PART I
PRELIMINARY

Chapter 1

HINDUS, MUSLIMS, CHRISTIANS, PARSIS AND JEWS

INTRODUCTORY

India is a country which abounds in personal laws; each community has its own personal law. The Hindus, the majority community, have their separate family law; so have the Muslims, the biggest minority community. Smaller minority communities, the Chrisitians, Parsis and the Jews, whose number, in the context of the total population of India, is not very significant, too, have their own separate family laws. Although each of these communities is a religious community, yet it is not necessary that their personal law is essentially religious law. It is also not necessary for the application of the personal law that members of the community should be ardent believers or followers of that religion. In most of the cases, if he is a member of the community by birth or conversion that will suffice, even though in actual persuasion he may be atheist, non-religious, non-conformist, anti-religious or even decry his faith. So long as he does not give up his faith and embrace another religion (among some communities, mere denunciation of faith is not sufficient) he will continue to be governed by the personal law of the community to which he belongs.

The Hindus and Muslims have all along maintained that their laws are of divine origin. No such claim is made by other communities. The modern Hindu law, by judicial interpretation and legislative modification, has undergone drastic changes, so much so that any claim of divinity can hardly be sustained. In some areas custom is still allowed to prevail.[1] Muslim law as administered in modern India, too, has undergone some changes and modifications, though legislative modifications are few, yet not insignificant; changes in Muslim law through judicial interpretation, too, have been made and in some areas they modernize Muslim law.[2] The Muslim matrimonial law has been statutorily modified by the Muslim Dissolution of Marriage Act, 1939, so as to permit the wife to have judicial divorce. The Wakf Act, 1954 has made some changes in the traditional Muslim law. The rest of Muslim law is still traditional. The Christian law in India is based on the 19th century English law. The Christian matrimonial law in India is contained in the Indian Christian Marriage Act, 1882 and the Indian Divorce Act, 1869. This has also been amended by Divorce Act, 2001. The Parsi matrimonial law before its codification was based on Hindu customs and English common law. Conceding to the demand of the Parsi community for the reform of their

1. *See* clauses (iv) and (v) of Section 5, Section 7 and Section 29(2), Hindu Marriage Act, 1955.
2. See *Aboobecker* v. *Manu*, 1971 KLT 663.

matrimonial law, the Parsi Marriage and Divorce Act was passed in 1865. It was modified in 1936 and in 1988 and is now almost at par with Hindu matrimonial law.

The Jew matrimonial law is still based on customs.

India has another aspect of family law—a family law which is applicable to the parties only if they choose to be governed by it. "Any two persons" belonging to any community, religion, nationality or domicile in India or abroad may opt to marry under the provisions of the Special Marriage Act, 1954, and if they do so, whichever community, religion or nationality anyone of them (or both of them) may belong to, or wherever they may be domiciled, they will be governed by the provisions of the Act and not by any other personal law.[1] In India, inter-community or inter-religious marriages are not recognized under the personal law of most of the communities, and if two persons belonging to different communities or religions want to marry each other without giving up their faith by converting to the other's religion, they have no option but to marry under the Special Marriage Act, 1954. Once two persons belonging to different communities or religions marry under the Act, a uniform family law is applicable to them in most of the matters, and thus in the inter-personal law, conflictual situations have been almost eliminated.

Yet, another aspect of matrimonial law in India is that in personal matters of some communities, custom still plays an important role. Custom either supplements or modifies the personal law of some communities, and some communities are either partly or wholly governed by customs. Thus, even after codification of the Hindu matrimonial law, in matters of prohibitions on marriage on the ground of blood relationship or affinity, ceremonies of marriage, and divorce, customs are allowed to override the statutory law.[2] Most Scheduled Tribes are governed by their customs. Before the Shariat Act, 1937, some Muslim communities were entirely governed by custom and in some matters, custom modified Muslim personal law, and even after the coming into force of the Shariat Act, some Muslim communities, such as the Khojas of Maharashtra and the Meos of Haryana, Rajasthan and Uttar Pradesh, are still governed by their customary law.[3] The Jews in India are wholly governed by customary law. In a few matters Parsis are still governed by custom.[4]

HINDUS

It is difficult to define the term "Hindu" in reference to religion since Hindu religion is so diverse and multifaceted that the definition of the term "Hindu" in terms of Hindu religion is almost an impossible task. From the point of view of the application of Hindu law, the term "Hindu" is of a very wide connotation. In its ambit are included :

(a) All those persons who are Hindus, Sikhs, Jains and Buddhists by religion. In this category are also included converts and reconverts

1. If a Hindu marries a non-Hindu, his joint status in the joint family property is automatically severed; *see* Special Marriage Act, 1954.
2. See Section 5, clauses (iv) and (v), S. 7 and S. 29(2), Hindu Marriage Act, 1955; *See* Paras Diwan, *Customary Law* (1978) Chapter XIII.
3. See Paras Diwan, *Muslim Law in Modern India* (1990) Chapter I.
4. See Phiroze K. Irani : "*The Personal Law of the Parsis in India*" In Anderson (Ed) *Family Law in Asia and Africa*, Chapter XXIV (1968).

to Hinduism, Sikhism, Jainism or Buddhism.[1]

(b) All those persons who are born of Hindu, Sikh, Jain or Buddhist parents (in case only one parent is a Hindu, then the child must be brought up as Hindu). In this category are included both legitimate and illegitimate children of such parents.[2]

(c) All those persons who are not Muslims, Christians, Parsis or Jews, who are domiciled in India and to whom no other law is applicable.[3]

Hindu by religion.—Any person who is Hindu by religion in any of its forms and developments is a Hindu. In the course of over five thousand years of its existence, Hindu religion has passed through many phases. From time to time dissentions, new ideas and thoughts and practices have come into existence, sometimes diametrically opposite to each other. The remarkable feature of Hindu religion has been that it has been able to absorb and assimilate all thoughts, ideas, dissentions, practices and professions in its fold and has retained its basic unity. The fundamental ideal before a Hindu has always been the achievement of the ultimate goal, the realization of the self, attainment of salvation, to reach *Moksha*, or to attain *amartya*. The self may be realized by following the *bhakti marg, gyan marg* or *karma marg*. It may be realised by believing that God has a form (*sagun*) or that it is formless (*nirgun*). It may be realised by following the path laid down in the *Vedas*, the *Upanishads*, the *Geeta* or any other Hindu scripture, or by *gurus* or *acharyas*. The self may be realized by *tapasya* or following the life of a *sadgrihasthi* or leading the life of an *akhand brahamachari*.[4] One is a Hindu whether one is a follower of any ancient or modern sect or sub-sect of Hindus. Thus *virashaives, lingayats, tantriks, raidashis, Brahama Samajists, Arya Samajists, Radhasoamis, Satsangis* and *Swayamariyarthias* are Hindus.[5]

Any person who is a Jain, Sikh or Buddhist by religion, is also a Hindu since Hindu law applies to him.[6]

In sum, if the nucleus of Hinduness, Sikhness, Jainness or Buddhness is established, a person is a Hindu.

Convert or re-convert.—Any person who is a convert or re-convert to Hinduism, Sikhism, Buddhism or Jainism is a Hindu. The usual mode of conversion is by undergoing the ceremonies of a conversion prescribed by the religion to which conversion is sought. But the *Dharamashastra* did not prescribe any ceremony of conversion to Hinduism. Hinduism has not been a proselytising religion. Among the Hindus, it is only the Arya Samajists who prescribe the ceremony of *Sudhi*, by undergoing which one may become an Arya Samajist Hindu. By judicial interpretation two modes of conversion have

1. Section 2(1) clauses (a) and (b), Hindu Marriage Act.
2. Section 2(1) clauses (a) and (b) to Explanation, Hindu Marriage Act.
3. Section 2(1)(c) Hindu Marriage Act.
4. See *Shastri Yognopurushaddasji* v. *Muldas*, AIR 1976 SC 1119.
5. *Guramma* v. *Mallappa*, AIR 1964 SC 510 (lingayats); *Rani Bhagwan* v. *J.C. Bose*, ILR (1903) 31 Cal II (*Brahma Samajists*) *Shanti Swaroop* v. *R.S. Sabha*, AIR 1969 All 248 (Radhasoamis).
6. *Rani Bhagwan* v. *J.C. Bose*, ILR (1903) 31 Cal 11, *Sugan Chand* v. *Prakash Chand* AIR 1967 SC 506 (Sikhs) *Babbaladi* v. *Babbaladi*, ICR (1927) 50 Mad 228; *Chhotey Lal* v. *Choono Lal*, ILR (1879) 4 Cal 74 (PC) *Commr. of Wealth Tax* v. *Chamba*, (1972) SCJ 168 (Jains); *Ram Pargash* v. *Mst. Daliah*, ILR (1924) 3 Pat 152 *Vanni* v. *Vannichi* ILR (1928) 51 Mad 1 (Buddhists).

also been developed. Thus, a person will be a Hindu by conversion or re-conversion if anyone of the following modes are adopted :

(a) If a person undergoes a formal ceremony prescribed by the religion, caste, community or sect which he wants to enter.[1]

(b) If a person expresses a bona fide intention to become a Hindu accompanied by a conduct unequivocally expressing that intention coupled with the acceptance of his as its member by the community or caste into the fold of which he has entered.[2]

(c) If a person bona fide declares that he has accepted Hinduism as his faith and he has been following Hinduism for sometime, he becomes a Hindu.[3]

A Hindu does not cease to be a Hindu if he becomes an atheist, dissents or deviates from the central doctrine of Hinduism or lapses from orthodox, religious practices, or adopts western ways of life, or decries Hinduism, or eats beef and does anything or everything which ordinarily a Hindu will never indulge in.[4]

Hindu by birth.—Under the modern Hindu law, the children of Hindu parents are Hindus, irrespective of the fact whether or not they follow, practice or profess Hinduism. In Hindu law, the child does not necessarily take the religion of his father. A person will be Hindu by birth in the following two cases :

A. A person (whether born legitimate or illegitimate) will be Hindu if both his parents are Hindus.

B. A person (whether born legitimate or illegitimate) will be Hindu : (i) if one of his parents at the time of his birth was a Hindu, and (ii) he was brought up as a Hindu.[5]

Thus, a child is born to a Hindu mother and Muslim father in 1980 and is brought up as a Hindu. In 1990, the mother converts to Islam. If now the question arises as to whether the child is Hindu or not, the child will be Hindu, even though at this point of time neither parent is a Hindu. This construction flows from the word "belong" used in Explanation (b) to Section 2(1), Hindu Marriage Act. The same will be the position of such a child if he is brought up as Hindu after the death of his Hindu parent. The words used brought up in Hindu religion, but in anyway of life in which any Hindu lives.

Persons who are not Muslims, Christians, Parsis or Jews.—Any person who is not a Muslim, Christian, Parsi or Jew (and who is also not known to be a Hindu, Sikh, Jain or Buddhist—if he is known to be such he is a Hindu), who : (i) is domiciled in India, and (ii) unless it is proved that Hindu law is not applicable to him, is a Hindu. This is a residuary clause. In India, from the point of view of application of personal law, it seems, a person must belong to one or the other religious community, though how deep is his

1. *Kusum* v. *Satya*, ILR (1930) 30 Cal. 99.
2. *Peerumal* v. *Poonuswami*, AIR 1971 SC 2352.
3. *Mohandas* v. *Devasam Board*, 1975 KLT 55.
4. *Rani Bhagwan* v. *J.C. Bose*, ILR (1903) 30 IA 249; *Chandra Shekhar* v. *Kunandaivelu*, AIR 1963 SC 185.
5. *Myna Boyce* v. *Octaram*, (1961) 8 MIA 400; *Ram Parkash* v. *Debnab*, ILR (1942) Pat 152; *Vennamuddals* v. *Cherhati*, AIR 1953 Mad. 571.

religiosity is immaterial. In *Rajkumar* v. *Barbara*,[1] the child was born of Hindu father and a Christian mother. It was not shown that the child was brought up as a Hindu. It was held that this child was Hindu. An atheist, or a person who believes in the commonwealth of all religions, has also to belong to one or the other community. In India, unless a person converts to another religion, he continues to belong to his community of origin or birth, whatever he may do with his religion.

A person who is a Sikh, Jain or Buddhist by religion or a person who is not a Muslim, Christian, Parsi or Jew is not a Hindu by religion although Hindu law applies to him. Section 2(1) of the Hindu Marriage Act, 1955 categorises the persons who are Hindus, and Section 2(3) calls all persons to whom Hindu law applies as Hindu.

The Hindu Marriage Act does not apply to the Scheduled Tribes coming within the meaning of clause (25) of Article 366 of the Constitution of India, unless the Central Government, by notification in the Official Gazette, directs that the Act will apply to any of the Scheduled Tribes.[2]

MUSLIMS

In Muslim law, the term "Muslim" has always been defined in terms of Muslim religion, though the orthodoxy or heterodoxy of the belief is not material.[3] Muslims, for the purpose of the application of Muslim law, fall into the following two categories :

A. Muslims by origin, and

B. Muslims by conversion. Muslims by conversion may be :

(a) Persons who profess Islam, or

(b) Persons who undergo the formal ceremony of conversion.

Muslim by religion.—No person can be a Muslim unless he subscribes to the basic tenets of Islam, and anyone who subscribes to the basic tenets of Islam, is a Muslim. The basic tenets of Islam are : (i) the principle of the unity of God—God is one, and (ii) Muhammed is a Prophet of God.

A person born of Muslim parents is a Muslim and it is not necessary to establish that he observes any Islamic rites or ceremonies, such as performance of five prayers, or observance of the Ramzan fast.[4] Such a person will continue to be Muslim till he renounces Islam.[5] Mere observance of some form of Hinduism or any other religion will not make a Muslim a non-Muslim,[6] conversely a person will not become a Muslim just because he calls himself Muslim or is considered by some as Muslim.[7]

A child whose both parents were Muslims at the time of his birth, is a Muslim, unless on becoming adult he converts to another religion. According to the Shariat, even if one of the parents is a Muslim, the child will be Muslim. It has been seen that under Hindu law, if one of the parents is a Hindu and the other is Muslim, and if the child is brought up as a Hindu, the

1. AIR 1989 Cal. 165.
2. Most of the Scheduled Tribes are still governed by custom.
3. *Narantakath* v. *Parakkal*, ILR (1922) 45 Mad. 225.
4. *Narantakath* v. *Parakkal*, ILR (1922) 45 Mad 225.
5. *Bhagwan* v. *Drigvijai*, (1941) 132 IC 779.
6. *Azima Bibi* v. *Munsi Bhamlam*, (1912) 12 CWN 121.
7. *Raj Bahadur* v. *Bishan Dayal*, ILR (1882) 4 All 343.

child will be Hindu. The rule of Muslim law, it is submitted, will be subject to this rule of Hindu law.

Muslim by conversion.—A non-Muslim may become a Muslim by professing Islam or by undergoing the conversion. Before 1937, it was possible for a convert to Islam to continue to be governed by his old personal law or custom,[1] but after the coming into force of the Shariat Act, 1937, the scope of the application of old personal law and custom has been cut down considerably.[2]

Under Muslim law a person can become a convert by professing Islam. Mere profession is enough and motive is immaterial. A person may renounce his old faith for love or avarice, what matters is the factum and not the latent spring of action which results therefrom.[3] A person's religious belief is not a tangible thing which can be seen or touched. It is the mental condition of one's believing in certain articles of faith that constitutes one's religion.[4] Succession to the property of a convert is governed by Muslim law.[5]

One can convert to Islam by undergoing the ceremonies of conversion prescribed for it.[6] The genuineness or otherwise of the belief in new faith is immaterial; and even if the convert does not practise Islam, he will be Muslim. But conversion should be bona fide, honest and not colourable, pretended or dishonest.[7]

Conversion of a Muslim from one sect to another does not amount to apostasy.[8]

After the Shariat Act, 1937, the position of converts of Islam is as under :

I. All converts to Islam are governed by Muslim law in matters relating to marriage, dissolution of marriage, divorce, guardianship, gift, trust properties, and *wakfs* (other than charities and charitable institutions and charitable and religious endowments).[9]

II. In respect of adoptions, wills and legacies, a convert will continue to be governed by custom, unless he files a declaration on a prescribed form that in these matters he desires to be governed by Muslim law.[10] On filing such a declaration he and his descendants

1. In *Abraham* v. *Abraham*, 19 MIA 195, the Privy Council observed that a convert might renounce the old law as he renounced his old religion, or he might abide by the old law even though he had renounced his old religion.
2. For details, *see* Paras Diwan, *Muslim Law in Modern India*, Chapter I, (1990).
3. *Mst. Resham Bibi* v. *Khuda Baksha*, AIR 1938 Lah 277.
4. *Ibid*, at 286; *see* also *Abdul Razak* v. *Aga Md.*, (1893) 21 IA 56.
5. *Rukamibai* v. *Bismillabai*, AIR 1993 MP 45.
6. The Islamic ceremonies of conversion are very simple. A person seeking to embrace Islam may go to a mosque. On the Imam asking him, "Are you voluntarily embracing Islam?" if he answers affirmatively, he is given *Kalma* to recite. On the completion of recitation of the *Kalma*, the conversion ceremony is over. The convert is given a Muslim name and he enters his name and appends his signature in a register maintained for the purpose in the mosque.
7. See *Skineer* v. *Order*, (1871) MIA 300; *see* also *Ram Kumari* v. *Kumari*, ILR (1891) 18 Cal 264; *Rakeyabibi* v. *Anil Kumar*, ILR (1948) 2 Cal 119; *Ali Nawaz* v. *Mohammed Yusuf*, PLD (1963) SC 51.
8. *Khan* v. *Habib*, ILR (1933) 14 Lah 518.
9. Section 2, Shariat Act.
10. Section 3, Shariat Act.

will be governed by Muslim law.[1]

III. The Shariat Act does not apply to agricultural land.[2]

A Muslim is free to convert to another religion or renounce Islam.[3]

PARSIS

The Parsis came and settled down in India as a result of their persecution in their native land, Persia. They came largely from Persian Province 'Pers' or 'Pars' from which the word 'Parsi' is derived. It seems that the word 'Parsi' has both a religious connotation and a racial significance. The Indian Parsis belong to the Zoroastrian faith, and in that sense, in India, the words 'Parsis' and 'Zoroastrian' are synonyms. Zoroastrianism is founded on the belief in one God and on the basic tenets of good thoughts, good words and good deeds. Conversion is enjoined by the original Zoroastrian religion, but in its Indian version it is a non-proselytizing faith, and it has been judicially accepted that conversion to the Zoroastrian religion is against the usage and customs of the Parsis of India.[4] After their immigration to India, Parsis were greatly influenced by Hindu customs.[5] In modern India, Parsi law applies to :

(a) Persons who are descendants of the original Persian emigrants, who are born of Zoroastrian parents, and who profess Zoroastrian faith,

(b) Persons whose father is (or was) a Parsi and mother an alien but admitted to Zoroastrian faith, and

(c) Zoroastrian from Iran, who are either temporarily or permanently residing in India.[6]

After the establishment of the rule of the East India Company in India, and its successor, the Crown, in respect of Parsis and Christians, a dual administration of justice came into existence. With the exception of Hindus and Muslims, all other British Indian subjects in the Presidency town came to be governed by the rule of English common law so far as it existed and was ascertainable, otherwise by rules of justice, equity and good conscience which were construed to mean mainly rules of English law if found applicable to the Indian society and circumstances.[7]

CHRISTIANS

The Indian Christian Marriage Act, 1872 defines the term 'Christian' as

1. The converts to Islam who before the Shariat Act, were governed by their old personal law or custom, are Khojas, Boharas, Kutchhi Memons, Halai Memons, Girarian and Meos. These were Hindu communities before conversion to Islam. For details, *see* Paras Diwan, *Muslim Law in Modern India*, Chapter I, (1990).
2. Section 2, Shariat Act. In Andhra Pradesh and Madras, the Shariat Act has been made applicable to agricultural land.
3. *Syed* v. *Union of India*, AIR 1991 Cal 205.
4. *Sir Dinshow M. Patel* v. *Sir Jamsetji Jiji Bhai*, (1909) 11 LR 25.
5. In fact, one of the conditions of their immigration to India imposed by the Hindu ruler on them was that they would adopt Hindu customs of marriage. *See* D.F. Karka, *History of Parsis* (Vols. I and II) (1884); S.K. Hodivala, *Parsis of Ancient India* (1920). "Family Law in Asia and Africa 273 and 286 (1968)" in Anderson (Ed). *Family Law in Asia and Africa* 273 and 286 (1968).
6. *See* Phiroze K. Irani, "*The Personal Law of the Parsis in India*", in Anderson (Ed).
7. *Waghela Rajsamji* v. *Sheikh Mahidin*, (1887) 141 A 89.

a person professing the Christian religion.[1] One may profess Christianity in any of its forms. Under the Act the term 'Indian Christian' includes Christian descendants of native Indians converted to Christianity, as well as such converts.[2] Ordinarily a person who is baptized is Christian, but a person does not become Christian just because at the time of his birth he is baptized, particularly when he is not in a position to tell the world as to what is his faith. Thus, when at the time of marriage, A refuses to be married as a Christian and ultimately solemnizes his marriage by Hindu ceremonies and rites, the facts that he attended a Christian school and dresses like a Christian are immaterial.[3] He is not a Christian. A child born to Christian parents is a Christian.[4] A person who professes to be a Christian is a Christian even though he has not been baptized.[5] The words 'persons who profess the Christian religion' mean not only adults who profess Christianity but also their children.[6]

JEWS

Any person who professes or practises Jewish religion is a Jew. But how is one to ascertain that a person is of the Jewish faith? In *Clayton* v. *Clayton*,[7] the court observed that whether a man was or was not a Jewish faith was a question of fact to be determined by evidence. But then what is the meaning of Jewish faith? All those persons who accept every tenet of, and observe every rule and practice and conduct prescribed by the Jewish religion, are obviously Jews. But there are others who do not accept all those tenets and are lax in the observance of some practices and rules and conducts. The extent to which the tenets are accepted and rules and practices are observed, vary from individual to individual. But if they assert that they are Jews, and, it seems, they will be Jews unless the contrary is proved. It is always a question of degree and if a person is a Jew in any degree, he is a Jew. On the other hand, if a person is not a Jew in any degree, he is not a Jew. This means if a person can show some Jewness, he is a Jew.

In India, the term 'Jew' does not refer to a race, but to a religion.

1. Section 3.
2. *Ibid.*
3. *Maharam* v. *E.*, AIR 1918 All. 164.
4. *Cannon* v. *Badamo*, AIR 1916 Lah 438.
5. *K.L.B. David* v. *Nilmoni*, AIR 1953 Orissa IV.
6. *Lucen* v. *Veeradu*, ILR (1894) 18 Mad 230.
7. (1943) AC 320.

Chapter 2

SCHOOLS OF LAW, MIGRATION, DOMICILE, RESIDENCE AND PROBLEM OF CONFLICT OF PERSONAL LAWS

I
INTRODUCTORY

Under the Indian Constitution, all aspects of family law are in the Concurrent List.[1] This means that both Parliament and the State Legislatures have power to legislate in respect of these matters. But, apart from some legislations relating to the Muslim *wakfs* and Hindu endowments, the State Legislatures have not exercised this power to any appreciable extent. The entire codified Hindu law[2] has been enacted by Parliament. Some minor modifications have been made here and there by the State laws.[3] The Tamil Nadu Legislature passed the Hindu Marriage (Amendment) Act, 1968, which validated certain marriages performed among the members of the Self-Respectors' Cult.[4]

All the statutes relating to family law of other Indian communities, too, have been passed by the Central Legislature such as the Christian Marriage Act, 1872, (Indian Divorce Act, 1869), Divorce Act, 2001 (Parsi Marriage and Divorce Act, 1936), Parsi Marriage and Divorce Act, 1988, Dissolution of Muslim Marriage Act, 1939 and Special Marriage Act, 1954.

In India, family law does not differ from State to State. Each community is governed by one single system of law wherever its members may be settled, domiciled or residing. However, within the system of law of each community there are some variations; in a community people belonging to different castes, sects, sub-sects or schools may be governed by separate rules. Sometimes custom also modifies the personal law in respect of some castes or tribes. Sometimes law may be different on account of some religious peculiarities.

II
SCHOOLS OF LAW

With the exceptions of the Hindus and the Muslims, the other communities have no school. In the case of Hindus, schools have some regional connotation, while it is not so in case of Muslims, it is as per sects.

1. Entry 5.
2. Hindu Marriage Act, 1955; Hindu Succession Act, 1956; Hindu Adoptions and Maintenance Act, 1956; Hindu Minority and Guardianship Act, 1956.
3. Thus, the Uttar Pradesh made cruelty as ground of divorce.
4. This is now S. 7-A, Hindu Marriage Act, 1955.

Hindu Law

Hindu law has two main schools : the Mitakshara school and Dayabhaga. The former has four sub-schools : the Mithila, the Benares, the Bombay and the South India or the Dravida. These sub-schools prevail in their respective jurisdictions and in some matters modify the Mitakshara law; otherwise it is the Mitakshara law which prevails. The Dayabhaga school of Hindu law prevails in Bengal, Assam, Tripura, Manipur, Mizoram, Arunachal and Meghalaya. In rest of India, it is the Mitakshara school which has its sway. The Mitakshara school prevails even in the Dayabhaga jurisdiction on all those matters on which the Dayabhaga is silent.[1]

The peculiarity of schools of Hindu law is that if a Hindu governed by a school migrates to another region (where different school has jurisdiction), he will continue to be governed by his own school, unless he gives up his school and adopts the law of the place where he has settled. In the modern Hindu law, schools have relevance only in respect of the uncodified Hindu law; they have lost all their relevance in regard to the codified Hindu law.

Another important aspect of Hindu law is that a person will be governed by custom if he is able to establish a custom applicable to him, even though such a custom is in derogation to Hindu law. Although the codified Hindu law overrides all rules and customs of Hindu law, yet such has been the impact of custom that in certain areas custom has been expressly saved.[2]

Muslim Law

In respect of Muslims, schools have no territorial or regional significance in the sense in which they have in relation to the Hindus. The Hanafi school, one of the four schools of Sunni sect, covers a vast majority of Muslims all over India. Muslims belonging to the Shafii school, another school of Sunnis, are mostly found in southern India. The other two schools of the Sunnis, the Maliki and Hanabali, have hardly any adherents in India.

After the Sunnis, the Shias consist of the next largest group of Muslims in India. The Ismailis, who constitute the smallest minority group among the Muslims and who are mostly found in western and central India, are governed by the Ismaili school of the Shias.[3] Most of the Shias are governed by the Ithana Ashari school. The Zahdis, followers of Zayd school of Shias, are not found in India. There are no followers of Ibadi school, another school of the Shias in India, either.[4] The Shias, like Sunnis, live all over India.

Mention may also be made of the three commercial communities of Muslims, the Khojas, the Bohras and the Cutchi and Halai Memons, who before the Shariat Act, 1937 were governed by their own customs and in some matters by Hindu law. After the year 1937 it is not so. The former two belong

1. For details, *see* Paras Diwan, *Modern Hindu Law*, Chapter IV, 1990.
2. It may be interesting to note that though the Dissolution of Muslim Marriage Act, 1939 is largely based on the progressive principles of matrimonial law of the Maliki school, the Maliki school has no followers in India. Similarly, Hanabali school has no followers in India though at one time it was believed that the Wahabis were its followers in India; in fact, they are adherents of the Hanafi school.
3. The Indian Ismailis are divided in two groups : (i) the Khojas who are followers of his Highness the Aga Khan, their 49th Imam, and (ii) the Boharas, who are known as Western Ismailis.
4. For details, *see* Paras Diwan, *Muslim Law in Modern India*, Chapter II (1990).

to the Shiite Ismaili school and the latter two belong to the Sunnite Hanafi school. The Mopilias and the Meos are also Hindu converts to Islam and in some matters they are still governed by customary law.[1]

In respect of matrimonial law, the Hanafi school of Sunnis and the Ithana Ansari school of the Shias are important.

In the case of other communities of India, there are no schools, though local variations still exist, such as those living in urban areas and those living in the *mofussil*. These variations exist either on account of historical development of law of the community concerned or on account of variations introduced by custom. India has all the sects of the Christians, the Protestants and the Catholics and others, too, though the Protestants are the dominant Christians.

Among the Parsis there are no sects or schools.

It has been often said that in India there is no *lex loci*, and every person is governed by his personal law. *Prima facie*, a Hindu residing in a particular part of India is deemed to be governed by the school of Hindu law that operates there.[2] Thus, a person living in Bengal is governed by the Bengal school. A Muslim is governed by the sect to which he belongs and the Muslim sects and their schools have no territorial connotation.

The Christians, particularly in respect of ceremonies of marriage, are governed by their own sects.

III
MIGRATION AND DOMICILE

A person who migrates from one part of India to another, carries with him his personal law. When it is alleged that a Hindu who has migrated from one part of the country to another is governed by the local law, then it has to be affirmatively proved that he has adopted it.[3] In regard to Hindus, in respect of codified law, no such problem can, now arise on account of migration, since all Hindus are governed by one uniform law.

Migration of a Muslim to another part of the country does not change his sect or school and he continues to be governed by his original sect or school, unless it is established that he has changed his sect or school.

The problem of change of law on account of migration from one part of the country to the other does not arise in the case of Christians, Parsis or Jews, since wherever they may be in India, each is governed by a uniform matrimonial law.

Domicile

In an early case, *Balwant Rao* v. *Baji Rao*,[4] the Privy Council observed, "If nothing is known about a person except that he lived in certain place, it will be assumed that his personal law is the law which prevails in that place. In that sense only domicile is of importance." The Privy Council added that if more was known about a person, then, his personal law should be determined accordingly, unless it was shown that he had renounced his original law in

1. *Ibid*, Chapter I.
2. *Balwant* v. *Beji*, AIR 1971 SC 59.
3. *Rani* v. *Jagdish*, (1902) 20 IA 82; *Bikal* v. *Manjura*, AIR 1973 Pat. 208.
4. (1927) 47 IA 213.

favour of the law of the place where he had migrated. This formulation holds valid in respect of person who is in India, and moves from one part of the country to another country whether he would be governed by his old personal law or the law of the country to which he has migrated; it depends whether he has acquired foreign domicile or retains the Indian domicile. Otherwise, under the Indian personal law domicile is not of such importance. The Indian personal law lays down that all those persons who are in India would be governed by their respective personal laws, irrespective of their domicile. Thus, if any two Hindus, Christians, Parsis and Jews are in India, they can marry under Hindu Law, Muslim Law, Christian Law, Parsi Law or Jewish Law, as the case may be, irrespective of their domicile or nationality.

Domicile is important in respect of the following :

(a) Those Indians who are domiciled in India but are abroad.

(b) Those Indians who are not domiciled in India.

Section 1(2), Hindu Marriage Act, 1955, specifically lays down that the provisions of the Act apply to those Hindus who are domiciled in India. This also seems to be the position under other personal laws. It should be noted that the Special Marriage Act, 1954, does not contain a similar provision. The matter in respect of Indian citizens who are abroad is regulated by the Foreign Marriage Act, 1969. The Act provides facility for Indian nationals to marry abroad with other Indian nationals, or with nationals of other countries or foreign domiciled persons.[1] Marriage under the Act has to be monogamous and can be performed only as a civil marriage.[2] Any marriage performed abroad may be registered under the Act, provided one of the parties to the marriage is an Indian national and provided further that the marriage is valid under *lex loci celebrationis*.[3] The marriage registered under the Act is at par with marriage performed under the Act. The Special Marriage Act, 1954, is applicable to marriages performed or registered under it.[4]

In India, domicile of an Indian citizen may be important in another sense. Indian citizens ordinarily have one domicile, an Indian domicile.[5] Under the Indian Constitution, all matters pertaining to family law are in Concurrent List.[6] The State Legislature has power to amend (though with the prior consent of the President of India) any statute pertaining to any matter of family law whenever they feel that regional requirements make such an amendment desirable. When this is done, the State domicile becomes relevant. For instance, the Uttar Pradesh Legislature passed the Hindu Marriage (U.P. Amendment) Act, 1962, which amended Section 13, Hindu Marriage Act by introducing, *inter alia*, cruelty as a ground of divorce. The amended provision applied to those persons who are domiciled in the State at the time of marriage. This meant that an Uttar Pradesh domiciled man or woman who had married a person domiciled elsewhere would be governed by the Uttar Pradesh Act.

1. Section 4.
2. Section 7, though the parties are free to perform any other ceremonies.
3. Section 17.
4. Section 18.
5. For instance, in *Joshi* v. *State*, (1955) SCJ 298, the Supreme Court recognised State domicile for the purpose of admission to educational institutions.
6. Entry 5.

The question of domicile came for consideration in an interesting manner, in *Yezdiar* v. *Yezdiar*.[1] Wife filed a suit for divorce against her husband under the provisions of the Parsi Marriage and Divorce Act, 1936. The parties were both Zoroastrian immigrants from Iran and were married in Bombay under the Parsi Marriage and Divorce Act. The husband contested the jurisdiction of the court on the ground that the parties were not domiciled in India. The trial court accepted this contention. The appellate court held that an Iranian Zoroastrian could become a Parsi only if he changed his domicile and became an Indian subject and not if he continued to have his domicile and nationality in Iran. This case does not represent good law, since it did not consider certain provisions of the Parsi Marriage and Divorce Act. Section 52(2) lays down that a Parsi, who has been married under the Act, will remain bound by the provisions of the Act even though he changes his religion or domicile so long as his spouse is alive or marriage has not been dissolved or declared null and void by a competent court. Section 4 further provides that a Parsi married under the Act cannot contract a second marriage by change of religion or domicile so long as his marriage subsists. Thus, under the Act, the change of domicile or religion is of no consequence and the Act will apply to parties who have married under the Act. In *Jamshed Irani* v. *Banu Irani*,[2] on similar facts, *Yezdiar* decision was considered and the court observed that it laid down bad law, and held that once parties were married under the Act, they continued to be governed by it; change of religion or domicile was immaterial.

Concept of Domicile

The concept of domicile and complications arising thereunder fall more in the realm of private international law than family law, but since complications primarily affect family law, a brief account of the same is given here.

The concept of domicile arose out of the social need that everyone must be connected with some or the other system of law, and this was independently of nationality. A person may not have any nationality, but he must have a domicile. Domicile is used as a connecting factor. A person may have one nationality, yet he may have a domicile in another country. Several countries have several legal systems operating in different parts of country and there the law of nationality has no meaning and, therefore, individual's connection with a system of law has to be established.[3] The connecting factor in these cases is domicile. A person is connected to a system of law of that territory where he is domiciled. However, in a country like India where personal law is community-wise, the connection of an individual is to the community, the law of which he seeks to be applied to him has to be found out. In such a case, the connecting factor would be the religion of the individuals; thus, if a person seeks to be governed by Hindu law, Muslim law, Christian law or Parsi law, he will have to show that he is Hindu, Muslim, Christian or Parsi, as the case may be.

Law imputes a domicile to every person and an adult person may also

1. (1890) 52 Bom LR 876.
2. (1966) 68 Bom LR 794.
3. For instance, a man or woman cannot be domiciled in the United Kingdom, but must be domiciled in England or Scotland or Wales.

establish his domicile by his free volition. This is called domicile of choice. No person can be without a domicile and no person can have more than one domicile. It is because many rights, obligations, capacities and status are governed by the law of domicile—*lex domicili*.

Domicile of origin.—The maxim that no person can be without a domicile implies that law confers a domicile on every person on birth. This is known as domicile of origin. This domicile continues to stick to a person till he acquires another domicile—domicile of choice. A minor has no capacity to acquire a domicile of choice, since he is incapable of forming an intention. Under English law, a person who has attained the age of 16 or marries under that age is capable of acquiring a domicile of choice.[1]

Since every person must have a domicile of origin by operation of law, the basis of this domicile is paternity or maternity. Thus, at common law and Indian law the domicile of a legitimate child follows that of a father and of an illegitimate child that of his mother.[2] It is evident that domicile of origin is neither connected with the place where the child is born nor with the place where its father or mother resides, but on the domicile of the father or mother, as the case may be. Only exception is that the domicile of the foundling is the place where he is found.[3] The peculiarity of the concept of domicile of origin is that no one can give it up till one acquires a new domicile. Even when a person acquires a new domicile of choice, his domicile of origin remains in abeyance and it revives the moment he gives up his choice. Thus, if a person who has his domicile of origin in India, acquires a domicile of choice in England. He later leaves England without any intention of returning there and goes to the United States and yet is uncertain as to in which part of the United States he is to settle and dies while in a hotel in New York. His Indian domicile of origin has revived and he would be deemed to have died domiciled in India.[4] However, under the Indian law and the U.S. Law, the rule is that the domicile of choice continues till a new domicile of choice is acquired.[5]

Domicile of choice.—An independent person has capacity to acquire a domicile of choice. Before 1973 under English law, minor and married women had no capacity to acquire a domicile of choice. Under Indian law, that is still the position.[6] For acquiring a domicile of choice, two conditions must co-exist : (i) residence in the country of domicile of choice, and (ii) intention to live there permanently. At the moment at which both co-exist, a domicile of choice is acquired. It is immaterial which precedes the other. Thus, a person having an Indian domicile of origin will not acquire a domicile of choice in England till he reaches there; conversely, a person who comes to Indian sub-continent and stays in a New Delhi hotel will not acquire a new domicile till he remains

1. Section 3, Domicile and Matrimonial Proceedings Act, 1973. In England, no person who is under the age of 16 can marry but if a person under that age is lawfully married under his *lex domicili*, he can acquire a separate domicile.
2. *Henderson* v. *Henderson*, (1955) All ER 1792, Section 9, Indian Succession Act.
3. Section 9, Indian Succession Act, 1925.
4. See for some of the anomalous result of this rule; *Winas* v. *AC*, (1904) AC 287, *Ramasy* v. *Liverpool Royal Infirmary*, (1930) 588; *Govindan* v. *Bharti*, AIR 1964 Ker 244.
5. Section 13, Indian Succession Act, 1925, *Restatement of Law; Conflict of Laws*, para 23.
6. But see exception to Section 16, Hindu Succession Act, 1925.

undecided as to whether to settle in India or Bangladesh or Pakistan. In this regard the unresolved question is whether a person, who leaves his country or the domicile of origin, should have intention of never returning there or should have no definite intention to return. In other words, if a positive intention not to return is the last, he will not lose his domicile of origin. On the latter test since he lacks a definite intention to return, he would lose domicile of origin.[1]

Domicile of married woman.—Under English common law, a woman on her marriage automatically acquired the domicile of her husband and retained it throughout the coverture, and she was incapable of acquiring separate domicile under any circumstances. Thus, even when parties separated by a separation agreement or under a decree of judicial separation, the wife continued to have the domicile of her husband. Not merely this, if a husband after deserting her acquired a new domicile elsewhere, she automatically acquired her husband's new domicile.[2] Lord Denning called it, "the last barbarous relic of wife's servitude."[3] This last relic of wife's servitude has now been demolished, and the Domicile and Matrimonial Proceedings Act, 1973 provides that a married woman may now retain or acquire an independent domicile like any other person of full capacity. Her domicile will be ascertained in the same way as that of an independent person.[4] Ordinarily, the married woman would have the same domicile as her husband, if she and her husband are living together, since they would be sharing the same residence and the same intention of living there. Of course, there are several possibilities when husband and wife may have separate domiciles. Thus, a woman domiciled in England who has married a man domiciled in Pakistan, will not be able to acquire Pakistani domicile until she goes to Pakistan with an intention to reside there. A couple domiciled in England decides to emigrate to the United States, and the husband goes first and wife is to follow him thereafter a year. The wife will not acquire a new domicile in the United States till she joins her husband there.

The Indian law still follows the old English law,[5] and lays down that the domicile of a married woman is, during marriage, the same as that of the husband and changes with the domicile of her husband. This is unfortunate that we should have blindly aped English law, particularly when the Indian Succession Act, 1925 provides that in the following two cases, wife may acquire a separate domicile, *viz.*, (i) when wife is living separate under a decree of the court, or (ii) when husband is undergoing a life sentence.[6]

Domicile of children.—Both under English common law and Indian

1. *Re Flym*, (1968) 1 All ER 49; *Qureshi* v. *Qureshi*, (1971); 1 All ER 325 support the former view while the latter view is supported by Cheshire who rightly says, "irresolution effects nothing"; Cheshire; *Private International Law*, 181.
2. *See* Dicey, Rule 9.
3. *Gray* v. *Formosa*, (1963) p. 251. *See* the following cases for anomalies arising out of this rule, *Lord Advocate* v. *Jaffery*, (1921) I AC 146, *AG for Alberta* v. *Cook*, (1926) AC 444.
4. Section 1(1).
5. *Prem Pratap* v. *Jagat Singh*, AIT 1944 All 97; *Teja Singh* v. *Satya*, (1970) 72 PER 225. This decision has been overruled by the Supreme Court on a different point; AIR 1975 SC 105; *Saeeda Khatun* v. *State of Bihar*, AIR 1951 Pat 454; *Allabandi* v. *Union of India*, AIR 1954 All 457.
6. Exceptions to S. 16.

law, a minor legitimate child acquires the domicile of its father, and a minor illegitimate child acquires that of its mother. This was called the dependent's domicile of children and it lasted throughout the minority of the child. The result was that even when a husband deserted his wife leaving their minor children with her and acquired a domicile of choice elsewhere, the domicile of children changed with the domicile of the father. The Domicile and Matrimonial Proceedings Act, 1973, has changed this common law rule, and now a child has capacity to acquire a domicile of choice at the age of 16. If the parents of a legitimate child are living apart, the child will have the domicile of that parent with whom it has a home.[1] This does not apply to illegitimate children whose position is unaffected by the statutory modifications.

The Indian law has followed the English law,[2] though the Indian Succession Act lays down some common different rules. Thus, it lays down :

(a) The domicile of origin of every person of legitimate birth, is in the country in which at the time of birth its father was domiciled; or if it is a posthumous child, in the country in which its father was domiciled at the time of his death.[3]

(b) The domicile of origin of an illegitimate child is in the country in which at the time of its birth its mother was domiciled.

(c) The domicile of the child follows the domicile of the parent from whom it derived its domicile of origin.[4]

(d) But in the undernoted cases, the child's domicile does not follow that of the parent :[5]

(i) If the minor has married.

(ii) If the minor holds any office of employment in the Government, and

(iii) If the minor has set up, with the consent of the parent, any separate business.

Under the Indian law, a minor child has capacity to acquire an independent domicile on attaining majority, *i.e.*, completion of 18 years of age.

The position of domicile of minor adopted child is the same as that of the natural born child.[6] In India also, this seems to be the position, since the Hindu Adoptions and Maintenance Act, 1956, Section 12 lays down that an adopted child is like a natural born child for all intents and purposes.

The minor female's domicile changes on her marriage and becomes that of her husband. This is still the position under the Indian law.[7] But, under the English law, a minor acquires capacity to have an independent domicile on marriage.

It seems that after the death of both parents of a legitimate child or both adopted parents of an adopted child, or mother of an illegitimate child, the

1. Section 4.
2. *Sharafat Ali* v. *State of U.P.*, AIR 1967 All; *Rasheed Hasan* v. *Union of India*, AIR 1967 All 54.
3. Section 7.
4. Section 14.
5. Exceptions to S. 14.
6. *See* Dicey Morris, Rule 12(5), p. 110. For Indian Law, *see* (1929) 30 MLW 691. This is also the view of the Private International Law Committee.
7. *See* S. 15, Indian Succession Act, 1925.

child's domicile cannot be at all changed, until it acquires the capacity to change it. It seems that the testamentary or certificated guardian has no such power. It is submitted that the guardian of a minor should have power to change minor's domicile wherever it is for the welfare of the minor.[1]

IV
RESIDENCE

Residence is important in family law for various reasons. Under English law and the Christian Marriage Act, 1872, residence is important in connection with the publication of banns. Under all the Indian matrimonial statutes, residence is important for the purpose of jurisdiction in matrimonial causes. For instance, under clauses (ii), (iii) and (iv) of Section 19, Hindu Marriage Act, 1955, a petition for nullity, divorce, judicial separation or restitution of conjugal rights may be filed on the basis of residence of the respondent, last joint residence of the parties or the residence of the petitioner. The same is the position under the Special Marriage Act, 1954.[2] The residence is similarly important under the Parsi Marriage and Divorce Act,[3] and the Indian Divorce Act.

The term 'residence' has been defined variously. Residence is a question of fact. In its ordinary meaning, "residence" means the permanent home, or a permanent place where a person lives, and does not include a temporary residence.[4] In a 1970 case, Lord Denning, MR accepted the meaning given in the Oxford dictionary :

> To dwell permanently or for a considerable time, to have one's settled usual abode, to live in, or at, a particular place.

In Indian cases this view has been expressed much earlier. Thus, in 1911, in *Kumud* v. *Jotindranath*,[5] the Court said that residence means the place where a person "eats, drinks and sleeps, or where his family eats, drinks and sleeps". In *Anilabla* v. *Dhirendera*,[6] the Court construed it to mean to "dwell permanently or for a considerable time."

It means that "residence" has two elements : physical presence and intention to remain there for a sufficiently long period to make the presence more than fleeting or transitory. However, the intention need not be to live there permanently. But what duration will give the stay the character of residence, will depend upon the facts and circumstances of each case. If a person goes to another place for a temporary stay, such as for health reasons, for business or study, that place cannot be said to be his residence. Residence cannot be lost by a temporary absence. For instance, if spouses live in their matrimonial home, they will be treated to be residing there even when they are absent from it for a month or two, just as when they go out on holidays. If a person goes abroad for business or study and retains his original residence, he would be treated to be residing at the latter place.[7] *Najak Dulari*

1. For details of the Indian and English rules relating to domicile, *see* Paras Diwan, *Indian and English Private International Laws*, Chapter VI (1977).
2. Section 31.
3. Section 29.
4. *Dennis* v. *Dennis*, AIR 1951 Nag 24; *Saraswati* v. *Keshawan*, (1961) Ker LH 124.
5. ILR (1911) 38 Cal 394.
6. ILR (1921) 48 Cal 577.
7. *Sinclair* v. *Sinclair*, (1967) 3 All ER 882.

v. *Narayan*,[1] is a good illustration. After their marriage, the spouses lived in Amritsar. After sometime the wife left the husband and went with her sister at Gurdaspur. With a view to persuading his wife to return to the matrimonial home, at Amritsar, the husband went to Gurdaspur and stayed there for a few days. The Court had no hesitation in holding that the parties did not reside at Gurdaspur but resided at Amritsar.

Stay.—But where a couple has no permanent home nor has established a matrimonial home at any place, and is moving from place to place (may be in search of a home or may be they want to make that as their way of life), then at which place could they be said to be residing? A negative answer, *i.e.*, they are not residing anywhere, will not solve the problem, since for the purpose of jurisdiction, the law must attribute them residence at some place. For instance, after their marriage, the spouses go out for *Bharat Darshan* from place to place all over India, and thus, after roaming about for nine months, they come to New Delhi (they had no intention of making New Delhi their matrimonial home) where some differences arise between them, consequent to which wife leaves the husband. In this case, which will be the place where they could be treated to have last resided together? During their itinerancy, they did not think to reside at any of the places they visited. The Indian courts have expressed the view that in such a case the place where they last stayed together will be the place where they last resided together.[2] In *Tara* v. *Jaipal Singh*,[3] the spouses did not set up any matrimonial home and lived at different places for short duration, and finally they stayed at Darjeeling from where they parted company. It was held that they last resided together at Darjeeling.

It is possible for a person to have more than one residence. In cases where he lives, say, seven months at one place and five months at another place, both places may be regarded as his residence.[4]

Habitual residence.—In England and other Western countries as an impact of certain international conventions and on account of difficulties inherent in the concept of domicile, residence has been accepted as a connecting factor for jurisdictional and some other purposes in cases having some foreign element.[5] The Domicile and Matrimonial Act, 1973, lays down that if either party to the marriage was habitually residing in England throughout the period of the year ending on the date when the proceedings are begun, the English Court has jurisdiction to entertain a petition for divorce. Yet, habitual residence has not been defined. According to the Law Commission of England, it is clearly distinguishable from domicile inasmuch as any intention as to the future is not relevant. But it is more than residence. It is a substantial connection of a person with the place or country of his

1. AIR 1959 Punj 50.
2. *Bright* v. *Bright*, ILR (1906) 36 Cal 964; *Clerence* v. *Clerence*, AIR 1964 Mys 67; *Saroja* v. *Imanuel*, AIR 1965 Mys 12. (These cases are under the Indian Divorce Act) *Lalithamma* v. *Keller*, AIR 1966 Mys 179; *Jagan* v. *Swaroop*, (1972) 2 MLJ 71; *Madhavi* v. *Sirotha*, AIR 1974 All 36 (these cases are under the Hindu Marriage Act, 1955).
3. ILR (1946) 1 Cal 604.
4. *Fox* v. *Stirk*, (1970) 3 All ER 7.
5. For instance, *See* Adoption Act, 1968, S. 11(i); Recognition of Divorce and Legal Separation Act, 1971, S. 3(1)(a).

residence. Whether or not a person has substantial links with the country of his residence can be proved by evidence.[1] The factual element of habitual residence has been emphasized by the Council of Europe on Fundamental Legal Concepts in the following words, "In determining whether a residence is habitual, account is to be taken of the duration and the continuity of the residence as well as other factors of a personal or professional nature which points to durable ties between a person and his residence." It seems that "habitual residence" and "ordinary residence" (a term which is used in some Indian statutes) have the same meaning.[2]

Ordinary residence.—In respect of jurisdiction over a minor, the English private international law and some Indian statutes use the expression "ordinary residence." Lord Denning, MR said :

> So long as the father and mother are living together in the matrimonial home, the child's ordinary residence is the home, and it is still his ordinary residence, even while he is away at boarding school.....When father and mother are at variance and living separate and apart and by an arrangement the child resides in the house of one of them, then that home is his ordinary residence, even though the other parent has access and the child goes to him from time to time. Quite generally I do not think a child's ordinary residence can be changed by one parent without the consent of the other or by other's acquiescence.[3]

Under the Guardianship and Wards Act, 1890, the District Court exercises jurisdiction over the child on the basis of child's "ordinary residence" within its jurisdiction.[4] The Indian courts have held that the place where the child has his home is the place where he has his ordinary residence and this residence is not changed by the mere removal of the child to another place by the other parent.[5] Similarly, our courts have held that if parents are living separate under an agreement, then the child's ordinary residence will be the place where the parent who is assigned the custody resides.[6] Similarly, if the other parent removes the child with the consent or acquiescence of the parent with whom the child has his ordinary residence, then, of course, the child's ordinary residence will change.[7] The ordinary residence[8] of a parentless child is the place where he is found.[9]

Problems of Conflict of Personal Laws

In India, with each community having its own personal law, there was a

1. Report para 42.
2. For details, see Paras Diwan, *Private International Law; Indian and English* (1988).
3. *In re* P (CE) (1965) 2 WLR 1 at 10.
4. Section 9.
5. *Mst. Lalita* v. *Parmatma Prasad*, AIR 1940 All 329; *Vimlabai* v. *Babooram*, 1951 Nag 179; *Chandra Kishore* v. *Hemlata*, AIR 1955 All 611; *Nazir Begum* v. *Ghulam Qhadi*, AIR 1973 Lah 793.
6. *Harbans Singh* v. *Vidhyawanti*, 1960 Punj 372; *Virbala* v. *Kalichand*, AIR 1973 Guj 1.
7. *Bholenath* v. *Sharda Devi*, AIR 1954 Pat 489; *Sarla Nayar* v. *Vayanka*, AIR 1957 Ker 158.
8. *Robert* v. *Lalchand*, ILR (1909) 34 Bom 121; *Chiman Lal* v. *Raja Ram*, AIR 1937 Bom 160.
9. For details, see Paras Diwan, *Private International Law; Indian and English*, (1988).

possibility of problems of conflict of laws arising, but since interpersonal relations in family matters are not permitted under the personal law of any community, the possibility of conflict of personal laws is minimal. Inter-communal marriages cannot take place, unless one of the parties accepts the faith of the other; in that event it becomes an intra-community marriage. In India, intercommunal, inter-religious or international marriages are possible only under the provisions of the Special Marriage Act; in that case personal laws of both parties cease to apply and in all personal matters spouses are governed by different laws. Thus, in all matrimonial matters, they are governed by the Special Marriage Act, and succession to their property is regulated by the Indian Succession Act, 1925. However, in some marginal cases, problem of conflict of personal laws arises, such as when a spouse changes his religion and marries again under the new personal law which permits such a marriage. In such a situation, the question arises whether the spousal relations of such a person will be governed by the pre-conversion or post-conversion law?

This question has arisen before the Indian courts in some cases where a non-Muslim spouse has converted to Islam with an avowed purpose of taking advantage of some provisions of Muslim law. In *Khambatta* v. *Khambatta*,[1] in 1905, a Scott woman married an Indian domiciled Muslim in Scotland before a Marriage Registrar. They came to India and the wife converted to Islam. In 1922, the husband pronounced *talak* (divorce) on his wife, and the wife, after obtaining a declaration from a civil court that her marriage stood dissolved, underwent a ceremony of civil marriage with one Khambatta under the Special Marriage Act, 1872. After ten years of her marriage with Khambatta, she sought a declaration of nullity of her marriage on the ground that since her Scottish marriage was not dissolved validly by any court of law, her second marriage was bigamous and hence void. The main question before the court was whether her first marriage validly stood dissolved and, obviously, the court was called upon to decide whether the marriage was governed by the law applicable at the time of her Scottish marriage, or by the law after conversion which was also the law of matrimonial domicile. The court decided in favour of the latter view and held that her marriage validly stood dissolved. In *Nurjahan* v. *Tisanco*,[2] two Russian Christians solemnized their marriage in Berlin. The spouses lived in several European countries, and in 1938, the wife came to India and husband went to Scotland. In 1940, the wife embraced Islam and assumed the name of Nurjahan. She thrice offered Islam to her husband and on the husband's refusal to accept it filed proceedings in an Indian court for the dissolution of marriage. (Under the Muslim law, this is a mode of dissolution of marriage). The court dismissed the proceedings on the short ground that since parties were not domiciled in India, it had no jurisdiction on the matter. However, the court did observe that no spouse can, on converting to another religion, impose his new religion and new law on the other spouse.

In *Aiyasabibi* v. *Subash Chandra*,[3] parties were, at the time of their marriage, Hindus domiciled in India and were married by Hindu ceremonies

1. AIR 1935 Bom 5.
2. 45 CWN 1047.
3. 49 CWN 745.

and rites. After sometime the wife converted to Islam and thrice offered Islam to her husband, and, on the latter's refusal to do so, she launched proceedings for dissolution of marriage in an Indian court. She also averred that her husband had treated her with cruelty. The court dissolved the marriage and observed that the law applicable would be the law of the wife after conversion. This is the only case holding this view. It is evident from a cursory perusal of the judgment that the court was impelled to grant the relief more on compassionate grounds since husband's cruelty was established. In *Saeeda Khatun* v. *Ovedia*,[1] two Indian domiciled Jews performed their marriage by Jewish ceremonies. In 1945, the wife converted to Islam and behaved the same way as *Nurjahan* and *Aiyasabibi* did. The proceedings were dismissed and the court observed that a marriage performed under one personal law could not be dissolved under another personal law, just because one of the parties had converted to another religion.[2]

In sum, it would appear :

(a) If both spouses change their religion, they will be governed by their new personal law.

(b) If one of the spouses changes his or her religion, then no matrimonial relief could be granted to the convert spouse under his or her new matrimonial law.

Under the Hindu law if one spouse converts to another religion, the other spouse may seek dissolution of the marriage on that ground.[3] Under Muslim law, apostasy from Islam operates as an immediate dissolution of marriage if the converting spouse is the husband. But apostasy of the wife does not result in instant dissolution of marriage.[4] But if the wife belonged to another faith before marriage and reconverted to her original faith after marriage (this implies that at the time of marriage she embraced Islam), then it results in instant dissolution of marriage.[5]

As to conversion to Christianity we have a peculiar statute—Native Converts' Dissolution of Marriage Act, 1886, a masterpiece of the Christian missionary legislation. The Act lays down that if a native spouse abandons him or deserts him for six months or more, a decree of divorce may be passed on the petition of the convert spouse. If the respondent is wife, the court would postpone the consideration of the petition for one year to enable her to accept Christianity and to cohabit with her husband. If she refuses to do so during this period, the decree of divorce will be pronounced.

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1. (1945) 49 CWN 745.
2. *See* also *Rakhima Bibi* v. *Anil Kumar*, ILR (1948) 2 Cal 119; *Rabasa Khanan* v. *Khodabad*, (1948) 48 Bom LR 864 where the same view was taken.
3. Section 13(1)(ii), Hindu Marriage Act, 1955.
4. Section 4, Dissolution of Muslim Marriage Act, 1939.
5. *Ibid*.

PART II
MARRIAGE

Chapter 3

CONCEPT OF MARRIAGE AND THEORIES OF DIVORCE

I
INTRODUCTORY

All over the Hindu and Christian worlds, marriage began as a sacrament. Marriage, as a sacrament, necessarily implied a permanent and indissoluble union. Hindus took the notion of indissolubility of marriage to the extreme by laying down that even death did not put the marriage asunder. It was a union not merely in this life but also in all lives to come—an eternal union. The Hindus conceived of their marriage as a holy and sacramental tie and not a contractual union. For a Hindu, marriage is ordained as a necessary sacrament (*Samskar*) for begetting a son, for discharging his debt to his ancestors, and for performing religious and spiritual duties. The Shastrakars ordained that once is a maiden given in marriage, and the injunction was : "A true wife must preserve her chastity as much after as before her husband's death."[1]

Hindu Law

Among Hindus marriage is a necessary *samskar*; every Hindu must marry. The man is incomplete without his wife, and it is a wife who completes him. She is *ardhangini* (half of him). The Brahmanas proclaimed, "The wife is verily the half of the husband".[2] "Half is she of the husband, that is wife."[3] The wife has been eulogized thus :

A wife is the very source of *purushartha*, not only of *dharma, artha* and *kama*, but also of *moksha*. Those who have wives can fulfil their due obligations in this world; those that have wives can be happy; those that have wives can lead a full life.

Wife is not just *patni* but *dharmapatni*—partner in the performance of spiritual as well as secular duties. A man cannot perform most of the *Yagnas* (sacrifices) without a wife. Wife is also *sahadharmini*.[4]

Thus, Hindus conceived of their marriage a sacramental union—a sacrosanct, permanent, indissoluble and eternal union. Hindus did not regard it as a contract, but as a tie which once tied cannot be untied. The indissoluble aspect of the Hindu marriage is thus expressed by Manu :

The husband is declared to be one with the wife. Neither by sale nor by

1. See *Manusmriti* v. 151, *Yajnavalkya Smriti* I, 76; *Vishnu Smriti* XXV, 13-14.
2. *Sathpath Brahamana* V, 1.6.10.
3. *Taittirya Sanhita* III 1,2,57.
4. *Manusmriti* IX, 64-68.

repudiation is a wife released from her husband.[1]

Thus, under Hindu law, divorce was out of question. However, under custom, divorce has been recognised in some Hindu communities and tribes.[2]

Hindu Marriage—A sacrament or contract.—Under Hindu law, polygamy was recognized and a Hindu male could take any number of wives, though very few Hindus practised polygamy. The Hindu Marriage Act, 1955, has abolished polygamy and introduced strict monogamy for all Hindus. Divorce also has been recognized. A religious ceremony is still necessary for most marriages. The question that still remains unresolved is : Has the Hindu marriage become a contract?

The Hindu Marriage Act does not lay down that a marriage without the consent of the parties is void, though it does lay down that if consent of a party to marriage is obtained by fraud or force, the marriage is voidable. Similarly, when one of the parties to marriage is of unsound mind, the marriage is voidable. It is laid down that bride should not be less than 18 years and bridegroom not less than 21 years in age. But marriage performed under those ages is valid. It is well established rule of law of contract that a contract for want of capacity is void. It is evident from the provisions of the Hindu Marriage Act that consensual element of marriage has not been emphasised; rather a marriage without consent is a valid marriage. Non-age does not render the marriage void or voidable. Fraud or force exercised on the consent to marry renders the marriage voidable. So does insanity. A combined reading of Sections 5, 11 and 12 of the Hindu Marriage Act, leaves no doubt that consent is not an essential aspect of Hindu marriage.

It is argued that when two persons undergo the ceremony of marriage, consent may be implied. It is submitted, it may be so, or it may not be so; it would depend upon the facts and circumstances of each case. Suppose, a spouse to a marriage is able to show that despite the fact that he underwent the ceremonies of marriage, he did not in any manner consent to the marriage, can a declaration of nullity be obtained? It is submitted that no such declaration can be obtained. For instance, a girl shows that she underwent the ceremony of marriage in deference to the sentiments of her ailing and orthodox father, while she had no intention to marry, can her marriage be declared to be null and void? In our opinion, no such declaration can be obtained; such a marriage is not voidable either.

On the other hand, the Hindu marriage has no longer remained an indissoluble and eternal union. Widow marriages are allowed. Divorce is also permitted. It may still be called a holy or sacramental union, in the sense that a sacramental ceremony is necessary. Thus, one may say that Hindu marriage has neither become a contract nor has remained a sacramental union; it has semblance of both.

Muslim Law

Muslims have, from the very beginning, regarded their marriage as a contract. Muslim marriage has been defined as a civil contract for the purpose of legalizing sexual intercourse and procreation of children. It is not a sacrament but a contract, though solemnized generally with the recitation of

1. *Manusmriti* IX 45-47.
2. *See* Paras Diwan, *Customary Law*, Chapter IX (1990).

certain verses from the *Koran*. Muslim law does not prescribe any religious service essential for its solemnization. In the words of Shama Charan Sircar :

> Marriage among the Muslims is not a sacrament but purely a civil contract.

Despite the observation of a modern judge that the impression that a Muslim marriage is a mere contract and not a solemn union is another fallacy of the Hindu and western students,[1] in its legal connotation, Muslim marriage is essentially a contract, though marriage as a social institution is regarded solemn all over the civilized world, including the Muslims. According to Fyzee, *Nikah* is an institution legalized for manifold objects, such as, the preservation of species, the fixing of descent, restraining men from debauchery, the encouragement of chastity, the promotion of love and union between the husband and the wife and developing of mutual help in earning livelihood.[2] That Muslim marriage is essentially a contract is evident from the nature of marriage and the mode by which it is performed. Thus, only a civil ceremony, *i.e.*, an offer made by one party and accepted by another in one and the same meeting in the presence of two witnesses (not among Shias) is sufficient for entering into the contract of marriage. Whatever religious ceremonies are appended to the civil ceremony are merely to give it sanctity; their performance or non-performance does not effect its legality.

Muslim marriage is a polygamous marriage limited to four wives. A Muslim male has capacity to keep four wives simultaneously. But if a Sunni male takes five or more wives, his marriage with the fifth wife or subsequent wives is not void but merely irregular.

Parsi, Jew and Christian Marriages

The Parsi marriage is also regarded as a contract though the religious ceremony of *ashirvad* is essential for its validity. Literally meaning "blessing", *ashirvad* is essential for its validity. *Ashirvad* means a prayer or exhortation to the parties to observe their marital obligations.[3] The marriage is solemnized by a Parsi priest in the presence of two witnesses.

Marriage among the Indian Jews is also regarded as a contract. A written contract called *Katuba* between the parties is essential for the validity of marriage. A religious ceremony is also required.

A Christian marriage in India is also a contract and it is usually solemnized by a Minister of Religion licensed under the Christian Marriage Act, 1872. It can also be solemnized by the Marriage Registrar.

Under the Special Marriage Act, 1954, marriage is essentially a civil contract. Non-age and lack of consent renders a marriage void. The Act lays down a civil ceremony for the marriage.

Definition of Marriage

According to the Canon law, marriage is a conjugal union of a man and woman which arises only from the free consent of each spouse, but this freedom relates to the question whether two persons really wish to enter into matrimony, it is entirely independent from the free will of spouses. Once a

1. Krishna Iyer, *Islamic Law in Modern India* 23.
2. Fyzee, *Outline of Muhammdan Law* 84 (1964).
3. See *Parshottam* v. *Meherbai*, ILR (1880) 13 Bom 302.

contract of marriage is entered into, a marriage is regarded as a sacrament; as an indissoluble union; only death can put it asunder. In *Hyde* v. *Hyde*,[1] Lord Penzance gave the following definition of marriage (it is treated as the classic definition of the Christian marriage, despite its flaws) :

"I conceive that marriage as understood in Christiandom may...be defined as the voluntary union for life of one man and one woman to the exlusion of all others."

But since this definition emphasizes the indissolubility aspect of marriage, it is not correct under English law. With a view to avoiding this deficiency in the definition, in *Nachimson* v. *Nachimson*,[2] the Court of Appeal appended a gloss by saying that it should be the intention of the parties when they enter into marriage that it should last for life. Though, later on, it may be dissolved on any ground available to the parties including the irretrievable breakdown of marriage.

II
THEORIES OF DIVORCE

In early Roman law, marriage and divorce were essentially private acts of the parties. Whenever two persons wanted to marry they could do so, and whenever they wanted to put their marriage asunder they were equally free to do so. No formalities or intervention of an agency was necessary for either. With the advent of Christianity, marriage came to be regarded as sacramental and indissoluble union, though it retained its cōnsensual aspect. In England before 1857, a marriage could be dissolved only by an Act of Parliament. After a considerable pressure, divorce was recognized under the Matrimonial Causes Act, 1857, but only on one ground, *i.e.*, adultery.

It seems that with the lofty ideals of liberty and equality of the Industrial Revolution sweeping England and the continent of Europe, it no longer remained possible to regard marriage as indissoluble.

However, marriage is also regarded as a social institution and not merely a transaction between two individuals, and therefore, it was argued that there was a social interest in preservation and protection of the institution of marriage. The institution of marriage was hedged with legal protection. The inevitable consequence of this philosophy was that marriage came to be regarded as a special contract which could not be put to an end like an ordinary contract. A marriage can be dissolved only if one of the spouses is found guilty of such acts and conducts which undermined the very foundations of marriage. This led to the emergence of the offence or guilt theory of divorce.

Fault Theory of Divorce

At first adultery was the only ground for divorce. In adultery a certain amount of criminality is considered to be involved. Later on, cruelty and desertion were added as ground for divorce. Adultery, cruelty and desertion frustrate the very purpose of marriage. Marriage, being an exclusive union, adultery destroys this very foundation. Cruelty undermines the basic assumption of marriage that parties will live together in harmony and mutual

1. (1860) 1 and D 130 at 133.
2. (1930) 1 and D p. 271

confidence. Desertion undermines the basic assumption that the parties will cohabit with each other. These are regarded as offence against marriage, and, in early English law, divorce was regarded as a mode of punishing the guilty spouse who had rendered himself or herself unworthy of consortium. It was natural to nomenclature this basis of divorce as offence theory. A marriage can be dissolved only if one of the parties to marriage has, after the solemnization of marriage, committed some matrimonial offence, which is recognized by law as a ground of divorce. Every matrimonial lapse is not a ground of divorce.

The guilt theory further lays down that the party seeking divorce must be an innocent party. This dichotomy of guilt and innocence is the basic requirement of this theory. In other words, on the one hand, one of the spouses must have committed one or the other matrimonial offence, and on the other, the spouse seeking divorce must be innocent, *i.e.*, in no way party to, or responsible for, the offence of the guilty party. For instance, if the ground on which a spouse seeks divorce is adultery and it is shown that the petitioner was guilty of connivance at the respondent's adultery, the petition would be refused. Similarly, if cruelty is provoked, divorce will be refused. English law took this theory to its logical end by laying down that if both parties were guilty, divorce would not be granted to either. Thus, if the respondent is guilty of desertion and the petitioner is guilty of adultery, the petition will be refused.

Since it was required that the petitioner should be an innocent party, there were evolved the bars to matrimonial relief; discretionary bars, and absolute bars. Absolute bars under the English law were : connivance, acquiescence, collusion and condonation. The discretionary bars were : petitioner's own adultery, cruelty, unreasonable delay and conduct conducing to the respondent's guilt. The existence of an absolute bar was fatal to the petition, while in respect of discretionary bars, the court had the discretion to grant or refuse to grant relief.

In later law when insanity was recognized as ground for divorce, the guilt or offence theory was rechristened as faulty theory, since it would be grotesque to say that an insane respondent is guilty of a matrimonial offence. Insanity is a misfortune. Thus, it came to be established that if one of the parties to marriage had some specified fault in him, marriage could be dissolved, irrespective of the fact as to whether the fault was his conscious act (such as adultery, cruelty or desertion) or was providential (such as insanity or leprosy). In some systems of law many more grounds for divorce were added. Thus, sentence of imprisonment for some specified period, whereabouts of a party not been known for a specified period, wilful refusal to consummate the marriage, leprosy, venereal disease, rape, sodomy, bestiality were recognised as grounds of divorce.

The English law has abandoned the offence or guilty theory of divorce.[1] But from English law the fault theory of divorce came to Indian Law.

The Indian Divorce Act, 1869, which applies only to Christian marriages was modelled on the Matrimonial Causes Act, 1857. The only ground for

1. It was done by the Divorce Law Reforms Act, 1969 which was replaced by the Matrimonial Laws Act, 1973. But see, *Ammini* v. *Union of India*, AIR 1995 Ker 252 (discussed in the next Chapter).

divorce is adultery. In the case of the husband, simple adultery of the wife entitled him to divorce, but in the case of the wife, husband's adultery has to be something more than adultery; conversion plus remarriage, incestuous adultery, adultery coupled with desertion for two years or upwards, adultery plus cruetly; she can also sue for divorce on the ground that the husband is guilty of rape, sodomy or bestiality.[1] After the enactment of Divorce Act, 2001, the matrimonial bars have been enacted in Sections 12, 13 and 14.

The fault theory is also the basis for divorce under the Parsi Marriage and Divorce Acts 1936-88. As many as eleven grounds for divorce are recognized, and practically all the matrimonial bars have been enacted.

Originally, under the Hindu Marriage Act, 1955, divorce was based only on the fault theory. The consent theory and breakdown theory were introduced later on. The Special Marriage Act, 1954, enacted both the fault theory and consent theory. The breakdown theory was added in 1970. The Dissolution of Muslim Marriage Act, 1939, also enacts the fault theory. The former two statutes also enact the matrimonial bars. The Marriage Laws (Amendment) Act, 1976, has amended the grounds for divorce under the Hindu Marriage Act and the Special Marriage Act, and have tried to bring them at par with each other (though some differences still exist). Under the Hindu Marriage Act, the present nine fault grounds for divorce are recognised on the basis of which either party can sue for divorce and four additional fault grounds are laid down on the basis of which wife alone can sue for divorce. The common fault, grounds are : adultery, cruelty, desertion of two years, incurable insanity, virulent and incurable leprosy, venereal disease in a communicable form, conversion, renunciation of the world, seven years of unheard absence. Renunciation of the world and conversion are not grounds for divorce under the Special Marriage Act, 1954; the other seven grounds are more or less the same. Under the Special Marriage Act, seven years' sentence of imprisonment is a ground for divorce. Under the Hindu Marriage Act, the additional grounds for wife are : pre-Act polygamous marriage of the husband, repudiation of marriage, rape, sodomy and bestiality of the husband and non-resumption of cohabitation for one year or more after the passing of an order of maintenance under Section 18, Hindu Adoptions and Maintenance Act, 1956, or under Section 125, Criminal Procedure Code, 1973. Under the Special Marriage Act, only the latter two are additional grounds of divorce.

Under the Dissolution of Muslim Marriage Act, 1939, nine grounds for divorce are recognized on which wife can sue for divorce. These are : unheard absence of husband for four years, neglect or failure to provide maintenance by the husband for a period of two years, seven years' sentence of imprisonment, failure of the husband to perform matrimonial obligations for three years, impotency of the husband, two years leprosy or virulent venereal disease, repudiation of marriage by the wife, cruelty of the husband, not treating her equitably with the other wife or wives, and any other ground recognized under Muslim law.

The Parsi Marriage and Divorce Act, 1936, as amended by the Act, 1988 has 11 fault grounds of divorce. It also recognized divorce by consent as well as irretrievable breakdown of marriage at par with Hindu law.

Section 23 of Hindu Marriage Act and Section 34 of Special Marriage Act

1. Engles : *Origin of Family, Private Property and State*, 117-83.

deal with bars to matrimonial relief. These are : accessory, connivance, condonation (all the three in case of adultery and only the last in case of cruelty), collusion, improper delay and any other legal grounds. These are common bars. Under the former, taking advantage of one's own wrong or disability is also a bar. It is not a bar under the Special Marriage Act. All bars are absolute bars.

The Hindu Marriage Act and the Special Marriage Act, Parsi Marriage and Divorce Act and Muslim Law and now Christian Law as well[1] recognise divorce by consent and also on irretrievable breakdown of marriage.

Consent Theory of Divorce

The free-volition concept of marriage if taken to its logical end implies that the parties should have the same freedom of divorce as they have of marriage. If marriage is a contract based on mutual consent of the parties, the marriage should also be dissoluble by mutual consent of the parties without showing any cause. Many a time people enter into transactions and later on want to get out of them. Similarly, parties may enter into a marriage and may later on want to get out of it. May be parties realise that they made a mistake in entering into the marriage or may be they want to get out of it by their mutual desire. There may be another angle also. Suppose, parties realise that on account of incompatibility of temperament or some other reason they cannot continue to live happily and harmoniously, they feel that their marriage has turned out to be a bad bargain, should they have no right to correct their error by mutual consent? If not, they are likely to go astray, one may commit a matrimonial offence so that a ground is made available; one may, out of sheer frustration, murder the other. Unhappy families are socially undesirable and are breeding grounds for delinquent children. In the words of Engels :

> If only marriages that are based on love are moral, then only those are moral in which love continues.....A definite cessation of affection, or its displacement by a new passionate love, make separation a blessing for both parties as well as for society. People will only be spared the experience of wading through the useless mire of divorce proceedings.

It is argued that since the basis of marriage is mutual fidelity, and if for any reason parties feel that mutual fidelity cannot be maintained, they should have freedom of dissolving their marriage, instead of being left to drift and go astray. The argument is clinched by saying that freedom of marriage implies freedom of divorce. The protagonists of this theory hold that freedom of divorce will bring about happy marriage and reduce the number of unhappy ones. It will help the spouses to live in harmony and consolidate the unity of the family. Freedom of divorce impels the parties to a marriage to take a serious and sincere view of each other. One will be very careful before marriage, lest one may repent later. One will be frank and honest so that one may not regret later.

The most cogent criticism of the consent theory seems to be that it will bring about chaos in the family and lead to hasty divorces. And this was the experience of the Soviet Union when after the Revolution, the consent theory

1. Section 10-A of Divorce Act, 2001.

was introduced in for divorce and no formalities were necessary. In 1944, the Soviet Union modified the consent theory.

Consent theory is recognized in many other countries of the world, such as Belgium, Sweden, Japan, Portugal, in some States of the United States, United Kingdom and most of the Commonwealth and East European countries, but in most of these countries it is hedged with adequate safeguards. In India, it is recognised under the Hindu Marriage Act, the Special Marriage Act, Parsi Marriage and Divorce Act and Muslim law and Divorce Act, 2001.

Under Muslim law, divorce by mutual consent is recognized in two forms : (i) *Khul*, and (ii) *mubbaraat*. The word *khul* literally means to "to put off". In law it means laying down by a husband of his right and authority over his wife for an exchange. In the words of the *Fatwa-i-Alamgiri*, "when spouses disagree and are apprehensive that they cannot observe the bounds prescribed by the divine law, that is, cannot perform the duties imposed on them by the conjugal relationship, the wife can release herself from the tie by giving up some property in return, in consideration of which the husband is to give her a *khul*, and when they have done this, dissolution of marriage results. Thus, *khul* is a divorce with consent but at the instance of the wife, in which she gives or agrees to give a consideration to the husband for release, *i.e.*, gives up her right to dower or gives some other property to her husband."[1] It is evident that the *khul* is more in the nature of a divorce by purchase, since giving some consideration by the wife for her release from the marital bond is an essential aspect of *khul*.

In *mubbaraat* aversion is mutual; both parties desire dissolution of marriage. *Mubbaraat* denotes the act of freeing one another mutually, and the proposal for divorce may emanate from either spouse. But even in *mubbaraat* wife has to give up her dower or part of it.

It is apparent that both forms of divorce by mutual consent confer a benefit on the husband, as he can make his wife agree to give up her claim to dower or give him some other property in consideration of his agreeing to release her. Otherwise he may not agree to divorce.

The consent theory of divorce has been criticized on two diametrically opposite counts :

(a) It makes divorce too easy, and

(b) It makes divorce too difficult.

Divorce by mutual consent offers a temptation to hasty, ill-considered and impulsive divorces. Every marriage is an experiment in mutual adjustment. Sometimes spouses tend to magnify their differences, discomforts, difficulties and problems and rush to the divorce court leading to the irrevocable consequence to the whole family. The post-revolution Soviet experience of consent theory testifies this criticism. The result is that today, in most countries divorce by mutual consent has been hedged with safeguards.

Under the Hindu Marriage Act, the Special Marriage Act and the Parsi Marriage and Divorce Act, the provision for divorce by mutual consent is fairly stringent. It is laid down that a petition for divorce by mutual consent

1. *Buzul-ul-Reheem* v. *Luteefutomissa*, (1861) MLA 379.

can be presented to the District Court by the spouses only if it shows 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. A further safeguard is provided by laying down that the parties cannot move the motion to the court for dissolution of marriage before six months of the presentation of the petition. On the motion of the parties, the District Court will pass a decree dissolving the marriage on being satisfied after making such enquiry as it deems fit that averments made in the petitions are true.

There is no way by which the other criticism of the theory can be met. Since divorce by mutual consent requires the consent of both the parties, and if one of them withholds his consent, divorce can never be obtained. It can happen that a spouse may withhold his consent on account of a belief in the indissolubility of marriage or on account of sheer malice, bigotry or aversion to divorce.

Breakdown Theory of Divorce

It is obvious that both the fault theory and consent theory failed to provide adequate solution to the problem of the deadlocked wedlocks. A search for new basis of divorce, was inevitable. In *Gollins* v. *Gollins*,[1] and *William* v. *William*,[2] the courts said that the purpose of divorce law was not to punish the guilty spouse but to protect the innocent spouse. This was a fundamental shift in the policy. In *Masarati* v. *Masarati*,[3] where both parties had committed adultery, the Court of Appeal, on wife's petition for divorce, said that the key factor in a divorce petition was the breakdown of marriage. If marriage had broken down, no social or public interest would be served by keeping the spouses together. The gate for the reception of breakdown theory was opened up.

It is argued that if a marriage has in fact broken down irretrievably, may be on account of fault of one of the spouses or both, or at the fault of neither, is there any sense in continuing such a union? In such a situation, will it not be in the interest of the individual as well as society that such a union is dissolved? The law should recognize the reality and redeem the parties from a situation that has become intolerable. It would serve no social and individual interest to enquire as to which is the party responsible for the breakdown of the marriage or which is in the wrong or which is the guilty.

In the words of the Law Commission on Reforms of the Grounds for Divorce, "the objectives of any good law of divorce are two : one to buttress, rather than to undermine the stability of marriage, and two, when regrettably a marriage has irretrievably broken down, to enable the empty shell to be destroyed with the maximum fairness and minimum bitterness, distress and humiliation."[4] In short, if a marriage has broken down beyond any possibility of repair, then it should be terminated without looking to causes or without fixing responsibility on either spouse. The breakdown of marriage is defined as "such failure in matrimonial relationship or such circumstances adverse to that relationship that no reasonable probability remains for the spouses

1. (1963) 2 All ER 966.
2. (1963) 2 All ER 994.
3. (1969) 1 WR 392.
4. Report, para 15.

against living together as husband and wife." Once it is shown that a marriage has broken down irretrievably, it should be dissolved at the instance of either party even if one of them is opposed to it. Thus, divorce is no longer a reward for marital virtue or penalty for marital delinquency. It is the acceptance of a factual situation—breakdown of marriage—a defeat for both, a failure of the marital two-in-oneship, disruption of marital togetherness.

In the modern laws of the world, the irretrievable breakdown of marriage theory of divorce has three versions :

A. The law lays down that if a marriage has broken down irretrievably, it should be dissolved. The fact of the breakdown of the marriage is left for the determination of the court—legislature laying down no criterion of breakdown. The family law of the Soviet Union of 1944 and 1968 recognized this form of breakdown. A decree of divorce is granted on the petition of either spouse, if the court is convinced that marriage has broken down, irretrievably.

B. In its second version, the legislature lays down the criterion of breakdown. Once the criterion is satisfied, the courts ordinarily have no option but to dissolve the marriage. The Divorce Law Reforms Act, 1973, lays down that if the parties have lived separate and apart for a period of five years, either party may sue for divorce. Living separate and apart for a minimum period of five years is considered to be sufficient indication of irretrievable breakdown of marriage. A petition on this ground may be opposed if "dissolution of marriage will result in grave financial or other hardship" to the respondent, and that "in all such circumstances it will be wrong to dissolve the marriage." The court has a duty of making effort at reconciliation of the parties.
Under the Australian Matrimonial Law of 1966, either party may obtain divorce if the parties to the marriage have separated and thereafter lived separate 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. The Canadian matrimonial law also contains a similar provision though the minimum period of living separate and apart is three years.

C. In the third version of irretrievable breakdown of marriage, the criterion is of non-resumption of cohabitation after a decree of judicial separation or non-compliance to a decree of restitution of conjugal rights for a certain duration. In either case, either spouse may sue for divorce. The Matrimonial Causes Act, 1959, of the Commonwealth of Australia provides that if a decree of restitution of conjugal rights remains uncomplied with for a period of one year, either party may sue for divorce. In the Swedish Marriage Law of 1920 there was provision that if parties had not resumed cohabitation for a period of one year or more after a decree of judicial separation, either party could sue for divorce. (The provision had since been repealed and replaced with a very liberal law of divorce).
Under the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954, breakdown theory has found place in its third version. In

1964, on a Private Member's Bill, this breakdown version was introduced almost unnoticed and without much debate. Under the original Hindu Marriage Act, 1955, we have the following two guilt grounds for divorce : (a) if respondent had not complied with the decree of restitution of conjugal rights for a period of two years or more, the petitioner could sue for divorce, or (b) if after a decree of judicial separation, the cohabitation had not been resumed for a period of two years or more, the petitioner could sue for divorce. Since these were framed essentially as fault grounds, only the innocent party, *i.e.*, the petitioners in both cases, could sue for divorce. The 1964 Amendment recast these grounds and reduced the period of two years to one year. A similar provision exists in the Special Marriage Act, 1954, and the Parsi Marriage and Divorce Act, 1988.

While introducing the breakdown principle in Hindu matrimonial law, Parliament overlooked the fact that the structure of divorce was based on fault theory, with the result that Section 23 (dealing with bars to matrimonial relief), Hindu Marriage Act was not amended. When Section 13(1-A) (dealing with breakdown grounds) came for interpretation, the courts could not get over the dichotomy of guilt and innocence, and held that the petitioner could get relief only if it was established that he was innocent. *Chaman Lal* v. *Mohinder Devi*,[1] is a typical case. On January 16, 1963, the wife obtained a decree of restitution of conjugal rights. On facts, it was established that the husband did not make any effort to comply with the decree, rather he refused to keep the wife. Pandit, J. of the Punjab and Haryana High Court refused to pass the decree in favour of the husband as he felt that granting of decree would amount to giving him advantage of his own wrong, since it was he who refused to comply with the decree. The Bombay and some other High Courts also took this view.[2] It is submitted that if we apply the petitioner taking advantage of his wrong doctrine to the breakdown principle of divorce, there will be hardly any occasion when divorce will be available. If a petitioner does not comply with the decree, he will remain in the wrong and cannot, therefore, seek divorce, and if he complies with it, there is no cause of action for divorce.

In respect of a petition for divorce on the ground of non-resumption of cohabitation after a decree of judicial separation, the courts have held that continuance of the same offence on the basis of which decree of judicial separation was granted cannot be a wrong within the meaning of Section 23(1)(a) so as to disentitle the respondent from getting divorce.[3] Similarly, it has been held that it is not incumbent on the part of either party to a decree of judicial separation to make any effort at the resumption of cohabitation.[4] A full Bench of the Punjab and Haryana High Court took the view that mere non-compliance with the decree of restitution or a mere disinclination to agree to an offer of reunion did not amount to be a wrong within the meaning of

1. AIR 1968 Punj. 287.
2. *Laxmibai* v. *Laxmi Chand*, AIR 1968 Bom 332; *Someshwar* v. *Leelavati*, AIR 1968 Mys 274; *Paveturi* v. *Paveturi*, AIR 1984 AP 84; *O.P. Mehta* v. *Saroj*, AIR 1986 Del 327
3. *Madhukar* v. *Sarla*, AIR 1973 Bom 55.
4. *Jethabhai* v. *Mankar*, AIR 1975 Raj 28; *Varalakshmi* v. *Hanumentha*, AIR 1978 AP 6. *Madhukar* v. *Sarla*, AIR 1973 Bom 55; *Geeta* v. *Serrushwara*, AIR 1983 AP 11.

Section 23(1)(a), Hindu Marriage Act, 1955.[1] The view has been confirmed by the Supreme Court in *Dharmendra* v. *Usha*.[2]

The Law Commission in its 71st Report has recommended the breakdown principle on the basis of three years or more living separate and apart should be accepted as an additional ground for divorce. A Bill was introduced in Parliament to give effect to the recommendations, but on account of opposition to the Bill by some women's organisations, it was allowed to lapse.

A little before the partition of India, in a case from Sind,[3] Tyabji, CJ, found something like a breakdown principle in Muslim law. He observed, "There is no merit in preserving intact the connection of marriage when parties are not able to, and fail to live within the limits of Allah....." The learned Judge said that from the earliest times Muslim wives have been entitled to divorce when it is shown that instead of being a reality, a suspension (or breakdown) of marriage has in fact occurred, and that the continuance of marriage involves injury to the wife." The learned Judge remarked that when Muslim law allowed divorce to the wife on the ground of husband's non-payment of maintenance, it was not because divorce was by way of punishment of the husband or was a means of enforcing wife's right of maintenance, but as an instance where cessation or suspension of the marriage had occurred. In 1959, this theme was picked up by a Pakistani Court.[4] The Full Bench of the Lahore High Court observed, "it is only if the judge apprehends that the limits of God will not be observed (this is a Koranic text) that a harmonious married state, as envisaged by Islam, will not be possible then he will grant dissolution." This theme was expressed in secular language by Krishna Iyer, J. in *Aboobacker* v. *Mamu*,[5] thus, "while the stream of life, lived in married mutuality, may wash away smaller pebbles, what is to happen if intransigent incompatibility of minds breaks up the flow of the stream? In such a situation, we have a breakdown of marriage itself and the only course left open is for law to recognize what is a fact and accord a divorce." Again, in *Yousuf* v. *Soweamma*,[6] the learned judge emphasised the breakdown aspect of marriage thus :

> While there is no rose which has no thorns but if what you hold is all thorn and no rose, better throw it away.

The ground for divorce is not conjugal guilt but breakdown of marriage.

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1. *Bimla* v. *Bakhtawar*, AIR 1977 P & H 67 (FB).
2. AIR 1977 SC 2218.
3. *Noerbibi* v. *Pir Bux*, AIR 1950 Sind 8.
4. *Belquis Fatima* v. *Najmul*, PLD 1959 (WP) Lah 566.
5. 1971 KLT 663.
6. AIR 1971 Ker 261.

Chapter 4

MARRIAGES UNDER HINDU LAW, MUSLIM LAW, CHRISTIAN LAW, AND PARSI LAW

I
INTRODUCTORY

Marriage, whether considered as a contract or sacrament, confers a status of husband and wife on the parties to the marriage, of legitimacy on the children of the marriage, and gives rise to certain spousal mutual rights and obligations of spouses.

Wherever marriage is regarded as a contract, in certain matters such as consent and form, it resembles an ordinary commercial contract, while in others it does not. It is because marriage is regarded not merely a contract but also a social institution. Marriage as a contract is *sui generis*. Thus, a marriage contract is quite different from an ordinary contract in the following matters : (a) capacity to marry, (b) formalities of marriage, (c) grounds of void and voidable marriage, (d) avoidance of marriage (a decree of court is necessary when marriage is voidable, it cannot be avoided by repudiation), (e) dissolution of marriage (a marriage can be dissolved only by a decree of the court; a contract of marriage cannot be discharged by agreement, frustration or breach), and (f) terms of marriage contract (spouses are not free to enter into any terms of the contract, rather spousal rights and obligations are largely laid down by law, though some flexibility is allowed, such as parties may, stipulate to release each other from the duty to cohabit. The most cogent example is found in Muslim law where the wife may stipulate that, for example, in the event of the husband taking a second wife or treating her with cruelty, she can pronounce divorce on herself).

II
AGREEMENT TO MARRY

Engagement, betrothal or sagai.—Among all the communities in India, a marriage is frequently, though not invariably, precede by an agreement to marry which is commonly called *sagai* or engagement. Following English common law, in India such agreements are governed by the general principles of law of contract, and if a party commits a breach of agreement without lawful justification, the other may sue for breach of contract. Under Muslim law, a view is expressed that unless a marriage contract is completed, no rights and obligations arise thereunder, and therefore, no suit for damages for the breach of promise lies. It is submitted that an agreement to marry can be entered into by two Muslims in the same way as it can be entered into by two Hindus, two Christians or two Parsis or by any two persons and once such an agreement is established, one party may

sue the party committing its breach. The matter is regulated not by personal law but by the general principles of law of contract. In India, marriage agreements on behalf of the minor are entered into by the guardian and such agreements are valid. Not merely the father of the minor, but also the minor himself can sue for breach of such agreement.[1]

Manu enjoined that if a girl has been promised in marriage to one man, the good men do not give her in marriage to another. But, father's right to annul the betrothal was also recognized by the sages if a better suitor was available. Similarly, on the discovery of specified defect in a party, the other was allowed to withdraw from the agreement. In *Pursotamdas* v. *Pursotamdas*,[2] an agreement to marry was entered into between the mother of a minor boy and the father of a minor girl. The boy filed a suit for damages against the father of the girl for breach of marriage agreement. The father pleaded that the agreement stood frustrated as the girl was not willing to marry the boy. Rejecting the argument, the court decreed the suit and awarded damages. The same view has been held in a case where parties were Parsis.[3] This view has been doubted on the ground that there cannot be an enforceable agreement to marry on behalf of minor children and therefore betrothal by parents cannot be binding on children.[4]

Narada laid down that if a party withdraws from the marriage engagement without any cause, he could be compelled to marry.[5] In modern Indian law, a suit for the specific performance of a marriage agreement is not maintainable[6] nor can an injunction be issued against a party who performs a marriage in breach of the agreement to marry.[7]

Under the Indian law, marriage brokerage contracts are void being against public policy.[8] In *Devarayan* v. *Muthuswami*,[9] an agreement was entered into between a father of the girl and father of the boy for a sum of Rs. 5,000. This agreement was held void as amounting to trafficking in marriage which is contrary to public policy. On the basis of this reasoning, a view has been propounded that even in the absence of a stipulation by way of penalty or liquidated damages, the contract of betrothal by parents on behalf of minor children would be unenforceable, as, in the case of a breach of contract, they have to pay damages, and therefore, they have a pecuniary interest in bringing about the marriage.

Betrothal of an unborn child is void,[10] since law does not permit ante-natal betrothals.

A marriage performed in contravention of a betrothal agreement is valid.[11]

1. *Atma* v. *Banku*, ILR (1930) 11 Lah 598.
2. ILR (1896) 21 Bom 2.
3. *Fray Engineer* v. *Shapurji*, AIR 1937 Bom 392.
4. But See *Venkata* v. *Govind*, 1937 MWN 1274.
5. *Naradasmriti*, XII, 35.
6. *Umed* v. *Nagindas*, 7 Bom HCR 122, *In re* Ganpat ILR 1 Cal 74.
7. *In re* Ganpat ILR 1 Cal 74.
8. See Section 23, Contract Act; *Girdhari Singh* v. *Neeldhar*, (1912) 19 All LJ 159.
9. ILR (1914) 37 Mad 393.
10. *Atma* v. *Banku*, ILR (1930) 11 Lah 598.
11. *Khimji* v. *Nari*, ILR (1915) 39 Bom 682; *Srevandy* v. *Bharattiyamma*, AIR 1962 Mad 40.

Agreement in restraint of marriage.—Section 26 of Indian Contract Act, lays down that every agreement in restraint of the marriage of any person, other than a minor, is void. This section has been interpreted to mean that an agreement which totally prohibits a marriage, is bad, but partial restraints on marriage are valid. Thus, an agreement under which restraints are imposed to marry a particular person or a class of persons or restriction on a second marriage (even when personal law permits bigamy), is valid.[1]

The Law Reforms (Miscellaneous Provisions) Act, 1970, has abolished an action for breach of marriage contract. It lays down that no agreement to marry shall take effect as a legally enforceable contract and that no action shall lie in England for breach of such an agreement, wherever it was made.

Property and gifts between engaged couples.—In India, a problem of recovery of gifts and property given upon, or at the time of, engagement often arises on the breach of a marriage engagement since it is customary to give clothes, cash and jewellery of considerable value on such an occasion. Another problem arises when two working couples get engaged and spend money jointly for acquiring a matrimonial home and in furnishing it. In English law since no action lies for breach of engagement, the position of engaged couples has been equated, more or less, with that of the married couple. [Section 2(1), Law Reforms (Miscellaneous Provisions) Act, 1970].

This may be illustrated by an example. If an engaged party purchases a house in his own name partly with money provided by his fiancee and they enhance its value by putting joint labour in improving it, the investment of her money and contribution of her labour will give her the same interest in it as she would have acquired had the parties been married at that time.

A similar provision has been enacted in the Law Reforms (Miscellaneous Provisions) Act, 1970, in respect of gifts made by the parties consequent upon, or at the time of, engagement.

It appears that birthday and like presents will vest in the donee and will not be covered by the above provision. The test will be : was the gift made to the donee as an individual or solely as the donor's future spouse? The gifts falling in the latter category are recoverable. The same seems to be the position of gift given by third persons.

Under Indian law an action for breach of a marriage contract still lies. It seems to be clearly the position under all personal laws that on breach of a marriage agreement, money, jewellery and dresses presented at the time of betrothal or expenses incurred in connection with betrothal or *sagai*, are recoverable.[2] The *Mitakshara* clearly laid it down. If there is a breach of contract or withdrawal, whatever is expended on account of the espousal by the intended bridegroom or by his father or his guardian is recoverable and must be repaid in full with interest by affiancer. The Indian courts have also taken this view. Thus, all presents made at the time of betrothal are specifically recoverable, and in case they have been spent or used, their full

1. *Khotilal* v. *Marion*, 59 IC 804; *Foonoo* v. *Fyzee*, 23 WR 66; *Sitaram* v. *Ahree*, 11 Bom LR 129; *Emperor* v. *Lazar*, ILR 30 Mad 550.
2. *Gulab Chand* v. *Fool Bai*, 31 C 748; *Rajendra* v. *Roshan*, AIR 1950 All 592; *Abdul* v. *Mohammed*, ILR (1910) 42 Bom 499.

value is recoverable.[1] However, it may be difficult to prove damages for pain and suffering on account of breach of contract particularly where alternative brides and bridegrooms are readily available.[2]

It is submitted that it would be in consonance with our social needs if the Indian law in this regard is modified on the lines of English law.

Guardianship in Marriage

In those systems of law where marriage of minors is allowed, guardianship in marriage is of importance, as a valid marriage cannot take place without the consent of the guardian. In some systems of law the guardians for marriage are different from the guardians of persons. This has been the position under Hindu law and Muslim law. In some systems the guardians for marriage are the same persons as guardians of the persons of minor, such as under Parsi law and Christian law.

The Child Marriage Restraint Act, 1929, which was amended in 1978, is a penal statute, which lays down that on the pain of penal consequence, no girl below 18 and no boy below 21 years of age should be married. The Act applies to all persons, to whatever religion, community or nationality, they may belong. The Act has repealed Section 8 of Hindu Marriage Act, which dealt with guardianship in marriage. A similar amendment has been made in the Christian Marriage Act, 1872, in respect of marriage of "native Christians" but in respect of other Christian marriages, no change has been made. These ages of marriage are applicable to Muslims also.

This Act has been replaced by the Prohibition of Child Marriage Act, 2006. This Act has made a child marriage voidable at the instance of the party who was a child at the time such marriage was solemnized (Section 3) and under certain circumstances such marriage would be void (Section 12).

Under Muslim law, now, there are no guardians of marriage and if a minor Hindu marries (since minor's marriage is still neither void nor voidable but valid), no guardian in marriage is necessary.

Although, a Muslim male below 21 and a Muslim female below 18 cannot marry, Muslim law of guardianship of marriage has not been changed. Under Muslim law, only an adult Muslim of sound mind can be a guardian for marriage. It seems that the Caste Disabilities Removal Act, 1850, does not remove the disability of a Muslim guardian who converts to some other religion. In all schools of Muslim law, father, if alive and fit, is the sole guardian of marriage, and no one else can be the marriage-guardian. But all schools of Muslim law do not agree as to who is the marriage-guardian after the death of the father. With the exception of Malikis, all schools agree that the executor cannot be the marriage-guardian. Among the Shafiis, Ismailis and Ithana Asharis only father, and after his death, father's father are recognized as guardians for marriage. The Hanafis provide a long list of guardians for marriage. After the father, it goes to father's agnates, nearer

1. *Rajendra* v. *Roshan*, AIR 1950 All 592; *Gulak* v. *Fuldei*, ILR (1909) 33 Bom 411 (clothing or other things which were used, their value is recoverable); *Balubhai* v. *Nanabhai*, ILR (1920) 44 Bom 446 (return of jewellery presented); *Rambhat* v. *Timmayya*, ILR (1892) 16 Bom 673 (return of jewellery presented).
2. *Kandaswami* v. *Kanniah*, AIR 1924 Mad 692.

being preferred.[1] Imam Muhammed said that in the absence of the agnates, guardianship in marriage goes to the *maula* (successor by contract), then to the ruler or the *kazi* (judge) who may delegate his authority to any person.

In all those cases where marriage-guardian improperly refuses to give his consent, or altogether withholds it, the minor may approach the *kazi* for the sanction of the marriage. Improper refusal to give consent on the part of the guardian is considered as an act of oppression. Where minor has no guardian and no *kazi* is available, he or she is free to marry himself or herself. Where a minor girl marries without the consent of the guardian and if dower is small or the man is unequal to her, the marriage is invalid, though minor may ratify it on attaining majority.

If a marriage-guardian incurs incapacity to exercise the right on account of mental illness, or his being sentenced to long imprisonment or becoming a *ghibat-ulmunkata* (*i.e.*, one who had gone to a distant place), the next guardian in order of proximity will exercise the right. Where there are two guardians equal in degree, such as two paternal uncles, then marriage performed by anyone of them is valid. A marriage contracted by a remoter guardian in the presence of a nearer one is invalid unless ratified by the nearer guardian.[2] A guardian may lose the right of ratification or cancellation on account of his laches, such as by the time he exercises the right, a child by the marriage is born.[3]

When a Muslim minor is married by a guardian other than the father or grandfather, the minor has the right of repudiation of marriage (without assigning any cause) on attaining majority. This is known as option of puberty (*khyar-ul-bulugh*). When the child is married by the father or the grandfather, then too the minor can repudiate the marriage but on certain specified causes.

Christian law, for the purpose of marriage, defines a minor as a person who has not completed the age of 21 years and who is not a widower or a widow. The Indian Christian Marriage Act, 1872, lays down that in case the father is living, his consent is required. In his absence the consent of the guardian of the person will be enough; if there is no guardian of person, mother's consent is needed. If no person having authority to give his consent in marriage is resident in India, the minor is free to marry himself or herself.

III
KINDS OF MARRIAGES

Permanent and Temporary Marriages

In the modern world to speak of "permanent" and "temporary" marriages is not of much consequence; no marriages are permanent in the sense of being indissoluble, and all marriages are temporary, since all are potentially terminable. However, when two persons marry with no intention to dissolve it in future, the marriage may be called a permanent marriage. In our contemporary society, it is possible for two people to enter into marriage for the purpose of enabling a child to be born legitimate, intending never to live

1. For details, see Paras Diwan, *Muslim Law in Modern India*, 52 (1981) Tahir Mahmood, *The Muslim Law of India*, 51, 1990.
2. *Chirag Bivi* v. *Ghulam Sarwar*, (1920) 60 IC 453; *Ayub Hasan* v. *Ahtari*, AIR 1963 All 529.
3. *Abubukkar* v. *Vangatt*, AIR 1979 Ker 277.

together but to obtain divorce by consent at the earliest opportunity. Such a marriage is undoubtedly a marriage. The Shia Muslims (the Ithana Asharis) recognize a type of marriage called *muta* marriage which is usually called temporary marriage, though, in fact, it is a term marriage, such a marriage is not recognized among other sects of Muslims.

Muta Marriage.—Under the Ithana Ashari Law, a male has capacity to contract any number of *muta* marriages (he can cross the limit of four) with a woman who is Muslim, Christian, Jew or a fireworshipper, but with none else. An Ithana Ashari female, on the other hand, can contract a *muta* marriage only with a Muslim male. If the woman is major, her *wali* (guardian) cannot object to such a marriage, but if she is a minor, she can do so only with the consent of her *wali*, otherwise the marriage will be void.

All the requisite formalities of a Muslim marriage must be performed. All stipulations of *muta* marriage should be entered into at the time of marriage. Conditions stipulated before or after the marriage are ineffective. For a valid *muta* marriage, the requirements are the following :

(a) Dower must be specified, otherwise the marriage will be void.

(b) The duration of the marriage must be specified. The duration may be a few hours, days or weeks, months or years. If the term is not specified, marriage is not void, it will be implied that parties intended to enter into a permanent union.[1] The main distinction between the *muta* marriage and permanent marriage is that in the former the term of cohabitation is specified, while in the latter, no term is specified. If no term is specified, the marriage will be treated as a permanent union,[2] and all incidents of such a marriage will flow from it.

The main incidents of a *muta* marriage are : (a) Spouses have no right of mutual inheritance, even if one of the spouses dies when *muta* is subsisting; (b) The wife of *muta* marriage is not entitled to any maintenance. But if maintenance is stipulated in the marriage contract, she is entitled to it during the whole of *muta*, even if the husband does not cohabit with her. It seems, in the absence of such stipulation, the court has power to award her maintenance under Section 125, Criminal Procedure Code;[3] (c) If marriage is not consummated, the wife is entitled to only half dower. On consummation of marriage, she is entitled to full dower, even if the husband does not cohabit with her during the entire duration of the term. If the wife leaves him before the expiry of the term, she is entitled to proportionate dower;[4] (d) On the expiry of the term, if the marriage has been consummated, she is required to undergo *idda* of two courses; otherwise no *idda* is required; (e) The husband has the right of *izl*, *i.e.*, right to refuse procreation, and no permission of the wife is needed; (f) The children of *muta* marriage are legitimate, and are entitled to inherit the property of both parents, (g) The *muta* marriage comes to an end automatically on the expiry of the term, unless extended or on the

1. *Shorat* v. *Jafri Begum*, ILR (1914) 17 Bom LR 17 (PC).
2. *Shahzada Qanun* v. *Fakhar Johan*, AIR 1953 Hyd 6, Fyzee does not agree with the view. Fyzee 14; he cites *Ali* v. *Allif*, ILR (1892) 14 All 429 and *Aziz Bane* v. *Md.*, ILR (1927) 47 All 829 in support.
3. See *Luddun* v. *Mirja*, ILR (1882) 8 Cal 336, the case is under the old code.
4. *Md. Abid* v. *Luddan*, ILR (1927) 14 Cal 276.

death of either party, if earlier; and (h) The husband has no right of *talak* though the parties are free to terminate it by mutual consent. If the husband wants to terminate the union earlier, he can do so by making a gift of the remaining term, called *hiba-i-muddat*, for which the wife's consent is not necessary.

IV
CONTRACT OF MARRIAGE : CAPACITY TO MARRY

In order that a man and a woman become husband and wife, it is essential that the following two conditions are satisfied :

(a) Both parties should possess capacity to marry, and

(b) They must perform the necessary formalities of marriage.

CAPACITY TO MARRY

In India, rules regarding capacity to marry differ from community to community. However, whatever be the requirements of capacity under the personal law, it is necessary that they must be complied with, otherwise the marriage may not be valid. We would discuss the requirement of capacity under the following heads :

A. Monogamy and bigamy.

B. Age of marriage.

C. Mental capacity, *i.e.*, insanity, or unsoundness of mind.

D. Prohibitions on account of relationship by blood or affinity.

Monogamy and Bigamy

Before 1955, India was the largest country of the world permitting majority of its people—Hindus and Muslims—to practise polygamy, (unlimited in the case of Hindus and limited to four wives in the case of Muslims). But Christian law, Parsi law and Jewish law did not allow bigamy in any form. In some parts of India, such as in the Lahaul Valley in Himachal Pradesh and among the Thiyyas of south Malabar, polyandry was recognized by custom. For Hindus, bigamy has been abolished by the Hindu Marriage Act, 1955, and has been made a penal offence. It is an offence punishable with imprisonment for a term of seven years and if the fact of the first marriage was concealed from the spouse, it is punishable for a term of imprisonment which may extend to ten years.

In modern India, only Muslims are permitted to practise polygamy, limited to four wives. However, in *Lily Thomas* v. *Union of India*,[1] it has been held by the Supreme Court that plurality of marriage is not an unconditional right conferred on the husband. He should have the capacity to do justice between the co-wives. It is a condition precedent. Under the Hanafi law, if a Muslim takes a fifth wife, the marriage is not void, but merely irregular, which he can regularise at any time by divorcing anyone of the earlier four wives. A Sunni taking a fifth wife is thus not guilty of the criminal offence of bigamy under Sections 494-495, IPC.[2] Among the Shias, the fifth marriage is void and, therefore, a Shia husband who takes a fifth wife can be prosecuted for bigamy.

1. AIR 2000 SC 1650.
2. *Shahulameedu* v. *Subajda*, (1970) MLJ Cr 569.

The offence of bigamy is committed by a person who marries during the lifetime of his or her spouse, provided that the first marriage is not null and void. Where a husband had married a woman whose marriage was in subsistence, his subsequent marriage, in such circumstances, would not be bigamous, his first marriage being void.[1] If the former marriage is voidable, then also the offence of bigamy is committed. It has been laid down that the offence of bigamy will be committed only if the requisite formalities of marriage have been performed at the time of the solemnization of the second marriage.[2] The second marriage cannot be treated to be proved by the mere admission of the parties, it is essential to prove that the requisite formalities were undergone.[3] Performance of some mock ceremonies is not enough, and therefore, the prosecution for bigamy will fail.[4]

A bigamous marriage is a void marriage under Hindu law, Christian law and Parsi law.[5] The same is the position under the Special Marriage Act. A declaration of nullity of marriage can be obtained by either party to the marriage. The spouse of the first marriage has no right to file a petition for nullity, though, it seems, he or she can file a declaratory suit to that effect under Section 34, Specific Relief Act, 1963. Under the matrimonial law, the spouse of the first marriage may sue for dissolution on the ground that the other party is living in adultery.

Age of Marriage

As has been seen earlier, in India, no male can marry below the age of 21 years and no female below the age of 18 years. Marriage below the specified ages lead to penal consequences under the Child Marriage Restraint Acts, 1929-78 and now Prohibition of Child Marriage Act, 2006.

Under the Hindu Marriage Act, Parsi Marriage and Divorce Act, Special Marriage Act and Christian Marriage Act (for native Christians), minimum age of marriage for girls is 18 years and for boys 21 years. But under the personal law of no Indian community is a child marriage void. It is only under the Special Marriage Act, 1954 that a child marriage is void. Under the Hindu law, child marriage is valid.

Muslim law lays down that a person who has not attained the age of puberty has no capacity to marry without the consent of his guardian for marriage. Muslim law considered puberty as a question of fact, and, in the absence of evidence to the contrary, it is generally presumed to have been attained on the completion of 15 years of age. Under Muslim law, marriage of a minor is not void. If a minor is married by a guardian other than father or grandfather, the minor can repudiate the marriage on attaining majority without assigning any cause. But if he is married by father or grandfather, he can repudiate it only in certain circumstances. The Shafii and Maliki schools lay down that even a major girl cannot marry without the consent of her father. In India, a major Muslim girl belonging to any school has a right to

1. *M.M. Malhotra* v. *Union of India*, AIR 2006 Supreme Court 80.
2. *Kamal Ram* v. *State of H.P.*, AIR 1965 SC 641; *S. Varadarajam* v. *State of Madras*, AIR 1965 SC 1964.
3. *Priya* v. *Suresh*, AIR 1971 SC 1153.
4. *Dr. D.N. Mukherji* v. *State*, AIR 1969 All 489.
5. Section 11, Hindu Marriage Act, Section 4, Parsi Marriage and Divorce Act, Section 19(4), Divorce Act.

marry at her own choice without the consent of the guardian; and if a major girl is married without her consent by her father or any other guardian, the marriage is void.[1]

The Child Marriage Restraint Act.—The Child Marriage Restraint Acts, 1929-78 apply to all communities and prohibit child marriages. But the Acts do not affect the validity of child marriage, which is governed by the personal law of the parties to marriage. The Act is a penal legislation and provides for punishment for the violation of the provisions of the Act.

Under the Act, the following categories of persons are liable to punishment : (a) If a male, above the age of 18 below the age of 21 years, marries a girl below the age of 15 years, he is liable to a sentence of simple imprisonment which may extend up to 15 days, or fine which may extend up to Rs. 1,000, or with both. (b) A male above the age of 21 years who marries a girl below 15 years is liable to punishment with a term of simple imprisonment which may extend up to three months and is also liable to fine. (c) Any person who conducts, directs, promotes or performs a child marriage is liable to a sentence of a term of simple imprisonment which may extend up to three months as well as to a fine, unless he proves that he has reason to believe that marriage was not a child-marriage. Thus, parents, guardians, negotiator, go-between, the *pandits, kazis, wakifs* or *mullas* or priests who officiate at the performance of such marriage are punishable. (d) If a person having a *de facto* or *de jure* charge of a minor (*de facto* and *de jure* guardians) promotes, permits or negligently fails to prevent the marriage of the child (negligent failure to prevent the marriage will be presumed on the part of the guardian unless contrary is proved) is liable to like punishment. But no woman guardian is punishable with imprisonment under the Act. Similarly, *baratis* and those who are present at the reception are liable to punishment.

The offences under the Act are cognizable. These are cognizable for the purpose of investigation only.[2] Only the court of Metropolitan Magistrate or a Judicial Magistrate or Magistrate of first class are competent to take cognizance of the offence.[3] But no cognizance of any such offence can be taken after the expiry of one year from the date on which the offence is alleged to have been committed.[4]

Injunction to restrain child marriage.—Under Section 12, Child Marriage Restraint Act, civil courts have, in the interest of the child, power to issue an injunction to prohibit a child marriage from being performed. Such an injunction may be issued if the court is satisfied, from information laid before it, through a complaint or otherwise, that a child marriage in contravention of the Act has been arranged or is about to be solemnized. But no such injunction will be issued against any person unless such person has been afforded an opportunity to show cause against the issue of the injunction. The court also has the power on its own motion or on the application of any person aggrieved to rescind or alter any order passed by it. Disobedience to an injunction entails a term of simple imprisonment which may extend up to three months, or with fine which may extend up to Rs.

1. *Kamma* v. *Ethiyumma*, AIR 1867 Kant 13; *Abubukkar* v. *Vengett*, AIR 1970 Ker 277.
2. Section 7.
3. Section 8.
4. Section 9.

1,000, or with both. But no woman can be punished with imprisonment.

Punishment for child-marriage under the Hindu Marriage Act.—The Hindu Marriage Act also provides for punishment for child marriages. Section 18 lays down that anyone who procures a child marriage for himself or herself may be punished for a term of simple imprisonment which may extend up to 15 days, or a fine which may extend up to Rs. 1,000, or with both.

Mental Capacity—Soundness of Mind

Under the personal law of all communities in India, a person of unsound mind has no capacity to marry, though under some systems, marriage of a person of unsound mind can take place with the consent of the guardian. The Hindu Marriage Act and the Special Marriage Act lay down that—

At the time of marriage neither party—

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

(b) though capable of giving a valid consent, is suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children, or

(c) is subject to recurrent attacks of insanity (or epilepsy).[1]

These clauses were inserted in both the statutes by the Marriage Laws (Amendment) Act, 1976. The inspiration is from English law. In an English case *Bennett* v. *Bennett*,[2] the Court observed that in ascertaining whether a person is 'unfit' for marriage, the question to be posed is, "Is this person capable of living in a married state or of carrying out the ordinary duties and obligations of marriage?"

In *Alka* v. *Avinash*,[3] the Madhya Pradesh High Court held that both conditions are not cumulative; if a spouse is unfit for marriage or incapable of procreation, he will be covered under this clause. In this case, the wife was cold and of nervous temperament, she hardly understood what is marital intercourse and could not co-operate in the sex act. She was incapable of maintaining the house or keep the kitchen. Nor did she understood the needs of the members of the family. The court held that she was of unsound mind.

Under Hindu law, a marriage on account of lack of mental capacity is voidable at the instance of the other party, but under the Special Marriage Act, the marriage is void.

Under Muslim law, a person of unsound mind (called *majnun* or *fatir-ur-akl*) has no capacity to marry except with the consent of the marriage-guardian. The insane persons for the purpose of marriage are equated with minors under the Muslim law.

1. Word Epilepsy has now been omitted from Hindu Marriage Act, 1955, as well as from Special Marriage Act, 1956 by virtue of sections 2 and 3 respectively of The Marriage Laws (Amendment) Act, 1999; Parliament Act No. 39 of 1999.
2. (1969) All ER 539.
3. AIR 1991 MP 205.

Parsi law does not treat the marriage of a person of unsound mind as void or voidable, it is a ground for divorce.

The Christian law lays down that if either party to the marriage is an idiot or lunatic at the time of marriage, a decree of nullity can be obtained on that basis. This provision does not relate to post-marriage idiocy or lunacy.[1]

PROHIBITION ON ACCOUNT OF RELATIONSHIP BY BLOOD OR AFFINITY

Most ancient systems of law deal, in elaborate details, with the prohibitions on marriage on account of relationship of blood or affinity. The Christians and Parsis lay down their own scheme of prohibited relationship. All systems prohibit marriage among near relations. Differences exist as to the details of these prohibitions.

Hindu Law

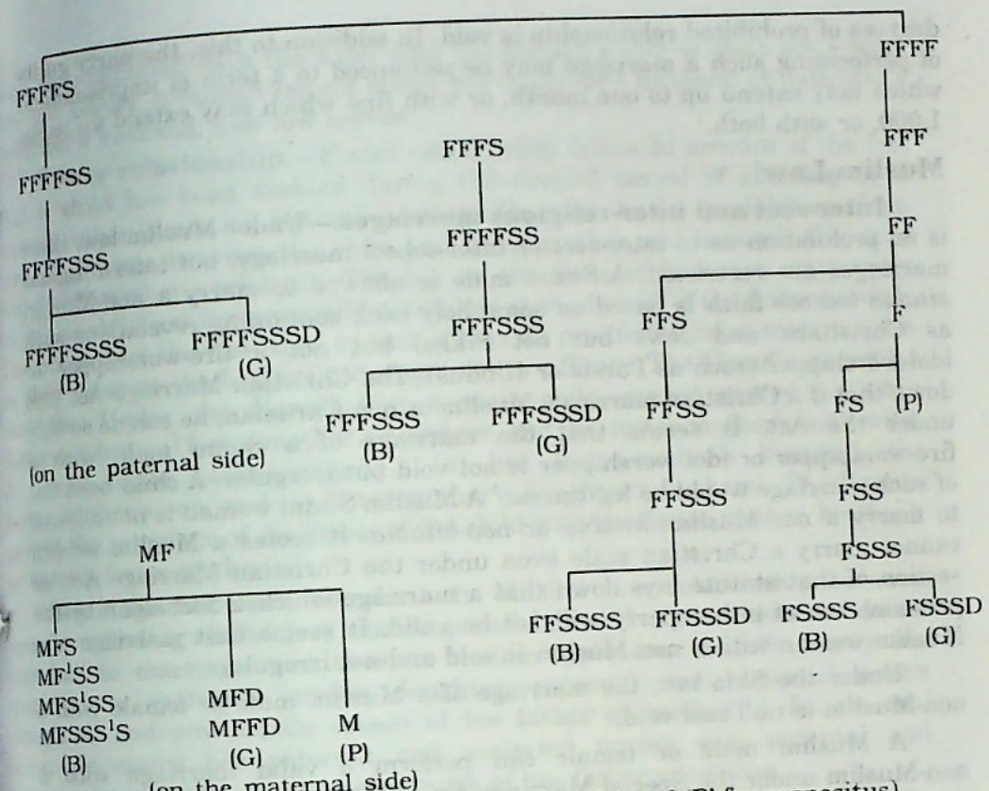
Sagotra and inter-caste marriages.—At one time Hindus prohibited marriages within the same *gotra* and *pravara*. They also prohibited inter-caste and inter-religious marriages. Today *sagotra* or *sapravara* marriages are valid. So are inter-caste marriages. In fact, under the modern Hindu law, "any two Hindus" can marry. Marriage between the persons who are Hindus, Sikhs, Jains and Buddhists are also valid. (Since followers of these religions are considered Hindus). The intercaste marriages are perfectly valid marriages. This case arose out of disturbing news items published in media where young men and women solemnizing inter caste marriages are being targeted by members of either or both communities. The Supreme Court has held that people perpetrating such violence and harassment should be severely punished.[2] A Hindu cannot marry a non-Hindu under Hindu law. He can do so only under the Special Marriage Act, as a civil marriage.

In the modern Hindu law, prohibitions of marriage on account of relationship are recognized on two counts : (a) *sapinda* relationship, and (b) degrees of prohibited relationship.

Sapinda relationship.—Section 3(f)(i) lays down "*in sapinda* relationship with reference to any person extends as far as the third generation (inclusive) in the line of ascent through mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation." Then Section 3(f)(ii) lays down, "persons are said to be "*sapindas*" of each other if one is a lineal ascendant of the other within the limits of *sapinda* relationship, or if they have a common lineal ascendant who is within the limits of *sapinda* relationship with reference to each of them."

The following two diagrams illustrate *sapinda* relationship on paternal and maternal side. (Diagrams are illustrative and not exhaustive) :

1. *Soloman* v. *Josephine*, AIR 1959 Mad 151; As to the meaning of idiocy and lunacy, *see* Paras Diwan, *Modern Hindu Law, Codified and Uncodified*, 105-106 (1995).
2. *Lata Singh* v. *State of Uttar Pradesh*, AIR 2006 SC 2522.



(Note : 'B' stands for boy, 'G' stands for girl and 'P' for propositus)

All the relations shown in both the diagrams are *sapindas* to P. Beyond these persons there will be no *sapinda* relationship.[1]

Degrees of prohibited relationship.—Degrees of prohibited relationship are stated in Section 3(g) of the Explanation. Two persons are said to be within the degree of prohibited relationship :

(i) if one is a lineal ascendant of the other, or

(ii) if one was the wife or husband of lineal ascendant or descendant of the other, or

(iii) if one was the wife of the brother or the father's brother's wife or grandmother's brother's wife, or

(iv) if the two are brother and sister, uncle and niece, aunt and nephew, or children of a brother and sister or of two brothers or two sisters.[2]

Under the modern Hindu law, for the purpose of *sapinda* relationship and degrees of prohibited relationship includes legitimate as well as illegitimate relationship, relationship by full blood, half blood and uterine blood, and relationship by adoption. Further, if a custom permits a marriage between two *sapindas* or between two persons within the degrees of prohibited relationship, marriage between the two will be valid.[3]

A marriage in violation of the requirement of *sapinda* relationship and

1. For details, *see* Paras Diwan, *Modern Hindu Law*, 91-103.
2. For details *see* Paras Diwan, *Modern Hindu Law*, 91-103.
3. *See* clauses (iv) and (v) of Section 5, Hindu Marriage Act. *See* also *K. Kamlakshi* v. *Mani*, (1970) 2 MLJ 47; *Subba* v. *Seetharaman*, 1972 I MLJ 497 (marriages).

degrees of prohibited relationship is void. In addition to this, the party guilty of performing such a marriage may be sentenced to a term of imprisonment which may extend up to one month, or with fine which may extend up to Rs. 1,000, or with both.[1]

Muslim Law[2]

Inter-sect and inter-religious marriages.—Under Muslim law, there is no prohibition as to inter-sect or inter-school marriage, but inter-religious marriages are restricted. A Sunni male is allowed to marry a non-Muslim *kitabia* (whose faith is based on some holy book containing revelations such as Christians and Jews but not Sikhs) but not a fire-worshipper or idol-worshipper (such as Parsis or Hindus). The Christian Marriage Act lays down that if a Christian marries a Muslim or non-Christian, he can do so only under the Act. It seems that the marriage of a Sunni male with a fire-worshipper or idol-worshipper is not void but irregular. A child born out of such marriage would be legitimate.[3] A Muslim Sunni woman is not allowed to marry a non-Muslim, *kitabia* or non-*kitabia*. It seems a Muslim woman cannot marry a Christian male even under the Christian Marriage Act, as section of that statute lays down that a marriage which is forbidden by the personal law of either party will not be valid. It seems that marriage of a Muslim woman with a non-Muslim is void and not irregular.

Under the Shia law, the marriage of a Muslim male or female with a non-Muslim is null and void.

A Muslim male or female can perform a valid marriage with a non-Muslim under the Special Marriage Act, 1954 in civil marriage form.

Muslim law lays down some impediments of marriage on the basis of relationship by consanguinity, affinity, fosterage.

Consanguinity.—On the basis of prohibition on the ground of consanguinity, a Muslim male cannot marry the following : (i) his mother or grandmother, how high soever, (ii) his daughter or grand-daughter, how low soever, (iii) his sister, full, consanguine or uterine, (iv) his aunt (both on father's and mother's side), how high soever. The expression "how high soever" and "how low soever" mean ascendants of any degree and descendants of any degree respectively. This prohibition is identical in all schools of the Sunnis and the Shias.

Affinity.—Prohibition of affinity is based on the relationship arising out of marriage. The peculiarity of the doctrine is that prohibition of affinity arises once a marriage has taken place, irrespective of the fact whether marriage is void or valid. The prohibition arises from an adulterous connection also. The Shafii school does not subscribe to the latter two extensions of the doctrine. The prohibition of affinity arises irrespective of the fact whether a marriage has been consummated or not. On the basis of this prohibition, a Muslim male cannot marry : (i) his wife's mother or grandmother, how high soever, (ii) his father's wife or father's father's wife, how high soever or grand-daughter, how low soever, (iii) his wife's daughter or granddaughter, how low soever (this prohibition arises only if marriage has

1. Section 18(b).
2. *See* Paras Diwan, *Muslim Law in Modern India*, 57-60.
3. *Shamsuddin M. Illias* v. *Md. Salim M. Idris*, AIR 2008 Ker. 59.

been consummated with the wife), and (iv) his son's wife or son's son's wife, how low soever. A woman cannot marry her daughter's husband or daughter's daughter's husband, how low soever.

Foster relationship.—Foster relationship arises on account of the fact that a child has been suckled during the normal period of suckling by a woman other than its natural mother. On this basis, prohibition from marrying arises between the child and foster-mother and between the child and foster-mother's relations. The bar on the basis of fosterage arises only when the child has been actually nourished at the breast of the foster-mother. The Shias take the view that in such a case all prohibited relationships arise as they arise on the basis of consanguinity or affinity. The Hanafis do not go that far. Under the Hanafi law, a male child cannot marry : (i) his foster-mother, (ii) foster-mother's daughter, and (iii) foster-mother's son's wife. A female child cannot marry : (a) her foster-mother's husband, (b) foster-mother's son, and (c) foster-mother's daughter's husband. The Sunnis permit the marriage of the father of the child with the foster-mother, brother's or sister's foster-mother.

Marriage between cousins.—In Muslim law, relationship between cousins including all the first cousins, parallel as well as cross, does not create any bar to marriage, and thus, a Muslim male can lawfully marry his paternal or maternal uncle's daughter, paternal and maternal aunt's daughter, and any female cousin of his father or mother. A female can, similarly marry her paternal and maternal uncle's son, paternal and maternal aunt's son, or any male cousin of her father or mother.

The relative impediments under Muslim law are : (a) prohibition on the basis of unlawful conjugation, (b) prohibition of marrying a woman undergoing *idda*, (c) prohibition from marrying a person of unequal rank, and (d) marriage while on pilgrimage. Under the Sunni law, a marriage in violation of relative impediments is irregular, while under the Shia law, it is void. In India, the latter two prohibitions are not of any importance.

Unlawful conjugation.—Under Muslim law, a male is not allowed to have at the same time two wives who are so related to each other by consanguinity, affinity or fosterage that if either had been a male, they could not have lawfully married each other. For instance, a person cannot marry two sisters, or an aunt and her niece. The Shias permit a marriage with wife's aunt with wife's permission. The prohibition will not apply if one has divorced his wife before marrying any such person.

Marriage with a woman undergoing idda.—A marriage performed by a Sunni male with a woman during the period of *idda* is irregular.[1] While in the case of a Shia male, it is void. Muslim law also lays down that the husband of a woman undergoing *idda*, too, cannot marry during her period of *idda*. *Idda* (or *iddat*) is a period prescribed by Muslim law during which a woman, after dissolution of her marriage, is not permitted to remarry. This bar is imposed with a view to ascertaining the pregnancy of the woman so as to avoid confusion of paternity. Muslim law provides different periods of *idda*, on the basis of the manner in which a marriage is dissolved. On this basis, the following periods of *idda* are laid down : (a) when a marriage is dissolved

1. *Tijbi* v. *Mowla*, ILR (1895) 23 Cal 130; *Tahiamand* v. *Muhammad*, ILR (1931) 12 Lah 52; *Rahiman Bibi* v. *Mahboob*, (1937) MLJ 753.

by divorce and marriage has been consummated, the woman must undergo an *idda* of three menstruation courses if she is subject to them, otherwise, she would undergo *idda* of three lunar months, (b) when marriage is dissolved by divorce and it has not been consummated, she is required to perform no *idda*, (c) when marriage is dissolved by the death of the husband, she is bound to observe *idda* for a period of four lunar months and ten days, irrespective of the fact whether or not marriage had been consummated. If the woman is pregnant, *idda* will continue till she delivers. The period of *idda* commences immediately on dissolution of marriage, and if the woman comes to know of the dissolution of marriage only after the expiry of the period of *idda*, she need not perform *idda*.

Marriage among persons of equal rank; and on pilgrimage

Islamic law laid down that marriage should be performed among persons of equal rank. Later on, it came to mean that husband should be equal to woman, though woman need not be equal in rank to him.[1] The Ithana Ashari and the Shafii laws lay down that a person who is on a pilgrimage, should not marry. But in modern India, such prohibitions have no meaning.

Prohibitions under Parsi and Christian Laws

The Parsi law also lays down prohibitions on the ground of affinity and consanguinity. A complete list is given in Schedule I of the Parsi Marriage and Divorce Act, 1936-88. The Christian Marriage Act does not specify the degrees of prohibited relationship but merely lays down that a marriage which is forbidden by the personal law of the parties is not valid. This includes prohibitions such as prohibited degrees of consanguinity or affinity. The Divorce Act lays down that the parties should not be within the prohibited degrees of consanguinity (whether natural or legal) or affinity.

CEREMONIES OF MARRIAGE

All communities in India prescribe different rites and ceremonies for marriage, among some these are very elaborate, such as among the Hindus, among some these are very simple such as among the Muslims. Among certain castes and tribes, a marriage can come into existence merely by cohabitation and no ceremonies are required.

Hindu law

Hindus have prescribed very elaborate ceremonies and rites for their marriage, though in modern Hindu law all these ceremonies are not mandatory. However, which of these rites and ceremonies are still essential, the law is not yet certain. Under the modern Hindu law, a Hindu marriage may be validly performed in the following two modes :

A. By performing the Shastric rites and ceremonies recognized by Hindu law, or

B. By performing customary formalities which prevail in the caste, community or tribe to which one of the parties (or both) belong.

Shastric rites and ceremonies.—The *Grihiya Sutra* deal elaborately with the rites and ceremonies of marriage. The main Shastric rites and ceremonies are : *kanyadan, panigrahan, vivaha-homam* and *saptapadi*. Of

1. *Md. Hayat* v. *Md. Nawaz*, AIR 1953 Lah 622.

these ceremonies, the *Saptapadi* is mandatory. Section 7(2), Hindu Marriage Act, lays down that where the rites and ceremonies of marriage "include the *saptapadi* (that is the taking of seven steps by the bride and bridegroom jointly before the sacred fire) the marriage becomes complete and binding when the seventh step is taken." It appears that the performance of *saptapadi* before the sacred fire is obligatory, though chanting of *mantras* is not.[1] The Madras High Court takes the view that *kanyadanam* or gift of the bride is also an essential ceremony. It is a settled view that in the *gandharva* form of marriage *kanyadan* is not essential. It is submitted that in the modern Hindu law under which only adults can marry, *kanyadan* cannot be regarded as an essential ceremony. Marriage is no longer viewed as a gift by the bride's father to the bridegroom. Among the Sudras, *vivaha-homam* is also not essential. It is submitted that the marriage will be valid if among the first three classes it is solemnized by the performance of the *saptapadi* and *vivaha-homam* (no other ceremony need be performed) and among the Sudras, if it is solemnized with *saptapadi* alone. Although in all Hindu marriages *pheras* (going round the sacred fire by the bride and bridegroom) are almost invariably taken (usually *pheras* are seven, but in some communities they are five, or even three), these are not essential for the validity of the marriage. In fact, in modern Hindu law, a marriage can be performed in less than five minutes, since what is required is to take seven steps together (by bride and bridegroom) before the sacred fire. However, most Hindus still prefer to solemnize their marriage with elaborate rites and ceremonies and fanfare of rituals.

Customary ceremonies.—In those castes, communities and tribes where customary ceremonies prevail and are recognized by law, a marriage may be validly solemnized by performing those ceremonies. The customary ceremony of marriage must be the one which prevails either on the side of the bride or the bridegroom. It need not be the one which is recognized on both sides. But customary rites and ceremonies can only be recognized if these have been followed continuously from ancient times and the members of the caste, community or sub-caste, recognize them as obligatory.[2] Customary ceremonies need not include any of the shastric ceremonies or rites. These may be totally non-religious, very simple or minimal ceremonies. Thus, among the *santhals*, smearing of vermilion by the bridegroom on the forehead of the bride and among the *Nairs* of south India, tying of the *vadu thali* around the neck of the bride is the only formality required for the solemnization of the marriage.[3] There are some tribes in which no ceremony of marriage, is required. Thus, among the Jats of Punjab in the *chadar andazi* form of marriage no ceremonies are required.[4] Similarly, in the *karewa* form of marriage prevalent among the Jats and lower castes of Punjab, Haryana and in some other parts of Northern India, mere cohabitation between the parties is enough.[5] The same is true among the Buddhists.[6]

Although the Hindu Marriage Act does not lay down as to whether a

1. *Berami* v. *Chindavaram*, AIR 1954 Mad 65.
2. *Rabindra Nath* v. *State*, AIR 1969 Cal 58.
3. *Tirumalai* v. *Ethirajamah*, (1946) MLJ 438; *Dhama* v. *E.*, AIR 1943 Pat 109.
4. *Sohan Singh* v. *Kabla Singh*, AIR 1928 Lah 706.
5. *Charan Singh* v. *Gurdial Singh*, AIR 1961 Punjab 301 (FB).
6. See Paras Diwan, *Customary Law*, Chapter VIII (1978).

marriage performed without essential ceremonies will be void or valid, but since no contract of marriage can come into existence without the performance of the necessary ceremonies, it is obvious that a marriage without requisite ceremonies is null and void.[1] Thus, if a Jain married a Buddhist by performing *anand karaj* (Sikh ceremony), the marriage will be void, since it is a ceremony which is recognized neither on the side of the bride nor bridegroom.[2]

It has been seen earlier that the proof of due performance of necessary ceremonies of marriage is essential for the prosecution for bigamy.[3] Similarly, petition for restitution of conjugal rights will fail if the performance of requisite ceremonies is not established.

No one can innovate new ceremonies and a marriage performed with the innovated ceremonies and rites is invalid.[4]

Registration of Hindu marriage has not yet been made compulsory, though the State Governments have been empowered to frame rules for compulsory registration of marriages. The interesting aspect of the law is that even when a State Government makes the registration of marriage compulsory, non-registration does not render the marriage invalid, though any person contravening the rules relating to compulsory registration of marriage may be punished, with a nominal fine which may extend up to rupees twenty-five. Mere registration is no proof of marriage.[5] However, the Supreme Court has held in *Seema* v. *Ashwani Kumar*,[6] that the registration of marriage falls within the ambit of expression "vital statistics" as provided in Entry 30, List-3, Section 7 of Constitution of India. Therefore, marriage of all citizens of India belonging to various religions should be made compulsorily registrable in the States where they are solemnized. Cohabitation between the parties of sufficient duration raises a presumption of valid marriage.[7]

Muslim law

Muslim law provides for simple ceremonies of marriage. All that is necessary for the performance of a Muslim marriage is that there should be a proposal of marriage made by, or on behalf of one of the parties to the marriage and accepted, by or on behalf of, the other, at one and in or at the same meeting. If the proposal is made in one meeting and acceptance is made in another, it does not result in a valid contract of marriage. The Sunni law requires that the proposal and acceptance should be made in the presence and hearing of two adult male witnesses, or one adult male witness and two adult female witnesses. The Shia law does not require the presence of witnesses. For making a proposal or for acceptance, no specific words are laid down, though it is necessary that whatever words are used, these must clearly and

1. *Laxman Singh* v. *Keshar Bai*, AIR 1966 MP 166; *Surjit* v. *Gajra*, AIR 1994 SC 135.
2. *See Sakuntala* v. *Nilkantha*, 1972 Mah LR 31, marriage between two Hindus by the Buddhist rites was held void.
3. *See* an interesting case *Dr. A.N. Mukherji* v. *State*, AIR 1969 All 489; *See* also case cited in footnote 25.
4. *Rajathi* v. *Selliah*, (1966) 2 MLJ 40.
5. *Shahji* v. *Gopinath*, AIR 1995 Mad 161.
6. AIR 2006 SC 1158.
7. *Nirmala* v. *Rukmani*, AIR 1994 AIR 364.

unequivocally convey the intention to be married. The usual words, though not prescribed, are, "I have married myself to you", and the other says, "I have consented myself to you." The Ithana Ashari law required the use of the two Arabic words, "*tazweez*" and "*nikah*". But even if proper words are not used, consummation of marriage cures the deficiency. No religious ceremonies are essential. No writing is required either.

In India, marriage among all sects of Muslims is usually solemnized by persons conversant with the requirements of law and they are designated as *kazis* or *mullas*. Two persons, formally appointed for the purpose, act on behalf of the contracting parties, with certain number of witnesses. The terms of marriage are usually embodied in a deed called *kabin namah*. In the *kabin namah* are incorporated such conditions as the amount of dower, mode of its payment, matters relating to custody of children and all other conditions which the spouses desire to stipulate.

Since Muslim marriage is a contract, Muslim law requires that consent of parties if adults, or of their guardians if minors, must be expressed clearly and unequivocally. Among the Hanafis and Shias, adult and sane persons are themselves competent to give their consents, therefore no consent of *wali* (guardian) is required. If guardian consents but the girl withholds her consent, no valid marriage takes place.[1] If a party is not competent to contract, the consent of the marriage-guardian is necessary. The Shafiis and Malikis insist that the consent to the marriage must be given by the girl herself, the *wali* merely communicates the consent, but it insists that the girl, even if adult, cannot herself communicate her consent, it must be conveyed through the *wali*.

In Muslim law, consummation of marriage cures deficiencies of the formalities. A valid retirement (*khalwal-us-sahiha* or *khilwat-us-sahib*) raises a presumption of consummation of marriage. It is necessary that the place of retirement should be such where parties can really have privacy. If the place is exposed to public view or has public access, or if it is an open, unenclosed place, no presumption of consummation of marriage arises.

Under the Shia and Shafii laws, no absolute presumption of consummation of marriage arises from valid retirement, it is only actual consummation of marriage which gives rise to marital rights and obligations.

Even according to the Hanafi and Maliki law, valid retirement raises a presumption of marriage for certain purposes, such as for confirmation of dower, establishment of paternity, observations of *idda*, wife's maintenance and lodgment, unlawfulness of marriage by man with wife's sister or fifth woman, and observance of time in repudiation of marriage. It does not raise the presumption for making a person *nushan* or a daughter unlawful, making a divorced woman lawful to her first husband or revoking repudiation of inheritance, or impairing virginity.

There is no Union law for registration of Muslim marriages; some State statutes provide for the registration of marriage and divorce.[2]

Bride's father can recover all marriage expenses from the groom or his

1. *Adam* v. *Mohammad*, (1990) 1 KLT 705.
2. Bengal Mohammadan Marriage and Divorce Registration Act, 1876; Assam Muslim Marriage and Divorce Registration Act, 1935; Orissa Mohammadan Marriage and Divorce Registration Act, 1947.

father if the father after the solemnization of marriage returns to his place without the bride or bride's father's refusal to pay expenses of nautch girl, even when the bride later on repudiates the marriage.[1]

Parsi law

Under the Parsi law, the ceremony of *ashirvad* should be performed by a Parsi priest in the presence of two Parsi witnesses. The registration of the Parsi marriage is essential. It lays down that immediately on the solemnization, the marriage should be certified by the officiating priest in the prescribed form (given in Schedule II of the Parsi Marriage and Divorce Act). The certificate has to be signed by the priest, the parties to the marriage, and by two witnesses present at the solemnization of marriage. The priest is required to send the certificate together with a fee of two rupees (paid by the husband) to the Registrar of the place at which such marriage has been solemnized, whereupon the Registrar enters the certificate in a certificate maintained by him for that purpose. The Act provides for the appointment of the Registrar of Marriages.

However, failure to register a marriage does not affect its validity. The Parsi Marriage and Divorce Acts, 1936-88 lay down that no marriage contracted under the Act shall be deemed to be invalid solely by reason of the fact that it was not certified by the priest who officiated at the ceremony, or that the certificate was defective, irregular or incorrect.

Christian law

The Christian Marriage Act, 1872, lays down elaborate procedure for the solemnization of marriages. Three sets of authorities are provided for the solemnization of marriage, *viz.*, minister of religion, marriage registrars and persons licensed to solemnize the marriage.

When a marriage is to be solemnized by a Minister of Religion, notices of the intended marriage, publication of such notice, and a declaration by one of the parties to the marriage are essential procedural requirements. The minister is free to solemnize the marriage in such form of ceremonies as he thinks fit to adopt, though the presence of two witnesses, other than the minister, is essential. Registration of such a marriage is compulsory.

Where a marriage is to be solemnized by a Marriage Registrar, more or less the same procedure has to be followed, such as notice of the intended marriage should be given, such notice should be published, declaration should be filed, certificates should be issued. Parties are free to choose such form and such ceremonies as they think fit, but marriage has to be solemnized in the presence of the marriage registrar and two or more credible witnesses. Parties are required to declare in some part of the ceremony, "I do solemnly declare that I know not of any lawful impediment why I, AB, may not be joined in matrimony to CD" and "I can upon these persons here present to witness that I, AB, to take thee, CD, to be my lawful wedded wife (or husband)". Registration of marriage is also compulsory.

A marriage between the Indian Christians may be solemnized without the preliminary procedural formalities (of notice, etc.) by any person licensed to solemnize such marriages. Such a marriage has to be solemnized by the

1. *Noor Md.* v. *Md. Jiajdia*, AIR 1992 MP 244.

licensed person in the presence of at least two credible witnesses and the parties are required to say to each other, "I call upon these persons present here to witness that, I, AB, in the presence of the Almighty God, and in the name of our Lord Jesus Christ, do take thee, CD, to be my lawfully wedded wife (or husband)." The licensed person is required to give a certificate of marriage to either party on payment of 25 paise. Registration of such marriage is also required.

The Indian Roman Catholic cannot marry under Part VI of the Christian Marriage Act.

Special Marriage Act

The Special Marriage Act provides for the performance of marriage by civil ceremony. Elaborate procedure is laid down. A notice of the intended marriage is required to be given by the parties to the marriage (in the form laid down in Schedule II) to the marriage registrar of the district within whose jurisdiction at least one of the parties to the marriage has been residing for a period of not less than thirty days immediately preceding the date on which the notice is given. Notice of the marriage has to be entered into the Notice Book which is available for inspection at all reasonable times.

Such a notice is to be published by affixing a copy thereof at some conspicuous place in the marriage registrar's office. Where either party to the marriage is not a permanent resident of the place where the notice is given, then a copy of notice has to be transmitted to the marriage officer of the district where the party or parties permanently reside and such marriage officer shall cause the publication of the notice.

Any person may file objections to the intended marriage before the expiry of 30 days (from the date on which the notice was published) that the intended marriage is in violation of any of the conditions of marriage laid down in Section 4. The Marriage Officer would dispose of the objection after giving due hearing to all the parties. If the marriage officer withholds the objection, he will refuse to solemnize the marriage. Against such order the parties have the right to prefer an appeal to the District Court within thirty days of the order of the marriage officer. The decision of the District Court shall be final and the marriage officer will act accordingly.

After the expiry of thirty days of the notice (if there are no objections) the marriage may be solemnized or if there are objections, the marriage may be solemnized after the rejection or withdrawal of the objections. The parties are free to get their marriage solemnized at the office of the marriage officer or at such other place within a reasonable distance therefrom as the parties may desire. In such a case parties have to pay certain fees as prescribed by the State Government under the rules framed under the Act. Before the solemnization of marriage, parties are required to file a declaration, the form of which is given in the Third Schedule. This declaration relates to status (unmarried, widower, widow or divorcee), age, and relationship (*i.e.*, they are not within the degrees of prohibited relationship).

The parties are free to solemnize their marriage in any form, but the marriage shall not be complete and binding unless each party says to the other in the presence of the marriage officer and three witnesses, in any language understood by the parties, "I, (A), take thee, (B), to be my lawful

wife or husband."

On the solemnization of the marriage, the marriage officer is required to enter a certificate in the marriage certificate book and such certificate should be signed by the parties to the marriage and three witnesses. Such a certificate is conclusive evidence of the fact that a marriage under the Act has been solemnized and that formalities thereto have been complied with.

VI
REGISTRATION OF MARRIAGE

Registration of marriage.—It is a unique feature of the Special Marriage Act that a marriage solemnized in any other form under any law, between any two persons, may be registered under the Act, and, on registration, such a marriage for all intents and purposes is treated as performed under the Act. This means the provisions of the Act, including matrimonial causes, apply to the parties. However, a marriage can be registered only when it is shown that the parties have undergone a ceremony of marriage and have been since then living together as husband and wife, neither party has more than one spouse living, neither party is an idiot or lunatic, parties have completed the age of 21 years, the parties are not within the degrees of prohibited relationship (unless a custom or law applicable to the parties at the time of their solemnization of marriage permitted such a marriage), and the parties have been residing within the district of the marriage officer where registration is sought for a period of not less than thirty days immediately preceding the date on which the application for registration is made.

Presumption of marriage.—Section 114 of Evidence Act lays down that where independent evidence of solemnization of a marriage is not available, it will be presumed to be a valid marriage by cohabitation between the parties unless the contrary is proved. Once a marriage is established *de facto*, it is the policy of law to lean in favour of its validity.[1] A couple which is treated by the community or neighbours as husband and wife and thus is reputed to be married, the burden of proof that the couple is not properly married lies on the person asserting it.[2] Thus, continuous and prolonged cohabitation raises a presumption in favour of marriage and against concubinage.[3] But if the conduct of the parties is incompatible with marital relationship, no such presumption arises.[4] Thus, where a woman is admittedly a prostitute, no presumption of valid marriage arises.[5] If no marriage ceremony had taken place, mere registration of marriage raises no presumption of valid marriage.[6]

Under Section 114 of Evidence Act, the presumption on the basis of prolonged cohabitation arises under all the Indian personal laws, since the

1. *Irieum* v. *Ramaswamy*, (1896) 12 MLA 143; *Chandu* v. *Khalilar*, ILR (1949) 2 Cal 299.
2. *Anadi* v. *Onkar*, AIR 1960 Raj 251; *S.P.S. Balasubramanyam* v. *Andali*, AIR 1994 SC 133.
3. *Gokal* v. *Purin*, AIR 1972 SC 231; *Badri Prasad* v. *Dy. Director, Consolidation*, AIR 1978 SC 1557; *Abdul Razak* v. *Aga Md*, (1892) 21 IA 56.
4. *Abdul Razak* v. *Aga Md*, (1893) 21 IA 201.
5. *Ghazanfar* v. *Kaniz Fatima*, (1913) 31 IA 105.
6. *Shaji* v. *Gopinath*, AIR 1995 Mad 161.

Evidence Act applies to all the communities.

Muslim law specifically lays down that prolonged cohabitation between two persons who have no legal impediments to marriage raises a presumption of validity of marriage.[1] Muslim law permits a man to acknowledge a woman as his wife[2] and to acknowledge a child as his legitimate child in which case a presumption of marriage between him and the mother of the child arises.[3]

The presumption of the validity of a marriage on the basis of long and continuous cohabitation does not apply to a petition for restitution of conjugal rights and for prosecution for bigamy as in these cases the performance of requisite ceremonies of marriage has to be established.[4]

VII
SUGGESTIONS FOR REFORM

It is a notorious fact that many prosecutions for bigamy fail because of the lack of proof of the solemnization of second marriage with requisite ceremonies. It is submitted that with respect to the ceremonial validity of marriage, a uniform law should be made applicable to the members of all communities. In other words, a statute under the title, "Ceremonies of Marriage Act" should be passed. The statute may provide for the following ceremonies of marriage :

A. **A simple ceremony of marriage.**—In the presence of relatives and/or friends, and/or acquaintances (whose total number should not be less than five) the bride and bridegroom should exchange garlands and rings, and with skirts of their mantles tied together they should seek blessing from the elders present there and greet friends and acquaintances. It is submitted that tying of the skirts of the mantle of the bride and bridegroom is a part of the ceremony of marriage, but not seeking of blessing of elders and greetings of others.

B. A civil ceremony of marriage on the lines of the Special Marriage Act, 1954 with simple procedure in civil form should be made available to all, and facilities for solemnization in civil form should be made available at all levels. Thus, all *panchas* of *gram panchayats*, all the revenue officers from the collector to the *patwari* and all officers of the rank of magistrates (of all grades and both judicial and executive) should be empowered to officiate at civil marriages. They may be designated as marriage officers. Not more than three days notice of marriage should be necessary if parties belong to the same locality where the marriage is to be solemnized. Where parties belong to a different locality, a notice of not more than 10 days should be necessary. All objections to the marriage should be disposed of within ordinarily twenty-four hours. No appeal should lie if objection is rejected. In case objection is sustained, the parties may appeal within 10 days of the order to the

1. There is a long line of cases. A Supreme Court case may be noted; *Md. Amin* v. *Vakil Ahmed*, (1952) SC 35.
2. *Md. Amin* v. *Vakil Ahmed*, (1952) SC 35; *CIT* v. *Mir*, AIR 1991 SC 331.
3. *Imambandi* v. *Mutsaddi*, (1918) 45 IA 73; *Fatima Bi* v. *Md. Mohideen*, (1971) 1 MLJ 73.
4. *Phankan* v. *State*, AIR 1965 J & K 1053.

lowest civil court, and the appeal should be disposed of within 48 hours of its filing. If objection is still sustained, a second appeal should lie to the District Court. Marriage may be solemnised at any place where the bride and bridegroom want it to be solemnized on payment of a fee of rupees eleven, to the marriage officer. The parties should also provide free transport (whatever mode is available) to the marriage officer. Each party should say to the other in the presence of the marriage officer and two witnesses, "I, (AB), take thee, (CD), to be my lawful wife (or husband)". Upon this the marriage will become complete and binding on the parties.

C. The performance of anyone of the above two ceremonies should be necessary and enough for the ceremonial validity of all marriages performed in India, among any two persons. However, the parties are free to perform any additional ceremonies, religious, traditional or customary.

D. Registration of all marriages performed in any form should be compulsory. All revenue officers from the Collector to the *patwari*, all the local self-government bodies, such as municipal corporations, municipal boards, town area committees, village panchayats and all magistrates (of any rank) judicial as well as executive should be authorised to keep a marriage register book and should be required to enter a certificate of marriage therein, such certificate should be signed by the spouses and their witnesses and countersigned by the marriage officer.

E. All marriages performed in a State should be published in the Official Gazette of the State Government, for which a fee may be charged from the parties.

PART III

DOWRY, DOWER, CONSORTIUM, COHABITATION AND MATRIMONIAL HOME

Chapter 5

DOWRY AND DOWER

I
DOWRY

Definition of Dowry

Under the Dowry Prohibition Act, 1961-86, "Dowry" is defined as any property or valuable security given or agreed to be given, directly or indirectly, (a) by one party to the marriage to the other party to marriage, or (b) by parents of either party to the marriage, or by any other person to either party to marriage or to any other person at or before or at any time, after the marriage "in connection with the marriage of said parties." It should be noticed that the Act uses the word "dowry" not merely in the sense of what bride's parents give to the bride and bridegroom but also the other way round. In other words, if property or valuable security is given by bridegroom to the bride or bride's father in connection with the marriage of the parties, it would also be covered in the definition of dowry. In the definition as laid down in the original Act, the words were "as consideration for marriage" which have been substituted with the words "in connection with the marriage." But wedding presents, whatever be their value, are excluded from the purview of dowry. It would have been better to say "whatever does not constitute wedding presents constitutes dowry." It is true, seemingly, two safeguards against the abuse of "presents" are laid down :

(a) All presents made to the bride or bridegroom at the time of marriage (but not those given before or after marriage) are to be put in a list, and

(b) Such presents should be commensurate to the financial status of the giver.[1]

Giver, taker and demander or dowry offenders

Taking or giving of dowry or abetting to give dowry or abetting to take dowry continue to be offences.[2] Similarly, demanding of dowry by any person, directly or indirectly, from parents or guardian of bride or bridegroom is also a dowry offence.[3] Under the original Act, the punishment for these offences was mild; the maximum punishment was six months' imprisonment, or a fine which could not be beyond a sum of Rs. 5,000; both the punishments could also be awarded. But now the punishment has been enhanced and minimum and maximum punishments have been laid down. The Amending Act of 1986 provides a punishment which shall not be less than five years' imprisonment

1. Section 3(2).
2. Section 3.
3. Section 4.

with fine which shall not be less than Rs. 15,000 or the amount of the value of such dowry whichever is more.[1] In regard to the punishment of inflicting fine, if the value of dowry is more than the sum of Rs. 15,000 or vice-versa, then the amount which is more is to be awarded as punishment.[2] If these provisions are considered to have teeth, then the same are blunted by another provision which confers a discretion on the court to impose a sentence of imprisonment for a term of less than five years. In awarding smaller punishment, the court is required to record in writing the adequate and special reasons for doing so.

Transfer of dowry to the bride

It may be that dowry has actually been received but its receiver is not the bride, but either the husband or some other person or someone from among the in-laws. In such a case, the Act lays down that dowry has to be transferred to the bride.[3] When any person has received dowry at, before, or after the marriage, he must transfer the same to the bride within three months of its receipt.[4] If dowry was received when the bride was a minor then it must be transferred to her within three months of her attaining majority.[5] Pending such transfer, he would hold the dowry as a trustee for the benefit of the bride.[6] The failure to transfer the dowry to the bride within the stipulated period constitutes a dowry offence, for which the offender is liable to be awarded the same punishment as the taker of dowry,[7] and in his case the court has no discretion to reduce the punishment below the minimum under any circumstances whatever. This punishment will be in addition to the one which may be awarded to him as taker of dowry, since both are separate offences. If the bride dies before the transfer of dowry is effected, her heirs will be entitled to it.[8] If the woman dies within seven years of her marriage, the property will go to her children, and, in their absence, to her parents. Further, the Act provides that the court will make an order directing the offender to transfer the dowry to the bride, or her heirs, as the case may be, within the time specified in the order.[9] If the offender still fails to comply with the order, the court is required to pass an order directing that an amount equal to the value of dowry should be recovered from the offender as if it was offender as if it was fine imposed by the court and should be paid to the bride or her heirs, as the case may be.[10]

Dowry offences are partly cognizable

Neither the original Act nor the Amending Acts have made the dowry offences as cognizable, but, nonetheless, these offences have been made cognizable for the purpose of investigation.[11] This is a welcome provision,

1. Section 3(1) and Section 4.
2. Proviso to Section 3(1) and Proviso to Section 4.
3. Section 6.
4. Section 6(1).
5. Section 6(1)(c).
6. *Ibid.*
7. Section 6(2).
8. Section 6(3).
9. Section 6(3-A).
10. *Ibid.*
11. Section 8(1).

since in the case of non-cognizable offences the police makes the investigation only when a complaint is lodged. Now the police has the freedom to make investigation of its own, and if it comes to the conclusion that an offence has been committed, it can approach the court. The Act lays down no person accused of dowry offence can be arrested without a warrant or without an order of the Magistrate, First Class.[1]

The dowry offences are non-compoundable offences. This means once a case goes to the court, the parties are not free to compromise.[2]

The offences relating to dowry are non-bailable.[3]

An agreement for giving or taking dowry is void, i.e., it cannot be enforced in a court of law.[4]

Trials of dowry offences

The Dowry Prohibition Act confers jurisdiction to try dowry offences only on the Metropolitan Magistrate or the Magistrate of the First Class.[5] No other court is competent to try these offences. Cognizance of dowry offences can be taken by the Magistrate himself or on the basis of a police report of the fact which constitute a dowry offence, or on a complaint lodged by a parent or other relation of such person, or by a recognized welfare institute or organization.[6] That now the court can be moved on the complaint of a social organization or institution is a welcome provision. The fact of the matter is that practically no prosecution of any dowry-offender could take place under the original Act as neither the aggrieved party nor her parents or relation came forward to lodge the complaint to the Magistrate or to the police, as they did not want to land into any complications particularly when the welfare of the bride was involved. This seems to be the justification of conferring a power of lodging complaint on the welfare organizations. However, with a view to preventing abuse of the provision, the right to lodge the complaint has been conferred only on the recognized welfare organizations or institutions.

Under the original Act, no cognizance of the offence could be taken by a Magistrate if the complaint was made after one year of the commission of the offence. Probably, the framers of the Act then did not realize that offences relating to dowry are offences of a totally different type; they are not like ordinary offences of theft, extortion or dacoity. The fact of the matter is that no one is likely to come forward to lodge a complaint immediately after the commission of the offence. Such offences are brought to light after the lapse of considerable period after the solemnization of the marriage, when continual harassment and torture of the bride compels her to take into confidence her parents, relatives or a friend and expose her husband and in-laws. The Amending Act has removed this limitation. Now complaint can be made at any time after the commission of the offence. But, of course, if a complaint has been lodged after considerable delay amounting to laches, the court may not entertain the complaint if no reasonable explanation is forthcoming of the delay.

1. Section 8(1)(ii).
2. Section 8(2).
3. *Ibid*, They have been made non-bailable to the Amending Act of 1986.
4. Section 5.
5. Section 7(1)(a).
6. Section 7(1)(b).

Dowry Prohibition Officers

It is now accepted that one of the reasons for the failure of the Dowry Prohibition Act, 1961, has been absence of any proper and effective enforcement agency. The committee also noted this fact, and suggested that there should be some machinery which can intervene whenever necessary and help in averting dowry tragedies by helping the dowry victims, as well as by helping otherwise in the enforcement of the provisions of the Act. It suggested appointment of Dowry Prohibition Officers in different areas of each State whose responsibility would be to take appropriate steps for enforcing and preventing the contravention of the provisions of the Act. In cases where contravention of the Act has taken place, they should collect evidence for the effective prosecution of the offenders. These officers would also render all possible aid and advise to persons who are subjected to the demand of dowry or who are tortured or otherwise harassed for not bringing proper dowry. The Dowry Prohibition (Amendment) Act, 1986, Section 8-B stipulates for the appointment of Dowry Prohibition Officers by the State Government.

II
DOWER

Introductory

Dower or *mahr* is a peculiar Muslim law concept. Historically, the idea of sale is latent in the notion of *mahr*. In the pre-Islamic era, in *beena* form of marriage, the woman, on her marriage, did not accompany her husband but remained at her own house, where the husband visited her. As part of the marriage contract, he made a gift to his wife. This gift was known as *sadaq*. In *baal*, the other prevalent form of pre-Islamic marriage, the woman accompanied her husband after her marriage, and in consideration of wife's leaving her parents' home, the husband paid a sum of money to her parents. This sum of money was known as *mahr* or dower and was likened to bride-price. On the spread of Islam in Arabia, marriage was reformed and *sadaq-mahr* was combined into one and became a sort of marriage-settlement for the wife. In the modern law, *mahr* is something in the nature of a nuptial gift which a Muslim husband undertakes to make to his wife. It is an integrated part of Muslim marriage. Probably, it is also used as a deterrent to Muslim husband's absolute power to pronouncing divorce on his wife.

Dower : Definition.—*Mulla* defines (It is submitted erroneously), "dower" as "a sum of money or other property which the wife is entitled to receive from the husband in consideration of marriage."[1] Explaining the reason for the preference of the use of the expression "consideration" by Muslim doctors, Mahmood, J. observed, "*mahr* has been compared to the price in a contract of sale because a marriage is a civil contract and sale is a typical contract to which Muslim jurists are accustomed to refer to by way of analogy."[2] It is submitted that dower is not a consideration proceeding from the husband for the contract of marriage, but it is an obligation imposed by law on the husband. Non-specification of dower does not render a Muslim

1. Mulla : *Mohammedan Law*, 277 (17th Ed.).
2. *Abdul Kadir* v. *Salima*, ILR (1886) 8 All 149; *See* also *Suburanunessa* v. *Sabdu Shaik*, AIR 1934 Cal 693; and *Hali Mokshed* v. *Del Rouson*, AIR 1971 Cal 162, where dower was defined as consideration.

marriage void. It is an integral part of marriage, and it may be fixed either before, at or after the marriage. In case it is not fixed by the parties, it is implied in every marriage, and is usually fixed by the courts. Such importance is attached to dower that even if a wife enters into a stipulation in the marriage contract that she abandons her claim to dower, such stipulation is void and the wife will, nonetheless, be entitled to proper dower.

In the apt words of Chandrachud, C.J. :

> But, the fact that deferred *mahr* is payable at the time of the dissolution of marriage, cannot justify the conclusion that it is payable on divorce. Even assuming that, in a given case, the entire amount of *mahr* is of deferred variety payable on the dissolution of marriage by divorce, it cannot be said that it is an amount which is payable on divorce. Divorce may be a convenient or an identifiable point of time at which the deferred amount has to be paid by the husband to the wife. But the payment of the amount is not occasioned by the divorce, which is what is meant by the expression 'on divorce' which occurs in Section 127(3)(b) of the Code. If *mahr* is an amount which the wife is entitled to receive from the husband in consideration of marriage, that is the very opposite of the amount being payable in consideration of divorce. Divorce dissolves the marriage. Therefore, no amount which is payable in consideration of the marriage can, possibly be described as an amount payable in consideration of divorce. The alternative premise that *mahr* is an obligation imposed upon the husband as a mark of respect on the wife is wholly detrimental to the stance that it is an amount payable to the wife on divorce. A man may marry a woman for love, looks, learning or nothing at all. And, he may settle a sum upon her as a mark of respect for her. But he does not divorce her as a mark of respect. Therefore, a sum payable to the wife out of respect cannot be a sum payable 'on divorce'.[1]

Dower, when fixed by mutual consent after the marriage, is known as *mahr-i-tafweez*, when fixed by the court, it is known as *mahr-i-takkim*. When dower is fixed by an agreement, it is known as specified dower and when it is determined by operation of law, it is known as proper dower.

Quantum of Dower

The peculiarity of the Muslim concept of dower is that no school of Muslim law fixes the maximum amount of dower. Even the minimum amount of dower is not fixed except by the Hanafis and the Malikis. The Hanafis fix the minimum amount at ten *dirhams*, and the Malikis at three *dirhams* (one dirham is equivalent to 30 to 40 paise). Since no maximum amount of dower is prescribed, a Muslim couple may fix any amount of dower-even an amount which is evidently much beyond the means of the husband.[2] Sometimes, dower is deliberately fixed at a very high figure so that it acts as a deterrent on husband's power of divorce[3] and in such a case the husband is not allowed to plead equity.[4] However, Oudh Laws Act, 1876 and the Jammu and Kashmir

1. *Shah Banu*, AIR 1985 SC 945.
2. *Haliman* v. *Md. Manir*, AIR 1971 Pat 385.
3. *Zakiri* v. *Sakina*, ILR (1909) 32 All 167.
4. *Md. Sultan* v. *Sarajuddima*, AIR 1936 Lah 183.

State Muslim Dower Act, 1920, lay down that the court may not award the stipulated dower if it considers it to be too excessive, and should award an amount which it considers reasonable with reference to the means of the husband and the status of the wife. But Muslim Law (including these statutes) does not empower the court to increase the amount of dower if it is fixed at too meagre a figure.

Usually dower is fixed in terms of money, but it may be as well any type of property, anything which falls within the meaning of *mal* and has value. Thus, instruction in the *Koran*, a prayer carpet, land or house may form the subject-matter of dower.

No writing is required, though usually a written deed, known as *mahr-nama* (dower-deed) is executed.

Classification of Dower

As has been seen, dower is usually classified under two heads :

A. Specified dower, *i.e.*, fixed mutual agreement of the parties.

B. Proper dower or customary dower, *i.e.*, arising by the operation of law.

Specified dower.—The specified dower may be fixed by parties to the marriage or if the son is minor, by the father. The Hanafis take the view that the amount fixed by the father is binding on the son, and the father is not liable personally or as surety for his son,[1] while under the Shia law, the father is liable if son has no means.[2] Under the Hanafi law, the wife is entitled to receive the minimum amount of dower, even if she has agreed to receive less. Under the Shia law and the Shafii law, the wife is entitled to receive only the amount fixed under the agreement whatever may be its quantum. Under the Ithana Ashari law, an adult woman, who is not of weak or facile disposition, has power not to receive any, or to forego the entire amount of dower.

Sometimes for the purpose of glorification of the husband a large sum of dower is announced in public, but, in fact, a moderate amount is fixed in private. It is the amount fixed in private which is the real and realizable dower.

The specified dower is usually in two parts :

(a) prompt dower, and

(b) deferred dower.

Prompt and deferred dower.—Ordinarily, what portion of dower is prompt and what is deferred is fixed under the agreement. It is usual to fix one half as prompt and the other half as deferred. But parties are free to put it in any proportion and they may stipulate that the entire amount will be prompt or deferred. If at the time of marriage no stipulation is made as to which part is prompt and which part is deferred, the Shias take the view that the entire amount is prompt, while the Hanafis hold that one part should be treated as prompt and the other deferred. The Madras High Court has expressed the view that in the absence of any stipulation as to which part is prompt or deferred, the entire amount should be treated as prompt

1. *Md. Siddi* v. *Shahabuddin*, AIR 1927 All 364.
2. *Sabir Hussain* v. *Farzand*, AIR 1938 PC 80.

irrespective of the fact whether parties are Shias or Hanafis.[1] A Full Bench of the Lahore High Court took the view that in such a case the matter should be determined in accordance with usage or custom of wife's family, and, in the absence of any custom or usage, the presumption should be that one half was prompt and the other half was deferred.[2] It appears that in this regard the court exercises discretion and decides each case in accordance with its facts.

The main distinction between the two is that the prompt dower is payable and realizable at once after the solemnization of marriage on demand, and the wife has the right to refuse conjugal relationship to the husband till the prompt dower is paid. On the other hand, deferred dower is payable either on the expiry of some specified period, or on the happening of a specified contingency, or in every case, on the dissolution of marriage, by death or divorce.

A wife whose prompt dower has not been paid has the right to refuse to live with her husband; she may not admit him to sexual intercourse. Non-payment of prompt dower is a complete defence to husband's suit for restitution of conjugal rights. However, if consummation of marriage has taken place with the consent of the wife, the husband's suit for restitution of conjugal rights cannot be defeated on the ground of non-payment of dower. In the words of Mahmood, J :

> .....after consummation of marriage, non-payment of dower, even though eligible cannot be pleaded in defence of an action for restitution of conjugal rights; the rule so laid down having, of course, no effect upon the right of the wife to claim her dower in a separate suit.[3]

It is submitted that in such a case, a decree for restitution of conjugal rights should be passed conditional on the payment of dower.

Proper dower.—Dower being the integral part of Muslim marriage even when dower is not stipulated in the marriage contract, the wife is entitled to what is known as proper or customary dower; *mahr-i-misl* or *mahrul-mithl*. The wife is entitled to proper dower even when at the time of marriage she had agreed to receive no dower. The proper dower is fixed by the court, having regard to the nobility of her birth, the beauty of her person, and the custom of her female relations. In other words, proper dower is fixed on the basis of custom prevailing on the side of the wife and not the husband. According to the Hanafis, the proper dower should be fixed with reference to the social position of wife's father, her own personal qualifications are at par (as far as possible) with the amount of dower given to her female paternal relations, such as consanguine sisters or paternal aunts. In fixing the amount of proper dower, husband's social position or status is not taken into consideration. The Shia authorities take the view that proper dower cannot exceed 500 *dirhams*. The Shias hold that if either party dies before the consummation of marriage, neither any dower or present is due and payable. If at the time of the marriage contract, the fixation of the amount of dower is

1. *Sheik Md.* v. *Ayesha*, (1937) 2 MLJ 779.
2. *Nasiruddin* v. *Amatul*, AIR 1948 Lah 139 (FB).
3. *Abdul Kadir* v. *Salima*, (1886) 8 All 149. The same view was expressed in *Rabia* v. *Mukhtiar*, AIR 1966 All 548. But a contrary view was taken by the Allahabad High Court earlier in *Wilayat* v. *Allah*, (1880) 1 All 483.

left to the husband, he is free to fix any amount. If, it is left to the wife, she cannot fix more than 500 *dirhams*. Among the Shias, the property dower may be the dower of an equal, or *mahr-in-sunnat*, *i.e.*, the amount of dower fixed for the Prophet's daughter Fatima which is 500 *dirhams* (Rs. 32.32 in Indian currency).

Confirmation of dower.—According to the Hanafi Law, confirmation of dower takes place : (i) on valid retirement, and (ii) on the death of either party irrespective of the fact whether marriage has or has not been consummated. On the happening of either event, dower vests in the wife. She can also assign it. Once dower is confirmed, it is vested in her and its forfeiture cannot take place, even on the basis of her gross misconduct such as adultery or apostasy. On her death, it devolves upon her heirs.

Among the Ithana Asharis and the Shafiis, the dower is confirmed either on the actual consummation of marriage, or death of either party to the marriage.

In the event of parties separating without the confirmation of dower, according to the Hanafis, the wife is entitled to half of dower if it is specified, and, if not specified, she is entitled to a present only and no dower, and that too if separation takes place on account of the husband. For instance, if the husband divorces an apostate or adulterine wife, since separation takes place on account of the wife, she will not be entitled to even a present. Where dower has been settled after the marriage, but the parties separate without consummation of marriage, the wife is entitled to a present only and to no portion of dower.

The Ithana Asharis are substantially in agreement with the Hanafis. However, they hold that if dower has been specified and separation takes place before the consummation of marriage, the wife is entitled to half of the dower. Where dower is not specified and divorce takes place before consummation of marriage, the wife is entitled only to a present. The Shafiis seem to take the view that in every case of separation, where dower is not fixed, wife is entitled to a present.

According to the Hanafis, the quantum of present is to be fixed on the basis of custom of wife, while the Ithana Asharis hold the view it is to be fixed on the basis of means and status of the husband.

Remission of dower.—Although the wife has no power to agree not to receive any dower at the time of marriage, she has the power to remit the whole or any part of the dower in favour of her husband or his heirs after the marriage. An adult and sane wife has power to remit the whole or any part of the dower even without consideration. There is some controversy among the High Courts as to whether age of majority should be governed by the Indian Majority Act or Muslim Law.[1] Obviously the remission of the amount of dower should be with the free consent of the wife. Consent given in great mental distress, such as when her husband is on the death bed or has died, cannot be treated to be free consent.[2] Remission of dower is a unilateral act and

1. *Ali* v. *Md.*, ILR (1918) 41 Mad 1026; *Najmunissa* v. *Serajuddin*, AIR 1939 Pat 133 (Indian Majority Act) and *Qasim* v. *Kamiz*, AIR 1932 All 649.
2. *Nuranuessa* v. *Khoje*, ILR (1920) 47 Cal 537; *Hasnumiya* v. *Halimnussa*, AIR 1942 Bom 128.

acceptance of remission by the husband or his heirs is not necessary.[1]

Remission of dower may be conditional. For instance, wife may agree to receive any annuity in consideration of her foregoing the dower.[2]

Dower—Its Nature and Mode of Enforcement

On confirmation, dower vests in the wife and she can recover it like an actionable claim. She has also the power to assign it. In its nature dower is a debt but it is an unsecured debt. It being an unsecured debt, the wife has to stand in the queue along with other creditors of the husband. However, a wife who is in possession of her husband's properties has power to retain them in her possession till her dower is paid.

Dower debt.—Dower as an unsecured debt may be recovered by the wife from her husband when alive or against his estate when dead. If the wife dies before she could recover dower, her heirs step into her shoes and can recover the same. Once the claim of dower arises (and it arises on the confirmation of dower) she can recover the amount from the husband or her estate like any other creditor of her husband. In *Kapoor Chand* v. *Kadarussia*,[3] the Supreme Court propounded the following three propositions :

(i) Widow, being like any other creditor of the husband, cannot claim priority over other creditors for her dower-debt.

(ii) However, widow's dower-debt has priority over the claims of heirs.

(iii) Heirs of the deceased husband are not personally liable for the dower-debt of the widow. The amount can be realized rateably from the shares of heirs in the husband's estate.

Though dower is *per se* not a charge on husband's property, but one may be created by agreement or under a decree of the court.[4] It appears certain that if the court creates a charge on husband's estate by a decree, the charge is enforceable.[5] Some have expressed the opinion that the court should not create a charge on husband's property, since it will give priority to the wife over other creditors.[6] It is submitted that sometimes the only way of protecting the interest of the wife in her dower may be by securing it on the estate; if it is so, the court has the power to do so.

Right of Retention.—

Right of retention is a right of Muslim wife to continue to be in possession of her husband's property in those cases where her dower has not been paid. However, the right of retention is available when the marriage has been dissolved by death or divorce. During the subsistence of marriage, the right of retention is not available to the wife, unless she has, under a contract, a right of lien or possession over her husband's property. In the words of the Privy Council :

1. *Jyant* v. *Umrao*, ILR (1908) 32 Bom 612; *Nuranuessa* v. *Khoje*, ILR (1920) 47 Cal 537; *Md. Zohair* v. *Sohiddenn*, ILR 1942 Pat 210.
2. *Ghulam Md.* v. *Gulam Hussain*, ILR (1931) 59 IA 74.
3. (1950) SCR 747.
4. *Ameer-connisa* v. *Mooradoon*, (1855) 6 MIA 211.
5. *Md. Wazid* v. *Bazyat*, (1878) 5 IA 211; *Qasim* v. *Habibur Rahman*, ILR (1929) 56 IA 250.
6. *See*, Mulla, 284, Aneer Ali, 450.

The possession of property being once peacefully acquired, the right of the widow to retain it till her dower-debt is paid is conferred upon her under Muslim law. It is not exactly a lien, nor a mortgage. The widow who holds possession of her husband's property until she has been paid her dower, has no interest in the property as a mortgagee has under a mortgage.[1]

In this case on the death of her husband in 1890, the widow entered into possession of her husband's property. In 1902, some of the heirs filed a suit to obtain possession of their share. The widow, *inter alia*, pleaded that her possession was in lieu of her dower. In 1903, the trial court passed a decree in favour of the heirs on the condition that they should pay a certain sum of money together with interest to the widow towards her dower. But nothing was paid to her and she continued in possession. In 1907, she made a gift of the property which was challenged by the heirs. The Privy Council observed that the widow has merely the right of retention of possession till she was paid, but has no right to alienate the property, or otherwise deal with it.

It is necessary that the widow should have come into possession of the property lawfully and without any force or fraud.[2] Following certain observations made by the Privy Council in *Hamira Bibi* v. *Zubaida Bibi*,[3] High Courts differ on the point whether widow's possession should be with the consent, express or implied, of the husband or his heirs or whether it could be otherwise also.[4] It is submitted that in view of the nature of the rights of retention, the view that no consent is necessary is preferable particularly in view of the well established proposition that widow's possession should be lawful and that she must have acquired it without force or fraud. Where a wife was in possession of her husband's property during his life and continued in possession after his death, the presumption is that her possession is lawful.[5] Similarly, where in mutation proceedings, wife's name was entered into the Record of Rights with the knowledge of the heirs, their consent would be implied.[6]

The outstanding feature of the right of retention is that once a widow obtains possession of her husband's property, she has right to retain it till her dower-debt is satisfied. If she is dispossessed, she can recover possession.[7] Since it is a mere right to retention, she is liable to accounts.[8]

The widow's right of retention does not confer any title to property on the widow, the title vests in the heirs.

The right of retention has the following implications :[9]

1. *Mauna Bibi* v. *Vakil Ahmed*, (1924) 52 IA 145.
2. *Haliman Md.* v. *Munir*, AIR 1971 Pat 385.
3. (1916) 43 IA 294.
4. In *Sahur* v. *Ismail*, AIR 1924 Cal 528; *Md. Zahair* v. *Ansar*, AIR 1942 Pat 210 and *Izhar* v. *Ansar*, AIR 1939 All 348 hold the view that consent is necessary, while *Beeju Bee* v. *Syed*, ILR (1920) 43 Mad 214; and *Hansumiya* v. *Halimunissa*, AIR 1942 Bom 128 hold that no consent is necessary.
5. *Abdul Sattar* v. *Aquida*, AIR 1927 All 319; *Jahuran* v. *Soleman*, AIR 1934 Cal 10; *Mirvamahedi* v. *Rashid Beg*, AIR 1951 Bom 22.
6. *Abdul* v. *Mustaq*, AIR 1944 All 68.
7. *Azizullah* v. *Ahmed*, ILR (1885) 7 All 353; *Majid Mian* v. *Bibi Sahib*, ILR (1916) 40 Bom 34.
8. *Beebee Bachuri* v. *R. Sheik Hamid*, (1871) 14 MIA 377.
9. *See* Paras Diwan : *Muslim Law in Modern India*, 68 (1993).

(a) The widow is liable to render full account of all the income and profits.

(b) She has no right to alienate the property.

(c) Her right of retention does not bar her suit for the recovery of her dower-debt.

Widow's liability to render accounts.—The Muslim widow holding the possession of property in her right to retention is liable to render full accounts of all rents and profits of property received by her to those who are entitled to the property.[1] She is entitled to compensation for forebearing to enforce her right of the dower-debt. The compensation is usually in the form of interest on the principal amount of her dower.[2] She may give up her right of compensation.[3]

No right of alienation.—Right of retention confers on her the right to satisfy her dower-debt out of the income and profits of the property, but she has no right to alienate the property for value or gratuitously.[4] However, if she makes an alienation, the alienation will be valid to the extent of her share in the property *qua* heir (widow is an heir of husband). Any alienation made by a widow does not affect the share of other heirs, and to that extent it is void. If she retains possession after she had made alienation, the other heirs have the right to a declaration that alienation is void, but cannot claim the possession of the property. The widow will retain the possession. On the other hand, if she has delivered the possession of property to the alienee, the heirs, on the declaration that the alienation is null and void, are entitled to immediate possession of the property. The widow cannot get back the possession, since she voluntarily relinquished it.[5]

The heirs have the right of alienating their shares, but the alienee will get the property subject to the right of the widow.[6]

Widow has the right to sue for the recovery of her dower.—The right of retention is no bar to her suit for the recovery of her dower-debt. However, in such a suit, she will have to offer to give up possession on the recovery of her dower-debt. She cannot retain possession as well as have a decree passed in her favour of dower-debt.[7] If a widow sues only for a part of the dower, she cannot sue for the balance later on, since the implication is that by suing for the part she has relinquished her claim for the rest.

No petition or suit lies for the recovery of the sum of dower in the family court or in any civil court, but in the Magistrate's court under Section 3, Muslim Woman (Protection of Rights on Divorce) Act, 1986.[8]

When right of retention is lost.—A widow may lose her right of retention in the following cases : (i) on satisfaction of the amount of dower out

1. *Saikh Salmi* v. *Md. Abdul*, AIR 1961 AP 428.
2. *Hamira* v. *Zubaida*, (1916) 431 A 294; *Sahebjain* v. *Ansaruddin*, ILR (1911) 38 Cal 475; *Hawasi* v. *Dialfroz*, AIR 1926 All 39.
3. *Ram Prasad* v. *Khodajatul*, AIR 1944 Pat 163.
4. *Chubli* v. *Shamsunnissa*, ILR (1874) 17 All 19; *Beejul* v. *Syed*, ILR (1920) 43 Mad 214; *Ram Prasad* v. *Khodajatul*, AIR 1944 Pat 163.
5. *Maina Bibi* v. *Vakil Ahmed*, (1925) 52 IA 145.
6. *Bazayat* v. *Doolichand*, (1818) 5 IA 211.
7. *Azizullah* v. *Ahmed*, ILR (1885) 7 All 353; *Majdmian* v. *Bibisahib*, ILR (1916) 40 Bom 34.
8. *Anjum* v. *Salma*, 1992 All 322.

of the income and profits of the property, (ii) on her alienation of property together with possession, and (iii) on her voluntarily handing over possession to heirs.

Widow's right of retention vis-a-vis other heirs' rights.—The widow's right of retention does not prevent other heirs from exercising their rights over the property. On payment of the proportionate amount of dower, the heirs have the right to have the possession of the property falling to their shares. A decree obtained by an heir's creditor for possession cannot be executed till the amount of dower is paid.[1]

Right of retention—Whether heritable and transferable.—The law is still uncertain as to whether or not the right of retention is heritable and transferable. In *Hadi Ali* v. *Akbar Ali*,[2] the Allahabad High Court took the view that right of retention being personal right is neither transferable for the value or gratuitously nor is it heritable.

In *Amir Hassan* v. *Mohammad*,[3] on the other hand, the Allahabad High Court took the view that the right of retention is not a mere personal right, it is property, and therefore it is transferable and heritable. This view has the support of some other High Courts also,[4] where it has been held that the right is heritable, though the question whether it is also transferable is left open.

Where it has been held that the right of retention is transferable, a further question has been raised; can it be transferred independently of the dower-debt? In *Amir* v. *Mohammad*,[5] the Allahabad High Court expressed the view that the right of retention could not be served from the dower-debt, and therefore, where right of retention is transferred, the dower-debt also stands transferred.[6]

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1. *Aminuddin* v. *Ram Khelawan*, AIR 1949 Pat 427.
2. (1989) B 20 All 263.
3. AIR 1932 All 345.
4. *Beejibi* v. *Syed Moor Thija*, ILR (1920) 43 Mad 214; *Majidmiyan* v. *Bibi-Sahab*, ILR (1916) 40 Bom 34; *Sagia* v. *Kitaban*, AIR 1928 Pat 224; *Ramija* v. *Sharifa*, (1943) 1 MLJ 332; *Husain* v. *Rahim*, AIR 1954 Mys 24.
5. ILR (1932) 54 All 499.
6. *See* also *Sheikh Abdur* v. *Shaik Wali*, AIR 1923 Pat 72; *Mohiban* v. *Zubeda*, AIR 1954 Pat 17, where the same view has been propounded.

Chapter 6

CONSORTIUM, COHABITATION AND MATRIMONIAL HOME

INTRODUCTORY

Marriage implies that each spouse has the right to consortium. Right to consortium implies the corresponding duty of each spouse to cohabit with the other. In the early law, wife was required to cohabit with her husband in the matrimonial home provided by him. In the modern law concepts of consortium, cohabitation and matrimonial home have undergone a change.[1] In Indian law, we have borrowed these concepts from English law and in the Indian Courts, English precedents are freely used to expound their meeting. In this Chapter we would discuss these concepts. The English law would be reviewed including its modern statutory modification for the simple reason that Indian law can be understood only on the basis of English law. There is another reason too, we have not yet modified our law, and whenever we would do so, we would certainly derive our inspiration from English law.

Consortium and Cohabitation

The right of consortium implies the corresponding duty to cohabit that each spouse owes to the other. Consortium means living together as husband and wife with all the incidents that flow from marital status and spousal relationship.[2] In other words, husband is entitled to consort with his wife and wife with her husband. These spousal rights and obligations are reciprocal.[3] Consortium implies sharing the common matrimonial home and common domestic life, and at one time it was insisted upon that the matrimonial home is the one which is established by the husband, and the wife must live in it—this view has been insisted upon even in 1977 by a Full Bench of the Punjab and Haryana High Court.[4] In the words of Lord Reid, "jurisprudentially, consortium resembles ownership for husband and wife who enjoy, a bundle of rights, some hardly capable of precise definition."[5] It is now recognized that incidents of consortium are not fixed and are capable of variation depending upon the facts and circumstances, as to age, health, social position, avocation and financial circumstances of the spouses. We would examine some of the incidents of consortium.

1. In modern Indian law, these concepts were developed on the basis of English precedent.
2. At common law and Hindu law, the position was that the husband has the right of consortium and the wife the corresponding duty of cohabitation; the vice-versa was not true.
3. *Place* v. *Place*, (1972) 2 KB 497 at 512.
4. *Kailashwati* v. *Ayodhya Parkash*, AIR 1977 P & H 642.
5. *Best* v. *Sammuel*, (1952) 2 All ER 394.

Matrimonial home and living together.—All over the world the spousal duties are largely conditioned by one single fact that husband is the bread-winner. The wife in such a household is primarily responsible for running the home and the husband in providing funds to run the household. Marital togetherness implies that the husband and wife will live together. In most Indian cases, a rigid view of togetherness has been taken. Thus, in 1953, in *Ram Parkash* v. *Savitri Devi*,[1] the court observed :

> According to Hindu law, marriage is a holy union for the performance of religious duties. The relationship between husband and wife imposes upon each of them certain marital duties and gives each of them certain legal marital rights. *The marital rights and duties are absolutely fixed by law*.....(emphasis authors).

The Court further observed, "it is the duty of the wife to live with her husband wherever he may choose to reside and to fulfil her duties in her husband's home."[2]

The basis for this formulation by Indian courts is a passage from Mulla's law, a work which was written much before the codification of Hindu law of marriage and at a time when most of textbooks writers of Hindu law based their formulation on the rigid interpretation of the *Dharmashastra*. Mulla's formulation is :

> The wife is bound to live with her husband and to submit herself to his authority.

Thus, it was laid down that wife's duty to her husband was to submit herself obediently to his authority and to remain under his roof and protection.[3]

In practically all patriarchal societies, wife's obligation to live under "the roof and protection" of the husband has been recognized. This is as much true of early English and Hindu societies as of others. Manu,[4] Yajnavalkya[5] and Vishnu[6] enjoined that the wife should obey her lord, so long as he lived, and remain faithful to his memory even after his death. The Hindu sages exhorted her to worship her husband as a God, even though he happens to be a man of bad character, or devoid of all good qualities.[7] Manu, whose article of faith was sternness and rigidity, ordained that a wife should always subject herself to his authority and should never do anything to displease him.[8] Notions of obedience and devotion to husband are not new to Hindus, but what seems to be strange is that exaggerated importance has been given to them in modern society. Even the Hindu sages recognised that in certain circumstances, the wife could leave her husband's home and live elsewhere.[9] It was on the basis of these texts that the law of wife's separate residence and maintenance was

1. AIR 1958 Punj 87.
2. *Ibid*, at 666.
3. Section 55.
4. *Manusmriti*, V. 151.
5. *Yajnavalkyasmriti*, I, 71.
6. *Vishnusmriti*, XXV, 13-14.
7. *Ibid*.
8. *Manusmriti*, V. 148-150.
9. See *Narada Smriti*, XII, 97, Madan Parijatya 153 quoting Vasisha, and the Arthashastra, XV where the circumstances have been specified in which the wife could give up her husband.

developed. But our judges are even now over emphasizing wife's duty to live under the roof and protection of the husband. In a 1977 case, Sandhawalia, J., (as he was then) observed :

> To my mind, the idea of the matrimonial home appears to be at the very centre of the concept of marriage in all civilized societies. It is indeed around it that generally the marriage revolves. The home epitomises the finer nuances of the marital status. The bundle of indefinable rights and duties which bind husband and wife can perhaps be best understood only in the context of their living together in the marital home. The significance of the conjugal home in the marriage tie is indeed so patent that it would perhaps be wasteful to elaborate the same at any length. Indeed the marital status and the conjugal home has been almost used as interchangeable terms.[1]

After equating "marital status" with "conjugal home", the learned Judge proceeds to say that from the concept of matrimonial home arises the concept of consortium. The learned Judge shows his awareness of the fact that the concept of consortium in that form is essentially a feudal concept.

According to him :

> The origin of the husband's right of action seems to have been that he was regarded as having a quasi-proprietary right, and I think that it included a right to his wife's society as well as to her services. I can see no sign of any difference in quality between his right to her assistance and his right to her society, and indeed it would be difficult to say where in fact assistance ends and society begins, *either today or in the middle ages*. No doubt, her service and assistance has an additional value because her comfort and society went with them. I do not think consortium was an abstraction. It seems to me rather to be a name for *what the husband enjoys by virtue of a bundle of rights* some hardly capable of precise definition.[2] (emphasis authors).

Conscious of the anachronistic character of consortium, the learned judge added :

> However, it is worth highlighting that originally consortium was used to determine a right which the law recognized in the husband growing out of the marital union to have access, to the companionship and society of his wife. But with the passage of time, the concept of consortium has definitely assumed a distinct and firm footing of mutuality. It is no longer merely husband's right to the companionship or the society of the wife but equally the wife's right to the companionship and society of the husband.[3]

Yet, the learned judge adhered to the old notion of matrimonial home. He posed the question : who had the right to determine the matrimonial home? and answered it by saying in most unequivocal terms, that it was the husband. That this position has changed considerably in England (from early English precedents the learned judge has borrowed freely) and in other common law countries after the First World War seemed to have not been brought to the notice of the learned judge. In 1940, Collins, J. said that the

1. *Kailashwati* v. *Ayodhya Parkash*, ILR (1977) P and H at 650.
2. *Ibid* at 653.
3. *Ibid*, at 651.

rights of a husband, as they used to be, have been considerably circumscribed in favour of the wife, without very much, if any, curtailment of his obligations, yet that point has not been reached where the wife can determine where the matrimonial home is to be, and, if the husband says that he wants to live in such and such a place, then, assuming always that he is not doing that to spite his wife, and the accommodation is of a kind which one would expect a man in his position to occupy, the wife is under the painful necessity of sharing that home with him.[1] In this case, owing to wife's mismanagement of the household and her refusal to cook for her husband, the husband sold the furniture and moved to a boarding house. After shifting there, the husband made repeated offers to his wife to induce her to live with him at the boarding house, but she refused to do so on the ground that she did not like the locality and the landlady. The husband filed a petition for divorce on the ground of her desertion and she, in the answer, denied desertion and alleged that on shifting from the matrimonial home to the boarding house he had deserted her. The court held that assuming the husband to have been guilty of desertion, he had put an end to it by his subsequent offer of alternative accommodation which he made in good faith, and the wife, under those circumstances, was bound to accept the accommodation offered, and had, by her refusal, been guilty of desertion. Seven years later, the court rendered its decision in *Dunn* v. *Dunn*,[2] where law of matrimonial home was given modern formulation. The husband, a seaman, petitioned for divorce on the ground of his wife's desertion without cause with the averment that when he had returned from long service overseas, he had requested her to leave her present inland matrimonial home and stay with him for an unspecified period at a port, where he was stationed, and where he had taken accommodation for his wife and family; and that she had refused and persisted in her refusal to accept his request. The husband had been out overseas on several occasions and sometimes for a fairly long duration. On returning in early 1941 from his China trip, parties cohabited at Morpeth till December, in 1941 when he left for Barrow-in-Furness where he was posted and requested his wife to join him there. Wife refused to go there for several reasons, one of which was that on account of severe deafness there was great difficulty for her on sharing premises with another tenant or landlord. The husband, *inter alia*, argued that he had the right to decide where the matrimonial home should be and if the wife refused to live there, she was in desertion unless he could prove that she had just cause for his refusal. Lord Denning, L.J. observed that the decisive matter in the case was that, throughout, the matrimonial home had been at Morpeth and the wife had always been willing to receive her husband there whenever he could go there and that was the place where the family were. Referring to the aforesaid observation of Collins, J., the learned judge observed that he (Collins) did not intend to lay down the proposition that husband had the right to decide as to where the matrimonial home should be; at best it was a proposition of ordinary good sense arising out of the fact the husband was usually the bread-earner and had to live near his work, and it was not a proposition which applied to all cases. He, then, formulated the proposition thus :

1. *Mansey* v. *Mansey*, (1940) 2 All ER 424.
2. (1949).

> The decision where the home should be is a decision which affects both the parties and their children. It is their duty to decide it by agreement, by give and take, and not by the imposition of the will of one over that of the other. Each is entitled to an equal voice in the ordering of the affairs which are their common concern. *Neither has a casting vote* though to be sure they should try to so arrange their affairs that they spend time together in a family and not apart. If such an arrangement is frustrated by the unreasonableness of one or the other and leads to separation between them, then the party who has produced the separation by reason of his or her unreasonable behaviour is guilty of desertion.[1] (emphasis authors).

This, in our submission, should be accepted to be the correct formulation not merely in the context of English society but also in all societies over the civilized world.

Matrimonial home is (provided the parties have established one) the place where parties live. Cohabitation is the sum total of conjugal relationship, sum total of husband-wife togetherness, sum total of two-in-oneship-relationship, which the marriage is. It is submitted that cohabitation should be understood not merely in the context of matrimonial home, but in the context of the totality of the husband-wife relationship. It is possible that a couple may not be able to establish a matrimonial home (either because they have no means to establish it or they may be yet in the process of establishing it), yet they may cohabit and continue to cohabit in this manner for several years or for their entire life. In the case of parties who have no matrimonial home and are yet cohabiting, if one of them withdraws from cohabitation, and it cannot be said that it will not amount to desertion just because parties have no matrimonial home. Cohabitation includes mutual rights to each other's society, comfort, companionship and affection. In short, cohabitation means to live as husband and wife in the matrimonial home in case they have one and without it, in case they have none. Cohabitation is not a mere state of residence.

In the words of Goddard, L.J. :

> Cohabitation implies a state of affairs very different from that of mere residence. It must mean that the wife is acting as wife and has kept her status and position as wife. I am not using the word 'status' in a very technical sense. What is meant by cohabitation is that the wife has kept her position as wife, in rendering wifely services to him and is acknowledged by the husband to be his wife. Of course, the parties can cohabit, without there being sexual intercourse between them, although as a rule there is sexual intercourse if parties are competent or of an age when sexual intercourse is likely to take place, but there may be cohabitation without sexual intercourse. Husband and wife cohabit by living together as husband and wife, the husband behaving as husband and the wife behaving as wife, doing housewifely duties.[2]

In an early case, *Bradshaw* v. *Bradshaw*,[3] the wife, a domestic servant,

1. *Ibid*, at 103-104; see *Simpson* v. *Simpson*, (1951) 1 All ER 955, where Lord Merriman has been somewhat critical of this formulation.
2. *Evans* v. *Evans*, (1947) 1 KB 175 at 180.
3. (1897) P 24.

never lived with her husband under the same roof, though she was visited from time to time by him at the house of her mistress (where the wife was employed) and a child was born of the marriage. Subsequently, the husband refused to receive the wife in the house where he lodged and refused to give her any help towards her maintenance. The wife applied for maintenance under the Summary Jurisdiction (Married Women) Act, 1895 under which, *inter alia*, it was essential to show that there had been cohabitation between the spouses which broke down by the act of the husband. Holding that while the husband was visiting the wife at her mistress's house, parties were cohabitating, P.H. June, P. observed :

> It is true that there cannot be desertion of a wife by a husband unless the cohabitation is broken by some act of desertion. But cohabitation does not necessarily imply that a husband and wife are living together physically under the same roof, if that were so, there would be large classes of persons to whom the term could have no application; married domestic servants, for example, who cannot live day and night under the same roof, but yet may cohabit together in the wider sense of the term.[1]

Abercrombie v. *Abercrombie*[2] is an interesting and illustrative case on cohabitation. Under a separation order, parties were living separate till 1943 when the husband with a view to ending the separation wrote a letter to the wife, and the wife responded positively. The husband who was a doctor, was engaged in various appointments as a *locum tenens*. Persuant to correspondence exchange between the parties, the first meeting between them took place at Perston, the second meeting at Manchester and from there wife went to Swinton and looked after the house in which the husband lived at that time. On all these occasions sexual intercourse took place, though the parties did not spend the night together. On two subsequent occasions, the parties stayed overnight at one Mrs. R's house and over one week-end later stayed together at a hotel in London. Thereafter, they went to Estleigh to see about a possible appointment for the husband as a *locum tenens*, on occasion also the wife inspected the house where they proposed to stay. Later on, differences arose between them, and the wife claimed maintenance under the original maintenance order. Under the Summary Jurisdiction (Separation and Maintenance) Act, 1925, the order of maintenance terminates on resumption of cohabitation by the parties. Thus, the question was, did parties resume cohabitation? The wife argued that she was willing for the resumption of cohabitation only if she was satisfied that the husband would conduct himself towards her in a normal manner and that there be no further act of cruelty by him. Lord Merriman, P. observed :

> Whether one talks about resumption of cohabitation or condonation, any wife, who has suffered an injury effects a reconciliation with the implied condition that there shall be no recurrent of the bad behaviour, but that does not change the nature of reconciliation. It does not change the nature of intercourse, and it does not change the nature of the physical act of intercourse, and it does not change the

1. *Ibid*, at 26-27.
2. (1943) 2 All ER 465.

nature of resumption of cohabitation, whichever aspect of the matter one chooses to look at; and, if one could attach a condition subsequent in such a way as to change the nature of the thing done, one would get as I say, this absurd position that, where there is a complete reconciliation subject only to the condition subsequent the parties might live together for five years, have three more children, and then, because some act of cruelty or adultery, or whatever it is, occurs which can be complained of by the wife, she is then entitled to say there never had been a resumption because the condition subsequent was operating the whole time. That seems to me to reduce the whole thing to an absurdity. Either they did or did not resume cohabitation.[1]

The learned judge held that resumption of cohabitation had taken place, even though parties did not establish a matrimonial home. In other words, in our submission, cohabitation is deemed to be resumed by togetherness of the spouses. In this case, the husband was a doctor, a *locum tenens*, who would accept temporary job and move from place to place wherever his services might be required. Even in short time with which we are concerned here, a span of bare three months, he was employed at Preston and Swinton, and apparently was negotiating for yet another employment in the south of England. Yet during this period no one could doubt that the wife was as serious in the resumption of cohabitation as any wife could be. This is what, it is submitted, cohabitation means. If that will not be the meaning of cohabitation, there will be a large class of persons—husbands and wives who cannot be said to have cohabited at all, despite the fact that they have lived happily for years together and have begotten children. Thus, domestic servants, travelling agents, railway guards and conductors, drivers, merchants and traders who trade in places far away from their matrimonial home; class IV government employees who serve in the cities and their wives and children live at their parental home. In some of these cases, there may be no matrimonial home, in some there may be two matrimonial homes. In most of these cases, if we insist to find out "a matrimonial home," then it will be the place where wife lives as it is here that the husband from time to time joins her and cohabits with her. Will the law permit the wife, at some stage or other, to say that since the husband did not live there, he had deserted her?

In some Indian cases, on account of our attachment to the notion of wife's duty to live "under the roof and protection" of the husband an exaggerated view of cohabitation has been taken. In these cases, wife had taken up a job, and on that account, had to live at a place different from husband's and did not comply with the desire of her husband to resign her job and live with him at the place where he was living, our courts held that she had withdrawn from the society of her husband, in terms of Section 9, Hindu Marriage Act, and the husband was entitled to a decree for restitution of conjugal rights.[2] The spouses belonged to the lower middle class and in most

1. *Ibid* 468.
2. *Tirath Kaur* v. *Kirpal Singh*, AIR 1964 Punj 28; *Gaya Prasad* v. *Bhagwati*, AIR 1966 MP 212; *Kailashwati* v. *Ayodhya Pd*, ILR (1977) 1 P & H 642; these cases and others have been discussed in the article by this writer, "Weekend Marriage and Restitution of Conjugal Rights" (1978) 20 JILI 1928.

cases the wife took employment after the marriage,[1] with a view to augmenting family finances, and on account of some differences between them, the husband "ordered" the wife to resign. In these cases, the usual arrangement that spouses entered into was whenever it was possible the wife would go to the husband's residence and whenever it was possible for the husband he would go to the wife's house. Thus, virtually, they have set up two matrimonial homes. In these cases (except one)[2] the wife maintained that she did not want to break the marriage and would prefer continuing to live as they had lived, but would not give up her job under any circumstances. In most cases,[3] the court placed exaggerated importance of Hindu wife's obligation to live under the roof and protection of the husband thereby dogmatically adhering to the notion that the matrimonial home is the place where husband lives (whatever be the circumstances), and he has the right to dictate to the wife to live in it. A wife who refuses to do so is in desertion or will be deemed to have withdrawn from his society. Ironically, it was considered to be advanced as a universal proposition of law. The interesting feature of most of these cases is that cohabitation had continued between the parties almost till the presentation of the petition of restitution by the husband.

However, in some cases,[4] the other view is also propounded, *viz.*, the matrimonial home should be set up by the mutual agreement between the parties and by implication laid down that where both spouses are in employment and, on that account, live at two different places, both the places, constitute matrimonial homes. On this formulation, wife's refusal to resign her job does not amount to desertion or withdrawal from the society of the husband, rather than the party which repudiates this arrangement, will be guilty of desertion.

Sexual intercourse.—In matrimonial law, it is a well established proposition that each spouse owes to the other a duty to consummate the marriage. Under all the Indian personal laws, incapacity to consummate the marriage entitled the other party to a decree of nullity of marriage. Wilful refusal to consummate the marriage is a ground of voidable marriage under the Special Marriage Act and of divorce under the Parsi Marriage and Divorce Act. Under Muslim law, consummation of marriage is essential for many purposes.

The mutual right to sexual intercourse continues throughout the entire period of marital life. But it has to be exercised reasonably.[5] A spouse is not bound to submit to the inordinate, perverted or otherwise unreasonable

1. In some cases as in *Mirchumal* v. *Devi Bai*, AIR 1977 Raj 113 and *Kailashwati* v. *Ayodhya Prasad*, ILR (1977) 1 P & H 642, the wife was in employment at the time of marriage and restrained it thereafter.
2. *Surinder Kaur* v. *Gurdeep Singh*, AIR 1973 P & H 134, where wife categorically refused to go to her husband's house as she apprehended danger to her person.
3. Cited in footnote 1.
4. For instance, *Shanti* v. *Ramesh*, (1971) ALJ 67; *Pravinben* v. *Sureshbhai*, AIR 1975 Guj 69, *Mirchumal* v. *Devi Bai*, AIR 1977 Raj 113 and *Swaraj Garg* v. *K.M. Garg*, AIR 1978 Del 296.
5. *Jyotish* v. *Meera*, AIR 1970 Cal 266; *Srikant* v. *Anuradha*, AIR 1980 Kant 8; persistent refusal to have marital intercourse amounts to cruelty, *Sheldon* v. *Sheldon*, (1966) 2 All ER 257; for six years the husband refused to have sexual intercourse with the wife without any cause.

demands of the other, particularly when it impairs the health.[1] No spouse has the right to insist upon using contraceptives or practising *coitus interruptus* if it deprives unreasonably the legitimate desire of the other to have children. This amounts to cruelty.[2]

Such domination was given to husband at English common law that marriage conferred on him a privilege of unlimited intercourse with the wife, since the rule was that by marriage she had consented to give him that privilege. From this flowed the general rule that the husband could not be guilty as principle in the offence of raping his wife. In the modern world, most people consider it abhorent and atrocious that a man could with impunity use force to compel his wife to have intercourse with him. In English law, this rule has been considerably modified. Thus, it has been held that a husband will be guilty of raping his wife, if she is living separate from him either under a separation order or an agreement, or under a decree of judicial separation,[3] or under a decree *nisi* of divorce.[4] It is based on the principle that she is relieved of the duty to intercourse (in the former case) or her consent may be regarded as revoked (in the latter case). Apart from these situations, the English common law still takes the view that the husband during the subsistence of marriage, cannot be guilty of raping his own wife. But in *R.* v. *Miller*,[5] Lynskey, J. observed that the husband could not insist upon his right to have intercourse by force and could be convicted of assault on his wife.

The English common law rule that the husband has the privilege of having unlimited intercourse with his wife is even now part of Indian law. Explanation to Section 375 of the Indian Penal Code lays down that "sexual intercourse by a man with his own wife, the wife not being below fifteen years of age, is not rape." The Indian Courts have not developed any exceptions to this rule, though they have laid down that the husband cannot enjoy his right of sexual intercourse with his wife disregarding her personal safety.[6] Such are the mores of the Indian society that rarely a case comes up before the court in which the wife complains that her husband had raped her.

Protection against Ill-treatment and Molestation

The feudal rule that the husband has the privilege to beat his wife, ill-treat her and do anything and everything with her is no longer valid. In most countries of the world, it is now well settled that the marriage does not entitle one spouse to inflict physical violence on, or to ill-treat, the other. In England, the criminal law remedies for murder and manslaughter, and attempts threat, through unlawful wounding, grievous bodily harm, assault, occasioning actual bodily harm, aggravated assault and common assault are available to the aggrieved spouse. The English common law also accorded to the aggrieved spouse the usual remedies of prosecution for assault and damages in tort for battery, against ill-treatment and molestation. However, it was soon realized that these common law remedies afforded no real

1. *Foster* v. *Foster*, (1921) P 438; (husband was suffering from VD); *Sidhava Saiah* v. *Laxmane*, AIR 1958 Mys 115.
2. *Ibid.*
3. *R.* v. *Charke*, (1949) 2 All ER 448; *R.* v. *Miller*, (1954) 2 All ER 529.
4. *R* v. *Brien*, (1974) 3 All ER 663.
5. (1954) 2 All ER 529.
6. *Re Huree Mohum Mythee*, ILR (1880) 18 Cal 49.

protection in the typical case of "battered wife". Ordinarily, the police do not intervene in domestic disputes except where physical injury of a serious nature has been inflicted.

The realization that the common law remedies were not adequate to accord protection to "battered wife", led to the passing of the following statutes : The Matrimonial Home Act, 1967, the Domestic Violence and Matrimonial Proceedings Act, 1976, and the Domestic Proceedings and Magistrates' Court Act, 1978. Of these statutes, the second one provides an effective protection against domestic violence. The last statute gives similar protection at the Magistrates' Court.[1]

The English courts have been reluctant to define the term "molestation". The term has been widely construed, and Stephenson, LJ, in *Vangham* v. *Vangham*,[2] observed that perhaps "pester" is the best single synonym for molestation. In this case, the husband called at his wife's house early in the morning and late at night, called at her place of work and made "a perfect nuisance of himself to her the whole of time." The court held that this amounted to molestation even if no violence or threat to use violence has been made. According to Shorter Oxford English Dictionary, molestation means "to cause trouble", "to vex", "annoy", "put to inconvenience." In certain circumstances, communication may amount to molestation. In each case, it is a question of fact and degree.

Injunction against molestation and ill-treatment.—Under English common law, the court, though has no power to ask the guilty husband to leave the matrimonial home, has the power to enjoin and restrain the husband from assaulting, molesting, annoying or otherwise interfering with the wife.

The advantages of injunction are : (a) it is a speedy remedy, and (b) effective sanctions are available for its breach. Such an order can be granted *ex parte* in cases of urgency, but this is done in exceptional cases.[3] Breach of an injunction is a contempt of court, for which the offending spouse may be committed to prison. But the purpose of committal proceedings is not so much as to punish and thus "committal orders are remedies of the last resort; in family cases they should be the very last resort. They are likely to damage complaint spouses almost as much as offending spouses, for example, by alienating the children. Such orders should be made very reluctantly and only when every other effort to bring the situation under control has failed or is almost certain to fail."[4] But in common law, the remedy has several limitations. The breach of an injunction order did not entail the arrest of the offending spouse.

Under English law, when proceedings are pending in a divorce court, an injunction order restraining the husband from molesting the wife may also be obtained. Under the Supreme Court of Judicature (Consolidation) Act, 1925, Section 45, the courts have general power to issue an injunction in any cause or matter before it, and in a case of urgency, an application for an injunction

1. These remedies are (respectively) available under Sections 28, 18, 47, 43 and 42 of the Offences Against the Person Act, 1861.
2. (1973) 1 WLR 1159.
3. *Ansah* v. *Ansah*, (1977) Fam 138.
4. *Ibid*, at 144, per Ormrod, LJ.

order may be presented even before the presentation of the petition for divorce, judicial separation or nullity. An order for injunction can be issued only if a petition in a matrimonial cause is filed, because the decree, if granted, would terminate the petitioner's duty to cohabit with the respondent. Such an order can remain in force, it seems, only till the termination of the proceedings. Once a final decree is passed, the court no longer remains seized of the cause.[1] Further, a divorce court could pass an injunction order only if (i) it was incidental or ancillary to proceedings in a matrimonial cause, (ii) the injunction proceedings had sufficient link with the main proceedings, and (iii) an injunction could be granted only in support of a legal right. With a view to removing these limitations, the Domestic Violence and Matrimonial Proceedings Act, 1976 was passed.

Under the Act, the court has been empowered to pass orders of arrest of an offending spouse against whom an injunction for using violence to his spouse or child, or an exclusion injunction, has been passed. Power of arrest is a discretionary power conferred on the court and can be used only if it is shown that the party enjoined has caused actual bodily harm to the applicant or the child and is likely to cause actual bodily harm again. In *Lewis* v. *Lewis*,[2] the court observed that it is not a routine remedy, but should be used in exceptional situations. Where men and women persistently disobey injunctions and make nuisance of themselves and to other concerned persons. The second limitation on the divorce court's jurisdiction was also removed. The Act lays down that the court has power to grant exclusion injunction and injunctions against molestation even where no proceedings in a matrimonial cause has been filed.[3] Thus, it is no longer necessary to commence divorce, judicial separation or nullity proceedings with a view to invoking court's power of granting injunction. Under the Act, an injunction order may be passed : (a) to restrain a spouse from molesting the applicant or a child living with the applicant, (b) to exclude the other party from the matrimonial home or a part of the matrimonial home or from a specified area in which the matrimonial home is included, or (c) to require the other party to permit the applicant to enter and remain in the matrimonial home or a part of the matrimonial home. In *Davis* v. *Johnson*,[4] the House of Lords observed that the Act provides, "first aid" but not "intensive care."[5]

Earlier English courts had adopted restrictive attitude, and an injunction excluding a man from his home was granted only in very hard cases where it was impossible or intolerable for the parties to continue under the same roof.[6] But in recent years their attitude has undergone a change and the courts have ceased to adopt "legalistic, artificial approach to the problem and look at the realities, terrible problems facing two human beings." The courts have got to solve them in terms of human beings and not in terms of

1. For contrary view, *Montgomery* v. *Montgomery*, (1964) 22 All ER 22; *Beasley* v. *Beasley*, (1909) 1 WLR 226.
2. (1978) 1 All ER 729.
3. Section 2.
4. (1978) 2 WLR 551.
5. It seems that the Act does not provide any protection in respect of household goods. In *Davis* v. *Johnson*, (1978) 2 WLR 553, the wife on return to the matrimonial home found it empty save for plastic ornaments and plates.
6. *Hall* v. *Hall*, (1971) 1 WLR 404, *Phillip* v. *Phillip*, (1973) 1 WLR 615.

"legal quibbles about the meaning of language."[1] The approach of the courts, in the words of Cumming-Bruce, LJ, "should be strictly practical, having regard to the realities of family life."[2] In the apt words of Geoffrey Lane, LJ, the courts should decide, "What is in all the circumstances of the case, fair, just and reasonable, and, if it is fair, just and reasonable that the husband should be excluded from the matrimonial home, then that is what must happen."[3]

Right to matrimonial home.—At English common law, marriage conferred a right of cohabitation on the wife and right to support according to husband's estate and condition. She also has a right to a roof over her head. But she never had a right to live in a particular house. Above all, her rights were enforceable only by personal remedies. Her rights were rights in personam and did not bind third parties even if they had notice of her rights.[4] Only remedy she had, was an injunction against the husband to restrain him from selling the matrimonial home, or otherwise conferring on a third party an interest which would enable him to evict her.[5] But if such a disposition took place, the wife had no remedy against the third person. This led to the passing of the Matrimonial Homes Act, 1967. The Act was amended in 1976. At present, notwithstanding some defects, the Act is an elaborate code regulating the right of spouses *inter se* in relation to the matrimonial home. The Act also protects the rights of the wife against third parties. The Act confers on both spouses a right not to be evicted from the matrimonial home except by an order of the court. Thus, the Act confers a right on the spouse to occupy a *particular* house. The Act confers a right on the spouse in occupation of the matrimonial home not to be evicted therefrom during the marriage save on court's order. The right can be made a charge by a simple procedure of registration and then the right will bind the third parties.[6] It is a right of occupation which is defined under the Act as "if in occupation, a right not to be evicted or excluded from the dwelling house or any part thereof by the other spouse except with the leave of the court given by an order under this section; if not in occupation a right with the leave of the court so given to enter and occupy the dwelling home."[7] The right is personal in nature and cannot be assigned. It comes to an end on termination of marriage whether by death or divorce, unless the court otherwise orders. The right of occupation of matrimonial home exists, even though the other spouse is the owner of the house in law or equity. The Act empowers the court "to declare, enforce, restrict or terminate a spouse's right of occupation." But the Act does not give any right over the household furnishings, and a spiteful spouse may remove all furnishings.

Action in tort.—Under English common law, no liability in tort could arise between the spouses and no action in tort could be brought by one spouse against the other. The Law Reform (Husband and Wife) Act, 1962 has

1. *Walker* v. *Walker*, (1978) 1 WLR 533 at 539, per Ormrod, LJ.
2. *Bassett* v. *Bassett*, (1975) Fam 76 at 86.
3. *Walker* v. *Walker*, (1978) 1 WLR 533 at 538.
4. See the House of Lords decision in *National Provincial Bank Ltd.* v. *Ainsworth*, (1965) AC 1175.
5. *Steward* v. *Steward*, (1948) 1 KB 507; *Lee* v. *Lee*, (1952) 2 KB 451.
6. Section 2.
7. Section 1(i).

removed this disability and lays down that each party to marriage has the same rights against the other in tort as if they were not married. However, the court may stay an action in tort if it appears : (a) that no substantial benefit will accrue to either party from the continuation of proceedings, or (b) that the question can be more conveniently disposed of by an application under Section 17, Married Women's Property Act, 1882.

In India, the statutory law relating to protection to wife and children does not exist, and not many cases of this nature come before the court. This does not mean that in India, the problem of "battered wife" does not exist, but the social awareness of the problem has not yet touched the legislature's conscience. The Indian Law Commission, in its 71st Report, though devoted itself considerably to the breakdown principle of divorce, did not show its awareness of this problem. In the absence of specific law, it is submitted that the general law of crime and tort and the provisions of injunction contained in the Specific Relief Act and the Civil Procedure Code may be utilized to resolve the problems of "battered wife."

Criminal law remedies.—Sections 350, 351 and 352 of the Indian Penal Code may provide some criminal law remedies to the harassed spouse, dealing with "Criminal Force". Section 350 runs as under :

> Whoever intentionally uses force to any person without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

Section 351 which deals with "assault" runs as under :

> Whoever makes any gesture or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.
>
> *Explanation*—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparations such a meaning as may make those gestures or preparations amount to an assault.

Under Section 352, the punishment for the use of criminal force or assault is a sentence of imprisonment which may extend to three months, or fine which may extend to Rs. 500, or with both.

The present writers are not aware of any reported case where these provisions have been used by a spouse against the other. But these provisions do present a possibility under which the court has power to give relief to a harassed spouse.

Security for good behaviour.—There is also a possibility that a harassed spouse may usefully use the provisions of the Criminal Procedure Code relating to "security for keeping peace", and "security for good behaviour." Section 107, Criminal Procedure Code, lays down that when an Executive Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of peace or disturb the public

tranquillity and is of the opinion that there is sufficient ground for proceeding, he may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding one year as the Magistrate thinks fit. The Magistrate can exercise jurisdiction against any person who is within jurisdiction. Similarly, under Section 110(g), when a Judicial Magistrate of the first class receives information that there is within his local jurisdiction a person who is so desperate and dangerous as to render his being at large without security hazardous to the community, such Magistrate may require such person to show cause why he should not be ordered to execute a bond, with sureties for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit.

In those cases, where the person ordered to furnish security either for keeping peace or for good behaviour fails to give security within the period stipulated in the order, he shall be committed to prison until the expiry of the period of the bond or security or until such period that he gives security to the court of Magistrates who made the order requiring it.[1]

Power to issue injunction.—This provision of the Civil Procedure Code applies to proceedings under the Indian matrimonial statute. A typical provision runs as under :

> Subject to the other provisions contained in this Act, and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated as far as may be, by the Code of Civil Procedure, 1908, (Act 5 of 1908).[2]

It is submitted that there is a possibility that most of the provisions relating to injunctions contained in the Domestic Violence and Matrimonial Proceedings Act, 1976 and the Matrimonial Homes Act, 1967, can be enacted by the High Court under their rule making powers. But so far the attention of the High Courts has not been drawn towards this aspect of the matter. It is submitted that such rules are very much needed now that the matrimonial litigation is considerable and need for such remedies does exist. The provisions of the Civil Procedure Code relating to injunctions may also be used. But the provisions of Civil Procedure Code relating to injunctions can be used only in proceedings ancillary to the proceedings in a matrimonial cause. An independent suit for injunction can also be filed under the Specific Relief Act, 1963. These provisions may be utilized for obtaining an injunction against molestation or exclusion injunction or injunction relating to matrimonial home.

Rule 2, Order 39 of the Civil Procedure Code, runs as under :

> (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of or any other breach of contract or injury of a like

1. Section 40, Special Marriage Act; Section 21, Hindu Marriage Act, Section 45, Parsi Marriage and Divorce Act and Section 45, Indian Divorce Act.
2. Section 40 of Special Marriage Act, 1954.

kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security or otherwise, as the court thinks fit.

Rule 2-A, Order 39 dealing with consequence of disobedience of breach of injunction runs as under :

(1) In the case of disobedience of any injunction granted or other order made under rule 1 or rule 2 for breach of any of the terms of which the injunction was granted or the order made, the court granting the injunction or making the order, or any court to which the suit or proceedings is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime, the court directs his release.

(2) No attachment made under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the court may award such compensation as it thinks fit, to the injured party and shall pay the balance, if any, to the party entitled thereto.

Rule 3 lays down that the court shall in all cases except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice to be issued. Thus, an *ex parte* injunction can be issued in case of urgency. In such a case, the court should record the reason for doing so. Under Rule 31, the court should endeavour to dispose of the application within 30 days of the grant of the *ex parte* injunction. In case it is not able to do so, it must record the reasons in writing.

The court has the power to discharge or vary or set aside any order of injunction on the application made thereto by any party dissatisfied with such order.[1]

The preventive relief of injunctions under the Specific Relief Act is a discretionary relief.[2] Under Section 37, Specific Relief Act, the court has wide power to grant a temporary injunction. It may be granted to prevent the repetition of an injury already inflicted or to prevent an apprehended injury. Under Section 38, the court has power to grant perpetual injunction "to prevent the breach of an obligation existing in his favour, whether expressly or by implication." Section 3 defines obligation as "including every duty enforceable by law." This will obviously include marital obligation. Thus, an injunction may be granted : (a) to prevent the occurrence of an injury, and (b) to prevent re-occurrence of an injury. Wherever the threatened act of the defendant is of such a character that it is most likely to result in injury to the plaintiff, the court has power to issue an injunction against the defendant restraining him from doing the act, even though no damage has actually occurred. It is submitted that this provision may also be used to prevent a

1. Rule 4.
2. Section 36.

spouse from molesting the other.

Marital Confidence—Spousal Evidence.—Every system of law emphasizes marital confidence. Time and again, it has been reiterated that the spousal relationship is based on mutual confidence. The basis of fidelity in marital bond is mutual confidence. Manu declared that mutual fidelity and confidence between the spouses is the highest *dharma*.[1] In an English case, it was stated that there could hardly be anything more intimate or confidential than is involved in that relationship called marriage and the confidential nature of the relationship, of mutual trust and confidence, is of its very essence and so obviously and necessarily implicit in it that there is no need for it to be expressed.[2] The concept of "marital confidence" raises two problems :

(a) Can a spouse who is bent upon betraying the confidence of the other be prevented from doing so?

(b) Can a spouse be compelled to give evidence against the other in a civil or criminal case?

The first question would, obviously, arise where the marriage has broken down and bitterness and vindictiveness have taken over. A spouse in such a situation will more often than not, look for first opportunity to betray the confidence. In *Argyll* v. *Argyll*,[3] some two years after divorce, the husband wrote a series of articles for a newspaper, some of which contained information relating to wife's private life, personal affairs, and private conduct, communicated to the defendant in confidence during the subsistence of the marriage. The wife sought an injunction against the husband. Granting, wife's prayer, the court observed that equity's general jurisdiction to restrain breach of confidence was sufficiently wide to enable it to grant an injunction to prevent the husband from divulging these secrets and confidences and the newspapers from publishing them. The protection extends, it seems only to confidential communications and the court will help the plaintiff only if his own hands are clean.

Though, as far as the present writers are aware, there is no Indian case on the subject but there should be no doubt that the Indian courts will take the same view as their powers of issuing injunctions under the Specific Relief Act, 1963, are fairly wide.

The second question involves a conflict between the two principles. On the one hand, marital confidences are to be protected and on the other, it is a fundamental principle that in any legal proceeding, civil or criminal, no relevant evidence should be excluded if it helps to arrive at the truth. Thus, if a person accused of a criminal offence has confessed his guilt to his wife, can the prosecution summon the wife to give evidence of the confession? It will very much like to do so. The same question may arise with the civil proceedings. Law of evidence has tried to arrive at a compromise between these two conflicting principles.

At one time at common law, neither of the party to the marriage was competent witnesses in a civil proceedings. The principle was partly based on the notion that their evidence was untrustworthy, and partly upon the

1. *Manusmriti*, IX, 101-102.
2. *Argyll* v. *Argyll*, (1965) 1 All ER 611.
3. *Ibid.*

undesirability of requiring a witness giving evidence against his or her spouse. Now this rule has been changed, and the Evidence Act as amended in 1953 makes spouses as competent and compellable witnesses for any party to the action and against each other.[1] But communication between spouses is still privileged.[2] This provision gives privilege to the spouse to whom the statement was made and not to the maker of the statement. Thus, if a statement is made by the husband of his wife, the husband may be compelled to disclose it, but not the wife. In case the wife wants to break the privilege, he has power to prevent her from doing so. These provisions have been repealed by the Civil Evidence Act, 1976, with the result that in civil proceedings, the principle that relevant evidence should not be excluded has been accepted, thus repudiating totally the principle that marital confidences should be protected.

On the other hand, in respect of criminal proceedings, the Evidence Act, 1968 has extended the principle that a witness may not be compelled to answer any question or produce any document that tends to expose him to criminal proceedings, and to questions and documents that might incriminate his or her spouse.[3] A further protection has also been provided; no statement made by either spouse to the other or to a third person with a *view to effecting reconciliation* may be put in evidence without the consent of the spouse who made it. The rationale of this rule is obvious; the policy of law to further all attempts at maintaining the marital union, and reconciliation is one of the modes of doing so. But if parties will be apprehensive all the time that whatever they say may be put in evidence, this will hinder free and frank discussion which is vital to any reconciliation.

The common law rule of spousal evidence, too, has been modified.[4] The communication between the spouses is privileged in criminal proceedings as it is in civil proceedings. But in criminal proceedings, common law recognized one exception; a spouse is a competent witness for the prosecution if the accused is charged with committing a crime of personal violence against him or her. Under the Criminal Evidence Act, 1898, the spouse of an accused is competent witness for the defence, subject to two exceptions : (a) spouse may not be called except on the application of the accused, and (b) matrimonial communication between the spouses is privileged. Thus, a husband who is accused of burglary calls his wife as a witness and she is asked in cross-examination whether her husband made any confession of the offence to her, it is for her to decide whether to preserve the confidence or not. This statutory privilege is attached to the spouse and not to the communication. If a letter written by one spouse to another confessing the guilt is intercepted by the police, the police cannot be prevented from producing that letter in evidence.[5] (c) In certain specified crimes, such as offences of sexual nature or against children, the spouse of accused is competent, though not compellable witness for the prosecution or the defence without the consent of the accused.[6] (d) A spouse is a competent witness for the prosecution in any proceedings

1. Evidence Act, 1851 and Evidence Amendment Act, 1953.
2. Section 3, Evidence Amendment Act, 1953.
3. Section 11.
4. See *IPP* v. *Biadi*, (1912) 2 KB 89.
5. *Rumping* v. *D.P.P.*, (1962) 3 All ER 256.
6. Section 4, Criminal Evidence Act, 1898.

brought by him or her against his or her spouse.[1] (e) A person is a competent, though not compellable, witness to give evidence for the prosecution or for the defence in any proceedings not brought by him or her in which his spouse is charged with any offence with reference to that person or that person's property.[2]

The incompetency of a spouse to give evidence against the other in respect of any matter continues even after the dissolution or annulment of marriage.

Under the Indian law, spousal communication is privileged. Section 122 of the Indian Evidence Act runs as under :

> No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

The basis of this provision is the same as is under English law, *viz.*, marital confidences are to be protected.

The privilege under Section 122 applies to all kinds of communication that may take place between spouses. This privilege continues even after the dissolution or annulment of marriage. But no communication between the spouses is privileged which takes place before marriage or after the dissolution or annulment of marriage. Thus, where a woman was accused of adultery, her husband cannot be compelled to disclose the conversation that she had with him on that matter. All communications, letters and other written communications are protected.[3] Under the Indian law, the following exceptions are recognized :

(a) A spouse may give evidence as to what her husband did though not what he said. Thus, in *Ram Bharosay* v. *State of U.P.*,[4] a person was accused for robbing his neighbour of ornaments and murdering him. He later on presented the ornaments to his wife. While presenting these ornaments to his wife, he said to her that he had gone to the house of the deceased to get them. The wife also deposed that one day early morning she saw her husband coming down the roof and then going to fodder store and having a bath. Then after dressing up he came to her and presented the ornaments. It was held that what he said to her is privileged and she could not testify it, but the evidence of his conduct was not privileged. The privilege extends only to *marital communication*.

(b) Spousal communication or conversation which takes place before a third person, or when overheard by a third person, may be testified by that person. But if a spouse passes on privileged communication to a third person, that third person is not competent to disclose it.[5]

1. Theft Act, 1968 Section 39(2).
2. Section 30(3).
3. *Ram Bharosay* v. *State of U.P.*, AIR 1954 SC 704.
4. AIR 1954 SC 704.
5. But see, *M.C. Varghese* v. *T.J. Ponnan*, AIR 1970 SC 1876.

(c) A spouse may waive the privilege and in that case, privileged communication can be adduced in evidence. Section 122 of the Evidence Act is specific on this. Thus, evidence of a privileged communication may be given by a spouse with consent of the party who made the communication or with the consent of representative in interest.

(d) A spouse is a competent witness for the prosecution in any proceedings brought by him or her against the other. Thus, if a husband is prosecuted for an attempt to murder his wife, the wife may disclose any communication made to her by the husband which is relevant to the offence.[1]

Termination of the Right to Consortium and Cohabitation

The right of consortium may come to an end in certain circumstances. Thus, it may come to an end in the following cases :

A. When a decree of judicial separation is passed, parties are no longer obliged to cohabit with each other. So long as the decree of judicial separation is in force, the right of consortium ceases to exist.

B. When a court passes an order allowing the wife to live separately and claim maintenance under Section 18(2), Hindu Adoptions and Maintenance Act, 1956, the duty to cohabit with the other comes to an end and the right to consortium is no longer available.

C. When a decree *nisi* is made (this is done only under the Indian Divorce Act) the duty of cohabiting comes to an end.

D. When the parties are living separate under a separation agreement, the right to consortium does not exist, so long as the agreement is in force.

E. When one of the spouses has committed some matrimonial misconduct, the other party is no longer obliged to cohabit with him. As was observed by Jenune, P., "Neither party to a marriage can insist on cohabitation unless she or he is willing to perform a marital duty inseparable from it."[2] Matrimonial misconduct "is sufficiently wide to include anything which can be pleaded as a defence to the charge of desertion."

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1. *Narendra Nath* v. *State*, AIR 1951 Cal 140.
2. *Synge* v. *Synge*, (1990) P. 180.

PART IV
MATRIMONIAL CAUSES

Chapter 7

NULLITY OF MARRIAGE

INTRODUCTORY

Although most systems of the world regard a marriage performed in violation of the requirement of capacity or form as invalid, the notion of nullity of marriage is peculiar to English law. In England, the notion of nullity of marriage came into existence at a time when the ecclesiastical courts exercised jurisdiction practically on all the aspects of marriage. Since the ecclesiastical courts followed the Roman Catholic concept of permanent union-either a marriage was valid for ever or never—certain peculiarities came into existence. Not merely the notion of indissolubility of marriage became a tenet of English law, but the jurisdiction to declare a marriage valid or invalid vested not in the royal, but ecclesiastical courts.

The ecclesiastical courts exercising jurisdiction could declare a marriage null and void if it was solemnized in violation of *impediments* on marriage which were considered absolute. Thus, no valid marriage could come into existence if either spouse was already married to somebody else who was alive at the time of marriage, or spouses were related to each other within prohibited degrees, or either party did not freely consent to the marriage. The ecclesiastical doctrine laid down that a marriage was not regarded as consummated if parties have not become one flesh by sexual intercourse, and consequently, if one of the parties was impotent and therefore unable to consummate the marriage, he or she lacked capacity to marry. Since in the ecclesiastical law, a marriage was either valid for ever or never, the ecclesiastical courts had to declare a marriage void *ab initio* in all the aforesaid cases, with the result that the children of the marriage were bastardised. It was never a marriage in fact or in law. Such a marriage could be formally annulled by a decree of an ecclesiastical court and even without such a decree, either party could contract another marriage. Its validity could also be put as a collateral issue by any person having an interest to do so, even after the death of one or both the parties to the marriage. Thus, on the death of A whose marriage with B was void, his brother P could claim his property in inheritance by making the validity of A's marriage as a collateral issue, and thereby excluding from inheritance both B and the children of A and B.

The ease with which the ecclesiastical courts could declare a marriage void and consequently bastardize the issues became a cause of concern to the royal courts, and, by the use of writ of prohibition, they cut down the jurisdiction of ecclesiastical courts. This had the result of dividing the impediments into two : (a) civil, and (b) canonical—which later on led to the emergence of the notion of void and voidable marriages. Generally, a marriage

performed in violation of the latter was voidable. In respect of voidable marriages, it was laid down that their validity could only be questioned by one of the spouses, and after the death of either, its validity could never be questioned. But a decree annulling a voidable marriage had retrospective operation—the marriage was regarded void from its inception, resulting in bastardising children and parties reverted to their premarital status.

The important aspect of voidable marriage is that the status of parties, like that in divorce, can be changed only by a decree of court. But a decree of divorce does not change the status of parties retrospectively. But a decree of nullity does.

Gradually, the English law by statutory amendments started modifying some of the undesirable effects of annulment of a voidable marriage. The Matrimonial Causes Act, 1937, laid down that the children of voidable marriage which was annulled on the ground of respondent's insanity or respondent's having venereal disease would not be illegitimate.[1] The Law Reform (Miscellaneous Provisions) Act, 1949, (this provision was re-enacted in the Matrimonial Causes Act, 1950) laid down that any child who would have been the legitimate child of the parties to a voidable marriage had it not been annulled should be deemed to their legitimate child even after the annulment of the marriage. The Matrimonial Causes Act laid down that a voidable marriage shall be treated as if it had existed up to the date of the decree absolute. This means that any child born or conceived between the date of marriage and date of decree will be legitimate.[2] The Legitimacy Act, 1959, confers status of legitimacy on the children of void marriage provided at the time of the act of intercourse resulting in the birth, or at the time of celebration of marriage if later, both or either of the parties reasonably believed that the marriage was valid.

The English concept of nullity of marriage was introduced in India. The Divorce Act, 1869, and the Parsi Marriage and Divorce Act, 1936, do not provide for voidable marriages.

It is interesting to note that the Divorce Act lays down that where a marriage is annulled on the ground of bigamy but it is shown that the subsequent marriage was contracted in good faith and with full belief of the parties that the former spouse was dead, or when a marriage is annulled on the ground of insanity, children begotten before the decree, will be legitimate.[3] According to the Parsi Marriage and Divorce Acts, 1936-88, children of void marriage are deemed to be fully legitimate. The Hindu Marriage Act, 1955, and the Special Marriage Act, 1954, make distinction between void and voidable marriage, and lay down that children of all void and annulled voidable marriages will be legitimate children even after the decree of annulment, but will be entitled to inherit the property of their parents alone.[4] Muslim law makes no distinction between void and voidable marriages. It makes a distinction between void (*batil*) and irregular (*fasid*) marriage, and lays down that children of irregular marriages are legitimate and of void marriage are bastards. There is no mode by which children of void marriage can be legitimated.

1. Section 7(2).
2. Section 16.
3. Section 21.
4. Section 16 of the former and Section 26 of the latter.

Void and Voidable Marriage

Void Marriages.—A void marriage is, in fact, a misnomer, a contradiction. It is called a marriage on account of the fact that two persons having no capacity to marry have, in fact, undergone the requisite rites and ceremonies of marriage. A void marriage is no marriage. For instance, if in 1970, a man undergoes a ceremony of marriage with his sister and they start living together as husband and wife, that will not make them husband and wife in law. Their marriage is void *ab initio, i.e.*, from 1970 and no legal consequences flow from it. The legal consequences of a valid marriage are : it confers a status of husband and wife on the parties, it confers a status of legitimacy on the children, and it gives rise to mutual right and obligations, as well as rights against third persons. No such consequences flow from a void marriage. Since parties have no status of husband and wife, either is free to marry again without obtaining a decree of nullity, and will not be guilty of bigamy. Someone may call the wife a concubine or mistress and he will not be guilty of defamation. A third party can take a stand on a void marriage, even if no court had declared it null and void. In any proceeding, the question of void marriage can be raised as a collateral issue even after the death of one or both the parties to such a marriage. Thus, A whose marriage was void dies leaving behind wife W, daughter D and son S and father F.F can claim to inherit the entire properties of A, treating A's marriage as void thereby denying the status of wife to W and of legitimacy to children D and S.

But for the statutory modifications (see subsequent pages, under the title, "Children of Void and Voidable Marriages"), the children of void marriage are bastards.

Since a void marriage is no marriage, a decree of nullity is not necessary.[1] When a court passes a decree of nullity in respect of a void marriage, it merely declares a marriage null and void. It is not the decree of the court which renders such a marriage void; the court merely makes a judicial declaration of an existing fact, *i.e.*, there existed no marriage between the spouses. Sometimes people prefer to get a decree of the court for various reasons. First, parties want to be certain of their legal position to avoid subsequent complications and harassment, since a decree of nullity is a judgment *in rem*, no one can allege that the marriage was in fact valid. Secondly, and most importantly, once a petition is moved, the court has power to grant ancillary reliefs, such as spousal maintenance, settlement of spousal property, custody of, and financial provisions for children. Since the parties are not married in law, this may be the only way for the 'wife' or 'husband' to obtain maintenance.

Under all the Indian matrimonial statutes, a petition for nullity can be filed only by either party to the marriage,[2] and if one of the parties dies, the

1. *Lila* v. *Laxmi*, 1968 All LJ 683.
2. In *Tulsan* v. *Krishni*, AIR 1973 P & H 422 : *Laxshamma* v. *Theyawanta*, AIR 1974 AP 255 and *Kushum Kumari* v. *Kushum Kumar*, AIR 1977 MP 90, the courts expressed a view that even after the death of a party, the other party can file such a petition. The courts were impelled to take this view since, before the amendments of 1976, children of void marriage, which was declared void, became legitimate. The courts thus tried to use the provisions for the legitimation of children. But this view was incorrect, and this has now been clarified by the amendments of 1976.

other cannot file such a petition.[1] If a petition of nullity is pending in the court and one of the parties to the marriage dies during pendency, the petition abates, and no decree can be made in the cause.[2]

In *Molly Joseph* v. *George Sebastian* and *Jose* v. *Alice*,[3] cases under Divorce Act, it was held that any declaration as to the marriage is void by ecclesiastical Court is not binding on the District Judge or the High Court and second marriage cannot be solemnized by virtue of above declaration till the marriage is dissolved or annulled in accordance with law in force.

A third person has no *locus standi* to file a petition of nullity, though, it seems, he can file a declaratory suit under Section 9, Civil Procedure Code read with Section 34, Specific Relief Act, 1963.[4] Thus, if a marriage is void on the ground that a man has taken a second wife, the petition for nullity can be filed by the second wife. The first wife has no such right, though she may petition for divorce on the ground of husband's adultery. However, the first wife may file a declaratory suit under the Specific Relief Act.

There is a controversy among our High Courts as to whether the first wife can get an injunction against a husband who wants to take a second wife.[5]

Voidable marriage.—A voidable marriage, on the other hand, is a valid marriage till it is avoided, and a voidable marriage can be avoided only on a petition by either party to the marriage. If one of the parties does not petition for annulment of marriage, it will remain valid, and if one of the parties dies, the validity of marriage cannot be questioned in any court of law. So long as a voidable marriage is not avoided, all legal consequences of a valid marriage flow from it. Parties have the status of husband and wife, the children have the status of legitimate children and all mutual rights and duties between the spouses arise.

It is unfortunate that in 1954 and 1955 and thereafter in the Special Marriage Act and the Hindu Marriage Act, we should have copied the provisions of void and voidable marriage from English law, while it was possible to make the grounds of voidable marriage as grounds for divorce as was done under the Parsi Marriage and Divorce Acts in 1936-1988.

Distinction between void and voidable marriage.—Distinction between the two must be clearly understood. Being no-marriage, a void marriage is void *ab initio*. It does not alter the status of the parties and the children of the marriage. No mutual rights and obligations arise between the parties. A voidable marriage, on the other hand, is a valid and binding marriage till it is avoided, and continues to subsist for all intents and purposes like a perfectly valid marriage till a decree of the court annuls it. A

1. Section 11 of Hindu Marriage Act; Section 24 of Special Marriage Act; Section 30 of Parsi Marriage and Divorce Act; Section 18 of Indian Divorce Act. *See* also *Gurcharan Kaur* v. *Rai Chand*, AIR 1970 P & H 206; *Shelwanti* v. *Ram Nandani*, AIR 1980 All 42; *Aina* v. *Bachan*, AIR 1980 All 174.
2. *Gurcharan Kaur* v. *Ram Chandra*, AIR 1979 P & H 206.
3. AIR 1997 SC 109; Also see *Jacob Mathew* v. *Maya Philip*, AIR 1999 Ker 192.
4. *Harmohan* v. *Kamla*, AIR 1979 Orissa 51.
5. The Mysore High Court in *Shankarappa* v. *Hasamma*, AIR 1964 Mys 247, took the view that such a suit may be filed under the Specific Relief Act, 1963. This is also the view taken in *Sitabai* v. *Ram Chandra*, AIR 1958 Bom 116; *Bourilal* v. *Kaushaliva*, AIR 1970 Raj 83. For contrary view, *see Kedar* v. *Suprama*, AIR 1963 Pat 311.

void marriage being no marriage, no judicial declaration of its invalidity is essential, and when the court passes a decree annulling it, it merely declares an existing fact.[1] Any party to a void marriage may perform a second marriage without getting it annulled, but this cannot be done by a party to voidable marriage. In the former case, no offence of bigamy is committed, while in the latter it is. A 'wife' of void marriage cannot claim maintenance under Section 125 of the Criminal Procedure Code though a wife of voidable marriage can.

Children of void and voidable marriage.—When the Hindu Marriage Act and the Special Marriage Act were passed, we were aware of the then state of English law. Under the Matrimonial Causes Act, 1950, children of voidable marriage continued to remain legitimate even after the passing of the decree of annulment of the marriage. We adopted this position and went a little further and wanted to confer a status of legitimacy on children of void marriages also. But the language we used resulted in conferring a status of legitimacy on the children of those void marriages which were declared null and void. If a marriage was not declared null and void, the children remained illegitimate. This has been remedied by the Marriage Laws (Amendment) Act, 1976. The present position under the Hindu Marriage Act and the Special Marriage Act is as under :

(a) Children of unannulled voidable marriage are legitimate in the same way as children of an otherwise valid marriage are.

(b) Children of annulled voidable and void marriage (whether declared void or not) are legitimate but they will inherit the property of their parents alone and of none else.

(c) If the marriage is void or voidable under any other provision of the law, except sections 11 and 12, the children will be illegitimate.[2] Such a case will be, for instance, when marriage is void for lack of performance of valid ceremonies.

It is now established that such children can inherit the separate property of their father under Section 8, Hindu Succession Act, but could not lay any claim on the coparcenary interest of the father. Child of such a marriage has no birth right in the Hindu joint family property.[3]

The position of children under the Parsi Marriage and Divorce Act, is the same as under the Divorce Act.

Valid, void and irregular marriages under Muslim law.—Muslim law does not recognize the distinction between void and voidable marriages. From the point of view of validity, marriages are classified as valid (*sahih*), void (*batil*) and irregular (*fasid*) marriages.

Valid or *sahih* marriage is the one which is performed between the parties having capacity to marry with all necessary formalities. From a *sahih* marriage, all legal consequences of a valid marriage flow. Under Muslim law, the consequences of a valid marriage are : (a) Parties acquire the status of husband and wife and sexual intercourse between them becomes legal. (b) Wife acquires the right of maintenance, dower and lodgement. (c) Mutual

1. *Nirmal Bose* v. *Mamta Gulati*, AIR 1997 All 401.
2. *Santaras* v. *Rangubai*, AIR 1992 Bom 18; *Sujata* v. *Jagar*, AIR 1992 AP 291.
3. *Sarda Ram* v. *Durga Bai*, AIR 1987 Bom 285 : (1980) Andh LT 210; *Sujata* v. *Jagar*, AIR 1992 Andh 291.

rights of inheritance are conferred on the parties. (d) Wife is under an obligation to be faithful and obedient to husband and admit him to sexual intercourse. (e) Prohibition of affinity comes into existence. (f) Wife comes under husband's power of restraining her movement, *i.e.*, husband can prohibit her from going out and appearing in public. It is submitted this is no longer valid in modern India. Muslim law also lays down that this power is subject to a contract to the contrary. (g) Husband acquires a right of reasonable chastisement and correction. This right is of limited significance in modern India. (h) On dissolution of marriage, by divorce or death, the wife has the obligation to perform *idda*. (i) The other rights and obligations between the spouses may also arise as agreed to under the marriage contract. (j) Children of marriage acquire the status of legitimate children.

Under Muslim law, a valid marriage does not confer on the parties any right or power on each other's property. Marriage also does not imply change of sect or school.

Void or *batil* marriage is the one which is performed in violation of perpetual impediments, under the Sunni law, and of all impediments under the Shia law. A *batil* marriage is no-marriage; it is void *ab initio*. No legal consequences flow from it. Thus, a marriage performed in violation of rules of consanguinity, fosterage, or affinity is void marriage. No legal action is necessary, and none is provided under Muslim law. However, if any party so desires, he or she can file a declaratory suit under the Specific Relief Act, 1963.

Where a marriage is performed in violation of an impediment or prohibition which is temporary or remedial, then the marriage is irregular or *fasid* under the Sunni law. It is neither a valid nor void marriage. It is not a voidable marriage either. It is a peculiar concept. To begin with, such a marriage is not valid, but it can be validated by removing the impediment, or by remedying the prohibition. Thus, when a person marries wife's sister or a fifth wife, he can remove the impediment by divorcing the wife in the former case and by divorcing any of the four wives in the latter case. An irregular marriage has no effect before consummation. Either party may terminate it, at any time, either before or after its consummation, by expressing an intention to do so. Any words are enough, if intention is clearly expressed. Thus, if one says to the other "I have relinquished thee," marriage stands terminated.[1] If marriage has been consummated, the wife is required to undergo *idda* of three courses on dissolution of marriage, either by death or divorce. If the marriage has not been consummated, the wife has no obligation to undergo *idda*. The children of such marriage are legitimate and have right of inheritance to the property of both parents, but the parties have no right to mutual inheritance.

The Shia law does not recognize irregular marriages, and marriages performed in violation of perpetual or temporary or remedial impediments are void (*batil*).

Grounds of Void Marriage

A marriage performed in violation of absolute impediments is void. The grounds of void marriage under the Indian personal laws are different,

1. *Bakh Baibi* v. *Quim Din*, AIR 1934 Lah 907.

though, broadly speaking, a marriage within prohibited degrees of relationship or a bigamous marriage (except among the Muslims) is regarded void under all personal laws.

Hindu law.—Grounds of void marriage under Hindu law are the following (These grounds relate to post-Hindu Marriage Act marriages) :[1] (a) If at the time of marriage either party has a spouse living. (The second marriage will be void only if the first marriage is valid.)[2] If the first marriage is void, the second will be valid. The first wife of a bigamous marriage has no remedy under Hindu Marriage Act, though under Specific Relief Act, she may sue for a declaration that the second marriage is void.[3] In our submission, she may sue for divorce on the ground of husband's adultery. (b) If the parties are *sapindas* to each other, unless such a marriage is permitted by custom. (c) If the parties are within the prohibited degrees of relationship, unless the marriage is permitted under custom. (d) If requisite ceremonies have not been performed. (e) Marriage between a Hindu and a non-Hindu is void under this Act.[4] (This is not a ground of void marriage under Section 11 and therefore provisions of Section 16 will not apply).

Muslim law.—Various requirements of capacity to marry under Muslim law have been discussed in Chapter IV of this work. Broadly speaking, a Muslim marriage is void under all schools if it is performed in violation of the conditions of : (a) consanguinity, (b) affinity, and (c) fosterage. Under the Shia law, a marriage is also void on all these grounds on which it is irregular under the Sunni law.

Christian law.—Under the Divorce Act, a marriage is void on the following grounds :[5] (a) Respondent was impotent at the time of the marriage and at the time of the institution of suit. (b) Parties are within the prohibited degrees of consanguinity or affinity. (c) Either party was idiot or lunatic at the time of marriage. (d) The former husband or wife of either party was living at the time of marriage and the marriage with such former husband or wife was then in force. (e) The consent of either party was obtained by force or fraud.[6] The jurisdiction to pass a decree of nullity on this ground is vested in the District Court.[7] Under the Act, a marriage may also be declared null and void if it was performed within six months of the confirmation of the decree of dissolution of the former marriage.[8] This ground as provided by Section 57 of the Act prior to Amendment Act of 2001 has been totally modified. Now the parties are free to remarry, once period of appeal is over or where appeal if filed has been dismissed,[9] or on the ground of non-performance of requisite formalities of the marriage.

1. *See* Section 11, Hindu Marriage Act, 1955 under which the first three are laid down as ground of void marriage.
2. *Savitri Devi* v. *Manorama Bai*, AIR 1998 M.P. 114.
3. *Birendra* v. *Kamla*, AIR 1995 All 243.
4. *Gullipalli Sowria Raj* v. *Bandaru Pavani*, AIR 2009 SC 1085.
5. Section 19.
6. *Ibid.*
7. In *Aykut* v. *Aykut*, AIR 1940 Cal 75 at the time of marriage, husband represented that he was a Christian though in fact he was a Muslim, the marriage was declared null and void.
8. As amended by the Indian Divorce (Amendment) Act, 2001. [Act 51 of 2001].
9. Section 57, see *Bethi* v. *Brawn*, AIR 1938 Mad 452.

Parsi law.—Under the Parsi Marriage and Divorce Act, a marriage is void : (i) If the parties are within prohibited relationship of consanguinity or affinity, (ii) If necessary formalities of marriage have not been performed. (iii) If male has not completed the age of 21 years and if a female has not completed the age of 18 years.[1] (iv) Either party to the marriage was impotent.[2]

Special Marriage Act.—Under the Special Marriage Act, a marriage is void on the following grounds :[3] (a) Either party has a spouse living at the time of marriage. (b) Either party was at the time of marriage incapable of giving a valid consent in consequence of unsoundness of mind or 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 procreation of children, or has been subject to recurrent attacks of insanity. (c) The bride was below 18 years in age and bridegroom was below the age of 21 years at the time of marriage. (d) Parties were within the degrees of prohibited relationship. (e) The respondent was impotent at the time of institution of the suit. These grounds do not apply to marriages registered under the Act. The registration of a marriage may be cancelled on the following grounds : (i) Marriage was bigamous. (ii) Either party was idiot or lunatic at the time of registration of marriage. (iii) No valid ceremony of marriage was performed between the parties. (iv) One of the parties or both were under the age of 21 years at the time of registration. (v) Parties are within the degrees of prohibited relationship.[4]

Grounds of Voidable Marriage

The grounds of voidable marriages are also different under the Indian personal laws, though there is basic unity inasmuch as they deal with the relative impediments to marriage. But the personal laws differ in the categorization of impediments, and under some personal laws, an impediment is treated as absolute, while under the other, it is treated as a relative impediment.

Hindu law.—Under the Hindu Marriage Act, a marriage is voidable on the following grounds :[5] (i) Failure of the respondent to consummate the marriage on account of impotency. (This is a ground of void marriage under the Special Marriage Act, Parsi Marriage and Divorce Act and Divorce Act). (ii) Incapacity of the respondent to give a valid consent in consequence of unsoundness of mind, or though capable of giving valid consent, the respondent was suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and procreation of children, or the respondent was subject to recurrent attacks of insanity. (This is a ground of void marriage under the Special Marriage Act and a ground of divorce under Parsi Marriage and Divorce Act). (iii) Respondent's pregnancy at the time of marriage of which the petitioner was not the cause and of which petitioner was ignorant at the time of marriage, and the petition is brought within one year of the solemnization of marriage, and further that the petitioner has had

1. Section 3.
2. Section 39.
3. Section 24.
4. Section 24(2).
5. Section 12.

no marital intercourse with the respondent after the knowledge of respondent's pregnancy. (This is a ground for divorce under the Parsi Marriage and Divorce Act). (iv) Petitioner's consent (or of the guardian if minor's marriage was performed before 1978) was obtained by force or fraud as to the nature of ceremony or as to any material fact or circumstances concerning the respondent, provided that the petitioner did not live with the respondent as husband or wife after the discovery of fraud or cessation of force, and provided further that the petition was presented within one year of the discovery of fraud or cessation of force. (This is a ground of void marriage under the Divorce Act).

Parsi and Christian law.—Under the Parsi Marriage and Divorce Act and the Divorce Act, the notion of voidable marriages is not recognized, and therefore there is nothing like a voidable marriage.

Special Marriage Act.—Under the Special Marriage Act, a marriage is voidable on the following grounds :[1] (a) Non-consummation of marriage on account of wilful refusal of respondent to do so. (b) Pre-marriage pregnancy of the respondent of which the petitioner was not the cause and of which the petitioner was at the time of the marriage ignorant, and marital intercourse has not taken place with the consent of the petitioner after the knowledge of pregnancy and further that the petition is presented within a year from the date of marriage. (c) Petitioner's consent was obtained by fraud or force, provided that the petitioner did not live with the respondent as husband or wife after the discovery of fraud or cessation of force and provided further that the petition was presented within one year of the discovery of fraud or cessation of force.

Grounds of irregular marriage under Muslim law.—Under the Sunni law, where concept of irregular marriage is recognized, the main grounds of such a marriage are : (a) Marriage with a woman undergoing *idda*. (b) Marriage in violation of prohibition on the ground of different religion. (c) Marriage performed without witnesses. (d) Marriage with a fifth woman. (e) Marriage performed in violation of rule against unlawful conjugation.[2]

Most of the grounds of void marriage (since these are also laid down as essential conditions of marriage) have been discussed in the preceding Chapter. The grounds of voidable marriage and those grounds of void marriages which are grounds of voidable marriage under some personal laws will be discussed in the subsequent pages.

PRE-MARRIAGE PREGNANCY

Pre-marriage pregnancy is a ground of voidable marriage under the Hindu Marriage Act,[3] and the Special Marriage Act[4] and of divorce under the Parsi Marriage and Divorce Act.[5] This is also a ground of voidable marriage under the Matrimonial Causes Act, 1973,[6] and is called pregnancy *per alium*.

1. Section 24.
2. *See* for details, Paras Diwan, *Muslim law in Modern India*, 56-59 (1990).
3. Section 25(ii).
4. Section 12(1)(d).
5. Section 32(i).
6. Section 12(2).

In India, we have borrowed this ground from English law. In the early English matrimonial law, it was treated as a special case of fraud. According to the *Dharamashastra*, if a man knowingly married a pregnant woman, she is his wife and the child born to her is his child, known as *sahodaja*. But if he married a pregnant woman without any knowledge of her pregnancy, he has the power to repudiate the marriage and return the wife to her father.[1]

In the modern law, it has been made a separate ground of annulment of marriage since in the case of pre-marriage pregnancy, there may not be any representation that the bride is not pregnant. It is a ground of voidable marriage since it amounts to foisting somebody else's child on the husband.

The ground is pre-marriage pregnancy and not pre-marriage unchastity. Even if the woman was unchaste before the marriage and she had delivered an illegitimate child, the marriage could not be avoided, since unchastity is not a ground of annulment of marriage.[2]

The requisite conditions of pre-marriage pregnancy as a ground of annulment of marriage or divorce are :

A. Respondent was pregnant at the time of marriage.
B. She was pregnant from a person other than the petitioner.
C. Petitioner was not aware of respondent's pregnancy at the time of marriage.
D. Petition must be presented within one year of the marriage under the Hindu Marriage Act, and the Special Marriage Act and within two years of marriage under the Parsi Marriage and Divorce Act.
E. No marital intercourse should take place with the consent of the petitioner after he had known of wife's pregnancy.[3]

It is necessary that all these requirements are established, otherwise no decree will be made.[4]

The burden of proof is on the petitioner who must establish all the aforesaid requirements. Although it is a very heavy burden, yet a burden rightly placed on the petitioner.[5] Wife's admission of pre-marriage pregnancy plus the fact that the husband had no access to her before marriage is sufficient to establish her pre-marriage pregnancy.[6] Medical evidence may also be given.[7]

If the petition is not presented within the time as specified in condition D above, the petition is barred and the petitioner has no remedy.[8] However, in *Pawan Kumar* v. *Mukesh Kumar*,[9] wife was pregnant by some other person and marriage had broken down immediately though petition was filed

1. *Manusmriti* IX, 73.
2. *Surjeet* v. *Raj Kumar*, AIR 1967 Punj 522.
3. *Mohinder Kaur* v. *Bikkar Singh*, AIR 1970 P & H 248.
4. *Ibid.*
5. *Nisit* v. *Anjali*, AIR 1968 Cal 105; *Mahendra* v. *Sushila*, AIR 1965 SC 364; *Baldev* v. *Urmila*, AIR 1979 SC 879; *Nand Kishore* v. *Munnibai*, AIR 1979 MP 45.
6. *Mahendra* v. *Sushila*, AIR 1965 SC 384.
7. *Baldev Raj* v. *Urmila Kumari*, AIR 1979 SC 879.
8. *Vellnayagi* v. *Subramanian*, (1969) MLJ 334; *Rangaswami* v. *Nananuma*, (1972) 2 Mys LJ 256; *Nanak Ram* v. *Drupaben*, AIR 1974 Guj 111; *Nand Kishore* v. *Munnibai*, AIR 1979 MP 45.
9. AIR 2001 Raj. 1.

belatedly. The fact of pre-marriage pregnancy by other person itself was held in causing cruelty and mental agony, therefore the application was converted into decree of divorce. Similarly, if the petitioner has had intercourse with his wife after he had come to know of her pre-marriage pregnancy, the petition will be barred, as it amounts to condonation. Once he accepts her as she is, he cannot repudiate her later on.

Lack of Consent—Consent obtained by Fraud or Force

The English statute, Matrimonial Causes Act, 1973, lays down that a marriage shall be voidable if either party did not consent to it, in consequence of duress, mistake, unsoundness of mind or otherwise.[1] Under the Indian personal laws, the ground is worded differently. Under the Hindu Marriage Act, 1955,[2] it is laid down that whenever the consent of the petitioner is obtained by fraud or force, the marriage is voidable at his instance. Under the Special Marriage Act also, the wordings of the ground are : the consent of either party was obtained by coercion or fraud, as defined in the Indian Contract Act, 1872. There is no such specific ground under the Divorce Act, 1869 and the Parsi Marriage and Divorce Act, 1936, but, it seems, lack of consent will render marriage void under these statutes. In Muslim law also, such a marriage, it appears, will be void, since Muslim law regards marriage as essentially a civil contract.

Under the Hindu Marriage Act and the Special Marriage Act, the requirements of the grounds are :

A. Consent of the petitioner was obtained by fraud or force (under the Hindu Marriage Act), or coercion or fraud (under the Special Marriage Act).

B. Petition must be presented within one year of the discovery of fraud or cessation of force, and

C. Petitioner must not have lived with the respondent, as husband or wife, as may be the case, after the discovery of fraud or cessation of force.

Force.—In ordinary parlance, 'force' means use of physical violence, but in matrimonial law, the word 'force' has a wider meaning. It does not merely include use of physical violence but also threat to use violence. English law uses the word "duress."[3] English authorities lay down that whatever owing to some natural weakness of mind or on account of some fear, whether entertained reasonably or unreasonably, but nonetheless entertained really, or when a party is in such a mental state that he finds it almost impossible to resist the pressure, it will amount to duress as in such a case there is no real consent.[4] This is what coercion means under the Special Marriage Act.

Force might be exerted by the respondent himself or by someone else on his behalf. For instance, where either the respondent or someone on his behalf may, at the point of dagger (or gun) compel the petitioner to marry the respondent, it would amount to use of force by the respondent. It is

1. Section 12(a).
2. Section 12(1)(c).
3. Matrimonial Causes Act, 1973, Section 12(c).
4. *H* v. *H.*, (1954) P 258, *Buckland* v. *Buckland*, (1968) 296; *Silver* v. *Silver*, (1955) V. 2 All ER 614 are some of the interesting English cases on this subject.

immaterial whether the petitioner is a minor or major. However, strong advice, persuasion, or importunity does not amount to use of force. In most of the arranged marriages, some persuasion, advice or even pressure is exercised, it will amount to use of force only if consent was induced or compelled as a result of actual use of force or threat to use force. In cases coming under the Hindu Marriage Act, it has been held that coercion and undue influence are included in the term 'force.'[1]

Fraud.—Fraud means such circumstances or conditions as to show want of real consent to marriage. The main element in fraud is deceit. Fraud in the matrimonial law is different from fraud in the commercial contracts. Neither a fraudulent nor an innocent misrepresentation will itself affect the validity of a marriage unless the misrepresentation induces an operative mistake, such as in respect of ceremony of marriage or identity of a party.[2] In an English case, it has been held that errors as to fortune, status, or moral character of the other party do not affect the validity of marriage.[3] In cases coming under the Hindu Marriage Act, this is more or less the position taken by the courts. The Marriage Laws (Amendment) Act, 1976 lays down that the fraud vitiating consent should relate to :

(a) nature of ceremony, or

(b) any material fact or circumstance concerning the respondent.

In *Nandkishore* v. *Munnibai*,[4] the court observed that fraud should be such which procures the appearance without reality of consent and thereby becomes an act fitted to deceive. In our arranged marriages, some exaggeration as to quality and accomplishment of bride or bridegroom is always made, but a marriage cannot be avoided for that reason alone. In *Pubi* v. *Basudev*,[5] the wife sought annulment of marriage on the ground that her husband's boasting as to his high prospects in life induced her to marry him. She was denied relief. It seems only those misrepresentations which affect the marriage fundamentally would amount to fraud. The term 'fraud' under the Hindu Marriage Act does not have the same meaning as under the Indian Contract Act,[6] though under the Special Marriage Act, 'fraud' is defined in reference to the Indian Contract Act. The cases that have come before our courts on this ground may be classified as under :

A. Fraud on the nature of ceremony.

B. Fraud as to identity of the parties to the marriage.

C. Concealment of disease.

D. Concealment of religion or caste.

E. Concealment of unchastity.

F. Concealment of illegitimate birth.

As to the first two, law is certain : such fraud renders the marriage voidable at the instance of the innocent party.

1. *Purabji* v. *Basudev*, AIR 1969 Cal 293; *Appibai* v. *Khimji*, ILR (1934) 60 Bom 455; *Scott* v. *Sebright*, (1886) 12 PD 21; *Rice* v. *Rice*, 72 LT 122 (old English case, where marriage was performed at the point of pistol).
2. *Moss* v. *Moss*, (1897) P. 263.
3. See Reydon on Divorce, 174-75 (1974).
4. AIR 1979 MP 45.
5. AIR 1969 SC 293.
6. *Nandkishore* v. *Smt. Munnibai*, AIR 1979 MP 44.

Fraud as to the nature of ceremony.—Where there is mistake as to the nature of ceremony in the mind of one of the parties to marriage or fraud is played on the ceremony of marriage, marriage is voidable. Thus, if A takes B, a Muslim girl, to the Arya Samaj temple telling her that she was going there to perform a conversion ceremony, while, in fact, marriage ceremony is performed. This is fraud on the ceremony of marriage rendering marriage voidable at the instance of the wife.[1] In *Shiram* v. *Taylor*,[2] a case under the Divorce Act, parties went through a ceremony of marriage while the husband had no intention to regard it as real marriage, the marriage was annulled at the instance of the wife. It was a case of lack of real consent.

Identity of a party.—A marriage is voidable if *A* undergoes a ceremony of marriage with *B* with the impression that *B* was *A*. *C* v. *C*[3] is an interesting case from New Zealand, where *W* married *H* in the erroneous belief that he was the well-known boxer called Miller. It was held that the marriage was not invalidated because *W* married the very individual she meant to marry.

Concealment of disease.—As to concealment of disease, the position seems to be that if the concealment is of a disease of serious kind, it would invalidate the marriage, but if the disease is an ordinary one, marriage will remain valid. Thus, concealment of pre-marriage mental derangement or temporary mental derangement does not invalidate the marriage. In *Amarnath* v. *Layyabati*,[4] concealment of venereal disease in a communicable form, was held to amount to fraud.[5] In *Madhu Sudhan* v. *Chandrika*,[6] it was held that concealment of syphilis by the respondent was not a type of misrepresentation, which will invalidate the marriage. But concealment of a disease of serious nature will amount to fraud.[7]

Concealment of religion or caste.—In two cases, it has been held that concealment of religion or caste amounts to fraud. In *Akyat* v. *Akyat*,[8] a case under the Divorce Act, W entered into a marriage with *H* on his representation that he was a Christian while in fact he was a Muslim, and in *Bimla* v. *Shankar*,[9] a case under Hindu Marriage Act, *W* married *H* on his representation that he was a high caste Hindu, while in fact, he was a low caste Hindu, it was held that it amounted to fraud and the marriage was annulled. In the submission of the present writers, when the policy and the letter of law permit inter-religious and inter-caste marriages, concealment of one's caste and religion should not be treated as such a misrepresentation as to invalidate the marriage. In *Leelamma* v. *Dilip Kumar*,[10] the wife married *H* in the belief that her husband was a Christian belonging to an ancient

1. See *Ford* v. *Stier*, (1896) PI; and *Mehta* v. *Mehta*, (1945) 2 All ER 690, where the girl was told that it was a betrothal ceremony, while in fact marriage ceremony was performed.
2. AIR 1952 Punj 277.
3. (1942) New Zealand Law Review 35-49.
4. AIR 1959 Cal 779.
5. This is a specific ground of voidable marriage under the Matrimonial Causes Act, 1973, Section 2(e).
6. AIR 1975 MP 74.
7. *Raghunath* v. *Vijay*, AIR 1972 Bom 132; concealment of epilepsy; *Asha* v. *Srivastava*, AIR 1981 Del 252 (Schizophrenia).
8. AIR 1940 Cal 75.
9. AIR 1959 MP 8. *See* also *Mandakini* v. *Shandraseen*, AIR 1986 Bom 172.
10. AIR 1993 Ker 57.

family as representation to that effect was made by the husband. In fact, it turned out that he was a Ezhava. The marriage was held void on account of fraud of the husband. (This case was under the Divorce Act).

Concealment of unchastity.—Concealment of pre-marriage unchastity does not amount to fraud either under English law or Indian law. In *Harbhajan* v. *Brij*,[1] *H* married *W* on the assurance of W's father that she was a virgin though later on it was revealed that she had given a birth to an illegitimate child before marriage, the court held that this did not amount to fraud.[2] In *Surjeet* v. *Harichand*,[3] Kapoor, J. observed that an expression misrepresentation by a woman of her unchastity does not by itself, amount to fraud. But if a husband attaches great importance to the chastity of his would be wife, he should make specific enquiries of his own or from the girl's relations at the time of negotiation of marriage. The learned judge observed, "It is only then he should be able to show that the relations of the girl were aware of her past unchastity, but they misled him." The amended clause of Section 12 of Hindu Marriage Act, specifically lays down that fraud as a ground of voidable marriage should be as to the material fact about the respondent. Is chastity a material fact about the respondent? Looked at from the modern attitude to unchastity, it can hardly be called a material fact about the respondent. But looked at from the Indian point of view, it is still considered a serious blemish.

Concealment of illegitimate birth.—Does concealment of one's illegitimacy amount to fraud? In *Bimla* v. *Shankar*,[4] the court held that concealment of his illegitimate birth by *H* at the time of his marriage with *W* amounted to fraud and *W* was entitled to a decree of nullity. It is submitted that in our modern world where attempts are being made to blur all distinctions between legitimate and illegitimate children, this case does not represent a good law.

Concealment of age.—In *Som Dutt* v. *Raj Kumar*,[5] concealment of age was considered to be a material fact and was held to amount to fraud. The wife was senior to her husband by seven years.

Concealment of financial status and job and educational qualification.—In *Anurag Anand* v. *Sunita Anand*,[6] monthly income and property status of husband was held to be material facts and circumstances and in the event of their being proving to be false, it would amount to fraud.

Non-disclosure of pre-marriage status.—Now under the extended meaning of fraud, non-disclosure of pre-marital status would amount to fraud. Thus, in *Rajindra Singh* v. *Pomila*,[7] the marriage was annulled as the husband did not disclose that he was a divorcee.

Wife being devoid of female organs.—Concealment of the fact that wife was devoid of female organs would amount to fraud.[8] But in *Ruby Roy* v.

1. AIR 1964 Punj 359.
2. *See* also *Debnath*, 23 CWN 751, where the same view was expressed.
3. AIR 1967 Punj 359.
4. AIR 1959 MP 8.
5. AIR 1986 P & H 191.
6. AIR 1997 Del 94 and *Bindu Sharma* v. *Ram Prakash*, AIR 1997 All 429.
7. (1978) HLR 522.
8. AIR 1987 Del 285.

Sudarshan Roy,[1] since the father of the bridegroom who negotiated the marriage, was told of the fact, it was held that there was no concealment.

Fraud of third person.—Ordinarily, it is the fraud of the respondent which renders the marriage voidable. But in typical condition of Hindu society, a misrepresentation by a third person may also amount to fraud. In *Bawi* v. *Ram*,[2] W filed the petition for annulment of her marriage on the averment that before her marriage with H, she overheard her father telling her mother that H was between 20 to 30 years and was well placed, but when she went to H's house, she found that H was over sixty years of age. The court passed a decree annulling the marriage. The court observed that the father of W by actively concealing a material fact about H which was within his knowledge, indirectly deceived W.[3]

IMPOTENCY

In most systems, impotency, inability to consummate the marriage, and refusal to consummate the marriage are grounds of nullity of marriage. Under some, these render marriage void, while under others, these render marriage voidable.

Under the Special Marriage Act,[4] the Dissolution of Muslim Marriage Act,[5] and the Indian Divorce Act,[6] the clause is identical and the requirements are two-fold : (a) respondent was impotent at the time of the marriage, and (b) continued to be so till the time of the presentation of the petition. Under the Special Marriage Act and the Divorce Act, this renders the marriage null and void. Under the Hindu Marriage Act, it is a ground of voidable marriage and under the Dissolution of Muslim Marriage Act, it is a ground for divorce.

Wilful refusal to consummate the marriage is a ground of voidable marriage under the Special Marriage Act,[7] and of divorce under the Parsi Marriage and Divorce Act.[8]

Impotency, wilful refusal to consummate the marriage.—The wordings of this clause are different under different matrimonial statutes. Under the Special Marriage Act, the Dissolution of Muslim Marriage Act and the Divorce Act, the requirement is that the respondent was impotent at the time of marriage and continued to be so till the presentation of the petition. Under the Hindu Marriage Act, the wordings are that the marriage has not been consummated on account of the impotency of the respondent, while under the Parsi Marriage and Divorce Act, the clause runs, "that the marriage has not been consummated within one year after its solemnization owing to the wilful refusal of the defendant to consummate it."[9]

A person is impotent if his or her physical or mental condition makes

1. AIR 1988 Cal 210.
2. AIR 1968 Pat 190.
3. *See* also *Alka* v. *Abhinash*, AIR 1991 MP 205.
4. Section 24(1)(ii).
5. Section 2(ii).
6. Section 19(1).
7. Section 25(i).
8. Section 32(a).
9. Section 24(1)(ii), Special Marriage Act; S. 2(ii), Dissolution of Muslim Marriages Act; S. 19(1), Divorce Act; S. 12(1)(a), Hindu Marriage Act, and S. 32(a), Parsi Marriage and Divorce Act.

consummation of marriage a practical impossibility. Persistent and invincible repugnancy on the part of the respondent to the act of consummation amounts to impotency.[1] Impotency means inability to perform sexual act or inability to consummate the marriage.

The key words are "inability to consummate the marriage." What is consummation of marriage? A marriage is consummated when parties have sexual intercourse after the solemnization of marriage. It seems that sexual intercourse amounting to consummation must be complete and not partial or imperfect. If a husband does not achieve full penetration in the normal sense, it would not amount to consummation.[2] But the degree of satisfaction obtained by a party is irrelevant.[3] Under-sexness or over-sexness of a spouse does not amount to impotency.[4] In English law (in India, cases of this nature have not yet come before the courts), a question has arisen; whether intercourse with the use of contraceptive amounts to full sexual intercourse? In a 1945 case, the court of appeal held that if a husband wore a contraceptive sheath or practised *coitus interruptus*, it did not amount to consummation of marriage.[5] But this view has been partially overruled in *Baxter* v. *Baxter*,[6] the House of Lords held that sexual act with the use of sheath amounts to consummation of marriage. The House of Lords left open the question whether *coitus interruptus* amounts to consummation of marriage or not.[7]

Thus, "non-consummation" as such is not a ground for avoiding a marriage. The non-consummation should be the result of the incapacity of a person to consummate it, as Hindu Marriage Act puts it : "marriage has not been consummated owing to the impotency of the respondent."[8]

Under the Special Marriage Act (as a ground of void marriage), the Dissolution of Muslim Marriage Act, (as a ground of divorce), Divorce Act (as a ground of void marriage) and the Hindu Marriage Act (before the amendment of 1976), the clause requires two conditions : impotency of the respondent before marriage and its continuance till the presentation of the petition. Under the Hindu Marriage Act, when this clause came for interpretation, the courts were faced with a difficulty; if at the time of marriage one or both the parties are so young as not to be in a position to consummate the marriage, it may be difficult to say that at the time of marriage the respondent was impotent. With a view to make the clause work, the court gave an artificial interpretation to the clause by laying down that the words "at the time of marriage" should be interpreted to mean "at the time of first consummation of marriage."[9] This is the background of the amendment of this clause under the Hindu Marriage Act.

1. *Digvijay* v. *Pratap Kumari*, AIR 1970 SC 137; *Usman* v. *Inderjeet*, AIR 1977 P & H 97; *Samar* v. *Snigdha*, AIR 1977 Cal 213.
2. See *Svarnabahen* v. *Chinabhai*, AIR 1970 Guj 43; *Chaman* v. *Rupa*, AIR 1966 J & K 68, *Shantibai* v. *Tarachand*, AIR 1964 MP 8 (Shiv Dayal, J. has given a brilliant summary of law of impotency).
3. *Samar* v. *Snigdha*, AIR 1977 Cal 213.
4. *Rajinder* v. *Manmohan*, AIR 1972 P & H 142.
5. *Cowen* v. *Cowen*, (1954) 2 All ER 1971.
6. *Baxter* v. *Baxter*, (1947) 2 All ER 886.
7. *Grimes* v. *Grimes*, (1948) 2 All ER 147 (held it did not); *Cackett* v. *Cackett*, (1950) 1 All ER 67 (it does).
8. Section 12(1)(a).
9. *Basi* v. *Nath*, AIR 1970 J & K 130.

Impotency is usually either (i) physical or (ii) mental

Physical impotency.—Malformation of, or structural defects in the organs such as unduly large male organ,[1] and abnormally small vagina,[2] are two instances of physical impotency. If a person is capable of consummation of marriage after undergoing some surgery or medical treatment, he cannot be said to be impotent. But if he refuses to undergo the surgery or treatment, an inference of impotency will be drawn. In *M.* v. *S*,[3] and *Ganeshji* v. *Hastuben*,[4] the wife, who was not in a position to have sexual intercourse on account of structural malformation, underwent a surgery as a result of which she became capable of consummation of marriage. In both cases, it was held that the wife was not impotent. In *Laxmi* v. *Babulal*,[5] the wife who had no vagina was given an artificial vagina of two inches and a half, it was held that this did not remove the impotency. *Ganeshji* was distinguished by saying that in the present case, there was no vagina while the former was a case of undersized vagina. In *Rajendra* v. *Shanti*,[6] on the other hand, the court held that the wife who was given an artificial vagina of one inch and a half after surgery was not impotent. It is submitted that the test of impotency is incapacity of performing sexual intercourse and not sexual intercourse to the satisfaction of the petitioner.

Psychological impotency.—When a person has psychological or moral repugnance to the sexual act, it is a case of mental impotency.[7] In *Jagdish* v. *Seetha*,[8] immediately after the marriage, the husband lived with his wife for three days and nights in the same room, but failed to consummate the marriage. The Court held that it was a fair inference that non-consummation of marriage was due to husband's knowing refusal arising out of his incapacity, nervousness and hysteria. In *M.* v. *S.*,[9] on the first night after marriage, the husband tried to consummate the marriage, but the wife did not allow him to do so on the plea that she was forced to marry him against her wishes. It was held that no inference of impotency can be drawn from this fact.[10]

If impotency is *qua* the petitioner, it is also a case of psychological impotency. It need not be total or general impotency.[11]

At English common law, consummation is referred to as *vera copula*, which consists of erection, ejaculation, intromission, *i.e.*, erection and penetration by the male of the female. In the modern English law, if sexual intercourse is performed, the marriage stands consummated even though the husband is physically incapable of ejaculation.[12] But if he is incapable of

1. *Kanthy* v. *Harry*, AIR 1954 Mad 316 (FB).
2. *A.* v *B*, ILR (1953) Bom 847, *G.* v. *G.*, AIR 1962 AP 151; *Rangaswami* v. *Agvindammal*, AIR 1957 Mad 243 (English and American cases have been reviewed).
3. AIR 1963 Ker LT 315.
4. AIR 1967 Guj LR 966.
5. AIR 1973 Raj 89.
6. AIR 1978 P & H 181.
7. *Jagdish* v. *Shyamma*, AIR 1966 All 156; *Rawi* v. *Nath*, AIR 1970 J & K 130.
8. AIR 1963 Punj 114.
9. (1963) KLT 305.
10. *See* also *Brij* v. *Sumitra*, AIR 1975 Raj 125.
11. *Suvarna* v. *G.M. Acharya*, AIR 1979 AP 169; *Vincent Adolf* v. *Jume Beatrice Rama*, AIR 1985 Bom 103 (case under Divorce Act).
12. *R.* v. *R*, (1952) 1 All ER 1194.

sustaining an erection for more than a very short period of time after penetration, he will be treated as impotent.[1] The English common law view has been accepted in some Indian cases. In *Govinda* v. *Nagamain*,[2] and *Rangaswami* v. *Arvindamal*,[3] it was observed that "potence" in case of males means power of erection of male organs plus discharge of healthy semen containing living spermatozoa and in the case of females, menses. This view has been differed to in later cases. In *Prajapati* v. *Hasturbai*,[4] the court said that ejaculation was not a test of potency; capacity of penetration is enough. In *Shawanti* v. *Bhawrao*,[5] the wife was sterile and did not menstruate. It was also established that even by surgery, these defects could not be removed. On the other hand, she was fully capable of having sexual intercourse, though not of bearing children. Singh, J. observed, "By the use of the word, "impotent" the legislature did not intend to bring in the idea of sterility or incapacity of conception; impotency here signifies incapacity to consummate the marriage. In other words, incapacity to have normal sexual intercourse. It is possible that a person may be sterile, still he or she may be capable of conjugal intercourse." This seems to be the correct position.

Most people in the world desire to have offspring and obviously if one of the parties to the marriage is sterile, this desire cannot be fulfilled. If a person knowingly marries a sterile person, the matter is different. If a spouse gets himself sterilized without begetting even a single child, thereby frustrating the wishes of the other spouse to beget offspring, this is certainly a case of cruelty. It is submitted that there is some substance in the view that natural or surgical sterility should be a ground of voidable marriage.

Sex and marriage with a eunuch.—Before the decision in *Corbett* v. *Corbett*,[6] English law did not specifically lay down that of the two parties to marriage, one must be male and the other female. In Indian matrimonial law, it has not been specifically laid down that of the two parties to marriage, one must be male and the other female. However, hitherto this has been the assumption, and a "marriage" between two males or two females cannot be regarded a marriage at all. But in *Corbett*, a new problem arose because of the coming into existence of sex-change surgery. In this case, the respondent, who was a male at birth, underwent a sex-change operation which meant removal of male genital organs and providing of artificial female organs, married the petitioner who was a male. After dwelling at length with the medical evidence, the court came to the conclusion that biological sex of a person is fixed at birth (at the latest) and cannot be subsequently changed by artificial means. In view of this, the court held the marriage void. Consequent to this decision, the Matrimonial Causes Act, 1973 lays down specifically that of the two parties to marriage, one must be a male and the other female.

In India, this question has not yet come before the court. But there cannot be any doubt that there cannot be "marriage" between two males or two females. In India, a question has come : whether marriage with eunuch is void or voidable, and, it seems, Indian law takes the view that one party

1. *W.* v. *W*, (1967) 3 All ER 178.
2. AIR 1962 AP 159.
3. AIR 1957 Mad 243.
4. (1967) 8 Guj LR 966.
5. AIR 1971 MP 168.
6. (1970) 2 All ER 33.

should be male and the other non-male or one party female and the other non-female, and regards marriage with eunuch as voidable. If we would apply the ratio of *Corbett*, such a marriage should be treated void as the eunuch is neither a female nor a male. In *Barmaswami* v. *Somathamneal*,[1] where the wife was eunuch, the question of validity of marriage came after the death of the husband, as a collateral issue. Alagiriswami, J. equated 'her' with an impotent person and held that such a marriage was not void but merely voidable. This view is justified on the basis that marriage is not all sex. It is companionship also. If a person can live happily with a eunuch, he or she should be allowed to do so and the marriage should not be regarded void. It was in this sense that some Hindu sages and commentators took this view that eunuchs have, *prima facie*, a right to marry.[2]

Doctrine of want of sincerity.—The English law doctrine of "want of sincerity" or "approbation and reprobation" lays down that if a person has derived some benefit from his marriage with an impotent, or where marriage has been approbated, such as where marriage takes place at an advanced age with the full knowledge of the parties that sexual enjoyment would be gravely impaired, curtailed or precluded, the marriage cannot be annulled on the ground of impotency. The doctrine of approbation applies even to those cases where the husband was able to obtain sexual relief from wife's vagina which was only one inch and a half deep and full penetration was impossible.[3] The Matrimonial Causes Act, 1973, now lays down that a decree of nullity in the case of voidable marriage will not be granted if the respondent satisfies the court that : (a) the petitioner, with knowledge that it was open to him to have marriage avoided, so conducted himself as to lead the respondent reasonably to believe that he would not seek annulment of marriage, or (b) it would be unjust to the respondent to grant the decree. Thus, in *W.* v. *W*,[4] where the wife, who was impotent, adopted a child at the instigation of the husband, later when the husband petitioned for nullity, the wife pleaded that if decree would be granted, she would be left with the adopted son. The decree was refused.

In *S.* v. *S*,[5] the Delhi High Court held that the doctrine of want of sincerity does not apply under the Hindu Marriage Act. In this case, the parties were married in 1943 and separated in 1956. A petition on the ground of husband's impotency was filed by the wife in 1962. The husband alleged that since the wife has derived certain advantages (certain properties were given to her as gift and some other pecuniary advantages were also derived by her), she should not be granted the decree. The court rejected husband's plea and observed that Hindu Marriage Act was a complete code and the courts were not free to fall back on any doctrine of English law.

Burden of Proof.—The burden of proof whether the respondent is impotent, is on the petitioner. It is he who has to prove that marriage has not been consummated owing to the impotence of the respondent.[6] It is not enough to show that the respondent has no interest in marriage or that she

1. AIR 1969 Mad 124.
2. See *Kane, History of Dharmashastra* Vol. I, 431.
3. *Pettir* v. *Pettir*, (1962) 3 All ER 37.
4. (1952) 1 All ER RI.
5. AIR 1968 Delhi 79.
6. *Jacranino Francisco* v. *Florance*, AIR 1980 Del 275.

is inclined to religious life.[1] However, from certain circumstances, the court can draw inference, such as from the fact that intercourse has not taken place over a long period. Birth of a child due to *fecundation ab extra* does not amount to consummation of marriage.[2] In *Suvanabalen* v. *Chinu Bhai*,[3] the court said that uncorroborated evidence of a spouse is enough, if it is reliable. Medical evidence of impotency is usually given and that is the best evidence. Most of our courts take the view that the court has no power to compel a person to undergo medical exmination.[4] On the other hand, the Calcutta High Court holds the view that the court can compel a party to undergo medical examination and on her refusal to do so, draw the inference of impotency.[5] This is also the view taken in a case under the Divorce Act.[6]

Wilful Refusal to Consummate the Marriage

Wilful refusal to consummate the marriage is a ground for voidable marriage under the Special Marriage Act and for divorce under the Parsi Marriage and Divorce Act. The right belongs to the innocent party. Lord Jowitt observed that wilful refusal connotes "a settled and definite decision without just cause."[7] In *Kaur* v. *Singh*,[8] the parties who were both Sikhs, married in a Registrar's office in England with the clear understanding that they would not have sex relationship till they had gone through *anand karaj*. It was held that the husband's refusal without excuse to undergo the *anand karaj* amounted to wilful refusal to consummate the marriage. Refusal to take treatment or surgery (attended by no danger) to remove physical or psychological impediment to consummation would amount to wilful refusal to consummate.[9] The court may infer from refusal to consummate the marriage, that party is impotent.[10]

Muslim law : Repudiation of Marriage and Option of Puberty

Faskh is the term usually applied for annulment of marriage. When a marriage is annulled for a cause imputable to wife, it is called *faskh*, though literally translated as annulment of marriage, is not the same thing, as annulment of a voidable marriage used in modern matrimonial law, since Muslim law does not recognize the concept of voidable marriage, may be, the term could be applied to void marriage. This term is also employed for judicial divorce. Muslim law does not provide for declaratory decree of void marriages.

Declaratory suits and Decrees.—A declaratory suit for the declaration that a marriage is null and void may be filed under Section 34,

1. *Jayaraj* v. *Mary*, AIR 1953 Mad 242.
2. *Manjula* v. *Suresh*, AIR 1979 Del 93, *Shakuntala* v. *Om Parkash*, AIR 1981 Del 53.
3. AIR 1970 Guj 43.
4. *Bipinchandra* v. *Madhurben*, AIR 1963 Guj 250; *Shreemomurthy* v. *Lakshmi Kanthem*, AIR 1955 AP 207; *Ranganathan* v. *China*, AIR 1955 Mad 546; *Ranama* v. *Shanthappa*, AIR 1972 Mys 157.
5. *Birendra* v. *Hemlata*, 24 CWN 914; *Mary Kurian* v. *T.T. Joseph*, AIR 1980 Ker 131; *George* v. *Saly*, AIR 1995 Ker 289 (cases under Divorce Act).
6. *Mathuram Augustine* v. *Vijayrani*, AIR 1980 Mad 1; *Mary Kurian* v. *T.T. Joseph*, AIR 1980 Ker 131.
7. *Horton* v. *Horton*, (1947) 2 All ER 871. Under English law it is a ground of voidable marriage, Section 12(6) of Matrimonial Causes Act, 1973.
8. (1972) 1 All ER 292, the case is under English law.
9. *S* v. *S*, (1954) 3 All ER 756.
10. *John* v. *Marry*, AIR 1994 Mad 81.

Specific Relief Act, 1963 read with Section 9, Civil Procedure Code. This remedy is available to Muslims as well as to others. But in those communities, like Muslims, where the matrimonial cause of nullity of marriage is non-existent, this is the only procedure by which a declaratory decree can be obtained. In respect of a marriage, the following declaratory suit may be filed and decrees passed :

(i) That the marriage of the plaintiff with the respondent is null and void.

(ii) That the defendant who is claiming himself or herself to be the husband or wife of the plaintiff is, in fact, not her or his husband or wife (English law calls it jactitation).[1]

(iii) That the plaintiff is the lawfully wedded wife or husband of the defendant.[2]

(iv) That the plaintiff in the exercise of his right of repudiation of marriage or option of puberty, has repudiated his or her marriage with the respondent.[3] (See below for details)

(v) That the plaintiff had repudiated his or her irregular marriage with the respondent.

(vi) That the plaintiff's marriage with the defendant has been validly dissolved.

Right of Repudiation of Marriage.—It has been stated earlier that under Muslim law, a minor can be given in marriage by the marriage-guardian. But in such a case, the minor on attaining majority has power to repudiate the marriage. Muslim law givers discuss the subject under the following two heads :

A. When the minor is given in marriage by the father or grandfather, the minor's right to terminate the marriage is called repudiation of marriage.

B. When the child is given in marriage by guardian other than father or grandfather, the right to terminate the marriage is known as option of puberty.

It appears now to be the established rule that when the father or grandfather has acted carelessly, wickedly, negligently, fraudulently, or where the minor is married to a lunatic, impotent person, or marriage is to the manifest disadvantage of the minor, the minor, on attaining majority, can repudiate the marriage. If on attaining majority, a minor does not repudiate the marriage, the marriage will remain valid.[4] The right of repudiation will be lost by express or implied ratification.[5] In *Aziz Bano* v. *Muhammed*,[6] it was held that a minor can exercise the right of repudiation without showing any cause on attaining majority unless it has been ratified by the consummation or otherwise.[7] If marriage has been consummated, the right of repudiation is lost. Now minor girls' right of repudiation is governed by the Dissolution of

1. *Mir Azmat Ali* v. *Mohamud-ul-Misal*, AIR (1897) 20 All 96.
2. *Razia* v. *Anwar*, (1969) SCR 111.
3. *Abdul* v. *Amina*, ILR (1934) 59 Bom 429.
4. *Aziz* v. *Muhammed*, ILR (1925) 47 All 823.
5. *Ibid.*
6. ILR (1925) 47 All 823.
7. *Zubeda* v. *Vazir*, AIR 1949 Sind 145.

Muslim Marriage Act, 1939. (See Chapter X of this work.)

Option of Puberty.—When a minor is given in marriage, by a guardian other than father or grandfather, the minor has the right of repudiation of marriage on attaining majority without showing any cause. This is known as option of puberty (*khyal-ul-bulug*). The Shias take this to its logical end and hold that such a marriage is entirely ineffective unless ratified by the minor on attaining majority. The requirements of the exercise of option of puberty are :

(a) plaintiff's marriage must have been performed when he/she was a minor, by a marriage-guardian other than father or grandfather,

(b) consummation of marriage should not have taken place, and

(c) marriage must be repudiated immediately on attaining puberty.

The courts have by judicial legislation mitigated some of the harshness of conditions (b) and (c). In case, a minor does not know that he has the right to repudiate the marriage after he has come to know of it or even after a reasonable time thereof.[1] Delay in the exercise of option may also be condoned on the basis of non-acquiescence.[2] Similarly, it has been held that the act of consummation to bar repudiation must be a consensual act.[3]

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1. *Bismilla* v. *Nur Md.*, ILR (1921) 44 All 61; *Aysha* v. *Md. Yunus*, AIR 1938 Pat 604.
2. *Khanoo* v. *Bhag*, AIR 1925 Lah 66; *Hussami* v. *Jivami*, AIR 1924 Lah 385.
3. *Abdul* v. *Aminabai*, ILR (1935) 59 Bom 426.

Chapter 8

SEPARATION AGREEMENT AND JUDICIAL SEPARATION

I
INTRODUCTORY

Under the matrimonial law of most of the Indian communities cohabitation may be brought to an end without terminating the marriage by a separation agreement entered into by the spouses or by a decree of the court in judicial separation proceedings.

Separation agreements are an important aspect of the law relating to husband and wife. In essence, a separation agreement is consensual separation from bed and board—each party releases the other from the duty to cohabit. The same state of affairs is brought about when parties are separated by a decree of the court, the primary purpose of which is to relieve the petitioner from the duty of cohabiting with the respondent. In short, when a separation agreement is in operation or a decree of judicial separation has been made, parties live separate from each other, and all basic marital obligations, such as mutual rights and obligations of living together and of marital intercourse, remain suspended. Nonetheless, marriage subsists. Parties remain husband and wife. If either remarries, he or she will be guilty of bigamy. During the subsistence of separation agreement or decree of judicial separation, if one spouse dies, the other will succeed to his property.

A decree of judicial separation will be made only if there is a valid marriage between the parties.[2] Similarly, a separation agreement will be valid only if there is valid marriage between the parties. If marriage is void, so will be the separation agreement.

When parties are living separate under a separation agreement, the state of separation will come to n end the moment parties resume cohabitation or revoke the agreement. On the other hand, if parties want to end the state of judicial separation, an order of the court rescinding the decree will be necessary since a decree of judicial separation is a judgment *in rem*.[3] Ordinarily, the court will rescind a decree whenever the parties ask for it.

SEPARATION AGREEMENTS

In England and the countries where laws are based on English law, separation agreements are regulated by the general law of contract, though in the modern English law, certain aspects of the separation agreements are

1. *Narasimha* v. *Broosamma*, AIR 1976 AP 77.
2. *Bishwanath* v. *Anjali*, AIR 1975 Cal 45.
3. Section 10(2), Hindu Marriage Act, S. 23(2), Special Marriage Act and S. 26, Divorce Act specifically provides for it.

regulated statutorily. Since separation agreements are regulated by the general principles of law of contract, in India, any husband and wife (governed by any personal law) may enter into such agreements. Sometimes spouses want to separate from each other, yet they do not want judicial separation or divorce, even when a ground is available to them. When they want to separate from each other as quickly as possible and without any publicity, the easy way open to them is to separate under an agreement. Once a separation agreement is entered into, neither party can dub the other as deserter.

In a separation by agreement, actual separation is necessary; the agreement must relate to present separation, as all agreements for future separation are void, being against public policy.[1] But under Muslim law, the position is somewhat different (see subsequent pages).

In separation agreements, consideration is provided by each party foregoing his or her right to the other's consortium. Separation agreements do not lead to the forfeiture of the claim of maintenance. In the modern law, separation agreements have become complicated. They contain clauses about many matters, such as for the maintenance of wife (or husband) and children, division and use of matrimonial property and matrimonial home, custody of children, and non-molestation clauses.

A separation agreement may be void or voidable for the same reason as any contract may be. Thus, such an agreement may be void for mistake. Suppose, the parties entered into the agreement on the assumption that they were lawfully wedded, but when it was discovered that no lawful marriage existed between them, the agreement became void.[2] An agreement may be voidable for fraud, misrepresentation, coercion, undue influence. A separation agreement may also be illegal just as any other contract may be, such as where the purpose of the agreement is to promote adultery.[3]

Covenant is agreement.—In India, not many spouses enter into separation agreements, and whenever they do so, these are simple separation agreements. But in England, separation agreements have become very specialized, and contain many terms, such as non-molestation clause, maintenance provision for the wife, wife's covenant not to sue the husband for maintenance, arrangements for custody and maintenance of children, settlement of property, covenants not to bring matrimonial proceedings and the like. These covenants may be entered into the separation agreements in India, too.

The non-molestation clause is usually worded thus : neither spouse will molest, annoy or interfere with the other. The nature of act or acts amounting to molestation is thus stated by Brett, MR :

> I am of the opinion that the act done by the wife or by her authority must be an act which is done with intent to annoy, and does in fact, annoy, or to put the latter proposition into another shape, that it must be an act done by her with a knowledge that what she is doing must of itself without more annoy her husband, or annoy a husband with ordinary and reasonable

1. *See* Section 23, Indian Contract Act.
2. *Gallaway* v. *Gallaway*, (1914) 30 ILR 531.
3. *Fearson* v. *Aylesford*, (1884) 14 BD 792.

feeling.[1]

If a wife commits adultery and gives birth to a child consequent thereto, it does not amount to molestation, but in case she holds out the child to be the child of her husband, it would amount to molestation. Similarly, if a spouse petitions for divorce, it will not amount to molestation, unless the suit is filed with the specific intention of causing annoyance.[2]

Covenants relating to maintenance of the spouse and maintenance, custody and education of children are enforceable.[3] There is conflict in the judicial opinion whether covenants relating to maintenance are enforceable if wife is found guilty of unchastity.[4] It is submitted that if the covenant granting maintenance is couched in absolute terms, the maintenance will be payable under all circumstances even when wife becomes unchaste or gets divorce or judicial separation or gets the marriage annulled.[5] Such a covenant can be executed even when cohabitation is resumed.[6] In England, the recent tendency is to regard the maintenance clause as a covenant for wife's lifetime, and such a covenant is, therefore, enforceable against the husband's executors if he predeceased her.[7]

It seems that the court has the power to alter the amount of maintenance agreed to under a separation agreement. It may be that sums when fixed were quite reasonable, but might become wholly unreasonable, in the light of subsequent events, such as inflation or change in the financial position of either spouse.[8]

It appears that the maintenance clause in a separation agreement does not lead to the forfeiture of the claim for maintenance, even though there may be a clause not to sue for maintenance. English law has now made a statutory provision to this effect.[9]

Covenants relating to custody and access are enforceable. But the court's jurisdiction to make orders for custody, access, etc. in matrimonial proceedings filed subsequently is not ousted. In English law, the Guardianship Act, 1973 now lays down that a spouse may give up, in whole or in part, his or her right and authority in relation to the custody or upbringing of minor child and administration of his property by a separation agreement. But that no court shall enforce any such provision if it is of the opinion that it is not for the child's welfare.[10] In India, under all personal laws and under all the matrimonial statutes as well as the Guardians and Wards

1. *Ibid.*
2. *Hunt* v. *Hunt*, (1897) 2 AB 547.
3. *Sandhya Chatterji* v. *Salil*, AIR 1980 Cal 244.
4. *Kishanji* v. *Lakhman*, AIR 1931 Bom 286 and *Sathyabhamma* v. *Keshavacharya*, ILR (1915) 39 Mad 358 hold that maintenance cannot be allowed while *Shive Lal* v. *Bai*, AIR 1931 Bom 297, *Subbayyan* v. *Ponnuchari*, AIR 1941 Mad 727 and *Thakur* v. *Dharma*, AIR 1953 All 134 hold that maintenance may be allowed.
5. For instance, *see* the English cases: *May* v. *May*, (1929) 2 KB 386, *Adams* v. *Adams*, (1941) 1 All ER 334.
6. *Nagus* v. *Forster*, (1882) 46 LT 675.
7. *Re Lidington*, (1940) 3 All ER 600; *Kirk* v. *Eustance*, (1937) 2 All ER 715 (1937) AC 491 (House of Lords).
8. *See* Matrimonial Causes Act, 1973, Section 35(3), and Hindu Adoptions and Maintenance Act, 1956, Section 25.
9. Section 34(1), Matrimonial Causes Act, 1973.
10. Section 1(2).

Act, the courts have held that the welfare of the child is the paramount consideration and, therefore, here the position seems to be the same.[1]

The right of a spouse to sue for divorce, judicial separation or nullity is not lost, even if there is clause to that effect in the separation agreement. However, sometimes parties stipulate in the separation agreement that neither of them shall file a petition for divorce or any other matrimonial proceedings on the basis of conduct that has occurred in the past. This is called *Rose* v. *Rose clause*, and under English law, such a stipulation is binding.[2] It is necessary that such a clause should be expressly included in the agreement; it cannot be implied. In India, there is no authority which holds that the *Rose Clause* is binding or otherwise.

Discharge of separation agreements.—The separation agreements in their formation as well as discharge are governed by the law of contracts. On discharge of a separation agreement, desertion may commence, the liability of maintenance under the agreement may cease, and, in fact, all terms stipulated thereunder may cease to be operative.

A separation agreement may be discharged by its own terms, or it may be discharged by a later independent agreement between the parties. It seems that resumption of cohabitation will also discharge a separation agreement,[3] though under English law, it is a matter of some doubt. But it seems the question is one of construction of an agreement. If under the agreement, a husband has created a separate trust in favour of the wife and children, or covenanted to pay the wife an annuity for the rest of her life, his liability will remain, even though the parties have resumed cohabitation.[4] A separation agreement may obviously be discharged by its breach, if the other party wishes to do so. In this regard, separation agreements differ from commercial contracts, as innocent party is not bound to inform the spouse in breach that he has accepted the repudiation.[5] Breach of some terms of agreement does not mean that the entire contract will stand discharged. If two covenants are not interdependent, breach of one does not mean that the other stood repudiated automatically. Thus, in *Fearson* v. *Aylesford*,[6] a husband's covenant to pay maintenance to wife and wife's covenant not to molest her husband were treated as not interdependent and thus it was held that the wife could still enforce husband's covenant, though she failed to perform her own.

Remedies for breach of separation agreements.—Damages may be claimed for breach of any covenant in a separation agreement. It appears specific performance may also be claimed for : (a) execution of a deed of separation, and (b) enforcing contract for creation of a trust. An injunction may also be granted to prevent the breach of a negative covenant, such as of the non-molestation clause.[7]

1. *See* Chapter IX of this work.
2. *Rose* v. *Rose*, (1883) 8 PD 98; *Rowley* v. *Rowley*, (1866) LR ISC & Div. 63 (House of Lords).
3. See *Batesman* v. *Rose*, (1813) Bow 235.
4. *See* Lush, *Husband and Wife*, 438-444 (4th ed); also *see Nagus* v. *Forster*, (1882) 46 LT 675 and *Nicol* v. *Nicol*, (1886) 31 Ch D 524.
5. *Pardy* v. *Pardy*, (1939) All ER 779.
6. (1889) 14 UB 792.
7. *Sanders* v. *Rodway*, (1852) 16 Beav 207.

Agreement under Muslim law

It is a unique aspect of Muslim matrimonial law that certain agreements entered into either at the time of marriage or subsequently thereto stipulating future separation or divorce are enforceable. These agreements mainly relate to the following two matters :

A. Regulation of matrimonial life, and

B. Stipulation for dissolution of marriage or separation on the happening of a stipulated contingency.

However, as under other Indian personal laws, only those agreements are enforceable which are not against public policy or unlawful. A simple agreement for future separation is void and unenforceable being against public policy.

Under Muslim law agreements, stipulating the following are enforceable : (a) husband's covenant that he would not contract a second marriage during the subsistence of the first, (b) husband will not remove the wife from the conjugal home without her consent, (c) husband will not absent himself from the conjugal home beyond a certain period, (d) spouses will live at a specified place during the subsistence of marriage, (e) certain amount of dower will be payable by the husband to the wife immediately after marriage or within certain stipulated period, (f) husband will pay to the wife, a certain sum of money periodically or lump sum for maintenance, (g) husband will maintain the children of the wife from her former husband, and (h) husband will not prevent her from receiving visits from her relations.[1]

It appears that reasonable stipulations in an agreement regarding the place where the wife wants to reside are enforceable,[2] but the stipulation after marriage that the wife should be at liberty to live with her parents has been held void.[3] However, under certain circumstances, such stipulation may be valid. Thus, where husband agreed to live as *Khana-damad* at wife's parents home, or stipulated that in case he took a second wife, the former wife would be at liberty to live at her parent's house or stipulated that wife would be entitled to a certain sum of money for maintenance,[4] the stipulations were held valid. Similarly, a stipulation with his third wife that she would have the right to divorce or live at her father's house in case the husband brought anyone of his former wives to matrimonial home was held valid.[5] The Shias take a very broad view of these covenants; all conditions in agreements between the spouses are valid unless they stipulate to legalize what is forbidden.[6]

Similarly, an agreement stipulating that certain amount will be paid periodically or in lump sum, either by way of maintenance or otherwise, to the wife after the marriage or on the happening of a certain contingency are valid and enforceable. Thus, a husband made a settlement of certain properties under an agreement with his first wife. After sometime he divorced his first

1. *See* Ameer Ali, *Muhammadan Law*, Vol. II, 321-322 (5th Ed).
2. *Abdul* v. *Husembi*, ILR (1904) 6 Bom LR 728; *Iman Ali* v. *Arfatunessa*, (1913) 18 CWN 693; *Fatima* v. *Nur Md.*, ILR (1920) 1 Lah 597.
3. *Jai* v. *Md. Khan*, AIR 1971 J&K 40 (FB).
4. *Sakina* v. *Shamsard*, AIR 1936 Pesh 195.
5. *Saifiraddin* v. *Soneka*, (1954) 59 CWN 139.
6. *See* Fyzee, 121-122.

wife and brought a suit for the recovery of the properties he had settled upon her. It was held that the wife was entitled to enjoy the income of the settled property during her lifetime, even though he had divorced her.[1]

Under Muslim law, spouses can validly enter into an agreement either at the time of marriage or thereafter stipulating that the wife will have the right of pronouncing divorce on himself on the happening of certain contingencies such as his taking a second wife or treating her with cruelty. This is called *talak-i-tafweez* or delegated divorce.[2]

If a husband commits breach of any stipulation in the agreement, the consequences stipulated therein ensue. Thus, it may defeat the husband's suit for restitution,[3] or give rise to the wife's claim for maintenance or payment of the entire sum of dower immediately, or entitle her to live separate from her husband.

JUDICIAL SEPARATION

Judicial separation is viewed as a lesser evil than divorce, since it leaves open the door for reconciliation. Ordinarily, judicial separation may either lead to reconciliation or divorce. In exceptional circumstances it may mean permanent separation, such as when parties abhor each other as much as they abhor divorce.[4]

Judicial separation and divorce.—A decree of judicial separation does not dissolve the marriage bond but merely suspends marital rights and obligations during the period of subsistence of the decree; parties continue to be husband and wife. Neither party is free to remarry. In the event of one of the spouses dying during the subsistence of the decree of judicial separation, the other will succeed to his property. On the other hand, a decree of divorce puts the marriage contract to an end; all mutual rights and obligations of spouses cease. In other words, after a decree of dissolution of marriage, marriage tie is broken, parties cease to be husband and wife, and are free to go their own ways. There remains no bond between them. After a decree of divorce, parties are free to remarry. Matters relating to alimony and maintenance of the wife and maintenance and custody of children may be agitated both after a decree of divorce as well as judicial separation.

Judicial separation and separate residence.—Under Section 18(2), Hindu Adoptions and Maintenance Act, 1956, a Hindu wife may, on certain grounds, live separate and claim maintenance from her husband. Two provisions are different though there is some superfluous resemblance between the two.[5] May be, in a given case, a wife does not want either divorce or judicial separation, yet she does not want to live with her husband. May be, no ground for divorce or judicial separation is available to her. If a ground for separate residence and maintenance is available to her under Section 18(2), Hindu Adoptions and Maintenance Act, a Hindu wife may sue for it. The remedy of judicial separation and remedy of separate residence and

1. *Mydeen* v. *Mydeen*, AIR 1951 Mad 992.
2. *Sadiya* v. *Ataullah*, AIR 1933 Lah 885; *Badrunissa* v. *Maffitulla*, (1871) 77 Bom LR 422.
3. *Abdul* v. *Husainbi*, (1904) 6 Bom LR 728; *Iman Ali* v. *Arafatanuisa*, (1913) 18 CWN 693; *Fatma* v. *Noor Md.*, ILR (1920) 1 Lah 597.
4. *Kusum* v. *Kampta*, ILR (1965) All 389.
5. *Rohani* v. *Narendra*, AIR 1972 SC 459.

maintenance are not the same. During the subsistence of decree of judicial separation, it is no longer obligatory on the parties to live with each other. But an order under Section 18(2) is not of the same quality. For instance, an order for separate residence and maintenance on the ground that the husband has a second wife living, will subsist only till the second wife is alive. If the second wife dies or marriage with her is dissolved, the other wife cannot insist to live separately.[1] A decree of judicial separation is a judgment *in rem* and will remain operative till it is rescinded, while this is not so in case of an order under Section 18(2).[2] A wife living separate under an order made under Section 18(2),[6] may choose to live with her husband at any time. She need not get the order rescinded. But for resumption of cohabitation by the parties judicially separated, it is necessary to get the decree rescinded. In judicial separation proceedings, the court has jurisdiction to make orders in ancillary proceeding for maintenance of spouses and custody, etc. of children and of settlement of matrimonial property. Under Section 18(2), only order that can be made is of maintenance of wife. Under the Hindu Marriage Act and the Special Marriage Act, if after a decree of judicial separation, parties have not resumed cohabitation for a period of one year, either party may seek divorce.[3] This cannot be done when parties are living separate under an order made under Section 18(2), Hindu Adoptions and Maintenance Act, even if parties have been living separately from each other for many many years.

Grounds of judicial separation.—In all systems of law, judicial separation is granted on some specified grounds. In some systems, grounds of judicial separation and divorce are the same, while in some they are different.

Under Section 10 of the Hindu Marriage Act, all the fault grounds for divorce are also the grounds of judicial separation.[4] This is also the position under Section 23, Special Marriage Act.[5] However, under the Special Marriage Act, there is an additional ground of judicial separation, *viz.*, a decree for restitution of conjugal rights has not been complied with.[6] Under Section 34, Parsi Marriage and Divorce Act also, all grounds of divorce are grounds for judicial separation.[7]

Under the Divorce Act, 1869, a decree of judicial separation may be obtained "on the ground of adultery or cruelty or desertion (without reasonable excuse)[8] for two years or upwards."[9]

Under Muslim law, there is no provision for a decree of judicial separation.

Since most of the grounds of judicial separation are the same, or akin to grounds of divorce, the same will be discussed in Chapter IX.

Decree of judicial separation in a petition for divorce.—Since judicial separation is a lesser relief than divorce, in a petition for divorce, the

1. *Annumalai* v. *Perumavee*, AIR 1955 Mad 139; *Rohani* v. *Narendra*, AIR 1972 SC 459.
2. *Godhabai* v. *Narayana*, (1972) MP LJ 10.
3. *See* S. 13(IA)(ii) of the former and S. 27(2) of the latter.
4. These are grounds laid down in sub-sections (1) and (2) of Section 13.
5. Fault grounds as laid down in sub-section (1) and (IA) of S. 27.
6. Section 23(1)(b).
7. Section 34.
8. Words "without reasonable excuse" omitted by Act 51 of 2001.
9. Section 22.

court has power to pass a decree of judicial separation instead of divorce, even though no such prayer is made in the petition. It may happen in a case that the petitioner has failed to establish the ground of divorce alleged by him though a ground for judicial separation is made out.[1] The Madras High Court has expressed the view that a petitioner may pray for lesser relief of judicial separation in a petition originally filed for divorce even at the appellate stage.[2] In *Chandra* v. *Suresh*,[3] an interesting situation arose. The petition for divorce was filed in January, 1966. The Divorce Court (additional District Judge) passed a decree of divorce on September 25, 1967. On appeal, the High Court converted the decree of divorce to a decree of judicial separation. On the letters patent appeal, the High Court said that the decree was effective from the date on which it was passed by the Divorce Court, and since by the time, the letters patent appeal came for hearing, a period of two years had elapsed since the passing of the decree of judicial separation, the petitioner was entitled to a decree of divorce under Section 13(1a)(ii), Hindu Marriage Act, 1956 (under the section, as it stood then, non-resumption of cohabitation for a period of two years or more entitle either party to sue for divorce. Now the period has been reduced to one year). This means that the court granted the divorce on a ground which was (and which could not have been taken, as then the ground did not exist) not taken in the original petition.

The Marriage Laws (Amendment) Act, 1976, has given statutory recognition to this power of the court under the Hindu Marriage Act,[4] and the Special Marriage Act.[5] But under the Hindu Marriage Act, if a petition for divorce is filed on the ground of change of religion, renunciation of world or presumption of death,[6] the court has no power to pass a decree of judicial separation in place of decree of divorce. Similarly, under the Special Marriage Act, the court has no power to pass a decree of judicial separation in a petition for divorce on the ground of presumption of death.[7]

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1. *Bhagwan* v. *Amar Kaur*, AIR 1962 Punj 144; *Vira* v. *Kishamma*, AIR 1969 Mad 235.
2. *Vira* v. *Kishtamma*, cited earlier.
3. AIR 1971 Del 208.
4. Section 13-A.
5. Section 27-A.
6. Clause (ii), (vi) and (vii) of Section 13(i).
7. Section 27-A.

Chapter 9

RESTITUTION OF CONJUGAL RIGHTS AND REMEDY FOR BREACH OF DUTY TO COHABIT

INTRODUCTORY

Hindu law and English Common law have been wedded to the notion that on marriage husband and wife become one. Hindus categorically laid down that wife was *ardhangni*, half of the husband. The Hindu sages enjoined that every Hindu must marry, since before marriage a man was incomplete; it was on marriage that he completed himself. But the Hindu did not take the notion of fusion of personality of husband and wife to the extent as to lay down that on marriage, wife's chattels and other assets become that of the husband, as was the position under English Common law. The peculiar fall out of the common law doctrine of unity of personality was that one spouse could not sue the other. Similarly, though consortium has been likened to the right attached to ownership, in one important respect, this analogy breaks down as the duty to cohabit, as between the spouses, is legally unenforceable. The result was that the only remedy that a deserted spouse had against the other was the petition for restitution of conjugal rights.[1]

Like many other anachronistic remedies, the restitution of conjugal rights dates back to the feudal England, where marriage was considered a property deal, and wife was part of man's possession like other chattels. Wife was treated like a cow, if ran away from master's shed, could be roped back. It is a remarkable feature of English law that many anachronistic common law actions were abolished in other spheres, but they survived in matrimonial

1. Originally, petitions for restitution of conjugal rights lay in the Ecclesiastical Court. In 1858, these were transferred to Divorce Court and in 1875 to the High Court. If the decree for restitution was disobeyed, the respondent could be ex-communicated; this was abolished in 1813 and was replaced by the power to commit for contempt by the Ecclesiastical Courts Act, 1813; and this was in turn abolished by the Matrimonial Causes Act, 1884. This meant that there was left no direct sanction against the failure to comply with the decree. The Act of 1984 provided that failure to comply with the decree of restitution of conjugal rights entitled the other party to sue for judicial separation. The wife could sue for divorce if the husband had also committed adultery. A decree for restitution of conjugal rights was also used by the wife to pray for ancillary order for maintenance. But the Law Reform (Miscellaneous Provisions) Act, 1949, rendered the use of restitution decree redundant as maintenance could be claimed directly by a petition to the High Court. Non-compliance to a decree of conjugal rights amounted to constructive desertion and after a lapse of the period of two years enabled the other party to sue for divorce or judicial separation. But the remedy of restitution had become a complete anomaly and was eventually abolished by the Matrimonial Proceedings and Property Act, 1970.

law and from there, were transplanted in the colonies.[1] Restitution of conjugal rights is a remedy which was made available to members of all communities at a very early period of the British rule in India. In India, a decree for restitution of conjugal rights can still be executed by attachment of respondent's property.[2] In modern India, the remedy is available to Muslims under general law, to Hindus under Section 9, Hindu Marriage Act, to Christians under Section 32, Divorce Act and to Parsis under Section 36, the Parsi Marriage and Divorce Act and to persons marrying in the civil form under Section 22, Special Marriage Act. Except under Muslim law, a decree for restitution of conjugal rights enables the wife (under Hindu and Parsi law, husband or wife) to claim maintenance as an ancillary relief under the Hindu Marriage Act and the Special Marriage Act, and Parsi Marriage and Divorce Act, it entitles either party to sue for divorce if decree of restitution is not complied with for a period of one year or more.[3] The remedy, which has been rightly called worse tyranny and worst slavery, should be, it is submitted, abrogated from the Indian law.

The provisions of Restitution of Conjugal Rights

The provisions for restitution of conjugal rights are identical in the Special Marriage Act and the Hindu Marriage Act. Section 9 of the latter runs as under :

> When either the husband or the wife has without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the District Court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.
>
> *Explanation.*—Where a question arises, whether there has been reasonable cause for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn

1. For instance, the common law action for damages for the tort of criminal conversion was abolished in 1857, but it survived in Matrimonial law as an action for damages for adultery *per se* against the correspondent in husband's petition for divorce on the ground of wife's adultery. The husband could sue for damages whenever wife was tortuously injured as he had interest in his wife's service and consortium, these being his quasi-proprietary rights. But the wife had no such remedy in the converse case. The Law Reform Committee has recommended that "where a husband or wife is tortuously injured, the other spouse should be able to recover reasonable medical and nursing expenses and all other costs properly incurred in consequence of injury, such as reasonable visits to hospital and reasonable cost of providing domestic help to replace the injured partner." The Law Commission has similarly recommended the abolition of action for loss of services and consortium and its replacement by a claim for compensation for financial loss suffered by the plaintiff as a result of tort committed to a third person. Similarly, the tort for enticement, seduction and harbouring which were virtually primitive remedies survived much longer. Action for breach of contract to marry was a fertile field for gold diggers and blackmailers. These remedies have been abolished in English Court by the Law Reform (Miscellaneous Provisions) Act. But most still survive in India.
2. Order 21, Rule 32, Civil Procedure Code, 1898.
3. Section 13(IA) of Hindu Marriage Act; Section 27(2) of Special Marriage Act and Section 32-A (i)(ii) of Parsi Marriage and Divorce Act.

from the society.[1]

The provision has been worded differently in the Parsi Marriage and Divorce Act from the Hindu Marriage Act and the Special Marriage Act. Section 36 runs as under :

> Where a husband shall have deserted or without a lawful cause ceased to cohabit with his wife, or where a wife shall have deserted or without lawful cause ceased to cohabit with her husband, the party so deserted or with whom cohabitation shall have so ceased may sue for the restitution of his or her conjugal rights and the court, if satisfied of the truth of the allegations contained in the complaint and that there is no just ground why relief should not be granted, may proceed to decree such restitution of conjugal rights accordingly.

The provision is somewhat different under the Divorce Act and reflects the state of the then English law of Restitution. The provision is contained in sections 32 and 33 which runs as under :

> When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, either wife or husband may apply by petition to the District Court (or the High Court)[2] for restitution of conjugal rights, and the court on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted may decree restitution of conjugal rights accordingly.

Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which would not be a ground for a suit for judicial separation or for a decree of nullity of marriage.[3]

Under Muslim law, Tayabji's formulation of the remedy is as under :

> Where either the husband or wife has, without lawful ground withdrawn from the society of the other, or neglected to perform the obligations imposed by law or by the contract of marriage, the court may decree restitution of conjugal rights, may put either party on terms securing to the other the enjoyment of his or her legal rights.[4]

In this language if we substitute the words "without reasonable cause" for "without lawful ground", the remedy of restitution of conjugal rights becomes more or less at par with the remedy under other personal laws; moreover, in most of the cases coming under the Muslim law, the courts have used this expression.

It is submitted that under all the personal laws, for restitution of conjugal rights, the following conditions must be satisfied :

A. that respondent has withdrawn from the society of the petitioner,
B. that withdrawal is without any reasonable cause or excuse,
C. that the court is satisfied about the truth of statement made in such petition, and
D. that there is no legal ground why relief should not be granted.

1. *See* Section 22 of the Special Marriage Act.
2. Words "or the High Court" removed by Act 51 of 2001.
3. Section 33.
4. Tayabji, *Muslim law*, Section 87, Page 103 (1968).

Restitution pre-supposes valid marriage.—It is a well established proposition that if a valid marriage does not exist between the parties, no decree for restitution of conjugal rights can be passed. But once the factum of a valid marriage is established, everything necessary for the validity of the marriage, such as capacity to marry and performance of requisite formalities of marriages, would be presumed.[1]

Withdrawal from the society and desertion.—The expression "withdrawal from society" means cessation of cohabitation by a voluntary act of the respondent. It means withdrawal from conjugal relationship. The word "society" here means the same thing as cohabitation. Thus, it is withdrawal from the totality of conjugal relationship, such as refusal to live together, refusal to have marital intercourse, and refusal to give company and comfort. In short, it is total repudiation of marital togetherness, marital two-in-oneship. Rejection by one of the relationship coupled with difficulties of normal affection does not amount to withdrawal from the society.[2] In withdrawal from the society, there is an element of desertion also. Desertion by one spouse of the other would obviously amount to withdrawal from the society. However, to establish withdrawal from the society, it is not necessary to prove legal desertion. What is required to be established is the total repudiation of cohabitation. Obviously, while the spouses are living together, mere refusal to have sexual intercourse does not amount to withdrawal from the society.[3] In a petition for restitution, it is not necessary to show that spouses were cohabiting earlier, even if spouses did not cohabit at all, the cause of action arises, once intention not to cohabit is established.[4] If one of the spouses refuses to cohabit with the other, it is not necessary to show that the consummation of marriage has taken place. Even when parties are living together under the same roof, refusal to cohabit would give a cause of action for a petition for restitution.[5]

The question of "withdrawal from the society" has come in an interesting manner in several cases in the situation where both spouses were employed and, per force, were living at two different places. They have arrangements under which whenever possible (either on holidays or by taking leave), spouses visited and lived together for as long as was possible either at husband's place or at wife's place, and in this way they continued to live together. But when for some reason or some misunderstanding relationship soured, the husband asked the wife to resign or give up her job and join him at the place he was living. On wife's refusal to oblige him, he filed a petition for restitution alleging that she had withdrawn from his society, some courts passed the decree for restitution in favour of the husband holding that the matrimonial home being the place where husband has established himself, matrimonial home being the place where husband has established himself, the wife must join him there, otherwise it would be deemed that she had withdrawn from the society of her husband.[6] Sandhawalia, C.J. called such

1. *Parkash* v. *Parmeshwari*, AIR 1987 P & H 37; *Sridhar* v. *Kalpana*, AIR 1987 Cal 213.
2. *Mauveer* v. *Mauveer*, (1972) 1 All ER 289.
3. *Weatherby* v. *Weatherby*, (1947) I All ER 563.
4. *Venugopal* v. *Laxmi*, AIR 1936 Mad 288.
5. *Ibid*; *See* also *Smith* v. *Smith*, (1939) 4 All ER 533; *Wilkies* v. *Wilkies*, (1943) I All ER 433.
6. *Tirath Kaur* v. *Kirpal Singh*, AIR 1964 Punj 28; *Surinder* v. *Gurdeep*, AIR 1973 P & H 134; *Gaya* v. *Bhagawati*, AIR 1960 MP 212

living together decisively as "weekend marriages."[1] But some High Courts expressed a different view and held that mere refusal to resign the job will not amount to withdrawal from the society.[2] It is submitted that in days of equality of sexes, the former category of judgments are wrong. Further, there is also misinterpretation of the word "cohabitation." (See Chapter 6, pp. 72-90 for the meaning of "Cohabitation").

In our submission, withdrawal from the society of the petitioner means cessation of cohabitation by a voluntary act of the respondent. Cohabitation means living together as husband and wife in the circumstances as they exist. If parties are forced to live separately because of the requirement of their employment, but meet together whenever circumstances permit, they are cohabiting. In such situations, the matrimonial home is at two places, the place where husband is living and the place where wife is living.

Where the husband dumped his wife at her father's house and thereafter totally neglected her, it was held that husband had withdrawn from the society.[3] Withdrawal from the society is total cessation of cohabitation. Mere refusal to have sexual relationship while parties are living together does not amount to withdrawal from the society.

For a petition for restitution, it is not necessary to show that parties were earlier cohabiting but later on ceased to do so, where there has been no cohabitation at all between the parties, petition for restitution is maintainable.[4]

It is not a valid defence to a petition for restitution that there has been a pre-marriage or post-marriage agreement to live separately.[5] Similarly, the pre-marriage agreement under which the husband agreed to live at the house of wife's parents as *Khana damad*, is no defence to husband's petition for restitution.[6] However, when parties are living separately under a valid separation agreement, one cannot be said to have withdrawn from the society of the other, or in desertion.[7] If one party has obtained a decree for restitution, the other cannot obviously sue for restitution.[8]

Reasonable excuse or reasonable cause.—Under all the matrimonial laws, whenever withdrawal from the society of petitioner is shown to be with "reasonable cause" or "reasonable excuse", it is complete defence to a petition for restitution of conjugal rights.

Section 33 of Divorce Act specifically lays down that only that may be pleaded against a petition for restitution of conjugal rights which is a ground for nullity of judicial separation. The other three matrimonial statutes use the expression "lawful cause" or "reasonable excuse." A ground for any matrimonial cause is obviously "a reasonable excuse." But "a reasonable excuse" need not be equivalent to a ground for a matrimonial cause.

1. *Kailashwati*, ILR (1977) P & H 642 (FB).
2. *Shanti* v. *Romesh*, (1971) ALJ 63; *Pravinben* v. *Sureshbhai*, AIR 1975 Guj 69; *N.R. Radha Krishan* v. *Dhanalakshmi*, AIR 1975 Mad 333; *Mirchumal* v. *Devi*, AIR 1977 Raj 114.
3. *Sushila* v. *Prem*, AIR 1986 MP 225.
4. *Venugopal* v. *Lakshmi*, AIR 1936 Mad 288; *Saba* v. *Lalit*, AIR 1985 P & H 349.
5. *Brodie* v. *Brodie*, (1971) P 271; *Bai Fatima* v. *Ali Md.*, (1912) 14 Bom LR 178.
6. *Pother* v. *Pother*, AIR 1965 AP 40.
7. *A.E. Thirumal* v. *Rajaram*, AIR 1968 Mad 201.
8. *P.V.P. Sharma* v. *P. Seshalakshmi*, AIR 1975 AP 239.

"Reasonable excuse"[1] may mean much less than a ground of a matrimonial cause. Any matrimonial misconduct which is grave and weighty will amount to reasonable excuse. In sum, the following will amount to reasonable excuse :

(a) a ground for relief in any matrimonial cause,

(b) a matrimonial misconduct not amounting to a ground of a matrimonial cause, yet sufficiently weighty and grave, or

(c) such an act, omission or conduct which makes it impossible for the respondent to live with the petitioner.

The defences coming under (a) are obvious cases.[2] Thus, for instance, if it is established that the petitioner is related to the respondent within degrees of prohibited relationship, or if petitioner is impotent or is guilty of cruelty, the petition for restitution will be dismissed.[3] The cases coming under (b) and (c) may be illustrated from some decided cases. Thus, husband's persistence that wife must live with his parents,[4] wife's reasonable apprehension that it would be unsafe to live with her husband,[5] husband's insistence[6] that the vegetarian wife should eat meat and drink wine, husband having another wife,[7] wife's nagging by husband's parents,[8] husband's keeping a concubine[9] or addiction to drinks or drugs accompanied by conduct dangerous to oneself or others,[10] husband's acts of physical violence (not amount to cruelty),[11] husband's false accusation of adultery or unchastity against the wife,[12] husband's overbearing, domineering and dictatorial conduct,[13] husband's extravagance in living and husband's persistent friendship with a member of opposite sex[14] amounts to reasonable excuse. If a husband tries to persuade his wife to have sex with his friend and on account of that she withdraws from his society,[15] it is reasonable cause.

In some cases, it has been held that it would amount to reasonable

1. For instance, *see Annapunamma* v. *Poparao*, AIR 1963 AP 312; *Kuppa* v. *Kuppa*, AIR 1975 AP 3; *Robrani* v. *Ashit*, AIR 1965 Cal 163; *Jagdish* v. *Shyama*, AIR 1966 All 150. In some cases an attempt was made to give wider interpretation to "reasonable cause" *Gurdev* v. *Sharma*, AIR 1959 Punj 162; *Madan* v. *Sarla*, 1966 PLR 177; *Santosh* v. *Mahar*, 1966 PLR 73; *Shakuntala* v. *Babu Rao*, AIR 1963 MP 10; *Ramkali* v. *Sewa Singh*, 1969 Del LT 519; *Shanti* v. *Balbir*, AIR 1971 Delhi 249; *Rajoy* v. *Aloka*, AIR 1969 Cal 477; *Rama Rao* v. *Krishnamani*, AIR 1973 Mad 279.
2. *Pushpa* v. *Vijai*, AIR 1994 All 216; *Himanshu* v. *Tapati*, AIR 1995 Cal 110 (cruelty as defence must be proved).
3. *Safia* v. *Zaheer*, AIR 1947 All 16; *Sakia* v. *Gulem*, AIR 1971 Bom 166.
4. *Jaindra* v. *Sivacharan*, AIR 1965 J & K 59.
5. *Shanti* v. *Balbir*, AIR 1971 Delhi 294.
6. *Chandra* v. *Saroj*, AIR 1975 Raj 88.
7. *Bhagwato* v. *Sadhu*, AIR 1961 Punj 181; *Mallappa* v. *Meelawwa*, AIR 1970 Mys 59. But *see Rohni* v. *Narendra*, AIR 1972 SC 459.
8. *Rabindra* v. *Ramial*, AIR 1979 Ori. 85.
9. *Anis* v. *Md. Istafa*, ILR (1933) 55 All 743; *Samraj Anraham* v. *Nachachi*, AIR 1970 Mad 434.
10. *Beer* v. *Beer*, (1909) 94 LT 704 (English case).
11. *Butand* v. *Butand*, (1913) 29 TLR 729 (English case).
12. *Bai Jammuna* v. *Dayalji*, (1920) 22 Bom LR 241; *Husani* v. *Rustom*, ILR (1906) 29 All 222; *Maqboolan* v. *Raman*, AIR 1927 Oudh 154.
13. *Timmus* v. *Timmus*, (1953) 2 All ER 187 (English case).
14. *Russel* v. *Russel*, (1835) 2 All ER 187 (English case); *Kempt* v. *Kempt*, (1953) 2 All ER 553 (English case).
15. *Leelamma* v. *Dilip*, AIR 1993 Ker 97.

excuse, if the petitioner is guilty of such conduct or act which makes it impossible for the respondent to live with the petitioner.[1] However, a conduct or act on the part of the petitioner which makes it impossible for the respondent to live happily with the petitioner would amount to reasonable excuse.[2] Restitution will be refused where the petition is not bona fide or filed with an ulterior motive, such as to take possession of wife's property,[3] or where the court feels that passing of the decree will not be just, reasonable or equitable.[4] In cases coming under Muslim law, the courts have observed that the failure of the husband to perform marital obligations arising either by operation of law or under marriage-contract is a good defence to husband's petition for restitution.[5] In *Itwari* v. *Asghari*,[6] the court said that the very act of taking a second wife constitutes cruelty, even though polygamy is recognized by the personal law. Similarly, restitution will not be granted where wife is living separately from her husband on account of non-payment of dower[7] or where sexual intercourse between the parties has become illegal such as after *lian* or *zihar*. Petitioner's apostasy also disentitles him to a decree of restitution.[8] The modern approach to restitution is thus summed up in a case under the Muslim law (it is submitted that this observation is equally valid under other personal laws) by Venkataramiah, J :

> It has to be borne in mind that the decision in a suit for restitution of conjugal rights does not entirely depend upon the right of the husband. The court should also consider whether it would make it equitable for it to compel the wife to live with her husband. Our notion of law in that regard have to be altered in such a way as to bring them in conformity with modern social condition.[9]

Equally apt is the observation of Vaidya, J. The learned judge observed :

Restitution of conjugal rights is a relic of ancient times when slavery or quasi-slavery was regarded natural.....and this barbarous remedy should be sparingly awarded, particularly after the Constitution of India came into force, which guarantees personal liberty and equality of status and opportunity to men and women alike.[10]

In *Sadhu Singh* v. *Jagdish*,[11] the Punjab and Haryana High Court observed that reasonable excuse is something less than a justification and something more than a mere whim, a fad or brainwave. Following English decision, the Indian courts have taken the view that the act or omission or conduct amounting to reasonable cause must be something grave and weighty or grave and convincing.[12]

1. *Gurdeveo* v. *Sarwan*, 1960 PLR 744; *Trilok* v. *Savitri*, AIR 1972 All 52.
2. *Baboo Ram* v. *Sushila*, AIR 1964 MP 73.
3. *Hamid* v. *Kunra*, ILR (1918) 40 All 332 *Solomen* v. *Chandriah*, (1968) 1 MLJ 289.
4. *Raj Md.* v. *Amina*, AIR 1976 Kant 200.
5. *Bazul-ul-Raheem* v. *Shunsoonisa*, (1867) 11 MLA 551; *Sofia* v. *Zaheer*, AIR 1947 All 16; *Wahi* v. *Taz Roao*, ILR 1960 AP 293.
6. AIR 1960 All 694.
7. *Ibid.*
8. *Nogroz Ali* v. *Azizbibi*, (76) FR 235 19; *Amin* v. *Sawan*, ILR (1910) 33 All 90; *Aia Jina* v. *Kherwa*, ILR (1907) 31 Bom 366.
9. *Raj Md.* v. *Amina*, AIR 1976 Kant 200 at 202.
10. *Shakila* v. *Gulam*, AIR 1971 Bom 166 at 170.
11. AIR 1967 Punj 139.
12. *Shyamlal* v. *Saraswati*, AIR 1967 MP 204; *Satya* v. *Ajai*, AIR 1973 Raj 20.

Burden of Proof.—It appears to be now established law that once the petitioner has proved that the respondent has withdrawn from the society of the respondent, the burden of proof that the withdrawal is for a reasonable cause is on the respondent.[1] This has been made clear by adding Explanation to S. 9 of Hindu Marriage Act and S. 22 of Special Marriage Act.

This means that initial burden to prove that the respondent has withdrawn from the society of the petitioner is on the petitioner, and once that burden is discharged, it is for the respondent to prove that there is a reasonable excuse to do so.[2]

There is no legal ground why petition should not be granted.—This relates to bars to matrimonial relief.

Constitutional validity of Section 9 of Hindu Marriage Act.—In *T. Sareetha* v. *T. Venkatasubah*,[3] Chaudhary, J. took the view that Section 9 was constitutionally violative of right to human dignity and privacy. Avadh Bihari Rohatgi, J. took a different view in *Harvinder Kaur* v. *Harmander Singh*. The Supreme Court has taken the same view as Rohatgi, J.[4]

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1. *Jyothi Pai* v. *P.N. Pratap Kumari*, AIR 1987 Kant 23; *Bittoo* v. *Ramdas*, AIR 1983 All 371.
2. *Atma Ram* v. *Narbada*, AIR 1980 Raj 35.
3. AIR 1983 AP 356.
4. AIR 1984 SC 1562.

PART V
MATRIMONIAL CAUSES : DIVORCE

Chapter 10

DIVORCE WITHOUT THE INTERVENTION OF THE COURTS

INTRODUCTORY

Unilateral Divorce—Muslim Law

Despite the precept of the Prophet, "Oh, Allah, the most detestable of all permitted things is divorce", divorce is the most copious and uninhibited aspect of Muslim matrimonial law. Another remarkable feature of Muslim law of divorce is that in most cases, no judicial or non-judicial authority is needed to effect dissolution of marriage.[1]

Non-judicial divorce under Muslim law may be classified as under :

I. Unilateral divorce by husband. It is called *Talak*. *Talak* may take the following forms :

(i) Express *talak*

(ii) Implied or contingent *talak*.

(iii) Delegated divorce, *talak-i-tafweez*.

(iv) Divorce by mutual consent : (This would be discussed in Chapter 12 of this work) : This has two forms :

(a) *Khul*, and

(b) *Mabaraa*.

Unilateral Divorce—Talak

It is a unique aspect of Muslim law that husband has the unilateral power of pronouncing divorce on his wife without assigning any reason, without any cause, literally at his whim, even in a jest, or in a state of intoxication, and without recourse to the court or any other judicial, administrative or familial authority, when no one is present (though Shia law requires two witnesses), and even in her absence, by just uttering the formula of *talak*. In short, it is his unilateral act. This form of divorce is recognised in modern India. All schools of the Sunnis and Shias recognize it. Abdur Rahim gives its rationale thus : with a view to regulating marital relations, Muslim law assigns predominant position to the husband, "because, generally speaking, he is mentally and physically superior of the two."[2] The real reason seems to be that in the then prevailing anarchic social conditions in the Muslim world, where a wife could be given up in a joke, it was the only feasible regulation of marital relations. What is sad is that it has survived in

1. Judicial divorce was introduced only in 1939 by the Dissolution of Muslim Marriage Act of that year and under the Act only wife can sue for divorce.
2. *Muslim Jurisprudence*, 327.

modern India where we proclaim equality of sexes and enjoin the State to make special provisions for ameliorating the lot of women. In *Hannefa* v. *Pathummal*,[1] the judicial conscience of Khalid, J. was disturbed and he called it "monstrosity."

Of the four modes of *talak*, the Shias recognize only express *talak* and delegated *talak*. The Sunnis recognize all the four forms.

Express Divorce.—When husband uses clear and unequivocal words such as "I have divorced thee", the divorce is express. The express *talak* falls into two categories :

(a) *talak-i-sunna* (approved divorce), and (b) *talak-ul-badai* or *talak-un-biddat* or *talak-ul-bidda* (unapproved divorce). The basic distinction between the two is that in the former case, the pronouncement for divorce is revocable, that is why it is called approved divorce, while in the latter, it is irrevocable. *Talak-i-sunna* has two forms : (i) *ahasan*, and (ii) *hasan*. The former is most approved and the latter is just approved. *Talak-ul-badai* also has two forms :

(i) triple divorce or three pronouncements at one time, and

(ii) one irrevocable pronouncement.

Ahasan talak.—*Ahasan talak* consists of a single pronouncement of divorce made in a period of *tuhr* (purity, i.e., period between two menstruation courses), or at any time if wife is free from menstruation, followed by abstinence from sexual intercourse during the period of *idda*. The requirement that pronouncement of *talak* should be made during a period of *tuhr* applies to oral divorce, but does not apply to *talak* in writing.

The advantage of this form is that the divorce can be revoked at any time before the completion of the period of *idda*. Thus, hasty, thoughtless divorces may be prevented. Revocation of divorce may be made expressly or impliedly. Thus, if, before the completion of period of *idda*, husband resumes cohabitation or sexual intercourse with his wife, or says to her "I have retained thee", the divorce is revoked. It is the revocable aspect of *talak-i-hasan* which makes it the popular and approved form of divorce.

Hasan talak.—In *hasan* form of *talak*, the husband pronounces the formula of *talak* (i.e., "I divorce thee") three times during three successive *tuhrs*. If the wife is not menstruating, the pronouncement of *talak* may be made after the interval of a month or thirty days. When the third pronouncement is made, *talak* becomes final and irrevocable. It is necessary that each of three pronouncements should be made when no intercourse has taken place during that period of *tuhr*. Thus, W, a wife, is having her period of *tuhr*, H, the husband, without having any sexual intercourse with her, says to her, "I have divorced thee." This is first pronouncement. Thereafter the husband resumes marital intercourse with her or revokes pronouncement by express words, such as, "I have retained thee." Then in the next period of *tuhr*, when no intercourse has taken place, he again pronounces divorce on her, "I have divorced thee." This is second pronouncement. H again resumes sexual intercourse with her or revokes the *talak* by express words. When W again gets her period of *tuhr*, H, without intercoursing with her, makes the

1. 1972 KLT 52.

pronouncement, "I have divorced thee." This is the third pronouncement. The moment he utters it, the marriage stands dissolved irrevocably, irrespective of *idda*. The significance of this mode of divorce can be understood only in the context of the then prevailing practice in the pre-Islamic Arbia where the husband could endlessly pronounce divorce and revoke it. The Prophet laid down that on third pronouncement, the marriage would stand dissolved. A further deterrent was imposed on this practice by laying down that parties were not free to remarry again unless the wife married another man with whom marriage was actually consummated and then the marriage was dissolved. On the completion of *idda*, the woman was free to remarry her former husband. This was probably meant as a penal provision to chastise the husband who repudiated his wife. No thoughts were wasted on the fact that it was a greater punishment and humiliation to the woman.

Talak-ul-bidda.—The *talak-ul-bidda*, which came into vogue during the second century of Islam, has two forms : (i) triple pronouncement of divorce made in a period of *tuhr*, either in one sentence, such as, "I divorce thee" triply or in three sentences, "I divorce thee", "I divorce thee", "I divorce thee". On the third pronouncement, the marriage stands dissolved irrevocably. (ii) A single irrevocable pronouncement of divorce made in a period of *tuhr* or even otherwise. In this form husband may say to his wife, "I have divorced thee in *talak-ul-bidda* form." It also results in dissolution of marriage irrevocably.[1] In this form also, remarriage can take place only when wife undergoes an intermediate marriage as in *hasan talak*. In this form of *talak*, the Supreme Court has held that *talak* to be effective has to be pronounced. The term "pronounced" means to proclaim, to utter formally, to utter rhetorically.[2]

A "*fatwa*" has been pronounced that Indian Muslims should not take recourse to this form of divorce.

Talak-ul-bidda in any form is not recognized among the Shias.

Implied and Contingent talak.—Sometimes the words used in the pronouncement of talak are not clear, such as when husband says to his wife, "I give up all relations with you and shall have no connection of any sort with you," or "I have released thee from being my wife." In these cases, the divorce will be implied if intention to divorce is clearly expressed.

When *talak* is pronounced so as to be effective on the happening of a future event, the divorce becomes effective on the happening of the event. This is known as contingent divorce. But repudiation cannot be qualified with an option. If a husband says to his wife, "I have divorced thee but I reserve to myself an option for three days,"[3] the *talak* will be valid and option will be void.

Hamad Ali v. *Imtiazan*[4] is a good illustration of both implied and contingent divorce. In this case, when wife insisted on going to her father's house, husband said to her "Thou art my cousin, my paternal uncle's daughter, if thou goest." But the wife left for her father's house. The words used by the husband constitute implied divorce, while wife's going to her father's house constitute the contingent event. It was held that this amounted

1. *Sheikh Fazher* v. *Aisa*, ILR (1929) 8 Pat 690; *Salema* v. *Sheikh*, AIR 1973 MP 207.
2. *Shamim Ara* v. *State of Uttar Pradesh and another*, AIR 2002 SC 3551.
3. See *Baschoo* v. *Bismillah*, AIR 1936 All 387; *Mirian* v. *Maimma*, AIR 1949 Assam 14.
4. ILR (1873) 2 All 73.

to *talak*.

The Shias do not recognize implied and contingent divorce.

Delegated *talak* or *talak-i-tafweez*.—Delegated divorce is recognized among both the Shias and the Sunnis. Muslim husband has the right to delegate his power of *talak* on his wife or on any other person. He may delegate the power absolutely, conditionally, temporarily or permanently. A permanent delegation of power is, but a temporary delegation of power is not revocable. The words used and the person designated in the delegation of power must be clear and certain.

Since under Muslim law, wife has no power to divorce her husband, it was the only way wife could obtain such a power, and, in fact, in the hand of the Muslim wife this became a very potent weapon to obtain freedom. Sometimes, in pre-nuptial agreements, this is included as one of the terms. Usually it is stipulated that if the husband took a second wife (this is how an attempt is made to prevent polygamy) or treated her with cruelty, the wife will have the option to pronounce divorce on herself. Such agreement has been held valid.[1] *Talak-i-tafweez* merely gives the wife an option to pronounce *talak* on herself on the happening of the stipulated event; it is for her to exercise or not to exercise the option. The happening of the stipulated event does not result in automatic divorce.[2] The wife may exercise the power whenever she wants even subsequently to the filing of suit for restitution by the husband.[3]

When the power is delegated to the wife under a pre-marriage or post-marriage agreement, it is not revocable.

Constructive divorce—*Ila and Zihar*.—The constructive divorce has almost become obsolete in India. In *Ila*, husband swears that he will have nothing to do with his wife and abstains from her society for a period of four months. On the expiry of the period of four months, marriage stands dissolved. In *Zihar*, upon the husband expressing his dissatisfaction with his wife by comparing her with the back of her mother or any other woman within the degrees prohibited relationship, the wife acquires a right to refuse cohabitation with him till he performs a penance, and if the husband refuses to perform penance, she has right of judicial divorce.

Capacity to pronounce divorce.—All schools of Muslims agree that *talak* can be pronounced only by a person of sound mind and who has attained puberty. A minor or a person of unsound mind has no capacity to pronounce *talak*.

The most curious aspect of the Hanafi law of *talak* is that divorce pronounced under compulsion, to please one's father or some other person or in jest is valid.[4] The Shia law does not recognize a divorce pronounced under compulsion or undue influence or obtained by fraud. The Malikis and the Shafiis also do not recognize a *talak* pronounced under compulsion or threat. Among the Hanafis, there is some controversy as to whether a *talak*

1. *Md. Khan* v. *Shanbai*, AIR 1972 J & K 8; *Hamidoola* v. *Faizunissa*, ILR (1882) 8 Cal 327; *Maharan Ali* v. *Ayesha*, (1915) 19 CWN 1226; *Saida* v. *Ata*, AIR 1933 Lah 885; *Marfatali* v. *Jabedaunnessa*, ILR (1941) 1 Cal 401.
2. *Ayatunnissa* v. *Karamatali*, ILR (1909) 36 Cal 23.
3. *Sainddin* v. *Latifunessa*, ILR (1919) 46 Cal 141.
4. *Ibrahim* v. *Ehayetur*, (1869) 4 Beng LR 13; *Reshid* v. *Anisha*, (1932) IA 21.

pronounced under intoxication is valid.[1] In India, it seems to be the established view that *talak* pronounced under voluntary intoxication is valid. The Shias and the Malikis do not recognize any *talak* pronounced under intoxication.

All schools of Muslims agree that a *talak* pronounced by one who happens to be delirious, or in a faint or in sleep, or unconscious or lost in astonishment is invalid. But a dumb person may pronounce divorce by signs, but if he is literate, he should do so in writing.[2]

Formalities of talak.—No schools of Sunnis prescribe any formalities for *talak*. But the Shias insist that divorce must be pronounced orally and in the presence of two competent witnesses, and the specific formula of divorce must be pronounced. They also insist that *talak* should be oral, unless the husband is physically incompetent to pronounce it orally. Among the Hanafis, *talak* may be oral or in writing,[3] and any words may be used, though intention to pronounce divorce should be clearly expressed.[4] Even when husband pronounces *talak* during wife's proceedings for maintenance or restitution of conjugal rights, it will result in dissolution of marriage.[5] This is how the husband always succeeded in frustrating wife's claim of maintenance. Section 125, Cr. P.C. now includes a "divorced wife" within the meaning of the term "wife." But their work has now been superseded by the Muslim Women (Protection of Rights on Divorce) Act, 1986. (See Chapter 28 of this work).

Neither a notice of *talak* nor the presence of wife is required;[6] nor is it necessary that it should be addressed to the wife, but the wife must be named.[7]

Although the presence of the wife at the time of *talak* is not necessary, for certain purposes, communication of *talak* is necessary.[8]

A Sunni husband may also make a written acknowledgement of divorce, in which case, the divorce is operative, at least, from the date of acknowledgement.[9]

Customary Law

Among Hindus, customary divorce is still recognized. Section 29(2), Hindu Marriage Act, runs as under :

"Nothing contained in this Act shall be deemed to affect any right

1. *Ibrahim* v. *Inaytur*, (1869) 4 Beng LR 13.
2. See Ameer Ali, Vol. II, 484 : *See* Mulla, 302 (17th Ed.).
3. *Sattar Sheikh* v. *Sahidunnissa*, 1969 ALJ 415.
4. *Ghansi Bibi* v. *Gulam Dastgir*, (1968) 1 Mys LJ 506; *Hamid Ali* v. *Intiazali*, AIR (1878) 2 All 71; *Wazid* v. *Zafar*, AIR 1932 Oudh 34.
5. *Chunnoo Khan* v. *State*, (1967) All WR 217; *Abdul Shakkoor* v. *Kulsum*, (1962) 2 Cr LJ 247; *Ali* v. *Rehmani*, (1972) 74 PLR 869; *Md. Haneefa* v. *Pathemmal*, 1972 KLR 512.
6. *Md. Samsuddin* v. *Noor Jahan*, AIR. 1955 Hyd 144.
7. *Ma Mi* v. *Kallandar*, (1927) 54 IA 61; *Ahmed* v. *Khatoon Bibi*, AIR 1933 27; *Fulchand* v. *Nazir*, AIR (1909) 36 Cal 184; *Sarabai* v. *Rubia Bai*, (1900) 536; *Monoh* v. *Moidun*, (1968) MLJ 660; *Rasid* v. *Anisa*, (1932) 59 IA 21; *Bibi* v. *Kadia*, ILR (1909) 33 Mad 22.
8. *Foolchand* v. *Nazib*, (1909) 36 Cal 184 (dower becomes due and *idda* is to be performed on dissolution of marriage); *Kathyaunnissa* v. *Urithel*, (1931) 1333 IC 375 (for the period of limitation for deferred dower).
9. *Asmat* v. *Khatunnissa*, AIR 1939 All 592.

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."

Before the coming into force of the Hindu Marriage Act, 1955, Hindus could obtain divorce only if a custom governing them allowed it. The Hindu Marriage Act preserves customary divorce, and to customary divorces, no provision of the Hindu Marriage Act applies. Section 11 (fair trial rule). S. 23 (bars to matrimonial relief), Section 15 (bar to remarriage), Sections 24 and 25 (maintenance and alimony), and Section 26 (custody of children) do not apply to customary divorces. The fact of the matter is that among most of the low caste Hindus, divorce has always been available under custom; with them sacramental character of marriage was a form without any substance. However, there is no general custom of divorce among Hindus. It varies from caste to caste, from place to place. Whenever customary divorce is claimed, it is to be established that parties are governed by custom. Customary divorce can still be obtained the same way as they were obtained before the coming into force of the Hindu Marriage Act. Under customary law, divorce may be obtained through the agency of *gram panchayat*,[1] caste tribunal or caste *panchayat*, by private act of parties, orally, in writing, such as by *tyaga-patra* of *farkat-nama*.[2] A custom permitting divorce must fulfil all the requirements of a valid custom. A custom permitting divorce at the unilateral wish of one party without the consent of the other is void, being unreasonable and against public policy. Custom in case of customary divorce ought to be pleaded and established as it is an exception to the general law of divorce.[3]

Under customs, various modes of divorce are recognized. Divorce may be obtained by mutual consent of the parties, sometimes divorce is given by husband or wife on flimsy grounds. It is difficult to classify different modes of divorce recognized under custom. Here some illustrative cases are discussed.

Renunciation, abandonment or repudiation.—Among several tribes and castes, particularly among the Jats, a husband has the power to repudiate the marriage. Immediately on repudiation, the wife is free to remarry.[4] A custom under which abandonment or desertion of the wife by the husband brings about dissolution of marriage is valid.[5] In some communities, oral abandonment is not enough, writing is insisted upon.[6] Most communities which recognize divorce by abandonment also confer a right of re-marriage on the wife.[7] It seems that if a husband abandons or deserts the wife, the wife has the right to treat the marriage dissolved.[8]

Immorality, unchastity, adultery or conversion.—Among some tribes and castes, husband has the powers to divorce his wife on the ground

1. *Pemabai* v. *Channoolal*, AIR 1963 MP 57.
2. *Chukna* v. *Lachamma*, (1969) 2 SC WN 605.
3. *Yamanaji H. Jhadhav* v. *Nirmala*, A.I.R. 2002 S.C. 971.
4. *Lachu* v. *Dal Singh*, 33 PR 1896 (Jats).
5. *Gopi Krishna* v. *Jogga*, 63 IA 295 (Vaishya Community).
6. *Basant* v. *Bhagwan*, AIR 1933 Lah 753 (Jats of Sialkot).
7. *Gurdit Singh* v. *Angrej*, AIR 1968 SC 142; (Jats), *Mal Singh* v. *Ram Kaur*, AIR 1973 P & H (Tarkhans); *Gopi* v. *Jaggo*, ILR (1930) 58 All 397 (PC).
8. *Gopi* v. *Jaggo*, (1930) 58 All 397.

of unchastity, immorality, adultery and conversion.[1] If the wife converts to another religion, husband may divorce her.[2]

Divorce by mutual consent.—Customs among some castes and tribes recognize divorce by mutual consent. It may be oral or in writing.[3] Sometimes consent of the husband is obtained by making payment to the husband of the actual expenses of the marriage; such a divorce is valid.[4] But if consent to divorce is obtained on payment of some price in cash or kind, divorce is not valid.[5]

Divorce under Special Enactments.—In South India, particularly, in the erstwhile States of Travancore and Cochin (now State of Kerala) divorce among several castes or groups was recognized and regulated under certain statutes. Among the matrilineal communities, such as *marmakhathayama* and *alisantana*, marriage has always been considered a consensual union and dissoluble by mutual consent. Some special enactment of the old Madras Province and the erstwhile States of Travancore and Cochin regulate marriage and divorce in these communities.[6] These statutes have not been repealed by the Hindu Marriage Act, and therefore divorce is still available under them.

In *Gurubasawwa* v. *Irawwa*,[7] judicial notice of custom was taken and proof of *udiki* marriage among *lingayats* was held to be a proof of dissolution of earlier marriage.

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1. *Bhan Kaur* v. *Isher Singh*, 1958 PLR 36 (Malerkotla Jats); *Batta* v. *Punion*, 1970 PLR 84 (Gurgaon District of Haryana).
2. *Naraina* v. *Hukum Singh*, 152 PR 1890 (Singh Jats of Taran Taran); *Jamma* v. *Mulraj* 49 PR 1907 (Aroras).
3. *Sunder* v. *Nipala*, 84 PR 1899.
4. *Chetty* v. *Chetty*, ILR (1894) 17 Mad 429.
5. *Keshav* v. *Bai Gandhi*, ILR (1915) 39 Bom 538.
6. Some of these statutes are : Madras Alisantana Act, 1949; Travancore Ezhva Act, 1925; Cochin Nayer Act, 1938; Madras Marumakhhtayama Act, 1933; Cochin Marumakkhayama Act, 1938; Travancore Nayer Act, 1925.
7. AIR 1997 Kant 7.

Chapter 11

FAULT GROUNDS OF DIVORCE

INTRODUCTORY

The Hindu Marriage Act, 1955, the Special Marriage Act, 1954, Dissolution of Muslim Marriage Act, 1939, Parsi Marriage and Divorce Act, 1936 and the Divorce Acts, 1869-2001 recognize divorce on fault grounds.

The modern matrimonial law in India has been greatly influenced by, and is based upon, English matrimonial law.

In England, the Matrimonial Causes Act, 1857 for the first time permitted divorce by judicial process.[1] Under the Act, the husband could petition for divorce on the grounds of wife's adultery (one act was enough), but a wife had to prove adultery coupled with either incest, bigamy, cruelty or two years' desertion, or, alternatively, rape or any other unnatural offence. This was the typical mid-Victorian attitude to sexual morality. The Matrimonial Causes Act, 1923 put both spouses at par and wife could also sue for divorce on the ground of adultery simpliciter. The Matrimonial Causes Act, 1937 added three more grounds : cruelty, three years' desertion and supervening incurable insanity.[2] After the Second World War, a movement developed for the reform of divorce law which accepts the breakdown of marriage as the basic principle of divorce. In 1973, the Matrimonial Causes Act, 1973 was passed which is a consolidating statute and retains the breakdown of marriage, as the basic ground of divorce.[3]

The Indian matrimonial law has closely followed the development in English law.

The Converts Marriage Dissolution Act, 1866 was passed to provide facility of divorce to those native converts to Christianity whose spouses refused to cohabit with them on account of their conversion. But the first divorce statute was passed in 1869.

The Divorce Act, 1869 was based on the Matrimonial Causes Act, 1857 and laid down the same grounds of divorce. At the time, when the statute was passed, it applied only to Christian marriages. This Act has been widely amended by the Indian Divorce (Amendment) Act, 2001. This Act has now been put almost at par with the other matrimonial statutes. The Act has been re-named as the Divorce Act. The Special Marriage Act was passed in 1954 and the Hindu Marriage Act in 1955.

Earlier the Parsi Marriage and Divorce Act was passed in 1936 which

1. Before 1857, divorce could be obtained only by a private Act of Parliament and only very rich could afford this luxury.
2. Sections 2 and 3.
3. The Bombay Hindu Bigamous Marriage Act, 1946 and Bombay Hindu Divorce Act, 1947. Similar statutes were passed by Madras in 1949.

replaced an earlier statute of 1865. It has been amended by the Amending Act of 1988, and in most matters its provisions have been put at par with Hindu Marriage Act. These statutes introduced monogamy and reformed the law of divorce of Parsis. Three years later, the Dissolution of Muslim Marriage Act, 1939 was passed which conferred the right of judicial divorce on the wife on certain grounds.

Divorce cannot be granted merely on the ground that other party does not object to it. A ground must be established.[1]

An issue was raised in *Gaurav Nagpal* v. *Sumedha Nagpal*,[2] that section 13 was conceived as a provision to strengthen the institution of marriage. Since there is phenomenal increase in the breakdown of marriages, this provision is not serving its purpose; hence it should be removed from the statute book. The Supreme Court held that the validity of this provision cannot be questioned. Work has to be done at various other levels to strengthen this institution.

Fault grounds under the Statutes

In a landmark judgment *Naveen Kohli* v. *Neelu Kohli*,[3] the Supreme Court has exhorted the Union of India to seriously consider and amend the existing Act to add the ground of irretrievable breakdown of marriage. The criteria or touchstone that a marriage has broken down irretrievably should be the long period of separation. The Supreme Court has admitted that fault grounds are proving to be inadequate to deal with this problem. To quote the apex court—

> We have been principally impressed by consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there is a long period of continuous separation, it may fairly be surmised that matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. ***By refusing to sever that tie, the law in such cases does not serve the sanctity of marriage. On the contrary, it shows scant regard for feelings and emotions of the parties.*** (emphasis authors).

It is submitted here that the present authors had also propounded the same thesis based on similar reasoning.[4] In this light, reading Section 23 along with Section 13(1-A) also becomes anachronistic.

The Supreme Court has further emphasized this aspect in *Manjula* v. *K.R. Mahesh*, where all efforts at reconciliation failed and the parties claimed that marriage has irretrievably broken down. After making arrangements for the daughter of marriage, divorce was granted to the parties.[5]

Under the Divorce Act, 1869, a marriage may be dissolved on the

1. *Edwardraj* v. *Sillakathi*, AIR 1994 Mad 82; *Vijayan* v. *Bhanusundari*, AIR 1995 Mad 166 (it must be ground under the Act); *Miliacy* v. *Rose*, AIR 1995 Gau 47 (on mere consent divorce cannot be granted under the Divorce Act).
2. AIR 2009 SC 557.
3. AIR 2006 SC 1675.
4. Irretrievable Breakdown of Marriage—Do We Understand its Real Purport? AIR 2005 Jour. 101.
5. AIR 2006 Supreme Court 2750.

petition of husband on the ground of wife's adultery and on wife's petition on the ground that the husband has changed his religion and has married again, or has been guilty of incestuous adultery, or bigamy with adultery, or marriage with another woman with adultery, or adultery coupled with cruelty, or adultery coupled with desertion without reasonable cause for a period of at least two years, or of rape, sodomy or bestiality.[1]

This was the law before the Act was amended. Under the old Act, husband could obtain divorce on the ground of wife's adultery simpliciter whereas wife could obtain divorce on adultery plus some other fault ground such as cruelty, *etc.* There were different grounds for men and women. Adultery simpliciter or adultery coupled with some other matrimonial offence was the only ground on which divorce could be obtained. The Amendment Act of 2001 has abolished this anomaly and has given ten fault grounds to both Christian wife or husband to obtain divorce. Apart from traditional grounds such as adultery, cruelty, desertion, insanity, leprosy, venereal disease, conversion, seven years whereabouts unknown, because Christian law does not recognise the concept of voidable marriage, the Act has added few more grounds such as wilful refusal to consummate marriage and non-compliance of decree of restitution of conjugal rights. Wife, like in other statutes, has additional ground to obtain divorce if her husband is guilty of rape, sodomy or bestiality after solemnization of marriage.

Since the Parsi Marriage and Divorce Acts, 1936-88 do not recognize the concept of voidable marriage, some of the grounds of voidable marriage have been made grounds for divorce. The Amending Act of 1988 has added a few more grounds. A Parsi marriage may be dissolved on anyone of the following grounds : wilful refusal to consummate the marriage by the defendant within one year of its solemnization; the defendant was of unsound mind at the time of marriage and continues to be so till the filing of the suit which would be filed within three years of marriage and the plaintiff should not have been aware of the defendant's insanity at the time of marriage; pre-marriage pregnancy of the defendant (the requirements are the same as under Hindu law). These three grounds relate to pre-marriage impediments. The test of the grounds relate to post-marriage faults. These are : that defendant committed adultery, fornication, bigamy, rape or an unnatural offence, (suit for divorce on anyone of the grounds should be filed within two years of the knowledge of the act); that defendant caused grievous hurt to the plaintiff, or infected her with venereal disease or compelled (when defendant is husband) her for prostitution, (the suit must be filed within two years of infliction of grievous hurt, knowledge of the infection or cessation of last act of prostitution, as the case may be); that defendant is undergoing a sentence of imprisonment for seven years or more for an offence under the Indian Penal Code (petition cannot be filed before the expiry of at least one year's imprisonment); that defendant has been in desertion for a period of two years or more, or has not resumed marital intercourse for a period of two years or more after the passing of maintenance to the plaintiff; or that the defendant has ceased to be Parsi by conversion to another religion, though a suit will not be allowed if it is filed two years after the knowledge of defendant's conversion.[2] The Act of

1. Section 10.
2. Section 32.

1988 has added the following two grounds :

(a) post-marriage unsoundness of mind (the language is the same as under Hindu Marriage Act), and

(b) cruelty (here also the language is same).

The Special Marriage Act, 1954 as amended by the Marriage Laws (Amendment) Act, 1976 recognizes eight guilt grounds for divorce on which either party may seek divorce,[1] and two additional guilt grounds on which wife alone may seek divorce.[2] The eight grounds are : adultery, two years' desertion, respondent undergoing a sentence of imprisonment for seven years or more for an offence under the Indian Penal Code; cruelty; venereal disease in a communicable form; leprosy (only if the disease was not contracted by the respondent from the petitioner); incurable insanity or continuous or intermittent mental disorder,[3] of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent; and presumption of death (respondent not been heard of as alive for a period of seven years or more).[4] The wife has two additional grounds of divorce. These are : the husband has, since the solemnization of marriage, been guilty of rape, sodomy or bestiality; and cohabitation has not been resumed for one year or more after the passing of an order of maintenance under Section 125, Criminal Procedure Code or a decree of maintenance under Section 18, Hindu Adoptions and Maintenance Act, 1956. (This visualizes that both the parties are Hindus).

The Hindu Marriage Act, 1955 as amended by the Marriage Laws (Amendment) Act, 1976 lays down seven guilt grounds of divorce : adultery; cruelty; two years' desertion; conversion to a non-Hindu religion; incurable insanity or mental disorder;[5] virulent and incurable leprosy; venereal disease in a communicable form; taking of *sanyasa*, (*i.e.*, renunciation of world by entering into a holy order); and presumption of death.[6] There are four grounds on which wife alone can sue.[7] These are : the husband has, since the solemnization of marriage, been guilty of rape, sodomy and bestiality, cohabitation has not been resumed for one year or more after the passing of an order of maintenance under Section 125, Criminal Procedure Code or a decree of maintenance under Section 18, Hindu Adoptions and Maintenance Act, 1956, the marriage of the wife was solemnized before she was fifteen and she repudiated the marriage before she attained the age of eighteen years and after she attained the age of fifteen years; and husband has married more than one wife before the commencement of the Hindu Marriage Act and at the time of presentation of the petition at least one more wife, apart from the

1. Section 27(1).
2. Section 27(1A).
3. Mental disorder has been defined as mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia. The expression 'psychopathic disorder' means a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which result in abnormally aggressive or seriously irresponsible conduct on the part of the respondent whether or not it requires or is susceptible to medical treatment.
4. Section 27(1).
5. The definition of insanity and mental disorder is the same as under the Special Marriage Acts, 1954-76. *See* Footnote 9.
6. Section 13(1).
7. Section 13(2).

petitioner, is alive.

Divorce can be granted only on the grounds laid down in the statute, neither any party nor the court is free to create a new ground.[1]

Muslim wife under the old Muslim law had, as we have seen earlier, practically no right of divorce. In 1939, legislature intervened and Muslim wife was given right to seek judicial divorce by suit on certain grounds. The grounds under the Dissolution of Muslim Marriage Act are : (a) whereabouts of the husband are not known for a period of four years, (when suit is filed on this ground, near relations of husband are to be given notice and they have a right to be heard, and a decree passed pursuant to this ground will not be effective for a period of six months from its date, and on husband's appearance within this period, the decree will not be effective); (b) husband's failure or neglect to provide maintenance to the wife; (c) husband being sentenced to imprisonment for a period for seven years or more (sentence of imprisonment should be final); (d) husband's failure without reasonable cause to perform marital obligations for a period of three years or upwards; (e) husband's impotency at the time of marriage and its continuance till the filing of the suit; (f) husband's insanity for at least two years or leprosy or virulent venereal disease; (g) exercise of right of repudiation by the wife, *i.e.*, if the wife was married by a guardian when she was a minor (*i.e.*, below 15 years) and she repudiated it before attaining the age of eighteen years and before the consummation of marriage; (h) the husband's cruelty; and (i) and other grounds on which wife may divorce her husband under Muslim law. Cruelty has been given a very wide meaning. It includes both physical cruelty and mental cruelty. The following acts on the part of the husband constitute cruelty; and husband's association with women of evil repute, his leading infamous life, husband's disposal of wife's property or preventing her from disposing of her property, husband's obstruction in the observance of her religious practices, and unequal treatment in case husband has more than one wife.[2]

It seems that the only ground that the old Muslim law recognized on the basis of which wife could divorce the husband was *lian* or imprecation, *i.e.*, false charge of adultery. This was available only in the case of a valid marriage, and not when the marriage was irregular. The husband's retraction of the charge before the start of the proceeding nullifies the ground. On the question whether husband's retraction after the filing of the suit will have the same effect, judicial opinion is divided.[3]

We would proceed to discuss these grounds.

ADULTERY

Adultery is a ground for divorce under all personal laws. Under the Hindu Marriage Act,[4] and Special Marriage Act,[5] the ground is worded thus :

1. *A. v. H.*, AIR 1993 Bom 70.
2. Section 2.
3. *M.M.E. Qureashi* v. *Hazrabai*, AIR 1955 Bom 265 (retraction can be made at any time before the close of trial); *Kalloo* v. *Imran*, AIR 1949 All 445 (retraction cannot be made after the filing of suit); *See* also Mulla, *Principles of Mohammedan Law* 276 (17th ed. 1972).
4. Section 13(1)(i).
5. Section 27(1)(a).

respondent "has, after the solemnization of marriage, had voluntary sexual intercourse with any person other than his or her spouse." Under the Parsi Marriage and Divorce Act, the wordings are : defendant "has since the marriage committed adultery."[1] Under the Divorce Act, the clause runs : the other party has since the solemnization of marriage "been guilty of adultery."[2]

In *Mallika* v. *Rajendran*,[3] it was established that husband was guilty of adultery and desertion, the wife was granted a decree of divorce.[4] While under the Act husband can sue for divorce on the ground of wife's adultery simpliciter, the wife has to prove that husband is guilty of more than adultery, that is to say, adultery should be incest, or coupled with cruelty, or coupled with desertion without reasonable cause for two years or more coupled with bigamy, etc. In *Ammim* v. *Union of India*,[5] this provision was held to be discriminatory. A special Bench of the Kerala High Court said that this provision was violative of Articles 14 and 21. The special Bench said :

> " .....as far as the ground of adultery is concerned, husband is in a much favourable position when compared to the wife since she has to prove adultery with one or other aggravating circumstances indicated in the section itself. Evidently the above discrimination is one purely based upon sex and nothing else. Such a discrimination based purely on sex will be against the mandatory provisions in Article 15 of the Constitution of India and a denial of equality before law guaranteed under Article 15 of the Constitution of India."

The Court further said :

> "The life of a Christian wife who is compelled to live against her will though in name only as the wife of a man who hates her, has cruelly treated her and deserted her putting an end to the marital relationship irreversibly will be a sub-human life without dignity and personal liberty. It will be a humiliating and oppressed life without the freedom to remarry and enjoy life in the normal course. It will be a life without the freedom to uphold the dignity of the individual in all respects as ensured by the Constitution in the preamble and in Article 21. It will be a life curtailed in various fields, can legitimately be treated only as a life imposed by a tyrannical or authoritarian law on a helpless, deserted or cruelly treated Christian wife quite against her will, which she is bound to lead till her death, tormented always by the feeling that she is remaining as the wife of a man who has treated her cruelly, hated her and deserted her for no fault of her. Such a life can never be treated as a life with dignity and liberty. It can only be treated as a depressed or oppressed life without the full liberty and freedom to enjoy life as one would desire to lead it in the way Constitution has ensured."

The Special Bench added that since cruelty and desertion are grounds of divorce available to all communities in India, but not to a Christian wife and therefore Section 10 of the Divorce Act is discriminatory on the ground of religion only.

1. Section 32(d).
2. Section 10.
3. AIR 1995 Mad. 100.
4. Section 10 (Before amendment).
5. AIR 1995 Ker 252.

In this landmark decision, the court said that since the words "adultery coupled with" desertion, etc. are severable and liable to be struck down as *ultra vires* of Articles 14, 15 and 21, the Christian wife may sue for divorce on the ground of adultery, desertion or cruelty.

Of course, this provision has undergone change after Amendment Act of 2001.

Under the Dissolution of Muslim Marriages Act, adultery as such is not a ground for divorce, but if the husband "associates with women of evil repute or leads an infamous life,"[1] it amounts to cruelty to wife and she can sue for divorce on that ground. This is, it seems, sometimes akin to living in adultery.

Under the Hindu Marriage Act, Special Marriage Act, Parsi Marriage and Divorce Act and the Divorce Act, adultery is a ground for divorce as well as judicial separation.

Adultery : Definition.—Although an English judge, Karminski, J. observed that "nobody has yet attempted to define adultery and we do not propose to rush in where wiser men have not,"[2] adultery has a fairly established meaning in matrimonial law. It means "consensual sexual intercourse between a married person and a person (whether married or unmarried) of the opposite sex not being the other's spouse." In short, the spouse who engages in extra-marital intercourse is guilty of adultery.

Sexual intercourse.—One of the essential elements of adultery is sexual intercourse. Adultery pre-supposes a carnal union between a man and a woman. Mere attempt at sexual intercourse will not amount to adultery. Some penetration, however brief, must take place. Full penetration is not required.[3] In *Subramma* v. *Saraswati*,[4] the court observed, "if an unrelated person is found along with a young wife, after midnight in her bedroom in actual physical juxtaposition, unless there is some explanation forthcoming for that, which is compatible with an innocent interpretation, the inference that a court of law can draw must be that two were committing an act of adultery together."[5] It seems that sex-act is necessary. A wife who allows herself to be artificially inseminated with semen provided by a person other than her husband is not guilty of adultery.[6]

Adultery and living in adultery.—As a ground for divorce, one act of adultery is enough. But to establish living in adultery means "continuous course of adulterous life as distinguished from one or two lapses from virtue,"[7] or "a course of adulterous conduct over some period with repetition of acts of adultery with one or more persons."[8]

Act of sexual intercourse must be consensual or voluntary.—The

1. Section 2(viii)(b).
2. *Sapsford* v. *Sapsford*, (1954) P 394.
3. *Dennis* v. *Dennis*, (1955) P 153; *Subramma* v. *Saraswati*, (1966) 2 MLJ 263.
4. (1966) 2 MLJ 263.
5. But see, *England* v. *England*, (1952) 2 All ER 784, where only evidence was that a man spent a night with the wife, it was held that inference of adultery cannot be drawn.
6. *Oxford* v. *Oxford*, (1921) 58 CLR 259 (Canadian case). *Maclennan* v. *Maclennan*, (1958). *See* case 105. *See* Paras Diwan, "*Technological Niyog and Nirodh*" (1981) JILI 1.
7. *Rajani* v. *Prabhakar*, AIR 1950 Bom 204.
8. *Maganlal* v. *Bai Debi*, AIR 1977 Guj 33. *See* also *Narayana* v. *Parkunty*, AIR 1973 KLT 80.

second essential element of adultery is that the act of sexual intercourse must be consensual. Thus, if a wife can show that she was raped,[1] or a spouse can show that he or she lacked mental capacity to consent,[2] it will not amount to adultery. Similarly, sexual intercourse with the respondent where he or she is unconscious or under the influence of drug or liquor or when sex act is performed in the belief that the co-respondent is his or her spouse, it will not amount to adultery.[3]

Parties to sexual intercourse.—When a spouse committs sexual act with a person who is not his spouse, she or he is guilty of adultery. The person with whom adultery is committed may be married or unmarried.

Proof of adultery and burden of proof.—The burden of proof that the respondent committed adultery is on the petitioner who must prove it beyond reasonable doubt.[4] "Proof beyond reasonable doubt" means such proof as precludes every reasonable hypothesis except that which tends to support it.[5] Till recently this view had its sway but now the courts take the view that it need not reach certainty but must carry a high degree of probability. In modern law, adultery can be proved by preponderance of evidence; it need not be proved beyond all reasonable doubts.[6]

No direct evidence of adultery is required and probably it is very difficult to adduce direct evidence. When direct evidence is adduced, it is looked down upon with suspicion.[7] The circumstance should be such as regarded together, they lead to irresistible conclusion of commission of adultery.[8] Mere statement of the petitioning spouse is not enough; it must be corroborated.[9] General evidence of ill-repute of husband or of the lewd company that he keeps and that he knows the addresses of prostitutes would neither prove nor probabilize adultery.[10] Under Muslim law, this amounts to cruelty as stated specifically in Section (viii)(b), Dissolution of Muslim Marriages Act. It may amount to cruelty under other personal laws also. Mere admission of the respondent in cross-examination is not enough to prove adultery.[11] Vasectomy is not a conclusive proof of adultery unless proper semen test has been taken.[12] If adultery is sought to be proved by non-access, the circumstances should be such as would leave a reasonable man to draw no other inference.[13]

Once adultery is established, a decree of dissolution of marriage should be made,[14] unless there is some bar to relief.

1. *Redpath* v. *Redpath*, (1950) 1 All ER 600 (English case).
2. *Lang* v. *Lang*, (1890) 15 PD 245; *S.* v. *S*, (1962) p. 133. (English decisions).
3. But if drinks are taken voluntary, it would be no defence to adultery; *Goshawk* v. *Goshawk*, (1955) 109 SJ 290.
4. *Bipin* v. *Prabha*, AIR 1957 SC 176; *White* v. *White*, AIR 1958 SC 441.
5. *Sachindranath* v. *Nilima*, AIR 1970 Cal 38, where Mukerji, J. has reviewed most of the English and Indian decisions. *See* also *Chhananlal* v. *Sakha*, AIR 1977 Raj 81.
6. *Sari* v. *Kalyan*, AIR 1980 Cal 374; *Mallika* v. *D.S. Rajendran*, AIR 1995 Mad 100.
7. *Pattayee* v. *Manichami*, AIR 1967 Mad 254.
8. *Tripathi* v. *Bimal*, AIR 1957 J & K 72; *Subbaramma* v. *Saraswati*, (1966) 2 MLJ 263; *White* v. *White*, AIR 1958 SC 441; *Banchanidde* v. *Kamladas*, AIR 1980 Ori 171.
9. *Sulekha* v. *Kamlakant*, AIR 1980 Cal 370.
10. *Henderson* v. *Henderson*, AIR 1980 Cal 370.
11. *Anandi* v. *Raja*, AIR 1973 Raj 94.
12. *Chiruthakuthy* v. *Subramanian*, AIR 1987 Ker 5.
13. *Om Prakash* v. *Roshan*, AIR 1985 P & H 364.
14. *Prafulla* v. *Saroj*, AIR 1979 Ori 168.

DESERTION

Under most of the personal laws in India, desertion is recognized as a ground for divorce and judicial separation. The Hindu Marriage Act and the Special Marriage Act lay down that desertion as a ground for divorce or judicial separation should be for a continuous period of two years.[1] Also under the Parsi Marriage and Divorce Act desertion should be for a continuous period of two years.[2] Under Divorce Act, also it is same.[3] Under the Dissolution of Muslim Marriages Act, "desertion" is not a ground for divorce but wife can sue for divorce if "the husband has failed to perform, without reasonable cause his marital obligations for a period of three years."[4]

Desertion—Definition.—In the early English decisions, desertion was given a restricted interpretation. Later on, it was given a wide meaning. Under the modern English law, two years' desertion constitutes a fact of breakdown of marriage.[5] Broadly speaking, desertion is based on the rejection or repudiation by one party of all the obligations of marriage.[6] Explanation to Section 13(1) of the Hindu Marriage Act and Section 27(1) of the Special Marriage Act, (the provision is identical), lays down that the expression "desertion" means "desertion of the petitioner by the other party to the marriage without any reasonable cause and without the consent or against the wishes of such party, and includes wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions." Traditionally, desertion has been defined as abandonment of the one spouse by the other without any reasonable cause and without the consent of the other. It is also said that desertion is withdrawal, not from a place but state of things. In short, desertion is a total repudiation of marital obligations. Desertion includes :

A. Actual desertion;

B. Constructive desertion; and

C. Wilful neglect.

Desertion has the following constituent elements :

(i) The factum of separation.

(ii) *Animus deserdendi* or intention to desert.

(iii) Desertion should be without the consent of the petitioner.

(iv) Desertion should be without any reasonable cause.

(v) The statutory period of two years. (This is so under all personal laws).

Actual Desertion

Factum of separation and intention to desert.—In actual desertion, abandonment of the matrimonial home as a fact situation is essential. Mere intention to abandon without actual abandonment of matrimonial home is not enough.[7] Similarly, factual separation without an intention to desert is also

1. Section 13(1)(ib) of the former and Section 27(1) of the latter.
2. Section 32(g).
3. Section 10(ix).
4. Section 2(iv).
5. Section 2(d), Matrimonial Causes Act, 1973.
6. See *Perry* v. *Perry*, (1951) P. 203, per Lord Evershed, MR.
7. *Ramesh* v. *Prem Lata*, AIR 1979 MP 15.

not enough. Intention to desert must be established.[1] A person may go out on business, study, etc. and may be stranded there for two years or more, it would not amount to desertion, since all along he has intention to return home. Similarly, abandonment by one spouse or the other in a fit of temporary passion, disgust or anger, without intending to put the cohabitation to an end, does not amount to desertion. Where a wife left the matrimonial home under a delusion that it would not be safe to live with her husband, she could not be called a deserter as she has no mental capacity to form an intention.[2] To constitute desertion, factum and animus must co-exist, and the moment they co-exist, it amounts to desertion; it is not necessary that intention must precede factum. For instance, when the spouse left the matrimonial home (for business, pleasure trip, etc.), he has all the intentions to return home, but subsequently, if he forms an intention not to return, the moment such an intention is formed, he becomes a deserter. If a spouse leaves the matrimonial home without any reason, she or he is a deserter.[3]

Lachhman v. *Meena*,[4] was a husband's petition for judicial separation on the ground of wife's desertion. This is a typical case where a couple is not able to adjust in the Hindu joint family setting. Meena, the daughter of an affluent businessman, having business houses all over the South East Asia, was married to a physician whose father was also a businessman, in November, 1946 at Hyderabad (Sind). Her married life got started in her husband's father's joint family which consisted of both his parents and two sisters. They were blessed with a male child in July, 1947. Partition of India disturbed the life of the couple; they had to migrate to India in October, 1947. For sometime Meena had to live in Colombo with Lachhman's maternal uncle along with his sisters and mother. In January, 1948, Meena left Colombo for her parents' house at Lonavala as she felt that her sisters-in-law did not treat her well. Lachhman also got a home in Bombay and from January, 1948 to the beginning of the year 1954, the couple lived together in Bombay, though during this period Meena used to visit her parents' house frequently. On February 26, 1954 Meena left her husband's house and went to Poona with her father and from there she went to several South East Asian towns where her father had business establishments. Lachhman wrote to her several letters requesting her to rejoin him and to every letter she replied that she would, as soon as her health would permit. But a time reached when Lachhman lost his patience and started hurling wild and nasty allegations in his letters, and ultimately crossed the threshold of the court by suing for judicial separation on the ground of her desertion. Meena's story is the usual mother-in-law daughter-in-law story. She said that her mother-in-law was not satisfied with the dowry she brought, that her parents-in-law did not permit her to visit her parents' house, that she was abused for trivial things, that the treatment of her mother-in-law from the beginning was cruel and humiliating and that the husband's attitude in this regard was far from satisfactory for husband always took the side of his parents and sisters, and abused her that she did not obey his parents and was quarrelsome with his sisters. Her further narration was that her parents-in-law not merely said many dirty

1. *Gopal* v. *Mithilesh*, AIR 1979 MP 316.
2. *Perry* v. *Perry*, (1963) 3 All ER 766.
3. *Venei* v. *Nirmala*, AIR 1987 Del 79; *Ravindra* v. *Kusum*, AIR 1991 Gau 54.
4. AIR 1964 SC 40.

things about her but they also did not allow their son (her husband) to talk to her, and she was prevented from doing any work for her husband or her son; sometimes she was even beaten up by her husband and was not allowed to see her child when he was ill. In short, her story reveals that she had no freedom in her husband's house, that she was abused and insulted by her parents-in-law and sisters-in-law, that she was not given the usual comforts which a wife expects, in her husband's house, that she was not allowed to look after her husband and the child and that whenever there was any trouble between her and her in-laws, her husband took the side of her in-laws. Inference that wife wanted to be drawn from these facts was that she was forced to leave the matrimonial home. The story of Lachhman is also the usual story of a son of a patriarchal household who cannot break the kinship bonds and feels miserable when his wife is not able to adjust in the joint family and tries to throw all blame on her. According to him, Meena was disrespectful and indifferent to him and was proud and arrogant that she refused to wear the clothes which were made for her by his parents on the ground that they were made of inferior stuff, that she was very disrespectful, disobedient and rude to his parents, that she used to leave for her parents' house very often, and sometimes without informing him, that she had no love and affection for him and that in her father's house she indulged in vices such as smoking, drinking and playing cards. It seems evident that the couple were not happy in their married life and probably their marriage began to break and it was certainly a broken marriage when on February 26, 1954, Meena had left her husband's house. The events before the husband went to the court were desperate attempts of a son of a Hindu joint family to retrieve, if possible, what was left of his marriage, which also reflects the Hindu husband's predicament.

Bipin Chandra v. *Prabhavati*,[1] presents identical joint family setting, with the exception that Prabhavati's father was not as rich as Meena's father. Soon after her marriage, in 1942, Prabha came to live in her husband's two room flat in Bombay in which also lived Bipin's parents and two unmarried sisters. A son was born to the couple in 1945. Apparently the marriage began well and there was no evident tension in their life. In 1946, there came to live in the family one Mahendra, a retired army man and a friend of the family. In January, 1947, Bipin went to England on a business trip. On return he came to know from his father, who had intercepted a letter written by Prabha to Mahendra, that Prabha became intimate with Mahendra. On the night of the return of Bipin from England, his parents prevented him from sleeping in the room occupied by the couple. Later on, when Bipin asked for an explanation from his wife, she denied having written the letter, and a day after she, along with her son, left for her parents' home at Jalgaon, ostensibly for the marriage of her cousin which was to take place four to six weeks later. After that the wife did not, or could not, come back to the matrimonial home. Some abortive attempts at reconciliation were made by Prabha's uncle and a cousin. It seems Prabha's mother and Bipin's mother also met but the desired reconciliation did not come about. The husband got a registered notice served on his wife through his solicitor charging her with adultery with Mahendra and asking her to send back the child. In November, 1947, Bipin was told by

1. AIR 1957 SC 176.

his mother that Prabha was coming to Bombay to join him, whereupon he sent a telegram to Prabha's father, "Must not send Prabha. Letter posted." Ultimately in 1951, the husband filed petition for divorce on the ground of his wife's desertion.

We may also consider a couple of cases in which the couples belonged to lower middle class joint family.

Krishnabai v. *Punamchand*,[1] is a typical case of lower middle class family where the couple did not lay claim to much education. Krishna on her marriage landed in the joint family of her husband's father and she could not adjust herself there for more than four or five months during which period the relationship between the spouses was not cordial. Punamchand's story as revealed in his petition for judicial separation was that she always quarrelled with his parents and wanted that he should live in a separate house with her. The story of Krishna was that her parents-in-law ill-treated her and her father-in-law misbehaved with her. Krishna was certain of her mind, and she said very categorically before the court, that she was willing to live with Punamchand only if he lived separate from his parents. *Mangalbai* v. *Devrao*,[2] presents identical story. Mangalbai refused to live with her husband in the house of her parents-in-law. She wanted her husband to live separately with her. In *Roshanlal* v. *Basant Kumari*,[3] parties were married in 1957 and lived together as husband and wife for about three years at Patiala. They were also blessed with a son and a daughter. But this ideal family got wrecked on the rocks of the joint family. Basant Kumari, the mother of two children, could not adjust herself with her in-laws and found that her husband took the side of his parents and scolded her whenever she complained against the treatment of her in-laws; rather he started ill-treating her. The wife left the matrimonial home and went to live in her parents' household still a safe shelter for an unhappy married daughter. Basant Kumari, too, was firm that she could live with her husband only if he lived separately from his parents.

How these cases went through courts is a fascinating and useful study. And, if one would scan through the record of these cases, one would find the judicial predicament of fact-analysis which is ultimately got over by the usual lawyer's technique of plunging into technicalities, what sociologists deferentially call "refined analytical skills on legal doctrinal issues."

In *Lachhman* v. *Meena*,[4] the petition was filed in the trial court on September 20, 1956. It reached the High Court on appellate side in 1958 and the High Court rendered its decision in 1960. The appeal to the Supreme Court under a certificate of fitness under Article 133(1)(c) was filed in 1961 and the Supreme Court rendered its judgment on August 14, 1963. The trial court passed a decree in favour of the husband. The High Court reversed the decree. In the Supreme Court, the majority (Ayyangar, J. with whom G.K. Das, Raghubar Dayal, JJ. concurred) decided in favour of the husband, while Subba Rao, J. dissented. Apart from the legal analysis of the constituent element of the matrimonial offence of desertion both by Ayyangar, J. and

1. AIR 1967 MP 196.
2. *Ibid.*
3. (1967) 69 PLR 566.
4. AIR 1964 SC 40.

Subba Rao, J. on which both are substantially in agreement,[1] there is a divergence in fact analysis. According to the majority, the wife left the matrimonial home without the consent of her husband and the nasty letters that the husband wrote to her while she was abroad did not have such impact on her mind as to prevent her from joining her husband. Subba Rao, J., on the other hand, found that she did not leave the matrimonial home without the consent of her husband and that the nasty letters and the behaviour of her husband subsequent to her return from abroad did create an impression on her mind that her husband did not want her to return to the matrimonial home. In *Bipinchandra* v. *Prabhavati*,[2] the Supreme Court rendered a unanimous verdict. Bipinchandra filed the suit for divorce on the original side of the High Court in July, 1951. The trial court passed a decree in his favour in March, 1952. On Prabha's appeal, the decree of the trial court was reversed in August, 1952. Bipin went in appeal to the Supreme Court and the Supreme Court upheld the verdict of the High Court and rendered its judgment in October, 1956. The trial court passed the decree in favour of the husband as it found that the wife was in desertion, but the High Court reversed the decree as it found that the wife was 'technically' not in desertion. The Supreme Court agreed with the High Court. Sinha, J. (who rendered the judgment on his behalf and on behalf of Venkataram Ayyar and Jagannadhadas, JJ) was of the view that the telegram of the husband to his father-in-law in which he asked him "not to send" Prabha to his house terminated the genuine and sincere effort of his wife at reconciliation. Thus, the judgment, a pure legal exercise, is mainly concerned with what amounts to desertion in law. Desertion is a continuing offence and it remains inchoate till the petition for the matrimonial relief is not filed; before that event the deserting spouse can bring the state of desertion to an end, *inter alia*, by making a genuine and sincere offer to return, and even if that offer is turned down, the state of desertion terminates. Our courts are courts of law and in pure legal terms the judgment is correct. It is evident that in both *Lachhman and Bipinchandra*, marriage had completely broken down, but our courts, when called upon to decide a matrimonial cause on a fault ground, are only concerned whether the ground has been established or not; they are least concerned as to whether or not the marriage has broken down irretrievably.

It is virtually the same story in other cases. In *Krishnabai* v. *Punamchand*,[3] where the petition was filed in trial court in July, 1960 and the court passed a decree in favour of Punamchand in January, 1965, from which the wife appealed to the High Court which upheld the decree of trial court by its judgment rendered in March, 1967, the Madhya Pradesh High Court observed that "the only question for consideration is whether this was a reasonable offer (the wife categorically said that she was willing to live with her husband provided he lived separately from his parents), and whether the appellant had reasonable cause or excuse to live separately." Krishna's assertion that she had to leave the matrimonial home on account of ill-treatment of her in-laws, the court found that Krishna's assertion that she

1. Apart from the *obiter dicta* on "wilful neglect", the learned judge gives substantially the same formulation to the matrimonial offence of desertion as is given by Ayyangar, J.
2. AIR 1957 SC 176.
3. AIR 1967 MP 200.

was ill-treated was not substantiated, and as to her offer to live with her husband, Surajbhan, J. has this to say : "Now her offer that she would only live with husband if he lives separately from his parents is an offer which is not conciliatory but hedged in with an unreasonable qualification or condition. It is to be borne in mind that *the respondent is the only son of his parents*",[1] (Emphasis author's). No judge in any Western country will probably make that observation and give that importance to only-sonship, but in the context of Hindu society, such statement is very natural and real. *Roshanlal* v. *Basant Kumari*,[2] has little longer history of litigation. Married in December, 1946 Roshanlal and Basant Kumari were blessed with two children, a male and a female. But it was not a happy marriage. Unable to adjust in the joint family of her husband, Basant Kumari left the matrimonial home in the early part of 1960. Roshanlal filed an application for restitution of conjugal rights in December, 1960 which was compromised in May, 1961 and spouses took the vow to live together but this vow would not last longer than August, 1961 when Basant Kumari, not able to adjust herself in the joint family, once again left the matrimonial home, and a little later, she filed an application for maintenance under (old) Section 488, Criminal Procedure Code.[3] Her application was dismissed in July, 1962, she filed a revision petition to the appellate court in February, 1963. This led to further deterioration in the spousal relations. The parents of both the spouses also jumped into the fray which led to security proceedings and the father and brother of Basant Kumari were bound down to keep peace by the Magistrate. In September, 1963, Roshanlal filed a petition for judicial separation on the ground of wife's desertion and cruelty (at that time both were grounds for judicial separation and not for divorce under the Hindu Marriage Act). In April, 1965 the petition was dismissed as the trial court came to the conclusion that Roshanlal had failed to establish his case. Roshanlal filed an appeal to the High Court. The High Court rendered its judgment in September, 1966, and passed a decree for judicial separation in favour of the husband. Kausal, J. found that the wife was not happy in the parental house of the husband where his mother and brother also resided and at one time, Roshanlal agreed to provide her with a separate house and did provide one, but soon after he went back to his parental house and wife refused to join him there. Basant Kumari was categorical that she would live with him only in a separate house. The learned judge observed, "Generally speaking, a husband being the wage earner has the right to say as to where he could keep his wife. This does not, however, mean that the wife has absolutely no say in the matter. Like reasonable people both parties should decide where they would live, namely, whether in the paternal home or in a separate home. Both sides have got to take a reasonable view of things."[4] But the learned judge found that by leaving the matrimonial home, wife was unreasonable and therefore was guilty of desertion.[5]

1. *Ibid* at 201.
2. (1967) 69 PLR 566.
3. It is S. 125 of the new Code.
4. (1976) 69 PLR 566 at 571.
5. See *Om Wati* v. *Kishan*, AIR 1985 Cal 43; *Asha* v. *Baldev*, AIR 1985 Del 76; *Karmat Kermar* v. *Kalyani*, AIR 198 Cal 111; *Varinder* v. *Suresh*, AIR 1988 Del 222.

Rohani v. *Narendra Singh*,[1] was again a husband's petition. The parties were married in 1945 and probably the marital life went on smoothy till 1947 when the wife packed up and went to her father's house, and, despite repeated requests of the husband, did not return. A day before the Hindu Marriage Act came into force, the husband took a second wife. In husband's petition for judicial separation, she averted that it was on account of her husband's ill-treatment that she was forced to leave the matrimonial home. On facts, the court found that none of the averments of the wife were correct and that she left the matrimonial home with a clear intention to abandon it. The court also found that the second marriage of the husband did not have any impact on her mind causing her to continue to live separate and apart from her husband.

It appears to be evident that these cases lay down :

(i) At any time when *animus and factum* co-exist, desertion commences.

(ii) The intention to forsake must be a permanent intention not to return.

(iii) The deserted spouse should not have consented and should not have provided any reasonable cause for desertion.

(iv) The intention to desert should continue during the entire statutory period of desertion rather till the presentation of the petition.

(v) If at any time before the presentation of the petition, the deserting spouse changes his or her intention to continue in desertion and wishes to return but is prevented from doing so by the other, he or she would not be in desertion; rather it might be the other party who may become deserter thenceforth.

Under the *Guruwant* custom, sister and brother of one family marry brother and sister of another family, and it so happens that if one marriage breaks down, the second also breaks down. When the wife refuses to go to her matrimonial home, she is guilty of desertion.[2]

Constructive Desertion

"Desertion is not the withdrawal from a place but from a state of things."[3] The Privy Council in *Lang* v. *Lang*,[4] thus explained the doctrine of constructive desertion :

> It has been recognized that the party truly guilty of disrupting the home is not necessarily or in all cases the party who first leaves it. The party who stays behind may be by reason of conduct on his part making it unbearable for a wife with reasonable self-respect, or power of endurance to say with him, so that he is the party really responsible for the breakdown of marriage. He has deserted her by expelling her, by driving her out.[5]

To constitute desertion, there must be separation of households, not a separation of houses. The parties thus may be in desertion even if living

1. AIR 1970 SC 459.
2. *Sanat Kumar* v. *Nalini*, AIR 1990 SC 594.
3. *Pulford* v. *Pulford*, (1923) P 18 at 21, Per Lord Merrivale.
4. (1955) AC 402.
5. *Ibid*, at 417.

under the same roof. In the expressive words of Denning, LJ :

> The husband who shuts himself in one or two rooms of his house and ceases to have anything to do with his wife, is living separately and apart from her as effectively as if they were separated by the outer door of a flat. They may meet on the stairs or in the passageway, but so they might if they each had separate flats in one building. If that separation is brought about by his fault, why is that not desertion? He has forsaken and abandoned his wife as effectively as if he had gone into lodgings. The converse is also true. If the wife ceases to have anything to do with or for, the husband he is left to look after himself in his own rooms, why is that not desertion? She has forsaken and abandoned him as effectively as if she had gone to live with her relatives.[1]

If one spouse by his words or conduct compels the other spouse to leave the matrimonial home, the former will be guilty of desertion, though it is the latter who physically separated from the other.[2] In short, the spouse who intends bringing cohabitation to an end and whose conduct in fact causes its termination, commits the act of desertion.[3]

Even in constructive desertion, factum of separation has to be established. It must be established that there is nothing else left in the parties' relationship except their living under the same roof. In *Hope* v. *Hope*,[4] it was observed that sharing a common living room, or taking meals at a common table are fatal and negative to separation between the parties. *Le Broco* v. *Le Broco*,[5] is an interesting case. The spouses had separated in everything, but the wife used to cook food for her husband for which she was paid by him. Harman, LJ., observed, "There was separation of bedrooms, separation of hearts, separation of speaking; but one household was carried on."[6] We would proceed to review some leading Indian cases. In *Jyotish Chandra* v. *Meera*,[7] a case under the Special Marriage Act, 1954, after her marriage in 1945, the wife came to live with her husband. The averments of the wife were that she found him cold, indifferent, sexually abnormal and perverse. Shortly after marriage, the husband left for England and the wife got busy with the M.A. examination. On return from England, the husband continued to be cold, and hardly spent any time with the wife. He used to return very late in the night from the club. At the instance of the husband, the wife went to England to do her Ph.D. where she stayed from 1948 to 1951. In between she made two visits to India and found her husband more cold than what he was. On her return from England, the wife stayed for sometime with her parents at Jaipur. Thereafter she went to live with her husband. Wife's suffering and mental agony continued. In 1952, she got a job of a lecturer in the Calcutta University. Realizing that she had to live a frustrated married life, she dedicated her life to work and began to observe complete reticence and indifference at the matrimonial home and apparently a defiant

1. *Hope* v. *Hope*, (1949) P 277 at 235.
2. *Lang* v. *Lang*, (1955) AC 402.
3. *Bowven* v. *Bowven*, (1920) P. 172.
4. (1947) P. 277.
5. (1964) I WLR 1085.
6. *Ibid* at 1097.
7. AIR 1970 Cal 266.

attitude towards her husband. There was in the husband's house, more of mental torture and violence and mental shock to her. The wife realised that the husband wanted her to live elsewhere and that the husband developed a feeling of hatred and abhorrence for her. In the same house, they became strangers to each other. And in this manner they continued to live till 1954, each of them having his or her own way. In November, 1954, the wife left the husband's home and shifted to a rented flat where her sister and mother were living. By this time she had made up her mind to abandon the matrimonial home. In 1955, wife's father tried to bring about reconciliation between the spouses but as she approached the husband, he was turned out and dragged to the flat where the wife was living. There the husband had a heated discussion with his wife and offered her two alternatives; either to sue for divorce or to go to Mandalay, where her father was posted. On wife's refusal to accept these terms, he flew into a rage and struck the wife with a stick. When wife's father protested, he tried to strike him also. But father and the sister caught hold of the stick and prevented him from doing so. Thereupon he gave several slaps to father and sister. He also twisted the arm of the sister. Under these circumstances, wife petitioned for divorce.

The court found that throughout the married life the husband was indifferent and cold to the wife, that the relationship between the parties was most abnormal, that it was the husband's marital lapses which caused bitter and unfortunate situation, that in the later days of their living together the husband persisted in his attitude of utter indifference, callousness and apathy towards the wife and lived with his wife as a stranger under the same roof, that no sexual intercourse took place between the parties, and that the husband had developed an attitude of hatred and abhorrence for her. Thus, the court said, in the context of her suffering and loneliness of a frustrated married life, the husband created such a situation that it was impossible for the wife to stay any longer in the matrimonial home. The husband thus forcing the wife by his conduct to leave the matrimonial home became himself guilty of desertion, even though it was the wife who had left the matrimonial home.

Shyam Chand v. *Janki*,[1] is the husband's petition for judicial separation on the ground of desertion, the wife stated that she was maltreated, beaten up and turned out of the house by the husband. She further stated that her husband kept her in village, Bedar, while he himself lived at Chorus, and the food given to her at Bedar was meagre. She was kept there in a cowshed, was deprived of the company of her children, was beaten up and ultimately turned out. Wife's averments were proved.[2]

In constructive desertion, it is the behaviour of one party which makes him the deserter, though he continues to live in the matrimonial home, such a behaviour may be of two types : (i) A spouse may physically expel the other, such as one may order the other spouse to leave the matrimonial home. In such a case, expulsive words must be clear and they should mean the circumstance in which these were uttered. The party which uttered them indeed meant the other to leave the matrimonial home.[3] In short, expulsive

1. AIR 1966 HP 70.
2. *See* also *Mangala* v. *Deorao*, 1962 MP 193; *Shrivastava* v. *Manoharlal*, 1959 MP 349.
3. *Dunn* v. *Dunn*, (1967) P. 217; *Butcher* v. *Butcher*, (1947) P. 25.

behaviour should be such that the petitioner cannot reasonably be expected to live with the respondent. (ii) The second case is the one where one party conducts himself in such a manner that the other party is driven out of the matrimonial home. The English Courts have expressed their fear of misuse of this doctrine. In *Pike* v. *Pike*,[1] Denning, LJ said : "This is yet another case in which the doctrine of constructive desertion has been allowed to run wild. A wife leaves the home, refuses to return to it, and then promptly charges her husband with constructive desertion." The English courts have said that the conduct should be such that a reasonable spouse in the circumstances and environment could not be expected to continue to endure.[2] *Lang* v. *Lang*,[3] provides a good illustration; in this case, the husband assaulted the wife, consistently abused her, forced intercourse on her "in circumstances of calculated and revolting indignity." This is a clear case where the wife cannot reasonably be expected to live with her husband, even though it is shown that the husband never "wished" her to leave him. In English cases, the following conducts have been held to amount to constructive desertion : husband keeping concubine or mistress in the matrimonial home,[4] husband inducing the wife to believe that he had committed adultery,[5] wife keeping twenty five or more cats (which she preferred to her husband) in the matrimonial home,[6] spouse's drunken behaviour,[7] spouse refusing sexual intercourse,[8] or spouse's conviction for indecent exposure.[9] It is submitted that these will also amount to reasonable cause or excuse for desertion. If husband is living with another woman in the matrimonial house, wife is not guilty of desertion.[10]

Wilful Neglect under Hindu law and Failure or Neglect to Maintain under Muslim Law

Under both the statutes, the Hindu Marriage and the Special Marriage Act, desertion includes the "wilful neglect" of the petitioner by the other party to the marriage. Under the Dissolution of Muslim Marriage Act, 1939, the husband's failure or neglect to provide maintenance for a period of two years or more entitles the wife to sue for divorce.[11] So far before the Indian courts, no case has come where "wilful neglect" has been taken as a ground for divorce or judicial separation, though in *Laxman* v. *Meena*,[12] Subha Rao, J., Obiter, observed that wilful neglect was designated to cover constructive desertion, and therefore should fulfil all the ingredients of desertion.[13] It is submitted that Parliament has by expressly including "wilful neglect" as a separate type of desertion, deliberately made a departure from the existing meaning of desertion. In our typical social background, it happens that the

1. (1947) p. 25.
2. *Hall* v. *Hall*, (1962) 1 WLR 1246.
3. (1950) AC 402.
4. *Kach* v. *Kach*, (1899) p. 221.
5. *Baker* v. *Baker*, (1954) p. 33.
6. *Winnan* v. *Winnan*, (1949) p. 174.
7. *Hall* v. *Hall*, (1962) 1 WLR 1246.
8. *Stan* v. *Stan*, (1969) p. 122.
9. *Crawford* v. *Crawford*, (1959) p. 195.
10. *Madan Mohan* v. *Chitra*, AIR 1994 Cal 133
11. Section 2(ii).
12. AIR 1964 SC 40.
13. *See* also *Tara Chand* v. *Narain Devi*, AIR 1979 P & H 300.

husbands deliberately neglect their wives, by refusing to have marital intercourse with them, by denying maintenance to them, or by declining to give company to them. Thus, a spouse may not totally withdraw from cohabitation, yet his conduct or act may be sufficiently grave and weighty; may cause untold misery and deprivation to the other. These will constitute wilful neglect.

The term "wilful neglect" has been in English law in the context of wife's claim of maintenance. On the ground of wilful neglect, the wife may claim maintenance from the husband. It seems that an act or omission done accidently or inadvertently is not wilful; it is also not absolutely necessary that to be wilful, the act or omission should be deliberate and intentional. Thus, it will amount to wilful neglect if a spouse consciously acts in a reprehensible manner in the discharge of his marital obligations. In other words, wilful neglect connotes a degree of neglect which is shown by a degree of abstention. But failure to discharge, or omission to discharge, every marital obligation will not amount to wilful neglect. But failure to discharge the basic marital obligations will amount to wilful neglect.

Failure to provide maintenance may also amount to wilful neglect.[1] That probably was the main context in which wilful neglect was made a variety of desertion. It becomes clear when we look at a similar provision under the Dissolution of Muslim Marriage Act, 1939 where a husband's failure or neglect to provide maintenance to the wife is a separate ground for divorce.[2] The courts have given a very wide interpretation to this clause since the words used are 'failure' and 'neglect' and 'wilful neglect.' Thus, it has been held that wife is entitled to a decree of divorce even if failure or neglect to maintain arises on account of his poverty, failing health, loss of work, imprisonment or any other cause, provided wife's conduct had not been such as to disentitle her from maintenance.[3] Similarly, where wife is living separate from her husband for a period of two years on account of husband's failure to pay her prompt dower and husband has also not provided her maintenance during this period,[4] or a wife who is living separate from her husband on account of his taking a second wife and to whom no maintenance has been provided by the husband,[5] is entitled to a decree of divorce.

It has been held that maintenance includes all those things which are necessary for the support of life, such as food, clothes and lodging. The provision of maintenance should be in consonance with the status of the husband and sufficient to meet the reasonable wants of the life;[6] half-hearted and illusory attempts to provide maintenance will not do.

Want of Reasonable Cause or Excuse

In Chapter 9 of this work, we have discussed the expression "reasonable cause" or "reasonable excuse." Reference may be made to the same. Wife's continuing to live at her parental home for completing her studies is a valid cause.[1]

1. *Balbir* v. *Dhir*, AIR 1979 P & H 200; *Neelam* v. *Vijaya*, AIR 1995 All 218.
2. Section 2(ii).
3. *Manek* v. *Mulkhan*, AIR 1941 Lah 167; *Satagunj* v. *Rehmat*, AIR 1946 Sind 48; *Kemju* v. *Md. Kedeja*, AIR 1959 Ker 151.
4. *Najman* v. *Serajuddin*, AIR 1946 Pat 467; *Syed Ahmed* v. *Taj Begum*, AIR 1958 Mys 128; *Kandswami* v. *Wachunnul*, AIR 1963 Mad 263 [husband's failure to pay maintenance under an order of the court passed under the Criminal Procedure Code, Section 125 (new Code)].
5. *Said Ahmed* v. *Sultan Bibi*, AIR 1943 Pesh 73.
6. *Satagnuj* v. *Bahmat*, AIR 1946 Sind 48.

Lack of Consent

There cannot be any desertion if the separation is by consent.[2] But consent in the context of desertion has to be construed strictly. Buckely, LJ observed :

> Desertion does not necessarily involve that the wife desires her husband to remain with her. She may be thankful that he has gone, but he may nevertheless have deserted her.[3]

It is in this context that the Special Marriage Act and the Hindu Marriage Act use two expressions : "Without the consent", or "against the wishes of such party." The real test of lack of consent is whether separation is really due to the conduct of the deserting spouse or to the other's consent to a permanent separation. When parties are living separate and apart under a separation agreement, it is a clear case of separation by consent.[4] Similar is the case where wife is living separate from her husband under a compromise agreement entered into in maintenance proceedings.[5] Consent may be express or implied. Whether or not there is consent to the separation is a question of fact. It may be implied by conduct. In *Rosley* v. *Rosley*,[6] Pearce, LJ observed :

> Often, in the rather haphazard parting of husband and wife, the fact of a mutual agreement to separation has to be deduced from things done and things said in emotion and temper. The court should, I think, be slow to decide that there is imported term that the separation should be forever and that there shall be no opportunity for any unilateral change of mind, no right ever to ask the other party to return to cohabitation.

If consent to separation is withdrawn, desertion will automatically begin, provided other conditions of desertion are satisfied.

Consent to separation must be free. Thus, in *Holroyd* v. *Holroyd*,[7] where a wife has signed a separation agreement under great mental strain, with no legal advice, because she thought that this would be the only means of obtaining maintenance from her husband, the court held that the wife had not given her consent freely to live separate and apart.

Statutory Period of Desertion

Desertion to constitute a ground for divorce or judicial separation must be for the continuous period of two years.[8] Desertion is a continuing offence, it is an inchoate offence, *i.e.*, once desertion begins, it continues day after day,

1. *Indira* v. *Shellendra*, AIR 1993 MP 59.
2. *Aryarama Yajulu Venkata Subba Rao* v. *Aryasomayajula Surya Kumar*, AIR 1980 AP 318.
3. *Haniman* v. *Haniman*, (1909) P 23.
4. *Vadramma* v. *Krishnama*, (1970) 1 AWR 13.
5. *Bhagwanti* v. *Sadhu Ram*, AIR 1961 Punj 181.
6. (1958) 2 All ER 167.
7. (1920) 30 TLR 479.
8. *Shakuntala* v. *Om Prakash*, AIR 1981 Del 53; *Madan Mohan* v. *Chitra*, AIR 1993 Cal 33.

till it is brought to an end by the conduct of the deserting spouse. It also means that desertion is not complete even if the statutory period has expired. It may still be brought to an end by an act or conduct of the deserting spouse. It is inchoate. It becomes complete only when the deserted spouse files a petition for matrimonial relief. It is this aspect of desertion which distinguishes it from all other matrimonial offences. Thus, in *Bipin Chandra* v. *Prabha*,[1] the wife was clearly in desertion. But the wife expressed an intention to resume cohabitation before the husband filed a petition for divorce, and thus terminated the desertion.

If a spouse gave a notice not to return, desertion commences from the date of notice,[2] wife's withdrawal of jewellery from the locker may be tantamount to desertion and desertion commences from the date of withdrawal of jewellery.[3]

Termination of Desertion

The matrimonial offence of desertion differs from adultery or cruelty fundamentally. The desertion is not complete until the petition founded on this cause is filed, and something may happen before it to terminate the desertion. The most outstanding and interesting aspect of desertion is this that the offence can be brought to an end by the guilty party. The character and quality of desertion makes it possible to bring the state of desertion to an end by some act or conflict of the deserting spouse.

Desertion may come to an end in the following cases :

(a) Resumption of cohabitation,

(b) when separation becomes consensual,

(c) offer to return, or

(d) supervening event may remove the duty to cohabit.

Resumption of cohabitation.—It is an obvious case. If at any time before the presentation of petition, spouses resume cohabitation, desertion comes to an end. Resumption of cohabitation must be by mutual consent and it should imply complete reconciliation.[4] Thus, where deserting spouse comes and stays in the matrimonial home for a couple of days without any intention to reconcile, desertion will not terminate.

Does resumption of matrimonial intercourse terminate desertion? If resumption of marital intercourse is a step towards resumption of cohabitation, it will terminate desertion, even though parties are not able to live together. But casual acts of intercourse do not terminate desertion. Thus, resumption of sexual intercourse on the part of the deserted spouse in the hope of reconciliation will not terminate desertion. In *Perry* v. *Perry*,[5] a wife resumed marital intercourse with her husband but in all other respects she repudiated the relationship. It was held that it did not terminate desertion. In *Dhrubajyoti* v. *Lila*,[6] (a case under Special Marriage Act) wife left her husband's home and did not return to the matrimonial home for more than

1. AIR 1957 SC 176.
2. *Permod* v. *Vasundhara*, AIR 1969 Bom 75.
3. *Suresh* v. *Gurmohinder*, AIR 1983 Del 230.
4. *Mummery* v. *Mummery*, (1942) 1 All ER 553.
5. (1952) 1 All ER 1976; *Mummery* v. *Mummery*, (1942) 1 All ER 553.
6. AIR 1979 Ori. 93.

two years. Thereafter one day she went to her husband's house with her relations and left it before her husband returned. It was held that the wife continued in desertion.

When separation becomes consensual.—If spouses enter into a separation agreement, desertion would be at an end. Similarly, if a decree of judicial separation is obtained, the desertion would come to an end from the date of decree of judicial separation.[1]

Offer to return.—In desertion there is an intention to destroy the marriage. But if the deserting spouse seeks to return, makes an offer to return, the intention to destroy the marriage is no longer there and therefore desertion will come to an end; the basic principle being that a spouse who has been deserted must take back his deserter spouse. The moment the deserter spouse makes an offer to return, the desertion is at an end. "If he will not receive her, he becomes himself a deserter." He cannot say, 'you have deserted me. I will not forgive you for running away and therefore you cannot return.' During the whole of the current period he must affirm the marriage."[2] Communication of the intention to return is an essential element; his motive for making an offer to return is not relevant.

In a simple case of desertion, offer to return will be sufficient. Thus, in *Bipin Chandra* v. *Prabha*,[3] the wife made an offer to return but the husband by sending the telegram, "Do not send Prabha....." frustrated her intention to come back and thereby desertion was terminated. But if the deserting spouse has been guilty of a behaviour which entitles the other to stay away, such as when deserter has been guilty of adultery, the simple offer to return will not be enough to terminate desertion, and the deserted spouse is not bound to accept it; were it not so it would amount to forcing condonation on him.[4] In such a case, the deserter spouse must give the other such credible assurances that conduct complained of will never be repeated in future.

Any offer to return must satisfy the following two conditions :

(i) It must be genuine and bona fide offer to return permanently, and the offerer must have the means and the intention to implement if it is accepted by the other party. If offer is made just to forestall or defeat impending proceeding in a court of law, offer cannot be said to be genuine and bona fide. In *Shyam Chand* v. *Janaki*,[5] a wife who was turned out by the husband from the matrimonial home filed maintenance proceedings. These proceedings were compromised and the husband agreed to have the wife back and maintain her. But subsequently he backed out and filed proceedings for divorce. His petition was rejected. He filed an appeal. At the hearing of his appeal, he made an offer to take back the wife. The wife rejected it. The court held that offer was not genuine and sincere. In *Dunn* v. *Dunn*,[6] the wife turned out the husband from the matrimonial home, refused to let him have the keys of the house, and otherwise ill-treated him and made unjustified

1. The English Statute, Domestic Proceedings and Magistrate Court Act, 1978 now lays down that orders of the Court excluding one spouse from matrimonial home will neither interrupt the period of, nor terminate, desertion.
2. *Perry* v. *Perry*, (1952) p. 203, Per Hodson, LJ.
3. AIR 1957 SC 176.
4. *Everitt* v. *Everitt*, (1949) 1 All ER 904.
5. AIR 1966 HP 70.
6. (1965) 1 All ER 1043.

charges of cruelty against him. Subsequently, she sent him an invitation to return couched in affectionate terms. The court held that offer was not genuine and sincere. On the other hand, in *Price* v. *Price*,[1] the wife had hated her husband, and had hated him for sometime before she left. After sometime she made an offer to return. The court found the offer genuine and sincere. The court observed that it was concerned with obligations and not affections.

(ii) The second requirement of an offer to return is that the offer should not be subject to unreasonable conditions.[2] This case provides a good illustration. In 1951, the wife deserted her husband taking with her three daughters of the marriage whose ages ranged between 17 to 19 years. After a while, the husband asked her to return but refused to have the daughters back. The wife declined the offer. In the husband's petition for divorce on the ground of wife's desertion, the court held that desertion terminated when the husband refused to take the daughters, since there was nothing in the conduct of the daughters to justify him in refusing to have them back and it was not unreasonable of the mother to decline to leave them to fend for themselves in view of their ages. On the other hand, if the deserter spouse has given the other spouse just cause to live separate and apart from him, the deserted spouse is entitled to refuse an offer to return either outright or to put conditions on the deserter spouse that he would abide by the assurances of better behaviour in the future.[3]

Supervening event.—If the deserted spouse commits an act which justifies the other to continue to live apart, desertion will stand terminated unless it can be shown that the deserter would not, in any case, have returned.[4] If the deserted spouse subsequently consents to the living apart of the deserter spouse, it will terminate desertion.

Burden of Proof

It is established law that the burden of proving all aspects of desertion are on the petitioner. Thus, it is for the petitioner to establish both *animus factum* of desertion. It is for him to establish that desertion was without reasonable cause and against his wishes and without his consent, and that it subsisted throughout the statutory period. At one time "it was the established view that desertion must be proved beyond all reasonable doubts."[5] However, the present view is that it may be established by balance of probabilities.[6]

Jarnail Singh v. *Shakuntala*,[7] presents a difficult situation. Wife failed to prove her allegations of desertion and cruelty and expressed her willingness to live with the husband without any pre-conditions. Husband who had developed illicit relationship with a woman refused to keep the wife. There were two daughters of marriageable age and three minor children of marriage. Refusing to grant wife's petition, the court, strangely, held that the

1. (1951) p. 413.
2. See English cases, *Pratt* v. *Pratt*, (1979) AC 417; *Fletcher* v. *Fletcher*, (1945) 1 All ER 582, *Dunn* v. *Dunn*, (1967) p. 217.
3. *Thomas* v. *Thomas*, (1924) p. 194; *Edwards* v. *Edwards*, (1948) p. 268; *Lewis* v. *Lewis*, (1956) p. 205.
4. *Herod* v. *Herod*, (1939) p. 11.
5. *Bipinchandra* v. *Prabha*, AIR 1957 SC 171, *Lachhaman* v. *Meena*, 1964 SC 40; *Rohani* v. *Narendra Singh*, AIR 1972 SC 459; *Bijoli* v. *Sukomal*, AIR 1979 Cal 87.
6. *Dastane* v. *Dastane*, AIR 1975 SC 1954; *Ratneshwar* v. *Prem Lata*, AIR 1986 MP 218.
7. AIR 1979 P & H 68.

marriage should not, in the circumstances of the case, be disrupted.

CRUELTY

Introductory

Under most of the personal laws, cruelty is a ground of judicial separation and of divorce. Under the Hindu Marriage Act,[1] Special Marriage Act,[2] and Parsi Marriage and Divorce Act,[3] and Divorce Act, it is a ground both for judicial separation and divorce.

Of all the matrimonial offences, cruelty is probably the most difficult to define.

The legislature and judges deliberately avoided formulating any definition of cruelty, because acts of cruelty are infinitely variable, and no attempt at drawing a complete list as to what constitutes cruelty can ever succeed.[4] Further, act of conduct which may be regarded as cruel in one case may not be regarded cruel in another. "Legal cruelty" may not be the same as cruelty in popular sense. Thus, no case may be a precedent for another.

In *G.V.N. Kameswara Rao* v. *G. Jalili*,[5] it has been held bythe Supreme Court that cruelty need not be of such nature as to create reasonable apprehension that it would be harmful for the petitioner to live with the other party. It would be cruelty if the act is committed with an intention to cause suffering to the other party. Further, whether a particular act would constitute cruelty or not, social status of the parties would be a relevant consideration.

Further acts of cruelty have to be distinguished from ordinary wear and tear of marriage.[6]

Cruelty—Meaning

Under Hindu Marriage Act[7] and the Special Marriage Act,[8] the ground is worded thus : the respondent, "has, after the solemnization of marriage, treated the petitioner with cruelty."

Under the Parsi Marriage and Divorce Act, as amended by the Act of 1988, there are two clauses. New clause[9] lays down that the defendant has since the solemnization of marriage treated the plaintiff with cruelty or has behaved in such a way as to render it in its judgment improper to compel the plaintiff to live with the defendant. The other clause runs as under :

> The defendant has since the marriage voluntarily caused grievous hurt to the plaintiff or has infected the plaintiff with venereal disease, or, where the defendant is the husband, has compelled the wife to submit herself for prostitution : Provided that divorce shall not be

1. Sections 10 and 13.
2. Sections 23 and 27.
3. Section 34.
4. *Sukumar* v. *Tripati*, AIR 1992 Pat 32.
5. A.I.R. 2002 S.C. 576.
6. *Savita Pandey* v. *Prem Chand Pandey*, A.I.R. 2002 S.C. 591.
7. Section 12(1)(a).
8. Section 27(1)(d).
9. Section 2(2)(b), Matrimonial Causes Act, 1973, clause (dd) of Section 32. The former part of the clause has for its inspiration the similarly worded clauses in the Hindu Marriage Act and the latter a similar clause in Matrimonial Causes Act, 1973.

granted on these grounds if the suit has been filed more than two years : (i) after the infliction of the grievous hurt, or (ii) after the plaintiff came to know of the infection, or (iii) after the last act of compulsory prostitution.[1]

Section 2(4), Parsi Marriage and Divorce Act defines "grievous hurt" to mean : "(a) emasculation, (b) permanent privation of the sight of either eye, (c) permanent privation of hearing of either ear, (d) privation of any member or joint, (e) destruction or permanent impairing of the powers of any member or joint, (f) permanent disfiguration of the head or face, (g) or any hurt which endangers life." Thus, cruelty is defined purely in terms of physical violence.

Section 10(1)(x) of Divorce Act, 1869 after amendment of 2001 is worded thus—has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.

Under the Dissolution of Muslim Marriage Act, 1939, cruelty as wife's ground for divorce is worded differently though the main clause has almost the same language as that of the Hindu Marriage Act. The ground runs as under :[2]

That the husband treats her with cruelty, that is to say,—

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead immoral life, or

(d) disposes of her property or prevents her exercising her legal right over it, or

(e) obstructs her in observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunction of the Koran.

Cruelty as a changing concept.—From the aforesaid review of "cruelty" as a ground of matrimonial relief in the various Indian statutes, it is evident that the concept of cruelty has not remained the same as it was some hundred or even fifty years back. In the early statutes, such as Divorce Act (before Amendment) and the Parsi Marriage and Divorce Act (before the Amendment of 1988), cruelty is defined purely in terms of physical cruelty. Under the Dissolution of Muslim Marriage Act, cruelty includes physical as well as mental cruelty, though emphasis is still on physical cruelty. Under the Hindu Marriage Act and the Special Marriage Act, cruelty includes both physical and mental cruelty. But so remarkable has been the development of cruelty that it has been so interpreted as to bring the concept in consonance with the social facts and needs of the contemporary society. The fact of the matter is that meaning of cruelty has varied from time to time and from society to society. In early English law, "intention to be cruel" was an essential element of cruelty, then the notion was that the objective of a good divorce law was to punish the guilty party. Later when it was accepted that the objective

1. Section 34.
2. Section 2(viii).

of a good divorce law was to protect the innocent party, the intention as an essential ingredient of cruelty was abandoned. Before the acceptance of the irretrievable breakdown of marriage as a ground, for that if a marriage has broken down by any act or conduct of the respondent, it was considered to be covered under "cruelty". And, despite Lord Denning's warning in 1950 that "if the doors of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility of temperament,"[1] the English court by 1960 virtually accepted incompatibility of temperament as being covered under cruelty.

No precise definition of cruelty has so far been attempted and the courts have purposely left cruelty undefined. Cruelty may be subtle or brutal, physical or mental. It may be by words, gestures or mere silence.[2] Acts of conduct constituting cruelty can be so numerous and varied that it would be impossible to discern any definite pattern or patterns. In English law, in an early case, *Russel* v. *Russel*,[3] (which contains the earliest formulation of cruelty and to a great extent that formulation is still valid), cruelty is defined as under :

Cruelty is a conduct of such a character as to have caused danger to life or health, bodily or mental, gives rise to reasonable apprehension of such danger.

The formulation contains the basic element of cruelty and includes both mental and physical cruelty, though it embodies the typical nineteenth century emphasis upon the necessity of protecting the petitioner and the belief that no conduct can amount to cruelty in law unless it has the effect of producing actual or apprehended injury to petitioner's physical or mental health. It also emphasizes that injury need not be actually suffered; a reasonable apprehension of injury is enough. But where there is no probability of injury, offence is not committed. The difficulty of applying this test arises on account of the fact that the respondent's conduct may not cause any injury to a normal person, but it may cause injury to a hypersensitive petitioner. In *Jamieson* v. *Jamieson*,[4] Lord Norman observed :

> The conduct alleged must be judged up to a point by reference to the victim's capacity for endurance, in so far as that capacity is or ought to be known to the other spouse.....That leaves it open to find, after evidence, that the petitioner was the victim of his or her own abnormal hypersensitiveness and not of cruelty inflicted by the respondent.

In the modern law, test seems to be that if the conduct or act causes an injury or a reasonable apprehension thereof to the petitioner, it will amount to cruelty. In *Gollins* v. *Gollins*,[5] Lord Pierce observed :

> It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from the normal standards of conjugal kindness causes injury to health or an apprehension of it, it is, I think, cruelty if a reasonable person, after taking due account of

1. *Kaslefaky* v. *Kaslefaky*, (1950) 2 All ER 398 at 403.
2. *Dastane* v. *Dastane*, AIR 1975 SC 1534.
3. (1997) AC 303.
4. (1952) 1 All ER 875.
5. (1963) 2 All ER 966.

the temperament and all the other particular circumstances, would consider that the conduct complained of is such that this spouse should not be called to endure it.

In 1969, in *Masarati* v. *Masarati*,[1] Sachs, LJ observed : "Today, we are perhaps faced with a new situation as regards the weight to be attached to one particular factor—that is, the breakdown of marriage.[2] The learned judge added that if it was evident that the marriage had broken, no public interest would be served by keeping the couple together.

The Indian courts have also given fairly wide meaning to legal cruelty.

Intention to be cruel.—In England, when in 1937, cruelty was recognised as a ground for divorce,[3] the English courts took the view that conduct would be cruelty only if the respondent intended to hurt or cause injury to the petitioner or if his acts were aimed at the other. If the conduct of the respondent was not the result of any intention to harm or injure but of pure selfishness or indifference, he could not be said to be guilty of cruelty. This resulted in injustice, and the courts were driven back to the presumption that a person might be taken to intend the mutual and probable consequences of his acts, and tries to mitigate the harshness of the rule. Gradually, the English courts started receding from this doctrinaire position and in 1952 in *Jamieson* v. *Jamieson*,[4] the House of Lords observed that an actual intention to injure is not an essential element and unintentional acts might amount to cruelty. Finally, in 1963, in *William* v. *William*,[5] and *Gollins* v. *Gollins*,[6] where the House of Lords have discussed the entire case law on cruelty, the intention as an element of cruelty was rejected. In the former case, the husband made persistent accusation of adultery against the wife but he was found insane. Observing that the main concern of the court was to give protection to the suffering spouse, Lord Pierce said :

> The argument for holding that a man should not be held to have treated his wife with cruelty if he did not know what he was doing is an attractive simplicity. But so to hold would create a dividing line which in practice is not easy to draw (even with medical help), which will at time make the court powerless to help when help is most needed and which will cause more hardship than it alleviates.[7]

In *Gollins* v. *Gollins*, the husband was incorrigibly lazy and just "hung up his hat in the hall." He was heavily in debt and his wife had to face his creditors and the bailiff. At no time did he do any physical harm to her but the strain of his debts finally began to tell upon her health. Rejecting the test that cruelty necessarily connotes an intention on defendant's part to be cruel, it did not matter whether it sprang from a desire to hurt or from selfishness or sheer indifference. What is important is the conduct of the respondent and not the state of his mind.

Motive, malignity or malevolent intention has never been considered as

1. (1969) 1 WLR 393.
2. *Ibid*, at 396.
3. Matrimonial Causes Act, 1937.
4. (1952) AC 525.
5. (1963) 2 All ER 994.
6. (1963) 2 All ER 966.
7. *Ibid*. at 1004.

an ingredient of cruelty. As early as 1810, in *Holden* v. *Holden*,[1] the court observed :

> It is not necessary in determining this point to inquire from what motive such treatment proceeds. It may be from turbulent passions, or sometimes from causes which are not consistent with affection, and, are indeed often consistent with it, as the passion of jealousy. If bitter waters are flowing, it is not necessary to inquire from what source they spring.

There is hardly any Indian case under the Divorce Act or the Parsi Marriage and Divorce Act on this aspect of the matter. But in cases, particularly under the Hindu Marriage Act, 1955, the court has held without least hesitation that intention is not an essential ingredient of cruelty. *P.L. Sayal* v. *Sarla*,[2] is an interesting case. Parties were married in 1948 and had two children of marriage, but it was not a happy marriage. The wife was crazy to get the love and affection of her husband, and with that in view, she consulted a *Fakir* who gave her some potion to be administered to the husband. She administered the same to the husband which resulted in his getting seriously ill. He became ill with slow fever, giddiness and ultimately got a nervous breakdown with vomiting, loss of weight, abdominal burning, backache and various other complications. The husband had to be admitted to the hospital where he remained for sometime. During the entire period of husband's illness the wife was in attendance on him, day and night, like a dutiful Hindu wife. She was repentent of her conduct and her eyes were constantly wet with tears. On discharge from the hospital the husband petitioned for judicial separation on the ground of wife's cruelty (then cruelty was not a ground for divorce under Hindu law). The court granted the decree. Shamsher Bahadur, J. observed that considering the state of mind of the parties and the prevailing notion of the strata of society to which the parties belonged, the conclusion appeared to be irresistible that a state of tension existed with his wife lest such a thing might happen again. The learned judge, after reviewing some leading English cases, said that intention to injure was not an essential element of cruelty; if act or conduct caused injury or a reasonable apprehension thereof, it was enough to constitute cruelty. The same view was held by the Bombay High Court in *Bhagwat* v. *Bhagwat*,[3] where the husband, who was insane, tried to strangulate wife's brother on one occasion and her son on another. Naik, J., granting wife's petition for judicial separation, observed :

> The conduct of the husband in this case is such as to amount to cruelty even in the absence of an intention to be cruel. Insanity, therefore, should not bar to relief claimed by the wife.....The schizophrenia from which the husband has a predilection to suffer periodically is no good defence to the plea of cruelty put forward on behalf of the wife.[4]

Although intention is not an essential ingredient of cruelty, yet an act or conduct which has an intention to injure, will certainly constitute cruelty.

1. (1810) 1 Hag Con 453.
2. AIR 1961 Punj 125.
3. AIR 1977 Bom 80.
4. *Ibid*., at 80.

There cannot be a graver matrimonial offence than to set out on a course of conduct with the deliberate intention of wounding or humiliating the other spouse and making his or her life miserable and then to continue in that course of conduct with the knowledge that it is seriously affecting his or her physical or mental health. The conduct which is intended to hurt strikes with a sharper edge than a conduct in consequence of mere obtuseness or indifference.[1] But in those cases, where respondent's act or conduct could amount to cruelty only if he intended to injure the petitioner, then there cannot be cruelty if he is incapable of forming an intention. On the other hand, in these cases where acts and conduct amounts to cruelty in any event, it is immaterial that the respondent did not intend to be cruel. It has now been held that in cruelty *mens rea* is not important.[2]

Act or conduct aimed at the petitioner.—After 1937, the English courts took the view that the act constituting cruelty should be aimed at the petitioner. If an act is directly aimed at the petitioner, even in the absence of a desire to injure or to inflict misery, it will amount to cruelty. Thus, a display of temper, emotion or perversion, giving vent to one's feelings, may amount to cruelty, if it could be shown plainly and distinctly to have caused injury, or apprehension thereof, to health, life or limb. On the other hand, when act or conduct, not directly aimed at the petitioner such as drunkenness, gambling, crime or sexual offences against third person, done generally for the gratification of one's selfish desire, then it cannot be ordinarily said to be aimed at the other.[3] Sexual offences directly relevant to the husband's conjugal obligations may amount to ill-treatment of wife. Thus, a criminal and indecent assault by a husband on his stepdaughter amounts to cruelty to wife, although there may be no intention to hurt or injure the wife.[4] In *Bhagwat* v. *Bhagwat*,[5] the husband's acts were aimed at wife's brother and her son, but the court held that these amounted to cruelty to wife.

The act or conduct must be that of respondent.—The English courts take the view that act or conduct aimed at the respondent must be those of the respondent or at his instance. In India, most couples live in joint families, and many a time wives are subjected to cruel acts of the in-laws in which husband may play no part. In *Shyamsunder* v. *Santadevi*,[6] wife was, soon after the marriage locked up, kept without food, ill-treated by her in-laws, while the husband stood there idly taking no part in it, but also not doing anything to protect his wife. This court took the view that intentional omission to protect his wife from the ill-treatment of the members of the joint family amounts to cruelty on the part of the husband. Relying on Hindu husband's duty as *pati* (protector) to protect his wife, the court said that husband's failure to protect his wife from the acts and conduct of cruelty of others, amounts to cruelty on his part.[7] But in *Gopal* v. *Mithilesh*,[8] the court held that husband's stand of neutrality between his mother and wife thereby

1. *Jamison* v. *Jamison*, (1952) AC 525; *Gopal* v. *Mithilesh*, AIR 1979 All 316.
2. *Suman Kapoor* v. *Sudhir Kapoor*, AIR 2009 SC 589.
3. *Cooper* v. *Cooper*, (1954) 2 All ER 415.
4. *Ivens* v. *Ivens*, (1954) 3 All 446.
5. AIR 1967 Bom 80.
6. AIR 1962 Orissa 50.
7. *Mango* v. *Prem*, AIR 1963 MP 5; *Tayawuu* v. *Chinuppa*, AIR 1962 Mys 130.
8. AIR 1979 All 316.

allowing his wife to be nagged by his mother did not amount to cruelty to the wife. The court added that it was the ordinary wear and tear of joint family life. The court was of the view that the words "treated with cruelty" imply some conscious act on the part of the respondent. Considering all facts and circumstances of the case, entire matrimonial relations between the spouses, surrounding circumstances, character and personality of the husband with all his limitations, the court said that he could not be held responsible for the acts or conduct of his parents. This, in our submission, overlooks the basic facts of the Hindu joint family living, where husband's failure to protect his wife from the act of cruelty and ill-treatment of the members of the joint family has often led to gruesome tragedies. It is submitted that looked at from this aspect, *Mithilesh* has not been correctly decided. In *Devakumar* v. *Thilagavathy*,[1] it was held that ill-treatment of wife by in-laws driving her to commit suicide within five days of the marriage and failure of the husband to protect his wife amounts to cruelty.

Cruelty of the child.—Ordinarily, cruelty by a child of the parties towards one of its parents does not amount to cruelty but when a child so identifies himself with one of the parents and collaborates with that parent to perpetuate cruelty on the other parent, the conduct of the child will be considered as cruelty on the part of the other parent. Thus, in *Savitri* v. *Mulchand*,[2] the mother and the son acting in concert to harass the father, grabbed his testicles and squeezed them on his refusal to do what the mother and the son wanted him to do. The court held that this would amount to cruelty on the part of the wife towards the husband.

Thus, cruelty may be : (a) physical, or (b) mental.

Physical cruelty

Acts of physical violence on the part of one spouse against the other resulting in injury to the body, limb or health or causing a reasonable apprehension thereof have been traditionally considered to amount to cruelty. What acts of physical violence will amount to cruelty, will differ from case to case, depending upon the gravity of acts and susceptibility or sensibility of the petitioner. In *Kaushalya* v. *Wisakhiram*,[3] husband ill-treated the wife, beat her so much so that she had to go to the police station to lodge a complaint against her husband. The court held that according to the standards of all civilized world, these would constitute cruelty, even though injuries might not be so serious as to require medical treatment. *Saptami* v. *Jagdish*,[4] where the husband constantly abused and insulted the wife and ultimately on one day, in her father's house, pushed her against the wall, was also a clear case of physical cruelty. A single act of violence may amount to cruelty,[5] or it may be series of small acts which together constitute cruelty.

Injury to private parts.—In *Ashok* v. *Santosh*,[6] during the intercourse (probably on account of husband's failure to complete coitus), the wife used to pull the flaccid penis of her husband. The Delhi High Court held this to

1. AIR 1995 Mad 161.
2. AIR 1987 Delhi 52.
3. AIR 1961 Punj 520.
4. (1969) 87 CWN 502.
5. *Mary* v. *Raghwan*, AIR 1979 MP 40 (case under Special Marriage Act).
6. AIR 1987 Del 63.

amount to cruelty, as pulling of the flaccid penis can cause extreme pain, if carelessly and contemptuously done; such pull of a flaccid penis is a species of inappropriate impulse which results in excessive pain and thus amounts to physical cruelty.

Physical cruelty and Parsi law.—Under clause (a) of Parsi Marriage and Divorce Act, the ground of divorce is "grievous hurt."[1] Grievous hurt is obviously an extreme case of physical cruelty. The fact of the matter is that the Parsi Marriage and Divorce Act does not use the expression 'cruelty' but uses 'grievous hurt' which has been defined in Section 2(4) of the Act. (This definition we have quoted earlier). Under the new clause (dd), "cruelty" is at par with Hindu law.

Physical cruelty under Muslim law.—Under Dissolution of Muslim Marriage Act, if the husband assaults the wife habitually, it is cruelty.[2] It should be noticed that the words are "habitually assaults" the wife. It is something akin to "persistent cruelty", under English law. A single act of assault will not amount to cruelty. Habitual beating of the wife would be covered under this clause.[3]

Mental cruelty

Mental cruelty is an important and the largest aspect of cruelty in the modern matrimonial law. Although intention is no longer an essential ingredient of cruelty but the mental state of the respondent cannot be altogether ignored. It is on the matters to be taken into consideration in the same way as temperaments and other circumstances are to be taken into consideration. In the words of Lord Pearce :

> Whereas a blow speaks for itself, insults, humiliations, deprivations, and the life may need the interpretation of underlying intention for an assessment of their fullest significance.[4]

In *Praveen Mehta* v. *Inderjeet Mehta*,[5] the Supreme Court has observed that mental cruelty is a state of mind and feeling, therefore, a matter of inference and inference has to be drawn on the facts and circumstances taken cumulatively.

Unusually callous, neglectful and harassing conduct.—Two Indian cases provide excellent illustration of mental cruelty. In *N. Sreeadecharya* v. *Vasantha*,[6] wife used to quarrel with, hurl vilest abuses at, and humiliate and insult, her husband on trivial matters. She subjected him to insults and humiliations in public and made him a laughing stock in the locality. On one occasion, she insulted and humiliated him in a public bus and caught hold of him by the collar, on another occasion she made him cook food for her, when he served food to her, she threw away the plates saying that the food was very badly cooked, and he must apologize to her, yet, on another occasion, when he was going to his office, she caught him by neck and abused and insulted him before his friends. She used to say that she wanted her husband to be killed in some accident so that she could have his provident fund and insurance

1. *Patnek* v. *Patnek*, 39 Bom LR 845.
2. Section 1(viii).
3. AIR 1947 All 16.
4. *Collins* v. *Collins*, (1963) 3 All ER 966 at 989.
5. AIR 2002 SC 2582.
6. AIR 1970 Mys 232.

money. All this obviously made the husband miserable, and he used to have sleepless nights and started keeping ill-health. This was a clear case of cruelty. *Dastane* v. *Dastane*,[1] presents another high watermark case on mental cruelty. Mrs. Dastane used to make all sorts of vile, filthy and false allegations, not merely against the husband but also against all the members of the husband's family. She used to abuse him and his family in vilest possible terms. Some of the things that she said were : "the pleader's *sanad* of that old hag of your father be forfeited", "I want to see the ruination of the whole Dastane dynasty", "burn the books written by your father and smear the ashes on your forehead." She taunted at her husband, "you are not a man, you are a monster in human body." She used to threaten him, "I will make you lose your job and get it published in the Poona newspapers." Twice she tore her *mangalsutra*; she used to lock out the husband, when he was due to return from the office; she rubbed chilly powder on the tongue of the child of the marriage and used to thrash her mercilessly. After switching on the lights in the night, she used to sit by the side of her husband and nag him. She did many other pranks like these. She was somewhat mentally unbalanced. But the husband suffered. This was a clear case of mental cruelty. *Ragudar* v. *Anita*,[2] is also of the same category. An incorrigible wife harassed the husband in all manners. (However, the court found condonation of cruelty on the part of the husband). In *Siddangiah* v. *Lakshmma*,[3] where the husband made false charge of adultery against his wife with a calculated desire to hurt her feeling and to humiliate her, the court had no difficulty in giving in finding of cruelty. The court observed :

> Wilful and unjustifiable interference by one spouse in the sphere of the life of the other, is one species of cruelty in the same way in which rough or domineering conduct or unnatural sexual practices or disgusting accusations of unchastity or adultery, and sometimes even studied unkindness or persistent nagging can in a proper case be regarded as cruelty.[4]

Thus, where a spouse is subject to insults, abuses, humiliations or false accusations of adultery or unchastity by the other spouse, it is certainly a conduct which would make married life together impossible to be endured and would make life very unhappy and miserable.[5] Denial of medical treatment to an ailing wife and then turning her out of the matrimonial home is the worst type of cruelty.[6] Wife not caring to see her seriously injured husband lying in hospital is equally a worst case of cruelty.[7] Continuous ill-treatment, cessation of marital intercourse, studied neglect or indifference, indulging in love affairs with another woman and then promising her to marry are acts which constitute cruelty.[8] But, it has been held that outbursts of temper without

1. AIR 1975 SC 1534.
2. AIR 1993 Del 135.
3. AIR 1968 Mys 115.
4. *Ibid.*, at 116.
5. See *Kondal* v. *Rananayaki*, AIR 1924 Mad 49; *Soosannamma* v. *Vergeese*, AIR 1957 SC 27; *Kamla* v. *Balbir*, AIR 1979 J & K 4.
6. *Balbir* v. *Ghur Das*, AIR 1979 P & H 162.
7. *Rajendra Singh* v. *Tarawati*, AIR 1980 Del 213.
8. *Lalita* v. *Radha*, AIR 1976 Raj 1.

rancour or,[1] writing of love letters to another person,[2] non-payment of interim maintenance,[3] and desertion *per se*,[4] do not amount to cruelty. Similarly, wife's inability to come to husband's mother's funeral is not callousness, and does not constitute cruelty.[5] Wife frequently absenting herself from matrimonial home amounts to cruelty.[6]

Some illustrative cases

False accusation of adultery or unchastity.—False accusations of unchastity of adultery constitute cruelty.[7] But allegation of adultery by the wife against the husband in the written statement does not amount to cruelty.[8] In *Saptmi* v. *Jagdish*,[9] husband constantly called the wife a prostitute, a girl on the street and the like. The court said :

> For the husband to call his wife a prostitute, a girl on the street and the like though she was nothing of the kind is to give such a shock as to incapacitate her to discharge the duties of a wife.....Remembering the families spouses come from, respectable and educated, the sort of cruelty we see here is worse than physical violence. It shakes foundations of the conjugal life.[10]

To compel a chaste wife to submit to overtures of other persons, out of the ignoble desire to make money by prostituting her is cruelty.[11] Persistent refusal to have marital intercourse without any reasonable cause is also cruelty.[12] In the leading English case, *Sheldon* v. *Sheldon*,[13] a comparatively young and apparently healthy and virile husband had refused to have sexual intercourse with his wife for about six years, though they continued to share the same bed. The wife became depressed and frustrated but the husband refused to change his attitude, even when the results were made clear to him by the wife and the doctor. Eventually she left him and petitioned for divorce on the ground of his cruelty. It was an obvious case and the court granted the decree of divorce. It should be clear that it is not mere refusal to have marital intercourse but its persistence that amounts to cruelty. If one of the parties insists on using contraceptives and thus denies the legitimate desire to have offspring to the other party, it may amount to cruelty. In *Kusum* v. *Kampta*,[14] Beg, J., observed that false accusations of adultery or unchastity have special dimension in Hindu society where a woman cherishes her chastity more than

1. *Aloka* v. *Marimal*, AIR 1973 Cal 393.
2. *Pranab* v. *Mriumayee*, AIR 1979 Cal 156.
3. *Ginden* v. *Barelal*, AIR 1976 MP 83.
4. *Kaushalya* v. *Vijaya*, AIR 1973 Raj 269.
5. *Narayan* v. *Sridevi*, AIR 1990 Ker 151.
6. *Parimi* v. *Parimi*, AIR 1994 AP 92.
7. *Gurbachan Singh* v. *Waryam Kaur*, AIR 1960 Punj 432; *Iqbal Kaur* v. *Pritam Singh*, AIR 1963 Punj 242; *Kusumlata* v. *Kampta Prasad*, ILR (1866) All 280; *Kohli* v. *Kohli*, AIR 1967 Punj 397; *Mohinder* v. *Bhagram*, AIR 1979 Punj 71; *Siddagagaiah* v. *Laxman*, AIR 1964 Mys 125; *Pushpa* v. *Archana*, AIR 1992 MP 260; *Ashoka* v. *Vijai*, AIR 1992 Del 102.
8. *Sulochana* v. *Ram Kumar*, AIR 1981 All 78.
9. ILR (1970) Cal 266.
10. *Ibid*, at 256.
11. *Dawn* v. *Handerson*, AIR 1979 Mad 104.
12. *Jyosith* v. *Meera*, AIR 1970 Cal 266; *Srikant* v. *Anirutha*, AIR 1980 Kant 8.
13. (1966) 2 All ER 257.
14. AIR 1965 All 280.

anything else. A wife may tolerate other things but not the false accusation of adultery.

In *Chandra* v. *Sudesh*,[1] wife left the matrimonial home and was found loitering with all sorts of people. It caused great mental and moral torture to her husband. It was held to amount to cruelty.

Sometimes it may amount to cruelty, even though the respondent has no conscious and unconscious part to play in an act or event that which has happened. In *Roop Lal* v. *Kartaro*,[2] wife was suffering from a deadly disease (arlorhinitis) as a result of which fleshy portion of her nose got putrefied and emitted a very foul smell. This made it impossible for the husband to enjoy her company or to have marital intercourse with her. This caused mental suffering to the husband. The court gave the finding of cruelty, though the wife was in no way responsible for it. It is submitted that this view needs reconsideration, otherwise any prolonged or serious or chronic ailment with which a spouse suffers may be considered as cruelty if the other spouse can show it caused anxiety and suffering to him, which it would be in every normal case.

Demand of dowry.—The demand of dowry from the wife or her parents and relations amounts to cruelty.[3] But this should be distinguished from Section 498-A, Indian Penal Code, whereunder it is a criminal offence.

Persistent refusal to have marital intercourse.—Persistent refusal to have marital intercourse amounts to cruelty.[4] In *Shakuntala* v. *Om Parkash*,[5] Leila Seth, J. observed :

> A normal and healthy sexual relationship is one of the basic ingredients of a happy and harmonious marriage. If this is not possible due to ill health on the part of one of the spouses, it may or may not amount to cruelty depending upon the circumstances of the case. But wilful denial of sexual relationship by a spouse when the other spouse is anxious for it, would amount to mental cruelty, especially when the parties are young and newly married. This is consistent view taken by the courts.[6]

Wilful refusal to sexual intercourse and impotency.—If refusal to have intercourse amounts to cruelty, so does the impotency. In *Rita* v. *Balkrishan Nijhawan*,[7] the Delhi High Court observed, ".....the law is well settled that if either of the parties to a marriage being of healthy physical capacity refuses to have sexual intercourse, the same would amount to cruelty entitling the other to divorce. In our opinion, it would make no difference in law whether denial of intercourse is the result of sexual weakness of the respondent disabling him from having sexual union with the appellant, or it is because of any wilful refusal by the respondent." This view has been

1. AIR 1971 Del 208.
2. AIR 1970 J & K 158.
3. *Sobha* v. *Madhukar*, AIR 1988 SC 1291; *Adarsh* v. *Sarita*, AIR 1987 Del 203; *Rajam* v. *Subramanyam*, AIR 1991 Bom 164.
4. *Jyosith* v. *Meera*, AIR 1970 Cal 266; *Srikant* v. *Anirutha*, AIR 1980 Kant 8.
5. *Shakuntala* v. *Om Parkash*, AIR 1981 Del 53.
6. *Anil Bhardwaj* v. *Nirmalesh*, AIR 1987 Del 11 (other cases have been reviewed).
7. AIR 1973 Del 200.

confirmed by the Supreme Court in *Sirujmohedkhan* v. *Hafizunissa*,[1] a case under Section 125, Criminal Procedure Code.

Wilful refusal to perform marital obligation amounts to cruelty.[2]

In a case, where husband was suffering from paranoid schizophrenia and was not able to consummate marriage is enough evidence of mental cruelty.[3]

Injury to private parts.—Pulling of flaccid penis of her husband by the wife amounts to cruelty.[4]

Drunkenness.—In a English decision, a view is propounded that drunkenness *per se* is not cruelty.[5] But it seems in the context of Hindu culture, there may be certain circumstances in which drunkenness may amount to cruelty. M.L. Jain, J., rightly observed that the habit of excessive drinking is a vice and cannot be considered to be reasonable wear and tear of married life. If a spouse indulges in excessive drinking and continues to do so in spite of remonstrances by the others, it may amount to cruelty, since it may cause great anguish and distress to the other spouse who may find living together not merely miserable but unbearable.[6] This decision gives a new dimension to cruelty, and considering our cultural context, it is a welcome decision.

False criminal charges.—In several cases, it has been held that prosecution of spouse by the other of a false criminal charge amounts to cruelty. Thus, it was held to amount to cruelty, where the wife launched prosecution of her husband on a false charge of bigamy under Section 494 of the Indian Penal Code.[7] In *Kalpana* v. *Surendra*,[8] the wife lodged report against the husband and his relations for offences under Sections 307 and 406, IPC as well as under Section 4, Dowry Prohibition Act with the result that cases were registered against the husband and his other relations and warrants were issued and they had to obtain bail from the court. But ultimately these turned out to be false cases. The Allahabad High Court held that this amounted to cruelty. In *Shyamlata* v. *Suresh*,[9] the wife lodged complaint against her husband and in-laws under Sections 107 and 151, Cr. P.C. But proceedings were subsequently dropped for want of prosecution. The Punjab and Haryana High Court held that this conduct of the wife did not amount to cruelty.

False, baseless and wreckless charge.—In *Bhagat* v. *Bhagat*,[10] the Supreme Court after review of authorities, said that mental cruelty can

1. AIR 1981 SC 1972; *See* also *Shankar* v. *Madhavai*, AIR 1982 Cal 474; *Hanuman* v. *Chandrakala*, AIR 1986 P & H 306; *Manjit* v. *Surendra*, AIR 1994 P & H 5.
2. *Jyosith* v. *Meera*, AIR 1970 Cal 766; *Srikant* v. *Anirutha*, AIR 1980 Kant 8; *Avinash* v. *Chandra Mohani*, AIR 1964 All 486; *Nijhawan* v. *Nijhawan*, AIR 1973 Del 200; *Shakuntala* v. *Om Prakash*, AIR 1981 Delhi 53; *Anil* v. *Nirmalesh*, AIR 1987 Del 111.
3. *Vinita Saxena* v. *Pankaj Pandit*, AIR 2006 SC 1662.
4. *Savitri* v. *Mulchand*, AIR 1987 Del 52; *Ashok* v. *Santosh*, AIR 1987 Del 63.
5. Thus, in *Chand* v. *Saroj*, AIR 1975 Raj 88, it has been held that drunkenness coupled with violence amounts to cruelty, though not excessive drunkenness.
6. *Rita* v. *Brij*, AIR 1984 Del 291.
7. *Raj* v. *Raj*, AIR 1986 Pat 362.
8. AIR 1985 All 253.
9. AIR 1986 P & H 383.
10. AIR 1994 SC 710.

broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. Even false, baseless and wreckless charges in the written statement and thereafter would amount to cruelty. The Supreme Court added :

> Though irretrievable breakdown of the marriage is not a ground by itself for divorce, while scrutinising the evidence on record to determine whether the grounds alleged are made out and in determining the relief to be granted, the circumstance that the marriage has irretrievably broken down can certainly be borne in mind. We have already indicated above, the attitude adopted by the wife and her father. In our view, the marriage between the spouses has irretrievably broken down. This is, thus, an additional factor which has to be borne in mind while considering the question of granting the decree for divorce.

After a review of all the relevant precedents and the Supreme Court decision in *Bhagat* v. *Bhagat*, the Bombay High Court in *Rajan* v. *Shobha*,[1] that wife's remark that her husband had a very ugly face and persons having ugly faces had ugly mind might not amount to cruelty, yet baseless and reckless allegations against the husband would amount to cruelty, even when made in written statement and in oral testimony.

The theme of *Bhagat* v. *Bhagat*, has been further advanced by the Supreme Court in *Romesh* v. *Savitri*,[2] the Court said that the marriage was dead emotionally and practically and the continuance of the marriage alliance for name-sake was prolonging the agony and affliction. In such a case, it was better to dissolve the marriage, the court held. The court observed :

> It cannot be disputed that the husband has not been dutiful and conscious of his responsibilities either towards his wife or his son. He did not contribute anything towards upbringing of the child. Yet the marriage being dead, the continuance of it would be cruelty, specially when the child born out of the wedlock of the appellant and the respondent as far back as 1968 having now grown up and being in service. The appellant has expressed remorse for his conduct and is willing to compensate for his past mistakes by transferring the only house in his name in favour of his wife.

Refusal to have children.—Just as wilful refusal to have sexual intercourse amounts to cruelty, similarly, the persistent refusal to a spouse to have any children amounts to cruelty. Thus, wilful refusal to have sexual

1. AIR 1995 Bom 246.
2. AIR 1995 SC 851.

intercourse to frustrate the other spouse's desire to have a child amounts to cruelty.[1] Among Hindus (and for that matter every normal person wishes to have one or two children) the birth of a son is considered to be necessary for the salvation of the soul, and if one of the parties refuses to have marital intercourse or insists to have it only with the contraceptives, it would amount to cruelty. Wife's insistence to terminate pregnancy twice over for no valid reason despite husband's desire to have a child amounts to cruelty.[2] Similarly, when the wife got her pregnancy terminated without consulting her husband and for no valid reason, it was held to amount to cruelty.[3]

Birth of an illegitimate child.—In *Mandan Lal* v. *Sudesh Kumar*,[4] the court held that birth of a child within six months of marriage amounted to cruelty. No one should dispute this finding. But under Section 12(2)(b)(ii), on the ground of pre-marriage pregnancy, the petition for annulment must be filed within one year of marriage. Suppose a person fails to do so, should he be allowed to take recourse to Section 13(1)(ii)(b)? In our submission, this would be violative of statutory provision. However, the judgment is socially just as no husband may be as large hearted as to live with such a wife.

Threat to commit suicide.—When a spouse threatens the other to commit suicide with a view to coercing the other to do something, it amounts to cruelty. Thus, in *Dastane* v. *Dastane*,[5] the Supreme Court held that the threat given by the wife that she would commit suicide amounted to cruelty. In *Shakuntala* v. *Om Prakash*,[6] also, Leila Seth, J. observed that threat given by the wife to commit suicide amounted to cruelty to the husband. In *Savitri* v. *Mulchand*,[7] the wife took poison when the husband returned from London. She was luckily saved. It was held that it amounted to cruelty on the part of the wife.

False complaint to the employer.—It seems to be now an established proposition of law that false, malicious, baseless allegations made by one spouse against the other in the letters addressed to the employer of the spouse or to any person in authority amounts to cruelty against the other. Thus, in *Lajwanti Chandhok* v. *O.N. Chandhok*,[8] it was held that wife's writing false anonymous complaint to the employer of the husband amounts to cruelty.[9] In *Kiran* v. *Surendra*,[10] wild allegations were made by the wife against her husband who was a class I officer in the Ministry of External Affairs, to the Superior Officer. These letters were very damaging to the reputation of the husband. The court held that this amounted to cruelty. Again, in *Jordan* v. *Chopra*,[11] the husband wrote several letters to the superior officer of his wife containing malicious, false and baseless allegations, such as that the Government was exploiting her weakness to

1. *Jyosith* v. *Meera*, AIR 1970 Cal 266.
2. *Satya* v. *Siri Ram*, AIR 1963 P & H 252.
3. *Kalpana* v. *Surendra*, AIR 1985 All 253; *Sushil* v. *Usha*, AIR 1987 Del 86.
4. AIR 1983 Del 93.
5. AIR 1975 SC 1534.
6. AIR 1981 Del 53; *See* also *Meera* v. *Vijai*, AIR 1994 Raj 33.
7. AIR 1987 Del 52.
8. AIR 1982 NOC 111.
9. See *Girdharilal* v. *Santosh Kumar*, (1982) 1 DMC 180.
10. *Kiran* v. *Surendra*, (1982) RLR Note 32.
11. AIR 1985 NOC 45.

their advantage. By these letters the husband tried to malign her and accused her of adultery. The court held that these letters constituted cruelty against her.[1] In *Harbhajan Singh* v. *Amarjeet Kaur*,[2] the wife lodged a false complaint against the husband to his bank employees. It was alleged in those letters that the husband had committed fraud in the bank and that he had withdrawn certain amounts from the bank by forging signatures. These were serious allegations and if proved to be true, would have led to the dismissal of the husband. It was also alleged that the husband had used L.T.C. benefits wrongly. V.D. Gyani, J. rightly observed :

> The matrimonial cause is not to be converted into a criminal trial. What was more important is the nature of complaint made by the defendant wife and consequence likely to result therefrom. If such a conduct is indulged in and as in this case, it is amply proved to have been indulged into by the defendant wife, then it certainly amounts to cruelty towards the husband irrespective of the trifling nature of the allegations of the fact that the employer bank has not pursued the same but it certainly points to cruelty indulged in by the respondent wife towards her husband.

Verbal abuses and insults using filthy and abusive language.—It is now well established that verbal abuses and insults and use of filthy and abusive language amounts to cruelty.[3]

Residing with a third woman.—If the husband lives with a woman who is not related to him, then the wife's living separate will be neither desertion nor cruelty.[4]

Allegations made in the written statement—Whether amounts to cruelty.—The English law adhered to the view that allegations of cruelty made before the filing of the petition were alone material and allegations made in the written statement could not be considered. But this view has undergone a change. The courts have taken the view that the subsequent events can be taken into account with a view to shortening the litigation and doing complete justice between the parties.[5] In *Parihar* v. *Parihar*,[6] M.L. Jain, J. observed that the court could take into consideration the facts and conduct amounting to cruelty that took place after the presentation of the petition and even after the decree of the trial court. In this case, the wife had made complaint against her husband to the air force authorities casting serious aspersions on the husband, (the husband was employed in the air force) after the husband had filed the petition. These letters could have caused immense harm to the husband if believed. In *Pushpa Rani* v. *Krishna Das*,[7] the wife had hinted in the written statement about the adulterous relations of the husband and then the same was directly suggested to him in the cross-examination and then in her examination she asserted that she had

1. See *Savitri* v. *Mulchand*, AIR 1987 Del 52, where earlier cases have been reviewed; See also *Arunna* v. *Ramesh Chandra*, AIR 1988 All 239.
2. AIR 1986 MP 41.
3. *Gangadharan* v. *Madhukar*, AIR 1988 Ker 244.
4. *Madan* v. *Chitra*, AIR 1993 Cal 33.
5. *Upper Ganges Valley Electricity Supply Co. Ltd.* v. *U.P. Electricity Board*, AIR 1973 SC 683.
6. AIR 1978 Raj 140.
7. AIR 1982 Del 107.

seen her husband and one Binda Devi, "closetted together, and sleeping together in a compromising position." While in fact Binda Devi was a lady senior to the husband by 20 years, and allegation was found to be false. In *Savitri* v. *Mulchand*,[1] the wife had made false, scandalous, malicious, baseless and unproved allegations in written statement against the husband. The court held that this amounted to cruelty. Similarly, in *Ashok* v. *Santosh*,[2] the wife in her written statement, made false, baseless, scandalous and defamatory allegations. The court held that these amounted to cruelty.

False allegations after filing of the petition.—If wife continues to make false, wild and reckless allegations against a husband after the filing of the petition, it would amount to cruelty.[3]

Wife's refusal to tender her resignation at the instance of the husband.—It has been held that wife's refusal to tender her resignation from her job on the demand of her husband does not amount to cruelty.[4]

A new trend is discernible in our High Courts, where there are allegations and counter allegations of cruelty and marriage is virtually dead, divorce is granted on this ground.[5] The Supreme Court in *Satish Sitole* v. *Ganga*,[6] has sort of given its seal of approval to this trend. In this case, the husband could not make any ground. Parties were living separate since 14 years and were leveling acrimonious charges against each other. Reconciliation was tried and proved futile. In these circumstances, divorce was granted with adequate alimony.

Ordinary wear and tear of married life.—Even though a very wide meaning had been given to legal cruelty, yet it is evident that every act or conduct of one party which makes other party unhappy or miserable cannot amount to cruelty. The fact that the respondent is moody, whimsical, mean, stingy, selfish, boorish, irritable, inconsiderate, will not be sufficient to amount to cruelty.[7] Similarly, mere neglect or want of affection, disavowal of love, wounding of the feeling or even expression of hatred will not be a conduct constituting cruelty. Just because the respondent is in the habit of using vulgar, obscene or rude language or of making offensive remarks, or lacks manners may not amount to a conduct constituting cruelty. In *Raj Kumar* v. *Ram Prakash*,[8] the wife used to abuse her husband and at times refused to cook food for him as a protest for his sending money to his parents. She also brought a *tawiz* to create in him hatred for his parents. The court held that this does not amount to cruelty. In *Narayan* v. *Prabha*,[9] the wife all

1. AIR 1987 Del 52.
2. AIR 1987 Del 63.
3. *Rajan* v. *Shobha*, AIR 1995 Bom 247.
4. *Nirmala* v. *Dinesh*, AIR 1991 MP 346; *Alka* v. *Bhaskar*, AIR 1991 Bom 164. Also see AIR 2001 Raj. 404.
5. *Poonam Gupta* v. *Ghanshyam Gupta*, AIR 2003 All. 51; *Madhu Sood* v. *Anil Kumar Sood*, A.I.R. 1999 H.P. 17, A.I.R. 1999 P. & H. 108; A.I.R. 1999 M.P. 108; *Jasminder Singh* v. *Prabhjinder Kaur*, AIR 2008 P. & H. 13; *Kamal Gorai* v. *Menka Gorai*, AIR 2008 Jhar 36 (DB); *Reebha Singh* v. *Dr. Ashok Kumar Singh*, AIR 2008 Jhar 53; *Varalakshmi Charkha* v. *Satyanarayana Charkha*, AIR 2008 AP 134 (DB); *Deo Kumar Sah* v. *Anjali Kumari*, AIR 2009 Pat. 4.
6. AIR 2008 SC 3093.
7. *Nirmala* v. *Dinesh*, AIR 1991 MP 346; *Alka* v. *Bhaskar*, AIR 1991 Bom 164.
8. (1968) 70 PLR 879.
9. AIR 1964 MP 28.

along disobeyed her mother-in-law who, a typical mother-in-law as she was, wanted her daughter-in-law to be always obedient to her and not to question her commands. The mother-in-law did not want her to touch certain articles during the periods but she deliberately touched them; the mother-in-law did not want her to take bath in cold water but she always took bath in cold water. The mother-in-law did not allow her to visit neighbours or to go to see pictures. The wife resented all this. The wife one day destroyed her mother-in-law's tobacco to which the latter was an addict. The court said that all these idiosyncrasies of the wife did not amount to cruelty, even though these made the husband unhappy. In *Anna* v. *Tarabai*,[1] the husband on certain occasions persuaded his wife to accompany him wherever he went and even pressed her for the same. This led to unpleasantness as the wife did not want to go with him. The court said that such conduct on the part of the husband was perfectly justified and it could not be said that he treated her with cruelty. In *Santosh* v. *Parveen*,[2] the wife had lived only for three or four days with her husband and thereafter complained of physical and mental cruelty which she could not substantiate. The Court dismissed her petition saying that it could not be more than initial wear and tear of married life. The Supreme Court in *J.L. Nanda* v. *Veera Nanda*[3] confirmed the view.

Day to day ordinary quarrels in married life, minor misunderstanding, raising of tone of voice does not amount to cruelty.[4]

Mental cruelty under Muslim law.—It is submitted that all the aforesaid cases of mental cruelty will also amount to cruelty under Muslim law, since in Section 2(viii) of the Dissolution of Muslim Marriage Act, words are "or makes her life miserable by cruelty of conduct even if conduct does not amount to physical ill-treatment." False accusation of adultery has been held to amount to cruelty. Under Muslim law, *lian* or imprecation, that is false accusation of adultery, is a ground of divorce. (See subsequent pages under the title "Lian or Imprecation") Section 2 (viii) lists six specific cases of mental cruelty, though the last one is typical Islamic situation arising out of recognition of polygamy by Muslim law and the Koranic injunction to treat all wives equitably. The first case, "attempts to force her to lead immoral life", is an obvious case and constitutes cruelty in all jurisdictions. The second case, *viz.*, "husband disposes of her property or prevents her from exercising her legal rights over it", will cover any disposal of wife's property which hurts her sentiments or causes emotional or mental strain on her. But in *Zubaida* v. *Sarda Shah*,[5] Abdul Rehman, J. said that the disposal of property should be without her consent (it is obvious) of a substantial portion of property for his own selfish ends and not for her benefit, in a wasteful manner, and with the intention of depriving the wife of the property, disposed of. This narrows down the scope of the clause and in our submission, is not a correct formulation. The clause has to be interpreted keeping in view that this is a type of cruelty. In *Badrunnisa* v. *Md. Yusuf*,[6] wife left goods at husband's house and did neither took them back herself nor asked her husband for their return. This

1. AIR 1970 MP 36.
2. AIR 1987 P & H 65.
3. AIR 1988 SC 407.
4. *Indira* v. *Shelendra*, AIR 1993 MP 59; *Tapan* v. *Anjali*, AIR 1993 Cal 10.
5. AIR 1943 Lah 310.
6. AIR 1944 All 23.

did not amount to deprivation of property. The third case is : husband obstructs her in the observance of her religious profession or practice. It is submitted that this clause will apply even where wife is a non-Muslim. This clause came for interpretation before the Kerala High Court in *Aboobacker* v. *Mamu Koya*.[1] Krishna Iyer, J. said that religious practices, the obstruction of which constitutes statutory cruelty are "those observances the performance of which makes a man or woman Muslim and departure from which deserves to be castigated as an un-Islamic—not deviation from every inconsequential, though orthodox ritual or mode of life. The statutory vice lies in fundamental violation and obstructions. Again, if every fugitive passion for fashion coming from either spouse can, with Las Vegas levity, work a legal disruption of wedlock, marriages will become plaything of passing fancies and too fluid to be regarded as a firm institution—a view most subversive of our cultural heritage. It will be cruel to the concept of cruelty and outraging the modesty of the statute to cast the net of guilt so wide as to catch within it such pleasurable pleasures as persuasion to see a cinema or don a dainty saree on her young figure.[2] In this case two instances of cruelty complained of by the wife were that the husband forced her to see a picture in a cinema hall and to don a *sari*. Wife also alleged that husband's way of life was un-Islamic. The learned Judge rightly observed that the un-Islamicness of the husband was not covered under the clause. He further observed that the departure from standards of suffocating orthodoxy and from the bigoted beliefs and ritualistic observances, did not constitute un-Islamic behaviour, nor was subscription to religious reforms and modern way of life un-Islamic. The fourth case of cruelty is : the husband who has more wives than one does not treat her (plaintiff) equitably with others, in accordance with the Koranic injunction. In an early case, where one of the two wives left the matrimonial home on account of ill-treatment of the husband and the husband did not make any effort to bring her back, the court held it was inequitable. However, the court observed that only very gross failure to render to a wife her just right could be covered under this clause.[3] It is submitted that this is not a correct view, and not in accordance with the modern thought and contemporary social conditions. The Koran enjoins that a man should take more than one wife only when he can treat them all equitably, otherwise he should be satisfied with one. Thus, it is submitted if a husband fails to treat his wives equitably, then anyone of them may sue for divorce under this clause. It is immaterial that his unequitable treatment is gross or mild. In *Umat-ul-Hafiz* v. *Talib Hussain*,[4] a husband went abroad leaving behind two wives; he made a provision for the maintenance of one wife but ignored the other. On the suit of ignored wife for divorce under this clause, the court had no difficulty in granting decree of dissolution of marriage. But if a wife leaves the husband just because he has married another wife, providing no opportunity to the husband to treat them equitably, it cannot be said that he did not treat her equitably.[5]

1. KLT 1944 All 23.
2. *Ibid*, 667-68.
3. *Ashmabai* v. *Umer*, AIR 1941 Sind 23.
4. AIR 1945 Lah 56.
5. *Umal-ul-Hafiz* v. *Talib Hussain*, AIR 1945 Lah 56.

Lian or imprecation or false accusation of adultery under Muslim law.—Technically, *lian* means a testimony confirmed by oath and accompanied by imprecation. When a man charged his wife with adultery, he may be called upon, on the application of the wife, either to retract the charge or to confirm it on oath, coupled with an imprecation in these words. "The curse of God be upon him if he was liar when he cast at her the charge of adultery." The wife is then called upon either to admit the truth of imputation or to deny it on oath coupled with an imprecation in these terms, "The wrath of God be upon me if he be true speaker of the charge of adultery which he has cast upon me." If the wife takes the oath, the *Kazi* must believe her and pronounce divorce. Dissolution of marriage by mutual imprecation is mentioned in the Koran and is supported by a tradition. *Lian* is mentioned in the Shariat Act, 1937. It seems that the classical form of *lian* is no longer in vogue in India. But if a husband makes a false charge of adultery, the wife can sue for divorce on that basis.[1] The false charge of adultery does not *ipso facto* lead to dissolution of marriage, but is a ground for judicial divorce. Obviously, no decree dissolving the marriage can be passed if the charge is true.[2] There is a conflict of opinion whether a husband can retract the charge of adultery once the suit is filed. One view is that he can do so before the close of evidence.[3] The Bombay High Court in an early case took the view that retraction had no place in the procedure of Indian courts,[4] but in a later case,[5] it said that retraction might be made before the end of trial. In *Kallo* v. *Imaman*,[6] the Allahabad High Court held that after the coming into force of the Dissolution of Muslim Marriage Act, retraction cannot be made, once a suit has been filed. It is submitted that cruelty as a matrimonial offence is complete once it is made and the guilty party cannot "retract" it. This should also be the view taken under Muslim law. Now a suit on the basis of *lian* can be filed under Section 2(ix), Dissolution of Muslim Marriage Act. Clause (ix) is a residuary clause and lays down "on any other ground recognized as valid for the dissolution of marriage."[7]

Mental cruelty under Parsi law.—The new clause (dd) of Section 32 of the Parsi Marriage and Divorce Act brings the concept of cruelty at par with that under the Hindu Marriage Act and the Special Marriage Act.[8] But the old clause has been retained under clause (e) of Section 32, it amounts to cruelty if the defendant has infected the petitioner with venereal disease, or the defendant has compelled her to prostitution or has caused voluntarily grievous hurt to the petitioner.

Acts or conduct constituting cruelty.—Which acts or/and conduct will constitute cruelty? In reference to conduct, the English courts have used

1. *Ayesha* v. *Abdool*, (1934) 59 Cal LJ 466; *Ralla* v. *Imaman*, AIR 1949 All 445.
2. *Zafar* v. *Ummat-ul-Rehman*, ILR (1949) 41 All 378; *Khatijabai* v. *Umar*, AIR 1928 Bom 285.
3. *Fakhree Jahan* v. *Ma*, AIR 1929 Oudh 8; *Tufail* v. *Jamila*, AIR 1921 All 570 (retraction should be made before the commencement of the hearing); *Rahima* v. *Fazil*, AIR 1927 All 55; *Shamsunnessa* v. *Mir*, AIR 1940 Cal 95 (at any time before the close of evidence).
4. *Ahmed* v. *Fatima*, AIR 1931 Bom 76.
5. *Maomedali* v. *Hazzarabai*, AIR 1955 Bom 464.
6. AIR 1959 All 449.
7. *Nurjahan* v. *Md. Kazim Ali*, AIR 1977 Cal 90.
8. The clause has been added by the Act of 1988.

several expressions. The conduct should be such which is "inexcusable", "unpardonable", "unforgivable" or "grossly excessive." The shortest expression is "grave and weighty." In short, conduct should be such that no reasonable person would tolerate it or consider that the complainant should be called upon to endure it.[1] Although the respondent's conduct must be weighty, the question before the court is whether *this* conduct of *this* respondent *to this* petitioner is cruelty. In deciding whether or not a particular state of affairs, conduct or act amounts to cruelty, the court has to consider the social status, the environment, the education, the mental and physical conditions and the susceptibilities of the innocent spouses as well as custom and manners of the spouses. The act and conduct complained of should be considered in reference to the whole matrimonial relationship.[2] It may be that various acts or conduct complained of in isolation to each other do not amount to cruelty, but in their overall effect they may amount to cruelty. In general, cruelty is, in its character, a cumulative charge. It may consist of a single act or conduct of the respondent, or it may consist of a series of acts, conducts none of which by itself may be said to constitute cruelty but in their totality they do.[3] In some Indian cases, the view has been propounded that what amounts to cruelty is not the magnitude of acts or conduct but the consequences they produce on the other party.[4] This was particularly so when before the amendment of cruelty in 1976, "cruelty" was defined in terms of its result on the petitioner, *i.e.*, it would be injurious or harmful for the petitioner to continue to live with the respondent. Now that the definition has been changed, it will no longer be necessary for the petitioner that it would be injurious or harmful for him to live with the respondent. The courts would take into account the whole matrimonial relationship, particularly when cruelty consists of not violent acts but of injurious reproaches, complaints, accusations or taunts. Thus, any conduct of one spouse which causes disgrace to the other or subjects him/her to a course of annoyance and indignity will amount to cruelty; the harm apprehended may be mental suffering as distinct from bodily harm, for pain of mind may be even severer than bodily pain and spouse disposed to evil may create more misery in a sensitive and affectionate spouse by a course of conduct addressed only to the mind than in fits of anger when he were to inflict occasional blow upon her person.[5] The caution is sounded by the House of Lords. In *Jamieson* v. *Jamieson*,[6] the House of Lords observed that every act must be judged in relation to the spouse's temperament. Acts which appear on the face to be unpardonable may in particular circumstances be, if not justified, at least excused by the petitioner's own conduct and the amount of provocation he has offered to the respondent. In *King* v. *King*,[7] the House of Lords observed that such questions are always questions of degree and the court must bear in mind the intensity and degree of the respondent's conduct whilst making allowance for the intensity and degree of provocation offered by the petitioner and all other relevant facts. Any conduct of one spouse which

1. *See* Pierce and Reid, LLJ in *Collins* v. *Collins*, (1953) 2 All ER 966.
2. *Rup Lal* v. *Kartaro*, 1970 J & K 158.
3. *Saptami* v. *Jagdish*, 73 CWN 502.
4. *Kusum Lata* v. *Kampa*, AIR 1965 All 280.
5. *Serala* v. *Pyle*, AIR 1959 Ker 75.
6. (1952) 1 All ER 875.
7. (1952) 2 All ER 584.

causes disgrace to other spouse or subjects him or her to a course of annoyance and indignity amounts to cruelty. Harm may be bodily injury or mental suffering.

The court might take into consideration even facts and conduct amounting to cruelty which took place after the presentation of the petition.[1]

Defence to cruelty.—Insanity is no longer a defence to cruelty. Provocation or self-defence is still good defence to a charge of cruelty.[2] Acquiescence to the acts or conduct of the defendant is also a good defence to a charge of cruelty, but submission to acts must be voluntary. If the petitioner has no option but to submit, he or she cannot be precluded from basing the ground upon these acts.[3] In *Meachur* v. *Meachur*,[4] the husband repeatedly assaulted his wife for visiting her sister (this can happen in India too) contrary to his wishes. It was held to be no defence to the charge of cruelty that the wife could have avoided them by giving in to her husband's demand which was obviously unreasonable.

Quantum of proof.—The cruelty need not be beyond all reasonable doubts. Cruelty may be proved on balance of probabilities. Relying on words "satisfied" in S. 23, Hindu Marriage Act (in other Indian matrimonial statutes also the same word has been used), the learned judge in *Dastane* v. *Dastane*,[5] said that "satisfied" means "satisfied on preponderance of probabilities", and not satisfied beyond reasonable doubts. It is submitted that it is a welcome departure from the rigid test of "beyond all reasonable doubts" particularly when in modern law, adultery, desertion and cruelty are not so much regarded as matrimonial offences, but more or less as instances leading to breakdown of marriage.

INSANITY

Under the Divorce Act, 1869-2001, by virtue of section 10(iii), the respondent has been incurably as unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition. Under the Dissolution of Muslim Marriage Act, 1939, husband's two years insanity is a ground on which wife may sue for divorce.[6] The insanity has not been qualified by words like "incurable" or "continuous."

At present under the Hindu Marriage Act, the Special Marriage Act and the Parsi Marriage and Divorce Act, insanity as a ground is worded identically. By the amendment of 1976, the clause has been modified in first two statutes and an identical clause has been inserted in the third statute by the Amending Act of 1988. The clause runs as under :

Respondent has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.—In this clause :

(a) The expression "mental disorder" means mental illness, arrested or

1. *Parihar* v. *Parihar*, AIR 1918 Raj 140.
2. *Meachur* v. *Meachur*, (1946) 2 All ER 307; *Dastane* v. *Dastane*, AIR 1975 SC 1534.
3. *Saquire* v. *Saquire*, (1948) 2 All ER 51; *I.* v. *I*, (1963) 2 All ER 746.
4. (1946) 2 All ER 307.
5. AIR 1974 SC 1534.
6. Section 2(iv).

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 subnormality 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.

The inspiration of this modification has come from English law. The definitions of "mental disorder" and "psychopathic disorder", have been bodily lifted from clauses (1) and (4) of Section 4, Mental Health Act, 1959. One wonders what advantage we are going to draw from this change. It merely makes simple matters complicated. The present definition is much wider than the three years' continuous and incurable insanity. The incurable unsoundness of mind may be of any (longer or shorter) duration; no period is specified. If it is incurable, that is enough. Mental disorder schizophrenia should be of such quality that the petitioner is not reasonably expected to live with the respondent.[1] It seems that in a petition on the ground of insanity, a preliminary inquiry as contemplated in Rule 3 read with Rule 15, Order 32 CPC, will be necessary.[2] Similarly, if the respondent is suffering from "mental disorder", continuously or intermittently, the mental disorder should be of a quality that the petitioner is not reasonably expected to live with the respondent. The mental disorder has also been defined under the Act. It would always be a question of fact as to whether the mental disorder is "of such a kind and such an extent" that the petitioner is not reasonably expected to live with the respondent.

Insanity under Muslim law.—The Dissolution of Muslim Marriage Act, 1939 lays down that if the "husband has been insane for a period of two years, the wife may sue for divorce."[3] In the Act, insanity is used in a very wide sense. It may be continuous or with lucid intervals, it may be curable or incurable, it may be pre-marriage or post-marriage insanity, it may be there before consummation of marriage or it may arise after consummation. Even before the Act, insanity was a ground for divorce under Muslim law, particularly among the Shias and the Shafiis.[4] It is submitted that insanity of any quality is a ground of divorce under the Dissolution of Muslim Marriage Act and there is no reason why it should be restrictively interpreted, or guidance derived from statute like the Special Marriage Act where wordings of the clause are entirely different.

LEPROSY

Leprosy is a ground for divorce and judicial separation under most of the matrimonial laws of the Indian communities. Under the Hindu Marriage Act, the ground runs : respondent "has been suffering from virulent and incurable form of leprosy."[5] Under the Special Marriage Act, the ground is worded differently. It runs : the respondent "has been suffering from leprosy, the disease not having been contracted from the petitioner."[1] Under the Dissolution of Muslim Marriage Act, the ground runs thus : "the husband is suffering from leprosy."[2] Under Divorce Act, by virtue of section 10(iv), the respondent has for a period not less than two years immediately preceding the presentation of petition been suffering from virulent and incurable form of leprosy.

Under any of the above statutes, where leprosy is a ground for divorce or judicial separation, the duration of leprosy is not specified. Under the Hindu Marriage Act, leprosy to be a ground for divorce or judicial separation must be : (a) incurable, and (b) virulent.

At present, leprosy in its early stages is curable. It seems that some period must elapse before leprosy becomes incurable. What time should elapse will vary from case to case depending upon the type of leprosy with which the respondent is suffering. Malignant and venomous leprosy are virulent forms of leprosy. A mild form of leprosy which is curable is not virulent. Lepromatous leprosy, which is malignant and contagious and in which prognosis is usually grave, is virulent leprosy.[3] Sometimes its spread can be arrested by a long period of treatment but relapses are frequent.[4] Leprosy is virulent when ulcerous and unsightly symptoms appear or when social intercourse becomes almost impossible.

Under the Special Marriage Act, leprosy need not be incurable or virulent. It seems that any type of leprosy will be a ground for divorce or judicial separation under the Act. In common parlance, "white spots" (leucoderma) is also called leprosy. But it is submitted that some caution is necessary not to interpret the term so widely, so as to include leucoderma.

Under the Special Marriage Act, leprosy is qualified by these words, "the disease not having been contracted from the petitioner."

Under Muslim law, the ground is "leprosy" simpliciter. It need not be incurable or virulent, it might or might not be contracted from the wife.

VENEREAL DISEASES

Venereal disease is a ground for divorce and judicial separation under the matrimonial laws of most Indian communities. Under the Hindu Marriage Act and the Special Marriage Act, the ground is worded in identical language. The ground runs : the respondent "has been suffering from venereal disease in a communicable form."[5] Under the Dissolution of Muslim Marriage Act, the ground runs : "The husband is suffering from a virulent venereal disease."[6] Under the Parsi Marriage and Divorce Act, a spouse can sue the other for divorce on this basis if the latter has infected him with the disease.

Under the Divorce Act, according to section 10(v), the respondent has been suffering from venereal disease in communicable form for a period not less than two years immediately preceding the filing of petition.

Under the Hindu Marriage Act and the Special Marriage Act, venereal

1. *Joginder* v. *Sutji*, AIR 1925 P & H 128; *Ram Narayan* v. *Rameshwari*, AIR 1989 SC 149.
2. *Asha Ram* v. *Amrat Lal*, AIR 1977 P & H 28.
3. Section 2(iv).
4. *See* Baillie II, 59-60.
5. Section 13(i)(iv).

1. Section 26(1)(g).
2. Section 2(iv).
3. *Annapurna* v. *Nabakishore*, AIR 1965 SC 72.
4. *Sivararaya* v. *Padma Rao*, (1974) 1 SCJ 79.
5. Section 13(1)(v) of the former and Section 26(1)(6) of the latter.
6. Section 2(vi).

disease to be a ground for divorce or judicial separation should be in a communicable form, while under the Dissolution of Muslim Marriage Act, the disease should be virulent. It is submitted that a virulent venereal disease has to be one which is communicable. Thus, there does not seem to be any difference, in the scope and meaning of the clause under both the statutes. Congenital syphilis is not included within the expression "virulent venereal disease" or "venereal disease in a communicable form."

In *Mr. X* v. *Hospital Z*,[1] divorce was granted to wife when husband was discovered to be HIV positive. It was observed by the Court that since venereal disease is a ground for divorce, it implies that a person suffering from venereal disease prior to marriage must be injuncted from entering into marriage.

It is immaterial that the disease is curable or was contracted innocently.

The duration of the disease is not mentioned in any of these statutes, it may, therefore, be of any duration.

The Hindu Marriage Act does not say that the disease should not have been contracted from the petitioner. If the disease is contracted from the petitioner, under Section 23(1)(a), the decree of divorce cannot be passed as it would amount to taking advantage of one's own wrong. Under the Parsi law, it is specifically laid down that the disease "having not being contracted from the petitioner." It is submitted that even though there is no such clause as Section 23(1)(a) in the Special Marriage Act or the Dissolution of Muslim Marriage Act, the equitable principle that one who seeks equity must come with clean hands would apply.

CONVERSION OR APOSTASY

Conversion or apostasy is a ground for divorce and judicial separation under some of the Indian personal laws, though it is not a ground, under the Special Marriage Act which stipulates for inter-religious marriages. Under the Hindu Marriage Act, whereunder it is a ground for divorce and judicial separation, the clause runs thus : the respondent "has ceased to be a Hindu by conversion to another religion."[2] Apostasy is a ground for divorce under Muslim law.[3] Under the Parsi Marriage and Divorce Act, under which conversion is both a ground for divorce and judicial separation, the clause runs thus : "that the defendant has ceased to be a Parsi."[4] Under the Divorce Act, the respondent has ceased to be Christian by conversion to another religion.[5]

Under Hindu law.—Under the Hindu Marriage Act, the requirements are two : respondent (i) has ceased to be a Hindu, and (ii) has converted to another religion. Under Hindu law, the peculiar situation is that a Hindu does not cease to be a Hindu on his declaration that he has no faith in Hinduism; mere renunciation of Hinduism does not make him cease to be a Hindu. He may not practise Hinduism, he may have no faith in it, he may not profess it, he may lead a very unorthodox life so much so as to eat beef and decry all

1. AIR 1999 SC 495.
2. Section 13(1)(ii).
3. Second proviso to Section 4.
4. Section 32(j).
5. Section 10.(ii).

Hindu gods and goddesses, he will not cease to be a Hindu.[1] Thus, ceasing to be a Hindu is only material in the context of conversion.[2] Thus, a Hindu will cease to be a Hindu when he converts to another religion.[3]

Today followers of Hinduism, Jainism, Sikhism and Buddhism are known as Hindus. Inter-conversion among these faiths, does not amount to conversion within the meaning of the clause. Conversion should be to a non-Hindu faith as Islam, Christianity or Zoroastrianism. Conversion to a non-Hindu faith should be in accordance with the rites and ceremonies or formalities laid down by that religion to which conversion is sought. However, sincerity of conversion or genuineness of belief in new faith is immaterial. It is also not necessary that after conversion the respondent must practise his new faith.[4]

Apostasy under Muslim law.—Muslim textbook writers use the word apostasy for conversion. Under Muslim law, a Muslim may cease to be a Muslim by mere renunciation of his faith. Apostasy may be express or implied. It is express, such as when a Muslim says, "I renounce Islam", or "I do not believe in God and the Prophet Muhammed." A mere declaration such as, "I renounce Islam", is enough.[5] It is implied when a Muslim uses grossly disrespectful language towards the Prophet or the Koran.

Apart from renunciation of Islam by a Muslim, formal conversion to another religion also amounts to apostasy.

The classical Muslim law considered apostasy as a treasonable offence. A male apostate was liable to death sentence and a female apostate to life imprisonment.[6] It led to automatic dissolution of marriage.

Under the Muslim law in modern India, before the coming into force of the Dissolution of Muslim Marriage Act, apostasy led to automatic dissolution of marriage. It appears that the Shias take the view that apostasy leads to instant dissolution of marriage only when marriage is not consummated. But if the marriage is consummated, its cancellation remains suspended till the completion of the period of *idda*. The Shafiis also take this view. Under Muslim law in modern India, position is as under :

A. Apostasy of husband results in instant dissolution of marriage,[7] and if the wife remarried even before the expiry of period of *idda*, she will not be guilty of bigamy.[8]

B. Apostasy of Muslim wife who was before her marriage a non-Muslim, will result in instant dissolution of marriage.[9]

C. Apostasy of a Muslim wife does not result in the dissolution of

1. *Rani Bhagwan* v. *J.C. Bose*, (1903) 30 IA 249; *Chandra Sekhar* v. *Kunandaivelu*, AIR 1963 SC 185; *Shastri Yogyoprasadaji* v. *Mooldas*, AIR 1966 SC 1119, *Ashim* v. *Narendra*, 76 CWN 1016.
2. *Chandrasekhar* v. *Kunandaivelu*, AIR 1963 SC 185.
3. See Paras Diwan, *Modern Hindu Law*, Chapter 1, 1990.
4. *Ibid.*
5. *Resham* v. *Khuda*, ILR (1937) 19 Lah 277.
6. See Ameer Ali, II, 388.
7. *Iqbal* v. *Halima*, ILR (1939) All 296; *Reshama* v. *Khuda Baksha*, AIR 1930 Lah 482, *Sarwai Yar Khan* v. *Jawahar Devi*, (1964) Andh WR 60.
8. *Abdul Gani* v. *Azizul*, ILR (1912) 39 Cal 409; *Karam Singh* v. *E.*, AIR 1933 All 433.
9. (Second proviso to S. 4, Dissolution of Muslim Marriage Act, 1939).

marriage, instant or otherwise.[1] The husband has the right to pronounce divorce on her. If she remarries, before the dissolution of her marriage, she can be prosecuted for bigamy.

D. Apostasy of Muslim wife does not debar her from suing for divorce on any ground laid down in Section 2, Dissolution of Muslim Marriage Act.[2]

After amendment of 2001,[3] the position is same as under Hindu Law.[4]

The Converts Marriage Dissolution Act, 1866 lays down that if a person converts to Christianity and his or her spouse for a period of six continuous months deserts him or repudiates the marriage, he can bring a petition for restitution of conjugal rights. If the decree for restitution of conjugal rights is not complied with for a period of one year, the convert-spouse may sue for divorce. But if after conversion, the non-convert spouse does not refuse to cohabit with the convert-spouse, the statute, obviously, does not provide any relief.

Conversion and Parsi law.—Under the Parsi Marriage and Divorce Act, the requirements of the ground are the same as under Hindu law.[5] But under the Parsi law, the suit for divorce must be filed within two years of the plaintiff's knowledge of the respondent's conversion.

PRESUMPTION OF DEATH

In all systems of law, it is now accepted that death dissolves a marriage. But what will be the position in cases, where there is no positive proof that death has occurred. In England, since 1937, the law provides that a spouse may obtain a decree of dissolution of marriage on the basis of presumption of death.[6] This is also the position under the modern English law.[7] From English law, the provision has come down to the Indian matrimonial statutes, whereunder presumption of death is a ground for divorce.

Under the Hindu Marriage Act and the Special Marriage Act, where it is a ground for divorce as well as judicial separation, the clause is identical though there is a slight difference in the language.[8] Under the former statute, the ground runs thus : respondent "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." Under the Dissolution of Muslim Marriage Act, where it is wife's ground for divorce, the period is four years. This period is not based on S. 108, Evidence Act but on the classical Maliki law. The ground runs : "that the whereabouts of the husband have not been known for a period of four years."[9] The clause does not use the words that the whereabouts of the husband are not known to those persons who would have naturally known, had he been alive. But a separate provision is enacted which

1. Proviso (1) to Section 4.
2. Section 10.
3. Section 10(ii).
4. *Nang* v. *Labya*, AIR 1924 Rang 263.
5. Section 32(j).
6. *Dhunbai* v. *Sorabji*, AIR 1938 Bom 68.
7. Matrimonial Causes Act, 1937.
8. *Ibid.*, Section 19.
9. Section 13(1)(vii). It is Section 26(1)(h) of the Special Marriage Act. The words in place of "had that party been alive" are "if the respondent had been alive."

lays down that in a suit of divorce on this ground : (a) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of the filing of the complaint, should be stated therein, (and if paternal uncle and brother of the husband are alive, they shall be cited as parties even if they are not heirs), (b) notice of suit shall be served on these persons, and (c) such persons shall have the right to be heard in the suit.[1] A decree passed on this ground shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the court that he is prepared to perform his conjugal duties, the court shall set aside the decree.

Under the Divorce Act, section 10(vi) lays down similar provision as in Hindu law.

Under the Evidence Act, a person is presumed to be dead if he is not heard as alive for seven years or more by those persons who would naturally have heard of him had he been alive.[2] This seems to be the basis of the ground. Under the Evidence Act, the Hindu Marriage Act, the Special Marriage Act, and the Dissolution of Muslim Marriages Act, the burden of proof that the whereabouts of the respondent are not known for the requisite period by the concerned persons is on the party seeking relief.[3]

Applying the presumption of death, no spouse can presume himself as widower or widow and remarry. If he does so and the missing spouse reappears, he would be guilty of bigamy, and the second marriage will be void. This seems to be the basis for making "presumption of death" as a ground for divorce. Once a marriage is dissolved, the spouse is free to remarry, and even if the missing spouse reappears the next day, he can do nothing. However, if the second marriage is performed on the basis of presumption of death without getting the marriage dissolved, no person other than the missing spouse can challenge it.

SEVEN YEARS' IMPRISONMENT

Seven or more years' sentence of imprisonment is a ground for divorce and judicial separation under some Indian personal laws. Under the Special Marriage Act, 1954, the ground runs thus : respondent "is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code".[4] Under Dissolution of Muslim Marriage Act, 1939, the ground runs thus : "that the husband has been sentenced to imprisonment for a period of seven years or upward." Under the Parsi Marriage and Divorce Act, 1936, the wordings of the clause are almost the same as that under the Special Marriage Act. The clause runs thus : "that the defendant is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code." Under the Special Marriage Act and the Parsi Marriage and Divorce Act, it is a ground for divorce as well as judicial separation.

Under Muslim law, the ground is seven or more years' imprisonment for any offence while under the Special Marriage Act[5] and the Parsi Marriage

1. Section 2(i).
2. Section 3.
3. Section 108.
4. *Surjeet Kaur* v. *Jhujhar Singh*, AIR 1980 P & H 274.
5. Section 27(1)(c).

and Divorce Act,[1] the seven years' imprisonment should be for an offence as defined under the Indian Penal Code. Under Muslim law, the sentence of imprisonment should be final, while under the Parsi law, a suit for divorce can be filed only if the defendant has prior to filing of the suit, undergone at least one year's imprisonment. There is no such qualification of the ground under the Special Marriage Act.

Under Hindu law and Christian law, it is neither a ground for divorce nor for judicial separation.

RENUNCIATION OF WORLD

"Renunciation of world" is a ground for divorce only under Hindu law. The ground runs : respondent "has renounced the world by entering into any religious order."[2]

According to the religious belief of Hindus, every Hindu is required to enter into the *Sanyasa Ashrama* [a Hindu's life is organized into four *ashramas* (stages) of which *sanyasa* is the last *ashrama*]. Since this is the last *ashrama* entered into the old age, it amounts to civil death—in fact one of the essential rites for entering into this *ashrama* is the performance of one's own funeral rites. The entering into this *ashrama* means not merely renunciation of the world or worldly things, but it is also an end of one's worldly life. Entering into this *ashrama* is a part of Hindu religion. A person may become *sanyasi* even at a young age, and it is considered meritorious. Looked at from the point of view of the non-*sanyasi* spouse, it may mean worst deprivation. It brings consortium to a dead end, and thus, in matrimonial law, it is nothing but desertion. But if we would call it desertion, it is going to hurt religious feelings. Therefore, with a view to ameliorating the hardship of *sanyasi's* spouse, it has been made specifically a ground for divorce and judicial separation.

The requirements of this ground are two : (a) renunciation of the world by the respondent, and (b) entering into a holy order by him.

A person may renounce the world, such as when he does not take any interest in the worldly affairs, or retires to a single room, withdraws from cohabitation, or takes a vow of celibacy, or becomes a *mauni*, yet he may not join a holy order. Such a spouse will not be covered under this clause, though his conduct may amount to desertion or cruelty. Unless the second condition is also fulfilled, the other spouse cannot sue for divorce or judicial separation under this clause.

A person enters into holy or religious order when he undergoes the ceremonies and rites prescribed by the order which he has entered.[3] Becoming a *chela* of a *guru* does not by itself mean entering into a holy order.[4] Entering into a holy order may not always amount to renunciation of the world. Thus, when a Sikh becomes a *granthi* or a Hindu becomes a *pujari*, there is no renunciation of the world. A *granthi* or a *pujari* is allowed to lead a family life. It is submitted that the clause will also not apply to those cases where a *mahant* or *sant* is allowed to lead a married life.

1. Section 2(vi).
2. Section 32(f).
3. Section 13(i)(vi), Hindu Marriage Act.
4. *Sitaldas* v. *Sant Ram*, AIR 1954 SC 606; *Satyanarayana* v. *Hindu Religious Endowment Board*, AIR 1957 AP 824.

Failure to perform marital obligations—Muslim law

Under Muslim law "failure to perform marital obligations" by the husband is a wife's ground for divorce. The ground runs : "that the husband has failed to perform without reasonable cause his marital obligations for a period of three years." What are the "marital obligations of a husband" is to be determined under Muslim law.

It is submitted that the failure to perform the marital obligations should relate to basic marital obligations and could not relate to each and every marital obligation. The failure to perform marital obligations should be without any reasonable cause. The "reasonable cause" here will have the same meaning as it has in connection with desertion. The failure to perform marital obligations should be for a period of three years.[1] The Act does not say that it should be continuously for three years. It is submitted that whenever a wife can add up a period of three years' failure to perform marital obligations, she can sue for divorce on this ground.

NON-RESUMPTION OF COHABITATION AFTER AN ORDER OF SEPARATE MAINTENANCE—PARSI LAW

Under the Parsi Marriage and Divorce Act, non-resumption of cohabitation after an order of separate maintenance for a period of one year entitles the innocent party to sue for divorce.

The clause runs :

> that an order has been passed against the defendant by a magistrate awarding separate maintenance to the plaintiff, and the parties have not had marital intercourse for one year or more since such decree or order.[2]

It is obvious that it has been enacted as a fault ground of divorce. Mere non-resumption of cohabitation after the said decree or order for a period of one year entitles the plaintiff to file a suit for divorce.

WIFE'S FAULT GROUNDS OF DIVORCE

We have seen earlier that the Dissolution of Muslim Marriages Act, 1939 specified certain fault grounds on which wife alone can sue for divorce. We have discussed in the preceding pages all those grounds on which under other Indian personal laws either spouse may sue for divorce, except one ground, *viz.*, repudiation of marriage, which we would discuss towards the end of this Chapter. The Hindu Marriage Act, the Special Marriage Act and the Indian Divorce Act lay down certain grounds on which wife alone can sue for divorce. These are fault grounds of divorce.

RAPE, SODOMY AND BESTIALITY

Rape, sodomy and bestiality are special grounds on which wife alone can sue for divorce under the Hindu Marriage Act,[3] the Special Marriage Act,[4] and the Divorce Act.[5] The grounds under the Hindu Marriage Act and the Special Marriage Act run thus : "that the husband has, since the solemnization of

1. *Govind* v. *Kuldeep*, AIR 1971 Del 151.
2. Section 32(h).
3. Section 13(2)(ii).
4. Section 27(2).
5. Section 10, para 2.

marriage, been guilty of rape, sodomy or bestiality."[1] Almost the similar language has been used under the Divorce Act.

Rape is a criminal offence under Section 375, Indian Penal Code. Sodomy and bestiality are listed as unnatural offences under Section 377, Indian Penal Code. A man is guilty of rape when he forces sexual intercourse on an unwilling woman, *i.e.*, against her will or without her consent, or while her consent is obtained by putting her in fear of death or hurt, or when she gives consent under a mistaken belief that she is his wife or with or without her consent when she is under twelve years of age. A man is not guilty of raping his own wife unless she is under the age of fifteen years.[2] A person who is guilty of rape "shall be punished with imprisonment for life of either description or for a term which may extend to ten years and shall also be liable to fine.[3] A person who is guilty of raping his own wife below 12 years "shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."[4] Section 377, IPC, relates to unnatural offences. That section runs :

> Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for a term of which may extend to ten years, and shall also be liable to fine.

Explanation to the section lays down that "penetration is sufficient to constitute the carnal intercourse." The same rule applies to rape, *i.e.*, "penetration is sufficient the sexual intercourse necessary for the offence of rape."[5]

Under all the three statutes, if the husband is guilty of rape, sodomy or bestiality, the wife may sue for divorce. In a wife's suit for divorce on this ground, it is not necessary for her to show that the husband was prosecuted and convicted for the offence. Even if the husband is discharged on the charge of rape, sodomy or bestiality, she can sue for divorce. In either case (whether the husband is convicted of the charge or discharged) the burden of proof for establishing the ground is on the wife.

If a man commits sodomy on his own wife without her consent, he is guilty of the offence, and wife may sue for divorce.[6]

PRE-ACT POLYGAMOUS MARRIAGE UNDER HINDU LAW

This ground under the Hindu Marriage Act is the natural corollary to the introduction of monogamy. The ground runs :

> A wife may sue for divorce on the ground, in the case of any marriage solemnized before the commencement of this Act, that 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 solemnization of the marriage of the petitioner, provided that in either case the other wife is alive at the time of the presentation of the petition.[1]

1. Section 32(2)(ii) of the Hindu Marriage Act.
2. Exception to Section 375.
3. Section 376.
4. *Ibid.*
5. Exception to Section 375.
6. *Bamption* v. *Bamption*, (1959) 2 All ER 766.

Under this clause, *any* wife of the polygamous married husband may sue provided at the time of the filing of the petition, at least, one more wife is alive. It is obvious that the ground will be available if both the marriages are valid. Under this clause, both the wives may sue for divorce, since requirement is that *at the time* of the presentation of the petition, the other wife should be alive.[2]

Since the ground relates to the policy of monogamy, the husband will not be allowed to plead any conduct or disability on the part of the wife-petitioner so as to bar relief.[3] Thus, any compromise which first wife might have entered with the husband at the time of second marriage or any of her conduct or disability,[4] or any plea of estoppel[5] cannot be pleaded in defence of her petition for divorce. It appears that no bar under Section 23, Hindu Marriage Act, can be pleaded against her petition.[6] However, it has been held that petition may be defeated on the ground of improper delay.[7]

After about more than 50 years of the coming into force of the Hindu Marriage Act and introduction of monogamy, this ground is no longer of any practical importance.

NON-RESUMPTION OF COHABITATION AFTER A DECREE OR ORDER OF MAINTENANCE

This is a new ground added to the Hindu Marriage Act and the Special Marriage Act by the Marriage Laws (Amendment) Act, 1976. The ground runs as under :

> A wife may also present a petition for the dissolution of her marriage on the ground—
>
> That in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956) or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) (or under the corresponding Section 488 of the Code of Criminal Procedure, 1898 (5 of 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 upward.[8]

It is evident that this ground has been enacted as a fault ground.

REPUDIATION OF MARRIAGE : HINDU LAW AND MUSLIM LAW

This ground has been enacted in the Hindu Marriage Act (and not in the Special Marriage Act) by the Marriage Laws (Amendment) Act, 1976. Since a

1. Section 32(2)(i).
2. *Venkatamma* v. *Venkataswami*, AIR 1963 Mys 118; *Mandal* v. *Lachmi*, AIR 1963 AP 82; *Leela* v. *Anant Singh*, AIR 1968 Raj 178.
3. *Nirma* v. *Nikkaswami*, AIR 1968 Del 260.
4. *Lali Thamma* v. *Kanna*, AIR 1965 Mys 178.
5. *Jawant* v. *Lal Singh*, 1969 PLR 178.
6. *Nirma* v. *Nikkaswami*, AIR 1968 Delhi 260.
7. *Laxmi* v. *Alagiriswami*, AIR 1975 Mad 211.
8. Section 13(2)(iii). It is Section 26 (IA)(ii), Special Marriage Act.

marriage of child under the Special Marriage Act is void, there was no question of enacting such a provision under it. There is an analogous provision in the Dissolution of Muslim Marriage Act. No other Indian personal law contains a similar provision. The ground in the Hindu Marriage Act runs as under :

A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground—

> that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she repudiated the marriage after attaining that age but before attaining the age of eighteen years.[1]

This ground is available to a wife irrespective of the fact whether her marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976.

Under the Dissolution of Muslim Marriage Act, 1939 the wife may sue for divorce on the ground :

> that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years :
>
> Provided that the marriage has not been consummated.[2]

Despite the fact that the Child Marriage Restraint Acts, 1929-1978 have raised the age of marriage of girls to 18 years and of boys to 21 years, child marriages continue to be performed among the Hindus as well as the Muslims. Such marriages are neither void nor voidable under Hindu law. Muslim law does not regard such marriages as void or voidable but gives the minor a right to repudiation of marriages, which means that such marriages are valid till repudiated. As we have seen earlier, Muslim law makes a distinction between the child marriage performed by father or grandfather as marriage-guardian and by any other marriage-guardian. That distinction is still valid as to child-marriage of boys, but as to child-marriage of girls, it is no longer valid. A child-wife can now sue for divorce under the Dissolution of Muslim Marriages Act, 1939. Under Muslim law, the right is available to both males and females whose marriage was performed before they attained puberty.

It is essential that the marriage is not consummated. Under Hindu law, consummation of marriage is no bar to divorce.

The suit for divorce may be filed after the attainment of the age of eighteen years, but repudiation of marriage must be made before the attainment of the age of eighteen years.[3]

Divorce by arbitration.—No divorce matter can be decided by arbitration.[4]

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1. Section 13(2)(iv).
2. Section 2(iv).
3. *Baithula Iylaiah* v. *Baithula Devamma*, AIR 1981 AP 74.
4. *Raj Kumar* v. *Anjana*, AIR 1995 P & H 18.

Chapter 12

DIVORCE BY MUTUAL CONSENT

Divorce by mutual consent is recognised under the Hindu Marriage Act, Special Marriage Act, Parsi Marriage and Divorce Acts, 1936-88, and Divorce Acts, 1869-2001 and Muslim law.

Under Hindu Marriage Act and Special Marriage Act and Parsi Marriage and Divorce Act.—The provision for divorce by mutual consent under the Hindu Marriage Act, Parsi Marriage and Divorce Ac, the Special Marriage Act and Divorce Act is identical. Section 13-B, Hindu Marriage Act, runs as under :

(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 [Under Divorce Act, these words are under Indian Divorce (Amendment) Act, 2001] 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 withdrawn in the meanwhile, 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.

In Hindu law, this provision was introduced by the Marriage Law (Amendment) Act, 1976, in Parsi Marriage and Divorce Act in 1988,[1] in Divorce Act it was introduced by the Indian Divorce (Amendment) Act, 2001,[2] while in the Special Marriage Act this provision has existed from the beginning.[3] The requirements for the presentation of the petition by mutual consent are the following :[4]

(1) That spouses have been living separately for a period of one year,
(2) That they have not been able to live together, and
(3) That they have mutually agreed that their marriage should be dissolved.[5]

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1. Section 32-B.
2. Section 10-A.
3. Section 28.
4. *Samistha* v. *Om Prakash*, AIR 1992 SC 1909.
5. *Girija* v. *Vijaya*, AIR 1995 Ker 159.

Living separate.—The expression "living separate" means that parties are not living as husband and wife, irrespective of the fact that they are living in the same house or in different houses.[1]

Not able to live together.—The expression "not able to live together" means that marriage had broken down irretrievably.[2]

After the presentation of the petition, the parties are required to wait for a period of six months but not for eighteen months or more. After the expiry of the period of six months, the parties should move a motion in the court that a decree of divorce dissolving their marriage be passed. The parties are also free to withdraw their petition. If the parties get a second thought and feel like continuing their marriage, they are given adequate opportunity to do so. In case no motion is made within the period of eighteen months after the presentation of petition for divorce, the petition shall stand dismissed. In *Roopa* v. *Prabhakar*,[3] the requirement of filing petition after six months and not beyond eighteen months is not mandatory.

On the motion being moved by the parties that their marriage be dissolved, 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. The court must in every case be satisfied that consent of neither party has not been obtained by force, fraud or undue influence.[4]

Now the trend is to waive the waiting period of 6 months considering the facts and circumstances of the cases.[5] But Punjab and Haryana High Court has held that this period cannot be waived.[6]

The bars to matrimonial relief also apply to a petition for divorce by mutual consent, so far as they are applicable. For instance, delay cannot be a bar to divorce on this ground.

In a petition for divorce by mutual consent, no other ground for divorce can be taken.[7]

Conversion of fault ground petition to petition by mutual consent.—*Indrawal* v. *Radhey Raman*,[8] is an interesting case of judicial social engineering. In this case, husband's petition on the grounds of wife's adultery and desertion was decreed and the wife appealed. At the appellate stage (probably in reconciliation efforts) the court asked the wife what she wanted and she said that she did not want to live with the husband and she would agree for a compromise decree of divorce if the husband withdrew the charges. The husband agreed, provided the wife also withdrew the counter charge of adultery. Both the parties agreed accordingly. The court found that there was no collusion between the two. Deoki Nandan, J. observed :

1. *Samistha* v. *Om Prakash*, AIR 1992 SC 1909.
2. *Ibid.*
3. 1994 Kant 12.
4. Section 23(1)(aa), Hindu Marriage Act.
5. *Dr. Subhraj Yoti Das* v. *Uttama Das*, AIR 2002 Gau. 117; *Malvinder Kaur* v. *Devinder Pal Singh*, AIR 2003 P & H 179; *Chander Kanta* v. *Mohinder Pratap Dogra*, AIR 2003 P & H 255; *Prabhat Shekhar* v. *Poonam Kumari*, AIR 2004 Pat. 12; *Dinesh Kumar Shukla* v. *Neeta*, AIR 2005 M.P. 106; *Anita Sharma* v. *Nil*, AIR 2005 Del. 365.
6. *Charanjeet Singh Mann* v. *Neelam Mann*, AIR 2006 P & H 201.
7. *Ravi* v. *Sharda*, AIR 1978 MP 44.
8. AIR 1981 All 151.

The policy of law having undergone a change after the Marriage Laws (Amendment) Act, it is possible now to dissolve a marriage by agreement between the parties although none of the grounds on which marriage may be dissolved by the court, be found to exist. It may be noticed that the technical requirement of Section 13-B was not fulfilled, yet the court dissolved the marriage. It is submitted that this is a welcome decision.

Similarly, in *Santosh* v. *Virendra*,[1] a petition for divorce on the ground of cruelty and desertion was allowed to be converted into the petition of divorce by mutual consent.

Unilateral withdrawal of consent by one party.—Earlier some High Courts expressed the view that once consent is given, one of the parties to the petition cannot withdraw the consent. But the Bombay, Punjab and Haryana, and Kerala High Courts have expressed the view that a spouse is free to withdraw his or her consent unilaterally at any time.[2] In our submission, this is not a correct view considering our social background where a lot of pressure is exercised on parties to withdraw. It should not be ignored that in such cases marriage has in fact broken down irretrievably and no use will be served in keeping it alive. The Supreme Court had at one stage held that a party can withdraw his or her consent unilaterally.[3] But later in *Ashok Hurra* v. *Rupa*,[4] the Supreme Court left the question open—whether mutual consent should continue till divorce decree is passed, even though divorce petition has been withdrawn by either of the parties within the said period of 18 months? In this case, divorce was granted even though the wife had unilaterally withdrawn the consent as the marriage was found to be irretrievably broken down. If no motion is moved within eighteen months, the petition shall stand dismissed. The period of 18 months is an upper limit for the withdrawal of the petition, but the court has power to grant divorce even after the expiry of that time or even before the expiry of six months, if other conditions are fulfilled.[5] Another trend is discernible in our High Courts, where waiting period of six months is dispensed with if there is history of long protracted litigation and marriage is found to be irretrievably broken down.[6]

Divorce on the basis of mutual compromise.—*Raymound* v. *Union of India*,[7] was a petition for divorce by mutual consent under the Divorce Act. The Supreme Court said that such a petition could not be granted, as under the Divorce Act, there is no provision for divorce by mutual consent. But after the amendment of the said Act this provision is now available by virtue of Section 10-A. In *Joginder* v. *Puspa*,[8] a petition for divorce on the basis of compromise was allowed. But the Calcutta High Court in *Apurba* v. *Manashi*,[9]

1. AIR 1980 Raj 128.
2. *Harcharan Kaur* v. *Nachhatar Singh*, AIR 1988 P & H 27; *Parkash* v. *Bikramji*, AIR 1989 P & H 46; *R.I. Mohanan* v. *Jeejabai*, AIR 1988 Ker 28; *N.G. Ram Prasad* v. *B.C. Vertru*, AIR 1988 Ker 162.
3. *Samistha Devi* v. *Om Prakash*, AIR 1992 SC 1904.
4. (1997) 4 SCC 226.
5. *Santosh* v. *Verendra*, AIR 1986 Raj 128; *Dhiram* v. *Mansu*, AIR 1988 Guj 159.
6. *Malvinder Kaur* v. *Devinder Pal Singh*, AIR 2003 P. & H. 179; *Prabhat Shekhar* v. *Poonam Kumari*, AIR 2004 Pat. 12; *Subhrajyoti Das* v. *Uttama*, AIR 2002 2 Gau. 117.
7. AIR 1982 SC 1261.
8. AIR 1969 P & H (FB).
9. AIR 1989 Cal 184.

has dissented from the view. In our submission, it is wrong view as a consent petition for divorce is after all a petition by compromise. In a statute which recognizes divorce by mutual consent, it is implicit that petition is a compromise petition.[1]

Under Muslim Law

A *hadith* runs :

> A woman who asks to be divorced from her husband without cause, the fragrance of the garden is forbidden to her.

The implication of *hadith* is that if there is a cause, the wife has the right to seek divorce. Islamic law has never conferred the same power to pronouncing *talak* on the woman, as it has on the man, though it recognizes that a Muslim wife has the right to seek divorce with the consent of the husband. When divorce is initiated by the wife and husband consents to it, divorce is known as *Ahul* or *Khula*. When husband and wife mutually consent to divorce, it is known as *mubaraa or mubarrat*. The main distinction between the two is that in the former, divorce is initiated by the wife, while in the latter, it may be initiated by either spouse. In the former, the wife gives some consideration for obtaining the consent of her husband. Thus, it is submitted that *khul* is not a divorce by mutual consent but divorce obtained by the wife with the consent of the husband where she gives something for her release which is usually her dower, though it may as well be any property. More properly, *khul* is thus a form of divorce by purchase. Even in *mubaraa*, though divorce may be initiated from either side, the wife has to give up her dower, or part of it, or to give to her husband some other property. If this were not so, why after all should husband agree to *khul* or initiate *mubaraa*? He can simply pronounce *talak* on her. But then he has to give her dower. Here, in both forms, he can escape the liability of paying dower, and may also gain more property in the bargain if the wife is very keen to obtain divorce.

Khul or Khula.—The word "*Khul*" literally means "to put off." In the context of matrimonial law, it means "laying down by a husband of his right and authority over his wife for an exchange."[2] In *Buzz-sul-Raheem* v. *Lutefunuissa*,[3] the Privy Council observed :

> A divorce by *Khula* is a divorce with the consent, and at the instance of the wife, in which she gives or agrees to give consideration to the husband for her release from the marriage tie. In such a case the terms of bargain are a matter of arrangement between the husband and wife, and the wife may as a consideration, release her *dyn-mohr* and other rights, or make any other agreement for the benefit of the husband.

Thus, when a woman feels that she cannot continue to live in matrimony, she can release herself from the tie by giving some property to her husband, in consideration of which the husband may give her *Khula*. *Khula* is divorce in *talak-ul-bain* form.

It should be evident that both the spouses must be of sound mind and

1. *Preeti* v. *Sandeep*, AIR 1995 SC 1851.
2. Baillie 38, Hedaya, 112.
3. (1861) 8 MIA 397.

major.[1] The *khul* may be entered into by the party herself or through an agent. Under the Hanafi law, the guardian of a minor wife has power to enter into *Khul* on her behalf but, then, consideration will be payable by him. But he has no such power on behalf of a minor male. Among the Shias, the guardian of a minor or insane wife has no power to enter into *Khul* on her behalf.

There does not seem to be any specific form of *Khul*, among the Sunnis. It may be in any form. It seems among the Sunnis, a *Khul* obtained under compulsion is also valid. On the other hand, the Shias insist on a specified form of *Khul*. In every case, the consent of the husband must be specific and clearly given. For instance, if the wife says to her husband : "Give me a *Khul* in exchange of my dower," and the husband replies "I do", it is enough and marriage stands dissolved.

Under the Sunni law (though not under the Shia law), *Khul* may be unconditional or conditional. An unconditional *Khul* results in irrevocable divorce, while conditional *Khul* takes place on the fulfilment of the condition. A *Khul* with an option to the husband to revoke cannot be made. Among the Shias, both the *Khul* and option are void. Among the Sunnis, the *Khul* is valid, the option is void.

Consideration for *Khul* may be anything. Usually, it is the *mahr*, whole or part of it. But it can as well be any property, movable or immovable. But it should not be illusory. If the consideration is illusory, the husbannd is not bound to release her. *Khul* may be entered into in consideration of a fraction of the dower. If wife has not received any dower, neither the wife can claim the balance nor can husband claim the fraction. If she has received the dower, she must pay him the fraction of the whole dower, if marriage has been consummated; if marriage has not been consummated, she must give fraction or half of the dower. It is possible to enter into a *Khul* on consideration to be determined later on.

The outstanding feature of *Khul* is that although consideration is a must for it, actual release of the dower or delivery of property constituting the consideration is not necessary and once husband gives his consent, irrevocable divorce results. Husband's remedy is to sue the wife for its recovery.

Under all schools of Muslim law, a proposal for *Khul* may be withdrawn at any time before it is accepted by the husband. The proposal is also revoked if she withdraws from the place where it was made before its acceptance.

Mubaraa or mubaraat.—When aversion is mutual, the proposal for divorce may emanate from either side. This is called *mubaraa*. It is submitted that *mubaraa* may be considered as divorce by mutual consent. In the words of *Faizee*, "in the case of *Khul*, the wife begs to be released and the husband agrees for a consideration, which is usually a part or the whole of dower while in *mubaraa* apparently both are happy at the prospect of being getting rid of each other."

The Shias insist that in *mubaraa* both the parties should feel bona fide that the marriage bond has become irksome. The Shias insist on a specific form also. If a husband says to his wife, "I have discharged you from the

1. *Rashid* v. *Anisa*, (1931) 59 IA 21.

obligation of marriage for such a sum, and you are separated from me," divorce will result. The Sunnis are not particular as to any form. Once *mubaraa* is entered into, all mutual rights and obligations come to an end from that day. Among both the Shias and Sunnis, like *Khul*, *mubaraa* is also irrevocable divorce. In the words of Al-Kakhi, "when the husband receives a compensation from the wife, the divorce is *bain*, and even when it is without compensation and consequently *rajai* (reversible at the option of the husband), if during the wife's *idda* he were to accept from her a compensation, the separation would be equally *bain*."

Some compensation is usually given in *mubaraa* (which is in most cases, forbearance of dower), though it is not an essential part of the transaction.

The other requirements of *mubaraa* are same as that of *khul*. In both, wife must undergo *idda*. Both are essentially acts of the parties and judicial intervention is not required, though it may be effected by *Kazi*. The essential aspect of both these forms of divorce is that the dissolution of marriage results from the spousal agreement, and the *Kazi*, merely declares the fact that parties have dissolved their marriage mutually.
