2.1 Introduction

Terminating the marriage contract by divorce is one of the legal measures, which has gone through various stages in the course of history of nations and countries and has undergone changes as well. The sociologists and jurists have put forth contradictory theories in this regard. These theories are briefly reviewed below.

(i) The Church Law

In the beginning the Catholic Church was against divorce. The base of this notion was a statement attributed to Jesus Christ, which also created differences between the biblical theorists. According to St. Mathew divorce was forbidden except in case of adultery. According to Mark and St. Luke divorce is strongly forbidden.

For centuries the Church fathers, including Tetulien, allowed divorce only in case of adultery. Advocacy of divorce became strong in the sixteenth century and the Protestant countries allowed divorce while its permission was not confined to adultery anymore. Consequently divorce was allowed in the Anglo-Saxon countries.

The Roman Empire laws allowed divorce without any need for the intervention of the judge or the consent of the other party. Husband and wife could leave each other.

In Judaism and in German norms the husband could divorce his wife without any reason and without the consent of the wife.
(ii) **French Law**

For the first time in the French Law divorce was facilitated by the September 20, 1792 Act. This Act gradually underwent changes and finally an Act was passed in 1941, but some parts of it were revoked by Erdnans on April 12, 1945. According to this Act in certain cases the court on the plea of husband or wife would investigate the case and allow divorce.

(iii) **Italian Law**

Divorce was allowed in Italy in the ancient times but was forbidden when church came to power. Article 148 of the Italian Civil Law explicitly envisages that marriage is not revoked unless one of the couples passes away.

(iv) **Spanish Law**

Divorce was earlier allowed in Spain in many cases, but it was revoked in 1930.

(v) **British Law**

According to the June 30, 1937 Act, three more cases were added to permission for divorces in addition to adultery. Now most of the European countries allow divorce in certain cases.

(vi) **Russian Law**

The Russian law allows divorce when one of the couples wills so.

On the basis of the above explanation, one may conclude that there are five notions about revocation or termination of marriage by divorce:

1. Lack of revocation of marriage except in case of death of one of the couples.
2. Revocation of marriage by husband in certain cases.

3. Revocation of marriage on the plea of any of the couples by the court in certain cases.

4. Divorce of the wife by husband without any reason.

5. Divorce on the will of each of the couples without any reason or cause.¹

2.2 Importance of Marriage in Islam

Before going through marriage dissolution, conditions and its causes; It is preferred to state some points on the importance of marriage and maintaining such a holy agreement by referring to the verses of Quran, Hadiths (tradition) and other traditions in order to know Islam attitude toward marriage and maintaining this matrimonial contract so that the couples do not think of divorce or dissolution of the marriage by any small excuse.

Many verses of Quran and the Hadiths are emphasizing on the importance of marriage and matrimonial contract as Allah consider marriage as the cause of relief and one of his signs so that one of the verses of Quran quotes:

“One of God’s sign is that He has created the one who is from your own kind so that you get relaxed when you are with her”.²

In Islam marriage and forming a family is a holy action and it is considered as a sacred virtue therefore it is a blamed action in avoiding it. In Islam there hasn’t yet been established any superior foundation than marriage, an event which causes molding the foundation of family and promotes man’s namaz (prayer) so that a

¹ Seyed Hassan Imami, Civil Rights, 5, pp. 1-3 (1994).
² Holy Quran, Surah Unos, Verse 67.
two-rakat-namaz is more acceptable from a married man than a seventy-rakat-namaz from non-married man. According to Islam, the worse dead persons are those who did not get married without any reason.

In Islam doctrines which is based on Quran verses and Impeccable/ Ma'sumin sayings, marriage and setting a family has been encouraged and conversely divorce and breaking the family has been discouraged, for instance Prophet Mohammad (Piece be Upon Him) has said:

“No other foundation is better than Marriage to Allah”.

In addition to that Prophet Mohammad considers marriage as his tradition and says:

“Marriage is my tradition and whoever rejects that and doesn’t get married he is rejecting my tradition”.

In another Hadith he introduces marriage as the one that Allah loves it and says: “To Allah nothing is better than the house which gets developed through marriage”.

In addition to that he considers marriage as his custom and says: “Marriage is my tradition and whoever rejects it and doesn’t get married he is rejecting my tradition”.

Moreover he says:

“A two-rakat-namaz is more acceptable from a married man than seventy-rakat-namaz from a non-married man”.

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3 Sheikh Horre Ameli, Vasael-lu-Shia, Vol. XIV, p. 3.
Also says:

“Two-rakat-namaz is more acceptable from a married man than a non-married man who is fasting all the time and rises at midnight for prayer”.\(^8\)

“The worse men are those who die single/unmarried”.\(^9\)

Also says:

“A person who marriage can maintain a half portion of his religion then he should try to maintain the other half of the portion”.\(^10\)

Imam Ali (Peace is upon him) says:

“Non of Prophet Mohammad’s followers get married until Prophet said to them that you have completed your religion”.\(^11\)

Imam Ali (Peace is upon him) says:

“The best mediation is that you mediate between two people for marriage so that they get married with being together”.\(^12\)

Article 10 of Iranian constitution state:

“Since the family is the fundamental unit of Islamic society, all laws, regulations, and pertinent programs must tend to facilitate the formation of a family, and to safeguard its sanctity and the stability of family relations on the basis of the law and the ethics of Islam”.

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\(^9\) *Ibid*.


\(^12\) Sheikh Horre Ameli, *Vasael-lu-Shia*, Vol. XIV, p. 27.
2.3 What does Islam say about divorce?

Islam gives necessary instructions for the preservation of family relationship. Conformation to these instructions paves the way for a strong family bond and trouble free matrimonial life. However, Islam is not blind to the discords that may occur in family life.

Islam is very stern on the issue of divorce and it is allowed only in absolutely unavoidable situations. Imam Sadegh (Peace be upon him) says:

"Among those which God has said they are Lawful/Halal, Nothing is more worse than Talagh/Divorce".\(^{13}\)

In another Hadith he says: “Nothing is worse and depraved than a family which is broken. Allah disgusts those who divorce and whenever divorce is done, Allah’s realm will be trembled”.\(^{14}\)

2.4 Iranian Official Religion and Other Religion in Iran

According to the Constitution of the Islamic Republic of Iran, Islam is the Official religion (Ja'afari Isna Ashari is the official school of jurisprudence). At the same time by virtue of Articles 12, 13 and 14 of the Constitution:

1. Other Islamic Schools are to be accorded full respect, and their followers are free to act in accordance with their own jurisprudence in performing their religious rites. These schools enjoy official status in matters pertaining to religious education, affairs of personal Status and related litigation in the courts of law.

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2. Zoroastrian, Jewish and Christian Iranians are recognized religious minorities, who within the limits set by the law, are free to perform their religious rites and ceremonies, and to act according to their own canon in matters of personal affairs and religious education.

3. The Government of the Islamic Republic of Iran and all Muslims are duty bound to treat non-Muslims in conformity with ethical norms and the principles of Islamic justice and equity and to respect their human rights. This principle applies to all who refrain from engaging in conspiracy or activity against Islam and the Islamic Republic of Iran. The term “non-Muslim” here also means those persons who do not believe in monotheism.

According to the Constitution of the Islamic Republic of Iran, the religious minorities can freely practice their customs and rites and follow the laws of their faiths and personal affairs.

According to Article 12 of the Iranian Constitution:

“The official religion of Iran is Islam and the Twelver Ja'fari school [in usual al-Din and fiqh/jurisprudence], and this principle will remain eternally immutable. Other Islamic schools, including the Hanafi, Shafi'i, Maliki, Hanbali, and Zaydi, are to be accorded full respect, and their followers are free to act in accordance with their own jurisprudence in performing their religious rites. These schools enjoy official status in matters pertaining to religious education, affairs of personal status (marriage, divorce, inheritance, and wills) and related litigation in courts of law. In regions of the country where Muslims following any one of these schools of fiqh
constitute the majority, local regulations, within the bounds of the
jurisdiction of local councils, are to be in accordance with the
respective school of fiqh, without infringing upon the rights of the
followers of other schools”.

According to Article 13 of the Iranian Constitution stats:

“Zoroastrian, Jewish, and Christian Iranians are the only
recognized religious minorities, who, within the limits of the law,
are free to perform their religious rites and ceremonies, and to act
according to their own canon in matters of personal affairs and
religious education”.

Article 14 of the Iranian Constitution

In accordance with the sacred verse; (“God does not forbid
you to deal kindly and justly with those who have not fought against
you because of your religion and who have not expelled you from
your homes”15, the government of the Islamic Republic of Iran and
all Muslims are duty-bound to treat non-Muslims in conformity with
ethical norms and the principles of Islamic justice and equity, and to
respect their human rights. This principle applies to all who refrain
from engaging in conspiracy or activity against Islam and the
Islamic Republic of Iran.

Article 19 says: “All people of Iran, whatever the ethnic
group or tribe to which they belong, enjoy equal rights and color,
race, language, and the like, do not bestow any privilege”.

Article 20 of the Constitution states: “All citizens of the
country, both men and women, equally enjoy the protection of the
law and enjoy the protection of the law and enjoy all human rights

15 Holy Quran, 60:8.
including political, social, and cultural rights in conformity with Islamic criteria”.

The above-mentioned items are not only reiterated by the Constitution but also in the normal rules and regulations of the country including an Article called “the law of observing the personal affairs of the non-Shia Iranians ratified in 1923”. According to this law, the courts should stick to rights of the followers of the faiths, which have been recognized concerning matters of personal status and will and inheritance, and act according to the stipulations and regulations of their faiths except when they contradict the social and public order.

2.5 The Judicial System in Iran

The judiciary is an independent branch whose powers and responsibilities include administration and implementation of justice, supervision on the proper enforcement of the law, of the promotion of legitimate freedoms, protection of individual and public rights, providing due process for the resolution of judicial disputes, and investigation, prosecution, and punishment of criminals in accordance with the Islamic penal code. It is also incumbent upon the Judiciary branch to take adequate measures to prevent crime and to rehabilitate criminals.

The highest judicial authority is a Justice well versed in judiciary affairs and skillful in the administration of justice. He is appointed by the Leader for a period of five years. The Ministry of justice is the official authority to which all grievances and complaints are referred. The Minister of justice is in charge of administrating the Ministry as well as coordinating the relationship
between the Judiciary branch and the legislative and executive branches.

The courts are functionally classified according to their area of jurisdiction, civil or criminal, and according to the seriousness of the crime or the litigation, e.g., value of property under dispute or the level of punitive action involved. There are four civil courts: first level civil courts, second level civil courts, independent civil courts, and special civil courts. The latter attend to matters related to family laws and have jurisdiction over divorce and child custody. Criminal courts fall into two categories: first and second level criminal courts. The first level courts have jurisdiction over prosecution for felony charges, while the second level courts try cases that involve lighter punitive action.

In addition to the regular courts, which hear criminal and civil suits, the judiciary encompasses clerical tribunals, revolutionary tribunals, and the Court of Administrative justice. Clerical courts entrusted with the task of trying and punishing misdeeds by the clergy. Revolutionary tribunals are charged with the responsibility of hearing and trying charges of terrorism and offenses against national security. The Court of Administrative justice under the supervision of the head of the judicial branch is authorized to investigate any complaints or objections by people with respect to government officials, organs, and statues. The Constitution also requires the establishment of a Supreme Court with the task of supervising the implementation of laws by the courts and ensuring uniformity in judicial procedures. The head of the judiciary, in consultation with the judges of the Supreme Court, nominates the Chief of the Supreme Court and the Attorney-General.
who, among other qualifications, must be specialists in Islamic Law.

The Special Civil Courts are presided over by Shari’ah judges and are empowered to deal with familial disputes relating to marriage, divorce, annulment of marriage, dowry, maintenance of the wife and other dependants, custody of children and inheritance.

The present Family Courts were established in 1997. The intention is to have at least one bench of every general court in each city specialising in family law, but in rural areas family law is the province of the general court. The jurisdiction of the family court covers permanent and temporary marriage; divorce, cancellation and annulment of marriages; dowry and engagement gifts; the payment of the wife for housework during the marriage; maintenance disputes; the custody of children and visiting rights; paternity; disobedience (of the wife); guardianship of minors; maturity; remarriage; and the conditions in marriage contracts. The judges in family courts must themselves be married, and must have a working experience of at least four years. They are assisted in their work by female counsellors and must give judgement in consultation with them.16

The constitution includes a striking provision making judges personally responsible for material or moral damages as a result of an error by a judge.17

2.6 Shi’a Law in Iran

Shi’a approaches to traditional Islamic law (Shari’ah) differ in some respects from those current in the four main Sunni schools

17 Article of 171 of Iranian constitution.
of law in the same period. Shi’a law is also known as the Ja’fari school of Shari’ah because of the importance of the sixth Imam, Ja’far as-Sādiq in its development.

References below to fiqh or Shi’ah Shari’ah should be taken as referring specifically to the Ithna-Ashari (Twelver) school of Shi’ah Shari’ah, which is the state religion in Iran.

2.7 The Iranian Civil Code

Iran's first Civil Code (Huquq-i Madani) was drafted and enacted between 1928 and 1936, under the inspiration of Shi’ah Shari’ah law and to a lesser extent the Code Napoleon and Belgian and Swiss codes. It closely follows the Shari’ah. Iranian Civil code are different from them because we have great jurisprudence sources in Civil Law and according to the Iranian constitution all must based on Islamic (shi’a) Shari’ah.

Article 4 of the Iranian constitution state:

All civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all Articles of the Constitution as well as to all other laws and regulations, and the wise persons of the Guardian Council are judges in this matter.
2.8 Table Showing Dissolution of Marriage under Iranian Law

According to the Iranian Civil Code (I.C.C.)

- Cancellation (Annulment/Fastkh)
  - Article 1121-25, 1128 of I.C.C.

- Divorce
  - Article 1133-1139 of I.C.C.

- Dispense with remaining Temporary Marriage
  - Article 1121-25, 1128 of I.C.C.

- Defect
  - Breaching conditions regarding qualification
    - (Article 1128 of I.C.C.)

- By plea of men
  - (Article 1133, I.C.C.)

- By plea of women
  - (Article 1029, 1023, 1129, 1130, I.C.C.)

- By mutual consent
  - (Article 1145, 1146 of I.C.C.)

- Common defects of Men and Women
  - Men's Specific defects
    - (Article 1122 of I.C.C.)

- Women's Specific defects
  - (Article 1123 of I.C.C.)

- Khul'a divorce
  - (Article 1146 of I.C.C.)

- Mubrat Divorce
  - (Article 1147 of I.C.C.)

- Insanity
  - (Article 1121 of I.C.C.)

- Khaas (which means castration)

- Male genital organ anatomical defect

- Anan (which means impotency)

- Quran (which means Bony structure blocking Vagina)

- Black Leprosy

- Leprosy

- EFZA (means joining bladder and menstruation channel)

- Parastic disability

- Two Eyes Blindness

Death

- Breaching conditions regarding qualification
2.9 Dissolution of Marriage in Iranian Laws

Marriage dissolution is ending up and breaking matrimonial relationship that has different reasons including voluntary or involuntary ones. Voluntary reasons are cancellation and divorce which are both unilateral legal acts and involuntary reasons are death of one of the couples.

Article 1120 of Iranian Civil Code states: “Marriage contract is dissolved by cancellation, divorce or Dispense with remaining term in Temporary Marriage”. This Article hasn’t stated anything about death but it is obvious that the death of one of the couples causes marriage dissolution. The clarity of the issue made it not to be mentioned by legislature in Article 1120. In this Article also the expiration of marriage period which is one of the reasons of dissolution of temporary marriage hasn’t been stated, it is stated in Article 1139. Therefore the reasons of permanent marriage are death, marriage dissolution and divorce.  

(i) Cancellation (Faskh) of Marriage in Iranian Law

Cancellation of marriage, like any other irrevocable contract, is voluntary, that is given to one party of the contract in certain issues of law according which he/she can break the marriage contract and stop continuing it and its effects from the time of dissolution. In cancellation it is assumed that the contract has been primarily made in a right way and it has its own effects and consequences although each parties of the contract has the right to dissolve the contract either based on contract and parties conditions

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19 H. Emami, Family Law, pp. 178-179 (1992). “...a dissolvable marriage contract is a contract which can be concluded in a correct way; but the party who has the optional law can cancel it to the benefit of his own side...”
or due to certain situation in which one of the parties’ will be in loss in continuing the contract. Optional laws in business transactions are not mentioned in marriage contract because marriage is not a business contract and on the other hand legislature has aimed stabilizing the family. For instance the optional law of lesion or optional law of conditions in business does not exist in marriage contract because in business it will be broken based on mutual agreement of both parties of contract.21

**Distinction between different ways of dissolution of marriage**

Under the Muslim law a marriage is dissolved either by the death of the spouse (husband or wife) by divorce (at the instance of the husband or wife) or by *Faskh*22 (cancellation of marriage) and *Infesakh*23 which the latter is the dissolution of the marriage-tie automatically under some circumstance while the former is a kind of option (*khiyar*) which can be applied by either of spouses. Each of these different ways has different consequences.

(a) **Causes of Cancellation (*Faskh*) of Marriage in Iranian Law**

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

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22 *Faskh* means the cancellation, abolishment, revocation, abrogation or annulment.
23 *Infesakh* is abrogation and annulment which effects automatically and immediately on happening of some circumstances. It differs with Faskh, which is another kind of annulment, it this sense that latter should be applied by one party in order to affect while the former, as stated before, will affection the spot without necessity of anyone’s consent. In dictionary. (J. G. Hava; *Cosmo Studen’s Dictionary of Arabic English*, (1990) (English translation of Al-Fara’ed ul- Dorriyya). In fesakh is cancellation of marriage automatically and the spouses should be separated, but in faskh the marriage can be continued if the concerned spouse desires.
Defect

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 (Foqahay-e-Imamiye), in Iranian Civil Code the causing defects of marriage cancellation are divided into three parts:

(a) Common defects of Men and Women,
(b) Men’s Specific defects and,
(c) Women’s specific defects.

Common defects of Men and Women

Common defects of Men and women are those defects in whosoever it is; it gives the right of marriage cancellation to the other party. In Article 1121 of Iranian Civil Code only Insanity is considered as common defect between men and women: “The insanity of each one of the couples is the cause of cancellation in condition of continuity, either continuously or in periods”. Insanity is a mental disorder; therefore transient forgetfulness, unconsciousness due to eventual excitement and epilepsy are not counted as Insanity.

Mental disorder is when the person can not do daily and routine responsibilities and she/he acts aimlessly. We can conclude one important conclusion that transient and unstable insanity which doesn’t make that much loss to wife/husband is not counted as Insanity.

the cause for marriage cancellation because the loss which is arising
from it, can be tolerated in common law; and matrimonial life is so
much worth to tolerate such disagreeable situation. Accordingly, in
Article 1121 marriage cancellation due to insanity is conditioned by
its continuity. 25, 26

Insanity can not 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) 27

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.28

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** 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.)

2. **Male genital organ anatomical defect** 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.

3. **Anan** which means Impotency (Anan means inability of men to have and maintain an erection and the person who is suffering is called Anin. According to Article 1125 of Civil Law, Anan is like insanity i.e. when man is affected even after marriage, woman has the right to dissolve/ cancellation in a condition that the couple hasn’t done intercourse even once. 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.

The defects No. 2 and 3 are the defects that prevent man to have intercourse but defect No. 1 doesn’t prevent intercourse but man affected by this is lacking testes and can not have seminal effusion.

The statement of Civil Code in this Article is obvious that only in existence of these three defects plus insanity, which is a common defect, woman has the right to dissolve the marriage in a condition that they have been existed before marriage and man hasn’t told them.

The existence of any other sexual or physical defect in man except those mentioned above doesn’t allow woman to dissolve.

About Anan if it happens before male genital organ put inside the woman, even if it happens after marriage, according to Article 1125 gives the right to woman to dissolve.

“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 of dissolution by women if a man happens not to be able to have intercourse, in a condition that she hasn’t been told about it before marriage”.

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;
2. Black leprosy;
3. Leprosy (Baras);
4. Efa;
5. Paralytic disability;
6. Two eyes blindness;

1. **Qaran:** 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).

2. **Black Leprosy (Juzam):** 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’.  

   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.  

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It seems that the view of minority is more acceptable and consistent with the Islamic jurisprudence's principles. Because according to the doctrine of 'La Zarar'\textsuperscript{32}(rule of "prohibition of detriment"; principle of harm)\textsuperscript{33} the wife must also have the same right as the husband's to dissolve the marriage in order not to be damaged by the husband's disease.

Moreover if the husband is entitled to right of the marriage's cancellation in order to get rid of such a defective wife then obviously the same right must be conferred on the wife too, because the husband, under Mohammadan law, can also dissolve the marriage by divorce at any time\textsuperscript{34} but the wife has no such a right.

3. **Leprosy (Baras):** Baras is kind of skin's disease due to which a part of body's skin changes in colour to either whiteness or blackness. \textsuperscript{35}

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

5. **Paralytic Disability:** According to some jurists the mere Paralytic Disability in the wife is not a ground under which the husband can apply for cancellation of

\textsuperscript{32} The rule in Arabic is thus, "La Zarara Va La Zerara in Islam".

\textsuperscript{33} According to this doctrine 'nobody should damage and to be damaged in Islam'. Therefore the marriage must be dissoluble at the instance of the wife who will be under damage in case of continuation of such marriage.

\textsuperscript{34} According to Article 1133 of Iranian Civil Code, "a man with observe to condition in this code can refer to court and sue divorce his wife".

marriage, unless it is to such an extent due to which she becomes crippled.

According to some Shi’a jurists the extreme lameness also will culminate in the same right for the husband though still she is not crippled. But the Iranian legislature has followed the former view.

6. Two Eyes Blindness: 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. But some jurists have claimed that there is Ijma of jurists on this point.

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.

“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 causes optional cancellation”.

Now the question is that are these defects limited or they can be generalized? In the other word can the other defects, having the same deprivations or even more, be generalized to the mentioned defects, concerning to the unity of criteria and reason, and considered as causes of marriage dissolution or not?

36 Hasan B. Sadid-ud-Din (Allameh Helli), Qawid ul- Ahkam, Qom, Iran, Chapter of Defects.
What is concluded from all common opinions of lawyers and experts of Muslim law is that the cases mentioned in Articles 1122 and 1123 are limited; therefore the existence of other defects except those mentioned doesn't cause cancellation of marriage.

(2) Breaching Conditions Regarding Qualification

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”.

This Article can be used in the sense that each party 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.

What is clear from the judges is that according to Iran Supreme Court which is the highest judging and Law reference, the defects and causes mentioned in Article 1122 and 1123 of Civil Law are limited and we can not include any other cause and defect for dissolution of marriage except those mentioned in those Articles. Regarding to this we can refer to the following voting: 1” Epilepsy by nature is not the cause of dissolution” Vote No. 1370/2/14-185 of Branch 20 in Supreme Court of Iran. 2” Lack of Womb in woman is not the cause of dissolution and is mentioned in Article 1123” vote no. 1374/2/3-5489 of Branch 33 in Supreme Court of Iran. 3” Paroxysm of body parts is not the cause of dissolution” Vote No. 1374/4/4-5743 of Branch 33 in Supreme Court of IRAN. (S. M. R Hosseini, Civil Law of Judgment Procedure, pp. 291-292 )
If the existence of one qualification hasn’t been mentioned clearly in the contract; although the matrimonial contract has been concluded based on its 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.  42

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.  43

Even the issues of concluding a contract based on unclearly mentioned obvious qualification has been mentioned in canonical works and it has been known as a cause of cancellation the contract, for instance a man is getting married to a woman, obviously a virgin woman who has hymen, but he gets to know that she is not virgin, therefore he can dissolve/ cancellation the contract due to not having the unclearly mentioned obvious qualification.  44

Anyway according to civil code and opinions of religious experts breaching conditions regarding qualification can be a cause for cancellation the contract and both men and women can refer to this Article and make some qualification conditions before getting

43 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.
married and if they breach the conditions and qualifications and non-existence of qualification they can dissolve.

**Problem**

If the defect which gives the right to dissolve the marriage is improved before cancellation, for instance if a psychopathic person is cured or woman who has Qaran, bony structure blocking vagina, is operated and healed; then the right of cancellation still remains or not?

Some law experts has stated that the person who has the right to dissolve the marriage due to defect can dissolve the marriage after operation and improving the defect too and his/her right remains still after improving defect; because this right has been due to defect and in case he/she has doubt on defect’s existence the previous right still remains.

Since these optional rights are to prevent detriment and detriment will not happen when defect is improved; moreover stopping cancellation is prudent for maintaining family, then the mentioned right will be cancelled if the defect is improved.45

**(b) The Urgency of Cancellation Right**

The optional rights in marriage are urgent (Article 1131 of Civil Code) and the person who has this right should act as soon as possible as common law; he should inform his willing for cancellation the marriage; because the optional right of cancellation is for preventing detriment to the party who has got this right. With these optional rights the purpose will be made and in breaching the law we must be content with whatever we get for our purpose.46

45 *Ibid* at 213-214
According to Article 1131 of Iranian Civil Code – “The option of cancellation of marriage must be exercised immediately and, if the party who is entitled to the option does not cancel the marriage after becoming cognisant of the reason upon which he could cancel the marriage, he forfeits the option, provided also that he had full knowledge of the existence of the option and its urgent character. Determination of the duration of time during which the option can remain valid depends upon custom and usage.

And according Article 1132: “The observance of the arrangements stipulated in the case of a divorce is not obligatory in a case of cancellation of marriage”.

Common law will recognize the amount of time for application the optional right; therefore if the person, who has the right, when realizing the cause of dissolution such as defect or hypocrisy, doesn’t act urgently, the right will be cancelled, in a condition that he knows his right for dissolution and its urgency. If he doesn’t know his right for dissolution or its urgency; then the optional law will not be cancelled.

The views of experts are different in case of the right of breaching conditions regarding qualification in marriage. Some experts in law do not consider the right of breaching conditions regarding qualification as an urgent right as per optional laws of business. They say that the person who has the right can dissolve the contract whenever he/she wants and its delayed doesn’t cause its cancellation. However according to Article 1131 of civil law which doesn’t differentiate the different optional rights and with regard to the exception of family content and marriage dissolution we can say that the optional law of breaching conditions regarding qualification
is also urgent and there is no difference between this law, hypocrisy and law of defect; although this doesn’t look logical.  

(c) **Similarities between Cancellation (Faskh) of Marriage and Divorce**

Cancellation (Faskh) and Divorce are both considered as Unilateral Legal Acts and they are both causing breaking the matrimonial contract. Both dissolving/cancellation permanent matrimonial contract and divorce are the same in waiting period (Iddah), period which a divorce or widowed woman may not be married to another man, that a woman can marry after three menstrual period; but Iddah for woman in her menopause will be three months. (Article 1151 of Civil Code).

(d) **Differences between Cancellation (Faskh) of marriage and Divorce**

The word “Divorce” or “Talaq” means complete separation and in Arabic the word “Tatligh” mostly used for breaking matrimonial contract. “Talaq” has been defined as:

“Breaking the commitment of marriage through the word Talaq or similar word to it”.  

Talaq/Divorce has been paraphrased in law as below:

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48 Article 1151 - The period of Iddah for a divorce or for the dissolution of a marriage consists of three consecutive monthly periods of a woman unless the woman concerned though of child bearing age has no monthly period, in which case the period of Iddah will be three months.
49 A. Dehkhoda, *Dehkhoda Dictionary*, entry “Talaq”.
50 Ibn Manzur, *Lesan ul Arab*, Entry “Talaq”.
Talaq/Divorce is a unilateral legal act following which the man is leaving his woman who is married to him permanently due to court sentence.

In religion also matrimonial contract is broken through cancellation or divorce.\(^{52}\)

The differences between cancellation of marriage and divorce are as below:

(a) Cancellation (Faskh) of marriage does not include formal procedure of divorce such as issuing the certificate of incompatibility, divorce sentence and execution of divorce in the presence of two just witness. It can be done through every oral statement or action which is indicating it. (Article 1132 of Civil Code).\(^{53}\)

(b) Divorce is correct only when woman has specific condition i.e. she should not be between two monthly periods during which intercourse has taken place \(^{54}\) but cancellation (Faskh) doesn’t have this condition.

(c) In divorce, if it is revocable, man has the right to return in waiting period (Iddah); but in matrimonial cancellation there is no chance of returning and marriage is broken totally.


\(^{53}\) Article 1132: “The observance of the arrangements stipulated in the case of a divorce is not obligatory in a case of cancellation of marriage”.

\(^{54}\) 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.
(d) If divorce happens before intercourse, woman can take half of the Mehr; however if the amount of Mehr is not defined before Divorce then woman has the right for reasonable marriage portion / Mehr – al – mottae, but if matrimonial contract is dissolved before intercourse, woman doesn’t have any right for Mehr unless the dissolution is due to Anan, man’s inability of erection. If man has the defect of Anan then woman has the right for half of the Mehr in marriage cancellation. (Article 1101 Civil law).

(e) According to Iranian civil code divorce is done by husband or his representative; but marriage cancellation can be done by man or woman, depends on case.

(f) If divorce is done three times successively it will be Haram, religiously prohibited; whereas marriage cancellation doesn’t make prohibition.

(g) Divorce should be recorded in a notary public office and if not it would be a crime (Article 1 of marriage

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55 Article 1087 - If a marriage 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.

Article 1093 - If no marriage portion is mentioned in the act of marriage and the husband divorces his wife before the consummation of marriage and the fixing of the marriage portion, the wife is entitled to a reasonable marriage portion, and if she is divorced after the consumption of marriage, she will be entitled to the equivalent of marriage portion.

Article 1094 - The status of the man in respect of wealth or poverty will be considered in fixing the reasonable marriage portion.


56 Article 1101 - If the marriage is cancelled before matrimonial relations for any reason, the wife is not entitled to any marriage portion. If the reason of cancellation is impotency, the wife will be entitled to half the marriage portion notwithstanding the cancellation of the marriage.
law); but if a marriage cancelation is not recorded it would not known as a crime.

(h) The causes of Divorce are different from causes of marriage cancellation. 57

(ii) **Section 2 – Divorce**

(a) **Definition of divorce in Iranian laws**

Divorce literally means liberation, relief, discarding and in Sharia it is terminating the matrimonial relations through an actual form of utterance of divorce. 58

Divorce means revoking the marriage contract in the life of husband and wife through the will of man or on the plea of woman in certain conditions. 59

Divorce means revocation of matrimonial ties of a permanent marriage contract whether on the consent of the wife or not (Article 1133-1139 Civil Law) either by the legal representative of the husband like divorcing an insane permanent wife by her custodian (Article 1137) 60 or in case a wife on the basis of a letter of attorney from her husband gets divorced (Article 4 of the Marriage Law 1931). Divorce may be performed by court (Article 1029). 61

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60 Article 1137 - The guardian of a permanently made person, can divorce the wife of the latter if the interests of the person under his custody allow him to do so.
61 Jafar Langrudi, *Terminology of Law*, p. 430 (1991). (Article 1029 - If a man has been for four years continuously absent with unknown whereabouts, his wife can apply for a divorce The judge will then grant the divorce subject to the stipulations of Article 1023. and Article 1023 – “In cases coming under Articles 1020, 1021 and 1022, the court can only issue the judgment of presumed death of a continuously absent person when a notice has been published for three consecutive times each with an interval of one month
Some French jurists have defined divorce as such:

“Divorce is termination of matrimonial ties on the verdict of the court during the lifetime of the couples on the petition of one or both of them”.

Indeed divorce is an undesirable practice in Islam and a Muslim man must not divorce his wife out of whim and caprice from the other in one of the local newspapers and one of highly circulated papers of Tehran inviting the persons who may have news of the man to convey their information to the court and when after the expiry of one year from the date of the first publication of this notice, the fact that the man is alive is not proved”.

Article 1020 – “The following cases are of those in which a continuously absent person cannot ordinarily be supposed to be alive:

1. When 10 full years have passed from the date of the last news received as to the life of the continuously absent person and at the expiry of the period his age has surpassed 75.

2. When a person was included in an armed force under any denomination and disappeared during the war and till three years after the conclusion of peace no news are received from him. If the war is not terminated by the conclusion of a peace agreement, the period in question must be reckoned as five years from the date of conclusion of the war.

3. When a man engaged in a sea voyage was on board of a ship which was wrecked in that voyage and three full years have passed from the date of wreckage of the ship in question and no news is received from him.

Article 1021 – “In the case of the last Clause of the above Article if after the expiry of the following periods of time from the date of departure of the ship the latter does not arrive at its destination, or if it has not returned to the port of departure in the case where it has set out without determined destination and there is no news of its existence, the ship in question will be considered as destroyed”.

(a) For voyages in the Caspian Sea and inside the Persian Gulf, one year.

(b) For voyages in the Sea of Oman, the Indian Ocean, the Red Sea, the Mediterranean Sea, the Black Sea and the Sea of Azof, two years.

(c) For voyages in other cases, three years”.

Article 1022 – Article 1022 - “If a person meets the danger of death or disappears in consequence of accidents other than those mentioned in Clause 2 and 3 of Article 1020 or if he has been in an airplane and the latter has disappeared a judgment of his presumed death will only be issued when five years have passed from the date when he met with the danger of death and during that period no news have been received showing that the man still alive”.

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. 63

(b) Components of Divorce

(a) Divorcer – One who divorces (Article 1136) 64
(b) Divorcee – wife (Articles 1140-1142) 65
(c) Actual form of utterance of divorce (Article 1134)
(d) Bearing witness (that is, the presence of witnesses of divorce) Article 1134. In the light of the Family Protection Act (Article 10), the fifth component should be defined as such:
(e) Issuance of the certificate of incompatibility by the Court. 66

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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63 Ibid at 178-179.
64 Article 1136 – “The divorcer must be puberty, sane, must intend the act and must be free in his action”.
65 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”.
Actual from of Utterance of Divorce (Formula of Divorce)

The actual from 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 eg. This wife or her name etc. 67

Mohammad. b. Moslim narrates the Sixth Imam; jafar b. Mohammad. Assadeq 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” (laisa Be Shi’a). 68

Whether the formula should be pronounced in Arabic or it can be translated to other languages, there is a difference of opinions. The Majority of jurists lay down that if the pronouncer (The husband or his agent) are able to pronounce divorce in Arabic then it cannot be said in other language. 69 Ibn Idris in his book ‘As-Sara’ir’ approved this view. But some others, including the great jurist Sheikh Tusi, in his book ‘An-Nihay’a, hold the contrary view. They say the divorce’s formula can be pronounced either in Arabic or any other languages provided the words used must be equivalent of their Arabic terms. 70

68 Wasail ul-Shia, Supra Vol. 15, p. 295.
69 Allameh Helli Hasan Sadid-ud-Din,alias, Mokhtalaf ul-shi’a, Qon(Iran), p. 585.
70 Supra note.
(c) Divorce in Writing

Majority of Shi’a jurists are of opinion that divorce must, orally, be pronounced if the divorce (husband or his agent on his behalf) is able to talk and the divorce given in other ways is void.

But if the pronouncer is unable of talk, due to any reason such as dumbness, then he/she can write whatever must have been said. 71

(d) Witnesses in 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...” 72

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. The same view has been taken by Shi’a jurist’s unanimously. 73

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71 Supra note.
72 Holy Quran, 65: 2.
73 Hsan ibn Saddid-ud-Din (Allameh Helli), Qavaid ul- Ahkam, Vol. II, p. 64.
Just witnesses:

The witnesses must also be just Section 1134 of Iranian Civil Code. Therefore, if the witnesses of divorce are in lack of this term then performed divorce is ineffective and void. This requirement is based on the letter of holy Quran\(^{74}\) and the great jurist Sayyed Mortaza has claimed that there is Ijma on this point.\(^{75}\)

(e) Necessity of the certificate of incompatibility by the court

According to Article 10 of Iranian Family Protection Act;\(^{76}\) if a wife intends to divorce herself on behalf 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 him or her such certificate.

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

On receipt of the application, the court shall directly, or, if it deems necessary, through an arbitrator or arbitrators, endeavour to bring about a compromise between the husband and wife, and prevent the occurrence of a divorce.

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\(^{74}\) Holy Quran, 56: 2.

\(^{75}\) Sayyed Mortaza, *Al-Intesar*, p. 128.

\(^{76}\) The Family Protection Act (1975).
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, 1371’77 “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.

As it is clear from context of the abovementioned Act there is two phases for resolving the dispute namely, the court and arbitration. If the court could not succeed to settle the dispute and bring about reconciliation between the disagreeable spouses, then the case should be referred to arbitrators, one from the husband’s side and the other from the wife’s.

(f) Arbitration in Divorce in Iranian Law and it’s Conditions

It can be claimed that the most affirmed method of divorce in Islam is a divorce resulted from arbitration. As it was mentioned in introduction, divorce is not a private matter between, only, husband and wife. It is a public issue because of having great impact on

77 28.8..1371 A. H (solar year)=1992 A. D.
society as well. Therefore, divorce must only be permitted to take place in the last resort. All the ways by which the reconciliation may be achieved, should be considered not by the spouses themselves, but by impartial arbitrators too.

Clause I of Executive by-lay of ‘Amendment of Divorce’s Regulations Act, 1371' says, “In respect of divorce’s suits filed by both or either of the spouses before the ‘Special Civil Court’ if the dispute could not be settled by the Court, the consideration of the case would be referred to arbitration”.

Clause II of the by-law says; “After reference of the case to the arbitration, either of the spouses has to introduce a qualified relative of his/her, as arbitrator, to court within twenty days from the day of such reference”.

The Clause III holds, “If, among relatives, there is no such a qualified person or is not accessible or refuses to accept arbitrator among other qualified persons. In case of refusal or disability of arbitrator’s introduction the court can, independently, attempt to appoint arbitrator(s) among qualified persons”.

The qualifications of arbitrator have been laid down by the Clause IV: “The selected or appointed arbitrators must be having the following qualifications.

1. Muslim.
2. Relative acquainted with religious commandments.
3. At least, forty years of age.
4. Married.
5. Reliable.

2. 12. 1371(solar year)=1993 A.D.

The Clause VII says; “The selected or appointed arbitrators have to convene at least, two sessions in presence of the spouses, try to settle the dispute and bring about reconciliation. In case the disagreement was not resolved or one of the spouses refrained to attend the sessions, either in the presence of spouses or one of them, or either absence, will consider the case and give their verdict of possibility or impossibility of reconciliation between the couple to the Court within the limited period fixed by the Court.

If any of the arbitrators claims remuneration, the court will fix a proportionate for him. It’s amount will firstly be taken from the spouse by/for whom the arbitrator has been selected or appointed but if the court thinks fit both the parties of divorce must share it equally. (Clause VIII).79

(g) Conditions for Correctness of Divorce

The fundamental conditions of divorce in Iranian law are:

(i) Intention and consent;
(ii) Competency;
(iii) Purity (woman should not be in menstruation);
(iv) Court’s verdict.

(i) Intention and consent divorce In any case must be accompanied with the intention and consent of the divorcer, therefore, if his intention or consent is lacking or is not perfect, divorce is invalid.

(ii) Competency: According to Article 1136 of the Civil Code; “The divorcer must be mature, must be in

79 The Family Protection Act (1975).
possession of his faculties, must intend the act and must be free in his action”.

(iii) **Purity of woman**: The third condition for divorce is that woman should not be period or post-delivery period or in menstruation.

(iv) **Court's verdict**: In cases that a woman can ask for divorce, if she asks for divorce and the husband does not willingly divorces her, the court issues the divorce verdict.

(h) **Formal Conditions of Divorce**

The formal conditions of divorce are related to:

(i) The documents necessary to show for performance of divorce. 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.

(ii) Persons who must present themselves at the time of performance of abrogation (unilateral legal act) of divorce are:

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80 Purity of woman in jurisprudence and civil law means when woman is not in her menstruation (monthly period). The gap between two menstruations is called purity; see Langrudi p. 423 (1991).

81 The blood oozing from woman’s womb every month, see, *Ibid* at 253.

82 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), *Ibid* at 718. (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).
The head of the notary public office, the divorcer or his advocate, the witnesses and if necessary the person who utters the words of divorce, the introducer and the committed.

(iii) Performed in the actual form of utterance

According to Article 1134 of the 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”. According to Article 1135 of the Civil Code “Divorce must be in clear and precise wording, a conditional divorce is null and void”.

(iv) Preparing the divorce certificate

The head of the notary public office by observing the abovementioned formalities prepares the divorce certificate and registers it in the office’s records.

(i) Causes of Divorce in Iranian Laws

Causes of divorce in Iranian laws are three ways:

(1) Divorce by plea of men.

(2) Divorce by plea of women.

(3) Divorce by mutual consent.

By causes of divorce we mean the reasons or means by which divorce is permissible and on their basis one can ask for divorce.

83 This is called Iqaa' in Civil Law of Iran which is a judicial act which refers to the unilateral abrogation of a contract by one of the parties without inflicting any loss on the other side (unless clearly mentioned in the laws such as the Divorce Law), other forms of Iqaa' are Ibra', I'radh and Faskh, see Ibid at 100.

84 Shaygan Ali (1996), Supra note at 258-261.
Following the Imamiyah jurisprudence, the civil code has enumerated the causes that can make divorce permissible.

First, “a man with observe to condition in this code can refer to court and sue divorce his wife” (Article 1133).

Secondly, According to Articles 1029, 1129 and 1130\(^8\) of the civil code a wife can plea to the court for divorce in certain cases.

Thirdly, the couples can separate from each other on mutual consent under certain conditions (Articles 1145, 1146). This divorce is called Khal’a (giving a compensation to husband) or mubarat (divorce by mutual consent). These two kinds of divorce will be discussed in this chapter.\(^8\)

(1) Divorce by plea of men

**Article 1133 of the Iranian Civil Code**

“A man with observe to condition in this code can refer to court and sue divorce his wife”.

The Family Protection Act has envisaged some limitations for this Article and has stipulated some conditions for the implementation of this Article. In fact legal divorce has replaced the divorce by husband. The Family Protection Act has tried to grant equal status to husband and wife and husband is obligated to divorce his wife whenever he decides only through the court and the permission for divorce will be given only when the arbitrators chosen by the couple fail to reconcile them.

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\(^8\) 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”.

The guarantee for the performance of this issue has been mentioned in the last note of the Article 10 of the Iranian Family Protection Act:

“When the husband without the court verdict divorces his wife, he will be sentenced to six month to one year imprisonment. The same punishment is applied to any notary office staffs who register the divorce.” 87

(2) Divorce by plea of women

Article 1029 of the Civil Code

“If a husband goes on missing or remains absent for four years, his wife can plea for divorce. In this case the judge would perform the divorce on the basis of Article 1023.” 88 It means that,

88 Article 1023 - In cases coming under Articles 1020, 1021 and 1022, the court can only issue the judgment of presumed death of a continuously absent person when a notice has been published for three consecutive times each with an interval of one month from the other in one of the local newspapers and one of highly circulated papers of Tehran inviting the persons who may have news of the man to convey their information to the court and when after the expiry of one year from the date of the first publication of this notice, the fact that the man is alive is not proved.

Article 1020 - The following cases are of those in which a continuously absent person cannot ordinarily be supposed to be alive:

1. When 10 full years have passed from the date of the last news received as to the life of the continuously absent person and at the expiry of the period his age has surpassed 75 (seventy five years old).

2. When a person was included in an armed force under any denomination and disappeared during the war and till three years after the conclusion of peace no news are received from him. If the war is not terminated by the conclusion of a peace agreement, the period in question must be reckoned as five years from the date of conclusion of the war.

3. When a man engaged in a sea voyage was on board of a ship which was wrecked in that voyage and three full years have passed from the date of wreckage of the ship in question and no news is received from him.

Article 1021 - In the case of the last Clause of the above Article if after the expiry of the following periods of time from the date of departure of the ship
after receiving the petition for divorce, a notice should be published in widely circulated newspapers of Tehran for three consecutive months asking the people to inform the court about the missing husband in case they have any information about him. After one year from the date of publication of the first notice, the court can perform the divorce.

Article 1129 of the Iranian Civil Code

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”.

Article 1119 of the Civil Code (power of attorney of women in divorce)

the latter does not arrive at its destination, or if it has not returned to the port of departure in the case where it has set out without determined destination and there is no news of its existence, the ship in question will be considered as destroyed

(a) For voyages in the Caspian Sea and inside the Persian Gulf, one year.
(b) For voyages in the Sea of Oman, the Indian Ocean, the Red Sea, the Mediterranean Sea, the Black Sea and the Sea of Azof, two years.
(c) For voyages in other cases, three years.

Article 1022 - If a person meets the danger of death or disappears in consequence of accidents other than those mentioned in Clause 2 and 3 of Article 1020 or if he has been in an airplane and the latter has disappeared a judgment of his presumed death will only be issued when five years have passed from the date when he met with the danger of death and during that period no news have been received showing that the man was still alive.

Article 1119 of Civil Code states – “The parties to the marriage can stipulate any condition to the marriage which is not incompatible with the nature of the contract of marriage, either as part of the marriage contract or in another binding contract: for example, it can be stipulated that if the husband marries another wife or absents himself during a certain period, or
Since divorce is only contingent upon the will of husband and wife cannot relieve herself except in certain cases, there are some mechanisms in the law to give power of attorney to wife to enjoy divorce.

Since attorneyship is among the permissible contracts, and husband can revoke the power of attorney for divorce given to her wife, the law has envisaged it in the form of conditional contract at the time of matrimonial contract. For instance, it is envisaged that whenever, the husband remarries, or goes on missing for a certain period of time, or abstains from giving alimony, or attempts to kill the wife, or mistreats her to the extent that their living becomes impossible, the wife has the power of attorney\(^90\) to plea to the court on behalf of her husband to get the final court verdict to divorce herself.\(^91\)

(3) Divorce by mutual consent

As above mentioned, the couples can separate from each other on mutual consent under certain conditions (Articles 1146, 1147). This divorce is called Khal’a or mubarat that will be discussed in this chapter.

\(^{90}\) Such an attorney is a person who enjoys power on behalf of her client to do any of the following two practices: a) to appoint another attorney for her client in this case the second attorney is the attorney of the client through another attorney and will not be the attorney of the first attorney. B) To appoint an attorney for himself in this case the second advocate will be the attorney of the first attorney and does not enjoy the power of attorney on behalf of the client, p. 754 (1999).

(j) According to conditions stipulated a separate binding marriage contract

As above mentioned, according to Article 1119 of the Iranian Civil Code “The parties to the marriage can stipulate any condition to the marriage which is not incompatible with the nature of the contract of marriage, either as part of the marriage contract or in another binding contract . . . .”.

By this meant condition that are not common in marriage contracts and could be specific to the couple undertaking the marriage commitment. Such couple can define certain conditions for their marriage. Common conditions in the Persian/Iranian culture could include, for example, living in a specific city, quitting smoking, taking the wife to a Macca trip, etc. if both parties agree to such conditions, and if anyone or more of these agreements are breached, then the regulations against this violation will be as effective as when a binding contract term is broken. For example; some of the stipulate can be include:

- By this a separate binding contract/, the wife conditioned that where the application filing request for divorce is not lodged placed by her, and, at the discretion of the court, the application dose not emanate from is not rooted in her disrespect for conjugal or morals,

- The husband shall (have to) pay the wife half the assets or its equivalent in cash, of all he has obtained throughout his marital life with her.

Spouses signed
Through this separate bond, the husband empowers his wife with the right of substitution to refer to the court of law and obtain the permit and, after selecting the type of divorce, dissolve her marriage.

Causes wherein the wife is eligible to file/apply for divorce as discerned by the court:

- 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 or;
- Where he fails to fulfil her other indisputable rights for the same period (of time) and it will not feasible to force him into doing this.

Spouses signed.

- The husband’s social misconduct or maltreatment of the wife to a point unbearable to her.

Spouses signed.

The husband’s affliction with refractory diseases, which can endanger the wife’s health.

Spouses signed.

- Cases of insanity wherein official dissolution is not religiously feasible/advisable.

Spouses signed.

By this is meant that when a husband is proven to be insane, he will have no volitional power to decide whether he intends to wilfully divorce his wife or not. In other words, a demented person is not in complete
possession of his mental power to decide whether to divorce his wife or not. At such times, the husband is completely incapacitated to make such decisions and the court will take over the responsibility to make a decision as to whether the wife should be divorced or not.

- The husband’s disobedience of the court injunction not to engage in careers discerned by the court to be beneath the wife’s family dignity and social status.

  Spouses signed.

- 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;

- Or a combination of the two together resulting in such a prison term and where the sentence has already been executed.

  Spouses signed.

- 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.

  Spouses signed.

- 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.

                      Spouses signed.

• 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.

                      Spouses signed.

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

                      Spouses signed.

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

                      Spouses signed.

• 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.

                      Spouses signed.

• Where the husband should remarry without seeking consent of the wife or where he should not treat his wives equally.

                      Spouses signed.

Other stipulations/conditions/terms in Iranian marriage contract.
These pages are provided for cases where, in addition to the specified in the marriage contract, the spouses wish to add further conditions of their own. In the present culture, such conditions can include terms of payment of the marriage portion by the husband, the husband’s pledge to establish his marriage life in the city specified by the bride, etc. It is also very customary to ask the groom for a pilgrimage to such sacred places as Mecca, Karbala, Najaf or cities inside Iran like Mashhad and Qom.\(^2\)

(k) Judicial Divorce

Judicial dissolution is a possibility where a woman seeks a divorce but her husband refuses to release her. It involves the judge either compelling the husband to pronounce a divorce or pronouncing it himself, on the husband’s behalf. This grounds recognized in Shi’a law are a husband failure to maintain the wife (Article 1029 of I.C.C.), the husband’s impotence (Article 1122 ), if a husband goes on missing for four years (Article 1029), and the husband can give to his wife attorney for divorce at the time of matrimonial contract (Article 1119).

These grounds have been greatly extended since 1982, including the husband’s taking a second wife without the permission of the first wife.\(^3\) However these apply, as a judicial divorce, in the marriages contracted before 1982. For marriage contracted after 1982, the conditions included as part of the marriage contract and the wife would have to pursue her own rights as a party to the contract. Article 1130 allows a judge to compel a husband to

\(^2\) Masoud Rae'e Sharif; *Translation of Legal Correspondence and Deeds*, pp. 165-171 (2009).

\(^3\) For a list, the family protection Act 1967 and 1975 (will be discuss later in this chapter)
divorce his wife where she has proved that “the continuation of the marriage causes difficult and undesirable conditions”.

Article 1129 specifies that a judge may compel a husband to divorce his wife where he is unable to maintain his wife, or has refused to pay maintenance and cannot be forced to do so.

Article 1156 allows a wife how husband is continuously absent and whose whereabouts are unknown to apply for a judicial divorce. The waiting period in this case is four months and ten days from the time the divorce is granted.

A court may also issue a finding of presumed death, following a procedure of public notification, where a person has been continuously absent for 10 years and the person concerned would be 75 years old or older, or was engaged in hostilities in the Armed Forces and has not appeared three years after the conclusion of peace, or has been presumed lost on board a ship or aircraft under specified circumstances. Such a finding is also relevant to

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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”.

95 Articles 1020 to 1023. (Article 1020 - The following cases are of those in which a continuously absent person cannot ordinarily be supposed to be alive:

1. When 10 full years have passed from the date of the last news received as to the life of the continuously absent person and at the expiry of the period his age has surpassed 75.

2. When a person was included in an armed force under any denomination and disappeared during the war and till three years after the conclusion of peace no news are received from him. If the war is not terminated by the conclusion of a peace agreement, the period in question must be reckoned as five years from the date of conclusion of the war.

3. When a man engaged in a sea voyage was on board of a ship which was wrecked in that voyage and three full years have passed from the date of wreckage of the ship in question and no news is received from him.
inheritance. Where a man has been continuously absent for four years, his wife can apply to the court for a divorce without the case having to meet the more stringent requirements for a declaration of presumed death. The procedure of public notification is the same. A waiting period (iddah) must be required following the judicial divorce, since Article 1030 deals with the possibility that the missing husband returns during this period. From this it follows that the divorce pronounced by the judge is conditional.

(I) Delegated Talaq

The fiqh (jurisprudence) allows the husband to delegate his right of talaq to his wife, by inserting this as a condition in the

Article 1021 - In the case of the last Clause of the above Article if after the expiry of the following periods of time from the date of departure of the ship the latter does not arrive at its destination, or if it has not returned to the port of departure in the case where it has set out without determined destination and there is no news of its existence, the ship in question will be considered as destroyed:

(a) For voyages in the Caspian Sea and inside the Persian Gulf, one year.
(b) For voyages in the Sea of Oman, the Indian Ocean, the Red Sea, the Mediterranean Sea, the Black Sea and the Sea of Azof, two years.
(c) For voyages in other cases, three years.

Article 1022 - If a person meets the danger of death or disappears in consequence of accidents other than those mentioned in Clause 2 and 3 of Article 1020 or if he has been in an airplane and the latter has disappeared a judgment of his presumed death will only be issued when five years have passed from the date when he met with the danger of death and during that period no news have been received showing that the man was still alive.

Article 1023 - In cases coming under Articles 1020, 1021 and 1022, the court can only issue the judgment of presumed death of a continuously absent person when a notice has been published for three consecutive times each with an interval of one month from the other in one of the local newspapers and one of highly circulated papers of Tehran inviting the persons who may have news of the man to convey their information to the court and when after the expiry of one year from the date of the first publication of this notice, the fact that the man is alive is not proved.

96 I.C.C. Article 1029.
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*. 97

**m** The Family Protection Act of 1967

Among the more important pre-revolutionary amendments was the Family Protection Act of 1967, which in effect abolished unilateral divorce (*talaq*). Divorces were decided by the courts that issued permits for the registration of divorce, known as certificates of the impossibility of reconciliation. If the couple had not reached mutual agreement, the court could issue a certificate, with the grounds available to women being the same as those available to men, except that women had additional grounds in the failure of the husband to support his wife, his taking another wife, or failing to treat co-wives equally. The second and subsequent marriages of a man were made conditional on court permission. The latter provision applied also to temporary marriages (see below).

From the point of view of the wife, the changes extended the grounds on which she could petition for a judicial divorce to include:

- her husband's imprisonment for five years or more,
- contracting a disease injurious to family life,
- taking a second wife without her permission,

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97 Article 1119 of I.C.C.
• abandoning family life, or
• being prosecuted for a crime dishonouring the family.

The conditions on which a court could grant a man permission to take a second wife were that he should be financially capable and able to fulfil the rule of impartiality in his treatment of his wives. Rather than enforce such conditions by legislation, the legislation required them to be written into marriage contracts as secondary conditions. The Shari’ah accepted the legality of such conditions as negotiated between the marriage partners or their representatives.

(n) The Family Protection Act of 1975

Many Articles of this Act have been cancelled by subsequent Articles included in the post-revolutionary revision of the Civil Code, but more than half remain valid. The extended grounds of divorce provided in the Family Protection Act of 1967 are incorporated into Article 8 of this Act.

The Special civil courts Act in effect re-instate some of the provisions of the Family Protection Law of 1967. The latter had been annulled following the revolution, leaving the Civil Code and the Shari’ah in effect.

The 1979 Act requires court permission for the registration of a divorce unless it is determined by mutual agreement (Special Civil Courts Act, Article 3/2). The court is required to refer a divorce petition by a husband to arbitration, in accordance with a Qur’anic verse recommending arbitration by two arbiters, one from the husband's family and one from the wife's. In 1982 new marriage contracts were printed, in effect establishing a new legal regime. The contract requires the husband to pay his wife, upon divorce, half of the wealth he has acquired during the marriage, providing
the divorce has not been initiated or caused by any fault of the wife. It delegates the right of divorce to the wife, through the intermediary of the court, where any of the following conditions have occurred:

- The husband fails to support the wife or fulfil other duties for at least six months.
- The husband's maltreatment of the wife to the extent that the continuation of the marriage is intolerable to her.
- The husband has contracted an incurable disease that could endanger her.
- The husband's insanity, where the Shari'ah does not otherwise provide for the annulment of the marriage.
- The husband's failure to comply with a court order to abstain from an occupation which is repugnant to the wife and her position.
- The husband has been sentenced to a prison term of five years or more.
- The husband is addicted to a harmful substance detrimental to family life.
- The husband has deserted family life for six months or more without just cause.
- The husband has been convicted of any offence repugnant to the family and position of the wife, including offences involving had punishments (fixed corporal punishments for some serious crimes) and discretionary punishments.
• The husband’s failure to father a child after five years of marriage. - the husband's disappearance, where it continues for six months after the date of the wife's application to the court.

• The husband has taken another wife without the consent of the first, or has failed to treat his wives equally.

These stipulations are only valid if the husband has initialled each clause, and not all do so.

A 1982 amendment to Article 1130 of the Civil Code enables a judge to issue a divorce where the marriage entails hardship and harm ('asr va haraj) for the wife. In effect this means that a woman married before 1982 can win a judicial divorce if she can establish grounds analogous to those above.98

2.10 Types of divorce

Depending on whether husband during the grace or waiting period can rejoin his wife or not, there are two forms of divorce;

(i) Irrevocable divorce and

(ii) Revocable divorce.

Article 1143 of the Iranian Civil Code states: “There are two forms of divorce, irrevocable divorce and revocable divorce”.99

(i) The Irrevocable divorce is the one according to which the husband is not entitled to reunite with his wife whether the grace or waiting period has been stipulated for this divorce or not.

(ii) The revocable divorce is that according to which the husband is entitled to rejoin his wife during the grace or waiting period.\(^{100}\)

(i) **Irrevocable Divorce (Definitive)**

Article 1144 of Iranian civil code states: "After an irrevocable divorce the husband has not the right to renounce his intention of divorcing".

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

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

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

(iii) *Khula*’ and *Mubarat* divorce ((a) a divorce which a wife achieves by giving a compensation to her husband and (*Khul'a*) and (b) a divorce by mutual consent (*mubarat*), as long as the wife has not demanded the return of the compensation).

(iv) 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.

In jurisprudence divorce of a minor wife too is definitive.\(^{101}\)

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

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

(vi) A divorce in which a wife due to power of attorney gets divorce.102

(a) Divorce before intercourse

In case a husband divorces his wife before intercourse, it is definitive and there is no grace or waiting period103 for it and the wife can marry anybody whom she likes immediately after the divorce. In this case it does not matter whether the woman is virgin or open. In fact the grace or waiting period after divorce is meant to prevent the intermingling of the descendents and when there is no intercourse there is no perception of intermingling of descendents. In case the former husband decides to rejoin and have intercourse with his former wife, he has to remarry her again.

By intercourse it is meant the insertion of the man’s genital organ up to the circumcision mark104 into the vagina or anus of the wife even if there is no ejaculation. In this case a castrated105 husband is just like a healthy husband. The divorce of a wife with whom intercourse has not taken place in this manner but there has been touches, in case of ejaculation it is just like the divorce of a

102 Imami, Supra note Vol. 5, p. 44 (1994).
103 Article 1150 – Iddah (waiting period) consists of a period during which a woman whose matrimonial bond has been dissolved cannot marry.
104 This much of insertion entails legal consequences. There are no differences between the legal and jurisprudential viewpoints in this regard. Supra note, pp. 215-216 (1991).
105 Castration refers to material manipulation of man’s testicles, Article 1122 of the Civil Law, p. 262 (1991).
wife with whom intercourse has taken place, because there is probability of intermingling of the descendants.

Note: As will be mentioned in the subject of grace or waiting period, the observation of the grace or waiting period for women is to preserve the generation and prevent intermingling of the descendents. Hence the following cases of divorce are not similar to the divorce of a woman with whom intercourse has not taken place:

(a) A woman with whom her husband has had intercourse and has revocably divorced her and has reunited but divorced her before intercourse. This case is the divorce of a woman with whom intercourse has taken place and the woman should observe the grace or waiting period, for as soon as reunion in revocable divorce takes place, the marriage is restored to its previous status and is continued. Therefore, the latter divorce is the very revocation of the first marriage and hence a woman is divorced who has already had intercourse.

(b) A woman who has been irrevocably divorced after intercourse and has remarried her husband during the grace or waiting period (this is exclusively possible only in (Khul'a and mubarat, the divorce on mutual consent which will be explained later) as a woman who has been divorced on mutual consent after intercourse and the woman remarries her former husband during the grace or waiting period without possessing the quid pro quo (so long as the woman has not demanded for the return of the compensation amount) but the husband divorces her before intercourse. In this case, the case of

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a woman with whom intercourse has not taken place does not apply to her. Rather she should observe the grace or waiting period for the second marriage, although some of the jurisprudents consider it the before intercourse maintaining that she is not supposed to observe the grace or waiting period.

(c) A woman who has been engaged in temporary marriage but the husband has forgiven the rest of temporary marriage period after intercourse or the duration of marriage has terminated, and her first husband permanently marries her during her grace or waiting period but divorces her before intercourse. In this case, the case of a woman with whom intercourse has not taken place is not applicable, for in the previous temporary marriage, intercourse has taken place and hence the woman must observe the grace or waiting period in order to prevent intermingling of descendents.107

(b) Divorce of a menopause

A menopause is a woman who does not menstruate due to agedness and hence is not capable of having a child. Such a woman is not supposed to observe grace or waiting period and can marry after divorce. A divorce is ba’en (irrevocable) when the wife due to agedness does not undergo menstruation. But if a woman in the young age due to some illness or any other reason does not undergo menstruation, her divorce does not follow this rule: that is, after


divorces she should observe the grace or waiting period, but her husband can remarry her. The age of menopause differs in women. The physician must diagnose whether the stoppage of menstruation is due to agedness or illness; however the age of menopause is fifty. \(^{108}\) It is also said that the age of menopause among the Quraishi\(^{109}\) women is 60, while it is fifty among the non-Quraishi women. \(^{110}\)

(c) **Khul’a and Mubarat Divorce**

(1) **Khul’a Divorce**

According to Article 1146 of the Civil Code, “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”.

Therefore, Khula' divorce is when wife dislikes her husband and presents a property to him as a quid pro quo or compensation for divorcing her. In this case separation is the result of a divorce performed conditional to compensation. This is why; the husband cannot revoke the divorce before the wife returns the amount of compensation to him.

**Essentials in Khul’a**

As it can be realized from the definition of kul’a there are three incidents for making a separation by this method, namely:

i. The offer from the wife (based on her free-will)

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\(^{109}\) Quraishi (also rendered as Qureshi, Quraishi, Koraishi, Kureshy or Kureishi), (Arabic: Quraishi) is a family name that originates from Arabs in Saudi Arabia, particularly from the city of Mecca. (http://en.wikipedia.org)

ii. The consideration (ivaz) which should follow the offer. It can be everything that can be given as dower.

iii. The acceptance by the husband.

Capacity for Khul'a

1. The Husband

He 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. 111

But the husband who is, legally, incapable due to silliness or insolvency can make a khula divorce without permission of his guardian (vali) or not, there is two opinions; (i) It is valid if the amount of consideration is equal to that of dower but void if it is less than that. 112 (ii) It is valid absolutely. 113

It seems that Iranian Civil Code agree with the second view because firstly, the maturity (Rushd) has not been enumerated as a capacity of the husband for making divorce and secondly as stated before, the husband receives the consideration not to lose it therefore the Section 1214 of Iranian Civil Code which legalizes such an action of silly person without permission of the guardian

113 Jawahir ul- Kalam, Supra, Vol. 32, p. 27.
114 Article 1214 Of Iranian Civil Code - Transaction and legal acts performed by a person not of age are not binding except with the permission of his natural guardian or his guardian, whether the permission has already been given or will be given after the transaction is made. Never the less, all kinds of possessory acts against no consideration are binding even without permission.
and Section 1207\textsuperscript{115} which only prohibits, from disposing of his properties and fiscal rights (which \textit{khula} does not belong to these two categories) are applied here.

2. **The Wife**

The wife must have, also, condition which can be classified under two categories:

1. **General Capacity:** which includes those conditions which are essential for making any contract i.e. being adult, sane and having intention and free will.

2. **Particular Capacity:** which includes those conditions which are essential for into the revocable divorce i.e.:

   - She should not be in menstruation; or
   - She is pregnant; or
   - She is divorced before consummation; or
   - The husband is absent and far from the wife.\textsuperscript{116}

3. If she is in purity period (\textit{Thur}), no consummation has been take place during this period unless:

   - She is out of age of menstruations,
   - She is pregnant or,

\textsuperscript{115} Article 1207 - The following persons are considered as under disability and are forbidden to take possession of their property and their pecuniary rights:
1. Minor children.
2. Persons who have not matured.
3. Lunatics.

\textsuperscript{116} 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.
3. **Witnesses in Khul’a**

The khula 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.¹¹⁸

4. **Intention in the Khul’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 valid¹¹⁹ but not under other three Sunni [and Shi’a] schools.¹²⁰

5. **Difference between Kul’a and Divorce**

(a) A divorce is pronounced by the husband at his own initiative. A khula is, however, given at the instance of the wife when she has an unavoidable aversion for her husband.

(b) In divorce the husband becomes liable for the immediate payment of the wife’s dower, but in khul’a it is the wife who makes a payment to the husband in order to induce him to release her from the marriage tie and the consideration may consist of the dower itself.

¹¹⁷ 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.


A divorce can be given only under certain specified conditions. Thus a husband cannot divorce his wife when she is in a state of impurity, that is, when she is having her menstrual course nor in the period of purity in which he has been intimate with her. But a *khul’a* can validly given in such circumstances.  

(2) **Mubarat Divorce**

Divorce on mutual consent (*Mubarat*) is also similar to *Khula* (when wife dislikes her husband and gives and 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.

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

**Deference between Khula and Mobarat**

1. *Khula* is redemption the contract of marriage while Mobarat is a mutual realizes from the marriage tie.

2. In *khula* the offer is made by the wife and its acceptance is made by the husband. In Mobarat any of two spouses may make an offer and the other accept it.

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3. In *khula* ‘consideration’ passes from wife to the husband. In *Mubarat* the question of consideration does not arise.

4. In *khula* the aversion is on the side of the wife while in *Mubarat* there is mutual aversion.

**Legal nature of such divorces**

According to clause 3 of the Article 1145 of the Civil Code: “The Khula’ and mubarat divorces are irrevocable (ba’en) so long as the woman has not demanded for the return of the compensation amount”. Hence in order to know the legal nature of divorces, we must make a distinction between two different stages:

(a) Divorce has been performed, but the wife has not yet received the compensation

(b) As soon as woman receives the compensation, divorce finds its main nature. Therefore, if divorce on the basis of its nature is returnable (revocable), from now on too it is possible to return to matrimonial ties, and the women regain the right to alimony and inheritance. \(^{123}\)

At this stage, divorce is irrevocable and it is not possible to resume matrimonial ties and the wife is not entitled to receive alimony from the husband and in case of the death of husband she does not inherit from him.

(d) **Third divorce**

According to clause 4 of the Article 1145 of the Civil Code the third divorce is: “...A third divorce, performed after three

\(^{123}\) Unless the husband has created some problems in this way such as marriage with the sister-in-law.
consecutive marriages (of the same parties) whether by revocation by the husband or by a new marriage between the two parties”.

(1) Third (triple) Divorce in Shi’a Law

There is no provision in Shi’a Law which approves triple divorce in one session as prevailed in India (Sunni) Muslim. That is to say a Shi’a husband cannot say to his wife that “you are divorced, divorced, divorced or “you are divorce irrevocably”. But divorce in one meeting should not be limited to only, above example.

Divorce is not a plaything and it must be used in last resort and not first of all. If we consider the injunctions of holy Quran and the Tradition of the prophet (peace be upon him) in this regard, we can, rightly find out that the divorce is not a private matter but it is a public one. Hence, they (Quran and Tradition) ordain us, while arising any rift and dispute between the spouses, to appoint arbitrators who are qualified to take final decision; either reconciliation or separation. Because the spouses and their children (if any) are living in a society and the destiny of every member of the society has an effect in it since society is nothing than congregation of individuals. So in case of Talaq (triple divorce) and separation between a couple, which may also bring about the separation between children, not only those individuals, involved in, suffer by effects of divorce but also the community, in which they are living and functioning, will be effected by the same.

124 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).
Triple divorce in one breath is not and it looks very abnormal and odd. If we believe that, it is a bidat (innovation) and neither according to Quranic mandates nor Tradition of Prophet (peace be upon him) and if we believe that it brings unbearable hardship for the wife and husband, then this is the task of Muslim jurists (Ulema) legislature and judiciary respectively, to try check or repeal it in order to regulate the issue according to first two primary sources of Mohammed Law (Quran and Sunnat).

(2) Triple Divorce at the time of the Prophet and the First Caliph

Ibn Abbas has reported that the pronouncement of three divorces at one and the same time was treated as one divorce during 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.125

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

1. 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.126

Ibn Abidin al-Shami; Radd al- Muhtar, Cairo, (1318 A. H.), p. 430.
126
2. It is stated in Radd al-Muhtar that it is now settled law that a triple pronouncement of divorce shall amount to Mughallazah or final divorce as supported by the following reasons:\(^{127}\):

(a) At the time when ‘Umar’ modified the law, there were living a very large number of the companions of the Prophet (peace be upon him) but they did not object it this modification. We can, therefore, presume that there might have been a Tradition known to them but it has not reached us on the basis of which the modification must have been made.

(b) In any case the companions accepted the modified law and so the modified law becomes binding on the basis of Ijma.

(c) The fact the modification was accepted by the successors of the Companions and the early jurists also give the modification the force of law by the principle of Ijma.\(^{128}\)

As regards the first two grounds, Mr. K.N. Ahmad author of ‘Muslim Law of Divorce ‘right,says” It may be explained that the very words of Caliph ‘Umar’ show that he was introducing a change in the law to meet the exigencies of his time. The third ground is quite correct, but I also established the fact that we can change the law if it is not suitable for a particular period of time. This is exactly what has been done by many Muslim countries. Thus, in Pakistan, under Section 7 of the Muslim Family Laws ordinance,


1961, a divorce by triple pronouncement is no longer considered Mughallazah or final and it is open to the spouses to continue the marriage if reconciliation is brought about between them within the prescribed period. The law was amended even earlier in Egypt, Sudan, Syria, Morocco and Tunisia. 129

(3) Procedure of Triple Divorce in Iranian Laws

The procedure of triple divorce in Iranian laws is:

(a) There must be three successive pronouncement of the formula of divorce.

(b) 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.

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

(d) 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 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. 130

So, under Shi’a law irrevocable divorce (triple divorce/ Bain) may take place by three pronouncements of formula of divorce.

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129 K.N. Ahmad, Supra note at 88.
130 Javaher-ul-kalam, Vol 32, pp. 128,158.
during three Tuhr, two of which are revocable and one pronouncement in third time, it becomes irrevocable. It means they cannot remarry each other unless procedure of "Halalah" or "Mohalleh" would have been exercised.

Article 1057 of Iranian Civil Code states:

"A woman who has been the wife of a man for three consecutive times and has been divorced each time will become unlawful as wife to that man unless she is married by permanent marriage to another man and, after matrimonial relations with that man, separation occurs between them by divorce or cancellation of the marriage or death".

The above Article has two parts: One impermissibility of remarriage of a man with the same woman whom he has divorced three times. Permission for remarriage with the same wife who has been divorced three times after she marries another man and then is divorced.  

Unlike in India, triple divorce in approved form, is applied in Iran very rarely.

(4) Doctrine of Halalah or Mohalleh

In order to prevent a nervous men who divorce his wife without any reason, (because in the Islam religion, Muslim man must not divorce his wife out of whim and caprice without an acceptable reason). So, where the husband divorces his wife for third time whether in approved or disapproved from he cannot remarry her again unless there be an interval marriage. That is the wife should marry with another man who is not minor and the marriage must be consummated and intercourse must take place. If

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the second husband afterwards, divorces the wife, she can remarry with the first husband after leading the Iddat or waiting period.

(5) Triple divorce in Holy Quran

"The divorce is twice, after that either you retain her on reasonable terms or release her with kindness. And it is not lawful for you (men) to take back (from your wives) any of what you gave them (the Mahr, bridal-money given by the husband to his wife at the time of marriage), except when both parties fear that they would be unable to keep the limits ordained by Allah (eg., to deal with each other on a fair basis). Then if you fear that they would not be able to keep the limits ordained by Allah, then there is no sin on either of them if she gives back (the Mahr or a part of it). These are the limits ordained by Allah, so do not transgress them. And whoever transgresses the limits ordained by Allah, then such are the wrongdoers. ). And if he has divorced her (the third time), then she is not lawful unto him thereafter until she has married another husband. Then, if the other husband divorces her, it is no sin on both of them that they reunite, provided they feel that they can keep the limits ordained by Allah. These are the limits of Allah, which He makes plain for the people who have knowledge).  

This honourable Ayah abrogated the previous practice in the beginning of Islam, when the man had the right to take back his divorced wife even if he had divorced her a hundred times, as long as she was still in her Iddah (waiting period). This situation was harmful for the wife, and this is why Allah made the divorce thrice, where the husband is allowed to take back his wife after the first divorce.

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and the second divorce (as long as she is still in her ‘Iddah). The divorce becomes irrevocable after the third divorce.\(^{133}\)

\[\text{“The divorce is twice, after that, either you retain her on reasonable terms or release her with kindness”}\(^{134}\)

(e) Forcing the husband to divorce

When a man is forced to divorce his wife in the said four cases according to Articles 1129\(^{135}\) and 1130\(^{136}\) of the civil law, this divorce is irrevocable and the husband cannot remarry his wife during the grace or waiting period, although the nature of the said divorce is returnable (rej’i) (that is, the first or second divorce of a woman who has had intercourse), because when the law due to one of the specified reasons allows the woman to lodge a complaint with the court pleading the court to force her husband to divorce her, it means that matrimonial relationship is already disturbed and its continuation creates hardship for her. Hence it is not rational to allow the husband to return to the previous matrimonial condition after a woman who on the basis of legal permission has pleaded the court for divorce and the court has gone through legal procedures and has forced the husband to divorce her, otherwise it abrogates the permission given to women to appeal to the court to force their

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\(^{133}\) Tafsir Ibn Kathir, Vol. 1.

\(^{134}\) Holy Quran. 2: 229.

\(^{135}\) Holy Quran. 2: 229.


Article 1129 of the Civil Law: “If the husband refuses to pay the cost of maintenance of his wife, 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. The same stipulation will be binding in a case where the husband is unable to provide for the maintenance of the wife”.

\(^{141}\)
husband to divorce them and hence it will be closer to mockery than to legislation.  

(f) Divorce of a woman by herself on the basis of power of attorney

A woman can get a power of attorney from her husband during the wedding contract to divorcer herself whenever she deems it necessary. Although this kind of divorce is essentially arec droit derevocative, it is 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 cannot renounce his decision for divorce during the waiting period.  

Second Type of Divorce

(ii) Revocable Divorce

This divorce in jurisprudential term is a divorce in which the divorcing husband has the right to renounce and reunite with his wife, whether he reunites or not. In fact this kind of divorce is the one in which the husband can is entitled to stay with his wife during the waiting period without remarriage.  

Revocable divorce in legal term is divorce that given man has ability refer woman, whether revert or doesn’t revert. In fact,

137 Article 1130 of the Civil Law: “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”.


revocable divorce, in jurisprudence and civil low 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:

(a) 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.

(b) 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. So, if divorce needs to waiting period, but because of special nature of it, there isn't possible of revert such as third divorce and *kul'a* divorce mustn't count revocable divorce.

According to Article 1148 of Civil Code; “in revocable divorce for husband in waiting period is reversion right (revocation of divorce)” hereby, revocation of divorce is in class of unilateral legal act and occur only by husband's will. Herby, in definition of revocable divorce can say: “it is divorce that after the woman must keep waiting period (*Iddah*) and in this time many possible revocation of divorce.141

Revocable divorce resembles of sakes several with separation which called a physical separation in France laws.142

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(a) **Affects and Consequence of Revocable and Irrevocable divorce**

The woman who divorce in irrevocable divorce, same moment wedlock confederacy divorce occurrence become cut between she and husband and resutly, 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 cat 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.\(^{143}\)

(a) Establish heredity (inheritance) alimony between them.\(^{144}\)

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\(^{143}\) In waiting period (*Iddah*), revocable divorced woman merits alimony. Article 1109, civil rule: - “Cost of maintenance of a divorced wife during the period of “*Iddah*” is to be borne by the husband, unless the divorce has taken place because of disobedience. But if the *Iddah* arises from the cancellation of the marriage or a final divorce, the wife is not entitled to cost of maintenance, unless she is with child from her husband in which case she be entitled to cost of maintenance till her child is born”.

\(^{144}\)
(b) The man cannot marry to sister of her in waiting period time.  

(c) In out of home, must left from 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.

In news and stories came too that revocable divorced woman can attires in waiting period and self proffer in husband.

(b) **Condition/Circumstances of Revocable of Divorce**

Revocable of divorce is a unilateral legal act and defined such: “returning divorced woman who is in waiting period to former matrimony”. Sometimes, reversion is ‘verbal’ and ‘very (act)’. Verbal reversion instead of say I reversed you or I like live you or every other sentence that be explanatory tendency to life’s

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144 If everyone of the couples die in revocable force time, other heirs of him, her, according to Article 943 of civil law “If husband divorces his wife to revocable divorce, every person of them die before lapse of force then other however if death one of them was after force or here to divorce, then they will not be heir each other”.

145 Husband can’t marriage to his divorced sister in law while doesn’t lose revocable waiting period.

146 Holy Quran, divorces sureh, Ayeh1.

continuance. Very (act) reversion consists doing every kind action prohibits with woman for non husband.148

Article 1149, Civil Law: “Return to the wife after divorce can be effected by any word or deed which may convey the idea, provided that it is based on an intention to do so”.149

If husband be mute, he can refer referral (Return to the wife). Therefore anyone of his actions cannot be referring without he has in intention of the reversion. For this reason, forget, negligent, sleep verb and intoxicated is null and don't count as reversion (revocation of divorce). Action typically refers to the reversion such as kiss or intercourse and examples of it is pathfinder of the reversion's intention, unless prove against it.150

(c) Wife’s period of Waiting (Iddah)

Article 1150 of Iranian Civil Code: “Iddah consists of a period during which a woman whose matrimonial bond has been dissolved cannot marry”.

Article 1151: “The period of Iddah for a divorce or for the dissolution of a marriage consists of three consecutive monthly periods of a woman unless the woman concerned though of child bearing age has no monthly period, in which case the period of Iddah will be three months”.

Article 1152: “The period of Iddah for divorce or dissolution of marriage or waiver of the remaining period or its expiry in the case of temporary marriage for a non - pregnant woman is the

148 Supra note at 447.
150 Sayed Hasan Emami, Civil Rights, p. 68.
expiry of two monthly periods unless contrary to the nature of her age, she no such periods, in which case the period will be 45 days”.

Article 1153: “The period of Iddah for divorce or dissolution of marriage act or waiver or expiry of the period of marriage in the case of a woman who is pregnant will be until she given birth to a child”.

Article 1154: “The period of Iddah in the case of death (of husband) in both permanent and temporary marriages will be four months and ten days, unless the wife is pregnant when the Iddah comes to an end with the birth of the child provided that the interval between the death of the husband and the birth of the child is longer than four months and 10 days: if not, the period of Iddah will be the same four months and 10 days”.

Article 1155: “There is no Iddah in the case of a wife who has not had any matrimonial intercourse with her husband, or in the case of a wife beyond the age of conception who is not affected by any Iddah for divorce or for dissolution of marriage. But the Iddah for death must be observed in both cases”.

Article 1156: “The wife of a continuously absent husband, whose whereabouts are unknown, if divorced by a judge, must observe Iddah for death, starting from the date on which the divorce was granted”.

Article 1157: “A woman who has had matrimonial relations by way of mistake with someone must observe the Iddah laid down in cases of divorce”.

(iii) Indirect Divorce

Indirect divorce can be divided into three parts as follow:

(a) Ila
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*.

*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.\(^{151}\)

In Muslim Laws *ila* implies a husband’s swearing by God or Marking a declaration to abstain from sexual intercourse with his wife for a period of four months or a longer period or that he shall undergo some specified hardship by way of penalty if he is intimate with the wife within the specified period of time or make some specified expiation that shall involve some hardship to him.\(^{153}\)

(1) **Religious Authority**

The Muslim Law of *Ila* is founded on the following verses of Quran “those who swear that they will not go in to their wives should wait four months. Then if they go back, Allah is surely

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\(^{152}\) 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).)

Forgiving, Merciful and if they resolve on a divorce, Allah is surely Hearing, Knowing”. 154

(2) 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”. 155

(3) ‘Ila’ in ‘Shi’a Law

Whatever will be mention on this issue under Sunni law are also applicable in Shi’a law. There are, only some following differences:

(a) The husband in addition of being adult and sane must be acting under his free will and pronounce the vow with an intention to exercise Ila. 156

(b) The wife must be permanent wife not temporary (Muta) and she must be cohabited by husband. 157

(c) Ila may be established only by swearing to God (Allah) nothing else. 158

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157 Supra note, (Of course this clause should be considered as a condition of making Ila under Shi’a law and not as a difference between Shi’a and Sunni law, only recognize permanent marriage).
158 Supra note at 334.
(d) The period of abstinence must be absolute and either for an indefinite period or for a period exceeding four months and it cannot be made just for four months (but it is enough to Hanafi school).  

(e) After finishing of Ila, the wife has to refer to judge for dissolution of marriage. In order words unlike the Hanafi’s opinion the marriage is not automatically divorced.

(f) Divorce ensuing by Ila is revocable (Rajia) unless the husband gives a irrevocable (Ba’in) divorce.

(g) 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.

(4) ‘Ila’ 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

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159 Supra note at 106.
161 Supra note at 111.
162 I will be discussing later in chapter III.
he is Mojtahid, will take decision according to his mind but if he is not a Mojtahid 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.

Compulsion or intoxication in ‘Ila’

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

(b) Zihar

The word zihar is derived from the word “Zuhur” which means 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.

The institution of Zihar is a Survival from pre-Islamic days, half of the civilized Arabs used to their wives of sexual enjoyment and to lay them down to a miserable life in a number of ways. This practice seems to have been quite prevalent by as the repudiation of the wife by using such words. This practice after the advent of great world reformer [Prophet Peace be upon him) was disapproved.

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163 Mojtahid is a person capable of exercising juristic reasoning, i.e., capable of discovering Islamic Law from its sources.

164 Under constitution of Iran, Leader must be a Mojtahid in Mohammadan Law. Ijtihad (educational degree of a Mojtahid), after Islamic Revolution of Iran 1979, has been recognized as equivalent to prof. degree.


However, it is maintained in a reformed shape on the authority of Holy Quran.¹⁶⁷

*Zihar* 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.¹⁶⁸

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.¹⁶⁹

(1)  

*’Zihar’ In the Holy Quran*

The institution of *Zihar* is based on the injunction of the Holy Quran:

“God has not placed two hearts in any man’s body, nor has He made your wives-from whom you keep away by saying, Be as my mother’s back’-your [real] mother, neither He has made your adopted sons as your own sons. These are merely words which you utter with your mouths: but God speaks the truth and gives guidance to the right path”.¹⁷⁰

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¹⁶⁹ K. N. Ahmad, *Supra* at 116.

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(2) **Penalty of ‘Zihar’ in Holy Quran**

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. 171

(3) **‘Zihar’ in Iranian law**

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

(c) **‘Lian’**

Lian literally means too curse each other. Lian and Molaenah are synonymous. We know that in Arabic language every verb in category of “Molaenah” implies an action between two parties. For

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instance “Mosahabat” means two persons talk to each other or “Mokatabat” means two persons write letters to two each other (correspondence). Lian, legally, means cursing of wife by the husband and vice versa with special procedure by which the wife can get rid of punishment for adultery and the husband also of punishment of slander. 172

(1) Religious Sanction

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”. 173

‘Lian’ in Iranian Law

Regarding lian we can only find one Section in Iranian Civil Code. In part of Marriage of the Code while enumeration the impediments of Marriage (Nikah) Section 1052 of the said Code briefly says: “Separation due to procedure of Lian cannot under any circumstances, remarry each other again”.

As stated before, in case of ‘Illa’ 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).\textsuperscript{174}

(2) Procedure of Lian

The procedure of Lian is in the holy Quran. Then a man charges his wife with adultery, he may be called upon, on the application of the wife, either to retract the charge or to confirm it (four times) oath (I call God to witness to the truth of my testimony concerning the adultery with which I charge this woman) coupled with an imprecation in these terms: “The curse of God be upon me if I was a liar when I cast at her the charge of adultery” The wife must then be called upon either to admit the truth of the imputation or to deny it by oath (four times) saying that, “I call Allah to be witness that my husband’s words respecting this adultery with which he charges me are altogether false”, coupled with an imprecation in these terms”. The wrath of God be upon me if he be a true speaker in the charge of adultery which he has cast upon me”.\textsuperscript{175}

If she takes oath, the Qazi, must believe her and pronounce a separation between the parties.\textsuperscript{176} On refusal or failure of husband to divorce the wife otherwise by lian the marriage is not dissolved ipso

\textsuperscript{174} Article 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.


\textsuperscript{176}
Here, we can find a difference between *Lian* and the two mentioned earlier *Ila* and *Zihar* i.e. in case of lian the judge can pronounce divorce on failure of refusal of husband to do so where as in case of the two (*Ila* and *Zihar*) only divorce could ultimately be pronounced by the husband.

**Ingredients of Lian**

1. **Imputation of adultery (Zina)** to the wife who must chaste and consummated. Then the wife in order to be imputed of adultery by the husband should have following conditions:

   (a) She must be a valid wife of the husband i.e. their marry must be valid not void (irregular marriage has not been recognized in Shi’a Law)

   (b) She must have chaste background among people.

   (c) She must be consummated by the husband.

   Then if husband claim that his wife has committed adultery [either from front side (*qobol*) or bachside(*dobor*)] and he has, only seen this hateful action and there is no any witness, in such a there is two ways in front of the husband either to resort to lian or to accept of punishment which has be determined for slanderer, known as *Hadd -e- Qazf*.  

2. **Denial of the child’s paternity:** If the husband denies the paternity of the child who is legally to the husband, his denial will amount to lian too if there is no witness to prove his claim against the wife.

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178 ‘Hadd-e-Qazf’ is to flog the slanderer for eighty times.
It should be noted that the child must have been born or be born within limited period in this regard.\textsuperscript{179}  

\textsuperscript{179} Minimum Six and Maximum 10 lunar months.