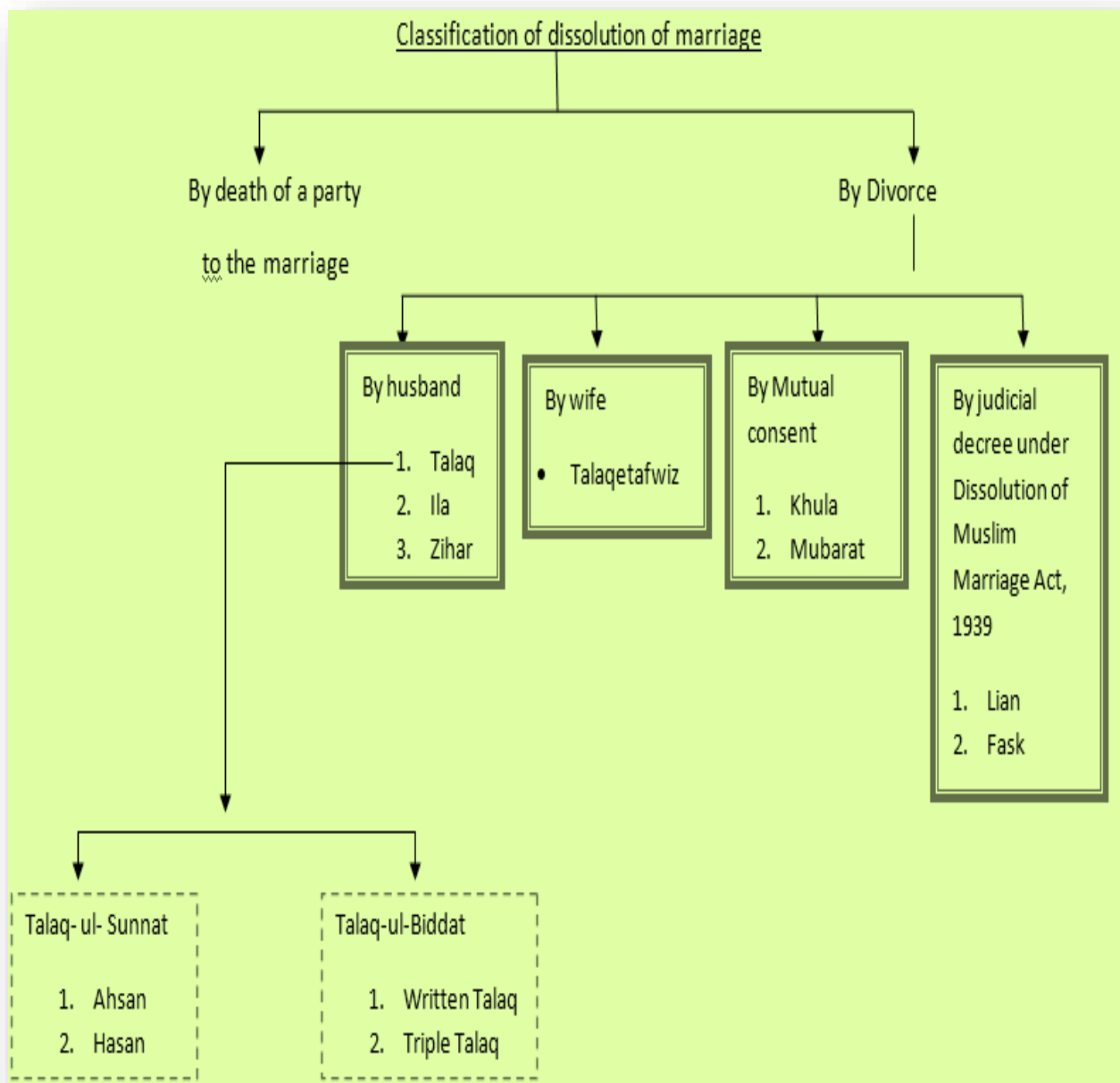


THE DISSOLUTION OF MARRIAGE

- Divorce is the dissolution of marriage by the act of the parties. It may be given by the husband or the wife.



DIVORCE AT THE INSTANCE OF HUSBAND

- Muslim law gives the husband absolute authority to terminate the marriage without any reason. Muslim husband can divorce his wife through the talaq, ıla, zihar.

TALAQ

- Talaq is Arabic word which means 'to release'. It means repudiation of marriage by husband
- Muslim husband has unrestricted right to pronounce Talaq without any reason.
- In Islam Talaq is permitted only when wife by her conduct or by her words does injury to husband or happens to be in impious.
- Talaq can be revocable [**talaq- i- rajaee**] or irrevocable [**talaq- e-bain**]

Conditions of Valid Talaq

1. **Capacity:** Every Muslim husband of **sound mind**, who has attained the **age of puberty**, is competent to pronounce talaq.
2. **Free consent:** consent of the husband pronouncing Talaq must be **free consent**. But, under Hanafi law Talaq pronounced under compulsion, coercion, and, fraud and voluntary intoxication is valid.
3. **Formalities:** following are the formalities
 - a) In Sunni law Talaq must be **oral or in writing**
 - b) In Shia law Talaq must be **pronounced orally** except where the husband is unable to speak.
 - c) No specific words are prescribed in Sunni of however words used must be **clear and unambiguous**.
 - d) Shia law requires the use of **specific Arabic words** in pronouncing talaq.
 - e) In Sunni law Talaq need not be made in the presence of witness.
 - f) Shia law Talaq must be pronounced in the presence of two witness

- g) The presence of wife is not necessary at the time of pronouncing talaq. For the validity of Talaq notice to wife is also not necessary.
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Kinds of talaq

1. Talaq ul Sunnat [revocable talaq]

- a. Talaq ahasan [most proper]
- b. Talaq Hasan [proper]

2. Talaq ul biddat [Irrevocable talaq]

1. Talaq ul Sunnat :-

- It is regarded as the approved form of talaq. It is based on Prophet Muhammad tradition[sunna], therefore it is called Talaq ul Sunnat
- It is also called revocable Talaq because there is a possibility of Reconciliation and compromise between husband and wife
- This mode of Talaq is recognized by both Shia and Sunni
- It is pronounced in either in Ahsan or Hasan form.

a. Talaq Ahsan

- It is also called **the most proper** form of Talaq because there is a possibility of revocation of Talaq and evil words of Talaq are found only once.
- In this form of Talaq husband is required to make a single pronouncement of Talaq during **Tuhr** of the wife. [**Tuhr is a period between two menstruation**].
- After this pronouncement the wife is required to observe iddat for **3 months courses**. During the period of iddat there should be no revocation of Talaq. Cohabitation with wife is implied revocation
- When the period of iddat expires and the husband does not revoke the talaq becomes final and irrevocable.

b. Talab Hasan

- There are 3 pronouncements of talaq made during successive tuhr.
- Husband makes a single pronouncement of Talaq in the period of Tuhr
- In the next tuhr, there is another pronouncement of talaq

- First and second pronouncement of Talaq may be revoked by husband
- If no revocation is made after first and second pronouncement then the husband has to make a third pronouncement in the tuhr. It becomes irrevocable as soon as third pronouncement is made
- There must be abstinence from sexual intercourse until the 3rd pronouncement.

2. Talaq ul biddat

- Biddat came from the word ***biddah*** [**innovation**] which means that this form of Talaq was devised later
- This form of Talaq is for **instant divorce**. It is an irrevocable form of divorce
- If the husband utters the word ‘***talaq***’ 3 times [orally in written or in electronic form] then he would have legally divorced the wife.
- It is banned and most of the Islamic nations of the world and in India it was only recognized by Sunni School.
- It is the disapproved form of talaq. The Talaq becomes effective as soon as the words are pronounced and there is no possibility of reconciliation
- Under Shia law this is not recognized
- In this form of Talaq husband makes three pronouncements during the period of purity[tuhr]
- It is also commonly known as **triple talaq**
- **Shayara Bano vs Union of India 2017** Supreme Court of India declared the practice of triple Talaq as unconstitutional. It was held that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must therefore be held to be violative of fundamental rights contained under **Article 14** of the Constitution of India. The court held that triple Talaq is not fundamental to Islam
- The Parliament has enacted the **Muslim women[protection of rights on marriage] Act 2019**, make instant triple Talaq a cognizable offence, attracting up to **three years of imprisonment with a fine**

3. Ila

- Ila is a constructive divorce by husband.
- In ila husband takes vow not to have sexual intercourse with the wife and followed by vow there is no consummation for the period of **4 months**.
- Under Ithna Asharia School of Shia Law does not operate as divorce without the order of the court

4. Zihar

- It is an inchoate form of divorce.
- In Zihar husband compares his wife with the woman within the prohibited relationship that is mother or sister etc. After such comparison the husband does not cohabit with the wife for a period of four months. The marriage does not dissolve after the completion of 4 months. the wife has the following rights:-
 - a) She may seek judicial divorce from court
 - b) She may seek restitution of conjugal rights from the court
- If the husband wants to revoke zihar by resuming cohabitation within the said period of four months, the wife cannot seek is judicial divorce
- However cohabitation with the wife who had been compared to a prohibited relationship is sinful and she can compel the husband to perform penance[apology] such as- freeing a slave, or for fasting for 2 months or feeding 60 poor person etc

Divorce at the instance of wife

- Divorce by Muslim wife is only possible in the following three situations
 1. where husband delegates the right to Talaq to wife[**Talaq e tafweez**]
 2. divorce by mutual consent [**Khula and Mubarat**]
 3. Dissolution of marriage under **The Dissolution Of Muslim Marriage Act 1939**
- 1. Talaq e Tafweez
 - ‘Tafweez’ means delegation or representation

- Instead of pronouncing talaq himself he may give the right to his wife or the husband may appoint an agent or representatives on his behalf and that agent would pronounce talaq to the husband's wife and the marriage would stand dissolved. The agent can be his second or third wife which he can send her to se talaq to his otherwise on his behalf.
- The delegation may be unconditional or subject to some conditions
- General practice is to delegate the power to wife is upon husband's failure to fulfill certain conditions

2. **Khula**

- Khula and Mubarat are form of divorce by mutual consent
- It is divorce by wife with the consent of the husband on payment of something to him.
- 'Khula' means to 'lay down'. In law it means laying down by husband of his rights and authority over his wife.
- In khula an offer is made by the wife to the husband to release her from matrimonial ties. The offer must be accepted by the husband. Until the offer is not accepted the divorce is not completed and in the meantime it can be removed by the wife. Once accepted it becomes an irrevocable talaq.
- Under Sunni law presence of witness is not necessary while under Shia law Khula must be made in presence of two competent witness

3. **Mubarat**

- **In Mubarat** both the parties are equally desirous of separation and often a be made from either husband or wife
- In Mubarat no party is legally required to compensate the other.
- The offer of Mubarat may proceed from the wife or it may proceed from the husband but once accepted the dissolution is complete and it operates irrevocable form of talaq.

Judicial Talaq

1. Lian

- It means imprecation [curse].
- When the husband charges his wife of adultery and the charges are false the wife is entitled to claim divorce on this ground. she must file a regular suit for dissolution of her marriage in the court
- Conditions
 1. A husband who is adult and of sound mind charges his wife who is also adult and of sound mind with adultery or denies the paternity of a child.
 2. Such charge is false and also could not be proved by the husband in the court
 3. Such false charge of adultery does not ipso facto dissolve the marriage; it only gives an opportunity to the wife to move to the court to dissolve the marriage.
 4. There should be a proper suit in the court and the marriage dissolves only through the decree of court
 5. Dissolution is irrevocable.

2. Fask

- Fask is a judicial divorce by the order of the court of law. On the application of wife if the marriage is found to be harmful to her.

The dissolution of Muslim Marriage Act 1939

- **Section 2** of the act provides the grounds on which divorce under the act can be claimed by the wife.
- Following are the ground
 1. The husband is missing for 4 years
 2. Husband's failure to maintain the wife for two years
 3. Imprisonment of husband for 7 years
 4. Husband's failure to perform marital obligation for 3 years

5. Husband impotency
6. Husband's insanity, leprosy for general disease
7. Option of puberty to wife - having been given in marriage by her father or another guardian before she attained the age of 15 years, repudiated the marriage before attaining the age of 18 years, provided that the marriage has not been consummated.[**Khyar-ul-Bulugh**]
 - **Mustafa v. Smt. Khursida 2005** The Hon'ble Court held that the option of puberty is a right given to the minor which will act as a blanket against the marriage contracted by their guardians without their consent. The only thing that has to be proved is that the parties were married before attaining the age of 15 years and the right of option of puberty was exercised before attaining the age of 18 years.
8. cruelty by husband
9. Any other ground which is recognized as valid for for the dissolution of marriage under Muslim law

Effect of Apostasy on Marriage

- **Section 4** of the dissolution of Muslim marriage act 1939 deal with this aspect
- If a Muslim husband renounces Islam, the marriage is dissolved immediately. This act does not apply to apostasy by husband
- If Muslim wife renounces Islam, the marriage is not dissolved automatically. If the wife wants she can obtain a decree of divorce under any of the ground specified under the act.