DISSOLUTION OF MARRIAGE UNDER MUSLIM LAW:
A CRITIQUE OF ITS COMPARATIVE PRACTICES IN IRAN AND INDIA

In Islam, divorce is considered as an exception to the status of marriage. The Prophet Mohammad (peace be upon him) declared that among the things which have been permitted by law, divorce is the worst. Divorce being an evil, it must be avoided as far as possible. But sometimes this evil becomes a necessity. When it is impossible for the parties to carry on their union with mutual love and affection, it is better to allow them to be separated instead of compelling them to live together in an atmosphere of hatred and sufferings. In such circumstances, there must be a suitable way of dissolving a marriage legally; otherwise if the parties are forced to continue to live together, their life is likely to become unbearable. In many cases, the consequences may be most regrettable and even tragic. In fact divorce may be regarded as an unpleasant and bitter pill which has to be taken in the case of need. Resort to it should not be made unnecessarily and for the sake of caprice.

Divorce is not a private matter between, only, husband and wife. It is a public issue because of having great impact on society as well. Therefore, divorce must only be permitted to take place in the last resort. All the ways by which the reconciliation may be achieved, should be considered not by the spouses themselves, but by impartial arbitrators too.

1 See Chapter III, p. 165.
The basis of the Islamic law of divorce is the inability of the spouses to live together. It is to be noted that with this idea behind a divorce, Muslim law recognizes several modes of divorce\(^2\) which is the purpose of this study to be explained.

### 7.1 Muslim and It’s Sects

Muslims are divided into two major groups: the Shi’is and the Sunnis. The sunnis are divided into four sub-sects: (a) the Hanafis (b) the Malikis (c) the Shafeis (d) the Hanbalis; and The Shi’is are divided into three main sub-sects: (a) the Imamis (the Twelver’s/Ithna Asharia), (b) the Zaydis (followers of Zayd, the great son of the fourth Imam), and (c) the Isma’ilis (followers of Isma’il, one of Imam Sadiq’s sons).

Both Sunni and Shi’a Muslims share the most fundamental Islamic beliefs and articles of faith.\(^3\) The difference is in the interpretation of some of the verses of the Holy Quran; and in believing or not believing some of the Sunnat as genuine; or in its interpretation. The Sunnat in Sunnis’ view include the actions, sayings or doing of the Prophet. And also, Traditions handed down by the contemporaries and companions of the Prophet, but, the Shias hold only those Ahadis [Sunnat/tradition] as authentic which come down from the Prophet or his family members. The Ijma in Sunni’s view are: Ijma of the Companions of the Prophet; Ijma of the jurists; Ijma of the people, the general body of the Muslims. But Shi’a has accepted only Ijmas which were confirmed by Prophet (P.B.U.H. & H.F.)\(^4\) or Imams. The Sunni school accepted the Qiyas as a fourth source but Shi’a school accepted the Aql/ reason as a fourth source.

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\(^2\) See Chapter III, p. 165.
\(^3\) See Chapter I, p. 18.
\(^4\) Peace be upon him and his family.
This difference of approach has led towards the difference in some basic principles and some laws of religion. Notwithstanding, in fact, most Muslims do not distinguish themselves by claiming membership in any particular group, but prefer to call themselves simply", Muslims.

Majority of Muslims in India are Sunni (Hanafi) and majority of Muslim in Iran are Shi’a (Athna Ashari). In this research, the researcher studied one of the family laws called divorce laws among in Iranian and Indian Muslim laws.

7.2 Dissolution of Marriage in Iranian (Shi’a) and Indian (Sunni) Muslim Laws

Marriage dissolution is ending up and breaking matrimonial relationship that has different reasons including voluntary or involuntary ones. Voluntary reasons are cancellation and divorce which are both unilateral legal acts and involuntary reasons are death of one of the couples.

Cancellation of marriage\(^5\), is voluntary, that is given to one party of the contract in certain issues of law according which he/she can break the marriage contract and stop continuing it and its effects from the time of dissolution.

(i) Causes of Cancellation (Faskh) of Marriage in Iranian Law

There are two things which cause marriage cancellation in Iranian law:

(A) Defect

(B) Breaching conditions regarding qualification

\(^5\) See Similarities and Differences between Cancellation (Faskh) of Marriage and Divorce, pp. 96-98.
In Iranian Civil Code the causing defects of marriage cancellation are divided into three parts:

(i) Common defects of Men and Women,

(ii) Men’s Specific defects and,

(iii) Women’s specific defects.

According to article 1121 of Iranian Civil Code only Insanity is considered as Common defect between men and women. And according to article 1122 of amended Civil Code in 1989 Men’s specific defects are 1- Khasa; 2- Male genital organ anatomical defect; 3- Anan; and Women’s specific Defects are 1.Qaran; 2. Black leprosy; 3.Leprosy/ Baras; 4.Efza; 5.Paralytic disability; 6.Two eyes blindness.

In Iranian Muslim Law the defects on which the man can cancel the marriage has been mentioned; but in Indian Muslim Law in contrary to Iranian Muslim Law the man can divorce his wife whenever he wishes to and it doesn’t require a rational reason for it; thus the women’s specific defects has not been stated; although the men’s specific defects has been stated on which woman can apply for cancellation.

In Indian Muslim law, according to Section 2 of the Dissolution of Marriages Act, 1939, the Muslim woman can refer to the power of Qazi to annul/ cancellation of marriage to apply for it.

(ii) Breaching Conditions Regarding Qualification

Article 1128 of Iranian Civil Code states: “Whenever one of the parties of the contract is determined by a qualification and after the contract it will happen not to be true then the other party of the contract has the right of cancellation, either the described
qualification is clearly stated in contract or it is orally stated during contract”.

7.3 Divorce in Iranian (Shi’a) and Indian (Sunni) Muslim Laws

A marriage in Muslim law may dissolve; (a) By husband including: (i) Talaq, (ii) Ila, and (iii) Zihar, (b) By wife (Delegated divorce) and (c) By mutual agreement, including to; (i) Khula, and (ii) Mubarat.

(i) Capacity for divorce

Every [Sunni] Muslim husband of sound mind, who has attained the age of puberty, is competent to pronounce Talaq. It is not necessary for him to give any reason for his pronouncement. But according to Iranian Muslim (Shi’a) law, the husband of sound mind, who has attained the age of puberty, cannot divorced his wife without reason.

According to Single Clause Bill 1 of the ‘Amendment of Divorce’s Regulation Act, 1991 in Iran: “If the husband or wife intends to divorce, he/she has to refer to the special Civil Court and shall apply to the court for issuing him or her certificate of incompatibility (non-reconciliation). The applicant should also mention the exact reasons for obtaining the certificate of non-reconciliation.

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7 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 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”.

**Suggestion**

Absolute and non-conditional freedom of husband to divorce is not compatible with the expediency of family and society and more over it is not adopted with Islamic doctrines in which divorce is considered as an absurd and exceptional issue. Therefore it is suggested that as in Iranian law, Indian Muslims Law also adopt measures to strengthen the foundation of family and female psychological security. Thus the husband should necessarily refer to the court whenever he wants to divorce his wife and explains his rational reasons for divorce so that the irrational divorces which are out of whim would be prevented.

(ii) **Essential of Intention for Divorce**

Every Shi’a jurist holds that the intention is a necessary element for validity of divorce. Thus divorce pronouncement by way of mistake or jest (without intention of divorce) is not valid.

Article 1136 of (I.C.C) states: “The divorcer must have been reached puberty, must be sane, must be definite for his intention and must be unrestricted in his action”.

But, The Hanafi law of talaq is that a divorce pronounced under compulsion, or in a state of voluntary intoxication, or to satisfy or please one’s father or some other person, or in jest, is valid. The Fatwai Alamgiri puts it thus: “A talaq pronounce by a an adult and sane Muslim male is valid, even though pronounce under compulsion, or even when it is uttered in sport or jest or inadvertently by a mere slip of tongue”. It is necessary that at the time of pronouncement of talaq the husband must be awake.

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8 (I.C.C) Iranian Civil Code.
9 Except under Hanafi law, the consent of the husband in pronounced Talaq must be a free consent.
Aishah reported, “I heard the Prophet (peace be upon him) said there is no divorce and no emancipation by force”. But in course of time the Hanafi jurists have held that a divorce under compulsion is valid.

**Criticism**

Divorce is not a personal and unilateral issue so that the person who is divorcing would be the only person who is punished. Therefore if a husband pronounce divorce in a state of voluntary intoxication, or to satisfy or please one’s father or some other person, or for jest, in fact he is not the only person that is punished; but his innocent wife and children are more punished than him and this decree is not consistent with the spirit of Islamic rules in which no innocent person is punished by other’s sin and mistake.

In addition to that as per Indian Muslim (Hanafi) Rules the divorce that happens under compulsion and pressure is also valid, therefore if a person repeats the word “talaq” for three times under the pressure of cruel and nasty people, his divorce is considered as irrevocable divorce (talaq-e-bain) and he can’t get married with his wife. This decree is not rational and not compatible with Prophet Mohammad Sunnat (tradition). Why Hanafi’s jurists and justices don’t amend this decree through reviewing Prophet Mohammad’s Suunat (tradition)?

This decree also is not consistent with the spirit of Islamic Laws. How can it be accepted that one expresses his divorce

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10 See, Chapter VI, p. 343.
12 Unless his wife gets married with another person and having intercourse with him. In a case the second husband divorces her, she can get married with the first one.
wordings under compulsion and pressure of cruel and nasty people to protect his own life and due to fear?; and How can a divorce get realized only due to the repetition of divorce wordings which is caused by compulsion, pressure, threatening and without any intention and determination? It seems that Hanafi jurisprudences can amend this decree according to other Sunnis and Shias’ believes and by more reviewing of Prophet Mohammad’s Sunnat (peace be upon him) and valid sources.

**Suggestion**

Therefore it is suggested that Hanafi School like other Islamic branches, (Sunni and Shia), should not valid the divorce which happens without intention or under compulsion, or to satisfy or please one’s father or some other person, or in jest or etc.

*(iii) The Presence and Notice of Wife at the Time of Divorce*

In the Indian (Sunni) Muslim law, Presence of wife at the time of pronouncement of Talaq is not necessary. A Talaq pronounced in the absence of the wife is lawful and effective.\(^{13}\) For the validity of Talaq, its notice to wife also is not necessary. It is not necessary for the husband to communicate to wife the pronouncement immediately.

But, In Iranian(Shi’a) Muslim Law, According to Single Clause Bill\(^{14}\) of Determining Validity Period on Non-Conciliation Decree, 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.

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\(^{13}\) See Chapter III, p. 173.

So, Presence of wife at the time of pronouncement of Talaq is necessary. Only “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.

**Suggestion**

Every husband and wife have spent nice days together too therefore as it is evident from experience sometimes the attendance of both husband and wife in divorce session made them to motivate their emotions and passions and reconsider their decision about divorce. Therefore it is suggested that in India Muslim Law also the attendance of both couples in divorce should be compulsory.

**(iv) Conditional and Contingent Talaq**

The conditional and contingent Talaq is recognized only under Sunni law; Shia law does not recognize conditional or contingent Talaq.\(^{15}\)

According to Article of 1135 of (I.C.C); “Divorce must be unconditional, a conditional divorce is null and void”.

**(v) Writing Divorce**

According to Sunni Law a Talaq may be oral or in writing. Talaq may be simply uttered by the husband or he may write a Talaqnama.

But, according to Shia law, the Talaq must be pronounced orally, except where the husband is unable to speak.

\(^{15}\) See Chapter III, p. 174.
Suggestion

In writing divorce the husband can divorce his wife by sending letter or e-mail or message that is very easy for him; but if divorce happens orally and with mutual attendance in the court, as above mentioned it can prevent divorce to happen and it is more consistent with the spirit of Islamic Law; therefore it is suggested that in Indian Muslim Law also only oral divorce in both parties attendance should be allowed, unless husband is not able to talk.

(vi) Procedure and Formalities of Taking divorce/Talaq

According to Shi’a and Sunni Muslim law, the man is not allowed to pronounce a talaq while the wife is in her menstrual period.

No school of the Sunnis prescribes any formalities for Talaq.\(^{16}\) 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 specific formula or use of any particular word is required to constitute a valid Talaq. Under Sunni law, Talaq without witnesses is valid.\(^{17}\)

But, In the Shi’a law, Talaq must be pronounced in the presence of two competent witnesses. A Talaq without witnesses or in presence of incompetent witnesses is void under Shia law.\(^{18}\)

The Shia law requires the use of specific Arabic words in the specific formula in the pronouncement of Talaq.\(^{19}\)

\(^{16}\) See Chapter IV, p. 346.
\(^{17}\) Ibid.
\(^{18}\) According to the Shia school of thought and as expressly mentioned in the Qur’an (second verse of Surat al-Talaq), divorce must be pronounced in the presence of at least two trustworthy and righteous witnesses.
In Iranian Muslim (Shi’a) law prescribes some formalities\textsuperscript{20} for taking \textit{Talaq} and also \textit{Talaq}/Divorce under Iranian Law doesn’t affect an out of-court only by husband own declaration.

The procedures of divorce in Iranian (Shia) Muslim laws are:

\textbf{(a)} The husband or wife intends to divorce, he/she has to go to the special Civil Court\textsuperscript{21} and shall apply to the court and also mention the exact reasons for issuing him or her certificate of incompatibility (non-reconciliation).\textsuperscript{22}

\textbf{(b)} The court shall endeavor to bring about a compromise between the husband and wife, through two arbitrators (Hakamain), as the Holy Quran\textsuperscript{23} ordered, and prevent the occurrence of a divorce.

\textbf{(c)} The arbitrations must be having some qualifications.\textsuperscript{24}

\textbf{(d)} The Court will hold an extra session to read them their duties.\textsuperscript{25}

\textsuperscript{19} See Chapter IV, p. 346.
\textsuperscript{20} As mentioned in Chapter IV, 346.
\textsuperscript{22} 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 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”.
\textsuperscript{23} Holy Quran ; 65: 2.
\textsuperscript{24} The arbitrations must be; (a). Muslim; (b). With proper familiarity with religious, family and social issues Forty years or older; (c). Married; (d). Trustable; (e). Non-famous for corruption and misbehavior.
\textsuperscript{25} Article V, \textit{Supra} note.
(e) The Court will determine a time limit for arbitrator to judge, and installed arbitrators must hold no less than two sessions with the couple to make peace among them.

(f) Written report [of arbitrations] on impossibility of reconciliation should be delivered to the Court based on all marriage conditions.

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

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

(i) Divorce pronouncement and its registration is conditioned to delivering all payables to the wife in cash (including dowry, marriage portion and etc) and should be done after paying them.

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

(k) In revocable divorces a written certificate about the living of the divorced woman with her husband in the same house until the end of the Idda is necessary.
(l) 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.\(^26\)

(m) After divorce\(^27\) the woman can appeal for the payment of the works that were not her legal and religious duties.

(n) Pregnancy or non-pregnancy certificate by qualified doctors and laboratories should be delivered.\(^28\)

(o) 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.\(^29\) 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.\(^30\)

(p) The divorce must be performed in the actual form of utterance and in the presence of at least two just men\(^31\) who must hear the actual form of divorce.\(^32\)

\(^26\) See Chapter IV, p. 349.
\(^27\) The jurists interpret the word ‘after divorce’: As ‘within the time of pronouncement of divorce’.
\(^28\) See Chapter IV, p. 235.
\(^29\) See Chapter VI, p. 345.
\(^31\) 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.
\(^32\) Article of 1134 of Iranian Civil Code.
The witnesses must be male\textsuperscript{33} and just. This requirement is based on the letter of holy Quran.\textsuperscript{34}

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.

**Suggestion**

In order to maintain the foundation of the family and prevent the divorce which are out of anger or hasty or whim, it is suggested that in Indian Muslim Law there should be the procedure and formalities that is applied in Iranian Muslim law such as referring to the court by husband or couples and providing rational reasons for divorce, appointing arbitrators from the family of husband or wife (in specific condition that was explained) by the court and their attempt for creating peace between the couples, paying all rights of female before divorce such as dower (Mahr) and past maintenance and maintenance of waiting period (Iddah).

**7.4 Revocable divorce (Talaq-ul-Sunnat)**

In Sunni law, *Talaq-ul-Sunnat* (revocable) may be further sub-divided into:

\textsuperscript{33} 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.

\textsuperscript{34} 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…” (Holy Quran; 65: 2.).
(i)  *Talaq Ahsan* (*Talaq-ul-raje* /most proper);

(ii) *Talaq Hasan* (proper).

Revocable divorce (*Talaq-ul-raje*) is recognized by both Shi’a and Sunni law. But, revocable divorce or *Talaq-ul-Sunnat* in the Iranian (Shi’a) law includes only *Talaq Talaq-ul-raje* (*Ahsan*/ most proper) like Sunni law. So, Shi’a recognizes only *Talaq Ahsan* as a revocable divorce because Shi’a believes that Prophet Mohammad (Peace be upon him) recommended only this kind of revocable *Talaq.*

Revocable divorce (*Talaq-ul-raje*) is the most proper form of repudiation of marriage. The reason is twofold:

First, there is possibility of revoking the pronouncement before expiry of the *Iddat* period.

Secondly, the evil words of *Talaq* are to be uttered only once.

**Suggestion**

It seems that *Talaq Hasan* (proper) is causing harassment and stress for women; and Prophet Mohammad (P.B.U.H) also recommended only *Talaq-ul-raje* (*Ahsan*) most proper of revocable *Talaq*, therefore it is suggested that Sunni Muslims

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35 According to the Hedaya, also this method of divorce is the most approved because the companions of the Prophet (Peace be upon him) 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. (Hedaya, at 72).

36 After this single pronouncement, the wife is to observe an *Iddat* of three monthly courses. If she is pregnant at the time of pronouncement of the *Iddat* is, till the delivery the child. During the period of the *Iddat* there should be no revocation of *Talaq* by the husband. Revocation may be express or implied. Cohabitation with the wife is an implied revocation of *Talaq*. If the cohabitation takes place even once during the period, the *Talaq* is revoked and it is presumed that the husband has reconciled with the wife.
valid only *Talaq-ul-raje* (Ahsan) *not Hasan* because in Talaq Hasan (proper) there is an opportunity for husband to return to his wife for reconciliation.

### 7.5 Irrevocable/ Triple Divorce (*Talaq-ul-Bidaat*)

This *Talaq* is also known as *Talaq-ul-Bain*. It is a disapproved mode of divorce. A *Bid’at Talaq* become final as soon as the words have been uttered and the marriage is completely dissolved. A Sunni husband, who wants to divorce his wife irrevocably, may do so in any of the following manners:

(a) The husband may make three pronouncements in a period of purity (*Tuhr*) saying: “I divorce thee, I divorce thee, I divorce thee”. He may declare this triple-*Talaq* even in one sentence saying: “I divorce thee thrice”, or “I pronounce my first, second and third *Talaq*”.

(b) The husband may make only one declaration in a period of purity expressing his intention to divorce the wife irrevocable saying: “I divorce thee irrevocably” or “I divorce thee in Bain”.

The Prophet never approved a *Talaq* in which there was no opportunity for reconciliation. Therefore, the irrevocable *Talaq* was not in practice during the life. The *Talaq-ul-Bid’at* has its origin in the second century of the Islamic era. Ibn *Abbas* has reported that the pronouncement of three divorces at one and the same time was treated as one divorce during the time of the

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37 See Chapter III, p. 182.
38 See Chapter VI, p. 354.
Prophet (peace be upon him), the first Caliph and during the first two or three years of regime of the second Caliph.\textsuperscript{39}

**But**, There is no provision in Shi’a Law which approves triple divorce in one single session as prevailed in India (Sunni) Muslim, i.e., a Shi’a husband cannot say to his wife that “you are divorced, divorced, divorced “or “you are divorce irrevocably”.

Triple divorce in one single meeting does not exist and it looks very abnormal and odd. This sort of divorce is a bidat (innovation) and is neither according to Quranic\textsuperscript{40} mandates nor Tradition of Prophet (peace be upon him). According to Prophet’s tradition, Shia law never recognizes an irrevocable Talaq (Talaq-ul-Bid’at) in which there is no opportunity for reconciliation.

According to clause 4 of the Article 1145 of the Iranian Civil Code, the third divorce is: “...A third divorce, performed after three consecutive marriages (of the same parties) whether by revocation of divorce by the husband or by a new marriage between the two parties”.\textsuperscript{41}

Therefore, under Shi’a law irrevocable divorce (triple divorce/ Bain) should take place by three pronouncements of formula of divorce during three Tuhr during which in the first two he is able to refer to his wife and in the third time it becomes

\textsuperscript{39} See Chapter VI, p. 357.
\textsuperscript{40} Holy Quran; 2:229.
\textsuperscript{41} The triple divorce in one meeting (like Indian Sunni Muslim law) has no place under) Iranian) Shi’s law. In the other word, we can say there is no provision in Shi’a Law which approves triple divorce in one session as prevailed in India. That is to say a Shia husband cannot say to his wife that “you are divorce, divorce, divorce “or “you are divorce irrevocably”. But triple divorce in one meeting should not be limited to only, above examples.( I will be explain about third divorce in The opinion of Indian Sunni Muslim law and opinion of Iranian Shi’a law in Chapter IV).
irrevocable, i.e., he is not able to refer to his wife again. Unlike in India that triple divorce is an approved form; in Iran it is very rare.

**Suggestion**

As it was explained earlier there was no such divorce as Talaq-e-bidat (innovation) i.e. the divorce which happens in one session, during the era of Prophet Mohammad, first Khalifa and the first three years of second Khalifa (according to Ib Abbas). This is an innovation that has been crept into Islamic Laws, therefore it is suggested that Sunni Muslims also follow Prophet Mohammad’s Sunnat (tradition) and consider this divorce as only one kind of divorce which is revocable and there is an opportunity of reconciliation for husband and it is compatible with the primary decree of Islam about divorce/talaq.

### 7.6 Divorce by wife in Iranian and Indian Muslim Law

Section 2 of the Dissolution of [Indian] Muslim Marriage (D.M.M) Act, 1939, provides that a woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the grounds enumerated therein.

According to articles 1029, 1129 and 1130 of the Iranian civil code also; a wife can plea to the court for divorce in certain cases.

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42 Unless his wife gets married to another person and has intercourse with that person then if they divorce, he can remarry her.


44 Article 1129 states: “If the husband refuses to pay the cost of maintenance of his wife (alimony), and if it is impossible to enforce a judgment of the court and to induce him to pay the expenses, the wife can refer to the judge applying for divorce and the judge will compel the husband to divorce her, also is the husband’s failure to provide maintenance”.
Iranian and Indian Muslim Laws provided some grounds that a woman entitled to obtain a decree for the dissolution of her marriage on any one or many grounds. Some important grounds are as follow:

(i) **Husband’s disappearance in Iranian and Indian Muslim Law**

According Section 2, (i); of the Dissolution of [Indian] Muslim Marriage Act, 1939,

“That the whereabouts of the husband have not been known for a period of four years”.

According to Article 1029 of the Iranian Civil Code also:

“If a husband goes on missing or remains absent for four years, his wife can plea for divorce.”

(ii) **Want of maintenance in Iranian and Indian Muslim law**

According Section 2, (ii); of (D.M. M.) Act, 1939, (in Indian Muslim Laws).

“That he husband has neglected or has failed to provide for her maintenance for a period of two years”.

According to Article 1129 of the (I.C.C): “If the husband refuses to pay the cost of maintenance of his wife (alimony), and if it is impossible to enforce a judgment of the court and to

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45 Article 1130 of the Civil Code: “In the following circumstances, the wife can refer to the Islamic judge and request for a divorce. When it is proved to the Court that the continuation of the marriage causes difficult and undesirable conditions, the judge can for the sake of avoiding harm and difficulty compel the husband to, divorce his wife. If this cannot be done, then the divorce will be made on the permission of the Islamic judge”.

46 In this case the judge would perform the divorce on the basis of Article 1023.

47 (D.M.M) is Dissolution of [Indian] Muslim Marriage Act, 1939.

48 (I.C.C) is Iranian Civil Code.
induce him to pay the expenses, the wife can refer to the judge applying for divorce and the judge will compel the husband to divorce her, also is the husband’s failure to provide maintenance”. 49

Article 1129 don’t mentioned any time for maintenance. So when husband refused to pay maintenance, his wife cans plea divorce to the curt. But, according to condition stipulated binding in Iranian marriage contract:

“Where the husband refuses to pay the wife’s cost of maintenance for any reason for (a period of) six months and it will be impossible to coerce him.

(iii) **Imprisonment in Iranian and Indian Muslim law**


“That the husband has been sentenced to imprisonment for a period of seven years or upwards”.

According to Section 8 of the Iranian family protection Act 1975 and condition stipulated binding in Iranian marriage contract:

The husband’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, his wife cans plea divorce from the court.

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49 Article 1119 of the Iranian Civil Code states: the husband can give to his wife attorney for divorce at the time of matrimonial contract.
(iv) **Non-performance of marital obligations in Iranian and Indian Muslim law**

According to Section 2 (iv), of (D.M. M.) Act, 1939, (in Indian Muslim Laws).

“That the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years”.

According to condition stipulated binding in Iranian marriage contract:

“Where he fails to fulfil her other indisputable rights (marital obligations) for (a period of) six months and it will not feasible to force him into doing this”.

There is difference between Iranian and Indian Muslim law. According to Indian Muslim (Suuni) law the husband has failed to perform marital obligations for a period of three years, the wife has right to dissolve the marriage; but according to Iranian Muslim (Shi’a) law this period is six months.

**Suggestion**

Two years of non-payment of maintenance, seven years of husband imprisonment and three years of husband’s failure to perform his duty are too long periods and they cause distress and constriction for women; therefore it is suggested that woman and husband agrees upon less period in conditions stipulated in a separate binding marriage contract so that these periods is reduced and in case woman faces distress and constriction, she will be allowed to apply for divorce.
(v) Impotency in Iranian and Indian Muslim law

Section 2 (v), of (D.M.M.) Act, 1939 (in Indian Muslim Laws);

That the husband was impotent at the time of the marriage and continues to be so, the wife entitled to obtain a decree for the dissolution of her marriage.

Article 1122 of (Iranian) amended Civil Code in 1989 in Iranian laws states:

The following defects of men give the right to women for cancellation:

a. **Khasa;**

b. **Male genital organ anatomical defect;**

c. **Anan (impotence);**

In addition to that in Iranian Muslim (Shi’a) law there is some more effect that woman has the right to apply for cancellation of marriage in the court which are: if the husband is **Khasa** and he has **Male genital organ anatomical defect.**

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50 Which means Castration (**Khasa** means a man whose testicles have been removed and **Khasi** is the person who has this defect. **Khasa** can be a right for women to dissolve/cancellation when it has been existing before marriage and the woman has not been told about it.)

51 As much as man is not able to intercourse. (Anatomical defect in Arabic is called Jab, i.e. cut and the person who has this defect is called **Majbub.**)

52 Which means Impotency (Anan means inability of men to have and maintain an erection and the person who is suffering is called **Anin.**

53 “The main purpose of matrimonial relationship is not intercourse, but at least it is one of its main reasons; so it wouldn’t be strange having the right of dissolution by women if a man happens not to be able to have intercourse, in a condition that she hasn’t been told about it before marriage.”
Suggestion

If we don’t consider intercourse as the main purpose of marriage, it is no doubt is one of the important aims of marriage. Therefore it is suggested that whenever the husband gets Anan (impotence) and his disease won’t be cured or Khasa (a man whose testicles has been removed) or he has genital anatomical defect according to article 1122 of Iranian Civil Code, the woman has the right to apply for divorce because continuing life for long time with a person with Anan or other defects is not possible for her and she becomes distressed and constricted.

(vi) Other diseases in Iranian and Indian Muslim law

According to Section 2 (vi): of (D.M. M.) Act, 1939; of Indian Muslim Law there are some other diseases in Iranian and Indian Muslim Law which gives the wife the right for cancellation of the marriage that are as following:

According to Indian Muslim law, the husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease” his wife entitled to obtain a decree for the dissolution of her marriage.

But according to Iranian Muslim (Shi’a) law, the insanity of each one of the couples is the cause of cancellation in condition of continuity, either continuously or in periods. In the Iranian law don’t mentioned a period of two years and also the insanity of each one of the couples is the cause of cancellation. This right is for couples not only for wife.

According to Section 2 (vi): of (D.M. M.) Act, 1939 Indian Muslim laws, the husband is suffering from leprosy his wife
entitled to obtain a decree for the dissolution of her marriage. Evidently this section includes leprosy which exists before and after marriage counteract.

But, according to Iranian Muslim law, these defects (woman’s defect like leprosy) give men the right to dissolve/cancellation if the defects have been existed in the time of marriage contract and she hasn’t told it.

**Suggestion**

In Indian Muslim Law insanity, leprosy and virulent venereal disease are specific male’s defects that woman can apply for divorce in case her husband is defected, but in Iranian Civil Law insanity is both Male and female’s common defect and leprosy is female’s specific defect. Therefore it is suggested that:

(a) In Indian Muslim Law insanity and leprosy should be included in both male and female’s common defects.

(b) In Iranian Muslim Law the termination of marriage should not be restricted to Article 1122 and 1123; but some other virulent venereal diseases such as syphilis, HIV or other diseases if they are virulent and dangerous for the other party should be included in common defects of male and female.

(c) In Indian Muslim Law virulent and dangerous diseases such as HIV should be included in common defects of both male and female so that if one of the couple suffers from one of the diseases, the other party would have the right to terminate the marriage.
(vii) **Cruelty in Iranian and Indian Muslim law**

In both Indian Muslim\(^{54}\) and Iranian Muslim Law\(^{55}\) cruelty is considered as one of the causes for woman to request for divorce.

### 7.7 Other grounds for Dissolution of Marriage in Iranian Laws

According to condition stipulated binding in Iranian marriage contract other grounds which wife can refer to the court for divorce are: The husband’s addiction to any of harmful drugs, the husband’s abandonment of family life with no justifiable reason, his refraining from appearing before/the court of law for six consecutive months after the summon, the husband’s punishment by the Islamic canon law due to an offence which is incompatible with the wife’s family prestige and customs, husband’s sterility or other physical affliction for five years, where the husband is missing within six months from the date the case was originally reported by the wife to the court.

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\(^{54}\) According to Section 2 (viii) of (D.M. M.) Act, 1939 Indian Muslim laws, is when the husband treats her with cruelty, that is to say: (a) habitually assaults her or (b) associates with women of evil repute or (c) attempts to force her to lead an immoral life, or (d) disposes of her property or (e) obstructs her in the observance of her religious profession or practice, or (f) if he has more wives than one and does not treat her equitably in accordance with the injunctions of the Quran; or (ix) on any other ground which is recognized as valid for the dissolution of marriages under Muslim law.

\(^{55}\) According to Article 1130 of (I.C.C) the wife can refer to the Islamic judge and request for a divorce, if it is proved to the Court that the continuation of the marriage causes distress and constriction for the woman. And also according to condition stipulated binding in Iranian marriage contract; “the husband’s social misconduct or maltreatment of the wife to a point unbearable to her, the wife can refer to the Islamic judge and request for a divorce. And, also; where the husband should remarry without seeking consent of the wife or where he should not treat his wives equally, the wife can refer to the Islamic judge and request for a divorce.
Suggestion

In Indian Muslim Law if husband is cruel, gets disappeared, has neglected or has failed to provide her maintenance for a period of two years, has been sentenced to imprisonment for a period of seven years or upwards, has failed to perform his marital obligations without reasonable cause for a period of three years, has been impotent at the time of the marriage and etc, are the causes that woman can apply for divorce; therefore to protect women’s right it is suggested that as well as above mentioned, other grounds such as The husband’s addiction, husband’s sterility and etc should be stipulated binding in Iranian marriage contract in which woman has the right to request for divorce.

7.8 Components of Divorce in Iranian and Indian Muslim Laws

Similarity of Components of Divorce in Iranian Muslim and Indian Muslim (Sunni-Hanafi) are: 1. Divorcer; 2. Divorcee; and differences between them in components of divorce are: 3. Actual form of utterance of divorce; 4. Bearing witnesses

According to Article 1134 of Iranian Civil Code; “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 Holy Quran the presence of witnesses at the time of pronouncement of divorce is necessary; “... and call to witness of two just men from among you, and give upright testimony for Allah…” (Holy Quran; 65:2).
But, a *Talaq* whether oral or in writing, need not be made in presence of the witnesses. Under Sunni law, *Talaq* without witnesses is valid.

**Suggestion**

According to Holy Quran the attendance of witness for divorce and *Khula* (divorce) is necessary; in addition to that it is evident from experience that the attendance of witnesses and their mediation in divorce have caused to prevent some divorces, therefore it is suggested that the attendance of witness in divorce becomes compulsory in Indian Muslim Law.

7.9 **Divorce by Mutual Consent**

Under Muslim law, a divorce may take place also by mutual consent of the husband and wife. There are two forms of divorce by mutual consent:

(i)  *Khula*; and

(ii)  *Mubarat*.

**Competence of the Parties for Khula in Iranian (Shi’a) and Indian (Sunni) law**

In the Indian Muslim Law, The husband and wife must be of sound mind and have attained the age of puberty (fifteen years). A minor or insane husband or wife cannot lawfully effect *Khula*. The guardian of a minor husband may not validly effect *Khulla* on his behalf.\(^{56}\)

*Hanafis* and *Shafis* permit the guardian of the minor wife to enter into *khula* on her behalf; but not the guardian of the minor husband. *Shias* insist that there must be no compulsion exerted on

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\(^{56}\) See Chapter VI, p. 378.
the mind of the wife, while Sunnis would not mind *kula* obtained under compulsion. Sunnis also recognize a conditional *kula*; not so the *Shias*. *Hanafi* Law permits the wife to retain an option to revoke the *kula*. If the husband stipulates such an option, the *kula* will be deemed irrevocable and the option void. Under *Shia* Law, both the *kula* and the option would be void; for the *kula* must be unconditional.

**Intention in *khul’a***

Whatever has been said regarding intention in divorce is applicable in *khul’a* too. Therefore under *Hanafi* law a *Khula* under compulsion or in the State of intoxication is also valid.\(^57\) But, under all other schools including *Shia* law, without free consent of the parties, the *Khula* is not valid.\(^58\)

In Shi’a law the husband should be adult, sane, having intention and free will. Therefore a *Khul’a* divorce by a minor, insane, or a person who is angry to that extent which is impossible to have a free will, is not valid.\(^59\)

All schools agree, in *kula* the consent of the husband in clear words is a must. *Hanafi* regard *kula* as a *talak-ul-bain*, an irrevocable divorce. *Shia* jurists differ on the point whether wife and husband can remarry immediately after *kula*. *Ithna Asharis* hold it irrevocable, but maintain that if the wife during *iddat* demands the return of the consideration, the husband may revoke the *kula*.\(^60\)

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\(^{57}\) *Rashid Ahmed v. Anisa Khatum*, (1931) 59 IA 21 (All).

\(^{58}\) See Chapter VI, p. 378.

\(^{59}\) See Chapter II, p. 132.

\(^{60}\) See Chapter III, p. 200.
Witnesses for Khula and Mubarat

Under Hanafi Law, presence of witnesses is not insisted upon, but under Shi’a Law presence of at least two witnesses is necessary; under Hanafi Law, there is no fixed formula; only the intention of the parties is to be made clear, under Ithna Ashari Law a formula is to be used. Among both the Sunnis and the Shias, the Khula and Mubarat are irrevocable divorce as in the talak-ul-bain; but, when the wife demanded the return of the compensation, the divorce converts to revocable (rajei divorce). The Khula and Mubarat divorce should be pronounced in presence of two Just Male witnesses.

Mohammad ibn Moslim has narrated from sixth Imam, Mohammad. b. Jafar As- Sadiq that he said “khula and Mubarat can not take place unless her menstrual period is over and in the presence of two witnesses.

Criticism and Suggestion

As it was reviewed before that all Sunni and Shia Muslims except Hanafi consider the husband’s intention and consent as a necessary requirement for divorce and they don’t consider

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61 In Iranian Muslim law like Indian Muslim, Divorce on mutual consent (Mubarat) is also similar to Khula’ regarding its legal structure with the exception that both the couples, not only the wife, dislike each other in mubarat divorce. Hence the amount of compensation must not be more than the marriage portion.

62 Burhan-al-Din Marghinani, the author of Al- Hidayah, has said that the granting of khula shall take effect as one irrevocable divorce and the wife shall have to compensate the husband. See Chapter III, p. 198.

63 See Chapter III, p. 201.

64 Article 1145(3) of (I.C.C); As long as the wife has not demanded the return of the compensation the Khula and Mubarat divorce are irrevocable divorce but ,when the wife demanded the return of the compensation that divorce convert to revocable (rajei divorce).

65 As above mentioned.

66 See Chapter VI, p. 378.
divorces which have been happened by force or intoxication as the right divorce; thus taking Khula divorce into account when it is done by force or intoxication is not rational and adapted to Islamic Laws because the person doesn’t have any intention and consent in his actions. Therefore it is suggested that jurisprudences of Hanafi is acting as the other branches of Islam, i.e., Sunni and Shia and they don’t consider the divorces which are done without husband’s intention and consent as a right divorce.

In both Shia and Sunni Law Khula and Mubarat is considered as an irrevocable divorce. The difference between Shia and Sunni in Khula and Mubarat is that when the woman is getting her compensation back, i.e. the properties that she has paid to husband for Khula divorce, the divorce converts to revocable divorce which means the husband and the wife can go back to each other for continuation of their life, in other words the return option is not closed for them. Therefore it is suggested that Indian Sunni Muslim Law also don’t close the way for woman to return to her common life and in case the woman intends to return and continue her common life, she should be given the chance.

7.10 Indirect Divorce

Indirect divorce in Iranian law can be divided into three parts as follow:

(i) Ila;

(ii) Zihar;

(iii) Lian.
(i) **Ila**\(^{67}\)

*Ila* is not exactly a divorce (*Talaq*) but it is a species of constructive divorce hence we put it under category of “indirect divorce” Nevertheless it has been treated as form of the same (divorce) by Muslim jurists.\(^{68}\)

Regarding applicability of *Ila* in some books it has been mentioned that “*Ila* is not in practice in India”.\(^{69}\) But in some other, “*Ila* is very uncommon, but is still extant and enforceable in Pakistan and India”.\(^{70}\)

In Iranian Civil Code, like the same in India, there is no provision regarding *Ila*. Therefore if an Iranian Court wants to resolve such a case it should refer to original context of *Feqh* (Jurisprudence) belongs to Shi’a.

(i) **The Difference between Shi’a and Sunnis’ View in Procedure of Ila**

In Indian (Sunni) Muslim law, No bar for expressing *Ila*. It may be pronounced either by express or by implied, but intention must be very clear. For example, “I will not approach thee”, “I will not unite with thee” or “I shall not lie with thee” are express forms, while such forms as “I will not come to her” or “I will not approach her bed” are implied form”.\(^{71}\) **But**, in Shi’a view *Ila* is

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\(^{67}\) The term Ila has been translated into English as ‘vow of continence’. Where a husband who has attained majority and is of sound mind swears by God that he will not have sexual intercourse with his wife for a period of four months or a longer period, he is said to make Ila. Thus if a husband says to his wife “I swear by God that I shall not approach you” it is a valid Ila.

\(^{68}\) According to Malik and Ahmad B. Hanbal, it is necessary to invoke the name of God but it is not necessary according to Abu Hanifa and Shafei for validating of Ila. See Chapter III, p. 182.

\(^{69}\) See Chapter VI, p. 384.

\(^{70}\) See Chapter III, p. 183.

\(^{71}\) See Chapter III, p. 184.
an oath to Allah and it cannot be effected without the word “Allah”.  

(ii) The Difference View in the *Ila’s Effectiveness and Qazi’s (Qadi’s) decree*

(a) According to the Hanafi Law, if the husband made *Ila* to his wife and prescribed period of four months, passes away without his having recourse to her (by words or acts) an irrevocable divorce shall (automatically) got effect on her.  

But, according to Shi’a Law, Divorce ensuing by *Ila* is revocable (*Rajia*) unless the husband gives an irrevocable (*Ba’in*) divorce.

(b) According to Hanafis, *Ila* divorce gets effected without the intervention of a *qadi*, only the condition is passing away of the prescribed period. According to shafei’s, the separation shall take effect only by decree of a *Qadi*.

But, under Ithna Asharia (Shi’a) School, *Ila* dose not operate as divorce without order of the court of law.

The judge himself cannot dissolve the marriage but he, after expiry of four months from the date of filing suit by the wife, shall order the husband either to take back his wife or to divorce her. On the husband’s failure or refusal to do so, the judge can

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73 See Chapter III, p. 186.  
74 See Chapter VI, p. 387.  
imprison and punish him to force him to choose one of the above two alternatives.76

(iii) The Difference View in Compulsion or intoxication in Ila

According to Sunni opinion, Ila is valid like Talaq whether made in compulsion or intoxication. But, According to Shi’a law freedom for choice is must to for Ila and in Shi’a law Ila in compulsion or intoxication is not valid.77

Zihar78

(iv) The Similarity View in Zihar

The penance which the husband is required to perform for being absolved of this sinful conduct is (1) feeding sixty poor persons or, (2) observance of fast for two months or, (3) release of a slave.79

76 Ibid.
77 See Chapter III, p. 188.
78 The word zihar is derived from the word “Zuhur” which means back or to oppose back to back. If there is any discard between the spouses they, instead of remaining face to face towards each other turn their back one against the other. Qadri, Anwar Ahmad; Islamic Jurisprudence in the Modern Word, p. 394 (2007). Zihar is a form of inchoate divorce. If the husband compares his wife to his mother or any other female within prohibited degrees (whether by blood, fosterage or by marriage) the wife has a right to refuse herself to him until he has performed penance. In default of expiation by penance the wife has the right to apply a judicial divorce. (Hidayatullah, Mohd, Mula’s principles of Mohammadan Law, Bombay, 19th Ed, p. 262 (1990)).
79 The Holy Quran states:
1. God has indeed heard the words of the woman who pleads with you about her husband and lays her complaint before God; God hears what the two of you have to say. God is all hearing, all seeing.
2. Those who separate themselves from their wives by pronouncing [Zihar], to me you are like my mother’s back,’ must concede that they are not their mothers; none are their mothers except those who gave birth to them- surely they utter an evil word and a lie. God is pardoning, forgiving.
3. Those who put away their wives by equating them with their mothers, and them wish to go back on what they have said, must set free a slave
The effect of Zihar is as below:

(i) Prohibition of sexual intercourse; \(^{80}\) (ii) Maintenance; \(^{81}\) (iii) Expiation; \(^{82}\) (iv) Separation. \(^{83}\)

(v) **The Difference between Shi’a and Sunnis’ View in Zihar**

Under Sunni Law Zihar is like to Ila, there is different juristic opinions upon Zihar: Abu Hanifa, like in divorce, gives sanction to a Zihar which is pronounced in jest or in mistake or under compulsion. \(^{84}\) Intention, also, according to him, is not before the couple may touch one another again. This is what you are exhorted to do. God is fully aware of what you do,

4. and anyone who does not have the means must fast for two consecutive months before they touch each other, and who is not able to do that must feed sixty needy people. (Holy Quran; 58: 1- 4.)

\(^{80}\) Regarding the effect of zihar is that sexual connection is prohibited even instance kissing; touching with desire, etc. is also prohibited till expiation is made. Such sexual intercourse would be prohibited till the expiation and if the marriage is dissolved by Talaq till the remarriage. And if such act is done by the husband, the penalty is expiation

\(^{81}\) The wife is entitled to maintenance as the husband is responsible for the future to obtain conjugal intercourse

\(^{82}\) By making Zihar expiation is necessary, but if the pronouncements are repeated then for such pronouncement and expiation will be obligatory, unless the intention is only to reaffirms and repeat the first.

\(^{83}\) Under the Islamic Law, Zihar did not operate as a Talaq. In case the husband who has made Zihar fueled to make expiation the judge could imprison him until he expiated or made Talaq against her. Qadri, Anwar Ahmad; Islamic Jurisprudence in the Modern word, (2007), 2nd Ed., pp. 276-78). The Court has no power to enforce expiation in the manner provided by Muslim Law. It may however, be noted that under the Indian Shariat Act (26 of 1937) it has been provided:

Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal Law, marriage, dissolution of marriage, including Talaq, Ila, Zihar, Lian, Khula and Mubarat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institution and charitable and religious endowment) the rule of decision in cases where the parties are Muslims shall be the Muslim personal Law (Shariat) (The Muslim Personal Law (Shariat) Application Act,1937.)

\(^{84}\) See Chapter VI, p. 390.
necessary and *Zihar* by a drunken man is also valid.\textsuperscript{85} But in Shia view is not valid.

Under the *Hanafi* law *Zihar* can be made conditional. Thus husband may say “If you enter that house or speak to such a person, you are to me like my mother”.\textsuperscript{86} But, under Shi’a view the conditional *Zihar* is void.

Under Sunni Law, the present two witnesses for *Zihar* is not necessary. But, according to Shi’a Law, the declaration of *Zihar* must be made in presence of two competent witnesses.

**Criticism and Suggestion**

*Ila* and *Zihar*, is a mode of divorce which have now become outdated. Although the provision of such a constructive divorce still exist in the law, but it does not exist in practice. A Muslim husband who wants to repudiate his marriage may do so by *Talaq* which is simple and more convenient than the indirect modes of *Ila* and *Zihar*.\textsuperscript{87}

In Hanafi School they believe that if a person does *Ila* and *Zihar* in any word it is correct; but in Shia School *Ila* is done only when it is accumulated by the swear to Allah. In Hanafi School as they believe in Divorce, *Ila* and *Zihar* are considered right if it happen unintentionally, in jest, by force or intoxication; but in Shia they don’t consider such *Ila* and *Zihar* a valid divorce if it happens in these conditions. Sunnis don’t consider the witness as a necessary requirement for *Zihar* whereas in Shia it is necessary. Therefore as it was mentioned in divorce and Khula, *Ila* and *Zihar* should not be considered as a valid divorce when it is done.

\textsuperscript{85} See Chapter VI, p. 390.

\textsuperscript{86} Ibid.

\textsuperscript{87} See Chapter III, p. 400.
unintentionally, in jest, by force or intoxication because it is not adapted to the spirit of Islamic Law. Thus it is suggested that Indian Muslim Law as other Sunni and Shia Muslims don’t consider this divorce as a valid divorce in such conditions.

(vi) **Lian**

According to *malik, Shafii*, Abu Yusuf, the wife becomes prohibited to the husband forever on the dissolution of marriage under the provisions of *lian* so that he cannot remarry her under any circumstances and even on reaction by him.\(^{89}\)

Abu *Hanifa* and Muhammad, however, contended that after the husband’s retraction, *lian* becomes null and ineffective hence remarriage between them is possible.\(^{90}\)

But, as above mentioned, according to Article 1052 of (I.C.C) “The separation which happens due to *Lian* causes the eternal prohibition and they cannot remarry each other under any circumstances”.

**Suggestion**

Sunni and Shia school both believe that on the provision of *lian* the wife becomes prohibited to husband forever so that he cannot remarry her under any circumstances and even on reaction by him because:

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\(^{88}\) Judicial divorce in the Indian Muslim Law can divide into two parts: (i) Lian (ii) Faskh: the Lian mentioned as a kind of judicial divorce (As mentioned in Chapter III) but in the Iranian law Lian cited kind of indirect divorce (as mentioned in chapter II), both of them are judicial divorce. So the difference is in divisions. (The term Lian is derived from the “Laan”. It means to derive away. According to the dictionary meaning is the infinite of the past tense Lanah where the husbands who makes a charge of accusation to his wife of adultery (which includes all cases of unlawful sexual intercourse.

\(^{89}\) See Chapter III, p. 216.

\(^{90}\) *Ibid.*
1. If the husband is not sure and certain about his wife’s adultery, he shall not permit himself to accuse her.

2. If the husband is sure and certain about his wife’s adultery, he cannot live with her again because he knows her adultery and moreover it ruins the enormity of the sin and encourages the woman to do it again.

Therefore, it is suggested that Abu Hanafi companions like other Sunni’s jurisprudences such as Malikis, Shafii, Abu Yusuf and Shiees follow the opinion of non possibility of returning to each other after Lian i.e. Eternal Prohibition.

7.11 Legal Consequences of Divorce

Effects or the legal consequences of divorce in Sunni and Shi’a view are given below:

(i) Cohabitation becomes illegal;\(^91\) (ii) Iddat;\(^92\) (iii) Maintenance during Iddat;\(^93\) (iv) Right to contract marriage;\(^94\) (v) Dower;\(^95\) (vi) Remarriage between the divorced couple.\(^96\)

\(^91\) After completion of the divorce.
\(^92\) The wife is required to observe an Iddat of three lunar months after the divorce or, if pregnant, till the delivery of the child. However, if the divorce takes place before consummation, the wife need not observe Iddat.
\(^93\) During the period of Iddat, the divorced wife is entitled to be maintained by her former husband.
\(^94\) Thus, husband can marry another woman immediately after the divorce. But a divorced wife cannot marry another husband before the expiry of the period of Iddat. If their marriage has dissolved before the consummation, the wife is also free to contract another marriage immediately after the divorce.
\(^95\) The unpaid dower becomes immediately payable to the divorced wife. Whether the dower is prompt or Deferred, the divorced wife is entitled to it immediately after the divorce.
\(^96\) After completion of divorce, the parties cease to be husband and wife. There is no restriction in their re-marriage with other persons. But, there is some restriction in the re-marriage of the divorced couple.
(i) **The Muslim’s View in the re-marriage of divorced couple**

In Indian Muslim laws, the re-marriage of the divorced, couple must have a fresh contract of marriage with all the essential formalities including fresh dower. If the divorced couple resumes cohabitation without contracting a fresh marriage, their union would be unlawful.

But, according to Shia laws, when the waiting period (Iddat) is expired, the re-marriage of the divorced couple must have a fresh contract of marriage with all the essential formalities including fresh dower. But if the waiting period is remaining the husband can refer to his wife without fresh contract of marriage, so their union will be lawful.

**Suggestion**

Islam aims preventing the occurrence of divorce and also would like to preserve family relationship. The time of waiting period is a time for the husband to think about his decision about divorce and refer to his wife. If it requires him establishing a new contract including fresh dower we have closed the possibility of reconciliation for the couple. Therefore it is suggested that Sunnis also like Shai allow the husband to return to his wife in Idda Period to maintain the family foundation which is emphasized by Islam and provide him the opportunity to return to his wife without new contract and useless formalities to start their common life.
7.12 Waiting period (Iddat, Iddeh)

Under Muslim law, it is that period during which a woman is prohibited from re-marrying after the dissolution of her marriage.

Marriage with a woman who is observing *Iddat* is irregular under *Sunni* law. And Under *Shia* law the marriage contract with woman observing *Iddat* is void.97

Different periods of *Iddat*, which a woman is legally required to undergo, are given below:

<table>
<thead>
<tr>
<th>Cause of Dissolution</th>
<th>Marriage whether consummated or not</th>
<th>Period of Iddat</th>
</tr>
</thead>
<tbody>
<tr>
<td>Divorce</td>
<td>Consummated</td>
<td>In <em>Sunni</em> laws the period is 3 courses in the case of menstruating and 3 lunar months in the case of a non-menstruating wife or, if pregnant, till delivery. In <em>Shi’a</em> law; The period is 3 <em>tuhrs</em> in the case of menstruating and 3</td>
</tr>
</tbody>
</table>

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97 See Chapter V, p. 246.
98 See Chapter VI, p. 398.
<table>
<thead>
<tr>
<th>Cause of Dissolution</th>
<th>Marriage whether consummated or not</th>
<th>Period of Iddat</th>
</tr>
</thead>
<tbody>
<tr>
<td>Divorce</td>
<td>Not consummated</td>
<td>No Iddat (in Shi’a and Sunni)</td>
</tr>
<tr>
<td>Death</td>
<td>Doesn’t matter</td>
<td>4 months and 10 days or, if pregnant, till delivery whichever period is longer (in the Shi’a and Sunni view is same.)</td>
</tr>
</tbody>
</table>

(i) **The Difference between Shi’a and Sunni’s View in the Commencement of Iddat**

In the Indian Sunni Law, the period of *Iddat* begins from the date of the divorce or death of the husband and not from the date on which the woman gets the information of her divorce or of the death of her husband. If she gets information after the
expiry of the specified term, she doesn’t need to observe the required *Iddat*. ⁹⁹

In Iranian law also the period of Iddat begins from the date of the divorce but the period of *Iddat* in the death of husband begins when the woman gets the information of death not from the date of death.

**Suggestion**

If the Idda due to Death of Husband is commenced when the woman gets the information of death, it may cause distress and constriction to the woman; therefore it is suggested that in Iranian Muslim Law as in Indian Muslim Law this Idda is commenced from the date of death not from the date of her acknowledgement.

### 7.13 The Parentage and Legitimacy of children in Muslim Laws

In the Muslim law, as in other systems of law, parentage involves certain right and obligations. The relation between a father and his child is called paternity; the relation between a mother and her child is called maternity. ¹⁰⁰

(i) Maternity;

(ii) Paternity;

(iii) Parentage ¹⁰¹

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⁹⁹ See Chapter VI, p. 400.

¹⁰⁰ See Chapter V, p. 251.

¹⁰¹ Parentage is the relationship of parents to their child or children. (Mulla, D.F, *Principle of Mohammedan Law*, edited by M.Hidayatullah, p. 355 (1977)). The mother and the father of a child are called the parents of the child. Importance of this legal relation lies in guardianship and inheritance.
(i) The Difference between Shi’a and Sunni’s View in Maternity

Maternity is commonly recognized by law as the natural relationship between the mother and the child. The woman who gives birth to the child is its mother. Sunni Law (like other legal system) recognizes this status, irrespective of the fact whether she is married or unmarried, and even if the child is the outcome of Zina. So the child can inherit from its mother. But under the Shia Law mere birth is not enough to establish maternity. A child born of adultery, incest or fornication is an illegitimate child and is devoid of maternity in the woman who gave birth to it; so he cannot inherit from her. Thus, there is a legal status to maternity and is a legal relationship.\(^\text{102}\)

**Suggestion**

According to Indian Muslim Law and some of Shia jurisprudences such as Sheikh Sadugh the child born of adultery, incest or fornication cannot inherit from his mother; but Article 884 of I.C.C is according to common believes of Shia Jurisprudences and says “the child born of adultery doesn’t inherit from parents and their relatives”.\(^\text{103}\) Therefore it is suggested that in Iranian Muslim Law like Indian Muslim Law and some of Shia Jurisprudences the child born of adultery inherits his mother.

\(^{102}\) See Chapter VI, p. 400.

\(^{103}\) But the maintenance of the child is the duty of father.
(ii) The Similarity between Shi’a and Sunni’s View in Paternity

Paternity is the legal relationship between child and its begetter. It is based in turn, on the legal relationship between the woman who gave him birth and the man who begot him- there must be a tie of marriage between the woman and the man; he must be the husband of the child’s mother. The marriage must be valid, may be even irregular, but no void or batil; neither Sunni law nor Shia law gives any credence to paternity if the marriage was batil. The fact of marriage is proved by either direct proof or by presumption.104

(iii) The Difference View in the Concept of Legitimacy

According to Sunni and Shi’a laws, when a child born after the dissolution of the marriage is legitimate if born-

(i) Within 10[lunar] months of the dissolution (Shia law)

(ii) Within 2 [lunar] years of the dissolution (Hanafi law). But under the recent Evidence Act105 in section 112, a child born after 280 days of the dissolution of marriage can never be treated as legitimate.106

(iii) Within 4 [lunar] years of the dissolution (Shafie & Maliki law).107

But according to Article 1158 of the (I.C.C): “Any child born during married life belongs to the husband provided that the

104 Ibid.
105 Indian Evidence Act, 1872.
106 See Chapter VI, p. 402.
107 See Chapter V, p. 254.
interval between intercourse and the birth of the child is not less than six months and not more than 10 months.

**Suggestion and criticism**

Two or four years after divorce are an unusual and unknown period for a child to get born. In Iranian Muslim Law this period is 10 lunar months. Abu Hanafi School, Indian Muslim Law, amended this period in 1872 from two years in previous law to 280 days in new law. Therefore it is suggested that Malik and Shafii branches of Sunni school also follow Shia or recent Hanafi Law.

### 7.14 Dower

**(i) Fixation of Dower (Mahr) in Iranian and Indian Muslim Laws**

Fazee states; “The amount of mahr may either be fixed or not; if is fixed it cannot be a sum less than minimum laid down by the law as follows:

(a) *Hanafi law*: 10 dirhams

(b) *Maliki law*: 3 dirhams

(c) *Shafei law*: no fixed minimum

(d) *Shia law*: -do-

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108 Mahr or dower is a sum that becomes payable by the husband to the wife on marriage, either by agreement between the parties or by operation of law. It may either be prompt (*Mu’ ajjal*), or deferred (*Mu wajjal*) (Tyabji: *Muslim Law, 4th Ed*, p. 102.)

109 It has been earlier stated that when dower is fixed by a contract between parties, it is known as specified dower; when dower arises by operation of law, it is known as proper dower.

110 See Chapter V, p. 271.
According to article 1080 of (I.C.C): Fixing of the amount of marriage portion (specific dower) depends upon the mutual consent of the marrying parties.

The amount of dower (**mahr**) may exceed the legal minimum in the Sunni law, but all schools of law (the Sunni and Shi’a) strongly recommend moderation, and some are of the opinion that **mahr** should not exceed the amount which the Prophet Mohammad (peace be upon him) bestowed on his wives known as **mahr ul-Sunnah**. Also the **mahr** of Prophet’s (Fatima-peace be upon her) was **mahr ul-Sunnah**.

In **Ithna ashari** law the presumption is that the whole of the dower is prompt,\(^\text{111}\) but in **Hanafi** law the position is different.

**Suggestion**

Mahr is a gift from husband to the wife to express his honesty regarding his request for marriage. One of the major problems which people are facing nowadays in Iran is a heavy Mahr and husband’s inability to pay it. Therefore it is suggested that: First the maximum amount of Mahr should be determined, Second the payment of Mahr should be in cash because the cash payment of Mahr in the beginning of marriage makes it’s amount rational.

\(^{111}\) See Chapter V, p. 281.
### 7.15 Maintenance

The Similarities and Differences between Iranian (Shi’a) and Indian (sunnis’) View in *Maintenance*

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Indian (Sunni) Muslim</th>
<th>Iranian (Shi’a) Muslim</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>There is different view among Indian (Sunni) Muslim jurists as to objects of the maintenance. Some believe that they are three things i.e, food, clothing and lodging.\textsuperscript{112} But some others confine it only to food; “Maintenance comprehends food, raiment and lodging, though in common parlance it is limited to the first”.\textsuperscript{113} According to last view, in this regard, maintenance is as stated before, not confined to only food, clothing and lodging but it includes other necessities of the woman.\textsuperscript{114}</td>
<td>According to Article 1107 of Iranian Civil Code: “Maintenance includes all standard needs and proportionate to wife’s condition such as lodging, clothing, food, furniture, health costs and servants if she has used to servant or if she is physically sick and defected thus needs servant”.</td>
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<tr>
<td>2.</td>
<td><em>kharch-e-pandan, guzara, mewa</em></td>
<td>This kind of maintenance is not</td>
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\textsuperscript{112} See Chapter VI, p. 407.  
\textsuperscript{113} See Chapter V, p. 306.  
\textsuperscript{114} *Ibid.*
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<th>Iranian (Shi’a) Muslim</th>
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<tbody>
<tr>
<td></td>
<td><em>khori, i.e</em>;</td>
<td>recognized in Iranian Law.</td>
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<tr>
<td></td>
<td>A husband may have a lawful agreement with the first wife that on his marrying a second wife the first wife may reside with her parents and obtain a regular allowance; or similarly, an agreement with a second wife to allow her to reside in her parents’ house and to pay her maintenance.¹¹⁵</td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td>Priority on obligation to maintenance is as follows: wife, children, father, mother, jointly grandchildren and grand-parents and the collaterals.</td>
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<tr>
<td>4.</td>
<td>(a) Wife’s Right: Wife is entitled to maintenance during <em>iddat</em> even</td>
<td></td>
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<tr>
<td></td>
<td>Priority on obligation to maintenance is as follows: wife, children, father, mother, jointly grandchildren and grand-parents. Article 1203 of (I.C.C) states: “If there are a wife and one or more relatives who are to be supported, the claim to support of the wife precedes that of others.</td>
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</table>

¹¹⁵ See Chapter V, p. 304.
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<tbody>
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<td></td>
<td>in the case of irrevocable divorce</td>
<td>was revocable or in the case of an irrevocable divorce and if she was pregnant. She is entitled to cost of maintenance till her child is born.</td>
</tr>
<tr>
<td>5.</td>
<td>(b) The wife is entitled to residence during <em>Iddat</em> for divorce in all cases.</td>
<td>The wife is entitled to residence in the case of revocable <em>talaq</em> or, in the case or irrevocable <em>talaq</em> till delivery, if pregnant.</td>
</tr>
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<td>6.</td>
<td>(c) The amount is determined by the rank and circumstances of parties.</td>
<td>It is determined according to the requirements of the wife and custom of her equal.</td>
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<td>7.</td>
<td>(d) Arrears are recoverable only if they are fixed by agreement or by Court. (According to Indian Muslim law, the wife is not entitled to sue her husband for past maintenance, unless the claim is based on a specific agreement or by Court.)</td>
<td>They can be recovered without any agreement or decree. According to Article 1206 of (I.C.C) “A wife can always and in any case prefer a claim for her past expenses (past maintenance), and her right to these expenses is preferential. In the event of bankruptcy or insolvency of the husband her dues must be paid before any</td>
</tr>
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<td>Sr. No.</td>
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<td>Iranian (Shi’a) Muslim</td>
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<td></td>
<td>liquidation payment is arranged.</td>
<td>8. As between parents the mother is entitled to preference for maintenance. The rights of the two are equal. According to Article 1200 Of (I.C.C.): “Maintenance expenses of parents must be paid by the nearest related child or grandchild in the order of kinship”. There is no different between father and mother.</td>
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<tr>
<td>9.</td>
<td>Under Indian and Iranian Muslim law, a person may have to right to be maintained by the other on the basis of: (a) the marriage (which include wife), and (b) the blood-relationship which include young children and necessitous parents and other relations within the prohibited degree.</td>
<td>Under Iranian Muslim law is same to Indian Muslim law. Only different is in the maintenance of young children. Article 1199 of the (I.C.C) cited, the children not mentioned young children, so the children in Iranian law is a general and included all children which he or she is poor and cannot earn a living by adopting an occupation.</td>
</tr>
<tr>
<td>Sr. No.</td>
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<tr>
<td>10.</td>
<td>After the husband’s death the widow is not entitled to maintenance even during her period of Iddat.</td>
<td>According to Article 1110 (I.C.C): “During Iddah Period that has happened due to the death of the husband, the living expenses are supplied from the relative’s property by woman’s asking, if they do not pay; The relatives who are responsible for alimony.</td>
</tr>
<tr>
<td>11.</td>
<td>Maintenance of Children and Descendants; A father is bound to maintain his sons until they attain puberty, and his daughters until they are married. He is also responsible for the upkeep of his widowed or divorced daughter.</td>
<td>According to Article 1199 of the (I.C.C). (as above mentioned)</td>
</tr>
</tbody>
</table>

**Suggestion**

In Indian Muslim Law the maintenance includes lodging, clothing and food but in Iranian Law, Article 1107 of I.C.C states that: “Maintenance includes all standard needs and proportionate to wife’s condition such as lodging, clothing, food, furniture, health costs and servants if she has used to servant or if she is physically sick and defected thus needs servant”. Therefore it is

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116 See Chapter V, p. 320.
suggested that in Indian Muslim Law the health, treatment costs and other logical and standard needs of women also included in maintenance.

According to Indian and Iranian Muslim Law the Priority on obligation to maintenance is as follows: wife, children, father, mother, jointly grandchildren and grand-parents; but

Article 1203 of (I.C.C) states: “If there are a wife and one or more relatives who are to be supported, the claim to support of the wife precedes that of others.

According to Indian Muslim law, the wife is not entitled to sue her husband for past maintenance, unless the claim is based on a specific agreement or by Court). But Article 1206 of (i.C.C) “A wife can always and in any case prefer a claim for her past expenses (past maintenance), and her right to these expenses is preferential. In the event of bankruptcy or insolvency of the husband her dues must be paid before any liquidation payment is arranged.

**Suggestion**

Maintenance is the woman’s right to which Islam has paid attention and it’s not stopped in passing time. Therefore it is suggested that in Indian Muslim Law, women’s right should be taken into consideration so that the woman should request for the previous maintenance which has been her right and her husband hasn’t paid to her.

In Indian Muslim Law, mother is prioritized in parent’s maintenance but in Iranian Muslim Law both mother and father are equalized if they need.
7.16 Conclusion

As mentioned before, both Sunni and Shi’a Muslims share the most fundamental Islamic beliefs and articles of faith. The difference is in the interpretation of some of the verses of the Holy Quran; and in believing or not believing some of the Sunnat as genuine; or in its interpretation. The difference in approach has led towards the difference in some basic principles and some laws of religion. As two or more brothers taste and behave differently, Muslims also have differences in some minor believes. Notwithstanding, in fact, most Muslims do not distinguish themselves by claiming membership in any particular group, but prefer to call themselves simply “Muslims”.

Regarding to suggestions and criticisms mentioned above it is recommended that Indian Muslims, Sunnis, and Iranian Muslims, Shias, who share most fundamental Islamic believes and articles of faith can improve their family laws based on the strong points of each other’s law.