

## **DIVORCE AND ITS CHANGING PARADIGMS**

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### **Abstract:**

Divorce under personal laws in India has never been seen as a severance of marital tie rather as a misfortune. The termination of marriage was always conceived as against the almighty's desires. Even when marriage was tie for eternity in archaic personal law, there were certain grounds where this tie could be severed. The problem with the available grounds was that those were mainly given to the husband. The feminist perspective of ancient Hindu and Muslim divorce laws have been discussed in this paper. Further, the paper here highlights the status of women under Hindu and Muslim personal laws and bring an analysis of the personal laws. It also makes a comparison between modern and ancient grounds of divorce.

Keywords: Divorce, personal laws, modern grounds, ancient grounds.

### **Introduction**

India is a nation and also a civilisation, it is a hybrid of various cultures, sects and norms. The nation proved its ability to manage differences and integrate various diversities.<sup>1</sup> The nation boasts its cultural legacy and it always project as if it is the epitome of human civilisation where there is respect for every human being but this cover page of civilisation has some different chapters that deconstruct the Panglossian marriage of tradition and modernity. Marriage in India is a divine unity (a sacrament as per Hindu law) or a contract (as per Muslim laws) of/ between two humans into a relationship that endows certain rights and duties on each partner. This paper attempts to explore the divorce rights in traditional and modern India plus the analysis of the findings. Ancient India had different set of reasoning related to issue like divorce. Divorce in those days meant separation from spouse and such separation was legally

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<sup>1</sup> Rajiv Malhotra , *Being different*, Harper Collins, Noida, 2013.

scrutinised. Moreover it was a stigma if a husband left his wife. When referring right to divorce in contemporary context, laws govern such issue. There is a proper procedure before divorce which the spouses have to follow. How law of divorce developed and how it became women centric in modern world. What reasoning people had and have regarding divorce especially the rights of women in asking or giving divorce to her husband. Does the irrationality of stigma related to a divorced (or deserted women as believed in ancient India) remains prevalent till date? The word divorce originates from Latin word *divortium* meaning separate<sup>2</sup> hence when two married people decide to dissolve their marriage and live their lives separately such separation is divorce.

## 1. Ethics of Marriage

Marriage is a social institution that sanctions a relationship between a man and woman, the bond has some inherent rights and duties. It is a rite where two human beings come together to start a new family and this unit is believe to last beyond the time necessary for procreation<sup>3</sup>. Sociologist Mazumdar defines marriage as a social unit of man and woman for the purpose of (a) building a household (b) sexual gratification (c) procreation (d) caring for the offspring. The understanding of marriage in religion is more complex than what social sciences define.

### 1.1. Hindu understanding of marriage

The Hindu religion believes marriage to be based on dharma, *praja* (progeny) and *rati* (pleasure). Sex is one of the sub part of marriage and hence given third place, indicating there by that it is least desirable aim of the marriage<sup>4</sup>. For Hindus marriage is a sacrament. It is a 'samskara' meaning purification rites essential for every Hindu. It a duty because no human

<sup>2</sup> --, 'Introduction what does divorce means?'(2007) *Shodhganga*, available at [http://shodhganga.inflibnet.ac.in/bitstream/10603/57778/6/07\\_introduction.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/57778/6/07_introduction.pdf) (last accessed 16 August 2018).

<sup>3</sup> J k Chopra, *A complete Resource Manual of Sociology*, Unique Publishers, New Delhi, 2015.

<sup>4</sup> --, 'Historical Background of Personal Law in India' (2012) *Shodhganga*, available at [http://shodhganga.inflibnet.ac.in/bitstream/10603/52367/6/06\\_chapter%202.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/52367/6/06_chapter%202.pdf) (last accessed 17 August 2018).

can fulfil all the obligations of his or her life alone. According to the scriptures a man in *grasthashrama* can attain fullest development of life.

### ***1.2. Muslim understanding of marriage***

Marriage in Muslim is termed as *nikah* meaning civil Contract as well as religious obligations. Muslims believe marriage is a legalised union of man and woman for the continuity of race and sexual gratification. Like Hindu marriages here too certain rights and duties are embedded in the bond. Justice Mahmood defines a Muslim marriage as a civil Contract upon the completion of which by proposal and acceptance, rights and duties are created. The Contract has two parties but woman has lesser say than man over the terms and conditions of marriage. For the contract to be valid the parties must fulfil the conditions of

- I. Capacity to marriage;
- II. Proposal and acceptance;
- III. Single meeting; and
- IV. Legal recognition.

### **2. Ancient understanding**

There was a king call Nala and a princess called Damyanti. Nala married Damyanti but Nala had a bad habit of gambling. Once he put on stake his kingdom while gambling with his brother. He lost to his brother and he with his wife had to leave the palace. Both lived in destitution and Nala could not see the plight of his beautiful wife hence one night while they were sleeping under a tree, Nala left her for search of Job. Damyanti in pain of her separation came back to her father's house. The king could not see daughter in such solitude hence he convinced her to remarry. She agreed to do so inspire of being married but the man she chose to remarry was her own husband who looked very different. This is a story from in ancient time of Atharva Veda divorce meant separation and when Damyanti was separated she had that right to remarry. Thus the understanding of separation vis a vis divorce exists from ancient time.

## 2.1. Personal law and religion sanctity

The understanding of divorce can be deconstructed through various personal law. The personal law or the legal system of Hindu and Muslims had their validity from religious scriptures. The divine law guided every helm of affairs. The religious force framed rules for the conduct of individual and state. There was no separation between state and religion yet religion was above all. It had the force to punish or reward any human being. The affairs of home was also under the influence of religious dictums and hence was the matrimonial tie. Ancient religious jurisprudence was based on morality. All the religion has a few principles similar like charity, devotion to God, etc. In India before the Islamic invasion, Hindu laws reigned over the landscape.

### 2.1.1 Hindu jurisprudence over divorce

Hindu laws found their sanctity in *Vedas* which is believed to be divine law as it is uttered from the mouth of *Brahma*. *Vedas* were the supreme law and have some character of positivist law. In *Vedas*, the words of *Rishis* were infallible and were rigid in nature. The reasonability of law was never questioned.

*'Hindu law has the oldest pedigree of any known system of jurisprudence, and even now it shows no sign of decrepitude.'* Henry Mayne.<sup>5</sup>

*Vedas* when heard were called *Shruti* and they were also believed to guide our conduct. Another class of law was in *Smriti*, meaning what is remembered. They are different from *Shruti* as they are not directly from *Vedas* but in memory.<sup>6</sup> The laws laid down by *Vedas* was a convergence of social, political and moral laws backed by religion.

The ancient India had various authors, who wrote their interpretation of *Vedas* which guided the inner sanctum of home. The *smritis* though lower in strata with rest of the sources of law but still were powerful enough to shape the society of their time. From the two kinds of divorces

<sup>5</sup> Neha Malik, 'Muslim Women's right for dissolution of Marriage' (2016) *legal service India*, available at <http://www.legalserviceindia.com/article/1338-Muslim-womens-right-for-dissolution-of-marriage.html> (last assessed 19 August 2018).

<sup>6</sup> --, 'Historical Background of Personal Law in India' (2012) *Shodhganga*, available at [http://shodhganga.inflibnet.ac.in/bitstream/10603/52367/6/06\\_chapter%202.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/52367/6/06_chapter%202.pdf) (last accessed 17 August 2018).

that are *vinculo matrimonii*<sup>7</sup> and *Mensa et thoro*<sup>8</sup> Indian ancient jurisprudence believed in *vinculo matrimonii*. Many philosophers were strong proponent of no relation after divorce principles but there were a few who dissented. The ancient Indian jurisprudence never accorded rights to women in matters of divorce but there were certain grounds in which a woman can be divorced and these rights were with men only. There are eighteen smritis or dharma shastras. They are Manu, Yajnavalkya, Parasara, Daksha, Vishnu, Samvarta, Harita, Yama, Satatapa, Gautama, Devala, Vasishtha, Apastamba, Usana, Atri, Sankha-Likhita, Saunaka.

### **2.1.1.1. Atri-Smriti**

Atri was a pro women rights activist as he believed that a woman should never be divorced or separated from husband. Even if a wife, who under the rage of passion does something immoral or violates her duties of taking care of her husband or in case she runs away from home or when she is assaulted by thieves or strangers or she is blamed for some misconduct she cannot be divorced. A nuptial tie is for a lifetime and there should be no ground of abandoning ones own wife.<sup>9</sup> Atri had lockean understanding for humans. He believed humans are good and peaceful. He even absolved adultery as a ground for divorce. In case a woman indulged in sexual activities with other man then he believed in reforming the relation instead of breaking it.

### **2.1.1.2. Bodhyana-smriti**

The grounds proposed by Bodhyana for a man to desert his wife project him as a misogynist in contemporary legal jurisprudence. He laid down absurd grounds where a wife can be separated against her will. They are if (a) a wife continues to bore female child, she must be divorced in twelfth year (b) in case a woman has a miscarriage in the initial year of marriage she must be

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<sup>7</sup> --, 'Separation and divorce information' (2004) *The Fair Fox County Commission For Women*, available at [http://www.fairfaxcounty.gov/ofw/pdf/separation\\_divorce\\_handbook.pdf](http://www.fairfaxcounty.gov/ofw/pdf/separation_divorce_handbook.pdf) (last accessed 18 August 2018).

<sup>8</sup> --, 'Separation and divorce information' (2004) *The Fair Fox County Commission For Women*, available at [http://www.fairfaxcounty.gov/ofw/pdf/separation\\_divorce\\_handbook.pdf](http://www.fairfaxcounty.gov/ofw/pdf/separation_divorce_handbook.pdf) (last accessed 18 August 2018).

<sup>9</sup> R. Naga Raja Sarma, 'Ethics of Divorce in Ancient India' (1931) *International Journal of Ethics*, available at <http://www.jstor.org/stable/2377858> (last accessed 17 August 2018).

deserted in fifteenth years of marriage (c) if she is a termagant and she is rude then she must be divorced immediately. He even proposed a 'no reason' grounds which means if a husband had no reason to divorce yet he can leave his wife in tenth year after marriage<sup>10</sup>. The teleology of a woman existence for Bodhyana was an object capable of giving birth to male child and follow the command of her husband. He gave no rights within marriage as if a woman for hi was a mere living beings devoid of emotions and reasoning. For him the purpose of marriage is to pay the debt to our ancestors called *pitra* and the debt could be redeemed only through a male progeny. The repressive patriarchy marginalised a woman and she became s dependent variable. He never considered marriage as a tie of love and understanding instead he propounded that if there is slight problem of adjustment for the husband he has an absolute right to dissolve the marriage.

### **2.1.1.3. Brihad-Yama-smriti**

Decoding the reasoning of Brihadyama one can easily say that his understanding was way ahead of his time. He never proposed any irrational grounds for divorce. He focused on that innate goodness of humans and every relationship can be amended or reconciled with proper counselling, thus if a woman does not follow her rituals or is loud mouth, a proper counselling can settle the dispute in marriage. The only ground he said cannot be reconciled is that of extramarital affair of woman with another man as this was breach of trust and the obligations that marriage impose<sup>11</sup>. Even he never listed a ground under which a woman can leave her husband. All of he divorce rights were given only to men.

### **2.1.1.4. Brihaddhartha-smriti**

It's very difficult to understand the logic of Brihaddhartha as he gave different sets of grounds for divorce r example he says a man can divorce a wife if she burns down the house or if she

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<sup>10</sup> R. Naga Raja Sarma, 'Ethics of Divorce in Ancient India' (1931) *International Journal of Ethics*, available at <http://www.jstor.org/stable/2377858> (last accessed 17 August 2018).

<sup>11</sup> R. Naga Raja Sarma, 'Ethics of Divorce in Ancient India' (1931) *International Journal of Ethics*, available at <http://www.jstor.org/stable/2377858> (last accessed 17 August 2018).

poisons her husband. He says a wife must be divorced if she does not take care of her husband's kids as if the kids never belonged to her, in case she is termagant, s husband should have right to be liberated from the marital bond. His idea of woman burning down the house is absurd in contemporary sense, it's unclear whether woman of his time were indulged in incendiary that he came up with such ground of divorce. He also list adultery as solid reason for divorce.<sup>12</sup>

#### 2.1.1.5. Devala-smriti

Around 800-900 AD when the Islamic religion was expanding and their way of expansion was invasion and looting treasure and women. This made Hindus susceptible to the situation. Author Devala had deep respect for woman and he authored smriti at that plundering era hence his work have the concern for people at that time. He said that *Mlechchhas*,<sup>13</sup> a term for the invaders who forced the masses to get converted or raped women. In the flux of such situation, Devala said no husband should divorce his wife if she is spoiled by the invader as she has no control over the circumstances. He treated marriage as *janma janmantar ka rishta* meaning a tie lasting beyond a lifetime.

#### 2.1.1.6. Gautama-smriti

Gautami smriti is one of the oldest smriti yet one of the most lenient.<sup>14</sup> The eighteen chapters of the work extend the divorce rights to women. It says when a husband dies or is impotent or indulge himself into immoral acts or he disappears without any trace. The wife must free herself of all the ties. She should have the right to divorce her husband. It's Gautama work that has a feminist overtone. He was one of the first who regarded women as sentinel beings.

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<sup>12</sup> R. Naga Raja Sarma, 'Ethics of Divorce in Ancient India' (1931) *International Journal of Ethics*, available at <http://www.jstor.org/stable/2377858> (last accessed 17 August 2018).

<sup>13</sup> --, 'Want to know more about Devala Smriti' (2013) *Historum*, available at <http://historum.com/asian-history/85165-want-know-more-about-deval-smriti.html> (last accessed 18 August 2018).

<sup>14</sup> --, 'Gautama Smriti' (2010) *Neel kanth Dham*, available at <http://www.neelkanthdhaam.org/Smriti.html> (last accessed 16 August 2018).

### 2.1.1.7. Yajnavalkya-smriti

Yajnavalkya is one of the ethical codes that govern Hindu jurisprudence. It has more scientific temperament. He said if a man deserted his wife then he must compensate her<sup>15</sup>. A husband was also barred from remarrying except when his wife was diseased, harmful or alcoholic. Adultery by was not accepted hence was a valid ground for divorce. Hence his smriti has rationality of considering women as an emotional being with equal rights to men.

### 2.1.1.8. Manu-smriti

Manu is called the exponent of Hindu law. Manu on one hand gave women an equal status to men like he said 'the mother excel a thousands father in point of honour'<sup>16</sup>, gods are pleased in a place where women are honoured.<sup>17</sup> But he gives a man the right to divorce his wife. In verse nine he says a barren wife must be left in eight year, if her kids dies in initial year of marriage then she must be deserted in tenth year and if she bears female children then in eleventh year and if she is quarrelsome then she must be divorced immediately<sup>18</sup>. He takes a step ahead and says that when a husband leaves his wife to squander around the world for erotic expedition or spiritual journey then the wife must wait for six years and still he does not come back then she must visit him and live with him.<sup>19</sup> He places the institution of marriage above the individual and he demean the existence of a wife though he respected a mother.

## 3. Muslim jurisprudence over divorce

The contractual relation of marriage in Muslim is a legal entity. According to the Islamic jurisprudence, the social and political life must be govern by the Quran. There is no difference

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<sup>15</sup>Saptarishis, 'Yajnavalkya-smriti' (2009) *issu publisher*, available at <https://issuu.com/saptarishisastrology1/docs/yajnavalkya-smriti--text-with-english-translation-> (last accessed 18 August 2018).

<sup>16</sup> Suresh Jayaswal, *Manusmriti* chapter 11: verse 148, Sadhana Publication, Delhi, 2008, p 61.

<sup>17</sup> Ibid p.89..

<sup>18</sup> Ibid p.81.

<sup>19</sup> R. Naga Raja Sarma, 'Ethics of Divorce in Ancient India' (1931) *International Journal of Ethics*, available at <http://www.jstor.org/stable/2377858> (last accessed 17 August 2018).



between religion and law. Quran had demarcated public life from private life (*huququl ebad*)<sup>20</sup> and each had to follow the dictums of Quran. Marriage or nikah is a unit for a happy family Life. Islam provides certain rigid grounds on which divorce is allowed. According to Prophet, divorce should be avoided and an arbitrator should be appointed in case of any problem in married life. Divorce should be the last resort.

### 3.1 Modes of divorce

Like any law based on religious jurisprudence gives more power to men than women, similarly in Islam men have more rights than women in matter of divorce (talaq). The word talaq means setting free. There are two categories within which we can put the various method of divorce. They are legal or judicial divorce and extra judicial divorce. Judicial divorce is governed by the Dissolution of Muslim Marriage Act, 1939. The non judicial method has three ways to talaq

When it is initiated by husband, it can be talaq, Ila and Zihar. When requested by wife it is called talaq-i-tafweez. When done through mutual consent it's called Khula. Talaq is of three kind and they are talaq-e-ahsan, talaq-e-hasan and talaq-e-biddat<sup>21</sup>. Islam has a detailed instruction for divorce.

#### 3.1.1. Divorce initiated by husband

Talaq-e-ahsan and talaq-e-Hasan are given in Quran and hence hold the authenticity of being in accordance with Islamic jurisprudence. Talaq-e-Hasan is a single pronouncement of talaq by a husband which is followed by s period of abstinence called iddat<sup>22</sup>. If the couple have sexual intercourse within the period of iddat then the divorce is revoked, this makes talaq-e-ahsan revocable. In case the spouse refrain from sexual relation during iddat then the divorce is absolute. Talaq-e-Hasan is also pronouncement of divorce or talaq by the husband then there is a three consecutive pronouncement this is followed by a period of abstinence. After the end of abstinence period if the husband again pronounces talaq the marriage is dissolved<sup>23</sup>. Both

<sup>20</sup> Setu Gupta, 'The concept of divorce under Muslim law' (2015) *legal service India*, available at <http://www.legalserviceindia.com/article/1393-Divorce-under-Muslim-Law.html> (last assessed 20 August 2018).

<sup>21</sup> *Shayara Bano v Union of India*, 2017 SCC OnLine SC 963.

<sup>22</sup> Setu Gupta, 'The concept of divorce under Muslim law' (2015) *legal service India*, available at <http://www.legalserviceindia.com/article/1393-Divorce-under-Muslim-Law.html> (last assessed 20 August 2018).

<sup>23</sup> Neha Malik, 'Muslim Women's right for dissolution of Marriage' (2016) *legal service India*, available at <http://www.legalserviceindia.com/article/1338-Muslim-womens-right-for-dissolution-of-marriage.html> (last assessed 19 August 2018).

the form of divorce is accepted among all Muslims. Talaq-e-biddat was the most harsh form of divorce and the husband pronounces talaq irrevocably thrice and marriage is dissolved. This form of divorce is not mentioned in Quran.

Ila is a form of divorce where a husband takes an oath not to consummate with his wife for four months. In case the spouse have sex with each other within four months then Ila is dissolved but if they refrain from cohabitation then the marriage is dissolved and wife Noe need to get her divorce approved by the court or can seek for restoring her conjugal rights hence this form of divorce has little value in eyes of many muslims. Zihar is an absurd form of divorce not much recognised now. In this form the husband compares his wife with prohibited relationship like sister or mother and start believing the marital relation similar to the prohibited ones. In such cases after the expiry of four months the marriage is dissolved<sup>24</sup>. In case of Zihar and Ila a wife has right to approach the court for a judicial divorce or restitution of conjugal rights or in ancient days husband was ordered by the court to free slave or do charity. Two witnesses are needed for Zihar to be valid.

### ***3.1.2. Divorce when requested by wife***

Talaq-i-tafweez is a kind of divorce where a husband gives the power to his wife thereby freeing her from pronouncing divorce. It is a delegation of power for sometime or permanently. Unfortunately it is at the sweet will of husband to delegate such authority to be exercised by wife. Once a wife pronounces divorce within the delegated authority, the divorce is valid. Another form of divorce that is prevalent from ancient days is of Lian<sup>25</sup>, in this the husband irrationally questions wife chastity or her character which is derogatory to her. In such circumstances she can demand divorce from husband but if the husband said such thing because of wife's behaviour then the validity of the demand for divorce is quashed.

### ***3.1.3. Divorce through mutual consent***

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<sup>24</sup> Setu Gupta, 'The concept of divorce under Muslim law' (2015) *legal service India*, available at <http://www.legalserviceindia.com/article/1393-Divorce-under-Muslim-Law.html> (last assessed 20 August 2018).

<sup>25</sup> Setu Gupta, 'The concept of divorce under Muslim law' (2015) *legal service India*, available at <http://www.legalserviceindia.com/article/1393-Divorce-under-Muslim-Law.html> (last assessed 20 August 2018).

Khula and Mubarat are two forms of divorce via mutual consent. The wife request such divorce but she will have to part away with her dower<sup>26</sup> or property. Khula word itself means to take off that is the wife has to part away her dower when divorced. In Khula the assent of husband matters, only when the husband consent to divorce his wife, the Khula will proceed. In both the party are happy to let the other go or free themselves from the marriage. The two sect of Muslims that is Shia and Sunni have different parameters for divorce through mubarat.<sup>27</sup> In Shia both the spouse have to prove that the relationship cannot sustain further and also both have good intention to end the marriage. Such conditions are not required in Sunni.

Though divorce in Islam is detailed and coded in scriptures yet it is one sided as one party has more rights than the other one.

#### **4. Advent of modernity: Dawn of women's rights**

The Britishers came as traders in India but the wealth was luring enough for them to continue their rule over Indian landscape. When the Britishers entered the Indian civil system, the criminal laws were similar for both Hindus and Muslims. In the initial establishment years, the East India Company adhered to non interference policy. Warren Hastings was the first person who used the policy of allowing Quran to govern over Muslims and shastras to govern Hindus. The judges used to consult the priests in case of matter pertaining to Hindus and maulwis in matters related to Muslims but the decision had the binding force and slowly these judgements ruled the law and the consultation phase faded. From 1866 to 1869 multiple enactments replaced the personal laws like converts marriage dissolution act 1866 and Indian divorce act 1869.

The enactment of 1939 was seen as harbinger of Muslims women rights. The bill was prepared by Qazi Muhammad Ahmad Kazmi.<sup>28</sup> Dissolution of Muslims Marriage Act, 1939 gave various grounds for divorce like:

- I. If a husband is missing for more than four years, Muslim wife can get divorce<sup>29</sup> ;

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<sup>26</sup> J k Chopra, *A complete Resource Manual of Sociology*, Unique Publishers, New Delhi, 2015.

<sup>27</sup> Adv. Mohamed Ahmad, ' Talaq in Islam' (2017) *legal service India* , available at [http://www.legalservicesindia.com/article/profile.php?author\\_id=4332](http://www.legalservicesindia.com/article/profile.php?author_id=4332) (last assessed 19 August 2018).

<sup>28</sup> Abida Samiuddin, *Muslim Feminism and Feminist movement*, Global Vision Publishing House, New Delhi, 2002.

<sup>29</sup> *Dissolution of Muslims Marriage Act, 1939*, s.2(i).

- II. If for two continuous years, the husband is not maintaining his wife then she is entitled to divorce<sup>30</sup> ;
- III. In case a husband is imprisoned for more than seven years wife has a right to divorce him<sup>31</sup> ;
- IV. If a man fails to deliver his marriage obligations for three years then wife can divorce her husband<sup>32</sup> ;
- V. If the husband is impotent then she can divorce him<sup>33</sup> ;
- VI. If the husband is suffering from venereal diseases then wife can divorce him<sup>34</sup>;
- VII. If she was married before 15 years and on attaining 18 years of age she wants to dissolve her marriage, she can unless she had had no sexual relation with her husband<sup>35</sup>; and
- VIII. If the husband is brutal a wife has the authority to get divorce.<sup>36</sup>

In Indian Divorce Act, 1869 following were the grounds under which one can take divorce. They were:

- I. conversion to another faith;
- II. adultery;
- III. either of couple suffering from venereal disease, unsound mind or leprosy;
- IV. missing for seven or more years;
- V. cruelty; and
- VI. wife can divorce on grounds of sodomy, rape, bestiality

### **5. The Indian laws for divorce**

India gained independence after bloody partition and hence the government was apprehensive of making any law that could create fear among minorities of losing their identities. Hence the laws made the Britishers like Dissolution of Muslim Marriage Act 1939 remained as it is but

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<sup>30</sup> *Dissolution of Muslims Marriage Act, 1939*, s.2(ii).

<sup>31</sup> *Dissolution of Muslims Marriage Act, 1939*, s.2(iii).

<sup>32</sup> *Dissolution of Muslims Marriage Act, 1939*, s.2(iv).

<sup>33</sup> *Dissolution of Muslims Marriage Act, 1939*, s. 2(v).

<sup>34</sup> *Dissolution of Muslims Marriage Act, 1939*, s.2(Vi).

<sup>35</sup> *Dissolution of Muslims Marriage Act, 1939*, s.2(vii).

<sup>36</sup> *Dissolution of Muslims Marriage Act, 1939*, s.2(viii).

the Hindus laws were changed. Parliament of India in 1955 enacted the Hindu Marriage Act. The Hindu code bill has Hindu Succession Act, 1956, Hindu Minority and Guardianship Act, 1956 and Hindu Adoption and Maintenance Act, 1956. The Act came on 18<sup>th</sup> March 1955.

### **5.1. Theories of divorce in India**

The modern jurisprudence classifies divorce on following basis: mutual consent, fault and irretrievable breakdown. Under the fault theory either of the spouse has committed an act in contravention to the ethics of marriage, in consent theory both the party are willing to end the marriage and their free wills are involved for the dissolution of marriage and in irretrievable breakdown theory thrust on any circumstances that is no way going to amend the broken relationship between the spouses, its s total failure of marriage institution.

#### **5.1.1. Grounds for divorce**

Under Hindu Marriage Act, 1955 amended in 1976 enshrines nine grounds under fault theory where both the party can seek divorce, two more grounds are available to wife only. The theory of mutual consent for divorce received legal recognition in 1976. The various ground are:

- Adultery<sup>37</sup> is described as a ground for divorce but what constitutes adultery is given in Indian Penal Code. If a man has sexual intercourse with a wife of another man with her consent but without the consent of the woman's husband.<sup>38</sup> In case of Earnest John White v Mrs. Kathleen Olive White and others<sup>39</sup> the Supreme Court of India allowed the divorce pleaded by the husband but no punishment was levied as such provisions are not given and wife is presumed to be a victim;
- Cruelty<sup>40</sup> includes mental as well as physical cruelty. In Pravin Mehta v Inderjeet Mehta<sup>41</sup> mental cruelty was defined as State of mind or lack of conjugal compassion. Cruelty can be in any form like threat to commit suicide, demand for dowry, drunkenness etc;

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<sup>37</sup> *The Hindu Marriage Act, 1955, S.13(1)(i).*

<sup>38</sup> *Indian Penal Code, 1860, s. 497.*

<sup>39</sup> *Earnest John White v Mrs. Kathleen Olive White and others*, 1958 SCR 1410: AIR 1958 SC 0441.

<sup>40</sup> *The Hindu Marriage Act, 1955, s.13(1)(a).*

<sup>41</sup> *Pravin Mehta v Inderjeet Mehta*, AIR 2002 SC 2538

- Desertion<sup>42</sup> means abandoning conjugal tie by one party without any justification or consent of the other party. In *Bipin Chandra v Prabhavati*<sup>43</sup> the husband left the home deserting his wife but later returns back but is prevented by the wife, this does not constitute a valid ground for divorce;
- Conversion;
- Insanity;
- Leprosy or venereal diseases;
- Renunciation;
- No knowledge of husband whereabouts;
- Already married to another woman at time of marriage; and
- Rape, sodomy or Bestiality.

Special Marriage Act 1954 as amended under the Marriage Laws (Amendment) Act, 1976 list the following grounds over which divorce can be granted:

- Adultery<sup>44</sup>;
- desertion<sup>45</sup>;
- imprisoned for more than or equal to seven years<sup>46</sup>;
- cruelty<sup>47</sup>; and
- unsound mind<sup>48</sup>.

The Foreign Marriage Act, 1969 is modelled on Special Marriage Act, 1955. The Parsi Marriage and Divorce Act, 1936 gives similar grounds for divorce under section 32 of the said Act.

## 6. Comparison between ancient and modern jurisprudence over divorce rights

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<sup>42</sup> *The Hindu Marriage Act, 1955*, S.13(1)(b)).

<sup>43</sup> *Bipin Chandra v Prabhavati*, AIR 1957 SC 176.

<sup>44</sup> *Special Marriage Act, 1954*, s. 27(1)(a).

<sup>45</sup> *Special Marriage Act, 1954*, s. 27(1)(b).

<sup>46</sup> *Special Marriage Act, 1954*, s. 27(1)(c).

<sup>47</sup> *Special Marriage Act, 1954*, s. 27(1)(d).

<sup>48</sup> *Special Marriage Act, 1954*, s. 27(1)(e).

If one compare the ancient and modern jurisprudence over divorce rights there is one clear understanding that in ancient India ethics of divorce were in favour of men as they had the rights to desert their wives on certain ground but the other way round was not available except a few work that expounded over women's rights. Ancient India especially during Manu's era women had a special place in society and she was respected as a mother or sister but had lesser place as a wife. Mere incompatibility was a valid reason for divorce hence ancient jurisprudence was patriarchal in nature, it's true that Muslims gave property rights to women yet when it comes to equal status in marriage they were denied. The ancient Hindu form of divorce was *vinculo matrimonii* where the relationship ends after divorce and there is no question of maintainability. The Islam form of divorce had partial character of *Mensa et thoro* type of divorce where husband had to maintain his wife for certain time period.

The problems with ancient Indian jurisprudence is lack of concrete evidences that prove exact situation of law and order. There are multiple sources of various smritis and sutras of Hindu personal laws and authenticity of each sources is questionable. But whatever is common in all the sources gives us an understanding that women remained at circumference of economical and political life of the state. The independent existence and identity of a woman was never a part of ancient jurisprudence. Woman was a dependent variable and her life was determined by the prescriptions given by husband or father or brother. Manu believed a woman was a pride or izzat of family and hence she needs protection under a father before marriage and a husband after marriage. This dependency ultimately turned fatal over her own reasoning, she was not expected to have a will or knowledge of what rights are as rights were allocated by the males of the society. It's true that no smriti or sutra ever brings the fact of cruelty to women but that could be because there was no definition of cruelty for women. Hence the ground like cruelty for divorce never surface in any religious scriptures. If we compare ancient jurisprudence with the modern theories we find it has a character of positivist school. The laws of Manu was fixed. Every woman had a fixed role to play and non compliance with her role became a valid ground for desertion by husband. The reasoning of law was absent and women were denied to question the laws.

The worst part of any religious law is its immunisation to reasoning. 'Law is religion and religion is law' swayed all the doubts casted over the rationality of law sanctioned by religion. Any law needs to be flexible enough to incorporate changes of society but religious laws written in past does not offer such concessions. It is rigid and hence fails in test of time yet its sanctity is important till date. The divorce laws especially in Quran are very repressive for women. A woman can be divorced only when the husband allows. A husband can delegate the power to wife for divorce as if the right to divorce is only for men and only they are capable of handling such rights. Why women remained so passive in matters of rights. Denial of such rights and claiming the religious text to be respecting women is a perfect oxymoron right. The self righteousness of religious law cannot suppress the rationality of natural law. Every human is born equal and no one can deny that equality. Mary daly once said why the God is a noun and not a verb? A law need to be active and dynamic which in case of personal laws seems inappropriate. The recent judgment of Supreme Court<sup>49</sup> in case of triple talaq quashed on ground of violative of women rights.

Modern divorce laws are more gender integrated. Women have more grounds for divorce than men and some of the clauses are against men. Adultery assumes the women to be a victim irrespective of the fact that she consented. There are two ways of looking at this law, one that law is presumably bias to men, second form a feminist perspective that the law still have patriarchal Overtone where women still are believed lacking the mental faculty to give consent.

The present divorce law is of *Mensa et thoro* where a husband has to give maintainability<sup>50</sup> to his wife. There is time or amount fixed. Muslims had a time period till which they could maintain their ex wives, after the expiry of such time period the Husband was absolved from any liability. The constitution of India gave all the women the right to maintainability and a Muslim woman knocked the door of court for her maintenance after divorce( after the expiry of iddat period) in case of *Shah Bano Begum v Mohd. Ahmed Khan*<sup>51</sup> where the secular law of the land awarded equal rights to all and hence she was entitled to maintenance even after iddat period.

## 7. Conclusion

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<sup>49</sup> *Shayara Bano v Union of India*, 2017 SCC OnLine SC 963.

<sup>50</sup> *Code of Criminal Procedure*, 1973, s.125.

<sup>51</sup> *Shah Bano Begum v Mohd. Ahmed Khan*, 1985 SCR (3) 844.



Divorce is still the last resort in any marital dispute. Indians unlike any other nations believe that relation of husband and wife as a pious entity. Marriage is believed to be an eternal bond binding two families. Marriage is a relation that lays the establishment of a family hence mere incompatibility cannot break the fabrics of marital life. The sanctity of marriage sometimes is place above the individuals and it becomes difficult for the spouse to do away the relation easily. The court in 2012 removed the six month period cooling time between couple contending for divorce. It's hard to get divorce if one of the party is adamant of not divorcing as the legal jurisprudence sometimes values the bond more than the aggrieved party. Whether we consider ancient jurisprudence or the modern the importance of marriage remains the same. The parties rights have changed and women have more autonomy.

