



**Directorate of Distance Education
NALSAR University of Law, Hyderabad**

Reading Material

**Post-Graduate Diploma in
Family Dispute Resolution**

1.1 Family, Marriage and Matrimonial Remedies

By:

Prof. (Dr.) Y. F. Jayakumar

M.A., M.L., Ph.D.

Professor (Retd.) & Former Dean, Faculty of Law

Osmania University, Hyderabad

(For private circulation only)

CONTENTS

MODULE	TITLE	
I.	THE EVOLUTION OF THE FAMILY Origin & Evolution	5-46
	Sociological Perspectives Forms of Family Joint & Nuclear Units Hindu Joint Family & Its Composition Legal Aspects of Family Institution of Marriage Origin & Evolution of Marriage Forms of Marriage Religious Forms of Marriage The Hindu Marriage The Muslim Marriage The Christian Marriage Status of Live in Relationships NRI Marriages Civil Marriage under Special Marriage Act, 1954	
II.	MATRIMONIAL REMEDIES	47-64
	Restitution of Conjugal Rights Judicial Separation Nullity of Marriage Divorce Ancillary Remedies	
III.	DISSOLUTION OF MARRIAGE	65-90
	Fault Theory Breakdown Theory Consent Theory Grounds of Divorce under Hindu Marriage Act, Special Marriage Act and Indian Divorce Act	
IV.	TALAQ & DISSOLUTION OF MUSLIM MARRIAGE	91-100
	Different Modes of Talaq	

V.	BAR TO RELIEF IN MATRIMONIAL	101-109
	DISPUTES	
	Taking advantage of one's own wrong	
	Collusion	
	Condonation	
	Delay	
	One year Bar	
	Custody of Child	
	Settlement of Matrimonial Properties	

Chart – IV: Judicial Separation

MODULE: I

THE EVOLUTION OF THE FAMILY

Structure of Module

- 1. Origin & Evolution**
 - 2. Sociological Perspectives**
 - 3. Forms of Family**
 - 4. Joint & Nuclear units**
 - 5. Hindu Joint Family & its composition**
 - 6. Legal Aspects of Family**
 - 7. Institution of Marriage**
 - 8. Origin & Evolution of Marriage**
 - 9. Forms of Marriage**
 - 10. Religious Forms of Marriage**
 - 11. The Hindu Marriage**
 - 12. The Muslim Marriage**
 - 13. The Christian Marriage**
 - 14. Status of Live-in Relationships**
 - 15. NRI Marriages**
 - 16. Civil Marriage under Special Marriage Act, 1954**
-

OVERVIEW:

This unit helps the students to understand the theoretical outlines of the institution of family as a sociological institution and also to understand the various forms of the family and the classifications therein. It is from the family that an individual gain and acquaints himself with a common code of behavior. To understand this, the student should learn about the origin & evolution of the family and sociological perspectives underlying the concept of family. Further, he must acquaint himself with the comparative analysis of marriage and family in multi religious settings and also with must have an idea about the dynamics of NRI marriages and Live in relationships.

A family is the first sociological institution into which a child is born, be it a large joint family consisting of large number of relatives or a small nuclear family consisting of both the parents. The family provides a first opportunity for an individual to socialize with others and later serves as a platform for the child enabling him or her to interact with the world. The family is the basic unit of the

society. It is an institution which not only serves the primate man but also is responsible for the religious and moral aspects of the society. The family integrates with the legal, political and governmental institutions. Though the family is different from locality, territorial, social or governmental groups, it is an integral and inseparable part of these groups.

The family is an institution which integrates and preserves rights and obligations in the basic fields of human interest, namely private, moral, religious and public. Certain rights and obligations of the family are purely private in their nature, whereas other rights and obligations are connected with society and public institutions. The individual members of the family must also obey the public law, pay their taxes to the government and serve, if necessary, in the armed forces.

In the olden days, there existed a notion regarding the family being a stable place of residence where father plays his role as the provider and the mother as the nurturer. But with the rapid changes in the society and societal relationships, the notion no longer remains true and today we are facing new and emerging forms of the family which were unimaginable for our forefathers. In order to appreciate the institution of the family it is essential that one should go to the rudimentary basics of the institution and trace its origin and evolution.

Definition of Family

The sociologists had always felt a difficulty in defining the family as a social institution since a family is a multifaceted institution which prevails over both the private and public life of an individual. However, a modest attempt has been made by many sociologists who had analyzed the institution of family from the functional perspective and well as other perspectives.

According to a renowned sociologist, George Peter Murdock (1949) – A family is defined as a group characterized by common residence, economic cooperation and reproduction. It includes adults of both sexes, at least two of whom maintain a socially approved sexual relationship, and one or more children of their own or adopted sexually cohabiting adults. Further he enumerates the functions served by the family along with other social institutions such as:

- i. Regulation of sexual relations;
- ii. Accounts for economic survival;
- iii. Controlling reproduction; and
- iv. Socialization of Children.

According to the other sociologists it is the last function i.e., the socialization of children is the most important and central function of the family. Thus the family plays an important role in the society and it has certain functional requisites which includes biological functions, reproduction, socialization of new members of the society, production and distribution of goods and services, maintenance of order within the group and maintenance of motivation for individual and group survival, etc.

ORIGIN & EVOLUTION

According to MacIver, in history there was no such stage in which family was absent or such stage in which it emerged."Tracing the origin and evolution of family is a very difficult task for the sociologists as well as the anthropologists because the families have originated in the different regions around the world and in different civilizational settings as such tracing a common path of evolution is impossible. However, certain sociologists came up with the plausible theories concerning the evolution of family. The outlines of the said theories are as follows:

a. Theory of Sex Communism

This theory suggests that in the initial stages of human development there existed a system of free sexual relations between men and women. A man can have sexual relations with any women of his choice. This was a stage when the women were used as a commodity for hospitality. It is from this feeling of man of having a woman for himself or jealousy that the need for establishing a family was felt. Thus, the family evolved in this way.

b. Patriarchal Family Theory

This theory originated in during the Roman times and it was supported by the renowned philosophers of that age i.e., by Plato and Aristotle. This theory in essence states that the man is the master of his wife and sons therefore he is the patriarch. The Roman law also condoned the killing of sons by the father. This is how the family had evolved i.e., man being the master of family. But this theory stands on a wrong footing since many of the early societies were also matriarchal in nature.

c. Matriarchal Family Theory

This theory states that since, there was no restriction on the sexual relations between men and women in the initial stages of the society the resulting offspring were brought up solely by the women i.e., the mother. It is the mother who nurtured and cared for her children and acted as their matriarch later with the passage of time the role of mother was taken over to a great extent by the father and he was given primacy in the family.

d. Evolutionary Theory

The theory was put forward by the American sociologist Morgan. According to him the theory of evolution of family has passed from the following stages:

- **Consanguine Family:** In this type of family, marriage between blood relatives was not forbidden. It was founded upon the intermarriage of brothers and sisters, own and collateral, in a group.
- **Punaluan Family:** In this type of family, brothers of one family can marry with the sisters of other family but among them no such restriction of sex. The rules of sex relations were not determined.

- **Syndasmain Family:** In this stage one-man can marry one woman at a time but the sex relationships of the married woman in the family was not defined.
- **Patriarchal Family:** In this type man is a family and had sex with many women at a time. The power of man was at full swing. He was the master of the family.
- **Monogamous Family:** This is the present stage of the family system. In this type one man can marry with one woman and one woman with one man at a time.

However, the evolution of the family in the above stated compartmentalized stages is not a plausible explanation for the evolution of the family. According to Ralph Linton, "Societies have not followed a single line of its evolution but many lines which diverge its evolution."

Evolution of Family in India

The civilization in India can be traced back to nearly 3000 years. The civilization in India had taken birth in the North-Western India during the time of Harappan civilization but the concrete details or literary sources are available only from the Vedic period onwards. In the initial stages of the Vedic society, the society was based upon egalitarian foundation where both men and women enjoyed equal status in the family. But with the passage of time, when the Vedic society gradually became an agricultural community more and more changes were seen in the institution of the family. The women no longer enjoyed the privileged position in the society and became extremely dependent on the men for their survival. The women were relegated to the status of nurturer of the family. The man exercised his absolute control over the family and was the patriarch. Later on the status of the families and the rules relating to the social relations within the family and between the families were strictly controlled by the ancient Hindu law texts such as Dharmasutras and Dharmashastras.

Later in the medieval ages the country came under the influence of Islam which was brought by the rulers and conquerors from the middle east. The Islamic notion of seclusion of women, polygyny, etc. came to be practised and adopted even by the people belonging to other religions. The women were totally confined to the home where she nurtured and cared for her children. Due to the existence of polygyny in the society the size of the family also grew much larger. The large families later known as joint families or extended families were very much prevalent in the society. In this stage the nuclear families or compact families were not known.

During the British Raj in India, the institution of family underwent a radical change. The men no longer acted as the sole bread winner of the family. With the encouragement of women education and advocacy of women's rights, the women also started playing an active role in the economic decision making thereby making her also the bread winner of the family. Due to the rapid urbanization affected by the British the people started flocking to the urban areas for better livelihood and other prospects due to which there was slow erosion of the joint family system in India.

In post Independence era many reforms were undertaken by the Government of India to reduce economic and gender disparity in the society as a result of which women and men now stand

on almost equal footing these days. The family structure had undergone total structural transformation and are paving the way for nuclear families. The joint family has not become a thing of the past with very few families in existence.

SOCIOLOGICAL PERSPECTIVES

The family is the most permanent and pervasive of all social institutions. There is no human society without any family system. All societies large and small, primitive and civilized, ancient and modern, have institutionalized the process of procreation of the species and the rearing of the young. It is a permanent and universal institution and one of the constants of human life. If there is a social institution which is universal it is the family. Almost everyone is born into a family is a part of family. The institution of family is unique in the sense that it is both private and publicly visible. Sociologically, a family is the group of two or more people who live together and are related by marriage, blood or adoption. A family is not only made up of husband and wife but also includes two brothers living together or a woman and her adopted son. A family, further is a part of network of families known as kinship. In accordance with the cultural backdrop the family relationships are considered.

In major part of India, we can see the prevalence of patrilineal system wherein father is the head of the family and all the members of the family trace their descent through the father's line of descent. In this system, generations are tied together into a kinship through male members of a family. A variation in this system can be observed in Kerala where the Nair community practices matrilineal system. Here, the kinship system consisted of families related through maternal line of descent. On the other hand, the western countries like USA and others, they follow a bilateral system wherein a person is considered to be equally related to both his or her father's and mother's relatives. In this system the descent is traced both through males and females.

While dealing with the family one often comes across the concept of 'household'. Many students tend to confuse the household with the family but there exist differences between both the concepts. A household is made up of one or more people who live in the same dwelling unit which may be house, an apartment or a room. A household includes not only family members but also persons who are not related to one another, if they share the same dwelling. Thus, a person living alone or a group of employees, whether related or unrelated, living under the same roof constitute a household. A family is always a household but every household is not necessarily a family.

Functions of the Family

The family being one of the most important social institution discharges very important social functions such as:

1. **Procreation:** Every society needs to replace its members. Although reproduction can take place outside the marital union, it is only the family that can effectively nurture and socialize the child to meet the needs of the society.

2. **Sexual Regulation:** Family establishes networks of relationships and forges useful alliances by restricting the sexual promiscuity of the humans. Further it defines the roles and statuses of the individuals within the family.
3. **Economic Support:** Family was the unit of production and consumption in the pre-industrial era and now also it plays an important function in maintenance of the children, their education and nourishment. Even the unemployed adults in the family find economic support from the other members in the family.
4. **Social Placement:** Every individual is recognized as the member of a family and this has an inherited status. Children inherit not only the family name and material assets but also a social standing. In fact, the birth into a family determines a person's caste, class, religion, language and clan.
5. **Socialization:** The family is the most important and effective agent of socialization. The human young is dependent on his or her parents for a long time. The child also spends the most formative years of his or her life in the family. The institution of family is responsible for initiating the child into the social circles, religious groups, language, and caste. Thus, the child gets socialized into the group's values, beliefs, standards and practices.
6. **Emotional Security:** it is only the family which provides emotional security to an individual due to its close-knit group and relations.

FORMS OF FAMILY

Sociologists have spoken of different forms or types of family. Based upon the different factors the families have been classified into various categories. Some of the common basis of classification are as follows:

- i. On the basis of *marriage*: Family has been classified into- (i) Polygamous Family, (ii) Polyandrous Family, and (iii) Monogamous Family.
- ii. On the basis of *nature of residence*: Family has been classified into – (i) Family of Matrilocal Residence, (ii) Family of Patrilocal Residence, and (iii) Family of Changing Residence.
- iii. On the basis of *ancestry or descent*: Family can be classified into – (i) Matrilineal Family, (ii) Patrilineal Family.
- iv. On the basis of *nature of authority*: Family can be classified into – (i) Matriarchal Family and (ii) Patriarchal Family.
- v. On the basis of *size or structure* and the depth of generations in the family: Family is classified into (i) Nuclear Family and (ii) Joint Family.
- vi. On the basis of *nature of relations* among the family members: Family can be classified into (i) Conjugal Family and (ii) Consanguine Family.

The following is a brief description about the different types of families:

Matriarchal Family

Matriarchal family is a mother centered or dominated family. Here the women is the head of the family and the authority is exercised by her. She is the head and manager of the household and all the economic decisions are taken by her. There is a subordination of all the other members of the family. Some of the matriarchal families can be found among the Inuit people, Malay Islanders, Odama Indians, Khasi tribals of India and others.

Characteristics of matriarchal family

The characteristics of matriarchal family can be summed up as follows:

- i. Descent, Inheritance and Succession can be traced to the mother. Daughters inherit the property.
- ii. Matrilocal Residence i.e., the family resides in the house of the mother. The female does not leave her maternal house after marriage as it happens in most of the societies in India.
- iii. Concentration and exercise of power is vested in the hands of the mother, she is the ultimate decision maker however, in practice the brother of the female head of the family exercises de facto control over the family.
- iv. The maternal family brings together the kinsmen on the women's side and welds them into a powerful group. This type of family is normally associated with exogamy.

Patriarchal Family

Patriarchal families are also known as the father centered families wherein the central role as the head of the family is played by a senior most male member. The senior male member exercises his authority and he is the owner and administrator of the family property. He also has last say in the all the matters involving the family. The patriarchal families are more common than the matriarchal families. The majority of the Indian society is patriarchal in nature.

Characteristics of patriarchal family

The characteristics of patriarchal family can be summed up as follows:

- i. Descent, Inheritance and Succession can be traced to the father. The sons inherit the property. Usually the rule of primogeniture prevails i.e., the eldest son succeeds to the position of his father as the karta / head of the family.

- ii. Patrilocal Residence i.e., the family resides in the house of the male member. The female leaves her maternal house after marriage to join with her husband in the matrimonial home.
- iii. Concentration and exercise of power is vested in the hands of the father; he is the ultimate decision maker. Sometimes in the case of joint families all the senior male members exert their authority over the other members of the family jointly.
- iv. The ultimate authority in the family is the senior most male member of the family and after the demise of the said individual his position is succeeded by his eldest son who becomes the patriarch of the family.

JOINT & NUCLEAR UNITS

Nuclear Family

The nuclear family is a characteristic of all the modern industrial societies. In simple words, a nuclear family is one which consists of the husband, wife and their children. Soon after their marriage, the children leave their parental home and establish their separate household. Hence, a nuclear family is an autonomous unit free from the control of the elders. Since there is physical distance between parents and their married children, there is minimum interdependence between them. Thus, a nuclear family is mostly independent. The American family is a typical example of modern independent nuclear family.

Extended Family / Joint Family

The joint family is also known as ‘undivided family’ and sometimes as ‘extended family’. It normally consists of members who at least belong to three generations: husband and wife, their married and unmarried children; and their married as well as unmarried grandchildren. The joint family system constituted the basic social institution in many traditional societies, particularly in the Eastern societies. The definition given by the renowned sociologist Irawati Karve sums up the whole meaning of joint family as follows: “a group of people who generally live under one roof, who eat food cooked at one hearth, who hold property in common, and who participate in common family worship and are related to each other as some particular type of kindred.”

- **Polygamous Family:** Family where a male member marries more than one woman.
- **Polyandrous Family:** Family where a female marries more than one male, usually the male members are co born brothers
- **Monogamous Family:** Family consisting of one man and one women married to each other.
- **Family of Matrilocal Residence:** Family which resides at the place of residence of mother / matriarch.

- **Family of Patrilocal Residence:** Family which resides at the place of residence of father / patriarch.
- **Family of Changing Residence:** Family which resides at different places from time to time and frequently changes the place of residence.
- **Matrilineal Family:** Family in which the descent is traced through females and in which the succession takes place from mother to daughter.
- **Patrilineal Family:** Family in which the descent is traced through males and in which the succession takes place from father to son.
- **Conjugal Family:** Consists of adult members among whom there exists sex relationship.
- **Consanguine Family:** Consists of members among whom there exists what is known as “blood relationship”- brother and sister, father and son, etc.

HINDU JOINT FAMILY & ITS COMPOSITION

The joint family system is an inseparable part of the Indian social system. Joint family or extended family is the most common and uniform family pattern found in India. The Hindu joint family is said to be the bedrock on which Hindu values and attitudes are built. It is found in all the parts of India. Family for a Hindu, is sacred institution deriving sanction from religion and social traditions with myths and legends. From the traditional point of view, the unit of the Hindu society is not the individual but the joint family.

Joint families assumed importance throughout the vedic period, post vedic period, in the period of Dharmashastras, Puranas, Epics and even during the Medieval period. Literatures produced during this period throw light on the growth of the Hindu family and the changes and modifications was undergoing.

Number of Hindu law-givers like Manu, Yajnavalkya, Vishnu, Narada, Vyasa, Brishaspathi, Kautilya, Katyayana, Parashara and others laid down the norms, rules and regulations to protect the institution of family and to regulate and control family relations, family property and family activities.

A Hindu Joint Family setup is an extended family arrangement prevalent which has an enormous legal significance in India. Simply, a Hindu Joint Family would at best be described as, the lineal descendants and their dependants where, the former trace their origin to one common ancestor. The underlying essence of a joint family is the fact that it traces its origin back to one common ancestor and with the addition and deaths of members, joint families can continue till eternity. It is important to understand that though a single familial unit, a Joint Hindu Family does not have a separate legal identity and is not a juristic person.

The ancient Schools of Hindu law is believed to be of two types and were in existence before the Hindu law was codified. The two types are:

1. Mitakshara School

2. Dayabhaga School

The major regions of India with the exception of West Bengal and parts of Assam follow the Mitakshara School which is further divided into various sub schools. Whereas in the state of West Bengal and parts of Assam the Dayabhaga school is prevalent.

Mitakshara School

The Mitakshara school is based upon the legal commentary named “Mitakshara” on Yajnavalkya Smriti by a scholar “Vijnaneshwara” during the Chalukyan times. The Mitakshara school is best known for its theory of “inheritance by birth”. The following are the salient features of the Mitakshara school:

1. **Joint vesting of Property** - In Mitakshara ownership of property vests in the family as such and not in any member of the family.
2. **Modes of devolution of property** - It recognizes two modes of devolution of property, one for joint family and the other for the individual.
3. **Joint property and self-acquired property** - While the family can and does own property which is joint, there is no bar on its member owning separate properties of their own.
4. **Coparcenary and Survivorship** - Where the deceased is a coparcener of a joint undivided family, his undivided interest in this coparcenary devolves by survivorship on the other coparceners.
5. **Self-Acquired property** - In respect of self-acquired and individual property and not family property, the same passes to his heirs by succession.
6. **Hindu Succession Amendment Act 2005** - Every male or female (after 2005 Amendment of Hindu Succession Act 2005) member born into the family acquires an interest in the property by birth. The family continues on the death of any member of the family including that of the common ancestor or the Karta. The interest of each coparcener fluctuates by births and deaths in the family.

Dayabhaga School

The Dayabhaga is a Hindu law treatise written by “Jimutavahana” which primarily focuses on inheritance procedure. This school was very much prevalent in the state of West Bengal and also certain parts of Assam. Dayabhaga is generally considered to be the reformed version of Mitakshara whereas the later is considered to be Hindu Orthodox law. The following are the salient features of the Dayabhaga School.

1. **Vesting of ownership** - In Dayabhaga ownership of property vests in the father as such and not in any member of the family. It doesn't distinguish between self-acquired property and family property.

2. **Exclusive possession and succession** - The father is the exclusive possessor of the property and on his death the property passes on to legal heir by succession.
3. **Son not a coparcenary** - A Son is not a coparcener by birth and do not get any interest in property.
4. **Both male and female relatives are legal heirs** - In Dayabhaga on death of the father, his legal heirs, both male and female become co-owners.

Differences between Mitakshara&Dayabhaga Schools

The differences between the Dayabhaga and the Mitakshara schools of law may be categorized under the following: -

Concept	Mitakshara School	Dayabhaga School
Joint Family	<ul style="list-style-type: none"> Joint family refers only to the male member of a family and extends to include his son, grandson and great-grandson i.e., all male paternal descendants. They collectively have co-ownership / Coparcenary in the Joint Family. Thus, a son by birth acquires an interest in the ancestral property of the joint family. father's power over the property is qualified by the equal rights by birth enjoyed by a son, a grandson and a great grand -son. An adult son can demand partition during his father's lifetime or his three immediate ancestors. He has a say in the disposition of the family property and can oppose any unauthorized disposition of ancestral or family property. 	<ul style="list-style-type: none"> The son has no automatic ownership right by birth but acquires it on the demise of his father, along with the daughter. Father has overall and uncontrolled power over the family property till death.
Coparcenary / Co-ownership	<ul style="list-style-type: none"> All the members of the Joint family enjoy coparcenary rights during the father's lifetime. The coparcener's share is not defined and cannot be disposed. 	<ul style="list-style-type: none"> The sons do not have coparcenary rights but acquire it on the death of the father. The share of each coparcener is defined and it can be disposed.
Partition	<ul style="list-style-type: none"> The true test of partition is in the 	<ul style="list-style-type: none"> The true test of partition is in the

	<p>“intention to separate”, and the intention involves holding the property in defined definite shares.</p> <ul style="list-style-type: none"> • None of the members of the coparceners can claim a definite physical share of the joint property. So, partition involves ascertaining and defining the share of the coparcener i.e., the numerical division of the property. 	<p>“intention to separate”, and there has to be a physical separation of the property into specific portions and assigning of separate share to each coparcener.</p> <ul style="list-style-type: none"> • Each coparcener has a definite share in joint family property even though the family is joint and undivided and possession is common. So, partition involves physical separation of the joint property into separate shares of the coparceners and assigning to each of the coparceners the specific portion of the property.
Rights of Woman	<ul style="list-style-type: none"> • Wife cannot demand partition. She however has the right to a share in any partition affected between her husband and her sons. • In any partition among the sons, the mother is entitled to a share equal to that of a son. • When a son dies before partition leaving the mother as his heir, the mother is entitled to a share of her deceased son as well as share in her own right when there is a partition between the remaining sons. 	<ul style="list-style-type: none"> • The wife or sons cannot demand partition as father is the absolute owner of property. • In any partition among the sons, the mother is entitled to a share equal to that of a son. • When a son dies before partition leaving the mother as his heir, the mother is entitled to a share of her deceased son as well as share in her own right when there is a particular between the remaining sons.

In conclusion we can say that the Mitakshara system is Conservative. It provides good security in times of difficulties as a member can rely on the joint family. However, sometimes a member can become a parasite under this system. The Dayabhaga system is more liberal. Among the two the Dayabhaga is more likely to last in modern times with the growth of individualism, individual enterprise and economic compulsions.

Due to industrialization, urbanisation, frequent migration of people and social mobility, the joint families are slowly disappearing and nuclear families are on the rise. In addition to urbanization, a tendency has developed towards equalitarian decision making in the family. Individualism, independence, vested interests, secular institutions, family planning, birth control, monogamy and small family concept are also contributing to the rise in nuclear families.

Family in Islam

Families are considered to be at the heart of every Muslim community. Family life was created by Allah to keep society together and Muslims should follow the example of the Prophet Muhammad, who was married and raised a family. The traditional Muslim family is an extended family. It usually includes parents, children, grandparents and elderly relatives. Most Muslims believe that extended families mean greater stability, continuity, love and support for each other.

Islamic law and practice recognise the differences between the sexes, resulting in different roles and obligations for men and women. However, many Muslims believe that men and women complement each other. In many Islamic societies, the woman's role is in the home and the man's role is in the public realm of the working world.

Many Muslims believe that family life is the foundation of human society providing a secure, healthy and nurturing environment for parents and growing children. The best place to pass on and develop human virtues such as love, kindness, mercy and compassion is in a family. Muslim parents have a responsibility to care for their children physically and emotionally. Their goal is for their children to grow into self-disciplined, independent adults. Parents are expected to teach their children right from wrong.

The mother is at the heart of the Muslim family and is responsible for teaching children about halal and haram in the home. The father is responsible for taking the children to the mosque. Further the Holy Quran has also advocated that their men shall have a share in what their parents and kinsmen leave; and women shall have a share in what their parents and kinsmen leave; whether it be little or much, they are legally entitled to their share.

Family in Christianity

Christianity preaches the doctrines of love, compassion, forgiveness, tolerance and universal family. The book of Genesis of the Holy Bible deals with the origin of the world and the human race. God created the universe along with all its flora and fauna and finally created Adam to occupy the earth. Then God found that Adam was alone and he said "it is not good that the man should be alone. I will make him a helpmate" and so "God made the man fall into a deep sleep. While he slept, he took one of his ribs and enclosed it in flesh." Yahweh, the God, built the rib he had taken from the man into a woman and brought her to the man. The man exclaimed: "this at last is a bone from my bones and flesh from my flesh! This is why a man leaves his father and mother and joins himself to his wife and they become one body". The Book of Numbers is about all of heritage. Moses, the God's spokesman of Israelites, said "the land is to be shared by Israelites according to the number inscribed, as a heritage." To the large in number, you are to give a large area and to the small in number, a small area; to each the heritage will be in proportion to the number registered. The division of the land is, however to be done by lots. Each is to receive his inheritance according to the number of names in the

patriarchal tribe; the inheritance of each tribe is to be divided by lots, each receiving in accordance with its large of smaller numbers.”

LEGAL ASPECTS OF FAMILY

In India, the Hindus, Muslims, Christians, Parsis and Jews have their own personal laws. All these communities claim their laws to be divine in their original form. However, in recent times, these laws have undergone certain changes through legislative and judicial processes. Article 44 of the Indian Constitution provides that the State shall endeavour to secure for its citizens a Uniform Civil Code throughout the territory of India. The State is empowered to enact laws for the welfare of the people. But the laws made by the State, be it public or personal law, should be within the ambit of the Indian Constitution.

The subjects of family law such as marriage, divorce, succession etc., are matters falling under the Concurrent List of VII-Schedule of the Indian Constitution. Consequently, both the Union Government and the State Government are competent to pass legislation in these areas. As a result, we find that there are several concurrent systems, applications, findings which exist in the field of family law in India. Following are the Family Institutions recognized in India:

Hindu

The Hindus believe in the existence of a number of Gods and respect the Vedas with great reverence. The philosophy of karma and idol worship are some of the important features of Hindu religion. Hindus are governed by the following legislations in respect of their personal laws:

1. **Hindu Marriage Act, 1955:** It deals with marriage, divorce and maintenance among the Hindus.
2. **Hindu Succession Act, 1956:** It deals with the law relating to succession (intestate and testamentary) to the property of a Hindu. It governs the property rights and the shares of the legal heirs of a Hindu.
3. **Hindu Adoptions and Maintenance Act, 1956:** It deals with the law relating to care and protection of adopted child and the duties of adoptive parents among Hindus.
4. **Hindu Minority and Guardianship Act, 1956.** This Act governs the rules of protection of Hindu Minor children and the parental rights of Hindus.

Muslim

A follower of Islam which is based on the Islamic religious text of Quran which teaches that Allah is the only God and Prophet Mohammad is the representative of God. Further, Islam teaches universal peace, brotherhood, compassion and mercy. As of now, the Muslim personal law in India is

uncodified and the Shariat (i.e. Divine) Law is applicable to the Muslims. By way of reforms, the following legislations have been passed in India in respect of Muslims:

1. **Muslim Personal Law (Shariat) Application Act, 1937:** This Act was passed by the British Government to bring all the Muslims under one umbrella of a legal institution.
2. **Dissolution of Muslim Marriage Act, 1939:** This Act provides certain rights to a Muslim woman to seek divorce from her husband through a Court of law.
3. **Wakf Act, 1954:** It deals with the protection and maintenance of the property dedicated in God by a Muslim for religious and charitable purposes.
4. **Muslim Women (Protection of Rights on Divorce) Act, 1986:** This is an important legislation passed by the Central Government which provides maintenance rights to the Muslim women after dissolution of marriage.

Christian

A follower of Christianity which is based on the Holy text Bible which teaches the doctrine of Trinity of God and holds that salvation to the human kind is only through the blood of Jesus Christ. Further, Christianity also preaches the doctrines of love, forgiveness, compassion, tolerance and universal family. Anglo Indians, native converts, persons professing Christianity including Catholics and Protestants in India are governed by the following legislations in matters relating to their personal law.

1. **Christian Marriage Act, 1872.**
2. **Indian Divorce Act, 1869** (renamed as the Divorce Act, 1869) as amended by the Marriage Laws (Amendment) Act, 2001
3. **Indian Succession Act, 1925.**

Parsi

A follower of the Zoroastrian faith who believes in fire worship. The Parsis are governed by the following legislations:

1. **Parsi Marriage and Divorce Act, 1939**
2. **Indian Succession Act, 1925**

Jews

A name applied to the people of Israel, who were also called Hebrews and the Torah is the most holy of the sacred writings of the Jews. The Jews in India are governed by their customary personal law, which includes customs, usages and English precedents.

Socio-Legal Problems of Families

The institution of marriage has come under great strain owing to problems arising out of divorce, dowry, domestic violence, child care, custody of children, extra-marital relations, Non-resident Indian marriages, on-line marriage agreements, inter-country marriages, inter-country adoptions, test tube babies, surrogate motherhood and other related matrimonial and legal issues. As a consequence, negative emotions such as ego, hate, guilt, bitterness, greed, malice, distrust and fear are building up among the spouses leading to marital conflicts. These emotions reach an aggravated form in legally contested cases, where the pleadings follow the traditional fault-oriented approach which only widen the gap between the parties. There is, therefore, a compelling need to advise and counsel the spouses of the consequences of a break-up of the family and its adverse impact on the children.

Role of Judiciary in Resolving Family Disputes

With the emergence of the Courts in the modern legal system, the State has become the custodian of the administration of justice. The administration of justice through the Courts is also known as judicial dispute resolution. It may be defined as a judicial act performed by the Court in determining the rights and duties of the parties. In the judicial dispute resolution system, the Court exercises the power and authority under the procedure established by law. Here, the State directly controls the dispute settlement process through one of its agencies, namely the Court. In the judicial dispute resolution system, there are two parties involved in a case or proceedings. Each party presents its arguments on the basis of evidence to support its case. Later, the other party rebuts those arguments and presents its own arguments duly supported by evidence. Based on the merits of the case, arguments, facts, evidence, the questions involved as to facts and law, the Court gives its findings in the form of a Judgement/Order/Ruling which is binding on the parties.

Conciliation in Suits Filed

The Law permits settlement of family disputes by Conciliation in suits pending before the Court also. The relevant portions of law with regard to conciliation and settlement of family disputes are given below.

Hindu Marriage Act, 1955 and Special Marriage Act, 1954

In any matrimonial suit, before granting any relief under the above Acts, it shall be the duty of the Court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. For the purpose of aiding the Court in bringing about such reconciliation, the Court may, if the parties so desire or if the Court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days, and refer the matter to any person named by the parties in this behalf or to any person nominated by the Court if the parties fail to name any person, with directions to report to the Court as to whether reconciliation can be and has been effected and the Court shall in disposing of the proceeding have due regard to the report.

Civil Procedure Code, 1908

Order 32-A, Rule 3 of the Civil Procedure Code, provides that, "In every suit or proceeding in relation to the matters concerning the family, an endeavour shall be made by the Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject matter of the suit or proceeding. If, in any such suit or proceeding, at any stage it appears to the Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement".

Family Courts Act, 1984

The Preamble of the Family Courts Act, 1984 itself casts an obligation on the Family Courts to endeavour to effect a reconciliation or settlement between the parties to the family disputes. The proceedings of the Court at the initial stage will be informal. Section 9 of the Act envisages the method to be adopted for a settlement. The role of the Judge of a Family Court is very important. He is expected to give an impression to the parties that he is their well-wisher and shall endeavour to settle the dispute amicably. The Judge of a Family Court shall assist and persuade the parties to come to a settlement rather than sit in judgement over their disputes. In this connection, the Judge may take the help of experts and Family Counsellors to resolve the family disputes.

The Legal Services Authorities Act, 1987

A Lok Adalat (People' Court) shall have jurisdiction to determine and arrive at a compromise or settlement between the parties to a dispute in respect of any matter falling within the jurisdiction of any civil, criminal or revenue Court or any tribunal constituted under any law for the time being in force in the area for which the Lok Adalat is organized. The family disputes can also be referred to the Lok Adalat for a settlement through conciliation and compromise.

Arbitration and Conciliation Act, 1996

Conciliation has been given statutory recognition for the first time in India under this Act. Part-III of the Act deals with Conciliation. Section 61 (1) of the Act reads as - "Save as otherwise provided by any law for the time being in force and unless the parties have otherwise agreed, this Part shall apply to conciliation of disputes arising out of the legal relationship, whether contractual or not and to all proceedings relating thereto."

Code of Civil Procedure (Amendment) Act, 1999

Section 89 has been inserted in the Civil Procedure Code, 1908 by the amending Act of 1999 which came into effect from 1-7-2002. It provides that where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement by providing an opportunity to the parties to settle their dispute by Arbitration, Conciliation, judicial settlement including through Lok Adalat or Mediation.

THE INSTITUTION OF MARRIAGE

ORIGIN & EVOLUTION OF MARRIAGE

Marriage is an important social institution. It is a relationship, which is socially approved. The relationship is defined and sanctioned by custom and law. It is one of the universal social institutions. It is established by the human society to control and regulate the sex life of a man. The social institution of family is very closely related to the marriage and both are complementary to each other. The concept of marriage has been thoroughly studied by the sociologists and some of the definitions of the marriage as propounded by the sociologists are as follows:

- Gillin & Gillin : “Marriage is a socially approved way of establishing a family of procreation.”
- Westermarck : “Marriage is rooted in the family rather than the family in the marriage.”
- Malinowski : “Marriage is a contract for the production and maintenance of children.”
- Robert H. Lowie: “Marriage is a relatively permanent bond between permissible mates.”

In addition to these definitions many sociologists have defined marriages in different perspectives since marriage is an institution of society which can have very different implications in different cultures. The purposes, functions and forms of marriages may differ from society to society, but it is present everywhere as an institution. However, the concept of marriage is also capable of legal analysis as it is the form of socially approved relationship, the legal consequences which flow out of a relationship of marriage can be summed up as follows:

1. Conferment of status of husband on man and status of wife upon the woman who are parties to the marriage.
2. Conferment of legitimacy to the children born out of the marriage. Which in later stages may help the children to claim the inheritance.
3. Creation of rights and obligations between the parties to the marriage.

Characteristics of Marriage

The institution of Marriage possesses the following characteristics:

- i. **Universality:** Marriage is more or less universal institution. There exists some or other form of marriage in each and every society. The marriage is also a social rule and a part of custom in society in which it exists irrespective of the fact that the society is primitive or highly technologically advanced.

- ii. **Relationship between Man and Woman:** Marriage is the union of man and woman. It indicates the relationship between one or more men to one or more women. The marriage also deals with the questions like who can marry; whom to marry; whom not to marry and the subsequent rules relating to the marriage.
- iii. **Marriage bond is enduring:** It indicates long lasting bond between the husband and wife. Marital relationship between the man and woman continues even after sexual gratification is obtained and the children or procreated. The bond continues till either of the spouse dies or till the marriage is dissolved by legal means such as divorce or dissolution of marriage.
- iv. **Marriage requires social approval:** A union of man and woman becomes socially approved only after marriage. It is when the society gives the hallmark of social approval to a relationship between man and woman, it becomes a valid marriage.
- v. **Marriage is associated with some civil or religious ceremony:** Marriage gets its social recognition through some ceremony. The ceremony may include its own rites, rituals, customs, etc. Marriage has to be concluded in the public and in solemn manner.
- vi. **Marriage creates mutual obligations:** Marriage imposes certain rights and duties on both the husband and wife. Both are required to support each other and their children.

FORMS OF MARRIAGE

The main forms of marriages are – Polygyny, Polyandry, Monogamy and Group Marriages.

- i. **Polygyny:** It is a form of marriage in which one man marries more than one woman at a given time. It is the popular form of polygamous marriages. It is was in practice since old civilizations. The polygyny is further classified into two types i.e., Sororal Polygyny i.e., a type of marriage in which the wives are invariably the sisters related to each other; and Non Sororal Polygyny i.e., a type of marriage in which the wives are not related to each other as sisters.
- ii. **Polyandry:** It is a form of marriage in which one woman is married to several men. It is less common than other forms of marriage. The polyandry is further classified as Fraternal Polygyny i.e., a type of marriage where the husbands of the woman are related to each other are brothers; and Non-Fraternal Polyandry i.e., a type of marriage where the husbands of the woman are not related to each other.
- iii. **Monogamy:** Monogamy is the form of marriage in which one man marries one woman. It is the most widespread form of marriage found both in primitive and civilized societies. Many societies even consider the monogamy as the best form of marriage.
- iv. **Group Marriage:** It means the marriage of two or more women with two or more men. It is however rare to find group marriages. Here in this marriage the husbands are common husbands and the wives are the common wives.

Hindu Marriage

The marriage of Hindus needs and implies no mutual promise and no theory of consideration underlines it to make it a binding contract. Under Hindu Law, marriage is a gift by the father of his daughter to the husband. The daughter has no choice. She need not give her consent. She may not even be conscious of the nature of the act and its effect upon her life, and she cannot refuse to live with her husband how much ever she might detest him.

In shastras several words are used to denote the marriage indicating one or more elements of marriage. They are 'Udvaha', which means taking a girl for a special purpose. That is, to make her wife; 'Parinaya' which means making pradakshina (circumambulation) around the sacred fire; and 'Panigrahana' which means taking the hand of the girl.

Mohammedan Marriage

The Mohammedan marriage is a transaction based upon the consent of the parties or of persons by whose consent they are bound. No formality is required nor any religious ceremony. It is the universal practice to summon persons for the special purpose of witnessing the transaction; two male persons or one male and two females being considered necessary. In declaring the intention of the parties, care is generally taken to use the word 'Nikah' which signifies marriage and makes the intention clear.

But the use of this word is not imperative. Words which indicate clearly the intention of the parties are sufficient. The usual conditions necessary to constitute a valid contract are necessary to constitute a contract of marriage also. The parties must be of sound mind and competent to contract. The contract of marriage, like other contracts, can be made through an agent. The Mohammedan jurists regard the institution of marriage as pertaining to both the nature of 'ibadat' or devotional acts and 'muamlat' or dealing among the men. Marriage among the Mohammedans is not a sacrament, but purely a civil contract, and though solemnized generally with the recitation of certain verses from the Quran, yet Mohammedan law does not prescribe any service peculiar to the occasion.

Christian Marriage

The English conception of a 'marriage' in the words of Lord Penzance is "a voluntary union for life of one man and one woman to the exclusion of all others". A union of this type is briefly called a Christian marriage. It is a contract which confers a special status on the parties to it. Any ceremony or contract purporting to be a marriage, but not complying with the requirements of the law is no marriage. The expression 'Christian' means the persons professing the Christian religion; and the expression 'Indian Christians' includes the Christian descendants of natives of India who had converted to Christianity. Every marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of Christian Marriage Act, 1872. Any such marriage solemnized otherwise than in accordance with such procedure shall be void.

A marriage between the Indian Christians may be solemnized without the preliminary procedural formalities by any person licensed to solemnize such marriage. Such a marriage has to be solemnized by the 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 presence of the Almighty God, and in the name of Lord Jesus Christ, do take thee, CD to be my lawful wedded wife (or husband).” The licensed person is required to give a certificate of marriage to either party on payment of requisite fee. Registration of such marriage is also required.

RELIGIOUS FORMS OF MARRIAGE

THE HINDU MARRIAGE

The Hindus have been giving great importance to marriage since time immemorial. Marriage is almost obligatory and unavoidable for an average Indian. Among the Hindus, marriage is not a social contract but it is a religious sacrament. Marriage to a Hindu is of great significance to an individual and it also has social significance for the individuals. It is a socially approved union of man and a woman aiming at procreation, pleasure and observance of certain social obligations.

Marriage is a matter of religious duty for the Hindus. Every Hindu is committed to marriage for he regards it as a great sacrament. For the Hindus marriage is not a matter of social contract, nor it is deemed as a license for sex life. In the Hindu scheme of the Ashramas, one can enter the much praised ‘grishastashrama’ only after the marriage. With marriage sacrament, man and woman as husband and wife establish the family, the home or grihashtashrama is not merely a biological necessity but it is also a well thought out social institution. It is shaped, organized and idealized human effort, ingenuity and wisdom for ages past (Prabhu, 1998). The main aims of Hindu Marriage are ‘Dharma’ – meaning duty; ‘Praja’- progeny of children and ‘Rati’ – pleasure of materialistic world.

Sanctity of Hindu Marriage

Hindus believe that marriage is a gift. The acceptance of bride as his wife by the Hindu groom as a gift by her parents is defined as marriage. Marriage according to Hindu law is a sacrament and a holy union for the performance of religious duties. The object of marriage is to enable a man and a woman to perform religious duties and beget progeny. Moreover, it is believed that a man is incomplete without a woman. Marriage is essential because all the ceremonies and rites are to be performed by a Hindu in the companionship of his wife, which would otherwise not bear any fruits. It is submitted that marriage under Hindu law is not regarded as a means of satisfaction of the corporeal trust nor does it have the connection of contractual obligations. On the contrary, it is simply a religious obligation and duty. The marriage is a permanent union which implies that marriage cannot be dissolved. It is also an eternal union which means the wife and the husband are united to each other not merely in this world but even in the heavenly world. It is an indissoluble union and only in exceptional cases the sages allowed a woman to abandon her husband and take another. In the present

day, the concept of marriage has undergone certain changes. The greatest contribution of the industrial revolution is the emergence of the concept that all human and social relations must be based on the free will of the individuals. The ideals of liberty, equality, privacy, the concept of voluntary union and consent theory play a vital role in the formation of marriage of the Hindus also. Paras Diwan, an authority on Hindu Law, commenting on the sacrosanctity of a Hindu marriage said “then, could we say that Hindu marriage continues to be sacramental? It has been seen that the sacramental marriage among the Hindus has three characteristics: it is a permanent and indissoluble union, it is an eternal union and it is a holy union. It is evident that the first element has been destroyed by the Hindu Marriage Act, 1955, which recognizes divorce. The second element was destroyed in 1856 when the widow remarriage was given statutory recognition. Probably, to some extent the third element is still retained. In most of the Hindu marriages a sacred and religious ceremony is still necessary. But the ceremonial aspect of the sacramental marriage is of least importance”.

Essential Conditions of Hindu Marriage

The requirements for solemnization of a Hindu Marriage may be summarized as follows:

1. Monogamy.
 2. Absence of idiocy, lunacy and unsoundness of mind. (Mental Capacity).
 3. Marriageable age of the parties.
 4. Parties are not within the degrees of prohibited relationship.
 5. Parties not sapindas of each other.
 6. Additional conditions such as Hindu religion, ceremony, consent and registration.
1. **Monogamy:** Section 5(1) of the HMA, 1955 required that neither party has a spouse living at the time of marriage. In *Gopal Lal v. State of Rajasthan* (AIR 1979 SC 713) the Supreme Court observed that when a spouse contracts a second marriage while the first marriage is still subsisting, the spouse would be guilty of bigamy under section 17 of the HMA, 1955 and also under section 494 of I.P.C., if it is proved that the second marriage was a valid one in the sense that the necessary ceremonies required by law or by custom have been actually performed. Bigamy includes both polygamy and polyandry. Polygamy is the custom and practice of having more than one wife at the same time, whereas Polyandry is the custom or practice of having more than one husband at the same time. Both polygamy and polyandry have now been abolished and monogamy has been made a rule for all Hindus.

The expression “neither party has a spouse living” depicts that the spouse must not be alive at the time of the marriage and that word ‘spouse’ means a spouse in the eyes of law. If the spouse is alive at the time of marriage that would bar the remarriage of a person. This does not apply to a bachelor, a widow or a widower and a divorcee. If a person contravenes this condition, the marriage is rendered void ab initio under Section 11 of the Act.

2. **Mental Capacity:** the second condition of Hindu marriage according to section 5(ii) of the Hindu Marriage Act, 1955 is:

At the time of the marriage, neither party-

- (a) is incapable of giving a valid consent of it in consequence of unsoundness of mind; or
- (b) though capable of giving a valid consent has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
- (c) has been subject to recurrent attacks of insanity or epilepsy;

Section 5(ii) of the Act lays down that the parties to a Hindu Marriage must be mentally competent at the time of the marriage. If this condition is not fulfilled the marriage is not a void marriage as provided U/s. 11 of the Act, but a voidable marriage U/s. 12 of the Act thereof which can be annulled by a decree of nullity on the ground that the other party was an idiot or lunatic at the time of marriage. The word 'lunatic' is not defined in the Act and it must be deemed to carry the meaning as contemplated under sec. 3(5) of the Lunacy Act 1912 (now repealed and corresponding definition is mentally ill person in sec. 2(b) of the Mental Health Act 1987). The definition of the word 'lunatic' (now mentally ill person) may regard an idiot as much a lunatic as a person of unsound mind and the act admits of no different degrees of lunacy. The standard of proof required in an allegation of insanity is that the court need only be satisfied on a balance of probabilities.

Clause (ii) amended: Under the Marriage Laws (Amendment) Act, 1976 the doubt and controversy as to the scope of the clause have been removed. The new amendment has made it clear now under what circumstances and to what extent unsoundness of mind, mental disorder, insanity or epilepsy can be pleaded as a condition for a valid marriage.

Mental disorder: the amendment of 1976 incorporating 'mental disorder' in sec. 5(ii)(b) of the HMA, 1955 is based on the recommendation of the Law Commission which has borrowed the expression from sec.12(d) of the English Matrimonial Causes Act, 1973. The expression 'mental disorder' in the Matrimonial Causes Act, 1973 is construed with reference to sec.4 of the Mental Health Act, 1959. Generally, the marriage of a mentally disordered person or person of unsound mind could validly take place during a lucid interval, and in this respect sec.5(ii)(b) of the HMA, 1955 differs from sec. 12(d) of the English Matrimonial Causes Act, 1973 which provides for suffering, whether continuously or intermittently, from mental disorder within the meaning of the Mental Health Act, 1959. Sec 5(ii)(b) of the Hindu Marriage Act, 1955 after amendment by the Marriage Laws (Amendment) Act, 1976, reads as follows:

“At the time of the marriage, neither party-

- (a) is incapable of giving a valid consent of it in consequence of unsoundness of mind; or
- (b) though capable of giving a valid consent has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
- (c) has been subject to recurrent attacks of insanity or epilepsy;”

Meaning of expression ‘Mental Disorder’: The liberalized provisions of sec. 5(ii)(b) of the HMA, 1955 amended by the Marriage Laws (Amendment) Act, 1976, make one of the two conditions found wanting in a spouse due to mental disorder, a disqualification for contracting a valid marriage. The word “and” between the expression “unfit for marriage”, and the expression “procreation of children” should be read ‘and/or’ meaning thereby that they may both co-exist or one of them exists as a pre-condition of a valid marriage. The word ‘procreation’ has to be assigned a wider legal meaning, that is the capacity if a spouse “to give birth as also to rear and bring up children”. Thus, a spouse although not sterile and medically fit to give birth to children may still be unfit for marriage due to his mental disorder to look after and bring up his children. Under sec. 5(ii)(b) a reasonable degree of sound mental state is a pre-condition of marriage for both the parties.

Effect of dullness or fraudulent circumvention: mere dullness of intellect is not by itself sufficient to incapacitate a person from marrying. But a marriage brought about by fraudulent circumvention and the exercise of undue influence over a person of considerable mental weakness might be avoided at that person’s instance, as having been contracted without any real consent on his part.

3. **Marriageable age of the parties:** The third condition is regarding the age of the persons entering into marriage. The bridegroom should have completed the age of 21 years and the bride the age of 18 years at the time of marriage. Under the old Hindu law no minimum age for marriage was prescribed, while the codified law prescribes this minimum age which is in keeping with that prescribed under the Child Marriage Restraint Act, 1929. Contravention of this condition is punishable (U/s. 18) with simple imprisonment which may extend upto 15 days, or with fine, which may extend to one thousand rupees, or with both.

However, breach of this condition does not make the marriage void or voidable. That means such a marriage is valid though it may attract penalties. This view is held by various High Courts. However, the Andhra Pradesh High Court subsequently overruled its former view and this had been approved by the Supreme Court. This means that breach of this condition provides a cause for divorce to the wife, at her option, under sec. 13(2)(iv) of the HMA, 1955.

4. **Degrees of prohibited relationship:** the other condition for a valid marriage required under sec. 5(iv) of Hindu Marriage Act, 1955 is that the parties are not within the degrees of

prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two. The instances of degrees of prohibited relationship are clearly defined u/s. 3(g) of the Act, which are as follows:

Two persons are said to be within the degrees of prohibited relationships:

- If one is a lineal ascendant of the other. For example, a Daughter cannot marry her father and grandfather. Similarly, a mother cannot marry her son or grandson.
- If one was the wife or husband of a lineal ascendant or descendant of the other. For example, a son cannot marry his stepmother. Similarly, a person cannot marry his Daughter-in-Law or son -in-law.
- If one was the wife of the brother or of the father's or mother's brother or the grandfather's or grandmother's brother of the other.
- If the two are brother and sister; uncle and niece; Aunt and Nephew or children of brother and sister of two brothers or two sisters. It must have been noticed in some communities the marriage with the wife of the brother and mother's brother and the first cousins are solemnized, those marriages, in the absence of a custom in the community are not valid marriages.

5. **Parties are not 'Sapindas' of each other:** Marriage between the sapindas is prohibited under sec. 5(v) of the HMA, 1955. The word 'sapinda' has been interpreted by the Mitakshara and Dayabhaga schools differently. According to Mitakshara, the word sapinda means the persons belonging to the same body. Therefore, the sapinda relationship arises because of the bride and bridegroom are blood relatives and their common ancestor is the same person. Whereas the Dayabhaga School maintained that the relationship between two persons arose from a religious obligation to offer Pinda Dan (funeral cake) to their common ancestors. According to this school, if two persons have obligation to offer pinda dan to the same person, the sapindarelationship exists between them.

According to sec. 3(f) of Hindu Marriage Act, 1955 'Sapinda relationship' with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the 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;

Two 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 expression lineal ascendant and line of ascent includes both male and female ascendants.

6. **Additional Conditions:** there are other conditions of a valid marriage which though not specified under section 5 are as important and significant as the above conditions. They are:
- (a) Free Consent of the parties, (b) Religion, (c) ceremony, (d) Registration of Marriage.
 - (a) **Free consent of the parties:** Absence of free consent to a marriage renders the marriage voidable. The consent of the petitioner or the guardian should not have been obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the marriage.
 - (b) **Religion:** To solemnize a marriage under Hindu Marriage Act, 1955, both the parties must be Hindus by religion. For the purpose of personal law, the word Hindus includes, Buddhists, Sikhs, Jains, concealment of religion amounts to concealment of material facts pertaining to marriage, which may lead to nullification or marriage at the option of the parties.
 - (c) **Ceremony:** According to section 7 of the Hindu Marriage Act, 1955, a Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. Where such rites and ceremonies include the Saptapadi (taking sevens steps around fire God), the marriage becomes complete and binding when the seventh step is taken. The Act thus gives saptapadi a statutory recognition but it does not make saptapadi an obligatory one. Whenever it is contended about the legality of marriage the court will presume the validity of marriage on the basis of necessary ceremonies that were performed. A person who challenges the marriage has to rebut the presumptions drawn in favour of solemnization of marriage.
 - (d) **Registration of Marriage:** Under Hindu Marriage Act, 1955 registration of marriage is not compulsory but an optional one. Since the subject of marriage is under the Concurrent List both the central government and the state governments can pass legislation to make the registration of marriage compulsory. A Hindu marriage can also be registered under the Special Marriage Act, 1954. Such marriage thereafter becomes a civil marriage and the parties are governed by the Hindu Marriage Act, 1955 (S.18 of the Special Marriage Act, 1954). The registration of marriage helps the courts to presume the factum of marriage. It is for the challenging party to rebut the validity of the marriage.

Void & Voidable Marriages under Hindu Law

A marriage solemnized in contravention of the following conditions is void under section 11, read with s.5 of the HMA, 1955, viz, when:

- (i) Either party has a spouse living at the time of solemnization of the marriage;

- (ii) Parties are within the degrees of prohibited relationship, unless custom or usage governing them permits such marriage.
- (iii) The parties are sapindas of each other, unless custom or usage permits such marriage.

A marriage is voidable under the HMA under the following conditions, viz:

- (i) the marriage has not been consummated owing to the impotency of the respondent; or
- (ii) any of the parties is incapable of giving a valid consent because of unsoundness of mind, or though capable of giving consent has been suffering from mental disorder to such an extent as to be unfit for marriage and procreation or children, or has been subject to recurrent attacks of insanity or epilepsy;
- (iii) the consent to the marriage has been obtained by force or fraud.
- (iv) the respondent was pregnant by some person other than the petitioner.

THE MUSLIM MARRIAGE

Marriage or nikah, according to Muslim law, is 'defined to be a contract which has for its object the procreation and legalizing of children' (Mulla). Thus a Muslim marriage is a contract and its object is (a) procreation, and (b) legalizing children. Ameer Ali cites an ancient text defining its objects as follows:

Marriage is an institution ordained for the protection of society, and in order that human beings may guard themselves from foulness and unchastity.

There is no formality or any religious ceremony required for a marriage. Since it is a contract, the usual conditions necessary to constitute a valid contract are to be fulfilled. Thus, the essential requirements for a valid Muslim marriage are capacity to contract marriage, proposal and acceptance and absence of any impediment to the marriage.

Conditions for a Valid Marriage

1. **Capacity for Marriage:** Every Muslim who is of sound mind and who has attained puberty has the capacity to marry. Marriage of such person without his / her consent, is void. Persons who are not of sound mind or have not attained puberty can be contracted in marriage by their guardians.
2. **Proposal & Acceptance:** There should be a proposal -ijab, and an acceptance- qubul of the proposal. The proposal and acceptance has to be made either by or on behalf of the parties. This has to be done in the presence and hearing of two male, or one male and two female, witnesses who must be sane and adult Mohammedans. It is significant to note here that the proposal and acceptance must both be expressed at one meeting; a proposal at one meeting and its acceptance at another does not constitute a valid marriage. The usual form of proposal is, 'I have married myself to you' and that of acceptance is 'I have consented'. Thus, the

words must indicate with ambiguity, nor words indicate only an intention or a promise to marry at a future time.

3. **Absence of Impediments:** The following are the prohibitions or impediments to a valid marriage, viz:

(i) A married woman cannot contract another marriage while her husband is alive and the marriage is subsisting. Such marriage is void.

(ii) The **bar of consanguinity** renders a marriage void. The following are the prohibited relationships of consanguinity, viz. a man cannot marry his:

- (a) ascendants e.g., mother or grandmother, how highsoever;
- (b) descendants, e.g., daughter or grand-daughter, how lowsoever;
- (c) his sister, whether full, consanguine or uterine;
- (d) his niece or great-niece, how lowsoever;
- (e) his aunt or great-aunt, how highsoever, whether paternal or maternal.

Such marriage, if contracted, is void.

(iii) Marriage is also prohibited on **ground of affinity** i.e., the relationships arising out of marriage. Thus, a man cannot marry:

- (a) his wife's mother, or grandmother, how highsoever;
- (b) his wife's daughter or grand-daughter, how lowsoever, if his marriage with his wife is consummated.
- (c) his father's wife or any other ascendant's wife; and
- (d) his sons, or any other lineal descendant's wife.

Such marriage, if contracted, would be void.

(iv) **Fosterage** is another impediment to a valid Muslim marriage. 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'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 cases all prohibited relationships arise as they arise on the basis of consanguinity or affinity. The Hanafis (sub sect of Sunni Muslims) 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. Similarly, a female cannot marry (i) her foster-mother's husband, (ii) foster-mother's son, and (iii) 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.

(v) The relative impediments under Muslim Law are:

- (a) Prohibition on the basis of unlawful conjugation: a male is not allowed to have at the same 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 such a marriage with the wife's permission. The prohibition will not apply if one has divorced his wife before marrying any such person.
- (b) Prohibition of marrying a woman undergoing iddat: A marriage performed by a Sunni male with a woman during the period of "iddat" is irregular. While in the case of Shia male, it is void. "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 pregnancy of the woman so as to avoid confusion of paternity. Muslim law provides different period of "iddat", 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 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 an idda of three lunar months (b) when marriage is dissolved by divorce and if 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 the marriage has 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.
- (c) Prohibition from marrying a person of unequal rank: Islamic law laid down that marriage should be performed among the persons of equal rank. Family, Islamic Religion, Profession, freedom, good character and means shall determine the status of equality.

- (d) Marriage while of pilgrimage: The IthnaAshari (Shia sub sect) and Shafi (Sunni sub sect) laws lay down that a person who is on a pilgrimage, should not marry, But in modern India such prohibitions have no meaning.

Under the Sunni Law, a marriage in violation of relative impediments is irregular, while under Shia Law, it is void. In India, the latter of two prohibitions are not of any importance.

Effects of a Legal Marriage

Briefly stated, the following are the legal effects of a valid marriage:

- (i) Sexual intercourse becomes lawful and the children born of the union are legitimate.
- (ii) The wife becomes entitled to her dower (mahr).
- (iii) The wife becomes entitled to maintenance.
- (iv) Mutual rights of inheritance are established.
- (v) The prohibitions regarding the marriage due to the rules of affinity come into operation.
- (vi) The wife is not entitled to remarry after the death of her husband, or after the dissolution of marriage, without observing iddat.
- (vii) Where there is an agreement between the parties, entered into either at the time of marriage or subsequent to it, its stipulations will be enforced, in so far as they are not inconsistent with the provision or the policy of the law.
- (viii) A woman does not change her status on marriage. She remains subject to her own pre-marital school of law. Neither the husband nor the wife acquires any interest in the property of the other by reason of marriage.

THE CHRISTIAN MARRIAGE

From the point of view of Christians, marriage is considered very necessary and important. It is not established just for providing sexual satisfaction but for other purposes also. The Christian churches have always held that the universal institution of marriage has a special place in god's purpose for all human life.

For Christians, marriage is a permanent and exclusive contract of love between a man and a woman. Marriage is a covenant of love; love is the basis of marriage. One freely chooses another and commits oneself to her [him]. One does not get married just to settle down or to obtain social and economic status or to legitimise the practice of sex in the eyes of the society. Love is and must be the strength and the atmosphere of the whole married life. The deeper it becomes, the more unselfish and faithful it grows and the more continually renewed. Sex among the couple is a consequence of love. Sexual love in marriage is an extension of true love.

Objectives of Christian Marriage

The major objectives of Christian Marriage can be specifically mentioned below:

1. **Providing for Sexual Satisfaction:** the main aim of the Christian marriage is to provide the sexual satisfaction or its marital partners. The present-day Christians consider sexual union of the marital partners, a necessary condition for the procreation of children.
2. **Establishment of Family:** the purpose of Christian marriage is to help the marital partners to establish a family of their own so that they can bring up their children in a proper manner.
3. **Stability of the Relations:** Christian marriage provides for the stable sex relationship between the husband and the wife. It is a type of life long contract entered into between husband and wife. Conjugal faith is the secret of marital success. This faith is based on mutual love.
4. **Mutual love and cooperation:** Development of qualities such as love, mutual cooperation, sacrifice, etc. constitute yet another purpose of Christian marriage. Love is the basis of marriage.

The Indian Christian Marriage Act

The laws regulating the solemnization of marriages among the Christian community in India is laid down by the Indian Christian Marriage Act of 1872. Initially enacted by the British-Indian administration, Christian marriages in the country are performed by an authorised Minister or Priest in a church. After the marriage ceremony is completed, the minister or priest registers the marriage and issues a certificate of marriage in the name of the couple and thereby, makes it official.

Essential Conditions for Marriage

According to The Indian Christian Marriage Act of 1872, the following are required to be fulfilled to constitute a valid marriage:

- (i) The age of the Bridegroom must not under twenty-one years and, the age of the Bride must not be under eighteen years.
- (ii) Both the parties of the marriage must give voluntary consent to the ceremony and should not be obtained by misrepresenting facts or under compulsion or undue influence.
- (iii) Neither of the party should have a living spouse at the time of the marriage.
- (iv) The marriage must be performed in the presence of a person licensed to grant a certificate of marriage and at least two reliable witnesses.

Individuals Eligible to Solemnise

The following individuals are authorised to solemnise a Christian marriage as per the Indian Christian Marriage Act.

- By an individual who has received the episcopal ordination and is authorised to solemnise a marriage according to the rules, rites, ceremonies and the customs of the Church of which he is a Minister.
- By an individual who is a Clergyman belonging to the Church of Scotland and is authorised to solemnise a marriage according to the rules, rites, ceremonies and the customs of the Church of Scotland.
- By an individual who is a Minister of Religion who is authorised to solemnise marriage with a license as per the Act.
- By an individual who is licensed under the Act to grant Certificated of marriage between Christians in India.

Notice of Intended Marriage

Either of the party must submit a written application or a notice of the intended marriage to Marriage Registrar that resides in the same vicinity as the parties. This is done to notify the concerned authority of their intention to get married. If both the parties live in different locations, it is essential that each party makes a separate notice in writing to the Marriage Registrar that is located within their area of residence. The written application or notice of the intended marriage is recorded into the “marriage notebook” and is put up in the notification area of the office for public viewing.

Pledge before the Registrar

Either of the party to the marriage must make a personal appearance before the Marriage Registrar before the certificate of notice has been issued. The party should appear before the Registrar by pledging the following.

1. That there are no obstacles, natural inclinations or other legitimate impediments to the intended marriage.
2. That the place of their residence is within the locale of the marriage registrar.

Certificate of Notice

Once the pledge is taken before the Marriage Registrar by either one of the parties to the intended marriage, a Certificate of Notice is issued. Once the pledge is done, the Registrar wait for four days to issue the certificate. After the period has lapsed, the Marriage Registrar has the power to grant the Certificate of Notice. Information such as the address of the Church or the Chapel or any other place that the marriage rituals are expected to be performed are stated in the Certificate of Notice. This Notice would not be issued if is stopped by anyone stating apparent reasons why the testament ought not to be granted. The issuance of the certificate of notice makes it mandatory for the marriage to be performed with two months from the date of publication. Failing to do so would make the certificate of notice redundant and new certificate would be required.

Performance of the Marriage

Under the Indian Christian Marriage Act, a Christian Marriage is performed between the parties to the marriage with accordance to the rituals which is considered to be essential and proper by the Minister or the Priest designated to perform the wedding. The presence of two eligible witnesses other than the minister or the priest performing the marriage is a mandatory requirement at the marriage ceremony. A marriage cannot be performed if it is not performed within two months from the issuance of the certificate of notice. In such a case, a new certificate of notice has to be applied for and issued to solemnise the marriage.

Time and Place

The Indian Christian Marriage Act clearly states where Christian marriages should take place at and the time at which it should be performed. The time for performing a Christian marriage ritual has to be scheduled between the timeframe of six in the morning to seven in the evening. The place that Christian marriage has to be performed is at a Church or a Chapel. Some special considerations and requests are granted that give flexibility to the time and place to conduct the marriage ceremony.

Registration of Marriage

An application for registration of the marriage is made by both the party to the concerned authority in whose jurisdiction either of the parties has been residing. The wedding is registered by the Marriage Registrar who was present at the marriage and performed the union of the couple in the Marriage Register. An acknowledgement slip of the registration with the authorised signatory of both the parties along with the witnesses present at the time is recorded. This is then attached to the Marriage Register and thereby indicating that the marriage was registered officially. These slips of acknowledgement are sent out at the end of the month to the Registrar General of Births, Deaths and Marriages. Christian marriages in India may also be endorsed under a special provision without prior notice.

STATUS OF LIVE-IN RELATIONSHIPS

‘Live in relationship’ means a relationship wherein an unmarried couple live together as wife and husband, and represent to the society that they are couple. Generally, the relationship is longstanding, stable and continuous, and also known as a ‘common law marriage’ or ‘de facto marriage’. Live-in relationships are a product of modern western culture and are still considered as a taboo in the Indian society.

Reasons for live-in relationship

- It provides individual freedom to the parties;
- It affords opportunity to test their compatibility;
- It is a convenient option for gay and lesbian couples, whose marriage is not permitted under law;

- It is preferred by parties belonging to different religions or castes and age difference, etc.
- In some cases, the parties feel that marriage is unnecessary and their social, emotional and sexual commitment to each other is sufficient;
- The parties do not want to be laden with the responsibilities of marriage;
- It allows parties to give more priority to their career compared to marriage.

In India, there is no specific legislation dealing with the ‘live-in relationship’. The Protection of Women from the Domestic Violence Act, 2005 is the only legislation which has recognized non-marital adult heterosexual relationships. The main objective of the Act of 2005 is to afford protection to the females subjected to abuse, not only in the relationship of marriage, but also any ‘relationship in the nature of marriage’ and seeks to denounce domestic violence upon women.

According to the Act of 2005, an ‘aggrieved person’ means “*any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subject to any act of domestic violence by the respondent.*” Further, ‘domestic relationship’ means “*a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.*” The courts have interpreted the term ‘relationship in the nature of marriage’ to include certain live-in relationships, and have granted reliefs under this Act to female partners and accorded legitimacy to the children of these relationships. Therefore, to understand the status, validity, legality, rights and obligations of parties in a live-in relationship the important judicial decisions on the subject shall be studied.

Live-in relationship – Marriage or Concubinage

The Privy Council in **A. Dinohamy v. W.L. Blahamy (AIR 1927 PC 185)** was the first case to lay down the generic proposition that “*where a man and a woman are proved to have lived together as a man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage and not in a state of concubinage.*” The same principle was reiterated in the case of *Mohabhat Ali v. Mohd. Ibrahim Khan* (1929) 31 BOMLR 846.

In the case of **Gokal Chand v. Parvin Kumari (AIR 1952 SC 231)**, the Supreme Court observed that, “*continuous cohabitation of woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage, but the presumption which may be drawn from long co-habitation is rebuttable and if there are circumstances which weaken and destroy that presumption, the court cannot ignore them. Polygamy, that is a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage that is marrying someone while already married to another and / or maintaining an adulterous relationship that is having voluntary sexual intercourse between a married person who is not one’s husband or wife, cannot be said to be a relationship in the nature of marriage.*”

In the case of **Badri Prasad v. Dy. Director of Consolidation and Ors.** (AIR 1978 SC 1557), the Supreme Court answering the question about the validity of the relationship of a couple living as husband and wife for around 50 years, held that *“a strong presumption arises in favour of wedlock where the partners have lived together for a long spell as husband and wife. Although the presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of legal origin. Law leans in favour of legitimacy and frowns upon bastardy.”*

In **Madan Mohan Singh & Ors. v. Rajnikant & Anr.** (AIR 2010 SC 1933), the Supreme Court reiterated and observed that, *“the courts have consistently held that law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a number of years. However, such a presumption can be rebutted by leading unimpeachable evidence.”*

Requirements of live-in relationship for recognition under DV Act, 2005:

The Supreme Court in **D. Veluswamy v. D. Patchaiammal** ((2010) 10 SCC 469), laid down the following requirements for a couple to fall under ‘relationship in the nature of marriage’ provided by the Protection of Women from Domestic Violence Act, 2005:

- The couple must hold themselves out to society as being akin to spouses.
- They must be of legal age to marry.
- They must be otherwise qualified to enter into a legal marriage, including being unmarried.
- They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.
- The parties must have lived together in a ‘shared household’ as defined in section 2(s) of the Act of 2005.

The Supreme Court emphasized that, to get the benefits under the Act of 2005 the above conditions must be satisfied and proved by evidence. The court further clarified that, *“If a man has a ‘keep’ whom he maintains financially and uses mainly for sexual purpose and or as a servant, it would not, in our opinion, be a relationship in the nature of marriage. No doubt the view we are taking would exclude many women who have had a live-in relationship from the benefit of the 2005 Act, but then it is not for this court to legislate or amend the law.”*

The Supreme Court in **Indra Sarma v. V.K.V. Sarma** (2013 (14) SCALE 448), dwelling in detail regarding the status of live-in relationship recognized the different categories of domestic relationships, and identified which of them would fall under the ambit of ‘relationship in the nature of marriage’ defined under section 2(f) of the Protection of Women from Domestic Violence Act, 2005. The following are the categories of domestic relationships, between:

- (a) **Unmarried adult woman and unmarried adult male:** this relationship will fall under the definition of section 2(f) of the Act of 2005 and in case of any domestic violence the aggrieved person (female) in this relationship can seek reliefs provided under the Act.

- (b) **Unmarried adult woman and a married adult male:** the status of the woman would be that of a concubine or a mistress, who cannot enter into relationship in the nature of marriage, and does not entail protection of the Act of 2005.
- (c) **Married adult woman and an unmarried adult male:** this relationship can lead to conviction for the offence of Adultery under section 497 of Indian Penal Code, and cannot be recognized as a relationship in the nature of marriage.
- (d) **Unmarried woman unknowingly enters into a relationship with a married adult male:** this relationship may, in any given situation, fall within the scope of section 2(f) of the Act of 2005, and the aggrieved person would be entitled to benefits of the Act.
- (e) **Same sex partners (Gays and Lesbians):** these relationships do not come under the section 2(f) of the Act of 2005 and any act, omission, commission or conduct of any of the parties would not lead to domestic violence.

In the Indra Sarma case, the Supreme Court also laid down guidelines for testing under what circumstances, a live-in relationship will fall within the expression “relationship in the nature of marriage” under section 2(f) of DV Act. They are:

- 1) Duration of period of relationship
- 2) Shared Household
- 3) Pooling of Resources and Financial Arrangements
- 4) Domestic Arrangements
- 5) Sexual Relationship
- 6) Children
- 7) Socialization in public
- 8) Intention and conduct of the parties

The Justice Malimath Committee in its Report submitted in 2003, dealing with the issues of criminal law amendments observed that “if a man and woman are living together as husband and wife for a reasonable long period, the man shall be deemed to have married the woman.” And suggested that the term wife in section 125 of Cr.P.C. shall be amended to include a ‘woman living with a man like his wife’, so that, even a woman having a live-in relationship with a man would also be entitled to maintenance. Further, the National Commission in its Annual report 2008-2009, also recommended that the definition of ‘wife’ in section 125 of Cr.P.C. must include women in a live in relationship which are in the nature of marriage, and relationships of convenience should not be considered. But, no such amendments have been made to the legislation, so far.

Status of children born out of live-in relationship

The Supreme Court in Uday Gupta v. Aysha&Anr. (Crl No. 3390 of 2014) answering to the question to legitimacy of children born out of live-in relationship held that, “*if a man and woman are*

living together for a long time as husband and wife, though never married, there would be a presumption of marriage and their children could not be called to be illegitimate.” Further, in **S.P.S. Subramanyam v. Suruthaya @ AndaliPadayachi and Ors. (AIR 1992 SC 756)**, the Supreme Court held that if man and woman are living under the same roof and cohabiting for a number of years, there will be a presumption under section 114 of the Evidence Act, that they live as husband and wife and the children born to them will not be illegitimate.

In **Tulsa &Ors. v. Durghatiya&Ors. (AIR 2008 SC 1193)**, the apex court observed that, a man and a woman who are cohabiting as husband and wife for a long period, will be treated as a married couple and their child would be called legitimate. Further, in **Bharat Matha&Ors. v. R. Vijaya Renganathan&Ors. (AIR 2010 SC 2685)**, the apex court dwelling upon the issue of succession of property, having regard to the section 16 of Hindu Marriage Act, 1955 which accords legitimacy to children born out of void and voidable marriages, held that, a child born out of a live-in relationship would be entitled to claim inheritance in the self-acquired property of his parents, but not entitled to claim share in the ancestral coparcenary property.

The Supreme Court in **Dhannulal and Ors. v. Ganeshram&Anr. (AIR 2015 SC 2382)** deciding a property dispute, wherein there was no valid marriage between the parties and question arose as to the validity of Will executed by a lady in respect of the property inherited from her deceased husband, observed that, where the relationship between the couple is longstanding and recognized by all persons concerned, it gives rise to a strong presumption in favour of the validity of a marriage and the legitimacy of its child.

Since there is no specific law that recognizes the status of the couples in live in relationship, hence the law as to the status of children born to couples in live in relationship is also not very clear. The Hindu Marriage Act, 1955 grants the status of legitimacy to every child irrespective of his birth out of a void, voidable or a legal marriage. But there is no specific law that raises presumption of legitimacy in favour of children of live in partners. The future of children in live-in partners becomes very insecure in case the partners step out of their relationship. As such, there is a need for a strong provision to safeguard the rights and interests of such children. There must be provision to secure the future of the child and also entitling the children to a share in the property of both the parents.

NRI MARRIAGES

NRI stands for Non-Resident Indian. NRI means an Indian citizen who is ordinarily residing in another country and holds an Indian passport. But, in the context of NRI marriages, NRI includes a Person of Indian Origin (PIO) who is a citizen of the foreign country where he/she is residing. Legally, PIO means a person of Indian origin or ancestry but who is not a citizen of India and is the citizen of another country. A PIO might have been a citizen of India and subsequently taken the citizenship of another country, or have ancestors born in India or other states.

Non-resident Indian (NRI) marriages may be between:

- Non-resident male and an Indian female.
- Non-resident female and an Indian male.
- Both Non Resident Indians who marry under Indian marriage laws either in India or in a foreign country.
- An Indian, male or female, marrying a foreigner under Indian marriage laws either in India or in a foreign country.

At present, NRI marriages are seen as two sides of the coin. They are transforming the living standard and economic welfare of most families and on the other hand, they are creating terrible problems for many families for which there is no easy remedy wither in law or in civil society. In most of the NRI marriages, the victim is the Indian woman, who is subjected to problems like non consummation of marriage, concealment of earlier marriage, lack of social security on the foreign soil, assault, desertion, separation of child, snatching away the passport, ex parte divorces, etc.

Reasons for Choice of NRI Marriages

If we see the history of British India, Indians used to go to foreign countries for higher education, but came back to settle in India. However, after independence, Indians started migrating for personal or professional or employment reasons and were subjected to cross-cultural influences. These migrants often married native spouses either for romantic alliances with their colleagues or subordinates or contractual union to fulfil the requirements for visa regulations. Thus, a phase of mixed racial progeny and naturalization started among Indian migrant population. Foreign governments also, in line with their national policy, offered visa facility to Indian families back home on sponsorship or marriage basis. With the increase in numbers, these migrants started establishing community gatherings and interpersonal contacts. Their living standards improved and the family finances increased with the passage of time. They started visiting their ancestral home more frequently and started influencing the local society with their western life style.

The young generation was attracted towards the liberalistic, western culture and lure for immigration started a chain reaction. This had two visible effects on society; firstly the practice of Barter marriages for easy migration of other family members on sponsorship basis and secondly the beginning of educational tourism, to secure validity scores to become eligible for foreign visa or residency status. Marriage with an NRI spouse became major reasons for persons to opt for NRI marriages are personal ambition and lack of employment opportunities in India. Further, NRI grooms also prefer Indian bride in lure for cultural roots and for instilling Indian values in children. As a result, sometimes, the Indian women and they parents fall prey to the frauds played by some NRI grooms, who exploit their weakness and craze for NRI marriages.

Law regulating NRI Marriages

- **Special Marriage Act, 1954:** The Special Marriage Act, 1954 provides for a marriage between two persons, irrespective of differences in their religion. It is a secular Act, which has removed the religious barriers to marriage and provided a purely secular and non-ritualistic ceremonial marriage. The Act prevails not only in cases of inter-religious marriages but also applicable to same religion marriages. Section 4 of the Act, provides for marriage between “any two persons”, which even excludes the need of spouses to be Indian citizens, such, any two foreigners, namely two non-citizens domiciled in India may have their marriage solemnized under the Act of 1954.
- **Foreign Marriage Act, 1969:** The objective of this Act is to make provisions relating to marriages of citizens of India outside India. Under this Act, a marriage may be solemnized between a citizen of India and another Indian national or a national of another country or with a person domiciled in another country. The central government has appointed its diplomatic and consular officers as ‘Marriage Officers’ in the foreign country, for the purpose of solemnizing and registering marriages under this Act. Further, a marriage solemnized as per the law of the foreign country, where one of the spouses is an Indian Citizen can get the marriage registered under this Act, and from the date of registration of such marriage shall be deemed to have been solemnized under this Act. The matrimonial reliefs, such as restitution of conjugal rights, judicial separation, nullity of marriage, divorce, etc., in respect of foreign marriages are provided under the provisions of the Special Marriage Act, 1954.

However, if Non-Resident Indians perform their marriage as per the customs and traditions of their personal law, without solemnizing their marriage according to the procedure laid down under the Foreign Marriage Act, 1969 or the law of that foreign country, parties to such marriages cannot claim any relief under Special Marriage Act, 1954. As such, it is advisable to take the precaution of solemnizing the marriage under the Foreign Marriage Act, 1969 in any Indian diplomatic office abroad then such a marriage can come under the jurisdiction of Indian Courts.

- **Hindu Marriage Act, 1955:** The NRI marriages may also be solemnized under this Act. The section 1(2) of Hindu Marriage Act, 1955 provides that “*the act extends to the whole of India except the State of Jammu and Kashmir and also that it applies to Hindus domiciled in the territories to which this Act extends, who are outside the said territories.*” Therefore, the Act will apply not only to a Hindu in India, but also to a Hindu residing in a foreign country, if he is domiciled in the territory of India.

Sometimes, many Hindu NRIs come to India and solemnize their marriage either with an Indian national or with a foreigner or Hindu religion, in accordance with customary rites and ceremonies under Hindu Marriage Act, 1955 and it is governed by the Act of 1955. It is essential that, the marriage shall be registered either under the Hindu Marriage Act, 1955 or

under Special Marriage Act, 1954 for the purpose of factum of proof of marriage, and also for immigration or entry into their present foreign home country. In the Special Marriage Act, 1954 there is a prolonged process of time, as it involves an application for registration with two months' notice and prescribed objection period before the Certificate of Marriage can be obtained. Whereas, in the Hindu Marriage Act, 1955 the procedural formalities are not required and the certificate can be obtained by submission of requisite documents relating to marriage to Registrar of Marriages. However, if one of the spouses is a foreigner and not Hindu by religion at the time of marriage ceremony, they will have to get their marriage registered under Special Marriage Act, 1954 only. It is pertinent to note that, if the marriage is not registered, the status of spouses as married couple is not recognized in the foreign country, which would lead to several legal problems.

CIVIL MARRIAGE UNDER THE SPECIAL MARRIAGE ACT, 1954

The Special Marriage Act, 1954, 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 (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 in the Notice Book which is available for inspection in the office of the Marriage Registrar 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 local jurisdiction of the Marriage Registrar, the notice has to be transmitted to the Marriage Officer of the district where the party permanently resides 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 of the Act. The Marriage Officer would dispose of the objections after giving the due hearing to all the parties. If the Marriage Officer upholds the objections, 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 orders 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 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 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 degree 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 the formalities thereto have been complied with.

Glossary:

1. *Matrilineal*: based on kinship with the mother or the female line.
2. *Patrilineal*: based on relationship to the father or descent through the male line.
3. *Nuclear Family*: a couple and their dependent children, regarded as a basic social unit.
4. *Joint Family*: The joint family is an extension of the nuclear family.
5. *Mitakshara*: Legal commentary on the Yajnavalkya Smriti best known for its theory of inheritance by birth.
6. *Dayabhaga*: Hindu law treatise written by Jīmūtavāhana which primarily focuses on inheritance procedure.

Frequently Asked Questions:

Objective Type

1. Marriage with more than one spouse is known as _____ marriage.
2. _____ is the basic unit of society and social interaction.
3. Major part of India follows the following school _____.
4. Dayabhaga School is followed in _____ area.
5. Marriage according to Muslim law is a _____.
6. _____ Act applies to interreligious marriages.
7. A Christian marriage is regulated by _____.
8. The marriage solemnized under the Special Marriage Act, 1954 is known as _____ marriage.
9. The essentials of a valid Hindu Marriage are enumerated under section _____.
10. _____ can solemnize a civil marriage under the Special Marriage Act, 1954.

Subjective Type

1. What do you mean by the concept of family and explain various kinds of families?

2. What are the essentials of a valid Hindu Marriage under Hindu Marriage Act, 1955?
3. Muslim marriage is a contract – Elaborate the statement.
4. Enumerate the legal provisions pertaining to the NRI marriages in India.
5. Explain the legal status of Live-in relationship in India.

Suggested Readings:

1. Sociology: Principles of Sociology with an Introduction to Social Thoughts by C.N. Shankar Rao.
2. Sociology of Indian Society by C. N. Shankar Rao.
3. Society in India: Concepts, Theories and Recent Trends by Ram Ahuja.
4. Indian Social System by Ram Ahuja.
5. Family Law in India by GCV Subba Rao.
6. Family Law by Paras Divan and Peeyushi Divan.

MODULE: II

MATRIMONIAL REMEDIES

Structure of Module

- 1. Restitution of Conjugal Rights**
 - 2. Judicial Separation**
 - 3. Nullity of Marriage**
 - 4. Divorce and Ancillary Remedies**
-

OVERVIEW:

This unit helps the students to understand the various matrimonial remedies available to the aggrieved spouse under their respective personal laws such as the restitution of conjugal rights, judicial separation, nullity of marriage, divorce and ancillary remedies. Out of the remedies mentioned, the restitution of conjugal rights is the least severe of the remedies which tries to protect the companionship of husband and wife and tries to bring both of them together in order to protect the institution of marriage between them. On the other hand, we have divorce which is nothing but complete severance of the marital ties between both husband and wife and where the whole institution of marriage falls apart. The laws pertaining to the matrimonial remedies are different as per the personal laws of the parties involved.

RESTITUTION OF CONJUGAL RIGHTS

The term 'conjugal rights' mean a spouse's so-called "rights" to the comforts and companionship from his/her mate, meaning sexual relations. The expression restitution of conjugal rights means restoration of marital rights of a party which were lost to him. One of the purposes of marriage is that the spouses must live together and that one spouse is entitled to the society and comfort of the other. When either the husband or the wife without reasonable excuse withdraws from the society of the other, the aggrieved party may apply by petition to the court, for restitution of conjugal rights.

The legal provisions pertaining to the restitution of conjugal rights are found in the Special Marriage Act, 1954; the Hindu Marriage Act, 1955; Parsi Marriage and Divorce Act, 1936; Indian Divorce Act, 1869.

The provisions of restitution of conjugal rights as found in Special Marriage Act, 1954 and the Hindu Marriage Act, 1955 are identical and they read as follows:

“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 excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.”

Whereas the provision has been worded differently in the Parsi Marriage and Divorce Act, 1936 as compared to the Hindu Marriage Act, 1955 and the Special Marriage, Act 1954. Section 36 of the Parsi Marriage and Divorce Act, 1936 reads as follows:

“Where a husband shall have deserted or without 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 plaint, and that there is no just ground why relief should not be granted, may proceed to decree such restitution of conjugal rights accordingly.”

This provision is somewhat different under the Indian Divorce Act, 1869 and reflects the state of the then English Law of Restitution. The provision is contained in Section 32 and 33 of the Indian Divorce Act, 1869 which reads 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 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 ground for a suit for judicial separation or for a decree of nullity of marriage.”

Under Muslim Law, Tyabji’s formulation of the remedy is as under:

“Whether the husband or the wife, without lawful grounds has 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, or may put either party on terms securing to the other the enjoyment of his or her legal rights.”

The term society means company or companionship. The law expects the husband and the wife to not withdraw from the society of each other and there are two modes in which this company is

exhibited. In the first mode, generally the husband and wife live together and part occasionally. In the second mode, they live apart generally and meet occasionally. These two styles of married life appear in our society. One is general and the other is exceptional. The above statutory provisions have not given any explanation to the term society and therefore judges play an important role in the interpretation of the facts according to the circumstances of the case. Similarly, the terms ‘withdrawal’ and ‘reasonable excuse’ used in the aforesaid sections also need interpretation by the courts on the basis of the facts.

The main purpose behind providing for restitution of conjugal rights by a court decree is to preserve the marriage tie as far as possible, it is an enabling provision which enables the courts to intervene and enjoin upon the withdrawing party to join the other. The conditions to be satisfied for obtaining a decree for restitution of conjugal rights is as follows:

1. Either of the spouse has withdrawn from the society of other spouse.
2. There is no reasonable excuse for such withdrawal. The burden of proof to show reasonable excuse lies on the party who has withdrawn.
3. The court’s satisfaction as to the truth of the statements made in the petition.

Instances of granting of Decree of Restitution of Conjugal Rights

Given below are some of the instances where the courts were pleased to grant the decree of restitution of conjugal rights:

- a. Agreement between husband and wife to live separately is no defence to the suit for restitution of conjugal rights as such agreement is invalid for being opposed to Hindu law as well as public policy;
- b. Where the wife refused to join the husband at his place of transfer;
- c. Where the respondent wife refused to resign her job which compelled her to live away from her husband, it cannot be said that she has deserted him or has withdrawn from his society without a reasonable cause;
- d. Uncorroborated evidence of the wife alleging cruelty and impotence of the husband, husband’s accusation of her chastity, and husband’s attempt of sodomy;
- e. Second marriage which is void is no legal ground for refusing relief of restitution of conjugal rights to the husband of the first valid marriage;
- f. Grievances made of normal incidents of married life or “the ordinary wear and tear of married life”;

- g. A petition cannot be dismissed merely because the wife does not like her husband or does not want to live with him, because he is too poor or is otherwise not fit to be a proper life companion for her;
- h. An agreement entered into between the parties prior to the marriage that the husband and wife have to live in the house of the wife's father does not affect the right of the husband to demand that his wife should live with him wherever he chooses to reside;
- i. The wife was brought to live in her parental house by the husband. There was a long silence, unresponsive attitude and cold indifference on the part of the husband towards his wife;
- j. Untrue allegations that the wife was driven out of the matrimonial home, she was unable to prove any injury on herself, nor when any doctor examined her; withdrawal by wife not justified.
- k. Wife claimed that she lived separately because husband's parents demanded dowry. Parties subsequently compromised and the wife returned to her husband's residence. No evidence as to mental cruelty suffered by the wife. Allegation that the husband was a drunkard and gambler was not mentioned in her written statement submitted to the court.

Instances where the Decree of Restitution of Conjugal Rights was not granted to the husband seeking relief

Given below are some of the instances where the courts declined to grant the decree of restitution of conjugal rights when husband sought reconciliation:

- a. The husband openly disgraced the wife by launching criminal prosecution against her father U/s. 498 IPC on the allegation that he enticed his wife for immoral purposes and for remarriage. The father was acquitted;
- b. Husband is impotent and guilty of cruelty towards wife;
- c. Husband having first wife;
- d. Physical violence to the wife;
- e. Husband though outwardly potent was impotent towards wife;
- f. Inordinate delay in making petition;
- g. Husband living with another woman in the same house;
- h. Husband became blind after marriage;
- i. Legal cruelty by husband and father-in-law;
- j. Mental pain caused to the wife by the husband cannot be lightly brushed aside on the ground that there was no physical violence or torture.

Constitutional Validity of Restitution of Conjugal Rights

T. Sareetha v. T. Venkata Subbaiah (AIR 1983 AP 356)

A Civil Revision Petition was filed in the High Court of Andhra Pradesh by Sareetha, a well-known film actress of South India, against the order passed by the learned Subordinate Judge, Cuddapah, overruling the objection raised by her with regard to the entertaining of an application filed by one Venkata Subbaiah, U/s. 9 of the Hindu Marriage Act, 1955 (hereinafter referred to as “the Act”) for restitution of conjugal rights with her.

Sareetha, at the age of about 16 years, when she was staying with her parents and studying at Madras, was alleged to have been given in marriage to the said Venkata Subbaiah at Tirupathi on 13th December, 1975. Almost immediately thereafter, they were separated from each other and have been continuously living apart from each other. Venkata Subbaiah had therefore, filed U/s. 9 of the HM Act for restitution of conjugal rights with Sareetha. Sareetha raised for the first time a question of constitutional validity of Section 9 of the Act. Through that petitioner Sareetha claimed that S.9 of the Act is liable to be struck down as violative of the fundamental rights in Part III of the Constitution of India, more particularly Art. 14, 19 & 21 in as much as statutory relief under the said provision, namely, restitution of conjugal rights offends the guarantee to life, personal liberty, human dignity and decency.

The origin of this remedy for restitution of conjugal rights is not to be found in the British Common Law which knows no matrimonial remedy. It is the medieval Ecclesiastical law of England which, Ecclesiastical Court and also ordinary courts enforce. But the British Law Commission, presided by Mr. Justice Scarman, recommended on 9th July 1969 that the abolition of this uncivilized remedy of restitution of conjugal rights. Accepting that recommendation of the British Law Commission, the British Parliament through Section 20 of the Matrimonial Proceedings and Property Act, 1970 abolished the right to claim restitution of conjugal rights in the English Courts. Section 20 of that Act reads thus: “No Person shall after the commencement of this Act be entitled to petition the High Court or any County Court for restitution of conjugal rights.”

But our ancient Hindu system of matrimonial law never recognized this concept of conjugal rights although it fully upheld the duty of wife to surrender to her husband. In other words, the ancient Hindu Law treated the duty of the Hindu Wife to abide by her husband only as an imperfect obligation incapable of being enforced against her will. It left the choice entirely to the free will of the wife.

Examining the validity of the S. 9 of the Act in the light of the above discussion, Justice P.A. Choudhary of AP High Court observed in his judgement that a decree enforcing restitution of conjugal right constitutes the starkest form of governmental invasion of personal identity and individual’s zone of intimate decisions. The victim is stripped of her control over the various parts of

her body, subjected to the humiliation, sexual molestation accompanied by a forcible loss of the precious right to decide when if at all, her body should be allowed to be used to give birth to another human being. In other words, pregnancy would be foisted on her by the State and against her will. There can therefore, be little doubt that such a law violates the right to privacy and human dignity guaranteed by and contained in Art. 21 of our constitution. It is of constitutional significance to note that the ancient Hindu Society and its culture never approved of such a forcible marital intercourse. Our ancient law givers refused to recognize any state interests in forcing unwilling sexual cohabitation between the husband and the wife, although they held the duty of the wife to surrender to the husband almost absolute. The only usefulness in obtaining a decree for restitution of conjugal rights consists in providing evidence for subsequent action for divorce. But this usefulness of the remedy which can be obtained only at enormous expense to human dignity cannot be counted as outweighing the interests in upholding the right to privacy.

The constitutional validity of Section 9 of the Act when examined on the touch-stone of equal protection of laws also leads to a conclusion of its invalidity. This is so because of two reasons. Firstly, S.9 of the Act does not satisfy the traditional classification test. Secondly, it fails to pass the test of minimum rationality required of any State Law.

In view of the above reasons, the constitutional validity of the Hindu Marriage Act, 1955 was held to be null and void.

Harvinder Kaur v. Harmander Singh (AIR 1984 Del. 7)

It was held by the Delhi High Court that the Section 9 of the Hindu Marriage Act, 1955 is not violative of Articles 14 & 21 of the Constitution of India. The judgement of AP High Court in *T. Sareetha v. Venkata Subbaiah* was dissented from.

The object of a decree of restitution of conjugal rights is to bring about cohabitation between the estranged parties, so that they may live together in the matrimonial home in amity. The leading idea of S.9 of the Act is to preserve the marriage. From the definition of cohabitation and consortium it appears that the sexual intercourse is one of the elements that goes to make up the marriage. But it is not the summum bonum. The court does not and cannot enforce sexual intercourse between the husband and the wife. Sexual relations constitute a most important attribute of the conception of marriage. But it is also true that they do not constitute its whole content, nor can the remaining aspects of the matrimonial consortium be said to be of wholly unsubstantial or trivial character. The remedy of restitution aims at cohabitation and consortium and not merely at sexual intercourse. To say that restitution decree subjects a person by the long arm of the law to positive sex act is to take the grossest view of the marriage institution. The restitution decree does not enforce sexual intercourse. It is a fallacy to think that the restitution of conjugal rights constitutes the starkest form of governmental invasion into marital privacy.

If the decree of restitution is not obeyed for the space of one year and the parties continue to live separately, it is undoubtedly the best evidence of breakdown of marriage and the passing of the time, most reliable evidence that the marriage is finished. Section 13(1A) of the Act is a legislative recognition of this principle. The decree of restitution of conjugal rights acts as an index of connubial felicity. It is a sort of litmus paper. The theory of irretrievable breakdown is also the basis of sub section (iii) of Section 13. The legislature is moving more and more towards the breakdown theory. But is had not completely broken away with the guilt theory which has dominated the law of divorce for 150 years. The breakdown theory is a recognition of the defects and demerits of the guilt theory. The Indian legislature believes that there should not be a sudden break up of the marriage tie. It believes in reconciliation. It believes that cooling off period is not only desirable but essential. S.9 is a provision designed to encourage reconciliation. S.9 combines the fault theory and the breakdown theory in on go.

There is only a financial sanction behind the restitution decree as Rule 33 of Order 21 which gives discretion to the court to refuse exception by attachment. Even if the court is bound to make a decree for restitution in a fit case it is no longer bound to enforce it as before by imprisonment or attachment. By the amending Act 44 of 1964 either party to a marriage is allowed to present a petition on the ground given under section 13(I-A). even the party found guilty in restitution proceedings is entitled to petition for divorce under Section 13(I-A)(ii). There is complete equality of the sexes here and equal protection of the laws. Section 9 is not violative of Art.14 of the Constitution.

Introduction of constitutional law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Art. 21 nor Article 14 have any place. In a sensitive sphere which is at once most intimate and delicate the introduction of the cold principles of constitutional law will have the effect of weakening the marriage bond. The introduction of constitutional law into the ordinary domestic relationship of husband and wife will strike at the very root of that relationship and will be a fruitful source of dissension and quarrelling. The domestic community does not rest on contracts sealed with seals and sealing wax, nor on constitutional law. It rests on that kind of moral cement which unites and produces 'two-in-oneship'.

Saroj Rani v. Sudershan Kumar Chadha (1984 SC 1562)

In this case the Supreme Court held that restitution of conjugal rights serves a social purpose as an aid to the prevention of break up of marriage. It cannot be viewed in the manner that the learned single judge of the AP High Court viewed. Therefore, the SC held that it was unable to accept the position that S.9 of the Hindu Marriage Act, 1955 is violative of Art. 14 & 21 of the Constitution.

JUDICIAL SEPARATION

It is one of the matrimonial remedies available under the personal laws in India. The judicial separation differs from divorce in the manner that it does not put an end to the marriage, the legal relationship of the husband and wife subsists and the parties cannot remarry. It is not however obligatory upon the parties to cohabit with each other but the doors are open for reconciliation. This relief is suitable for those who have abhorrence to the divorce. However in practice we can see that a large number of applications under this section in hope that after the lapse of the statutory period of one year, the party may be granted divorce. It is 'half way' house to the divorce. The statutory position of the judicial separation under the different laws is as follows:

Hindu Law

Section 10 of the Hindu Marriage Act, 1955 speaks about the judicial separation as follows:

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

(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statement made in such petition, rescind the decree if it considers it just and reasonable to do so.

From the above we can see that there are common grounds available for both judicial separation and the divorce i.e., judicial separation can be obtained on the grounds of:

1. Adultery
2. Cruelty
3. Desertion
4. Conversion to another religion
5. Mental disorder

However, after passing of the decree the parties are not obliged to live together and there is also a possibility of rescinding of the decree of judicial separation by the court on the application made by either of the party to the marriage.

The decree of judicial separation does not sever the ties between husband and wife and keeps all the venues for reconciliation open. In some cases where the courts are of the opinion that the grant of divorce will have great implications over the parties, their parents, children and society at large

may refuse to grant decree of divorce and may instead grant judicial separation of the parties. The decree of judicial separation can be rescinded by the court of law if it is satisfied on the application of the parties that the parties had taken steps to reconcile differences amongst themselves. However, mere assertion by parties is not enough until and unless they take concrete steps for reconciliation.

There cannot be no judicial separation unless the grounds as mentioned in section 13(1) of the Hindu Marriage Act, 1955 are satisfied and also that there cannot be a judicial separation merely upon the consent of the parties. Further during the course of judicial separation neither party can contract another marriage.

Special Marriage Act, 1954

The position of judicial separation is same as in Hindu Marriage Act, 1955 and according to section 23 of the Special Marriage Act, 1954 the grounds for separation and divorce are common.

Parsi Law

S.34 of the Parsi Marriage and Divorce Act, 1936 states that the grounds of matrimonial reliefs of divorce and judicial separation are common.

Christian Law

The only law which still retains some point of distinction between the judicial separation and divorce is the Indian Divorce Act, 1869. As per S. 22 of the Indian Divorce Act, 1869, judicial separation can be sought on the grounds of adultery, or cruelty, or desertion without reasonable excuse for two years or upwards. However, there are other additional grounds based on which divorce can be granted but the judicial separation may not be granted.

Muslim Law

The matrimonial relief of judicial separation is not available under the Muslim law.

NULLITY OF MARRIAGE

A marriage is a nullity either because it is void or voidable. A marriage which is not a valid marriage may be void or voidable. A void marriage is the one which has no legal sanctity and no rights or obligation flow out of the said marriage. It is void *ab initio* right from the beginning. Hence parties can contract another marriage even without seeking nullification of the first so called 'marriage'. On the other hand, a voidable marriage is the one where the marriage is binding and valid and subsists in law for all purposes until it is annulled by a court. Thus, as long as the marriage subsists the parties are under an marital obligation. In a voidable marriage, the parties are not at liberty to marry another person when their marriage is still continuing. The void and voidable marriages can be distinguished as follows:

Void Marriage	Voidable Marriage
It has no legal status from the beginning and the defects in the marriage are not curable i.e., no matter what, the marriage cannot be converted or ratified into a valid marriage.	It has legal status right from the beginning. The parties enjoy rights and obligations of a marriage until and unless the said marriage is annulled by a court of law.
It may be declared as a nullity at the instance of either party.	The court can pass a decree of annulment at the instances of the aggrieved party.

Position of Void, Voidable and Irregular Marriage under various Personal Laws

The position of void, voidable and irregular marriage under various personal laws is as follows:

Hindu Law

The essentials of a valid marriage and the conditions thereof are stipulated in the Hindu Marriage Act, 1955. The HM Act prescribes certain conditions the violation of which renders the marriage void between the parties or renders the marriage voidable at the instance of the aggrieved party. A Hindu marriage which is solemnized in violation of the following conditions is **void**:

- i. **Monogamy:** Either party has a spouse living at the time of solemnization of second marriage.
- ii. **Degrees of Prohibited Relationship:** if the parties to the marriage are within the degrees of prohibited relationship unless custom or usage governing the parties permits.
- iii. **Sapinda Relationship:** if the parties are sapindas of each other, unless the custom or usage governing the parties permits.

A Hindu marriage which is solemnized in violation of the following conditions is **voidable** at the instance of the aggrieved party:

- i. **Non Consummation:** the marriage has not been consummated due to the impotence of the respondent.
- ii. **Mental Incapacity:** any of the parties to the marriage is incapable of giving valid consent owing to the mental incapacity or has been suffering from mental disorder rendering the party unfit for marriage or procreation of children or has been subject to the recurrent attacks of insanity.
- iii. **Absence of free consent:** if the consent to the marriage has been obtained by force or fraud.
- iv. **Pregnancy:** if the respondent was pregnant at the time of marriage by some person other than the petitioner.

Special Marriage Act, 1955

S.4 read with s.24 of the Special Marriage Act, 1954 prescribes the conditions under which the marriage is **null and void** the conditions are as follows:

- i. **Marriageable Age:** if the parties to the marriage are of not marriageable age i.e., 21 years for the groom and 18 years for the bride.
- ii. **Monogamy:** if there is another spouse living.
- iii. **Prohibited Degrees of Relationship:** if the parties are within prohibited degrees of relationship, unless custom or usage governing the parties permits.
- iv. **Mental Incapacity:** any of the parties to the marriage is incapable of giving valid consent owing to the mental incapacity or has been suffering from mental disorder rendering the party unfit for marriage or procreation of children or has been subject to the recurrent attacks of insanity.
- v. **Impotent:** the respondent was impotent at the time of marriage and at the time of filing of the suit.

Marriage under Special Marriage Act, 1954 is **voidable** if:

- i. **Non Consummation:** if the marriage is not consummated owing to wilful refusal of the respondent.
- ii. **Pregnancy:** if the respondent is pregnant by some person other than the petitioner.
- iii. **Consent:** if the consent of the parties had been obtained by coercion or fraud.

Parsi Law

The Parsi Marriage & Divorce Act, 1936 lays down that a second marriage without divorce in case of an earlier marriage is void.

A marriage where consummation of the marriage is impossible from natural causes, may, at the instance of either party to the marriage, be declared null and void.

Christian Law

Sections 18 & 19 of the Indian Divorce Act, 1869 lays down that a marriage may be declared as null and void on the following grounds, viz:

- i. **Impotency:** of the respondent at the time of marriage and at the time of the institution of the suit.

- ii. **Prohibited Degrees:** if the parties are within prohibited degree of consanguinity or affinity.
- iii. **Lunacy or Idiocy:** either party was a lunatic or idiot at the time of marriage.
- iv. **Monogamy:** the former husband or wife of either party was living at the time of the marriage and the earlier marriage was subsisting.

Muslim Law

According to the customary Muslim law, marriages are classified into Valid (Sahih), Void (Batil) and Irregular (Fasid). However, as per the Shia Sect of Islam only valid and void marriages are there and there is no such thing as irregular marriage. Therefore a marriage which is irregular as per the Sunni sect is void under the Shia sect

Batil (Void Marriages) these marriage do not create any mutual rights and obligations between the parties and the children born out of the said marriage are illegitimate. A marriage is deemed to be void if it is with a mooharin (prohibition) arising out of:

- (a) Consanguinity
- (b) Affinity, or
- (c) Fosterage

In such kind of marriages, wife is not entitled to dower and if one party dies then the other is not entitled to inherit from the deceased.

Fasid (Irregular Marriages) it is recognized only by the Sunni sect of Islam. These marriages suffer from certain procedural and legal formalities which can be rectified. The marriage is per se not unlawful and all the rights and obligations arising out of the marriage are still binding upon the parties. Marriage in the given circumstances is fasid:

- i. Without witnesses
- ii. With a fifth wife by a person having four wives.
- iii. With a woman undergoing iddat
- iv. Prohibited by reason of difference or religion
- v. With a woman so related to the wife, that is one of them had been a male, they could not have lawfully intermarried.

In the above situations, the prohibition against such marriages is temporary or relative or accidental, and can be thus rectified:

- i. by subsequent acknowledgement before witnesses;
- ii. by divorcing one of the four wives;
- iii. by expiration of the iddat period;

- iv. by the woman becoming a convert to Islam, Christianity or Jewish religion, or the husband adopting Islam.
- v. by the man divorcing the wife who constitutes the obstacle.

An irregular marriage may be terminated by either party, either before or after consummation. It has no legal affect before consummation. If, however, consummation has taken place, then:

- i. the wife is entitled to dower, prompt of specified, whichever is earlier.
- ii. She is bound to observe iddat, the duration of which, in case of both divorce or death, is three courses.
- iii. children born of the marriage are legitimate.

It is significant to note that an irregular marriage, even if consummated, does not create mutual rights of inheritance between the parties.

DIVORCE & ANCILLARY REMEDIES

The term divorce is derived from the Latin word ‘divotium’ means to turn aside; to separate. It is the legal cessation of marital bond. Divorce can be considered as the golden key to the legal cage of marriage. Divorce is a legal means through which an end can be put to the relationship of marriage. It is the most drastic remedy which can be availed by a party to the marriage. It puts an end to the marriage and severs all the ties arising out of the marriage. Divorce acts as an emergency exit in the institution of marriage and as such should be resorted to, in the gravest of circumstances. It is not a panacea for all the matrimonial problems.

Divorce is a social phenomenon it is the product of a long process of marital discord which may be engineered by adverse socio-economic conditions as well as by psychological disturbance of individuals. Every family system evolves certain mechanisms to resolve marital conflicts and maintain a stable family yet conflict occurs, therefore we can infer that divorce has existed universally in some form as a mechanism to save an individual from being forced to live with a spouse. But in no contemporary society, primitive or industrialized, the divorce is actually valued. Divorce has its consequences for the society, the kin networks and the individuals, and these are tedious when not awkward, and burdensome, when not destructive.

Contemporary India is currently undergoing the process of rapid social change. More and more people are getting displaced due to migration and there has been considerable change in the status of the people day by day due to industrialization, the urbanization, etc. which has brought a radical change in the attitudes of people towards the institution of marriage and divorce. The concept of divorce which was abhorred in the Indian society is not becoming well accepted norm. We can see

the instances of the in both lower and also the upper strata of the society. The proneness to divorce has increased multifold and the tendency for seeking divorce is rapidly growing up.

When it comes to divorce there exists a unique feature of the Indian legal system i.e., the parties are governed by their respective personal laws when they seek divorce. There is no secular law in this respect. All the existing personal laws in India provide for obtaining of divorce under certain conditions and grounds. Though there are different statutes governing people belonging to different religions the grounds are more or less the same, with few variations with Muslim Law of divorce being totally different.

ANCILLARY REMEDIES

HINDU MARRIAGE ACT, 1955

Maintenance Pendente Lite: "Where in any proceedings under this Act it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceedings, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceedings and monthly during the proceeding such sum as, having regard to the petitioner own income and the income of the respondent it may seem to the Court to be reasonable.

Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be". (Section 24) (as amended by the Marriage Laws (Amendment) Act 2001).

Permanent Alimony and Maintenance : "(1) Any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purposes by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immoveable property of the respondent.

(2) If the Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the Court may deem just.

(3) If the Court is satisfied that the party in whose favour an order has been made under this Section has re-married or, if such party is the wife, that she has not remained chaste or if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at

the instance of the other party vary, modify or rescind any such order in such manner as the Court may deem just". (Section 25).

Custody of Children : "In any proceeding under this Act the Court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible and may, alter the decree, upon application by petition for the purpose make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the Court may also from time to time revoke, suspend or vary any such orders and provisions, previously made.

Provided that the application with respect to the maintenance and education of the minor children, pending the proceedings for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent". (Section 26) (as amended by the Marriage Laws (Amendment) Act 2001).

DISPOSAL OF PROPERTY: In any proceeding under this Act, the Court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and wife. (Section 27).

SPECIAL MARRIAGE ACT, 1954

ALIMONY PENDENTE LITE: "Where in any proceeding under Chapter-V or Chapter-VI it appears to the District Court that the wife has no independent income sufficient for her support and the necessary expenses to the proceeding, it may, on the application of the wife, order the husband to pay to her the expenses of the proceeding, and weekly or monthly during the proceeding such sum as having regard to the husband's income, it may seem to the Court to be reasonable.

Provided that the application for the payment of the expenses of the proceeding and such weekly or monthly sum during the proceeding under Chapter-V or Chapter-VI, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the husband". (Section 36) (as amended by the Marriage Laws (Amendment) Act 2001)

PERMANENT ALIMONY AND MAINTENANCE: " (1) Any Court exercising jurisdiction under Chapter-V or Chapter- VI may, at the time of passing any decree of at any time subsequent to the decree, on application made to it for the purpose order that the husband shall secure to the wife of her maintenance and support, if necessary, by a charge on the husband's property such gross sum or such monthly or periodical payment of money for a term not exceeding her life, as having regard to her own property, if any, her husband's property and ability, the conduct of the parties and other circumstances of the case it may seem to the Court to be just".(Section 37)

CUSTODY OF CHILDREN : "In any proceeding under Chapter-V or Chapter-VI the District Court may, from time to time, pass such interim orders and make such provisions in the decree as it may seem to it to be just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes wherever possible, and may after the decree, upon application by petition for the purpose, make, revoke, suspend or vary, from time to time, all such orders and provision with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending.

Provided that the application with respect to the maintenance and education of the minor children, during the proceeding, under Chapter- V or Chapter-VI shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent". (Section 38) (as amended by the Marriage Laws (Amendment) Act 2001).

CHRISTIAN LAW - THE INDIAN DIVORCE ACT, 1869 (as amended by the Act of 2001)

Alimony Pendente Lite : "In any suit under this Act, whether it be instituted by a husband or a wife, whether or not she has obtained an order of protection the wife may present a petition for expenses of the proceedings and alimony pending the suit. Such petition shall be served on the husband; and the Court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of the expenses of the proceedings and alimony pending the suit as it may deem just: Provided further that the petition for the expenses of the proceedings and alimony pending the suit shall, as far as possible, be disposed of within sixty days of service of such petition on the husband". (Section 36) (as amended by the Marriage Laws (Amendment) Act 2001) Power to order permanent alimony: "The High Court may, if it thinks fit, on any decree absolute declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife, and the District Judge may if he thinks fit, on the confirmation of any decree of his declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife, order that the husband shall, to the satisfaction of the Court, secure to the wife, such gross sum of money, or such annual sum of money for any terms not exceeding her own life as having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable; and for that purpose may cause a proper instrument to be executed by all necessary parties", (Section 37).

Power to order monthly or weekly payments: Section 37 also empowers the Court to make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable. However, if the husband is unable to make such payments due to any reason, the Court may discharge or modify the order suitably. Later, depending on the circumstances, the Court may revive the same order, wholly or in part, as it thinks fit. Court

may direct payment of alimony to wife or to her trustee: "In all cases in which the Court makes any decree or order for alimony, it may direct the same to be paid either to the wife herself, or to any trustee on her behalf to be approved by the Court, and may impose any terms or restrictions which to the Court seem expedient, and may from time to time appoint a new trustee, if it appears to the Court expedient so to do". (Section 38)

Inquiry into existence of ante-nuptial or post nuptial settlements : "The High Court, after a decree absolute for dissolution of marriage, or a decree of nullity of marriage, and the District Court, after its decree for dissolution of marriage or of nullity of marriage has been confirmed, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders, with reference to the application of the whole or a portion of the property settled, whether for the benefit of the husband or the wife, or of the children (if any) of the marriage, or of both children and parents, as to the Court seems fit : Provided that the Court shall not make any order for the benefit of the parents or either of them at the expense of the children". (Section 40).

Glossary:

1. *Conjugal* :relating to marriage or the relationship between a married couple.
2. *Decree*: an official order that has the force of law or court order.
3. *Reconciliation*: the action of making one view or belief compatible with another.
4. *Adultery*: voluntary sexual intercourse between a married person and a person who is not their spouse.
5. *Desertion*: the action of deserting a person.
6. *Nullity*: the state of being invalid.
7. *Consummation*: the action of making a marriage complete by having sexual intercourse.
8. *Pendente lite*: during pendency of litigation.
9. *Nuptial*: relating to marriage.
10. *Monogamy*: marrying only one spouse.

Frequently Asked Questions:

Objective Type

1. Restitution of conjugal rights is granted to a Hindu spouse under section _____ of Hindu Marriage Act, 1955.
2. The remedy of _____ puts a temporary suspension on the marriage.
3. Alimony Pendente lite is granted during the _____.
4. Irregular (Fasid) marriage is recognized only under _____ sect of Islamic Law.
5. Adultery is decriminalized under IPC in the recent case of _____.
6. _____ Act applies to a marriage between a hindu and a muslim.

7. Alimony means _____.
8. T. Sareetha v. T. Venkata Subbaiah is a landmark judgement on the concept of _____.
9. The essentials of a valid muslim marriage are guided by _____ law.
10. When consent of a person to marry someone is obtained by fraud, the marriage is _____ marriage.

Subjective Type

1. Differentiate between a voidable and a void marriage?
2. Discuss the concept of Restitution of Conjugal rights with the help of decided cases?
3. Discuss the essentials of a civil marriage under the Special Marriage Act, 1954.
4. Write a note on judicial separation & how it is different from divorce.
5. Explain various ancillary remedies available under the personal laws in India.

Suggested Readings:

1. Family Law in India by G.C.V. Subba Rao., NarendarGogia& Company, Hyderabad.
2. Family Law by Paras Divan and Peeyushi Divan, Allahabad Law Agency.
3. Paras Diwan : Modern Hindu Law, Allahabad Agency, Delhi.
4. Mayne: Hindu Law - Customs and Usages , Bharat Law House, New Delhi.
5. Y.F. Jaya Kumar, Horizons of Family Law in India-Select Essays(2017), Spandana Publications, Secunderabad.
6. Duncan M. Derrett, A Critique of Modern Hindu Law.

MODULE: III

DISSOLUTION OF MARRIAGE

Structure of Module

1. **Fault Theory**
2. **Breakdown Theory**
3. **Consent Theory**
4. **Grounds of Divorce under Hindu Marriage Act, Special Marriage Act & Divorce Act, 1869.**

OVERVIEW:

This unit helps the students to understand the various theories pertaining to the dissolution of marriage such as the fault theory – where either spouse is at fault; breakdown theory – where the institution of marriage breaks between spouses and consent theory – where both the spouses agree to dissolve the marriage. Divorce being a severe remedy is classified based on these theories and makes the remedies available to the aggrieved spouse(s). The grounds of divorce available to the spouses are somewhat similar in the Hindu Marriage Act, Special Marriage Act and Divorce Act, 1869. But the customary law of divorce under the Muslim Law is totally different as it is guided by Quran and the customs.

Divorce under Hindu Law

The Hindu Marriage Act, 1955 provides various grounds for divorce which may be studied under the nomenclature of Fault Theory, Breakdown Theory and Consent Theory.

FAULT THEORY

Under the Fault Theory, grounds for divorce are classified as common grounds of divorce and special grounds of divorce available to the wife.

Common Grounds:

1. **Adultery [Section 13(1)(i)]:** Adultery means consensual sexual intercourse between a married person and a person of the opposite sex, not being the other spouse, during the subsistence of the former's marriage. Before the amendment in the law, the petitioner, in order to obtain divorce on this ground, had to prove that the other party was living in adultery

which would cover, more or less a continuous and habitual course of action. An isolated act of immorality was not sufficient to prove adultery. But after the amendment of 1976, even a single and isolated act of infidelity would be sufficient ground to obtain divorce. In the recent landmark judgement of Supreme Court in **Joseph Shine v. Union of India** (2018 SCC OnLine SC 1676) the Supreme Court had decriminalized s. 497 of the Indian Penal Code which punishes adultery however it categorically held that the adultery can be a ground for a civil offense and also a ground for divorce.

Instances of Adultery:

- a. Wife has been absenting herself from her house sometimes and seen in the company of a stranger to the family of her husband, without reasonable explanation or any explanation.
- b. Unrelated person found alone with the wife after midnight in her bedroom in actual physical juxtaposition.
- c. Child born beyond the period of twelve months after the cessation of marital consortium between the spouses.
- d. Evidence on post-suit adultery is admissible to prove and explain other evidence given in the case and to show the character and quality of the previous acts.
- e. Paramour's letters indicating facts of illicit relationship.
- f. Admission of adultery by wife through letters.
- g. Testimony of disinterested witnesses to the effect that they had seen the respondent sleeping together with another person in nights is sufficient to prove adultery.
- h. A solitary instance of voluntary sexual intercourse by wife with another person is enough to prove adultery.
- i. Wife left her husband and was living at her parent's house. The husband alleged that she became pregnant there without his having access to her. The wife stated that her husband used to visit her parent's house, stayed overnight and cohabited with her. Wife failed to examine her parents or any other witness in support of her statement. There was no interference with the decree of divorce granted against the wife.

Instances of no Adultery:

- a. No conclusion of adultery where the wife was found going on the scooter of some other person or talking with someone other than her husband.
- b. No corroboration to prove adultery of wife when she remains in a room with door though shut but unbolted at 10 p.m. with another person when the mother of the husband and five grown up children were present in the house.
- c. Mere fact that some male relation writes letters to a married woman does not necessarily prove that there was illicit relationship between the writer and the recipient of the letters.

2. **Cruelty [Section 13(1)(ia)]:** There is voluminous case law around the legal concept of cruelty in both English and Indian jurisprudence. In India, cruelty is a ground for dissolution of marriage, in all family systems. But no precise definition has been given to the word cruelty, Since the acts or the conduct constituting cruelty can be so numerous and varied that it would be impossible to fit them into any water tight compartments. With the passage of time and advancement of the social conditions and standards of living, the concept of cruelty has undergone many changes, in the absence of any specific statutory definition for ‘cruelty’ in personal law, there is always scope for conflicting views in judicial adjudication.

Statutory Position in India

- a. **Hindu Marriage Act, 1955:** Cruelty is a ground for divorce as well as judicial separation. Section 13(1)(ia) reads as “the other party has after the solemnization of the marriage treated the petitioner with cruelty.”
- b. **Special Marriage Act, 1954:** Section 27(d) reads as “The respondent has, since the solemnization of marriage, treated the petitioner with cruelty.”
- c. **Indian Divorce Act 1869:** Section 10(X) says that the respondent 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.
- d. **Parsi Marriage & Divorce Act, 1936:** Section 32(e) reads as “that 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 to prostitution”.

Cruelty is also a ground for judicial separation under section 34 which reads as “that the defendant has since the solemnization of the marriage treated the plaintiff with cruelty or has behaved in such a way as to render it in the judgment of the Court improper to compel the plaintiff to live with the defendant”.

- e. **Dissolution of Muslim Marriage Act, 1939:** The Act is applicable to Muslim women only, and permits her to obtain divorce on certain specified grounds. Section 2 (viii) reads as - "A woman married under Muslim law shall be entitled to obtain divorce for the dissolution of her marriage... 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 her 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 from exercising her legal right(s) 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.

The English Matrimonial Causes Act, 1973 worded the term cruelty as "The respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the respondent". Originally, when cruelty was a ground for judicial separation along with divorce under Section 10(1) (b) of the Hindu Marriage Act, 1955, the petitioner was required to show that the respondent had treated him or her with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. The Marriage Laws (Amendment) Act, 1976, which makes cruelty a ground for divorce, has changed the wording of the clause thus: "Respondent has treated the petitioner with cruelty".

All the above statutory provisions except Section 32(e) of Parsi Marriage and Divorce Act 1936, have given a similar meaning to the term cruelty. Cruelty implies both physical and mental cruelty as grounds for dissolution of marriage. As far as the proof of the factum of physical cruelty is concerned, the Courts may not find any difficulty to establish the facts. The general test applied here is whether there is any physical violence or whether there is any act which is likely to cause any physical harm to life or limb or health of the petitioner from the respondent, either directly or indirectly. But, while construing 'mental cruelty' the Courts enjoy complete discretion. Some times this discretion may lead to wrong precedents.

Instances of Cruelty:

- (a) Abusing the husband in public, in a bus and catching hold of his collar;
- (b) Wife suffering from deadly disease and thereby prevented the husband from performing his marital functions;
- (c) Ill-treatment and beating wife, compelling her to report to a police station;
- (d) Wife administering 'love potion' to husband in the belief that it would be conducive to a happy married life, but, in fact, it caused ill-health of the husband; though the wife repented subsequently, still it was held to be an act of cruelty;
- (e) Forcibly dragging an unwilling wife to the husband's home;
- (f) Where eventhough the wife had not been given anyphysical beating, she was refused any medical treatment in addition to being turned out from the house by her husband on the same day of her arrival at the house, with a false allegation against her father, it would constitute legal cruelty;
- (g) Any conduct of the husband which causes disgrace to the wife or subjects her to a course of annoyance and indignity amounts to legal cruelty;
- (h) Where the wife left the husband's house to the house of her parents leaving behind her two months old child and when approached there to return to the husband's house, she not only refused to come back to the husband's house but also refused to keep the child that died later as a result thereof, the attitude of the wife amounted to cruelty;
- (i) Wife made unfounded, scandalous allegations against the husband and threatened to get him dismissed from service and also to have him killed, which amounts to mental cruelty;
- (j) Persistent failure or inability on the part of a spouse to effectuate sexual intercourse without any reasonable cause may amount to cruelty;
- (k) Persistence of wife in making baseless charges of immorality against the husband, taunting him, filing complaints and writing anonymous letters against him and also causing physical injury to him amounts to cruelty;
- (l) Impotency of husband amounts to both legal and mental cruelty;
- (m) Promise of husband to marry and maintain another woman in his own house consequent upon a love affair amounts to cruelty to the wife;
- (n) Wife, a Government servant, made complaint to the Prime Minister against her husband, also a Government servant, alleging the demand of dowry and an amount for his sister's marriage,

beating and driving her out of the house which on departmental enquiry turned out to be false. It was held that the wife caused mental cruelty to the husband;

- (o) No reasonable person marries to bargain to endure habitual drunkenness, a disgusting conduct of husband. It may constitute cruelty but is not an independent ground for any matrimonial relief in India;
- (p) Quarrelsome wife beats up not only her mother-in-law and sister-in-law but also her husband;
- (q) Husband not visiting the hospital to see his baby daughter although he had no other preoccupation or was otherwise busy constitutes mental cruelty to wife;
- (r) Attempt to commit suicide with a view to coerce the husband into doing something which he is not inclined to do, for whatever reason, amounts to cruelty to the husband;
- (s) False, scandalous, malicious, baseless and unproved allegations made in the Written Statement amount to cruelty;
- (t) Allegations of illicit relationship based on mere suspicion by one spouse against the other amount to mental cruelty;
- (u) Lodging of complaint of commission of a criminal offence against the husband who was a Government official amounts to cruelty;
- (v) Allegation of wife that the husband is impotent amounts to cruelty;
- (w) The demand for dowry is prohibited under law and amounts to cruelty entitling the wife to get a decree for dissolution of marriage;
- (x) The husband got his job through the wife's relation and taking advantage of that favour the wife pressurized the husband to live separately from his joint family and he was transferred from one place to another and was also assaulted physically;
- (y) Where the wife falsely alleged that the husband attempted to set her ablaze by dousing her in kerosene oil, such false allegation was held to be cruelty because it would result in mental agony of the gravest character;
- (z) the wife, a Vice-President in a Public Sector Corporation in her Written Statement, and the questions put by her counsel to the petitioner, an advocate, in cross-examination, had made allegations that the petitioner-husband was a mental patient and he required psychological treatment. The wife alleged that the husband and all the members of his family were a bunch of lunatics. All these constitute mental cruelty;
- (zl) Wife filing false civil and criminal cases one after another against the husband;

- (z2) Frequent desertions by wife to live away from the husband without any reason and showing disaffection towards him;
- (z3) Husband refused to lead marital life with wife and wife went on hurling baseless allegations amounting to moral turpitude against the husband;
- (z4) Where a man having never liked his wife right from the beginning raised demands for dowry, lead adulterous life and ultimately contracted marriage with another lady, it amounted to cruelty;
- (z5) General conduct and behaviour of wife towards parents, brother and sisters of the husband were indifferent, insulting and violent. Persistent resistance to sexual intercourse by the wife depriving the husband of normal matrimonial pleasure and her act in trying to jump from the balcony during the event of a marriage in the family amounted to the gravest acts of cruelty;
- (z6) Wife having illicit relationship with another person with whom she went to several places and who has taken active part in prosecuting her case;
- (z7) Wild, reckless and scandalous allegations by wife against the husband's mother, his two married sisters and brothers-in-law;
- (z8) Wife living with her parents and declined to cohabit with the husband;
- (z9) Allegation by wife against husband for having resorted to unnatural casual relationship, not denied in cross-examination;
- (z10) Starting a criminal case against the husband and mother-in-law immediately after separation by the wife amounts to cruelty.

Instances of no Cruelty:

- (a) The husband on certain occasions persuaded his wife to accompany him and even pressed her for the same. This conduct on the husband's part giving rise to unpleasantness because the wife was unwilling to go with him, was held to be perfectly justified and could by no stretch of imagination be treated as cruelty;
- (b) Grievances made of normal incidents of married life nor husband's demand for money nor his taking away ornaments can be regarded as legal cruelty;
- (c) Respondent suffering from epilepsy does not become a ground for cruelty;
- (d) Wife refused to live with the family members of the husband, since two persons in his family were suffering from Tuberculosis. She had no objection to live with the husband in a separate house. Her conduct would not amount to cruelty;

- (e) Allegation of wife in her Written Statement that the husband was having adulterous relations with his sister-in-law does not constitute cruelty;
- (f) Where there is no pleading or proof of allegation of husband that the wife denied cohabitation with him;
- (g) No relief to husband's petition where wife is ill-treated for not bringing extra dowry;
- (h) Husband and wife are employed in service at two different places. The wife's insistence to continue with her service does not amount to cruelty;
- (i) Temperament of spouses not conducive to each other resulting in petty quarrels is not cruelty, even if they might have resulted in physical or mental ailments;
- (j) Solitary instance of emotional outburst or violent behaviour does not constitute cruelty;
- (k) Demand by wife for separate residence from husband's mother and also allegation of neglect by wife during illness of husband by staying at father's place in the absence of evidence regarding nature and period of illness do not constitute cruelty;
- (l) Wife resigned her job twice and accompanied the husband to his place of service but refused to resign subsequently on his further transfer;
- (m) Merereseries of incidents of quarrel between the husband and the wife on account of presence of the mother-in-law or mostly on account of the fact that the husband did not set up a separate establishment of his own would not constitute mental cruelty;
- (n) Wife was not providing food to the husband properly and was taking away his salary and spending it for her parents. No complaint in this regard made by the husband to the elders during panchayat;
- (o) Consumption of 3 Crocin tablets by wife with an intention to commit suicide. A conclusion cannot be drawn thereupon that the wife's intention was to cause mental torture to the husband;
- (p) No evidence to prove that the wife was addicted to smoking;
- (q) Failure of husband to protect the wife at the time of ill-treatment to her by her in-laws and attempting of wife to commit suicide within five days after marriage;
- (r) Merely some misunderstanding between the spouses, unruly temper or whimsical nature of a spouse are not enough;
- (s) the wife had mixed something in the food prepared by her for the husband and upon taking the food the husband felt giddy. On another occasion the husband found a small piece of glass

in the food prepared by the wife which had not been done deliberately by her. These did not constitute cruelty and as such could not be a ground for divorce.

3. **Desertion**

Desertion, in its essence, means the intentional permanent forsaking and abandonment of one spouse by the other without the other's consent and without reasonable cause. It is a total repudiation of the obligation of marriage. Desertion is not withdrawal from a place but from a state of things. The person who actually withdraws from cohabitation is not necessarily the deserting party.

There are two types of desertion - actual desertion and constructive desertion.

Actual desertion: It means an act of the respondent who withdraws from the association or consortium of the petitioner without reasonable cause and without the consent or against the wishes of the petitioner. It also embraces wilful neglect of the petitioner by the respondent. In its essence, desertion means the intentional permanent forsaking and abandonment of one spouse by the other without the other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage.

In order to establish the act of desertion, the petitioner must prove the following two conditions against the respondent:

- (1) the factum of separation, i.e. physical separation from the matrimonial home and
- (2) intention to separate from the association of the petitioner.

Constructive desertion: Where a situation or circumstances are created either by actual use of force or by conduct of one spouse that the other spouse is compelled to leave the matrimonial home, it constitutes constructive desertion. It is not necessary for the husband in order to desert his wife to actually turn his wife out of doors; it is sufficient if by his conduct he compels her to leave the house.

Instances of Desertion

- (a) The wife alleged that her father-in-law tried to poison her, but it was not proved. The wife offered to live with her husband provided her husband lived separately from his parents and it was not accepted by the husband. Consequently, the wife left the matrimonial home with an intention not to return. It amounts to desertion;
- (b) The husband left his wife at her parent's house for 7 to 8 years uncared for his conduct amounted to desertion;
- (c) Party adopting an unreasonable attitude resulting in separation is guilty of desertion;

- (d) The wife left the matrimonial home for paucity of accommodation and the husband refused to live separately from the members of his family due to meagre income. The act of wife amounted to desertion;
- (e) Wife conceived and gave birth to a child during the pendency of the divorce proceedings on the ground of desertion for more than three years. The decree of dissolution of marriage was granted.
- (f) Wife living separately from the husband for about 8 years although in a separate accommodation provided for her. She implicated the father and the mother of the husband in criminal complaints;
- (g) Wife stayed away from matrimonial home for over two years and filed application for maintenance under Section 125 Cr. P.C. while staying at her father's place;
- (h) Notice issued by wife to the husband expressing her intention not to return to the matrimonial home constitutes desertion commencing from the date of notice.

Instances of no Desertion

- (a) The husband's allegation of the wife's unchastity caused the wife to live separately from the husband;
- (b) Where the husband himself accompanied his wife to her mother's place for confinement, there is no desertion;
- (c) Where the husband was guilty of cruelty to wife and of openly keeping a mistress in the house so that the wife was compelled to leave her husband's house, it was held that the wife did not desert the husband without reasonable cause;
- (d) Letter written by the husband in anger saying that he would have nothing to do with the wife's people thereafter. It was held that it was no evidence of desertion by husband;
- (e) The wife was living separately in a room provided by the husband under a compromise in a proceeding under Section 488 Cr. P.C. (old) and the husband had another wife living with him. Separation does not amount to desertion by the wife;
- (f) Mere refusal of matrimonial bed by wife is no desertion nor is it desertion to neglect opportunity or consorting with the husband;
- (g) Continued separation without intention to wilfully neglect is not desertion;
- (h) An aggrieved spouse cannot be said to be in desertion;

- (i) After abortion of pregnancy through the husband, the wife was staying with her parents for better treatment. There was no adverse inference that the wife intended to remain separate and she did not want to come back to her husband's place;
- (j) Wife insisted on separate home away from husband's family and she left the matrimonial home. Wife was not guilty of desertion, because physical separation by a party does not constitute desertion;
- (k) Wife was going to the house of her parents upon false allegation of her immorality;
- (l) Wife was harassed with dowry demands compelling her to leave the matrimonial home and was abandoned by her husband;
- (m) Wife was leaving for her parent's home in her advanced stage of pregnancy with intention to return after delivery. But the husband did not visit her in the Nursing Home where she underwent caesarean operation and neglected the wife and the child. Desertion was not without just cause;
- (n) Mere notice by the husband to the wife for returning home without any further effort is not sufficient to prove desertion by wife, particularly when the notice is a pre-emptory call fraught with threatening legal consequences;
- (o) Where the conduct of the elder sister of the husband was such that it was not possible for the wife to put up and pull on with her, the leaving of the matrimonial home by the wife would not amount to desertion;
- (p) No specific evidence by husband-petitioner was adduced to prove desertion; on the other hand, the wife proved reasonable cause to live separately from the husband;
- (q) Letters written by wife to her relations not indicating her mind to desert her husband or to become 'nun' or 'bai'. Wife ready to co-operate with the husband to discharge her matrimonial obligations;
- (r) Wife, with her son residing with her parents, never entertained the idea of separation and has no animus deserendi to part with the company of her husband;
- (s) Mere departure from home for being unable to withstand the conditions there does not amount to desertion;
- (t) Though there was a condition before the marriage that the husband would take up a house near the university to facilitate the wife to pursue her research study, it was not fulfilled. Wife completed the research living separately. No attempt by husband was made to bring her back and as such there was no desertion;

- (u) Where the husband had driven out the wife from his residence and had not taken any step to rehabilitate her and the children born out of the marriage for the last six years before the initiation of the proceeding, there was no animus deserendi on the part of the wife.

Conversion

On the ground that the other party has ceased to be a Hindu by conversion to another religion, marriage can be dissolved by a decree of divorce. When one of the spouses voluntarily relinquishes one's religion and adopts another distinctive religion after formal ceremonies, it is conversion on his part. However, even after a Hindu adopts Jainism or Buddhism or Sikhism, he remains a Hindu. Conversion does not dissolve the marriage automatically, but a petition under Section 13 of the Hindu Marriage Act, 1955 has to be filed before the Court to obtain a decree of divorce. Even though a Hindu by birth, if one of the spouses admires Islam or some other major religion or if he professes a theoretical allegiance to some such other religion, he cannot be said to have converted to that religion.

Similarly, if one declares that he or she has ceased to be a Hindu, that would not afford a ground for relief under Section 13 for taking divorce. If one spouse ceases to be a Hindu, the marriage continues to be governed by Hindu Law and it can be dissolved only under the provisions of the Hindu Marriage Act, 1955. However, if both the spouses change their religion and cease to be Hindus, none of them can invoke the aid of Section 13.

A petitioner who seeks the aid of this ground has to prove the following:

- (a) that the other spouse has ceased to be a Hindu; and
- (b) that the other spouse has done so by accepting another religion.

One must remember that conversion as a ground of divorce is not available to the converting spouse; it is the other spouse who remains a Hindu that can avail of this ground, if he or she so desires. It may be that one of the spouses converts to another religion and still, however, they can retain their marriage. There is nothing in the Act which can prevent them from retaining their marriage.

Insanity or mental disorder

Section 13(1) (iii) and two Explanations attached to it refer to two distinct mental conditions as a ground for divorce:

- (a) Unsoundness of mind, and
- (b) Mental disorder.

These two conditions are explained by means of Explanations (a) and (b) which clearly specify that: (i) the unsoundness of mind must be incurable, and (ii) the mental disorder (whether it is

continuous or intermittent) must be of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Mental disorder means, (i) mental illness - arrested or incomplete development of mind, (ii) psychopathic disorder, or (iii) any other disorder or disability of mind, (iv) and includes schizophrenia.

The expression '**psychopathic disorder**' has been explained as (i) a persistent disorder, or (ii) disability of kind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment.

The sub-section deals with unsoundness of mind which comes in between or occurs in the middle of two ends. The unsoundness of mind must be incurable. Explanation (b) speaks that the mental disease has to be (i) of a particular kind, and (ii) to a particular extent.

'**Mental disease**' is a very wide term covering and embracing within its fold different phases of unsoundness of mind and mental disorder. Mere branding of a spouse as schizophrenic is not sufficient. It was held by the Supreme Court that the degree of mental disorder of a spouse has to be shown and it should be such that the other spouse cannot reasonably be expected to live with him or her.

Schizophrenia is a mental disease wherein the patient's personality appears to be divided and this personality disintegration which characterises schizophrenia may be of varying degrees.

Leprosy

The next ground for divorce is leprosy. The other party must be suffering from a virulent and incurable form of leprosy. The leprosy (lepromatous), if it is contagious, malignant and incurable, satisfies the requirement of the section. The Supreme Court has also held that leprosy, as a ground for divorce, has to be malignant. This Section does not mention any minimum duration of the disease for obtaining the relief of divorce. However, this was the legal position before the enactment of The Personal Laws (Amendment) Act, 2019. After the passing of the said Act leprosy being a curable condition with the advent of modern medicine was removed as the ground for obtaining divorce under the five acts namely: the Divorce Act, 1869, the Dissolution of Muslim Marriages Act, 1939, the Special Marriage Act, 1954, the Hindu Marriage Act, 1955 and the Hindu Adoptions and Maintenance Act, 1956.

Venereal disease

Venereal disease is an infectious disease associated with unprotected sex and may be communicable. Prior to the amendment of 1976, the duration of the disease was a condition for

obtaining the relief of divorce from the Court. This condition has now been removed and the only stipulation is that the disease should be in a communicable form.

Renouncing the World

Renouncing the world by entering any religious order may be termed as ascetic retirement. One should remember that a genuine renunciation is tantamount to civil death. When a person becomes a Sanyasi, he relinquishes all worldly ties and his attachments, which provides a ground for divorce to the petitioner. The clause enumerates two conditions, namely:

- (i) renouncing the world, and
- (ii) entering a religious order.

Both the conditions must be satisfied at the same time. Putting on saffron coloured clothes, shaving one's head and saying that he has become a Sanyasi, is not sufficient. He must perform the necessary rites and ceremonies prescribed by the religious order, i.e., Sastras. In other words, a proper theological admission into Sanyasa is necessary. According to the general belief of the Hindu religion, a Sudra cannot become a Sanyasi or Yati. However, if he becomes a Sanyasi, his or her spouse does not have a cause available for divorce. Some writers are of this opinion but it is submitted that is not correct and is of doubtful validity. Persistence of the Court in following such a view would amount to discriminating between Sudras and non-Sudras.

Unheard of for seven years or more

Under the Evidence Act, 1872 a person who has not been heard of for seven years or more by his close relations, etc., should be presumed to be dead and the burden of proving the contrary lies on him who asserts that he is alive. This is the common law rule. The Hindu Marriage Act, 1955 accepts the same rule. The expression "those persons who would naturally have heard of him" could mean such person's parents, spouse, children, brothers, uncles, sisters, and other close relatives. One must note that a decree of divorce granted under this Section shall be valid and effective, even if it is discovered later on that the respondent is in fact alive. Such a decree is not a decree declaring the death of the missing or unheard of person. It is at best a decree of presumption of death under Section 108 of the Evidence Act, 1872.

Special Grounds for Divorce to the wife

(1) Bigamy:

The Hindu Marriage Act, 1955 has made bigamy an offence. Sections 5, 18 and sub-section (2) (i) of Section 13 lay down that either of the co-wives of a man can seek divorce provided that:

- (i) both the wives were married to him before the commencement of the Act and
- (ii) are alive when a petition for divorce is filed, and that

- (iii) both the above said marriages legally exist at the said time.

Clear proof of earlier marriage must be given under this Section and mere living as husband and wife is not enough. If one of the wives dies, the other wife cannot apply for a divorce. If the second marriage is void, it cannot become a ground for divorce.

In **Ram Singh v. Susilabai** (AIR 1970 Mys 20), the husband tied a Tali (sacred string) on the hand of the other woman. This was done in the presence of a Shastri or Purohit (priest). The Court held that merely tying of a Tali is no proof of second marriage. Moreover, when the priest did not know Sanskrit, how could he perform Saptapadi? Thus, the Court held that the accused husband did not marry again in the lifetime of the respondent-wife for all purposes. Here, the law failed to take notice of the intention of the parties involved in bigamy. The law here pays attention only to formalities of the rites. Therefore, the Court must take notice of the intention of the parties in the observance of whatever ceremonies they went through at the time of the bigamous marriage. That is, this should be a relevant consideration in judging the charge of bigamy. The Tripura High Court and Calcutta High Court have taken this view. When people living around recognise that a man and a woman live as husband and wife, there arises a strong presumption in favour of validity of the marriage.

(2) **Rape, sodomy and bestiality:** Another additional ground available to the wife is the perversion of the husband in case of sex. Definition of 'rape' as given in the Indian Penal Code holds good here. Forced cohabitation with a wife under 16 years of age, or during judicial separation may be regarded as rape. Sodomy is anal intercourse by a man with his wife or with another woman or with a man. Consent of the victim and the victim's age are not relevant considerations here. Bestiality is sex with an animal.

(3) **Maintenance decreed to wife:** Where a decree or order has been passed against the husband awarding maintenance to the wife notwithstanding that (i) she was living apart and that (ii) since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards, a wife on this ground, may present a petition for the dissolution of her marriage by a decree of divorce.

Decree or order of separate residence and maintenance can be obtained under Section 18 of the Hindu Adoptions and Maintenance Act, 1956, and under Section 125 of the Criminal Procedure Code, 1973. The law gives a wife, who obtains such a decree or order, a right to seek divorce if her husband does not resume cohabitation within one year from the date of the decree or order.

When a decree under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 or an order under Section 125 of Cr. P.C. is passed in the wife's favour, it becomes the duty of her husband to pay maintenance to her and he must resume cohabitation within one year. If the husband fails to do so, the wife can seek divorce from the Court.

(4) Repudiation of marriage by wife: After an analysis of clause (iv) of Section 13(2), it becomes clear that a wife can get divorce if-

- (i) at the time of her marriage she was below the age of fifteen years, and
- (ii) after that, but before attaining the age of eighteen years, she has repudiated that marriage.

Consummation of marriage is immaterial here. The Act or the Section does not prescribe or lay down any procedure for the repudiation of marriage. The only means of repudiation of marriage for the wife is to bring this matter to the notice of the Court. As the welfare of the child is of paramount consideration, the Court will take necessary action in the matter.

BREAKDOWN THEORY

Originally, divorce was based on the guilt theory. Divorce could be obtained if one of the parties to the marriage was guilty of a matrimonial offence and the other was innocent. In 1964 by the Hindu Marriage (Amendment) Act, a form of breakdown theory was introduced in Hindu Law by modifying the last two clauses of Section 13 (1), viz., clauses (viii) and (ix). These clauses were renumbered as clauses (i) and (ii) of Section 13(1A). These clauses have been modified by the Marriage Laws (Amendment) Act, 1976 under which the period of two years has been reduced to one year.

Section 13(1A) reads as under:

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

As is evident, either party can seek divorce. The question of guilt or innocence of either party does not arise. This is the crux of the breakdown theory which is evident in the "Statement of Objects and Reasons" appended to the Act. The right to apply for divorce on any one of these grounds should be available to both the husband or wife, as in such a case it is clear that the marriage has proved to be a complete failure. There is, therefore, no justification for making the right available only to the party who has obtained the decree in his or her favour. Thus, the clear intention of the Parliament was that living in separation for a period of one year after obtaining a decree of restitution or judicial separation is a clear proof of failure of marriage or of the fact that marriage has broken down irretrievably, and therefore there is no use in retaining the empty shell. Further, in such a case no

useful purpose will be served in finding out as to which of the two spouses is guilty or innocent. If the two-in-one-ship between the spouses has ended, the marriage should be dissolved at the instance of either party.

CONSENT THEORY

The consent theory is based upon the logic that the marriage is entered into by the parties out of their free will, and hence, they must also be free to put an end to the marriage, if both of them agree. In India, before 1954 it was only the Muslim personal law which allowed parties to a lawful marriage to dissolve their marriage by mutual consent by modes called as Khula and Mubarat. The Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 were amended by the Marriage Laws (Amendment) Act, 1976 which introduced the concept of divorce by mutual consent.

Mutual Divorce under Section 13-B of Hindu Marriage Act, 1955

Section 13 B(1) of the Hindu Marriage Act, 1955 requires the petition for mutual divorce to be filed on the ground that both parties to the marriage 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. These are the only requirements of a petition filed under this provision claiming divorce by mutual consent. Sub-section 2 of Section 13-B provides for the requirements to be fulfilled at the trial. There will be a joint motion by both the parties made not earlier than 6 months after the date of presentation of the petition and not later than 18 months after that date. The motion being made by the parties in this manner, the Court is required to be satisfied, after hearing the parties and making such enquiry as it thinks fit, that marriage has been solemnized and that the averments made in the petition are true. On satisfaction of the Court about these matters, the Court is required to pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree. Some of the legal ramifications in respect of Section 13-B(2) have been examined as under.

Section 13-B(2) is mandatory in form and directory in substance

In **Roopa Reddy v. Prabhakar Reddy** (II (1993) DMC 274), the Division bench of Karnataka High Court categorically said that the intention of the legislature in introducing Section 13-B is to liberalise and unlock the wedlock. The words used in this Section shall have to be read in the context in which the provision has been made by the legislature enabling the unwilling parties to seek divorce instantaneously and thus bring an end to their untold misery. Therefore, the Court observed that the six months period mentioned in the Act may not be strictly complied with. The Court also observed that Section 13-B(2) is directory in nature and it has been incorporated to help two discordant spouses to get quick separation and lead their remaining life without any agony.

Time-Table fixed by Section 13-B(2) need not be followed

In **K. Omprakash v. K. Nalini** (AIR 1986 AP 167), the Andhra Pradesh High Court observed that Section 13-B of the Hindu Marriage Act, 1955, does not prevent the Court from granting immediate relief of divorce, when any amount of persuasion for patching up of differences is impossible. Therefore, it was held that Section 13-B(2), no doubt cautions the Court of its duty to fight the last ditch battle to save the marriage, but when the Court is fully satisfied, on the basis of the proved facts, that in the interest of justice and the society, the individual marriage tie should be put to an end immediately. Therefore, Section 13-B(2) does not impose any fetters on the powers of the Court to grant an instant decree of divorce. At any rate, the Court said the time-table fixed by Section 13-B(2) does not apply to an Appellate Court.

Parties need not wait for six months

In **DhanjitVadra v. Smt. BeenaVadra** (AIR 1990 Delhi 146), while explaining the scope of Section 13-B, the Delhi High Court pointed out that "it is clear that the requirement of a motion within the time specified under Section 13-B(2) is merely a matter of formality and that a decree for divorce by mutual consent can be granted without waiting for a period of six months specified under sub-section (2) Section 13-B, if a Court is satisfied in a case that the requirement of sub-section (1) of Section 13-B is fulfilled. In other words, the time specified in sub-section (2) can be waived, if they have mutually agreed that the marriage should be dissolved as envisaged by sub-section (1) of Section 13-B of the Act."

Order can be passed even after 18 months

In **Santhosh Kumari v. Veerendra Kumar** (AIR 1986 Raj 128), considering the scope of Section 13-B(1) and (2) and the applicability of Order 23, Rule 3 of C.P.C. in matrimonial cases by mutual consent, the High Court of Rajasthan held that the mutual consent in the nature of compromise through Order 23, Rule 3, C.P.C. is not strictly applicable. It was observed that the principle underlying compromise can certainly be invoked in matrimonial proceedings. Regarding the power under Section 13-B(1) and (2) to make a motion for dissolution of marriage, the Court observed that the period mentioned thereunder shall be read as directory and not mandatory. It also held that an order for dissolution can be made even before and after 18 months from the date of presentation of the petition, as the Court would always get jurisdiction to entertain the petition and grant decree of divorce in accordance with law. The above chronicles of judicial reasoning in interpretation of Section 13-B(2) denote that some of the Judges show their readiness or sometimes over-readiness to dispense justice in matrimonial proceedings of mutual divorce. No doubt the concept of Family Court essentially implies that Judges should do away with the traditional adversarial procedure. But it should be remembered that divorce by mutual consent offers a great temptation to hasty and ill-considered divorces. More often than not, parties unnecessarily magnify their differences, discomforts

and other difficulties, which are nothing but problems of mutual adjustments" and rush to divorce Courts leading to irrevocable consequences to the whole family. Moreover the policy in Section 13-B(2) is designed to prevent the sundering of marriage ties for slight or trivial causes. In fact, marriage is a relation in which the public is deeply interested, and is subject to proper regulation and control by the State. As rightly pointed out by the U.S. Supreme Court, "other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities", (Maynard V. Hill, 125 US 190). The legislature in its wisdom rightly prescribed a statutory period of six months for reconciliation of the deserted spouses.

Reasoning for minimum period of six months

After a careful study of Section 13-B of the Hindu Marriage Act, 1955 the legislative intention may be categorically drawn as follows:

- (a) **To get rid off emotional feelings:** Abandonment by one spouse of another may be in a state of temporary passion, disgust or anger or emotion, without any intention to separate permanently. This separation does not amount to 'living separately' within the meaning of Section 13-B. The parties to a divorce petition require sufficient time and opportunity to come out from their emotional trauma.
- (b) **To investigate the matters by the Court:** The word 'satisfaction' of the Court under Section 13-B functionally imposed a legal duty on the Family Court to enquire, observe and investigate the factum of marriage as well as the genuineness of the allegation of the parties of divorce proceedings.
- (c) **To provide conciliation and counselling:** In dealing with disputes relating to family, the Courts ought to adapt a humanistic approach, which is radically different from the ordinary civil proceedings. The role of counselling of the Court is very important. Conciliation and counselling may clarify the issues and problems and help the parties to arrive at a settlement, irrespective of the fact whether the marriage survives or not.
- (d) **To prevent collusion suits:** The purpose of Section 13-B is to accord remedy to the unwilling parties but not to willing spouses to gain their vested rights by any means. It was said that during 1970's when the land reforms were proposed by the Central Government and State Governments, a large number of collusion suits were filed in Matrimonial Courts for mutual divorce, in order to tactfully escape from the clutches of the land ceiling legislations.
- (e) **To intervene by friends and relatives:** No doubt it is not possible to make the unwilling horse to drink, but sometimes desertion may be restored on persuasion, guidance and friendly advice of the kith and kin.

It is submitted that the above cited "objects" of Section 13-B of the Hindu Marriage Act, 1955 cannot be fulfilled in a overnight proceedings. The heavens may not fall on the earth if the divorce proceedings are postponed to six months. But the parties of the divorce proceedings may taste the bitterness of life if they realise their mistake after obtaining the decree of divorce. Therefore, Section 13-B(2) has been properly articulated by visualising the problems and prospects of the parties of the divorce proceedings. In fact, Section 13-B is an irrebuttable presumption which is mandatory in both form and substance.

Divorce under Christian Law

Christians in India belong to three different traditions, viz. (i) Roman Catholics; (ii) Protestants who are the followers of the Church of South India (CSI); and Church of North India (CNI); and (iii) Syrian Christians, who are the followers of Greek Orthodox Churches. Apart from these, there are a large number of Christians among various tribes in the North East Region whose customs and traditions are protected by the Constitution. Among the three traditions, only the Roman Catholic Church considers marriage to be a sacrament and subscribes to the doctrine of indissolubility of marriage. The other two Churches namely the Protestant Churches as well as the Orthodox Churches do not have doctrinal objection of divorce. The early Christian Church (the Eastern Orthodox Church of Syria, Greece etc.) permitted divorce. The theory of indissolubility was evolved later. By the 12th century, the Roman Church formulated the Canon Law regulating marriages and divorce among Christians in Europe. During the industrial era, the Protestant Reformists broke away from the Roman Catholic traditions. The French Revolution led to the separation of the State and the Church in France. In 1880, the French Civil Code (Napoleonic Code) changed marriages from a sacramental status to dissoluble contracts. The doctrine of separation of State and Church and marriages as dissoluble contracts spread all over Europe.

Following this tradition, in 1857 the matrimonial jurisdiction was transferred from the Ecclesiastical Court (Church Courts) to Civil Courts (High Courts) and marriages were construed as dissoluble contracts. Limited grounds for dissolution of marriages were provided under the statute for the first time under the English Law. Prior to that, a divorce could only be obtained through an Act of Parliament, a procedure which was extremely expensive rendering divorces outside the reach of the Commoners.

The English Matrimonial Causes Act, 1857 had been amended in England, as early as 1923, by the Matrimonial Causes Act, 1923 putting the husband and the wife on an equal footing by making adultery an independent ground of divorce for both the parties. The Matrimonial Causes Act, 1937 added three new independent grounds of divorce, viz. desertion, cruelty and insanity and thereby became progressive. The Divorce Reform Act, 1969, was thereafter enacted which made irretrievable

breakdown of marriage to be the sole ground for divorce. This has been replaced by the Matrimonial Causes Act, 1973.

THE INDIAN DIVORCE (AMENDMENT) ACT, 2001

The Indian Divorce (Amendment) Act, 2001 has amended the Indian Divorce Act, 1869 w.e.f. 3-10-2001. The amendments were made after consultations with the leaders of prominent churches in India, Members of Parliament belonging to Christian community and after taking into account the Law Commission's Report and Judgements of Supreme Court and various High Courts. It removes the gender bias against Christian women vis-a-vis their men and brings about uniformity in application of Sections 10,17 and 20 to the entire Christian community in our country. The grounds for dissolution of marriage have been widened for Christian spouses. Mutual consent as a ground for divorce has been incorporated. Certain provisions have been omitted to simplify the procedure and obviate delay and consequential hardships to estranged couples by doing away with the requirement of obtaining confirmation of the concerned High Court for giving effect to divorce decree or decree annulling the marriage. Remarriage has been simplified.

The new Section 10 reads as follows:

"Any marriage solemnized, whether before or after the commencement of the Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or his wife, be dissolved on the ground that since the solemnization of the marriage, the respondent — has committed adultery; or has ceased to be Christian by conversion to another religion; or has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; or has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy (now removed as per Personal laws Amendment Act 2019); or has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent, if the respondent had been alive; or has wilfully refused to consummate the marriage and the marriage has not therefore been consummated; or has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; or has deserted the petitioner for at least two years immediately preceding the presentation of the petition; or 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. A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality".

Divorce by mutual consent:

A petition for dissolution of marriage 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 Indian Divorce (Amendment) Act, 2001, on the ground that they have been living separately for a period of two years or more, that they have not been able to live together and they have mutually agreed that the marriage should be dissolved.

On the motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn by both the parties in the meantime, the Court shall, on being satisfied, after hearing the parties and 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 declaring the marriage to be dissolved with effect from the date of decree (Section 10-A).

DIVORCE UNDER THE SPECIAL MARRIAGE ACT, 1954

Divorce: Section 27(1) reads as follows: "Subject to the provisions of this Act and to the rules made there under a petition for divorce may be presented to the District Court either by the husband or the wife on the ground that the respondent, (a) has after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or (b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or (c) is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code (45 of 1860) ; or (d) has since the solemnization of the marriage treated the petitioner with cruelty; or (e) has been incurably of unsound mind or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation — In this clause —

- (a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;
- (b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the respondent, and whether or not it requires or is susceptible to medical treatment; or
- (f) has been suffering from venereal disease in a communicable form; the disease not having been contracted from the petitioner; or

- (h) 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 the respondent if the respondent had been alive.

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

(I A) A wife may also present a petition for divorce to the District Court on the following ground:

- (i) that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality;
- (ii) that in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956) , or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973 (2 of 1974), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards.

(2) Subject to the provisions of this Act and to the rules made thereunder, either party to a marriage, whether solemnized before or after the commencement of the Special Marriage (Amendment) Act, 1970 (29 of 1970), may present a petition for divorce to the District Court on the following ground: (i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or (ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

Alternate relief in divorce proceedings: In any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the ground mentioned in clause (h) of sub-section (I) of Section 27 (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 the respondent if the respondent had been alive), the Court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation. (Section 27A).

Divorce by mutual consent: Section 28 of the Special Marriage Act, 1954, provides for divorce by mutual consent. It reads as follows: (I) Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the District Court by both the parties

together on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

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

Glossary:

1. *Divorce*: the process of terminating a marriage or marital union.
2. *Mutual Consent*: consent of both the spouses.
3. *Solemnization*: the public performance of a sacrament or solemn ceremony.
4. *Matrimonial*: something pertaining to marriage or marital relation.
5. *Desertion*: the action of deserting a person.
6. *Venereal diseases*: a sexually transmitted disease.

Frequently Asked Questions:

Objective Type

1. Adultery is a ground of divorce available to a Hindu spouse under section _____ of Hindu Marriage Act, 1955.
2. Cruelty as a ground of divorce is available under section _____ of Special Marriage Act, 1954.
3. The Dissolution of Muslim Marriage Act, 1939 is applicable to only _____.
4. Leprosy as a ground of obtaining divorce has been abolished by recent enactment of _____.
5. A person is presumed to be dead if he has been unheard for a period of _____ years.
6. The ground of bigamy to obtain divorce under Hindu Marriage Act, 1955 is available to only _____.
7. _____ Section of Hindu Marriage Act speaks about breakdown of marriage.
8. Divorce by Mutual consent can be obtained under section _____ of Hindu Marriage Act, 1955.

Subjective Type

1. Elaborate the grounds of divorce available under the Hindu Marriage Act, 1955?
2. Discuss the Breakdown Theory of dissolution of marriage.

3. Compare and contrast between the grounds available under Special Marriage Act, 1954 and Indian Divorce Act, 1869.
4. Explain cruelty as a ground for divorce and give instances of cruelty.
5. Explain various grounds exclusively available for a Hindu woman to seek divorce.

Suggested Readings:

1. Family Law in India by G.C.V. Subba Rao., NarendarGogia& Company, Hyderabad.
2. Family Law by Paras Divan and Peeyushi Divan, Allahabad Law Agency.
3. Paras Diwan : Modern Hindu Law, Allahabad Agency, Delhi.
4. Mayne: Hindu Law - Customs and Usages , Bharat Law House, New Delhi.
5. Y.F. Jaya Kumar, Horizons of Family Law in India-Select Essays(2017), Spandana Publications, Secunderabad.
6. Duncan M. Derrett, A Critique of Modern Hindu Law.
7. Poonam Pradhan Saxena, Family Law Lectures, Family Law– II.

MODULE: IV

TALAQ & DISSOLUTION OF MUSLIM MARRIAGE

Structure of Module

1. Different modes of Talaq
2. Ila
3. Zihar
4. Talaq-e-tafweez
5. Khula
6. Mubarat
7. Dissolution of Muslim Marriage Act, 1939.
8. Iddat.

OVERVIEW

This unit helps the students to understand the various forms of Talaq i.e., Divorce under the customary Muslim law. Under the Muslim law marriage is a social contract having all the essentials of the contract and unlike Hindu Law, dissolution of marriage is simple. This unit elucidates the different forms of Talaq i.e. Talaq at the instance of the wife, at the instance of the husband and also delegated talaq.

Divorce under Muslim Law

Prior to Islam, divorce amongst ancient Arabs was easy and of frequent occurrence and the tendency has persisted to some extent in Islamic law. In Islamic law, the husband has been given an absolute power to divorce his wife even without cause. The law is most liberal in this respect. Even a single pronouncement of the word Talaq by the husband is sufficient to operate. He has to give no reason why he is divorcing his wife. The wife remains always unaware of the reason of her being divorced. If the parents of the husband want that he should divorce his wife, the husband can do so by a single pronouncement. The divorce given even in anger is valid. The husband has to observe no formality. No religious ceremony has to be observed. The divorce becomes operative from the moment, it is pronounced. There is no restriction on the right of the husband to pronounce the divorce. He has to pay maintenance to his wife during Iddat only. After Iddat he is not bound to pay maintenance. After the divorce, the wife cannot approach the Court to annul the declaration of divorce pronounced by the husband.

Some restrictions have been put on the exercise of this right. The restriction is of dower. Dower is an incident of marriage. At the time of the marriage, any amount of dower may be fixed. This amount may be heavy. The husband is bound to pay the dower on the dissolution of the marriage. The amount of dower fixed at the time of the marriage is generally so heavy that the husband is unable to pay it. At the time of divorcing the wife, the husband has to think twice since he would have to pay a heavy amount of dower to his wife. But, indirectly it is in fact a check on the husband's right to divorce. The husband may secure the remission of the divorce from the wife either by persuasion or by giving great offerings to the wife. Once the dower amount is paid to the wife, the husband becomes free from all bondages.

However, the Prophet Mohammad disliked the power of the husband to pronounce a divorce unilaterally without assigning any reasons therefor. He is reported to have said that "with Allah, the most detestable of all things permitted is Divorce". At the end of his life, Prophet Mohammad made some reforms that forbid the exercise of divorce by the husband without the intervention of arbitrator or a Judge.

Divorce is not favoured in Islam and is permitted only in exceptional circumstances. Al-Ghazali remarks that divorce in Islam is permissible when the object is not to trouble the wife but only in case of extreme necessity and on just grounds. The behest of Quran regarding separation is:

"Virtuous women are obedient and careful during husband's absence, because God hath of them been careful. But (as to) those for whose refractoriness you fear desertion, admonish them, but if they are obedient, seek not a way against them, verily God is high and exalted. And if you fear a breach between husband and wife, refer the matter to two arbitrators one chosen from the family of each party, if they desire, Allah will effect harmony between them".

The Prophet also discouraged and disapproved divorce except in extremely intolerable circumstances. He warned his followers that (i) "Curse of God rests on him who repudiates his wife capriciously, and (ii) Divorce shakes the throne of God".

According to Ameer Ali, the reforms of Prophet Mohammad marked a new departure in the history of Eastern legislations. The Prophet of Islam is reported to have said "with Allah, the most detestable of all things permitted is divorce", and towards the end of his life he practically forbade its exercise by men without intervention of an arbiter or a judge. The Quran ordains, "...if ye fear a breach between them twain (the husband and the wife) appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment, Allah will make them of one mind". The Quran permits divorce partly because of some countenance to the customs and partly to enable men to get rid of an odious union.

Divorce under Muslim Law in India may be classified into two categories as Non-judicial divorce and Judicial divorce.

I. Non judicial Divorce:

1) Talaq ; 2) Ila ; 3) Zihar ; 4) Talaq-e-tafweez ; 5) Khula ; and 6) Mubarat

II. Judicial Divorce:

1) Divorce under Dissolution of Muslim Marriage Act, 1939

- 1) TALAQ:** Talaq, in its original sense, means repudiation or rejection. But under Muslim Law, it means a release from the marriage tie, immediately or eventually. It is a generic name for all kinds of divorce, but is particularly applied to the repudiation by or on behalf of the husband. In order to pronounce a valid Talaq, the husband must possess the following qualifications. Under Shia Law, every Muslim husband of sound mind, who has attained the age of puberty is competent to pronounce Talaq, provided Talaq is not pronounced in any form of compulsion or duress etc., and is pronounced orally (in the presence of at least two witnesses), unless the husband is unable to speak. The following are the main effects of Talaq under the Islamic law:

- (1) immediately when the divorce becomes irrevocable both the spouses are prohibited not to have sexual intercourse. They can remarry after performing certain formalities;
- (2) in case there have been three declarations amounting to an irrevocable Talaq, the remarriage of the spouses can be performed only after performing the following procedures –
 - * the wife should observe Iddat;
 - * after observing Iddat period, the woman has been lawfully married to a second husband;
 - * the second husband should divorce the woman;
 - * it is obligatory on the part of the wife to observe Iddat of the second marriage;
 - * only after the expiry of Iddat period she can remarry with her first husband;
- (3) in case of death of any spouse during Iddat period the other spouse will have a right of inheritance;
- (4) in case the pronouncement of divorce was irrevocable, neither of them can inherit from the other; It is the duty of the husband to maintain his wife during Iddat period
- (5) After the expiry of Iddat period the husband was under no obligation to maintain his wife. In case the wife was observing Iddat on account of the death of her husband she does not have a right to claim maintenance.

Modes of Talaq: The following are three modes of pronouncement of talaq by the husband.

(1) Ahsan; (2) Hasan; and (3) Talaq-ul-biddat

(1) **Ahsan:** It consists of one single pronouncement in a period of tuhr (purity i.e., when the woman is free from her menstrual courses), followed by abstinence from sexual intercourse during Iddat. This form of talaq is revocable during Iddat.

(2) **Hasan:** It is also an approved form, but less approved than ahsan. It consists of three successive pronouncements during three consecutive periods of purity (tuhr). Each of these pronouncements must have been, made at the time when no intercourse has taken place during that particular period of purity.

(3) **Talaq-ul-biddat:** It is of two forms, i.e. (i) Triple declaration: In this form, three pronouncements are made in a single tuhr, in one sentence by saying talaq, talaq, talaq. Such a talaq is lawful. (ii) Single declaration: In this form, a single irrevocable pronouncement is made either during the period of tuhr or even otherwise and it may be given in writing. The talaq-ul-biddat form is not recognized by the Shia Law.

The divorce is irrevocable in the following situations:

- (a) Talaq Ahsan - on expiry of the period of iddat.
- (b) Talaq Hasan - it becomes irrevocable on the third pronouncement irrespective of the iddat.
- (c) Talaq-ul-biddat - it becomes irrevocable just on its pronouncement irrespective of iddat.

The Muslim Women (Protection of Rights On Marriage) Act, 2019: This Act is popularly known as the Triple Talaq Act. The Act was passed by the Indian parliament. The Act prima facie bans and criminalizes the practice of Triple Talaq amongst the Muslims. The salient features of the Act are as follows:

- I. The Act makes all declaration of talaq, including in written or electronic form, to be void (i.e. not enforceable in law) and illegal.
- II. It defines talaq as talaq-e-biddat or any other similar form of talaq pronounced by a Muslim man resulting in instant and irrevocable divorce.
- III. The Act makes declaration of talaq a cognizable offence, attracting up to three years' imprisonment with a fine. (A cognizable offence is one for which a police officer may arrest an accused person without warrant.)

- IV. The offence will be cognizable only if information relating to the offence is given by: (i) the married woman (against whom talaq has been declared), or (ii) any person related to her by blood or marriage.
 - V. The Act provides that the Magistrate may grant bail to the accused. The bail may be granted only after hearing the woman (against whom talaq has been pronounced), and if the Magistrate is satisfied that there are reasonable grounds for granting bail.
 - VI. The offence may be compounded by the Magistrate upon the request of the woman (against whom talaq has been declared). Compounding refers to the procedure where the two sides agree to stop legal proceedings, and settle the dispute. The terms and conditions of the compounding of the offence will be determined by the Magistrate.
 - VII. Allowance: A Muslim woman against whom talaq has been declared, is entitled to seek subsistence allowance from her husband for herself and for her dependent children. The amount of the allowance will be determined by the Magistrate.
 - VIII. Custody: A Muslim woman against whom such talaq has been declared, is entitled to seek custody of her minor children. The manner of custody will be determined by the Magistrate.
- 2) **Ila:** Where a husband who has attained majority and is of sound mind, swears by God that he will not have sexual intercourse with his wife and leaves the wife, to observe iddat, he is said to make ila. Thus, if a husband says to his wife, "I swear by God that I shall not approach thee", it is a valid ila. Where the husband having made ila abstains from intercourse with his wife for four months, the marriage is dissolved with the same legal results, as if there had been an irrevocable divorce pronounced by the husband.
 - 3) **Zihar:** If the husband (who is sane and adult) compares his wife to his mother or any other female within a prohibited degree, the wife has a right to refuse herself to him until he has performed penance. In default of expiation by the penance, the wife has a right to apply for a judicial divorce.
 - 4) **Khula:** Khula or redemption literally means "to lay down". In law, it means laying down by a husband of his right and authority over his wife. 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 a consideration to the husband for her release from the marriage tie. It signifies an arrangement entered into for the purpose of dissolving a connubial connection in lieu of compensation paid by the wife to her husband out of her property. Khula, in fact, is thus a right of divorce purchased by the wife from her husband. From this definition follow the essentials of khula as under:
 - (i) There must be an offer from the wife;
 - (ii) The offer must be accepted with the consideration (evaz) for the release; and

(iii) The offer must be accepted by the husband.

- 5) **Mubarat:** Mubarat is also a form of dissolution of the marriage contract. It signifies a mutual discharge from the marriage claims. In mubarat, the aversion is mutual and both the sides desire separation. Thus, it involves an element of mutual consent. In this mode of divorce, the offer may be either from the side of wife or from the side of the husband. When an offer mubarat is accepted, it becomes an irrevocable divorce (talaq-ul-bain) and iddat is necessary.
- 6) **Talaq-e-tafweez:** The doctrine of 'tafweez' or delegation of power is an important topic of the Muslim Law of divorce. A husband may, either himself, repudiate his wife or delegate this power of repudiating her to a third party, or even to his wife. Such a delegation of power is called tafweez. An agreement made either before or after the marriage providing that the wife would be at liberty to divorce herself from her husband under certain specified conditions such as in case the husband marries a second wife or fails to maintain her for a specified period, is valid, provided first, that the option is not absolute and unconditional and secondly, that the conditions are reasonable and not opposed to public policy.

II. **Judicial divorce:**

(a) **Dissolution of Muslim Marriage Act, 1939** — The object of the passing of the Act is to consolidate the provisions of the Muslim Law relating to divorce and to remove doubts as to the effect of the renunciation of Islam by a married woman on her marriage. The main provisions of this Act are as under:

(i) **Missing husband:** The wife is entitled to obtain a decree for dissolution of the marriage if the whereabouts of the husband have not been known for a period of four years. But a decree passed on this ground will not be effective for a period of six months from the date of such a decree, if the husband appears either in person or through an authorized agent within that period.

(ii) **Failure to maintain:** If the husband has neglected or has failed to provide for the wife's maintenance for a period of two years, the wife may file a suit for a decree for divorce. In *Fasal Mohammad v. Ummatur Rahim* AIR(1949), it was observed that Section 2 of the Dissolution of Muslim Marriage Act, 1939 does not abrogate the general principles of Mohammadan law. Therefore, before a husband can be said to have neglected or failed to provide maintenance, it must be shown that the husband was under a legal duty to provide such maintenance.

(iii) **Imprisonment of husband:** If the husband is sentenced to imprisonment for a period of seven years or more, divorce may be awarded however no decree can be passed until the sentence has become final by the competent court of jurisdiction.

(iv) **Failure to perform marital obligations:** If the husband fails to perform, without reasonable cause, his marital obligations for a period of three years.

(v) **Impotency:** It must be proved that the husband was impotent at the time of the marriage, and that he continues to be so. But before passing a decree on this ground the Court is bound on, the application of the husband but not otherwise, to make an order enquiring 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. If the husband satisfies the Court so, no decree can be passed.

(vi) **Insanity, leprosy, venereal disease:** If the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease, the marriage can be dissolved on an application by the wife. Leprosy has been removed as a ground for obtaining divorce under the Personal Laws Amendment Act, 2019.

(vii) **Option of puberty:** If the marriage has been performed by the father or grandfather and the wife was under the age of 15 years, the wife has an option of repudiating the marriage until she attains the age of 18, provided that the marriage has not been consummated.

(viii) **Cruelty:** If the husband treats the wife with cruelty, which means that he :

- habitually assaults her or makes her life miserable by cruelty or bad conduct, even if such conduct does not amount to physical ill treatment;
- associates with women of evil repute or leads an infamous life;
- attempts to force her to lead an immoral life;
- disposes of her property or prevents her from exercising her legal rights over it;
- obstructs her in the observance of her religious profession or practice;
- if he, having more wives than one, does not treat her equally.

(ix) **Any other ground under Shariat:** In addition to above mentioned grounds, a Muslim wife is entitled to sue for dissolution of marriage on any other ground which is recognized as valid under the Islamic law.

(x) **Apostasy:** Under Section 4, the renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage, provided that after such renunciation or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on the ground mentioned in Section 2.

IDDAT

Iddat is a period of chastity which a Muslim woman is bound to observe after the dissolution of her marriage by the death of her husband or by divorce, before she can lawfully marry again. This is a period of continence imposed on the woman on the termination of marriage in the interest of certainty of paternity.

The abstinence is imposed on her to ascertain whether she is pregnant by the husband, so as to avoid confusion of the parentage. This is a period by the completion of which a new marriage is rendered lawful. The primary object of Iddat is to impose a restraint on the marriage of the wife for a certain time.

Duration of Iddat:

(i) Iddat of Death:

(a) In the case of a woman who is pregnant at that time, for four months and ten days, or until delivery, whichever period is longer; and

(b) In the other cases, for four months and ten days.

The Iddat of death commences from the date of the husband's death. If the information of the husband's death does not reach the wife until after the expiration of the period of iddat, she is not bound to observe iddat. If the marriage is dissolved by death, the wife is bound to observe the period of iddat, whether the marriage was consummated or not.

(ii) Iddat of Divorce:

Iddat of divorce lasts for three menstrual periods. If the divorced wife is not subject to menstruation for any reason other than gestation, the period of iddat lasts for three lunar months. If she is pregnant at the time, the iddat lasts until delivery, irrespective of whether the period is shorter or longer than three months.

The iddat of divorce commences from the date of divorce. If, however, the information of divorce does not reach the wife until after the expiration of the period of iddat, she is not bound to observe iddat of divorce, and she is free to marry immediately.

Under the Muslim Woman (Protection of Rights on Divorce) Act, 1986, the "iddat" period, with reference to a divorced woman, is defined to be:

(a) Three menstrual courses after the divorce, if she is subject to menstruation;

(b) Three lunar months after her divorce, if she is not subject to menstruation; and

- (c) If she is enceinte (pregnant) at the time of the divorce, the period between the divorce and the delivery of the child, or the termination of the pregnancy, whichever is earlier?

Wife's Rights during Iddat:

1. The wife is entitled to lodging in the husband's house during iddat.
2. She is also entitled to maintenance during the iddat of divorce. Khilwat-us-Sahiha. (Valid retirement)

Glossary:

1. *Talaq* : customary divorce under the Muslim Law.
2. *Talaq e tafweez*: Talaq by delegation.
3. *Quran*: The holy Book of Muslims.
4. *Shariat*: customary Islamic Law.
5. *Talaq ul Biddat*: popularly known as triple talaq; irrevocable talaq in single pronouncement.
6. *Mubarat*: mutual divorce under customary Muslim Law.

Frequently Asked Questions:

Objective Type

1. The Dissolution of Muslim Marriage Act, 1939 is applicable to only _____.
2. After pronouncement of Talaq, a Muslim woman must undergo _____.
3. In _____ form of divorce, the right to pronounce Talaq is purchased by wife.
4. A Muslim man can have _____ number of wives at a time.
5. _____ is the best form of Talaq according to Muslim law.

Subjective Type

1. Discuss the grounds of dissolution of marriage available to Muslim women under the Dissolution of Muslim Marriage Act, 1939.
2. Discuss the various modes of Talaq.
3. Discuss the non judicial kinds of divorce under the customary Muslim law.

Suggested Readings:

1. Tahir Mahmood: The Muslim Law of India, Law Book Company, Allahabad.
2. Aquil Ahmed: Text Book of Mohammadan Law, Central Law Agency, Allahabad.
3. G.C.V. Subba Rao: Family Law in India, S.Gogia & Company, Hyderabad.
4. Asaf A.A. Fyzee: Outlines of Mohammadan Law, Oxford University Press, Delhi.
5. Mulla: Principles of Mohammedan Law.
6. M.A. Qureshi: Text Book on Muslim Law, Central Law Publications, Allahabad.
7. B.R. Varma, Mohammedan Law, Delhi Law House, New Delhi.

MODULE: V

BAR TO RELIEF IN MATRIMONIAL DISPUTES

Structure of Module

- 1. Taking advantage of one's own wrong**
- 2. Collusion**
- 3. Condonation**
- 4. Delay**
- 5. One year Bar**
- 6. Custody of Children**
- 7. Settlement of Matrimonial property / other resources**

OVERVIEW:

This chapter will enable the readers to get acquainted with the bars imposed by the various personal laws on seeking the matrimonial remedies. The bars imposed disable the person approaching the court to avail the matrimonial remedy sought by him / her owing to the wrongs committed on the part of the person approaching the court of law. The law openly states that one who approaches the court should come with clean hands the bars imposed on seeking matrimonial reliefs gives total effect to this principle. Further the unit also deals with the post divorce adjustments such as the custody of children of the separated couple and also settlement of matrimonial property and other resources.

The aggrieved party in a marital relationship is conferred with the rights by the statute to seek various kinds of matrimonial reliefs ranging from restitution of conjugal rights to divorce. However, the said right of the aggrieved party to seek relief is not absolute and there are certain situations and circumstances under which the law itself curtails the remedy available to the party despite the existence of the rights. All the personal law statutes such as Special Marriage Act, 1954, (s. 34); Hindu Marriage Act, 1955, (s. 23); Parsi Marriage and Divorce Act, 1936, (s. 35); Indian Divorce Act, 1869, (ss. 12-14) as amended in 2001 provide for bars to matrimonial relief in the instances of taking advantage of one's own wrong, condonation, collusion and delay.

TAKING ADVANTAGE OF ONE'S OWN WRONG

Section 23(1)(a) of the Hindu Marriage Act, 1955 stipulates that prior to the granting of any decree the court granting such relief must be satisfied that the grounds for the relief exist and the aggrieved party i.e. the petitioner who has approached the court is not taking advantage of his/ her

own wrong or disability to seek such relief. The duty of the court is absolute in the sense that the court has to satisfy itself of the genuineness irrespective of the fact whether the proceedings are defended by the defendant or not.

In the case of **Balwinder Kaur v. Hardeep Singh** (AIR 1998 SC 764), the wife was successful in duping the husband and obtaining his signatures on the divorce papers, the case proceeded *ex parte* and granted *ex parte* divorce. The Supreme Court in this case held that the grant of *ex parte* divorce by the lower court without satisfying itself as per s. 23 was not proper.

In the case of **Vijaya Lakshmi Devi v. Gautam Mishra** (AIR 2010 Pat 56), a husband filed a petition for restitution of conjugal rights with alternative relief for divorce on the ground of desertion. The wife remained *ex parte*. The court held that the absence of the wife would not absolve the husband to discharge the burden for making out a case for divorce.

The requirement of law is based on the doctrine of sincerity and on the legal maxim that one who comes to the court should come with clean hands. While the provisions in the other statutes are not as explicit but it is implied.

In **Mohan Lal v. Mohan Bai**, (AIR 1955 Raj 71), a wife sought divorce on the ground of husband's second marriage. The husband contended that the wife was not living with him and was living separately. It is the fact of separation that he was compelled to marry for the second time and that his remarriage was the consequence of his wife's fault and that she cannot take advantage of her own fault. The court rejected the contention and held that the wife did not commit any wrong by living separately from her husband and the said act would not constitute wrong under s. 23 of the Hindu Marriage Act, 1955.

In the case of **Kanchan Sahu v. Premananada Sahu** (1999 AIHC 68 (Ori.)), a family court granted an *ex parte* divorce decree to the husband on the ground of the wife's desertion, without considering the factors which compelled her to leave the matrimonial house. On appeal, the case was remanded for fresh decision. The wife's allegation was that she was compelled to leave the house due to the husband's ill-treatment, who had also kept a mistress in the house. The High Court held that in these circumstances, the husband cannot blame the wife for leaving him. 'This will amount to giving a premium to the husband for his wrongful act,' the court observed.

However, it is the court which is the best judge of circumstances and conduct of the parties and hence would decide according to the demands of justice, expediency and equity in the case; nonetheless an element of subjectivity cannot be ruled out and different judges may have different perspective with regard to the same set of facts.

COLLUSION

Collusion is an agreement or understanding between the parties or their agents, to present or prosecute a petition, either positively, by putting forward true facts in support of a false case or false facts in support of a true case, negatively, to suppress facts which would prevent or tend to prevent the court from granting a divorce. It is an illicit secret understanding to which, parties who are jointly furthering a common object, assume the semblance of hostility. In collusion the parties take advantage of the legal machinery in furtherance of their motives. Collusion always has an element of misrepresentation, clandestine motive, suppression of facts and an attempt to play fraud upon the court and the legal process. In matrimonial proceedings when a proceeding is initiated or conducted by an agreement or understanding between the parties, it is collusion, the collusion may be express or implied.

With respect to the collusion s. 23(1)(c) of the Hindu Marriage Act, 1955 and also the s.34 of the Special marriage Act, 1954 states that before granting relief under the acts, the court must satisfy itself that the petition is not presented or prosecuted in collusion with the respondent. Further, s.47 of the Indian Divorce Act, 1869 provides that 'every petition under this Act for a decree of dissolution of marriage, or of nullity of marriage, or of judicial separation shall state that there is not any collusion or connivance between the petitioner and the other party to the marriage.' Likewise, under s. 35(b) of the Parsi Marriage and Divorce Act, 1936, the court, in any suit for nullity, dissolution or divorce, has to satisfy itself that the husband and wife are not colluding together. This provision applies even in undefended cases.

Collusion as a bar to matrimonial relief has been provided, to safeguard the administration of those conditions on the fulfillment of which alone, the marriage tie can be dissolved. Its object is to ensure, as far as possible, that nothing but the truth shall be laid before the court, and that no matrimonial facts shall be hidden from its consideration. Failure to plead absence of collusion, however, is not fatal to a petition. Thus, where a wife sought dissolution of her marriage where her 'husband' already had a spouse living, without pleading absence of collusion, it was held that she would be entitled to relief if there is otherwise enough proof to satisfy the conscience of the court that there was no collusion.

In the case of **Janardhan Rao v. M. Aruna Kumari** (AIR 2000 AP 127), a wife filed a petition for judicial separation, which was resisted by the husband. However, in order to put an end to the tension, he indicated in his written statement that he had no objection to it. After making all efforts at reconciliation, the decree was passed. When, after a year, the husband sought divorce under s. 13(1A)(i), the wife resisted the same. The family court rejected the husband's petition on the ground that the decree of judicial separation was without contest, and literally a consent or collusive decree.

On appeal, however, relying on *Saroj Rani v. Sudershan Kumar*, the court held that a consent decree, per se, cannot be treated as collusive in matrimonial matters.

CONDONATION

Condonation constitutes an important bar under almost all the personal law statutes. Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. Thus, when a spouse condones a matrimonial lapse of the other, then he or she cannot later seek relief on that ground.

Under s. 34(b) of the Special Marriage Act, 1954, it is laid down that when adultery or cruelty is condoned by the petitioner; he/she is not entitled to any relief on those grounds. Under ss. 13 and 14 of the Indian Divorce Act, 1869, amended in 2001, no relief is available to a petitioner on the ground of adultery of the respondent, if such adultery has been condoned. The Hindu Marriage Act, 1955, vide s. 23, provides that in a petition for judicial separation or divorce on the ground of respondent's adultery or on the ground of cruelty, no relief would be available when the adultery or cruelty has been condoned.

Condonation consists of two aspects namely 1. Forgiveness and 2. Restoration. There is to be both, a factum of reinstatement; and a clear intention to forgo and remit the wrong. In the case of **Arun Kumar Bharadwaj v. Anil Bharadwaj** (AIR 1993, P&H 33), divorce was sought by a husband on the ground of the wife's adultery, and it was alleged that the parents of the wife were called and they assured that there will be no such lapse by their daughter in future, and thereupon the parties lived together, it was held that the alleged offence been condoned.

In **Tapan Kumar v. Jyotsna** (AIR 1997 Cal 134), a wife filed criminal cases and a maintenance suit against her husband. However, there was a compromise, and the parties lived together for over a year. In the husband's petition for divorce on the ground of cruelty, it was held that he could not take the plea of cruelty committed before the compromise, because such cruelty, if any, stood condoned.

DELAY

Delay in filing a suit for matrimonial relief is another bar in matrimonial litigation. It is, however, not any delay, but only unnecessary and improper delay, which would operate as a bar. The idea is that the offended spouse should not be allowed to hold his weapon, i.e., the ground which entitles him/her to relief, over the head of the other party for an unlimited or unreasonable period.

All the matrimonial law statutes provide that a matrimonial petition should be presented without unnecessary and improper delay. Thus, under s. 14 of the Indian Divorce Act, 1869, 'the court shall not be bound to pronounce ... decree if it finds that the petitioner has ... been guilty of unreasonable delay in presenting or prosecuting such petition... .' Section 35 of the Parsi Marriage and

Divorce Act, 1936, provides that relief can be decreed only when the court is satisfied that, inter alia, '(save where a definite period of limitation is provided by this Act) there has been no unnecessary or improper delay in instituting the suit.' The wordings of s. 34(e) of the Special Marriage Act, 1954, and s. 23(d) of the Hindu Marriage Act, 1955, are the same viz., 'there has not been any unnecessary or improper delay in instituting the proceeding.' Thus, it is unnecessary or improper delay only, which would be a bar under the Parsi Marriage and Divorce Act, 1936, Special Marriage Act, 1954 and Hindu Marriage Act, 1955 against the petitioner filing a suit. The Indian Divorce Act, 1869 refers to unreasonable delay. However, in this context, this includes unnecessary and improper delay and hence is practically no different from the other Acts.

In **Nijhawan v. Nijhawan**, (AIR 1973 Del 200) a petition for annulment of marriage, filed 13 years after the marriage, on the ground of husband's impotence was allowed, because of the conditions of the society and the traditions of the families to which the parties belonged.

In **Jyotsnaben Ratilal v. Pravin Chandra Tulsidas**, (AIR 2003 Guj 222) a husband's petition for annulment of the marriage on the ground of wife's impotency, six years after marriage, was held not to be barred. The husband waited that long in the hope that medical science may find some cure. The delay was held not to be unnecessary or improper.

In **Shakuntala v. Amar** (AIR 1982 P&H 221), marriage was sought to be annulled five years after the marriage, on the ground that consent was obtained fraudulently, and the delay was not properly explained, the petition was held to be barred.

In **Gurmit Kaur v. Buta Singh** (AIR 2010 NOC 440 P&H), It was held that a petition for declaration of marriage as null and void, however, cannot be rejected on ground of delay and laches. Marriage being void (in this case on ground of bigamy) from inception, no amount of delay can stand in the way of obtaining a declaration of nullity.

ONE YEAR BAR

It is a matter of public policy to ensure that fair trial is given to a marriage, and parties do not take recourse to judicial proceedings in haste and the ship of marriage may not be wrecked in the first storm of married life. A petition for divorce within one year of marriage is barred. The Hindu Marriage Act, 1955 and the Special Marriage Act, 1954, (the wordings of the sections are more or less the same) provide that as a matter of general rule, no petition for divorce shall be entertained by a court, if it is presented within one year of the marriage. (Prior to the Marriage Laws (Amendment) Act, 1976, this period was three years). The exception to the rule of one year has been made in cases where there exists 1. Exceptional hardship to the petitioner; 2. Exceptional depravity on the part of the respondent. If the court is satisfied that these circumstances exist then it can allow the filing of the petition for divorce even before the expiry of one year from the date of marriage.

In the case of **Priya v. Sanjay Gaba** (2004 (1) HLR 640), the parties were just two months short of the statutory requirement under s. 13-B (divorce by mutual consent). They sought waiver on the plea that the parents of the girl had already found a match for her and he was to go abroad and if the period was not waived it would cause them great hardship. While the trial court refused, the High Court granted the request.

In **Ravulaapalli Yogamma v. Thellarnkak Venkata Ratnam** (AIR 1998 AP 371), a wife filed an application seeking annulment of the marriage, alleging non-consummation owing to husband's impotence. The trial court rejected her case on the ground that it was filed within one year of marriage and so not tenable. Her review application before the same court was turned down, hence the appeal. Accepting the appeal, the court held that the section applies to cases where marriage is sought to be dissolved by a decree of divorce, and not where a marriage is sought to be annulled on prescribed grounds.

CUSTODY OF CHILDREN

Guardianship and custody of children is an important component of matrimonial relationships. The subject assumes greater significance when parents fall out and battle in courts over the custody of their children.

All the personal law matrimonial statutes make provisions for dealing with the issue of child custody.' The provisions in the matrimonial Acts can however, be invoked only when there are some proceedings pending under the Act. The Hindus have an additional Act viz., the Hindu Minority and Guardianship Act, 1956. Apart from this there is the Guardians and Wards Act, 1890. This is a secular law for appointment and declaration of guardians and allied matter, irrespective of caste, community or religion, though in certain matters the court will give consideration to the personal law of the parties - The provisions of the Hindu Minority and Guardianship Act, 1956 (and other personal laws) and the Guardians and Wards Act, 1890 are complementary and not in derogation to each other, and the courts are obliged to read them together in a harmonious way.

In determining the question of custody and guardianship, the paramount consideration is the welfare of the minor. The word 'welfare' has to be taken in its widest sense and must include the child's moral, as well as physical well-being, and also have regard to the ties of affection.

In **Kirtikumar Joshi v. Pradip Kumar Joshi** (AIR 1992 SC 1447), custody of two minor children was sought by father as also by maternal uncle. Mother of the children died an unnatural death and the father was facing charge under section 498-A of the IPC Children were staying with the maternal uncle and they also expressed their desire to stay with him and not with the father. The court granted custody in favour of maternal uncle.

In **Ravi Dadu v. Seema Gupta** (AIR 2007 (NOC) 11 (Del)), a female child was living with her mother and step-father since 10-12 years. On father's application for visitation rights, the court held that the child need not be forced to meet her real father. The High Court, however, directed that if the child, on her own, wishes to communicate and meet her father, she may do so unhindered by any of the parties.

A very significant judgment was delivered by the Supreme Court in **Githa Hariharan v. Reserve Bank of India and Vandana Shiva v. J. Bandhopadhyaya**, (AIR 1999 SC 1149) where s. 6(a) of the Hindu Minority and Guardianship Act, 1956, and s. 19(b) of the Guardians and Wards Act, 1890, were challenged as being violative of Arts. 14 and 15 of the Constitution of India, since the mother is relegated to an inferior position. In *Githa Hariharan*, the parents of a minor applied to the Reserve Bank of India for relief bonds in the name of their son. In the application, they stated that the mother would act as the guardian of the child for purposes of investments made with the money. Accordingly, in the prescribed form, the mother signed as the guardian. The bank refused to entertain the application, and asked the parents to produce the application form signed by the father, or a certificate of guardian-ship from a competent authority, in favour of the mother. Against this, the mother filed a petition in the court. In *Vandana Shiva*, divorce proceedings were already pending and the father prayed for the custody of their son. He, allegedly, was repeatedly writing to the petitioner asserting that he being the only natural guardian of the child, no decision pertaining to the child should be taken without his permission. The petitioner, consequently, moved the Supreme Court challenging the above mentioned provisions of the Hindu Minority and Guardianship Act, 1956 and the Guardians and Wards Act, 1890, as being unconstitutional.

Hearing both the petitions together, the Court observed that the wording of s. 6(a) of the Hindu Minority and Guardianship Act, 1956—the father and after him the mother—do give an impression that the mother can act as a guardian only after the lifetime of the father. However, instead of striking down this section, as also s. 19(b) of the Guardians and Wards Act, 1890 as unconstitutional, it chose to construe them in a manner, in which they would not offend the constitutional mandate of equality and non-discrimination. According to the court, the Constitution of India, which came into being in the year 1950, prohibits gender discrimination, and the Hindu Minority and Guardianship Act, 1956 came six years later. The Parliament could not have intended 'to transgress the constitutional limits or ignore the fundamental rights guaranteed by the Constitution of India, which essentially prohibits discrimination on grounds of sex.' Adopting the rule of harmonious construction, it held that the word 'after' in s. 6(a) of the Hindu Minority and Guardianship Act, 1956 need not necessarily mean 'after the lifetime' but, 'in the absence of.' If the father is not in charge of actual affairs of the minor, either because of his indifference, or by virtue of mutual understanding between the parents, or because of some physical or mental incapacity, or because he is staying away from the place where the mother and the minor are living, then, in all such situations, the father can be

considered as 'absent' under the provisions of both the above mentioned statutes, and the mother, who in any case is a recognized natural guardian, can act validly on behalf of the minor as the guardian. The predominant consideration in every case, however, would be the welfare of the child. This ruling of the Supreme Court will solve problems of many mothers, who are practically in charge of the affairs of their minor children, and who face harassment and embarrassment from various authorities, who insist on father's signatures. However, a question which still remains open is, what if the father and mother, along with the child, are living together and the father is not 'absent' within the meaning of the term as defined by the court? Did the court intend to give complete equality to both the parents in the matter of guardianship, in which case it would mean either/or, mother/father? However, since the court in the present case, has delved only on the interpretation of the word 'after', the primary clause under which the mother would be the guardian, only 'after' the father, still stands. The only change the judgment has made, is that it has given an extended meaning to the word 'after', to include several situations. It has not conferred equal guardianship right on the mother.

SETTLEMENT OF MATRIMONIAL PROPERTY / OTHER RESOURCES

One of the key consequential issues after the dissolution of marriage pertains to the division of matrimonial properties and matrimonial home. The personal laws very rarely touch upon this aspect and currently there are no strong or concrete laws in force to regulate this aspect. S. 27 of the Hindu Marriage Act, 1955, provides for disposal of property presented at, or about the time of marriage, 'which may belong jointly to both the husband and the wife'.

In the case of **B. R. Kadam v. S. B. Kadam** (AIR 1997 SC 3562), the Supreme Court construed the expression 'at or about the time of marriage,' more liberally to include even property given before or after the marriage, provided it is relatable to the marriage. It however, reiterated that such property should belong jointly to both the spouses. However, a wife who had claimed certain jewellery, stating that she had received the same, 'at or about the time of marriage,' was refused the relief, as according to the court, there was no proper trial to establish that the jewellery belonged jointly to both the spouses. The matter was accordingly sent back to the family court.

Similarly, in **Manjit Kaur v. Inderjit Singh** (AIR 1999 P&H 196) where the wife made an application claiming an amount on account of jewellery, silver coins and cash given to the husband in dowry, and the same was allowed by the trial court, the High Court 'in appeal' set aside the order. It held that the two pre-conditions under the section are: (i) property should have been presented at, or about the time of marriage; and (ii) it should be held jointly by both. In this case, since there was no evidence to show that the jewellery, cash or silver coins were held jointly by the spouses, the wife's application under s. 27 was dismissed.

In **Bharat Heavy Plates and Vessels Ltd.** (AIR 1985 AP 207), the spouses were living in a quarter allotted to the husband by his company. When differences arose, the husband vacated the

quarter and wrote to the company to terminate the lease. The wife sought injunction, restraining the company from evicting her. The same was granted. The husband and the company had both recognised the quarter as the matrimonial home where the wife too was living. The amount of rent was directed to be deducted from the salary of the husband.

In **Ajit Bhagwandas Udeshi v. Kumud Ajit Udeshi** (AIR 2003 Bom 120), the issue was, whether in maintenance proceedings by a wife, the court can award tenanted residential premises in her favour. The husband had obtained a divorce on the ground of wife's desertion. The family court granted alimony of Rs. 1,000 per month, and the rented residential premises, in favour of the wife. The husband objected to the latter. The court held that even though the accommodation was rented in the name of the husband, a substantial amount towards pagdi was paid by the wife; and secondly, the husband was not staying in that house but was residing else-where, whereas the wife had no alternate accommodation. The court observed that the wife cannot be left without shelter, and dismissed the husband's appeal.

Frequently Asked Questions:

Objective Type

1. A party who has condoned an act of cruelty cannot seek divorce on the ground of _____.
2. The statutory time period of _____ must lapse before filing a petition for divorce.
3. Githa Hariharan's case is a landmark judgement on _____.
4. _____ is the paramount consideration while awarding the custody of a child.
5. Section _____ of the Hindu Marriage Act, 1955 deals with the disposal of property presented at or about the time of marriage.

Subjective Type

1. Discuss the various bars to matrimonial reliefs available under various personal laws.
2. Discuss the point of law as laid down in Gita Hariharan's case.

Suggested Readings:

1. Kusum, Cases and Materials on Family Law, Universal Law Publishing.
2. Paras Divan and Peeyushi Divan, Modern Hindu Law, Allahabad Law Agency.
3. Paras Divan, Law of Marriage and Divorce: A Comprehensive Treatise on matrimonial laws of all the Indian communities including Hindus, Muslims, Christians, Parsis and Jews, Universal Law Publishing Co.

.....

CHART – I
REQUIREMENTS OF A VALID MARRIAGE

	Hindu Marriage Act, 1955	Muslim Personal Law	Christian Marriage Act, 1872	Parsi Marriage & Divorce Act, 1939	Special Marriage Act, 1954
1. Who can marry?	Both parties must be Hindus (Sec. 5)	Both parties Muslims or a Muslim man & Kitabia (follower of a religious book)	Only one-party need be a Christian (S. 4)	Both must be Parsis (S.3)	Any two persons belonging to any communities or religious (S.4)
2. Marriage is regarded as	A samskara and a contract	A civil contract	A sacrament	A sacrament	A civil contract
3. Age of Marriage	Boy – 21 yrs; Girl – 18 yrs	Age of puberty (15 yrs) for boy or girl	Boy-21 yrs, Girl – 18 years	Boy-21 yrs; Girl – 18 yrs	Boy – 21 yrs Girl- 18 yrs.
4. Permissible no. of spouses for husband and wife	One wife; One husband	Maximum four wives; one husband.	One wife; one husband	One wife; one husband	One wife; one husband.
5. Consent of the parties	Must be of a sound mind to give valid consent (mental capacity).	Insane person can marry with the consent of the marriage guardian.	Idiocy or lunacy ground for declaring nullity.	Unsoundness of mind ground for divorce.	Unsoundness of mind, insanity or epilepsy, marriage is void.
6. Prohibitions	Relationship by blood or affinity; prohibition on account of Sapinda Relationship (unless custom provides)	Consanguinity, affinity and fosterage.	Consanguinity & affinity	Consanguinity & affinity set forth in Schedule I.	Except custom, Schedule-I – Part I, Part II, Prohibited degree of relationship.
7. Registration	Compulsory	Not compulsory	Compulsory	Not compulsory	Automatic & Compulsory
8. Ceremonies	As per custom: Homa, Saptapadi, Kanyadan, etc.	Proposal & acceptance, two witnesses.	Ministers of religion & marriage registrar.	Ashirwad ceremony priest, two Parsi witnesses.	Civil ceremony, notice by marriage officer, 3 witnesses.

CHART – II
RESTITUTION OF CONJUGAL RIGHTS

	Hindu Marriage Act, 1955	Muslim Personal Law	Christian Marriage Act, 1872	Parsi Marriage & Divorce Act, 1939	Special Marriage Act, 1954
1. Historical Origin	No provision historically introduced during British Raj.	No provision historically introduced during British Raj.	Came to England from Jewish Law, Ecclesiastical Courts enforced restitution by ex-communication Statute of George III recognized it.	--	--
2. Who may apply?	Either husband or wife under Sec.9	Technically husband or wife but usually husband if wife applied husband can resort to Talaq.	Either husband or wife (S.32)	Husband or wife (S.36)	Husband or wife (S.22)
3. On what grounds?	For withdrawal from society of the other – without reasonable cause.	Neglecting to perform obligations imposed by law or contract of marriage without lawful ground.	For withdrawal from society of the other without reasonable cause.	For deserting & ceasing to cohabit with the other without reasonable cause.	For deserting & ceasing to cohabit with the other without reasonable cause.
4. What is the defence available	Lack of reasonable cause for withdrawal.	Grounds of batil (void marriage) and fasid (irregular marriage) and grounds under Dissolution of Muslim Marriage Act.	Ground for judicial separation of nullity of marriage alone (S.33)	Lack of lawful cause for withdrawal.	Lack of reasonable cause for withdrawal.

* A decree for Restitution of Conjugal Rights may be enforced under Rule 32, Order 21 of the CPC by attachment of property and also under Rule 33 by ordering periodic payment of money for non compliance which ultimately recoverable as if it were payable under a decree for payment of money.

* See. T. Saritha v. T. Venkatasubbaiah (AIR 1983, A.P. 356); Harvinder Kaur v. Harmandar Singh (AIR 1984, Del. 66).

CHART – III
NULLITY OF MARRIAGE

	Hindu Marriage Act, 1955	Muslim Personal Law	Christian Marriage Act, 1872	Parsi Marriage & Divorce Act, 1939	Special Marriage Act, 1954
1. No. of Spouses	If either party has a spouse living.	Taking a fifth wife.	A former marriage was in force (Sec. 18 & 19 of IDA, 1869).	--	If either party has a spouse living at the time of marriage. (S.24)
2. Subsisting Relationship	If the parties are sapindas or within prohibited degrees (unless custom permits)	Consanguinity, affinity, fosterage, marrying wife's sister.	Parties are within the prohibited degrees of consanguinity or affinity (S.18 & 19 of IDA, 1869)	If the parties are within the prohibited degrees of consanguinity or affinity (S.3)	If the parties are within prohibited degrees of marriage.
3. Ceremonies	If requisite ceremonies as per custom are not performed (S.7)	Not performed before two witnesses.	---	If necessary formalities of marriage are not performed (S.3)	Absence of Registration
4. Capacity of the party	Incapacity to give valid consent (S.12(b) R/w. S.5).	---	Idiocy/ lunacy at the time of marriage (S.18 & 19 of IDA)	----	Unsoundness of mind, insanity or epilepsy (S.24)
5. Age	--	---	Less than 18 (S.60 CMA) & guardians consent absent	If less than 21 & guardians consent absent (S.3)	Bride below 18 yrs and bridegroom below 21 yrs (S. 21 R/w. S.4)
6. Impotency	Failure to consummate (S.12A)	Irregular (Faaid)	Respondent was impotent at the time of marriage and at the time of institution of the suit (Sec. 18 & 19)	If either party was impotent (S.30)	Respondent was impotent (S.24) Non consummation on account of wilful refusal.
7. Consent	If obtained by force or fraud.	---	If consent obtained by force or fraud.	---	If obtained by force or fraud (S.25) or where incapacity to consent exists. (S.24)
8. Pre- Marriage Pregnancy	Respondent's pregnancy at the time of marriage (S.12(a))	---	---	---	Pre-marriage pregnancy (S.25)

CHART – IV
JUDICIAL SEPARATION

Hindu Marriage Act, 1955 S. 10 R/w. S.13	Indian Divorce Act, 1869 S. 22-26 R/w. S.32	Parsi Marriage & Divorce Act, 1939 S.34 R/w. S.27	Special Marriage Act, 1954 S. 23
1. After solemnization of marriage has voluntary sexual intercourse with person other than his or her spouse.	Adultery	Adultery, Fornication, bigamy, rape or unnatural offence (Suit within 2 yrs)	After solemnization had voluntary sexual intercourse with any person other than his/ her spouse.
2. Cruelty	Cruelty	Cruelty or bad behaviour as left to the court.	Cruelty
3. Desertion for a continuous period of (two) 2 years.	Desertion for 2 yrs	Desertion for 3 yrs.	Desertion for a continuous
4. Conversion and ceased to be a Hindu.	-----	Apostacy (suit within 2 yrs)	----
5. Unsound mind (cannot reasonably be expected to live together).	-----	Unsound Mind	Unsound mind (cannot reasonably be expected to live together)
6. Venereal diseased in communicable form.	-----	Caused grievous hurt or infected with VD or compelled wife to submit to prostitution.	VD in a communicable form.
7. Renounced the world by entering any religious order.	-----	----	-----
8. Has not been heard of being alive for a period of 7 yrs or more.	-----	----	Has not been heard of being alive for a period of 7 yrs or more by

			persons who would have normally have heard.
9. --	-----	Imprisonment for 7 yrs for an offence under IPC (in prison for atleast 1 year)	Imprisonment for 7 years or more for an offence under IPC.
10. --	----	Non consummation for 1 yr.	----
11. --	-----	Pregnant by another, suit within 2 yrs., no intercourse after knowledge.	----
12. ---	----	Non compliance with decree for restitution of conjugal rights for 1 yr.	----
14. for wife only: any other wife or husband alive.	-----	-----	-----