

# Adultery as a Ground for Divorce under the Hindu Marriage Act

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ADULTERY MEANS voluntary sexual intercourse outside lawful wedlock. Under the Hindu Marriage Act, 1955 which came into force on May 18, 1955, adultery has been incorporated as a ground for judicial separation and divorce. In case of divorce a decree can be obtained only if the respondent 'is living in adultery'. The purpose of this paper is to examine critically the provisions for divorce on the ground of 'living in adultery' as embodied in section 13(1)(i) of the Hindu Marriage Act, and compare it with similar laws obtaining in India amongst Christians, Muslims, Parsees and Jews. Suggestions have been made for introducing reforms keeping in view the ultimate aim of ushering in a uniform civil code as envisaged in article 44 of the Constitution applicable to all the aforesaid communities.

Marriage generally in all civilized countries is a union for life. Divorce is allowed only when the union becomes a source of misery and generally it is allowed through the court. Divorce was as such unknown in Hindu law. It could not find a place in a system where the law declared "neither by sale nor by repudiation is a wife released from her husband".<sup>1</sup> Marriage tie was deemed to be indissoluble among the Hindus, although a wife could be forsaken for conjugal infidelity, there could be no divorce. Manu declared, "Let mutual fidelity continue until death, this may be considered as summary of the highest law for husband and wife. Let man and woman, united in marriage, constantly exert themselves that they may not be disunited and may not violate their mutual fidelity."<sup>2</sup> There was, thus, an obligation on the part of the wife to keep unsullied the bed of her husband and a like obligation on the part of the husband to be faithful to his wife. The abandonment of an infidel wife was tantamount to cessation of all conjugal association with the husband. It was "tyaga" or desertion. It was not banishment from the house but only suspension of conjugal rights and

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1. *Manu*, IX, 46.

2. *Manu*, IX, 101-102.

religious duties. The marriage tie subsisted even after such "tyaga". The wife could not become the legitimate wife of another man. While a husband could thus discard or turn out a wife on the ground of adultery, the wife had no power whatsoever to discard the husband.<sup>3</sup> Yajnavalkya maintains that when the husband is guilty of "mahapataka" the wife must wait till he performed penance or expiation.<sup>4</sup> Severe punishment was provided for a wife who violated her marital duties.<sup>5</sup> The texts generally support the view that howsoever wicked the husband might have been the wife could not discard him.

Generally speaking, in all systems men have laid down a much higher standard of sexual morality for women than they were themselves prepared to accept, and Hindu society was no exception to this. Men who were guilty of adultery were treated with relative leniency. There is no doubt that some authorities laid down that a husband guilty of adultery committed a sin for which there was no adequate penance.<sup>6</sup> Apastamba declared that such husband should be compelled to wear donkey's skin and made to beg alms for six months. But it is doubtful whether in actual practice it was resorted to. Later *smiritis* watered down these harsh rules by providing that even if a husband transgressed his marriage vows, the wife had to revere him as God.<sup>7</sup> Whatever be the position, at least in Hindu law there could be no divorce among the three higher castes on ground of adultery or on any other ground. Among lower castes numerous customs allowed divorce in different places in India on mutual consent of the parties. In actual practice, however, lower castes (which are most numerous) are familiar with more or less easy divorce, usually without any fixed grounds, often without the intervention of third parties, or caste elders, or panchayat as these experienced mediators are often called. The customary law allowed and even now allows divorce on grounds of unchastity and on similar grounds which fall short of 'living in adultery'.<sup>8</sup>

## II

The Hindu Marriage Act, 1955 allows divorce on the ground that a party is 'living in adultery'. Single or isolated acts of adultery will entitle the other party to seek only judicial separation under section 10 of the Act.

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3. Latter *smiritis* like *Narada*, *Parashara* and *Brihaspati* allowed a wife to remarry after her husband's death or even if he was impotent or had neglected her for too long or became a *patita*.

4. *Mitakshara*, Ch. IV, 77.

5. *Manu*, VIII, 371; *Vishnu* V, 18.

6. *Mahabharata*, XIII, 58, 13.

7. *Markandeypurana*, the story of Anasuya.

8. See J.D.M. Derrett. *A Critique of Modern Hindu Law*, 288 (1st ed. 1970).

When intercourse takes place by force or fraud, it cannot amount to adultery. Mere caresses or other acts of intimacy with another's wife do not amount to adultery unless there is sexual union though it is not necessary that the sexual act should have been completed.<sup>9</sup> The conduct of the parties may, of course, raise a presumption of adultery but which cannot be drawn when it is shown that the man was impotent. Sexual intercourse with a person other than his or her spouse would constitute adultery and hence if a married man marries again and starts living with the second wife then the man, apart from being guilty of bigamy, is also living in adultery.

Similarly when the first marriage is void and the man marries second time and continues his relations with the so-called first wife then he is 'living in adultery' within the meaning of section 13(1)(i) and the second wife can obtain a decree of divorce. The words 'living in adultery' used in this section have been interpreted to mean, a more or less continuous course of adulterous conduct of a spouse right upto the time of filing of the petition for divorce. Single act of adultery may entitle the party to petition for judicial separation. It may practically be very difficult to prove all that is required by this section, *i.e.*, to prove the adulterous course of conduct of the respondent upto the time of the filing of the petition. In case the respondent had ceased to lead such an immoral life before the filing of the petition, no relief under this clause can be obtained.

In *Rajani v. Prabhakar*<sup>10</sup> it was pointed out by the High Court of Bombay that 'it would not be in consonance with the intention of the legislature to put too narrow and too circumscribed a construction upon the words 'is living' in section 13(1)(i). For attracting the operation of these words, it would not be enough if the spouse was living in adultery, some time in the past, but has seceded from such life for appreciable durations extending to the filing of the petition. But it is clear, that for invoking the application of section 13(1)(i) it must be shown that the period during which the spouse was living an adulterous life was so related from the point of proximity of time to the filing of the petition that it could be reasonably inferred that the petitioner had a fair ground to believe, that when the petition was filed, she was living in adultery.<sup>11</sup> These words 'living in adultery' do not presuppose adherence to one adulteror and hence it was held in *Nokhi v. Tehru*<sup>12</sup> that a woman who was incurably promiscuous was 'living in adultery. The same can be said about a man who does not confine to one mistress but goes to different brothels.

9. *Dennis v. Dennis*, (1955) 2 All E.R. 51.

10. A.I.R. 1958 Bom. 264.

11. *Id.* at 267.

12. A.I.R. 1957 Him. Pra. 63.

Adultery as a general rule is proved by presumptive proof based upon ; (i) circumstantial evidence; (ii) evidence of non-access and birth of children ; (iii) contracting of venereal diseases; (iv) by evidence of visits to houses of ill repute; (v) decrees and admissions of the parties which should generally be corroborated though in exceptional circumstances, even if uncorroborated they may be acted upon.<sup>13</sup> The true test where a confession or admission of adultery made by the other spouse is relied upon would seem to be that the court should be satisfied from all the surrounding circumstances that the averments are true and there is no collusion. If so satisfied it is open to the court to grant relief, notwithstanding the absence of independent corroborative testimony.<sup>14</sup> If a party starts living in adultery with another person other than his or her spouse, after judicial separation it forms a ground for divorce.

Section 23 of the Act requires that before granting relief the court must be satisfied that the ground for relief is established, the petitioner is not in any way taking advantage of his or her own wrong, and has not in any manner been accessory to or connived at or condoned the acts of the respondent. There should not be any collusion or improper delay. The present section itself lays down a standard and puts adultery, cruelty and other matrimonial offences on the same footing. What is required is that there should be strict inquiry into the matter. The word 'strict' is sufficiently apt to describe the measure and standard of proof and it is submitted, that on a true construction, the expression 'satisfied' used in this section does not connote anything less than proof beyond reasonable doubt or as it is sometimes said strict proof.<sup>15</sup>

In *White v. White*<sup>16</sup> the Supreme Court considered the meaning of words 'satisfied on evidence' occurring in section 14 of the Indian Divorce Act, 1869 and the court was in agreement with the decision of House of Lords in *Preston Jones v. Preston Jones*<sup>17</sup> as laying the correct test, that the court must be satisfied beyond reasonable doubt about the commission of the matrimonial offence and that the evidence must be clear and satisfactory beyond mere balance of probabilities. Under section 23 of the Hindu Marriage Act, the court has ample discretion and it should not, in public interest, set aside the marriage bond lightly. Thus, sexual intercourse was sought to be proved by two letters written by a male relation to a married woman and

13. *Mahalingam Pillai v. Amsavalli*, (1956) 2 M.L.J. 289

14. Mulla, *Hindu Law* 673 (13th ed. 1966).

15. *Id.* at 217.

16. (1958) S.C.R. 1410.

17. (1951) A.C. 391.

the Supreme Court rightly held that such letters do not necessarily prove any illicit relationship between the writer and the married woman<sup>18</sup>. "It is not the Judge's wives' behaviour that is the standard and many a stone-breaker's wife will wink at many a tea-vendor without 'living in adultery' with him or with somebody else."<sup>19</sup>

The policy of the law is to discourage rash and hasty proceedings of divorce "so that the ship of marriage may not be wrecked in the first storm of married life".<sup>20</sup> Section 14 of the Act lays down :

(1) Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of divorce, unless at the date of the presentation of the petition *three years* have elapsed since the date of the marriage.

Provided that the court may...allow a petition to be presented before three years have elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent but if... the petitioner obtained leave...by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree...the decree shall not have effect until after the expiry of three years from the date of marriage or may dismissed the petition...

(2) the court shall have regard to the interest of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said three years."

As to what constitutes exceptional hardship or depravity will depend on the merits of each case. In addition to the grounds of divorce mentioned in section 13 if there are other aggravating circumstances such as cruelty or where there are more than one ground for divorce, as for example, when the husband has converted to another religion and also is living in adultery with a woman of ill repute, there will be a fit case of exceptional hardship and the wife can obtain divorce.<sup>21</sup> When the conduct of the respondent is so abhorrent

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18. *Smt. Chandra Mohini Srivastava v. Avinash Prasad Srivastava*, A.I.R. 1967 S.C. 581.

19. *Supra* note 8 at 355.

20. *Sawita Devi v. Pran Nath*, A.I.R. 1967 J. & K. 89.

20a. See s. 14 of the Hindu Marriage Act.

21. See Raghavachariar, *Hindu Law*, 1060-61 (6th ed. 1970).

that it will be impossible for the petitioner to tolerate it, a case of exceptional depravity is made out. For example, if the husband is having sexual relations with the servants of the house or commits unnatural offence with another person in the presence of the wife it will be a case of exceptional depravity of the husband.

The following general principles may be laid down for guidance in considering what would be treated as exceptional hardship or depravity :

- (i) Adultery with one person is not exceptional depravity ;
- (ii) Adultery aggravated by desertion in favour of another woman or cruelty to the wife would constitute exceptional hardship to the wife ;
- (iii) Wife having a child by adultery ;
- (iv) Husband's adultery promiscuously with other woman ;
- (v) Husband committing adultery soon after marriage ;
- (vi) Adultery with the wife's sister or servant of the house.<sup>22</sup>

### III

The provisions as contained in section 13(1)(i) of the Hindu Marriage Act, may be compared with similar provisions obtaining amongst other religious communities in India.

In Muslim law offence of adultery is severely dealt with. A false charge of adultery by the husband against his wife entitles the latter to sue for divorce. This form of divorce is known as *lian* and if the husband persists on the charge, a decree of divorce is possible under the Dissolution of Muslim Marriage Act, 1939. Similarly, if the husband associates with women of evil repute and leads an infamous life the wife is entitled to a decree of divorce. It seems that isolated acts of unfaithfulness or immorality would not be a sufficient cause under the Dissolution of Muslim Marriage Act. A Muslim husband has a right to put an end to the marriage by pronouncing *talak* at any time and in case the wife is guilty of adultery the husband may put an end to the marriage if he feels so.

The law of divorce for Christians is contained in the Indian Divorce Act, 1869. Divorce among Christians is not favoured by their religion and the Roman Catholics are in fact prohibited by their religion to have divorce. A

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22. *Id.* at 1063,

clergyman in the Holy Orders of the Church of England may refuse to solemnize the marriage of a person whose marriage is dissolved on the ground of his or her adultery. There is no legal prohibition against divorce among Christians.

Under the Act a husband may present a petition to the district court or the high court for obtaining a decree of divorce on the ground that the wife has been guilty of adultery after the marriage.

Pre-marriage unchastity of the wife is immaterial as a woman who was unchaste in her past life may become a good wife after her marriage. Adultery implies voluntary sexual intercourse and hence if rape was committed upon the wife, she is not guilty of adultery. Similarly, if the wife was of unsound mind and had sexual intercourse with another man, then she being incapable of knowing that this act of her was wrong, cannot be said to have committed an act of adultery.<sup>23</sup> To constitute adultery there must be some penetration at least even though complete sexual intercourse is not necessary.<sup>24</sup> Thus, mere masturbation of the co-respondent by the respondent wife does not come within the ambit of adultery.<sup>25</sup>

Adultery even if committed outside India constitutes a valid ground for seeking divorce under the Act.<sup>26</sup> Unlike section 13(1)(i) of the Hindu Marriage Act a single act of adultery is sufficient ground for seeking divorce under the Indian Divorce Act, 1869, provided it has not been connived at or condoned. But the court must be vigilant where a single act of adultery is alleged. Adultery is usually proved by circumstantial evidence and no higher proof of the fact is demanded than that it is established beyond reasonable doubt. The evidence must be clear and satisfactory beyond mere balance of probabilities. Thus, contracting of a venereal disease and when there had been no access of the parties to each other, raises a very strong presumption of adultery. If a child is born of the wife when there had been no access of the parties to the marriage to each other, adultery is established. But adultery cannot be presumed from the fact of long period of gestation after the husband had last access to his wife. In *Clark v. Clark*<sup>27</sup> it was held that a period of gestation of hundred and seventy-four days was possible and does not prove adultery of the wife.

While a husband can obtain a decree of divorce on the ground of adultery of the wife, the wife cannot get a decree of divorce only on the ground

23. *S.v.S.*, 1962 L.R. 133, cited by Manchanda, in *The Law and Practice of Divorce*, 52 (1973).

24. *Sapsford v. Sapsford*, (1954) 2 All E.R. 373.

25. *Ibid.*

26. *Clifford v. Clifford*, (41) 45 C.W.N. 249-250 (D.B.).

27. (1939) 2 All E.R. 59,

of the adultery of the husband. She must prove adultery of the husband in addition to the other circumstances mentioned in section 10 of the Act. She can obtain a decree of divorce on one of the following grounds, namely, that her husband :

(i) has renounced the Christian religion and has gone through a form of marriage with another woman :

It will have to be established that the husband has adopted another religion and has remarried. If the husband after his change of religion lives in adultery, with another woman, this clause is not attracted. Similarly, if the husband remarries without change of religion, the second marriage will be void and he will be only living in adultery and no decree of divorce on this ground alone will be granted to the wife;

(ii) has been guilty of incestuous adultery :

If the husband commits adultery with a woman within prohibited degrees of consanguinity (natural or legal) or affinity, the wife is entitled to a decree of divorce. The prohibited degrees of consanguinity are to be determined by the customary law of the party and will include legitimate and illegitimate relations and will also apply to adopted relations;

(iii) has been guilty of bigamy with adultery :

To constitute bigamy it is necessary to show that the husband was not allowed to marry second time during the life time of the first wife by his personal law otherwise it will not constitute bigamy. Thus, in *Sainapatti v. Sainapatti*<sup>28</sup> the question was whether a Hindu, who had married a Christian lady in England according to Christian rites, committed bigamy when he married a Hindu woman in India while his Christian wife was alive? Currie, J., held that the husband had not committed bigamy under the Penal Code and the wife could not claim divorce on the ground of bigamy with adultery.

Under this clause bigamy and adultery must be with the same woman, and the *factum* of bigamy must be independently established in the divorce suit. It is not sufficient to rely on a conviction of bigamy in a criminal case;

(iv) has been guilty of marriage with another woman with adultery:

This clause is closely related to the preceding clause. The reason for the enactment of this clause separately is that a husband may not be guilty of

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28. A.I.R. 1932 Lah. 116. It should be noted that the old Hindu law allowed polygamy.



bigamy in the technical sense but (1) if the husband marries during the life time of his former wife, (2) and the husband has committed adultery the wife is entitled to decree of divorce. It is immaterial where the second marriage took place<sup>29</sup> and whether the husband was allowed to marry a second time by his personal law. Thus, in *Sainapatti v. Sainapatti*<sup>30</sup> it was held that a Christian woman married to a Hindu in England could obtain a decree of divorce under this clause if the husband married a Hindu woman in India and cohabited with her just as she would be entitled to apply if the husband would have been guilty of bigamy with adultery.

In English law a decree of divorce may be obtained by either husband or the wife on the ground that the respondent has since the celebration of the marriage committed adultery.<sup>31</sup> Under the Indian Divorce Act however, the wife will have to show the existence of the circumstances besides adultery of the husband and thus it becomes difficult for a wife in India to seek divorce;

(v) has committed adultery coupled with such cruelty which even without adultery would have entitled her for a divorce *mensa et toro*:

The wife must prove adultery and cruelty on the part of the husband in order to take the benefit of this clause. No exact inclusive and exclusive definition of legal cruelty can be given. According to modern view, the question whether the defendant is guilty of legal cruelty is purely a question of fact depending upon the circumstances of the particular case. Cruelty may, in the legal sense, be defined as conduct of such a character as to have caused danger to life, limb or health (bodily or mental) or to give rise to a reasonable apprehension of such danger.<sup>32</sup> Where the wife proves only adultery of the husband, she may get a decree for judicial separation;

(vi) has been guilty of adultery coupled with desertion, without reasonable excuse, for two years or more:

'Desertion' in essence means the abandonment of one spouse by the other without the latter's consent. There must be an intention to desert the other and desertion begins when the intention to desert takes effect. To constitute

29. S. 3(8) of the Indian Divorce Act, 1869.

30. *Supra* note 28.

31. S. 1 of the Matrimonial Causes Act, 1950. Husband and wife are also treated on equal footing under s. 2(1)(a) of the Divorce Reform Act, 1969.

32. *Russell v. Russell*, (1897) A.C. 395.

desertion, therefore, there must be cessation of cohabitation and an intention on the part of the guilty party to desert the other.<sup>33</sup> If the desertion (without reasonable excuse) continues for at least two years and the husband also commits adultery, then the wife can get her marriage dissolved.

For granting a decree of divorce the court requires clear proof of the facts on which the petition or suit is based. In case of collusion between the parties no relief will be granted by the court and the suit or petition will be dismissed. The court should be satisfied that the petitioner has not in any manner been accessory to, or connived at, the going through of the illegal marriage of the alleged adultery and has not condoned the same.

Provided that the court shall not be bound to pronounce such a decree if it finds that the petitioner has, during the marriage, been guilty of adultery, or if the petitioner has, in the opinion of the court, been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct of or towards the other party as has conduced to the adultery.

Thus, the court will refuse to grant the petitioner any relief if a counter charge of a marital offence has been alleged and proved against him or her by the respondent. Charges of misconduct if proved against the petitioner would entitle the respondent to claim a decree of divorce as if he or she were the petitioner.

Adultery of one spouse may be condoned by the other. Resumption or continuation of conjugal cohabitation after knowledge of such adultery is deemed to be condonation of adultery and cannot be made a ground for dissolution of marriage.

In a petition for dissolution of marriage by the husband on the ground of his wife's adultery, the adulterer should be made, co-respondent unless he is excused from doing so on one of the following grounds, to be allowed by the court :

- (i) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed ;
- (ii) that the name of the adulterer is not known even though the petitioner made due efforts to discover it ;

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33. *Roi v. Ras Singh Naik*, A.I.R. 1935 Mad. 541,

(iii) that the alleged adulterer is dead.<sup>33a</sup>

The Indian Divorce Act follows the idea that divorce is granted to an innocent spouse against the guilty spouse and allows a decree of divorce to a Christian wife on more strict ground than the husband.

In English law under the provisions of the Matrimonial Causes Act, 1950 a petition for divorce could be presented either by the husband or the wife on the ground that the respondent has since the celebration of the marriage, committed adultery.

More comprehensive reforms in the field of divorce have been introduced in England by the Divorce Reform Act, 1969 which came into force on January 1, 1971. Under this Act the sole ground on which a decree of divorce will be granted is that the 'marriage has broken down irretrievably'. Breakdown will be held to exist only when the petitioner 'satisfied' the court of the existence of five facts or conditions one of which is adultery. The petitioner will have to prove adultery of the respondent and also that the petitioner finds it intolerable to live with the respondent.<sup>34</sup> Continuation or resumption of cohabitation after discovery of adultery does not wash away the ground altogether and cohabitation for less than six months can be disregarded but if cohabitation is continued for more than six months after the discovery of adultery then it bars divorce on the basis of that adultery. The court can, it seems, hold that the petitioner did not find life with the respondent intolerable if there are other facts which show that the petitioner left the respondent before the aforesaid periods of six months because of other factors which weighed with him or her such as a temptation to marry another wealthy person. In this new Act the bars in old law such as connivance, collusion, petitioner's misconduct, *etc.*, are abolished. Condonation and delay in presentation of petition may be taken even now to mean that marriage has not irretrievably broken down. Thus, the only important consideration in case of adultery is that if the husband and wife have lived together in the same household for more than six months after discovery of the fact then no divorce can be claimed.

Under the Matrimonial Causes Act, 1965 the only provision directly concerned with reconciliation was contained in section 2 which required the court to consider the possibility of reconciliation when an application was made to present a petition for divorce within three years of marriage. Under the new Act of 1969 a solicitor must give a certificate whether he has or not discussed reconciliation with the petitioner and given him details of persons

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33a. See s. 11 of the Indian Divorce Act, 1869.

34. S. 2(i) (a) of the Divorce Reform Act, 1969.

qualified to help in this,<sup>35</sup> and if he has not done so, the court may adjourn proceedings for reconciliation and which the court may also do if there is reasonable prospect of reconciliation.<sup>36</sup> Reconciliation is encouraged in the Act by providing the rule regarding 'cohabitation upto six months' as discussed above.

In the Indian Divorce Act, there is no provision for such reconciliation between the parties. In Indian law collusion, or condonation or connivance of adultery shall bar the remedy,

Under Parsi Marriage and Divorce Act, 1936 a decree of divorce is obtainable if the defendant has since the date of marriage committed adultery<sup>37</sup> or bigamy or rape or unnatural offence. The plaintiff must file the suit within two years of his or her knowledge of the facts outlined above. This new Act of 1936 places the husband and wife on equal footing as the grounds of divorce discussed above are available to both the spouses though under the Act of 1865 a wife had to prove some aggravating circumstance in addition to adultery of the husband in order to claim divorce and the husband could claim divorce only on the basis of wife's adultery. In this respect the Parsi Marriage and Divorce Act, 1936 has surpassed the Indian Divorce Act, 1869. Further, while granting divorce it is the duty of the court to satisfy itself that there exists a ground for divorce and that there is no reason to withhold such a relief. It should also satisfy itself that there is no collusion, condonation or connivance; that there has been no unnecessary or improper delay in instituting the suit; and that there is no other legal ground why the relief should not be granted.

There is no statutory law of marriage and divorce applicable to Jews in India. It is the customary law that is applied. It was held by the Bombay High Court that on an application by a Jew husband on the ground of adultery of his wife the court has power to make a decree absolute at once.<sup>38</sup>

Under the provisions of the Special Marriage Act, a petition can be filed for divorce on the ground that the respondent has committed adultery after marriage with the petitioner.<sup>39</sup> Under the Special Marriage Act no petition for divorce can be presented within three years of marriage unless the case is one of exceptional hardship suffered by the

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35. *Id.* s. 3.

36. *Id.* s. 3(2).

37. See s. 32 (d) of the Act.

38. *Engel v. Engel*, A.I.R. 1944 Bom. 15.

39. See s. 27(1)(a) of the Special Marriage Act.

petitioner or of exceptional depravity on the part of the respondent and for this purpose an application for leave to present a petition for divorce before the expiry of three years shall have to be made to the district court and if the application is allowed the aforesaid petition can be presented. In disposing of any application for leave to present a petition for divorce as aforesaid, the court should have regard to the interest of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the prescribed three years.<sup>40</sup>

The court shall not pass a decree of divorce unless it is satisfied that when the ground of the petition is adultery, the petitioner has not in any manner been accessory to or connived at or condoned the adultery and there has not been unnecessary delay. Before granting any relief including divorce under this Act, it shall be the duty of the court in every case where it is possible to do so consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties.<sup>41</sup>

A comparison between the Special Marriage Act and Hindu Marriage Act, shows that a single act of adultery is sufficient for divorce under the former while under the latter the respondent must be 'living in adultery' which means that there should be a continuous process of guilty conduct. Husband and wife are treated on equal footing under both the Acts and the same is the case in the Parsi Marriage and Divorce Act, 1936. The Indian Divorce Act, 1869 does not treat husband and wife on equal footing. The husband can obtain a decree of divorce on the ground of adultery of the wife but the wife has to prove something more in case she wants to obtain such a decree on the ground of adultery on the part of the husband. Under Muslim law also the husband and wife are not treated on equal footing. The husband has the unilateral power of pronouncing *talak* whenever he likes.

#### IV

As observed earlier the words 'is living in adultery' create difficulties as it may be very difficult to prove a continuous course of adulterous conduct till the date of the presentation of a petition for divorce. Adultery is proved through circumstantial evidence and may be presumed from proof of

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40. *Id.* s. 29.

41. *Id.* at 34(2).

association and opportunity.<sup>42</sup> Birth of a child when the husband was away, contracting of venereal disease when the petitioner is free from it are evidences of adultery. The evidences must be clear and convincing as to lead to the irresistible conclusion that adultery has been committed. In matrimonial cases proof beyond all doubts is not necessary. In England a view was at one time taken that the petitioner in a matrimonial case must establish his or her case beyond reasonable doubt<sup>43</sup> but this view was later on abandoned and the House of Lords held by a majority that so far as the grounds of divorce or the bars to divorce like connivance or condonation are concerned, "the case, like any civil case, may be proved by a preponderance of probability".<sup>43a</sup> It is wrong, therefore, to apply an analogy of criminal law and to say that adultery must be proved with the same strictness as is required in a criminal case.

As far as the standard of proof is concerned, adultery like any other ground for divorce, may be proved by a preponderance of probability; but it has been said that in proportion, as the offence is grave, so ought the proof to be clear. In *Dastane v. Dastane*<sup>43b</sup> the Supreme Court held that the word "satisfied" occurring in section 23 of the Act must mean satisfied on a preponderance of probabilities and not satisfied beyond a reasonable doubt. The rider put in by section 13 (1)(i) of the Hindu Marriage Act, on adultery by the words 'is living' makes it very difficult for the innocent spouse to get a decree of divorce, and this condition has proved to be too severe for numerous injured spouses.<sup>44</sup> One may argue that the innocent party may get a decree of judicial separation and may get a decree of divorce under 'two-year rule' as embodied in section 13(1A).

This will mean that the guilty party is given a long rope and he or she will continue to be legally married till ultimately the marriage is dissolved. "There is a public interest that in any matrimonial dispute justice should be seen to be done :

that a clearly guilty party should not be permitted to profit from a situation which he and he alone has been instrumental in creating... It is very well to speak in sweeping terms of the irrelevance of guilt or innocence, and to say that the parties to an unhappy marriage are

42. *Patrick Donald Stracey v. Eileen*, A.I.R. 1957 Assam 66; *Raspin v. Raspin* (1953) 2 All E.R. 349.

43. *Fairman v. Fairman*, (1949) 1 All E.R. 938; *Ginesi v. Ginesi*, (1947) 2 All E.R. 438.

43a. *Blyth v. Blyth* (1966), 1 All E.R. 524. -

43b. A.I.R. 1975 S.C. 1534.

44. *Valliammal v. Singaram*, (1966) 2 M.L.J. 425; *Bhagwan Singh v. Amar*, A.I.R. 1962 Punj. 144; *Varadarjulu v. Baby Ammol*, A.I.R. 1965 Mad. 29.

'victims in an overwhelming situation', but, like many academic generalities, it conceals more than it reveals".<sup>45</sup>

Recourse to such indirect tactics, as pointed above, through the help of two-year rule, may produce more harm than do good in some cases. Such a course will consume more time and may prove to be cruel to the innocent spouse. Moreover, justice delayed is justice denied. The concepts of judicial separation and restitution of conjugal rights are outdated and they should be abolished.

The Special Marriage Act, 1954 is a progressive piece of legislation and may form the basis of a future civil code. In that Act we have seen that a single act of adultery is sufficient ground for a decree of divorce. The Parsi law is also the same in this respect. The Christian law in India is based on obsolete English law. Muslim law is also out of date in many respects. In any modern matrimonial law husband and wife should be treated on equal footing and marriages which have broken hopelessly should be decently and directly dissolved. Commission of a single act of adultery should be sufficient for claiming divorce at the will of the injured spouse. The innocent spouse may of course condone the wrongful act of the other and hence the court in the first instance should try for reconciliation. The Law Commission has suggested in its *Fifty-ninth Report* that the court should be empowered to seek the help of the third party in its endeavours at reconciliation. It is suggested that for this purpose in each case a council consisting of the two parties their parents or their two nominees should be constituted. This council should try for reconciliation, and if the guilty spouse repents and promises to lead a virtuous life in future and if it is acceptable to the other spouse, the council should send its report to the court which may dispose of the case accordingly. It is only when the council fails to reconcile that the court should proceed with the case. Marriage in India is still a dynastic link between the two families and hence a solution will succeed in actual practice only when the two families also reconcile.

The rule, that a marriage should not be ordinarily dissolved within the first three years was enacted in the form of section 14 of the Hindu Marriage Act to ward off hasty divorces. It is submitted that this is too long a period. It should be provided that a petition of divorce may be presented but the decree shall not be passed by the court unless one year had elapsed from the date of marriage and the attempts at reconciliation, as outlined above, through the help of the council, have failed. Thus, if one spouse is guilty of

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45. B.D. Inglis, *Family Law Reform, Law and the Commonwealth* (papers presented at the Fourth Commonwealth Law Conference), at 532-533 (1971).

adultery the other may condone the act and reconcile or if there is no chance of reconciliation especially when the other is bent upon repeating such acts, there is a quicker and absolute relief, by way of dissolution of the marriage, after one year from the date of marriage.

It is also suggested that the restrictions on remarriage as embodied in the proviso of section 15 of the Act be deleted. This restriction of one year creates hardness to the parties unnecessarily. It may be argued that such a provision was enacted so that divorce should not be obtained in order to marry somebody else immediately. My answer could be that once a marriage has been decently dissolved by a court, we should not inflict a punishment. Will it not be better that the parties are allowed to settle down in matrimony immediately by marrying persons of their own choice, after a battle in the court? Further, it is also possible that the same parties after obtaining divorce may come to terms and seriously contemplate to marry each other immediately.