CHAPTER 4
PROCEDURES TO TAKE DIVORCE IN INDIA AND IRAN

4.1 Procedure and Formalities of Taking divorce/Talaq in Indian Muslim law

No school of the Sunnis prescribes any formalities for Talaq.¹

A [Sunni] Muslim husband may, under all schools of Muslim law effect an out-of-court divorce by his own declaration. This is called talaq. It was in fact a pre-Islamic practice which Islam reformed and retained in its law; it was not introduced by Islam.

There is nothing in the law suggesting that the husband is free to exercise the power of talaq in an arbitrary, irrational or unreasonable manner. The Muslim law allows talaq subject to several conditions that are of a dissuasive nature; their purpose is to discourage the husband from exercising his right without a careful and cool consideration.

The man is not allowed to pronounce a talaq while the wife is in her menstrual period; since this is a period of mutual distance not fit enough to take a decision on separation. A man thinking of talaq must wait till the wife is a tuhr (menstrual-free state) – as then by getting closer to the wife he might change his mind.²

The Muslim [Sunni] law prescribes a simple procedure for talaq, keeping all chances of reconciliation and reconsideration open. A talaq strictly following this procedure is talaq-e-sunnat – a proper talaq.

¹ Paras Diwan, Muslim Law, p. 88 (2009).
Within the limits of talaq-e-sunnat there are degrees of virtue in respect of the man's conduct. The more virtuous conduct in this respect will be ahsan (better), the less virtuous hasan (fine).

A talaq in violation of the prescribed procedure is a talaq-e-bidat or bid'l talaq – an improper talaq.³

**Oral or Writing Divorce in Sunni Laws**

According to Sunni law Talaq/divorce may be oral or in writing. Talaq may be simply uttered by husband or he may write a Talaqname.

**No Need Specific Formula or Particular Word for Divorce**

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.

**No Need To Witnesses in divorce in Sunni Laws**

A Talaq whether oral or in writing, need not be made in presence of the witnesses. Under Sunni law, Talaq without witnesses is valid.⁴

**4.2 Formalities of Divorce in Shi'a Muslim laws**

**Divorce/Talaq must be orally in Shi'a laws**

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

³ Supra note at 105.
Divorce Need to Two Competent Witnesses in Shi’a Laws

*Shi’a* 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 Muslim of sound mind may be substituted to act as witnesses. A *Talaq* without witnesses or in presence of incompetent witnesses is void under *Shi’a* law.  

Majority of *Shi’a* jurists are of opinion that divorce must, orally, be pronounced if the divorce (husband or his agent on his behalf) is able to talk and the divorce given in other ways is void. But if the pronouncer is unable of talk, due to any reason such as dumbness, then he/she can write whatever must have been said.  

Specific Arabic word for Divorce In Shi’a Laws

*Shi’a* law requires the use of specific Arabic words in the specific formula in the pronunciation of *Talaq*.

The actual form of utterance of divorce in Arabic is ‘Ante Taliqon’ means ‘you are divorced’. ‘Ante’ is pronoun for feminine single and ‘Anta’ for masculine one. ‘Taliqon’ is name of agent and ‘Talaq’ is infinitive. That word in the formula which should not be changed is ‘Taliqon’ otherwise instead of ‘Ante; it can be altered to eg. This wife or her name etc.

Mohammad. b. Moslim narrates the Sixth Imam; Jafar b. Mohammad. As-sadeq that he was asked if the husband says to the

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5. R.K. Sinha, p. 84.
6. Supra note.
7. R.K. Sinha, p. 84.
wife that ‘you are free from my side’ or you are separate’ or ‘you are forbidden to me’ there can be a divorce? Iman Sadiq said ‘No’(laisa Be Shi’a).9

Whether the formula should be pronounced in Arabic or it can be translated to other languages, there is a difference of opinions. The Majority of jurists lay down that if the pronouncer (The husband or his agent) are able to pronounce divorce in Arabic then it cannot be said in other language.10 Ibn Idris in his book ‘As-Sara’ir’ approved this view. But some others, including the great jurist Sheikh Tusi, in his book ‘An-Nihay’a, hold the contrary view. They say the divorce’s formula can be pronounced either in Arabic or any other languages provided the words used must be equivalent of their Arabic terms.11

4.3 Procedure and Formalities for Taking of Divorce in Iranian Laws

The procedures of taking divorce in Iranian (Shi’a) Muslim laws are:

1. The husband or wife intends to divorce, he/she have to go to the special Civil Court12 and shall apply to the court for issuing him or her certificate of incompatibility (non-reconciliation).13

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9 [laisa Be Shi’a], It is Arabic sentences that means: No, He is not Shia], 
10 Hasan b. Sadid-ud-Din alias Allameh Helli; Mokhtalaf ul-shi’a, (Qom-Iran), p. 585.
11 Supra note.
13 Single Clause Bill 1 of the ‘Amendment of Divorce’s Regulation Act, 1991-1992 states: “Since the adaptation of this Amendment, all divorce seeking couples, should apply in special civil courts and if their differences are not solved by the court and the arbitrators from both sides, (as it is said in Holy
2. The applicant should also mention the exact reasons for obtaining the certificate of non-reconciliation.

According to Section 8 of the family protection Act 1975, the wife or husband can suits to the court for issuing certificate of non-reconciliation in the causes of below and the court while discerning these causes will issue that certificate.

(a) Mutual agreement for divorce.

(b) Where the husband refuses to pay the wife’s cost of maintenance for any reason and it will be impossible to coerce him or; Where he fails to fulfil her other indisputable rights for the same and it will not feasible to force him into doing this.

(c) non-compliance (non-sexual submission) of wife with husband.

(d) Both husband and wife’s social misconduct or maltreatment to each other to a point unbearable to her.

(e) The husband and wife’s affliction with refractory diseases, which can endanger the other side health.

(f) Cases of insanity wherein official dissolution is not religiously feasible/ advisable.

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Quran), the Court will issue a Non-Conciliation Decree and introduce the couple to the Notary Public that are no more eligible to register divorce for couples whiteout such Decree. The working permissions of Notaries violating this law will be deemed void".

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(g) The husband's disobedience of the court injunction not to engage in careers discerned by the court to be beneath the mutual's family dignity and social status.

(h) The husband or wife's find conviction resulting in a five-year imprisonment or its equivalent pecuniary punishment resulting in such a prison term due to his incapacity to extinguish the debt;

(i) Both husband and wife's addiction to any of harmful drugs which, as discerned by the court, interferes with the family principles and renders life unbearable for the wife.

(j) Where the husband remarries without seeking consent of the wife or where he is not treating his wives equally as discerned by the court.

(k) The husband and wife's abandonment of family life with no justifiable reason. Where both the abandonment and the justification are discerned/decide/confirmed by the court;

(l) The condemnation of husband and wife due to an offence which is incompatible with the mutual's family prestige and customs. The court should discern and confirm the incompatibility of the crime to family prestige according to the situation of both sides.

(m) Where one of the couples is infertile and when either wife or husband cannot bear a child due to her mutual's sterility or other physical affliction.
(n) Where the husband or wife is missing/untraceable and is not found with regard to Article 1029 of Civil Law.

Note: The divorce that is occurred based on this law and non-reconciliation certificate will be referred only in case of mutual written agreement within waiting period.

3. On receipt of the application, the court shall through two arbitrators (Hakamain), as the Holy Quran\textsuperscript{14} ordered, endeavour to bring about a compromise between the husband and wife, and prevent the occurrence of a divorce.

4. After reference of the case to the arbitration, either of the spouses has to introduce a qualified relative of his/her, as arbitrator, to court within twenty days from the day of such reference.\textsuperscript{15}

In case of non-existence of a relative with mentioned requirements, or impossibility to reach such person, or their non-acceptance of arbitration, each of the couple could introduce other qualified people and in case of their inability to introduce an arbitrator, the Court will install an arbitrator directly.\textsuperscript{16}

5. The arbitrations must be having the some qualifications. According to Article 4 of the Executive Procedure on Divorce Law Amendments 1993,

\textsuperscript{14} Holy Quran, 65: 2.
\textsuperscript{15} Article II of the Executive Procedure on Divorce Law Amendments, 1993.
\textsuperscript{16} Article III, Supra note.
“Introduced or installed arbitrator must have the following requirements:

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

6. After introduction and installation of arbitrators, the Court will hold a extra session to read them their duties.17

7. The Court will determine a time limit for arbitrator to judge, arbitrators could ask for time extension and the Court will approve it if distinguished urgent.18

8. Installed arbitrators must hold no less than two sessions with the couple to make peace among them and in case of failing to conciliate or one or both of the couple not taking part in these sessions, they must hold the sessions with one or neither of them, to study the differences and declare their decree on feasibility of conciliation to the Court within the time limit.19

The main privileges of arbitration over court are:

17 Article V, Supra note.
18 Article VI, Supra note.
19 Article VII, Supra note.
(a) Family is center of emotions and could not be processed with emotionless harsh regulations but the differences should be solved emotionally as far as possible. Clearly emotions have no place in law courts.

(b) Parties in law courts would reveal any secret to defend themselves, however revealing family secrets in front of strangers may hurt the feelings of the other party. In this case if the couple is ordered by the court to return to their home, no closeness and intimacy will prevail between them. Experience has proved that couple who go to court will no more be the same. In arbitration sessions, however, family secrets are either not-revealed or in case of revealing, since it is in front of close relatives, it will not do any harm.

(c) Law court judges are mainly indifferent to the fate of divorcing couples or their children and do not care if they separate or reunite. This is, however, completely different in arbitration sessions where arbitrators are relatives with common interests as with the couples and cannot be indifferent to their fate so they will do their best to reunite them.

9. Written report [of arbitrations] on impossibility of reconciliation should be delivered to the Court based on all marriage conditions and issues written in marriage documents of the Islamic Republic of Iran and also determining the guardianship of children and settlement
of financial issues signed by the couple and their arbitrators and also if suspected by the Court, a mental health certificate should be delivered.\footnote{Note II of the Single-Clause Bill – Amendment to Divorce Law, 1991 by the Parliament and 1992 by the Expeditionary Council.}

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

11. The Non-Conciliation Decree issued by judiciary officials is deemed void if not referred to divorced registration offices within three months.

   In case of referring the Decree to such offices, the Notary Public should summon the couple for recitation of divorce vows and registering their divorce, in case one of the parties does not show up on time, the office will summon them for the second time in no more than one month and will do as following:

   (a) If the wife does not show up, the husband will recite the divorce vows and the Notary Public will register the divorce and inform the wife

   (b) If the husband does not show up, the Notary Public will inform the Court and it will summon the husband on its authority and in case of repeated refusal on part of the husband, the Court will recite divorce vows, observing religious aspects and will order the Notary Public to register the divorce and inform the husband.
If the husband shows up in office but refuses to divorce the wife, the office will do as part B.\textsuperscript{21}

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

Recitation of divorce vows and registering it is conditioned to delivering all payables to the wife in cash (including dowry, marriage portion and etc.) unless (in \textit{khula} and \textit{Mobarat} divorce) in divorces granted based on forgiving all compensations by wife (as far as it is forgiven) or in case of consent by the wife or issuing final decree on husband's inability to pay.\textsuperscript{22}

13. According to the proviso guarantees\textsuperscript{23} in the marriage contract, if a man files for divorce, he is obliged to give his wife up to half of the assets he has acquired during marriage. Considering the structure of our society and that many women do not have financial resources, this proviso is a means of securing financial security for women so that they can support themselves after divorce.

14. In revocable divorces a written certificate on living of the divorced woman in common house until the end of the Idda is necessary and if divorce is revoked the

\begin{footnotesize}
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\item[22] Note 3 of Single Clause Bill – Amendment to Divorce Law, 1991 by the Parliament and 1992 by the Expeditionary Council.
\item[23] As mentioned in Chapter II.
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divorce report will be annulled and in case on non-revocation, the divorce report is completed and is official if signed by the couple, arbitrators, witnesses, and signed and sealed by head of the Notary Public.24

15. After divorce25 and in case of an appeal by the divorced woman for payment against works that were not her religious duties, the Court will initially try to make a settlement on this appeal and in case of infeasibility of such settlement, if any conditions had been made, on financial issues, during the marriage or other binding contracts, and if the divorce was not requested by the wife, and also if the divorce request was not a result of woman’s refusal of her matrimony duties or misbehavior, the Court will do as follows:

(a) If the woman had done such religiously unbinding works by the order of the man and without any benevolence motivations, and this is proved before Court, the Court will calculate fees for such works and will order for its payment.

(b) In cases other than above, based on their common years and nature of works done by the wife and financial abilities of man, the Court will determine an amount as gift (Nahla) for the wife.26

24 Note 4 of Single-Clause Bill, Supra note.
25 The jurists interpret the word ‘after divorce’: As ‘the time of pronouncement of divorce’.
26 Note 6 of Single-Clause Bill, Supra note.
16. Pregnancy or non-pregnancy certificate by qualified doctors and laboratories should be delivered. 27

17. The notary public office has no right to register any divorce whose certificate of ‘impossibility of reconciliation’ has not been issued for. Otherwise the faulty Notary would be incapacitated. 28

18. If each of the parties goes for divorce without receiving the certificate of non reconciliation, he/she will be condemned to 6 months – one year imprisonment. The same penalty would be for the notary public office of the Divorce who has registered the divorce. 29

19. The divorce must be performed in the actual form of utterance and in the presence of at least two just men who must hear the actual form of divorce. 30

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

20. The witnesses must be male and just. This requirement is based on the letter of holy Quran 32 and

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27 Note 7 of Single-Clause Bill, Supra note.
30 Article of 1134 of Iranian Civil Code.
31 The witnesses based on the letter of Section 1134 of the Iranian Civil Code must be male. Then if there is double number of females e.g., one male and two females or four females of two males, it is not enough.
32 Holy Quran, 56: 2.
the great jurist Sayyed Mortaza has claimed that there is Ijma on this point. 33

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

The same view has been taken by Shi’a jurist’s unanimously.35

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

**4.4 Components of Divorce in Iranian Laws**

1. Divorcer – One who divorces (Article 1136)36

2. Divorcee – wife (Articles 1140-1142)37

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33 Sayyed Mortaza, Al-Intesar, Tehran, Iran, p. 128.
34 Holy Quran, 65: 2.
35 Hsan B. Sadid-ud-Din (Allameh Helli), Qavaid ul-Ahkam, Qom (Iran), Vol. II, p. 64.
36 Article 1136 - "The divorcer must be of legal, must be in possession of his faculties, must intend the act and must be free in his action".
37 Article 1140 - “It is not proper to divorce a wife during her monthly period or during the convalescent period after childbirth unless when the wife is pregnant or when the divorce occurs before matrimonial relations with her, or when the husband is absent so that he cannot obtain information concerning her monthly period”.

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

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3. Actual form of utterance of divorce (Article 1134)

4. Bearing witness (that is, the presence of witnesses of divorce) Article 1134. In the light of the Family Protection Act (Article 10), the fifth component should be defined as such.

5. Issuance of the certificate of incompatibility by the court.\textsuperscript{38}

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

4.5 Conditions for Correctness of Divorce in Iranian Laws

The fundamental conditions of divorce in Iranian law are:

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

(i) Intention and consent

Divorce in any case must be accompanied with the intention and consent of the divorcer, therefore, if his intention or consent is lacking or is not perfect, divorce is invalid.

(ii) Competency

“The divorcer must be mature, must be in possession of his faculties, must intend the act and must be free in his action.\textsuperscript{39}.

\textsuperscript{38} Langrudi, \textit{Supra} note at 231 (1999).

\textsuperscript{39} Article 1142- “The divorce of a wife who although of child - bearing age has no monthly period, will be valid only when three months have passed from the date of the last matrimonial relations with her”.
(iii) **Purity of woman**

The third condition for divorce is that woman should not be period or post-delivery period or in menstruation.

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

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

(iv) **Court’s verdict**

In cases that a woman can ask for divorce, if she asks for divorce and the husband does not willingly divorces her, the court issues the divorce verdict.

4.6 **Formal Conditions of Divorce in Iranian laws**

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

1. The documents necessary to show for performance of divorce. The identity card or the letter of attorney of the husband if his advocate is divorcing on his behalf

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39 Article 1136 of the Iranian Civil Code.
40 Purity of woman in jurisprudence and civil law means when woman is not in her menstruation (monthly period). The gap between two menstruation is called purity, see Langrudi; p. 423 (1991).
41 The blood oozing from woman’s womb every month, see, Ibid at 253.
42 In jurisprudence or civil law it refers to the blood oozing at the time of delivery or after the delivery (Article 1140 of the Civil Law), Ibid at 718.
and the client is not present and in case the woman has asked for divorce she must also possess the court verdict and should be submitted to the notary public office.

2. Persons who must present themselves at the time of performance of abrogation of divorce⁴³ are: the head of the notary public office, the divorce or his advocate, the witnesses and if necessary the person who utters the words of divorce, the introducer and the committed.

3. Performed in the actual form of utterance

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

4. Preparing the divorce certificate

The head of the notary public office by observing the abovementioned formalities prepares the divorce certificate and registers it in the office’s records. ⁴⁴

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⁴³ In jurisprudence or civil law it refers to the blood oozing at the time of delivery or after the delivery (Article 1140 of the Civil Law), Ibid, p. 718.

⁴⁴ This is called Iqaa’ in Civil Law of Iran which is a judicial act which refers to the unilateral abrogation of a contract by one of the parties without inflicting any loss on the other side (unless clearly mentioned in the laws such as the Divorce Law), other forms of Iqaa’ are Ibra’, I’radh and Faskh, Ibid, p. 100.