CHAPTER- V
DIVORCE UNDER VARIOUS PERSONAL LAWS: A COMPARATIVE STUDY

1. Introduction

All over the civilized world, marriage is a very important social institution. Whether considered as a sacrament or a contract marriage gives rise to status\(^1\). It confers a status of husband and wife on the parties to marriage and it confers a status of legitimacy on the children of marriage. The basic difference between the marriage and any other contract is that a commercial or mercantile contract does not give rise to any status, while marriage does. Then, once the marriage is performed, the contract of marriage has no utility in respect of the marriage or in regard to any rights and liabilities arising under it. Practically all the countries of the world agree that marriage is a union between man and woman. Beyond this there are differences. In the Western countries marriage is considered as a contract, and a monogamous union, though Roman Catholic Church (despite the recent Italian legislation conferring power of dissolving marriage on civil courts) still insists that marriage is a sacrament and an indissoluble union. The Muslim world has all along considered marriage as a civil contract though has, at the same time, recognised limited polygamy.\(^2\) At one time in the East- among Hindus and Buddhists- marriage was considered as a sacrament and indissoluble union; among both the people unlimited polygamy was recognised. Today the Buddhists and Hindus no longer recognize polygamy. The Chinese Buddhists consider their marriage as a contract.\(^3\) Among Hindus marriage is something in between a sacrament and a contract.\(^4\)

According to the Vedas a Hindu Marriage is an indissoluble union till eternity. It is defined as a union of “bones with bones, flesh with flesh and skin with skin, the husband

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\(^1\) Rajneesh Rajpurohit (Dr.) v. Savita, AIR 2008 Raj 119, “the concept of marriage under the Shastric Hindu Law is a sacrament, religious ceremony which results in a sacred and a holy union of man and wife by which the wife is completely transplanted in the household of her husband, become a part and parcel of the body of her husband.”

\(^2\) A Muslim can have four wives simultaneously, and even when he takes a fifth or more, the marriage is not void but merely irregular (fasid). Some Muslim countries like Turkey, have abolished polygamy, while some like Pakistan have placed restriction on its practice. On the other hand, in countries, like India, Muslims are allowed to practice polygamy limited to four wives.

\(^3\) See the Chinese Family Law of 1931 and 1949.

and wife become as if they were one person. The Hindu Marriage Act, 1955 came into force on 18th May 1955. It applies to a Hindu by religion in any of its forms and development. A Hindu marriage may be solemnized between any two persons who are Hindus by faith and religion. Hindu marriage is monogamous. According to Muslim law marriage is a purely civil contract; no religious ceremony is essential; there must be an exchange of offer and acceptance respectively by the parties, in each other’s presence and hearing. A special feature of a Muslim marriage is that the wife is always entitled to receive from her husband money or other property in consideration of the marriage.

The Indian Christian Marriage Act is applicable to persons who profess the Christian religion including natives in India converted to Christianity and their Christian descendants. This Act deals with the forms and ceremonies of a Christian marriage.

The marriage and divorce of Parsis in India is now governed by legislation contained in the Parsi Marriage and Divorce Act. The marriage is monogamous.

The making and validity of a contract of marriage between Jews in India depends wholly on the religious usages of the Jewish faith and is unaffected by legislation.

In India, Marriage and Divorce is treated as part of the personal law of the parties considered mainly by reference to their religious profession. With the advancement of time and social awareness, several acts have been passed by the government to make the present day divorce procedure in India more progressive with respect to gender affairs and related sensitive issues.

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6 Section 2, Hindu Marriage Act, 1955.
7 Monogamy amongst the Hindus is introduced for the first time by the Act. Bigamy now punished under the Indian Penal Code, 1860. The conditions and requirements of a valid marriage are now very much simplified as is evident from the provisions of section 5 and 17 of the Hindu Marriage Act, 1955.
8 Ijab (proposal) - the marriage should be proposed by or on behalf of either party thereto this is called ijab.
9 Qubul (acceptance) – the proposal should be accepted by or on behalf of other party this is called qubul.
10 Maher or dower is a sum that becomes payable by the husband to the wife on marriage, either by agreement between the parties or by operation of law. It may be either be prompt (mu’ajjal) or deferred (mu’wajjal). The Islamic concept of maher has been widely misunderstood. The fact is that maher is neither consideration nor dowry; it has a unique position of its own; Abdul Kadir v. Salima (1886) 8 All 149; Hamira Bibi v. Zubaida Bibi AIR 1916 PC 46; Syed Sabir Hussain v. Farzand Hasan AIR 1938 PC 80.
Divorce procedure in India is based on the following legislation:-

1. The Hindu Marriage Act, 1955
2. The Special Marriage Act, 1954
3. The dissolution of Muslim Marriage act, 1939
4. The Indian Divorce Act, 1869
5. The Parsi Marriage and Divorce Act, 1936
6. The Foreign Marriage Act, 1969

2. Divorce under Hindu Law

Fault grounds of divorce

The Hindu Marriage Act, 1955 recognizes nine-fault grounds of divorce which are available to both the spouses and four-fault grounds are available to the wife alone. Section 13(1) of the Hindu Marriage Act, 1955 under which either spouse can seek divorce runs:

Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or wife, be dissolved by a decree of divorce on the ground that the other party-

i) Has after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse, or

   ia) Has, after the solemnization of marriage, treated the petitioner with cruelty, or

   ib) Has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition, or

ii) Has ceased to be a Hindu by conversion to another religion, or

iii) Has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such a kind and to such...
an extent that the petitioner cannot reasonably be expected to live with the respondent.

iv) Has been suffering from a virulent and incurable form of leprosy, or

v) Has been suffering from venereal disease in a communicable form, or

vi) Has renounced the world by entering any religious order, or

vii) Has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive.

Section 13(2) under which wife alone can seek divorce runs as under-

A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground-

i) In the case of any marriage solemnised before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnisation of the marriage of the petitioner,

Provided that in either case the other wife is alive at the time of the presentation of the petition, or

ii) That the husband has since the solemnisation of the marriage, been guilty of rape, sodomy or bestiality, or

iii) That in a suit under section 18 of the Hindu Adoption and Maintenance Act, 1956, or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 a decree or order has been passed against husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards,

iv) That her marriage (whether consummated or not) was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

13 Subs. By Act 68 of 1976, sec. 7(c) (ii), for clause (i) (w.e.f. 27-5-1976).
Explanation- This clause applies whether the marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).

3. Divorce under Special Marriage Act

Fault Grounds of Divorce

Section 27(1) of the Special Marriage Act, 1954 containing ten-fault grounds of divorce on which either spouse can seek divorce, runs:

Subject to the provisions of this Act and to the rules made there under, a petition for divorce may be presented to the district court either by the husband or the wife on the ground that the respondent-

(a) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(c) is undergoing a sentence, of imprisonment for seven years or more for an offence as defined in the Indian Penal Code;

(d) has since the solemnization of the marriage treated the petitioner with cruelty; or

(e) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation- In this clause-

(a) the expression “mental disorder” means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression “psychopathic disorder” means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in

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14 Subs. By Act 68 of 1976, sec. 27, for clause (a) and (b) (w.e.f. 27-5-1976).
15 Subs. By Act 68 of 1976, sec. 27, for clause (e) and (f) (w.e.f. 27-5-1976).
abnormally aggressive or seriously irresponsible conduct on the part of the respondent, and whether or not it requires or is susceptible to medical treatment; or

(f) has been suffering from venereal disease in a communicable form; or

(g) has been suffering from leprosy, the disease not having been contracted from the petitioner, or

(h) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive.

**Explanation**- In this sub-section, the expression “desertion” means desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage and its grammatical variations and cognate expressions shall be construed accordingly.

Section 27(1A)\(^{16}\) of the Special Marriage Act, 1954 which contains two fault grounds on which wife alone can seek dissolution of marriage runs:

A wife may also present a petition for divorce to the district court on the ground-

(i) that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality;

(ii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal procedure, 1973 (2 of 1974) [or under the corresponding section 488 of the code f criminal procedure, 1898 (5 of 1898)], a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards.

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\(^{16}\) Ins. by Act 68 of 1976, sec. 27 (w.e.f. 27-5-1976).
4. Divorce under Muslim Law

Fault Grounds of Divorce

The dissolution of Muslim Marriage Act, 1939 contains nine-fault grounds on which wife alone can sue. According to Section 2-

A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds namely:--

(i) That the whereabouts of the husband have not been known for a period of four years.

(ii) That the husband has neglected or has failed to provide for her maintenance for a period of two years.

(iii) That the husband has been sentenced to imprisonment for a period of seven years or upwards.

(iv) That the husband has failed to perform, without reasonable cause, his marital obligation for a period of three years;

(v) That the husband was impotent at the time of the marriage and continues to be so;

(vi) That the husband has been insane for a period of two years or is suffering from leprosy or a virulent disease;

(vii) That she, having been given in marriage by her father or other 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;

(viii) That the husband treats her with cruelty, that is to say-

a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

b) associates with women of evil repute or leads an infamous life, or
c) attempts to force her to lead an immoral life, or

d) disposes of her property or prevents her exercising her legal rights over it, or

e) obstructs her in the observance of her religious profession or practice, or

f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;

(ix) on any other ground which is recognised as valid for the dissolution of marriage under Muslim Law; Provided that-

a) no decree shall be passed on ground (iii) until the sentence has been come final;

b) a decree passed on the ground (i) shall not take effect for a period of six months from the date of such decree and if the husband appears either in person or through an authorised agent within that period and satisfies the court that he is prepared to perform his conjugal duties, the court shall set aside the said decree; and

c) before passing a decree on ground (v) the court shall, on application by the husband, make an order requiring the husband to satisfy the court within a period of one year from the date of such order that he has ceased to be impotent and if the husband so satisfies the court within such period, no decree shall be passed on the said ground.

5. Divorce under Christian Law

Fault Ground of Divorce

Sub-Section (1) of section 10 of the Indian Divorce Act, 1869, which contains the ground of divorce which runs as under:

**Grounds for dissolution of Marriage**17- (1) any marriage solemnized, whether before or after the commencement of the Indian Divorce (Amendment) Act 2001, may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent-

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17 Subs. by Act 51 of 2001, sec. 5, for section 10 (w.e.f. 3-10-2001).
(i) Has committed adultery; or

(ii) has ceased to be Christian by conversion to another religion; or

(iii) has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(iv) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or

(v) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from venereal disease in, 1 communicable form; or

(vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive; or

(vii) has willfully refused to consummate the marriage and the marriage has not therefore been consummated; or

(viii) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; or

(ix) has deserted the petitioner for at least two years immediately preceding the presentation of the petition; or

(x) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.

(2) A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

6. Divorce under Persian Law

Fault Grounds of Divorce:

The Parsi Marriage and Divorce Act, 1936, contain ten-fault grounds of divorce on which either spouse may seek divorce. Section 32 runs:
Any married person may sue for divorce on any one or more of the following grounds, namely:

(a) That the marriage has not been consummated within one year after its solemnization owing to the willful refusal of the defendant to consummate it;

(b) That the defendant at the time of the marriage was of unsound mind and has been habitually so up to the date of the suit: Provided that divorce shall not be granted on this ground, unless the plaintiff: (1) was ignorant of the fact at the time of the marriage, and (2) has filed the suit within three years from the date of the marriage;

(bb) that the defendant has been incurably of unsound mind for a period of two years or upwards immediately preceding the filing of the suit or has been suffering continuously or intermittently from mental disorder of such kind and to such an extent that the plaintiff cannot reasonably be expected to live with the defendant.

**Explanation**—In this clause:

(i) The expression “mental disorder” means mental illness, arrested or incomplete development of psychopathic disorder or any other disorder or disability of mind and includes schizophrenia:

(ii) The expression ‘psychopathic disorder’ means a persistent disorder or disability of mind (whether or not including sub normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the defendant, and whether or not it requires or is susceptible to medical treatment;

(c) That the defendant was at the time of marriage pregnant by some-person other than the plaintiff:

Provided that divorce shall not be granted on this ground, unless: (1) the plaintiff was at the time of the marriage ignorant of the fact alleged, (2) the suit has been filed within two years of the date of marriage, and (3) Marital intercourse has not taken place after the plaintiff came to know of the fact;

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18 Ins. by Act 5 of 1988, sec. 8 (w.e.f. 15-4-1988).
(d) that the defendant has since the marriage committed adultery or fornication or bigamy or rape or an unnatural offence;

Provided that divorce shall not be granted on this ground, if the suit has been filed more than two years after the plaintiff came to know of the fact;

(dd) \(^{19}\) that the defendant has since the solemnization of the marriage treated the plaintiff with cruelty or has behaved in such a way as to render it in the judgment of the court improper to compel the plaintiff to live with the defendant;

Provided that in every suit for divorce on this ground it shall be in the discretion of the court whether it should grant a decree for divorce or for judicial separation only;

(e) That the defendant has since the marriage voluntarily caused grievous hurt to the plaintiff or has infected the plaintiff with venereal disease or, where the defendant is the husband, has compelled the wife to submit herself to prostitution:

Provided that divorce shall not be granted on this ground if the suit has been filed more than two years (i) after the infliction of the grievous hurt, or (ii) after the plaintiff came to know of the infection, or (iii) after the last act of compulsory prostitution;

(f) That the defendant is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code (45 of 1960):

Provided that divorce shall not be granted on this ground, unless the defendant has prior to the filing of the suit undergone at least one year’s imprisonment out of the said period; that the defendant has deserted the plaintiff for at least two years; that an order has been passed against the defendant by a Magistrate awarding separate maintenance to the plaintiff, and the parties have not had marital intercourse for one year or more since such decree or order;

(i) \(^{20}\)[xxx]

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\(^{19}\) Ins. by Act 5 of 1988, sec. 8 (w.e.f. 15-4-1988).

\(^{20}\) Clause (i) omitted by Act 5 of 1988, sec. 8 (w.e.f. 15-4-1988).
(j) That the defendant has ceased to be a Parsi by conversion to another religion. Provided that divorce shall not be granted on this ground if the suit has been filed more than two years after the plaintiff came to know of the fact.

7. Divorce under Jews\textsuperscript{21} Law

Under Jewish law, a man can divorce a woman for any reason or no reason. The Talmud specifically says that a man can divorce a woman because she spoiled his dinner or simply because he finds another woman more attractive, and the woman’s consent to the divorce is not required. In fact, Jewish law requires divorce in some circumstances: when the wife commits a sexual transgression, a man must divorce her, even if he is inclined to forgive her.

This does not mean that Judaism takes divorce lightly. Many aspects of Jewish law discourage divorce. The procedural details involved in arranging a divorce are complex and exacting. Except in certain cases of misconduct by the wife, a man who divorces his wife is required to pay her substantial sums of money, as specified in the ketubah (marriage contract). In addition, Jewish law prohibits a man from remarrying his ex-wife after she has married another man. Kohanim cannot marry divorcées at all.

Dissolution of Marriage:

- **Death of either party** - by death of either party, the marriage stands dissolved.
- **Void marriage and non-fulfilment of conditions** - if the marriage was between prohibited degrees, it was *void ab initio*. No formal divorce is necessary in such a case. When the marriage was preceded by *Kaseph Kiddushim* and some conditions were put during such ceremony, the aggrieved party - in the event of non-fulfilment of the conditions by the other party - may get rid of the effects of betrothal without intervention of the court.\textsuperscript{22}
- **Mutual agreement** - the Jewish law provides that the court should not interfere where both parties declare that their marriage has failed and that they would like to dissolve their marriage.

\textsuperscript{21} The Jewish has no codified legislation. They are governed by their own customary laws.

\textsuperscript{22} See Ezekiel v. Reuben 33 Bom LR 725.
(d) **Divorce through court**- Rev. M. Mieliziner\(^{23}\) has presented the matrimonial law as divided into two categories:

(1.) Old law, according to the religious scripture, referred to as the Mosaic Law and its Rabbinical interpretations and provisions; and

(2.) The causes for divorce considered in the modern legislations in England and the United States.

The grounds of divorce (besides by mutual consent) under the old personal law are as follows:

The husband is entitled to divorce:

i. On account of wife’s adultery and even on strong suspicion of her having committed this crime;

ii. On account of her public violation of decency;

iii. On account of change of religion or proved disregard of the ritual law in the management of the household by which she caused him to transgress the religious precepts against his will;

iv. On account of obstinate refusal of connubial rights during a whole year;

v. On account of her unjustified refusal to follow him to another domicile;

vi. On account of insulting her father-in-law in the presence of her husband, or her insulting the husband himself;

vii. On account of certain incurable diseases, rendering cohabitation impracticable or dangerous, such as epilepsy etc.

The wife can claim divorce on the following grounds:

i. Gross immoral living. The husband leads an immoral life;

ii. Loathsome disease which the husband contracted after marriage but not from the wife;

iii. Impotency of the husband;

iv. Refusal by the husband to matrimonial intercourse;

v. Apostasy. If the husband changes the religion, the wife may claim divorce;

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vi. Distasteful or immoral trade. If the husband is engaged in such trade so as to render the wife shun his company, she may claim divorce;  
vii. If the husband squanders away his property and refuses to maintain the wife, she may claim divorce;  
viii. Cruelty, ill-treatment by the husband is another ground for divorce;  
ix. If the husband, having committed a crime, flees away from the country, the wife may claim divorce.

The matrimonial causes of the Jews are also regulated by modern legislations in some parts of England and the United States. Rev. M. Mieliziner in his treatise has also mentioned about such modern legislations and has compiled the principal grounds on the basis of which divorce may be granted.

Principal grounds of divorce on the basis of modern legislative principles:

(a) Adultery;  
(b) Cruelty, differently described in the laws of different States, such as intolerable severity, injurious treatment, indignities making life burdensome, etc.  
(c) Desertion, also termed as abandonment, or absence without good cause. The time of wilful absence required to constitute desertion is differently fixed in the statutes varying from one to five years.  
(d) Habitual drunkenness.  
(e) Imprisonment for crime. The duration of imprisonment varies in different States.  
(f) Neglect to provide for the wife’s maintenance and support, though being able to do so. Also gross neglect of duty on the part of the wife is a ground for divorce in some of the States.  
(g) Impotency in several States, qualified as existing before marriage, and in this case evens a cause for annulling the marriage, so as to render it void ab initio.  
(h) Joining a religious society which holds marriage to be unlawful is by the statutes of a few States made a ground for divorce.  
(i) In some of the States the causes for which divorce may be granted are wholly or in part left to the discretion of the Courts.

24 Ibid.
In the case of *Bension Joseph Hayeema v. Sharon Bension Hayeema*,\(^{25}\) the husband initiated the proceeding for divorce on the grounds that the wife insulted him and her father-in-law in his presence and of other allegations. Evidence, however, revealed that his parents and sister used to insult the wife and then left her and her children to her meager earnings. Upon evidence as also on the basis of Jewish matrimonial law, the husband’s case failed.

In the case of *Benjamin v. Benjamin*,\(^{26}\) it has further been observed by Crump J that the Jews in Bombay came mainly from Baghdad and it was improbable that they regard the Jewish law in precisely the same light as the Jews living in England or in America. It would therefore be plain that the custom of the community must be considered on points where there was a room for doubt. Referring to the uncertainty prevailing in India about the exact state for Jewish law on “divorce”, Crump J suggested for consideration of the Jewish community whether they would not be well advised to place upon a more satisfactory basis the adjustment of their matrimonial disputes. This could be done either by establishment of a “bethdin” such as is found in Jerusalem and Baghdad and perhaps in London or by special legislation similar to the Parsi Marriage and Divorce Act, 1936.

8. Common Grounds of Divorce

Now each common grounds of divorce under various personal laws discuss in detail:

i) Adultery

Adultery\(^{27}\) is a ground of divorce under Hindu Marriage Act, 1955, Special Marriage Act, 1954, Indian Divorce Act, 1869 (though in the case of wife’s petition for divorce adultery simpliciter is a not a ground, it is adultery-plus), and the Parsi Marriage and Divorce Act, 1936. Under the Dissolution of Muslim Marriages Act, 1939 adultery as such is not a ground of divorce but husband’s association with women of evil repute or his

\(^{25}\) 1 (1996) DMC 546 (Bom- DB).

\(^{26}\) AIR 1926 Bom 169; 28 Bom LR 328.

leading an infamous life is a ground of divorce, though it is considered to amount to cruelty under the Act it is something akin to living in adultery.28

In the Oxford Dictionary, ‘adultery’ is defined as ‘the voluntary sexual intercourse of a married person with one of the opposite sex, whether married or not’. Adultery is defined as ‘the willing sexual intercourse between a husband or a wife, with one of opposite sex, while the marriage subsists. In India adultery is also a criminal offence as provided in Indian Penal code, 1860.29

The wording of the clause in different matrimonial statutes is somewhat different (though under the Hindu Marriage Act, 1955 and Special Marriage Act, 1954 the clauses have identical language), but basically they have the same meaning. Under the Hindu Marriage Act, 195530 and the Special Marriage Act, 195431 clause is worded thus respondent has, after the solemnization of marriage, had voluntary sexual intercourse with any person other than his or her spouse. Under the Parsi Marriage and Divorce Act, 193632 the language of the clause is different: defendant has since the marriage committed adultery, but under Parsi Law divorce will not be granted on the ground if the suit for divorce has been filed more than two years after the plaintiff came to know of the fact, while under the Indian Divorce Act, 1869 the clause runs: the other party, since the solemnization of the marriage been guilty of adultery.33

Under section 10 of the Indian Divorce Act, 1869, while the husband is entitled to dissolution of marriage on the ground of the wife’s adultery, the wife is not so entitled unless she proves that the husband’s adultery is incestuous or is coupled with cruelty or bigamy or desertion. In other words, the husband is entitled to dissolution of marriage on the ground of adultery simpliciter on the part of the wife, but the wife is not so entitled unless some other matrimonial fault is also found to be super-added. In Swapan Ghose v.

28 Section 2 (viii) (b).
29 Section 497 Adultery.- Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extent to five years, or with fine or with both. In such case the wife shall not be punishable as an abettor.
30 Secton 13(1) (i).
31 Section 27(1) (a).
32 Section 32(d).
33 Section 10.
Sadanand Ghose\textsuperscript{34}, a special bench of Calcutta High Court observed that such a provision was discriminatory. But surprisingly, the court did not hold the provision ultra-vires the constitution.

However, in \textit{Ammini E.J. v. Union of India}\textsuperscript{35} holding the provision invalid, A special bench of Kerala High Court observed that as far as the ground of adultery was concerned husband is in a favourable position when compared to wife since she has to prove adultery with one or other aggravating circumstances. Evidently this is a discrimination based purely on sex thus this provision is violative of Article 15 of the Constitution. The court held that qualifying words from the section are unconstitutional and thus wife can sue on the ground of adultery, desertion and cruelty.

\textbf{ii) Cruelty}

Cruelty\textsuperscript{36} is a ground of divorce as well as judicial separation under the Hindu Marriage Act 1955\textsuperscript{37}, the Special Marriage Act, 1954\textsuperscript{38} and the Parsi Marriage and Divorce Act, 1936\textsuperscript{39}. Under the last statute “voluntarily causing grievous hurt” is also a ground for divorce\textsuperscript{40}. Under the Parsi law if behaviour of defendant is such as to render, in the judgment of the court, improper to compel the other party to live with the defendant divorce may obtained\textsuperscript{41}. Under the Indian Divorce Act, 1869\textsuperscript{42}, wife can sue for divorce on

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\textsuperscript{34} AIR 1989 Cal. 1.
\textsuperscript{35} AIR 1995 Ker 252.
\textsuperscript{37} Clause (ia) of section 13(1) of the Hindu Marriage Act, 1955 provides cruelly as a ground for a decree of divorce. It lays down that the other party— has, after the solemnization of the marriage, treated the petitioner with cruelty.
\textsuperscript{38} Section 27(d) and section 23(i).Clause (d) of section 27 of the Special Marriage Act, 1954 provides that the respondent has, since the solemnization of marriage, treated the petitioner with cruelty.
\textsuperscript{39} Clause (dd) of section 32 of the Parsi Marriage and Divorce Act, 1936 runs: that the defendant has since the solemnization of marriage treated the plaintiff with cruelty or has believed in such a way as to render it in the judgment of the court improper to compel the plaintiff to live with the defendant. There is yet another clause, i.e., clause (e) of the original Act which is akin to physical cruelty and runs as under.

That the defendant has since the marriage caused grievous hurt to the plaintiff... or where the defendant is the husband, has compelled the wife to submit herself to prostitution.

The proviso to the section gives to the court discretion to pass a decree of dissolution of marriage or judicial separation.
\textsuperscript{40} Section 32(e).
\textsuperscript{41} Section 34.
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the basis of husband’s adultery coupled with such cruelty as without adultery would have entitled her to a divorce a *mensa et toro*43 while “cruelty” as such is a ground for judicial separation44. In *Swapna Ghose v. Sathanda Ghose*45 a Special Bench of the Calcutta High Court said that for Christians, desertion and cruelty are not grounds of divorce, while these are for other communities and therefore the provision is discriminatory. But, still, the Court declined and held the provision unconstitutional. Under Muslim law a wife can’t sue for divorce on the ground of husband’s cruelty; cruelty has been defined46.

**Cruelty: Definition, Meaning**

The English legislature as well as the courts have not attempted to define cruelty and English as well as Indian courts have emphasized that in the back-drop of spousal relationship, acts or conduct constituting cruelty are infinitely variable, and then in the ever changing and variable social context with increasing complexities of modern life, no attempt at defining cruelty is likely to succeed. The Royal Commission on Marriage and Divorce in its Report (1956) said, “We consider that it is...not (proper) to have a detailed definition, but to allow the concept of cruelty to remain open to such adjustments as it is desirable to make through the media of judicial decisions so as to accord with the changing social conditions.” This is also the view expressed by the Indian Law Commission, and it is submitted that this should continue the approach to cruelty. Indeed, the concept of cruelty has undergone changes during the last half a century. The mosaic of married life, the Himachal Pradesh High Court observed, is of myriad patterns. Acts of cruelty are behavioural manifestations stimulated by different factors in the life of spouses arid their surroundings, and therefore, each case will have to be determined by its own set of facts. The Court added, physical cruelty is often easy to comprehend, but difficulty usually arises in considering what amounts to mental cruelty; perhaps, mental cruelty is lack of such conjugal kindness which Inflicts pain of such a decree and duration that it

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42 Clause (x) of section 10(1) of Indian Divorce Act, 1869 mentions that the respondent- has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.
43 Para 2 of section 10.
44 Section 22.
45 AIR 1989 Cal 1 (SB); see also Rabin v. Rupia, AIR 1989 MP 326.
46 Section 2 (viii), of the Dissolution of Muslim Marriage Act, 1939.
adversely affects the health, mental or bodily, of the spouse on whom it is inflicted\(^47\). Acts and conduct constituting cruelty can be so numerous and varied that it would be well-nigh impossible to fit them in any water-tight compartments. Cruelty may be subtle or brutal, physical or mental. It may be by words, gestures or by mere silence\(^48\).

Thus, it is submitted under all the Indian matrimonial Statutes, cruelty can be given the same meaning. Giving cruelty a modern interpretation it will include both physical and mental cruelty. It is in this background that the concept of cruelty should be looked at. The 1897 formulation of cruelty in the house of Lord, *Russel v. Russel*\(^49\) is still a good starting point in any discussion of cruelty. The formulation of cruelty was made thus:

Cruelty is a conduct of such a character as to have caused danger to life or health, bodily or mental give rise to reasonable apprehension of such danger.

**Physical cruelty**

“Causing of grievous hurt” under the Parsi Marriage and Divorce Act, 1936 and “habitual assaults” under the Dissolution of Muslim Marriages Act, 1939\(^50\) are grounds of divorce. In *Patnek v. Patnek*\(^51\) the Bombay High Court held that unless an act amounts to grievous hurt, it would not be ground of divorce. In *Md. Sharif v. Nasrin*\(^52\) the Rajasthan High Court has held that cruelty should be such as to give rise to a reasonable

\(^{47}\) Padma v. Parma Ram, AIR 1959 HP 37; Bhagat v. Mrs. D. Bhagat; AIR 1994 SC 710.
\(^{48}\) Sukumar Mukherjee v. Tripti Mukherjee, AIR 1992 Pat 32.
\(^{49}\) 1897 AC 305.
\(^{50}\) Section 2 of The Dissolution of Muslim Marriage Act, 1939 lays down grounds for a decree for dissolution of marriage. It provides: A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage… that the husband treats her with cruelty, that is to says—

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) associates with women of evil repute or lead an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran.

\(^{51}\) 39 Bom LR 845.
\(^{52}\) AIR 1996 Raj 23.
apprehension that it would cause danger to life, limb or health. It is submitted that this is not ‘so under’ Muslim law. It is not so even under Hindu Law though originally Hindu Marriage Act used these words of course, the court rightly said that allegation should not be of general nature. These should be specific Section 2(4) of the Parsi Marriage and Divorce Act, 1936 defines grievous hurt as under.

(a) emasculaton;
(b) permanent privation of sight of either eye;
(c) permanent privation of the hearing of either ear;
(d) privation of any member or joint;
(e) destruction or permanent impairing of the power of any member or joint;
(f) permanent disfiguration of the head or face;
(g) any hurt which endangers life.

Under Muslim Law “assault” simpliciter is not a ground for divorce. It must be habitual assault, which in the context, would mean repeated acts of assault. Beating of wife or constant threats to beat her would amount to cruelty\(^53\). In *Hamid Hussain v. Kubra Begam*\(^54\) and *Asma Bibi v. Zainudin*\(^55\) it was held that near chastisement of wife on one or two occasions would not amount to assault. In *Tanni v. Kalloo*\(^56\) it was held that if it was shown that the husband gave beating to the wife at regular intervals extending over a considerable period, it would amount to habitual assault. Similarly, where within the first twenty days of the marriage when wife was living in the matrimonial home she was assaulted by the husband, ill-treated and bolted inside a room, it would amount to habitual assault\(^57\). It may be said that no single act of assault may amount of cruelty, because of its mildness but if these acts are continued for certain duration there accumulated effect would amount to cruelty.

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\(^{53}\) AIR 1947 All.16
\(^{54}\) (1918) 40 All 332.
\(^{55}\) 79 IC 999.
\(^{56}\) 108 IC 133.
\(^{57}\) Khachern v. Khairunissa, AIR 1952 All 638.
Proviso to clause (dd) of section 32 of the Parsi Marriage and Divorce Act, 1936 lays down that in a petition for divorce on the ground of cruelty, the court has discretion to pass a decree of divorce or judicial separation.

**Mental Cruelty**

Under the Dissolution of Muslim Marriages Act, 1939, cruelty has been defined in very broad terms; Section 2 (viii) (a) uses the words “cruelty of conduct even if such conduct does not amount to physical ill-treatment.” This language is wide enough to include all the aforesaid cases of cruelty that have been discussed earlier. Not merely this, it would cover all kinds of misconduct, or misbehaviour serious and not very on the part of the husband, and thus goes is much beyond the “legal cruelty” as the term understood under English law and the Indian matrimonial statutes. In *Abdul Aziz v. Bashiran Bibi* a Pakistani case, it was held that a course of conduct pursued by the husband calculated to break the spirit of the wife by physical or moral force was systematically exerted towards wile to such a degree and to such a length of time resulting in undermining her health, it would amount to cruelty. Similarly, where wife is turned out of the matrimonial home or where the breach between the marital relationship is irreparable or where parties have been on bad terms for a considerable time or where the husband sued the wife in a criminal court on a false charge, it would amount to cruelty.

**iii) Desertion**

Under most of the Indian statutes desertion is a ground for divorce or judicial separation or for both. The Special Marriage Act, 1954 and the Hindu Marriage Act,
1955\textsuperscript{63} contain an identical provision, and desertion is a ground for both desertion of marriage\textsuperscript{64} and judicial separation\textsuperscript{65}. Earlier under the Indian Divorce Act, 1869 desertion as such was not a ground of divorce for either spouse. But in the case of wife’s petition for divorce, husband’s desertion for a continuous period of two years coupled with his adultery was a ground for divorce\textsuperscript{66}. However, two years’ desertion without reasonable cause is a ground for judicial separation for either spouse\textsuperscript{67}. Now position has been changed by the Indian Divorce (Amendment) Act, 2001 both adultery\textsuperscript{68} and desertion is separate ground for divorce.\textsuperscript{69}

Under the Parsi Marriage and Divorce Act, 1936\textsuperscript{70} two years’ desertion is a ground for divorces\textsuperscript{71} as well as judicial separation\textsuperscript{72}. Section 2(iv) of the Dissolution of Muslim Marriage Act, 1939\textsuperscript{73} does not recognize desertion as such as a ground of divorce. But a Muslim wife can sue her husband for dissolution of marriage if “the husband has failed to perform without reasonable clause his marital obligation for a period of three years.” Further clause (ii) of the section lays down that the husband has neglected or failed to

\begin{itemize}
  \item Section 13(1) (ib) of the Hindu Marriage Act, 1955 provides desertion as a ground for divorce. It lays down that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.
  \item The formulation of “desertion” is contained in Explanation to section 13(1), The Explanation runs:
    \begin{itemize}
      \item In this sub-section, the expression “desertion” means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.
    \end{itemize}
  \item Section 27(1) (b) of the Special Marriage Act, 1954 and section 13(1) (ib) of the Hindu Marriage Act, 1955.
  \item Section 23(11)(a) of the Special Marriage Act, 1954 and section 10(1) of the Hindu Marriage Act, 1955.
  \item Section 10, Para 2 of the Indian Divorce Act, 1969.
  \item Section 22.
  \item Section 10 (1) (i) “the respondent has committed adultery”.
  \item Section 10 (1) (ix) “the respondent has deserted the petitioner for at least two years immediately preceding the presentation of the petition”.
  \item Section 32(g) of the Parsi Marriage and Divorce Act, 1936 contains the ground of divorce on the basis of desertion. It lays down that a spouse may sue for divorce on the ground—that the defendant has deserted the plaintiff for at least two years.
  \item Section 32(g).
  \item Section 34.
  \item Section 2(iv) of the Dissolution of Muslim Marriages Act, 1939 lays down that a Muslim wife shall be entitled to a decree of dissolution, of marriage on any one or more of the following grounds, namely that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years.
\end{itemize}

See also Section 2(ii) of the Act runs: that the husband has neglected or failed to provide for the maintenance for a period of two years.
provide for her maintenance for a period of two years.” It is submitted that as we would see, these clauses virtually amounts to desertion.

**Definition and Elements of Desertion**

The courts have consistently refused to define ‘desertion’ both in England and India. Earlier English courts adopted a restrictive view of desertion apprehending that too wide a definition would lead to divorce by mutual consent. But later on the attitude of the courts became liberal\(^\text{74}\). Under the Hindu Marriage Act, 1955 and Special Marriage Act, 1954, “desertion” means the “desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and include willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly”. In short, desertion means the rejection by one party of all the obligations of marriage. Desertion means permanent forsaking or abandonment of one spouse by the other without any reasonable cause and without the consent of the other. Desertion, in short, means a total repudiation of marital obligation. To explain it with an analogy: most of us are familiar with the term desertion—deserter from the army. A deserter from the army is one who runs away from his post or from his duty. A spouse is in desertion if it runs away from his marital obligations, from cohabitation. The “running away” may mean that he actually leaves the matrimonial home permanently or living in matrimonial home refuses to perform marital obligations; he ceases to cohabit or he abandons his matrimonial obligations. The latter aspect of desertion is termed as constructive desertion. Thus desertion may be classified under the following heads:

(a) Actual desertion,

(b) Constructive desertion\(^\text{75}\) and

(c) Willful neglect: this expression is used both under the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955 and in some cases; it has been considered part of constructive desertion.

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\(^{74}\) Perry v. Perry (1952) 1 All ER 1076.

\(^{75}\) Gollins v. Gollins, (1964) AC 644.
It is submitted that failure to perform without reasonable cause of marital obligations for a period of three years under Muslim law will also amount to constructive desertion.

The main elements of desertion\textsuperscript{76} are:

(a) the fact of separation (factum deserdendi) and

(b) the intention to desert (animus deserdendi)

These elements apply to the spouse who is in desertion; the deserter spouse must have left the other party with an intention to forsake and abandon the other permanently.

The further elements are:

(i) without any reasonable cause,

(ii) without the consent of the other party or against his wishes.

These elements apply to deserted spouse, i.e. the deserted spouse must not have provided a reasonable excuse or cause for the deserter spouse to leave or withdraw from cohabitation he should not give his consent for the act of desertion.

(iii) desertion should be at least of two ‘years’ duration under the Hindu Marriage Act, 1955, Special Marriage Act, 1954 and the Indian Divorce Act, 1869 while it should be of at least three years under the Parsi Marriage and Divorce Act, 1936 and the Dissolution of Muslim Marriages Act, 1939.

Further, to examine of the elements of desertion, the following two preliminary observations are necessary to note with a view to clearly comprehending the legal concept of desertion:

A. Until an action is brought desertion remains an inchoate offence, that is to say, it can be terminated by the party in desertion by either resuming cohabitation or expressing an unequivocal intention to resume cohabitation,

Although fact of separation is an essential element of desertion, it does not mean that the party who leaves the matrimonial home is necessarily the deserter. It may be that a party who stays behind may by conduct or act on his part had made it intolerable for the other spouse to stay on in the matrimonial home. This aspect of desertion is called constructive desertion.

**Willful Neglect**

In the formulation of “desertion” under the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 willful neglect\(^\text{77}\) is included as part of, or a type of desertion. Under the Dissolution of Muslim Marriages Act, 1939, the wife can sue her husband for divorce on the ground that the husband has neglected or has failed to provide for maintenance for a period of two years\(^\text{78}\). The neglect may be willful or otherwise. The failure to perform marital obligations, without any reasonable cause for a period of three years is also a ground of divorce under Muslim law.

Under the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955 “willful neglect” as a ground for divorce has come for discussion in a few cases. In *Lachman Uttamchand Kirplani v. Meena*,\(^\text{79}\) Subba Rao, J., (as he then was) made the following observation, obiter:-

The words “Willful neglect” in the Explanation was certainly designed to cover constructive desertion in English law. If so, it follows that willful conduct must satisfy the ingredients of desertion as indicated above. Hence, the appellant cannot take advantage of the inclusive definition unless he establishes all the ingredients of constructive desertion, namely, animus factum and want of just cause\(^\text{80}\).

The learned judge rejected the argument that by inclusion of the words willful neglect, Parliament has enlarged the scope of desertion. According to this argument ‘desertion’ would include conscious neglect on ‘the part of the offending spouse, without

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\(^{78}\) Clause (ii) of section 2.

\(^{79}\) AIR 1964 SC 40.

the requisite intention to desert. The learned judge has rejected this contention on the
specious argument that it would much beyond the accepted meaning of desertion in
English law. Somehow or other we have not been able to shed our blind adherence to
English law. Subba Rao, J., said:

…the history of the doctrine of desertion discloses some limitation thereon
conceived iii the interest of society and Parliament by the inclusive definition
couched in wide language could not have intended to remove those limitations.
The inclusive definition is only- intended to incorporate therein the doctrine of
constructive desertion known to English law and the language designedly made
wide to cover the peculiar circumstances of our society.

Thus the learned judge admitted that scope of desertion was widened to cover our
peculiar social circumstances. He obviously did not spell those circumstances. It is
submitted that willful neglects adds new dimensions to the notion of desertion, inasmuch
as if the offending spouse consciously neglects the other party without any intention to
desert, it would nonetheless amount to desertion. An act or omission done by accident or
inadvertence is not willful, nor is it, on the other hand, absolutely necessary that to be
willful, the act or omission should be deliberate and intentional. Thus it will amount to
willful neglect if a person consciously arts in a reprehensible manner in the discharge of
his marital obligations, or consciously fails in a reprehensible manner in the discharge of
these obligations. In short, it connotes a degree of neglect which is shown by an
abstention from an obvious duty, attended by knowledge of the likely result of the
abstention. However, failure to discharge or omission to discharge, every marital
obligation will not amount to willful neglect. It will be a willful neglect to fail to fulfill
basic marital obligations, such as denial of company or denial of marital intercourse.
Failure to provide maintenance may also amount to willful neglect81.

Failure or Neglect to maintain the wife

Under section 2(ii) of the Dissolution of Muslim Marriage Act, 1939, the wife can
sue her husband for divorce on the ground that the husband has neglected or failed to
provide for her maintenance for a period of two years. As is evident from the language of

the clause, this ground is in a sense much wider than “willful neglect” as neglect may be willful or inadvertent, the husband will be at fault. On the other hand, it is narrower in the sense that failure or neglect relates to one matter only, namely, maintenance. But clause (iv) of section 2 of the Act is much wider.

**Failure to maintain may be willful or otherwise**—The courts have consistently taken the view that the failure of the husband need not be willful. Of course, if it is willful she is entitled to divorce. But she is entitled to divorce even if the failure to maintain her arises on account of his poverty, failing health, loss of work or imprisonment. In *Najiman Nissa Begum v. Serajuddin Ahmed Khan*\(^8^2\) on husband’s failure to pay prompt dower, wife sued him for its recovery and he took several pleas such as there was no agreement to pay it, the wife had relinquished it. But all pleas failed. The suit of wife was decreed. But still he did not pay it. Wife refused to live with him. The husband did not provide her any maintenance. On wife’s suit for dissolution of marriage on the ground of husband’s failure to maintain her more than two years, the court decreeing her suit observed that since before the institution of suit by the wife the husband had not provided her with maintenance, not had he provided it after the institution of suit, the wife was entitled to the decree. The husband’s attitude all along had been that he was not bound to pay her any maintenance unless wife came to live with him, while under Muslim law she was not bound to do so till her prompt dower was paid. The court also gave the finding that the husband had deliberately neglected to maintain his wife.

In *Kochn Mohammad Kunju Ismail v. Mohammad Kadeja Umma*\(^8^3\), the Kerala High Court said that Muslim wife could obtain divorce from her husband if he had failed to maintain her for a period of two years or more, irrespective of the fact whether his failure arose out of his willful neglect or inability to provide maintenance to her. The court added, it was absolutely immaterial whether the failure to maintain arose due to his poverty, failing health, loss of work, imprisonment or any other cause whatsoever.

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\(^8^2\) AIR 1946 Pat. 467.
\(^8^3\) AIR 1959 Ker. 151.
Failure to perform marital obligation

Clause 4 of section 2 of the Dissolution of Muslim Marriage Act, 1939 lays down that if the husband has failed to perform without reasonable cause, his marital obligation for a period of three years the wife is entitled to sue for divorce. This clause is vide enough to include failure any marital obligation and does not necessarily mean total cessation of cohabitation. Of course if a husband does not cohabit his wife (which would, it is submitted, amount to desertion), under this clause the wife can sue for divorce. But she can sue for divorce for his failure to perform any of his marital obligations. The conditions are two: 1, it should be continuously for a period of three years, 2, it should be without any reasonable cause.

Marital obligation- The Dissolution of Muslim Marriage Act, 1939 does not define marital obligations. It is submitted that the expression “marital obligation” will mean basic marital obligations recognized under Muslim law. These are:

(a) Equal treatment of the wife clause (viii) of section 2 of the Act this is now a specific ground of divorce, being considered cruelty to the wife.

(b) Maintenance—this is also a specific ground of divorce under clause (ii) of section 2.

(c) Sexual intercourse—Sexual intercourse, i.e., the marital right to it flows directly from the Muslim concept of marriage. But denial should be of a reasonable claim. It would mean the same thing which we have discussed in the ground of “cruelty” under this title.

(d) Right to separate apartment or at least a separate room.

(e) Dower- if wife is not paid prompt dower, she can refuse conjugal right to her husband.

(f) Right to visit—The Muslim wife has right to visit her relations and she has a right to be visited by them. The restriction of this right should not be unreasonable.

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Reasonable Excuse

As has been seen above that if desertion is for a justifiable reason or excuse or if there is consent of the other party, legal desertion does not take place. In short, if there is a justification for abandoning or forsaking a spouse permanently then no desertion is constituted.

Consensual separation or living separate with consent

Where one spouse leaves the matrimonial home with the consent of the other, the former is not in desertion. ‘Wherever separation is with the other part’s consent, express or implied: there is no desertion. Where parties are living separate under a separation agreement, this is the most obvious case of consensual separation. In other words, where both the parties consent to a separation, there cannot be any desertion. Whether or not the separation is consensual is a question of fact in every case. Thus, for instance, in an English case, *Crabtree v. Crabtree* \(^{(85)}\) under a so-called formal separation agreement the husband had agreed to provide maintenance to his wife. The court found that it was simply an agreement under which husband was providing maintenance to his wife and it was not an agreement to live separately \(^{(86)}\). In *Pardy v. Pardy* \(^{(87)}\) the court said that even if parties were separated under a formal separation deed, this would not be effective if one of the spouses was in a fundamental breach of his duties under it, such as failure to provide maintenance and the other elected to treat the agreement as repudiated, the separation no longer remains consensual \(^{(88)}\).

An agreement to separate may be implied. In *Joseph v. Joseph* \(^{(89)}\) the wife, who was a Jew, obtained get (non-judicial divorce under Jewish law). This divorce is not recognized Under English law. But the law construed get as showing that wife had no objection in her husband living separate. In other words, this was construed a consensual separation.

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85 (1953) 1 WLR 708.
86 See also Bosley v. Bosley, (1958) 1 WLR 645.
87 (1939) P. 286.
88 See also Hall v. Hall, (1960) 1 WLR 52.
89 (1953) 1 WLR 1182.
iv) Insanity

Insanity\(^{90}\) is a ground of divorce as well as of judicial separation both under the Hindu Marriage Act, 1955\(^{91}\) and the Special Marriage Act, 1954\(^{92}\) and the language of both the clauses is identical. Under the Dissolution of Muslim Marriage Act, 1939 two years insanity of the husband is a ground on which wife can sue for divorcee\(^{93}\). But under the Indian Divorce Act, 1869, insanity is neither a ground for divorce nor judicial separation. Under the Parsi Law, pre-marriage insanity and post-marriage insanity are two separate grounds for divorce. Since under the Parsi Marriage and Divorce Act, 1936\(^{94}\) concept of voidable marriage is not recognized, pre-marriage insanity is a ground for divorce. Section 27(e) of the Special Marriage Act, 1954 contains “insanity” as a ground of divorce. Its language is the same as under Hindu Marriage Act, 1955.

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\(^{91}\) Section 13(1) (iii) of the Hindu Marriage Act, 1955 contains “insanity” as a ground of divorce. It lays down that a petition may be presented for, divorce by either party on the ground that the other party has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation—in this clause—

(a) The expression “mental disorder” means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind, and includes schizophrenia;

(b) The expression “psychopathic disorder” means a persistent disorder or disability of mind (whether or not including sub normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment.

\(^{92}\) Section 27(c).

\(^{93}\) Section 2(vi).

\(^{94}\) Section 32(b) of the Parsi Marriage and Divorce Act, 1936 runs: that the defendant at the time of marriage was of unsound mind and has been habitually so up to the date of suit.

Clause (bb) of section 32 of the Act runs: that the defendant has been incurably of unsound mind for a period of two years or upwards immediately preceding the filing of the suit or has been suffering continuously or intermittently from mental disorder of such kind and to such an extent that the plaintiff cannot reasonably be expected to live with the defendant.

Explanation- In this clause-

(a) The expression “mental disorder” means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) The expression “psychopathic disorder” means a persistent disorder or disability of mind (whether or not including sub normality or intelligence) which results in abnormally aggressive or seriously ‘irresponsible conduct on the part of the defendant, and whether or not it requires or is susceptible to medical treatment.
Under the Dissolution of Muslim Marriage Act, 1939, the term “insanity” has been used in a wide sense—wider than under other Indian matrimonial statutes. Insanity with or without lucid intervals at the time of marriage or arising after marriage, or existing before the consummation of marriage or arising after the consummation is a wife’s ground of divorce both among the Shias and Shafis. The Act lays down that if “the husband has been insane for a period of two years”, the wife can sue him for divorce. Under the Act, insanity may be continuous or intermittent; it may be curable or incurable; it may be pre-marriage or post-marriage; it may be existing before the consummation or may exist thereafter. Thus it includes all the aspects of insanity included under the Shafi school. It is submitted that insanity as a ground of divorce has wider meaning then legal insanity under section 84 of the Indian Penal Code and unsoundness of mind under the other Indian matrimonial statutes. No attempt should be made to restrict it scope by applying precedents under other statutes. In short, general unsoundness of mind or mental derangement of any type or mental disorder of any nature resulting in the disability to manage one’s affairs or to understand the ways of society or inability to understand matrimonial obligations would be covered under insanity. Obviously mere eccentricities, whimsicalness, crudeness or boorishness would not come within the scope of insanity. In sum, insanity of any quality is ground for divorce. Anything which is not covered by any form of insanity will not be ground for divorce.

Insanity: Meaning

Prior to the amendment of these clauses under the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954, by the Marriages Laws (Amendment) Act, 1976, the clauses in both the statutes was worded thus: the respondent “has been incurably of unsound mind for continuous period of not less than three years—immediately preceding

95 Among the Hanafis. Abu Hanifa and Abu Yusuf took the view that wife has no right to sue the husband on account of his insanity, and Mohammed held that she can sue for divorce: Hedaya, 128. Among the Shafi, either party could sue for divorce.

Among the Shias, the husband could sue for divorce if insanity was total.

96 Section 84, Indian Penal Code, 1860: Act of a person of unsound mind—nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. See also Seralli Wali Mohammed v. State of Maharashtra, AIR 1972 SC 2443.

97 For critical and comparative study of different personal law see Qureshi (M.A.) Marriage and Matrimonial Remedies, (1978).
the presentation of the petition.” Under the present clauses there is no period prescribed. Under the Dissolution of Muslim Marriages Act, the word is “insane” and insanity has to be for a period of two years. Under the Parsi law in reference to post-marriage insanity a period of two years is prescribed in other respect the clause has identical language as in the Hindu Marriage Act, 1955.

The word “mental disorder” means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia.

Insanity as a ground of divorce has the following two requirement:

(i) The respondent has been incurably of unsound mind, or,

(ii) the respondent has been suffering - continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

In Ajirai Shivprad Mehta v. Bai Vasuwnat the Court observed that the test to be applied is whether by reason of his mental condition, he is capable of managing-himself and the affairs and if not, whether he can hope to be restored to a stage in which he will be able to do, and he test of the capacity is that of a reasonable person. Obviously a mere mental defect is not unsoundness of mind. In Bipin Chandra v. Madhuriben the Gujarat High Court propounded the following three propositions:-

(a) it is for the petitioner to establish unsoundness of mind i.e. burden of proof is on the petitioner,

(b) the unsoundness of mind should be incurable and

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99 The definition of the terms “mental disorder” and “psychopathic disorder” (mental disorder includes psychopathic disorder) have been borrowed from the Mental Health Act, 1959 (an English statute).

100 AIR 1969 Guj 78.

101 AIR 1963 Guj 250
(c) respondent cannot be compelled to undergo medical examination, though on account of his refusal, an adverse inference may be drawn.

It is submitted that if the respondent is capable of exercising his option of not submitting for medical test, then he is certainly not of unsound mind.

In sum, the test of unsoundness of mind is such mental incapacity which makes one incapable of managing himself and his affairs including the problem of the society and of married life, and it will be incurable if there is no reasonable hope of his being restored to a mental health in which he will be able to do so.

v) Leprosy

With the exception of the Indian Divorce Act, 1869 and the Parsi Marriage and Divorce Act, 1936, leprosy is a ground of divorce under all other Indian personal laws. Under the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 it is both a ground of divorce and judicial separation. Under Muslim law ‘it is only wife’s ground for divorce.

The wordings of the clause containing the ground of leprosy are different under all three statutes. Under the Hindu Marriage Act, 1955\(^{102}\) leprosy has to be virulent and incurable, while under the Special Marriage Act, 1954\(^{103}\) the respondent must be suffering from leprosy which has not been contracted from the petitioner. On the other hand, under Dissolution of Muslim Marriage Act, 1939\(^{104}\) only thing need be shown is that the respondent is suffering from leprosy.

**Leprosy: Meaning**

Socially looked at, leprosy has always been considered as a loathsome disease and a leper has always been a social out-caste. Everywhere in the world there are leper colonies where they are segregated from others. Many systems disinherit them. Under the old Hindu law leprosy was a disqualification from inheritance. Contagiousness of leprosy

\(^{102}\) Clause (iv) of sub-section (1) of section 13 of the Hindu Marriage Act, 1955 lays down that the divorce can be obtained by a spouse if the other: has been suffering from a virulent and incurable form of leprosy.

\(^{103}\) Clause (g) of sub-section (1) of section 27 of the Special Marriage Act, 1954 lays down that the petitioner can seek divorce if the respondent— has been suffering from leprosy, the disease not having been contracted from the petitioner.

\(^{104}\) Clause (vi) of section 2 of the Dissolution of Muslim Marriage Act, 1939 lays down that wife may sue her husband for divorce if he is suffering from leprosy.
and repulsive and revulsive outward manifestations are responsible for creating a psychology where man not merely shuns the company of lepers but looks at them loathfully and scornfully. Probably, this apathy towards lepers created a movement in favour of lepers and great leaders all over the world favoured a human approach towards them. Gandhiji did a lot to ameliorate their lot. Mother Teresa is also engaged the same work. All over the world, humanists, sociologists and social workers have been leading movement for a human approach towards lepers. However, in most systems leprosy has been a ground for divorce. It is submitted that having a humanist approach towards lepers is one thing, but to compel a healthy spouse to live with a leper is another matter. A bridge has to be built between them. We should not allow our minds to be swayed by feelings of emotional loathing and revulsion with which leprosy patients have been treated throughout human history in all countries throughout the world and that we should take up a very human and balanced outlook and accept leprosy “as simply another disorder that requires medical attention.” That this is a correct social approach to leprosy should not provide any justifications “for compelling a person to live with a spouse who is suffering from an aggravated form of leprosy and who can give him and his children leprosy almost any moment in their daily life. There is no doubt that the law-makers do not treat the subject of divorce lightly and must have taken into consideration the consequences of one spouse being compelled to live intimately with another spouse who suffers from leprosy when they provided for a way out for the former\textsuperscript{105}.

**Virulent Leprosy**

Under the Hindu Marriage Act, 1955 leprosy is a ground for divorce or judicial separation should satisfy two qualifications viz. (a) it should be virulent\textsuperscript{106}, and (b) It should be incurable.


\textsuperscript{106} Steadman’s Medical Dictionary: Extremely poisonous; nothing markedly pathogenic microorganism. Chamber’s Twentieth Century Dictionary: Highly poisonous, malignant, venomous, and acrimonious. Webster’s Seventh New Collegiate Dictionary: Marked by a rapid, severe and malignant course; able to overcome bodily defensive mechanisms; extremely poisonous or venomous; noxious. Shorter Oxford Dictionary: Of wounds and ulcers- characterized by the presence of corrupt or poisonous matter of disease etc. extremely malignant or violent; Swaraja Lakshmi v. G.G. Padma Rao AIR 1974 SC 165, the Supreme Court finally summarized by laying down that the expression means malignant and infectious.
It appears that malignant or venomous leprosy is virulent leprosy. Lepromatous leprosy which is malignant and contagious and in which prognosis is usually grave is a form of virulent leprosy. The word “virulent” is not a medical term, nor has it been defined in the Act. According to Chamber’s Dictionary, “virulent” means ‘highly poisonous or malignant, venomous, or acrimonious. In *Swarajya Lakshmi v. G.G. Padma Rao*\(^{107}\) the Court was concerned with lepromatous leprosy which is recognized by all medical authorities as malignant and contagious and, therefore, virulent Mukherjee, J., in his judgment has collected the meaning of lepromatous leprosy from medical authorities. The Supreme Court held that lepromatous leprosy is virulent. This type of leprosy is malignant and contagious. It is also incurable form of leprosy. Thus a leprosy which is malignant and contagious is virulent leprosy. The test of virulent leprosy is that it should be malignant and contagious. In this context one should look at section 27(1)(g) of the Special Marriage Act, 1954, which uses the words “disease not having been contracted from the petitioner”. Only a contagious disease can be contracted.

**Incurable**

Under the Hindu Marriage Act, 1955 ‘leprosy’ as a ground for divorce should not be virulent but it should also be incurable. Before the clause was amended by the Amending Act of 1976 it was laid down that leprosy should be for a duration of at least three years. The Marriage Laws (Amendment) Act, 1976 has omitted the period of three years. It seems that the period was redundant. No leprosy can be said to be Incurable unless some period elapses from the time it was diagnosed as such. When it is found to be incurable (even, say after three to six months), then there is no need for prescribing any period\(^{108}\).

It appears to be rather odd that under the Special Marriage Act, 1954. Leprosy of any type, whether virulent or non-virulent and whether curable or incurable is a ground of divorce just as it is under Muslim law. Only qualification is that it should not have been contracted from the petitioner. If it is not contracted from the petitioner, any type of leprosy can form the ground of divorce but leprosy should be contagious. This obviously

\(^{107}\) AIR 1974 SC 165 (167-168)

indicated that disease should be in a communicable form. Usually leprosy in a communicable form is virulent as well as incurable.

The unique aspect of leprosy as wife ground for divorce under Muslim law is that it need not be incurable or virulent. It may also be of any duration. In *Md. Ibrahim v. Altafan* the Allahabad High Court observed that leprosy of any type and of any duration is a ground of divorce under Muslim law.

Under Shia law if wife is suffering from leprosy or Juzam (leucoderma), the husband can sue her for divorce. It is submitted that leucoderma would not be included in leprosy under clause (vi) of section 2 of the Dissolution of Muslim Marriage Act, 1939, where husband’s leprosy simpliciter is wife’s ground of divorce.

**vi) Venereal Diseases**

Venereal disease is not a ground for divorce or judicial separation under the Indian Divorce Act, 1869. On the other hand, it is a ground of divorce under the Hindu Marriage Act, 1955\(^\text{109}\), Special Marriage Act, 1954,\(^\text{110}\) the Dissolution of Muslim Marriage Act, 1939\(^\text{111}\) and Parsi Marriage and Divorce Act, 1936\(^\text{112}\). It is also a ground of judicial separation under the first two statutes. While under the former two statutes the ground is in identical language, under the last two statutes its language is slightly different. Under the former two statutes venereal disease has to be in a communicable form\(^\text{113}\), while under the Dissolution of Muslim Marriage Act, 1939 the disease should be virulent\(^\text{114}\). Under the

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\(^{109}\) (1925) 47 All 243.

\(^{110}\) Clause (v) of sub-section (1) of section 13 of the Hindu Marriage Act, 1955 which contains the venereal disease as a ground of divorce lays down that a spouse may present a petition for dissolution of marriage on the ground that the other spouse has been suffering from venereal disease in a communicable form.

\(^{111}\) Clause (f) of sub-section (1) of section 27 of the Special Marriage Act, 1954 which lays down venereal disease as a ground of divorce provides that a spouse may present a petition for divorce on the ground that the respondent has been suffering from venereal disease in a communicable form.

\(^{112}\) Clause (vi) of section 2 of the Dissolution of Muslim Marriage Act, 1939 which contains the venereal disease as a ground of divorce lays down that a Muslim wife may sue her husband for divorce on the ground that the husband...is suffering from...virulent venereal disease.

\(^{113}\) Clause (e) of section 32 of the Parsi Marriage and Divorce Act, 1936 which contains venereal disease as a ground of divorce lays down that a spouse may sue the other spouse for divorce on the ground that the defendant has since the solemnization of the marriage...infected the plaintiff with venereal disease.

\(^{114}\) The expression “communicable” shows that the disease not has been communicated to the petitioner. It is enough to show that the disease has developed in an advanced stage that it poses a danger of infection or contagion to whatsoever comes into his/her conduct.

\(^{115}\) According to Chamber’s Dictionary: “virulent” means ‘highly poisonous or malignant, venomous, or acrimonious.”
Parsi Marriage and Divorce Act, 1936, the requirement is that the defendant had infected the plaintiff with the disease.

**Venereal Disease: Meaning**

In regard to the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954, the Marriage Laws (Amendment) Act, 1976 has simplified this ground. Prior to amendment, the disease was required to be of three years duration. The amendment has done away with the period\(^{116}\). Now under the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955 the venereal disease to be ground of divorce or judicial separation should be in a communicable form. On the other hand, under Dissolution of Muslim Marriage Act, 1939 it should be virulent, while under the Parsi Marriage and Divorce Act, 1936 a spouse cannot sue for divorce, unless he or she gets infected with the venereal disease from the other spouse. If the spouse seeking divorce does not get infected from the disease from the other spouse, it is immaterial that the other party is suffering from a venereal disease in a communicable form or in an aggravated or virulent form.

According to Encyclopedia Britannica:

Venereal disease comprises a number of contagious\(^{117}\) diseases that are most commonly acquired in sexual intercourse\(^{118}\). Included in this group are both a destroyer of life (Syphilis) and a preventer of life (Gonorrhea). The group includes at least three other diseases: chancroid, lymphogranuloma venereum and granuloma inguinale. These five are linked not because of similarity of causative agents, tissue reactions and symptoms produced, but because of the principal means of spread of each disease are by sexual intercourse especially promiscuous sexual intercourse, as implied by their group name, Venereal which is derived from the name of goddess of love, Venus. Not only are the causative agents different morphologically but they also represent five distinct classes of micro-spirochetes, bacilli, viruses, and the Donovan body (perhaps a bacterium).

The most common form of venereal disease is Syphilis and Gonorrhea, and of these two, former is considered to be more dangerous. Gonorrhea is considered to be

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\(^{116}\) By this Amendment the words “the disease not having been contracted from the petitioner” have also been omitted.


\(^{118}\) Venereal Disease is a result of intercourse, i.e. it originates from it and may be communicable.
treatable and in most of the cases complete cure can be obtained. Syphilis in early stage is also curable. Congenital syphilis is not a disease in a Communicable form and is thus not considered to be ground of divorce.119

vii) Conversion or Apostasy

Conversion120 to another religion is known as apostasy under Muslim law. Conversion to another religion is a ground of divorce under the Hindu Marriage Act, 1955121 and the Parsi Marriage and Divorce Act, 1936122. Apostasy is a ground of divorce under Muslim law123.

Conversion as such is not a ground of divorce under the Indian Divorce Act, 1869124. Husband’s bigamy plus conversion is a wife’s ground of divorce and not simple conversion. Under the Act, conversion or conversion plus marriage with another is not a ground divorce for the husband.

When a person adopts another religion by formally converting to it (in accordance with the formalities prescribed by the religion to which conversion is sought), he ceases to be the follower of his former faith and becomes the follower of his new faith. Ordinarily, conversion is effected by undergoing the formalities or ceremonies of conversion laid

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119 Popkin v. Popkin, (1794) 1 Hagg Ecc 765; Browning v. Browning (1911) 161; Foster v. Foster, All ER 490; See also Section 12(e) of the Matrimonial Causes Act. 1973.
121 Clause (j) of sub-section (1) of section 13 which contains this ground lays down that a spouse may petition for divorce on the ground that the other party has ceased to be a Hindu by conversion to another religion.
122 Clause (j) of section 32 which contains this ground lays down that a spouse may sue for divorce on the ground that the defendant has ceased to be a Parsi by conversion to another religion:

Provided that divorce shall not be granted on this ground if the suit has been filed more than two years after the plaintiff came to know of the fact.
123 Section 4 of the Dissolution of Muslim Marriages Act, 1939 clarifies: The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage:

Provided that after such renunciation, or conversion the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the ground mentioned in section 2:

Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.
124 Para 2 of section 10 of the Indian Divorce Act, 1869, which contains the ground runs: Any wife may present a petition to the District Court or the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman.
down by the religion to which conversion is sought. Different religious prescribe different modes of conversion\textsuperscript{125}.

**Conversion: Meaning**

Under Hindu law, a person does not lose his faith by mere renunciation of it; nor does he belong to another faith by merely professing it or practising it. Thus, if a person, Christian-by faith, becomes an admirer of Hinduism, so much so that he starts practising and preaching it, he does not thereby becomes a Hindu.

The Dharmashastra did not prescribe any ceremony for conversion to Hinduism. It seems that ancient Hindu law did not provide for conversion of followers of other religions. Among the Hindus, it is only the Arya Samajists who prescribe a ceremony of conversion, known as Sudhi a person who undergoes the ceremony of sudhi converts to Hinduism but then he is Arya Samajist Hindu. A non-Hindu becomes a Hindu if he undergoes the ceremonies of conversion\textsuperscript{126}.

In a series of cases\textsuperscript{127}, culminating with the Supreme Court decision in Peerumal v. Poonuswami\textsuperscript{128}, it has been laid down that a person may also become Hindu if after expressing an intention, expressly or impliedly, he lives as a Hindu and the community or caste, into the fold of which he is ushered in, accepts him as a member or that community or caste. In such case one has to look to the intention and conduct of the convert, and if the consensus of the community into which he was initiated is sufficiently indicative of his conversion, then the lack of some formalities cannot negative what is an accomplished fact\textsuperscript{129}. In such a case no formal ceremony of purification or expiation is necessary to effectuate conversion. It is immaterial to which class of Hindus convert belongs. It is also not necessary to show that he practises or follows tenets of any sect or sub-sect of Hindus. However, because a Hindu of a higher caste becomes a share-holder of the Kerala

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\textsuperscript{125} Suresh Babu v. Leela, AIR 2007 (NOC) 285 (Ker)(DB).
\textsuperscript{126} Kusum v. Satya, (1903) 30 Cal 999.
\textsuperscript{127} Durga v. Sudarsanswami, AIR 1940 Mad 513; Sethalakshmi v. Poonuswami, (1966) 2 Mad 374, where some earlier cases have been reviewed.
\textsuperscript{128} AIR 1971 SC 2352.
\textsuperscript{129} Sethalakshmi v. Poonuswami, (1966) 2 Mad 374.
Scheduled Castes and Schedule Tribes Welfare Board does not mean that he has been accepted as a member of the Scheduled Caste and thus has become a Scheduled Caste\textsuperscript{130}.

A person who is a reconvert to Hinduism, Jainism, Buddhism or Sikhism is also a Hindu, both under the Uncodified Hindu law\textsuperscript{131} and codified Hindu law\textsuperscript{132}. A person who ceases to be a Hindu by converting to a non-Hindu religion will, again, become a Hindu if he reconverts to any of the four religions of Hindus\textsuperscript{133}. It is not necessary that he reconverts to the same religion from which he converted to the non-Hindu religion. Thus, a Jain who converted to Islam will be a Hindu if he reconverts to Sikhism. However, technically, this is not a case of reconversion but of double conversion. In a case where a person belonging to a Scheduled Caste who had converted to Christianity, reconverts to Hinduism, he and his children will belong to the former Schedule only if the members of that caste admit him to their fold\textsuperscript{134}. For reconversion to Hinduism no particular ceremony or any expiatory rite is necessary, unless the practice of caste makes it mandatory\textsuperscript{135}.

In sum, under modern Hindu law two propositions are well established. A non-Hindu will become Hindu by conversion:

i. if he undergoes a formal ceremony of conversion or reconversion prescribed by the caste or community to which he converts or reconverts, or

ii. if he expresses a bona fide intention to become Hindu accompanied by conduct unequivocally expressing that intention coupled with the acceptance of him as a member of the community into the fold of which he was ushered into.

The Kerala High Court in \textit{Mohanulas v. Devaswom}\textsuperscript{136} Board has gone a step further from the proposition propounded by the Supreme Court in \textit{Peerumal v. Poonuswami}\textsuperscript{137}. It held that when a person declares that he is a follower of Hindu faith

\textsuperscript{130} J. Das v. State of Kerala, AIR 1981 Ker 164.
\textsuperscript{131} Vermani v. Vermani, AIR 1943 Lah 51.
\textsuperscript{132} See Explanation (C) of sub-section (1) of section 2 of the Hindu Marriage Act, 1955.
\textsuperscript{133} Vermani v. Vermani, AIR 1943 Lah 51; Durga v. Sudarsanswami, AIR 1940 Mad 513, V.V. Giri v. D.S. Dara, AIR 1959 SC 1318; the change of caste cannot be effective unless it has received recognition by the caste.
\textsuperscript{134} Guntar Medical College v. Mohan Rao, AIR 1976 SC 1904
\textsuperscript{135} S.A. Anbalagan v. B. Devrajan, AIR 1984 SC 411.
\textsuperscript{136} 1975 KLT 55.
\textsuperscript{137} AIR 1971 SC 2352.
and if such a declaration is bonafide and not made with any ulterior motive or intention, it amounts to his having accepted the Hindu approach to God. He becomes a Hindu by conversion. In this case one Jesudas, a Catholic Christian by birth and famous play-back singer used to give devotional music in a Hindu temple and worshipped there like a Hindu. He had also filed declaration, “I declare that I am a follower of Hindu faith.” On these facts the court held that Jesudas was a Hindu and could not be prevented from entering the temple.

**Conversion as ground of Divorce**—Under Clause (ii) of sub section (I) of section 13 of the Hindu Marriage Act, 1955 the following two conditions must be satisfied before the ground can be invoked:

i. Respondent has ceased to be a Hindu, and

ii. Respondent has converted to another religion.

**Ceases to be a Hindu** — A person does not cease to be a Hindu merely because he declares that he has no faith in his religion. A person will not cease to be a Hindu if he does not practice his religion, or does not have faith in his religion or renounces his religion or leads an unorthodox life, so much so even if he eats beef and insults all Hindu Gods and Goddesses. He will also not cease to be a Hindu even if he expresses his faith in another religion and even starts practising another religion. Such a person will continue to be Hindu. Thus, ceasing to be a Hindu is hardly material except in the context of conversion\(^{138}\).

**Conversion to another religion** — The second requirement is that the respondent has converted to a non-Hindu faith. A person who, at the time of his marriage was a Hindu by religion converts to Sikhism, Jainism or Buddhism, will not cease to be Hindu, since a person who is Sikh or Buddhist or Jam by religion is a Hindu.

This ground will be available only when the respondent converts to a non-Hindu faith, such as to the Christianity, Islam or Zoroastrianism. What is required is a conversion to a non-Hindu faith, and such conversion can take place when the respondent undergoes the formalities prescribed by the faith to which he seeks conversion. Sincerity of

conversion or genuineness of belief in the new faith is immaterial. It is also not necessary that the respondent, after conversion, should practice his new faith.

The conversion of the respondent to a non-Hindu faith does not amount, to automatic dissolution of marriage. The petitioner has to file a petition to obtain a decree of divorce. If a petitioner chooses to continue to live with his spouse who has converted to another religion, there is nothing to debar him from doing so.

**Apostasy or Conversion**

Mere renunciation of Islam by a Muslim amounts to apostasy\(^{139}\) under Muslim law. So does conversion of Muslim to any other religion amounts to apostasy. Apostasy may express or implied. When a Muslim says, “I renounce Islam” or “I not believe in God and the Prophet Mohammad”, the apostasy is expressed, when a Muslim uses grossly disrespectful language towards the Prophet or the Koran, the apostasy is implied. Formal conversion to another religion also amounts to apostasy. A mere declaration such as ‘I renounce Islam’ is enough. Formal conversion need not be resorted\(^{140}\). A non-Muslim may become a Muslim by professing Islam, i.e., by acknowledging that there is only one God and Mohammad is his prophet, or by under-going the ceremonies of conversion to Islam. A convert to Islam is ordinarily governed by Muslim law.

**Apostasy as a ground of divorce.**—Apostasy leads to dissolution of marriage. In classical Islam apostasy was considered to be a criminal offence. A male apostate was liable, to be awarded death sentence and a female apostate to life imprisonment. But this is no long so in India.

Under the Indian Muslim law, the rule came to be established that apostasy of either wife or husband operated as a complete and immediate dissolution of marriage, or instant dissolution, in the words of Ameer Ali\(^{141}\).

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\(^{139}\) The Muslim authorities predominantly take the view that Apostasy results in immediate and automatic dissolution of marriage and no confirmation by the court is necessary. But section 4 Dissolution of Muslim Act, 1939 which lays down that the apostasy of the wife does not result in the automatic dissolution of the marriage.


\(^{141}\) Ameer Ali, Mohommadan Law, II, 388.
However, as to the Muslim wife’s conversion to a Kitabia faith, Ameer Ali took the view that it did not lead to dissolution of marriage. He gave the following three reasons:

i. the marriage between a Muslim and Kitabia woman is lawful under Muslim law,

ii. the adoption of Kitabia faith by a Muslim wife should not affect the status of marriage, and

iii. If this would be the consequence, more wives will find apostasy as a mode of dissolution of their marriages.

But the Indian High Courts took the view that the apostasy of either spouse leads to the dissolution of marriage. The position is now different after the coming in to force of the Dissolution of Muslim Marriage Act, 1939. It is as under:

i. The apostasy of the husband still results in an instant dissolution of marriage. Thus, where on the apostasy of the husband the wife married another man, even before the expiration of Iddat it was held that she was not guilty of bigamy.\(^{142}\)

ii. If a Muslim wife, who belonged to another faith before her marriage, reconverts to her original faith, or to some other faith, then also, it results in the instant dissolution of marriage \(^{143}\).

iii. The apostasy of a Muslim wife does not result in the dissolution of marriage, instant or otherwise \(^{144}\). Apostasy of the wife does not bar her right to sue for divorce on any ground specified in section 2 of the Dissolution of Muslim Marriage Act, 1939 \(^{145}\).

It seems that the Hanafis took the view that the apostasy leads to instant dissolution of marriage only when marriage was not consummated. But if the marriage was con the cancellation of marriage remained suspended till the completion of the period.

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\(^{143}\) Karam Singh v. E., AIR 1933 All 433. See second proviso to section 4 of the Dissolution of Muslim Marriage Act, 1939.

\(^{144}\) Section 4.

\(^{145}\) First Proviso to section 4.
of idda with this view the Shafis also agreed.\textsuperscript{146} Ameer Ali is of the view that even in the Hanafi law this was the position taken by the later jurists.\textsuperscript{147}

According the Shias, if the husband apostate before the consummation of marriage, the wife is entitled to half of the dower, but if it is she who apostates then no claim for dower can be advanced. If marriage is consummated she is entitled to full dower. The Hanafis take the view that the results of the dissolution of marriage on the ground of apostasy are the same as of talak.

Ameer Ali is of the view that when both parties apostate and adopt another faith, the marriage remains intact by consensus.\textsuperscript{148}

The Indian Divorce Act, 1869 permits a wife to divorce her husband if he has converted to another religion and married another woman.\textsuperscript{149} But if the wife converts to another religion, the husband has no such right.\textsuperscript{150}

The Native Converts Marriage Dissolution Act, 1866 lays down that if a person converts to Christianity and his or her spouse for a period of six continuous months deserts him or repudiates the marriage he can bring a petition for restitution of conjugal rights. If the decree for restitution of conjugal rights is not complied with for a period of one year, the convert spouse may sue for divorce. But if after conversion, the non-convert spouse does not refuse to cohabit with the convert spouse, the statute, obviously, does not provide any relief.

Under the Parsi Marriage and Divorce Act, 1936 the requirements of the ground are:

(a) The defendant has ceased to be a Parsi by conversion to another religion.

(b) The suit for divorce is filed within two years of the plaintiffs’ knowledge of respondent’s conversion.

\textsuperscript{146} See Ameer Ali, II 388-90
\textsuperscript{147} Ibid., at 390-91.
\textsuperscript{148} Ibid., 394.
\textsuperscript{149} Section 10.
\textsuperscript{150} Dunbai v. Sorabji, AIR 1938 Bom 68
It is necessary that both the conditions are satisfied. It may be noted that under the Parsi law, it is not necessary that one of the spouses should convert to another religion. What is required is that the other spouse has ceased to be a Parsi. The period of two years within which the plaintiff has to file the suit for dissolution has to be reckoned not from the date when defendant ceased to be a Parsi but from the date of plaintiffs knowledge of that fact.

viii) **Renunciation of World**

“Renunciation of world” is a ground of divorce only under Hindu law, as renunciation of the world is a typical Hindu notion. Under Hindu Law, “Renunciation of world” by entering into a holy order, generally operates as civil death. A person can be said to enter a religious order only when he undergoes some ceremonies and rites prescribed by the particular sect.

Clause (vi) of sub section (1) of section 13 of the Hindu Marriage Act, 1955 lays down that a spouse may seek divorce if the other has renounced the world by entering into any religious order. Thus the requirements of the clause are the following:

(a) The other party has renounced the world, and

(b) has entered into a holy order.

The life of a Hindu is organized into four Ashrarnas, or stages of life, of which the Sanyasa Ashram (which implies renunciation of the world) is the last Ashram. The Ashrama Dharma is based on the purashartha, individual’s striving to attain the Ultimate. The theory of purusharthas provides the key to the understanding of the Individuals striving to attain salvation in relationship to society. These purusharthas are four dharma, artha, kama and moksha. Of these dharma pervades throughout the four ashramas. Dharma is created for the well-being of all creation. All that is free from doing any harm to any created being is Dharma for indeed, dharma is created to help all creations free from any harm. “Dharma, is so called because it protects all, dharma preserves all that is created.

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152 Supra note 120.
153 Mahabharat, Shanti Parva, 58.
Dharma then is surely that principle which is capable of possessing the universe\(^{154}\). Kama implies desires in men and enjoyment and satisfaction of the life of senses, including sexual desires, Kama, thus, refers to the totality of the inmate, desires and drives in men. Artha implies acquisition of wealth and it refers to the means necessary to acquire worldly prosperity, such as wealth and power\(^{155}\).

Mokhsa means attainment of salvation Dharma controls everything. Artha and kama are to be acquired in accordance with dharma. The stability of the universe depends upon dharma, artha and kama, too, depend for their proper management upon dharma. Dharma is the foremost of all. Artha is said to be middling, and kama is the lowest of the three. Dharma is the holder of the balance in terms of which artha and kama have to be dealt with, weighed, practised and acquired. Therefore, we should conduct our lives in accordance with dharma\(^{156}\). Manu says that good of man consists in the harmonious coordination of the three\(^{157}\). As Kulluka\(^{158}\) puts it, with reference to the supreme end of moksha, the other three objectives of life become but the means for the attainment of that end salvation (moksha)\(^{159}\).

**ix) Presumption of Death**

The ground of divorce on the basis of presumption of death exists under the Hindu Marriage Act, 1955, the Special Marriage Act, 1954, the Indian Divorce Act, 1869 and the Dissolution of Muslim Marriages Act, 1939. There is no such provision under the Parsi Marriage and Divorce Act, 1936. In England it was enacted for the first time under the Matrimonial Cause Act, 1937.

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\(^{154}\) Mahabharat, Shanti Parva, 59.

\(^{155}\) Mulla’s Hindu Law, 14th edn. p. 748.

\(^{156}\) Mahabharat, Shanti Parva, 167, 6-9.

\(^{157}\) Manusmriti, II. 224


Under the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 the provision is similar, having the same period of seven years, while under the Dissolution of Muslim Marriages Act, 1939 the period is four years.

The ground under the Hindu Marriage Act, 1955,\textsuperscript{160} the Special Marriage Act, 1954,\textsuperscript{161} and Indian Divorce Act\textsuperscript{162} is substantially the same, notwithstanding some minor difference in the wording of the clauses.

Under Indian Evidence Act, 1872\textsuperscript{163}, a person who has not been heard of for seven years or more by his close relations\textsuperscript{164}, etc. should be presumed to be dead. The question that becomes important in matrimonial law is whether the other spouse on the basis of presumption of death can assume that he or she has become a widower or widow and therefore marriage stands dissolved. And, on this assumption, whether he or she can contract a second marriage. One can do so only at his own risk. If after some time the missing spouse re-appears, whether the validity of second marriage can be maintained. The answer is in the negative. Not merely the second marriage will not be valid the spouse can also be prosecuted for bigamy. To avoid the risk of missing spouse re-appearing on the scene rendering the second marriage void; Clause (vii) of sub-section (1) of section 13 provides that a petitioner may obtain a decree of dissolution of marriage on this ground. Once the marriage is dissolved the petitioner is free to marry again and even if the missing spouse returns the next day of the passing of the decree or before the second wedding, he

\textsuperscript{160} Clause (vii) of sub-section (1) of section 13 of the Hindu Marriage Act, 1955, which contains the provision lays down that a spouse may file a petition for divorce on the ground that the other spouse has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive.

\textsuperscript{161} Clause (h) of sub-section (1) of section 27 of the Special Marriage Act, 1954, which lays down this ground provides that a. spouse may present a petition for divorce on the ground that the other spouse has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive.

\textsuperscript{162} Clause (vi) of sub-section (1) of section 10 of the Indian Divorce Act, 1869, which provides that a spouse may file a petition for dissolution of marriage on the ground that the respondent has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive.

\textsuperscript{163} Section 108: Burden of proving that person is alive who has not been heard of for seven years- Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.\textsuperscript{164} It means parents, spouse, children, brothers, and uncles, any relations by adoption, other close relative and probably also close friends if any.
can do nothing. The absence of the respondent for seven years without his whereabouts being known by his near relatives and friends who would have naturally heard of him is a ground for divorce. Thus freed, the petitioner may marry again and have children of unquestioned legitimacy. However, if the second marriage is performed on the basis of presumption of death without getting a decree of divorce, no person other than the missing spouse can question the validity of the second marriage.\footnote{\begin{enumerate} \item Nirmoo v. N.K. Karam, AIR 1948 Del 260 \item (1956) P 414. \end{enumerate} In \textit{Thompson v. Thompson}\footnote{Clause (1) of section 2 of the Dissolution of Muslim Marriage Act, 1939, which contains the ground, lays down that the wife may sue her husband for dissolution of marriage on the ground that the whereabouts of the husband have not been known for a period of four years. This should be read along with section 3 of the Act and proviso (b) to section 2. Section 3 runs: In a suit to which clause (i) of section 2 applies—\begin{enumerate} \item the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of the filing of the plaint shall be stated in the plaint, \item notice of the suit shall be served on such persons, and \item such persons shall have the right to be heard in the suit: Provided that the paternal uncle and brother of the husband, if any, shall be cited as party even if he or they are not heirs. \end{enumerate} Proviso (b) to section 2 runs: A decree passed on ground (i), shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the court that he is prepared to perform his conjugal duties, the court shall set aside the said decree.} the Court said that the words “the petitioner has no reason to believe that the other party has been living within” seven years should be read as, “if nothing has happened within that time to give the petitioner reason to believe that he test of whether “there is reason to believe” relates to the standard of belief of a reasonable man; pure speculation is excluded.

Since some miscarriage of justice is likely to result in a petition for divorce on the basis of presumption of death, the High Court Rules provide some safeguards.

Under the Dissolution of Muslim Marriage Act, 1939\footnote{Proviso (b) to section 2 runs: A decree passed on ground (i), shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the court that he is prepared to perform his conjugal duties, the court shall set aside the said decree.} the period is four years. This period is based on classical Maliki law. Under Maliki law if the whereabouts of the husband were not known for a period of 4 years, the judge could pronounce a divorce. The judge was required to postpone the consideration of wife’s petition for a period of another four years. Now clause (i) of section 2 of the Act, lays down a uniform provision. The clause does not use the words that the whereabouts of the husband are not known to those
persons who would have naturally known, had he been alive. But a section 3 of the Act lays down that in a suit of divorce on this ground; (a) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of the filing of the complaint should be stated therein, (and if paternal uncle and brother of the husband are alive they should be cited as parties even if they are not heirs), (b) notice of the suit shall be served on ‘such persons, and (c) such persons shall have the right to be heard in the suit. A decree passed on this ground shall not take affect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the court that he is prepared to perform his conjugal duties, the court shall set aside the decree. Obviously, it is not necessary to prove death. If the above procedure is gone into that is enough.

The unique aspect of the Muslim law provision is that the decree does not come into effect immediately on its passing. It remains suspended for a period of six months. During this period’ of six months, the marriage will subsist, and the wife cannot remarry. The decree will become effective after the expiry of the period. If the husband reappears, the decree will stand cancelled.

It is obvious that this cumbersome procedure of making husband’s relation as parties and ‘then keeping the decree in suspense is made with a view to ensure that in case the husband is alive, his where about may still be traced and he himself is given an opportunity to reappear. Under the Hindu Marriage Act, 1955 or the Special Marriage Act, 1954 no such procedure is laid down.

x) Seven Years’ Imprisonment

Except under Hindu law and the Indian Divorce Act, 1869 where seven years imprisonment is neither a ground for divorce nor for judicial separation, under all other Indian matrimonial statutes it is a ground for divorce. Under the Special Marriage Act, 1954, it is both a ground for judicial separation and divorce, while under the dissolution

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169 Clause (c) of sub-section (1) of section 27 of the Special Marriage Act, 1954, which contains the ground lays down hat a spouse may sue the petition for divorce on the ground that the other spouse is undergoing a sentence of imprisonment for seven years for an offence as defined under the Indian Penal Code (45 of 1860).
of Muslim Marriage Act, 1939\textsuperscript{170} and the Parsi Marriage and Divorce Act, 1936\textsuperscript{171}, it is ground of divorce. The wordings and requirements of this ground under these statutes are slightly different.

The rationale behind this provision is that like desertion (which may be of two years or of indefinite duration) the cohabitation stands disrupted for seven years, besides one being dubbed as a spouse of a prisoner. One may or may not stand the seven years separation, but one may find the ignomy of a prisoner’s wife or husband too hard to withstand. Thus, if a spouse finds either or both difficult to suffer, he or she may seek divorce.

While under the Special Marriage Act, 1954 and the Parsi Marriage and Divorce Act, 1936 the other spouse must have been sentenced to a term of imprisonment of seven years for an offence under the Indian Penal Code, there is no such qualification under the dissolution of Muslim Marriage Act, 1939—sentence must be for a period of seven years, it may be under any law, though as the word “sentence” indicates, it must be a sentence passed by a criminal court. Therefore, a preventive detention or detention as prisoner of war, even if for a period of seven years would not be the type sentence stipulated under this clause. But the Act requires that it should be a final sentence. A sentence will be final when it is no longer open to challenge in appeal or revision.

Under the Parsi Marriage and Divorce Act, 1936, a suit for divorce on the ground of seven years’ term of imprisonment can be filed only if the defendant had undergone at least one year’s imprisonment prior to the filing of the suit.\textsuperscript{172}

\begin{flushright}
170 Clause (iii) of section 2 of the Dissolution of Muslim Marriage Act, 1939, which contains this ground for divorce runs: that the husband been sentenced to imprisonment for a period of seven years or upwards. This ground should be read with proviso (a) to section 2 of the Act which lays down that: no decree shall be passed on ground (iii) until the sentence has become final.

171 Clause (f) of section 32 of the Parsi Marriage and Divorce Act, 1936, which lays down the ground, provides that a spouse may sue the other for divorce on the ground that the defendant is undergoing a sentence of imprisonment for seven years or more for an offence as defined under the Indian Penal Code (45 of 1860):

Provided that divorce shall not be granted on this ground, unless the defendant has prior to the filing of the suit undergone at least one year’s imprisonment out of the said period.

172 Section 32(f) of the Parsi Marriage and Divorce Act, 1936.
\end{flushright}
xi) Non-Resumption of Marital Intercourse after an Order for Separate Maintenance has been passed for a Period of Two Years

Under Parsi law, non-resumption of marital intercourse after an order of separate maintenance for a period of two years by the party against whom such an order is passed entitles the other party to a decree of divorce\textsuperscript{173}. The Parsi law conceives it essentially as a fault ground and therefore only the innocent party, i.e., the party who has obtained the decree or order, can sue for divorce.

Clause (b) of section 32 of the Parsi Marriage and Divorce Act, 1936 before the amendment of 1988 which contains this ground lays down that a spouse may sue the other for divorce on the ground that a decree or order for judicial separation has been passed against the defendant, or an order has been passed against the defendant by a magistrate awarding separate maintenance to the plaintiff, and the parties have not had partial intercourse for three years or more since such decree or order.

The amending Act has re-modeled the clause thus:

That an order has been passed against the defendant by a magistrate awarding separate maintenance to the plaintiff, and the parties have not had marital intercourse for two years or more since such order.

Under the clause basis for divorce is:

Non-resumption of marital intercourse- for a period of two years after an order for maintenance is passed by a Magistrate.

“The Magistrate’s order” contemplated under the clause is the order of maintenance passed under section 125 of the Code of Criminal Procedure, 1973.

The clause lays down that there should be non-resumption of “marital intercourse” and not of cohabitation. It is submitted that if parties resume cohabitation, (which ordinarily includes marital intercourse, but may not in a given case, such as on account of advance age), the ground will not be available. After the resumption of cohabitation within two years, the spouse resuming cohabitation, cannot say that though he resumed

\textsuperscript{173} Section 32(h) of the Parsi Marriage and Divorce Act, 1936.
cohabitation yet, since no marital, intercourse took place thereafter, the ground was still available to him. On the other hand, it seems this clause does not contemplate resumption of cohabitation fully. Even if parties resume marital intercourse (any sexual intercourse between a married couple is always a marital intercourse) though not cohabitation (i.e. they do not live together), the ground would cease to be available.

It is a simple ground in the sense that once non-resumption of marital intercourse for a period of two years or more is established, divorce would follow as a matter of course. The court will have no alternative but to pass a decree dissolving the marriage.

This is also a ground for judicial separation under the Parsi law.

The burden of proof that resumption of cohabitation has not taken place for a period of one year is on the petitioner.

xii) Residuary Ground of Divorce

The Dissolution of Muslim Marriages Act, 1939\(^\text{174}\) was not stipulated as a complete code of Divorce for Women. In its eight clauses section 2 provides certain specific grounds on which a Muslim wife can sue her husband. The other modes of divorce available to a Muslim wife under Muslim law are not affected by the Act and this is what this clause lays down. Thus a Muslim wife can still obtain divorce by lian, Khula, mubaart and talaq-i-afweez.

Bigamy is a ground of void marriage under all matrimonial causes in India, except Muslim law which recognizes polygamy (though not polyandry). Adultery is a ground of divorce under the dissolution of Muslim Marriage Act, 1939, Special Marriage Act, 1954, Hindu Marriage Act, 1955, Parsi Marriage and Divorce Act, 1936\(^\text{175}\) and the Indian Divorce Act, 1869. “Fornication” is also a ground of divorce. Under Parsi law it is defined

\(^{174}\) Clause (ix) of section 2 of the Dissolution of Muslim Marriages Act, 1939 lays down that the wife may sue for divorce on any other ground which is recognized as valid for the dissolution of marriage under Muslim law.

\(^{175}\) Clause (d) of section 3 of Parsi Marriage and Divorce Act, 1936, which contains this ground lays down that a spouse may sue the other for divorce the ground that defendant has since the marriage committed adultery or fornication or bigamy or rape or an unnatural offence:

Provided that divorce shall not be granted on this ground, if the suit has been filed more than two years after the plaintiff came to know of the fact.
as “voluntary sexual intercourse between two unmarried persons or two persons not married to each other”.

Rape and unnatural offence would be discussed in the subsequent pages of this chapter when these would be discussed as wife’s additional grounds of divorce under other statutes.

**xiii) Wife’s Grounds of Divorce**

Except the Parsi Marriage and Divorce Act, 1936, all other systems of Indian personal laws recognize some separate grounds of divorce for wife. Most of them are by way of protective discrimination in favour of wife. The Hindu Marriage Act, 1955 recognizes four additional grounds on which the wife alone can sue for divorce\(^{176}\). The Special Marriage Act, 1954, recognizes two additional grounds of divorce\(^{177}\). Since under

\(^{176}\) Section 13 (2) of the Hindu Marriage Act, 1955, which contains four additional grounds of divorce on which wife alone can sue for divorce, runs: A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,—

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married, again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or

(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upward;

(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

**Explanation**- This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).

\(^{177}\) Section 27 (1A) of the Special Marriage Act 1954, which contains two additional grounds of divorce on which wife alone can sue runs: A wife may also present a petition for divorce to the district court on the ground,—

(i) that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality;

(ii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1976), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife

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Muslim law recognition of unilateral divorce gives very wide power of divorce to the husband and since there were hardly any grounds on which a wife could seek divorce, the dissolution of Muslim Marriages Act, 1939 lays down nine grounds of divorce on which wife alone can sue for divorce. Under the Hindu Marriage Act, 1955, Special Marriage Act, 1954 and the Parsi Marriage and Divorce Act, 1936, the wife can sue for divorce on all those grounds on which husband can sue for divorce. Under the former two statutes wife’s ground of divorce are additional grounds of divorce, on which she alone can sue for divorce and husband cannot sue her for divorce on those grounds. The Parsi Marriage and Divorce Act, 1936 recognizes the principle of equality and lays down grounds of divorce of which either spouse, (husband or wife) can sue for divorce. It goes to the extent of recognizing unnatural offences which is wife’s ground of divorce under the Hindu Marriage Act, 1955 and Special Marriage Act, 1954, as ground of divorce both for the husband and the wife. It is only the Indian Divorce Act, 1869 which discriminates against the wife. The fact of the matter is that it is a statute based on the state of English Matrimonial law prevailing then. Following the Matrimonial Causes, Act, 1857, it recognizes only one ground on which husband can sue the wife, namely, wife’s adultery.

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178 Section 2, the dissolution of Muslim Marriages Act, 1939.
179 Para 2 of section 10 of the Indian Divorce Act, 1869, which lays down the grounds on which wife can sue for divorce, runs: Any wife may present a petition to the District Court or to the High Court praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman:

- or has been guilty of incestuous adultery,
- or of bigamy with adultery,
- or of marriage with another woman with adultery,
- or of rape, sodomy or bestiality,
- or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et thoro,
- or of adultery coupled with desertion, without reasonable excuse for two years or upwards.

180 Section 32.
181 Section 32 (d).
182 Section 11.
But wife cannot sue the husband on husband’s bare adultery. It has to be adultery plus—
adultery along with some or other matrimonial misconduct\(^{183}\).

It should be noticed that the additional grounds on which wife alone can sue are also fault grounds under all the matrimonial statutes.

Section 2 of the Dissolution of Muslim Marriage Act, 1939 contains nine grounds on which a Muslim wife can sue for divorce. Most of the grounds are the same which are available to either spouse under most of the other matrimonial statutes. The grounds contained in clauses (ii) and (iv)—”that the husband has neglected or has failed to provide for her maintenance for a period of two years”, and “that the husband has failed to perform, without reasonable cause his marital obligations for a period of three years—have been discussed along with “desertion”.

Apostasy, which is ground of divorce under Muslim law, and its modification as contained in section 4 of the Dissolution of Muslim Marriage Act, 1939 has been discussed under the head “conversion” which is a ground of divorce under the Hindu Marriage Act, 1955 and the Parsi Marriage and Divorce Act 1936 also.

Similarly, pre-marriage impotency which is ground of divorce under Clause (v) of section 2 of the Act has been discussed under the head “impotency”. Under the Special Marriage Act, 1954 it is a ground of void marriage and under Hindu Marriage Act, 1955 it is a ground of voidable marriage. In this same manner other grounds of divorce which are common under the other matrimonial heads have been discussed along with each of these grounds.

Clause (vii) of section 2 of the Dissolution of Muslim Marriage Act, 1939 contains a typical Muslim Matrimonial law notion of “option of puberty” and “repudiation of marriage”. Cruelty as contained in clause (vii) of section 2 of the Act deals with some typical, Muslim law notions of cruelty.

Under Parsi Law, rape and unnatural offences are ground of divorce for both husband and wife\(^{184}\).

\(^{183}\) See para 2 of section 10.
Rape, Sodomy and Bestiality

Rape, sodomy and bestiality are grounds of divorce under which wife alone can sue for divorce under the Hindu Marriage Act, 1955\(^{185}\), Special Marriage Act, 1954\(^{186}\), and the Indian Divorce Act, 1869\(^{187}\). Fornication, rape and unnatural offence are a ground of divorce both for the husband and wife under the Parsi Marriage and Divorce Act, 1936\(^{188}\). It is interesting to note that unnatural offences (homosexuality and bestiality) are laid down as ground of divorce under the Parsi Marriage and Divorce Act, 1936 while under other statutes these are grounds of divorce for the wife alone. Under clause (d) of section 32 of the Parsi Marriage and Divorce Act, 1936 “rape” is also mentioned as a ground of divorce on which either husband or wife can sue for divorce. It is submitted that since rape is an offence where woman is involved, i.e., one can rape a woman; one cannot rape a man, even under the Parsi law, this ground will be available only to the wife. In other words, wife can sue her husband for divorce on the ground that he is guilty of rape. It cannot be the other way round.

The language of the clause under the Hindu Marriage Act, 1955, the Special Marriage Act, 1954 and the Indian Divorce Act, 1869 is identical. “The husband had since the solemnization of marriage, “guilty of rape, sodomy or bestiality”. Under the Parsi Marriage and Divorce Act, 1936, the clause lays down that any married person may sue for divorce on the ground “that the defendant has since marriage committed…rape or unnatural offence.”

Unnatural Offences: Homosexuality, Sodomy and Bestiality

The Hindu Marriage Act, 1955\(^{189}\) the Special Marriage Act, 1954\(^{190}\), the Indian Divorce Act, 1869\(^{191}\) use the expressions “sodomy” and “bestiality” while the Parsi Marriage and Divorce Act, 1936, uses the expression “unnatural offence”\(^{192}\).

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\(^{184}\) See 32(a) of the Parsi Marriage and Divorce Act, 1936 under which adultery, fornication, rape and unnatural offences are clubbed under this clause.

\(^{185}\) Section 13(2)(ii)

\(^{186}\) Section 27(1A)(i)

\(^{187}\) Section 10

\(^{188}\) Section 32 (d).

\(^{189}\) Section 13(2)(ii)

\(^{190}\) Section 27 (1A) (i).

\(^{191}\) Section 10, Para 2.
The Indian Penal Code, 1860\textsuperscript{193} does not directly use the expression “sodomy” and “bestiality” but uses the expression “unnatural offences”. This section makes it an offence to indulge in unnatural carnal intercourse to stop the offence would be committed when there is a penetration. If there is no penetration, it would not be an offence, though under matrimonial Law, it may amount to cruelty\textsuperscript{194}.

**Non-Resumption of Cohabitation for One Year after an Order of Maintenance**

This is also wife’s additional ground on which she alone can sue her husband. This ground was introduced in the Hindu Marriage Act, 1954 by the Marriage Laws (Amendment) Act, 1976. This ground is available to the wife under the following two situations:-

(a) When a wife obtains a decree for her maintenance against her husband in a suit filed by her under section 18 of the Hindu Adoptions and Maintenance Act, 1956 [it stipulates situations where wife can live separately from her husband and yet can claim maintenance; most of these situations have been stated in section 18 (2) of the Act] and resumption of cohabitation does not take place even after the lapse of one year from the decree, then wife can sue her husband for divorce.

(b) When a wife obtains an order of maintenance in her proceeding initiated under section 125 of the Code of Criminal Procedure, 1973 cohabitation is not resumed over a year or more after the date of the order, the wife can sue for divorce.

Under (a) the parties have to be Hindus, even if they are married under the Special Marriage Act, 1954; otherwise this provision under the Special Marriage Act, 1954 will not be applicable. Under (b), again parties are to be Hindu if wife sues for divorce under the Hindu Marriage Act, 1955. They may be of any community if they have married under the Special Marriage Act, 1954.

\textsuperscript{192} Section 32(d).
\textsuperscript{193} Section 377 Indian Penal Code, 1860 runs: Whoever voluntarily has carnal intercourse against the order of nature, with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation- penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.
\textsuperscript{194} Sathan v. Sathan (1928) All E R 219.
Under both the statutes, it is contemplated as a ground of divorce for the wife alone. The fact of the matter is in situations like these marriage stands broken down irretrievably and thus divorce should have been permitted to either spouse. But here it is stipulated as a fault ground.

The ground is available if it shows that a decree or order for maintenance has been made and cohabitation has not resumed for a period of one year or more. Of course, assumption is that the wife is living separate from the husband after the passing of the decree.

**Repudiation of Marriage**

The Marriages Laws (Amendment) Act, 1976 introduced a new ground of divorce under Hindu law, namely, where a girl is married below the age of 15 and she repudiates the marriage after attaining the age 15, but before attaining the age 18, she can sue for divorce on that basis. The rationale of this ground is that despite the fact that minimum age of marriage both for boys and girls is laid down in the Act; non-age does not render the marriage invalid. Marriage remains valid. It is still very common among Hindus that girls below the age of 15 are married. An opportunity is given to them to get out of the union if they considering it irksome, and have repudiated it before attaining the age of 18 years. Under the clause it is immaterial whether the marriage has or has not been consummated.

In *Savitri Bai v. Sitaram* wife petitioned for dissolution of her marriage on the ground that when she was married she was below the age of fifteen and she repudiated the marriage before she attained the age of eighteen years. For proving the age of the girl, the horoscope of the girl and oral testimony of the father was given. The trial court felt that the wife’s testimony was not beyond reasonable doubt. The Madhya Pradesh High Court observed that in the absence of matriculation certificate the testimony of parents and horoscope of the wife the only source by which age can be established, since the ground can be established by preponderance of probabilities.

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196 AIR 1986 MP 218
Under Muslim law, the provision has existed from the beginning. As to the Muslim wife’s right to divorce on this ground, the law has been codified by the Dissolution of Muslim Marriages Act, 1939. The wife is entitled to file a suit for the dissolution of her marriage on the ground that she was given in marriage by her father or grandfather or any other guardian, before she attained the age of fifteen, that the marriage had not consummated, and that she had repudiated the marriage before she attained the age of eighteen.197

xiv) Divorce by Mutual Consent under various Personal Laws:

Hindu law

Section 13 B, insertedby1976 amendment but given retrospective effect, provides for divorce by joint consent of both the spouses. They may present a petition to the district court on the grounds:

i. That they have been living separately for one year or more;

ii. That they have not been able to live together; and

iii. That they have mutually agreed that the marriage should be dissolved.

The court does not dispose of the proceedings immediately after presentation. It waits until aftersix months but before eighteen months thereof. If within such period the parties make a motion pressing the petition, the court hears the parties, makes such inquiry as it thinks fit, and passes a decree for dissolution of the marriage after satisfying itself-

i. That the marriage has been solemnized; and

ii. That the averments in the petition are true.

On the matter of satisfaction of the court, the provisions of section 23 have to be looked into. One specific point may be highlighted-

Section 23 (1) (bb) - the court satisfies itself that consent has not been obtained by force, fraud or undue influence.

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197 Section 2 (vii) of the Act. This is also now a ground under the Hindu Marriage Act, 1955 with this modification that the wife can obtain a decree on the basis of repudiation of marriage irrespective of the fact whether the marriage has or has not been consummated.
Special Marriage Act

By 1976 amendment this added ground was inserted as section 28. It provides for divorce on the joint petition by the husband and wife to the district court on the grounds:

i. That they have been living separately for one year or more;

ii. That they have not been able to live together; and

iii. That they have mutually agreed to dissolve the marriage.

The court does not dispose of the proceeding immediately after presentation. Instead, it waits for the parties to appear after six months of the presentation of the petition but before eighteen months thereof. If the parties appear within such period and make a motion pressing the petition, the court makes such inquiry, as it thinks fit, to satisfy itself:

i. That the marriage has been solemnized; and

ii. That the averments in the petition are true.

Section 34 also lays down the duty of the court in passing a decree for any matrimonial relief. The court has to satisfy itself on the points noted down there. For instance, section 34(1) (c) casts duty on the court to ensure that the consent has not been obtained by force, fraud or undue influence.

Muslim Law

Khul and Mubaraa

Khul or Khula and Mubaraa or Mubaraat are two forms of divorce by mutual consent but in either of them, the wife has to part with her dower or a part of it or some other property. In the then prevailing conditions in Arabia these forms of divorce were considered to be progressive and part of reformist measures introduced by the Prophet. A verse in Koran runs as under:

And it is not lawful for you that ye take from women out of that which ye have given them: except (in the case) when both fear that they may not be able to keep within the limits (imposed by Allah), in that case it is no sin for either of them if the woman ransom herself.

A tradition is also cited in support. One Jamila, wife of Sabit-bin-Qais, appeared before the Prophet and said that though she had no complaints to make against Sabit, her
husband or religion, she could not bring herself to be wholeheartedly loyal to him as a Muslim wife ought to be as she hated him, and, therefore, requested the Prophet to grant her divorce since she did not want to live in Kufr (disloyalty). The Prophet enquired of her whether she was willing to give him back the garden that he had given her and her agreeing to do so, the Prophet sent for Sabit, and asked him to take back the garden and grant her divorce^{198}. 

The word “Khula” in its original sense means “to draw” or “dig up” or “to take oil”, such as taking off one’s clothes or garments. By analogy it is said that spouses are like clothes to each other and when they take “Khula”, each takes off his or her clothes, i.e., they get rid of each other. In law it is said to signify agreement between the spouses for dissolving a connubial union in lieu of compensation paid by the wife to her husband out of her property. It is also said as “laying down by husband of his right and authority, over his wife for an exchange.”^{199} According to the Fatwa-i-Alamgiri^{200}

“When married parties disagree and are apprehensive that they cannot observe the bounds prescribed by the divine law, that they cannot perform the duties imposed on them by the conjugal relationship, the woman can release herself from the tie by giving up some property in return, in consideration of which the husband is to give her a khula, and when they have done this, a tatak-ul-bain would take place.

In Buzul-ul-Raheem v. Luteefutoon-nissa^{201} the Privy Council said:

A divorce by Khula is a divorce with the consent, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband -for her release from the marriage tie. In such a case, the terms of bargain are a matter of arrangement between the husband and wife, and the wife may, as a consideration, release her dyn-mohr and other rights, or make any other agreement for the benefit of the husband.

In short, khul form of divorce is one where wife makes a proposal for divorce, either because of her dislike for her husband or for any other reason, to her husband in

^{198} Bhukhari, 68, II.  
^{199} Hedaya, 112; Ballie, 31  
^{200} Fatwa-i-Alamgiri I, 669.  
^{201} (1861) 8 MIA 379.
consideration of her agreeing to forgo her dower or to give some property to him when the proposal is accepted by the husband, it results in divorce.

**Mubaraa**

In Mubarra or Mubarrat form of divorce by mutual consent, the outstanding feature is that both the parties, desire divorce, or as the Muslim authority say, “aversion is mutual”. Thus, proposal may emanate from either side. The word, “mubaraa” denotes the acts of freeing each other by mutual consent. In the words of Fyzee, “in the case Khul, the wife begs to be released and the husband agrees for a certain consideration, which is usually a part or whole of the mahr, while in mubaraa apparently both are happy at the prospect of being rid of each other”\(^{202}\). Among the sunnis when the parties to marriage enter into a mubarraa at mutual consent rights and obligations come to an end. The Shia law is stringent It requires that both the parties must bona fide find the marital relationship to be irksome. Among the Sunnis no specific form is laid down, but the Shias insist on a proper form. If the husband were to say to his wife, “I have discharged you from the obligation of marriage for such a sum, and you are separated from me” divorce would result\(^{203}\).

Among the Shias mubaraa is effected by such words, “I have liberated thee for so much and thou art repudiated”. The Shias insist that the word mubaraa” or “mubaraat” should be followed by the word talak otherwise no divorce would result. The Shias also hold that the pronouncement should be in Arabic unless the parties are not able to pronounce the Arabic words. Just as in khula so in mubaraa intention to dissolve the marriage must be clearly expressed. It appears that in mubaraa, consideration cannot be whole of dower. It can also not be of property worth more than dower. It has to be something less than dower. We have seen there is no such inhibition in khula.

Among both the Sunnis and the Shias, the mubaraa is an irrevocable divorce as in the talak-ul-bain. In the words of Al Karkhi, when the husband receives a compensation from the wife the divorce is *bain* and even when it is without compensation and

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\(^{202}\) Fyzee 156  
\(^{203}\) Ameer Ali II, 517.
consequently rai (reversible at the option of the husband), if during the wife’s idda he were to accept from her a compensation, the separation would be equally bain.

The other requirements of the mubaraa are the same as that of the khul. Just as in the khul, so in the mubaraa, the wife must undergo idda. In both the khul and mubaraa, the divorce is essentially an act of parties, and no intervention of the court is required.

Christian Law

Amending Act 51 of 2001 has inserted section 10A which is largely comparable to section 13B of the Hindu Marriage Act or section 32B of the Parsi Marriage and Divorce Act or Section 28 of the Special Marriage Act. Before this Amendment divorce by mutual consent was not permitted to the Christians. The Supreme Court declined to accept this ground for divorce in Reynold Rajamani v. Union of India, even on the basis of Section 7 of the Act, i.e. by applying the rule under the Matrimonial Causes Act, 1973 of England.

Thus even if the parties agreed and consented to have their marriage dissolved, the court would not permit it. Such decree was vitiated and not in accordance with law, the court held in Susanna v. Yeshwanth.

When there is no possibility for reunion and marriage between the parties is practically dead, enforced continuity of the marriage would only force parties to spend more years in agony and bitterness.

In a petition for divorce by mutual consent, in practice and procedure it is always just and proper for parties to approach the District Court instead of approaching the High Court straight away though the High Court has jurisdiction to entertain such petition.

Where litigation stated with a petition for nullity or dissolution of marriage and more than six months thereafter the joint petition for divorce by mutual consent was made

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204 Quoted by Ameer Ali, II 517.
206 AIR 1985 Kant 133.
and the parties were already living separately since two years, the waiting period of six months vide sub-section (2) of section 10 A was waived.209

In Esther @ Gunabhooshanam v. S. Christopher Immanuel,210 a marriage was dissolved by mutual consent in exercise of extraordinary jurisdiction vested in the High Court; vide section 8 of the Act. The petition was originally filed by the husband for restitution of conjugal rights which was allowed by the family court. Pending appeal against this by the wife, the appellant wife and the respondent husband entered into a compromise agreeing to dissolve the marriage by consent. All the conditions as laid down in section 10 A were satisfied. Invoking the provisions of section 8, the High Court exercised its special powers and modified the family court order and passed a decree for dissolution of the marriage.

It is significant to note that for a divorce by consent, the parties must obtain a decree under section 10-A of the Act. There can be no divorce by a deed by dissolution between the spouses; and such deed or document does not amount to a valid divorce. Thus where a Christian husband enters into a second marriage alleging that his first marriage with his wife was dissolved under a deed of dissolution, it was held that the status of the second woman is merely that of concubinage and children born of the union are illegitimate.211

**Parsi Law**

Section 32 B of the Parsi Marriage and Divorce Act, 1936 has been inserted by 1988 Amendment Act. It provides simply that a suit may be filed together by both parties to the marriage on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed to have the marriage dissolved. After filing of the suit as provided in section 32 B (1) if the court is satisfied as per the provisions in section 32 B (2) the decree can be pronounced. Similar provisions in the in the Special Marriage Act, 1954 (section 28) and the Hindu Marriage Act, 1955 (section 13 B) are subject to certain conditions. The court is

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not hyper-technical while granting relief under this Act. In a petition for divorce by mutual consent, the court need not seek the assistance of delegates.\textsuperscript{212}

In \textit{Yasmin Karkaria v. Cyrus Edul Karkaria},\textsuperscript{213} an application under this section was filed by the parties who were residing in the United States. The plaint filed in court was signed by both the plaintiffs and presented by an appointed attorney who was an advocate; the original power of attorney duly signed and attested by both the parties was also filed on record and notarised by a Notary Public in the U.S.A. considering the finding on issues given by delegates and also considering the fact that parties had already obtained a divorce from a competent court in the U.S.A., a decree of divorce under section 32 B was granted.

\textbf{Jewish law}

The Jewish law provides that the court should not interfere where both parties declare that their marriage has failed and that they would like to dissolve their marriage. If both the parties agreed to divorce it was to be granted and the court was not required to investigate or seek proof of any wrongful conduct or to condemn and party as the “offender” the court was concerned only that both parties should be acting with full knowledge and without fraud or duress; that minor children, if any, be provided for; that the property rights of the parties, especially the wife, fairly and honestly adjudged and that proper formalities be observed that no doubt could later be cast on the validity of divorce. The Jewish law recognises divorce by mutual consent of the parties, divorce on the petition of the husband and wife separately on certain grounds\textsuperscript{214}, and divorce enforced by court without petition by either party.

\begin{itemize}
\item \textsuperscript{212} Minoo Rustomji Shroff v. Union of India, (2005) 4 Bom CR 147 (DB): 2005 (2) Mah LJ 1124.
\item \textsuperscript{213} 2001(1) Mah LJ 422: 2001 (1) Bom CR 571.
\item \textsuperscript{214} These grounds based on the original text are set out by Rev. (Dr) M. Mieliziner in his book entitled, “The Jewish Law of Marriage and Divorces”. This work is accepted as accurate account of Jewish law. See also Benjamin v. Benjamin, 28 Bom LR 328.
\end{itemize}
xv) *Divorce under Custom and Special Enactments*

**Hindu law**

The unique feature of the Hindu Marriage Act, 1955\(^{215}\) is that it still retains custom in some matters. One important aspect of recognition and retention of custom relates to dissolution of marriage. Similarly, divorce under certain local enactment is also recognized.

This means that post-Act and pre-Act marriages are still dissoluble under custom or special legislation provided such dissolution is recognized under custom or special enactment. Not merely customary mode of divorce is still recognized but the customary forum is also recognized.

**Divorce under Custom**

In fact, before the statutory reform of Hindu matrimonial law, divorce under Hindu law was recognized only under custom; otherwise, Hindu marriage was regarded as indissoluble. Divorce, if custom recognized it, was available to Hindus. So was the forum of divorce. This position is still retained.

In respect of customary divorce, neither one year’s bar to divorce (the fair trial rule) under section 14, nor any of the bars laid down in section 23 of the Hindu Marriage Act, 1955 are applicable. The provisions of sections 24, 25 and 26 of the Act are also not applicable. In short, no provision, of the Hindu Marriage Act, 1955 applies to such divorces; No petition in the court is required. The customary divorce may still be obtained the same way as they were obtained earlier. Thus, a divorce under custom may be obtained through the agency of gram panchayat or caste tribunal or caste panchayats, by private act of parties, orally or in writing, or under an agreement, oral or written, such as bill of divorcement, tyaga-patra or farkat-nama\(^{216}\). A custom recognizing divorce must

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\(^{215}\) Section 29(2) of the Hindu Marriage Act, 1955 runs: Nothing contained in this Act shall be deemed to affect any right recognized by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.

fulfill all the tests of a valid custom. A custom permitting divorce to one spouse against the wishes of the other is void being unreasonable and against public policy\textsuperscript{217}.  

The gram-panchayats and caste-panchayats continue to exercise jurisdiction over customary divorces. How the jurisdiction is exercised and when the courts of law may interfere in their adjudication is well illustrated by \textit{Pemabat v. Chanoolal}\textsuperscript{218}. The marriage of parties was dissolved by the Panchayat on the basis of mutual consent of the parties. Subsequently, the wife filed a suit in a court of law for a declaration that the marriage still subsisted on the averment that when she gave her consent for divorce she was only fourteen years old and was not capable of giving a valid consent. Rejecting the suit, the court observed that the wife had at that time sufficient understanding and since such divorces were recognized in the caste, the marriage stood dissolved. On the other hand the case of \textit{Kishanlal v. Prabhu}\textsuperscript{219} illustrates as to when and how the courts may interfere, in a customary divorce. The court can look into question as to whether the gram panchayat had the jurisdiction and as to whether the principles of natural justice were followed.

In Punjab and Haryana, divorce has been recognized practically in all the tribes. However, it should be noted that there is no general custom of divorce among the Punjab tribes. Custom varies from tribe to tribe and from locality to locality. Among some tribes divorce is not recognized on any basis, while, in some tribes, divorce is available very easily. Any discussion of customary mode and customary forum of divorce under Punjab customary law cannot be exhaustive. Among, low caste Hindu tribes divorce has been generally recognized. It is only among the High caste Hindus that divorce is recognized only under a special custom. It appears that among the Muslim agricultural tribes the usual mode of talak is in talak-bidda form, that is one single pronouncement of divorce, such as, \textit{“I divorce thee triply”}, resulting in irrevocable dissolution of marriage. The urban Muslims mostly follow Muslim law in matters of divorce; they are largely governed by their personal law.

\textsuperscript{217} Gurdit v. Angrej, AIR 1968 SC 142.
\textsuperscript{218} AIR 1963 MP 57. See also Madho v. Shakuntla, AIR 1972 All 119; Thimmakhu v. Bandhu, AIR 1977 Kant 115.
\textsuperscript{219} IR 1963 Raj 95.
No specific grounds, of divorce are recognized\textsuperscript{220} Divorce may be obtained by mutual consent, sometimes the husband divorces his wife on some flimsy ground, sometimes he abandons her or renounces her, and sometimes wife obtains divorce from him on some flimsy ground, or even without any. It is a difficult task to clarify various modes of divorce. No such attempt is made here; some illustrative cases are grouped together. It appears most Jat tribes recognize easy mode of divorce. In some Jat tribes divorce is in writing, in some it is oral. There are only a few Jat tribes which do not recognize divorce. Other tribes too recognize divorce.

**Written divorce**

Some tribes, such as Ghuman Jat\textsuperscript{221} insist that the divorce must be in writing. In such a case it is not necessary to state the ground of divorce. Mostly, in such a caste divorce is unilateral; whenever the husband wants to divorce his wife, he writes a tyagpatra (in case of Hindu tribes) or farkatnama (in case of Muslim tribes). However, there is no rigidity. A Hindu husband may also use the form of farkatnama. It must be clearly understood that customary law does not prescribe any form. However, if it is in writing, the deed must clearly express the intention to divorce. The tyagpatra and farkatnama are only two instances of written divorce. When written divorce is recognized and the husband divorces his wife by a writing which may be in the form of a tyagpatra or farkatnama, or in any form, divorce is valid, and the woman is free to remarry.\textsuperscript{222} So is the man.

**Renunciation, abandonment or repudiation**

Among several tribes and communities, particularly the Jat tribes, a husband has the power to repudiate marriage. In *Lachhu v. Dalsingh*\textsuperscript{223} where parties were Guman Jats of Gurdaspur Tehsil, Roe, C.J., observed: “It is in no way repugnant to the spirit of this law that a man who takes a wife should have the power of repudiating her and that, when

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\textsuperscript{220} See Gurdit v. Angrej, IR 1968 SC 142
\textsuperscript{221} Sunder v. Nihala.84 PR 1889. See also Basant Singh v. Bhagwan Singh, AIR 1933 Lah 755 (Jats of Sialkot).
\textsuperscript{222} Ghuman and Chimah jats of Sialkot recognize this mode of divorce, See also Jassan v. Nthala., 78 PR 1884, and Basant Singh Bhagwan Singh, AIR 1933 Lah 75 which are the same effect.
\textsuperscript{223} 33 PR 1896.
so repudiated, she should be free to marry another man.” In *Gopi Krishna v. Jaggo*\(^\text{224}\) a custom in the vaishya community under which abandonment or desertion of the wife by the husband brought about a dissolution of marriage, was held valid. Among the Jats of Sialkot an oral abandonment or repudiation of wife does not lead to divorce: it must be in writing\(^\text{225}\). At one time it was doubted as to whether among the Jats of Jullundur District a husband could divorce his wife\(^\text{226}\). But in all the districts surrounding Jullundur there has been a well-recognized custom under the husband can dissolve the marriage by turning out or abandoning his wife. In such a case the wife is free to remarry. In *Gurdit Singh v. Angrej*\(^\text{227}\), the Supreme Court found that such a custom also prevailed in Jullundur District. In some cases a view has been expressed that mere abandonment of the wife by the husband does not lead to automatic divorce, and if the abandoned wife lives with another man as his wife, the second marriage will not be recognized\(^\text{228}\). On the other hand, in some cases, it has held that a repudiated or abandoned wife is free to remarry either in formal form or in informal form, such as Karewa or Chadarandazi form.\(^\text{229}\) Sir Shadi Lal observed that whereby custom abandonment or desertion of a wife by her husband dissolves the marriage tie, the wife may, during the life time of her husband, validly contract a second marriage.\(^\text{230}\) Among some castes, just as Zargars of Gurdaspur District, abandonment or desertion of the wife by the husband does not lead to divorce.\(^\text{231}\) However, in this case it was found that Zargars (goldsmiths) were not governed by custom

\(^{224}\) 63 IA 295.

\(^{225}\) Basant v. Bhagwan. AIR 1933 Lah 755 (earlier cases have been referred).

\(^{226}\) Uttv Hira Singh, 78 PR 1893; see also Govindaraju v. K. Munnusami, AIR 1997 SC 10.

\(^{227}\) AIR 1968 SC 142.

\(^{228}\) Inder v. Jiwa, 49 PR 1890; Ganga Singh v. V. Inder, 72 PR 1892; Raghbir Singh v. Kartar Kaur, 1954 PLR 513 (in this case it was found that Zargar of Gurdaspur do not recognize the custom of divorce) See also Sudarshan Kaur v. Manmohan Singh, 1977 PLR 98, where Narula, C.J., observed (it is submitted obiter) that abandonment or release does not amount to divorce. His Lordship- were called upon to determine whether a suit for declaration by the plaintiff that the defendant is not his wife falls within the purview of the Hindu Marriage Act, 1955. That suits for such relief, called Jactitation under English law do not fall under the scope of the Hindu Marriage Act is obvious. But it seems that the learned Chief Justice felt that if abandonment or release will amount to divorce it will not be covered by the Hindu Marriage Act. It is submitted, that the finding was not necessary for the decision of the petition; only declaratory relief that can be granted under the Hindu Marriage Act is under section 11 for a declaration that a marriage is null and void. All other declaratory relief will come under the Specific Relief Act, 1963.

\(^{229}\) Ishwar Singh v. Budhi, (1913) 19 IC 460 (Sikh Jats of Shakargarh Tehsil); Mat Singh v. Ram Kaur, AIR 1973 P & H 124 (Tarkhans); Pritam Singh v. Nasib Singh, (1956) PLR 424.

\(^{230}\) Gopi Krishna v. Jaggo, (1930) 58 All 397 PC.

\(^{231}\) Raghbir Singh v. Kartar Kaur 1954 PLR 513.
but by personal law, i.e. Hindu law. A woman by abandoning or deserting her husband cannot, thereby, repudiate the marriage and enter into a valid second marriage.

**Immorality, unchastity, adultery or conversion**

Among some tribes the husband can divorce his wife on the ground of unchastity, immorality or adultery. In *Bhan Kaur v. Isher Singh*\(^{232}\) the Court recognized that among Maler Kotla Jats the husband has power to divorce a wife who is immoral or who committed adultery or who converted to another religion. In Gurgaon District the husband has a right to dissolve his marriage with his unchaste wile by abandoning her\(^{233}\).

**Apostasy**

Before the coming into force of the Dissolution of Muslim Marriage Act, 1939, the position was that apostasy (conversion to another religion) or either husband or wife operated as an instant dissolution of marriage\(^{234}\). This was also the position among the Muslim tribes of Punjab.\(^{235}\) After the coming into force of the Dissolution of Muslim Marriage Act, 1939 the position is: (i) apostasy of the husband still results in an instant dissolution of marriage if the wife who before marriage belonged to another faith, reconverts to her original faith, it results in instant divorce; (ii) the apostasy of Muslim wife does not result in instant divorce.\(^{236}\)

Whether the apostasy of Hindu wife or husband results into instant divorce under customary law in a series of cases it has been held that apostasy of the Hindu wife or husband in any tribe or community does not result in divorce\(^{237}\). Under the Hindu Marriage Act, 1955, the conversion of wile or husband entitles the other party to sue for divorce\(^{238}\).

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233 Batto v. Punion, 1970 PLR 84
235 Allah Baksh v. Amir Begum, 61 PR 1899, Imam Din v. Hasan Bibi, 85 PR 1906 (earlier cases have been reviewed.).
236 Section 4.
237 Naraina v. Hukum Singh, 152 PR 1890 (Singla Jats of Tarn Taran Tehsil); Jamna Devi v. Mul Raj, 49 PR 1899.
238 See section 13 (1) (ii) of the Hindu Marriage Act, 1955.
Expulsion from caste

Expulsion of the husband from the caste does not lead to divorce and the wife cannot refuse to live with the husband.

Divorce by mutual consent

The customary law recognizes divorce by mutual consent. Sometimes such divorces are in writing and sometime these are oral\(^\text{239}\). Sometimes the consent of the husband is obtained by making payment to the husband of the actual expenses of the marriage. Such a divorce is valid\(^\text{240}\). But marriage with a woman whose husband is alive even with the knowledge of the latter is not valid\(^\text{241}\). Similarly, a custom under which the marriage can be dissolved either by the husband or the wife without obtaining the consent of the other spouse, on the payment of a sum of money to biradari is not a valid custom\(^\text{242}\).

Divorce under Special Enactments

Prior the coming into force of the Hindu Marriage Act, 1955, some of States had passed statutes introducing monogamy and divorce in Hindu law. Some States have some matrimonial statutes to regulate marriage and divorce among some Hindu communities and castes a group of castes. The Hindu Marriage Act, 1955 has repealed all the States’ general statutes introducing monogamy and divorce. However, it has not repealed the statutes falling under the second category. Section 29 (2) of the Hindu Marriage Act, 1955 retains them.

In some of these enactments\(^\text{243}\) divorce by mutual consent or by a deed executed by the parties is recognized. Among the matrilineal communities, such as Marumakkathayama and Aliasantana, marriage has always been considered to be consensual union and not a sacrament and has been considered to be dissoluble by mutual consent. Some special enactment of the old Madras Province and the erstwhile States of Travancore and Cochin regulated marriages and divorce in these communities. These

\(^{239}\) Sunder v. Nihala, 84 PR 1899.
\(^{240}\) Chetty v. Chetty, (1894) 17 Mad 429.
\(^{241}\) Jassan v. Nihala, 78 PR 1884.
\(^{242}\) Keshav v. Bai Gandhi, (1915) 30 Bom 538.
enactments have not been repealed by the Hindu Marriage Act: 1955. When divorce is sought under these enactments none of the provision of the Hindu Marriage Act, 1955 apply to it. Neither one year’s bars to divorce, nor any bars under section 23 of the Hindu Marriage Act, 1955 apply to such divorces. Similarly, the provisions of sections 24, 25 and 26 of the Act do not apply.

In *M. Saraswathy Amrna v. P. Padthavathy Amma* there are some interesting aspects. Section 29(2) of the Hindu Marriage Act, 1955 saves customary divorces and divorces under special statutes. The present case is concerned with section 6(2) of the Madras Marumakkathayam Act, 1933 under which a marriage may be dissolved by mutual consent of the parties. In this case a divorce deed was executed between the spouses under which they agreed to dissolve their marriage by mutual consent. But they did not act upon the deed and continued to live as husband and wife. Thereafter the husband took a second wife. The question was whether the first marriage stood dissolved. The Court came to the conclusion that it did not as parties continued live together. In view of this finding the Court said that the second marriage was void. It is submitted that the written deed under the special statute was enough to dissolve the marriage. If thereafter parties lived together it was at best the relationship between a man and his concubine. In view of this the second marriage was valid.

There is an interesting discussion on the question as to what is the effect of section 4 of the Hindu Marriage Act, 1955 on the existing statutes and customary law. In this case learned counsel argued that “what is saved by section 29 (2) is the right to” obtain dissolution. He further argued that the right to seek divorce was available, but that it was limited to the grounds under section 13, and that the grounds under the earlier enactment would not be available, as those would be inconsistent with section 4 of the Hindu Marriage Act, 1955. The learned Judge, Mr. Justice Shankaran Nair, rightly observed that under the section grounds of divorce were saved, as otherwise there would nothing else to be saved. The learned Judge observed: “Saving cannot be of something which needs no saving and saving can only be of something, which otherwise the repealing Act would

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244 Avyappan v. Paraketty, AIR 1971 Ker 44 (FB); Prema v. Ananda, AIR 1973 Mys 69.
245 Prema v. Ananda, AIR 1973 Mys 69
246 AIR 1993 Ker 194
destroy”. This view finds support of the Punjab and Haryana High Court in *Jagjit Singh v. Mohinder Kaur* where the court observed:

If under custom or under special enactment a Hindu has a right to obtain dissolution on grounds other than those enumerated under Section 13 of the Hindu Marriage Act, he is entitled to avail of the same. However, Nair, J., left the question open as he had decided the case on other basis, which it has been submitted earlier, is an erroneous view.

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