



## Divorce in India: An overview of personal laws

Sandeep Kumar

Assistant Professor, Himachal Pradesh University Institute of Legal Studies, Shimla, Himachal Pradesh, India

### Abstract

Various general and personal laws deal with the issue of divorce among married spouses in India. Constitutionality and rationale to enact personal laws to regulate divorce under Muslims, Jews, Parsis, and Christians etc. have always been under judicial scanner. Personal laws have been given recognition under Constitutional law of India barring Article 44 of Indian Constitution that imposes a positive obligation on the governments to implement Uniform Civil Code in India. But Article 44 till date has not been implemented hence personal laws are continues in operation and prevail over general laws in India. The provisions of personal laws are flawed in many respects. Therefore, protection and retention of personal laws seems unreasonable and unacceptable. In this study, an attempt has been made to discuss the significant provisions of personal laws and the statutory general laws on divorce. The purpose of comparison of grounds of divorce would be useful to find out the answer of questions whether personal laws on divorce still needs to be retained in India or whether time has come to implement Article 44 of Constitution to ensure equality and gender neutrality in matter of seeking divorce. The present study will attempt to answer these questions. The study is theoretical in nature hence secondary data will be used to complete the study.

**Keywords:** divorce, personal laws, general laws, constitutionality, retention

### Introduction

#### Prelude

Initially the institution of marriage was unknown to mankind. During that period the human being lived like animals and their main requirements were food and shelter only. With the development of society this institution came into existence. This universal institution passed through various stages with the development of concept of family. In India, the uncodified Hindu Law considered the marriage as a sacrament. Under Hindu Law it was more religious than a secular institution. It was respected as a tie that can never be broken because it was a tie of several births of the couple. This concept of marriage in India had a great impact or influence of Islamic culture during *Mughal* period. It also underwent a change during British period because of the influence of Christianity, Jewish and *Parsi* Culture. This holy institution of marriage has also been affected by the education of girls and their empowerment in Indian society which resulted in the development of the concept of divorce under the Hindu law. The present study aims to go through the problem of dissolution of marriage as it affects not only the parties but also the children and the Indian society at large. The researcher is willing to discuss the concept, reasons, grounds, kinds of divorce or failure / dissolution of marriage under different personal laws. In this study a sincere attempt has been made by the researcher to highlight the problems faced by parties, the causes, the various enactments and the judgment of the various courts of India.

#### Objective of the Study

The main objective behind the study is to analyze the origin, concept, causes and consequences of divorce under different codified or un-codified, statutory or customary personal laws in India. The researcher is willing to find out the loopholes if any in matters of dissolution of marriages. The

researcher is also willing to find out the position of weaker section of society i.e. women in matters of divorce. The present paper shall also scrutinize the approach or the role of judiciary in such matters.

#### Hypothesis

The concept of divorce in Hindu, Muslim, Christian, *Parsi*, Jews and Special Marriage Act achieves the same purpose.

#### Research Methodology

The research methodology used by the researcher here is doctrinal in nature. The researcher has used the secondary sources that involves collection of material from various sources such as Statutes, books, Articles written by famous authors and eminent Jurists, judgments of High Courts and Supreme Court and on line material. The analytical, descriptive and evaluative methods have been adopted to scrutinize various provisions of law and the judgments passed by various courts.

#### The Divorce: Meaning and Concept

The term 'divorce' derived from the Latin term 'divortium' which means separation. It is also equivalent to the word 'divort' or divortere'. This word 'divorte' is a combination of 'di' and 'vortere'. 'Di' means apart and 'vortere' means to turn to different ways. This word has also been referred to meant separate, turn aside, divert or leave one's husband. The word was traced in French vocabulary in the later part of the 14<sup>th</sup> century and in the Middle English in the year 1350-1400 <sup>[1]</sup>.

According to Webster's Dictionary, divorce means "to legally dissolve one's marriage with: to end marriage with (one's spouse)" <sup>[2]</sup> Today, although this term divorce has been defined in different ways but it clarifies a single idea that is dissolution of marriage or separation, disunion or to

disunite a marital union or termination of marriage. Once the divorce is complete, the legal rights and duties of parties to marriage towards each other come to an end and that's why it is known as process of termination of marriage. Divorce in fact is an effect, not a cause. It is not the disease but a symptom. It does not break up marriage. As a matter of fact it is drunkenness, adultery, the decay, cruelty, incompatibility or transfer of affection etc. that destroy the marriages. It is only when marriages have been completely wrecked, and the parties have discontinued their marital relations, that parties resort to divorce, that the remaining bond created by law, may be dissolved by law as well. Divorce, is the annulment of the legal bond, on proof of *de facto* dissolution, of marriage.

India, a secular state comprises of people from different religion such as *Hindus, Muslims, Sikhs, Christians, Parsis, Jews, Jains* etc. Here each and every person is free to profess, propagate and practice any religion<sup>[3]</sup>. Keeping in view this constitutional provision the legislature of India has given power to people of India to perform or dissolve marriage as per their custom, faith, tradition, convention etc or as per the provisions of the concerned law where the parties are regulated in accordance with that law such as The Hindu Marriage Act, 1955<sup>[5]</sup>, The Divorce Act, 1869, The Dissolution of Muslim Marriage Act, 1939, The Parsi Marriage and Divorce Act, 1936 or The Special Marriage Act, 1955.

### Genesis of the Institution of Divorce in India

As discussed above that India comprises of different religious beliefs and is thus governed as per the religion itself. Marriage and divorce are also being subject to different treatment under different religions. Therefore it will be better to find out the evolution of Institution of divorce in India under different religions existing over here.

### Evolution of Institution of Divorce under Hindu Law

So far as Hindu religion is concerned, the marriage is always considered as a sacramental affair/union of husband and wife. This fact exists right from patriarchal society of *Rig Vedas* to contemporary modern society. If we go through the ancient period this institution of marriage was so strong that there was nothing given in respect to institution of divorce in Hindu *Shastric* Law. As per *Manu* the marital relationship can be released neither by sale, nor by any other way and the mutual fidelity will continue till death, since it is the highest *dharma*<sup>[9]</sup>.

Although no recognition was given in *Shastric* Law but some limited recognition was given to divorce in *Vedic* Law. *Narda* and *Prasada* permitted a wife to choose another husband and *Kautilya* also expressed the same view with some liberal colour that if there is mutual aversion then parties to a marriage can be released<sup>[10]</sup>. But it will be pertinent to mention here that *Kautilya* clarified that marriage if entered by *Brahma, Praja, Arsha* and *Daiva* then it can never be dissolved or terminated and if it is entered by *Gandharva, Asura, or Rakshasa* then it can be terminated by mutual consent of both the parties<sup>[11]</sup>. Similarly *Manu* and *Yajnavalkya* also recognize that husband can abandon (*Tyaga*) his wife on certain grounds<sup>[12]</sup>. This power of *Tyaga* has been given to husband only and not to the wife. And so far as this *Tyaga* is concerned it is basically abandonment not divorce.

The concept of divorce is unknown to historians in Muslim

period and same was the position during British Period. During British Era courts only accepted *Manu* as the foremost authority and *Manu* was against such practice and moreover there was no unanimous view of different scholars relating to practices of divorce among Hindus. Britishers made certain laws such as The Native Converts Marriage Dissolution Act, 1866, The Indian Divorce Act, 1869, The Parsi Marriage and Divorce Act, 1936. But these Acts provided divorce rights to Christians and Parsis as the case may be and none of these acts were applicable to *Hindus*.

It is only after the independence of India a uniform law of divorce was codified for *Hindus* i.e. the Hindu Marriage Act, 1955. This Act provides several grounds of divorce that too equally for husband and wife.

### Evolution of Institution of Divorce under Muslim Law

So far as the Muslim Law on divorce is concerned it is unfortunate that in pre-Islamic Arabia the divorce among the ancient Arabs was easy and frequent. Divorce was an instrument of torture. Men divorced their wives out of a sudden caprice or whim<sup>[16]</sup>. The power of divorce possessed by husband was unlimited. Despite the fact that the marriage was treated as a civil contract, where both parties enjoy equal rights, the Muslim Husbands enjoy special privileges in the matters of divorce since ancient times. They could divorce their wives at any time without any reason. They could revoke their divorce and divorce again as many times as they wished. Harassment of wife would be done by falsely accusing her of adultery and thereby getting exempted from any formal responsibility of maintenance or legal punishment<sup>[17]</sup>.

In pre-Islamic days, women were treated as chattels, where it was very easy to obtain divorce. It was only the Prophet Mohammad who brought a complete change in the position of Muslim women. He denounced it as an evil by pronouncing that "of all the permitted things divorce is the most abominable with God."<sup>[18]</sup> He was the first person who improved the status of Muslim women. He restrained the power of divorce of husband and gave the right of obtaining separation on reasonable grounds to women. He warned his followers that (a) "curse of God rests on him who repudiate his wife capriciously" (b) "Divorce shakes the Throne of God."<sup>[19]</sup>

It has been emphasized plenty of time by the Muslim thinkers that the Islamic law vests the right of divorce in husband and wife, it forcefully restrains the exercise of such right. Mr. Justice *Kishna Iyer* pointed out, "the view that the Muslim enjoys an arbitrary unilateral power to inflict instant divorce does not accord with Islamic injunction.... It is a popular fallacy that a Muslim male enjoys under the Quranic Law unbridled authority to liquidate the marriage."<sup>[20]</sup>

### Evolution of Institution of Divorce under Christianity

The other community that is living in India is Christians who came and settled especially in south Indian Territory, many century ago. St. Thomas was the first Christian who settled in India and converted many Indians to Christianity<sup>[21]</sup>. Followed by St. Francis Xavier<sup>[22]</sup>. Before the establishment of east India Company in India the marriages were solemnized as per the rituals of the concerned parties, to whom they belong but thereafter, the Company established it's own courts and made the common law applicable among the Christians on the subjects of marriage

and divorce. In the year 1866 the very first law passed for the dissolution of marriage was Native Converts Marriage Act, 1866<sup>[23]</sup>. This Act legalized the dissolution of marriage of natives who converted into Christianity. But in order to meet the requirements of these converted Christians pertaining to divorce was passed and the law was Indian Divorce Act<sup>[24]</sup>. It was later amended by Indian Divorce (Amendment) Act, 2001.

#### **Evolution of Institution of Divorce under Parsi Law**

The Parsi, also spelled Parsee, member of a group of followers in India of the Iranian prophet Zoroaster or Zarathustra. The Parsis, whose name means "Persians," are in fact the descended from Persian Zoroastrians. They migrated to India to avoid religious persecution by Muslims. The exact date of migration of these Parsi is not known. According to tradition, the Parsis initially settled at Hormuz on the Persian Gulf, but finding themselves still persecuted they set sail for India, arriving in the 8th century<sup>[25]</sup>.

When Parsi migrated to India they did not bring any law for themselves. They adopted Hindu customs, laws and entered into agreement with Hindu ruler, *Sanjan*, to respect cow, to observe Hindu Customs. Right from their entry the Parsi adopted quite a good number of customs from the Hindu society<sup>[26]</sup>. Even though their western orientation was conspicuous in the Twelfth century. There was a complete lawlessness in the matrimonial matters of Parsi. Every Parsi did as seemed good in his own eyes. The question acquired urgency on the 17<sup>th</sup> day of July, 1856, when the Privy Council decided that the Supreme Court in its ecclesiastical side possesses no jurisdiction to entertain a suit brought by a Parsi wife for restitution of conjugal rights. The Privy Council held that these matters of Parsis were to be left with their domestic tribunal i.e. the Panchayat<sup>[27]</sup>.

For years and years together after their migration to India, the Parsis were left without any law governing their social and moral duties and obligations. Since they have adopted the laws and customs of Hindus in matrimonial matters, therefore the necessity for special legislation for regularizing the law of marriage and divorce among Parsis had long been foreseen. In the year 1837, Sir John Awdry expressed himself that an enactment having the force of law on this subject was required. Similar views were expressed by Sir E. Perry and Sir Joseph Arnold thereafter. Finally, keeping in view this need of Parsis the Parsi Marriage and Divorce Act was passed in the year 1865<sup>[28]</sup>. This Act was actually fashioned after the Matrimonial Causes Act, 1857<sup>[29]</sup> of England. In the 19<sup>th</sup> Century the Parsis realized the inequality and difficulty in applying this Parsi Marriage and Divorce Act hence therefore demanded the codification of the Parsi law relating to marriage, divorce and inheritance for the members of Parsi community. It resulted in enactment of the Parsi Marriage and Divorce Act, 1936<sup>[30]</sup>.

#### **Evolution of Institution of Divorce under Jewish Law**

The Jews, first entered India as traders trading in ivory, spices and pepper. It was during the time of King Solomon the migration of Jews began. The major migration can be dated around 70 A.D during the Roman takeover of Judea<sup>[31]</sup>. The Jews in Indian subcontinent went through a series of hardships and persecutions from time to time by Portuguese and Dutches. After independence of India they started migrating to Israel, England and United States. So far as the law governing Marriage and divorce is concerned,

the uncertainty that prevailed within Jewish community long ago still exist. The major reason behind the same is that there is no codified law for the same.

The Jewish community regards marriage not as a civil contract but they believe it to be a relation between two persons involving very sacred duties<sup>[32]</sup>. But if there exist any breach of this duty then it becomes difficult to resolve the same because of lack of material. The Bombay High Court itself observed that the non-availability of Jewish material for resolving the disputes among Jews had been actually felt by the Courts and they had to apply the rules of Jewish law as stated in some American books<sup>[33]</sup>. The traditional Jewish law accord absolute right of Husband in ancient times to dismiss his wife at pleasure by handing over the deed of divorcement. But with the passage of time even the wife can also initiate proceedings for obtaining divorce on certain grounds.

#### **Theories of divorce**

Freedman said, "The contemporary crisis of family results from a variety of factors: Changes in social philosophy, which emphasized the freedom of the individual, as against the mainly regularly determined indissolubility of the marriage status; the profound transformation in the economic status of the family in the modern urbanized society, and in particular in the position of married woman, woman who owns her property, builds up her own career, votes in election and in perpetuity wooed and flattered by the advertisers is unlikely to put up with ill treatment and neglect from her husband; modern scientific and medical developments, which make birth control and artificial insemination possible; finally the growing claims of the modern welfare state which makes new demands on, but also assumes for greater responsibilities towards the family."<sup>[34]</sup> Thus, the divorce becomes a social invention necessary to persuade people to break the unwanted relations and to create harmony and peace by creation of new relations and mitigating the ill effects of unstable marriage, which are considered as suicidal for human being and for the development of neo-social concept.

The concept of divorce emerged in India a little slowly. Here people are governed by statutory laws or in some cases such as Muslims and Jews by traditional laws. There are certain grounds such as adultery, cruelty, refusal to cohabit etc. that are present in almost every tradition of law. The various grounds give rise to as many as three basic theories i.e. Guilt/Fault/Offence Theory, Consent Theory and Breakdown Theory. The divorce can be obtained on the basis of any of them.

#### **Guilt/Fault/Offence Theory of Divorce**

As per this theory a marriage can be dissolved only if one of the parties to marriage commits matrimonial offence after solemnization of marriage. But it is mandatory that the offence shall be one that is recognized as a ground for divorce. As per this theory, one party is at fault or guilty and the other is innocent that means this innocent party did not contribute in any way the commission of matrimonial offence. If the other party is involved in the matrimonial offence then it is no more an innocent party. If both parties are guilty on same count then divorce can be denied to them. For instance, if divorce is sought by a party on the ground of adultery committed by the other, the court may deny divorce to him/her if he/she himself/herself was also

involved in adultery. Since this theory Fault theory demands innocence of the petitioner therefore law has evolved the doctrine of matrimonial bars. It means that even if a petitioner has established a ground of divorce to the satisfaction of the Court, he/she may not get divorce if one of the matrimonial bars is proved against him/her.

In India, The Indian Divorce Act, 1869<sup>[35]</sup>, Dissolution of Muslim Marriage Act, 1936<sup>[36]</sup>, The Parsi Marriage and Divorce Act, 1936<sup>[37]</sup>, The Special Marriage Act, 1954<sup>[38]</sup> and The Hindu Marriage Act, 1955<sup>[39]</sup>, recognize divorce on fault grounds. The Hindu Marriage Act contains grounds available to both husband and wife under Section 13(i) and the Section 13(ii) provides the grounds available to wife alone. The grounds are living in adultery, insanity, cruelty, desertion, change of religion, venereal disease, presumption of death, renunciation of world. All of these grounds are available to both i.e. husband and wife whereas additional grounds of rape, sodomy, bestiality of the husband and existence of spouse of the polygamous marriage pree 1955 marriage of husband are only available to wife. So far as the ground of insanity is concerned it cannot be covered under the theory of fault or guilty as it does not fit in this theory, because if a party is suffering from some mental disease then the party cannot be called to be guilty party. The Section 13 shall always be read with Section 23 of the Act as it contains matrimonial bars. The petitioner can never be allowed to take advantage of his/her own wrongs.

### Consent Theory of Divorce

As per this theory if both parties agree to come out of the relationship of husband and wife then they are free to do so with mutual consent. The protagonists of this theory are of the opinion that both of the parties to marriage are free to dissolve the marriage in the same manner as they are to enter it. Therefore, it has also been argued that freedom of marriage implies freedom of divorce, then and then only can mutual fidelity continue can real monogamy exist. Engles observed, "if only marriage that are based on love are moral, then only those are moral in which love continues..... A definite cession of affection, or it's displacement by a new passionate love, makes separation a blessing for both parties as well as for society. People will only spread the experience of wedding instead of the useless mire of divorcing proceedings"<sup>[40]</sup>

The marriages are based on mutual fidelity. Therefore, it will be better to dissolve the marriage if the mutual fidelity cannot continue. This is the best way to preserve the fidelity. The consent theory is of great importance in such a situation where both parties realize that it is impossible for them to live together harmoniously, due to any reason, then they can end their marriage with mutual consent. Dr. Diwan is of the opinion "when marriage had turned out a bad bargain, they have right to correct the error, because if they were not allowed to correct this error, then it is not merely going to affect the physical life, moral spiritual life, which will only result into sheer frustration, and the children of such wedlock will lose faith in the institution of marriage. Such an unhappy family is ground for delinquent children<sup>[41]</sup>.

This theory has also been criticized. The main criticism of this theory is that it leads to hasty divorce and it will definitely bring or lead to chaos in the society. It will increase the number of divorce in the society. It will make lose to sacramental and indissoluble character of marriage.

It will make this institution to be more like a contract in which parties will be at liberty to dissolve their marriage easily sometimes on truffles. Moreover, it will make the regular divorce difficult because in such divorce the consent by both parties will be necessary, therefore if one party withholds the consent then there can be no divorce. But the protagonists of this theory believe that this theory will not bring chaos or any other immorality or infirmity to society, because this theory provides freedom of divorce to the parties, which indeed is an essential right especially when their marriage is not working. They believe that it will not only reduce the number of unhappy marriage, but, also bring happy marriages.

In India, Hindu Marriage Act, 1955<sup>[42]</sup> and Special Marriage Act 1954<sup>[43]</sup> the consent theory divorce has been adopted. Under Muslim law *Khul* and *Mubarat* are considered by many as species of divorce by mutual consent. But as a matter of fact *Khul* is a divorce at the instance of wife, whereas, *Mubaraa* or *Mubarat* defiantly mutual and proposal for divorce may emanate from either party. The genesis of divorce by mutual consent is also there in the Jewish traditional laws in India despite there being no codified law of divorce for Jews in India.

### Irretrievable Breakdown of Marriage Theory of Divorce

The irretrievable breakdown of marriage, supported by a prescribed period of separation is recognized in many countries. Friedman said that "After several years of continuous separation, it may fairly be surmised that the matrimonial community is beyond repair. The alternative to the legal dissolution of marriage after separation for a number of years is not restoration of marriage bond, but maintenance of the fiction of a marriage by a legal tie, which will derive one or the other or both spouses to sexual and other relations with outsiders, clandestinely or under a social stigma, rather than openly. The law in such a case does not serve the sanctity of the marriage, but it preserves sanctimonious righteousness which will, in fact, increase adultery, fornication and personal bitterness<sup>[44]</sup>.

The irretrievable breakdown theory of divorce represents the modern view on divorce. It recommends that when a marriage has been broken down irretrievably either by fault of one spouse or by the fault of both, such marriage only remains in form only. The real substance of marriage disappears or elopes; therefore, there is no need to retain such meaningless or useless relationships. Thus the irretrievable breakdown theory represents the modern form of divorce where the marriage becomes completely intolerable and the same deserves to be dissolved.

The Law Commission also supported and recommended this view and said that "Accordingly, as it seems to us, a good divorce law should seek to achieve the following objectives (i) To buttress, rather than undermine, the stability of marriage, and (ii) When regrettably, a marriage has irretrievably broken down, to enable the empty shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation."<sup>[45]</sup>

The Law Commission of India in it's 71<sup>st</sup> report recommended that the irretrievable breakdown of marriage should compulsorily made a ground for seeking divorce, if the parties live separately for a minimum period of three years<sup>[46]</sup> and accordingly a bill was passed by the Parliament on the basis of these recommendations but it lapsed. In the year 2006, the Apex Court of India

recommended to the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate the irretrievable breakdown of marriage as ground for the grant of divorce<sup>[47]</sup>. Thereafter, the Law Commission of India took a suo motu action and took up the study of this subject. The Commission examined at length the extant of the legislations as well as a number of judgments passed by the Apex Court and High Courts on this subject and recommended that “irretrievable breakdown of marriage” should be incorporated as another ground for granting divorce under the provisions of the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954. It was also recommended that the Court before granting a decree for divorce on the ground that the marriage has irretrievably broken down should also examine whether adequate financial arrangements have been made for the parties and children<sup>[48]</sup>.

The irretrievable breakdown of marriage has also been realized as a ground under the Muslim law in case of non-payment of maintenance by the husband, irrespective of the fact that such a failure resulted on account of default of the conduct of wife<sup>[49]</sup>. In *Noornibi v. Pir Baksh*, it was held that there is no merit in preserving intact the connection of marriage when the parties are not able to or fail to live within the limits of Allah.”<sup>[50]</sup>

### Divorce System in India

India being a home to different cultures and religions, and the personal laws applicable to each and every religion are different as the customs and practices of every religion are different. Personal law is a set of laws that are applicable to personal issues of human beings, like marriage, adoption, inheritance and succession. Divorce is the termination of marriage and dissolution of matrimonial rights and duties of married couples. Although divorce is common among all religions and cultures, but the law relating to divorce is not common in India. It is because the concept of marriage is different among different religions. For Hindus it's a sacrament and for a very long period of time divorce was an unknown concept for Hindus. For Muslims, marriage is a contract and divorce is the legal dissolution of marriage. The researcher hereby studies the concept of divorce under different personal laws or the different of methods and grounds on which a divorce can be sought under various legislations in India.

### Divorce under Hindu Law

Divorce was unknown to the laws of *Dharamshastra* as the marriage was considered as an indissoluble union of the husband and wife. But the provisions for divorce in the present Marriage law brought about a radical change in the legal concept of Hindu marriage. The Section 13 of the Hindu Marriage Act, 1955 describes the circumstances which extend the right of divorce. The Section 14 renders the provisions of divorce a bit difficult as it provides that no petition for divorce can be presented within one year of the marriage unless it causes exceptional hardship to the petitioner or it becomes a case of exceptional depravity on the part of respondent. Section 15 lays down the limitations on the right of divorced persons to marry again.

### Grounds of Divorce

In India a petition for divorce can be filed under Section 13 (1) of the Hindu Marriage Act, 1955 by either party to marriage on any one of the following grounds:

### Adultery

Adultery is a ground of divorce as well as judicial separation under Hindu Marriage Act, 1955. A single act of adultery constitutes two grounds<sup>[51]</sup>. This term ‘adultery’ has not been defined in the Act. In the year 1954, an English Judge, Karminski, J. said that “nobody has yet attempted to define adultery and I do not propose to rush in where wiser men have not”<sup>[52]</sup>. Still adultery is one of three traditional grounds, elements of which have not posed much difficulty of interpretation. In adultery there shall be consensual of voluntary sexual intercourse between respondent and a person whether married or unmarried. In simple words there has to be a sexual intercourse of spouse with non spouse. Therefore, a decree of divorce may be sought on the ground after the solemnization of marriage the respondent had voluntary sexual intercourse with any person other than his or her spouse, is sufficient to make out a case for divorce<sup>[53]</sup>. But it will be pertinent to mention here that mere attempt at sexual intercourse will not amount to adultery. Some penetration howsoever brief, must take place, though full penetration is not required<sup>[54]</sup>. The presence of consent is also mandatory in such cases. If wife is raped then it is not adultery or the wife is not in a position to give consent due to any bodily or mental incapacity then also it is not adultery.

A petition for divorce can be filed by either husband or wife. It is not necessary to prove that the respondent must be living in adultery and a single act of adultery is enough to constitute ground of divorce<sup>[55]</sup>. In case of adultery the direct proof of adultery is not necessary and the circumstantial evidences are enough for proof of charge to arrive at a conclusion<sup>[56]</sup> because the act of adultery is committed with calculated care and sufficient secrecy. It is therefore, unrealistic to expect a direct evidence of any eyewitness to the act<sup>[57]</sup>. But it shall also be taken into consideration that although it is not necessary that proof reach certainty, but must carry high degree of probability.

### Cruelty

The Section 13 (1) (ia) of the Hindu Marriage Act, 1955 provides that a spouse has a right to file a petition of divorce, if respondent has treated the him/her with cruelty. No precise definition of cruelty exists nor is it possible to do so. Acts on conduct contributing cruelty can be so numerous and varied that it would be impossible to fit them into any water tight compartment. Cruelty may be brutal or subtle. It may be mental or physical. It may be by words, gestures or by mere silence<sup>[58]</sup>. This term cruelty may be defined as a willful and unjustifiable conduct of such a character as to cause danger to the life, limb or health, bodily or mental, or as to give rise to reasonable apprehension of such a danger. Such reasonable apprehension must be of such a nature which causes the petitioner to believe that it will be harmful or injurious to live with respondent.

To obtain a decree of divorce it is mandatory that the conduct of the respondent must grave and weighty. The conduct must be such cannot be tolerated by a reasonable man. In *Naveen Kohli v. Neelu Kohli*<sup>[59]</sup> the wife published news against the husband to defame his image in society. She also filed criminal and civil cases against him. She wanted to make his life miserable. The Apex Court while granting divorce held that all of the acts of wife amounts to cruelty and their marriage has broken beyond repairs.

### Desertion

The third ground of divorce is desertion. The Section 13 (1) (ib) of the Hindu Marriage Act, 1955 enables a petitioner to file a divorce petition if the respondent has deserted him/her for a period of 2 years or more, without consent and without reasonable cause. The Apex Court while interpreting the term desertion said that “In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage.”<sup>[60]</sup> The term desertion also includes the willful neglect of one spouse by the other<sup>[61]</sup>. The expression desertion does not mean withdrawal of place, but from a state of thing. The burden to prove desertion always lies on petitioner to prove that the respondent has deserted him/her without reasonable cause, justification and without consent and against wish<sup>[62]</sup>. This question of desertion arose in *Bipinchandra v. Prabhavati*<sup>[63]</sup> where the husband and wife lived together happily and a son was also born. Husband went to England for some time and when came back he came to know that his wife was having some extra marital affairs with his friend, Mahindra, but the wife denied. After some time the wife went to her parental house for marriage, which took place after six weeks and then she did not return. Thereafter the husband wrote a letter to his wife through solicitor and charged her with the allegation of having illicit relations. However his mother told him that his wife is coming within a few days. Thereupon he sent a telegram to his father-in-law “must not send”. A divorce petition was filed on ground of desertion. In this case the Apex Court held that when wife wanted to return, she received the telegram “must not send” therefore, husband himself is the deserter not the wife.

### Conversion

The Section 13 (1) (ii) of the Hindu Marriage Act, 1955 confers a right on the petitioner to file a divorce petition on the ground of conversion by the respondent. But it will be pertinent to mention here that conversion itself does not dissolve the marriage automatically or it does not forbid the continuation or subsistence of a marriage between parties one of whom has ceased to be a Hindu. If the spouse chooses to continue with the other even after conversion then there is nothing which leads to automatic dissolution of marriage. Even the Apex Court held that conversion of a spouse to another religion does not ipso facto dissolve the marriage. Therefore, where the husband after conversion to Islam got married again was held to be bigamy<sup>[64]</sup>. This Section simply provides a ground to the other spouse to claim divorce. This ground is available to the spouse who remained Hindu. Therefore, the Supreme Court held that the party who ceased to be a Hindu cannot seek divorce on the ground of his or her own conversion.

### Unsoundness of Mind or Suffering from Mental Disorder

Another ground for divorce contained in Hindu Marriage Act is incurable unsoundness of mind or suffering from mental disorder. The burden to prove this ground also lies on the petitioner. The petitioner will have to prove it beyond reasonable doubts that there exist the unsoundness of mind or mental disorder. The test to determine unsoundness of mind was laid by Calcutta High Court in *Kartik Chandra v. Manjurani*<sup>[65]</sup> case wherein the Court held that the practical

test of degree is to find in the phrase “incapable of managing himself as well as problems of married life and of society”. Thus in case a spouse is unable to handle himself and fails to handle the affairs of society and marriage, then, such person is deemed to be a person of unsound mind. In another case the Calcutta High Court while defining the unsoundness of mind held that the respondent shall be unable to understand the nature and consequences of the acts, which he is doing only then it can be termed as unsoundness of mind<sup>[66]</sup>.

So far as the ground of mental disorder is concerned it has been held by the Supreme Court that the petitioner shall not only prove the mental disorder but also must establish that it is reasonably not expected to live with the respondent due to mental disorder.

### Virulent and Incurable Leprosy (Now Omitted)

Prior to The Personal Law Amendment Act 2019, the Section 13 (1) (iv) of Hindu Marriage Act, 1955 enabled the petitioner to file a divorce petition on the ground that the respondent has been suffering from a virulent and incurable leprosy. It was mandatory that the respondent shall be suffering from (a) virulent and (b) incurable form of leprosy. The term “virulent” had been interpreted as malignant or venomous<sup>[67]</sup> The onus to prove leprosy lied on petitioner but once it had been established that the respondent was suffering from this disease or it was not disputed that the respondent had been suffering from leprosy even then the onus lied on respondent again to prove that the leprosy is virulent and incurable.

The Personal Law Amendment Act 2019 omitted Section 13 (1) (iv) hence this ground is no more available to either party<sup>[68]</sup>.

### Venereal Disease in Communicable Form

The venereal disease in a communicating form is another ground filling divorce petition under the Hindu Marriage Act, 1955. It is also a ground for obtaining a decree for judicial separation. In *Mr. X v. Hospital Z*<sup>[69]</sup> it was held that right to marry shall be suspended till the person who contacted a venereal diseases (in the present case it was HIV positive) is cured of the same and moreover the venereal disease is a ground for obtaining divorce under Hindu Marriage Act, 1955 therefore it is better to avoid such a situation after marriage if the same can be prevented in advance i.e. before marriage.

### Adoption of Religious Order

The Section 13 (1) (vi) of the Hindu Marriage Act, 1955 enables the petitioner to seek divorce on the ground that the respondent has renounced the world by entering into a religious order. It is mandatory that both of these grounds i.e. renunciation of world and entered some religious order shall be proved for obtaining the decree of divorce under this provision. Among Hindus if a person enters *Sanyasa Ashram*, then he renounces the world. Before entering into this *Ashram* he will have to perform his own funeral rites. Performance of ceremonies is necessary. A declaration to this effect is not enough without ceremonies to constitute a ground. Such an act in fact if performed as per religious orders tantamount to civil death<sup>[70]</sup>.

### Presumption of Death

The last ground prescribed in Section 13 (1) is that if a person is not heard for last seven or more years by his near and dears then the other spouse can file a petition for divorce on this ground. Even similar provision is contained in Evidence Act <sup>[71]</sup> which declares such person as dead. The burden of proving this fact lies on the petitioner. Once the decree of divorce is awarded in favour of petitioner thereafter he/she is free to remarry and the marriage becomes valid even if the other spouse appears on the very next day of marriage.

### Pre-Act Polygamous Marriage

The Section 13 (2) (i) provides a special ground to a Hindu wife only to claim divorce if at the time of presentation of divorce petition the husband has another wife who is alive. This ground can exist only if any marriage was solemnized before the commencement of the Hindu Marriage Act, 1955.

### Husband Guilty of Rape, Sodomy or Bestiality

The other special ground available only to wife for obtaining divorce is that the husband committed rape, sodomy or bestiality. The petition can be filed at any time even if no prosecution or punishment has been inflicted on husband. But the wife will have to establish the guilt. But if the husband has been punished by the court of law then there is no need to prove the charges.

### Non-Resumption of Cohabitation after a Decree of Maintenance

The Section 13 (2) (iii) enables the wife to file a divorce petition, if there is no resumption of cohabitation between parties for a minimum period of one year or afterwards, after passing of orders of maintenance in favour of wife under Section 125 of the Code of Criminal Procedure, 1973 <sup>[72]</sup> or a decree under Section 18 of the Hindu Marriage Act, 1956. It will be pertinent to mention here that this right has only been given to wife alone.

### Repudiation of Marriage

Under Hindu law if a marriage has been solemnized by parties before attaining majority then the same is neither void nor voidable. It remains a valid marriage. The Section 13 (2) (iv) enables such wife to repudiate her marriage, if she was married before 15 years of age, provided such right is only exercised after attaining the age of 15 years but before 18 years notwithstanding the marriage was consummated or not.

### Divorce by Mutual Consent

The Section 13 B of the Hindu Marriage Act, 1955 provides that a divorce petition can be filed by both of the spouses on two grounds i.e. (a) both parties have been living separately for a period of one year and (b) they have also mutually agreed to live separately. Both of these grounds are mandatory. Once the mutual petition is filed in the court of law thereafter the parties will have to wait for another 6 months. In *Charanjeet Singh Man v. Neelam Mann* <sup>[73]</sup> the Punjab and Haryana High Court held that this waiting period of 6 months is mandatory and it can not be waived off. But in *Abhay Chauhan v. Rachna Singh* <sup>[74]</sup> the Delhi High Court held that in certain special cases this period can be waived off. However the Apex Court finally cleared all doubts that the waiting period of six months can be waived

if the circumstances of the case warrant so <sup>[75]</sup>.

### Divorce under Customary Law

A divorce can also be affected under the ancient customary law of Hindus. The Section 29 of the Hindu Marriage Act, 1955 provides that a marriage solemnized at any time can be dissolved under the custom or any special enactment. The Apex Court also held that the ancient custom of divorce is valid form of divorce and a marriage can be dissolved by any customary mode of divorce <sup>[76]</sup>. While defining the mandatory requirement for divorce under customary law the Apex Court in another case held that customary divorce is an exception to the general law of divorce, so it ought to be pleaded by the concerned party <sup>[77]</sup>.

### Divorce By Arbitration

The Section 23 (2) of the Hindu Marriage Act, 1955 provides that the court has power to refer the matter of divorce for reconciliation. It will be pertinent to mention here that if a matter is referred for conciliation before arbitrator then the arbitrator has to work on reconciliation only. In *Raj Kumar v. Anjali* <sup>[78]</sup> the parties were referred to person of their own choice, but, these persons took the matter as arbitration and recommended that the divorce should be granted and the trial court passed the decree of divorce. But the High Court reversed the decision on the ground that the decision was delivered without going into the merit of the case and the same was decided on the basis of the opinion of referee's verdict.

### Divorce under Special Circumstances

The Madras Aliasantana Act, 1924, Travancore Ezhava Act, 1925, Madras Marumakkathayya Act, 1924, Cochin Marumakkathayama Act, 1938 are the acts that were passed before the enactment of the Hindu Marriage Act, 1955. The Act of 1955 did not repeal these acts, therefore if a divorce petition is sought under these enactments than the provisions of Hindu Marriage Act shall not be applicable. Generally the marriages under these Acts are dissolved by mutual consent or by a deed executed by the parties to marriage.

### Divorce under Muslim Law

There are two categories of divorce under the Muslim Law. The first one is extra judicial divorce and the other one is judicial divorce. So far as extra judicial is concerned, the Muslim law in India recognizes three kinds of extra judicial divorce, which can be effected by (1) husband (2) wife (3) mutually by husband and wife. In case of judicial divorce a party will have to take shelter of court of law.

As discussed above the extra judicial divorce that as recognized in India can be categorized in three categories under the traditional Muslim Law. The divorce can be given by husband, wife or jointly by husband and wife. When divorce is preceded by husband it is called as *Talaq*, and when it takes place at the instance of wife it is called as *Khula* and in case of mutual consent it is *Mubara*. The extrajudicial divorce and the judicial divorce can be discussed as under the following heads:

#### Divorce by Husband

##### 1. Talaq

##### a. Approved Forms of Talaq

- (i) Ahsan
- (ii) Hasan

- b. Unapproved Forms of Talaq
  - (i) Tripple Talaq
  - (ii) By Deed of Divorce
- 2. Ila or Vow of Continenence
- 3. Zihar or Injurious Assimilation
- Divorce by Wife
  - Talaq-i-tafweed or Delegated Divorce
  - Divorce by Mutual Consent
    - a. Khul or Redemption
    - b. Mubarat or Mutual Freeing
  - Divorce by Judicial Process
    - a. Lian or Mutual Imprecation
    - b. Faskh or Judicial Rescission

### Divorce by Husband

#### Talaq

The term talaq is an Arabic word which means 'undoing of or release from knot' [79]. It is used by Muslim jurists to denote the release of women from marital tie. It means repudiation of wife or termination of marriage. Talaq once complete frees a Muslim wife from the bondage of marriage or releases her from the marital tie either immediately or eventually. A Muslim man can obtain divorce at any time and without giving any reason if he is of sound mind and has attained the age of puberty. Moreover, divorce can be pronounced by husband in absence of wife [80]. The only requirement is that the husband while pronouncing talaq shall clearly specify the name of the wife. In such cases the talaq comes into effect only when the wife comes to know about talaq [81]. Muslim law also gives a right to an ailing husband who is on death bed (*Marzul-maut*) to dissolve his marriage if he does not want to give right of inheritance to his wife after his death. The different kinds of talaq that can be pronounced by husband are as under:

- **Ahsan:** In this form of talaq the husband pronounces talaq when his wife is in the period of purity (tuhr). Ahsan is known as the best and most approved [82] mode of talaq wherein the husband pronounces the formula of divorce i.e. "I divorce you" in a single sentence that too during tuhr. Thereafter the wife will have to complete the period of iddat (i.e. 90 days from the date of pronouncement of talaq) and after expiration of the iddat period, divorce becomes irrevocable. But, it is also equally important rather mandatory that the husband shall abstain from performing sexual intercourse during the period of iddat. In case the husband if intends to revoke the talaq then he may do so by express words or by resuming conjugal relationship before completion of period of iddat.
- **Hasan:** The another approved form of talaq in India is hasan wherein the husband pronounces talaq in three consecutive periods of tuhr and on the third pronouncement the marriage stands dissolved [83]. It is mandatory that the pronouncement shall be made only during the period of tuhr, but in case the wife is non menstruating, the pronouncement should be made during the successive intervals of 30 days. The divorce becomes final on third pronouncement. In case the husband pronounces the talak first time and then revokes it by words or resuming cohabitation and again when the wife is in tuhr and he pronounces talak but revoke it second time and if he pronounces talaq third time during tuhr then the divorce stands final and irrevocable. Thereafter, even if the husband desires to

take his wife back or to remarry her then he can't do so without following procedure laid by Muslim law, which indeed is a humiliation. This form of talaq made an end to pernicious practice of the ancient Arabs, who were used to take back many times their wives after talaq. It protected the wife from being harassed every time.

- **Triple Talaq:** In this form of talaq the husband pronounces the words talaq, talaq, talaq during the period of *tuhr*. This is most unapproved form of talaq. This pronouncement dissolves the marriage immediately and leaves no scope for reconciliation. While commenting on evolution of triple *talaq* Paras Diwan said that it appears that triple *talaq* is an innovated form of *Hasan* form wherein the time gap between the pronouncements is eliminated [84]. The Apex Court of India declared triple *talaq* as unconstitutional [85].
- **Deed of Divorcement:** The another unapproved form of talaq under Muslim law is the talaq by single irrevocable declaration either in the period of purity or otherwise, marriage may be terminated. Such a declaration may be deduced in writing [86]. This form of divorce dissolves the marriage instantly and there remains no scope for reconciliation as it is irrevocable and it is for this reason that this form of talaq is unapproved [87].

#### ILA

This is another form of divorce under Muslim law wherein a Muslim husband can divorce his wife. For this kind of divorce it is mandatory that the husband has attained the age of puberty and he is also a person of sound mind, and he swears in the name of god that he shall not have any intercourse with his wife and refrains for a period of four months. In case the husband does not revoke his pronouncement either expressly or by resuming sexual intercourse, the marriage stands terminated at the end or expiry of the period of four months.

#### Zihar

Zihar is a sought of inchoate divorce, where a husband compares his wife to a woman within the prohibited degrees, for example, by saying she is like his mother or sister. If the husband wishes to revoke this declaration then he will have to offer expiation otherwise the wife can seek divorce or restitution of conjugal rights in the court of law. But it is mandatory that the husband who uses zihar for divorce shall be a person of sound mind and has attained the age of puberty. This type of divorce is in fact of little significance in the present world because if a husband will be willing to terminate his marriage he already has other better options.

#### Divorce by Wife

Generally the power to dissolve marriage lies in husband in Muslim Law, but the husband can also delegate this power to a third party or even to his wife. Thus under Muslim law the wife can also divorce his husband and it is known as *talaq-i-tafweed* or delegation of power. This power delegated to the third person or wife can either be conditional or absolute. This delegation is known as *tafweed* and the divorce is called as delegated divorce. This delegation of power can be exercised by husband at any time i.e. either before or after marriage with the help of an



agreement. In *Manjila Bibi v. Noor Hossain* <sup>[88]</sup> the husband delegated the power to divorce to his wife through a *kabulnama*. The wife exercised the power on being harassed by husband. The Calcutta High Court held that the wife divorced herself on behalf of husband.

### **Divorce by Mutual Consent**

The Muslim Law in India permits a divorce by mutual consent /agreement of the spouses. Where the parties to marriage realize that they are unable to fulfill their mutual matrimonial obligations in furtherance of their welfare and they decide to terminate this relationship, then they are free to do so. Muslim law recognizes divorce by mutual consent either by *Khul* or *Mubaraat*. In case of *khul* the wife is desirous of terminating the marriage hence it can be termed as divorce at the instance of wife whereas in *Mubarat* both of the parties are eager to obtain divorce.

### **Divorce by Judicial Process**

Before the enactment of Dissolution of Muslim Marriage Act, 1939, there were two grounds on which the marriage can be dissolved i.e. *Lian* and *Fask*. In case of *Lian* if the wife is charged with adultery and the charge is false then she can file a regular suit for dissolution of marriage. In case of *Fask*, the Muslim Law conferred upon *Kazi* or a Judge the authority to annul a marriage when the parties are unable to fulfill their respective obligations. Especially when the marriage is prejudicial to women, the *Kazi* could break the tie. There was no other way for dissolution of marriage available to Muslim women. It was only in the year 1939 when the Act was passed with a view of consolidating and clarifying the provisions of Muslim Law pertaining to suits for dissolution of marriage by wife. The Section 2 of the Dissolution of Muslim Marriage Act, 1939 provides as many as nine grounds to Muslim wife for obtaining a decree of divorce for dissolution of marriage. The Muslim women can seek divorce on any one or more of the following grounds:

#### **Absence of husband**

Section 2 clearly states that if the whereabouts of husband are not known for a period of four years then the wife is entitled to seek divorce from the court of law. The only condition in such cases is that the decree of divorce shall take effect after six months from the date of passing of decree.

#### **Failure to Maintain**

In case the Muslim husband neglects or fails to maintain his wife for a period of two years then the wife can seek divorce under the Act, even if the wife is having sufficient money to maintain herself. In *Mst Nur Bibi v. Pir Bux* <sup>[89]</sup> the wife filed a suit for divorce on the ground of failure to maintain. As a matter of fact the wife after three years of marriage went to her parents voluntarily. Thereafter the husband got married again and then she filed the suit for divorce on the ground of neglect and failure to maintain. It was held that in Muslim law polygamy is permissible and the wife cannot live apart on this ground hence there is no question of maintenance that may arise in such a case. Thus the wife cannot take advantage of her own conduct and claim dissolution of marriage. In *Veeran Sayvu Ravuthar v Beevathumma* <sup>[90]</sup> the Kerala High Court held that even if a wife is living separately from husband and the husband is

paying maintenance to child only, the husband will be cruel for not giving maintenance to wife, hence divorce can be granted to wife on this ground. However, in *Yusuf v. Sowramma* <sup>[91]</sup> the girl of 17 years got married to a man was twice to her age and she came back to her parents after one months. Husband was willing to take her back but she refused and the husband did not pay any maintenance to for two years. She filed a suit for divorce on neglect and failure to maintain. Court awarded the decree in her favour on this ground.

#### **Imprisonment of Husband**

As per Section 2 (iii) of the Dissolution of Muslim Marriage Act, 1939, if the husband is sentenced to imprisonment for seven years or more then the wife can seek divorce on this ground. But in such cases the sentence should have become final.

#### **Failure to Perform Marital Obligations**

As per Section 2 (iv) of the Dissolution of Muslim Marriage Act, 1939, if a Muslim husband fails to perform his marital obligations without assigning any reasonable cause for a continuous period of three years, then his wife is entitled to obtain a decree of divorce from the court of law. In *Veeran Sayvu Ravuthar v. Beeva Thumma* <sup>[92]</sup> the husband never tried to take back or accompany her and he also didn't try for the restitution of conjugal rights hence the Kerala High Court awarded the decree of divorce on the ground of failure to perform marital obligations.

#### **Impotency**

Another ground for obtaining divorce available to Muslim wife is impotency of husband. But the husband should be impotent at the time of marriage and continue to be so. But before awarding decree of divorce on this ground the court can order that the husband shall satisfy the court within a period of one year from the date of order that he has ceased to be impotent. If he succeeds then no decree of divorce shall be passed on this ground.

#### **Insanity, Venerable Disease**

As per Section 2 (vi) of the Dissolution of Muslim Marriage Act, 1939 a Muslim wife is entitled to seek divorce if her husband has been insane for a period of two years or he is suffering from virulent disease. The virulent disease may have appeared recently or may be an old one. There is no condition of two years for this disease.

#### **Repudiation of Marriage by Wife**

The Section 2 (vii) deals with repudiation of marriage by wife. In case the girl was given in a marriage by her father or by any other guardian and she was below 15 years of age then she can repudiate the marriage before attaining 18 years of age provided the marriage has not been consummated. If the wife does not exercise this right before attaining the age of majority then she cannot ask for dissolution of marriage after attaining the age of majority because of her implied ratification <sup>[93]</sup>.

#### **Cruelty of Husband**

Cruelty is another ground for obtaining divorce under Muslim law. In such cases the Muslim wife can approach the court of law for dissolution of marriage. Cruelty includes mental and physical cruelty.

### Grounds of Dissolution Recognized by Muslim Law

The Section 2 of the Dissolution of Muslim Marriage Act, 1939, a Muslim wife is entitled to seek a decree of divorce on any other ground recognized by or under the Muslim law. In *Noor Jahan Bibi v. KLazim Ali* <sup>[94]</sup> a suit for divorce was filed by Noor Jahan against her husband on the ground that her husband charged her on false ground of adultery. The Calcutta High Court held that since *Lian* is a recognized mode for seeking divorce under Muslim Law hence she is entitled to claim the same.

### Divorce under Special Marriage Act, 1954

A person can apply for divorce under this Act only if the marriage was solemnized under this Special Marriage Act, 1954. There are several grounds on which either party can apply for divorce. The grounds are adultery, desertion, respondent imprisoned for seven or more year, cruelty, insanity, venereal disease and not known for seven or more years i.e. presumed to be dead <sup>[95]</sup>. There are some grounds that are available to wife only. The grounds are rape, sodomy bestiality, non-resumption of co-habitation after passing maintenance order or judicial separation or restitution of conjugal rights <sup>[96]</sup>. The parties can also apply for divorce on mutual consent as well <sup>[97]</sup>.

### Divorce under Christian Law

The divorce law applicable to Indian Christians pertaining to divorce was passed in the year 1869 <sup>[98]</sup> and the same was amended in the year 2001 <sup>[99]</sup>. This Act provides several ground for divorce such as adultery, cruelty, insanity, venereal disease in a communicable form, not heard for 7 or more years, willfully did not consummate marriage, did not comply with the decree of conjugal rights and desertion <sup>[100]</sup>. Besides this the Christian wife can also seek divorce if the husband is guilty of rape, sodomy or bestiality <sup>[101]</sup>. The husband and wife can also seek divorce on mutual consent under Section 10A of the Act. In all of these cases the petition for divorce is required to be filed in the District Court <sup>[102]</sup>.

### Divorce under Parsi Marriage and Divorce Act, 1936

A Parsi can seek divorce on any ground mentioned in Section 31 or Section 32 of the Act. As per Section 31 if a party to marriage is not heard for last minimum 7 years by his/her near and dears then the other party can seek divorce under this ground. The section 32 provides that a party can seek divorce on any of the following grounds: non consummation of marriage within one year, unsound mind, wife was pregnant at the time of marriage by some other person, adultery, fornication, bigamy, rape, unnatural offences, cruelty, caused hurt, venereal disease, compelling to prostitution, sentenced for 7 or more years of imprisonment, desertion, after orders of maintenance no sexual intercourse for one year and conversion. The Section 32 of the Act provides for the option of divorce by mutual consent.

### Divorce under Jews Laws

As discussed earlier that there is no codified law for marriage and divorce of Jews residing in India. Jews are governed under their customary laws only. As per their customary law either party can seek divorce on the ground of physical incapacity cohabit, willful refusal to cohabit, apostasy or conversion, being childless, breaches of

observances of the religion of mosses. The husband can obtain divorce on the ground of adultery even on ground of strong suspicion. The wife can seek divorce on the ground of cruelty, non maintenance, if he is immoral, if he is suffering from loathsome disease or if the husband is perusing malodorous occupation. The law pertaining to marriage and divorce was clarified by Justice Crumps as Jews regard marriage as a relation whereas divorce involves sacred duties, to be performed by the parties to marriage. They did not regard marriage as a civil contract. The Jews may marry under Special Marriage Act, as the Act is applicable to every citizen irrespective of their religion. So, Jews law has not codified and they regulate their relationships as per the customary laws. Hence, in case if they register their marriage as per Special Marriage Act, 1954, than they be regulated by the same provisions as to divorce as provided under the Act <sup>[103]</sup>.

### Divorce under the Foreign Marriage Act, 1969

The Foreign Marriage Act covers within it's ambit all marriages solemnized between an Indian and a foreign national irrespective of religion. The main features of this Act derived from the Hindu Marriage Act and the Special Marriage Act. A divorce petition can be filed by a party who is subject to this Act <sup>[104]</sup> on the same ground as mentioned in Section 27 of the Special Marriage Act, 1954. But it will be pertinent to mention here that a divorce petition will be maintainable only if the marriage was solemnized under the Act and both of the parties are domiciled in India. While dealing with this issue in *Vincent Joseph Konath v. Jacintha Angela Vincent Konath* <sup>[105]</sup> the main question was that, can a Christian marriage that was solemnized outside India, be dissolved in India? It was held that, the Section 2 of Indian Divorce Act, 1969 must be interpreted in more depth and details. The Court said that since both the parties were domiciled in India, the High Court, even though its jurisdiction extends only within the boundaries of India, can dissolve the marriage.

### Causes of Divorce

Divorce is the result of failure of marriage. There are plenty of causes for divorce. The major one is the patriarchal society where in the majority of powers have been enjoyed by male members of society. The educated women of the present India is rightly against such powers of male members of our society. The changing status of women in Indian society made them more independent. The other reason is the westernization of our culture. Initially we believed that the marriages are arranged in heaven and the same is indissoluble. But present couples don't believe in this concept any more. The other reasons behind dissolution of marriage are sexual dissatisfaction, interference by in laws, lack of commitment, domestic violence, physical emotional or abuse infidelity/extramarital affairs, communication problem, financial troubles, unrealistic expectations, inequality, loss of identity, incompatibility, getting married at an earlier stage, getting married for wrong reasons, lack of intimacy, addictions or even alimony whether it is pen-dentilite of permanent.

### Consequences of Divorce

Divorce is a death of a union or death of a dream or promise or end of a life. Dissolution of marriage affects not only the couple but their entire family, even friends and the society

as well. With the modernization and other reasons it has become a common course of the society. The dignity or the sanctity of the institution of marriage has gone down with the passage of time. People are now heading for live in relationships. The couples who opt for divorce also face plenty of problems such as mental depression, economic problems, losing friends, division of memories and belongings, singleness, emotional stress, feeling guilty, anger/irritability, difficulties in adapting to change and loss of interest in social activity etc. Besides this the major effect of divorce can be seen on children. Children suffer a lot and that too because of the fault of their parents. The society also learns from this activity and follows the same. Thus divorce affects the entire society as a whole.

### Comparison of Divorce under Personal Laws

In case of personal laws pertaining to divorce, the Indian legal system has a pluralistic approach. There are several methods to attain divorce under different marriage codes as compared to the uniform civil code in several Western countries. Here the divorce is can be obtain either under the personal laws of different religions or under the statutory laws. The grounds for divorce under the statutory enactments i.e. The Hindu Marriage Act, 1955 and The Special Marriage Act, 1954, Indian Divorce Act, 1869 and Parsi Marriage and Divorce Act, 1936 are almost similar. In the case of marriage under the Foreign Marriage Act, 1969 the divorce proceedings are governed as per the Special Marriage Act, 1954. Under all of these statutes either spouse can file an application for divorce apart from various specific grounds especially available to the wife. i.e. the ground of bigamy, rape, sodomy or bestiality etc. The parties can also file an application mutually for a divorce under all of these statutes. These statutes also recognize in some cases, the theory of irretrievable breakdown of marriage where even after a decree for restitution of conjugal rights or judicial separation is passed and the couples are not able to live together and can file for divorce. In the case of Muslims, the divorce is governed under the Personal laws and The Dissolution of Muslim Marriage Act, 1939. The personal laws give majority of powers or we can also say all of the powers to Muslim males for obtaining divorce. It is only the Section 2 of the Dissolution of Muslim Marriage Act, 1939 that provides for grounds of divorce to the woman and only on those specified grounds they could seek divorce unlike men under Muslim Personal law. The grounds available to Muslim women under the act are cruelty, conviction of husband for than seven years, impotency, failure or neglect to pay maintenance to wife, insanity etc.

These statutory enactments have overridden the effects of the customs and usages. The divorce under all religions is governed as per the statutory enactments which do not recognize any custom or usage. So far as the Jews are concerned their personal laws govern the divorce as there is no enacted law for them.

### Conclusion and Suggestions

A marriage which is not working shall come to an end. In such cases there is no need to stick around as there is an option of getting divorce. But a divorce, in fact, is among the most traumatic misfortunes for any married couple. The entire process of divorce, that starts from coping up with emotional ups and downs to contesting for the long awaited

divorce decree for several months or years is definitely a tough affair to get through. Before opting for a divorce, the party should be aware of the fact that a divorce procedure in India extents for almost a year and in some cases of disputes the procedure may continue for years as well. Since India is a land of varied religious communities having their own marriage laws, the divorce procedure too varies, according to the community of the couple seeking divorce. Thus, our country has adopted the concept of "Law according to the religion of the party" and at the same time provided for Special Marriage Act, 1954 and The Foreign Marriage Act, 1969 to deal with marriages having no bar as to religion or country. India has also recognized the customary law of every religion which is prevalent since time immemorial. With the advancement of time and social awareness, several Acts have been passed by the Indian Government to make the present day divorce procedure in India more progressive with respect to gender affairs and related sensitive issues. Although the law of divorce has many forms but the final achievement is one that is obtaining divorce or dissolution of marriage. At the same time it is also true that it takes different forms in different religions and statutes. So far as codified laws are concerned the divorce laws in India can broadly be categorized into two categories i.e. Divorce by Mutual Consent and Contested Divorce. In codified laws equal rights have been given to both parties for seeking divorce. But in case of extra judicial divorces there is nothing like contesting divorce. The majority of powers to obtain divorce is in the hands of husband and the Muslim law is the best example of the same who can divorce his wife without assigning any reason and can give effect to divorce in spur of a moment by simply saying *talaq, talaq, talaq*. Fortunately in India this concept of triple *talaq* has now been declared unconstitutional by the Apex Court. Although it has been declared unconstitutional but still there exist other problems in Muslim laws such as inequality and extraordinary powers of husband.

It is a matter of concern that in India Muslim women is not getting equal justice or rights like Hindu women. It is a violation of Article 14 of the Constitution of India as well. The protection and retention of personal laws seems to be unreasonable and unacceptable. The grounds of divorce contained under Muslim personal law deserve to be quashed because all Indian females shall have equal rights and the same can only be achieved by enacting a uniform civil code. On the basis of the above study on divorce laws in India the researcher suggests the following:

- A uniform Civil Code for every religion is required to be enacted to regulate the divorce proceedings so that each and every Indian shall possess equal rights.
- If Uniform Civil Code is not possible then a gender just codified Muslim Law on divorce shall be enacted.
- Appointment of an officer to look after the interest of the public as contemplated in Section 17 A of the Indian Divorce Act, 1869.
- Compulsory registration of marriage and divorce
- The procedural laws pertaining to divorce need to be simplified keeping in view the interest of common people.
- Compulsory establishment and conduct of Family Court.
- Jewish law should be codified.
- There shall be a Family Bureau having a team of counselors easily accessible to all. The team may

consist of social workers, psychiatrists, lawyers, doctors, sociologists etc.

## Reference

1. History of Divorce, Origin and Meaning, Available at: <https://phillyesquire.com/history-of-divorce-meaning/#:~:text=%22Divorce%22%20comes%20from%20the%20Latin,separate%20or%20leave%20one's%20husband.>
2. Merriam Webster Dictionary, Available at: [https://www.dictionary.com//divorce.](https://www.dictionary.com//divorce)
3. Constitution of India, 1950, Art. 25.
4. The Hindu Marriage Act, 1955 (Act No 25 of 1955).
5. The Indian Divorce Act, 1869 (Act No 04 of 1869).
6. The Dissolution of Muslim Marriage Act, 1939 (Act No. 06 of 1939).
7. The Parsi Marriage and Divorce Act, 1936 (Act No. 3 of 1936).
8. The Special Marriage Act, 1954 (Act No. 43 of 1954).
9. Manu IX, 46 and 101 quoted by Diwan, Paras, Modern Hindu Law, Allahabad Law Agency, 2015, 86.
10. Akhtar Naseem, Family Law on Divorce and Judicial Separation, Deep and Deep Publications, New Delhi, 2003, 9.
11. Id.
12. Manu IX, 72.
13. The Native Converts Marriage Dissolution Act, 1866 (Act No. 21 of 1866).
14. Supra Note 5.
15. Supra Note 7.
16. Ahmad A, Galwash, The Religion of Islam, Cairo, Nasr City, Egypt, 1945, 117.
17. Ibrahim, Abdul Hamid, Dissolution of Marriage, Islamic Quarterly - 3, 1956, 166-75.
18. Abu Dawud Sulaiman bin al-sunan Kanpur I as cited in K. N Ahmad, Muslim Law of Divorce, Kitab Bhavan, New Delhi, 1978, 3.
19. Supra Note 16.
20. Yousuf v. Swaramma, AIR 1971 Ker 261 (264).
21. Religion: St. Thomas in India-TIME, available at: [http://content.time.com > time > magazine > article, visited on 16-06-2021.](http://content.time.com > time > magazine > article, visited on 16-06-2021)
22. Beri BP. Law of Marriage and Divorce in India, Eastern Book Company, Delhi, 1989, 30.
23. Supra Note 13.
24. Supra Note 5.
25. Britannica, Parsi, Religion, History and Facts, available at: <https://www.britannica.com/topic/Parsi>, visited on 16-06-2021.
26. Mithibai v. Limgi Nowraji Banaji, (1881) 5 Bom 506.
27. Addresser v. Perzebove, 6 MIA 348: 10 Moo PC 375.
28. Parsi Marriage and Divorce Act, 1865 (Act No. XV of 1865)
29. Matrimonial Causes Act, 1857 (20 & 21 Vict.)
30. Parsi Marriage and Divorce Act, 1936 (Act No 03 of 1936).
31. Jewish Law of Marriage and Divorce in India, available at: <https://blog.ipleaders.in/jewish-law-marriage-divorce/>, visited on 16-06-2021.
32. Mielziner, David, The Jewish Law of Marriage and Divorce in Ancient and Modern Times And It's Relation to The Law of The State, Read Books Publishers, 2006, 1.
33. David Sarsoon Ezkeil v. Najia Noori Rueben, (1931) 55 Bom 804.
34. Wolfgang Freedman, Law in a Changing Society, Penguin, 1964, 237.
35. Supra Note 5.
36. Supra Note 6.
37. Supra Note 7.
38. Supra Note 8.
39. Supra Note 4.
40. Engels, Friedrich, Origin of Family, Private Property and State, Penguin Classics, 2010, 117-18.
41. Dr Diwan, Paras, Modern Hindu Law, Allahabad Law Agency, 2015, 64.
42. Supra Note 4; Sec. 13 (B).
43. Supra Note 8; Sec. 28.
44. Friedman, Wolfgang, the Law in a Changing Society, Penguin, 1964, 233.
45. The Law Commission, Reform of the Grounds of Divorce the Field of Choice, 1965 (Presented to Parliament in the year 1966), para 15.
46. The Law Commission of India, 71<sup>st</sup> Report (1978), the Hindu Marriage Act, 1955- Irretrievable Breakdown of Marriage as a Ground of Divorce.
47. Naveen Kohli v. Neelu Kohli, AIR 2006 SC 1675.
48. The Law Commission of India, 217<sup>th</sup> Report (2009), Irretrievable Breakdown of Marriage - Another Ground for Divorce.
49. Supra Note 6; Sec. 2 (ii).
50. AIR 1950 Sindh 8.
51. Rajinder v. Sarala, AIR 1993 MP 142.
52. Sapsford v Sapsford, (1954) P 394.
53. Gitabai v. Fattoo, AIR 1966 MP 130.
54. Subramma v. Saraswathi, (1966) 2 MLJ 263.
55. Amita v. Rathor, AIR (2000) 1 HLR 588.
56. Pushpa Devi v. Radhey Shyam, AIR 1972 Raj. 260.
57. Bhagwan Singh v. Amar Kaur, AIR 1962 Punj. 144; Ganeshi v. Ganeshi, (1948) All. E.R. 378.
58. Dastane v. Dastane, AIR 1976 SC 1534.
59. AIR 2006 SC 1675.
60. Lachman v. Meena, AIR 1964 SC 40.
61. Mangalbai v. Deorao, AIR 1962 M.P. 193.
62. Devi Singh v. Sushila, AIR 1980 Raj. 48.
63. AIR 1957 SC 176.
64. Sarala Mudgil v. Union of India, AIR 1995 SC 1531.
65. AIR 1973 Cal 545.
66. AIR 1982 Cal 138.
67. Swarajya Lakshmi v. Padma Rao, AIR 1974 SC 165.
68. Personal Law Amendment Act 2019 (Act No. 06 of 2019).
69. AIR 1999 SC 495.
70. Mulla, Hindu Law, Lexis Nexis Butterworths, New Delhi 19<sup>th</sup> Edition, 2, 146.
71. The Indian Evidence Act, 1872 (Act No. 01 of 1872), Sec. 108.
72. The Code of Criminal Procedure, 1973 (Act. No. 02 of 1974), Section 125.
73. AIR 2006 P&H 201.
74. 2006 Del 18.
75. Devinder Singh Narula v. Meenakshi Nangla, AIR 2012 SC 2890.
76. Shakuntalabai v. Kulkarni, AIR 1989 SC 1309.
77. Yamunaji H. Jhadav v. Nirmala, AIR 2002 SC 971.
78. Raj Kumar v. Anjali, AIR 1995 P&H.
79. The Wire, Islam Does Not Sanction Triple Talaq in One Sitting, available at: <https://thewire.in/law/islam-triple->

- talaq-one-sitting, visited on 24-07-2021
80. Asha Bibi v. Kadir, 1910 ILR 33 Mad 22.
  81. Fulchand v. Navab Ali Choudhry, (1909) 36 Cal 185.
  82. The reason for deeming it to be most approved form is that the husband behaves in a dignified manner and has also the power to revoke it (Sheikh Faylur Rahman v. Noor Jahan, AIR 1955 Hyd 144).
  83. Saiyed v. Anisa, AIR 1932. PC 25.
  84. Diwan, Paras, Muslim Law in Modern India, Allahabad Law Agency, Faridabad, 1985, 77-78.
  85. Shayara Bano v. Union of India, (2017) 9 SCC 1.
  86. Sarabhai v. Rabiabai (1905) ILR 30 Bom 537.
  87. Md. Shamsuddin v. Noorjehan, AIR 1955 Hyd 144.
  88. AIR 1992 Cal. 93.
  89. AIR 1950 Sind 8.
  90. ILR (2002) 3 Ker. 126.
  91. AIR 1971 Ker 261.
  92. AIR 2002 Ker 370.
  93. Aziz Bano v. Muhammad, (1925) 47 All 823.
  94. AIR 1977 Cal 90.
  95. Supra Note 8; Sec. 27 (1) (a) to 27 (1) (h).
  96. Ibid; Section 27 (1-A).
  97. Ibid; Section 28.
  98. Supra Note 5.
  99. The Indian Divorce (Amendment) Act, 2001.
  100. Supra Note 5; Sec. 10(1).
  101. Ibid; Sec 10(2).
  102. The term District Court has been defined in Section 3 (3) of the Indian Divorce Act, 1869 as “in the case when any petition is presented under this Act, then the District Court within whose local jurisdiction, or within whose jurisdiction the husband or wife reside, or last resided together.”
  103. ILR 50 Bom. 359.
  104. The Foreign Marriage Act, 1969 (Act no. 33 of 1969).
  105. AIR 1994 Bom 120.