

# THEORIES OF MARRIAGE AND DIVORCE UNDER ISLAMIC LAW

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## ABSTRACT

*Marriages in India are one of the most important social institutions that bind a family. In India before the enactment of any act or code, marriages were usually governed by social traditions, customs which have been prevalent in that particular community or tribe from time immemorial. Although, even after the enactments of such acts and codes, the customs and traditions of a community holds a good value in society and the courts have readily accepted them if it could be proved by one community that a particular custom has been practiced by that community from time immemorial or from the inception of such community. The reason as to why the acts and statutes were drafted was to give a uniform framework and skeleton as to how a particular community would be governed if it doesn't have any customs and traditions as such. It also aimed to prevent any anomaly which existed in a particular community. Therefore Marriage and Divorce provisions have been separately drafted in the act.*

*Divorce means to legally dissolve one's marriage with (someone) because there has been an irretrievable breakdown of marriage and both the parties don't want to continue their marital ties with each other. Divorce was said to be recognized only in the Islamic Jurisprudence but in later times it became a part of all religions and communities.*

*This article specifically deals with the essentials and process of marriage and divorce in Muslims under Islamic law.*

## 1-INTRODUCTION

In the pre-Islam Arabia, the laws were mostly in the favour of Muslim male and against the women. At that time, there were different kinds of marriage was prevailed and method of dissolution of marriage was simple and easy for Muslim male. The basic rights of Muslim wife were denied because male was considered superior as compare to Muslim female. Women were treated as a property of their husband and they were absolutely depend upon their husband Under the Muslim law, marriage is taken into consideration as the civil settlement. The Arabic word Nikah (marriage) manner "the union of sexes" and in law, this means "marriage". The phrase 'Nikah' has been used for marriage under Muslim law. 'Nikah' literally method, "to

tie up collectively". It implies a particular agreement for the reason of legalizing technology. Marriages create a particular and high status in the society. Marriage ensure balance in a married life as it bound both parties to marriage to live together for an indefinite period and also required the wife to be honoured with the Maher. Islamic law is strongly in the favour of institution of marriage. There may be no area for celibacy in Islam just like the Roman Catholic Monks and nuns. The Prophet has said, "There may be no Celibacy in Islam." <sup>1</sup>

Muslim Marriage is a contract governed by Muslim law that permits physical relationship between husband and wife. It is an honourable way to regulate domestic life and to ensure the continuation of a responsible generation. When a contract is valid, both husband and wife have rights and responsibilities towards each other. They have the right to live together and to make plans for their life and future. Unfortunately, not all marriages last forever. As the final solution and the last resort, the dissolution of marriage or divorce is allowed. Divorce amongst historic Arabs changed into easy and of frequent incidence. In fact, this tendency had even endured to a point, in Islamic law in spite of the truth that Prophet showed dislike to it. The term 'Divorce' is understood at some stage in the sector and its concept is located in each language and religion. According to Islamic idea matrimonial alliance is a kind of social contract and it can be dissolved while it ceases to serve its purpose. This doesn't imply that marriage has no sanctity and solemnity in Islam. Islam with its sensible and practical outlook on all human affairs acknowledges 'Divorce', however handiest as an essential evil, inevitable in sure occasions. Who can deny the truth that there do stand-up positive situations in which it isn't always humanly possible for the couple to steer a glad and useful existence via continuing as husband and wife? In place of dragging on with a sour and miserable lifestyle in pressured partnership, wouldn't it now not be more conducive to the welfare of the parties to the element with the grace and true will? Ameer Ali in his book 'Mohammedan law' is of view that the reforms of Prophet Mohammed marked a brand new departure within the records of ignore regulation. . Prophet Mohammad confined the power of divorce and gave to the women the right of acquiring separation on reasonable grounds. The Prophet is pronounced to have stated," If a female is prejudiced by using a wedding, let or not it's damaged off." terrific divergence exists a few of the various colleges concerning the workout of the energy of divorce through husband of his very own motion without the intervention of the decision. Big and influential our bodies of jurist regard talaq emanating from the husband as in reality prohibited except for the necessity including the adultery of the wife. Some other segment consisting chiefly of the 'Matanzas', consider talaq as now not permissible without the sanction of the 'Hakim-ush-sharia', viz. the decision to administer the Muslim law. They recall this type of motive as can also justify separation and eliminate talaq from the category of being forbidden, must be examined via an unbiased decide and in help of their doctrine, they talk to the phrases of the Prophet already stated and his guidelines that in case of dispute between the married parties, arbitrators have to be appointed to the agreement in their differences. The pre-Islamic group of divorce required no system to make its movement legitimate, and as there has been no test on the effect that the tie changed into

<sup>1</sup> <http://www.legalserviceindia.com/article/1162-Concept-of-Marriage-in-Muslim-Law.html> (visited 27th march 2019)

dissolved became considered enough. In Muslim marriage, the husband can dissolve the wedding tie at his will as he has a good deal greater rights than that of the wife but the girl cannot divorce herself from her husband without his consent. She can, of course, buy her divorce from her husband.<sup>2</sup>

The Arabic word for the divorce is 'talaq' which incorporates the literal importance of liberating or the undoing of a loop. In the terminology of the jurists, the talaq is called khula (that means actually the eliminating or starting off of a factor), while it's far claimed with the aid of the spouse. Under Muslim law, talaq is the merely arbitrary act of a Muslim husband who can also repudiate his spouse at his own pleasure without or with reason. . He can pronounce the talaq at any time. It is not necessary for him to obtain the prior approval of his wife for the dissolution of his marriage. The Muslims considered their marriage as a contract without any semblance of sacrament. They recognize divorce in three main versions - a) unilateral divorce by husband, b) divorce by mutual consent, c) judicial divorce which is available only to the wife. In former two no intervention of the Court is required.<sup>3</sup>

Under Muslim law, a marriage may be dissolve either through the loss of life of the husband or wife or by way of divorce. After the death of the spouse, the husband may also remarry right now. But the widow cannot remarry before a positive exact duration known as iddat expires. The iddat of loss of life is four months and ten days in case of the death of husband and if she is pregnant, till the delivery of the child.

In India, Divorce in Muslims is regulated by their personal Muslim laws and according to that Nikah can be dissolved either by the death of husband or wife i.e. the act of god or by divorce i.e. the act of parties. The Large population of Muslims in India belongs to Sunni community and in Sunnis, a Muslim husband has an exclusive right to give divorce to his wife just by pronouncing talaq for three times either in one sentence or in three sentences by saying "I divorce you, I divorce you, and I divorce you". Triple Talaq becomes neither recognized nor sanctioned via The Holy book Quran and The Holy Prophet. Triple-Talaq is also called as Talaq-ulBiddat which gives a right to a Muslim husband to give divorce to his wife at any time which become valid and irrevocable immediately. This not only violates Muslim wives rights but this also makes them inferior in the eyes of society in addition to inside the eyes of fellows. Similarly to this, the most thrilling reality about this is that its miles being used by the husband but outcomes are faced by wife. Under the Quran the marriage status is to be maintained as far as possible, and there should be conciliation before the divorce, and Quran discourage divorce. Islamic law permits talaq when the wife has not a good character which made an unhappy married life. When the husband gives divorce without reason, it is not considered as an appropriate talaq in the eyes of religion. This practice was not approved by Allah but this practice is followed still now. Men use triple talaq as a right to abandon their wife who needs to be respected and supported.<sup>4</sup>

<sup>2</sup> [https://www.doccity.com/en/marriage-under-muslim-law/2198773/\(visited 27<sup>th</sup> march 2019\)](https://www.doccity.com/en/marriage-under-muslim-law/2198773/(visited%2027%20march%202019))

<sup>3</sup> Cochin law review vol ix,1985,pp 317-321

<sup>4</sup> Divorce in Muslims, available at: [www.legalamicus.com/journal](http://www.legalamicus.com/journal) (visited 28<sup>th</sup> march 2019)

The holy book of Islam i.e. Quran provides the procedure of giving divorce. A divorce is Talaq which means taking off any tie or restrain and signifies dissolution of marriage. In Hanafi law recognized express, implied, contingent, constructive and delegated. Ithna Ashari law recognized only the express and the delegated talak in the presence of two male witnesses. When the husband pronounces talaq in the absence of the wife, it has taken effect on such date the wife came to know of it. The express talaq falls into two categories:

- a) Talak-ul-Sunna and
- b) Talaq-ul-Biddat or Talaq-e-Badai.

Ahsan is most approved form of divorce where the husband disown his wife by a single pronouncement in a time of tuhr (purity, i.e., when the wife is free from her menstrual courses), amid which he has not engaged in sexual relations with her. Main purpose of iddat period is that divorce can be repudiate at any time for the completion of iddat period. Hasan has approved a form of talaq where the husband successively pronounces divorce three times during the time of tuhr. If the wife beyond the age of menstruation period, the pronouncement of talak may be made after the interval of a month or thirty days between the successive pronouncements. When the last pronouncement is made, the talak becomes final and irrevocable. Talaq-ul-Biddat is not the approved form of talaq. This form of talaq is not recognized by the Shia. Triple divorce the husband repudiates marriage by orally saying talaq in one sentence thrice within the time of tuhr. Three pronouncements of talaq are made in a single tuhr, either in one sentence e.g. "I divorce you triply or thrice", or in three sentences, "I divorce you, I divorce you, I divorce you." But a triple repetition is not a necessary condition of talaq-ul-biddat, and the intention to render a talaq irrevocable may be expressed even by such sentence, as, "I have divorced you by a talaq-ul-bain (irrevocable talaq)".<sup>5</sup>

Triple divorce or immediate talaq become no longer length for the duration of Prophet's Mohammad lifetime, for the duration of the first Caliph Abu Bakar's reign and additionally for more than two years throughout the second one Caliph Hazrat Umar's time. Later on, Hazrat Umar accepted it due to a particular scenario of women. When the Arabs ruled Syria, Egypt, Persia etc. they found that women were more beautiful as compare to their own women and hence were attracted to marry them. However, the female who have been not understanding approximately Islam's disapproval of triple divorce in a single sitting, could insist that before marrying them they need to pronounce divorce thrice to their current wives which they could without difficulty take delivery of to do (as they knew Islam had abolished triple divorce and that it would now not be effective) and marry the Syrian or Egyptian women and might also retain their in advance other halves. Whilst the Egyptian and Syrian women determined that they were cheated, they complained to second Caliph Hazrat Umar. The Caliph then enforced triple divorce again so one can prevent its misuse with the aid of tile Arabs. He had done so to meet an emergency scenario and not to put in force it permanently and to contravene

<sup>5</sup> Steps to an Islamic Divorce-available at <https://www.thoughtco.com/steps-to-an-islamic-divorce-2004442>(visted 29<sup>th</sup> march 2019)  
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specific provisions of Holy Qur'an and pronouncing of Holy Prophet Mohammad. But later Jurists declared this form of divorce valid and gave no secular sanction to it. The motive for legitimizing this form of divorce via Caliph Hazrat Umar appears to be restrictive instead of permissive. He held it permissible to impose positive restrict on loose dispositions to divorce which had crept in the course of his regime. Hazrat Umar's item in making powerful three divorces suggested on one event turned into to warn the people that they would take evil outcomes of following a un-Islamic practice, however, the result was contrary to what he intended. Henceforth, it has become a widespread exercise to pronounce divorce three times on an unmarried occasion dissolving the wedding immediately and irrevocably. it is this component of divorce which has created false impression regarding the pronouncement of divorce, alongside the felony effect of it becoming irrevocable, both via three pronouncements at an unmarried sitting or three pronouncements at three tuhrs of single Iddat seems to have crept into Islamic Jurisprudence, and is a matter grave enough to require seriously take a look at duration.<sup>6</sup>

**MEANING OF TALAQ**-In Muslim law, talaq means freedom from the bondage of marriage and not from every other bondage. In the legal sense, it manner the repudiation of marriage by husband using three words of talaq. In other words, talaq is the refusal of marriage by way of the husband according to the technique laid down by means of the law. While the husband physical activities his right to pronounce divorce technically that is referred to as talaq. The best Muslim Law Advocates in India can be consulted to understand the concept of divorce in Islam. The most remarkable feature of Muslim law regarding talaq is that all the schools of the Sunnis and the Shias sanction but they have different view in some matters. The absolute power of a Muslim husband of divorcing his wife unilaterally, without assigning any purpose, actually at his whim, even in a joke or in a state of intoxication, and without recourse to the courtroom, and even within the absence of the wife, is diagnosed in modern India. All that is essential is that the husband ought to pronounce talaq; how he does it whilst he does it, or in what he does it isn't always very important. Consistent with Sunni regulation, a talaq may be oral or in writing. No precise formula or use of any particular phrase is required to represent a legitimate talaq. Any expression which simply shows the husband's choice to interrupt the marriage is enough. It wants not be made in the presence of the witnesses. According to Shias, talaq must be in the oral form, except where the husband is unable to speak. If the husband is able to speak but he offers it in writing, the talaq is void under Shia law. The other condition for talaq under the Shia law is that talaq must be pronounced in the presence of two witnesses. The phrases of talaq need to without a doubt indicate the husband's intention to dissolve the marriage. If the pronouncement is not express and is ambiguous then it is certainly important to show that the husband certainly intends to dissolve the marriage.<sup>7</sup>

<sup>6</sup> Instant triple talaq unislamic-available at-<https://timesofindia.indiatimes.com/city/kochi/instant-triple-talaq-is-un-islamic/articleshow/60186435.cms>(visited 27<sup>th</sup> march 2019)

<sup>7</sup> Talaq a Biddat: Classical views and Judicial trends available at: [http://shodhganga.inflibnet.ac.in/bitstream/10603/52355/7/07\\_chapter %203 .pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/52355/7/07_chapter%203.pdf) (visited 29<sup>th</sup> march)

## 2-MARRIAGE AND DIVORCE UNDER MUSLIM LAW

Marriage is referred to as Nikah under Muslim marriage laws. Nikah is an Arabic term which means carnal conjunction or union of the sexes. Justice Mahmood has expressed the view that Nikah is civil contract. The civil contract of marriage will complete with the proposal and acceptance of parties to marriage. All the rights and obligation of parties to marriage come into existence after the fulfilment of valid marriage. If we compare the Muslim marriage with Hindu law, we can say that the Muslim marriage is not a sacrament but it is a civil contract. Nikah or marriage following are the essential requirements: <sup>8</sup>Essential of valid marriage: Essential for valid marriage under Muslim law given as below:

1. Under Muslim law proposal given by one party (Ijab) and acceptance (Qubul) from the other to marriage.
2. For the validity of a marriage, the proposal made by one of parties to the marriage, and acceptance of the proposal by another party.
3. The proposal and acceptance must both be expressed at one meeting. Under Mohammadan law or religion there is no particular ceremony or rituals for conversion. Any people who profess Mahomedan religion and acknowledges that there is one god and Mohammad is his last prophet is a Mohammadan. It is not necessary that he should observe any particular ceremonies or be an outbox believer in the religion. Puberty: when the marriage under party contracted, during the by guardian on the behalf of minor they can repudiate their marriage after attained the age of 15 year, but before the completed 18 years of age.

### 1. CAPACITY TO MARRIAGE-<sup>9</sup>

1. A person who is sound mind may make a contract of marriage.
2. A Person who is minor (not attained the age of puberty) maybe enter into the contact of marriage through their respective guardians.
3. The consent of the party marriage must be free. If the consent of the party caused by fraud, force, the marriage will not valid in the eye of Law. When consent to a marriage has been obtained by force fraud, the marriage is invalid unless it is ratified. Where consent of the marriage has not been obtained, consummation against the will of the women will not validate the marriage.

### 2. MUTA MARRIAGE-

The word Muta marriage means enjoyment, and by implication ‘the marriage for pleasure’. A Shia Muslim may enter into a contract of marriage for a limited period. Which may be for a year, a month, a day, or even a

<sup>8</sup> Essentials of Valid Muslim Marriage-available at [https://www.webindia123.com/law/family\\_law/muslim\\_law/essentials\\_of\\_valid\\_marriage.htm](https://www.webindia123.com/law/family_law/muslim_law/essentials_of_valid_marriage.htm) (visited 29th march 2019)

<sup>9</sup> ibid

part of day. A Muta marriage is not recognized by Sunnis. Under Sunni law Muta marriage is void. When the period of marriage, and the dower have been fixed then the contract is fixed. If the period is fixed and the dower is not specified, the contract is void. But where the dower is fixed and the period is or not specified, though contract is void as a Muta marriage yet it may operate as a permanent marriage.<sup>10</sup>

### 3. PROHIBITED RELATIONSHIP<sup>11</sup>

There are certain prohibited degrees within which marriage is prohibited under Muslim laws. The prohibition among the parties may be of two kinds;

- 1) Absolute prohibition
- 2) Relative Prohibition.

Absolute prohibition may be classified into three categories:-

- a) **CONSANGUINITY**-<sup>12</sup> Consanguinity means blood relationships. Muslim marriage laws dictate that a man cannot marry with the following persons;

1. his mother or grandmother however high so ever
2. his daughter or granddaughter how-low-so-ever
3. his sister whether full blood half blood or uterine blood
4. his niece or great niece how low so ever
5. his aunt or great aunt how high so ever .

- b) **AFFINITY**-Affinity means relationship by marriage. A man prohibited from marriage his; <sup>13</sup>

1. Wife's mother's grandmother however high soever.
2. Wife of one's own son or son's son or daughter's son his wife's daughter or granddaughter how low soever
3. father's wife or paternal grandfather's wife how low soever

<sup>10</sup> Dr. Deepak Miglani "Muta Marriage-An Introduction"- available at [https://legalpoint-india.blogspot.com/2013/03/muta-marriage-introduction\\_22.html](https://legalpoint-india.blogspot.com/2013/03/muta-marriage-introduction_22.html) visited 29th march 2019)

<sup>11</sup> "What are the Prohibited Relationships under Muslim Law?" available at <http://www.shareyouressays.com/knowledge/what-are-the-prohibited-relationships-under-muslim-law/117676> (visited at 29th march 2019)

<sup>12</sup> Supra note 11

<sup>13</sup> ibid

- c) **FOSTERAGE**-Foster relationship arises between two persons so connected through suckling milk at the breast of one woman. The effect is that a man is not only prohibited from marrying his own sister but also his foster sister. Shias place consanguinity and fosterage in the same footing however Sunnis do not follow the same<sup>14</sup>

#### 4. **RELATIVE INCAPACITY OR PROHIBITION**-<sup>15</sup>

Springs from cases which render the marriage invalid only so long as the cause which creates the bar exist. The moment it is removed, the incapacity ends and the marriage become valid and binding. The following are the cases:

- a. Unlawful conjunction,
  - b. Polygamy or marrying a fifth wife.
  - c. Absence of proper witnesses
  - d. Differences of religion
  - e. Woman undergoing IDDAT
    - i. Unlawful conjunction: means contemporaneously marrying two women so related to each other by consanguinity, affinity or fosterage, which they could not have lawfully intermarried with each other if they had been of different sexes. Thus a Muslim cannot marry two sisters, or an aunt and her niece.
- Under the Shia Law, a Muslim may marry his wife's aunt, but he cannot marry his wife's niece without her permission. Marriage prohibited by reason of unlawful conjunction is void under ShiaLaw.
- ii. Polygamy or marrying a fifth wife: means plurality of wives, i.e. marrying a fifth wife. It is unlawful for a Mohammedan to have more wives than four.

A Muslim woman cannot marry more than one husband. If a woman marries a second husband, she is liable for bigamy under Sec.494, Indian Penal Code and the issues of such a marriage are illegitimate.

In India no Muslim marrying under or getting his marriage registered under The Special Marriage Act, 1954, can marry a second wife during the lifetime of his spouse.

<sup>14</sup> ibid

<sup>15</sup> 'Marriage Muslims' available at

<http://www.advocatekhoj.com/library/lawareas/marmuslim/relative.php?Title=Marriage%20Muslims&STitle=Relative%20Incapacity%20or%20Prohibition> (visited 30<sup>th</sup> march 2019)



- iii. Absence of proper witnesses: It is essential amongst the Sunnis that at least two male witnesses or one male or two female witnesses must be present to testify that the contract was properly entered into between the parties. The witnesses must be of sound mind, adult and Muslim.

In Shia Law, a marriage contracted by the spouses themselves or their guardians in private are held valid. Presence of witnesses is not necessary.

- iv. Differences of religion: A Sunni male can marry a Muslim female (Of any sect) or a Kitabia. Marriage with the Kitabia, i.e. a woman who believes in a revealed religion possessing a Divine Book viz Islam, Christianity and Judaism is valid under the Sunni Law. But he cannot marry an idolatress or a fire-worshiper. A marriage, however with an idolatress or a fire worshiper is merely irregular in Sunni Law, but void in Shia Law. A Muslim woman cannot marry any man who is not a Muslim, whether he is Kitabia (i.e. man believing in a revealed religion possessing a divine book) or not. According to Mulla, a marriage between a Muslim woman and Non-Muslim male is irregular. But according to Fyzee, such a marriage is totally void

Under Shia Law, no Muslim, whether male or female can marry a non-Muslim in the Nikahform.

Thus a marriage between a Muslim and a non-Muslim can only take place under The Special Marriage Act, 1954.

- v. Woman undergoing Iddat: Iddat is a period during which it is incumbent upon a woman, whose marriage has been dissolved by divorce or death of her husband to remain in seclusion and to abstain from marrying another husband

Under Sunni Law marriage with a woman undergoing Iddat is irregular and not void. But under Shia law marriage with a woman who is undergoing Iddat is void.

## 5. PERIOD OF IDDAT<sup>16</sup>

As per Muslim Marriage laws Iddat is the period during which a woman whose marriage has been dissolved or husband has died has abstain from a marrying another man. A Muslim marriage continues even after the divorce or death of a woman's husband. The purpose behind that is to correctly ascertain whether wife is pregnant by the earlier husband or not and to prevent confusion as to the parentage of the child. Iddat commences from the time when the divorce is pronounced and not from the time it comes to the knowledge of the women. If women does not get knowledge of her divorce or death of her husband and the period of iddat passes away she considered to have completed the period of observance the iddat. The period of Iddat is depends upon the nature of dissolution of marriage which given are below;

<sup>16</sup> Period of Iddat, available at: <http://www.askfamilyproblem.com/marriage-under-muslim-marriagelaw-india.html/>(visited 29<sup>th</sup> march 2019)

1. In case of widow- 4 months and 10 days.
2. In case the woman is pregnant - till the delivery.

The Prophet of Islam was indeed social reformer thinking far ahead of his time. He found arbitrary divorce-practices prevailing among the pagans and Jewish-Christian Arabs. Disgusted he set out to reform them. It was impossible, however, under the existing condition of the society to abolish the custom entirely. The prophet has to mould the mind of an uncultured and semi-barbarous community to a higher development. Accordingly he allowed the exercise of power of divorce under certain conditions. He permitted the parties to divorce the parties at three distinct and separate time periods within which they might endeavour to become reconciled; but should all attempt to reconcile prove unsuccessful; then in the third period the final separation become effective. The Mussalman law of divorce is the logical consequence of the status of marriage. As it regards it as an Aqd or a contract, it confers on both the parties to the contract the power of dissolving the tie or relationship under certain specified conditions. The Islamic law did not take away the customary right of the husband to divorce his wife unilaterally, but it imposed numerous restrictions, on the exercise of this right. A Muslim man cannot divorce his wife and take her back as he pleases. Though permissible in law, divorce is not favoured in Islam as prevents conjugal happiness and interfered with the proper up-bringing of the children. Prophet told his people: "Divorce is most detestable in the sight of God; abstain from it. He also said: "Divorce shakes the throne of God."The permission therefore, in the Quran, though it gave a certain countenance to the old custom, has to be read with light of lawgivers own words. When it is borne in mind how intimately law and religion are connected in Islamic system, it will be easy to understand the bearing of words on the institution of divorce.<sup>17</sup>

## 6. DIVORCE IN QURAN-TALAQ

It is imperative to understand the various forms through which a marriage can be dissolved. When dissolution proceeds from the husband it is called Talaq and when it takes place at the instance of the wife, it is called Khula. When it is by mutual consent it is called Mubaraa, and when it is by qadi through a judicial process it is Faskh or sometime it can be Lian.

Talaq as defined in law "is a release from the marriage tie, either immediately or eventually, by the use of special words." It is used by Muslim jurists to denote release of women from marital tie. A Muslim husband under all schools of Muslim law can divorce his wife by unilateral action and without the intervention of the court. It is not necessary to provide for such power in the Marriage-Contract; the husband derives this power from the law itself this power is known as the power to pronounce talaq. The husband though given the unilateral power to pronounce talaq has to be very judicious in its exercise. The Quran has laid down certain rules which have to be followed strictly. He has been given this power with expectation that firstly he will not ordinarily exercise it and avoid it as much possible. Secondly that if he finds it unavoidable then he shall do it

<sup>17</sup> "Iddah" available at <https://en.wikipedia.org/wiki/Iddah> (visited 30th march 2019)

with a sense of justice (adl) and rationality. There is nothing in Islamic law which gives husband the power to divorce his wife arbitrarily, irrationally and in unreasonable manner. Further, it has been laid in Quran that before the procedure for talaq is to be started the spouses should try to reconcile with each other by appointing arbitrators, one from the side of wife and the other from the side of husband. This has been provided under Holy Quran. It has been observed by a learned commentator of Holy Quran: as “An excellent plan for setting the family disputes, without too much publicity or mud-throwing or resort to chicaneries of the law.” The Latin countries recognized this plan in their legal system. It is a pity that Muslims do not resort to it universally, as they should. They arbiters from each family would know idiosyncrasies of both parties and would be able, with Allah’s help to effect reconciliation.” According to Moulana Mohammed Ali, this a procedure par excellence, which portrays Islam in its true glory. But later Muslim jurists of “great antiquity and high authority” threw to the winds this salutary procedure. According to Tahir Mahmood there is a simple procedure of talaq in Islam which is, unfortunately, misunderstood by majority of Muslim themselves. They erroneously believe that they are allowed different “modes” or “forms” of talaq and also have absolute freedom of action. He says that there are not any modes of talaq like ahsan, hasan or bid’at.<sup>18</sup>

The law of Islam says to husband:

- (i) Talaq is “worst of all permitted things”; better avoid it: but if you find necessary to have recourse to talaq, then-
  - (a) Wait till the wife enters the period of tuhr
  - (b) During that period pronounce talaq and do not make it irrevocable by your words
  - (c) Revoke the Tale, if possible, before the expiry of the wife’s iddat
  - (d) If you do not revoke it by that time, at the expiry of wife’s iddat the marriage will stand dissolved
  - (e) If you have exercised your power of Tale in this way, your behavior has been “best” (ahsan); (f) Now you cannot revoke the talaq at your pleasure; but after expiry of the wife’s iddat you can marry the same woman with her consent.
- (ii) If you have revoked the talaq pronounced by you for the first time, never pronounce it again. However, in case you find it necessary to pronounce the talaq once again then,
  - (a) Wait till the wife enters the tuhr period;
  - (b) Pronounce talaq in tuhr;
  - (c) Do not by your words make, this second talaq irrevocable;
  - (d) Try to revoke this second talaq before the expiry of wife’s iddat;
  - (e) If you do not revoke it then, at the expiry of wife’s iddat the marriage will once again stand dissolved;
  - (f) As before now, you cannot revoke the talaq at your pleasure, but after the expiry of her iddat you can re-marry the same women with her consent.

<sup>18</sup> <http://www.legalservicesindia.com/article/2324/Talaq-Divorce-in-Islam.html> (visited 30<sup>th</sup> march 2019)

(iii) If you have succeeded in preparing yourself to revoke the talaq (which you pronounced for a second time), never pronounce a talaq again, but if, again, you really find it unavoidable to pronounce a talaq, then:

- (a) Wait for her being once more free from her menstrual periods;
- (b) Know that if you now pronounce a talaq (for the third time) you cannot revoke it anymore; also you will not be able even to remarry your divorced wife right away; if you so wish you will have to pay a penalty- which, due to human nature, you will never like the penalty of finding your wife becoming somebody else wife and remarrying her only if and when she is lawfully free of the second marital bond (the halala);
- (c) If, knowing all this, you still find it impossible to withhold yourself, pronounce a talaq (for the third time);
- (d) The moment you do so the marriage will stand dissolved;
- (e) If you have exercised your power of talaq in this way, your behavior is still “good” (hasan). This is the one and only form of divorce which has been given in the Quran. Further there is one more confusion that hasan talaq must be given in three “consecutive” or “successive” tuhr. This is submitted as wrong. The correct position is that if the husband has given talaq once he should not pronounce the next talaq before the second tuhr but he can give the same at any time during the subsistence of marriage and that talaq will be counted as one. The same is the situation when he pronounces the second talaq. Thus it should be understood that the condition for next “tuhr” for the second or the third talaq is that there should be minimum time of one month for the husband to think and it is not to be taken as maximum limitation.

## 7. TYPES OF TALAQ-

**TALAQ-E-SUNNAT:** talaq-e-sunnat is governed according to the dictation of Prophet Mohammad. It has been divided into two categories:<sup>19</sup>

- **AHSAN:** It consists of a single pronouncement of divorce made within the period (purity, between menstruations), or at any time if the spouse is free from menstruation. The husband ought to abstain himself from intercourse for the period of iddat. The requirement that the pronouncement is made at some point of a duration of tuhr applies simplest to oral divorce and does not practice to talaq in writing. The advantage of this form is that divorce can be revoked at any time earlier than of the entirety of the length of iddat, consequently hasty, inconsiderate divorce can be averted. The revocation can be effected expressly or impliedly. Therefore, if earlier than the completion of iddat, the husband resumes cohabitation together with his wife or says “I have retained thee” the divorce is revoked. Resumption of sexual intercourse before of the entirety of the period of iddat also effects within the revocation of divorce.

<sup>19</sup> “Triple Talaq And Other Forms Of Muslim Divorce Explained” available at <https://www.ndtv.com/india-news/triple-talaq-and-other-forms-of-muslim-divorce-explained-1793123> (visited 30th march 2019)

- **HASAN:** in this, the husband is needed to pronounce the formulation of talaq three times all through three successive tours. If the wife has crossed the age of menstruation, the pronouncement of it could be made after the interval of a month or thirty days between the successive pronouncements. When the remaining pronouncement is made, the talaq becomes very last and irrevocable. Its miles vital that each of the three pronouncements need to be made at a time whilst no sex has taken place at some point of the duration of tuhr. Talaq-i-biddat: Triple talaq that was struck down by the Supreme Court. Triple talaq means three times pronouncing talaq.

**TALAQ AL BIDDAT-** It is an irregular divorce. This is of two kinds:<sup>20</sup>

- a) Three declarations: here a husband repudiates his wife by three divorces at a time in one sentence or where he repeats the sentence separately thrice within one period of purity.
- b) One irrevocable declaration: the husband may say that he divorces his wife a hundred times, the Talaq is complete. Here the husband neither pays any attention to the period of purity nor to the abstention from intercourse. The divorce is valid, but the pronouncer of such divorce shall be sinner. Under the Shia sect, no divorce is affected by the pronouncement of three divorces at a time.
- c) Divorce under intoxication: according to the Hanafi jurists, the divorce pronounced in an intoxicated condition occasioned by wilful use of liquor or other unlawful intoxicating substances with the purpose of bringing on intoxicating and thereby enjoying its pleasure, shall take effect. But if he was intoxicated under compulsion, there is no divorce. Shias do not recognize divorce under intoxication.
- d) Divorce under compulsion: Hanafi jurists consider a Talaq given by a man under compulsion as valid, while the Shia jurists consider it as invalid. Divorce pronounced in jest: according to the Hanafi, if a person uses the words of divorce for his wife even in jest and without the intention of really effecting it, divorce shall duly take effect.

## 8. DIVORCE BY WIFE-

The wife can get her marriage dissolved by the under mentioned three ways:

- **TALAQ-E-TAFWEEZ-**Talaq-e-Tafweez additionally referred to as delegated divorce (recognized among each, the Shias and the Sunnis). The Muslim husband is free to delegate his power of saying divorce to his wife or another man or woman. He may delegate the power in reality or conditionally, temporarily or permanently. A permanent delegation of power is revocable but a temporary delegation of power is not revocable. This delegation must be made distinctly in favour of the person to whom the power is delegated, and the purpose of delegation must be clearly stated. It should be noted that even in the event of a contingency, whether or not the power is to be exercised,

<sup>20</sup> Paras Diwan, Muslim Law in Modern India, 83, (Allahabad Law Agency, Delhi, 9th edn. 2004)

depend upon the wife she may choose to exercise it or she may not. The occurring of the event of contingency does now not result in automatic divorce.<sup>21</sup>

- **ILA:** In ILA, the husband takes an oath not to have sexual intercourse together with his wife. Observed by this oath, there is no consummation for a period of four months. After the expiry of the fourth month, the marriage dissolves irrevocably. But if the husband resumes cohabitation within four months, ILA is cancelled and the marriage does not dissolve. The first-class Muslim regulation lawyers in India may be hired to recognize the idea of divorce in Islam.<sup>22</sup>
- **ZIHAR:** in this mode, in this mode, the husband compares his wife to a woman inside his prohibited relationship e.g., mother or sister and so forth. The husband would say that from these days the wife is like his mother or sister. After this kind of comparison, the husband does not cohabit along with his spouse for a duration of 4 months. Upon the expiry of the stated period, Zihar is complete. After the expiry of the fourth month the wife has following rights:
  1. She may go to the court to get a decree of judicial divorce.
  2. She may be file a petition for the decree of restitution of conjugal rights.
  3. In which the husband wants to revoke Zihar via resuming cohabitation within the said length, the wife can't are seeking a judicial divorce. it could be revoked if:
    - A. The husband observes speedy for a length of two months, or,
    - B. He provides meals at least sixty human beings, or,
    - C. Frees a slave.<sup>23</sup>
- **LIAN:** When the husband made false charges of unchastely or adultery against his wife then this amounts to character assassination and the wife has obtain a right to file petition for a divorce on these grounds. Such a mode of divorce is called Lian. However, it is only a voluntary and aggressive charge of adultery made by the husband which, if false, would entitle the wife to get the wife to get the decree of divorce on the ground of Lian. Muslim Divorce by Mutual Consent: The parties to the marriage may dissolve their marriage with the aid of mutual consent. Khula and Mubarak are types of divorce wherein the events may additionally repudiate their marriage.<sup>24</sup>
- **KHULA:** The word Khula means to remove or put off, as a man is said to be Khula his garment when he puts it off. In law it is the laying down by a husband of his right and authority over his wife for an exchange. It is a contract entered into for the purposes of dissolving a marriage tie, in lieu of compensation paid by the wife to her husband out of her property. Whenever hate takes place between husband and wife and they both see reason to apprehend that the ends of marriage are not likely to be

<sup>21</sup> Paras Diwan, Muslim Law in Modern India, 86, (Allahabad Law Agency, Delhi, 9th edn. 2004).

<sup>22</sup> Ibid 87

<sup>23</sup> Supra note 21 88

<sup>24</sup> Raffia Arshad, Islamic Family law, 127, (south Asian edn. 2016)

answered by a continuance of their union, the women need not scruple to release herself from the power of their husband, by offering compensation.<sup>25</sup>

- **MUBARAAT:** Mubarak is also a form of dissolution of a marriage contract. It signifies a mutual discharge from the marriage claims. In mubaraat the aversion is mutual and both the sides desire separation. Thus it involves an element of mutual consent. In this mode of divorce, the offer may be either from the side of wife or from the side of the husband. When an offer mubaraat is accepted, it becomes an irrevocable divorce (talaq-ul-bain) and iddat is necessary. Muslim law favours more husband than wife when it comes to divorce. Husband has been given more powers to dissolve the marriage in their own instances. Triple talaq is one of the worst forms of talaq where uttering of words by husband three times would result in the dissolution of marriage and wife has no remedy against unreasonable use of such right but this form or Triple-Talaq had been declared unconstitutional by Supreme Court. Under an agreement, the wife may divorce her husband either by Khula or Mubaraat. Before 1939, a Muslim wife had no right to seek divorce except on the ground of false charges of adultery, insanity or impotency of the husband. Even with the advent of such legislation wives are not on the same pedestal with husband. They have not been provided same right so due to such procedure, it is always unfavourable to wife. On the instances of the delegated power of divorce, Faizee observes, “this form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain freedom without the intervention of any court and is now beginning to be fairly common in India.”<sup>26</sup>

### 3-CONCLUSION-

The term ‘Nikah’ has been used for marriage under Muslim law. In Muslim law, Nikah is a contract for the legalization of intercourse and the procreation of children. Hence Nikah means union of sexes. It confers the status of husband and wife on a man and woman to marriage and the status of legitimacy on the children born out of such union. The Quranic injunctions regarding marriage are: Marriage is recognized as the basis of society. Marriage as an institution leads to the uplift of man and is a means for the continuance of the human

<sup>25</sup> Mohammad Nazmi, *Mohammadan law*, 80, (Central Law Publication, Allahabad, 3rd edn. 2012)

<sup>26</sup> “Divorce by Mutual Consent in Muslim Law – MUBARAT” available at

<https://arjungupta1993.wordpress.com/2015/03/22/divorce-by-mutual-consent-in-muslim-law-mubarat/> ( visited 30<sup>th</sup> march 2019)

race. Spouses are strictly enjoined to honour and love each other. It is a contract for the legalization of intercourse and procreation of children.

Legally speaking, Muslim marriage is a civil contract. Therefore, its legal nature is contractual. Besides being a civil contract, Muslim marriage is also a social and religious institution. Sanctity attached to the institution of marriage. It is a religious duty of every Muslim to contract a marriage according to the rules of Islam. Moreover, marriage is also the tradition (sunnat) of the prophet. In Islam, it is believed that marriage is a 'Sunnat Muwakkidah'. This means that, it is an act of such a nature that, if a person does it, he gets religious benefits. If he abstains from doing it, then he commits sin.

