



NALSAR UNIVERSITY OF LAW HYDERABAD



Lecture on:

MARRIAGE AND MATRIMONIAL REMEDIES

MODULE-IV

TALAQ

(DIVORCE UNDER MUSLIM LAW)

by

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PRE-ISLAMIC PERIOD

- ❑ 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 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 , and would have no intercourse with their wives, though still living with them.
- ❑ They could **arbitrarily accuse** 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.
- ❑ There were atleast **four types of dissolution of marriage were known in pre-Islamic Arabia**. These were *Talak, Ila, Zihar and Khula*. *She can't marry until iddat period had passed.*

AFTER THE ADVENT OF ISLAM

- ❑ The **Prophet of Islam looked on these customs of divorce** with extreme disapproval and regarded their practice as calculated to undermine the foundation 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; but should all attempts at reconciliation prove unsuccessful, ***then in the third period the final separation became effective.***

MODES OF DISSOLUTION OF MARRIAGE

CLASSIFICATION

A. BY THE DEATH OF HUSBAND OR WIFE

B. BY THE ACT OF PARTIES

➤ By the Husband:

❖ (i) Talak

❖ (a) Talaq-us-Sunnat (Ahsan [Most approved]; Hasan (approved))

❖ (b) Talaq-ul-Biddat (Triple Divorce; One Irrevocable Divorce [Single] (generally in writing)

(ii) Ila (Vow of Continence)

(iii) Zihar (Injurious Comparison)

➤ By the Wife: (*Talak-e-Tafwid*) (*Delegated Divorce*)

➤ By Mutual Consent

(i) Khula (Redemption)

(ii) Mubarat (Mutual Freeing)

C. BY JUDICIAL PROCESS:

➤ Lian (Mutual Imprecation)

➤ Faskh (Judicial Annulment)

A. BY THE DEATH OF THE HUSBAND OR WIFE

- ❑ It is clear and natural that with the death of husband or wife the marriage tie comes to an end.
- ❑ When the **wife dies**, the husband may remarry immediately,
- ❑ But in **husband's death**, widow has to wait till the expiry of iddat (4 months and 10 days, or if pregnant, till delivery).

B. BY ACT OF THE PARTIES

GENERAL PRINCIPLES OF TALAQ

1. BY THE HUSBAND

i. Talaq (dissolution of marriage):

- **Definition:** Talak means to put an end to the marriage with immediate or deferred effect, by using any of the special words meant for it – whether these words are used by the husband himself or by his representative, or by the qazi who in certain situations is regarded by the Shariat as the husband's deputy and is empowered to pronounce a divorce on his behalf without his consent.
 - **Essence of Talaq:** To utter by mouth any of the special words implying talaq is of the essence in a talaq. **Just thinking talaq or silently deciding on it will not result into talaq.**
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➤ **Written Talaq:**

- ✓ **Kitabat-e-mustabinah (legible writing);** such writing on some paper wall, etc.
which is clear and remains intact.
- ✓ It is of two kinds –
- ✓ **mustabinah marsumah (formal legible writing),** and
- ✓ **mustabinah ghair marsumah (informal writing).**

➤ **Conditions for Effectiveness of Talaq:**

- ✓ Sanity
- ✓ Senses
- ✓ Not Intoxicating but inebriated condition
- ✓ Pronouncement must relate to wife either expressly or by necessary implication.
- ✓ Proper Object
- ✓ **Talaq becomes Effective:**
- ✓ Compulsion
- ✓ Joke
- ✓ Anger
- ✓ Dumb Person

❖ (a) *Talaq-us-Sunnat (Proper Talaq):*

❖ *ie. A talaq which carries the approval of the Prophet. It may be in the most approved form, ie. **Ahsan; or Hasan.***

❖ *Talaq-e-Ahsan (Better Divorce):*

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

✓ -----[**Single Pronouncement**]-----**Tuhr**-----**NI**-----[**Iddat**]-- **Div.Revo**]-----

✓ The **divorce remains revocable during the iddat**, and the parties retain the right of inheritance.

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- ✓ This method **is the most approved** because the companions of the Prophet 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.
 - ✓ In a marriage **not yet consummated**, **ahsan talaq** may be pronounced **during menstruation also**.
 - ✓ Where the wife and husband are living separate from each other, or where the wife is beyond the age of menstruation (ie. Old age), the condition of *tuhr* is not applicable, it is also applicable to a written divorce.
 - ✓ This talaq 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 talaq becomes final and irrevocable.**
 - ✓ -----P-----D-----NI-----[Iddat Lapses]----Divorce Irrevocable]

❖ Talaq-e-Hasan (Good Divorce):

- ✓ In *talaq hasan*, ***the husband successively pronounces divorce three times during consecutive periods of purity (tuhr).***
- ✓ Therefore, it is a “divorce upon a divorce”, where the first and second pronouncements are revoked and followed by a third, ***only then talaq become irrevocable.***
- ✓ It is also essential that ***no intercourse should have taken place during that particular period of purity*** in which the pronouncement has been made.
- ✓ ***(Illustration) → (Next Slide)***

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- ✓ This may be illustrated thus: *When the wife is in **Tuhr**, without having intercourse with her*, the husband pronounces talaq. Then he revokes it by words or by intercourse. **Menstruation follows**. Again when she is in tuhr, and before intercourse, the husband pronounces talaq. Intercourse follows (ie. Repudiation). **Again menstruation follows**. Now during tuhr, without having had intercourse, he pronounces talaq. **This is final and divorce becomes irrevocable.**
 - ✓ -----Tuhr----NI-----Talaq-----Revokes-----W/I-----[M-----]-----
 - ✓ -----Tuhr----NI-----Talaq-----Intercourse-----[M-----]-----
 - ✓ -----Tuhr----NI-----Talaq-----[This Talaq is final and irrevocable].

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- ✓ Where the wife is *not subject to menstrual courses*, *an interval of 30 days is required between each successive repudiation.*
 - *Talaq Hasan* *tries to put an end to a barbarous pre-Islamic practice* to divorce a wife and take her back several times in order to ill-treat her.
 - Through this method of *talaq*, the husband has been given two chances of divorcing and then taking the wife back, *but the third time he does so, the talaq becomes irrevocable.*

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- *In this way, the process of divorcing and repudiating cannot be continued indefinitely. Thus it is a kind of relief to the wife from the harassment and tension on account of uncertainty that the Arabs could cause her by repeated talaq and revocations without limit. **The Prophet restrained them to the limit of three repetitions.***
 - *Further shack on the overbearing males was by way of the requirements of intermediary marriage, its consummation and divorce before remarriage with such wife. **Of course the aspect of her further humiliation involved in this process was overlooked.***

❖ (b) *Talaq-ul-Biddat (Improper Talaq):*

- *Here the husband does not follow the approved form of talaq ie. Talak-us-sunnat, and neither pays any attention to the period of purity nor to the abstention from intercourse.*
- *This was an **escape lane from the restrictions imposed by the Prophet, as discussed above.***

➤ **Talaq-e-Biddat (Improper Talaq):** It includes:

- ✓ In a consummated marriage divorcing the wife during menstruation, (OR)
- ✓ -----Consummation-----DIVORCE-----DURING 'M'-----
- ✓ Divorcing her in a tuhr after coitus (OR)
- ✓ -----Coitus-----Tuhr-----Divorcing-----
- ✓ Pronouncing an irrevocable divorce (OR)
- ✓ Pronouncing more than one talaq in a single Tuhr and in

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- ✓ In an unconsummated marriage pronouncing together more than one talaq, (OR)
 - ✓ Pronouncing more than one talaq in a single month on a minor or woman past menopause.
 - **Talaq-e-Biddat is prohibited**; but if a person pronounces such a talaq it will be effective while the man will be guilty of a **SEVERE SIN**.

ii. **Ila (Vow of Continence):** Ila is when a person **swears that he will not have sexual intercourse with his wife** and **abstains from if for four months**, the divorce is effected.

➤ **Kinds of Ila: Two kinds:**

✓ **In a Temporary Ila; cohabitation within four months makes obligatory** for the man either an expiation (compensation or penance) or the performance of the difficult action to which cohabitation was subjected by him. **If there is no cohabitation for four months, at the expiry of this period an irrevocable talaq takes effect. In either case the Ila will come to an end.**

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- ✓ **Permanent Ila:** If the husband cohabits within four months expiation becomes obligatory and Ila ends; and **if he does not (ie. Expiation)**, there will be an irrevocable divorce but the Ila will not end for the purpose of divorce. If now after halalah the man remarries her, non-cohabitation will not lead to a talaq but cohabitation will make expiation obligatory.

iii. Zihar (Injurious Comparison):

- **Zihar literally means** positioning or joining back-to-back. **In Shariat comparing the wife or any of her organs which may signify her whole being with women who are permanently in the prohibited degrees of marriage or with any of their such organs to see which is absolutely prohibited , is called 'Zihar'.**
- **Effects of Zihar:**
 - ✓ **Zihar does not effect a divorce, but unless the husband undertakes expiation for zihar cohabitation with the wife will be absolutely prohibited.**
 - ✓ **If the husband does not cohabit with the wife due to his failure to expiate for zihar, the wife can through the qazi compel him either to expiate or to divorce her.**

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- ✓ **Expiation for zihar is continuous fasting for two months without including in it the month of Ramazan** and those five days fasting on which is prohibited.
 - ✓ If Ramazan begins or the 10th of Zil-Hij arrives while the man is expiating for zihar, **he will have to expiate afresh in full.**
 - ✓ For a person who is **not capable of fasting, the expiation is to offer middle standard food to sixty indigent persons** or the prescribe measure of what or its value to each of them.

2. BY THE WIFE

❑ *Talaq-e-Tafwid (Delegated Divorce)*

- *As a man may in person repudiate his wife, so he may commit the power of repudiating her to herself or to a third party, ie. **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.***
- *The delegation must be made in clear terms and the circumstances **in which the wife is to exercise the choice must be spelt clearly.***

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- ❑ The condition **must not be opposed to public policy**. Thus delegation of the right to talak if the husband fails to pay her maintenance may be delegated.
 - ❑ **The wife must exercise her option expressly**, mere happening of the stipulated event would not per se result in talaq.
 - ❑ The **power may be delegated at the time of nuptial agreement** or during the married life. The power so delegated cannot be revoked by the husband.
 - ❑ **The wife may exercise the power to counter a suit for restitution of conjugal rights** instituted by the husband, and that exercise will result in talaq.
 - ❑ Even when the wife exercises the option, **it will be called a divorce of wife** by husband, as she would be acting on his behalf.
 - ❑ **In spite of the delegation the husband retains the right to talaq her according to his choice.**

3. By Mutual Consent

- i. *Khula*
 - ii. *Mubarat*
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i. **KHULA**

Khula:

- *If the mutual relationship between the husband and wife is not good, the wife, if she so desires, may seek a **Khula divorce**, e.g. **by relinquishing her claim to the dower.***

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- It, however, entirely upon the husband to accept the consideration of dower and to grant the divorce.
 - A husband may similarly propose a ***Khula divorce***; the wife may accept or refuse it. If she accepts, it means that she has relinquished the right to get dower from her husband.
 - ***Khula*** may be for any consideration – dower, money, property, etc.
 - ***Wife's failure to pay the consideration agreed upon in a Khula divorce*** does not invalidate the divorce, so as to enable the husband to sue for restitution of conjugal rights, but only entitles him **(a)** to claim the release of dower, **or (b)** to sue for any money or property due under the agreement.

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- ❑ **Leading Case: Moonshee Buzul-Raheem v. Luteefut-oon-Nissa, (1861) 8 MIA 379;** in which it was observed that a divorce by *khula* is at once complete from the moment when the husband repudiates the wife. **There is no period during which such a divorce can be repudiated.**
 - ❑ **Note: Mulla** considers *khula* as a divorce by mutual consent. But **Paras Diwan** differs, saying that since in *Khula* the desire to separate emanates from the wife, and she has to make her husband agree to it by offering consideration, it would be proper to call it divorce at the instance of the wife.

ii. Mubarat (Mutual Freeing)

- ❑ When the divorce is effected by mutual consent of the husband and wife, it is known as *mubarat' at* (ie. Freeing one another mutually).
- ❑ ***Case: Sayeeda Khanum v Mohd. Sami, PLD 1952 (WP) Lah 113 (FB);*** It was held that matters as “*incompatibility of temperaments, aversion, or dislike cannot form a ground for a wife to seek dissolution of her marriage, at the hands of a Kazi or a Court, but they fall to be dealt with under the powers possessed by the husband and the wife under Muslim law*”, that is, the capacity of making a *Khula* or *Mubarat 'at* divorce.

- ❑ *Khula* and *Mubarat'at* are **irrevocable divorce**; iddat becomes necessary for wife, and she is entitled to maintenance.

- ❑ **Differences:**

- ❑ **Khula:** Redemption of the contract of marriage
- ❑ **Mubarat:** Mutual release from the marriage tie

- ❑ **Khula:** Offer comes from the wife, husband accepts it.
- ❑ **Mubarat:** Any party may make the offer, the other side accepts.

- ❑ **Khula:** Consideration passes from wife to husband.
- ❑ **Mubarat:** No question of consideration

- ❑ **Khula:** Aversion (dislike) is on the side of the wife
- ❑ **Mubarat:** Mutual aversion

B. BY JUDICIAL PROCESS

- (i) Lian (Mutual Imprecation)
 - (ii) Faskh (Judicial Annulment)
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- ❑ **Lian (Mutual Imprecation):** The wife is entitled to sue for a divorce on the ground that her husband has falsely charged her with adultery.
- At the hearing of the suit, the husband had two alternatives: (i) he may retract (withdraw) the charge before the end of the trial, in which case the wife **could not** get a divorce; **(or)** (ii) to persist in his attitude, whereby he will be required to accuse his wife on oath. This is followed by oaths of innocence made by the wife. After these “mutual imprecations” the **Court dissolves the marriage.**

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- The husband and wife both must be sane adults;
 - the charge must be false;
 - The wife must file a regular suit for the dissolution of marriage making the false charge the ground for seeking divorce.
 - Mere laying of charge by husband or mere application to the Court complaining that the husband had falsely charged her of adultery *would* not by itself amount to divorce.
 - Their marriage must be ***sahih*** and not ***fasid***.
 - **When dissolved by the court, it would be an irrevocable consequence.**
 - The doctrine of lian is still accepted by courts as a valid Muslim Law procedure.



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- ❑ ***Faskh (Judicial Annulment):*** *Faskh* means annulment. It refers to the power of Kazi (in India, law court) to annul the marriage on the application of the wife.
 - ❑ The law of *Faskh* is founded upon Koran and Traditions. *“If a woman be prejudiced by a marriage, let it be broken off”* (Bukhari).
 - ❑ ***In India such judicial annulments are governed by S.2 of the Dissolution of Muslim Marriages Act, 1939.***
 - ❑ Prior to the Act 1939, the Muslim woman could apply for dissolution of marriage under the doctrine of *faskh* on **4 grounds:**

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- i. The marriage was irregular,
 - ii. In exercise of the right of option (Khyar-ul-Bululgh)
 - iii. The marriage was within the prohibited degrees of relationship,
 - iv. Post-marriage conversion of the parties to Islam
 - v. Impotency of the Husband
 - vi. Lian

Prior to the Act what happened?

- ❑ The classical Hanafi law of divorce was causing hardships **as it consisted no provision whereby a Hanafi wife could seek divorce on such grounds as disappearance of the husband, his long imprisonment, his neglect of matrimonial obligations etc.** Finding no other way to get rid of undesired marital bonds, many Muslim women felt compelled by their circumstances to renounce their faith.
- ❑ **Hence, Act was passed** enabling the Muslim woman to obtain a decree from the courts dissolving her marriage due to the misery felt by wife.

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