A COMPARATIVE STUDY OF DIVORCE UNDER THE HINDU AND THE MUSLIM LAW

ABSTRACT

THESIS
SUBMITTED FOR THE Degree OF
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IN
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BY
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UNDER THE SUPERVISION OF
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ABSTRACT

In this thesis I have attempted to deal with various aspects of Talaq (divorce) in Hindus and Muslims. Now-a-days divorce has become so frequent in our society that in almost all the courts of law in India there are a large number of cases of divorce rather than the performances of marriage in the court. Hence, the laws of divorce in both the communities are sometimes required to be amended as per requirements of the circumstances.

So far as Hindu Shastras are concerned, no provisions for divorce are found. It was only in 1955 that the government has passed an act in this regard so that the spouses involved may not come across any situation which make complicate their existence. This act has further been amended according to the circumstances and condition prevailing in the society.

In the first chapter of this work various aspects and effects of divorce in religious books of both the religion has been given. Condition prevailing in pre and post independent India is also surveyed in this chapter. Hindu Shastric Law, as I have been pointed out here, attached great sanctity to the concept of marriage by declaring it as a sacrament and holding it as an indissoluble bond between the spouses which is supposed to subsist not only during the life times but also in next existence in heaven. From the religions and spiritual point of view even the death of one of the marriage partner does not mean dissolusion of the marriage. That is why a Hindu widow was not allowed to remarry, although
there are some Shastric laws which are capable of being construed either as authorising a woman to take a second husband in some cases, e.g. when her husband is impotent, lost, died, or becomes a religious ascetic, or as countenancing customs permitting remarriage provided those conditions obtained such as other analogus texts may alternatively be interpreted in part as cases of presumption of death actual death or civil death and would conceivably be seen by the orthodox as venial breaches of the Shastric pattern of the indissolubility of marriage.

Apastamba says, "He who has unjustly forsaken his wife shall put on an ass's skin with the hair turned outside and beg in seven houses saying, 'Give alms to him who forsook his wife'. That shall be his livelihood for six months." Manu, Narada and Vasishtha also provide sanctions against the unjust abandonment of a wife.\(^1\) This shows that even abandonment, which is comparable to judicial separation in English law and Islamic Law, was not recognised at Hindu Shastric Law. In fact the prevailing sentiment of Hindu society has always been repugnant to the idea of divorce and remarriage of females, excepting the regions where divorce is practised by custom.\(^2\)

\(^{1}\) Apastamba I.10.28, 19-20, S.B.E., II.

\(^{2}\) Manu IX, 30, S.B.E., 25; Narada XII, 95, S.B.E., 33; Vasishtha XXVIII, 2-3, S.B.E., 14; these texts are discussed earlier at chapter I.

The existence of rigid orthodox Shastric rules against permitting divorce inevitably had given rise to various problems to the couple as well as the society and created cases of real hardship which necessitated legislative measure, e.g., Baroda Hindu Nibandha, 1937; Bombay Hindu divorce act, 1947; Madras Hindu (Bigamy Prevention and divorce) Act, 1949; Saurashtra Hindu Divorce act, 1952 and finally the Hindu Marriage Act, 1955. The Marriage Laws (Amendment) Act, 1976 (No 68 of 1976) was passed by the Parliament. This act has further amended the Hindu Marriage Act, 1955 and the Special Marriage act, 1954 (Received the assent of the president on 27th May, 1976) provided a uniform system of marriage or divorce for all Hindus in India.

I have also discussed in details in this chapter (Unit-D) about divorce in the light of Islamic Law, Talaq (divorce) is strongly condemned in Islam and it should not be resorted unless it becomes impossible for the spouses to live together in peace and harmony. But once it is pronounced by the husband it will upheld and valid although there may be no appropriate cause for it. It is described in a precept of the Holy Prophet (PBUH.) as the worth of all the things that law permits. Islam takes a realistic and sympathetic view of human affairs and therefore it attaches great importance to the happiness of both the spouses. In Islam marriage in the ordinary course is to last till one of the spouses dies. But if a husband
and wife can not live happily together so that the very objects of marriage are defeated and it becomes a mere farce, then its continuance is no longer considered desirable. Under such circumstances, divorce and dissolution of marriage are allowed under Islamic law.

A Muslim marriage, unlike marriage in certain other religions, is not a sacrament. It has been stated by some writers and also held in some cases that it is a civil contract. But this view is equally incorrect and a Muslim marriage is not a mere civil contract. Great importance has been given to marriage by Islam and al-Durr-ul-Mukhter and Ashbah wan Nazair and other books have called it an act of devotion. The Holy Prophet (P.B.U.H.) has said, "Marriage is my Sunnah." But in spite of the above it is not to be considered as sacred and indissoluble tie. A sacrament cannot be violated but Muslim Law unquestionably allows divorce. The Holy Prophet (P.B.U.H.) has said, "of all the permitted things divorce is the most abominable with Allah." (4) Even when a man is not satisfied with his wife, the Holy Qur'an enjoins forbearance. It says, "And retain them (the wives) kindly. Then if you hate them, it may be that you dislike a thing while Allah has put abundant good in it." (5)

If it is established that a husband and wife cannot live together in peace and harmony, they are given the option

to separate. Divorce is also permitted when the wife's conduct is undesirable as when she does injury to her husband or is not chaste. This rule is based on a Qur'anic text wherein the husbands has been enjoined "to keep the wives with kindness". (6) Thus it is laid down in the Qur'an, "And if you fear a breach between the two (husband and wife), then appoint an arbiter from his (husband's) people and an arbiter from her (wife's) people. If they desire agreement, Allah will effect harmony between them". (7) Judicial separation in which the aggrieved spouse is allowed to live separate from the other without the marriage being dissolved is an institution not recognized by the Islamic Law. The reason for this is that the objects of marriage are not restored by the judicial separation, while it may be result in immorality which in Islam is an evil far greater than divorce. The Islamic law, while it permits divorce, insists that there shall be some guarantee that the husband or the wife is not acting from caprice or frivolity or on the impulse of a momentary provocation. For this purpose certain restriction are imposed by the law upon the spouses right to dissolve their marriage.

In the second chapter grounds of divorce in both the religions is discussed at length (in details). It is under this chapter that the grounds for divorce have been

(6) Qur'an, II:231. (7) Qur'an, IV:35.
discussed and compared with Islamic law. Hindu Law of divorce is by no means identical with Islamic law which is resorted to for the sake of clarification of legal terms. In interpreting the concept of desertion, cruelty and other matrimonial faults Indian courts frequently look at the English case-law in order to find out how English judges have construed the same words. Consequently English decisions seem to have a strong persuasive authority in this respect. Where there are no judicial precedents, not only English decisions but also Indian decisions under different statutes, e.g., the Indian Divorce Act, 1969 and Special Marriage Act, 1954, are referred to if they throw light on a similar point. This is obvious from a study of case-law.

"Living in adultery" is a ground for divorce under S.13,(I)(i) of the Hindu Marriage Act, 1955. Here this term has a wider meaning than in S.297 of the Indian Penal Code and S. 488 of the Criminal Procedure Code. Modern Hindu law gives a right of divorce on the ground of "living in adultery", while a single act of sexual intercourse with a person other than his or her spouse entitles the innocent party to a decree of judicial separation. It is interesting to compare this with the situation at Hindu Shastric Law and see what amounted to adultery in these days.

The grounds for divorce, as I have discussed, are
based on the doctrine of matrimonial offence, namely, the commission by one spouse (the guilty) of a matrimonial offence on which the other (the innocent spouse) petitions for relief by way of dissolution of marriage. The relief may be refused if the petitioner is not so innocent, as for instance, where he has committed adultery or other matrimonial affence and the court's discretion is not exercised in his favour.

Under Islamic law, if the family peace is disturbed which is not returnable then husband can give divorce unilaterally or the wife can take divorce. The other grounds of divorce are, (1) when any one of the spouses renounces Islam (2) if the wife embraces Islam. If the husband embraces Islam and his wife, belongs to a non-scriptural refuses to embrace. In such cases divorce is spontaneous. All this grounds of divorce are analysed in great large in this chapter.

While in the third chapter various modes of divorce, ways of dissolution of marriage (For Hindu & Muslim) are dealt with. Various modes of divorce under Islamic law are very clear and it can be taken directly from Hadith and Qur'an. Specially the details description can be obtain in different books of Fiqh by deferent outhers. I have used the various descriptions of Holy Qur'an, Hadith and the books of Fiqh for the deferent circumstances.

As divorce is not allowed in Hindu Shastric law so
there is no question of getting or obtaining any way or mode of divorce in Hindu Shastra. But in judicial law two types of modes or ways are available to take or gives divorce for Hindu. These are the features of this chapter.

Under which conditions or from which time the divorce will come into effects are the matter of discussion of fourth chapter. For the Hindu divorce comes into effect after the judicial court comes to a final decision on the petition filed by any one of the couple and the parties are bound to wait upto the final decision of the court about the divorce. As full descriptions are available in Hadith and in the books of Fiqh so the conditions and the time from which divorce comes into effect are discussed in the light of Islamic law. The various important words of the Holy Qur'an and the Holy Prophet (PBUH.) have been quoted with full explanation.

In fifth chapter I have discussed the modification of the divorce law in Independent India for both the communities the divorce laws for the Hindu have been modified many times from time to time. The details description of this modification, after independence, have been given in this chapter.

Where as the rules and conditions of divorce are available in Islamic books so there were no need of new rules of divorce for the Muslim. It has been taken from
Islamic books without any considerable change. And hence there was no need of further modification. It was 1939 when the divorce laws for Muslim were described in a little different manner, without any change in original laws.

In sixth chapter a qualitative comparison and the points of the similarities and dissimilarities of divorce laws for both the Hindu and the Muslim, in respect of grounds, Modes, effects, etc, have been discussed.
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DEDICATED
TO MY
LOVING MOTHER
This is to certify that the research work embodied in this thesis entitled "A COMPARATIVE STUDY OF DIVORCE UNDER THE HINDU AND THE MUSLIM LAW (IN RELIGIOUS PERSPECTIVE)" is an original work carried out by MR. MOHD. YUNUS ALI and is suitable for the submission for the award of the degree of DOCTOR OF PHILOSOPHY in SUNNI THEOLOGY.

( DR. ZAINUS SAJIDIN SIDDIQI )
# CONTENTS

1. Acknowledgement
2. Qur'ani Aayat
3. Introduction:
   - What does Divorce mean? General and legal effects.
4. Chapter - I:
   - (A) Divorce according to the leading Hindu sources Books-Vedas Shastra-Manu Shastra-Yajnavalkya etc and Government at Acts. (Hindu court Bill) and various schools.
   - (B) Divorce according to the Quran/Hadith/Leading School of Jurisprudence. The Latest acts-pre-post Independent India.
5. Chapter - II:
   - (A) Grounds of Divorce under Hindu Law.
   - (B) Grounds of Divorce under Islam (Muslim Law).
6. Chapter - III:
   - (A) Modes of Divorce/Dissolution of Marriage under Hindu Law.
   - (B) Modes of Divorce/Dissolution of Marriage under Islam (Muslim Law).
7. Chapter - IV:
   - (A) Effective Divorce under Hindu Law.
   - (B) Effective Divorce under Islam (Muslim Law).
8. Chapter - V:
   - Hindu and Islam (Muslim Law) on Divorce and the concerned acts causes of the Independent India.
9. Chapter - VI:
   - Point of Similarities and dissimilarities (in the both Laws) in the above fields.
10. Conclusion:
    - Recapitulation
11. Bibliography
IN THE NAME OF ALLAH, MOST GRACIOUS AND MERCIFUL

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It is my first duty to express my gratitude to the "Almighty Allah" for providing and guiding all the channels of the work in cohesion and coordination to make this study possible.

It is a great pleasure to express my indebtedness and deep sense of gratitude to my supervisor Dr. Qazi Zainus Sajidin Siddiqui, Reader in the Department of Sunni Theology, Aligarh Muslim University for encouragement, expert advice and valuable guidance.

(MOHAMMAD YUNUS ALI)
بسم الله الرحمن الرحيم

(111)

الآيات القرآنية التي تشير إلى إمر الزوج والطلاق

1. وطلعت بترتب بالمسير ثلاثة نورٍ.

2. وإن حرموا الطلاق فأنا سعيد علىكم.

3. الطلاق ضررًا، فتعززه أو نصحًا كسبًا.

4. لا يكل لكم أن تأخذوا ما لم يعوضت نسياً إلا أتفرجوا أن لا يقيموا حدود الله فإن هم يفتنون.

5. أن لا يحصروه الله فلا يجحف حليماً بما انتهت به ذلك حدوه الله، فلا يعوضوا وما بايعه حدوه.

الله ما وليك هم الطائرون. البقرة 234

6. إن خلقنا ملأت له من نفس حتى تكتم روحاً سره.

7. إن طلقتنا ملأت حديثًا أن تتراجعوا إن ظنا أن تهم.

8. فعدوا الله ونلحد حدوه الله بيننا لقوم يعينون. البقرة 235
5. وإذا طلقت النساء أُنُفِّضْنَ نارًا، فساضرُوهُنَّ محروبةً، ولا تسلوهُن ضرًا، لعلكما نشرذًا، وَكَفَيْتِ الْرَّبِّ ذِي فَضْلِهِمْ لَنَسْهَ.

6. وإذا طلقت النساء، فبلغن أجلهن فلاتحصلن أن ينالن

7. الذين يتورون نفسيهم أبداً، وترزقهم ينون ورافعه.

8. ولا جداح على مكَّة، وما عرضت به من هذب الناس، أو نتم

9. في الناس، فأنت لهم سيد لرُؤسين وليمتُ لا أراهون

10. سألوا ما سألوهُمْ، واتبعوا ما عقلهه∆ النَّكَاحُ حتى سلَّمَ الباب

11. أو أعلمو أن الله نعَمَ ما في الناس، ماحلةً، واعطوا

12. أن الله عصوهم. البقرة 235
9. لا يُحاَجُّ عَلَى الْمَلَكِ عَن طَلَقُتِهِ الْمَرْأَةِ مَا سُوَّاهُ مَن سَوَّاهُ أوُلُو تَقْرُباً إِلَى فُرِيقَةٍ وَمَلْعُونٍ عَلَى المَوْسِعَ فَحَذَرْ فِي مَعْنَايِ الْمُعَتَّرِقَةُ.

فَمَا أَلَّهَ عَلَى الْمَلَكِ أَن طَلَقَ مَرْأَةً حَتَّى أَقَامَ الْمَاءَ عَلَى الْمَلَكٍ. الْبَقَرَةٌ 237.

10. وَإِن طَلَقَهُالْمَلَكُ مِن قَبْلِ أَن يُعْظَمَ مَا قَضَّى الْمَلَكُ وَقَدْ فَرَضَهُ فِي مَلْعُوبٍ فَخَفَّفَهُ الْمَلَكُ مَنْ حَلَّى الْمَرْأَةَ. الْبَقَرَةٌ 237.

۱۱. وَالَّذِي نُوْعَهُ مَيْلَ وَلِيْمَ نَزَّلَ وَقَدْ وَقَى عَلَى الْكُرُوحِ مَا فَرِحَ مَرْأَتُهُ فَصَمَّدَتْ عَلَى مَلْعَوبٍ مَّمَّا أَلَّهَ عَلَى الْمَلَكِ. نَافِعٍ ۱۵۴.

۱۲. مَعَانٍ مِّن مَّعْبُورٍ وَلَلهُ مَّعْمَالٌ حَكِيمٌ الْبَقَرَةٌ ۲۴۰.

۱۳. وَلِلْمَلَكِ مَخْتَالٌ مَّعْبُورٌ عَلَى الْحَمْرِ. الْبَقَرَةٌ ۲۴۰.

۱۴. بَلْ أَنَّهُمْ أَمَرُوا إِذَا فَلَكُمُ الْمَوْجُوَّدَاتُ مَن طَلَقَهُمْ مِن قَبْلِ أَن يُعْظَمُ مَا سَوَى فَخَفَّفُوهُ الْمَلَكُ مَنْ حَلَّى الْمَرْأَةَ وَفَرَضَهُ الْمَلَكُ وَقَدْ فَرَضَهُ فِي مَلْعُوبٍ.

۱۵. وَقَالُهُمْ عَلَى الْمَلَكِ فَأُنْفِقُوهُ مَنْ عَلَى مَلْعُوبٍ وَأَجْمَعُوهُ مَنْ عَلَى مَلْعُوبٍ الْبَقَرَةٌ ۴۹.

۱۶. بَلْ أَنَّهُمْ أَمَرُوا إِذَا فَلَكُمُ الْمَوْجُوَّدَاتُ مَن طَلَقَهُمْ وَأَجْمَعُوهُ مَنْ عَلَى مَلْعُوبٍ الْبَقَرَةٌ ۴۹.
Meaning of Divorce: "Divorce" as a verb, has been defined as meaning to "separate" and it has been held that "separation" or "dissolution" of marriage means divorce, but not every such separation or dissolution can properly be so designated. So, while the term "divorce" has sometimes been broadly defined or applied to include both decrees of nullity and decrees of dissolution of marriage, especially where the marriage was not voided but only voidable at the option of the injured party, this has been declared to be not in accord with modern usage, and generally the term denotes only dissolution or suspension of a marital relation. It does not mean annulment of an invalid marriage.

"Divorce is the dissolution in whole or in part of the tie of marriage". It includes both the complete abrogation of the marriage relation known as a divorce a vincula matrimonial which carries with it the power of re-marriage on the part of both the parties to the marriage and also that incomplete weverance not involving powers to re-marry, which was formerly known as divorce a mensa et thro, and is now termed "Judicial Separation". Less strictly, divorce is commonly understood to include Judicial declarations of nullity of marriage, which while practically terminating the marriage relation and proceed
In Hindu Religion, marriage being a sacramental union - an inviolable and immutable union thus even death does not dissolve the marriage. The Dharmashastra do not recognise divorce, and any attempt to reduce from sāmary Simiriti texts. The Christian concept of marriage is intended to last for life, whereas under the Hindu Śhastric law marriage is deemed to be a sacramental bond continuing up to heaven. The proposition that divorce recognised by some Smritikars is nothing but one's inability to comprehend the basic concepts that the Dharmashastra propounded. However, the Dharmashastra's adherence to the doctrine of indissolubility of marriage did not hamper the recognition of the people's need of divorce, and a particular section of Hindus say lower classes did enjoy the right of divorce. This was under the custom which prevailed over the sacred law customary modes of divorce made easy. In some cases a marriage could be dissolved by mutual consent. Some times divorce could also be purchased. Very little formalities for dissolving a marriage were needed. Many time it was purely a private act of the parties. In some communities a forum was necessary in the shape of either a Panchayat or a family Council. Customary divorce was the privilege of the lower castes and higher castes seldom had a custom with
Meaning of Divorce in Islam (Muslim Law):

Talaq "Divorce" is an Arabic word which means "Undoing of or release a Knot". It is used by Muslim jurists to denote the release of a woman from the marriage tie, and means a Talaq (divorce).

The term talaq is explained in the dictionary is the taking off of any tie or restraint. In the language of Law it is the taking off of the marriage tie by appropriate words. Talaq in its primitive sense means dismissal. In law it signifies the dissolution of a marriage by the annulment of its legality by pronouncing appropriate words. The term has acquired a clear and definite meaning as the dissolution of the marriage tie by a declaration of the husband. It is not only used in the sense in the Qur'an and the traditions of the Prophet (peace be on him) but habitually as a matter of usage although its root meaning is "setting free" or "letting loose". The word talaq and its grammatical variations are terms of art and the technical meaning which they have acquired by usage is "freedom from the bondage of marriage" and not from any other bondage.
"Divorce". The term "divorce" is somewhat ambiguous and has been often indiscriminately used as synonymous with Talaq. The term "Talaq," in law is used in two senses (1) a restricted sense in which it is confined to separation effected by use of certain appropriate words by the husband; and (2) a wider sense, in which it covers all separations for causes originating in the husband.

Baillie uses the term "divorce" for all separations originating from the husband and "repudiation" for talaq in the limited sense, namely of separation effected by use of appropriate words. The term has got a still wider connotation in this thesis. Certain forms of dissolution of marriage Khula and Mubaraat are covered by the generic term "divorce". The various forms can be enumerated as under:-

A valid Muslim marriage may be dissolved by divorce in the following forms as stated in the sections of this chapter noted below:-

(1) Talaq, or repudiation by the husband;
(2) Ila or the vow of continence by the husband;
(3) Zihar or injurious assimilation of the wife by the husband to certain prohibited relations;
(4) Khula or redemption by the wife;
(5) Mubarra or separation by Mutual consent;
(6) Li'an, or imprecation.

**Divorce with and without intervention of Court:**

A divorce may be made in some cases through the Court and in other cases without intervention of the Court. They may be analysed as below:-

(1) Divorce without intervention of court:-
(a) by the husband by talaq, Ila or Zihar;
(b) by the wife by talaq-e-tafweez;
(c) by mutual agreement between the parties by Khula or Mubaraat.

(2) Divorce through the Court:-
(a) by the husband by li'an;
(b) by the wife by claim under Act 8 of 1939.

(1) **Pre-Islamic Period:** Among the pre-Islamic Arabia, the power of divorce occupied by the husband was unlimited. He could repeat the word Talaq (divorce), divorce again as many times as he may prefer. He could, moreover, if he was so bent, swear that he would has no intercourse with his wife, though still living with her. He could arbitrarily accuse his wife of adultery, dismiss her and leave her with such notoriety as would deter other suitors; while he himself would go exempt from any formal responsibility of maintenance or legal punishment. (4)
According to Abdur Rahim, at least there existed four various types of dissolution of marriage known in Pre-Islamic Arabia. These were Talaq, Ila, Zihar and Khula. A woman if absolutely separated through any of these four modes was probably free to re-marry, but she could not do so until period called Iddat, had passed.

It was to ascertain the possibility of the child. But it was not a strict rule. Some times, pregnant wife was divorced and was married to another person under an agreement. It is interesting to note that the period of Iddat in case of death of husband then was one year.

**After the advent of Islam:** The Holy Prophat (PBUH) of Islam looked upon these customs of divorce with extreme disapproval; and regarded their practice as calculated to undermine the foundation of society. It was impossible, however, under the existing conditions of society to abolish such customs entirely. The Holy Prophet (PBUH) had to mould the mind of an uncultured and semi-barbarous community to a civilized society. Accordingly he allowed the exercise of the power of divorce to husbands under certain conditions. He permitted to divorce parties three distinct and separate periods within which he might endeavour to become reconciled; but should all attempts at reconciliation prove unsuccessful, then in the third period the final separation become effective.
The reforms of the Prophet Mohammad (peace be on him) marked a new departure in the history of Eastern legislation. He restrained the unlimited power of divorce by the husband, and gave to the woman right of obtaining the separation on reasonable grounds. He pronounced "talaq to be the most detestable before God of all permitted things" for it prevented conjugal happiness and interfered with the proper upbringing of children.

**Effect of Dissolution of Marriage:**

The dissolution of marriage either by talaq (divorce) or otherwise gives to the following results:

1. The marriage, becomes dissolved immediately in the case of an irrevocable divorce and in the case of a revocable divorce on the expiry of the wife's iddah.

2. The parties become absolutely prohibited to each other on the pronouncement of triple divorce and cannot even remarry until and unless the wife marries another person and that marriage is dissolved after consummation. Section 7 of the Muslim Family Laws Ordinance, 1961 in force in Pakistan, has modified this rule to some extent. Thus it is laid down as under.

Talaq (i) Any man who wishes to divorce his wife, shall as soon as may be after the pronouncement of talaq in any form whatsoever give the chairman notice in writing of his
having done so, and shall supply a copy thereof to the wife.

(ii) "...a talaq, unless revoked earlier, expressly expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman of the Union Council.

(iii) If the wife being pregnant at the time talaq is pronounced, talaq shall not be effective until the period mentioned in sub-section (3) or pregnancy whichever be later, ends.

(iv) Nothing shall debar a wife whose marriage has been terminated by talaq effective under this section from re-marrying the same husband, without an intervening marriage with a third person unless such termination is for the third time so effect. Under the general Muslim law the parties come remarry, without the necessity of an intervening marriage only if the divorce has been pronounced once or twice.

(3) Cohabitation between the parties becomes unlawful from the time of the pronouncement of an irrevocable divorce and in the case of a revocable divorce from the time of expiry of the wife's 'iddah.

(4) The wife shall be entitled to contract another marriage on the expiry of her 'iddah.

(5) The husband cannot marry after divorce, certain women, prohibited to him on account of his marriage He
also cannot marry another woman during this period if the
divorced wife was one of four living wives.
(6) The wife has to observe, 'iddah for the prescribed
period unless she is exempted for its observance.
(7) The husband's liability for maintenance of the wife
terminates on the expiry of the period of the wife's
'iddah.
(8) The wife's prompt dower becomes due in the case of
revocable divorce on the expiry of the wife's 'iddah and
immediately in the case of irrevocable divorce without any
demand being made by the wife.
(9) The parties right to inherit to each other ceases
immediately an irrevocable divorce is pronounced. In the
case of a revocable divorce the right shall ceases on the
expiry of the period of the prescribed 'iddah'.
(10) Nasab or Legitimacy of a child shall be established
only if it is born within a certain period from the time
of dissolution of marriage.

General Effect of Dissolution of Marriage:-

From the above one can see that Talaq has been very
much condemned who both in the Holy Qur'an and Hadith and
thus is treated as most disfavored act creating a number
of problems for the parties involved. Not only the parties
even the society is very much effected. Talaq, in the
present time has an economic affect also. It affects the
children, their upbringing and allround progress either without mother or father. In brief, the general effects of Talaq are very bad and far reaching in very rare case it becomes peace for the parties who are thus separated.

REFERENCES

(2) Encyclopaedia Britannia, heading "Divorce".
(3) Abid.
(4) Narada, XIII.93
(11) Al-Mabsoot, VI, p.2; Al-Lubab II, p.3.
(15) Bail I, p.204. (13) Ibid. (14) Ibid.
1. The Nature of Hindu Marriage:— In Hindu law, that is to say, in the dharma Shastra or 'orthodox' Juridical theory of India, marriage (Vivaha) is one of the ten samkaras necessary for men of the twice born classes and the only Vedic sacrament for women.(1) As in canon law and moral theology matriminum is treated under sacraments, so in Hindu law vivaha is not treated under vyavahara (litigation) but under samskara. A samskara is a sacrament or a purificatory act. Marriage is considered sacred because it is said to be complete only on the performance of the sacred rites attended with sacred procedure. This samskara gives rise to the status of wifehood and its performance cannot be annulled by the fact that the husband or wife lapses from virtues i.e. by committing adultery.(2) It is almost impossible to define marriage in legal terms but the Shastric concept of marriage would seem to be as a union between a man and a woman which arises at the time when the ceremony of marriage (i.e.) (samskara) has been completed, the bridegroom having the requisite qualifications for taking a girl in marriage and the bride the qualifications for being given in marriage, and this procedure having been completed before the nuptial fire.(3) Marriage is a sacramental rite, which is performed for the girl for the purpose of making
her a wife and is marked by the holding of hands along with its entire procedure and subsidiary details. (4) It gives the status of husband and wife to the married couple. The mantras used in ceremony of wedding create a wife. The sacrament becomes complete by the use of those mantras. As regards the marriage of a Sudra, there are no mantras but other rites apply excluding the mantras. (5)

2. The Purpose of the Samskaras:– The exact purpose of Samskaras was left rather vague in our authorities. A critical look at the list of Samskaras will reveal that their purposes were manifold. According to ancient Hindu religious belief man was surrounded by superhuman influences which were powerful for good or evil consequences. These influences could interfere in every important occasion in man's life. Therefore, the Hindus tried to remove hostile influences and attract beneficial ones, so that man might grow and prosper without external hindrances and receive timely directions and help from gods and spirits. Another purpose of the Samskaras was the attainment of heaven. It had also a psychological value, impressing on the mind of the person concerned that he had assumed a new role and must strive to observe its rules. (6) The Vivaha-Samskara consists essentially in an acceptance, which produces the mental impression that the girl is man's wife, and wifehood arises from her having undergone the Samskara, which Samskar itself could not occur but for the marriage. (7)
During the samskara of marriage a bride groom is said to be an active receiver of the bride, who is taken by him and given by her father or other guardian. From the Shastric point of view the religious aspect of marriage was so highly rated that a father was supposed to be under a sacred duty to give his daughter in marriage at the appropriate age, neglect of which duty was regarded as a sin. The Shastric marriage has undergone changes from time to time.

3. **Marriage in the Vedic Period**:- It was a simple religious ceremony consisting of grasping the hand of the bride by the bridegroom. The Rigveda enjoins, "I take the hand for good fortune, that thou mayest attain old age with me as thy husband; the gods have given thee to me that I may be master of the household."(9)

4. **Marriage in the Sutra Period**:- The procedure of marriage became complex during the Sutra period. The bridegroom was to lead the bride three times round the nuptial fire, and the ceremony was completed on taking the seven steps by the couple. The wife was shown the pole star, which was symbolic of the fact of her stability in her husband's home.(10)

5. **Marriage in the Smriti Period**:- During this period we
During this period we notice various forms of marriage, eight of which are briefly dealt with below.

(i) The Brahma:- The gift of a daughter, after decking her with costly garments and honouring her by presents of jewels, to a man learned in the Vedas and of good conduct, whom the father himself invites, is called the Brahma rite. Medhatithi on Manu XXVII comments that there is nothing to indicate the connection of special dressing with either the bride only or with the bridegroom only; hence they should be taken as relating to both. This seems to be the correct view, because in practice even today both the bride and the bridegroom are specially dressed and adorned for the wedding.

(ii) The Daiva:- This was a gift of a daughter whom her father had beautifully clothed when the sacrifice had already begun, to the officiating priest, who performed that act of religion.

(iii) The Arsha:- When the father gave away his daughter according to the rule, after receiving from the bridegroom, for the fulfilment of the sacred law, a cow and a bull or two pairs, that marriage was termed the Arsha. On the face of this text it appears that the taking of the consideration from the bridegroom rendered this form inferior to the above two and the Prajapatya below. But this is doubtful, for Medhatithi on Manu III, 29 comments that such receiving of the cattle by the father was done in obedience to law, and not with the idea of receiving it in exchange for the price of the girl.

(iv) The Prajapatya:- When the father gave away his
daughter with honour saying distinctly, "May both of you perform together your civil and religious duties." Again Medhatithi (14) comments that the formula implies the condition that the daughter is to be given to the bridegroom only if he fulfills his duty, properly and pleasure along with her. Therefore, this form was regarded as inferior by reason of this condition. Ludwick Sternbach, (15) whose study is based on the Dharmasastra, Arthasastra, Kamasutra, Grihya-Sastras and the Mahabharata, concludes that when the forms of marriage are closely examined there existed in ancient India not eight but eleven forms of marriage. The difference between the Projapaty and the Brahma is that the bridegroom in the former is the suitor, i.e. he has solicited the girl, and is not invited by the father of the bride. He is an applicant for the bride's hand and this makes it inferior to the Brahma form, where the bridegroom is voluntarily and respectfully invited by the father of the bride to accept his daughter. A Hindu marriage, being a gift of the bride, loses a part of its merit if it is not voluntary or wilful, but has to be applied for. The Prajapaty was probably used only for a monogamic and husband could not renounce his wife and take to the order of Sanayasa or Vanaprastha without her consent or her company. In fact the Brahma was originally identical with the Prajapaty, because Apastamba and Vasishtha do not mention Prajapaty at all. The Prajapaty was added later, therefore, the
Smriti writers fail to bring out the difference between the two. (16) Prajapatyas is the second best and approved form. (17) As in the Brahma form so in the Prajapatyas one the bridegroom is invited and honourably received by the father of the bride. (18)

(v) The Asura:— The bridegroom having given as much wealth as he could afford to the father, Paternal Kinsman and to the girl herself took her as his bride. This being a sale of the bride was regarded as a base form of marriage and was prohibited by Manu. (19) This form was recognised by the Hindu law during the British period. In Kailasanatha V. Parasakthi. (20) It was hold that the distinctive feature of the Asura form of marriage is the giving of money's worth to the bride's father for his benefit or as consideration for his giving the girl in marriage. However, a courtesy or complimentary present given to the bride or her family has to be distinguished from bride-price. (21) Money paid by the bridegroom for the specific purpose of making jewellery for the bride is not bride-price and does not make the marriage an Asura one. (22) Now after India Independence the whole situation was reviewed by the Supreme Court, (23) which held that the Asura is an unapproved form of marriage and the test of it is that there shall be not only benefit to the bride's father, but that benefit shall form a consideration for the sale of the bride.

(vi) The Gandharva:— This was a marriage arising out of
mutual desire of a man and a woman, and can be compared with the modern love marriage. It was enjoined by the Sastra that a Brahmana could contract a marriage legitimately in one of the first four forms. However, in practice at least according to the Mithila School of law the Brahmins. In Bhaoni V. Maharaj the Gandharva was equated with concubinage. It was held that this form had become obsolete as a form of marriage giving the status of wife and making the issue legitimate. This case is unlikely to be followed in view of the Hindu Marriage Act, 1955 and changing public opinion, which tends to encourage grown up persons to make their own decision in the choice of their life partners.

(vii) The Rakshasa: This was a marriage by seizure of a girl by force from her house while she wept and called for assistance, after her kinsmen and friends had been slain in battle or wounded and their house broken open.

(viii) The Paisacha: Where the suitor secretly reduced the girl while she was asleep or drunk or disordered in intellect that sinful marriage was called Paisacha. This is the eighth and the basest.

The first four marriages are regarded as "approved" marriages. It was a Hindu religious belief that sons born of these marriages were radiant with knowledge of the Vedas and were honoured by good men. Having these qualities of beauty and goodness, possessing wealth and
fame, obtaining as many enjoyments as they desire and being most righteous, they would live a hundred years. The remaining four are regarded as blameworthy, from which spring sons who are cruel and liars, who hate the Vedas and the sacred law. Rakshasa and Paisacha, which were condemned by Manu as base and sinful, however did not legalise force or fraud as the marriage ceremony had in theory to be performed with sacred rites, without which the marital relationship did not arise. Their recognition can be justified on the ground that they existed in order to validate the circumstances of which the unfortunate woman was the victim. The jurists were concerned with the results flowing from the circumstances preceding the marriage and classified those circumstances accordingly.

According to the sastra inferior forms of marriage, namely, Asura, Gandharva, Rakshasa and Paisacha do not involve a change of the gotra of the bride, which is an essential part of the ceremony of the Vedic marriage, because in such forms there is no voluntary gift of the bride by her father to the bridegroom. Approved forms were meant for Brahmans who were an important caste. According to Manu the first six forms of marriage were lawful for a Brahmana, the four last for a Kshatriya, and the same four, excepting the Rakshasa, for a Vaisya and a Sudra. The significance of the approved and
unapproved forms of marriage was that it determined the devolution of a woman's property on her death. In the former the husband and his family, while in the latter the father and his family succeed to her Stridhana. Where a woman was married in the unapproved forms, her death ceremonies were to be performed by a member of the gotra of her father, whereas in case of the approved marriage, they might be performed either by her husband's gotra or her father's. The reason for this distinction seems to be that approved marriages were authorised by the families of the couple concerned, while the unapproved were contracted against the wish of family of the woman concerned, if we reserve the case of the Asura marriage, which originally did not imply a sacramental transfer but only a sale-spiritually (so the sastra seems to imply) she remained a member of her natal gotra. That is why she retained the gotra of her father.

If we look critically at the above mentioned eight forms of marriage, it will be evident that they were a mere elaboration of the concept of marriage (vivaha). They took account of local custom and usage, which were developing alongside the sastra. A survey of the Dharma-Sastra smritis, Nibandhas and the Commentaries will prove that Hindu law was never static, but was modified by the practice of the time to suit the just demands of the people. With the advent of the British
rule, the ancient sources of Hindu law began to be modified by judicial decisions and legislative enactments, while Hindu society assumed a new character because of its contact with the Western education, civilisation, economic and scientific progress.\(^{34}\) In fact the Hindu Marriage Act, 1955 is the result of the influence which had started in the British period. Thus the dharma-sastra's contact with actual usage, though sometimes difficult to trace, has been, in practice, continuous.

According to Kautilya, whose Arthasastra (a predominantly secular book), reflects practical usages, there can be no divorce in case the marriage is contracted in one of the approved forms. But if the marriage is in an unapproved form, then it can be dissolved by mutual consent, if both have come to hate each other. There can be no release at the instance of only one party to the marriage who has begun to feel aversion to the other party in whatever form the marriage may have been performed.\(^{35}\) Kautilya actually says amokso dharma-vivahnan "The law does not allow the dissolution of marriage between spouses who have undergone a dharmic vivaha."\(^{36}\) The first four marriages are dharmya, i.e., connected with righteousness, because they are brought about under the authority of the father. Such marriages do not admit divorce.
6. **Nuptial Ceremonies**:- According to the plain smriti texts marriages in the unapproved forms do not require the performance of the religious ceremony, but the sastric law as applied by the courts during the British period in India held that such ceremony was essential for the validity of the marriage.\(^{37}\) This is so even in modern Hindu Law. It was held in Deivani V. Chidambaram\(^{38}\) that there are two essential elements to constitute a valid marriage, viz.; a secular element, which is the gift of the bride in the four forms, the transference of dominion for consideration in the Asura form, and mutual consent of the spouses in the Gandharva form. These must be supplemented by the actual performance of marriage by going through the forms prescribed by the Grihya-Sutras, of which the essential elements are 'panigrahana' (joining of hands of the bride and the bridegrooms) and 'saptapadi' (taking of seven steps by the bridal couple). In the case of Rakshasa and Paisacha forms also (should these be capable of validity in modern times), there should be a marriage ceremony prescribed by the sastras. In Bhaurao V. State of Maharashtra\(^{39}\) it was laid down that solemnisation of the marriage with proper rites and ceremononies was essential in the Gandharva 'form'. Similarly it was recently held by the Supreme Court\(^{40}\) in a case of bigamy that in order to prove the validity of the second marriage it is necessary to prove that the essential nuptial ceremonies were performed.

The performance of rites and ceremonies according
to religious beliefs (e.g., saptapadi) or according to custom and usage has been reserved by the Hindu Marriage Act. 1955. The modern law has been developed in such a way as to show that the ceremony though vital to the religious purpose is no longer vital to the working of secular rights. Thus where a man and woman live as husband and wife and have children who are recognised as such by their community by the custom the rights of the spouses and their children will not be destroyed merely by someone's attempting to bring forth evidence that no ceremonies of marriage were performed on the couple.

Whether or not such ceremonies are essential, their non-performance or wrong performance can be excused under certain circumstances by the doctrine of factum valet, e.g., where the saptapadi (taking of seven steps) is not completed because of an accidental fire or some other mishaps, the validity of such a marriage cannot be upset subsequently. Where a marriage takes place under a custom according to which saptapadi is not an essential ceremony, the non-performance of saptapadi does not invalidate the marriage. In considering the validity of a marriage it is necessary to distinguish between the essentials and non-essentials of the custom. The presumption that a valid marriage took place can be raised where it is established that the marriage was duly solemnised but some unessential ceremony was not performed.
or there was some defect in the completion of the rite. (44)
Thus the sacramental and sastric characteristic of the Hindu marriage so far as the performance of the religious ceremonies is concerned is still in existence.

According to the sastric view the spiritual aspect of marriage was so important that the husband was said to have received his wife from the gods and not wedded her according to his own will, for he was doing what was agreeable to gods. (45) The consequence of marriage was that man and woman became one person, as the Veda expresses, "Her bones become identified with his bones, flesh with flesh, skin with skin." (46) From the time of the marriage, they are united in body and mind as well as in religious ceremonies. (47) As a river loses its identity by merging itself into the ocean, so a wife was supposed to merge her individuality with that of her husband. In the revealed texts of the Veda, in the traditional laws of the Smritis, and in the popular usage, the wife is declared to be half the body of her husband, equally sharing the outcome of good and evil act. (48) So a Hindu marriage was a sacred union of two personalities into one for the purpose of the continuance of the society and for the uplistment the two by self-restraint, self-sacrifice and mutual co-operation for the performance of holy rites. (49) This is the central concept of Hindu ethics and law.
7. **The Object Of Marriage:** It was threefold, namely dharma (the performance of religious and righteous duties), praja (progeny) and rati (pleasure). Where the Hindu lawgivers regarded dharma as the first and the highest aim of marriage, and procreation as the second, dharma, according to the sastra, dominated marriage. Marriage was a means not merely for satisfying sexual desire or to obtain progeny, but to secure a partner for the performance of religious duties. It enabled a man, by becoming a householder to perform religious sacrifices to the gods and to procreate sons. It was the duty of the husband to require and the right of the wife to give co-operation in all religious acts. Manu on the authority of the Veda declares that religious rites must be performed by the husband and wife together. Women were not allowed to perform any sacrifice, vow or fast apart from their husbands. They could obtain heaven merely by being obedient to their husbands.

It was a Hindu belief that a Hindu from his birth is born with three debts, i.e., he owes brahmacarya (study of the Vedas) to the sages, sacrifice to the gods, and progeny to pitris (ancestors). The second purpose of the marriage was to procreate sons, who were supposed to save a man from hell. A son is called putra because he delivers his father from the hell called put. So much importance was attached to the birth of a son that a man
was said to have conquered the spiritual worlds and obtained immortality and heaven by having a son. (54) Immediately upon the birth of his first-born son a man was freed from his debt to the ancestors. (55) Legitimate progeny being the objective, marriage was a religious necessity. (56)

The purpose of the marriage is further evidenced by the procedure of the marriage ceremony, when the bridegroom addresses the bride as, "I am heaven you are earth, Come! Let us join together so that we may generate a male child, a son, for the sake of the increase of wealth, a blessed offspring of strength." (57) Marriage enabled a man to make himself complete by the association of his wife and his son. (58) His sacred obligations, i.e., the proper performance of his religious duties, faithful service to gods, his offspring, highest conjugal happiness, heavenly bliss for himself and his ancestors, depended on his wife alone, (59) as he was incompetent to perform the above mentioned acts without the help and presence of the latter.

8. The Dissolution of Hindu Sastriic Marriage:— It has been seen that a Hindu marriage, being a sacrament, once performed before the nuptial fire with the sacred texts, becomes irrevocable on the completion of the ceremony of taking seven steps by the couple. (60) There is no evidence as to the practice of divorce as such during the Vedic and
Post Vedic periods. It was a holy union of mind, body and soul of the spouses and, it was believed, that even death did not put an end to it, for the wife remained linked with her husband in soul after death in the next world.\(^{(61)}\) It was the highest duty of husband and wife to remain united in marriage and be utterly faithful to each other.\(^{(62)}\) It was ordained by the Creator that a husband could not release his wife by sale or repudiation.\(^{(63)}\) The wife was required to be obedient to her husband under all circumstances. She was expected to worship him as God even if he was lacking in good qualities and virtue.\(^{(64)}\)

According to Apastamba\(^{(65)}\) if the solemn vow of marriage is transgressed both husband and wife certainly go to hell. Hindu marriage was regarded as an eternal and sacred bond which united the husband and wife for the performance of their religious sacrifices. Dissolution of marriage was thus not contemplated by the sastra, for it was un-dharmic, unrighteous and sinful.

9. **Remarriage of Females:** It has been seen that the sastra did not countenance divorce. From this the question arises whether the remarriage of females was allowed? The procedure of performing sastric nuptials was available only for virgins, and never for girls who had lost their virginity.\(^{(66)}\) A girl was fit for being given in marriage only once as Manu has said, "Once is a maiden given in marriage and once does a man say, 'I will give', this is
The bride is free to be transferred from the father's house to that of the husband; but she is not allowed to leave her husband's home and go elsewhere, i.e., take another husband. This is supported by a hymn of the Atharvaveda, which reads, "Hence from the father's house, and not thence from the husband's house, I send the bride free. I make her softly fettered there so that she may live with her husband blessed in fortune and offspring." This shows that no separation was allowed between husband and wife.

According to the sastra a woman was expected to lead a life of chastity and self-denial and was not to mention even the name of another man after the death of her husband. She who remains virtuous and chaste after the death of her husband reaches heaven, although she may have no son. On the contrary a woman who from a desire to have offspring violates her sacred duty towards her deceased husband, brings on herself disgrace in this world and loses her place in heaven. "Nowhere is a second husband prescribed for a virtuous woman." Thus the non-existence of nuptial ceremonies for a second marriage and the prohibition of remarriage of women are evidence against the recognition of divorce in the matrimonial system known to the sastra.

However, Narada, Parasara and Vasishtha authorise a woman to take another husband in five cases, i.e., when
her husband is lost or dead, when he becomes a religious ascetic, when he is impotent and when he has been expelled from caste. A wife must wait for six years if her husband had disappeared, twelve years if he went to a foreign country for the purpose of studying. If he was heard of she should go to him. According to Narada if the husband had gone abroad a Brahmana wife should wait for eight years, or four years if she had no issue. A lesser number of years was prescribed for Kshatriya and Vaisya wives. After that period she was entitled to take another husband. Manu says that if the husband went abroad for sacred duty, the wife should wait for eight years, six years if he went for knowledge and fame, and three years if he went for pleasure or for another wife. He does not mention what the wife should do after these years of waiting, but remarriage is obviously envisaged in such a case.

Narayana, Kulluka and Raghava following Vasishthha say that she should go to see her husband in the place where he might be expected to be present. But Nandana and Devala are of the opinion that she could take another husband and in doing so there would be no sin at all. It is argued on the authority of these texts that the second marriage of the wife presupposes the dissolution of the first. It is also contended on the authority of the Atharva-Veda IX. 5, 27-28, that a widow could remarry
on performing the 'Aja Panchoudana' sacrifice. A second husband dwells in the same world with his re-wedded wife if she offers the 'Aja Panchoudana' to the memory of her deceased husband. This argument is supported by the funeral hymn in the Rig-Veda X. 18. 8, which reads, "Rise woman, thou art lying by the side of one whose life is gone; come to the world of the living away from him, thy husband that is dead, and become the wife again of him who is willing to take thee by the hand and marry thee."(80)

However, this view did not find favour with Sir Gooroodas Banerjee, (81) who explained these texts on the ground that these rules either, like the practice of raising up issue by a kinsman on an appointed wife, relate to an earlier stage of Hindu society in which rapid multiplication of the race was regarded as an important object, or they merely show the existence of some difference of opinion among the Hindu sages on a point on which absolute unanimity of opinion can hardly be expected. The prevailing sentiment of Hindu society has always been repugnant to the second marriage of women. The true explanation seems to lie rather in the need of the sastra to recognise utilitarian practices. This is evident from the Arthasastra of Kautilya, whose provisions reflect customary law and usage. Kautilya (82) allows a woman to remarry under certain circumstances, e.g., where her husband had gone away on a long journey, or had become an
ascetic or was dead. She was expected to wait for certain periods of time depending upon whether she had children and was maintained by her husband's family. Remarriage of women in such cases could be attributed to custom and usage which were developing alongside the sastra. The texts authorising or presumed to be authorising a woman to take a second husband may alternatively be construed as cases of presumption of death-actual death and civil death-and could be seen by the orthodox as only apparent breaches of the sastric pattern of the indissolubility of marriage.

According to the commentaries and digests the above mentioned texts do not apply to the present (Kali)\(^{(83)}\) age. The human race having degenerated from its original virtue and purity, the sages of Hindu law, for the benefit of human race declared that the remarriage of widows in the 'Kali' age is forbidden. A.S. Altekar\(^{(84)}\) on the authority of the Adityapurana, Devanabhatta and Madhava, the commentator on parasara, admits that widow-remarriage is no longer valid in the 'Kali' age. Widow-remarriage in the present age was so much disapproved of that an extended meaning was given to the word 'widow' so as to include the betrothed girl whose prospective husband had died before the performance of the marriage ritual. If by mistake a man happened to marry such a girl, he was to perform a penance and abandon her.
However, this practice did not find much approval in a society which continued to be guided by Manu's sensible opinion that no marital tie arises before the marriage ceremony is performed.

The stigma attached to the twice-married woman proves that widow-remarriage was not prevalent in orthodox Hindu society to which especially the sastra applied. She was called a punarbhu, who might be of three kinds, namely a 'widow' whose marriage had not been consumated, one who after having left the husband of her youth and betaken herself to another, returns to the house of her former husband, and the woman, who on failure of brothers-in-law, is delivered by her relations to a sapinda (blood-relative) of the same caste. (85)

The Punarbhu was regarded as an inferior wife, (86) but her issue were legitimate, (87) though according to the quality of her marriage they occupied an inferior status, (88) as her son (paunarbhava) did not inherit his father's property as an heir but as a Kinsman. (89) He was not fit for being invited to a sradha (a feast given to the Brahmins in the memory one's ancestors). The husbands of remarried women were not to be associated with nor to be invited to the sraddha. (91) The daughters of the Punarbhuses were to be avoided and regarded as girls of the lowest birth. (92) They were treated as equal to the "mothers of Sudras."
(The mothers of Sudras were fourth-caste wives of a Brahmana, wedded for lust, and of low social status). The children of these women were not admitted to social meetings; they were considered as unfit for society. Apastamba enumerates the twice-married woman among those who are unfit for being taken in marriage. He condemns remarriage of females altogether when he says, "If one has intercourse with a woman who had already another husband, then sin is incurred; in that case the son also sinful."

According to Vatsyayana who harmonises Kama with dharma so that they may not clash in any way, there was no regular marriage for a widow, but if a woman who had lost her husband was of weak character and was unable to restrain her desires, she might unite herself to a man, who was a seeker after pleasure and was an excellent lover, and such a woman was called punarbhu. In the choice of such a lover it was best for her to follow the natural inclinations of her own heart. However, the connection with her was of a loose character. She was more independent than the wife wedded according to sacramental rites. She assumed the place of a mistress, patronised his wives, was generous to his servants and treated his friends with familiarity. She was expected to show greater knowledge of the arts than his wedded wives and to please the lover with the sixty-four arts of love (kamakalas). She
participated in sports, festivities, drinking parties, garden picnics and other amusements. Vatsyayana says that it was improper to establish sexual relations with the punarbhu, but such an act was not absolutely condemned, because pleasure was the guiding motive in all such connection. Thus the position of the punarbhu was quite distinct from that of the wedded wife who participated with her husband in all religious performances and had to live with decency. The inferior position accorded to the punarbhu, the imposition of social penalties upon her children, and sometimes upon her husband are evidence against the approval of widow-remarriage by orthodox Hindu society.

Divorce, in the sense of dissolution of marriage whereby the status of husband and wife ceases to exist as such, marital rights and duties are severed by law and the spouses are free to remarry, was not recognised at Hindu law by the sastra. This is also supported by a hymn of the Atharva-Veda, which reads, "Be not divided, O husband and wife; live together all your lives, sporting with sons and grandsons, rejoicing in your happy home." According to Vatsyayana even the Gandharva marriage (an approved form) when solemnised before the holy fire could not be dissolved. He treated this form of marriage as the best. In this respect he seems to be more humanitarian than religious. By marriage a girl normally
became integrated into her husband's family. She formed part of the household, which consisted of his parents, brothers, unmarried sisters and sisters-in-law together with their children, all of whom enjoy commensality and worship jointly. Whether or not her marital relationship with her husband was happy, she could not be uprooted from the family by abandonment or supersession. Therefore, there was no divorce acknowledged by the dharmaśāstra.

However, a husband could abandon or supersede his wife under certain circumstances (see later the distinction between abandonment and supersession). Such an abandonment had to be just and reasonable otherwise a very humiliating punishment is prescribed for such an act by Apastamba who says, "He who has unjustly forsaken his wife shall put on an ass's skin with hair turned outside, and beg in seven houses saying, 'Give alms to him who forsook his wife.' That shall be his livelihood for 6 months." Similarly if a wife forsook her husband she had to perform a hard penance for twelve night. According to Manu a wife is punished for her sin of disloyalty to her husband in her next life by being born in the womb of a jackal and tormented by disease. Narada enjoins that if a man leaves a wife who is obedient, of pleasant speech, skilful, virtuous and the mother of male issue, the king shall make him mindful of his duty by severe punishment. A person who leaves a blameless wife should be punished as a
thief. Vasishtha makes a sweeping remark when he states that though tainted by sin, whether she be quarrelsome, or left the house or has suffered criminal force or has fallen into the hands of thieves, a wife cannot be abandoned.

She should be abandoned, however, if she yields herself to her husband's pupil, or to his teacher, or a man of degraded caste or attempts to kill her husband. This shows that even unjust abandonment was not allowed by Hindu law, let alone the dissolution of marriage. Steele as a result of his enquiries in the early British period understood 'abandonment' in the above case as equal to divorce, but it is submitted that this was incorrect. 'Abandonment' could be treated as relating to the worldly and/or the spiritual purposes of marriage. The former would be frustrated, where a wife was addicted to drink, was of bad conduct, was diseased, insane, guilty of adultery, had attempted to kill her husband or committed other heinous crime including procuring abortion. The latter purpose of the marriage would be frustrated, if she was barren, bore daughters only and had reached the menopause. Therefore, the husband would be justified in ceasing to cohabit with such a wife, but this 'abandonment' never had the effect of divorce.

10. The Distinction Between Abandonment and Supersession:

Since it might be apprehended that the right to
abandon was tantamount to a right to divorce even under sastric law, the vocabulary needs to be examined. The Sanskrit word used for 'abandonment' is tyaga. Medhatithi defines tyaga as giving up all intercourse with her and forbidding her to do household work. He says that for the wife going off in anger, caused by supersession, there are two optional alternatives in the shape of confinement or divorce. Here Jha's translation needs to be checked. Medhatithi in fact says tyaga or samnirodha, abandonment or confinement in that order are alternatives. Tyaga denotes separation from conjugal intercourse as opposed to Moksa, which might be technical divorce. It is not clear whether after being abandoned by her husband, a wife was free to marry again. Therefore, the word 'tyaga' can denote several things. It implies supersession, e.g., where the husband abandoned an obedient, pleasant speaking, sonbearing and skilful wife. It may imply a divorcium a mensa et-thara, where the wife became pregnant by another, or attempted to kill her husband, or committed heinous crime. In such cases she was abandoned from marital intercourse and religious ceremonies. It may mean temporary separation, where a wife was abandoned for three months for the purpose of reforming her. But abandonment in any case did not amount to dissolution of marriage whereby the status of the husband and wife ceased to exist as such and the marriage-tie was severed at law. Some coincidence with
Christian teaching on divorce is visible here, but the point is not appropriate for further exploration here.

Manu says, "But she who shows aversion towards a mad man or an outcaste, a eunuch, one destitute of manly strength or one afflicted with such diseases as punish crimes, shall neither be cast off nor deprived of her property."\(^{(113)}\) G. Banerjee on the authority of Kulluka and Jagannatha\(^{(114)}\) rightly states that what Manu excuses here is 'aversion', which means want of diligent attention, and not absolute abandonment.\(^{(015)}\) Thus the text does not authorise even abandonment. This is supported by a popular verse which says that a husband could not release his wife by sale or repudiation.\(^{(116)}\)

The object of 'abandonment' was to punish the wife for her misdeeds, e.g., a wife who had committed adultery was required to wear clothes smeared with clarified butter, and was to sleep on a mat of grass, or in a pit filled with cow dung; until her penance had been performed.\(^{(117)}\) The 'abandonment' consists in not allowing her to participate in religious rites and conjugal matters, not casting her away onto the streets. She was to be kept apart in one room and provided with food and raiments. She was to wear dirty clothes and was treated with scorn. But after her periodical illness the sin was expiated and she was to be restored to her original position with her usual rights of a wife.\(^{(118)}\) Similarly a
wife who was disrespectful to her husband; was addicted to some evil passion; was a drunkard or diseased should be abandoned for three months after depriving her of her ornaments and furniture.\(^{(119)}\) The object of this temporary punishment was to correct the wife and bring her to the right way. A husband should bear for one year with a wife who hated him. After that he should deprive her of her property and cease to cohabit with her.\(^{(120)}\) Abandonment under the above circumstances is regarded as virtually legal dissolution of marriage.\(^{(121)}\) This is not justifiable, for divorce as such did not exist at sastric Hindu law. Abandonment in the above cases is reasonable, because according to Manu, \(^{(122)}\) a husband must be constantly worshipped as a god by a virtuous wife. The wife was expected to follow the same principle as her husband. By doing the above mentioned disgraceful acts, she was violating her sacred duty of obedience to her husband and was accordingly punishable.

Supersession (like 'abandonment') could be treated as relating to the worldly and/or the spiritual aspects of marriage. The former would be defeated and the wife would become unfit for the society of her husband, who might supersede her at any time, if she was addicted to spiritual liquor, was of bad conduct, rebellious, diseased, mischievous or wasteful.\(^{(123)}\) Manu allows supersession of a barren wife in the eighth year, one all
of whose children die in the tenth year, of her who is quarrelsome without delay. (124) Baudhyana allows supersession of a barren wife in the tenth year of marriage, bearing daughters only in the twelfth year, all of whose children die in the fifteenth year and uttering unpleasant word at once. (125) Kautilya allows supersession if a wife remains barren for eight years, if she bears still-born children for ten years and if she bears only females for twelve years. Then if he is desirous of having sons, he can marry again. (126) 

Supersession under the above circumstances is justifiable. As the purpose of the Hindu sastric marriage is to perform religious rites and beget male progeny, if either of the two is frustrated, a man is entitled to take another wife. (127) The above grounds defeat the religious aspect of marriage, because the delivery of the ancestors from hell after the death is considered to be brought about only by the continuation of the line through sons. The supersession had to be just and reasonable, and in the case of a sick wife who was virtuous and kind to her husband her consent had to be obtained. (128) However, in practice husbands could supersede their wives without their consent and even against their wishes merely on the ground that the wife was of a harsh and disagreeable nature. (129) Sometimes she was superseded even if she was virtuous and was the mother of male issue. (130) But in
such a case she continued to occupy her status as a wife, and her marital rights remained unimpaired. She must be maintained properly and be given compensation as Vijananesvara comments, "Though superseded by another wife, she must be treated with courtesy, and receive gifts and respect as before." (131) In fact, she had precedence over her husband's subsequent wife in the performance of religious sacrifices. (132) But if superseded wife goes out of her husband's home in anger, she must either be instantly confined or abandoned in the presence of the family. (133)

Both in abandonment and supersession the wife retained her status of a wife and had to be maintained. In the former she lost her conjugal, religious and household rights unless and until she was restored to her former position after the performance of the appropriate penance. Unjust abandonment was punishable. Prof. Indra (134) on the authority of Daksha Smriti, IV, 45 asserts that the wife even though she be fallen should not be abandoned, and a man violating this principle is born as a woman in his next life and bears the agony of abarrenness. Thus according to the sastra a Hindu marriage being a sacrament cannot be dissolved, because the wife is a gift from gods which cannot be revoked by the act of human beings.

11. **Divorce Under Custom or Usage:** The position under the sastra has been indicated briefly. How then is it
possible to claim that Hindus in India are familiar with divorce? The answer lies in the field of custom. The sastra itself recognised custom as a source of law. The acts productive of merit which form part of the customs of daily life, as they have been settled by the agreement of those who know the law, have authority. The time-honoured institutions of each country, caste and family should be preserved intact. The laws of countries, castes and families, which are not opposed to the sacred law, have also authority. The Veda, the sacred tradition, the customs of virtuous men, and one's own pleasure are means of defining the sacred law. When it is impossible to act up to the precepts of sacred law, it becomes necessary to adopt a method founded on reasoning, because custom decides everything and overrules the sacred law. Customs prevalent in a country must be acknowledged as authoritative. There is evidence that the smritis themselves represented the existing practices. Thus custom is transcendent law according to the sages so far as it is consistent with the sastric principles. The Vedas, the smritis and the practices of good men are the sources of law.

The right of dissolution of marriage recognised by custom has been preserved by S. 29 (2) of the Hindu Marriage Act, 1955. The writers belonging to high castes attribute this to the low cultural level and high
degree of illiteracy of tribes rendering the enforcement of the provisions of the Act both inexpedient and difficult. According to O'Malley divorce is opposed to the saramental idea of marriage, but is permitted by many law castes, on such grounds as the unchastity of the wife or be failure to bear sons. Even among them, however, it is regarded as a concession to a husband rather than as a right. Divorce or deviations from the ordinary Hindu law are to be found only among the aboriginal tribes and the lower classes of Aryans; they are to be met with among the higher castes of Aryans only where (as in Southern India) they are surrounded by non-Aryans or have been influenced by non-Hindu communities. However, this view popular to higher caste written is not correct for divorce is known in communities which are not necessarily low, e.g., in the states of Maharashtra and some parts of the Punjab. Divorce is practised custom even by Brahmans.

Widows can validly remarry under the custom of 'Karewa' or 'Darewa'. The most usual form of 'Darewa' is when a widow marries the brother of her deceased husband. The origin of this custom can be traced from the time of the RigVeda. The second marriage is contracted under the form known as Chaddar Andazi. The fact, that dissolution of marriage and remarriage of females are recognised by customary law, is no evidence
that people governed by such customs are of low culture or of low morality. On the contrary it rather militates against it, for public morality is better served by a good system of divorce than by ineffective orthodoxy. Moreover, the courts do not recognise a custom which is contrary to reason, morality and public policy.

Among the Khasas in the Himalaya districts of Uttar Pradesh, marriage is not a sacrament, but a secular transaction. The main features are the transfer of dominion over the woman for consideration and her actual or constructive appropriation as a wife. No stigma is attached to divorce and widow-remarriage. Whether a wife divorces her husband for just cause, e.g., leprosy or impotency, apostacy, etc., or without such a cause, the second husband is in all cases required to refund the marriage expenses. The marriage can also be dissolved by mutual consent of the spouses among the Khasas and the Patwas of Madhya Pradesh. Widow-remarriage is also frequently practised.

In the Assam valley, among some agricultura classes, the interchange of pan-leaf constitutes the ceremony of marriage, and tearing of the pan-leaf by the husband and the wife indicated its dissolution. Second marriage is contracted in the forms of 'Sagai' and 'Shugna' in northern India. Among the Lingayat of
south Canara the remarriage of a wife deserted (i.e., divorced) by her husband is valid. The remarriage is called Serai Udiki. The ceremony consists in tying a toli (necklace) and giving a new cloth to the woman. This could only happen if the original bond of matrimony were severed.

Among the lower castes women can remarry under certain circumstances, e.g., where the husband is impotent or where there are constant quarrels between the spouses, and the husband with the consent of his wife breaks her neck ornament and tears her saree and gives her a chor chitti, i.e. a deed of releaseement. After this the wife is free to contract a second marriage, which is called the Pat in the Maharashtra and Natra in Gujarat.

According to the custom prevailing in Manipur divorce or Khainaba is permissible even amongst the Hindus. There is no condition attached to it, and it can be obtained at the pleasure of either spouse, even on a slight pretext. The remarriage of a divorced woman is also recognised. The caste system is still practised by the orthodox Hindus in India. Particular communities governed in their social relations by their castes recognise the authority of the Panchayats (i.e. important and influential members of the caste) to dissolve the marriage. The proceedings of the Panchayats are informal
and their judgements are not recorded. Therefore, there is lack of material and knowledge on the working of divorce under caste rules. The courts do not recognise the authority of the caste Panchayat to dissolve a marriage without the consent of both parties. However, if such divorce is obtained by custom, its existence has to be proved by the party alleging it.

As it has been shown (above at p.33) S. 29 (2) of the Hindu Marriage Act, 1955 does not disturb the position which a customary divorce occupied before the enactment. For the operation of this section it must be proved as a fact that such customary dissolution of marriage was effected. In Andhra Pradesh in the Shepherd's community, divorce in accordance with custom is prevalent. Where such divorce is obtained it is not necessary for the parties to have again to go before the court under S. 10 or 13 of the Hindu Marriage Act, 1955 and obtain sanction of the court to render the divorce valid.

From all that has been said earlier it must be concluded that divorce as such was not recognised by the sasrta. Marriage being a sacrament once solemnised with the sacred rites before the nuptial fire was irrevocable, and was believed to exist even after the death of the husband. So a widow was not allowed to remarry, and it was not until the passing of the Hindu Widow's Remarriage Act, 1856 that the harshness of this sastric principle was abolished by
legalising the remarriage of widow. It is the most fashionable view of Indian writers belonging to the high castes that dissolution of marriage was actually practised by the aborigines and lower communities of non-Aryans to Hindu culture cannot be calculated with certainty. As we have seen before there has been a mixture of the sastric principles and the practice of the people. This is testified to by the Arthasastra of Kautilaya and other customs. Customary divorce is practised by many communities which are by no means completely tribal or low. such customs have been rightly preserved by the Hindu Marriage Act, 1955, which recognises a utilitarian concept of law.

12. Legislative Measures:— The Native Converts' Marriage Dissolution Act, 1866 provided an indirect way of divorce for converts to Christianity. Under this Act when one of the spouses adopts Christianity and the other refuses to live with the convert on that ground for a period of six months, the latter may apply to the court or alternatively to dissolve the marriage.

Under the Indian Divorce Act, 1869, the Indian Christians could get divorce on the following grounds. Under Section 10 any husband could petition for divorce on the ground that his wife has, since the solemnisation of the marriage, been guilty of adultery. Similarly a petition could be presented for divorce by a wife on the
ground that her husband has exchanged his Christian religion for that of some other, and had married another woman; or has been guilty of incestuous adultery; or of bigamy with adultery; or of marriage with another woman with adultery; or of rape, sodomy or bestiality; or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa at thoro; or of adultery coupled with desertion, without reasonable excuse for two years or upwards.

The Indian Divorce Act, 1869, applicable to Christians, was also made available to Hindus marrying under the Special Marriage Act, 1872. This was repealed and replaced by the Special Marriage Act, 1954, which provides under S. 27 that either spouse could petition for divorce on the ground that the other has committed adultery; or has been guilty of desertion for three years; or is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code (Act XLV of 1860) provided that divorce shall not be granted on this ground, unless the respondent has prior to the presentation of the petition undergone at least three years imprisonment out of the said period of seven years; or has treated the petitioner with cruelty; or has been incurably of unsound mind for a continuous period of not less than three years; or has for a period of not less than three years immediately preceding the
presentation of the petition, been suffering from venereal disease in a communicable form, the disease not having been contracted from the petitioner; or has not been heard of as being alive for a period of seven years or more; or has not resumed cohabitation for a period of two years or upwards after the passing of a decree for judicial separation against the respondent; or has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; and by the wife on the ground that her husband has been guilty of rape, sodomy, or bestiality. Section 28 provides for divorce by mutual consent.

Drastic changes were effected in the personal laws of the Hindus by the Hindu Marriage Act 1955. The introduction of divorce was an innovation for a proportion of Hindus and not all, because by S. 29 (2) of the same Act any right recognised by custom or conferred by any special enactment, such as the Travancore Nayar Act (2 of 1100), to obtain the dissolution of Hindu marriage, whether solemnised before or after the commencement of the Hindu Marriage Act, 1955 has been saved. The motive behind this enactment was to open the way towards a progressive society and to recognise the independence of women. It abolished polygamy and introduced divorce and judicial separation, which are based on the principles borrowed
from the (English) Matrimonial Causes Act 1950 (as modified by the (English) Matrimonial Causes Act, 1965).

Under S. 13 (1) of the Hindu Marriage Act, 1955 divorce is available on the following grounds, namely, that the other spouse is living in adultery; or has ceased to be a Hindu by conversion to another religion; or has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition; or has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or has renounced the world by entering any religious order; or 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; or has not resumed cohabitation for a space of two years or upwards after the passing of a decree for judicial separation against that party; or has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree.

The following additional grounds are provided for a wife petitioner. In the case of any marriage solemnised
before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnisation of the marriage provided that in either case the other wife is alive at the time of the petition; or that the husband has been guilty of rape, sodomy or bestiality.

The Act is based mainly on the provisions of the Matrimonial Cause Act, 1950, whereby under Section 1 (1) either spouse may petition for divorce on the ground that the other has since the celebration of the marriage committed adultery; or has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or has treated the petitioner with cruelty; or is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition; and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.

Under Section 14 either spouse can petition for a decree of judicial separation on the same grounds as are available for divorce, or on the ground of failure to comply with a decree for restitution of conjugal rights, or on any ground on which a decree for divorce a mensa et thoro might have been pronounced before the Matrimonial
Kenya followed the Indian example by passing the Hindu Marriage and Divorce Ordinance, 1960 for Hindus domiciled there. Under Section 10 (i), either party can petition for divorce on the ground that the respondent has since the celebration of marriage committed adultery; or has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the petition; or has ceased to be a Hindu by reason of conversion to another religion; or has renounced the world by entering a religious order and has remained in such order apart from the world for a period of at least three years immediately preceding the presentation of the petition; or a decree of judicial separation has been in force between the parties for a period of at least two years immediately preceding the presentation of the petition, and the parties have not cohabited since the date of the decree.

A wife can petition on the additional ground that her husband has since the celebration of the marriage, been guilty of rape, sodomy or bestiality; or in the case of a marriage solemnised before the commencement of the ordinance, at the time of the marriage was already
married; or married again before such commencement, the
other wife being in either case alive at the date of the
presentation of the petition.

Uganda Passed the Hindu Marriage and Divorce
Ordinance, 1961. Under Section 9 (2) in addition to the
grounds for divorce mentioned in the Divorce Ordinance,
Matrimonial Causes, Chapter 112, a petition for divorce
may be presented by either party to a marriage on the
ground that the respondent has ceased to be a Hindu by
reason of conversion to another religion; or has renounced
the world by entering a religious order and has remained in
such order apart from the world for a period of at least
three years immediately preceding the presentation of the
petition; and by the wife, in the case of a marriage
solemnised before the commencement of this Ordinance, on
the ground that her husband at the time of marriage was
already married; or married again before the commencement
of this Ordinance, the other wife being in either case
alive at the date of the presentation of the petition.

The Divorce Ordinance (1904) Section 5 (1) provides that a husband may petition for the dissolution
of his marriage on the ground that since the solemnisation
thereof his wife has been guilty of adultery. Under
Section 5 (2), a wife may petition for the dissolution of
her marriage on the ground that since the solemnisation
thereof her husband has changed his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman; or has been guilty of incestuous adultery or of bigamy with adultery; or of marriage with another woman with adultery; or of rape, sodomy, or bestiality; or adultery coupled with cruelty; or adultery coupled with desertion, without reasonable excuse, for two years or upwards.

In 1923 Tanganyika had passed the Marriage, Divorce and Succession (Non Christian Asiatics) Ordinance (Laws of Tanganyika, Cap. 112). This, in brief, gave the High Court jurisdiction to hear and determine all matrimonial suits and suits arising out of marriages which were valid marriages within the Ordinance, and authorised the court to apply the 'law of the religion', in matters of succession, the law of the religion including caste custom in the case of Hindus, and being specifically open to be determined by the court by any means which if thought fit, whether evidence on the subject were legal evidence or not Under Section 8, textbooks on Hindu law, such as those of Mulla and Mayne, will be used, and the Indian cases upon which they rely. (166)

Kenya Ordinance, 1960 is similar to the (English) Matrimonial Causes Act, 1950 in this, that adultery is a ground for divorce. Both of these differ from the Hindu Marriage Act, 1955, under which 'living in adultery' forms
a ground for divorce, but single act of sexual intercourse by the husband or wife with some one who is not his or her spouse gives the other party a ground for judicial separation. Uganda differs from all of these because in the case of a wife petitioner, adultery has to be incestuous or coupled with bigamy; or coupled with marriage with another woman; or coupled with cruelty, or coupled with desertion without reasonable excuse for two years or upwards in order to provide a ground for divorce. The provision for presumption of death does not appear in the Kenya or Uganda ordinances.

The Keya and Uganda ordinances are more in accord with (English) Matrimonial Causes Act, 1950 than with the Hindu Marriage Act, 1955. This is evident in the provisions and phraseology of the former. Yet the prohibition of second marriage of the husband is common to both the East African ordinances and the Hindu Marriage Act, 1955, and so are the grounds for renunciation of the world and conversion to another religion. However, the provisions for venereal disease and leprosy do not occur in the Kenya or Uganda statutes. The provision of care and treatment for unsoundness of mind does not appear in the Hindu Marriage Act, 1955, because the large number of population makes it impracticable that such mental patients are properly looked after in the mental hospitals. Here poverty is one of the causes. But care and
treatment is provided for both in the (English) Matrimonial Causes Act, 1950 and the Kenya Ordinance, 1960, S. 10 (2). Failure to resume cohabitation for a period of two years or upwards after a decree of judicial separation has been granted does not appear as a ground for divorce under the Uganda Ordinance. The Kenya and Uganda Ordinances differ from each other as they do from the Hindu Marriage Act, 1955 and the (English) Matrimonial Causes Act, 1950.

Though the provisions of the English and Hindu statutes have been adopted by the Kenya and Uganda ordinances, the result of the application may not be the same in every case, e.g., the economic, social, educational and cultural outlook of the Hindus in East Africa is different from those in India and from the English. However, the concept of divorce was unfamiliar to the Hindus there as it was in India and was first introduced by the legislature and divorce laws were enacted on the western notion of marriage and divorce. This is claimed by many vocal critics to have destroyed the purely sacramental nature of the Hindu marriage and has turned it into a civil contract, which like any other contract can be terminated by the parties on the prescribed grounds. This is a superficial view. Society has its own notions of what marriage is. Conventionally
these are contained within the juridical concept of "Sacrament". It may be more true to say that remedies have been provided for those to whom their sacrament is no longer meaningful.
CHAPTER-I

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UNIT-A


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E.T. Dalton, Descriptive Ethnology of Bengal, Calcutta, 1872, p. 86.

Hurry Churn V. Nimai (1884) 10 Cal. 138; Kally V. Dukhee (1880) 5 Cal. 692.


Golapchandra Sarkar Sastri, A Treatise on Hindu Law, p. 169.

Rahi V. Govind (1876) I Bom. 97; J.S. Siromani, Commentary on the Hindu Law, Calcutta, 1885, p. 83. (It seems that Natra is capable of being confused with concubinage. See Laxmansingh V. Kesharbai, A.I.R. 1966 Madh. Pr. 166 at p. 169).


Kishenlal V. Prabhu, A.I.R. 1963 Raj. 95; see also Pramanbai V. Channolal A.I.R. 1963 Madh. Pr. 57.


Are Lachiah V. Are Raja (1963) 1 An. W.R. 295.

Laws of Uganda, Cap. 112.

A Muslim marriage, unlike marriages in certain other Religions, is not a sacrament. It has been stated by some writers and also held in some cases that it is a civil contract. But this view is equally incorrect and Muslim marriage is not a mere civil contract. Great importance has been given to marriage by Islam and al-Durr-ul-Mukhtar, Al-Ashbah wan Nazair and Hedayah and other books have called in on act of devotion. The former has stated it to be incumbent on a person whose passion is ungovernable. The Holy Prophet (peace be on him) has said, "Marriage is my Sunnah", But in spite of the above point it is not to be considered a sacred and indissoluble tie and al-Durr-ul-Mukhtar goes so far as to state that when there is any fear of injustice, marriage becomes abominable. Similarly it is stated in Tahtavi that marriage when injustice is certain is unlawful. A sacrament cannot be violated but Muslim Law unquestionably allows divorce. On the other hand there is no virtue attached to a civil contract but marriage in Islam is considered a virtuous act. Hence to say that it is a sacrament or to describe it as a mere civil contract is not correct. As pointed out by Abdur Rahim in his well-known book, Muhammeden Jurisprudence, marriage under
Muslim Law Partakes of the nature of both a sacrament and a civil contract. Being commended by religion it tends to be treated as a holy injunction. It holds a position midway between the two. But so far as the rights and obligations of the parties in relation to each other are concerned, they are governed by the ordinary law of contracts. It is open to the spouses to specify and restrict each other’s rights and obligations wising out of the marriage and fix the conditions for its termination by mutual consent. Muslim writers treat it as something between religious matters and worldly affairs. The Muslims have been enjoined to contract marriages safeguard against loose living. A marriage also unites two different individuals aby love and affection and two different families by a bond of Kinship. When these objects, amongst others, fail, the continunance of a marriage may not be in the interest of the spouses and so its dissolution is permitted. Divorce is not regarded as a disgrace in Islam nor necessarily a sequel that follows misconduct by either the husband and the wife or by both.

✔ Muslim law does not compel the spouses to lead a miserable life when their marriage has proved a failure, but grants them the right to separate. At the same time it does not contemplate separation on frivolous and trivial grounds, such as are now recognized sufficient in some parts of the world.
In Arabia itself divorce, prior to Islam, was a frequent occurrence without any regard to marital obligations and every individual took as many wives as he could afford and then divorce them at his sweet will.

In Islam Divorce, when not absolutely necessary, is strongly disapproved of and discouraged. Talaq (divorce) is strongly condemned by the Mohammadan religion and it should not be pronounced unless it has become quite impossible for the parties to live together in peace and harmony, but once it is pronounced it is upheld and valid although there may be no good cause for it. It is described in a precept of the Holy Prophet (PBUH) as the worst of all the things that law permits. It has been done in two ways namely, condemning divorce except in certain circumstances and commending forbearance and the continuation of marital relationship even in the case of disagreement and some suffering. "The Holy Prophet (peace be on him) has said, "of all the permitted things divorce is the most abominable with Allah."(1A) Even when a man is not satisfied with his wife, the Holy Qur'an enjoins forbearance. It says, "And retain them (the wives) kindly. Then if you hate them, it may be that you dislike a thing while Allah has put abundant good in it."(2) The Holy Prophet (Peace be on him) has said, "That man is better amongst you who is better to his wife."(3) On another occasion he said, "The most perfect amongst the faithful in respect of faith is he who is best in disposition among them (women) and better among you are those who are better towards their wives."(4)
Abu Hurayrah (Rad) reports that the holly Prophet (peace be on him) said, "Let not the faithful man hate the faithful woman; if he dislike some of her habits, he may like others."(5) He is also reported to have said, "Marry, do not divorce, for Allah does not like men and women who relish variety in sex matters."(6) In short, the husbands have been enjoined not to divorce their wives except in the case of their being unfaithful.(7)

**Divorce, when permitted:** If it is established that a husband and wife cannot live together in peace and harmony, they are given the option to separate. Divorce is also permitted when the wife's conduct is undesirable as when she does injury to her husband or is not chaste. Divorce is obligatory on a husband when he is incapable of matrimonial intimacy or cannot maintain his wife, and the like.(8) This rule is based on a Qur'anic text wherein the husbands have been enjoined, "to keep the wives with kindness."(9)

Divorce is permitted as a matter of necessary for the avoidance of greater evil which may result from the continuance of a marriage. But even in such cases an attempt is first to be made for reconciliation by referring the matter to arbitration. Thus it is laid down in the Qur'ān, "And if you fear a breach between the two (husband and wife), then appoint an arbiter from his (husband's) people and an arbiter from her (wife's) people."
If they desire agreement, Allah will effect harmony between them."(10) According to the spirit of the law, it is only when disagreement continues and efforts to bring about a reconciliation prove unavailing that the parties may dissolve the marriage. Judicial separation in which the aggrieved spouse is allowed to live separate from the other without the marriage being dissolved is an institution not recognized by the Muslim Law. The reason for this is that the objects of marriage are not restored by judicial separation, while it may result in immorality which in Islam is an evil far greater than divorce. The Muslim Law, while it permits divorce, insists that there shall be some guarantee that the husband or the wife if not acting from caprice or frivolity or on the impulse of a momentary provocation. For this purpose certain restrictions are imposed by the law upon the spouses, right to dissolve their marriage. The object of these restrictions, as stated above, is to ensure that the spouses should not act in haste such as under the influence of wine, anger, excitement, and the like, and that an opportunity is provided to the parties for rapprochement. This cautious attitude towards divorce forms the basis of the al-talaq al-sunnah under which marriage is terminated only after a minimum period of there terms of the wife's menstrual courses from the time of the pronouncement of divorce. During this period the husband has the option to take the wife back.
The above discussion will make it clear that a Muslim husband cannot justly divorce his wife in the absence of reasonable grounds and without having recourse to an attempt at reconciliation. It is unfortunate that this basic principle regarding divorce has been lost sight of and divorce given capriciously and without any justification, whatever, is considered good in law though it is strongly discouraged in religion. This conception of law ignores the strong condemnation and disapproval of divorce in Islam and has led many a husband to make an unscrupulous use of his power misery and unhappiness for the wife and has made marriage insecure and the wife's position very precarious.

Muslim jurists have held different views regarding divorce in Islam. According to some, divorce is prohibited but is permissible in case of necessity. It is stated in al-Radd al-Muhtar, dealing with Hanafi Law, that no doubt it (divorce) is forbidden, but it becomes mubah (permitted) for certain outside reasons. Its ibahah (permission) arises from the necessity for release (from the marital tie) in certain cases. Therefore, when there is no cause for separation whatever, there is no necessity for release, and if there is no legal ground for talaq, or release, then it must be considered unlawful. Holy for the Qur'an says, "So if they (your women) obey you, seek not away against them". (11) The Hanafi Jurists also assert that divorce in itself is a pernicious thing and is
a disapproved procedure, as it dissolves marriage, a tie or relationship which involves many considerations of temporal as well as spiritual nature nor is its propriety at all admitted except on the ground of urgency of release from an undesirable wife.(12) They further add that the propriety of divorce rests upon the cause of the urgency. The urgency itself being a matter concealed and unascertainable (but by virtual proof) and the act of proceeding to divorce is proof of the urgency.(13) The explanation of the Hanafi Jurists is based on too technical a ground. The underlying principle is however, clear. Most of the Muslim Jurists, while discussing talaq, say that 'talaq being in itself a pernicious and disapproved procedure, it is only the urgency of release that can give sanction to it.(14) It is a very reasonable and sound view of the matter and it is not clear why it was not adopted by all the jurists who, however, agree that divorce is pernicious and should be discouraged. Hence, if a person divorces his wife without there being an urgent need for release, he shall be guilty of sin. Abu Hanifah (Ra ) is of the opinion that if there is no urgent need for release from the marriage-tie, the divorce is 'haram' (Forbidden).(15)

The author of al-Bada'i'wa 'l-Sana'i' has discussed the matter at length. He says, "Marriage is a beneficial union which becomes the means for obtaining
benefits in the hereafter and in this world and divorce destroys it and the destruction of a good thing is reprehensible. Allah has said, "And verily Allah does not like mischief. And this means that in law it (divorce) is undesirable, for Allah does not love it. It can happen that sometimes on account of disparity in temperament and nature or due to disputes the advantage of marriage is lost; the husband knows that the benefits bypass him because of his marriage with a particular woman and on account of his living with her, and that is such cases advantage would lie in divorce so that the objectives of marriage might be fulfilled by marriage with another woman. However, there is constant likelihood that he may not have thought over the matter as carefully as its gravity requires and he might not have visualized all the possible consequences, so the Shari'ah and reason both require that he should reconsider the matter and for this reason he is expected to give her one revocable divorce so that the woman may repent her misconduct and dislike (for him) and might return to the path of rectitude. But when she has tasted the betterness of separation and does not repent, the husband will consider his over situation whether he can stay away from her. And if he feels he will not be able to bear a separation, he might bring her back, but if he feels that he will be able to bear the separation, he may divorce her again in the second tuhr" (16)
It is unfortunate that some later jurists have over looked this basic concept regarding divorce, nor have they taken into consideration the hardship caused to a wife as a result there of. It can not be gainsaid that the present practice which allows a husband to divorce his wife unscrupulously, does not only contravene the basic principle of Muslim law of marriage and divorce but also very ften r ins the life of the wife and even leaves her absolutely destitute. There is no Bayt al-Mal (public treasury) to support her now, and it is, therefore necessary that this outlook should be changed and a reasonable view in keeping with the basic principle of Muslim Law be adopted.

**Modifications in Mulsim Law:** Many Muslim Jurists of the past did not hesitate to modify the law to make it suit the needs of their own times and we should also do the same. These Jurists considered themselves bound only by express injunctions of the Qur'an and the traditions regradng obligations to do a thing or to abstain from doing a certain thing. But, where the law was not obligatory and was merely permissive, they allowed its modification however necessary. Muslim law is very elastic. The muslim jurists in later times, however, considered themselves absolutely bouned by the law laid down by the early jurists, without caring to see if it suited the needs and conditions of their times and so they
made the law very rigid.

Muslim law however, is full of instances where necessary modifications, to meet the requirements of their own times had been made by the jurists. To quote a few instances drinking was punishable with forty stripes during the caliphate of Abu Bakr, but 'Umar increased the number to eighty in order to put a stop to the evil habit. (17) Pronouncement of three divorces at one and the same time was considered tantamount to one divorce in the time of Prophat (peace be on him) and Abu Bakr(R) and during the first two or three years of the caliphate of 'Umar. People, however, used to wantonly repeat the pronouncement many times simultaneously by ignoring the seriousness of divorce. Umar considered it necessary to discourage this practice and held that repetition of three pronouncements at the same time would amount to three divorces. To give another example, conquered lands were distributed amongst the Muslim warriors by the Prophet (peace be on him), but 'Umar stopped this practice in the public interest. Again, marriage with a Kitabiyah (Christian or Jewish woman) was permitted by the Prophet (peace be on him) and the first three caliphs, though the second caliph discouraged it, and when a Governor had married a Jewess, the caliph ordered him to divorce her. (18) But 'Ali(R) the fourth Caliph, took up a very strong attitude and according to the majority of Shi'i'ulama' such a marriage is absolutely forbidden.
According to some other Shi'i Jurists the marriage is not forbidden though it is considered highly undesirable. The Supreme Court of Pakistan has accepted the latter view. For a learned and interesting discussion of the subject, see Syed Ali Nawaz Shah Gardezi V. Lt-Col Mohammad Yusuf Khan, P.L.D.1962 (w.p.), Lahore 558.

This practice of modifying rules of law continued even after the orthodox caliphs as can be seen from the following instance.

(a) Formerly, if a husband wanted to take his wife to another place and she refused to accompany him, then, according to Abu Hanifa, Abu Yusuf, and Imam Mohammad, she was considered disobedient and lost her right to maintenance. But later, Abu Qasim Šaffar held that the rule was applicable in the times of those Imams, but in Šuffar's time the husband could not take her to another city (against her wishes).(19) The modification in the rule is probably due to the fact that travelling had become dangerous in later times. Also, because the Muslims had then spread out to very distant lands and means of communication were difficult and it was not considered desirable to force a wife to leave her relations and country in such circumstances.

(b) In the 'Alamgiriyyah it is stated, " If a person divorces his wife while under the influence of hemp or
bhang, then, according to Tandhib, divorce would not be
effectected. But a divorce under such circumstances would now
be given effect to and the husband would also be liable to
punishment because of the prevalence of the vice (of the
taking) of bhang or hemp amongst the people in our times
and the Fatwa in our time is in accordance with view."(20)
To give instances of our own times, we may quote some
important changes introduced in the Muslim law of divorce
by the dissolution of Muslim Marriages Act of 1939. The
bill was introduced in the Central Legislative Assembly by
the late Muhammad Ahmad Kazimi, a member of the working
Committee of the Jamiyyat al-Ulama'-i Hind, because it was
considered necessary to bring about certain important
modifications in the then prevalent provisions of Muslim
law. The following will show the extent to which
modifications were made:
(1) A Muslim girl could not formerly exercise her option
of puberty on attaining majority if she had been given
away in marriage, while a minor, by her father or paternal
grandfather. This rule was based on the reasoning that
they were so closely related to the girl that it could be
presumed that they must have acted in the best interests
of the girl and must have given her away in marriage to
the most suitable person. But, in course of time, it was
found that a father or a grandfather gave away his
daughter or granddaughter in marriage to a very
undesirable person or even to a man of depraved character
either through carelessness or simply for the sake of some monetary or other gain and thus sacrificed the girl's future happiness. The law was, therefore, amended to meet this situation and a girl can now exercise her option of puberty even when she is given away in marriage by her father or grandfather during her minority.

(ii) The Hanafi law did not allow the dissolution of a marriage on the basis of the husband's cruelty to the wife or for his failure to maintain her which was found to result in great hardship to her. The Act now allows the dissolution of a marriage on these grounds.

(iii) Under the Hanafi law, the wife of a missing husband had to wait for at least sixty years before contracting a second marriage. But under the Maliki law, the period of waiting is four years only. The act has adopted the latter rule with some modifications in order to save the wife from obvious hardship.

(iv) There was a great difference of opinion amongst the Muslim Jurists about the effect of the conversion of a Muslim wife to a revealed religion. The majority of Muslim Jurists held the view that the marriage would get dissolved on the renunciation of Islam by the wife, but the 'Ulama' of Ma-wara al-Nahr
(Transoxiana) held a different opinion and stated that the marriage would not be dissolved under these circumstances. The Act has adopted the latter opinion.

Reason for Differences of Opinion:– We sometimes find that the Muslim Jurists have expressed different views on a particulars point. It may be mentioned here that the difference is often due to a difference in the mode of interpretation as explained below:

(a) One group of Muslim Jurists considers that a verse of Holy the Qur'an or a tradition is to be interpreted literally, but the other group prefers to look into the underlying idea and to apply the basic principle according to the changed conditions and to meet the requirements of their own times. They consider that the spirit of a rule cannot be changed, but its application changes with time, environment, circumstances, conditions etc. It is obvious that these two modes of interpretation will result in a difference in the application of the rule though there is no difference in the basic rule applied by them.

(b) The other ground for difference lies in the application of a certain rule of law. Thus, some Jurists hold that a rule should be followed and applied strictly so that people should not take undue advantage in any way and may not lightly ignore it and
commit a breach of it. But there are other Jurists who are of the opinion that Allah wants to be merciful and does not want to be hard on mankind and so we should lenient in applying the rule of law in order to avoid the infliction of hardship on the people.

It can thus be seen that after there is no real difference in the basic rule applied by the jurists, but the difference arises out of the process of application of a rule.

As the basic rule in each case is generally the same, it is open to us to adopt such interpretation of law that meets the needs and requirements of our own times.

Some one has aptly stated that all kindness and leniency is due to the injunctions of Allah and the Prophet (peace be on him) while all hardships and difficulties arise out of the rules laid down by Ulama. Ibn Qayyum has nicely explained that the Shariah (Muslim Law) is based on wisdom and is meant for the worldly and spiritual benefit of the people, and means complete justice for all and absolute kindness and wisdom. Hence we cannot consider that code of Law, a law of the Shariah in which there is cruelty instead of justice, hardship in place of leniency, loss instead of advantage and foolishness in place of reason. He stresses that law changes with the change of environment time, place,
financial conditions, and customs of the people and that misunderstanding has arisen among people due to their ignorance of the relation between human society and the law, which has constricted the scope of Islamic Shariah. They do not realise that such narrow-mindedness can have no place in a system which has given most consideration to the welfare of the people. (23)

Wife's Right to Dissolve Marriage:— Under the provisions of Muslim law, the right to the dissolution of marriage does not rest with the husband alone, but the wife has also been given this right though it is not as absolute as that of the husband. She can herself terminate her marriage under certain conditions or get it dissolved through a Qa'idi if there are genuine grounds for such a step. But generally speaking, the right of the wife is not coextensive with that of the husband. The difference lies in the fact that where as the husband can himself divorce his wife, the wife can, except under special circumstances or conditions, obtain the dissolution of her marriage only through the intervention of a Qa'idi or an Arbitrator.

Difference in Powers of Husband and Wife:— There are two Holy verses in the Qur'an which deal with this matter. It is stated in the first verse, "They (the women) have rights similar to those (of men) even them in kindness and men are a degree above them". (24) The other says, "Men are
the maintainers of women with that Allah has made some of
them to excel others and with that they spend out of their
wealth."

(25)

**Reasons for the above mentioned difference:**

The superiority of men over women has been explained in
the second verse to be due to two reasons, namely:

(a) because they spend of their property (for the support
of women), and

(b) because Allah has made one of them to excel the other.

This shows that superiority has been given to man
because of his responsibility to support and his
capacity to protect his wife. He has to bear a greater
burden of domestic life than the wife and so,
consequently, enjoys greater rights in some matters
than she does. As regards the second ground, it is
generally accepted that men are physically superior to
women.
## CHAPTER-I

### REFERENCES


(1A) Sunan, Abū Dawūd, I: 296.

(2) Qur'ān, IV:19.

(3) Wali al-Dīn al-Khatib, Mishkat al-Masabih, Delhi, P. 181.


(8) Ibid, (9) Qur'ān, ll: 231.

(10) Qur'ān, IV; 35. (11) Qur'an, IV; 34.


(14) Sami op,cit, II:426-7.


(16) Al-Kasani, Ala'al-Dīn, Bada'i' al-Sana'i', Cairo, III:95 p. 95


(20) Ibid. p. 145.

(21) Shami, op.cit., II:338.

(22) Ibid, ll-402-3.


(24) Qur'ān, II:228.

(25) Ibid., IV: 34.
CHAPTER-II

GROUNDS OF DIVORCE UNDER HINDU RELIGION OR HINDU LAW

UNIT-A

Married as it was to the doctrine of indissolubility of marriage (marriage being a sacramental union was an in rolable and immutable union—thus even death did not dissolve the marriage), the Dharmashastra did not recognise divorce, and any attempt to deduce from s ray Smriti texts the proposition that divorce was recognised by some Smritikars is nothing but owe’s inability to comprehend the basic concepts that the dharmashastra propounded. However, the dharmashastra’s adherence to the doctrine of indissolubility of marriage did not hamper the recognisition of the people’s need of divorce, and a large section of Hindus (i.e., the lower classes) did enjoy the right of divorce. This was under the custom which prevailed over the sacred law. Customary modes of divorce were easy. In some cases a marriage could be dissolved by mutual consent. Some times divorce could also be purchased. Very little formalities for dissolving a marriage where needed many a time it on purely a private act of parties in some communities a form was necessary it was either a Panchayat or family concil customary divorce was the privilege of the lower castes and higher castes selfom had a custom which permitted divorce.

Later on when insanity was added as a ground for
divorce the guilt or offence theory suffered a jolt, since it could not be said that the party suffering from insanity or unsoundness of mind was guilty of matrimonial offence of insanity. Insanity is a misfortune, not a guilt. With insanity being recognised as a ground some other diseases like leprosy also came to be recognised. This led some to re-name the doctrine and it was given the name of fault theory, i.e., if the respondent has some such fault which makes continuance of cohabitation almost impossible or very difficult, then the petitioner is entitled to divorce.

It was in this background of English law, that the special Marriage Bill and Hindu Marriage and Divorce Bill came before Parliament. It may be noted that in 1950 the Matrimonial Causes Act was passed by the English Parliament which consolidated and reformed the then existing English matrimonial law. A basic knowledge of the provisions of the Matrimonial Causes Act, 1950 is essential as we have freely (it is submitted, at times, thoughtlessly) drawn from it. Section 1 of the Act recognized four grounds of divorce on the basis of any one of which either party to the marriage could present a petition: viz., adultery, desertion, cruelty and insanity. Wife could also present a petition on the ground that since the solemnization of marriage the husband is guilty of rape, sodomy and bestiality. Section 2 laid down a
three years bar to divorce (which is also known as the fair trial clause). We have adopted this section almost verbatim in section 14 of the Hindu Marriage Act, 1955 and in section 29 of the Special Marriage Act, 1954. Section 4 deals with the bars to relief which we have substantially copied in section 23, the Hindu Marriage Act, and in section 34, the Special Marriage Act. The basic modification we introduced is that we have made all of them as absolute bars. This basic structure of divorce in English law was adopted by us in both the statutes, viz., the Special Marriage Act, and the Hindu Marriage Act. The guilt or fault theory was also adopted by us without much ado. In respect of grounds of divorce in the Hindu Marriage Act, what we did was to adopt a conservative stance and made all the three traditional fault grounds of divorce, i.e., adultery, cruelty and desertion, as grounds of judicial separation. We thought one act of adultery should not be sufficient for divorce and, therefore, we laid down the ground as 'living in adultery'(to be more precise 'respondent is living in adultery', is the ground of divorce). We made insanity, venereal diseases and leprosy as common grounds of divorce and judicial separation (with a very irrational distinction of period and use of some superficial words), and added some typical Hindu grounds of divorce, such as conversion and renunciation of the world. "Presumption of death and dissolution of marriage" which is a separate provision under the
Matrimonial Causes Act, 1950\(^7\) was made as one of the nine grounds of divorce. Divorce on the basis of non-compliance of decree of restitution of conjugal rights and non-resumption of cohabitation after a decree of judicial separation are the provisions borrowed from the state laws of the Commonwealth of Australia. What need to be emphasised is that in both the statutes Parliament enshrined the guilt or fault theory of divorce, though under the Special Marriage Act, the consent theory had also been accorded recognition.

The Divorce Law Reform Act, 1969 substantially accepted the third alternative proposal of the Law Commission. It also accepted the recommendation of the Mortimer Committee inasmuch as it accepts only one single ground of divorce. But curiously enough, what has been done is this that indirectly the three traditional grounds of divorce too have been retained. The Mortimer Committee's recommendation is incorporated in section 1 which lays down that after the commencement of the Act the breakdown of the marriage shall be the sole ground of divorce. Section 2 formulates certain criteria of breakdown; these are: (a) adultery of the respondent, but then the petitioner has also to establish that on this count he finds it impossible to live with the respondent; (b) cruelty of the respondent, (which is stated in the following terms: the reponent has behaved in such a way,
that the petitioner cannot reasonably be expected to live with the respondent); (c) two years desertion; (d) two years living apart of the spouses, provided the respondent agrees to divorce (this is the English version of divorce by mutual consent); and (e) five years living apart of the spouses (in this consent or non-consent of the respondent is immaterial). (8) Section 2 of the Matrimonial Causes Act, 1973 lays down something in the nature of condonation and clarification in respect of the first three facts of breakdown of marriage (from sub-section (1) to sub-section (5)). (9) Sub-section (6) explains the meaning of living apart. "...a husband and wife shall be treated as living apart unless they are living with each other in the same household." Section 3 of the Matrimonial Causes Act, 1973 enacts the three bar (or fair trial to marriage clause) in the same as it had existed in earlier Matrimonial Causes Acts. (10) However, a petition for divorce on the ground of five years separation may be opposed "on the ground that the dissolution of marriage will result in grave financial or other hardship to him and that it would in all circumstances be wrong to dissolve the marriage." (11) When the petition on the ground of five years separation is opposed,

the court shall consider all the circumstances, including the conduct of the parties to the marriage and the interest of those parties and of any children or other persons concerned, and if it
is of opinion that the dissolution of the marriage will result in grave financial or other hardship to the respondent and that it would in all circumstances be wrong to dissolve the marriage it shall dismiss the petition.\(^{(12)}\)

Under the Act the court has a duty to attempt reconciliation.\(^{(13)}\) The Matrimonial Causes Act, 1973 makes adequate provisions for financial relief for parties to marriage and children of the family.\(^{(14)}\)

In Australia also in 1966 the breakdown principle was accepted as a ground for divorce. Five years separation is considered to be evidence of breakdown of marriage. Thus divorce may the obtained on the ground that the parties to the marriage have separated and thereafter have lived separately and apart for a continuous period of not less than five years immediately preceding the date of petition, and there is no likelihood of cohabitation being resumed.\(^{(15)}\)

However, a clarification is made: "The parties to a marriage may be taken to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of only one of the parties, whether constituting desertion or not".\(^{(16)}\)
It is in this background—of the world laws of divorce—that the Indian provisions of divorce in the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955 and the proposal of the Ministry of Law for reforms and the recommendations of the Law Commission are to be looked at and judged, in our own social background, and also realizing that there is a basic unity in the matrimonial law all over the world.

When the Rau Committee submitted the Draft Hindu Code Bill, 1948 it had no model like the Matrimonial Causes Act, 1950. The divorce provisions of the Hindu Code Bill make a strange reading as an attempt had been made for blending the law of nullity and divorce. But when the Special Marriage Bill and the Hindu Marriage and Divorce Bill were drafted, the Matrimonial Causes Act, 1950, was readily available and our draftsmen had no hesitation in freely drawing on it, though hither and thither they made their own innovations. Probably, the Special Marriage Bill was meant to be a progressive measure, a measure for the educated and enlightened and, therefore, it seems, that both the fault theory and consent theory of divorce are given a place in the Act.

Section 27 of the Special Marriage Act, lays down eight fault grounds. The three traditional guilt grounds, adultery, cruelty and desertion (three years); three grounds pertaining to certain diseases, such as insanity,
incurable and continuous venereal diseases in a communicable form, leprosy (all of at least three years duration); and seven years sentence of imprisonment, presumption of death (it may be interesting to note that under the Dissolution of Muslim Marriage Act, 1939 the divorce may be obtained if whereabouts of the husband are not known for a period of four years). The three additional guilt grounds on which the wife alone can seek divorce are: rape, sodomy or bestiality. The divorce by mutual consent was enacted in section 28. It is ensured that no hasty divorce may be obtained on this ground. Every petition must precede by a separate living for a period of at least two years and no decree can be passed dissolving the marriage unless a period of one year elapses after the presentation of the petition (that also only on a motion moved by either parties). At that time divorce on the breakdown principle was not even in the contemplation of Parliament.

The breakdown principle was also not in the contemplation of Parliament when the Hindu Marriage Act was passed in 1955. Rather, the Hindu Marriage Act displays a strange conservatism, a strange faltering attempt at reform, a half-hearted endeavour to march with the time. The feeling, the psychosis that Hinduism is conservatism, orthodoxy and almost a make-belief that Hindu society will not tolerate any rapid or radical reforms of its law, make one proceed very cautiously. One
point that is forgotten is that the dharmashastras have touched the common people only at the fringe. The lower classes of Hindus—who have always formed a large section of society—have always a very liberal law of divorce. Conservatism and Orthodoxy have prevailed mostly among the elite, the purohits, the ruling classes and the Vaishyas. Dharmashastras have not been conservative. The Law Commission is as much aware of this as any one of us:

Hindu law was never static; it was dynamic and was changing from time to time. The structure of any society, which wants to be strong, homogeneous and progressive, must, no doubt, be steady but not static; stable but not stationary; and that is exactly the picture we get if we study the development of Hindu law carefully before the British rule began in India. (18)

But unfortunately that is not the picture of Hindu law ever since the Britishers left India.

Suffering from the psychosis that Hinduism symbolizes conservatism and orthodoxy, the reforms that were made in Hindu law of marriage and divorce are far from being satisfactory. The Hindu Marriage Act, 1955 did not represent a picture of progressive law when it was enacted and the reforms that are proposed by the law ministry and the recommendations that have been made by the Law Commission fail to make the Hindu matrimonial law
(even if all the recommendations are accepted) an example of progressive law. One may be permitted to quote what the Law Commission had quoted in its introduction to the report from Radhakrishnan:

To survive, we need a revolution in our thoughts and outlook. From the altar of the past we should take the living fire and not the dead ashes. Let us remember the past, be alive to the present and create the future with courage in our hearts and faith in ourselves.

Let us then look at the revolution in thoughts and examine the matrimonial law that we are going to reform from that angle.

Even a cursory glance at the provisions of Hindu Marriage Act, 1955 will indicate that the framers of divorce structure of Hindu Marriage Act founded their grounds on the guilt or fault theory. In fact it is the guilt theory which loomed large in the minds of the framers of the Act and which is still looming large in the mind of the Ministry of Law and the Law Commission. But even the guilt theory was made more rigid by the framers of the Hindu Marriage and Divorce Bill so much so that in the Act of 1955 it becomes virtually a reactionary theory. The three traditional fault or guilt grounds, adultery, desertion and cruelty, are not grounds of divorce. (19) Strangely, one single act of adultery is not considered
to undermine the foundation of marriage and, therefore, 'living in adultery' is made a ground of divorce. (20) Then virulent leprosy, incurable and continuous insanity and venereal diseases (all for at least three years) are made grounds of divorce. (21) Conversion to another religion and renunciation of the world as grounds of divorce are included in the typical background of Hindu society. (22) Then there were added two more grounds: the non-compliance of a decree of restitution of conjugal rights and non-resumption of cohabitation for a period of two years or more after the decree of judicial separation entitled the petitioner for the restitution of conjugal rights or judicial separation, as the case may be, to divorce. (23) These too were based on the fault theory. The wife is entitled to sue on the ground of rape, sodomy or bestiality by the husband after the marriage. (24) Thus section 13 of the Hindu Marriage Act contains the matrimonial offences or fault theory and section 23 contains the matrimonial bars. The dichotomy of fault theory viz., one party at fault and the other innocent, was enacted in Hindu Marriage Act.

In 1964 it occurred to a member of Parliament to introduce breakdown principle in Hindu law of divorce on the basis of the Australian Matrimonial Causes Act, 1959. He moved a private member's Bill and very quietly the breakdown principle was enacted in the Hindu Marriage Act by remodelling clauses (viii) and (ix) of section 13(1)
and numbering the provision as section 13(1A). The provision runs as under:

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—

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

ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of two years or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they are parties.

It is obvious that under this provision even the guilty party is entitled to seek divorce. Only basis of divorce is that despite the decree of restitution of conjugal rights, there is no cohabitation between the parties for a period of two years or more or cohabitation has not been resumed for a period of two or more after the decree of judicial separation. This way of living apart is considered to be evidence enough of the breakdown of the marriage. That this was so is abundantly
clear from the statement of objects appended to the Bill. It was stated therein:

The right to apply for divorce on the ground that cohabitation has not been resumed for a space of two years or more after the passing of a decree for judicial separation or on the ground that conjugal life has not been restored after the expiry of two years or more from the date of decree for restitution of conjugal rights should be available to both the husband and the wife as in such a case it is clear that the marriage has proved complete failure. Therefore, there is no justification for making the right available only to the party who has obtained the decree in each case. (25)

The breakdown principle was thus introduced in the Hindu matrimonial law very quietly, without the Ministry of Law making any proposals of reform and the Law Commission its recommendation. And probably this quietness caused the difficulties of interpretation. It is interesting to note that with a similar quietness a similar provision was introduced in the Special Marriage Act, in 1970, though in each case the minimum period is one year.

This is the divorce structure of Hindu Marriage
Act, 1955, (basically this is also the divorce structure of the Special Marriage Act, 1954). It is in this background that the proposals of the Ministry of Law and the recommendations of the Law Commission should be taken into consideration. The proposals of the Ministry of Law and the recommendations of the Law Commission with regard to dissolution of marriage may be divided into three heads: (i) some modification in the guilt grounds; (ii) reduction of period from two years to one in the breakdown grounds; and (iii) addition of new grounds. The Law Commission accepts some of the proposals of the Ministry of Law and recommends their implementation. The members of the Law Commission have also made their own recommendations all of which fall under head (i), i.e., some modification in the guilt grounds. We would proceed to consider the proposals of the Ministry of Law and the recommendations of the Law Commission together.

In the report of the Law Commission some new grounds of divorce have been recommended under the Hindu Marriage Act, 1955 and some of the existing grounds have been recommended to be reformed. The general approach of the Law Commission on divorce is based on the fault theory. It has been observed:

....ur approach in this regard has been that while all reasonable efforts must be made to protect stability of the marriage, at the same time, if
circumstances exist which show that conjugal life is impossible either by reason of a matrimonial offence or by reason of disease, or other specified circumstances, then reality must be recognized and provision should be made for terminating the bond of marriage. (26)

Thus, it seems that breakdown of marriage is not within the approach of the commission. (27)

Adultery has been suggested to be made a ground of divorce under the Hindu Marriage Act, 1955. The proposed language of this ground runs: "has, after the solemnization of the marriage, (28) had voluntary sexual intercourse with any person other than his or her spouse". This is the language of clause (f) of section 10(1), only the word 'voluntary' has been added before the word 'sexual'. It is a common knowledge that adultery means voluntary extramarital sexual intercourse. It is submitted that one is at a loss why two works "committed adultery" have not been considered sufficient (clause(a) of section 1(1) of the Matrimonial Causes Act, 1950, it may be interesting to note, uses the words; "has since the celeberatin of marriage committed adultery").

In this connection the Law Commission uses the words, "after the solemnization of the marriage", but in connection with "cruelty" it insists that these words should not be used. (29) It is obvious that one cannot
commit adultery before marriage, but one can commit cruelty. It is submitted that these words should either be used with both the clauses or should be omitted from both. It is needless to say that cruelty and adultery should be grounds of divorce, and should have been so even in 1955, since the former is the destructor of "mutual confidence", the very basis of marriage, and the latter of the very foundations of marriage, marriage being an exclusive union.

The Law Commission also suggests two years desertion as a ground of divorce and adopts the definition of "desertion" given under section 9(1)(a) and explanation to that section of the Hindu Marriage Act, for both the Hindu Marriage Act, and Special Marriage Act.

Thus, the three traditional guilt grounds of divorce which have been recognized almost all the world over from the nineteenth century onwards are now proposed to be made grounds of divorce under Hindu law in the latter part of the twentieth century. (30)

The Law Commission has also suggested some reforms in the three grounds of divorce relating to certain diseases, both under the Hindu Marriage Act and the Special Marriage Act. First recommendation relates to insanity. (31) It is recommended that the three years period of insanity should be deleted; and the clause
should be reworded as, "incurably of unsound mind". The second recommendation is in respect of venereal diseases. It has been already seen that the Law Commission has recommended the deletion of the words, "the disease not having been contracted from the petitioner" from section 10(1)(d), the Hindu Marriage Act. A similar suggestion is made in regard to the similar provision in section 27(1)(f) of the Special Marriage Act. The Law Commission observes:

In conformity with our recommendation as to the corresponding provision (provision has been marked with footnote number and footnote number 1 runs: "See discussion as to section 13, Hindu Marriage Act, with reference to venereal disease. No page number is stated) in the Hindu Marriage Act, we recommend that from section 27(1)(f) of the Special Marriage Act, (i), the period should be removed, and (ii) the requirement that the disease should not have been contracted from the petitioner, should also be removed. (32)

It is submitted that no suggestion as to the removal of the period has been made by the Law Commission in connection with venereal diseases under the Hindu Marriage Act, (33) though on reading the passage quoted above one tends to believe that, that is what the Law Commission recommended earlier. Further, in the summary of recommendations of the Law Commission given in the report
mention of this has not been made.

In respect of leprosy, the Law Commission, while making recommendations on the reform of the Special Marriage Act observes:

In conformity with our recommendations as to ("to" is marked with footnote number 2 and in footnote number 2 it is stated: "See recommendation as to section 13, Hindu Marriage Act, with reference to leprosy. Again, no page number is mentioned) the corresponding provision in the Hindu Marriage Act, we recommend that the period should be removed. The clause should, therefore, be revised so as to read as follows: "has been suffering from leprosy, the disease not having been contracted from the petitioner." (34)

The Ministry of Law has suggested an additional ground of divorce to the wife in the following terms: "that an order has been passed against the husband by a Magistrate awarding separate maintenance to the petitioner, and the parties have not had marital intercourse for three years or more since such order". It seems (and the Law Commission also thinks so), (35) that the Ministry of Law proposed to make the grounds at par with section 13(1A) of the Hindu Marriage Act, with this basic distinction that under section 13(1A) either husband or wife may present a petition, while under the proposal of Ministry of Law only the wife can present a petition.
The question, therefore, arises if this proposal is on the analogy of section 13(1A), why both the parties should not have the right of divorce, as, after all if failure of conjugal life for three years (or two or one year) is indication of breakdown of marriage under section 13(1A) it is equally an indication when parties are living separate after an order in favour of the wife has been passed under section 488, Criminal Procedure Code). probably in this International Year of Women, the Ministry of Law wants to put up a show of special privilege to the wife, by denying the equal right to man. It is interesting to note that the Law Commission has considered the question of husband being granted the relief, but rejected it.

The Law Commission has rejected the husband's claim of seeking divorce on this ground as it has converted it into a fault ground. It observed:

Moreover, we do not think that the guilty party namely the husband who is proved to have neglected or refused to maintain his wife, should be allowed to take advantage of his own wrong and get rid of the obligation imposed by the order for maintenance. (36)

Earlier the Law Commission gave another reason too: ....having regard to the social conditions prevailing in our country, if liberty is given to
the husband to apply for a decree of divorce in cases under which an order has been passed under the code, in a large majority of cases, it may work great hardship to the wife. (36)

This social problem has been a focus of attention in several countries and we are well in a position to take advantage of their experience. In the past we have been modelling our laws, including matrimonial laws, on common English laws. We have drawn a good deal in the Hindu Marriage Act, and the Special Marriage Act, from the English Matrimonial Causes Act, 1950, even the Law Commission has drawn copiously from the English law. But it has ignored the recent trends in English law, the Divorce Law Reform Act, 1969, whose provisions have now been re-enacted in the consolidation statute, the Matrimonial Causes Act, 1973 has given new direction to divorce law. The Law Commission has also ignored the experience of other countries with the breakdown principle.

The proposals for the reform of the Hindu Marriage Act and the Special Marriage Act have been made after twenty-five years of their enactment and yet these are half-hearted, ill-conceived and not-very-thoughtful measure. It is very unfortunate, and is a dereliction of duty that we owe to posterity. The members of the Law Commission are very proud that they have coompleted "the work within a month and a half" and that in the total
pile-up of reports it was their fifty-ninth report. The author wishes that how nice it would have been had the country taken the pride that the members of the Law Commission have produced a document which goes to a great extent to subserve the social needs of our contemporary society. In that respect the author feels that this report of the Law Commission is singularly disappointing.

It is submitted that the country should accept without any reservation the breakdown principle as the basic structure of divorce in both the statutes. In the present state of social development probably the Soviet pattern would not suit, but we can one again draw from the English experience and make suitable modification to suit our conditions. Section 13 of the Hindu Marriage Act, and sections 27 and 28 of the Special Marriage Act may be drafted on the following lines:

(1) Any marriage solemnized, whether before or after the commencement of this Act may, on a petition presented by either party to a marriage, be dissolved by a decree of divorce on the ground that the marriage has broken down irretrievably.

(2) Any one of the following set of facts, when proved, shall constitute breakdown of marriage irretrievably:

(i) that cohabitation between the parties has been disrupted (or the parties have not been cohabiting
with each other) for a period of two years or more, without any possibility of its being resumed;

(ii) that cohabitation has not been resumed between the parties for a period of one year or more after the passing of the decree of judicial separation;

(iii) that there has been no restitution of conjugal right for one year or more after the passing of a decree of restitution of conjugal rights;

(iv) that the parties have been living separate and apart for a period of one year and the respondent consents to a decree being passed;

(v) that the respondent has committed sodomy or bestiality;

(vi) that the respondent has treated the petitioner with cruelty or has been guilty of wilful neglect of the petitioner;

(vii) that the respondent has deserted the petitioner for a period of one year or more;

(viii) that the respondent has committed adultery;

(ix) that the marriage has not been consummated on account of wilful refusal of the respondent or on account of his incapacity to consummate it for a period of one year or more;

(x) that the respondent has been suffering from insanity for a period of one year or more;
(xi) that the respondent is suffering from leprosy for a period of one year or more:
provided that if leprosy is in virulent form the petition may be presented earlier;
(xii) that the respondent is suffering from a venereal disease in a communicable form;
(xiii) that for any other reason the petitioner finds it impossible to cohabit with the respondent.

(3) On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged by the petitioner and the respondent.

It is evident that some of the grounds mentioned in section 13 of the Hindu Marriage Act do not find a specific mention in the grounds suggested above. It is submitted that all these grounds will be covered either under clause (2)(i) or clause (2)(xiii), disruption of cohabitation under clause (2)(i) may be on account of the imprisonment of the respondent for a period of two or more years, or it may be on account of renunciation of the world or because the whereabouts of the respondent are not known for a period of two years or more. Conversion will be covered under clause (2)(xiii). It is submitted that conversion per se should not be a ground of divorce. If the petitioner finds it impossible to cohabit with the respondent on account of his conversion, then she may seek
divorce. Clause (2)(xiii) is contemplated to include all types of other cases where the cohabitation stands disrupted on account of some reasons for which the petitioner finds it impossible to cohabit with the respondent.

In clause (2)(i) the language of section 1(2)(d) of the Matrimonial Causes Act, 1973, "the parties...have lived apart" has not been used, because in the Indian social background it is possible that the parties are living in the same home, but cohabitation stands disrupted. The words "separate and apart" have existed in some state statutes and now exist in the Matrimonial Causes Act, 1959-1966. There is a divergent interpretation of these words. In Main v. Main (39) it was held that these words mean both physical and spiritual dissociation, a destruction of the consortium vitæ was not enough. In Murphy v. Murphy (40) where the wife finding it difficult to get a separate dwelling after a decree of judicial separation continued to live in the matrimonial home, but completely estranged from her husband, the court held that parties were living separate and apart.
CHAPTER-II

REFERENCES

UNIT-A

(1) The Law Commission in its Fifty-nine Report at p.65 quotes Parasara, IV. 30, because, it seems that it is ordained that Parasara is to be followed in Kalyuga. See also Narada, XIII. 93.

(2) Collector of Madura V. Mootoo Ramalinga, 12 M.I.A. 397 (1868).

(3) Sankeralingoma Chetty, I.L.R., 17 Mad. 475 (1894); Thangammal V. Gengammal, (1945) 1 M.L.J. 299; Jina Mangan V. Bai Jethi, (1941) I.L.R. Bom. 535; Memabai v. Whannooolal, 1963 P.M. 57; Kishenlal V. Piabhu, A.I.R. 1963 Raj. 95; Madho V. Shakuntala, A.I.R. 1972 All. 1119. Divorce by mutual consent was also recognised under certain regional statutes. Just as under the Cochin Marumakhthyama Act, 1938; the Cochin Nair Act. 1931; the Travancore Ezhava Act, 1925; the Travancore Nayyar Act, 1925; the Madras Marumakhthayam Act, 1933; the Madras Alisanthana Act, 1924; see also Nangu v Appi, A.I.R. 1966 Ker. 41 (F.B.); Vasappan v. Sarda, A.I.R. 1958 Ker. 39 (F.B.).

(4) Sankaralingam v. Subhan Chetty, supra note 2; Kashibai v. Bai Gandi, (1915) I.L.R. 39 Bom. 538 (consent of the other party is essential).


(6) See ss. 10 and 13 of the Hindu Marriage Act, 1955. The words, "disease having not been contracted" are part of clause (d) of s. 10(1) and are not used in clause (v) of s.13(1). If at all these words were necessary these should have been added with clause (v) of s. 13(1) since divorce is bigger matrimonial cause, though as has been submitted these words are of no significance. One year's virulent leprosy is a ground for judicial separation, while it is three years for divorce : s. 10(1)(c) and s. 13(1) (iv). Three years' venereal disease is a ground both for divorce and judicial separation : s. 13(1) (v) and s. 10(1) (d).


(9) S. 2. Now sub-ss.(1) and (2) of s. 2 of the 1973 Act


(12) S. 5(2). See also sub-s.(3) Which is based on the observation of Begnell, J. in Rule v. Rule, (1971) 3 All E.R. 368.

(13) S. 6. Part II of the Act.

(14) S. 28(m) of the Matrimonial Causes Act, 1959-1966.

(15) S. 36(1).


(17) See clauses 35 and 36 of the Draft Hindu Code Bill.


(19) S. 10 of the Act.


(21) Cls.(iii) to (v) of s. 13(1).

(22) Cls. (ii) and (vi) of s. 13(1).

(23) Before the amendment of 1964 they were cls.(viii) and (ix) of s. 13(1).

(24) 13(2) (ii) of the Act.


(26) Supra note 44, para 7.5 p. 71.

(27) It may be of interest to note that the Law Commission has used the words, "irretrievably broken down" only once and that too in connection with the Philosophy that the Law Commission had behind these recommendations: see p. 12. Basically the approach of the Law Commission is based on the fault theory. It observes:

But we may state, at the outset, that our general approach in this regard has been that while all reasonable efforts must be made to protect the stability of marriage, at the same time, if circumstances exist which show that conjugal life is impossible either by reason of a matrimonial offence or by reason of a decease of other specified circumstances, then the reality must be recognized, and provision should be made for terminating the bond of marriage. (p. 66, emphasis given by the author)
This goes very well with the general flaw of fault or guilt grounds: The Law Commission has formulated legal cruelty thus: "has treated the petitioner with cruelty." the report, supra note 44 at 22.

Id. at 71.

These recommendations should be looked into the background that most of the countries of our contemporary society (including the United Kingdom, which still continues to be our model in most legal matters) have almost totally abandoned the guilt theory and have based their divorce law on consent theory or breakdown theory and sometimes on both.

Supra note 44, para 7,13, p. 62.

The report, id. at 101-102.

Id. para 2.18, p. 19. (34) Id. para 9.20, p. 102.

Supra note 44, para. 2.20, p. 23.

Id. para 2.25, p. 26.

Ibid.

This is based on s. 1(3) of the Matrimonial Causes Act, 1973.

(1949) 78, C.L.R. 636.

(1956) C.L.Y. 25, 8 A.C.
**Dissolution of Marriage:** The Muslim Jurists and Qadis used to follow faithfully the following injunction laid down in the Qur'an, "To keep them (the wives) with kindness or separate (from them) with humanity." (1) Imam Mohammad has stated a very useful rule in this connection. He says that if a marriage causes injury to the wife on account of any defect in the husband then let the marriage be dissolved. (2) The Qadis in earlier times used to follow this rule of law. They used to be realistic in considering the wife's complaint and scrupulously guarded her happiness. They would free a wife from the marriage tie if they were unsatisfied that it was impossible for her to live happily with her husband owing to some defect in him. Thus in a case a wife was granted divorce when her husband was found suffering from halitosis (foul breath) to such a degree that the wife could not tolerate it. (3)

In course of time, however, the wives' right to get their marriages dissolved became greatly restricted due to incorrect and sometimes adverse interpretation of law. Many of their rights have however, been restored to them during the last decade. The Dissolution of Muslim Marriage Act, 1939 (now in force in Pakistan and India).

**Adoption of Other Laws by the Hanafis:** The Hanafi Law is favourable to women in many respects, but in some matters
it is very hard (in its application) as Abu Hanifah was prove to be over cautious, and a wife is sometimes put to great hardship on this account. Later Hanafi Jurists have tried to overcome the difficulty in several cases. Thus al-Radd al-Muhtar has stated that the Hanafis have adopted the Maliki law in some cases and it states that Abu'l-Layth Samar Kandi has written in his book Ta'sis-un-Naza'ir that in case no authority of Hanafi law can be found in any particular case then return may be had to the law of Maliki because his law is more akin to the Hanafi law. It is also stated in al-Radd al-Muhtar that when a wife is put to hardship for not being maintained by her husband it is open to a Hanafi Qa'idi to have recourse to Shafi'i law. He can not however, decide the case himself according to the Hanfi law, but he can appoint a Shafi'i Qa'idi as his agent (deputy) to decide the case according to the Shafi'i law. The decision of the latter shall be binding on the parties. Again, in the case of a misrin husband the Hanafis have adopted the Maliki law. These cases seem to lay down the rules of law that it is a open to a Hanafi Qa'idi to have recourse to the law enunciated by another Imam of the Sunni seat whose law may be more equitable in a particular case. This is borne out by some cases discussed by them. This rule was made use of by the Hanafi Qadis of old when they would refer a wife to a Shafe'i, Maliki or Hanbali Qa'idi for the discision of her case. Unfortunately the courts during the
British rule in India ignored this very useful rule and decided the cases according to the law of the particular sect to which the parties belonged. They ought to have followed the rule to decide a case according to the law laid down by any of the Imams necessary in the interest of justice, equity and good consequence. Besides, a Court should take a broad view in cases of separation and should not lose sight of the spirit of the law. Such a view can be supported by many traditions of the Prophet (peace be on him) who repeatedly commanded that women should be treated with kindness.

**Reasons of Difference in Sunni and Shi'i Law:** There is a difference in some rules applicable to marriage and divorce under the Sunni and the Shi'i Laws. It is important to understand the basic principles underlying these differences. The Sunni Jurists seem to consider that a marriage brings about a new and a very important change in the status of the spouses. They consider it essential that all necessary safeguards should be taken so that the newly acquired status is not jeopardized in any way. They, therefore make it a condition for the validity of a marriage that all necessary precautions should be taken to establish the creation of the new status. Hence, they want full publicity of a marriage and insist on the presence of at least two witnesses at the time of its celebration as necessary under a tradition of the Prophet (peace be on him).
They, however, seem to think that a divorce merely restores the spouses to their original status, and so, while greatly approving of the presence of witnesses at the time of divorce, they do not consider the presence of witnesses at that time an essential condition for its validity. They also consider that the presence of witnesses at the time of marriage is necessary to discourage immorality for, in the absence of such a condition, it can always be open to a man and woman charged with adultery, which is a very serious offence under Muslim law, to plead that they had been secretly married in the absence of witnesses and so escape the consequences of their immoral conduct.

The Shi'i Jurists, on the other hand, relying on their interpretation of a verse of Surah at Talaq, insist that the Qur'an commands the presence of two witnesses for a valid divorce. The verse leads: "So when they have reached their prescribed time limit, retain them with kindness, and call to witness two just ones from among you, and give upright testimony for Allah."(7) As pointed out at another place, the Sunnis consider that the injunction about calling of witnesses relates to retraction or rajah.(8)

They further seem to think that it is not necessary for the Qadi to probe into the conduct of the parties and he must accept the statements of a man and woman charged with adultery that they have been married
secretly as correct—particularly when they shall have to live in future as husband and wife in view of their explanation.

**Failure of Marriage:** The failure of marriage can be due to certain circumstances. It may also be due to certain defects or faults in one or both of the spouses. The spouse at fault is held responsible for failure of the marriage and the other spouse becomes entitled, under certain conditions, to the dissolution of the marriage on that account.

**Marriage when to be Dissolved:** As already stated, the Muslim Jurists are guided in the matters of marriage and divorce by injunction of the Qur'an, "Retain them (the wives) in kindness or separate (from them) with kindness." (9) The Muslim Jurists state that a husband cannot be said to be keeping his wife in a becoming or kindly manner when the wife cannot live happily with him because of a defect or fault in him and that under such circumstances the husband becomes a transgressor of this injunction of the Qur'an. The Qaḍi can, therefore, dissolve such a marriage in order to remove. The husband's transgression and to give relief to the aggrieved party.

There is another verse in the Qur'an, which is equally important in this connection and defines the rights of the spouses. It states, "And women have rights
similar to those against them in a just manner." (10) This verse shows that men and women have similar rights and obligations against one another. A party failing to discharge his or her obligations will be failing in his or her duty towards the other and will thus be a transgressor of this injunction of the Qur'an. In such a case marriage shall have to be dissolved on the complaint of the aggrieved party. It is not an essential condition for the dissolution of marriage that the party at fault should have actually committed some act which results in misery for the other party. It is quite possible that the husband or the wife may be the victim of causes beyond his or her control. Whether the aggrieved party can live with the other spouse in a manner where by the objectives of marriage are not defeated. If that is not possible then the dissolution of marriage becomes desirable.

**Marital Obligation:** It is also to be seen for the dissolution of a marriage whether the spouses are faithfully and sincerely fulfilling the marital obligations incumbent on them.

(1) The following are some of the important obligations of a husband according to the Muslim Jurists:

(a) to protect the wife;
(b) to maintain her;
(e) to pay her dower to her;
(d) to make himself attractive and to be equally fit so that she (the wife) should not feel completely neglected or be dissatisfied with the marriage on that ground;

(e) to treat the wife with affection and kindness. This includes permission to her visit her parents and relatives;

(f) not to obstruct her in the performance of her religious duties and

(g) to grant her freedom from the bond of marriage when he has no inclinations towards her.

(2) The important marital obligations of the wife are;

(a) to look after the domestic comforts of her husband;

(b) to be respectful, obedient and faithful to him;

(c) to make herself available to him at all reasonable times;

(d) to make herself attractive to him;

(e) to suckle the children during the prescribed or usual period of time, if so desired by the husband, and to bring up the children properly.

Some of these obligations cast a legal duty on the husband or the wife, as the case may be, while others are in the nature of moral obligations only.

It is not every failure of the marital obligations on the part of one party that entitles the other party to the dissolution of the marriage and such right can be
exercised only when the failure is of a serious nature.

A marriage can be dissolved when a wife has an 'invincible' repugnance or aversion for her husband. The dissolution of marriage at the instance of the wife will be dissolved in the chapter on Khula.

As already stated, a marriage can also be dissolved when one of the spouses suffers from some serious defect physical, social, cultural or moral. It may, however, be stated that when one or more of the objects of a marriage are lost due to a defect in one of the spouses, the marriage does not ipso facto cease to exist but that it gives option to the other party who may or may not like to continue such a marriage. Thus, a man may marry a woman who may be beyond her age at which she can bear children simply to escape from loveliness or to have someone to attend to his domestic requirements. Similarly, a woman may, for the sake of financial support, marry a man who she knows is suffering from incapacity.

**Right to Dissolve Marriage:** A Muslim marriage is ordinarily a relationship for life based on mutual consent of the parties. But under the Muslim law, unlike some other systems of law, marriage is a special type of civil contract. It follows that the parties continue to it have a right, as in other contracts, to continue the contract of marriage or to discontinue it on reasonable grounds.
Who can Dissolve Marriage:— A marriage can be dissolved by either the husband or the wife or by their mutual consent or by the Qaḍi or the Arbitralor. It can also get terminated automatically on the happening of certain contingencies. The cause, that constitutes a ground for dissolution of marriage can be the conduct or physical or mental condition of the husband or of the wife. The marriage can also be dissolved when it is ill-assorted.

Dissolution of Marriage by the Husband:— A marriage can be dissolved by the husband through divorce ila or Zihar.

(a) Divorce: The present Muslim practice allows the husband full powers to dissolve the marriage at his sweet will without assigning any reason or without even there being a reasonable ground for the divorce. All the Muslim sects, with the exception of the Mu'tazilites, conceds this absolute power to the husband. Some of them do admit that marriage being commended, it can be terminated only in case of urgency for its dissolution and that when there is no valid necessity for its termination then the husband is not justified in dissolving it. But in spite of it, they do not hold a divorce without justification to be legally invalid; they only consider it to be sinful. The view of the vast majority of the Jurists' may, for all practical purpose, be taken in the present times to be the Muslim law on the point. The matter is fully
discussed in a subsequent chapter.

(b) Ila' and Zihar: These are two other methods of dissolving the marriage by the husband, that will be discussed in subsequent chapter.

Dissolution of Marriage by the Wife:-- A wife can herself dissolve her marriage by the exercise of Khiyar al-bulugh (option of puberty) or under tafwid, that is, when the power of divorce has been delegated to her by the husband. She can also have recourse to Khula.

Dissolution of Marriage by Mutual consent:-- It is always open to the spouses to mutually agree to the termination of their marriage for a consideration or without it. This they can do by Khula, mubarah, or talâq bi'iwaḍ al-mal.

Dissolution of Marriage by the Qaḍi:--

At the instance of the husband. A husband can get his marriage dissolved by the Qaḍi without usually becoming liable for the payment of the dower in the following cases:

(a) If the wife or the guardian of a minor wife has been guilty of fraud in certain respects;

(b) When the husband was married during his minority by his guardian for a dower unreasonably high;

(c) When the spouse is non-Muslim and the husband embraces
Islam but the wife refuses to do so;
(d) When the wife is suffering from some serious defects: physical, social or mental.

The Malikis, the Shafi' and the Hanabalis among the Sunnis, and the Shi'is hold that a marriage can be dissolved by the Qadi at the instance of the husband on serious blemish in the wife. The Hanafis do not agree with this view and do not allow the termination of marriage on this ground as it deprives the wife of a portion of her dower.

At the Instance of the Wife:— A marriage can be dissolved by the Qadi at the instance of the wife on the following grounds:
(a) When the husband's conduct is such as has been specifically disapproved of by Islam;
(b) When the husband is suffering from a serious mental or physical defect which renders the continuation of the marriage unsafe or undesirable for the wife;
(c) When she was given in marriage by her guardian and her dower is unreasonably low, that is, is lower than the customary dower;
(d) When she was a minor at the time of her marriage;
(e) When the spouses are non-Muslim and the wife embraces Islam but the husband refuses to do so;
(f) When the husband accuses her of unchastity;
(g) When she embraces Islam and chooses a Muslim state for her domicile but her husband remains dwelling in a non-Muslim state. (Applicable to non-Muslims).

The above grounds are briefly discussed below:-

**Undesirable Conduct of the Husband:** The conduct or behaviour of the husband that becomes cause for the dissolution of marriage must be such as injuriously effects the wife, such as when the husband:

(i) attributes unchastity to the wife;

(ii) takes a vow not to be intimate with his wife for a period of four months or more and this constitutes ila';

(iii) makes it unlawful for himself to be intimate with his wife by Zihar;

(iv) absents himself from the conjugal domicile for a period of four years or longer, and his whereabouts, are not known or

(v) is guilty of inequality between two or more wives, etc.

**Automatic Dissolution of Marriage:** Under Muslim law marriage becomes automatically dissolved on

(i) the death of one of the spouses;

(ii) apostasy of one of the spouses;

(iii) under the Sunni law, on the fulfilment of a condition in the case of a conditional divorce, or
(iv) Change of domicile in case of non-Muslims.

The various methods of dissolution of marriage shall be discussed in detail in the subsequent chapters.

If a marriage is dissolved for a cause imputable to the husband then it has, generally speaking, the effect of talaq or divorce on the ground the dissolution of the marriage has been brought about on account of the husband and so he should be deemed to have divorced his wife. Thus, if the marriage is dissolved on the ground that the husband is important or insane and the like, then the dissolution of the marriage will have the effect of talaq even though the marriage is dissolved by the Qaḍi at the instance of the wife. The dissolution of marriage by or at the instance of a wife is called Faskh (termination). If the marriage is dissolved due to a cause attributable to the wife then also it shall have the effect of Faskh or termination of the marriage by the wife. Thus, if it is dissolved by the wife in the exercise of the option of puberty or by the Qaḍi on the ground of some serious blemish in her, then it shall be deemed to be Faskh by the wife. It may be added here that the above is not an invariable rule of law and there are certain exceptions to it. Thus, if a marriage is dissolved on account of the apostasy or conversion to Islam of the husband or his adoption of a domicile in dar al-harb when the wife resides in dar al-Islam, then the dissolution shall be
considered to be Faskh, although the marriage is dissolved for a cause attributable to the husband.

The effect of both these methods, namely, talaq and Faskh is the same as for as dissolution of marriage is concerned. The difference lies in the extent of the husband's liability for payment of dower and the number of divorce effected.

The termination of marriage by the Qaḍi either on his own initiative or at the instance of the wife or a third person is called Faskh. The automatic termination of marriage is called a Furqah(separation).

**At the Instance of a Third Party:** A marriage can be dissolved at the instance of certain near relations of the wife if she contracts a marriage for a dower which is less then the customary dower in her family or if the husband is otherwise unequal to the girl's family.

**By the Qaḍi on his Own Initiative:** It is duty of the Qaḍi to dissolve a marriage if he comes to know that it is Fasid or irregular.
CHAPTER-II
UNIT-B

REFERENCES

(1) Qur'ān, II:231.

(2) Ibn al-Humam, Fath al-Qadir, III:268.


(4) Shami, op., cit, p. II:552-674.

(5) Ibid.


(7) Qur'ān, LXV:2

(8) See point on classification in Raj'ah. (retraction).

(9) Qur'ān, II:231.

(10) Qur'ān II:228.

(11) Shami, op,cit., II:315
Sub-section (2) of 5.9 provides that nothing contained in this Act shall be deemed to affect any right recognized by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage whether solemnized before or after the commencement of this Act. Thus both in respect of pre-act and post act marriage.

(1) The customary mode and forum of dissolution of marriage are preserved, and
(2) Grounds and Jurisdiction of dissolution of marriage under special enactments are retained.

**Divorce under Custom:**— Before 1955 among the Hindus divorce was available only under custom, and customary modes of divorce unless found to be contrary to public policy or morality, were given effect to. The customary mode of divorce and the customary form of divorce are still available to those who are governed by custom. And it seems, neither the three years bar to divorce nor one year's bar on re-marriage after a decree of divorce applies to customary divorces. Customary divorce may be obtained through the agency of panchayats or caste tribunals or by private act of parties such as by agreement, bill or divorcement, tyag Patra or Furkat
Such a custom must satisfy the standard of reasonableness. A custom permitting one spouse to divorce the other against the will of the latter is void, being unreasonable.

The panchayat and caste tribunals continue to exercise jurisdiction; how this jurisdiction is exercised and how the courts may interfere with such jurisdiction is illustrated by Penabai V. Channoo Lal. The marriage of parties was dissolved by the panchayat on the basis of mutual consent of parties. A suit was filed in the court by the wife for a declaration that marriage still existed on the averment that when she gave her consent before the panchayat she was only fourteen years old and was not capable of giving her free consent. The court rejected the suit and observed that the wife had sufficient understanding when she gave her consent and that such a divorce was recognized in the caste (parties were put was) by custom. Kishen Lal V. Prabhu adds a new dimension to the matter. The court said that it should be clearly proved that the panchayat has jurisdiction to dissolve the marriage and that rules of natural justice have been followed. This seems to be an attempt to bring customary divorces under judicial scrutiny.

**Divorce under special enactments:** Before the Hindu Marriage Act, 1955, in the erstwhile State of Madras and the former State of Travancore and Cochin several statute
were passed to regulate marriage and divorce in various castes or group of castes. Under these enactment (7) divorce by mutual consent and by deed executed by parties is recognized. Among the matrilineal communities, such as Marumakhatthayam and Diyasantana, marriage has been always considered to be a consensual union and not a sacrament. A full bench of the Kerala High Court recently held that the right to obtain divorce by mutual consent under the Travancore Nayar Act remains unaffected by the Hindu Marriage Act (8) The same is true about other special enactments.

Section 10 of the Hindu Marriage act, grants a decree of judicial separation to an aggrieved spouse on grounds of desertion, cruelty, venereal disease, insanity, leprosy & sexual misconduct of a spouse. According to one point of view this decree does not guarantee couples a permanent conjugal peace rather in the long run it encourages them to seek divorce. The judicial separation decree too, in many cases, it is said, fails to up the differences between the estranged couples.

Section 10 of the Hindu Marriage Act, was enacted by parliament for avoiding easy & hasty divorces on the ground that Hindu society does not favour divorce & further, divorce creates many social problem. Section 10 thus offers the exicted and estranged couples the cooling of period and an opportunity to dissolve their marital differences like a good sportsman and a good old friend. But it may be submitted that the decree of judicial separation can help those who either afford the idea of
divorce or do not appreciate it. But what does about those who want divorce and are not interested in leading a cruel married life?

Section 13 of the Hindu Marriage Act allows divorce to a Hindu spouse on certain grounds. Some of the grounds are available to both the parties to marriage, but the others to the wife only. A Hindu wife has two additional grounds for claiming divorce against her guilty husband and one of these two is rape, Sodomy and bestiality committed by the husband. One may question the wisdom of the law makers, that why the wife alone should enjoy this ground of divorce can a wife be not guilty of committing bestiality? The Hindu marriage Act does not allow a Hindu to seek divorce on the following grounds viz-desertion, mutual consent, cruelty, impotency, and breakdown of marriage irretrearrably. Mutual consent and desertion should grounds of divorce in the special Marriage Act, 1954. Mutual consent (Mubarat) is also a ground of divorce in Muslim law. It is a ground of divorce in customary divorces too.

The suggestion, that it should be made a ground for divorce in the Hindu Marriage Act, needs a thorough consideration and necessary caution. Hindu Marriages in most of the cases are arragned marriages and ceremonial in character and therefore, to permit divorce by mutual consent may not be much helpful, as in the case with
intercaste and interreligion marriages conducted in a court of law. Further, among Hindus, child marriages are much in vague uptil now. It is also a fact that, in a Hindu marriage, validity of marriage does not depend on the consent of parties to the marriage and a Hindu marriage in not invalid for lack of concert. Therefore, when consent is not material for contracting a valid Hindu marriage, why it should be a ground for terminating the Hindu marriage? In civil and Muslim marriages consent plays a dominant role in validating a marriage moreover, divorce by mutual consent possener its own merits and demerits and its utility has already been judged by scholars on Hindu law.\(^{(12)}\) Therefore, it is submitted that if it is incarforated in section 13 (1) of the Hindu Marriage act. It should have only a restricted application and he relief on this ground be so checked and controlled that it is not readily or hastily enjayed by contesting parting parties in vacumm.

Cruelty has become a ground of divorce in Uttar Pradesh by a local amendment it is reasonably expected from parliament, that sice cruelty can be practised in all states by the Hindu spouses, it should be made a ground of divorce for all Hindus residing in any part of India.

Deseration is not a ground of divorce in the Hindu Marriage Act, it can be made a ground us in the case in England\(^{(13)}\) as well as in India in the case of the
special Marriage Act. Where polygamy is allowed or where interreligion marriages take place, the possibility of desertion in greater than in a Hindu marriage; nevertheless, it cannot be denied that it is a serious matrimonical offence and it should get its due place in section 13 (1) of the act. Because it in honestly, believed that a deserted spouse is much in need of an established home than a more hope or assurance of an "established Rome" which unfortunately sometimes collapses with no hope of repair; due to the most hostile attitude of the deserting spouse. For desertion, divorce is a better remedy than judicial seperation and further it is in tune with the current norms of the society. Impotency is a ground of divorce in Muslim Law, but in the Hindu Marriage Act, a spouse can obtain only a decree of nullity on this ground. It appears to be a sound logic that where parties opt to live together; irrespective of having no sexual pleasure, their martial tie should not be disturbed by law. But where people marry a younger age with a view to desiring legitimate sexual pleasure. They should not be tied up with impotent partners and indirectly allowed to satisfy their physical needs outside the legal wedlock. Where impotency is in curable medically or surgically, it is too much to expect from a younger couple to continue the martial tie, on the ground that impotency did not exist at the time of marriage, but existed at the time of filling. The petition only. It is that a Hindu never
marriage for sex alone; but when it has great importance in married life; how can it be forgotten easily?

Now consummation of marriage has been suggested to be a ground of divorce too but one fails to understand, how it can mark further complicate them and moreover, to prove the fact of non consummation of marriage in many wife during subsistence of marriage, many engage herself in extra-martial activities, the court may find it difficult to ascertain the fact of non-conformation of marriage. The court at the most can look to the medical report for confirmation of non consummation, but how for it will be reliable one may only wonder in awe.

Some of the grounds of customary divorce have been found to be quite effective in granting speedier divorce to the extranged couples belongning to the lower class of Hindu. Therefore, a plea for this incorporation in the act may not sound unresonable, if some of these grounds are thoroughly studied and if found suitable are granted to Hindus. It may also be noted that the procedure for obtaining customary divorce is easy, simple; non technical as well as speedier. The plea for liberalizing divorce is beeing forward that these days. Therefore a suggestion is put forward that three years bar for obtaining divorce should be suitably reduced to one year. It appears to be just and human suggestion, because one cannot wait too long for terminating his or her marriage,
without being cruel towards each other.

It is just plea that estranged couples have lost all faith and charms of married life and are fed up with the tortures of conjugal union; they should be given a fresh opportunity to re-orient their matromonial life new, if they so desire, instead of dragging on unsuccessful martial life unnecessarily and that too far a very long time. Where divorce is granted too late, the parties to the unsuccessful marriage not only exhaust their energy; money and reputation in terminating it, but suffer much embarrassment and disappointment also in future life. The sanctity of judicial institution is also affected, when it becomes a source of further embarrassment to the litigants; who are already frustrated with their matrimonial liver

The procedure of first obtaining judicial separation and then divorce appears to be a dilatory process and it unnecessarily delays justice to the parties in dispute justice delayed in justice denied in such easier. It is not too much to expect that extranged spouses, who are much in need of divorce, should get it only after three years or more after the total satisfaction of the court and in many cases at such as late stage of life that, all their future charm of another marriage is diminished, because they find them selver now too old for it. Where conjugal relations are damaged irreparably soon
after marriage or within few years of marriage, the extranged couple expect speedier divorce. To delay the divorce in such cases will not only be inhumane but absurd too. Therefore the Hindu Marriage act should be so moderated that it ensures the extranged couples divorce at an earlier date i.e., when they are much in need of it. But in doing so regard must be had, that the sanctity of a Hindu marriage is not associated beyond repairs. Because the unstitution of marriage is more respectable than the institution of divorce and the later is a part of the former and not above it.

The younger generation it appears, does not posses that much of regard for the institution of marriage, as the people of the past had, nevertheless if it desires easy divorce, its demand should be conceded to with almost care and caution; and on university accepted principles of marriages and divorce law.

Bisider above observations, it may also be pointed out that section 5 (i)\(^{17}\) and (vi)\(^{18}\) and section 16 of the Hindu Marriag Act\(^{19}\) also need a better drafting, so that the law laid down in it is further clarified and made up to date.

It is reartening to note that the law commision recomendations or contained in its 50th report have taken note of the in adequancies of matromonial reliefs granted in the Hindu Marriage Act,
1955 (Special Marriage Act 1954) and the commission has been right in recommending the following reforms Viz.

(i) Guilty should be made a ground of divorce.
(ii) Adultery should be made a ground of divorce.
(iii) Two years desertion should, on the part of either party be made a ground of divorce.
(iv) There should be deletion of three years period for grounds based on diseases Viz. insanity, leprous and venereal diseases.
(v) I regard to section of 13(A), Hindu Marriage Act 1955 the period be reduced to one year i.e., divorce should be allowed to either party one year after the non compliance of the decrees of judicial separation of restitution of conjugal right. In other word two years period of waiting be reduced to one year in the above cases.
(vi) Three years bar for obtaining divorce as provided in section 14 of the Act be removed i.e. section 14 should be delated.
(vii) From section 15 of the Act, the bar of one year for remarriage be removed.
(viii) With a view to avoiding under delay in the disposal of matrimonial petitions, the family courts be establish and "endeavor should be under delay.
(ix) Every proceedings under the Act should be made in camera.

According to one Fifty ninth report of the law commission is very disappointing; but this view needs a through study in a separate paper.
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(1) Mayne, Hindu Law, (11th Ed.), 175-76

(3) Gurdit V. Angeuj, (Customary divorce among the Hindu Jat of Jullandhar District is recognized) 1968 S.C.142.


(4) Anandi V. Baija, 1973 Raj 94;


(7) Travancore, Fzhava Act, 1925, Cochin Nayar Act 1933; Madras Alisantan'a Act, 1924. Cochin Marnmakatheyam Act, 1938.


(9) See S. 13 of the Act (10) S. 13(2) of the Act.

(11) See 8.28 with 8.34(c) of the special Marriage Act.


(13) The (English) Divorce Reforms Act, 1969.

(14) S.27(b) of the Special Marriage Act.

(15) S. 29(2) of the Act gives recognition to it.


(17) The rule of monogamy says that one cannot keep two wives or two husbands at a time, but if one keeps a wife and many girl friends....S.5(i) cannot effectively check it.

(18) Where Parents withhold consent unnecessarily, the Act is helpless.

(19) S. 16 of the Act should also cover the children of avoid marriage contracted in violation of S.15 and S.7.
CHAPTER-III

UNIT-B

"MODES OF DIVORCE/DISSOLUTION OF MARRIAGE"

UNDER ISLAM (MUSLIM LAW)

Introductory:— Talaq (Divorce) is an Arabic word which means "Undoing of or a release from a knot," It is used by Muslim Jurists to denote the release of a woman from the marriage tie, and means a divorce.

Among the book written on the basis of Qur'an, Hadith and Fiqah for Muslim divorce, including that of Baillie, Wilson, Tyabji, Ameer Ali, Mulla, Saxana, K.N. Ahmad, Justice Mohmood, Abdur Rahim, Ibne Abedin, Qodama, Ibne Taymea, Ibne Nujaim, and Marghinani and Fayzee the best classification have been given by Fyzee, K.N. Ahmad and Marghinani. Their method of classification are scientific and easily accepted by the society and under the Qur'an and Hadith. Their basis of classification are the following.

Classification of Divorce:—

A. By the death of the husband or the wife
B. By the act of Parties
C. By Judicial process.

A. By the death of Husband or the wife:

It is clear and natural that with the death of husband or wife the marriage tie automatically terminates. The husband can remarry immediately after his wife death. But in case of the husband's death the widow has to wait
till the expiry of Iddat (Menstrual courses to 4 months and 10 days or is pregnant, till the delivery).

B. **By the Act of Parties:**

1. **By the Husband:** Talaq - In its literal sense this Arabic word means "Taking off any tie or restraint," and in law it signifies the dissolution of marriage. In Handi law, no special form or phrase is necessary to pronounce talaq. The Ithna Ashari Law, however, insist on strict adherence to a form, that is, it must be in the Arabic language uttered orally, in the presence and hearing of two made witnesses, who should be honest and virtuous Muslims.

   Talaq (divorce) or dissolution of marriage by the husband may conveniently be discussed under the following main heads:-

   **Religious Sanction**

   **Mode of Expression, and**

   **Effect of Divorce**

   **Religious Sanction:**

   - **Divorce under this head is divided under the Sunni Law by the husband into two classes:**
     - **(a) Talaq us-Sunnah,**
     - **(b) Talaq ul-Biddat or Talaq ul-Bid'ah**
   
   - **ii) Ila (Vow of continence)**
   
   - **iii) Zihar (Injurious comparison)**

2. **By the Wife:** Talaq-e-Tafwiz (delegated divorce)

3. **By Mutual Consent:**
   - **i) Khula (redemption)**
   - **ii) Mubarah (mutual freeing)**
C. By Judicial Process:
1. Lian (mutual imprecation)
2. Faskh (Judicia annulment)

Description: Talaq us - Sunnah is regarded as the regular on orthodox form and Talaq ul-Biddat as the unorthodox or irregular form of talaq. The latter has now become the more common and prevalent method of dissolving a marriage.

(a) Talaq us-Sunnah: Talaq us-Sannah is again subdivided into two classes namely:
   i) Ahsan meaning "Must approved," good and very proper.
   ii) Hasan meaning "Approved" good and proper

(b) Talaq ul-Biddat: Talaq ul-Biddat is again subdivided into two classes namely
   i) Tripe divorce, and
   ii) One irrevocable divorce (generally in writing)

Description: Talaq us-Sunnah, that is, a talaq which carries the approved of the Prophet. It may be in the most approved form, i.e., ahsan; or hasan, i.e., simply an approved form. These two forms of Talaq ul-Sunnah are described below:

(a) i) Talaq ul-Ahsan: Talaq ul-Ahsan means the more proper divorce or must approved divorce. The words "must approved" do not denote any intrinsic merit of this kind of divorce. What is meant is that this kind of divorce is the least disapproved of its various forms. This is the Holy best form of talaq which had been approved by the Prophet
at the beginning of his ministry. According to the Sunnath form restrictions have to be observed with respect to-
(a) the number of pronouncements; and
(b) the time (i.e. whether the wife is in her menstrual courses or in a state of purity).\(^1\)
Hedyah brands or remarks it as the most laudable divorce, where the husband repudiates his wife by a single pronouncement in a period of Tuhor (purity) i.e., when the wife is free from her menstrual courses), during which he has not had intercourse with her, and then leaves her to the observance of iddat.

The divorce remains revocable during the iddat, and the parties retain the right of inheritance.\(^2\) Talaq-E-Ahsan form is considered most laudable both because the Prophet held this to be the most excellent method and because in pursuing the method the husband still has the power of recalling his wife.\(^3\)

According to the Hedyah, this method of divorce is the most approved because the companions of the Prophet approved of it, and secondly, because it remains within the power of the husband to revoke the divorce during iddat, which is three monthly period or till delivery.\(^5\)

What is meant is that this kind of divorce is the least disapproved of its various forms. The reason for the preference of this form of divorce over others is that it does not immediately sever the marital relationship but
allows an opportunity to the spouses to continue the marriage if they so choose and, in pursuing this method, the husband can still exercise his right without the necessity of an intermediary marriage to retain his wife by a reversal of the divorce during the period of her 'iddat, if he be so inclined. This rule is based on an injunction in the Qur'an which says, "Divorce may be pronounced twice, then keep them in good fellowship or let (them) go in kindness." It is laid down at another pace, "So, if he (the husband) divorces her (the third time) she shall not be lowfu to him afterwards until she marries another person." Also because this method is the one lawful method of divorce unanimously agreed upon.

(a) ii) Talaq ul-Hasan:- Talaq ul-Hasan means proper divorce or approved divorce. It is not unanimously accepted as a lawful divorce by all the Sunni Schools of law. Imam Malik considers it to be Bid'ah or an innovation. He says that divorce is meant no serve as a prohibition and it is secured by one pronouncement and so, according to him, a divorce would no doubt be effected in this way but the husband would be guilty of sin in pronounceing it Iman Shafi; Other Sunni Jurists accept it as a lawful divorce in the form of Talaq ul-Sunnah. Khalid Rashid says in this form that the husband successively pronounces divorce three times during consecutive periods of purity (tuhr). 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. It is also essential that no intercourse should have taken place during that particular period of purity in which the pronouncement has been made.

Where the wife is not subject to menstrual Courses, in interval of 30 days is required between each successive repudiation. Talaq Hasan tries to put an end to a harbarous pre-Islamic practice to divorce a wife and take her back several times in order to ill treat her. Through this method of talaq, the husband has been given two chances of divorcing and then taking the wife back, but the third time he does so, the talaq becomes irrevocable. In this way, the process of divorcing and repudiating cannot be continued indefinitely. (9)

Requirement of Talaq ul-Ahsan: The following conditions are necessary for Talaq ul-Ahsan:

(a) In the case of a consummated marriage with a menstruating wife, the pronouncement must be made during a tuhor (i.e., in a state of purily)
(c) There must be no sexual intercourse during the tuhor
(d) There must be abstinence from sexual intercourse during the period of iddat. The period of iddat in the case of a pregnant woman extends up to the time of delivery. There must therefore be abstinence from sexual intercourse till the birth of the child.
The restrictions about the abstinence from intercourse relate only to a menstruating wife whose marriage has been consummated. In the case of an unconsummated marriage, tuhor or during the actual occurrence of the courses. \((12)\) So also, in the case of a non menstruating wife a talaq may be pronounced after intercourse without any time intervening between it and the talaq. A pregnant woman may also be immediately after delivery. \((13)\)

Valid retirement would stand on the same footing as consummation for the purposes of talaq-us-Sunnah. \((14)\)

Talaq-ul-Ahsan secures in a large measure against the hasty pronouncement of talaq as it pronounced during the time in which there is no bar to conjugal intercourse. The talaq continues to be in suspense during iddat and affers room for reconsideration of the decision by the husband. If there is only one declaration of divorce and parties continue to live as husband and wife and children born from the wife are recognised by the husband as his, the marriage would not become dissolved. \((15)\)

**Shia-Law:** The wife must also not be in her puerperal courses. \((16)\)

**Requirements of Talaq-ul-Hasa:** This is also one of the approved forms of talaq. Talaq-ul-Hasan may be made in the following manner.

(a) Three pronouncements must be made.
(b) In the case of a wife who is subject to menstruation (and is not pregnant), the three pronouncement must be made during three consecutive tuhurs; 
(c) In the case of a wife is not subject to menstruation or is pregnant, the pronouncement must be made at the intervals of 30 days between each pronouncement. The condition that the pronouncement should be made between two periods of tuhurs would not be applicable to a woman who passed the age of menstruation because it would be physically impossible to have any such periods. 
(d) There must be abstinence from sexual intercourse during the three tuhurs (the period covered by pronouncements) 

The main difference between the two forms Ahson and ḥasan, is that the period after which the talaq becomes effective in the latter form is reduced. In the case of the former, the husband has to wait till the expiry of the iddat before the talaq becomes final. This would in case of a menstruating wife cover a period of three menstrual courses after the date of the pronouncement. In the case of talaq ul-ḥasan the period may be much shorter. This form also has the same features of talaq-ul-ahsan about preventing a hasty pronouncement and also about leaving a scope for reconsideration by the husband.
Talq of a pregnant wife:— According to Imam Ibu Hanifa (Rah) and Imam Abu Yousuf (Rah) a pregnant wife may be divorced in the regular way (i.e., by talaq-ul-Sunnah) by three talas. He is first to pronounce a single sentence of divorce upon her and then one at the expiration of one month and a third at the expiration of next succeeding month, (i.e., in the ahsan form). According to Imam Mohammad the only talaq-ul-Sunnah in the case of a pregnant woman is a single divorce (i.e., only in ahsan form).(17)

(b) Talq ul-Bid'ah or Talq ul-Bid'i

Introductory:— The other method of divorce considered from a religious point of view is Talq al-Bid'ah or Talq al-Bid'i, unorthodox divorce. Here the husband does not follow the approved form of talaq i.e., talaq-us-Sunnah, and neither pays any attention to the period of purity nor to the abstention from intercourse. It is so called because it is not approved by Muslim Jurists and is considered and desirable innovation. Any divorce which does not conform to Talq-us-Sunnah is deemed to be an innovation or bid'ah and is called Talq al-Bid'i. It is the most dissapproved forms of divorce. Ameer Ali is not exactly correct when he says,".........which (Talaq ul-Bid'ah) was introduced in the second century of the Muhammadan era. It was then that the ummayad monarchs, finding the checks, imposed by the Prophet (peace be on him) on the facility of repudiation galling, looked about
for some escape from the strictness of law and found in
the pliability of the jurists a loophole to effect their,
purpose." (17) Talaq ul-Bid' i was some times resorted to
Holy
even in the time of the Prophet (peace be on him). Thus
there is the well known case of Ibn 'Umar who had divorced
his wife during the period of meanstruation. The Prophet
(peace be on him) on being informed of this told him that
he had acted wrongly and advised him to cancel the divorce
by raj' ah (cancellation) and then to proceed in the proper
manner if he still persisted in his desire to divorce the
wife. (18) The fact is that the Prophet (peace be on him)
strongly condemned it and did not sanction it. But in the
course of time it came to be considered a valid and legal
form of divorce. Moreover, it assumed many other forms in
the second century and came to be recognised as an
effective divorce.

The above points relating to Talaq al-Bid' ah are fully
discussed below: -

(a) Divorce in period of purity in which there has been
intimacy: -

It is not permissible to divorce the wife in a
Tuhan (period of purity) in which the husband has been
intimate with her. If he does so, then according to the
Sunnis a Talaq al-Bid' ah shall be effected reasoning of
the jurists for this rule is that a divorce is to be given
only when there is necessity and in the absence of
necessity a divorce is not to be given. The fact that the husband was intimate with the wife during the period of purity shows that he does stand in need of her and so there is no necessity for divorce in such a case and a divorce cannot be properly given under such circumstances.\(^{(19)}\) The prohibition does not apply when the wife is incapable of pregnancy whether on account of tender or old age.\(^{(20)}\) A girl below nine years and a woman fifty five years of age is supposed to be incapable of pregnancy and so a Talaq is permissible in such a case in a period of purity in which there has been intimacy between her and her husband.\(^{(21)}\) Such a talaq would be considered to be a Talaq us-Sunnah.

(b) Repetition of Pronouncement:- The most prevalent method of exercising Talaq al-Bid'ah under the Sunni law now a days is to pronounce three divorce at the same time.\(^{(22)}\) It is not necessary that the husband should repeat the pronouncement three times in order to constitute an irrevocable divorce. The triple repetition is merely one of the many forms by which such a divorce can be effected and the same result can be obtained by any other method recognized for the purpose. A husband can effect such a talaq even by only one pronouncement if he makes it clear that he was pronouncing a Talaq al-Bain, that is, an irrevocable divorce. Thus, to effect such talaq the husband may say, "You are repudiated thrice.\(^{(23)}\) He can also convey his intention of
pronouncing three divorces by saying, "You are divorced so many times" and showing three fingers at the same time which will result in a Talaq al-Bid'ah. (24)

(c) Divorce during the Period of Impurity:— A divorce given while the wife is in her monthly course is considered Bid'i or innovation, because it is against the prescribed method of divorce. Thus there is a Tradition to the effect that Ibn 'Umar divorced his wife during the period of impurity (menstruation). The Prophet (peace be on him) was told of this and he said to Ibn 'Umar, "Ibn 'Umar. Allah has not allowed you to act like that you have gone against the Sunnah (i.e., against the approved religions law). The correct method is to wait till she is pure and then to pronounce the divorce in the period of purity, "and the further asked him to revoke the divorce by raj'ah (retraction). (25) The Hanafi Law holds such divorce to be effective, but it is considered proper for the husband to revoke it and to pronounce a fresh divorce in a period of purity in order to escape from sin. (26)

According to some Jurists, the revocation of divorce is incumbent on the husband. It is stated in some books that this view is the better view. (27) It is explained in al-Hadayah that revocation of divorce is incumbent on the husband for three reasons, namely:—

Holy
(a) The order of Prophet (peace be on him) to Ibn 'Umar as cited above.
(b) The pronouncement of divorce during the period of impurity is sinful, and it is the duty of every man to redress the wrong by every means within his power, and (c) The protraction of the 'Iddah places an extra burden on the wife, which transgresses the limits prescribed by the book. (28)

Maliki Law:- Maliki holds that a Talaq al-Bid'ah shall effect a separation, but considers it to be disapproved of. He makes it an essenciel of a valid divorce that it should fulfil the following conditions and a Bid'i divorce is one which does not fulfil them:-

(a). It must be given when the wife is in a state of purity, that is not during the period of menstrual fellow non during the Nafa (the term child birth). The maximum period of Nifas is fixed at foruty days or according to a woman's usual period in such case. (29)

(b). The husband should not have been intimate with the wife in the period of purity in which the divorce is pronounced.

(c). After pronouncing a divorce no fresh divorce be given during the period of iddah

(d). Note more than one divorce should be pronounced at the same time (30)

If the husband contravenes the conditions given above he shall be forced to take back his wife. (31) This is however, subject to the condition that the marriage has
been consummated. If there has been no intimacy then compulsion shall not be used and wife shall become separated on the pronouncement of divorce. (32)

**Shafi'i Law:** Shafi'i has expressed the opinion that a Talaq al-Bid'ah is forbidden but nevertheless it effects a separation between the spouses. (33) He considers it to be sinful. (34)

**Hanbali Law:** Imam Ahmad ibn Hanbal agrees with Imam Abu Hanifah and holds that a Talaq al-Bid'i would be effective, though sinful. (35)

**Shi'i Law:** Under the Shi'i law Talaq (divorce) is divided in two main classes, namely:-
(a) Bid'i (irregular or heretical), and
(b) Sunni (regular)
(a) Bid'i:- Talaq is considered irregular. It is constituted in the following three ways:

i. Divorce against an enjoyed wife is not pregnant and who is in her courses, or Nifas (puer peral discharge) when her husband is present with her or absent from her for a period less than the prescribed period. It is the discharge after childbirth and, according to the Shi'i Jurists, its maximum period can be ten days while according to the Sunnis it can last for forty days.

ii. Pronouncement of divorce against a wife, who is not
in that period of the wife's purity in which the husband has been intimate with her. Period purity means the period when the wife is free of her menstrual courses.

iii) Pranouncement of three divorce whether by one sentence or one after another when there has been no intermediate revocation.\(^{(36)}\) The first two forms of divorce are considered valid and absolutely ineffective under the Shi'i law.\(^{(37)}\) This also holds good in respect of three pronouncements at the same time. But if they are pronounced at different times then the first time pronouncement may be given effect to.

The second class of talaq is called Sunni. The word Sunni is used in contradistinction to Bid'i.

It recognises only Talaq al-Sunnah of which there are three kinds. It is divided by Shi'i Jurists into three classes, namely:

1. Talaq-i-Bain or absolute, is irrevocable Talaq
2. Talaq-i-Raja'i that is revocable Talaq, and
3. Talaq-ul-iddah.

1. Talaq-i-Bain is that divorce which cannot be revoked. It is constituted in the following six ways:
   i) Divorce against a wife who is past child bearing age.
   ii) Divorce against a wife with whom there has been no intimacy
   iii) Divorce against a wife who has been thrice repudiated
with two intermediate revocations.

iv) Divorce against a wife of such a tender age that she is not subject to meanstrual courses. This age is fixed at nine years.

v). Divorce against a wife who has obtained a Khula divorce for consideration.

vi). Divorce against a wife who has secured a divorce under the doctrine of Mubarah.

It is necessary in the case of the fifthe class and sixth class of divorce that the consideration for Khula or Mubarah has not been revoked. If it has been revoked then the divorce shall be a Raj' divorce and not a Talaq-i-Bain.

(b) Talaq-Raj'i:- Talaq Raj'i is that kind of divorce in which the husband has got a right to cancel it. This he can do before the expiry of the wife's iddah. If the period of the wife's iddah expires then a revocable divorce is effected. But if the spouses want to unite then they can remarry without the necessity of there being an intermediary marriage.

(c) Talaq al-Iddah:- In this form of divorce, the husband divorces his wife under the requisite conditions; he then recalls her and cohabits with her before the expiration or completion of her iddah. He again divorces her a second time in another tuhor, that is, other than that in which he was intimgte with her. He recalls her again and
cohabits with her and then divorces her in a subsequent tuhor. This kind of divorce effects what is called a mughallazah divorce in which the wife becomes forbedden to husband. She can become lawful to him only if after the divorce she marries another person and that marriage is dissolved after consummation. (38) It is only than that she can marry the former husband. It is a necessary condition of such Tala and there must be inter course after each revocation. If the husband divorce his would be effected, but it would not be Talaq al-iddah.

**Divorce considered with Regard to the mode of Expression:**

A divorce can be considered with respect to the mode of expression from two aspects, namely, (a) Lucidity of expression (b) Whether it is conditional or unconditional.

**Divorce considered with Regard to Lucidity of expression:**

The language used by a husband to divorce his wife may or may not be clear enough to denote his intention of divorcing her. The pronouncement of divorce considered with regard to lucidity of expression is divided into tw kinds, namely:

i) **Sarih or express or plain and**

ii) **Kinayah or implied or ambiguous.** (39)

i) **Sarih or clear Expression:** A saih or clear prononouncement of divorce is one which is given in such
spoken words the meaning of which is unmistakable, as for example, when a husband says to his wife. "I have divorced you" or "you are divorced," such a pronouncement of divorce includes the use of expressions that have acquired a particular significance by long usage and are not used in any other sense than of divorce. As the expressions are not used in any sense other than that of divorce and are well understood as implying divorce, no proof of intention to divorce is required under the Sunni Law. In divorces given by Sar or clear pronouncements the law will hold that the husband meant what the actual words used by him conveyed without permitting him to explain that he meant something else. In Sarih expressions the actual intention of a husband who divorces his wife is immaterial and a Raj'i divorce shall be effected. It is the intention conveyed by his words in repudiating his wife that shall be taken into consideration, and the validity and effectiveness of the divorce should not be governed by any mental reservation on the part of the husband to the effect that the divorce pronounced by him was not a genuine divorce.

The word Talaq is used in India, Pakistan Bangladesh and Shirilangka in the same sense as in Arabic and is well understood by every one and even by illiterate persons. The word Talaq has acquired in Urdu the technical meaning
by reason of usage and so must be given its technical import. The sentences in which the word is used form sarih or clear expressions and so no explanation or evidence can be given too denote a contrary intention under the general rule of the Sunni law.

If a husband is asked whether he has divorced his wife and he replies in the affirmative it would amount to sarih divorce. (45) If a wife says to her husband, "AmI a divorce?" and should he reply,"yes," then too it would amount to a sarih divorce. (46)

A number of such expressions as constitute express divorce have been given in al-Hadayah and other books, but the expressions given as the form of Sarih divorce are not expressions.

Maliki Law:-- According to Imam Maliki, Sarih expressions are four in number and can only be denoted by the word Talaq. (47) They are such as give below:
(a) I divorce you,
(b) You are divorced as regards myself etc.

Shafi'i Law:-- According to Shafi'i Law, expressions which clearly indicate severance of marriage relationship are termed Sarih (clear) expressions. They denote repudiation, separation, dismissal. (48) Such expressions are as "I repudiate you," "You are repudiated," "You are free," etc. The expression may be explicitly pronounced in any
language provided the expressions employed correspond to the above terms. (49)

**Hanbali Law:** According to Imam Ahmad ibn Hanbal, Sarih Talaq is that expression which is not used for any other purpose than Talaq. The husband can say, "I divorce you," or "You are a divorce." (50)

**Effect of:** In the absence of words to denote an intention to the contrary the pronouncement to of a Talaq by Sarih expression shall effect a Talaq al-Raj'i or a revocable divorce, that is, a divorce that leaves it in the power of the husband lawfull to take back his wife at any time before the expiration of the period of 'iddah. (51) But if the marriage has not been finished then the very first pronouncement of divorce shall effect an irrevocable divorce. (52) Section 7 of the Muslim Family Laws Ordinance, 1961, has done away with the difference between a Raj'i (revocable) and a Bain (irrevocable) divorce.

**Kinayah or implied expression of divorce:** Kinayah or implied expression of divorce means an expression which is obigous as opposed to a clear expression. The ambiguous expressions are such as can mean a divorce as well as something else and in which real purpose of the speaker is not clear but is concealed. (53) A divorce is not effected by a Kinayah expression unless there is intention
of which there is proof or it can be gathered from the surrounding circumstances or there is a mention of divorce. As a Kinayah expression does not denote divorce alone but may also mean something else, hence intention in requisite in such cases to determine the meaning of the pronouncement. (54)

The Sunni Jurists have given a very large number of examples of expressions of Kinayah or implied divorce which would or would not effect a divorce according the the intention of the husband. A few are given below:-

"Your are not to me as a wife,"
"I have not need of you,"
"Go to your own relations," "Go out,"
"You are nobody to me,"
"You are of no use to me,"
"Leave me" or "Leave me alone,"

"I give up all relations with you and will have no connection of any sort with you," "I do not desire you."
If the wife should say to her husband,"You are not a husband to me" and he should say,"I belive you," intending divorce, it would take effect and she would be divorce. When a man intending to divorce his wife says to her,"You are not to me as a wife" or "I am not to you as a husband," it takes effect according to Imam Abu Hanifa(Rah) But Imam Muhammad and Imam Abu Yusuf (Rah) do not agree with him. (55)
As a general rule a divorce by Kinayah expression amounts to an irrevocable divorce. (56) But under the provisions of the Muslim Family Law Ordinance, 1961, the divorce shall be Raj'i (revocable) only.

**Maliki Law:**— Imam Malik (Rah) also agrees with the Hanafis about divorce by Kinayah or ambiguous expressions. (57) He divides Kinayah (ambiguous) expressions into two classes namely,

(a) **Kinayah Zahiriah**

(b) **Kinayah Khafifia**

(a) **Kinayah Zahiriah:**— The expression indicates the use of language which refers to divorce but only indirectly. In such a case the intention of the husband is immaterial and the husband shall be taken to have divorced his wife by a revocable divorce unless there is proof or the circumstantial evidence points otherwise. (58)

(b) **Kinayah Khafifia:**— Kinayah Khafifia means an expression which does not clearly indicate a divorce. Divorce shall be effected only when the husband so intended and not otherwise. (59)

**Shafi Law:**— Imam Shafi'i agrees with the Hanafis in the matter of divorce by Kinayah expressions. But he holds that divorce by Kinayah or ambiguous expressions amounts to such a divorce as the husband intended. According to him to nature and number of Kinayah divorce shall depend
on the husband's intention as stated by him. In the absence of any intention only one revocable divorce shall be effected. (60) All Kinayah divorce, according to him, amount to a revocable divorce unless the expression used indicates three divorce when it shall amount to an irrevocable divorce. (61) He has given his our examples of Kiayah or ambiguous expressions. (62)

**Hanbali Law:** According to Imam Ahmad b. Hambal the nature and number of divorce shall depend on the husband's intention. (63)

**Shi'i Law:** The Shi'ahs donot recognise al-Talaq al-Kinayah.
CHAPTER-III
UNIT-B

REFERENCES

(1) Al-Mugni, VII, p.96; Shami, Cairo, II, p.425-26; Deoband, Nomaniah, p.414.


(2) Bail, I, 206-207; Hed 73. Delhi-335.


(5) Hedayah 72; Qur'an, II:228, Surah al-Baqarah.

(6) Qur'an, II:229, Surah al-Baqarah.

(7) Qur'an, II:230.


(9) Muslim Law, Khalid Rashid, Lucknow. p.90.

(10) Bail-I, 206-207.

(11) Hedayah-73; Delhi-335; Bail-I, 207.

(12) Bail-I, 208.

(13) Bail-I, 206-207.


(15) Bail-II, 110.


For discussion see. "Mughallazah divorce"


(24) Ibid; al-Bahr al-Ra'iq, Cairo, III, p.259.


(30) Ibid. (31) Ibid. (32) Ibid.


(34) Ibid. (35) Ibid.


(37) Ibid. (38) Ibid.


(40) Al-Bahr al-Ra'iq op.cit., III, p.269.


(42) Ibid.


(44) Ibid.


(48) Ibid.


(51) Ibid.


(54) Ibid.


(56) Ibid.


(58) Ibid. (59) Ibid.


(61) Ibid.


ZIHĀR

INJURIOUS COMPARISON

Introductory: In the pre-Islamic times the half civilised Arabs used to deprive their wives of sexual enjoyment and to tie them down to a miserable life in a number of ways. Zihār is one of them. It is an unusual form of temporary prohibition in which the husband compares his wife to his mother. In Zihār the marriage is not dissolved and the woman still remains the wife of the person, but the husband cannot be intimate with her and she is deprived of all sexual intimacy. Islam has freed the wife from this hard lot and has also discouraged the use of such expressions. It has made it clear that a wife does not become the mother or other relation by the idle and poolish talk of a person while a penalty has been imposed on the husband who has expressed Zihār but wants to retain his wife. The wife has been empowered to force the husband either to divorce her or re-establish the matrimonial connection on paying the prescribed penalty.

In pre-Islamic times Zihār was considered to be a sort of divorce Muslim law, while preserving its nature which is prohibition from intimacy with the wife, has altered its effect to a temporary prohibition only which does not dissolve the marriage, and so Zihār does not exactly amount to a divorce and is distinct from it.
(ii) Religious Sanction: The law about ḹiḥār is based on the injunctions in the Qur'an given below:-

"Allah has note made for any man two hearts (within him); nor has he made your wives whom (you desert) by ḹiḥār, your mothers; nor has He made those whom you assert (to be your sons) your sons. These are the words of your months. And Allah speaks the truth and He shows the right way. (1)

"Those of you who put away their wives by calling them their mother—they are not their mothers: None are their mothers mothers save those who gave them birth, and they utter indeed a hateful word and a lie. And surely Allah is pardoning, Forgiving."

And those who put away their wives by calling them their mothers, then go back on that which they said, must free a captive before they touch one another. To this you are exhorted; and Allah is wore of what you do.

"But he who has not the means, should fast for two mounths successively before they touch one another, and he who is unable to do so should feed sixty needy ones. That is in order that you may have faith in Allah and His Messenger. And these are Allah's limits. And for the disbelievers is a painful chastisement." (2)
(iii) **Definition:** The word Zihār is derived from "Zahār" (back), Zihār means "To oppose back to back." It is explained that when there is discord between the husband and the wife, they instead of remaining face to face towards each other turn their backs against each other. In the language of law it signifies a man comparing his wife to any of his female relations within such prohibited degrees of relationship, whether by blood, fosterage or by marriage, as renders marriage with her inviolably unlawful. Zihār signifies a husband's comparison of his wife with his mother or any female relation within the prohibited degrees. In Zihār, the usual phrase is "thou are to me as the back of my mother." This mode of talaq is very rare in India, Pakistan and Bangladesh.

(iv) **Applicability:** Zihār is very rarely used in India, Pakistan and Bangladesh as is clear from the fact that there is practically no case law on the subject. But the doctrine of Zihār is still applicable to Muslims in India, and Pakistan. Section 2 of the Muslim Personal Law (Shari'at) Application Act, 1937, and sub-section IX of section 2 of the Dissolution of Muslim Marriages Act, 1939, Make this clear. A remark in Saeeda Khanam Vs Muhammad Salim also supports this view.

(v) **Essentials:** Certain conditions have to be satisfied for the validity of Zihār. They relate to the following aspects.
(a) Expression, (b) Comparison, (c) Husband, (d) Wife, and (e) Expiation

(a) Expression or Language:— There is no fixed formula for żihār and any expression can be used for the purpose. But the language should be clear, unambiguous and certain. There should be no uncertainty attached to żihār and an uncertain expression of żihār is invalid. Thus if a husband says to his wife, "Allah willing you are to me....." then no żihār will be established. Żihār can be given orally or in writing and even by signs by a dumb person if they are well-understood and denote his intention in this respect.

In many cases an expression can amount to a divorce by implication as well as to żihār. It becomes necessary in such a case to find the effect of the expression. According to Muslim Jurists, such an expression takes effect according to the husband's intention as explained by him. Thus, if he were to say, "You are to me like my mother," it is necessary to ascertain his intention. The expression may be used merely to show respect or appreciation or to denote a divorce or a żihār or without any definite intention at all. In the first and the last cases the expression would neither establish a żihār nor a divorce. But in the second and the third cases a divorce or a żihār would be established according to the intention of the speaker. Hence, if he
declares that he had no particular divorce, divorce will be established. (9)

When the expression used consists of a comparison of the wife to a part of body of his mother or other prohibited women as when he says, "You are to me like the back of my mother, Zihar only will be established because the expression is used only for Zihār and cannot be used for divorce and so no divorce would be effected by such an expression even when such be the intention of the husband. (10)

Under the present law, however, the bare statement of the husband will not suffice and the Court will give its finding on the evidence produced before, it and will be guided by the circumstances of a particular case.

(b) **Comparison:** Comparison is a necessary condition of Zihār, and so there will be no Zihār if there is no comparison as when a husband calls his wife as his daughter, mother etc., without comparison the expression may amount to a divorce if he so intends but cannot amount to Zihār. (11) Further, the comparison should be to a woman permanently prohibited to him. If the wife be compared to a woman only temporarily prohibited, there is no Zihār. (12) Thus, a comparison to one's sister-in-law will not amount ot Zihār as marriage with her is possible one the dissolution of the present marriage by divorce or the
wife's death. (13) When the compison reletes to a part of the body of a woman, the part must be such as is not proper for him to see. Hence, when the comparison is to what can be seen decency by him as the face, hands, hair, etc. there is no Zihār. (14)

(c) Husband: It is a condition of Zihār that the husband should be a person capable of making expiation, that is, he must be save and adult. (15) Hence, the Zihār of a minor or an insave person is not valid, further, the husband should not be in a faint or under the influence of sleep; Zihār by any one in one of these condition is not valid. (16) But it is not necessary under the Hanafi law that the husband should be in earnest so that Zihār by one in jest or in mistake is valid. (17) Zihār under compulsion is valid and effective according to the Hanafi. (18) Bu- Imam Shafi'i and Imam Ahmad ibn Hanbal do not agree with this view and according to then Zihār under compulsion is unvalid. (19) Zihār by a dumb husband is valid when made in writing or by intelligible signs and with intention. (20) Zihār by a drunker man is valid according to the Hanafis. (21)

(d) Wife: Zihār can only be mode in respect of the lawfully married wife of the speaker. (22) Hence, if a person say to a woman who is not his wife, "you are to me like the bace of my matter" and after wards marries her,
Zihār shall not be established because the woman was not his wife when he used the expression of Zihār. But if he says to a woman, "if I marry you then you are to me as the bake of my mother" and afterwards marries her then Zihār shall be established and expiation shall become incumbent on him. It is not necessary that the wife should be major, sane or Muslimah as Zihār like divorce, is valid even when the wife is a major, lunatic or Kitabiyah.

Zihār by the Wife:-

It is not open to the wife to use the expression of Zihār against her husband.

Wife's Right:- A wife is entitled to call her Muzahir (i.e. one who has expressed a Zihār) husband to his matrimonial duties. She can also prevent him from intimacy with her till he has made the necessary expiation. If he does not make it, then according to the Muslim Law the Qazi, on her complaint, is to imprison and punish him till he does so or repudiates her. The Qazi can also order the beating of the husband in such a case. Islam has thus forbidden a husband to keep a wife in suspense by giving up intimacy with her and at the same time not divorcing her. Thus, there is an injunction in the Qur'an namely
"But turn not away (from a woman) altogether so as to leave her (as it were) hanging (in the air). (31) (i.e. in suspense)."

If the husband declares that he has performed the expiation, his declaration is deemed sufficient and the Qazi is not required to inquire if the allegation is true or not and the husband's version will be accepted as correct until it is proved to be incorrect. (32)

(e) **Expiation**:- It is obligatory on a Muzahar (i.e. a husband who has declared Zihār) to make an expiation if the intendeds to have intercourse with his wife after the Zihār. (33) But if he is determined that she should remain unlawful to him and has no intention of returning o matrimonal intercourse with her, he is not liable to expiation. (34)

(vi) **Conditional**:- Under the Hanafi law Zihār can be made conditional. Thus a husband may say, "If thou entereth that house or speaketh to such a person, thou art to me like my mother." (35)

(vii) **Limited in time**:- Zihār can be limited in point of time. Thus, where a husband says to his wife, "you are to me like my mother's back for one year," Zihār will be effective for the period of one year only and will become ineffective after that period, and he can renew his sexual
relations with her on the expiry of the period without incurring expiation. But according to Malik, an expression of 'Zihār limited in time shall amount to an absolute 'Zihār and shall not become ineffective with the expiry of the specified time. Expiation would, however, be incumbent on him if he is intimate with the wife before the expiry of the period. Shafi and Imam Ahmad ibn Hanbal agree with Abu Hanifah.

(viii) The Maliki, Shafi'i and Hanbali Laws:

The Maliki, Shafi'i and Hanbali Laws are the same as the Hanafi Law discussed above at various places.

(ix) Breach of:— If a man, having pronounced 'Zihār upon his wife, has matrimonial connection with her, he is not liable to any penalty other than the expiation for 'Zihār.
(i) **Introductory:** İlä is not exactly a divorce, but has been treated as a form of the same by the Muslim Jurists. It was a common practice in pre-Islamic days and is one of the expressions for divorce used by the uncivilised Arabs of that period to harass their wives. By İlä the marriage was not completely dissolved; it meant only a cessation of sexual relations between the husband and the wife. The wife was thus deprived of the sexual intimacy but she remained tied down to her husband and could not contract another marriage. Islam has put a check to the evil effects of this practice. It has discouraged the use of such expressions by imposing a penalty on a husband who wants to retain his wife after the use of the expression while if he does not repent and cancel his declaration within the prescribed period, he stands to lose his wife.

It has also restricted the maximum period for the cancellation of İlä to four months.

(ii) **Définition:** The word in its literal sense means a Vow and the maker of the Vow is called a muti, who is defined as a person who cannot approach his wife for a period of four months without incurring some penalty or some very trouble some, serious or difficulty liability. In Muslim Law it implies a husband's swearing by Allah or
making a declaration to abstain from sexual intercourse with his wife for a period of four months or a longer period or that he shall undergo some specified hardship by way of penalty if he is intimate with the wife within the specified period of time or make some specified expiation that shall involve some hardship to him.\(^{(2)}\) Īlā is when a person swears that he will not have intercourse with his wife, and abstains from it for four months, the divorce is effected. The Hanafi Jurists argue that the husband acted unjustly towards his wife, it is equitable that on the expiration of four months he should be deprived of the benefit of marriage.\(^{(3)}\) But according Imam Malik and Imam Ahmad bin Hambal, it is necessary to invoke the name of Allah but not necessary according to Imam Abu Hanifah and Shafi'i for the validity of Īlā'. It is stated in al-Mughni that all the Sunni Jurists hold that a vow, in the name of Allah or one of his attributes whereby the husband makes it unlawful for himself to be intimate with his wife constitutes an Īlā'.\(^{(4)}\)

But there is a difference of opinion whether a vow of other classes to abstain from intimacy will constitutes īn Īlā'. The correct view is that what so-ever be the vow by which intimacy is made unlawful, and Īlā' shall be effected provided the vow incures some hardship. The above opinion has been expressed by Imam Abu Hanifah, Imam Malik, Shafi'i and all Imams of Hijiaz and Iraq.\(^{(5)}\)
(iii) **Religious Sanction**: The Muslim Law of Ḩā' is founded on the following verses of the Qur'ān:

"For those who swear that they will not go in to their wives should wait four months; then if they go back, Allah is surely Forgiving, Merciful."

And if they resolve on a divorce, Allah is surely Hearing, Knowing." 

(iv) **Applicability**: Ḩā' is very uncommon, but is still extant and enforceable in Pakistan and India. It was clearly mentioned in 2 of the Muslim personal law (Shari'ah) Application Act, 1937, as applicable to Muslims. Clause ix of section 2 of the Dissolution of Muslim Marriages Act, 1939, lays down that a wife can seek the dissolution of her marriage on any ground which is recognised as valid for the dissolution of a marriage under Muslim Law. A remark in Sayeeda Khanam Vs. Mohammad Sami also supports this view.

(v) **Essentials**: The essentials of Ḩā relate to the following subject:

(a) Husband, (b) wife, (c) vow, (d) cancellation, and (e) Effect.

(a) **Husband**: The person competent to pronounce an Ila is one who is competent to repudiate the marriage, that is, he should be adult and sane.

(b) **Wife**: The woman in respect of whom an Ḩā vow can be
made should be the wife of the person making the vow at the time when Īlā' is to take effect. But an Īlā' can be made in respect of a woman not yet the wife of the speaker provided it is to take effect in future at a time when the marriage has actually taken place and she becomes his wife. Thus a man may say to a woman, By Allah, I shall have no sexual intercourse with you when I marry you, then Īlā' shall be effected if he marries her because his vow makes Īlā' applicable when the woman acquires the status of being his wife. But if Īlā' is made in respect of a woman other than the wife without reference to her status at the time when Īlā' is to take effect then the Īlā' shall be ineffective. By Allah I will never have sexual intercourse with you," and he afterwards marries her then Īlā' shall not be established. Here there is no reference to her status at the time when Īla' is to take effect. There is a tradition to the effect that the Prophet (peace be on him) has stated that there is no vow for the son of Adam in what he does not own, and no divorce in what he does not own.

(c) Vow: The vow must be for four month or for a longer period or for an indefinite time. But if it relates to a period less than four months then the vow does not constitute Īlā'. This is so even though the accumulated period of two or more consecutive Īlā' vows may amount to four months or a
Thus if a man makes a vow, saying to his wife, "By God, I will not have sexual connection with you for two months, nor for two months after that Ila' is established. But if a man swears that he will not have sexual connection with his wife for two months," and then remains silent for a day, and the next day again swears that he will not have sexual connection with her for two months after the other two months, Ila' is not established because the second vow is distinct and separate from the former.

A husband shall not be held to have pronounced Ila' except when he takes an oath against having sexual intercourse with his wife. If the husband's oath refers to something else than sexual intercourse then he shall not be held to have made Ila'. Thus if a man says to his wife, "By God, my skin shall not touch thy skin," he shall not be deemed to have made an Ila' because the vow refers to a breach of something other than sexual intercourse and touching of their skin is possible without there being intimacy between them. It is also a necessary condition of Ila' that it should not be possible for the husband to violate the vow, that is, to have sexual intercourse with his wife, without being guilty of the breach of his vow. Thus if husband being in Lahore and his wife being in Delhi swears that he will not go to Delhi then Ila' is not established because there is no reference
to intimacy while he can still be intimate with his wife without incurring any penalty as by sending for her at Lahore and being intimate with her there. (20)

(d) **Cancellation of:** The only one way to render the vow ineffective is by having sexual intercourse with the wife within the period of four months from the time of taking the vow. (21) If husband should be intimate with his wife during the prescribed period of four months then he shall be forsworn in his vow and the Īlā' would cease after cohabitation. (22) An expiation shall however, be incumbent upon the husband as a penalty for the breach of his vow. (23) The vow cannot be cancelled by speech but only by conduct that is, by having sexual intercourse with the wife except under certain special circumstances. (24) Thus, if during the time in which an Īlā' can be revoked there should be any natural or accidental impediment to sexual intercourse on the part or either the man or the woman, such a serious illness or wife's tender age, or being at such a distance from one another as does not admit of their meeting during the term of the Īlā' then in such a case it shall be lawful for the man to receive his Īlā' by speech, as, for example, by saying "I have returned to my wife," upon which the Īlā' drops. (25) But this holds good only so long as the impediment lasts. If it should become possible to have sexual intercourse before the expiration of four months then his right of return by
speech would be cancelled and another cancellation must be made by intercourse. (26) If Ḥiḍā had been constituted by a vow in the name of Allah then expiation shall be incumbent for the breach of the vow. But it shall not be incumbent in other cases. (27)

**Expiation:**— If the husband has intercourse during the period of Ḥiḍā' he will violate his vow. He should therefore, make the expiation for the infringement of his vow. (28) It consists of manumission of a slave or clothing or feeding ten poor persons. If he has not the ability to do either of them, he should keep fast for three days consecutively. This expiation is based on the Qur'ānic verse Vs89. (29) If he has mentioned any particular penalty in his vow, then the expiation is the performance of the same. Thus, for instance, if he had stated that on breach of his vow, that is, on cohabitation, he shall perform Hajj, or shall fast or will give something in charity, then he shall have to discharge the Ḥiḍā' by performing the specified expiation. (30) The husband's declaration that he has made the expiation shall be considered sufficient without any proof of the same.

"**Nature of Divorce by Ḥiḍā'**":—

Under the Imam Hanafi law, the divorce that is effected by Ḥiḍā' amounts to an irrevocable divorce. (31) But according to Imam Malik and Shafi'i and Ahmad ibn Hanbal it would
amount only to a Raj'i or revocable divorce. A divorce by the Qazi shall also amount to one revocable divorce. According to Ahmad bin Hanbal, as certain reports say, it would amount only to a Raj'i or revocable divorce. A divorce by the Qazi shall also amount to one revocable divorce. According to Ahmad bin Hanbal, as certain reports say it would amount to an irrevocable divorce.

Shi'ah Law:- The Shi'ah law can be discussed under three main heads namely.

(a) The husband pronouncing 'Ilā' called muti,
(b) The wife, and (c) The Vow.

(a) **Husband**:- The husband who takes an 'Ilā' vow should be major, sane and should possess understanding. He should be acting under his free will and should pronounce the vow with an intention to exercise 'Ilā'.

(b) **The wife**:- The woman must be the lawfully married wife of the person taking the vow at the time of the Ila. There can be no 'Ilā' in respect of a woman married in mut'ah form, that is by a temporary marriage. Further, the marriage must have been consumated.

(c) **The Vow**:- The vow of 'Ilā' must be in the name of Allah and cannot be made merely by a declaration. It cannot be made for four months but the period should exceed it. It must absolute and either for an indefinite period or for a period exceeding four months. The vow cannot be made to depend on a condition or to take effect at a future time.
If a man who is ill takes an Īlā' vow with the intention to avoid cohabitation with his wife during the period of his or her illness then it shall not amount to Īlā'. It is not necessary that the vow should be taken in Arabic. (38)

**Conceallation Under Shi'al Law:**

Under Shi'ah Law if the vow relates to a definite period then it abates on the expiry of the specified period when the husband can approach his wife without incurring any penalty. The vow cannot be cancelled by speech but can be cancelled only by cohabitation. (39) If a man is temporarily unfit for cohabitation then he can cancel Īlā' by speech, but he should declare that he will cancel the Īlā' by cohabitation when he is able to do so. (40)
(34) Shami; op.cit, II, pp. 59, 92.
(35) Al-Fatawa al-Hindiyah, op.cit, II, p.127
(36) Ibid; p. 126.
(37) Al-Mughni, op.cit, VII, p.349 (38) Ibid.

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(1) Al-Hedayah, Delhi, II, p.381.
(2) Shami, op.cit, II, p.507. (3) Jung-66.
(5) Al-Mughni, VII, p.278.
(7) Sayeeda Khanam vs Mohd Saleem; P.L.D. 1952, Lahore p.113 to 119.
(9) Shami; op.cit, II, p.560.
(10) Shami; op.cit, II, p.560. (11) Ibid.
(20) Hedayah; op.cit; II, p.382; Shami, op.cit, II, p.565.
(21) Fatawa al-Hindiyah, op.cit, II p.113; Shami, II P.563.
(22) Ibid. (23) Ibid.
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(1) Qur'an, XXXIII:4, Surah, Al-Ah'zab.

(2) Qur'an, LXIII:2-4, Surah Al-Mujadilah.


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(8) Ibid. (9)Ibid. (10) Ibid. (11) Ibid.


(13) Shami op.cit; vol. II. p.590.


(15) Al-Fatāwa al-Hindiyah op,cit; vol. II. P. 126.

(16) Ibid; Shami, op.cit; v. II, p. 589.


(18) Ibid; Shami op.cit, II, p. 589.


(20) Al-Fatawa al-Hindiyah, op.cit; II, p.127; Shami, op.cit; II, p.589.

(21) Shami; op,cit; II, p.589. (22) Ibid; p. 589.


(28) Al-Hedayah, op.cit.; II, pp. 381-82.
(32) Ibn Rushd, op.cit.; II, p. 84; Al-Mughni, op.cit., II, p. 331.
(33) Ibid.
(35) Ibid.
(37) Ibid.
(38) Ibid.
(40) Kitab Shara'i, al-Islam, op.cit; p.229.
Section 23(2) of the Hindu Marriage Act and section 34(2) of the special Marriage Act enjoin upon the court dealing with matrimonial proceedings to make endeavours to effect reconciliation between the parties in consonance with the nature and circumstance of the case. Despite the mandatory provisions, in practice it is done only perfunctorily, the reasons being lack of time at the disposal of the court and non-existence of proper machinery to assist the court.

To overcome the procedural difficulties which obstruct the court in carrying out the objectives of attempting reconciliation between the spouses during the trial, the law commission has proposed an additional clause in section 23 of Hindu Marriage Act. The suggested clauses reads:

For the purpose of aiding the court in bringing about such reconciliation, the court may if the parties so desire or if the court think it just and proper so to do, adjourn the proceeding for a reasonable period not exceeding fifteen days and refer the matter to any person named by parties in this behalf or to any person nominated by the court if the parties fail to name any person, with direction to report the court as to whether the reconciliation can be and has been effected, and the court
shall, in disposing of the proceeding have due regard to the report. (12)

The court ought to be empowered with wide discretionory power while dealing with matrimonial cases. In C.V.C (13) and S.V.S (14) opportunities were given to the parties to make an attempt at reconciliation and the case were also adjourned for the purpose, but the court had no power to issue an injunction with regard to any particular course to be followed. The problem become more intricated where one of the spouses is keen on having conciliation and the other is nonehevnt. The peremtory duty of the court loosing its significance and it cannot be performed realistically unless a series attempt has been made by the court to ascertain whether reconciliation can be effected. Consequently in England for the effective implementation of the provision, a well devised machinery was attached to the court (15). According to this machinery, cases where there is a possibility of reconciliation are refered by the court and the welfare officer has direction to refer the case to a probation officer or to a qualified marriage consellor recommended by the branch of appropriate organisations concerned with marriage guidance or to some other oppropriate person or body indicated by the special circumstances of the case.

A comprehensive arrangement has been designed under section 3 of the Divorce Reform Act, 1969 (and
carried on to section 6 of the Matrimonial Cases Act, 1973) to promote reconciliation between spouses. A Solicitor is required to certify that he has not only discussed with the parties about the chances of reconciliation but has provided them with the addresses of qualified person.\(^{(16)}\) And the court is empowered to adjourn the case at any stage of the proceedings to consider the possibility of conciliation between the parties.\(^{(17)}\) Similarly, parties are encouraged to attempt reconciliation in certain circumstances by living together for a limited period without jeopardising to right the petition for divorce in case the attempt at reconciliation is failed.\(^{(18)}\)

Like wise, most of the states in the U.S.A. have provisions for statutory and voluntary conciliation services attached with the court. The conciliation counselling has become an intergd and indisposible part of divorce of laws. It provides safe guards against easy divorces and preserve the stability of marriage.

However, the law commission's recommendations with regard to the adjournment of the matrimonial case for fifteen days and reference of the matter for the purpose of conciliation to the person either nominated by the court or suggested by the parties will not help to achieve the desired purpose of conciliation between the parties. Fifteen days time for identify the delicate
problem of Duputed marriage is very short and one man's arbitration is too sufficient to resolve the acute differences clearing a part of the spouses, Who are mostly in need of sympathetic and patient hearing to aid their grievances against each other. Moreover, with respect to the choice of an arbitrator, it is very difficult to expat two erring parties to choose the same person.

In view of the proposed suggestion of the law commission relating to section 23 of the Hindu Marriage act, it is suggested that the services of conciliation bureaus are required to check the inflation, if any, in the divorce rate after the liberalization of ground of divorce. After the filling of petition, the case should be referred by the court to well constituted conciliatory statutory board attached to the court. The proceeding of the case be commenced after the receipt of the report of the conciliatory board. The report should be treated as a secret document except where its disclosure is the necessary in the interest of the parties. The informal atmosphere of conciliatory counselling help to bring the parties together in finding out amicable solution of their problem by easing of tensions and reduction of hostilities. step should be taken to encourage the setting up of voluntary and statutory conciliatory agencies to better the union by harmonizing the logs of discordant marital machinery.
In Western Countries also during the past decade a number of modification have been introduced to make the divorce law adjustable to the current need of the society. Prior to the passing of the Divorce Refrain Act, 1969 in England like other Countries, the concept of matrimonial offence was the basis of divorce. The Divorce Reform Act, 1969 aimed at adopting a realistic view of what conses married people seek divorce by dispensing with the time warm concept of matrimonial offence. In the Divorce Reform act, the various of divorce dealing with matrimonial offences were replaced by sale non-fault ground of irretrievable break down of marriage. Nevertheless, that the marriage has irretrievably broken down five guidelines. The party seeking divorce has to establishing one or more of the following five guidelines.

(a) That the respondent has committed adultery and petitioner finds it utolerable to live with the respondent

(b) that the respondent has behave in such a way that the petitioner cannot responsibly be expected to live with the respondent,

(c) that the respondent has deserted for a continous period of at least two year immediately preceeding the presentation of petition

(d) that the parties to the marriage have lived a part for a continuous period of at least two year immediately
preceding the presentation of the petition and the respondent consents to a divorce being granted;

(e) that the parties to the marriage lived apart for a continuous period of at least five years immediately preceding the presentation of the petition. (19)

The incorporation of irretrievable breakdown as the grant for the divorce in the divorce law is based on the fundamental assumption that the aim of a good divorce law are to strengthen the solidarity of marriage and when "regrettably a marriage has irretrievably broken down, to enable the empty legal shall to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation. (20)

In both the Hindu marriage act or the Special Marriage Act, to some extent the irretrievable breakdown of marriage as a ground for divorce and partial non-fault element is preceivable. (21)

Under the Special Marriage Act, mutual consent of the spouses as one of the ground for divorce is an evidence of the fact that marriage has irretrievably broken down. Similarly the amended section 13(1A) of the Hindu Marriage Act. Vouches for the introduction of non-fault element in that act under section 13(A) either party to proceeding is given a right to ask for a decree of divorce if there has been no resumption of cohabitation
for a period of two year or more after the passing of divorce of restitution of the conjugal rights are judicial separation, irrespective of the fact that in whose favour the initial decree was passed.

The traditional concept of granting divorce only to the innocent party against a matrimonial wrong committed by the other is giving way to the rational view that when the breakdown of marriage has reached the saturation point and it is no longer possible to tie down together two warring partners, the remedy dissolution of marriage be made available to either party to marriage without declaring any one of them to be responsible for the breakdown.
REFERENCES

(1) Supra note 8 at 82-83.
(2) (1967) 1 All E.R. 928.
(3) (1976) 3 All E.R. 139.
(4) See Practice Direction, (1967) 1 All E.R. 894.
(5) See also clause iv of S.3 of the Divorce Reform Act, 1969.
(6) Clause (2) of S.3 of the Divorce Reform Act (now S.6 of Matrimonial Causes Act 1973) empowers the Court to adjourn the proceeding for such period as it deems fit to enable the parties to effect reconciliation.
(7) Attempts at reconciliation are encouraged by allowing the parties to live together enable the parties to effect with prejudicing the right to Divorce by clause (3) of Section.3 of the Divorce Reform Act. Where the parties to the marriage have lived with each other for any period or periods after it become known to the petitioner that the respondent had, since the celebration of Marriage, committed adultery then,-
(a) if the length of that period or those period periods together was six months or less, their living with each other during that period or those periods shall be dis regarded in determing for the purposes of S. 2(1)(a) of this Act whether, the petitioner finds it intolerable to live with the respondent,
(i) if the length of that period or of those periods together exceeded six months, the petitioner shall not be entitled to rely on that adultery for the purposes of said S.2(1)(a).
(4) Where the petitioner alleges that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him but the parties to the marriage have lived with each other for a period or periods after the date of the occurrence of the final incident relied on by the relived on by the petitioner and held by the court to support his allegations that fact shall be disregarded in determing for the purposes of Section 2(1)(b)
of this Act (1974) whether the petitioner cannot reasonably be expected to live with the respondent if the length of that period or of those periods together was six months or less. These provisions are now incorporated in S.2 of the Matrimonial Causes Act, 1973.

(8) These guidelines are now enumerated under S.1 of the Matrimonial Causes Act, 1973.

(9) Justice V.S. Deshpande; Divorce under the Hindu Marriage Act, A.I.R. 1971. (Journal) 113 at 114.

(1) As stated before, the legal rights and obligations of the parties against each other in a Muslim Marriage are governed by the law of contracts. A husband has got the right to terminate the marriage by divorce. The wife can also exercise this power under certain conditions. It is, therefore, necessary, as in other civil contracts, that they must possess the capacity to act in the matter.

The Muslim Jurists classify the circumstances which affect the capacity or incapacity of a person to act into two categories, namely, Samawi and Maksubah. The former means what may be cited an act of God, that is, circumstances created or brought about by one himself. Some instances of the conditions belonging to the former category are linnarcy, sleep, fainting, fit etc. Such conditions as ignorance of law or facts that the voluntary drunkenness, mistake etc. are instances of the second category. (1) A person can generally has no hand in bringing about the condition of the former class, but the bringing about of circumstances of the latter class is attributed to him or her. Hence a divorce pronounced under the former condition is not considered effective while a divorce pronounced in the latter condition is considered effective.

(II) The tradition given below deal with a man's capacity
to exercise the power of divorce:

1. A'ishah reported, "I heard the Holy Prophet (peace be on him) say: There is no divorce and no emancipation by force."  
2. Ali reported that the Prophet (peace be on him) said: 'Pen has been lifted from the three the sleeping man till he is awake" a boy till he attains maturity; and an insane person till he recovers his senses.
3. Abu Hurayrah reported that the Prophet (peace be on him) said: "Every divorce is lawful except the divorce of the lunatic and of one who has demanded."  
4. Abu Hurayrah has also reported that the Prophet (peace be on him) said: There are three things of which the serious is serious and the frivolous is serious, namely, marriage, divorce and rajaa.

III Under Muslim Law two condition must be satisfied before a person can lawfully dissolve a marriage. He or she must be major and should possess understanding. If one of these conditions is not fulfilled, he or she shall not be competent to dissolve a marriage. In case of divorce by the husband, intention is not considered a necessary condition for valid pronouncement by the Sunnis, if the husband uses the word Talaq. If however, the pronouncement of divorce is ambiguous then it will be necessary to ascertain the husband's intention. But there is a difference of opinion amongst the Sunni Jurists in respect of several matters as has been discussed at relevant
places in this thesis. Some of them are such as involve hardship to the parties or at least to one of them. The provisions of the Pakistan Muslim Family Laws Ordinance, 1961, provide against the undesirable aspects of divorce given in certain special circumstances. Thus Section 7 (1) of the ordinance makes it incumbent on a husband who divorces his wife to give information of his action to the chairman of the Union Council of his ward and to send a copy of it to his wife. It reads as follows, "Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the chairman notice in writing of his having done so, and shall supply a copy thereof to the wife." Subsection (3) states, "Save as provided in sub-Section (5), a talaq, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under sub-section is delivered to the chairman."

(IV) As has been stated in the beginning of this chapter, the Prophet (peace be on him) has not sanctioned the validity of divorce by force. But in course of time the Hanafi Jurists have held that a divorce under compulsion is valid. (7)

Under the Maliki, Shafi'i and Hanbali laws choice is an essential condition for pronouncing the word Talaq a (divorce). A marriage, therefore, cannot be dissolved by a divorce
pronounced under coercion. (8) Under Shi'i Law majority, understanding, intention and free will are essential conditions for the valid pronouncement of a divorce by person. A divorce shall not be deemed valid if even one of these four conditions is not fulfilled. (9) Hence, a divorce under the influence of drink or sleep as under compulsion or when pronounced without understanding the meaning of the words pronounced, or under fraud and the like will be absolutely ineffective. In view of this basic principle, of law, it has not been considered necessary to discuss the Shi'i Law under the various Sunni rules.

(V) A divorce is considered to be the sole act and right of the husband and generally speaking the wife has no hand in a divorce by the husband. It can be pronounced even against her wishes and so the wife's capacity is of no consequence. It is not, therefore, necessary that she should be major or should possess understanding.

Ameer Ali has stated, "Both School insist that the formula or sighn, by which the talaq is pronounced, should in every case be understood by the wife. It would seem to follow, therefore, that when she is of such tender age as to be unable to comprehend the legal consequences following from the act of repudiation, or does not possess discretion (rushd), a valid talaq cannot be effected against her. The Shi'ah Nail-ul-Maram requires akl(sound
understanding) on both sides for the effectuation of proper repudiation."(10) It is submitted that as far as the Sunnis are concerned, this view does not apply to them and there is no such provision under the Sunni law. But the point of view expressed by Ameer Ali is a sound one and it should have been the duty of our law-givers to give due consideration to it. It is whenever, no longer necessary to do so as the child marriage restraint act prohibits the marriage of a girl below fourteen years of age.(11) The Muslim family laws ordinance, 1961, in force in Pakistan, has increased the age to sixteen years.

(VI) The question of capacity is a very important one and some important aspects relating to it are there fore, discussed below:-

(a) Majority:- Majority is a necessary condition under Muslim law in respect of a man's capacity to divorce his wife. A minor is not compe-tent to exercise that power even if he may be possessed of understanding.(12) Hence; a divorce by him would be ineffectual even when he confirms it on attaining if therefore, on attaining majority he wants to persist in the divorce, given by him when he was a minor, he must give a fresh divorce to his wife.(14) A divorce by a boy or a minor is not considered valid for two reasons. Firstly, because the Prophet (peace be on him) has said; Every divorce is lawful except that of a boy, that is, a minor or lunatic.(15) Secondly, because a
man's capacity to act depends on his possession of a sound judgment. Which is presumed lacking in the case of minor. The guardian of a minor also cannot divorce a minor's wife on his behalf.\(^{(16)}\) If does so, the divorce will be ineffective and the invalidity cannot be cured even if the minor assents to it an attaining majority.\(^{(17)}\) Majority, age of: Majority of a boy or a girl with regard to his or her capacity in the matter of dissolution of marriage shall be determined according to the age fixed under the Muslim Law and not according to the Majority Act.\(^{(18)}\) Shi'i Law:- Shi'i law is the same as the Sunni Law with regard to the condition of puberty or majority. But under that law the guardian of a minor can divorce the minor's wife on his behalf if the minor is deficient in understanding and the divorce is in the interest of the minor.\(^{(19)}\)

(b) Understanding:- It has been seen above that it is an essential condition of divorce that the husband should possess understanding. If he is divoid of it as when he is insane then he not held responsible for his acts and so a divorce pronounced by him shall be ineffective.\(^{(20)}\) Want of understanding however, means complete loss of intellect so that the person cannot understand the nature of his acts. But the mere fact that he cannot fully appreciate the consequences of his acts is not sufficient to bring a person with him the exception.\(^{(21)}\)

The effect of understanding on the dissolution of marriage
can be considered from three aspects, namely, when the husband is (i) Completely devoid of understanding or (ii) is suffering from a temporary loss of understanding or (iii) when he possesses a weak intellect

(1) Lunatic: A divorce by a lunatic is not effective. Two reasons are given for this rule. The first is that the Prophet (peace be on him) has said, Every divorce is lawful except that of a boy or a lunatic." The second is that a man's competency to divorce depends on his possession of a sound judgment which is wanting in the case of lunatic.

Idiot: The word "Lunatic" is used here in a general sense and includes an "Idiot."

(II) Temporary loss: By want so less of understanding is not meant only a permanent loss of that faculty but even a temporary condition of insanity can bring a case within the exception to the general rule that every person can divorce his wife. This exception, shall held good only during the period the condition lasts. A divorce by person having lost his understanding for the time being due to some cause in Muslim Law possession of understanding is an essential condition for competency to divorce. This rule holds good both when the husband is a lunatic or has temporarily lost his understanding.

Lucid interval: A divorce given to fits of lunacy shall be considered a lunatic for the purpose of this rule during the time when a fit is on.
But he shall be considered to be same when he is free of a fit so that a divorce pronounced during the period of lunacy shall be effective.\(^{(22)}\) Hence, if a person, while in a lunatic interval, pronounces a conditional divorce to be effective on the happening of a certain event and he then becomes insane the divorce would become effective under the Sunni Law on a happening of that event whatever be his condition at the time of the happening of the event.\(^{(28)}\)

(iii) **Person of weak understanding:** The mere fact that a person cannot fully appreciate the consequences of his acts is not sufficient to bring a case within the exception and divorce pronounced by a person of weak intellect is not invalid but is binding on him.\(^{(29)}\) Such a person is not completely devoid of understanding and so his case differs from that of a lunatic. If a person is a weak intellect then it is to be seen if the majority of his acts are normal or not. In the former case he shall be considered to be a normal man and his acts to be binding on him, but in the latter use he shall be considered to be insane and so not bound by his acts. The result is that a divorce pronounced in the former case shall be binding on him but not in the latter case.\(^{(30)}\)

(c) **Divorce under influence of sleep:** It has already been seen that sleep is a condition which is not brought about by man himself. He is, therefore, not held responsible for an act done by him while under the
influence of that condition because the act is done without any volition on his part. A divorce uttered by a person under the influence of sleep shall not be effective.\(^{(31)}\) A person cannot be aware of the words uttered by him in his sleep and they are not the result of volition.\(^{(32)}\) This rule of law is based on the tradition that the Prophet (peace be on him) has stated that three classes of persons are not responsible for their acts, namely, a minor till he attains puberty, a lunatic till his recovery and a person who asleep till he wakes up.\(^{(33)}\) A divorce would be ineffective even if he says, on waking up to his wife. "I divorce you in my sleep."\(^{(35)}\)

(d) **Divorce under the Influence of drink:** If a person gets intoxicated by drinking some fermented liquid the question arises whether a divorce pronounced by him while in that condition would be effective or not. A general rule of law is that if a person gets drunk by the use of any liquor, prohibited by Muslim law, then any act done by him, while under the influence of that drink shall not be excused but shall be held to be effective. Thus, if he divorces his wife while drunk, or sells something, enters into an agreement, borrows or lends money, all these acts shall be held valid and binding on him. This rule is based on the ground that as the cessation of his reason is due to the committal of a sinful act, namely, drinking of an intoxicant liquor, it shall be presumed that he is still possessed of his reason. The Qadi's order shall be held
effective on the above ground. Al-Radd al-Muhtar has stated another general rule of law in respect of the effect of pronouncement of divorce while under the influence of drink. It is laid down that what is to be seen in such a case is whether the drink has assumed a form the use of which is forbidden by Muslim law. If it has reached that stage then a divorce pronounced under its influence is effective. But if it has not reached that degree then a divorce pronounced under its influence shall not be effected. The underlying idea is that a drink that has undergone a certain amount of fermentation but has not yet be come intoxicating would not come within the prohibition. If a person drink such a liquor and happens to get intoxicated and divorces his wife under the influence of the intoxication then the pronouncement of divorce shall not be given effect to. If the liquar has, however, reached a high degree at intoxication, so much so that its use is not permitted by Muslim Law, and should a person drink it and then get intoxicated and should a person drink it and then get intoxicated and should he divorce his wife while in that condition, then the pronouncement of the divorce shall be given effect to. It must be noted here that in the first instance he was not guilty of the breach of any provision of Muslim law while in the other case he does commit a branch of provision of Muslim Law. Hence, a divorce pronounced under the influence of grape-juice, if it has not become wine, shall
not be effected. But a divorce shall be effected if the juice has became wine. It may be noted here that the basic principle is that a divorce pronounced when a man is not possessed of understanding is not held to effective. Thus, a divorce given by a husband while suffering from insanity is absolutely ineffective. But a divorce given while a person is devoid of understanding under the influence of drink is held to be effective simply by way of punishment for the breach of the law restraining the use of strong liquors in order to discourage its use. The matter may be considered from two aspects:

(i) When a person gets intoxicated involuntarily and
(ii) When he gets drunk voluntarily.

**Involuntary Drinking:** If a person is made drunk against his will as takes liquore from necessity as under medical advice and then gets in-toxicated and repudiates his wife while under its influence then the divorce shall not be effective. This rule is based on the principle that his act was not voluntary and he cannot be held responsible for drinking in such a case. If follows that the pronunciation of the divorce by him too would not be effective. Some jurists hold otherwise but the former opinion is generally accepted as correct and is more reasonable.

**Voluntary Drinking:** Hanafi view There is a difference of opinion about the effect of the pronunciation of divorce when the husband is in a state of inebriety from voluntary drinking. Some jurists are of the opinion that the matter
should be considered with regard to two distinct stages of intoxication. If the husband pronounce a divorce when slightly intoxicated so that he can realize the effect of his acts then it would be effected.\(^{(40)}\) But if he pronounce if while dead drunk so that he cannot distinguish between right and wrong, then the divorce would not be effected.\(^{(41)}\) It is stated in al-Hidayah and other books that if a person were to drink wine or some other fermented liquor in such a large quantity as to produce delirium or inflammation of the brain, thereby suspending his reason and while in the condition he pronounces a divorce then it shall not take effect.\(^{(42)}\) Uthman bin Affan holds that the pronouncement of divorce by a person under the influence of drink is not effective.\(^{(43)}\) Opinions differ amongst the Hanafi Jurists about the degree of intoxication which would absolve a person from responsibility for his acts while in that condition. According to Abu Hanifah the person should be drunk to such a degree as to lose all understanding so much as to be able to differentiate between the sky and the earth\(^{(44)}\) Abu Yusuf and Mohammad are less exacting in the matter. They consider that a person shall not be held responsible for his acts if he is drunk so much as to bring about a suspension of his reason so that he is not able to have control over his speech as in a delirium.\(^{(45)}\)

According to al-Bahr al-Raiq the rule laid down by
Imam Muhammad and Abu Yusuf is to be followed. Ibn al-Humam holds that the opinion of Abu Hanifah shall be applicable for awarding punishment while the opinion of the latter will hold good in cases of divorce. He explains in al-Tahir that the drink referred to by Abu Hanifah is the drink the use of which will make the person liable to punishment while the drink referred to by Imam Muhammad and Abu Yusuf is the drink the use of which will not subject the person to punishment but to other liabilities and means only the drink under the influence of which the person shall lose control of his speech and may talk wildly. Of course it is not necessary that the whole speech should be meaningless or irrational. In his commentary of al-Tahrir, Ibn Amir al-Hajj explains that what Ibn al-Humam meant is that the greater portion of the speech should be meaningless and only a small portion should be rational. If on the other hand, the greater portion of the speech should be rational and only a small portion wild and meaningless, he shall be considered to be possessed of understanding. A pronouncement of divorce by him shall, therefore, be effective. Their reasoning is that the reality of intention is connected with the exercise of reason which is suspended during such intoxication and so divorce pronounced under such a condition would be ineffective. Tahawi and Kerhki are of the opinion that a divorce given while a man is drunk is wholly ineffective. It is stated in the Tatar Kaaniyah
that this is the generally accepted view. But Al-Radd al-Muhter opposes this view regarding voluntary drinking. (50) It states that it shall be presumed that the speaker is still possessed of reason and so his pronouncement of divorce shall take effect in order to deter him from drinking liquor which is forbidden. It is clear from line of reasoning that the divorce is held valid to discourage drinking rather than on account of his capacity to pronounce a valid divorce while in that condition.

The majority of Hanafi jurists follow the rule stated by Abu Yusuf and Muhammad. It is also the view of the other three Imams, namely, Malik, Shafii and Ibn Hanbal. It finds full support in a dictum of 'Ali that a drunkard is one who begins to talk irrationally and wildly. It is the view which is generally accepted as correct. (51) But the Fatawa al-Alamgiriyyah makes no distinction between the stages when a husband is only slightly drunk and when he is drunk to such an extent as to lose his understanding and the divorce pronounced by a person under the influence of wine or other fermented liquor is held to be effective. (52) It is stated in Al-Bahr al-Ra'iq that a divorce given under the influence of drink shall be effected irrespective of the fact whether the drink was taken voluntarily or under compulsion. (53) A different view has, however, been
expressed in the Fatawa Qaḍi Khan where it is stated that the divorce given under the influence of drink, taken under compulsion or from any necessity shall not be effected. The Tuhfah supported by fath al-Qadir also preferred the opinion stated in Tuhfah al-Fugaha given in al-Muhit.

Maliki law: The Malikis do not consider a divorce pronounced under the influence of drink to be effective if the husband is drunk to such an extent as not to distinguish between right and wrong.

Hanbali Law: Ahmad b. Hanbal at one time held the same opinion as expressed by Malik and considered that a divorce by a husband when he is drunk to such an extent as not to understand what he is talking is not effective. He expressed a different opinion at other times, but finally he left the matter open on the basis that the matter was not clear as there was a difference of opinion on this point amongst the companions themselves, and that every case has to be decided on its merits. His disciples too are not agreed in this matter. Thus Abu-Bakr al-Khilal, a very well known Hanbali jurist, holds a divorce, pronounced under such a condition, to be effective while Abu Bakr Abd al-'Aziz, an equally famous Hanbali jurist hold otherwise.

Shafi'i Law: Shafi'i's expressed different view at different times. At first he held that a divorce
pronounced when one has temporarily lost one's reason under the influence of liquor is not valid and is ineffective. He based this view on the ground that the drink might have produced delirium or inflammation of the brain to such an extent as to make him devoid of reasoning faculties. He justifies this opinion on the ground that the divorce pronounced by a minor is not effective because he does not possess understanding and the same rule shall apply here. His second ground is that divorce under the influence of bhang(hemp) is not effective and there is no difference in the use of bhang and of a fermented liquor as both produce the same result, namely, temporary loss of reason. The third reason is that apostasy under the influence of drink is not permitted and the same rule shall apply here. The Hanafis have explained that Allah has permitted divorce and there is no exception in the case of a divorce given under the influence of drink. In case a divorce by a minor or a lunatic, it is not effective for want of understanding. They have not violated any rule of Muslim law, but in case of drinking the husband has been guilty of an offence and so his divorce shall be held effective by way of punishment. The use of bhang is not an offence and so it has no application here. The case of apostasy is also inapplicable because these an attempt is made to save him from renunciation of Islam while here the husband has to be punished to discourage drinking. Without entering
into the merits of statements, it may be stated that Shafi'i subsequently changed his opinion and held divorce given under the influence of wine to be effective (61). If a drink then fermentation acts in after some time. If a person consumes it in that condition or when it has fully become an intoxicant, gets drunk and pronounces a divorce then there is a difference of opinion about the matter. Muhammad al-Shaybavi holds that divorce in such a case shall be effected, while Imam Abu Yusuf has expressed the view that it shall not be effected (62). Fatawa Qadi Khan has followed the latter view while al-Bahr-al-Ra'iq has adopted the former view (65). Al-Bazzaziyah has stated, "in over times it is necessary to penalise the consumption of such drink and so divorce should be held to be effected" (64). Influence of Bhang (Hemp). The divorce of person in toxicated with Bhang (Hemp) is held to be ineffective by various Muslim Jurists as also in the Fatawa Qadi Khan and al-Tahrir. It is stated in al-Bahr al-Ra'iq that a divorce given by a husband while he is under the influence of Bhang (Hemp) shall not be effected. The author, however, suggests that it would be proper to differentiate between the two cases, namely: (a) when it is taken for pleasure and (b) when it is taken as medicine (65).

A divorce shall be effected if bhang or opium is taken for pleasure, but it shall not be effected it either is taken by way of medicine (66). It is stated in Al-Radd
al-Muhtar referring to al-Jawahir that in these times a divorce given by a husband while in a state of intoxication of bho' nij (hemp) or opium shall be held effective in order to discourage the use of these intoxication.\(^{67}\) Fatawa, Alamgiriyah also holds it to be effected on account of the frequency of this act among people and on this is the fatawa (dictum) in our times.\(^{68}\) Ameer Ali remarks, "Just be-fore this rule the contrary was stated from the Tahzib, Showing clearly the change in the interpretation and application of the law according to the change of times and social condition. This conception of the law is last sight of in the British Indian Courts.\(^{69}\) A different view has been expressed in al-Mutanah Marramah al-Khazanah where it is given that a divorce pronounced under the influence of bhang (hemp) shall not be effected. This view is based on the reasoning that a divorce pronounced when a man is not possessed of understanding is not held to be effective. Thus a divorce given by a husband while suffering from insanity is absolutely ineffective. But a divorce given while a person is devoid of understanding under the influence of drink is held to be effective simply by way of punishment for the breach of the law restraining the use of strong liquor in order to discourage their use. This view is based on the reasoning that a person loses his understanding under the influence of bhang but the use of drink or fermented liquor does not necessarily produce this effective.\(^{70}\)
By Agent When Drunk:- There is a difference of opinion about the effect of a divorce pronounced by an agent, appointed to pronounce a divorce on behalf of the husband against his wife when the agent is drunk. It is given in Al-Fatawa at-Hindiyah from Tatarkhaniah have some jurists hold it to be ineffective while many others hold it to be effective. The compilers of 'Alamgiliyah have not expressed any opinion of their own. It is stated in Ashbah that such a divorce would not be given effective to while Bazaziah makes a distinction between divorce given by the agent for consideration or without it. It shall not be effective in the former case but shall be effective in the latter use. This view seems to be based on the reasoning that in the former case he has to judge the propriety of the consideration which being intoxicated, he may not be able to do. But he has not to make any such decision in the case of divorce by the husband. This view leads to the result that a divorce by the agent will be effective if his authority is unconditional but will not be effective if it is subject to certain conditions. But if the agent has to pronounce the divorce under certain conditions then he may not be able to judge about the effectiveness of the conditions, that is if they have been fulfilled and so a divorce by him while drunk should not be held effective.

Shi'i Law:- Shi'i Law a divorce given by an agent under the influence of drink will not be held valid for want of
intention.

There is great difference of opinion about the effectiveness of a talaq (divorce) pronounced under compulsion not only amongst the various schools of Muslim law but also amongst the Sunni jurists themselves. Abu Hanifah, Abu Yusuf and Muhammad held a divorce given under compulsion to be effective. They jurists this opinion on two grounds, first, that divorce is the result of necessity. In the case of a person not under compulsion it is the necessity to separate from a wife who may be odious or disagreeable to him, while in the case of compulsion the necessity is to save himself from the apprehension of that with which he is threatened. Hence, according to them there is no difference between the two cases and so a divorce under compulsion is effective. The second ground advanced is that the husband who is coerced into pronouncing a divorce cannot be held to have no option for he does possess a choice. He has a choice between two evils, one, the thing with which he is threatened and the other the divorce under compulsion and viewing both he makes a choice and this proves that he has an option. (73) Hence, according to them, there is no difference on principle between a divorce pronounced of free will and one given under compulsion and so the latter is as effective as the former. They further rely on a tradition that a person approached the Prophat (peace be on him) and stated that he was sleeping when his wife sat on his chest
and treatened to cut his throat he pronounced the divorce three which he did for fear of his life. The Prophet (peace be on him) said that a divorce had been effected and the husband could not revokc it. Compulsion has been defined by Hanafi jurists to mean the act as speech of a person that affects another person so much as to force him to do the act demand of him against his will. The threat may be caused by speech or conduct. It usurps the free will of the person threatened but not his capacity to do the act demanded of him. The essentials of a threat are:

(a) The person who threatened should be in a position to carry it out.

(b) The person threatened should be under the conviction that the Threat would be carried out unless he complies with the demand.

(c) The threat should relate to something serious such as loss of life, limb, grievous hurt or blows or imprisonment either of himself or of a person closely related to him. But if the threat is directed against a person who is not closely related to the husband and the latter repudiates his wife in order to avert the danger from the said stranger then the repudiation shall take effect.

(d) The person threatened would not do the act in absence of the threat.

(e) The husband be not in a position to save himself from
the threatened act.

The other sects of Sunni jurists, namely, Imam Malik, Shafi'i and Ahmad b. Hanbal rely upon a precept of the Prophet (peace be on him) that God will not held a person responsible for acts and omissions done through forgetfulness under compulsion. Aishah, the wife of the Prophet (peace be on him) has also reported. "I heard the Messenger of Allah say. There is no divorce and no emancipation by force." There are several other traditions of the same effect. Thus, it reported by Ibn 'Abbas that the Prophet (peace be on him) said that Allah forgives a person for an act done by him under compulsion. Abu Dharr al-Ghifari and Abu Hurayrah have reported that the Prophet (peace be on him) said that Allah forgives the acts and deeds done by a Muslim by mistake or through forgetfulness or under compulsion. The tradition relied upon by Abu Hanifah and others in this connection relates to a particular incident and does not lay down a general rule of law. The Prophet's interest in the well-being of women is well known and he must have concluded that it must have been a very unhappy marriage or that the husband must have been very cruel to his wife that forced her to take such a serious step to regain her freedom and so he must have declared that particular marriage to have been dissolved under the peculiar circumstances of the case. The tradition relied upon by the order group of jurists lay down a general rule of law
and must be followed in preference to the other tradition relating to a particular incident, moreover, the opinion that such a divorce is effective is opposed to public policy, equity and good conscience. It has been laid down by Sulaiman, J. (as he then was) that where there are two opinions on a point of Muslim law, the rule of equity, justice and good conscience should be that guiding principle.\(^{(82)}\) This principle of law applies with equal force to the use of a divorce under compulsion. The courts have generally applied the rule laid down by Abu Hanifah and others to the Hanafis and have held that the pronouncement of a divorce is effective at through it has been given under coercion. Thus it was held in an early case the according to Muhammadan Law, as laid down in Al-Hidayah the divorce of one acting upon compulsion from threats is effective.\(^{(83)}\) The privy concil has expressed the same view.\(^{(84)}\) The Calcutta High Court has also taken the same view and has stated that according to the Hanafi school of Law a pronouncement of divorce is effectual although it has been made under compulsion.\(^{(85)}\) The matter again came up for decision before the Allahabad High Court in 1945. Sulaiman J. pointed out that the Hanafi jurists are not unanimous in holding such a divorce to be effective and such a divorce is against public policy.\(^{(86)}\) It is time that the court should reconsider the matter as there is no reasonable ground for accepting the validity of such a divorce.
As stated before, when there is a difference of opinion amongst the Sunni jurists, it is open to a Qaḍi, if he is possessed of certain qualifications, to adopt any one of the opinions which he considers proper in a particular case. The courts now held the same position as held by the qaḍis in former times and can therefore, take advantage of this rule to decide a case. (87)

**Shafi'i Law:** Under the Shafi'i Law, a divorce extared by violence is absolutely ineffective. (88) Shafi'i maintains that divorce given under compulsion is not effective because the husband who has been compelled to do has no optain, and no normal act of law is worthy of consideration unless it is purely optional. (89) Ameer Ali has suggested an interesting proposition regarding the pronouncement of divorce under compulsion by a Hanafi. He says, "Supposing a Hanafi, under the influence of threats and strong coercion, pronounce a talaq against his wife, and on recovering his freedom of action disavous the validity of his act and places himself under the Shafi'i rules to escape from the result of the talaq, there can be little doubt that he would be justified in doing so, and the repudiation he had pronounced would be invalidated." (90)

Maliki and Hanbali laws. Both Imam Malik and Ahmad bin Hanbal hold the same opinion that as expressed by Shafi'i and are of the opinion that a divorce under compulsion is
(91) Imam Malik, however, further adds that the husband should not have actually intended to divorce his wife while pronouncing the divorce under compulsion. This intention can refer only to his mental attitude over which there can be no compulsion and so shall result in a divorce if he so intended.

Acknowledgement under Compulsion:

The jurists are unanimous in that an acknowledgement obtained under compulsion to the effect that a person had divorced his wife is not effective. (92) This is based on the ground that in fact he has not divorced his wife but merely makes an incorrect statement to the effect, hence there having been no divorce, the wife would not be repudiated. The courts have also followed this rule of the Muslim Law. (93) This rule seems to be based on the reasoning that the oath no doubt, was taken under compulsion, but there was no compulsion when the act was done or the omission made.

There is a curious historical background to the practice of a conditional divorce under compulsion it is stated that the Abbasid Caliph discovered that people were not sincere in their oaths of allegiance to them and they, therefore, introduced a clause in the oath or "if I violate my oath then my wife shall stand divorced." This put the people in a very difficult position. There were many
people who did not like the caliphs and took the oath merely under the fear of punishment without any intention of being loyal to the caliphs. They felt very uneasy when the new clause was added to the oath because they were not honestly loyal to the caliphs and they feared that their wives would be automatically divorced on that ground. The matter of conditional divorce under compulsion was Malik who gave his futwa that a divorce under compulsion can also not be effective. This dictum led to the conclusion that a person could safely take the oath of and his wife would not be divorced on his having no real intention of being loyal to the caliph or on violating his oath of allegiance since it was under compulsion that he had taken that oath. The Governor of Madinah asked Malik to withdraw his futwa and he was even flogged but the Imam refused to change his opinion. (95)

Appointment of an Agent Under Compulsion:

The appointment of an agent under compulsion by a person for divorcing his wife is considered to be valid and a divorce pronounced by the agent to be effective. (96)

Divorce Written Under Compulsion: A divorce written under compulsion is not considered effective by all the Imams including Abu Hanifah, Abu Yusuf and Muhammad. (97) According to them writing takes the place of speech only under necessity. Here there was no necessity to write hence
no divorce shall be effected. (98)

**Divorce Under Undue Influence:** There is not much difference between compulsion and undue influence if it is exerted to such an extent as to divest the person of the exercise of his free will and in that are the same rule shall apply as to a divorce given under compulsion. But whether undue influence has been exercised is a question of fact to be determined in each case. An adult cannot be presumed to be acting under the influence of his relations, without whom he is living in the absence of any evidence to that effect. Hence, in the absence of proof to the contrary divorce given by him shall be considered effective.

**Divorce in Jest or Given Non-seriously:** It is considered by Sunni Jurists that the pronouncement of divorce is a serious thing and not a fit subject for jest. It has, therefore, been laid down that a divorce pronounced in jest would take effect even against the wishes of the husband and even when he never meant it. (99) The authority for this rule is a precept of the Prophat (peace be on him) in which he stated,"There are three things in which it makes no difference whether a man is in earnest or in jest namely, marriage, divorce and raj'aa." (100) It means that effect would be given to a man's words even when spoken inadvertently or as a joke. It is obvious that these are serious matters and a person
cannot be allowed to undo the effect of his words by saying that he was not in earnest but had uttered the words by way of joke. The Privy Council has followed this rule of law and has held that a talaq pronounced in jest is valid and effective. But a different view has been expressed in al-Fatawa al-Bazzaziah and Qiniyah and such a divorced has not been considered effective if the pronouncement refers to a past act. But if the pronouncement refers to the present time, the divorce shall be effected.

(viii) A divorce pronounced by the husband as a result of fraud is deemed by the Sunnis to be binding on him. This rule is a necessary corollary of the law that intention does not from as essential condition of divorce under the Sunni law. This rule is justified on the ground that though the husband acted under fraud in pronouncing the divorce yet the decision to divorce was taken by him voluntarily and deliberatily and need not have been taken had not the man considered some alternative such a getting some adventage as higher and more important than the divorce. If he was deceived by a false promise of some material gain or by offer of some compensation he nevertheless allowed him-self to be influenced by such offer which he obviously put above the consideration of a broken marriage. The husband has no escape from the effect there of except by the way provided by the book, that is raj'ah if possible in the
circumstances.

But there can also be cases in which the fraud is of such a nature that the man under the instigation of some mischief maker or an interested party, pronounced the divorce without understanding the significance of the words on knowing that he was there by divorcing his wife. Thus, there is an example given in al-Radd al-Muhtar" if some one teaches an illiterate person to pronounce 'Talaq' and he speaks it while addressing his wife, a divorce would be effected in law according to some jurists but others hold otherwise and have stated that not divorce would be effected so as to save people from loss under fraud."(103)

Here again the Hanafis insist that intention does not from an essential condition of divorce, since no one save God can know the secrets of a man's heart and his words and actions can be the only indication of his intention. However, this argument is not very convincing, as the establishment of the fact that a fraud had been committed on the husband coupled with the husband's statement an oath that he had no intention of divorcing his wife and would not have pronounced the divorce in the absence of the fraud ought to be deemed sufficient by the court to hold the divorce ineffective. The courts should not allow the wrongdoing party, that is, the party who has
actually committed the fraud or was privy to the same, to take advantage of his fraud.

A good deal of light it thrown on the matter by Ibn Nujayam in al-Qiniyah. It is state there in on page 181 of the lude now edition on the strength of al-Ashbah wan Nazair that if a person admists that he had divorced his wife relying on the futwa of a Mufti, but it transpires subsequently that the fatwa was incorrect and the or pronouncement of the husband had not amounted to divorce then no divorce would be effected.

(ix) **Hanafi law**, Under Hanafi Law, a divorce would be effected even when the husband pronounces it in ignorance of the meaning of the words he utters.\(^{(104)}\)

**Hanbli law**: According to Ahmad b. Hanbal, if a husband pronounces a divorce without understanding the meaning of the words the divorce shall not be effected.\(^{(105)}\)

**Shafi'i Law**: Shafi'i does not recognize the validity of a divorce given in words the meaning of which the husband does not know.\(^{(106)}\)

**Dumb Person**: The Hanafis hold that a divorce by a dumb man expressed by sings in effective when his defect is of long standing and his signs have become well-understood because sings of dumb persons are recognised in practice and admitted to stand in place of speech\(^{(107)}\) It is
stated in Al-Radd al-Muhtar and Al-Fatwa al-Alamgiriyah that in case the dumb person is literate, his repudiation would be effected by writing only and not signs.\(^{(108)}\) This, as matter of fact, is the doctrine of Shafi'i but the Hanafis have adopted it and is now considered to be the established law.\(^{(109)}\) Divorce by a husband who is capable of speaking cannot be effected by sings.

**Shafi'i Law:** Shafi'i considers a divorce given by a dumb person by signs to be valid. But such divorce by a person capable of speech is held invalid and ineffectible.\(^{(110)}\)

**Maliki Law:** If the signs of a dumb person are well understood, a divorce by him by signs shall be effective.\(^{(111)}\)

**Hanbali Law:** The Hanbali law holds a divorce given by a dumb person by signs to be effective provided his signs are well understood. If they are such that some people understand them while others do not it shall amount to a Kinayah (ambiguous) divorce. In such a case he shall be asked if he really intended to pronounce divorce.\(^{(112)}\)
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(42) Ibid., Al-Hidayah, op. cit., 11:338.
(43) Al-Bukhari, al-Jami' al-Sahih, Delhi, 1938, 11:739; Al-Bahr-al-Ra'iq, op. cit., 111:266.
(44) Ibn Nujaym op. cit., 111:265; Shami op. cit., 11:434.
(45) Ibid.  (46) Ibid., 111:266.
(47) Shami, op. cit., 11:434-35.  (48) Ibid.
(49) Ibid., Al-Hidayah, op. cit., 11:338-39.  (50) Ibid.
(51) Ibid.
(54) Qazi Khan, Fatawa Qazi Khan, Kanpur, p.219.
(60) Ibid., Al-Kasani, Ala' al-Din Abu Bakr, Bada'i' al-Sana'i', Cairo, 1324 A.H., 111:99.
(61) Ibid., 111:99-100.
(62) Bahr al-Ra'iq op. cit., 111:266.  (63) Ibid.
(64) Ibid (65) Ibid. (66) Ibid.


(69) Ameer Ali, Muhammadan Law, op.cit., 11:520, f.n.3.


(72) Shami op.cit., 11:435.

(73) Al-Hidayah op.cit., 11:338.


(75) Shami op.cit., V:83-84. (76) Ibid. (77) Ibid.

(78) Al-Mughni op.cit., VII:118.


(80) Ibid. (81) Ibid.


(84) Rashid Ahmad V. Anisa Khalum, I.L.R. 54 All.46(pc).


(87) Ibid.

(88) Al-Hedayah op.cit. 11:337-38; Al-Mughni op.cit., VII:118.


(91) Al-Bahr al-Ra'iq op.cit., 111:264; Al-Mughni op.cit. VII:118.

(92) Ibid.

(94) Al-Bahr al-Ra'iq op.cit., lll:264.


(96) Al-Bahr al-Ra'iq op.cit., lll:264; Shami op.cit., ll:432.

(97) Ibid. (98) Ibid. (99) Ibid.

(100) Ibn Majah, op.cit., p. 148.


(102) Shami, op.cit., ll:434. (103) Ibid., ll:436.

(104) Ibid.


(108) Ibid. (109) Ibid.


(112) Ibid.
CHAPTER-V

HINDU AND MUSLIM LAW ON DIVORCE AND THE CONCERNED ACTS,
CAUSES OF THE INDEPENDANT INDIA.

An Act further to amend the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954.

(Received the assent of the President on 27th May, 1976)

Be it enacted by Parliament in the Twenty-seventh year of the Republic of India as follows:

UNIT-A

PRELIMINARY

S.1. Short Title: This Act may be called Marriage Laws (Amendment) Act, 1976.

UNIT-B

AMENDMENTS TO THE HINDU MARRIAGE ACT, 1955

S.2. Amendment of Section 5: In the Hindu Marriage Act, 1955 (hereinafter referred to as the Hindu Marriage Act), in section 5, for clause (ii), the following clause shall be substituted, namely:

"(ii) at the time of the marriage, neither party-
(a) is incapable of giving 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 an extent as to be unfit for marriage and the procreation of children; or
(c) has been subject to recurrent attacks of insanity or epilepsy;".

3. Amendment of section 9: In section 9 of the Hindu Marriage Act,-

(a) in sub-section (1), the brackets and figure "(1)" shall be omitted and to that sub-section as so amended, the following Explanation shall be added, namely:

"Explanation.—Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society."

(b) sub-section (2) shall be omitted.

4. Amendment of section 10: In section 10 of the Hindu Marriage Act, for sub-section (1) and the Explanation thereunder, the following sub-section shall be substituted, namely:-

"(1) Either Party to a marriage, whether solemnized before or after the commencement of this Act may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented."

5. Amendment of section 11: In section 11 of the Hindu Marriage Act, after the words "presented by either party thereto", the words "against the other party" shall be inserted.
6. Amendment of section 12: In section 12 of the Hindu Marriage Act,-

(a) in sub-section (1),-

(i) for clause (a), the following clause shall be substituted, namely:-

"(a) that the marriage has not been consummated owing to the impotence of the respondent; or";

(ii) in clause (c), for the words "or fraud", the words "or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent" shall be substituted;

(b) in sub-section (2), in clause (b), in sub-clause (ii), for the words "the grounds for a decree" the words "the grounds for a decree" the words "the said ground" shall be substituted.

7. Amendment of section 13: In section 13 of the Hindu Marriage Act,-

(a) in sub-section (1),-

(i) for clause (i), the following clauses shall be substituted, namely:-

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

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

(ii) for clause(iii), the following shall substituted, namely:-
"(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation,-In this clause,-

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

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

(iii) in clauses (iv) and (v), the words, "for a period of not less than three years immediately preceding the presentation of the petition", shall be omitted;

(iv) after clause (vii), the following Explanation shall be inserted, namely:-

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

(b) in sub-section (1A), for the words "two years", in the two places where they occur, the words "one year" shall be substituted;

(c) in sub-section (2),

(i) in clause (ii), for the word "bestiality", the word "bestiality; or" shall be substituted;

(ii) after clause (ii) as so amended, the following clauses shall be inserted, namely:

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

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

Explanation—This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976.".
8. Insertion of new sections 13A and 13B: After section 13 of the Hindu Marriage Act as so amended, the following sections shall be inserted, namely:

"13A. Alternate relief in divorce proceedings: 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-section (1) of section 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.

Divorce by mutual consent: (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

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

9. Amendment of section 14: In section 14 of the Hindu Marriage Act,

(i) in sub-section(1),

(a) for the words "unless at the date of presentation of the petition three years have elapsed", the words "unless at the date of the presentation of the petition one year has elapsed" shall be substituted;

(b) in the proviso,

(1) for the words "before three years have elapsed", the words "before one year has elapsed" shall be substituted;

(2) for the words "expiry of three years," the words "expiry of one year" shall be substituted;

(3) for the words "expiration of the said three years", the words "expiration of the said one year" shall be substituted;

(ii) in sub-section(2),

(a) for the words "expiration of three years", the words "expiration of one year" shall be substituted;

(b) for the words "said three year", the words "said one year" shall be substituted.
10. Amendment of section 15: In section 15 of the Hindu Marriage Act, the proviso shall be omitted.

11. Substitution of new section for section 16: For section 16 of the Hindu Marriage Act, the following section shall be substituted namely:

"16. Legitimacy of children of void and voidable marriages (1) Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in or to
the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents."

"19. Court to which petition shall be presented: Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction-

(i) the marriage was solemnized, or

(ii) the respondent, at the time of the presentation of the petition, resides, or

(iii) the parties to the marriage last resided together, or

(iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends, or 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 him if he were alive."

13. Amendment of section 20: In section 20 of the Hindu Marriage Act, in sub-section (1), for the words "and shall also state", the words and figures "and, except in a petition under section 11, shall also state" shall be substituted.

section 21 of the Hindu Marriage Act, the following sections shall be inserted, namely:

"21A. Power to transfer petitions in certain cases:

(1) where-

(a) a petition under this Act has been presented to a district court having jurisdiction by a party to a marriage praying for a decree for judicial separation under section 10 or for a decree of divorce under section 13, and

(b) another petition under this Act has been presented thereafter by the other party to the marriage praying for a decree for judicial separation under section 10 or for decree of divorce under section 13 on any ground, whether in the same district court or in a different district court, in the same State or in a different State,

the petitions shall be dealt with as specified in sub-section (2).

(2) In a case where sub-section (1) applies,-

(a) if the petitions are presented to the same district court, both the petitions shall be tried and heard together by that district court;

(b) if the petitions are presented to different district courts, the petition presented later shall be transferred to the district court in which the earlier petition was presented and both the petitions shall be heard and disposed of together by the district court in which the earlier petition was presented.
(3) In a case where clause (b) of sub-section (2) applies, the court or the Government, as the case may be, competent under the Code of Civil Procedure, 1908 to transfer any suit or proceeding from the district court in which the later petition has been presented to the district court in which the earlier petition is pending, shall exercise its powers to transfer such later petition as if it had been empowered so to do under the said Code.

21B. Special provision relating to trial and disposal of petitions under the Act: (1) The trial of a petition under this Act shall, so far as is practicable consistently with the interests of justice in respect of the trial be continued from day to day until its conclusion unless the court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(2) Every appeal under this Act shall be heard as expeditiously as possible, and endeavour shall be made to conclude the hearing within three months from the date of service of notice of appeal on the respondent.

(15) Amendment of section 23: In section 23 of the Hindu Marriage Act,-

(a) in sub-section (1),-

(i) in clause (a), after the words "the petitioner" the brackets, words, letters and figures "[except in cases where the relief is sought by him on the ground specified
in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of section 5]" shall be inserted;

(ii) in clause (b), the words, brackets, letter and figures "in clause (l) of sub-section (l) of section 10, or" shall be omitted;

(iii) after clause (b), the following clause shall be inserted, namely:

"(bb) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence, and";

(iv) in clause (c), for the words "the petition", the words, brackets and figures "the petition (not being a petition presented under section 11)" shall be substituted

(b) to sub-section (2), the following proviso shall be added at the end, namely:

"Provided that nothing contained in this sub-section shall apply to any proceeding where relief is sought on any of the grounds specified in clause(ii), clause(iii), clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (l) of section 13.";

(c) after sub-section (2) as so amended, the following sub-sections shall be inserted, namely:

"(3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to
do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person with directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report.

(4) In every case where a marriage is dissolved by a decree of divorce, the court passing the decree shall give a copy thereof free of cost to each of the parties.

16. Insertion of new section 23A: After section 23 of the Hindu Marriage Act, the following section shall be inserted, namely:

"23A. Relief for respondent in divorce and other proceedings; In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground; and if the petitioner's adultery, cruelty or desertion is proved, the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground."

17. Amendment of section 25: In section 25 of the Hindu Marriage Act,
(a) in sub-section (1),-
(i) the words, "while the applicant remains unmarried," shall be omitted;
(ii) for the words "and the conduct of the parties," the words, "the conduct of the parties and other circumstances of the case" shall be substituted;

(b) in sub-section (3), for the words "it shall rescind the order", the words "it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just" shall be substituted.

19. Substitution of new sections for section 28: For section 28 of the Hindu marriage Act, the following sections shall be substituted, namely:--

"28. Appeals from decrees and orders: (1) All decrees made by the court in any proceeding under this Act shall, subject to the provisions of sub-section (3), be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

(2) Orders made by the court in any proceeding under this Act under section 25 or section 26 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders, and every such appeal shall lie to the court to which appeals ordinarily lie from the
decisions of the court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of thirty days from the date of the decree or order.

28A. Enforcement of decrees and order: All decrees and orders made by the court in any proceeding under this Act shall be enforce in the like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction for the time being are enforced;".

UNIT-C

AMENDMENTS TO THE SPECIAL MARRIAGE ACT, 1954

20. Amendment of section 2: In section 2 of the Special Marriage Act, 1954 (hereinafter referred to as the Special Marriage Act), for clause (e), the following clause shall be substituted, namely:-

'(e) "district court" means, in any area for which there is a city civil court, that court, and in any other area, the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government by notification in the Official Gazette as having jurisdiction in respect of the matters dealt with in this Act;".

21. Amendment of section 4: In section 4 of the
Special Marriage Act, for clause (b), the following clause shall be substituted, namely:

"(b) neither party-

(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(ii) 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

(iii) has been subject to recurrent attacks of insanity or epilepsy;".

22. Insertion of new section 21A: In Chapter IV of the Special Marriage Act, after section 21, the following section shall be inserted, namely:

"21A. Special provision in certain cases: Where the marriage is solemnized under this Act of any person who professes the Hindu, Buddhist, Sikh or Jaina religion with a person who professes the Hindu, Buddhist, Sikh or Jaina religion, section 19 and section 21 shall not apply and so much of section 20 as relates a disability shall also not apply.".

23. Amendment of section 22: To section 22 of the Special Marriage Act, the following Explanation shall be added at the end, namely:

"Explanation—Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the
person who has withdrawn from the society.

24. Amendment of section 23: In section 23 of the Special Marriage Act, in sub-section (1), in clause (a), after the word, brackets and figure "sub-section (1)" , the words, brackets, figure and letter "and sub-section (1A)" shall be inserted.

25. Amendment of section 24: In section 24 of the Special Marriage Act, in sub-section (1), for the words "and may be so declared", the words "and may, on petition presented by either party thereto against the other party, be so declared shall be substituted.

26. Substitution of new section for section 26: For section 26 of the Special Marriage Act, the following section shall be substituted, namely:-

"26. Legitimacy of children of void and voidable marriages: (1) Notwithstanding that a marriage is null and void under section 24, any child of such marriage who would have been legitimate if the marriage had been valid shall be legitimate, whether such child is born before or after the commencement of the Marriage Law (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under section 25, any child begotten or conceived before the decree is made, who would have
been the legitimate child of the parties to the marriage if a the date of decree it has been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 25, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents."

27. Amendment of section 27: In section 27 of the Marriage Act, in sub-section (1),-

(a) for clauses (a) and (b), the following clauses shall be substituted, namely; -

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

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

(b) in clause (c), the proviso shall be mitted;

(c) for clauses (e) and (f), the following clauses shall be substituted, namely:-
'(e) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with respondent.

Explanation.--In this clause,-

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

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

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

(d) in clause (g), the word "for a period of not less than three years immediately preceding the presentation of the petition" shall be omitted;

(e) after clause (h), the following Explanation shall be inserted, namely:-

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

(f) the words "and by the wife on the ground that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality" occurring at the end shall be omitted;

(g) after sub-section (1), the following sub-section shall be inserted, namely:-

"(1A) A wife may also present a petition for divorce to the district court on the ground, -

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

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

28. Insertion of new section 27A: After section 27 of the Special Marriage Act as so amended, the following section shall be inserted, namely:-
"27. Alternate relief in divorce proceeding: 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 ground mentioned in clause (h) of sub-section (1) of section 27, the court may, if it considers it just to do having regard to the circumstances of the case, pass instead a decree for judicial separation."

29. Amendment of section 28: In section 28 of the Special Marriage Act, in sub-section (2) for the words, brackets and figure "On the motion of both the parties made not earlier than one year after the date of the presentation of the petition referred to in sub-section (1) and not later than two years", the words, brackets and figure "On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months" shall be substituted.

30. Amendment of section 29: In section 29 of the Special Marriage Act,—

(i) in sub-section (1)

(a) for the words "unless at the date of the presentation of the petition three years have passed", the words "unless at the date of the presentation of the petition one year has passed" shall be substituted;

(b) in the proviso,—
(1) for the words "before three years have passed", the words "before one year has passed" shall be substituted;

(2) for the words "expiry of three years", the words "expiry of one year" shall be substituted;

(3) for the words "expiration of the said three years" "expiration of the said one year" shall be substituted;

(ii) in sub-section (2),-

(a) for the words "expiration of three years", the words "expiration of one year" shall be substituted;

(b) for the words "said three years", the words "said one year" shall be substituted.

31. Amendment of section 30: In section 30 of the Special Marriage Act, the words "and one year has elapsed thereafter but not sooner," shall be omitted.

32. Amendment of section 31: For sub-section(1) of section 31 of the Special Marriage Act, the following sub-section shall be substituted, namely:--

"(1) Every petition under Chapter V or Chapter VI shall be presented to the district court within the local limits of whose original civil jurisdiction--

(i) the marriage was solemnized; or

(ii) the respondent, at the time of the presentation of the petition resides; or

(iii) the parties to the marriage last resided together; or

(iv) the petitioner is residing at the time of the
presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years by those who would naturally have heard of him if he were alive.

33. Substitution of new section for section 33: For section 33 of the Special Marriage Act, the following section shall be substituted, namely:

"33. Proceedings to be in camera and may not be printed or published:

(1) Every proceeding under this Act shall be conducted in camera and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees."

34. Amendment of section 34: In section 34 of the Special Marriage Act,-

(a) in sub-section (1), in clause (b), for the words "where the ground of the petition is adultery, the petitioner has not in any manner been accessory to or connived at or condoned the adultery," the words, brackets
letter and figures "where the petition is founded on the ground specified in clause (a) of sub-section (1) of section 27, the petitioner has not in any manner bee accessory to or connived at or condoned the act of sexual intercourse referred to therein" shall be substituted;

(b) to sub-section (2), the following proviso shall be added at the end, namely:-

"Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (c), clause (e), clause, (f), clause (g) and clause (h) of sub-section (1) of section 27".

(c) after sub-section (2) as so amended, the following sub-sections shall be inserted, namely:-

"(3) for the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can and has been, effected and the court shall in disposing of the proceeding have due regard to the report.

(4) In every case where a marriage is dissolved by a decree of divorce, the court passing the decree shall give
35. Substitution of new section for section 35: For section 35 of the Special Marriage Act, the following section shall be substituted, namely:

"35. Relief for respondent in divorce and other proceedings: In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground, and if the petitioner's adultery, cruelty or desertion is proved, the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground."

36. Amendment of section 37 of the Special Marriage Act,

(a) in sub-section (1), for the words "and the conduct of the parties" the words "the conduct of the parties and other circumstances of the case" shall be substituted;

(b) in sub-section (3), for the words "it shall rescind the order", the words "it may, at the instance of the husband vary, modify or rescind any such order and in such manner as the court may deem just" shall be substituted.

37. Substitution of new section for section 39: For section 39 of the Special Marriage Act, the following
sections shall be substituted, namely:

"39 Appeals from decrees and orders: (1) All decrees made by the court in any proceedings under Chapter V or Chapter VI shall, subject to the provisions of sub-section (3), be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

(2) Orders made by the court in any proceeding under this Act under section 37 or section 38 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of thirty days from the date of the decree or order.

39A. Enforcement of decrees and orders: All decrees and orders made by the court in any proceeding under Chapter V or Chapter VI shall be enforce in the like manner as the decrees and orders of the court made in the exercise of
its original civil jurisdiction for the time being are enforce."

38. Insertion of new sections 40A, 40B, and 40C: After section 40 of the Special Marriage Act, the following sections shall be inserted, namely:

"40A. Power to transfer petition in certain cases: (1) where-

(a) a petition under this Act has been presented to the district court having jurisdiction by a party to the marriage praying for a decree for judicial separation under section 23 or for a decree of divorce under section 27, and

(b) another petition under this Act has been presented thereafter by the other party to the marriage praying for decree for judicial separation under section 23, or for decree of divorce under section 27 on any ground whether in the same district court or in a different district court, in the same State or in a different State,

the petition shall be dealt with as specified in sub-section (2)

(2) In case where sub-section (1) applies,-

(a) if the petitions are presented to the same district court, both the petitions shall be tried and heard together by that district court;

(b) if the petitions are presented to different district courts the petition presented later shall be
transferred to the district court in which the earlier petition was presented and both the petitions shall be heard and disposed of together by the district court in which the earlier petition was presented.

(3) In a case where clause (b) of sub-section (2) applies, the court or the Government, as the case may be, competent under the Code of Civil Procedure, 1908 to transfer any suit or proceeding from the district court in which the later petition has been presented to the district court in which the earlier petition is pending, shall exercise its powers to transfer such later petition as if it had been empowered so to do under the said Code.

40B. Special provision relating to trial and disposul of petitions under the Act: (1) The trial of a petition under this Act shall, so far as is practicable consistently ;with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(2) Every petition under this Act shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date of service of notice of the petition on the respondent.

(3) Every appeal under this Act shall be heard as expeditiously as possible, and endeavour shall be made to conclude the hearing within three months from the date of
service of notice of appeal on the respondent.

40C. Documentary evidence: Notwithstanding anything contained in any enactment to the contrary, no document shall be admissible in evidence in any proceeding at the trial of a petition under this Act on the ground that it is not duty stamped or registered.

39. Special provision as to pending cases: (1) All Petitions and proceedings in causes and matters matrimonial which are pending in any court at the commencement of the Marriage Laws (Amendment) Act, 1976, shall be dealt with and decided by such court-

(i) if it is a petition or proceeding under the Hindu Marriage Act, then so far as may be, as if it had been originally instituted therein under the Hindu Marriage Act, as amended by this Act;

(ii) if it is a petition or proceeding under the Special Marriage Act, then so far as may be, as if it had been originally instituted therein under the Special Marriage Act, as amended by this Act.

(2) In every petition or proceeding to which sub-section (1) applies, the court in which the petition or proceeding is pending shall give an opportunity to the parties to amend the pleadings, in so far as such amendment is necessary to give effect to the provisions of sub-section (1), within such time as it may allow in this behalf and any such amendment may include an amendment for conversion of a petition or proceeding for judicial separation into a petition or proceeding, as the case may be, for divorce.
UNIT-D

THE DIOLUTION OF MUSLIM MARRIAGES ACT, 1939

ACT NO. VIII OF 1939

Passed the Indian Legislature

Received the assent of the Governor-General on

the 17 March, 1939

(Published in the Gazette of India dated the 25th

March, 1939)

An Act to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her married tie.

The Hanafi law is very favourable to women in many matters but in a few cases it involves great hardship to women. To overcome this difficulty, the Hinafi jurist have evolved the rule that in case of necessity a Hanafi case may be decided according to the law of another set Sunnis. This important rule was not followed by the Anglo Indian Courts with the result that sometimes the Hanafi wives were put to great hardship. Thus a marriage cannot be dissolved when the husband is guilty of cruelty, desertion etc. The Ulema of pre-partition India felt the need for the reform of the enforcible law. At their instance the late Moulvi Muhammad Ahmad Kazmi, Advocate, M.L.A. and a member of the Working Committee of the Jamiat al-Ulama-i-Hind introduced a Bill in 1938 in the
Legislative Assembly. It was passed with a few changes in 1939. It proved of immense help to the Muslim women and has been adopted by the Government of Pakistan. Certain charges have to be made in it to make it more useful.

Whereas it is expedient to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by the women married under Muslim Law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie. It is hereby enacted as follows:

The Hanafi law is generally very favourable to women but in a few cases it involves great hardship to women. Thus there is no provision in it to dissolve a marriage when the husband treats his wife with cruelty, deserts her or does not maintain her. The Qadi can only admonish or imprison him but cannot dissolve the marriage. This and other similar matters resulted in great hardship to women. To overcome such difficulties the Hanafi jurists evolved the rule that in case of necessity a Hanafi Qadi could send a case to a Malik, Shafi'i or Hanbali Qazi to be decided according to his own law which allows the dissolution of marriage or grant other relief in such cases. The British India Courts could not adopt this measure as there were no separate Courts for different Muslim sects nor did they themselves have recourse to this
procedure. The result was that many Muslim women experienced great hardship. The Muslim Ulama realized this difficulty and at the instance of the Jamiat-al-i-Hind, the late Mohammad Ahmad Kazimi, a member of the Working Committee of the Jamiat and a member of the Legislative Assembly introduced a Bill in 1938 which after some modification was passed in 1993. It has proved of immense help to Muslim women and is in force in India and Pakistan. The Pakistan Government has made a few changes in it to make it more useful.

1. Short title and extent. This Act may be called the Dissolution of Muslim Marriage Act, 1939.

2. It extends to all the provinces and the capital of the federation. A woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of the marriage on any one or more of the following grounds, namely—of (1) that the whereabouts of the husband have not been known for a period of four years.

Under the Hanafi law a missing person could be presumed to be dead after a minimum period of sixty years from the time of his disappearance. The Indian Evidence Act, of 1872 prescribed the period of seven years when a person could be presumed to be dead. The Hanafi wives could take advantage of this provision of law. But this period of seven years was also found to be too long in
view of the changed conditions of the times. Hence advantage was taken of the Hanafi rule to adopt the law of another Sunni sect in case of hardship.

This is the Maliki law and has been adopted in the Act to provide adequate relief to wives whose husbands are missing. This provision was suitable for ancient times when means of communication were difficult and a long time was necessary to trace a missing person. With the great facilities in communication now available, the period of four years is too long and may with advantage be reduced to two years.

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

(ii-a) That the husband has taken an additional wife in the contravention of the provisions of the Muslim Family Laws Ordinance, 1961;

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

The period of seven years is too long. How can a young wife be deprived of the society of her husband for such a long time. For discussion of this aspect, see Ila and Zihar. It seems desirable to reduce the period of seven years to two years as in the case of Clause ii.

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

There seems to be no justification to fix the period at three years and the period of two years may be substituted for it. For discussion, see Chapter 23 "Other Grounds".

(v) That the husband was impotent at the time of 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.

Provided that after such renunciation, or conversion the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the ground mentioned in section2:

Provided further that provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

Opinions differed about the effect of apostasy of the wife. The majority of Muslim jurists expressed that the marriage shall be dissolved on the wife's apostasy but some jurists held otherwise. This sub-clause has adopted the latter view.

Rights to Dower not to be affected,-Nothing
contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of marriage.

Repeal of section 5 of Act XXVI of 1937.—Section 5 of the Muslim Personal Law (Shariat) Application Act, 1937 is hereby repealed.
UNIT-E

THE MUSLIM FAMILY LAWS ORDINANCE, 1961

The Dissolution of Muslim Marriages Act, 1939, had provided great relief to Muslim wives but there was a great demand that some more safeguards were necessary and that it was also necessary that the cases under the Act be decided speedily. The Pakistan Government set up a Law Commission to go into the matter. The Commission consisted of seven members one of whom represented the Ulama. It submitted its report on 1st June, 1956. Maulana Ehtishamul Haq submitted a separate dissenting report. The majority recommended that there should be compulsory registration of marriages and divorce and a standard Nikahnama be prescribed. It also stated that child-marriages should be prevented by law and that pronouncement of three divorces at a single sitting should be considered to amount to one divorce only. It also recommended that the judges trying matrimonial cases should try to bring about a reconciliation between the parties. The Commission also said that permission to take a second wife should not be given unless the applicant was in a position to support both wives and his children in the standard of living to which the family was accustomed and that the husband shall have to pay the Meher agreed upon however high it might be. In the absence of specification the whole dower shall be payable on demand. The Commission also recommended that the wife could claim maintenance for the past three years. The Commission also suggested the establishment of
Matrimonial Courts which shall decide a case within three months. Maulana Sahib and other Ulama did not agree with most of the views of the Commission. Their objection may be summarised as under:

"There is no priest-hood in Islam so that no Nikah-khwans can be appointed by the Government. Registration of marriages is useful but even then it should not be made compulsory. It may result in inconvenience while the presence of witnesses and solemnization of marriage in public adequately serve the purpose.

Fixation of age at 18 years for the bridegroom and 15 years for the bride is uncalled for. Shariat has not fixed such ages and none need be fixed now. To discourage child-marriages we must educate people.

The pronouncement of three divorces at one time: The majority of Muslim jurists consider that the pronouncement of three divorces at one time amounts to three divorces. To remove the disadvantages following such practices, Muslims should be taught the proper method of divorce. Polygamy has been allowed by Islam and practised by the Holy Prophet (Peace be on him) and his Companions. It is not necessary to obtain the permission of any authority for the second, third or fourth marriage of a man. It is also unnecessary.

The enactment about the payment of dower fixed how high it may be is unreasonable. The parties may have recourse to arbitration."

The report was not given effect to until 1961 when certain recommendations were given effect to. This is the background of the Ordinance of 1961.
UNIT-F

DIVORCE REFORM ACT, 1969

The Act came into force on 1st January, 1971. It has introduced radical changes in the English law of divorce. It has introduced divorce by mutual consent and even unilateral divorce with certain safeguards for the respondent. It is necessary for divorce by mutual consent that the parties should have lived apart for a minimum period of two years and the consent of a party should not have been obtained by misleading him or her. As regards unilateral divorce, it is necessary that (1) the parties should have lived apart for a period of five years 2(e) the dissolution of the marriage would not result in grave hardship, financial or otherwise, to the respondent. The Court will also take into consideration the interest of the children and other persons concerned. The respondent can also plead that it would in all circumstances be wrong to dissolve the marriage 4(2) (b). The court will also take into consideration the financial position of the respondent, 6(1) (b). It will also consider certain other matters specified in section 6(2).

Divorce Reform Act, 1969

An Act to amend the grounds for divorce and judicial separation; to facilitate reconciliation in matrimonial causes; and for purposes connected with the matters of aresaid.

(22nd October 1969).

BE IT ENACTED by the Queen's Most Excellent
Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.-After the commencement of this Act the sole ground on which a petition for divorce may be presented to the court by either party to a marriage shall be that the marriage has broken down irretrievably.

Before the passing of the new Act, there were several grounds on which a divorce could be obtained. This Act prescribes only one ground on which a divorce can now be granted. But the section is so exhaustive that it includes every conceivable ground for separation; the only condition being that it should have led to the irretrievable breaking up of the marriage. The next section describes the condition on the basis of which a marriage may be considered to have broken down.

SCHEDULE 1

CONSEQUENTIAL AMENDMENTS OF THE MATRIMONIAL CAUSES ACT 1965

1. In section 3(1) after the word "petitioner" there shall be inserted the words "or respondent".

2. In section 4(1) and (2) for the words "on the ground of adultery" there shall be substituted the words "in which adultery is alleged" and in section 4(1) for the words "on that ground" there shall be substituted the
words "and alleging adultery".

3. In section 5(6) for the words from "opposes" to "desertion" there shall be substituted the words "alleges against the petitioner and proves any such fact as is mentioned in section 2(1) of the Divorce Reform Act 1969".

4. In section 15(b) for the words "on the ground of her husband's insanity" there shall be substituted the words and alleging any such fact as is mentioned in section 2(1)(e) of the Divorce Reform Act 1969 where the court is satisfied on proof of such facts as may be prescribed by rules of court that her husband is insane.

5. In section 16(3) for the words from the beginning to "insanity" there shall be substituted the words "where on a petition for divorce presented by a wife the court granted her a decree and held that the only fact mentioned in section 2(1) of the Divorce Reform Act 1969 on which she was entitled to rely was that mentioned in paragraph (e), then if the court is satisfied on proof of such facts as may be prescribed by rules of court that the husband is insane".

6. In section 17(2) for the words from the beginning to "She" there shall be substituted the words "where on a petition for divorce presented by the husband he satisfies the court of any such fact as is mentioned in section 2(1)(a), (b) or (c) of the Divorce Reform Act 1969 and the court grants him a decree of divorce, then if it
appears to the court that the wife" and for the words
"innocent party" there shall be substituted the word
"husband".

7. In section 20(1) (b) for the words "on the
ground of her husband's insanity" there shall be
substituted the words "and the court held that the only
fact mentioned in section 2(1) of the Divorce Reform Act
1969 on which she was entitled to rely was that mentioned
in paragraph (e) and the court is satisfied on proof of
such facts as may be prescribed by rules of court that the
husband is insane".

8. In section 26(6), as amended by the Family
Provision Act 1966, in the definition of "court", after
the word "court", where first occurring there shall be
inserted the words "means the High Court and ".

9. In Section 30(2)-

(a) in paragraph (a) for the words "on the ground
of her husband's insanity" there shall be
substituted the words "and the court is
satisfied on proof of such facts as may be
prescribed by rules of court that her husband
is insane".

(b) in paragraph (b) the word "divorce" and the
words "or judicial separation" shall be
omitted; and

(c) after paragraph (a) there shall be inserted
the following paragraph:-
"(aa) a petition for divorce or judicial separation is presented by a husband and the court is satisfied on proof of such facts as may be prescribed by rules of court that his wife is insane; or"

10. In section 34(3) for the words "on the ground of the husband's insanity" there shall be substituted the words "in favour of a wife where the court held that the only fact mentioned in section 2(1) of the Divorce Reform Act 1969 on which she was entitled to rely was that mentioned in paragraph (e) and the court is satisfied on proof of such facts as may be prescribed by rules of court that the husband is insane".

11. In section 46(2) after the definition of "adopted" there shall be inserted the following definition:

"'the court' (except in sections 26, 27, 28 and 28a) means the High Court or, where a country court has jurisdiction by virtue of the Matrimonial Causes Act 1967, a country court; and"

12. In Schedule 1, in paragraph 2 after the word "Act" there shall be inserted the words "or of section 2(1)(c) of the Divorce Reform Act 1969".
(1) In Hindu Religion, Marriage being a sacramental union was an inviolable and immutable union—thus even death did not dissolve the marriage. Where as under the Hindu shastric Law, marriage is deemed to be a sacramental bond continuing up to heaven. The Dharmashastra did not recognised divorce.

But Islam takes a realistic and sympathetic view of human affairs and therefore it attaches great importance to the happiness of both the spouses. In Islam marriage in the ordinary course is to last till one of the spouses dies. But if a husband and wife can not live happily together so that the very objects of marriage are defeated and it becomes more farce, then its continuance is no longer considered desirable. Under such circumstances, divorce and dissolution of marriage are allowed under Islamic law.

(2) In Hindu law, totally, modes of divorce and grounds of divorce and causes are from Preliminary Acts, causes, Amendment, ordinance and judicial rules, not from dharmashastra, that for divorce.

But In Islam, modes of divorce, grounds of divorce and causes are from Religious view, that for divorce but some causes are modifications in Muslim Law.
(3) In Hindu Law, no iddat (menstrual period) is mentioned. But in Islam iddat must have to be observed and necessary. This iddat is the period for which a woman must wait before marrying again whether, in the event of divorce or death.

(4) In Hindu Law, no dower system, but in Islam the dower system is necessary. ("Dower, under the Muhammadan Law, is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of marriage, and even where o dower is expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife as a necessary effect of marriage. To use the language of the Hedaya,'the payment of dower is enjoined by the law merely as a taken of respect for its object (the woman), wherefore the mention of it is not absolutely essential to the validity of a marriage; and, for the same reason, a marriage is also valid although a man were to engage in the contract on the special condition that there should be no dower."(1)

(5) In Hindu Law, there is no oral system of divorce or pronouncement of divorce, but in Islam it is oral divorce recognised as valid as stated in the Holy Qur'an and Hadith.

(6) In Hindu Law, only there is one way or system for divorce, that only petition, But in Islam three are many
ways for divorce.

(7) In Hindu Law and Act time to time changed by judicial committee with social change and demand of people or Hindu community. And the Muslim main law is unchangeable can change but the opinions of Muslim Jurists can be changed.

(8) After divorce a Muslim woman (Qur'an and Hadid) is entitled to maintenance from her husband during the period of iddat. But also for the time, if any, that elapsed after the expiry of the period of iddat and her receiving notice of talaq. (3) Adoptions Act 1955 (1) Subject to the provisions of this section a Hindu wife, whether married before or after the promulgation of this Act shall be entitled to be maintained by her husband with the second marriage or her life time of she does not marry.

(9) A Muslim widow is not entitled to maintenance out of the estate of her late husband in addition to what she is entitled to by inheritance or under his will. (44)

A Hindu wife, whether married before or after the commencement of this Act, (Adoptions Act) shall be entitled to be maintained often the death of her husband by her father-in-law.

(10) Ahsann talaq, in the case of Ahsa talaq, three pronouncements have to be made in three different tuhrs or
(10) Ahsan talaq, in the case of Ahsan talaq, three month pronouncements have to be made in three different tuhurs or in the case of a non mensturing, woman at interval of month.

Hedaya brands it as the most laudable divorce, where husband repudiates his wife by a single pronouncement in a period of during which he has not had intercourse with her, and then leaves her to observance of IDDAT. The divorce remain revocable during the IDDAT, and the parties relain the right of inheritance. According to the Hedaya this method divorce is the most approved because the companions of the Prophet approved of it, and secondly, because it remains within the power of husband to revokes the divorce during IDDAT, which is three mentrfal periods or till delivery.

Such form of divorce is in Islam but the Hindu law has no conception of such form of divorce, so this point may, noted be as a dissimilerity between Islam and Hindu Law.

(11) Hasan,-In talaq, Hasan, th husband successivily pronounces divorce three times during consecutive periods of purity ( tuhrs ). It is therefore "a divorce upon a divorce" when the first and second pronouncements are revoked and followed by a third, laonly the talaq becomes irrevocable. It is also essential that no intercourse
should have taken place during that particular period of purity in which the pronouncement has been made.

Where the wife is not subject to menstrual courses an internal of 30 days is required between each successive repudiation. Talaq Hasan to put an end to a barbarous pre-Islamic practice to divorce a wife and take back several times in order to ill treat her. Through this method of talaq the husband has been given to chances of divorcing and then taking the wife back but the third time he does so, th talaq becomes irrevocable. Tn this way, the process of divorcing and repediating cannot be continued indefinitely.

This divorcing is in Islam but the Hindu Law has no conception of such wonderfull divorce.

(12) Triple divorce:- Hedaya defines it as a divorce where the husband repudiabes his wife by three divorces in one sentences or where he repeats the sentence, separately, three within tuhr such a divorce is lawful, although sinful, in Hanafi law; but in Shia law it is not permissible. Such divorce is lawful in Islam but in sinful and it is not permissible Shia law inspite of this, such form of as be mentioned divorce is not in Hindu law.

(13) Ila (vow of continence):- Ila is when a person swears that he will not have sexual intercourse with his
The Hanafi jurists argue that since the husband acted unjustly towards his wife, it is equitable that on the expiration of four months he should be deprived of the benefit of marriage.

This system of divorce is not in Hindu law but the Islam has recognized such form of divorce.

(14) Zīhār (injurious comparison):- Zīhār signifies a husband's comparison of his wife with his mother or any female relation within the prohibited degrees. In Zīhār the usual phrase is "Thou art to me as the back of my mother."

This mode of talaq is very rare in India, Pakistan, Shri Lanka, and Bangladesh.

As above mentioned this is a very rare form of divorce is found in above mentioned countries. So it is the one form of divorce in Islam Law but in Hindu law there is no conception of such divorce in any situation. This is discrepant to mode of divorce in Hindu law.

(15) Talaq-i-tafweez (delegated divorce):- A mustion husband has got the power pronouncing a talaq in respect of his wife. He is also entitled to delegate the power of his wife or any other person to effect a talaq, with his wife. As to difference in case of an agent to pronounce a talaq and the power pronounce it. The delegation of power is technically called "Tafweez" Tafweez means the making
another person owner of act which apertains to the person making the Tafweez. It is deligation by the husband of power of talaq to the wife desering her to give the effective sentence.

Such mode of divorce is not in Hindu law, but Islam is recognize this form of divorce by Qur'an and Hadith.

Point of Similareties in the following above fieds, in the both Religious:-

In Hindu law, liberty to parties to marry again When six months of the date of an order of a High Court confirming the decree for a dissolution of marriage made by District Judge have expired.

In Islam, A Muslim wife is entitled to marry again other party after iddat from dissolution by mutual contract.

(2) A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage.

A woman married under Hindu Law shall be entitled to obtain a decree for the dissolution of her marriage.

(3) Hindu law accepted any mutual contract for dissolution of marriage.
Muslim law too accepted any mutual contract for dissolution of marriage.

**By Mutual Consent:** Khula -(redemption ) - If the mutual relationship between the husband and wife is not suitable the wife, if she so desires, may seek a Khula divorce, e.g. by relinquishing her claim to the doweer. It, however, entirely depends upon the husband to accept the consideration of dower and to grant the divorce. A husband may similarly propa a Khula divorce; the wife may accept or refuse it.(5) If she accepts, it means that she has relinquished the right to get dower from her husband. Khula may be for any consideration - dower, mooney, property etc.

Such system of divorce is, Hindu and Muslim but in In Hindu, with different condition.

Mubaraat. (mutual freeing):- Where there is a aversion to the marriage on the part of both the parties who are desirous of dissolving it, it is called mubaraat.(6) A dissolution of marriage at the desire of the wife alone for consideration is called Khula. Thd Sunni law places mubarrat under the head of Khula. Khula may be effected by use of the word mubaraat, so that it comes under the definition of Khula.(6) There is however some difference in effects in the use of dower.

Such system of divorce exists in both Hindu and Muslim Law.
**BY JUDICIAL PROCESS**

**Li‘ān (mutual imprecation):** When the husband makes a charge accusing his wife of adultery (which term includes all cases of unlawful sexual connection whether incest, fornication, whoredom or adultery) the procedure for the settlement of the accusation by swearing and imprecating upon them the curse of Allah is technically called li'an.\(^7\) They are testiconfirmed by oaths.\(^8\) In this perfouse Holy Qur'an said. "And those who accuse honourable women but bring not four witesses, scourge them (with) eighty stripes and vever (afterward) accept their testimony. They indeed are evil-doers".\(^9\)

"As for those who accuse their wives but have no witnesses except themselves; let the testimony of one of them be four testimonies (swearing) by Allah that he is of those who speak the truth; and yet a fifth, invoking the curse of Allah on and it shall avert the punishment from her if she bear witness before Allah four times that thing he saith is indeed false; and a fifth (time) that the wrath of Allah be upon her if be speaketh truth".\(^10\)

The wife is entitled to suit for a divorce on the ground that her husband has falsely charged her with adultery. At the hearing of the suit, the husband had two alternatives: (i) he may retract (withdraw) the charge before the end of the trial, in which case the wife could not get a divorce, or (ii) to persist in his attitude,
whereby he will be required to accuse his wife on oath. This is followed by oaths of innocency made by wife. After these "mutual imprecations", the Court dissolves the marriage. (11)

Such mode of divorce is in Hindu Law by Judicial Act and Governor Ordinance but in Islam is recognized this form of divorce by Holy Qur'an and Hadith.

**Faskh (Judicial annulment):** Faskh means annulment. It refers to power of Qadi (in India, Law Court in Pakistan, under the Muslim family Laws Ordinance) 1961, the Chairman of the Union Council to annul a marriage on the application of the wife. The Law of Faskh is founded Holy Qur'an and Hadith "If a woman be prejudiced by a marriage, let it be broken off", (Bukhari). In India, such judicial annulments are governed by section 2 of the Dissolution of Muslim Marriage Act, 1939.

This form of divorce is in both the Hindu Law and Muslim religion.
CHAPTER-VI

REFERENCES

(1) Hedayah of Hamilton by Grady, p. 44; Durr al-Mukhtar p. 79. (1a). Qur'an, 11-229.


(6) Shami; p. 244-45.


(8) Baill I, 335.

(9) Qur'an XXIV, 4.

(10) Qur'an XXIV, 6-9.

(11) Fyzee, 158; Citing Baill, (i) 338.
RECAPITULATION

In the first chapter of this academic venture dealing with Hindu divorce according to the leading Hindu source Books-Vedas Shastra-Manu Shastra-Yajnavalkya etc and various at Acts, (Hindu Court Bill) and various schools we have observed that the Hindu divorce or dissolution of marriage has not remained a can divorce or a Dharmashastric or shastric divorce but has come to be a judicial contract and has also become a civil contract, though it has semblance of both. It has a semblance of a contract or a civil contract as consent is of some most importance necessary. In this chapter, I have also mentioned the various forms of the Hindu Marriage and divorce. In this chapter, I have also discussed the nature of Hindu marriage and divorce and its form and capacity of the parties entering into divorce literally means the theory of the "sapurate" in law this term means "divorce". In Dr. H.S. Gour's Hindu law of marriage and divorce has been defined to be "Separation" or 'dissolution' of a marriage means divorce, but not every such separation or dissolution can properly be so designated. So while the term "divorce" has sometimes been broadly defined or applied to include both decrees of nullity and decrees of dissolution of marriage." In Modern Hindu Law by prof. Paras Diwan, it is defined as:

"Once it came to be established that marriage is a civil contract, it is a logical next step to recognize that it is also a dissoluble union. In the second part of this
chapter I have discussed the divorce according to the Qur'an/Hadith/Leading School of Juris Prudence. The latest acts -pre-post Independent India.

In Islam divorce, when not absolutely necessary, is strongly disapproved of and discouraged. The Prophet (peace be on him) has said, "of all the permitted things divorce is the most abominable with Allah." (Sunan, Abu Dau'ud). Even when a man is not satisfied with his wife, the Qur'an enjoins forbearance. It says, "And retain them (the wives) kindly. Then if you hate them, it may be that you dislike a thing while Allah has put abundant good in it." (Qur'an, IV.19).

Muslim Jurists have held different views regarding divorce in Islam. According to some, divorce is prohibited but is permissible in case of necessity. It is stated in al-Radd al-Muktar, dealing with Hanafi Law, that no doubt it (divorce) is forbidden, but it becomes mubah (permitted) for certain outside reasons. Also in this chapter I have discussed to give instances of our own times. We may quote some important changes introduced in the Muslim law of divorce by the dissolution of Muslim marriages act of 1939. The Bill was introduced in the central Legislative Assembly by the late Muhammad Ahmad Kazmi, a member of the Working Committee of the Jam-iyyat al-Ulama-i Hid, because it was considered necessary to bring about certain important modification in the then
prevalent provision of Muslim Law.

In the second chapter I have discussed the grounds of divorce under Hindu law. Before 1937 divorce was impossible without proof of adultery; this was prejudicial to public morality, as a person who wished to bring an end to his marriage had either to commit adultery or perjury; the law was an incitement to immorality. The development of the English law of divorce has been dealt with in brief outline in chapter 1st, as the Hindu marriage act, 1955, The Hindu marriage and divorce ordinance, 1960(Kenya) and the Hindu marriage and divorce ordinance, 1961(Uganda) have borrowed the provisions for divorce largely from the English Matrimonial Courses Acts, 1937-1950 (as amended and consolidated by the (English) matrimonial courses act, 1965). The above legislation brought revolutionary changes in the Hindu matrimonial law by introducing divorce and making marriage a civil contract, which can be terminated on prescribed grounds. As we see in chapter (1st), a Hindu castric marriage was purely of a sacramental nature and did not admit divorce, so there is Indian case law to which courts can look for Precedents in applying the modern Hindu law of divorce, which is still in process of devolompment. The question is how far the Hindu courts can resort to English Precedents? The following observations of Gajesedragadkar, J. (as he then was) can be of some help in this respect. "When we are dealing with the problems of constrving a constitutional provision which is
not too clear or lucid you feel inclined to inquire how other Judicial minds have responded to the challenge presented by similar provisions in other sister constitutions.

Since the Hindu marriage act 1955 is based largely on the English matrimonial causes act, 1950 there is a great tendency to rely upon English decisions. However, there are differences between the two acts and great care has to be taken while acting upon the English law and practice of divorce; for instance, English decisions ordering medical examination of an alleged lunatic can have no application in a case arising under the Hindu marriage act, 1955, because, under the matrimonial causes rules in England, specific provision has been made for examination by medical inspectors. There is no such provision in India. There are other important considerations. There are differences in the social conditions between Hindu and English society and in the language of the English and Hindu acts. Hindu law is quite different from English law in the following respects. Suffering from a virulent form of leprosy for a period of at least one year, and suffering from a venereal disease in a communicable form for a period of not less than three years are grounds for judicial separation, but there is no such provision in English law, though the communication of venereal disease may amount to cruelty. Coasing to be a Hindu by conversion to another religion and renunciation
of the world by entering a religious order are grounds for
divorce peculiar to Hindu law, which I have defined and
discussed in this chapter.

In the second part of the second chapter of this
work I have also discussed the grounds of divorce under
Islam or Muslim law. The guiding principle in the matter
of the husband's duty towards his wife is provided by the
verse of the Qur'an where in it is laid down, "To keep
them (the wives) with kindness or separate (from them)
with humanity," in Surah al-Nisa, IV:34. It is stated at
another place, in Surah al-Bagarah,11:231, "And They (the
wives) have rights similar to those against them in a just
manner." The Prophet (peace be on him) said in his sermon
at the last pilgrimage, "O, my people, you have certain
rights over your wives and so have your wives over you'.
At another time he stressed this matter when he told a
person "thy body has a right over the and the soul has a
right over thee and thy wife has a right over thee."
As stated, one of the important objects of marriage is a
happy companionship of the parties and with this end in
view the husband has to perform certain marrital
obligations. But the failure to perform marrital
obligations by a husband does not necessarily constitute a
cause for the dissolution of marriage. In some cases it
may amount to a moral offence only, but in the case of the
breach of some important obligations the wife gets a right
to the dissolution of her marriage.

In India, Pakistan and Bangladesh, a wife can also get her marriage dissolved under the provisions of Act viii of 1939, if the husband fails to perform his marital obligations.

In chapter III I have discussed the modes of divorce/dissolution of marriage under Hindu Religion or Hindu Law and in the secnd part of this chapter I have discussed and defined the modes of divorce/dissolution of marriage under Islam or Muslim law.

In fourth Chapter I have discussed the effected divorce under Hinduism and Hindu Law and also I have discussed the effected divorce under Islam or Muslim Law.

In Chapter fifth I have metioned the present Hindu and Muslim Laws on divorce and the concerned Acts. (causes of the Independant India)

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ABBREVIATIONS

A.C. : Appeal Cases.
A.I.R. : All India Reporter.
All. : Allahabad.
Bom : Bombay.
C.W.N. : Calcutta Weekly Notes.
Cal. L.J. : Calcutta Law Journal
I.L.R. : Indian Law Reports.
Ker. : Kerala.
L.R. : Law Reports.
L.T. Jour. : Law Times Journal
Lah. H. Ct. : Lahore High Court.
Mad. H. Ct. : Madras High Court.
W.L.R. : Weekly Law Reports.
W.R. : Weekly Law Reports.
Yaj. : Yajnavalkya.