CHAPTER-III

UNIT-A

MODES OF DIVORCE/DISSOLUTION OF MARRIAGE
UNDER HINDU LAW
DIVORCE UNDER CUSTOM OR SPECIAL ENACTMENT

Sub-section (2) of 5.9 provides that nothing contained in
this Act shall be deemed to affect any right recognized by
customor conferred by any special enactment to obtain the
dissolution of a Hindu marriage whether solemnized before
or after the commencement of this Act. Thus both in
repect of pre-act and post act marriage.

(1) The customary mode and forum of dissolution of
marriage are preserved, and
(2) Grounds and Jurisdiction of dissolution of
marriage under special enactments are retained.

Divorce under Custom:- Before 1955 among the Hindus
divorce was available only under custom, and customary
modes of divorce unless found to be contrary to public
policy or morality, were given effect to. The customary
mode of divorce and the customary form of divorce are
still available to these who are governed by custom.

and it seems, neither the three years bar to divorce nor
one year's bar on re-marriage after a decree of divorce
applies to customary divorces. Customary divorce may be
obtained through the agency of panchayats or caste
tribunals or by private act of parties such as by
agreement, bill or divorcement, tyag Patra or Furkat
Such a custom must satisfy the standard of reasonableness. A custom permitting one spouse to divorce the other against the will of the latter is void, being unreasonable.

The panchayat and caste tribunals continue to exercise jurisdiction; how this jurisdiction is exercised and how the courts may interfere with such jurisdiction is illustrated by Penabai V. Channoo Lal. The marriage of parties was dissolved by the panchayat on the basis of mutual consent of parties. A suit was filed in the court by the wife for a declaration that marriage still existed on the averment that when she gave her consent before the panchayat she was only fourteen years old and was not capable of giving her free consent. The court rejected the suit and observed that the wife had sufficient understanding when she gave her consent and that such a divorce was recognized in the caste (parties we put was) by custom. Kishen Lal V. Prabhu adds a new dimension to the matter. The court said that it should be clearly proved that the panchayat has jurisdiction to dissolve the marriage and that rules of natural justice have been followed. This seems to be an attempt to bring customary divorces under judicial scrutiny.

**Divorce under special enactments:** Before the Hindu Marriage Act, 1955, in the erstwhile State of Madras and the former State of Travancore and Cochin several statute
were passed to regulate marriage and divorce in various castes or group of castes. Under these enactment, divorce by mutual consent and by deed executed by parties is recognized. Among the matrilineal communities, such as Marumakkathayam and Diyasantana, marriage has been always considered to be a consensual union and not a sacrament. A full bench of the Kerala High Court recently held that the right to obtain divorce by mutual consent under the Travancore. Nayar Act remains unaffected by the Hindu Marriage Act. The same is true about other special enactments.

Section 10 of the Hindu Marriage act, grants a decree of judicial seperation to an aggrieved spouse on grounds of desertion, cruelty, venereal disease, insanity, leprosy & sexual misconduct of a spouse. According to one point of view this decree does not guarantee couples a permanent conjugal peace rather in the long run it encourages them to seek divorce. The judicial seperation decree too, in many cases, it is said, fails to up the differences between the estranged couples.

Section 10 of the Hindu Marriage Act, was enacted by parliament for avoiding easy & hasty divorces on the ground that Hindu society does not favour divorce & further, divorce creates many social problem. Section 10 thus offers the exicted and estranged couples the cooling of period and an appartunity to dissolve their marital differences like a good sportsman and a good old friend. But it may be submitted that the decree of judicial seperation can held those who either afford the idea of
divorce or do not appreciate it. But what does about those who want divorce and are not interested in leading a cruel married life?

Section 13 of the Hindu Marriage Act allows divorce to a Hindu spouse on certain grounds. Some of the grounds are available to both the parties to marriage, but the others to the wife only. A Hindu wife has two additional grounds for claiming divorce against her guilty husband and one of these two is rape, sodomy and bestiality committed by the husband. One may question the wisdom of the law makers, that why the wife alone should enjoy this ground of divorce can a wife be not guilty of committing bestiality? The Hindu marriage Act does not allow a Hindu to seek divorce on the following grounds viz-desertion, mutual consent, cruelty, imotency, and breakdown of marriage irretrearably. Mutual consent and desertion should grounds of divorce in the special Marriage Act, 1954. Mutual consent (Mubarat) is also a ground of divorce in Muslim law. It is a ground of divorce in customary divorces too.

The suggestion, that it should be made a ground for divorce in the Hindu Marriage Act, needs a thorough consideration and necessary caution. Hindu Marriages in most of the cases are arragned marriages and ceremonial in character and therefore, to permit divorce by mutual consent may not be much helpful, as in the case with
intercaste and interreligion marriages conducted in a court of law. Further, among Hindus, child marriages are much in vague up till now. It is also a fact that, in a Hindu marriage, validity of marriage does not depend on the consent of parties to the marriage and a Hindu marriage is not invalid for lack of concert. Therefore, when consent is not material for contracting a valid Hindu marriage, why it should be a ground for terminating the Hindu marriage? In civil and Muslim marriages consent plays a dominant role in validating a marriage moreover, divorce by mutual consent possener its own merits and demerits and its utility has already been judged by scholars on Hindu law.\(^{(12)}\) Therefore, it is submitted that if it is incorporated in section 13 (1) of the Hindu Marriage act. It should have only a restricted application and the relief on this ground be so checked and controlled that it is not readily or hastily enjoyed by contesting parting parties in vaccum.

Cruelty has become a ground of divorce in Uttar Pradesh by a local amendment it is reasonably expected from parliament, that since cruelty can be practised in all states by the Hindu spouses, it should be made a ground of divorce for all Hindus residing in any part of India.

Desecration is not a ground of divorce in the Hindu Marriage Act, it can be made a ground us in the case in England\(^{(13)}\) as well as in India in the case of the
special Marriage Act. (14) Where polygamy is allowed or where interreligion marriages thake place, the possibility of desertion in greater than in a Hindu marriage; nevertheless, it cannot be denied that it is a serious matrimonical offence and it should git its due place in section 13 (1) of the act. Because it in honestly, belived that a deserted spouse is much in need of an established home than a more hope or assurance of an "established Rome" which unfortunately sometimes collapses with no hope of repair; due to the most hostile attitude of the deseriting spouse. For desertion, divorce is a better remedy than judicial seperation and further it is in tune with the current norms of the society. Impotency is a ground of divorce in Muslim Law, but in the Hindu Marriage Act, a spouse can obtain only a decree of nullity on this ground. It appears to be a sound logic that where parties op to live together; irrespective of having no sexual pleasure, their martial tie should not be disturbed by law. But where people marry a younger age with a view to desiring legitimate seacual pleasure. They should not be tied up with impotent parteners and indirectly allowed to satisfy their physical needs outside the legal wedlock. Where impotency is in curable medically or surgically, it is too much to expect from a younger couple to continue the martial tie, on the gound that impotency did not exist at the time of marriage, but existed at the time of filling. The petition only. It is t that a Hindu never
marriage for sex alone; but when it has great importance in married life; how can it be forgotten easily?

Now consummation of marriage has been suggested to be a ground of divorce too but one fails to understand, how it can mark further complicate them and moreover, to prove the fact of non consummation of marriage in many wife during subsistence of marriage, many engage hereself in extra-martial activities, the court may find it difficult to ascertain the fact of non-conformation of marriage. The court at the most can look to the medical report for confirmation of non consummation, but how for it will be reliable one may only wonder in owe.

Some of the grounds of customary divorce have been found to be quite effective in granting speedier divorce to the extranged couples belonging to the lower class of Hindu. Therefore, a plea for this incorporation in the act may not sound unresonable, if some of these grounds are thoroughly studied and if found suitable are granted to Hindus. It may also be noted that the procedure for obtaining customary divorce is easy, simple; non technical as well as speedier. The plea for liberalizing divorce is beeing forward that these days. Therefore a suggestion is put forward that three years bar for obtaining divorce should be suitably reduced to one year. It appears to be just and human suggestion, because one cannot wait too long for terminating his or her marriage,
without being cruel towards each other.

It is just plea that estranged couples have lost all faith and charms of married life and are fed up with the tortures of conjugal union; they should be given a fresh opportunity to re-orient their matromonial life new, if they so desire, instead of dragging on unsuccessful martial life unnecessarily and that too far a very long time. Where divorce is granted too late, the parties to the unsuccessful marriage not only exhaust their energy; money and reputation in terminating it, but suffer much embrassment and disappointment also in future life. The sanctity of judicial institution is also affected, when it becomes a source of further embrassment to the litigants; who are already frustrated with their matrimonial liver.

The procedure of first obtaining judicial separation and then divorce appears to be a dilatory process and it unnecessarily delays justice to the parties in dispute justice delayed in justice dnied in such easer. It is not too much to expect that extranged spouses, who are much in need of divorce, should get it only after three years or more after the total satisfaction of the court and in many cases at such as late stage of life that, all their future charm of another marriage is diminished, because they find them selver now too old for it. Where conjugal relations are damaged irreparably soon
after marriage or within few years of marriage, the extranged couple expect speedier divorce. To delay the divorce in such cases will not only be inhumane but absurd too. Therefore the Hindu Marriage act should be so moderated that it ensures the estranged couples divorce at an earlier date i.e., when they are much in need of it. But in doing so regard must be had, that the sanctity of a Hindu marriage is not associated beyond repairs. Because the unstitution of marriage is more respectable than the institution of divorce and the later is a part of the former and not above it.

The younger generation it appears, does not posses that much of regard for the institution of marriage, as the people of the past had, nevertheless if it desires easy divorce, its demand should be conceded to with almost care and caution; and on university accepted principles of marriages and divorce law.

Bisider above observations, it may also be pointed out that section 5 (i) and (vi) and section 16 of the Hindu Marriag Act also need a better drafting, so that the law laid down in it is further clarified and made up to date.

It is reartening to note that the law commision recomendations or contained in its 50th report have taken note of the in adequancies of matromonial reliefs granted in the Hindu Marriage Act,
1955 (Special Marriage Act 1954) and the commisions has been right in recommending the following reforms Viz. 

(i) Guilty should be made a ground of divorce.
(ii) Adultery should be made a ground of divorce.
(iii) Two years desertion should, on the part of either party be made a ground of divorce.
(iv) There should be deletion of three years period for grounds based on diseases Viz insanity, leprously and veneral diseases
(v) I regard to section of 13(A), Hindu Marriage Act 1955 the period be reduced to one year i.e., divorce should be allowed to either party one year after the non compliance of the decrees of judicial seperation of restitution of conjugal right. In other word two years period of waiting be reduced to one year in the above cases.
(vi) Three years bar for obtaining divorce as provided in section 14 of the Act be removed i.e. section 14 should be delated.
(vii) From section 15 of the Act, the bar of one year for remarriage be removed.
(viii) With a view to avoiding under delay in the disposal of matrimonial petitions, the family courts be establish and "endeavor should be under delay.
(ix) Every proceedings under the Act should be made in camera.

According to one Fifty ninth report of the law commision is very dissapointing; but this view needs a through study in a seperate paper.
CHAPTER-III

UNIT-A

REFERENCES

(1) Mayne, Hindu Law, (11th Ed.), 175-76

(3) Gurdit V. Angeuj, (Customary divorce among the Hindu Jat of Jullandhar District is recognized) 1968 S.C. 142.


(4) Anandi V. Baija, 1973 Raj 94;


(7) Travancore, Fzhaya Act, 1925, Cochin Nayar Act 1933; Madras Alisantan’a Act, 1924. Cochin Marnmakatheyam Act, 1938.


(9) See S. 13 of the Act (10) S. 13(2) of the Act.

(11) See 8.28 with 8.34(c) of the special Marriage Act.


(13) The (English) Divorce Reforms Act, 1969.

(14) S.27(b) of the Special Marriage Act.

(15) S. 29(2) of the Act gives recognition to it.


(17) The rule of monogamy says that one cannot keep two wives or two husbands at a time, but if one keeps a wife and many girl friends....S.5(i) cannot effectively check it.

(18) Where Parents withhold consent unnecessarily, the Act is helpless.

(19) S. 16 of the Act should also cover the children of avoid marriage contracted in violation of S.15 and S.7.
CHAPTER-III

UNIT-B

"MODES OF DIVORCE/DISSOLUTION OF MARRIAGE"

UNDER ISLAM (MUSLIM LAW)

Introductory:- Talaq (Divorce) is an Arabic word which means "Undoing of or a release from a knot," It is used by Muslim Jurists to denote the release of a woman from the marriage tie, and means a divorce.  

Among the book written on the basis of Qur'an, Hadith and Fiqah for Muslim divorce, including that of Baillie, Wilson, Tyabji, Ameer Ali, Mulla, Saxana, K.N. Ahmad, Justice Mohmood, Abdur Rahim, Ibne Abedin, Qodama, Ibne Tayemea, Ibne Nujaim, and Marghinani and Fayzee the best classification have been given by Fyzee, K.N. Ahmad and Marghinani. Their method of classification are scientific and easily accepted by the society and under the Qur'an and Hadith. Their basis of classification are the following.

Classification of Divorce:-

A. By the death of the husband or the wife
B. By the act of Parties
C. By Judicial process.

A. By the death of Husband or the wife:

It is clear and natural that with the death of husband or wife the marriage tie automatically terminates. The husband can remarry immediately after his wife death. But in case of the husband's death the widow has to wait
till the expiry of Iddat (Menstrual courses to 4 months and 10 days or is pregnant, till the delivary).

B. **By the Act of Parties** :

1. **By the Husband** :- **Talaq** — In its literal sense this Arabic word means "Taking off any tie or restraint," and in law it signifies the dissolution of marriage. In Handi law, no special form or phrase is necessary to pronounce talaq. The Ithna Ashari Law, however, insist on strict adherence to a form, that is, it must be in the Arabic language uttered orally, in the presence and hearing of two made witnesses, who should be honest and virtuous Muslims.

Talaq (divorce) or dissolution of marriage by the husband may conveniently be discussed under the following main heads:-

**Religious Sanction**

**Mode of Expression, and**

**Effect of Divorce**

**Religious Sanction**: i) Divorce under this head is divided under the Sunni Law by the husband into two classes:-

(a) **Talaq us-Sunnah**,

(b) **Talaq ul-Biddat or Talaq ul-Bid'ah**

ii) **Ila (Vow of continence)**

iii) **Zihar (Injurious comparison)**

2. **By the Wife**: **Talaq-e-Tafwiz** (delegated divorce)

3. **By Mutual Consent**: i) **Khula** (redemption)

   ii) **Mubarah** (mutual freeing)
C. By Judicial Process:

1. Lian (mutual imprecation)
2. Faskh (Judicia annulment)

Description: Talaq us - Sunnah is regarded as the regular on orthodox form and Talaq ul-Biddat as the unorthodox or irregular form of talaq. The latter has now become the more common and prevalent method of dissolving a marriage.

(a) Taaq us-Sunnah:- Talaq us-Sannah is again subdivided into two classes namely:

i) Ahsan meaning "Must approved," good and very proper.
ii) Hasan meaning "Approved" good and proper

(b) Talaq ul-Biddat:- Talaq ul-Biddat is again subdivided into two classes namely

i) Tripe divorce, and
ii) One irrevocable divorce (generally in writing)

Description: Talaq us-Sunnah, that is, a talaq which carries the approved of the Prophet. It may be in the most approved form, i.e., ahsan; or hasan, i.e., simply an approved form. These two forms of Talaq ul-Sunnah are described below:

(a) i) Talaq ul-Ahsan:- Talaq ul-Ahsan means the more proper divorce or must approved divorce. The words "must approved" do not denote any intrinsic merit of this kind of divorce. What is meant is that this kind of divorce is the least disapproved of its various forms. This is the Holy best form of talaq which had been approved by the Prophet
at the beginning of his ministry. According to the Sunnah form restrictions have to be observed with respect to-
(a) the number of pronouncements; and 
(b) the time (i.e. whether the wife is in her menstrual courses or in a state of purity)\(^1\)

Hedyah brands or remarks it as the most laudable divorce, where the husband repudiates his wife by a single pronouncement in a period of Tuhor (purity) i.e., when the wife is free from her menstrual courses), during which he has not had intercourse with her, and then leaves her to the observance of iddat.

The divorce remains revocable during the iddat, and the parties retain the right of inheritance.\(^2\)

Talaq-E-Ahsan form is considered most laudable both because the Prophet held this to be the most excellent method and because in pursuing the method the husband still has the power of recalling his wife.\(^3\)

According to the Hedyah, this method of divorce is the most approved because the companions of the Prophet approved of it, and secondly, because it remains within the power of the husband to revoke the divorce during iddat, which is three monthly period or till delivery.\(^5\)

What is meant is that this kind of divorce is the least disapproved of its various forms. The reason for the preference of this form of divorce over others is that it does not immediately sever the marital relationship but
allows an opportunity to the spouses to continue the marriage if they so choose and, in pursuing this method, the husband can still exercise his right without the necessity of an intermediary marriage to retain his wife by a reversal of the divorce during the period of her 'iddat, if he be so inclined. This rule is based on an injunction in the Qur'an which says, "Divorce may be pronounced twice, then keep them in good fellowship or let (them) go in kindness."(6) It is laid down at another pace, "So, if he (the husband) divorces her (the third time) she shall not be lawfu to him afterwards until she marries another person."(7) Also because this method is the one lawful method of divorce unanimously agreed upon.

(a) ii) Talaq ul-Hasan:- Talaq ul-Hasan means proper divorce or approved divorce. It is not unanimously accepted as a lawful divorce by all the Sunni Schools of law. Imam Malik considers it to be Bid'ah or an innovation. (8) He says that divorce is meant no serve as a prohibition and it is secured by one pronouncement and so, according to him, a divorce would no doubt be effected in this way but the husband would be guilty of sin in pronounceing it Iman Shafi; Other Sunni Jurists accept it as a lawful divorce in the form of Talaq ul-Sunnah. Khalid Rashid says in this form that the husband successively pronounces divorce three times during consecutive periods of purity (tuhr). It is therefore "a divorce upon a divorce", where the first and second pronouncements are
revoked and followed by a third, only then talaq becomes irrevocable. It is also essential that no intercourse should have taken place during that particular period of purity in which the pronouncement has been made.

Where the wife is not subject to menstrual Courses, in interval of 30 days is required between each successive repudiation. Talaq Hasan tries to put an end to a harbarous pre-Islamic practice to divorce a wife and take her back several times in order to ill treat her. Through this method of talaq, the husband has been given two chances of divorcing and then taking the wife back, but the third time he does so, the talaq becomes irrevocable. In this way, the process of divorcing and repudiating cannot be continued indefinitely. (9)

**Requirement of Talaq ul-Ahsan**—The following conditions are necessary for Talaq ul-Ahsan:

(a) In the case of a consummated marriage with a menstruating wife, the pronouncement must be made during a tuhor (i.e., in a state of purily)

(c) There must be no sexual intercourse during the tuhor

(d) There must be abslinence from sexual intercourse during the period of iddat. The period of iddat in the case of a pregnant woman extends up to the time of delivery. There must therefore be abstinence from sexual intercourse till the birth of the child.
The restrictions about the abstinence from intercourse relate only to a menstruating wife whose marriage has been consumated. In the case of an unconsummated marriage, tuhor or during the actual occurrence of the courses. So also, in the case of a non menstruating wife a talaq may be pronounced after intercourse without any time intervening between it and the talaq. A pregnant woman may also be immediately after delivery.

Valid retirement would stand on the same footing as consummation for the purposes of talaq-us-Sunnah.

Talaq-ul-Ahsan secures in a large measure against the hasty pronouncement of talaq as it pronounced during the time in which there is no bar to conjugal intercourse. The talaq continues to be in suspense during iddat and affers room for reconsideration of the decision by the husband. If there is only one declaration of divorce and parties continue to live as husband and wife and children born from the wife are recognised by the husband as his, the marriage would not become dissolved.

Shia-Law:- The wife must also not be in her puerperal courses.

Requirements of Talaq-ul-Hasa:- This is also one of the approved forms of talaq. Talaq-ul-Hasan may be made in the following manner.

(a) Three pronouncements must be made.
(b) In the case of a wife who is subject to menstruation (and is not pregnant), the three pronouncement must be made during three consecutive tuhurs;

(c) In the case of a wife is not subject to menstruation or is pregnant, the pronouncement must be made at the intervals of 30 days between each pronouncement. The condition that the pronouncement should be made between two periods of tuhurs would not be applicable to a woman who passed the age of menstruation because it would be physically impossible to have any such periods.

(d) There must be abstinence from sexual intercourse during the three tuhurs (the period covered by pronouncements)

The main difference between the two forms Ahson and ḥasan, is that the period after which the talaq becomes effective in the latter form is reduced. In the case of the former, the husband has to wait till the expiry of the iddat before the talaq becomes final. This would in case of a menstruating wife cover a period of three menstrual courses after the date of the pronouncement. In the case of talaq ul-ḥasan the period may be much shorter. This form also has the same features of talaq-ul-ahsan about preventing a hasty pronouncement and also about leaving a scope for reconsideration by the husband.
Talq of a pregnant wife:- According to Imam Ibu Hanifa (Rah) and Imam Abu Yousuf (Rah) a pregnant wife may be divorced in the regular way (i.e., by talq-ul-Sunnah) by three talas. He is first to pronounce a single sentence of divorce upon her and then one at the expiration of one month and a third at the expiration of next succeeding month, (i.e., in the ahsan form). According to Imam Mohammad the only talq-ul-Sunnah in the case of a pregnant woman is a single divorce (i.e., only in ahsan form).(17)

(b) Talq ul-Bid'ah or Talq ul-Bid'i

Introductory:- The other method of divorce considered from a religious point of view is Talq al-Bid'ah or Talq al-Bid'i, unorthodox divorce. Here the husband does not follow the approved form of talq i.e., talq-us-Sunnah, and neither pays any attention to the period of purity nor to the abstention from intercourse. It is so called because it is not approved by Muslim Jurists and is considered and desirable innovation. Any divorce which does not conform to Talq-us-Sunnah is deemed to be an innovation or bid'ah and is called Talq al-Bid'i. It is the most disapproved forms of divorce. Ameer Ali is not exactly correct when he says,"..........which (Talaq ul-Bid'ah) was introduced in the second century of the Muhammada era. It was then that the ummayaad monarchs, finding the checks, imposed by the Prophet (peace be on him) on the facility of repudiation galling, looked about
for some escape from the strictness of law and found in the pliability of the jurists a loophole to effect their purpose." (17) Talaq ul-Bid'i was some times resorted to even in the time of the Prophet (peace be on him). Thus there is the well known case of Ibn 'Umar who had divorced his wife during the period of menstruation. The Prophet (peace be on him) on being informed of this told him that he had acted wrongly and advised him to cancel the divorce by raj'ah (cancellation) and then to proceed in the proper manner if he still persisted in his desire to divorce the wife. (18) The fact is that the Prophet (peace be on him) strongly condemned it and did not sanction it. But in the course of time it came to be considered a valid and legal form of divorce. Moreover, it assumed many other forms in the second century and came to be recognised as an effective divorce.

The above points relating to Talaq al-Bid'ah are fully discussed below:--

(a) **Divorce in period of purity in which there has been intimacy:**

It is not permissible to divorce the wife in a Tuhur (period of purity) in which the husband has been intimate with her. If he does so, then according to the Sunnis a Talaq al-Bid'ah shall be effected reasoning of the jurists for this rule is that a divorce is to be given only when there is necessity and in the absence of
necessity a divorce is not to be given. The fact that the husband was intimate with the wife during the period of purity shows that he does stand in need of her and so there is no necessity for divorce in such a case and a divorce cannot be properly given under such circumstances. The prohibition does not apply when the wife is incapable of pregnancy whether on account of tender or old age. A girl below nine years and a woman fifty five years of age or older is supposed to be incapable of pregnancy and so a Talaq is permissible in such a case in a period of purity in which there has been intimacy between her and her husband. Such a talaq would be considered to be a Talaq us-Sunnah.

(b) Repetition of Pronouncement:— The most prevalent method of exercising Talaq al-Bid'ah under the Sunni law now a days is to pronounce three divorce at the same time. It is not necessary that the husband should repeat the pronouncement three times in order to constitute an irrevocable divorce. The triple repetition is merely one of the many forms by which such a divorce can be effected and the same result can be obtained by any other method recognized for the purpose. A husband can effect such a talaq even by only one pronunciation if he makes it clear that he was pronouncing a Talaq al-Bain, that is, an irrevocable divorce. Thus, to effect such talaq the husband may say, "You are repudiated thrice." He can also convey his intention of
pronouncing three divorces by saying, "You are divorced so many times" and showing three fingers at the same time which will result in a Talaq al-Bid‘ah.\(^{(24)}\)

(c) **Divorce during the Period of Impurity:** A divorce given while the wife is in her monthly course is considered Bid‘i or innovation, because it is against the prescribed method of divorce. Thus there is a Tradition to the effect that Ibn ‘Umar divorced his wife during the period of impurity (menstruation). The Prophet (peace be on him) was told of this and he said to Ibn ‘Umar, "Ibn ‘Umar. Allah has not allowed you to act like that you have gone against the Sunnah (i.e., against the approved religions law). The correct method is to wait till she is pure and then to pronounce the divorce in the period of purity, "and the further asked him to revoke the divorce by raj‘ah (retraction).\(^{(25)}\) The Hanafi Law holds such divorce to be effective, but it is considered proper for the husband to revoke it and to pronounce a fresh divorce in a period of purity in order to escape from sin.\(^{(26)}\)

According to some Jurists, the revocation of divorce is incumbent on the husband. It is stated in some books that this view is the better view.\(^{(27)}\) It is explained in al-Hadayah that revocation of divorce is incumbent on the husband for three reasons, namely:

Holy

(a) The order of Prophet (peace be on him) to Ibn ‘Umar as cited above.
(b) The pronouncement of divorce during the period of impurity is sinful, and it is the duty of every man to redress the wrong by every means within his power, and (c) The protraction of the 'Iddah places an extra burden on the wife, which transgresses the limits prescribed by the book.\(^{(28)}\)

**Maliki Law:** Maliki holds that a Talaq al-Bid’ah shall effect a separation, but considers it to be disapproved of. He makes it an essential of a valid divorce that it should fulfil the following conditions and a Bid’i divorce is one which does not fulfil them:-

(a). It must be given when the wife is in a state of purity, that is not during the period of menstrual fellow non during the Nafa (the term child birth). The maximum period of Nifas is fixed at forty days or according to a woman's usual period in such case.\(^{(29)}\)

(b). The husband should not have been intimate with the wife in the period of purity in which the divorce is pronounced.

(c). After pronouncing a divorce no fresh divorce be given during the period of iddah

(d). Note more than one divorce should be pronounced at the same time\(^{(30)}\)

If the husband contravenes the conditions given above he shall be forced to take back his wife.\(^{(31)}\) This is however, subject to the condition that the marriage has
been consummated. If there has been no intimacy then compulsion shall not be used and wife shall become separated on the pronouncement of divorce. (32)

**Shafi'i Law:** Shafi'i has expressed the opinion that a Talaq al-Bid'ah is forbidden but nevertheless it effects a separation between the spouses. (33) He considers it to be sinful. (34)

**Hanbali Law:** Imam Ahmad ibn Hanbal agrees with Imam Abu Hanifah and holds that a Talaq al-Bid'i would be effective, though sinful. (35)

**Shi'i Law:** Under the Shi'i law Talaq (divorce) is divided in two main classes, namely:-
(a) Bid'i(irregular or heretical), and
(b) Sunni (regular)

(a) **Bid'i**:- Talaq is considered irregular. It is constituted in the following three ways:
   i. Divorce against an enjoyed wife is not pregnant and who is in her courses, or Nifas (puerperal discharge) when her husband is present with her or absent from her for a period less than the prescribed period. It is the discharge after childbirth and, according to the Shi'i Jurists, its maximum period can be ten days while according to the Sunnis it can last for forty days.
   ii. Pronouncement of divorce against a wife, who is not
Pregnant: in that period of the wife's purity in which the husband has been intimate with her. Period purity means the period when the wife is free of her meanstrual courses.

iii) Pranouncement of three divorce whether by one sentence or one after another when there has been no intermediate revocation. The first two forms of divorce are considered vaid and absolutely ineffective under the Shi'i law. This also holds good in respect of three pronouncements at the same time. But if they are pronounced at different times then the first time pronouncement may be given effect to.

The second class of talaq is called Sunni. The word Sunni is used in contradistinction to Bid'i.

It recognises only Talaq al!Sunnah of which there are three kinds. It is divided by Shi'i Juris s into three classes, namely:
1. Talaq-i-Bain or absolute, is irrevocable Talaq
2. Talaq-i-Raja'i that is revocable Talaq, and
3. Talaq-ul-iddah.
1. Talaq-i-Bain is that divorce which cannot be revoked. It is constituted in the following six ways:
i) Divorce against a wife who is past child bearing age.
ii) Divorce against a wife with whom there has been no intimacy
iii) Divorce against a wife who has been thrice repudiated
with two intermediate revocations.

iv) Divorce against a wife of such a tender age that she is not subject to menstrual courses. This age is fixed at nine years.

v). Divorce against a wife who has obtained a Khula divorce for consideration.

vi). Divorce against a wife who has secured a divorce under the doctrine of Mubarah.

It is necessary in the case of the fifth class and sixth class of divorce that the consideration for Khula or Mubarah has not been revoked. If it has been revoked then the divorce shall be a Raj' divorce and not a Talaq-i-Bain.

(b) **Talaq-Raj'i**:- Talaq Raj'i is that kind of divorce in which the husband has got a right to cancel it. This he can do before the expiry of the wife's iddah. If the period of the wife's iddah expires then a revocable divorce is effected. But if the spouses want to unite then they can remarry without the necessity of there being an intermediary marriage.

(c) **Talaq al-Iddah**:- In this form of divorce, the husband divorces his wife under the requisite conditions; he then recalls her and cohabits with her before the expiration or completion of her iddah. He again divorces her a second time in another tuhor, that is, other than that in which he was intimated with her. He recalls her again and
cohabits with her and then divorces her in a subsequent tuhor. This kind of divorce effects what is called a mughallazah divorce in which the wife becomes forbidden to husband. She can become lawful to him only if after the divorce she marries another person and that marriage is dissolved after consummation. It is only then that she can marry the former husband. It is a necessary condition of such Tala and there must be intercourse after each revocation. If the husband divorce his would be effected, but it would not be Talaq al-iddah.

Divorce considered with Regard to the mode of Expression:

A divorce can be considered with respect to the mode of expression from two aspects, namely, (a) Lucidity of expression (b) Whether it is conditional or unconditional.

Divorce considered with Regard to Lucidity of expression:

The language used by a husband to divorce his wife may or may not be clear enough to denote his intention of divorcing her. The pronouncement of divorce considered with regard to lucidity of expression is divided into two kinds, namely:

i) Sarih or express or plain and

ii) Kinayah or implied or ambiguous.

i) Sarih or clear Expression: A saih or clear pronouncement of divorce is one which is given in such
spoken words the meaning of which is unmistakable, as for example, when a husband says to his wife. "I have divorced you" or "you are divorced,"(40) Such a pronouncement of divorce includes the use of expressions that have acquired a particular significance by long usage and are not used in any other sense than of divorce. (41) As the expressions are not used in any sense other than that of divorce and are well understood as implying divorce, no proof of intention to divorce is required under the Sunni Law. (42) In divorces given by Sar or clear pronouncements the law will hold that the husband meant what the actual words used by him conveyed without permitting him to explain that he meant something else. (43) In Sarih expressions the actual intention of a husband who divorces his wife is immaterial and a Raj'i divorce shall be effected. It is the intention conveyed by his words in repudiating his wife that shall be taken into consideration, and the validity and effectiveness of the divorce would not be governed by any mental reservation on the part of the husband to the effect that the divorce pronounced by him was not a genuine divorce. (44)

The word Talaq is used in India, Pakistan Bangladesh and Shirilangka in the same, sense as in Arabic and is well understood by every one and even by illiterate persons. The word Talaq has acquired in Urdu the technical meaning
by reason of usage and so must be given its technical import. The sentences in which the word is used form sarih or clear expressions and so no explanation or evidence can be given too denote a contrary intention under the general rule of the Sunni law.

If a husband is asked whether he has divorced his wife and he replies in the affirmative it would amount to sarih divorce. (45) If a wife says to her husband, "AmI a divorce?" and should he reply,"yes," then too it would amount to a sarih divorce. (46)

A number of such expressions as constitute express divorce have been given in al-Hadayah and other books, but the expressions given as the form of Sarih divorce are not expressions.

**Maliki Law:** According to Imam Maliki, Sarih expressions are four in number and can only be denoted by the word Talaq. (47) They are such as give below:
(a) I divorce you,
(b) You are divorced as regards myself etc.

**Shafi'i Law:** According to Shafi'i Law, expressions which clearly indicate severance of marriage relationship are termed Sarih (clear) expressions. They denote repudiation, separation, dismissal. (48) Such expressions are as "I repudiate you," "You are repudiated," "You are free," etc. The expression may be explicitly pronounced in any
language provided the expressions employed correspond to the above terms.

Hanbali Law: According to Imam Ahmad ibn Hanbal, Sarih Talaq is that expression which is not used for any other purpose than Talaq. The husband can say, "I divorce you," or "You are a divorce."

Effect of: In the absence of words to denote an intention to the contrary the pronouncement to of a Talaq by Sarih expression shall effect a Talaq al-Raj'i or a revocable divorce, that is, a divorce that leaves it in the power of the husband lawfull to take back his wife at any time before the expiration of the period of 'iddah. But if the marriage has not been finished then the very first pronouncement of divorce shall effect an irrevocable divorce. Section 7 of the Muslim Family Laws Ordinance, 1961, has done away with the difference between a Raj'i (revocable) and a Bain (irrevocable) divorce.

Kinayah or implied expression of divorce: Kinayah or implied expression of divorce means an expression which is obigous as opposed to a clear expression. The ambiguous expressions are such as can mean a divorce as well as something else and in which real purposse of the speaker is not clear but is concealed. A divorce is not effected by a Kinayah expression unless there is intention
of which there is proof or it can be gathered from the surrounding circumstances or there is a mention of divorce. As a Kinayah expression does not denote divorce alone but may also mean something else, hence intention in requisite in such cases to determine the meaning of the pronouncement. (54)

The Sunni Jurists have given a very large number of examples of expressions of Kinayah or implied divorce which would or would not effect a divorce according the the intention of the husband. A few are given below:-

"Your are not to me as a wife,"
"I have not need of you,"
"Go to your own relations," "Go out,"
"You are nobody to me,"
"You are of no use to me,"
"Leave me" or "Leave me alone,"

"I give up all relations with you and will have no connection of any sort with you," "I do not desire you."
If the wife should say to her husband,"You are not a husband to me" and he should say,"I belive you," intending divorce, it would take effect and she would be divorce.

When a man intending to divorce his wife says to her,"You are not to me as a wife" or "I am not to you as a husband," it takes effect according to Imam Abu Hanifa(Rah ) But Imam Muhammad and Imam Abu Yusuf (Rah) do not agree with him. (55)
As a general rule a divorce by Kinayah expression amounts to an irrevocable divorce. But under the provisions of the Muslim Family Law Ordinance, 1961, the divorce shall be Raj'i (revocable) only.

**Maliki Law:** Imam Malik (Rah) also agrees with the Hanafis about divorce by Kinayah or ambiguous expressions. He divides Kinayah (ambiguous) expressions into two classes namely,

(a) Kinayah Zahiriah
(b) Kinayah Khafifia

(a) **Kinayah Zahiriah:** The expression indicates the use of language which refers to divorce but only indirectly. In such a case the intention of the husband is immaterial and the husband shall be taken to have divorced his wife by a revocable divorce unless there is proof or the circumstantial evidence points otherwise.

(b) **Kinayah Khafifia:** Kinayah Khafifia means an expression which does not clearly indicate a divorce. Divorce shall be effected only when the husband so intended and not otherwise.

**Shafi Law:** Imam Shafi'i agrees with the Hanafis in the matter of divorce by Kinayah expressions. But he holds that divorce by Kinayah or ambiguous expressions amounts to such a divorce as the husband intended. According to him to nature and number of Kinayah divorce shall depend
on the husband's intention as stated by him. In the absence of any intention only one revocable divorce shall be effected. (60) All Kinayah divorce, according to him, amount to a revocable divorce unless the expression used indicates three divorce when it shall amount to an irrevocable divorce. (61) He has given his our examples of Kiayah or ambiguous expressions. (62)

Hanbali Law:— According to Imam Ahmad b. Hambal the nature and number of divorce shall depend on the husband's intention. (63)

Shi'i Law:— The Shi'ahs donot recognise al-Talaq al-Kinayah.
CHAPTER-III
UNIT-B

REFERENCES

(1) Al-Mugni, VII, p.96; Shami, Cairo, II, p.425-26; Deoband, Nomaniah p.414.
(2) Bail, I, 206-207; Hed 73. Delhi-335.
(5) Hedayah72;Qur'an, II:228, Surah al-Baqarah.
(6) Qur'an, II:229, Surah al-Baqarah.
(7) Qur'an, II:230.
(9) Muslim Law, Khalid Rashid, Lucknow. p.90.
(10) Bail-I,206-207.
(11) Hedayah-73; Delhi-335; Bail-I,207.
(12) Bail-I,208.
(13) Bail-I, 206-207.
(15 ))Bail-II,110.
(22) For discussion see. "Mughallazah divorce"
(24) Ibid; al-Bahr al-Ra'iq, Cairo, III, p.259.
(30) Ibid. (31) Ibid. (32) Ibid.
(34) Ibid. (35) Ibid.
(37) Ibid. (38) Ibid.
(40) Al-Bahr al-Ra'iq op.cit., III, p.269.
(42) Ibid.
(44) Ibid.
(48) Ibid.
(51) Ibid.
(54) Ibid.
(56) Ibid.
(58) Ibid. (59) Ibid.
(61) Ibid.
In the pre-Islamic times the half civilised Arabs used to deprive their wives of sexual enjoyment and to tie them down to a miserable life in a number of ways. Ḥīḥār is one of them. It is an unusual form of temporary prohibition in which the husband compares his wife to his mother. In Ḥīḥār the marriage is not dissolved and the woman still remains the wife of the penson, but the husband cannot be intimate with her and she is deprived of all sexual intimacy. Islam has freed the wife from this hard lot and has also discouraged the use of such expressions. It has made it clear that a wife does not become the mother or other relation by the idle and poolish talk of a person while a penalty has been imposed on the husband who has expressed Ḥīḥār but wants to retain his wife. The wife has been empowered to force the husband either to divorce her or re-establish the matrimonial connection on paying the prescribed penalty.

In pre-Islamic times Ḥīḥār was considered to be a sort of divorce Muslim law, while preserving its nature which is prohibition from intimacy with the wife, has altered its effect to a temporary prohibition only which does not dissolve the marriage, and so Ḥīḥār does not exactly amount to a divorce and is distinct from it.
(ii) **Religious Section:** The law about ḥiḥār is based on the injunctions in the Qur'ān given below:

"Allah has not made for any man two hearts (within him); nor has he made your wives whom you desert by ḥiḥār, your mothers; nor has He made those whom you assert (to be your sons) your sons. These are the words of your months. And Allah speaks the truth and He shows the right way. (1)

"Those of you who put away their wives by calling them their mother-they are not their mothers: None are their mothers mothers save those who gave them birth, and they utter indeed a hateful word and a lie. And surely Allah is pardoning, Forgiving."

And those who put away their wives by calling them their mothers, then go back on that which they said, must free a captive before they touch one another. To this you are exhorted; and Allah is wore of what you do.

"But he who has not the means, should fast for two mounths successively before they touch one another, and he who is unable to do so should feed sixty needy ones. That is in order that you may have faith in Allah and His Messenger. And these are Allah's limits. And for the disbelievers is a painful chastisement." (2)
(iii) **Definition:**- The word Zihār is derived from "Zāhār" (back), Zīhār means "To oppose back to back." It is explained that when there is discord between the husband and the wife, they instead of remaining face to face towards each other turn their backs against each other. In the language of law it signifies a man comparing his wife to any of his female relations within such prohibited degrees of relationship, whether by blood, fosterage or by marriage, as renders marriage with her invariably unlawful. Zīhār signifies a husband's comparison of his wife with his mother or any female relation within the prohibited degrees. In Zīhār, the usual phrase is "thou are to me as the back of my mother." This mode of talaq is very rare in India, Pakistan and Bangladesh.

(iv) **Applicability:**- Zīhār is very rarely used in India, Pakistan and Bangladesh as is clear from the fact that there is practically no case law on the subject. But the doctrine of Zīhār is still applicable to Muslims in India, and Pakistan. Section 2 of the Muslim Personal Law (Shari'at) Application Act, 1937, and sub-section IX of section 2 of the Dissolution of Muslim Marriages Act, 1939, Make this clear. A remark in Saeeda Khanam Vs Muhammad Salim also supports this view.

(v) **Essentials:**- Certain conditions have to be satisfied for the validity of Zihar. They relate to the following aspects.
(a) Expression or Language:— There is no fixed formula for Ḥizār and any expression can be used for the purpose. But the language should be clear, unambiguous and certain. There should be no uncertainly attached to Ḥizār and an uncertain expression of Ḥizār is invalid. Thus if a husband says to his wife, "Allah willing you are to me....." then no Ḥizār will be established. Ḥizār can be given orally or in writing and even by signs by a dumb person if they are well-understood and denote his intention in this respect.

In many cases an expression can amount to a divorce by implication as well as to Ḥizār. It becomes necessary in such a case to find the effect of the expression. According to Muslim Jurists, such an expression takes effect according to the husband's intention as explained by him. Thus, if he were to say, "You are to me like my mother," it is necessary to ascertain his intention. The expression may be used merely to show respect or appreciation or to denote a divorce or a Ḥizār or without any definite intention at all. In the first and the last cases the expression would neither establish a Ḥizār nor a divorce. But in the second and the third cases a divorce or a Ḥizār would be established according to the intention of the speaker. Hence, if he
declears that he had no particular divorce, divorce will be established. \(9\)

When the expression used consists of a comparison of the wife to a part of body of his mother or other prohibited women as when he says, "You are to me like the back of my mother, Zihar only will be established because the expression is used only for Zihār and cannot be used for divorce and so no divorce would be effected by such an expression even when such be the intention of the husband. \(10\)

Under the present law, however, the bare statement of the husband will not suffice and the Court will give its finding on the evidence produced before, it and will be guided by the circumstances of a particular case.

(b) **Comparison**:- Comparison is a necessary condition of Zihār, and so there will be no Zihār if these is no comparison as when a husband calls his wife as his daughter, mother etc., without comparison the expression may amount to a divorce if he so intends but cannot ammont to Zihār. \(11\) Further, the comparison should be to a woman permanently prohibited to him. If the wife be compared to a woman only temporarily prohibited, there is no Zihār. \(12\) Thus, a comparison to one's sister-in-law will not amount ot Zihār as marriage with her is possible one the dissolution of the present marriage by divorce or the
wife's death. When the comparison relates to a part of the body of a woman, the part must be such as is not proper for him to see. Hence, when the comparison is to what can be seen decency by him as the face, hands, hair, etc. there is no Zihār.

(c) Husband: It is a condition of Zihār that the husband should be a person capable of making expiation, that is, he must be save and adult. Hence, the Zihār of a minor or an insane person is not valid, further, the husband should not be in a faint or under the influence of sleep; Zihār by any one in one of these condition is not valid. But it is not necessary under the Hanafi law that the husband should be in earnest so that Zihār by one in jest or in mistake is valid. Zihār under compulsion is valid and effective according to the Hanafi. Bu' Imam Shafi'i and Imam Ahmad ibn Hanbal do not agree with this view and according to them Zihār under compulsion is unvalid. Zihār by a dumb husband is valid when made in writing or by intelligible signs and with intention. Zihār by a drunker man is valid according to the Hanafis.

(d) Wife: Zihār can only be made in respect of the lawfully married wife of the speaker. Hence, if a person say to a woman who is not his wife, "you are to me like the face of my matter" and afterwards marries her,
Zihār shall not be established because the woman was not his wife when he used the expression of Zihār.(23) But if he says to a woman, "if I marry you then you are to me as the bake of my mother" and afterwards marries her then Zihār shall be established and expiation shall become incumbent on him.(24) It is not necessary that the wife should be major, save or Muslimah as Zihār like divorce, is valid even when the wife is a major, lunatic or Kitabiyah.(25)

Zihār by the Wife:-

It is not open to the wife to use the expression of Zihār against her husband.(26)

Wife's Right:- A wife is entitled to call her Muzahir (i.e. one who has expressed a Zihār) husband to his matrimonial duties.(27) She can also prevent him from intimacy with her till has made the necessary expiation.(28) If he does not make it, then according to the Muslim Law the Qazi, on her complaint, is to imprison and punish him till he does so or repudiates her.(29) The Qazi can also order the beating of the husband is such a case.(30) Islam has thus forbidden a husband to keep a wife in suspense by giving up intimacy with her and at the same time not divorcing her. Thus, there is an injunction in the Qur'an namely
"But turn not away (from a woman) altogether so as to leave her (as it were) hanging (in the air). (31) (i.e. in suspense)."

If the husband declares that he has performed the expiation, his declaration is deemed sufficient and the Qazi is not required to inquire if the allegation is true or not and the husband's version will be accepted as correct until it is proved to be incorrect. (32)

(e) **Expiation**: It is obligatory on a Muzahar (i.e. a husband who has declared Ḿīhār) to make an expiation if the inteneds to have intercourse with his wife after the Ḿīhār. (33) But if he is determined that she should remain unlawful to him and has no intention of returning o matrimonial intercourse with her, he is not liable to expiation. (34)

(vI) **Conditional**: Under the Hanafi law Ḿīhār can be made conditional. Thus a husband may say, "If thou entereth that house or speaketh to such a person, thou art to me like my mother." (35)

(vii) **Limited in time**: Ḿīhār can be limited in point of time. Thus, where a husband says to his wife, "you are to me like my mother's back for one year," Ḿīhār will be effective for the period of one year only and will become ineffective after that period, and he can renew his sexual
relations with her on the expiry of the period without incurring expiation. (36) But according to Malik, an expression of Zihâr limited in time shall amount to an absolute Zihâr and shall not become ineffective with the expiry of the specified time. Expiation would, however, be incumbent on him if he is intimate with the wife before the expiry of the period. (37) Shafi and Imam Ahmad ibn Hanbal agree with Abû Hanifah. (38)

(viii) The Maliki, Shafi'i and Hanbali Laws:-

The Maliki, Shafi'i and Hanbali Laws are the same as the Hanafi Law discussed above at various places.

(ix) Breach of:- If a man, having pronounced Zihâr upon his wife, has matrimonial connection with her, he is not liable to any penalty other than the expiation for Zihâr. (39)
(i) **Introductory:** Īlā is not exactly a divorce, but has been treated as a form of the same by the Muslim Jurists. It was a common practice in pre-Islamic days and is one of the expressions for divorce used by the uncivilised Arabs of that period to harass their wives. By Īlā the marriage was not completely dissolved; it meant only a cessation of sexual relations between the husband and the wife. The wife was thus deprived of the sexual intimacy but she remained tied down to her husband and could not contract another marriage. Islam has put a check to the evil effects of this practice. It has discouraged the use of such expressions by imposing a penalty on a husband who wants to retain his wife after the use of the expression while if he does not repent and cancel his declaration within the prescribed period, he stands to lose his wife.

It has also restricted the maximum period for the cancellation of Īlā to four months.

(ii) **Définition:** The word in its literal sense means a Vow and the maker of the Vow is called a muti, who is defined as a person who cannot approach his wife for a period of four months without incurring some penalty or some very trouble some, serious or difficultyliability. In Muslim Law it implies a husband's swearing by Allah or
making a declaration to abstain from sexual intercourse with his wife for a period of four months or a longer period or that he shall undergo some specified hardship by way of penalty if he is intimate with the wife within the specified period of time or make some specified expiation that shall involve some hardship to him. (2) Ḥā' ala' is when a person swears that he will not have intercourse with his wife, and abjures from it for four months, the divorce is effected. The Hanafi Jurists argue that the husband acted unjustly towards his wife, it is equitable that on the expiration of four months he should be deprived of the benefit of marriage. (3) But according Imam Malik and Imam Ahmad bin Hambal, it is necessary to invoke the name of Allah but not necessary according to Imam Abu Hanifah and Shafi'i for the validity of Ḥā' ala'. It is stated in al-Mughni that all the Sunni Jurists hold that a vow, in the name of Allah or one of his attributes whereby the husband makes it unlawful for himself to be intimate with his wife constitutes an Ḥā' ala'. (4)

But there is a difference of opinion whether a vow of other classes to abstain from intimacy will constitutes Ḥā' ala'. The correct view is that what so-ever be the vow by which intimacy is made unlawful, and Ḥā' ala' shall be effected provided the vow incurs some hardship. The above opinion has been expressed by Imam Abu Hanifah, Imam Malik, Shafi'i and all Imams of Hijaz and 'Iraq. (5)
(iii) **Religious Sanction:** The Muslim Law of Īlā' is founded on the following verses of the Qur'ān:

"For those who swear that they will not go in to their wives should wait four months; then if they go back, Allah is surely Forgiving, Merciful."

And if they resolve on a divorce, Allah is surely Hearing, Knowing."(6)

(iv) **Applicability:** Īlā' is very uncommon, but is still extant and enforceable in Pakistan and India. It was clearly mentioned in 2 of the Muslim personal law (Shari'ah) Application Act, 1937, as applicable to Muslims. Clause ix of section 2 of the Dissolution of Muslim Marriages Act, 1939, lays down that a wife can seek the dissolution of her marriage on any ground which is recognised as valid for the dissolution of a marriage under Muslim Law. A remark in Sayeeda Khanam Vs. Mohammad Sami also supports this view.(7)

(v) **Essentials:** The essentials of Īlā relate to the following subject:

(a) Husband, (b) wife, (c) vow, (d) cancellation, and (e) Effect.

(a) **Husband:** The person competent to pronounce an Ila is one who is competent to repudiate the marriage, that is, he should be adult and sane.(8).

(b) **Wife:** The woman in respect of whom an Īlā vow can be
made should be the wife of the person making the vow at the
time when Ḩāla' is to take effect. But an Ḩāla' can be
made in respect of a woman not yet the wife of the speaker
provided it is to take effect in future at a time when the
marriage has actually taken place and she becomes his
wife. Thus a man may say to a woman, By Allah, I shall
have no sexual intercourse with you when I marry you," then Ḩāla' shall be effected if he marries her because his
vow makes Ḩāla' applicable when the woman acquires the
status of being his wife. But if Ḩāla' is made in
respect of a woman other than the wife without reference
to her status at the time when Ḩāla' is to take effect then
the Ḩāla' shall be ineffective. "By Allah, I will never
have sexual intercourse with you," and he afterwards
marries her then Ḩāla' shall not be established. Here
there is no reference to her status at the time when Ḩāla'
is to take effect. There is a tradition to the effect that
the Prophet (peace be on him) has stated that there is no
vow for the son of Adam in what he does not own, and
no divorce in what he does not own.

(c) Vow:- The vow must be for four month or for a longer
period or for an indefinite time. But if it relates to
a period less than four months then the vow does not
constitute Ḩāla'.

This is so even though the accumulated period of two or
more consecutive Ḩāla' vows may amount to four months or a
longer period of time. Thus if a man makes a vow, saying to his wife, "By God, I will not have sexual connection with you for two months, nor for two months after that Ila' is established. But if a man swears that he will not have sexual connection with his wife for two months," and then remains silent for a day, and the next day again swears that he will not have sexual connection with her for two months after the other two months, Ila' is not established because the second vow is distinct and separate from the former.

A husband shall not be held to have pronounced Ila' except when he takes an oath against having sexual intercourse with his wife. If the husband's oath refers to something else than sexual intercourse then he shall not be held to have made Ila'. Thus if a man says to his wife, "By God, my skin shall not touch thy skin," he shall not be deemed to have made an Ila' because the vow refers to a breach of something other than sexual intercourse and touching of their skin is possible without there being intimacy between them. It is also a necessary condition of Ila' that it should not be possible for the husband to violate the vow, that is, to have sexual intercourse with his wife, without being guilty of the breach of his vow. Thus if husband being in Lahore and his wife being in Delhi swears that he will not go to Delhi then Ila' is not established because there is no reference
to intimacy while he can still be intimate with his wife without incurring any penalty as by sending for her at Lahore and being intimate with her there.\(^{(20)}\)

(d) **Concellation of:** The only one way to render the vow ineffective is by having sexual intercourse with the wife within the period of four months from the time of taking the vow.\(^{(21)}\) If husband should be intimate with his wife during the prescribed period of four months then he shall be forsworn in his vow and the Īlā' would cease after cohabitation.\(^{(22)}\) An expiation shall however, be incumbent upon the husband as a penalty for the breach of his vow.\(^{(23)}\) The vow cannot be cancelled by speech but only by conduct that is, by having sexual intercourse with the wife except under certain special circumstances.\(^{(240)}\) Thus, if during the time in which an Īla' can be revoked there should be any natural or accidental impediment to sexual intercourse on the part or either the man or the woman, such a serious illness or wife's tender age, or being at such a distance from one another as does not admit of their meeting during the term of the Īlā' then in such a case it shall be lawful for the man to receive his Īlā' by speech, as, for example, by saying "I have returned to my wife," upon which the Īlā' drops.\(^{(25)}\) But this holds good only so long as the impediment lasts. If it should become possible to have sexual intercourse before the expiration of four months then his right of return by
speech would be cancelled and another cancellation must be made by intercourse. (26) If Ila' has been constituted by a vow in the name of Allah then expiation shall be incumbent for the breach of the vow. But it shall not be incumbent in other cases. (27)

**Expiation:** If the husband has intercourse during the period of Ila' he will violate his vow. He should therefore, make the expiation for the infringement of his vow. (28) It consists of manumission of a slaves or clothing or feeding ten poor persons. If he has not the ability to do either of them, he should keep fast for three days consecutively. This expiation is based on the Qur'ānic verse Vs89. (29) If he has mentioned any particular penalty in his vow, then the expiation is the performance of the same. Thus, for instance, if he had stated that on breach of his vow, that is, on cohabitation, he shall perform Hajj, or shall fast or will give something in charity, then he shall have to discharge the Ila' by performing the specified expiation. (30) The husband's declaration that he has made the expiation shall be considered sufficient without any proof of the same.

"**Nature of Divorce by Ila'**":

Under the Imam Hanafi law, the divorce that is effected by Ila' amounts to an irrevocable divorce. (31) But according to Imam Malik and Shafi'i and Ahmad ibn Hanbal it would
amount only to a Raj'i or revocable divorce.\textsuperscript{(32)} A divorce by the Qazi shall also amount to one revocable divorce. According to Ahmad bin Hanbal, as certain reports say, it would amount only to a Raj'i or revocable divorce.\textsuperscript{(32)} A divorce by the Qazi shall also amount to one revocable divorce. According to Ahmad bin Hanbal, as certain reports say it would amount to an irrevocable divorce.\textsuperscript{(33)}

\textbf{Shi'ah Law:-} The Shi'ah law can be discussed under three main heads namely,

(a) The husband pronouncing Īlā' called muti,
(b) The wife, and (c) The Vow.

(a) \textbf{Husband:-} The husband who takes an Īlā' vow should be major, sane and should possess understanding. He should be acting under his free will and should pronounce the vow with an intention to exercise Īlā'.\textsuperscript{(34)}

(b) \textbf{The wife:-} The woman must be the lawfully married wife of the person taking the vow at the time of the Īla. There can be no Īlā' in respect of a woman married in mut'ah form, that is by a temporary marriage. Further, the marriage must have been consumated.\textsuperscript{(35)}

(c) \textbf{The Vow:-} The vow of Īlā' must be in the name of Allah and cannot be made merely by a declaration. It cannot be made for four months but the period should exceed it.\textsuperscript{(36)} It must absolute and either for an indefinite period or for a period exceeding four months.\textsuperscript{(37)} The vow cannot be made to depend on a condition or to take effect at a future time.
If a man who is ill takes an Īlā' vow with the intention to avoid cohabitation with his wife during the period of his or her illness then it shall not amount to Īlā'. It is not necessary that the vow should be taken in Arabic. (38)

**Cancellation Under Shi'ah Law:**

Under Shi'ah Law if the vow relates to a definite period then it abates on the expiry of the specified period when the husband can approach his wife without incurring any penalty. The vow cannot be cancelled by speech but can be cancelled only by cohabitation. (39) If a man is temporarily unfit for cohabitation then he can cancel Īlā' by speech, but he should declare that he will cancel the Īlā' by cohabitation when he is able to do so. (40)
(34) Shami, op.cit, II, pp. 59,92.
(35) Al-Fatawa al-Hindiyah, op.cit, II, p.127
(36) Ibid; p. 126.
(37) Al-Mughni, op.cit, VII, p.349 (38) Ibid. 

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(1) Al-Hedayah, Delhi, II, p.381.
(2) Shami, op.cit,II, p.507. (3) Jung-66.
(5) Al-Mughni, VII, p.278.
(7) Sayeeda Khanam vs Mohd Saleem; P.L.D. 1952, Lahore p.113 to 119.
(9) Shami; op.cit, II, p.560.
(10) Shami; op.cit, II, p.560. (11) Ibid.
(20) Hedayah; op.cit; II, p.382;Shami,op.cit,II,p.565.
(21) Fatawa al-Hindiyah, op.cit, II p.113; Shami,II P.563.
(22) Ibid. (23) Ibid.
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(2) Qur'ān, LXIII:2-4, Surah Al-Mujadilah.
(6) Al-Fatawa al-Hindiyah, op,cit; v.II p.127; Shami, op.cit; vol. II p. 589.
(8) Ibid. (9)Ibid. (10) Ibid. (11) Ibid.
(13) Shami op.cit; vol. II. p.590.
(15) Al-Fatāwa al-Hindiyah, op,cit; vol. II. P. 126.
(16) Ibid; Shami, op.cit; v. II, p. 589.
(18) Ibid; Shami op.cit, II, p. 589.
(20) Al-Fatawa al-Hindiyah, op.cit; II, p.127; Shami, op.cit; II, p.589.
(21) Shami; op,cit; II, p.589. (22) Ibid; p. 589.


(28) Al-Hedayah, op.cit.; II, pp. 381-82.


(32) Ibn Rushd, op.cit.; II, p. 84; Al-Mughni, op.cit., II, p. 331.

(33) Ibid.


(35) Ibid.


(37) Ibid.

(38) Ibid.


(40) Kitab Shara'i, al-Islam, op.cit; p. 229.