Chapter-2

DISSOLUTION OF MARRIAGE

2.1 INTRODUCTORY REMARKS

The Union of marriage is never meant to be broken under any personal law. Firm union of the husband and wife is a necessary condition for a happy family-life. Islam therefore, insists upon the subsistence of marriage and prescribes that breach of the marriage-contract should be avoided. Initially no marriage is contracted to be dissolved in future, but in unfortunate cases the dissolution takes place and the matrimonial contract is broken. A marriage may be dissolved:

(1) by act of God i.e. due to death of the husband or wife, or
(2) by act of the parties i.e. divorce

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. Where a Marriage is terminated by act of the parties, the dissolution is called divorce. Under Muslim law the divorce may take place by the act of parties themselves or through a decree of the court of law. In Islam, divorce is considered as an exception to the status of marriage. The Prophet declared that among the things which have been permitted by law, divorce is the worst.\(^1\) Divorce being an evil, it must be avoided as far as possible. But sometimes this evil becomes a necessity. When it is impossible for the parties to carry on their union

\(^1\) See Tyabji; Muslim Law; Fourth Edn. p. 143.
with mutual love and affection, it is better to allow them to be separated instead of compelling them to live together in an atmosphere of hatred and sufferings. The basis of the Islamic law of divorce is the inability of the spouses to live together rather than any specific cause (or guilt of a party) on account of which the parties cannot live together. It may be noted that with this idea behind a divorce, Muslim law recognizes several modes of divorce.

The Indian Divorce Act, 1869 regulates the law relating to the divorce of persons professing the Christian religion and also the other matrimonial clauses. This act has application if one of the parties to the proceedings is a Christian. The Act is modeled on the English law of divorce (Section 7) Section 10 of the act provides the grounds on which a husband or a wife may petition for dissolution of marriage. It has prescribed a solitary ground for dissolution of marriage on a petition by a husband that is adultery of the wife. It is not necessary that there should be direct evidence of adultery before marriage can be dissolved, for direct evidence is rarely available. Association coupled with opportunity and evidence of illicit affection or familiarity may be sufficient for the court.

2.2 MUSLIM WOMEN- DISSOLUTION OF MARRIAGE

(a) Divorce by husband

Among the pre-Islamic Arab, the power of divorce possessed by the husband was unlimited. They could divorce their wife at any time, for any reason or without reason. They could also revoke their divorce, and divorce again as many times as they preferred. They could, if they were so inclined, swear that they would have no intercourse with their
wives, though still living with them. They could arbitrarily accuse their wives of adultery, dismiss them, and leave them with such notoriety as would deter other suitors; while they themselves would go exempt from any formal responsibility of maintenance or legal punishment.\(^2\)

According to Abdur Rahim, at least four various types of dissolution of marriage were known in the pre-Islamic Arabia. These were *talaq, ila, Zihar, Khula*. A woman, if absolutely separated through any of these four modes, was probably free to re-marry. But she could not do so until sometime, called the period of *iddat*, had passed. It was to ascertain the legitimacy of the child. But it was not a strict rule. Sometimes, pregnant wife was divorced and was married to another person under an agreement. It is interesting to note that the period of *iddat* in case of death of husband then was one year.

The Prophet of Islam looked upon these customs of divorce with extreme disapproval, and regarded their practice as calculated to undermine the foundation of society. It was impossible, however, under the existing conditions of society to abolish the custom entirely. The Prophet had to mould the mind of an uncultured and semi-barbarous community to a higher development. Accordingly, he allowed the exercise of the power of divorce to husbands under certain conditions He permitted to divorced parties three distinct and separate periods within which they might endeavour to become reconciled, but should all attempts of reconciliation prove unsuccessful then in the third period the final separation became effective.\(^3\)


The reforms of the Holy Prophet Muhammad marked a new departure in the history of Eastern legislation. He restrained the unlimited power of divorce by the husband, and gave to the woman the right of obtaining the separation on reasonable grounds. He pronounced "talaq to be the most detestable before God of all permitted things", for it prevented conjugal happiness and interfered with the proper upbringing of children.

Ameer Ali asserts:

"The permission (of divorce), therefore, in the Koran though it gave a certain countenance to the old customs, had to be read in the light of the Law giver's own enunciation? When it is borne in mind how intimately law and religion are connected in the Islamic system, it will be easy to understand the bearing of his words on the institution of divorce."

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

It is sometimes suggested that the greatest defect of the Islamic system is the absolute power given to the husband to divorce his wife without

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4 Abu Daud, Sunan, xiii 3.
5 Supra note, 17.
cause. Dower to some extent restricts the use of this power. But experience shows that greater suffering is engendered by the husband's withholding divorce than by this irresponsible exercise of the right.\(^7\)

It is true that the divorce does him at the root of many sufferings, but it is to be borne in mind that the husband's right to divorce is in fact circumscribed in various ways. The amount of dower itself serves as "a check on the capricious exercise of his unlimited power of divorce".\(^8\) The higher the amount of dower, the more difficult is the pronouncement of *talaq*. Then *talaq tafweed* (divorce by delegation) is perhaps the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of any court".\(^9\) The wife may at the time of entering into a marriage contract to secure the right of divorce from the husband.

"One cannot deny that many Muslim men abuse the matrimonial laws of Islam and treat their women shabbily. But it certainly does not mean that Muslim women live inconstant dread of the blighted word - *talaq, talaq, talaq* as some self-appointed experts on Shariat... would have us believe", observes Parwez Hafeez. According to him, Muslim men despise divorce as much as Muslim women. Divorce is considered a dirty word and is strongly disapproved of even in Muslim society. Because of the social stigma attached to it, the overwhelming majority of Muslim men never dream of uttering the word. The rate of divorce among Indian Muslim is more or less the same as among other communities. In the Western society, where divorce is a time-

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\(^6\) Id. at pp. 245 & 46  
\(^7\) Id. at pp. 245 & 46  
\(^9\) Id. at 159.
consuming, expensive and torturous process, the divorce rate in some countries is as high as 45 percent. Bertrand Russel, much-married and much-divorced, observes the author, acknowledged that *where family feeling is strong, the rate of divorce is low even if it is legally easy and conversely where family feeling is weak, rate of divorce is high even if it is legally difficult. It need not be mentioned (hat family ties are extraordinarily strong in Muslim society. The "rational, realistic and modern law of Islamic divorce" appears repugnant to many because of their mind-set that divorce is something inherently immoral. But social scientists and marriage counsellor agree that it is a better and healthier for a constantly squabbling couple to part than to persist with a marriage that becomes a mere sham. When a matrimonial alliance turns into a prison sentence, making life an unending nightmare for both or either of the spouses, divorce is the only escape-route to relief, liberty and sanity. Other societies realized this reality only in the current century while law-givers of Islam realized it fourteen centuries ago.10

The legal systems of various countries have grudgingly accepted the truth that if the marriage has broken down irrevievably let there be a divorce. Called the "breakdown theory", this law was incorporated by British in 1969 and recommended by the Indian Law Commission in its report in 1978.

Besides these precautionary devices, Islamic law has given rights to the wife to get rid of an unpleasant husband and has the marriage dissolved through the prescribed procedure on certain grounds.11 The

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10 Parwez Hafeez, “Talaq is as dirty a word for Muslim men as it is for women”. The Asian Age, 23 August, 1995.
law also protects the wife against the malicious intent of the husband in pronouncing *talaq*. This situation is well-explained by Mulla who says that the rights of mutual inheritance cease immediately when the *talaq* becomes irrevocable, though the death, whether of the husband or wife, may occur before the expiry *iddat*. To this there is an exception in favour of the wife. It is this that if the repudiation was made during the husband's death- "illness (marz-al-maul), and he dies, before the expiry of the *iddat* the wife is entitled to inherit from him, the reason being that a repudiation by a man in his last illness is nothing but a device to defeat the wife's right of inheritance.¹²

Lastly, the inequality of sexes is explained by Abdur Rahim in these words:

"The relations between two members of the opposite sexes which marriage legalizes are, however, so subtle and delicate and require such constant adjustment, involving the fate and well-being of the future generations, that in their regulation, the law considers it expedient to allow the voice of one partner more or less predominant over that of the other".¹³

The structure of the Islamic law of divorce is, as already stated, based on the so-called "breakdown theory", now being adopted by modern laws on matrimonial disputes. Without prescribing any specific "grounds" for divorce, it allows dissolution of marriages at the instance of husband (by *talaq*) or the wife (by *Khul*) and by mutual consent (by *mubara’at*) subject in each case, to such ifs and buts that in modern legal terminology can be best translated into nothing but "irretrievable break down".¹⁴

¹⁴ Tahir Mahmood, "Halala: A misunderstood concept of Muslim Law". 11 NO. 4 Islamic &
The Prophet who set the examples by never divorcing any of his wives despite occasional provocation inspired religious awe against divorce by declaring that "among legally permitted things most detestable in God's sight is divorce". The Qur'an prescribed bilateral reconciliatory measures to precede essentially every case of divorce. Only where marital relationship was ruptured past all repairs, room was kept for a respectable parting of ways. Divorce, since it disintegrates the family unity, is, of course, a social evil in itself, but is a necessary evil. It is better to wreck the unity of the family than to wreck the future happiness of the parties by binding them to a companionship that has become odious.

Thus it may be submitted that Islam discourages divorce in principle and permits it only when it becomes absolutely impossible for the parties to live in peace and harmony. The Prophet has expressed his abhorrence of it on various occasions. Unequivocally declaring divorce to be abghad al-mubahat (i.e. most detestable of all legally permissible things) the Prophet issued a stern warning:

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

Another tradition says: "Marry but do not divorce, because God does not like men and women who relish variety of sexual pleasure." He also warned, 'Do not make nikah and talaq a play thing'. Elsewhere he said, 'Marry not for the sake of divorce'. In case of differences and

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15 Qu'an, IV: 35.
17 Muhammad Ali, Manual Hadith, 284.
18 Abu Da'ud, Mishkat (Kitab al talaq) as cited in the Jami Saghir (Egyptian ed.)
family jars which may lead to divorce, Qur'an enjoins four steps to be in that order: (1) perhaps verbal advice or admonition may be sufficient; (2) if not, sex relations may be suspended; (3) if this is not sufficient, some light physical correction may be administered; but Imam Shaft considers this inadequate, though permissible and all authorities are unanimous in deprecating any sort of cruelty, even of the nagging kind; (4) if all this fails, a family council is recommended:

As to those women On whose part ye fear Disloyalty and ill-conduct, Admonish them (first), (Next), refuse to share their bed (And last) beat them (lightly); But if they return to obedience. Seek not against them.

Means (of annoyance): For God is Most High, Great (above you all).

35. If ye fear a breach Between them twain, appoint (two) arbiters. One from his family and the other from hers; If they wish for peace.

God will cause their reconciliation: For God hath full knowledge. And is acquainted with all things.\textsuperscript{19}

It may be submitted that this is an excellent plan for settling family disputes without too much publicity or mud-throwing or resort to the chicaneries of the law. It is a pity that Muslims do not resort to it universally, as they should. The arbiters from each family would know the idiosyncrasies of both parties and would be able, with God’s help to effect a real reconciliation.\textsuperscript{20}

It has also been observed that these three measures are not to be applied to simultaneously or equally in every case. The punishment shall correspond to the fault and the status of the wife. Where a light

\textsuperscript{19} The Holy Qur’an. IV: 34-35.
admonishment proves effective, sterner measures shall not be resorted to, as for the third harsher alternative in case of an incorrigible wife. The Prophet directs men not to hit across the face, nor to beat severely nor use anything that might leave marks on the body (Ibn Majah). And the Prophet elaborates in the most unambiguous terms that husbands who resort to such measures are not among the best. Again it must be borne in mind that this permission to rectify an errant wife is just symbolic and by way of a warning.\textsuperscript{21}

The Qur'anic injunction apart, there is also a tradition of the Prophet suggesting reconciliation:

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"... 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."\textsuperscript{22}
\end{quote}

Though Islam recognizes the necessity for divorce in cases when marital relations have been poisoned to a degree which makes a peaceful home life impossible, it does not believe in unlimited opportunities for divorce on frivolous and unimportant grounds, because any undue increase in the facilities of divorce would destroy the stability of 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. Let us see in more detail the Islamic law on this point.

So far as men are concerned, they have been given liberty of divorce on certain conditions. First, as regards the dower they bestowed on

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their wives, they are not permitted to withhold it or take back anything from it, if they decide upon divorce. Secondly, a divorce pronounced at a single sitting does not have the effect of final separation. It is laid down as a condition that a divorce, to take legal effect, must be pronounced three times at an interval of one month each. There is some difference of opinion as to whether three pronouncements at a single sitting can have the effect of final separation. Most jurists hold that for a divorce to take effect, it is pronounced three times even at a single sitting. But Imam Ahmad ibn Hanbal and Ibn Taymiyyah reject this opinion and regard three declarations of divorce delivered at a single sitting as one pronouncement, so that separation does not come at the end of three such declarations, but only when such declarations are separately made at an interval of one month. There are strong grounds for supporting the stand taken by Imam Ahmad and Imam Ibn Taymiyyah. In the first place it is obvious that the intention of the law in prescribing three pronouncements of divorce separated by fixed intervals of time precedent to final separation was to leave open the opportunity of reconciliation. This intension is defeated by recognition of three pronouncements delivered at a single sitting with the effect of final separation. Secondly, there is evidence to show that the companions of the Prophet regarded this form of divorce as being morally reprehensible and involving the person responsible in a great religious sin. It is recorded that ‘Umar, the second caliph, used to punish such persons who pronounced three divorces at a single sitting. Ibn Abbas, another companion of the Prophet was asked about a person who divorced his wife in a single sitting. He said: ‘Man was

guilty of disobedience to divine commands'. 'Ali is reported to have said: 'If the people faithfully observed the conditions of divorce, no one would feel sorry for the separation of his wife'. In the face of this strong evidence, it is strange that the majority of the jurists recognized the legal validity of an act which has been universally condemned as being highly sinful and which obviously defeat the law giver's intention.

During the period of the first two pronouncements of divorce, the husband and the wife are required to live together as formerly, so that if the husband has acted hurriedly or in a fit of passion, he may revoke his pronouncement and normal relations may be restored. Again if the husband has sexual intercourse with his wife or indulges in the preliminaries of co-habitation, the pronouncement of divorce lapses automatically without express declaration on his part. If, however, no such thing has happened and two intervals of one month each has elapsed, and the husband makes the third and final pronouncement after this period, marital relations are completely dissolved and the divorce is complete. If the husband reports after this and wishes to have his wife again, he cannot do so, except after his wife has been married to someone else and divorced by him too. This provision has been considered necessary in order that it may act as a deterrent for husbands who are prone to act rashly without considering the consequences of their action. According to one submission 'this was deterrent law meant to prevent the husband from divorcing his wife for a third time, whenever it be in his life,... . It was a pro-woman law of a permissive nature.'

Talaqul biddat triple declaration or a single declaration, observes Mulla,\(^{26}\) "is good in law, though bad in theology". Tyabji points out it has become most common, for men have always moulded the law of marriage so as to be the most agreeable to themselves.\(^{27}\) Though it is common use, it may be submitted, the present trend of opinion all over the Islamic world is against it. Pakistan has abolished it.\(^{28}\) There it has been given in writing with a prior notice of three months. Talaq is effective only with the permission of the union council constituted by the government. Similarly in Sudan, Jordan, Syria and Morocco, it is provided that the triple divorce when pronounced in a single formula or on one and the same occasion, would count as a single and revocable divorce.

Similarly, in divorcing one's wife regard is shown for the better considered judgment. One might ask: why should the Talaq be effective even if it is pronounced under compulsion or in a state of voluntary intoxication,\(^{29}\) in jest or in anger? Talaq under intoxication is peculiar to Hanafi law alone, and has been criticized as absurd and hence unjust and should be abolished by statute.\(^{30}\) Ameer Ali and Abdur Rahim suggest that in such cases where the parties happen to be Hanafi, the court should on grounds of equity, apply the Shafei law. The Ottoman law of Family Rights also provides that talaq uttered under the influence of intoxication or intimidation would no longer be given effect to. The legislations introduced in Jordan and Syria provide that the formula of talaq uttered as an oath or threat would be carried into effect only if the husband really so intended. It may be observed

\(^{26}\) Mulla S. 311.
\(^{27}\) Tyabjee, Muhammadan Law (3rd ed) 221.
\(^{28}\) Section 66, government of Pakistan, Ministry of Law, Ordinance no. viii of 1961.
\(^{29}\) A.A.A. Fyzee, Outlines of Muhammedan Law (4th ed.) p. 156.
in this connection that *Talaq-ul-biddat* came into being during the second century of Islam when the Umayyid monarchs, finding that the checks imposed by the Prophet on the facility of repudiation interfered with the indulgence of their caprice, endeavoured to find an escape from the strictness of the law, and found a loophole to effect their purpose.  

Thus it is abundantly clear that it was not Islam but Omayyid practices that gave validity to these *biddat* divorces. It has recently been pointed out by Justice Iyer in *Yusuf v. Sowramma* where he said:

"*It is a popular fallacy that a Muslim male enjoys under the Qur'anic law, unbridled authority to liquidate the marriage... the view that the Muslim husband enjoys an arbitrary, unilateral power to inflict divorce does not accord with Islamic injunctions. However, Muslim Law, as applied in India has taken a course contrary to the spirit of what the Prophet or the Holy Qur'an laid down and the same misconception vitiates the law dealing with the wife's rights to divorce... Commentators on the Qur'an have rightly observed and these tallies with the law now administered in some Muslim countries like Iraq that the husband must satisfy the court about the reasons for divorce".

*Talaq-ul-biddat* should, therefore, be not given effect to Abdur Rahim is more poignant when he says:

"*I may remark that the interpretation of the law of divorce by the jurists specially of the Hanafi School, is one flagrant instance where because of liberal adherence to mere words and a certain tendency towards subleties they have reached a result in direct..."
antagonism to the admitted policy of the law on the subject”.

Far-reaching reforms relating to unilateral divorce have been introduced during the recent years, in a large number of Muslim countries.\(^{34}\) It is high time that some thing be done in India too. It is interesting to note that under a decree of H.H. the Aga Khan, the Khojas in India have their own marriage tribunals and neither a second marriage nor a divorce is possible without recourse to these tribunals.\(^{35}\)

Another condition laid down for husbands intending to divorce their wives is that they should not pronounce the divorce during the period of their wives ‘menstruation’. This condition has been deemed necessary because a woman is liable to become ill-tempered and easily irascible during the period of menstruation. This physical disability leads her sometimes to act and behave in a manner which she disapproves herself on becoming clean. Vermilow in his *Biological Tragedy of Woman* makes some observation which is pertinent in this case:

"Women's mental equilibrium is upset during the period of menstruation... A woman street-car conductor pulls out the wrong tickets and is muddled in counting the change. A menstruating motor-woman drives the street-car slowly and with hesitancy, becoming confused at crossings. The lady typist's fingers strike the wrong keys, The woman dentist cannot find the proper instrument. An actress is not in the right mood and makes wrong gestures”.\(^{36}\)

Havelock Ellis observes:


\(^{35}\) Khalid Rashid, *Supra* note 44, p. 97

"There is in this period greater impression-ability, greater suggestion and more or less diminished self-control. It is at this time that sudden caprices, fits of ill-temper, moods of depression, impulses of jealousy, outbursts of self-confession are chiefly liable to occur."\(^{37}\)

Another reason for this stipulation is that normal sexual relations between husband and wife are suspended for the time she undergoes her monthly course, and sexual relations are commonly the basis of love and amity between husband and wife. It is possible that, a couple may resume their normal attitude to each other and forget their quarrels when their sexual relations are restored after the period of menstruation. There is a tradition that ‘Abdullah b. Umar divorced his wife when she was having her monthly period. His father reported the matter to the Prophet who became very angry and ordered that Abdullah should revoke his divorce and wait until his wife is clean, after which he is free to do as he liked. Another tradition states that the Prophet told Ibn Umar to observe the following procedure in divorcing his wife:

"Ibn Umar", said the Prophet, “you adopted a wrong method. The right one is that you should wait for tuhr (period of cleanliness), then pronounce a divorce during tuhr and another during the second. During the third tuhr you should decide finally either to retain your wife or to divorce her".

It is respectfully submitted that in talaq-ul biddat the form of talaq widely and indiscriminately practiced in India, the process prescribed by the Holy Prophet is hardly observed.

(b) Wife's right to divorce

The general survey in the foregoing pages reveals the right of divorce sanctioned in favour of the husband. In the following pages right to divorce sanctioned in favour of Muslim wife will be examined. There are two ways in which a woman is allowed to seek separation from her husband; first, through mutual agreement between the husband and the wife which is called Khula, secondly, through a judicial decree by filing a suit against the husband in a law court called fask. It will be seen that the wife is not at liberty like husband, to get herself released by an outright declaration of divorce. If her husband refuses to release her from the marriage bond, she has to go to a court of law and obtain a decree in her favour. This may seem to place her at a disadvantage in comparison with her husband and it may be asserted that this implies inequality of rights, as between husband and wife. Actually, the intervention of the state in this matter is a device for the fuller protection of her rights. Conditions all over the world, including even Western countries, are such that a woman is not altogether free to exercise the legal rights. The husband can, if he so desires, place many impediments in her way. If the state does not come to her help in order to safeguard her rights, the woman may find herself handicapped in many ways, despite all talks and preaching of sex equality. It is, therefore, in her own interest to seek the support of authority in defending and exercising her rights. This was all the more necessary in the past when woman’s social position exposed her to greater difficulties.

As in the case of divorce by the husband, the legal permission given to
woman to seek and obtain separation through mutual agreement or through the intervention of the court does not imply moral approval of the act. Islam has unreservedly condemned men and women who use their legal rights of divorce except on legitimate grounds and in absolutely unbearable condition. Thus a tradition of the Prophet states: 'God does not like men and women who seek variety of sexual experience'. Another tradition says, 'God has showered curses on those men and women who make frequent use of divorce for the sake of sexual enjoyment' Again, the Prophet of God said; 'A woman who seeks divorce from her husband without any excess on his part will be cursed by God and His angels' Yet another Hadith says: 'Women who make a play thing of their divorce rights are hypocrites'. According to Ahmed and Tirmizi, the Holy Prophet of Allah said, 'Whichever woman asks her husband for divorce without fault, the fragrance of paradise is unlawful for her'. These warnings and moral exhortations are intended to discourage men and women from disturbing the stability of family life and resorting to separation except in cases of unavoidable necessity. Moral dissuasion apart, there is no dispute about a woman's legal right to seek separation from her husband. This she may do either by giving up a part or the whole of the dower given to her by the husband or by offering an arranged sum of money to her husband in return for his consent to release her from the marriage bond. Thus both men and women are required to undergo monetary sacrifice for securing their separation. This is likely to act as a deterrent in both cases. Should the husband refuse to part with his wife on any of these terms, it is open to the latter to the protection of law by filing a suit against him and obtaining a legal decree of separation.
Actual legal decisions by the Prophet of Islam show the spirit and principles which the law courts should apply to cases brought by women against their husband.

The most famous among the cases is that of Thabit b. Qais whose two wives sought divorce from him. One of them Jamila bint Abi Salul, disliked his features. She came to the Prophet of God and complained against him, saying: 'O Prophet, nothing can bring him together with me. I lifted my face covering to see him coming along with a few other men and I noticed that he is the blackest, the most short-statures and the ugliest of them.' Another report says: 'she said, by God, I do not dislike his morals or behaviour, but I cannot stand his ugliness. According to Ibn Majah, she is reported to have said, ‘By God, if fear of God did not stand in my way, I would have spit him on his face’. According to the author of Fath-al-Bari, Jamila said 'You see, O Prophet, how beautiful I am, but Thabit is an ugly person'. Bukhari reports that she said to the Prophet: 'I do not blame him for his morals or religion, but I am afraid Islam will lose its hold upon me if I am compelled to live with him'. After hearing her complaint, the Prophet said to her, 'Will you give him back the orchard he gave you?' She replied, 'yes and also more, if he wants'. The Prophet asked her not to give more and ordered Thabit to accept the orchard and divorce her.

It will, thus, appear that distaste for the husband's appearance was considered a sufficient ground by the Prophet for the dissolution of marriage. It is significant that the Prophet did not endeavour to expound to Jamila the Philosophy about facial appearance agreeable or otherwise. What is important to note is that once the Prophet was satisfied that there existed a deep-seated distaste in the heart of the
wife for her husband, the marriage was ordered by him to be dissolved. The Prophet had, presumably, so ordered in view of the moral consequence. The repercussions thereof could have been harmful for character, religion and morality. These considerations must out-weigh the harmful ramifications of dissolution of marriage.\footnote{SAM Khusro, ‘A Muslim Wife’s right to divorce: A note on the proper perspective’, II No. 41 Is. & CLQ 2 December, 1982, p. 299.}

Another wife of Thabit b Qais, Habibah bint Sahil, according to a report from Imam Malik and Abu Dawud, came to the Prophet early one morning. When the Prophet came out, he saw her standing before the door. On the Prophet's enquiry how she happened to be there, she replied: 'I and Thabit cannot pull together.' When Thabit came, the Prophet said to him: 'This is what your wife says about you, so leave her'. According to Ibn Majah, Habibah complained to the Prophet that Thabit had beaten her so badly as to break her bone. In any case, the Prophet, on hearing both sides of the matter, ordered dissolution of the marriage.

During the time of ‘Umar, the second Caliph, a suit of divorce was brought to him. He advised the wife not to leave her husband and try to pull on with him. The woman refused to do so 'Umar put her in a dirty room for three days. On the fourth day he asked her how she had fared. She said that she had real peace of mind only for those three days, whereupon 'Umar ordered dissolution of her marriage'.

These three cases show that the mere fact of a woman having disgusted with her husband is sufficient ground for legal separation between them. In the case of Thabit b. Qais, the Prophet showed by his action that a woman's disapproval of her husband on physical grounds
is a legitimate ground for a decree of separation in her favour. It is enough for the court to satisfy itself that one of the partners had developed sufficient antipathy against the other to make reconciliation impossible. The court need not inquire into the detailed reasons of this antipathy, because a woman may dislike her husband on many grounds, some of which she may not like to state openly. There may also be reasons for disgust which may not seem valid to the court or any other arbiter, but which may be sufficient to spoil the marital relations of husband and wife. The court has no right to give its verdict on the point whether the reasons for dissatisfaction as expressed by the wife are valid. All it can do is to satisfy itself on the point whether the dissatisfaction is genuine or feigned, whether it arises from causes which are temporary and may disappear or it is so deep-rooted as to preclude the possibility of happier relations being restored.

It is inadvisable for the court to inquire whether a wife seeking divorce is doing so because she is sexually erotic and desires a variety of sexual pleasure or her aversion to her husband springs from genuine causes. The right of a man to divorce is not limited by conditions that he should not use it for satisfying his anarchic sexual desire, the mere fact being unable to obtain a divorce from a law court will not prevent her from forming illicit unions, and in such a case the court, by refusing a decree of separation, will be supplying an incentive to illegitimate sexual activity which is morally and socially more reprehensible than frequency of divorces. The effect of a court decree in favour of separation is the same as that of the final divorce pronounced by the husband, which dissolves the marriage finally and irrevocably. The couple cannot be remarried unless the woman marries.
another husband and gets a divorce.

As regards monetary sacrifices involved when a woman seeks divorce from her husband, it has already been stated that the husband cannot claim more than what he has already given to his wife as dower. If the separation comes as a result of mutual agreement without the intervention of the court, the amount has to be settled between the two partners. But if the dispute is brought to the court the latter can decide what portion of the dower should be returned by the wife, whether the full amount or half of it or one-fourth etc. Many jurists agree that if separation takes place as a result of the ill-treatment of the husband or his excesses, and such charges are proved during the process of legal inquiry, the court can totally exempt the wife from repayment of the dower, or it can decide in favour of an amount less than that of the dower, according to the circumstances involved. Some jurists are also of the opinion that if the court is satisfied that the wife has no legitimate grounds for seeking separation and is merely the victim of anarchic sexual impulses, it can order her to pay more than her dower.

Thus, it is established that under classical matrimonial laws, wife's right to divorce has been admitted. In India, the Dissolution of Muslim Marriages Act, 1939 was enacted in the light of the sanction delineated above.

(c) **Indian scenario**

(i) **Divorce on wife's own initiative**

Divorce on wife's own initiative as already stated assumes the form of a *talaq-i-tafwid* or a *Khula*. A Muslim wife can at the time of marriage
reserve in the *kabinnama* (marriage-deed) a right for herself to
dissolve the marriage under certain specified conditions. This is styled
as *tafvid-e-talaq* (delegation of divorce). A stipulation that, under
certain specified conditions, the wife can pronounce divorce upon
herself has been held to be valid, provided first, that the option is not
absolute and unconditional secondly, that the conditions are reasonable
and not opposed to public policy.

Stipulations such as wife's power to exercise divorce on the failure of payment of maintenance, contracting second marriage by husband, shifting of matrimonial home, interference with wife's movement consequent upon economic and social needs, wife's insistence not to live with her in-laws have been adjudged as valid and not in variance with the spirit of Islamic law. The wife exercising her powers under the agreement must establish that the conditions entitling her to exercise the power have been fulfilled.

It has been observed that *talaq-i-tafwid* is perhaps the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of any court and has become rife in India since thirties.

Regardless of incorporation of such a clause in the *Kabinnama* as in the process of delegated divorce every Muslim wife is facilitated by the right to *Khula*. ‘*Wife’s right to Khula is parallel to the men’s right of talaq* like the latter the former, too is unconditional’. In the matter of *Khula* if it is taken to the court, it is not for the court to enquire if she wants dissolution on a genuine ground or just for the sake of

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40 Mirjan Ali v. (Mst.) Matmuna Bibi AIR (1950) Cal. 304
marrying another man'. If a wife thinks that it is no more possible for her to live with her husband, she would simply tell him that she needs a divorce. Where the husband is reluctant, the wife may straightaway proceed to the court for a decree of Khula. Here the husband may demand of the wife to relinquish her claim to dower.

Khula is extremely liberal and pro-woman law.⁴³ Although the institution of Khula has been grossly misunderstood by the Indian courts since the Privy Council's pronouncement in the Moonshee Buzloor Raheem,⁴⁴ its true spirit has been duly recognized by the courts of Pakistan and now of Bangladesh following the celebrated judgment by Pakistan Supreme Court in Khurshid Bibi v. Mohammad Amin.⁴⁵ It would be therefore, in the fitness of things that the court in India pass decrees of Khula under the residuary clause of section 2(ix) of the Dissolution of Muslim Marriages Act, 1939 enabling a Muslim wife to dissolve a marriage on "any other ground which is recognized as valid for the dissolution of marriages in Muslim law".

Table-i-tafwid and khula apart, accessible to a Muslim wife is the judicial divorce, styled as fask In India it may be granted on any of the grounds specified under the Dissolution of Muslim Marriages Act, 1939 Section 2 of the Act lays down that even a single ground incorporated therein is enough for a Muslim wife to secure a dissolution of her marriage. Among these grounds are missing of a husband, failure on the part of a husband to maintain his wife, imprisonment of husband, failure to perform marital obligations, impotency, insanity, leprosy, venereal disease option of puberty and

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⁴⁴ (1861) 8 MIA 379.
⁴⁵ PLD 1967 SC 97
cruelty. Unfortunately, however, the courts in India are reluctant to grant a divorce to a wife on the grounds in the Act. In *K.C. Moyin v. Nafeesa*,<sup>46</sup> Justice Khalid observed that under lib circumstances can a Muslim marriage be repudiated by the wife and he further said (hat a unilateral repudiation of marriage by way of *fask* by wife has no legal sanction.

(ii) **Divorce by mutual agreement**

In Islamic law dissolution of marriage by mutual consent is known as *mubara'at*. It is a process in which a couple can jointly dissolve their marriage extra-judicially on the terms that may be mutually agreed upon. The word *mubara'at* denotes the act of freeing one another mutually. In case of *Khula* literally meaning 'to take off clothes', the wife to be released and the husband agrees for a certain consideration, which usually form a apart of the whole of the *mah*, while in *mubara* at apparently both are happy and may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

When wife may petition for dissolution- any wife may present a petition to the District<sup>47</sup> Court or to the High Court, praying<sup>48</sup> that her marriage may be dissolved on the ground that, since the solemnization thereof her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman: <sup>49</sup>

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<sup>46</sup> (1973), Kerala Law Journal, 181.
<sup>47</sup> ...
<sup>48</sup> ...
<sup>49</sup> ....
“or has been guilty of incestuous adultery, or of bigamy with adultery, or of marriage with another woman with adultery, or of rape, sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et toro, or of adultery coupled with desertion without reasonable excuse for two years or upwards”.

While commenting on the Jordan case Lucy Carroll observed:

“Talk of family law reform or a uniform civil code frequently focuses on the major minority community, the Muslims. This is unfortunate because reform is needed elsewhere as urgently. Jordan Diengdeh v. S. S. Chopra50 highlights the archaic divorce law that continues to govern Christians in India. Based on English matrimonial law of the mid-nineteenth century, the Divorce Act of 1869 has remained unchanged for nearly a century and quarter while the parent statute in England has undergone revolutionary change. Ironically, the Dissolution of Muslim Marriages Act 1939 would offer greater succor to the unhappy wife in the present case than the laws of her own community afford”.

Earlier as back as 1960 Law Commission took up the matter for consideration. However, the reform could not be carried out because of a section of the Christian community. In Law Commission’s own words

“Coming next to divorce, the Roman Catholics have strongly pressed on us that divorce should not be recognized, as it is opposed to their faith, or, in the alternative, that they should be exempted from the provisions of this Act in so far as they relate to divorce. They say, basing themselves on the passage in the Bible,

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"What therefore God has joined together let not man put asunder", that, it is a fundamental article of the Christian faith that marriage is indissoluble; that the canonical law therefore does not recognize divorce; that the grant of divorce would be repugnant to it; and that therefore the provisions relating to divorce should not apply to them.\textsuperscript{52}

Regarding grounds of divorce under section 10 of Indian Divorce Act, 1869, the Commission appreciated the well-founded criticism that it makes a distinction between the husband and the wife in the matter of grounds on which they could obtain divorce and that there is no justification for maintaining this distinction between them. It also entertained the view that this law has now become very much out of date, and that it is necessary to allow divorce on several other grounds, 'as has been done in all modern legislation'.\textsuperscript{53}

Part of observation made by the Law Commission of India, however, evoked severe criticism from the National Specialized Agencies and Women's Equality which records its findings in the following terms:

"Regarding the grounds for divorce the Commission departs from its usual practice of clearly enunciating a proposal or turning down one by giving detailed reasoning. The provision in the Divorce Act provides for only one ground viz., adultery and even in this clearly differentiates between a husband and a wife. Adultery simpliciter is sufficient for a husband to proceed for divorce. In the case of the wife, adultery is not sufficient, she has to prove aggravated adultery like incestuous adultery or adultery with cruelty. The Commission recommends mildly a change by opining that there is criticism against this distinction and 'we agree with it'. Headed by a retired Supreme Court Judge, there is no mention of the fact in 1960, many years after our constitution, this is violative of the fundamental rights prohibiting discrimination on the

\textsuperscript{52} Law Commission of India, Fifteenth Report (1960).

\textsuperscript{53} Ibid.
ground of sex. This point was forcibly argued when the Commission took up the case of the Christian matrimonial law for the third time in 1973 and the Commission headed by an eminent retired Chief Justice warned the Government that if they did not remove this provision, the courts would do so and that would result in a lacuna in the law, till the legislature moved and remedied the situation.”

The Commission recommended sweeping change of the much criticized section 10 of the Act containing grounds of Christian divorce. Appreciating the drive, the Agency noted that "while suggesting additional grounds for divorce 'as has been done in all modern legislation', the Report is clear and forthright".

These all despite, the law on divorce was left stranded. No reform could be introduced till date. Again the problem of the Indian Divorce Act, 1869 was highlighted in one of the cases reported as recently as 1995. Mary Sonia Zachariah v. Union of India is a case in point. In this case the grounds for dissolution of marriage by the Christian wife under section 10 of the Indian Divorce Act, 1869 was challenged as violative of Fundamental Rights guaranteed under Articles 14,15,19 and 21 of the Constitution. Indian women of all religions other than Christianity are entitled to get divorce ground of cruelty and / or desertion without reasonable excuse for two years or more ^dependent grounds are available under the respective enactments. For Christians governed by Indian Divorce Act, besides cruelty and desertion, adultery should also be proved while seeking divorce. Direct proof of

54 National Specialized Agencies and Women’s Equality, Law Commission of India, prepared by Latika Sarkar, Centre for Women’s Development Studies, New Delhi, pp. 88-89.
55 Ibid.
adultery by wife is well-nigh impossible. Provision for divorce is
infructuous inasmuch as while husband is entitled to get divorce on the
proof of adultery simplicitor, wife is obliged to prove either cruelty or
desertion along with incestuous adultery. It is a sex-based
discrimination and so this provision is constitutionally bad.... The
antiquated and anomalous nature of the Act was noted by the Supreme
Court and the other courts ....

The court found that the life of the Christian wife who is compelled to
live against her will as wife of a man who hates her, treats her with
cruelty, deserts her, will be a inhuman life imposed by tyrannical
law— violative of Article 21. If such relationship is not allowed to put
an end, it will lead to continued bickering, quarrels and litigation.

It was also observed by the court that there is a "real need of
comprehensive reform" and "this judgment will have a compelling
effect on the Central Government in finalizing its proposal for
introducing comprehensive reform in the law governing marriages and
divorce among Christians in India."57

It may be submitted that the inadequacy of the provision of the Indian
Divorce Act B conspicuous. It has severely marred the interest of the
parties, particularly, the wives. In D'Souza's case a Full Bench of the
court had stated:

"The inadequacy of the provisions of (the Indian
Divorce) Act is patent. Perhaps when this Act was
passed by the Legislature in 1869 it was a progressive
law. To-day one can almost say that it is an archaic law
requiring serious reconsideration by Parliament to

57 Id. p. 58.
The reform was demanded from all sections of the intelligentsia. Kusum, while surveying the family laws observed that 'the need for reform in the Act is overdue. Over the past few years there have been many cases which show that the Act is too harsh on the parties and hence needs to be amended and brought at par with other divorce laws in the country. A case decided by the Andhra Pradesh High Court reinforces this fact.

(d) Delegated Divorce

A Muslim husband has unrestricted right to divorce his wife whenever he likes. This right is so absolute that he may exercise it either himself or may delegate his right to another person. In other words, instead of pronouncing the Talaq himself he may give his right of divorce to any one else, including his own wife. Even the presence of wife at the time of pronouncement of Talaq is not necessary. A Talaq pronounced in the absence of wife is lawful and effective. Divorce by such other person, who acts as agent of the husband under his authority, is called Talaq-e-Tafweez or delegated divorce. In the delegated divorce the Talaq pronounced by that other person is as effective as if it was made by the husband himself.

The husband may delegate his right of divorce to his own wife and authorize her to pronounce Talaq. According to Fyzee, this form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of any

58 AIR 1980 Del. 275.
59 Kusum, Annual Survey of Indian Law (1990)
court and is now beginning to be fairly common in India. The authority it’s given to the wife under an agreement at the time of the marriage or any time after it. The delegation of the power of divorce to the wife may either by permanent or temporary i.e. only for a specified duration. A temporary delegation of power is irrevocable but a permanent delegation may be revoked by the husband.\(^{62}\)

The delegation may be unconditional or subject to certain condition or contingency. Where the delegation is conditional, the authority of giving *Talaq* cannot be exercised until that condition is fulfilled. The general practice is to delegate the power of divorce to the wife upon the husband’s failure to fulfill certain conditions or upon the happening of an event. But the conditions must be of reasonable nature and must not be against the principles of Islam.

(e) **Judicial Divorce**

Judicial divorce means a divorce by the order of a court of law, granted on a number of grounds.

Before 1939, a Muslim wife could seek her divorce by a judicial decree only on the ground of (1) false charge of adultery by the husband against her (Lian), or (2) impotency of the husband, and on no other grounds. There were conflicting provisions in the various schools of Muslim law in respect of divorce by a wife through judicial intervention. It was felt by the right thinking persons of the Muslim society and also by the Government, that great injustice was being done to a Muslim society and also by the Government, -at injustice was

\(^{61}\) Outlines of Mohammedan Law, Fourth Edn.p. 159  
\(^{62}\) D.F. Mulla; Principles of Mohammedan Law; 18\(^{th}\) Edn. p. 332
being done to a Muslim wife in the matter of matrimonial relief. Accordingly, the Dissolution of Muslim Marriages Act, 1939 was enacted by the Central Legislature Under this Act, a wife married under Muslim law, may seek divorce by a judicial decree on any of the grounds enumerated therein. The Act is applicable to all the wives married under Muslim law irrespective of their schools or sub-schools.

The Dissolution of Muslim Marriages Act, 1939 may be considered as a landmark in respect of matrimonial relief to a Muslim wife. The wife's right of divorce, which was denied to her, was restored to her under the Act. Salient features of the Dissolution of Muslim Marriages Act, 1939, may be summarized as under:

(a) Section 2 of the Act contains certain grounds on the basis of any one of which a wife married under Muslim law, may file a petition for divorce. There are nine grounds in Section 2 out of which seven grounds are matrimonial guilt’s (or faults) of the husband which entitle a wife to get her marriage dissolved by a court of law. Clause (vii) entitles the wife to exercise the right of option of puberty through a judicial decree. The ninth ground in Section 2 Clause (ix) is a residuary clause. Under this clause a wife may seek divorce on any other ground recognized under Muslim law which could not be included in the first eight grounds. For example, under this clause, a wife may seek her divorce by judicial decree on the ground of false charge of adultery against her (Lian). Thus, while giving some additional grounds of divorce to a Muslim wife, the Act has not affected her right of divorce on the ground already available under pure Muslim law.
(b) The grounds for matrimonial relief in Section 2 of the Act are available exclusively to the wife. It is because Muslim law has already given an absolute right to the husband to divorce his wife without judicial intervention and without any reason.

Section 2 of the Dissolution of Muslim Marriage Act, 1939, provides that a woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the grounds enumerated therein. The benefits of this Section may be availed by a wife whether her marriage was solemnized before or after the commencement of the Act. The provisions of Section 2 may be given retrospective effect. The specified grounds are as under:

(i) The Husband is missing for Four Years
(ii) Husband's failure to maintain the wife for Two Years
(iii) Imprisonment of the husband for Seven Years:
(iv) Husband's failure to perform marital obligations for Three Years
(v) Husband's Impotency
(vi) Husband's insanity, leprosy or venereal disease
(vii) Option of Puberty by wife.
(viii) Cruelty by the husband.

2.3 CHRISTIAN WOMEN AND DIVORCE

Section 10 of the Indian Divorce Act, 1869 sets forth the grounds on which a Christian marriage may be dissolved. A wife may present a petition for dissolution of the marriage to the District Court or to the High Court on any one of the following grounds:

(i) If the husband has exchanged his profession of Christianity for
some other religion, after the solemnization of marriage and he has gone through a form of marriage with another women the wife is entitled to get her marriage dissolved.

(ii) It means adultery committed by a man with a woman who he could not lawfully marry by reason of her being within the prohibited degrees of relationship even if his wife were dead. If a husband is guilty of such incestuous adultery, the wife can claim divorce on that ground.

(iii) If the offences of bigamy and adultery are committed by the husband during the subsistence of first marriage the wife can claim divorce if they are proved separately.

(iv) Wife is entitled to divorce on this ground after his marriage if he left his wife and subsequently married another woman.

(v) If the husband is found guilty of rape, sodomy or bestiality the wife may claim divorce on that ground. These offences are define a under Sections 375 and 377 of the Indian Penal Code.

(vi) Adultery with cruelty has not defined in the Act. It is "generally described as conduct of such a character as to have caused danger to limb or health (bodily or mental) or as to give rise to reasonable apprehension of such danger”.

(vii) Desertion alone is not a ground for dissolution of marriage. It can be invoked as a ground only when the adultery is coupled with desertion without reasonable excuse for two years or upwards. The desertion can be actual or constructive.

A man and woman married under the Christian Marriage Act are not
entitled to a degree of divorce by mutual consented. The grounds set forth in Section 10 of the act are only grounds on which a Christian marriage can be dissolved. Therefore additional grounds can not be included by the judicial construction of some other Section unless that Section plainly intends so.

Thus it could be seen that a Christian wife can invoke seven grounds for dissolving the marriage. However the existing law appears to be deficient as it is very narrow in substance and application. It is suggested that the Act may be amended to make the law broader in sweep and effective in application.

Apart from the divorce, Christian women can seek judicial separation on the ground of adultery, cruelty and desertion without reasonable excuse for two years or upwards (Section 22). Similarly she can also claim restitution of conjugal rights under Section 32. She is also entitled to alimony *pendente lite* from the husband and also to permanent alimony (Section 36 & 37).

The Indian Divorce Act, 1969, requires a Christian Husband only to prove adultery simpliciter whereas requiring the Christian wife to prove adultery with one or other aggravating circumstances like desertion and cruelty. This discrimination has been taken note of by a few High courts in India. In *Pragati Varghese v. Syryl George Varghese,* a full Bench of the Bombay High Court held that the different treatment which is accorded to Christian women under Section 10 is based nearly on the grounds of sex. Similarly if one compares the provision of the other enactments on the subject of Divorce, it would be clear that the Christian wives are discriminated

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63 AIR 1997 Bom. 349.
and have been treated differently as compared to wives who are governed by other enactments. The discrimination therefore is based on the ground of religion also. This discrimination is violative of Article 14 and 15 of the Constitution of India. Similarly if one has regard to the dealings with protection of life and personal liberty it would be clear that the position of Christian women has been rendered most demeaning as compared to Christian husbands as also wives governed by other enactments. In the light of this discrimination, the Bombay High Court held that the discrimination part of Section 10 of Indian Divorce Act, 1869 is violative of Article 21 of Constitution of India also.64

In *Jorden Deigndeh v. Chopra*,65 suggested complete reform of law of marriage and introduction of mutual consent and irretrievable breakdown of marriage as grounds for divorce. The court berated for not introducing the changes into the Indian Divorce Act to bring it in tune with modern conditions.

In view of the clear discrimination against the Christian wives on the ground of religion and sex and also in view of the fact that the High Courts of A. P. Bombay and Kerala have already struck down the discriminatory provision it is suggested that the Indian Divorce Act must be amended without delay and to remove the bias and also to render gender justice.

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65 AIR 1985 SC 935