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Divorce

The Prophet said 'With Allah, the most detestable of all things permitted is Divorce'. *Classification:* Divorce

(i) By death of a spouse, (ii) By husband:

(a) Talaq (repudiation)

(b) Ila (vow of continence)

(c) Zihir (injurious assimilation)

(iii) By the wife : •

(a) Talaq-e-Tafwid (delegation of power to divorce).

(iv) By common consent :

(a) Khul (redemption)

(b) Mubaraa (Mutual freeing).

(v) By Judicial process :

(a) Lian (mutual imprecation)

(b) Faskh (Judicial rescission)

(c) Under Muslim Marriage Dissolution Act 1939.

Talaq:

Means literally to release an animal from a tether i.e., to free the wife from the bondage of marriage.

Hence in law Talaq is an absolute power of the husband to divorce his wife at all times.

The Muslim husband must be of sound mind. The divorce operates from the date of pronouncement of Talaq. The presence of wife is necessary; giving of notice is not essential. The words must clearly indicate the intention to dissolve the marriage. He may declare 'I divorce my wife, X forever and render her haram for me',

Hanaf i Law prescribes no form. But according to Asharl Law, Talaq must be **in the presence** of two male witnesses.

There are different types of Talaqs.

Talaq may be revocable or irrevocable. Revocable is approved form. Irrevocable is disapproved form,

(/) Approved farms (Talaq ul Sunnst) :

1. **Talaq ehsan:** One pronouncement of Talaq is made by husband during the period of Tuhr (purity) i.e., when she is between two menstrual courses, plus abstinence during 'Idda'. This may be revoked during Idda i.e., three months from the date of declaration. It may be express or implied. Redemption of conjugal relationship is implied revocation. After the period of Idda, the divorce becomes irrevocable.
Talaq is a cruel word. Hence, repetition is not necessary.

2. **Hasan Form :** This is an approved form. There are three successive pronouncements during three consecutive periods of Tuhr with abstinence thereof.

The procedure is:

(i) During Tuhr, the husband pronounces Talaq.

(ii) During the second period of Tuhr, he pronounces again Talaq—there should be complete abstinence by husband,

(iii) After this, during the third period of Tuhr he pronounces Talaq.

This is final and binding. Divorce becomes complete and irrevocable.

Disapproved forms

1. Triple declaration:

Three declarations made during Tuhr.

In one sentence Talaq Talaq Talaq. It is lawful though it is sinful according to Hanafi. Other schools do not approve this form.

Jurist Ameer Ali, says King Humayun seems to have initiated this as, it was advantageous to him.

2, Single irrevocable declaration: This is also not approved.

Legal effect

(i) When divorce is irrevocable marital intercourse becomes unlawful.

(ii) If the husband or wife dies during Idda with revocation each is entitled to inherit from the other.

(iii) If the divorce is irrevocable neither of them can inherit from the other. (Jv) **Wife is entitled to maintenance during *Idda*.**

Zihar;

Zihar is a form of divorce by the husband. It means injurious assimilation. This is very rare in India and of no practical importance.

Here the husband swears that 'to me the wife is like the back of my mother' or she is my sister. If he intends to revoke this declaration, he, must pay money by way of expiation or fast for a certain period. If he abstains for four months, the wife may get a decree of divorce from the court. This was in existence in pre-Islamic Arabia, It is an archaic form of oath. Tyabji says that Zihar has no significance in Indian law courts. But, Sn. 2 of the Shariat Act 1937 has recognised Zihar.

ILA:

Husband takes oath to abstain from sexual intercourse. He should follow this for four months. Among Shia's, tthna Asharia school, the wife should get a decree if divorce is to be effective.

Khul and Mubaraa

These refer to dissolution of marriage by common consent. The Fatawa Alamgiri says when spouses cannot perform their duties, the woman could release herself by giving up some property, i.e., consideration. In return, the husband gives her a "Khula". This results in dissolution of marriage,

Conditions:

- (i) Mutual consent of husband and wife, essential.
- (ii) Some iwad (consideration) should pass from wife to husband.

If the desire comes from the wife it is Khul (to take off).

But, if divorce is made by mutual aversion (or consent) it is mubaraa (freeing mutually). In Khul, the wife begs to be released and the husband agrees for a consideration. In Mubaraa both agree and hence, each is happy being rid of the other.

Certain formalities are to be observed according to Hanafi Law and Ithna Ashari Law. The husband H proposes the dissolution of the marriage and the wife accepts in the same meeting. No form is prescribed. This contract dissolves the marriage.

Similarly in respect of consideration, in Khul, the wife makes some compensation to the husband or gives up a part of her Mahr. Legal effects :

- (i) The marriage becomes dissolved.
- (ii) Idda is to be observed wife and **children have a right to maintenance,**

Dissolution of Muslim Marriages Act 1939

This Act was passed in 1939 to enable a Muslim married woman to get a divorce decree by filing a suit against her husband, as earlier there was no such law to enable wife to get a decree except for impotency of husband or imputation of unchastity to wife by her husband.

Further it aims at removing doubts as to the effects of conversion of a Muslim woman on her marriage tie. The Act became operative from 17-3-1939.

Apostacy :

Before this Act, apostacy from Islam,, dissolved the marriage. But Sn. 4 of this provided that either renunciation of Islam or conversion to any other religion by the wife, *will not* ipso facto dissolve the marriage.

However apostacy of the Muslim husband operates as a complete and immediate dissolution of marriage,

It provides for the following grounds to the wife :

- (i) Husband's whereabouts unknown for above four years
- (ii) Husband's failure to maintain his wife for-two years (Hi)
Impotency of the husband

(iv) His insanity

(v) His cruelty

(vi) Imprisonment of husband for seven years (vii) Failure to observe marital obligations

(viii) Any other ground recognised by Muslim law

Grounds Explained:

(i) **Unheard of:** If husband is unheard of for four years or more, his wife may file a suit, and, get a decree. This comes into operation after six months and marriage gets dissolved. If

the husband within this six months, presents himself, and agrees to fulfil marital responsibilities the court may not dissolve the marriage.

(ii) **Maintenance:** if the husband fails to maintain his wife for two years or more, the wife may file a suit. If for a reasonable cause, the wife is living separately for two years, the court may give a decree.

(iii) **Impotency;** Before 1939, this was also a ground for dissolution of marriage. The Act has retained this ground.

(iv) **'Insanity:** If the husband is suffering from insanity, leprosy or venereal disease, the wife may get a decree. The duration is not fixed -by the Act. The court decides.

(v) **Cruelty:** This is another ground. It may be physical or mental. Attributing unchastity and scolding again and again with vulgar language, is mental cruelty. The court decides what is cruelty.

(vi) **Imprisonment:** If the husband is convicted for seven years or more, and confirmed by the highest appellate court, the wife may claim for a decree.

(vii) **Marital duties:** If the husband for three years has failed to follow marital duties, the wife may get a decree

viii) Other grounds :

a. False allegation of unchastity to wife

b. option of puberty

these are also available to the wife.

A decree may be granted to the wife on proof of anyone of the above grounds.