not characterless.<sup>184</sup> The marriage between the parties should be valid and not muta or irregular.<sup>185</sup> The husband himself made the charge. He cannot make the charge through an agent.<sup>186</sup>

Procedure for lian:

The procedure for lian is as follows:

“ the husband should bear witness four times saying each time, ‘I attest by God that I was a speaker of the truth when I cast at her the charge of adultery, and he should then say the fifth time, the curse of God be upon me if I was a liar when I cast at her the charge of adultery’. The woman is then to bear witness four times, saying each time, ‘I attest by God that he is a liar in the charge of adultery that he has cast upon me’, and saying the fifth time, ‘the wrath of God be upon me if he be a true speaker in the charge of adultery which he has cast upon me’ .<sup>187</sup>

Retraction of charge:

The pure Muslim law permitted a retraction of the charge by the husband; but that involved a punishment of 80 stripes under the criminal law. If the husband admitted that the charge was false, he was to be punished for slander.<sup>188</sup>

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<sup>182</sup>. Baillie, I, 339; Durr-ul-Mukhtar, 268; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn.1998, p.219, Orient Publishing Company, Allahabad.

<sup>183</sup>. Baillie II, 155; The Hedaya, 125; cited ibid.

<sup>184</sup>. Baillie, I, 336, 337; II, 152; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn.1998, p.219, Orient Publishing Company, Allahabad

<sup>185</sup>. Baillie, I, 332, 336; II, 155; The Hedaya, 123; cited ibid. p.220.

<sup>186</sup>. Baillie, I 335; cited ibid.

<sup>187</sup>. Fatwa-i- Alamgiri (Baillie I, 338), cf: Asaf A.A.Fyzee- Outlines of Muhammadan Law, Ninth impression, 2005, p. 167, Oxford University Press, New Delhi.

<sup>188</sup>. Durr. 264; cited ibid at p. 251.

As to whether the rule as to retraction is applicable even today, there is some difference of opinion. In some cases, it has been stated that retraction has no place in the procedure of the Indian courts.<sup>189</sup> On the other hand, in some cases, it was held to be in force with respect to the retraction of the charge<sup>190</sup>, and it has been held that if a valid retraction is made, the wife will not be entitled to a decree for divorce. It has been held that the technical rule as to retraction has now no place after the enactment of the Dissolution of Muslim Marriage Act, 1939 as it would be adding an exception to Sec. 2 (ix) of the Act.<sup>191</sup>

Three conditions are necessary for a valid retraction: 1) that the husband must have made a charge of adultery; 2) that the charge was false, and 3) that the retraction is made before the end of the trial. The retraction must be honest and straight forward.<sup>192</sup> And the retraction must be unconditional and bona fide and results of sincere repentance. There must be unequivocal assertion that the accusation was false<sup>193</sup>.

A retraction must be made before the hearing of the suit; but would not be good if it is made after the close of the evidence or the trial of the case.<sup>194</sup> The marriage would not stand dissolved merely by the making of a false charge of adultery. It continues till a decree for dissolution is passed. This provision of law is available only for innocent wives. Thus, a suit on this ground by a wife having an illegitimate child would be dismissed by the court.<sup>195</sup>

An accusation of adultery does not by itself, dissolve the marriage. It only gives the wife, a right to sue the husband for divorce. If the charge is proved to

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<sup>189</sup>. Ahmad Suleman v. Mst. Bai Fatima AIR 1931 Bom 76; Rahim Bibi v. Fazil AIR 1927 All 56; cf: Asaf A.A.Fyzee- Outlines of Muhammadan Law, Ninth impression, 2005, p. 167, Oxford University Press, New Delhi.

<sup>190</sup>. Mst. Fakhre Jahan Begum v. Mohammed Hamid Ullah Khan AIR 1929 Oudh 16; Mst. Banno Begum v. Inayat Husain AIR 1948 All 34; cited ibid.

<sup>191</sup>. Kaloo v. Mst. Imaman AIR 1949 All 445; cf: Asaf A.A.Fyzee- Outlines of Muhammadan Law, Ninth impression, 2005, p. 167, Oxford University Press, New Delhi.

<sup>192</sup>. Mst. Banno Begum v. Inayat Husain AIR 1948 All 34; cf: B.R. Verma- Islamic Law, 6<sup>th</sup> edn. 1986, p.251, Law Publishers (India) Private Limited.

<sup>193</sup>. Shamsunnessa Khatun v. Mir Abdul Mannf AIR 1940 Cal 95; cited ibid.

<sup>194</sup>. Rahiman Bibi v. Fazil AIR 1927 All 56.

<sup>195</sup>. Ghulam Bhik v. Hussain Begum PLD 1975 (WP) Lahore 998; cf: Noshirvan H. Jhabvala- Principles of Muhammadan Law, 25<sup>th</sup> edn. 2009, p. 58, C. Jamnadas & Co. Mumbai.

be false, she is entitled to a decree.<sup>196</sup> In *Saju v. Maksed*,<sup>197</sup> a Muslim was married to a Muslim woman in Bombay in 1940. In 1944, the husband charged the wife with bigamy and adultery in a Criminal Court, but did not lead any evidence to prove the charges. The wife was acquitted. Thereupon, the wife filed a suit for divorce on the ground that the husband had falsely charged her with bigamy and adultery. The wife was a beauty and the husband loved his wife, but had made the charges by reason of jealousy and on information. The husband did not desire that there should be a divorce. It was held that the husband could retract lian and on his doing so, the court had the power to dismiss the wife's suit.

In *Noor Jahan Bibi v. Kazim Ali*,<sup>198</sup> one Noor Jahan filed a suit against her husband Kazim Ali who charged her that she was of bad character and she was enamoured of one Asghar Ali and committed adultery with him. The court held that, the doctrine of Lian has not become obsolete under the Muslim law and therefore, a Muslim wife can bring a suit for divorce against her husband on the ground that, her husband has charged her with adultery falsely, by virtue of Section 2 (ix) of the Dissolution of Muslim Marriages Act, 1939.

### *iii) Divorce by Mutual Consent :(Mubaraat)*

Mubaraat means "release", which puts an end to matrimonial rights. The word Mubaraa means an act of freeing one from another mutually. It is a mutual discharge from marriage tie.<sup>199</sup> It is a divorce by mutual consent of the husband and wife. The formalities for Mubaraat are the same as in the case of khula.<sup>200</sup> The aversion in Mubaraat is mutual and the proposal for divorce may emanate from either the husband or the wife. Under Shia law, the parties can dissolve their marriage by way of Mubaraa if it is impossible for them to continue.<sup>201</sup>

<sup>196</sup>. Noshirvan H. Jhabvala- Principles of Muhammadan Law, 25<sup>th</sup> edn. 2009, p. 58, C. Jamnadas & Co. Mumbai.

<sup>197</sup>. 1945 Cal WN 122; cf: Noshirvan H. Jhabvala- Principles of Muhammadan Law, 25<sup>th</sup> edn. 2009, p. 59, C. Jamnadas & Co. Mumbai.

<sup>198</sup>. AIR 1977 Cal 90.

<sup>199</sup>. Hedaya, Vol. I, p. 322; cf: Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.83, Central Law Publications, Allahabad.

<sup>200</sup>. Ameer Ali, II, 508, 516; cf: B.R. Verma- Islamic Law, 6<sup>th</sup> edn. 1986, p.228, Law Publishers (India) Private Limited.

<sup>201</sup>. Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.83, Central Law Publications, Allahabad.

To enter in to Mubaraat, both the parties must be of sound mind and have attained puberty.

*Formalities:*

Under Sunni law, no particular form is required. But mutual agreement must be made at the same meeting and the word “Mubaraat” must be clearly expressed in the proposal<sup>202</sup> and if ambiguous expressions are used, intention must be proved.<sup>203</sup>

But under Shia law, proper form is required. Mubaraat must be expressed in Arabic language and the expression “Mubaraat” must be clearly expressed. Mutual agreement must be made at the same meeting in presence of two witnesses under Shia law.<sup>204</sup> if the husband were to say to his wife, “I have discharged you for the obligation of marriage for such a sum, and you are separate from me”<sup>205</sup>, the marriage would be dissolved. In this form, since both the parties are equally interested in the dissolution of marriage, no party is legally required to compensate the other by giving some consideration.<sup>206</sup>

Under Sunni law, when the parties enter into a “Mubaraat”, all mutual rights and obligations come to an end; but under Shia law, it requires that, if both the parties bona fide find the marital relationship to be irksome, then only, a marriage stands dissolved.<sup>207</sup> The wife may agree to pay to her husband, some compensation. When the husband receives compensation from the wife, the divorce is *Bian*, and even when it is without compensation and (consequently) *rajai* (reversible) at the option of the husband, if during the wife’s *iddat*, he were to accept from her a compensation, the separation would be equally *Bian*. The payment of compensation is not the essential condition for divorce.<sup>208</sup>

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<sup>202</sup>. Baillie, I, 306, 311-312; cf: : DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn.1998, p.207, Orient Publishing Company, Allahabad.

<sup>203</sup>. Durr-ul-Mukhtar, 247; cited *ibid*. Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.88, Central Law Agency, Allahabad.

<sup>204</sup>. Baillie, II, 134; cf: Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.88, Central Law Agency, Allahabad.

<sup>205</sup>. Ameer Ali, Mohammedan Law, II, 517; cited *ibid*.

<sup>206</sup>. Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.83, Central Law Agency, Allahabad.

<sup>207</sup>. Fatwa-i-Alamgiri, I, 669; The Hedaya, 139; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn.1998, p.207, Orient Publishing Company, Allahabad.

<sup>208</sup>. Hedaya, Vol. I, p.323; cf: Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.83, Central Law Publications, Allahabad.

Immediately on the completion of divorce by way of Mubaraat, the parties must be separated, even if the wife has not paid compensation. A wife, who has obtained a release from the marital tie by Khula or Mubaraat, is entitled to maintenance during her iddat period.

Legal effects of Khula and Mubaraat:

1. Under Hanafi and Ismaili School, the dissolution of marriage on a Khul or Mubaraat has the same effect as a single divorce after it has become irrevocable. The parties cannot resume sexual intercourse until and unless a fresh marriage was arranged between them.
2. Under Shia law, when the Khula is effected, the husband has no power of revocation. However, the wife is at liberty to re-claim the consideration during the iddat period. Under such circumstances, the husband can revoke the Khul at his option.<sup>209</sup>
3. The wife is required to observe iddat and is also entitled to be maintained by the husband during the period of iddat.
4. After completion of Khula or Mubaraat, the marriage dissolves and cohabitation between the parties becomes unlawful. If the consideration in Khula is not the release of wife's dower, the wife is entitled to get her dower.<sup>210</sup>

2. Judicial separation:

The remedy of judicial separation may be used by the parties who still hope for an ultimate reconciliation. The relief of judicial separation is not much significant under Muslim law. The reason is that Muslim law permitted unfettered powers of terminating the marriage to the Muslim husbands. The wife cannot separate herself from him except under the agreement known as khula.<sup>211</sup> The right of Muslim wives to live separately carries no force. However the law has

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<sup>209</sup>. Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.83, Central Law Publications, Allahabad.

<sup>210</sup>. Dr. R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.96, Central Law Agency, Allahabad.

<sup>211</sup>. Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.62, Central Law Publications, Allahabad.

recognized the following grounds where a Muslim wife will refuse to live with the husband and will be entitled for judicial separation.<sup>212</sup>

1. Husband's impotency:

Where the husband is impotent, the kazi should permit him to prove his potency within a period of one year from the date of litigation. If he has sexual relation with the wife, then there will be no divorce. However if he has no sexual relation, the kazi must pronounce a separation.

2. Cruelty:

If there was cruelty rendering it unsafe for the wife to return to his dominion, she could refuse to give company to her husband.

3. A Muslim wife can claim separation if her marriage was irregular.

4. If there was gross failure on the husband's part to perform the obligation imposed on him by the marriage contract, then also she was permitted to live separately.

5. A Muslim wife may enter into an agreement at the time of marriage. Such a contract will be enforced by the courts if it is lawful and not opposed to the principles of Islam.

6. If her husband has been made an outcast by his community, then also, she can claim separation.

7. A Muslim wife can claim separation if the marriage was arranged by her guardian other than the father.

Divorce being an evil, it must be avoided as far as possible. But some times, this evil becomes a necessity. When it is impossible for the parties to carry on their union with mutual love and affection, it is better to allow them to be separated instead of compelling them to live together in an atmosphere of hatred and sufferings. The basis of the Islamic law of divorce is the inability of the spouses to live together than any specific cause on which, the parties cannot live together.<sup>213</sup>

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<sup>212</sup>. Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.62, Central Law Publications, Allahabad.

<sup>213</sup>. Islam does not specify any matrimonial offence (guilt) as an excuse for divorce. The underlying principle of Islamic law of divorce is that, divorce is allowed in cases where the marriage is to be broken because of incompatibility between the spouses. However, the Dissolution of Muslim Marriage Act, 1939

### 3. Judicial divorce: (Faskh)

Apart from the divorce which may emanate from the husband or the wife without the intervention of the court or any other authority, the Muslim law also provides for the dissolution of marriage by a decree of the court. It is called "Furkat" which literally means separation. Faskh means annulment. It refers to the power of Kazi (in India, law court) to annul a marriage on the application of the wife. In India, such judicial annulments are governed by Section 2 of the Dissolution of Muslim Marriages Act, 1939. Abdul Rahim puts it as:

"If a decree of separation be for a cause imputable to the husband, it has generally speaking, the effect of a talak, if the decree for separation be for a cause imputable to the wife, then it will have the effect of annulment of marriage."<sup>214</sup>

The Quranic verse on judicial divorce runs thus:

"If you fear a breach between them twain, appoint (two) arbiters, one from his family and the other from hers; if they wish for peace, Allah will cause their reconciliation: for Allah has full knowledge, and is acquainted with all things".<sup>215</sup>

Ameer Ali says that 'when the husband is guilty of conduct which makes the matrimonial life intolerable to the wife, when he neglects to perform the duties which the law imposes on him as obligations resulting from marriage or when he fails to fulfil the engagements voluntarily entered into at the time of the matrimonial contract, she has the right of preferring a complaint before the Kazi or judge and demanding a divorce from the court'.<sup>216</sup> The power of Kazi or judge to pronounce a divorce is founded on the express words of Prophet Mohammad: "If a woman be prejudiced by a marriage, let it be broken off".<sup>217</sup>

is based on the guilt principle because, wife may get a decree of nullity on any of the grounds enumerated in it; cf: Dr. R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.81, Central Law Agency, Allahabad.

<sup>214</sup>. Abdul Rahim, 339; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn.1998, p.211, Orient Publishing Company, Allahabad.

<sup>215</sup>. Quran, Sura IV; Ayat 35; The Holy Quran, translated by Abdullah Yusuf Ali, edn. 2004, Ayman Publications, New Delhi.

<sup>216</sup>. Ammer Ali, II, 519; cf: Dr. Paras Diwan- Muslim Law in Modern India, 9<sup>th</sup> edn. 2005, p.95, Allahabad Law Agency, Faridabad (Haryana).

<sup>217</sup>. Ammer Ali: Mohammedan Law, Vol. II, edn. III, p. 519 (citing Bukhari) cf: Asaf A.A.Fyzee- Outlines of Muhammadan Law, Ninth impression, 2005, p. 168, Oxford University Press, New Delhi.

Before passing of the act of 1939, a Muslim woman could apply for dissolution of marriage on three grounds: i) impotency of the husband; ii) lian (false charge of adultery), iii) repudiation of marriage by the wife. But under the Shafii and Maliki laws, a wife was entitled to get a decree from the court for dissolution of her marriage on the grounds of husband's failure to maintain her, desertion, cruelty etc. Therefore there were conflicting provisions in the various Schools of Muslim law in respect of divorce by a wife through judicial intervention.<sup>218</sup> The Dissolution of Muslim Marriages Act, 1939 made revolutionary changes in the existing law and provided six more grounds on which the wife may apply to the court for the dissolution of marriage. Thus, under the act, 9 grounds have been provided under which a Muslim wife may obtain a decree for dissolution of her marriage.

Prior to the passing of the act of 1939, the classical Hanafi law of divorce was causing hardships as it consisted no provision whereby a Hanafi wife could seek divorce on such grounds as disappearance of the husband, his long imprisonment, his neglect of matrimonial obligations, etc., finding no other way to get rid of undesired marital bonds, many Muslim women felt compelled by their circumstances to renounce their faith. Before 1939, the court, following the Hanafi interpretation of the law, had denied to Muslim women, the rights of dissolution available to them under the Shariat.

After a great deal of public agitation, Qazi Muhammad Ahmad Kazmi introduced a bill in the central legislature on 17<sup>th</sup> April 1936. Ultimately, the bill was passed by the Assembly with suitable modifications and became law on 17<sup>th</sup> March 1939, and ever since, it has been hailed as one of the most progressive enactments passed by the legislature within recent years. It achieved two objects: it restored to Muslim wives, an important right accorded to them by the Shariat, and it treated all Muslims alike<sup>219</sup>.

The statement of the Reasons and Objects of this Act indicates the circumstances in which this Act was passed:

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<sup>218</sup>. Dr. R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.96, Central Law Agency, Allahabad.

<sup>219</sup>. Asaf A.A.Fyzee- Outlines of Muhammadan Law, Ninth impression 2005, p. 169, Oxford University Press, New Delhi.

“There is no provision in the Hanafi code of Muslim law enabling a married Muslim woman to obtain a decree from the courts dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently ill-treating her or certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India, the Hanafi jurists, however, have clearly laid down that in cases in which the application of Hanafi law causes hardship, it is permissible to apply the provision of the Maliki, Shafii or Hanbali law.

Acting on this principle, the ulema have issued Fatawas to the effect that in cases enumerated in Clause 3, Part A of this Bill, a married Muslim woman may obtain a decree dissolving her marriage. A lucid exposition of this principle can be found in the book called *Heelat-un-Najeza* published by Maulana Ashraf Ali Sahib (Thanvi) who has made an exhaustive study of the provisions of Maliki law which under the circumstances prevailing in India may be applied to such cases, this has been approved by a large number of ulema who put their seats of approval on the book.

As the courts are sure to hesitate to apply the Maliki law in the case of a Muslim woman, legislation recognizing and enforcing the abovementioned principle is called for in order to relieve the sufferings of countless Muslim women”. In view of the above reasons, The Dissolution of Muslim Marriages Act, 1939 was passed.

The Dissolution of Muslim Marriages Act, 1939 contains several fault grounds. The pre-Act fault grounds too have been saved. Section 2 contains 8 fault grounds. Clause (ix) of section 2 saves the existing grounds on which, wife may sue for divorce. The wife may obtain a decree of divorce on any one of the grounds specified in the Act by filing a suit in the lowest civil court. The benefits of this Section may be given to a wife whether her marriage was solemnized before or after the commencement of the Act. The provisions of Section 2 may be given retrospective effect.<sup>220</sup>

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<sup>220</sup>. Dr. R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.98, Central Law Agency, Allahabad.

*Grounds of divorce.*<sup>221</sup>

A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely—

- i) that the whereabouts of the husband have not been known for a period of four years;
- ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;
- iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;
- iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
- v) that the husband was impotent at the time of the marriage and continues to be so;
- vi) that the husband has been insane for a period of two years or , is suffering from leprosy or a virulent venereal disease;
- vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years; provided that the marriage has not been consummated;
- viii) that the husband treats her with cruelty, that is to say,--
  - a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or
  - b) associates with women of evil repute or leads an infamous life, or
  - c) attempts to force her to lead an immoral life, or
  - d) disposes of her property or prevents her in exercising her legal rights over it, or
  - e) obstructs her in the observance of her religious profession or practice, or
  - f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;

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<sup>221</sup>. See Section 2 of the Dissolution of Muslim Marriage Act, 1939.

ix) on any other ground which is recognized as valid for the dissolution of marriages under Muslim law:

provided that—

- a) no decree shall be passed on ground (iii) until the sentence has become final;
- b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the court that he is prepared to perform his conjugal duties, the court shall set aside the said decree; and
- c) before passing a decree on ground (v) the court shall on application by the husband, make an order requiring the husband to satisfy the court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the court within such period, no decree shall be passed on the said ground.

(i) Missing husband:<sup>222</sup>

Section 2 (i) of the Dissolution of Muslim Marriages Act, 1939 provides that a woman shall be entitled to obtain a decree for the dissolution of her marriage if the whereabouts of the husband has not been known for a period of four years. A wife is required not to marry for a period of six months from the date of passing of the decree. In case the husband appears within six months from the date of the passing of the decree, and satisfies the court that he is willing to perform his marital obligations, the court may set aside the decree. The suit filed by the wife shall contain the following information:

- i) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of the filing of the plaint shall be stated in the plaint;
- ii) notice of the suit shall be served on such persons;
- iii) such persons shall have the right to be heard in the suit;
- iv) the parental uncle and brother of the husband are to be made parties in the suit even though they may not be the heir in the property of the husband.<sup>223</sup>

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<sup>222</sup>. See Clause (i) of Section 2 of the Dissolution of Muslim Marriage Act, 1939.

(ii) Failure to maintain:<sup>224</sup>

If the husband has neglected or failed to provide maintenance to the wife for two or more years, the wife is entitled to obtain a decree for the dissolution of her marriage. If the husband is unable to maintain his wife due to poverty, unemployment, imprisonment, ill-health or any other misfortune, even then the wife has a right to get the decree for dissolving her marriage.<sup>225</sup>

But the husband cannot be said to have neglected her or has failed to provide maintenance for his wife unless he was under an obligation to maintain her. Under Muslim law, the husband is not bound to maintain his wife who is not faithful or obedient to her husband, or who does not perform her marital duties. Therefore, where a wife files a suit for the dissolution of her marriage on the ground of failure of maintenance, and it is found that she was neither faithful nor obedient to her husband, the suit must be dismissed.<sup>226</sup> Therefore, if the wife lives separately without any reasonable excuse, she is not entitled to get a judicial divorce on the ground of husband's failure to maintain her because her own conduct disentitles her for maintenance under Muslim law.<sup>227</sup>

(iii) Imprisonment of husband:<sup>228</sup>

If the husband has been sentenced to imprisonment for a minimum period of seven years, the wife may file a suit for dissolution of marriage. But no decree shall be passed until the sentence has become final. Therefore, the decree can be passed in her favour only after the expiry of the date for appeal by the husband or after the appeal by the husband has been dismissed by the final court.

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<sup>223</sup>. Dr. M.A. Qureshi- Muslim Law, 3<sup>rd</sup> edn. 2007, p.104, Central Law Publications, Allahabad.

<sup>224</sup>. See Clause (ii) of Section 2 of the Dissolution of Muslim Marriage Act, 1939.

<sup>225</sup>. Satgunj v. Rahmat AIR 1945 Sind 48; cf: Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.98, Central Law Agency, Allahabad.

<sup>226</sup>. Dr. Mohammad Nazmi- Mohammadan Law, 2<sup>nd</sup> edn. 2008, p. 77, Central Law Publications, Allahabad.

<sup>227</sup>. Rabia Khatoon v. Mukhtar Ahmad AIR 1966 All 548; Bai Fatima v. Munna Miranji, AIR 1957 453.

<sup>228</sup>. See Clause (iii) of Section 2 of the Dissolution of Muslim Marriage Act, 1939.

(iv) Failure to perform marital obligation.<sup>229</sup>

If the husband without reasonable excuse, has failed to perform his marital obligations for a period of three years, the wife may file a suit to dissolve her marriage.

Under Muslim law, A Muslim husband has four obligations towards his wife: i) to maintain her; ii) to treat all his wives equally; iii) to make available to her a personal apartment, and iv) to allow her to visit and be visited by her parents and blood relations. The first two are covered by clauses (ii) and (viii) (f) of Section 2. The last two would be covered by this clause.<sup>230</sup>

The Act does not define 'marital obligation of the husband'. Under Muslim law, there are several matrimonial obligations of the husband. But for purpose of this clause, husband's failure to perform only those conjugal obligations may be taken into account which are not included in any of the clauses of Section 2 of this Act. Thus, where the husband deserts his wife or does not cohabit with her without any reasonable excuse, it amounts to failure of the husband to perform marital obligations.<sup>231</sup>

Such failure of the husband without reasonable justification for at least three years, entitles the wife to get a decree for dissolution of the marriage. But, if the husband does not cohabit with wife for three years due to some reasonable excuse e.g., illness, or remains away from her because of his business or studies etc., the wife cannot get the decree of dissolution of marriage under this clause.

(v) Husband's impotency.<sup>232</sup>

If the husband was impotent at the time of marriage and continues to be so, the wife may file a suit to dissolve her marriage. But for getting a decree, the wife has to prove two facts: 1) that the husband was impotent at the time of the marriage, and 2) that he continues to be impotent till the filing of the suit. The

<sup>229</sup>. See Clause (iv) of Section 2 of the Dissolution of Muslim Marriage Act, 1939.

<sup>230</sup>. Syed Khalid Rashid- Muslim law, 5<sup>th</sup> edn. 2009, p.121, Eastern Book Co., Lucknow.

<sup>231</sup>. Dr. R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.100, Central Law Agency, Allahabad.

<sup>232</sup>. See Clause (v) of Section 2 of the Dissolution of Muslim Marriage Act, 1939.

wife can get divorce on this ground only if both the above mentioned facts are fully satisfied.<sup>233</sup>

Before passing of a decree of divorce on this ground, the court is bound to give to the husband, one year time to prove his potency; provided he makes an application for it. If the husband does not give such application, the court shall pass the decree of divorce without delay. Where the husband is successful in proving his potency within the period of one year, the decree of divorce cannot be passed. But if he fails to contradict the allegation of the wife, a decree dissolving the marriage is passed.<sup>234</sup>

Husband's impotency as a ground of judicial divorce was recognized also in the old law; and before passing of the Act of 1939, the wife was entitled to get a decree for divorce on this ground. But the Act has made some important changes in the law on this point. The main differences in the old and the present law are:

a) Under the old law, it was necessary for the wife to prove that she had no knowledge of husband's impotency at the time of her marriage. Now, under the Act of 1939, she can obtain a divorce on this ground even if she knew this fact at the time of her marriage.

b) Under the old law, the wife's suit was adjourned by the court for one year (during which, the husband had to prove his potency) even if the husband did not apply for that. Under the Act of 1939, the suit is adjourned only on the application of the husband. The present law is that, the suit is adjourned only on the application of the husband. If the husband does not make any application, the decree for dissolution of marriage is passed immediately.<sup>235</sup> The burden of proof will lie on the husband to prove that he is not impotent.<sup>236</sup>

'Impotency' means inability to consummate the marriage. The marriage is consummated by sexual intercourse. The sexual intercourse is an act where the

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<sup>233</sup>. Where the husband was potent at the time of marriage; but becomes impotent after the marriage, the wife cannot get divorce under this clause. In other words, husband's subsequent impotency cannot be a ground for divorce under Section 2 of the Act.

<sup>234</sup>. Dr. R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.100, Central Law Agency, Allahabad.

<sup>235</sup>. Ibid. p. 101.

<sup>236</sup>. M. Ibrahim v. Altafan (1925)47 All 243; cf: Dr. M.A. Qureshi- Muslim Law, 3<sup>rd</sup> edn. 2007, p.105, Central Law Publications, Allahabad.

male acts as an active partner and the female acts as a passive one. Impotency with reference to a male means non-erection of the male organ, or erection but non-penetration of it into female's body.

Impotency may be physical or mental. Examples of Physical impotency are:

- i) Failure of erection-- where sexual desire is present but the power of erection is so feeble that intrusion is impracticable, such impotence is termed as 'bridegroom's impotence'.
- ii) homosexuality-- Homo-sexuals and person suffering from sexual perversions are often unable to copulate with a normal partner; even they may love and respect that partner. Such persons are generally impotent with the opposite sex.
- iii) Absence of penis.
- iv) Malformation or defect of male organ-- for example, the loss or absence of both testicles;<sup>237</sup>

Sharply bent of the penis when erect; tumors of or near the penis, elephantiasis of the genitals, tight urethral structure causing dribbling of semen after subsidence of erection instead of ejaculation during erection, abnormal or very small size of the penis, a tight phimosis and a hydrocele.

The physical impotency of a man may be of two types—absolute and relative. It is absolute where a person is impotent in relation to all the persons. It is complete and universal. In cases of relative impotency, a man is impotent with a particular woman but not with other.

The mental or psychological impotency consists in the uncontrollable repugnance to the act of sexual intercourse either generally or with the particular individual. It can arise from various causes: from nervousness, excessive sensibility or unconquerable aversion<sup>238</sup>.

In *Gulam Mohd. Khan v. Hasina*,<sup>239</sup> the wife filed a suit for dissolution of marriage on the ground of husband's impotency. The husband made an application before the court seeking an order for proving his potency. The court

<sup>237</sup>. Dr. Mohammad Nazmi- Mohammdan Law, 2<sup>nd</sup> edn. 2008, p. 78, Central Law Publications, Allahabad.

<sup>238</sup>. Ibid.

<sup>239</sup>. AIR 1988 J &K 62.

allowed him to prove his potency and husband produced certificate of the Medical Board that he was potent and competent to perform sexual intercourse. But the court ordered that husband should re-examine himself by another Medical Board

The husband preferred an appeal against this order. The Jammu & Kashmir High Court held that the court has no authority to make order for re-examination by another Medical Board and that the certificate by first Medical Board is to be relied upon. In the certificate of first Medical Board, the husband was declared competent to perform sexual intercourse.

A husband is said to be impotent if he is unable to perform sexual intercourse with his wife. Impotency here means impotency with respect to his wife, not with respect to any other woman. A husband may be impotent for his wife; but may be competent to perform sexual-intercourse with any other woman or may be vice-versa. Therefore, if a husband claims that he ceases to be impotent, he must satisfy the court that he is now capable of performing sexual intercourse with his wife.

(vi) Insanity, leprosy or venereal disease of husband:<sup>240</sup>

A wife married under Muslim Law can obtain divorce on the ground that he husband is insane or is suffering from leprosy or venereal disease. The husband's insanity must be for a period of two or more years immediately preceding the presentation of the suit. But the Act does not specify whether unsoundness of mind should be curable or incurable<sup>241</sup>.

Insanity of the husband with or without lucid intervals. Pre-marriage as well as Post-marriage, arising either before or after the consummation of marriage, was a ground of divorce under the old law also. The only difference between the old law and the present law is that, the Act does not provide for pre-

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<sup>240</sup>. See Clause (vi) of Section 2 of the Dissolution of Muslim Marriage Act, 1939.

<sup>241</sup>. Insanity as a ground for matrimonial relief under the Hindu Marriage Act, 1955 must be of incurable form.

marriage or post-marriage insanity and also does not specify that, insanity must be continuous and incurable.<sup>242</sup>

It is not necessary that the husband has been adjudged insane, or that he has been committed to, confined in or placed under the supervision of a mental disease institution. But if there is such a declaration or confinement that may be sufficient proof of insanity.<sup>243</sup> The Act does not define insanity. It is the term 'insanity' should not be interpreted strictly. Section 84 of the Indian Penal Code should not be made applicable. General unsoundness or derangement of the mind or mental disorder resulting in the disability to manage one's own affairs and lack of proper sense of social behaviour to manage one's won duties be generally sufficient for the purposes of the Act. Mere eccentricities would not be sufficient.<sup>244</sup>

Leprosy may be white or black or cause the skin to wither away. it may be curable or incurable (permanent). The Act neither specifies the form of leprosy nor its duration. She can get the decree of dissolution of her marriage only where the leprosy is loathsome, i.e., the husband is unfit for social contact and is shunned by the society. For this purpose, leucoderma (white skin) is not considered as leprosy.<sup>245</sup>

Venereal disease is a disease of the sex-organs. The Act provides that this disease must be of virulent (permanent) nature i.e., incurable. It may be of any duration. Moreover, even if this disease has been infected to the husband by the wife herself, she is entitled to get divorce on this ground.<sup>246</sup> "Taking advantage of one's own wrong" doctrine of Hindu law has not been enacted in the Act.

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<sup>242</sup>. Baillie I, 59-60; The Hedaya, 128; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.214, Orient Publishing Company, Allahabad.

<sup>243</sup>. Dr. Mohammad Nazmi- Mohammadan Law, 2<sup>nd</sup> edn. 2008, p. 79, Central Law Publications, Allahabad.

<sup>244</sup>. Dr. M.A. Qureshi- Muslim Law, 3<sup>rd</sup> edn. 2007, p.106, Central Law Publications, Allahabad.

<sup>245</sup>. Ibid.

<sup>246</sup>. Dr. R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.101, Central Law Agency, Allahabad.

(vii) Option of Puberty by wife:<sup>247</sup>

This ground for the dissolution of marriage is not based on any 'fault' of the husband. It is an independent provision under which, a marriage is voidable at the option of the wife. Under Section 2 (vii), a wife can obtain a decree for dissolution of her marriage if her marriage was contracted by her father or any other guardian during her minority. Thus, this clause gives her, the option to repudiate the marriage before attaining the age of eighteen years; provided, the marriage has not been consummated.

This right was also available to the wife under the old law. But this Act has made following changes in the law of option of puberty (Khyar-ul-Bulugh) by a wife:

1. Under the old law, the option of puberty was not available where the minor's marriage was contracted by father or father's father. But now, a wife may exercise this right even if she was given in marriage by her father or father's father.
2. Under the old law, the option of puberty by a wife was to be exercised by her, immediately after attaining the age of puberty. Now, the Act of 1939 provides that, a wife can exercise this right up to the age of eighteen years; provided, the marriage is not consummated.

In *Mustafa v. Khursida*,<sup>248</sup> A Muslim girl of 7 years was given in marriage by her parents. The marriage was never consummated. The birth certificate and passport of her mother proved that petitioner was 7 years and 23 days of age at the time of her marriage contracted by her parents. It was also corroborated by ration card. It was proved that, petitioner and respondent had never lived together as husband and wife. There is no cohabitation any time. On attaining puberty but before attaining 18 years, the girl applied before the Family Court at Jodhpur for dissolution of her marriage u/S. 2 (vii) of The Dissolution of Muslim Marriages Act, 1939. Her application was granted. On appeal by the husband

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<sup>247</sup>. See Clause (vii) of Section 2 of the Dissolution of Muslim Marriage Act, 1939.

<sup>248</sup>. AIR 2006 Raj 31.

against the decree, the High Court upheld her right of the option of puberty and held, she was entitled to the decree.

Consummation of the marriage with a girl who is below 15 years of age would not destroy her option to repudiate the marriage after she attains the age of 15. The assent should come after puberty and not before.<sup>249</sup>

The mere exercise of the option of puberty does not operate as dissolution of marriage. The repudiation is only a ground to file a suit to dissolve the marriage. The repudiation must be confirmed by the decree of the Civil Court. Until then, the marriage subsists, and if either party to the marriage dies, the other party will inherit.<sup>250</sup>

(viii) Cruelty of Husband:<sup>251</sup>

Section 2 (viii) of The Dissolution of Muslim Marriages Act, 1939 provides that a Muslim wife will be entitled for divorce if her husband treats her with cruelty. Even before passing of the Act of 1939, cruelty was recognized as a good ground for the wife to seek divorce. Section 2 (viii) of the Act of 1939 contains various instances of cruelty. These instances are:

- a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or
- b) associates with women of evil repute or leads an infamous life, or
- c) attempts to force her to lead an immoral life, or
- d) disposes of her property or prevents her in exercising her legal rights over it, or
- e) obstructs her in the observance of her religious profession or practice, or
- f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;

a) Physical and Mental Cruelty:

<sup>249</sup>. Ghulam Sakina v. Falak Sher AIR 1950 Lah 45; cf: B.R. Verma- Islamic Law, 6<sup>th</sup> edn. 1986, p.333, Law Publishers (India) Private Limited, Chandrakanti, ETAH, (U.P.).

<sup>250</sup>. Dr. Mohammad Nazmi- Mohammadan Law, 2<sup>nd</sup> edn. 2008, p. 79, Central Law Publications, Allahabad.

<sup>251</sup>. See Clause (viii) of Section 2 of the Dissolution of Muslim Marriage Act, 1939.

Any conduct of the husband, which may not be a physical ill-treatment, but is of such a nature which makes the life of the wife miserable, is also a cruelty against her. If the husband stops talking to his wife for a considerably long period, or deliberately ignores her, it may make her life miserable although there is no physical assault in it. Similarly, if the husband habitually abuses the wife or repeatedly makes insulting statements against her character, the conduct of the husband may be regarded as mental cruelty against the wife.<sup>252</sup>

In *Siddique v. Amina*,<sup>253</sup> it was established that, husband had administered his wife with some drug causing miscarriage. He also physically tortured her. The court held that, it amounts to cruelty.

In *Begum Subanu v. A.M. Abdul Gafoor*,<sup>254</sup> the Supreme Court held that, sharing the matrimonial bed with the second wife of the husband constituted 'matrimonial injury' affording her, a ground to live separately from the husband.

b) Concubinage—Associates with woman of evil repute or leads an infamous life:

Section 2 (viii) (b) of the Act of 1939 confers on a Muslim wife, a judicial divorce, if her husband associates with woman of evil repute or leads an infamous life. It appears that, if the husband associates with a woman of evil repute, the clause will not apply. Association should be with women (more than one). This is something like living in adultery, and that too, not with ordinary women; it should be with prostitutes. One or two lapses from virtue will not be enough.<sup>255</sup>

The bringing of a second wife or keeping a mistress will definitely adversely affect on the mind of the wife and it amounts to cruelty. In such cases, the wife can refuse to live along with her husband.<sup>256</sup> In *Itwari v. Smt. Asghari*,<sup>257</sup> the husband married a second time during the existence of first marriage.

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<sup>252</sup>. Dr. R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.102, Central Law Agency, Allahabad.

<sup>253</sup>. Dr. Paras Diwan- Muslim Law in Modern India, 9<sup>th</sup> edn. 2005, p.98, Allahabad Law Agency, Faridabad (Haryana).

<sup>254</sup>. AIR 1987 SC 1103.

<sup>255</sup>. Dr. Paras Diwan- Muslim Law in Modern India, 9<sup>th</sup> edn. 2005, p.99, Allahabad Law Agency, Faridabad (Haryana).

<sup>256</sup>. *Anis Begum v. I. Istafa* AIR 1933 All 634; cf: Dr. M.A. Qureshi- Muslim Law, 3<sup>rd</sup> edn. 2007, p.109, Central Law Publications, Allahabad.

<sup>257</sup>. AIR 1960 All 684.

Consequently, the first wife refused to fulfil the marital obligation. Her contention was the bringing of second wife during the existence of first marriage amounts to cruelty. The Allahabad High Court held that, bringing of second wife will amount to cruelty.

c) Attempts to force her to lead an immoral life:

Mere attempt of the husband to force his wife lead an immoral life is sufficient to ask the court for the dissolution of her marriage. It would be a great mental torture for a chaste and pious wife if she is compelled by her husband to live in corruption and immorality against her wishes. Where a husband compels his wife to lead an immoral life, his conduct is obviously a mental cruelty against his wife.<sup>258</sup>

d) The husband disposes off her property or prevents her from exercising her legal rights over it:

Under Muslim law, a wife continues to maintain her separate legal entity. The property in the name of the wife is separate from the property of her husband. The husband has no right to dispose of his wife's property. In case, the husband has disposed of his wife's property, the wife acquires a right to ask the court for the dissolution of her marriage under the Act of 1939.<sup>259</sup>

In *Umatul Hafiz v. Talib Husain*,<sup>260</sup> it was held that, the disposal of the property must be for getting rid of that property not for the benefit of the wife, but with the object or intention of preventing the wife from exercising her rights in the property for the selfish aims of the husband himself. The disposal of the wife's property does not become lawful even if it is necessary for a pressing need of the husband. The disposal must be without her consent. She would also be entitled to a dissolution of her marriage if she was prevented from exercising her legal rights over the property.<sup>261</sup>

e) Obstructs her in the observance of her religious profession or practice:

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<sup>258</sup>. Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.103, Central Law Agency, Allahabad.

<sup>259</sup>. Dr. M.A. Qureshi- Muslim Law, 3<sup>rd</sup> edn. 2007, p.110, Central Law Publications, Allahabad.

<sup>260</sup>. AIR 1945 Lah 56; cf: Dr. M.A. Qureshi- Muslim Law, 3<sup>rd</sup> edn. 2007, p.110, Central Law Publications, Allahabad.

<sup>261</sup>. Dr. M.A. Qureshi- Muslim Law, 3<sup>rd</sup> edn. 2007, p.110, Central Law Publications, Allahabad.

Islam guarantees the personal faith of the ladies. They are allowed to observe religious practice or profession according to their faith. Under the Act of 1939, a wife can approach the court for her dissolution of marriage if her husband obstructs her in the observance of her religious duties.<sup>262</sup>

But under this clause, the husband's restrictions on wife's religious practice must be of such a nature, which affects the fundamental religious belief of the wife. A direction restraining the wife, not to follow blindly the orthodox rituals, may not be cruelty. In *Aboobacker v. Mamu Koya*,<sup>263</sup> the husband used to compel his wife to put on a Sari and see pictures in cinema halls. The wife refused to do so because according to her beliefs, this was against the Islamic way of life. She sought a divorce under Section 2 (viii) (e) of the Act, saying that since the husband compels her to do something which is against her religious profession and practice, it is mental cruelty by the husband. The Kerala High Court held that, the conduct of the husband cannot be regarded as cruelty because; mere departure from standards of suffocating orthodoxy does not constitute un-Islamic behaviour.

f) If he has more wives, than one, does not treat her equitably:

A Muslim is permitted to marry four wives provided, he is able to treat them equitably. If he is apprehensive that, he will not be able to do justice between them, he is enjoined to marry one wife only. In other words, if a man cannot treat his two wives with perfect equality, he is enjoined to marry only one wife.<sup>264</sup> If a husband having two wives, favours one and ignores the other, the wife so ignored may sue for divorce on the ground of mental cruelty.

In *Asma Bi v. Umar*,<sup>265</sup> it was held that, where one of the wives left the husband because of his ill-treatment, and the husband made no efforts to persuade her to come back, inequality was established and the wife was entitled to the judicial decree on the ground of cruelty.

<sup>262</sup>. Dr. M.A. Qureshi- Muslim Law, 3<sup>rd</sup> edn. 2007, p.110, Central Law Publications, Allahabad.

<sup>263</sup>. 1971 KLT 663; cf: Dr. R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.104, Central Law Agency, Allahabad.

<sup>264</sup>. Dr. M.A. Qureshi- Muslim Law, 3<sup>rd</sup> edn. 2007, p.110, Central Law Publications, Allahabad.

<sup>265</sup>. AIR 1960 All 684.

In *Umatul-Hafiz v. Talib Husain*,<sup>266</sup> a husband went abroad leaving behind two wives in India. He provided maintenance for one wife from there, but ignored the other. The court held that, the other wife was entitled to divorce under this clause.

In *Parakkattil Abu v. Pachiyath Beekkutty*,<sup>267</sup> wife filed a suit dissolution of marriage on the ground of cruelty and inequitable treatment. She complains about the conduct of her husband remarrying after 25 years of matrimonial life with 2 children born in the wedlock. Such re-marriage was without the consent or approval of the wife. She felt that she was being treated inequitably after the second marriage of the husband. The court held that wife's assertion regarding inequitable treatment only matters in such cases. Non-repetition of details of specific allegations of matrimonial cruelty in affidavit sworn by her before court does not make it defective and unacceptable and it confirmed the order of dissolution of marriage passed by lower court.

(ix) A Residuary Clause.<sup>268</sup>

Section 2 (ix) is a residuary clause under which, a wife may seek dissolution of her marriage on any ground which is recognized as valid for the dissolution of marriage under the Muslim personal law. It covers other grounds such as Lian, Khula, Talaq-i-Tafweez, ilya, Mubaraat, zihar, apostasy from Islam. This is a residuary ground on which, a Muslim wife may seek the dissolution of her marriage. The Act proceeds to lay down a residuary provision in order that, the wife may not lose the benefit of any other ground which may have escaped the attention of the Parliament.<sup>269</sup>

Section 2 (ix) has been regarded as the 'residuary clause' because it is the last clause which entitles a wife to seek decree for dissolution of her marriage in absence of any of the grounds expressly provided under the Act. This clause has been interpreted by courts to give new dimensions to 'mental cruelty' in the

<sup>266</sup>. 1945 Lah 56; cf: Dr. Paras Diwan- Muslim Law in Modern India, 9<sup>th</sup> edn. 2005, p.101, Allahabad Law Agency, Faridabad (Haryana).

<sup>267</sup>. AIR 2011 Ker 38.

<sup>268</sup>. See Clause (ix) of Section 2 of the Dissolution of Muslim Marriage Act, 1939.

<sup>269</sup>. Dr. Mohammad Nazmi- Mohammadan Law, 2<sup>nd</sup> edn. 2008, p. 80, Central Law Publications, Allahabad.

light of changing socio-economic changes in the Muslim community of the modern sensibility. Under this clause, complete 'break-down' of matrimonial relations or total mental incompatibility in itself, has been regarded as a 'reasonable ground' for dissolution of a Muslim marriage. Such interpretation of this clause would not only be realistic, rational and modern approach but generally, it would also be in consonance with Islamic policy of dissolution of marriage.<sup>270</sup>

#### 4. Dissolution through conversion :( *Apostasy*):

Apostasy means renouncing or giving up one's religion. Renunciation of Islam or conversion of a Muslim to some other religion is called apostasy (*Ridda*) from Islam. Under Muslim law, when a non-Muslim accepts Islam, i.e., when he believes that there is only one God and Prophet Mohammad was his messenger, it is said that he has concerted himself into Islam. On the other hand, when a Muslim abandons his faith in Islam, his act is known as an act of apostasy<sup>271</sup>

Before passing of the Dissolution of Muslim Marriage Act, 1939, apostasy of either party to a marriage ipso facto dissolves marriage and an immediate dissolution of the marriage comes into existence. The date on which the wife renounces Islam, she ceases to be the wife and if any person takes her away even during the period of iddat period, the offence of adultery u/S. 498 of the Indian Penal Code would not be committed.<sup>272</sup> During iddat, if the woman marries another man after apostasy, she would not be guilty of bigamy u/S. 494 of the Indian Penal Code.<sup>273</sup>

But under Shia law, in the case of an unconsummated marriage only, apostasy results into immediate dissolution of marriage and in the case of a consummated marriage, after the expiry of the period of iddat, the marriage stands dissolved.

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<sup>270</sup>. Yousuf Rowthan v. Swamma AIR 1971 Ker 261.

<sup>271</sup>. Dr. M.A. Qureshi- Muslim Law, 3<sup>rd</sup> edn. 2007, p.111, Central Law Publications, Allahabad.

<sup>272</sup>. Karan Singh v. Emperor AIR 1933 All 433; cf: DR. Nishi Purohit- The Principles Of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.179, Orient Publishing Company, Allahabad.

<sup>273</sup>. Abdul Gani v. Azizul Haq, ILR. 39, Cal. 409; cited *ibid*.

After passing of the dissolution of Muslim Marriage Act, 1939, the position has got a little change. According to Section 4 of the Act, “The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage”

Provided that after such renunciation or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in Section 2 of the Act.

Provided further that the provisions of this Section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

The present law relating to apostasy may be summarized as under:

1) Apostasy by Husband:

If a Muslim husband renounces Islam, the marriage dissolves immediately. Section 4 of the Act of 1939 does not apply to apostasy by a husband. The result is that, apostasy by the husband is still governed by the old law under which, renunciation of Islam by the husband operates as immediate dissolution of the marriage.

Where a Muslim, husband converts to another religion, his marriage is immediately dissolved and the wife ceases to be a Muslim wife of that husband. As such, the wife is not governed by Muslim law and is free to marry another person without waiting for the iddat period.<sup>274</sup>

2) Apostasy by wife:

If a Muslim wife renounces Islam, the marriage is not dissolved. In other words, the apostasy by a Muslim wife does not operate as immediate dissolution of the marriage. Moreover, even after renouncing Islam, if the wife wants, she may obtain a decree for the dissolution of her marriage on any of the grounds specified in Section 2 of the Act of 1939.

Exception: the provision does not apply if the wife was not a Muslim by birth. That is to say, where the wife was a converted Muslim at the time of her marriage, and such converted Muslim wife renounces Islam and again embraces

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<sup>274</sup>. Dr. R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.106, Central Law Agency, Allahabad.

her original religion, then the marriage dissolves immediately. Thus, an apostasy by a converted Muslim wife results in the immediate dissolution of her marriage.<sup>275</sup> But an apostate wife is entitled to recover her dower.<sup>276</sup>

Section 4 of the Act has no retrospective operation. Therefore, apostasy by a wife before 1939 dissolved the marriage immediately.

A convert of Islam is ordinarily governed by Muslim law. Till 1937, it was possible for a convert to be continued to be governed by his personal law, including customary law. For example, the Khoja and the Cutchi Memon Muslim, who were originally Hindus but converted to Islam some four hundred years ago, continued to follow the Hindu customary law of inheritance. However, in 1937, the Shariat Act 1937 abolished all the customs (except those which related to agricultural land or other matters not included in the act) among Khoja and the Cutchi Memon Muslim.<sup>277</sup> After coming into force of the Shariat Act, 1937, it was laid down that:

“Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage including talak, ulla, Zihar, lian, Khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims, shall be the Muslim Personal Law (Shariat)<sup>278</sup>

Conversion of a Muslim from one Sect to another does not amount to apostasy, and a person changing from one Sect to another continues to be a Muslim. The genuineness of belief in the new faith is immaterial and even when a convert does not practice the new faith, he will continue to be a Muslim. But it is

<sup>275</sup>. Dr. R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.106, Central Law Agency, Allahabad.

<sup>276</sup>. Sarwar Ali Khan v. Jawahar Devi (1964)1 Andh WR 60.

<sup>277</sup>. Dr. R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.4, Central Law Agency, Allahabad.

<sup>278</sup>. Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937.

necessary that the conversion should be bona fide, honest, and should not be pretended colourable or dishonest.

In *Skinner v. Orde*,<sup>279</sup> a Christian woman was cohabiting with a married Christian man. With a view to legalizing their living together as husband and wife, both of them underwent a ceremony of conversion to Islam. After conversion, they married. Later on, when the question of validity of this marriage arose, the Privy Council held that the marriage was null and void on the ground that conversion was not bona fide. Moreover, it was a fraud upon the law, since the parties underwent the ceremony of conversion with a view to eluding their personal law.

The reason behind such conversions was either to claim divorce on the ground of apostasy, or to take advantage of the Muslim law provision which permits polygamy. It is happening that Hindu or Christian who wants to take a second wife and who has no ground available to divorce his first wife, converts to Islam and takes another wife. Since Muslim law permits polygamy, such a person cannot be prosecuted for bigamy, and his former spouse has to put up with such situation. Thus, in the matter of Ram Kumari,<sup>280</sup> a Hindu married woman adopted Islam and assuming that this meant automatic dissolution of her marriage, took a second husband. She was prosecuted and convicted for bigamy.

In *Sarla Mudgal v. Union of India*,<sup>281</sup> the Supreme Court of India, while interpreting the scope and extent of Section 494 of the Indian Penal Code, made the following observations:

‘.....that the second marriage of a Hindu husband after conversion to Islam, without having his first marriage dissolved under law, would be invalid. The second marriage would be void in terms of the provisions of Section 494 I.P.C. and the apostate husband would be guilty of the offence under Section 494 I.P.C.’”

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<sup>279</sup>. (1871) 14 MIA 309; cf: Dr. Paras Diwan- Muslim Law in Modern India, 9<sup>th</sup> edn. 2005, p.4, Allahabad Law Agency, Faridabad (Haryana).

<sup>280</sup>. (1891) 18 Cal 264; cf: Dr. Paras Diwan- Muslim Law in Modern India, 9<sup>th</sup> edn.,2005, p.4, Allahabad Law Agency, Faridabad (Haryana).

<sup>281</sup>. AIR 1995 SC 1531.

In *Lily Thomas v. Union of India*,<sup>282</sup> G.C.Ghosh and Smt. Sushmita Ghosh were married according to Hindu rites on 10<sup>th</sup> May 1984. Both were living happily at Delhi. In June 1992, the husband married a second wife. For legalizing the second marriage, he embraced Islam. He, in fact married one divorcee named Ms. Vanita Gupta having two children. The husband told his first wife that she should agree to her divorce; otherwise, she will have to put up with the second wife. He insisted his wife on several occasions to get a divorce by mutual agreement; otherwise, she (Sushmita Ghosh) would be compelled to live with his second wife (Vanita Gupta). The husband converted to Islam solely for the purpose of re-marrying and was having no real faith in Islam. He changed his name as Mohd. Karim Ghazi. He does not practice the Muslim rites as prescribed nor has he changed his name or religion and other official documents.

Smt. Sushmita Ghosh approached a Woman Organization Kalyani, which came to her rescue and filed petition in the Supreme Court on behalf of Smt. Sushmita Ghosh. The question before the Supreme Court was where a non-Muslim gets converted to the Muslim faith without any real change or belief and merely with a view to avoid an earlier marriage or to enter into a second marriage, whether the marriage entered into by him after conversion would be void.

The Supreme Court held that, conversion of the husband to Islam was illegal, and he cannot be regarded as Muslim so as to legalize his second marriage during the subsistence of the first. The husband was held guilty of the offence of bigamy punishable u/S. 494 I.P.C. r/w. Sec. 17 of the Hindu Marriage Act; because mere conversion does not automatically dissolves his first marriage.

Before advent of Islam, the husband can pronounce talaq at any time and for any number of times. They could also revoke it by taking the women back and resuming marital connection and again pronounce talaq as many times as they preferred. After advent of Islam, the prophet Mohammad showed his dislike to it. Prophet regarded it to be the most hateful before the Almighty god of all

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<sup>282</sup>. AIR 2000 SC 1650.

permitted things; for it prevents happiness and interfered with the proper bringing up of children. Islam put a check upon the arbitrary powers of the husband. Now, after third pronouncement, the marriage dissolves irrevocably and it is not possible to revoke easily. An effective check placed by Islam on frequent divorce and remarriage was that, in case of irrevocable separation, it is essential for remarriage that the wife should marry another man, and this marriage should be consummated before divorce, and the wife should observe iddat period. This was a measure which rendered separation rarer.

After passing of the Dissolution of Muslim Marriage Act, 1939, the position of Muslim women is improved. This is the most progressive enactments passed by the legislature. Now she can release from an unhappy marital tie on various grounds recognized by Islam and also by legislation, through judicial process. Thus, with these changes, the position of Muslim women is improved. These are welcome changes which are desirable in the present day society.

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