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Dissolution of Marriage under Muslim Law

Adila Jaleel¹

Introduction

In the Muslim Law relating to marriage and divorce, the sanctity of marriage is often stressed though a Muslim marriage is like a civil contract. It is not, at the same time, insisting on the continuance of strained relations between spouses. It left almost unchanged the husband's customary power of unilateral repudiation of marriage. The law imposed several restrictions of religious nature on the said power to dissuade men from exercising it arbitrarily. The Prophet had said, "In the sight of God the most detestable of all things permitted is divorce" as it prevented conjugal happiness and interfered with the proper bringing-up of children. Referring to this Ameer Ali says "When it is borne in mind how intimately law and religion are connected in the Islamic system, it will be easy to understand the bearing of the words on the institution of divorce." Ameer Ali further says "In Islam, Talaq is permitted only when the wife by her conduct on her words does injury to the husband or happens to be impious."

The traditional law of Islam made available to a divorced wife the deferred part of her dower and maintenance during *iddat* both to be paid by the husband. The statutory law in Syria, Tunisia, and Morocco impose on the husband the liability to pay to the divorced wife an identity by way of compensation.

In *Yusuf Rowthan Vs Sowramma*² Justice Krishna Iyer pointed out that *talaq* emanating from the husband was prohibited except in cases of necessity when it could be pronounced with the sanction of the judge administering the Muslim Law.

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² (AIR 1971 Ker 261)

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In general, the observations of Lord Welsbury in *Shaw V Gould*³ are relevant in this context: “...and no part of the laws and institutions of a country can be of more importance to its subjects than those which regulate the manner and conditions of forming, and, if necessary, of dissolving, the marriage contract.”

Kinds of Divorce

Based on the nature of the transaction or its consequences, divorce can be classified into different headings. The main classification can be:

1. By conduct
2. By agreement
3. By judicial process
4. By operation of law

Depending on consequences they can be classified as ‘revocable’ which are also the ‘approved’ forms and as ‘irrevocable’ which are ‘disapproved’ forms. Again some are by the unilateral action of the husband, some by mutual consent, and some others by the wife. Exceptionally, the wife can exercise the authority of the husband by delegation.

By Conduct

(a) Talaq Ahsan

Talaq Ahsan form is the most approved or most proper or most regular one. Ahsan means “very good”. It consists of one single pronouncement during the *Tuhr* period which is the period of purity between two consecutive menstrual courses. The declaration is to be followed by abstinence from sexual intercourse during the periods of *iddat*. This form of divorce has been approved by Prophet. The pronouncement must be in unambiguous language showing the

³ (1868, L.R.3 H.L 55)

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intention to dissolve the marriage. For instance when the husband declares, “I divorce you forever”, or “I have divorced you”, no further evidence to prove intent is necessary.

When the wife has passed the age of menstruation or when the marriage has not been consummated the condition of *tuhr* is not applicable.

Revocation

The Talaq in this form is revocable. There is the possibility for exercising ‘locus ponitentiae.’ The revocation can be effected during the period of *iddat*. It is three lunar months from the date of pronouncement. If the woman was pregnant the period extends till delivery. The revocation may be in express words or by conduct. However, Islamic Law would not allow an infinite number of unilateral divorces pronounced by the husband and later revoked by him. That is why three months are provided.

According to modern legislation in countries like Egypt, Sudan, Jordan, Syria, and Morocco all divorces are normally revocable by the husband during the period of *iddat*. Those, which are made statutorily irrevocable are –

- a third divorce,
- a divorce pronounced before consummation,
- a divorce for consideration like Khula; and
- a divorce effected under Court’s decree on medical grounds.

(b) Talaq Basan

Talaq hasan form is an approved form or proper form. Hasan means “good”. It consists of three successive pronouncements during three consecutive *tuhrs*. Each of these pronouncements should have been made at a time when no intercourse has taken place during that particular period of purity. Therefore, during the first two *tuhrs* there might have been revocation and resumption of cohabitation. Then in the third period of *tuhr* when no intercourse has taken

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place, the husband for the third time pronounces the formula of divorce, it becomes an irrevocable dissolution of the marriage. Muslim law would not allow an indefinite number of unilateral divorces pronounced by the husband and later revoked by him. In a series of three consecutive pronouncements of divorce, the third would constitute an irrevocable divorce as soon as it is pronounced irrespective of the *iddat*.

The effect, in the words of Fyzee, is that “the marriage is dissolved; sexual intercourse becomes unlawful; *iddat* becomes incumbent and the remarriage between the parties becomes impossible unless the wife lawfully marries another husband, and that other husband lawfully divorces her after the marriage has been consummated.” This is therefore the second approved form. It agrees with the Qur’anic injunction: “When they have reached their term, take them back in kindness or part from them in kindness.”

(c) *Talaq-ul-Bidaat(Irrevocable Talaq)*

Talaq-ul-Bidaat or Talaq-i-Badai is of later origin. During the reign of the second Caliph, Umar-al Faruq, the idea of irrevocable talaq was introduced. Bidat means innovation. There will be no occasion for exercising locus poenitentiae. Hanafi School recognizes this form. Shias and Shafeis do not recognize this form. There are two forms under this "disapproved" mode of talaq. They are commonly followed.

- **Triple declaration:** Three pronouncements are made in a single *tuhr*. It may be making the declaration in one sentence or separate sentences. For instance, “I divorce you thrice”; or "I divorce you, I divorce you, I divorce you" will be sufficient to constitute a talaq under this form. The important characteristic feature of this form is its irrevocability. Therefore, it may be called talaq-ul-bain. It becomes irrevocable soon after the pronouncement is made without reference to the observance of *iddat*.
- **Single irrevocable declaration:** A single pronouncement made during a *tuhr* indicating an intention to render talaq irrevocable is sufficient under this mode of "disapproved" form. If the husband says “I have divorced you by, talaq-ul-bain” that is

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sufficient. Another alternative is, "I divorce you irrevocably". Following the decision in *Saiyid Rashid Ahmed v. Anisa Khatun*⁴ the Madhya Pradesh High Court reiterated that in our country an irrevocable divorce (talaq-i-bain) could be given even by a single pronouncement: *Siehabi v. Sheikh Gulla*⁵

Tyabji points out that in Hanafi law this irrevocable form of talaq has become the most prevalent one because "men always have molded the law of marriage to be most agreeable to themselves."

Oral Talaq - Normally the pronouncements may be made orally expressing the intention to divorce in unequivocal terms as above. It has been held that the presence of wife is not necessary at the place of pronouncement provided clear reference is made to her. For taking effect it should come to her knowledge.

Talaqnama - It is customary to record the fact of talaq in a written document which is called talaqnama. It may also be a deed by which the divorce is affected. It has to be executed in the presence of Kazi, or of the wife's father, or other witnesses. If it is properly subscribed or is in a customary form intention to divorce is not to be proved separately. Divorce by talaqnama takes effect from the date of the document.

Other methods of Talaq

(d) ILA (Vow of Contenance)

Ila is a form of constructive divorce by the husband. He will not be making any direct declaration of divorce. He takes a vow of abstinence from sexual intercourse for four months. After the expiry of these four months, the marriage dissolves irrevocably.

⁴ (AIR 1932 P.C. 25)

⁵ (AIR 1973 M.P.207)210

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If the husband resumes cohabitation within the said period divorce by Ila does not arise.

Under Shafei law Ila is only to enable the wife to get a judicial divorce. Ila is recognized by the Shariat Act, 1937.

(e) Zihar

Zihar is also a form of constructive divorce. The term refers to unlawful comparison i.e. comparing the wife to female relationships within the prohibited degree of relationship. Such a comparison is prohibited by the Quran. When a man says to his wife, "you are to me like my mother", she becomes prohibited to him. The wife may then prevent him from having sexual intercourse with her unless and until he makes an expiation. Zihar does not of itself dissolve the marriage and the wife may sue either for restitution of conjugal rights or divorce. Cases of Zihar are unknown in India. However, the Shariat Act, 1937 has recognized it.

(f) Li'an

Li'an means imprecation. Divorce by mutual imprecation is mentioned in the Quran. It is supported by the traditions of the Prophet. Muslim law takes a serious view of the imputation of unchastity against a married woman. If a false allegation of adultery is made against the wife she is entitled to claim judicial divorce on this ground. A mere charge of adultery is not sufficient to dissolve the marriage. It gives the wife the right to sue for the divorce. The decree of the Court is essential for dissolution. If the charge is proved false she is entitled to the decree. Therefore, in a suit on this ground by a wife having an illegitimate child, the remedy will not be granted. Shariat Act, 1937 has recognized Li'an as a method of divorce. Under s.2 (ix) of the Dissolution of Muslim Marriages Act, 1939, a Muslim wife is entitled to a decree for dissolution of marriage on any of the grounds recognized as valid for dissolution of marriage under Muslim law. In *Nurjahan v. Kazim Ali*⁶ an attempt was made by the wife to invoke the allegation of adultery made by the husband as a defense in the wife's suit for dissolution during the proceedings in the lower Court as a ground for judicial divorce on the ground of Li'an.

⁶ (AIR 1977 Cal. 90)

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Disallowing this the Court asserted that only a "voluntary and aggressive charge" of adultery made by the husband which, if false, would make room for a divorce grounded on Li'an.

By Mutual Consent

(a) *Khula (Redemption)*

Khula is a form of divorce with the consent of the parties. It is at the instance of the wife. She has to make the proposal to which the husband has to agree. The wife will have to pay a consideration for the release. In effect, it is the laying down by a husband of his right and authority over his wife for an exchange. The other terms are to be determined by the parties as part of the bargain. The wife may release her right for unpaid *mahr* or make any other agreement for the benefit of the husband. Non-payment of consideration doesn't make Khula void but entitles the husband to sue for recovery of the benefit of the husband. Non-payment of consideration does not release her right for unpaid *mahr* or make any other agreement for consideration. The husband and wife must be of sound mind and the consent must be freely given. Under Hanafi law, a Khula under compulsion or in the state of intoxication is also held valid: *Rashid Ahmed v. Anisa Khatun* (1931). In case of compulsion, the wife will not be liable for making any payment. This rule of Hanafi law has been subjected to criticism. Fyzee has suggested that it should be abolished as it is unjust.

Shia Law - Khula must be made in the presence of two witnesses. In the case of a consummated marriage, Khula must be during a period of *tuhr* (purity). If the husband stipulates a power to revoke it, the Khula will not be valid. If consideration is illegal, Khula is void. A Khula made under compulsion or in a state of intoxication or a fit of anger so great as to take away real intention is void.

Effect - The effect of Khula is like that of a single irrevocable divorce. The wife has to observe *iddat*. The husband has to provide maintenance to the wife during the period of *iddat*. Any children born out of the relationship will also be entitled to maintenance.

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In *Hamid Khan v. Jummi Bi*,⁷ the wife was divorced by an oral Khula whereby she surrendered her right to *mahr*. She remained unmarried and was awarded Rs. 100 per month as maintenance. The High Court set this aside. But because of the Supreme Court's decision in *Tahira Bai's case*⁸ it seems that she would be entitled to maintenance though the right to *mahr* is surrendered. Tahira Bai's case held that a wife's purported contract and surrender of her right to *mahr* does not in any way defeat her right to maintenance as the statutory right cannot be surrendered

(b) Mubara'at (Divorce by mutual consent)

Mubara'at is a dissolution of marriage by agreement between the parties. The term means to release or free one another mutually thus, both the husband and wife desire separation. The proposal for divorce may proceed either from the wife or from the husband. The aversion is mutual. The wife is not expected to pay anything for the release. The wife's right to dower is extinguished in the absence of express agreement. But the wife will have the right of maintenance during *iddat* which the wife is bound to observe. As in the case of Khula, once the proposal is accepted the result is that there will be an irrevocable divorce. The Special Marriage Act, 1954, provides for a form of divorce by common consent of the spouses⁹.

Judicial Process

(a) Faskh

Muslim law provides, in exceptional cases, some rights in favor of the wife for getting her marriage dissolved by the Kazi (judge) by way of faskh. The power of the judge is based on the express words of the Prophet: "If a woman is prejudiced by a marriage, let it be broken off" (Ameer Ali citing Bukharai). The different schools were not uniform in interpreting this. The Maliki school took a view most favorable to the women. Then came the Shafei and the Hanbali

⁷ LQ 1977 HC 2238

⁸ (AIR 1979 S.C. 362),

⁹ Section 28 of Special Marriage Act, 1954

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schools. In India, such principles are contained in s.2 of the Dissolution of Muslim Marriages Act, 1939; a brief note of which is given below.

In *Moyin v. Nafeeza*¹⁰ Justice Khalid expressed the view that repudiation of marriage by “faskh” without the intervention of the Court is opposed to the law of the land.

Judicial Divorce under 1939 Act - Under Muslim law, a wife has no absolute right to get a divorce. It resulted in "unspeakable misery to innumerable Muslim women in British India". Under the Dissolution of Muslim Marriages Act, 1939, specific grounds for such divorce are given, including social and medical grounds. Section 2 of the Dissolution of Muslim Marriages Act, 1939, provides that a woman married under Muslim law shall be entitled to obtain from the Court a decree for dissolution of marriage on specified grounds. Nine of them can be grouped as follows:-

- i) Husband missing for 4 years
- ii) Husband's failure or negligence to provide maintenance for 2 years
- iii) Husband's imprisonment for 7 years
- iv) Husband's failure to perform marital obligations for 3 years.
- v) Continued impotency of the husband
- vi) Husband's insanity for 2 years
- vii) Husband suffering from leprosy
- viii) Husband suffering from virulent venereal disease
- ix) Husband treating the wife with “cruelty.”

(as explained in the provision)

Option of Puberty

“Option of Puberty” or repudiation of the marriage contracted before puberty (Khyar-ul-bulugh) is provided in s.2(vii) of the Act in a modified form.

¹⁰ 1972K.L.T.785

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General Clause

Enabling a Muslim wife to invoke any other grounds recognized as valid for dissolution of marriage in Muslim law.

By Operation of Law

(a) Death

Death of the wife or the husband operates in law as a dissolution of marriage. In the case of death of the husband, the wife has to observe *iddat*. Only after this she is entitled to marry again. In this respect, the period of *iddat* is 4 months and 10 days. If at the end of such period she is pregnant *iddat* will continue till delivery. On the death of the wife, the husband becomes entitled to remarry.

(b) Apostasy

The change of religion of the husband operates as an immediate dissolution of marriage. Therefore, if a Muslim becomes a Christian and the wife marries another person before the expiry of the period of *iddat* she is not guilty of bigamy. Before the 1939 Act, conversion of the wife into another religion was also used to operate as an immediate dissolution of the marriage. Now s.4 of the 1939 Act specifically provides that apostasy of the wife shall not of itself operate as a dissolution. But s.4 does not apply to a person who converted to Islam and then re-embraced her former faith. Therefore, if a Hindu woman convert to Islam and married under Muslim law, then her marriage would be dissolved on her renouncing Islam and re-embracing Hinduism.

(c) Talaq ul-tafwid

An agreement made between the parties to a marriage, whereby it is provided that the wife should be at liberty to divorce herself in specified contingencies, is valid. Such an agreement may be entered into before or after marriage. The delegation of the power of divorce to the wife may either be permanent or temporary, i.e. for a specified duration. However, the

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conditions should be reasonable and should not be opposed to the public policy of Muslim law. In such a case the wife may, on the happening of the contingency, repudiate herself in the exercise of the authority delegated to her. This juristic device helps women to avoid undesired things like husbands' bigamous marriage. The fiction is that the wife is exercising the delegated power of talaq from the husband. Tufwid means delegation. It is made on behalf of the husband. Therefore, it is in the eye of law a talaq of the wife by the husband. Talaq-ul-tafwid is also known as talag-e-tafiveez. In the words of Fyzee it is perhaps the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of any Court and is now beginning to be a fairly common weapon in the hands of a Muslim wife to obtain her freedom in India.

Consequences of Divorce

Important changes take place when divorce becomes effective. The rights, duties, and obligations of the husband and wife on divorce can be briefly summarized as follows:-

- In the case of irrevocable divorce, marital intercourse becomes unlawful. The issues of such a relationship will be illegitimate. Their paternity cannot be acknowledged.
- When there has been a triple divorce, remarriage is permissible only on satisfying prescribed conditions.
- If after a revocable pronouncement, the husband or wife dies during the period of *iddat* each is entitled to inherit from the other.
- In the case of irrevocable divorce, neither can inherit from the other.
- The wife becomes entitled to immediate payment of the whole of the unpaid dower if the marriage was consummated. If it was not consummated she becomes entitled to half of the specified dower.
- The wife is entitled to maintenance during *iddat* after divorce.

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Remarriage

Regarding the first consequence mentioned above, reference may be made to *Rashid Ahmed v. Anisa Khatun (AIR 1932 P.C. 25)*. There was an irrevocable divorce between the spouses. Later, without remarriage or intermediate marriage, they lived together. Five children were born to them. In this situation, the Privy Council held that the children were illegitimate. Acknowledgment of legitimacy will be of no use. Even without an intermediate marriage if the parties had married earlier, the children would have been legitimate as the remarriage, in that case, would have been merely irregular and not void.

Reconciliation

- 1) In the case of one or more pronouncements in the approved forms of talaq, a conciliation can take place during *iddat*. There need not be a regular remarriage. It may be by a formal or express revocation or by course of conduct, i.e. by resuming cohabitation.
- 2) When the period of *iddat* has expired in the above case, a mere reconciliation will not be sufficient. The parties will have to remarry again.
- 3) In the case of irrevocable talaq, the divorced couple can lawfully remarry again only if the following conditions are satisfied-
 - a) The wife should observe *iddat*;
 - b) After *iddat* the wife should be married to another husband;
 - c) Such intermediate marriage must be consummated;
 - d) The second husband must pronounce divorce for which also *iddat* must be observed.

A marriage without fulfilling the condition of intervening marriage with a stranger is irregular. The children born of such marriage are legitimate and if consummation has taken place the wife is entitled to dower. If they live together without a marriage such a relationship will be void.

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Grounds for Decree for Dissolution of Marriage

Under Section 2 of Muslim Marriages Act a woman is entitled to obtain a decree for dissolution on any one or more of the grounds specified in the provision. Brief notes on these grounds are given below:-

- **Missing Husband**

The wife is entitled to file a petition for divorce and a decree can be passed when the whereabouts are not known for 4 years or more at the date of the decree. If the husband appears either in person or through an agent, this provision shall not take effect for 6 months.

i) The names and addresses of the persons who would have been the heirs of the husband if he had died on the date of the filing of the plaint shall be stated;

i) Notice of the suit shall be served on such persons; and

ii) Such persons shall have the right to be heard. The paternal uncle and brother of the husband, if any, shall be cited as a party. Thus sufficient caution is taken to be convinced of the fact of missing of husband and sufficient information is given to the near relatives.

- **Failure to provide maintenance**

Another ground is the failure or negligence to provide maintenance. This should be continuing for 2 years. If the wife stayed away despite the request of the husband, she would not be entitled to the right under this ground. But the Kerala High Court had a different view.

- **Imprisonment**

When the husband has been sentenced to imprisonment for seven years or upwards the wife is entitled to claim divorce. A decree can be passed only after the sentence has become final.

- **Failure to perform marital obligations**

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The fourth ground is that the husband has failed to perform without reasonable cause, his marital obligations for 3 years. The husband is bound to perform the legal obligations arising out of marriage. If there is a failure to perform such obligations for 3 years this ground could be invoked.

- **Continuing impotence**

The husband should have been impotent at the time of marriage and should continue to be so till the date of suit for getting a decree on this ground. The Court shall make an order requiring the husband to satisfy the Court within one year from the date of such order that he has ceased to be impotent. This is to be done if the husband applies for it. If the husband satisfies the Court within such period that he has ceased to be impotent, no decree shall be passed dissolving the marriage on this ground. [Section 2(v) read with proviso(c)]

- **Insanity or disease**

The husband's insanity for 2 years is a sufficient ground for claiming divorce. So, if the husband is suffering from leprosy or venereal disease the wife will be entitled to get a divorce.

- **Option of Puberty**

The principle of Muslim law relating to the option of puberty (Khyar-ul-bulugh) is now contained in s. 2(vii) of the 1939 Act in a modified form. Under this provision, a woman can claim for the decree of divorce on the ground that she, having been given in marriage by her father or another guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years, provided that the marriage has not been consummated.

Under the old law of the option of puberty, when a minor who had not attained puberty is given in marriage by a guardian other than the father or father's father the minor could exercise the option on attaining puberty. This right was available to both males and females. Such

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repudiation will not be possible if the marriage is contracted by the father or father's father unless he acted negligently or fraudulently.

Under Shia law, a marriage brought about by anyone other than the father or grandfather will be ineffective until it is ratified by the minor on attaining puberty.

Under s.2 (vii) of the 1939 Act, the conditions for invoking the rule of the option of puberty by the wife are:-

- i) The marriage was contracted before she attained the age of 15 years;
- ii) The marriage has not been consummated;
- iii) She repudiated the marriage before attaining 18 years of age.

- **Cruelty**

The Section reads - "The husband treats her with cruelty"; that is to say that the Act provides for cruelty which may be physical or mental, like-

- habitually assaults her or makes her life miserable by cruelty of conduct, even if such conduct does not amount to physical ill-treatment, or
- associates with women of evil repute or leads an infamous life, or
- attempts to force her to lead an immoral life, or
- disposes of her property or prevents her from exercising her legal right over it, or
- obstructs her in the observance of her religious profession or practice, or
- or if he has more wives than one, does not treat her equitably as per the injunctions of the Quran.

False accusation of adultery has also been held to be cruelty.

- **Other Grounds**

It is also possible to sue based on any other ground which is recognized as valid for the dissolution of marriages under Muslim law.

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Under S.2 (ix) the residuary clause is comprehensive enough to include talaq by delegated authority (tafweez). The ground is to be one recognized by Muslim law as valid for the dissolution of marriage under Muslim law. The Shariat Act, 1937, has recognized Khula and Mubara'at as forms of divorce. Both of them depend on the agreement. The talaq by delegation is also depending on the agreement. Therefore talaq by delegation could also be brought within the purview of s.2 (ix) of the 1939 Act. In the Family Protection Act of 1967 of Iran, it is provided that a delegated divorce could be effected only by a decree of the Court.

- **Effect of Apostasy**

To remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie, s.4 is there. Thus, the renunciation of Islam by a married Muslim woman or her conversion to another faith shall not by itself operate to dissolve the marriage. Therefore, if she remarries before actual dissolution she can be prosecuted for bigamy, entitled to obtain a decree for the dissolution of marriage.

After such renunciation or conversion, the woman shall be entitled to obtain a decree for the dissolution of marriage on any of the grounds specified in s. 2. As far as the husband is concerned he has the right to pronounce divorce on her. In the case of a woman converted to Islam from some other faith, s.4 is not applicable at the time of re-conversion. In such a case apostasy will result in the dissolution of marriage. It may also be recalled that if the husband changes religion there will be an instant dissolution of marriage. In that case, if the wife remarried even before the expiry of the period of *iddat* she will not be guilty of bigamy.

- **Right to Dower**

The provisions of the Act will not affect any right which a married woman may have under Muslim Law to her dower or any part thereof on the dissolution of marriage. For that purpose, pure personal law will continue to be operative.

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Conclusion

The sanctity of marriage is much stressed upon under the Muslim law, though a Muslim marriage is in the nature of a civil contract. However, it does not insist on the continuance of strained relations between spouses. This article explains the procedure of dissolution of marriage followed under the Muslim law. The author has firstly explained the various forms of divorce under Muslim law, and the requirements and effects of each one of them. The author has also discussed the consequences of divorce between husband and wife under Muslim law. Lastly, the author has also enlisted and briefly explained the statutory grounds for obtaining a decree for dissolution of marriage.