CHAPTER 3
DISSOLUTION OF MARRIAGE UNDER INDIAN MUSLIM LAW

3.1 Introduction

(i) Background of Pre-Islamic Divorce

As mentioned, among the pre-Islamic Arab, the power of divorce possessed by the husband was unlimited. They could divorce their wives at any time, for any reason or without any reason. They could also revoke their divorce, and divorce again as many times as they preferred. They could, moreover, if they were so inclined, swear that they would have no intercourse with their wives, of adultery, dismiss them, and leave them with such notoriety as would deter other suitors; while they themselves would go exempt from any formal responsibility of maintenance or legal punishment.¹

In pre-Islamic Arabia, the Arab who was having number of his wives, he was like—wise absolutely free to release himself from the marital tie. His power in this connection was absolute and he was required or expected to assign any reason for the it’s exercise, nor was he under the necessity or observing any particular procedure, The word Talaq commonly used for this purpose. It depended upon this dissolution whether he would dissolve the marriage absolutely and thus set the woman free to many again or not. He might if he so chose, revoke the divorce and resume marital connection. Sometimes an Arab would pronounce Talaq ten times

and take his wife and again divorce her and then take her back and so on. The wife in such a predicament was entirely at the mercy of the husband would renounce his wife by means of what was called a suspensory divorce. This procedure did not dissolve the marriage but if only enable the husband to refuse to live with his wife; the later was not at liberty to marry again.

Another form of divorce in use among the Arab was Ila, the husband swearing that he would have nothing to do with his wife. According to some, such an oath had the effect of causing an instant separation, but others say that it was regarded as a suspensory divorce. Sometimes when Arab wanted to divorce his wife he would say that she was like the back of his mother. This would have the effect of an irrevocable divorce and was as zihar from back.²

The wife among the Arab had no corresponding right to release herself from the bond of marriage. But her parents by a friendly arrangement with the husband could obtain a separation by returning the dower, if it had been paid or by agreeing to forego it if not paid. Such an arrangement was called Khula and by it the marriage tie would be absolutely dissolved.³

According to Abdur Rahim, at least four various types of dissolution of marriage were known in pre-Islamic Arabia. These were Talak [Talaq], Ila, Zihar and Khula. A woman if absolutely separated through any of these four modes was probably free to remarry, but she could not do so until sometime, called the period of Iddat, had passed. It was to ascertain the legitimacy of the child. But it was not a strict rule. Sometimes, pregnant wife was divorced and was married to another person under an agreement. It is

³ Supra note.
interesting to note that the period of *iddat* in case of death of husband them was one year.  

(ii) **Divorce After the advent of Islam**

The Prophet of Islam looked on these customs of divorce with extreme disapproval of society. It was impossible, however, under the existing conditions of society to abolish the custom entirely. The Prophet had to mould the mind of an uncultured and semi-barbarous community to a higher development. Accordingly, he allowed the exercise of the power of divorce to husbands under certain conditions. He permitted to divorced parties three distinct and separate periods within which they might try to reconcile their differences; and should all attempts at reconciliation prove unsuccessful, then the third the final separation become effective.\(^5\)

The reforms of Prophet Muhammad (peace be upon him) marked a new departure in the history of Eastern legislation. He restrained the unlimited power of divorce by the husband and gave to the woman the right of obtaining the separation on reasonable grounds. He pronounced “*Talak* to be the most detestable before God of all permitted things” for it prevented conjugal happiness and interfered with the proper bringing up of children. *Ameer Ali* asserts:

“The permission (of divorce), therefore, in the Koran though it gave a certain countenance to the old customs, has to be read in the light of the lawgiver’s own enunciations. When it is borne in mind how intimately law and religion are connected in the Islamic

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system, it will be easy to understand the bearing of his words on the institution of divorce".  

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

*Fyzee* says that it is sometimes suggested that the greatest defect of the Islamic is the absolute power given to the husband to divorce his wife without cause. Dower to some extent restricts the use of this power. But experience shows that greater suffering is engendered by the husband’s withholding divorce than by his irresponsible exercise of the right.

**(iii) Divorce in Islam**

Islam recognises the necessity for divorce in cases when marital relations have been poisoned to a degree, which makes a peaceful home life impossible. But Islam does not believe in unlimited opportunities for divorce on frivolous and unimportant grounds, because any undue increase in the facilities of divorce would destroy the stability of family life. Therefore, while allowing

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6 *Supra* note at 244.
7 *Supra* note at 245-46.
divorce on genuine grounds, Islam has taken great care to introduce checks and balance designed to limit the use of available facilities. The permission has been given both to man and woman to obtain a release from the bond of marriage in cases of absolute necessity, the Prophet (peace be upon him) has made it clear that Islam does not regard it as desirable.  

The institution of divorce in Islam is a means of dissolving the contract of marriage in abnormal circumstances when finds it impossible to live together in matrimonial bond. Thus, divorce is not a passing whim but the result of a settled determination over a length of time. Though the institution of divorce has been kept as a sort of reservation in abnormal circumstances, yet the sharah condemns its free use in the most emphatic terms.  

*Ibn Umar* reported that the Holy Prophet (peace be upon him) said:  

"The most detested act out of the lawful acts in the sight of Allah is divorce".  

The French legists *Plan[io]l* and *Ri[pert]* have explicitly emphasized Islam's point of view in regard to divorce in these words:  

"Divorce is a mischief. However, it is a measure that cannot be avoided for harm, which may be more dangerous. The prohibition of divorce, whatever harm it may imply, is like the prohibition of surgery, because the surgeon is compelled to amputate some of the limbs of the patient's body. However, there is no danger, whatsoever, in legislating for divorce (in accordance

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with the practice established by Islam) since it is not divorce that spoils marriage life and dissolves its sacred tie, but the misunderstanding that arises between the married couple and hinder the strengthening of this (union by marriage) and demolishes it. Divorce alone puts an end to the hatred that may occur between the husband and his wife before it is aggravated and becomes an intolerable mischief to society”.12

Islam has granted all the basic rights to women which are still denied to them in some western societies. These rights include the choice of life partners, profession and ownership of property. In Islamic countries the issue was already settled as Islam granted equal rights to women which they did not enjoy before the advent of Islam. But unfortunately these rights have been denied to the Muslim women of later ages and there is great need of legislation to restore these rights to them.13

The spread of education in the modern age has again made Muslim women conscious of their rights. In almost all the Islamic countries they have started movements for the restoration of their rights as provided is the teaching of Islam. Almost all the Muslim countries have guaranteed the principle of equal rights for men and women in their Constitution.14

(iv) Modes of Dissolution of Marriage

Among the books on Muslim Law, including that of Baillie, Wilson, Tyabji, Ameer Ali, Mula and Sakena, the best classification of divorce has been given by Fyze. His method of classification is more scientific and easy to grasp, and hence, it has been adopted

14 *Supra* note at 116.
here with little additions. The discussion which follows in the sequence, however, is not confined to Fyzee alone.

3.2 Classification of Dissolution of Marriage

(a) By the Death of Husband or Wife

(b) By the Act of Parties

1. By the husband

(i) Talak

(a) Talak-us-Sunat
Ahsan (most approved)
Hasan (approved)

(b) Talak-ul-Biddat
Triple Divorce
One Irrevocable divorce (single)
Generally in writing.

(ii) Ila (Vow of continence).

(iii) Zihar (Injurious comparison).

2. By the wife

Talak-e-Tafwid (delegated divorce).

3. By mutual consent

(i) Khula (redemption)

(ii) Mubarat (mutual freeing)

4. By Judicial Process

(i) Lian (mutual imprecation)

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(ii) Faskh (judicial annulment)\textsuperscript{15}

(i) By the Death of Husband or Wife

Death of the husband or wife during subsistence of marriage, dissolve the marriage immediately under all the personal law system. The very fact of the death of any party to the marriage is sufficient to terminate the marriage. There is no need of any formality or decree of the court to dissolve the marriage. Where a marriage terminates by act of the parties, the dissolution is called divorce. Under Muslim law the divorce may take place by the act of parties themselves or through a decree of the court of law. However, in whatever manner a divorce is affected, it has not been regarded as a rule of life. In Islam, divorce is considered as an exception to the status of marriage. The Prophet declared that among the things which have been permitted by law, divorce is the worst.\textsuperscript{16} Divorce being an evil, it must be avoided as far as possible. But sometimes this evil becomes a necessity. When it is impossible for the parties to carry on their union with mutual love and affection, it is better to allow them to be separated instead of compelling them to live together in an atmosphere of hatred and sufferings. The basis of the Islamic law of divorce is the inability of the spouses to live together tether than any specific cause (or guilt of a party) on account of which the parties cannot live together. It is to be noted that with this idea behind a divorce, Muslim law recognizes several modes of divorce.\textsuperscript{17}

\textsuperscript{15} Syed Khalid Rashid, \textit{Muslim Law, Supra} at 105-06.
(ii) **By the Act of Parties**

A divorce (or dissolution of marriage by act of parties) may be either by act of husband or by act of the wife. A husband may divorce his wife by repudiation the marriage without giving any reason. Pronouncement of such words which signify his intention to disown the wife is sufficient. Generally this is done by *Talaq*. But he may divorce the wife also by *Ila* and *Zihar* which differ from a *Talaq* only in form not in substance. A wife cannot divorce her husband of her own accord. She can divorce the husband only where husband has delegated such right to her or under an agreement. Under an agreement a wife may divorce the husband either by *Khula* or *Mubarat*. Before 1939 a Muslim wife had no right to seek divorce except on the ground of false charge of adultery by the husband (*Lian*), insanity or impotency of husband. But the Dissolution of Muslim Marriage Act, 1939, now lays down several other grounds (including *Lian*) on the basis of any one of which a Muslim wife may get her marriage dissolved by an order of the court. 18

### 3.3 Divorce by the Husband

(i) *Talaq*

(ii) *Ila*

(iii) *Zihar*

### 3.4 Talaq

*Talaq* is an Arabic word and its literal meaning is 'to release'. Under Muslim law, *Talaq* means repudiation of marriage by the husband. As a mode of divorce, *Talaq* is peculiar because a Muslim husband has an unrestricted right to divorce his wife without giving

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18 *Supra* note at 81-82.
any reason. Muslim law does not require the existence of any fault or matrimonial offence as an excuse for *Talaq*. The Muslim concept of divorce is that where it is impossible for the spouses to live together, they must separate peacefully. The law gives to the husband an absolute authority to terminate the marriage by pronouncing *Talaq* because in a society dominated by males, the conjugal happiness primarily depends upon the efforts of the husbands. Whenever a husband finds that the marriage cannot be continued happily (either because of the misconduct of the wife or because of his own fault) he is empowered to dissolve the marriage. But this absolute authority of pronouncing *Talaq* should not be misused by the husband. In Islam “*Talaq* is permitted be impious”.19 The Islamic policy has never been to confer an absolute authority of *Talaq* upon a husband to be misused by him. But unfortunately, the unrestricted right to *Talaq* has been misunderstood and Islamic guidelines for it has been ignored by the society and the courts of law. The result is that there is no legal control over the unfettered right of Muslim husband to dissolve the marriage by uttering few words. However, an indirect check upon this right is the obligation of a husband to pay the dower upon the dissolution of marriage.20

(i) **Conditions for a Valid Talaq**

There are various modes of pronouncing *Talaq*. But, in every form of *Talaq* the following essential elements must be present:

(a) **Capacity**

Every Muslim husband of sound mind, who has attained the age of puberty, is competent to pronounce *Talaq*. It is not necessary for him to give any reason for his pronouncement. If a husband has

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attained the age of puberty and possesses a sound mind, he can pronounce Talaq against his wife whenever he likes. This absolute right is given to him by Muslim law itself and does not depend on any condition or cause.

A husband who is minor or is of unsound mind cannot pronounce Talaq. Talaq by minor or insane husband is void and ineffective. However, if the husband is lunatic the Talaq pronounced by him during ‘lucid interval’ is valid. The guardian cannot pronounce Talaq on behalf of a minor husband. Although a guardian has right to contract minor’s marriage, but he has no such right in respect of Talaq on behalf of such insane husband if such Talaq is in the interest of the husband. When insane husband has no guardian, the Kazi or a Judge has right to dissolve the marriage in the interest of such husband.

Regarding the capacity of the wife against whom divorce is pronounced. Ameer Ali observes:

“. . . When she is of such tender age (minor) as to be unable to comprehend the legal consequences flowing from the act of repudiation, or does not possess discretion, a valid Talaq cannot be effected against her”.

In view of the opinion of this learned jurist, it may be said that a Talaq pronounced against a minor wife is void and ineffective. Similarly, as the wife’s knowledge of the proceeding of Talaq is necessary, it may be stated that Talaq pronounces against an insane wife of unsound mind is also void and ineffective.

21 Supra note at 83.
22 Ibid.
(b) Free Consent

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

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

(i) the compeller must be in a position to do what he threatens to;

(ii) three is a strong possibility of threat being carried out; and

(iii) the threat involves some imminent and serious danger to the man.

The Shi’a law does not recognize a divorce pronounce under compulsion, not obtained by fraud, or given under influence under compulsion or threat. Among the Hanafi there is some controversy whether a divorce pronounce under intoxication is valid. In India, it seems to be the established view that talak pronounced under voluntary intoxication is valid.24

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24 Paras Diwan, Muslim Law in Modern India, p. 90 (2008).
Involuntary Intoxication

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

Shia Law

Under the _Shia_ law (and also under other schools of the Sunnis) a _Talaq_ pronounced under compulsion, coercion, undue influence, fraud or voluntary intoxication is void and ineffective).

Supreme Court on Triple Talaq under Intoxication

Recently (on 21st April, 2006) the Supreme Court held that where the husband pronounced a ‘triple _talaq_’ in the condition of intoxication and thereafter realizing his mistake agreed to live with wife and children; then, the religious-head (Maulvee) of the community has no right to issue a Fatwa (religious-order) for separating the couple; and issue a Fatwa (religious-order) to excommunicate the couple. In the year 2004, _Najma Bibi_’s husband pronounced ‘_talaq_’ thrice in the condition of intoxication. But, realizing his mistake the husband agreed to live with _Najma_ together with his three children. However, the _Maulvees_ (head of the community) of _Bhadrak_ (of Orissa) have issued a Fatwa (religious-order) that the couple cannot live together without observing the ritual of _Halala_ (procedure laid down under Muslim personal law for the re-marriage of a divorced wife). _Najma Bibi_ refused to observe the _Halala_. Accordingly, the couple was forced to live separately. 

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26 Supra note at 84.
A bench comprising Justice Ruma Pal, Justice C. K. Thakur and Justice Markandey Katju ordered the Orissa Government to provide ‘police protection as may be required by the couple’ so that they may peacefully live with their children. The Apex Court “strongly criticized the Mufti driven (i.e. religious order issued by Maulvees) action” and observed that “in a secular country like India, communities should behave properly”.27

(c) Formalities

No school of the Sunnis prescribes any formalities for talak/talaq. On the other hand, the Shias insist that divorce must be pronounced orally and in the presence of two competent witnesses. The specific formula of divorce must be pronounced.28

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

No specific formula or use of any particular word is required to constitute a valid Talaq. Any expression which clearly indicates the husband’s desire to break the marriage is sufficient to dissolve the marriage through Talaq.

A Talaq whether oral or in writing, need not be made in presence of the witnesses. Under Sunni law, Talaq without witnesses is valid. 29

Shia Law

According to Shia law, the Talaq must be pronounced orally, except where the husband is unable to speak. If the husband the

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29 R.K. Sinha, Supra note at 83.
capacity to utter the words but gives it in writing, the *Talaq* is void and ineffective under *Shia* law.

*Shia* law provides that *Talaq* must be pronounced in the presence of two competent witnesses. Every male Muslim of sound mind, who has attained the age of puberty, is competent to act as witness. However, in place of one male, two adult female Muslims of sound mind may be substituted to act as witnesses. A *Talaq* without witnesses or in presence of incompetent witnesses is void under *Shia* law.

*Shia* law requires the use of specific Arabic words in the specific formulae in the pronouncement of *Talaq*.30

(d) **Express Words**

The words of *Talaq* must clearly indicate the husband’s intention to dissolve the marriage. Therefore, the pronouncement must be express. If *Talaq* is in express terms, proof regarding the husband’s motive or intention is not necessary. Where the husband clearly uses the word *Talaq* he cannot say that he did not mean divorce. But, if the pronouncement is not express and is ambiguous and confusing then it is necessary to prove that husband actually intends to dissolve the marriage. For example, where a husband addresses his wife as “You are my cousin, the daughter of my uncle, If you go” or, “I give up all relations and would have no connection of any sort”,31 it is then necessary to prove that husband intended to divorce the wife because these expressions are not clear in their meaning. If the words of *Talaq* are not express, it is duty of the Court to lay emphasis upon the intention of the husband rather than to rely upon the apparent words. In a case from Peshawar High

30 Supra note.
Court, there was a quarrel between two brothers over a bottle of honey. One of them declared in an agitated mood that “if he could not take back the honey from the other, his wives would be considered divorced”. It was held by the Court that the declaration by that brother cannot be treated as words of Talaq because the intention was to emphasise the efforts of taking back the honey and not to divorce the wives.32

**Presence of Wife**

Presence of wife at the time of pronouncement of Talaq is not necessary. A Talaq pronounced in the absence of the wife is lawful and effective. 33 But the wife must be specifically referred in the pronouncement. Where a husband has more than one wife, he must specify and name the wife against whom he is pronouncing Talaq.34

**Notice of Talaq**

For the validity of Talaq, its notice to wife is not necessary. It is not necessary for the husband to communicate to wife the pronouncement immediately. The Talaq becomes effective from the moment of its pronouncement and not from the date on which the wife comes to know about it. Under [Sunni] Muslim law, even if the Talaq has not been communicated to the wife, the Talaq is valid and effective. However, knowledge of Talaq is required for the claim of dower and for claim of maintenance from former husband.35

**Conditional and Contingent Talaq**

A Talaq may either be absolute (i.e.unconditional) or subject to a condition or contingency. An uncertain future event is called

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32 Muhammad Irfan v. Mst. of Mohando, (52) P. Pesh. 55.
35 Supra note.
contingency: where the *Talaq* is without any condition it takes effect immediately. A conditional or contingent *Talaq* becomes effective only upon the fulfillment of the condition or happening of the future event. Conditional and contingent *Talaq* is recognized only under *Sunni* law; *Shia* law does not recognize conditional or contingent *Talaq*.

Under *Sunni* law a conditional or contingent *Talaq* is valid. But the conditions must not be un-Islamic. If a condition is against the principles of Islam, the condition is void and a *Talaq* cannot take place. For example, if the condition is that whenever the wife would demand her Prompt Dower there would be *Talaq* by husband, the condition is void and *Talaq* does not take place.

Where the condition is valid, a lawful *Talaq* is effected only upon the fulfillment of the condition or happening of the specified event. In a conditional or contingent *Talaq* the marriage dissolves as soon as the condition is fulfilled or the event takes place: further pronouncement is not necessary. For example, in *Bachchoo v. Bismillah*, the husband promised, in writing, to pay a maintenance allowance to the wife for certain period. On failure of the husband to do so, the writing was to operate as *Talaqnama*. It was held by the Allahabad High Court that it was a conditional *Talaq*. The condition was non-payment of maintenance allowance to the wife if the condition was fulfilled. Thus, the *Talaq* became effective without any further pronouncement.

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36 (1936) All LJ 302.
37 P. K. Sinha, p. 86.
Contingent Talaq

Mirjan Ali v. Maimuna Bibi,38 is an interesting case on contingent Talaq. The facts of the case were as under: “There was an agreement between husband and wife under which if the wife lived with her parents for a period of 90 days, or more, and the husband failed to take her back within the said period of 90 days, it would result in the husband’s irrevocable Talaq and the wife would be free to remarry. The husband visited the place of the wife’s parents within the stipulated period of 90 days and asked his wife to accompany him. The wife refused to go with him on the ground that now she had divorced the husband under the authority given to her by the husband. It was argued by the wife that the agreement was a delegated Talaq and under this delegated authority she had divorced her husband.39 It was held by the Assam High Court that the agreement written by the husband was not a delegated Talaq and she had no authority to divorce the husband. The Court further observed that the abovementioned agreement was that of a contingent Talaq and the contingency was ‘failure of the husband to take her back within 90 days’. As the contingency did not happen and husband went to her back within the said period, the Talaq by husband could not take place. As such, the wife was bound to accompany the husband.40

In Bilqees Begam v. Manzoor Ahmed,41 the husband used to object his wife’s frequent visits to female friends. Once, there was a

38 AIR 1949 Assam 14.
39 As discussed in the following pages, a Delegated Talaq is that Talaq in which the husband delegates or gives his authority to pronounce Talaq to some other person including his wife.
40 R.K. Sinha, p. 86.
quarrel between husband and wife on this matter and in anger, husband declared that if she went again to her female friend’s house there would be *Talaq* by him. From that date, the wife never went there. The Karachi High Court (Pakistan) held that husband’s declaration was conditional *Talaq*. But, since the condition was not fulfilled after the declaration, therefore, *Talaq* has not taken place.\(^{42}\)

**Shia Law**

Under *Shi’a* law, conditional or contingent *Talaq* is void and ineffective. Even if the condition or contingency is lawful, the *Talaq* is not valid. In other words, under *Shi’a* law a *Talaq* must be unconditional. \(^{43}\)

**(ii) Kinds of Talaq**

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

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

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

The *Talaq-ul-Sunnat* or revocable *Talaq* may be pronounced either in the *Ahsan* form or in the *Hasan* form. That is to say, *Talaq-ul-Sunnat* may be further sub-divided into: (i) *Talaq Ahsan* (most proper); (ii) *Talaq Hasan* (proper). *Talaq-ul-Bidaat* is irrevocable and becomes effective as soon as it is pronounced in any way, indicating husband’s desire to dissolve the marriage. In brief, the classification of the different kinds of *Talaq* is given below:

\(^{42}\) P. K. Sinha, p. 86.  
\(^{43}\) *Supra* note.
(a) **Talaq-ul-Sunnat (Revocable Talaq)**

*Talaq-ul-Sunnat* is regarded to be the approved form of *Talaq*. It is called *Talaq-ul-Sunnat* because it is used on the Prophet’s tradition (Sunna). As a matter of fact, the Prophet always considered *Talaq* as an evil. If at all this evil was to take place, the best formula was one in which there was possibility of revoking the effects of this evil. With this idea in mind, the Prophet recommended only revocable *Talaq*, because in this form, the evil consequences of *Talaq* do not become final at once. There is possibility of compromise and reconciliation between husband and wife. *Talaq-ul-Sunnat* is also called as *Talaq-ul-raje*. Only this kind of *Talaq* was in practice during the life of the Prophet. This mode of *Talaq* is recognized both by Sunnis as well as by the Shia. *Talaq-ul-Sunnat* may be pronounced either in *Ahsan* or in the *Hasan* form. 44

(1) **Talaq Ahsan (Most Proper)**

*Hedaya* brands it as he most laudable divorce, where the husband repudiates his wife by a single pronouncement in a period of *tuhr* (purity, i.e., when the wife is free from her menstrual courses), during which he has not had intercourse with her, and then

44 *Supra note.*
leaves her to the observance of *iddat*. The divorce remains revocable during the *iddat*, and the parties retain the right of inheritance.\footnote{A.A.A. Fyzee, *The Muslim Wife's Right of Dissolution her Marriage*, p. 152 (1936).} According to the *Hedaya*, this method of divorce is the most approved because the companions of the Prophet (Pease be upon him) approved of it, and second, because it remains within the power of the husband to revoke the divorce during *iddat*, which is three months, or till delivery.\footnote{Hedaya, at p. 72.}

In a marriage not yet consummated, *ahsan* and *hasan* may be pronouncement during menstruation also. Where the wife and husband are living separate from each other, or where the wife is beyond the age of menstruation (i.e.in old age), the condition of *tuhur* is not applicable,\footnote{*Chand Bibi v. Bandesha*, AIR 1960 Bom 121.} it is also not applicable to a written divorce. This *talak* may be revoked either by express words, or impliedly by cohabitation within the *iddat* period. On such revocation, it is not necessary for the wife to undergo intermediary marriage; the husband can simply say 'I have retained you'. After the *iddat* period lapsing without revocation, the *talak* becomes final and irrevocable.\footnote{Syed Khalid Rashid, *Muslim Law*, p. 108.}

Therefore, this is the most proper form of repudiation of marriage. The reason is two fold:

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

Secondly, the evil words of *Talaq* are be uttered only once. Being an evil, it is preferred that these words are not repeated. In the *Ahsan Talaq* there is a single declaration during the words are

\footnote{\textsuperscript{45} A.A.A. Fyzee, *The Muslim Wife’s Right of Dissolution her Marriage*, p. 152 (1936).} \footnote{\textsuperscript{46} Hedaya, at p. 72.} \footnote{\textsuperscript{47} *Chand Bibi v. Bandesha*, AIR 1960 Bom 121.} \footnote{\textsuperscript{48} Syed Khalid Rashid, *Muslim Law*, p. 108.}
not repeated. In the Ahsan Talaq there is a single declaration during the period of purity followed by no revocation by husband for three successive period of purity. In this form, the following formalities are required:

(a) The husband has to make a single pronouncement of Talaq during the Tuhr of the wife. Tuhr is the period of wife’s purity i.e. a period between two menstruations. As such, the period of Tuhr is the period during which cohabitation is possible. But if a woman is not subjected to menstruation, either because of old age or due to pregnancy, a Talaq against her may be pronounced any time.49

(b) After this single pronouncement, the wife is to observe an Iddat of three monthly courses. If she is pregnant at the time of pronouncement of the Iddat is, till the delivery the child. During the period of the Iddat there should be no revocation of Talaq by the husband. Revocation may be express or implied. Cohabitation with the wife is an implied revocation of Talaq. If the cohabitation takes place even once during the period, the Talaq is revoked and it is presumed that the husband has reconciled with the wife.

When the period of Iddat expires and the husband does not revoke the Talaq either expressly or through consummation, the Talaq becomes irrevocable and final.

It may be noted that the characteristic feature of the Ahsan form of Talaq is a single pronouncement followed by no revocation during the period of three month’s Iddat. Therefore, where a

husband makes any declaration in anger, but realizing his mistake afterwards, wants to cancel it, there is sufficient time for him to do so. Single pronouncement of the civil words of Talaq and sufficient opportunity to the spouses for reconciliation, are the two reasons for calling form as the 'most proper' form of Talaq.  

(2) Talaq Hasan (Proper)

The hasan form of talaq, also an approved form but less approved than the first (ahsan), consists of three successive pronouncements during three consecutive period of purity (tuhr). Each of these pronouncements should have been made at a time when no intercourse has taken place during that particular period of purity.

The hasan form of talaq requires some explanation and a concrete illustration should suffice. The husband (H) pronounces talaq on his wife (W) for the first time during a period when W is free from her menstrual courses. The husband and wife had not come together during this period of purity. This is the first talaq. H resumes cohabitation or revokes this first talaq in this period of purity. Thereafter in the following period of purity, at a time when no intercourse has taken place, H pronounces the second talaq. This talaq is again revoked by express words or by conduct and the third period of purity is entered into. In this period, while no intercourse having taken place, H for the third time pronounces the formula of divorce. This third pronouncement operates in law as a final and irrevocable dissolution of the marital tie. The marriage is dissolved; sexual intercourse becomes unlawful; iddat becomes incumbent; remarriage between the parties becomes impossible unless W

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50 R.K. Sinha, Muslim Law, pp. 87-88.
lawfully marriage another husband, and that other husband lawfully divorces her after the marriage has been actually consummated. 51

(b) Talaq-ul-Bidaat (Irrevocable)

This Talaq is also known as Talaq-ul-Bain. It is a disapproved mode of divorce. A peculiar feature of this Talaq is that it becomes effective as soon as the words are pronounced and there is no possibility of reconciliation between the parties. The Prophet never approved a Talaq in which there was no opportunity for reconciliation. Therefore, the irrevocable Talaq was not in practice during the life. The Talaq-ul-Bid'at has its origin in the second century of the Islamic era. According to Ameer Ali, this mode of Talaq was introduced by the Omayad Kings because they found the checks in the Prophet’s formula of Talaq inconvenient to them. 52 Since then this mode of Talaq has been in practice among the Sunni Muslims.

Shia Law

Under the Shia law, an irrevocable Talaq is not recognized.

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

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

thee thrice”, or “I pronounce my first, second and third Talaq”.

(b) The husband may make only one declaration in a period of purity expressing his intention to divorce the wife irrevocable saying: “I divorce thee irrevocably” or “I divorce thee in Bain”. 53

Written Talaq

Under Shia law, the Talaq must be pronounced orally except where husband is unable to speak. But, under Sunni law the Talaq may be oral or in writing. If the words are clear and express, a written Talaq takes place immediately. That is to say, it becomes irrevocable as soon as the Talaq is written. But where the writing itself indicates any specific date or event on which the Talaq shall come into force, the Talaq becomes effective from that very date or upon happening of the specified event and not on the date when the letter reaches to wife. For example, where the writing says, “When this my letter reaches thee, then thou are repudiated”, the Talaq comes into effect (and becomes irrevocable) only after the receipt of the letter by wife, not on the date on which it was written. However, where a husband writes to his wife that she had been divorced on say 5th March, 1985 and that period of third divorce would expire on 5th May, 1985, the writing is to be interpreted as Talaq Hasan which shall be completed only after two more pronouncements. 54

3.5 Ila Divorce by Act of the Husband

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

53 R.K. Sinha, Muslim Law, p. 89.
54 Ibid at 91.
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.\(^{55}\)

In Muslim Laws *ila* implies a husband’s swearing by God\(^{56}\) 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.\(^{57}\)

Regarding applicability of *Ila* in some books it has been mentioned that “*Ila* is not in practice in India”.\(^{58}\) But in some other, “*Ila* is very uncommon, but is still extant and enforceable in Pakistan and India”.\(^{59}\)

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


\(^{56}\) 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).


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.  

Shi’a view

*Ila* is an oath by Allah and it can not be effected without the same.  

Period of Ila

(a) Sunni view

The minimum period for *Ila* is four months and for maximum period no limit has been prescribed. If a man takes a vow that he will not have sexual intercourse with his wife for a year excepting a days on that instant *Ila* would not be established. But after taking vow, the husband having sexual connection at any time when four months or more than that they still remain, *Ila* would be established.  

(b) Shia View

Under Shia Law *Ila* is not contracted unless the prohibition is absolute and perpetual or for a time exceeding four months. 

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61 Supra note.
62 Ibid.
63 Ibid.
Conditional Ila

The (expression) *Ila* may be conditional\(^{64}\) but the condition should be certain. If a Vow depends on a condition which is uncertain or which may or may not happen within four months does not constitute an *Ila*.\(^{65}\) Thus the expression, *By God I will have no sexual intercourse with you until such a person arrives or such a thing happens when it is possible for the person to come with four months or for the thing to happen within that period of time,* dose not amount to an *Ila*.\(^{66}\)

**Particular Penalty or Expiation**

A husband can take a vow, that he will not be intimate with his wife and that on breach of the vow he shall be liable to a particular penalty involving some great hardship\(^{67}\) and in such a case, that is, if he commits a breach of his vow he shall incur only the particular penalty specified by him.

The husband, who breached his vow, if the vow has been pronounced by name of Allah, has to pay expiation. According to 89\(^{68}\) verse of fifth *Surah (Maedah)* of Holy Quran, it consist of manumission of a slave, or clothing or feeding ten poor persons, if he has not the ability to do either of them, he should keep fast for three successive days. Of course if the husband has mentioned any particular penalty in his vow, then the expiation is the performance of the same (which he had already fixed it).\(^{68}\)

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\(^{64}\) But the Vow cannot be made depend on a condition or to take effect at future time (K.N. Ahmad, *Supra* at 114).


\(^{66}\) *Supra* note.

\(^{67}\) If the penalty determined by the husband in breach of his vow, is simple, illa cannot be constituted (Ibn Abidin, *Supra*, Vol. II, p. 116).

\(^{68}\) *Supra* note.
Cancellation of Ila

Ila is cancelled by:

(a) Intimacy

The husband resuming sexual intercourse within the period of four months or in case of impossibility of having intimacy due to any reason.

(b) A verbal retracting thereof

Then when the cohabitation with wife is possible the husband cannot retract his vow and cancel the Ila orally but if it is impossible due to e. g. serious illness or wife’s tender age or being at such a distance from one another as does not admit of their meeting during the term of the Ila, then in such a case it shall be lawful for the man to rescind his Ila by speech as for examples by saying “I have returned to my wife” upon which the Ila drops.69

Ila’s Effectiveness

According to the *Hanafi* Law, if the husband made Ila to his wife and prescribed period of four months, passes away without his having recourse to her (by words or acts) an irrevocable divorce shall (automatically) got effect on her.70

Qazi’s (Qadi’s) decree not necessary

According to *Hanafis*, Ila divorce gets effected without the intervention of a *qadi*, only the condition is passing away of the prescribed period. According to *shafei’s*, the separation shall take effect only by decree of a *Qadi*.71

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71 *Supra* note.
Ila in Sunni and Shi’a Laws

Some Differences are between Sunni and Shi’a Opinion in Ila.

Whatever have been mentioned on this issue under Sunni law are also applicable in Shi’a law. There are, only some following differences:

1. 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.\(^\text{72}\)

2. The wife must be permanent wife not temporary (Muta) and she must be cohabited by husband.\(^\text{73}\)

3. Ila may be established only by swearing to God (Allah) nothing else.\(^\text{74}\)

4. 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).\(^\text{75}\)

5. 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.

\(^{72}\) M. J. Moqni, Al- Feq alal Mazahib ul – Khamsa (comparative jurisprudence of five Sects), p. 333.

\(^{73}\) 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).

\(^{74}\) Supra note at 334.

\(^{75}\) Supra at 106.
6. Divorce ensuing by Ila is revocable (Rajia) unless the husband gives a irrevocable (Ba’in) divorce.76

7. 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.77

Under Sunni School after four months of abstainment, the marriage is dissolved either automatically (according to Abu Hanifa) or by new pronouncement of the husband either voluntarily or by judge (according to Malik, Shafii and Ibn Hanbal).

Compulsion or intoxication in Ila

According to Sunni opinion, Ila is valid like Talaq whether made in compulsion or intoxication. According to Shi’a law freedom for choice is must to for Ila. And in Shi’a law Ila in compulsion or intoxication is not valid.78

3.6 (Zihar) Divorce by Act of the Husband

As mentioned in chapter II, the word zihar is derived from the word “Zuhur” which means back or to oppose back to back. If there is any discard between the spouses they, instead of remaining face to face towards each other turn their back one against the other.79

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76 Jafar Ibn Hasan (Mohaqeq –e- Heli); sharai ul – Islam, Dar ul, p. 228.
77 Supra note at 111.
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.80

The Institution of Zihar is a survival from pre-Islamic days, half of the civilized Arabs used to deprive their wives of sexual enjoyment and to lie 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 “Thy back is as my mother’s back for me”. This practice after the advent of Great World Reformer (Prophet Peace be upon him) was disapproved. However, it is maintained in a reformed shape on the authority of Holy Quran. In those days Zihar stood as a Talaq, but changed its nature to a temporary prohibition which holds until the performance of expiation but without dissolving the marriage.81

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.82

Zihar In the Holy Quran

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

82 K.N. Ahmad, Supra at 116.
“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.”  

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.  

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83 Holy Quran, 33: 4.
84 Holy Quran, 58: 1- 4.
**Effect of Zihar**

The effect of *Zihar* is as below:

(a) **Prohibition of Sexual Intercourse**

Regarding the effect of *zihar* is that sexual connection is prohibited even instance kissing; touching with desire, etc. is also prohibited till expiation is made. Such sexual intercourse would be prohibited till the expiation and if the marriage is dissolved by *Talaq* till the remarriage. And if such act is done by the husband, the penalty is expiation.

(b) **Maintenance**

The wife is entitled to maintenance as the husband is responsible for the future to obtain conjugal intercourse.

(c) **Expiation**

By making *Zihar* expiation is necessary, but if the pronouncements are repeated then for such pronouncement and expiation will be obligatory, unless the intention is only to reaffirms and repeat the first.

(d) **Separation**

Under the Islamic Law, *Zihar* did not operate as a *Talaq*. In case the husband who has made *Zihar* fueled to make expiation the judge could imprison him until he expiated or made *Talaq* against her.85

The Court has no power to enforce expiation in the manner provided by Muslim Law. It may however, be noted that under the Indian *Shariat Act* (26 of 1937) it has been provided:

Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal Law, marriage, dissolution of marriage, including *Talaq, Ila, Zihar, Lian, Khula and Mubarat*, maintenance, dower, guardianship, gifts, trusts and trust properties, and *wakfs* (other than charities and charitable institution and charitable and religious endowment) the rule of decision in cases where the parties are Muslims shall be the Muslim personal Law (Shariat). 86

**Zihar in Sunni View**

Under Sunni Law *Zihar* is made by the husband who must be adult and of sound mind, says that his wife (or any undivided part of her person or any member which implies the whole person) is to him like the back (or any part of the body which is unlawful for him to see) of his mother (or of any other person whom he is prohibited from marrying). 87

*Zihar* has thus, according to the provision of Act has been expressly includes within the meaning of his dissolution of marriage. The power of dissolving marriage by granting a divorce may now be exercised in case husband refuses to expiate. And such type of divorce would be treated as a single irrevocable *Talaq*. 88

Like in *Ila*, there is different juristic opinions upon *Zihar*:

1. Abu Hanifa, like in divorce, gives sanction to a *Zihar* which is pronounced in jest or in mistake or under

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86 The Muslim Personal Law (Shriat) Application Act, 1937.
compulsion. Intention, also, according to him, is not necessary and Zihar by a drunken man is also valid.

2. Under the Hanafi law Zihar can be made conditional. Thus husband may say “If you enter that house or speak to such a person, you are to me like my mother”.91

Zihar in Shia view

Under Shia Law, Zihar is a declaration which is made in the presence of two just witnesses, by the husband who (is adult and he sound mind) that his wife is to him like the back of his mother (or any other woman from whom is prohibited from marrying otherwise than affinity or unlawful conjunction), provided that when her husband is not absent from the wife and she is subject to menstruation, the declaration must be made. While the wife in a tuhr and during which there has been no connubial intercourse.92

Zihar in Indian Muslim Law

The Law of Zihar has statutory recognition under Shariat Act 1957. An Indian wife whose husband has deserted by Zihar can she for ‘faskh’ under Section 2 (ix) of the Dissolution of Muslim Marriage Act 1939. At the commencement of hearing of the husband expresses his willingness to resume the cohabitation the suit may be dismissed. But if he continuously abstains from the wife ‘faskh’ may be granted.93

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92 Faiz Badruddin Tyabji, Muslim Law, p. 182 (1968).
3.7 Divorce by the Wife

A Muslim wife has no independent right of divorce. She cannot divorce her husband whenever she likes, as her husband may do. Under Muslim law, divorce by wife is possible only in the following situations:

(a) Where the husband delegates to the wife the right of *Talaq* (*Talaq-e-Tafweez*).

(b) Where she is a party to divorce by mutual consent (*Khula and Mubarat*).

(c) Where she wants to dissolve the marriage under the Dissolution of Muslim Marriage Act, 1939.

In the first two cases the wife’s right of divorce depends upon the consent of her husband. In *Talaq-e-Tafweez*, unless the husband himself gives her the right to pronounce *Talaq*, she cannot divorce. In a divorce by mutual consent, she cannot get divorce unless the husband also gives his consent for it. Under the Dissolution of Muslim Marriage Act, 1939, the dissolution of marriage depends upon the decision of the Court. In other words, a Muslim wife cannot divorce without her husband’s consent or without a judicial decree. ⁹⁴

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⁹⁴ Before enforcement of the Dissolution of Muslim Marriage Act, 1939, a Shafie and an Ithna Asharia wife had a right to divorce her husband without his consent or without any judicial decree on any of the following grounds: (i) Insanity of the husband, (ii) that husband was an eunuch or an impotent, (iii) that husband was unable to maintain her. These grounds for divorce are now available to the wife belonging to other schools as well subject to conditions contained in the Act of 1939. It is, therefore, submitted that after 1939, the IThna Asharia and Shafie law on this point has been superseded by the Dissolution of Muslim Marriage Act, 1939, and the divorce by a wife belonging to any of these two schools is also subject to judicial decree.
(i) Talaq-e-Tafweez (Delegated Divorce)

The power to give divorce by the husband, he may delegate it to the wife or to a third person, either absolutely or conditionally and either for a particular period or permanently. The person to whom the power is thus delegated may then pronounce the divorce accordingly; such a delegation of power is called Taweez.\(^{95}\)

A temporary delegation of the power is irrevocable but a permanent delegation may not be revoked.\(^{96}\)

When a man has said to his wife, ‘Repudiate’ thyself, she can repudiate herself at the meeting and he can divest her of the power. But if there is no reference to his pleasure it is an appointment of agency which is not restricted to the meeting and may be revoked. When a man has said to his wife, ‘choose thyself, or this month, or a month, or a year, she may exercise the option at any time within the given period.\(^{97}\)

That is, the husband may delegate the power of divorce to his wife. He may do so at the time of marriage contract or at any time when he so likes.

This doctrine is peculiar to the Muslim Law and has no parallel in other systems. Fyzee says that this form of delegate divorce is now beginning to be fairly common in India. The Indian High Court have repeatedly held as valid the agreement by which the husband authorizes the wife to divorce herself from him in the event of his marrying a second wife without her consent.\(^{98}\)

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\(^{95}\) Paras Diwan, *Muslim Law in Modern India*, p. 79 (1985).


\(^{97}\) *Supra* note at 300.

Religious authority

The doctrine of the delegation of the power of divorce is based on an incident mentioned in the Holy Quran where the Prophet (Peace be upon him) told his wives that they were at liberty to live with him or to get separated from him as they chose. Thus it is stated:

"O Prophet, say to your wives, ‘If you seek the life of this world and all its finery then come, I will make provision for you, and release you honorably’." 99

Difference between Conditional Talaq and Talaq-by-Tafweez

(i) A conditional Talaq is a Talaq by the husband subject to a condition or upon happening of a future event. A Talaq by Tafweez is a Talaq by the wife provided she is authorized by the husband to do so.

(ii) In a conditional or contingent Talaq mere happening of that event is sufficient to dissolve the marriage; the husband need not pronounce the Talaq again. In the case of a Talaq-by-Tafweez mere happening of the specified event does not dissolve the marriage. The marriage dissolves only if the wife has actually exercised his right of divorce after happening of that event.

(iii) Conditional or contingent Talaq is not recognized under the Shia law but a Talaq-by-Tafweez is recognized under both the schools, Shia and Sunni. 100

100 R.K. Sinha, Muslim Law, p. 95.
3.8 Divorce by Mutual Consent

Under Muslim law, a divorce may take place also by mutual consent of the husband and wife.\(^{101}\) Existence of any prior agreement or delegation of authority by the husband is not necessary for a divorce by common consent. It may take place any time whenever the husband and wife feel that it is now impossible for them to live with mutual love and affection as is desired by God. A divorce by mutual consent of the parties is a peculiar feature of Muslim law. Under Hindu law there was no such provision before 1976. There are two forms of divorce by mutual consent:

(i) **Khula**

(ii) **Mubarat**\(^{102}\)

(i) Khula

Literal meaning of the word *Khula* is, ‘to take off the clothes’. In law, it means divorce by wife with consent of her husband on payment of something to him. Before Islam the wife had no right to take any action for the dissolution of her marriage. But in Islam, she is permitted to ask her husband to release her (as he puts off his clothes) after taking some compensation. Quran lays down about *khula* in the following words:

“... and if you fear that they (husband and wife) may not be able to keep within the limits of Allah, in that case it is no sin for

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\(^{101}\) Under Hindu law, divorce by mutual consent was not possible before 1976. By an Amendment in 1976, Section 13B was included in Hindu Marriage Act, 1955 which now provides an additional ground for divorce by mutual consent; this ground has already been provided under Section 38 of the Special Marriage Act, 1954.

either of them if the woman releases herself by giving something (to the husband)".  

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

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

Tayabji says, “Muslim Marriage may also be dissolved by an agreement between the parties for a consideration to be paid by the wife to the husband”. When wife alone is desirous of divorce it is called as kula.

According to Fatawai Alamgiri “when married parties disagree and apprehensive that they can not observe the bounds prescribed by the divine laws, that is, can not perform the duties imposed on them by the conjugal relationship, the woman can release herself from the tie by giving up some property in return in consideration of which the husband is to give her a kula and when they have done this a talak- ul- bain would take place”.

We may submit that kula is dissolution of marriage by an agreement made between the parties to the marriage on giving some

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103 Quran: Sura II, Ayat 229.  
105 A.A.A. Fyzee, Outline of Mohammadian Law, p. 163.  
106 Faiz Badruddin Tyabji, Muslim Law, p. 196 (1968).  
consideration to the husband for release of the wife from the marriage tie. The granter of the release is called ‘kula’ and the woman obtaining the release is called ‘mukhtalia’.

In *khula* case, the proposal is made by the husband and it is accepted with the consent of the wife and proposal and acceptance have to be in the same meeting. Under *Hanafi* Law, presence of witnesses is not insisted upon, but under *Ithna Ashari* Law presence of at least two witnesses is necessary; under *Hanafi* Law, there is no fixed formula; only the intention of the parties is to be made clear, under *Ithna Ashari* Law a formula is to be used. Kula may be effected orally, generally the agreement is not necessary. In India, however, generally the agreement is reduced to writing which is called *khula* name.

According to Hanafis Kula is an irrevocable divorce. Burhan-al-Din Marghinani, the author of *Al- Hidayah*, has said that the granting of *khula* shall take effect as one irrevocable divorce and the wife shall have to compensate the husband.

**Essentials of a Valid Khula**

It may be noted that *Khula* is a divorce by common consent but the wife has to make the payment of some consideration to husband because she takes the initiative for dissolution of the marriage. Essentials of valid *Khula* are given below:

(a) **Competence of the Parties**

The husband and wife must be of sound mind and have attained the age of puberty (fifteen years). A minor or insane

husband or wife cannot lawfully effect Khula. The guardian of a minor husband may not validly effect Khulla on his behalf.\textsuperscript{111}

Hanafis and Shafis permit the guardian of the minor wife to enter into kula on her behalf; but not the guardian of the minor husband. Shias insist that there must be no compulsion exerted on the mind of the wife, while Sunnis would not mind kula obtained under compulsion. Sunnis also recognize a conditional kula; not so the Shias. Hanafi Law permits the wife to retain an option to revoke the kula. If the husband stipulates such an option, the kula will be deemed irrevocable and the option void. Under Shia Law, both the kula and the option would be void; for the kula must be unconditional. All schools agree, in kula the consent of the husband in clear words is a must. The wife may revoke the kula before the agreement is finalized by getting up from the meeting. Hanafi regard kula as a talak-ul-bain, an irrevocable divorce. Shia jurists differ on the point whether wife and husband can remarry immediately after kula. Ithna Asharis hold it irrevocable, but maintain that if the wife during iddat demand the return of the consideration, the husband may revoke the kula.\textsuperscript{112}

(b) Free Consent

The offer and the acceptance of Khula must be made with the free consent of the parties. But, under Hanafi law a Khula under compulsion or in the State of intoxication is also valid.\textsuperscript{113} But, under all other schools including Shia law, without free consent of the parties, the Khula is not valid.\textsuperscript{114}

\textsuperscript{111} Tyabji, Muslim Law, Edition IV, p. 182. However, under Hanafi law, the guardian of a minor wife may validly enter Khula on her behalf.

\textsuperscript{112} Syed Kalid Rashid, Muslim Law, p. 115.

\textsuperscript{113} Rashid Ahmed v. Anisa Khatum, (1931) 59 IA 21 (All).

\textsuperscript{114} R.K. Sinha, Muslim Law, p. 96.
(c) **Formalities**

There is an offer by the wife to release her from the matrimonial tie. The offer is made to the husband. The offer for *Khula* must also be accepted by the husband. Until the offer is accepted, the divorce is not complete and it may be revoked by the wife. But once the offer has been accepted, the divorce is complete and becomes irrevocable. Offer and acceptance may either be oral or in writing. The offer and acceptance must be made at one sitting i.e. at one place of meeting.

Under Sunni law the presence of witnesses is not necessary. But under *Shia* law, the offer and acceptance of *Khula* must be made in presence of two competent-witnesses. Further, under the *Shia* law, the *Khula* is revocable by wife during *Iddat*. 115

(d) **Consideration**

For her release, the wife has to pay something to the husband as compensation. Any sum of money or property may be settled as consideration for *Khula*. There is no maximum or minimum limit as is in the case of dower. But once this consideration has been settled, it cannot be increased. 116

(ii) **Mubarat**

*Mubarat* is also a divorce by mutual consent of the husband and wife. In *Khula* the wife alone is desirous of separation and makes the offer, whereas *Mubarat* both the parties are equally willing to dissolve the marriage. Therefore, in *Mubarat* the offer for separation may come either from husband or from wife to be accepted by the other. The essential feature of a divorce by *Mubarat*

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115 *Supra* note at 96.
116 *Qasim Husain Beg v. Kaniz Sakina*, (1932) 54 All 806.
is the willingness of both the parties to get rid of each other; therefore, it is not very relevant as to who takes the initiative. Another significant point in the Mubarat form of divorce is that because both the parties are equally interested in the dissolution of marriage, no party is legally required to compensate the other by giving some compensation.\textsuperscript{117}

Like Khula, a Mubarat is also dissolution of marriage by agreement that there is a difference between the two. In Mubarat the offer of divorce may proceed from the wife or it may proceed from the husband, but once it is accepted the dissolution is completed and it operates as a Talaq-i-bain as in case of khula. As in Talaq, so in Khula and Mubarat, the wife as bound to observed iddat.\textsuperscript{118}

**Legal Consequences of Khula and Mubarat**

The legal effects of a valid Khula or Mubarat are the same as that of a divorce by any other method. The wife is required to observe Iddat and is also entitled to be maintained by the husband during the period of Iddat. After completion of Khula or Mubarat, the marriage dissolves and cohabitation between the parties becomes unlawful. If the consideration in Khula is not the release of wife’s dower, the wife is entitled to get her dower. Other legal consequences of Khula and Mubarat are discussed in detail in the following pages under the head ‘Legal effects of divorce’.\textsuperscript{119}

Among both the Sunnis and the Shias, the Mubarat is an irrevocable divorce as in the talak-ul-bain. In the words of Al-Karkhi, “when the husband receives a compensation from the wife the divorce is bain and even when it is without compensation and

\textsuperscript{117} R.K. Sinha, Muslim Law, p. 97.
\textsuperscript{118} Mullah, Principle of Mohammadan Law, p. 304 (1972).
\textsuperscript{119} R.K. Sinha, Muslim Law, p. 97.
consequently rajai (reversible at the option of the husband), if during the wife’s idda he were to accept from her a compensation, the separation would be equally bain”.\textsuperscript{120}

**Distinction between Khula and Mubarat**

The distinctions between the two are as follows:

1. Khula is a redemption of the two contract of marriage, while Mubarat is a ‘mutual release’ from the marriage tie.

2. In Khula, the offer is made by the wife and its acceptance is made by the husband, in Mubarat any of the two may make an offer the other accept it.

3. In Khula a ‘consideration’ passes from the wife to the husband. In Mubarat, the question of consideration does not arise.

4. In Khula, the aversion is one side of the wife, while in the Mubarat, there is mutual aversion.

Both Khula and Mubarat are to be followed by observance of iddat.\textsuperscript{121}

The Shariat Act 1937 mentions the both Mubarat and khula. Therefore, both now have a statutory recognition in India.\textsuperscript{122}

### 3.9 Judicial Divorce

By judicial divorce we mean a divorce by the order of a Court of law. Islam provides for the dissolution by a Kazi or judge. On the application of a wife if the marriage was found to be harmful or

\textsuperscript{120} Paras Diwan, *Muslim Law in Modern India*, p. 94 (2008).
undesirable for her, the Kazi could dissolve the marriage. The power of a Kazi or Judge to pronounce a divorce is founded on the express words of Prophet Mohammed.123

“If a woman be prejudiced by a marriage, let it be broken off”.124

However, despite the Quranic injunction and the traditions of the Prophet, the Anglo-Indian Courts have not recognized Muslim wife’s right of judicial divorce on grounds other than Lian and impotency of the husband. Before 1939, a Muslim wife could seek her divorce by a judicial decree only on the ground of (1) false charge of adultery by the husband against her (Lian), or (2) impotency of the husband, and on no other grounds. On the other hand, the husband need not go to the Court at all as all the forms of divorce (Talaq, Ilia, Zihar, Khula or Mubarat) depend solely upon his will. Therefore, under pure Muslim law, a Hanafi wife could hardly get any relief against her unwilling husband on any other ground except the above mentioned two grounds. But under the Shafie and Maliki laws a wife was entitled to get a decree from the Court for dissolution of her marriage on the grounds of husband’s failure to maintain her, desertion, cruelty, etc. Therefore, there was conflicting provisions in the various schools of Muslim law in respect of divorce by a wife through judicial intervention. It was felt by the right thinking person’s of the Muslim society and also by the Government that great injustice was being done to a Muslim wife in the matter of matrimonial relief. Accordingly, the Dissolution of Muslim Marriage Act, 1939 was enacted by the Central Legislature and it came into force on the 17th March, 1939.

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Under this Act, a wife married under Muslim law may seek divorce by a judicial decree on any of the grounds enumerated therein. The Act is applicable to all the wives married under Muslim law irrespective of their schools or sub-schools.\textsuperscript{125}

Judicial divorce can divide into two parts:

(i) \textit{Lian}

(ii) \textit{Faskh}

\textbf{(i) Lian}

The term \textit{Lian} is derived from the “\textit{Laan}”. It means to derive away. According to the dictionary meaning is the infinite of the past tense \textit{Lanah} where the husbands who makes a charge of accusation to his wife of adultery (which includes all cases of unlawful sexual intercourse. Whether incest, fornication, whoredom or adultery). It procedure for settlement the charge of adultery (which has been made by the husband himself) is by swearing and imprecating upon them, the curse of Allah, the Almighty is technically known as \textit{Lian}.\textsuperscript{126}

\textit{Lian} become due when the husband accuses his wife of adultery. Under such circumstances that if he had made the accusation against other woman then, he would be liable to prosecution for defamation.\textsuperscript{127}

\textit{Lian}, in \textit{Shariah}, means the giving of evidence or testimony by the husband and wife, each in person, four times in the \textit{Qadi} (\textit{Qazi}), such evidence or testimony having been strengthened by oath, that is adjuration; the husband’s evidence being further

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\textsuperscript{125} R. K. Sinha, p. 97-98.
\textsuperscript{126} B.R. Verma, \textit{Muslim Marriage, Maintenance and Dissolution}, 2\textsuperscript{nd} Ed, p. 252 (1988).
\textsuperscript{127} K.N. Ahmad, \textit{Muslim Law of Divorce}, p. 452.
\end{flushright}
accompanied by the use of the word ‘ghadab’ or wrath of Allah, the Almighty the evidence of the husband standing in the place of ‘hudd-i-qudhuf’ [Persian Hadde Qazf]; so far as the husband is concerned, i.e., the husband having accused the wife of Zina or adultery, he would have been liable to punishment of ‘Kazf’ (Qazf) or slander but for this procedure, and therefore, the punishment for slander is extinguished and Lian takes place- and so far as the woman is concerned, her evidence standing in the place of ‘hadd-i-Zina’ i.e.the punishment of Zina having become extinguished. Lian takes the place of the punishment for Zina. So far as the woman is concerned because to invoke of Allah, the Almighty, when giving evidence is more destructive in its effect than punishment, the condition for the validity of the Lian being subsistence of the continuation of the relation of the husband and wife and that the ‘nikah’ is ‘sahih; and not invalid; the cause of Lian is the husband accusing the wife of ‘Zina’ under circumstances that, if such accusation had been made a strange woman, it would him liable to ‘hadd-i-qudhuf’ that is to say the wife should be ‘muhsinah’ and ‘afifah’, i.e.one having the reputation of committing ‘Zina’. The pillars of Lian are the evidence or testimony four in number strengthened by the use of the oath on God and by the word ‘lian’; the ‘hukm’ or consequence or effect of ‘lian’ is that after the ‘Lian’ is made, it is unlawful for the husband to have sexual intercourse and enjoy the wife, the ‘ahl’ or the person fit to make ‘Lian’ is a man who is qualified to give testimony to the detriment of and

against a Muslim and this condition excludes a non-Muslim and others who cannot give such testimony.¹²⁹

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 that his charge is true, 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”.¹³⁰

Origin and History of Lian

In order to know the exact principles which has been laid down in the doctrine of Lian, it is essential to bear its origin and history in the mind. The law has been based mainly on two considerations:¹³¹

1. “Very severe punishment is prescribed both for scandal by way of a false charge of adultery and for the offence of adultery itself”.

In Muslim law if the husband makes a false charge of adultery against his wife, he is to receive a punishment of eighty stripes and this punishment for

¹²⁹ Supra note at p. 396.
slander is known as ‘hadd-ul-kazaf’ or specific punishment for slander.

2. “The law of evidence for proving the charge of adultery was very strict it insisted on the production of no less than four law worthy witnesses as laid down in Quran”.  
132

The Holy Quran says:

“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”.133

The Holy Quran gives the wife also a chance to rebut her husband’s oath:

“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”.134

It is reported in Al-Bukhari by Ibn Abbass that the occasion of the revelation of the above verses was at the trial of Hilal bin Umayah. Hilal had accused his wife of adultery with Shink bin Salima, the Holy Prophet in accordance with the previous verse of the Quran demanded received the prescribed punishment of eighty stripes.135

132 Supra note at 253.
134 Supra note.
"Those who defame chaste woman, but cannot produce four witnesses, shall be given eighty lashes. Do not accept their testimony ever after, for they are transgressors." 136

_Hilal_ exclaimed, I swear by Allah, I am truthful, Allah will sent down an order and save me from being flogged, then the above verses constituting _Lian_ immediately revealed.137

The whole object of introducing this procedure as to making of the _Lian_ was intended to prevent the husband and wife receiving the punishment prescribed respectively for slander and adultery which should have been inevitable because of the stringency of law as to evidence. In a proceeding of _Lian_, the curse on the part of the man becomes a substitute for the _had-ul-kazaf_ (specific punishment for slander) and the _ghazab_ or wrath on the part of the wife becomes a substitute for _had-u-zzina_ (specific punishment for adultery) and the invoking of Allah when giving evidence more destructive in its effect than punishment.138

**Essentials condition in Lian:**

There are certain conditions which are essential for _Lian_ and the law of _Lian_ will not be applicable unless they are satisfied. They relate to the following matters:139

1. Accusation
2. Marriage
3. Spouses, capacity and status of,
4. Absence of witness,

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136 *Supra* note 38 at 263.
137 *Ibid*.
5. Demand by wife

6. Denial by wife and

7. Procedure

These essentials are now-being explained which are as follows:

1. Accusation must be made by the husband charging his wife with adultery. It must be definite certain and unambiguous. The charge of adultery may be express or implied.

2. There should be subsist a valid marriage between the parties at the time of accusation at the time of imprecations and at the time of ‘Qadi’s’ order. There cannot be no Lian when the marriage is Batil or Fasid. Thus, if a man accuses his wife of the charge of adultery and later on, divorce her irrevocably the doctrine of Lian shall not apply. But on the other hand, in case of the revocable divorce, the wife can have recourse to Lian during the period of her iddat.\textsuperscript{140}

3. The parties should be adult and possessed of understanding.

4. The husband should not be in a position to produce four witnesses to establish the truth of his accusation if he can produce witnesses to support his version then the doctrine of Lian shall have no application.\textsuperscript{141}

5. The wife should demand Lian.

\textsuperscript{140} Supra note.

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

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

If a husband makes accusation to his wife with charge of adultery but is unable to prove the allegation. The wife in such cases is entitled to file a suit for dissolution of marriage. The mere allegation or oath in the form of an anathema does not dissolve the marriage. A Qudi must intervene; According to Indian Law a regular suit has to be filed. 142

At hearing the suit, the husband, has two alternatives: 143

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

In the case of denial of paternity, the oath by the husband is, “I testify by Allah the Almighty that I was a true speaker in what I imputed to her by denying her child”, and by the wife saying, “I testify by Allah the Almighty that he was a liar in what he imputed to me by denying the child”.

143 Supra note.
Where there is combined charged expressly of adultery and also denial of paternity, the above formula is to be modified by adding a reference to *Zina* also.\textsuperscript{144}

**Shia view**

More or less, similar forms under *Shia* law; the husband should concluded with the word ‘wrath’. The parties should say, “I testify by Allah” and not “I swear” otherwise it would not be lawful.\textsuperscript{145}

**Reference to Qazi**

According to Sunni Law *Lian* can be effected only by proceeding before the judge. So long as the wife does not refer the matter of charge of adultery to the court; there would be no effect of the charge and the woman shall continue to be the wife.\textsuperscript{146}

**Lian under Modern Indian Law:**

As stated, based on the provisions of the Muslim personal Law (*shariah*) Application Act (1937) and the Dissolution of Marriage Act (1939), the divorce can be stemmed by *Lian* but a question now arises that whether the doctrine of *lian* can still be applied entirely in its old form or it has become inapplicable. To determine this question we should distinguish between that part of *Lian* which is related to substantive law and another part related to procedural law. As the Muslim law of marriage and divorce is still applied to Muslims the substantive portion of law shall govern them but the portion relating to procedure is not longer applicable as

\textsuperscript{144} *Supra* note at p. 257.
\textsuperscript{145} *Ibid* at 258.
\textsuperscript{146} B.R. Verma *Supra* note at 257.
Muslim law of Evidence and procedure has been superseded by the Evidence Act. 1871.\textsuperscript{147}

Under the existing in India (and Pakistan) a wife is not liable to any punishment for committing adultery and so she does not stand in need of lian to escape from punishment. The wife adopted by the Courts in a number of cases is that it is not, now, incumbent on the spouses to take the prescribed imprecations on the ground that they relate to the Muslim law of evidence having been superseded, the spouses shall be governed by the oresent law wherein the imprecations do not find any place. Besides, formerly if a husband refused to take the prescribed oaths or to admit the falsity of his accusation, the Qazi could imprison him till he complied with the order. But there is no provision of law which empowers a court to take such an action.\textsuperscript{148}

It was pointed out by the Lahore High Court in a case that provision does not prescribe that the procedure of lian was to be followed but that was meant simply to make certain that a wife could get a divorce on basis of her husband’s accusation her adultery.

The Court considered the procedure prescribed by the Muslim law has been superseded by the present day law so that the wife cannot ask the Court to order her husband either to retract his statement or to take prescribed oaths. It is; however, open to the parties to a suit to agree that it may be decided on one spouse taking the prescribed imprecations. This matter shall be governed by the oath Act 9 (Act x of 1872) which provides for giving such special oath as may be agreed upon between the parties.

\textsuperscript{148} Supra note.
Accordingly it has been held by the Court that it is not necessary for a Court to take the husband whether he wants to retract his accusation or if he wants to proceed with the case.\textsuperscript{149} It was stated that the offer to retract by the Qazi to the husband relates to procedure and so it is no longer necessary for the Court to make such an offer and it does not from an essential condition of \textit{lian}.\textsuperscript{150}

It was stated by the High Court of Bombay that the India Court are bound to give the husband an opportunity or offer to retract. It has also pointed out in that case that \textit{Mulla} was not right in stating in his book 'Mohammedan Law' that High Court of Bombay had expressed the opinion that retraction has no place in the procedure in British Courts in India and that what was actually held was the view that the India Court are not bound to give the husband an opportunity to retract.\textsuperscript{151}

In some cases it may happen that the wife claims that her husband has charged her of adultery hence she files the suit for either rehabilitation or separation. In such a case if the husband denies her claim the burden of proof lies on the wife. In order words she has to establish the fact (that her husband has charged her of adultery) by producing witnesses. If she fails to do so her suit shall fail.\textsuperscript{152}

According to above mentioned incidents and condition of \textit{Lian}; it is clear that the question of the determination of the wife’s guilt or innocence is left undecided under the provision of \textit{lian} (because of impossibility of producing of witnesses). Hence the question of burden of proof does not come into the picture at all. It

\textsuperscript{149} Ahmad Saleman Vohra v. Bai Fatima, AIR 1931 Bom 76; Lelan v. Rahim Bux, P. L. D. 1951 B. J. 91.
\textsuperscript{150} Supra note.
\textsuperscript{151} Muhammad Ali M. E Quraishi v. Hazra Bai, AIR 1919 All. 182.
\textsuperscript{152} Al-Fatawa, supra Vol. II, p. 132.
has, however, been held by the various High Courts in different cases that the wife in order to succeed in her case must establish that the husband’s accusation was false. 153 This view introduces a new condition foreign to the law of Lian.

The present-day practice of the Courts is not only against the provision of the Muslim Law, but is definitely harmful as it sometimes condemns wife to a lifelong misery when her husband contrives to prove that she has been erratic in her conduct. It will be in consonance with the spirit of the Muslim Law to dissolve a marriage if it is proved that the husband had made a charge of unchastely against his wife, unless he retracts his accusation as already discussed before.

**Different opinions of difference Sunni Schools**

1. It is necessary that neither of the spouses, who want to be a party of Lian, should have been convicted previously for slander because on being punished for slander the husband or the wife’s evidence cannot be admitted afterwards in any case even if he or she repents. 154 But according to Shafii His / her credibility shall be restored by retraction or repentance. 155

2. The wife, under Hanafi Law, should not be a slave girl or Christian or a Jewess even married to a Muslim. 156 But Shafii, Malik and Ahmad do not debar a woman of a questionable character or a non-Muslim or slave girl from having recourse to Lian. Under Shafii law lian is

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155 Supra note.
incumbent even when the husband is dumb because his signs are equivalent to spoken words.157

3. If the wife refuses to take the prescribed oath or to admit her guilt then under the Hanafi law she shall be imprisoned till she complies with the Qazi’s order. But Malik, Shafii and Ahmad b. Hanbal hold otherwise and state that she shall be punished for commission of adultery.158

4. Under the Hanafi law the mere accusation by the husband does not affect the marriage and separation shall not be effected thereby or by mere lian.159 But Malik has expressed the opinion that a separation takes place when the husband and the wife have taken the prescribed oath even before the Qazi.160

5. According to Malik, Shafii, Abu Yusuf, the wife becomes prohibited to the husband forever on the dissolution of marriage under the provisions of lian so that he cannot remarry her under any circumstances and even on reaction by him.161

Abu Hanifa and Muhammad, however, contended that after the husband’s retraction, lian becomes null and ineffective hence remarriage between them is possible.162

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158 Ibn Rushd, Supra note at 99.
159 Al-Fatawa, Supra note Vol. II, p. 130.
162 Supra note.
6. If the wife who was accused of adultery by her husband happens to die whether before or during the proceedings, the husband shall not be liable to be punished for the slander. But Shafii does not agree with this view and according to him the punishment is not to be remitted. But if she dies after the imprecations then husband is not liable to any punishment for slander on account of lian.\(^{163}\)

(ii) Faskh

Faskh means annulment. It refer to the power of Kazi/Qazi (in India, Law court) to annul a marriage on the application of the wife. The law of *faskh* is founded upon Koran (Quran) and Tradition, "If a woman be prejudiced by a marriage, let it be broken off", (*Bukhari*). In India, such judicial annulments are governed by Section 2 of the Dissolution of Marriages Act, 1939. Prior to the Act, the Muslim woman can apply for dissolution of marriage under doctrine of *faskh* on 4 grounds: (i) The marriage was irregular, (ii) in exercise of the right of option- *Khyar-ul-Bulugh*, (iii) the marriage was within the prohibited degrees of relationship, (iv) post-marriage conversion of the parties to Islam.\(^{164}\)

3.10 The Dissolution of Muslim the Marriage Act 1939

A Historical Perspective

The dissolution of Muslim Marriage Act, 1939 is most important enactment among the existing legislative measures relating to the Muslim personal Law. This is only legislative measure which introduced a substantive reform in the Islamic law of


\(^{164}\) Tyabji, *Muslim Law*, p. 194.
the various schools as applied in undivided India regarding the institution of divorce. The method by which this law was originally proposed to be enacted is known as Takhayyur (Eclectic choice) and signifies replacement of the principles of one school of Islamic law adhered to in a particular region or by particular people with those of any other school.¹⁶⁵

This fundamental principle was accepted by all the schools of Islamic law but in respect of the circumstances in which it should be applied and the procedure through which a woman’s marriage could be dissolved, the school of Islamic law greatly differs from one another. At one extreme there was the Maliki School which Qazi to dissolve a woman’s marriage on a wide variety of grounds. On the other hand, there was the Hanafi School which greatly restricted woman’s right to keep dissolution of marriage by Qazi, especially by a non-Muslim judge.¹⁶⁶

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

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

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

(c) Matters incidental to the aforesaid subjects (Sections 3 and 5).

¹⁶⁵ Tahir Mahmood, Muslim Personal Law, p. 54 (1972).
¹⁶⁶ Ibid at 72.
Regarding the applicability of the dissolution of Muslim marriage Act, 1939 after independence it was made applicable to entire India except the erstwhile part B states. In 1959 it was amended to make it applicable to the whole of India except the state of Jammu & Kashmir. In the state of Jammu & Kashmir local dissolution of Muslim marriage Act, 1942 is applicable with some different provision parallel to the (central) dissolution of Muslim marriage Act, 1939 in erstwhile Mysore state a local dissolution of Muslim marriage Act, 1943 was enacted on the policy and lines of (central) dissolution of Muslim marriage Act, 1939, and it remarried applicable till the merger of Mysore to the Indian union.¹⁶⁷

3.11 The Grounds of Dissolution of Muslim Marriage under the Act, 1939

Section 2 of the Dissolution of Muslim Marriage Act, 1939, provides that a woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the grounds enumerated therein. It is to be noted that benefits of this Section may be given to a wife whether the marriage was solemnized before or after the commencement of the Act. That is to say, the provisions of Section 2 may be given retrospective effect.¹⁶⁸

A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

¹⁶⁷ Supra note at 57.
Section 2 (i): Husband’s Disappearance

That the whereabouts of the husband have not been known for a period of four years;

Section 2 (ii): Want of Maintenance

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

Section 2 (iii): imprisonment

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

Section 2 (iv): non- performance of marital obligations

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

Section 2 (v): Impotency

That the husband was impotent at the time of the marriage and continues to be so;

Section 2 (vi): other diseases

That the husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease;

Section2 (vii): option of puberty

That she, having been given in marriage by her father or other guardian before she attaining the age of fifteen years, repudiated the marriage before attaining the age of eighteen years:

Provided that the marriage has not been consummated;

Section 2 (viii): cruelty

That the husband treats her with cruelty, that is to say:
(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

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

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

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

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

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;

(ix) on any other ground which is recognized as valid for the dissolution of marriages under Muslim law:

Provided that:

(a) no decree shall be passed on ground (iii) until the sentence has become final;

(b) a decree passed on ground (i) shall not take effect for period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and

(c) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one
year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.