

**Chapter - III**

**DIVORCE UNDER HINDU, MUSLIM AND CHRISTIAN  
RELIGIONS**

*1) Divorce under Hindu Marriage Act.*

Before the commencement of the Hindu Marriage Act, 1955 the system of divorce was unknown for Hindus. A Hindu marriage was an indissoluble tie between the husband and the wife<sup>1</sup>. Hindus believed marriage a sacrament, a holy union forever. Owing to strong influence of Islam during Moghul rule and that of Christianity during British rule as well with the change of social circumstances with more and more education among girls, the need to necessitate divorce was felt under Hindu law too<sup>2</sup>.

The Native Converts Marriage Dissolution Act, 1866 permitted divorce by Hindus, who were converted into Christian faith<sup>3</sup>. Some more Acts like Hindu Divorce Act, 1947 and Hindu (Bigamy Prevention and Divorce) Act were also permitted divorce among Hindus but applicable to Bombay and Madras Provinces respectively. The Hindu Marriage Act came into force on May 18, 1955 and it was applicable to all those Hindus who are domiciled in India including those outside the territories of India but domiciled in it.

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<sup>1</sup> . B.M. Gandhi – Hindu Law, 3<sup>rd</sup> edn.2008, P.297, Eastern Book Company, Lucknow.

<sup>2</sup> . Law of Marriage Divorce by P.C. Pant. II edition, 2001, Page-59. published by Orient publishing Company.

<sup>3</sup> . Law of Marriage Divorce by PC Pant, II edition, 2000, P.5, 2<sup>nd</sup> edn., 2001, published by Orient publishing company, New Delhi.

The Word “divorce” has been derived from the Latin word *divortium* which means diverse. In an ordinary implication it was understood as divorce is nothing neither more nor less than any other name for dissolution of marriage<sup>4</sup>.

Divorce in common verbal communication means the termination of marriage by legal formalities. That is divorce puts the marriage to an end, and the parties revert to their unmarried status and are once again open to marry<sup>5</sup>.

Thus Divorce is the legal separation of two spouses by bringing an end of the vows that they took during the sacred ceremony of marriage. Divorce would ruin the marriage life eternally and it is also difficult for children to cope with separation of their parents<sup>6</sup>.

Section 13 of the Hindu Marriage Act, 1955 has introduced an innovative amendment to the *shastric* Hindu law. It provides for the dissolution of marriage. But it does not take place unless it has been granted by a Court.

The provisions regarding divorce have been amended twice since the passing of the Hindu Marriage Act, 1955; i) by the Hindu Marriage (Amendment) Act, 1964 and ii) by the Marriage Laws (Amendment) Act, 1976<sup>7</sup>. The original

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<sup>4</sup> . Zohara Khatoon V. Mohd. Ibrahim, (1981) 2 SCC 509 at 523: AIR 1981, cf: Law of Marriage Divorce by PC Pant, II edition, 2000, P.60, 2<sup>nd</sup> edn., 2001, published by Orient publishing company, New Delhi.

<sup>5</sup> . Dr Paras Diwan – Modern Hindu Law, 18<sup>th</sup> edn. 2007, p.128, Allahabad Law Agency, Faridabad (Haryana).

<sup>6</sup> . Law of Marriage Divorce by PC Pant, II edition, 2000, P.5, 2<sup>nd</sup> edn., 2001, published by Orient publishing company, New Delhi.

<sup>7</sup> . Ramesh Chandra Nagpal – Moderna Hindu Law, 1<sup>st</sup> edn. 1983, p.144, Eastern Book Company, Lucknow.

provisions of the Hindu Marriage Act, 1955 regarding divorce have been liberalized by the Marriage Laws (Amendment) Act, 1976. It also added a new ground namely divorce by mutual consent of the parties has been made available as a matrimonial relief under the Hindu Marriage Act, 1955.

Either husband or wife may file an application before the court praying to dissolve their marriage by granting decree of divorce, on any one or more grounds mentioned hereunder.<sup>8</sup>

That the other party has voluntary sexual intercourse with any person other than his or her spouse.<sup>9</sup>

After the marriage the respondent treated the petitioner with cruelty.<sup>10</sup>

The respondent deserted the petitioner continuously for a period of two years or more preceding the presentation of the petition.<sup>11</sup>

The respondent converted to another religion from Hindu religion.<sup>12</sup>

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<sup>8</sup> . Section 13 (1) of Hindu Marriage Act, 1955.

<sup>9</sup> . Section 13 (1) (i) of Hindu Marriage Act, 1955.

<sup>10</sup> . Section 13 (1) (ia) of Hindu Marriage Act, 1955.

<sup>11</sup> . Section 13 (1) (ib) of Hindu Marriage Act, 1955.

<sup>12</sup> . Section 13 (1) (ii) of Hindu Marriage Act, 1955.

The respondent has been suffering from mental disorder endlessly due to incurable of unsound mind and it cannot be possible to lead marital life with the respondent.<sup>13</sup>

The respondent has been suffering from a virulent and incurable form of leprosy.<sup>14</sup>

The respondent has been suffering from venereal disease, which is a communicable form.<sup>15</sup>

The respondent renounced the world by entering any religious order.<sup>16</sup>

The respondent has not been heard of as being alive for a period of seven years or more.<sup>17</sup>

After passing of decree for judicial separation in the proceeding, there has been no resumption of cohabitation between the parties to the marriage for a period of one year or more, either party to a marriage may also file a petition for dissolution of his/her marriage.<sup>18</sup>

After passing of decree for restitution of conjugal rights in a proceeding, there has been no restitution of conjugal rights between the parties to the marriage

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<sup>13</sup> . Section 13 (1) (iii) of Hindu Marriage Act, 1955.

<sup>14</sup> . Section 13 (1) (iv) of Hindu Marriage Act, 1955.

<sup>15</sup> . Section 13 (1) (v) of Hindu Marriage Act, 1955.

<sup>16</sup> . Section 13 (1) (vi) of Hindu Marriage Act, 1955.

<sup>17</sup> . Section 13 (1) (vii) of Hindu Marriage Act, 1955.

<sup>18</sup> . Section 13 (1A) (i) of Hindu Marriage Act, 1955.

for a period of one year or more, either party to a marriage may file a petition for dissolution of his/her marriage.<sup>19</sup>

A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground that her husband already married another woman and the said person is alive at the time of presentation of the application.<sup>20</sup>

A wife also may file a petition for dissolution of her marriage that her husband has been guilty of rape, sodomy or bestiality.<sup>21</sup>

After passing of decree against the husband by granting maintenance to the wife under Section 18 of the Hindu Adoption and Maintenance Act, 1956 or under Section 125 of the Code of Criminal Procedure, there was no cohabitation between the parties for a period of one year or more, the wife is entitled to file application for dissolution of her marriage.<sup>22</sup>

If the marriage is performed below the age of 15 years, which was consummated or not, and she has repudiated the marriage after attaining the age but before attaining the age of eighteen years, she can file petition for dissolution of her marriage.<sup>23</sup>

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<sup>19</sup> . Section 13 (1A) (ii) of Hindu Marriage Act, 1955.

<sup>20</sup> . Section 13 (2) (i) of Hindu Marriage Act, 1955.

<sup>21</sup> . Section 13 (2) (ii) of Hindu Marriage Act, 1955.

<sup>22</sup> . Section 13 (2) (iii) of Hindu Marriage Act, 1955.

<sup>23</sup> . Section 13 (2) (iv) of Hindu Marriage Act, 1955.

Section 13 of the Act lays down three types of grounds for divorce, which may be classified as follows:

- 1) Nine grounds based on the “fault-disability” theory of divorce which only the ‘aggrieved spouse’ may avail. These are laid down in sub-Section (1).
- 2) Two grounds based on the “break down” theory of divorce which either the ‘aggrieved’ or the ‘guilty’ spouse may avail.
- 3) Four special grounds, which only a wife can avail. These are laid down in sub-Section (2).

In all, there are 15 grounds for divorce.

1) Fault grounds of divorce:

(i) Extra-Marital Sex: (Adultery)

The word “adultery” has not been used as an alternative expression of “voluntary sexual intercourse with any person other than his or her spouse” was incorporated. It means “an act of consensual sexual intercourse between a married person and another person of opposite sex who is not his or her spouse during subsistence of former’s marriage”<sup>24</sup>. Where the other party has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse, a divorce petition can be filed.

Section 497 of the Indian Penal Code defines adultery: “Whoever has sexual intercourse with a person who is and whom he knows or has reason to

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<sup>24</sup> . Gita Bai V. Fattoo, AIR 1966 MP 130.

believe to be the wife of another man without the consent or connivance of that man, such intercourse not amounting to the offence of rape is guilty of the offence of adultery”.

The criminal action is filed not against the wife but against the adulterer. The wife is not guilty of offence, not even as an abettor. In the matrimonial court, when a petition is filed for the matrimonial relief of divorce or judicial separation on the ground of adultery, the main relief is sought against the spouse and not against the adulterer. The adulterer or the adulteress is made merely a co-respondent, and that too is not always necessary. It is in this aspect, that the matrimonial offence of adultery is different from the criminal offence.<sup>25</sup>

In the matrimonial offence of adultery it is essential to establish that the sexual intercourse was willingly indulged into by the respondents. If the wife can establish that she was raped by the co-respondent, then the husband would not be entitled to divorce. Further, in a petition for dissolution of marriage, it is not necessary to prove that the co-respondent had knowledge or reason to believe that the respondent was the wife or husband of the petitioner. It seems difficult for a man to establish that he was forced. But if he can establish that in fact he was forced, the court would not grant the relief to the wife.<sup>26</sup>

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<sup>25</sup> . Dr. Paras Diwan on Hindu Law, 2<sup>nd</sup> edn. 2005, P.771, Orient publishing Co., Allahabad.

<sup>26</sup> . Dr Paras Diwan on Hindu Law, 2<sup>nd</sup> edn. 2005, P.771, Orient publishing Co., Allahabad.



The Madras High Court held that “the unwritten taboos and rules of social morality in this country and particularly in village areas must necessarily be taken into account<sup>27</sup> .

In *Dr. Ashok Kumar Aggarwal V. Smt. Anju Raje*<sup>28</sup>, the Court held that mere suspicion of husband cannot be a proof of adultery, especially when husband had not seen wife in company of any male member, nor he could name any person, he was not entitled to divorce.

If an unconnected person is found alone with a young wife after midnight, in her bedroom in an actual physical juxtaposition, unless there is some explanation forthcoming for this which is compatible with an innocent interpretation, the only interpretation that a court of law can draw must be they were committing an act of adultery together<sup>29</sup> .

In the matrimonial cases and criminal cases, proof of marriage is required. It would be unreasonable to expect direct evidence of adultery<sup>30</sup>. The nature of the act is such that direct evidence is not possible<sup>31</sup>. Courts therefore, expect circumstantial evidence<sup>32</sup>.

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<sup>27</sup> . Subbaramma v. Saraswati, AIR 1967 Mad. 85.

<sup>28</sup> . AIR 2010 (NOC) 442 (P&H)

<sup>29</sup> . Subbaramma v. Saraswati, AIR, 1967 Mad.85.

<sup>30</sup> . Pushpa Devi V. Radhey Syam AIR 1972 Raj 360.

<sup>31</sup> . Patayee Ammal V. Manickam AIR 1967 Mad 254.

<sup>32</sup> . Imarta Devi V. Deep Chand (2004) 1 HLR 387.

The birth of a child after four hundred and two days of separation from the husband is a clear evidence of adultery, because no child can be born through the husband after so long a separation<sup>33</sup>.

In the society man and woman observe utmost secrecy about their meetings even when it is lawful. When it is unlawful, they take extra care. This makes direct evidence of adultery extremely difficult. Therefore, if law insists on direct evidence, few cases will be proved amongst hundreds and thousands. The result will be that the security of the marital right against 'adultery' will be reduced to a nullity.

The adultery is one of the major reasons for dissolving more matrimonial cases. Higher educations, increasing employment opportunities and using cell phones by the women in the society they would develop acquaintance or friendship with other men, thereafter it leads to develop illicit intimacy in between them. Due to that reason the disputes arose between the couple and later it leads to dissolve their marriage. In the present days such types of cases are increasing day by day. Most of the persons are filing divorce applications before the courts for divorce on the ground of adultery. In daily news papers, it is observing that due to illicit intimacy most of the crimes are occurring in the society and it will ruin the family as well as society. Therefore, every married person shall not develop

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<sup>33</sup> . H.T. Veera Reddi v. Kistamma, AIR 1969 Mad. 235.

illicit intimacy with other persons and then only reduce the divorce rate on the ground of adultery.

*Cruelty:*

In India nearly 70% matrimonial cases are filed before the Courts under the ground of cruelty.

The petitioner was required to prove that the respondent had treated him or her with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party.

The Shorter Oxford Dictionary defines “Cruelty” as ‘the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another’s pain; mercilessness; hard-heartedness’.

In *Russel V. Russel*,<sup>34</sup> Lopes L.J. observes “there must be danger to life, limb or health, bodily or mental or a reasonable apprehension of it to constitute cruelty”.

Cruelty can be of both kinds: physical and mental. It is physical when the body is injured. It is mental when feeling and sentiments are wounded. The petitioner may be meted with cruelty of either or both types. However, cruelty has to be distinguished from the ordinary wear and tear of family life. It cannot be

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<sup>34</sup> . *Russel V. Russel* (1897 A.C.395)

decided on the basis of sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other<sup>35</sup>.

The term “mental cruelty” has been defined in the Black’s Law Dictionary<sup>36</sup>:

“As ground for divorce, single spouse’s course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse.”

In the case of *V. Bhagat Vs. Mrs. D. Bhagat*<sup>37</sup>, in which the Supreme Court observed that:

“Mental cruelty in Sec. 13 (1) (ia) of Hindu Marriage Act can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for the party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be asked to put up with such conduct and continue to live with the other party. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and

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<sup>35</sup> . Savitri Pandey V. Premchandre Pandey, AIR 2002 SC 591.

<sup>36</sup> . 8<sup>th</sup> Edition, 2004.

<sup>37</sup> . AIR 1994 SC 710.

circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made”.

In the case of *S. Hanumantha Rao V. S. Ramani*<sup>38</sup>, the Supreme Court further stated that “Mental cruelty broadly means, when either party causes mental pain, agony or suffering from such a magnitude that it severs the bond between the wife and the husband and as a result of which it becomes impossible for the party who has suffered to live with the other party. In other words, the party who has committed wrong is not expected to live with the other party.”

In *A. Jayachandra Vs. Anil Kaur*<sup>39</sup>, the Supreme Court observed that constant nagging, casting doubt, suspecting husband’s fidelity, character and reputation is certainly amounts to cause indelible mental agony and amounts to cruelty.

In the case of *Sujata Uday Patil Vs. Uday Madhukar Patil*<sup>40</sup>, in which their Lordships held that:

“The word “Cruelty” and the kind or degree of “Cruelty” necessary which may amount to a matrimonial offence has not been defined in the Act. What is cruel treatment is to a large extent a question of fact or a mixed question of law and fact and no dogmatic answer can be given to the variety of problems that arise before the Court in these kinds of cases. The law has no standard by which to

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<sup>38</sup> . 1999 (3) SCC 620.

<sup>39</sup> . I (2005) DMC 111.

<sup>40</sup> . 2007 (3) ALT 43 (SC).

measure the nature and degree of cruel treatment that may satisfy the test. It may consist of a display of temperament, emotion or pervasion whereby one gives vent to his or her feelings, without intending to injure the other. Where there is a proof of a deliberate course of conduct on the part of an individual, intended to hurt and humiliate the other spouse, and such a conduct is persisted, cruelty can easily be inferred. Neither actual nor presumed intention to hurt the other spouse is a necessary element in cruelty”.

In *Rita Nijhawan Vs. Balkrishna Nijhawan*<sup>41</sup>, a Division Bench of Delhi High Court arrived a conclusion regarding cruelty that:

“Thus the law is well settled that if either of the parties to a marriage being a healthy physical capacity refused to have sexual intercourse the same would amount to cruelty entitling the other party to a decree. In our opinion it would not make any difference in law whether denial of sexual intercourse is the result of sexual weakness of the respondent disabling him from having a sexual union with the appellant, or it is because of any willful refusal by the respondent, this is because in either case the result is the namely frustration and misery to the appellant due to denial of normal sexual life and hence cruelty”.

In *Smt. Shakuntala vs. Om Prakash Ghal*<sup>42</sup>, it is held that willful denial of sexual relationship by a spouse when other spouse is anxious for it would amount

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<sup>41</sup> . AIR 1973 Delhi, 200 at 209.

<sup>42</sup> . AIR 1981 Delhi 53.

to mental cruelty, especially when the parties are young and newly married. Similar view was expressed by Supreme Court in *Chiranjeevi vs. Lavanya @ Sujatha*<sup>43</sup> that “Persistent resistance of sexual intercourse by her depriving husband of normal matrimonial pleasure amounts to cruelty.

In the case of *Mrs. Iris Paintal Vs. Dr. Autar Singh Paintal*<sup>44</sup>, their Lordships observed that “making false and frivolous allegations to employer and colleagues of spouse amounts to cruelty”.

In the case of *Shobha Rani Vs. Madhukar Reddi*<sup>45</sup>, the Court observed that:

“Each case may be different. We deal with the conduct of human beings who are no generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful (sic) realm of cruelty.”

Cruelty being a question of fact the circumstances of each case must be taken into consideration, including the physical and mental condition and the position in the life of parties. However the conduct complained of must be serious and higher than the wear and tear of married life.<sup>46</sup>

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<sup>43</sup> . 1999 (2) ALD 508.

<sup>44</sup> . AIR 1988 Delhi 121.

<sup>45</sup> . (1988) 1 SCC 105,

<sup>46</sup> . Alka v. R.K. Gautam, AIR 1996, p.279.

In *Smt. Mamata Dubey V. Rajesh Dubey*<sup>47</sup>, the Court held that, constantly accusing the husband of having adulterous relationship with other which proved later to be false and sending the family members to jail under Section 498-A of I.P.C. amounts to cruelty.

In *Rajiv Dinesh Gadkari v. Smt. Nilangi Rajiv Gadkari*,<sup>48</sup> husband residing in U.S.A., and forcing his wife to adopt American life. The court held that asking the wife to wear particular type of dress or compelling her to drink wine or alcohol amounts to cruelty.

In *Mrs. Flora Bose v. Suproti Bose*,<sup>49</sup> the husband remained unemployed during his stay with his wife and started spending money for liquor indiscriminately. He used to come home late night, gave physical beatings as well as mental torture to his wife and also demanded to give share in her flat. Ms. Aruna Suresh, j. held that the conduct of husband can be construed as cruelty.

In *Kamma Damodar Rao v. Kamma Anuradha*,<sup>50</sup> the husband was addicted to vices like alcoholism and drugs and in the said mental and physical state, he used to abuse his wife in filthy language and also beat her rudely. He was moving with people of low class in state of drunkenness and was staying in hotel without paying bills, causing nuisance to inmates of hotel and it would prove disrespect of

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<sup>47</sup> . AIR 2009 All 141.

<sup>48</sup> . AIR 2010 (1) Bom R.45.

<sup>49</sup> . AIR 2011 Delhi 5.

<sup>50</sup> . AIR 2011 Andhra Pradesh 23.



husband to family and wife. It amounts to mental cruelty and wife entitled for divorce.

There are many other acts of husband/wife, which were ruled as cruel acts by the courts.

- \* Disrespectful and disparaging remarks against the husband and his close relations by the wife.<sup>51</sup>
- \* Coercing the wife or persons related to her to meet any unlawful demand<sup>52</sup>.
- \* Impotency of the husband and the resultant damage to the wife's physical and mental health.<sup>53</sup>
- \* Wife attempting to commit suicide<sup>54</sup>.
- \* Unnatural carnal relationship<sup>55</sup>.
- \* False allegation against the character of spouse.<sup>56</sup>
- \* The harassment of daughter-in-law to meet demand of dowry by relatives of husband.<sup>57</sup>
- \* Derogatory and ugly remarks by wife against her husband.<sup>58</sup>
- \* Using abusive words and foul language against parents of husband<sup>59</sup>.

<sup>51</sup> . Smt. Santana Banerjee v. Sachindra Nath Banerjee, AIR 1990 Cal. 367.

<sup>52</sup> . Rajani vs. Subramonian, AIR 1990 Ker. 1.

<sup>53</sup> . Hanuman v. Smt Chander Kala, AIR 1986 P & H 308.

<sup>54</sup> . Vijayappan Nair v. Ammini Amma, I (1997) DMC (Ker.) 648.

<sup>55</sup> . Vinit H. Joglekar v. Vaishali Vinit Joglekar, I (1998) DMC (Bom), 715.

<sup>56</sup> . Nandita Roy v. Asish Kumar Roy, II (1996) DMC (Cal.) 668.

<sup>57</sup> . Shobha Rani v. Madhukar Reddi, (1998) 1 SCC 105.

<sup>58</sup> . Sannatana Banerjee v. S.N. Bannerjee, AIR 1990 Cal. 367.

<sup>59</sup> . V. Bhagat v. D. Bhagat, AIR 1994 SC 710.

- \* Wild reckless and scandalous allegations by wife against the husband's mother, his two married sisters and brother-in-laws.<sup>60</sup>
- \* Removal of 'Mangal Sutra' by wife to irritate her husband.<sup>61</sup>
- \* The constant nagging, casting doubt, suspecting husband's fidelity, character and reputation.<sup>62</sup>
- \* Wife's refusal to join co-habitation till her demand is fulfilled.<sup>63</sup>
- \* Husband pressurize for transfer of land or property in his favour<sup>64</sup>.
- \* Putting lock outside the room.<sup>65</sup>
- \* Maltreatment by husband and his family members asking her entire salary and also used to beat her to get valuable household articles from her parents.<sup>66</sup>
- \* Leaving matrimonial home without consent of husband and not returning.<sup>67</sup>
- \* The husband putting obstruction to wife to prosecute her Ph.D., but he used to take the amount from her scholarship for his vices.<sup>68</sup>
- \* Wife asking the husband's mother to transfer the house in her name and on such refusal to harass her and make her to leave the house.<sup>69</sup>

<sup>60</sup> . Rajan Vasant Revankar v. Shobha Rajan Revankar, AIR 1995 Bom. 246.

<sup>61</sup> . S. Hanumantha Rao v. S. Raman, AIR 1999 SC 1318 at 1320.

<sup>62</sup> . A. Jaya Chandra v. Anil Kaur, I (2005) DMC 111.

<sup>63</sup> . Gajendra v. Madhumati, AIR 2001, MP. 299.

<sup>64</sup> . Ammakharoon v. Kashim Ansari, AIR 2001, Jha. 28.

<sup>65</sup> . Lini Mohan John v. Mohan John, AIR 2001, Ker. 309.

<sup>66</sup> . Indu Bala v. Francis Xavier Toppo, AIR 2002, Del. 54 (SB).

<sup>67</sup> . Rakesh Sharma v. Subhi Sharma, AIR 2002, Raj. 138.

<sup>68</sup> . Kambalesh v. S.H. Kundan Kour, 2003 (1) CCC 397 (Del.).

<sup>69</sup> . Smt. Pramella Bhatia v. Vijay Kumar Bhatia, 2000 (4) CCC 470 Raj.

- \* Wife filed false civil and criminal cases one after another with an intention to harass the husband.<sup>70</sup>
- \* The husband had never liking the wife right from the beginning and contacted second marriage, demanded for dowry.<sup>71</sup>
- \* After marriage, wife eloped with her boy friend.<sup>72</sup>
- \* Wife humiliated and insulted husband.<sup>73</sup>

In the following cases the courts held that there is no cruelty:

- \* Persuading and pressing on unwilling wife to accompany the husband to his place<sup>74</sup>.
- \* Solitary and or occasional beating of the wife by the husband<sup>75</sup>.
- \* Petty quarrels and troubles<sup>76</sup>.
- \* Beating of the child and quarrel between the couple<sup>77</sup>.
- \* Refusal to give treatment and diet as prescribed by a Doctor, because that was beyond the means of the husband<sup>78</sup>.
- \* Mere consumption of alcohol by the husband unaccompanied by abuses, insults and violence<sup>79</sup>.

<sup>70</sup> . P.K. Vijayappan Nair v. J. Ammini Amma, AIR 1997, Ker. 170.

<sup>71</sup> . Satya Narain v. Mamtha, AIR 1997, Raj. 118.

<sup>72</sup> . Sunitha Singh vs. Raj Bhahadur Singh, AIR 1999, All. 69.

<sup>73</sup> . Parini Mehar Sheshu v. Poarini Nageshwara Sastry, 1993 (2) ALT 489 (DB)

<sup>74</sup> . Anna Saheb V. Tarabai AIR 1970 MP 36.

<sup>75</sup> . Tulsa V. Pannalal AIR 1963 MP 5.

<sup>76</sup> . J.L. Nanda V. Veena Nanda 1988 SCC 122.

<sup>77</sup> . Harpal Sharma V. Tripta Ani (1994) 1 HLR 151 (P&H)

<sup>78</sup> . Shyamlal V. Saraswati Bai, AIR 1967 MP 204.

<sup>79</sup> . Harjit Kaur V. Roop Lal (2004) 1 HLR 143 (P&H).

- \* On the complaint of wife, mere filing of an FIR U/s.498-A IPC<sup>80</sup> is not amounts to cruelty against the husband<sup>81</sup>. To live with a wife who is a victim of gang rape<sup>82</sup>.
- \* Initiation of legal proceedings U/s.498-A and 323 IPC<sup>83</sup> against the husband which failed<sup>84</sup>.
- \* Wife going to her parent's house without husband's permission<sup>85</sup>.
- \* Husband negligent about wife's health, not visiting her even after she gave birth to a child<sup>86</sup>.

12. Filing of petition by wife for maintenance under Sec.125 Cr.P.C. in which proceedings if the husband fails to pay maintenance, non-bailable warrant may be issued, such arrest is not cruelty.<sup>87</sup>

In the present days most of the couple approached the courts for divorce on petty reasons by mentioning the ground of cruelty. If the couple adjust with each other in day to day family life, it will be possible to prevent the increasing divorce cases in India.

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<sup>80</sup> . "Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine".

<sup>81</sup> . Virender Kumar V. Santro Devi (2003)2 HLR 401 (P&H)

<sup>82</sup> . Rajesh Kumar Singh V. Rekha Singh (2005)1 HLR 759 (All DB); cf. B.M. Gandhi, Hindu Law, 3<sup>rd</sup> edn. 2008, P.318, Eastern Book Company, Lucknow.

<sup>83</sup> . Whoever, except in the case provided for by Section 323, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both".

<sup>84</sup> . Radha Rani V. Har Bhagwan (2004)1 HLR 50 (P&H).

<sup>85</sup> . Kamlesh V. Prem Prakash (1989)1 HLR 554 (Raj).

<sup>86</sup> . Rajinder Prasad Jain V. Rama Jain 1980 HLR 122 (P&H)

<sup>87</sup> . Binalrani Banik v. Pradeep Kumar Banik, AIR 1999, Gau. 139.

*Desertion:*

The word “desertion” refers to abandonment or giving up. For the purposes of Section 13, it means intentional abandonment of a spouse by the other without his or her consent and without reasonable cause.

The expression “desertion” means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage and its grammatical variations and cognate expressions shall be construed accordingly<sup>88</sup>.

In matrimonial law, desertion means continual absence from cohabitation contrary to the will or without the consent of the party charging it, and without reasonable cause. Desertion is not to be tested by merely ascertaining which party left the matrimonial home first. The party who intends to bring the cohabitation to an end and whose conduct in reality caused its termination commits the act of desertion<sup>89</sup>.

In *Lakkaraju Padma Priya V. Lakkaraju Shyam Prasad*<sup>90</sup>, their Lordships held that “desertion” in the context of matrimonial law represents a legal

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<sup>88</sup> . Marriage laws, by E.L. Bhagiratha Rao, 10<sup>th</sup> edition, 2013, P-45, Asia Law House, Hyderabad.

<sup>89</sup> . Ramantha Aiyar – The Law Lexicon, 1990, p.323, Wadhwa and Company Law, Publishers, Nagpur.

<sup>90</sup> . AIR 2009 AP 54 (DB) = 2009 (1) ALD 608 =2009 (1) ALT 626, cf. Marriage Laws by E.L. Bhagiratha Rao, 10<sup>th</sup> edn, 2013, p-56, Asia Law House, Hyderabad..

conception. Though the expression 'desertion' is to be widely interpreted and understood, the essential conditions have to be established.

To make out a case of divorce on the ground of desertion four conditions are required to be fulfilled<sup>91</sup>:-

- (a) factum of separation,
- (b) the intention to bring marital life to an end<sup>92</sup>,
- (c) without consent of the other spouse, and
- (d) without reasonable cause<sup>93</sup>.

If the wife leaves her matrimonial home and lives apart this would be a desertion by her. But if she shows that there was cruelty on the part of the husband and so she had quit the matrimonial home, there would be no legal desertion by her. On the contrary, it would be treated a desertion by the husband who had driven her out. So the question of legal desertion cannot be established merely by showing who left the matrimonial home. Thus desertion has to be inferred from the state of things. This is known as constructive desertion<sup>94</sup>.

The wife had deserted the husband after seven months of marriage and the parties were living separate since a period of fourteen years. Wife was not willing to live with husband in spite of all efforts. Better part of their lives was wasted in

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<sup>91</sup> . Law of Marriage Divorce by P.C. Pant, 2<sup>nd</sup> edn. 2001, P.65, published by Orient Publishing Company, New Delhi.

<sup>92</sup> . Leela Devi V. Suresh Kumar, AIR 1944 Raj 128, cf: Law of Marriage Divorce by P.C. Pant, 2<sup>nd</sup> edn. 2001, P.65, published by Orient Publishing Company, New Delhi.

<sup>93</sup> . Lachhman U. Kriplani V. Meena, AIR 1964 SC. 40, Ibid.

<sup>94</sup> . Mayne's Hindu Law & Usage, 13<sup>th</sup> edn. 1995, p.329, Bharat Law House, New Delhi.

litigation and the parties disliked each other. There was irretrievable breakdown of marriage. Therefore, to put an end to litigation and to put an end to the bitterness between the parties, divorce granted on the ground of desertion<sup>95</sup>.

*Termination of desertion:*

Desertion is a continuing. It is possible to bring the state of desertion to an end by some act or conduct on the part of deserting spouse. It may come to an end in the following ways:

- i) Resumption of cohabitation.
- ii) Resumption of marital intercourse.
- iii) Supervening *animus revertendi*, or offer of reconciliation.

In *Smt Rajna Choudhary V. Sh. Raghubir Singh*<sup>96</sup>, wife also did not allow husband to have sexual access. Wife left matrimonial home on her own desire. The Court held that the husband was entitled to divorce on the grounds of desertion.

To constitute a ground for divorce or judicial separation, desertion must be for a continuous period of two years preceding the date of presentation of the petition.

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<sup>95</sup> . Durga Prasanna Tripathy v. Arundhati Tripathy, AIR 2005 SC 3297.

<sup>96</sup> .AIR 2011 HP 27.

*Conversion:*

One spouse voluntarily relinquishes one's religion and adopts another distinctive religion after formal ceremonies; it is conversion on his part. Thus, one should adopt some other religion which cannot be regarded as Hindu religion. If a person who is a Jain adopts Buddhism, he is still a Hindu<sup>97</sup>. He cannot be said to have changed his religion.<sup>98</sup>

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 the petitioner chooses to continue to live with the spouse who has converted to another religion, there is nothing to debar him or her from doing so<sup>99</sup>.

*Unsound mind:*

The words "incurably of unsound mind" depict the state of mind of a person who is incapable of managing himself/herself and hence discarded to

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<sup>97</sup> . Though the Jains may not be Hindus by religion (Jainism is a distinctive religion) they would be governed by the same law as the Hindus. Section 2 of the Hindu Marriage Act, 1955 deals with application of the Act. It lays down a list of persons who would be governed by this Act. These persons can be brought under the following three main groups.

1) Persons who are Hindus by religion – Section 2 (1) (a).

2) Persons who are Buddhists, Jains and Sikhs by religion – Section 2 (1) (b).

3) any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion – Section 2 (1) ©. B.M. Gandhi – Hindu Law, 3<sup>rd</sup> edn. 2008, P.257, Eastern Book Company, Lucknow.

<sup>98</sup> . B.S. Mohankumar V. B.K. Nirmala (2005) 1 HLR 117 (Kant DB).

<sup>99</sup> . Dr. Paras Diwan – Modern Hindu Law, 18<sup>th</sup> edn. 2007, P.162, Allahabad Law Agency, Faridabad.



situations where he/she will not be called upon to manage himself/herself or his/her affairs but will live an artificial life until his/her death<sup>100</sup>.

Before passing of the Marriage Laws (Amendment) Act, 1976 the position of insanity as ground of divorce or judicial separation was as follows:

- 1) Insanity (whether curable or incurable) – lasting for not less than two years ending with the filing of the petition was a ground for judicial separation;<sup>101</sup>
- 2) Incurable insanity – lasting for at least three years immediately preceding the filing of the petition was a ground for divorce.<sup>102</sup> In 1976, while unifying the grounds for judicial separation and divorce, the legislature not only accepted the said recommendation, it also went further to explain and expand the concept of insanity under Section 13. This was done in the light of the commission's general observations regarding insanity.<sup>103</sup>

Now the Act refers to two distinct mental conditions, namely:

1. Unsoundness of mind, and
2. Mental disorder.

The Conditions attached to each of these two are:

1. Unsoundness of mind must be incurable; and

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<sup>100</sup> . Radhamony Amma V. Gopinathan Pillai, 1990 (1) CCC Kerala 425, cf: Cruelty & Offences against husbands, by V.K. Dewan, 2<sup>nd</sup> edn. 2011, p-350.

<sup>101</sup> . Section 10 (1) (e) – repealed in 1976.

<sup>102</sup> . Section 13 (1) (iii) as it stood before the 1976 amendment.

<sup>103</sup> . 59<sup>th</sup> Report 1974, pp.42-50; cf. Dr Tahir Mahmood – Hindu Law, 2<sup>nd</sup> edn. 1986, p.456, The Law Book Co. (P) Ltd. Allahabad.

2. Mental disorder (whether continuous or intermittent) must be of such a kind and to such an extent that the petitioner can not reasonably be expected to live with the respondent.

A person who is incapable of managing himself and his affairs including the problem of society and of married life can be said to be person of unsound mind<sup>104</sup>.

Schizophrenia is a mental disease wherein the patient's personality appears to be divided and this personality disintegration which characterizes schizophrenia may be of varying degrees.<sup>105</sup>

In *Harmanjit Kaur V. Bhupinder Singh Gill*,<sup>106</sup> the appellant was suffering from mental disorder (Schizophrenia) since before her marriage; that this fact was not disclosed to the respondent; that according to the medical advice the disease is incurable and she might become a danger to the husband and also to the child. Therefore, the court granted divorce.

In *Krishna Bhat V. Srimathi*,<sup>107</sup> the husband in evidence disclosed about the strange and odd behaviour of the wife when she lived with him. She used to behave in odd manner and used to run away from the house irrespective of the fact

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<sup>104</sup> . Kartik Chandra V. Manju Rani, AIR 1973 Cal 545; Ban Devi V.A.K. Bannerjee, AIR 1972 Delhi 50.

<sup>105</sup> .B.M. Gandhi – Hindu Law, 3<sup>rd</sup> edn. 2008, P.329, Eastern Book Company, Lucknow.

<sup>106</sup> . (2003) 2 HLR 661 (P & H) cf: Ramesh Chandra Nagpal – Modern Hindu Law, 2<sup>nd</sup> edn. 2008, p.223, Eastern Book Company, Lucknow.

<sup>107</sup> . 1996 (1) CCC 582 (Karnt).

whether it was day or night. She used to go and lie down in stranger's house. She was showing absolute disinclination to cohabit with him and consummate the marriage and even evinced aversion to the same and also started developing aggressive mannerism. In the circumstances the Court came to conclusion that the wife was suffering from mental disorder at the time of marriage.

In the case of *Vinita Saxena V. Pankaj Pandit*,<sup>108</sup> The Apex Court dealt with elaborately about the aspects of the mental disorder – schizophrenia; the signs and symptoms; its causes and risk factors involved; nature of the diseases; how it develops etc. The extracts were taken from various medical publications.

*Leprosy:*

There are various types of leprosy. They are classified under:

- i) Lepromatous leprosy.
- ii) Tuberculoid leprosy.
- iii) Maculoan aesthetic leprosy.
- iv) Polyneuritic leprosy.
- v) Borderline leprosy and
- vi) Indeterminate leprosy.

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<sup>108</sup> . (2006) 2 Supreme 663, cf: Ramesh Chandra Nagpal – Modern Hindu Law, 2<sup>nd</sup> edn. 2008, p.223, Eastern Book Company, Lucknow.

If it was virulent<sup>109</sup> and incurable, it was a ground for divorce, where it lasted for three years ending with the filing of the petition. The Marriage Laws (Amendment) Act, 1976 has made leprosy, a ground both judicial separation and divorce. It omitted the period of three years. Under this clause, Leprosy can be a ground of divorce only if it is both virulent and incurable and it is sufficient ground for decree of divorce<sup>110</sup>.

Perhaps border line leprosy and indeterminate leprosy are not contagious and cannot be contracted from another by mere physical contact. Lepromatous leprosy which is malignant and contagious and in which prognosis is usually grave is virulent leprosy<sup>111</sup>. Malignant or venomous leprosy is called virulent leprosy. A mild type of leprosy which is capable of treatment is neither a ground for divorce nor for judicial separation<sup>112</sup>. Some forms of leprosy are slight, uncontagious and non-virulent. Thus leucoderma, wrongly called leprosy, is not envisaged as a type of leprosy constituting ground of divorce or judicial separation under any of matrimonial law of India.

In *Swarajya Lakshmi Vs. G.G. Padma Rao*,<sup>113</sup> the wife was suffering from lepromatous leprosy and the Apex Court came to the unavoidable conclusion that it was a fit case in which the husband should be granted a decree of divorce.

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<sup>109</sup> . 'Virulent' means highly poisonous or malignant, venomous or acrimonious.

<sup>110</sup> . Sivarajya Lakshmi V. G.G. Padma Rao, AIR 1974 SC 165.

<sup>111</sup> . Annapurna Devi V. Nabakishore Singh, AIR 1965 Ori. 72.

<sup>112</sup> . Dr. Paras Diwan on Hindu Law – 2<sup>nd</sup> edn. 2005, P.869, Orient Publishing Co., Allahabad.

<sup>113</sup> . AIR 1974 SC. 165, cf: Ramesh Chandra Nagpal – Modern Hindu Law, 2<sup>nd</sup> edn. 2008, p.223, Eastern Book Company, Lucknow.

In this case the court was concerned with lepromatous leprosy which is recognized by all medical authorities as malignant and contagious and therefore virulent.

*Venereal disease:*

The venereal disease is a ground of divorce and as well as Judicial separation. Under this clause a spouse may present a petition for dissolution of marriage on the ground that the other spouse has been suffering from venereal disease in a communicable form like AIDs etc.

“Respondent has for a period of not less than three years immediately preceding the presentation of the petition, has been suffering from venereal disease in a communicable form, the disease not having been contracted from the petitioner<sup>114</sup>”.

Venereal diseases comprise a number of contagious diseases that are most commonly acquired in a destroyer of life (syphilis) and a preventer of life (gonorrhoea). The group includes at least three other diseases; chancroid, lymphogranuloma venereum and granuloma inguinal. These five are linked not because of similarity of causative agents, tissue reactions and symptoms produced, but because of the principal means of spread of each diseases is by sexual intercourse especially promiscuous sexual intercourse, as implied by their group name, venereal which is derived from the name of goddess of love, ‘Venus’. Not

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<sup>114</sup>. Section 10 (1) (d) of the Hindu Marriage Act, 1955.

only are the causative agents different morphologically but they also represent five distinct classes of micro-organisms: Spirochets; bacilli; viruses and Donovan body (perhaps a bacterium)<sup>115</sup>.

*Renunciation of the world:*

A spouse is entitled to file for a divorce if the other has renounced the world by entering any religious order. Thus the requirements of the clauses are:

1. the other party has renounced the world, and
2. has entered into a holy order.

Hindus recognize *Sanyasa Ashrama* as the last of the four *Ashramas* into which, the life of a Hindu is organized. According to Hindu religion, every Hindu is required to enter the last *ashrama* in his old age. Entering into this *ashrama* amounts to civil death. For taking *sanyas*, a person has to perform eight *shradhas* (including his own *shradha*) and has to give up his matrimonial life and property<sup>116</sup>.

A Hindu can according to his religion, renounce the world and take up *sanyas* or *vanaprastha ashram*. Such a person is known as *sanyasi*, *yati*, *vanaprastha* or perpetual *brahmachari*, can not any more attend to his worldly obligations.<sup>117</sup>

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<sup>115</sup> . Dr Paras Diwan on Hindu Law – 2<sup>nd</sup> edn. 2005, p.870, Orient Publishing Co., Allahabad.

<sup>116</sup> . R.C. Nagpal – Modern Hindu Law, edn. 1983, P.170, Eastern Book Co., Lucknow.

<sup>117</sup> . Dr. Tahir Mahmood- Hindu Law, 2<sup>nd</sup> edn. 1986, P.460, The law Book Company (p) Ltd., Allahabad.

If a spouse has left home and has become *Sanyasi*, other spouse may seek divorce on this ground<sup>118</sup>.

A person may enter into a holy order even at the young age and it is not contrary to Hindu religion. But it becomes a ground for divorce. The reason seems to be that one can follow the religious faith or belief one has, but it should not amount to hardship to one's spouse. And when one spouse leaves the other, even by becoming a *sanyasi*, it prima facie causes hardship to the other party. Looked at from this angle, to become a *sanyasi* is no hope that the *sanyasi* spouse will ever return to resume cohabitation. This seems to be the reason for making it a ground for divorce.<sup>119</sup>

A man enters into holy or religious arrange when he undergoes the ceremonies and rites prescribed by the order which he enters<sup>120</sup>. Unless these ceremonies are undergone, it would not amount to entering into holy order. But if a person enters into a holy order, yet comes home, and resumes cohabitation or after entering into the holy order, continues to cohabit then also the ground will not be available, because though he has entered a religious order, he has not renounced the world<sup>121</sup>.

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<sup>118</sup> . Sita V. Sant Ram, AIR 1954 SC 606.

<sup>119</sup> . Dr Paras Diwan – Modern Hindu Law, 18<sup>th</sup> edn.2007, p.162, Allahabad Law Agency, Faridabad (Haryana).

<sup>120</sup> . Satyanarayana V. Hindu Religious Endowment Board, Madras 1957 AP 824.

<sup>121</sup> . Dro Paras Diwan – Modren Hindu Law, 18<sup>th</sup> edn. 2007, p.163, Allahabad Law Agency, Faridabad (Haryana)

Nobody becomes a *sanyasi* simply because he calls himself a *sanyasi* or wears saffron coloured clothes or has got his head shaved or leaves the homestead or people address him as *sanyasi*<sup>122</sup>.

*Presumption of death:*

If a person is not seen or heard alive by those who are expected to be ‘naturally heard’ of the person for a continuous period of seven years, the person is presumed to be dead. The other spouse may file petition for divorce<sup>123</sup>.

A person is presumed to be dead if he is not heard of as alive for seven years or more by those who would have normally heard from him or about him had he been alive.

Under matrimonial law, the other spouse on the basis of presumption of death, by assuming that he or she has become a widower or widow, contracts a second marriage and after some time, the missing spouse re-appears, then the second marriage is void under Section 11 and the spouse can also be prosecuted for bigamy.<sup>124</sup>

To avoid the risk of missing spouse re-appearing, rendering the second marriage void, Clause (vii)<sup>125</sup> of Section 13 (1) provides that a petitioner may

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<sup>122</sup>. R.C. Nagpal – Modern Hindu Law, edn. 1983, p.170, Eastern Book Co., Lucknow.

<sup>123</sup>. Marriage Laws by EL. Bhagiratha Rao, 10<sup>th</sup> edn. 2013, Asia Law House, Hyderabad.

<sup>124</sup>. Section 494 of I.P.C. 1860.

<sup>125</sup>. A person has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it; had that party been alive.



obtain a decree of dissolution of marriage on this ground. Once the marriage is dissolved, the petitioner is free to marry again and even if the missing spouse returns the next day of the passing of the decree or much before the second wedding, he can do nothing.<sup>126</sup> He or she as the case may be is not entitled to the restitution of conjugal rights with the petitioner (who has obtained divorce). The remarriage of the decree holder is not violative of Section 5 (i)<sup>127</sup> of the Hindu Marriage Act, 1955 and hence it is not bigamy.

*Breakdown theory:*

Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or more after the passing of a decree for judicial separation in a proceeding to which they were parties; or there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or more after the passing of a decree of restitution of conjugal rights.<sup>128</sup>

In 1964, Section 13 (1-A) was inserted which contains second type of divorce based on the 'Break down' theory. Thus the two grounds mentioned in sub-Section (1-A) are available to both the husband and wife. The two clauses

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<sup>126</sup> . Dr. Paras Diwan – Moderan Hindu Law, 18<sup>th</sup> edn.2007, P.163, Allahabad Law Agency, Faridabad (Haryana).

<sup>127</sup> . Neither party has a spouse living at the time of the marriage.

<sup>128</sup> . The Hindu Marriage Act, 1955 1<sup>st</sup> edn. 2009 by Saibaba Itapu, p.23, Sharma Law House, Hyderabad.

under which, non resumption of cohabitation for two years or upwards after the decree of judicial separation or restitution of conjugal rights was made a ground of divorce. This is a modification of clauses (viii) and (ix) of Section 13 (1) of the Hindu Marriage Act, 1955. By the Marriage Laws (Amendment) Act, 1976 the period of two years is reduced to one year. This Section introduced an element of Break-down theory in the Hindu Marriage Act, 1955.<sup>129</sup>

The present provision has come into existence after two amendments in the original provision. The original provision under Section 13 (1) (viii) and (ix) was that a party to marriage may file a petition for divorce if the other party (i) has not resumed cohabitation for a period of two years or upwards after passing of a decree for judicial separation against that party,<sup>130</sup> or (ii) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after passing of that decree.<sup>131</sup> It was judicially held that, only the decree holder could obtain divorce on the basis of the decree for judicial separation or as the case may be, for the restitution of conjugal rights. The reason given was that a decree is passed for the benefit of the decree holder. If the judgment debtor was given right to divorce on the ground of that decree, it will mean that he is allowed to benefit himself from his own wrong. That will be violative of Section 23 (1) (a)

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<sup>129</sup> . Prof. G.C.V. Subba Rao – Family Law in India, 8<sup>th</sup> edn.2005, P.205, S.Gogia & Company, Hyderabad.

<sup>130</sup> . Section 13 (1) (viii) of the H.M. Act, 1955.

<sup>131</sup> . Section 13 (1) (ix) of the H.M. Act, 1955.

of the Hindu Marriage Act, 1955, which provides that no one will be permitted to benefit oneself from one's own wrong or disability<sup>132</sup>.

In *Mehta V. Smt Saroj Mehta*,<sup>133</sup> is a case illustrating the application of Section 23 (1) (a) to the irretrievable breakdown ground. In this case, the husband obtained a decree for restitution of conjugal rights. Then he filed a petition for divorce on the ground of wife's adultery about 6 months after he had obtained a decree for restitution of conjugal rights.

In *Meera Bai V. Rajinder Kumar*,<sup>134</sup> the husband allowed an ex parte decree to be passed against him in favour of his wife. After one year, he filed a petition for divorce under Section 13 (1-A) (ii). But it was proved that he had taken a second wife and never cared to comply with the decree for restitution of conjugal rights. The court held that he could not take advantage of his own wrong and his petition was rejected.

In *Tajinder Kaur V. Nirmaljeet Singh*,<sup>135</sup> wife filed a petition for divorce under Section 13 (1-A) (ii). Decree of restitution of conjugal rights was not executed. The parties had not cohabited for a period of one year after passing of decree. It was held that he was entitled to a decree of divorce.

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<sup>132</sup> . R.C. Nagpal – Modern Hindu Law, 2<sup>nd</sup> edn. 2008, P. 234, Eastern Book Co., Lucknow.

<sup>133</sup> . AIR 1986 Del. 327.

<sup>134</sup> . AIR 1986 Del. 136.

<sup>135</sup> . AIR 2010 (NOC) 545 (P&H).

In *Subhash Chander Sharma v. Anjali Sharma*,<sup>136</sup> Kailash Gambhir, j. held that, irretrievable breakdown of marriage is not a ground of divorce under the Hindu Marriage Act, 1955. High Court in exercise of its inherent power, cannot grant divorce on the ground of irretrievable breakdown of marriage.

In *Vijay Prakash Chaturvedi V. Preeti Chaturvedi*,<sup>137</sup> K.K. Lahoti and Abhay M. Naik. jj. Held that, provision of Hindu Marriage Act, 1955 do not provide for divorce merely on the ground of broken marriage independent of sub-Sections (1) or (2) of Section 13 of the said Act. A person seeking divorce is under an obligation to prove any of grounds enumerated in law. If any of grounds is proved, fact that marriage between parties is irretrievably broken provides additional support to grant of decree of divorce.

*Additional grounds of divorce for wife:*

Prior to the Hindu Marriage Act, 1955 a Hindu male can marry as many wives as he liked and no limit to the number of wives. After commencement of the Act, if a man had married more than one wife, then every wife was given a right to seek divorce from the husband on the ground of his pre-act remarriage. The plea of the first wife is that, her husband married again during her life time, and the plea of second wife is that her husband married her when he already possessed a wife<sup>138</sup>.

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<sup>136</sup> . AIR 2011 (NOC) 38 (Del).

<sup>137</sup> . AIR 2011 (NOC) 43 (MP)

<sup>138</sup> . R.C. Nagpal – Modern Hindu Law, edn.1983, p.178, Eastern Book Co., Lucknow.

If the wife is below the age of 15 years and the husband forces sexual intercourse on her<sup>139</sup>, it would be treated as guilty of rape and his wife can sue him for divorce<sup>140</sup>. ‘Sodomy’ is anal intercourse by a man with his wife or with another woman or with a man<sup>141</sup>. The age and consent of the victim is irrelevant<sup>142</sup>. If a man commits sodomy on his wife without her consent, then it would amount to the matrimonial offence of sodomy.<sup>143</sup>

‘Bestiality’ means sexual intercourse with an animal.<sup>144</sup>

When a wife files a petition for divorce on the grounds of rape, sodomy or bestiality, it is not necessary for her to show that he was prosecuted or convicted for the offence. Even if the husband has been acquitted by the criminal court, she can in divorce proceedings establish his guilty and obtain relief. On the other hand, even if the husband has been convicted by a criminal court, the wife will

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<sup>139</sup>. Section 375 of Indian Penal Code, a man is said to commit ‘rape’ who except in the case hereinafter excepted has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: (1) against her will (2) without her consent (3) with her consent which was obtained by force (4) with her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believer herself to be lawfully married, (5) with her consent, when she was unsound mind or intoxication etc. and (6) with or without her consent when she is under sixteen years of age.

<sup>140</sup>. Dr. Paras Diwan on Hindu Law – 2<sup>nd</sup> edn.2005, P.876, Orient Publishing Co., Allahabad.

<sup>141</sup>. Section 377 IPC, 1860.

<sup>142</sup>. Dr Tahir Mahymood – Hindu Law, 2<sup>nd</sup> edn. 1986, P.467, The Law Book Company (p) Ltd., Allahbad.

<sup>143</sup>. C V. C.22 TLR 26; Bampton V. Bampton (1952)2. All ER 766; cf: Dr. Paras Diwan Modern Hindu Law, 18<sup>th</sup> edn. 2007, P. 165, Allahabad Law Agency, Faridabad (Haryana)

<sup>144</sup>.Sec. 377 of IPC.

have to prove the offence *de novo* in the matrimonial proceedings, then along she will be entitled to the decree of divorce.<sup>145</sup>

Where a decree under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 or under Section 125 of the Code of Criminal Procedure, 1973 is passed in favour of the wife, it becomes the duty of her husband to pay maintenance to her and he must resume cohabitation within one year. If he fails to do so, the wife can seek divorce.<sup>146</sup>

A wife, who was married before she had attained the age of 15 years, and who had repudiated the marriage after attaining that age but before attaining the age of 18 years, may bring a petition for divorce.<sup>147</sup> Consummation of marriage is immaterial. The Hindu Marriage Act, 1955 does not prescribe any procedure for repudiation of marriage. Therefore, the fact of repudiation has to be proved by the wife.<sup>148</sup> No such relief is provided for a male who is married below the age of fifteen or eighteen or twenty one year.

She can apply for divorce whether her marriage was consummated or not. It is sufficient if she repudiates the marriage before completion of 18 years and it is not necessary that she should file a petition under Section 13 (2) (iv) before that

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<sup>145</sup> . Dr Paras Diwan – Modern Hindu Law, 18<sup>th</sup> edn. 2007, p.165, Allahabad Law Agency, Faridabad (Haryana).

<sup>146</sup> . B.M. Gandhi – Hindu Law – 3<sup>rd</sup> edn. 2008, p.333, Eastern Book Company, Lucknow.

<sup>147</sup> . Dr Paras Diwan – Modern Hindu Law, 18<sup>th</sup> edn. 2007, p.165, Allahabad Law Agency, Faridabad (Haryana).

<sup>148</sup> . B.M. Gandhi – Hindu Law – 3<sup>rd</sup> edn. 2008, p.333, Eastern Book Company, Lucknow.

date. She could file it even after that date.<sup>149</sup> Where the wife declined to go to her husband before attaining the age of 18 years, it was held that it amounts to repudiation by conduct.<sup>150</sup>

In a case where there was no averment in the petition that she repudiated the marriage before the attaining the age of 18 years, and it was advanced in the stage of arguments, it was held that she was not entitled.<sup>151</sup>

*Alternative Relief:*

Section 13-A of the Hindu Marriage Act, 1955 deals with in any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (ii), (vi) and (vii) of sub-Sec. (1) of Sec.13, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation<sup>152</sup>.

The Section applies, even, if no prayer for judicial separation is made<sup>153</sup>. The object of the Section as mentioned above is to provide opportunity for reconciliation<sup>154</sup>.

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<sup>149</sup> . Kamlesh V. Chamel Singh ( 1986) 2 HLR 464 (P&H); cf. Mayne's Hindu Law & Usage – 13<sup>th</sup> edn. 1995, p.255, Bharat Law House, New Delhi.

<sup>150</sup> . Seethal Das v. Bijay Kumari (1988)2 HLR 359 (P& H); cited *ibid*.

<sup>151</sup> . Durgabai v. Kedarmal Sharma 1980 HLR 166; cf. Mayne's Hindu Law & Usage – 13<sup>th</sup> edn. 1995, p.255, Bharat Law House, New Delhi.

<sup>152</sup> . Law of Marriage and Divorce by P.C. Pant, II Edition 2001, P-75.

<sup>153</sup> . V.S. Ramanthan V. R. Subbulakshmi, 1983 HLR 574.

<sup>154</sup> . Angrez Kaur V. Baldev Singh, AIR 1979 HLR 561.

Where in reply to the petition of divorce by husband, wife makes allegation of illicit relationship against her husband with another woman but fails to prove, it amounts to cruelty but the court, in the circumstances of the case that husband failed to establish other allegations of cruelty made by him against the wife, granted decree of judicial separation instead of decree of divorce<sup>155</sup>.

*Divorce by mutual consent:*

Divorce by mutual consent is not new to Hindus and it was recognized through legislation and customs by some states and communities<sup>156</sup>. But there was no provision to take divorce by mutual consent under Hindu Marriage Act, 1955. Section 13-B was added by the Marriage Laws (Amendment) Act, 1976 where the parties can now obtain divorce by mutual consent. This provision is retrospective as well as prospective. If both the parties have agreed to dissolve their marriage, they may do so in a more civilized and cultured way than by quarrelling between themselves in a court. They may file petition together under Section 13-B in a District Court that they may be granted a decree of divorce.

Both parties to a marriage together filed petition for dissolution of marriage by a decree of divorce before the District Court stating that they have been living separately for a period of one year or more, that they have not been able to live

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<sup>155</sup> . Tapan Chakraborty V. Jyotsand Chakraborty, AIR 1997 Cal. 134.

<sup>156</sup> . It was permitted by the Travancore Exhara Act, 1100 (1925 BC). The Travancore Act, 1925 (Reg.III of 1100), the Cochin Marumakkattayam Act, 1133 (1938 BC) and the Cochin Nayat Act, 1113 (1938 BC). In certain communities, it was provided by custom (Jina Magan Pakhali v. Rai Jethi AIR 1941 Bom 298; ILR 1941 Bom 535; cf: B.M. Gandhi – Hindu Law, 3<sup>rd</sup> edn. 2008, p.335, Eastern Book Company, Lucknow.



together and that they have mutually agreed that the marriage should be dissolved.<sup>157</sup>

After six months the presentation of the petition and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the Court after satisfied and on hearing the parties, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of decree.<sup>158</sup>

The court can allow the parties to amend a petition for divorce under Section 13-B to be converted into a petition for divorce by mutual consent. This is possible even at the appellate stage. When a decree of divorce under Section 13-B is passed on such an amended petition, the effect is that all the past allegations and cross-allegations made by the parties against each other during the hearing of the petition under Section 13-B are quashed.

It shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of a divorce, (unless the date of the presentation of the petition one year has elapsed since the date of marriage)<sup>159</sup>.

Some petitions may be allowed within one year of the marriage on the ground that the case is one of exceptional hardship to the petitioner or exceptional depravity on the part of the respondent, but it appears to the court at the hearing of

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<sup>157</sup> . Section 13-B (1) of the Hindu Marriage Act, 1955.

<sup>158</sup> . Section 13-B (2) of the Hindu Marriage Act, 1955.

<sup>159</sup> . Subs. By Act 68 of 1976. Sec.9 w.e.f. 27.5.1976.

the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after <sup>160</sup>(expiry of one year) from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after expiration of the said year upon the same or substantially the same facts as those alleged in support of the petition so dismissed.<sup>161</sup>

According to Sub-section (1), the three essentials are:

- i) that both parties have been living separately for a period of one year or more;
- ii) that both parties have not been able to live together;
- iii) that both the parties have mutually agreed that their marriage should be dissolved.

In disposing of any application under this section for leave to present a petition for divorce before one year from the date of marriage, the court shall show the welfare of minor children and also made effort for reconciliation.<sup>162</sup>

In *Kiritbhai Girdhar Bhai Patel V. Prafulabeen Kiritbhai Patel*<sup>163</sup>, the Gujarat High Court held that, the expression “have been living separately” under Sub-Section (1) of Section 13-B of the Act does not necessarily mean that the

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<sup>160</sup> . Subs., by Act 68 of 1976 Sec.9 w.e.f. 27.5.1976.

<sup>161</sup> . Section 14 (1) of the Hindu Marriage Act, 1955.

<sup>162</sup> . Section 14 (2) of the Hindu Marriage Act, 1955.

<sup>163</sup> . AIR 1993 Guj.111.

spouses have to live in different places. What the expression would seem to require is that they must be living apart, viz., not living with each other as 'husband' and 'wife'. Merely going abroad jointly and staying under one roof is not living as husband and wife. It can not be ground to refuse divorce when marriage has not been consummated for more than one year.

The parties have mutually agreed that their marriage should be dissolved. The same may proceed from one party to the other or from a third party to both the parties<sup>164</sup>.

After filing of a petition under sub-section (1) of Section 13-B, the court shall not proceed with it for six months. This is for the purpose of giving time to the parties to re-think over this drastic step. At the end of six months, the court will not proceed with the petition *suo moto*. If the parties move the court thereafter, then only the court will proceed. The motion must be made by both parties. These are mandatory provisions.

The parties have to make a motion not later than eighteen months from the date of the filing of the petition. This is a mandatory provision. The petition will not be heard beyond above said period. It is however; open to the parties to withdraw the petition in the mean time. In *Smt. Sureshta Deve Vs. Om Prakash*,<sup>165</sup> the Supreme Court held that a party to the petition for divorce by mutual consent

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<sup>164</sup>. R.K. Agarwala- Hindu Law, 21<sup>st</sup> edn. 2003, p.96, Central Law Agency, Allahabad.

<sup>165</sup>. AIR 1992 SC 1904.

can unilaterally withdraw his consent at any time till passing of the decree under this section. It is not irrevocable. If subsequent motion seeking divorce decree under sub-Section (2) is not of both the parties because of the withdrawal of consent by one of the parties, the court gets no jurisdiction to pass the decree. Mutual consent must continue till divorce decree is accepted.

The parties are entitled to petition again under this Section if they have withdrawn the petition or if they did not move the court within the prescribed period of eighteen months. Withdrawal of the petition or failure in moving the court to proceed in the matter shows that they had attempted reconciliation.<sup>166</sup>

In *Shaveta Garg V. Rajat Goyal*,<sup>167</sup> it was held that waiting period of six months can be waived on concession of both the parties.

In *Smt Suman V. Ashok Chhajjer*,<sup>168</sup> in a petition for divorce under Section 13-B, both parties appearing in person and stating that it was not possible for them to live together. To secure ends of justice for peaceful life of both parties, divorce by mutual consent granted.

In *Hitesh Bhatnagar V. Deepa Bhatnagar*,<sup>169</sup> The Supreme Court held that marriage cannot be dissolved on the ground of non-withdrawal of consent by wife before expiry of stipulated period of eighteen months has no bar. Eighteen months

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<sup>166</sup> . R.C. Nagpal – Modern Hindu Law, 2<sup>nd</sup> edn.2008, p.254, Eastern Book Co., Lucknow.

<sup>167</sup> . AIR 2009 (NOC) 1640 (P&H)

<sup>168</sup> . AIR 2010 (NOC) 549 (Raj).

<sup>169</sup> . AIR 2011 SC 1637.

period was specified only to ensure quick disposal of cases of divorce by mutual consent, and not to specify time period for withdrawal of consent.

In *Padma Kiran Rao Vs. B. Venkata Ramana Rao*,<sup>170</sup> husband residing at USA. His presence not required at the time of hearing and his affidavit is sufficient. Decree can be granted.

*Judicial separation:*

Judicial separation means suspending the duties and obligations under the Marriage Act. But not divorce and the marriage subsists during that period the attempt be made for reunion by the spouses.

The grounds specified in sub-section (1) of Section 13 of the Act, either party to a marriage may present a petition before the court praying for a decree for judicial separation, in case of a wife also file application on any of the grounds specified in sub-section (2) of Section 13 for judicial separation.<sup>171</sup>

It shall no longer be obligatory for the petitioner to cohabit with the respondent, where a decree for judicial separation has been passed, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements, rescind the decree if it considers it just and reasonable to do so.<sup>172</sup>

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<sup>170</sup> . 1995 (3) ALD 341 (DB)

<sup>171</sup> . Section 10 (1) of the Hindu Marriage Act, 1955.

<sup>172</sup> . Section 10 (2) of the Hindu Marriage Act, 1955.

The Hindu Marriage Act, 1955 does not provide separate grounds for a decree of judicial separation and makes reference of grounds mentioned in Section 13 of the Act. This act refers to the malicious areas of cruelty, adultery, desertion, venereal disease and leprosy, lunacy, conversion of religion etc.

The policy of law is that divorce should not be easily granted and doors of opportunities for parties to unite should be kept open wherever divorce is not necessary.

Judicial separation is an arrangement by which husband and wife live apart by the court's decree. It does not extinguish the marital relationship between two<sup>173</sup>. In other words, judicial separation permits parties not to cohabit without bringing to an end their tie of wedlock. It is separation from both bed and board. However, no decree of judicial separation can be passed unless marriage is valid between the parties<sup>174</sup>. With decree of judicial separation in hands parties remain husband and wife and are not free to remarry. It only suspends their certain mutual rights and obligations leaving room for reconciliation and if they fail to reconcile for one year, either of them may seek divorce on this ground under Sec. 13 of the Act<sup>175</sup>.

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<sup>173</sup> . M. Narasimha Reddy V. M. Moosamma, AIR 1976, A.P. 77.

<sup>174</sup> . Bishwanth V. Anjali, AIR 1975 Cal. 45.

<sup>175</sup> . Jethabhai V. Manabai, AIR 1975 Bom. 88.

During the course of judicial separation, either party may be entitled to get maintenance from the other if the situation so warrants. It is temporary suspension of marital rights between the spouses<sup>176</sup>. The parties remain husband and wife. If any of them remarries, he or she will be guilty of bigamy. In the event of one of the parties dying, the other party will inherit the property of the deceased spouse<sup>177</sup>.

Before passing of the Marriage Laws (Amendment) Act, 1976, the grounds for divorce are more serious than those for judicial separation. After the amendment of the Act 1976, Section 10 has been completely recast. The various grounds for judicial separation mentioned in the old Section 10 have been omitted. It is provided that the petitioner may apply for judicial separation on precisely the same grounds that can support a petition for divorce.

Mere judicial separation does not put an end to her marital status as wife<sup>178</sup>.

All grounds stated above for judicial separation shall be discussed elaborately in Section 13<sup>179</sup> as the said grounds are also applicable for grant of divorce.

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<sup>176</sup> . R.K. Agarwala- Hindu Law, 21<sup>st</sup> edn. 2003, p.58, Central Law Agency, Allahabad.

<sup>177</sup> . Narasimha Reddy and others V. M. Boosamma AIR 1976 AP 77.

<sup>178</sup> . M. Narasimha Reddy V. Boosamma, 1975 (1) An.WR 25 (SN) = 1975 (1) APLJ 29 (SN = 1975 APHN 88, cf. Marriage Laws & Family Courts Act, 10<sup>th</sup> edition, 2013, Page -23, by E.L. Bhagiratha Rao, published by Asian Law House, Hyderabad.

<sup>179</sup> . Referred in pages 13 to 17 of this chapter.

*Voidable marriages:*

Before or after the commencement of this Act, any marriage solemnized shall be voidable and may be annulled by a decree of nullity.<sup>180</sup>

Any marriage shall be voidable and may be annulled by a decree of nullity when the marriage has not been consummated owing to the impotence of the respondent.<sup>181</sup>

When the marriage is in contravention of the condition specified in Clause (ii)<sup>182</sup> of Section 5 of the Act.<sup>183</sup>

When the consent of the petitioner or where the consent of the guardian in marriage of the petitioner obtained by force or fraud.<sup>184</sup>

At the time of marriage the respondent was pregnant by some person other than the petitioner.<sup>185</sup>

In case of fraud or force obtained from the petitioner and it was revealed subsequently to the petitioner, but the petitioner filed the petition more than one year before the court after discovered the fraud or force, the said petition is not

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<sup>180</sup> . Section 12 (1) of the Hindu Marriage Act, 1955.

<sup>181</sup> . Section 12 (1) (a) of the Hindu Marriage Act, 1955.

<sup>182</sup> . Section 5 (ii) at the time of marriage, neither party:- (a) is capable of giving a valid consent to it in consequence of unsoundness of mind, or (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children, or (c) has been subject to recurrent attacks of insanity.

<sup>183</sup> . Section 12 (1) (b) of the Hindu Marriage Act, 1955.

<sup>184</sup> . Section 12 (1) (c) of the Hindu Marriage Act, 1955.

<sup>185</sup> . Section 12 (1) (d) of the Hindu Marriage Act, 1955.



entertained. It means after knowing the fraud or force the petitioner shall file the petition within one year.<sup>186</sup>

After knowing the force or fraud, the petitioner with his or her full consent lived with the other party to the marriage as husband or wife, the petition is not entertained in this section.<sup>187</sup>

In the case of respondent was pregnant at the time of marriage by some person other than the petitioner, but the petitioner was ignorant about the alleged facts by that time, the petition shall be entertained under this section.<sup>188</sup>

Either party to a marriage may file a petition under this section within one year from the date of solemnization of marriage.<sup>189</sup>

The marital intercourse with the consent of the petitioner did not take place after the discovery of such pregnancy.<sup>190</sup>

A voidable marriage remains valid and binding and continues to subsist for all purposes unless a decree is passed by the court annulling the same on any of the above grounds mentioned in this Section. There is a distinction between a marriage void *ipso jure* and a marriage which is voidable at the instance of one of

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<sup>186</sup> . Section 12 (2) (a) (i) of the Hindu Marriage Act, 1955.

<sup>187</sup> . Section 12 (2) (a) (ii) of the Hindu Marriage Act, 1955.

<sup>188</sup> . Section 12 (2) (b) (i) of the Hindu Marriage Act, 1955.

<sup>189</sup> . Section 12 (2) (a) (ii) of the Hindu Marriage Act, 1955.

<sup>190</sup> . Section 12 (2) (a) (iii) of the Hindu Marriage Act, 1955.

the parties to the same; the former is a nullity from the inception and the latter continues to be valid, unless annulled by a decree of the competent court of Law.

*Impotence:*

Impotency is the lack of ability to perform full and complete sexual intercourse. Partial and imperfect intercourse is not consummation and if a party was not capable of performing the sexual intercourse fully, he would be deemed to be impotent.

In “*Shamala Devi Vs. Surjit Sing*” their Lordships of *Himachal Pradesh High Court*<sup>191</sup> observed that if a fairly resistant hymen with small opening be found intact, there is a strong presumption of chastity; if on the other hand, there be a very soft and resilient hymen with a large opening, no opinion can be offered. It is also held that potency incase of males, means, power of erection of the male organ plus discharge of healthy semen containing living spermatozoa and in the case of females means (1) development of internal or external genitals and (2) ovulation and menstruation<sup>192</sup>.

The word ‘impotence’ has been understood in matrimonial cases as meaning incapacity to consummate the marriage. Evidence of physical structural

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<sup>191</sup> . AIR 1998, H.P.32, cf. Taylor’s Principles and Practice of Medical Jurisprudence, Volume-II, 11<sup>th</sup> edition, in Chapter-II.

<sup>192</sup> . The Hindu Mariage Act, 1955 by Saibaba Itapu, 1<sup>st</sup> edn. P-16, published by Sharma Law House, Hyderabad.

defect can safely be said to be sufficient to render the marriage invalid if it is shown that on this account sexual intercourse is not possible<sup>193</sup>.

In *Grimes Vs. Grimes*<sup>194</sup>, *Dr. Lushinton* observed: “The sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse, it does not mean partial and imperfect intercourse yet. I cannot go to the length of saying that every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with, but if so imperfect as scarcely to be natural, I should not hesitate to say that, legally speaking, it is no intercourse at all”<sup>195</sup>.

Petition filed by wife on the ground of non consummation of marriage owing to impotency of husband. Wife being virgin after petition, the petition for divorce should be granted in the absence of any proof to the contrary.<sup>196</sup>

Where a medical expert has found less than 50% of erection after the “pipe test” in the male sexual organ such male can be treated as impotent for the purposes of this section.<sup>197</sup>

Like lesbianism, homosexuality is also impotency. The husband was a homosexual. As per the statement of the wife he was unable to perform sexual

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<sup>193</sup> . *Devi V. Harish Kumar*, II (1996) DMC (MP) 551, cf. *Marriage Laws* by E.L. Bhagirath Rao, 10<sup>th</sup> edn. P-30, published by Asia Law House, Hyderabad.

<sup>194</sup> . (1948) 2 All. ER 147, cf. *The Hindu Marriage Act, 1955* by Saibaba Itapu, 1<sup>st</sup> edn, 2009, p.17, published by Sharma Law House, Hyderabad.

<sup>195</sup> . *The Hindu Marriage Act, 1955* by Saibaba Itapu, 1<sup>st</sup> edn, 2009, p.17, published by Sharma Law House, Hyderabad.

<sup>196</sup> . *Suvarna v. G.M. Achary*, 1978 (1) ALD 61 (NRC).

<sup>197</sup> . *Manjit Kaur v. Surinder Singh*, AIR 1994 P & H 5.

intercourse with her and he enjoyed the company of males only and could not react to females. He was unable to have heterosexual intercourse with any woman.<sup>198</sup>

*Fraud:*

The term fraud is not defined in the Hindu Marriage Act, 1955. Before the marriage if the respondent obtain the consent of the petitioner by suppression of disease or misrepresenting anything like education etc., it can be called fraud. Suppression with regard to status, educational qualifications, financial situation, state of health, earlier marriage, if the respondent is pregnant by some other person other than the petitioner at the time of marriage or virginity can afford a ground for the annulment of the marriage. The past conduct of the respondent, except what is mentioned in clause (d), should be come ground of the dissolution of the marriage<sup>199</sup>.

Wife is high qualified than husband. Husband represented that he had a good job but in fact he is only an apprentice. He suppressed the material fact. Decree of annulment granted<sup>200</sup>.

In the case of *Pavan Kumar Vs. Mukesh Kumari*<sup>201</sup>, wife pregnant by other person at the time of marriage, she does not disclosed the same, marriage broken

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<sup>198</sup> . *Moina Khosla v. Amardeep Singh Khosla*, 1986 (2) CCC 56 (Delhi).

<sup>199</sup> . The Hindu Marriage Act, 1955 by Saibaba Itapu, 1<sup>st</sup> edn, 2009, p.17, published by Sharma Law House, Hyderabad.

<sup>200</sup> . *Bindu Sharma Vs. Ram Prakash Sharma*, AIR 1997, All. 429, cf. The Hindu Marriage Act, 1955 by Saibaba Itapu, 1<sup>st</sup> edn, 2009, p.17, published by Sharma Law House, Hyderabad.

immediate after the marriage. Considering the facts it is converted to Sec.13 of the Act for divorce treating the same as cruelty.

In the following cases the courts allowed the petitions on the ground of force or fraud and annulled the marriages:-

- i) Concealment of factum of annulment of first marriage at the time of second marriage<sup>202</sup>.
- ii) non disclosure that party getting married to the petitioner is partially disabled because of polio in the childhood<sup>203</sup>.
- iii) threat to commit murder or to commit suicide<sup>204</sup>.
- iv) impersonation at the time of selection for marriage i.e. person shown was different than person actually married to the petitioner<sup>205</sup>.
- v) obtaining consent of the petitioner by concealing the fact that the opposite party was suffering from Schizophrenia<sup>206</sup>.

#### *Paternity & Pregnancy:*

This section required that the party disputing the paternity to prove non-access in order to dispel the presumption. “Access and “non-access” means the existence or non existence of opportunities for sexual intercourse; it does not mean

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<sup>201</sup> . AIR, 2001, Raj. 1. cf. The Hindu Marriage Act, 1955 by Saibaba Itapu, 1<sup>st</sup> edn, 2009, p.17, published by Sharma Law House, Hyderabad.

<sup>202</sup> . Kiran Bala V. Bahairo Prasad, AIR 1982 All 242; (1982) 1 DMC 327, cf. Law of Marriage Divorce by PC Pant, 2<sup>nd</sup> edn.2001, P.54, published by Orient Publishing Company.

<sup>203</sup> .Balbir Kaur V. Maghar Singh, AIR 1984 P & H 417. cf. ibid.

<sup>204</sup> . Purabi V. Basudeb Mukherjee, AIR 1969 Cal 293. cf. Law of Marriage Divorce by PC Pant, 2<sup>nd</sup> edn.2001, P.54, published by Orient Publishing Company.

<sup>205</sup> . Raja Ram V. Deepa Bai, AIR 1974, MP. 52, Ibid.

<sup>206</sup> . R. Sankarnarayan V. Anandhavalli, AIR 1998 Mad 198 (201), cf. Ibid.

actual “co-habitation”. If the person was born during the continuance of a valid marriage between his mother and the man or within 280 days after its dissolution and the mother remains unmarried. It shall be taken as conclusive proof that he is the legitimate son of that man.

In India most of the divorce cases are filing on the grounds of illegal contacts and cruelty. In the ancient Hindu society the women had not come out for higher education and employment and their usual life is brought up the children in a proper manner by staying at home. There after there was rapid change in the society, then due to higher education and employment opportunity to the women they used to acquaintance with other men and used to develop illicit intimacy with them as a result of which there were disputes between spouses. In the present days the spouses are not adjusting with each other in leading matrimonial life and they used to quarrel on flimsy grounds and then approaching the courts for divorce on the ground of cruelty etc. In this connection the spouses shall change their attitude and they shall behave in a proper manner not to involve in any immoral life in the society then only to prevent the divorce rate in India.

Moreover, the provisions of the Hindu Marriage Act, 1955 have proved to be inadequate to deal with the issue of irretrievable breakdown of marriage and therefore, a need has been felt for certain amendments in the Act. Then the Marriage Laws (Amendment) Bill, 2010-Irretrievable breakdown of marriage, ground for divorce was produced before the Parliament and it was allowed. The

origin, object and necessity of the ground 'irretrievably breakdown' has been discussed elaborately hereunder.

*Marriage Laws (Amendment) Bill, 2010-Irretrivable breakdown of marriage: ground for divorce:*

New Zealand was the first country to accept the concept of "irretrievable breakdown of marriage" in the year, 1920. Thereafter several countries have accepted it as a ground to seek divorce. In fact, in the United Kingdom, it is the only ground on which one can seek divorce. In India however, "irretrievable breakdown of marriage" had not been accepted as a ground for divorce under the Hindu law till today<sup>207</sup>.

Divorce is the "dissolution of a valid marriage in law". Once divorce is granted, the parties are free from any kind of obligation, legal or otherwise, towards the other party. A law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the fault theory guilt has to be proved.

When it is impossible to live like husband and wife, any compulsion to unite them would lead to more problems. However rigid the social fabric, it is not the social system but the personal safety of the parties to the wedlock that shall prevail<sup>208</sup>.

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<sup>207</sup> . Lawyers clubindia Article by Vallari Gaikwad, downloaded from the website of [www.lawyersclubindia.com/articles/print](http://www.lawyersclubindia.com/articles/print).

<sup>208</sup> . Ashok Kumar Bhatnagar v. Shabnam Bhatnagar, AIR 1990 Delhi 1.

Where marriage has been ruined beyond the hope of salvage, the public interest would in fact, lie in the recognition of that fact, despite it being true that public interest would actually lie in securing the marital status of the parties as far as possible, the law, by not allowing the grant of decree of divorce would not serve the sanctity of marriage. Human life has a short span and situations causing misery cannot be allowed to continue indefinitely<sup>209</sup>.

The provision of the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 have proved to be inadequate to deal with the issue where there has been irretrievable breakdown of marriage but it cannot be taken to be a ground for decree of dissolution of marriage and therefore, there is a need for certain amendments.<sup>210</sup>

The Law Commission of India in its 71<sup>st</sup> report strongly recommended for introduction of breakdown of marriage as a ground for divorce. According to report “restricting the ground of divorce to a particular offence or matrimonial disability causes injustice in those cases where the situation is such that although none of the party is at fault or the fault is of such nature that the parties to the marriage cannot be worked”. The report also suggested certain safeguards to check uncontrolled divorces. Moreover, the jurists, academicians and the courts

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<sup>209</sup> . Lawyers clubindia Article by Vallari Gaikwad, downloaded from the website of [www.lawyersclubindia.com/articles/print](http://www.lawyersclubindia.com/articles/print).

<sup>210</sup> . Nitu v. Krishan Lal, AIR 1990 Delhi 1.



have been making a plea for introducing the said ground in the matrimonial laws<sup>211</sup>.

Accordingly, the Marriage Laws (Amendment) Bill-1981 to amend the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954, was introduced before the Lok Sabha for proper consideration but the same was dissolved by the 7<sup>th</sup> Lok Sabha and hence the bill lapsed<sup>212</sup>.

The Supreme Court in *Ms. Jordan Diengdesh vs. S.S. Chopra*,<sup>213</sup> had pointed out the necessity to introduce irretrievable breakdown of marriage.

Similarly in *Naveen Kohli vs. Neelu Kohli*,<sup>214</sup> the Supreme Court recommended to the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for divorce.

It should not be the compulsion of law for the man and woman to remain as husband and wife, when they seized to be so in fact and the situation is such that none of the parties is at fault, or the fault is of such a nature that the parties to it do not want to disclose it, yet there has arisen a situation in which the marriage cannot be worked<sup>215</sup>.

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<sup>211</sup> . Paras Diwan, 'Divorce Structure of the Hindu Marriage Act, 1955.

<sup>212</sup> . The Marriage Laws (Amendment) Bill, 2010, introduced in the Rajya Sabha.

<sup>213</sup> . AIR 1985 SC 935)

<sup>214</sup> . AIR 2006 SC 1675.

<sup>215</sup> . Cruelty and offences against husbands, by V.K. Dewan, 2<sup>nd</sup> edn. 2011, p-373, by Asia Law House.

But in some extreme circumstances, the Supreme Court of India dissolved the marriages granting decree of divorce by exercising its inherent powers under Article 142<sup>216</sup> of the Constitution of India on the ground of 'irretrievable breakdown'. In certain cases the Supreme Court had taken the ground of irretrievable breakdown.

In *Ms. Jorden Diengdeh v. S.S. Chopra*<sup>217</sup>, the Apex Court expressed that there is no point or purpose to be served by the continuance of marriage, which has so completely and signally broken down. It is also observed that some time it is better to give a decree of divorce than to tie the parties. It was suggested that time has come for intervention of the Legislature in these matters to provide by law for a way out of unhappy situation in which couples have found themselves in.

In *Naveen Kohli v. Neelu Kohli*,<sup>218</sup> the wife had initiated number of civil and criminal proceedings against her husband. She ventured to issue an advertisement in a national newspaper that her husband was only her employee and cautioned the business associates to avoid dealing with her husband due to which the reputation of the family decreased in the society and there is no possibility for their reunion.

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<sup>216</sup> . As per Article 142 of the Constitution of India, the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and in decree so passed or order so made shall be enforceable through the territory of India in such manner as may be prescribed by or order any law may by Parliament and until provision in that behalf is so made in such manner as the President may by order prescribed.

<sup>217</sup> . (1985) 3 SCC 62.

<sup>218</sup> . I (2006) DMC 489 (SC).

In the above case, the Supreme Court observed that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interest of the parties. Where there has been a long period of continuous separation, it may fairly be surmised 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.

The marriage was irretrievably broken down and hence dissolved<sup>219</sup>.

In *Rishikesh Sharma v. Saroj Sharma*,<sup>220</sup> the Apex Court observed that the parties have been litigating since 1981 and have lost valuable part of life, now cannot live peacefully for remaining part of their life.

There is no possibility to them resuming the normal marital life and their marriage has been irretrievable breakdown and the parties cannot reconcile themselves and live together forgetting their past as a bad dream<sup>221</sup>.

Both parties have crossed the limit of no return and a workable solution was certainly not possible and they could not reconcile themselves to live together<sup>222</sup>.

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<sup>219</sup>. Swati Verma v. Rajan Verma, (2004) 1 SCC 123.

<sup>220</sup>. I (2007) DMC 77 (SC)

<sup>221</sup>. Durga P. Tripathy v. Arundhati Tripathy, (2005) 7 SCC 353.

There were allegations and counter allegations against each other by the wife and husband. The allegations against the husband were inhuman treatment, bestial activities including merciless beating, attempting to kill her etc. So the marriage of the parties totally irretrievable broken down.<sup>223</sup>

There are cases where the marriage between the parties is rendered a complete deadwood, an irretrievable breakdown of marriage. There is no doubt in it that priority of law is to sustain the marriage and so also the mandate of social norms, but where parties are living separately for years together, there is no chance whatsoever to reconcile and all efforts in this regard have failed, it would be no use to keep the marriage just on paper. Such views were taken in the following noted cases<sup>224</sup>:

In some general cases the Court refused to grant divorce on the ground of irretrievable breakdown of marriage. At the time of deciding cases, the court must not lightly dissolve a marriage. It is only in extreme circumstances the court may use this ground for dissolving a marriage. In the following cases, the court has not taken the ground of irretrievable breakdown of marriage.

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<sup>222</sup> .Vinita Saxena v. Pankaj Pandit, (2006) 2 Supreme 663.

<sup>223</sup> . Sabitanjai Pattanaik v. Priyabala Pattanaik, AIR 2001 Orissa 84.

<sup>224</sup> . Chandrakala Menon v. Vipin Menon, (1993) 2 SCC 6.  
Kanchan Devi v. Promod Kumar Mittal, (1996) 8 SCC 90.  
Sandhya Rani v. Kalyanaram Narayanam, (1994) Supp. SCC 588.  
Durga Prasanna Tripathy v. Arunadhathi Tripathy, AIR 2005 SC 3297.  
Anjana Kishore v. Puneet Kishore, (2002) 10 SCC 194.  
Swati Verma v. Rajan verma, (2004) I SCC 123.  
V. Bhagat v. D. Bhagat, AIR 1995 SC 851.

In *Chetan Dass v. Kamala Devi*,<sup>225</sup> the Apex Court observed that it would not be appropriate to apply any submission of “irretrievable breakdown” as a straitjacket formula for grant of relief of divorce. Such views were taken in the cases noted below:<sup>226</sup>

The marriages are made in heaven and broken on earth, and hence appropriate care has to be taken to see that such marriages are not broken easily.<sup>227</sup>

Supreme Court criticized the Hindu Marriage Act, 1955,<sup>228</sup> that “due to this Act most of the families suffered in the society, after the dissolution of marriage it would affect on the lives of children, the effect will be grave in case of female, especially at the time of marriage. Justice *Arijith Pasayath* and Justice *G.S. Singhvi* also opined that the Hindu Marriage Act dissolved more cases than solving the disputes between couple.

Justice *Markandeya Katru* and Justice *V.S. Sirpurarkar* of Supreme Court of India dismissed the divorce application filed on the ground of irretrievable break down of marriage stating that ‘it will not be possible to grant divorce on the

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<sup>225</sup> . (2001) 4 SCC 250.

<sup>226</sup> . Romesh Chander v. Savitri, AIR 1995 SC 851.  
 Rita Das Biswas v. Trilokesh Das Biswas, AIR 2007 Gau. 122.  
 Lalitha v. Manikswamy, (2001) 1 DMC 679 (SC).  
 Syam Sunder Kohli v. Sushma Kohli, AIR 2004 Supreme Court 5111.

<sup>227</sup> . Bajrang Gangadhar Revdekar v. Pooja Gangadhar Revdekar, AIR 2010 Bombay.

<sup>228</sup> . Statement in Eenadu Daily news paper, dt.18.6.2008.

ground of irretrievable break down of marriage’ as there is no provision under Section 13 of the Hindu Marriage Act, 1955.<sup>229</sup>

Further, the 18<sup>th</sup> Law Commission of India *suo motu* took up the matter and in its 217<sup>th</sup> Report to the Government recommended that ‘irretrievable breakdown of marriage’ should be incorporated as another ground for grant of a decree of divorce under the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954<sup>230</sup>.

It has made efforts to provide safeguard to the wife and affected children in cases of a deadlock, by providing for amendment in Section 13 by adding Sections 13-C, 13-D and 13-E of Hindu Marriage Act, 1955 and amending Section 28 by inserting 28-A, 28-B and 28-C of the Special Marriage Act, 1954.

The summary of the proposed Sections are to be inserted hereunder:

For dissolution of marriage the petition may be made by either party before the District Court, irrespective of the fact that whether the marriage was solemnized before or after the commencement of Marriage Law (Amendment) Bill of 2010.<sup>231</sup>

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<sup>229</sup> . Eenadu Daily News Paper, dt.5.3.2009.

<sup>230</sup> . The Marriage Laws (Amendment) Bill, 2010.

<sup>231</sup> . Section 13 C (1) of the Marriage Laws (Amendment) Bill, 2010.

The parties to the marriage have lived apart for a continuous period of not less than three years immediately preceding the presentation of petition<sup>232</sup> and in that continuous period no account shall be taken of any one period (not exceeding three months in all) during which the parties resumed living with each other, in such circumstances the decree may be granted though the marriage has not hold to have broken down irretrievably.<sup>233</sup>

If the court is satisfied on the evidence that the parties are living separately more than three years, then unless it is satisfied on the evidence that the marriage has not broken down irretrievably, grant a decree of divorce.<sup>234</sup>

It further specifies what ‘living apart’ actually means in context of granting a decree of divorce based on the ground. It states that a husband and wife shall be treated as living apart, unless they are living together in the same household.<sup>235</sup>

Once, if the wife has opposed the said petition on the above grounds, then it would be the court’s duty to consider and examine all the facts and circumstances of the case, which would be taken into consideration.

- i) the conduct of the parties towards each other;
- ii) interests of the parties concerned;
- iii) responsibility and custody of the children (if any) and

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<sup>232</sup> . Section 13 C (2) of the Marriage Laws (Amendment) Bill, 2010.

<sup>233</sup> . Section 13 C (4) of the Marriage Laws (Amendment) Bill, 2010.

<sup>234</sup> . Section 13 C (3) of the Marriage Laws (Amendment) Bill, 2010.

<sup>235</sup> . Section 13 C (5) of the Marriage Laws (Amendment) Bill, 2010.

- (iv) interests of other persons who might get affected by any effective change in the relationship of the parties in question.<sup>236</sup>

It states that the court, shall not grant the decree of divorce until and unless, adequate provisions for maintenance of children born out of the marriage are made, keeping in mind the financial soundness of the parties to the marriage.<sup>237</sup>

The Marriage Laws (Amendment) Bill was approved by the Union Cabinet on 10.6.2010. It has prepared on the recommendations of the Law Commission as well as the Supreme Court, after examining various legislations along with previous judgments, and has expressed its view that, “Irretrievable Breakdown of Marriage” should be incorporated as a ground for divorce.

Some jurists have expressed their apprehension for introduction of irretrievable breakdown of marriage as a ground for granting of decree of divorce as the said amendment in the Acts would put human ingenuity at a premium and throw wide open the doors to litigation, and will create more problems than are sought to be solved. According to the Law Commission Report, majority of jurists welcomed the new Bill as the human life has a short span and situations causing misery cannot be allowed to continue indefinitely<sup>238</sup>.

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<sup>236</sup> . Section 13 D of the Marriage Laws (Amendment) Bill, 2010.

<sup>237</sup> . Section 13 E of the Marriage Laws (Amendment) Bill, 2010.

<sup>238</sup> . Samar Ghosh v. Jaya Ghosh, 2007 (4) ALD 11 (SC)



Keeping in pace with the changing times, introduction of such new ground is a welcome step. At the time of granting decree of divorce the following points shall be taken into consideration:

- 1) If any property relating to marriage shall be distributed as per choice of parties;
- 2) If any child born to a marriage, the future of the child shall be taken into consideration at the time of dissolution of marriage and future maintenance shall be granted.
- 3) The custody and visitation rights of the minor children shall be taken into consideration; it will prevent the future disputes.
- 4) Permanent alimony may be granted to wife and children for their future life.
- 5) If there is any unmarried female child to a marriage, the court shall direct the father to deposit some amount for marriage expenses.

The above points seem to be the only way to ensure, that the life of women and their children may be safe after dissolving the marriages also.

Now a days most of the couple wondering around the courts years together by filing divorce application due to small disputes. Innocent spouses are suffering years together without any fault on their behalf in the marriage, due to which their lives are destroyed. Some times the contest litigation may be taken time 5 to 10 years before the courts in the meanwhile the young life of couple may be spoiled and it will not be recovered at any point of time. If the ground of irretrievable break down comes into force, half of the matrimonial contested cases pending in

all over India may be disposed within short period as in this Bill, the desertion of parties for three years or more is taking into consideration for granting divorce. After obtaining divorce a wife or husband may be lived happily with another choice and may not loss their remaining valuable life. In this ground a preference shall be given to the children at the time of granting decree of divorce, so the courts shall take much care for the welfare of the children.

Most of the ground work of the Bill is already completed and it will come into force shortly and it will be inserted in marriage laws in a little while.

## 2) *Divorce under Muslim Law:*

In Muslim law there are two types of divorces ie., extra judicial divorce and judicial separation and judicial divorce. In extra judicial divorce, the topics discussed are unilateral divorce (*talaq*), divorce at the instance of wife (*Khula*), divorce by mutual consent (*mubaraat*), delegated divorce (*talaq-i-tafweez*). In constructive divorce, it covers the topics of *ila* and *zihar*. The effects of conversion (apostasy) are also discussed. It also deals with the grounds of judicial separation and grounds of divorce on which a Muslim wife can apply for divorce.

Islam is perhaps the first religion in the world which has expressly recognized the dissolution of marriage by way of divorce.

Divorce among the ancient Arabs was easy and of frequent occurrence. In fact, this tendency has even persisted to some extent in Islamic law, in spite of the fact that Prophet Mohammad showed his dislike to it. It was regarded by the Prophet to be the most hateful before the God of all permitted things; for it prevented conjugal happiness and interfered with the proper bringing up of the children<sup>239</sup>.

Divorce may be affected by the act of the husband, but in certain special circumstances, also by wife or by mutual agreement or by the operation of law. A Muslim spouse can seek restitution of conjugal rights by a civil suit. A Muslim husband and wife can separate from each other as any other spouses by a separation agreement under the general law of contract<sup>240</sup>.

The Dissolution of Muslim Marriage Act, 1939 now lays down several other grounds on the basis of any one of which, a Muslim wife may get her marriage dissolved by an order of the court. Islam provides a modern concept of divorce by mutual consent.

The dissolution of marriage under Muslim law can be studied under three heads:

1. Extra Judicial divorce.

It can be again divided into three:

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<sup>239</sup> . Ibrahim Abdel Hamid – “Dissolution of Marriage”, *Islamic Quarterly*, 3 (1956) 166-75, 215-223;4 (1957)3-10,57-65, 97-113; cf: Syed Khalid Rashid – *Muslim Law*, 4<sup>th</sup> edn 2004, P.98, Eastern Book Co., Lucknow.

<sup>240</sup> . Dr Paras Diwan – *Muslim Law in Moderrn India*, 9<sup>th</sup> edn. 2005, P.81, Allahabad Law Agency, Faridabad (Haryana)

i) Divorce at the instance of husband (talaq)

In this, there are two types of dissolutions:

- a) talaq pronounced by the husband himself;
- b) talaq delegated by the husband (talaq-i-tafweez).

ii) Divorce at the instance of wife:

Under these heads, fall-

- a) khula
- b) ila
- c) zihar
- d) Lian.

iii) Divorce by mutual consent (mubaraat).

2. Judicial separation.

3. Judicial divorce.

a) Unilateral Divorce:

i) Divorce at the instance of the husband:

a) Talaq:

Under the Muslim law, husbands possess power to dissolve his marriage as and when he likes to do so. It is an arbitrary act of a Muslim husband who may repudiate his wife at his own pleasure with or without showing any cause. He can pronounce *talaq* at any time. It is not necessary for him to obtain the prior approval of his wife for the dissolution of marriage. The *talaq* may be pronounced

on mere whim or caprice without any reason.<sup>241</sup> Talaq can be pronounced by the husband without the intervention of court.

*Talaq* is an Arabic word and its literal meaning is “to release”. Under Muslim law, *talaq* means ‘repudiation of marriage by the husband’.<sup>242</sup> The word *talaq* comes from a root (*tallaqa*) which means “to release (an animal) from a tether”; hence, to repudiate the wife or free her from the bondage of marriage.<sup>243</sup>

The Islamic policy has never been to confer an absolute authority of *talaq* upon a husband to be misused by him. But unfortunately, the unrestricted right of *talaq* has been misunderstood and Islamic guidelines for it have been ignored by the society and the courts of law. The result is that, there is no legal control over the unfettered right of a Muslim husband to dissolve the marriage by uttering few words. However, an indirect check upon this right is the obligation of a husband to pay the dower upon the dissolution of a marriage.<sup>244</sup>

Long back, the Privy Council in *Moonshee Bazloor Raheem V. Shamsoonissa Begum*,<sup>245</sup> said that matrimonial law of the Mohammedan like that of every ancient community favours the stronger sex where the husband can dissolve the marital tie at his will.

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<sup>241</sup> . Dr. M.A. Qureshi – Muslim Law, 2<sup>nd</sup> edn. 2002, p.68, Central Law Publications, Allahabad.

<sup>242</sup> . Dr R.K. Sinha – Muslim Law, 5<sup>th</sup> edn. 2003, P.82, Central Law Agency, Allahabad.

<sup>243</sup> . Asaf A.A. Fyzee – Outlines of Muhammadan law, 4<sup>th</sup> edn. 2005, p.150, Oxford University Press, New Delhi.

<sup>244</sup> . Dr. R.K. Sinha – Muslim Law, 5<sup>th</sup> edn. 2003, P.82, Central Law Agency, Allahabad.

<sup>245</sup> . (1987)11 MIA 551 (610); cf: Dr. M.A. Qureshi – Muslim Law, 2<sup>nd</sup> edn. 2002, p.68, Central Law Publications, Allahabad.

According to Baillie,<sup>246</sup> the term divorce includes all separation originating from the husband and repudiation for *talaq* in the limited sense, namely, of separation affected by use of appropriate words. In Islam, the term '*talaq*' means, absolute power which the husband possesses of divorcing his wife at all times.<sup>247</sup>

Every Muslim husband of sound mind, who has attained the age of puberty, is competent to pronounce *talaq*, whenever he likes. He need not give any reason for his pronouncement. This absolute right is given to him by Muslim law itself and does not depend on any condition or cause.

A minor or unsound mind can not pronounce *talaq*. *Talaq* by minor or insane husband is void and ineffective. However, if the husband is lunatic, the *talaq* pronounced by him during lucid interval is valid. The guardian cannot pronounce *talaq* on behalf of minor husband. According to *Tyabji*, guardian of a husband of unsound mind may pronounce *talaq* on behalf of such insane husband if such *talaq* is in the interest of the husband.<sup>248</sup> A person is said to be of sound mind if he is sane and not a lunatic or suffering from some disease similar to lunacy.<sup>249</sup> A dumb man may also affect divorce by intelligible signs.<sup>250</sup>

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<sup>246</sup> . Baillie – Digest of Mohammedan Law, Part-I, p.204; cf: Dr. M.A. Qureshi – Muslim Law, 2<sup>nd</sup> edn.2002, P.67, Central Law Publications, Allahabad.

<sup>247</sup> .

<sup>248</sup> . Tyabji – Muslim Law, Ed. IV, p.153; cf: Dr R.K. Sinha – Muslim Law, 5<sup>th</sup> edn. 2003, p.83, Central Law Agency, Allahabad.

<sup>249</sup> . Dur-ul-Mukhtar, 125, 126 cf: Dr. Nishi Purohit – The Principles of Mohammedan law, 2<sup>nd</sup> edn, 1998, p.188, Orient Publishing Company, Allahabad.

<sup>250</sup> . Dr Jung – Anglo – Muslim Law, 25; cf: Dr. Mohammad Nazmi – Mohammedan Law, 2<sup>nd</sup> edn. 2008, p.68, Central Law Publications, Allahabad.

Against the wife, divorce is pronounced, *Ameer Ali* observes: “.....when she is of such tender age (minor) as to be unable to comprehend the legal consequences flowing from the act of repudiation, or does not possess discretion, a valid *talaq* cannot be effected against her”.<sup>251</sup>

Except under *Hanafī* law, the consent of the husband at the time of pronouncing *talaq* must be free. Under *Hanafī* law, a *talaq* pronounced under coercion, compulsion, fraud, voluntary intoxication and undue influence etc., is valid and dissolves the marriage. The basis of this rule is the tradition of the Prophet where he is reported to have said thus: “There are three things which whether done in joke or earnest, shall be considered as serious and effectual: one, marriage; the second, divorce and the third, taking back”.<sup>252</sup> Divorce given under the influence of intoxication is valid according to *Hanafī* law; where as *Shias* do not recognize it.<sup>253</sup>

*Talaq* pronounced under involuntary intoxication or force is void even under *Hanafī* law. Under *Hanafī* law, where a husband is made to drink some intoxicant (wine) by force or takes it as drug and then pronounces *talaq*, the *talaq* is not valid.<sup>254</sup>

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<sup>251</sup> . *Ameer Ali* – Mohammedan Law, Vol. II, Ed.III, P.533; cf: Dr. R.k. Sinha – Muslim Law, 5<sup>th</sup> edn, 2003, p.83, Central Law Agency, Allahabad.

<sup>252</sup> . Tyabji- Muslim Law, Ed. IV, p.53; (quoting ‘Miscut-ul-Musabeeh’); cf. Dr. R.K. Sinha – Muslim Law, 5<sup>th</sup> edn. 2003, p.83, Central Law Agency, Allahabad.

<sup>253</sup> . Syed Khalid Rashid – Muslim law, 4<sup>th</sup> edn. 2004, p.103, Eastern Book Co., Lucknow.

<sup>254</sup> . Tyabji: Muslim Law, ed. IV, p.152; cf: Dr.R.K. Sinha – Muslim Law, 5<sup>th</sup> edn. 2003, p.83, Central Law Agency, Allahabad.

The divorce operates from the time of the pronouncement of *talaq*. The presence of the wife is not necessary, nor need notice be given to her. Under *Hanafi* law, no special form is necessary; whereas *Ithna Ashari* law insists on a strict formula being used.<sup>255</sup>

The words used must indicate a clear and unambiguous intention to dissolve the marriage. They must be express, eg. “Though art divorced” or “I have divorced thee”; in which case, no proof of intention is necessary. No School of the Sunnis prescribes any formalities for *talaq*. But the *Shias* insist that divorce must be pronounced orally and in the presence of two competent witnesses.

The Sunnis permit divorce in writing too; but the *Shias* insist that *talaq* should be oral; unless the husband is physically incapable of pronouncing it orally.<sup>256</sup> The *Ithna Asharis* also require that certain Arabic words must be used in the formula of divorce.<sup>257</sup> So long as the intention is clear, no specific form is necessary. Any words may be used.

In *Waj Bibee V. Azmat Ali*,<sup>258</sup> The Calcutta High Court held that an instrument of divorce signed by the husband in the presence of the wife’s father was valid, notwithstanding that it was not signed in the presence of wife.

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<sup>255</sup> . Asaf A.A. Fyzee – Outlines of Mohammedan law, 4<sup>th</sup> edn. 2005, p.150, Oxford University Press, New Delhi.

<sup>256</sup> . Dr Paras Diwan – Muslim Law in Modern India, 9<sup>th</sup> edn, 2005, p.76, Allahabad Law Agency, Faridabad (Haryana).

<sup>257</sup> . Baillie, II, 113-115; *ibid*.

<sup>258</sup> . (1867)8 WR 23; Dr M.A. Qureshi – Muslim Law, 2<sup>nd</sup> edn. 2002, p.71, Central Law Publications, Allahabad.



In *Asha Bibi V. K. Ibrahim*,<sup>259</sup> the husband pronounced *talaq* in the absence of his wife. The Madras High Court held that such *talaq* is valid.

If the words of *talaq* used by the husband are express, the *talaq* is valid, even if it is pronounced under compulsion. Under *Hanafi* law, the intention is unnecessary, and mere use by the husband of a formula of *talaq* even in jest, or under compulsion or in voluntary drunkenness, is valid. The reason given for this is that, a man must not be allowed to plead the illegal condition of drunkenness as an excuse for the detestable act of *talaq*.<sup>260</sup>

According to *Shia* School<sup>261</sup> and *Shafii* sub-School of Sunni law,<sup>262</sup> a *talaq* pronounced under compulsion, intoxication or jest is not valid.

A *talaq* may be affected orally or by a written document called “*Talaqnama*”. As person who is not able to speak can also terminate his marriage by positive and intelligible signs. An oral divorce must be addressed to someone. Among *Hanafis*, no special form of *talaq* is recognized. All that is necessary is that, the words of *talaq* should show an intention to dissolve the marriage. But under *Shia* law, there is a prescribed formula which must be recited orally in the presence of two competent witnesses in order to affect the *talaq*.

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<sup>259</sup> . (1909) ILR 33 Mad. 22; cited *ibid*.

<sup>260</sup> . Fitzgerald: Mohammad law, 1931 edn. 73; cf: Dr Mohammad Nazmi – Mohammadan Law, 2<sup>nd</sup> edn. 2008, p.69, Central Law Publications, Allahabad.

<sup>261</sup> . Hedaya, 76; cf: Dr Mohammad Nazmi – Mohammadan Law, 2<sup>nd</sup> edn.2008, p.69, Central Law Publications, Allahabad.

<sup>262</sup> . Hedaya (Grady’s edn), 75; Dr Mohammad Nazmi – Mohammadan Law, 2<sup>nd</sup> edn. 2008, P.69, Central Law Publications, Allahabad.

The formula of *talaq* is an *Arabic*, but if the man is ignorant of Arabic, then he may use any language known to him.<sup>263</sup> A *talaq* communicated only in writing is not valid unless the husband is incapable of pronouncing it orally.

*Shia* law has prescribed the following formula for pronouncing a *talaq*:

- i) by the husband using the words “though art repudiated”; or “this person is repudiated” or “such person is repudiated”; or
- ii) by the husband answering in the affirmative in replying to a question, “is thy wife divorced” or “hast thou divorced by wife”?

*Talaq* will not take place where ambiguous expressions are used except by intention or circumstantial proof.<sup>264</sup>

The *talaq* neither the notice nor communication to the wife is not necessary. The *talaq* becomes effective from the moment of its pronouncement and not from the date on which, the wife comes to know about it. However, knowledge of *talaq* is required for claiming dower and maintenance from her former husband.<sup>265</sup>

Written *talaq* may be of two types: (i) Customary and (ii) Non-Customary.

- i) *Customary or Marsoom or Manifest Talaq*:

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<sup>263</sup> . Dr. Jung: Anglo – Muslim Law, 26; cf: Dr Mohammad Nazmi – Mohammadan Law, 2<sup>nd</sup> edn. 2008, p.68, Central Law Publications, Allahabad.

<sup>264</sup> . Hedaya, pp.84-85; cf: Dr M.A. Qureshi – Muslim Law, 2<sup>nd</sup> edn. 2002, p.72, Central Law Publications, Allahabad.

<sup>265</sup> . Dr R.K. Sinha – Muslim Law, 5<sup>th</sup> edn. 2003, p.85, Central Law Agency, Allahabad.

The writing of *Talaq (Talaqnama)* is properly made so as to be legible and clearly indicating to whom and by whom it is addressed, it is customary, also known as *Marsoom* or *Manifest talaq*; and a *talaq* will be effected immediately and irrevocably even if the husband had no intention of making it<sup>266</sup> and it is not brought to the knowledge of the wife.<sup>267</sup>

ii) *Non-Customary or Unusual Talaq*:

If the *Talaqnama* is not written in the customary form and it is not addressed to anyone, the intention to divorce has to be proved.<sup>268</sup> Such *talaq* is known as Non-Customary or Unusual *Talaq*.

Though *talaq* may be pronounced in the absence of the wife, yet its communication to the wife is required for some purposes, e.g. on divorce, Dower becomes payable and the wife to undergo *Iddat*<sup>269</sup>.

In *Mohd. Shamsuddin V. Noor Jehan Begum*,<sup>270</sup> it was held that, there is nothing in law to support the position that the *talaq* takes effect from the time when the wife comes to know of it. The *Iddat* would begin to run immediately. Similarly the period of limitation for the purpose of recovery of her deferred

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<sup>266</sup> . Sarabai V. Rabiabai, ILR Bom 537; cf: Dr. Nishi Purohit – The Principles of Mohammedan law, 2<sup>nd</sup> edn, 1998, p.191, Orient Publishing Company, Allahabad.

<sup>267</sup> . Amhad Kasim V. Khatun Bibi, 1993, Cal 27 at p.32, cited ibid.

<sup>268</sup> . Rasul Baksh V. Mst. Bhalan, AIR 1932 Lah 498 at 500; cited ibid.

<sup>269</sup> . Foolchand V. Nazib (1909) 36 Cal 184; cf. Dr. Nishi Purohit – The principles of Mohammedan law, 2<sup>nd</sup> edn, 1998, p.192, Orient Publishing Company Allahabad.

<sup>270</sup> . AIR 1955 Hyd 144.

dower will start running only from the date when she had knowledge of *talaq*<sup>271</sup>. The wife can also claim maintenance from her husband till such time the communication of *talaq* reaches her.

A *talaq* may be either absolute or subject to a condition or contingency. Contingency means an uncertain future event. Where the *talaq* is without any condition, it takes effect immediately. A conditional or contingent *talaq* becomes effective only upon the fulfillment of the condition of the future event. Under Sunni law conditional and contingent *talaq* is recognized. *Shia* law does not recognize conditional or contingent *talaq*.<sup>272</sup>

Under *Shia* law, conditional or contingent *talaq* is void and ineffective. Even if the condition or contingency is lawful, the *talaq* is not valid.

The husband used to object his wife's frequent visits to her female friends, due to which there was a quarrel between them. The husband declared that, if she went again to her female friend's house there would be *talaq* by him. Thereafter the wife never went out<sup>273</sup>. The High Court held that the husband's declaration was a conditional *talaq*. But since the condition was not fulfilled after the declaration, the *talaq* has not taken place.

In other words, under *Shia* law, a *talaq* must be unconditional.

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<sup>271</sup> . Kathiyamma V. Urathel (1931) 133 IC. 375; cf: Dr. Nishi Purohit – The principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p. 192, Orient Publishing Company, Allahabad.

<sup>272</sup> . Dr R.K. Sinha – Muslim Law, 5<sup>th</sup> edn. 2003, p.85, Central Law Agency, Allahabad.

<sup>273</sup> . Bilqees Begum v. Manzoor Ahmed, PLD (1962) Karachi 491.

*Talaq* is of two kinds:

1. *Talaq-ul-Sunnat* or revocable *talaq*.
2. *Talaq-ul-Biddat* or irrevocable *talaq*.

As the Prophet Mohammad did not favour the institution of *talaq*, the revocable forms of *talaq* are considered as the ‘approved’ and the irrevocable forms are treated as the ‘disapproved’ forms.<sup>274</sup>

#### 1. *Talaq-ul-Sunnat*: (Revocable *talaq*)

It is the *talaq*, which is effected in accordance with the traditions of Prophet and it is approved form of *talaq*. It is a traditional mode of divorce, and approved by the Prophet Mohammad, and is valid according to all Schools of Muslim law.<sup>275</sup> In fact, the Prophet always considered *talaq* as an evil and that he recommended only revocable *talaq*; because in this form, the evil consequences of *talaq* do not become final at once. There is possibility of compromise and reconciliation between husband and wife.<sup>276</sup>

It has been further sub-divided into:

##### i) *Talaq Ahsan*:

This Arabic word ‘*ahsan*’ means ‘best’. It is also called ‘very proper’ form of *talaq*. This signifies that the *talaq* pronounced in the *ahsan* form is very best

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<sup>274</sup> . Asaf A.A. Fyzee – Outlines of Mohammedan law, 4<sup>th</sup> edn. 2005, p.151, Oxford University Press, New Delhi.

<sup>275</sup> . Dr. Mohammad Nazmi – Mohammadan Law, 2<sup>nd</sup> edn. 2008, p.70, Central Law Publications, Allahabad.

<sup>276</sup> . Dr R.K. Sinha – Muslim Law, 5<sup>th</sup> edn.2003, p.86, Central LawAgency, Allahabad.

kind of *talaq*. *Ahsan talaq* is the most approved and best form of *talaq*. *Ahsan* means ‘very good’. The best feature of this kind of *talaq* is that, it is revocable. So, hasty divorce can be prevented.

It is the most proper form of repudiation of marriage because of two reasons: First, there is possibility of revoking the pronouncement before expiry of the *iddat* period. Secondly, the evil words of *talaq* are to be uttered only once. Being an evil, it is preferred that these words are not repeated.<sup>277</sup>

This mode of *talaq* consists of a single pronouncement of divorce made in a period of *tuhr*<sup>278</sup> or at any time if the wife is free from menstruation, followed by abstinence from sexual intercourse during the period of *iddat*<sup>279</sup>. In case of a pregnant woman, there must be no sexual intercourse till the birth of the child.<sup>280</sup>

#### *Shia law:*

The *Shias* requires the presence of two witnesses at the time of pronouncement of *talaq*. If a man had sexual intercourse during her Pak (pure) period and wishes to divorce his wife, he should wait till she enters into menstruation and then again becomes Pak, only then she could be divorced. In case a husband had sexual intercourse during Pak period and separated from wife,

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<sup>277</sup> . Dr. R.K. Sinha – Muslim Law, 5<sup>th</sup> edn. 2003, p.87, Central Law Agency, Allahabad.

<sup>278</sup> . Tuhr means purity ie., the period between two menstruations.

<sup>279</sup> . Iddat means the period of chastity which a woman under Muslim law has to mandatory observe on divorce from her husband or death of her husband.

<sup>280</sup> . Dr. Nishi Purohit – The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.193, Orient Publishing Company, Allahabad.

like, if he proceeded on journey and wishes to divorce, then he should wait for at least one month.<sup>281</sup>

*ii) Talaq Hasan:*

In Arabic, *Hasan* means “good”. While *Ahsan* means very good. This kind of *talaq* is also regarded to be proper and approved form, in this form also, there is a provision for revocation. But it is not the best mode because evil words of *talaq* are to be pronounced three times in the successive *tuhrs*.<sup>282</sup> This is also a kind of *Talaq-e-Sunnat* but considered less approved than *Talaq-e-Ahsan*.<sup>283</sup>

In which, the husband is required to pronounce the formula of *talaq* three times during three successive *tuhrs* and it may be made after an interval of thirty days between the successive pronouncements. It is therefore, “a divorce upon a divorce”, where the first and second pronouncements are revoked and followed by a third, only then *talaq* becomes irrevocable.<sup>284</sup>

When the wife is in *tuhr*, without having intercourse with her, the husband pronounces *talaq*. This is the first *talaq*. Then he revokes it by words or by intercourse. Again when she is in *tuhr*, and before intercourse, the husband pronounces *talaq*. This is the second pronouncement. Husband again revokes it. Again, when the wife enters her third period of purity and before any intercourse

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<sup>281</sup>. Seestani P.464; cf. Yawer Qazalbash – Principles of Muslim Law, 2<sup>nd</sup> edn. 2005; p.129, Modern Law House, Allahabad.

<sup>282</sup>. Dr R.K. Sinha –Muslim Law, 5<sup>th</sup> edn. 2003, p.87, Central Law Agency, Allahabad.

<sup>283</sup>. Yawer Qazalbash – Principles of Muslim Law, 2<sup>nd</sup> edn. 2005, p. 129, Modern Law House, Allahabad.

<sup>284</sup>. Syed Khalid Rashid – Muslim law, 4<sup>th</sup> edn. 2004, p.102, Eastern Book Co., Lucknow.

takes place, husband makes a pronouncement of *talaq*. This is the third pronouncement. After the third pronouncement of husband, the marriage stands dissolved irrevocably.<sup>285</sup>

After revocable of marriage, the parties were not free to remarry again unless the wife married another man who had actually consummated the marriage, and then divorced her. On the completion of *iddat*, the woman could marry her former husband. This is a penal provision meant to chastise the husband who repudiates his wife thoughtlessly.<sup>286</sup>

A husband wrote a *talaqnama* in which he said that he had pronounced his first *talaq* 15<sup>th</sup> September and the third *talaq* would be completed on 15<sup>th</sup> November. He communicated the same to his wife on 15<sup>th</sup> September. The court observed that for an effective and final *talaq*, the three pronouncements must actually be made in three *tuhrs*, only a mention of the third declaration is not sufficient<sup>287</sup>.

## 2. *Talaq-ul-Biddat: (Irrevocable)*

This is also known as *Talaq-ul-Bain*. It is a disapproved mode of divorce. It is sinful form of divorce. It is the irregular mode of *talaq* introduced by *Omayyads*

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<sup>285</sup> . Syed Khalid Rashid – Muslim law, 4<sup>th</sup> edn. 2004, p.102, Eastern Book Co., Lucknow.

<sup>286</sup> . Dr. Paras Diwan – Muslim Law in Modern India, 9<sup>th</sup> edn. 2005, p.84, Allahabad Law Agency, Faridabad (Haryana)

<sup>287</sup> . Ghulam Mohyuddin v. Khizer, AIR 1929 Lah.6, cf. Dr. R.K. Sinha Muslim Law, 5<sup>th</sup> edn. 2003, p.88 Central Law Agency, Allahabad.



in order to escape the strictness of law.<sup>288</sup> *Biddat* means disapproved, wrong innovation or to some extent, forbidden. In common practice, this is also called ‘instant triple *talaq*’.<sup>289</sup> This form of *talaq* was allowed by second caliph of Islam, Omar.

The *Talaq-ul-Biddat* has two forms:

- a) Triple irrevocable *talaq*.
- b) Single irrevocable *talaq*.

The *Talaq-ul-biddat* in any of its forms is not recognized by the *Shias* and *Malikis* except *Sunni* law. A peculiar feature of this *talaq* is that it becomes effective as soon as the words are pronounced and there is no possibility of reconciliation between the parties. The Prophet never approved the same as there was no opportunity for reconciliation and that it was not in practice during his life time. The Prophet declared that the man was making the plaything of the words of god and made him to take back his wife. Therefore, *talaq-ul-biddat* has its origin in the second century of the Islamic era.<sup>290</sup>

#### *Triple Talaq:*

It is a recognized; but it is a disapproved form of divorce and is considered by the *Islami* jurists as an innovation within the fold of *Shariat*. It commands neither the sanction of *Holy Quran* nor the approval of the hold Prophet. It was

<sup>288</sup> . Aqil Ahmad – Mohammedan Law, 21<sup>st</sup> edn.2004, p.169, Central Law Agency, Allahabad.

<sup>289</sup> . Yawer Qazalbash – Principles of Muslim Law, 2<sup>nd</sup> edn.2005; p.130, Modern Law House, Allahabad.

<sup>290</sup> . Ammer Ali – Mohammedan Law, II, 514; cf: Dr. Nishi Purohit – The principles of Mohammedan law, 2<sup>nd</sup> edn, 1998, p.194, Orient Publishing Company, Allahabad.

not in practice during the life time of first *Caliph Abu Bakar* and second *Caliph Omar's* time. Later on, *Hazrat Omar* permitted it on account of certain peculiar situation. Subsequently, the *Hanafi* jurists declared this form of divorce valid and also paved religious sanction to it.

The women of *Syria, Egypt and Persia* are much more beautiful than the *Arabian* women and they attracted to marry them. But they insisted that in order to marry them, the *Arabian* men should divorce to their existing wives by pronouncing three divorce in one sitting. The condition was acceptable to the Arabs because they knew that, in *Islam*, divorce is permissible only twice in two separate periods of *tuhr* and its repetition at one sitting is un-Islamic, void and shall not be effective.

At present, much inconvenience is being felt by the Muslim Community, so far as this law of 'triple divorces' is applied in India. The relevant verse of the *Quran* can be relied upon:

“A divorce is only permissible twice; after that, the parties should either hold together on equitable terms, or separate with kindness. It is not lawful for you, (men), to take back any of your gifts (from your wives), except when both parties fear that they would be unable to keep the limits ordained by Allah. If you (judges) do indeed fear that they would be unable to keep the limits ordained by

Allah, there is no blame on either of them if she gives something or her freedom.<sup>291</sup>

The question of *Tuhr* is concerned, *Hedaya* has validated this form if the pronouncement is made even during menstruation of wife.<sup>292</sup> Relying on *Hedaya*, the *Patna* High Court has held that an irrevocable *talaq* may be pronounced even during menses period.<sup>293</sup>

In the single irrevocable *Talaq*, three pronouncements are made in single *Tuhr*, either in one sentence, “I divorce thee, thrice” or in separate senses e.g., I divorce thee, I divorce thee, I divorce thee”.

Following are the requirements of a single form of *Talaq*:

- i) Marriage must be consummated.
- ii) A single irrevocable pronouncement of *talaq* may be made. Thus, if a husband says to his wife, “I had divorced thee in *Talaq-ul-Biddat* form”, it is enough and an irrevocable divorce will come into effect.
- iii) Such pronouncement may be made any time either in a period of *tuhr* or even during menstruation.<sup>294</sup>

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<sup>291</sup> . The Holy Quran, Sura-II, Ayat-229, translated by Abdullah Yusuf Ali, edn. 2004, Ayman Publications, New Delhi.

<sup>292</sup> . *Hedaya*, p.74; Ghulam Mohiuddin v. Khizar Hussain, AIR 1929 Lah.6; cf. Yawer Qazalbash-Principles of Muslim Law, 2<sup>nd</sup> edn. 2005; p.130, Modern Law House, Allahabad.

<sup>293</sup> . Sheikh Fazlur v. Mt.Aisha (1929) 8 Pat 690; cf: Dr. R.K.Sinha –Muslim Law, 5<sup>th</sup> edn. 2003, p.88, Central Law Agency, Allahabad.

<sup>294</sup> . Sheik Fazlur V. Mst. Aisha AIR 1929 Pat 81 (FB); cf: Dr. Nishi Purohit – The principles of Mohammedan law, 2<sup>nd</sup> edn. 1988, p.195, Orient publishing Company, Allahabad.

iv) Such pronouncement may be made even if the husband had sexual intercourse with her since the last menstruation.

v) Marriage is dissolved immediately on the irrevocable pronouncement of *talaq*.

For triple form of *talaq* the following are necessary.

i) Marriage must be consummated.

ii) Triple pronouncement of *talaq* must be made, such as “I divorce thee, I divorce thee, I divorce thee” or such pronouncement may be made in one sentence such as, “I divorce thee thrice or triply” or the husband may say “I release you from the marital bond by giving three *Talaqs*”.<sup>295</sup>

iii) Such pronouncement may be made any time, either in a period of *tuhr* or even during menstruation.

iv) Such pronouncement may be made even if the husband had sexual intercourse with her since the last menstruation.

v) Marriage is dissolved immediately on the irrevocable pronouncement of *talaq*.

The *Talaq-ul-Biddat* in any of its forms is not recognized by the *Shia* Law.<sup>296</sup>

In *Yusuf V. Sowramma*,<sup>297</sup> the *Kerala* High Court observed that, “it is popular fallacy that a Muslim male enjoys, under *Quranic* law, unbridled authority to liquidate the marriage. The holy *Quran* expressly forbids a man to seek pretext

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<sup>295</sup> . Jarina Akhtar V. Hafiza AIR 1926 Cal.242; cf: Dr. Nishi Purohit – The principles of Mohammedan Law, 2<sup>nd</sup> edn. 1998, p.195, Orient Publishing Company, Allahabad.

<sup>296</sup> . Baillie, II, 118; cf: Dr. Nishi Purohit – The principles of Mohammedan Law, 2<sup>nd</sup> edn. 1998, p.196, Orient Publishing Company, Allahabad.

<sup>297</sup> . AIR 1971 Ker 261.

for divorcing his wife so long as she remains faithful and obedient. He further observed about the state of affairs in India, that Muslim law as applied in India has taken a course contrary to the spirit of what the holy Prophet or the holy *Quaran* laid down and the same misconception vitiates the law dealing with the wife's right to divorce".

*Delegated Divorce: (Talaq-i-Tafweez)*

*Talaq-i-tafweez* is also known as *Talaq-i-Tawhid*. Literally, *tafweez* means 'delegate'. A Muslim husband can delegate his power of pronouncing *talaq* to his wife or to any other person.<sup>298</sup> But such power does not deprive the husband of his own right to pronounce a *talaq*.<sup>299</sup> A Muslim husband is entitled to pronounce a *talaq*. He is also entitled to delegate his power to another person to do so.<sup>300</sup> He may confer the power upon the wife herself or a third party to repudiate the marriage.

Capacity to delegate the power: A husband:

- a) is a one who has sound mind, and
- b) who has attained the age of puberty may delegate his right of pronouncing *talaq*. If a husband becomes insane after delegating his power, the delegation will

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<sup>298</sup> . Baillie, I, 328; Hedaya, 86; cf: Dr . Nishi Purohit – The principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.201, Orient Publishing Company, Allahabad.

<sup>299</sup> . Nag Kyw v. Mi Hia 49 IC 67 (Rang); cited *ibid*.

<sup>300</sup> . Baillie, I, 246; cf: B.R. Verma – Islamic Law, 6<sup>th</sup> edn. 1986, p.229, Law Publishers (India) Private Limited.

not be invalidated.<sup>301</sup> It is not necessary that the wife or any other person, to whom the power is delegated, should also have attained the age of puberty.<sup>302</sup>

In the delegated divorce, the *talaq* pronounced by that other person is an effective as if it was made by the husband himself and the marriage dissolves.<sup>303</sup> A Muslim husband may delegate the power absolutely or conditionally, temporarily or permanently.<sup>304</sup> This form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain freedom without the intervention of any court.<sup>305</sup>

A stipulation conferring an authority on the wife to exercise her right of divorce may be made either at the time of or after the marriage. In the absence of any stipulation in the contract, such delegated power may be exercised by the wife at the same meeting in which she becomes aware of the power.<sup>306</sup>

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<sup>301</sup> . Baillie, I, 247; c: Dr. Nishi Purohit – The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.201, Orient Publishing Company, Allahabad.

<sup>302</sup> . Baillie, I, 246; cited *ibid*.

<sup>303</sup> .Dr. R.K. Sinha – Muslim Law, 5<sup>th</sup> edn.2003, p.92, Central Law Agency, Allahabad.

<sup>304</sup> .Baillie, 238 and 109; cf: Dr. Paras Diwan – Muslim Law in Modern India, 9<sup>th</sup> edn. 2005, p.86, Allahabad Law Agency, Faridabad (Haryana)

<sup>305</sup> . Dr Paras Diwan – Muslim Law in Modern India, 9<sup>th</sup> edn. 2005, p.86, Allahabad Law Agency, Faridabad (Haryana).

<sup>306</sup> . Durr-ul-Mukhtar, 171, 172; cf: Dr. Nishi Purohit – The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.201, Orient publishing Company, Allahabad.

*Kinds of tafweez:*

The power to pronounce *talaq* may be conferred in three forms of expressions, two of which are implied forms and the third, an express form. They are:<sup>307</sup>

- a) *Ikhtiyar* (choice of option), e.g., the husband telling his wife, “choose” or using a similar expression (thereby intending a *talaq*); delegation of power is implied. By ‘giving the choice’ is meant giving her, the choice to get rid of the matrimonial tie. The delegation may be made subject to certain condition such as a husband may say if the maintenance does not reach you, you are given the choice, etc. However in any case the delegation of power of divorce must be within the knowledge of wife who had accepted it.<sup>308</sup>

The power was delegated to wife by the husband, and similarly at the time when wife divorces herself. Wife must say ‘I am divorced’ or I divorce myself and not ‘I divorce thee’ because it is the wife who is divorced and not the husband.<sup>309</sup>

b) *Amar-ba-yad* (*liberty*):

It literally means business in hand. This may, for example, be given by the husband telling the wife ‘thy business is in they hand’ (hereby intending a *talaq*);

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<sup>307</sup> . Yawer Qazalbash – Principles of Muslim Law, 2<sup>nd</sup> edn. 2005; p.133, Modern Law House, Allahabad.

<sup>308</sup> . Ibid.

<sup>309</sup> . Yawer Qazalbash – Principles of Muslim Law, 2<sup>nd</sup> edn. 2005; p.134, Modern Law House, Allahabad.

in case the husband says ‘divorce thyself thrice or twice)’ and she divorces only once, divorce would take effect.<sup>310</sup>

c) *Musheeat (will or pleasure)*:

This may be given in the imperative mood by which *sareeh* or express *talaq* may be given, e.g., by the husband saying to the wife, “give yourself *talaq* if you please”.

The power to pronounce *talaq* in the first two forms is impliedly given and can be effective if it is shown that *talaq* was intended. But the third kind is in the express form and *talaq*, if pronounced, would be effective even if it is not intended. The use of the term “*talaq*” being an express form, its use would convert any form of *tafweez* into *musheeat*.<sup>311</sup>

Husband under a pre-marriage agreement, under took to pay certain amount of marriage expenses incurred by his father-in-law, if he leaves the house. The husband left the house without paying the amount of marriage expenses. Then the wife exercised the right and divorced herself. A valid divorce came into effect.<sup>312</sup>

There was an agreement between husband and wife under which, the husband delegated to the wife, his own power of giving three *talaqs* in the event of his marrying a second wife without the permission of the first. He took second

<sup>310</sup>. Yawer Qazalbash – Principles of Muslim Law, 2<sup>nd</sup> edn. 2005; p.134, Modern Law House, Allahabad.

<sup>311</sup>. Baillie, I, 241, 244; Hed., 89; cf: B.R. Verma – Islamic Law, 6<sup>th</sup> edn. 1986, p.229, Law Publishers (India) Private Limited.

<sup>312</sup>. Mohd. Khan v. Mst. Shahmali, AIR 1972 J & K 8.



wife without the permission of the first. Accordingly, the first wife gave herself three *talaqs* under the authority of the *tafweez*. The court held that as the event upon the happening of which, the wife was given the authority to divorce herself was valid under Muslim law, and since that event has happened, the divorce by the wife was effective and the marriage must dissolve.<sup>313</sup>

Where a wife is given the option to divorce herself under a *tafweez*, she cannot be compelled to exercise her right. She may or may not exercise the right. Mere happening of the event under which, the wife is authorized to divorce herself, is not sufficient to dissolve the marriage; the wife must also exercise her right expressly.<sup>314</sup>

## 2) *Divorce at the instance of wife:*

### a) (*Khula*)

*Quran*, the original source of Islamic Law, provided the system of *Khula*. In law it is surrender of right of husband over his wife for an exchange.

The word *Khula* or redemption literally means “to lay down”. In law, it means laying down by a husband of his right and authority over his wife”<sup>315</sup> The word *Khula* literally means “to take off clothes” and thence, to lay down one’s

<sup>313</sup> . Sainuddin v. Latifunnessa, (1918) 46 Cal. 141; cf. Dr R.K. Sinha –Muslim Law, 5<sup>th</sup> edn. 2003, p.93, Central Law Agency, Allahabad.

<sup>314</sup> . Aziz v. Mt. Naro and others AIR 1955 HP 32.

<sup>315</sup> . Aqil Ahmad – Mohammedan Law, 21<sup>st</sup> edn. 2004, p.184, Central Law Agency, Allahabad.

authority over wife.<sup>316</sup> In law, it is laying down by a husband of his right and authority over his wife for an exchange”.<sup>317</sup>

*Khula* 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. *Khula* in fact is thus a right of divorce purchased by the wife from her husband.<sup>318</sup> In India, the word *Khula* is also spelt as *Khoola* or *Khula* and even *Khola*. *Khula* literally means “to take off clothes, and thence, to lay once authority over a wife”.<sup>319</sup>

Initially there was no *Khula* in Pre-Islamic legislation; subsequently it was introduced in Muslim Law.

In *Khula*, both the husband and the wife must be of sound mind and have attained puberty. Under *Hanafi* law, the guardian of a minor wife may enter into a *khula* on her behalf; but the guardian of a minor husband cannot enter into a *khula* on his behalf. A *khula* may be entered into by any party through an authorized agent who will act within the scope of his authority.<sup>320</sup> Under *Shia* law, the Arabic language must be used in *khula* and presence of two witnesses is also required.

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<sup>316</sup> . Asaf A.A. Fyzee – Outlines of Mohammadan law, 9<sup>th</sup> impression., 2005, p.163, Oxford University Press, New Delhi.

<sup>317</sup> . Baillie 31; Hedaya, 112; cf: Dr. Paras Diwan – Muslim Law in Modern India, 9<sup>th</sup> edn. 2005, p.910 Allahabad Law Agency, Faridabad (Haryana).

<sup>318</sup> . Aqil Ahmad – Mohammadan Law, 21<sup>st</sup> edn. 2004, p.185, Central Law Agency, Allahabad.

<sup>319</sup> . Dr M.A. Qureshi-Muslim Law, 2<sup>nd</sup> edn. 2002, p.81, Central Law Publications, Allahabad.

<sup>320</sup> . Dr. Nishi Purohit- The principles of Mohammadan law, 2<sup>nd</sup> edn. 1998, p.204, Orient Publishing Company, Allahabad.

The consent to *khula* may be conditional or unconditional under Sunni law; but under the *Shia* law, conditional *khula* is not recognized.<sup>321</sup>

Once the husband gives his consent to *khula*, it dissolves as in *Talaq-ul-Bian*. But in the case of conditional *khula* under the Sunni law, *Khula* comes into effect only on the fulfillment of the condition.

When *khula* has been effected all right of spouses are extinguished, except the rights of wife for maintenance during period of *iddat* and a right to live in the husband's house, unless it is so expressly agreed upon. In case wife has not attained the age of discretion and *Khula* is obtained by father, she is entitled to dower because "father as a guardian has no power over the dower".<sup>322</sup>

No particular form is required. Proposal may be made either by the use of the word "*khula*" or by the expressions conveying the sense of sale and purchase.<sup>323</sup> Acceptance must be made at the same meeting. If a wife says, "give me a *khul* in exchange of my dower" and the husband replies, "I do", a valid dissolution of marriage comes into effect.<sup>324</sup>

Everything which may be the subject matter of the dower may be given as consideration for *khula*. On non-payment of consideration, the husband may sue

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<sup>321</sup> . Dr S.R. Myneni's Muslim Law, 1<sup>st</sup> edn.2009, p168, published by Asia Law House, Hyderabad.

<sup>322</sup> . Ibid.

<sup>323</sup> . Baillie, I, 306, 311-312; cf; Dr. Nishi Purohit – The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.205, Orient Publishing Company, Allahabad.

<sup>324</sup> . Ameer Ali – Mohammedan Law, II, 512; cf: Dr. Nishi Purohit – The Principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.205, Orient Publishing Company, Allahabad.

his wife for its recovery or may set up the plea of non-payment of consideration as a defence in a claim for dower by the wife. When consideration for *khula* is illegal, *khula* is valid; but the consideration is void.<sup>325</sup> But under *Shia* law, both are void.<sup>326</sup>

Divorce accomplished at once under a *Khula* by (i) offer from the wife; (ii) its acceptance by the husband; and (iii) with an *iwad* (return, consideration) passing from the wife to the husband for redemption. According to *Hanafi* jurists, *Khula* is valid when given even under compulsion or in a state of voluntary intoxication. It is not valid when given by an insane person.<sup>327</sup>

When there is disunion between the spouses and there is no hope of union, *khula* may be effected in lieu of something which may be fit for being fixed dower i.e. less than ten *Dirhams*, what may be in wife's hand or even a lamb in the womb of a goat. On behalf of wife it is an exchange with property which is in her right whether to accept or reject it as opposed to regular *talaq* where she has no option. The Shariat Act, 1937 also recognized *khula* to obtain divorce.<sup>328</sup>

### ***Rules of Khula:***

Law of Divorce (compiled by All India Muslim Personal Law Board in 'Compendium of Islamic Laws') provides that:

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<sup>325</sup>. Baillie II, 312; cf: Dr Nishi Purohit- The principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.206, Orient publishing Company, Allahabad.

<sup>326</sup>. Baillie II, 130; cited *ibid*.

<sup>327</sup>. Dr S.R. Myneni's Muslim Law, 1<sup>st</sup> edn.2009, p168, published by Asia Law House, Hyderabad.

<sup>328</sup>. Dr S.R. Myneni's Muslim Law, 1<sup>st</sup> edn.2009, p169, published by Asia Law House, Hyderabad.

(i) Termination of marital relation by the husband in consideration for a return agreed upon by the parties is *khula*, whether it is through the word *khula* or by *mubaraat*, or by the word *talaq* or any of its synonyms.

(ii) In a *khula* only those rights will abate and only that return will be due the abatement and payment of which has been agreed upon.

(iii) In a *Khula* if the woman expressly forgoes maintenance for *iddat* it will abate, but the right of residence during *iddat* and children's maintenance will not abate even if it so agreed upon.

(iv) Whatever amount of return is agreed upon in *khula* will be lawful. However, to fix a return exceeding the amount of dower, or to take it, is undesirable.<sup>329</sup>

*b) ila: (vow of continuance):*

*ila* means "oath" or "vow". In law, it means that, when a husband takes an oath that he will not do sexual intercourse with his wife for four months or above on the expiry of four months after making *ila*, if the husband has abstained from sexual intercourse during this period, the marriage shall stand dissolved.<sup>330</sup> There is no limit prescribed for the longest period. *ila* made under compulsion or intoxication would be valid as in the case of *talaq* under similar circumstances.<sup>331</sup>

The shortest period of vow of abstinence must be four months. If a period of more than four months, *ila* would be valid even if it is pronounced during menstruation

<sup>329</sup> . Dr S.R. Myneni's Muslim Law, 1<sup>st</sup> edn.2009, p171, published by Asia Law House, Hyderabad.

<sup>330</sup> . Baillie II, 312; cf: Dr Nishi Purohit- The principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.206, Orient publishing Company, Allahabad.

<sup>331</sup> . Baillie II, 130; cited ibd.

but if it is pronounced to be perpetual, it would be valid only if pronounced during *tuhr*.

Under *Ithna Ashari* law, *ila* can be made only after consummation of marriage. As per *Ismaili* law, *ila* can be made only during a period of *tuhr* when there was no sexual intercourse during it.<sup>332</sup> Under *Ithna Ashari* law, *ila* does not operate as divorce without order of the court. According to this School, after the expiry of the fourth month, the wife is simply entitled for a judicial divorce. If there is no cohabitation, even after expiry of four months, the wife may file a suit for restitution of conjugal rights against husband. If the husband does not cohabit even then, the marriage is dissolved by a decree of the Court.<sup>333</sup> In Sunni law, legal proceedings are not required.

*c) Zihar: (injurious assimilation)*

The term “*zihar*” is derived from ‘*Zuhar*’, the back. When the husband compares his wife with the back of his female relations within the degrees of prohibited relationship, he may say ‘the back of my wife is as my mother’s back’. The woman so addressed was thereby promoted from the subordinate status of a wife to the highly honourable position of an adoptive mother. During the time of ignorance (ie., before the establishment of the Muslim faith), *zihar* stood as a divorce; and the law after wards preserved its nature, but altered its effect to a

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<sup>332</sup> . Dr. M.A. Qureshi-Muslim Law, 2<sup>nd</sup> edn. 2002, p.96, Central Law Publications, Allahabad.

<sup>333</sup> . Tyabji: Muslim Law, IV edn. P.175; cf: Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.91, Central Law Agency, Allahabad.

temporary prohibition, which hold until performance of expiation but dissolving the marriage.<sup>334</sup> In India, the *Shariat* Act has recognized *Zihar*. After its legislative recognition, the right of wife to claim a divorce on this ground may be granted by courts.<sup>335</sup>

d) *Lian*:

The word *lian* literally means “imprecation”. Muslim law provides very severe punishments for adultery and slander. The *hudd*<sup>336</sup> for adultery was stoning to death, if the wife was a *moohsin* (i.e., if she was sane and adult and her marriage was consummated). The punishment was scourging with stripes, if she was not a *moohsin*.

Islamic law punishes the offence of adultery (*zina*) severely, and so it takes a serious view of an imputation of un-chastity against a married woman. If a husband accuses his wife of infidelity, he was liable to punishment for defaming his wife unless he proved his allegation. If there was no proof forthcoming, the procedure of *lian* was adopted.<sup>337</sup>

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<sup>334</sup> . Dr. M.A. Qureshi-Muslim Law, 2<sup>nd</sup> edn. 2002, p.87, Central Law Publications, Allahabad.

<sup>335</sup> . Hedaya, 117 and 602; cf: Yawer Qazalbash – Principles of Muslim Law, 2<sup>nd</sup> edn. 2005; p.139 Modern Law House, Allahabad.

<sup>336</sup> . Specific punishment.

<sup>337</sup> . Asaf A.A. Fyzee- Outlines of Mohammadan Law, Ninth impression, 2005, p.166 Oxford University press, New Delhi.

Mere accusation of adultery does not serve by itself dissolve the marriage. It gives right to wife for filing divorce suit against her husband. If the charge is not proved she is entitled to a decree.

iii) *Divorce by Mutual Consent: (Mubaraat)*

*Mubaraat* means “release”, which puts an end to matrimonial rights. The word *Mubaraat* means an act of freeing one from another mutually. It is a mutual discharge from marriage tie.<sup>338</sup> It is a divorce by mutual consent of the husband and wife. The formalities for *Mubaraat* are the same as in the case of *khula*.<sup>339</sup> The aversion in *Mubaraat* is mutual and the proposal for divorce may emanate from either the husband or the wife. Under *Shia* law, the parties can dissolve their marriage by way of *Mubaraat* if it is impossible for them to continue.<sup>340</sup>

To enter into *Mubaraat*, both the parties must be of sound mind and have attained puberty.

*Formalities:*

Under Sunni law, no particular form is required. But mutual agreement must be made at the same meeting and the word “*Mubaraat*” must be clearly

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<sup>338</sup> . Hedaya, Vol.1, p.322; cf: Dr M.A. Qureshi – Muslim Law, 2<sup>nd</sup> edn. 2002, p.83, Central law Publications, Allahbad.

<sup>339</sup> . Ameer Ali, II, 508, 516; cf: B.R. Verma – Islamic Law, 6<sup>th</sup> edn. 1986, p.228, Law Publishers (India) Private Limited.

<sup>340</sup> . Dr. M.A. qureshi – Muslim Law, 2<sup>nd</sup> edn. 2002, p.83, Central Law Publications, Allahabad.



expressed in the proposal<sup>341</sup> and if ambiguous expressions are used, intention must be proved.<sup>342</sup>

Under *Shia* law, proper form is required. *Mubaraat* must be expressed in Arabic language and the expression “*Mubaraat*” must be clearly expressed. Mutual agreement must be made at the same meeting in the presence of two witnesses under *Shia* law.<sup>343</sup> In this form, since both the parties are equally interested in the dissolution of marriage, no party is legally required to compensate the other by giving some consideration.<sup>344</sup>

The parties enter into a “*Mubaraat*” in Sunni law, all mutual rights and obligations come to an end. But under *Shia* law, it requires that, if both the parties’ bonafide find the marital relationship to be irksome, then only, a marriage stands dissolved.<sup>345</sup> In this form, the payment of compensation is not the essential condition for divorce.<sup>346</sup>

## 2. *Judicial separation:*

The remedy of judicial separation may be used by the parties who still hope for an ultimate reconciliation and it is not much significant under Muslim law.

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<sup>341</sup> . Baillie II, 306, 311-312; cf: Dr Nishi Purohit- The principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.207, Orient publishing Company, Allahabad.

<sup>342</sup> . Durr-ul-Mukhtar, 247; cited ibid. Dr. R.K. Sinha- Muslim Law, 5<sup>th</sup> edn. 2003, p.88, Central law Agency, Allahabad.

<sup>343</sup> . Baillie, II, 134; cf: Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn.2003, p.88, Central Law Agency, Allahabad.

<sup>344</sup> . Dr.R.K. Sinha – Muslim Law, 5<sup>th</sup> edn. 2003, p.83, Central Law Agency, Allahabad.

<sup>345</sup> . Fatwa-i-Alamgiri, I, 669; The Hedaya, 139; cf: Dr. Nishi Purohit – The principles of Mohammedan law, 2<sup>nd</sup> edn. 1998, p.207, Orient Publishing Company, Allahabad.

<sup>346</sup> . Hedaya, Vol.I, p.323; cf: Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.83, Central Law Publications, Allahabad.

The reason is that Muslim law permitted unfettered powers of terminating the marriage to the Muslim husbands. The wife cannot separate herself from him except under the agreement known as khula.<sup>347</sup> The right of Muslim wives to live separately carries no force. However the law has recognized the following grounds where a Muslim wife will refuse to live with the husband and will be entitled for judicial separation.<sup>348</sup>

Where the husband is impotent, the *kazi* should permit him to prove his potency within a period of one year from the date of litigation. If he has sexual relation with the wife, then there will be no divorce. However if he has no sexual relation, the *kazi* must pronounce a separation.

If there was cruelty rendering it unsafe for the wife to return to his dominion, she could refuse to give company to her husband.

A Muslim wife can claim separation if her marriage was irregular.

If there was gross failure on the husband's part to perform the obligation imposed on him by the marriage contract, then also she was permitted to live separately.

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<sup>347</sup> . Dr. M.A. Qureshi- Muslim Law, 2<sup>nd</sup> edn. 2002, p.62, Central Law Publications, Allahabad.

<sup>348</sup> . *ibid.*

A Muslim wife may enter into an agreement at the time of marriage. Such a contract will be enforced by the courts if it is lawful and not opposed to the principles of Islam.

If her husband has been made an outcast by his community, then also, she can claim separation.

A Muslim wife can claim separation if the marriage was arranged by her guardian other than the father.

### *3. Judicial divorce: (Faskh)*

Apart from the divorce which may emanate from the husband or the wife without the intervention of the court or any other authority, the Muslim law also provided for the dissolution of marriage by a decree of the Court. It is called “*Furkat*” which literally means separation. It refers to the power of *Kazi* (in India, law Court) to annul a marriage on the application of the wife.

The agitations of public, *Qazi Muhammad Ahmad Kazmi* introduced a bill in the central legislature on 17.4.1936, it was passed on 17.3.1939. After introducing the Dissolution of Muslim Marriages Act, 1939, the Muslim women have a right to obtain divorce through the courts.

*Grounds of divorce:*

Section 2 of the Act, 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<sup>349</sup> -

- i) that the whereabouts of the husband have not been known for a period of four years;
- ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;
- iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;
- iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
- v) that the husband was impotent at the time of the marriage and continues to be so;
- vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;
- vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years;

Provided that the marriage has not been consummated;

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

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<sup>349</sup> . Mulla's Principles of Mohammedan Law by M. Hidayatullah and Arshad Hidayatulla, 7<sup>th</sup> edn, published by Bombay N.M. Tripathi Private Ltd.

- a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment; or
- b) associates with women of evil repute or leads an infamous life; or
- c) attempts to force her to lead an immoral life; or
- d) disposes of her property or prevents her exercising her legal rights over it; or
- e) obstructs her in the observance of her religious profession or practice; or
- f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the *Quran*;
- ix) on any other ground which is recognized as valid for the dissolution of marriages under Muslim law:

Provided that-

- a) no decree shall be passed on ground (iii) until the sentence has become final;
- b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and
- c) before passed a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

(i) Missing husband:<sup>350</sup>

Section 2 (i) of the Dissolution of Muslim Marriages Act, 1939 provides that a woman shall be entitled to obtain decree for the dissolution of her marriage if the whereabouts of the husband has not been known for a period of four years.

The suit filed by the wife shall contain the following information:

- a) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of filing of the plaint shall be stated in the plaint.
- b) notice of the suit shall be served on such persons;
- c) such persons shall have the right to be heard in the suit;
- d) the parental uncle and brother of the husband are to be made parties in the suit even though they may not be the heir in the property of the husband.<sup>351</sup>

ii) Failure to maintain:<sup>352</sup>

If the husband has neglected or failed to provide maintenance to the wife for two or more years, the wife is entitled to obtain a decree for the dissolution of her marriage. If the husband is unable to maintain his wife due to poverty, unemployment, imprisonment, ill-health or any other misfortune, even then the wife has a right to get the decree for dissolving her marriage.<sup>353</sup>

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<sup>350</sup>. See Clause (i) of Section 2 of the Dissolution of Muslim Marriage Act, 1939.

<sup>351</sup>. Dr. M.A. Qureshi – Muslim Law, 3<sup>rd</sup> edn. 2007, p.104, Central Law Publications, Allahabad.

<sup>352</sup>. See Clause (ii) of Section 2 of the Dissolution of Muslim Marriage Act, 1939.

<sup>353</sup>. Satgunj v. Rahmat AIR 1945 Sind 48; cf. Dr.R.K. Sinha- Muslim Law, 5<sup>th</sup> edn.2003,p.98, Central Law Agency, Allahabad.

Under Muslim law, the husband is not bound to maintain his wife who is not faithful or obedient to her husband, or who does not perform her marital duties. In the suit filed by wife, it is found that she was neither faithful nor obedient to her husband, the suit must be dismissed.<sup>354</sup> Moreover, if the wife lives separately without any reasonable excuse, she is not entitled to get judicial divorce on the ground of husband's failure to maintain her because her own conduct disentitles her for maintenance under Muslim law.<sup>355</sup>

(iii) Imprisonment of husband:<sup>356</sup>

If the husband has been sentenced to imprisonment for a minimum period of seven years, the wife may file a suit for dissolution of marriage. But no decree shall be passed until the sentence has become final.

(iv) Failure to perform marital obligation:<sup>357</sup>

If the husband without reasonable excuse, has failed to perform his marital obligations for a period of three years, the wife may file a suit to dissolve her marriage.

Under Muslim law, a Muslim husband has four obligations towards his wife: 1. to maintain her; 2. to treat all his wives equally; 3. to make available to her a personal apartment and 4. to allow her to visit and be visited by her parents

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<sup>354</sup> . Dr. Mohammad Nazmi- Mohammadan Law, 2<sup>nd</sup> edn. 2008, p.77, Central Law Publications, Allahabad.

<sup>355</sup> . Rabia Khatoon v. Mukhtar Ahmad AIR 1966 All 548; Bai Fatima V. Munna Miranji, AIR 1957 453.

<sup>356</sup> . See Clause (iii) of Section 2 of the Dissolution of Muslim Marriage Act, 1939.

<sup>357</sup> . See Clause (iv) of Section 2 of the Dissolution of Muslim Marriage Act, 1939.

and blood relations. The first two are covered by clauses (ii) and (viii) (f) of Section 2. The last two would be covered by this clause.<sup>358</sup>

The Act does not define ‘marital obligations of the husband’. But where the husband deserts his wife or does not cohabit with her without any reasonable excuse, it amounts to failure of the husband to perform marital obligations for a period of three years.<sup>359</sup>

(v) Husband’s impotency:<sup>360</sup>

If the husband was impotent at the time of marriage and continues to be so, the wife may file a suit to dissolve her marriage and she has to prove two facts: (1) that the husband was impotent at the time of marriage and (2) that he continues to be impotent till the filing of the suit.<sup>361</sup>

Before passing of a decree of divorce on this ground, the court is bound to give to the husband, one year time to prove his potency; provided he makes an application for it. Where the husband is successful in proving his potency within the period of one year, the decree of divorce cannot be passed but if he fails, a decree dissolving the marriage is passed.<sup>362</sup>

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<sup>358</sup> . Syed Khalid Rashid – Muslim Law, 5<sup>th</sup> edn. 2003, p.100, Central Law, Agency, Allahabad.

<sup>359</sup> . Dr R.K.Sinha- Muslim Law, 5<sup>th</sup> edn. 2003,p.100,Central Law Agency, Allahabad.

<sup>360</sup> . See Clause (iv) of Section 2 of the Dissolution of Muslim Marriage Act, 1939.

<sup>361</sup> . Where the husband was potent at the time of marriage; but becomes impotent after the marriage, the wife cannot get divorce under this clause. In other words, husband’s subsequent impotency cannot be a ground for divorce under Section 2 of the Act.

<sup>362</sup> . Dr . R.K. Sinha – Muslim Law, 5<sup>th</sup> edn. 2003, P.100, Central Law Agency, Allahabad.



The ground of impotency is elaborately discussed by mentioning medical evidence and number of judgments in the first section.<sup>363</sup>

(vi) Insanity, leprosy or venereal disease of husband.<sup>364</sup>

A wife married under Muslim Law can obtain divorce on the ground that the husband is insane or is suffering from leprosy or venereal disease for a period of two or more years immediately preceding the presentation of the suit. But the Act does not specify whether unsoundness of mind should be curable or incurable.<sup>365</sup>

These grounds are already discussed elaborately by mentioning medical evidence and number of judgments in the first section.<sup>366</sup>

(vii) Option of Puberty by wife:<sup>367</sup>

This ground for the dissolution of marriage is not based on any 'fault' of the husband. It is an independent provision under which, a marriage is voidable at the option of the wife. Under this clause, a wife can obtain a decree for dissolution of her marriage if her marriage was contracted by her father or any other guardian during her minority, she can repudiate the marriage before attaining the age of eighteen years; provided, the marriage has not been consummated.

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<sup>363</sup> . The Impotency elaborately discussed in Sec.12 (1) of the Hindu Marriage Act, 1955.

<sup>364</sup> . See Clause (vi) of Section 2 of the Dissolution of Muslim Marriage Act, 1939.

<sup>365</sup> . Insanity as a ground for matrimonial relief under the Hindu Marriage Act, 1955 must be of incurable form.

<sup>366</sup> . Regarding venereal disease elaborately discussed in Sec.13 (1) (v) of the Hindu Marriage Act, 1955.

<sup>367</sup> . See Clause (vii) of Section 2 of the Dissolution of Muslim Marriage Act, 1939.

(viii) Cruelty of Husband:<sup>368</sup>

Under this clause a Muslim wife will be entitled for divorce if her husband treats her with cruelty and it is a good ground for the wife to seek divorce. Section 2 (viii) of the Act of 1939 contains various instances of cruelty. These instances are noted hereunder:

## a) Physical and mental Cruelty:

Any conduct of the husband, which may not be a physical ill-treatment, but is of such a nature which makes the life of the wife miserable, is also a cruelty against her. If the husband stops talking to his wife for a considerable long period, or deliberately ignores her, it may make her life miserable although there is no physical assault in it. Moreover, if the husband habitually abuses the wife or repeatedly makes insulting statements against her character, the conduct of the husband may be regarded as mental cruelty against the wife.<sup>369</sup>

In *Siddique v. Amina*,<sup>370</sup> it was established that husband had administered his wife with some drug causing miscarriage. He also physically tortured her. The court held that it amounts to cruelty.

b) *Concubinage*-

Section 2 (viii) (b) of the Act of 1939 confers on a Muslim wife, a judicial divorce, if her husband associates with woman of evil repute or leads an infamous

<sup>368</sup> . See Clause (viii) of Section 2 of the Dissolution of Muslim Marriage Act, 1939.

<sup>369</sup> . Dr R.K. Sinha – Muslim Law, 5<sup>th</sup> edn. 2003, p.102, Central Law Agency, Allahabad.

<sup>370</sup> . Dr. Paras Diwan – Muslim Law in Moders India, 9<sup>th</sup> edn. 2005, p.98, Allahabad Law Agency, Faridabad (Haryana).

life. Under this clause association should be with women (more than one). This is something like living in adultery, and that too, not with ordinary women; it should be with prostitutes. One or two lapses from virtue will not be enough.<sup>371</sup>

The bringing of a second wife or keeping a mistress will definitely adversely affect on the mind of the wife and it amounts to cruelty. In such cases, the wife can refuse to live along with her husband.<sup>372</sup>

c) Attempts to force her to lead an immoral life:

Mere attempt of the husband to force his wife lead an immoral life is sufficient to ask the court for the dissolution of her marriage. It would be a great mental torture for a chaste and pious wife if she is compelled by her husband to live in corruption and immorality against her wishes.<sup>373</sup>

d) The husband disposes off her property or prevents her from exercising her legal rights over it:

Under Muslim law, a wife continues to maintain her separate legal entity. The property in the name of the wife is separate from the property of her husband. The husband has no right to dispose of his wife's property. In case, the husband

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<sup>371</sup> . Dr. Paras Diwan – Muslim Law in Moders India, 9<sup>th</sup> edn. 2005, p.99, Allahabad Law Agency, Faridabad (Haryana).

<sup>372</sup> . Anis Begum v. I. Istafa, AIR 1933 All 634; cf: Dr. M.A. Qureshi- Muslim Law, 3<sup>rd</sup> edn. 2007, p.109 Central Law Publications, Allahabad.

<sup>373</sup> . Dr R.K. Sinha – Muslim Law, 5<sup>th</sup> edn. 2003, p.103, Central Law Agency, Allahabad.

has disposed of his wife's property, the wife acquires a right to ask the court for the dissolution of her marriage under the Act of 1939.<sup>374</sup>

e) Obstructs her in the observance of her religious profession or practice:

Islam guarantees the personal faith of the ladies. They are allowed to observe religious practice or profession according to their faith. Under the Act of 1939, a wife can approach the Court for her dissolution of marriage if her husband obstructs her in the observance of her religious duties.<sup>375</sup>

f) If he has more wives, than one, does not treat her equitably:

A Muslim man is permitted to marry four wives provided; he is able to treat them equitably. If he is apprehensive that, he will not be able to do justice between them, he is enjoined to marry one wife only. In other words, if a man cannot treat his two wives with perfect equality, he is enjoined to marry only one wife.<sup>376</sup>

In *Asma Bi v. Umar*,<sup>377</sup> it was held that, where one of the wives left the husband because of his ill-treatment, and the husband made no efforts to persuade her to come back, inequality was established and the wife was entitled to the judicial decree on the ground of cruelty.

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<sup>374</sup> . Dr M.A. Qureshi- Muslim Law, 3<sup>rd</sup> edn. 2007, p.110, Central Law Publications, Allahabad.

<sup>375</sup> . Ibid.

<sup>376</sup> . Dr M.A. Qureshi- Muslim Law, 3<sup>rd</sup> edn. 2007, p.110, Central Law Publications, Allahabad.

<sup>377</sup> . AIR 1960 All 684.

*ix) A Residuary Clause:*<sup>378</sup>

Under this clause, a wife may seek dissolution of her marriage on any ground which is recognized as valid for the dissolution of marriage under the Muslim personal law. It covers other grounds such as *Lian, Khula, Talaq-i-Tafweez, ilya, Mubaraat, zihar*, apostasy from *Islam*. The Act proceeds to lay down a residuary provision in order that, the wife may not lose the benefit of any other ground which may have escaped the attention of the Parliament.<sup>379</sup>

*Dissolution through conversion: (Apostasy)*<sup>380</sup>

The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam is not a ground to dissolve her marriage<sup>381</sup>. After such renunciation or conversion, the women shall be entitled to obtain decree for dissolution of her marriage.

After passing of the Dissolution of Muslim Marriages Act, 1939, the position of Muslim women is improved. Now she can release from an unhappy marital tie on various grounds recognized by Islam and also by legislation, through judicial process.

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<sup>378</sup> . See Clause (ix) of Section 2 of the Dissolution of Muslim Marriage Act, 1939.

<sup>379</sup> . Dr. Mohammad Nazmi – Mohammadan Law, 2<sup>nd</sup> edn. 2008, p.80, Central Law, Publications, Allahabad.

<sup>380</sup> . See Under Section 4 of the Dissolution of Muslim Marriages Act, 1939.

<sup>381</sup> . Marriage laws & Family courts Act, 10<sup>th</sup> edn, 2013, by E.L. Bhagiratha Rao, published Asia Law House, Hyderabad

Divorce being an evil, it must be avoided as far as possible. But some times, this evil becomes a necessity. When it is impossible for the parties to carry on their union with mutual love and affection, it is better to allow them to be separate instead of compelling them to live together in an atmosphere of hatred and sufferings. The basis of the Islamic law of divorce is the inability of the spouses to live together than any specific cause on which, the parties cannot live together.<sup>382</sup>

It is common knowledge that Muslim women are greatly deprived of their rights within the laws that govern crucial aspects of the man woman relationship. Among the pre Islamic Arabs and now also, the power of divorce possessed by the husband was unlimited. They could give divorce to their wives at any time, for any reason or without any reason by pronouncing *talaq*. Equality always been guaranteed to Muslims by their laws and the law of Islam as rather contradictory from general perception is very equitable and hardly provides any scope for discrimination against women.

In Muslims there is no equality for men and women for obtaining divorce. The men can obtain divorce easily by pronouncing *talaq* and in case of women they have to obtain divorce through courts. In Muslims most of the women are

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<sup>382</sup>. Islam does not specify any matrimonial offence (guilt) as an excuse for divorce. The underlying principle of Islamic law of divorce is that, divorce is allowed in cases where the marriage is to be broken because of incompatibility between the spouses. However, the Dissolution of Muslim Marriage Act, 1939 is based on the guilt principle because, wife may get a decree of nullity on any of the grounds enumerated in it; cf: Dr. R.K. Sinha- Muslim law, 5<sup>th</sup> edn. 2003, p.81, Central Law Agency, Allahabad.

illiterate and they are also showed as being confined to the four walls of their homes and oppressed. The system of divorce in Muslims is violated the provisions of Article 14<sup>383</sup> of the Constitution of India, as the absolute power of a Muslim husband of divorcing his wife unilaterally, without assigning any reason, literally at his whim, even in a jest or in a state of intoxication, and without recourse to the court, and even in the absence of the wife, is recognized in modern India.

The Muslim women still suffer due to polygamy, oral unilateral divorce, low *mehr* amounts, lack of maintenance and other ills which plague Muslim law. For the last two decades there was no effort to reform the Muslim law by codifying it and making it uniformly applicable to the entire Muslim population across the country and it shall uplift the position of the women. Most of the women organizations continued to play a catalyst in organizing the Muslim women around the issues like demand for the abolition of oral unilateral divorce.

*Irretrievable breakdown of marriage:*

Divorce is on the basis of irretrievable breakdown of marriage has come into existence in Muslim Law through the judicial interpretation. In *Umar Bibi v. Md. Din*<sup>384</sup>, it was argued that the wife hated her husband so much that she could not possibly live with him and there was total incompatibility of temperaments, but the court refused to grant a decree of divorce. But 25 years later in *Neorbibi v.*

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<sup>383</sup> . The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

<sup>384</sup> . AIR 1945 Lah. 51.

*Pir Bux*,<sup>385</sup> again an attempt was made to grant divorce on the ground of irretrievable breakdown of marriage, at that time the court granted the divorce.<sup>386</sup>

In Muslim Law there are two breakdown grounds for divorce. (1) Non payment of maintenance by the husband even if the failure has resulted due to the conduct of wife and (2) where there is total irreconcilability between spouses.

The Kerala Muslim Women (Relief on irretrievable breakdown of marriage and prohibition of Talakul Bidaat) Bill was produced in the 59<sup>th</sup> year of the Republic of India. It is applicable only for Kerala State Muslim Women in India. The following grounds are inserted in the said Bill.

The summary of the proposed sections are to be inserted hereunder:

On the application of Muslim women the court has jurisdiction to grant decree on the ground of irretrievable breakdown.<sup>387</sup>

If a married Muslim woman has exercised her right to *khula* or *talaq-e-tafwiz*, the same may be recognized and affirmed by the court in any civil or criminal judicial proceedings.<sup>388</sup>

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<sup>385</sup> . AIR 1971 Ker 261.

<sup>386</sup> . Article of Divorce under Muslim law, down loaded from the website of <http://www.legal-serviceindia.com/article/1339>.

<sup>387</sup> . Section 3 of the Kerala Muslim Women (Relief on irretrievable breakdown of marriage and prohibition of talakul bidaat) Bill.

<sup>388</sup> . Section 4 of the Kerala Muslim Women (Relief on irretrievable breakdown of marriage and prohibition of talakul bidaat) Bill.



A Muslim man has no right to pronounce oral *talaq* against a Muslim woman and there is no legal valid to that oral *talaq* after commencement of the Act.<sup>389</sup>

Triple *talaq* at one stretch shall not be considered as an irrevocable *talaq* and it shall be treated only as pronouncement of a single *talaq*.<sup>390</sup>

The decision taken by the husband to *talaq*, confirmed by the *Mahal* Committee or *Muthawalli* of the *Mosque*, if the wife feels the said *talaq* is unreasonable and she is entitled to file an appeal before the Family Court within one month. The family court has got jurisdiction to entertain the said appeal, even after thirty days, if there is valid reason.<sup>391</sup>

The Muslim Law of divorce is based exclusively on the theory of irretrievable breakdown of marriage and it permits an out of court divorce both at the instance of either party to a marriage by mutual consent. The instant divorce by triple *talaq* is alien to Islam's spirit, in which the women are most aggrieved for the reason that they are not getting reasonable opportunity to challenge it. To prevent such discriminations some provisions are made in the above bill.<sup>392</sup>

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<sup>389</sup> . Section 5 of the Kerala Muslim Women (Relief on irretrievable breakdown of marriage and prohibition of talakul bidaat) Bill.

<sup>390</sup> . Section 6 of the Kerala Muslim Women (Relief on irretrievable breakdown of marriage and prohibition of talakul bidaat) Bill.

<sup>391</sup> . Section 7 of the Kerala Muslim Women (Relief on irretrievable breakdown of marriage and prohibition of talakul bidaat) Bill.

<sup>392</sup> . the Kerala Muslim Women (Relief on irretrievable breakdown of marriage and prohibition of talakul bidaat) Bill, page-3.

The Bill is being recommended to provide an additional channel of relief to the Muslim women and was not meant to abolish or restrict their pre-existing divorce rights under the Muslim Law. The Bill was pending for statutory recognition.

So, there are no equal rights for Muslim women in the country and it is necessary to modify the Muslim Law relating to marriage and divorce and it shall violate the provisions of Article 14<sup>393</sup> of the Constitutional Law.

Therefore, there is a need to amend the Muslim law like other religious divorce law in India as the Muslim women also citizens in India and they are entitled to all benefits like other religious.

### *3) Divorce under Christian Law:*

This third section deals with the divorce under Christian Law. The expression “Christian” means persons professing the Christian religion.<sup>394</sup>

A person professing Christian religion, even, if not baptized is a Christian.<sup>395</sup> The Indian Christian Marriage Act, 1872 denotes only the marriages of persons professing the Christian religion and its procedure. The relief of

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<sup>393</sup> . The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

<sup>394</sup> . Law of Marriage Divorce by PC. Pant, 2<sup>nd</sup> edn.. p-176, 2001, Orient Publishing Company, New Delhi.

<sup>395</sup> . K.J.B. David v. Nilamoni Devi, AIR 1953 Orissa, 10 at 13, cf: Law of Marriage Divorce by PC. Pant, 2<sup>nd</sup> edn.. p-176, 2001, Orient Publishing Company, New Delhi.

divorce for the Christian religion is a separate Act and it is known as ‘the Divorce Act, 1869’.

The Act, 1869 is relating to the divorce of persons professing the Christian religion.<sup>396</sup> The Act is applicable to Christians only.<sup>397</sup> If one of the parties to the marriage is a Christian it is sufficient to give jurisdiction to decide the petition under this Act.<sup>398</sup>

A Christian marriage can be dissolved only by decree of the Court passed under this Act.<sup>399</sup>

*Ground for dissolution of Marriage:*

A wife or husband may file a petition for dissolution of marriage before the District Court only<sup>400</sup>.

The respondent has committed adultery.<sup>401</sup>

Adultery is extra-marital sex. It is consensual sexual intercourse between a married person and a person of the opposite sex not being the other spouse, during the subsistence of the former’s marriage.

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<sup>396</sup> . Law of Marriage Divorce by PC. Pant, 2<sup>nd</sup> edn.. p-211, 2001, Orient Publishing Company, New Delhi.

<sup>397</sup> . G.S. Dhanamani v. G.S. Benerjee, AIR 1985 AP 237; cf: Law of Marriage Divorce by PC. Pant, 2<sup>nd</sup> edn.. p-212, 2001, Orient Publishing Company, New Delhi.

<sup>398</sup> . Pramila Khosla v. Rajesh Kumar Khosla, AIR 1979 Delhi 79; cf. Ibid.

<sup>399</sup> . George Sebastian v. Molly Joseph, AIR 1995 Ker. 16 (FB)

<sup>400</sup> . Section 10 (1) of the Divorce Act, 1869.

<sup>401</sup> . Section 10 (1) (i) of the Divorce Act, 1869.

The husband can seek dissolution of marriage on the ground that his wife was guilty of adultery simpliciter. The wife has to prove adultery with one or other aggravating circumstances as indicated in the Section. Evidently this is a discrimination purely based upon sex and nothing else. This discrimination mandates against the provisions of Article 21 and also violates equality provisions under Article 14 of the Constitution.<sup>402</sup>

Where the wife had given birth to a child in the absence of husband due to illicit relationship with co-respondent and where evidence stands unrebutted the petitioner was granted decree of dissolution of marriage.<sup>403</sup>

The mere fact that a woman is seen going with a male other than her husband is hardly sufficient to prove the case of adultery.<sup>404</sup>

Further the adultery ground is elaborately discussed in the first section by referring number of Apex Court decisions.<sup>405</sup>

The respondent has ceased to be Christian by conversion to another religion;<sup>406</sup>

The respondent has been suffering from incurably of unsound mind for a continuous period of not less than two years before presentation of petition.<sup>407</sup>

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<sup>402</sup> . Ammini E.J. v. Union of India, AIR 1995 Ker. 252.

<sup>403</sup> . Ronald Lawrence Pereira v. Flory Pereira, II (1994) DMC (Bom.) 618.

<sup>404</sup> . R. Amirda Amalraj v. Thamima, I (1995) DMC (Mad.) 191.

<sup>405</sup> . First section divorce under Hindu Law in Sec.13 (1) (i) of Hindu Marriage Act.

<sup>406</sup> . Section 10 (1) (ii) of the Divorce Act, 1869.

The respondent has been suffering from a virulent and incurable form of leprosy for a period of not less than two years prior to the filing of the petition.<sup>408</sup>

The respondent has been suffering from venereal disease in a communicable form for more than two years before filing of the petition.<sup>409</sup>

The respondent has not been heard of being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive.<sup>410</sup>

The respondent has willfully refused to consummate the marriage and that the marriage has not been consummated.<sup>411</sup>

Two years after passing the decree of restitution of conjugal rights the respondent has failed to comply with that decree.<sup>412</sup>

The respondent deserted the petitioner for at least two years prior to the presentation of the petition.<sup>413</sup>

The respondent treated the petitioner with cruelty it would be harmful or injurious for the petitioner to live with the respondent.<sup>414</sup>

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<sup>407</sup> . Section 10 (1) (iii) of the Divorce Act, 1869.

<sup>408</sup> . Section 10 (1) (iv) of the Divorce Act, 1869.

<sup>409</sup> . Section 10 (1) (v) of the Divorce Act, 1869.

<sup>410</sup> . Section 10 (1) (vi) of the Divorce Act, 1869.

<sup>411</sup> . Section 10 (1) (vii) of the Divorce Act, 1869.

<sup>412</sup> . Section 10 (1) (viii) of the Divorce Act, 1869.

<sup>413</sup> . Section 10 (1) (ix) of the Divorce Act, 1869.

<sup>414</sup> . Section 10 (1) (x) of the Divorce Act, 1869.

If the husband has been guilty of rape, sodomy or bestiality, the wife can file petition for dissolution of her marriage.<sup>415</sup>

The other grounds of Section 10 of the Divorce Act, 1869 except the clause (vii), for dissolution of marriage the other grounds under Clause (ii) the respondent has ceased to be Christian by Conversion to another religion, (iii) the respondent has been incurably of unsound mind, (iv) the respondent suffering from a virulent and incurable form of leprosy, (v) the respondent suffering from venereal disease in a communicable form, (vi) the respondent has not been heard of as being alive for a period of seven years, (viii) the respondent has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards, (ix) the respondent has deserted the petitioner two years or more, (x) the respondent has treated the petitioner with cruelty and Section (2) A wife may also present a petition for dissolution of her marriage on the ground that the husband has been guilty of rape, sodomy or bestiality, which are one and same grounds for dissolution of marriage under Hindu Law and the same are discussed elaborately and evidently by referring Apex Court decisions.<sup>416</sup> Therefore, the above said grounds are not discussed repeatedly in this section.

Both parties to a marriage together file petition before the District Court on the ground that they have been living separately for a period of two years or more,

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<sup>415</sup> . Section 10 (2) of the Divorce Act, 1869.

<sup>416</sup> . In the first section the dissolution of marriage under Section 13 of Hindu Marriage Act.

they have not been able to live together and they have mutually agreed that their marriage should be dissolved.<sup>417</sup>

After six months from the date of filing of the petition and not later than eighteen months after the date of marriage, if the petition is not withdrawn by both parties, the court after satisfied that the petition averments are true, may pass a decree declaring the marriage to be dissolved from the date of decree.<sup>418</sup>

A husband or wife file a petition for dissolution of marriage on the ground of adultery, the petitioner shall show the alleged adulterer or adulteress as co-respondent in the petition.<sup>419</sup>

Some times the petition may be taken into consideration without adding the adulterer or adulteress as a co-respondent in case of the petitioner does not know the person with whom the respondent committed adultery<sup>420</sup>. The name of the adulterer or adulteress is unknown to the petitioner though the petitioner made efforts to discover it<sup>421</sup> and in case of the alleged adulterer or adulteress is dead.<sup>422</sup>

A wife or husband may present a petition before the District Court praying that her or his marriage may be declared null and void.<sup>423</sup>

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<sup>417</sup> . Section 10-A (1) of the Divorce Act, 1869.

<sup>418</sup> . Section 10-A (2) of the Divorce Act, 1869.

<sup>419</sup> . Section 11 of the Divorce Act, 1869.

<sup>420</sup> . Section 11 (a) of the Divorce Act, 1869.

<sup>421</sup> . Section 11 (b) of the Divorce Act, 1869.

<sup>422</sup> . Section 11 (c) of the Divorce Act, 1869.

<sup>423</sup> . Section 18 of the Divorce Act, 1869

Nullity of marriage may be declared that the respondent was impotent at the time of marriage and at the time of the institution of the suit.<sup>424</sup>

The term 'impotency' has been understood by English Judges in matrimonial cases as meaning incapacity to consummate the marriage, that is to say, incapacity to have sexual intercourse, which is one of the objects of the marriage.

The incapacity in the woman for sexual intercourse need not be physical and it may be due to mental or physical causes. The wife was not willing to have intercourse with the husband and evidence also corroborates it where the respondent was absent and medical examination could not be held. The decree was granted in favour of husband.<sup>425</sup>

In *Jyotsna Ram v. Subhash Ram*<sup>426</sup>, wife filed petition for decree of nullity of marriage on the ground that her husband was impotent, and was proved correct, the wife was granted decree.

Wife and husband are within the prohibited degrees of consanguinity or affinity.<sup>427</sup>

Either party was a lunatic or idiot at the time of the marriage.<sup>428</sup>

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<sup>424</sup> . Section 19 (1) of the Divorce Act, 1869.

<sup>425</sup> . *Justyn Cyril v. Hannah Vasanthie*, II (1994) DMC (Mad. 545).

<sup>426</sup> . I (1993) DMC (MP) FB) 382.

<sup>427</sup> . Section 19 (2) of the Divorce Act, 1869



In one case of mental disorder lunatic or idiot it was held that the Court was not concerned with respondent's mental state at the time of petition or trial but was only concerned with the mental state of the respondent at the time of marriage.<sup>429</sup>

Under the Indian Divorce Act mere incompatibility between spouses or the prospect of unhappy married life cannot be a valid ground either for divorce or for a declaration that the marriage was null and void.<sup>430</sup>

The marriage can be declared as null where one or both the parties were *lunatic* or *idiot* at the time of marriage. If a person became lunatic after solemnization of marriage, the marriage cannot be declared null.<sup>431</sup>

Minor psychological problems are also no ground to declare a marriage void, even, if it existed at the time of marriage.<sup>432</sup>

Mere weakness of intellect would not justify annulment.<sup>433</sup>

Detection after five years of marriage that wife was suffering from *paranoid Schizophrenis* is not sufficient to declare marriage null and void.<sup>434</sup>

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<sup>428</sup> . Section 19 (3) of the Divorce Act, 1869

<sup>429</sup> . Lissy v. Jaison, II (2000) DMC ( Ker.) 59; cf: Marriage Laws, E.L. Bhagiratha Rao, 10<sup>th</sup> edn, 2013, p-325, published by Asia Law House, Hyderabad.

<sup>430</sup> . Solomon v. Josephine, AIR 1959 Mad. 151.

<sup>431</sup> . Geroge Joseph v. Alphonsa @ Lovely, AIR 1999 Ker. 25.

<sup>432</sup> . Joy Kutty Mathew v. Valasamma Kuruvilla, AIR 1990 Ker. 262.

<sup>433</sup> . Usha v. Abraham, AIR 1988 Ker. 96.

<sup>434</sup> . Thomas Titus v. Rosa Titus, AIR 1992 Ker 320.

At the time of marriage the former husband or wife of either party was living and their prior marriage was in existence.<sup>435</sup>

In *Maria Monica D'souza v. Martin Santan Dias*,<sup>436</sup> wife established the earlier marriage of the husband with another woman, which subsisted at the time of her marriage with the respondent; their marriage was declared to be null and void.

The husband married the appellant/wife believing that she was unmarried virgin girl, later he came to know that already her marriage was performed and former husband was still alive. Hence the husband was entitled to decree declaring second marriage null and void.<sup>437</sup>

The District Court has no jurisdiction to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud.

A husband or wife may obtain a decree of judicial separation on the ground of adultery, or cruelty, or desertion for a period of two years or more and such decree shall have the effect of a divorce *a mensa et thoro*<sup>438</sup> under the existing law.<sup>439</sup>

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<sup>435</sup> . Section 19 (4) of the Divorce Act, 1869

<sup>436</sup> . II (1994) DMC (Bom.) 650.

<sup>437</sup> . Anu Thomas v. Mathew Thomas, AIR 2001 Ker. 387.

<sup>438</sup> . Means (1) Decree of Judicial separation and (2) a divorce from table and bed or from bed and board, is a partial or qualified divorce by which the parties are separated and forbidden to live and cohabit together without affecting the marriage itself; cf: Cruelty offences against husbands by V.K. Dewan, 2<sup>nd</sup> edn. P-83, 2002, Asia Law House, Hyderabad.

<sup>439</sup> . Section 22 of the Divorce Act, 1869.

A divorce *mensa et toro* only suspends matrimonial relation but it does not dissolve it.<sup>440</sup>

Adultery should not be taken as it means in Section 497<sup>441</sup> of Indian Penal Code, 1860, and sexual intercourse with any other woman whether married or unmarried is covered within adultery for the purposes of this Act.<sup>442</sup>

Driving wife from the matrimonial home and forcing her to live separately is a clear case of cruelty.<sup>443</sup>

In *Amarthala Hemalatha v. Dasari Balu Rajendra Varaprasad*<sup>444</sup>, the High Court of A.P. held that there was no provision in the Divorce Act, 1869 which enables the wife or the husband to seek divorce in the same manner as is provided in the Hindu Marriage Act for non-resumption of cohabitation for a specified period after passing of a decree for judicial separation.

The decree for judicial separation does not have any other effect and cannot lead to a decree for total dissolution of marriage while the former spouse lives.<sup>445</sup>

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<sup>440</sup> . Arun Kumar v. Manjula, AIR 1981 Cal. 252 (FB).

<sup>441</sup> . Adultery:- Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery.

<sup>442</sup> . S. Nadar v. Abraham, AIR 1970 MP. 434.

<sup>443</sup> . K.A. Lyngdoh v. U.J. Pakem, AIR 1987, Gauhati 69.

<sup>444</sup> . AIR 1990 AP 220.

<sup>445</sup> . Amarthala Hemalatha v. Dasari Balu Rajendra Varaprasad, AIR 1990 AP 220.

Wife deserted the husband and she proved her plea of cruelty against her husband. Determination to put an end to marital relation established and judicial separation granted.<sup>446</sup>

A decree passed under this section needs no confirmation by the High Court.<sup>447</sup>

For judicial separation the grounds adultery, cruelty and desertion are already discussed elaborately and evidently by referring the Apex Court decisions in the first section, i.e., judicial separation under Hindu Law.<sup>448</sup> Therefore, there is no necessity to repeat the same highly again and again.

A wife or husband may file an application before the District Court for judicial separation on the ground of adultery, or cruelty, or desertion, then if the court satisfied of the truth of the statements made in such application may grant decree of judicial separation.<sup>449</sup>

Imputation of unchastity on the wife is a reasonable cause to grant decree of judicial separation.<sup>450</sup>

The existing laws are not sufficient to settle the family disputes in a speedy manner due to which so many couples wondering around the courts years together

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<sup>446</sup> . Dara Laxmi @ Kamala Devi v. B. Parashuramulu, 1975 APHN 76.

<sup>447</sup> . Benzamin v. Rundbhai, AIR 1989, MP. 25.

<sup>448</sup> . Section 10 of the Hindu Marriage Act, 1955 mentioned in the first section of this thesis.

<sup>449</sup> . Section 23 of the Divorce Act, 18869.

<sup>450</sup> . K.A. Philip v. Susan Jacob and others, AIR 2001 Ker. 195.

by filing divorce applications on pretty reasons and spoiling their valuable lives. In the circumstances, the ground 'irretrievable breakdown of marriage' may be introduced in the Divorce Act.

*Irretrievable breakdown of marriage:*

The Law Commission in its 15<sup>th</sup> Report made a strong recommendation for reformation of the Divorce Act. The Ministry of Law reciprocated to this proposal and drafted a Bill and referred it to the Law Commission again. After collecting public opinion, the Law Commission in its 22<sup>nd</sup> Report in the year, 1961 reiterated its stand for amending the Marriage Law of Christians. Though the legislative concern remained in limbo, the poor spouses of irretrievably broken down matrimonial ties in the Christian Community remain without any relief while members of other communities are privileged to be benefited by realistic relief's by the laws applicable to them.<sup>451</sup>

Divorce being an evil, it must be avoided as far as possible. But some times, this evil becomes a necessity. When it is impossible for the parties to carry on their union with mutual love and affection, it is better to allow them to be separate instead of compelling them to live together in an atmosphere of hatred and sufferings. Moreover, it is necessary to amend Section 10 of the Divorce Act, 1869 and may be inserted the new ground of 'irretrievable breakdown of

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<sup>451</sup> . Marriage Laws & Family Courts Act by E.L. Bhagiratha Rao, 10<sup>th</sup> edn, 2013, published by Asia Law House, Hyderabad.

marriage'. It will be helpful to the grievance couple for their dissolution of marriage as soon as possible, due to which they may live happily in their remaining valuable life as the life of human being is very short.