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“A COMPARATIVE STUDY OF DIVORCE UNDER HINDU LAW AND MUSLIM LAW: JUDICIAL TRENDS AND LEGISLATIVE DEVELOPMENTS”

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Abstract

This research paper engages in a comparative examination of divorce under Hindu and Muslim law in India, with a focus on judicial trends and legislative developments. It examines the underlying principles of marriage and breakdown in both personal laws, tracing differences in procedures, grounds for divorce, and the gender factor in availing legal remedies. In Hindu law, codified legislations like the Hindu Marriage Act, 1955, give a uniform treatment to divorce, while Muslim law, which is mainly uncodified, permits different kinds of talaq on the principles of religion. The research analyzes significant judicial pronouncements such as *Shayara Bano v. Union of India (2017)* and *Sarla Mudgal v. Union of India (1995)* in order to analyze the changing role of the judiciary balancing personal law practices with constitutional imperatives of justice and equality. It also analyzes recent legislative reforms proposing modernization and harmonization of divorce laws with modern social sensibilities. The article concludes by stressing the imperative of an even-handed approach that is respectful of religious freedom, ensuring gender justice and legal clarity.

The article critically analyzes the divorce concept in both the systems, with a focus on procedures including mutual consent, fault-based divorce, and customary regimes in Hindu law, and forms including Talaq-e-Ahsan, Talaq-e-Hasan, Triple Talaq, and Khula in Muslim law. Special focus is given to the gendered aspects of divorce and the ease of access to legal remedy for women under both religious systems.

Keywords: Demonstrate, Reconciliation, Unified, Convergence, Dis-Solution, Sacrament, Decriminalized, Pronouncement, Judicial Interventions, Irretrievably broken, cohabitation, reconciliation, coercing

I. INTRODUCTION

Background of Divorce Laws in India

In India, marriage is seen as a sacred bond, especially under Hindu law where divorce is not common. It was considered a sacrament in ancient texts, with separation controlled socially rather than legally. The Hindu Marriage Act of 1955 introduced statutory divorce while upholding marriage's sanctity. Conversely, divorce under Muslim law is accepted, based on the Qur'an and Hadith, with practices like khula (wife's request) and talaq (husband's repudiation). Islamic jurisprudence views marriage contractually, allowing divorce under certain procedures when harmony fades, while Hindu law treats it as a last resort after reconciliation efforts. Together, these systems reflect India's pluralistic personal law shaped by legislative, religious, and historical influences.

This research sets out to contrast Muslim and Hindu laws of divorce, looking at the legislative and judicial developments. Both the laws are influenced both by their religious heritage as also their cultural traditions, so there is a need to adopt a comparative method. The analysis will identify the avenues for change, looking at the convergence as also the divergence, to encourage a common legal code for the dissolution of marriages. It will also identify the points where the system compromises gender justice, societal values, as also the rights of the individuals, in the matter of divorces.

Important research questions are as follows: What are the contrasts between Muslim and Hindu laws on divorce? How have judicial verdicts impacted the laws on divorce? How do recent statutory changes deal with justice, gender equality, and rights while getting a divorce? To what extent do the laws correspond to international human rights standards? This research shall offer some insight into the laws on divorces in India as well as recommend steps for justice and equality.

Methodology

In order to investigate the topic thoroughly, the current study takes a doctrinal, comparative, and analytical approach. The study of legal doctrines, statutes, and court rulings pertaining to divorce under Muslim and Hindu law is the main objective of the doctrinal approach. This entails a thorough analysis of primary sources, including important case laws that have influenced how these statutes are interpreted as well as legislative texts like the Hindu Marriage

Act of 1955 and the Dissolution of Muslim Marriages Act of 1939. By methodically contrasting the clauses, processes, and grounds for divorce under the two legal systems, the comparative approach draws attention to the parallels, divergences, and underlying ideologies. This makes it possible to determine where the two personal laws differ, overlap, and possibly harmonize.

Considering their socio-legal ramifications, the analytical method is used to critically assess legislative developments, judicial trends, and interpretive changes over time. To offer a comprehensive viewpoint, secondary sources like scholarly articles, law commission reports, and commentary are also looked at. By integrating these methods, the study seeks to provide critical insights into the laws' efficacy, equity, and applicability in modern Indian society in addition to a descriptive account of the laws.

Concept and Legal Framework of Divorce

The legal dissolution of a valid marriage, which ends the parties' marital rights and responsibilities, is referred to as a divorce. In India, marriage is not only a private agreement but also a revered social institution, especially in the context of Hindu law, which views it as a sacrament. Modern legal advancements, however, acknowledge that spouses have the right to end a marriage when it becomes intolerable. The Indian legal system regulates divorce through a combination of secular statutes, personal laws, and court decisions, guaranteeing both the preservation of cultural values and the protection of individual rights.

Law's Origins

Acts and codified laws that contain statutory provisions: Personal law statutes like the Hindu Marriage Act of 1955, the Dissolution of Muslim Marriages Act of 1939, the Indian Divorce Act of 1869 (for Christians), and the Parsi Marriage and Divorce Act of 1936 are the main sources of law. Furthermore, a secular framework that applies to interfaith marriages is provided by the Special Marriage Act of 1954.

Religious Texts and Customs: Divorce laws in uncodified areas are still influenced by religious texts, community traditions, and customs. Islamic law, for example, is based on the Qur'an and Hadith, whereas Hindu customs and smritis historically governed divorce before they were codified.

Divorce Grounds: An Overview

Different personal laws have different grounds for divorce, but they all have some things in common. Adultery, cruelty, desertion, conversion to another religion, mental illness, and communicable diseases are typically recognized as legitimate grounds under statutes. Renunciation of the world and presumption of death are also included in Hindu law, as stated in Section 13 of the Hindu Marriage Act. Muslim law acknowledges judicial dissolution under the 1939 Act, khula (wife's request with husband's approval), and talaq (husband's declaration). Regardless of religion, the Special Marriage Act provides consistent grounds. Additionally, the scope of judicial interpretation has broadened, with a focus on the idea of "irretrievable breakdown of marriage" as a tenet of modern divorce law.

Meaning and Nature of Divorce in Indian legal system

In its most basic definition, divorce is the legal dissolution of a marriage between two people, which releases them from the responsibilities, rights, and duties that come with being married. In the Indian legal system, divorce is a formal legal procedure regulated by personal laws, statutory provisions, and court rulings rather than just a private separation between spouses. The idea acknowledges marriage as a legally recognized social institution and divorce as a way to end a marriage when the goals of cohabitation, companionship, and respect for one another cannot be met.

India's pluralistic legal system is reflected in the slight variations in the definition of divorce among its various personal laws. According to Hindu law, as outlined in the Hindu Marriage Act of 1955, divorce denotes the final and total dissolution of a marriage, subject to specified grounds like cruelty, adultery, desertion, and consent from both parties. Muslim law permits divorce (talaq) in a number of ways, including judicial divorce (khula, mubarat, or under the Dissolution of Muslim Marriages Act, 1939). Talaq has both religious and legal aspects. Divorce is also defined in the frameworks of Christian law, Parsi law, and the Special Marriage Act of 1954's secular provisions.

The following characteristics define the nature of divorce in the Indian legal system:

Legal Formality: Divorce must follow certain rules and is frequently only approved by a court or other appropriate authority.

Grounds-Based System: The majority of personal laws outline specific grounds for divorce, such as mutual consent, fault, or breakdown.

Gender and Religious Sensitivity: While recent reforms and judicial activism aim to promote equality and uniformity, provisions vary amongst religions.

Public Policy Consideration: Indian law prioritizes reconciliation and alternative dispute resolution before granting divorce, despite the fact that it is legal. This reflects the societal preference to maintain marriage.

In Essence, Divorce in India essentially represents a fine balance between maintaining the family as a social unit and allowing for individual autonomy. It is a legal remedy intended to offer relief when a marriage has irretrievably failed, not to promote separation. The meaning and reach of divorce are still being shaped by judicial interpretations, which make sure that the institution changes to reflect shifting social norms and constitutional values.

SOURCES OF LAW

Statutory provisions (Acts, codified laws).

Statutory law refers to **laws enacted by the legislature**, i.e., Parliament or State Legislatures. It is the most important and primary source of law in modern legal systems, including India. Statutory provisions are authoritative, binding, and enforceable by courts of law.

1. Meaning of Statutory Provisions

- "Statutory" means something that is **created, defined, or regulated by statute (legislation)**.
- Statutory provisions are the **rules, sections, or clauses** contained in an **Act, Code, or Law** passed by the legislature.
- They provide certainty and uniformity to the legal system, unlike customary or unwritten laws which may vary from place to place.

2. Qualities

Enacted by Competent Authority: According to Articles 245–246 of the Indian Constitution, only Parliament or State Legislatures have the authority to enact statutory legislation.

They are organized in a methodical manner using codes, such as the Indian Penal Code of 1860 and the Code of Civil Procedure of 1908.

Binding Nature: Statutory laws must be obeyed by all people and organizations.

Supremacy: Subject to constitutional restrictions, statutory law usually takes precedence over customary law in cases of conflict.

Grounds for Divorce

General Overview

Causes of divorce are "no-fault" grounds like irreconcilable differences and "fault" grounds which include specific conduct of one of the spouses, e.g., adultery or cruelty. State requirements are place-specific but common fault grounds are infidelity, abuse, abandonment, and conviction of a felony. Most jurisdictions also have divorce by mutual consent where both spouses agree to end the marriage. The Indian Divorce Act, 1869 (for Christians), the Parsi Marriage and Divorce Act, 1936, the Hindu Marriage Act, 1955, the Muslim Personal Law (Shariat), and the Special Marriage Act, 1954 (which applies to civil and interfaith marriages) are among the personal laws that govern divorce grounds in India. Every legal system recognizes some common grounds, which are augmented by additional and special grounds based on the situation, even though every law has its own unique grounds.

1. Adultery

One of the most frequent reasons for divorce in all legal systems is adultery. A married person engaging in a voluntary sexual relationship with someone other than their spouse is referred to by this term. Adultery was a crime and a reason for divorce in India before **Section 497 IPC** was decriminalized in **Joseph Shine v. Union of India (2018)**. Following the ruling, it is still a legitimate civil basis for divorce but is no longer a crime.

2. Cruelty

There are two types of cruelty: mental and physical. While mental cruelty includes acts of abuse, humiliation, neglect, false accusations, or behavior that causes psychological suffering, physical cruelty includes acts of violence or bodily harm. The definition of cruelty has been expanded by courts to encompass ongoing abuse, denial of marital rights, and even neglect and apathy.

3. Desertion

Desertion means the permanent abandonment of one spouse by the other without reasonable cause and without consent. To constitute desertion, two elements must be present:

- **Factum of separation** – actual physical separation.
 - **Animus deserendi** – the intention to permanently abandon the spouse.
- Generally, desertion for a continuous period of at least **two years** is required under the Hindu Marriage Act and Special Marriage Act.

5. Unsoundness of Mind or Mental Disorder

A spouse can seek divorce if the other has a severe mental disorder that makes cohabitation impossible. Courts ensure that minor issues aren't misused for divorce; the condition must be serious and intolerable.

6. Additional Grounds for Wives

Some personal laws grant wives exclusive rights to divorce:

Under the Hindu Marriage Act, a wife can divorce if her husband commits rape, sodomy, or bestiality.

If a husband has multiple wives (polygamy) prior to the Hindu Marriage Act.

Muslim law recognizes grounds like lack of maintenance, cruelty, or impotency for women.

Under Christian and Parsi laws, wives have extra protections in cases of adultery with cruelty or desertion.

7. Mutual Consent

The modern law allows divorce on the grounds of both spouses both acknowledging that the marriage has irretrievably broken down. It requires:

Agreement of both parties.

A one-year separation (Hindu marriage Act and the Special Marriage Act).

Joint court application, thereafter cooling-off period.

This provision prioritizes personal liberty and the right to leave an unhappy marriage.

Divorce under Hindu Law

The divorce is the termination of marriage by court of law. The Hindu law traditionally treated marriage as a sacramental and eternal bond that could not be broken; it had no provision for

divorce. The Hindu Marriage Act of 1955 acknowledged marriage both as a sacrament and as a social contract and made provision for divorce.

Legal Framework-

The law relating to divorce among Hindus is governed by:

The Hindu Marriage Act, 1955 (as amended in 1976 and subsequent years)

Applies to Hindus, Buddhists, Jains, and Sikhs.

Provides both fault-based divorce and mutual consent divorce.

3. Grounds for Divorce under Section 13 of HMA

Either spouse may seek divorce on the following grounds:

1. **Adultery** – Voluntary sexual intercourse with another person.
2. **Cruelty** – Physical or mental cruelty causing hardship.
3. **Desertion** – Abandonment for a continuous period of 2 years.
4. **Conversion** – Spouse ceases to be Hindu.
5. **Unsoundness of Mind** – Incurable mental disorder.
6. **Leprosy** – (now repealed by 2019 amendment).
7. **Venereal disease** – In a communicable form (also repealed).
8. **Renunciation of the world** – By entering a religious order.
9. **Presumption of death** – Not heard of for 7 years.

In *Samar Ghosh v. Jaya Ghosh (2007)*, the Supreme Court laid down broad guidelines for determining mental cruelty, holding that sustained abusive behavior and denial of companionship constitute cruelty.

Breakdown Theory:

The Breakdown Theory of divorce argues that if a marriage has irretrievably broken down, remaining in the marriage is irrelevant. As distinct from fault-based grounds of divorce, such as proof of guilt of adultery or cruelty, it emphasizes the collapse of a relationship as a legitimate ground of divorce, advocating for equity and reducing animosity.

Mutual consent divorce:

Mutual Consent Theory grants divorce if both the spouses voluntarily wish to terminate their marriage, and freedom and the notion that a failed marriage should not persist prevail. Created by Section 13B of the Hindu Marriage Act, 1955, mutual consent, a period of reconciliation, and absence of coercion and deceit are needed.

1. **Judicial Interpretations** (Important case laws).

Bipin Chandra v. Prabhavati (1957) AIR SC 176

Principle: Desertion as a ground of divorce under Section 13 of the Hindu Marriage Act (HMA).

- **Held** that desertion means the intentional permanent forsaking of one spouse by the other without reasonable cause and against the wish of the deserted spouse.

Naveen Kohli v. Neelu Kohli (2006) 4 SCC 558

- **Principle:** Irretrievable breakdown of marriage.
- Supreme Court recommended that irretrievable breakdown should be recognized as a valid ground of divorce even though not explicitly in HMA.

Shilpa Sailesh v. Varun Sreenivasan (2023) SC

- **Principle:** Power of Supreme Court under Article 142 to grant divorce.
- Constitution Bench held that SC can dissolve marriage on the ground of irretrievable breakdown even if not a statutory ground under HMA.

Divorce under Muslim Law

1. **Historical & Religious Sources** of divorce.

Divorce (Talaq) in Muslim law has its foundation in **historical evolution and religious sources** derived from the **Qur'an, Sunnah, Ijma, and Qiyas**, as well as later codifications.

(a) *Historical Sources*

1. **Pre-Islamic Arabia** –

- Before Islam, divorce was unrestricted and entirely controlled by men.
- Husbands could repudiate wives at will, often leading to injustice and exploitation.

2. **Islamic Reforms** –

- With the advent of Islam in the 7th century, Prophet Muhammad reformed this practice.
- The Qur'an placed **restrictions** on arbitrary divorce and emphasized reconciliation, mediation, and fairness towards women.
- Talaq was recognized as a lawful but **disliked remedy**, to be exercised only when marital life became impossible.

3. Medieval Period –

- Classical Islamic jurists of different schools (Hanafi, Shafi'i, Maliki, Hanbali) developed detailed rules on divorce.
- These interpretations became binding precedents in Muslim societies.

4. Modern Times –

- Colonial India codified personal laws through **Anglo-Mohammedan law**, relying on classical juristic texts.
- Post-independence, reforms were introduced, such as **Dissolution of Muslim Marriages Act, 1939** in India, giving women specific grounds to seek divorce.
- Recent judicial developments, such as **Shayara Bano v. Union of India (2017)**, struck down *instant triple talaq* (Talaq-e-Biddat) as unconstitutional.

1. By Husband

Talaq (Repudiation by Husband): Unilateral right to terminate marriage in the hands of the husband.

Talaq-ul-Sunnat (Revocable Talaq): Validated under Prophet's traditions, proper and valid.

Ahsan form: One pronouncement of divorce in a tuhr (a period of purity), followed by continence during iddat period. Revocable before iddat comes to an end.

Hasan form: Three pronouncements in three consecutive tuhrs. Revocable before third pronouncement.

Talaq-ul-Biddat (Irrevocable Talaq): Also referred to as Triple Talaq; is three pronouncements made in one sitting. **Held** to be unconstitutional in **Shayara Bano v. Union of India (2017)**.

2. By Wife

- **Talaq-e-Tafweez:** Delegated divorce, where the husband delegates his power of talaq to the wife, either absolutely or conditionally, usually by agreement at marriage.
- **Khula:** Divorce at the instance of wife, with the husband's consent, in exchange for consideration (return of *mahr* or property).

3. By Mutual Consent

- **Mubarat:** Both husband and wife mutually agree to dissolve the marriage, releasing each other from marital obligations.

4. By Judicial Decree

- **Faskh (Dissolution by Court):** A decree granted by a Qazi or court under the **Dissolution of Muslim Marriages Act, 1939**, on grounds such as cruelty, desertion,

husband's failure to maintain, impotency, insanity, or husband's disappearance for four years.

Recent Reforms

- Triple Talaq judgment (**Shayara Bano v. Union of India, 2017**).

The Supreme Court in *Shayara Bano v. Union of India* (2017) declared the practice of **instant triple talaq (talaq-e-biddat)** unconstitutional, holding it violative of Article 14 (Right to Equality) and Article 21 (Right to Life and Personal Liberty). The judgment emphasized gender justice, dignity, and equality for Muslim women. Following this, the Parliament enacted the **Muslim Women (Protection of Rights on Marriage) Act, 2019**, criminalizing the pronouncement of instant triple talaq.

Judgment: A five-judge Constitutional Bench gave a **3:2 majority decision**.

- **Majority Opinion (3 Judges):** Declared instant triple talaq unconstitutional and void, holding that it was **arbitrary and violated Article 14** (Right to Equality).
- **Minority Opinion (2 Judges):** Favoured upholding the practice on the ground that personal laws are protected under **Article 25 (Freedom of Religion)**, but they urged Parliament to legislate on the matter.

Landmark Judgments shaping divorce law in both religions

1. Milestone judgments mapping divorce law for both religions

What we see: In the past few decades, courts have produced a few landmark judgments that changed the way personal law is understood — not through statute revision but through the interpretation of them in the light of constitutional norms. Most such judgments deal with procedural entitlement (access, legal aid), substantive basis (what constitutes cruelty, failure of marriage), and the interface of the personal law and statutory redresses (maintenance, guardianship).

Why it matters: Path-breaking judgments lay down binding precedents for the lower courts, fill the legislative vacuum, and can trigger legislative intervention. They lay down cross-religion precedents as well — courts prefer to apply the logic utilized under one personal law scenario for the purpose of resolving similar matters under another.

Consequences / examples of impact:

Broad, instrumental descriptions of statutory grounds for divorce (e.g., contemporary courts apply the meaning of "cruelty" and "desertion" with contextual tests and not literalism).

Increased protection for the weaker spouse (custody and maintenance law stressing the child's interest and gender neutrality).Judicial interventions that sometimes lead to legislative reform or policy action when courts identify systemic gaps.

Shifts from traditional to modern interpretations

What we see: Courts are moving away from rigid, literalist readings of personal statutes and customary rules toward interpretations that: (a) emphasize individual rights, (b) apply contemporary social realities, and (c) use constitutional values (equality, dignity, liberty) as interpretive lenses.

Why it matters: Personal laws were often framed in older social contexts; modern interpretation helps the law remain relevant and protect fundamental rights without wholesale repeal of community laws. This shift recognizes changing family structures, women's changing social and economic roles, and international human rights norms.

Typical modernizing moves by courts:

- Interpreting ambiguous grounds (like "cruelty") functionally — looking at the cumulative impact of conduct rather than isolated acts.
- Emphasizing gender neutrality where statutes are silent or ambiguous — e.g., applying similar standards to spouses of either gender.
- Developing equitable remedies (interim maintenance, rehabilitative support) rather than only categorical outcomes.

Practical outcome: A greater tendency to resolve divorce disputes with focus on fairness, child welfare, and constitutional protections rather than mechanical application of religious formulas.

Role of the Supreme Court and High Courts in harmonizing personal laws with fundamental rights

What we see: Higher courts (Supreme Court and High Courts) play the lead role in resolving tensions between community-specific personal laws and constitutional guarantees (Articles 14, 15, 21, etc.). They perform functions of (a) constitutional arbiter, (b) harmoniser, and (c)

normative developer.

How they do it:

- **Constitutional review:** Striking down or reading down statutory or customary provisions that clearly violate equality, dignity, or life/liberty guarantees.
- **Principled interpretation:** Using progressive, purposive interpretation to reconcile religious/family law rules with fundamental rights where possible (read down, read-in).
- **Filling gaps:** Creating jurisprudential standards for evidence, proof, and remedy that lower courts apply uniformly (for instance, tests for cruelty, approach to irretrievable breakdown, or standards for interim relief).
- **Incremental reform:** Rather than replacing personal laws wholesale, courts often set standards that nudge legislatures and communities toward reform.

Why this role is critical: Without higher-court harmonization, personal law could produce results inconsistent with constitutional values, creating unequal protection across religions and genders. Courts thus act as a stabilizing force — protecting individual rights while trying to respect pluralism.

Illustrative takeaways:

- Courts avoid gratuitous interference with religious practice but will intervene when a personal-law rule infringes fundamental rights.
- Harmonization is rarely abrupt; it is typically an incremental jurisprudential process that balances respect for community autonomy with individual rights protection.

Challenges and Criticism

Gender justice issues in divorce laws.

Issues and Criticisms for Gender Justice for Divorce Cases

Gender justice in divorce laws ensures fairness and equality for both men and women during divorce. The Indian divorce law still witnesses extreme difficulties and criticisms while dealing with gender justice.

1. Unequal Grounds for Divorce

Some personal laws permit different grounds for divorce for men and women.

Traditionally, Muslim law accorded men unilateral talaq authority (currently limited by the judgment in **Shayara Bano v. Union of India (2017)**), and women only some restricted choices such as khula and faskh.

Criticisms: This entrenched male dominance and reinforced women's vulnerability to capricious divorce.

2.) Maintenance and Alimony Matters

Challenge: Maintenance allowed under Section 125 CrPC and personal laws has been ineffective and sluggish.

Commentary

Women may receive meager maintenance, insufficient to sustain themselves.

They find maintenance laws biased, causing misuse and financial strain, even if the wife has a fixed income.

3.) Prolonged and Costly Proceedings

Divorce litigation frequently lingers due to appeals and delays.

Conclusion:

Women experience economic and emotional stress from delays.

Men claim delayed proceedings are a tactic for harassment or coercing settlements.

Divorce laws in India have increasingly been liberal and gender justice-oriented with the reformation steps such as abolishing triple talaq and acknowledgement of irretrievable breakdown for divorce, but we are yet to see problems in equality, accessibility to justice, and rights balance. The conundrum is in protecting women against being exploited and yet countering abuse of gender-exclusive sections.

In summary, the analysis comparing divorce in Hindu and Muslim legal frameworks reveals that although both systems strive to reconcile personal rights with the importance of marriage, they differ markedly in their procedures, grounds for divorce, and underlying philosophies. Hindu law, influenced by the Hindu Marriage Act of 1955, predominantly adheres to a structured and secular methodology, highlighting the importance of court involvement and attempts at reconciliation prior to granting a divorce. Conversely, Muslim law, which is based on Sharia tenets, has historically permitted divorce to occur outside the court system, particularly through the practice of talaq.

However, recent judicial interpretations and legislative actions—such as the Supreme Court ruling in Shayara Bano versus Union of India in 2017 that prohibited immediate triple talaq—have increasingly focused on safeguarding women's rights and promoting fairness.

In general, both legal systems demonstrate a forward-thinking movement

towards gender equality, limiting the arbitrary breakdown of marriages and fostering just resolutions, which mirrors the changing societal and legal perspectives on marriage and divorce within India.

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