



# Comparative Study Of Matrimonial Laws Of Hindu And Muslim

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## Abstract

India is a secular country and secularism is the basic feature of the constitution. In India, people of all religion reside. All the people have the right to profess their religion. They are also governed by their personal laws in the civil matters. In spite of the need of provision for uniform civil code, the uniform civil law are neither made nor applied in India and therefore they have the right to marry and divorce according to their own personal laws. In India Hindu and Muslim are two major religions. The Hindus are governed by Hindu laws and Muslims are governed by their muslim/personal laws. For Hindus, specific law relating to marriage has been enacted in the year 1955 which provides the provisions for marriage as well as the divorce but there is no specific enactment relating to the matters of marriage and divorce however Dissolution of Muslim Marriage Act, 1939 was enacted which provides only the right to divorce to Muslim woman and the man. Granting the legal rights including those of civil rights to all the people deeply divided society is the necessity of secular India.

## Introduction

Right to equality is enshrined in the constitution as the basic feature. This right is based on the principle that like should be treated alike. Therefore the people who are not alike to other may be treated differently. Keeping in view this principle, the constituent assembly specifically provide the right to profess the religion which the people like and they will be governed in their civil matters according to their personal laws. In India specific law relating to Hindu was enacted after independence which provides for monogamy in marriage and also provides equal rights of divorce to the husband and wife. But for Muslim there is no specific enactment relating to marriage. They are free to marry according to their personal law. According to the personal law the Muslim male has right to solemnize four marriages but Muslim woman has right to marry only one. There is lot of difference and discrimination between the people of both the religions. Before independence, an act to provide right to divorce was enacted by British govt. but that law gives the right to divorce to the woman only.

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## 1. Provision relating to marriage of Hindus

Hindu Marriage Act, 1955 specifically provides the provisions for Hindu marriage. This act is not only applicable upon Hindu but as per the definition given under section 2 of the act, the act is also applicable to the Buddhist, Sikhs and Jains by religion and also upon the persons who are not Muslim, Christian, Parsi and Jew. The parliament has expanded the scope of Hindu Marriage Act. The act provides the conditions which are essential for the valid Hindu Marriage. The act provides that the two Hindus can perform a valid Hindu marriage if they do not have a living spouse at the time of marriage<sup>2</sup>. It means the act provides monogamy as the first condition for a valid Hindu marriage. After the enactment of Hindu marriage act, the bigamous marriage is void<sup>3</sup> and punishable<sup>4</sup>. The act further provides that the parties to the marriage should be of sound mind<sup>5</sup> at the time of marriage. However the marriage in contravention of this condition is voidable<sup>6</sup> and not void. The parties must have completed the age of 21 years and 18 years as bridegroom and bride respectively at the time of marriage<sup>7</sup>. The marriage in contravention of this condition is absolutely valid but punishable.<sup>8</sup> In continuation the act provides the parties must not stand in the prohibitory and sapindas relation to each other<sup>9</sup>. The marriage in contravention of this provision is void as well as punishable.<sup>10</sup>

All these conditions are necessary for the valid marriage. The parties whose marriage is valid have the right to apply for the decree of divorce only. The marriage which is voidable can be declared as void and the decree of divorce can never be dissolved. Apart from the essential conditions for the valid Hindu Marriage, the act also provides that the ceremony of saptpadi must also be performed, if it is necessary according to the customs of both of the parties. The performance of ceremony of saptpadi is not necessary for the marriage in the communities in which it is not essential according to their customs such as among Sikh the ceremony of Anandkaraj is the essential ceremony.

## 2. Provision relating to divorce among Hindus

Although the ceremony may differ among different community of Hindus governed by Hindu Marriage act, 1955 but the conditions necessary for the valid marriage are essential for all the people governed by this act. The act provides specific provisions for divorce. The provisions relating to divorce for Hindus are provided under section 13 of the act. Section 13 contains various grounds of divorce which can be divided under two parts. The grounds available to both the spouses to the marriage and the grounds available to wife only.

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<sup>2</sup> Section 5 (i) Hindu Marriage Act, 1955

<sup>3</sup> Section 11 Hindu Marriage Act, 1955

<sup>4</sup> Section 17 Hindu Marriage Act, 1955

<sup>5</sup> Section 5 (ii) Hindu Marriage Act, 1955

<sup>6</sup> Section 12 (i) (c) Hindu Marriage Act, 1955

<sup>7</sup> Section 5 (iii) Hindu Marriage Act, 1955

<sup>8</sup> Section 18 Hindu Marriage Act, 1955

<sup>9</sup> Section 5 (iv) & (v) Hindu Marriage Act, 1955

<sup>10</sup> Section 11 and Section 18 of Hindu Marriage Act, 1955

### \* Grounds available to both spouses

Hindu marriage Act, 1955 provides the common grounds of divorce available to both the spouse under section 13 (1), section 13 (1-A) and section 13(B) of the act. The grounds mentioned under section 13 (1), (1-A) and section 13(B) are as under.

#### Adultery

Section 13<sup>11</sup> provides that if either the husband or the wife has committed sexual intercourse voluntarily with third party, shall be guilty of adultery. The victim spouse can apply to the court for dissolving the marriage by granting the decree of divorce.

#### Cruelty

This ground was not incorporated in the act at the time of enactment. It was incorporated in the year 1976. Section 13 (1) (ia) provides that if any spouse treats the other spouse with cruelty, the victim spouse can obtain the decree of divorce by filling the petition before the Competent/District Court.

#### Desertion

This ground was also inserted in the Hindu Marriage Act in the year 1976 in clause (1) (ib) of Section 13. According to the provision of this section if either the husband or the wife has deserted the spouse without any reasonable cause, the deserted spouse can apply for divorce. The period necessary for getting the decree of divorce under this section is 2 years. This section does not provide for kinds of desertion however there are two kinds of desertion, i.e. actual and constructive desertion.

#### Conversion

Apostasy is also a ground of divorce available to all the Hindus. Section 13 (1) (ii) provides that if either party to the marriage has ceased to be by converting to any other religion, the victim spouse will be entitled to get the marriage dissolved. The reason is that the Hindu Marriage act is applicable to Hindus only and if any spouse converts and the other spouse is not willing to convert in other religion to which Hindu Marriage Act is not applicable the spouse has the right to put an end to the relation of marriage.

#### Unsoundness of Mind

To be of sound mind is a condition for a valid marriage and if any party to the marriage is of unsound mind at the time of marriage, the marriage is voidable. But if the husband or wife has become of unsound mind after the marriage has been solemnized, the marriage is not voidable. The marriage is valid and the other spouse can apply before the court for dissolving the marriage.<sup>12</sup>

#### Leprosy

Section 13 (1) (iv) provides that if either spouse is suffering from virulent and incurable form of leprosy, the other spouse has right to divorce. This right can only be exercised only when the disease of leprosy is incurable one or the respondent is not taking proper treatment for the same.

#### Venereal disease

<sup>11</sup> Section 13 (1) (a) Hindu Marriage Act, 1955

<sup>12</sup> Section 13 (1) (iii) Hindu Marriage Act, 1955

Venereal disease is also an important ground of divorce. Venereal disease is such which can be communicated/transmitted through sexual relation/intercourse of the parties. The institution of marriage legalizes the sexual relations between spouses and such diseases which affects such institution, the purpose of marriage is destroyed, so becomes a ground of divorce Therefore if any spouse has venereal disease in communicable form, the other spouse can get the decree of divorce.<sup>13</sup>

#### Renunciation of world

Section 13 (1) (vi) provides that if either of the spouse has renounced the world by becoming a sanyasi and refused to fulfill his or her obligation towards the family, the victim spouse can get the marriage dissolved.

#### Presumption of Life

If either of the spouse is not fulfilling his or her duties as well as his or her existence is not known by their family members or other relatives or friends for seven years or more, the court shall presume him as dead and grant the decree of divorce so that the other spouse can move in his/her life.<sup>14</sup>

The grounds discussed here are based on fault theory. for availing any of these grounds the other party has to make a fault with respect to the elation of the marriage. Apart from the fault grounds, one more ground is also available to both the parties to the marriage known as divorce by mutual consent based on consent theory.

#### Divorce by Mutual Consent

This is very important ground available to both of the parties. This ground of divorce provides the right to both of the spouses to come before the court and put an end on their marital relation if they are not willing to live each other. This ground was not available in the act when the act was implemented. This ground was inserted in the year 1976 under section 13 (B) keeping into consideration, the circumstances where the parties to the marriage are not happy in their relation it will be good set them free. However the section also provides a condition that the decree of divorce can't be granted before the expiration of the period of 6 months.

#### Grounds available to wife only

Apart from the grounds available to both the parties to the marriage, section 13 (2) provides four more grounds which are available to the wife only. These grounds are provided to woman only after taking into consideration the conditions of woman in pre-independent India.

#### Husband has more than one wife

Section 13 (2) (i) provides the right to such woman whose husband has more wife excluding her and her marriage was solemnized before the commencement of the act ad after it commencement she wants her marriage to be dissolved.

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<sup>13</sup> Section 13 (1) (v)

<sup>14</sup> Section 13 (1) (vii) Hindu Marriage Act, 1955

### **Husband is guilty of offences**

Section 13 (2) (ii) provides that if the husband is guilty of the offences of rape and other unnatural offence under criminal law and convicted by the court, the wife can file the petition for the decree of divorce. The purpose behind the provision is that she should not be compelled to live with the criminal.

### **Compensation has not been paid by Husband<sup>15</sup>**

Every woman has right to maintenance from her husband irrespective of the fact that she has been divorced or she is living with her husband. If any order for paying maintenance has been passed in favour of the wife in the proceedings under section 125 of Cr.P.C. or under section 18 of Hindu Adoption and Maintenance Act and the amount of maintenance has not been paid by the husband for two years or more, the wife can apply for the decree of divorce alleging that the husband is not capable of maintaining her.

### **Marriage solemnized in minority**

Section 13 (2) (iv) provides that if the marriage was solemnized before the wife has attained the age of fifteen years she has right to take divorce subject to the condition that she must apply for the decree before attaining the age of eighteen years.

These four grounds are available to the wife only however initially there were two grounds and two grounds were added in the year 1976.

### **3. Provision relating to marriage of Muslims**

The laws or provisions relating to marriage of Muslims are not similar to those of Hindus. Unlike Hindus, the Muslims are not bound by the rule of monogamy.

The Muslims are also not bound by any ceremony and conditions. According to the Muslims personal law, the Muslim man has right to solemnize four marriages at one time but Muslim woman has right to marry only one. No age is prescribed for the marriage among Muslims however it is provided that they have right to marry at the age of puberty. For deciding the age of puberty, the concept of age is divided under three parts i.e. shagir, shahriri and kahyal ul bulug. The age of shagir is the age when the marriage of Muslim male and female is void and their guardians can't give them in marriage. The age of shahriri is the age in which the male or female though have no right to give consent for the marriage but their guardians have right to give them in marriage. The age of bulugh is the age of puberty after attaining of which the male and female can legally married. The marriage among Muslims is a contract. Like contract, the proposal and acceptance is necessary by the parties and consideration in the form of Mahr is also payable to wife by the husband. The Muslims man has right to marry a non-muslim woman but a muslim woman does not have such right. The list of sapinds is not long and limited only to the member related through full blood only however some bars have been imposed in which the marriage is void such as the marriage of a Muslim male to two real sisters is void and the marriage at the time of pilgrimage is also void.

<sup>15</sup> Section 13 (2) (iii) Hindu Marriage Act, 1955

#### 4. Provision relating to marriage of Muslims

There are no specific provisions regulating the matters of divorce among Muslims. They are governed by their own personal laws in the matters of divorce also. There are two categories of divorce among Muslims i.e. Judicial and Extra Judicial.

##### **The category of extra Judicial divorce is sub divided in to three parts**

(i) Divorce by Husband, (ii) Divorce by the wife, (iii) Divorce by mutual consent

**In the category of judicial divorce, the right is available to wife only.**

#### 4.1. Extra judicial divorce

##### **(i) Divorce by Husband:**

The Muslims husband can divorce his wife in three modes i.e. Talaq, Ila and Zihar. Talaq is the express form of divorce whereas Ila and Zihar are the implied modes of divorce.

**Talaq:** Divorce is expressed by the husband by express words, it is called Talaq. Talaq is further divided in to two forms. These are talaq ul sunnat and talaq ul biddat.

##### **Talaq ul sunnat:**

Talaq ul sunnat has two forms i.e. Talaq-ahasan and Talaq-i-hasan

##### **Talaq-i-ahasan:**

This is the most approved form of talaq. Talaq-i-ahasan is a form in which the husband pronounces talaq in a single pronouncement in her state of purity which may also be called tuhr followed by the abstinence from sexual intercourse during the period of iddat. As soon as the iddat period completes talaq also becomes irrevocable. This form of talaq is the best and approved form of talaq because the talaq can be revoked at any time before the completion of iddat period. This form of talaq does not put an end on the marriage relation immediately.

##### **Talaq-i-hasan**

In talaq –i-hasan the husband makes three pronouncements of talaq during three successive tuhrs. If the wife is not subject to menstruation or has crossed such age, the husband can pronounce talaq after the interval of one month or thirty days as he wishes. One important requirement is that there must not be sexual intercourse between the husband and wife during this period. The talaq becomes irrevocable after the third pronouncement followed by abstinence from sexual intercourse. This form of talaq is the less approved form of talaq. But the chances of revocation of marriage are available because the parties may resume their marriage by cohabiting with each other.

##### **Talaq-ul-biddat**

Talaq-ul-biddat is also called talaq-i-bain. In this form of talaq the husband pronounces talaq irrevocably either in a single sentence or in three sentences. This form of talaq is irrevocable talaq because the parties have no opportunity to reverse the consequences of their mistake. This form of talaq is the deemed an unapproved form of talaq because this form of talaq revokes the marriage irrespective that the husband pronounced talaq in the slip of tongue or at the time of sleep or anger.

**Ila**

This is an indirect or implied form of talaq. In this form the husband does not pronounce talaq but takes the oath that he will not have sexual intercourse with his wife. If the husband does not involve sexually for four months after taking of such oath, the marriage is dissolved irrevocably and wife is bound to undergo iddat period. But if the husband resumes cohabitation between the periods of four months, the marriage is also resumed. Ila is form of divorce which does not become final without the court order.

**Zihar**

Zihar is also an indirect form of talaq. In this form the husband compares his wife with the woman in prohibited relations such as his mother or sister. The husband says to his wife that you are like my mother or sister and I will not cohabit with you. After making of such comparison if the husband does not cohabit with his wife for four months the marriage becomes dissolved.

**(ii) Divorce by Wife:**

The Muslim wife has also right to divorce her husband. The modes of talaq available to the wife are talaq-i-tafweez and Lian.

**Talaq-i-tafweez**

Talaq-i-tafweez is also called delegated talaq. Among Muslims only the husband has the right to pronounce divorce but he may delegate his right to his wife to pronounce divorce either conditionally or absolutely. In such form of talaq the wife is free to pronounce talaq upon her in the happening of the mentioned condition.

**Lian:**

Lian means the false allegations. If the husband levies false charges against his wife upon her character alleging that she has committed adultery, the wife would be entitled to get divorce from her husband. The court can grant the decree of divorce to the wife if she proves that the allegations made by the husband upon her character hurt her feelings and it would not be possible for her to live with the husband.

**(iii) Divorce by Mutual consent**

The husband and the wife has right to dissolve the marriage by mutual consent. There are two forms of divorce by mutual consent these are Khula and Mubarat. In both of these forms the consent of both spouses is necessary. In khula the wife asks her husband for pronouncing talaq on her and if the husband consents for such proposal for his wife and pronounces talaq, the marriage dissolved irrevocably. In the Khula form of divorce, the wife has to leave her right to dower as a consideration. Khula is the proposal from the side of wife and acceptance by her husband. Opposite from it divorce by Mubarata is also divorce by mutual consent but in the form of Mubarata the marriage is dissolved by the mutual consent of both of the parties. Mubarat is the divorce by mutual consent therefore the decree of the court is necessary for complete dissolution of the marriage and both the parties are required to file the petition together. In Mubarat also the wife may be required to leave her right of dower.

## 4.2. Judicial Divorce

The provisions relating to divorce have been incorporated in the dissolution of Muslim marriage act 1939 however only the wife has the right to get the marriage dissolved by applying before the court for the decree of divorce. Section 2 of Dissolution of Muslim Marriage Act, 1939 provides various grounds of divorce available to the woman only. The wife can apply for the decree of divorce on the grounds that:

- (i) The husband is not heard of by the wife and relatives of her husband.
- (ii) The husband has not paid the maintenance to his wife for the period of two years.
- (iii) The husband has been convicted and sentenced for seven years or more in a criminal trial and his sentence has become final.
- (iv) Husband has not fulfilled his marital obligations for a continuous period of three years
- (v) The husband was impotent and not able to consummate
- (vi) The husband is insane or suffering from leprosy or venereal disease
- (vii) The wife has repudiated the marriage on the ground that she has been given in marriage by her guardians when she has not attained the age of fifteen years and she has repudiated the marriage before attaining the age of eighteen years. But this right is subject to the condition that the marriage has not been consummated.
- (viii) The husband has treated her with cruelty and compels her to lead immoral life.

## 5. Comparison between the laws of Hindus and Muslims

The personal laws of Hindus and Muslims are totally different. The Hindu law relating to marriage speaks for equality between the man and woman. The ceremonies necessary to be fulfilled and conditions for a valid marriage are applicable to both the husband and wife equally. The husband as well wife both are bound by the monogamous rule and similar grounds of divorce are available to both of the spouses. But the Muslim personal law is against the fundamental right of equality. The Muslim husband has right to solemnize four marriages at one time. If wants to marry the fifth wife he has unlimited right to pronounce talaq upon any one of his existence wife and marry a new one. There is no codified law relating to divorce among Muslims. The husband has right to pronounce talaq upon his wife on minor issues or in anger. The Muslim wife does not have right of maintenance from her husband after talaq and in the case of not married again. If after pronouncing talaq the husband wants to marry his wife again the marriage shall be void because first the divorced wife has to marry another person and has to consummate the marriage and then she can legally married her previous husband. However in India secularism is the basic feature but the personal laws implemented on the name of secularism are against the right to equality which is also a fundamental right under Indian Constitution.



## Conclusion & suggestion

India is a country of unity in diversity. The diversity can be seen not only in the matters of food, clothing, climate, grains, geography etc. but in the matters of law also. After independence when the constitution was drafted, secularism was incorporated in the constitution as a fundamental right as well as basic feature. But this right is against another fundamental right as well as basic feature of equality provided by the constitution. The difference between the personal laws was the cause of injustice between the woman of Hindu and Muslim woman. The idea of bringing uniform civil code was enshrined under article 44 of the constitution which could not be act upon till date. But parliament has made great efforts in this context by repealing the act of 1986 “Muslim woman (protection of rights on divorce) 1986 in the year 2019 which has made the pronouncing triple talaq or the form of talaq-i-biddat as punishable. Appreciating efforts have been made by the parliament for giving respect to the Muslim wife by repealing the old act and enacted the new. Although the act has made punishable the talaq-i-biddat but other forms of talaq are still valid among Muslims. Moreover the concept of halala is still necessary to be observed for Muslim woman. Complete equality is still needed to be established and therefore parliament should focus on these issues. It is therefore suggested that the principle of uniform civil code should be implemented effectively and right to equality should be insured to all so that the whole of India can move for progress together.

