

The Indian legal system is based on a three-tier structure of courts. At the bottom of the system are the District Courts. In each district there is a court, which is headed by a District judge. Subordinate to the District judge are the civil judges (who adjudicate upon civil disputes, arising in the jurisdiction of the district) and magistrates (who adjudicate upon criminal matters arising within the area of the police station under their jurisdiction). Similarly each state has a High Court having jurisdiction over the whole state, and the Union of India has a Supreme Court that has jurisdiction over the whole country.

Courts play an important role in striking a balance between the changing needs of the society and protection of the freedom of the individual. Freedom can never exist without order. It is essential that freedom be exercised under authority and order should be enforced by authority which is vested solely in the executive. The Supreme Court and the High Courts are the protectors of constitutional rights. Courts by way of several judgments have elaborated the exact extent and nature of the guarantee given by the Constitution. These judgments in fact have clarified the law to a large extent.

The judges as human beings have their prejudices, reactions, likes, dislikes, etc., which creates plus and minus reactions in judicial pronouncements. The real law is what they do in actual judicial behaviors. The life of law is not logic but experience and what the court decide and this stresses the empirical and pragmatic aspects of law. Making new rules is legislation and it also includes judicial legislation.<sup>1</sup> According to Dias and Hughes:

"legislation is law made deliberately in a set form by an authority which the courts have accepted as competent to exercise that function."<sup>2</sup>

In India judges fully realize that the legalistic approach cannot exclusively further or cater the social goals of the community. The process of social change was very slow in pre-independence period because of British domination and Parliamentary law had no real relationship with social justice in keeping with the life of the people. After independence the judiciary under new framework of Indian polity

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<sup>1</sup> Webster's New International Dictionary, 1412 (1995).

<sup>2</sup> Dias and Haghese, *Jurisprudence*, 77 (1964).

adopted the attitude of promoting social economic justice for the masses in order to promote the welfare of people.

The attitude of the court is reflected in many judgments which attempt to resolve social and economic tensions in order to meet the challenges of new emerging social order. A detailed study is required to highlight the role of judiciary in mouldings the fragmented matrimonial laws into one uniform law for all thereby ushering in social justice to the masses irrespective of their religious affiliations.

### **Pre-Independence Judicial Trends**

British rulers of India had adopted the policy of retaining and protecting the traditional personal laws of various religions. Accordingly, Hindu and Muslim customs were recognized by the British Parliament and the Indian courts. The Charter of 1753 on the Mayor's court at Bombay contained 'the earlier records of preservation of native laws and customs.'<sup>3</sup> The preamble to 21 Geo III Chapter page 70 (1782 A.D) said that one of the purpose of which this Act was passed was to maintain and protect the inhabitants of Bengal, Bihar and Orissa the enjoyment of all their laws, usages, rights and privileges and by section 17 of the same Act it was enacted that the Supreme Court of Judicature at Fort William in Bengal would have full power and authority to here and determine..... all manner of actions and suits, against all inhabitants of the city of Calcutta, and that their inheritance and succession to lands, rents and goods and all matters of contract and dealing between party and party would also be determined, in the case of Mohammedans by Muslim law, and in case of Hindus by Hindu law. The Bombay regulation IV of 1827 provided by section 26 that the Law to be observed in the trail of suits would be Acts of the Parliament and regulations of Government, applicable to the case; in the absence of such Acts and regulations, by the usage of the community; and in the absence of usage, by the Law of the defendant; and in the absence of specific law and usage, by applying principles of justice, equity and good conscience. The High Court Act of 1861 provided that the High Courts of were also bound to decide according to the usages in matter of inheritance and succession. The Government of India Act, 1915 by section 112 provided that the High Courts at Calcutta, Madras and Bombay would in matter of inheritance and succession of land, rents and goods, and in matter of contract and dealing between party and party, will decide according to personal laws and customs

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<sup>3</sup> *Lopez v. Lopes*, 5 Bom. H.C.R.O.C.J., 183

having force of law, to which parties were subject. The Government of India Act, 1935 by section 223 preserved intact the operation of section 223 of The Government of India Act, 1915. In addition to above Acts, there were many other Acts which had recognized the importance of custom.<sup>4</sup> It had been held in number of cases that when a custom, which was opposed to the general law, had been proved, it superseded the general law, under Hindu system clear proof of usage will outweigh the written text of Law.<sup>5</sup> Justice, equity and good conscience have been generally interpreted to mean the rules of English law and equity in such modified form as may suit the Indian conditions and circumstances.<sup>6</sup> The courts by analogy applied the principles of natural justice by ignoring many a provisions of the textual laws.

As regards Muslim Law a Muslim wife was not entitled to ask dissolution of marriage even if her husband was cruel to her. In *Monshee Buzloor Rahem v. Shamsoonnissa Begum*,<sup>7</sup> the husband disposed of the property of her wife and confined her into a room like jail. He also misbehaved with his wife. In appeal the husband said that under Muslim Law, a wife has no right to live separately even though the conduct of the husband is bad. The Privy Council held that if under the Muslim Law, no wife can separate herself from her husband under any circumstances whatsoever, the law is clearly repugnant to natural justice and the Privy Council was not bound to follow it. The Court decided the case in the favour of wife, keeping in view the English doctrine of justice, equity and good conscience. This was perhaps the first Indian case under Muslim Law on the subject of cruelty in which judges molded the law for the dispensation of justice to the suitor. Later on, in *Hussaini Begum v. Mohammad Rustom Ali Khan*,<sup>8</sup> it was held that if the wife raises the plea of legal cruelty, the facts, constituting such cruelty as understood in English Law are to be proved in order to establish the plea. It follows that Indian Law does not recognize various types of cruelty such as 'Muslim cruelty', 'Christian cruelty' and so on, and that the test of cruelty is based on the universal humanitarian standards, that is to say, conduct of the husband which would cause such bodily or mental pain as to endanger

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<sup>4</sup> The Madras Civil Courts Act (III) of 1873; Bengal, North-West Provinces and Assam Civil Courts Act (XII of 1887, section 37); Burma Courts Act (XVII of 1875, section 4); Central Provinces Laws Act, 1875, section 5; The Oudh Law Act (XVIII of 1876, section 3); The Punjab Law Act (IV of 1872, section 5) as amended by Act XII of 1878.

<sup>5</sup> *Thakurani Tara Kumari v. Chaturbhuj*, 17 Bom. L.R. 1012; *Mohammad Ibrahim v. Shaik Ibrahim*, AIR 1922 P.C. 59; *Collector of Madura v. Mooto Ramalinga* (1868) M.I.A 397, 436.

<sup>6</sup> *Waghela Raji v. Sheikh Masludin* (1887) 14 I.A. 89

<sup>7</sup> (1867) 11 M.I.A 551.

<sup>8</sup> (1907) I.L.R. 29 All. 222

her safety or health. Further in *Syed Jafar Hussain v. Mst. Hussain Ara Begum*,<sup>9</sup> it was held that only in those cases the proof of cruelty will be accepted where the evidence, as required under English Law, is made available. Thus the courts had succeeded in changing law in accordance with the English conceptions of justice, equity and good conscience. Under Muslim Law, in India, a Muslim wife could divorce her husband, under husband's delegated power, in the event of his taking a second wife. *Babu Mia v. Badrannessa*,<sup>10</sup> ruled that polygamy, under Muslim law, as an institution is tolerated but not encouraged and has not conferred upon the husband any fundamental rights to compel the first wife to share his consortium with another woman in all circumstances. In *Khurshid Begum v. Abdul Rashid*,<sup>11</sup> the Court refused relief to the husband because it was of the opinion that the husband and wife had been 'on the worst of terms' for years and the suit had been brought with the object of getting possession of wife's property. Thus, English judges administered Muslim law in the light of universal reasoning and uniform principles for dispensation of justice to the parties involved in the suit.

The pre Independence Judicial trend towards triple Talaq under Muslim Law was in favour of recognizing it and it was considered as irrevocable divorce. Instances are as in *Sara Bai v. Rabia Bai*<sup>12</sup>, Bombay High Court recognized triple talaq as irrevocable divorce. In another Privy Council Case *Mst. Annesa Khatoon v. Rasheed Ahmad*,<sup>13</sup> the decision appears to be harsh. In this case Privy Council held agreeing with the conclusion of the subordinate judges of the lower court, that the pronouncement of the Triple Talaq taken by the respondent constituted an immediately effective divorce. The learned judges of the Privy Council pointed out the validity and the effectiveness of an irrevocable divorce in the biddat form would not be affected by the husband's intention. In *Amiruddin v. Mst. Khatoon Bibi*,<sup>14</sup> the dispute was whether the conjugal rights between the husband and wife still subsist. Mst Khatoon Bibi, the plaintiff-respondent filed the suit for the recovery of her dower, her maintenance during the period of iddat and her moveables in the possession of her husband Amiruddin, the defendant-appellant and ultimately this appeal has arisen. Mst. Khatoon Bibi had been lawfully married to Amiruddin and she

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<sup>9</sup> (1912) 13 I.C. 609.

<sup>10</sup> AIR 1919 Cal. 511.

<sup>11</sup> AIR. 1926 Nag. 234.

<sup>12</sup> I.L.R. (1905) Bom. 537.

<sup>13</sup> AIR (1932) P.C. 25.

<sup>14</sup> AIR (1917) All. 343.

lived as his wife up to 8<sup>th</sup> September 1913. Her counsel pleaded that her husband divorced her at the railway station at Allahabad as she was going with her parents to Mahoba against his wishes. But her husband denied the divorce and advocated that the words used by him at the railway station did not in law have the effect of a valid divorce and in any case he has the option to revocation which he exercised within the prescribed period. The court of the first instance rejected all pleas of the defendant and held that the words used by the husband at the railway station on 8 September 1913 were sufficient and valid for divorce under Muslim Law. The court further held that he did revoke the divorce but he had no option of revocation as he had pronounced a triple talaq which was irrevocable. Accordingly the court of first appeal and second appeal affirmed the decision of the lower court.

Initially the judicial trend was in favour of recognizing the triple talaq as an irrevocable divorce. Instances are as in *Sara Bai v. Rabia Bai*<sup>15</sup>, the Bombay High Court recognized triple talaq as irrevocable divorce. In *Aisha Bibi v. Qadir Abraham*,<sup>16</sup> the Madras High Court held that even in the absence or presence of wife does not affect the irrevocability of triple divorce. The Privy Council in *Mst. Annesa Khaatoon v. Rasheed*<sup>17</sup> Ahmad agreed with the conclusion of the subordinate judges of the lower court, that the pronouncement of the triple talaq taken by the respondent constituted an immediately effective divorce. The learned judges of the Privy Council pointed out the validity and effectiveness of an irrevocable divorce in the biddat form would not be affected by the husband's intention. Again in 1931 the Madras High Court took another view in *Kathuyumma v. Urathel Marakkar*,<sup>18</sup> and said that there could be a valid talaq in the absence of wife but it would come into operation only from the date on which the wife comes to know of it. Similarly, the Bombay High Court said in *Sarabai v. Rabibai*,<sup>19</sup> "that the evidence was quite clear that every practical step was taken to communicate the divorce and make over the iddat money to the plaintiff, and that these measures, if they were frustrated, were frustrated solely by her own obstinate refusal to accept the paper or the money." The Calcutta High Court's opinion was also the same on the point in *Fulchand v. Namal Ali*

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<sup>15</sup> ILR (1905) Bom. 537.

<sup>16</sup> (1910) 3 Mad. 22.

<sup>17</sup> AIR (1932) PC 25.

<sup>18</sup> AIR (1931) Mad. 647.

<sup>19</sup> (1906) 30 Bom. 537.

*Chaudhary*,<sup>20</sup> “We therefore hold that it is not necessary for the wife to be present when the Talaq is pronounced.”

Hindus conceived of marriage as a union primarily meant for the performance of religious and spiritual duties. It could not take place without the performance of sacred rites and ceremonies and it was considered a permanent and eternal union. There was no requirement for the consent of the parties to a marriage and a marriage was not rendered null and void due to lack of consent. Therefore marriages of lunatics and minors were legal. In fact even courts of law in India have upheld such a marriage as was held in *Amirthammal v. Vallimayil*<sup>21</sup>. Therefore the concept of divorce was unimaginable and did not exist.

Under Hindu Law many customary divorces were approved ignoring the textual laws providing sacramental and indissoluble character of Hindu Marriage.<sup>22</sup> In *Shankarlingam Chetti v. Subhan Chetti and others*,<sup>23</sup> the court observed that there was nothing immoral in a caste custom by which divorce and remarriage are permissible in mutual consent.

Historical developments beginning with the grant of ‘Diwany’ witness how the British steadily involved them in the administration of justice and took over the task to mould our traditional systems. For easier administration of justice, the English judges first administer Hindu Law with the assistance of Hindu Dharamshastras. This institution of Pundits as official referees of the courts was abolished in 1864 (XI of 1864). In this process of administration of justice the British Courts including judges and lawyers did not look for making new laws. the process of social change was very slow and the laws made by the British Parliament had also no real relationship with the life of the people. The role of judges was not to discover the needs of the people but to interpret the law in its logical manner irrespective of the considerations of social justice.

In short, before 1947, the law was an instrument of political coercion imposed by alien ruler upon the Indian people without any consideration of welfare of the people. Judges were bound themselves to follow precedents. British judges were not authorized to go beyond law. Wherever law permitted them to exercise inherent

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<sup>20</sup> (1909) 36 Cal. 184.

<sup>21</sup> AIR 1942 Mad. 693

<sup>22</sup> *Pakhali Jiwa Magan v. Bai Jethi*, (1941) Bom. 536; *Emperor v. Bai Ganga* (1917) I.L.R. 19 Bom. 56; *Hira v. Hansi Pema* (1912) I.L.R 37 Bom. 295; *Kodu v. Lola* I.L.R. (1947) Nag. 885.

<sup>23</sup> (1894) I.L.R. 17 Mad 479.

judicial power, particularly in case of customs in India, they applied their own methods. They tried to apply British rules of interpretation and to some extent molded the traditional personal laws by infusing traditional legal institutions with English legal concept. The survey of the judicial decisions before 1947 shows the non-interference in religious laws of the Indians and the application of British judicial system by British judges in India. This process casually provided the application of universal principles of justice and uniform pattern of law throughout the territory of India.<sup>24</sup>

### **Post-Independence Judicial Trends**

After Independence, India adopted a democratic Constitution with Fundamental Rights and Directive Principles of State Policy which indicates the method and process of social change. The concept of independent judiciary along with the power of judicial review came in existence which was imagined as protector and guarantor of Fundamental rights and the Constitution. The Indian judiciary is empowered to examine the validity of laws made by the legislature along with the authorization to interpret them. This power is vested in the Court under the various provisions of the Constitution of India.<sup>25</sup> Article 13 of the Constitution provides for the judicial review of all laws of India. This power is conferred on the High Courts and on Supreme Court by virtue of which any law inconsistent with the provisions of the Constitution can be declared as unconstitutional hence void by these courts. In *Keshavanand Bharti*,<sup>26</sup> in which Judicial Review was declared as the basic feature of the constitution which cannot be destroyed by amending the Constitution, it was said:

"Judicial Review has thus become an integral part of our Constitutional system and a power has been vested in the High Court and the Supreme Court to decide about the validity of the provisions of the statutes. if the provisions of the statutes found to be violative of any of the Article of the constitution which is the touch stone for the validity of all laws the High Court and the Supreme Court are empowered to strike down the said provisions."

After the commencement of the Indian Constitution all the laws in force in the territory of India immediately before the commencement of the Constitution shall continue to remain in force but subject to the provisions of Constitution and until they

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<sup>24</sup> Shiv Sahai Singh , *Unification of Divorce Laws in India*, 257 (1993).

<sup>25</sup> The Constitution of India, Articles 13, 32, 136, 226.

<sup>26</sup> *Keshavanand Bharti v. State of Kerala*, AIR 1973 SC 1461.

were altered, repealed or amended by the legislature. By this test those portions of personal law which were inconsistent with the constitution would stand automatically repealed.<sup>27</sup> The view of P.B. Gajendragadkar, J., that 'personal laws were laws because they came down from ancient times as customary laws. They were not enacted by the state and would not be construed as a product of state action. Therefore their validity could not be challenged on the ground that they discriminated among people of India on the ground of religion alone.'<sup>28</sup> This view of Justice P.B. Gajendragadkar was successfully countered by A.M. Bhattacharjee. While considering the authority of Muslim law in India he has shown that it has been made applicable to the Muslims of India not by any inherent authority of such laws but by legislation enacted to give it the force of the state law. The British Government in India enforced the personal laws by enacting various regulations and statutes from 19th century onwards. Even as late as in 1937, the Muslim Personal Law Application Act was passed to give effect to Muslim Personal Law in India.<sup>29</sup> The position, therefore, was that the Muslim Law or Hindu Law needed recognition by the legislature and by the courts before their enforcement as laws in India.

The High Courts<sup>30</sup> and the Supreme Court<sup>31</sup> on different occasions examined the constitutionality of provisions of the Hindu Marriage Act, 1955. After the commencement of the Indian Constitution many states enacted laws for the abolition of polygamy in the Hindu community. In *Srinivas Aiyar v. Saraswathi Ammal*,<sup>32</sup> it was argued that the legislation abolishing polygamy was unconstitutional as it infringed the religious freedom of a Hindu and discriminated against him on religious grounds. The Court held that the practice of religion is subject to state regulation; the state can regulate or restrict a practice if it thinks that in the interest of social welfare and reform it is necessary to do so. Prohibition of bigamy under Hindu Marriage Act, 1955 was also challenged in *Ram Prasad v. State of Uttar Pradesh*,<sup>33</sup> the Allahabad High Court upheld abolition of polygamy by the Hindu Marriage Act, 1955.

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<sup>27</sup> V.S. Deshpande, *A review of Muslim Law and the Constitution*, 609, 27 JILI (1985).

<sup>28</sup> *State of Bombay v. Narasappa Mali*, AIR 1952 Bom. 83

<sup>29</sup> *Supra* note 26.

<sup>30</sup> *T. Sareetha v. T. Venkata Subbiah*, AIR 1983 A.P. 356 (section 9 of the Hindu Marriage Act was declared unconstitutional); *Smt. Harvinder Kaur v. Harmandar Singh Chaudhury*, AIR 1984 Del. 66 (section 9 of the Hindu Marriage Act was not violative of Article 21 of the Constitution of India, therefore, declared as valid).

<sup>31</sup> *Smt. Saroj Rani v. Sudarshan Kumar*, AIR 1984 SC 1562.

<sup>32</sup> AIR 1952 Mad 193.

<sup>33</sup> AIR 1957 All. 411.

Under Muslim Law in *Ahmad Giri v. Mst. Begha*<sup>34</sup>, Jammu and Kashmir High Court held that triple talaq becomes effective and irrevocable the moment it is given. Again in *Saliha B. v. Sheikh Gulla*<sup>35</sup>, Madhya Pradesh, High Court held triple repetition is not necessary condition for irrevocability effect. In this way we find till 1979 or till the decision of *Khadisa v. Mohammad*<sup>36</sup>, triple divorce was recognized as an irrevocable divorce if pronounced in single breath. The learned judge Narayana Pillai observed that a remarriage without conducting an intermediate marriage is only an irregularity and therefore does not render the marriage as void. So now the courts are taking liberal view on the subject of talaq-ul-biddat deviating from there earlier views regarding the effect of triple talaq and there by the courts are inclining towards the view taken by the progressive scholars and the triple pronouncement in a single breath amounts to one divorce and therefore revocable.

The Judicial trends towards the need of social change and justice in circumstantial situations can be seen in the case *Anipian J. v. Zilla*<sup>37</sup>, where an ex parte divorce was granted to the husband on a ground which does not even exist under the Indian Divorce Act, 1869. Under this act, only husband can claim for the decree of dissolution of marriage on the ground of only adultery of the wife. In this case husband obtained a decree of restitution of conjugal rights. Despite best efforts, the wife did not resume cohabitation after the decree of restitution. He prayed for the decree of divorce. The court granted the decree of divorce on the ground that the wife withdrew from the society of the husband without any reasonable cause and that despite a decree for restitution she had not resume cohabitation. Though it is desirable and correct that a marriage which has broken down should not be made to continue in law but in that line clear provision is required to be incorporated in the Indian Divorce Act. Here again court marched ahead to provide social justice in view of changed situations in spite of the absences of clear law on the subject.

In *Harichand Srinivas v. Sunanda*<sup>38</sup>, it was held that section 23 of Hindu Marriage Act, 1955 would apply to section 13(A) and the Court is not bound to grant divorce on mere proof of non cohabitation for the stipulated period and that further section 10(2) does not vest right to get decree for divorce in the spouse. In the instant

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<sup>34</sup> AIR 1955 J&K 1.

<sup>35</sup> AIR 1973 MP 207.

<sup>36</sup> (1979) KLT 878.

<sup>37</sup> AIR 1986 P&H 196.

<sup>38</sup> AIR 2001 SC 1285

case the husband was living an adulterous life and continued to do so after passing the decree of judicial separation. On the expiry of one year he filed the petition for divorce under section 13(A). He had also not paid any maintenance to the wife. In the view of above two facts the court held him to be wrong and refused his petition. The following observation of the court may be noted-

"It has to be kept in mind that relationship between spouses is a matter concerning human life. Human life does not run on dotted lines or charted course laid down by the statute. It has also been kept in mind before granting prayer to the petitioner to permanently snap the relationship between the parties to the marriage every attempt should be made to maintain the sanctity of relationship which is of importance not only for the individuals or their children but also for the society."<sup>39</sup>

In the view of above observation it is submitted that the learned judges though appreciated the fine nuances of human life but fail to see the whole issue in large perspective. It is agreed that a settlement as to the maintenance has to be made before the grant of divorce. But an important fact has been overlooked by the learned judges that the petitioner was and is living in adultery which means that he has no intention of cohabiting with his wife. The fact has been overlooked by the judges that the marriage is in fact irretrievably broken down and by refusing the decree what the court is retaining is an empty shell. In this day and age we have to give a new look to the jurisprudence of divorce.

It is implied that the critical consideration for granting divorce is not the finding, whether the petitioner himself or herself is guilty of some matrimonial offence; the court's concern should be to find if the marriage has broken down beyond redemption. Such a position is said to be, "settled beyond doubt" by the decision of the Supreme Court in *Dharmendra Kumar v. Usha Kumar*<sup>40</sup> in which, the wife has secured a decree of restitution of conjugal rights and soon after the statutory period of waiting, when she presented her petition for divorce under section 13(1A) (ii) of the Hindu Marriage Act, the husband vehemently resisted on the plea that he sincerely made several attempts to take her back but she deliberately avoided them and thereby, it was she and not he, who became the deserter. He pleaded that in view of section 23(1) (a) of the act (which forbids the court to grant relief to petitioner who is taking advantage of his or her own wrong), her petition for divorce deserved to be rejected.

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<sup>39</sup> *Ibid.*

<sup>40</sup> AIR 1977 SC 2218

This plea did not find favour with the Apex court: the allegation “that the petitioner refused to receive or reply the letters written by the appellant (husband) and did not respond to his other attempts to make her agree to live with him.....even if true” did not disentitle her to the relief she had asked for under section 13(1-A) (ii) of the Act. The whole concern of the court is to find out not just whether or not the marriage has broken down but also whether or not this breakdown is “irretrievable”. In reality, the principles of irretrievable break down of marriage, as introduced even in a piecemeal manner by the amendment act 44 of 1964, is essentially located on the non-adversary plane. Under this, attempt is made to find out if the marriage has indeed broken down beyond repair.<sup>41</sup>

The conversion of these grounds in irretrievable break down of marriage grounds under Special Marriage Act, 1954 took place in 1970.<sup>42</sup> The period of two years was reduced to one year by Marriage Laws Amendment Act, 1976.

The irretrievable breakdown of marriage divorce theory has been judicially discovered under Muslim Law of India and Pakistan. In 1945, the Lahore High Court in *Umar Bibi v. Md. Din*<sup>43</sup> held that a wife is not entitled to a decree of divorce on the ground of incompatibility of temperaments or her hatred for her husband. On these averments the Lahore High Court refused to pass a decree of divorce in favor of wife. Twenty Five years later in *Neorbibi v. Pir Bux*<sup>44</sup> again an attempt was made to obtain divorce on the same grounds. This time the line of argument prevailed. After observing that from the earliest times of Islam, Muslim wives have been entitled to divorce when it was clearly shown that either marriage has ceased to be a reality and suspension of marriage tie had in fact taken place or the continuance of marriage involved injury to wife. In *Amma Khatoon v. Kashim Ansari*<sup>45</sup>, the issue before the Jharkhand High Court was 'Can a Muslim marriage be dissolved on the ground of irretrievable breakdown by invoking Section 2(xi) of the Dissolution of Muslim Marriages Act, 1939?' The Court dissolved the marriage on the ground of irretrievable breakdown by invoking Section 2(xi) of the Dissolution of Muslim Marriages Act, 1939. The Court observed:

"When an intolerable situation has been reached and the partners are living

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<sup>41</sup> Virender Kumar, “*See the Rift, not the Fault*”, The Tribune, 21 May, 2006.

<sup>42</sup> The Special Marriage Amendment Act, 1970

<sup>43</sup> AIR 1954 Lah. 51

<sup>44</sup> AIR 1971 Ker. 261

<sup>45</sup> AIR 2001 Jhar 28.

with hostility for a considerable number of years, it is legitimate to draw an inference that the marriage has broken down in reality and law should recognize it and try to end the relationship. Islam concedes the grounds of dissolution of marriage at the instance of wife and the statute itself recognizes it and preserves it as saving provision under section 2(ix) of the Act when it is enacted "any other ground which is recognized as valid for dissolution of marriage under Muslim Law."

Tayabji C.J. observed, "There is no merit in preserving intact the connection of marriage when the parties are not able to and fail to live within the limit of – Allaha!" The Ld. C.J. further observed that When Muslim Law allows divorce to the wife on the ground of husband's non-payment of maintenance, it was not because divorce was by the way of punishment of the husband, or was a means of enforcing wife's right of maintenance, but as an instance, where cessation or suspension of marriage of marriage had occurred." Thus was laid the foundation of the theory of breakdown of marriage as quoted by Paras Diwan in his Article "Break down Theory."<sup>46</sup>

It has been held in number of cases under Hindu Marriage Act that when there is no ground for divorce as recognized by legislature, it cannot be granted, example the standard of living or the education or the mental level of the respondent are not the expectation of the petitioner.<sup>47</sup> In *Rajesh Kumar Upadhya v. Family Judge, Family Court*<sup>48</sup>, the court observed, "There is controversy whether divorce is permissible under Hindu Marriage Act on the averments of one of the parties that the marriage has broken down irretrievably. Irretrievable break down of marriage means that no love is left between the husband and wife, that there is complete absence of emotional attachment between them, that there is intense hatred and animosity between them, and that marriage is virtually dead."

In *Tapan Kumar Chakarborty v. Jyotsna Chakarborty*,<sup>49</sup> the court held that in the petition for divorce no ground as mentioned in the Act established, so court cannot grant divorce on mere ground of irretrievably broken down of marriage.<sup>50</sup> The division bench of Calcutta High Court held that mere irretrievable breakdown of marriage will by itself not constitute a ground for dissolution of marriage even when no statutory

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<sup>46</sup> Paras Diwan, "Breakdown Theory", 191 (1969) Lawyer 191

<sup>47</sup> *Dipak Kumar Sarkar v. Sima Sarkar*, 2005 (1) HLR 730 (Cal. D.B)

<sup>48</sup> 1999 (1) HLR All 220.

<sup>49</sup> AIR 1997 Cal. 134

<sup>50</sup> *Ibid.*

ground is available for the purpose.<sup>51</sup>

However in certain extreme cases, where the marriage has irretrievably broken down and there was no possibility of reconciliation the court granted the decree of divorce.<sup>52</sup> It has been held by Calcutta High Court that decree under Hindu Marriage Act can only be given on any of the ground mentioned in Section 13 would be an act without any sanction of law, such power being only with the apex court under Article 142 of the Constitution of India. In a particular case to decide the decree has to be granted for divorce as the court thinks that the marriage has been broken down irretrievably is also to overlook the sentiments of a party especially of the wife.<sup>53</sup>

The ground of irretrievable breaking down of matrimonial home can be taken recourse to only in exceptional cases. Where the wedlock has become deadlock the court held that the marriage is irretrievably broken and it is in the interest of justice that decree of divorce be granted so that both the parties can live in peace.<sup>54</sup>

When the court finds in the facts as well as from the talks of the resettlement or reconciliation between the husband and wife and the refusal of the decree of divorce would only prolong the agonies of the spouses, it can dissolve the marriage on this ground.<sup>55</sup> In *Sanghamitra Singh v. Kailash Chandra Singh*<sup>56</sup> the husband's petition for divorce was dismissed on the ground that he failed to prove desertion but on the wife's petition for restitution the High Court of Orrisa dissolved the marriage on the ground that the marriage was irretrievably broken.

In *Suprabha Joel (Capt.) v. Dr. Joel Solomon*<sup>57</sup>, the Bombay High Court observed that in the facts and circumstances of the case the marriage had broken down irretrievably. In this case first the wife had filed the petition for the nullity of marriage on the ground of husband's impotency and then husband had filed the petition for divorce on the ground of adultery of wife. Though strictly speaking nullity was granted under section 18, 19 of Indian Divorce Act but nonetheless a new dimension has been added to the act by the Bombay High Court.

There may be the cases where it is found that as the marriage has become dead an account of contributory acts of commission and omission of the parties, no useful

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<sup>51</sup> *Sukhdev Kaur v. Ravinder Singh*, 1996 (2) HLR 296

<sup>52</sup> *Kanchan Devi v. Parmod Kumar Mittal*, AIR 1996 SC 3192

<sup>53</sup> *Swapan Kumar Gangully v. Smritikina Gangully*, 1997 (2) HLR 19 (Cal.)

<sup>54</sup> *Krishna v. Somnath*, 1996 (1) DMC 667 (P&H)

<sup>55</sup> *Ashok Govindram Hurra v. Rupa Ashok Hurra*, 1996 (2) HLR 512 (Guj.)

<sup>56</sup> AIR 2001 Ori.151.

<sup>57</sup> AIR 1997 Bom.171

purpose would be served keeping such marriages alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses.<sup>58</sup>

In *Kusum v. R.K. Sexena*<sup>59</sup>, the Delhi High Court observed that, "the parties have not seen other or cohabited during the period of whole litigation and it is not difficult to understand why. But merely because the marriage has irretrievably broken down due to the passage of time spent in the courts, it would not be legally correct to dissolve the marriage." But the learned court have not taken in view that after such a long time when the marriage is in fact not exists and the when the daughter of both parties is of marriageable age the marriage doesn't solve its purpose.

The question arose before Supreme Court in, *Jorden v. Chopda*,<sup>60</sup> whether divorce may be granted on a ground which has no place in Hindu Marriage Act. The Court observed that, "surely the time has now come for a complete reform of law of marriage and make a uniform law applicable to all people irrespective of religion and caste. It appears to be necessary to introduce irretrievable break down of marriage as ground for divorce in all cases.

The Supreme Court have granted divorces on the ground of irretrievable break down of marriage in various case, but the said ground is not available independently in any statutory law. The Supreme Court has granted divorces on the ground of irretrievable break down of marriage while exercising its powers under Article 142 of the Constitution of India. In *Ramesh Chander v. Savitri*,<sup>61</sup> Supreme Court without going into the merits of the case cut short the matter on the basis that, "the marriage is dead emotionally and practically. Continuance of marital alliance for name sake is prolonging the agony and affection ..... the marriage being dead the continuance of it would be cruelty and in exercise of the power under Article 142 of the Constitution of India the court dissolves the marriage."

In *Naveen Kohli v. Neelu Kohli*,<sup>62</sup> the Supreme Court, clearly and strongly while permitting dissolution of thirty year old mismatch, urged the Government of India to amend Hindu Marriage Act in order to make Irretrievable break down of marriage a valid ground for divorce. The court held that "irrevocable break down of marriage" as a ground for divorce was prevalent in many other countries and

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<sup>58</sup> *Chetan Dass v. Kamla Devi*, AIR 2001 SC 1709

<sup>59</sup> 2004 (2) HLR Del. 248

<sup>60</sup> 1985 (3) SC 62

<sup>61</sup> AIR 1995 SC 851

<sup>62</sup> 2006 (4) SCC 558

recommended the union of India to seriously consider bringing an amendment in Hindu Marriage Act, 1955 to incorporate irretrievable break down of marriage as a ground for the grant of divorce. The court ordered to send a copy of judgment to the Secretary, Ministry of law and justice, Department of legal affairs, Government of India for taking appropriate steps<sup>63</sup>.

The Hon'ble Supreme Court observed," Undoubtedly it is the obligation of the court and all concerned that the marriage status should, as far as possible, as long as possible and whenever possible, be maintained but when the marriage is totally dead in that event nothing is gained by trying to keep the parties tied forever to a marriage which in fact has ceased to exist."<sup>64</sup>

A law of divorce based mainly on fault is inadequate to deal with a broken marriage. Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition of divorce, it can well be presumed that the marriage has broken down. Once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of the fact, and it would be harmful to the society and injuries to the interest of the parties. Where there has been a long period of continuous separation it may fairly be summarized that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie; by refusing to serve that tie the law in such cases does not serve the sanctity of marriage.<sup>65</sup>

Recently in *Ramesh Jangid v. Sunita*<sup>66</sup>, wife wanted her husband to leave his parents and live separately. The Court held that the demand of wife was unreasonable and as wife was living separately for 13 years and denying physical relationship, so divorce was granted. The court observed that," The differences that have grown up between the parties, the distance which has widened for over a decade cannot be brushed aside lightly. Thus irreparable break down of marriage is obvious."

In *Prabhakar v. Shanti Bai*<sup>67</sup>, parties were married in 1955, they have not stayed together since 1958, and no cohabitation was there since last 49 years. The court granted the decree of Divorce as the marriage between the parties was irretrievably broken.

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<sup>63</sup> *Ibid*, para 96

<sup>64</sup> *Ibid*.

<sup>65</sup> *Ibid*.

<sup>66</sup> 2008 (1) HLR 8 (Raj.)

<sup>67</sup> 2008 HLR 250 (Nagpur)

The Law commission of India and the Supreme Court has recommended the irretrievable break down of marriage should be made a separate ground of divorce by the legislature. No useful purpose would be served by keeping alive de jure what is dead de facto. It is possible that if the parliament does not act on this recommendation the legislature of some states of India may take the lead, exercising power under entry 5 of the concurrent list of the 7<sup>th</sup> schedule.<sup>68</sup>

In a significant ruling,<sup>69</sup> the Supreme Court ruled that a Hindu couple cannot be granted divorce on the ground that there was “irretrievable breakdown” of marriage. The bench passed the order while dismissing the appeal of Vishnu Dutt Sharma who sought divorce from his wife Manju Sharma on the ground that their marriage has irretrievably broken down. Though the husband had sought divorce the wife was unwilling for the same. The husband filed the appeal in the apex court after the matrimonial court and Delhi High Court both dismissed his plea. The apex court rejected his plea said that it was crystal clear from the bare provisions of section 13 of the Act that no such ground of irretrievable break down of marriage is provided by the legislature of granting a decree of divorce. “This court cannot add such a ground to section 13 of the Act as that would be amending the Act, which is a function of legislature”, the bench observed. The bench observed, “A mere discretion of the court without considering the legal position is not a precedent. If we grant divorce on the ground of irretrievable breakdown then we shall by judicial verdict be adding a clause to Section 13 of the Act to effect the irretrievable breakdown of the marriage is also a ground for divorce.”<sup>70</sup>

The confines of Irretrievable break down of marriage however cannot be put in a strait jacket formula, till it is made a separate ground of divorce under statutory laws, but the courts already have assumed jurisdiction to grant divorce on additional ground of irretrievable break down of marriage. The cases in which courts have denied to grant divorce might be having different factual situations in the opinion of respective courts.

Now after considering deeply the judicial trend it can be said that the courts have given different opinions in different cases and there is no uniformity. On the one hand in 2006, in Naveen Kohli case, the Supreme Court has recommended the

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<sup>68</sup> Ramesh Chander Nagpal, *Modern Hindu Law*, 182 (2008).

<sup>69</sup> *Vishnu Dutt Sharma v. Manju Sharma*, AIR 2009 SC 2254.

<sup>70</sup> “No divorce for ‘irretrievable breakdown’ of marriage: SC”, *The Tribune*, 9 March, 2009.

Government of India to amend the Act but on the other hand after three years, recently in *Vishnu Dutt Sharma v. Manju Sharma*, the Supreme Court has not granted the divorce on the ground of irretrievable breakdown of marriage.

In India Monogamy is, and must remain, the norm of married life. Both the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955 have attempted to enforce its norm as an absolute ideal in itself under section 4a, 24(1), 43, 44 of the Special Marriage Act, 1954 and section 5(ii), 11 and 17 of the Hindu Marriage Act, 1955. The Question is what relief does the Indian law gives to a Hindu wife whose husband marries again for no reason? A husband who is more cautious and does not want to incur even the risk of prosecution, would announce a sham conversion to Islam and then marry again. Under the law the poor wife will have to file a petition against the husband to declare the bigamous marriage null and void as decided in *Parma Sami v. Sarnathammal*<sup>71</sup>. Judicial opinion is that this is not violative of the equality clause of the Constitution.

Our High courts are making several brave attempts to judicially modify the procedure and provisions. In *Ammini E.J. v. Union of India*<sup>72</sup>, the court held section 10 of the Indian Divorce Act is ultra virus of the Constitution, by saying that since cruelty and desertion are grounds of divorce available to all communities in India but not to the Christian wife and therefore Section 10 of the Act is discriminatory on the ground of religion only. In this landmark decision court further said that since words adultery coupled with desertion, etc. are severable and liable to be struck down as *ultra vires* of Article 14, 15 and 21 of the Constitution of India. The Christian wife may sue for divorce on ground of adultery, desertion or cruelty. Taking a cue from the Kerela High Court, Bombay High Court has also held this provision violative of the Constitution in *Pragati Varghese v. Cyril Varghese*<sup>73</sup>. The Andhra Pradesh High Court in *N. Sarda Mani v. G. Alexander*,<sup>74</sup> had also exhorted Parliament to immediately take notice of this anomaly and fill in the void by suitable legislation. Further in *Annu Thomas v. Thomas Koshy*<sup>75</sup>, and *Lavina Yorke v. Terence York*<sup>76</sup>, the divorce was granted to wife on the ground of cruelty. In former case the wife had alleged sodomy and beastly behaviour on the part of husband and in the latter husband

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<sup>71</sup> AIR 1969 Mad. 124.

<sup>72</sup> AIR 1995 Ker. 252.

<sup>73</sup> AIR 1997 Bom. 349.

<sup>74</sup> AIR 1998 AP 157.

<sup>75</sup> AIR 1997 Del. 345.

<sup>76</sup> AIR 1997 Del. 346.

used to maltreat her after consuming liquor. So in order to give same grounds for divorce to Christian wife as available to Christian husband the Indian Divorce Act, 1869 has been amended recently in 2001. Now both have same grounds for Divorce.

However, the lack of will on the part of the Indian legislature to enact a compulsory law for registration of marriages has not gone unnoticed by the courts. The Supreme Court of India in *Seema v. Ashwani Kumar*<sup>77</sup>, has directed all states in India to enact rules for compulsory registration of marriages irrespective of religion, in a time bound period. This reform, which has been spearheaded by the National Commission for Women, has struck a progressive blow to check child marriages, prevent marriages without consent of parties, check bigamy/polygamy, enable women's rights of maintenance, inheritance and residence, deter men from deserting women, and for checking the selling of young girls under the guise of marriage. The Supreme Court felt that this ruling was necessitated by the need of time as certain unscrupulous husbands deny marriage, leaving their spouses in the lurch, be it for seeking maintenance, custody of children or inheritance of property.<sup>78</sup> The Supreme Court of India in another decision dated March 27, 2006 has stayed the legal validity of the marriages of minor girls below eighteen years of age, which had been earlier upheld by the two high court's orders. At least seven states in India have a high incidence of child brides and the law does not take care of the anomaly to ban child marriages.

Community practices in certain states and in certain religious denominations in India have led to the creation of community or religious courts which do not have the legitimate backing of the system of law and have no sanctity in the official legal system. It is in the matter of inter caste or inter religious marriages or divorces that such self-styled extra-constitutional authorities take upon themselves the power of courts of law to issue community mandates to people within the community. Such religious edicts result from summary hearings often in violation of fundamental rights guaranteed by the Constitution of India. In this regard, the Supreme Court of India on March 27, 2006 in *Vishwa Lochan Madan vs Union of India and others*, issued notices to the central government, State governments, All India Muslim Personal Law Board (AIMPLB) and Darul Uloom, an Islamic seminary, in the matter of the existence of parallel Islamic and Shariat Courts in the country, which are posing a

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<sup>77</sup> Judgments Today, 2006 (2) SC 378.

<sup>78</sup> *All marriages must be registered*, The Times of India, 15 Feb., 2006.

challenge to the Indian judicial system. In this petition filed as a Public Interest Litigation petition in the Supreme Court of India, Advocate Vishwa Lochan Madan sought immediate dissolution of all Islamic and Shariat Courts in India. Earlier, on, August 16, 2005 in *Vishwa Lochan Madan v. Union of India and others*, the Supreme Court of India had also issued notices to the Indian States of Uttar Pradesh, Haryana, Assam, Madhya Pradesh, Rajasthan, West Bengal and Delhi, where, according to the petition, Islamic courts had been formed and were posing a challenge to the judicial system of the country. The Petition sought an immediate dissolution of all Islamic and Shariat courts in India, alleging that the AIMPLB claimed to have established Darul Qaza (Muslim Courts) in India at Thane (Maharashtra), Akola Dholiya (Rajasthan), Indore (Madhya Pradesh), South and East Delhi, Asansol and Purulia (West Bengal), Lucknow and at Sitapur (Uttar Pradesh). Citing the fatwa (a religious decree) issued by the Deoband-based seminary in the State of Uttar Pradesh known as Darul-Uloom in an earlier rape case and the supporting stand of AIMPLB, the petitioner pointed out that the criminal law was not allowed to take its natural course as the entire issue was said to be hijacked by the Muslim clerics. The petitioner sought a ban on the establishment of such Islamic courts, along with a declaration that these fatwas have no legal sanctity, and requested the court to direct the central and the state governments to take effective steps to dissolve all Darul Qazas and Shariat Courts in India. In addition, the petition further sought a direction from the court to the AIMPLB and Darul Uloom, Deoband, other seminaries and Muslim organizations, to refrain from establishing a parallel Muslim judicial system (Nizam-e-Qaza). A direction from the court was also sought to restrain these organizations from interfering with the marital status of Indian Muslim citizens or passing any judgments, remarks, fatwas or deciding matrimonial disputes amongst Muslims. This petition no doubt raises a crucial issue as to whether there could be two parallel legal systems in operation-one legal and the other religious, particularly when the Constitution of India prohibits discrimination on grounds of caste or religion, and whether the right to freedom of religion could be extended to the establishment of a parallel judicial system. On this the Supreme Court observed that there is no place for a parallel system of justice. The bench headed by Justice Ruma Pal ruled that fatwas have no *locus standi* in a secular nation and that every citizen will have to follow the law as

laid down in the Constitution of India.<sup>79</sup>

On similar lines exist the caste panchayats (village council), especially in the State of Haryana in India. These caste panchayats throw several lives into turmoil, often by declaring marriages invalid. Invariably their victims belong to the weakest sections of society. Traditionally, caste panchayats have played a powerful role at the village level in several other states of the country also. However, khap panchayats (caste based village councils) are not elected bodies and their decisions are not enforceable by law, as such extra-constitutional bodies have no sanctity or recognition in law. They however, derive support from community recognition. Khap panchayats are so powerful because of their ability to mobilize a large number of people that they appear to be democratic from outside, but they are not. They exclude women, the youth, as well as the groups who are lower down in the caste hierarchy in the village. Recently, in response to a public interest litigation (PIL) filed by the Haryana unit of the People's Union for Civil Liberties (PUCL), the state's High Court directed the government to protect the life and liberty at all costs of a couple who had entered in an inter caste wedlock. The High Court also directed the authorities to ensure that nobody coerced the couple to change the status of their marriage. A similar situation had arisen when the Punjab and Haryana High Court heard a number of writ petitions challenging the fatwas issued by the self-styled caste based khap panchayats in the State of Haryana, ordering married couples to dissolve their marriages and live separately and ordering their expulsion from the villages on their refusal to do so. Another recent village panchayat dictate that a divorced Muslim woman could remarry her husband only if she married and divorced her brother-in-law first. The positive decisions by the courts of law are no doubt a setback to the caste panchayats of Haryana which have a powerful influence in its socially and culturally backward villages. A positive step has been taken by the court but there cannot be a constructive outcome until the society as a whole decides to fight back to demolish this age old obsolete system. The executive authorities have done little to check the extra-judicial activities of these extra constitutional courts which are a blatant interference with the fundamental rights of the citizens. The responsibility of the state cannot be abdicated. If this be so, judicial Courts in India seem to be the best recourse in giving relief in individual matters involving blatant violation of fundamental Rights of the citizens

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<sup>79</sup> SC on Fatwa, *The Tribune*, 24 April, 2006

which are dictated by community councils enforcing their edicts by force and extra-judicial means on alleged moral grounds. But then, should courts grant relief as an alternative to ailing legislation? Courts may not legislate but must vindicate human rights. Clearly, the duty of the state to enforce the law of the land is the need of the day. The courts unhesitatingly should strike down all mandates of any such extra-judicial bodies which have no legal sanctity in a civilized society.<sup>80</sup>

So although the judicial trend is shifting but yet the goal is quit far, whereas in family law matters conciliation is a better serving method than adversial type of litigation. Rather litigation in respect of any matter concerning family, whether, divorce, maintenance and alimony or custody should not be viewed in terms of failure or success of legal action but as a social therapeutic problem.

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<sup>80</sup> Anil Malhotra and Ranjit Malhotra, *Family Law and Religion—The Indian Experience*, <http://www.jstor.org>, visited on 18-3-2013.