Chapter - 2

A Comparative Study of Grounds available for the Dissolution of Marriage Under Personal Laws in India

Terminating the marriage contract by dissolution of marriage and divorce is one of the legal measures, which has gone through various stages in the course of history of nations and countries and has undergone changes as well. About divorce different ideas and opinions are expressed. Some people considered it is harmful and dangerous so condemned it, and some people believe some times divorce is necessary and better than a life with suffering and conflict.¹

Just as culture constitutes a set of techniques for living that occasionally promote as many problems as they solve, so divorce may be regarded as a problem-solving technique in culture. In any community divorce bears a systematic relationship to other features of social life and its meaning for individual and group varies according to dominant patterns of ideology in the community.²

It is true that India uses personal law with regard to family (which provides Muslims, Christians, and other minority religious groups with different legal systems). Nevertheless, during the Monsoon Session of Parliament in July 2001, the Special Marriage Act (1954), the Hindu Marriage Act (1955), the Parsi Marriage and Divorce Act (1936), the Indian Divorce Act (1869), and the Code of Criminal Procedure (1973) came under the purview of seminal amendments which have proved to be milestones in the personal law reforms. For example, section 39 of the Indian Divorce Act, 1869 (later deleted), empowered the court to order settlement of the wife's property for the benefit of her husband and children. Moreover, the Law Commission did not permit ecclesiastical courts to grant decrees of the dissolution of marriage, observing that courts constituted by law have exclusive authority to determine disputes relating to civil rights.³

While we talk about marriages and its significance in the life, it's important that we also discuss the intricacies of the separation as it's a right provided to all men and women on different grounds to the separate if the marriage is not considered

¹ Seyed Javad Seyyed Alizade Ganji, Women's Rights In Dissolution Of Marriage; A Comparative Study Between Iranian Muslim-Shia And Indian Hindu Laws, 2nd International Conference on Humanities, Historical and Social Sciences, (2011).
² John J. Honigmann, A Comparative Analysis of Divorce, 37 (1953).
happy. Though it is still look upon as a social evil, the law permits a couple to separate ways on mutual grounds. Also Indian women have their own rights to file for a divorce if not treated well. Even though we observe that women are ill treated in our country in rural as well as urban areas of India; a very small percentage of women who initiate for separation. But more and more social activists and social agencies are creating awareness about the laws and rights available to women as well as men. While this is one side of the tale, there are also cases where the law is twisted and turned and misused by both men and women. However, we must discuss the other side of the heavenly knot. Divorce is the 'dissolution of a valid marriage in law’, in a way other than the death of one of the spouses, so that the parties are free to remarry either immediately or after a certain period of time.

Divorce as rule in all the matrimonial laws, is based on the number of grounds upon which the spouses of marriage can seek the remedy to terminate the marriage bond. A critical conceptual analysis of 'divorce grounds' to explore uniform standards and contrast in them will be beneficial in formulating the unification equations on the issue of making one law throughout the territory of India to all the citizens. To cover the organized debate for the improved coverage of the different 'divorce grounds' contained under various matrimonial laws, it can be classified under following heads:

1. No mistake of either parties.
2. When either party is on fault.

No Fault Grounds:

There are precious objectives of the marriage in all legal systems in India and when probability come to disturb them, the dissolution of marriage automatically gets berth in the matrimonial tie to hold the social descriptions among human beings. The factors responsible for annoying objectives of marriage are many, in them there are situations when the parties of the marriage are not at any fault, but certain inability in either of them due to disease etc. disturb the objective of the marriage and which results the interruption in marriage life, consequently the dissolution of marriage remains the only cure to save the disorder in relations of the spouses. Following are grounds of divorce under different systems where the spouses are not at fault.
Insanity

In India under Hindu Marriage Act, 1955 there is no ground like insanity or idiocy for divorce. The Marriage Law (Amendment) Act, 1976 has changed the language of section 13(1) clause(iii). It now lays down that a petitioner may get decree of divorce if the respondent:

"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 require or is susceptible to medical treatment; or]

This provision has been borrowed from the English Matrimonial Causes Act, 1973. Gupte observes that 'it is a pedantic rigmarole meaning nothing except unsoundness of mind.' In a case Joginder v. Surjit, the court observed:

'the newly worded clause is bound to create difficulties in its interpretation. Mental disorder or schizophrenia should be of such a quality that the petitioner is not reasonably expected to live with respondent.'

In 'Clinical Psychiatry' the term 'schizophrenia' is defined as:

"The term 'schizophrenia' is used here for a group of mental illness characterised by specific psychological symptoms and leading in the majority of cases, to a disorganization of the personality of the patient. The symptoms interfere with the patient's thinking, emotions, conations and motor behaviour, and with each in a characteristic way. The disorganization of personality often results in a chronic way invalidism and lifelong hospitalization in spite of the absence of gross physical signs or symptoms."

In ancient Hindu Law insanity no doubt was considered as a ground for

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5 AIR 1985 P&H 128.
declaring Hindu marriage invalid:

"A damsel betrothed to one devoid of character and good family, or affected by impotency, blindness and the like, or an outcaste or an epileptic or an infidel or (incurably) diseased or to one who is an ascetic or when she has been married to sagotra, should be taken from him (and married to another)" - "Vasista cited by Madhava, Raghunandan and other commentators."  

In *Mouji Lal v. Chandrabati Kumari*\(^8\), a Privy Council case from Bhagalpur, Sir Arthur Wilson observed:

"It is said, first, that the alleged husband was at times completely insane, so much so as to be incompetent to enter into a marriage. Their Lordship agree with the learned judges of High Court in thinking that, to put it at the highest, the objection to the marriage on the ground of mental incapacity must depend on a question of degree, and that in present case the evidence of mental incapacity is wholly insufficient to establish such a degree of that as to rebut the extremely strong presumption in favour of the validity of marriage."

The Hindu Marriage Act, 1955 provides for dissolution of marriage only in certain kinds of mental disorder of the respondent. The petitioner merely by providing that the respondent is of unsound mind or that he suffers from mental disorder cannot obtain divorce. It is required to prove that the respondent has been incurably of unsound mind. Thus the marriage can be dissolved only by proving that the respondent is suffering from some form of mental disorder which is of such a kind and of such an extent that the petitioner cannot reasonably be expected to live with the respondent. The petitioner must prove that because of such mental disorder it is not reasonably possible to enjoy conjugal life with the respondent. In *Tarlochan Singh v. Jit Kaur*\(^9\), the wife who was suffering from schizophrenia before marriage, continued to suffer from it even after the marriage. It was also established that this fact was concealed from the husband and his relations at the time of marriage. It was a clear case where the decree of annulment of marriage could have been granted. But the Court choose to grant a decree of dissolution of marriage. Sodhi, J. observed that in such a situation husband was not expected to live with his wife who has been

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8 38 Ind App. 122, at 125.
9 AIR 1986 P&H 379.
suffering from such mental disorder. In *Smritikana Bag v. Dilip Kumar Bag*\(^\text{10}\), the court ruled that the court ought to be satisfied that the respondent's mental disorder is of such a nature and of such intensity that it would not be reasonable to compel the petitioner to endure or suffer the same. In *Bani Devi v. A.K. Banerjee*\(^\text{11}\), there was medical evidence that the appellant was suffering from epilepsy and was prone to fits in which she resorted to physical violence against others as well as on herself and that she could not be cured completely. She was held to be of incurably unsound mind and not capable of managing herself or her affairs as an ordinary reasonable persons. In *Kadambani Sahu v. Resham Lal Sahu*, the court observed that the burden of establishing that the wife has been suffering from epilepsy is on husband. It would not stand discharge merely on the basis that the wife failed to appear as a witness.\(^\text{12}\) In *Joginder Singh v. Surjit Singh*\(^\text{13}\), the husband filed a petition for divorce on the ground that his wife is suffering from mental disorder including schizophrenia which was of such a quality that he could not be reasonably expected to live with her. But the High Court did not find that the wife was suffering from such mental disorder. It was rather established that the slight schizophrenia which she had was cured and she could remain mentally fit if the treatment were continued. On these findings the petition was dismissed. Further in a case *Pritam Kaur v. Surat Singh*\(^\text{14}\), though it was established that the wife was suffering from schizophrenia, there was no evidence that the mental disorder was of such a kind and to such an extent that the petitioner could not reasonably be expected to live with her and the petitioner also did not state anything about her behaviour either towards him or towards his family members or towards anybody else from which it could be concluded that the state of her mental disorder was such that for any reasonable person, it would be difficult to live with her. The ground was held not to be proved. The Court further held that mere statement of Doctor that wife was suffering from schizophrenia, not be sufficient from which it could be inferred that the mental disorder was of such a nature and extent that the husband could not reasonably be expected to live with the wife. In *Santosh v. Nandan Singh*,\(^\text{15}\) the court held that the mental disorder could not be established merely on the oral testimony of relations of the parties. Their statement might prove the symptoms

\(^{10}\) AIR 1982 Cal. 147.

\(^{11}\) AIR 1972 Del. 50.

\(^{12}\) AIR 1990 MP 150

\(^{13}\) AIR 1985 P&H 128.

\(^{14}\) 1981 HLR 24.

\(^{15}\) 1980 HLR 528 (Delhi).
but expert medical opinion is necessary to affirm whether these symptoms amounted to mental disorder. In *Gandharv v. Anita*, no medical evidence was produced but it appeared that after 10 days of the marriage of the parties, the husband met with an accident and the doctors found that there was no hope of his survival and as a result the wife got a mental set-back and she swooned. It was held that this evidence was hardly sufficient to hold the wife to be suffering from mental disorder. In *Pramatha Kumar Maity v. Ashima Maity*, the husband appellant sued the wife respondent for dissolution of marriage on the ground specified in section 13(1)(iii) of Hindu Marriage Act, 1955, that the wife "has been incurably unsound mind or has been suffering continuously or intermittently from mental disorder of such kind and to such extent that the petitioner cannot be reasonably expected to live with the respondent." High Court said mental disorder of wife even if proved, could not, by itself, warrant a decree for divorce. It must further be proved that it is of such a nature as the husband could not reasonably be expected to live with the wife. It must further be proved that it is of such a nature as the husband could not be reasonably expected to live with the wife. In *Smt. Nirmala Manohar Jagesh v. Manohar Shivam Jagesh*, where the stray instances indicating tampered nature and somewhat unpredictable behaviour the court held that it is not sufficient for alleged mental disorder. The Special Marriage Act, 1954, also provides 'insanity' as a ground for divorce. The Indian Divorce Act, 1869, does not provide for 'insanity' or idiocy as a ground for divorce. In that Act the same ground has been provided for the decree of annulment of marriage. If anyone wants to get the marriage be declared as annul under this Act he must prove that idiocy or mental disorder existed since the time of marriage. In *Joy Kutty Mathew v. Valsamma Kuruvilla*, the Kerela High Court said that under The Indian Divorce Act, 1869 "much more strict proof" was needed for the proof of lunacy that the mental disorder and mental illness contained under Hindu Marriage Act, 1955 as ground of divorce.

The Parsi Marriage and Divorce Act, 1936 provides that divorce can be

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16 1980 HLR 518 (P&H).
17 AIR 1991 Cal. 123.
18 AIR 1991 Bom. 259.
19 Section 27(e), Substituted by The Marriage Laws (Amendment) Act, 1976
20 The Divorce Act, 1869, Section 10.
21 Supra note 20, Section 19.
22 Hancock v. Reaty, (1867) I.P&D 335.
23 AIR 1990 Ker. 262.
24 The Parsi Marriage and Divorce Act, 1936, Section 32(b).
granted if the defendant was of unsound mind at the time of marriage and has been habitually so up to the date of suit. The proviso to section 32 (b) of the Act, however provides that divorce shall not be granted on this ground unless the plaintiff:

1. was ignorant of the fact at the time of marriage, and
2. has filed the suit within three years from the date of the marriage.

In section 32 new clause (bb) has been inserted after clause (b), under which a plaintiff may sue for divorce if the defendant has been incurably of unsound mind for a period of two years or upwards immediately preceding the filing of suit or is suffering from mental disorder to such an extent that the plaintiff reasonably cannot be expected to live with the defendant, "Mental Disorder" has been defined as mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia. In *Pothiwala v. Pothiwala* 25, Wadia J. said that the conditions laid down in the proviso are cumulative, so that before the suit can lie, plaintiff must show that he was ignorant of wife's unsoundness of mind at the date of the marriage and secondly that the suit was brought within three years, not from the date of his knowledge of wife's unsoundness of mind, but within three years from the date of marriage. The Parsi Marriage and Divorce Act, 1936 uses the word 'unsound' not in the same sense in which the word 'idiocy' or 'lunacy' has been used in other Indian enactments. Secondly, it leaves hardly any doubt that under the Parsi Marriage and Divorce Act, unsoundness must exist at the time of marriage and it is not enough if unsoundness develops at any stage subsequent to solemnization of marriage. This proposition is easily conceivable by the words used in the proviso, 'was ignorant at the time of the marriage.' The true scope of this section is that all the cases, in which there was existing unsoundness of mind at the time of marriage, fall under this section provided such insanity was not noticed by the other spouse at the time of marriage. This provision of the Parsi Marriage and Divorce Act, 1936 relating to the unsoundness of mind stands diametrically opposed to the provisions of Hindu Marriage Act, 1955 and Special Marriage Act, 1954 on the material date of commencement of unsoundness of mind. By its unequivocal language the Parsi Marriage and Divorce Act, specifically lays down that insanity must exist both on date of marriage and on the date of presentation of the petition. The provisions made in this respect in Hindu Marriage Act, 1955 and Special Marriage

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25 (1937) 39 Bom.LR. 1146.
Act, 1954 seem correct and reasonable. Insanity at the time of marriage would be a
ground for annulment of marriage rather than becoming a ground for divorce and no
doubt the provision made in this Act appears to be founded upon an illogical
reasoning.26

The Muslim law is complex and contradictory on the issue of insanity as a
ground for the dissolution of marriage. Under the Hanafi law, for insanity of wife, the
husband has no right to annul the marriage. According to Abu Hanifa and Abu Yusuf,
in case of insanity of husband, there is no option to the wife to claim separation on
this ground. Mohammad, however holds that she has such right.27 Ammer Ali
maintains that according to Shafei law either party can claim separation on the ground
of insanity.28 Under Shia law, the insanity of the husband empowers the wife to break
the marriage, whether the insanity is continuous or occasional and whether before or
subsequent to connubial intercourse. This is also the rule in the case of supervening
insanity.29 In case of insanity of wife, the husband is entitled to break the marriage, if
insanity amounts to total derangement of the intellect. Slight aberrations, which easily
subside or stupor, though of frequent occurrence, are not sufficient grounds unless
they are confirmed or permanent.30 The Dissolution Of Muslim Marriage Act, 1939
lays down:

"that the husband has been insane for a period of two years."31

Under Muslim law, it is necessary to prove that the insanity existed at the time
of marriage and in order to be effective, it must last for a period of two years.
Therefore, in India this Act provides sufficient scope for judiciary to interpret as to
what amounts to unsoundness of mind in a particular case. It is submitted that in order
to arrive at its finding on insanity for avoidance of marriage the court should insist not
only on sufficient evidence in proof of the factum of insanity but it would also satisfy
itself as to the extent and intensity of such insanity.

\textbf{Impotency}

Dr. Tolstoy is of view, "Impotency or incapacity is inability to consummate
the marriage. This incapacity to consummate may be on account of some structural

30 \textit{Supra} note 29, at 60.
31 The Dissolution of Muslim Marriage and Divorce Act, 1939, Section 2(vi).
incurable defect or because of some mental or moral disability. Sterility alone is not impotency."\(^32\)

According to D.F. Mulla\(^33\), "Impotency means incapacity to consummate marriage, i.e., the incapacity to have conjugal intercourse, which is one of the objects of marriage. capacity to consummate must exist at the time of marriage."

In *Rangaswami v. Arvindammar*\(^34\), the court defined impotency as, "Potency is case of male means power of erection of the male organ plus discharge of healthy semen containing living spermatozoa and in case of females means-

1. Development of external and internal genitals, and
2. Ovulation and menstruation

Impotency is defined as lack of ability to perform sexual act and sterility and lack of ability to procreate children."

In *Fice v. Fice*\(^35\), the court defined impotency as, "Impotency is an ability to copulate or carry out sexual intercourse and is not established by evidence of a complete ability to copulate but in such a manner that conception cannot result which is merely sterility." It has also been held that matrimonial incapacity as ground for divorce may consist in a woman's pregnancy by someone other than husband at the time of marriage.\(^36\) In *Jayraj v. Mary*\(^37\), it was held that in the legal sense impotency is incapacity to consummate marriage and it may be physical or psychological.\(^38\) In *Jagdishlal v. Shyama*\(^39\), impotency was defined as incapacity for normal sexual intercourse. Such incapacity may arise in various ways:

I. it may be due to some physical or organic defect;
II. it may be on account of the existence of some loathsome or incurable disease;
III. it may be arise due to invincible repugnance or hatred for sexual intercourse in general or in relation to a particular individual.

In *Nijhawan v. Nijhwan*, it was held that imperfect and partial intercourse would not amount to consummation of marriage and if the husband is incapable of performing sexual intercourse fully, he would in law be deemed to be impotent.\(^40\) In

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\(^{34}\) AIR 1957 Mad. 245.

\(^{35}\) (1937) 2 DLR 591.

\(^{36}\) *Canton v. Canton*, 17 DC 309.

\(^{37}\) AIR 1967 Mad. 242.


\(^{39}\) AIR 1966 All. 150.

\(^{40}\) AIR 1973 Del. 200.
A.K. Ahluwalia v. Nirmal Kanta, the court held, legal parlance consummation must mean full and complete penetration and a partial penetration or an abortive attempt at intercourse or an incomplete act of coitus would not constitute consummation.\textsuperscript{41} However failure to cope with over sexed partner would not amount to impotence.\textsuperscript{42} In Nijhawan v. Nijhwan, it was found that on occasions husband was able to penetrate the wife for a short time, but that after he got inside her, his erection collapsed and he came out, it was held that penetration maintained for so short time resulting in no emission either inside the wife or outside her, could not be described as ordinary and complete intercourse. "I do not think that there is any authority which binds me to hold that any penetration, however, transient, amounts to consummation of marriage........"\textsuperscript{43} The Delhi High Court in Jorden Diengdeh v. S.S. Chopra\textsuperscript{44}, has, however, held where though sexual intercourse is admitted but complaint is made that there is always used to be premature ejaculation, it cannot be said that the marriage had not been consummated or that the husband was impotent.

The Muslim Law allows divorce on the ground of impotency. 'Talaq' given on this ground is called 'Talaq-ul-Innin'.\textsuperscript{45} In India it is found that Muslim Law under textual or Quaranic law and also in statutory law allows divorce on the ground of impotency, the statue states, '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)......
ii)......
iii)......
iv)......
v) that the husband was impotent at the time of the marriage and continues to be so';\textsuperscript{46} Before passing a decree on ground (v) the Court shall, on application by the husband, made 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\textsuperscript{47}.

\textsuperscript{41} 1978 Mat.LR 1.
\textsuperscript{42} Rajinder Kapur v. Manmohan Singh, AIR 1972 P&H 142.
\textsuperscript{43} Supra note 40.
\textsuperscript{44} (1982) 1 DMC 224.
\textsuperscript{45} Supra note 28, at 530.
\textsuperscript{46} The Dissolution of Muslim Marriage Act, 1939, Section 2(v).
\textsuperscript{47} Supra note 46, Section 2(v) read with proviso (c).
In *Altafan v. Ibrahim*[^48], the case involved a virgin wife alleging husband's impotency; the court ordered her to submit to him for a year to prove his capacity to consummate. The court held that the right of the husband to have an opportunity of demonstrating that he is not impotent is a substantive right recognized by Muslim Law. Under the Muslim Law, a wife has no absolute right to obtain a divorce. She has a right only under certain specific contingencies and conditions. The mere fact that since the marriage the husband has had no intercourse with her, and therefore, she is still a virgin, would not per se, entitle her to a divorce unless it is proved that he is incapable of cohabitation with her. It, therefore, recognises that the husband should have full opportunity after he has been challenged to prove that he is not impotent. This, according to the court is a substantive right and not a mere rule of procedure, and hence is enforceable. In *Abdul Azeem v. Fahimunissa*[^49], the question before the Mysore High Court was can a wife be compelled to submit to the husband to prove that he has ceased to be impotent after a finding by the court, on wife's petition for dissolution of marriage, that he was impotent? The court held, "It is not necessary to enumerate the processes by which cessation could be established, although it is plain that production of medical evidence is one. There may be others equally efficacious. But we hesitate to recognise the right of the husband to demand the company of his wife to be able to establish the disappearance of his impotence. That right does not flow from anything contained in the Dissolution of Muslim Marriages Act and in the absence of clear provision creating it, we feel reluctant to say that the wife could be compelled to submit herself to the experiments of a humiliated husband whose exacerbation can provoke dangerous reprisals. The duty to involve herself in such great peril does not either expressly or by necessary implication emanate from proviso (c) to section 2 or any other part of the Act which is a complete and exhaustive code on dissolution."

A man may, however, be nominally or temporarily potent due, for instance, to the use of certain medical drugs or other cause or he may be potent as regards some women and not potent as regards his wife.[^50]

In this way a Muslim wife is entitled to seek divorce on the ground of impotency of her husband only subject to the following conditions:

[^48]: AIR 1924 All. 116.
[^49]: AIR 1964 Mys. 226.
1) that the impotency existed at the time of marriage.\textsuperscript{51}

2) that the wife had no knowledge of it at the time of marriage.

3) that the defect had not been since removed.

According to the Dissolution of Muslim Marriage Act, 1939, the material date is the marriage and not the date of consummation. It would mean that if a husband is potent at the time of marriage but becomes impotent before the date of consummation, the wife will not be entitled for judicial divorce. It was necessary even before the Act to prove the impotency existed all through the period of marriage and remained incurred since the time of marriage.\textsuperscript{52}

Impotency under the Divorce Act, 1869,\textsuperscript{53} Parsi Marriage and Divorce Act, 1936,\textsuperscript{54} Special Marriage Act, 1954,\textsuperscript{55} and Hindu Marriage Act, 1954,\textsuperscript{56} is a ground for nullity and not for divorce.

According to Parsi Marriage and Divorce Act, 1936 impotency is not ground for nullity specifically but the words of section 30 of the Act means to this effect, "In any case in which consummation of the marriage is from natural causes impossible such marriage may, at the instance of either party thereto, be declared to be null and void."

Under Divorce Act, 1869, impotency means incapacity to consummate the marriage and not merely incapacity for procreation. In Jorden Dienadoh v. Swaranjit Singh\textsuperscript{57}, the court held that the fact that the wife does not get proper satisfaction from her husband does not mean that the marriage was not consummated or that the husband was impotent. In Birendera Umar v. Hemlata Biswas\textsuperscript{58}, the court observed:

"Capacity of sexual intercourse must exist at least 'in poses' at the time of marriage. Permanent and incurable impotency such as to render complete and natural sexual intercourse between parties practically impossible is a ground for annulment of the marriage. Impotency means physical and incurable incapacity to consummate the marriage. Incapacity may result from loathsome and incurable syphilis."

In L.B. v. A.B.,\textsuperscript{59} a case under section 19 of the Indian Divorce Act, 1869, the

\textsuperscript{51} AIR 1924 All. 116.

\textsuperscript{52} Pirbux v. Muhammad Unnissa, AIR 1937 Lah. 383.

\textsuperscript{53} Section 19(1).

\textsuperscript{54} Section 30.

\textsuperscript{55} Section 24(1)(ii).

\textsuperscript{56} Section 12(1)(a).

\textsuperscript{57} (1982) HLR 311 (Del.).

\textsuperscript{58} AIR 1921 Cal. 459.

\textsuperscript{59} AIR 1991 Bom. 8.
court said an 'inanimate' man cannot penetrate for sexual intercourse. A man having sexual intercourse cannot be said to be inanimate or impotent. The fact he has been persuaded or lured or seduced makes no difference, nor does it make any difference that this was only a single act of copulation. If a man copulates with his wife, i.e., penetrates her for sexual intercourse, that is no case of impotency.

Under the Special Marriage Act, 1954, the words 'a petition presented by either party thereto against the other party' restrict the remedy of an application to the actual parties to the void marriage. Under section 24(1)(ii) the respondent must be impotent at the time of the marriage and at the time of filing the suit. In Kishore Sahu v. Snehprabha Sahu\(^{60}\), each party accused other for impotence. Their marriage was a mixed marriage as the parties belonged to different castes. The wife swore that she was a virgin before she married and still continued a virgin. She swore that there were no romances before the marriage, whereas the husband stated that their courtship proceeded along normal lines. They kissed and embraced and made love as lovers about to be married do. He swore that the marriage had never been consummated in spite of repeated efforts on his part. He stated that every attempt to consummate the marriage reduced his wife to a state of hysteria. She would bite, kick and cry bitterly. Short of using force being brutal and virtually raping her it was impossible to obtain consummation. It was true that the two lived together for some three months after their marriage and then off and on for another ten months before they finally separated for good.

Pollock, Vivian Bose and Digby, JJ., observed as under:

"Section 19 requires that the impotence must have been present at the time of marriage as well as at the date of the suit. Therefore, if the marriage is once consummated, the decree cannot be granted."

In other cases it was held that proof of impotence, that is physical unfitness for consummation, must be proved, or there must be facts from which this can be inferred.\(^{61}\)

**Leprosy**

While matrimonial law cannot take notice of every kind of physical abnormality as affording a ground for relief, there are certain serious diseases, which

\(^{60}\) AIR 1943 Nag. 185.

\(^{61}\) AIR 1916 Mad 675 (FB).
it would take into account in its provisions relating to matrimonial reliefs. One of them is leprosy. A few countries in the world have given recognition to leprosy as a ground for divorce. There are, however, a few countries where an appreciable number of people suffer from disease probably due to adverse climatic effect and only in these countries statutes recognise leprosy as a ground for divorce. In India this disease is common problem for all irrespective of their differences in caste, sect and religion but surprisingly some of the family laws, not all, have only provided for leprosy as a ground for divorce. Such omissions do not appear to be deliberate: they are rather the results of reckless legislations in haste.\footnote{Supra note 26, at 160.} Under Hindu Marriage Act, 1955\footnote{Section 13(vi).}, as amended in 1976, divorce is available if the other party is suffering from 'virulent and incurable form of leprosy'. Under Special Marriage Act, 1954\footnote{Section 27(f).}, leprosy is ground for divorce with a difference that in case of leprosy, the disease need not to be 'virulent and incurable' (unlike the requirement under the Hindu Marriage Act, 1955) though it should not have been contracted from the petitioner. The Divorce Act, 1869\footnote{Section 10(1)(iv).}, as amended by Act 51 of 2001, also provides 'virulent and incurable' form of leprosy as a ground for the dissolution of marriage, provided that the respondent must have been suffering from the disease for not less than two years immediately preceding the presentation of the petition. Under Parsi Marriage and Divorce Act, 1936, leprosy is not provided as a ground for divorce. Muslim law is not clear on this point. There is a difference of opinion between Prophet Mohammad and Haneefa on the one hand and Abu Yusuf on the other hand. Prophet Mohammad says that the wife is entitled to this option, whereas Abu Yusuf is of view that the wife is not entitled to ask for divorce on the ground of husband's leprosy.\footnote{Supra note 27, at 128.} But under Dissolution of Muslim Marriage Act, 1939\footnote{Section 2(vi).}, a wife is entitled to a decree of dissolution of marriage on the ground, inter alia, that the husband is suffering from leprosy. The bare provision is very much clear that the respondent must be suffering from the disease at the time of presentation of the petition for divorce.

Thus we find that there is no uniformity in regard to the nature and duration of the disease, so as to afford a ground for divorce. Under Hindu Law, in *Annapuramma*...
v. Appa Rao\textsuperscript{68}, the court held that the provision requires that in case of leprosy the petitioner must prove:

a) that the respondent has been suffering from leprosy;

b) that the leprosy is of virulent and incurable form.

In \textit{Swarajya Lakshmi v. G.C. Padma Rao},\textsuperscript{69} the husband and wife lived together for one and a half year and had a child. Thereafter the husband filed petition for divorce on the ground that the wife is suffering from leprosy. His petition was granted. It may be mentioned here that under Hindu Marriage Act, 1955, as stood prior to 1976, a petition for divorce could not be filed within the three years of marriage, unless the case be one of 'exceptional hardship or depravity'. In this case husband along with his substantive petition for divorce, also filed a petition under section 14 of the Act for relaxing three year limit referred to above, on the ground that the case was one of exceptional hardship to him. On the behalf of wife it was contended that the court should not, in granting relief, be guided by emotional considerations. Upholding the grant of divorce the court observed\textsuperscript{70}:

"Sociologists insist and they do so very correctly that we should not allow our mind 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 humane and balanced outlook and accept leprosy 'as simply another disorder that requires medical attention.' We have no doubt that this is absolutely correct about what should be the social approach but to our minds this should not provide any justification for compelling a husband to live with a wife who is suffering from an aggravated form of leprosy and who can give him and his children leprosy almost at any moment in their daily life...........we have no doubt in our mind 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 who suffers from leprosy when they provided for a way out for the former."

In this way except for the Parsi Marriage and Divorce Act, 1939, leprosy is considered a valid ground for obtaining a divorce. However, under the Muslim law, it is only the wife who can use this ground for divorce. According to the Hindu

\textsuperscript{68} AIR 1963 AP 312.

\textsuperscript{69} AIR 1974 SC 165

\textsuperscript{70} \textit{Supra} note 69.
Marriage Act, 1955 if one of the spouses is suffering from leprosy that is ‘virulent and incurable’, the other can file a petition for divorce based on this ground. The Special Marriage Act, 1954 states that the respondent should be suffering from this disease, which the petitioner has not contracted. According to the Dissolution of the Muslim Marriage Act, 1939, the only requirement for claiming divorce on this ground is that the respondent should be suffering from leprosy, irrespective of whether it is virulent or incurable. It is interesting to note that both the Special Marriage Act, 1954 and the Muslim Marriage Act, 1939 do not ask for the petitioner to show that their spouse is suffering from a virulent and incurable type of leprosy. Any type holds good for obtaining divorce on the grounds of leprosy.

In the light of this advancement in medical science classification of leprosy should be made on the basis of their curability and incurability and not on any commonsense basis like virulent and non virulent leprosy. Leprosy should not be ground for divorce where it is curable by medical treatment.

**Venereal Disease**

Pollock and Clutterbuck have defined 'Venereal' as 'associated with sexual intercourse'.\(^{71}\) Wharton describes 'venereal disease as syphilis, gonorrhoea or soft chancre'.\(^{72}\) In Venereal Disease Act, 1917, it has been defined as 'syphilis, gonorrhoea or soft chancre' for the purpose of the Act.\(^{73}\) Earlier in U.S.A only two states, Illinois and Kentuky, allowed divorce on this ground.\(^{74}\)

In India we find that under the Divorce Act, 1869, as amended by Act 51 of 2001, venereal disease in a communicable form is regarded as a ground for dissolution. In this case, the respondent must have been suffering from the disease for not less than two years immediately preceding the petition. Prior to the amendment, the Act did not recognise the venereal disease as a ground for divorce or even for nullity. But the question was raised that under section 19(1) of the Act whether venereal disease constitutes impotency and as such a ground for divorce under that section. In *T. Rangaswami v. T. Arvindammat*,\(^{75}\) the Madras High Court ruled out that 'such incapacity may arise in various ways :

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\(^{73}\) An English Statute.


\(^{75}\) *AIR 1957 Mad.* 234.
a) it may be due to some physical or organic defect;

b) it may be on account of the existence of some loathsome or incurable disease, like syphilis, which may result in an incapacity to consummate marriage;

c) it may arise due to invincible repugnance or hatred for sexual intercourse in general or in relation to a particular individual.'

In case of impotency, marriage cannot be consummated at all, whereas in case of venereal disease, it is the hidden danger to the health of the other spouse which is the motivating force for the recognition of venereal disease as a ground of divorce. In one case it is the impossibility and rather a fraud on law whereas in the other case it is the probability of affecting the health in a major degree, are the causes which lead both to the same result. 76

The Parsi Marriage and Divorce Act, 1936, also provides for the venereal disease as a ground for divorce. According to this Act where the defendant has infected the plaintiff with venereal disease, the latter may file a suit for divorce. Such suit has to be filed not later than two years after knowledge of the infection. The bare provision of the Act reads as follows:

"Any married person may sue for divorce on any one or more of the following grounds, namely:-

(e) ...........or has infected the plaintiff with venereal disease

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"77

The Dissolution of Muslim Marriage Act, 1939, also provides venereal disease as a ground for divorce. The bare provision runs as under:

"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:

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;"78

It must be noted that the Muslim law specifies that the disease should be virulent.

The Special Marriage Act, 1954, provides venereal disease as a ground for

76 Supra note 26, 150.
77 Section 32(e).
78 Section 2(vi).
divorce. It read:

"has been suffering from venereal disease in a communicable form." \(^{79}\)

Similarly, the Hindu Marriage Act, 1955, lays down:

"has been suffering from venereal disease in a communicable form." \(^{80}\)

Under Indian law the minimum period before which a petition for dissolution of marriage cannot be filed of this ground is different in different statutes. The Parsi Marriage and Divorce Act, 1936, provide that petition can be presented after expiry of a minimum period of two years. Further under the Act the period is to be reckoned from the date of infection of the disease. The provisions under the other Indian statutes, like the Hindu Marriage Act, 1955, the Special Marriage Act, 1954, the Dissolution of Muslim Marriage Act, 1939, do not provide for any such time-bar and only 'suffering from venereal disease' will be sufficient for a decree of divorce upon presentation of a petition at any time. In *Madhusudan v. Chandrika* \(^{81}\), a decree was sought by the husband on the ground that the wife was suffering from venereal disease (syphilis) for more than three years and the consent for the marriage was obtained fraudulently by concealing this fact. The court refused to grant the decree because the husband failed to establish that the wife had been suffering from 'venereal disease in a communicable form', for not less than three years immediately preceding the presentation of the petition. The judgement could have been different if the case had come up after the 1976 Amendment, which has done away with the requirement of three year period. The words 'for a period of not less than three years immediately preceding the presentation of the petition' under the Hindu Marriage Act, 1955, have since been omitted by, Act No. 68, Marriage Laws Amendment Act, 1976 to make it at par with the provisions of the Special Marriage Act, 1954.

In India it is irrelevant that whether the petitioner was ignorant or not, about the fact that the other partner whom he or she was going to marry was suffering from any venereal disease.

In the absence of case law in India it is difficult to ascertain the meaning and the scope of 'communicable'. There is confusion as to whether it means communicable to husband or wife only or it includes 'any person' other than the wife or husband. In England it has been laid down that 'communicable' means

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\(^{79}\) Section 27(g).

\(^{80}\) Section 13(v).

\(^{81}\) AIR 1975 MP 174
communicable to any person, so that where the wife's syphilis was communicable to a child of the marriage but not to the husband, the husband was entitled to a decree on the ground of his wife's venereal disease.\footnote{Lawrence v. Lawrence, June 2, 1954, Per Judge Lawson Cambell (Rayden & William, Rayden on Divorce, 148 (1971)).}

AIDS is not a ground for any relief under the Act. However, if the analogy in \textit{Mohinder Singh v. Preet Kaur}, viz., husband's blindness, is applied might give to the non afflicted spouse a reasonable ground to withdraw or may be even cruelty. In \textit{Triveni Singh v. State of U.P.}\footnote{(2008) 1 DMC 731 (All-DB).} the court held that the statutory provisions as they exist do not provide for AIDS as a ground for annulment or declaring a marriage null and void or even divorce.

\textbf{Fault Grounds}

The central concern while transforming marriages from a status to contract was to obtain the right to dissolve the marriage through a judicial decree, which would entitle the spouses to enter into a subsequent marriage. Once the sacred tie of marriage was severed, the bondage of marital servitude ended. This was a significant step for both Christians and Hindus\footnote{Flavia Agnes, \textit{Family Law Vol. II: Marriage, Divorce and Matrimonial Litigation}, 29 (2011).}. There are several ways through which a marriage can be dissolved; the 'fault theory' was the first step in this direction. It forms the core of the matrimonial litigation. When the right to divorce or the right to dissolve the matrimonial bond was first introduced into matrimonial law, it was based on the 'guilt theory'. According to this theory, a marriage can be dissolved if one of the parties to the marriage, after the solemnization of the marriage, commits some matrimonial offence. It was assumed that the purpose of the right to dissolve the marriage and set free the innocent spouse was to punish the party that had committed a matrimonial offence by depriving him or her of conjugal access of the other.\footnote{Ibid.} The basic ingredients of a fault ground divorce are:

i) There must exist a guilty party or a party who is responsible for having committed one of the specified matrimonial offence.

ii) There must also exist an innocent party who has suffered due to the misconduct of the guilty party.

iii) The innocent party should have no role in the cause of the misconduct i.e.,
there must be no collusion.

The petitioner should prove that the respondent was guilty of one or more grounds of divorce stipulated in the statutory provisions governing the divorce laws of the parties, i.e., petitioner and respondent.

**Cruelty**

The notion of 'cruelty' as a ground of divorce has gone substantial expansion over the last four decades. In contemporary legal discourse, a wide range of issues of matrimonial conflict can be brought within its preview. This has led to cruelty being the most widely used ground of matrimonial misconduct. Cruelty is a ground for matrimonial relief under all matrimonial laws in India. The same has, however, not been defined and rightly so, for human nature and conduct are infinitely diverse - what is considered as cruelty today was not so construed a few decades back, and acts which may not constitute cruelty today might be so regarded after a few years.

According to Tolstoy, "cruelty is a wilful and unjustifiable conduct which causes danger to life, limb or health (bodily or mental) or gives rise to a reasonable apprehension of such a danger." In Rayden on Divorce it is laid down:

"To obtain divorce on the ground of cruelty it must be proved that one partner in the marriage, however mindless of the consequences, has behaved in a way which the other spouse could not in the circumstances be called to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury."

Cruelty can be established after consideration of two sides of an alleged conduct of cruelty: firstly, whether the petitioner ought to be called on to endure the conduct; secondly, whether the defendant's conduct was excusable.

Lord Stowell's proposition in *Evans v. Evans* was approved by the House of Lords, and may be put thus:

"before the court can find a husband guilty of legal cruelty towards his wife, it is necessary to show that he has either inflicted bodily injury upon her or has so conducted himself towards as to render future cohabitation more or less dangerous to

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88 Supra note 32, at 61.
89 Supra note 26, at 74.
91 *Supra* note 26, at 74.
limb or life, or mental or bodily health."

In *Russel v. Russel*, the majority of judges declined to go beyond the above definition. In this case the sole question was whether the respondent's allegation is without cause that the appellant had been guilty of an abominable offence, and that she persisted in asserting it without an honest belief in its truth. Lord Herschell observed:

"Upon review of the authorities prior to the time when the Divorce Act came into operation, I think, it may confidently be asserted that in not a single case was divorce on the ground of cruelty granted unless there had been bodily hurt or injury to health, or a reasonable apprehension of one or the other of these. And it may, with equal confidence, be asserted that no other test was ever applied when it had to be determined whether a sentence of divorce on the ground of cruelty should be pronounced. I can find no case in which the impossibilities that the duties of the married life could be discharged was treated as creation."

As aptly remarked by the apex court in *Ravi Kumar v. Julmi Bai*, cruelty has no definition; in fact such definition is not possible. Cruelty in matrimonial cases can be of infinite variety. It defies any definition and its categories can never be closed. In other words, the concept of cruelty is very subjective - varying with time, place and person. This is clearly indicated when we go through earlier legal commentaries and cases.

Cruelty as a ground for divorce is widely accepted by almost all the legal systems of the world. In countries like U.S.A, Canada, Mexico, South Africa, Australia, New Zealand, China, Japan, Russia and in many Latin American countries, it is a ground for divorce. Under old English Law according to Blackstone, a husband could correct his wife even by beating. Chaucer gives an instance (amongst others) where a husband broke the leg of his wife since she had disregarded his instruction to visit a particular place. In *Holmes v. Holmes*, the husband's conduct was highly reprehensible. He used to abuse and assaults his wife, and on one occasion he insisted upon sexual intercourse with her in the presence of two men, and threatened that if she refused, the men would hold her down. When she escaped

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92 (1897) A.C. 395, H.L.
93 Supra note 89, at 456.
94 (2010) I DMC 411 SC.
96 A. Abram, *English Life and Manners in the Later Middle Ages*, 174 (1913).
97 (1755) 2 Lee : 161 ER 283.
through the window, the men followed her at the instance of the husband and dragged her back by her hair. In spite of all this, the wife was held not to be entitled to any relief on the ground of cruelty.

Hindu Law

In India also initially the position was different. According to Manu, a husband should beat his wife only with the rope or split bamboo, so that no bones are broken. There is however, in Shyam Sunder v. Shantamani\(^98\), Kamala Devi v. Amar Nath\(^99\), Gurcharan Singh v. Waryam Kaur\(^100\), Pancho v. Ram Prasad\(^101\), it is seems to be a sea change in the attitude of the courts, and acts of physical violence by the husbands against their wives are highly disapproved. In Gurdev Kaur v. Swaran Singh\(^102\), Grover J. pointed out, cruelty has to be defined with regard to social conditions as they exist in the present day, and not according to the rigid tenets of Manu and other law givers of bygone ages.

Under the Hindu Marriage Act, 1955, as amended by the Marriage Laws (Amendment) Act, 1976, cruelty is a ground for divorce as well as for judicial separation.\(^103\) Section 13(1)(ia) states that, "Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty;"

Prior to 1976, cruelty was only a ground for judicial separation.\(^104\) Another significant change brought about by the 1976 Amendment is that the concept of cruelty has been enlarged. Earlier it was confined to 'such cruelty so as to cause reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party'. However, now the petitioner has simply to establish that the respondent has 'treated the petitioner with cruelty'. There are no conditions as regards the nature or fear of injury or harm. The Law

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\(^98\) AIR 1962 Ori. 50.
\(^99\) AIR 1961 J&K 33.
\(^100\) AIR 1960 Punj. 422.
\(^101\) AIR 1956 All. 41.
\(^102\) AIR 1959 Punj. 162.
\(^103\) Section 13(1)(ia) and 10, The state of Uttar Pradesh had made cruelty (and desertion) as a ground for divorce way back in 1962 vide Hindu Marriage(Uttar Pradesh Sanshodhana) Adhiniyam, 1962.
\(^104\) Section 10(b) of the unamended Act, i.e. prior to 1976.
Commission of India in its 59th report had recommended for change in the definition of 'cruelty' in Indian Marriage laws following the changes in the concept of cruelty in English Law. After the Marriage Laws (Amendment) Act, 1976, the legislature left it to the courts to determine the conduct of cruelty on the facts of each case. Whether any conduct amounts to cruelty or not is to be determined by the courts keeping in mind the principle that relief is granted not only to protect a spouse from physical injury but also from danger to mental health.

It may be pointed out here that the move towards liberalisation of the divorce laws vide the amendments in 1976 had many dissenters who apprehended that the institution of marriage would collapse. They urged caution and pointed out that divorce is not by any means a panacea of women's ills, and that quick-divorce may be much less valuable than tardy divorce. Derrett at another place asserts that, "The absence of desertion and cruelty from the ground of divorce (prior to 1976) speaks volumes not for Parliament's inhumanity, but rather for its belief that the moral qualities of Hindu spouses will, give a chance, reconcile them to the shortcomings of their partners whom they have after all deserved through their merits or demerits in previous births."

What would constitute cruelty would depend on a number of factors - the social and cultural background of the parties, their mental and physical conditions, the quality and length of their married life and so on. Also, cruelty can assume a variety of forms and could be infinite in its species. It could be physical or mental, direct or indirect, intended or unintended.

The Supreme Court in Samar Ghosh v. Jaya Ghosh tried to enumerate instances that constituted mental cruelty. These instances were only illustrated and not exhaustive.

They said:

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot

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107 2007 (4) SCC 511.
reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to
mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

In an interesting case before the Bombay High Court, a petitioner, who was a homoeopathic practitioner, sought divorce on the ground that her in-laws forced her to wear sari. Dismissing the petition, a division bench of Justices A.P. Deshpande and Rekha Sondurbaldota held that in-law's insistence on sari may be a bothersome garment, a marriage cannot be ended over it.

In Neelu Kohli v. Naveen Kohli, which is now overruled by Supreme Court, Allahabad High Court, and in Nirmala Jagesha v. Manohar Jagesha, the Bombay High Court, the courts were of view that not any and every abnormal act of the other party can be viewed as mental cruelty. In Navin Kohli v. Neelu Kohli, the Supreme Court observed that the conduct complained should be grave and weighty. It should be such that no reasonable person should tolerate it. It should not be ordinary wear and tear of marriage. Hon'ble apex court in one case, on 9th of February, 2010, through Justices P. Sathasivan and Ashok Kumar Ganguly held, "even spouse's silence may amount to cruelty. At times it may be just an attitude or an approach. Silence in sane situation may amount to cruelty. Therefore, cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Broadly it means absence of mutual respect and understanding between spouses which embitters

109 AIR 2004 All 1.
111 AIR 1991 Bom 259.
112 Supra note 110.
the relationship and often leads to various outburst of behaviour which can be termed cruel.”

In *G.V. Siddaramesh v. State of Karnataka*, 114 the court concluded that there can never be any strait jacket formula or fixed parameter for determining mental cruelty in matrimonial matters.

In *Bajrang Gangadhar Revdekar v. Pooja Bajrang Revdekar*, 115, a husband's petition for divorce alleging cruelty by wife was dismissed as, according to the court, instances alleged to establish her cruelty were day to quarrels over trivial matters; the fact that the wife makes her grievance in loud voice was not cruelty. The court held:

"It is not expected that a lady should remain like a maidservant and only to prepare food and look after the children. The wife is not executed a slavery bond in favour of the husband or in favour of her in-laws. Normal wear and tear is expected in every matrimonial home............. A wife is also expected to have equal honour and dignity in the matrimonial home...........” 116

In *B.N. Panduranga Shet v. S.N. Vijay Laxmi*, 117, the husband alleged that the wife was schizophrenic; the acts and incidents narrated by him were such as removing mangalsutra and kum kum, throwing bangles; however, despite all this he lived with her for four years and had two children. The court held there was no case of mental cruelty. While arriving at such conclusions, regard must be given to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together and all other relevant facts and circumstances.

A reference may be made of some cases which are suggestive of how the concept of cruelty is interpreted, as also how it has evolved over a period of years, so as to keep in tune with the changing items.

In *Amrit Pal Singh v. Gurpreet Kaur*, 118, the court held that where the husband giving beating to wife under drunken condition which affected both physical and mental cruelty, divorce was granted on the ground of cruelty.

In *Manisha Tyagi v. Deepak Tyagi*, 119, the court held that to establish cruelty it is not necessary that physical violence should be used. However, continued ill-treatment, cessation of marital intercourse, studied neglect, indifference of one's

114 2010 (1) HLS (SC) 314.
115 AIR 2010 Bom 8.
116 Supra note 114, at 13.
117 AIR 2003 Kant 357.
118 2009 (2) HLR (P&H) 430.
119 AIR 2010 SC 1042.
spouse to other may lead to an inference of cruelty.

In *Parveen Mehta v. Inderjeet Mehta*[^120^], wife's non co-operation about sex, refusing of medical treatment, depriving husband normal cohabitation, false plea of conception and miscarriage were declared that this would draw an inference of mental cruelty.

In *Smt. Hemlata Sonwani v. Dr. K.R. Sonwani*[^121^], the court held that the wife making wild allegations against husband that he is having illicit relations with ten twelve girls and even husband is having one illegitimate child, but wife had not produced any evidence in support of her allegations, these allegations are not sufficient for constituting mental cruelty.

In *Akhilesh K. Bisht v. Sunita*[^122^], the court held that, wife using obnoxious words, "randi, khadus bhudhiya, kulta, badmas" for her mother-in-law, insulting husband in front of his colleagues in his office constitute cruelty.

In *Rajiv Dinesh Gadkari v. Nilangi Rajiv Gadkari*[^123^], the court observed that wife marrying an NRI, husband compelled his wife to take wine, beef, short wear and vulgar dress and mix with friends. husband took photographs of wife in short vulgar clothes and uploaded them in different websites. It amounts cruelty.

In *Varsha Praveen Patil v. Praveen Madhukar Patil*,[^124^] the court held that mere fact that a wife did not file any formal police complaint against alleged torture by her husband and in-laws, would not dislodge her allegations of cruelty in defence to the husband's plea of desertion.

In *Mayadevi v. Jagdish Prasad*,[^125^] since the beginning the husband was suffering harassment from the wife, quarrelsome nature, abusive language, threats to implicate in false criminal cases and merciless beating of the children. When she was pregnant with the fourth child, she pushed her three children in the well and jumped after them. While she could be rescued, the children died. There could not be a more serious case of cruelty than this. The husband got the divorce decree.

Parenthood is a normal natural desire of every human being. A spouse who deprives the other of this pleasure and desire would be causing great mental agony to

[^120^]: AIR 2002 SC 2582.
[^121^]: AIR 2010 Chh. 77.
[^122^]: 2010 (2) HLR (Uttark.) DB 133
[^123^]: 2010 (1) HLR (Bom.) DB 61.
[^124^]: AIR 2009 Bom. 60.
[^125^]: AIR 2007 SC 1426.
the other spouse. In *Suman Kapur v. Sudhir Kapur*, a husband sought divorce on the ground, inter alia, that his wife, who was a carrier oriented lady, got her pregnancy terminated three times because she did not want motherhood thereby depriving him and his parents, the joy of parenthood. This was held mental cruelty.

In *V. Bhagat v. D. Bhagat*, the allegations of wife that the husband who was a practising advocate, was a lunatic and that there is a streak of insanity running throughout his family, was held to amount to mental cruelty.

In *K. Srinivas Rao v. D.A. Deepa*, the Hon'ble Supreme Court held that, "Thus, to the instances illustrative of mental cruelty noted in Samar Ghosh, we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse."

In this case through Justices Aftab Alam and Ranjana Prakash Desai, held that, "Staying together under the same roof is not a pre-condition for mental cruelty. Spouse can cause mental cruelty by his or her conduct even while he or she is not staying under the same roof. In a given case, while staying away, a spouse can cause mental cruelty to the other spouse by sending vulgar and defamatory letters or notices or filing complaints containing indecent allegations or by initiating number of judicial proceedings making the other spouse’s life miserable."

**Muslim Law**

Under Islamic law, a husband can divorce his wife without assigning any reason or pleading any ground. Hedaya does not mention anywhere that a Muslim wife is entitled to ask for the dissolution of marriage if her husband is cruel to her. In *Munshee Buzloor Rahim v. Shamsoonissa Begum*, the husband disposed of the property of his wife and confined her into a room like a jail. He also misbehaved with his wife. In appeal the husband said under Muslim Law, a wife has no right to live.

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126 Supra note 87, at 28-30.
127 AIR 2009 SC 589.
128 AIR 1994 SC 710.
129 2013 STPL (Web) 152 SC
130 Ibid.
131 Supra note 26, at 82.
132 (1897) 11 M.I.A. 551.
separately, even though the conduct of the husband is bad. The privy Council said, "If under 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 doctrine of justice, equity and good conscience. In *Hussani Begum v. Mohammad Rustom Ali Khan* and in *Syed Jafar Hussain v. Mst. Hussan Ara Begum*, the issue of cruelty was dealt in favour of wives by the courts. In *Kadir v. Koleman Bibi* and in *Hamid Hussain v. Kubra Begum*, the dissolution of Muslim marriage on the ground of cruelty is well summed, it was said that to constitute cruelty it is not necessary that there must be actual violence or a reasonable apprehension of it. In *Begum Zohra v. Muhammad Ishaqu Majid*, it was said that if a husband habitually abuses and uses insulting language against his wife it may amount to cruelty. Again in *Abdul Aziz v. Bashiran Bibi*, it was said that when the circumstances are such that it would be cruel if the wife is to continue the marital relations, actual habit of cruelty need not be established.

There have been, confusions, whether Muslim law has permitted a Muslim wife to ask for the dissolution on the ground of husband's cruelty or not. There are also alternative propositions of law from the husband's side. Muslim husbands claim their right to chastise their wives if the wives fail to obey the commands of their husbands. It has been said that the Muslim husband is entitled to beat the wife for nushuz rebelliousness or disobedience to reasonable commands. Therefore he may beat her for neglecting to adorn herself, when he desires her company or refusing him when he is pure or abandoning the practice of prayer and its proper conditions. It has been said that Prophet Mohammad directed Muslims not to beat their wives. Similarly, not so long ago in England a husband could inflict corporal chastisement on the wife without causing comments. Maulana Abul Kalam Azad says, “that God has created man and woman for love and affection”. It means there is no scope for

133 (1907) I.L.R. 29 All. 222.
134 (1912) 13 IC 609.
136 (1918) I.L.R. All. 322.
137 (1955) P. Sind 378.
138 (1958) P. Lah. 59.
139 Abdul Qadir v. Salima, (1886) 8 All.149.
140 Supra note 29, at 88.
beating in Quran.

Qazi Mohammad Ahmad Kazmi introduced a bill in the Legislature regarding the issue on 17th April 1936. It however became law on 17th March 1939 and thus stood the Dissolution of Muslim Marriages Act, 1939.

So far as wife is concerned apart from the right of khoola and mubarat divorce, she has a statutory right under the Dissolution of Muslim Marriage Act, 1939, to obtain a divorce on certain grounds. Cruelty is mentioned as one of the grounds. The concept of cruelty is explained in the Act as follows,\(^\text{143}\) viz., that the husband treats her with cruelty, that is to say?

\(\text{(a)}\) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or
\(\text{(b)}\) associates with women of evil repute or leads an infamous life, or
\(\text{(c)}\) attempts to force her to lead an immoral life, or
\(\text{(d)}\) disposes of her property or prevents her exercising her legal rights over it, or
\(\text{(e)}\) obstructs her in the observance of her religious profession or practice,
\(\text{(f)}\) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;

In Muslim Law, keeping of mistress during the subsistence of the first marriage has been considered sufficient ground for cruelty to the first wife. In *Itwari v. Asghari*,\(^\text{144}\), it has been held that, in the "absence of cogent explanation", the court will presume, under modern conditions, that the action of the husband in taking a second wife involves some degree of cruelty to the first, and that this will be accepted by the court as a defence to any action brought against her for restitution of conjugal rights. In *K. Muhamma Latheef v. Nishath*,\(^\text{145}\), the husband was the appellant. He was assailing the decree for dissolution of marriage. The parties got married on 30-3-1997. Thereafter on 28-7-1998, both of them were separated. During the subsistence of marriage within 5 months of separation, the appellant-husband got remarried. He was having a child in the new wedlock. This came to light when he was examined by lower courts. The lower courts held that the respondent could not to be expected to treat the petitioner equitably with the second wife who is along with him. The contention was not justified. The High Court held that the appellant had married

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\(^{143}\) The Dissolution of Muslim Marriage Act, 1939, Section 2(ix).

\(^{144}\) AIR 1960 All. 684.

\(^{145}\) AIR 2004 Ker. 22.
another within 5 months of separation from the respondent wife, that itself manifests
the cruelty towards her. If the decree was reversed it would affect the harmonious life
of second wife as well. In this way the court supported the interest of respondent and
second wife of appellant.

The Dissolution of Muslim Marriage Act, 1939, however, details acts and
behaviour, which would constitute cruelty so as to entitle the wife to relief. The use of
words "that is to say", in the beginning of the clause viii of section 2 of the Act lays
down the whole range of categories of cruelty as it is understood under Muslim Law.
The work of limiting cruelty to these categories under Muslim divorce law has been
done by the legislature along with the judiciary. Such limitations on the interpretative
strength of judiciary are found only in this enactment.146

*Christian Law*

Under Indian divorce Act, 1869, prior to the amendment in 2001, for a wife,
cruelty alone was not regarded as a ground for divorce. What was required for divorce
was cruelty coupled with adultery.147 Prior to the amendment of 2001 in the Act,
husband only can claim for the decree of dissolution of marriage on the ground of
only adultery of the wife. Hence it was obligatory that the petitioner-wife must prove
his or her case for cruelty coupled with adultery in order to succeed. The proper scope
of the section was underlined in *Mr. King v. King*148, the facts of the case are that
Mr. King was living an adulterous life with one Mrs. Appleton and as a result two
children born to her. This adultery which was confessed through some letters by
Mr. King to Mrs. King was condoned by the latter as a nice lady. Later when both
were living together she became pregnant. During pregnancy Mrs. King was
subjected to threats of cruelty by Mr. King. Walsh J. observed:

"threats of force used towards a women in that condition are sufficient to
constitute legal cruelty."

In *Josephine Henrietta Alexander v. Edward Phillip Alexander*149, the husband
and the wife were living apart and cruelty alleged was that the husband came to the
petitioner's house on several occasions in a drunken state and abused her. Once he
abused her on public street and that once, about four years ago, he took her by the
throat, threw her down and caused bruises on her body by pushing her against a chair.

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146 *Supra* note 26, at 85.
147 The Indian Divorce Act, 1869, Section 10. (prior to the amendment of 2001)
148 *Mrs. Alice King v. Mr. King*, AIR 1925 All. 237.
149 (1911) Ind. Cas. 784.
The learned judge observed:

"The above acts of ill-treatment would not amount to legal cruelty."

In *Mrs. Ada Jose v. Mr. Charles Leonard Jose*\(^{150}\), the facts of the case were that the parties were married at St. Andrew's Church Lahore on July 15, 1912 and had five children. Petitioner applied to District Judge, Lahore, to grant her a decree nisi of dissolution. Her case was that her husband had been guilty of cruelty and adultery with some unknown woman. The only evidence of adultery was that he suffered with gonorrhoea from which the petitioner was free. In this state of health he entered into forced sexual intercourse with her knowing fully well that he was suffering from such a loathsome disease and according to wife it amounted to cruelty. The District Court granted judicial separation on the ground of cruelty but on appeal Tekchand, J. observed:

"There is no doubt that the trend of authority in England is to hold that if a husband or wife be proved to have contracted a venereal disease (not from the wife or husband) during the marriage, that is sufficient evidence of adultery."

It was further held that this sort of forced sexual intercourse, especially when one of the spouse is suffering from venereal disease, would amount to cruelty which will make a fit case for a decree of dissolution.

The Divorce Act, 2001 has completely transformed the original Act and the grounds for matrimonial relief have been brought almost at par with the other statutes and the position now as regards cruelty is that a marriage may be dissolved if 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."\(^{151}\)

**Parsi Law**

Under the Parsi Marriage and Divorce Act, 1936, prior to 1988, cruelty was only ground for judicial separation, and cruelty was explained as such behaviour 'as to render it in the judgement of the Court improper to compel him or her to live with the respondent'. The section also explicitly included cruelty to children as matrimonial cruelty for purpose of relief.\(^{152}\) After the amendment of 1988, cruelty has been

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\(^{150}\) AIR 1930 Lah. 833.

\(^{151}\) The Divorce Act, 2001, Section 10(x).

\(^{152}\) The Parsi Marriage and Divorce Act, 1936, Section 34, prior to 1988.
incorporated as a ground for judicial separation\textsuperscript{153} as well as for divorce\textsuperscript{154}, provided that in every suit for divorce on this ground, it would be the court’s discretion whether to grant divorce or judicial separation. The provisions of the Parsi Marriage and Divorce Act, 1936, seem to lay down the ground with more clarity of expression though the term 'cruelty' has been avoided therein. The terminology of the section is a clear proof of borrowing by the legislature from the judicial pronouncements. The provision provides:

"that the defendant has since the marriage voluntarily caused grievous hurt to the plaintiff or has affected 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 grievous hurt, or (ii) after the plaintiff came to know to the infection, or (iii) after the last act of compulsory prostitution." \textsuperscript{155}

Grievous hurt is defined in section 2(4) of the Parsi Marriage and Divorce Act, 1936. The newly sub clause (dd), added after the amendment of 1988 empowers a plaintiff to sue for the divorce on the ground of cruelty of the defendant.

The above discussion on the meaning and scope of cruelty shows its importance as a ground for divorce in all matrimonial systems prevalent throughout in our country irrespective of their religious-oriented differences in identity. There in much in common in them obviously because they are dealing with the instincts, feelings, egos and different behaviours of human beings in matrimonial home in the scope of cruelty. There are number of things like ordinary wear and tear of the family life and those have not been treated within the scope of cruelty. There are many judicial pronouncements and factual circumstances in which the court named various actions and omissions as causes constituting cruelty. But all the rulings of the courts are not justifiable in the light of our national programmes for health and family planning. Aborting of the foetus in the very first pregnancy by the wife deliberately and without any medical reasons and without the consent of the husband was regarded by the Delhi High Court as cruelty against husband.\textsuperscript{156} High Court have seems to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{153} Ibid, after 1988.
\item \textsuperscript{154} Ibid, Section 32.
\item \textsuperscript{155} Ibid, Section 32(e).
\item \textsuperscript{156} Sushil Kumar Verma v. Usha, AIR 1987 Del 86; similarly in Sunil Kumar v. Jyoti alias Meena, AIR 1987 P&H 526.
\end{itemize}
\end{footnotesize}
overlook the provisions of special statute\textsuperscript{157} of that time, which has liberated women from unwanted pregnancies. It is for the woman to decide when she wants to have a child and no consent from the husband is required.\textsuperscript{158} Indeed marriage relationship provide mutual rights and obligations to each other but the spouses must not try to frustrate the objective of marriage on the basis of available legal rights against each other.

While purely a civil matrimonial dispute can be amicably settled by a Family Court either by itself or by directing the parties to explore the possibility of settlement through mediation, a complaint under Section 498- A of the IPC presents difficulty because the said offence is not compoundable except in the State of Andhra Pradesh where by a State amendment, it has been made compoundable. Though in Ramgopal v. State of Madhya Pradesh\textsuperscript{159}, the Supreme Court requested the Law Commission and the Government of India to examine whether offence punishable under Section 498-A of the IPC could be made compoundable, it has not been made compoundable as yet. In B.S. Joshi & Ors. v. State of Haryana\textsuperscript{160}, the Supreme Court stated that while dealing with matrimonial disputes and the complaint involving offence under Section 498-A of the IPC can be quashed by the High Court in exercise of its powers under Section 482 of the Code if the parties settle their dispute. Even in Gian Singh v. State of Punjab\textsuperscript{161}, the Supreme Court expressed that certain offences which overwhelmingly and predominantly bear civil flavour like those arising out of matrimony, particularly relating to dowry, etc. or the family dispute and where the offender and the victim had settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may quash the criminal proceedings if it feels that by not quashing the same, the ends of justice shall be defeated.

The incidence of quarrels among the spouses will have to be examined separately because the nature of such incidents differs from case to case. Concept of cruelty differs between Hindu and Muslim families because of their different customs and practices i.e., Purdah is a practice which may be cruel in Hindu family and yet it may be in Muslim family. For example, disposal of the property of the wife by the

\textsuperscript{157} The Medical Termination of Pregnancy Act, 1971.
\textsuperscript{158} Poonam Pradhan Sexena, "Abortion as a ground for divorce in Hindu Law", 29 JILI 421 (1987).
\textsuperscript{159} (2010) 13 SCC 540
\textsuperscript{160} AIR 2003 SC 1386
\textsuperscript{161} (2012) 10 SCC 303
husband will amount to cruelty\textsuperscript{162}, but it is not so in the case of a Hindu woman. In \textit{Gurdev Kaur v. Swaran Singh}\textsuperscript{163}, Grover J. pointed out, cruelty has to be defined with regard to social conditions as they exist in the present day, and not according to the rigid tenets of Manu and other law givers of bygone ages. Thus it is incumbent that in deciding an issue of cruelty, social status, mental and physical conditions and customs of the spouses shall be taken into consideration. The concept of cruelty has been undergone a change with the change in socio-economic conditions of the country.

\textbf{Adultery}

Adultery was the first matrimonial fault introduced as a ground for divorce\textsuperscript{164}. Adultery is a serious matrimonial lapse and even the most liberal of societies view this as extremely damaging to a harmonious marital relationship. No wonder the law takes cognizance of this and provides for matrimonial relief to the aggrieved party. Under almost all the personal law statutes in India, adultery of a spouse entitles the other to seek divorce or judicial separation, though the verbal formula to denote deviation from marital fidelity as a ground for relief varies from Act to Act.\textsuperscript{165} Almost all Legal systems of the world in which the institution of divorce has got some room have laid down adultery as a specific ground for divorce\textsuperscript{166}. Uptill 1937, it was the only ground in England but through the Matrimonial Causes Act, 1937, section 2, other grounds were added to it. In Scotland it has been a ground of divorce since Reformation. In France, Germany, Greece, Holland, Austria, Denmark, Norway, Sweden, Switzerland, Turkey and Yugoslavia adultery is now ground for divorce by either party. Hungry, Czechoslovakia, Poland, Rumania, and Bulgaria, before their adoption of the Russian system, adopted it as a ground for divorce. Even Polish and Bulgarian statutes of 1945 and 1953 respectively clearly mention adultery as one of the grounds. In Belgium and Luxemburg adultery by husband is a ground only if he has a concubine in the common household. Adultery was not a ground of divorce in the state of South Carolina previously but now it is a good ground of divorce in all the states of U.S.A. including South Carolina. Some countries do not allow divorce in case of adultery where it was caused by the connivance or collusion of the other party.

\textsuperscript{162} The Dissolution of Muslim Marriage Act, 1939, Section 2(viii)(a).
\textsuperscript{163} AIR 1959 Punj. 162.
\textsuperscript{164} Supra note 84, at 31.
\textsuperscript{165} Supra note 87, at 49.
\textsuperscript{166} Supra note 26, at 52.
or where the other party has condoned it. These countries include England, Germany, Greece, Denmark, India and a few other states. Therefore, adultery on the part of the petitioner himself destroys the remedy for him as provided by the Indian and English laws.

In India adultery has received statutory recognition as a ground for divorce. The various regulations regarding matrimonial relationship have specifically mentioned adultery as a specific ground for divorce. Initially, the enactments, which were passed within a short range of time, did not tally in their terminology and probably in their meaning. Marriage Laws (Amendment) Act, 1976 has changed those laws (Special Marriage Act and Hindu Marriage Act) and provided for the same provisions for dissolution of marriage on the ground of adultery. In India adultery is both a matrimonial offence as well as a criminal offence.\textsuperscript{167} In both instances, it is essential to prove a wilful act of sexual intercourse outside wedlock. It is not necessary to prove that the adulterer had the knowledge or reason to believe that the person concerned was the wife (or husband, as the case may be) of the petitioner. Though the words used in both the provisions is the same, there is a difference between the criminal and matrimonial law regarding 'adultery'. While under the matrimonial law, both the husband and wife can avail of the provisions against the spouse who has committed an act of sexual intercourse outside the marriage, in criminal law, the provision can only be used by the husband against the adulterer who has committed adultery with his wife. This is an archaic provision which views the wife as the property of husband and an act of adultery as a violation of the proprietary rights.\textsuperscript{168} Under matrimonial law, the action is aimed at the erring spouse. The adulterer or the adulteress is merely a co-respondent.

The Special Marriage Act, 1954 which governs the marriages solemnized between parties belonging to different castes and professing different religions, admits specifically adultery as sufficient ground for petition to dissolve the marriage. The provision is the same as in Hindu Marriage Act, 1955, and aggrieved spouse may seek either divorce or a separation on the ground that 'the respondent has, after solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse'.\textsuperscript{169}

\textsuperscript{167} Indian Penal Code, Section 497.
\textsuperscript{168} Supra note 84, at 31.
\textsuperscript{169} The Special Marriage Act, 1954, Section 27(a).
Meaning of Adultery

In English law "adultery" has been defined as "consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse, during the subsistence of marriage". A divorced woman who has sexual intercourse with a married man thereby commits adultery with him, but it is necessary to prove that the man in question is a married man at the material time. Similarly woman with whom adultery is committed need not to be a married woman. In 'Latey on Divorce' the learned author adds that:

"In the divorce court adultery means willing sexual intercourse between a husband or wife and one of the opposite sex while the marriage subsists".

Acts of voluntary sexual intercourse falling short of complete sexual intercourse may be sufficient to justify a finding of adultery. In an English decision the above definition was sufficiently explained. In Dennis v. Dennis, a leading case which emphasises that nothing else other than penetration constitutes the offence of adultery. In order to constitute adultery, there must be an act of sexual intercourse between the parties, i.e., the respondent husband or wife, and the other person. What would constitute sexual intercourse is again a matter where different views have been given. In an Australian case, Locke v. Locke, it was held that 'to constitute adultery as a ground for divorce, some penetration of woman by the man must be found to have taken place. It is not necessary that such penetration should constitute a complete act of intercourse. The act need not be complete but a mere attempt without penetration is sufficient.'

For the purpose of divorce the scope of adultery has been subjected to scrutiny in India also. Sometimes question is posed whether the scope of adultery is same as defined in the Indian Penal Code, 1860 or a different one for the purpose of the law of divorce. The issue came before the court in the case of Olga Thelma Gomes v. Mark Gomes, where a divorce petition under section 10 of the Indian Divorce Act, 1869, was filed. The petitioner in this case found her husband sleeping with a girl covered
with a sheet up to throat. Besides, there was evidence that the husband entered into sexual intercourse with many more girls. Lahiri, J. observed:

"If the word 'adultery' as used in section 10 of the Indian Divorce Act has the same meaning as in section 497 of the Indian Penal Code, the respondent in the present case cannot be said to be guilty of adultery because the girl with whom he is alleged to have committed the acts of sexual intercourse have not proved to be married woman. In our opinion, however, this narrow definition of the word 'adultery as given in section 497 of the Indian Penal code has no application to a proceeding for divorce under section 10 of the Indian Divorce Act'. The definition of the "adultery" in section 497 of the Indian Penal Code applies only to make offenders and under Indian Penal Code a woman cannot be said to be guilty of adultery but the very first paragraph of section 10 of the Indian Divorce Act authorizes a husband to present a petition for the dissolution of marriage on the ground of adultery by his wife. This fact by itself is sufficient to show that the word "adultery" has been used in a wider sense in section 10 of Indian Divorce Act, than the definition given in section 497 of the Indian Penal Code."

In Murray's Oxford Dictionary adultery has been defined as "violation of the marriage bed", "The voluntary sexual intercourse of a married person with one of the opposite sex whether married or unmarried to another (the former case being technically designated single, the latter double adultery)."

Though the wordings under various Acts vary, yet the context and meaning of the matrimonial offence of adultery is more or less the same under all laws. Adultery in matrimonial jurisprudence is voluntary sexual intercourse between a married person and a person of opposite sex, the two persons not being married to each other. Infact, the term has nowhere been defined in any of the matrimonial statutes, except in a limited way under the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 after the amendment in 1976. These Acts describe it as 'voluntary sexual intercourse with any person other than his or her spouse,' after the marriage.

Hindu Law

Under Hindu Marriage Act, 1955, either husband or wife may file a petition

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180 The Hindu Marriage Act, 1955, Section 13(1)(i).
181 The Special Marriage Act, 1954, Section 27(1)(a).
for dissolution of marriage or judicial separation, respectively, on the ground that the other party, 'has, after solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse.' So far as Hindu personal law is concerned, prior to 1976, there were two categories of adultery entitling the petitioner to two different reliefs— a lesser relief of judicial separation and a more significant or serious relief by way of divorce decree. For a separation, the petitioner had to prove just a single act of adultery of the respondent, but since divorce was more serious matter, the immorality on the part of the respondent was required to me more serious, and hence, only if petitioner could prove that the other spouse was 'living in adultery' could he or she get a decree of divorce. It however, came to be realized that even a single lapse could be enough to shatter mutual faith and regard between the spouses and court should not be restrained from giving a decree of divorce where the petitioner so desires. Accordingly, in 1976, the provision of section 13 of the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 were amended by the Marriage Laws (Amendment) Act, and now a single act of voluntary sexual intercourse by a party with any person other than his/her spouse is sufficient to prove adultery. The new provision does not use the word adultery, though what it implies is, in fact, adultery. The words used are 'voluntary sexual intercourse with any person other than his or her spouse'.

Christian Law

Under the Indian Divorce Act, 1869, as amended in 2001, the fact that the respondent 'has committed adultery' is a ground available to both the husband and the wife to file a petition for the dissolution of marriage or for judicial separation. Prior to 2001, the husband could file a petition for dissolution of marriage on the ground that his wife has, since the solemnisation of the marriage, been guilty of adultery. Thus, a simple single instance of adultery was sufficient for a husband to get a divorce from his wife. Not only this, he was also entitled to claim damages from the co-adulterer. In B.K. Ghosh v. Arpana, the husband's application of dissolution of marriage on the ground of adultery and for the damages against the co-adulterer was decreed ex parte. An amount of rupees 1000 was awarded as damages. The wife,

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182 The Hindu Marriage Act, 1955, Section 13(1)(i).
183 Supra note 87, at 50.
185 Indian Divorce Act, sections 10(1)(i) and 22.
186 Ibid, Section 34.
however, had no ground if her husband had committed or was even living in adultery. In order to obtain a relief, her plea of adultery had to be coupled with another ground, *viz.*, bigamy or marriage with another woman, or with cruelty or desertion without reasonable cause for two years or more, or with incest. The result of such provision was that in a large number of cases, even though the husband was living a life of adultery yet, the wife was unable to get relief of divorce until she succeeded in proving the other charges as well. On the basis of adultery she was entitled only to decree of judicial separation. The Indian Divorce (Amendment) Act, 2001 has, however, changed the entire law. On proof that the 'respondent has committed adultery', either the husband or the wife may now file a suit for the dissolution of marriage or for judicial separation. Also, the alleged adulterer or adulteress has to be made co-respondent, unless the petitioner has sought waiver from the court on the grounds specified in the Act, *viz.*, the respondent is leading an immoral life and the petitioner does not know who the co-respondent is; the name of the co-respondent is unknown; or the alleged adulterer is dead. The amended Act has also deleted section 34, which entitled the husband to claim damages from the adulterer.

**Muslim Law**

Under the Muslim Law, a husband can divorce his wife without assigning any reason. Divorce among Muslims by recourse to court, is governed by the Dissolution of Muslim Marriages Act, 1939. So far as the wife is concerned, though adultery by the husband is not clearly mentioned as a ground available to the wife for divorce, but an inference to this effect can be drawn by a clause in Dissolution of Muslim Marriages Act, 1939, which provides that she shall be entitled to obtain a decree of dissolution of marriage if husband treats her with cruelty. As on the instances of cruelty, the Act mentions the fact that, 'the husband associates with women of evil repute or leads an infamous life'. This, in substance, could be a species of adulterous conduct, which furnishes a ground for relief to the wife. Beside this specific ground a sweeping clause is also provided in the following language:

"On any other ground which is recognised as valid for dissolution of marriage under Muslim law."

Therefore, adultery not being a specific ground of divorce can only be pleaded

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188 Indian Divorce Act, 1869, Section 11, Prior to the amendment, there was no provision for making the adulteress a co-respondent.
189 The Dissolution of Muslim Marriages Act, 1939, Section 2(viii)(b).
190 *Ibid*, Section 2(ix).
if it has an authority for divorce in customary law of Muslims and no doubt certain schools of Mohammedan law such as Hanafi\textsuperscript{191} do recognize adultery as a ground for dissolving a Muslim marriage. Islam says that only in three cases a Muslim may be put to death, i.e., apostasy, adultery and murder.\textsuperscript{192} If the charge of adultery is proved to be true, the woman charged with adultery would be condemned to death, if on the other hand, the charge is proved to be false, the person making the charge would receive punishment of scourging with eighty stripes.\textsuperscript{193}

British brought certain reforms into the Muslim law to minimise brutal punishment which was against the principles of equity, justice and good conscience. In the year 1860, the Indian Penal Code was introduced in India and the term adultery was incorporated with a new meaning and definition. Ameer Ali\textsuperscript{194} has maintained that if the husband has falsely charged his wife with adultery, the wife will be entitled for judicial divorce. In \textit{Tufail Ahmad v. Jamila Khatun}\textsuperscript{195}, it was held that if a husband has falsely charged his wife with adultery, the wife may be entitled for dissolution of marriage. On the other hand, it was held in \textit{Khatabibi v. Umar Saheb},\textsuperscript{196} that if a charge of adultery is proved to be true, the marriage can be dissolved.

Muslim Law does not provide uniformly equal privilege to both the spouses in the matter of dissolution of marriage on the ground of adultery. Wife suffers from a rule of discretion directed against her by reason of certain provisions made in the Dissolution of Muslim Marriage Act, 1939. The Act provides discretionary power to the courts to ascertain the matter in view of customary divorce laws prevalent in the Muslim law. The customary divorce law gives more effective and arbitrary power to Muslim husbands instead of rescuing the Muslim wives. The judicial pronouncements with help of rare customary laws providing for certain rights to Muslim women in cases of adultery are visible in the records of Muslim divorce laws. However, the meaning and the nature of adultery is almost same as prevalent in and applicable to other personal laws based on British model.\textsuperscript{197}

\begin{footnotesize}
\begin{enumerate}
\item Under Safal law adultery is a ground for divorce. \textit{Syed Mohammad v. S.M. Kassim Devee}, AIR 1954 Travan-Cochin 219.
\item \textit{Supra} note 27, at 178.
\item \textit{Supra} note 28, at 575.
\item (1962) All. 570.
\item (1928) Bom. 285.
\item \textit{Supra} note 26, at 62.
\end{enumerate}
\end{footnotesize}
Parsi Law

The Parsi Marriage and Divorce Act, 1936, provides for divorce and judicial separation on the ground 'that the defendant has since the marriage committed adultery.........' The suit, however, has to be filed within two years of the knowledge of the fact that the respondent has committed adultery. Dissolution of marriage being a matter of grave consequences affecting not only the parties but also their children, family, and the society at large, it is the duty of the court to first enquire and satisfy itself that all the facts necessary to constitute the matrimonial ground and entitle the petitioner to the relief, are present. The court has to be satisfied that the petition is not collusive and that there is no condonation or connivance, or undue delay in filing the same. In *Clarence v. Raicheal*, the wife confessed to the husband on the first night of marriage that she had an affair with someone else. The husband thereupon, absolved her of her marital obligations and left her with her parents. After five years, he also granted her permission to marry her lover. After about 15 years, he filed a petition for the dissolution of marriage alleging adultery of the wife as confessed by her. He was refused relief on the ground of connivance and undue delay in filing the petition.

*Post-marriage Lapse:* It is only post-marriage lapse that gives to the petitioner a ground for relief against the respondent. Such conduct prior to marriage is immaterial. Evidence of pre-marital intimacy with a stranger is thus irrelevant. In *Elam Plakkat Mathe w v. Mulam Kothrayil*, a Christian husband sought divorce on ground of wife's adultery, as his wife had concealed the fact that she was pregnant by another person at the time of marriage. The court held that section 10 of the Indian Divorce Act, 1869 provides for adultery, but it does not deal with premarital sexual behaviour. This would be a case of fraud, but not adultery, according to the court.

*Voluntary act of Adultery:* The act of sexual intercourse must be voluntary. So a man or a woman forced or fraudulently induced into the situation would not be guilty. Also, the parties concerned must be capable of giving consent to the act, and not being incapable by reason of their age or mental health. Adulterer committing rape on

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198 The Parsi Marriage and Divorce Act, 1936, sections 32(d) and 34.
199 *Supra* note 87, at 56.
200 AIR 1964 Mys 67.
201 *Arokia Raj Morais v. Babita Maria*, (2006) 2 MLJ 537 (Mad)
202 *Santoshi Devi v. Sadanand Goswami*, II (2004) DMC 301 (Jhar.)
203 AIR 1999 Ker 354.
wife is not adultery by wife. In *Rajesh Kumar Singh v. Rekha Singh*, the petition filed by the husband for divorce on the ground of wife's adultery was dismissed by the trial court. In the appeal, while affirming the order of trial court, the Allahabad High Court held that the allegations against the wife were frivolous. The court clarified that the wife did not have any illicit relationship and that on the contrary, she was gang raped. There is a fundamental difference between the two: one is with consent and other is without consent. Regarding her refusal to disclose this fact to husband, the court further commented: "Rape leaves physical as well as emotional scars on the victim. Her physical wounds may have healed but the emotional scars, though less visible, are more difficult to treat. The wife was not disclosing the entire picture, as it was natural for any woman to hesitate to talk about such a gruesome crime against her." The primary requirement of the ground for adultery is that the erring spouse should have consented to the act of adultery. Without consent, sexual relations outside wedlock do not constitute adultery. Similarly, if the party lacks the mental capacity to give consent on account of being minor or a person of unsound mind, the presumption is that intercourse was not voluntary. Hence, the act cannot be used as a ground for divorce. Insanity is an important disqualification for constituting adultery. For accomplishing an act of adultery it is necessary that the parties must understand the nature and legality or illegality of their act.

**Adulterer as Co-respondent:** The Indian Divorce Act, 1869, makes it specific provision for joinder of adulterer as co-respondent, there is no such provision under the other Acts. However, in exercise of the powers conferred by sections 14 and 21 of the Hindu Marriage Act, 1955, High Courts have made various rules under the Act, including rules as to necessary parties in a petition. Most of the states have rules requiring joinder of co-adulterer as a necessary party. Section 41 of the Special Marriage Act, 1954, is more specific on this issue, and empowers the High Court to make rules for impleading by the petitioner of the alleged adulterer as co-respondent. In this context reference may be made to *Sikha Singh v. Dina Chakrabarty*. The wife filed a suit for divorce against her husband on the ground of adultery with the co-respondent, and also claimed damages against her. The trial court decreed the same.

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205 AIR 2005 All 16.
206 Supra note 84, at 32.
207 Supra note 26, at 61.
208 AIR 1982 Cal. 370.
The co-respondent filed an application under Or.1, R.10 of the Code of Civil Procedure, 1908, for striking off her name as a co-respondent, as there was no provision in the Special Marriage Act, 1954 providing for joinder. Her further arguments were that R.10 provides for adulterer to be made co-respondent, and does not refer to adulteress. This contention was negated as, according to the court, under the General Clauses Act, 1897, the use of masculine gender includes feminine also. Besides, the idea behind the rule relating to joiner of such party proceeds on public policy to prevent collusion. Moreover, in this case, because a claim for damages was made by the wife, the co-respondent was not only a proper party, but a necessary party, according to the court. It was consequently held that she could not claim that her name should be struck off under Or.1, R.10 of the Code of Civil Procedure, 1908.

In *M.V. Ramana v. M. Peddiraju* 209, where the requirement of pleading co-adulterer was not complied with, a husband's petition for divorce on ground of adultery was dismissed. In *Soya v. A.K. Mohanan*, the husband made allegations of adultery against his wife with his own brother but did not implead him as a co-respondent. In an appeal filed by the wife against the orders of the trial court, the Kerala High Court set aside the decree of divorce on the ground that the exemption granted to the husband against impleading his own brother as co-respondent in proceeding was incorrect and hence the allegations of adultery was not proven. *K. Kumar Raju v. K. Maheshwari* 210 and *Vijayan v. Bhanusundari* 211 were petitions by husbands under the Indian Divorce Act, 1869, where the adulterers were neither impleaded as co-respondents nor the leave sought from the court for such waiver. The High Court consequently refused to confirm the trial court's decree granting divorce to the husbands. But if the allegations are that the spouse has had multiple sexual relations or where the husband is specifically accused of visiting brothels, the requirement is dispensed with. Making the adulterer a party to the litigation makes the process cumbersome and time consuming. At times, there is collusion between the person named as adulterer and the husband which further complicates the matter for the wife against whom the allegations of adultery is made. If the husband is able to obtain an affidavit from the adulterer, admitting the relationship, the courts will grant the husband a decree of

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209 AIR 2000 AP 328.
210 AIR 1995 AP 222.
211 AIR 1995 Mad 160.
divorce on the ground of adultery.\textsuperscript{212} In \textit{Radhey Shyam v. Mst. Pappi}\textsuperscript{213}, the court held that the requirement to give full particulars and ground on which relief is sought are to be those "which are known to him". In this case the husband has also obtained permission from the court for a DNA test and the DNA report along with the forwarding letter clearly stated that the child was not his. The evidentiary value of this report was challenged by the wife, but the court held that the DNA report is a conclusive proof that the child was fathered by somebody else and hence adultery was established.

\textit{Evidence and Proof:} In disposing of a civil action for adultery the judge requires one set standard of proof.\textsuperscript{214} However, the nature of one fact in issue requires that the evidence be such as would lead the tribunal to its conclusion with care and caution so that such conclusion becomes fair and reasonable.\textsuperscript{215} Hence the charge must be proved beyond all reasonable doubts and this appears to be the standard proof in all matrimonial offences.\textsuperscript{216} The burden of proving adultery is always on the person alleging the same. None can be asked to prove a negative fact that he or she is not living in adultery.\textsuperscript{217} Halsbury's Laws of England says that adultery must be proved to the satisfaction of court, that is, on a preponderance of probability. But the degree of probability depends on the subject matter and in proportion to the gravity of the offence. Hence the analogies from criminal law cannot be drawn. In a criminal case, there is a presumption of innocence in the favour of accused. Inspite of the provision of the section 3 of Indian Evidence Act, such presumption of innocence of an accused has been imported into the Indian criminal law from the English Law.\textsuperscript{218} In well known case, \textit{Woolwington v. Direction of Public Prosecutions},\textsuperscript{219} it has been stated that throughout the web of English Criminal Law one golden thread is always seen, that is, the duty of the prosecution to prove the prisoner's guilt. But there is no such law in regard to our civil proceedings. The Indian Evidence Act, 1872, nowhere says that a civil proceeding has to be proved beyond reasonable doubt. In \textit{Earnest John White v. Mrs. Kathleen Olive White}\textsuperscript{220}, reference was made to the case \textit{Preston Jones v. Preston Jones}\textsuperscript{216}.

\begin{thebibliography}{99}
\bibitem{212} Supra note 84, at 32.
\bibitem{213} AIR 2007 Raj. 42.
\bibitem{214} \textit{Smith v. Smith and Smedman}, (1952) 3 D.L.R. 449.
\bibitem{216} \textit{Preston Jones v. Preston Jones}, (1951) A.C. 391.
\bibitem{217} \textit{Asha Rani v. Jagdish Singh}, 1981 HLR 344.
\bibitem{218} Supra note 26, at 65.
\bibitem{219} 1935 AC 462.
\bibitem{220} AIR 1958 SC 441.
\end{thebibliography}
v. Preston Jones\textsuperscript{221}, and it was stated that in case of adultery, the petitioner must prove his case to the hilt. In this case the husband alleged various acts of adultery between the wife and the co-respondent. It was alleged that the wife committed adultery on a particular day at a particular place under fictitious names. The Kapur J. observed,

‘In other words the evidence was in quality and quantity such that it satisfies the requirements of section 14 of the divorce Act which provides that in case the court is satisfied on evidence that the case of the petitioner has been proved ..............’

The words required consideration are "satisfied on evidence". These words mean that the duty of the court is to pronounce a decree if it is satisfied that the case for the petitioner has been proved, and if not satisfied dismiss it.

In \textit{Dastane v. Dastane}\textsuperscript{222}, an Indian case, in which aspect of proof was discussed by the Supreme Court and it was held that such cases need not be proved to the hilt. So in this way previous view that such cases must be proved beyond reasonable doubt, was reversed.

Adultery may be proved by either direct or indirect evidence or circumstantial evidence leading to the inference of the act or by confession, or where the respondent is the wife, by proof of the birth of a child of which the petitioner could not be the father because of non-access. However, by very nature of the act, it is extremely rare to produce direct evidence and eye-witnesses who have seen parties in that state. Conduct of the parties, association, opportunity, illicit affection, undue familiarity and guilty attachments are some of the instances which create an inference upon which court can act.\textsuperscript{223} Mere presumption and medical evidence that the wife was habituated to sexual intercourse does not lead to an inference of adultery. This could have been before marriage too, and law takes cognizance of only post-marriage adultery.\textsuperscript{224}

Letters written by alleged adulterer to the wife requesting to meet him is no indication of any adulterous conduct of the wife.\textsuperscript{225} In \textit{Ashok Kumar Aggarwal v. Anju Raje},\textsuperscript{226} where the alleged adulterer was neither named nor impleaded, the husband's mere suspicion was held to be no proof of adultery.

\textsuperscript{221} (1951) 1 All.ER 124.
\textsuperscript{222} AIR 1975 SC 441.
\textsuperscript{223} Agnes v. Ashley, AIR 1964 Cal 28.
\textsuperscript{224} Chander Prakash v. Sudesh Kumari, AIR 1971 Del 208.
\textsuperscript{225} B. David Sudhakar v. B. Nilda, AIR 2010 NOC 708 (AP).
\textsuperscript{226} AIR 2010 NOC 442 (P&H).
**Direct Evidence:** The full bench of Rajasthan High Court in *Charles v. Nora*\(^{227}\), dwelt upon the proof of adultery and held:

i. Direct proof of adultery is very rare;

ii. Adultery can be established by circumstantial evidence;

iii. All circumstances must be such as would lead the guarded discretion of a reasonable and just amount to conclusion of adultery.

In case of adultery it is, of course, difficult to obtain direct evidence. The offence is itself of such a nature that the adulterers would take utmost caution to hide it from the eyes of other persons. In *Patrick Donald Stracey v. Eileen Stracey*,\(^ {228}\) Ram Labhaya, J. observed:

"Adultery from its very nature is a secret or promiscuous act. Seclusion is necessary for indulgence in it. Direct evidence of an act of adultery is so extremely difficult to obtain that insistence on it by courts may well amount to a denial of the legitimate protection of marital rights. Couples may not be caught in the act even if the indulgence in adulterous intercourse continues for a long time. They take precautions against it."

The evidence of adultery either has been spoken as "beyond reasonable doubts\(^{229}\)" or "clear and convincing\(^ {230}\). In the charge of adultery, it not necessary to prove that fact of adultery by direct evidence and such evidence, if produced, would normally be suspect and likely to be discarded.\(^ {231}\) But where the husband on coming back home unannounced on peeping through a chink of shutters of a room found the wife and the respondent no.2 on bed in a compromising position and the wife on being reprimanded replied that she had nothing to do with her husband and left the house in the company of respondent no.2, adultery was held proved.\(^ {232}\)

In *Prem Masih v. Kumudani Bai*\(^ {233}\), the court held that in founding a divorce decree on ground of adultery, a civil standard of proof of adultery was enough and not proof beyond reasonable doubt. But in *A.J. Tulloch v. M.P. Tulloch*\(^ {234}\), in the same year it was decided that adultery must be proved beyond reasonable doubt. However

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\(^{227}\) 1980 HLR 141

\(^{228}\) AIR 1957 Ass. 66.

\(^{229}\) Earnest John White v. Mrs. Kathleen Olive White, AIR 1958 SC 441.


\(^{231}\) Pushpa Devi v. Radhey Shyam, AIR 1972 Raj. 260.

\(^{232}\) Kamlesh Kumari v. B.S. Bedi, AIR 1973 P&H 152.

\(^{233}\) AIR 1974 MP 88.

\(^{234}\) (1975) 79 CWN 157.
there can be no hard and fast rule. In *Rashmi v. Vijay Singh Negi*\(^{235}\), where the husband's allegation of adultery against the wife were supported by his grown-up son, who stated that, he and his sister were so fed up with there mother's conduct that the two started cooking their food separately even while living with her and the younger son also corroborated the statement of his elder brother that their mother was living in adultery, adultery was held to be proved.

*Circumstantial Evidence*: The rule of circumstantial evidence in cases of adultery has been well stated in *Pollock v. Pollock*\(^{236}\), an American case:

"Though it is an act of darkness and great secrecy, and not often provable by direct means, and the evidence must in most cases be circumstantial, yet the circumstances must be sufficient to satisfy the mind that the adulterous intercourse has actually taken place. Though presumptive evidence alone is sufficient to establish the fact, the circumstances must lead to it, not only as a fair inference, but as a necessary collusion. It is clear that the plaintiff had opportunity for carnal intercourse with the female, who is alleged to have been is paramour in that he was with her in the same set of apartments, which were his, in the day time and the night time. There should be some accompanying circumstances to show a disposition to avail themselves the opportunity to commit adultery, and to ground an inference that they have actually done so." To succeed such an issue it is not necessary to prove the direct facts or even an act of adultery, its time and place\(^{237}\), the name of the person with whom the respondent is alleged to have committed adultery\(^{238}\).

The court usually infers adultery from the fact that respondent wife shared a bed or bedroom for the night with a person of the opposite sex other than husband or from the fact that the respondent had been carrying on an association with a person of the opposite sex other than the petitioner and there is evidence of illicit affection or undue familiarity between them coupled with an opportunity for them to have committed adultery\(^{239}\). Where the only evidence in support of the charge of adultery was that the husband based to tell his wife that he would keep another woman as his wife that the husband had intimacy with one woman who had invited him to a dinner at her house and that once he was seen going along with her to her residence, it was

\(^{235}\) AIR 2007 Uttaranchal 13.
\(^{236}\) 71 NY 137 (1877).
\(^{239}\) *Samuel v. Roshni*, AIR 1960 MP 142.
held that the evidence was not at all satisfactory and sufficient to prove that the
husband had voluntary sexual intercourse with that woman.\textsuperscript{240} If the wife had given
birth to the child and it was proved to the satisfaction of the court by admissible
evidence that the husband could not possibly be the father, that was sufficient
evidence to the wife's adultery.\textsuperscript{241} In \textit{Rajee v. Baburao},\textsuperscript{242} the Madras High Court was
of view "Mere hole-and-corner tattle or bazaar gossip will not prove adultery." In a
rare case, \textit{Swapna Ghosh v. Sadanand Ghosh},\textsuperscript{243} the wife found her husband in bed
with the adulteress. Hence she was able to obtain divorce on the ground of adultery
though the requirement for proving adultery was as stringent under the Indian Divorce
Act as under the criminal law. But the situation has been changed after the
amendment of 2001 to the Indian Divorce Act of 1869 and the courts are now
mandated to apply the principle of 'preponderance of probability' rather than the strict
proof as per the maxim 'beyond reasonable doubt' as applicable under other
matrimonial statutes. However, this is an extremely rare incident. Evidence of
cohabitation, nights spent in hotels through hotel register, photographs of physical
intimacy, evidence of visit to brothels, contracting venereal disease, confessions by
cleared parties, the birth of child when the husband has no access to wife at the
time of conception, reports of DNA test in case of disputed paternity, etc., have been
used as evidence to prove adultery.

\textbf{Admissions and Confessions:} Confession as a piece of evidence of adultery are looked
with great suspicion. In \textit{Marjoram v. Marjoram},\textsuperscript{244} where the husband was alleged to
have committed adultery with another woman and to which he confessed to his wife
in a manner that he would not live with the wife but instead would like to join that
other woman, whose company, he said, how pleasant he found. Lord Merriman P.
observed:

"There is no law that it is essential, and that there is no law that it is essential
with regard to adultery any more than in other cases though here again, courts have
always been cautious which depend solely on the evidence of the other spouse."

But when the admission of adultery by a husband, was clear, distinct and unequivocal,
the court considered it trustworthy.\textsuperscript{245} In \textit{Vedavalli v. Ramaswamy}\textsuperscript{246}, the evidence clearly disclosed that the husband was on terms of indelicate familiarity an illicit intimacy with his spinster niece, who was living with the spouses in the matrimonial home. This illicit connection led to the pregnancy of the niece. Entry in the admission register of the hospital where she gave birth to a child denoted the uncle as her husband. It was held that the evidence was sufficient to establish the charge of adultery. The court may grant a decree on the uncorroborated confession of the wife that she has committed adultery but only when there is an absence of reasonable grounds for suspicion as to the truth of such confession.\textsuperscript{247} Where the respondent confessed her guilt through a letter written by her and there was no corroborative evidence to it, the decree was refused.\textsuperscript{248} In \textit{Bipin Chander v. Prabhawati}\textsuperscript{249}, the Supreme Court referred to the law on subject and observed that though corroboration is not required as an absolute rule of law in proof of a matrimonial offence the courts insist upon corroborative evidence unless its absence is accounted for the satisfaction of the court. The use of word "satisfied" in the Indian divorce statutes (as it is understood by judicial interpretation in England) is suggestive of the fact that offence must be proved beyond doubts.

**Conversion**

Religion is a very sensitive and personal aspect of individual's life and the Constitution of India guarantees the freedom of conscience and religion to people of all denominations.\textsuperscript{250} Thus a person is free to profess any faith or relinquish his faith of birth and convert to another religion. Wherever family law is based on religion, conversion finds a unique place in the law of matrimonial remedies. However, in view of the diversity of personal law in our country, upon apostasy the personal law of the convert would change too with legal consequences on his matrimonial life. In other words, conversion of a spouse gives to the non-convert spouse, a ground for matrimonial relief.\textsuperscript{251} In India conversion/apostasy has been recognized as a ground of divorce by all those statutes which have got religious fervour, namely the Parsi

\textsuperscript{245} \textit{Arnold v. Arnold}, (1887) 13 VLR 249.  
\textsuperscript{246} \textit{AIR} 1964 Mys. 280.  
\textsuperscript{247} \textit{Lake v. Lake}, (1896) 2 A.L.R. 313.  
\textsuperscript{248} \textit{Boyle v. Boyle} (1920) 22 WALR 58.  
\textsuperscript{249} (1956) SCR 838.  
\textsuperscript{250} The Constitution of India, 1950, Article 25-28.  
\textsuperscript{251} \textit{Supra} note 87, at 88.
Marriage and Divorce Act, 1936, the Dissolution of Muslim Marriage Act, 1939, the Indian Divorce Act, 1869 and the Hindu Marriage Act, 1955. But the Special Marriage Act, 1954, being secular Act is completely silent on this point.

The logic underlying the grant of relief in case of conversion is, however, not merely a legal one, viz., that after conversion, the convert will be governed by different personal law, but also conversion could mean a radical change in the personality of convert. The event is often very much akin to a breakdown of the marriage and goes to the root of conjugal life of the spouse.

*Legal effects of Conversion on Marriage*

Conversion could have the following legal effects on marriage:

1. **An automatic dissolution of marriage:** Though there is no statutory provision to the effect in any of the personal laws, under Islamic law, a husband who renounces Islam is an apostate, and as such, his marriage with his Muslim wife is dissolved ipso facto. According to Mulla, apostasy of the husband from Islam operates as a complete and immediate dissolution of marriage.

2. **A ground for divorce at the instance of the non-convert:** Conversion is a ground for divorce and judicial separation at the instance of non-convert under all the personal law statutes.

3. **A ground for divorce at the instance of the convert:** The Converts Marriage Dissolution Act, 1866, which seeks to legalise, under certain circumstances, the dissolution of marriage of converts to Christianity, is the only relevant statute.

*Hindu Law*

Under section 13(1)(ii) of the Hindu Marriage Act, 1955:

"Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party has ceased to be a Hindu by conversion to another religion"

This is available as a ground for judicial separation also. Prior to 1976, the grounds for judicial separation and divorce were different and change of religion was not a ground for judicial separation. After the 1976 Amendment, the grounds

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available for divorce and judicial separation are same and hence conversion is now
ground for judicial separation as well. Conversion can take place when the respondent undergoes the formalities prescribed
by the faith to which he seeks conversion. Sincerity of purpose of conversion or
genuineness of belief in the new faith is immaterial. It is also necessary that the
respondent after conversion should practice his or her new faith. But 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 with his or her spouse who had converted to another
religion, there is nothing to debar him or her from doing so. Conversion of either
spouse to any other religion could not dissolve a marriage. Thus, where a wife
converts to Islam, or a husband converts to Islam, such conversion will not
sufficient to dissolve marriage. In Amar Nath v. Amar Nath, Cornelius, J. after
discussing the effect of conversion on Hindu marriage, observed that in case of a
Hindu marriage in the Vedic form the nature and the incidents of the marriage bond
between the parties are not in any way affected by conversion to Christianity of one of
the spouses, and the bond will retain all the characteristics of a Hindu marriage,
notwithstanding such conversion unless there shall follow upon conversion of one
party, repudiation or desertion by the other, and unless consequential legal
proceedings are taken and a decree is made as provided by the Native Converts
Marriage Dissolution Act of 1866. Gharpure writes:

"Change of religion does not ipso facto dissolve the marriage tie. A wife,
cannot, therefore, during her husband's lifetime enter into any other valid marriage
contract."

The issue whether a marriage performed under Hindu Law can be dissolved
under the Hindu Marriage Act, 1955 by a spouse who ceases to be a Hindu by
conversion to another religion, was considered by Delhi High Court in Vilayat Raj v.
Sunita. The parties were Hindus at the time of marriage in 1978. They separated in

254 The Hindu Marriage Act, 1955, Section 10.
256 Rakeya Bibi v. Anil Kumar Mukherjee, ILR (1948) 2 Cal. 119.
257 Keolapati v. Raja Harnam Sing, AIR 1936 Oudh 298.
258 AIR 1948 Lah. 126 , at 129.
259 J.R. Gharpure, Hindu Law, 91 (1931).
260 AIR 1983 Del. 351.
1980 and in 1981 the husband filed a petition for divorce under section 13(1)(ia) on the ground of cruelty. In the petition he set out his religion as Mohammadan at the filing of the same. The wife challenged his right to file a petition under the Hindu Marriage Act, 1955, on the ground that he was no longer a Hindu. While the lower court accepted the plea of wife, the High Court reversed the order.

The court observed:

"Conversion does not per se operate to deprive the party, of rights which may be otherwise available to him under the Act....party is not entitled to take advantage of his own wrong or disability and gain from a situation which he has brought about resulting in detriment to other spouse........But if aggrieved party does not seek dissolution on this ground does it debar the other party from approaching the court on other grounds, which are available to him under the Act. It would appear not."261 As to whether a spouse who has consented to the other's conversion is estopped from seeking relief on this ground, the court answered in the negative. In Suresh Babu v. V.P. Leela262, a husband converted to Islam and the wife filed a petition for divorce on this ground. The husband's defence was that since she had given him such permission she was not entitled to seek divorce on this ground. The court however, rejected his argument and held that even if she had given her consent, the act of renunciation of Hinduism and conversion to Islam is a matrimonial wrong and a ground for divorce under section 13(1)(ii) of the Hindu Marriage Act, 1955.

In context of conversion reference may be made of a recent case from Kerala where a significant issue was involved, viz., whether endeavour for reconciliation in a divorce petition on this ground is mandatory.263 At the outset it may be pointed out that vide proviso to section 23(2) of the Act, when the ground for divorce is conversion of the non-petitioner, then there is no duty caste upon the court to make an effort to bring about reconciliation between the parties. However in this case where the family court granted divorce to the husband on the wife's admission that she had converted to another religion, the same was set aside on appeal by the wife. It was held that even though under the provisions of the Hindu Marriage Act, 1955 endeavour for reconciliation was not mandatory but after the enactment of the Family Courts Act, 1984, even in grounds excepted by the Hindu Marriage Act, 1955, the

261 Supra note 260, at 355.
262 AIR 2007 (NOC) 285 (Ker).
family court is bound to make efforts for reconciliation. Passing of a decree on mere admission of conversion by a spouse was against the spirit and mandate of the provisions under the Family Courts Act, the court held.

*Muslim Law*

A Muslim may renounce Islam and this is known as apostasy (*Ridda*); or a non-Muslim may embrace Islam and this is called conversion.\(^{264}\) According to the general principles of Muslim Law a person who embraces Islam is immediately governed by Islamic Law.\(^{265}\) But a man who renounces Islam suffers greatly under civil as well as criminal law. Islamic polity declares apostasy a treasonable offence; an apostate (*murtadd*), if a man, is in extreme cases liable to suffer the death penalty; if a woman, to suffer imprisonment.\(^{266}\) Ameer Ali explains: \(^{267}\)

"There is hardly any religious system which does not regard secession from the established religion of the State as tantamount to treason, or does not visit the culprit with punishment of the severest character. So late as the close of the eighteenth century of the Christian era Christian churches in Western Europe condemned 'heretics' to the stake or the gallows; no distinction was made on the score of sex or age......The peculiar and difficult circumstances under which the church of Islam came into existence made 'apostasy' a danger to the state; the abandonment of Islam was tantamount to the renunciation of allegiance to the Islamic commonwealth; it was nothing short of treason. The law consequently prescribed the death-penalty for the offence but not at the stake, nor by drowning or hanging. The extreme penalty was, however, reserved only for the adult male *murtadd*, the traitor-apostate, and that only when he was a Muslim born. A woman, a youth, a man who had adopted Islam under compulsion, a young man whose parents were not Muslim, and a number of other persons similarly circumstanced, were exempt from death-penalty. When a woman abandoned Islam, she was to be imprisoned until she returned to the Faith."

Prior to the enactment of the Dissolution of Muslim Marriage Act, 1939, conversion of either spouse had the effect of automatic dissolution of marriage under the Muslim personal law. When a Muslim husband renounces Islam, the first question that often arises is: has there been on the part of the party concerned 'an act of apostasy'? The Lahore High court had held that a formal declaration is sufficient and a


\(^{265}\) *Supra* note 28, at 148.

\(^{266}\) *Supra* note 264.

\(^{267}\) *Supra* note 265, at 393.
genuine conversion to some other religion need not to be proved. A Muslim husband who renounces Islam is an apostate and as such his marriage with the Muslim wife is dissolved ipso facto. Ameer Ali is of view that when a Muslim married couple abandon Islam and adopt another faith, their marriage is not dissolved but remains intact. The present law however is different and it makes a difference between a Muslim wife who was before her marriage a non-Muslim and a wife who was a Muslim before marriage. In former case, the apostate wife would result in instant dissolution of marriage. In other words, if a woman coverts to Islam from some other faith and then re-embraces her former faith, then it will have the effect of immediate dissolution of her marriage. For instance, W, a Christian woman, embraces Islam and marries H, a Muslim husband. She then commits an act of apostasy and re-embraces Christianity. In this case the marriage of W with H is dissolved. According to the older law, as laid down by the classical jurists of Islam, apostasy on the part of the wife operated as an immediate and absolute dissolution of marriage. But in India this rule was used for the purpose of dissolving a marriage which had grown irksome to the wife, as there was no other way open to her to get rid of her husband. Now that the Dissolution of Muslim Marriages Act, 1939 gives remedy, the statute provides that apostasy by itself does not dissolve the marriage unless it be that a woman re-embraces her former faith.

\textit{Shiah Doctrine}\footnote{Resham Bibi v. Khuda Bakhsha, (1937) 19 Lah 277.}

Under the Shiah law, if either of the married parties renounces Islam before connubial intercourse, the marriage is cancelled. The wife has no right to dower if she be the pervert, but if husband apostatises, she would be entitle to half the dower. If renunciation of the Islam takes place after the parties have cohabited, the cancellation is suspended until after the expiration of the wife's iddat, where such apostasy is on the husband or her part and no part of the dower abates, for the right to it is established by consummation (\textit{dukhul}).

\begin{itemize}
\item \textit{Resham Bibi v. Khuda Bakhsha}, (1937) 19 Lah 277.
\item Tyabji, \textit{Muslim Law}, 200 (1918).
\item Supra note 28, at 394.
\item \textit{Iqbal Ali v. Halima Begam}, (1939) ILR 296 (All).
\item The Dissolution of Muslim Marriage Act, 1939, second proviso to Section 4.
\item \textit{Amin Beg v. Saman}, (1910) 33 All 90 (conversion to Christianity).
\item Supra note 264, at 139
\item Supra note 26, at 138.
\end{itemize}
Shafeite Doctrine

The Shafeis agree with the Shiah that when either of the spouses renounces Islam after consummation, the marriage would become dissolved on the expiration of three courses of the woman. According to Ameer Ali, it follows that until then marriage remains suspended.

Hanafi Doctrine

According to the old lawyers of the Hanafi school, whose views are enunciated the 'Hedaya,' the 'Fatawi Alamgiri' and other works, apostasy from Islam of either husband or wife, where it takes place before or after consummation, dissolves ipso facto the marriage tie. Ameer Ali observes that the above observation of the Hanafi school has been interpreted in a set of cases by the courts without taking into consideration the developments which took place in Hanafi legal concepts during the last three centuries. In a case, after abandoning Islam the wife contracted another marriage before expiry of the period of Iddat. A suit by husband for bigamy was brought and it was held that the charge could not be sustained because marriage tie dissolved immediately on her renunciation of Islam.

According to Islamic law conversion to Islam on the part of a man following a scriptural religion (Kitabia) such as Judaism or Christianity does not dissolve his marriage with a woman belonging to his old creed. The rule, however, is different if the couple belonging to a non-scriptural faith. In that case the Muslim husband could not lawfully retain a non-kitabia wife; wherefore Islam was to be offered to her and, on her refusal a decree for dissolution was to be passed. These rules however cannot be applied in a modern state where 'all religions are equal in the eyes of law,' and where 'the court judicially administering the law cannot say that one religion is better than another.' In this branch of jurisprudence where the men and women often try to twist and mould the rules of law to suit their own selfish ends, the words of Blagden J. must always be kept in view:

"British India as a whole is neither governed by Hindu, Mohammadan, Sikh, Parsi, Christian, Jewish or any other law, except a law imposed by Great Britain under which Hindu, Mohammadan, Sikh, Parsi, Christian, Jewish and others enjoy equal

278 Abdul Ghani v. Azizul Haq, (1911) ILR 39 Cal. 409.
279 Supra note 28, at 384.
280 O'Hanlon v. Loque, (1906) 1 Irish Reports 247, 260.
rights and the utmost possible freedom of religious observance consistent in every
case with the rights of other people. I have to decide this case according to the law as
it is and seems, in principles, no adequate ground for holding that in this case
Mohammadan law is applicable to a non-Mohammadan." 282

These principles enunciated by an English judge in a British Indian court
would apply equally in India and Pakistan.283

A non-Muslim lawfully married in accordance with his own law cannot by
mere conversion to Islam dissolve his own marriage.284 Thus, if a Christian lawfully
married to Christian woman were to declare himself a convert to Islam and marry a
Muslim woman in Muslim fashion the second marriage would be, in the judgement of
the Privy Council, of doubtful validity;285 but aliter, if there had been a bonafied
conversion of both parties to the Islamic faith. However, it has been held that a
married Christian domiciled in India after his conversion to Islam, is governed by
Muslim law and is entitled, during the subsistence of his marriage with his former
Christian wife, to contract a valid marriage with another woman according to Muslim
rites. The conversion of a non-Muslim wife to Islam does not ipso facto dissolve her
marriage with her husband and the ancient procedure of 'offering Islam' to husband
and on his refusal obtaining a dissolution of marriage, as laid down in texts, 286
cannot be followed in India. It has been held that by this procedure neither a Hindu,287
nor a Christian,288 nor a Jewish,289 nor an Irani Zoroastrian wife, 290 can get rid of her
husband.

Section 5 of Dissolution of Muslim Marriages Act, 1939, lays down that a
dissolution obtained under the Act by a Muslim woman does not affect her right of
dower. If the marriage was consummated, the whole dower is immediately due; if not,
half the dower is payable.

283 The Constitution of India, Article 25.
285 Skinner v. Orde, (1871) 14 MIA 34.
286 Supra note 28, at 385; Ahmad Bux v. Smt. Nathoo, AIR 1969 All 75.
287 Rakeya Bibi v. Anil Kumar Mukherji, (1948) 2 Cal 119.
288 Noor Jehan v. Eugene Tischenko, (1942) 2 Cal. 165. In this case the plaintiff was a Russian
woman married in Berlin. Later she came to India, embraced Islam and called upon her husband to
accept her newly adopted religion. The husband refused and there upon she filed this suit for a
declaration that her marriage with the defendant stood dissolved. The court refused the declaration.
Christian Law

Under the Christian law, the position under the Indian Divorce Act, 1869, was until September 2001, that the husband had on ground for any matrimonial relief if his wife changed her religion. The only ground available to him was his wife's adultery. So far as wife is concerned, she could file a petition for dissolution of marriage on the ground that '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'. Thus, the mere fact of the husband's conversion was not enough to entitle a wife to seek dissolution, unless she also alleged and proved his second marriage. In this way for a wife the ground available for dissolution was conversion coupled with bigamy by her husband.

The Indian Divorce Act, 1869 which was so antiquated and not in tune with changing times has now undergone revolutionary changes with the enactment of the Indian Divorce (Amendment) Act, 2001. It has removed the gender based discrimination within the Act as also the harsh provisions for matrimonial reliefs. The grounds for the dissolution of marriage for the husband and wife have been brought almost at par. Besides, the grounds have been liberalized. Thus conversion of the defendant to another religion, inter alia, has also been incorporated as a ground for dissolution of marriage. This ground is available to both spouses. In this context, a reference may be made to the Converts Marriage Dissolution Act, 1866. Under sections 4 and 5 of the Act if a husband or a wife changes his/her religion to Christianity, and if in consequences of changes, the non-convert spouse for a space of six continuous months, deserts or repudiates him/her, then the deserted spouse may sue the other for conjugal society and if that is not complied with, may, ultimately seek a dissolution.

Parsi Law

Under Parsi Law, the Parsi Marriage and Divorce Act, 1936, provides that either party can bring a petition for divorce on the ground that the other party has ceased to be a Parsi as defined in the section 2(7) of the Act. But divorce will be refused if the suit is not filed within two years after the plaintiff came to know of this fact, i.e., defendant ceasing to be a Parsi. The observation in this regard made by

291 The Divorce Act, 1869, Section 10(1)(ii).
292 Supra note 87, at 92.
293 The Parsi Marriage and Divorce Act, 1936, Section 32(j).
Wadia, J. in *Dhanubai v. Sorabji*,\(^{294}\) are:

"Under the strict wording of section 32(j) it is enough for one of the spouses to prove that the other spouse has ceased to be Parsi Zoroastrian during their married lives. The Act does not say that the defendant should not have only ceased to be a Parsi, but must continue to be a non-Parsi till the date of the suit or for any particular period of time. It is not, therefore, open to the defendant to show that he had become a Parsi Zoroastrian again, either when the suit was filed or before the hearing. It is enough if the plaintiff shows that during their married life the defendant has ceased to follow the tenets and the doctrines of the Zoroastrian religion.

A point may arise under this section whether a plaintiff is entitled to sue for divorce, if the defendant has ceased to be a Parsi Zoroastrian without embracing any other or any form of religion. He may have discarded the outer symbols of the Zoroastrian religion and ceased to believe in its doctrines and tenets altogether and may have, thus, ceased to be a Parsi. It is arguable whether the intention of the legislature was to cover such a case too. But if the language used is a clue to such intention, the words of the section 32(j) are in my opinion, sufficiently wide to cover the case of Parsi Zoroastrian who had ceased to be such without having been converted to any other religion. I may point out to you, gentleman delegates, in this connection that under section 10 of Indian Divorce Act, 1869, a wife may present a petition to the court praying that her marriage may be dissolved inter alia on the ground that since the solemnization thereof husband has exchanged his profession of Christianity for the profession of some other religion and gone through a form of marriage with another woman. Such or similar words are wanting in Section 32(j). All that is required is that defendant should, after the solemnization of his or her marriage with the plaintiff have ceased to be a Parsi Zoroastrian and that the aggrieved party has brought the suit for divorce not later than two years after he or she came to know of the fact that the defendant has ceased to be a Parsi. A mere doubt or suspicion on the part of the plaintiff that the defendant had ceased to be a Parsi will not suffice."

It is significant to mention here that prior to the amendment of 1988, the provision was simpliciter that the 'defendant has ceased to be a Parsi'. The words 'by conversion to another religion' were added in 1988. Thus it is not enough that the defendant should have given up his faith; it is also required that he should have

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acquired another faith. Apostasy does not ipso facto effect a marriage tie, and if the non-convert spouse has no objection, the marriage continues. The converted spouse, however, cannot seek a matrimonial relief on the ground of his/her own apostasy.\textsuperscript{295} In this context provision under the Act is pertinent. It reads:

"A Parsi who has contracted a marriage under the Parsi Marriage and Divorce Act, 1865, or under this Act, even though such Parsi may change his or her religion or domicile, so long as his or her wife or husband is alive and so long as such Parsi has not been lawfully divorced from such wife or husband or such marriage has not lawfully been declared null and void or dissolved under the decree of a competent court under either of the said Acts, shall remain bound by the provisions of this Act."\textsuperscript{296}

\textit{Under Special Marriage Act, 1954}

The Special Marriage Act, 1954, being secular legislation, it has no reference to conversion. Apostasy or conversion therefore does not constitutes a ground for any matrimonial relief under this Act. So Special Marriage Act, 1954, being secular Act is completely silent on this point.\textsuperscript{297}

It is important to note that conversion does not automatically affect a marriage tie, and secondly, it is the non-convert spouse only who can seek matrimonial relief on this ground. A spouse who gives up Hinduism and adopts another faith cannot go to the court and seek any relief on the ground. This is barred even under the provisions of section 23(1)(a) of the Hindu Marriage Act, 1955, viz., that the petitioner cannot be allowed to take advantage of his or her own wrong or disability.\textsuperscript{298}

India is a secular state and this very fact militates against the retention of any panel provision on conversion. Arguments are in favour of abolishing conversion as a ground for divorce in matrimonial laws throughout the territory of India. Being a secular state, India should not under the stress and strain of religious diversities and its laws should not be named on the basis of religion, i.e., Hindu Law, Muslim Law, etc. Indeed, Article 25 of the Constitution of India guarantees religious freedoms but that religious freedoms ought to be enjoyed and exercised subject to reasonable

\begin{footnotes}
\item[295] \textit{Supra} note 87, at 90.
\item[296] The Parsi Marriage and Divorce Act, 1936, Section 52(2).
\item[297] \textit{Supra} note 26, at 136.
\item[298] \textit{Supra} note 87, at 89.
\end{footnotes}
restrictions on grounds of public order, morality and health.\textsuperscript{299} Harmony and balance between Directive Principles and Fundamental Rights,\textsuperscript{300} is a basic structure of the Indian Constitution and, therefore the Articles 25 and 44 should be made effective jointly. May be this is the reason which inspired the Parliament to exclude conversion from the list of the grounds for divorce available under Special Marriage Act, 1954, which is purely a secular optional matrimonial law made by the Parliament after the adoption of the Indian Constitution. If it is desired to preserve conversion as a ground for divorce in matrimonial laws the rule of equity requires that law should distinguish between wilful conversion and conversion under duress. Many converts do this to dissolve their marriage and to marry the girl of their own choice or for any other selfish reasons. In such cases, such conversions are fraud on the society and in such cases court and legislature have to play a constructive role to avoid them as it had been done in Sarla Maudgil case\textsuperscript{301}. 

**Desertion**

The term 'Desertion' is quite vague. It is difficult to define what desertion is. Moreover judicial pronouncements have added more to its vagueness than to clarity.\textsuperscript{302}

Living together is the essence of marriage; living apart is its negation. This negation of very essence of marriage is what the law terms as desertion.\textsuperscript{303}

Desertion implies the permanent abandoning of one spouse by the other. It is necessary that desertion should be accompanied without a reasonable cause, and without the consent of the other party.\textsuperscript{304}

The question as to what constitutes 'desertion' came up for consideration before Supreme Court in Bipin Chandra v. Prabhavati,\textsuperscript{305} and under mentioned summery of law in Halsbury's laws of England was cited with approval:

*Meaning of Desertion:* In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligation of

\textsuperscript{299} Supra note 26, at 143
\textsuperscript{300} Minerva Mills v. Union of India, AIR 1980 SC 1789.
\textsuperscript{301} Sarla Mudgal v. Union of India, AIR 1995 SC 1531; (1995) 3 SCC 635.
\textsuperscript{302} Supra note 26, at 101.
\textsuperscript{303} Supra note 87, at 75.
\textsuperscript{304} Supra note 86, at 41.
\textsuperscript{305} AIR 1957 SC 176.
When one spouse leaves the other in a manner which is not justifiable, the deserted spouse has a remedy by way of matrimonial reliefs. As pointed out by Apex court in *Savitri Pandey v. Prem Chandra Pandey*:307

"Desertion for the purpose of seeking divorce under the Act means the international permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the obligation of marriage. Desertion is not the withdrawal from a place, but from a state of things.... Desertion is not a single act complete in itself, it is continuous course of conduct to be determined under the facts and circumstances of each case."

Latey on Divorce308 sets out what constitutes desertion as under:

"There is no judicial definition of desertion that can be applied to meet the facts of every case, but it is in essence the abandonment of one spouse by the other with the intention of forsaking him or her without just cause."

Tolstoy says309 that desertion is the cessation of cohabitation brought about by the fault or act of deserting spouses. This requires two elements on the part of deserting spouse, namely, the fact of separation and the intention to desert; otherwise there can be no desertion.

Initially no attempt was made by the legislature in India to define desertion in the relevant statutes except in the Divorce Act, 1869. It reads:

"Desertion implies an abandonment against the wish of the person charging it"310

Thus it was left for the judicial organ of the country to interpret desertion under different statutes. As the practice of the court shows, greater reliance is placed on English decisions and peculiar Indian social circumstances which form the background for operating matrimonial legal rule of the country. Later on, the legislature, through various amendments in marriage laws of the country, not only made desertion one of the grounds of divorce but also explained it under various statutes.

The statutory period for desertion to become a ground of divorce is two years

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308 *Supra* note 193, at 104.
310 The Indian Divorce Act, 1869, Section 3(9).
in which there should be complete withdrawal by one spouse from carrying out his or her marital obligations. The essential elements of desertion are:

i) separation or *factum deserendi*.

ii) the intention to desert or *animus deserendi*.

The intention to desert does not have to precede the fact of separation. The moment, however, desertion is contemplated, the individual becomes a deserter. Supervening desertion thus refers to a situation where the factual separation already existed, but the intention to desert followed much later.\(^{311}\)

**Hindu Law**

Paras Diwan\(^{312}\) stated that desertion in the Hindu Marriage Act, 1955 is of following three categories:

i) Actual Desertion.

ii) Constructive Desertion.

iii) Wilful Neglect.

**i) Actual Desertion:**

The essential factors which must be established to prove actual desertion are\(^{313}\):

i. the spouses must have parted or terminated all joint life;

ii. the deserting spouses must have an intention to desert the other spouse;

iii. the deserted spouse must not have agreed to the separation;

iv. the desertion must have been without cause; and

v. the state of affairs must have continued at least for the prescribed period immediately before presentation of the petition. Thus if there is a break between the deserting period and the date of presenting divorce petition, the petitioner cannot succeed.

The first two elements apply to the deserting party, i.e., the deserting spouse must have left the other party with an intention to forsake or abandon permanently. The element third and fourth apply to the deserted spouse, i.e., he or she must not have given his or her consent or provided a reasonable cause of desertion. The last element is the statutory requirement of the period before the expiry of which a petition is not maintainable. Thus the petitioner must prove all the five elements to succeed in a suit for dissolution of marriage on the ground of desertion.

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\(^{311}\) Supra note 86, at 41.


\(^{313}\) Philips, *Practice of the Divorce Division*, 18 (1951).
In *Vinay Kumar v. Nirmala*\(^{314}\), the wife had left the matrimonial home for over two years without the consent of her husband. It was shown that she did not get along with her husband and her parents-in-law. She usually used abusive language, threw things around and denied sex to her husband. Once she even threatened to put the matrimonial home on fire. The court held that these facts are sufficient to show her intention to desert. In *Om Wati v. Kishan Chand*\(^ {315}\), the wife sued the husband on the ground of desertion. It was found that the parties were living separately for more than two years. It was proved that when the husband was informed of his child's death, he did not come even for performing the last rites of the child. The court held that the conduct of the husband had totally broken off him from his family. It was held that the husband was guilty of desertion. In *Ashok Kumar v. Shabram Bhatnagar*\(^ {316}\), husband filed a petition for divorce on the ground of wife's desertion. It was established that wife was forced to leave the matrimonial home as she was constantly and continuously harassed by the husband and his parents with the demand of dowry and was ultimately abandoned by the husband. It was held that the wife was not guilty of desertion. In another case,\(^ {317}\) Bombay High Court ruled that it is not necessarily the house of the husband or the house of his parents matrimonial home. In this case the husband and wife were employed at different places decided to book ownership flat at Bombay. Husband contributed initial amount and wife paid the remaining amount. Court held that the flat at Bombay was the matrimonial home of the parties. It is, thus, well established that desertion is not the withdrawal of place but from the state of things, i.e., from cohabitation and a bundle of matrimonial duties. Burden of proof of plea of desertion lies upon the petitioner to affirmatively prove the essential ingredients of desertion.\(^ {318}\)

**ii) Constructive Desertion:**

The spouse who leaves the matrimonial home may not always be the deserter. The spouses who is residing in the matrimonial home and has made it intolerable for the other spouses to continue living under the same roof can be construed as the deserter under the notion of 'constructive desertion'. This legal premise is particularly relevant to women who are compelled to leave their matrimonial home due to

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\(^{314}\) AIR 1987 Del 79.

\(^{315}\) AIR 1985 Del 43.

\(^{316}\) AIR 1989 Del 121; J. Shyamala v. P. Sundar Kumar, AIR 1991 NOC 29 Mad.


domestic violence or dowry harassment. As per Indian tradition, the bride usually has to leave her natal family and enter the matrimonial home, which is often joint family. This family may not accept the young bride or subject her to humiliation and ill treatment. When the situation becomes unbearable, the wife will be compelled to leave the matrimonial home. This act of leaving matrimonial home cannot give rise to a petition for divorce on the ground of her desertion. The Supreme Court and several High Courts have explained the notion of constructive desertion and held that the husband, who had caused the wife to leave, is guilty of constructive desertion. Further he cannot take advantage of his own wrong.319

Bipinchandra v. Prabhavati, and Lachman v. Meena are two landmark rulings of the Supreme Court which extended the scope of constructive desertion. Both these cases were filed by husbands. The trial court awarded them the decree of divorce on the ground of their wives desertion. In appeal, the Bombay High Court set aside the decree of divorce, which the Supreme Court upheld. Bipinchandra v. Prabhavati320, was a case, where the wife left the matrimonial home due to allegations of adultery against her. When she wanted to return home, the husband sent her a telegram: 'Must not send Prabha.' Thereafter he filed a petition of divorce on the ground of desertion. The trial court upheld his plea and awarded him decree of divorce. But in an appeal, the Bombay High Court reversed the trial court decree and held that since the husband had prevented the wife from returning, it was he who was guilty of constructive desertion. In Lachman v. Meena321, the husband petitioned for the divorce on the ground of the wife's desertion. In her reply, the wife stated that she was ill treated and constantly taunted by her mother-in-law. The trial court upheld the husband's plea and awarded the decree in his favour, but the Bombay High Court set aside the decree of divorce. The husband approached the Supreme Court which discussed the issue of desertion in detail and concluded that 'desertion in its essence means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause'. The court pointed out that there could not be standard criterion of desertion. The nature of the act is such that it must be seen in the context of specific circumstances and motives. In Perumal v. Sithalakashmi,322 it was said that the intention to drive away the other spouse can be inferred from the conduct

319 Supra note 86, at 42
320 AIR 1957 SC 176.
321 AIR 1964 SC 40.
322 AIR 1956 Mad. 415.
of the guilty party or it may be inferred from the conduct of the guilty party or it may be established independently to such conduct. A husband, who subjects his wife of acts of insult and cruelty, which ultimately causes her to leave the matrimonial home with her children, cannot be heard to say that he had no intention to drive her out. In Renganayaki v. Arunagiri, the husband had an illicit relation with the maid servant and he beat up the wife when she complained about it. The Madras High Court held that the wife was compelled by the circumstances to leave the home but this does not amount to desertion. In Teerth Ram v. Parvati, the wife insisted on a separate home away from husband's family and left the matrimonial home. The Rajasthan High Court held that the wife was not guilty of desertion as the mere fact of physical separation does not constitute desertion. In Kamala Sharma v. Suresh Kumar Sharma, the woman's eldest sister-in-law (the wife of her husband's eldest brother) was burnt to death by her in-laws. Hence the petitioner left the matrimonial home. It was held that the desertion was not without reasonable cause. In Bishwanath Panday v. Anjana Devi, where the wife was living in a separate room, provided by the husband under compromise in proceedings for maintenance and the husband had another woman living with him, it was held that the separation does not amount to desertion by the wife. In Bhupinder Kaur v. Budh Singh, the husband obtained divorce on the ground that his wife deserted him twenty two years ago. This was decreed in his favour. In appeal, the High Court held that the husband had made no effort to take the custody of the children, send them money, or resume cohabitation with his wife. The fact that the wife did not attend the cremation ceremony of the parents of the husband or the fact that she did not file for restitution of conjugal rights cannot give rise to cruelty or desertion on her part. In Kishan Chand v. Smt. Munni Devi, the husband had an extra marital affair and had driven his wife out of the matrimonial home. After nine and a half years, he filed for divorce on the ground of cruelty and desertion. Denying him the decree the High Court held:

"The conduct of the husband compelled the wife to leave the matrimonial home and prompted her not to withdraw the criminal proceedings and to back out from the compromise. The main facts considered by the district judge to conclude that

323 AIR 1993 Mad 174.
324 AIR 1995 Raj 86.
326 II (2002) DMC 397 Jha.
327 I (2002) DMC 735 P&H.
the wife did not desert her husband was the refusal of the husband to transfer one room in his house to his wife's name, which made her feel insecure. The wife was justified in staying away from her husband as she had reasonable apprehension that she would continue to be ill-treated and beaten up."

In *Adhyatma Bhattar Alwar v. Adhyatma Bhattar Sri Devi*, the husband's plea of desertion was upheld by the trial court. In appeal, High Court reversed the decree. But the Supreme Court upheld the trial court decree and held the wife had failed to substantiate a serious allegation of molestation by the father-in-law. She also did not demonstrate her willingness to return to the matrimonial home and fulfil her matrimonial obligation.

In the light of above discussion, the well established preposition of law is that where one party by his or her conduct forces the other party to leave matrimonial home, the former must be presumed to have requisite *animus deserendi*, and he or she would be guilty of constructive desertion.

**iii) Wilful Neglect:**

Definition of desertion contained under Special Marriage Act, 1954 and Hindu Marriage Act, 1955, by virtue of added explanation by the Marriage Laws Amendment Act, 1976, includes the wilful neglect of the petitioner by the other party to the marriage. In *Balbir v. Dhir Dass*, the court held that failure to provide maintenance may amount to wilful neglect. According to Dr. Paras Diwan, "Wilful neglect adds new dimensions to our notion of desertion, in as much as if the offending spouse consciously neglect the other party without any intention to desert, it would nonetheless amount to desertion... It will amount to wilful neglect if a person consciously acts 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 a knowledge of the likely result of abstention."

Considering the fact of social life, where the wives are deliberately neglected by husbands, they are denied company, sexual intercourse and maintenance, the Parliament has clarified the scope of desertion under Hindu Law and Special Marriage Act in definite form. Any of above mentioned denials and acts in matrimonial home

329 (2002) 1 SCC 308.
330 AIR 1979 P&H 200.
331 *Supra* note 312, at 126.
itself may not amount to desertion, but these are the acts of wilful neglect which do cause untold misery to the wife. It seems for this reason Parliament specifically mentioned 'wilful neglect' as a constituent of desertion in Matrimonial Hindu Law and Special Marriage Act, 1954.\textsuperscript{332} In \textit{K. Narayanan v. K. Sri Devi},\textsuperscript{333} where there was no sufficient evidence that the wife wanted to stop cohabitation permanently, the husband could not get a decree of divorce on the ground of wife's desertion.

\textit{Muslim Law}

Under the Muslim Law a husband can divorce his wife without assigning any reason or pleading any ground. Though desertion is not explicitly stated as a ground under Muslim Law, but under the statutory law, Muslim woman has a statutory right under the Dissolution of Muslim Marriages Act, 1939, to obtain divorce on the ground 'that the husband has failed to perform without reasonable cause, his marital obligations for a period of three years'.\textsuperscript{334} Also under the same statute she has right to obtain divorce under the ground, 'that the husband has neglected or has failed to provide for her maintenance for a period of two years'.\textsuperscript{335} The provision under sections 2(iv) and 2(ii) of the act are, in substance, concerned with situations which can be viewed as one where the husband has deserted and the wife seeks a remedy.

In \textit{Fazal Mahmud v. Umatur Rahim},\textsuperscript{336} it was held that the section 2(ii) does not abrogate the general principles of Mohammadan law; therefore before a husband can be said to have neglected or failed to provide such maintenance, it must be shown that the husband was under the legal duty to provide such maintenance, it must be shown that the husband was under the legal duty to provide such maintenance. Where the wife refuses to reside with the husband, or fails to discharge her marital obligations without any reasonable cause, she cannot claim maintenance. The case is illustrative of the fact that desertion on the part of the wife may debar the wife from claiming the maintenance, as well as a decree for divorce if she so claims. But the Sind High Court has taken a different view. In \textit{Nur Bibi v. Pir Bux},\textsuperscript{337} it was laid down that where a husband has failed to provide maintenance of his wife of a period of two years immediately preceding the suit, the wife could be entitled to a dissolution of marriage under section 2(ii) of the Act inspite of the fact that on account of her

\textsuperscript{332} \textit{Supra} note 26, at 110.
\textsuperscript{333} AIR 1990 Mad. 151.
\textsuperscript{334} The Dissolution of Muslim Marriages Act, 1939, Section 2(iv).
\textsuperscript{335} \textit{Ibid}, Section 2(ii).
\textsuperscript{336} AIR 1949 Pesh. 7.
\textsuperscript{337} AIR 1950 Sind 8.
conduct in refusing to live with her husband, she would not have been entitled to enforce any claim for maintenance against the husband in respect of the period during which the husband has failed to maintain her. It is doubtful whether either of these propositions is correct. However, the language of the section itself is sufficiently clear to allow divorce because it ultimately leads to the same, i.e., desertion on the part of husband.

Under the Muslim law it is not necessary that the husband must wilfully neglect his wife. If he has neglected his wife, that will be good ground for divorce. Therefore it has been said in Zafar Hussain v. Mst. Akhtari, that under the Dissolution of Muslim Marriage Act, 1939, failure to maintain, whether on account of poverty, ill-health or imprisonment, is a good ground for the wife to seek divorce. In Badrunnisa v. Mohammad Yusaf, it was said that 'neglect' in section 2, of the Dissolution of Muslim Marriage Act, 1939, implies the wilful failure and the words 'has failed to provide' imply on omission of duty.

It was said in Rabia Khatoon v. Mohd. Mukhtar Ahmad, that if the wife fails to establish that she was ready and willing to perform her part of marital duties during three years when she had been living separately from her husband, he is under no obligation to maintain her and under such circumstances cannot bring the case within the scope of section 2(ii) further, a defendant husband has no duty to maintain his wife who has voluntary and without justifiable cause refused to live with her husband. In Itvari v. Ashgari, High Court held that bringing of second wife is sufficient ground for the first wife to leave her husband's home and to ask for separate maintenance. In Najiman Nissa Begum v. Serajuddin Ahmed Khan, the husband's failure to pay the dower even after several pleas by the wife was construed by the courts as indicative of the husband's neglect to maintain her. In Kochu Mohammad Kunju Ismail v. Mohammad Kadeja Umma, the Kerala High Court held that the 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 whether his failure arose out of

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339 AIR 1944 Lah. 336.
340 ILR 1944 All. 27.
343 AIR 1960 All. 684.
344 AIR 1946 Pat 467.
345 AIR 1959 Ker 151.

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wilful neglect or inability to provide maintenance. In A. Dastagir Sab v. N. Shariffunnissa, the wife refused to live with her husband due to non-payment of dower and non-fulfilment of the condition of protection. It was held that the husband could not refuse maintenance to her. His refusal would amount to default on his part and would provide her a ground to dissolve her marriage under section 2(ii) of the Dissolution of Muslim Marriage Act, 1939. In Yousaf v. Sowramma, it was held that it is absolute immaterial whether the failure to maintain the wife is due to poverty, failing health, loss of work, imprisonment or to any other cause. In Mehaboz Alam Dastagirsab Kelledar v. Shagufa, a divorce petition was filed by the wife on ground of desertion. It was held that the trial judge was justified in granting relief to her, awarding her a decree of dissolution of marriage under section 2(ii) of Dissolution of Muslim Marriage Act, 1939.

Christian Law

Under Christian Law, section 3(9) of the Divorce Act, 1869, provides that 'desertion' implies an abandonment against the wish of the person charging it. Prior to the amendment of the Act in 2001, a Husband had no ground to seek dissolution of marriage on the ground of desertion. The only ground available to him was adultery. So far as the wife is concerned, she could seek dissolution on the ground of 'adultery coupled with desertion without reasonable excuse, for two years or upwards'. Desertion without reasonable excuse for two years or above was available as a ground for decree for judicial separation to both husband and wife. By the amendment of the Indian Divorce Act, 1869 in 2001, the words 'reasonable excuse' has been deleted. As a result, a court while dealing with an application for judicial separation under section 22, need not enter into an inquiry as to whether the respondent had any reasonable excuse for desertion. The fact of abandonment when proved is enough to entitle the petitioner to relief. The amendment Act provides for desertion as a ground for divorce to both the husband and the wife. Thus, the husband who had no such ground available earlier, has now been given this ground, and the wife who, along with the desertion had also to prove adultery as well prior to the amendment, now can base her case on desertion alone. In Lini Mohan v. Mohan

346 AIR 1953 Mys 145.
347 AIR 1971 Ker 261.
348 AIR 2003 Kar 373.
349 Ibid.
350 Ibid.
351 Ibid, Section 22.
John, the wife filed a suit praying for a decree of divorce on ground of husband's desertion and cruelty. Married in 1986 in India the spouses left for Saudi Arabia where the husband was employed. Husband had a penchant for gambling, had borrowed heavy sum of money but could not repay the creditors who would knock at the doors of their house making the wife insecure. The husband also cheated his company to the tune of SR 1,36,000.00 and absconded from that place with a forged passport. During their stay in Saudi Arabia, he would lock the wife from outside to go for gambling and would return only in morning. In the high temperature of 50 degrees they lived without an air conditioner and telephone and the wife was totally cut off from rest of the world. he demanded and took Rs. 6 lakhs from his father-in-law in addition to the Rs. 3 lakhs that he had taken at the time of the marriage and threatened him that unless the money was paid to him he would send his daughter back to India. After coming back to India, the husband did not contact the wife nor lived with her nor did they cohabit with each other for over ten years since their child was born. the court was satisfied that the wife established both desertion and cruelty and granted her divorce despite opposition coming from the husband who wanted to retain marriage.

The Indian Divorce Act has been thoroughly amended after 2001 and now the grounds for matrimonial relief are almost at par with the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954. The gender based and religion based discrimination has been removed.

*Parsi Law*

Under section 32(g) of the Parsi Marriage and Divorce Act, 1936, any married person may sue for divorce if the defendant has deserted the plaintiff for at least two years. 'Desertion' is also not defined under the provisions of the Act. Therefore, courts are left with no other alternative but to rely on English common law to find the meaning of desertion. Prior to the amendment of the Act in 1988, section 32(g) provided for desertion for at least three years as a ground for divorce. This was ground for judicial separation as well, vide section 34 of the Act. After the amendment in 1988, desertion of the plaintiff by the defendant for at least two years is a ground for divorce.

Wilful neglect should be made as one of the essential elements of the desertion which our courts rightly ruled on various occasions in various cases. A spouse who

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352 AIR 2001 Ker 309.
has no intention to desert the other spouse, cannot be ascribed any such fault.\textsuperscript{354} In \textit{Kharshed Muncherji v. Muncherji Sorabji},\textsuperscript{355} the court held that to make out a case for desertion, it is necessary for the plaintiff to prove (a) that she has been deserted for at least three years, and (b) that she has been deserted without reasonable cause and without her consent or against her will. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. For the offence of desertion two essential conditions must be there, viz., (i) the factum of separation, and (ii) the intention to bring cohabitation permanently to an end (animus deserendi). Desertion commences when the fact of separation and animus deserendi co-exist. Once it is found that one of the spouses has deserted the presumption is that desertion continued.\textsuperscript{356}

\textbf{Conviction of Crime}

In 43 states of USA, according to Vernier, imprisonment for, conviction of crime is cause for divorce. In fifteen states statutes require 'conviction' of the crime, in fifteen others 'conviction and sentence', in ten conviction and sentence must follow by 'imprisonment', two mention 'conviction' in one clause of statute and 'conviction' and 'sentence' in another; one says 'is for crime deemed to be or treated as if civilly dead'.\textsuperscript{357} In Mexico, New South Wales and Victoria (Australia), France\textsuperscript{358}, Holland, Norway, Sweden, Yugoslavia\textsuperscript{359}, Switzerland\textsuperscript{360}, Turkey\textsuperscript{361}, Bulgaria, Belgium, Poland, New Zealand and Japan the conviction on crime was made ground for Divorce. In Japan judicial divorce was granted under code promulgated in 1989, as amended in 1914, on the ground that the other spouse was sentenced for grave offence.\textsuperscript{362} When a person is convicted of a crime and sentenced to four or seven or more years of imprisonment, the spouse of the convicted person can use this as a ground for divorce.\textsuperscript{363}

In India, the fact that the respondent is undergoing a sentence of imprisonment is a ground for divorce under three statutes, Dissolution of Muslim Marriage Act,

\begin{footnotesize}
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\item[\textsuperscript{354}] Supra note 26, at 112.
\item[\textsuperscript{355}] AIR 1938 Bom. 86.
\item[\textsuperscript{356}] Supra note 26, at 125.
\item[\textsuperscript{357}] Dina Dinshaw v. Dinshaw Ardeshir, AIR 1970 Bom. 341.
\item[\textsuperscript{358}] Chester G. Vernier, \textit{American Family Laws}, 48 (1932).
\item[\textsuperscript{359}] The Napoleonic Code, Art. 232.
\item[\textsuperscript{360}] Law of April 3, 1946, Art. 63.
\item[\textsuperscript{361}] The Swiss Civil Code, Art. 139.
\item[\textsuperscript{362}] Supra note 26, at 125.
\item[\textsuperscript{363}] Supra note 86, at 48.
\end{itemize}
\end{footnotesize}
This ground is not available either in the Divorce Act, 1869, or in the Hindu Marriage Act, 1955. The reason for recognizing such a ground for divorce is that the parties cannot fulfil the marital obligations.

**Special Marriage Act, 1954**

Under Special Marriage Act, 1954, the provision is, "on the ground that the respondent is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code, 1860."

In this way the defence for the purpose of divorce in encircled by the strong walls of the Indian Penal Code, 1860. It differs with other Statutes on the point that the requirement under this statute is that the respondent must be undergoing the imprisonment. Therefore in a case where the sentence has been passed out but the respondent is not serving the penal term, the decree for divorce cannot be granted. Under this act the words 'is undergoing' show that the petitioner can avail this ground only while the respondent is undergoing the sentence. The petitioner cannot avail the ground after the respondent has already undergone the sentence. Prior to the Marriage Laws (Amendment) Act, 1976 the proviso to section 27(1)(c) of the Special Marriage Act, 1954 provided that such petition could be presented after the respondent had undergone three years imprisonment. This proviso has now been deleted. The sentence must be operative at the time of filing of the petition. It is immaterial that during the pendency of the proceedings the respondent had completed the period of sentence. The mere fact that an appeal is pending would not come in the way of the petitioner. However, if the appeal is accepted and the sentence awarded is set aside or reduced to a period of less than seven years, the ground shall cease to be available to the petitioner. Thus, subsequent events since inceptions of the proceeding (divorce) shall be taken into account by court. Where, before the institution of the proceedings, the sentence is remitted, the respondent cannot come under the range of undergoing sentence of imprisonment for seven years. In a case where remission is granted after the institution of the proceedings, the relief should cease to be available as by remission the respondent does not continue to be under a sentence of imprisonment for seven years.

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364 The Dissolution of Muslim Marriage Act, 1939, Section 2(iii).
365 The Special Marriage Act, 1954, Section 27(1)(c).
366 The Parsi Marriage and Divorce Act, 1936, Section 32(b).
**Muslim Law**

Under Muslim Law the Dissolution of Muslim Marriage Act, 1939, provides: "A woman married under Muslim law shall be entitled to obtain decree for dissolution of her marriage on any one or more of the following grounds, namely: 'that the husband has been sentenced to imprisonment for a period of seven years or upward' Provided that: No decree shall be passed on the ground until the sentence has become final."

So in this way under the Act the remedy is available only to wife. In this Act the nature of the crime is also not mentioned as it has been mentioned in Special Marriage Act, 1954 and Parsi Marriage and Divorce Act, 1936, that the respondent should have convicted for an offence under Indian Penal Code, 1860. Under this Act the sentence which is required, must has been finally passed, while other enactments only require that the respondent must be undergoing the imprisonment. Therefore in a case where the sentence has been passed out but the respondent is not serving the penal term, the decree for divorce can be granted under the Dissolution of Muslim Marriage Act, 1939.

Under Criminal Procedure Code, 1973, it is there that, on breach of any condition of the remission there is not an automatic revival of the sentence. The right of the Muslim wife to file petition against respondent shall automatically revive on passing of an order of cancellation of the remission of sentence. Under this Act the words 'an offence as defined in the Indian Penal code' are not used this shows that the sentence of imprisonment may have been awarded under any other law and it is not necessary that the offence leading to the conviction and sentence falls within the term of 'offence' as defined in the Indian Penal code.

**Parsi Law**

The Parsi Marriage and Divorce Act, 1936, provides that any married person may sue for divorce on any of the following grounds, namely:

"That the defendant is undergoing a sentence of imprisonment for seven years or more for an offence as defined under the Indian Penal Code provided that divorce shall not be granted on this ground unless the defendant has prior to the filing of the

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368 Supra note 26, at 126.
369 The Criminal Procedure Code, 1973, Section 401(3).
suit undergone at least one year's imprisonment out of the said period."

In Parsi Marriage and Divorce Act, 1936, the offences for which the respondent is undergoing a sentence of imprisonment, must be as defined under Indian Penal Code. The ground under this Act is available to the petitioner only if the defendant has prior to the filing of suit for dissolution of marriage undergone at least one year's imprisonment. Therefore, in case where the sentence has been passed but the respondent has not undergone at least one year's imprisonment, prior to the filing of suit, the decree of divorce cannot be granted under this Act.

**Bigamy**

Bigamy is a post-nuptial matrimonial offence. It provides grounds for divorce of an existing marriage, annulment of the subsequent marriage and charging the spouse for committing a criminal offence under the legal system which recognises monogamy only. In India for the offence of 'bigamy' it has been defined in section 494 of the Indian Penal Code. All personal law statutes in the country, except for Islam, impose monogamy as a rule, and any marriage performed in contravention of the provisions imposing monogamy, is illegal. In fact, such marriage is void under almost all statutes and does not establish any relationship of husband and wife between the parties. For the purpose of divorce the Matrimonial Causes Act, 1857, of England 'bigamy' is defined as:

"the marriage of any person married to any other person, during the life time of the former wife or husband, whether the said marriage shall have taken place within Her Majesty's Dominions or elsewhere".

In *Rameshwari Devi v. State of Bihar*[^373], the second wife of the deceased was held not to be entitled to his terminal benefits; so also in *Smiti Parvathamma v. C. Subramanyam*[^374], a case of claim for compensation under the Motor Vehicles Act, 1988, the wives of the void marriage of the deceased were held not to be entitled to any compensation.

In this context the Apex Court[^375] recently held that the second wife of the

[^371]: The Hindu Marriage Act, 1955, Section 5, 11 and 17. The Special Marriage Act, 1954, Section 4, 24, 43 and 44. The Divorce Act, 1869, Section 18 and 19; and the Parsi Marriage and Divorce Act, 1936, Section 4, 5 and 11.

[^372]: The Matrimonial Causes Act, 1857, Section 27.

[^373]: AIR 2000 SC 735.

[^374]: AIR 2000 Kant 309 (DB).

deceased is also entitled to compassionate appointment in the government jobs after the husband's death as long as the first wife has no objection. The order was passed on an appeal by the Karnataka Government challenging a direction of Karnataka High Court to consider the appointment of second wife of a deceased head-constable of the Armed Reserve Police. The Apex court rejected the arguments of the State Government that under the Hindu Marriage Act, 1955, since a man cannot have two wives simultaneously --- that so called second wife cannot claim any right of appointment by merely entering into an agreement with the first wife. "when two wives have come to an understanding who are you to oppose it? Why should you be bothered if one wife seeks compassionate appointment and the other wants the compensatory benefits" a bunch of Justices Markandeya Katju and R.M. Lodha held, dismissing the Karnataka Government's appeal.

It is significant to note that even if the first spouse desires or permits the other's second marriage, it would be illegal. In Santosh Kumari v. Surjit Singh376, a Hindu wife filed an application in court seeking permission that her husband be allowed to marry another women. The trial court granted the permission as the applicant wife was weak and ailing. The court also passed the maintenance orders in the favour of the first wife and daughter. The High Court, however, held that such order was absolutely wrong and illegal and against the clear provisions of the Hindu Marriage Act, 1955, which does not permit second marriage during the subsistence of the first marriage.

Hindu Law
The relevant provisions under the Hindu Marriage Act, 1955, are as follows:
Section 13(2): A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground:
(i) in case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or 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.

The Hindu Marriage Act, 1955, which introduced monogamy among the

376 AIR 1990 HP 77.
Hindus, came into force on 18-5-1956. In spite of this statutory prohibition the practice of polygamy continues in Hindu society.\(^\text{377}\) The Hindu Marriage Act has two-way approach to jettison this infamous and undesirable practice in the present state of society.\(^\text{378}\) An indication of the status of Hindu marriages in the post- 1955 period came to us in 1974 in the report of the Committee on the Status of Women, Towards Equality. As per this report, the rate of polygamous marriages among Hindus, Muslims and tribals for the period 1951-60 is as follows: Hindus - 5.06%, Muslims - 4.31% and Tribals - 17.98 %.\(^\text{379}\)

The Act does not declare pre-Act polygamous marriages as void but it provides for relief by way of divorce to a wife of any such marriage, the husband will not be allowed to plead any conduct or disability on the part of the wife petitioner so as to bar relief.\(^\text{380}\) In *Leela v. Anant Singh*\(^\text{381}\), the court ruled that 'a wife of a polygamous marriage cannot be deprived of her right of divorce on the ground that prior to the commencement of the Act, she entered into a compromise with her husband to continue to live with him; nor can a husband take the plea that her conduct or disability is a bar to her claim of divorce.' However, where polygamous marriage is contracted after the commencement of the Hindu Marriage Act, 1955, the wife of such a contract of polygamous marriage is entitled to a nullity decree. It is true that bigamy is no more a ground for divorce under Hindu Law because bigamous marriage is an impossibility under it.\(^\text{382}\) Divorce presumes a marriage tie existing between the parties one of whom seeks to dissolve it. Bigamy has, however, been recognized as a ground for decree of nullity.\(^\text{383}\) The issues of such a marriage which has since been annulled on the ground of bigamy have qualified and restricted legitimacy under Hindu Marriage Act, 1955,\(^\text{384}\) though their progenitor and progenitrix are liable to be subjected to penal sanctions.\(^\text{385}\)

The provisions prohibiting bigamy under Hindu Marriage Act, 1955, and

\(^{377}\) Hindustan Times, 12 December 1969; also refer to B.K. Roy Burman's (Deputy Registrar General of India) statement in Hindustan Times, 14 January 1972 revealing that a study of 500 Indian villages showed that practice of polygamy among the Hindus was 5.1% and among Muslims 4.8%, quoted from Family Law and Social change, 133 (1975)

\(^{378}\) Supra note 26, at 122.


\(^{381}\) AIR 1963 Raj. 178.

\(^{382}\) The Hindu Marriage Act, 1955, Section 5 lays down the condition for a Hindu Marriage.

\(^{383}\) Ibid, Section 11.

\(^{384}\) Ibid, Section 16.

\(^{385}\) Ibid, Section 17.
under a rule in the Government Servant's Conduct Rules was challenged, as being an infringement of the right to religion under Article 25 of the Constitution of India. The court however overruled the challenge and held that cl.(2)(b) of Art. 25 of the Constitution of India does not prevent the state from making any law providing for, 'Social welfare and reform......'. Prohibition of bigamy was a measure of social welfare and reform, and hence not ultra vires the court ruled out. However, it is only the parties to the marriage who can seek a decree of annulment of such marriage. The previous wife not being a party to the second marriage was held not to have any locus standi to file a petition for annulment under section 11 of the Hindu Marriage Act, 1955. Similarly, in Ajay Chandrakar v. Ushabai, a husband entered into the second marriage and the first wife filed the petition under section 11 of Hindu Marriage Act, 1955 for having second marriage declared null and void. The court held that the remedy under this section is available only to a person who is a party to such marriage, and the first wife not being a party, cannot file a petition under this section. Her remedy according to the court lies by the way of suit for declaration under section 34 of the Specific Relief Act, 1963. Likewise in Sona Ralsel v. Kiran Mayee Nayak, it was held that the first wife cannot file an application along with the husband, against the second wife under section 11 and 5(i) though she is entitled to file a civil suit in this regard invoking section 9 of the Civil Procedure Code read with section 34 of the Specific Relief Act, 1963. In Mohan Lal Sharma v. Parveen, a husband sought a decree of nullity on the ground that the wife already had a spouse living at the time of their marriage and this act was fraudulently concealed. The wife's defence was that her earlier marriage had been dissolved by mutual consent by a dissolution deed with the intervention of the elders. She however, failed to prove custom which permitted divorce in this way. The marriage was held to be null and void. The court further clarified that even if the second husband i.e. the petitioner, had knowledge of the previous marriage, the marriage would still be void. In Sushma Choure v. Hetendra Borkar, where at the time of impugned second marriage an application for restitution of conjugal rights was pending against the first husband, it

390 AIR 2010 P&H 65.
391 AIR 2010 Chhat 30 (DB).
was held to be enough evidence to presume the subsistence of previous marriage.

In *Surjeet Kaur v. Jhujar Singh*,\(^\text{392}\) the wife was married before she married the petitioner husband. She had obtained only a decree of judicial separation in respect of her first marriage. She could not discharge the burden of proving that the previous husband was not alive at the time of her second marriage. The marriage was held to be void being in contravention of section 5(i) of the Hindu Marriage Act, 1955.

In *Amit Aggarwal v. State of U.P.*\(^\text{393}\), an already married Hindu man deceived a girl into marrying her by concealing the fact of the earlier marriage. On knowing this, the girl left for her parent's house. On husband's writ of habeas corpus against the father of the girl for direction to produce her so he could take her home, the court not only quashed the writ and held that the marriage being void she is free to live anywhere, but also directed him to pay compensation of rupees three lakhs to the girl and her father.

The Hindu Marriage Act, 1955, makes no specific provision for issuing of injunctions, yet, that does not prevent the court from restraining a party from doing an act which is illegal or void under the provisions of the Act. This is what the court ruled in *Kirti Sharma v. Civil judge, Senior Division, Etah*.\(^\text{394}\) The plaintiff filed a suit for restitution of conjugal rights under section 9 of the Hindu Marriage Act, 1955, along with an application for interim injunction restraining the defendant from contracting second marriage. An interim injunction was issued and was challenged by way of writ petition under Article 226 of the Constitution of India. The petitioner's case was that she was kidnapped at gun point and was not married to plaintiff, and that the suit was not maintainable and the injunction could not be granted. On evidence and the statements made by the witnesses, the court found that their was marriage ceremony under Arya Samaj rites and the partners stayed together for one month but the marriage was not consummated as both the partners had so decided till their relationship was approved by the girl's parents. It was further argued by the appellant that the Hindu Marriage Act, 1955 was a special legislation and the provision under O. 39, R. 1, pertaining to injunctions, would not apply for granting injunction restraining a wife from remarrying. The court did not accept this argument.

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\(^{392}\) (1981) HLR 301.

\(^{393}\) AIR 2007 (NOC) All 442.

\(^{394}\) AIR 2005 All 197.
and held: 395

"No doubt Hindu Marriage Act, 1955, is a special Act but if it is silent on the issue of injunction the place can be occupied by general legislation especially so to restrain a party from performing a void act (viz. second marriage which is void under section 11 coupled with section 5(i) of the Hindu Marriage Act, 1955.)"

*Special Marriage Act, 1954*

Sections 4, 24, 43 and 44 of the Special Marriage Act, 1954, are pari materia, section 5, 11 and 17 of the Hindu Marriage Act, 1955.

*Muslim Law*

So far as Muslim Law is concerned, while a male may legally have upto four wives at a time, a Muslim woman cannot remarry during the subsistence of first marriage. The Muslim Law, recognizes the right of a male Muslim to take as many as four wives at a time whereas the wife can have only one husband at a time.

According to Mulla, 396 "A Mohammedan may have as many as four wives at the same time, but not more. If he marries fifth wife when he has already four, the marriage is not void, but merely irregular."

As regards Muslim females, Mulla says, "it is not lawful for a Muslim woman to have more than one husband at the same time. A marriage with a woman who has her husband alive and who has not been divorced by him, is void. A Muslim woman marrying again in the lifetime of her husband is liable to be punished under section 494 of the Indian Penal Code, 1860. Children of such marriage are illegitimate, and cannot be legitimated by acknowledgement either." 397

Before the advent of Islam fighting was order of the day with the result that number of men was much less than that of women. This state of affairs largely contributed to the continuance of the institution of polygamy during the early period of Islamic history. The following verse of Quran, which is a sacred law for all Muslims, is a pointer towards monogamy: 398

"And if yr fear that ye will not deal fairly by the orphans, marry of the women who seem good to you, two or three or four and if ye fear that ye cannot do justice(to so marry then one only or the captives) that your right hands possess. Thus it is more likely that ye will not do justice."

395 Supra note 394, at 198.
396 Supra note 253, at 257.
397 Ibid, at 382.
398 Quran IV, 9; Supra note 27, at 31.
It is clear that the Quran only permits but it does not enjoin polygamy, and that too only in those cases where the man finds it impossible to safeguard the interests of widows and orphans. If the man does not feel confident of treating all the wives equally without discriminating against any of them, he should have only one.\(^{399}\)

But is it possible for a man to give equal love and affection to all the four wives? It is quiet impossible. Therefore, the arbitrary power of the Muslim husband to have more than one wife has been controlled in all Muslim countries. Some countries have totally abolished polygamy, others have partially abolished this institution.\(^{400}\)

The Muslim Family Laws Ordinance, 1961 promulgated in the united Pakistan imposed restrictions on the Muslim husband's supposed freedom to contract a bigamous marriage (section 6). The Ordinance has remained in force in Bangladesh where it was adapted to the local administrative system by Muslim Family Laws (Amendment) Ordinance, 1985.

As regards the scope and interpretation of the anti-bigamy provisions under the Ordinance, reference may be made to Pakistan Supreme Court's decision in *Faheemuddin v. Sabeeha*.\(^{401}\) In Bangladesh case of *Makbul Ali v. Manwara Begum*,\(^{402}\) it was clarified that the second wife of a bigamist husband cannot be prosecuted under the anti-bigamy provisions of the Ordinance of 1961. While the Ordinance only puts certain restrictions on a Muslim husband's supposed right to contract a bigamous marriage, in *Jesmin Sultana v. Mohammad Elias*,\(^{403}\) the Dhaka court has recommended an outright prohibition of polygamy:

"We find that section 6 of the Muslim Family Laws Ordinance, 1961 is against the principles of Islamic law. We recommend that this section be deleted and be substituted with a section prohibiting polygamy."

Obviously, polygamy which is not expressly permitted by the Quran in normal times, has no practical relevance among the Muslim of India. Statistical researches have proved the incidence of polygamy amongst the Hindus is more frequent than among the Muslims.\(^{404}\)

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\(^{399}\) *Supra* note 26, at 123.

\(^{400}\) Article 30 of Turkish code; Article 17 of Syrian code; Article 18 of Tunisian code; Article 17 of the Iranian Family Protection Law of 1967; Section 24 of Ceylonese Muslim Marriage and Divorce Act, 1951(a non-Islamic country); Sections 6(1),(2),(3),(4), and (5)(a)(b) of Pakistan Muslim Laws Ordinance, 1961; Article 6 of Jordanian Law of Family Rights, 1951.

\(^{401}\) PLD 1991 SC 1074.


\(^{403}\) (1997) 17 BLD 4.

\(^{404}\) *Supra* note 377.
In the Indian case, *Shahbano Begum v. Abdul Ghafoor*, a case where the Muslim wife had claimed separate maintenance on the ground of bigamy on her husband's part, the Supreme Court observed:

"From the point of view of the neglected wife........... it will make no difference whether the woman intruding into her matrimonial life and taking her place in the matrimonial bed is another wife permitted under law to be married and not a mistress. The legal status of a woman to whom the husband has transferred his affections cannot lessen her distress and her feelings of neglect. In fact from one point of view the taking of another wife portends a more permanent destruction of her matrimonial life than the taking of a mistress."

In *Itwari v. Asghari*, the court emphasised the fact that even though polygamy is permissible among Muslims, the Muslim law as enforced in India has considered it as an institution to be tolerated but not encouraged, and has not conferred upon the husband any fundamental right to compel the first wife to share his consortium with another woman in all circumstances.

In *K. Muhamma Latheef v. Nishath*, the issue before the Kerala High Court was whether though bigamy is justified under Muslim Law, the second marriage is justified? It was held that the appellant had married another woman within 5 months of separation from the respondent wife, that itself manifests the cruelty towards her. If the decree was reversed it would affect the harmonious life of second wife as well. The court with lenient view supported the interest of respondent as well as the second wife of the appellant.

In India the freedom of a married non-Muslim converting to Islam to contract another marriage without divorcing his first non-Muslim wife was examined in the leading case of *Sarla Mudgal v. Union of India*. The court declared such a marriage to be invalid and penal under sections 494-495 of the Indian Penal Code, 1860. This decision was reaffirmed by court in *Lily Thomas v. Union of India*, observing that:

"Even under Muslim Law (right to) plurality of marriages is not unconditionally conferred upon the husband. It would, therefore, be doing injustice to Islamic law to urge that the convert is entitled to practise bigamy notwithstanding the

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405 AIR 1987 SC 1103.
407 AIR 2004 Ker 22.
408 AIR 1995 SC 1531.
continuance of his marriage under the law to which he belonged before conversion. The progressive outlook and wider approach of Islamic law cannot be permitted to be squeezed and narrowed by unscrupulous litigants."

Christian Law

The Divorce Act, 1869, does not give any definition of bigamy. Instead of that definition the Act provides us with two definitions, viz., 'bigamy with adultery' and 'marriage with another woman' but there is nothing like a third definition on 'marriage with another woman with adultery'. From the two definitions which are provided by the Act it is difficult to distinguish between 'bigamy' and 'marriage with another woman' during the life of the former wife and though the expression "marriage with another woman with adultery" is not defined in the Act, it came up for consideration before the Lahore High Court in Sainapatti v. Sainapatti, Currie, J., in delivering the judgement, observed as follows:

"Rattigan in his commentary - remarks that if a man after such second marriage co-habits with such woman, the wife is entitled to apply for dissolution of marriage just as she would have been entitled to apply, if the husband would have been guilty of 'bigamy with adultery'."

The Calcutta High Court in Susama v. Sailendra Nath, has observed:

"The real distinction between 'bigamy and adultery' and 'marriage with another woman with adultery' appears to be that there is 'bigamy with adultery' when the second marriage is null and void under any law but still then there is co-habitation: 'marriage with another woman with adultery' happens when the second marriage, though taking place during the life time of either the husband or the wife is not void under any law and there is cohabitation between the husband and the last married wife. It may be difficult to conceive adultery with one's wife or husband, the marital tie between whom does not become void under any law, but nevertheless that may be the distinction which the section contemplates."

It is significant to note that the word used in both the sections of the Divorce Act, 1869, is 'may' which means that it is only an enabling provision and not mandatory. Apart from this, section 60 of Indian Christian Marriage Act, 1872,

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410 The Divorce Act, 1869, Section 3.
411 AIR 1932 Lah. 116.
412 AIR 1961 Cal 373.
413 Sections 18 and 19.
provides for conditions for certification of a Christian Marriage. Though the Act nowhere states that a marriage during the lifetime of any spouse of either parties to the marriage is void and nullity, section 60 states that: "Every marriage between (Indian) Christians applying for certificate, shall, without the preliminary notice required under part III, be certified under this part, if the following conditions be fulfilled, and not otherwise:

1. ........
2. neither of the persons intending to be married shall have a wife or husband still living;
3. ........

Section 60(2) bars only certification under Chapter VI of the Act. The legality of a bigamous marriage is not assailed in Parts IV and V of the Act, viz. registration of the marriages solemnized by Minister of Religion, and marriages solemnized by or in the presence of, a Registrar, respectively. This is anomalous and needs to be rectified.416

The distinction which can be drawn in 'bigamy' and 'marriage with another woman' is that in case of bigamy there must be an existing valid marriage at the time of the question; whereas in case of 'marriage with another woman' there is no such presupposition that the first marriage was a valid or invalid one. It is only the fact of marrying in the life time of the other spouse which is material and the nature of the first marriage will not be inquired into. But in case of bigamy the nature of the first marriage is very material and suppose if it was void, and so declared by the court of competent jurisdiction then that marriage would not constitute the ground of bigamy but it must fall under 'marriage with another woman'. It is necessary to draw such a distinction in Indian conditions where the institution of polygamy is so common and thus by these provisions woman has been provided with one more arrow from the legal armoury in order to protect her from growing lust of her husband who often desires a change.417

Parsi Law

Under Parsi law, the Bigamy is prohibited. The Parsi Marriage and Divorce Act, 1936 states that:

415 The word "Native" subs. by AO 1950.
416 Supra note 87, at 103.
417 Supra note 26, at 120.
"(1) No Parsi (whether such Parsi has changed his or her religion or domicile or not) shall contract any marriage under this Act or any other law in lifetime of his or her wife or husband, whether a Parsi or not, except after his or her lawful divorce from such wife or husband or after his or her marriage with such wife or husband has lawfully been declared null and void or dissolved, and, if the marriage was contracted with such wife or husband under Parsi Marriage and Divorce Act, 1865, or under this Act, except after divorce, declaration or dissolution as aforesaid under either of the said Acts.

(2) Every marriage contracted contrary to the provisions of sub section (1) shall be void."\(^{418}\)

The Act also provides for the punishment if a Parsi contracts a second marriage in accordance with the provisions of Indian Penal Code, 1860. The Act states:

"Every Parsi who during the lifetime of his or her wife or husband, whether Parsi or not, contracts a marriage without having been lawfully divorced from such wife or husband, or without his or her marriage with such wife or husband having legally been declared null and void or dissolved, shall be subject to the penalties provided in sections 494 and 495 of the Indian Penal Code 1860 for the offence of marrying again during the lifetime of a husband or wife."\(^{419}\)

Section 11 of the Act provides for penalising any priest who knowingly and wilfully solemnises any marriage contrary to and in violation of section 4. Punishment prescribed is simple imprisonment for a term which may extend to six months, or fine which may extend to two hundred rupees, or both. Parsi Marriage and Divorce Act, 1936, section 4.

**Unnatural Offences**

In India at present all the matrimonial laws provide for the right of a wife to seek divorce on the grounds of unnatural offences such as rape, sodomy and bestiality committed by the husband.\(^{420}\) There are rare Indian cases seeking divorce on such ground. Generally, as and when a case comes to the court, the practice of English

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\(^{418}\) The Parsi Marriage and Divorce Act, 1936, Section 4.

\(^{419}\) Ibid, Section 5.

\(^{420}\) The Divorce Act, 1869, Section 10; The Parsi Marriage and Divorce Act, 1936, Section 32(d); The Dissolution of Muslim Marriage Act, 1939, Section 2(viii)(b); The Special Marriage Act, 1954, Section 27(1A); The Hindu Marriage Act, 1955, Section 13(2)(ii).
cases are followed as they have a strong persuasive authority on the Indian Courts.\footnote{Supra note 26, at 135.}

\textit{Rape}

'Rape is the offence of having a carnal knowledge of a woman without her consent by force, fear, fraud and it is an essential ingredient of that particular offence that it must be without the woman's consent.'\footnote{Regina v. Miller, (1954) 2 Q.B. 285.} The essence of rape is the penetration of the woman's person without her wish or consent. In other words, where the woman does not intend that the sexual act shall be done upon her either at all or by the particular individual doing it and an assault which includes penetration does not under such circumstances to be anything but rape.\footnote{Q v. Clarence, (1889) 22 Q.B.D. 23.} In different matrimonial laws in force throughout the territory of India, the definition of rape is absent. It is, therefore, clear that the intention of the legislature was that as far as the definition of this word is concerned, the definition given under the Indian Penal Code, 1860,\footnote{The Indian Penal Code, 1860, Section 375.} should be taken into consideration.

(i) \textit{Rape with the wife}

Thirteen judges tried the case of \textit{Rex v. Clarke},\footnote{(1949) 2 All. E.R. 448.} in course of which the position of a married woman with regard to rape upon his wife was considered. Nine of them took one view and the rest had a different view. This was a case in which the accused was charged with the rape of his wife at a time when separation order made by justices on the ground of persistent cruelty, was in force. In \textit{Regina v. Miller},\footnote{(1954) 2 Q.B., at 282.} a case of similar facts in which the husband was charged with rape upon his wife. The difference between two above referred cases was that in the former, the separation was pronounced by the court which consisted a non-molestation clause. But in latter case, there has been 'no separation, no judicial separation and no agreement to separate'. So the question was whether such intercourse of husband with wife amounted to rape entitling a wife for a decree of divorce. The Byrne, J. in former case, enunciated the principle to be applied in these terms:

"No doubt on marriage the wife consents to husband's exercise of the matrimonial rights of intercourse during such time as ordinary relations created by the marriage contract subsists between them".

Lynskey, J., observes in latter case while referring to the dissenting judgement
of *Rex v. Clarke*:

"...it is a judgement which would appeal to a great many people as drawing a
distinction between what a woman is a assenting to and what she is not, that is, she is
assenting to the act of the sexual intercourse but not to another act which is dangerous
to her health and there may be circumstances in which a woman would be entitled to
refuse that which is dangerous to her health. In the divorce court the act would be an
act of cruelty".

In *Mst. Bhonri v. State*, it was held that the sexual intercourse under the
influence of drink cannot be said to be with consent under section 375-376 of the
Indian Penal Code. A mere attempt to rape will not give a ground for divorce to the
wife. It is necessary for the wife to prove that the husband has been guilty of rape.
However, it is not absolutely necessary to prove that he has been criminally
convicted. If the husband has been acquitted by the criminal court, she can in divorce
proceedings, establish his guilt and obtain relief. If the husband has been convicted by
the criminal court, the wife will have to prove the offence in the matrimonial
proceedings; then alone she will be entitled to the decree of divorce. Further, one
cannot be guilty of raping his own wife, unless she is below fifteen years.

(ii) Rape with third party

In a case *Virgi v. Virgo*, the wife filed a petition for divorce on the ground
of a single act of adultery, said to have been committed by the respondent, with his
own child, a girl of thirteen. The petitioner stated that on returning home in the
evening of November 25, 1891, she found her husband drunk and her daughter, in the
house. Her husband shortly afterwards went out and then child made a complaint to
her in consequence of which she went to the police station and respondent was
subsequently tried at the 'Central Criminal Court' and convicted of the minor offence
of attempting to carnally know the child. Barnes, J. observed:

"I think, however, that this is a case in which I am justified in finding as a fact,
that incestuous adultery has been committed by the respondent. I, therefore,
pronounce a decree nisi.... ".

In *Coffey v. Coffey*, facts were that the petitioner claimed that her marriage
with the respondent should be dissolved, on ground that the respondent left his home

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427 AIR 1955 Raj 473.
428 *Laxmi v. Alagiriswami*, AIR 1975 Mad. 211.
429 69 L.T. 460
430 (1898) R., at 169.
in East Sheen, Surrey, with some another woman and lived together in Jersey and Reading as man and wife under an assumed name and while at Reading he had been arrested for a criminal assault upon, his servant, a girl below thirteen years of age and convicted for the same at the Reading Assizes. Thus, petition against the respondent was based on adultery and rape. Corral Barnes, J. allowed a decree nisi for the dissolution of marriage.

Where there has already been a conviction, proof of such conviction for rape is neither necessary nor sufficient. The offence must be proved de novo.  

**Hindu Law**

Under ancient Hindu Law rape was heavily punished. Unnatural intercourse with a man or a woman used to be punished by a fine of 40 panas. Under Hindu Marriage Act, 1955, this ground of Rape is exclusively reserved for the wife alone.

**The Special Marriage Act, 1954**

The Special Marriage Act, 1954 allows, in the same tone as under The Hindu Marriage Act, 1955, to wife alone to file a petition for divorce on the ground that her husband has, since the solemnisation of the marriage, been guilty of rape.

**Muslim Law**

Illicit sexual intercourse with an unmarried woman is strictly prohibited under the Muslim Law.

**Christian Law**

Under the provisions of Divorce Act, 1869, a wife may present a petition for dissolution of her marriage on the ground that her husband has been guilty of rape. Such commission of the offence must be post nuptial.

**Parsi Law**

The Parsi Marriage and Divorce Act, 1936 provides for this right to seek divorce by either spouse for unnatural offence of the other spouse. It grants relief by way of granting a decree of divorce on the ground that the defendant has since the

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431 *White v. White*, (1899) 21 A.L.T. 76.
432 Ganganath Jha, *Hindu Law in its Sources*, 493 (1930).
433 *Ibid*, at 502; Bestiality, i.e., intercourse with animals with loc, and in case the animal was a cow, the fine was 500.
434 The Hindu Marriage Act, 1955, Section 13(2)(ii).
435 The Special Marriage Act, 1954, Section 27(1-A)(i).
436 The Indian Divorce Act, 1869, Section 10(2).
437 The Parsi Marriage and Divorce Act, 1936, Section 32(d).
marriage committed adultery, or fornication or bigamy or rape. Here either party to
marriage, unlike other analogous Indian statutes, is entitled to a decree of divorce
when the guilt is found on the part of the other spouse. The Act makes no distinction,
simply on the ground of sex. It is difficult to justify this provision because all other
Indian statutes dealing with divorce in similar circumstances allow the relief alone to
wife.

Sodomy

Sodomy 'is a connection between two human beings of the same sex- the
male-- named from the prevalence of the sin Sodom: Sodomy is noncoital carnal
copulation with a member of the same or opposite sex, for example, per anus or per
OS. Sodomy and the 'crime against nature' have often been used synonymous
terms; and hence the infamous crime against nature, either with man or beast made
punishable by criminal code includes not only the offence of sodomy, but any other
bestial and unnatural copulation.

A man may indulge in sodomy even with his own wife. A husband,
therefore could be guilty of sodomy on his own wife if she was not consenting
party. Consent to an act of sodomy prevents the wife-petitioner relying on it as a
matrimonial offence. Similarly, condonation is a complete bar to the charge of
sodomy. In T v. T, the husband suggested to his wife that sodomy should be
committed but the wife on many occasions refused. According to her she permitted it
only on three occasions, as her husband told her that other wives of her acquaintances
made no objection and that it was her wifely duty to do it and then she accepted. In
her evidence she stated that she thought it was not a natural thing to do although she
did not think that it was wrong. the issue before the court was that, whether a wife
who is persuaded into believing that sodomy is normal between married couples and
who, although disliking it, submits to husband's desire for sodomy, under the belief,
induced by him, that it is part of her marital duty to submit, is to debarred for relief
when she discovers the truth, on the ground that she consented to the act? It was held
that the real consent involves a knowledge of the relevant facts bearing on the

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438 Ausman v. Veal, 10 Ind. 355; See also 'Words and Phrases Judicially Defined', 6539 (1905).
439 Tuteja Rajinder, Tuteja's Commentary on Marriage, Divorce and Maintenance, 170 (1994).
440 Honselman v. People, 48 N.E. 305.
441 Grace Jayamani v. E.P. Peter, AIR 1982 Kat 56 (FB).
442 B v. B, 68 PR 1882 (Full Bench of Punjab Chief Court).
444 (1963) 2 All E.R. 746.
question whether consent should be forthcoming or not and one of the chief attribute of these is whether the act to which consent is sought is right or wrong. Where the wife is deceived into thinking that it was not wrong, it is immaterial that the gross misrepresentation was innocent on the husband's part. Thus there was no real consent and the wife was not debarred from the decree of divorce. In another case it has been held that the onus of proving that the wife consented to the admitted sodomy on her is on the husband. Where wife condones the sodomy, no matrimonial offence is made out unless the husband revives his offence. In Smith v. Smith, a case under the Divorce Act, 1869, the wife alleged cruelty, against her husband and, among other instances of cruelty, stated that the husband frequently attempted to have unnatural intercourse with her. It was held that there was consent of wife and, therefore, the divorce could not be granted. Where the wife in her petition for divorce on the ground of sodomy stated that at the time of having sexual intercourse, the husband used to put his male organ into her mouth or he used to put it into her arms and there was no cross-examination on the assertions made by the lady in the box, and the father of the wife whom as her witness had in general way corroborated the evidence, the District Judge was held justified in coming to the conclusion that the husband had committed sodomy on wife by forcing her for carnal copulation per anus per OS.

Muslim Law

About Sodomy, the Islamic law has conflict of opinion and the jurists are divided on punishment. According to Haneefa, if a man copulates with a strange women per anus (i.e., commit the act of sodomy with her), there is no stated punishment for him. Shafie says that if a person has committed sodomy the parties should be put to death. Once the Prophet said 'stone both, the agent and the subject'.

Bestiality

Bestiality is the unnatural connection of man or woman in any manner with an animal. There is no need for emission. Bestiality means carnal intercourse against the order of nature by a person with an animal. Bestiality is a crime of men having carnal intercourse with beasts. Sodomy and bestiality together come under the

446 (1932) 59 Cal. 945.
447 Grace Jayamani v. E.P. Peter, AIR 1982 Kat 56 (FB).
448 Supra note 26, at 127.
450 Supra note 439, at 170.
description of "unnatural offence" described under Indian Penal Code, 1860.452

In case of bestiality our courts mostly relied on the approach of English case laws irrespective of the religion of the party. The offence of the bestiality must be proved and mere attempt will not be sufficient to constitute the offence. It is not necessary that the accused must be convicted of the offence under the criminal law.453

Under ancient Hindu Laws in case of bestiality, and especially in case the animal was a cow, the fine was 500.454 As regards, bestiality, if a man has committed this crime, he does not incur Hidd or stated punishment as this act has not properties of whoredom.455

Renunciation of World

If either of the spouse enters into any religious order by renouncing the world, then it becomes sufficient ground for divorce in certain countries. There are 'religious orders' which prohibit their members to cohabit or to inspire them to disbelieve in cohabitation between husband and wife. It is pertinent to note that this ground is peculiar to Hindu Law as no other personal Law provides this as a ground for matrimonial relief.456 A Faqir or Sanyasi comes under the preview of such a religious order. Like conversion, renunciation also affords wonderful opportunity for collusive divorce. Therefore the court should examine minutely every case of divorce filed on either of these grounds. Without the performance of certain necessary ceremonies, a man or a woman cannot be considered or have entered into any religious order. The renunciation must be complete and final withdrawal from worldly affairs by entering into a religious order or ascetism.457 In an Allahabad case,458 Sulaiman and Kendall, JJ., observed:

"It cannot be doubted that the mere fact that a person declares that he has become a sanyasi or that he is described as such or wears clothes ordinarily worn by the sanyasis could not be sufficient to make him a perfect sanyasi. It is essential that he must enter into the fourth stage of his life in accordance with the necessary requirements. He must not only retire from all worldly interest and become dead to

452 The Indian Penal Code, 1860, Section 377.
454 Supra note 432, at 503.
455 Supra note 27, at 185.
456 Supra note 87, at 192.
the world, but to attain this he must perform the necessary ceremonies, without which the renunciation will not be complete."

Merely calling oneself a sanyasi or wearing clothes ordinarily worn by a sanyasi is not enough. He/She must perform the ceremonies necessary for the same.459

**Not Heard of as Alive for Seven Years**

Absence for a longer period has been recognized as a ground for divorce in many countries of the world. In India enactments, namely the Dissolution of Muslim Marriage Act, 1939,460 the Special Marriage Act, 1954461 and the Hindu Marriage Act, 1955,462 the Parsi Marriage and Divorce Act, 1936,463 and the Divorce Act, 1869,464 as amended in 2001, provide for the long absence as a ground for divorce.

According to Indian Evidence Act, 1872, "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 that he is alive is shifted to the person who affirms it."465

The crucial question is, whether on the presumption of death, he or she becomes widower or widow and, thus marriage stand dissolved. Whether this presumption permits him or her to contract a second marriage. The position becomes more awkward if the missing spouse reappears. To avoid all these embarrassments, all statutes provide for approaching the court to dissolve the marriage on the ground that the husband or the wife was not heard of as alive for specified statutory period. 'After the decree has been made absolute, the petitioner may remarry and the re-marriage will be valid even if the vanished spouse reappears.'466 It may be noted 'that 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.'467

The important words, 'who would naturally have heard of it' would include the petitioner and other near relatives of those who would otherwise be interested in him

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460 The Dissolution of Muslim Marriages Act, 1939, Section 2(i).
461 The Special Marriage Act, 1954, Section 27(1)(h).
462 The Hindu Marriage Act, 1955, Section 13(1)(vii).
463 The Parsi Marriage and Divorce Act, 1936, Section 31.
464 The Divorce Act, 1869, Section 10(1)(vi).
465 The Indian Evidence Act, 1872, Section 108.
466 Supra note 193, at 431.
or her. However, a wife who, for example, left her husband and is in keeping of another, is not one of the persons who would naturally hear of him if he were alive.\textsuperscript{468}

If the Police is unable to serve the warrant for seven years that is considered to be sufficient evidence of missing of the spouse.\textsuperscript{469} It is notable that there is presumption of law as to the continuance of life or death but when a person has not been heard of for seven years by those who would naturally have heard of him or her had he been alive, and inquiries in vain have been made as to his or her whereabouts, he or she may be presumed to be dead. But it cannot be said as to what should be the date of the death of the person. It is the duty of the person who alleges the presumption to prove the date of death.\textsuperscript{470}

So all the personal statutes regarding dissolution of marriage except the Dissolution of Muslim Marriage Act, 1939, provide for dissolution of marriage if the whereabouts of the spouse are not known for seven years or more. Under the Dissolution of Muslim Marriages Act, 1939, which provides for the grounds on which a woman married under Muslim law may seek a divorce, one of the ground is that the whereabouts of the husband have not been known for a period of four years. It is also, that this ground under this Act is available to only wife, and the husband needs no ground at all.\textsuperscript{471} Of course, this period is qualified by certain conditions and they must be satisfied before a decree may be made absolute. Conditions are:\textsuperscript{472}

- six months have elapsed since passing the decree;
- the husband did not appear either in person or through an authorized agent before the court to satisfy the court that he is prepared to perform his conjugal duties.

This four year rule is known to both Maliki and Safei Law.

"According to Hanafis if the wife of the missing man remarries after waiting for four years and after observing the usual 'iddat' and he appears, "the wife would be for him" whilst any children born to her by her second husband would below to latter."\textsuperscript{473}

\begin{itemize}
\item \textsuperscript{468} Kamtabai v. Umabai, AIR 1929 Nag 127.
\item \textsuperscript{470} V.K. Virdi, \textit{The Grounds for Divorce in Hindu and English Law}, 202 (1972).
\item \textsuperscript{471} Supra note 87, at 193.
\item \textsuperscript{472} The Dissolution of Muslim Marriage Act, 1939, Section 2(i) and proviso to it. See Section 3 for the procedural details as well as to substantive law.
\item \textsuperscript{473} Supra note 28, at 95.
\end{itemize}
Breakdown of Marriage:

Large number of countries recognize separation between parties to marriage. Separations are made in the hope that the parties will come together again in near future and in most of the cases success remains simply at arms length and which can be easily bagged by giving an opportunity to the parties to have some sort of adjustment. But, unfortunately, it is not true in all cases. Cases do exist, as they existed in the past, in which such a hope had always been a sweet dream of reconciliation.\textsuperscript{474} Separation is based on the fact that marriages very often fail not because of the fault or guilt of one of the spouses but because the spouses are not compatible in their temperament. Despite their best efforts, they are unable to live together as husband and wife.\textsuperscript{475} Separation may be of two kinds:

1. Separation by mutual consent.
2. Separation by judicial pronouncement.

The basic common factor in these two sorts of separation is the non-cohabitation of the parties during such separation.

Separation by Mutual Consent

Separation by mutual consent or by an agreement is a sort of voluntary separation. Fault or ground based matrimonial litigation is time consuming and expensive. It also involves a lot of mud-sling there by further embittering the relationships and thwarting prospects of amicable resolution of ancillary issues like maintenance, child-custody/visitation and, so on.\textsuperscript{476} Before the introduction of the theory of mutual consent the only avenue open to such a couple was to fabricate a fault ground where one spouse accuses the other of a matrimonial fault and the other does not contests it. This is termed as a 'collusive' decree and is specifically prohibited under the matrimonial statutes. However, left with no other option, the couple would be forced to collude to secure their release from the matrimonial bondage. Easy outlets to do so under the Indian Penal Code and the Domestic Violence Act often result in harassment to the parties, even though they may have no apparent role attributed to them.

To remedy the problem faced by such couples, the notion of a 'consent divorce' came to be included in matrimonial laws. The purpose was to enable couples

\textsuperscript{474} Supra note 26, at 179.
\textsuperscript{475} Supra note 86, at 49.
\textsuperscript{476} Supra note 87, at 153.
to adopt honest rather than fraudulent or collusive means to achieve legitimate ends.\textsuperscript{477}

Divorce by mutual consent has always been a highly controversial and much debated issue. Certain systems of the world have denied recognition to divorce by mutual consent. At present day lawyers in general daily face innumerable number of clients, both literate and illiterate, who seek their help in the matter of divorce by mutual consent.\textsuperscript{478}

In a fast evolving society of urban set-ups and escalating cross-border matrimonial unions, divorces settled through mutual consent petitions to avoid ugly, protracted and harmful litigations are being increasingly resorted to through the process of alternative dispute resolution and mediation centres now available in all courts of India.\textsuperscript{479}

This type of dissolution conforms to the idea that marriage is a contract; consequently, it allows spouses to negotiate the conditions and effects of their divorce. Although either party may initiate this type of dissolution, in systems that require court endorsement or some other formal proceedings, usually spouses must apply jointly although some systems allow one or other to apply for validation.\textsuperscript{480}

The consent theory is a sharp departure from the sacramental notion of marriage and brings marriage to the level of a purely consensual contractual partnership. 'If spouses are free to enter a matrimonial contract, they are equally free to withdraw from the contract of marriage' is the premise which governs the notion of 'consent divorce'. Some legal scholars believe that this spelled the virtual death of traditional Hindu Law which viewed marriage as a sacrament (Derrett 1978).\textsuperscript{481}

\textit{Parsi Law}

Divorce by mutual consent was incorporated in the Parsi Marriage and Divorce Act, 1936, by an amendment in 1988.\textsuperscript{482} The relevant provisions states:\textsuperscript{483}

(1) Subject to the provisions of this Act, a suit for divorce may be filed by both the parties to a marriage together, whether such marriage was solemnized before or after

\begin{itemize}
  \item \textsuperscript{477} Supra note 84, at 49.
  \item \textsuperscript{478} Supra note 26, at 194.
  \item \textsuperscript{479} Anil Malhotra, "Opening\textit{ Prenuptial window for Divorce}", The Tribune, 21 August 2013.
  \item \textsuperscript{480} Women Living Under Muslim Laws, 251 (2006), a handbook by The Russell Press, Nottingham, UK.
  \item \textsuperscript{481} Supra note 84, at 49.
  \item \textsuperscript{482} Section 32B inserted by the Parsi Marriage and Divorce (Amendment) Act, 1988.
  \item \textsuperscript{483} The Parsi Marriage and Divorce Act, 1936, Section 32B.
\end{itemize}
the commencement of the Parsi Marriage and Divorce (Amendment) Act, 1988, 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 that the
marriage should be dissolved:

Provided that no suit under this sub-section shall be filed unless at the date of
the filing of the suit one year has lapsed since the date of the marriage.

(2) The Court shall, on being satisfied, after hearing the parties and after making such
inquiry as it thinks fit, that a marriage has been solemnized under this Act and the
averments in the plaint are true and that the consent of either party to the suit was not
obtained by force or fraud, pass a decree declaring the marriage to be dissolved with
effect from the date of the decree.

It is significant to note that the Act does not provide for any interregnum
between the filing of the petition and the second motion. Thus, without any time lag
the court may grant the decree after verifying the averments in the petition, and also
that the consent of either party was not obtained by force or fraud. Thus, it would
imply that if there was no force or fraud when the petition was jointly filed, there
cannot be any withdrawal unilaterally.484

Christian Law

Under the Indian Divorce Act, 1869, prior to the Indian Divorce (Amendment)
Act, 2001, there was no provision for divorce by mutual consent. Since the Roman
Catholic Church was opposed to the notion of divorce, and accepted the sacramental
notion of a marriage, there was opposition from the church to introducing the mutual
consent as a ground for divorce into the law applicable to Christians. But finally, after
sustained struggle, this ground was included in the Indian Divorce Act, 1869, through
an amendment in 2001.485

There have been hard cases where courts realised the hardships of the parties
and the futility of retaining the marriage tie but in the absence of any provision
enabling parties to obtain a divorce by consent, no effective relief could be given. Reynold Rajamani v. Union of India,486 is a pertinent, though unfortunate, case in this
context. To state the facts briefly: a marriage was solemnized under section 27 of the
Indian Christian marriage Act, 1872. After about 12 years of marriage, the couple

484 Supra note 87, at 172.
485 Supra note 84, at 50.
486 AIR 1982 SC 1261.
presented a joint petition for divorce by mutual consent under section 28 of the Special Marriage Act, 1954. The trial court dismissed their application since the ground of mutual consent under the Special Marriage Act, 1954 could not be invoked in the case of marriage governed by Indian Divorce Act, 1869 (as was the marriage in this case) and the Indian Divorce Act, 1869 did not provide for divorce by consent. A writ petition before Delhi High Court against this order was also filed. In appeal to the Supreme Court, the couple applied for permission to amend their joint petition to enable them to rely on section 7 of the Indian Divorce Act, 1869 read with section 1(2)(d) of the Matrimonial Causes Act, 1973, of England. The amendment was allowed and they filed an amended petition in the trial court seeking divorce on the ground that they had been living separately for over two years and the marriage had irretrievably broken. Having failed at the trial court and the High Court, the parties approached the Supreme Court. It was argued that the section 1(2)(d) of the English statute must be deemed to have been incorporated in the Indian Divorce Act, 1869, by virtue of section 7 of the Act. According to the Supreme Court however the expression 'principle and rules' does not refer to the grounds on which a suit may be instituted. What was contemplated was the manner in which the court could exercise the jurisdiction in deciding a case. Were it to be interpreted otherwise, there would be conflict with section 10 of Indian Divorce Act, 1869, which contains the limited grounds for divorce. The counsel's plea that the court should adopt a policy of 'social engineering' and import into section 7 the content of section 28 of the Special Marriage Act, 1954 and section 13B of the Hindu Marriage Act, 1955, was also turned down. 'This is a matter of legislative policy. Courts can not extend or enlarge legislative policy by adding a provision which was never enacted there', the court remarked. Likewise in Elizabeth v. Abraham, confirmation of a decree of dissolution granted by lower court on the basis of a compromise was refused by the High Court on the ground that the Indian Divorce Act, 1869 does not permit divorce on such ground.

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487 This is one of the grounds available under English statute.
488 Section 7 states: 'Subject to the provisions contained in the Act, the High Court and the District Court shall, in all suits and proceedings here under, act and give relief on principles and rules which in the opinion of the said courts, are as nearly as may be comfortable to the principles and rules on which the Court of Divorce and Matrimonial Causes in England for the time being acts and gives relief.'
489 AIR 1982 SC 1261, at 1264.
490 AIR 2000 Bom 276.
The amended Indian Divorce Act, 1869 has brought about significant changes in the Christian divorce law.\textsuperscript{491} Divorce by mutual consent has also been introduced by inserting a new section 10A. It is pertinent to note that under this provision, the minimum period of separate living prescribed is two years against one year in other personal laws.

\textit{Jewish Law}

Jewish Law allows a "Get" in case of mutual agreement. 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 the party or 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, as 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. Rabbine authorities felt that. When marriage had become burdensome to both parties and divorce is based on mutual consent, the evils of hypocrisy, deceit, perjury, acrimony and immorality are avoided. The principle behind is, "Contra bono mores".\textsuperscript{492}

\textit{Muslim Law}

Within Muslim law, since its inception in the 7th century, was based on the premise of contractual and dissoluble marriages, there was no difficulty in accepting the notion of a consent divorce.\textsuperscript{493} While there is no explicit statutory provision providing for divorce by mutual consent, the Muslim Law does recognise divorce by mutual consent in the form of Khula and Mubarat. Dissolution of marriage by the consent of the spouses is a peculiar feature of Islamic law. Prior to Islam the wife had practically no right to ask for divorce; it was Quranic legislation which provided for this form of relief.\textsuperscript{494} The Fatawa Alamgiri lays down:

"When married parties disagree and are apprehensive that they cannot observe the bounds prescribed by the divine laws, that is, 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

\textsuperscript{491} The Indian Divorce (Amendment) Act, 2001 (Act 51 of 2001).
\textsuperscript{492} http://www.jewishvirtuallibrary.org/jsource/judaisam, visited on 5-8-2013.
\textsuperscript{493} Supra note 84, at 49.
\textsuperscript{494} Quran, II: 229.
a khula, and when they have done this a talaq-ul-bain would take place.”

The two essential conditions are consent of the husband and wife and, as a rule, iuwaz (return consideration) passing from the wife to husband. If the desire to separate emanates from the wife it is called khula; but if the divorce is effected by mutual aversion (and consent) it is known as mubarat.

Khula or redemption literally means 'to lay down'. In law, it means laying down by husband of his authority or right over his wife. As per the definition given in *Moonshee-Buzul-ul-Raheem v. Lutteefuoonisa*:

"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. It signifies an arrangement entered into for the purpose of dissolving a connubial connection in lieu of compensation paid by the wife to her husband out of her property."

Mubarat, which means mutual release, is also a form of dissolution of marriage contract. It signifies a mutual discharge from the marriage claim. In mubarat, the desire for separation is mutual. Thus there is mutuality of consent. In this mode, the offer may be either from the side of wife or from the side of the husband. When the offer is accepted, it becomes an irrevocable divorce.

The law of khula and mubarat has now assumed a great deal of importance in India. According to Hanafi law the husband proposes dissolution and the wife accepts it at the same meeting. The proposal and the acceptance need not be in any particular form. The contract itself dissolves the marriage and operates as a single talaq-e-bain, and its operation is not postponed until the execution of khuła-nama (document of release).

As a general rule, in khula the wife makes some compensation to the husband or gives up a portion of her maher; but this is not absolutely necessary. The true position is that once consent is proved and the dissolution has been effected the question of releasing the maher or making compensation is a question of fact to be determined with reference to each particular case, and there is no general presumption

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495 *Supra* note 28, at 506.
497 *Supra* note 264, at 129.
498 8 MIA 395, at 399.
499 *Supra* note 87, at 173.
500 *Supra* note 269, at 169.
that the husband has been released of his obligation to pay dower.\textsuperscript{501} Tyabji has shown that jurists of authority differ on this question:

"Abu Hanafi holds that in the absence of agreement maher is deemed to be relinquished by the wife both by khula and by mubarat. Abu Yusuf lays down that maher is deemed to be relinquished by mubarat, but not by khula; and Imam Muhammad holds that maher is deemed to be relinquished neither by khula nor by mubarat."\textsuperscript{502}

Even while there is no explicit statutory provision for divorce by mutual consent, in an interesting case, the court did concede a couple's request to grant divorce by consent. In \textit{Mh. Abdul Zahl Ahmed v. Marina Begum},\textsuperscript{503} a wife filed an application for divorce under the provisions of Dissolution of Muslim Marriages Act, 1939, on the ground of cruelty and non-performance of marital obligations by the husband. Thereafter both the husband and wife filed a joint application for divorce by mutual consent. The court held that the grounds for divorce under the section were already met, so a decree of divorce can be passed in the terms of the compromise between the parties even in the absence of a provision of divorce by consent under the Act, more so when the husband had already married again and the wife's marriage was also fixed up.

Khula and mubarat operates as a single irrevocable divorce. Therefore, marital life cannot be resumed by mere reconciliation; a formal marriage is necessary. In either case iddat is incumbent on the wife and, in the absence of agreement to the contrary, the wife and her children do not lose the rights of maintenance during the period.\textsuperscript{504}

Since these provisions are under uncodified Muslim Law, it is not mandatory to obtain a judicial decree. It can be done through a divorce agreement, signed by witnesses and the parties concerned. An agreement endorsed by a qazi is helpful but not mandatory.\textsuperscript{505}

\textit{Special Marriage Act, 1954}

Of course, the concept of mutuality of dissolution of a marriage had gained

\textsuperscript{501} Supra note 253, at 320.
\textsuperscript{502} Supra note 269, at 173.
\textsuperscript{503} AIR 1999 Gau 28.
\textsuperscript{504} Supra note 253, at 319.
\textsuperscript{505} Supra note 84, at 50.
legislative recognition in the Special Marriage Act, 1954. Prior to 1976, the only Indian statute which had a provision of divorce by mutual consent was the Special Marriage Act, 1954. Persons married or registered under the Act could get their marriage dissolved by mutual consent. The Special Marriage Act, 1954 which provided for civil marriage between persons belonging to any community, religion, nationality or domicile was perceived to be for the benefit of the educated, sophisticated and enlightened urban-based elites.  

Under this Act the provision in connection with the dissolution of marriage by mutual consent reads as under:  

(1) 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 by both the parties together 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 that the marriage should be dissolved.  

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the district court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized under this Act, and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of the decree.  

The Supreme Court held that a party to a petition for divorce by mutual consent under section 13B of the Hindu Marriage Act, 1955 is in part material with section 28 of the Special Marriage Act, 1954. Further the Act provides that when divorce is sought on the ground of mutual consent, the court has to satisfy itself that such consent has been obtained without any force, fraud or undue influence.  

In order to get relief under the provision of this Act, it is mandatory that the marriage should have either been performed under the provisions of this Act, or registered thereunder. Thus in Reynold Rajamani v. Union of India, where the parties were married under the Indian Christian Marriage Act, 1872, and their petition

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507 The Special Marriage Act, 1954, Section 28.
508 Sureshta Devi v. Om Prakash, AIR 1992 SC 1904
509 The Special Marriage Act, 1954, Section 34(1)(c)
510 AIR 1982 SC 1261.
for divorce by mutual consent under section 28 of the Special Marriage Act, 1954, was dismissed, the court held that the ground could not be availed of by the parties, as they were governed by the Indian Divorce Act, 1869, which did not provide for divorce by mutual consent.

Hindu Law

Under Hindu family laws, where the marriage is considered as a sacrament and not a contract, statutory provisions and customary rites (divorce by custom) under Hindu Law allow divorce on the ground of mutual consent. Customary divorce by mutual consent of the parties worked satisfactorily among several Hindu Communities. In these customary divorce cases generally mutual consent was the ground of divorce. Such cases included the facts which showed cruelty or failure to provide for maintenance on the part of the husband; the final act of the high drama is always related to mutual consent by which alone the tie comes to an end. In a case *Pemabai v. Channoolal*, the marriage of the parties was dissolved by the Panchayat on the basis of mutual consent of the parties. Later on, 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 14 years old and was not capable of giving a valid consent. Rejecting the suit court observed that the wife had at that time sufficient understanding and since such divorces were recognized in the caste, the marriage stood dissolved.

The idea enshrined in section 13B of the Act, is a new innovation in the law of Hindu Marriage which was introduced for the first time through Act No. 68 of 1978 by the Marriage Laws (Amendment) Act, 1976. This ground is now incorporated into most marriage laws as a progressive step to end incompatible or acrimonious relationships, without the necessity of having to 'wash dirty linen in public' through exaggerated allegations of sexual infidelity, cruelty or desertion. The provisions of this section evidently help those spouses who cannot live together as husband and wife. Hence the right to divorce by mutual consent, being the creation of the statute, could be granted only on legal basis of a Hindu Marriage by treating it as ordinary form of contract by mutual consent. Just as the parties can obtain a consent decree

511 The Hindu Marriage Act, 1955, Section 13B.
512 Supra note 26, at 196.
514 Supra note 513, at 50.
515 Supra note 439, at 176.
from the courts under Order 23 Rule 3 C.P.C., so they can now under section 13 B of
the Hindu marriage Act, 1955, obtain a consent decree.\textsuperscript{516} Section 13B was introduced
for dissolving 'dead marriage with the minimum of hostility and the maximum of
humanity'.\textsuperscript{517} Divorce by mutual consent is no longer foreign to Indian law of divorce.
The Supreme Court said that all cases of consent decree could not be said to be
collusive and divorce by mutual consent could be obtained.\textsuperscript{518}

The requirements which have to be complied with under this provision thus
are:

i. the parties have been living separately for a period of at least one year; The
Supreme Court has now defined 'living separately' as 'not living as husband
and wife', or in other words not having a conjugal (sexual) relationship. Hence
a couple residing under the same roof is not prevented from filing of divorce
by mutual consent if they affirm that they have ceased to have a conjugal
relationship for a period of one year.\textsuperscript{519}

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

iii. they have mutually agreed to have the marriage dissolved.

At the outset it may be pointed out that a petition under this section can be
filed only by the spouses. When both the parties are well educated and mature, the
father of either party has no \textit{locus standi} or right to be impleaded as a party in such
matrimonial petitions unless the spouses or any of them is a minor or of unsound
mind.\textsuperscript{520}

In the Indian context, the legal approach towards matrimonial disputes has
been focused on divorce-oriented litigation, rather than prenuptial deeds. However, a
recent Supreme Court decision shows a different way. In a decision rendered on July
15, 2013, the Supreme Court accepting a tripartite settlement deed executed between a
woman, her husband and his mother through mediation, permitted the parties to part
ways upon onetime payment of Rs. 45 lakh to the wife with the condition that both
would not seek divorce on any other ground. The couple married for 30 years agreed
to withdraw all their pending litigations and the wife agreed not to cause any
disturbance or invade the privacy of her husband and his 83 years old mother living in

\textsuperscript{516} K. Om Parkash v. Nalini, AIR 1986 AP 167 (DB).
\textsuperscript{518} Saroj Rani v. Sudarshan Kumar Chadha, AIR 1984 SC 1562.
\textsuperscript{519} Sureshta Devi v. Om Prakash, AIR 1992 SC 1904.
\textsuperscript{520} Ranjana Munshi v. Taral Munshi, (1996) 1 HLR 130 (MP).
their household property. The sum of 45 lakh paid in full and final settlement to the wife was towards all her financial claims. Both parties, living separately since 2009, agreed that they shall have nothing to do with each other's lives and will not undergo any divorce proceedings. the wife will not claim restitution of conjugal rights or rights of residence in the household. However, in the event of remarriage of husband, the agreement shall stand terminated and the wife would be entitled to revive her claim for maintenance or alimony for the present and future, since the sum of Rs. 45 lakh shall not be considered as an amount towards dissolution of marriage and payment of permanent alimony. The court accepting the deed and the undertakings of the parties, disposed of the matter and permitted the parties to file the same before all courts where the litigation was pending with liberty to invoke the provisions of the Contempt of Courts Act, 1971, upon breach if any.\textsuperscript{521}

While the above ruling from one extreme end of the continuum, Lok Adalats can be placed at the other. Here it is possible to file for mutual consent divorce and obtain a decree on the same day. Lawyers practising in the family courts prefer to move the case from the regular court to a Lok Adalat, rather than couple having to wait for six more months to obtain decree.\textsuperscript{522} In Mumbai, the marriage bureaus also issue quick divorce by invoking custom. An affidavit is prepared by the lawyers that the parties are willing for the divorce and the terms of the divorce are mentioned and this document is notarised. The parties believes that the divorce is valid. After the case of women who was deprived from her right to custody of children and maintenance was brought to the light by media and an NGO initiated proceedings, the Bombay High Court issued directions that such divorces are not valid and a court decree is essential.\textsuperscript{523} But this creates problem for a Muslim woman contracting a subsequent civil marriage under Special Marriage Act, as they could not produce a court decree of divorce since they were divorced through an oral talaq. In a particular case the woman herself had accepted the talaq and there was a written document to prove talaq. She was constrained to move the High Court and obtain directions to the Registrar of Marriages to register the marriage.\textsuperscript{524}

As of now, mutual consent is the most resorted to method for divorce if parties

\textsuperscript{521} Anil Malhotra, "Opening Prenuptial window for Divorce", The Tribune, 21 August 2013.
\textsuperscript{522} Supra note 84, at 57.
\textsuperscript{523} Order passed by the Division Bench of Bombay High Court on 20 October 2004 in Majlis Manch v. State of Maharashtra, WP 2425/2004 (unreported).
are principally in agreement on the terms and conditions of termination of marriage, which in itself reflects acceptable breakdown of marriage. However Parliament is looking at defining and bringing in irretrievable breakdown of marriage as an additional ground of divorce, through the process of legislation may be time consuming. Though the irretrievable breakdown of marriage is not recognized as a ground of divorce under existing matrimonial laws, the apex court, in exercise of its vast powers under Article 142 of the Constitution of India, may pass such decree or make such order as it is necessary for doing complete justice in any cause or matter pending before it.

The law of divorce has evolved from divorce under exceptional circumstances to divorce on demand because it is being increasingly realised that there is no point in thrusting a relationship on unwilling partners who see in marriage more of misery than happiness. Our legislature had already gone much ahead on aping the west by introducing breakdown theory of divorce in different matrimonial laws. Till now we have followed vigorously English law of divorce.

Adequate protection and financial support to an abandoned spouse needs to be secured in advance to avoid flights of fancy, leaving a hapless partner with nothing to survive on, if a marriage goes sour. Securing protection for children from inter-parental child removal is another dimension of breaking marriages when abduction of children is resorted to by parents to settle egos. Such facets of life of new generations makes the mind ponder to evolve solutions which as of now do not exist in the statute book but are now necessitated with the advent of time.

In a prolonged messy litigation, the court may bury the hatchet in the facts and circumstances of a case under its inherent jurisdiction. The court in B.S. Joshi v. State of Haryana, and G.V. Rao v. L.H.V. Prasad, has very eloquently emphasised the need to encourage the court settlements in matrimonial disputes. It concluded, "........that the parties may ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in the court of law where it takes years and years to conclude and in that process the parties lose their young days in chasing their cases in different courts." Therefore, there is far greater emphases in

525 Supra note 87, at 174.
526 Supra note 26, at 200.
527 Supra note 521.
the Indian context to settle post marriage matrimonial disputes in the event of divorce oriented litigation, rather than focusing on prenuptial agreements. Law looks at the cure and not the remedy to prevent the problem. The sanctity of marriage cannot be allowed to be undermined by the whims of one of the annoying spouses. The law allows divorce by mutual consent, but its intent is not to facilitate the dissolution of marriage. To save marriage and not to hasten its dissolution should be the core concern of courts.\textsuperscript{530}

**Separation by Judicial Pronouncement**

Non-resumption of cohabitation after a decree of judicial separation or non-compliance with a decree for restitution of conjugal rights is a ground for divorce under various statutes. Infact, when parties have not been able to resume marital life despite court decree of restitution or when a period of judicial separation has not brought any change of mind in them, it is desirable to treat the relationship as beyond repair. In *Herrick v. Herrick*,\textsuperscript{531} it was observed that the majority view taken in the American decisions on the point rests on the probability that the husbands and wives who have lived apart for the statutory number of years cannot live together in happiness. If this is so, there is no reason why the parties should be denied a divorce. It is desirable that in the best interest of the state and society divorce should be granted in such cases. There is nothing to be gained by refusing it, and a divorce will reduce the danger of immorality and perhaps give both the parties a second chance of marital happiness.

Where factually marriage has broken down irretrievably, in such cases no useful purpose will be served in finding out the guilt or innocence of the parties and for such cases law proceeds to cut-off the tie.\textsuperscript{532}

If two or more years have passed without resumption of marital life in spite of decree by a competent court, it was considered unrealistic to except that some day spouse will unite and marriage will work. Permitting only a decree-holder to move the court for divorce led to a settlement. If he chose not to do so a curious situation could arise. Opposite party was left with no remedy and the marriage was, as it were, a limbo. This "fault" theory was, therefore, pushed and "break-theory" had been pushed

\textsuperscript{530} Virender Kumar, *"Divorce By Mutual Consent"*, The Tribune, 25 July 2011.

\textsuperscript{531} 55 Nev. 59; 25 P. (2nd) 378 (1933).

\textsuperscript{532} Supra note 26, at 180.
step further.\textsuperscript{533} Having progressed from fault to consent theory of divorce, arriving at the break-theory was a logical step ahead.\textsuperscript{534}

In a convoluted manner, this theory found a place in the matrimonial statutes through an amendment in 1976. The above two situations i.e., non-resumption of cohabitation after a decree of judicial separation and non-compliance with a decree for restitution of conjugal rights afford a ground for matrimonial relief under the Hindu Marriage Act, 1955\textsuperscript{535}, the Special Marriage Act, 1954\textsuperscript{536}, and the Parsi Marriage and Divorce Act, 1936\textsuperscript{537}. Under the Divorce Act, 1869 as amended in 2001 only non-compliance of restitution decree for two years or above is a ground for dissolution of marriage.\textsuperscript{538}

The Law Commission, in its 71st report, had considered this issue and recommended the adoption of this ground into family law in India. Based on the recommendations of the Law Commission, a bill was introduced in Parliament, but it was withdrawn as it met with great deal of opposition by several women’s organizations.\textsuperscript{539}

\textit{Hindu Law}

The law in India has recognized only Judicial Separation (under the decree of court) and not the separation by agreement. Separation by agreement was recognized under textual (old) Hindu Law and it still continues. In India judicial separation may ripen into divorce provided the statutory period passes without resumption of cohabitation between the spouses. Under such circumstances either party will be entitled for relief by way of a decree of divorce.\textsuperscript{540}

Prior to 1964 a petition for divorce could be filed under clauses (viii) and (ix) of subsection 1 of section 13 only by a party who had obtained a decree of judicial separation or restitution. The party against whom the decree was passed had no \textit{locus standi}. Also a period of two years was prescribed before such decree could be used as a ground. The result was that quiet often a spouse would simply obtain a decree for restitution or judicial separation (without any intention to resume cohabitation) and

\begin{itemize}
  \item \textsuperscript{533} \textit{Supra} note 439, at 162.
  \item \textsuperscript{534} \textit{Supra} note 86, at 59.
  \item \textsuperscript{535} The Hindu Marriage Act, 1955, Section 13(1A)(i)and(ii).
  \item \textsuperscript{536} The Special Marriage Act, 1954, Section 27(2)(i)and(ii).
  \item \textsuperscript{537} The Parsi Marriage and Divorce Act, 1936, Section 32A.
  \item \textsuperscript{538} The Divorce Act, 1869, Section 10(1)(viii).
  \item \textsuperscript{539} \textit{Supra} note 506, at 19.
  \item \textsuperscript{540} \textit{Supra} note 26, at 181.
\end{itemize}
then keep quiet. Thus the marriage tie was kept legally intact but practically dead. The
judgement debtor had no right to go to the court for divorce and the decree holder, for
reasons which could be social, economic or personal, could block the way of the other
party by neither resuming cohabitation nor seeking a divorce.\textsuperscript{541} In the year 1964, the
provision was amended and section 13(1A) was introduced. The clause has been
further amended in 1976 and the period of time lapse after the decree has been
reduced from two years to one year. The position as it stands today, thus is that if after
a period of one year of the decree of separation or restitution, the parties do not come
together then any one of them can move the court for divorce under section 13 1A(i)
and (ii).

After the amendment of 1964, it has been said that irretrievable breakdown of
marriage in its two versions, viz., non-compliance with a decree of restitution for one
year and non resumption of cohabitation after a decree of judicial separation for one
year is part of Hindu matrimonial law. But irretrievable breakdown of marriage, per
se, is not ground of divorce.\textsuperscript{542}

The Hindu Marriage Act, 1955, also lays down,\textsuperscript{543} provision to the effect that
where the relief desired is divorce, the court may grant judicial separation, except in
cases where the petitions of divorce are founded on the grounds given in clauses (ii),
(vi) or clause (vii) of sub-section (1) of section 13. According to the Law Commission
of India:\textsuperscript{544}

"This discretion will be exercised where, in view of the special circumstances
of the case the court is of opinion that in the interest of justice the marriage should not
be immediately dissolved. We do not propose to confine this discretion only to cases
where the grant of divorce is the alleged adultery of the respondent. Guidance in the
exercise of the discretion could, of course, be drawn from the decisions relating to
exercise of the discretion of the court where adultery is a ground of divorce."

Where after a decree of judicial separation obtained by a husband, the wife
merely makes an assertion that she wishes to join the husband, that by itself would not
stand in the way of the husband from seeking relief under this provisions. The decree

\textsuperscript{541} Supra note 87, at 135.
\textsuperscript{542} Ashok Kumar v. Shabram Bhatnagar, AIR 1989 Del 12.
\textsuperscript{543} The Hindu Marriage Act, 1955, Section 13A.
\textsuperscript{544} 59th Report of Law Commission of India on Hindu Marriage Act, 1955 and Special Marriage Act,
of separation needs to be set aside to negate its effect.\textsuperscript{545}

The ground is, in essence, a recognition of the principle that a marriage which does not work should be allowed to be dissolved. The amendment of 1964 in section 13 of the Hindu Marriage Act, 1955, in a way, was a step that advanced this principle. However, the extent to which the advance was achieved has become a matter of uncertainty because of the existence of another competing doctrine, viz, that a party cannot take advantage of his or her own wrong. This doctrine is given statutory recognition in section 23(1) of the Hindu Marriage Act, 1955. The question then is, which of these two competing principles is to win when after a decree of restitution of conjugal rights or judicial separation, the party against whom the decree was passed i.e., the party who was originally in the wrong petitions for divorce? Judicial attitudes have been conflicting.\textsuperscript{546}

A reference may be made of \textit{Waryam Singh v. Pritpal Singh},\textsuperscript{547} the husband’s petition for divorce on ground of non-resumption of cohabitation for over two years after a decree of judicial separation obtained by the wife, was refused. According to the court, the husband was a guilty party and his wrong entitled the wife to the separation decree; he cannot therefore avail of this ground to obtain a divorce. This was pre-1964 case where only decree holder was entitled to obtain relief and the period of waiting was two years.

In \textit{Chamanlal v. Mohinder Devi},\textsuperscript{548} \textit{Somewara v. Leelavathi},\textsuperscript{549} \textit{Sayal v. Sayal},\textsuperscript{550} and \textit{Laxmibai v. Laxmichand},\textsuperscript{551} \textit{Kanak Lata v. Amal Ghosh},\textsuperscript{552} also, the courts refused to grant relief to the petitioner husbands on the ground that they could not take advantage of their own wrong. The courts held that the decrees of restitution in these cases could not be compiled with, due to conduct of husbands. In \textit{Shantabai Prabhakar v. P.A. Kothale},\textsuperscript{553} a wife obtained a decree for restitution, but the husband showed no inclination to comply. Instead, he applied for divorce. Dismissing his petition, the High Court held that the section 23(1)(a) of the Hindu Marriage Act, 1955, could not be ignored. If the judgement debtor is allowed to disobey a decree

\textsuperscript{545} \textit{Dolly Roy v. Raja Roy}, AIR 2010 Ori 1.
\textsuperscript{546} \textit{Supra} note 87, at 137
\textsuperscript{547} AIR 1961 Punj 320.
\textsuperscript{548} AIR 1968 Punj 287.
\textsuperscript{549} AIR 1968 Mys 275.
\textsuperscript{550} AIR 1968 Punj 489.
\textsuperscript{551} AIR 1968 Bom 332.
\textsuperscript{552} AIR 1970 Cal 328.
\textsuperscript{553} (1977) MahLJ 453.
and then seek relief under section 13(1A) the result would be that greater the defiance of a decree the better would be his chance of getting a divorce. This was not in the interest of the society.

In *Soundarammal v. S.M. Nadar*, 554 a wife obtained a decree on the ground of husband's adultery. Two years later, the husband filed for divorce under section 13(1A). The wife resisted the same on the ground that he cannot take advantage of his own wrong and that section 13(1A) is subject to section 23(1)(a). The subordinate court held that the husband was living in adultery and so he cannot get a divorce. However, the Appellate Court held that no new ground was alleged by the wife to resist the divorce petition which has to be ordered as a matter of course as soon as the statutory period is over. On further appeal by the wife, the High Court held that the husband cannot take advantage of his own 'wrong'.

In *Hirachand Srinivasa Managaonkar v. Sunanda*, 555 the Supreme Court held that non-payment of maintenance by husband despite the court order and his continuing to live in adultery even after a decree of judicial separation obtained by the wife on the ground of husband's adultery, amounted to wrongs on the part of the husband so as to disentitle him to the relief under section 13(1A). According to the court, even after a decree of judicial separation, it is the duty of the parties to do their part of cohabitation. The husband was expected to act as a dutiful husband towards the wife and the wife was expected to act as a devoted wife towards the husband.

On the other hand there have been rulings where the courts have held that divorce follows on un-complied restitution decree or non-resumption of cohabitation after the stipulated period, as a matter of course. Thus in *Tej Kaur v. Hakim Singh*, 556 a wife obtained a separation decree, and later when she sought divorce, the same was decreed despite the husband's defence that he was serving a life sentence in prison and therefore was unable to perform his matrimonial obligations. Desire to resume cohabitation by the defeated party is, according to the court, of no consequence, and therefore, where the husband is anxious or not is of no consequence. This judgement seems to have taken a very extreme view and overlooked the fact that law cannot expect a party to achieve the impossible.

554 AIR 1980 Mad 294.
555 AIR 2001 SC 1285.
556 AIR 1965 J&K 111.
In *Gajna Devi v. Purshotam*, the argument of the petitioner taking advantage of his own wrong was repelled by the Delhi High Court on the ground that section 23 was not attracted. If the Parliament had so intended, it would have inserted an exception and with such insertion this provision of section 13(1A) would have become practically redundant as guilty party could never reap the benefit of obtaining a divorce. A similar view was taken in *Bimla Devi v. Singh Raj*, wherein the court held that the concept of wrong or disability, which was hitherto the sole basis of relief under the Hindu Marriage Act, 1955, has now in part given way to the concept of broken marriage, irrespective of wrong or disability. It was not, therefore, permissible to apply the provisions of section 23(1)(a), based as they were on the concept of wrong disability, to proceedings in which relief is claimed under section 13(1A) based on the concept of a broken marriage.

In *Dharminder Kumar v. Usha Kumar*, the Supreme Court held that where a petition under section 13(1A), the mere disinclination of a party to affect reunion as contemplated by a decree of restitution is not a wrong within section 23, and thus it does not disentitle that party to the relief. The wrong must consist of some serious misconduct. In this case, the wife had obtained the decree of restitution. Later she filed divorce under section 13(1A). In defence, the husband contended that it was the wife who refused to stay with him, thereby rendering the decree of restitution ineffective. The Supreme Court did not accept the husband's defence, holding that the word 'wrong' in the above situation meant something more than a mere disinclination to agree to an offer of reunion. It must be a conduct serious enough to justify denial to the relief to which the husband or the wife is otherwise entitled to. The question whether the wrong must be subsequent to the decree for restitution did not arise squarely before the Court. However, in its judgement, the court expressed agreement with a Delhi Full Bench ruling, where it had been held that the wrong must be subsequent to the decree. Mere non-compliance of a restitution decree obtained by the wife was held to be not a wrong within the meaning of section 23 of the Act so as to disentitle the husband to a decree of divorce in *Ajith Kumar v. K. Jeeja*.

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557 (1977) DLT 77.
558 AIR 1977 P&H 167.
559 AIR 1977 SC 2218.
561 AIR 2009 Ker 100.
In *Bai Mani v. Jayantilal*,\(^{562}\) the parties have been living separate for 17 years for reasons valid on both sides. The wife obtained judicial separation and the husband filed the divorce under section 13(1A). The wife's objection that he was living in adultery and could not take advantage of his wrong, was dismissed. In this long period of 17 years, the husband was committed to his mistress and also had three children. The court held that this continuing to live with the mistress is no wrong subsequent to the decree of separation. This was the wrong on which the earlier decree was based, and so was exhausted. No new fact or wrong was there so as to disentitle him to the decree. Likewise in *Mina Gupta v. Prabir Kumar*,\(^{563}\) mere non-compliance with the decree of restitution was held to be no wrong in terms of section 23(1)(a) so as to disentitle the other spouse to obtain a decree of divorce under section 13(1A)(ii). In this case, the wife's attempts at restitution were thwarted by the husband by refusing her entry in the matrimonial home. This was done after one year of the decree. The court held that the husband was entitled to the decree of divorce, as he did not commit any wrong within the period of one year after the decree of restitution. In a case, *Santosh Arya v. Narsingh Lal*,\(^{564}\) the Rajasthan High Court stated, that though in granting relief the conduct of the petitioner subsequent to the passing of the decree of restitution should be considered but clarified that the judgement debtor also being entitled to divorce, section 23(1)(a) had no reference to remedying the wrong on which the restitution decree was based. Thus, if the restitution decree was based on the ground of desertion, this wrong would not come in the way of the judgement debtor seeking a divorce.

In *Anantha Padmanabhan @ Balu v. Sassicala*,\(^{565}\) wife obtained a decree of restitution but never tried to execute it nor did the husband volunteer to take her back, the court held that it cannot be said that the husband was taking advantage of his own wrong by filing a divorce on the ground that there was no restitution of conjugal rights. The court further clarified that if the wife had tried to execute the decree and the husband had refused then it could be said that he was trying to take advantage but not so in the circumstances of this case, mentioned above.

A simple long separation does not ripen into right to seek divorce. In *Angrej*...
the husband filed a petition for restitution but lost as the court found that the wife had a reasonable ground to live separately. After 29 years of marriage and 15 years of virtual separation, the husband petitioned for divorce on the ground that they were living separately and both the parties stated that they could not live together. The District Court decreed the suit but on appeal the High Court found that it was the husband who was at fault and it was an unfortunate situation where the both parties admitted that they could not live together and yet the husband could not be given a divorce since he could not prove any ground. However, in view of the long separation and no prospects of immediate reconciliations the High Court granted the judicial separation under section 13-A. i.e., alternative relief.

Whether the decree of restitution or separation is ex parte or contested, makes no difference for purpose of relief under section 13(1A). Thus, in *Luxmi v. Ishwar Modiyan*, where a husband had obtained an ex parte decree of restitution which was never challenged by the wife, he was held to be entitled to divorce under section 13(1A). Likewise in *Santosh Acharya v. Narsingh Lal*, the court held that an ex parte decree was as good as a contested decree for attracting section 13(1A).

The right which is conferred under section 13(1A)(i) and (ii) flows from the decree of separation or restitution passed by a court. However, when the said decree is under challenge, the grounds under sections 13(1A)(i) or (ii) cannot be invoked. Thus, in *S.R. Sanjay Karkhanis v. S. Surendra Karkhanis*, the husband got a decree of separation. The wife filed an appeal against it. She also filed an application for stay of the said decree after a period of one year was over, which was granted. Meanwhile, the husband had already filed a petition for dissolution of marriage under section 13(1A)(i) after the period of one year from the date of decree of separation. He contended that since there was no stay granted against the separation decree within the period of one year, a right was crystallised to seek the decree of divorce under section 13(1A)(i). The court, however, did not accept this argument and held that the right which is conferred under section 13(1A)(i) flows from the decree of separation which was passed by the court below. If the said decree is reversed, then there can be no such right which can be exercised under that provision.

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566 AIR 1970 P&H 171.
567 1998 AIHC 932 Raj.
568 1998 AIHC 1614 Raj.
569 1994 AIHLR 536 Bom.
In Someswara v. Leelavathi,\textsuperscript{570} the husband obtained the decree of restitution and the wife returned to him and after a stay of six days she returned to her parents alleging ill-treatment by husband. The husband filed divorce, but the same was rejected by the court on the ground that the decree was compiled with and the wife had joined him, but had to leave again due to husband's ill treatment. In Jasmel Singh v. Gurnam Kaur\textsuperscript{571} and also in Veer Handa v. Avinash Handa,\textsuperscript{572} the courts refused to grant relief as this amounted to compliance with the decree and so there was no cause of action for a petition under section 13(1A)(ii).

The bar of delay as disentitling the petitioner to a relief applies equally to petitions under section 13(1A)(i) and (ii). As pointed out by the court in Jaswal Singh v. Gurnam Kaur,\textsuperscript{573} the court is not to be used as a place to which a party to a marriage could come for redress whenever it suited him or her having meanwhile held the weapon of redress over the head of the other party to the marriage. In this case there was inordinate delay on the part of the husband. It was held that the policy of the law is not to encourage utilisation of a decree for restitution of conjugal rights for malafide purpose. The husband was refused relief.

\textit{Special Marriage Act, 1954}

The provisions under the Special Marriage Act, 1954, are similar as under the Hindu Marriage Act, 1955. The Special Marriage Act, 1954, provides:\textsuperscript{574}

"Subject to the provisions of this Act and to the rules made there under, either party to a marriage, whether solemnized before or after the commencement of the Special Marriage (Amendment) Act, 1970, may present a petition for divorce to the district court on the ground--

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties."

Under the Special Marriage Act, 1954, the court is empowered to exercise its

\textsuperscript{570} AIR 1968 Mys 275.
\textsuperscript{571} AIR 1975 P&H 225.
\textsuperscript{572} AIR 1984 Del 445; Santosh Kumari v. Kewal Krishna Sabharwal, AIR 1985 Del 393.
\textsuperscript{573} AIR 1975 P&H 225.
\textsuperscript{574} The Special Marriage Act, 1954, Section 27(2).
discretion to grant judicial separation instead of divorce in divorce proceedings, except in a case where the petition of divorce is on the ground that the respondent has not been heard of as being alive for a period of seven years or more.\textsuperscript{575} The court will exercise its discretionary powers and consider it just so to do, having regard to the circumstances of the case.

The Special Marriage Act, 1954, as amended by the Special Marriage (Amendment) Act, 1970, provides for break down ground of divorce to either party to a marriage when the other party had not complied with the decree for restitution of conjugal rights for a period of one year or upwards after passing of the decree. The object of the amendment is to enlarge the right of divorce in a case where reconciliation is no more practicable.\textsuperscript{576}

\textit{Muslim Law}

In Muslim Law, the relief of judicial separation does not carry much weight. Under that law the husband has unfettered powers of divorce against his wife and the Quran enjoins the husband 'to the retain his wife with kindness or separate her with kindness'.\textsuperscript{577} The wife cannot separate herself from him except under the agreement called khula, which is made upon terms to which both are assenting parties and operate in law as divorce of the wife by the husband. The Muslim Law in theory, assures to wife considerable rights against her husband. Tyabji in his book entitled 'Muslim Law' says that the regularly married wife who has attained an age at which she can render conjugal rights to her husband\textsuperscript{578} is entitled to live separately while the marriage subsist\textsuperscript{579}. But this right of the Muslim wives does not carry much force because the Muslim husbands possess the arbitrary power of divorce. Thus, whenever the British courts in India found that Muslim Law did not give any relief to the wife, the relief was given by the courts by applying the doctrine of justice, equity and good conscience.\textsuperscript{580} The law, however, has recognized the following grounds where the wife will refuse to live with the husband and will be entitled for judicial separation:

i. If the husband be Inneeen (impotent), it is requisite that the Qazi may appoint the term of one year from the period of litigation, within which if the accused

\textsuperscript{575} Supra note 574, Section 27A.
\textsuperscript{576} Supra note 26, at 189.
\textsuperscript{577} \textit{Quran}, Sura 65, V-3.
\textsuperscript{578} J.D. Mayne, \textit{Hindu Law and Usage}, 610 (1953), Under Muslim Law the husband is bound to pay for the maintenance of an immature wife, even when she stays with her parents.
\textsuperscript{579} \textit{Shah Abu Ilyas v. Ulfat}, (1806) 19 All. 50; \textit{Abdul Fateh Moulvie v. Sammessa}, (1881) 6 Cal. 631. Supra note 26, at 185.
have carnal connection with his wife, it is well, but if not, Qazi must pronounce a separation.\(^{581}\)

ii. A Muslim husband can enforce his marital rights; if in case of cruelty to a degree rendering it unsafe for the wife to return under his dominion, she can refuse to come back.\(^{582}\)

iii. The Muslim wife can claim separation if the marriage was irregular.\(^{583}\)

iv. The Muslim wife can claim separation if the marriage was arranged by her guardian other than the father.\(^{584}\)

v. Where the husband has been made an outcaste by his community the wife can live separately.\(^{585}\)

Such type of separations shall be followed finally by way of divorce in Muslim Law. The wives will be in position to seek divorce later on under the Dissolution of Muslim Marriage Act, 1939.

Under Muslim Law in force in India the right to pass a decree for restitution of conjugal rights is at the discretion of the court. The Dissolution of Muslim Marriage Act, 1939, does not provide any provision regarding the remedy of restitution of conjugal rights. Muslim Law clearly does not provide any right to the parties to marriage to file suit or petition for dissolution of marriage on any breakdown theory in case of non-compliance with the decree of restitution of conjugal rights within a specified time. But by implications it is found that Muslim law of modern India recognized two breakdown grounds of divorce under the Dissolution of Muslim Marriage Act, 1939:

a) non-payment of maintenance by the husband even if the failure has resulted on account of the conduct of the wife.\(^{586}\)

b) where there is total irreconcilability between the spouses or in other words, where marriage has broken-down irretrievably.\(^{587}\)

**Christian Law**

This ground was not available under the Indian Divorce Act, 1869, until the

\(^{581}\) Supra note 27, at 126.

\(^{582}\) Munshee Bazloor Ruhem v. Shumsoonnissa Begum, (1867) 11 MIA 551.

\(^{583}\) Mst. Bakh Bibi v. Quaim Din, (1934) A.L. 907.

\(^{584}\) Ghulam Sakina v. Falakshe, (1949) Lah. 75.

\(^{585}\) Bai Jina v. Kharwa Jina, (1907) 31 Bom. 366.

\(^{586}\) The Dissolution of Muslim Marriage Act, 1939, Section 2, clause(ii).

\(^{587}\) Ibid, clause(ix).
Act was amended in 2001, although section 22 of the Act provided for judicial separation obtainable by the husband or wife. Prior to the amendment, many cases decided by the judiciary show that the Act was too harsh on parties. In *Amaratha Hemalatha v. Dasari Balu Rajendra Varprasad*,588 which was a reference under section 17 for the confirmation of lower court's order dissolving a marriage. The petitioner's wife had filed for dissolution of marriage on the ground that after a decree of judicial separation obtained by the husband over two years ago, there has been no cohabitation between the parties. The husband filed a counter pleading no rejection for dissolution of marriage. The trial court granted the decree on the ground of non-resumption of cohabitation after a decree of separation. It was held by the High Court that the Indian Divorce Act, 1869 did not provide for divorce on the ground specified in the petition. The court further held that the parties were not entitled to rely on the provisions of the English statute on the basis of section 7 of the Act. In number of other decisions589 High Courts declared section 17 of the Act discriminatory and meaningless.

Prior to the amendment, the Indian Divorce Act, 1869 did not provide for provisions to seek divorce on the ground of non-compliance of a decree for restitution of conjugal rights or judicial separation within one year or upwards from the date of decree of trial court. In spite of this in *Anpian J. v. Zilla*,590 an ex parte divorce was granted to the husband on the ground of non-cohabitation after a decree of restitution of conjugal rights which did not exist as ground for divorce under the Act. In this case husband obtained the decree of restitution and even after best efforts, the wife did not resume cohabitation. Husband prayed since there is no hope of cohabitation and the statutory period had passed he be granted divorce. The lower court passed an ex parte orders and the same was confirmed in proceedings under section 17. The court order is in conformity with the new social changes on one uniform pattern of society in the country.

By the amendment Act, respondent's failure to comply with the decree of restitution for two years or more after passing of the decree against him or her, entitles the decree holder to file for divorce.591 Thus the ground is available only to the decree

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588 AIR 1990 AP 220.
590 AIR 1986 P&H 196.
591 The Divorce Act, 1869, Section 10(1)(viii).
holder and the period for non-compliance is two years. The Act does not provide for non-resumption of cohabitation after a decree of judicial separation as a ground of dissolution. In *T.M. Bashian v. M. Victor*, a wife who obtained a judicial separation under section 22 of the Act applied for dissolution of marriage after four years of the decree on the ground of non-resumption of matrimonial living. While the district judge passed the dissolution decree, the High Court held that a judicial separation does not ripen into a decree for dissolution by the lapse of any time interval.

**Parsi Law**

The Parsi Marriage and Divorce Act, 1936 earlier allowed divorce where, "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 residence and maintenance to the plaintiff and the parties had no marital intercourse for three years or more since the date of such decree or order." When an order has been passed by the magistrate under section 125 of the Criminal Procedure Code awarding separate maintenance of the plaintiff and from the date of such order the plaintiff and the defendant had no marital intercourse for a period of three years or more, the fact entitles the plaintiff to a divorce. New section 32A inserted in the Parsi Marriage and Divorce (Amendment) Act, 1988 provides that either party to a marriage has been empowered to sue for the divorce on the ground of non-resumption of cohabitation within one year after the passing of the decree. However, no decree of divorce would be granted if the plaintiff has failed to comply with the order of maintenance passed against him. Under the Act, in case of restitution decree the waiting period is one year or more.

**Irretrievable Breakdown of Marriage**

The problem that the modern law faces is that if a marriage has in fact broken down irretrievably, may be on account of fault of either party or both parties, or on account of fault of neither party, then is there any sense in continuing such a marriage? Such a marriage should be dissolved, which will be in the interest of both the parties as well in the interest of society. The basic postulates of break down of marriage theory is that if a marriage had broken downs without any possibility of

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592 AIR 1970 Mad 12.
593 The Parsi Marriage and Divorce Act, 1936, Section 32(h).
594 *Ibid*, Section 32(i).
repair then it should be dissolved without looking to the fault of either party. If a marriage has broken down irretrievably, then divorce should be granted, as there is no use in retaining the empty shell. In, *Herrick v. Herrick* 595, It was observed that the majority view taken in the American decisions on this point rests on the probability that the husbands and wives who have lived apart for the statutory number of years cannot live together in happiness. If this is so, there is no reason why the parties should be denied a divorce. It is desirable that in the best interest of the state and society divorce should be granted in such cases. The Law Commission on Reform of the Grounds of the Divorce said in its report that objectives of any good divorce law are two, “one, to buttress, rather than undermine, the stability of marriage, and two, when regrettablly, a marriage has irretrievably broken down, to enable the empty shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation.” 596

In our contemporary society the irretrievable breakdown of theory is recognized by law of many countries. The Break down Theory found its acceptance in the Soviet Family Law of 1944. Under Soviet Law it is for the court to decide whether a marriage has or has not been broken down irretrievably. In English Law Irretrievable break down of marriage dissolution was introduced by Divorce Law Reforms Act, 1969 after a long considerable debate extending over a period of more than two decades. Following the recommendations of the Law Commission of England, the Divorce Reforms Act, 1969 (which has been replaced by the Matrimonial Causes Act, 1973) laid down that if the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consented to the decree being granted, decree dissolving the marriage could be passed. 597 In Australia also in 1966 the break down principle was accepted as a ground for divorce. Five years separation is considered to be evidence of breakdown of marriage. 598 The break down theory is also recognized in Canada. Under Canadian Law the period of separation is three years. 599 Thus we find that in various countries of the world the break down principle exists.

Under the Indian matrimonial laws, a form of irretrievable break down of

595 Nelson, *Divorce and Annulment*, 146 (1945).
596 *Supra* note 312, at 66.
597 Section 2(1)(d)
598 See Section 2 (2) (3): also sections 4 and 6 of the Act.
599 The Divorce Act 1968, (Canada) S. 4(1) (e)
marriage has been recognized under Hindu Marriage Act 1955, (section 13-A), Parsi Marriage and Divorce Act, 1936 (section 32-A) and the Special Marriage Act 1954 section 27 (2) while another form of irretrievable break down of marriage as a basis of divorce is recognized under Muslim Law. No other Indian personal laws recognizes irretrievable breakdown of marriage as basis of divorce in any form.

Originally the Hindu Marriage Act 1955 and Special Marriage Act 1954 contained two fault grounds under which divorce could be obtained by a petitioner in whose favour a decree of restitution of conjugal rights had been passed and the respondent had not complied with it for period of two or more years, and a petition at whose instance a decree of judicial separation has been passed and no cohabitation had been resumed for a period of two or more years. In 1964 on a Private Member Bill, these grounds were converted into break down of marriage grounds, by laying down that in each of these cases either party could sue for divorce. So in this way prior to the amendment of 1964 under Hindu Marriage Act, only the decree holder (the so called “innocent party”) had the right to move to the court for divorce against the so called the “guilty party”. Extending the same right to the spouse hitherto considered “guilty” was introduction of the principle of irretrievable break down of marriage.

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 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. 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

600 The Hindu Marriage Amendment Act, 1964
601 AIR 1977 SC 2218
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.\textsuperscript{602}

The conversion of these grounds in irretrievable break down of marriage grounds under Special Marriage Act, 1954 took place in 1970.\textsuperscript{603} 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 \textit{Umar Bibi v. Md. Din}\textsuperscript{604} 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 \textit{Neorbibi v. Pir Bux}\textsuperscript{605} 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 infact taken place or the continuance of marriage involved injury to wife. 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 – Allah!” 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.”\textsuperscript{606}

\textsuperscript{602} Virender Kumar, “\textit{See the Rift, not the Fault}”, The Tribune, 21 May, 2006.
\textsuperscript{603} The Special Marriage Amendment Act, 1970
\textsuperscript{604} AIR 1954 Lah. 51
\textsuperscript{605} AIR 1971 Ker. 261
\textsuperscript{606} Paras Diwan ,“\textit{Break down Theory}”, 1969 Lawyer 191
Thus in Muslim Law of modern India, there are two break down grounds for divorce:

- Non payment of maintenance by the husband even if the failure has resulted on account of the conduct of wife. (This is based on the interpretation of clause (ii) of section 2 of Dissolution of Muslim Marriage Act, 1939).
- Where there is total irreconcilability between the husband and wife, or in other words where marriage has broken down irretrievably. (This is based on the interpretation of clause (ix) of section 2 of Dissolution of Muslim Marriage Act, 1939).

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.\(^{607}\) In *Rajesh Kumar Upadhya v. Family Judge, Family Court*,\(^{608}\) 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 last 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*,\(^{609}\) 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.\(^{610}\) 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 ground is available for the purpose.\(^{611}\)

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.\(^{612}\) 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

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607 Dipak Kumar Sarkar v. Sima Sarkar, 2005 (1) HLR 730 (Cal. D.B)
608 1999 (1) HLR All 220.
609 AIR 1997 Cal. 134
610 Ibid.
611 Sukhdev Kaur v. Ravinder Singh, 1996 (2) HLR 296
612 Kanchan Devi v. Parmod Kumar Mittal, AIR 1996 SC 3192
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.613

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.614

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.615 In Sanghamitra Singh v. Kailash Chandra Singh,616 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,617 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 purpose would be served keeping such marriages alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses.618

In Kusum v. R.K. Sexena619, the Delhi High Court observed that,” the parties have not seen other or cohabited during the period of whole litigation and it is not

613 Swapan Kumar Gangully v. Smritikina Gangully, 1997 (2) HLR 19 (Cal.)
614 Krishna v. Somnath, 1996 (1) DMC 667 (P&H)
615 Ashok Govindram Hurra v. Rupa Ashok Hurra, 1996 (2) HLR 512 (Guj.)
616 AIR 2001 Ori. 151.
617 AIR 1997 Bom. 171
618 Chetan Dass v. Kamla Devi, AIR 2001 SC 1709
619 2004 (2) HLR Del. 248
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*, 620 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 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*, 621 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* 622 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 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

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620 1985 (3) SC 62
621 AIR 1995 SC 851
622 2006 (4) SCC 558
India for taking appropriate steps.\textsuperscript{623}

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.”\textsuperscript{624}

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.\textsuperscript{625}

The express introduction of the “irretrievable break down” principle, as has been done in England will be much more conducive and functional than merely relying on the “implied” principle. Besides, the administration of justice on the basis of clearly codified law is superior to the adjudication from case to case. For this, parliament could reintroduce the Marriage Laws (Amendment) Bill, 1981 (No.23 of 1981), which earlier did not fructify into law for expressly introducing irretrievable break down of marriage as the singular ground for divorce, as the bill was allowed to lapse.\textsuperscript{626}

Recently in \textit{Ramesh Jangid v. Sunita},\textsuperscript{627} 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.”

\textsuperscript{623} Ibid. para 96
\textsuperscript{624} Ibid.
\textsuperscript{625} Ibid.
\textsuperscript{626} Supra note 602.
\textsuperscript{627} 2008 (1) HLR 8 (Raj.)
In *Prabhakar v. Shanti Bai*\(^{628}\), 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.

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\(^{th}\) schedule.\(^{629}\)

In a Uniform Civil Code which is the cherished constitutional goal, if we have a single ground of divorce viz that the marriage has broken down irretrievably, the scope of any controversy is ruled out.\(^{630}\)

Where factually marriage has broken down irretrievably, no useful purpose will be served in finding out the guilt or innocence of the parties and in such cases law proceeds to cut off the tie.\(^{631}\)

Analytical discussion on these issues shows that there should be one single ground of divorce, viz. irretrievable breakdown of marriage.\(^{632}\)

Irretrievable Breakdown of marriage and divorce by mutual consent should be made uniformly a ground to dissolve the marriage of spouses irrespective of their religious faiths. The critical analysis of different existing grounds of divorce contained under various divorce laws shows more uniformity and less contrast in them. Therefore, the conceptual analysis of the different existing ground of divorce paves the way to push up the matter of uniformity in them legislatively.\(^{633}\)

In a significant ruling, *Vishnu Dutt Sharma v. Manju Sharma*,\(^{634}\) 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.

\(^{628}\) 2008 HLR 250 (Nagpur)


\(^{630}\) *Supra* note 506, at 47.

\(^{631}\) *Supra* note 26, at 376.

\(^{632}\) *Ibid*, at 377.

\(^{633}\) *Ibid*.

\(^{634}\) (2009) 6 SCC 379
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.” 635

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 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. Recently the Supreme Court relying on two of its decisions, viz. Vishnu Dutt Sharma v. Manju Sharma636 and Gurbax Singh v. Harinder Kaur637 held that “we cannot persuade ourselves to grant a decree of divorce, on the ground of irretrievable breakdown of marriage for the simple reason that the breakdown is only from the side of the husband as the wife consistently maintained that she was intensely concerned with her future relationship with her husband and that her greatest and paramount desire was to rejoin her husband and to live with him normally in a matrimonial relationship, once again. Since the respondent does not consent to the severance of...

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636 (2009) 6 SCC 379
637 (2010)14 SCC 301
matrimonial ties, it may not be possible for us to accede the prayer”.\footnote{Darshan Gupta v. Radhika Gupta, 2013 (7) SCALE 583; 2013 (6) SLT 67.} Supreme Court of India in the above case has given a very valid explanation and also reasoning with legal and judicial support to its view. Court has made it clear that to declare a marriage as irretrievably broken, mere living separate is not sufficient; there should be break down from both the sides.\footnote{http://articles.timesofindia.indiatimes.com/2013-07-02/india/40328132_1_permanent-alimony-radhika-gupta-husband. visited on 5-11-2013} In this controversial situation, it can be suggested that irretrievable breakdown of marriage can be made an independent ground for divorce by amending the statutes, but courts should grant divorce with due diligence, so that the pious union of marriage must not be broken haphazardly and this institution must be saved. In the light of above discussions it can be said that at present judicial trend has shifted towards a judicially created ground “irretrievable break down” of marriage for granting divorce, even in the absence of any such ground mentioned in the statute has come to stay.