CHAPTER 6
DIFFERENCE BETWEEN IRANIAN AND INDIAN MUSLIM LAW ON DISSOLUTION OF MARRIAGE

6.1 Introduction

(i) Beliefs of Shia and Sunni Muslims

Both Sunni and Shi’a Muslims share the most fundamental Islamic beliefs and Articles of faith. All the Muslims agree that Allah is one; Muhammad (PBUH & HF) is His last Prophet, the Holy Quran is His last Holy Book for mankind, and that one day Allah will resurrect all human beings, and they will be questioned about their beliefs and actions.

In the other word, there is no difference of opinion amongst Muslim schools that the religion of Allah is Islam; that the only way to know Islam is through the Book of Allah and the Sunnah of the Holy Prophet; and that the Book of Allah is what is known as the Quran, without any “addition” or “deletion”. The difference is in the interpretation of some of the verses of the Quran; and in believing or not believing some of the Sunnah as genuine; or in its interpretation. This difference of approach has led towards the difference in some basic principles and some laws of religion. As the basic principles of Islam are well known. It will be sufficient if some of the important differences are described here to give the readers a fairly comprehensive idea of the main characteristics which distinguish the Shiats from the Sunnis. As mention above, all the Muslims agree that Allah is one, Muhammad (PBUH & HF) is His last prophet, and that one day Allah will resurrect all the human beings and all will be questioned about their beliefs and actions. All
of them agree that anyone who does not believe in any of the above three basic principles is not a Muslim. Also, they agree that anybody denying the famous tenets of Islam, like salat (prayers), sawm (fasting), hajj (pilgrimage to Mecca), zakat (religious tax), etc., or believing that the famous sins, like drinking wine, adultery, stealing, gambling, lie, murder, etc., are not sins, is not a Muslim, though he might have been believing in Allah and His Prophet Muhammad (PBUH & HF). That is because to deny such things is like to deny the prophet hood of Muhammad and his shariah (Divine Laws). When we go further, we come across those subjects which are not agreed amongst Muslims, and the differences between different schools of Islam begin there. Many people think that the difference between Shia and Sunni is the issue of leadership after the death of prophet. This is true, but as a matter of fact, different leaders instruct different ways of approach to each issue. This may result to more differences as the time goes.

Apart from the different internal divisions of Shi’a and Sunni schools; they have similar believes in their religious issues. Therefore to make their difference clear it is necessary to explain the similarities first.

(ii) The Similarities between Shi’a and Sunni Muslims in belief’s principles

All Muslim believes to certain standards also, for example, he believes in the following fivefold classification of human actions, namely:

(a) Farz [ or vajeb], acts the omission of which is punished and the doing of which is rewarded;

(b) Mustahab, acts the doing of which is rewarded but the omission of which is not punished;
(c) *Jaiz* or *Mubah*, acts the doing of which is simply permitted and which carry neither reward nor punishment;

(d) *Makruh*, acts which are disapproved but are largely valid; and

(e) *Haram*, acts which are strictly prohibited and punishable.

And also All Muslim:

(i) Believe in the existence of Allah and HIS unity

(ii) Believe in prophecy i.e. Allah has send a person named Prophet to lead human beings and the last of them is *Mohammad Ibn Abdollah*, Mohammad the son of *Abdollah*.

(iii) Believe in Resurrection, eternal life after death, evaluation of human deeds and getting their oblation and torment.

(iv) Believe in Quran as a holy book and it has been sent by Allah to Prophet *Mohammad Ibn Abdollah*.

(iii) The Similarities between Shi’a and Sunni Muslims in jurisprudence laws and divisions

**Obligatory (Farz or Vajeb)**

(a) *Namaz* (pray)

(b) *Haj* (Makka pilgrimage)

(C) *Fasting* (Roza)

(d) Islamic religion tax
(e) commanding for good deeds and prohibition of bad deeds

Unlawful (Haram)

(a) Lie
(b) Backbiting
(c) Alcoholic drink
(d) Prohibition of singing
(e) Stealing
(f) Adultery and so many other lawful (Halal) and unlawful (Haram) issues; however they disagree in details and conditions of these general principles.

The main difference between Shia and Sunni is in the succession of Prophet Mohammad Ibn Abdollah. Shia believes that the conditions of successor are: infallibility, divinity knowledge, complete knowledge about cosmos, human being and his training. Therefore Allah should determine the successor not by election of the people because people can not recognize about the existence of these conditions in a person; but Sunni school don’t believe in these conditions.

(iv) The Separation of Shi’a and Sunni

The issue separating the Shi’is and the Sunnis dates back to the events that occurred after the death of the Prophet and pertained to the vicegerency of the Prophet. The Sunnis maintain that Abu Bakr is the first caliph based on the consensus of the Muslim community. The Shi’is, however, hold that the issue of vicegerency of the Prophet is not simply political. Shi’a believes that the conditions of successor are: infallibility, divinity knowledge,
complete knowledge about cosmos, human being and his training. Therefore Allah should determine the successor not by election of the people because people can not recognize about the existence of these conditions in a person; but Sunni school don’t believe in these conditions. The Shi’is believe that ‘Ali, son of Abutalib, possessed all these characteristics and was appointed Imam by God through the Prophet. This trend will continue till the coming of the twelfth Imam, the hidden Imam Mahdi or Imam-I Zaman (literally meaning “Imam of the age”).

Moreover, they needed someone who could interpret the rationale behind Islamic teachings, analyze the Islamic texts and explain complexities of the religion. All this necessitates that there should be an Imam who possesses all these characteristics in the absence of the Prophet. The Imam is appointed by Allah and has a spiritual status much more exalted than the mere political position of the “caliph”.

Most of the differences among schools of jurisprudences roots in different views in principles for instance Sunni School values Quran and the tradition of Prophet as well as the tradition of companions and followers; however Shi’a school values Quran and the tradition of Prophet and if they can’t cite the tradition of companions to the tradition of Prophet they won’t accept it as religious source.

Thus, the difference between Shi’a and Sunni refers to how they infer the religion laws. Each school of jurisprudences has their own principles for inference of religion laws. Apparently the difference in principles and inference sources would result in the different conclusions.
Points of difference between the Sunni and Shi’á schools

The following are briefly some of the important points of difference between the Sunni and the shi’á schools:

1. Law of Marriage.
2. Dower.
3. Divorce.
4. Maternity.
5. Guardianship.
7. Gift.
8. Waqf.
9. Pre-emption.
10. Wills.
11. Inheritance.

In this research, I will study a kind of family law called divorce laws among in Iranian (Shi’a Athna Asharia) Muslims and Indian (Sunni-majority are Hanafi) Muslims.¹

¹ The Shi’s and the Sunnis School- As mentioned in chapter II, Muslims are divided into two major groups: the Shi’s and the Sunnis. The sunnis are divided into four sub-sects: (i) The Hanafi School, (ii) The Maliki School, (iii) The Shafei School, (iii) The Hanbali School. The Shi’s are divided into three main sub-sects: (i) The Imami School (the Twelver’s or Ithna Asharia), (ii) The Zaydi School (followers of Zayd, the great son of the fourth Imam), (iii) The Isma’ili School (followers of Isma’il, one of Imam Sadiq’s sons).
6.2 Difference source of Muslim laws between Shi’a and Sunni

The sacred law (Shariat) of the Muslims has been derived from various primary as well as secondary sources.

(i) The primary sources in Sunni Schools

(a) The Quran.

(b) The Sunna (Tradition of Ahadis).

(c) The Ijma (consensus of opinion)

(d) The Qiyas / Qiyas (Analogical deductions)

(ii) The primary sources in Shi’a School

(a) The Quran;

(b) The Sunnah/Tradition; only those which have come from the Prophet and Prophet’s family (Imams)

(c) The Ijma; (only those which were confirmed by Imams)

(d) The Reason; (Aql)

Various sources of Islamic law are used by Islamic jurisprudence to elucidate the Sharia, the body of Islamic law. The primary sources, accepted universally by all Muslims, are the Qur’an and Sunnah. The Qur’an is the holy scripture of Islam, believed by Muslims to be the direct and unaltered word of Allah.

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The Imamis comprise about 130 million Muslims. Most of them live in Iran, Iraq, Lebanon, and Persian Gulf countries, Afghanistan, Azerbaijan, Pakistan and India. (A. Zamani and S. Shakouri, What is Islam?, p. 24).

The Difference between Shi’a and Sunnis’ View in Interpretations of Holy Quran

As regards the Quran, the Shi’as hold it as the first and the foremost source of the Muslim law like the Sunnis; and the difference between them is due to the fact that they differ in its interpretations of some verses of Quran.

The Difference between Shi’a and Sunnis’ View in Sunnat

The Sunnah or traditions, in Sunni view include the actions, sayings or doing of the Prophet. And also, Traditions handed down by the contemporaries and companions of the Prophet are generally considered to be genuine, provided they satisfy other tests.

But, the Shi’as hold only those Ahadis as authentic which come down from the Prophet or his family members and are very strict in this respect; and so they have got very few Ahadis.

The Difference between Shi’a and Sunnis’ View in Ijma

The ‘ijma’, or consensus amongst Muslim jurists on a particular legal issue, constitutes the third source of Islamic law.

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3 The Quran - It is original or primary source of Islamic Law. It is the name of the Holy Book of Muslims containing the direct revelations from God through the Prophet. (Nishi Purohit, The Principles of Mohammedan Law, pp. 24-25 (1998)).

4 The traditions, i.e., the actions, sayings or doing of the Prophet, termed Sunna or Hadis, take the second place as the source of law. (M. Kashi Prasad Saksena, Muslim Law As Administered in India and Pakistan, p. 2 (1956)).

5 The Sunnah is the next important source, and is commonly defined as “the traditions and customs of Muhammad” or “the words, actions and silent assertions of him”. It includes the everyday sayings and utterances of Muhammad, his acts, his tacit consent, and acknowledgments of statements and activities. According to Shi’ite jurists, the sunnah also includes the words, deeds and acknowledgments of the twelve Imams and Fatimah, Muhammad’s daughter, who are believed to be infallible. (Farhad Nomani, Ali Rahnema, Islamic Economic Systems, pp. 4-7 (1994)).

6 Kashi Prasad Saksena, Muslim Law as Administered In India and Pakistan, pp. 1-3 (1956).
Muslim jurists provide many verses of the Qur'an that legitimize *ijma'* as a source of legislation.⁷

There are various views on *ijma'* among Muslims. Sunni jurists consider *ijma'* as a source, in matters of legislation, as important as the Qur'an and *Sunnah*. Shi'ite jurists, however, consider *ijma'* as source of secondary importance, and a source that is, unlike the Qur'an and *Sunnah*, not free from error.⁸

*Ijma* in the Sunni school is of various kinds:

(a) Ijmaa of the Companions of the Prophet which is universally accepted throughout the Muslim world and is unrepeatable;

(b) Ijmaa of the jurists; and

(c) Ijmaa of the people, the general body of the Muslims.

But Shi'a has accepted only *Ijmas* which were confirmed by Prophet (P. B. U. H&HF) or *Imams*.

The Difference between Shi'a and Sunnis' View in *Qiyas or aql* (reason)

*Qiyas* or analogical deduction is the fourth source of *Sharia* for the Sunni jurisprudence. But Shiites do not accept *qiyas*, and replace it with reason (*aql*).⁹

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⁹ Shi'ite jurists maintain that if a solution to a problem cannot be found from the primary sources, then *aql* or reason should be given free rein to deduce a proper response from the primary sources. The process, whereby rational efforts are made by the jurist to arrive at an appropriate ruling, when applied is called *ijtihad* (literally meaning “exerting oneself”). Shi'ite jurists maintain that *qiyas* is a specific type of *ijtihad*. The Sunni Shafi’ school of thought, however, holds that both *qiyas* and *ijtihad* are the same. 9 Sunni jurists accepted *ijtihad* as a mechanism for deducing rulings.
The Sunni school accepted the *Qiyas* as a fourth source but *Shi’a* school accepted the *Aql/ reason* as a fourth source. In the absence of the first three sources of law the *Shias* take recourse to the Reason.  

*Shi’ite* jurists maintain that *qiyas* is a specific type of *ijtihad*. The Sunni *Shafti’* school of thought, however, holds that both *qiyas* and *ijtihad* are the same.  

The Difference between Shi’a and Sunni’s View in Secondary Source

Secondary sources in Sunni School are those sources which are development on the foundations laid down by the primary sources. These are:

(i) *Istihasan* (Juristic equity or Juristic preference)

(ii) *Istislah* (public good or public advantage or public interest)

(iii) *Istidlal* (Juristic deductions) is of three types

(iv) *Fatawas* (precedent)

(v) *Legislation*

Secondary source in Iranian (Shi’a) laws are commentary and *fatwas* (legal opinions) based on these;

And to some extent established customs and the rulings of superior courts.

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10 Kashi Prasad Saksena, *Muslim Law as Administered In India and Pakistan*, pp. 1-3 (1956).


13 According to Article 167 of Iranian constitution [Rule of Law for Judiciary]
6.3 Dissolution of Marriage under Muslim Law

Islam is very stern on the issue of divorce and it is allowed only in absolutely unavoidable situations.

Indeed divorce is an undesirable practice in Islam and a Muslim man must not divorce his wife out of whim and caprice without an acceptable reason. In other words, Islam tries to prevent divorce as much as possible. In Islam divorce is allowed only as the last resort when all other means fail. 14

6.4 Dissolution of marriage in Indian Sunni Muslim law

A marriage in Sunni Muslim may dissolve:

(a) By act of God i.e. death of the husband or wife, or
(b) By act of the parties i.e. divorce.

Dissolution of marriage by act of the parties divided into two parts:

(a) Extra-judicial divorce, and
(b) Judicial divorce (by wife under the Dissolution of marriage Act, 1939).

The Extra-judicial divorce also divided into three parts:

(a) By husband including
   (i) Talaq,
   (ii) Ila, and

   “The judge is bound to endeavour to judge each case on the basis of the codified law. In case of the absence of any such law, he has to deliver his judgement on the basis of authoritative Islamic sources and authentic fatawa. He, on the pretext of the silence of or deficiency of law in the matter, or its brevity or contradictory nature, cannot refrain from admitting and examining cases and delivering his judgement”.

6.5 Divorce by Husband

The Difference between Shi’a and Sunnis’ View in Capacity for divorce

Every [Indian Sunni] Muslim husband of sound mind, who has attained the age of puberty, is competent to pronounce Talaq. It is not necessary for him to give any reason for his pronouncement. If a husband has attained the age of puberty and possesses a sound mind, he can pronounce Talaq against his wife whenever he likes. This absolute right is given to him by Muslim law itself and does not depend on any condition or cause. 16

But according to Iranian Muslim (Shi’a) law, the husband of sound mind, who has attained the age of puberty, is not competent to pronounce Talaq. It is necessary for him to give the reason for his pronouncement.

According to Single Clause Bill 1 of the ‘Amendment of Divorce’s Regulation Act, 1991:

15 R.K. Sinha, Muslim Law, p. 82.
16 Ibid at 83.
If the husband or wife intends to divorce, he/she has to refer to the special Civil Court and shall apply to the court for issuing him or her certificate of incompatibility (non-reconciliation).

The applicant should also mention the exact reasons for obtaining the certificate of non-reconciliation.

Certificate of incompatibility in Iranian Shi’a Law

According to Article 10 of Iranian Family Protection Act, “If a wife intends to divorce on the delegate of her husband and also in case of Section 4 of the Marriage Act, she shall (first) obtain from the court a certificate of incompatibility provided”.

And Article 8 of the Iranian Family Protection Act states; “The prescribed words (Sighah) of divorce shall be pronounced after the court has considered the relevant case and issued a certificate of incompatibility (non-reconciliation) between the parties”.

A person desirous of obtaining the aforesaid certificate of incompatibility between the parties shall apply to the court for issuing the certificate to him or her.

The applicant should also mention the exact reasons for obtaining the aforesaid certificate.

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18 Single Clause Bill 1 of the ‘Amendment of Divorce’s Regulation Act,1991-1992 states: “Since the adaptation of this Amendment, all divorce seeking couples, should apply in special civil courts and if their differences are not solved by the court and the arbitrators from both sides, (as it is said in Holy Quran), the Court will issue a Non-Conciliation Decree and introduce the couple to the Notary Public that are no more eligible to register divorce for couples whiteout such Decree. The working permissions of Notaries violating this law will be deemed void”.

19 The Family Protection Act (1967).
On receipt of the application, the court shall directly, or, if it
deems necessary, through an arbitrator or arbitrators, endeavor to
bring about a compromise between the husband and wife, and
prevent the occurrence of a divorce.

In case all the efforts of the court to bring about
reconciliation fail to bear the desired result, the court shall issue a
certificate of non-reconciliation between the parties.

On receipt of the aforesaid certificate, the Divorce
(Registration) Office shall take necessary action for the
pronouncement of the divorce and its registration.

Under clause 1 of the ‘Amendment of Divorce’s Regulation
Act, 137120 “The Couple”, whose demand is divorce, should,
hereafter, refer to the special Civil Court in order to resolve their
dispute. In case their dispute could not be resolved by the court and
two arbitrators (Hakamain), as the Holy Quran ordered, the court
will issue the certificate of impossibility of reconciliation and send
them (the couple) to the ‘Notary public’s office’. The notary public
office has no right to register any divorce whose certificate of
‘impossibility of reconciliation’ has not been issued for. Otherwise
the faulty Notary would be incapacitated.

But, no school of the Sunnis prescribes any formalities for
talak/talaq.21

The Difference between Shi’a and Sunnis’ view in Essential of
Intention for Divorce

Intention, here, means that the husband while pronouncement
the divorce, must know what is, exactly, doing and he must know

20 28.8.1371 A. H (solar year)=1992 A.D.
the meaning of the words he pronounces. Moreover, he must in
pronouncement of divorce, be and aware of its consequence.22

Every Shi'a jurist holds that the intention is a necessary
element for validity of divorce. Thus divorce pronouncement by
way of mistake or jest (without intention of divorce) is not valid.

The Shi'a law does not recognize a divorce pronounce under
compulsion, not obtained by fraud, or given under influence under
compulsion or threat. Among the Hanafi there is some controversy
whether a divorce pronounce under intoxication is valid. In India, it
seems to be the established view that talak pronounced under
voluntary intoxication is valid.23

Aishah reported, “I heard the Prophet (peace be upon him)
said there is no divorce and no emancipation by force”.24

But in course of time the Hanafi jurists have held that a
divorce under compulsion is valid.25

The Hanafi law of talaq is that a divorce pronounced under
compulsion, or in a state of voluntary intoxication, or to satisfy or
please one's father or some other person, or in jest, is valid. The
Fatwai Alamgiri puts it thus:” A talaq pronounce by a an adult and
sane Muslim male is valid, even though pronounce under
compulsion, or even when it is uttered in sport or jest or
inadvertently by a mere slip of tongue”. It is necessary that at the
time of pronouncement of talaq the husband must be awake.

Except under Hanafi law, the consent of the husband in
pronounced Talaq must be a free consent.

22 Sayyed Mostafa Mohaqeq Damad, Family Law, Marriage and its
Dissolution, p. 398 (1986).
23 Paras Diwan, Muslim Law in Modern India, p. 90 (2008).
24 Vali ul-Din Al-Khatib, Mishkat al- Muhtaj, p. 284 (1938).
The Difference between Iranian and Indian Muslims’ View in Presence and Notice of Wife at the Time of Divorce

Presence of wife at the time of pronouncement of Talaq is not necessary. A Talaq pronounced in the absence of the wife is lawful and effective. But the wife must be specifically referred in the pronouncement. Where a husband has more than one wife, he must specify and name the wife against whom he is pronouncing Talaq.

For the validity of Talaq, its notice to wife is not necessary. It is not necessary for the husband to communicate to wife the pronouncement immediately. The Talaq becomes effective from the moment of its pronouncement and not from the date on which the wife comes to know about it. Under [Sunni] Muslim law, even if the Talaq has not been communicated to the wife, the Talaq is valid and effective. However, knowledge of Talaq is required for the claim of dower and for claim of maintenance from former husband.

But, according to Single Clause Bill of Determining Validity Period on Non-Conciliation Decree, the Notary Public should summon the couple for recitation of divorce vows and registering their divorce, in case one of the parties does not show up on time, the office will summon them for the second time in no more than one month.

And also, Presence of wife at the time of pronouncement of Talaq is necessary. Only “If the wife does not show up, the husband will recite the divorce vows and the Notary Public will register the divorce and inform the wife.

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28 Supra note.
The Difference between Shi’a and Sunnis’ view in Involuntary Intoxication in Divorce

Talaq pronounced under forced or involuntary intoxication is void even under Hanafi law. Where a husband is made to drink some intoxicant (wine) by force or takes it as drug and then pronounces Talaq, the Talaq is not valid under the Hanafi law.30

But, Under the Shia law (and also under other schools of the Sunnis) a Talaq pronounced under compulsion, coercion, undue influence, fraud or [even] voluntary intoxication is void and ineffective.31

The Difference between Shi’a and Sunnis’ view in Conditional and Contingent Talaq

A Talaq may either be absolute (i.e.unconditional) or subject to a condition or contingency. Conditional and contingent Talaq is recognized only under Sunni law; Shia law does not recognize conditional or contingent Talaq.32

Under Shi’a law, conditional or contingent Talaq is void and ineffective. Even if the condition or contingency is lawful, the Talaq is not valid. In other words, under Shi’a law a Talaq must be unconditional.33

According to Article of 1135 of (I.C.C.); “Divorce must be in clear and precise wording, a conditional divorce is null and void”.

30 R.K. Sinha, Muslim Law, p. 83.
31 Supra note at 84.
33 Supra note.
The Difference between Shi’a and Sunnis’ view in writing Divorce

According to Shia law, the Talaq must be pronounced orally, except where the husband is unable to speak. If the husband has the capacity to utter the words but gives it in writing, the Talaq is void and ineffective under Shia law.

But, According to Sunni Law a Talaq may be oral or in writing. Talaq may be simply uttered by the husband or he may write a Talaqnama.

6.6 The Similarities and Differences between Iranian and Indian Muslim law in the Procedure and Formalities of Taking divorce/Talaq

Similarity

According to Shi’a and Sunni Muslim law, the man is not allowed to pronounce a talaq while the wife is in her menstrual period; since this is a period of mutual distance not fit enough to take a decision on separation. A man thinking of talaq must wait till the wife is an a tuhr (menstruation-free state) – as then by getting closer to the wife he might change his mind.34

The Differences in Formalities

No school of the Sunnis prescribes any formalities for Talaq.35

A [Sunny] Muslim husband may, under all schools of Muslim law effect an out-of-court divorce by his own declaration. This is called talaq.

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35 Paras Diwan, Muslim Law, p. 88.
But, in Iranian Muslim (Shi’a) law prescribes some formalities\(^{36}\) for taking Talaq and also Talaq/Divorce under Iranian Law doesn’t affect an out of-court only by husband own declaration.

The [Sunni] Muslim Law prescribes a simple procedure for \textit{talaq}, keeping all chances of reconciliation and reconsideration open.\(^{37}\)

According to Sunni law Talaq/divorce may be oral or in writing. Talaq may be simply uttered by husband or he may write a Talaq name. No specific formula or use of any particular word is required to constitute a valid Talaq. Under Sunni law, Talaq without witnesses is valid.\(^{38}\)

But, According to Shia law, the Talaq/divorce must be pronounced orally, except where the husband is unable to speak. And also, Shi’a law provides that Talaq must be pronounced in the presence of two competent witnesses. A Talaq without witnesses or in presence of incompetent witnesses is void under Shia law.\(^{39}\) The Shia law requires the use of specific Arabic words in the specific formula in the pronouncement of Talaq.\(^{40}41\)

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\(^{36}\) As mentioned in chapter II and IV.

\(^{37}\) \textit{Supra} note at 105.

\(^{38}\) R.K. Sinha, \textit{Supra} note at 84.

\(^{39}\) \textit{Ibid}.

\(^{40}\) \textit{Ibid}.

\(^{41}\) The actual form of utterance of divorce in Arabic is ‘Ante Taliqon’ means ‘you are divorced’. ‘Ante’ is pronoun for feminine single and ‘Anta’ for masculine one. ‘Taliqon’ is name of agent and ‘Talaq’ is infinitive. That word in the formula which should not be changed is ‘Taligon’ otherwise instead of ‘Ante; it can be altered to e.g., This wife or her name etc. Mohammad, b. Moslim narrates the Sixth Imam; jafar b. Mohammad. As-sadeq that he was asked if the husband says to the wife that ‘you are free from my side’ or you are separate’ or ‘you are forbidden to me’ there can be a divorce? Iman Sadiq said “No” (Iaisa Be Shi’a).
Procedure and Formalities for Divorce in Iranian Laws

The procedures of divorce in Iranian (Shia) Muslim laws are:

The husband or wife intends to divorce, he/she has to go to the special Civil Court\(^{42}\) and shall apply to the court and also mention the exact reasons for issuing him or her certificate of incompatibility (non-reconciliation). \(^{43}\)

The court shall endeavor to bring about a compromise between the husband and wife, through two arbitrators (Hakamain), as the Holy Quran\(^{44}\) ordered, and prevent the occurrence of a divorce. Either of the spouses has to introduce a qualified relative of his/her, as arbitrator, to court within twenty days. In case of non-existence of a relative each of the couple could introduce other qualified people and in case of their inability to introduce an arbitrator, the Court will install an arbitrator directly.\(^{45}\) The arbitrations must be having some qualifications.\(^{46}\) The Court will hold an extra session to read them their duties.\(^{47}\) The Court will determine a time limit for arbitrator to judge, and installed


\(^{43}\) Single Clause Bill 1 of the ‘Amendment of Divorce’s Regulation Act, 1991, 1992 states: “Since the adaptation of this Amendment, all divorce seeking couples, should apply in special civil courts and if their differences are not solved by the court and the arbitrators from both sides, (as it is said in Holy Quran), the Court will issue a Non-Conciliation Decree and introduce the couple to the Notary Public that are no more eligible to register divorce for couples whiteout such Decree. The working permissions of Notaries violating this law will be deemed void”.

\(^{44}\) Holy Quran, 65: 2.

\(^{45}\) Article III, Supra note.

\(^{46}\) a. Muslim; b. With proper familiarity with religious, family and social issues Forty years or older; c. Married; d. Trustable; e. Non-famous for corruption and misbehavior.

\(^{47}\) Article V, Supra note.
arbitrators must hold no less than two sessions with the couple to make peace among them. Written report [of arbitrations] on impossibility of reconciliation should be delivered to the Court based on all marriage conditions.

In case all the efforts of the court and arbitrations to bring about reconciliation fail to bring the desired result, the court shall issue a certificate of non-reconciliation between the parties. The Non-Conciliation Decree issued by judiciary officials is deemed void if not referred to divorced registration offices within three months.

Divorce pronouncement and it’s registration is conditioned to delivering all payables to the wife in cash (including dowry, marriage portion and etc) and should be done after paying them.

The prescribed words (Sighah) of divorce shall be pronounced after the court has considered the relevant case and issued a certificate of incompatibility (non-reconciliation) between the parties.

In revocable divorces a written certificate about the living of the divorced woman with her husband in the same house until the end of the Idda is necessary.

The divorce report is completed and is official if signed by the couple, arbitrators, witnesses, and signed and sealed by head of the Notary Public.48

After divorce49 the woman can appeal for the payment of the works that were not her legal and religious duties.

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48 Note 4 of Single-Clause Bill.
49 The jurists interpret the word ‘after divorce’: As ‘within the time of pronouncement of divorce’.
Pregnancy or non-pregnancy certificate by qualified doctors and laboratories should be delivered.\textsuperscript{50}

The notary public office has no right to register any divorce whose certificate of ‘impossibility of reconciliation’ has not been issued for; otherwise the faulty Notary would be incapacitated.\textsuperscript{51} If each of the parties goes for divorce without receiving the certificate of non reconciliation, he/she will be condemned to 6 months – one year imprisonment. The same penalty would be for the notary public office of the Divorce who has registered the divorce.\textsuperscript{52} The divorce must be performed in the actual form of utterance and in the presence of at least two just men\textsuperscript{53} who must hear the actual form of divorce.\textsuperscript{54} The witnesses must be male\textsuperscript{55} and just. This requirement is based on the letter of holy Quran.\textsuperscript{56}

As it is clear from context of the above mentioned about procedure of divorce in Iranian Muslim (Shia) laws, there are some phases for resolving the dispute between the parties. The procedure of divorce in Iranian courts is according to Holy Quran, Sunnah and other Shi’a Muslim’s sources. This long procedure is a must because most of the divorces occur due to whim, caprice and nervousness.

\textsuperscript{50} Note 7 of Single-Clause Bill.
\textsuperscript{51} Single-Clause Bill.
\textsuperscript{52} Section 10 of Family Protection Laws, The Family Protection Act, (1975).
\textsuperscript{53} The just men is a person who fears God and does not commit moral sin and does, even, not commit venial sin frequently. Therefore, if the witnesses of divorce are in lack of this term then performed divorce is ineffective and void.
\textsuperscript{54} Article of 1134 of Iranian Civil Code.
\textsuperscript{55} The witnesses based on the letter of Section 1134 of the Iranian Civil Code must be male. Then if there is double number of females e.g., one male and two females or four females of two males, it is not enough.
\textsuperscript{56} According to Holy Quran the presence of witnesses at the time of pronunciation of divorce is necessary; “. . . and call to witness two men of justice from among you, and give upright testimony for Allah . . .” (Holy Quran, 65:2.)
The Formal Conditions for Divorce in Iranian laws

The formal conditions of divorce under Iranian law are related to:

(a) The documents\textsuperscript{57} necessary to show for performance of divorce.

(b) Persons who must present themselves at the time of performance of abrogation of divorce\textsuperscript{58}

(c) Performed in the actual form of utterance\textsuperscript{59}

(d) Preparing the divorce certificate\textsuperscript{60}

6.7 The Similarity and Difference between Shi’a and Sunnis’ View in Kinds of Talaq

From the point of view of the mode of pronouncement and effect, there are two kinds of Talaq:

1. *Talaq-ul-Sunnat* or revocable *Talaq*; and

2. *Talaq-ul-Bidaat* or irrevocable *Talaq*

\textsuperscript{57} The identity card or the letter of attorney of the husband if his advocate is divorcing on his behalf and the client is not present and in case the woman has asked for divorce she must also possess the court verdict and should be submitted to the notary public office.

\textsuperscript{58} The persons are: the head of the notary public office, the divorce or his advocate, the witnesses and if necessary the person who utters the words of divorce, the introducer and the committed. (In jurisprudence or civil law it refers to the blood oozing at the time of delivery or after the delivery (Article 1140 of the Civil Law).

\textsuperscript{59} According to Article 1134 of the civil law “The divorce must be performed in the actual form of utterance and in the presence of at least two just men who must hear the actual form of divorce”. According to Article 1135 of the civil code “Divorce must be unconditional, a conditional divorce is null and void”.

\textsuperscript{60} The head of the notary public office by observing the abovementioned formalities prepares the divorce certificate and registers it in the office’s records.
The Talaq-ul-Sunnat or revocable Talaq may be pronounced either in the Ahsan form or in the Hasan form. That is to say, Talaq-ul-Sunnat may be further sub-divided into: (i) Talaq Ahsan (most proper); (ii) Talaq Hasan (proper). Talaq-ul-Bidaat is irrevocable and becomes effective as soon as it is pronounced in any way, indicating husband's desire to dissolve the marriage.

_Talaq-ul-Sunnat_ is regarded to be the approved form of Talaq. It is called _Talaq-ul-Sunnat_ because it is used on the Prophet's tradition (Sunna). As a matter of fact, the Prophet always considered Talaq as an evil. If at all this evil was to take place, the best formula was one in which there was possibility of revoking the effects of this evil. With this idea in mind, the Prophet recommended only revocable Talaq, because in this form, the evil consequences of Talaq do not become final at once. There is possibility of compromise and reconciliation between husband and wife. Talaq-ul-Sunnat is also called as _Talaq-ul-raje_. Only this kind of Talaq was in practice during the life of the Prophet. This mode of Talaq is recognized both by Sunnis as well as by the Shia. Talaq-ul-Sunnat may be pronounced either in Ahsan or in the Hasan form.

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61 R.K. Sinha, p. 86.
62 _Hedaya_ brands it as he most laudable divorce, where the husband repudiates his wife by a single pronouncement in a period of _tuhr_ (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. (A.A. Fyzee, _The Muslim Wife's Right of Dissolution her Marriage_, p. 152 (1936)).
63 According to the _Hedaya_, this method of divorce is the most approved because the companions of the Prophet (Peace be upon him) approved of it, and second, because it remains within the power of the husband to revoke the divorce during _iddat_, which is three months, or till delivery. (_Hedaya_, at 72).
Article 1144 of (I.C.C.) states: “There are two forms of divorce, irrevocable divorce (Ba’in) and revocable divorce (Talaq-ul-raje)”.

**Similarity**

Revocable divorce (Talaq-ul-raje) is recognized by both Shi’a and Sunni law.

In fact, revocable divorce, in jurisprudence and civil law is kind of divorce which husband (man) can spend force time and without re- matrimony with his wife. While, divorce is revocable that includes these two characteristics:

1. After divorce, woman must keep waiting period and she can’t marriage immediately. Therefore, divorce that has no waiting period, like; divorce before intercourse and menopause is class irrevocable divorce.

2. In the time of waiting period can revert of divorce and without when need to other matrimony, should continue wedlock and annihilate divorce effectiveness rather than future.

Revocable divorce (Talaq-ul-raje) is the most proper form of repudiation of marriage. The reason is twofold:

First, there is possibility of revoking the pronouncement before expiry of the Iddat period.

Secondly, the evil words of Talaq are be uttered only once.  

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65 After this single pronouncement, the wife is to observe an Iddat of three monthly courses. If she is pregnant at the time of pronouncement of the Iddat is, till the delivery the child. During the period of the Iddat there should be no revocation of Talaq by the husband. Revocation may be
Differences

(a) *Talaq-ul-Sunnat* (revocable)

In Sunni law, *Talaq-ul-Sunnat* (revocable) may be further sub-divided into: (i) *Talaq Ahsan* (most proper); (ii) *Talaq Hasan* (proper).

But, revocable divorce or *Talaq-ul-Sunnat* in the Iranian (Shi’a) law includes only *Talaq Ahsan* (most proper) like Sunni law. So, Shi’a recognize only *Talaq Ahsan* as a revocable divorce because Shi’a believes that Prophet Mohammad (p. b. u. h) recommended only this kind of revocable *Talaq*.

(b) *Talaq-ul-Bidaat* (Irrevocable)

This *Talaq* is also known as *Talaq-ul-Bain*. It is a disapproved mode of divorce. A peculiar feature of this *Talaq* is that it becomes effective as soon as the words are pronounced and there is no possibility of reconciliation between the parties.

The Prophet never approved a *Talaq* in which there was no opportunity for reconciliation. Therefore, the irrevocable *Talaq* was not in practice during the life. The *Talaq-ul-Bid’at* has its origin in the second century of the Islamic era. According to Ameer Ali, this mode of *Talaq* was introduced by the Omayad Kings because they found the checks in the Prophet’s formula of *Talaq* inconvenient to them. Since then this mode of *Talaq* has been in practice among the Sunni Muslims.

As the irrevocable *Talaq* was not in practice during the life of Prophet Mohammad in which in a *Bid’at* form there is no express or implied. Cohabitation with the wife is an implied revocation of *Talaq*. If the cohabitation takes place even once during the period, the *Talaq* is revoked and it is presumed that the husband has reconciled with the wife.

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opportunity for the revocation of Talaq; Shia law also never recognize an irrevocable Talaq (Talaq-ul-Bid'at) in which there is no opportunity for reconciliation.

**Irrevocable or Divorce (Definitive) in Iranian law**

According to Article 1145 of Iranian civil code states: "in the following cases a divorce is definitive or irrevocable:

(a) Divorce before intercourse (divorce performed before the occurrence of matrimonial relations.)

(b) Divorce of menopause (a wife who is incapable of conception).

(c) Khul’a and Mubarat divorce (i) a divorce which a wife achieves by giving a compensation to her husband (Khul’a) and (ii) a divorce by mutual consent (Mubarat), as long as the wife has not demanded the return of the compensation.

(d) A third divorce, performed after three consecutive marriages (of the same parties) whether by mere renouncement by the husband of his desire to divorce the wife or by a new marriage between the two parties.

Besides the abovementioned cases, the following two cases too are irrevocable divorce:

(e) A divorce in which a husband is forced by the court to divorce his wife.

(f) A divorce in which a wife due to power of attorney gets divorce.67

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The Difference between Shi’a and Sunnis’ view in Third (Triple) divorce

We have already seen that in a Bid’at form there is no opportunity for the revocation of Talaq. A Bid’at Talaq become final as soon as the words have been uttered and the marriage is completely dissolved. A Sunni husband, who wants to divorce his wife irrevocably, may do so in any of the following manners:

The husband may make three pronouncements in a period of purity (Tuhr) saying: “I divorce thee, I divorce thee, I divorce thee”. He may declare this triple-Talaq even in one sentence saying: “I divorce thee thrice”, or “I pronounce my first, second and third Talaq”.

The husband may make only one declaration in a period of purity expressing his intention to divorce the wife irrevocable saying: “I divorce thee irrevocably” or “I divorce thee in Bain”.  

But, there is no provision in Shi’a Law which approves triple divorce in one single session as prevailed in India (Sunni) Muslim, i.e., a Shi’a husband cannot say to his wife that “you are divorced, divorced, divorced” or “you are divorce irrevocably”.

Triple divorce in one single meeting does not exist and it looks very abnormal and odd. This sort of divorce is a bidat (innovation) and is neither according to Quranic mandates nor Tradition of Prophet (peace be upon him).

Ibn Abbas has reported that the pronouncement of three divorces at one and the same time was treated as one divorce during

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68 R.K. Sinha, Muslim Law, p. 89.
69 Holy Quran, 2:229.
the time of the Prophet (peace be upon him), the first Caliph and during the first two or three years of regime of the second Caliph.  

Form when and why the pronouncement was considered to be final divorce:

Three successive pronouncements at one and the same time was considered as final divorce or Mughallazah when the second Caliph, Umar b. Khattab, found that people used to pronounce divorce wantonly, many times and in order to discourage this undesirable practice, he introduced the rule that pronouncement of three divorces at one, and the same time shall be treated as three divorces or a final or Mughallazah divorce. It is also reported that ‘Umar’ used to punish people who pronounced three divorces at the same time.  

The Procedure of Triple Divorce in Iranian Laws

According to clause 4 of the Article 1145 of the Civil Code, the third divorce is: “. . . A third divorce, performed after three consecutive marriages (of the same parties) whether by revocation of divorce by the husband or by a new marriage between the two parties”.  

So, the procedure of triple divorce in Iranian laws is:

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71 Ibn Qudamah ; Al- Moqni, (1307 A. H), Cairo, Vol. VIII, p. 104.
72 The triple divorce in one meeting (like Indian Sunni Muslim law) has no place under) Iranian) Shi’s law. In the other word, we can say there is no provision in Shi’a Law which approves triple divorce in one session as prevailed in India. That is to say a Shia husband cannot say to his wife that “you are divorce, divorce, divorce “or “you are divorce irrevocably”. But triple divorce in one meeting should not be limited to only, above examples. (I will be explain about third divorce in The opinion of Indian Sunni Muslim law and opinion of Iranian Shi’a law in chapter 4).
(i) There must be three successive pronouncement of the formula of divorce.

(ii) In the case of menstruating wife, the first pronouncement should be made during a period of *Tuhr*, the second during the next *Tuhr* and the third during the successive *Tuhr*.

(iii) In the case of non-menstruating or a pregnant wife the three pronouncements should be made during the successive interval of 30 days.

(iv) The sexual intercourse should take place during three periods of *Tuhr*, namely; the husband divorce his wife and the time of *Idda* or waiting period reunite with his wife (revocation of divorce) either verbally or practically, and second time divorce his wife again then the time of *Idda* or waiting period reunite with his wife, then divorce his wife, the husband is not entitled to reunite with his wife and this divorce called triple divorce and is irrevocably.\(^7\)

So, under Shi’a law irrevocable divorce (triple divorce/ *Bain*) should take place by three pronouncements of formula of divorce during three *Tuhr* during which in the first two he is able to refer to his wife and in the third time it becomes irrevocable, i.e., he is not able to refer to his wife again; unless his wife gets married to another person and has intercourse with that person then if they divorce, he can remarry her.

Unlike in India that triple divorce is an approved form; in Iran it is very rare.

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\(^7\) Javaher-ul-kalam, Vol 32, pp. 128, 158.
6.8 Divorce by wife

The Similarity between Iranian and Indian Muslim’s View in Delegated Divorce (Talaq-e-Tafweez)

Delegated Talaq (Talaq-e-Tafweez) in Indian Muslim law

The power to give divorce by the husband, he may delegate it to the wife or to a third person, either absolutely or conditionally and either for a particular period or permanently. The person to whom the power is thus delegated may then pronounce the divorce accordingly; such a delegation of power is called Taweez. The husband may do so at the time of marriage contract or at any time when he so likes.

Delegated Talaq in Iranian Muslim Law

The fiqh (jurisprudence) allows the husband to delegate his right of talaq to his wife, by inserting this as a condition in the marriage contract, enabling her to divorce herself. The husband retains his own right of talaq.

The right is normally subject to a condition, for instance the wife may have the right to divorce her husband if he remarries or treats her harshly. The procedure in this case would be for the wife to apply to a court, demonstrating that the condition had been fulfilled, and asking the judge to pronounce the talaq.

This kind of divorce called irrevocable because the woman gets divorced as an attorney of her husband. In fact the woman gets divorced because life becomes impossible for her. Hence when such a divorce is after intercourse and the woman is not menopause, man

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74 Paras Diwan, Muslim Law in Modern India, p. 79 (1985).
75 Article 1119 of I.C.C.
76 Article 1119 of I.C.C.

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cannot renounce his decision for divorce during the waiting period.\textsuperscript{77}

**The Dissolution of Muslim Marriage Act 1939**

The dissolution of Muslim marriage Act, 1939 in India, was passed by British legislature in March 1939, along with the changes made in the original Bill at the instance of the select committee. It dealt with:

(a) Grounds on which a Muslim wife can apply to the court for the dissolution of her marriage (Section 2)

(b) The effect of renunciation of Islam by a Muslim wife (Section 4)

(c) Matters incidental to the aforesaid subjects (Sections 3 and 5)\textsuperscript{78}

**Divorce by wife in Indian Muslim Law**

Section 2 of the Dissolution of [Indian] 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.\textsuperscript{79}

**Divorce by wife in Iranian Muslim Law**

According to Articles 1029, 1129\textsuperscript{80} and 1130\textsuperscript{81} of the civil code a wife can plea to the court for divorce in certain cases.

\textsuperscript{77} Imami, *supra* note at 64-65 (1994).

\textsuperscript{78} *Supra* note at 57.


\textsuperscript{80} Article 1129 states: "If the husband refuses to pay the cost of maintenance of his wife (alimony), and if it is impossible to enforce a judgment of the court and to induce him to pay the expenses, the wife can refer to the judge applying for divorce and the judge will compel the husband to divorce her, also is the husband’s failure to provide maintenance".
The Similarities and Differences of Divorce by Wife’s Plea in Iranian and Indian Muslim Laws

Iranian and Indian Muslim Laws provided some grounds that a woman entitled to obtain a decree for the dissolution of her marriage on any one or more of the grounds. Some important of the grounds are as follow:

**Husband’s disappearance in Iranian and Indian Muslim law**

According Section 2, (i); of the Dissolution of [Indian] Muslim Marriage Act, 1939,

“That the whereabouts of the husband have not been known for a period of four years”.

According to Article 1029 of the Iranian Civil Code also:

“If a husband goes on missing or remains absent for four years, his wife can plea for divorce.”

**Want of maintenance in Iranian and Indian Muslim law**

According Section 2, (ii); of (D. M. M.) Act, 1939,

“That he husband has neglected or has failed to provide for her maintenance for a period of two years”

According to Article 1129 of the (I.C.C.) “If the husband refuses to pay the cost of maintenance of his wife (alimony), and if

81 Article 1130 of the Civil Code: “In the following circumstances, the wife can refer to the Islamic judge and request for a divorce. When it is proved to the Court that the continuation of the marriage causes difficult and undesirable conditions, the judge can for the sake of avoiding harm and difficulty compel the husband to, divorce his wife. If this cannot be done, then the divorce will be made on the permission of the Islamic judge”.

82 In this case the judge would perform the divorce on the basis of Article 1023.

83 (D. M. M.) is Dissolution of [Indian] Muslim Marriage Act, 1939.

84 (I.C.C.) is Iranian Civil Code.
it is impossible to enforce a judgment of the court and to induce him to pay the expenses, the wife can refer to the judge applying for divorce and the judge will compel the husband to divorce her, also is the husband’s failure to provide maintenance.  

Article 1129 don’t mentioned any time for maintenance. So when husband refused to pay maintenance, his wife cans plea divorce to the court.

But, according to condition stipulated binding in Iranian marriage contract:

“Where the husband refuses to pay the wife’s cost of maintenance for any reason for (a period of) six months and it will be impossible to coerce him.

**Imprisonment in Iranian and Indian Muslim law**

Section 2 (iii): of (D. M. M.) Act, 1939,

“That the husband has been sentenced to imprisonment for a period of seven years or upwards”.

According to Section 8 of the family protection Act 1975 and condition stipulated binding in Iranian marriage contract:

The husband’s find conviction resulting in a five-year imprisonment or its equivalent pecuniary punishment resulting in such a prison term due to his incapacity to extinguish the debt, his wife cans plea divorce from the court.

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85 Article 1119 of the Iranian Civil Code states: the husband can give to his wife attorney for divorce at the time of matrimonial contract.
Non-performance of marital obligations in Iranian and Indian Muslim law

According to Section 2 (iv), of (D. M. M.) Act, 1939,

“That the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years”.

According to condition stipulated binding in Iranian marriage contract:

“Where he fails to fulfil her other indisputable rights (marital obligations) for (a period of) six months and it will not feasible to force him into doing this”.

The Difference between Iranian and Indian Muslim law in Non-performance of marital obligations

There is difference between Iranian and Indian Muslim law. According to Indian Muslim(Suuni) law the husband has failed to perform marital obligations for a period of three years, the wife has right to dissolve but according to Iranian Muslim(Shi’a) law is six months.

Impotency in Iranian and Indian Muslim law

Section 2 (v), of (D. M. M.) Act, 1939;

That the husband was impotent at the time of the marriage and continues to be so, the wife entitled to obtain a decree for the dissolution of her marriage.

Article 1122 of amended Civil Code in 1989 in Iranian laws states:

The following defects of men give the right to women for cancellation:
(a) *Khasa*\(^{86}\);

(b) *Male genital organ anatomical defect*,\(^{87}\)

(c) *Anan (impotence)*\(^{88}\)

According to Article 1125 of (I.C.C.), *Anan* is like insanity i.e. when man is affected even after marriage, woman has the right to dissolve/cancellation.\(^{89}\)

**The Differences between Iranian and Indian Muslim Law in impotency**

Another effect in Indian Muslim law in which woman has right to apply the divorce is that when the husband was impotent at the time of the marriage and continues to be so;

But according to Iranian Muslim (Shi’a) law, woman has the right to apply for cancellation of marriage in the court when the impotence is affected even after marriage.

In addition to that in Iranian Muslim (Shi’a) law there is some more effect that woman has the right to apply for cancellation of marriage in the court which are: if the husband is *Khasa* and he has *Male genital organ anatomical defect*.\(^{90}\)

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\(^{86}\) Which means Castration (Khasa means a man whose testicles have been removed and Khasi is the person who has this defect. Khasa can be a right for women to dissolve/cancellation when it has been existing before marriage and the woman has not been told about it.)

\(^{87}\) As much as man is not able to intercourse. (Anatomical defect in Arabic is called Jab, i.e. cut and the person who has this defect is called Majbub).

\(^{88}\) Which means Impotency (Anan means inability of men to have and maintain an erection and the person who is suffering is called Anin).

\(^{89}\) Therefore here the difference between Anan and Insanity gets cleared because in Insanity cancellation is possible either intercourse has been done or not; but in Anan cancellation is not possible if it has been happened after intercourse marriage).

\(^{90}\) "The main purpose of matrimonial relationship is not intercourse, but at least it is one of its main reasons; so it wouldn’t be strange having the right
Other diseases in Iranian and Indian Muslim law

According to Section 2 (vi): of (D. M. M.) Act, 1939; of Indian Muslim Law there are some other diseases in Iranian and Indian Muslim Law which gives the wife the right for cancellation of the marriage that are as following:

“When the husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease”.

According to Article 1121 of (I.C.C.):

“The insanity of each one of the couples is the cause of cancellation in condition of continuity, either continuously or in periods”

‘Leprosy’ is one of the six Women’s specific Defects in the Iranian law. These defects give men the right to dissolve/cancellation if the defects have been existed in the time of marriage contract and she hasn’t told it.

“Women’s defects which has been existed before marriage causes optional cancellation and whatever defects have been existed after marriage contract (intercourse marriage) does not cause optional cancellation”.

According to condition stipulated binding in Iranian marriage contract:

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91 Article 1123 of Civil Code states six defects of women that give the right of dissolution to men which are: 1. Qaran; 2. Black leprosy; 3. Leprosy (Baras); 4. Efza; 5. Paralytic disability; 6. Two eyes blindness;(mentioned in Chapter II)

92 Article 1124 of (I.C.C.).

“The husband’s affliction with refractory diseases, which can endanger the wife’s health”, his wife entitled to obtain a decree for the dissolution of her marriage.

And Article 1130 of (I.C.C.) allows a judge to compel a husband to divorce his wife where she has proved that “the continuation of the marriage causes difficult and undesirable conditions. 94a

And according to Article 1127 of (I.C.C.) : “If the husband contracts a venereal disease after the performance of the marriage act, the wife have the right to refuse to have any sexual relations with him and this refusal will not debar her from the right to cost of maintenance”.

The Difference between Iranian and Indian Muslim laws in Insane and Leprosy

According to Indian Muslim law, the husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease” his wife entitled to obtain a decree for the dissolution of her marriage.

But according to Iranian Muslim (Shi’a) law, the insanity of each one of the couples is the cause of cancellation in condition of continuity, either continuously or in periods. In the Iranian law don’t mentioned a period of two years and also the insanity of each one of the couples is the cause of cancellation. This right is for couples not only for wife.

94 Article 1130 of Civil Code “In the following circumstances, the wife can refer to the Islamic judge and request for a divorce. When it is proved to the Court that the continuation of the marriage causes difficult and undesirable conditions, the judge can for the sake of avoiding harm and difficulty compel the husband to, divorce his wife. If this cannot be done, then the divorce will be made on the permission of the Islamic judge”. 
According to Section 2 (vi) of (D. M. M. ) Act, 1939 Indian Muslim laws, the husband is suffering from leprosy his wife entitled to obtain a decree for the dissolution of her marriage. Evidently this Section includes leprosy which exists before and after marriage counteract.

But, according to Iranian Muslim law, these defects (woman’s defect like leprosy) give men the right to dissolve/cancellation if the defects have been existed in the time of marriage contract and she hasn’t told it.

Cruelty in Iranian and Indian Muslim law

According to Section 2 (viii) of (D. M. M. ) Act, 1939 Indian Muslim laws, that the husband treats her with cruelty, that is to say,-

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill- treatment, or

(b) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or;

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;
(g) on any other ground which is recognized as valid for the dissolution of marriages under Muslim law.

Article 1130 of (I.C.C.) states: “In the following circumstances, the wife can refer to the Islamic judge and request for a divorce. When it is proved to the Court that the continuation of the marriage causes difficult and undesirable conditions, the judge can for the sake of avoiding harm and difficulty compel the husband to, divorce his wife. If this cannot be done, then the divorce will be made on the permission of the Islamic judge”.

And also according to condition stipulated binding in Iranian marriage contract; “the husband’s social misconduct or maltreatment of the wife to a point unbearable to her, the wife can refer to the Islamic judge and request for a divorce. And, also;

Where the husband should remarry without seeking consent of the wife or where he should not treat his wives equally, the wife can refer to the Islamic judge and request for a divorce.

Other grounds for Dissolution of Marriage in Iranian Laws

According to condition stipulated binding in Iranian marriage contract other grounds which wife can refer to the court for divorce are:

— The husband’s addiction to any of harmful drugs which, as discerned by the court, interferes with the family principles and renders life unbearable for the wife.

— The husband’s abandonment of family life with no justifiable reason.

— Where both the abandonment and the justification are discerned/decide/confirmed by the court;
— Or his / defaulting from (appearing before) refraining from appearing before/the court of law for six consecutive months after the summon.

— The husband’s punishment by the Islamic canon law or a competent theologian due to an offence which is incompatible with the wife’s family prestige and customs.

— Distinction as to whether the punishment is in disharmony with the wife’s social and personal status lies with the court of law.

— Where the wife cannot bear a child due to her husband’s sterility or other physical affliction for five years.

— Where the husband is missing/ untraceable and is not found/within six months from the date the case was originally reported by the wife to the court.

6.9 Causes of Cancellation (Faskh) of Marriage in Iranian Law

According to Iran Civil Code there are two things which cause marriage cancellation:

(a) Defect

(b) Breaching conditions regarding qualification

Defect

One of the causes of marriage cancellation is the existence of some physical or mental disorders in one of the parties of contract that gives the right to the other party to dissolve the marriage. According to common opinions of experts of Moslem laws
(Faqahay-e-Imamiye), in Iranian Civil Code the causing defects of marriage cancellation are divided into three parts:

(i) Common defects of Men and Women,
(ii) Men’s Specific defects and,
(iii) Women’s specific defects.

Common defects of Men and Women

According to Article 1121 of Iranian Civil Code only Insanity is considered as common defect between men and women.

Insanity cannot be the cause of marriage cancellation in following cases:

1. Discontinuous insanity (Article 1121 of Civil Code)
2. Insanity before marriage contract that each of the couples has been told about it. (Article 1126 of Civil Code).\textsuperscript{95}

The Difference between Women & Men’s Insanity in Marriage Cancellation in Iranian Law

In Iranian law men’s insanity is different from women’s insanity, so that according to Article 1125 of Civil Code; Women have the right to dissolve the marriage if man’s insanity happens after marriage contract. The Article states: “Insanity and Anan in men can be the cause of marriage cancellation if it happens after marriage contract”. Whereas insanity defect of women can be a cause of marriage cancellation for men only if it has been existed before marriage and he hasn’t been told about it. Here civil law is paying attention to women. The difference between men and women in this defect for marriage cancellation is reasoned so that if woman

happens to be psychopathic in marriage then husband can provide her alimony by working and can take care of her and whenever he gets fed up he can divorce her but if husband become psychopathic after marriage there would be nobody to provide wife alimony so woman doesn't have any other way except marriage cancellation to get rid of it.96

Men's specific defects

Iranian Civil Code states: three defects of men due to which women have the right to dissolve/cancellation the marriage, the defects which prevents men to have natural intercourse.

Article 1122 of amended Civil Code in 1989 states:

The following defects of men give the right to women for cancellation:

1. Khasa;
2. Male genital organ anatomical defect;
3. Anan;

The Difference between Iranian and Indian Muslim Law in Men's Specific Defects

According to Iranian Muslim (Shi’s) Law the 1- Khasa; 2- Male genital organ anatomical defect; 3- Anan; are as a men’s specific defects which woman can refer to the court and apply for divorce, But according to Section 2(v), (vi) of (D. M. M) Act, 1939 in Indian Muslim law the impotency, insanity, leprosy and venereal disease are as a men defects. The impotency is same to Anan in the Iranian Muslim law but there are differences between ‘Khasa’ and Male genital organ anatomical defect which mentioned in Iranian

law as a men’s defect with insanity, leprosy and venereal disease in the Indian Muslim laws.

**Women’s specific Defects**

Article 1123 of Civil Code states six defects of women that give the right of dissolution to men which are:

1. Qaran;\(^{97}\)
2. Black Leprosy (Juzam);\(^{98}\)
3. Leprosy (Baras);\(^{100}\)
4. Efza\(^{101}\);
5. Paralytic disability;\(^{102}\),
6. Two eyes blindness:-\(^{103,104}\)

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97 Which means Bony structure blocking vagina. Qaran which means a bony or fleshy tissue in vagina which prevents intercourse. (Rataq and Afal are also in the same meaning).

98 Some jurist’s hold that Leprosy (Juzam) and Black Leprosy (Baras) are not special to the wives and the husbands may, also, suffer from. And since these diseases are communicable then if the husband is sufferor, the wife must also be able to get rid of the marriage. Thus Leprosy (Juzam) and Black Leprosy (Baras) according to them must be enumerated as 'common defects' (Ameli, Zain ud-Din (Shahid Thani); Masalik ul- Afham; Dar ul-kotob pub. Tehran, Vol. I, p. 420.)

99 But the majority of jurists relying on; not having any religious authority to extend these two defect in the case of husbands also and the principle of necessity of marriage’s subsistence when there is no evidence contrary to, do not involve the husbands with these two defects (Ibid).

100 Baras is kind of skin’s disease due to which a part of body’s skin changes in colour to either whiteness or blackness. (Zain ud-Din Ameli, (Shahid Thani); Masalik ul- Afham, Vol. I, p. 420).

101 Efza which means joining bladder and menstruation channel that is a disease which exists only in women and prevents intercourse.

102 According to some jurists the mere Paralytic Disability in the wife is not a ground under which the husband can apply for cancellation of marriage. (Hasan B. Sadid-ud-Din (Allameh Helli), Qawid ul- Ahkam, Chapter of Defects) Unless it is to such an extent due to which she becomes crippled.

103 The majority of jurists have confirmed that the husband can apply for cancellation of marriage due to blindness of the wife if she is blind of both eyes. (Shikh Horr Ameli, Wasail ul- Shia, 2nd Edition, Chapter of ‘Defects’).
According to Article 1124, these defects give men the right to dissolve/cancellation if the defects have been existed in the time of marriage contract and she hasn’t told it.

**The Difference between Women’s specific Defects in Iranian and Indian Muslim Laws**

As above mentioned, according to Iranian Muslim law there are six defects of women that give to men the right of dissolution (cancellation of marriage), if the defects have been existed in the time of marriage contract and she hasn’t told it. But I couldn’t find any women’s specific defect in that give the right of cancellation to men in Indian Muslim Law.

**Breaching Conditions Regarding Qualification in Iranian law**

The second factor in Civil Law of Iran which causes cancellation by one of the contract parties is breaching conditions regarding qualification.

Article 1128 of Civil Code states: “Whenever one of the parties of the contract is determined by a qualification and after the contract it will happen not to be true then the other party of the contract has the right of cancellation, either the described qualification is clearly stated in contract or it is orally stated during contract”.  

But some jurists have claimed that there is Ijma of jurists on this point. (Ruhullah Komeini, Tahrir ul-Wasileh, Vol. II, p. 293. Isfahani, Supra note, Vol. II, p. 262).

This Article can be used in the sense that each parties of matrimonial contract can determine every logical qualification including determining a good qualification, lack of any defect, related to mental or physical aspects or related to external and contingent aspects of both parties; then after contract if it happens not to be true, the other party can refer to this law and dissolve the contract.

If the existence of one qualification hasn’t been mentioned clearly in the contract; although the matrimonial contract has been concluded based on its
The Difference between Breaching Conditions Regarding Qualification in Iranian and Indian Muslim Law

In Iranian Muslim Laws breaching of condition is as a cause, gives to other party of (marriage) contract right of cancellation, but I couldn’t find anything about this matter in Indian Muslim Laws.

Components of Divorce in Iranian laws

(a) Divorcer – One who divorces (Article 1136)\textsuperscript{108}

(b) Divorcee – wife (Articles 1140-1142)\textsuperscript{109}

(c) Actual form of utterance of divorce (Article 1134\textsuperscript{110})

(d) Bearing witness (that is, the presence of witnesses of divorce) Article 1134. In the light of the Family obvious existence in one of the couple so that in case of lack of it qualification the party hadn’t concluded the contract at all, and after contract it becomes clear that the party doesn’t have the obvious qualification therefore the other party can dissolve/cancellation the contract based on Article 1128. (H., Emami, Civil Law, Vol. IV, p. 471; N. Katuziyan, Civil Law, Family, Vol. I, 2\textsuperscript{nd} Edition, p. 285).

In canonical works not only hypocrisy/fraud, pretending to have a qualification or lacking a defect, is a cause for cancellation a matrimonial contract but also conditions regarding qualifications and breaching of them is a cause for cancellation matrimonial contract Article 438 of the Civil Code states - Trickery denotes conduct which causes the other party to the transaction to be misled. And according to Article 440 - The Option of Trickery, after it becomes known, should be exercised immediately.

Article 1136 – “The divorcer must be of legal, must be in puberty, sane, must intend the act and must be free in his action”.

Article 1140 - “It is not proper to divorce a wife during her monthly period or during the convalescent period after childbirth unless when the wife is pregnant or when the divorce occurs before matrimonial relations with her, or when the husband is absent so that he cannot obtain information concerning her monthly period”.

Article 1141 – “It is not proper to divorce a wife between two monthly periods during which intercourse has taken place unless the wife is pregnant or is incapable of conception”.

Article 1142- “The divorce of a wife who although of child - bearing age has no monthly period, will be valid only when three months have passed from the date of the last matrimonial relations with her”.

According to Article 1134; “The divorce must be performed in the actual form of utterance and in the presence of at least two just men who must hear the actual form of divorce”.

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Protection Act (Article 10), the fifth component should be defined as such:

(e) Issuance of the certificate of incompatibility by the court.\textsuperscript{111}

The Similarity and Difference between Iranian and Indian Muslim (\textit{Hanafi}) in \textit{Components of Divorce}

Similarity of Components of Divorce in Iranian Muslim and Indian Muslim (\textit{Sunni-Hanafi}) are:

1. Divorcer
2. Divorcee

And differences between them in components of divorce are:

3. Actual form of utterance of divorce,
4. Bearing witnesses.

The Difference between Shi'a and Sunnis' View in \textit{Actual form of utterance of divorce}

\textit{Shia} law requires the use of specific Arabic words in the specific formulae in the pronouncement of \textit{Talaq}.\textsuperscript{112}

Arabic words must be used in the formula of divorce (pronouncement of divorce) in Iranian (Shia) law, but in the Indian Muslim (Sunni-hanafi) laws a husband can divorce his wife with any kind of words.

Bearing witnesses

\textsuperscript{111} Langrudi, p. 231 (1999).
\textsuperscript{112} Supra note.
Shia insist presence of two competent witnesses for divorce but, the Sunnis laws do not require any witnesses at the time of pronouncement of divorce.

The Difference between Shi'a and Sunnis' View in Witnesses for Divorce

According to Article 1134 of Iranian Civil Code; “The divorce must be performed in the actual form of utterance and in the presence of at least two just men who must hear the actual form of divorce”.

The witnesses must be male and just. The just person is a person who fears God and does not commit moral sin and does, even, not commit venial sin frequently. Therefore, if the witnesses of divorce are in lack of this term then performed divorce is ineffective and void.

According to Holy Quran the presence of witnesses at the time of pronouncement of divorce is necessary; “... and call to witness two men of justice from among you, and give upright testimony for Allah . . .”

But, A Talaq whether oral or in writing, need not be made in presence of the witnesses. Under Sunni law, Talaq without witnesses is valid.

Holy Quran, 65: 2.
6.10 Divorce by Mutual Consent

Divorce by Mutual Consent in Iranian and Indian Muslim Law

Under Muslim law, a divorce may take place also by mutual consent of the husband and wife. There are two forms of divorce by mutual consent:

(a) *Khula*; and

(b) *Mubarat*.

Khula

Literal meaning of the word *Khula* is, ‘to take off the clothes’. In law, it means divorce by wife with consent of her husband on payment of something to him. Prior to Islam, the wife had practically no right to ask for divorce, it was the Quranic legislation which provide, for this form of relief*.  

"prior to the Islam, the wife had practically no right to ask for divorce, it was the *Quranic* legislation which provide, for this form of relief*".  

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114 Under Hindu law, divorce by mutual consent was not possible before 1976. By an Amendment in 1976, Section 13B was included in Hindu Marriage Act, 1955 which now provides an additional ground for divorce by mutual consent; this ground has already been provided under Section 38 of the Special Marriage Act, 1954.


116 Before Islam the wife had no right to take any action for the dissolution of her marriage. But in Islam, she is permitted to ask her husband to release her (as he puts of his clothes) after taking some compensation. Quran lays down about khula in the following words: 

"... and if you fear that they (husband and wife) may not be able to keep within the limits of Allah, in that case it is no sin for either of them if the woman releases herself by giving something (to the husband)". (Quran: Sura II, Ayat 229).

117 According to Abdur Rahim, “The wife among Arabs had no corresponding right to release herself from the bond of marriage. But her parents by a friendly arrangement with the husband could obtain a separation by returning the dower if it has been paid or by agreeing to forgo it if not paid. Such an agreement was called kula. It stripping and by it marriage tie would be absolutely dismissed. (Abdur Rahim, *The Principles of Mohammadan Jurisprudence*, p. 11 (1958).

The Differences between Iranian (Shia) and Indian (Sunni) Muslims’ View in Witnesses, Intention, Competence of the Parties for Khula

Competence of the Parties for Khula in Shi’a and Sunni law

In the Indian Muslim Law, the husband and wife must be of sound mind and have attained the age of puberty (fifteen years). A minor or insane husband or wife cannot lawfully effect Khula. The guardian of a minor husband may not validly effect Khulla on his behalf.120

Hanafis and Shafis permit the guardian of the minor wife to enter into khula on her behalf; but not the guardian of the minor husband. Shiias insist that there must be no compulsion exerted on the mind of the wife, while Sunnis would not mind kula obtained under compulsion. Sunnis also recognize a conditional kula; not so the Shiias. Hanafi Law permits the wife to retain an option to revoke the kula. If the husband stipulates such an option, the kula will be deemed irrevocable and the option void. Under Shia Law, both the kula and the option would be void; for the kula must be unconditional. All schools agree, in kula the consent of the husband in clear words is a must. The wife may revoke the kula before the agreement is finalized by getting up from the meeting. Hanafi regard kula as a talak-ul-bain, an irrevocable divorce. Shia jurists differ on the point whether wife and husband can remarry immediately after kula. Ithna Asharis hold it irrevocable, but

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119 Tayabji says, “Muslim Marriage may also be dissolved by an agreement between the parties for a consideration to be paid by the wife to the husband”. When wife alone is desirous of divorce it is called as kula. (Faiz Badruddin Tyabji, Muslim Law, p. 196 (1968)).

120 Tyabji, Muslim Law, 4th Edition, p. 182. However, under Hanafi law, the guardian of a minor wife may validly enter Khula on her behalf.
maintain that if the wife during iddat demand the return of the consideration, the husband may revoke the *kula*.\(^{121}\)

**The difference between Iranian and Indian Muslims’ Shi’a and View in Witnesses for Khula**

Under *Hanafi* Law, presence of witnesses is not insisted upon, but under *Ithna Ashari* Law presence of at least two witnesses is necessary; under *Hanafi* Law, there is no fixed formula; only the intention of the parties is to be made clear, under *Ithna Ashari* Law a formula is to be used. According to *Hanafis* Kula is an irrevocable divorce.\(^{122}\)

But, According to Iranian (Shi’a) law, The *khula*\(^{123}\) like revocable divorce should be pronounced in presence of two (male) witnesses.

*Mohammad ibn Moslim* has narrated from sixth Imam, *Mohammad, b. Jafar As-Sadiq* that he said “No *khula* and *Mobarat* can take place without being the wife in her purity period which has not been consummated and presence of witnesses.\(^{124}\)

\(^{121}\) Syed Kalid Rashid, *Muslim Law*, p. 115.

\(^{122}\) *Burhan-al-Din Marghinani*, the author of *Al- Hidayah*, has said that the granting of *khula* shall take effect as one irrevocable divorce and the wife shall have to compensate the husband. (*Tanzil-Ur-Rahman, A Code of Muslim Personal Law*, p. 548 (1978))

\(^{123}\) According to Article 1146 (I.C.C.), “A Khul'a divorce occurs when the wife obtains a divorce owing to dislike of her husband, against property which she cedes to the husband. The property in question may consist of the original marriage portion, or the monetary equivalent thereof, whether more or less than the marriage portion”.

The difference between Shi’a and Sunnis’ View in Intention in the Khu’a

Whatever has been said regarding intention in divorce is applicable in khul’a too. Therefore under Hanafi law a khul’a given under compulsion is valid\(^\text{125}\) but not under other three Sunni[and Shi’a] schools.\(^\text{126}\)

In Shi’a law the husband should be adult, sane, having intention and free will. Therefore a Khul’a divorce by a minor, insane, or a person who is angry to that extent which is impossible to have a free will, is not valid.\(^\text{127}\)

The Difference between Iranian (Shia) and Indian Sunni (Hanafis’) View in Free Consent for Khula

In the Iranian Muslim law, the offer and the acceptance of Khula must be made with the free consent of the parties. But, under Hanafi law a Khula under compulsion or in the State of intoxication is also valid.\(^\text{128}\) But, under all other schools including Shia law, without free consent of the parties, the Khula is not valid.\(^\text{129}\)

Mubarat

Mubarat is also as a divorce by mutual consent of the husband and wife. In Khula the wife alone is desirous of separation and makes the offer, whereas Mubarat both the parties are equally willing to dissolve the marriage. Therefore, in Mubarat the offer for

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\(^\text{128}\) Rashid Ahmed v. Anisa Khatum, (1931) 59 IA 21 (All).  
\(^\text{129}\) R.K. Sinha, Muslim Law, p. 96.
separation may come either from husband or from wife to be accepted by the other. The essential feature of a divorce by *Mubarat* is the willingness of both the parties to get rid of each other; therefore, it is not very relevant as to who takes the initiative. Another significant point in the *Mubarat* form of divorce is that because both the parties are equally interested in the dissolution of marriage, no party is legally required to compensate the other by giving some compensation.\(^{130}\)

**The Similarity between Iranian and Indian Muslim law in *Mubarat***

In Iranian Muslim law like Indian Muslim, Divorce on mutual consent (*Mubarat*) is also similar to *Khula’* (when wife dislikes her husband and gives an amount for compensation to him as a quid pro quo for divorce) regarding its legal structure with the exception that both the couples, not only the wife, dislike each other in *mubarat* divorce. Hence the amount of compensation must not be more than the marriage portion.

**The Difference between Iranian and Indian Muslim law in *Mubarat***

In Indian Muslim law the offer for separation (compensation) in *Mubarat* may come either from husband or from wife to be accepted by the other, But, in Iranian law that compensation is from wife and the compensation must not be more than the marriage portion (*Mahr*).\(^{131}\)

Article 1147 of I.C.C.) states: “A “*Mubarat*” divorce occurs when the dislike is mutual in which case the compensation must not


\(^{131}\) [The husband spends some money for marriage celebration, marriage portion and maintenance during the common life].
be more than the marriage portion”. Any amount more than the amount of marriage portion received by husband as a quid pro quo for divorce does not invalidate the divorce, but the husband is not entitled to own the excess amount.\textsuperscript{132}

The Similarities and differences between Shi’a and Sunnis’ View in Legal Consequences of Khula and Mubarat

Similarities

The legal effects of a valid \textit{Khula} or \textit{Mubarat} are the same as that of a divorce by any other method. The wife is required to observe \textit{Iddat} and she is entitled to be maintained by the husband during the period of Iddat.

After completion of \textit{Khula} or \textit{Mubarat}, the marriage dissolves and cohabitation between the parties becomes unlawful.\textsuperscript{133}

Among both the Sunnis and the Shias, the \textit{Mubarat} is an irrevocable divorce as in the \textit{talak-ul-bain}. In the words of Al-Karkhi, “when the husband receives a compensation from the wife the divorce is \textit{bain} and even when it is without compensation and consequently \textit{rajai} (reversible at the option of the husband), if during the wife’s \textit{idda} he were to accept from her a compensation, the separation would be equally \textit{bain}”.\textsuperscript{134}

Difference

According to Article 1145,(3) of (I.C.C.); As long as the wife has not demanded the return of the compensation the \textit{Khula} and \textit{Mubarat} divorce are irrevocable divorce but, when the wife

\textsuperscript{132} Katuzain, \textit{Supra} note at 274 (2000).
\textsuperscript{133} R.K. Sinha, \textit{Muslim Law}, p. 97.
\textsuperscript{134} Paras Diwan, \textit{Muslim Law in Modern India}, p. 94 (2008).
demanded the return of the compensation that divorce convert to revocable (rajei divorce).\textsuperscript{135}

In Indian Muslim law, the wife entitled to be maintained by the husband during the period of *Iddat in the Khul’a* and *Mubarat divorce*, but in Iranian Muslim law, *Khula* and *Mubarat* are irrevocable divorce and the wife is not entitled for maintenance during the period of *Iddah* unless she has demanded the return of the compensation from her husband, thus if the wife has demanded the return of the compensation, the *Khula* and *Mubarat* become revocable divorce and the wife is entitled for maintenance.

\textsuperscript{135} The woman who divorce in irrevocable divorce, same moment wedlock confederacy divorce occurrence become cut between she and husband and reslutly, all regular orders of conjugality on wife’s, including:

A) Divorced woman has no alimony merit, unless be pregnant.

B) Doesn’t establish a heredity (inheritance) relationship between them.

C) Man can marriage in waiting period (Iddah) with sister of her.

D) Authority of her is in hand of himself completely. And she isn't need asking permission in his actions and behavior of couple.

But woman who divorces in revocable divorce, while did not been spent waiting period(Idda) of her, relationship and the wedlock confederacy don’t cut between her and her husband and jurisprudence term of divorce by revocable, it is in wife decree and therefore in polar:

She having a right of alimony. (Article 1109 of I.C.C.).

Establish heredity (inheritance) alimony between them. (Article 943 Of, I.C.C.)

The man cannot marriage to sister of her in waiting period time.

In out of home, must left form husband and not this case, she counts as vicious (woman who refuses to fulfill her marital duties) and finally all orders which relate on permanent wedlock will be late to him too.

According to Islamic law such as divorce and separation is one of the suspicious and confidential acts, so management is adopted that in case of revocable divorces occurrences via second peace and open one of wedlock resumption methods and this point is definite in Holy Quran, there says in appendix of divorce’s Ayeh:

(Perhaps couple of his action repents and revert again). (Holy Quran, divorces sureh, Ayeh1).

In news and stories came too that revocable divorced woman can attires in waiting period and self proffer in husband (Mohaqueq, Damad, sayed Mostafa, juridical analyse of family rights – matrimony and breakup of it’s’, p. 446 (1989)).
6.11 Indirect Divorce

Indirect divorce in Iranian law can be divided into three parts as follow:

(i) Ila

(ii) Zihar

(iii) Lian

(i) Ila

‘Ila’ in the Iranian and Indian Muslim Law

Ila in the Indian Muslim Law

The term Ila has been translated into English as ‘vow of continence’. Where a husband who has attained majority and is of sound mind swears by God that he will not have sexual intercourse with his wife for a period of four months or a longer period, he is said to make Ila. Thus if a husband says to his wife “I swear by God that I shall not approach you” it is a valid Ila. However, it is not exactly a divorce (Talaq) but it is a species of constructive divorce hence we put it under category of “indirect divorce” Nevertheless it has been treated as form of the same (divorce) by Muslim jurists.136,137

Ila is not exactly a divorce (Talaq) but it is a species of constructive divorce hence we put it under category of “indirect divorce” Nevertheless it has been treated as form of the same (divorce) by Muslim jurists.136,137

Regarding applicability of Ila in some books it has been mentioned that “Ila is not in practice in India”.138 But in some other,

137 According to Malik and Ahmad b. Hanbal, it is necessary to invoke the name of God but it is not necessary according to Abu Hanifa and Shafei for validating of illa. (K. N. Ahmad, *Muslim Law of Divorce*, p. 106 (1984).
“Ila is very uncommon, but is still extant and enforceable in Pakistan and India”.

It was clearly mentioned in Section 2 of the Muslim personal Law (Shariat) Application Act, 1937, as applicable to Muslims. Clause ix of Section 2 of the Dissolution of Marriage Act, 1939, lays down that can seek the dissolution of a marriage under Muslim law.

‘Ila’ in the in Iranian Law

In Iranian Civil Code, like the same in India, there is no provision regarding Ila. Therefore if an Iranian Court wants to resolve such a case it should refer to original context of Feqh (Jurisprudence) belongs to Shi’a. If there is different opinions of Shi’a jurists regarding some aspects of Ila, as there are in different Sunni Schools and we have already considered them, the judge, if he is Mojtabah, will take decision according to his mind but if he is not a Mojtabah he will decide the case according to the decree of the majority of jurists which, In Feqh, is called ‘Mashhoor’. But, generally, the tendency of the Courts in Iran while facing with some differences of juristic opinion over some issues for which there are no definite enactments, is to decide the matter according to the opinion of the leader of Iran.

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140 Mojtabah is a person capable of exercising juristic reasoning, i.e., capable of discovering Islamic Law from its sources.
141 Under constitution of Iran, Leader must be a Mojtabah in Mohammadan Law. Ijtihad (educational degree of a Mojtabah), after Islamic Revolution of Iran 1979, has been recognized as equivalent to prof. degree.
The Difference between Shi’a and Sunnis’ View in Procedure of Ila

No bar for expressing Ila. It may be pronounced either by express or by implied, but intention must be very clear. For example, “I will not approach thee”, “I will not unite with thee” or “I shall not lie with thee” are express forms, while such forms as “I will not come to her” or “I will not approach her bed” are implied form”.\footnote{B.R. Verma, Muslim Maintenance and Dissolution, p. 231 (1988).}\footnote{Supra note.} But, In Shi’a view Ila is an oath to Allah and it cannot be effected without the word “Allah”.\footnote{Holy Quran, 5: 89.}

The Similarity between Shi’a and Sunnis’ View in Particular Penalty or Expiation

In the Muslim Law, The husband, who breached his vow, if the vow has been pronounced by name of Allah, has to pay expiation. According to Holy Quran,\footnote{Supra note.} it consist of manumission of a slave, or clothing or feeding ten poor persons, if he has not the ability to do either of them, he should keep fast for three successive days. Of course if the husband has mentioned any particular penalty in his vow, then the expiation is the performance of the same (which he had already fixed it).\footnote{Supra note.}

The Difference between Shi’a and Sunnis’ View in the Ila’s Effectiveness and Qazi’s (Qadi’s) decree

(a) According to the Hanafi Law, if the husband made Ila to his wife and prescribed period of four months, passes away without his having recourse to her (by words or
acts) an irrevocable divorce shall (automatically) got effect on her.\textsuperscript{146}

But, according to Shi’a Law, Divorce ensuing by \textit{Ila} is revocable (\textit{Rajia}) unless the husband gives an irrevocable (\textit{Ba’in}) divorce.\textsuperscript{147}

\textbf{(b)} According to \textit{Hanafis}, \textit{Ila} divorce gets effected without the intervention of a \textit{qadi}, only the condition is passing away of the prescribed period. According to \textit{shafei’s}, the separation shall take effect only by decree of a \textit{Qadi}.\textsuperscript{148}

But, under Ithna Asharia (Shi’a) School, \textit{Ila} dose not operate as divorce without order of the court of law. According to this school, after the expiry of the fourth month, the wife is simply entitled for a judicial divorce. If, there is no cohabitation, even after expiry of four months, the wife may file suit for restitution of conjugal rights against husband. If husband does not cohabit even then, the marriage is dissolved by a decree of the court.\textsuperscript{149}

The judge himself cannot dissolve the marriage but he, after expiry of four months from the date of filing suit by the wife, shall order the husband either to take back his wife or to divorce her. On the husband’s failure or refusal to do so, the judge can imprison and punish him to force him to choose one of the above two alternatives.\textsuperscript{150}

\begin{flushleft}
\textsuperscript{148} Supra note.
\textsuperscript{149} Tyabji, \textit{Muslim Law}, 4\textsuperscript{th} Edition, p. 175.
\textsuperscript{150} Supra note at 111.
\end{flushleft}
The Difference between Shi’a and Sunnis’ View in Compulsion or intoxication in Ila

According to Sunni opinion, Ila is valid like Talaq whether made in compulsion or intoxication. According to Shi’a law freedom for choice is must to for Ila. But, in Shi’a law Ila in compulsion or intoxication is not valid. 151

(ii) Zihar

The Similarity between Shi’a and Sunnis’ View in the Zihar

Zihar152,153 is a form of inchoate divorce. If the husband compares his wife to his mother or any other female within prohibited degrees (whether by blood, fosterage or by marriage) the wife has a right to refuse herself to him until he has performed penance. In default of expiation by penance the wife has the right to apply a judicial divorce.154

The Similarity between Shi’a and Sunnis’ View in Penalty of Zihar

The penance which the husband is required to perform for being absolved of this sinful conduct is (1) feeding sixty poor

152 The word zihar is derived from the word “Zuhur” which means back or to oppose back to back. If there is any discard between the spouses they, instead of remaining face to face towards each other turn their back one against the other. Qadri, Anwar Ahmad; Islamic Jurisprudence in the Modern Word, p. 394 (2007).
153 In pre-Islamic times Zihar was considered to be a sort of divorce. Muslim Law, while preserving its nature, which is prohibition form intimacy with the wife, has altered its effect to a temporary prohibition only, which does not dissolve the marriage, and so Zihar does not exactly amount to divorce and is distinct from it. K. N. Ahmad, Supra, p. 116.
persons or, (2) observance of fast for two months or, (3) release of a slave.  

The Similarity between Shi’a and Sunnis’ View In the Effect of Zihar

The effect of Zihar is as below:

(a) Prohibition of sexual intercourse
(b) Maintenance
(c) Expiation
(d) Separation

155 R.K. Sinha, Muslim Law, p. 93. (The Holy Quran states,  
1. God has indeed heard the words of the woman who pleads with you about her husband and lays her complaint before God: God hears what the two of you have to say. God is all hearing, all seeing.  
2. Those who separate themselves from their wives by pronouncing [Zihar], To me you are like my mother’s back,’ must concede that they are not their mothers; none are their mothers except those who gave birth to them- surely they utter an evil word and a lie. God is pardoning, forgiving.  
3. Those who put away their wives by equating them with their mothers, and them wish to go back on what they have said, must set free a slave before the couple may touch one another again. This is what you are exhorted to do. God is fully aware of what you do,  
4. and anyone who does not have the means must fast for two consecutive months before they touch each other, and who is not able to do that must feed sixty needy people. (Holy Quran, 58:1-4).

156 Regarding the effect of zihar is that sexual connection is prohibited even instance kissing; touching with desire, etc. is also prohibited till expiation is made. Such sexual intercourse would be prohibited till the expiation and if the marriage is dissolved by Talaq till the remarriage. And if such act is done by the husband, the penalty is expiation
157 The wife is entitled to maintenance as the husband is responsible for the future to obtain conjugal intercourse.
158 By making Zihar expiation is necessary, but if the pronouncements are repeated then for such pronouncement and expiation will be obligatory, unless the intention is only to reaffirms and repeat the first.
159 Under the Islamic Law, Zihār did not operate as a Talaq. In case the husband who has made Zihār fueled to make expiation the judge could imprison him until he expiated or made Talaq against her. Qadri, Anwar Ahmad; Islamic Jurisprudence in the Modern word, pp. 276-278 (2007)). The Court has no power to enforce expiation in the manner provided by Muslim Law. It may
The Difference between Shi’a and Sunnis’ View in Zihar

Under Sunni Law Zihar is like to Ila, there is different juristic opinions upon Zihar:

Abu Hanifa, like in divorce, gives sanction to a Zihar which is pronounced in jest or in mistake or under compulsion.\textsuperscript{160} Intention, also, according to him, is not necessary and Zihar by a drunken man is also valid.\textsuperscript{161} But in Shia view is not valid.

Under the Hanafi law Zihar can be made conditional. Thus husband may say “If you enter that house or speak to such a person, you are to me like my mother”.\textsuperscript{162} But, under Shi’a view the conditional Zihar is void.

Under Sunni Law, the present two witnesses for Zihar is not necessary. But, according to Shi’a Law, the declaration of Zihar must be made in presence of two competent witnesses.

Ila and Zihar, as mode of divorce have now become outdate. Although the provision of such a constructive divorce still exist in the law, but it does not exist in practice. A Muslim husband who

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{160} Al-Fatawa al-Hindiyah, (1349 A.H.), p. 126.
  \item \textsuperscript{161} Ibn Abidin, \textit{Supra}, Vol. II, p. 589.
  \item \textsuperscript{162} Al- Fatawa, \textit{Supra}, Vol. II, p. 127.
\end{itemize}
\end{footnotesize}
wants to repudiate his marriage may do so by Talaq which is simple and more convenient than the indirect modes of Ila and Zihar.163

**Zihar in the Iranian and Indian Muslim Laws**

The Law of Zihar has statutory recognition under *Shariat Act* 1957. An Indian wife whose husband has deserted by Zihar can she for ‘faskh’ under Section 2 (ix) of the Dissolution of Muslim Marriage Act 1939. At the commencement of hearing of the husband expresses his willingness to resume the cohabitation the suit may be dismissed. But if he continuously abstains from the wife ‘faskh’ may be granted.164

The *Shariat Act* 1937 mentions the both *Mubarat* and *khula*. Therefore, both now have a statutory recognition in India.165

But, in the Iranian law Zihar is same to Ila. (As mentioned in Ila).

(iii) **Lian**166

The Similarity between Shi’a and Sunnis’ View in Concept of Lian

The term Lian is derived from the “Laan”. It means to derive away. According to the dictionary meaning is the infinite of the past tense Lanah where the husbands who makes a charge of accusation to his wife of adultery (which includes all cases of unlawful sexual intercourse. Whether incest, fornication, whoredom or adultery). It

165 Ibid.
166 Judicial divorce in the Indian Muslim Law can divide into two parts: (i) Lian (ii) Faskh: the Lian mentioned as a kind of judicial divorce (As mentioned in Chapter III) but in the Iranian law Lian cited kind of indirect divorce. (as mentioned in chapter II), both of them are judicial divorce. So the difference is in divisions.
procedure for settlement the charge of adultery (which has been made by the husband himself) is by swearing and imprecating upon them, the curse of Allah, the Almighty is technically known as Lian. After Lian it is unlawful for the husband to have sexual intercourse.

The Similarity between Shi'a and Sunnis' View in Essentials condition in Lian

There are certain conditions which are essential for Lian and the law of Lian will not be applicable unless they are satisfied. They relate to the following matters:169

1. Accusation;170
2. Marriage;171
3. Spouses, capacity and status;172 of,

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168 The provision of ‘Lian’ has been laid down in the Quran which are mentioned below: “6. One who accuses his wife and has no witnesses except himself shall swear four times by God hat his charge is true,. . 7. and the fifth time, that God’s curse a lie. 8. The wife shall receive no punishment, if she bears witness four times in the name of God that truth. 9. and, a fifth time that God’s wrath will be upon her if he is telling the truth. 10. Were it not for God’s grace and His mercy upon you, [you would have come to grief] and God is wise, acceptor of repentance”. (Holy Quran, 24 (Sure-al-Nur :6-10, trans. By Mulana Wahiduddin, (2009).
170 Accusation must be made by the husband charging his wife with adultery. It must be definite certain and un-ambiguous. The charge of adultery may be express or implied.
171 There should be subsist a valid marriage between the parties at the time of accusation at the time of imprecations and at the time of ‘Qadi’s’ order. There cannot be no Lian when the marriage is Batil or Fasid. Thus, if a man accuses his wife of the charge of adultery and later on, divorce her irrevocably the doctrine of Lian shall not apply. But on the other hand, in case of the revocable divorce, the wife can have recourse to Lian during the period of her iddat. (Supra note).
172 The parties should be adult and possessed of understanding.
4. Absence of witness;

5. Demand by wife;

6. Denial by wife; and

7. Procedure.

More or less, similar forms under Shia law; the husband should concluded with the word ‘wrath’. The parties should say, “I testify by Allah” and not “I swear” otherwise it would not be lawful.

193 The husband should not be in a position to produce four witnesses to establish the truth of his accusation if he can produce witnesses to support his version then the doctrine of Lian shall have no application. (Ibn Abidin; Radd-al-Mokhtar ala ad-Dur al-Mukhtar, Vol. 8, 2Ed, p. 601.)

194 The wife should demand Lian.

195 The wife must deny the truth of the husband’s accusation. If she admits the charge or does not deny its truth then there can be no Lian.

196 Procedure: The procedure of Lian may be described briefly as follows:

If a husband makes accusation to his wife with charge of adultery but is unable to prove the allegation. The wife in such cases is entitled to file a suit for dissolution of marriage. The mere allegation or oath in the form of an anathema does not dissolve the marriage. A Qadi must intervene; According to Indian Law a regular suit has to be filed. At hearing the suit, the husband, has two alternatives:

He may formally retract the charge. If this is done at or before the commencement of the hearing (but not after the close of evidence or the end of the trial) the wife is not entitled to dissolution are altogether false, respecting the adultery with which he charges we and again a fifth time, may the wrath of Allah the Almighty a light upon me if my Husband is just in bringing a charge of adultery against me. On the both making imprecation in this manner a separation takes place between them; but not until the Qadi pronounces a decree to that effect.

In the case of denial of paternity, the oath by the husband is, “I testify by Allah the Almighty that I was a true speaker in what I imputed to her by denying her child”, and by the wife saying, “I testify by Allah the Almighty that he was a liar in what he imputed to me by denying the child”. Where there is combined charged expressly of adultery and also denial of paternity, the above formula is to be modified by adding a reference to Zina also. (Asaf A.A. Fyzees, Outlines of Muhammadan Law, p. 167 (1974)).

Ibid at 258.
‘Lian’ in Iranian Law

Only Article 1052 of the (I.C.C.) about lian briefly says: “Separation due to procedure of Lian cannot under any circumstances, remarry each other again”.178

The Difference between Shi’a and Sunni (Hanafis’) View in Remarriage after Lian

According to malik, Shafii, Abu Yusuf, the wife becomes prohibited to the husband forever on the dissolution of marriage under the provisions of lian so that he cannot remarry her under any circumstances and even on reaction by him.179

Abu Hanifa and Muhammad, however, contended that after the husband’s retraction, lian becomes null and ineffective hence remarriage between them is possible.180

But, as above mentioned, according to Article 1052 of (I.C.C.) “Separation due to procedure of Lian cannot under any circumstances, remarry each other again”.

178 Articles 882 & 883 of the Iranian Civil Code state: Article 882 - After a solemn malediction (li’an) husband and wife will take inheritance from one another; similarly a child who, owing to a denial of paternity, has been the cause of a solemn malediction, does not take inheritance from the father nor the father from him; but the said child takes inheritance from the mother and his maternal relations, and vice versa.

Article 883 - If a father, after pronouncing a solemn malediction, withdraws it, the son takes inheritance from him; but he takes no inheritance from the paternal relations, nor does the father nor the inheritance from the paternal relations, nor does the father nor the paternal relations take inheritance from the son.

As stated before, in case of ‘Ila’ and ‘Zihar’, for any exposition in respect of Lian, it’s incidents and procedure we should refer to the authentic text books of Shi’a Feq (jurisprudence)

180 Supra note.
6.12 The Similarities between Shi’a and Sunnis’ View in the Legal Consequences of Divorce

Effects or the legal consequences of a divorce are given below:

(a) **Cohabitation becomes illegal** (after completion of the divorce.)

(b) **Iddat**: The wife is required to observe an *Iddat* of three lunar months after the divorce or, if pregnant, till the delivery of the child. However, if the divorce takes place before consummation, the wife need not observe *Iddat*.

(c) **Maintenance during Iddat**: During the period of *Iddat*, the divorced wife is entitled to be maintained[^181] by her former husband.

(d) **Right to contract marriage**: Both the parties are free to contract another marriage with other persons.[^182]

(e) **Dower**: The unpaid dower becomes immediately payable to the divorced wife. Whether the dower is prompt or Deferred, the divorced wife is entitled to it immediately after the divorce.

(f) **Remarriage between the divorced couple**: After completion of divorce, the parties cease to be husband and wife. There is no restriction in their re-marriage.

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[^181]: Maintenance of divorce wife is now governed by Muslim Woman (Protection of Rights on Divorce) Act, 1986. Under this Act too the former husband is liable to maintain the divorced wife only up to the period of Iddat.

[^182]: Thus, husband can marry another woman immediately after the divorce. But a divorced wife cannot marry another husband before the expiry of the period of Iddat. If their marriage has dissolved before the consummation, the wife is also free to contract another marriage immediately after the divorce.
with other persons. But, there is some restriction in the re-marriage of the divorced couple.

6.13 The Similarities and Differences between Iranian and Indian Muslim’s View in the re-marriage of divorced couple

Indian [Sunni] Muslim law prescribes certain special rules for the re-marriage between divorced husband and wife. These special rules [in Indian Muslim laws] are given below:

(a) The re-marriage of the divorced couple must have a fresh contract of marriage with all the essential formalities including fresh dower. If the divorced couple resumes cohabitation without contracting a fresh marriage, their union would be unlawful.

According to Shia laws, when the waiting period (Iddat) is expired, the re-marriage of the divorced couple must have a fresh contract of marriage with all the essential formalities including fresh dower. But if the waiting period is remain the husband can refer to his wife without fresh contract of marriage, so their union would be lawful because the Islam want to prevent the occurrence of divorce and also want to preserve family relationship. The time of waiting period is a time for the husband to think about his decision about divorce and refer to his wife. If the husband requires establishing a new contract we have closed the possibility of reconciliation for the couple.

(b) The divorced couple cannot remarry even by a fresh contract without adopting the following special procedure:
(i) After completion of divorce the wife observes the required *Iddat*. When *Iddat* is completed, the divorced wife contracts a valid marriage with another person. This marriage with the other person should not be merely a formality. It must be consummated.

(ii) The marriage with such other person dissolves. The husband either voluntarily divorces the wife or is himself dead and the wife observes *Iddat*.

(iii) Now, after the expiry of this *Iddat*, the wife may lawfully remarry the former husband.  

In the Section of (i) (ii) and (iii) the sort of divorce is not clear and not mentioned that these special procedure is related to which kind of divorce?

In Iranian Muslim (Shi'a) law, the special procedure that conditioned above are (only) concerning third divorce (triple divorce/irrevocable divorce) not revocable divorce.  

When divorce is a Kind of revocable divorce, the re-marriage of the divorced couple is lawful. But in the third divorce (irrevocable divorce), the husband cannot refer to his former wife, unless the wife marries with another person. When she divorced second husband the first husband can re-marry with a fresh contract. According to Iranian Civil Code “...A third divorce, performed after three consecutive marriages (of the same parties) whether by mere

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183 This difficult and long procedure before the remarriage of divorce couple has been incorporated in Muslim law with the object of checking the evil practice of the per-Islamic Arab who used to divorce and remarry several times so that their wives could never be free to marry another person. (R.K. Sinha, *Muslim Law*, pp. 108-109 (2006)).

184 I discussed in chapter II (third divorce in Iranian laws).
renouncement by the husband of his desire to divorce the wife or by a new marriage between the two parties.\textsuperscript{185}

6.14 Waiting period (Iddat, Iddeh)

Under Muslim law, it is that period during which a woman is prohibited from re-marrying after the dissolution of her marriage.

The Difference between Shi’a and Sunni’s View in Marriage With a Woman Who is Observing Iddat

Marriage with a woman who is observing Iddat is irregular under Sunni law. But Under Shia law the marriage contract with woman observing Iddat is void.\textsuperscript{186}

The similarities and Differences between Iranian and Indian Muslim Laws in Periods of Iddat

Different periods of Iddat, which a woman is legally required to undergo, are given below.\textsuperscript{187}

<table>
<thead>
<tr>
<th>Cause of Dissolution</th>
<th>Marriage whether consummated or not</th>
<th>Period of Iddat</th>
</tr>
</thead>
<tbody>
<tr>
<td>Divorce</td>
<td>Consummated</td>
<td>In Sunni laws the period is 3 courses in the case of menstruating and 3 lunar months in the case of a non-menstruating wife or, if</td>
</tr>
</tbody>
</table>

\textsuperscript{185} The triple divorce in one meeting (like Indian Sunni Muslim law) has no place under (Iranian) Shi’s law. In the other word, we can say there is no provision in Shi’a Law which approves triple divorce in one session as prevailed in India. That is to say a Shia husband cannot say to his wife that “you are divorce, divorce, divorce “or “you are divorce irrevocably”. But triple divorce in one meeting should not be limited to only, above examples.

\textsuperscript{186} Sinha, p. 55.

\textsuperscript{187} Syed Khalid Rashid’s, Muslim Law, p. 135 (2009).
<table>
<thead>
<tr>
<th>Cause of Dissolution</th>
<th>Marriage whether consummated or not</th>
<th>Period of Iddat</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>pregnant, till delivery.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>In Shi’a law; The period is 3 tuhurs in the case of</td>
</tr>
<tr>
<td></td>
<td></td>
<td>menstruating and 3 months</td>
</tr>
<tr>
<td></td>
<td></td>
<td>in the case of a non-menstruating wife or, if</td>
</tr>
<tr>
<td></td>
<td></td>
<td>pregnant, till delivery</td>
</tr>
<tr>
<td>Divorce</td>
<td>Not consummated</td>
<td>No Iddat (in Shi’a and Sunni)</td>
</tr>
<tr>
<td>Death</td>
<td>Doesn’t matter</td>
<td>4 months and 10 days or, if</td>
</tr>
<tr>
<td></td>
<td></td>
<td>pregnant, till delivery</td>
</tr>
<tr>
<td></td>
<td></td>
<td>whichever period is longer</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(in the Shi’a and Sunni view is same. )</td>
</tr>
</tbody>
</table>

The Difference between Shi’a and Sunni’s View in the Commencement of Iddat

In the Indian Sunni Law, the period of Iddat begins from the date of the divorce or death of the husband and not from the date on which the woman gets the information of her divorce or of the death of her husband. If she gets information after the expiry of the specified term, she need not observe the required Iddat.  

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188 Sinha, Supra note at 55-56.
In Iranian law also the period of Iddat begins from the date of the divorce but the period of Iddat in the death of husband begins when the woman gets the information of death not from the date of death.

6.15 The Parentage and Legitimacy of children in Muslim Laws

In the Muslim law, as in other systems of law, parentage involves certain right and obligations. The relation between a father and his child is called paternity; the relation between a mother and her child is called maternity. 189

(a) Maternity;
(b) Paternity;
(c) Parentage 190, 191

The Difference between Shi’a and Sunni’s View in Maternity

Maternity is commonly recognized by law as the natural relationship between the mother and the child. The woman who gives birth to the child is its mother. Sunni Law (like other legal system) recognizes this status, irrespective of the fact whether she is married or unmarried, and even if the child is the outcome of Zina. So the child can inherit from its mother. But under the Shia Law mere birth is not enough to establish maternity. A child born of adultery, incest or fornication is an illegitimate child and is devoid of maternity in the woman who gave birth to it; so he cannot inherit

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190 Parentage is the relationship of parents to their child or children (D.F. Mulla, Principle of Mohammedan Law, p. 355 (1977) edited by M. Hidayatullah).
191 The mother and the father of a child are called the parents of the child. Importance of this legal relation lies in guardianship and inheritance. (R.K. Sinha, Muslim Law, p. 111).
from her. Thus, there is a legal status to maternity and is a legal relationship.\textsuperscript{192}

**The Similarity between Shi‘a and Sunni’s View Paternity**

Paternity is the legal relationship between child and its begetter. It is based in turn, on the legal relationship between the woman who gave him birth and the man who begot him—there must be a tie of marriage between the woman and the man; he must be the husband of the child’s mother. The marriage must be valid, may be even irregular, but no void or \textit{batil}; neither Sunni law nor \textit{Shia} law gives any credence to paternity if the marriage was \textit{batil}. The fact of marriage is proved by either direct proof or by presumption.\textsuperscript{193}

**The Difference between Iranian (Shi’a) and Indian (Sunni)’s View in the Concept of Legitimacy**

The concept of legitimacy of children is the direct outcome of the concept of marriage. Society that recognises the institution of marriage also recognises the legitimacy of children born within lawful wedlock; and vice versa, those born outside the wedlock are illegitimate. The father of a child born in wedlock is presumed to be the husband of the woman giving it birth, and a child which is born after six months of marriage and during its continuance is said to be born in wedlock. The legal effect of marriage on fixing the paternity of a child continues, according to \textit{Hanafis}, for two years, and according to the \textit{Malikis} and the \textit{Shafiis} for four years after the separation by divorce or death.\textsuperscript{194}

So, according to Sunni law, when a child born after the dissolution of the marriage is legitimate if born:

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\textsuperscript{192} Syed Khalid Rashid’s, \textit{Muslim Law}, p. 146 (2009).

\textsuperscript{193} \textit{Supra} note.

\textsuperscript{194} Syed Khalid Rashid’s, \textit{Muslim Law}, p. 145.
(i) Within 10 [lunar] months of the dissolution (*Shia law*)

(ii) Within 2 [lunar] years of the dissolution (*Hanafi law*). But under the recent Evidence Act\(^{95}\) in Section 112, a child born after 280 days of the dissolution of marriage can never be treated as legitimate.\(^{96}\)

(iii) Within 4 [lunar] years of the dissolution (*Shafie & Maliki law*).\(^{97}\)

But according to Article 1158 of the (I.C.C.): “Any child born during married life belongs to the husband provided that the interval between intercourse and the birth of the child is not less than six months and not more than 10 months. In Iranian law a child born more than 10 months after a divorce (in permanent marriage) or the end of a temporary marriage will be assumed to be the issue of zina.

**Acknowledgement of Paternity (Iqrae-e-Nasab) in Iranian and Indian Muslim law**

Acknowledgement\(^{98}\) (Iqrar) of paternity takes place in Islam as follows:

(a) Where the paternity of child is not know or established beyond a doubt\(^{99}\) (b) it is not proved that the claimant is the offspring of Zina (illicit intercourse); and (c) the circumstances are such that they do not rebut the

\(^{95}\) Indian Evidence Act, 1872.


\(^{97}\) Tyabji, *supra* at 219.


\(^{99}\) ‘Paternity dose not admit of positive proof, because the connection of a child with its father is secret. But it may be established by the word of the father himself’, Ameer Ali,Il p. 190-1 citing Fatawa Alamgiri.
presumption of paternity, an acknowledgement of paternity by the father is possible and effective.200

According to Iranian law, paternity, or legal filiations, is recognized only in the context a valid marriage, whether permanent or temporary. A child born outside a valid marriage is the issue of zina (fornication) and cannot be legitimated, as stated in Article 1167 of the (I.C.C.): “A child who is the issue of zina is not attached to the zani (fornicator)”. The abortion of illegitimate children is not permitted.201 And according to Article 1161202 of the Iranian Civil Code, “that a husband’s explicit or implicit acknowledged of paternity, cannot later be withdrawn.

6.16 Dower203

Fixation of Dower (Mahr) in Iranian and Indian Muslim laws

Fazee states; “The amount of mahr may either be fixed or not; if is fixed it cannot be a sum less than minimum laid down by the law as follows:204

(a) Hanafi law : 10 dirhams
(b) Maliki law : 3 dirhams
(c) Shafei law : no fixed minimum

200 Fzyee, Supra note at 154.
201 Khomeini, Clarification of Question, p. 2453.
202 Article 1161 of (I.C.C.): “In the cases coming under the foregoing Articles, if the husband has explicitly or implicitly admitted that he is the father, his subsequent denial of this will be of no validity”.
203 Mahr or dower is a sum that becomes payable by the husband to the wife on marriage, either by agreement: between the parties or by operation of law. It may either be prompt (Mu’ ajjal), or deferred (Mu wajjal) . (Tyabji, Muslim Law, 4th Edition, p. 102).
(d)  *Shia law* : -do-

Under Shi’a *Ithna Ashari* laws there is no legal minimum of *mahr*.

It has been earlier stated that when dower is fixed by a contract between parties, it is known as specified dower; when dower arises by operation of law, it is known as proper dower.

**The Difference between Iranian (Shi’a) and Indian (Sunnis’) View in Relating to Dower**

<table>
<thead>
<tr>
<th>Indian (Sunni) Law</th>
<th>Iranian (Shi’a) Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>A minimum limit of 10 dirhams[^205^] is prescribed for specified dower. There is no maximum limit for specific dower.</td>
<td>No minimum and maximum limit is prescribed. Although some traditional jurists have recognized a legal maximum of 500 <em>dirhams</em>, citing traditions from the sixth Imam to support this. Others say that the limit of 500 <em>dirhams</em> is recommended, not obligatory. According to Article 1080 of (I.C.C.): Fixing of the amount of marriage portion (specific dower) depends upon the mutual consent of the marrying parties.</td>
</tr>
</tbody>
</table>

[^205^]: In India, the value of ten *dirhams* is between Rs. 3-4. Thus, the minimum of *mahr* in both schools is nominal.

[^206^]: Hassan Emami, *L’institution juridique du mahr*, p. 34.
<table>
<thead>
<tr>
<th><strong>Indian (Sunni) Law</strong></th>
<th><strong>Iranian (Shi’a) Law</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>There is no limit to proper dower.</td>
<td>Article 1091 of I. C. C: “In fixing of the proper dower the status of the wife in respect of her family’s station and other circumstances and peculiarities concerning her in comparison with her equals and relatives and also the customs of the locality, etcetera, must be considered”.</td>
</tr>
<tr>
<td>I the absence of an agreement only a reasonable part of the dower is presumed to be prompt</td>
<td>The whole is presumed to be prompt.</td>
</tr>
<tr>
<td>A present for dower consists of three Articles or their value</td>
<td>The value of the present is to be regulated by the position and means of the husband.</td>
</tr>
<tr>
<td>If the marriage is dissolved by death and dower has not been specified, or it is agreed that no dower shall be payable, proper dower would be due whether the marriage was consummated or not.</td>
<td>In such case no dower would be due if the marriage was not consummated. But if the husband dissolved by death and dower has been specified; in this case operate according to Article 1082 of (I.C.C.) which states: “Immediately after the performance of the marriage ceremony the wife becomes the owner of the marriage portion and can dispose of it in any way and manner that she may like”.</td>
</tr>
<tr>
<td>An agreement that no dower shall be due is void.</td>
<td>Such agreement by sane and adult wife is valid. According</td>
</tr>
</tbody>
</table>
## Indian (Sunni) Law

<table>
<thead>
<tr>
<th>Iranian (Shi’a) Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>to Article 1087 (I.C.C.): “If a marriage dower (portion) is not mentioned, or if the absence of marriage portion is stipulated in a permanent marriage, that marriage will be authentic and the parties to it can fix the marriage portion subsequently by mutual consent. If previous to this mutual consent matrimonial intercourse takes place between them, the wife will be entitled to the marriage portion ordinarily due”.</td>
</tr>
</tbody>
</table>

The amount of dower (*mahr*) may exceed the legal minimum in the Sunni law, but all schools of law (the Sunni and Shi’a) strongly recommend moderation, and some are of the opinion that *mahr* should not exceed the amount which the Prophet Mohammad (peace be upon him) bestowed on his wives known as *mahr ul-Sunnah*. Also the *mahr* of Prophet’s (Fatima-peace be upon her) was *mahr ul-Sunnah*.

### The Difference between Shia and Sunnis’ View in prompt dower

In *Ithna ashari* law the presumption is that the whole of the dower is prompt\(^{207}\); but in *Hanafi* law the position is different. The whole of the dower maybe promptly awarded\(^{208}\), but a Full Bench decision lays down that where the *kabin-nama* is silent on the question the usage of the wife’s family is the main consideration, in

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\(^{208}\) Per Mahmood J. in *Abdul Kadir v. Salima*, (1886)8 All 149; Tyabji, p. 123.
the absence of proof of custom the presumption is that one-half is prompt and the other half deferred, and the proportion may be changed to suit particular cases.209

6.17 Maintenance

The Similarities and Differences between Iranian (Shi’a) and Indian (sunnis’) View in Maintenance

<table>
<thead>
<tr>
<th>Indian (Sunni) Muslim</th>
<th>Iranian (Shi’a) Muslim</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. There is different view among Indian (Sunni) Muslim jurists as to objects of the maintenance. Some believe that they are three things i.e., food, clothing and lodging. But some others confine it only to food; “Maintenance comprehends food, raiment and lodging, though in common parlance it is limited to the first”. According to last view, in this regard, maintenance is as stated before, not confined to only food, clothing and lodging but it includes other necessities of the woman.212</td>
<td></td>
</tr>
<tr>
<td>According to Article 1107 of Iranian Civil Code: “Maintenance includes all standard needs and proportionate to wife’s condition such as lodging, clothing, food, furniture, health costs and servants if she has used to servant or if she is physically sick and defected thus needs servant”.</td>
<td></td>
</tr>
<tr>
<td>2. <em>kharch-e-pandan, guzara, mewa</em></td>
<td>This kind of maintenance is not</td>
</tr>
</tbody>
</table>

---

212 Hedaya, supra note at 392.
<table>
<thead>
<tr>
<th>Indian (Sunni) Muslim</th>
<th>Iranian (Shi’a) Muslim</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>khorī, i.e.</em>;</td>
<td>recognized in Iranian Law.</td>
</tr>
<tr>
<td>A husband may have a lawful agreement with the first wife that on his marrying a second wife the first wife may reside with her parents and obtain a regular allowance; or similarly, an agreement with a second wife to allow her to reside in her parents’ house and to pay her maintenance.</td>
<td></td>
</tr>
</tbody>
</table>

3. Priority on obligation to maintenance is as follows: wife, children, father, mother, jointly grandchildren and grand-parents and the collaterals.

Priority on obligation to maintenance is as follows: wife, children, father, mother, jointly grandchildren and grand-parents.

According to Article 1106 of Iranian Civil Code (I.C.C.): “The cost of maintenance of the wife is at the charge of the husband in permanent marriages”.

And, Article 1203 of (I.C.C.) states: “If there are a wife and one or more relatives who are to be supported, the claim to support of the wife precedes that of others.

Article 1199 of the (I.C.C.) states: “Maintenance of children is the duty of the father on his death or his incapacity for

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213 Mulla, *Supra* note at 280.
<table>
<thead>
<tr>
<th>Indian (Sunni) Muslim</th>
<th>Iranian (Shi'a) Muslim</th>
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<tbody>
<tr>
<td>maintenance, this duty devolves on the paternal grandfathers, the nearer of his kin coming before the father. In the absence of a father or paternal grandfathers or in the event of their incapacity, the duty of maintenance devolves on the mother. . .</td>
<td></td>
</tr>
</tbody>
</table>

4. (a) Wife’s Right: Wife is entitled to maintenance during *iddat* even in the case of irrevocable divorce. Wife is entitled to maintenance during *Iddat* and also if divorce was revocable or in the case of an irrevocable divorce and if she was pregnant. She is entitled to cost of maintenance till her child is born.

5. (b) The wife is entitled to residence during *Iddat* for divorce in all cases. The wife is entitled to residence in the case of revocable *talaq* or, in the case of irrevocable *talaq* till delivery, if pregnant.

6. (c) The amount is determined by the rank and circumstances of parties. It is determined according to the requirements of the wife and custom of her equal. (Article 1080 of (I.C.C.)

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<table>
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<tbody>
<tr>
<td>7. (d) Arrears are recoverable only if they are fixed by agreement or by Court. (According to Indian Muslim law, the wife is not entitled to sue her husband for past maintenance, unless the claim is based on a specific agreement or by Court.)</td>
<td>They can be recovered without any agreement or decree. According to Article 1206 of (I.C.C.) “A wife can always and in any case prefer a claim for her past expenses (past maintenance), and her right to these expenses is preferential. In the event of bankruptcy or insolvency of the husband her dues must be paid before any liquidation payment is arranged.</td>
</tr>
<tr>
<td>8. As between parents the mother is entitled to preference for maintenance</td>
<td>The rights of the two are equal. According to Article 1200 Of (I.C.C.): “Maintenance expenses of parents must be paid by the nearest related child or grandchild in the order of kinship”. There is no different between father and mother.</td>
</tr>
<tr>
<td>Indian (Sunni) Muslim</td>
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</tbody>
</table>
| **9.** The liability to children to maintain is equal but there is some difference of opinions. | The liability in proportion to the means of each.  
   Article 1198 of (I.C.C.) states: “A man is only obliged to maintain another if he is in a position to do so, that is to say he can provide such maintenance without thereby causing himself distress. To determine whether a man can maintain another obligations and his manner of life must be taken into consideration”. And according to Article 1197 of (I.C.C.): “A person is entitled to maintenance expenses if he or she is poor and cannot earn a living by adopting an occupation”. |
| **10.** Under Indian and Iranian Muslim law, a person may have to right to be maintained by the other on the basis of: (a) the marriage (which include wife), and (b) the blood-relationship which include young children and necessitous parents and other relations within the prohibited degree. | Under Iranian Muslim law is same to Indian Muslim law.  
   Only different is in the maintenance of young children. Article 1199 of the (I.C.C.) cited, the children not mentioned young children, so the children in Iranian law is a general and included all children which he or she is poor and cannot earn a living by adopting an occupation. |
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<tbody>
<tr>
<td><strong>11.</strong> After the husband’s death the widow is not entitled to maintenance even during her period of Iddat.</td>
<td>According to Article 1110 (I.C.C.): “During Iddeh Period that has happened due to the death of the husband, the living expenses are supplied from the relative’s property by woman’s asking, if they do not pay; The relatives who are responsible for alimony.</td>
</tr>
<tr>
<td><strong>11.</strong> Maintenance of Children and Descendants; A father is bound to maintain his sons until they attain puberty, and his daughters until they are married. He is also responsible for the upkeep of his widowed or divorced daughter.</td>
<td>According to Article 1199 of the (I.C.C.). (as above mentioned)</td>
</tr>
</tbody>
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214 Wilson was of the opinion that a father was bound to maintain his sons till the age of 18. Mulla took a contrary view and said that his obligation ceases when the son completes the age of 15. This question has so far not been settled by judicial authority. Wilson, pp. 140-142; Mulla, p. 370.