CHAPTER III

DIVORCE UNDER THE HINDU MARRIAGE ACT, 1955 — a critical assessment

The concept of divorce, though not alien to the Hindus, is not an easily acceptable one. This has been discussed at length in the previous chapter. However the non acceptance of the concept of divorce neither meant its non existence, nor did it mean that the situations akin to divorce did not arise. This perhaps was the reason why the system gained recognition eventually. Hinduism expressly recognised monogamy, but that remained confined to the text books only. Wives could be cast away for no reason at all. But gradually, as the women became aware of their rights, the concept of marriage no longer remained a matter of domination of the husband over the wife and the society had to concede the right of divorce to women. Therefore, when there is a marriage, divorce must be conceded per se.

This chapter is a critical analysis of the laws regarding divorce under the Hindu Marriage Act, 1955. The relevance of this critique is vital to the understanding of the subtle legal nuances of divorce laws but it will also be a help in the understanding of the socio-psychological and economic aspects of the divorce cases and the analysis thereof presented in the subsequent chapters and also will serve as a background.

It cannot be denied that the society is generally interested in maintaining the marriage bond and preserving the matrimonial state with a view to protecting social stability, the family, home and proper growth and happiness of children of the marriage. Legislation for the purpose of dissolving the marriage constitutes a departure from that primary principle and the legislature is extremely circumspect in setting forth the grounds on which the marriage may be dissolved. The history of all matrimonial legislations will show that the onset of conservative attitudes influenced the grounds on which separation or divorce could be granted. Over the decades, a more liberal attitude has been adopted, fostered by a recognition of the need for the individual happiness of the parties involved. But although the grounds for divorce have been liberalised, they nevertheless continue to form an exception to the general principle favouring continuation of marital tie[1]. This is inevitably so. The history of matrimony itself in the recent past has been a movement from the ritualistic and sacramental to equalisation and contractual, even as the history of relationship between the sexes has been a movement from male dominance to equality between the sexes, even though economic and social equality between the sexes appear to be a distant goal. Economic instability and insecurity appear to be the root cause for not succeeding in our aim of equality between the

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1. Per R.S. Pathak J (as he then was) in Reynold Rajamoni Vs Union of India and another, AIR 1982 SC 1261.

the sexes. Society still looks askance at a divorced woman. She is yet a suspect and her chances of survival is further diminished by her divorce. Every divorce solves a problem and creates several others[2].

Marriage is an alliance between man and woman and is recognised in law. The first essential of marriage therefore is the formation of an alliance, and the second essential is that such an alliance must be recognised in law. The legal recognition is dependent on the law and custom to which the parties were subject, the prescribed rules and ceremonies of that law. In its solicitude for upholding marriages, the law permits every community to follow its own notions of a valid marriage. It even presumes that it has been performed with requisite sanction of custom. Even the Hindu Marriage Act can be overridden if a custom can be proved. According to Dr. Hari Singh Gaur, remarriage of wives come within the purview of Customs[3]. He believes that even Manu allows the wives to remarry under conditions of de facto divorce when the husband is not heard of for a long time[4]. There is however no clear mandate to this effect in the text of Manu, such remarriages are the only logical conclusion that can be drawn from the Verse[5]. Narada, Gautama,

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2. Per O. Chinnappa Reddy J. in Reynold Rajamoni Vs Union of India and Another, AIR 1982 SC 1261 at page 1265, para 14.

3. Dr. Hari Singh Gaur, The Hindu Code, Pages 223-224, Volume I, Law publishers (1974).

4. Ibid at page 234.

5. Manu Smriti. Chapter IX, Verse 76. For a detailed translated text see G. Buhler, The Laws of Manu, Motilal Banarasidas (1964). For original text see Kullaka Bhatta, Manu Smriti Motilal Banarasidas (1983).

Vasistha all have given a clear mandate to the wife to marry again after the prescribed waiting period if the husband is unheard of for a long time[6]. Among the lower castes and other custom ridden societies remarriages of wives are very common. This was so in the medieval society also, but among the upper caste during those days, the men often remarried but divorce as such was unacceptable.

Tolerance, adaptability, adjustment are all synonymous with Hinduism because the Hindu philosophy is so fluid in nature that it very easily moulds itself with the changing times. However, surprisingly enough, we adhere to the teaching of Manu with a zeal bordering on fanatism. Though I am at a loss to understand this, it is very clear to me that ever since the days of Manu, the society had to bow to the inevitable and accept the dissolubility of marriage. Once divorce was recognised and conceded, it has taken the form of a right today[7].

Perhaps the earliest legislative sanction for divorce in India came in the form of Native converts Marriage Dissolution Act, 1866, under which the conversion of a Hindu male or female into Christianity was treated as a ground for dissolution of marriage. The first legislation in respect of dissolution of marriage among the Hindus was very probably enacted in the year 1920 in the State

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6. Narada, Chapter XII Verse 97; Gautama, Chapter XXII Verses 15, 17; Vasistha, Chapter XVII Verse 78. Also see Bhagbat N Deshpandey "Divorce And Hindu Smriti" AIR 1934 Jour 20. Also K.N. Chatterjee, Hindu Marriage Past and Present, Tara Publications, Varanasi (1972).

7. This aspect has been discussed at length in the first Chapter of this work.

of Kolhapur. This was the first tentative step towards widening the door of divorce for the women. In the State of Baroda, a Divorce Act, 1931 was passed for the Hindus which gave the right to divorce to both the husband and the wife equally. Close at its wake came the Madras Act, 1933, legislated similarly on the line of the enactment of the State of Baroda. However even though a new right was bestowed on women, the judicial recognition of the right took a long time in coming.

It should be noted here that Divorce as a customary law was present in the Hindu society since the ancient times. The scriptural canons only reflected the ideal for emulation by the elite and members of the upper caste. Modern laws however universalised this social phenomenon for all members of the Hindu Society.

The Hindu Marriage Act, 1955, was the first serious and comprehensive legislative step in the matter of marriage and divorce. The Hindu Marriage Act, under Sections 13 and Section 13B enumerates several grounds for divorce under which the Hindu man and woman may seek divorce.

The Hindu law allows divorce for cruelty, desertion, adultery, unsoundness of mind et al. But such dissolutions are by no means easy or automatic. There is not the slightest doubt that whatever sympathy a judge may have for the difficulties of a particular spouse

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8. The text of the statutory provisions and the grounds for divorce shall be discussed at relevant places in this chapter.

or couple, he will not facilitate their separation or a divorce otherwise than in complete accordance with the policy of the Hindu Marriage Act, which does not by any means provide for termination of duties reciprocally of a married pair to suit their personal claims and prejudices[9]. It is of interest to the nation that marriages should be stable, and matrimonial relief is available under that fundamental understanding[10]. This has gained further importance in view of a number of cases that have been started by the spouses who have never come to grips with the realities and have trumped up preposterous charges against each other. Since subsistence of the marriage is the concern of the country and not the individual spouses alone, the courts have been placed under a positive duty to attempt reconciliation. There is no reason to dissolve the marriage if the courts can reconcile a marriage merely by getting the parties to adjust with each other. However caution must be exercised to see that such reconciliation attempts do not take the form of a hasty ritual. If reconciliation attempts are a must, they should always strive to preserve its spirit[11].

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9. Apurba Mohan Ghosh Vs Manashi Ghosh I (1990) DMC 145.

10. Aruna Vs Sudhansu AIR 1962 Ori 65 (SB).

11. J. Duncan M. Derret, Introduction to Modern Hindu Law, pp. 140-178, Oxford University Press (1963).

Where dissolution of marital bonds are concerned, the Hindu Marriage Act is very cautious. It does not allow spouses to dissolve the marriage in collusion with each other. The petition warrants that no collusion has infact taken place[12]. Collusion here means a secret and illegal agreement for a fraudulent and illegal purpose. It is a secret understanding between the spouses to plead and testify and proceed fraudulently against each other in order to mislead and to that extent defraud the court. The court is entitled to refuse to decree a relief as petititioned unless it is satisfied that the petition was not a collusive one[13].

One may argue here that once the spouses decide that they cannot continue with their marriage and want to get it dissolved, what objection can any one, let alone the court, have to it? In answer, it has been stated that the Hindu Marriage is a sacrament which is popularly believed to have been made in heaven and of a deep religious value. Anything so potently sacred and significant, is obviously not woth destroying on human whim.

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12. The Hindu Marriage Act, 1955, S.23(1) which reads as "Every petition presented under this Act shall state as distinctly as the nature of the case permits the facts on which the claim to relief is founded and except in a petition Under S.11 shall also state that there is no collusion between the petitioner and the other party to the marriage".

13. Ibid S.23(1)(c) which reads as "In any proceeding under this Act, whether defended or not, if the court is satisfied that ..... the petition not being a petition presented under S.11 is not presented or prosecuted in collusion with the respondent ....."

But, if however, we allow the modern trend to surface, we cannot deny the freedom of choice and maturity of judgement to the spouses. It is they who must comply with the judgment of the court. Here the court can only bring the proverbial horse to the water, but I doubt if the court can make it drink the water. So it is really very doubtful if the parties will be able to comply with the courts judgment in the bruised and aberrated state of mind after a prolonged legal battle.

The concern for preserving the marriage and preserving the same must come from within and no amount of judicial, social or legal lectures will generate that feeling.

The Hindu Marriage Act, perhaps is most unique for its caution in granting the decree of dissolution. The Act, even while contemplating divorce by mutual consent does not allow the marriage to be dissolved if there does not exist any of the established and specific grounds of divorce as enumerated under the S.13 of the said Act. Thus, even for a petition under S.13 B of the Hindu Marriage Act for mutual consent the court makes doubly sure that there is no collusion and also a definite and specific ground for divorce does in fact exist.

This is also the reason why irretrievable breakdown of marriage has not been recognised under the Hindu Marriage Act[14].

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14. Harendranath Burman Vs Suprova Burman & Anr. 93CWN 102; Saroj Rani Vs Sudarsan AIR 1984 SC 1562 at 1566 Mita Gupta Vs Prabir Kumar Gupta 93CWN50.

However, unfortunately what the court denies through the front door it allows through the back door, where irretrievable breakdown fails to gain recognition, the concept of cruelty is made so wide that anything at all can be brought under its purview[15].

The Act, does not tolerate delay and recognises condonation on the part of the spouses. The limitation period for filing a suit for the dissolution of marriage begins to run after the expiry of the prescribed period under the Act itself and may continued upto seven years as per S. 30 of the Limitation Act. One must satisfy the court of the reason for such delay or else the court is free to presume connivance and collusion[16]. Law expects one to be alive to ones rights. It is another matter that in India few have that kind of knowledge of law. Fortunately the court being aware of this fact allows itself to be fully satisfied as to the reasons of delay if the reasons are like, One was working for a reconciliation or protecting the children or being a poor village rustic took a long time to know his or her rights. This "Satisfaction of the courts" clause is like a gamble to the petitioner. If he succeeds in

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15. This will be discussed in detail under the head of "Cruelty".

16. The Hindu Marriage Act, 1955 S. 23(1)(d) which reads:
(1) "If any proceeding under this Act, whether defended or not, if the court is satisfied that .... (d) There has not been any unnecessary or improper delay in instituting the proceeding, ..." read with the relevant Section of the Limitation Act, 1963.

satisfying the court a delay longer than seven years may be condoned and if he fails to so satisfy the court it may prove fatal to his case.

Since the matrimonial causes are based on what is losely known as matrimonial offences, the grounds on which the relief is to be granted, both take the form of an offence. As a result of this the parties approach the court as adversaries one being the guilty and the other being the aggrieved one. If the aggrieved party, it is found, has forgiven the fault of the guilty party either expressly or impliedly, then he becomes disentitled to present the petition for the dissolution of marriage[17]. At the same time the court does not recognise condonation of insanity or void marriages which means, where the petitioner is morally disentitle to relief, relief cannot be and will not be granted. The court will not step outside the boundaries of equitable justice and good conscience. The test of condonation are two. One, whether the aggrieved spouse was aware of the offence committed against him, and two, whether after and inspite of such awareness the guilty spouse was reinstated in his or her former position and status. Mere uttering of "I

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17. Ibid S. 23(1)(b) reads as (1) "if any proceeding under this Act, whether defended or not, if the court is satisfied that - ..... (b) Whether the ground of the petition is the ground specified in Cl(i) of Sub-Section (1) of Section 13, the petitioner has not, in any manner been accessary to or connived at or condoned the act or acts complained of or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty ....."

forgive thee" will not suffice and does not amount to condonation[18].

Finally, no relief will be granted if there is any "other legal ground" based on which relief should not be granted[19]. If a person is himself guilty of certain matrimonial misconduct, then he cannot take avantage of his own wrong[20]. The petitioner to matrimonial relief should come to the court with clean hands that is free from matrimonial misconduct. Thus a man who has driven his wife away from her marital home, and has absolutely neglected her, thereafter cannot seek a divorce in the court of law on the ground of dessertion. Similarly if a wife in desertion is living in adultery,

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18. N.G. Dastane Vs S. Dastane, AIR 1975 S.C. 1534.

19. Ibid, S. 23(1)(e) reads as - (1) "In any proceeding under this Act, whether defended or not, if the court is satisfied that ..... (e) there is no other legal ground why relief should not be granted".

20. Ibid, S. 23(1)(a) reads as - (1) "In any proceeding under this Act, whether defended or not, if the court is satisfied that ..... (a) anyof the grounds for granting relief exist and the petitioner, except in cases where the relief sought by him on the ground specified in Sub-Clause (a), sub clause (b) or sub clause (c) of Clause (ii) of Section 5 is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief ....."

she cannot hope that the court will exercise its discretion in her favour even if a matrimonial offence on her husbands part can be proved.

Within the protective shield of these five procedural requirements, namely collusion, delay, condonation, clean hands and alternative grounds, the Hindu Marriage Act will dissolve a marital tie only if the petition is presented after one year of the marriage[21], whatever be the ground for seeking the relief, unless the petitioner obtains a special permission from the High Court after making out a case of exceptional hardship[22].

Therefore, this piece of legislation is extremely circumspect where it must terminate the antiquated norms of the marriage and liberate the parties from bondage. The spirit is to preserve the institution of marriage but to allow the inevitable if it must. This extreme caution has a strong psychological effect on the parties as they are put in a social limbo, a kind of torpor during the years of litigation which they spend in a statusless state. These elaborate precautionary measures, as required under the Act also has the inevitable delaying effect. This delay only helps to intensify their bitterness.

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21. Ibid, S.14(I), no petition for divorce to be presented within one year of marriage.

22. Ibid, Proviso to S. 14(I).

TERMINATION OF MARRIAGE : DIVORCE

Under the Hindu Marriage Act, the husband and the wife have been granted roughly about eleven grounds for terminating their marriage, which after a combination and permutation assumes an enormous dimension. Yet the Act is not exhaustive in nature, which is quite understandable in view of the diversified and complex human behaviour and the allied circumstantial causes.

The refusal to accept the ground of irretrievable breakdown has opened a flood gate through which a multiplicity of behaviours and situations came to be recognised as cruelty. The result is that where the marriage has in effect irretrievably broken down cannot be dissolved as such but instead the spuses have to bring the case before the court under the grounds enumerated under Section 13 of the Hindu Marriage Act. This means that the spouses cannot have their marriage dissolved freely, and dignifiedly and quietly. They must stand before the world, soil each others image by airing before an audience each intimate detail of their marriages, till the court declares one of them guilty. With the acceptance of the breakdown theory of marriage at least the concept of adversary guilt establishing tendency will come to an end. Matrimonial causes are the result of mutual short comings and non adjustments. The answer to every such cause is only dissolution of marriage and that can be done without laboriously finding out who is guilty.

The main obstacle in this direction appears to be that where breakdown is accepted, the requirement of reconciliation under Section 23 of the Hindu Marriage Act 1955 cannot be complied with.

Once breakdown is conceded there is no scope for reconciliation. When two mature parties to a marriage want to dissolve their marriage they do it after weighing all the pros and cons of the consequences. In such cases even if the court attempts reconciliation it will seldom succeed. It is therefore, healthier and less traumatic to concede breakdown. In so doing the totality of the marriage has to be focussed on and not raise accusing finger at either of the spouses[23].

Since marriage do continue to breakdown irretrievably inspite of the non recognition of the breakdown the courts have allowed through the back door what they disallowed through front door. Take for example a case, where the wife, soon after marriage, finding that she cannot live with her husband goes home to her father. Later she files a maintenance suit against the husband. The husband, while contesting the maintenance suit files a suit for restitution of conjugal rights against his wife. In reply the wife files a divorce suit against the husband[24]. Is it not irretrievable breakdown of

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23. Virendra Kumar, "The working of Formal Adversary Procedures In The Resolution of Marital Conflict Problems in India" 18 and 19 Ban L.J. (1982-83) p. 60. See generally pages 70-81.

24. Maya Rani Mondal Vs Bharat Mondal M.R. Case No. 123/89 filed in SDJM court at Siliguri, Bharat Mondal Vs Maya Rani Mondal M.S. No. 39/89 filed at the court of District Judge at Darjeeling, claim of divorce by the wife is in the written Statement of the wife in 39/89.

the marriage? What purpose a prolonged litigation would serve for the court has to dissolve the marriage here. If it does not dissolve the marriage, the parties will continue in a state of de facto divorce. But instead the concept of cruelty is made wider and wider[25] not keeping in time with the change in the society and social behaviour and custom.

Matrimonial Causes : ADULTERY[26]

Hindu law, which is also known as Vyavhara Mayukha discusses adultery under its fifteenth title. It is an act which is condemned by every society and religion in all times and by every prophet with equal emphasis. Manu condemns adultery in its every form and degree[27].

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25. Sushil Kumar Verma Vs Usha AIR 1987 Del 86; Savitri Balchandani AIR 1987 Del 52, Vinay Kumar Vs Nirmala Chauhan AIR 1987 Del 78. Sudha Vs Mahesh Chand AIR 1987 Del 174, Tapan Kr Kundu Vs Bibha Kundu AIR 1988 Cal 223.

26. The Hindu Marriage Act, S. 13(i)(i) states that "(I) Any Marriage solemnised whether before and after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party - (i) has after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spuse".

27. Dassi Vs Dhani Ram Teku, AIR 1969 P&H 25 at p. 6 para 8. Apart from being a case of adultery it also propounded the need to prove the offence of adultery beyond any reasonable doubt. In this connection also see Patrick Donald Tracy Vs Eileen Tracy, AIR 1957 ASm 66. These cases are cited only as examples of cases of adultery to show that the condemnation by Manu had very little effect on the common man.

Adultery is hard to forgive, Marriage creates a reciprocal bond to cherish each other. It gives a spouse an exclusive right against the other both emotionally and materially, especially in relation to sex and procreation. When one spouse breaks up this reciprocal bond, the right of the other is affected. It is true that the person or body of the wife is not to be owned like a chattel or commodity. It is also true that the willingness and wishes of both the spouses are important factors[28], but beyond this in the realm of emotions and spirituality a bond, a kind of ownership is created at a totally abstract level. This bond is not unilateral but reciprocal. Therefore it applies to both the spouses equally and to equal extent. When either of the spouses commit adultery, they in fact violate this right, the agreement and understanding of the other spouse. Since this whole thing is at an abstract level, beyond the realm of the written contracts, it is much more serious and the loss is much more hurting.

The root cause behind setting up the social institution of marriage is the prevention of sexual promiscuity. For that reason the physical relationship that results from the marriage is fiercely guarded and protected. Even a single lapse on the part of the spouse cannot be accepted and reconciled with. It is neither upto the court nor upto the society to forgive the lapse whether a single one or a

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28. T. Saretha Vs T. Venkata Subbaiah, AIR 1983 A.P. 356.

series of them, only the aggrieved spouse can forgive the lapse under the concept of condonation. Just as the marital bond is strictly confined to them alone so is the power of forgiveness . . strictly confined to them.

Yet the incidents of adultery is very common, unrepentent and erring spouses are not rare . The Dharmasastra prescribes variously for such situations.

In the medieval period, the sages have exhibited an uniquely humane side of their nature amidst the relentlessly rigid social standard. They have not approved that the wives should be cast away for the offence of adultery, except when she conceives from such adulterous indulgence or when she is guilty of terminating the pregnancy arising from such adulterous indulgence[29], otherwise she can be purified through penance and punishments. Such penance or punishment take the form of providing a bare subsistence of food, clothes etc. and being kept in a guarded room. Other means of social castigation may also be used like shaving off her head etc. The degree of punishment depended upon the caste of the man with whom adultery was committed[30]. Thus, the above, ineffect, reduces adultery to a minor sin, an "upapataka" which can be atoned for through penance at as long as no pregnancy or termination of pregnancy results

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29. Pandurang Vaman Kane, History of Dharmasastra, Vol II Part I p. 571, Bhandarker Oriental Research Institute, Poona (1941), Also see, Gautama, Ch. 22 Verse 35; Yajuavalkya Ch. I Verse 70, 72.

30. Ibid at p. 572.

from the adulterous intercourse. Conversely, if a man of lower caste committed adultery with a woman of a higher caste, he would face death. If a brahmin committed adultery he paid the fine[31].

This is the reflection of a society which disallowed divorce. A society where the marital bond was made so strong that even adultery could be forgiven after the guilty spouse undertook the prescribed penance.

Manu, like every other teacher forbids adultery. Criminal conversation with another woman is forbidden. According to Manu, adultery leads to the destruction of the social fabric. He requires that adulterous be terrorised and banished. In order to eliminate all possibilities of adultery Manu does not permit a man to address another man's wife in seclusion let alone touch her or be intimate with her. A non brahmin man faces death for committing the sin of adultery, but if a man commits adultery with a woman of the same caste, he just had to pay the prescribed fine. For a Brahman the punishment is the payment of fine. The devine punishment for an adulterous man is said to be the swelling of limbs and for the wife the punishment of eternal hellfire befalls her for indulging in adulterous acts[32].

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31. Ibid at page 160.

32. Manu Smriti, Ch. IV Verse 133-134; Ch. VIII v. 352-353, 356-359, 366, 385, Ch. IXv. 30; Ch XI v. 52, 60, 177-179; CH XII v. 60 for the original text see Kullaka Bhatta, Manu Smriti, Motilal Banarasidas (1983) and for a detailed translated text see G. Buhler, The Laws of Manu, Motilal Banarasidas (1964).

Therefore, more than the relationship between the spouses, Manu is more concerned with the destruction of the social fabric. So while the present society is concerned with the break up of the bond between the individual spouses which results in moral promiscuity and thus destroying the social values. Manu does not advocate abandonment or divorce but only penance as a deterrent to the social destruction.

Kautilya prescribes that if the husband condones the act, then no harm has been done. If not, the woman's nose and ears should be cut off and the lover shall meet death. Various punishments are prescribed depending upon severity of the offence committed according to the caste to which the parties belong[33].

Two things emerge from the study of the medieval society, (1) Adultery was only a upapataka, that is a minor sin as contrasted with Mahapataka a major sin and could be atoned for through penance. (2) The question of caste played a very significant role. Both medieval and modern societies sought to preserve the marriage and the social values, but proceeded to adopt different means. The medieval teachers were concerned with the purity of the social fabric and disapproval of adultery for it would result in mixed castes, and today adultery is disapproved of in order to protect the society from sexual promiscuity.

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33. R.P. Kangle, The Kautilya Arthasastra, Part II 4.12.35; 4.13.30-41. University of Bombay (1972) For the original text please see Part I by the same author. Also, V.K. Gupta, Kautilyan Jurisprudence, B.D. Gupta, 146, Gali Aryasamaj, Delhi (1987).

In view of this extremely sensitive situation, the question arises that how can adultery be proved? This issue is very important as the consequences are serious for the matrimony is totally ruined and a greater social stigma is involved. Thus to treat the ground of adultery lightly is neither in the interest of the spouses nor in the interest of the society.

Prior to 1976, the law required, with a view to safeguard the incidents involving false charge of adultery, that it is not sufficient if a single act of adultery is alleged, the spouse should be living in adultery. In 1976, the futility of the concept of living in adultery was realised and since then, a "single act" theory has taken the place of "living in adultery" theory. Even a single act of adultery amount to a breach of trust enshrined in spousal promise "to cherish each other till death do us part".

Since the charge of adultery is a serious charge, ordinarily it would have to be proved beyond any reasonable doubt. But, if one must prove adultery beyond any reasonable doubt, adultery would be impossible to prove[34]. Therefore it is not necessary to prove the fact of adultery by direct evidence, and such evidence, if produced, would be likely to be rejected as a fabricated one. Adultery should be proved through a set of circumstantial evidences which inevitably will lead one to conclude adultery. Adultery, from its very nature,

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34. Dassi Vs Dhani Ram Teku AIR 1969 P&H 25; Patrick Donald Tracy Vs Eileen Tracy AIR 1957 Asm 66.

is a secret and a promiscous act. Seclusion is necessary and a lot of cunning is involved on the part of the erring spouses to indulge in the act of adultery, and when they do, they leave their individual hallmark behind. For this reason alone there cannot be any thumb rule to prove adultery and it has to be proved circumstantially to the extent that it leads a man of reasonable mind to reach that conclusion. This is a very delicate and dangerous task for an error will not only destroy a marriage but affect several lives including the spouses, the children and the lover[35].

This theory of probability must be exercised judiciously because, the act of adultery the status of the parties and public interest requires that marriage should not be set aside lightly, but human nature devious as it is, involves and invents many tengential situations.

Since adultery is no longer to be proved beyond any reasonable doubt and only circumstances pointing to the commission of the act need alone be proved, a very disturbing development has surfaced. Spouses allege unchastity and adultery very easily. Since the courts sometimes even accept uncorroborated evidence[36] the spouses allege

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35. Pushpa Devi Vs Radheshyam AIR 1982 Raj 260 at p. 262 para 12; Bhagwan Singh Sher Singh Arora Vs Aman Kaur AIR 1962 Punj 144 at 145 Para 6, 8; Somasekhar Nair Vs Thankamma AIR 1988 Ker 308; P appelant Vs P and others AIR 1982 Bom 498; Dr. Saroj Kumar Sen Vs Dr. Kalyan Kanta Roy AIR 1980 Cal 374, Vinod Anand Lakra Vs Belula Lakra, AIR 1982 Pat 213.

36. Varadarajulu Naidu Vs Baby Ammal AIR 1965 Mad 29 at Page 29-30 para 5.

unchastity with impunity. The law laid down by the courts declare that such allegations of adultery amounts to cruelty[37]. When it comes to cooking up a set of damning circumstances against an unsuspecting spouse, alleging and proving adultery becomes easier than proving many of the grounds laid down in the Hindu Marriage Act. It is of course of little concern to the falsely alleging spouse that at the end of the prolonged legal battle if he or she is successful the other innocent spouse is left behind with a lot of social stigma. If he or she is unsuccessful, then too he or she goes free while the stink lingers on with the woman[38]. The other easier way to obtain divorce against the wife is to falsely accuse her of unchastity and adultery, when she leaves the matrimonial home in retaliation to bring a case of desertion against her. Now how will she prove that she was falsely accused of unchastity and adultery[39]. There are also cases where the spouses falsely allege adultery and bigamy against each other[40], the inevitable result in such a case is that marriage must be dissolved for the latent indication is that the marriage has

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37. Aruna Jalan Vs Ramesh Chand Jalan AIR 1988 ALL 239.

38. Lakshman Uttamchand Kirplani Vs Meena alias Mota AIR 1964 SC 40 at Para 18 on p. 42.

39. Ibid, See also Chiruthakutty Vs Subramanian AIR 1987 Ker 5.

40. Parvathy Vs Shivram AIR 1989 H & P 29. Saptamy Vs Jagadish 73CWN502 Subbarama Vs Saraswati (1966) 2 M.L.J.

completely rotted, the allegation being only the symptom of such decay. In other words, the indication is that the marriage is totally and irretrievably broken down. False allegations of adultery amounts to extreme cruelty especially if such a charge is made before the superiors at the place of work. Such charge must have an evidentiary value of unimpeachable nature otherwise it will have far reaching results. For example, if a wife alleged before her husbands superiors at work that her husband is an adulteror and is able to prove the allegations to an extent then the husband is likely to lose his job, face the break up of his marriage, be perpetually blemished with the result that apart from the social censure, he may not be able to pick up the shattered pieces of his life and settle down in matrimony again. But if the wife fails to substantiate her allegations even then the husband has to face embarrassment at his place of work and live with the stigma[41].

To prove that the wife who is living apart from the husband is also living in adultery is a successful way to get rid of the wife's claim of maintenance[42]. The cardinal principle in such cases should be that the solitary evidence of a spouse should never be relied upon because he might be extremely interested in the case.

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41. Aruna Jalan Vs Ramesh Chand Jalan, AIR 1988 AII 239 at p. 242 para 8. Also see, Rajbala Vs Gajender Singh & others I (1990) DMC 282 at Para 6 (P & H.C) Parveen Singh Vs Kanchan Devi I(1990) DMC 24.

42. Shankarlal Jaiswal Vs Umabai alias Dhaneswari II (1989) DMC 131 (M.P.H.C.)

Here adultery is to be proved. Where the question of adultery arises the social background of the parties cannot be ignored. The vital question is how the parties are accustomed to live in the given set of social background. Ordinarily the natural intermingling of the opposite sexes cannot be looked down upon especially in the modern jet set world. Yet the common middle class families still maintain a decree of conservatism. The unusual meeting of the two persons in seclusion for any length of time amongst that class can justifiably lead to the inference of adultery.

The most difficult question involved in cases of adultery is how and where to strike a balance between sexual promiscuity and the modern intermingling. One cannot overlook the fact that such large scale intermingling can result in innocent intimacy of heterogenous sexes on one hand or lead to adulterous relationship on the other. It is the latter that is sought to be protected and the former is to be ignored. But if such innocent heterosexual intermingling aggrieves the other spouse, even that is to be avoided. Faith is the essence of marriage, trust and belief are its pillars. They must always be preserved. A slight tremor in the foundation of the marriage is sufficient to destroy it.

Matrimonial Causes : Cruelty[43]

The question of cruelty is judged on the basis of evidence on record and on the totality of the circumstances of the case. The

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43. The Hindu Marriage Act, 1955 S. 13 "(I) Any marriage solemnised whether before and after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party - ..... (ia) has after the solemnisation of the marriage, treated the petitioner with cruelty".

cultural background of the spouses, their temperament, their behaviour with each other in daily life their colloquialism with each other and their norms and conceptions have to be kept in view in determining as to whether an act or omission amounts to cruelty.

Cruelty need not be a physical violence inflicted by one spouse upon the other. Cruelty may also be in his demeanour and treatment. A solitary incident of cruelty or a solitary lapse of term however would not be sufficient to bring the case within the ambit of cruelty, the act must be repeated persistently. Even the incidents wear and tear during the initial days of marriage which occur while the spouses are trying to adjust with each other is not sufficient to allege cruelty[44]. The nature, degree and extent of cruelty which would make it actionable depends up the capacity of the petitioner for endurance.

The test, therefore would not be whether the respondent is cruel but whether the conduct appears as cruel to the other spouse. In other words, what is relevant is the impact or the effect of the alleged conduct upon the petitioner. The emphasis no longer is on the nature of the act but on the effect produced by that act, in other words cruelty depends upon the level and degree of endurance that is exhibited by the spouse.

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44. This point was emphasised by M.M. Punchi J in Santosh Kumari Vs Parveen Kumar AIR 1987 P&H 33.

Manu appears to be oblivious of any spousal behaviour which may be termed cruel. Where reciprocal behaviour of the spouses are concerned, Manu is guided by a few thumb rules. The first being that the woman is a dependent creature and she must worship and obey her husband in order to get a seat in heaven. The second one is that the woman is a heartless wretched being, she must be fiercely guarded at all times, must be kept busy always and if necessary she may even be punished by beatings[45]. Though Manu dwells on the fact of women being honoured failing which the household comes under a curse of perishing, the sad truth is that he, in fact, advocates cruel behaviour towards women. If the husbands were to follow the code of Manu today, then very few marriages will survive.

Kautilya on the other hand is more stable. According to him a cruel behaviour, whether on the part of the husband or the wife is to be punished with fine. Kautilya Arthasastra has behaviours like refusal to cohabit, refusal to open the door to the husband, going out at night, abusing in filthy language etc well within the purview of the concept of cruelty. In case of extreme misconduct the woman may even forfeit her woman's estate. Such extreme misconduct takes place on the part of the husband or the wife if one

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45. Manu Smriti, Ch. V Verse 148-151, 153-156, 167-168 Ch. IX V. 2-16, 26-30, 96, 101-102 Ch. VIII V. 299-300. For original text see Kullaka Bhatta, Manu Smriti, Motilal Banarasidas (1983) and for translation Shri G. Buhler, Laws of Manu Motilal Banarasidas (1972).

spouse puts the other into a genuine apprehension of his or her limb or life, that is to a cruel behaviour or misconduct by which one spouse feels endangered by the other[46].

The tone and nature of these behaviours as described in the sastras, the remedy, modus and procedures that are prescribed for them has made the common man take an adversarial attitude towards marital problems. This breeds a lot of antagonism between the spouses. They feel drawn to establish and prove the guilt of the other. Society which is aware and sensitive to these issues tend to exaggerate them and took down upon the so called guilty spouse. By attaching a social stigma to such erring spouses the society attempts to take preventive measures. The adversarial attitude also leads man to idolise marriage to such an extent that one loses touch with the reality. Matrimonial norms are required to function at a dual plane, the social plane and the individual plane. So wide an interpretation of the term cruelty results in mechanisation and dehumanisation of the term cruelty. In such an event every human behaviour will amount to cruelty. So instead of identifying the problem with a certainity and objectivity at the individual plane, there ensues a legal battle which instead of rendering any

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46. Kautilya Arthasastra, 3.3-7-11; 3.3.14; 3.3.16, 3.3.23-24 3.3.32 See R.P. Kangle. The Kautilya Arthasastra, Part II for the translation and Part I for the original script Published by the University Press, Bombay (1972). Also peruse, V.K. Gupta, Kautilyan Jurisprudence B.D. Gupta 146 Gali Arya Samaj Delhi (1987).

individual or social justice, forecloses the future development of any social norms. Non recognition of irretrievable break down of marriage is a case in point.

Starting with false accusation of unchastity, to indifference, nagging, quarrels everything is cruelty. Thus abortion is also a ground for divorce, refusal to make tea, not opening the door, shouting before friends, beating and abusing the children, all are cruelty and a ground for divorce.

The Act[47], does not define cruelty and the word is naturally used in relation to human conduct or behaviour. It is a conduct in relation to and in respect of matrimonial duties and obligations. It is a course of conduct which adversely affect the other. Cruelty can be physical and mental, intentional and unintentional. If it is physical the court has no difficulty in deciding the case, since it becomes a matter of fact and degree. Mental cruelty presents a lot of difficulty. First the enquiry is on the nature of the cruel behaviour and second its impact on the mind of the other spouse. Based on these an inference has to be drawn.

There is a rapid change in the life around us and in the matrimonial duties and responsibilities in particular. They vary from house to house and person to person. Therefore, when one spouse complains of cruelty by another spouse it is futile to search for the standard in life, for a set of events stigmatised as cruelty

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47. The Hindu Marriage Act, 1955.

in one case may not be so in the other, for it depends upon the type of life the parties lead and the values to which they attach importance. The categories of cruelty are not closed. Each case brings a different set of circumstances and human beings are as a rule dissimilar. Among human beings there is no end to the kind of behaviour that may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, their capacity and incapacity to tolerate the conduct complained of such is the wonderful realm of cruelty[48].

Matrimonial Cause : Desertion[49]

Desertion involves a very complicated fact situation. The Hindu Marriage Act does not define desertion just as it does not define cruelty. However an effort is made here to make the concept of desertion clear.

According to Halsbury's Laws of England "..... Desertion means the intentional and permanent foresaking or abandonment of one spouse by the other without that others consent or without reasonable cause. It is a total repudiation of the obligations of

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48. Sobharani Vs Madhukar Reedy, AIR 1988 SC 121.

49. The Hindu Marriage Act, 1955, Section 13 "(1) Any marriage solemnised, whether before and after the commencement of this Act, may, on a petition presented by either the husband or the wife be dissolved by a decree of divorce on the ground that the other party ..... (ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition, or ....."

the marriage"[50]. In view of the large variety of circumstances and modes of life involved, the courts have discouraged attempts at defining desertion, there being no general principle applicable to all cases.

In the medieval period the expressly monogamous nature of the Hindu Sastra was followed more in contravention than in compliance. While the wives worshipped, the husbands searched greener pastures to commit bigamy. Such being the case, the question of desertion was hardly a significant one. Yet Manu[51] prescribed that neither by sale nor by desertion is the wife released from the husband. When the woman is left behind by the husband for any reason she is asked to wait for a certain period. Manu is silent on the course of action a woman is to follow if her husband does not return after the prescribed period[51a]. Thus, when the husband did in fact desert the wife it was considered to be no desertion at all.

According to Kautilya the woman could seek to dissolve her marriage if her husband leaves her behind and goes away to a foreign land subject to the condition that dharmya marriages and

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50. Halsbury's Laws of England (3rd Edition) Volume XII paragraphs 453 and 454 at Pages 241-243.

51. Manu Smriti, Chapter IX Verses 46, 76. For the Original text, see Kullaka Bhatta, Manu Smriti. Motital Banarasidas (1983). For a detailed translation of the verses see G. Buhler Laws of Manu. Motilal Banarasi Das (1972).

51a. Ibid. This was also discussed at length in the first Chapter of this work and also at the beginning of this Chapter.

upper caste marriages could not be dissolved[52].

All these reflect a medieval society where wives could be discarded at will. The men could supercede them and marry again but the wives would have to spend the life cliging to the memory.

Today desertion is a ground for divorce, if such desertion is for a continuous period of two years. Which means intermittent comings and goings are not cause enough to seek divorce on the ground of desertion. Such behaviour could of course be termed as cruelty. Even desertion itself is a type of cruelty even though desertion simplicitor is itself a ground for divorce.

Abandonment or desertion must therefore be (a) wilful and deliberate, (b) without express or implied consent of the deserted party, (c) against the wishes of the party deserted, and (d) without reasonable cause[53]. Thus, desertion is not a withdrawal from a place, but from a state of things for what law seeks to enforce is the recognition and discharge of the obligations of a married state of things which usually is termed as the home. For this there are two essential conditions to be fulfilled by the deserting spouse, namely, (1) The factum or the actus of separation called the factum deserendi or actus deserendi, and (2) the intention to bring

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52. Kautilya Arthasastra, 3.3.15-19, 8.2.48. For the original text see R.P. Kangle, Kautilya Arthasastra Part I and for the translated text see the Part II of the same book by the same author published by University Press, Bombay (1972). See also V.K. Gupta, Kautilyan Jurisprudence, B.D. Gupta, Gali Arya Samaj, New Delhi (1987).

53. Perumal Naicker Vs Seetha Laxmi Ammal, AIR 1956 Mad 415.

cohabitation or the spousal relationship permanently to an end, more commonly known as the animus deserendi. Two conditions are to be fulfilled by the deserted spouse too. They are (1) absence of consent and (2) absence of any conduct giving rise to any reasonable cause to the spouse leaving the house. If the spouse sincerely expresses an willingness to return, i.e. exhibits animus revertendi then he or she cannot be held guilty[54].

Just as with any other marital causes, desertion is also an inference to be drawn from the fact and circumstances of each case. The cause of action begins when the fact of separation and the intention to end the marriage coexists. But it is not necessary that they should commence at the same time. Separation can be without necessary intention or they may coincide at a given point of time. Where there is a fact of separation, it must be found out on whose part was the intention to end the marriage was involved. The guilt of desertion befalls on that spouse who had the intention to end the marriage. Where there is a fact of separation and the separated spouse later develops an interest to end the marriage, desertion commences from that point of time.

That act of desertion involves both, the actual abandonment and also expulsive conduct. When a spouse, by his or her behaviour and demeanour, by his or her acts and omissions forces the other spouse to leave him or her, it is known as expulsive conduct. Since

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54. Bipin Chandra Jaisinghbhai Jha Vs Prabhavati, AIR 1957 SC 180.

desertion is a withdrawal from a state of things it can take place even when the spouses are sharing a bed and board. Completely neglecting and ignoring a spouse, denying him or her every marital rights are all an extreme form of cruelty and desertion. For example where the spouses are sharing the same board and bed, if they do not have any physical and emotional relationship for years inspite of such sharing, it not only is an extreme form of cruelty but also desertion. Such desertions are very painful and wrecking[55]. But in our society due to the adverse economic and social conditions such desertions are common.

In the course of my empirical study I have come across cases where the wives have been brought back to their parents house by the devoted husbands who wanted to give them some rest or recuperate their health, there weing no quarrels and tensions. Then when they went back, they refused to accept them back. These women do not want divorce so they have not sought one. In some cases the husbands have filed a divorce suit but did not follow them up. These women are even now ready to join their husbands if reconciliation, though they do not know what they should reconcile, can be

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55. Lachman Uttamchand Kirplani Vs Meena alias Mota AIR 1964 SC 40. Tapan Kumar Chatterjee Vs Kamala Chatterjee AIR 1989 Cal 74. Jyotish Chandra Vs Meera Guha, AIR 1970 Cal 266. Gollins Vs Gollins (1963) 2 AII ER 966. Sheldon Vs Sheldon 1966 Prob. 62.

affected, they in the meanwhile continue to live in a state of de facto divorce[56].

To confine one self to the strict technical limits, the animus - actus, - consent - conduct paradigm often results in unnecessary inquiries which obscure reality. As a result there may either be a prolongation or denial of justice. Instead of such elaborate deductions the only single rule by which one should be guided is the existence of a reasonable ground. The entire situation is to be viewed as a composite whole. The conduct and reactions of the parties are to be assessed keeping in view of their personal and habitual experiences, the exceptions and knowledge of life, society and law. To consider marital relations in bits and pieces brings about a virtual disaster on the contesting parties. Because marital conflicts are basically human conflict, they are to be handled in proper societal setting.

In the modern society, where offering and accepting a dowry has de facto become one of the essentials of a valid marriage, there is a rampant abuse of marriage in its sacramental form and also an increase of greed. Where dowry claims cannot be prevented by implementing the Dowry Prohibition Act, 1961, act of desertion

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56. Subrata Mukherjee Vs Aparna Mukherjee M.S. 20/84, Filed in the Ld. District Court at Darjeeling. See also the case of Lila Singh, Meera Ghosh and several others discussed in a Later Chapter and given in the appendix.

has become an easy means of escaping a violent death. In such cases factum deserendi is hardly significant, and divorce is a relief[57]. The courts have held that harrassment for dowry, misbehaviour, neglect and abuse in order to obtain dowry are all cruelty and if the wife leaves her marital home due to such ill treatment it does not amount to desertion, for then she has a reasonable ground for such separation. She may even claim maintenance from her husband.

Desertion, which with an unbroken monotony consists of one parting from the society of the other, in effect gives rise to a gravely complex situation, which requires utmost care if miscarriage of justice is to be prevented.

Matrimonial cause : Unsoundness of Mind[58].

Of all the matrimonial causes, the cause that involves the maximum tragedy is that of unsoundness of mind. In causes like desertion, cruelty, adultery, an element of mes rea, intention or animus is involved. These are actions resorted to by one party against the other consciously and intentionally. But, when a person suffers from unsoundness of mind, he or she can hardly help it. Such a person who has lost the orientation of mind he or she can

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57. Tapashi Ghosh Vs Anjan Ghosh MS No. 45/89, Filed at the Ld. District Court Darjeeling, See appendix She ran away from her husbands house after they attempted to burn her and later divorced him on the ground of extreme cruelty.

58. The Hindu Marriage Act, 1955, Section 13 "(1) Any marriage solemnised whether before or after the commencement of this Act, may, on apetetion presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party - .... (iii) has been incurably of unsound mind or has been suffering continually 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.

hardly plan a marriage, let alone a family and its future. Therefore, when a marriage takes place where one of the parties to the marriage is of unsound mind, the people arranging for such marriages are worthy of nothing but social condemnation. Needless to mention that such marriages seldom last, subjecting the already incapacitated mind to further trauma.

The question of the validity of marriage, with a person of unsound mind did not arise at all during the time of Manu. According to him marriage was indissoluble. Women, he propagated, must worship their husbands even if they be devoid of any virtue, even if they sought their pleasure elsewhere and were sans any good qualities. The question of unsound mind is not raised at all. However, to be fair to Manu, he exhorts the fathers not to give their daughters in marriage to a groom who is not of excellent virtues and qualities[59]. However I have not come across any verse where Manu allows a marriage in contravention of this rule to be dissolved, nor is there anything in the code where a father who contravenes this requirement is to be punished. But a wife is not to be punished for being averse to her husbands madness.

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59. Manu Smriti Chapter IX Verses 79, 89, 95. For Original Text see Kullaka Bhatta, Manu Smriti, Motilal Banarasidas (1983), for the translated text see G. Buhler. The Laws of Manu, Motilal Banarasidas (1964).

Kautilya, who has exhibited an extreme sensitivity to human problems is silent on the issue. However by inference and deduction insanity can be brought within the purview of the ground where Kautilya permits a wife to seek divorce when she feels that her husband is becoming dangerous to her life, and that he is a viscious person. There is a some difficulty here. Visciousness is a conscious act and so excludes insanity. Where she feels endangered by her husband, it includes only violently insane person. She, therefore is left without a remedy if her husband is of incurably unsound mind even though such insanity is of milder form. Therefore, accordingly only those impairment of mind which are incurable in nature and violent in form will make a wife entitled to seek a remedy on the ground that she is endangered by her husband[60].

A mere hint or a whispered allegation of unsoundness of mind is sufficient to put a marriage in jeopardy. To concede the fact of insanity will render a marriage dissoluble at the instance of the parties. To conceal the fact of insanity at the time of marriage will render a marriage viodable at the instance of the parties on the same ground and also on the ground that a fraud has been practiced on the party[61], and when the fact of past affliction is revealed,

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60. Kautilya Arthasastra, Book III Chapter II Verse 48. For original text see R.P. Kangle, Kautilya Arthasastra, University Press, Bombay (1972) for the translated text see Part II of the same book. Also refer, V.K. Gupta, The Kautilyan Jurisprudence, B.D. Gupta 146 Gali Arya Samaj, Delhi (1987).

61. The Hindu Marriage Act, 1955, Clause (b) and (c) of Sub-Section (1) of Section 12.

it becomes the bane of the married life with one spouse reading the symptoms of an unsound mind in every acts and omission of the other spouse. N.G. Dastane Vs Sucheta Dastane[62] is a case in point.

In this case, the bride's father, with a view to avoid any future dispute, informed the parents of the groom regarding a past mental disturbance of the wife which was subsequently cured. It is true that the cause of the affliction was at first stated to be a bad attack of sunstroke and later changed to malignant maleria. However the cause of the affliction is immaterial here, what is materially important is that the groom N.G. Dastane could not reconcile himself to this revelation, nor could he overcome the temtation to marry the bride, namely Sucheta, who belonged to a very affluent family. The result was a prolonged and traumatic legal battle where the behaviour of the wife, arising from her inability to adjust with the Dastane family due to their different socio-economic background was attributed to her earlier mental affliction. Normally what would have been a cruel act became an act arising from an unsound mind. The husband kept hurling the charge of insanity to her face, then changed the allegation to cruelty and yet kept referring to her insanity. Though divorce was denied to the couple on the ground of condonation, it is obvious from the afore-narrated facts that the marriage had irretrievably broken down.

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62. AIR 1975 S.C. 1534.

However, there are some exploitative marriages when the insane party is given in marriage for some material gain and benefits. During my survey in this field I came across a case where the wife was suffering from an incurable type of schizophrenia which was punctuated by lucid intervals. During one such lucid intervals her parents arranged her marriage with the groom. Fortunately or unfortunately she remained steady for about three years during which period she bore two daughters. Her second child birth proved ruinous. She suffered a relapse and her problem if anything became more severe and violent than before. The parents alleged extreme cruel behaviour of the husband as the cause of insanity. Persistent and prolonged inquiry revealed her medical history. Subsequently the marriage was dissolved mutually but only after he settled a handsom alimony on her[63].

This is a tragic situation to say the least, and more so, because there are two innocent children involved in the tragedy. One cannot blame the husband for dissolving the marriage and the wife is beyond reproach.

A third variety of situation arises where unsoundness of the mind is imputed falsely so that the marriage may be dissolved. Such false allegations amount to cruelty. The spouses under such circumstances get a chance to lead evidence and contest each others

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63. Sunil Debnath Vs Sandhya Debnath, MS 19/1989, In the Court of the Ld. District Judge, Darjeeling.

allegations. Such situations though regretful has a chance of being proved or disproved[64]. A husband, suffering from tuberculosis of a curable nature may bring a suit for the dissolution of marriage against a wife who is incurably of unsound mind. However the situation cannot be reversed where a wife suffering from uncurable mental disorder brings a suit of dissolution against a husband who is suffering from tuberculosis of curable nature[65].

The matrimonial cause of insanity also includes various other forms of mental disorder, namely idiocy, lunacy, epilepsy and other psychopathic disorder. The requirements are two fold - (1) the impairment should be of incurable nature and (2) the impairment of the mind should be of such a type that the petitioner could not be reasonably expected to live with the spouse. The degree of affliction is an important point for without it very few marriages would survive. For all of us are eccentric to an extent and eccentricity is not insanity. Eccentricity is to be enjoyed, insanity is to be treated and sympathised with.

In 1950, at a very late stage, the Federal court ruled that insanity could be a reason to nullify the marriage till then marriage with a lunatic was a valid marriage and incapable of dissolution, nullification of annulment[66]. In the year 1955, unsoundness of mind

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64. Ram Narain Gupta Vs Rameshwari Gupta, AIR 1988 SC 2260; Manisha Vs Pramod I (1990) DMC 540.

65. Veeranna Vs Sumitra Bai I(1990) DMC 49.

66. Ratneswari Nandan Vs Bhagwati Saran, AIR 1950 FC 142.

was given the legislative and judicial acceptance as a ground for dissolution of the marriage. It was brought to the present form in the year 1976 and is now wide enough to include all forms of mental disorder. As things stand today, insanity as a ground for seeking annulment of marriage requires that the imapirment of mind should have been present at the time of the marriage. Insanity as a ground of dissolution of marriage requires that the disorder should be in there at the time of presenting the petition.

The latter situation appears to be very heartless. Yet unless the petitioner wants to remain in wedlock with such a person, unless the spouses have an urge from within to remain together, no one, let alone the law can ask a healthy spouse to continue with such a marriage especially if the insanity of either of the parties adversely affect the children. So, a clean break, even if painful, is desirable.

Accordingly, to me, marriage with a lunatic is not accepted by the Dharmasastra. The ceremony of Kanyadan involves giving away of the daughter in dana or gift and accepting her as such. He, who has lost his mind, becomes incompetent to accept such gifts. Such marriages would therefore be ipso facto invalid. However when such marriages were performed, validity was granted on the rule of factum valet. If, however, the parties feel that they are incapable of continuing with the alliance, they should be free to do so. The whole realm of insanity revolves around the degree and severity of the affliction.

Every mental disorder calls for a medico-legal distinction, which is not the intention of this work. The action reprehensible

to human values are those where one is deceived into such marriages. Casting away a mentally unstable spouse or divorcing a spouse because he has been afflicted by mental disorder at a later stage of the marriage is equally painful.

The standard of proof in cases of mental disorder is very high. The entire complex situation is to be evaluated on unimpeachable medical evidence coupled with the conduct of the spouse. His or her behaviour towards the other, his or her habits as noticed, his or her loss of personality and other noticeable features to understand. Whether a person is suffering from a mental disorder of any kind.

Matrimonial causes : Other Grounds For Divorce

Apart from the four foregoing grounds divorce may be sought on several other grounds. Unlike these four grounds, these are less commonly used and are unique by themselves. Such grounds are discussed under this head.

A. Conversion[67] :

One would have thought that with the constitutional proclamation of the secular nature of Indian Polity, people have become indifferent to any religious dogma. However the multi ethnic society

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67. The Hindu Marriage Act, 1955, Section 13, "(1) Any marriage solemnised whether before or after the commencement of this Act may, on a petition presented by either the husband or the wife be dissolved by a decree of divorce on the ground that the other party ..... (ii) has ceased to be a Hindu by conversion to another religion.

of India, to date, remains exotic, emotional and deeply religious. Conversion to another religion, therefore is a good cause enough to seek divorce. The Indian Courts being the secular instrument of secular India cannot prefer one religion over the other.

The Dharmasastra and the Sastric teachers do not speak of conversion. Those who did allow the women to seek divorce allowed them to seek it on the ground of the other spouse having embraced another religious order. This was because as early as the days of Dharmasastra, India was a unireligious nation. Apart from the Hindu religion, no other religion was known to India at that time. By analogy however it can be presumed that conversion would have been a good ground to seek divorce[68].

When one spouse ceases to be a Hindu, the religious sentiment of the other may be hurt. In recognition, however, of this fact. The Native Converts Marriage Dissolution Act, was passed in the year 1866. Under this law when either of the spouses converted to Christianity the marriage could be validly dissolved by the one who did not get converted, and not when a person adopts any of the religion which is considered to be a form and development of Hinduism and its

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68. Narada Chapter XII Verse 98, Parasara IV. 30. Kautilya is silent on the issue which indicates that during those days conversion was not contemplated. Adopting Sanyasa, or becoming a recluse would give rise to a matrimonial cause of divorce.

other sister religions[69] Conversion to Islam will automatically dissolve the marriage unless the other spouse too adopts Islam as his/her religion. In the year 1950 the word "native" was dropped from the caption of the Act of 1868 and it became The Convert's Dissolution Of Marriage Act 1866. Under this a spouse whose partner embraced Christianity could get his or her marriage dissolved.

Such dissolution however is not automatic, and if the spouses feel that despite conversion they can continue to lead a conjugal life they may do so, there is nothing in law and society to prevent them. However if dissolution is sought then the unconverted spouse may seek dissolution under the Hindu Marriage Act[70] and if the converted spouse seeks dissolution then he or she must use the Convert's Dissolution of Marriage Act[71].

A social problem is created by the conversion of one spouse into another religion especially Islam. Sometimes such conversion is affected with the sole purpose of contacting another marriage. In such cases interest of the party in the conversion is a vital

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69. The Hindu Marriage Act, 1955; Clause (a)(b) of sub section (1) of Section 2. Under this the form and development of Hindu religion are Virashaiva, lingayat, Bramho, Prarthana or Arya Samaj, Budhists, Jaina and Sikhs are its sister religion.

70. See ante foot note 67.

71. The Convert's Dissolution of Marriage Act, 1866, Section 4 and 5 and also sections 15, 16 and 17.

factor. The intention of the party and the circumstance under which the conversion is affected is inquired about.

In a case by his first wife, Puja Khanna, Javed Khan was accused of bigamy under Section 494 of the Indian Penal Code. According to her case he had embraced Islam solely for the purpose of marrying a second time. Jai Sharma, as Javed Khan was known before his conversion married his first wife Puja Khanna according to Hindu rites. The marriage ran into troubled waters within a year and Jai Sharma embraced Islam in order to marry another girl known as Rajani Ahuja who herself embraced Islam and came to be known as Shayeeda. Puja Khanna brought a case for bigamy and conversion and obtained relief[72].

The courts have repeatedly held that where the conversion is merely on the ground of obtaining some material benefit or gain of that religion and custom related to it, such conversions are invalid. Such conversions are against public policy and morality and cannot be recognised by the courts, even the doctrin of factum valet will not come to their aid because any action which is in deliberate violation of a legal rule cannot ever be valid[73].

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72. Reported in The Telegraph, July 30th 1989.

73. Ibid. See also Juliana Yonzone Vs Pratap Kumar, 14/85 and 22/88. Filed in the Ld Court of the District Judge at Darjeeling. Also Budhausa Rowther Vs Fatima Bi AIR 1914 Mad 192.

The facts of each and every case of conversion is to be viewed and weighed separately. Facts of no two cases can have precedence over each other. The background the circumstance and intentions of the parties are some of the factors to be considered while dealing with the cases of conversion. The Delhi High Courts decision is in direct contradistinction to the view widely held thus far that a man who converted himself to Islam can marry a second time during the subsistence of the first marriage, only he cannot divorce his first wife by Talaque. Where a woman embraces Islam, she may not marry during the subsistence of the first marriage as Islam does not allow polyandry[74].

Thus, conversion will be accepted socially and legally only and if only it is for reasons of deep and abiding faith. Conversion of convenience is a kind of insult to that religion which is governed by some special features not found in another religion, conversion must essentially be based on faith and spiritual satisfaction alone. If it is for the subversion of law, then it is no conversion at all.

The phenomenon of conversion has a history of only two centuries and conversion has gradually gained momentum and is fully in keeping with the secular spirit of the Indian Constitution but it must at any cost exhibit a broadness of mind and faithfulness of the spirit.

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74. Budhausa Rowther Vs Fatima Bi, AIR 1914 Mad 192.

B. Leprosy[75]:

Leprosy is a ground for divorce, and leprosy is curable. Only a virulent and incurable form of leprosy alone will give rise to a valid cause of action. However the human mind has a deep seated revulsion and fear for this disease. The people suffering from leprosy suffer psychologically too, for they believe it to be contagious, painful and a result of some dreadful sin. None of this is of course true. Like so many unreasonable social fetter this is also one.

Apart from a sweeping statement that a wife should not be punished if she is averse on the husbands madness and crime, Manu is silent on the issue[76]. Dharmasastra is not however silent on the issue. Parasara says a woman may seek to dissolve her marriage if her husband has fallen. The word 'fallen' is of a very wide connotation; within it is included a man who has leprosy or veneral disease, which were in those days believed to be incurable and result of some sins[77] and resulted in excommunication. Similarly Kautilya observes that if a man has become degraded or an outcaste or is fallen his wife may seek divorce on that ground. By a similar analogy again a man suffering from leprosy is to be brought under this provision. Kautilya takes a step further and adds that when a husband endangers the life of his wife she may seek to dissolve the

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75. The Hindu Marriage Act, 1955, Section 13, sub section "(1) Any marriage solemnised whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party - .... (iv) has been suffering from a virulent and incurable form of leprosy.

76. Manu Smriti, Chapter IX.79. See for original text Kullaka Bhatta, Manu Smriti, Motilal Banarasi Das. (1983). and for translation G. Buhler, The Laws of Manu, Motilal Banarasidas, (1964).

77. Parasara Smriti, Chapter IV Verse 30.

marriage. That means if a man by having a contagious and virulent form of leprosy endangered the life of the wife she would be free to seek divorce[78].

Thus,though leprosy is an illness and no one has any control over illness, it bore a stigma since days beyond a memory. Such an attitude no doubt perpetrates a social problem and ineffect condemned a man to an animal existence.

Sociologists insist that we should not allow our minds to be swayed by feelings of emotional loathing and revulsion with which leprosy patients have been treated, throughout human society in all countries throughout the world and that we should take a very balanced and humane outlook and accept leprosy as simply another disorder that requires medical attention[79].

This social approach can seldom be followed in the married life. The spouse cannot be forced to lead a healthy marital life nor can they be compelled to overcome their prejudices. Keeping this in view and in order to strike a balance in law and society, divorce is allowed where the disease is of virulent and contagious nature. This provision also aims to safeguard the health of the spouses and children.

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78. Kautilya Arthasastra, Book III Chapter II Verse 48. For the Original Text see R.P. Kangle, Kautilya Arthasastra, University Press, Bombay (1972) Part I. For translation see Part II by the same author. Also V.K. Gupta, Kautilyan Jurisprudence, Published by B.K. Gupta.

79. Swarajya Lakshmi Vs G.G. Padma Rao, AIR 1974 SC 165

To secure relief under this provision of law it must be by unimpeachable medical evidence that (1) the disease is a contagious one and (2) it is incurable in nature. The latter is a predominant requisite. Even where the disease is a communicable one but curable in nature will not entitle the spouses to seek the relief of divorce only on medical authentication of this fact can a marriage be dissolved.

Divorce must be declined where the disease has already been communicated by one spouse to another and both are suffering from the same. A divorce, merely to satisfy the vengeance of the wronged spouse would set an unhealthy trend. Thus here the courts must seek to preserve the marriage.

Where the wife is living away from the husband on account of his leprosy but claims maintenance from him, the courts have held that the leprous husband cannot force her to cohabit with him nor can he use his disease as a defence to resist maintenance[80].

Just as the insane, the leprous also have no control over their disease. Though both are curable in most cases these socially unfair yet unavoidable.

C. Veneral diseases[81]

Veneral diseases are the result of sexual promiscuity and

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80. H. Sheenappayya Vs Rajamma alias Padmavati. AIR 1922 Mad 399.

81. The Hindu Marriage Act, 1955, Section 13 Sub section "(1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party- ..... (v) has been suffering from veneral disease in a communicable form....."

has a psychological impact on the person whose spouse is suffering from it. These are abhorent diseases which are the result of a reckless life style. If such a disease is communicable in nature, then it is a good ground for seeking divorce. The fact that a person is suffering from veneral disease or has in the past suffered from such a disease is sufficient to run the marriage into troubled waters.

If a spouse being aware of his or her disease has intercourse with the other or forces it upon the other, it will amount to inflicting an extreme form of cruelty upon the other. There is no obligation on the part of the court to dissolve the marriage if both the spouses are suffering from the disease.

The existence of the disease is to be considered from three points of view. They are, (1) whether it is a breach of contract of marriage, (2) whether existence of the disease at the time of the marriage is cause enough to get it annuled and (3) whether any of the spouses contracting the disease after the marriage has a good ground for divorce.

Regarding the first query, contracting the marriage inspite of the disease results in a crime against society where consortium vitae, the gratification of natural passion is rendered lawful by marriage for the procreation of children to build a healthy society. Violation of such a rule of society (or agreement or contract) invariably result in a breach of contract. Specially if the disease is of a communicable nature, there remains the possibility

of the other spouse and the future child contracting the same. The law will constrain no man to assume a position so full of perils to have placed within his reach a lawful means of gratifying a powerful passion at the risk of another's health or life and the possibility of bringing into this world children in whose constitution the sin of the father lurks and who may carry the disease by reason of its birth to this particular parents.

As regards question number two, when, the disease prevents and obscures very purpose of marriage that is physical and emotional companionship, gratification of natural passion and procreation of children, such a marriage is worthy of annulment, and may be fitted within the framework of that provision[82].

As for the third question, contracting veneral disease indicates that the spouse was having a sexual relationship with several other persons which ipso facto brings the action within the purview of adultery and cruelty. Such cruelty assumes an extreme form if one spouse begets the disease from the other, and as such it comes to be recognised as a ground for divorce[83]. But a mere

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82. The Hindu Marriage Act, 1955; Clause (c) of Sub-Section (1) of Section 12.

83. Birendra Kumar Biswas Vs Hemlata Biswas AIR 1921 Cal 459.

allegation that the other spouse is suffering from veneral disease is not sufficient, the alleged disease must be proved medically and beyond any doubt[84]. Falsely alleging veneral disease of the other spouse is again a cruelty and renders the marriage dissoluble[85].

Existence of the disease in a person is a clear indication of the persons bad character and loose morals, or else it shows that the disease is inherited. In either case it has a tremendous effect upon the mind irrespective of whether the disease is curable or not. It is unwise to seek to preserve such marriages and when the parties approach the court, it shoudl have no hesitation in granting the relief sought.

The social stigma that is attached with the illness is so intense and deep that the afflicted spouse is so affected psychologically that often suicide is attempted. Sometimes the fact of the unfaithfulness of one spouse drives the other to self destruction. Therefore, the disease which has its roots in the carnal pleasures of the body has the capacity to cause the sure death of the spirit.

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84. Madhusudan Vs Chandrika, AIR 1975 MP 174.

85. Probodh Kumar Pal Vs Kabita Pal. M.S. No. 16/88, Filed at the court of the Learned District Judge at Darjeeling. In this case the wife alleged veneral disease falsely.

D. Sanyas[86]

Renunciation of the world at large and embracing another religious order is known as sanyas. The sanyasi by renouncing the world renounces his grihasthasrama and all other material desire.

The preachers of Dharmasastra allow the marriage to end if the husband has either become a sanyasi or a recluse. Narada says that another husband is ordained for the wife if the husband adopts another religious order[87]. According to Parasara, a woman may dissolve her marriage if her husband has become a recluse or a sanyasi[88]. Kautilya, does not say that the wife may divorce when the husband renounces the world but refusal to have conjugal relationship, according to him, is a good reason for divorce[89].

Since adopting sanyasa, in effect, terminates the marital tie, whether the person has actually adopted sanyas is a vital question. Otherwise a person, in order to escape the obligations of marriage, may simply pretend to have adopted sanyas. Therefore, it must be proved beyond any reasonable doubt that all the religious requirements for the adoption of sanyas were complied with. Adoption

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86. The Hindu Marriage Act, 1955. Section 13. "(1) Any marriage solemnised whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife be dissolved by a decree of divorce on the ground that the other party - (vi) has renounced the world by entering any religious order".

87. Narada Smriti XII. 98.

88. Parasara Smriti IV. 30.

89. Kautilya Arthasastra, 3.2.48 R.P. Kangle, Kautilya Arthasastra, Part I and II, University Press, Bombay (1973).

of sanyas amounts to a civil death having effect on both marriage and succession.

Religion and piety is good so long as it does not affect the life of the others. So, he who adopts sanyas before assuming any such marital obligations or does so only after the completion of all his responsibilities is beyond reproach. Adopting sanyas while well burdened by family and matrimonial relationship is a callous escapism from life itself.

It is easier to prove desertion than sanyas because in the latter case the whereabout of the spouse remains unknown and the wives find it very difficult to sue them, even though when one adopts sanyas, factum deserendi and animus deserendi coincide. Only in desertion, the cause of action commences if it continues for a continuous period of two years, in sanyas the cause of action commences at once subject to the requirement under Section 14 of the Hindu Marriage Act[90].

E. Presumption of Death[91]

When a person is unheard of for more than a period of seven years by people who would have heard from him had he been alive,

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90. Every petition under this section is to be presented after one year of completion of marriage unless a special permission of the High Court is obtained on specified grounds.

91. The Hindu Marriage Act, 1955, Section 13 "(1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party - (vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had the party been alive.

it is presumed that he is dead. In such an event the marriage became dissolvable.

Presumption of death is conceded by the Dharmasastras. Narada allows it a prime importance where the wife is ordained another husband[92]. Parasara also allows a woman to marry if her husband is not heard of for a long time[93]. Kautilya broadens the situation when he concedes divorce to a wife whose husband has gone to a foreign land and is unheard of for a long time[94]. Manu[95] on the other hand prescribes an eight years waiting period for the woman whose husband has gone off to another country. Though this eight years waiting period is the maximum limit. Manu does not specify what the woman should do after the said time limit expires.

The process of proving the case is pure logic. If the petitioners contention regarding the silence of the husband is true,

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92. Narada Smriti, Chapter XII Verse 98.

93. Parasara Smriti, Chapter IV Verse 30.

94. Kautilya Arthasastra, 3.2.48. For the original and the translated text see R.P. Kangle, Kautilya Arthasastra, Part I & II University Press, Bombay (1972).

95. Manu Smriti, Chapter IX Verse 76, Kullaka Bhatta, Manu Smriti Motilal Banarasidas (1983) and G. Buhler, Laws of Manu, Motilal Banarasidas (1964).

then the case goes unchallenged, if not,the spouse reappears or makes his whereabouts known than divorce move will be thwarted. The court can only ascertain the truth by advertisement and notifications.

Matrimonial Causes : Sustained Judicial Separation and non restitution[96].

As the law stands now, either spouse may get their marriage dissolved if (1) the parties did not resume cohabitation for one year even after the passing of the decree of judicial separation, (2) they have failed to comply with the restitution of conjugal rights for a period of one year passed in favour of one spouse against the other.

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96. The Hindu Marriage Act, 1955, Section 13 "(1-A) Either party to a marriage, whether solemnised before or after the commencement of this act, may also present a petition for the dissolution of the marriage by a decree on the ground - (1) that there has been no resumption of cohabitation 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 proceedings 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 of restitution of conjugal rights in a proceedings to which they were the parties."

This is a roundabout method of recognising the theory of irretrievable breakdown of marriage, for there is a distinct shift of emphasis involved here. It shows that whoever was the so called guilty party in the previous litigation, he or she has taken no steps to correct it or atone for it. In other words the so called guilty party in the marriage, simply does not care whether the marriage can be saved or not.

Under the circumstances, the legislative policy enshrined in this provision is clear. It makes divorce liberal for the parties whose marriages have suffered irreparable damage. This involves least bitterness and hostility and maximum human understanding[97]. Thus this section affords relief to the parties who cannot even agree to disagree. Such is the extent of their mutual intolerance and hatred.

Where one of the spouses lead an adulterous life and the other spouse obtains a decree of judicial separation, but the "guilty" spouse does not make amends nor corrects his or herself, there will only be a sustained judicial separation. Take the situation where one spouse had deserted the other spouse without any reasonable grounds with a view to live in adultery and a decree of restitution of conjugal rights is passed against him or her. In this situation with or without efforts restitution cannot be affected.

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97. Bimala Devi Vs Singh Raj, AIR 1977 P & H 167

Now, what should the court do in these circumstances? Will granting a divorce decree not encourage these aberrative practices? And help one to take advantage of the situation? The answer prima facie would appear to be in the positive, but in reality it would not amount to encouragement. The foregoing hypothetical questions only reflect a hapless state of married life. Refusal to grant a decree would not make them live together and lead a happy conjugal life again. I have met people who are living in separation due to the similar situations enshrined above. A few women have told me that they are going to context the divorce when it comes up before the court. I asked them the reason for this, would they then lead a happy life with their husband. They denied such possibilities. They said that they knew they would have to continue in a state of de facto divorce but they would context the case (of course win it also) in order to punish the husbands and avenge themselves.

Such marriages therefore, even if made to subsist, would be unhealthy empty shell marriages. Socially, these marriages are better dead than alive. Therefore, even if one spouse is hurt and emotionally aberrated, the court takes a right step when it dissolves such marriage, especially in view of the fact that even if divorce is declined to the parties on contest, they continue to live in a state of de facto divorce, often continuing the adulterous relationship which formed the cause of action of the suit. Divorce will at least enable the other spouse to turn a new leaf.

But so long as matrimonial laws are not broad enough to warrant the dissolution of marriage on the sole ground of irretrievable break down of marriages, each case will have to be assessed upon whether one spouse is taking advantage of his or her own wrong and the court will very often be put in a dilemma in such cases.

One must remember that after a decree of judicial separation neither of the spouses have an obligation to cohabit with the other spouse. In judicial separation, both parties are relieved from all types of marital obligation, only the fact of the marriage exists. Therefore, failure of the spouses to make amends and resume and reactivate the conjugal life does not amount to the spouses taking advantage of their own wrong[98]. Yet in every case of sustained judicial separation and non restitution, this question of whether the spouses are taking advantage of their wrong arise and very valuable judicial time is wasted in debating the issue.

It cannot also be ruled out that with the usual cunning of the litigative party, a spouse may obtain a decree for restitution against the other and does not enforce the same with the sole purpose of obtaining a divorce with least ado at a later date after the lapse of the statutory period. But such conduct or abuse of law can be prevented through legislative measures alone but as matters stand now, disinclination to execute the decree in ones favour with an ulterior motive of obtaining a decree of divorce is not prohibited

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98. Smutra Manna Vs Gobinda Chandra Manna 92CWN 254; Jethabhai Vs Manabai, AIR 1975 Bom 88; Dharmendra Kumar Vs Usha Kumari, AIR 1977 SC 2218.

legally and divorce cannot be declined on that ground[99]. Where a decree of restitution is passed in favour of one spouse against the other, there is no decreetal obligation on the part of the spouses to resume cohabitation although there is a marital and a moral obligation to do so. Thus, a spouse even after obtaining a decree of restitution, (if a spouse) does not offer his or her society to the other, still, he or she may obtain a decree under this provision[100].

Therefore, behind this innocuous provision of law, there is the cardinal principle that let no law compel the union of man and woman who have decided to separate. If they desire to be two why should the law insist that they be one. Where the marriage, de facto, has become defunct, where is the obligation to keep it de jure alive? If this is so, and the provision ultimately aims at this, then why not adopt a more direct and forthright approach and accept irretrievable breakdown simplicitor as a ground for divorce?

This roundabout acceptance of the inevitable leads to the prolongation of the agony of the spouses. There is a loss of much valued litigative time which is used up debating issues like taking advantage of own wrong etc, specially keeping in view of the huge back log of cases in every court in India.

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99. Radha Kumari Vs K.M.K. Nair, AIR 1988 Ker 235.

100. Mita Gupta Vs Prabir Kumar Gupta 93 CWN 50, Gajna Devi Vs Purushattam Giri, AIR 1977 Del 173, Dharmendra Vs Usha AIR 1977 SC 2218, Anil Vs Sudhaben, AIR 1978 Guj 74, Saroj Rani Vs Sudharshan, AIR 1984 SC 1562.

Matrimonial Cause: Special Ground of Divorce for the wife[101]

Under the Hindu Marriage Act, the wife has been conceded certain special grounds on which she may dissolve her marriage in a court of law (i) Bigamy[102]: with the lapse of almost three and a half decade, the bigamous marriages which took place before the cut off year of 1955, have become antiquated. The provision, further loses significance since bigamy has been covered from different aspects under the law. At the very outset, for a valid Hindu marriage, neither party should have a spouse living at the time of the marriage[103] and of such marriages, therefore, if performed in contravention of this rule, would ipso facto be null and void[104]. Inspite of this, if a

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101. The Hindu Marriage Act, 1955, Sub Section (2) of Section 13 provides four special grounds under which the wife alone "may also present a petition for the dissolution of her marriage".

102. Ibid Clause (i) of sub-section (2) of Section 13 states that, "in the case of any marriage solemnised before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnisation of the marriage of the petitioner: ....."

103. Ibid. Clause (i) of Section 5. While discussing the conditions of a Hindu marriage lays down that "A marriage may be solemnised between any two Hindus, if the following conditions are fulfilled namely - (i) neither party has a spouse living at the time of the marriage ....."

104. Ibid. Section 11 reads as "Any marriage solemnised after the commencement of this Act shall be null and void and may, on other party be so declared by a decree of nullity if it contravenes any of the conditions specified in clauses (i), (iv) and (v) of Section 5".

person marrid a second time while he or she has a spouse living, then they can be prosecuted under the criminal laws as well[105].

The wife of the earlier valid marriage cannot have the subsequent bigamous marriage declared as void under the Hindu law, neither can she have the subsequent marriage dissolved under any provision of divorce[106]. But she has one weapon to fight the case. She can sue her husband on the ground of adultery for having had sexual intercourse with a person other than his wife i.e. herself. Marrying again after the act has come into force, that is after the cut off year of 1955, is certainly adultery, and if he is living with the other woman as if she were his wife, then she is living in adultery. Unlike criminal law, where the validity of both the marriages are to be proved to the hilt and beyond any reasonable doubt, the charge of adultery will be sustained even if the subsequent marriage was defective and invalid[107]. In that case criminal

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105. The Indian Penal Code, 1860, Section 494 reads "Whoever having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine" and section 495 reads "whoever commits an offence in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

106. Umashankar Vs Radha Devi, AIR 1967 Pat 220

107. Chanda Vs Nandu AIR 1965 MP 268, Geetabai Vs Fattoo AIR 1966 MP 130, J. Duncan M Derret, "A Round up of Bigamous Marriages" Bom Law Reporter Vol. LXIX Pg 90 as cited in Essays in classical and Modern Hindu Law by the same author.

law will also come to the aid of the aggrieved spouse[108], but the difficulty is that under the criminal law, adultery is to be proved beyond any reasonable doubt, but the matrimonial law has no such stringent requirement.

To prove a marriage valid or an adultery beyond a reasonable doubt is a very difficult thing in the criminal law, with the result that very rarely does the bigamist or the adulterer face any consequences of their deed. The least the courts can do is condemn it as a very reprehensible social conduct.

The Dharmasastra is totally silent on the question of bigamy even though Hindu sastras are monogamous in nature. Therefore bigamy though reprehensible has become a social fact.

(ii) Sexual And Unnatural Offences[109]: The wife may seek divorce on the ground of the husbands perverted and unnatural sexual behaviour. These offences are also punishable under the criminal law but only on a conclusive evidence alone[110]. But under the

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108. The Indian Penal Code, 1806, Section 497, "whoever has sexual intercourse with a person who is or whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape is guilty of the offence of adultery and shall be punished with imprisonment of either description of a term which may extend to five years or with fine or with both. In such cases the wife shall not be punishable as an abettor.

109. The Hindu Marriage Act, 1955, Clause (ii) of Sub-Section (2) of Section 13 reads that, "A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground - (ii) that the husband has, since the solemnisation of marriage, guilty of rape, sodomy or bestaiality, or ....."

110. Under the Indian Penal Code, 1806, Section 377, a carnal intercourse against the order of nature with any man, woman or animal is made punishable as unnatural offences and the offence of rape is defined under Section 375.

matrimonial laws, if a set of circumstances point towards the commission of that offence it would be taken as a sufficient proof.

(iii) Upholding the wife's claim of maintenance[111]: Where the courts have upheld the wife's claim of maintenance in a maintenance suit, the wife, in the subsequent divorce case becomes entitled to the relief of divorce thereby again upholding the theory of irretrievable breakdown of marriage and avoidance of multiplicity of litigations. This is also similar to Section 13(1-A).

(iv) Repudiation of Marriage by the bride[112]: Where the marriage has taken place between the parties when the girl was below the age of fifteen and very young, she can repudiate her marriage on reaching the age of fifteen but before attaining the age of eighteen. Her marriage may be dissolved on such repudiation. This provision

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111. The Hindu Marriage Act, 1955, Section 13(2)(iii) reads as "(2) wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground.... (iii) that in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, 1956, or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973, or under the corresponding section 488 of the Code of Criminal Procedure 1898, decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife not withstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards or ....."

112. Ibid. Clause (iv) reads ... " that her marriage, (whether consummated or not) was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of 18 uears".

is fraught with danger because young men can be exploited under this section. Take the case of a girl of fiteen who repudiates her marriage because her parents wants her to do so. Here, in these types of marriages parental whim is more at play than the wisdom of the child-woman of the marriage, for these children hardly can take an individual and independent decision at such an young age.

Matrimonial Cause: Divorce by Mutual Consent[113]: The decree by mutual consent is the least painful process of divorce and is one of its smoothest form. However, in this healthy procedure the legislature still requires that (1) a reconciliation proceeding should be affected and (2) mere agreement to divorce is not enough; any of the grounds established uncer S. 13 of the Hindu Marriage Act, should be there.

This provision has a two way operation. It allows a six months' time limit to the petitioners to withdraw the petition if they change their decision to dissolve the marriage. Should they decide to go ahead sith their decision to dissolve the marriage, they may do so

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113. The Hindu Marriage Act, 1955, Section 13-B "(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to a district court by both the parties to a marriage together whether such marriage was solemnised before or after the commencement of the Marriage Laws Amendment Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and they have mutually agreed that the marriage should be dissolved.

after the expiry of initial six months and within eighteen months from the date of filing the petition. Therefore, not only is the requirement of court reconciliation complied with but the spouses are granted a six month "thinking period", thereby another reconciliation attempt is made.

Among the propounders of Dharmasastra, Kautilya alone advocated mutual disaffection as a ground for the dissolution of marriage[114].

Since mutual consent or mutual disaffection is good enough to end the marriage by analogy one would tend to feel, that if the concerned spouses enter into an agreement or a compromise to end the marriage, then, it should be enough for the court to dissolve the marriage. However, that is not the case. The court insists on the following:

1. Whether such agreement or compromise is a lawful one.
2. Whether such agreement or compromise satisfy the requirement of Section 23 of the Hindu Marriage Act, 1955.
3. Whether any of the grounds specified for divorce in the Act exists.
4. Satisfaction of the court on the foregoing requirements[115].

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114. Kautilya Arthasastra 3.3.15-19. For original text see R.P. Kangle, Kautilya Arthasastra, Part I, University Press, Bombay (1972). For translated text see Part II of the same book by the same author. For further reference see V.K. Gupta. The Kautilyan Jurisprudence, B.D. Gupta, Gali Arya Samaj, Delhi (1987).

115. Apurba Mohan Ghosh Vs. Manashi Ghosh I (1990) DMC 145.

These stringent requirements deprive the section and thereby the spouses to the marriage, the real facility and inherent dignity of the mutual consent.

At the Indian scene, the judiciary and the legislature have taken upon themselves the duty and the responsibility of trying to reconcile each marriage and protect one spouse from the other. They fail to understand that the requirement of S. 23 of the Hindu Marriage Act, must have been essential in the 1950s and the 1960s when the social transformation was just initiated. Today, however strict adherence to this section does not appear to be keeping tune with the time and people. The only thing the court can insist upon is that, where the spouse has been coercively and in collusion made to apply for the divorce under mutual consent, he or she should bring the fact to the notice of the court within six months of the petition.

There is no doubt that the legislation has bestowed upon the court a duty to fight a last ditch battle to save the marriage but the truth is that even if the court wins the battle apparently and officially, very few of such marriages have been patched up. As will be seen from the subsequent chapters, I have come across many cases in the course of my empirical study that even where the court has declined to grant the divorce relief, the parties did not press the case and the suit has been dropped for non prosecution or default or the case has been withdran and the parties are still not living together and continuing with the marriage.

During reconciliation, the parties sometimes agree to try again. Sometimes out of emotional reaction, which is of very temporary nature, sometimes people agree to reconcile out of fear and belief that not to agree with the courts reasoning will be a kind of contempt for which they will be punished. Even where divorce is declined because a spouse is taking advantage of his or her own wrong, or where an element of fraud and coercion is involved, they come away from the court empty handed only to lead a life of de facto divorce. To my mind this is a worse social problem and it is better to dissolve the marriage where the parties are pleading that they cannot continue to live together.

To that extent, I am in full agreement with P.A. Choudary J[116] when he says that it is a well settled proposition of law, that a statutory-provision though mandatory in form, can yet be treated as directory in substance. In my opinion, the requirement of caution under S. 23 of the Hindu Marriage Act is only directory in substance though mandatory in nature. Justice Chowdhury opines that, the desigh of the law expresses its liberalising tendency by providing relief to the parties on the basis of their mutual consent from their broken marriages. This relief is granted by bringing about a profound alteration in the concept of Hindu Marriage. By that alteration law has definitely set its face against forcible perpetration of the

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116. P.A. Choudary J. in Om Prakash Vs K. Nalini AIR 1986 A.P. 167 at page 169.

status of matrimony between unwilling partners. A procedural provision must be interpreted as a handmaid to justice in order to further and advance the interest of justice and not as a technical rule. When the court is satisfied that in the interest of justice, primarily to the spouses, then to the society, the marriage must be broken, the court must put the marriage tie asunder. And what can be a greater "satisfaction" than the fact that both the spouses feel that they cannot continue with the marriage.

Therefore, when the parties to the marriage seek divorce on the strength of an agreement or compromise they have entered into, the court should not hesitate to dissolve the marriage on the strength of that document. This sentiment and reasoning has been upheld by the Law Commission[117]. When it said that the essence of marriage is a sharing of common life, a sharing of all happiness that life has to offer, and all the miseries that has to be faced in life, an experience of joy that comes from enjoying common things of the matter and of the spirit, from showering love and affection to ones offsprings. Living together is the symbol of such sharing in all its aspects. Living apart is a symbol indicating a negation of such sharing. It is indicative of disruption of the essence of marriage - a "breakdown", and if it continues for a fairly longer period, it would indicate the destruction of the essence of marriage-"irretrievable breakdown". That being so, when the parties to the marriage

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117. Law Commission, 71st Report "Irretrievable Breakdown of Marriage As a Ground for Divorce" Para 62, Government of India Publication.

after living apart for a year or more approaches the court on mutual consent, that they would like to get their marriage dissolved, the court should have no hestitation to do so unless either of the parties approach it before the expiry of six months on the ground of collusion and fraud.

In view of the foregoing reasons stated above, I cannot help but agree with Madan Mohan Punchhi J. when he says that, the fruitful years in human life being short, the possibilities of the litigating parties rearranging their lives after the divorce by mutual consent also seem to have been the persuasive factors for granting instant relief, and when satisfied that there is no collusion, the matrimonial court can dissolve the marriage by a decree of divorce between two Hindus. It can do so on the basis of a compromise entered into between the parties without strictly following the time lapses prescribed under the provision of mutual consent under section 13-B of the Hindu Marriage Act of 1955, but only after satisfying itself of the absence of collusion etc as required under S. 23 of Hindu Marriage Act, 1955 to be brought to the notice of the court within six months of filing the petition[118].

The concept of mutual consent is novel to Hindu law. Hitherto-fore, the concept to divorce envisaged in the law was based upon the fault theory. To dissolve a wedlock, the courts would have to set

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118. M.M.Punchhi J. in Smt Krishna Khetarpal Vs Satish Lal AIR 1987 P&H 191 at paras 16, 17 at pages 196, 197.

out to discover who was the guilty spouse and due to whose guilt did the marriage reach such impasse. But under mutual consent the parties, without blaming each other can agree to dissolve the wedlock and go their independent ways to begin life afresh, and under such circumstances the requirements under S. 23 of the Hindu Marriage Act should have no relevance at all. The spirit of the law is being overlooked by the courts when divorce law has been restructured and liberalised by shifting the concept from fault theory to breakdown theory, this section should not be allowed to cast its shadow on this healthy trend.

CONCLUSION

The right of divorce is a phenomenon which found a concrete shape in the statutory law about three and a half decade back. That is not to say that the customary form of divorce was not prevalent among the lower castes in the ancient and medieval society. It also does not mean that the precepts of subsequent law givers like Yajnavalkya, Parashara, Narada and Kautilya were entirely baseless. The reflection is on the development that took place in the society from which the modern trend of thought has emerged. The concept of divorce lay dormant in the ancient and medieval time, its staturorisation merely resulted in the universalisation of the concept of divorce which hithertofore was latent within the idea of marriage itself and prevalent among the lower castes.

Divorce was shunned by Manu. To him a marital tie was for keeps. Nothing could terminate the marital relationship between the

husband and the wife. Subsequent law givers like Yajnavalkya, Parashara, Narada and Kautilya conceded the right of divorce under certain specific circumstances. In a nutshell those circumstances are as follows:

a) cruelty, (b) desertion, (c) adultery, (d) excommunication, (e) have not been heard of for a long time, (f) impotency, (g) apostacy, (h) sexual offences, (i) other crimes.

The same causes among few more form the ground of divorce under the Hindu Marriage Act, 1955.

In the medieval society, these causes were treated to be a criminal offence first and the marriage ended as a further reaction to the said offence. In other words, the reason behind terminating the marriage was that either of the spouses were guilty of committing a criminal offence. This way such termination of marriage was also a part of the punishment. Under the Hindu Marriage Act, 1955 all the matrimonial causes are not considered as criminal offences. Acts of adultery, intoxication, sexual offences, fall within the category of crimes and also within the purview of Indian Penal Code. But if a divorce is sought on any of the grounds that is both a criminal offence and a matrimonial cause the only outcome of such a litigation would be either denial or decree of dissolution of the marriage depending upon the merit of the case. If one wishes to secure a punishment for those acts as criminal offence, then one would have to proceed in a criminal court. This diversification of the cause of action on the same offence was absent in the medieval time.

In the medieval time the social structure and the social status of women were such that the very thought of divorce would be considered a mortal sin. Things are different today. Even though society looks askance at a divorced woman, her social status is relatively much different from the earlier times and she can at least think of seeking a matrimonial remedy in court.

If Hindu Jurisprudence is studied for the purpose of restructuring the past only, then Hinduism will be left possessed with antiquity alone. My purpose of studying the Hindu jurisprudence regarding marriage with the Modern Hindu law relating to marriage is to evaluate the extent to which the modern law is rooted in the medieval law. It can be done from three different angles, one, establish the point of linkage of the ancient law with the modern law, second, evaluation of the continuity and moulding of the modern law with the Sastric law and thirdly to establish the extent to which the Sastric law has influenced the modern law.

A descriptive assessment of both the sastric and the modern law shows that certain behavioural aspects of marriage, that were found to be socially offensive during the sastric period are still held to be offensive in the modern times, example, adultery, sexual offences etc. Yajnavalkya, Parasara, Narada and Kautilya have agreed that impotency, apostacy, insanity, desertion, conversion, being unheard of for a long time can each be a good reason for terminating marriage. The Statute lays down the same very grounds as causes of divorce. These are also the points where the sastric law and the modern law remains linked together.

But sastric principles cannot be said to be the descriptions of the ancient society alone. These descriptive prescriptions were obeyed as social norms for the same reasons as todays laws are obeyed by the people. Therefore those principles can be evaluated from within the context of the modern values.

Manu prohibited divorce, adultery is declared to be an offence. He recognised that when a person is unheard of for a long time he puts the woman in a social peril and he does condemn sexual offences. However when Yajnavalkya and others held that these could be reason enough to terminate a marriage, it only showed that society had changed and people were forced to rethink on marriage so as to grant the right of divorce. This not only signifies a social change but also a change in human thought and relationship. An element of continuous social development is involved here. When the Hindu Marriage Act was enacted, the same very reasons found their way into the enactment as grounds of divorce. Thus what was found to be offensive and irregular by Manu at one time was thought to be reason enough to dissolve marriage subsequently and went a step further when they were statutorised and legitimised as grounds of divorce. Thus a continuity between the sastric and the modern law can be established.

A dharmasastri and a modern law framer both perceive themselves as teachers of morality and justice. Both clearly prescribe what ought to be done rather than taking into account what is being done. Reforms of 1955-56 may mean a deviation from the sastric traditions but the norms of the sastras continued to influence the modern law of marriage. For example the fault theory of marital

dissolution can be traced back to the sastra. Every dharmasastri attributed a sense of guilt to the matrimonial causes rather than treating it as an accidental situation for which both the spouses are equally responsible and relating to the imeediate causation of the situation back to multifarious socio-economic and psychological reasons. This is a direct influence of the sastra. The structure of the family, the relationship between the husband and the wife are to a large extent influenced by traditional views. This is more so because the Indian society itself is in the tight grip of the sastras and social and moral standards are still being set up under their influence.

The ups and downs, the discontent and the discord of the marriage was the same as in the ancient and modern society. Both the society has people with feelings and emotions. Divorce is merely a consequence of such discontentions. Divorce law per se cannot keep the ties of conjugal life together. These laws cannot be made the keeper of morality and conscience, they simply put a legal stamp over the inevitable breakdown of marriage.

Neither the dharmasastra, nor the Modern Hindu law has delved deeply into the cause of the marital breakdown. Without delving deeply into this the question of the real cause of divorce cannot be solved. A glance beyond the court rooms and the parliamentary debates and into realm of reality reveals that socio-economic and psychological factors are involved here.

The subsequent chapter seeks to look into these factors of marriage.

There is a crying need for social engineering in this area and an attempt is made to achieve the same in this work.