CHAPTER-III

SOCIAL STATUS OF WOMEN UNDER SHARI’AH
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3.1. Introduction

It is evident from the source material that women, throughout the history, had been subjected to degeneration and subjugation in matters of their socio-economic status under the major religions and civilizations, almost all over the world which led to the deprivation of even their basic rights by men-folk. In the Arabian society also, where Islam has emerged as a new religion in the world, their socio-economic status was no better than any other society that existed at that time. But Islamic Law did not remain mute expectator unlike other religions and it made a successful attempt to abrogate all the anti-gender customs aiming at providing a better social status to woman by declaring her the better-half/companion of her counterpart. Islamic Law, further, upgraded the social status of women by giving her the right to marry with her free consent and also granting her the right to initiate divorce in an unhappy or forceful marriage. She was also allowed to remarry after a certain period called *iddah* after the dissolution of her marriage.

Thus, Islamic Law recognises woman as a worthy human being who has her own individual existence apart from being a mother, daughter, wife and sister. Under Islamic Law, she has been given equal rights like that of man so that she may not only exist in the society but also live her life freely.1 In this chapter, basic social rights of women in Islam i.e., right to marriage and divorce, which are very essential for living a dignified social life, have been examined. According to Islamic Law, women cannot be forced to marry anyone without their consent. As the woman’s right to decide about her marriage is recognized under Islamic Law, so also her right to seek an end for an unsuccessful marriage is recognized. To provide for the stability of the family, however, and in order to protect it from hasty decisions under temporary emotional stress, certain steps and waiting periods have been observed by men and women seeking divorce. More specifically, some aspects of Islamic Law concerning woman’s right to marriage and divorce are interesting and are worthy of separate treatment.

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3.2. Woman’s Right to Marriage under Shari’ah

Marriage is a socio-legal institution that forms the bedrock of a family and society. It is called a sacred ceremony, the purpose of which is to enable the young couple to settle down in life and live together, enjoying each other’s company peacefully. It creates the most important relations in life which influence morality and civilization of people than any other institution. The concept of marriage in Islam is no different. In Islam, marriage is essentially a solemn covenant between a male and a female of conventional age which creates eternal bond based on mutual love and compassion, not just for the gratification of human biological needs but aims at to bring solace in material life of the couples.²

Islam granted woman the right to choose her life-partner and marry with her free consent without any undue pressure from her nears and dears. Earlier, it was the guardian of the woman who used to select a bridegroom for her according to his own wish and she had no say in matter of her marriage. But Islamic Law grants woman as much freedom in the choice of her husband as the man has been granted in choosing his wife. Islamic Law does not give any right to anyone to give her away in marriage against her free consent. The Holy Prophet (PBUH) is reported to have said in this regard:

“A previously married woman (whose marriage is dissolved) shall not be married until she consents to it nor a virgin shall be married until her consent is sought... and, her silence is her consent.”³

Thus, it becomes crystal clear that no compulsion or coercion can be exercised to force a woman into marriage. Even if any minor girl is given in marriage by her guardian then Islamic Law gives her the option to repudiate her marriage when she attains puberty. The Holy Prophet (PBUH) annulled the marriage of a girl who had been given in marriage by her father, since she disliked it.⁴ However, repudiation must be made immediately after she attains puberty and the same should be done before the consummation of marriage. Once the marriage gets consummated, girl loses her right to repudiation of marriage.⁵

³ Reported in Sahih Muslim.
⁴ Reported in Sahih Bukhari.
⁵ Syed Khalid Rashid, Muslim Law 95 (Eastern Book Company, Lucknow, 2009).
3.2.1. Philosophy of Marriage in Islam

Marriage is one of the fundamental social institutions, which has been maintained by mankind since its very beginning, without any disruption. Marriage was treated as a sacred bond even by the so-called ‘uncivilized’ tribes and primitive societies. Islam has based its matrimonial laws on the correlation between masculinity and femininity by keeping procreation as its main goal in sight. Islamic marriage is based on this reality, and all its matrimonial rules revolve around this axis. On this foundation are based the Islamic Laws concerning chastity and conjugal rights, exclusive attachment of the wife to her husband and rules of divorce and *iddah*, legitimacy and parentage, custody of children and their upbringing, inheritance and other related matters. Thus, it is clear that Islamic Law considers marriage as a legal and honourable union of a man and a woman to ensure the continuation of mankind.

But this does not mean that under Islamic Law, the purpose of marriage is only the procreation of children. *Nikah*, in Islam, is intended to cater a multiple of other purposes also which include, above all of them, the spiritual tranquillity and peace through a successful union. The Holy *Qur’an* declares in this regard:

> “Among His signs is that He created for you spouses of your own kind in order that you may repose to them in tranquillity and He instilled in your hearts love and affection for one another; verily, in these are signs for those who reflect (on the nature of the reality).”\(^6\)

*Nikah* also fulfils other purposes like co-operation and partnership among the spouses so that they may fulfil the divine mandate in a better way. The Holy *Qur’an* provides:

> “The believers, males and females, are partners of one another; they shall jointly enjoin all that is good and counsel against all that is evil...”\(^7\)

In this manner, Islam is not just a religion but also proves itself to be a complete natural way of life by taking into account all the genuine human instincts such as physical, spiritual, intellectual, emotional, etc. Islamic Law considers that although the fulfilment of one’s physical needs in a decent manner is one of the main purposes of marriage but this purpose is not the sole one. Islam declares the spouses as one another’s companion in every walk of life and not merely the means of fulfilling their bodily desires. They have been declared as garments for each other in the Holy *Qur’an*:


\(^7\) *Holy Qur’an*, IX:71.
The meaning of the above verse may be understood in a clear way by knowing the value of garments in one’s life. It is not that a man gets protection by wearing garments from heat and cold but also he gets respect in the society only when his body is covered with garments otherwise the society considers him either insane or shameless. Also, he gets beautified by wearing them and in the similar way, marriage enhances one’s character by protecting a man from the commission of various sins of which, otherwise, may not be possible for him to resist. Thus, it can be said that the garment serves three purposes i.e., it beautifies, it covers the parts of body, and it also protects one from heat and cold. As the Almighty Allah says in the Holy Qur’an:

“O children of Adam! We have indeed sent down to you clothing to cover your shame, and (clothing) for beauty and clothing that guards (against evil), that is the best. This is of the communications of Allah that they may be mindful.”

Thus, it can be said that the husband and wife cover the natural shortcomings of each other by uniting together as their union protects them from the difficulties and hardships which they may face while living alone. Marriage, in Islam, consummates one’s faith as it spares one from looking at other women or men and offers one to preserve his/her chastity by the satisfaction of one’s sexual desires by lawful means. Hence, adultery is no longer an option for them to fulfill their bodily desires.

The philosophy underlying nikah in Islam is not only that it helps Muslim in preserving his faith and the procreation of children but it is also considered as an indispensable pillar of worldly happiness which Islam has always encouraged its followers to enjoy so that they may not get distracted from the upliftment of their souls which is their ultimate goal for the attainment of high degrees of spirituality. According to Imam Muslim, the Holy Prophet (PBUH) said:

“*The whole world is pleasure, and the best pleasure of the world is the righteous woman.*”

Therefore, it is evident that by uniting together, spouses lead a happy and prosperous life by discharging all the duties, with their joint efforts, that have been laid down upon them by

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10 Reported in Al-Bayhaqi.
their human nature. Marriage, under Islamic Law, is thus a strong commitment and a shared responsibility between a man and a woman since their first day together. This is the reason that Islam completely rejects celibacy and considers marriage as the means to reach God.11

3.2.2. Nature of Marriage under Shari’ah

It is needless to reiterate that Islam attaches great importance to the institution of marriage in its social system.12 In the Holy Qur’an, sayings of the Holy Prophet (PBUH) and also in the sayings of Imams, the marriage has always been greatly encouraged and the Holy Prophet (PBUH) is reported to have said:

“There has not been created any institution in Islam which is more favoured and dearer to Allah than marriage”13

Therefore, it seems that marriage, under Islamic Law, is inter-related with the religious duties as the Holy Imam Ja’far as-Sadiq (A.S.) is reported to have said:

“Two (units) of a married person’s salat (prayer) are better than seventy units offered by a bachelor.”14

Thus, the purpose of the institution of marriage is to bring about the spiritual development of the human beings along with the emotional and physical satisfaction. Muslim marriage is a contract whereupon a man and a woman decide to lead the rest of their lives together, in order to perform their worldly as well as religious duties in a better and easy way. But the nature of Muslim marriage has been disputed by Muslim as well as non-Muslim jurists and writers alike in their writings by declaring it merely a contract the purpose of which is only the satisfaction of sexual desires and procreation of children.15 They cite the definition given by Justice Mahmood in the case of Abdul Kadir v. Salima16 where he defined marriage as under:

“Marriage among Muhammadans is not a sacrament, but purely a civil contract and though it is solemnized generally with the recitation of certain

14 Ibid.
15 Supra Note 12 at 182.
16 (1886) 8 All. 149.
verses from the Holy Qur’an, yet the Muhammedan Law doesn’t positively prescribe any service peculiar to the occasion.”

Justice Mahmood describes Muslim marriage as purely a civil contract because its constitution is dependent upon a declaration or proposal by one and the consent or acceptance by the other contracting parties. It is important to mention here that the Holy Qur’an does not refer to marriage contract as a contract based on offer and acceptance. Rather, it describes it as ‘mithaqun galithun’ (a solemn covenant), which is carefully regulated by a body of laws. The word ‘mithaq’, which means ‘covenant’ appears in a number of places in the Holy Qur’an. In each place, it refers to a momentous context, such as the covenant between God and the children of Israel, or those with whom the Muslims have concluded a treaty. Furthermore, Egyptian jurist and a leading Islamic female scholar, Malakah Zirar notes that Allah has placed marriage within the category of ibadat, which relate to Allah’s worship and not within mu’amalat, where contracts are usually placed.

The writers who rely on the definition of justice Mahmood for their understanding of the nature of Muslim marriage give logic that like in a contract of sale, the consideration is money so in the contract of Muslim marriage, the consideration is mahr (dower). But it must be remembered that mahr is not a consideration for marriage but only a gift by the husband to his wife as a mark of his love and respect for her. The other comparisons that are made of Muslim marriage with that of the contract of sale are that in the contract of sale, there is a proposal and its acceptance and the like way, in Muslim marriage, there is ijab and qubool. Another justification given by those who compare Muslim marriage with the contract of sale is that the contract of sale entered into by the guardian of a minor on his behalf can be set aside, so also the minor’s marriage contracted by his guardian can be repudiated by him upon attaining the age of majority.

These jurists and writers describe the nature of Muslim marriage as purely a civil contract due to the lack of knowledge of the principles of Shari’ah governing the institution of marriage in Islam. The true nature of Muslim marriage has been made clear by Abdur Rahim in his definition which is as follows:

17 Abdul Kadir v. Salima, (1886) 8 All. 149.
18 Supra Note 5 at 198.
“The Mohammedan jurists regard the institution of marriage as partaking both of the nature of *ibadat* (worship or devotional acts) and *mu'amlat* (transactions between human beings).”\(^{21}\)

The Muslim marriage in its *ibadat* aspect can be best described by the fact that it is an act pleasing to Allah-The Almighty because the husband and wife love each other and help each other to make efforts for the continuance of human race in accordance with His Commandments only for the sake of becoming the true servants of Allah. This aspect has been beautifully explained by the Holy Prophet (PBUH) in the following Tradition.

> “When a man marries, he has fulfilled half of his religion, so let him fear Allah regarding the remaining half.”\(^{22}\)

Thus, the Holy Prophet (PBUH) considered marriage as half of his religion for a Muslim because it shields him from the commission of promiscuity, homosexuality, fornication, adultery, rape, prostitution, etc. in order to satisfy his lust which ultimately leads to various other evils in the society like slandering, quarrels and homicides, loss of property and disintegration of the family. According to the above-mentioned Tradition of the Holy Prophet (PBUH), when a man marries a woman, he completes half of his *deen* and now he should worry about only the other half which according to the Holy Prophet (PBUH) can be saved by *taqwa*. Another Tradition of the Holy Prophet (PBUH) which proves that marriage is a religious obligation, by laying a great emphasis upon the importance of marriage, is as under:

> “Marriage is my Sunn’ah. Whosoever keeps away from it is not from me.”\(^{23}\)

In this way, *Shari’ah* considers marriage as ‘*sunnat-e-muwakkidah*’ meaning thereby that if a person does it, he gets the religious benefits but if he abstains himself from doing it, then he is likely to commit sins.\(^{24}\)

In its *mu’amlat* aspect, marriage is the only lawful means to fulfil the basic biological instinct to have sexual intercourse and procreation of children. Through the institution of marriage, *Shari’ah* has prescribed detailed rules for translating this response into a living human institution reinforced by a whole framework of legally enforceable rights and duties, not only of the spouses, but also of their offspring.

\(^{22}\) Reported in *Bayhaqi*.
\(^{23}\) Reported in *Sunan Ibn Majah*.
The judiciary also supports the sacramental nature of Muslim marriage in the case of Anis Begum v. Mohammad Istafa,\textsuperscript{25} although it is considered by many as an orthodox view. Chief Justice Sir Shah Sulaiman has tried to put a more balanced view of the nature of Muslim marriage by holding it both a civil contract and a religious sacrament.\textsuperscript{26} Further, it is worth mentioning here that Privy Council had also upheld the sacramental character of Muslim marriage in Shoharat Singh v. Jafri Begum\textsuperscript{27} by laying down that nikah (marriage) under Islamic Law is a religious ceremony.\textsuperscript{28}

Regarding the nature of Muslim marriage, Dr. Jung also holds the same view when he says that Muslim marriage, though essentially a contract is also a devotional act, its objects are rights of enjoyment and procreation of children and regulation of social life in the interest of the society.\textsuperscript{29} As it has become clear now that marriage is no purely a civil contract under Islamic Law but also a religious duty therefore, it becomes necessary to answer the question whether this religious duty is obligatory upon a Muslim or is merely recommendatory for him? The answer can be given in the light of the following:

- According to Imams Abu Hanifa, Ahmad ibn Hanbal and Malik ibn Anas, marriage is recommendatory; however in case of certain individuals it becomes wajib/obligatory.
- Imam Shaafi’i considers marriage to be nafl or mubah (preferable).
- The general opinion is that if a person, male or female fears that if he/she does not marry, he/she will commit fornication then marriage becomes ‘wajib’.
- If a person has strong sexual urges then it becomes ‘wajib’ for that person to marry.
- According to some Traditions of the Holy Prophet (PBUH), marriage should not be put off or delayed especially if one has the means to do so.\textsuperscript{30}

Thus, while describing the nature of Muslim marriage, it should be judged taking into consideration all its aspects. It cannot be denied that Muslim marriage is a contract but is also a sacred covenant. As an institution, marriage leads to the upliftment of man and is also a means for the continuance of the human race. The main aim of marriage is the protection of man from unchastity and foulness. Thus, marriage is so holy a sacrament that it has rightly

\textsuperscript{25} (1933) 55 AP 743.
\textsuperscript{26} Anis Begum v. Mohammad Istafa, (1933) 55 AP 743.
\textsuperscript{27} (1914) 17 BOMLR 13.
\textsuperscript{28} Mohammed Ahmad Qureshi, Marriage and Matrimonial Remedies: A Uniform Civil Code for India 43 (Concept Publishing Company, Delhi, 1978).
\textsuperscript{29} Dr. M.U.S. Jung, Dissertation on the “Development of Muslim Law in British India” at 1-2.
\textsuperscript{30} “Concept of Marriage in Islam”, available at: http://www.islamawareness.net/Marriage/marriage_article001.html (Retrived on September 26, 2016).
been called an act of *ibadat* (worship) for it preserves mankind free from pollution.\(^{31}\) Therefore, declaring it as merely a civil contract without being any religious importance attached to it unlike the concept of marriage under other religions of the world would be unjust.

### 3.2.3. Essentials of a Valid Muslim Marriage

It is always seen in Muslim communities that various kinds of ceremonies and social functions are performed during marriage and these ceremonies differ from one community to another. But these functions and ceremonial rites are not necessarily to be performed in order to make the marriage valid. These are only the ways of celebrating the occasion. A valid Muslim marriage can be solemnized even without any social function or ceremonial rites and no officiants or irksome formalities are required for this purpose.

There may be difference in views of the Muslim jurists on the essential elements of a marriage contract. For example, according to Imam Shafi’i, a Muslim marriage must contain four essential elements for being valid which are:

- i) Offer and acceptance;
- ii) Contracting parties (i.e., husband and wife);
- iii) Two witnesses; and
- iv) Presence of guardian.

While Imam Malik added to this list another essential element, dower and according to him the essentials for the validity of marriage contract are:

- i) Offer and acceptance;
- ii) Presence of guardian;
- iii) Contracting parties; and
- iv) Dower.

On the other hand, the Hanafi jurists regard just one element and acknowledge the same for the validity of marriage and that element is ‘offer and acceptance’. But generally, the following are the only essential conditions that must be satisfied for the validity of Muslim marriage:

1. **Capacity to Marry:**

Under Islamic Law, every person who is of sound mind and has attained the age of puberty\(^{32}\) can enter into a contract of marriage. A person is presumed to have attained the age of puberty on the completion of 15 years. Thus, the age of majority, under Islamic Law, is not 18 years for the purpose of marriage, dower and divorce and the age of puberty is considered as the age of majority in these matters. But in respect of other matters e.g., will, gift, *waqf*, guardianship, etc. the provisions of the *Indian Majority Act, 1875* shall apply which prescribe 18 years as the age of majority. *Hedaya* prescribes the earliest possible age of puberty for the boys to be 12 and for the girls to be 9 years\(^{33}\) but this cannot be treated as an absolute rule because the sexual competency depends upon various factors and varies from person to person. The Privy Council had made it clear by laying down the rule by which the age of puberty is to be determined in the case of *Mst. Atika Begum v. Mohd. Ibrahim*.\(^{34}\) The Privy Council held the following in the said case:

> “According to Muslim Law, a girl becomes major on the happening of either of the two events: (a). completion of her fifteen years of age; or (b). on the attainment of a state of puberty at an earlier period. The same rule may be applicable in respect of the age of a boy.”\(^{35}\)

Thus, it can be said that in the absence of any proof to the contrary, any person who has completed the age of 15 years shall be presumed to be a major and mature enough to give consent for the purpose of marriage, divorce and dower. So, those who have reached the age of puberty can enter into a valid marriage contract along with the satisfaction of other conditions specified by *Shari’ah*.

Under the *Prohibition of Child Marriage Act, 2006*,\(^{36}\) the marriage of a male who is below the age of 21 years and of a female who is below the age of 18 years is considered as a child marriage and is prohibited. The said Act prescribes the minimum age for boys as 21 years and for girls as 18 years for the validity of the marriage and the parties who violate the provisions of the Act shall be liable to be punished.\(^{37}\) Thus, if two Muslims marry before attaining the age prescribed under the *Prohibition of Child Marriage Act*, they are liable to be

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\(^{32}\) *Puberty* means the age at which a person becomes adult (i.e., he/she becomes capable of performing sexual intercourse and procreation of children).

\(^{33}\) Charles Hamilton (Transl.), *The Hedaya- Commentary on the Islamic Laws* 53 (Kitab Bhavan, New Delhi, 1994).

\(^{34}\) AIR 1916 PC 259: 36 Ind Cas 20.


\(^{36}\) Act No. 6 of 2007.

\(^{37}\) Sections 9-11 of the *Prohibition of Child Marriage Act, 2006*. 

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punished. However, the marriage between two Muslims who have attained puberty is valid though they have violated the provisions of the *Prohibition of Child Marriage Act, 2006*.

Though, under Islamic Law, the soundness of mind and the age of puberty is an essential element for the validity of marriage but the marriage of a lunatic or a minor contracted by his/her respective guardian on behalf of the lunatic or the minor is recognised as a completely valid marriage if certain conditions have been fulfilled. As a minor is considered incompetent to give a valid consent, the right to contract a minor’s marriage (known as the ‘guardianship in marriage’) belongs successively to the following persons:

Under *Sunni* law-

i) Father;

ii) Paternal grandfather (How high so ever);

iii) Brother and other male relations on the father’s side;

iv) Mother; or

v) The maternal uncle or aunt and other maternal relations.

Under *Shia* law:

i) Father;

ii) Paternal grandfather.

Under *Sunni* law, if a remoter guardian of the minor (whether male or female) contracts minor’s marriage in the presence and availability of a nearer guardian and such nearer guardian does not give consent to marriage, the marriage will be void. But if, after attaining the age of puberty, the parties to the marriage ratify the same, marriage will be valid. However, if the nearer guardian is absent due to his presence at such a distance which precludes him from acting, the marriage contracted by the remoter guardian will also be lawful. On the other hand, *Shia* law recognises a minor’s marriage, contracted by anyone except father or father’s father, as totally ineffective until it is ratified by the minor on the attainment of the age of puberty.  

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38 *Aiyesha v. Mohd. Yunus, 1938 PWN 656.*
In such cases where the minor’s marriage was contracted by his guardian, Islamic Law gives the option of puberty (*khyar-ul-bulugh*) to the party whose marriage was contracted by the guardian other than the father or father’s father.\(^{39}\)

**Khyar-ul-Bulugh (Option of Puberty)**

Where the marriage of a minor is contracted by the father or father’s father, the contract of marriage is valid and binding and it cannot be annulled by the minor on attaining puberty. But in cases, where a minor’s marriage is contracted by any guardian other than the father or father’s father, Islamic Law gives the minor the right to repudiate such marriage on attaining majority (i.e., age of puberty). This right is called *khyar-ul-bulugh* which means the ‘option of puberty’.

According to Mulla, the option of puberty is lost by the female who does not exercise her right immediately after attaining puberty, or on being informed of marriage if she was unaware of it. The option of puberty is also lost if the marriage has been consummated.\(^{40}\) However, the consummation against the will (free consent) of the woman will not validate the marriage.\(^{41}\) Under the *Dissolution of Muslim Marriages Act, 1939*, a woman can seek divorce on the ground of repudiation of marriage on the attainment of age of 15 years (age of puberty) but before the age of 18 years.\(^{42}\) In case of a male, however, the right to repudiate marriage continues until he has ratified such marriage either expressly or impliedly (e.g., by cohabitation or by payment of dower).\(^{43}\)

The option of puberty has been considerably modified by the *Dissolution of Muslim Marriages Act, 1939* as prior to the Act, a minor girl could not repudiate her marriage on the attainment of puberty if her marriage was contracted by her father or grandfather. But under Section 2(7) of the said Act, the woman whose marriage was contracted when she was a minor girl by her father or grandfather, she can obtain a decree for divorce from the court if the following conditions are satisfied:

i. The marriage took place before the age of fifteen years;

ii. She repudiated the marriage before attaining the age of eighteen years; and

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39 *Supra* Note 5 at 73.
42 Section 2(7), *Dissolution of Muslim Marriage Act, 1939*.
iii. The marriage has not been consummated.

Under the classical *Hanafi* law, in case where the minor’s marriage was contracted by father’s father, such a marriage cannot be cancelled by the minor on attaining puberty except on the proof that:  

a. Marriage was contracted fraudulently or negligently; or  
b. Dower fixed is improper; or  
c. Inequality (in status, etc.) of the other partner of the minor.

2. Proposal and Acceptance:

The second essential for the validity of Muslim marriage is that there must be an offer (*ijab*) by or on behalf of one of the parties to the marriage and its acceptance (*qubool*) by or on behalf of the other party to the marriage. The *ijab* (offer) and *qubool* (acceptance) must be expressed in one and the same meeting only otherwise the marriage will not be valid. A proposal made at one meeting and its acceptance made at another meeting does not result into a valid Muslim marriage. Acceptance may be given either in oral or written form. When it is reduced in writing, it is known as *kabin-nama*.  

According to *Hanafi* jurists, no specific term is required for offer and acceptance, however, an expression which clearly expresses the purpose of the parties is sufficient. However, there are certain other terms such as *qabiltu*, *raditu*, *tazawwajtu*, etc. On the other hand, there is a difference of opinion on this point between the *Shafi’i* and *Hanabali* jurists and they do not permit to convey offer from words other than *ziwaj* and *nikah* because according to them, these terms convey intention in clear and unequivocal terms.

In the case of *Rashida Khatoon v. S.K. Islam*, a man started cohabiting with a woman on the false assurance of marrying her. After sometime, a male child was born to them. Later, she claimed the status of wife through the court of law and on the question before court that whether their marriage was a valid one, the Orrisa High Court cited with approval the paragraph of Mullah’s book:

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44 *Supra* Note 5 at 74.  
46 M. T. Mansoori, *Family Law in Islam 74* (Shariah Academy, Islamabad, 2009).  
48 AIR 2005 Ori. 57.
“It is essential for the validity of marriage that there should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other party, in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Muslims. The proposal and acceptance must both be expressed at one meeting; a proposal made at one meeting and an acceptance made at another meeting does not constitute a valid marriage. Neither writing nor any religious ceremony is essential.”

The court, however, held that in the instant case the assurance of marrying in future does not constitute a valid marriage as there was no proposal and acceptance.

3. Free Consent of the Parties:

The Holy Qur’an refers to marriage as a *mithaq* i.e., a solemn covenant or agreement between husband and wife. Since, it is not possible to reach out to any agreement between the parties unless they freely give their consent to it, so also, a marriage can be contracted only with the free consent of the parties to the marriage. Freedom in choosing husband/wife is a principle to which Islam has paid much attention, for satisfactory conjugal life depends on intellectual, spiritual and moral compatibility between the spouses. This compatibility can exist only if both the parties are free in their choice and choose each other with their own free will which is totally free from any undue influence or coercion. Otherwise their conjugal life cannot be expected to be smooth and satisfactory. In Islam, there is no place for forced marriages.

Islam regards free consent of the parties to the marriage as absolute necessity for the validity of marriage. In case, marriage has been contracted without the free consent of the parties, it will be null and void under *Shari’ah*. Islam considers the marriage of a girl who is of sound mind and has attained the age of majority as completely invalid if it has been performed without taking her prior consent. Also, where the consent has been obtained by force or fraud, the marriage shall be invalid, unless the party whose consent has been so obtained ratifies the marriage. Islam also lays down that where the marriage of the girl has been contracted

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50 Supra Note 24 at 115.
without her free consent and it has been consummated against her will, such a consummation will not render it from an invalid marriage into a valid one.\textsuperscript{53}

There may arise some situations where the consent cannot be said to be free i.e., if the consent is obtained through compulsion or through fraud or through mistake of the facts. When the consent is given under any compulsion, force, threats or coercion, then it renders the marriage of the parties invalid under all the Schools of Islamic Law except the Hanafi School.\textsuperscript{54} Only the Hanafi School treats such a marriage as a valid marriage as an exceptional rule.\textsuperscript{55} Where the marriage has been contracted by obtaining the consent of either of the party to marriage by fraud, then such a marriage shall be voidable at the option of such party whose consent was so obtained. If the person who has been defrauded chooses to repudiate the marriage contract, then he will have to do so as soon as the fact of being defrauded comes to his knowledge. But if he thinks that there is no harm in being deceived, then he shall be presumed to have impliedly ratified the marriage and the marriage will become valid. In case, such a person chooses to repudiate the marriage, then he can reject the marriage contract altogether and thus, the marriage will become invalid.\textsuperscript{56}

**Relevance of Woman’s Consent for Marriage in the Light of Holy Qur’an and Sunn’ah**

The consent of both the parties to the marriage (i.e., man and woman) forms an essential for the validity of Muslim marriage and thus, the Holy Qur’an has given to women a substantial right in choosing their life partners. It lays down:

> “Do not prevent them from marrying their husbands when they agree between themselves in a lawful manner.”\textsuperscript{57}

However, Imam Malik (one of the four great imams of the Sunni Schools of Islamic Jurisprudence) gives a slightly restrictive interpretation to this verse and makes the choice of partner by a Muslim girl subject to the over-ruling power or ijbar of her father or guardian in the interests of the girl herself. Practically, it has always been seen that in Muslim communities, the girls are never given the chance of choosing a suitable partner for them and


\textsuperscript{54} Faiz Hassan Badrudin Tyabji, Muhammadan Law 59 (N. M. Tripathi, Bombay, 1940).

\textsuperscript{55} Dr. Mufti Samiya Tabasum, Status of Women in India- Law Relating to Marriage, Divorce and Maintenance 78 (Regal Publications, New Delhi, 2013).

\textsuperscript{56} Sabrunnissa v. Sabdu Sheikh, 61 Cal 814.

\textsuperscript{57} Holy Qur’an, II.232.
in many cases they are not even asked about their consent before the fixation of their marriage. This seems similar position as it used to be in the pre-Islamic Arabian society where the girls could be married by their guardians to anyone whom they wanted to do so and women had no say in their own marriages. Today, one finds everywhere that if the girls happen to make a choice in matters of their marriage with their free consent, they are condemned and in some cases even murdered in the name of family honour. Still most of the families think that the consent of the girl is not an essential for the marriage contract and it is the parent’s responsibility to choose a life partner for her. They name such marriages as arranged marriages which cannot at all be considered as wrong. The point here is that there is a huge difference between the arranged marriages and forced marriages. The parents can select a boy for their daughter and obtain her consent but if she refuses to marry the same boy then Islamic Law does not allow them to contract such a marriage forcefully. As it has already been mentioned previously that there is no place for forced marriages in Islam and it completely rejects the idea of contracting such marriages where the girls do not consent freely, such marriages are invalid under Islamic Law. Here, it is very essential to mention that a forced marriage is different from an arranged marriage, which is an institution based on trust and consent.\textsuperscript{58}

It may sometimes happen, especially in the present society where the western culture has enrooted itself very deeply, that in her immaturity or over-zealousness, a girl may want to marry a man about whom she has distorted information or who does not possess good character or who lacks proper means of livelihood. In such a case, it is better, or rather incumbent upon the girl’s father or guardian, that, in the wider interests of the girl, he restrains her from marrying such a worthless man and finds a suitable person to be her husband. But in such a case also, the father or the guardian must try to make the girl understand that such a marriage will ruin her happiness throughout her life but still he has got no right to contract her marriage with a person of his choice without her free consent. Generally speaking, such marriages arranged by fathers and guardians work better than a marriage brought about through western courtship, but only if they have been solemnized with the free consent of the girls. While dealing with the importance of a female’s consent in her marriage, the Holy Prophet (PBUH) is reported to have said:

\textsuperscript{58} Supra Note 52 at 263-267.
“When a man gives his daughter in marriage and she dislikes it, the marriage shall be annulled.”

It is reported in many books of Traditions that once a virgin girl came to the Holy Prophet (PBUH) and said that her father had married her to a man against her wishes. The Holy Prophet (PBUH) gave her the right to repudiate the marriage. Therefore, it becomes necessary to mention here that hadith of the Holy Prophet (PBUH) for making it clearer:

> Once a woman, named Khansa bint Khidam, came to the Holy Prophet (PBUH) and complained, “My father has forced me to marry my cousin in order to raise his own status (in the eyes of the people).” The Holy Prophet (PBUH) told her that she was free to dissolve this marriage and choose whoever she wished to marry. She replied, “I accept my father’s choice, but my aim was to let the women know that fathers have no right to interfere in the marriage.”

Thus, it is evident from the hadith of the Holy Prophet (PBUH) that a father has got no right to marry his daughter to a man she hates and does not approve of. He must, first of all, have her opinion of the man that whether she agrees or disagrees to whom she is going to marry. If she says, “no” then the father has no authority or power (whatever the situation may be) to force her to marry someone with whom she does not want to marry. Hence, it is well settled law in Islam that a female has the right to accept or reject her marriage proposals. Her consent is a pre-requisite for the validity of the contract of marriage according to the Holy Prophet’s (PBUH) teachings. It follows that if by ‘arranged marriage’ is meant marrying the girl without her consent, then such a marriage is not at all allowed by the Islamic Law and is totally nullifiable, if she wishes to do so.

4. Absence of a Legal Disability/Prohibition:

Islamic Law lays stress that the marriage contract must not be against the interests of the society. Therefore, it prohibits the marriage between certain persons and also contracted in certain circumstances. These are known as legal disabilities which, if present, make the marriage contract invalid or irregular, depending upon the circumstances under which the marriage takes place. These disabilities/prohibitions can be classified into two classes: A). Absolute and B). Relative prohibitions.

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59 Reported in Sunan Abu Dawud.
60 Ibid.
A). **Absolute Prohibitions:** The marriage contracted in contravention to the absolute prohibitions is invalid.\(^{61}\) The following are considered as absolute prohibitions:

1). **Prohibited Degrees of Relationship**

Islamic Law prohibits the marriage between the persons who are related to each other through blood (i.e., consanguinity) or come within certain others relationships (affinity, fosterage). The prohibited relationships are the following:

**(a) Consanguinity:**

‘Consanguinity’ means ‘blood relationship’ and a marriage with a woman who comes within the relationship of consanguinity is invalid and children born out of that wed-lock are illegitimate.\(^{62}\) Islamic Law prohibits a man from marrying the following females who are related to him through consanguinity:

i) His mother or grandmother (however high so ever); or  
ii) His daughter or granddaughter (how low so ever); or  
iii) His sister (whether related through full blood, half blood or uterine blood); or  
iv) His niece or great-niece (how low so ever); or  
v) His aunt (paternal/maternal) or great-aunt (how high so ever).

**(b) Affinity:**

‘Affinity’ means ‘related through marriage’ and Islamic Law prohibits a man from marrying certain female relatives due to nearness of relationship through affinity. Such marriages are invalid under *Shari’ah*.\(^{63}\) Under this disability, a man is prohibited from marrying the following women:

i) His wife’s mother or grandmother (how high so ever) or  
ii) His wife’s daughter or granddaughter (how low so ever) or  
iii) His father’s wife or paternal grandfather’s wife (how high so ever); or  
iv) Wife of one’s own son or son’s son or daughter’s son (how low so ever).

\(^{61}\) *Supra* Note 31 at 51.  
\(^{62}\) *Supra* Note 33 at 27.  
\(^{63}\) *Id.* at 28.
(c) Fosterage:

‘Fosterage’ means ‘the milk relationship’ i.e., when a child is breast-fed/suckled by a woman other than his own mother, she becomes the foster-mother of that child. Under Islamic Law, a man is prohibited from marrying certain persons having foster relationship. Shia jurists hold the view that fosterage includes the same limits of prohibited relationship for marriage as consanguinity. Thus, a man is prohibited from marrying the following females coming within the foster relationship:

i) His foster-mother or grandmother (how high so ever); or
ii) His foster-sister (daughter of foster mother).

However, the Sunni jurists differ in this point and do not hold the same view as that of Shia jurists. According to Sunni law, there are certain exceptions to the general rule of prohibition on the ground of fosterage and a valid marriage may be contracted with:

i) Sister’s foster mother; or
ii) Foster-sister’s mother; or
iii) Foster-son’s sister; or
iv) Foster-brother’s sister.

Shia jurists do not recognize the exceptions permitted by the Sunnis that have been mentioned above.

2). Polyandry

‘Polyandry’ means ‘marrying more than one husband’. It is a form of polygamous marriage in which a woman marries more than one husband at a same time. Islamic Law strictly prohibits polyandry i.e., a woman is not at all allowed to marry a second husband as long as her marriage with the first husband subsists and the husband is alive. If any woman contracts a second marriage in contravention of this prohibition, her marriage will be invalid and she will also be liable to punishment for bigamy under Section 494 of the Indian Penal Code, 1860.

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64 Asaf A.A. Fyzee, Outlines of Muhammadan Law 100 (Oxford University Press, New Delhi, 2005).
65 Section 494, I.P.C.: Marrying again During Lifetime of Husband or Wife-
B). Relative Prohibitions: Islamic Law also recognises some relative prohibitions which are not absolute but only relative and these relative prohibitions do not render the marriage invalid but only make it irregular. The moment, the irregularity caused due to the presence of relative prohibitions is removed, the prohibition ends and the marriage becomes valid. However, under Shia law, a marriage that has been contracted against any of the relative prohibition is either invalid or perfectly valid because Shias do not recognise an irregular marriage.66 Islamic Law provides the following relatives prohibitions:

1). Unlawful Conjunction

Under Islamic Law, a man is prohibited from marrying two women at the same time who are related to each other by consanguinity, affinity or fosterage, who could not have lawfully inter-married each other if they had been of different sexes. For example, a man cannot marry his wife’s sister during the subsistence of his marriage with his wife. But if his wife dies or he divorces her, he can marry her sister after the same and the marriage will be a valid one. Marrying two real sisters at the same time is an unlawful conjunction under Islamic Law. Under Sunni law, such a marriage will not be invalid but only irregular and can be validated by the husband by divorcing one sister.

In India, various High Courts have held different views on this point. For example, the Chief Court of Oudh and the High Courts of Bombay, Madras and Lahore have held the view that the marriage with two sisters at the same time is irregular67 but the Calcutta High Court has held such a marriage to be an invalid marriage.68

Shia law considers such a marriage invalid, that has been contracted in violation of the rule of unlawful conjunction. However, under Shia law, a Muslim cannot marry his wife’s aunt but he can validly contract a marriage with his wife’s niece with the wife’s permission.69

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66 Supra Note 55 at 92.
67 Supra Note 64 at 113.
68 Azizunnissa Khatoon v. Karimunnissa Khatoon, ILR (1895) 23 Cal 130.
69 Supra Note 43 at 289.
2). Marrying a Fifth Wife (Polygamy)

‘Polygamy’ means ‘marrying more than one wife’. Islamic Law permits polygamy with a restriction of marrying maximum four wives at a time. This means that a Muslim is allowed to have four wives at the same time. But if he marries the fifth time when he already has four wives, his marriage with the fifth wife will be irregular under Sunni law and invalid under Shia law. Thus, if the husband, under Sunni law, divorces one of his wives from his earlier marriages or if one of his wives dies, his marriage with the fifth wife will become valid.  

In India, however, if a Muslim man marries or gets his marriage registered under the Special Marriage Act, 1954, he cannot marry a second wife during the lifetime of his spouse.

3). Absence of Proper Witnesses

Islamic Law requires that the marriage must be contracted in the presence of proper and competent witnesses. Sunni law requires that the proposal and acceptance must be made in the presence of two male witnesses who must be Muslim of sound mind and must have attained puberty or one male and two female witnesses who must be sane, adult and Muslim. However, the absence of the witnesses does not render the marriage invalid but only makes it irregular which can be made valid by removing the same impediment.

On the other hand, under Shia law, witnesses are not compulsory. Often, it has been seen that all the writers use the word ‘necessary’ instead of the word ‘compulsory’ and there is a thin line of differentiation between the two words. Thus, in any case, if the witnesses are not available, then also a valid marriage can take place and Shia law does not render a marriage invalid only on the ground of the absence of witnesses as there is no concept of irregular marriage under the same and they recognise marriage either to be a valid or a void one. Hence, the presence of witnesses is not an essential requirement which cannot be done away for the purpose of the validity of marriage. But this is generally an exception and Shias too solemnize their marriages in the presence of two witnesses.

70 Supra Note 55 at 93-96.
71 Section 44, The Special Marriage Act, 1954: Punishment for Bigamy-
“Every person whose marriage is solemnized under this Act and who, during the lifetime of his or her wife or husband, contracts any other marriage shall be subject to the penalties provided in section 494 and section 495 of the Indian Penal Code, for the offence of marrying again during the lifetime of a husband or wife, and the marriage so contracted shall be void.”
72 Supra Note 55 at 100.
4) Difference of Religion (Marriage with Non-Muslim)

There is a difference between Sunni and Shia law regarding the marriage with a non-Muslim. Under Sunni law, a man can marry a Muslim woman or a Kitabia but he cannot marry an idolatress or a fire worshiper. ‘Kitabia’ means a person who believes in a revealed religion that possesses a Divine Book viz. Judaism and Christianity.\(^{73}\) Thus, a Sunni Muslim male can validly enter into a marriage contract with a Christian or a Jew female but not with a Hindu, Sikh, Buddhist or a Jain female. However, a marriage, with an idolatress or a fire worshiper is merely irregular and not invalid.\(^{74}\)

On the other hand, a Sunni female cannot marry a non-Muslim male. But the marriage of a Muslim female with a non-Muslim male (whether he is a Christian or a Jew or an idolatress or a fire worshipper) is not invalid but merely an irregular marriage which can be validated by conversion of the husband to Islam. However, there is difference of opinion among the writers of Islamic Law in this regard. For example, according to Mulla, a marriage between a Muslim female and non-Muslim male is irregular\(^{75}\) but according to Fyzee, such a marriage is totally invalid.\(^{76}\)

While Shia law regards the marriage of a Muslim with a non-Muslim as invalid. Thus, both spouses are required to be Muslims under Shia law for the validity of the marriage. But Shia law permits a man to contract a valid muta marriage with a Kitabia and even with an idol or fire-worshipper.\(^{77}\)

However, in India, a marriage between a Muslim and a non-Muslim can validly take place under Special Marriage Act, 1954. If a Muslim male marries or registers his marriage under Special Marriage Act, 1954, then the law bars him from marrying a second wife during the subsistence of the first marriage\(^{78}\) and also the parties cannot be governed by their personal laws in their personal matters after that.

\(^{73}\) Supra Note 54 at 142.
\(^{74}\) Supra Note 55 at 96.
\(^{75}\) Supra Note 43 at 298.
\(^{76}\) Supra Note 64 at 97.
\(^{77}\) Ibid.
\(^{78}\) Section 44 of the Special Marriage Act, 1954 (Act No. of 1954).
5) Marriage during *Iddah*

Islamic Law prohibits a woman who is undergoing *iddah* from marrying during that specific period. The purpose behind that is to ascertain whether she is pregnant by earlier husband, so as to avoid confusion of parentage of the child. The period of *iddah* varies in different situations and depends upon the mode of dissolution of marriage or the confirmation of pregnancy. Thus, the period of *iddah* that has been prescribed under Islamic Law for a woman to observe is as under:

a. In case of the termination of marriage by divorce, time period of *iddah*, as prescribed by Islamic Law, is three lunar months or three menstrual courses;

b. In case, the marriage gets terminated by the death of husband, then the widow has to observe an *iddah* for a time period of 4 months and 10 days; and

c. In case where the woman is pregnant, the time period during which she will have to observe *iddah* gets extended till the delivery of the child or miscarriage (if so happens unluckily).

Under *Sunni* law, a marriage that takes place with a woman who is undergoing *iddah* is irregular and not invalid while, *Shia* law considers such a marriage with a woman who is undergoing *iddah* as invalid.

3.2.4. Enforcement of the Conditions of Marriage:

Islamic Law permits various conditions to be laid down in the contract of marriage if the parties so wish. But these conditions must be reasonable and not opposed to the spirit of *Shari’ah*. Such conditions may be appended to the marriage contract which may be ante or post nuptial. The parties are allowed to modify or rescind these conditions any time they want to do so. Regarding the insertion of conditions that can be fixed by the parties and can be inserted in marriage contract, the opinion of Muslim jurists is divided. For example, the *Hanafi* and *Maliki* jurists divide conditions into valid and irregular conditions, however, their criteria varies. While *Shafi’i* jurists divide conditions into valid and invalid. According to these jurists, valid conditions are those that are permissible and are binding upon the parties whereas the invalid conditions are those that render the contract of marriage invalid.

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79 ‘*Iddat*’ is the period during which it is incumbent upon a woman, whose marriage has been dissolved by divorce or death of her husband, during which she must abstain from marrying any other man.

80 *Supra* Note 64 at 102.
Moreover, Hanbali jurists define two conditions, one that are collateral to the contract and they entail some lawful advantage to one of the two contracting parties, for instance, a condition that the husband will not marry another women or he will not take her away from her hometown, etc. Such conditions are completely binding on the parties to the marriage. Further, the first three Schools of Islamic Jurisprudence are restricted on the acceptability of extrinsic conditions and stipulations in marriage contract while the Hanbali School is liberal in this issue.\textsuperscript{81}

As already mentioned above that Muslim marriage is a contract between the parties to the marriage and thus, reasonable conditions can be attached to the matrimonial contract. Therefore, in case of breach of any such condition, the court shall have the jurisdiction to enforce the same. But the conditions in order to be enforceable by the court should not be illegal or against the public policy. Some of the examples of legal conditions may be given below: \textsuperscript{82}

i) The condition of non-removal of wife by her husband from the conjugal domicile without her consent;

ii) Establishment of matrimonial home at a certain place;

iii) A fixed amount of maintenance;

iv) Condition of maintenance of children of wife’s former marriage by the second husband;

v) Non-prevention of wife and her relations from visiting each other;

vi) The condition of earning livelihood and maintenance of wife by the husband and also residing in a house approved by her parents. In case of failure of husband in keeping all the conditions mentioned in the agreement, the wife would be entitled to claim divorce was also held to be valid,\textsuperscript{83}

vii) A stipulation of wife’s desertion of her husband’s residence in case of ill treatment;

viii) Restriction on second marriage by the husband;

ix) Fixation of certain amount of dower as prompt which is to be paid at once and the payment of the rest part (deferred dower) on the dissolution of marriage; or

x) Prohibition on the consummation of marriage up to a certain period of time.

\textsuperscript{81} Supra Note 52 at 263-267.
\textsuperscript{82} Supra Note 24 at 133-134.
\textsuperscript{83} Mohd. Yasin v. Mumtaz Begum, AIR 1936 Pesh. 195.
3.3. Woman and Law of Divorce under Shari’ah

Women, in pre-Islamic Arabian society were totally at the mercy of men in matters of their marriage and divorce. She could be married to any one whom her father or the guardian wanted to. Not only that she had no say in her marriage but also she had no right to repudiate her marriage if she was not happy with the same. It was a power in the hands of the husband to dissolve the marriage whenever he wished so. He could do so without assigning any reason for the same and not only this, he could divorce his wife as many times as he wanted to do so and could also take her back again and again. In some cases, he could also put a condition on his divorced wife that she would not marry anyone else without his prior permission. Also, the *khula* at that time was not a divorce initiated by the woman but it was a tool in the hands of a father by which he could get her daughter back by paying back to her husband. At that time, Islam came forward to protect women and save them from such discrimination in the hands of men. Islam reformed the law of divorce and gave women the right to initiate divorce instead of living a miserable life with her husband in a broken marriage. Thus, Islamic Law of divorce seems to be based on the modern-day ‘breakdown theory’.

Islam recognises the necessity of divorce in cases where marital relations have been poisoned to such a degree which makes it impossible for the spouses to stay together in a harmonious and peaceful manner. But, at the same time, Islam does not believe in the unlimited power and opportunities for divorce on frivolous and unimportant grounds because any undue increase in the facilities of divorce would destroy the stability of the family life. Therefore, while allowing divorce on genuine grounds, Islam has taken great care to introduce checks and balances designed to limit the use of available facilities. The permission has been given to both, men and women, to obtain a release from the bond of marriage in cases of absolute necessity. The Holy Prophet (PBUH) has made it clear that Islam does not regard it as desirable.  

84 The Holy Prophet (PBUH) has been reported to have said:

“Of all the permissible things in Islam, divorce is the most hateful act in the sight of Allah.”  


He further said in this regard:

“He further said in this regard: “Make nikah (but) do not give talaq because talaq shakes the Arsh of Allah Ta’ala.”

As mentioned earlier also that Islamic Law purports marriage as a highly revered institution for mankind so that the husband and wife may find peace and tranquillity in each other’s company but it appears sometimes that some couples are not compatible enough with each other, which makes it very difficult for them to live a peaceful and happy life together. Under Islamic Law, it is only is such cases that the recourse to divorce should be taken otherwise it must be avoided.

3.3.1. Philosophy of Divorce in Islam

It cannot be denied that Islam granted the right of divorce to women at a time when other communities would not have even thought of doing so. But this does not mean that Islamic Law encouraged divorce. Nature demands that man and woman live their lives together according to the principles of Shari’ah within the bonds of marriage. Islam regards marriage as a civil contract entered into by two persons (male and female) by mutual consent and also a highly sacred bond to which great religious and social importance is attached. It is an extremely desirable institution, and hence, Islam’s conception of marriage is the rule of life and divorce is only an exception to that rule. Although Islamic Law permits divorce, it lays great emphasis on its being a concession and a measure to be resorted to only when there is no alternative. The Holy Prophet (PBUH) has said in this regard:

“Of all things permitted, divorce is the most hateful in the sight of Allah.”

Although Islam gives great importance to the institution of marriage but it does not force anyone to remain into a relationship which is a burden for him/her. In cases, where the couples are not happy together and they have tried their levels best but still they find that it will be quite impossible for them to live a happy life together, in such cases, Islam permits to break that relationship through divorce and move on, instead of making life a hell by staying together. Not every divorce is commendable in Islam. Some cases of divorce are disliked or even forbidden because they entail destruction of the family. Divorce, according to Islamic Law, is similar to a painful surgery; the sane human being endures the pains of his wound,

87 Maulana Wahiduddin Khan, *Women in Islamic Shari’ah* 103-104 (The Islamic Centre, New Delhi, 2010).
88 Reported in *Sunan Abu Dawud*. 
even an amputation, in order to protect the remaining parts of the body to keep away greater injury. If the aversion between husband and wife is undiminished and the means of reconciliation and attempts by reconciling parties fail to bring them together, divorce then is the bitter medicine which has no alternative. This is the reason why if there can be no reconciliation, there is divorce. The Glorious Qur’an says:

“But if they separate (by divorce), Allah will provide abundance for every one of them from His Bounty.”

It has already been stated above that the structure of Islamic Law of divorce is based on the theory of ‘irretrievable breakdown of marriage’ which is being adopted by the modern laws of matrimonial disputes. Tahir Mahmood explains this correctly when he says that under Islamic Law, the breakdown theory of divorce allows the dissolution of marriage, without prescribing any specific grounds, at the instance of husband or the wife or by mutual consent. It may be submitted further that although Islam allows divorce but it also discourages human beings from taking recourse to it unless there is a dire need for the same. In such cases also, the first recourse that should be taken is to try their level best for reconciliation. If the attempts for reconciliation fail, only then the divorce should be resorted to as the last recourse. The Holy Prophet (PBUH) has set an example by never divorcing his wives despite occasional provocations. By doing so, he (PBUH) has tried to inspire religious awe against divorce by declaring it as the most detestable in the sight of Allah. Further, by declaring divorce as abghad al-mubahat i.e., most detestable act of all the legally permissible things, the Holy Prophet (PBUH) has further given a stern warning against divorce in the following words:

“Enter into marriage and do not dissolve it. Allah hates those men and women who change their bed-partners for sake of pleasure.”

In case of differences between the husband and wife, Islamic Law prescribes for the bilateral reconciliatory measures essentially before taking recourse to divorce as a last measure. The Holy Qur’an says in this regard:

“And if you fear dissention between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation,

89 Holy Qur’an, IV:130.
91 Reported in Mishkat Abu Da’ud.
Allah will cause it between them. Indeed, Allah is ever knowing and Acquainted (with all things).”

In this regard, the Holy Prophet (PBUH) is also reported to have said:

“...Let the case be referred to two Muslim arbitrators, free and just, one chosen from the family of each of the parties; and they shall see, whether in that particular case reconciliation or separation is desirable; and their decision shall be binding upon them both.”

It may be submitted thus, that the adoption of reconciliation is an excellent means of settling disputes between the husband and wife without giving too much publicity to the same. But it is pitiful that Muslims do not resort to it universally, as has been prescribed by the Islamic Law. The reason behind the selection of arbiter from each side is that they would know the idiosyncrasies of both parties and therefore, would be able to effectively bring out the proposed reconciliation between the spouses. But if the arbiters fail to bring out reconciliation between the husband and wife through all the means and come to the conclusion that the marriage between the spouses has been broken down up to such an extent that it would be absolutely impossible for them to stay with each other, only then they must suggest for a divorce. Otherwise, all the sincere and possible efforts should be made to settle the dispute between husband and wife through the means of reconciliation. Thus, though the necessity for divorce is recognised under Islamic Law in cases where the marriage has been poisoned to such a degree which makes a peaceful home life impossible, Islam does not believe in providing unlimited opportunities for divorce on just frivolous grounds.

Islam considers any undue increase in the facilities of divorce as a means of destroying the stability of family life. Therefore, Islam has taken great care of putting checks and balances on the power of divorce while allowing certain grounds for divorce. These checks and balances on the power of divorce have been designed to limit the use of facilities that are available under Islamic Law of divorce. Therefore, it becomes crystal clear that only where the marital relationship between the husband and wife was ruptured past, leaving no scope for repairs, Islamic Law keeps a room for parting ways in a respectful manner. Islamic Law considers divorce as a social evil since it disintegrates the family unity. The philosophy underlying divorce under Islamic Law is that it is better to wreck the unity of the family than

92 Holy Qur’an, IV: 35.
93 As cited by Dr. Ahmad A. Galwash, The Religion of Islam 135 (Conveying Islamic Message Society, Alexandria, 1940).
to wreck the future happiness of the parties by binding them to a companionship that has become odious.94

Almost all the social scientist and marriage councillors agree with the fact that instead of staying in an unhappy marriage, it is better and healthier for a constantly squabbling couple to part ways. In the modern age, legal systems of various countries have also accepted this truth grudgingly that if the marriage has broken down irretrievably then let there be a divorce. Also, the British legal system incorporated the law of “breakdown theory” of divorce in 1969 and Indian Law Commission also recommended the same in the year 1978. While other societies have realised this fact only in the present century, Islam provided this escape-route to relief, liberty and sanity to the spouses, whose marriage has turned into an unending nightmare, fourteen centuries ago.95

3.3.2. Modes of Dissolution of Marriage under Shari’ah

The dissolution of marriage under Islamic Law may take place either by the act of God or by the act of the parties.

i) Dissolution of Marriage by the Act of God

The marriage of a Muslim gets dissolved by the act of God by way of death of one of the spouses. Death of the husband or wife during subsistence of marriage dissolves the marriage immediately under all the personal law systems. The very fact of the death of any party to the marriage is sufficient to terminate the marriage.

ii) Dissolution of Marriage by the Act of the Parties

The marriage under Islamic Law may also be dissolved by the act of the parties. When the marriage is dissolved by the act of the parties, it is known as divorce.

95 Parwez Hafeez, “Talaq is as dirty a word for Muslim men as it is for women” in The Asian Age 46 (23 August, 1995).
Classification of Divorce under Islamic Law

Before getting into the details of the dissolution of marriage by the act of the parties, it is imperative to have a better understanding of classification of divorce under the principles of Islamic Law.

Thus, Islamic Law classifies divorce in the following four categories:

A. Divorce at the instance of the husband;
   1. *Talaq* (Repudiation);
   2. *Ila* (Vow of Continence);
B. Divorce at the instance of the wife;
   1. *Talaq-e-Tafweez* (Delegated divorce);
   2. *Khula* (Redemption).
C. Divorce by mutual consent; and
D. Divorce through judicial process.
   1. *Lian* (False Imprecation);
   2. *Fasakh* (Rescission).

**A. Divorce at the Instance of the Husband**

1. **Talaq (Unilateral Divorce):**

**Concept and Meaning**

‘*Talaq*’ is an Arabic word which means ‘the removal of any restraint’. Literally, it means ‘untying the knot’ or ‘being released from a covenant’. It is a derivative of the word ‘*itlaq*’ which means sending away or untangling the knot of marriage. Later is a technical meaning. This word was commonly in use in the Arabian society during the *jahiliya* period which essentially means ‘leaving’ or ‘giving-up’. Hence, *talaq* is an act of repudiation of marriage

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* Supra Note 31 at 82.
by the husband in exercise of his power to do so, which has been conferred upon him by Islamic Law.\(^97\)

Under Islamic Law, a man can dissolve his marriage with his wife unilaterally at his will, even without assigning any reason for the same.\(^98\) The approval of wife is not necessary for divorce to be valid.\(^99\) Under Sunni law, a talaq pronounced by the husband under compulsion or jest or a mere slip of tongue is regarded as a valid divorce\(^100\) and thus, the intention of the husband is consequential.\(^101\) But under Shia law, such a divorce is not valid. Divorce can take place even without the presence or knowledge of the wife. A talaq pronounced during the death illness (marz-ul-maut) shall also be a valid divorce.\(^102\)

No particular form of words is prescribed for effecting a talaq. If the words are express (saheeh) or well understood as implying a divorce, no proof of intention is required. If the words are ambiguous (kinayat), then the intention must be proved.\(^103\) In a case before the Calcutta High Court, the husband merely pronounced the word ‘talaq’ before a family council and this was held to be invalid as the wife was not named.\(^104\) The Madras High Court has also held that it is sufficient that the words should refer to the wife.\(^105\) The talaq pronounced in absence of the wife takes effect even though not communicated to her, but for the purpose of dower, it is necessary that it should come to her knowledge.\(^106\)

A man may divorce his wife by pronouncing either revocable or irrevocable divorce. Marriage does not get dissolved immediately on the revocable divorce until the expiry of the period of iddah but an irrevocable divorce breaks-off the marriage tie immediately on such pronouncement.

**Essentials of a Valid Talaq**

Islamic Law lays down some essential conditions which must be satisfied for the validity of talaq. There is a difference of opinion among the jurists of Shia law and Sunni law on some

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\(^{99}\) Moonshee Buzloor Rahim v. Laloo Buxtoon Nisa, 8 MIA 397.

\(^{100}\) Saiyed Rashid Ahmad v. Mst Anisa Khattun, AIR 1932 P.C. 25.

\(^{101}\) Ghansi Bibi v. Ghulam Dastagir (1968) 1 Mys. L.J. 566.

\(^{102}\) Supra Note 24 at 169.

\(^{103}\) Ma Mi v. Kallander Ammal (1927) 29 BOMLR 800.

\(^{104}\) Furzund Hussein v. Janu Bibe (1878) 4 Cal. 588.

\(^{105}\) Asha Bibi v. Kadir (1909) 33 Mad. 22.

points regarding the essentials of a valid *talaq*. For the validity of divorce pronounced by the husband (under his power to divorce his wife unilaterally), it must fulfil the following conditions:

1) **Capacity:**

Every Muslim who has attained the age of puberty and is of sound mind may validly pronounce *talaq* on his wife. It is not incumbent upon him to state reasons for his action. Thus, a minor or a person of unsound mind cannot pronounce a valid *talaq* under Islamic Law and if he pronounces *talaq*, it will be void and ineffective. However, a lunatic may pronounce *talaq* on his wife during his lucid intervals and it will be completely a valid *talaq*. Under Islamic law, a guardian cannot pronounce *talaq* on behalf of the minor. However, in the interest of an insane husband, his guardian may pronounce *talaq* on his behalf. A dumb man may also effect *talaq* by intelligible signs. Where the insane person has no guardian available, the *talaq* may be effected by the *qazi* or judge on his behalf.\(^{107}\) Regarding the capacity of the wife, against whom the *talaq* has to be effected, Ameer Ali expresses the following views:

> “...When she (wife) is of such tender age (minor) as to be unable to comprehend the legal consequences flowing from the act of repudiation, or does not possess discretion, a valid *talaq* cannot be effected against her.”\(^{108}\)

2) **Free Consent:**

A *talaq* to be valid must be pronounced by the husband with his free consent under all the Schools of Islamic Jurisprudence except under *Hanafi* law. *Hanafis*, on the other hand, regard a *talaq* pronounced under compulsion, undue influence, voluntary intoxication, coercion or fraud, etc. as a valid *talaq*. A *talaq* pronounced under involuntary intoxication is void even under the *Hanafi* law. Thus, under *Hanafi* law, a *talaq* pronounced by a husband when he is made forcefully to drink some intoxicant (wine) or takes the same as a drug, shall not be valid.\(^{109}\)

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\(^{109}\) *Supra* Note 54 at 152.
3) **Formalities:**

*Sunni* law holds that a *talaq* may be oral or in writing. The husband has the choice either to just simply pronounce it in words or he may write a ‘*talaqnama*’. For the validity of *talaq*, under *Sunni* law, no specific formula or use of any particular word(s) is required. Thus, any expression that clearly indicates the husband’s desire to break the marital tie is sufficient to constitute a valid *talaq*. Also, *talaq* need not to be pronounced in the presence of any witnesses.\(^{110}\)

On the other hand, *Shia* law requires that for a valid *talaq* to take place, it is necessary that it must be pronounced orally except where the husband in unable to speak. Where the husband can speak but still gives *talaq* in writing then such a *talaq* will be totally void under *Shia* law. Also, *Shia* law requires that *talaq* must be pronounced in the presence of two sane adult Muslim witnesses for its validity otherwise no valid *talaq* shall take place in the absence of the same.

4) **Express Words:**

Under *Sunni* law, no specific words are required to be used for effecting a valid divorce. *Talaq* must clearly indicate the intention of the husband to dissolve the marital tie. Where, the pronouncement is not express and ambiguous then in such cases, a valid *talaq* can be effected only on the absolute proof of the husband’s intention of dissolving the marriage.\(^{111}\)

But *Shia* law requires that, for the validity of *talaq*, it must be pronounced in the prescribed formula which is in Arabic language. If the man does not know Arabic language, then he may use any other language known to him. Given below is the reason behind this according to the *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.”\(^{112}\)

*Shia* law prescribes the following formula for pronouncing a *talaq*:

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\(^{110}\) K.P. Sharma, *Muslim Vidhi* (Hindi) 168 (Rajasthan Hindi Granth Academy, Jaipur, 1983).

\(^{111}\) *Supra* Note 64 at 151.

The Husband is required to use the given words in Arabic which mean that “though art repudiated” or “this person is repudiated” or “such person is repudiated”.

5) Conditional and Cintingent Talaq:

A *talaq* pronounced under Islamic Law may be either absolute or it may be sometimes subjected to some condition or contingency. Contingency means an uncertain future event. *Sunni* law recognises a conditional or contingent *talaq*. Under *Sunni* law, where the *talaq* is pronounced without any condition, then it takes effect immediately on its pronouncement and where it is based on some condition or contingency, it becomes effective only upon the fulfilment of such a condition or contingency. But the conditions must not be un-Islamic and where the condition laid down for the validity of *talaq* is against the principles of Islamic Law, such a condition shall be void and no valid *talaq* can take effect in such a case.

Under *Shia* law, a *talaq* must be absolutely unconditional for being valid. Thus, *Shias* do not recognise a conditional or contingent *talaq*. Even if the condition or contingency is lawful, the *talaq* will be void and ineffective.

6) Notice of Talaq:

For the validity of *talaq*, it is not necessary that the wife must be communicated through notice of *talaq* or she should have the knowledge of the same. Under Islamic Law, a *talaq* becomes effective the moment it is pronounced and not on the date upon which the wife is communicated or it comes to her knowledge. However, the knowledge of *talaq* is required by a divorced wife for making a claim of dower and maintenance from her former husband.113

The Calcutta High Court held in *Waj Bibee v. Azmat Ali*114 that where an instrument of divorce is signed in the presence of and is given to the father of the wife, it shall constitute a valid *talaq*, notwithstanding that it was not signed in the presence of the wife.

Further, it was held by the Madras High Court in the case of *Asha Bibi v. K. Ibrahim*115 that the *talaq* pronounced by the husband in the absence of the wife is a valid *talaq*.

113 *Supra* Note 31 at 85.
114 (1867)8 WR 23.
115 (1909) ILR 33 Mad.22.
Different Kinds of Talaq

After expounding on the Islamic perspective regarding talaq, the question now arises as to how talaq be implemented. For the answer to this question, first of all it is important to discuss the kinds of talaq that have been recognised by the Islamic Law. Thus, talaq may be divided into two categories given below:

a) Talaq-e-Sunnat; and
b) Talaq-e-Biddat.

a) Talaq-e-Sunnat

Talaq-e-Sunnat may further be subdivided into two categories:

i) Talaq-e-Ahsan; and
ii) Talaq-e-Hasan.

i) Talaq-e-Ahsan

‘Ahsan’ is an Arabic word which means ‘best’. Talaq-e-ahsan is considered as the most ‘proper’ form of talaq and is the most approved form in all the Schools of Islamic jurisprudence. In the ahsan form of talaq, single pronouncement of divorce is made in the period of tuhr (period of purity between two menstruations) and if the wife is free from menstruation, then the pronouncement can be made at any time. This pronouncement is followed by the complete abstination from sexual intercourse during the period of iddah. The requirement of the pronouncement of talaq to be made during the period of tuhr is applicable only to the oral divorce and if the husband gives talaq to his wife in writing, then the requirement of tuhr can be validly done away. Similarly, this will not be applicable in such cases where the wife has passed the age of menstruation (i.e., she has reached the age of menopause). Also, where the parties have been living away from each other for a long time or where the marriage has not been consummated, the pronouncement of talaq during the tuhr is not required. After the pronouncement of talaq, the wife is required to wait for iddah of three months. The reason for this rule of waiting period has been incorporated in the Islamic Law
isr to confirm the pregnancy of the woman. In case, the woman is confirmed to be pregnant, then her period of *iddah* shall extend up to the delivery of the child.\textsuperscript{116}

*Talaq-e-ahsan* is a revocable form of divorce which may be revoked either expressly or impliedly. Implied revocation takes place by the resumption of cohabitation between the spouses before the completion of *iddah* period. This means that *talaq* pronounced in the *ahsan* form is the best form of *talaq* because it is a revocable form of *talaq* and thus, leaves a room between the parties to revoke their *talaq* within the specified time period i.e., during *iddah*.\textsuperscript{117} *Radd-ul-Muhtar* explains this beautifully in the following words:

> “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.”\textsuperscript{118}

According to *Hedaya*:

> “This method of divorce is the most approved because the companions of the Holy Prophet (PBUH) 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.”\textsuperscript{119}

Once the period of *iddah* expires and the husband has not revoked *talaq* either expressly or impliedly, *talaq* becomes irrevocable and final.\textsuperscript{120} The verses of the Holy Qur’an relating to *talaq-e-ahsan* 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.”\textsuperscript{121}

> “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.”\textsuperscript{122}

\textsuperscript{117} Ibid.
\textsuperscript{118} Jesse Russell and Ronald Cohn (Eds.), *Radd Al-Muhtar Ala Ad-Dur Al-Mukhtar* 688 (Book on Demand, New Delhi, 2012).
\textsuperscript{119} Supra Note 33 at 72.
\textsuperscript{120} Supra Note 31 at 87.
\textsuperscript{121} *Holy Quran*, II:228.
\textsuperscript{122} *Holy Quran*, II:232.
From the above verses of the Holy Qur’an, it becomes evidently clear that the characteristic feature of *talaq-e-ahsan* is that it is a single pronouncement of divorce followed by no revocation of the same during the *iddah* period. Hence, in cases where the husband makes any declaration of *talaq* in anger but soon after realises his mistake and wants to cancel the same, then he has got sufficient time for the same. Thus, this form of *talaq* is less injurious to wife and parties can even remarry without undergoing through the process of *halala*, if they want to do so.

**Shia Law:**

*Shia* law on this point differs slightly from the *Sunni* law in the sense that if a man cohabits with his wife during her *tuhr* and he intends to divorce her, then he will have to wait till she enters into menstruation and then again becomes pure, only then he can pronounce *talaq* on her. In case, where the husband cohabits with his wife during her *tuhr* and gets separated from his wife, e.g., he proceeds on some journey and intends to divorce her during that separation, then he will have to wait for a period of one month before doing so.\(^{123}\)

**ii) Talaq-e-Hasan**

The meaning of the Arabic word ‘*hasan*’ is ‘good’. While the word ‘*ahsan*’ stands for ‘very good’, on the other hand, ‘*hasan*’ stands for something which is ‘good’. This kind of *talaq* is also regarded to be proper and approved form. In *talaq-e-hasan* also, there is a provision for the revocation of divorce but if it is not revoked during the period of *iddah* and once it becomes final, divorce becomes irrevocable and the parties cannot remarry each other unless the rule of *halala* is complied with. Though it is approved form and there is a provision of its revocation during the *iddah* period, but it is not regarded as the best form of divorce because the evil words of *talaq* are to be pronounced three times in the successive *tuhirs*. For example, W, a wife, is in *tuhr* and no cohabitation has taken place between her and her husband. At this time, her husband, H, pronounces *talaq* on her. This is the first pronouncement by express words. Then again, when she enters the next *tuhr* and before any cohabitation takes place between W and H, H makes the second pronouncement. Again, when the wife enters her third *tuhr* and before any cohabitation takes place, H pronounces the third pronouncement. The moment H makes the third pronouncement, the marriage stands dissolved irrevocably, irrespective of *iddah*.

\(^{123}\) **Yawer Qazalbash, Principles of Muslim Law** 129 (Modern Law House, Allahabad, 2005).
In talaq-e-hasan, the husband pronounces the formula of talaq three times during three successive tuhrs. If the wife has crossed the age of menstruation, the pronouncements of talaq are to be made after an interval of 30 days in such a case. The first and the second pronouncements of talaq, in this form, are revocable but on the third and the final pronouncement of talaq, an irrevocable divorce is effected. For a valid ahsan talaq to be effected, it is necessary that no cohabitation must have taken place during the period of tuhr in which the pronouncement has been made. Talaq-e-hasan was intended to put an end to the barbarous practice which was prevalent in the pre-Islamic Arabian society under which the husband used to divorce his wife and take her back several times with the purpose of ill-treating her. The husband has been given two chances to take his wife back through this form of talaq but if he does not revoke the talaq, then it becomes irrevocable on the third and the final pronouncement (as mentioned above). Thus, the purpose behind this was to stop the process of divorcing and repudiating the same that used to be continued indefinitely during the jahiliya period. The women were used to be harassed by way of divorcing and taking them back and again divorcing and again taking back and so on, without any limit of the same. The Holy Prophet (PBUH) restrained them to the limit of three repetitions only. To impose a further deterrent on this arbitrary practice, it was laid down that the parties are not free to remarry each other unless the wife undergoes through the process of halala. Thus, it has been made a penal provision which is meant to chastise the husband who repudiates his marriage with his wife thoughtlessly. The following is the Commandment of Allah in the Holy Qur’an in this regard:

“So if a husband divorces his wife (irrevocably), he cannot, after that, remarry 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 reunite: provided they feel that they can keep the limits ordained by Allah, which He makes plain to those who understand”

In the case of Ghulam Mohyuddin v. Khizer, the husband wrote a talaqnama in which he mentioned that he had made the first pronouncement on 15th of September and the talaq would be complete on the third pronouncement of talaq on 15th of November. He also mentioned that he had communicated talaq to his wife on 15th of September only. In this case, the Lahore High Court held that this was an ahsan talaq because the talaqnama was

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124 Supra Note 5 at 102.
125 Dr. Paras Diwan, Muslim Law in Modern India 84 (Allahabad Law Agency, Faridabad, 2005).
126 Holy Quran, II:230.
127 AIR 1929 Lah. 6.
merely a record of the first pronouncement and thus, the *talaq* was revocable. The court further held that a mere mention of the declaration was not sufficient and in order to effect a final *hasan talaq*, the three pronouncement must actually be made in three *tuhrs*.\(^{128}\)

**b) Talaq-e-Biddat**

*Talaq-e-biddat* is also known as *talaq-ul-bain*. As the name itself says that it is a *biddat* which means sin. The most distinctive feature of this *talaq* is that it becomes effective the moment it is pronounced and it leaves no scope for any reconciliation between the parties. Though Islamic Law recognises *talaq-e-biddat*, but it is a disapproved form of *talaq*. It is an innovation within the fold of *Shari’ah* upon which the jurists of all the Schools of Islamic Jurisprudence agree. It is neither approved by the *Maliki* School of Islamic Jurisprudence, nor does the *Shia* law recognise it. *Talaq-e-biddat* commands neither the sanction of the Holy *Qur’an* nor it has the approval of the Holy Prophet (PBUH).\(^{129}\)

In this form, three pronouncements of *talaq* are made in a single *tuhr* either in one sentence or three sentences. The ignorant people who pronounce *talaq* thrice and that too in one and the same sitting, actually commit a sin against the law of the Creator. In common parlance, it is known as ‘triple *talaq*’\(^{130}\) which is under a lot of controversies in India these days. As already mentioned that this form of *talaq* is an innovation and it has no religious basis therefore, many countries have abolished it which will be discussed later in this chapter only.

**Historical Background of Talaq-e-Biddat and its Position under Shari’ah**

*Talaq-e-biddat* as purely an un-Islamic form of divorce, which is against the commandments of the Almighty Allah and Traditions of the Holy Prophet (PBUH), was completely denounced by the Holy Prophet (PBUH) and all the Caliphs except Hazrat Umar.\(^{131}\) The Holy Prophet (PBUH) never approved such a form of *talaq* because there was no opportunity for the reconciliation. It is, thus, clear that *talaq-e-biddat* has no place in Islamic Law and it was not in practice during the life time of the Holy Prophet (PBUH). *Talaq-e-biddat* traces out its history back in the second century of Islamic era. Ameer Ali depicts the historical background of this form of *talaq* in the following words:

\(^{129}\) Supra Note 24 at 169.
\(^{130}\) Supra Note 123 at 130.
"Talaq-e-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 Holy Prophet (PBUH) 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 power of divorce, which was in the beginning left to the husband, was strongly disapproved by the Holy Prophet (PBUH). It is reported that, when once news was brought to Him (PBUH) that one of his disciples had divorced his wife, pronouncing the three *talaqs* at one and the same time, the Holy Prophet (PBUH) stood up in anger on his carpet and declared that the man was making the plaything of the words of Allah and made him to take back his wife."^{132}

*Talaq-e-biddat* was also not in practice during the life time of the first Caliph, Abu Bakar. Also, it was not practised for more than two years during the time of second Caliph, Umar. It was permitted by Hazrat Umar on the account of some peculiar situation i.e., when the Arabs conquered Syria, Persia and Egypt, etc., they found that women there were more beautiful than the Arabian women. Thus, the Arabs used to get attracted towards the women of these conquered countries. But the Syrian and Egyptian women insisted that they should divorce their wives if they wanted to marry them. These women of Egypt and Syria asked the Arabs to divorce their wives instantaneously, in front of them, by pronouncing triple *talaq* in one sitting. The Arabs readily accepted the condition because they were aware that Islamic Law does not recognise such a divorce and *talaq*, to be valid, must be pronounced only twice in two separate periods of *tuhr* and its repetition in one sitting makes it un-Islamic, void and ineffective. By pronouncing triple *talaq*, the Arabs could marry these beautiful women and at the same time, they could also retain their existing wives. This fact was reported to the second Caliph, Hazrat Umar by the women of the conquered countries whom the Arabs married. On knowing this, the second Caliph, Hazrat Umar decreed that even the repetition of the word *talaq, talaq, talaq* at one sitting would amount to a valid *talaq* and the marriage would stand dissolved irrevocably by this form of *talaq*.

Thus, it must be remembered that recognition of triple *talaq* was just an administrative measure which was adopted by the second Caliph, Hazrat Umar to meet an emergency situation that occurred at that particular time and he had no intention of making it a permanent law. But the *Hanafi* jurists, unfortunately, declared triple *talaq* as a valid form of divorce by the husband on his wife and also paved religious sanction to the same. The

\footnote{\textit{Supra} Note 108 at 514.}
relevant verse of the Holy Qur’an, which can be relied upon to prove the un-Islamic nature of talaq-e-biddat, is as under:

“A divorce is only permissible twice; after that, the parties should either hold together on equitable terms, or separate with kindness…”  

Thus, it is clear that triple talaq has no recognition under Shari’ah. It was allowed by Hazrat Umar in order to deal a particular situation that must have suited the needs of his own time. But it was never meant to be recognised for ever. The practice of triple talaq has resulted in a great deal of harm in modern times. Hazrat Umar used triple talaq to protect and safeguard the interests of the women of his time, but unfortunately, the Muslim jurists of the later period have used it against women only, by giving recognition to it. The recognition of and giving effect to this improper talaq, by the Hanafi School of Islamic jurisprudence, is not a part of the original Islamic Law.

**Essentials and Effect of Talaq-e-Biddat**

The following are the essential requirements for talaq-e-biddat to take effect, which shall dissolve the marriage of a Muslim couple irrevocably:

i) Marriage between the husband and wife must have been consummated;

ii) Triple (three) pronouncements of talaq must have been made by the husband, 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”;

iii) The pronouncement of triple talaq may be made at any time and thus, the requirement of pronouncement of talaq to be made during the period of tuhr is not necessary in the case of talaq-e-biddat;

iv) The pronouncement of triple talaq may be made even if the husband had cohabited with his wife since her last menstruation; and

v) Marriage stands dissolved immediately on the irrevocable pronouncement of talaq.

On the pronouncement of triple talaq, talaq becomes irrevocable immediately after it is pronounced, irrespective of iddah. Once talaq-e-biddat has been pronounced by the husband

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133 *Holy Quran*, II:229.
on his wife, it cannot be revoked. Therefore, once a definite and complete separation has taken place, they cannot remarry without the formality of the woman marrying another man and being divorced by him.

**Position of Talaq-e-Bidaat in India**

In India, the practice of *talaq-e-biddat* has been taken to ridiculous heights by men, who these days, divorce their wives irrevocably on what sapp, facebook, e-mail etc. In the State of Jammu and Kashmir particularly, it is the most common form of *talaq* that is followed by the majority of men. It has been used in majority of the cases in the Kashmir Province of the State. It is very interesting to note that according to various media reports, out of the 75 cases of *talaq-e-biddat*, in 80 per cent of the cases, the husbands were well educated. Only in 16.66 per cent of cases, *talaq-e-sunnat* was exercised.

According to the daily news telecast through media (electronic as well as print), of late, there has been a loud uproar, even by the usually docile Muslim women, to do away with the abhorrent practice of triple *talaq*. There have been several instances of Muslim women being rendered destitute because their husbands chose to send them triple *talaq* over e-mail/whatsapp/facebook. The newspapers and internet sites are full of the details of such misfortunate cases where husbands of men have divorced their wives through social media. One site provides the case of a woman whose husband, working in the Middle East, dropped her triple *talaq* over e-mail. The case was brought before a local *maulvi* for seeking his opinion on the same and the *maulavi* upheld *talaq* as the husband proved that he had two witnesses while sending the e-mail. This shows that how men-folk are misusing the power of divorce granted to them by the Creator and the so-called *maulavis* also participate in the same against the principles of *Shari’ah*. This only proves their lack of knowledge and ignorance of the religious laws.

Then there is the case of Shayara Bano, whose husband sent her a letter containing triple *talaq*. Shayara has filed a petition against the same and is fighting against the injustice in the Supreme Court. Jaipur’s Afreen was also divorced by her husband through a letter. She too is fighting for her rights in the Supreme Court.

Due to an alarming increase in the cases of misuse of triple *talaq*, the *Bharatiya Muslim Mahila Andolan* has started a campaign of getting it banned by the Legislature. For the same
purpose, it has been able to gather 50,000 signatures in its drive to help Muslim women in getting rid of this odious law. Even Sangh affiliated Muslim Organizations are going on the offensive against this regressive practice. To deal with the situation, a Central Government panel was appointed for looking into this issue which has recommended amendments in the Dissolution of Muslim Marriages Act, 1939. The panel is in favour of a ban on verbal, unilateral and triple talaq. Several courts have also ruled against triple talaq and have asked the couples to attempt reconciliation. But the All India Muslim Personal Law Board (AIMPLB) continues to oppose to any changes to be made in the process of triple talaq.

Currently, there seems to be a wave of debates, petitions and uproar going on against the constitutional validity of this mode of talaq everywhere which can be witnessed in the print, electronic as well as social media. All India Muslim Personal Law Board and other like authorities purport that there is no scope of change in triple talaq system. Their contention is that the abolition of triple talaq would be contrary to the teachings of the Holy Qur’an and the Supreme Court does not have the right to intervene in religious law.

Thus, it can be submitted that at present, the Muslims of India are facing a great inconvenience so far as the law of triple talaq is applied in India. Most of the Islamic countries have already derecognised triple talaq but the Indian Muslims are divided in their opinion of abolition of triple talaq here. Only the time will decide the future of this un-Islamic form of divorce in India, which has no place in Shari’ah. The Muslims in India still need to be made aware of the true nature of triple talaq and its position under Islamic Law.

**Judicial Response towards Talaq-e-Biddat in India**

There is no need to mention that the dissolution of marriage by the pronouncement of triple talaq (talaq-e-biddat) has caused injustice in a number of cases. The Hon’ble Supreme Court of India has greatly curtailed its exercise by calling for strict proof triple talaq to establish it in the case of Shamim Ara v. State of U.P.\(^\text{135}\) In subsequent decisions, the High Courts have gone to the extent of holding such talaqs invalid, in absence of it being preceded by attempts of reconciliation.\(^\text{136}\) There are numerous court judgements which have established that triple talaq is invalid and have set some definite requirements for its validity.

\(^{135}\) AIR 2002 SC 3551.

In *Masroor Ahmed v. State (NCT of Delhi)*,\(^{137}\) triple *talaq* was held to be one revocable *talaq* meaning thereby that the divorce can be revoked at any time before the completion of the period of *iddah*, after which the marriage shall stand dissolved. The court held further that for being valid, *talaq* must be for a reasonable cause.

In the case of *Riaz Fatima v. Mohd. Sharif*,\(^ {138}\) it was held that the evidence must be given by the husband of the reasons that have compelled him for the pronouncement of triple divorce. Also, a proof, that *talaq* was proclaimed thrice in the presence of witnesses or in the letter, must be provided and prior to that, an attempt of reconciliation has been made. The proof of payment of the amount of *mahr* and observance of *iddah* must also be given.

In *A.S. Parveen Akthar v. Union of India*,\(^ {139}\) a writ petition was filed seeking an unconstitutional status of *talaq-e-biddat*. The petition was dismissed and the prayer to Justice R. Jayasimha Babu made against validation of section 2 of *Muslim Personal Law (Shariat) Application Act, 1937* was not granted by the Hon’ble Madras High Court. In the instant case, the court made a mention of Professor Wener Menski’s Article, wherein he mentioned that *talaq-e-sunnat* that comprises *talaq-e-ahsan* and *talaq-e-hasan* are the right ways of *talaq* under Islamic Law. The learned Professor said that *talaq-e-biddat* is clearly an innovation and is treated as less than ideal.

In *Saiyyad Rashid Ahmad v. Anisa Khatoon*,\(^ {140}\) Ghayas Uddin pronounced triple *talaq* in the presence of witnesses, though in the absence of the wife. Four days later a *talaqnama* was executed which stated that three divorces were given. However, the husband and wife still lived together and had children. While the husband treated her like a wife, it was held that since there was no proof of remarriage, the relationship was illicit and the children were illegitimate.

In case of *Fazlur Rahman v. Aisha*,\(^ {141}\) it was held that the verses of the Holy *Qur’an* have been interpreted differently by different schools. Thus, *talaq-e-biddat* is legally valid for *Sunnis* but not for *Shias*.

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\(^{137}\) 2008 (103) DRJ 137 (Del.).
\(^{139}\) 2002 (MANU/TN/2472/2002).
\(^{140}\) (1932) 34 BOMLR 475.
\(^{141}\) 115 Ind Cas 546.
In Rahmat Ullah v. State of Uttar Pradesh,\(^{142}\) it was observed by the Allahabad High Court that triple *talaq* (*talaq-e-biddat*) is an unlawful divorce because it is in clear violation with the dictates of the Holy *Qur’an* and it also violates the mandatory provisions of the *Constitution of India*. Justice Tilhari observed further, by referring to the relevant provisions of the Holy *Qur’an*, that *Shais* and *Malikis* do not recognise *talaq-e-biddat* and it is not valid under their law. He, further, added that although *Hanafi* law recognises *talaq-e-biddat* but it is sinful and is against the mandate of the Holy *Qur’an*. He also held the view that *talaq-e-biddat* amounts to a practice which is derogatory to the dignity of women.\(^{143}\)

**Modern Legislations Banning *Talaq-e-Biddat***

As mentioned earlier also, many Islamic countries have amended their divorce laws suitably and have abolished *talaq-e-biddat* by declaring it an innovation and hence, un-Islamic in nature which has no place in the rules of *Shari’ah*. Professor Tahir Mahmood explains this in the following words:

“In a later period of history, it was somehow believed, rather disbelieved, that a *talaq-e-biddat* was to be given effect invariably in every case even against the wishes of a repentant husband and an aggrieved wife, both of whom may be wanting to continue their marital relationship. As this was never the intention of the jurists of the past, a large number of Muslim countries have enacted laws to outlaw all forms of *talaq-e-biddat*.“\(^{144}\)

The countries like Egypt, Iraq, Jordan, Kuwait, Morocco, Sudan, Syria, Yemen, etc. have totally banned *talaq-e-biddat* by declaring it an unrecognised and un-Islamic form of *talaq*. In these countries, every *talaq*, even though repeated thrice or qualified with a word ‘three’, shall have the effect of a single *talaq* only and therefore, the question of performance of *halala* has no point in such cases and the husband can revoke divorce within the period of *iddah* or he will be free to remarry straight away with the divorced wife with her consent if the *iddah* period has expired. The following legislations of the above-mentioned countries deal with the unrecognition of *talaq-e-biddat*.\(^{145}\)

\(^{142}\) II (1994) DMC 64.

\(^{143}\) Supra Note 31 at 123.

\(^{144}\) Supra Note 98 at 117.

• Egypt

According to Article 3 of the *Law of Personal Status, 1929*, a *talaq* accompanied by a number, expressly or impliedly, shall not be effective except as a single revocable divorce.\(^{146}\)

• Iraq

Article 37 (1) of the *Code of Personal Status, 1959* provides that where a *talaq* is coupled with a number, express or implied, not more than one divorce shall take place. Further, in clause (2) of Article 37 of the same Code completely bans the doctrine of *halala* by providing that if a woman is divorced thrice on three separate occasions by her husband, no revocation or remarriage would be permissible after that.\(^{147}\)

• Jordan

Under Article 90 of the *Code of Personal Status, 1976*, a divorce coupled with a number, expressly or impliedly, as also a divorce repeated in the same sitting, will not take effect except as a single divorce.\(^{148}\)

• Kuwait

The *Code of Personal Status, 1984* of Kuwait derecognises triple *talaq* under its Article 109 by laying down that if a *talaq* is pronounced with a number (two, three) by words, signs or writing, only one *talaq* shall take effect.\(^{149}\)

• Morocco

In Morocco also, the *Code of Personal Status, 2004* bans triple *talaq* under its Article 92 which provides that multiple expressions of divorce, oral or written, shall have the effect of a single divorce only.\(^{150}\)

\(^{146}\) *Id.* at 304.

\(^{147}\) *Id.* at 309.

\(^{148}\) *Id.* at 314.

\(^{149}\) *Id.* at 317.

\(^{150}\) *Id.* at 323.
• Sudan

The Law on Talaq, 1935 declares under its Article 3 that a formula of divorce coupled with a number, expressly or impliedly, shall effect only one divorce.\(^{151}\)

• Syria

Under the Code of Personal Status, 1953, triple talaq has been banned by laying a provision under Article 92 of the same Code that if a divorce is coupled with a number, expressly or impliedly, not more than one divorce shall take place.\(^{152}\)

• Yemen

According to Article 64 of the Decree of Personal Status, 1992 of Yemen, a divorce to which a number is attached, whatever be the number, will effect only a single revocable divorce.\(^{153}\)

B. Divorce at the Instance of the Wife

If a woman is not happy in marriage, then Islam does not force her to stay in that unhappy marriage and she can get herself released from such an unpleasant union. Even the husband has no right to keep her forcefully, if the woman wants to dissolve such a marriage. Though, she has no right to dissolve her marriage unilaterally but Islamic Law gives the woman the right to demand divorce and get released from her husband, without the intervention of the court, by the following ways:

1. Talaq-e-Tafweez

Talaq-e-tafweez is a divorce at the instance of the wife under which the wife can pronounce divorce upon herself under the powers delegated to her by her husband. ‘Tafweez’ means ‘delegation’. Talaq-e-tafweez is recognised by all the Shia and Sunni Schools of Islamic Jurisprudence. Talaq-e-tafweez may also be pronounced by a third person other than the wife, if the powers to divorce his wife have been delegated by the husband to such person. Therefore, it becomes evident that although, Islamic Law gives the man the power to

\(^{151}\) Id. at 324.
\(^{152}\) Id. at 325.
\(^{153}\) Id. at 333.
repudiate marriage with his wife by pronouncing \textit{talaq} on her but he can also delegate this power to his wife or a third person.\textsuperscript{154}

It appears, therefore, that a Muslim husband is free to delegate his power to pronounce \textit{talaq} either to his wife or some one else to repudiate his marriage with her if he fails to fulfil a condition or upon the happening of an event. In such cases, the dissolution of marriage takes place the same way as if the husband himself has pronounced the \textit{talaq}.\textsuperscript{155} For instance, the husband may authorise his wife or a third person to dissolve marriage whenever he behaves with cruelty towards his wife or when he refuses to pay her prompt dower.

**Delagation of Power of Divorce by the Husband**

The husband may delegate his power to pronounce \textit{talaq} either absolutely or conditionally, temporarily or permanently. Where the husband delegates the power to pronounce divorce based on some condition, the condition must be reasonable and not against the principles of Islamic Law. For example, in the case of \textit{Mohd Khan v. Mst. Shahmali},\textsuperscript{156} the parties entered into a pre-nuptial agreement where the husband agreed to live in the wife’s parental house on the condition that if he left the house, he would pay a certain sum to the wife, the default of which would amount to an act of divorce. In this case, the court held this condition to be valid as it was not unconscionable or opposed to public policy.\textsuperscript{157}

Further, where the delegation is made conditional, it cannot be exercised unless that condition is fulfilled. The delegation made by the husband must be made distinctly, specifying the person in whose favour such power is being delegated. He must also specifically state the purpose of the delegation of power. The power may be delegated either to the wife or a third person. Also, where the option of divorce is delegated to the wife, she cannot be compelled to exercise her right and it is totally her choice, whether she wants to exercise her right to pronounce divorce or not. Mere happening of the event, upon which the power of delegation is based, is not sufficient to dissolve the marriage and the wife has to actually exercise her right expressly. If the wife chooses not to exercise her right to dissolve her marriage with her husband on the happening of the event, she is free to do so and no one can compel her to

\textsuperscript{154} Supra Note 112 at 238.
\textsuperscript{155} Supra Note 55 at 164.
\textsuperscript{156} AIR 1972 J&K 8.
\textsuperscript{157} \textit{Mohd Khan v. Mst. Shahmali}, AIR 1972.
exercise her right. Thus, the wife may or may not exercise her right of dissolution of marriage delegated to her by the husband.\textsuperscript{158}

It must be noted that once the husband has delegated his power to pronounce \textit{talaq}, after that he cannot revoke or withdraw the same.\textsuperscript{159} However, the delegation of his power does not bar the husband from exercising his own right to pronounce \textit{talaq} on his wife if he wishes to do so.\textsuperscript{160}

\textit{Shari’ah} Rules Regarding the Delegation of Power by the Husband

Islamic Law has provided some rules and regulations that are to be complied-with when pronouncing a delegated divorce under the power delegated by the husband to the wife or some other person. Given below are the rules relating to the delegation of power by the husband which are required to be understood properly in order to understand the Islamic principle of \textit{talaq-e-tafweez}:

\begin{itemize}
\item[a)] Where the right is delegated to the wife to pronounce \textit{talaq} in a session (\textit{majlis}) she is in then, she will have such a right restricted to this \textit{majlis} only and if she does not exercise her right in that session, her right will be lost once she leaves the \textit{majlis}. However, where the husband delegates the right of pronouncing \textit{talaq} for a specific period (e.g., 2 years) or permanently, then she will have this right accordingly.\textsuperscript{161}
\item[b)] The wife can exercise her right according to that only which has been delegated to her by the husband. For example, if the husband delegates his wife the right to divorce herself only once and not twice or thrice, or he delegates her the right to divorce herself irrevocably, then she has to exercise her right accordingly. Islamic Law, thus, provides that she can be allowed to utilise the right to pronounce divorce on herself only in a manner in which it has been delegated to her by the husband.\textsuperscript{162}
\item[c)] If the husband delegates his wife the right to divorce herself only for a specific number of divorces, then the wife shall have to exercise her right up to that limit only and she cannot divorce herself more than the number provided by the husband.
\end{itemize}

\textsuperscript{158} Aziz v. Mst. Naro, AIR (1955) HP 32.
\textsuperscript{159} Fatawe-e-Alamgiri, Vol. II at 67.
\textsuperscript{160} Tanzil-ur-Rahman, \textit{A Code of Muslim Personal Law} 392 (Hamdard Academy, Karachi, 1978).
\textsuperscript{161} Supra Note 118 at 729.
\textsuperscript{162} Ibid.
d) The husband cannot overturn or revoke the power of pronouncing divorce once it has been delegated by him to his wife or some other person.\textsuperscript{163}

e) Where the husband delegates his wife the right to pronounce divorce on herself for a specific period of time, then the wife has to exercise her right within that period only and if she fails to do so, she cannot exercise it afterwards when the time period for which she was delegated the right elapses as the right will no longer remain.\textsuperscript{164}

f) Where the wife rejects the right of divorcing herself delegated to her by the husband, then if the delegation is of permanent nature, her rejection will have no effect on the same and she still will have the right to do so in spite of her rejection. However, if the delegation made by the husband is of temporary nature then on her rejection, the right will get terminated and she cannot exercise it afterwards.\textsuperscript{165}

\textbf{Classification of Delegation (Tafweez)}

Muslim jurists have classified the delegation of power by the husband in favour of the wife to pronounce $talaq$ on herself into three categories. The first and the second categories fall under the implied form of delegation and the third category falls under the express form of delegation of power by the husband. Given below are the categories into which the delegation of power to pronounce $talaq$ by the wife on herself can be classified:\textsuperscript{166}

\textit{1. Ikhtiyar (Choice of Option)}

This literally means ‘to choose’. Under this category of delegation, the husband gives his wife the choice to get rid of the matrimonial tie. This form of delegation made by the husband may be for a day, or a certain period of time, or may be for all the times to come. This delegation may be made by the husband in his wife’s favour subject to some conditions. For instance, the husband says to her wife that if her maintenance does not reach her, she has the choice of divorcing herself.\textsuperscript{167} In such a case, if the wife chooses to divorce herself, she has the power to do so. In such a case, it must be proved that the divorce was actually intended because in the implied form of delegation, a divorce will be valid only if there is a clear intention to dissolve the marriage.

\textsuperscript{163} Id. at 731.
\textsuperscript{164} Ibid.
\textsuperscript{165} Ibid.
\textsuperscript{166} Supra Note 123 at 133.
\textsuperscript{167} Ibid.
2. *Amar-ba-Yad* (Liberty)

This literally means ‘business in hand’. Such a delegation may be made by the husband in favour of his wife, for example, by telling her, “Your business is in your hands” (herein intending *talaq*). Here, if the husband says to his wife, “Divorce yourself thrice (or twice)” and if she pronounces a single divorce on herself, divorce will take effect. But for the validity of the divorce, it must be proved that divorce was actually intended because this is also an implied delegation of right to divorce.

3. *Musheeat* (Will or Pleasure)

Under this category of delegation, the husband expressly delegates the power of divorcing herself in favour of his wife. For example, where the husband says to his wife, “Give yourself divorce if you please”, this will amount to an express delegation. This kind of delegation will be effective even without any intention because the delegation of the right to pronounce *talaq* has been made by the husband in the express words. This kind of delegation of *talaq* may be either unconditional or subjected to certain condition or contingency. Where the husband makes such delegation based on some condition, the wife cannot pronounce *talaq* on herself until that condition is fulfilled. But the condition must be reasonable and not against the principles of Islamic Law. In such cases, where the wife pronounces *talaq* on herself, it will be valid in the same manner as if the husband by himself has pronounced it.

**Different Stages of Delegation**

According to *Hanafi* jurists, there may be four different times and stages when the husband can delegate his wife or some other person to pronounce divorce on her. These stages may be summerised as under:

1. **Casual Delegation**

Casual delegation of power of divorce may be delegated by the husband to his wife in the course of a conversation between the spouses or in a discussion at which the spouses and the other are present. For instance, a delegation made during a discussion concerning the couple’s marital problems which may involve the other relatives of the spouses also. Though,

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168 *Id.* at 134.
169 *Supra* Note 31 at 93.
casual delegation is an irrevocable delegation of pronouncing divorce but in this form of delegation, the right if not used immediately may expire very quickly unless the words used for making the delegation indicate otherwise. Therefore, the wife must act upon the delegated authority within the same conversation or meeting in which the delegation was made.

The husband can delegate the right to the wife by using such words which may confer authority that will endure for days, months or permanently. He may also confer authority on wife which will be exercisable only if certain circumstances arise, then such an authority will be valid in the prescribed circumstances only and not otherwise.  

2. Post-Nuptial Delegation

The second situation may arise where, after the marriage, spouses may enter into an agreement, under which the husband delegates his power of pronouncing divorce to the wife if certain situation arises. This is a post-nuptial delegation of power and as they have already entered into wedlock, such a delegation by the husband to his wife is a valid delegation. This delegation may be exercised immediately after the exchange of the consents between the spouses or may be a part of the marriage rites themselves.

3. Delegation as a Part of Marriage Contract

The third situation may arise where the husband makes the delegation in favour of his wife at the time of contracting marriage. But this delegation will be valid only if the proposal of marriage is initiated by the wife. Thus, where the man makes the proposal of marriage to the woman, such a delegation can not be made in favour of woman by the man and if such a delegation takes place, it will be invalid. The example of such a delegation is where the woman initiates the contract of marriage by offering to the man by saying, “I marry myself to you on the condition that I will have the right to divorce myself whenever I wish to do so” and the husband replies, “I accept this”. This will be a valid delegation and will be effective. Thus, a permanent and completely unrestricted right to pronounce talaq on herself is conferred upon the wife at her pleasure by the terms used in the example. Therefore, where the woman (or her representative) initiates the marriage contract by making offer (ijab) and asks for the right to divorce to be delegated in her favour then she will be

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170 Supra Note 33 at 89-90.
171 Supra Note 112 at 251-253.
172 Supra Note 118 at 170.
entitled to this right and whenever she divorces herself by using this power, divorce will be valid.

4. Pre-Nuptial Delegation

The fourth situation may arise where the delegation of power is made before the actual contract of marriage takes place but the intention is to give effect to the same after the solemnization of a valid marriage between them. In other words, one can say that in such a situation, the woman demands the right to herself if they are to get married. This may be permissible only on the condition that the delegation must be made by the husband by attributing the same to the marriage contract, otherwise it will be void delegation and thus, the wife will have no authority to divorce herself after the marriage. The example of this is where the husband says, “If I marry you, then you have the right to issue one irrevocable divorce on yourself.” Where the man does not attribute this delegation to the marriage, it will be void.\(^\text{173}\)

The distinction between the pre-nuptial and the post-nuptial delegation of power by the husband to his wife to pronounce talaq on herself is that one is made at a time when she is already her wife and thus, the agreement is valid but the other is made at a time when the woman has no relation with the man only except that they have an intention of entering into a marriage in future. Thus, the pre-nuptial delegation cannot be held to be valid if the man does not attribute the same to the marriage contract because under this situation, he is delegating his power to such a woman who is not his wife and the delegation can be made in the favour of wife only.\(^\text{174}\)

**Talaq-e-Tafweez in the Light of Holy Qur’an and Sunnah**

The Holy Qur’an states in verse number 28 and 29 of Surah al-Ahzaab that a woman can divorce herself if she so desires. It is to be submitted that the doctrine of delegation of power of divorce by the husband in favour of his wife is based on an incident which has been mentioned in the Holy Qur’an wherein the Holy Prophet (PBUH) told his wives that they were at liberty either to live with him (PBUH) or to get separated from him by way of divorcing themselves. The Holy Qur’an provides in this regard:

\(^{173}\) *Id.* at 171.

\(^{174}\) *Supra* Note 112 at 19.
“O Prophet (PBUH), say to your wives, “If you should desire the worldly life and its adornment, then come, I will provide for you and give you a gracious release.” ¹⁷⁵

It provides further:

“But if you should desire Allah and His Messenger (PBUH) and the home of the Hereafter- then indeed, Allah has prepared for the doers of good among you a great reward.” ¹⁷⁶

The above verses were revealed at a time when the Holy Prophet (PBUH) deserted his wives for a period of one month. The Muslim jurists have explained this in the following words:

“The Holy Prophet (PBUH) had, in obedience to the above injunction of the Holy Qur’an, empowered his wives to choose either him or a separation, i.e., they might either get their marriage dissolved or prefer to choose their continuation. A’isha has explained that “We (the wives) chose the Holy Prophet (PBUH), i.e., we preferred the continuation of marriage, and so we were not divorced and the marriage was not dissolved.” It is inferred from this Tradition that a husband can lawfully delegate to his wife the power to dissolve the marriage if she so wants.” ¹⁷⁷

The following Tradition provided in Sahih Muslim that is reported to have been narrated by A’isha, further makes clear the religious basis of the delegation of the power of divorce by the husband to his wife. A’isha, thus, narrates:

“When the Messenger of Allah (PBUH) was commanded to give an option (of divorce) to his wives, he started with me saying: “I am going to mention to you a matter in which you should not (decide) hastily until you have consulted your parents.” She (A’isha) said that he (PBUH) already knew that my parents would never instruct me to seek separation from him. She said: “Then he (PBUH) said: Allah, the Exalted and Glorious, said: “O Prophet (PBUH), say to your wives: If it be that you desire the life of this World, and its glitter, then come! I will provide for your enjoyment and set you free in a handsome manner. But if you seek Allah and His Messenger (PBUH), and the Home of the Hereafter, verily Allah has prepared for the well-doers amongst you a great reward. A’isha says that I said to the Messenger of Allah (PBUH): “About this should I consult my parents, for I desire Allah and His Messenger (PBUH) and the abode of the Hereafter?.” She (A’isha) said: “Then all the wives of the Messenger of Allah (PBUH) did as I had done.” ¹⁷⁸

Thus, it is clear from the above mentioned verses of the Holy Qur’an and the Tradition of the Holy Prophet (PBUH) narrated by A’isha that Islamic Law grants the power to pronounce talaq on herself to wife also which she may get delegated in her favour either at the time of

¹⁷⁵Holy Qur’an, XXXIII:28.
¹⁷⁶Holy Qur’an, XXXIII:29.
¹⁷⁸Reported in Sahih Muslim.
marriage or afterwards. The wife may enter into an agreement with her husband that if, in future, she is not happy with her husband or if a certain situation may arise, then she will have the right to get herself released from the marital union through the pronouncement of *talaq* on herself. It must be noted that under *talaq-e-tafweez*, a wife cannot divorce her husband as it is the power of the husband to repudiate the marriage which he has delegated to his wife and not the wife’s power to do the same. Therefore, the wife can pronounce *talaq* on herself and not upon her husband. It must also be submitted that by the delegation of his power to the wife, the husband does not lose his own right to divorce his wife unilaterally if he so wishes. Even after the delegation of power in favour of the wife, the husband still retains the right to dissolve the marriage between them and can validly pronounce unilateral *talaq* on her wife.

### 2. Khula or Redemption

The word ‘*khula*’ literally means ‘to lay down’ or ‘to take off clothes’. In legal context, it means the laying down of his right and authority by a husband over his wife. In law, *khula* means laying down by a husband of his right and authority over his wife for an exchange.\(^{179}\) Thus, *khula* is a form of divorce under which the wife asks for a release from the marital tie and in exchange for the same gives or agrees to give a consideration which is mostly the release of her due dower. Most of the Islamic jurists consider *khula* as a form of divorce by mutual consent and keep *khula* in that category only. But here it has been kept under the category of *talaq* at the instance of the wife because though *khula* can take place with the mutual consent of the parties only but it is the woman who wants a divorce from her husband under this form of divorce. *Fatawa-e-Alamgiri* describes *khula* in the following words:

> “When the married parties disagree and are apprehensive that they cannot observe the bounds prescribed by the divine laws, i.e., they can not perform the duties imposed on them by the conjugal relationship, the woman can release herself from the marital 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.”\(^{180}\)

*Khula* is, thus, a right of divorce that a wife purchases from her husband which signifies an arrangement entered into by the spouses in which the husband agrees to dissolve the concubial connection in lieu of compensation paid to him by the wife out of her property. Once the husband agrees to divorce his wife in exchange for some money or the remission of

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\(^{179}\) Supra Note 33 at 112.

\(^{180}\) Supra Note 159 at 669.
her dower, a valid divorce takes place which is as valid as the husband would have given on his own initiative. Once the husband agrees by the terms of the wife, he is asked to pronounce a *talaq* on his wife in lieu of the consideration agreed between them. The consideration for *khula* totally depends on the agreement between the husband and wife. For example, if the husband agrees to pronounce a *talaq* on his wife provided that she either abandons her right over her unpaid dower or returns back to the husband the amount of dower (if the same has already been paid), then a valid divorce by *khula* will take effect.

Therefore, *khula* is a form of divorce which is, though, initiated at the instance of the wife but can take place only when both the parties consent for a divorce under an agreement. However, suppose if there may arise a situation where the parties cannot come to an agreement by their mutual consent, then the wife can take her case to an Islamic court (*qazi*) or *Shari’ah* Council. The *qazi* or *Shari’ah* Council will evaluate the arguments put forward by both, the husband and wife, and then come to a verdict which will be binding on the spouses. But if the wife goes to a non-Islamic court and initiates divorce by *khula* and the court sends the document to the husband and then husband willingly signs the same fully understanding the contents of the document, then under Islamic Law, a valid divorce will take effect. But if the husband rejects to sign the document and the court passes the decree of dissolution of marriage against his will then, according to *Shari’ah*, no valid divorce will take place.\(^{181}\)

**Essentials of Khula**

It has already been mentioned above that *khula* is a right of the wife against her husband to buy her release from the marital tie from him. A *khula* made under compulsion will be void under *Shia* law but it will be valid under *Sunni* law. Further, *Shia* law also requires that *khula* must be made in Arabic language and in presence of two witnesses. The proposal and acceptance must be made in the same meeting and that too in express words. Under *Shia* law, a conditional *khula* is not recognised but under *Sunni* law, *khula* can be either conditional or unconditional. A *khula*, in order to be valid, must satisfy the following conditions:

\(^{181}\) *Supra* Note 118 at 464.
a) Capacity of the Spouses

The husband and wife, both, must be of sound mind and must have reached the age of majority. Under Islamic Law, a person is said to be major when he/she has reached the age of puberty. Under Hanafi law, the guardian of a minor wife can validly enter into a khula on her behalf but the guardian of a minor husband cannot enter into a khula on his behalf.182

b) Proposal by the Wife

In khula, the offer for the dissolution of marriage must come from the wife by herself or through her authorized agent, who has to act within his authority. If the wife is being ill-treated or is unhappy in marriage and she feels that it would not be possible for her to stay in marriage within the limits prescribed for her by Islamic Law, then she can make an offer to her husband for a release from the marital tie. The proposal/offer for khula may be retracted by the wife at any time before its acceptance by the husband. If the wife rises from the meeting in which she makes the offer for khula, her offer stands revoked.183

c) Acceptance by the Husband

Khula can take place only when the husband accepts the offer of the wife with his free consent. Once, the husband accepts the offer of the wife for divorce by khula, it becomes effective and irrevocable the moment it is accepted and the wife becomes bound to observe iddah. However, wife cannot force her husband for her release against his free will and if the husband accepts her offer of dissolution of marriage without his free consent, then the divorce by way of khula shall not be valid.184

d) Consideration for Release

For a divorce by khula, it is essential that the offer of the wife for dissolution of marriage must be accepted by the husband in lieu for a consideration (evaz) for her release. For a valid consideration for khula under Islamic Law, everything that can be given in dower can also be given in lieu of consideration. However, anything upon which the wife has no right, cannot be given in consideration for khula. It must be noted here that if the wife fails to give the consideration that was agreed upon between the spouses at the time of making khula, the

182 Supra Note 116 at 204.
183 Supra Note 112 at 316.
184 Supra Note 116 at 204.
divorce will not become invalid but the husband has the right to claim the consideration. An increase in consideration after a valid khula has been entered into is void. If the consideration for khula is illegal, khula will be valid but the consideration will be invalid under Sunni law while under Shia law both, the khula as well as the consideration, will be invalid.\textsuperscript{185}

In the case of Moore\-shee Buzloor Rahim v. Lateefutoon Nissa,\textsuperscript{186} the court defined khula as a divorce by mutual consent of the spouses in which the wife gives or agrees to give a consideration to the husband for her release from the marriage tie and the husband accepts her offer in lieu of the agreed consideration. Khula is, thus, the right of divorce purchased by the wife from her husband but the actual payment of consideration does not render the khula invalid.

e) Offer to be made only on the Valid Grounds

It becomes necessary to mention here that the wife must ask for khula from her husband only on the valid grounds based on the sound Islamic reason and not otherwise. But, if she asks for khula even without a sound reason and the husband accepts her offer with his free consent, then also a valid khula will take effect. However, a khula forced upon the husband by his wife will not be valid (as mentioned above). Asghar Ali Engineer, in his book ‘Rights of Women in Islam’, has provided the following reasonable grounds on which the wife can ask for a khula:

i) Unability to live with her husband (intense dislike);
ii) Physical defect of the husband;
iii) Ill-treatment of the wife by the husband or his family members;
iv) Impotency of the husband;
v) Imprisonment of the husband;
vi) Non-fulfilment of the husband’s Islamic obligations towards her such as, maintenance, shelter, etc.

Modes of Effecting Khula

It has been provided again and again that khula is the separation of the wife from the husband by way of divorce in return for a payment made by the wife for her release. In

\begin{footnotes}
\item[185] Supra Note 112 at 130.
\item[186] (1861) 8 MIA 379.
\end{footnotes}
khula, the husband takes the payment which can be her mahr, which he gave to his wife or more or less, and lets his wife go in return. The Islamic jurists have divided khula in two categories. One which can be entered into by the husband and wife with their mutual consent and the other category is where if the husband refuses to give divorce by way of khula, and if the wife has a genuine reason, then she can get a khula through the Shari’ah court (qazi).\textsuperscript{187}

Thus, the mode of effecting khula may differ in both the categories provided above. The wife who wants to get a divorce by khula must, first of all, initiate the process by making a proposal for khula by asking her husband to divorce her in lieu of some consideration. If the husband accepts her proposal and agrees to pronounce a talaq on her, then a valid divorce takes place in the form of talaq-ul-bian by which the marriage stands dissolved irrevocably, irrespective of the fact that whether the wife has actually paid the consideration or not. The non-payment of the consideration shall not affect the validity of the divorce. After such a divorce the wife will have to observe iddah.

But if the husband refuses to accept the proposal of the wife for khula, she has the right to initiate the proceedings for it in a Shari’ah court i.e., before a qazi. Then the court will hear all the arguments from both sides and will decide after considering all the facts of the case, that whether or not to grant a khula in wife’s favour. If the court finds that there is a fault on the part of the husband, then it shall give two options to the husband i.e., either to pronounce a talaq on wife by himself or the court shall grant a decree of divorce in favour of the wife by using its authority. Thus, if the husband refuses to grant khula to the wife, then the Shari’ah court has the authority to dissolve the marriage of the couple.\textsuperscript{188}

However, there are some scholars of Islamic Law who firmly hold the view that whether there is a fault on the part of the wife or not, the court should order the husband to divorce his wife whenever she initiates a proceeding before the court. Their logic is based on the simple notion that the wife asks for divorce only when she cannot live with her husband and is afraid that due to her dislike towards him, she may not be able to fulfill her obligations towards him sincerely and in a manner provided by the Islamic Law. Further, these scholars also believe that where the agreement can be reached out by mutual settlement, then the intervention of court is not needed at all.

\textsuperscript{187} Supra Note 55 at 169.
\textsuperscript{188} Id. at 172-173.
Under Islamic Law, if the wife initiates *khula* against her husband then she is required to repay back the amount of *mahr* that was paid to her by her husband at the time of *nikah*, unless the husband, of his own free will, wishes to let the wife keep the amount of *mahr*. But in case, where the husband initiates the divorce, it is forbidden for him to take back anything that has been paid by him to his wife by way of *mahr*. Allah commands in this regard in the following verses of the Holy Qur’an:

“*But if ye decide to take one wife in place of another (through divorce), even if ye had given the latter a whole treasure for dower (mahr) take not the least bit of it back: would ye take it by slander and a manifest wrong?*”\(^{189}\)

“And how could ye take it when ye have gone in unto each other and they have taken from you a solemn covenant?”,\(^{190}\)

Thus, it can be summerised that where the wife initiates divorce against her husband by way of *khula* and the husband has no fault in his actions towards her then Allah says that she is required to repay him back her amount of *mahr* in full as a compensation. But where the husband is at fault then Allah forbids him to request any part of her *mahr* from her for her freedom.

Under *Shia* law, husband is not allowed to revoke *khula* but if the wife wants to revoke *khula*, she can withdraw her compensation during the period of *iddah*. The husband has the option in such a case to revoke *khula* at the wife’s will and if he chooses to do so, the *khula* shall stand revoked.\(^{191}\)

**Effects of Khula**

Where a husband accepts the proposal for *khula* made by the wife, the *khula* is said to have taken place at the moment of acceptance only. Although consideration forms an important part in *khula* but where the husband has accepted the offer of *khula*, then the actual release of dower or some other property, on which *khula* was agreed-upon by the spouses, is immaterial and is not essential for the validity of *khula*. Thus, the actual release of dower or the delivery of property is not a condition precedent for the validity of *khula*. Where the wife has not released her dower or delivery of the property has not taken place, the husband has the right

\(^{189}\) *Holy Qur’an*, IV:20.

\(^{190}\) *Holy Qur’an*, IV:21.

\(^{191}\) Dr. M.A. Qureshi, *Muslim Law* 83 (Central Law Publications, Allahabad, 2002).
to move to the court for the recovery of the same but this cannot affect the validity of the
divorce.\textsuperscript{192}

Once the agreement of \textit{khula} takes place between the parties, the marriage stands dissolved
irrevocably as is the case in \textit{talaq-e-bian} form. The cohabitation becomes unlawful between
the parties unless they enter into a fresh marriage contract. The husband has got no power
under Islamic Law to cancel \textit{khula} on the ground of non-payment of the consideration by the
wife. As it has been mentioned that \textit{khula} falls in the \textit{bian} category of divorce, the wife is not
entitled to maintenance during \textit{iddah} except when she is pregnant. Where the marriage gets
dissolved by \textit{khula}, the wife is not entitled to clothing during the period of \textit{iddah} but she is
fully entitled to accommodation for such period. The wife may, however, lose any of these
entitlements if she chooses to redeem herself of any of them in seeking \textit{khula}.\textsuperscript{193}

The woman becomes bound to observe \textit{iddah} when her marriage gets dissolved by way of
\textit{khula} like in any other form of divorce. But there are different opinions regarding the \textit{iddah}
period for the woman who has been granted \textit{khula} by her husband. General opinion is that the
period of \textit{iddah} in \textit{khula} cases shall be of one month which is taken from the following
Tradition of the Holy Prophet (PBUH):

\textit{“When Rabia bint Masood obtained khula from Thabit, the Holy Prophet
asked her to wait until one menstrual cycle before she could go to her
home.”}\textsuperscript{194}

Thus, it can be interpreted that the wife is required to observe \textit{iddah} of one month only where
her marriage has been dissolved by \textit{khula} and where the wife is pregnant, the period of \textit{iddah}
gets extended up to the delivery of the child.

\textbf{Religious Basis of Khula}

The right to \textit{khula} has been stipulated in the Holy \textit{Qur’an}. The relevant verses of the Holy
\textit{Qur’an} in this regard are:

\textit{“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.

\textsuperscript{192} Moonshee Buzloor Rahim v. Lateefutoon Nissa, (1861) 8 MIA 379.
\textsuperscript{193} Musal Ali Ajetumobi, “The Concept of Kuhla and Examination of its Cases in Nigerian Courts of Shari’ah Jurisdiction” (XIX)\textit{Islam and Modern Age} 267 (November 1988).
\textsuperscript{194} Reported in \textit{Sunan Abu Dawud}.}
But if you do good and practice self-restraint, Allah is well-acquainted with all that you do."\(^{195}\)

At another place, Allah states in the Holy Qur'an:

"…It is not lawful for husbands to take anything back which they have given them except when both parties fear that they may not be able to follow the limits set by Allah; then if you fear that they both will not be able to keep the limits of Allah, there is no blame if, by mutual agreement the wife compensates the husband to obtain divorce. These are the limits set by Allah; do not transgress them, and those who transgress the limits of Allah are the wrongdoers."\(^{196}\)

From the above verses of the Holy Qur'an, it is clear that *khula* can only be carried out with the consent and agreement of both the husband and wife and thus, the wife has no jurisdiction to enforce *khula* without her husband’s consent. With regard to compensation, Islamic Law provides that if the husband is at fault which has lead to *khula*, then it will be totally unjust and undesirable for him to demand compensation in return for a divorce. Allah states in this regard:

"If you wish to marry another wife in place of the one you already have, do not take back anything of what you have given her even if it be a heap of gold…"\(^{197}\)

However, if it is the wife who is at fault, then also it is not just or desirable for the husband to take from her more than what he had given her although it is permissible for him to take extra (if they agree upon it).\(^{198}\) Also, the wife has not to surrender all of her *mahr*, if the husband does not request for the entire amount.

The Holy Prophet (PBUH) himself, during his lifetime, has dissolved the marriages of many women by way of *khula* who were not happy with their husbands and wanted to leave them. One such case can be witnessed through the following Tradition of the Holy Prophet (PBUH):

*The wife of Thaabit ibn Qays ibn Shammaas came to the Holy Prophet (PBUH) and said, “O Messenger of Allah (PBUH), I do not find any fault with Thaabit ibn Qays in his character or his religious commitment, but I do not want to commit any act of kufr after becoming a Muslim.” The Holy Prophet (PBUH) said to her, “Will you give back his garden?” (Because, he had given her a garden as her mahr). She said, “Yes.” Then the Holy Prophet (PBUH) dissolved the marriage.\(^{199}\)"

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\(^{195}\) *Holy Qur’an*, IV:128.  
\(^{196}\) *Holy Qur’an*, II:229.  
\(^{197}\) *Holy Qur’an*, IV:20.  
\(^{198}\) Supra Note 33 at 404.
Prophet (PBUH) said to Thaabit: “Take back your garden, and divorce her.”

From this Tradition, the Muslim scholars have interpreted that if a wife does not want to stay with her husband, then indeed, the judge should ask the husband to divorce her by *khula*. And if she agrees to pay some consideration or compensation to her husband for her release from the marriage tie, the husband must release her. But if the husband does not agree, then the Muslim woman has the right to approach a *qazi* for a decree of divorce who will thereby dissolve their marriage by granting a decree of divorce in wife’s favour.

**Controversies Surrounding Khula and Modern Legislations**

It has become crystal clear now from the verses of the Holy Qur’an and the Traditions of the Holy Prophet (PBUH) that it is the right of the wife to obtain *khula* if she is unhappy with her husband and does not want to live with him. But under this method, as practiced today, the wife obtains the consent of the husband to divorce her only by paying him a huge sum of money. Mostly, the husband refuses, in many cases, to grant his consent at any price or demands a very high price for his consent. As a result, the wife may be unable to regain her liberty even through *khula* also.\(^{200}\) Originally, *khula* was meant to be an equitable solution for the woman to get a release from an unhappy marriage. According to Prophetic precedent, a woman who does not like her husband, though no fault on his part, has the option of leaving him, so long as she returns him the *mahar* (dower) that he gave her.

The idea behind the granting of the right to *khula* to woman was that it would be unfair for the wife who dislikes her husband and decides to leave him and also takes the *mahar* as well without having fulfilled her part of the contract. Yet, today, as a result of centuries of patriarchal jurisprudence, women are expected to pay more than their *mahar*, in order to obtain a divorce from their husbands by way of *khula*. Muhamad Rashid Ridha, while describing the abuses of khula process by the husbands, writes that the situation has become so serious that at times, it resembles blackmailing in some cases.\(^{201}\) This state of affairs is the direct result of the fact that jurists made the husband’s consent necessary for effecting *khula*.

Therefore, on 10th of May 2013, a seminar was held in Jeddah which was hosted by the Socio-Reforms Society in which the subject concerning the difficulties faced by Muslim

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\(^{199}\) Reported in *Sahih Bukhari*.

\(^{200}\) *Supra* Note 12 at 24.

women in enforcing their right to *khula* was broached. The seminar also focussed on the injustice of *Shari‘ah* courts, who give more rights to men than women concerning divorce. The points that were raised during the seminar were that whilst, according to the Holy *Qur’an* and *Sunnah* of the Holy Prophet (PBUH), Islam has granted equal rights to women as have been granted to men and also recognises their status as being equal to men in the society but it is evident everywhere in the Muslim communities across the world that these societies interpret the laws of Islam according to their own needs and convenience. Further, the seminar also raised an important concern namely that the Muslim husband is at liberty to utter the words of *talaq* and thus, darken the future of the woman and children and also, it is applicable instantly. However, if the wife is not happy with her husband and wants to leave him then she has to face humiliation for months or even years. In the dispute between the husband and wife, both are equally responsible but it is always the woman who is punished by the society mostly. In the said seminar, it was also a matter of concern that there is a common notion that *khula* is not recognised unless the husband ‘signs off’ and consents to the same. It was thus, concluded in the seminar that this act alone marginalizes the rights of Muslim women in Islam and makes them the prey to vengeful tactics by their disgruntled husbands.

The above-mentioned debates and the concerns become more clear when one observes the following facts regarding the recognition of *khula* in Muslim societies and the roles played by the *Shari‘ah* courts in the same, for example:

- The Egyptian Islamic Law recognised the wife’s right to file for *khula* in the year 2000, however, out of the 5000 cases that were filed in the courts, only 122 were approved.
- The right to ascertain *khula* was given to women in Pakistan in the year 1939 under the *Dissolution of Marriages Act* but the law has not been revised till date to accommodate the current times and the women are being forced by their families to give-up their properties or other assets to ascertain their freedom from their husbands.
- In Saudi Arabia- the birth place of Islam- the rights of women have been severly marginalized oftenly. Here, if a woman seeks *khula* from her husband, she loses her right to the custody of her children and it is granted to the husband by the courts.
- Even in Nigeria, which is in fact the number one country in the enforcement of wife’s right to *khula* and where the majority of the divorces are initiated at the instances of
wife, women face the biggest challenge of gathering enough money so that they may be able to secure *khula* from their husbands.

- In South Africa also, women face problems in the enforcement of *khula* because it is always claimed that there is no *qazi* available in the courts who will instill the wife’s right to seek *khula*. Therefore, there is barely any recognition of the wife’s right to obtain *khula* from her husband.

Thus, it is evident from the enforcement of the wife’s right to *khula* that even though some countries have passed laws but women can hardly get their right enforced when they approach the *Shari’ah* courts in these countries. Therefore, it can be concluded that *Shari’ah* courts discriminate on a large scale when the question of the enforcement of wife’s right to *khula* is brought before them. However, in some countries like Malaysia, the courts have the power to fix the consideration if the parties fail to reach to an agreement in *khula* cases. The following countries also, other than the mentioned above, have recognised the wife’s right to *khula* in accordance with the Islamic Law:

- **Algeria**

In Algeria, Article 54 of the *Code of Family law, 1984* recognises the Muslim wife’s right to obtain *khula* from her husband in the following words:

> “The wife can get separation from the husband by khula. In case of disagreement by the husband the court may pass a decree of khula for a consideration to be given by the wife not exceeding the value of her dower.”

- **Libiya**

Under Article 48, the *Family Law, 1984* of Libiya recognises the wife’s right to *khula* in the words given below:

> “The wife can have the marriage dissolved by khula. If she is too poor to pay compensation for it, the court can defer its payment and give effect to the khula.”

- **United Arab Emirates (UAE)**

Article 110 of the UAE’s *Law of Personal Status, 2005* lays down the provisions for divorce by way of *khula* in the following words:

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202 Supra Note 145 at 302.
203 Id. at 320.
“110 (1)- Khula means termination of the contract of marriage by the husband at the instance of the wife for a consideration paid by her or by another person on her behalf.

(2)- Whatever may be lawfully stipulated as dower in a marriage may be specified also as the consideration for khula. But foregoing of maintenance or children’s custody rights on the wife’s part cannot form consideration for khula.

(3)- If the consideration agreed upon for khula is not lawful, the khula will still be effective but the wife will have to forgo dower.

(4)- A khula transaction can be made effective by means of judicial proceedings.

(5)- Notwithstanding Clause (1) of this Article, if the husband arbitrarily refuses to give consent to khula demanded by the wife and it is feared that the parties cannot live together in compliance with law, the kazi shall decree khula for an appropriate consideration fixed by him.”

- Malaysia

Malaysia recognises the wife’s right to obtain khula from her husband under Article 49 of the Islamic Family Law Act, 1984 in the following words:

“49 (1)- Where the husband does not agree to voluntarily pronounce a talaq but the parties agree to a divorce by redemption or Cerai Tebus talaq (khula), the court shall, after the amount of the payment (consideration for khula) is agreed upon by the parties, cause the husband to pronounce a divorce by redemption, and such divorce is irrevocable.

(2)- The court shall record the khula accordingly and send a certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

(3)- Where the amount of the payment (consideration for khula) is not agreed upon by the parties, the court may assess, in accordance with Hukm Shara (Islamic Law), the amount having regard to the status and the means of the parties.

(4)- Where the husband does not agree to a divorce by redemption or does not appear before the court as directed or where it appears to the court that there is a reasonable possibility of reconciliation, the court shall appoint a Conciliatory Committee as provided under section 47 and that section shall apply accordingly.”

C. Divorce by Mutual Consent

Islamic Law does not force its followers to remain in an unwanted and unhappy union and therefore, it provides that if the spouses are not happy together and they feel that it would be impossible for them to remain within their limits in properly fulfil their marital obligations towards each other, then it gives them the option to mutually agree to dissolve their marital tie and get separated for each other. This is termed as divorce by mutual consent. Here, the wife is not required to relinquish her right to dower.

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204 Id. at 331-332.
205 Id. at 340.
1. Mubarat or Mutual Release

*Mubarat* is a divorce by mutual consent. The word ‘*mubarat*’ literally means ‘release’. Thus, *mubarat* is an act of mutual freeing of the spouses which puts an end to the matrimonial rights. *Mubarat* is different from *khula* in the sense that while the later is a divorce initiated at the instance of the wife because it is she who wants a separation from her husband though he consents to it by accepting her proposal but in *mubarat*, both the spouses want a separation from each other.206 Therefore, in *mubarat* both, the husband and wife, want a divorce. The formalities for *mubarat* are same as in the case of *khula*. As the averson in *mubarat* are the same, therefore, the proposal for the dissolution of marital tie can emanate from either side i.e., either from the husband or the wife.207 Under Sunni law, all the rights and obligations come to an end if the parties enter into a *mubarat*. Among Sunnis, no specific form has been laid down for effecting *mubarat*. The only formality is that the word ‘*mubarat*’ must be clearly expressed in the proposal and no particular form is required for effecting the same. However, if the ambiguous expressions have been used, then the parties are required to prove the intention.208

*Shia* law is very stringent in case of divorce by *mubarat* and requires that for entering into *mubarat*, the parties to the marriage must bonafide find their marital relationship to be irksome and cumbersome. Thus, *Shia* law recognises the divorce by *mubarat* only in those cases where it has become absolutely impossible for the spouses to continue to stay with each other in a marital union. *Shias* require that *mubarat* must be entered into by a proper way. They require that *mubarat* must be performed with the use of Arabic language unless the parties are unable to pronounce the Arabic words and the term ‘*mubarat*’ must be expressed clearly. It must be pronounced in the presence of two adult sane witnesses.209

Among both, the *Sunni* and *Shia* law, *mubarat* is an irrevocable form of divorce. Other requirements for *mubarat* are same like that in the case of *khula*. For example, both the parties to the marriage must have attained puberty and must be of sound mind. Like any other form of divorce under Islamic Law, under *mubarat* also, the wife is required to observe *iddah* after the dissolution of marriage. As *mubarat* is essentially an act of the parties, the

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206 *Abdul Rehman v. Ma Kye*, 26 I.C 102 (BD).
208 *Supra* Note 116 at 207.
209 *Supra* Note 112 at 134.
intervention of the court is not required for the dissolution of marriage. *Mubarat* must take place in one and the same meeting only. 210

In *mubarat*, as both the parties desire a separation from each other, no party is legally required to compensate the other by giving some consideration. For instance, where the husband says to his wife, “I have discharged you from the marital obligations and you are separate from me now” and the wife agrees to the same, a valid *mubarat* takes effect and the marriage between them will stand dissolved. The wife is not required to give-up her right to dower but she may agree to pay the same or some other compensation to her husband. If the husband receives any kind of compensation from his wife for *mubarat*, then the divorce will be *bian*. Even when the divorce takes place without compensation initially and consequently is reversible (*rajai*) at the option of the husband, if during *iddah* the husband accepts any compensation from his wife, the divorce would become *bian*. 211

**Essential Conditions for *Mubarat***

Islamic Law requires that for effecting a valid divorce by *mubarat*, the parties must be of sound mind and must have also reached the age of puberty. However, an insane husband can pronounce a valid *mubarat* during his intervals of sanity. Further, the aversion for the dissolution of marriage may arise either from the husband or the wife and no prior agreement or delegation of authority to the wife by the husband for that is necessary for the validity of *mubarat*. Thus, *mubarat* may take place between the husband and wife at any time when they feel that it has become impossible for them to live a peaceful life together and thus, they must separate from each other peacefully. Therefore, the most essential feature of *mubarat* is willingness of both the parties to get rid of each other. 212

It can be submitted here that the grounds for *mubarat* shall be the development of extreme and intense dislike for each other or a continuous hatred for each other or failing to continue their marriage bond peacefully. Abdullah Yusuf Ali while commenting on *mubarat* says that it has been provided in the Holy Qur’an:

> “There is danger in *mubarat*, just as with all forms of divorce, to which the parties might act hastily, then repent, and again wish to separate. To prevent such capricious action repeatedly, a limit is prescribed. Two divorces (with attempted reconciliation in between) are allowed. After that the parties must

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210 Supra Note 31 at 83.
211 Supra Note 191 at 83.
212 Supra Note 55 at 176.
definitely make up their minds, either to dissolve their union permanently or
to live together in mutual love and forbearance.”

Therefore, according to him, if the proposal comes from the husband, it must not be retracted. It totally depends upon the wife that whether she wants to accept the offer or rejects the same. He further provides reason for this that an offer from the husband is deemed to be equivalent to an oath and when the wife accepts the same, the marital tie between them dissolves the moment she accepts his offer. Where, on the other hand, the offer for mubarat comes from the wife, she can withdraw it before its acceptance by the husband. He finally observes that consent is also an essential condition/ingredient for the effect of mubarat as it requires the consent of both the parties to the marriage because if the parties lack the necessary intention or have been induced into acceptance by coercion, mistake, duress or fraud, the agreement for mubarat will be voidable.

Legal Consequences of Mubarat

It is interesting to note that the legal consequences of talaq-e-mubarat are same as that of the khula except that the wife, unlike in khula, is not required to pay any compensation to her husband for her release from the marriage tie. Thus, if the husband and wife both agree by their mutual consent to dissolve their marriage, conditionally or unconditionally, the woman would be released. The wife is required to observe iddah after the dissolution of marriage under this form of divorce and she is also entitled to maintenance during that period. Another legal consequence of talaq-e-mubarat is that the cohabitation between the husband and wife becomes unlawful after the dissolution of their marriage. By talaq-e-mubarat, single irrevocable divorce takes place between the parties to the marriage. Thus, there is no need for halala for remarriage and if the parties want to marry each other after the period of iddah is over, they are free to do so.

D. Divorce by Judicial Process (Fasakh)

Judicial divorce (fasakh) is the dissolution of marriage with the intervention of court. Though Islamic Law provides for either the reconciliation between the parties in case of disputes or the dissolution of marriage in between them but it does not appreciate their disputes to be

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214 Ibid.
215 Supra Note 55 at 176.
brought before the court as it leads to humiliation for both the spouses. But, under certain miserable conditions, it allows the qazi or judge to dissolve the marriage between the parties to dispute. The Qur’anic injunction for the judicial divorce is:

“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.”

The word ‘fasakh’ literally means ‘annulment’ or ‘abrogation’. Fasakh generally means to rescind (a bargain) or to annul (a deed). Thus, fasakh is the annulment of Muslim marriage by a qazi or judge on the application made by the wife. It can be said, thus, that fasakh is the dissolution of marriage by a judicial decree. Where the husband, with his ill-treatment, makes it difficult for the wife to stay with him, the qazi or the court can intervene on the application of wife and grant a decree of fasakh to her. The power of the qazi or judge to pronounce a divorce may be founded in the express words of the Holy Prophet (PBUH). The Holy Prophet (PBUH) is reported to have said:

“If a woman be prejudiced by a marriage, let it be broken off.”

After the enactment of the Dissolution of Muslim Marriages Act, 1939, the judicial annulments, in India, are governed by Section 2 of the same Act. Before the said Act, a Muslim wife could apply for the dissolution of her marriage with her husband on the following three grounds:

i) Impotency of the husband; or

ii) Lian (false charge of adultery); or

iii) Repudiation of marriage by the wife.

But there were conflicting provisions in various Schools of Islamic Jurisprudence with respect to the grounds on which a wife could get her marriage annulled through the intervention of the court of law. For instance, the Shafi’i and Maliki law provided that a wife was entitled to dissolve her marriage with her husband by obtaining a decree from the court on the grounds of husband’s failure to maintain her, desertion, or cruelty, etc. The Dissolution of Muslim Marriages Act, 1939 has tried to bring every Muslim wife on an equal footing in matters of grounds for judicial divorce, irrespective of her School of thought, by

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216 Holy Qur’an, IV:35.
217 Sahih Bukhari.
218 Supra Note 31 at 96.
making some revolutionary changes in the existing law by providing various grounds to the Muslim wife to dissolve her marriage by filing a suit in the court.

**Wife’s Right to Divorce under Dissolution of Muslim Marriages Act, 1939**

Under the traditional Hanafi law, a married woman has no provision for the dissolution of marriage through a judicial decree in case her husband neglects to maintain her, or absconds somewhere leaving her alone and unprovided, or makes her life miserable to such an extent that it becomes absolutely impossible for her to stay into such a union with him, etc. In such situations in India, in the past, Muslim women had to undergo a long period of subjugation and misery in the hands of their cruel husbands. Then the British Government enacted the Dissolution of Muslim Marriages Act in the year 1939 which provided some safeguards for those women who were not happy in their marriages but still had to stay in the unwanted and unhappy union because under the traditional law, they had no ground for the dissolution of their marriage. The Act provides certain grounds upon which a Muslim wife can file petition in the court of law and get a decree of divorce if the husband does not agree to leave her. These are the grounds which already had been provided by Shari’ah but the fiqh had denied the same to the Muslim women.

**Historical Background of the Act**

On 17th of April, 1936, Qazi Muhammad Ahmad Kazmi introduced the Dissolution of Muslim Marriages Bill in the Central Legislature. A great deal of public agitation by the Muslims started across the country. But ultimately, the said Bill was passed by the Assembly with suitable modifications and finally it became law on 17th March, 1939. Since then, the Dissolution of Muslim Marriages Act has been hailed as one of the most progressive enactments that have been passed by the legislature within the recent years. The said Act has been successful in achieving two objectives- First, it has restored to the Muslim wives a right which is very important for their independent identity and which has been accorded to them by the Shari’ah itself; Secondly, it has treated all the Muslims wives alike irrespective of the Schools of Islamic Jurisprudence to which they belong.219

As already mentioned above that, before the Dissolution of Muslim Marriages Act, 1939, a Muslim wife could seek judicial divorce only on the two grounds i.e., (1) false charge of

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219 *Supra* Note 64 at 169.
adultery against the wife by the husband (lian); or (2) impotency of the husband. In fact, there were lots of conflicting provisions among the various Schools of Islamic Jurisprudence in respect of divorce by the wife through the intervention of courts. It was to overcome such situation that the right-thinking persons among Muslims and also the Government felt the need for a legislation which provides grounds for the dissolution of marriage to a Muslim wife irrespective of their School of thought. It was felt that the conflicting provisions regarding the matrimonial relief under different Schools of Islamic Jurisprudence were causing a great deal of injustice to women. Thus, the Dissolution of Muslim Marriages Bill was introduced in the Parliament in the year 1936 and accordingly the Dissolution of Muslim Marriages Act was enacted in 1939 which empowered the Muslim wives to seek divorce on any one or more of the grounds that have been enumerated in the Act. The Act applies to all the Muslim wives, irrespective of their Schools or sub-Schools of Islamic Jurisprudence. In this way, the Dissolution of Muslim Marriages Act, 1939 turned out to be landmark legislation in the history of Islamic Law in India which gave the Muslim wives a great sigh of relief from a long period of sunjugation in the hands of their husbands in matters of the dissolution of their unhappy and incompatible marriages.

Salient Features of the Act

There are two-fold salient features of the Dissolution of Muslim Marriages Act, 1939 which may be summerized as under:

i) First one is that Section 2 of the said Act has provided various grounds for the dissolution of marriage on the basis of any one or more of which she can seek divorce by filing a petition against her husband in the court of law for obtaining a decree of divorce. The Act provides nine grounds under which the wife is entitled to claim divorce against her husband from the court of law. Out of these nine grounds, seven are the matrimonial guilt’s (or faults) of the husband under which the wife can seek divorce from the court. Also, the clause (vii) of Section 2 of the Act entitles the wife to exercise her right to option of puberty under which she can obtain a judicial decree for the dissolution of marriage from the court of law against her husband. Further, the ninth ground in Section 2 of the Dissolution of Muslim Marriages Act, 1939 provides a residuary clause also under which the wife can seek divorce on any other ground that could not be included in the Act under the first eight grounds but which has been recognised under Islamic Law. The best instance of this can be divorce by lian under
which the Muslim wife can file a petition for obtaining a decree of divorce against her husband from the court on the ground of false charge of adultery against her by her husband. In this way, it can be said that, while providing some additional grounds of divorce to the Muslim wife, the Act has not, in any way, affected her right to dissolve her marriage with her husband on the other grounds that were available to her under the traditional Islamic Law.

ii) The other salient feature of the Dissolution of Muslim Marriages Act, 1939 is that the grounds for matrimonial relief that have been provided under Section 2 of the Act are available exclusively to the wife. The main reason for incorporation of such a provision is that the traditional Islamic Law has already provided a whole lot of rights to the husband to divorce his wife that does not require any judicial intervention and without assigning any reason. The benefit of the said Section has been given to the wife irrespective of the fact that whether her marriage was solemnized before or after the commencement of the Act. Thus, the provisions of the Act have been given retrospective effect.\textsuperscript{220}

**Grounds for the Dissolution of Marriage under the Act**

Section 2 of the Dissolution of Muslim Marriages Act, 1939 provides that a Muslim wife shall be entitled to obtain a decree of divorce from the court of law by filing a petition against her husband on any one or more of the grounds enumerated therein under the Act. The following are the grounds that have been provided under Section 2 of the said Act:

**i) Husband Missing for Four Years**

Where a Muslim woman’s husband’s whereabouts have not been known for a period of four years, the wife can file a petition in the court of law for obtaining a decree of divorce on the same ground. The husband is said to be missing if his wife or any other such person, who is expected to have the knowledge of his whereabouts, is unable to locate him.\textsuperscript{221} The wife, under the provisions of the Dissolution of Muslim Marriages Act, 1939 is not allowed to marry until the expiry of six months after the passing of such a decree by the court.

Under Section 3 of the Dissolution of Muslim Marriages Act, 1939, the wife who files a petition for divorce on the ground of husband’s absence is required to give the name and

\textsuperscript{220} Supra Note 31 at 98..  
\textsuperscript{221} Section 2, Clause (i) of the Dissolution of Muslim Marriage Act, 1939.
addresses of all such persons who would have been the legal heirs of the husband upon his death and the court shall issue notices to all such persons to appear before it and state if they have any knowledge about the missing husband. If the court is satisfied that nobody has such knowledge as to the whereabouts of the husband, then the court shall pass a decree to this effect which becomes effective only after the expiry of six months. If before the expiry of the period of six months, the husband reappears and satisfies the court that he is ready to perform his marital obligations, the court shall set aside its decree and the marriage between the husband and wife shall not be dissolved.

**ii) Husband’s Failure to provide Maintenance for Two Years**

Clause (ii) of the *Dissolution of Muslim marriages Act, 1939* provides that where the husband has neglected or has failed to provide maintenance for his wife for a period of two years or more, the wife, in such a case, shall be entitled to claim a decree of divorce by filing a petition on the same ground in the court of law. The husband may not maintain his wife either due to neglect on his part or due to the lack of means for maintenance but in both the situations, the result would be the same under the Act and the wife shall be entitled to obtain a decree of divorce from the court. The poverty or incapacity of the husband is no excuse. Also, the wife’s riches do not become a justification for the husband’s failure to provide maintenance for his wife.

But the husband cannot be said to have neglected or failed to provide for his wife’s maintenance if he is under no obligation to maintain her. Under Islamic Law, the husband is not obliged to maintain his wife if she is disobedient or not faithful to her husband or fails to perform her marital obligations without any just cause. Thus, where the wife is not faithful towards his husband or is not obedient to him, she shall not be entitled to seek divorce on the said ground. Also where the wife deserts the husband without any reasonable excuse, her suit for decree of divorce on the ground of husband’s failure to provide maintenance for two years shall be dismissed by the court due to her own bad conduct.

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222 Section 3 of the *Dissolution of Muslim Marriages Act, 1939*.
223 Proviso (b) of Section 2 of the *Dissolution of Muslim Marriages Act, 1939*.
In case of *Abdul Azeem v. Fahimunnisa Begum*, the parties got married in 1952 but in 1955, the wife went away to her parents. The husband then contracted a second marriage. Wife filed a suit against the husband for the dissolution of their marriage on the ground of husband’s failure to maintain her for a period of two years but her suit failed. It was held by the court that under Islamic Law, polygamy was allowed and could not be a ground for living apart and claiming maintenance in the absence of other grounds which would justify the wife to follow other course.

In *Munnawarbai v. Sabir Mohammad’s* case, wife left the matrimonial house and stayed away from the husband without any justifiable cause and then asked for the dissolution of marriage on the ground that the husband has failed to maintain her. It was held by the court that the wife was not entitled to relief under section 2 (ii) of the *Dissolution of Muslim Marriages Act, 1939*.

iii) Impriosisment of Husband for Seven Years

Clause (iii) of the *Dissolution of Muslim Marriages Act, 1939* entitles a Muslim wife to seek divorce on the ground of her husband’s imprisonment for seven years or upwards. However, the court shall not pass any decree for the dissolution of marriage until the sentence becomes final. But there is no condition precedent that the husband must actually serve any term of imprisonment and thus, the ground for the dissolution becomes applicable from the moment the sentence becomes final. Therefore, decree of divorce on this ground can be passed by the court in wife’s favour only after the expiry of the date for appeal by the husband or after the appeal has been dismissed by the final court of the country.

iv) Husband’s Failure to Perform Marital Obligations for Three Years

Under clause (iv) of the *Dissolution of Muslim Marriages Act, 1939*, the Muslim wife can file a petition in the court for the dissolution of her marriage with her husband on the ground that her husband has failed to perform his marital obligations towards her without any reasonable excuse for a period of three years or more.

The *Dissolution of Muslim Marriages Act, 1939* has no where defined the marital obligations of the husband towards his wife. Under Islamic Law, there are several matrimonial

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obligations of the husband but for the purpose of clause (iv) of Section 2 of this Act, only the husband’s failure to perform those conjugal obligations may be taken into account which have not been included in any other clause of Section 2 of the Act. For instance, where the husband deserts his wife or does not cohabit with her without any reasonable justification for a period of three years, it shall amount to failure of the performance of marital obligations by the husband and the wife can seek divorce on this ground from the court. But, if the husband has a reasonable justification for non-cohabitation with his wife for a period of three years or more e.g., husband’s illness or his absence on account of his business or studies etc., the wife shall not be entitled to divorce in such cases. Also, under Islamic Law, the husband has an obligation- a) to maintain his wife; b) to treat her equally with other wives (if any); c) to make available a personal apartment for her; and d) to allow her to visit or be visited by her blood relations. The first two obligations of the husband have been covered under clauses (ii) and (viii) of Section 2 of this Act, and thus, the last two will be covered under this clause.228

v) Husband’s Impotency

Husband’s impotency is also a ground for the dissolution of marriage for Muslim wife under the Dissolution of Muslim Marriages Act, 1939 under clause (v) of Section 2 of the Act. But for seeking a decree of divorce on the ground of husband’s impotency, the wife must prove that the husband was impotent at the time of marriage and continues to be so till the filing of the suit. Thus, where the husband was potent at the time of marriage but becomes impotent afterwards, the Act does not entitle the wife to seek divorce on this ground.

Impotency may be due to the congenial constitution or old age or weakness or disease or accident, etc. Sometimes, it can also be due to some psychological cause which may have nothing to do with husband’s physical condition. In the former case, he will be incapable for all women but in the later case, his incapacity may be limited only to some specific woman or women.

Before passing the decree for divorce on the ground of husband’s impotency, the court is bound to give time of one year to the husband to improve his potency provided he makes an application for the same but if he fails to file such an application, the court shall, without any delay, pass the decree of dissolution of marriage. If the husband satisfies that he has ceased to be impotent, the court cannot grant a decree of dissolution of marriage on this ground. But if

228 Supra Note 5 at 121.
the husband continues to be incapable of consummating the marriage, the court shall pass a decree of divorce in wife’s favour.

vi) Husband’s Insanity, Leprosy or Veneral Disease

A Muslim wife is also entitled to claim divorce from the court of law on the ground of her husband’s insanity, leprosy or virulent veneral disease. Clause (vi) of Section 2 of the Dissolution of Muslim Marriages Act, 1939 provides that if the husband of a Muslim woman has been insane for more than two years, or is suffering from leprosy or a virulent veneral disease, she can obtain a decree of divorce by filing a petition on this ground in the court of law. The Act provides that insanity of the husband must be of two years or more preceding the date of filing of the suit but it does not specify anywhere that whether the unsoundness of mind must be curable or incurable. It may be permanent or with lucid intervals or it may be pre-marriage insanity or post-marriage. Also, it may have arisen either before or after the consummation of marriage. Further, leprosy may be black or white or it may cause the skin to wither away which may be curable or incurable. Regarding the veneral disease, the Act provides that it must be of incurable nature which may be of any duration. Moreover, under this Act, even if this disease has been transmitted to the husband from the wife herself, she is entitled to get a decree of divorce on this ground.

vii) Option of Puberty by the Wife

Under clause (vii) of Section 2 of the Dissolution of Muslim Marriages Act, 1939, where the Muslim woman was given in marriage by her father or any other guardian before she attained the age of puberty, and she has repudiated the marriage after attaining the age of fifteen years but before attaining the eighteen years, she is entitled to seek divorce in the court of law provided her marriage with her husband has not been consummated. This right of repudiation of marriage is known as khiyar-ul-bulugh or option of puberty under Islamic Law. Thus, the wife shall be entitled to the decree of divorce on this ground on the proof of the following facts:

a) The marriage took place before she attained the age of fifteen years;
b) She repudiated the marriage before attaining the age of eighteen years; and
c) Her marriage with her husband has not been consummated.
The option of puberty has been provided to the wife by Islamic Law as a safeguard against undesirable marriage. The basic idea underlying this ground is to protect a minor from an unscrupulous exercise of authority in her marriage by her guardian. This ground is not based on any fault of the husband and is an independent provision which makes a marriage voidable at the option of the wife.

It may be noted that the mere exercise of the option of puberty by the wife does not dissolve her marriage with her husband unless she files a suit in the court and obtains a decree of divorce from the same. Therefore, until the confirmation of the repudiation of marriage by the court with a decree of dissolution in this regard, the marriage between the parties subsists and if either of them dies, the other party shall be entitled to inherit as a spouse.

viii) Cruelty of the Husband

One of the important objects of marriage is a happy and compatible companionship and for this purpose, the spouses must treat each other with respect, kindness, love and affection. Islamic Law does not approve of a marital union where instead of love and respect, the spouses treat each other with hatred, ill-treatment or hold ill-feelings for each other. In such a situation, it allows the severance of the spouses. Thus, the ground of cruelty of the husband has been incorporated in the Dissolution of Muslim Marriages Act, 1939 relying on the said notion of Islamic Law. Under this Act, clause (viii) of Section 2 provides that if the husband treats his wife with cruelty, the wife can seek divorce on the same ground. The husband is said to treat his wife with cruelty if he:

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 the women of ill-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 from exercising her legal rights over it;

In the case of M.B. Rahim v. Shamsoonnissa Begum,229 Privy Council observed that wherein the husband disposed of the property of his wife and confined her to a room as if she was in a jail and also misbehaved with his wife, the wife is entitled to divorce.

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

f) If he has more than one wives, does not treat her equitably in accordance with the injunctions of the Holy Qur’an.

In the case of *Umatul-Hafiz v. Talib Husain*, 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 whom the husband failed to treat equitably was entitled to divorce under this clause.

**ix) Any Other Ground Recognised as Valid for the Dissolution of Marriage under Islamic Law**

Clause (ix) of Section 2 of the *Dissolution of Muslim Marriages Act, 1939* is a residuary clause which allows all such grounds for seeking divorce to the wife that have been recognised by Islamic Law but have not been included in the first eight grounds of this Act. The courts in India, under this clause, are at liberty to pass a decree of dissolution on any ground, which are deemed to be valid for the purpose. Thus, it covers all grounds that are available to a Muslim wife under the traditional Islamic Law such as *ila*, *zihar*, *khula*, *mubarat*, *lian* and apostasy from Islam.

### 3.4. Conclusion

Islamic Law has provided women certain social rights for their dignified living in the society. At a time, when female children were buried alive in Arabia and women were considered as a transferable property, Islam honoured women in society by elevating them and protecting them with unprecedented rights. Islam gave them the right to education, to marry someone of their choice, to retain their identity after marriage. From the given facts and Islamic legal principles, it comes to conclusion that Allah has created both man and woman as equals and therefore, like men, women also have been given the right to choose the life partner of their own choice. A marriage contracted without the free consent of woman is considered as invalid under Islamic Law. In a marital union also, Allah commands man to treat his life

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230 *AIR 1945 Lah 56.*


The court held that the doctrine of *lian* has not become obsolete under the Islamic Law and therefore, a Muslim wife can bring a suit for divorce against her husband on the ground that her husband has falsely charged her with adultery under Section 2(ix) of the *Dissolution of Muslim Marriages Act, 1939.*

232 Section 4 of the *Dissolution of Muslim Marriages Act, 1939* removes apostasy as a ground for granting divorce automatically. However, if a woman reconverts back to her original faith, the marriage shall stand dissolved.
partner with great respect and care. In Islam, marriage is based on mutual peace, love, and compassion and that is why a woman has the right to accept or reject marriage proposals and her approval/consent is necessary for a valid marriage because if her husband is not of her choice, she will not be happy with him. Therefore, she cannot be forced to marry someone against her will and if this occurs for cultural reasons, it is in direct opposition to the principles of Islamic Law and such a marriage will be null and void.

Not only this, as the woman has the right to select her life partner, the same way and by the same principle, she also has the right to seek divorce if she is dissatisfied with her marriage. Islam does not force any person to stay in an unhappy marriage and therefore, it permits divorce. But divorce is considered as the most detestable act in the sight of the Creator-Almighty Allah. Therefore, it must be the last resort and before that all attempts should be made to bring together the estranged spouses with the help of reconciliation method. For that purpose, Islam provides that two persons should be selected, one from each side, to try to reconcile between the couple. And if they find that reconciliation is impossible, only then they must suggest for a divorce between the two, otherwise not. But it is often witnessed that nowhere in Muslim societies, reconciliation proceedings are adopted before granting divorce, neither by the courts nor by the religious leaders.

It seems that there is a great deal of misconception and myth about the system of divorce in Islam, not only among the non-Muslims but also amongst the Muslims, who think that men have the exclusive right to give divorce. But this is not the reality and under Islamic Law, women too have the right to initiate divorce if they find it difficult to stay with their husband. If they think that they would not be able to fulfil their obligations properly then, it is better for them to part their ways from their husband according to Islamic Law. Various modes of dissolution of marriage that can be adopted by Muslim women include talaq-e-tafweez, khula, fasakh and mubarat. But as it has already been mentioned that although Islamic Law permits divorce but it should be the last resort for any couple and they must try to keep their relationship intact because Islam favours stability in family life and does not like destruction of this basic unit of the society i.e., family.