MATRIMONIAL RELIEFS

Table of Contents

1. Non-Judicial Resolution of Marital Conflict of Problems: Customary Dissolution of Marriage

Earlier divorce was unknown to general Hindu law as marriage was regarded as an indissoluble union of the husband and wife. Manu declared that a wife cannot be released by her husband either by sale or by abandonment, implying that the marital tie cannot be severed in any way. Although Hindu law does not contemplate divorce yet it has been held that where it is recognized as an established custom it would have the force of law.

According to Kautilya's Arthashatra, marriage might be dissolved by mutual consent in the case of the unapproved form of marriage. But, Manu does not believe in the discontinuance of marriage. He declares" let mutual fidelity continue till death; this, in brief, may be understood to be the highest dharma of the husband and wife."

According to traditionalists, divorce was unknown in Hindu Law. Even today divorce is not a socially accepted norm among many sections.

> *"We can take judicial notice of the fact that even today considerable sections of the Hindu society look with disfavour on the idea of dissolving a marriage."*

Customary Divorce: Contrary to the general notion regarding the indissolubility of Hindu marriages, a large section of Hindus among the lower castes have traditionally practiced divorce. These customary forms of divorce were recognized, both socially and judicially. The usual customary forms are:

a) Unilaterally
b) Mutual Consent
c) By Deed of Divorce (Char-chitti)

Unilateral Divorce

According to the custom prevailing in Manipur (Khaniaba), it has been stated that a husband can dissolve the marriage without any reason or at his pleasure.

Among the Rajpur Gujaratis in Khandesh, and in the Pakhali Community marriage is dissolved if the husband abandons or deserts the wife.

Among the Vaishyas of Gorakhpur in Uttar Pradesh a husband may abandon or desert his wife, and dissolution takes place even without reference to the caste tribunal.

By Mutual Consent

The custom of obtaining divorce by mutual consent is prevalent among certain castes in Bombay, Madras, Mysore and Kerala. In Madhya Pradesh it has been held that divorce by mutual consent is a valid custom among the Patwas of that State.

A customary form of divorce by agreement (chuttam-chutta) amongst the Barai Chaurasiyas of Uttar Pradesh has been declared valid by the Allahabad High Court. These are only a few illustrations to indicate the existence of divorce by mutual consent.

Divorce by Deed

This form is prevalent among certain castes in South India, also in Himachal Pradesh and the Jat community. Recently the Supreme Court has upheld a deed executed by the husband divorcing his wife.

Usually customary divorces are through the intervention of the traditional Panchayats of caste tribunals. Therefore, in States where this has not been customary, the courts have not permitted Panchayats to take upon themselves the right to dissolve a marriage. Once the custom is proved, however, the courts will not interfere.

The courts have exercised a lot of judicial scrutiny and discretion in upholding or rejecting such customary divorce practices. In doing so they have applied the strict test for the validity of such customs.

When the existence of a custom was not proved, or where the custom could be regarded as running counter to the spirit of Hindu Law, or was against public policy or morality, courts have declared such customary forms of divorce as invalid.

Under customary law there is no waiting period after divorce to remarry. But if divorce is obtained under the Hindu Marriage Act, then either party to the marriage can lawfully remarry only after a lapse of one year after the decree of divorce (Sec. 15).

Retention of customary forms of divorce under the Hindu Marriage Act is advantageous because this process of dissolving the marriage saves time and money in litigations. The only difficulty that may arise is if the divorce according to customary law is brought at some stage to the notice of the court and the latter decrees that particular form of divorce to be against public policy or morality. If one or both parties have remarried, such a marriage will be void and the status of the children will be affected.

To minimize this, it has been suggested that the Ministry of Law should prepare an exhaustive record of customs relating to divorce found in different States and set up a panel of socio-legal experts to determine if any of these customs are invalid. Copies of the record should be made freely and easily available to the people and the Panchayats.

With the enactment of the Hindu Marriage Act of 1955, divorce became a part of the law governing all Hindus. The ground for this had been already prepared by the passing of the Hindu Women's Right to Separate Residence and Maintenance Act in 1946, which inter alia permitted the wife to separate from her husband on the ground that he had married again. Following this, some of the States took the initiative and as with monogamy, legislated to permit divorce for Hindus.

SC: Customary Divorce from wife No Licence to Remarry

The Supreme Court on Thursday said marrying a second time on the basis of a "customary divorce" from the first wife will render the second marriage void as the law stipulates that a a man and woman are permitted to tie the nuptial knot only if they do not have a living spouse.

This decision came in the case of an inter-caste marriage solemnised in 2010. The marriage developed strains allegedly because of the husband's drunken habits and matrimonial torture inflicted on the wife. While leaving for her parental home with her belongings, she discovered a marriage dissolution deed of her husband from his first wife and later moved a Pune court seeking her marriage to be declared void.

The second wife alleged that the marriage was solemnised by fraud as the man declared himself a bachelor in the marriage registration document under the Special Marriage Act. She said there was no divorce decree from the first wife, a fact concealed from her, and the man had a spouse at the time of marriage.

The man argued that he had married a second time under pressure as the woman threatened to commit suicide if he said no. He pointed out that there was a customary divorce between him and his first wife prior to his second marriage and hence the wedding was valid. The Pune court had dismissed the woman's petition and the Bombay High Court too refused to give relief.

A customary divorce is a recognised method of separation without involving the court if such a custom is recognised by marriage laws.

On appeal before SC, a bench of Justices L Nageswara Rao and M R Shah set aside orders of the trial court and the HC and declared the second marriage null and void. It said under Section 4 of the Special Marriage Act, at the time of marriage neither party should have a living spouse. The bench also ruled that no time limit can be set for filing a petition for annulment of marriage and that it could be filed as and when a party to the marriage discovers that the other had a living spouse at the time of their marriage.

Writing the judgement, Justice Shah said, "The husband was required to prove that such customary divorce was permissible in his caste or community. In the absence of any such issue or any evidence, the courts were not justified in observing that there was customary divorce between the man and his first wife."

"In the absence of the above, it can be said that at the time of marriage between the appellant and respondent, the respondent (husband) had a living spouse and therefore, considering Section 24 read with Section 4 of the Act, the marriage was void and the woman is entitled to a decree of nullity at her instance," Justice Shah said and ruled that the trial court and the HC erred materially in rejecting the marriage petition.

2. Divorce under Muslim Law

Firm union of the husband and wife is a necessary condition for a happy family life. Islam therefore, insists upon the subsistence of a marriage and prescribes that breach of marriage contract should be avoided. Initially no marriage is contracted to be dissolved but in unfortunate

circumstances the matrimonial contract is broken. One of the ways of such dissolution is by way of divorce . Under Muslim law the divorce may take place by the act of the parties themselves or by a decree of the court of law. However in whatever manner the divorce is effected it has not been regarded as a rule of life. In Islam, divorce is considered as an exception to the status of marriage.

The Prophet declared that among the things which have been permitted by law, divorce is the worst . Divorce being an evil, it must be avoided as far as possible. But in some occasions this evil becomes a necessity, because when it is impossible for the parties to the marriage to carry on their union with mutual affection and love then it is better to allow them to get separated than compel them to live together in an atmosphere of hatred and disaffection. The basis of divorce in Islamic law is the inability of the spouses to live together rather than any specific cause (or guilt of a party) on account of which the parties cannot live together. A divorce may be either by the act of the husband or by the act of the wife. There are several modes of divorce under the Muslim law, which will be discussed hereafter.

Modes of Customary Divorce:

i. ***By husband:*** talaaq
ii. ***By wife:*** talaaq-i-tafweez
iii. ***By mutual agreement***.

Talaaq

Talaaq in its primitive sense means dismission. In its literal meaning, it means "setting free", "letting loose", or taking off any "ties or restraint". In Muslim Law it means freedom from the bondage of marriage and not from any other bondage. In legal sense it means dissolution of marriage by husband using appropriate words. In other words talaaq is repudiation of marriage by the husband in accordance with the procedure laid down by the law.

The following verse is in support of the husband's authority to pronounce unilateral divorce is often cited:

Men are maintainers of women, because Allah has made some of them to excel others and because they spend out of their property (on their maintenance and dower) . When the husband exercises his right to pronounce divorce, technically this is known as talaaq. The most remarkable feature of Muslim law of talaaq is that all the schools of the Sunnis and the Shias recognize it differing only in some details. In Muslim world, so widespread has been the talaaq that even the Imams practiced it . The absolute power of a Muslim husband of divorcing his wife unilaterally, without assigning any reason, literally at his whim, even in a jest or in a state of intoxication, and without recourse to the court, and even in the absence of the wife, is recognized in modern India. All that is necessary is that the husband should pronounce talaaq; how he does it, when he does it, or in what he does it is not very essential.

In **Hannefa v. Pathummal**, Khalid, J., termed this as "monstrosity" . Among the Sunnis, talaaq may be express, implied, contingent constructive or even delegated. The Shias recognize only the express and the delegated forms of talaaq.

Conditions for a valid talaaq:

I. **Capacity:** Every Muslim husband of sound mind, who has attained the age of puberty, is competent to pronounce talaaq. It is not necessary for him to give any reason for his pronouncement. A husband who is minor or of unsound mind cannot pronounce it. Talaaq by a minor or of a person of unsound mind is void and ineffective. However, if a husband is lunatic then talaaq pronounced by him during "lucid interval" is valid. The guardian cannot pronounce talaaq on behalf of a minor husband. When insane husband has no guardian, the Qazi or a judge has the right to dissolve the marriage in the interest of such a husband.

II. **Free Consent:** Except under Hanafi law, the consent of the husband in pronouncing talaaq must be a free consent. Under Hanafi law, a talaaq, pronounced under compulsion, coercion, undue influence, fraud and voluntary intoxication etc., is valid and dissolves the marriage.
Talaaq pronounced under forced or involuntary intoxication is void even under the Hanafi law.
Under the Shia law (and also under other schools of Sunnis) a talaaq pronounced under compulsion, coercion, undue influence, fraud, or voluntary intoxication is void and ineffective.

III. **Formalities:** According to Sunni law, a talaaq, may be oral or in writing. It may be simply uttered by the husband or he may write a Talaaqnama. No specific formula or use of any particular word is required to constitute a valid talaaq. Any expression which clearly indicates the husband's desire to break the marriage is sufficient. It need not be made in the presence of the witnesses.
According to Shias, talaaq, must be pronounced orally, except where the husband is unable to speak. If the husband can speak but gives it in writing, the talaaq, is void under Shia law. Here talaaq must be pronounced in the presence of two witnesses.

IV. **Express words:** The words of talaaq must clearly indicate the husband's intention to dissolve the marriage. If the pronouncement is not express and is ambiguous then it is absolutely necessary to prove that the husband clearly intends to dissolve the marriage.

Talaaq-i-tafweez

Talaaq-i-tafweez or delegated divorce is recognized among both, the Shias and the Sunnis. The Muslim husband is free to delegate his power of pronouncing divorce to his wife or any other person. He may delegate the power absolutely or conditionally, temporarily or permanently . A permanent delegation of power is revocable but a temporary delegation of power is not. This delegation must be made distinctly in favour of the person to whom the power is delegated, and the purpose of delegation must be clearly stated. The power of talaaq may be delegated to his wife and as Faizee observes, "this form of delegated divorce is perhaps the most potent

weapon in the hands of a Muslim wife to obtain freedom without the intervention of any court and is now beginning to be fairly common in India".

This form of delegated divorce is usually stipulated in prenuptial agreements. In **Md. Khan v. Shahmai**, under a prenuptial agreement, a husband, who was a Khana Damad, undertook to pay certain amount of marriage expenses incurred by the father-in-law in the event of his leaving the house and conferred a power to pronounce divorce on his wife. The husband left his father-in-law's house without paying the amount. The wife exercised the right and divorced herself. It was held that it was a valid divorce in the exercise of the power delegated to her. Delegation of power may be made even in the post marriage agreements. Thus where under an agreement it is stipulated that in the event of the husband failing to pay her maintenance or taking a second wife, the will have a right of pronouncing divorce on herself, such an agreement is valid, and such conditions are reasonable and not against public policy . It should be noted that even in the event of contingency, whether or not the power is to be exercised, depend upon the wife she may choose to exercise it or she may not. The happening of the event of contingency does not result in automatic divorce.

Divorce by mutual agreement:

Khula and Mubarat are two forms of divorce by mutual consent but in either of them, the wife has to part with her dower or a part of some other property. A verse in the Holy Quran runs as: "And it not lawful for you that ye take from women out of that which ye have given them: except (in the case) when both fear that they may not be able to keep within the limits (imposed by Allah), in that case it is no sin for either of them if the woman ransom herself." The word khula, in its original sense means "to draw" or "dig up" or "to take off" such as taking off one's clothes or garments. It is said that the spouses are like clothes to each other and when they take khula each takes off his or her clothes, i.e., they get rid of each other.

In law it is said is said to signify an agreement between the spouses for dissolving a connubial union in lieu of compensation paid by the wife to her husband out of her property. Although consideration for Khula is essential, the actual release of the dower or delivery of property constituting the consideration is not a condition precedent for the validity of the khula. Once the husband gives his consent, it results in an irrevocable divorce. The husband has no power of cancelling the 'khul' on the ground that the consideration has not been paid. The consideration can be anything, usually it is mahr, the whole or part of it. But it may be any property though not illusory. In mubarat, the outstanding feature is that both the parties desire divorce. Thus, the proposal may emanate from either side. In mubarat both, the husband and the wife, are happy to get rid of each other . Among the Sunnis when the parties to marriage enter into a mubarat all mutual rights and obligations come to an end.

The Shia law is stringent though. It requires that both the parties must bona fide find the marital relationship to be irksome and cumbersome. Among the Sunnis no specific form is laid down, but the Shias insist on a proper form. The Shias insist that the word mubarat should be followed by the word talaaq, otherwise no divorce would result. They also insist that the pronouncement must be in Arabic unless the parties are incapable of pronouncing the Arabic words. Intention to dissolve the marriage should be clearly expressed. Among both, Shias and Sunnis, mubarat is irrevocable. Other requirements are the same as in khula and the wife must undergo the

period of iddat and in both the divorce is essentially an act of the parties, and no intervention by the court is required.

3. Judicial Resolution of Marital Conflicts

There are basically three theories for divorce: fault theory, mutual consent theory & irretrievable breakdown of marriage theory.

Under the Fault theory or the offences theory or the guilt theory, marriage can be dissolved only when either party to the marriage has committed a matrimonial offence. It is necessary to have a guilty and an innocent party, and the only innocent party can seek the remedy of divorce. However, the most striking feature and the drawback is that if both parties have been at fault, there is no remedy available.

Another theory of divorce is that of mutual consent. The underlying rationale is that since two persons can marry by their free will, they should also be allowed to move out of the relationship of their own free will. However, critics of this theory say that this approach will promote immorality as it will lead to hasty divorces and parties would dissolve their marriage even if there were slight incompatibility of temperament.

The third theory relates to the irretrievable breakdown of the marriage. The breakdown of marriage is defined as "such failure in the matrimonial relationships or such circumstances adverse to that relationship that no reasonable probability remains for the spouses again living together as husband & wife." Such marriage should be dissolved with maximum fairness & minimum bitterness, distress & humiliation.

Fault Divorce

Fault divorces are not as common and, in fact, most states no longer even recognize them. In the states that do recognize them, a spouse can requests that a divorce be granted based on some fault of the other spouse. The most common grounds for granting a fault divorce are:

- Adultery;
- Abandonment for a certain length of time;
- Prison confinement;
- A spouse is physically unable to have sexual intercourse; or
- The other spouse has inflicted emotional or physical pain (cruelty).

Another key difference between fault and no-fault divorce is that spouses filing a fault divorce are not required to live apart for a specific period of time before filing. The ability to prove fault in a divorce case can also lead to a larger distribution of the marital property or support to the spouse that was without fault. These two characteristics make a fault divorce more attractive to some people.

Irretrievable Breakdown Of Marriage

Irrespective of the three remedies available to parties that is: restitution of conjugal rights, judicial separation, and divorce, the judiciary in India is demanding irretrievable breakdown of marriage as a special ground for divorce, as sometimes courts face some difficulties in granting the decree of divorce due to some of the technical loopholes in the existing theories of divorce.

Both the Supreme Court and Law Committee consider the implementation of such a theory as a boon to parties who for one or the other reasons are unable to seek the decree of divorce. Therefore in the opinion of the Supreme Court and Law Commission of India, it is very essential to make it a special and separate ground mission that introduction of irretrievable breakdown of marriage, as a special ground will do any public good.

The Irretrievable breakdown theory of divorce is the fourth and the most controversial theory in legal jurisprudence, based on the principle that marriage is a union of two persons based on love affection and respect for each other. If any of these is hampered due to any reason and if the matrimonial relation between the spouses reaches to such an extent from where it becomes completely irreparable, that is a point where neither of the spouses can live peacefully with each other and acquire the benefits of a matrimonial relations, than it is better to dissolve the marriage as now there is no point of stretching such a dead relationship, which exist only in name and not in reality.

The breakdown of the relationship is presumed *de facto*. The fact that parties to marriage are living separately for reasonably longer period of time (say two or three years), with any reasonable cause (like cruelty, adultery, desertion) or even without any reasonable cause (which shows the unwillingness of the parties or even of one of the party to live together) and all their attempts to reunite failed, it will be presumed by law that relationship is dead now.

Merits

The only merit of the theory as has been propounded by the jurists is that a marriage, which in practice is considered to be a sacramental institution, should be based on grounds on which a sound marriage is built- that is tolerance, adjustment and respecting each other. If any of the party to the marriage is not ready to live with the other party the relationship will not be a happy relationship. Stretching such a relationship will do no good, rather will develop hatred and frustration among the parties for each other. Therefore to protect the sanctity of marriage, to reduce the number of unhappy marriages and to prevent from getting wasted the precious years of the life of the spouses, it is necessary to dissolve such a marriage.

Demerits

The Law Commission Of India in Chapter 4 of the 71st report has dealt in detail the demerits of the irretrievable breakdown theory. Which are following:

i. It will make divorce easy. It will allow the spouses or even to any one of the spouses to dissolve the marriage out of their own pleasure.
ii. It will allow the guilty spouse to take advantage of his own fault by getting separated and dissolving the marriage.

4. Nullity of Marriage

Marriage is a holy arrangement adopted and recognized by society and religion, between man and woman who are called husband and wife respectively. It is a religious sacrament some time referred as contract between man and woman to live life together as husband and wife. The concept of holy wedlock has given it religious sacramental status in religion. In India marriage is also legal status under different personal laws such as Hindu Marriage Act, 1955, Parsi Marriage and Divorce Act, 1936, Indian Christian Marriage Act, 1872. There is also Special Marriage Act, 1954 for certain marriages. Under muslim law marriage is a contract. Though the marriage is a holy wedlock for life but due to some complexity and prospective development in modern society there are legal grounds for the end of marriage, or nullify the marriage. Nullity of marriage is a legal declaration by the court that there was no existence of marriage between two people and marriage was not valid. It is a declaration that supposed that marriage was never happened.

Difference between nullity of marriage, divorce and judicial separation

Sometime people get confused with nullity of marriage, divorce and judicial separation. There is difference between these three.

i. **Nullity of Marriage:** Nullity of marriage is a judicial declaration that marriage was not in existence. It refers to the validity of marriage according to law. It means that there was not a valid marriage has performed between the parties.

ii. **Divorce:** Divorce is judicial declaration on the petition of the parties of marriage which led to the end of valid marriage. In divorce validity of marriage is not questioned but continuation of marriage is affected and there is end of a valid marriage.

iii. **Judicial Separation:** Judicial separation is judicial declaration on the petition of the parties of marriage to live separate under the status of marriage. It is not end of marriage. Duties and liabilities remain same towards each other.

Nullity of Marriage under different Laws in India

Nullity of marriage under Hindu law

For the Hindus according to smrities marriage is an essential sanskar. It is a duty of one to perform this. Marriage was indissoluble and essential to perform religious and spiritual responsibility. Before the parliamentary enactment there was no concept of end of marriage or nullity of marriage under Hindu personal law and marriage it treated as holy and strong wedlock for whole life. But after enforcement of Hindu Marriage Act, 1955 there are certain

grounds on which marriage shall be declared null and void. These grounds are given under Clause (i), (iv) and (v) of Section 5 of The Hindu Marriage Act, 1955. *These grounds are as follow:*

1. If either party has living spouse at the time of marriage i.e. bigamy
2. If marriage between prohibited degree relation unless customs and usage are allowed,
3. If marriage between sapindas unless customs and usage are allowed such marriage.

Sagotra marriage is valid under Hindu Marriage Act, 1955

There are voidable marriages also which are valid until declared null and void. Voidable marriage shall be annulled by the decree of nullity under section 12 of Hindu Marriage Act, 1955. It is at the option of the parties to continue with marriage or to annul marriage by decree of court. *Grounds are as follow:*

1. Impotency of the respondent
2. Incapacity to give valid consent or forced consent of parties or mental illness or person unfit for procreation of child
3. Under aged marriage
4. If respondent was pregnant by some other person at the time of marriage.

Nullity of marriage under Muslim Personal law

Under islam marriage is a dissoluble contact different from the Hinduism where marriage is indissoluble. Under Muslim personal law marriage is treated as contract where valid consent of both the parties is required and 'mehar' is also decided. Hence dissolution of marriage is also permitted in both the sect shia and sunni. Under Dissolution of Muslim Marriage Act, 1939 and personal law marriage without valid consent by the parties or there guardian is void. There are some other grounds also on which marriage can be declared null and void. These grounds are as follow:

1. Interreligious marriage by woman does not have religious status. A muslim male also cannot marry a female who does not follow Isalm.
2. Marriage between milk relation or 'maharim' close blood relatives.
3. Marriage with person who renounce Islam or not having faith in principle of Islam.
4. Temporary or conditional marriage is void in Sunni.
5. Marriage to a woman during the period of iddat.
6. Where conditions of marriage are against the principle of Islam.

Nullity of marriage under Christian law in India

By the evolution of Christianity status of marriage has also changed. In Christianity is also indissoluble and holy wedlock and made it a public religious ceremony. Hence nullity of marriage is difficult to grant. But by development of society and to remove the discrimination for the Indian Christian there is separate marital law Indian Christian Marriage Act, 1872 was enacted and for their divorce or nullity of marriage Indian Divorce Act , 1869 is also there. This Act was amended in the year of 2001. According to this Act on following ground marriage can be declared null and void:

1. Respondent was impotent at the time of marriage and at the time of institution of suit,
2. Either of the party has living husband or wife at the time of marriage and that marriage is in force i.e. bigamy
3. Marriage between the persons within the prohibited degree of consanguinity or affinity
4. Either party was lunatic or idiot at the time of marriage.

Under Indian Divorce Act, 1896 consent is not a ground for nullity of marriage.

Nullity of marriage under Parsi Marriage and Divorce Act, 1936

In India there is separate marital law for Parsi community. Under this Act under section 30 where consummation of marriage due to some natural causes is impossible, at the instance of the party marriage can be declared null and void.

Nullity of marriage under Special Marriage Act, 1954

Under section 24 of the Act on the petition of either of the party marriage can be declared null and void by the decree of nullity on following ground

1. Neither party has living spouse
2. Incapable to give valid consent due to unsoundness of mind or mental illness or unfit to procreation of children
3. Parties are under aged
4. Parties are in relation of prohibited degree
5. Impotency of respondent

There are some other grounds on which voidable marriage can be declared null and void.

1. Marriage has not been consummated due to wilful refusal of respondent.
2. If respondent was pregnant by some other person at the time of marriage.
3. Consent of either party was obtained by fraud or coercion as defined in Indian Contract Act, 1872

Special marriage Act provides legal status and security to the interreligious marriage performed according to the provisions of this Act. Any person of any cast or religion may perform his or her marriage under this Act.

<u>Procedure for obtaining Decree for Nullity of Marriage</u>

Procedure is generally same in all personal law for obtaining decree of nullity of marriage. Petition for nullity of marriage shall be presented before court. The jurisdiction of court is decided where defendant or respondent has resides or marriage has solemnized or place where the party has last resized together. Then court issue notice to respondent or defendant to give reply before court. After hearing and evidence court grant relief accordingly. Under the parsi law court means court established under the Act. Under Hindu Marriage Act, 1955 and Special

Marriage Act, 1954 court is Family court or city civil court. Under the muslim law matter does not decided by court but matter decided by the religious practice.

Consequences of Nullity of Marriage

When the declaration of nullity of marriage is made with it court also decides the maintenance which is to be given to the opposite party either monthly or yearly or lump sum amount. Children born out of this marriage are deemed to be legitimate. Nullity of marriage is a declaration that there was no marriage in existence and parties are not husband and wife. They are free to marry to other. Nullity of marriage declares that there was no status of marriage between two persons. Null and void marriages have no legal status. They are against the law and not enforceable by law.

Under the statutory provisions there is no need to appoint pleader in family court but for understanding legal provisions and procedure is helpful to take assistance from lawyer.

End Note: In India there are different religion and practices and each having its own personal law related to marriage. In India marriage is a holy religious sacrament which is essential for the systematic functioning of society. It should be done without force and for continuation of family in all religion. Therefore ground for nullity of marriage is also same in India. Nullity of marriage make a person free from the marriage which is like a Burden over them. The grounds of nullity of marriage are also legal as well as taking care of religious sentiments.

5. Option of Puberty

The law relating to option of puberty (khiyar al-bulugh) can be discussed under different heads in order to see how this branch of the law has been liberalized by judicial pronouncements.

The period before 1939

According to traditional Muslim law if a minor has been given in marriage by the father or the father's father, the marriage is binding and valid and the minor has no right to repudiate the marriage on attaining puberty, unless it could be shown that the father or the father's father has acted negligently or fraudulently; but if the minor was given in marriage by any other guardian he or she has the right to repudiate it on attaining puberty. There are two limitations under which such an option of repudiation is to be exercised; first, it should be exercised immediately on attaining puberty; and, second, the marriage should not have been consummated. Delay in notifying such an option and the fact of consummation of marriage is fatal to this right. The courts in India have applied this law in favour of females by invoking rules of equity and justice.

In an Allahabad case a Shia girl given in marriage by her father to a Sunni husband during minority was allowed to repudiate the marriage as it was contrary to all rules of equity and justice to force such a marriage on her, which might be repugnant to her religious sentiments. Considerable relaxation in respect of the time during which option to repudiate the marriage could be exercised was also made by courts. In **Bismillah Begum v. Nur Mohammed**." it was held that a wife could exercise the option only after she had known that she had such a right. The Patna High Court in **Mst. Ayesha v. Muhammad Yunnus**, took the same view. It was held that a minor wife did not lose her right to repudiate the marriage within a reasonable time after she became aware of her rights. These decisions, it may be pointed out arc not entirely in tune with the teachings of Abu Hanifa and Abu Yusuf, according to whom a woman would lose her option of puberty even if she was unaware of the right, unless she exercised it immediately on becoming major; but they conform to the doctrine of Imam Muhammad according to whom the right will be exercisable only when the wife is acquainted with the fact that she has that right. Thus, in the aforesaid cases the hardship caused by the Hanaf principle that option of puberty should be exercised immediately and that a day's delay would be fatal has been considerably mitigated. Some decisions allowed delay in the exercise of the option of. puberty even on the ground of non-acquiescence.25 As regards the rule that consummation of marriage will put an end to the right of option, it has been held that mere consummation is not sufficient; it must have taken place with the consent of the wife.

The period after 1939

The law of option of puberty was largely modified by the Dissolution of Muslim Marriages Act 1939. One of the grounds on which the Act permitted a married Muslim woman to seek dissolution of her marriage by the court was:

> *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.*

It may be noticed that under the Act the traditional principle that a minor's marriage contracted by the father or the grandfather could not be repudiated has been done away with.

Conflicting decisions have gathered round the interpretation of this provision, as the remedy has been frequently availed of by Muslim women. The difference of opinion has arisen in the courts on various points such as the time within which the option could be exercised, the period during which marriage has been consummated; whether a court's decree is essential to sever the marriage tie, and whether such option could be exercised in the same suit in which the husband sued for restitution of conjugal rights.

As regards the time within which the option of puberty could be exercised, it was held in **Gulam Sakina v. Falak Sher Allah Baksh**, that puberty is presumed in the absence of evidence on the completion of the age of fifteen years. It may be pointed out here that the Act does not speak of puberty at all, but only of an age. The court in the above case" proceeded on the basis of the presumption that a girl attained puberty at the age of fifteen years. Therefore, when she was given in marriage before attaining the age of fifteen years and the marriage was also consummated before attaining that age, that consummation was given no considerations. This interpretation will prevent a minor from misusing her option.

As regards the question whether a court's decree is necessary to confirm the exercise of the option of puberty and sever the marriage tie, there is difference in judicial opinion. It was decided by the Calcutta High Court that a woman who contracted a marriage after exercising the option did not commit bigamy even though the option was not confirmed by a judicial order.33 However, in another case an application made by the wife to a judicial officer was considered by the same High Court sufficient to avoid the marriage". These decisions followed the opinion expressed in Radd al-Muhtzr, according to which a decree of the qaldi is not necessary to dissolve the marriag. But according to Hidnya, such a decree is essential to dissolve the marriage. Accordingly, the Madhya Pradesh High Court has held that the repudiation must be confirmed by a court and that a decree dissolving the marriage is necessary." In Pakistan, it has been held that the exercise of the option of puberty puts an end to marriage without intervention by the court.

Regarding the question whether a wife could successfully resist the suit of the husband for restitution of conjugal rights by repudiating the marriage in such a suit on the basis of option of puberty, it has been decided in **Sk, Sahib Ali v. Jinnathan Nahar**, that a substantive suit by the wife to exercise the option under the Act must be instituted. But the court in Madhya Pradesh took the view that the wife could exercise the option even in a suit filed by the husband for restitution of conjugal rights.4o This view is more reasonable as it does not force the' wife to go in for a separate suit.

6. Restitution of Conjugal Rights

A husband has the right to require his wife to live with him wherever he may choose to reside. On the other hand, it is corresponding duty of the wife to live with her husband. However, there may be circumstances which compel the spouses to live in different places. These circumstances may furnish reasonable or just excuse to the wife to live at a different place. It is for the Court to decide as to whether the circumstances permit the wife to reside apart from her husband.

Law provides that when either husband or the wife withdraws from the society of the other, the aggrieved party may apply to the Court for a direction that the other party should live with him or her. (Section 9 of the Hindu Marriage Act). Such a petition is to be filed before the District Judge.

The petitioner is to satisfy the Court that the other party has without reasonable excuse withdrawn from his or her society. So, if your wife has without reasonable excuse withdrawn from your society, you may file petition before the District Judge for such a relief. When you file such a petition, Court is to satisfy that you have a bona fide desire to bring your spouse to your company. Remember, when the Court finds that your own conduct debars you from seeking this relief of the company of your spouse or a fact shows that you are taking advantage of your own wrong, Court shall dismiss your petition. (See section 23 of the Hindu Marriage Act).

Your petition may be dismissed in case Court finds that there is no truth in the statements made in it. If Court finds that your wife has reasonable excuse in withdrawing your society, even

then your petition shall be dismissed. Court shall dismiss your petition, if it is found that there is any other legal ground for dismissing the same.

Question arises as to when the other party would have reasonable excuse to withdraw from the society? In this respect, it is to be remembered that if your wife withdraws from your society and she alleges that she withdrew from your society for a reasonable excuse, it is for her to prove that she withdrew for a reasonable excuse. If it is proved that your conduct as a husband is grave and weighty matter which gives the wife good cause for leaving you, you as husband would not be entitled to obtaining a decree for restitution of conjugal rights.

On the other hand, if your husband withdraws from your society and he alleges that he withdrew for a reasonable excuse, it is for him to prove it.

Section 9, in actuality, is a means of saving the marriage, it is in a sense an extension of sub-sections (2) and (3) of section 23 of the Act which encourage reconciliation by the court.

7. Judicial Separation

In Indian Society, marriage is considered as a sacrament. It is an irrevocable relationship between husband and wife established through rituals and customs. Before 1955, there was no relief available to either party in case of a failed marriage. They had to continue with the marriage and couldn't break the marriage. After the passage of Hindu Marriage Act, 1955 things changed in favour of both parties to the marriage. Now, in case of a failed marriage, the parties do not need to suffer in the marriage and can easily break their matrimonial alliance through Judicial Separation or by a decree of Divorce.

The Marriage Laws (Amendment) Act, 1976 makes the ground for judicial separation and divorce common. It is upon the parties to choose between the two methods of dissolution.

The legal effect of judicial separation and divorce is however different. A divorce puts the final nail in the coffin of marriage whereas judicial separation leaves the scope of settlement between parties.

Either party to the marriage, whether solemnized before or after commencement of the Hindu Marriage Act, 1955 can under Section 10 of the Act file a petition for judicial separation. After a decree is passed in favor of the parties, they are not bound to cohabit with each other. Some matrimonial rights and obligation, however, continue to subsist. They cannot remarry during the period of separation. They are at liberty to live separately from each other. Rights and obligations remain suspended during the period of separation. The grounds for judicial separation are same as for divorce. *Under Section 13(1), judicial separation may be sought on the following grounds:*

- **Adultery:** If other spouse had a voluntary sexual intercourse with any person other than his or her spouse after solemnization of marriage.
- **Cruelty:** If after solemnization of marriage, one of the spouse treats the other with cruelty.

- **Desertion:** If the other party has deserted the spouse for a continuous period of 2 years without any reasonable ground immediately preceding the presentation of the petition.
- **Conversion:** If one of the spouses has ceased to be a Hindu.
- **Insanity:** If the other party is of unsound mind or has been suffering continuously from mental disorder of such a kind and to such an extent that the petitioner cannot live with the other party.
- **Leprosy:** If the other party has been suffering from a virulent and incurable form of leprosy.
- **Venereal disease:** If the other party has been suffering from venereal disease in a communicable form.
- **Renounced the world:** If the other spouse has renounced the world by entering any religious order.
- **Has not been heard alive for seven years.**

In addition to these grounds some of the grounds are exclusively reserved for women:

- Husband has more than one wife living: If the husband had married before the commencement of the Act and after the commencement of the Act has again remarried either of the wives can present a suit for judicial separation provided the other wife is alive at the time of presentation of the petition.
- Rape, Sodomy or Bestiality: If a man is guilty of offense like rape, sodomy or bestiality, the wife can present a petition for judicial separation.
- Marriage before the age of fifteen years: If the marriage of women was solemnized before attaining 15 years of age, on her attainment of 15 years she could repudiate it but before attaining the age of 18 years.

Effect of Separation

Separation isn't the same as divorce, but it does have a similar effect with respect to inheritance or new contracts. Any property acquired subsequent to the separation can be disposed off by the spouse as if she/he were unmarried; similarly, if the spouse dies intestate, the property would be distributed among his/her heirs exactly as if the husband/wife were already deceased.

In case of judicial separation, the court can also deal with the questions of maintenance of wife, custody of children and property.

In the case of **Sohan Lal vs. Kamlesh** it was held that in case of judicial separation, a wife is allowed to claim maintenance from husband in case she is not able to maintain herself.

Since a decree for judicial separation is a judgment *in rem*, if the parties want to resume cohabitation, it is necessary for them to get the order of judicial separation annulled by the

court. Normally, the court rescinds the degree on presentation of the petition by consent of both the parties.

Judicial Separation is a step prior to a divorce. The purpose of judicial separation is to provide an opportunity to the parties to reconcile their difference.

8. Divorce

In divorce, parties cease to be husband and wife. Divorce puts an end to the marriage and all mutual rights, and obligations stand terminated. The parties are free to marry again.

Grounds of Divorce

- The grounds for divorce is mentioned under Section 13(1). The grounds of divorce and judicial separation are the same. Apart from these grounds, the wife may seek divorce on additional grounds as discussed above.
- The parties are also free to present a petition in case there is no resumption of cohabitation between the parties to the marriage for a period of one year or more after the passing of judicial separation by the court. In such a case, the court will not require proof of any of the grounds of divorce. Merely a presentation of the petition will be sufficient for the court to grant a decree of divorce.
- In case, the court had ordered restitution of conjugal rights under Section 9 of the HMA, 1955 and the parties do not comply with the decree of the court and fail to cohabit. In such a case, on presentation of the petition for divorce the court will not enquire into any grounds for divorce and will pass a decree of divorce on the grounds of failure of restitution of conjugal rights.
- In a petition for divorce, if the petitioner cannot prove grounds for divorce, or the court is not satisfied that the act is so grave to pass a decree of divorce it has the power to pass a decree of judicial separation even if the petitioner did not ask for it. In the case of **Vimlesh v. Prakash Chandra Sharma**, the court held that a single instance of cruelty is not so grave to pass a decree of divorce. Thus, the court granted a decree of judicial separation to provide an opportunity for the parties to reconcile.

Additional grounds for Divorce

The Marriage Law (Amendment) Act, 1976 provides an additional ground for divorce under Section 13(b). Where both the parties feel that the marriage is torn and there is no scope of reconciliation, both the parties may by mutual consent present a decree of divorce under Section 13(b) whereby the court will not enquire for any reason for divorce and will grant a decree in favor of the parties if both of them want a divorce. Under the Act, a period of 6 months for reconciliation is granted on presentation of a petition for divorce by mutual consent. However, in the case of **Nikhil Kumar V. Rupali Kumar**, the Supreme Court has done away

with the mandatory reconciliation period of six months. Now, divorce on the ground of mutual consent can be granted on presentation of the petition and parties do not need to wait for six months.

S.No.	Judicial Separation	Divorce
1.	Can file a petition at any time post marriage.	Can file only after completion of one year of marriage.
2.	Only one stage of judgement. If grounds are satisfied, decree granted.	Judgement is a two-step process. First reconciliation, then divorce.
3.	Temporary suspension of marriage.	Brings marriage to an end.
4.	Cannot remarry after the passage of decree.	Can remarry once decree in favour of divorce is passed.
5.	It is a ground for divorce. A single instance of adultery sufficient for Judicial Sep.	Living in an adulterous relationship necessary.
6.	The possibility of reconciliation.	No possibility of reconciliation.

9. Bars to Matrimonial Reliefs under Hindu Law

It is a particular aspect of fault theory of divorce in which even if the respondent is guilty of matrimonial offence the petitioner will not be granted divorce if it is established that he is not an innocent party.

Burden of proof is on petitioner. Most of these bars are based on the maxim, "one who comes to equity must come with clean hands.''

There are mainly eight bars to matrimonial remedies. They are as follows:

i. Doctrine of strict proof
ii. Taking advantage of one's own wrong or disability
iii. Accessory
iv. Connivance
v. Condonation
vi. Collusion
vii. Delay
viii. Any other legal ground

All these bars are absolute bars under Indian personal laws, They have been enacted in every matrimonial law except Muslim matrimonial law, though not uniformly. The bars almost the same under the Hindu Marriage Act and the Special marriage Act as provided in Section 34, and in accordance to section 35 of the Parsi Marriage and Divorce Act and section 12of the Divorce act as-well.

Doctrine of Strict Proof

It is recognised under all personal laws. In a matrimonial proceeding the petitioner must establish the ground of matrimonial remedies beyond all reasonable doubts. No petition can be decreed mainly on the basis of admission of parties.

10. Grounds for Divorce under Dissolution of Muslim Marriage Act, 1939

A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

i. that the whereabouts of the husband have not been known for a period of four years;
ii. that the husband has neglected or has failed to provide for her maintenance for a period of two years;
iii. that the husband has been sentenced to imprisonment for a period of seven years or upwards;
iv. that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
v. that the husband was impotent at the time of the marriage and continues to be so;
vi. that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;
vii. that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years: Provided that the marriage has not been consummated;
viii. that the husband treats her with cruelty, that is to say:
    a. habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or
    b. associates with women of evil repute or leads an infamous life, or
    c. attempts to force her to lead an immoral life, or
    d. disposes of her property or prevents her exercising her legal rights over it, or
    e. obstructs her in the observance of her religious profession or practice, or
    f. if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;
ix. on any other ground which is recognised as valid for the dissolution of marriages under Muslim law: Provided that:
    a. no decree shall be passed on ground (iii) until the sentence has become final;
    b. a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfied the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and
    c. before passing a decree on ground (v) the Court shall, on application by the husband, made an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent,

and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

End Note: Section 2 of the Act deals with the right of a woman married under Muslim Law to obtain a decree for dissolution that her husband assaults her or makes her life miserable by cruelty. If any incident perpetrated by the husband with cruelty had made her communal life miserable then that would amount to cruel treatment as envisaged in the clause. Held, it was a cruelty to force a young woman, who was desirious of becoming a mother, to abort her pregnancy and some drug was administered to her and miscarriage occurred consequently. (Siddique v. Amina, 1996(1) DMC 87)

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