



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL**
**ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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With this thought, we hereby present to you

JUSTICE OR PREJUDICE: ANALYSING THE BIAS IN DIVORCE LAWS OF INDIA

AUTHORED BY - KHUSHI SAGAR

SUBMITTED FOR SUBJECT CODE LLB 502

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DECLARATION

I hereby declare that the dissertation entitled **“JUSTICE OR PREJUDICE: ANALYSING THE BIAS IN DIVORCE LAWS OF INDIA”** is based on original research undertaken by me, and it has not been submitted to any university for any degree or diploma.

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CERTIFICATE

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ACKNOWLEDGEMENT

I would like to express my sincere gratitude to my supervisor, Assistant Prof. Dr. Amita, for their invaluable guidance and support throughout this dissertation. Her insightful feedback and academic expertise have been instrumental in shaping the direction and quality of this work.

I am also thankful to the faculty and staff of the Vivekananda School of Law and Legal Studies, Vivekananda Institute of Professional Studies, for providing the necessary academic resources and a supportive environment for my research.

I would like to express my heartfelt thanks to my family for their unconditional love, patience, and continuous support throughout this journey. Their faith in me gave me the strength to overcome all challenges.

A special word of appreciation goes to my friends Yakshita, Chhavi, Rohan, Vatsal, etc, for their constant support and encouragement, late-night discussions, and for being by my side through every step of this process.

Lastly, I am grateful to all those who contributed in any way to the completion of this dissertation. Your support has been deeply appreciated.

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- AIMPLB: All India Muslim Personal Law Board
- AIR: All India reporter
- AP: Andhra Pradesh
- BJP: Bharatiya Janata Party
- CrPc: Code of Criminal Procedure
- EIC: East India Company
- GWA: Guardians and Wards Act
- HC: High Court
- HMA: Hindu Marriage Act
- HSA: Hindu Succession Act
- IPC: Indian Penal Code
- MPL: Muslim Personal Law
- NCRB: National Crime Records Bureau
- NGO: Non-government Organisation
- NRI: Nonresident-Indian
- PIL: Public interest litigation
- DV: Protection of Women from Domestic Violence Act, 2005
- SC: Supreme Court
- SCC: Supreme Court cases
- UCC: Uniform Civil Code
- UK: United Kingdom

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CHAPTER 1

INTRODUCTION

N

1.1 Background of divorce laws in India

In India, marriages are seen as one of the most crucial social structures that bond families together. Historically, Indian weddings were governed by social traditions and customs that were unique to specific communities or tribes and had been followed for many generations. Despite the implementation of various laws and codes, these traditions still maintain considerable importance within society. Courts tend to acknowledge these customs if it's shown that a community has adhered to a particular practice since ancient times or from the community's founding. The purpose of implementing these laws was to create a consistent framework for managing communities that lacked clear customs and to rectify any irregularities within them. As a result, marriage and divorce regulations have been explicitly detailed in these legal statutes. Divorce is characterized as the formal termination of a marriage, usually occurring when there has been an irreversible breakdown in the relationship and both parties desire to sever their marital connections. Although divorce was originally recognized solely in Islamic law, it has since gained acceptance across a range of religions and communities.

1.1.1 Applicability of Laws

In Hindu culture, marriages are usually governed by the HMA, 1955, which is thought to be shaped by the rules set forth by the “Mitakshara” and “Dayabhaga” Schools of law in India, before any official codes and acts were introduced to regulate Hindu marriages.

“Section 2 of the HMA” explicitly defines its range of applicability. It pertains to anyone who identifies as Hindu by religion or birth, including members of the “Virashaiva” and “Lingayat” groups, as well as adherents of the “Brahmo,” “Prarthana,” or “Arya Samaj”. Furthermore, the act also encompasses individuals who practice “Buddhism,” “Jainism,” and “Sikhism”. This aspect is often termed the negative interpretation of the act, as it delineates the religions and communities to which the HMA does not apply, particularly those belonging to the Muslim and Jewish faiths, among others.

This section is pertinent to individuals identifying as Hindus in various forms, along with individuals who intermittently expand that definition to include Buddhists, Jains, or Sikhs. It is relevant to anyone from these faiths living in the country who are not Muslims, Christians,



Zoroastrians, or Jews, unless it can be shown that these individuals are exempt from the Act based on any recognized custom or practice. The Act also applies to Hindus living abroad, as long as such a Hindu maintains their domicile in India. However, if a specific community can prove the existence of a recognized custom within their group, then that custom will override the HMA.

Moreover, the scope of the Act is broad since it includes all persons categorized as Hindus who are not covered by the exception clause of the section, a fact that was also affirmed by the Supreme Court in its judicial decision.¹, The court also stated that while it is quite challenging, it is not wholly unattainable to define the Hindu religion in a manner similar to other religions. It encompasses a wide array of beliefs and lifestyles, which broadens the definition of who qualifies as a Hindu.

In relation to Muslims, marriages are governed by the "Muslim Personal Law (Shariat) Application Act of 1937," which addresses matters such as marriage, divorce, inheritance, and succession. The Quran is regarded as the primary source for Muslims, as it is believed to contain the words and actions of the Prophet Mohammed. "Sharia Law" has developed through various interpretations offered by different scholars and schools of "Muslim Law".

There are four main Sunni Islamic legal schools: "Hanafi," "Maliki," "Shafi'i," and "Hanbali." In Shia Islam, there are three significant schools: "Isna," "Ashari," "Ismaili," and "Zaydi."

For a marriage to be recognized in Islam, both individuals need to be Muslim. Nonetheless, the requirements are slightly different for Shia and Sunni Muslims. Shia Muslims are allowed to marry individuals from the Kitabia faiths (such as Jews, Parsis, or Christians) under a Muta form of marriage, which is a contract for a set duration. Any marriage outside this arrangement is deemed invalid for Shia Muslims. Sunni Muslims may also marry persons from the Kitabia religions, but such unions are classified as irregular marriages. An irregular marriage has no legal recognition until it is consummated, which then establishes certain rights and responsibilities.

Prophet Mohammed stated that, *"divorce is regarded as the least favorable action permitted by Islamic law, and it should be avoided whenever possible. Nonetheless, when a couple finds*

it impossible to sustain their relationship with care and affection, separation is preferable to forcing them to remain together in a hostile situation. In Islamic law, the foundation for

¹Sastri Yagnapurushadji And Others vs Muldas Brudardas Vaishya And Another, AIR 1966 SC 1119.



divorce is based on the inability of the spouses to coexist peacefully, rather than any particular cause or fault assigned to one partner”.

Divorce can be initiated by either the husband or the wife. If marriages are performed in accordance with Muslim law, both parties are entitled to initiate a divorce if deemed necessary.

1.1.2 *Marriage in Hinduism*

To form a legal marriage, certain fundamental requirements need to be met. First and foremost, the marriage must be monogamous; bigamy is completely prohibited. Both individuals must be mentally capable at the time of the marriage, meaning that neither person should have a mental condition that would hinder their ability to provide authentic consent. Conditions such as epilepsy, seizures, or any mental illness that hinders the purpose of marriage can prevent the ability to have children and meet marital obligations.

In addition, age requirements must be strictly adhered to according to the “Majority Act,” which specifies that males should be at least twenty-one years old and females at least eighteen years old. It is also essential that the individuals do not belong to the prohibited degree of relationship. This includes ensuring that they are not “sapindas,” or direct descendants of one another, as they should not share a common ancestor for whom they perform the ritual of “Pindadaan.” Maintaining these guidelines is crucial for the sanctity and validity of the marriage.

1.1.3 *Marriage in Islam*

To have a valid Islamic marriage, it is essential that both individuals possess the capacity to enter into marriage. Additionally, there should be a clear proposal and acceptance between them, along with the free consent of both parties. It's also necessary to ensure that there are no legal disabilities or obstacles to prevent the marriage.

1.1.4 *Divorce*

Divorce, often referred to as the termination of a marriage, is the procedure for dissolving a marital relationship. This process generally includes the annulment or modification of the legal commitments and duties that come with being married, thereby breaking the marital connection between a couple according to the applicable laws of their country or region.

The reasons for divorce may vary between individuals of Hindu and Muslim faiths.



1.1.5 Divorce and Maintenance under the HMA

The HMA of 1955 protects Hindus who are part of the sacred institution of marriage, regardless of their specific rituals. Since different ceremonies can establish this religious bond for both men and women, the law does not dictate a particular method of marriage.

This legislation was introduced in response to numerous individuals facing embarrassment due to fraudulent marriages. It applies to all “Hindus”, including “Jains”, “Sikhs”, and “Buddhists”, as well as anyone who is neither “Muslim”, “Christian”, “Parsi”, nor “Jew”, and those who are not subject to other specific laws. If you were born a “Hindu” or practice “Hinduism”, this law is applicable to you. “Section 2 of the HMA” provides a detailed definition of who qualifies as a “Hindu,” establishing who falls under the act's jurisdiction.

In cases of divorce or separation, a financially dependent spouse may seek maintenance from the other, carried out with respect and compassion. “Section 24” of the Act outlines the process through which either spouse can pursue temporary financial support, particularly in situations involving cruelty, whether emotional or physical.

A wife is entitled to seek temporary financial assistance through the court as permitted by “Section 36 of the Divorce Act 1869.” Additionally, “Section 25 of the HMA” empowers the court to issue decrees or applications concerning the provision of maintenance and support from one spouse to another.

1.1.6 Divorce in the case of Muslims

Separation or talaq., in the context of Muslims is unique in that Islam is the only religion that acknowledges it as a way to end a marriage, a practice that later influenced other faiths. However, it is permitted only in extremely rare circumstances; the Prophet Mohammad regarded divorce as the least favorable option among those allowed, and some Muslim scholars even classified it as sinful.

For a divorce to be valid under Islamic law, specific criteria must be fulfilled. Firstly, the person initiating the divorce must possess the capacity to do so, meaning they must have reached puberty. Those who are minors or classified as insane are not permitted to file for divorce, and any divorce initiated by a guardian on behalf of a minor is considered invalid. However, a guardian is allowed to initiate a divorce for someone deemed mentally unfit.

Secondly, both parties must voluntarily agree to the divorce. Since marriage in Islam is regarded as a contract, the legitimacy of the divorce hinges on the absence of coercion, undue influence, misrepresentation, fraud, and other similar factors.

Furthermore, the manner in which divorce is executed varies between different religious sects: Shia law mandates that the divorce be expressed verbally, whereas Sunni law permits either a written or spoken declaration. In all circumstances, the husband must clearly convey his intention to terminate the marriage. For Shia Muslims, it is essential that the divorce is witnessed by two male witnesses from the paternal family; failure to do so renders the divorce invalid. On the other hand, Sunni law does not require this stipulation.

In Islamic law, men are typically viewed as having more authority than women. It is thought that women rely entirely on their husbands for their welfare, which leads to the perception that they cannot be self-sufficient, as demonstrated in the case of, “Danial Latifi & Anr v. Union of India”², A wife can claim maintenance only if her husband fulfills his marital responsibilities. If she chooses not to cohabit with her husband and is unable to consummate the marriage, she may pursue maintenance according to Muslim law; however, this entitlement is forfeited if she is under eighteen and residing with her parents.

A divorced Muslim woman is entitled to seek maintenance if her husband has been abusive or has failed to fulfill his obligation to pay her dower (Mahr). It is essential to understand that she cannot seek maintenance during the “iddat” period or for benefits related to widowhood. Historically, divorced women were not eligible for maintenance after that period concluded, receiving only the Mahr. The significant case of Shah Bano transformed this by permitting divorced women to ask for maintenance from their husbands or their families, even if the husband had passed away before the divorce was finalized.

Both Hindu and Muslim laws regard marriage as significant, though they have different interpretations. Under Hindu law, marriage is perceived as a sacred bond, while under Muslim law, it is seen as a contractual agreement.

Divorce in Hindu law is a relatively recent development as marriage was historically thought to last forever. As a result, the “HMA” established various grounds for divorce along with the conditions and requirements for valid marriages and divorces. In contrast, divorce has long been accepted under Muslim law, with only a few recent modifications.

Traditionally, Muslim

² Danial Latifi & Anr v. Union of India, AIR 2001 SC 3958.



law primarily granted divorce rights to men, but recent reforms have introduced grounds for women to initiate divorce as well.

1.2 Objectives of the Study

The objective of this dissertation is to critically examine claims of systemic gender bias in Indian divorce law, with a balanced, research-driven approach. It will scrutinise whether provisions of the HMA (1955) and MPL inadvertently disadvantage men, or if allegations of misuse by women are substantiated. In light of recent developments, the study will analyse how courts have interpreted divorce, maintenance, and cruelty clauses, and will juxtapose men's rights assertions with mainstream legal scholarship on gender justice. For example, recent SC decisions, such as the 2024 ruling that even an estranged wife may claim maintenance despite refusing conjugal rights³ highlight continued emphasis on protecting women. At the same time, the courts have warned that laws like Section 498A (IPC) "*cannot be misused as a personal weapon to settle scores*"⁴, reflecting concerns that spouses may file spurious cruelty or dowry cases against husbands. This research aims to situate such case-law in context, exploring both sides of the debate. Ultimately, the study will assess whether India's divorce laws and their application truly exhibit any unfair prejudice against men, or whether recent reforms and judicial checks appropriately balance the interests of both genders.

1.2.1 Key Objectives

To analyse divorce and maintenance provisions under the HMA and MPL. This includes studying the statutory grounds for divorce (such as cruelty, desertion, restitution of conjugal rights) and maintenance/alimony clauses to understand how they assign rights and obligations by gender⁵. The research will track recent amendments and judicial interpretations, for instance, the SC's 2024 judgment confirming that "Section 125 CrPC applies to all women, not just married women."⁶ and evaluate whether these legal provisions reflect or redress gender asymmetries.

³ The Indian express, (<https://indianexpress.com/article/opinion/columns/supreme-court-verdict-misuse-of-law-by-women-alimony-divorce>). Accessed on Apr 30, 2025.

⁴ India today, (<https://www.indiatoday.in/india/story/bengaluru-techie-suicide-divorce-laws-unfair-men-family-courts-laws-men-sectionhinduact>). Accessed on Apr 30, 2025.

⁵ Chambers of Mohit Singh, (<https://www.chambersofmohitsingh.in/blog/complexities-of-gender-bias-and-justice-in-indian-divorce-laws>). Accessed on Apr 30, 2025.

⁶ Business Today, (<https://www.businesstoday.in/india/story/muslim-women-entitled-to-alimony-on-divorce-supreme-court-rules-in-landmark>). Accessed on Apr 30, 2025.



To examine recent court decisions and high-profile disputes involving divorce laws. The study will be on SC and HC decisions that bear on the debate. Notable examples include Mohd. Abdul Samad case⁷ a landmark alimony case for divorced Muslim women, and other rulings like Rina Kumari v. Dinesh Kumar Mahto⁸, where the Court upheld a wife's maintenance claim despite her refusal to return home⁹. Contrastingly, it will analyse cases in which courts have explicitly decried the "*growing tendency to misuse provisions like Section 498A*" and have overturned divorce/custody orders alleged to be based on false allegations. The dissertation will also consider widely reported disputes in which men have publicly alleged harassment via domestic/anti-dowry laws, to assess patterns in how these laws operate in practice.

To survey academic, media, and activist discourse on gender and family law. This includes reviewing men's rights advocacy and scholarly critiques of gendered divorce laws. For instance, organizations like the Save Indian Family Foundation highlight how "*laws which are supposed to contain [dowry/domestic violence] have also been weaponised against men*", and note a lack of safeguards against false accusations. The study will juxtapose these perspectives with mainstream feminist-legal analyses and social science research, which typically emphasize that personal laws historically favoured men (e.g., MPL was long criticized for giving men greater divorce rights) and that recent protections for women were introduced to correct systemic inequalities.

By examining both media accounts and peer-reviewed work, the research will identify how the narrative around "male disadvantage" in divorce law has evolved, and what empirical evidence is cited on each side.

To evaluate the overall fairness of the divorce law framework and recommend reform where needed. Drawing together statutory analysis, case studies, and discourse review, the dissertation will assess whether current divorce laws in India exhibit an inherent or procedural bias against men. It will particularly consider the SC's recent emphasis on balance (e.g., the December 2024 judgment noted the need to "*strike a balance between protecting women from genuine abuse and preventing unjust exploitation of the law*"). Using this lens, the study will determine if reports of misuse or bias are substantiated by data and legal outcomes, or if they overstate isolated problems. The goal is a nuanced, evidence-based conclusion that can inform

⁷ Mohd. Abdul Samad v. State of Telangana, (2025) 2 SCC 49.

⁸ Rina Kumari v. Dinesh Kumar Mahto, (2025) 3 SCC 33.

⁹ The Indian express, (<https://indianexpress.com/article/opinion/columns/supreme-court-verdict-misuse-of-law-by-women-alimony-divorce>). Accessed on Apr 30, 2025.



debate on personal-law reform, for instance, whether more gender-neutral statutes or additional safeguards are warranted, so that the divorce system serves justice for all parties.

1.3 Hypothesis

Indian divorce laws, shaped by traditional gender roles, often lead to unfair outcomes, especially disadvantaging men during legal proceedings.

1.4 Research Questions

1. Do the provisions under the HMA, 1955, and MPL exhibit any structural or interpretive bias against men in divorce proceedings?
2. To what extent are legal provisions intended to protect women (e.g., maintenance, cruelty, restitution of conjugal rights) being misused in contemporary divorce cases?
3. How have Indian courts (particularly the SC and HCs) responded to claims of legal misuse by women in divorce and maintenance disputes?
4. What are the lived experiences and legal outcomes for men accused under provisions like Section 498A IPC or Section 125 CrPC, in the context of contested divorces?
5. Does the existing legal framework sufficiently protect both parties rights in matrimonial disputes, or is there a need for more gender-neutral reforms in personal law?
6. How do societal attitudes, media portrayal, and activism (both feminist and men's rights) influence the perception and application of personal laws in India?

1.5 Research Methodology

This study adopts a qualitative research methodology, primarily based on doctrinal legal analysis. It involves a detailed examination of statutory provisions under the HMA, 1955, and MPL, along with relevant sections of the IPC (Section 498A) and Criminal Procedure Code (Section 125). The research critically analyses SC and HC judgments, particularly from the past decade (2015-2025), to identify judicial trends, interpretations, and responses to allegations of gender bias and legal misuse. Additionally, the study incorporates case studies where men have claimed unfair treatment or legal harassment during matrimonial disputes. Secondary sources such as peer-reviewed journal articles, legal commentaries, government and Law

Commission reports, and media coverage of high-profile cases are examined to contextualise the



legal analysis within broader societal and academic debates. The research also engages with the narratives of feminist scholars, men's rights activists, and civil society organizations to present a balanced and multi-perspective view. While this study is qualitative, it employs a structured analytical framework that emphasizes constitutional values such as equality (Article 14) and non-discrimination (Article 15) to assess whether Indian divorce laws operate fairly or reflect systemic prejudice. The geographical scope is limited to India, and the study does not involve fieldwork or primary interviews, relying instead on documented legal sources and reported case materials.

1.6 Scope and Objective

This dissertation aims to critically examine the Indian divorce laws to assess whether they genuinely uphold the principles of justice or whether they reflect underlying biases—particularly gender-based and religious. The scope of the study includes a detailed analysis of statutory frameworks of the Hindu Marriage Act and Muslim Personal Law, as well as key judicial pronouncements that have shaped the discourse on divorce in India.

The study focuses on areas where disparities or perceived injustices emerge, especially concerning gender roles, maintenance and alimony, child custody, and procedural hurdles. It explores how different personal laws impact individuals' access to fair and unbiased divorce proceedings, with particular attention to the experiences of women and marginalized groups.

The study is guided by several integrated objectives aimed at critically examining Indian divorce laws. First, it seeks to analyze both the substantive and procedural aspects of these laws for any signs of systemic or implicit bias. In addition, the role of the Indian judiciary will be evaluated to understand how it has reinforced, challenged, or mitigated such biases through landmark judgments and evolving jurisprudence. The investigation will also delve into the differences in personal laws across religious communities concerning divorce, assessing whether these variations contribute to inequality or prejudice. Furthermore, the study aims to assess the real-world implications of these legal frameworks on individuals, particularly regarding their access to justice and equitable treatment. Finally, it will propose legal and policy reforms designed to create more uniform, equitable, and just divorce laws

in India.

This study also includes a comparative glance at international legal systems to contextualize India's position and to draw possible lessons for reform.



1.7 Statement of Problem

Despite the constitutional guarantee of equality before the law, India's divorce legal framework shaped by a mix of secular and religious personal laws often reveals inconsistencies and potential biases. These laws sometimes reflect traditional gender roles, social hierarchies, and cultural norms that may not align with contemporary notions of justice and individual rights. As a result, questions arise about whether the Indian divorce system serves all citizens equitably, or whether it disproportionately affects certain groups, particularly women, religious minorities, and economically weaker parties. This research seeks to uncover whether India's divorce laws truly deliver justice or whether they perpetuate prejudice, both through statutory provisions and judicial interpretation.

1.8 Literature Review

A meaningful study can truly add to the existing body of literature only if it begins with a careful look at what's already out there. Keeping this in mind, this current research, *Justice or Prejudice: Analysing the bias of divorce laws in India*. The researcher has taken the time to read and reflect on various works by different authors, gathering insights from their observations and findings. Here's a list of books, articles, and research papers that have informed this study.

1.7.1 Books

Paras Diwan's *Modern Hindu Law* (2003)¹⁰ stands as a foundational text in the study of Hindu personal law in India. The book offers a comprehensive analysis of both codified and uncodified aspects of Hindu law, encompassing topics such as marriage, divorce, adoption, inheritance, and property rights. Diwan meticulously traces the historical evolution of these laws, highlighting the interplay between traditional practices and modern legislative reforms. The text is particularly noted for its examination of landmark judicial decisions and their impact on the interpretation and application of Hindu law. Serving as an essential resource for students, scholars, and legal practitioners, Diwan's work provides critical insights into the complexities and nuances of Hindu personal law in contemporary India.

¹⁰ PARAS DIWAN, MODERN HINDU LAW, 46, 101, (Allahabad law Agency),(2003).



Naseem Akhtar's *Family Law on Divorce and Judicial Separation* (2003)¹¹ offers a comprehensive examination of divorce and judicial separation within India's diverse matrimonial legal systems. The book systematically analyses statutory provisions and judicial interpretations across various personal laws, including Hindu, Muslim, Christian, and Parsi traditions. Akhtar delves into procedural aspects and consequential reliefs, integrating recent legislative amendments and landmark case law to provide a nuanced understanding of matrimonial remedies. The author's methodical approach and critical evaluation of legal frameworks make this work a valuable resource for scholars, legal practitioners, and students seeking insight into the complexities of family law in India.

K.N. Ahmad's *Muslim Law of Divorce* (1978)¹² It is a comprehensive examination of Islamic divorce jurisprudence, offering an in-depth analysis of the various schools of thought within Muslim law. Ahmad meticulously explores the rules and interpretations of divorce across different Islamic traditions, drawing extensively from primary sources and classical texts. His analytical and unbiased approach facilitates a comparative study of these legal systems, enhancing the book's value for scholars and practitioners alike. Notably, Ahmad addresses complex issues such as the impact of conversion on marital status and conflicts between Muslim and secular laws, providing critical insights into the dynamic nature of Islamic divorce law.

1.7.2 Articles

In his article “*History of the Evolution of Muslim Personal Law in India*,” **K. K. Rahiman**¹³ offers a comprehensive analysis of the development of Muslim personal law from the advent of Islam in India to the post-independence era. He traces its evolution through various dynasties, colonial interventions, and socio-political influences, highlighting the shifts in interpretation and application. Rahiman critically examines how British colonial policies codified and institutionalized certain aspects, often distorting traditional practices. The article contributes valuable insight into the historical and legal transformations of Muslim personal

¹¹ AKHTAR NASEEM, FAMILY LAW ON DIVORCE AND JUDICIAL SEPARATION,(Deep and Deep Publication),(2003).

¹² 1, K.N AHMAD, MUSLIM LAW OF DIVORCE, (kitab bhavan),(1978).

¹³ Rahiman, K. K. "History of the evolution of Muslim personal law in India." *Journal of Dharma* 11, no. 3 (1986): 249-263, <https://dvkjournals.in/index.php/jd/article/download/1376/1266/2759>.



law, emphasizing the need for contextual understanding in ongoing legal debates and reform efforts.

Naseem Akhtar's *Family Law on Divorce and Judicial Separation* (2003)¹⁴ offers a comprehensive examination of divorce and judicial separation within India's diverse matrimonial legal systems. The book systematically analyzes statutory provisions and judicial interpretations across various personal laws, including Hindu, Muslim, Christian, and Parsi traditions. Akhtar delves into procedural aspects and consequential reliefs, integrating recent legislative amendments and landmark case law to provide a nuanced understanding of matrimonial remedies. The author's methodical approach and critical evaluation of legal frameworks make this work a valuable resource for scholars, legal practitioners, and students seeking insight into the complexities of family law in India.

Srimati Basu's article, "***Judges of Normality: Mediating Marriage in the Family Courts of Kolkata, India***" (2012)¹⁵, offers a critical ethnographic analysis of Kolkata's lawyer-free family courts. Basu examines how these courts, envisioned as feminist legal reforms, often reinforce traditional gender norms under the guise of mediation. She argues that while alternative dispute resolution aims to empower women, it frequently pressures them into reconciliation, even in cases involving domestic violence, thereby perpetuating patriarchal structures. The study highlights the limitations of institutional reforms that fail to address underlying societal norms, emphasizing the need for substantive gender justice beyond procedural changes.

Chandra Mallampalli's article, "***Escaping the Grip of Personal Law in Colonial India: Proving Custom, Negotiating Hindu-ness***" (2010)¹⁶, examines how colonial courts in India adjudicated personal law cases by balancing scriptural authority with local customs. Mallampalli explores how litigants, particularly from marginalized communities, leveraged customary practices to challenge rigid interpretations of Hindu personal law. The article highlights the colonial legal system's role in shaping religious identities and underscores the

¹⁴ 1, AHMAD A GALWASH, THE RELIGION OF ISLAM, 117, (conveying Islamic message to society), (1940). Ibrahim, Abdul Hamid, Dissolution of Marriage, Islamic Quarterly - 3,166-75,1956, <https://msbrijuniversity.ac.in/assets/uploads/newsupdate/LawofDivorce.pdf>.

¹⁵ Srimati Basu's article, "***Judges of Normality: Mediating Marriage in the Family Courts of Kolkata, India***"

(2012).

¹⁶ C., Mitra. *Escaping the Grip of Personal Law in Colonial India: Proving Custom, Negotiating Hindu-ness*, 28 *Law & Hist. Rev.* 1043 (2010).



complexities of legal pluralism in colonial India. Mallampalli's work contributes to understanding the interplay between law, religion, and colonial governance, offering insights into the historical foundations of contemporary personal law debates.

1.10 CHAPTERIZATION

CHAPTER 1: INTRODUCTION

Divorce laws in India, rooted in diverse personal laws, aim to provide justice to separating spouses. However, questions persist about whether these laws are truly neutral or reflect underlying biases, particularly gender-based. This study explores the intersection of law, gender, and social perception to analyse whether divorce laws in India serve justice or perpetuate prejudice. By examining statutory provisions, judicial interpretations, and lived experiences, the research aims to uncover inconsistencies and potential biases. This chapter lays the foundation for the inquiry by outlining the background, objectives, scope, and significance of the study on fairness within Indian divorce law.

CHAPTER 2: EVOLUTION OF DIVORCE LAWS IN INDIA

This chapter explores the evolution of divorce laws in India with a focus on Hindu and Muslim personal laws. Traditionally, Hindu law did not recognize divorce, viewing marriage as a sacrament, until the enactment of the Hindu Marriage Act, 1955, which introduced legal grounds for divorce. In contrast, Muslim law has historically permitted divorce, with practices like *talaq*, *khula*, and *mubarat*. Over time, judicial interpretations and legislative reforms have aimed to balance religious doctrines with constitutional principles. This chapter examines these developments to understand how each system has evolved and how they contribute to the broader discourse on justice and bias.

CHAPTER 3: GENDER BIAS IN DIVORCE LAWS

This chapter examines the presence of gender bias within divorce laws under Hindu and Muslim personal laws in India. While Hindu women often face challenges related to maintenance, custody, and social stigma, men too encounter significant hurdles. Under the Hindu Marriage Act, 1955, men may suffer from prolonged litigation, false allegations (such as misuse of Section 498A IPC), and heavy financial burdens due to alimony and maintenance orders. Additionally, they often face emotional distress and limited custody

rights. By analysing these gender-specific issues, the chapter explores whether the current legal framework ensures fairness or reinforces systemic bias against either gender.



CHAPTER 4: CASE STUDIES AND JUDICIAL PRECEDENTS

This chapter presents key case studies and legal precedents that illustrate how Indian courts have interpreted and applied divorce laws under Hindu and Muslim personal laws. By examining landmark judgments, the chapter highlights instances of both justice and perceived bias in the judicial process. Cases involving issues such as unilateral *talaq*, cruelty, maintenance, and custody are analysed to understand evolving legal interpretations. The chapter also explores how courts have responded to allegations of gender discrimination, setting important legal standards. These case studies provide real-life context to the theoretical framework, offering insight into the practical functioning of divorce laws in India.

CHAPTER 5: SOCIETAL AND CULTURAL INFLUENCE ON DIVORCE LAWS

This chapter explores how societal norms, cultural beliefs, and religious traditions influence the formulation, interpretation, and implementation of divorce laws in India. It examines how deeply rooted patriarchy, stigma around divorce, and community pressures impact both men and women differently under Hindu and Muslim personal laws. The chapter also addresses the role of caste, honour, family reputation, and gender roles in shaping legal attitudes and decisions. By highlighting these external factors, it reveals how the law is not applied in isolation but is deeply affected by the social environment, often reinforcing existing biases and inequalities within matrimonial disputes.

CHAPTER 6: NEED FOR LEGAL REFORMS AND GENDER NEUTRAL APPROACH

This chapter emphasises the urgent need for legal reforms in India's divorce laws to ensure fairness, equality, and justice for all genders. It highlights the limitations of the current personal law framework, which often reinforces gender stereotypes and leads to unequal outcomes. The chapter advocates for a gender-neutral approach that treats both spouses equally in matters of divorce, maintenance, and custody. It explores recommendations from legal experts, judicial observations, and law commission reports, calling for uniform civil principles that transcend religious boundaries. The aim is to promote a more balanced and inclusive legal system that upholds constitutional values and human rights.

CHAPTER 7: CONCLUSIONS AND SUGGESTIONS



This chapter provides a comprehensive summary of the findings from the previous chapters, drawing conclusions about the gender biases and systemic inequalities present in India's divorce laws under Hindu and Muslim personal laws. It underscores the need for reform, emphasising the importance of a gender-neutral approach to ensure fairness in divorce proceedings. The chapter also offers practical suggestions, including the adoption of uniform civil laws, better judicial training on gender sensitivity, and the promotion of alternative dispute resolution mechanisms. Ultimately, it calls for a holistic legal overhaul to balance the scales of justice and protect the rights of all individuals.



CHAPTER 2

EVOLUTION OF DIVORCE LAWS IN INDIA

2.1 Overview of Marriage and Divorce Throughout History

Marriage and divorce are profound social constructs that have shaped human relationships throughout history, reflecting the evolving dynamics of love, commitment, and societal norms. The very institution of marriage dates back thousands of years, with its origins rooted in various cultural, religious, and economic practices. Ancient civilizations, from the Egyptians to the Romans, established marriage not merely as a romantic union but as a strategic alliance, often aimed at securing wealth, property, and political power. In these contexts, the roles of partners were often clearly defined, reinforcing societal structures and expectations. As civilizations progressed, the significance of marriage expanded to include emotional bonds, underscoring the transition from purely transactional unions to those based on love and companionship, particularly evident during the Middle Ages and the Renaissance.

In contrast, divorce, often seen as taboo in many cultures, has existed alongside marriage as a means for partners to extricate themselves from unsatisfactory or harmful unions. Historical attitudes toward divorce have varied significantly; in some cultures, it was accepted and even encouraged, while in others, it was strictly forbidden or stigmatized. For instance, in ancient Rome, divorce became a common place practice among the upper classes, reflecting a shift toward individual autonomy in marital relationships. The advent of religious doctrines, particularly in Christianity and Islam, introduced additional layers of complexity regarding marital permanence, often mandating stringent conditions for divorce or labeling it a sinful act. However, as societal values evolved, particularly with the rise of feminist movements and the push for gender equality in the 20th century, the legal and cultural barriers to divorce began to diminish, granting individuals greater freedom to pursue their happiness outside of a marriage when necessary.

The 20th century marked a significant turning point, as legal reforms in many Western countries led to the introduction of no-fault divorce laws, which acknowledged that relationships could be irreparably broken without assigning blame to either party. This shift was revolutionary, as it not only allowed couples to dissolve their marriages more

amicably but also reflected changing societal norms about individual fulfillment and personal choice. As cultures continue to grapple with the meanings of marriage and divorce, contemporary discussions have begun



to address the nuances of same-sex marriage, cohabitation, and non-traditional family structures, prompting a reevaluation of what commitment and partnership mean in today's world.

Thus, the history of marriage and divorce is a tapestry woven with threads of love, power, societal expectations, and individual rights. It serves as a mirror reflecting the complexities of human relationships, the struggles for autonomy, and the continual evolution of social norms. As we delve deeper into this topic, we will explore not just the historical frameworks that have defined marriage and divorce but also the personal stories and societal impacts that shape our current understanding of these fundamental aspects of human life. Through examining the interplay between legal, social, and personal elements, we can appreciate the rich and varied history of marriage and divorce, offering insights into how they influence contemporary relationships and societal structures today.

2.1.1 Global Historical Developments in Divorce Legislation

In ancient civilizations, the "Code of Hammurabi" in Mesopotamia recognized divorce, permitting men to end marriages for various reasons, while women had the right to request a divorce under certain circumstances. In Ancient Egypt, unions were considered legal agreements, permitting both wives and husbands to seek a divorce. The procedure involved the return of the dowry and the allocation of assets, although men generally had more favorable conditions in these situations.

In "Ancient Greece," it was relatively straightforward for men to initiate a divorce, while women encountered greater obstacles and needed significant justifications, such as "adultery" or "neglect," to pursue a divorce. Conversely, in "Ancient Rome," both men and women were allowed to seek divorce, often through mutual consent or personal declaration. Over time, "Roman law" progressed toward a more equitable perspective, showcasing early examples of gender equality in the termination of marriages.

During the Middle Ages, the ascendance of Christianity in Europe led the Catholic Church to perceive marriage as a sacred and unbreakable bond, strictly forbidding divorce and permitting annulments only under certain circumstances, such as when it could be demonstrated that the marriage was invalid from the beginning. Conversely, Islamic law, which was established in the 7th century, permitted divorce but controlled it through

specific procedures. Men had the ability to initiate divorce through talaq, while women could seek it through khula or legal intervention under certain conditions. In India, a secular country, each religion follows its own



legal framework governing divorce within its communities. Historically, marriage was regarded as a lifelong commitment, with the belief that it should not be easily dissolved. However, over time, divorce has become more widely accepted and has emerged as a significant issue. Nowadays, numerous couples opt for divorce, considering it a feasible resolution to problems that might often be addressed through open communication and mutual adjustments. Divorce serves as a legal procedure to end the marital relationship, thereby concluding the marriage without the death of either partner.

The Protestant Reformation in the 16th century challenged the teachings of the Catholic Church regarding divorce, with reformers like Martin Luther advocating for the option of divorce in cases of adultery and abandonment. In England, the “MCA of 1857” made divorce more accessible by transferring jurisdiction from ecclesiastical courts to civil courts, permitting divorce for reasons such as adultery, cruelty, and desertion.

The 19th century experienced industrial growth and the rise of cities, leading to changes in family dynamics and gender roles. As legal changes made divorce easier to obtain, there was an increase in divorce rates. In the United States, the late 19th and early 20th centuries witnessed considerable transformations, as states began to relax divorce regulations and progressed towards no-fault divorces by the mid-20th century.¹⁷

In summary, the development of marriage and divorce laws mirrors the changing values and norms of societies throughout history. These laws have evolved in response to shifts in cultural beliefs and the growing emphasis on individual rights and societal expectations. From ancient civilizations, where marriage was often viewed as a strategic alliance, to modern perspectives that celebrate love and personal choice, the interpretation of marriage has undergone significant transformation over the years. This evolution underscores the profound impact that social structures have on personal relationships, highlighting the importance of context in understanding the dynamics of marriage and divorce.

Additionally, societal attitudes toward divorce have changed considerably, marking a pivotal shift in how individuals view personal fulfillment and their right to pursue happiness. In cultures that accept divorce, people can seek relationships that resonate more with their personal goals, reflecting an increasing acknowledgment of the significance of emotional well-

¹⁷ The law advice, Evolution of divorce from ancient times to modern society, the law advice. <https://www.thelawadvice.com/articles/evolution-of-divorce-from-ancient-times-to-modern-society-and-indian-context>, Accessed on Mar 13, 2025.



being in marriage. Conversely, in societies that stigmatize divorce, restrictive norms can create obstacles for individuals wanting to leave unhealthy or unfulfilling marriages.

The introduction of no fault divorce in the 20th century represented a significant milestone, reinforcing the idea that marriages can end without assigning blame. This change recognized that various personal circumstances often contribute to the dissolution of relationships, permitting individuals to prioritize their happiness without the burden of guilt or shame. It fostered a more compassionate understanding of divorce within society, promoting the belief that individuals deserve the freedom to exit partnerships that no longer meet their needs.

Looking ahead, our perspectives on marriage and divorce must continue to adapt. As society evolves, it is crucial to engage in open discussions about how these institutions affect individual rights and societal dynamics. Such ongoing dialogue will help to eliminate persistent stigmas associated with divorce and ensure that legal frameworks align with contemporary values of equality and personal agency. Acknowledging that marriage is not just a legal agreement, but a partnership founded on respect and mutual support, can lead to healthier relationships. Ultimately, embracing the complexities of marital relationships will pave the way for greater understanding and fulfillment. Accompanying challenges of divorce, will lead to a society that values individual happiness and fosters stronger, more resilient partnerships.

As we look to the future, our views on marriage and divorce need to keep evolving. It's important to have open conversations about how these institutions influence individual rights and the dynamics of our society. Continued dialogue can help reduce the stigma surrounding divorce and ensure that legal systems reflect modern values of equality and personal choice. Recognizing that marriage goes beyond a mere legal contract and is a partnership built on respect and mutual support can contribute to healthier relationships. Ultimately, embracing the complexities of marital relationships will facilitate better understanding and fulfillment, and tackling the challenges of divorce will create a society that prioritizes individual happiness and nurtures stronger, more resilient partnerships.

2.2 Impact of colonial rule on marital laws

Colonial rule in India significantly shaped the country's legal system, especially in marital

laws. Before British influence, marriage was primarily governed by a variety of religious and customary traditions, with Hindu and Islamic frameworks dictating personal laws (Derrett,



1968)¹⁸. However, as British rule took hold, the colonial administration aimed to organize, codify, and regulate these indigenous practices to fit their legal and political ideologies (Cohn, 1989)¹⁹. This change was fueled by the British belief that law was essential for governance and social order, leading to the categorization of marriage and family matters as “personal laws,” distinct from criminal and civil law.

The colonial state's approach to marital laws was contradictory. It attempted to preserve and codify traditional customs while also introducing new interpretations influenced by Western legal thought, particularly regarding individual rights, property, and gender roles (Menski, 2003)²⁰. A significant impact of colonial involvement was the official acknowledgment of religious laws under governmental control. Before British domination, Hindu and Muslim communities adhered to their traditional laws concerning marriage, divorce, inheritance, and family issues (Jain, 2011)²¹. However, in pursuing legal uniformity and administrative ease, the colonial administration codified these laws through judicial decisions, legal texts, and statutory reforms (Anderson, 1996)²². The British established Hindu and Muslim laws as distinct legal entities, thereby reinforcing religious identities and limiting the flexibility that had previously characterized customary practices. This codification impacted the dynamic nature of indigenous legal traditions and subjected them to colonial courts, thereby reshaping the role of religious authorities in matters of marriage and family (Sharafi, 2014)²³.

Furthermore, colonial interventions in marital laws significantly influenced gender norms and women's legal status. British legal principles, rooted in Victorian views of morality and gender hierarchy, altered the understanding and regulation of marriage in India (Chatterjee, 1990)²⁴. While colonial authorities often claimed to be intervening for reform and social progress, their actions typically reinforced patriarchal systems. The British stance on child marriage, widow remarriage, and women's property rights showcased an imposition of legal norms that sometimes conflicted with indigenous traditions (Sarkar, 2001)²⁵. Laws like the “Hindu

¹⁸ Derrett, J. D. M. (1968). *Religion, Law and the State in India*. Oxford University Press.

¹⁹ Cohn, B. S. (1989). *Colonialism and Its Forms of Knowledge: The British in India*. Princeton University Press.

²⁰ Menski, W. (2003). *Hindu Law: Beyond Tradition and Modernity*. Oxford University Press.

²¹ Jain, M. P. (2011). *Outlines of Indian Legal and Constitutional History*. LexisNexis.

²² Anderson, M. R. (1996). *Islamic Law and Colonial Encounters*. Oxford University Press.

²³ Sharafi, M. (2014). *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947*. Cambridge

University Press.

²⁴ Chatterjee, P. (1990). *The Nation and Its Fragments: Colonial and Postcolonial Histories*. Princeton University Press.

²⁵ Sarkar, T. (2001). *Hindu Wife, Hindu Nation: Community, Religion, and Cultural Nationalism*. Indiana University Press.



Widows' Remarriage Act of 1856” and the “Age of Consent Act of 1891” were created to tackle certain social issues but were also influenced more by colonial interests than by native reform movements (Forbes, 1996)²⁶.

Additionally, the idea of personal law led to a lasting legal divide among religious communities, further institutionalizing differences in marriage laws. By treating Hindu and Muslim marital laws as distinct legal categories, the colonial administration established the groundwork for the ongoing existence of religious personal laws in post-independence India (Larson, 2018)²⁷. This separation has continued to play a role in contemporary discussions about the UCC and the significance of religious identity in legal matters. Consequently, the impact of colonial rule on India's marital laws was not just administrative; it was also deeply political and social, shaping the course of legal and social reform in independent India.

2.2.1 Impact of colonial rule on Hindu law

The beginning of colonial dominance in India in the 17th century marked a crucial period that significantly impacted all aspects of traditional social and cultural life. Among the many institutions examined by colonial authorities, Hindu marriage and family structures experienced alterations that would echo through future generations. The British East India Company, and later the British Crown, implemented a colonial framework aimed at governing the various customs, traditions, and social norms integral to Hindu society.

This paper thoroughly evaluates the significant impacts of colonial governance on Hindu marriage and family structures. It analyzes how the introduction of Western ideas, legal systems, and socio-economic strategies fundamentally transformed traditional practices within Hindu households. It is crucial to recognize the rich and deeply rooted traditions of Hinduism that existed prior to colonial influence. Hinduism encompasses much more than just a religion; it embodies a complex socio-religious framework that intricately integrates marriage into its cultural fabric. Important texts such as the Manusmriti and the Ramayana outline the principles that guide marriage alliances, familial obligations, and social hierarchy.

The rise of colonial powers represented a pivotal moment, as the British aimed to establish their supremacy not only politically and economically but also culturally. The resulting clash

²⁶ Forbes, G. (1996). *Women in Modern India*. Cambridge University Press.

²⁷ Larson, G. J. (2018). *India's Agony Over Religion*. SUNY Press.



between native traditions and colonial impact set the stage for changes in Hindu marriage and family structures.

A major effect of colonial governance was the introduction of Western legal frameworks to traditional Hindu marriage practices. The British enacted codified regulations designed to govern various aspects of Hindu personal law, such as marriage, divorce, and inheritance. This codification, exemplified by the HMA of 1856, signified a notable shift from the flexible and complex nature of customary Hindu practices. The new legal structure often conflicted with local traditions, reshaping marital relationships and family hierarchies. The inherently patriarchal nature of British legal systems clashed with the more communal and adaptable characteristics of traditional Hindu families, leading to shifts and conflicts in power dynamics within households.

In addition, the economic policies during colonial rule aimed to exploit India's resources for the benefit of the British Empire, which disrupted existing livelihood patterns. The agrarian economy, vital for many Hindu communities, faced considerable upheaval that led to migration and alterations in traditional family jobs. This economic transformation, combined with the introduction of Western education, resulted in a change in social aspirations and values. As people sought new job and educational prospects, the traditional joint family structure began to shift.²⁸

Examining the impact of colonial governance on Hindu marriage and family structures indicates that its effects extended beyond legal and economic dimensions. The interaction with colonial powers brought about significant sociocultural transformations that both challenged and modified, and at times resisted, the longstanding traditions that shaped Hindu family life over the years. This study seeks to explore the complex aspects of this transformative period, highlighting the delicate balance between colonial imposition and the persistence of indigenous customs within the sacred sphere of Hindu marriage and family.

Legal frameworks governing Hindu marriages play a crucial role in shaping the dynamics of this age-old institution, facilitating its integration with contemporary legal standards and societal expectations. These interventions vary and include legislative changes, judicial decisions, and government policies that address different elements of marital relationships. A

²⁸ Renuka Kancherla and Dr. Sunil Kumar Chaturvedi, Assessing the influence of colonial rule in Hindu marriage and family structures, vol. 3, IJARST, 656, 657-658, 2023, (<https://ijarsct.co.in/Paper9749H.pdf>).



primary objective of legal reform is to modernize and standardize marriage laws, thereby promoting equity, justice, and compliance with constitutional values.

The HMA of 1955 created a comprehensive legal structure for Hindu marriages, addressing eligibility requirements, valid marriage conditions, and grounds for divorce. Over time, amendments have sought to tackle modern issues, particularly by advancing gender equality, as seen in the 2005 amendment to the HSA, which granted daughters equal rights to inheritance. The judiciary plays a crucial role in resolving marital disputes, interpreting laws, and influencing legal standards through important court decisions. Additionally, the “Prohibition of child marriage act, 2006” makes it illegal for minors to marry, protecting their rights and aligning legal practices with current views on consent. Government initiatives support these laws with campaigns focused on awareness and education. Initiatives like Beti Bachao and Beti Padhao in India aim to address challenges such as female infanticide while promoting girls' education and empowerment, fostering a broader societal shift in attitudes toward gender roles and the significance of women within family structures.²⁹

The economic transformations initiated during colonial rule had a profound effect on Hindu marriage and family dynamics, reshaping established social and economic ties in ways that are still evident today. The British colonial era, which spanned from the 17th century to the mid- 20th century, introduced various economic policies and administrative changes that significantly impacted the traditional structure of Hindu communities.

One major effect was the reorganization of land ownership and agricultural practices. The “Permanent settlement act, 1793”, enacted in certain regions of British India, shifted agrarian societies toward landlord-driven frameworks. This shift disrupted existing economic hierarchies and altered the economic foundations of families. With the introduction of new taxation and revenue systems, Hindu families faced increased economic strain as land, a crucial economic asset, became subject to higher taxes. As a result, many families had to relinquish their ancestral properties.

This economic turmoil had profound implications for marriage customs, as the search for an appropriate spouse increasingly depended on factors such as land ownership and economic stability. Consequently, colonial policies influenced the criteria for partner selection and led to shifts in matrimonial alliances.

²⁹ Women and Child Development, <https://wcdhry.gov.in/schemes-for-women/beti-bachao-beti-padhao>, Accessed on Mar 20, 2025.



The transition to a cash-based economy during the colonial period significantly altered traditional occupations and economic practices. Many artisanal and craft jobs, which were essential for the survival of Hindu families, declined as colonial policies favoured industries that catered to European markets. This shift compelled individuals to migrate in search of new opportunities, disrupting traditional family dynamics and often leading to extended separations between spouses and families.

Furthermore, the establishment of colonial educational institutions reshaped the aspirations of Hindu youth. With an emphasis on Western-style education, a new class of professionals emerged, challenging the established socio-economic roles within Hindu families. Education became a crucial factor in marriage prospects, reflecting a shift from agrarian to intellectual and professional values.

The economic transformations during colonial rule also played a significant role in the escalation of the dowry system. Although it existed previously in some capacity, it became more pronounced due to changing economic conditions. The demand for significant financial contributions to secure an appropriate marriage intensified, placing additional financial burdens on families and influencing marriage negotiations.

Cultural views, shaped by various historical, social, and political factors, play a vital role in forming our perspective on the world. One important viewpoint through which cultures have frequently been analyzed is Orientalism. Introduced by Edward Said in the 1970s, *“Orientalism refers to the Western practice of depicting Eastern cultures—particularly those from the Middle East, Asia, and North Africa—as exotic, mysterious, and often inferior”*. This viewpoint has significantly influenced cultural interpretations, solidifying stereotypes and power dynamics that persist today.

Orientalism is a notion that highlights how Western cultures characterize Eastern cultures in contrast to themselves. It positions the West as the benchmark and evaluates the East by that standard. This results in the “othering” of Eastern societies, simplifying their rich complexities and reducing them to inaccurate stereotypes. The manner in which the West typically presents the East fosters misunderstandings and bolsters the concept of Western superiority, thereby contributing to an unequal global power dynamic.

The repercussions of Orientalism are evident across academic fields, popular culture, literature, art, and media. The East is frequently shown as a singular, homogenous entity,

disregarding the variety within its cultures. This oversimplification not only generates cultural



misinterpretations but also obstructs genuine cross-cultural interaction. Furthermore, portraying Eastern societies as static perpetuates the stereotype of an “unchanging Orient.”

In the realms of art and literature, Orientalist works frequently glamorize and inaccurately depict Eastern cultures, transforming them into exotic fantasies appealing to Western audiences. While these representations may be visually captivating, they can perpetuate damaging stereotypes and overlook the true diversity and richness of these cultures. The influence of Orientalism extends beyond art, affecting policies, international relations, and societal perceptions.

Nevertheless, numerous scholars and activists criticize Orientalism for its inherent biases. They advocate for a more nuanced understanding of cultures. Ongoing discussions emphasize the importance of dismantling Orientalist perspectives and fostering fair and inclusive representations of Eastern societies. This entails recognizing the autonomy of Eastern cultures and enabling them to articulate and shape their own identities instead of depending on often skewed external interpretations.

2.2.2 Impact of colonial rule on Muslim Personal Laws

Marriage and family were crucial aspects of colonial Hindu law, impacting both legal scholarship and court decisions. Acknowledging the importance of family helps to better grasp how colonial Hindu law operated within the framework of the modern colonial state and its implications for individuals subject to its laws. The colonial authorities primarily classified Hindu law (along with Muslim law) as a set of rules concerning familial matters, aligning with broader Western notions of family and religion during the eighteenth and nineteenth centuries, which depicted them as distinct from, yet influenced by, state authority.

In this colonial context, religious law incorporated certain aspects of indigenous customs but regarded them as fundamentally separate from the state's dominant values and beliefs. This distinction resulted in a paradoxical perception of “Hindu law” as both a confined domain regarding “private” local issues, deemed insignificant to state interests, and a morally and politically charged area necessitating state oversight and intervention.

Although colonial religious law, often referred to as “personal” law, was primarily centred on family law, it mainly focused on the property rights and entitlements that stemmed

from familial connections. This focus on property rights within colonial personal law tied it to wider British legal and political ideologies that associated property ownership with legal capability.



Consequently, the core principles of liberal thought shaped personal law, implying that the capacity to own property and enjoy equal rights signified autonomy, equality, and comprehensive legal recognition.

Within this framework, colonial personal law differentiated between Hindus and Muslims, along with men and women, categorizing them as distinct legal subjects, each with specific rights and statuses upheld by the state. Consequently, the rights related to property and personhood in personal law became an essential foundation for the development of political claims. (Lubin, Davis Jr, & Krishnan)

In India, discussions about personal laws, especially MPL, have often stirred debate. Supporters of a UCC argue that these personal laws create obstacles to equality. Since India gained independence, the MPL has been a significant topic for both Muslim groups and Hindu right-wing movements.

Muslim law in India is based on Islamic teachings and the Holy Quran, which serves as its main source. The laws introduced by the Prophet Muhammad aimed to improve the social conditions of his time in Arabia. During the pre-Islamic era, known as the Jahiliya period, society faced many issues. Although there isn't much written about this time, the Prophet's teachings sought to eliminate practices like charging excessive interest rates, to ensure that women could inherit property, and to put an end to the practice of female infanticide.

The Medinese Surahs of the Holy Quran concentrate on matters such as public prayer, prohibitions on wine consumption, and topics like marriage, divorce, adultery, and inheritance, establishing itself as the final authority on these issues. *Ahadis* are narratives that recount events involving the Prophet, as described by witnesses, while *Sunnas* refer to the practices of the Prophet, providing additional guidance to the Quran. To address contemporary issues, jurists introduced the concept of '*Ijma*', which represents the collective consensus of jurists from a specific era on certain matters. Additionally, when earlier methods of jurisprudence were insufficient to tackle all issues, Muslim jurists turned to their reasoning and judgment, a practice that was supported by the Prophet.³⁰

Islamic scholars present a variety of viewpoints on these issues. Yasin Dutton emphasizes the interpretations of the Quran and Hadith as the foundation of Islamic law, giving less

weight to legal principles derived from Ijma and Qiyas. In his research, Dutton points out cases that are

³⁰ Razia Patel “ Indian Muslim Women, Politics of MPL and Struggle for Life with dignity and justice” , EPW, p.45.



clearly cited in the Quran. However, it is evident that oral traditions have significantly influenced the evolution of Islamic law, particularly in unique situations. The development of Islamic law cannot be solely based on the original teachings of the Prophet; it has experienced extensive interpretation throughout history. Different juristic schools have approached MPL in distinct ways. Although the core principles tend to be similar, the specific laws can vary widely. The four primary Sunni schools, Hanafi, Shafi, Hanbali, and Maliki along with Shiite legal sources, demonstrate that MPL is more accurately described as an ethical framework rather than a strictly uniform legal system. Ultimately, it showcases a rich variety of interpretations while maintaining essential principles of justice, equality, and compassion. (Fadl, 2000)

2.2.3 Muslim Personal Laws in India

The MPL (Shia Application act) was enacted by the British Government of India as part of the (The Government of India act , 1935). Instead of stemming from divine revelations, this action emerged during the British colonial period. The colonial authorities aimed to create a uniform set of legal regulations applicable to all individuals practising Islam. In their efforts to establish a cohesive “Muhammadian Law” that could fit into the colonial judicial system, they incorrectly regarded certain classical Islamic texts as definitive legal codes. Historically, the legal interpretation of these texts had been handled by recognised jurists, who understood local customs and were adept at translating religious tenets into practical applications.

During the colonial era, the codification of Muhammadan law and customs helped maintain a sense of stability in Muslim identity. A key aspect of Anglo-Muhammadian law was the belief that Islam constituted a collection of strict religious rules applicable equally to all Muslims, regardless of their various cultures and traditions. This push for uniformity failed to recognise that Islamic law has always been interpreted in diverse ways to suit changing social circumstances. In India, Muslim law has primarily been acknowledged as

In India, Muslim law is primarily acknowledged in matters related to marriage and divorce, the rights of children and minor adoption, intestate succession, wills, joint family issues, and property divisions. It is important to note that the Shariat, or Muslim law, does not apply to criminal matters. Anderson analyzed the evolution of MPL during the colonial era, pointing out that British authorities aimed to achieve two major goals: to extract

economic resources through agrarian taxes and to maintain political dominance with minimal military involvement. They upheld the structure of the pre-colonial political system, including its legal elements, by



simplifying societal diversity into two main categories—Hindu and Muslim—while overlooking the complexities within these groups. (Narain, 2001)

In the pre-colonial era, Muslims adapted their legal interpretations to fit local customs. However, during British rule, the codified Mohammedan law was based on a narrow selection of sacred texts. Authorities relied heavily on the book “*al-Hidayah*”, written by Mirghayani and translated into English by Mr. Hamilton, which served as the main source for Muslim legal practices in India. The legal decisions originating from these cases eventually established what is now referred to as MPL. This 'scriptural' method of legislation has had enduring negative impacts on the identity politics of Muslims. Some conservative groups within the Muslim community have branded these laws as “*shariat-based*,” labelling them as divine and thus closing off avenues for any potential reform. (Ahmed)

2.2.4 *Women and Muslim Personal Laws*

Granting cultural rights to communities presents challenges, especially regarding women's treatment. In many cultures, women often hold subordinate roles, and the recognition of minority rights can foster exclusive nationalism that marginalizes women and other vulnerable groups. Therefore, diversity must go hand in hand with equal rights for all.

MPLs contain provisions that conflict with gender equality principles, such as oral divorce, polygamy, and unfair maintenance practices, disadvantaging women. While polygamy and unilateral divorce may not be prevalent, laws on maintenance, inheritance, and adoption impact all women.

In reaction to the women's movement, the “Special Marriage Act, 1954” was created to provide a more equitable legal structure. It is argued that MPLs discriminate against women and should be reformed to enhance equality. Notably, some nations, including Turkey, have advanced women's rights by embracing Quranic principles.

In India, significant opposition to MPLs highlights concerns for women's rights, with right-wing factions advocating for a UCC and women's rights groups demanding equal treatment. There is an urgent need for knowledgeable theologians to address the conflicting perspectives within the community and work towards a more equitable codification of MPLs.

The concern that the implementation of a UCC could threaten the cultural rights of minority communities became pronounced during the aftermath of the Shah Bano case. In 1975, Shah Bano was divorced by her husband, Mohammad Ahmed Khan, after forty-three years of



marriage. Following the divorce, she found herself without means of support, having been a housewife who had relied entirely on her husband for financial security. In response to her situation, Shah Bano filed a lawsuit against her ex-husband for insufficient maintenance, as prescribed in the section, which mandates that a former spouse who would otherwise be destitute should receive maintenance of up to rupees five hundred only.

In a thorough examination of the case and its consequences, it is noted that Shah Bano initially brought her claim to a lower court in Madhya Pradesh, which awarded her only Rs 25 per month. Feeling discouraged by this small amount, she appealed to the Madhya Pradesh HC, which, in 1980, increased her monthly maintenance to Rs 180. However, her ex-husband challenged this decision based on the iddat period, arguing that his responsibility to pay maintenance lasted only three months after the divorce. The SC ultimately supported the HC's ruling, emphasizing that Shariah law requires Muslim men to ensure financial security for their wives before abandoning them. This ruling was seen as an effort by the SC to engage with MPL, a move that some clerics perceived as a threat to both MPL and the broader Muslim community. Few interpretations have garnered such a strong response from Muslims. (Menski, 2001)

A significant part of the Muslim community, represented by groups like Jamiat-ul-Ulema-i-Hind, Jamiat-e-Islami, and the Muslim League, condemned the ruling and launched a campaign against what they considered an intrusion into MPL. (Hasan, 1989)

“Jamiat-ul-Ulema-i-Hind” took the initiative, but other groups also joined the effort, as the campaign to protect the integrity of Shariah became a representation of Muslim identity. Over time, the Muslim community has resisted modifications to personal law, arguing that it is a crucial aspect of their socio-religious identity. The political significance of issues related to MPL largely stems from its role in distinguishing Muslims from other communities. For religious leaders, adherence to Shariah symbolises the preservation of Muslim identity and serves as a means of integrating the community. Consequently, there is strong opposition to changes in family laws, although the community has accepted secular legislation in almost all other areas, including criminal law. The SC ruling presented a vital chance for community leaders to reestablish their influence, revitalising Muslim organisations. For the first time since independence, the political landscape appeared to shift in their favor. While the community had differing views on the matter, many Muslim

organizations welcomed the ruling as beneficial for divorced women. However, the focus shifted from maintenance rights to the minority



community's right to exist as a religious community within a secular state. Many Muslims did not see any contradiction between the ruling and Islamic principles, which emphasize justice. Women's groups in Kerala, West Bengal, Bombay, and Delhi advocated for the rights of indigent women to receive support from their husbands and criticized religious scholars for using religion as a tool of injustice. A significant development was the establishment of the Committee for the Protection of the Rights of Muslim Women, which aimed to protect rights guaranteed by the Indian Constitution. This committee emphasized the importance of recognizing Muslim women within both the social sphere and the broader community of women. They noted that Maintenance law is categorized as a criminal law to protect women from poverty. The community remained divided on this issue.

The colonial construction of Hindu and MPLs continues to have significant implications for legal and political discourse in contemporary India. By categorizing religious laws primarily as family laws, the colonial state reinforced the notion that personal laws were distinct from the broader legal system while simultaneously subjecting them to state regulation and intervention. This dual approach—of marginalization and oversight—shaped the evolution of personal laws in ways that continue to influence modern legal debates. The emphasis on property and inheritance within personal laws also reflected and reinforced the British liberal framework, which associated property ownership with legal capacity, autonomy, and citizenship. This colonial legacy led to the classification of different communities as distinct legal subjects, with men and women assigned different rights and obligations under the law. Consequently, the personal law system not only reinforced religious distinctions between Hindus and Muslims but also entrenched gendered hierarchies, impacting women's legal status and agency.

The post-colonial Indian government took over a legal system that, despite constitutional assurances of equality and secularism, has faced challenges in addressing the tensions within the personal law framework. The ongoing discussions surrounding the UCC underscore these conflicts. Supporters argue that personal laws foster inequality and impede national unity, while critics believe they are vital for maintaining religious and cultural identity. MPL has been particularly controversial, serving as a key issue for both Muslim organizations that advocate for religious freedom and right-wing Hindu groups that push

for uniform legal standards. The politicization of this law mirrors broader conflicts surrounding minority rights, secularism, and state involvement in religious matters. Additionally, critiques of MPL often fail to consider its historical development and how Islamic Law, as established by the Prophet Muhammad, aimed



to reform pre-Islamic customs by enhancing women's inheritance rights and banning exploitative practices such as usury and female infanticide. Nonetheless, the implementation of MPL in India has been influenced not only by Islamic legal principles but also by colonial legal interpretations and subsequent government policies, creating a complex and disputed area of law..

The colonial heritage of personal laws highlights the difficulties in reconciling religious identity, gender equality, and legal consistency in a diverse society. Although personal laws were originally intended to address private, local matters, they have evolved into significant political issues that shape legal rights, identity politics, and discussions surrounding justice and equality. The continued existence of religiously-based legal categories raises crucial questions about citizenship, the state's role in managing personal matters, and how much legal systems should reflect cultural diversity. Whether through reforming religious laws, gradually adopting a UCC , or exploring alternative legal frameworks, the way forward calls for a careful approach that considers both historical contexts and current realities. To navigate this intricate landscape, India needs to align its constitutional promise of equality with its pluralistic nature, ensuring that legal reforms are inclusive, participatory, and attentive to the varied needs of its population.

2.2.5 Marriage under Hindu law during colonial times

The interaction of Indian nationalism with colonial modernity and cultural diversity played a significant role in shaping postcolonial family law. The influence of colonial categorization on Indian nationalism oscillated between viewing the nation as a blend of religious communities and as a unified entity. This latter perspective often reverted to the former, which predominantly characterized Indian culture as Hindu. Both cosmopolitan and Hindu majoritarian narratives regarding the Indian nation significantly impacted family law.. (Subramanian, 2010)

Postcolonial views on India's history often concentrate on representations that facilitated colonial domination. For example, the belief that Indian society is fundamentally shaped by caste or religion supported the ostensibly secular or neutral governance system introduced by the British. Scholars have argued that many common assumptions about Indian society are more influenced by an imperial perspective than by the actual social realities experienced by Indians. The colonial administrators' efforts to comprehend and

manage India through the analysis of ancient texts contributed to a distinct form of Orientalism in India. (C., 2010)

Colonial rule had a profound effect on traditional Hindu marital customs by instituting Western legal systems. The British introduced formal laws that governed areas of Hindu personal law,



including marriage, divorce, and inheritance. This legal codification, illustrated by the HMA of 1856, represented a departure from the previously more flexible Hindu traditions. The newly established legal structure often clashed with local practices, altering marital dynamics and family hierarchies.

The patriarchal nature of British law contrasted sharply with the communal and adaptable characteristics of traditional Hindu families, resulting in conflicts and changes in power relations within households. Furthermore, colonial economic policies designed to exploit Indian resources for the British Empire disrupted established livelihoods. The agrarian economy, vital to many Hindu communities, faced significant turmoil, leading to displacement and shifts in traditional family roles.

This economic transformation, combined with the spread of Western education, brought about changes in social aspirations and values. As people sought new job and educational opportunities, the traditional joint family system—a cornerstone of Hindu family life—began to show signs of strain, promoting a more individualistic way of living.

When analyzing the effects of colonial rule on Hindu marriage and family structures, it becomes evident that the consequences reached beyond legal and economic spheres. The colonial experience initiated significant sociocultural changes that challenged, adapted, and sometimes resisted long-standing Hindu familial traditions. This paper seeks to delve into the complexities of this transformative era, highlighting the intricate interplay between colonial imposition and the resilience of indigenous practices in the sacred realms of Hindu marriage and family.

2.2.6 Legal Remedies in the Realm of Hindu Marriages

Legal remedies within Hindu marriages play a crucial role in how this traditional institution evolves to meet contemporary legal standards and social values. These remedies encompass a range of elements, including legislative changes, judicial rulings, and government policies, all aimed at addressing various facets of matrimonial relationships.

One of the primary objectives of these legal remedies is to reform marriage laws. These reforms seek to update and standardize practices to promote fairness, justice, and compliance with constitutional principles. A notable development in this area has been the introduction of a thorough legal framework for the formalization and dissolution of Hindu marriages. This framework has set uniform regulations regarding marriage eligibility, the requirements for a valid marriage, and the grounds for divorce. Continuous amendments are being made to address modern challenges, demonstrating an ongoing commitment to adapting the legal system to changing societal norms.

Legal remedies aim to tackle gender imbalances in Hindu marriages. For example, changes in legislation have provided daughters with equal rights to inheritance, which challenges the traditional practices that favored male successors. These modifications highlight a dedication to harmonizing the law with the principles of gender equality and non-discrimination, promoting a more inclusive and fair matrimonial framework.

Moreover, the judicial system acts as a platform for resolving disputes within marriages. Courts handle cases involving divorce, alimony, child custody, and other family issues, frequently interpreting laws in light of evolving social circumstances. Significant judicial rulings have influenced legal criteria and created precedents that direct subsequent cases. In addition, legal measures are intended to address child marriages, which have been widespread in certain Hindu communities. Recent laws establish a minimum legal marriage age and ban the formalization of marriages involving individuals below that age. This legislation aims to safeguard the rights and wellbeing of minors, ensuring that legal standards reflect contemporary views on consent and maturity.

2.2.7 Landmark Judicial Decisions in Hindu Marriage Laws

Legal solutions also confront the gender disparities that exist in Hindu marriages. The Supreme Court along with several High Courts in India have significantly influenced matrimonial

laws through their key judgments.



Although this case primarily addressed MPL, it had significant implications for Hindu marriage laws as well. It emphasized the importance of maintenance rights for women under “Section 125, CrPC 1973”, which applies to all religions, including Hinduism. The decision emphasized that a divorced woman has the right to receive maintenance if she is unable to support herself.³¹

The AP HC ruled that forcing a spouse to cohabit against their will violated the right to privacy and dignity.³² Although later overruled by the SC³³ in This case brought significant attention to the rights of individuals within marriage and influenced later discussions on marital rights.

Though primarily concerning Muslim law, this judgment reaffirmed gender equality principles by upholding a woman's right to maintenance beyond the iddat period. The case indirectly reinforced the necessity of providing fair maintenance laws for Hindu women as well.³⁴

While not directly related to Hindu marriage laws, this case laid the foundation for gender justice by recognizing sexual harassment as a violation of fundamental rights. It had a profound impact on women's legal protections within marital relationships as well³⁵.

Concerning MPL, this case reinforced the importance of gender equality in marriage. It influenced legal debates on reforming discriminatory aspects of Hindu marriage laws.³⁶

The amendment to the HSA, 2005 granted daughters equal inheritance rights, challenging traditional practices that favored male heirs. In the Vineeta Sharma Case³⁷, the SC held that daughters have coparcenary rights in ancestral property by birth, even if their father was deceased before the 2005 amendment. This ruling further strengthened gender equality within Hindu family law.

The legal system also functions as a forum for resolving disputes related to marriage. Courts handle cases involving divorce, maintenance, child custody, and other family matters, often interpreting laws in light of changing social dynamics. Significant court rulings have shaped legal norms and set precedents that guide future cases.

Legal remedies aim to prevent child marriages, which have historically been common in some Hindu communities. “The prohibition of child marriage act, 2006”, Sets a legal minimum age

³¹ Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945.

³² T. Sareetha v. T. Venkata Subbaiah, 1983 SCR (2) 607

³³ Smt. Harvinder Kaur v. Harmander Singh Choudhry, AIR 1984 DELHI 66.

³⁴ Danial Latifi, *supra* note 2.

³⁵ Vishakha v. State of Rajasthan, AIR 1997 SC 3011

³⁶ Shayara Bano v. Union of India, AIR 2017 SC 4609

³⁷ Vineeta Sharma v. Rakesh Sharma, AIR 2020 SC.3717



for marriage and prohibits the solemnization of marriages for individuals under that age. This legislation aims to protect the rights and welfare of minors, ensuring that legal standards reflect contemporary understandings of consent and maturity.

The SC, in Independent Thought case³⁸, the court determined that engaging in sexual relations with a minor wife (under 18 years old) is considered rape, strengthening the legal structure opposing child marriages.

Legal remedies in Hindu marriages have evolved to align traditional practices with contemporary legal standards and constitutional values. Legislative reforms, judicial interventions, and government policies collectively shape the institution of marriage in modern India. While significant progress has been made, ongoing challenges such as gender inequality, marital rights, and personal law reforms require continued legal and social engagement. Through landmark judgments and legal advancements, the judiciary and policymakers continue to strengthen the foundations of justice, equality, and dignity in Hindu matrimonial laws.

2.2.8 Marriage under MPL during colonial times

Although the roots of religious legal pluralism in South Asia extend back before European colonialism, the personal law system took its current form during British rule. Starting in 1772, the EIC established regulations that created a state-centered legal structure to resolve religious and personal law disputes according to community laws. Until the mid-19th century, this meant consulting local authorities and seeking legal answers within medieval texts, which were translated and published for British judges' reference. While these texts were numerous, they were just one resource available to jurists. In the latter half of the 19th century, legal cases involving Muslim litigants led to the development of substantive case law, influencing future decisions. British-trained Indian Muslim judges became prominent in deciding cases and crafting opinions that challenged and redefined Anglo-Muslim law. Legislation gained significance in the period leading up to independence, with laws like the "MPL (Shariat) Application Act, 1937" and the "Dissolution of Muslim Marriages Act (1939)" being introduced. However, legislation continued to be just one of several interpretive tools. Nearly a century later, fundamental questions regarding who can define Islamic law and in what

³⁸ Independent Thought v. Union of India, AIR 2017 SC 4904



manner remain hotly debated, making the field of legal interpretation and discussion dynamic. (Lhost, 2025)

Marriage under MPL during the colonial period in India was a multifaceted institution influenced by Islamic legal principles, customary practices, and British colonial legal changes. Rooted in Islamic marriage (Sharia), Muslim marriage (nikah) was traditionally viewed as a civil contract rather than a religious sacrament, which set it apart from Hindu marriage customs. It was governed by Islamic jurisprudence (fiqh) principles derived from the Quran, the sayings of the Prophet Muhammad (Hadith), consensus (ijma), and analogy (qiyas), with variations reflective of the predominant Sunni or Shia schools of thought. However, the introduction of British colonial rule in the 18th and 19th centuries substantially transformed the legal context of Muslim marriages. The British implemented a non-interference policy concerning religious laws while simultaneously aiming to codify and regulate them through the Anglo- Mohammedan legal framework. This created a blend of Islamic principles and English legal traditions, resulting in notable alterations in the interpretation and application of Muslim personal laws. British courts, often relying on translations of Islamic legal texts by colonial scholars such as William Jones and Henry Maine, frequently interpreted Muslim marriage laws through a Western perspective, occasionally misrepresenting their true nature. The colonial administration also introduced legal measures that indirectly impacted Muslim marriages, including the “Criminal Tribes Act” and the “Child Marriage Restraint Act of 1929”, alongside judicial precedents established by high courts that changed the traditional independence of qazis. Moreover, the emergence of reformist movements within the Muslim community, like the Aligarh movement and the Deoband movement, contributed significantly to discussions regarding marriage, polygamy, divorce, and women’s rights. The status of women in marriage, encompassing their rights to dower (mehr), divorce (talaq, khula), and maintenance, became contentious topics in colonial courts, as legal disputes frequently revealed conflicts between customary practices and interpretations of Islamic law. Although the British did not directly legislate on Muslim marriage matters, they influenced its resolution through legal institutions like the Privy Council, which often adjudicated personal law conflicts. The colonial era also witnessed heightened discussions surrounding social reform, with Muslim intellectuals and women’s rights advocates urging changes in marriage customs, particularly related to polygamy, marriage age, and women’s divorce

rights. These tensions led to significant legal cases and legislative initiatives, such as the “Shariat Application Act of 1937” and the “Dissolution of Muslim Marriages Act of 1939”, aimed at reaffirming the supremacy of Islamic



law over customary practices while also addressing gender inequalities in marriage. Consequently, Muslim marriage during the colonial era in India was not a fixed institution but a fluid legal and social construct shaped by the interplay between Islamic jurisprudence, colonial legal frameworks, and local reform movements. Grasping this historical period is essential for tracing the development of Muslim personal law in India and its ongoing relevance in present-day legal and societal discussions.

Just like other private contracts, a marriage under sharia law is formed through the agreement, either verbal or written, of the parties involved or their representatives. The only prerequisite is the presence of two witnesses during the contract, although this is not mandatory according to Sunni law. The formalities commonly observed, such as ceremonies held in the presence of a religious authority, are rooted in traditions rather than legal requirements.

2.2.9 Marriage under Islamic law

The standards for a marriage contract are uniform across all schools of sharī'ah. Firstly, the parties involved or their representatives must possess legal competence, and secondly, there must be no legal barriers to the marriage. The essential criteria for legal capacity include being sane and having reached the age of majority, which is identified through physical maturity rather than a set age. Generally, a boy is deemed a minor until he turns twelve, while a girl is considered a minor until the age of nine. Both genders are assumed to reach majority upon finishing their fifteenth year. However, individuals who surpass the minimum age of majority but are not yet fifteen may marry if they show signs of maturity. A person who has attained adulthood (bāligh) and is mentally sound (‘āqil) possesses rights and responsibilities, must perform religious duties, and can be held liable for crimes. Minors (saghīr) and individuals deemed insane (majnūn) can entirely enter into marriage agreements. Those described as idiots (ma‘tūh) or imbeciles have the capacity to accept beneficial transactions, such as gifts, but cannot enter into marriage. An incompetent adult (safih) may be subjected to restrictions (ḥajr) and oversight, which could hinder their ability to engage in contracts. In the context of Ḥanafī and Shī‘ī jurisprudence, an adult woman can marry independently, whereas in the other three Sunnī schools, her marriage guardian (walīy) is required to finalize the contract on her behalf. All schools recognize the guardian's mandatory authority, known as ijbār, which enables them to arrange a marriage

for their charges without considering the individual's preferences. The precise extent of this authority varies among schools: under Ḥanafī law, only minor wards are impacted, and the power is absolute when exercised by a father or paternal grandfather. In other



cases, the ward has the right to reject the marriage upon reaching puberty. However, this option (*khiyār al-bulūgh*) is lost once the marriage is consummated. The guardianship in marriage is granted to the nearest male relatives, reflecting the hierarchy of inheritance: father, grandfather, brothers, nephews, uncles, cousins, and if none are present, female relatives. ("Islamic Law: Personal Law .", 2025)

According to the Ḥanafī doctrine of marriage equality (*kafā'ah*), a guardian can prevent an adult female from marrying someone if he believes that the prospective husband does not meet certain equality standards. This principle primarily applies to men, who are expected to match their potential wives in terms of lineage, religion, status (freeman versus slave), piety, financial means, and profession. However, if neither the guardian nor the bride brings up the issue of equality before the marriage contract, they cannot later annul the marriage if they find out that the husband does not meet those equality criteria. In contrast, the Shāfi'ī and Mālikī schools do not allow an adult virgin to independently finalize her marriage, as the guardian is the one who finalizes the marriage, making the concept of *kafā'ah* inapplicable in these cases.

Marriage is not allowed between close relatives, which can create permanent barriers to marital relationships categorized into three types. The first type is blood relationships, where a man cannot marry his direct descendants, ancestors, the children of his parents, or his grandparents' immediate offspring. The second type is affinity, where marriage is prohibited between a man and his wife's relatives, as well as the relatives of any of his own ancestors or descendants. The third type is fosterage, which occurs when a woman breastfeeds another person's child. This relationship forbids marriage not just between foster siblings but also between the foster mother and all her relatives, as well as her foster children, their spouses, and their descendants.

A Muslim woman cannot marry a non-Muslim man unless he converts to Islam. In contrast, a Muslim man is permitted to marry a *kitābīyah*, which refers to a woman who adheres to a faith with a holy scripture, like Judaism or Christianity. Additionally, the Qur'ān forbids both Muslim men and women from marrying polytheists or those who worship fire. (Andolan), 2014) A man is not permitted to marry a woman who is currently married or who is in a period of *'iddah*, which is the waiting time a woman must observe after a divorce, unless her marriage was never consummated. Typically, *'iddah* lasts for three menstrual

cycles, or if the woman is pregnant, until she gives birth. The primary aim of 'iddah is to confirm whether there is a potential pregnancy before remarrying. In the case of a widow, she must observe a waiting period of four months and ten days after her husband's death.



The position of women within “MPL” has been historically complex and frequently debated, shaped by a mix of religious beliefs, cultural customs, and legal frameworks. The principles of this law, primarily rooted in the Quran, Hadith, and the interpretations of Islamic scholars, addresses various aspects of family law, including marriage, divorce, inheritance, and maintenance. While Islamic doctrine initially granted women rights considered progressive for their era, such as the ability to own property, seek divorce, and receive financial support, the practical implementation of these rights has often been obstructed by patriarchal traditions and socio-political factors.

In many cultures, especially where traditional norms dominate, interpretations of MPLs often prioritize male authority, limiting women's independence and fair treatment. The notion of talaq (divorce) can render women vulnerable, as men may terminate marriages at their discretion. Additionally, the mishandling of mahr (dower), a required payment from husband to wife, can weaken the financial security it is intended to ensure.

Debates surrounding women's rights within “MPL” gained significant traction during the colonial and post-colonial periods. Throughout colonial rule, particularly in the Indian subcontinent, discussions emerged regarding the extent of reform in personal laws, as various communities sought recognition and legal status. Advocates for reform worked to implement changes that would promote gender justice, challenging conservative perspectives that aimed to remain closely aligned with traditional customs. In contrast, traditionalist factions resisted these reform efforts, emphasizing the importance of established practices and the necessity of upholding Islamic legal traditions.

Notably, the British colonial authorities usually steered clear of direct involvement in MPL, choosing instead to develop an Anglo-Mohammedan legal framework that affected the interpretation and application of women's rights. This legal system often led to inconsistencies in the enforcement of laws, complicating women's legal status and access to justice. Following colonization, various reforms were initiated to address the visible gender inequalities within the law. However, despite their importance, these reforms encountered substantial opposition, highlighting the complex link between cultural identity and the quest for justice.

Presently, the conversation surrounding personal law reform remains a divisive issue in many Muslim-majority nations and secular states. Women's rights activists and

organizations are at the forefront, advocating for legal changes that would ensure fair rights and protections for women within the framework of MPL. Their efforts emphasize the need for reinterpretation



and reform, arguing that advancements in women's rights are essential for broader societal progress.

On one hand, religious leaders often contend that reforms could threaten Islamic values and endanger the cultural identity of Muslim communities. This tension between preserving religious traditions and pursuing legal modernization creates challenges in achieving gender justice within Islam. As discussions about family law evolve, it is crucial to find a balanced approach that respects religious identity while promoting legal equality. Addressing the complexities of women's rights within this legal framework requires more than mere legal reforms; it necessitates a broader dialogue about gender justice, cultural heritage, and the evolving roles of women in society. Through thoughtful engagement in these discussions, communities can work towards ensuring that the rights guaranteed by Islamic law are effectively implemented, thus granting women the autonomy and dignity they deserve.

The status of women within this legal context has always been a multifaceted issue, intertwining religious, cultural, and legal dimensions. This body of law is primarily derived from sources such as the Quran, Hadith, and various interpretations by Islamic scholars, covering vital family law areas like marriage, divorce, inheritance, and maintenance. While Islamic principles historically afforded certain rights to women that were progressive for their time—such as property ownership, the right to initiate divorce, and financial support—the actual enforcement of these rights has often been hindered by patriarchal interpretations and socio-political environments.

In many situations, particularly where deep-rooted customary practices exist, interpretations of this law tend to favor male authority, obstructing women's autonomy and access to justice. For instance, the practice of unilateral divorce often allows men to end marriages with little recourse for women, leaving them in vulnerable positions. Additionally, issues related to required payments from husbands to wives are sometimes overlooked, undermining the financial security that Islamic law aims to provide.

The dialogue surrounding women's rights in this context gained significant attention during the colonial and post-colonial periods. In many areas, especially the Indian subcontinent, these discussions were sparked by the dynamics between colonial governance and local legal traditions. Reformists aimed to challenge traditional interpretations that favored men,

advocating for greater gender justice, while conservative factions resisted these changes, highlighting the need to protect established religious practices and their cultural importance.



The British colonial government typically took a non-intrusive stance toward family law, creating an Anglo-Mohammedan legal system that influenced women's rights interpretation within Islamic law. This dual legal structure often led to inconsistencies and inequities, complicating women's access to justice.

In the post-independence era, various legal reforms have sought to rectify the gender inequalities embedded in the legal system. However, these efforts continue to face significant pushback, reflecting the ongoing conflict between cultural identity and legal advancement. Today, the debate over reform remains contentious in both Muslim-majority and secular nations. Women's rights activists have become crucial advocates for changes that would ensure fair rights and protections for women. Their efforts underscore the need for reinterpretation and reform, arguing that the progress of women's rights is vital for the overall socio-economic development of communities.

On the other hand, religious leaders often claim that reforms might jeopardize Islamic values and the cultural identity of Muslim communities. This tension between maintaining religious traditions and striving for legal equality creates a challenging environment for achieving gender justice within Islamic law. As the conversation surrounding personal laws continues to develop, it is crucial to adopt a nuanced approach that respects religious identity while promoting legal fairness. Addressing the complexities related to women's status under personal laws goes beyond simply reforming laws; it requires a thorough dialogue about gender justice, cultural values, and the role of women in society. By engaging in these essential discussions, communities can move toward realizing the rights outlined in Islamic law, thus upholding women's autonomy and dignity in practice.

The topic of personal law and the rights of Muslim women has become a contentious issue between the state and the "All India Muslim Personal Law Board" (AIMPLB), which consists of ulemas from different schools of thought advocating for the preservation of MPL. The absence of Muslim women's perspectives during the Shah Bano debate underscored their marginalization within the broader women's movement. However, this situation is slowly improving with the emergence of organizations like the "Bharatiya Muslim Mahila Andolan" (BMMA) and other networks led by Muslim women in urban areas, which provide an

alternative voice to counter the dominance of AIMPLB and have gained national attention by engaging in discussions regarding the rights of Muslim women.³⁹

Muslim women have often been associated with concepts like purdah, polygamy, and personal laws, depicted as the bearers of the community's honor and viewed as oppressed, victimized, and voiceless. They are frequently regarded as a uniform group within a minority. The Hindu right, in advocating for a UCC, portrays Muslim women as helpless victims. This narrative highlights how Shah Bano was framed as a woman in need of rescue by both the “Bharatiya Janata Party” (BJP) and the Muslim clergy. The BJP, currently in power, has consistently maintained a contentious relationship with the Muslim community.⁴⁰

The text discusses Shah Bano's pursuit of justice through the court, highlighting her individuality as a citizen, a wronged wife, and a responsible mother. However, the Muslim clergy diminished her other identities, framing her solely as a Muslim woman who epitomized Islamic values. Their influence is evident in her letter where she renounces the SC's favorable ruling by asserting her identity as a Muslim woman unwilling to accept anything that contradicts Islamic law. The “All India MPL Board” (AIMPLB) and the broader Muslim clergy effectively “rescued” her and their faith by exerting control over her. Meanwhile, the BJP portrayed Shah Bano as a victim in need of saving, implying that her community was incapable of providing that help. This presented an opportunity for the BJP to disparage the Muslim community while claiming to be a better protector of Muslim women. Ultimately, she was reduced to a mere victim, with her agency stripped away, becoming a pawn in the struggles between the BJP and AIMPLB.

Muslim women continue to be viewed by both the state and community representatives as a group that requires protection. Within this protection narrative provided by the state, as well as the AIMPLB and other religious leaders, there is no acknowledgment of these women's own agency. Over the past decade, these women have begun to dismantle this category by voicing their concerns, both collectively and individually, as part of various networks and organizations. They have challenged the perception of Muslim women as oppressed individuals. They are actively expressing their views and engaging in discussions about their challenges. This group has begun to establish an alternative platform for themselves,

³⁹ Kirmani, N. (2009). Deconstructing and reconstructing 'Muslim women' through women's narratives. *Journal of Gender Studies*, 18(1), 47–62, <https://doi.org/10.1080/09589230802584253>.

⁴⁰ Varghese, Arpita 2015. *Personal Laws in India: The Activisms of Muslim Women's Organizations*. Honors thesis, Duke University, <https://hdl.handle.net/10161/9725>.



developing a distinct voice that opposes the dominant influence of AIMPLB regarding personal law. Additionally, they are addressing broader issues such as education, employment, marginalization, discrimination, and communal violence. They have shattered the stereotype of Muslim women as mere passive victims, instead portraying themselves as individuals ready to assert their presence and power in the political landscape.

BMMA has worked to create a framework for gender justice in family and marriage, addressing the legal gaps faced by Muslim women in their community. They have developed a draft family law and a model Nikahnama, which is a formal written marriage contract that outlines the consent of both parties along with other terms and conditions. This contract is signed by both individuals, the qazi, and four witnesses, two from each side, ensuring gender equitable agreements. Additionally, one of their key achievements is the establishment of women's Shariah courts in several states where they operate. Previously, Shariah courts were predominantly run by male clerics and exhibited biases favoring patriarchal norms. BMMA's Shariah courts focus on issues related to marital disputes, divorce, and property matters, aiming to provide justice to Muslim women without prejudice against men, in accordance with the equal rights outlined in the Quran.

Taking a significant step forward, they introduced the "Women Qazi Training Institute," a dedicated center for Islamic education and theology. In February 2016, a group of 30 women began their training in Jaipur, which covers topics such as theology, the history of Islam, the Indian Constitution, Islamic principles and values, and various schools of jurisprudence. The prevalence of triple talaq and halal practices often stems from a lack of understanding of Quranic teachings among the public and their endorsement by predominantly male qazis in India. These qazis have the authority to officiate marriages and also to validate divorces. The emergence of women qazis will challenge these practices, as they are less likely to endorse actions that are unsupported by the Quran. This movement has not only confronted the patriarchal foundations of personal law but has also carved out a space for women in the traditionally male-dominated arena of theology. They are now equipped to interpret Quranic teachings in a way that is more equitable and considerate of women, becoming part of the growing movement of Islamic feminism worldwide that seeks to reinterpret religion through a female lens and reclaim their rightful place in the spiritual realm.

2.3 Development of divorce laws in various personal laws (Hindu law and Muslim personal law)

Postcolonial nations had varied responses to the group-specific personal laws inherited from colonial rule. Some countries, like Lebanon, kept most of these laws intact, while others, such as Tunisia, implemented significant reforms. Most countries, including Egypt, India, and Indonesia, made moderate but meaningful changes. In India, policymakers maintained religious-based personal laws for diverse groups and did not alter minority rights, though there was room for culturally informed reforms. Changes were made to Hindu law that reflected both modern Western ideals of the nuclear family and reinterpreted Hindu traditions to align with contemporary standards. Although Hindu nationalists and conservatives upheld the authority of lineage over inherited property, legislators did introduce limited rights for divorce, eased restrictions on partner selection, and prohibited bigamy. The initial reform ideas set the stage for many subsequent alterations in India's family law framework.

The development of divorce laws in post-colonial India has been shaped by the evolving legal frameworks governing Hindu and Muslim marriages, striving to harmonize religious traditions with the goal of gender equality. The “Hindu Marriage Act of 1955” marked a notable transformation in the regulation of marriage and divorce for Hindus, moving away from the former view of marriage as an unbreakable bond. The Act defined explicit grounds for divorce, such as cruelty, desertion, adultery, and mental illness, and it also allowed for divorce through mutual consent. Over time, court interpretations have expanded the understanding of these grounds, especially concerning domestic violence and the irretrievable breakdown of marriage. In contrast, the Muslim community has continued to adhere to Islamic personal law, which has traditionally enabled men to divorce their wives unilaterally through talaq, while women faced limited options like khula (which allows women to initiate a divorce) or filing for legal action under the “Dissolution of Muslim Marriages Act of 1939.” The significant “Shah Bano case in 1985” brought attention to the issue of alimony for divorced Muslim women, resulting in the “Muslim Women (Protection of Rights on Divorce) Act, 1986.” This Act sought to safeguard religious rights but received criticism for limiting women's rights. A notable improvement in Muslim personal law occurred in 2019 with the prohibition of instant triple talaq (talaq-e- bid'ah)

through the Act, which ensured that arbitrary and unilateral divorces were no longer legally valid. Despite these legal reforms aiming to modernize divorce regulations, significant disparities persist between Hindu and Muslim personal laws, leading to demands for a UCC to establish a more equitable legal framework. The progression of divorce law in India reflects



the tension between preserving religious independence and pursuing gender justice, highlighting the difficulties of reconciling tradition with progressive legal principles.

2.3.1 Chronological development of divorce laws under Hindu law and Muslim law

Hindu personal law has significantly evolved when it comes to divorce and the dissolution of marriage. Historically, the cultural and religious values of the time influenced the view of marriage in Hinduism as a sacred and unbreakable bond. Currently, Hindu law encompasses a set of personal laws specifically for Hindus in India that govern various aspects such as marriage, adoption, and inheritance.⁴¹

During the late 19th and early 20th centuries, there were significant social reform movements advocating for women's rights and gender equality. Leaders such as Ishwar Chandra Vidyasagar and Raja Ram Mohan Roy challenged traditional beliefs and highlighted the importance of utilizing the judicial system to address marital disputes. The HMA, 1955 emerged as a result of legislative efforts in Hindu personal law, facilitated by these reform movements. Following independence, the government chose to codify Hindu law based on the recommendations of the "Hindu Law Committee", which was established in 1941. The "HMA of 1955" brought about a crucial shift by formalizing Hindu personal law and creating a comprehensive legal framework for divorce. In addition to procedural safeguards aimed at ensuring fairness and justice, the Act specifies various grounds for divorce, including mutual consent, cruelty, and desertion.

The evolution of divorce within Hindu law over time reveals significant changes influenced by key legal provisions and judicial decisions under the HMA, while also reflecting the interplay between traditional values and contemporary practices. This exploration seeks to provide a thorough understanding of how divorce regulations navigate the balance between personal freedoms and cultural principles in light of the evolving landscape of Hindu society.

Hindu personal law has undergone considerable transformation when it comes to ending a marriage or divorce. Historically, the traditional view within Hinduism considered marriage a sacred and permanent bond, mirroring the cultural and religious values of the era. Currently,

⁴¹ Herbert Cowell, *The Hindu Law: Being a Treatise on the Law Administered Exclusively to Hindus by the British Courts in India*, Calcutta, Thacker, Spink and Co., 1871.



Hindu law serves as the framework of personal laws that specifically govern Hindus in India, addressing matters such as marriage, adoption, and inheritance.

During British rule, a significant piece of legislation was the “Mussalman Wakf Act of 1923”, which set forth various rules and regulations for the administration of wakf properties. This Act required the maintenance of financial records and the auditing of wakf properties. Following this, several provincial Acts were introduced based on the same framework. Currently, these local Acts function in conjunction with the “Central Wakf Act of 1954” and the “Shariat Act”.

2.3.2 The “Dissolution of Muslim Marriage Act” 1939

Alongside the Shariat Act, a significant piece of Muslim personal legislation established in British India was the Dissolution of Muslim Marriage Act of 1939. The motivations behind the enactment of this law are thoroughly outlined in the Statement of Objects and Reasons, as stated below: *“There is no provision in the Hanafi code of Muslim law enabling a married Muslim woman to obtain a decree from the court dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and under certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. The Hanafi jurists, however, have clearly laid down that in cases in which the application of Hanafi law causes hardship, it is permissible to apply the provisions of Maliki, Shafii or Hanbali law. Acting on this principle the ulama have issued fatwas to the effect that in cases enumerated in clause 3, Part A of this Bill married Muslim woman may obtain a decree dissolving her marriage. One more point remains in connection with the dissolution of marriage. The courts in British India have held in a number of cases that the apostacy of a married Muslim Woman ipso facto dissolves her marriage... The Ulama have issued fatwas supporting non-dissolution of marriage by reason of the wife's. Apostasy, The Muslim Community has again and again given expression to its supreme dissatisfaction with the view held by the courts”*

The Act enables the Court to terminate a marriage at the wife's request under certain conditions. These conditions include cases where the husband has gone missing, failed to provide support or meet other marital responsibilities, is incarcerated, suffers from chronic impotence or mental illness, is abusive, or has leprosy or a sexually transmitted disease. Furthermore,

the wife can exercise her 'option of puberty' if it is carried out in accordance with the conditions outlined in the Act. The Act specifies that a Muslim wife's decision to renounce Islam does not



automatically end her marriage; however, if a woman who has converted to Islam returns to her previous religion, her marriage will be considered dissolved.

The fact cannot be gainsaid that most of the members of the Muslim community are opposed to the enactment of a common Civil Code for India as contemplated by (The constitution of india art. 44). They feel that the viewpoints and emotions of Muslims have not been completely recognized by others concerning this issue. Muslims firmly believe that Islamic law is fundamentally based on the teachings of the Quran, which they regard as the divine words revealed to the Prophet Muhammad. A devoted Muslim has the essential duty to follow and uphold the laws stated in the Quran. They rightfully fear that the establishment of a common Civil Code may result in potential violations of their personal laws, which would be in conflict with Quranic law. The protection of religious freedom is the cornerstone of our Constitution, which has made India a secular state. It guarantees religious and cultural freedom for all, particularly for minorities, among which Muslims are the largest group. It would be a historic misstep if India, in its quest for a uniform Civil Code, were to compromise the rights of all religious communities to freedom of conscience and the capacity to practice and spread their faith freely.⁴²

Marriage has been a key part of human society for thousands of years. It has changed over time, influenced by culture, society, and economics. In the past, marriage often served practical purposes, like forming alliances, joining wealth, and strengthening family ties. For many ancient cultures, including the Egyptians and Romans, marriage was more about these practical aspects than romance. As time went on, the purpose of marriage shifted towards emotional connections and companionship. This change became clear during the Middle Ages and the renaissance.

Divorce has always existed alongside marriage as a way for people to leave unhappy or harmful relationships. Attitudes toward divorce have varied greatly throughout history. In some cultures, divorce was common and accepted, while in others, it was frowned upon. For example, in ancient Rome, wealthy individuals could easily get a divorce, which showed a growing recognition of personal choice in marriage. However, religious beliefs, especially in Christianity and Islam, made divorce more complicated. These beliefs often treat marriage as

⁴² Rahiman, K. K. "History of the evolution of Muslim personal law in India." *Journal of Dharma* 11, no. 3 (1986): 249-263, <https://dvkjournals.in/index.php/jd/article/download/1376/1266/2759>.



something that should last forever, leading to negative views about divorce and making it harder to accept.

The 20th century experienced significant changes in divorce laws and societal perceptions, especially in Western countries. Legal reforms introduced no-fault divorce, allowing couples to end their marriages without needing to place blame. This transformation recognized that not all partnerships thrive and removed the requirement for guilt or accusation. This contemporary method enabled more amicable separations for couples. Additionally, the emergence of feminist movements played a crucial role in advocating for gender equality and individuals' rights to seek happiness outside traditional marriage.

Exploring the history of marriage and divorce laws helps us understand broader issues of personal freedom and social expectations. By looking back at how these laws have changed, we can better appreciate the human stories behind them and their impact on society. This exploration helps us see how love, commitment, and personal rights evolve, connecting legal, social, and personal experiences that shape our current world. Marriage has been a key part of human society for thousands of years. It has changed over time, influenced by culture, society, and economics. In the past, marriage often served practical purposes, like forming alliances, joining wealth, and strengthening family ties. For many ancient cultures, including the Egyptians and Romans, marriage was more about these practical aspects than romance. As time went on, the purpose of marriage shifted towards emotional connections and companionship. This change became clear during the Middle Ages and the Renaissance.

2.3.2 Evolution of the Institution of Divorce under Hindu Law

In the context of Hinduism, marriage is always viewed as a sacred union between husband and wife. This belief has persisted from the patriarchal society of the Rig Vedas to modern times. Historically, the institution of marriage was so firmly established that Hindu Shastric Law did not provide for divorce. According to Manu, the marital bond cannot be dissolved through sale or any other means, and mutual fidelity is expected to last until death, as it is considered the highest duty.⁴³ While this law did not acknowledge divorce, Vedic Law offered some limited recognition of it. Narda and Prasada allowed a wife the option to select another husband, and Kautiliya also conveyed a similar idea, suggesting that if there is mutual dislike, both parties

⁴³ PARAS DIWAN, MODERN HINDU LAW, 46, 101, (Allahabad law Agency),(2003).



in a marriage can be freed from the union.⁴⁴ It is important to note that Kautilya explained that marriages initiated through Brahma, Praja, Arsha, and Daiva cannot be dissolved or ended. In contrast, if a marriage is formed through Gandharva, Asura, or Rakshasa, it can be dissolved with the mutual agreement of both parties. In a similar manner, Manu and Yajnavalkya acknowledge that a husband is permitted to leave his wife under specific circumstances. The ability to practice Tyaga has been granted solely to the husband and not to the wife. Concerning Tyaga, it fundamentally refers to abandonment rather than divorce. The idea of divorce was not recognized by historians during the Muslim period, and the same holds true for the British period. During the British Era, courts primarily recognized Manu as the leading authority, and Manu opposed such practices, with no consensus among various scholars about divorce practices among Hindus. The British established certain laws like The Native Converts “Marriage Dissolution Act, 1866”, “The Indian Divorce Act, 1869”, and “The Parsi Marriage and Divorce Act, 1936”. However, these Acts granted divorce rights only to Christians and Parsis, without being applicable to Hindus. It was only after India gained independence that a uniform divorce law was established for Hindus, namely the “HMA, 1955”. This Act outlines multiple grounds for divorce, granting equal rights to both husband and wife.

2.3.3 Evolution of the Institution of Divorce under Muslim Law

Regarding divorce in Muslim Law, it is regrettable that in pre-Islamic Arabia, divorce was both easy and common among the ancient Arabs. It served as a means of torment. Men would often end their marriages based on impulsive desires or whims.⁴⁵ The husband's authority over divorce was boundless. Although marriage is regarded as a civil contract where both individuals have equal rights, Muslim husbands have historically had specific advantages concerning divorce. They had the ability to end their marriages at any moment and without justification. They could also reinstate the divorce and separate again as often as they chose. The wife could be subjected to harassment through false allegations of infidelity, allowing the husband to evade any formal obligations for support or legal consequences.⁴⁶ In the time before Islam, women were regarded as property, and divorces were easily attainable. It was the Prophet Muhammad who initiated a significant transformation in the status of Muslim women. He denounced it as an evil by pronouncing that “*of all the permitted things, divorce is the most*

⁴⁴AKHTAR NASEEM, FAMILYN LAW ON DIVORCE AND JUDICIAL SEPERATION,(Deep and Deep Publication),(2003).

⁴⁵1, AHMAD A GALWASH, THE RELIGION OF ISLAM, 117, (conveying Islamic message to society), (1940).

⁴⁶ Ibrahim, Abdul Hamid, Dissolution of Marriage, Islamic Quarterly - 3,166-75,1956, <https://msbrijuniversity.ac.in/assets/uploads/newsupdate/LawofDivorce.pdf>.



abominable with God."⁴⁷ He was the pioneer in enhancing the status of Muslim women. He limited the husband's authority to divorce and granted women the right to seek separation on justifiable grounds. He warned his followers that *"curse of God rests on him who repudiate his wife capriciously, Divorce shakes the Throne of God."*⁴⁸ Muslim scholars have frequently highlighted that Islamic law grants both the husband and wife the right to divorce, while also imposing significant limitations on the use of this right. Mr. Justice Kishna Iyer pointed out, *"the view that the Muslim enjoys an arbitrary unilateral power to inflict instant divorce does not accord with Islamic injunction.... It is a popular fallacy that a Muslim male enjoys under the Quranic Law unbridled authority to liquidate the marriage."*⁴⁹

Post-Colonial Period

The "HMA of 1955" represented one of the most significant legal shifts after India's independence. This legislation brought crucial changes intended to improve the current Hindu marriage laws and regulations.⁵⁰

The main provisions of the act detail several significant aspects. Firstly, it defines the criteria for a legally recognized marriage, which includes stipulations for monogamy, a minimum age of twenty-one for males and eighteen for females, and the requirement of mutual agreement between the partners. Furthermore, marriages between individuals who are within forbidden degrees of relationship are deemed invalid and illegitimate unless expressly permitted by agreements. Although registering a marriage is not compulsory, it is recommended for legal reasons. The law also specifies various causes for judicial separation and divorce, including infidelity, domestic abuse, abandonment, and mutual consent from both spouses.

The SC provided further clarification on the concept of "mental cruelty" as defined in the HMA of 1955. In the case, the judge determined that mental cruelty can serve as a valid ground for separation when one partner's ongoing neglectful, aggressive, and violent behavior inflicts significant mental distress on the other partner.⁵¹

⁴⁷ 1, K.N AHMAD, MUSLIM LAW OF DIVORCE, (kitab bhavan),(1978).

⁴⁸ *Supra* Note 16.

⁴⁹ *Yousuf v. Swaramma*, AIR 1971 Ker 261 (264).

⁵⁰ The Hindu marriage Act, 1955, No. 25, Acts of Parliament, 1955, (India).

⁵¹ *Narasimha Murthy v Susheelabai*, AIR 1996 SC 1826.



2.3.4 Muslim Personal Laws and Triple Talaq Reforms

The tradition of Triple Talaq (talaq-e-biddat) allowed a Muslim man to instantly divorce his wife by uttering “talaq” three times. This practice faced criticism for being arbitrary and unjust towards women. In 2017, the Supreme Court of India declared Triple Talaq unconstitutional, and in 2019, the Indian government passed the Muslim Women “Protection of Rights on Marriage” Act, criminalizing the practice. This law marked a significant step forward in achieving gender equality for Muslim women.⁵²

The transformation of divorce in India illustrates the wider shifts in society, ranging from historical customs to contemporary legal systems. As the nation progresses, it is probable that divorce laws and practices will continue to evolve, aiming to reconcile personal rights and requirements with cultural and religious traditions. Maintaining gender equity and human rights will be crucial to this progression, empowering every individual in society and promoting a fair and just legal framework.

2.4 Modern Legal Framework Governing Divorce

Modern divorce laws in India represent a dynamic intersection of traditional personal laws and evolving legal frameworks aimed at accommodating the changing nature of marriage and family life in contemporary society.

Studying the evolution of marriage and divorce laws offers valuable insights into issues of personal freedom and societal norms. By examining historical changes in these laws, we can appreciate the individual narratives that influenced them and their broader societal effects. This investigation reveals how concepts of love, commitment, and personal rights have transformed over time, linking legal frameworks with social and personal experiences that define our contemporary world. Marriage has played a critical role in human communities for millennia, evolving under the influences of culture, society, and economic factors. Historically, marriage often fulfilled practical functions, such as creating alliances, consolidating wealth, and fortifying familial connections. In many ancient civilizations, including those of the Egyptians and Romans, marriage was more about these practical considerations than romantic sentiments. However, as time progressed, especially during the Middle Ages and the Renaissance, the focus of marriage began to shift towards emotional bonds and companionship.

⁵² SHAYARA BANO, *supra* note 29.



2.4.1 Evolution of Divorce under Hindu Law

In Hinduism, marriage is typically regarded as a sacred connection between a husband and wife, a viewpoint that has persisted from the patriarchal frameworks of the Rig Vedas to current times. Historically, the idea of marriage was so deeply rooted that Hindu Shastric Law did not permit divorce. According to Manu, the marital relationship is permanent, requiring lifelong loyalty as its most significant obligation. Although divorce was not officially acknowledged, some Vedic writings, such as those by Narda and Prasada, permitted a wife to select another husband, and Kautilya proposed that mutual dislike could permit both individuals to end the union. Nonetheless, certain categories of marriages (Brahma, Praja, Arsha, and Daiva) were deemed indissoluble, while those formed through Gandharva, Asura, or Rakshasa could be terminated with mutual consent.

Manu and Yajnavalkya recognized circumstances under which a husband might abandon his wife, but the authority to enact Tyaga (abandonment) was reserved solely for the husband, not the wife. The idea of divorce remained largely unrecognized throughout the Muslim and British periods. In British India, the judicial system mainly adhered to Manu's principles, which rejected divorce, resulting in diverse scholarly interpretations on the matter within Hinduism. The British established laws such as The Native Converts "Marriage Dissolution Act, 1866," "The Indian Divorce Act, 1869," and "The Parsi Marriage and Divorce Act, 1936," which permitted divorce for Christians and Parsis but did not extend these provisions to Hindus. It was not until after India gained independence that a standardized divorce law for Hindus was enacted with the introduction of the "HMA, 1955," which provided various grounds for divorce and ensured equal rights for both partners.

2.4.2 Evolution of Divorce under Muslim Law

In pre-Islamic Arabia, divorce was regrettably common and readily available under Muslim law, often utilized as a means of torment. Men often ended their marriages impulsively, exercising almost unlimited authority over the process. Although marriage is considered a civil contract that provides equal rights to both partners, historically, Muslim husbands enjoyed distinct advantages in divorce, being able to terminate marriages without justification and repeatedly reinstate separations. Wives could endure harassment through false allegations of infidelity, enabling husbands to evade support obligations or legal

repercussions.

It was the Prophet Muhammad who brought about a crucial change in the standing of Muslim women. He denounced the ease of divorce as a negative practice, stating that “of all the



permitted things, divorce is the most abominable with God.” He was a trailblazer in championing women’s rights within Islam, curtailing a husband's ability to initiate divorce and granting wives the right to pursue separation under legitimate circumstances. He warned his followers that “the curse of God rests on him who repudiates his wife capriciously, for Divorce shakes the Throne of God.” Muslim scholars often emphasize that Islamic law grants both husbands and wives the right to divorce, while also establishing significant limitations on this right. Justice Kishna Iyer remarked that the view of unrestricted unilateral divorce power for Muslim men does not reflect Islamic principles.

2.4.3 Hindu Marriage Act, 1955

Marriage is a crucial institution in our society, yet it can be one of the most complex partnerships to maintain, especially in today's world where divorce has become more common. This is where the HMA (HMA) plays a vital role in preserving marriages and preventing families from breaking apart.

Implemented in 1955, the HMA aims to create a consistent set of laws for Hindus. It provides individuals with the ability to file for divorce when necessary, according to the law's specified provisions.

Marriages are often emotionally and financially significant relationships, marked by complexity. The primary goal of this act is to protect the rights of both the bride and groom within the framework of the HMA.

This legislation applies to any person practicing Hinduism in any of its various forms or branches, encompassing followers of Virashaiva, Lingayat, or the Brahmo, Prarthana, or Arya Samaj. It also extends to individuals who identify as Buddhist, Jaina, or Sikh. Furthermore, it is relevant to any other person living in the areas covered by this legislation who does not belong to the Muslim, Christian, Parsi, or Jewish faiths, unless it can be proven that such an individual would not have been subject to Hindu law or any related customs or practices concerning the issues addressed in this legislation if it had not been enacted. Divorce was recognized in British India as a legitimate means of separation in 1869, primarily aimed at Christians seeking a lawful divorce. Before this period, there was no formal legal framework in India that governed divorce. Later, in 1955, the HMA was

established to offer a legal pathway for individuals to seek divorce under Hindu law.



The HMA is an important law that individuals should familiarize themselves with prior to entering into a formal marriage. Although a comprehensive understanding may not be required, possessing a basic knowledge of the law and its importance can help both the bride and groom appreciate the gravity of marriage and the risks associated with a nonchalant attitude. The HMA establishes key principles and safeguards the rights of both parties involved.

Bigamy: According to the HMA, a man is not allowed to have more than one wife simultaneously. He must legally divorce his current wife before marrying someone else. If he fails to do so, he may face penalties under sections 494 and 495 of the IPC, 1860.

Marriage Age: Indian legislation stipulates the legal age for marriage, setting the minimum at twenty-one years for men and 18 years for women. Marriages conducted before these ages will not be legally recognized, and the couple may face legal repercussions.

Restitution of Conjugal Rights: This term refers to a situation where one spouse withdraws from the marriage without a valid reason, allowing the other partner to approach the court for restitution of conjugal rights. This process aims to protect the marriage and maintain its integrity.

Mental Stability: A marriage may be declared null and void if one or both individuals enter into the union while mentally unfit. Legal consent is required under these circumstances, as outlined in “sections 5(ii)(a), (b), and (c) of the HMA”.

Marriage Ceremonies: When a couple marries through traditional rituals and customs, their union is legally valid, creating a lawful bond. Consequently, any child born from such a marriage is considered legitimate, and the father (the groom) bears legal responsibilities towards them.

2.4.4 Relevant provision under HMA

Recently, the SC indicated that, through the powers provided by “Article 142” (which permits the SC to achieve complete justice), they possess the capacity to annul any marriage or grant a divorce decree in cases where the marriage has irreparably broken down. This allows individuals to bypass the waiting period and file a direct petition to the SC.

Section 10: This discusses judicial separation and outlines the procedure for legally obtaining a divorce, including submitting a petition in the family court. The reasons for

separation and relevant sections can be included in the petition according to “sections 13 (i) and (ii)”.



The issue of bigamy was raised when a man, who was already married according to Hindu Law, converted to Islam and entered into a second marriage under Muslim Law. The SC ruled that the second marriage was invalid since the first marriage had not been legally dissolved under the HMA. This Act, established in 1955, enforces the principle of monogamy, meaning that a person cannot have more than one spouse at the same time.⁵³

Section 5: The requirements for a Hindu marriage emphasize important factors that are optional rather than compulsory. It is typically stated that “the marriage may” be performed under certain conditions. To begin with, both the bride and groom must be unmarried at the time of the wedding. Additionally, each person should be capable of consenting to the marriage and should not have any mental disabilities that might affect their ability to marry, including issues such as recurring insanity or epilepsy. Both individuals must also adhere to the legal age of marriage in India, which is twenty-one for men and eighteen for women. Moreover, neither person should be related in a prohibited manner, unless their cultural practices permit such a relationship. Finally, the individuals should not be sapindas unless their religion or customary laws allow it.

Section 13: The HMA outlines various conditions under which individuals can seek a divorce. It specifies different grounds that are recognized by the courts for this purpose. Notably, Clause 1-A allows either party to file for divorce, whereas Clause 2 of “Section 13” provides grounds specifically for women.

“Section 13-1” lists reasons such as the conversion of a Hindu to a different religion, which includes faiths like Christianity, Islam, Buddhism, Jainism, Sikhism, and others not recognized as Hindu, as well as mental illness, the presence of a sexually transmitted disease, and the presumption of death.

On the other hand, “Section 13-2” includes grounds such as bigamy, rape, sodomy, or bestiality; it also covers scenarios involving a decree for maintenance under “Section 18” of the HMA or Section 125 of the Penal Code, which can support a wife in filing for divorce. Additional grounds include a wife living separately, marriages contracted before the age of fifteen, which allows for divorce proceedings prior to reaching eighteen, and situations where both partners have lived apart for at least one year.

⁵³ Smt. Sarla Mudgal, President, Kalyani & ... vs Union Of India & Ors, 1995 SCC (3) 635.



Section 14: No marriage can be dissolved within one year from the date of marriage, according to the law. However, exceptions may apply if the necessary sections and appropriate evidence are submitted when filing for divorce. The “Indian Marriage Act” emphasizes that every marriage deserves an opportunity for re-evaluation and reconciliation, taking into account the mental, emotional, and financial investments involved, as well as the potential impact on any children born from the marriage.

Section 15: Defines the rights of both parties to marry again once the divorce decree is granted. The period is defined based on any new or existing appeal against the decree. Until any appeal exists and is not dismissed in the court of law, against any party, the rights of marrying lawfully stand null and void.

Many people seek to understand the various grounds of divorce before making the decision to end their marriage, some of them are:

Adultery: having an extramarital affair or sexual relationship with someone outside of marriage.

Cruelty: This includes unjustifiable behavior that harms physically, mentally, or emotionally.

Desertion: abandonment of the partner by the other one, without consent for any reasonable cause.

Conversion to Another Religion: As stated above, conversion from Hindu to any other religion that is not part of the Hindu religion.

Mental Disorder: any mental illness that makes it practically and emotionally impossible for two people to stay together.

Communicable Disease: This includes STDs or any other type of disease that can be fatal for the other partner.

Renunciation of the World: This is when either partner has gone out of the marriage, leaving all material things to pursue any religion or any kind of faith, and abandoned their family in all forms.

Presumption of Death: When a partner goes away, gets lost, or is not found or has any record in any form and is not found for 7 years or more, he/she is presumed dead and the

petitioner can seek divorce under the HMA, 1955.



Unsound Mind or Suffering from Continuous Insanity: Any mental disorder that has an indefinite period of cure, or doesn't have a treatment; in this case, the petitioner has all valid and medical reasons for not staying with the partner and can file for a divorce.

There are several types of divorce petitions that individuals can file depending on their circumstances and the nature of their separation which are as follows:

Divorce with Mutual Consent: This is when both parties agree to a mutual divorce; they get the memorandum of understanding prepared with their respective lawyers based on which the final petition is created and filed in the court.

Divorce without mutual consent: This is where either party is not ready for divorce, and the divorce decree is obtained when the petitioner files the petition in court, and the decree is granted solely by the family court as per all the facts presented before them.

Divorce Notice: This is an official and legal document that is sent by the petitioner to their partner, which indicates their intention and also works as a final warning where they can think and decide wisely, before getting into any legal battle.

The procedures of divorce can often be complex and emotionally challenging for all parties involved.

A petition on behalf of both parties, i.e., both the partners (husband and wife), is submitted in the family court by their respective lawyers. This petition contains all details pertaining to the separation of both parties, their terms, and pieces of evidence required for the divorce.

A specified date is given to both parties when they have to be present before the family court along with their respective counsels for scrutinizing every aspect of the petition, family backgrounds, properties owned, the reason for divorce, kids custody (if applicable), ID proofs, and more.

Before this, the courts may also send the parties for mediation to explore chances of reconciliation, as Hindu marriage is regarded as sacred and is a bond of an Indissoluble nature or a permanent bond. However, if both parties deny reconciliation, the proceedings take place as per the family court.

After examining carefully and checking pieces of evidence and statements of both parties,

the family court judge has full authority to add or modify conditions as per the law in case there is any issue related to alimony or maintenance amount & agreement, or if any child custody or



visitation rights are involved. It is not limited to these conditions, though. After this, the first motion is passed and parties are given a time for 6 months to reconsider their decision and try to reconcile if they still have any chances. This period can be extended to 18 months from the date of the petition in the family court.

During the waiting period, if both parties try to reconcile and want to stay together, they can appeal for cancellation of the divorce through their counsel. However, if either party disagrees to reconcile, their divorce is proceeded with as per the order, and in the second motion (as per the given date by the family court), the final statements of each party are recorded before the family court.

Once the statement is recorded, the full and final agreement between the parties is signed by the spouses so that there are no conflicts and differences thereafter for any alimony, maintenance, or child custody.

Once the court is satisfied by each side and there is no chance for reconciliation in the final motion, the court grants the divorce decree, and the Marriage gets void and invalid.

Both maintenance and alimony are vital considerations during divorce proceedings to ensure financial support for the dependent spouse.

Maintenance and alimony, in simple terms, are the financial support that a person has to give to their spouse as per the order of the court, irrespective of their divorce status.

Interim maintenance is a decided amount of money that is given by one partner to another for fulfilling their needs during the proceedings. This also helps to ensure that the receiving party is not short of funds and is not weaker while contesting the case.

Maintenance After the Divorce Proceedings is a decided amount that one partner has to give to their separated partner once the divorce is granted. In case the payer fails to give the maintenance after the divorce, the receiving party can again go the court to get legal support.

Factors Considered When Deciding Maintenance and Alimony: While the court decides on maintenance and alimony, a lot of factors are taken into consideration, such as future expenses, lifestyle expenses, costs of education in case of children/child, inflation, medical expenses, and more. However, the amount is decided as per the financial ability of both

parties and enough proof of their financial standings. It need not be unrealistic. However, once decided, the giver



is bound to provide financial maintenance and alimony as decided and cannot shy away from their responsibility.

2.4.5 Muslim Personal Laws

In India, the term Muslim law applies to the personal matters concerning that section of the Indian society composed of people following Islam. Hence, the MPL governs the institutions of marriage and divorce, adoption, succession, and charity in the Indian Islamic community. The MPL governs the institutions of marriage and divorce, adoption, succession, and charity in the Indian Islamic community.

UCC, as the term itself suggests, aims to codify the currently existing diverse communal laws into a single overriding legislation in accordance with the fundamental principles enshrined in the Indian Constitution. However, the introduction of the code is fraught with several difficulties as these differences that we are currently in vogue originates in the religious statutes and several sections of the society especially the minority communities feel that it will eventually turn out to be a guise under which they will be subjected to the majority community's norms.

Though Islam is considered a monolithic religion, divisions exist on the basis of several sub- sectarian practices. The most widely known of such a division is between the Schools of Shia and Sunni. Correspondingly, the Islamic law as practised in these communities exhibits subtle variations.

There are four authorities for Islamic law according to the Sunni School of thought, which are: The Quran, Haadis or Sunnat, Ijma, Qiyas, and the Shia School.

In the Shia school, the authorities of law are the Quran, Hadith, and the dictums of Imams. They did not accept the Sunni view of considering Quiyas as an acceptable source of law. Besides, the Shias do not support those Haadis compilations which emanate from households not related by blood to the prophet himself. Thus, they follow only compilations such as AL- Kafi, and Tahdhib-UL-Abham as most authentic of all collections.

2.4.6 Muslim Marriage Dissolution Act

Section 2 of the Act provides woman married under the Muslim law to obtain a decree of

dissolution on various grounds on the side of husband such as cruelty, lack of correspondence, neglect, imprisonment for a period of seven years or more, failure to perform marital



obligations for more than three years, insanity for a period exceeding two years or in case marriage solemnized when she was minor (below 15).

2.4.7 Marriage under Islamic law

In Islam, marriage is not seen as a temporary choice but rather as a necessary commitment, as celibacy is strictly forbidden. Unlike many other religions where marriage is viewed as a sacrament, in Islam it is regarded as a contract, categorized as either an Ibadat or a Muamalat. However, experts note that the marital contract differs from a typical civil contract because it cannot be based on future conditions or established for a limited duration, with Mutah marriage being an exception to this rule.

Based on Islamic law, the fundamental elements of marriage includes ,A proposal for marriage must be made by one party and accepted by the other, with both actions occurring in the same meeting. The individuals involved must be legally competent to marry. Additionally, there should be two male witnesses or one male and two female witnesses, all of whom must be mentally sound and present during the proposal and acceptance. There is no requirement for a written document or a religious ceremony. While polyandry is not permitted, polygyny is allowed under specific conditions.

Divorce under Muslim law involves specific procedures and regulations that differentiate it from other legal systems.

According to Islamic law, divorce can occur either through the actions of the individuals involved or through a court ruling. The primary reason for seeking divorce is the inability of the couple to coexist. Either the husband or the wife can initiate a divorce. In this context, a simple verbal declaration from the husband indicating his intention suffices. While a wife cannot independently initiate a divorce, she can do so if her husband grants her that authority. Divorces initiated by women are referred to as Khula or Mubarat. Before the Dissolution of Muslim Marriages Act was enacted, women had very limited rights to request a divorce, only permitted in cases of false adultery claims, the husband's insanity, or his impotency. The Act expanded the reasons for divorce, making it accessible for a variety of other grounds through a legal order.

Inheritance under Muslim law is governed by specific rules and guidelines that determine the distribution of an individual's estate among heirs.

The wife is entitled to receive one-eighth of the inheritance if there are children and one-fourth if there are no children. If there are multiple wives, the one-eighth share is distributed equally among them. The husband inherits one-fourth of his wife's estate if there are children and half if there are none upon her death.

In the case of daughters, all daughters share equally in two-thirds of the estate. If there is only one daughter, she receives half of the estate. If there are grandchildren, one-sixth of the deceased child's estate goes to the mother; in the absence of grandchildren, she receives one-third of the estate.

Special property: Mahr is the total amount of money or property that the husband is obligated to provide to the wife at the time of marriage. This can be given either on the day of the marriage or after a specified period.

Hiba: A gift under Muslim Law allows any property to be transferred as a gift. For this transfer, the giver must declare their intention to make a gift, which must then be accepted by the recipient.

Under Muslim law, parents are considered natural guardians of their children, responsible for their upbringing and welfare.

In both Sunni and Shia schools, the father of a minor child is acknowledged as the guardian, equivalent to a natural guardian. The mother is not recognized as the guardian of the child, even if the father passes away. The father's guardianship rights remain intact even if custody of the child has been assigned to the mother or another related female.

The father possesses complete authority over the minor child's education and religious upbringing, and he is empowered to make decisions for the child's welfare. Hence, while the father is alive, he is the exclusive and primary guardian of his minor child.

The father's right to guardianship is limited to his legitimate minor child or any child under the age of eighteen. He does not have the right to guardianship or custody of his illegitimate minor child. In contrast, the mother has the right to custody of her illegitimate child, even though she does not hold guardianship over this child. The mother's right to custody, known as Hizanat, is not an absolute right, and the father remains the legal guardian of his children.

The father is also eligible to obtain custody of his minor child under two circumstances: first, when the period during which the mother or other women could claim custody has ended, and



second, when there is no mother or female entitled to custody. The father's right to custody continues until the children reach puberty.

Among Sunnis, the father is the sole natural guardian of minor children, and upon his death, the guardianship reverts to the executor. In Shia communities, after the father's death, the guardianship passes to the grandfather, even if an executor was designated by the father. No other individual, including a brother, can be regarded as a natural guardian. In the absence of a grandfather, the guardianship ultimately goes to the grandfather's appointed executor, if one exists. According to Muslim law, the father serves as the natural guardian, or de jure guardian, of a minor or mentally incapacitated individual and their property, holding legal authority to oversee the child's actions.

The guardianship of a minor's property is primarily the responsibility of the father, who is recognized as the natural guardian. Following his death, this responsibility falls to the executor designated by the father in a will, who then acts as a guardian for the minor child. If the father passes without appointing an executor, the paternal grandfather is entitled to act as the legal guardian of the minor's property. After the paternal grandfather's death, any executor he appointed would take over as the guardian of the minor's property. If there is no executor assigned by the grandfather, it becomes the court's obligation to appoint a guardian to manage the minor's property under The Guardian and Wards Act of 1890.

A testamentary guardian is appointed to care for a child in the event that their parents can no longer do so.

A testamentary guardian is one designated by the will of a father or mother, who are the natural guardians of a minor. No other individual has the authority to name a guardian through their will. Historically, it was solely the father who had the right to designate a guardian, excluding the mother.

Among Sunni Muslims, the father has the complete authority to appoint a guardian in his testament. If the father and his executor are not present, the grandfather is permitted to name a testamentary guardian. In Shia law, the father's appointment of a guardian is valid only if the grandfather has passed away.

The grandfather also holds the right to name a testamentary guardian. No one else possesses this authority. In both Shia and Sunni traditions, a mother cannot appoint a testamentary

guardian for her children. However, she can designate a testamentary guardian for her minor



children's property in two scenarios: first, if she has been named as a general executrix in the father's will; second, if she appoints an executor concerning her own property that will pass to her children after her death.

It is essential for the appointment of a testamentary guardian to be accepted, whether that acceptance is expressed or implied. After acceptance, resignation from the guardianship cannot occur without court permission.

Muslim law does not specify particular formalities for appointing testamentary guardians. An appointment can be made either in writing or verbally. In all instances, the intention behind appointing a testamentary guardian must be unmistakable and clear. A testamentary deposition made by a testator must be deemed invalid; however, the appointment of an executor can be either general or specific. The testator must be of legal age and possess sound mind, meaning he should have full control of his faculties at the time the will is executed.

The court has appointed guardians to oversee the matter. The Qazi was given the authority to appoint a guardian for a Muslim minor in situations where there are no natural or testamentary guardians available. At the moment of appointing a guardian for a minor child by the court, the "Guardianship and Wards Act, 1890", becomes applicable. This Act is relevant not only to Muslims but also to all Indian citizens, meaning it applies to everyone regardless of their religious affiliation and serves as special legislation focused on guardianship and wards. The court designates guardians for a minor's person or property under this statute.

According to Muslim law, when a child's father is absent and legal documents such as a will are not available, the court holds the responsibility for appointing a legal guardian for the minor. Since guardians are appointed according to the provisions of the "Guardianship and Wards Act, 1890", they are referred to as "Statutory Guardians." In instances where a conflict arises between "Muslim Personal Law and the Guardians and Wards Act", the latter takes precedence. When the term court is referenced, it denotes a District Court.

The courts have the authority to appoint a guardian for a minor upon receiving an application. Section 17(2) of the Act states that in evaluating the welfare of a minor, the court must consider the age, sex, and religion of the minor, as well as the character and capabilities

of the proposed guardian, their closeness to the minor, the wishes, if any, of a deceased parent, and any prior or existing relationships between the proposed guardian and the minor or their property. Furthermore, if the minor is sufficiently mature to express a thoughtful preference, the court may take that into consideration as well. It is important to note that although the Act establishes



a consistent rule for guardianship throughout India, regardless of religion, the minor's religion and personal law can be factored into the decision-making process for appointing a guardian.

In “Smt. Farzanabai v. Ayub Dadamiya”, The Bombay HC noted that the “Guardians and Wards Act” requires courts to consider the personal laws of the parties, with the child's best interests being a priority. Nevertheless, since the main focus should be the well-being of the minor, the court may refer to the principles of Muslim personal law only if they promote the child's welfare.

Islam modified the early customary rules of inheritance, yet it did not completely discard all traditional practices. When a minor child cannot support themselves, it becomes necessary to appoint a guardian who is an adult capable of making decisions in the best interest of the child, whether the child is a boy or a girl. Guardianship under Muslim Law acknowledges various types of guardianship, including natural or legal guardians, testamentary guardians, guardians designated by courts or statutory guardians, and de-facto guardians.

The court holds the power to terminate a guardian in certain circumstances, such as when the husband has breached the trust of the woman, failed to fulfill his responsibilities as a husband, lacks the capacity to perform his duties, or has mistreated the woman. Additionally, if the husband disregards court orders and does not adhere to the stipulations of the Guardianship Act, or if he is found guilty of moral wrongdoing, then he may possess conflicting interests as a guardian. Furthermore, the wife is no longer considered a minor.

The Islamic inheritance law primarily recognizes two distinct types of legal heirs: male agnates, or heirs according to tribal customs, and newly established Uranic heirs. This inheritance structure eliminated numerous previously recognized categories and introduced additional groups of heirs. Many heirs received specific rights, which sometimes resulted in the subdivision of property into smaller shares.

The principles of Islamic inheritance can be summarized as follows: both the husband and wife are considered heirs. Females and cognates are acknowledged as eligible to inherit. Parents and ancestors have the right to inherit when there are male agnatic descendants present. No wills can be made in favor of any heirs. Bequests to non-heirs are permitted only up to

one-third of the estate. However, an exception to the one-third limit applies to potential heirs if they consent. Adoption is not included in the scope of inheritance. Inheritance rights only come into effect upon the death of a specific individual.



CHAPTER 3

GENDER BIAS IN DIVORCE LAWS

3.1 Alimony and maintenance: a one-sided obligation

Alimony, commonly known as spousal support, refers to the financial assistance that one spouse provides to the other following a divorce. It is usually a one-time lump sum payment given to the spouse in a weaker financial position to help them uphold a similar standard of living as was experienced during the marriage. The purpose of alimony is to offer financial security to the partner who may lack the resources to support themselves after the divorce, particularly if they were financially reliant on the other spouse throughout the marriage.

Conversely, maintenance refers to the ongoing financial assistance given during or after the marriage. This includes both interim maintenance (during the duration of the divorce proceedings) and permanent maintenance (awarded post-separation or divorce). Maintenance may also apply to children resulting from the marriage. Unlike alimony, maintenance is typically granted as a monthly payment instead of a single lump sum and can undergo periodic adjustments based on the changing financial circumstances of both parties.

3.1.1 Understanding Maintenance and Alimony Under the Hindu Marriage Act

Indian law contains specific regulations concerning alimony and maintenance, as well as the associated consequences. These include Section 13B of the HMA 1955, Section 24 of the HMA 1955, Section 25 of the HMA 1955, Section 18 of the Hindu Adoption and Maintenance Act of 1956, and Section 125 of the Criminal Procedure Code of 1973.

Section 13B of the HMA outlines specific provisions that govern the relevant legal matters addressed within the act.

According to the provisions of this Act, a joint petition for divorce may be submitted to the district court by both spouses, regardless of whether their marriage took place before or after the initiation of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), based on the grounds that they have lived apart for at least one year, they have been unable to reside

together, and they have mutually consented to dissolve their marriage.

Upon the joint request of both spouses made no sooner than six months after the petition mentioned in subsection (1) is filed and no later than eighteen months following that date, as long as the petition has not been withdrawn during that time, the court shall issue a decree of



divorce affirming the dissolution of the marriage as of the date the decree is issued, after ensuring, through a hearing and any necessary investigation, that a marriage did occur and that the claims in the petition are valid.

Section 13-B outlines that both spouses must submit a joint petition indicating that they have been living apart for at least a year and that they have been unable to coexist. They must also mutually agree to dissolve the marriage. The petition will be held in court for six months, and during this time, either party can withdraw their application. If the application is not withdrawn within the six-month period but before eighteen months have passed, both parties may need to file a second petition. This new petition should reiterate the earlier declarations regarding the dissolution of the marriage. At the time of this second petition, the court will review the statements made. It is crucial that the consent for the divorce was given voluntarily and not obtained through force, deceit, or inappropriate pressure.

“Sureshta Devi v. Om Prakash 1992”⁵⁴“ They have not been able to coexist,” indicates that the marriage has completely deteriorated.

“K.K. Rao v. Kamalakshmi”⁵⁵ If no action is taken within eighteen months, the petition will be considered dismissed. The 18-month time frame serves as the maximum limit for withdrawing a petition.

There is a crucial question regarding how long mutual consent must exist for a divorce, and different HCs have interpreted this in various ways. The Bombay, Delhi, and Madhya Pradesh HCs argue that mutual consent is relevant only until the first petition is submitted, while the Kerala, Punjab and Haryana, and Rajasthan HCs contend that mutual consent must be maintained until the divorce is completed. This issue was addressed by the SC in the “Sureshta Devi case”.

The SC raised the issue of whether either spouse in a divorce petition filed with mutual agreement can unilaterally withdraw that agreement or if the consent becomes permanent once granted. The SC noted that a period of six to eighteen months was set for the parties to reflect on their decision and seek counsel. During this waiting period, one party might reconsider and choose not to proceed with the petition. There is no provision in Section 13B that prohibits this from happening.

⁵⁴ Sureshtha Devi v. Om Prakash, AIR 1992 SC 1904.

⁵⁵ K.K. Rao v. Kamalakshmi, AIR 1983 KANT 235.



The Court determined that mutual consent is essential for the granting of a divorce decree under Section 13B, and this agreement must remain intact until the decree is finalized. As a result, it has been established that a party has the right to withdraw their consent on their own. As pointed out by the esteemed scholar, Dr. Paras Diwan, the SC's viewpoint is viewed as flawed within the context of our society. It is important to acknowledge that in such situations, the marriage has indeed reached a stage of irreparable breakdown, and its continuation would be pointless.

However, in Hurra Case⁵⁶, the SC requested a review of Sureshta Devi's case and shared its opinions. Therefore, it approved the divorce despite the wife having withdrawn her consent on her own, as the marriage was determined to be irreparably damaged.

Section 24- Maintenance Pendente Lite and Expenses of Proceedings

In any proceedings under this Act, if the court finds that either the wife or the husband lacks independent income adequate for their support and the necessary costs of the proceedings, it may, upon application by either party, order the respondent to pay the petitioner the costs of the proceedings and a monthly amount during the proceedings that the court deems reasonable, considering the petitioner's income and the respondent's income. [Provided that the request for payment of the proceeding expenses and the monthly amount during the proceedings should, as much as possible, be resolved within sixty days from the date the notice is served on the wife or husband, as applicable.]

Maintenance refers to the payments that a husband is obligated to provide to a wife during the duration of a marriage, separation, or divorce under specific circumstances, or the other way around. According to Hindu law, either spouse, whether husband or wife, can claim maintenance.

The term “pendente lite,” as used in the HMA, signifies maintenance awarded during the pendency of legal proceedings. This is also referred to as interim maintenance or temporary maintenance. Either party to the marriage can file a claim for maintenance.

A request for interim maintenance can encompass personal maintenance for the claimant as well as related expenses for the proceedings. The foundation for granting interim maintenance is quite clear: the claimant must show they do not have independent income that adequately supports them and that they cannot manage the costs of the proceedings.

In determining the

⁵⁶ Ashok Hurra vs Rupa Ashok Hurra, AIR 1997 SC 1266.



amount of interim maintenance, courts consider several factors, including the incomes of both the claimant and the non-claimant.

Section 24 uses the word 'income'. The court determined that the term 'income' in Section 24 does not encompass other property or assets; therefore, when determining the amount of maintenance pendente lite, the court will consider only the applicant's income and not any other non-income-generating assets or properties.⁵⁷ In contrast, Section 25 employs the phrase "income and other property." Consequently, if the claimant possesses adequate resources for their maintenance, the court should issue an order for temporary maintenance.

Determined that the respondent lacks resources and income, thus the court is not obligated to establish any maintenance amount.⁵⁸

A ruling issued without taking into account the financial situation of both parties is unlawful. The primary criterion for determining interim maintenance is "if the applicant possesses adequate resources to maintain themselves." Relationships based on goodwill, charity, and friendship cannot be factored in.

If the claimant has sufficient means to maintain herself, no amount of maintenance can be granted to her.⁵⁹

The behavior of the parties, the number of dependents to be supported by the non-claimant, and the requirements of the claimant are among the factors the court must evaluate when deciding on maintenance.

In 1989 P&H HC Case,⁶⁰ it was held that the court cannot misuse its powers by denying maintenance with the object of coercing the claimant into reconciliation.

Although section 24 does not specifically refer to the withdrawal of a petition to hinder the implementation of interim maintenance, numerous courts have ruled in various cases that if a legitimate claim for maintenance is established, withdrawing the main petition cannot undermine it. If the petitioner is the non-applicant and declines to pay maintenance, the court may halt all further proceedings until the payment is made; on the other hand, if the respondent is the non-applicant, the court may dismiss their defense.

⁵⁷Gita Chatterjee vs Probhat Kumar Chatterjee, AIR 1988 Cal 83.

⁵⁸ Rajambal V/s Murugappan, AIR 1985 Mad 284.

⁵⁹Ram Pal Vs. Nisha, AIR 1994 Raj 204.

⁶⁰ Gurmeet Vs. Gurraj, AIR 1989 P&H 223.



3.1.2 *Permanent alimony and maintenance*

Any court with jurisdiction under this Act can, at the time of issuing any decree or at a later point, upon receiving a request from either the husband or the wife, mandate that the respondent pay the applicant a designated gross amount or a monthly or periodic sum for a duration not exceeding the applicant's lifetime. This ruling will take into account the respondent's income and assets, along with those of the applicant, to assess what is reasonable, and any such payment may, if necessary, be secured by a charge on the respondent's property.

If the court identifies a change in circumstances for either party at any time after issuing an order under sub-section (1), it may, at the request of either party, modify, amend, or revoke any such order in a manner that the court considers fair.

If the court finds that the party receiving the order has remarried or, in the case of a wife, if she has not remained faithful, or if the husband has had sexual relations with another woman outside of marriage, it may, at the request of the other party, modify, amend, or revoke any such order in a way the court deems fair.

Section 25 outlines regulations concerning permanent maintenance, commonly referred to as alimony. Alimony signifies payments mandated by the court to be made to a spouse or former spouse as part of a separation or divorce agreement. The purpose of alimony is to provide financial assistance to the spouse with the lower income or, in certain cases, no income at all.

In *Chand Dhawa* case,⁶¹ it was held that if the main petition is dismissed, the court has no jurisdiction to award permanent maintenance.

In the case of *Jagdish vs. Bhanumati*, the Bombay HC held that maintenance proceedings, being ancillary proceedings, must be filed in the court where the original petition seeking matrimonial relief in any matrimonial cause has been filed.⁶²

When determining the amount of maintenance, the court must take several factors into consideration. First, it looks at the income and assets of the claimant. At the time of setting maintenance, the claimant's earnings and any property they own are evaluated. For wives, the maintenance amount is based on the husband's financial status rather than that of the claimant's father. Additionally, the court also considers the income and property of non-

claimants. A

⁶¹ Chand Dhawan v. Jawahar Lal, 1993 SCR (3) 954.

⁶² Jagdish vs Bhanumati, AIR 1983 Bombay 297.



husband cannot escape his responsibility to provide maintenance by claiming he is unemployed, that the wife is qualified to work, or that she is supported by her father.⁶³

The basis of a claim of maintenance is that the claimant has insufficient means to maintain herself. When a wife is qualified but has no employment or other income, the court may allow her maintenance.⁶⁴

Conduct of parties: The term “conduct” is utilized in a wider context here. It includes the behavior exhibited by the parties towards each other, their actions concerning the marriage itself, particularly which party contributed to its dissolution their behavior towards the court. Historically, under English law, a party considered responsible for the failure of a marriage was ineligible for maintenance; however, this is no longer the case, although the amount of maintenance awarded may still be influenced, potentially leading to a reduced sum than is typical. In India, comparable laws exist, although a more traditional approach is frequently adopted when the marriage is terminated due to the wife's infidelity.

The Kerala HC held that if the marriage is dissolved on account of the wife's adultery, she cannot claim any maintenance.⁶⁵

However, in a case, the Bombay HC has submitted that a wife is entitled to maintenance even if the decree was passed on the ground of her adultery. This view is right as in accordance with the social conditions because a woman once divorced on the grounds or proved unchastity should not be left to the resources of immorality.

The English Courts follow the practice of awarding one-third of income of non-claimant as maintenance to claimant. However, this rule of one-third is a mere guide line for India Courts. They haven't followed it rigidly. Depending on the circumstances, the court may grant more or less.

According to the provisions of section 18 of HMA, a Hindu wife, regardless of whether her marriage occurred before or after the enactment of this law, has the right to receive maintenance from her husband throughout her lifetime. Additionally, a Hindu wife can choose to live separately from her husband without losing her right to maintenance under specific circumstances. These circumstances include if the husband has deserted her without reasonable cause or her consent, if he has subjected her to cruel treatment that causes her to fear for her

⁶³ M.D. Krishna vs M.C. Padma, AIR 1968 Kant 226,

⁶⁴ Id.

⁶⁵ Raja Gopalan vs Rajamma, AIR 1967 KER 181



safety, if he suffers from a severe form of leprosy, if he has another wife, if he keeps a concubine in the same residence as her, if he has converted to another religion, or if there are any other valid reasons for her to live apart.

However, a Hindu wife will lose her right to separate living and maintenance if she is considered unchaste or if she converts to another religion. Additionally, the Hindu Adoption and Maintenance Act of 1956 provides further rights to a Hindu wife, allowing her to live separately without losing her maintenance claim, as long as the reasons for her separate living are justified, similar to the aforementioned conditions. It is important to note that a wife does not need to be involved in ongoing matrimonial litigation with her husband to claim maintenance under this statute.

According to section 125 of CrPc if an individual with sufficient means neglects or refuses to provide maintenance for certain dependents, a first-class magistrate may intervene. This applies to a wife who is unable to support herself, a legitimate or illegitimate minor child (regardless of marital status) who cannot maintain themselves, or a legitimate or illegitimate child (excluding a married daughter) who has reached adulthood and cannot support themselves due to physical or mental disabilities. It also encompasses an individual's father or mother who is unable to sustain themselves. Upon proof of neglect or refusal, the magistrate can order the individual to pay a monthly allowance for the maintenance of the respective spouse or dependent, with the maximum amount set at five hundred rupees, as determined by the magistrate. Additionally, the magistrate may require a father to provide support for a minor female child until she reaches adulthood, provided they are convinced that the child's husband, if married, lacks sufficient means. It is important to note that a minor, as defined by the "Indian Majority Act of 1875", is someone who has not yet reached the age of majority. Furthermore, the term "wife" includes a woman who has divorced her husband and has not remarried. The maintenance allowance will commence from the date of the order or, if specified, from the date of the maintenance application.

If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowances remaining unpaid after the execution of the warrant,

to imprisonment for a term which may extend to one month or until payment if sooner made.



Provided that no warrant shall be issued for the recovery of any amount due under this section unless application is made to the Court to levy such amount within a period of one year from the date on which it became due.

If a person offers to support his wife on the condition that she lives with him, and she declines, the Magistrate may take into account any reasons she provides for her refusal. The Magistrate can still issue an order under this section if he finds valid grounds to do so. For instance, if a husband is married to another woman or maintains a mistress, that would be considered a valid reason for his wife to refuse to live with him.

A wife is not entitled to financial support from her husband if she is engaging in adultery, if she refuses to live with him without sufficient reason, or if both parties have mutually agreed to live separately. If it is proven that a wife benefiting from an order is living in adultery, refusing her husband without justification, or living separately by mutual consent, the Magistrate must revoke the order.

Beyond personal laws applicable to specific religions, the CrPC, 1973 includes provisions for maintenance for wives that apply to all individuals regardless of their religious affiliation. This legal relief is prompt and available whether or not there are ongoing matrimonial proceedings.

Under this code, a wife, including a divorced one, has the right to seek maintenance without the need for ongoing litigation. She may live separately if justified by sufficient reasons and still qualify for support. It is necessary for the husband to show neglect or refusal to provide maintenance, and the wife must lack the means to support herself. The court is authorized to grant interim maintenance, and the support amount may be adjusted or terminated based on changes in circumstances. In certain cases, a wife may be ineligible to claim maintenance, and her right to support ends upon remarriage. The legal proceedings regarding maintenance are designed to be quick and efficient.

The SC in the case of “Chaturbhuj v Sitabhai⁶⁶”, The provision outlined in Section 125 is designed as a means of social justice, specifically to safeguard women and children. Its purpose is not to penalize individuals for past neglect but rather to avert vagrancy and poverty by requiring those who are able to provide support to assist those in need, especially those who have a moral entitlement to that support.⁶⁷

⁶⁶ Chaturbhuj v Sitabhai, AIR 2008 SC 530.

⁶⁷ Madhav Goyal, Maintenance and Alimony, LEGAL SERVICES INDIA, Accessed on Apr 23, 2025
<https://legalserviceindia.com/legal/article-6937-maintenance-and-alimony.html>.



Thus, all personal statutes as well as the CrPC, 1973, provide for the maintenance of wives. Thus sums the circumstances under which the husband is liable to maintain his wife.

Section 20 of HMA imposes a duty on children to provide for the maintenance of elderly and ailing parents who cannot support themselves from their own earnings or assets. The HMA represents the first law in India that establishes a responsibility for children to care for their parents. This duty of maintenance applies not only to sons but also includes daughters. According to the HMA, both fathers and mothers have equal rights to seek maintenance.

3.1.3 *Muslim Personal Laws*

Maintenance, referred to as “*Nafqah*,” signifies what a man allocates for his family, encompassing essentials like food, clothing, and shelter. This concept was established to offer assistance to individuals who are unable to support themselves. The principles of maintenance involve financial assistance, sources of income, and educational opportunities. In the context of marriage, the husband is responsible for providing for his wife and ensuring she has all necessary provisions. The primary aim of maintenance is to safeguard the rights of the wife and ensure she lives with dignity; even after a marriage ends, the husband is still obligated to provide maintenance if the wife cannot support herself. Maintenance is not limited to the wife but extends to children, parents, grandparents, grandchildren, and other blood relatives. The maintenance amount is determined by the financial capacity of the individual obliged to provide it. According to Muslim law, women are perceived as less able than men, and therefore, it is the husband's duty to maintain the wife under all circumstances, even if she is capable of supporting herself. Generally, beyond the wife and minor children, other relatives have no entitlement to maintenance. However, every Muslim must provide maintenance to their ancestors and descendants and can also seek support from them, as long as the provider of maintenance is not in a state of poverty. Who qualifies for maintenance includes the wife, the children, the parents and grandparents, and other relatives.

According to Muslim law, men are viewed as superior to women, with women being seen as dependent on men in all instances. The husband is responsible for providing maintenance to his wife even post-divorce. The husband's duty to maintain his wife commences once she reaches the age of fifteen, but not earlier.

Regardless of his financial status, it is the husband's responsibility to ensure adequate maintenance for his wife under all circumstances. This obligation to provide maintenance persists even after the marriage is dissolved. A wife, whether she is Muslim or non-Muslim,



wealthy or poor, healthy or ill, has the right to receive maintenance from her husband in all situations. The wife holds an unequivocal right to receive maintenance.

The amount of maintenance is not defined by any matrimonial laws and is determined at the court's discretion, taking into account the circumstances of both the husband and the wife.

Along with maintenance, the husband is also required to cover additional contracted expenses, such as *Karachi-I-pandan*, *Meva*, and *Kohri*, for his wife.

A wife may be ineligible for maintenance under certain conditions. These include situations where the marriage is irregular or void, if she announces the marriage without a valid reason, if she fails to comply with her husband's reasonable orders, or under Shia law regarding the wife of a *muta*. Additionally, if a wife refuses to live with her husband without a valid reason, she may face imprisonment, and if she is under fifteen years old and has not reached puberty, she also cannot claim maintenance.

However, a wife can still pursue maintenance even if she disobeys her husband in specific cases, such as when her husband is keeping a concubine, if he has subjected her to cruelty, or if the marriage cannot be consummated due to his illness or malformation, his absence from her without prior permission, or if he has not yet reached puberty.

A pre-nuptial agreement may specify that if certain conditions are met, the wife is entitled to live separately and can seek maintenance from the husband. These conditions could include the husband not mistreating her, not taking a second wife, or not keeping a concubine.

Additionally, if included in the pre-nuptial agreement, the wife may be eligible for a special allowance known as the *Kercher-i-Pad*.

Under Muslim law, a wife has an absolute right to maintenance during marriage; however, her rights diminish after divorce. Specifically, she is entitled to maintenance only during the *Iddat* period, which lasts for three menstrual cycles or three lunar months. Once this period ends, Muslim law does not grant her any further maintenance. The Hanafi school allows maintenance for a divorced woman during *Iddat*, while the Shafi'i school does not provide any maintenance at all.

This situation poses challenges for divorced Muslim women, as men can easily initiate

divorce and are permitted to remarry multiple times, while women often lack adequate means to support themselves. If a woman is unable to sustain herself after the Iddat period, her ex-husband has no obligation to support her, potentially leaving her with nothing.



“Section 125 of CrPC” addresses the matter of maintenance across all religions. It stipulates that a divorced wife who cannot support herself is entitled to maintenance from her former husband until she remarries. This provision also applies to minor children, regardless of their legitimacy, who are unable to care for themselves, as well as adult children with physical or mental disabilities that prevent them from being self-sufficient; however, married daughters are excluded. Additionally, it extends to parents unable to maintain themselves. Importantly, this legislation includes Muslim women, ensuring they can receive maintenance from their husbands even after the Iddat period has concluded.

According to section 3 of the act, a Muslim husband is obligated to provide a fair and reasonable maintenance amount to his wife and must make appropriate arrangements for her support following a divorce. His responsibility for maintenance extends beyond the Iddat period, meaning he must ensure support for her even after that time. Under section 4 of the act, a divorced woman is entitled to financial support from her relatives who are beneficiaries of her property after her passing. If her relatives are unable to provide maintenance, the act establishes a Wakf board to assist in supporting such women. A magistrate has the authority to instruct this board to disburse maintenance to them. The SC has ruled that the act is constitutionally valid based on these provisions. Additionally, there are considerations regarding the maintenance of children.

Children are the responsibility of their parents, and they should be taken care of. They are entitled to proper and adequate maintenance from their parents and especially the father. Under Muslim law, men are considered superior and are in the obligation to maintain their family, and the maintenance of the child is their primary responsibility.

A son has the right to receive maintenance from his father until he reaches the age of majority as defined by the “Indian Majority Act”, or until he reaches puberty. The father is also responsible for supporting his daughter until she gets married, and a widowed or divorced daughter can likewise seek maintenance from her father. However, the father is not obligated to support his son or unmarried daughter if they choose not to live with him without a valid reason. According to Muslim law, a father is not required to maintain an illegitimate child. On the other hand, under Section 125 of CRPC, a father with sufficient means must provide maintenance for his child, regardless of whether the child is legitimate. A mother's duty to support her child comes into play when the child is

illegitimate, especially if the husband refuses to provide for it. However, under Hanafi law, if the father is financially struggling while



the mother is well-off, the mother is tasked with maintaining the child, although she can seek reimbursement from the father once he is financially stable. In contrast, under Shia law, even if the father is impoverished and the mother is affluent, the responsibility for the child's dowry lies with the grandfather instead of the mother.

3.2 Child custody: Favours Mothers over Fathers

Child custody is a vital and delicate element of family law in India, frequently coming up during divorce or judicial separation proceedings. It involves making decisions about guardianship and the welfare of children, ensuring their best interests are upheld. Given the variety of personal laws catering to different religions along with a secular system to reconcile them, custody regulations in India illustrate the nation's cultural and legal intricacies.

Child custody pertains to the legal authority to care for a child and make decisions regarding their upbringing. This includes aspects like education, healthcare, and general well-being. In India, both parents possess equal rights to seek custody. However, courts determine custody based on the child's welfare, rather than the preferences of the parents.

Laws related to child custody are secular and apply to all communities, with the child's welfare being the primary focus. In the context of Hindu laws, relevant legislation includes the “Hindu Minority and Guardianship Act of 1956”, the “HMA of 1955”, and the “SMA of 1954”.

Muslim Laws: Governed by the principle of “*Hizanat*,” emphasising the mother’s custody during early years unless unfit.

3.2.1 Types of Child Custody in India

Physical Custody: Physical custody places the child under the guardianship of one parent while granting the other parent visitation rights. The aim is to provide a stable and nurturing environment while maintaining the child’s relationship with both parents.

Joint Custody: In joint custody, both parents share the responsibility of raising the child. The child alternates living with each parent based on a schedule, such as weeks or months.

Special Guardianship: Special guardianship applies when neither biological parent is deemed fit or available to care for the child. Guardianship is granted to a third party, such

as grandparents or relatives, to ensure the child's welfare.



Sole Custody: Sole custody is granted when one parent is deemed unfit due to reasons like abuse, neglect, or substance addiction. The custodial parent assumes full responsibility for the child's upbringing.

Visitation Rights: Even when one parent is awarded custody, the other parent retains visitation rights to maintain a bond with the child. Courts determine the frequency and conditions of these visits.

Factors influencing custody decisions include a variety of elements such as the best interests of the child, parental abilities, and the living environment.

In India, the well-being of the child is fundamental to custody decisions. Courts consider various factors to make their determinations. First and foremost, the best interests of the child are prioritized, which includes their well-being, education, and emotional stability. Courts aim to ensure that the custody arrangement provides a safe and nurturing environment for the child. Additionally, the fitness of each parent is evaluated, taking into account their physical, mental, and emotional ability to provide proper care. While financial stability is assessed, it is not the only factor influencing decisions; the court ensures that the non-custodial parent contributes to the child's maintenance, especially if the custodial parent has limited financial resources. For older children, especially those aged nine and above, their preferences may also be taken into account. Furthermore, cultural and religious backgrounds are considered to ensure continuity in the child's upbringing. Lastly, maintaining the child's routine, schooling, and community connections is crucial in making custody decisions.

The factors considered by courts in granting custody include the child's best interests, the parents' ability to provide a stable environment, and the child's relationships with each parent.

When making custody decisions, the primary focus is on the welfare of the child. Courts assess various aspects, including the emotional, educational, and physical needs of the child, to ensure their best interests are prioritized. This evaluation includes the child's relationship with each parent, the stability of their living situation, and the capability of each parent to meet those needs.

While the preferences of the parents are taken into account, they are considered secondary

to the child's well-being. Courts are careful to ensure that fulfilling a parent's wishes does not negatively impact the child's best interests. Parents can express their preferences for custody arrangements, but ultimately, the court decides what is best for the child.



If the child is sufficiently mature, their wishes may also be factored in. This is especially pertinent for older children who can articulate their desires clearly. The court evaluates the child's age, maturity, and understanding of the situation when considering their preferences.

Additionally, a child's age and sex often play a role in custody determinations. Typically, very young children are placed with their mother unless there are compelling reasons to do otherwise. Courts recognize that children under five may thrive in a nurturing environment provided by their mother.

Examining legal precedents helps understand how courts interpret and apply custody laws. Notable cases like *Nagpal v. Nagpal*⁶⁸ prioritize the child's welfare as the foremost concern in custody conflicts. In this instance, the SC of India underscored that the child's best interests must be prioritized over the rights of the parents, emphasizing that custody determinations should concentrate on the child's welfare.

Other important cases, such as "*Vohra v. Bhalla*"⁶⁹, significant legal principles surrounding child custody have been established in this case. The court highlighted the necessity of taking the child's preference into account, especially when the child is capable of conveying a clear and informed opinion. These legal precedents offer essential guidance for courts as they make custody decisions that focus on the child's well-being.

The court plays a crucial role in custody decisions, taking into account the best interests of the child and the unique circumstances of each family.

According to "Section 26 of HMA", courts are empowered to make interim rulings and final decisions regarding child custody. They also have the ability to adjust these orders as circumstances change to prioritise the child's best interests. The court's responsibility is to make sure the child's needs are fulfilled and that custody arrangements support their overall well-being.

The court can issue interim orders to provide temporary custody arrangements while the case is being resolved. These orders can address immediate concerns, such as where the child will live and how their needs will be met. Once a final decision is reached, the court issues a decree that outlines the custody arrangements, including physical and legal custody, visitation rights, and financial support.

⁶⁸ Gaurav Nagpal v. Sumedha Nagpal , AIR 2009 SC 557.

⁶⁹ Vikram Vir Vohra v. Shalini Bhalla, AIR 2010 SUPREME COURT 1675.



3.2.2 *Child Custody under Muslim Personal Laws*

Custody, commonly known as “*Hizanat*” in Islamic legal terminology, relates to the rights and duties concerning the upbringing and care of a child. In accordance with Muslim law, child custody is regulated by a unique set of principles that seek to balance the child's welfare with the rights and responsibilities of the parents and other guardians. This article examines the notion of custody under Muslim law, the roles of parents, factors that affect custody decisions, and key judgments that have influenced this area of law.

Muslim child custody laws vary significantly across different countries and cultures, often emphasizing the welfare of the child while considering religious principles.

MPL regulates child custody issues for Muslim families, with variations depending on whether the family is Sunni or Shia. Alongside personal laws, Indian legislation such as the “Indian Majority Act of 1875” and judicial precedents also influence custody disputes in India. According to Section 3 of the “Indian Majority Act, 1875”, a minor is defined as any person living in India who is under eighteen years old. A minor is seen as unable to protect their own interests, which creates the need for an adult guardian to represent them.

It is important to differentiate between custody and guardianship according to Muslim law. Custody involves the right to care for and nurture the child physically, whereas guardianship relates to legal and financial obligations. Although the father is acknowledged as the child's natural guardian, custody is typically awarded to the mother in the child's early years, as she is deemed the most appropriate caretaker during this time. Mother's rights to custody are an important aspect of family law.

Typically, the mother is awarded custody of her children during their early years. For sons, this custody generally lasts until they are seven years old, while for daughters, it may continue until they reach puberty. This preference for maternal custody stems from the belief that mothers are better equipped to provide care, affection, and nurturing for young children. However, a mother's custody rights are not unconditional. Certain circumstances can result in her losing custody, such as converting to a different religion, remarrying someone not related to the child within the prohibited degrees of relationship according to Muslim law, or engaging in conduct considered unsuitable for raising a child, such as neglect or immorality.

The father's role in custody is crucial and can significantly impact the child's well-being and development.



Typically, fathers are not granted custody during the early years of a child's life, but they still hold important responsibilities. These include providing financial support for the child's upbringing and education, ensuring that the child has a suitable place to live, and managing the child's legal matters, like obtaining passports. A father might be awarded custody if the mother is deemed ineligible or unfit. Furthermore, once the child reaches the age at which maternal custody is no longer preferred, the father's chances of gaining custody, especially for sons, become more substantial.

Custody arrangements involving non-Muslim parents can present unique challenges and considerations.

Under Muslim law, a non-Muslim parent is generally not permitted to have custody of a Muslim child. Similarly, a Muslim mother who converts to another religion may lose her custody rights. This principle is based on the belief that the child's religious upbringing must align with Islamic values and practices.

Factors influencing custody decisions play a significant role in determining the best outcomes for children in family law cases.

Several factors are considered when determining custody under Muslim law. The welfare and best interests of the child are paramount, and various personal and situational aspects are evaluated to ensure that the custody arrangement serves the child's needs.

In a case, the SC highlighted the necessity of evaluating the character and appropriateness of the suggested guardian to assess their ability to have custody of the minor child.⁷⁰ This ruling reinforces the idea that the well-being of the child is the foremost concern in custody conflicts.

Custody restrictions may impact an individual's ability to remarry. In Muslim law, mothers with custody are typically not allowed to remarry. This rule is intended to avoid possible conflicts of interest and to prioritize the well-being of the child. However, this regulation has sparked discussions, with many calling for a more fair approach that honors the mother's rights while also protecting the child's best interests.

Other custodians of a child play a vital role in their upbringing and development. If both parents are found unfit or ineligible for custody, the responsibility may be given to other family

members, which could include grandparents on either side, full siblings, or other close female

⁷⁰ Nil Ratan Kundu & Anr. v. Abhijit Kundu, [2008] 11 S.C.R. 1111.



relatives like aunts. The order of preference for custody often varies based on the particular sect's guidelines and the child's best interests.

3.3 Property Rights and Financial Settlements

In every marriage, both partners are equally involved in accumulating assets and managing the household. However, divorce laws expose a challenging reality for many women. Although these laws provide a way for women to leave unhappy or abusive marriages, they often face significant financial difficulties. This issue arises from laws that typically recognize the husband as the main owner of family assets and property, highlighting the urgent need for clearer regulations on property division post-divorce.

There are two main models of property ownership recognized between spouses. The first, known as the “community ownership model”, views property as jointly owned by both partners, typically leading to an equal split of assets upon divorce, reflecting the understanding that both contribute to acquiring property through financial and non-financial means, such as caregiving. On the other hand, India follows the “separate ownership model,” which asserts that no economic partnership exists due to marriage, allowing each spouse to maintain ownership of their individually held property after divorce. Therefore, Hindu law in India does not support a division of “matrimonial property” upon divorce.

Within Hindu law, two models of property ownership are acknowledged. The first is the “community ownership model,” indicating that both partners jointly own property, which is divided equally upon divorce, recognizing their equal contributions. Conversely, the separate ownership model, as practiced in India, does not recognize an economic partnership between spouses, granting each partner ownership of their individual assets post-divorce. Thus, under Hindu law, there is no concept of “matrimonial property” for division in the event of divorce.

Despite numerous acts and reforms related to personal laws, little has changed in this scenario. ("The Hindu Women's Rights to Property Act", 1973) was a significant advancement for its time but only granted limited property rights to wives in cases of their husbands' death, not in divorce situations. The HMA introduced “Section 27”, allowing courts to consider property presented jointly by spouses around the time of marriage, and

to divide it fairly. However, this jointly characteristic limits the court's authority to property specifically given at the wedding, thereby excluding any jointly acquired assets throughout the marriage. Although courts can facilitate property settlements for either partner, their jurisdiction is mostly restricted to jointly



owned property, neglecting assets solely owned by each spouse or those acquired during the marriage for family purposes.

("The Hindu Succession Act", 1956) gave widows the right to inherit a share of their deceased husband's estate but did not provide them claims to the marital home while their husbands are alive. Throughout marriage, wives are entitled only to maintenance, which is often inadequate for a comfortable living. Upon divorce, they may receive permanent alimony but lack claims to their husband's assets.

In Hindu joint families, wives can only claim a share of the property when a partition occurs between their husbands and sons and cannot initiate such a partition themselves. While the "DV Act, 2005" offers significant rights by granting wives residency in the matrimonial home, it does not confer any ownership rights to that property after divorce. Consequently, despite the enactment of various laws, the circumstances for women post-divorce remain largely unchanged.

This situation is further complicated by the Indian viewpoint on matrimonial property, which overlooks both the financial and non-financial contributions wives make during marriage. In Hindu philosophy, a wife is not only seen as a homemaker (*grihaspatni*) but also as a partner in moral values (*dharmapatni*) and an equal collaborator (*sahadharmini*).

In the case of "Arun Kumar Agrawal Case",⁷¹ the SC condemned the 2001 Census for labelling 367 million homemakers as "non-workers," positioning them among beggars, inmates, and sex workers. Upon the dissolution of marriages, women frequently experience a decrease in their quality of life and may have to move back to their parental homes, which may not receive them kindly. Furthermore, marrying at a young age further restricts their authority over assets, rendering them financially insecure and vulnerable to societal backlash following divorce or separation.⁷²

As a result, minimal advancements have been made in relation to post-divorce property rights for women, given that existing Hindu personal law does not acknowledge joint marital property. This disregard is particularly troubling, especially as divorce laws become more flexible while societal attitudes toward women's roles in acquiring property during marriage

⁷¹ Arun Kumar Agrawal v. National Insurance Co. Ltd., AIR 2010 SC 3426,

⁷² Kunal Parihart, Silent laws, Unheard voices: The Matrimonial property under Hindu Law, SCC TIMES ONLINE, Accessed on Apr 25, 2025, <https://www.sconline.com/blog/post/2024/09/17/silent-laws-unheard-voices-the-matrimonial-property-under-hindu-law/>.



continue to lag behind. Hence, it is essential to create effective strategies to tackle the lack of legislation regarding matrimonial property within Hindu law in India.

3.3.1 *Matrimonial property under MPL*

In Muslim culture, inheritance issues arise solely after an individual has passed away. According to MPL, property that belongs to a living person cannot be transferred through inheritance, nor is there recognition of the 'right to property by birth' as acknowledged in Hindu law. This means that a child born into a Muslim family has no claim to property at birth.

The distribution of inheritance is determined only after settling the main obligations of the deceased, which include funeral expenses, debts, wages, and other related costs. It can also be noted that the actual allocation of inheritance occurs after fulfilling these obligations of the deceased.

Muslim law does not differentiate between movable and immovable assets; all belongings of the deceased are subject to inheritance. Additionally, there is no distinction made between self-acquired property and ancestral property, indicating that both categories are equally eligible for inheritance.

Under MPL, heirs are divided into two categories: sharers and reliquaries. The sharers include the Husband, Wife, Daughter, Son's Daughter, Father, Mother, Paternal Grandfather, Paternal Grandmother, full Sister, Consanguine Sister, Uterine Sister, and Uterine Brother. Reliquaries comprise individuals who are entitled to a share of the remaining property. If no heirs are left for the deceased's estate, the entire property passes to the government through escheat.

In regard to Muslim inheritance laws, an individual can draft a will (*wasiyat*) in favor of anyone, but the allocation can only cover one-third of the deceased's property. If a Muslim who marries under the "SMA, 1954", creates a will, that will falls under the "Indian Succession Act, 1925", rather than the provisions of Shariat. Furthermore, if the testator takes their own life, the will is rendered invalid, and the approaches to such situations differ between Shia and Sunni laws. Additionally, the validity of a testator's will remains intact even if they convert to a non-Islamic faith after drafting it as a Muslim.

The distribution of property under Muslim law can occur in two ways that is per capita

distribution and per strip distribution. In the per capita method, the property is shared equally among the legal heirs, with each individual's share determined by the total number of heirs. This approach is mainly applied in Sunni law. Conversely, per strip distribution is utilized in



Shia law, where property is divided among legal heirs based on the specific strip they belong to. The amount of inheritance is entirely contingent on the branch and the individuals affiliated with that branch.

The property rights of women under Muslim law are an important aspect of gender equity and legal recognition in many communities. According to the “MPL (Shariat) Application Act, 1937”, there is no differentiation in the rights of men and women, which means that both sons and daughters become legal heirs to inherited property after the death of their ancestor. A female heir is entitled to receive half the share of property compared to male heirs because, under Muslim law, a woman receives Mehr and maintenance from her husband upon marriage, while males solely inherit ancestral property. Mehr is defined as the property a woman receives from her husband at the time of marriage, which she can utilize as she wishes. Mehr is not owned by a woman’s guardian or parents, ensuring it cannot be inherited by others. The amount of Mehr is determined by the husband, who may also choose to provide his entire property to his wife as Mehr. The Mehr can be justifiably claimed by the husband, parents, or guardians of a woman if she willingly decides to transfer it.

In case of a married women, following her husband's death, a Muslim widow is entitled to inherit one-fourth of his estate if there are no children involved. However, if the deceased has children or grandchildren, his wife is entitled to one-eighth of the estate. In cases where the deceased has multiple wives, each wife is entitled to one-eighth of the estate, but this share reduces to one-sixteenth each if there are children. If a man was unwell at the time of marriage and dies without having consummated the marriage, his widow will not have any claim to his estate. Conversely, if the ailing husband divorced his wife and then died, she retains the right to a portion of his estate until she remarries.

The right of women to property after divorce is an important issue that needs to be addressed.

According to Section 125, CrPC, a divorced woman with a minor child is entitled to seek maintenance from her former husband until she remarries. Although Shariat law prohibits maintenance payments after divorce, the “Muslim Women (Protection of Rights on Divorce) Act, 1986”, guarantees women reasonable maintenance during the Iddat period, as well as child support and the provision of Mehr.

A woman has the right to claim property rights over her child's property. If a woman's son passes away without having children, she is entitled to receive one-sixth of her son's estate. However, if the deceased son has any offspring, her entitlement increases to one-third.

If a Muslim woman is pregnant then that child in her womb is a legal heir of the inherited property, if he/she is born alive, whereas if the child is not born alive, then his/ her share in the property is null and void.

(Sahara Kalyan Committee vs Union of India , 2023) The text relates to a social organization advocating for amendments to MPL, particularly concerning equal inheritance rights for women within the Muslim community. The Delhi HC was asking for the Union of India's perspective on this public interest litigation (PIL). The case was presented on January 29, 2019, and brought up issues about the court's authority and its capacity to implement legislation via a judicial ruling.⁷³

3.4 Judicial trends and their gendered Interpretations

Judicial trends in Indian divorce law reflect a shift towards recognizing the “irretrievable breakdown of marriage” as a ground for divorce, alongside the established grounds of cruelty and adultery. The courts also increasingly emphasize gender equality and the need for fair and just interpretations of personal laws, as seen in decisions regarding alimony and property division.

Irretrievable Breakdown Theory: According to the Irretrievable Breakdown theory, when a marriage has deteriorated to a point where it cannot be repaired and reconciliation is unachievable, the court utilizes this theory. The SC has recognized the idea of irretrievable breakdown of marriage, indicating that a marriage that has completely and permanently fallen apart may be ended through divorce, even in the absence of proven fault or traditional grounds for divorce, such as cruelty or abandonment. Nevertheless, the Court emphasized that this principle should be invoked only in exceptional circumstances, where all attempts at reconciliation have been unsuccessful.⁷⁴

Even though this principle is not explicitly specified in the HMA, 1955, it is within the court's discretion to apply it in certain cases to grant a divorce if the situation warrants it. In 2019, the

⁷³ Mohd. Ahmed Khan v. Shah Bano Begum And Ors., 1985 SCR (3) 844.

⁷⁴ Samir Kumar v. Union of India, 9 SCC 1 2017



Law Commission of India proposed adding irretrievable breakdown of marriage as a ground for divorce in legislation, but this change has yet to be enacted.

The Guilt Theory suggests that one party is at fault, typically referring to the matrimonial offenses committed by the respondent, such as adultery, cruelty, desertion, and so on.

For example, if one spouse is found guilty of adultery and the other seeks a divorce, the court may grant it; conversely, if both spouses are guilty of adultery, either party can file for divorce, which is known as the Doctrine of Recrimination. On this Doctrine, as stated in a commentary that one of the Chief Justices of England well said that,

*“Perhaps it is not vouchsafed to everyone, whether in Holy Orders or out to them, to appreciate the full beauty of the doctrine that if one of the two married person is guilty of the misconduct, there may be a divorce, while if both are guilty, they must continue to abide in the holy state of matrimony”.*⁷⁵

3.4.1 Adultery

Adultery means a married person having a voluntary sexual relationship with someone who is not their spouse. The HMA, 1955, grants adultery as an absolute ground for divorce. It is defined in section 13 (1) (i) of the Act as voluntary sexual intercourse by either party with someone other than their spouse during the subsistence of marriage. Adultery was also a criminal offence under Section 497 of the IPC and had remained so till *Joseph Shine v. Union of India*⁷⁶, for which the SC decriminalised adultery by declaring it unconstitutional. The Court held that it treats women as property and violates their fundamental rights to equality and personal autonomy. Thus, adultery remains an accepted ground for divorce under personal laws, but no longer attracts criminal punishment.

3.4.2 Cruelty-

In a marriage, cruelty refers to any behavior by one partner that creates challenges for the other partner's ability to coexist with them by inflicting physical or emotional pain. This can include actions that profoundly affect the other person's mental and emotional well-being, physical violence, harsh comments, continuous degradation, or neglect.

⁷⁵ <https://pdfcoffee.com/paras-diwan-modern-hindu-lawpdf-pdf-free.html>

⁷⁶ Joseph Shine v. Union of India, AIR 2018 SC 4898.



As per the case of “Russel v. Russel 1995”,

“Cruelty which is a ground of the dissolution of the marriage can be as wilful and unjustifiable conduct of such as character, as to cause danger of life, limb or health, bodily and mental as a give rise to a reasonable apprehension of such a danger”

Cruelty is recognized as a valid reason for divorce under Section 13(1)(i-a) of the HMA, 1955. It refers to actions by either spouse that significantly and repeatedly harm the mental well-being of the other partner, rendering it impossible for them to coexist. Cruelty can manifest in the form of physical violence, verbal insults, humiliation, neglect, wrongful accusations, or any conduct that severely impacts the mental or emotional stability of the spouse. It encompasses not just physical harm but also psychological and emotional abuse.

In SC case⁷⁷ it has been explained that cruelty must be of a type that creates a reasonable fear in the minds of the victims that cohabitation is impossible. The classification of an act as cruelty is determined by the specific circumstances and the impact it has on the affected spouse. In India, to address this issue and provide protection for women against violence, the Domestic Violence Act was enacted in 2005. Domestic violence is acknowledged as a valid ground for divorce which entitles a spouse to seek divorce if they have been subjected to cruelty by the other party. Domestic violence, encompassing physical, emotional, sexual, or economic abuse, is deemed a form of cruelty that can render living together intolerable and serves as a legitimate basis for filing for divorce. The (PWDVA) complements this by establishing a legal structure for women to obtain protection against various types of abuse within a marriage.

The SC acknowledged that domestic abuse, including both emotional and physical harm, can be a valid reason for divorce, viewing it as a breach of fundamental human dignity and marital stability.⁷⁸ Courts evaluate the extent of the abuse and its effects on the victim's welfare prior to granting a divorce, ensuring that the victim is shielded from further harm. Recognizing domestic violence as a basis for divorce underscores the legal protections available to those in abusive marriages, enabling them to leave unsafe and unhealthy relationships.

3.4.3 Domestic Violence-

Under section 3 of the act, it clearly defines violence not only as physical or verbal but also

the financial and economic abuse.

⁷⁷ V. Bhagat vs D. Bhagat, 1 SCC 337, 1994.

⁷⁸ Samar Ghosh v. Jaya Ghosh, AIR ONLINE 2007 SC 347.



“Definition of domestic violence.—For the purposes of this Act, any act, omission, or commission or conduct of the respondent shall constitute domestic violence in case it:

- *Harms or injures or endangers the health, safety, life, limb, or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse, and economic abuse; or*
- *Harasses, harms, injures, or endangers the aggrieved person with a view to coercing her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or*
- *Has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or*
- *Otherwise injures or causes harm, whether physical or mental, to the aggrieved person.”*

In terms of economic abuse, it refers to control or harm of another person by either restraining them in their access to financial resources, keeping someone from being financially independent, or using finances as a means of control. The Indian law pronounces economic abuse as cruelty and also takes into account DV Act, 2005 (PWDVA), which squarely includes economic abuse in the purview of domestic violence.⁷⁹

In the case of Ajay Kumar⁸⁰, the SC ruled that economic abuse is considered a form of domestic violence. Specifically, withholding a woman's financial resources and means to support herself is recognized as both cruelty and domestic violence.

When it comes to the limitation periods for filing a case based on this ground, it's essential to highlight the distinctions between the two laws. Under the HMA, there is no defined time limit for submitting a divorce petition on the grounds of cruelty, which includes economic abuse. However, the petition must demonstrate that acts of cruelty have occurred recently or are ongoing.

In contrast, the PWDVA, 2005 allows a complaint to be filed while the abusive relationship is ongoing or after separation, as long as the abuse took place within the last year, according to

⁷⁹Protection of women from domestic violence act, 2005, https://www.indiacode.nic.in/bitstream/123456789/15436/1/protection_of_women_from_domestic_violence_act%2C_2005.pdf.

⁸⁰ Ajay Kumar Vs. Lata Alias Sharuti, (2019) 15 SCC 352.



procedural guidelines. Still, courts may consider delays in filing based on the unique circumstances of each case.

The recent judicial trend in divorce cases in India reflects evolving perspectives and legal reforms. The SC has increasingly recognized irreconcilable differences as a valid ground for divorce, moving away from traditional fault-based grounds like cruelty or adultery. Recently, in the case of *Shilpa Sailesh*. Recently, in a case of the Court recognized that long periods of separation, such as even twenty years, could be an indicator of an irretrievable breakdown of marriage and allow dissolution of the marital bond.

In India, the principle of irretrievable breakdown has been emphasized as the key legal basis for ending a marriage, and the courts have not shied away from using their extraordinary powers under Article 142 to grant divorces when reconciliation seems unattainable. For example, the SC recently allowed a divorce for a couple that had been apart for twenty-two years, determining that the ongoing litigation and emotional estrangement had effectively ended their marriage both in fact and in law.

Procedurally, there have been changes to simplify divorce processes. For mutual consent divorces, a two-year separation period is required, and courts typically promote mediation and counselling prior to issuing final divorce decrees. It appears that the courts prioritize the welfare of children and are equitable in their decisions regarding maintenance and alimony.

While the standard application of this principle is not as rigid as seen in earlier cases, the SC has ruled that in cases of mutual consent divorce, couples separated for over a year with no possibility of reconciliation can be granted a divorce before the mandatory waiting period of six months. Consequently, the decision in *Amardeep Singh Case*⁸¹ allowed for more flexible interpretations of the cooling-off period in mutual divorce cases by utilizing the court's powers under Article 142, facilitating a swifter dissolution of marriages.

These developments indicate a more progressive and liberal approach towards divorce law in India, focusing on personal dignity alongside the practical aspects of marital dissolution.

⁸¹ Amardeep Singh v. Harveen Kaur, (2017) 8 SCC 746.



CHAPTER

4

JUDICIAL PRECEDENTS

4.1 Landmark SC Judgements on Divorce

Landmark judgments in divorce law have played a crucial role in shaping the legal landscape governing marital relationships in India. These decisions, delivered by the SC and various HC, have clarified the grounds for divorce, the rights of spouses, and the interpretation of personal laws across different religions. From granting divorce on grounds of cruelty and desertion to recognizing irretrievable breakdown of marriage, these rulings have evolved the understanding of matrimonial rights and responsibilities. They not only ensure justice for aggrieved parties but also influence future legal reforms, making them vital pillars in the development of family law jurisprudence.

4.1.1 *Judgements under Hindu law*

“Dr. N.G. Dastane vs Mrs. S. Dastane , 1975”⁸²

Facts of the case:

In this situation, Dr. Narayan Ganesh Dastane is the appellant, while Sucheta Dastane is the respondent, and they got married in April 1956. However, prior to finalizing the marriage proposal, the respondent's father, B. R. Abhyankar, informed the appellant that the respondent had previously experienced a severe episode of sunstroke and cerebral malaria, which negatively impacted her mental condition temporarily, from which she has since recovered. He did not pursue any additional inquiries. The couple had two daughters and cohabited until February 1961, and on the day they separated, the respondent was three months pregnant. On February 19, 1962, the appellant initiated legal proceedings in the Trial Court, claiming that the respondent was of unsound mind and had subjected him to cruelty, thereby posing a threat to his life.

Judgment:

Condonation refers to the situation where the accuser has either forgiven or opted to overlook an action that they are now legally contesting. In this case, the SC determined that the spouse engaged in a typical sexual relationship despite the respondent's acts of

cruelty. It can be

⁸² Dr. N.G. Dastane vs Mrs. S. Dastane,, AIR 1975 SC 1534



reasonably inferred that the intention to restore and forgive the offending partner to their original status exists, as the parties maintained an intimate existence that reflects a normal marital relationship, unaffected by the conduct of the respondent. Consequently, divorce was not granted to Mr. and Mrs. Dastane.

“Naveen Kohli vs Neelu Kohli ,

2006” Facts of the case:

In this situation, the appellant Naveen Kohli and the respondent Neetu Kohli were married on November 20, 1975, and they had three sons together. However, they soon began to experience frequent disputes. The Family Court decided to annul the marriage between the two parties under Section 13 of the HMA, 1955, and ordered the appellant to pay Rupees 5 lakhs as support for the respondent and their children. Nevertheless, this ruling from the Family Court of Kanpur City was overturned by the Division Bench of the Allahabad HC, leading to an appeal to the SC.

Judgment:

The Court concluded that the HC's findings were utterly untenable. The Court concurred with the family court's observations that the marital relationship between both parties was irreparable. The animosity between them was so great that they frequently argued in the courtroom, exchanging allegations against each other. Thus, the SC of India determined that the public interest and the interest of all involved necessitate acknowledging this reality and declaring legally void what is already effectively non-existent; meaning, when a relationship cannot be restored and has no validity, it is preferable to officially validate this reality for the benefit of everyone involved. The Court also advised the government to consider adding irretrievable breakdown of marriage as a valid reason for granting a divorce.

“Parveen Mehta vs Inderjit Mehta, 2002”

The essence and significance of the phrase 'cruelty as a matrimonial offense' is the central issue upon which the outcome and future of this case hinges.

Facts of the case:

In this matter, the appellant and the respondent were married on December 6, 1985. The

respondent claimed that he was unable to consummate their marriage due to the appellant's lack of cooperation. He also asserted that the appellant was dealing with a mental illness that she



had not disclosed to him either before or after their marriage. During a discussion for a possible settlement between the parties, a senior Judicial Service officer, Shri S.K. Jain, was present when the appellant grabbed the respondent's collar, creating an uncomfortable situation. Furthermore, on July 30, 1986, the appellant, accompanied by some accomplices, searched for the respondent at the Kaithal Court premises, and after failing to locate him there, forcibly entered his home and threatened him. He subsequently filed a report regarding the incident and forwarded it to his superior. Based on these enumerated facts and circumstances, the respondent submitted a petition in August 1996 seeking to dissolve the marriage on the grounds of cruelty and desertion.

Judgement:

Unlike physical cruelty, determining mental cruelty through direct evidence is more challenging. Mental cruelty can be understood by examining the specific facts and circumstances of a given situation. Feelings of distress, animosity, disappointment, and frustration in one spouse, brought on by the behaviour of the other, can be recognized by assessing the conditions in which both partners have been living. Hence, it is not appropriate to consider a single instance of misconduct in isolation and question whether that conduct alone is adequate to establish mental cruelty.

The correct approach should involve evaluating the overall impact of the facts and circumstances arising from the evidence presented in the ongoing case and then arriving at a just conclusion regarding whether the petitioner in the divorce case has experienced mental cruelty due to the behaviour of the other party. Therefore, the respondent's request for the dissolution of the marriage based on cruelty per Section 13(1)(i-a) of the Act was deemed valid, resulting in the granting of the divorce decree.

“Smt. Sureshta Devi vs Om Prakash, 1991”

The Honourable SC noted in this case that when a couple jointly files a petition for divorce by mutual consent, it indicates their inability to live together. Thus, the parties are not required to prove that they have been unable to coexist. In fact, the phrase “not able to live together” reflects the idea of a marriage's breakdown, indicating that there is no remaining hope for reconciliation. It is crucial to assess whether the consent provided by both parties is genuinely free and not extracted through any form of force, coercion, fraud, or undue

influence. If either party at any point states, “I have retracted my consent,” or asserts, “I am not a willing participant in the divorce,” the Court will refrain from issuing a decree for divorce by mutual



consent. If the Court were to have the authority to grant a decree based solely on the initial petition, it would undermine the entire principle of mutuality and consent for divorce. Mutual consent is essential for issuing a divorce decree under Section 13-B. If the parties wish to obtain a divorce, then their mutual consent must persist until the divorce decree has been finalized..

“Amardeep Singh vs Harveen Kaur, 2017”

The matter addressed in this appeal was whether the six-month minimum period specified in Section 13B(2) of the HMA, 1955, for a divorce decree based on mutual consent was obligatory or could be waived in exceptional circumstances.

Judgment:

Courts have the discretion to assess the timeframe based on the specific facts of the case and the relationship between the spouses; if there is no possibility for a peaceful resolution to restore cohabitation or any alternatives remaining, the court may opt for an immediate resolution, setting aside the requirement of Section 13B(2).

4.1.2 Judgements under Muslim Personal Law

“Itwari vs Smt. Asghari And Ors, 1959”

The matter at hand was whether a husband's second marriage constitutes cruelty.

Unlike Hinduism, where polygamy is not permitted, Islam allows it. A husband can have multiple wives, but he is limited to four at a time, and he must treat each wife with equal love and respect. In India, while polygamy is an accepted practice, it is not promoted. A husband does not possess the authority to force his first wife to share her marital life with another woman under any circumstances. Although he may have the legal ability to marry a second wife while still married to the first, if he attempts to seek the help of the Civil Court to require the first wife to resume their conjugal life together against her consent, she has the right to question whether the court should, as a matter of fairness, force her to live with such a husband.

The court determined that a husband's second marriage qualifies as mental cruelty, and consequently, the husband cannot be granted conjugal rights against the wife's wishes, and he is obligated to provide maintenance to her.

“Abdurahiman v. Khairunnessa”⁸³

How should the phrase “does not treat her equitably following the injunctions of the “Quran” in Section 2(viii)(f) of “Dissolution of Muslim Marriages Act, 1939”, be interpreted legally?

In this case, the first wife sought a divorce on the grounds of cruelty, alleging that the husband did not treat her fairly according to the teachings of the Quran, but failed to provide significant proof to support her claims.

The court ruled in favor of the wife, stating that Islamic law does not compel a spouse to remain with someone against their will. The court further expressed that “It is for her to decide whether she feels her husband is treating her fairly in line with the Quranic guidelines.” Additionally, the court affirmed that the wife is not obligated to disclose or explain how her husband diminished his affection for her, as the husband similarly possesses the right to terminate the marriage unilaterally.

“A. Yousuf v. Sowramma”⁸⁴ Facts of the case:

In this case, the wife was fifteen years old when she got married to her husband who was twice her age. After marriage, she moved to her husband's home, where they consummated their marriage, soon the husband left the city for his work and after some time the wife returned to her paternal house. She filed for divorce and claimed that her husband was not able to maintain her for two years. The husband was willing to take her back, but she refused.

Judgment:

The divorce was filed under section 2(ii) and section 2(vii). The court rejected the latter saying that there is no proof that the wife was below fifteen and that the fact marriage was consummated. But divorce was granted based on first that the husband was not able to maintain her for two years.

⁸³ Abdurahiman v. Khairunnessa, 2010 (1) KLT 891.

⁸⁴ A. Yousuf Rawther vs Sowramma, AIR 1971 KERALA 261.



“Smt. Mariam vs Mohd. Shamsi Alam”⁸⁵

Facts of the case:

In this situation, the wife left her husband's home and returned to her parents' residence. The husband attempted to bring her back, but she declined, prompting him to angrily pronounce talaq three times in one breath. However, upon realizing his error, he revoked the talaq within the Iddat period.

Judgment:

The court determined that although the word “talaq” was stated three times, because it was uttered all at once, it would be regarded as a single declaration. Consequently, the talaq was considered to be in the “Ahsan” form, which permits revocation during the Iddat. Since the husband explicitly retracted the talaq before the completion of the Iddat period, the marriage remained intact and valid, and the wife was instructed to return to her husband.

4.2 Case Studies of Discriminatory Outcomes

Discriminatory outcomes in Indian divorce law, particularly for women, are evident in cases where grounds for divorce are disproportionately applied, leading to unequal treatment. For example, a husband might plead a wife's failure to fulfill domestic duties or refusal to engage in sexual relations as cruelty, while a wife's grounds for divorce often revolve around basic survival, such as dowry demands or physical abuse. Furthermore, the criminalization of triple talaq, while a landmark judgment, highlights the discriminatory impact of personal laws on Muslim women.

4.2.1 *Current Divorce Rate in India*

India has historically maintained a lower divorce rate compared to Western countries, with various studies indicating the rate to be around 1%. However, this statistic does not fully capture the reality, as cultural stigma often discourages individuals, particularly in rural areas, from pursuing divorce. In contrast, urban centres, especially among the younger generation, have witnessed a gradual increase in divorce rates. This rise is largely attributed to evolving societal norms, financial independence, and an increasing acceptance of divorce as a viable option for couples experiencing unhappiness. In

metropolitan areas, the divorce rate has experienced an escalation, this trend underscores significant transformations in social attitudes,

⁸⁵ Smt. Marium vs Mohd. Shamsi Alam, AIR 1979 ALLAHABAD 257.



enhanced participation of women in the workforce, and a notable shift towards individualistic perspectives on marriage. These factors collectively contribute to the reconfiguration of marital dynamics and societal perceptions regarding the institution of marriage.

4.2.2 Cultural Stigma and Its Impact

Despite the increasing rate of divorce, it still carries considerable social stigma in India. A lot of individuals opt to stay in unsatisfactory marriages instead of seeking divorce because they fear societal judgment. This cultural hesitation often results in underreporting, particularly in rural regions.

Recent changes in Indian divorce legislation include the push for gender-neutral provisions, especially regarding maintenance and alimony. Recent court rulings are increasingly aimed at ensuring equal rights for both men and women during divorce proceedings. There have been demands for reforms related to the division of property in divorce cases, and courts are more frequently acknowledging the importance of safeguarding the financial interests of women and children post-divorce, particularly in situations where the woman has been financially reliant on her husband. Growing awareness about child custody matters has led to a heightened focus on making sure that custody disputes are resolved with the child's best interests prioritized, rather than automatically granting custody to the mother.

4.2.3 Recent Judicial trends on divorce

Recent legal developments concerning divorce in India reflect a notable change in societal views and legal structures. The SC has increasingly recognized irreconcilable differences as a legitimate basis for divorce, moving away from traditional fault-based reasons like cruelty or adultery. In the significant case of “Shilpa Sailesh v. Varun Sreenivaasan⁸⁶” in May 2023, the Court acknowledged that prolonged periods of separation could indicate an irretrievable breakdown of marriage, thus permitting the dissolution of the marital relationship.

The focus has shifted toward irretrievable breakdown as the primary legal basis for divorce, with Indian courts readily exercising their extraordinary authority under (The Constitution of India, Article 142.) of the Constitution to grant divorce when reconciliation

seems impossible. For example, the SC recently granted a divorce to a couple who had been apart for twenty-two

⁸⁶ Shilpa Sailesh v. Varun Sreenivaasan, 2023 INSC 468.



years, concluding that extensive legal proceedings and emotional disconnection had effectively ended their marriage in both reality and law.

Procedurally, there have been changes aimed at simplifying the divorce process. Mutual consent divorces now require a two-year separation period, and courts actively promote mediation and counselling before finalizing divorce petitions. Overall, the courts seem to prioritize child welfare and exhibit fairness in judgments regarding maintenance and alimony.

Although it is not strictly applied, the SC has determined that in cases of mutual consent divorce, if the couple has been separated for over a year and reconciliation seems unlikely, a mutual consent divorce can be granted even before the mandated six-month waiting period.

These developments indicate a shift toward a more liberal and progressive approach to divorce law in India, emphasizing individual dignity alongside the practical realities involved in the dissolution of marriages.

In terms of procedural changes, efforts have been made to simplify divorce processes. Mutual consent divorces now require a separation period of two years, with courts promoting mediation and counselling before finalizing any divorce petitions. The courts appear to prioritize the welfare of children and strive for fairness in their rulings regarding maintenance and alimony.

Such trends point to a more liberal and progressive framework for divorce law in India, an emphasis on individual dignity, and the pragmatic realities of the dissolution of marriages.

4.2.4 Challenges faced by the husband in the case of Divorce

There are many challenges that can be faced by the husband, such as those related to alimony and maintenance, custody of the children, social stigmas, etc.. The biggest challenge is the false allegations. It is commonly seen that if the women file the divorce case, the women also file the case of Domestic violence and dowry as well. Although these cases were false. The data related to this is shown below-

“National Crime Records Bureau (NCRB) Crime Report of 2021 shows that under the DV Act,

seven cases ended as false out of 855 cases. Under the Dowry Prohibition Act, 418 cases were false out of 21287 cases in the final report. According to NCRB 2020, of the 56731 cases



*reported under the Dowry Prohibition Act, 22 cases proved to be false. Of 2330 cases reported under the DV, 3 cases are proven to be false.*⁸⁷

4.2.5 The Reasons Behind False Cases Filed by Women

In India, during divorce proceedings, there is a notable issue regarding the misuse of legal provisions related to domestic violence and dowry harassment, mainly by women. It has been noted that some women may lodge false allegations alongside divorce petitions, often driven by the intention to gain an advantage in divorce settlements. Such allegations can help in obtaining alimony, child custody, or a more favorable distribution of assets. Additionally, these claims may act as leverage during negotiations, as the courts generally show significant sensitivity towards accusations of domestic abuse.

Social pressures significantly influence this situation. In conservative societies, divorce is often viewed negatively; therefore, claims of domestic violence can help to shift the focus away from the woman and place the blame for the marriage breakdown on the husband's perceived failings. Furthermore, family members may encourage this behavior, believing it will safeguard the interests of the woman involved.

Nevertheless, it is essential to emphasize that not all claims of domestic violence are baseless. Numerous women truly endure difficult circumstances, and legal systems must find a way to ensure that false allegations do not overshadow legitimate cases. The difficulty lies in differentiating between authentic instances of domestic abuse and those that are fabricated, all while ensuring that real victims receive appropriate protection and redress.

Moreover, men, too, have at times resorted to filing false allegations, often as a strategy to avoid obligations such as maintaining financial support or obtaining custodial rights over children. By counterclaiming damages based on alleged false accusations under various sections of the (Code of Criminal procedure chapter xii, s.156(3),s.125,s.340), men may initiate legal proceedings that complicate the landscape of matrimonial disputes.

Another significant concern within divorce and matrimonial cases is the potential detrimental impact of negligent or incompetent legal representation. The ramifications of poor legal counsel may manifest as delayed justice, denial of relief, or other adverse outcomes. Landmark

⁸⁷National data sharing and accessibility policy, DATA.GOV.IN, [https://data.gov.in/ministrydepartment/National%20Crime%20Records%20Bureau%20\(NCRB\)#:~:text=Accidental%20Deaths%20&%20Suicides%20in%20India%20\(ADSI\)%20%2D%202021,and%20Rate%20of%20Accidental%20Deaths](https://data.gov.in/ministrydepartment/National%20Crime%20Records%20Bureau%20(NCRB)#:~:text=Accidental%20Deaths%20&%20Suicides%20in%20India%20(ADSI)%20%2D%202021,and%20Rate%20of%20Accidental%20Deaths).



cases, have underscored the issue of professional misconduct, particularly when attorneys seek repeated adjournments, thereby compromising the efficiency of judicial processes. Similarly, in *(Surendra Mohan Rai Choudhury vs Mohendra Nath Banerjee And Ors. , 1931)*, The court recognized that individuals affected by the negligence of their legal representatives can submit complaints about professional misconduct under the “Advocates Act of 1961”. However, proving cases of gross negligence in court can be difficult, as courts usually distinguish between honest mistakes and intentional wrongdoing.

Empirical studies highlight several cases where late filings or unreliable legal counsel result in the dismissal of cases. Courts have sometimes refused to excuse delays caused by attorney’s mistakes, leaving clients without options. This situation emphasizes the crucial need for choosing qualified legal representation. Additionally, regulatory organizations like the Bar Council must carefully monitor lawyers' professional conduct to reduce the likelihood of justice being hindered by unethical behavior.

The actions of legal professionals not only affect individual cases but also raise concerns about the overall efficiency of the judicial system in delivering justice. Therefore, it is essential to promptly address these issues and implement the necessary steps to maintain the integrity of the legal procedure.

4.2.6 Factors Contributing to Discriminatory Outcomes

Indian family laws, while intended to be gender-neutral, often overlook the specific challenges and vulnerabilities that women encounter in marriage, resulting in inadequate protection for them. Additionally, judicial bias may play a role, as judges can be unconsciously swayed by deep-seated patriarchal norms and stereotypes, leading to interpretations of the law that disproportionately harm women and perpetuate existing inequalities. Furthermore, societal expectations and cultural norms place significant pressure on women, often forcing them to maintain the institution of marriage even in circumstances of abuse or unhappiness, thereby prioritizing family stability over their individual well-being. Many women also face a lack of awareness regarding their legal rights and available avenues for support, along with limited access to competent legal representation, which makes it extremely challenging for them to contest and reform discriminatory practices and outcomes.

Among various other socio-religious communities, the Muslim community is often negatively characterized for its oppressive and authoritarian customs and laws regarding women. The differentiation in status between males and females within Islam is exceedingly unfair and



detrimental to the welfare of women. It is notable that most practices that discriminate against Muslim women were not originally prescribed by the holy Quran but were mistakenly established to support patriarchal perspectives.

Numerous customs and laws that clearly demonstrate gender discrimination include the unilateral divorce rights held by men, the widespread practice of veiling, the rights of women to inherit personal property, triple talaq, the practice of polygamy, and Nikah halala. Muslim women experience widespread inequality due to these customs, with only men possessing the authority to initiate divorce.

The rights of women are severely undermined by MPL, which grants Muslim men the unrestricted power to end a marriage without considering the wife's preferences. Muslim husbands hold such significant power that it appears to be overtly biased against the interests of their wives, to the extent that women aren't even permitted to hear the term “talaq” uttered; they are not even entitled to be informed of the reasons for their divorce, as husbands are not legally required to disclose them. The SC's landmark decision has promoted gender justice within Islamic law.

A legal framework for evidence-based proceedings, accountability at the lawyer level, and judicial efficiency is crucial for a fair justice system, particularly in sensitive issues like domestic violence and dowry harassment. Courts must ensure that concrete evidence is provided for allegations of this nature to prevent misuse of the legal system. This includes the analysis and integration of newly established tools such as digital evidence and expert testimonies. Introducing penalties for false claims can deter people from abusing the legal system, ensuring that genuine victims receive prompt justice.

Lawyer accountability is equally essential. Regular audits of legal practitioners by Bar Councils and swift resolutions of complaints against negligence or misconduct are necessary. Public information campaigns can effectively inform litigants about their rights and the significance of professional legal services, which can help reduce their susceptibility to being taken advantage of by less experienced or unethical advocates.

Legal reforms that impose penalties for professional negligence and intentional delays in managing cases would enhance judicial efficiency. Courts can adopt time-bound case management systems to mitigate both parties' dilatory tactics during proceedings. This

oversight would improve the judicial process and protect the interests of litigants as well as the overall justice system.



Collectively, all these measures ensure fairness, uphold the credibility of judicial institutions, and defend the rights of all involved parties.

4.3 Comparative Analysis with Global Divorce Laws

This research aims to thoroughly analyse the concept of “irretrievable breakdown of marriage” and its relevance in the Indian legal framework, while also drawing comparative perspectives from countries such as Australia, New Zealand, the United Kingdom, Canada, and Russia. The main objective is to explore the legal systems that pertain to the idea of irretrievable breakdown of marriage in these jurisdictions and to evaluate the need and potential impacts of incorporating such a framework into Indian legislation. Through this examination, the study seeks to offer an in-depth understanding of how this legal principle can effectively tackle modern challenges related to divorce in India.

4.3.1 Australia

The concept of an irreversible deterioration of marriage is recognized as an acceptable basis for divorce in Australia. This refers to a situation where the relationship between the partners has deteriorated to the point where reconciliation is no longer feasible. The regulation of family law matters in Australia is governed by the “Family Law Act 1975(Cth)”, specifically outlined in Section 48.⁸⁸ The act indicates that a divorce order may be granted if the court finds that the marriage has irretrievably broken down, with the couple having been separated for at least twelve months. When determining whether a marriage has truly broken down irretrievably, the court will evaluate various factors, such as the length of the separation, the nature of communication and conflict between the spouses, the impact on any children involved, and any attempts made towards reconciliation.

The basis for applying for a divorce order in Australia is detailed in Section 48 of “Family Law Act 1975.” As per this section, a divorce order can be issued only if the marriage has irretrievably broken down. The couple must have lived separately and apart for a continuous duration of no less than twelve months immediately before the submission date of the divorce application. Nevertheless, if the court finds that there is a reasonable possibility of the couple resuming cohabitation, a divorce order will not be issued. This stipulation is designed to prevent hasty divorce applications and to promote reconciliation efforts. In summary, Section 48 establishes a clear structure for the grounds upon which a

divorce order application can be filed

⁸⁸The Family Law Act, 1975 (Cth) s 48 (Austl.).



in Australia, highlighting the critical nature of the irretrievable breakdown of the marriage and urging parties to contemplate reconciliation prior to seeking divorce.⁸⁹

4.3.2 *Canada*

The idea of divorce in Canada is based on the principle of an irretrievable breakdown of marriage. The “Divorce Act” oversees divorce procedures in the country. Under Section 8(2) of the Act, a court may grant a divorce if it concludes that the marriage has indeed disintegrated. An irreparable breakdown of marriage happens when the relationship has deteriorated to a point where the spouses can no longer live together as husband and wife. The causes of this breakdown can vary significantly and may involve infidelity, physical or emotional abuse, financial issues, or poor communication.

In Canada, a court with the right authority can grant a divorce to one or both spouses who apply, as long as the marriage has irretrievably broken down. This breakdown is acknowledged under two specific conditions. First, when the spouses have been living separately for at least one year immediately before the divorce application and were already living apart at the beginning of the proceedings. Second, if the spouse against whom the divorce is sought has committed adultery or has subjected the other spouse to physical or mental cruelty, making continued cohabitation intolerable since the marriage was celebrated.

4.3.3 *United Kingdom*

No-fault divorce has emerged as a popular option in recent years, allowing couples to dissolve their marriage without having to demonstrate any wrongdoing by either party. The United Kingdom is one of several nations that have adopted this idea.

The main legislation regulating divorce in the UK is primarily detailed in the “MCA 1973”. Before the introduction of no-fault divorce provisions, a spouse had to prove that the other had committed adultery, shown unreasonable behavior, deserted them, or that the couple had separated for a minimum of two years (with mutual consent) or five years (with just one spouse’s consent).

In 2018, the UK government indicated a desire to implement no-fault divorce legislation, leading to the enactment of the Divorce, “Dissolution and Separation Act 2020”. This law made

⁸⁹ P, Ramji Kumar, Exploring the Imperative and Implementation Challenges for Irretrievable Breakdown of Marriage as a Ground for Divorce in India - A Comparative Study with Other Jurisdictions (April 2023). International Journal of Law Management & Humanities, (2023) Vol. 6; 1860, <https://ssrn.com/abstract=4649187>.



significant changes to existing regulations, permitting couples to obtain a divorce simply by informing the court that the marriage has irretrievably broken down. There is no longer a need to establish any misconduct on the part of either spouse.

The advent of no-fault divorce in the UK has been largely welcomed as a beneficial reform. It is seen as a method to reduce animosity and hostility between couples seeking a divorce, resulting in a less traumatic and contentious process.

*White v White*⁹⁰ is a pivotal case in the development of no-fault divorce in the UK. The court determined that the starting point for asset division in a divorce should be equality, indicating that both parties are entitled to an equal share of the assets unless there are valid reasons to deviate from this norm. This ruling is based on the belief that marriage is a partnership, and thus, both individuals should be treated fairly.

The global acceptance of irretrievable breakdown of marriage as a valid reason for divorce is increasingly gaining support. Nevertheless, this ground is not yet recognized in India, where there is a critical need for its introduction. This change would primarily aim to reduce the bitterness associated with divorce proceedings and make the process smoother for couples wanting to terminate their marriages. Numerous developed nations, including Canada, Australia, and the United Kingdom, have already recognized irretrievable breakdown as a legitimate reason for divorce. Evidence indicates that it acts as an effective mechanism for resolving marital disputes.

Introducing this ground for divorce in India could significantly minimize the backlog of cases in the judicial system, which currently requires proof of fault or mutual consent, both of which are lengthy and costly processes. By acknowledging irretrievable breakdown as a valid reason for divorce, we could facilitate a more rapid and less contentious dissolution of marriages, benefiting all parties involved. As such, recognizing irretrievable breakdown as a ground for divorce is crucial to align with evolving societal values and to provide a more efficient and less adversarial method for ending marriages in India.

⁹⁰ White v. White, [2001]1 All ER 1.



CHAPTER 5

SOCIETAL AND CULTURAL INFLUENCES ON DIVORCE LAWS

5.1 Traditional gender roles and their Legal impact

In conventional marriages, men are typically expected to prioritize their careers and financial security, while women take care of household responsibilities and raising children. This division of responsibilities can create an imbalance if one partner feels overwhelmed or unappreciated. Furthermore, the communication styles shaped by gender expectations can result in misunderstandings. Men might be socialized to remain stoic, whereas women are anticipated to be emotionally expressive and nurturing. The dynamics of power also play a significant role; if one partner dominates the finances or decision-making, it can foster feelings of inequality and resentment, which may lead to marital conflict and potential divorce.

When partners have differing views on gender roles, it can create significant friction and arguments in their relationship. If one partner adheres to traditional beliefs while the other embraces a more modern, equal approach, these differences can lead to misunderstandings, feelings of resentment, and diminished respect for one another. If these issues remain unaddressed over time, they can weaken the marriage's foundation, increasing the likelihood of divorce. It's crucial to recognize and tackle these varying beliefs to maintain a healthy and balanced partnership.

5.1.1 *Divorce Initiated by Gender*

Women are the ones initiating approximately 70% of divorces, pointing to reasons such as emotional labor, financial independence, and shifting societal norms. They often bear a considerable amount of emotional labor, handling not just their own feelings but also those of their partner and family. When a spouse feels that this effort is neither reciprocated nor appreciated, it can lead to exhaustion and discontent, pushing women to pursue divorce. Traditionally, the financial reliance of women on their husbands made it challenging to leave a troubled marriage. However, as an increasing number of women have joined the workforce and achieved financial autonomy, they are in a stronger position to initiate divorce. Additionally, societal perceptions of divorce have changed, enabling more women to seek separation when they are unhappy with their marriage.

5.1.2 Divorce Rates by Gender

The increased rate at which women initiate divorce is associated with their heightened dissatisfaction with conventional marital roles, elevated expectations for emotional satisfaction, and greater economic autonomy. These elements together explain the trend of women pursuing divorce more often than men. This trend underscores the need to tackle the fundamental issues related to gender roles within marriage to lower the chances of divorce and encourage healthier, more equitable relationships.

In summary, the conventional gender roles affecting marriage and divorce under MPL and the HMA, 1955, reveal a long-standing patriarchal system that has historically influenced the lives of both men and women in India. In the context of MPL, marriage (nikah) is viewed as a civil contract rather than a sacred bond, as seen in Hinduism. Nevertheless, both legal frameworks historically placed women in inferior roles within the marriage structure. Men were typically regarded as protectors and providers, while women were expected to be compliant, nurturing, and largely responsible for domestic duties. These roles were ingrained not just in societal norms but also reflected in legal frameworks and religious interpretations, which shaped the gender dynamics in marriage and affected divorce processes and outcomes.

Under MPL, the husband's traditional right to unilaterally divorce his wife through talaq particularly the triple talaq practice highlighted male dominance within the marital relationship. A man could declare divorce independently without needing judicial approval, whereas women encountered significant procedural and social hurdles when attempting to seek separation through khula (divorce initiated by the wife) or mubarat (divorce by mutual consent). Although women were permitted to include conditions in marriage contracts (like clauses against polygamy or granting themselves the delegated right to pronounce talaq- (talaq-talaq-talaq-e- tafweez), in reality, socio-economic dependencies and limited legal knowledge often rendered these protections ineffective for most women. The patriarchal bias in traditional Muslim divorce laws left women exposed to sudden abandonment, financial instability, and social alienation, often without adequate maintenance support. The "Muslim Women (Protection of Rights on Marriage) Act 2019", which outlawed the practice of instant triple talaq, represented a major reform in addressing these gender inequalities and affirmed the constitutional principles of gender justice and equality.

However, even today, difficulties persist regarding the consistent implementation of rights across diverse sects in Islam and the practical enforcement of women's rights following divorce.



Conversely, under the HMA, 1955, marriage is considered both a sacred and contractual relationship, merging religious customs with contemporary legal principles. Prior to the establishment of Hindu marriage law, divorce among Hindus was generally not permitted, especially for women, as marriage was viewed as unbreakable. The HMA introduced divorce as a legal option for both spouses under grounds such as cruelty, desertion, adultery, conversion, mental illness, and mutual consent (through a later amendment).

Nonetheless, disparities in gender roles continued even after these legal reforms. Historically, men controlled assets and financial resources, while women were often financially reliant on their husbands, influencing their capacity to initiate or continue divorce proceedings. Traditional Hindu cultural norms esteemed female chastity and perseverance, frequently pressuring women to remain in toxic or unsatisfactory marriages for the sake of familial honour. Although the HMA established equal legal grounds for divorce, societal expectations still imposed a heavier toll on women, particularly in rural and conservative areas.

Furthermore, the HMA initially permitted only husbands to seek damages for their wives' adultery, perpetuating gender biases; it was through judicial intervention and amendments that legal standards began shifting toward more gender neutrality. The courts have played a crucial role in interpreting provisions under the Act in ways that aim to safeguard women's rights. For instance, in cases of cruelty, Indian courts have acknowledged not only physical but also psychological cruelty as valid grounds for divorce, thus expanding opportunities for women to exit oppressive marriages. However, the fight for equal acknowledgement of marital rights continues, particularly concerning issues like the division of matrimonial property, where, unlike in many Western legal systems, India lacks a default community property structure, often leaving divorced women without an equitable share of assets accumulated during marriage.

The rights to maintenance under both MPL and the HMA further exemplify traditional gender roles. According to Muslim law, a husband's obligation primarily consists of providing mehr (dower) and maintenance throughout the iddat period (three months following divorce).

5.2 Social Perceptions of Divorce and Its Consequences

In India, societal perspectives on divorce and its consequences are heavily shaped by religious traditions, cultural values, and historical practices, especially within the frameworks of the HMA of 1955 and MPLs. Traditionally, marriage is viewed in Indian society not merely as a contract between two individuals but as a sacred commitment, particularly among Hindus.



According to Hindu beliefs, marriage is regarded as a *samskara*, a sacred, lifelong bond, making divorce an option of last resort and, prior to the enactment of the HMA, nearly inconceivable. Even after divorce was legally acknowledged by the HMA, societal attitudes remained conservative. A divorced woman typically experiences significant stigma, as she is often perceived to have failed in fulfilling her “duty” to preserve the marriage, irrespective of the circumstances surrounding the split. This social ostracism frequently extends to her family as well, impacting the marriage opportunities of her siblings and creating a sense of alienation within the community. While men may also encounter some criticism post-divorce, they usually experience less severe social consequences, reflecting deep-rooted patriarchal standards that assess women's value based on their marital status. The HMA outlines grounds for divorce such as cruelty, desertion, adultery, conversion, mental health issues, and mutual consent, ideally ensuring that both partners have equal rights. Nevertheless, societal expectations regarding female endurance, sacrifice, and subservience often deter women from seeking divorce, pressuring them to place family reputation above their own well-being. Even today, women who pursue divorce may face accusations of selfishness or moral failures, while men are more frequently understood or even sympathized with, particularly if they remarry quickly and create a new “stable” family environment.

In the Muslim community, marriage is regarded as a civil contract (*nikah*), which theoretically offers a simpler method for ending marriages compared to Hindu traditions. However, even with this possible ease, societal perceptions remain similarly restrictive for women. Traditionally, Muslim men have held the exclusive right to initiate *talaq*, while women seeking a divorce through *khula* or the “Dissolution of Muslim Marriages Act, 1939”, face both procedural and societal challenges. Although Islamic law permits divorce, it is viewed as the “most abhorrent of all lawful things” in the eyes of God, resulting in societal stigma that disproportionately targets divorced women, who are often seen as dishonorable or unsuitable for remarriage. Despite reforms such as the criminalization of instant triple *talaq* through the “Muslim Women (Protection of Rights on Marriage) Act”, 2019, divorced Muslim women still experience significant financial difficulties and societal prejudices. The belief that a “good woman” should tolerate marital strife to preserve family harmony continues to exist, restricting women's genuine autonomy despite legal frameworks that enable them to terminate an unsatisfactory marriage. The

repercussions of divorce in both legal systems are distinctly gendered. Financial difficulties rank among the most substantial consequences for divorced women. Under the HMA, a woman has the right to seek maintenance and permanent alimony



under Section 25, though the amounts granted are often limited, and the enforcement can be slow and cumbersome. Maintenance is typically viewed as a means to meet basic needs rather than a way to maintain the living standards experienced during marriage. Furthermore, Hindu women traditionally possess ambiguous rights to matrimonial property, as India does not automatically recognize joint ownership of assets acquired during the marriage. As a result, many divorced Hindu women find themselves with minimal or no financial assistance.

The psychological impacts of divorce, though often neglected in legal conversations, are substantial. The stigma and blame usually directed toward women can result in feelings of depression, anxiety, and lowered self-esteem. Children of divorced parents also encounter consequences, often finding themselves caught between opposing family demands and societal scrutiny. As per the HMA, custody decisions prioritize the “welfare of the child,” and courts have made progress toward impartial assessments. Yet, traditional views persist, mothers are generally expected to assume sole caregiving responsibilities post-divorce without sufficient financial support, while fathers are mostly seen as financial providers rather than emotionally involved caregivers. Under MPL, mothers typically receive custody of young children during their formative years, while fathers retain guardianship, reflecting entrenched gendered perceptions of parental duties.

Moreover, the prevailing societal perception of divorce remains one of moral decay and family breakdown, despite the legal recognition of individual autonomy. Divorce is often portrayed in public discourse as a phenomenon of the West, viewed as incompatible with Indian principles that highlight family cohesion and sacrifice. This cultural viewpoint fosters an atmosphere where individuals, particularly women, experience guilt or shame for seeking divorce even in cases of serious abuse, infidelity, or neglect. Religious and community leaders, who often intervene to mediate marital issues informally, tend to emphasize reconciliation above all else, sometimes pressuring women back into harmful circumstances instead of supporting their right to live independently. The lack of extensive social support systems, such as shelters, counselling services, and financial assistance, further exacerbates the adverse effects of divorce on women.

Legal changes brought about by the HMA and MPLs have undoubtedly broadened the reasons for divorce and established means for redress, yet these advancements have not

completely permeated societal awareness. The conflict between progressive legal standards and traditional cultural norms creates a difficult environment for divorced individuals, particularly women,



who must contend with both legal challenges and societal judgment. While there is a rising urban minority where divorce is less shamed and second marriages are becoming more frequent, for a large portion of the Indian population, divorce remains a significant event with deep social consequences. Until wider societal views shift to see divorce not as a moral failing but as a valid expression of personal freedom and dignity, the genuine potential of legal reforms will only be partially realized. Enhancing legal protections for women after divorce, ensuring fair distribution of marital assets, promoting awareness campaigns, and providing solid social services for divorced individuals are crucial steps toward alleviating the severe repercussions of divorce in India and fulfilling the constitutional principles of equality, liberty, and dignity for everyone.

5.3 Role of media and activism, and legal reforms

In traditional Indian society, divorce was once considered a profound social taboo, a subject often shrouded in silence and stigma. Marriage, deeply rooted in cultural and religious traditions, was viewed as a lifelong commitment, and the very idea of dissolving such a union was seen as a breach of societal norms. However, over the past few decades, the narrative around divorce has evolved significantly. This article explores the historical context of divorce in India, the factors that have influenced its changing perception, and the ongoing challenges faced by divorced individuals in the country.

The social perception of divorce began to shift in the 20th century, driven by various factors including modernization, women's empowerment, and legal reforms. As India emerged from colonial rule and embraced modernization, traditional values were increasingly challenged. Urbanization and exposure to global ideas about gender equality and individual rights began to influence Indian society.

The feminist movement played a crucial role in this transformation. Advocates for women's rights argued for legal reforms that would provide women with greater autonomy and protection in marriage and divorce. This advocacy led to significant legal changes, including the introduction of laws that allowed for more equitable grounds for divorce and protection for women in divorce proceedings.

The legal framework for divorce in India has evolved significantly over the years. Key legislative changes have contributed to the gradual normalization of divorce and improved

the legal rights of individuals seeking to dissolve their marriages.



Social Challenges and Stigma: Even with legal reforms, divorce remains a sensitive issue in India, often accompanied by social stigma and cultural challenges. The perception of divorce is influenced by a range of factors, including traditional beliefs, family honor, and societal expectations.

Cultural and Familial Expectations: In many Indian families, marriage is considered a pivotal aspect of one's identity, and divorce can be seen as a failure or a source of shame. The pressure to maintain family honor can make it difficult for individuals to openly discuss or pursue divorce.

Gender Bias: Despite legal protections, divorced women often face greater social stigma than men. Women are frequently subjected to judgment and discrimination, which can impact their personal and professional lives. This bias reflects deep-seated gender inequalities and traditional views on women's roles in society.

Economic Disparities: Divorced individuals, particularly women, may face economic hardships following a divorce. The lack of financial support and the challenge of rebuilding a stable livelihood can be significant barriers to personal growth and recovery.

5.3.1 The Role of Media and Awareness

In recent years, media representation and public awareness have played a crucial role in shaping perceptions of divorce. Films, television shows, and social media have brought discussions about divorce into the public sphere, challenging traditional norms and encouraging open dialogue.

Media portrayals of divorce often reflect a more progressive view, highlighting the personal struggles and triumphs of individuals navigating divorce. These representations can help to normalize the concept of divorce and reduce the associated stigma, contributing to a broader acceptance of diverse family structures.

5.3.2 Support Systems and Legal Aid

The increasing recognition of the need for support systems for divorced individuals has led to the establishment of various organizations and initiatives aimed at providing legal aid, counseling, and social support. Non-governmental organizations and community groups offer valuable resources for individuals navigating the challenges of divorce, helping to

address issues related to legal processes, emotional well-being, and financial stability.



Legal aid services play a critical role in ensuring that individuals, particularly those from disadvantaged backgrounds, have access to justice and support throughout the divorce process. These services can help mitigate the impact of legal and financial challenges, providing a pathway to recovery and empowerment.

In India, media portrayals and activist movements surrounding divorce are complex, evolving, and often influenced by societal norms and legal frameworks. While media coverage can sensationalize high-profile divorces, activism plays a crucial role in challenging traditional views and advocating for change. The rise in divorce rates, coupled with changing attitudes towards marriage and family life, has led to a more open discussion, albeit still with lingering cultural and legal complexities.

5.3.3 Media Portrayals

Sensationalism: Media outlets often focus on the drama and controversy surrounding divorces, potentially creating a distorted view of the situation.

Gendered Narratives: Media narratives frequently celebrate women's empowerment post-divorce but often overlook or downplay the emotional impact on men, perpetuating existing societal stereotypes.

Impact on Reputation: Excessive media attention can damage reputations and relationships, making it harder for individuals to move on, according to Tanya L. Freeman.

Influence on Social Media: It can also contribute to the quickening of divorce and a devaluation of commitment in marriage. The advent of social media has revolutionized communication, altering how people interact and share information. In India, social media platforms such as Facebook, Twitter, Instagram, and WhatsApp have become integral to daily life. However, the influence of social media extends beyond personal interactions, seeping into legal realms, particularly divorce proceedings.

The primary reason for the significant impact of social media on divorce proceedings in India is the wealth of evidence it provides regarding the personal behaviors and interactions of the parties involved. Social media platforms, such as Facebook, WhatsApp, and Instagram, often capture intimate details of an individual's life that can be pivotal in divorce cases. Posts, messages, photos, and status updates can reveal evidence of infidelity, financial misrepresentations, and even instances of cruelty. Courts have

increasingly recognized the relevance and admissibility of such digital evidence under the “Indian Evidence Act, 1872”,



particularly with the advent of “Section 65-B”, which addresses the admissibility of electronic records. This has enabled spouses to present compelling evidence that can substantiate their claims, leading to more informed and fair judicial decisions.⁹¹

Another critical reason is the role of social media in shaping perceptions of parental fitness in child custody disputes. The portrayal of a parent’s lifestyle and behavior on social media can influence the court’s assessment of their suitability for custody. Posts depicting irresponsible or harmful behavior can be detrimental to a parent’s case, whereas evidence of positive and responsible parenting can bolster it. The increasing reliance on social media evidence in custody battles underscores its impact on divorce proceedings, highlighting the need for individuals to be mindful of their online presence. This shift also reflects broader changes in societal norms and legal practices, as digital footprints become an integral part of personal and legal narratives in the modern age.

Social media can provide critical evidence in divorce cases, influencing outcomes significantly. Posts, messages, and shared media can reveal infidelity, hidden assets, or other behaviours pertinent to the case. Courts increasingly accept such evidence, provided it is authentic and relevant.

5.3.4 Admissibility of Social Media Evidence

The IEA, 1872, governs the admissibility of evidence in Indian courts, introduced by The “Information Technology Act, 2000”, deals with the admissibility of electronic records, including social media content. Under this section, any information stored electronically and reproduced in a physical format is admissible in court subject to certain conditions.

The SC of India, in the landmark case of Anvar v. PK Basheer⁹², clarified the requirements for electronic evidence admissibility. The Court held that electronic evidence must be accompanied by a certificate under Section 65B(4) signed by a person responsible for managing the electronic device.

5.3.5 Social Media and Grounds for Divorce

Social media can play a pivotal role in substantiating grounds for divorce, such as cruelty, adultery, or desertion.

⁹¹ Naman jain, Admissibility of E-evidence in India: An Overview (March 31, 2021).
<https://dx.doi.org/10.2139/ssrn.3816724>.

⁹² Anvar P.V vs P.K.Basheer & Ors., AIR 2015 SC 180.



Cruelty: In the “Shobha Rani Case”⁹³ The SC determined that mental cruelty should be evaluated according to the specific facts and circumstances of every individual case. Consequently, evidence from social media can offer context and depth to allegations of mental cruelty.

Adultery: The SC highlighted that proof of infidelity does not have to be explicit but can be deduced from the context. Interactions on social media can serve as circumstantial proof of this.⁹⁴

Desertion: Social media activity indicating a spouse’s prolonged absence or new residence can support claims of desertion.

5.3.6 Amendments and Legal Developments-

The impact of social media on divorce cases has led to legislative and judicial actions to tackle the challenges associated with digital evidence. The “Information Technology Act of 2000” was a significant legislative change that acknowledged the admissibility of electronic records, which includes content from social media. Through provisions of the Indian Evidence Act, the Act laid the foundation for the inclusion of electronic evidence in legal proceedings. “The Personal Data Protection Bill of 2019” seeks to protect individuals' privacy and govern the handling of personal data. This Bill contains provisions that affect the use of social media evidence in divorce cases, highlighting the necessity for consent and data protection. Although the Bill has not yet been enacted, its provisions emphasize the need to balance evidence gathering with the right to privacy.

5.3.6 Activism and Legal Change

Activism plays a crucial role in challenging conventional norms surrounding marriage and divorce, advocating for more inclusive and fair legal systems. Feminist movements have emphasized the significance of divorce as a means for women to escape damaging relationships and attain greater independence. Additionally, activism aims to tackle gender inequality in divorce cases, particularly in matters related to the division of assets and child custody. Efforts by activists have led to legal changes, such as the establishment of the SMA in 1954, which sought to create a more consistent legal structure for interfaith marriages.

⁹³ Shobha Rani vs Madhukar Reddi, AIR 1988 SC 121.

⁹⁴ Narendra v. K. Meena , AIR 2016 SC 4599.



Furthermore, initiatives are increasingly focusing on the needs of men after divorce, acknowledging the emotional and social difficulties they encounter.

CHAPTER 6

NEED FOR LEGAL REFORMS AND GENDER-NEUTRAL APPROACH

6.1 Analysis of proposed reforms in Indian divorce laws

Over the years, divorce laws in India have seen major reforms aimed at aligning more closely with the constitutional principles of gender equality and personal freedom. Although these laws vary among different religious groups, a shared aspect of their development is the acknowledgment of individual rights, particularly those of women, within marriage. The HMA of 1955 and the SMA of 1954 were some of the earliest initiatives to establish clear grounds for divorce, including cruelty, desertion, and mental illness, while the amendment in 1976 introduced the idea of divorce by mutual consent. This change represented a transition from a fault-based approach to a more consensual and compassionate method. However, MPLs, which are governed by the “Shariat Act of 1937” and shaped by religious customs, largely resisted codified reforms for many years, often resulting in considerable gender inequalities. A prominent example was the practice of triple talaq (*talaq-e-biddat*), which permitted a Muslim man to instantly and unilaterally divorce his wife without any legal proceedings, leaving women in precarious and often financially unstable situations. This practice underscored the deeply embedded gender bias present in Muslim divorce laws, as no comparable unilateral right was afforded to Muslim women. The landmark SC ruling in the Shayara Bano case marked a significant moment in confronting this injustice. The Court ruled that triple talaq was unconstitutional, citing its infringement on fundamental rights as per the Constitution of India. This ruling led to the passage of the “Muslim Women (Protection of Rights on Marriage) Act” in 2019, which made the practice illegal and was celebrated as a significant advancement toward gender justice. (the constitution of india, fundamental rights, art.14, art. 21)

Despite this, Muslim women still face procedural and substantive hurdles in obtaining a divorce. For instance, although Islamic jurisprudence permits women to seek divorce

through *khula* or *faskh*, these processes often require the consent of the husband or a religious authority, thereby reinforcing male dominance.

The amendment to the “Indian Divorce Act in 2001” eliminated biased provisions that mandated Christian women to demonstrate adultery along with another fault to obtain a divorce, while men could file for divorce solely based on adultery. Overall, the evolution of divorce law reform in India illustrates a complex relationship between religious freedom and constitutional principles. Although significant progress has been achieved, particularly through judicial actions, the ongoing presence of gender discrimination, especially under MPLs, highlights the critical need for a comprehensive codification and consistent application of divorce regulations that uphold the fundamental rights of every individual, regardless of religion or gender.

In the context of Indian law, a concerning truth remains obscured gender bias. Despite progress toward equality, the legal system often falls short of providing unbiased justice to men, who frequently encounter discrimination in various areas of judicial proceedings. This bias is particularly evident in family law, where stereotypes regarding male roles and responsibilities continue to significantly impact rulings. For example, custody disputes commonly favor mothers by default, reflecting societal assumptions rather than the specifics of each case. Additionally, legislation concerning domestic violence and sexual offenses can be one-sided, often presuming the accused's guilt based on gender alone. These systemic inequities not only deprive men of fair treatment but also perpetuate a cycle of injustice, reinforcing outdated views of masculinity and victimization. The situation becomes more complicated when considering societal pressures that compel men towards stoicism, obstructing their ability to seek legal assistance or emotional support. In our pursuit of a genuinely equitable legal system, tackling and correcting gender bias is not just a policy issue but a moral necessity. Only by recognizing and dismantling these biases can the Indian legal framework realize its commitment to justice for everyone, regardless of gender.

Family courts in India were established as a response to numerous issues faced by women in the country. Different groups united to advocate for justice for women, leading to the creation of family courts.

The “Family Courts Act of 1984” brought about important provisions designed to benefit

women, yet their practical enforcement often remains more conceptual than effective, hampered by existing patriarchal attitudes among conciliators and judicial officers. Despite the judiciary's attempts to adapt to changing societal demands, cases involving families with both parents still often favor mothers over fathers. This pattern underscores entrenched societal beliefs that view mothers as the primary caregivers, while fathers are commonly perceived mainly as financial providers.

These societal norms exert considerable pressure on families to conform to traditional gender roles, often leading to tense relationships and eventual family breakdowns. When families pursue resolution through the legal system, these ingrained stereotypes can cloud objective assessment, complicating the pursuit of just outcomes. Even though India is gradually embracing more egalitarian principles, influenced by Western cultures, traditional viewpoints continue to prevail, shaping decisions within the legal framework.

To tackle these biases, it is essential to implement not only legal and policy reforms but also a significant cultural transformation towards recognizing and appreciating diverse family roles based on individual abilities rather than solely on gender stereotypes. By actively confronting and dismantling gender bias, the Indian legal system can more effectively uphold its responsibility to deliver fair justice for all individuals, regardless of gender.

With regard to the societal stereotypes in place, it becomes evident how men often encounter discrimination and bias when family matters arise. In divorce cases, there is a belief that men are not believed when they claim to be victims of abuse from their wives. The courts frequently do not accept cruelty claims made by men. Nevertheless, the counterargument posits that women in India face challenges in obtaining divorce, as they typically depend on their husbands for many necessities. In terms of maintenance, various discussions highlight that only women have the authority to seek maintenance under the “Hindu Adoptions and Maintenance Act of 1956”.

Ensuring that Family Courts in India are free from gender bias is essential for improving access to justice and decreasing conflicts, especially in matters related to NRI Legal Services. This responsibility primarily rests with individual judges, emphasizing the need for systemic changes. One suggested reform is to make family court rulings public instead of keeping them private, aiming to reduce biased and arbitrary decisions. Public scrutiny

encourages critical evaluation and highlights shortcomings, which can lead to necessary legal reforms.

A notable event took place in December 2020 when a public interest litigation called on the SC to implement gender-neutral maintenance laws across various religions. This reform aims to determine divorce and maintenance outcomes based on financial stability instead of gender, representing a significant advancement toward equality.

Regarding child custody, the 257th Law Commission report proposed reforms to India's laws, advocating for decisions rooted in the comprehensive best interests of the child, financially, emotionally, educationally, and medically. This framework seeks to replace gender-specific preferences with arrangements that prioritise the child's welfare, including shared custody options that allow both parents to participate equally in raising their children, thus fostering fairness and family harmony.

6.2 Recommendations for a Balanced and Equitable Legal Framework

Family courts were established in response to various women's rights organizations advocating for an informal and non-confrontational method of achieving justice. The aim was to provide affordable, quick, and accessible justice, particularly for women from marginalized communities. The Family Courts Act of 1984 (hereinafter referred to as the Act) includes a provision encouraging the appointment of female judges in these courts.

However, the Act has not functioned as intended in practice. Its opening clause emphasizes the focus on the “preservation of family” through mediation and the involvement of conciliators. Feminist organizations argue that these conciliators are often influenced by patriarchal mindsets. They tend to encourage women to reconcile with their husbands, disregarding the women's autonomy, self-respect, and safety.

A significant obstacle to understanding the functioning of family courts is the lack of accessible datasets containing court decisions. This is due, in part, to the absence of family court judgments in legal databases, as is the case with other lower-level courts. Additionally, family court proceedings are typically held in private, which obscures the specific details of individual cases. Judgments from family courts are often not made publicly available online, complicating efforts to compile datasets and to make judgments accessible.⁹⁵

6.2.1 Root Causes of Gender Bias in Courts

Judicial courts, including Family Courts, operate within the broader societal context. Traditional gender roles often favour a family structure that consists of a male and female parent with biological children, viewing the mother primarily as the child's nurturer and the father as the breadwinner. Fathers are generally not expected to engage as actively in child-rearing, focusing instead on financial provision. Conversely, mothers are expected to be involved in every aspect of their children's lives.

Due to social pressure, many families conform to these traditional gender roles. This conformity significantly impacts the decisions made in family courts. When a couple,

⁹⁵ NEW DELHI DISTRICT COURTS, <https://districts.ecourts.gov.in/delhi-family-court#content>. Accessed on Mar 31,2025.



specifically a man and a woman, enters into marriage, they typically intend to maintain a stable family unit. They do not perform their roles with the expectation of a breakdown. However, upon entering court proceedings, they must confront this challenging reality. The courts, influenced by societal norms, often fall prey to these stereotypes, which can affect the outcomes of their cases.

As westernization progresses, nuclear families where both parents work are becoming more common. However, traditional gender roles are not easily abandoned. Even as more women enter the workforce, they are frequently seen as the primary caregivers, forcing them to juggle both work and family responsibilities. (Basu, 2012)

6.2.2 Men Facing Negative Bias in Family Court

Family courts have broad jurisdiction, addressing issues related to marriage validity, separation, divorce, maintenance, and child custody. Let's examine the potential for negative biases in each type of case.

6.2.3 In the area of Divorce Cases

Arguments for Bias Against Men: Some men's rights activists argue that claims of cruelty made by men are often less likely to be believed by judges. This is particularly concerning since cruelty is a common ground for seeking divorce.

Arguments Against Bias: It is important to note that women frequently struggle to file for divorce due to financial dependence on their husbands. Maintenance laws are often inadequate, leaving women trapped in unsuitable marriages. Furthermore, child marriage disproportionately affects women and is often legally recognized unless proved to be against their will. The consent of women is frequently disregarded, and minors cannot legally consent under contract law. Even if a marriage is established when the girl is a minor, it is treated as voidable rather than null. Once the woman turns eighteen, a minority at the time of marriage cannot be used as valid grounds for divorce.

Under Muslim law, polyandry (a woman having multiple husbands) is prohibited, whereas polygamy (a man having multiple wives) is permitted and considered grounds for divorce. Notably, the "Dissolution of Muslim Marriages Act of 1939", allows a wife to file for divorce on various grounds, including desertion, cruelty, lack of maintenance, imprisonment, and

impotency. In contrast, the Bombay HC ruled⁹⁶ that a Muslim man merely needs to state his reasons and appoint conciliators to obtain a valid divorce. Additionally, under the concept of khula in Muslim law, a wife is required to provide some monetary compensation for the divorce. It's important to mention that many provisions of MPL derive from judicial decisions rather than codification.

6.2.4 In the area of Maintenance Cases

Arguments for Bias in Maintenance Laws: The “Hindu Adoptions and Maintenance Act of 1956”, stipulates that wives are entitled to maintenance as long as they remain chaste and unmarried. For Hindus, Parsis, and Christians, the financial position and stability of both parties in a marriage can create complex dynamics during maintenance disputes.

6.3 Role of Policymakers and Judiciary in ensuring justice

Many feminist theorists contend that viewing law merely as a means for potentially changing society is overly simplistic. They argue that law is a crude and limited instrument, constrained by the prevailing ideologies of the society that creates it.

Pre-existing beliefs and assumptions inform the context of any legal provision. Even when doctrinal changes are effectively implemented, they can fail if judges or others responsible for applying the new laws revert to interpretations that simply reproduce previous outcomes.

The influence of dominant ideologies on the formation and substance of law and the legal process complicates the notion of 'progress' through legal reforms. Since legal, moral, and social standards are shaped by the prevailing patriarchal claims, an exploration of justice and fairness for women can only begin after dismantling the facade of 'neutrality,' 'impartiality,' and 'formal equality.'

In analyzing women's rights, it becomes essential to tackle the doctrinal question of whether a legal doctrine focused on women can be seen as 'biased' and lacking a 'neutral' perspective. Is it fair to label the feminist perspective or advocacy for women's rights as 'biased'?

When we look at the evolution of law, we find that the women's movement has prompted the inclusion of women in the legal framework, especially after they began asserting their

rights within a predominantly patriarchal structure. The women's movement advocated for equality, with significant victories including the right to vote, access to education, and the ability to

⁹⁶ Dagdu Chotu Pathan v. Rahimbi Dagdu Pathan And Others, 2003(1)BOMCR740.



pursue various professions. Influenced by these struggles, the Indian Constitution guarantees equality under Article 14 and prohibits discrimination under Article 15. Equality, along with liberty and freedom, serves as the foundation of our constitution designed to protect women. The right to vote, equal educational and employment opportunities, and equal pay for equal work all fall within this concept of formal equality.

However, when we consider the domestic realm within matrimonial laws, this concept of equality can be harmful to women. Because men and women in a marriage are not on equal footing, the same standard of equality cannot be applied. Equality can only exist between equals; if the principle of equality is applied to those who are not equal, it will cause greater inequality. Yet, this distinction has not been clearly articulated in matrimonial laws. This is particularly evident when we examine the HMA of 1955, which was enacted soon after the Constitution took effect.

6.3.1 *An unequal marriage*

The roles and status of women in marriage greatly differ from those of men. The male partner typically acts as the wage earner, and his contributions can be evaluated in financial terms. In contrast, the female partner usually takes on the role of homemaker and occupies a subordinate position within the marriage. She embodies the cultural values of both the family and the broader community. Nevertheless, matrimonial laws fail to acknowledge this disparity in status between the spouses. When either party seeks a divorce, they must base their petitions on the same specified grounds: adultery, desertion, and cruelty. However, the types of cruelty cited by men when seeking divorce differ significantly from those used by women to justify their petitions. It's akin to comparing apples to oranges.

Now, let's explore several issues that arise in divorce cases presented before our courts. Instances such as failing to prepare meals promptly, not making tea upon the husband's return from work (even if the wife is also earning), refusing intimacy, terminating a pregnancy, not covering her head in the presence of in-laws or in public, declining to wear sindoor or a mangal sutra (symbols of marriage), requesting a separate residence away from the extended family, or filing a complaint under "Section 498A of IPC" related to dowry, are cited by husbands as examples of cruelty when requesting a divorce.⁹⁷



The reasons women present in their divorce petitions differ significantly. They stem from fundamental survival issues—being expelled from the marital home, ongoing demands for dowry, insults directed at her parents for not being able to provide more dowry, refusal to offer maintenance, taking away her belongings and denying access to her stridhan, preventing her from seeking employment or seizing her salary, attacks on her moral character, severe physical, sexual, or emotional abuse, and denial of custody or visitation with the children, among others, are the justifications a woman cites for her divorce request.

In a patriarchal society and patrilineal living arrangement, typically, the woman leaves her family of origin to live with her husband, where historically, her right to stay was not formally acknowledged. When a wife is sent back to her parents' home for childbirth, the husband could easily block her return and later claim desertion. It took a significant amount of time for the courts to conceptualize constructive desertion when the husband actively obstructs his wife's return. Thus, we observe that even the grounds for desertion manifest differently for men compared to women.

The husband traditionally held the authority to determine the marital residence, and if the wife accepted a job in a distant location, the husband could initiate a claim for restitution of conjugal rights, which the courts would grant based on the notion that the husband is the ultimate authority (pati- parmeshwar), and it is the wife's sacred obligation to comply and live where he has chosen for their marital home. This occurred despite the HMA of 1955 having transformed Hindu marriages into contractual civil unions.

6.3.2 The maintenance problem

The most troubling aspect of the HMA is the provision that allows husbands to seek maintenance from their wives, based on the idea of equality. This was established in 1955, during a time when Hindu daughters did not have the right to be coparceners in their family of origin, and there was significant inequality between men and women in terms of literacy, higher education, and employment opportunities.

At that time, monogamy for men was just being introduced and had not yet become established as the standard. Nevertheless, it was considered essential to promote equality between spouses based on a liberal interpretation of formal equality, thereby making women responsible for paying maintenance to their husbands. Such a stipulation was

absent in the matrimonial laws of other communities and even the SMA.

However, maintenance, which is a fundamental right related to survival, is framed in relation to the husband's economic strength, creating a juxtaposition with the woman's sexuality. This creates a lingering threat that persists even after divorce, while the man can remarry without any consequences. There is a recent trend in the courts to enforce access for husbands to their wives, even in situations where they refuse to fulfill their maintenance obligations to their wives and children. Women perceive this judicial attitude as a significant injustice.

It has taken a considerable amount of time for the courts to understand that terms like cruelty, desertion, and adultery carry different meanings for husbands and wives. More than sixty years have passed before recognizing this discrepancy and moving away from a notion of equality toward advocating for gender-specific legal measures to protect women from domestic violence. Ultimately, the DV Act, 2005 acknowledges this by outlining a comprehensive list of behaviours that constitute cruelty against women, without any corresponding list for men or reciprocal remedies available.

6.3.3 The adultery law

The disparity in the treatment of adultery laws becomes evident, particularly when we consider the outdated legal framework prior to its repeal in “Joseph Shine vs Union Of India” on September 27, 2018. Under this archaic law, it was deemed a crime against the husband if a man had sexual relations with his wife without his consent, while women were not subject to punishment under the same statute. Legal challenges to this provision, citing violations of equality rights, were often dismissed through a paternalistic lens that characterized the law as protective and beneficial for women. Unfortunately, the negative implications for women were largely overlooked in legal discussions.

From a gender perspective, the law assumed women were passive and lacked agency over their own bodies and sexual desires, essentially treating their bodies as property belonging to their husbands post-marriage. Rooted in Victorian ideals of sexual morality, the law reflected a concern primarily between men regarding access to a woman's body. Although the statute criminalized only men, its underlying principles were fundamentally anti-women, as it reduced women to mere possessions and legitimized a husband's ownership over his

wife. Thus, any sexual encounter involving another man and a married woman, without the husband's consent, was viewed as an infringement on the husband's right to exclusive sexual access to his wife.

While examining the constitutionality of this provision in *Joseph Shine*, the Centre had defended this provision using a deeply flawed argument that the section was essential to save the institution of marriage. *"Diluting the adultery law will impact the sanctity of marriage. Making adultery legal will hurt marriage bonds,"* the Centre had pleaded in an affidavit filed before the court. It failed to see that the provision does not ensure marital fidelity. It merely protected male privileges. When adultery with the consent or connivance of the husband is not an offence, the patriarchal notion of the dominion of the husband over the woman's sexuality and bodily integrity gets reinforced.

In an extremely short-sighted manner, in 2003, the Justice V.S. Malimath Committee had recommended making the provision gender neutral, premised on a flawed logic of equality. When marriage is constructed as a patriarchal institution, the woman does not have the corresponding control over her husband's sexuality. Granting the husband additional powers to prosecute his wife for adultery would amount to adding salt to a festering wound. Justice Prabha Sridevan, former judge of the Madras HC, comments that a law which is superficially equal but kicks in injustice when it is put in action is something we have recognised too late.

On earlier occasions when this provision was challenged, the courts declined to strike down the section based on a paternalistic notion of protecting women, (*Yousuf Abdul Aziz vs State of Bombay*, 1954), "*Smt. Sowmithri Vishnu*"⁹⁸ and *V. Revathi*"⁹⁹ These challenges were based on a two-way discrimination, the woman's right to prosecute her husband and his lover for adultery and the husband's right to prosecute his adulterous wife.

On September 27, 2018, the five-judge Constitutional bench affirmed the feminist perspective on the section and annulled it. The bench noted that the scope of fundamental rights should encompass the rights of women and that individual dignity is vital in a respected society. The court believed that the law was detrimental to women who had no chance to defend themselves when falsely associated with a man based solely on suspicion, as a woman could not be included as a party in the case under Section 497 and had no standing. As he delivered the ruling, the then Chief Justice of India, Justice Dipak Misra,

stated,

“A husband is not the master of his wife. Legal subordination of one sex by another cannot be permitted.”

Justice D. Y. Chandrachud stated that a woman forfeits her voice and autonomy upon entering marriage, emphasizing that autonomy is essential for a dignified human life. He pointed out that Section 497 prevents women from making choices and is a remnant of outdated societal

⁹⁸ Smt. Sowmithri Vishnu vs Union Of India & Anr, AIR 1985 SC 1618.

⁹⁹ V. Revathi vs Union Of India & Ors, 1988 AIR 835.



norms. Justice Indu Malhotra remarked that “Section 497 IPC” constitutes a blatant infringement of the fundamental rights guaranteed by the Constitution, and there is no rationale for the nation to retain this antiquated provision.

In examining why, it took one hundred fifty-eight years for this provision to be annulled, we encounter the idea of a ‘reasonable man’, a fictional concept frequently used to infer how typical individuals might react in specific circumstances. Once again, there is an assumption that men and women would react in the same manner and that their perceptions do not differ based on gender. Challenging this notion of the ‘reasonable man’ is the focus of an article titled “*In Search of the Ordinary Woman.*”

Justice Sridevan discusses a case of sexual harassment which came up before the Madras HC,

“The Enquiry Officer found the delinquent officer guilty. But the HC exonerated him and while doing so, made certain observations which indicate how the Ordinary Man gets constructed differently from the Ordinary Woman.” ...The delinquent is leading a happy married life, and there was no necessity for him to solicit sexual favours from anyone, much less the complainant ... The complainant lodged the said criminal complaint [...] only to create documentary evidence in her favour so as to be used in the departmental proceedings, which shows her motivated intention of achieving her illegal goal of throwing the delinquent officer from his official position.”¹⁰⁰ She comments, “Going by the judgment, the Ordinary Man is ordinarily faithful. The Ordinary Woman is ordinarily vengeful.”

6.3.4 A biased neutrality

To sum up, the original question of whether the framework of feminism or the pursuit of women’s rights can be considered 'biased' is revisited. The insights from Justice D.Y. Chandrachud shed light on this issue. In October 2018, during a roundtable discussion at the

O.P. Jindal Law School called “Feminism in Practice: Feminist Lawyering and Feminist Judging,” Justice Chandrachud remarked that,

“As a judge, the core values enshrined in the Constitution, including principles such as equality, liberty, and fraternity, are to be actualized. Thus, the application of feminist principles is aligned with the judicial mandate to realize the substantive equality embedded in constitutional law.”

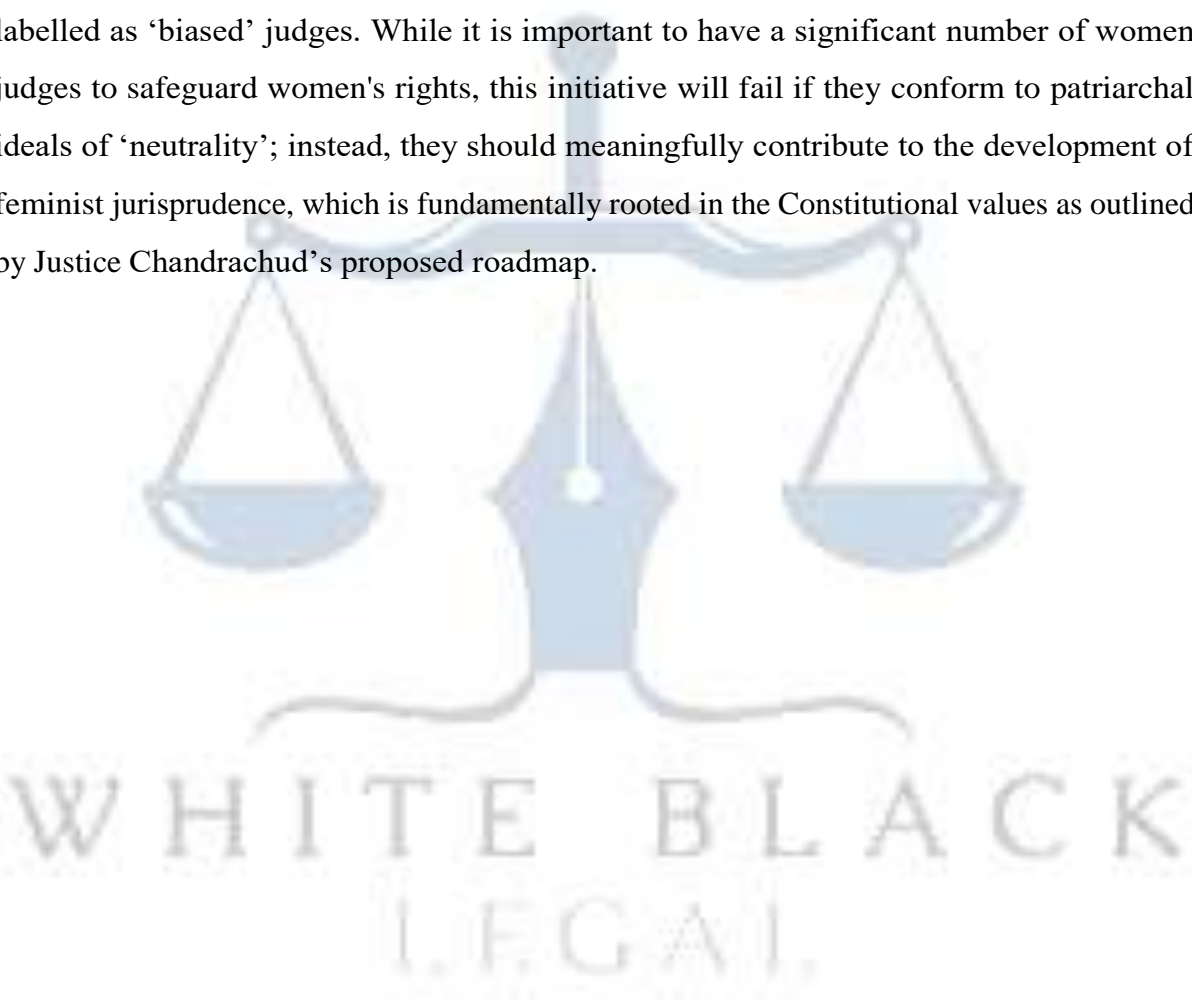
¹⁰⁰ Prabha Sridevan, In search of the ordinary woman, THE HINDU, <https://www.thehindu.com/opinion/lead/in-search-of-the-ordinary-woman/article5222195.ece>, Accessed on Apr 29, 2025.



When questioned about the feminist character of the Constitution, it was further elaborated by Justice Chandrachud that,

“Feminism fundamentally seeks to disrupt entrenched social hierarchies, and this objective resonates with the transformative aspirations inherent in the Constitution. Such transformation necessitates a challenge to existing social structures.”

As the representation of female judges rises in all our courts, it is crucial that they confidently introduce a women-centric approach to jurisprudence without the fear of being labelled as ‘biased’ judges. While it is important to have a significant number of women judges to safeguard women's rights, this initiative will fail if they conform to patriarchal ideals of ‘neutrality’; instead, they should meaningfully contribute to the development of feminist jurisprudence, which is fundamentally rooted in the Constitutional values as outlined by Justice Chandrachud’s proposed roadmap.



CHAPTER 7

CONCLUSION AND SUGGESTIONS

7.1 Summary of key findings

This research presents several key insights into the operation and perception of divorce laws in India, especially under the HMA and MPL. Firstly, while both legal frameworks were initially intended to safeguard women from marital injustices, there is an increasing recognition both judicially and socially that some provisions might be susceptible to misuse, particularly in contentious divorces. Analysis of case law indicates that courts have consistently acknowledged the risk of false or exaggerated claims, especially under “Section 498A of the IPC” and maintenance applications under “Section 125 CrPC,” often leading to legal and emotional difficulties for men.

Secondly, while the legal texts may seem gender-neutral in various aspects, their interpretation and enforcement often tilt in favor of women due to the historical backdrop of patriarchal oppression. However, this has resulted in a reverse imbalance in certain instances where men are assumed to be at fault, compromising due process. In recent years, courts have begun to adopt a more balanced approach, cautioning against the misuse of protective laws while still ensuring that genuine victims receive justice.

Thirdly, the research points to an expanding public discussion surrounding men’s rights in marriage disputes, with numerous judgments and NGO reports highlighting a rise in instances of misuse. Nevertheless, the lack of formal gender-neutral alternatives, standardized safeguards against false allegations, and inconsistencies in judicial decisions continue to pose challenges to the fairness of matrimonial litigation.

Finally, the study suggests that while women continue to face significant vulnerabilities in many marriages, the legal discourse must progress to represent a more balanced and gender-just framework. The findings emphasize the pressing need for legal reforms, including gender-neutral language, procedural safeguards, and explicit judicial guidelines, to ensure that the quest for justice does not unintentionally give rise to new forms of bias.

7.2 Addressing legal and social challenges

To address the growing concerns of gender bias and misuse in Indian divorce laws, this study recommends the introduction of gender-neutral language in personal laws, particularly under the HMA and MPL, to ensure equal legal treatment for all spouses. Section 498A IPC should be reformed with procedural safeguards such as preliminary inquiries and penalties for false allegations. Uniform guidelines for awarding maintenance and alimony should be implemented to avoid judicial inconsistencies. Further, judicial officers must be trained to balance protection with due process. A review mechanism or oversight body should be established to monitor false claims in matrimonial cases. Additionally, promoting marital counselling and exploring a UCC framework could support a more balanced and just legal approach to matrimonial disputes across communities.

7.3 Future Scope of the Research

This research opens pathways for further exploration into the complex relationship between gender and personal laws in India, specifically within the frameworks of the HMA and MPL. Future studies can incorporate empirical research, such as interviews and surveys involving affected individuals, legal professionals, and judicial officers, to provide a deeper, real-world understanding of how these laws are applied and potentially misused. Expanding the scope to analyse regional variations in judicial interpretation and outcomes across different HCs could reveal important trends in legal reasoning. Moreover, interdisciplinary work involving gender studies, sociology, and psychology could enrich the understanding of how matrimonial litigation affects men and women differently in terms of mental health, social stigma, and financial consequences. The research also sets the stage for policy-oriented studies aimed at promoting gender-neutral reforms within existing religious personal law frameworks.

7.4 Final remarks on achieving justice in Divorce Laws

This study set out to examine whether India's divorce laws, particularly under the HMA and MPL, embody justice or reflect underlying prejudice, especially in the context of increasing allegations of legal misuse by women. Through a comprehensive doctrinal and case law analysis, it is evident that while these laws were historically designed to protect women from systemic inequality and abuse, their implementation in contemporary India reveals a complex and evolving picture. Judicial interpretations, media reports, and

emerging social narratives indicate that protective provisions such as “Section 498A, IPC” and maintenance laws are at times misused, leading to undue hardship for men and raising concerns about fairness and due process.

At the same time, the study acknowledges that women continue to face structural and societal disadvantages in marriage, and legal safeguards remain vital. The real challenge lies not in removing such protections, but in balancing them with mechanisms that prevent misuse and uphold the constitutional values of equality and non-discrimination. Courts have begun recognizing the need for nuanced adjudication, but the absence of codified safeguards, gender- neutral statutory language, and consistent guidelines continues to create legal ambiguities.

Ultimately, this dissertation argues for a recalibration of matrimonial law through measured, gender-sensitive reforms. Justice in divorce law should not be defined by the gender of the litigant, but by the facts, fairness, and constitutionality of legal proceedings. Only then can Indian personal law systems truly reflect both protection and parity, fulfilling the constitutional promise of justice for all.

7.5 Suggestions

To address the increasing concerns of gender bias and misuse in Indian divorce laws, it is imperative to introduce gender-neutral language within personal laws, particularly the Hindu Marriage Act, 1955 (HMA), and Muslim Personal Law (MPL). This shift would ensure that all spouses, regardless of gender, receive equal legal protection and treatment, especially in matters of divorce, maintenance, and cruelty. Section 498A of the Indian Penal Code, while crucial in safeguarding women against domestic violence, requires reform to prevent misuse. Introducing procedural safeguards such as preliminary inquiries before arrest, mandatory family counseling sessions, and penalties for proven false allegations would help maintain the law's integrity without discouraging genuine complaints. Additionally, a uniform framework for awarding maintenance and alimony should be implemented to reduce inconsistencies in judicial decisions. This could involve standardized guidelines or a maintenance calculator, considering variables like income, duration of marriage, and standard of living. Judicial officers and legal practitioners must be equipped with regular training and sensitization programs to recognize and address implicit gender biases, ensuring a fair balance between protection and due process.

Moreover, establishing an independent oversight body to review matrimonial litigation, identify patterns of false claims, and recommend reforms could enhance accountability within the legal system. Encouraging or mandating pre-litigation marital counseling would also support reconciliation or at least informed dispute resolution, potentially reducing the burden on courts. Collectively, these recommendations aim to promote a more balanced, equitable, and just approach to matrimonial disputes in India.

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