

# The Evolution of Dissolution of Marriage: From Sacred To Secular

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## Abstract

The institution of marriage has undergone significant changes throughout history, influenced by various religious, legal, social, and cultural factors. This paper examines the evolution of the dissolution of marriage, or divorce, from a sacred to a secular phenomenon, focusing on the Indian context. It traces the historical development of divorce laws and practices among different religious communities in India, such as Hindus, Muslims, Christians, and Parsis, and analyzes the impact of colonialism, modernization challenges and issues related to divorce, such as gender equality, human rights, social stigma, and uniform civil code. The paper aims to provide a comprehensive and critical overview of the historical and current trends of divorce and marriage dissolution in India and to explore the implications and prospects for the future of this institution.

**Keywords:** Dissolution of Marriage, religious, legal, social, and cultural, Hindus, Muslims, Christians, Uniform Civil code.

## Introduction

No religion in the world expressly or impliedly insults a woman. Islam is also not an exception. Conceptually, the position of Muslim women in the society of the pre-Islamic ages was merely a private act and subject to the supremacy of their tribal rules and regulations. The women of that era, as the historian exposes, were masters of their own will. They were free to select their sex partner in their tents. The children were named by their maternity. Over time, their position began to weaken due to their physical unfitness and ignorance of the outer world. They, gradually, became mere puppets in the hands of Arabian Sheikhs. They began to be treated as temporary wives subject to conditions of Mutta marriage. Later, with the advent of Islam, through The Holy Prophet, there was a turning point in the position and status of Muslim women. They began to be considered as a gift of Allah and their respect became a burning issue among the existing evils.

The Prophet improved new strategies about marriage, dower, divorce, maintenance, and inheritance. In the Holy Quran, there are 176 verses<sup>1</sup> on women out of the total of 6349 including Bismillah.<sup>2</sup> In the British age, some legislative efforts were also made to protect women's rights and tried to provide them with an honourable position in society. In Indian reference, we are still trying to establish gender equality among Muslims. Our concept of constitutionalism does not provide a Uniform Civil Code for all religions; hence protection of all personal laws is a tremendous issue for good governance. To treat each community according to its personal values and laws is a difficult task but our judiciary and legislatures are performing their duties consistently and positively. But sometimes, to protect fundamental rights, especially in the cases of women and children, the Indian judiciary or Parliament has to interfere in personal laws by enacting some specific legislation or giving strict judgments. The judgment by the Supreme Court in the "Shayara Bano" case<sup>3</sup> and "The Muslim Women (Protection of Rights on Marriage) Act, 2019"<sup>4</sup> confirm the researcher's hypothesis.

As per the title, research goes with the actual position or status of Muslim women in society and is particularly based on laws on the dissolution of marriage. The researcher has taken his research as descriptive, analytical, and empirical focusing on the concept of divorce, the various theories of divorce, and the classification of various modes of divorce under different traditional, and legal systems. Through the historical aspect of divorce under major religions

<sup>1</sup> Badawi Jamal (1995), *Gender Equality in Islam*, Published by American Trust Publications Plainfield, Indiana.

<sup>2</sup> Hixon, Lex (2003). *The heart of the Quran: an introduction to Islamic spirituality*, Ed-2, ISBN-9780835608220.

<sup>3</sup> Shayara Bano v. Union of India, AIR 2017 SC 4609.

<sup>4</sup> A favourable reaction by Indian Parliament after Shayara Bano case.

specifying Muslim law, the researcher will produce the current scenario of the dissolution of marriage and the effect thereof on Muslim women.

### An Analytical Aspect of The Growth of the Concept Through Ages

Marriage is a rule and divorce is an exception. Marriage is a beautiful, charming and interesting aspect of life whereas divorce is a bitter reality. Divorce or permanent separation is an expression of a Latin maxim i.e., "**divorce a mensa et thoro**" which means divorce from bed-and-board.<sup>5</sup> The terms came into existence after the 10<sup>th</sup> century and allowed the spouses to live in separation without any further cohabitation.<sup>6</sup> It was merely a separation, it did not mean permission of another marriage, their marital relationship was not fully terminated. The Civil courts had no power over marriage or divorce, the Church was the supreme authority to give the spouses any matrimonial remedy. Divorce has been considered a matrimonial remedy against domestic violence or disobedience by one spouse towards another. It is a traditional or legal proclamation to end a marriage. The Latin word **divortium** is the source of the phrase **divorce** which means separation or dissolution of a marriage. It is similar to the word **divort** or **divortere** where the word **di** means apart and **vertere** means to turn to different ways. The word '**Divertere**' was also used to denote the meaning of separation from one's conjugal society.<sup>7</sup> Dr Paras Diwan writes that divorce returns the married persons to the former stage and they are free to marry once again.<sup>8</sup> The word **divortium** was found in the French dictionary of the 14<sup>th</sup> century<sup>9</sup> and a similar term could be seen in Middle English i.e., the 15<sup>th</sup> century.<sup>10</sup>

It is said that King **Hammurabi** of Babylon in 1760 (BC) carved 282 fundamental laws in stone tablets including the law on divorce. He, in his 128<sup>th</sup> point of law, wrote that a person who had taken a woman as his wife but did not maintain conjugal relations, the woman could not be treated as his wife.<sup>11</sup> In the 136<sup>th</sup> point of law, the King mentioned that in case a husband deserted his wife and she began to live with another man, later on, the former husband could not be allowed to treat the lady as his wife.<sup>12</sup>

**The Hammurabi Code**, as the historians say, was the first codified law<sup>13</sup> of divorce and in the emperorship of Hammurabi, a man could divorce his wife by a mere announcement stating, "You are not my wife," and after such declaration, he had to pay compensation and return the dowry to the wife. In case when the wife was blessed with children and her husband wanted to leave her company, he had to pay a huge compensation for her maintenance and a portion of the property to the children.<sup>14</sup> when the wife could not bear children,

<sup>5</sup> [https://en.wikipedia.org/wiki/Legal\\_separation](https://en.wikipedia.org/wiki/Legal_separation) retrieved on 27/4/2019.

<sup>6</sup> Kent's Commentaries on American Law. (1896) Ed-14<sup>th</sup> p. 125.

<sup>7</sup> Zohara Khatoon V. Mohd. Ibrahim, (1981) 2 SCC 509.

<sup>8</sup> Diwan Paras. (2007). *Modern Hindu Law*. Ed.-18. p.128.

<sup>9</sup> Smith William. (1890) *A Dictionary of Greek and Roman Antiquities*.

<sup>10</sup> Crystal, David (1995), *The Cambridge Encyclopaedia of the English Language*, Cambridge Uni. Press. Pp-32.

<sup>11</sup> King, L. W., (1915), *The Code of Hammurabi*, No. 128: "If a man takes a woman to wife, but have no intercourse with her, this woman is no wife to him."

<sup>12</sup> No.136: "If anyone leave his house, run away, and then his wife goes to another house, if then he returns, and wishes to take his wife back: because he fled from his home and ran away, the wife of this runaway shall not return to her husband."

<sup>13</sup> Powis, Smith, J. M. (2005). *The Origin and History of Hebrew Law*. The Lawbook Exchange, Ltd. p-13.

<sup>14</sup> King, L. W. (1915). *The Code of Hammurabi*, No.137: "If a man wishes to separate from a woman who has borne him children, or from his wife who has borne him children: then he shall give that wife her dowry, and a part of the usufruct of field, garden, and property, so that she can rear her children. When she has brought up her children, a portion of all that is given to the children, equal as that of one son, shall be given to her. She may then marry the man of her heart."

he had to give her the purchase money and the dowry given by her father at the time of marriage.<sup>15</sup> A guiltless wife was also allowed to take divorce on the grounds that her husband began to avoid conjugal relations and become faithless.<sup>16</sup>

**The History of the Anglo-Saxon** ages shows that divorce was possible only with the consent of both parties to the marriage. In the early era, the church scholars considered marriage as unbreakable as it was not permitted in the Holy Bible.<sup>17</sup> According to Christian jurists Jesus disliked adultery and considered divorce a sin.<sup>18</sup> Thus, In the early era of Christianity, divorce was not common among Christians, the Roman Catholic Church considered marriage a sacrament over the centuries. Synoptic Gospels write that Jesus advocated marriage as a true and permanent bond between a man and a woman.<sup>19</sup> Marriage to them was the blessing of God and even in case of divorce, the spouses were treated as husband and wife because their pious tie was created by the Church.<sup>20</sup> One spouse was barred from remarrying while his or her spouse was alive. The only ground when divorce could happen was adultery. The innocent spouse was permitted to leave the company of another who was found in adultery, however, even after the divorce, they could enjoy their remaining life with each other according to their mutual understanding.<sup>21</sup>

In the time of **Henry VIII**,<sup>22</sup> we got the first instance of divorce based on grounds other than adultery. Henry was a Roman Catholic who wanted to divorce his first wife, Catherine of Aragon, because she was unable to bear a male heir.<sup>23</sup> He asked the Church of England to pay specific attention and favour towards his intention and allow him to dissolve the marriage with Catharine and let him marry Anne Boleyn. But the Church did not grant to dissolve the marriage on such a ground.<sup>24</sup> Henry had to go to the Archbishop of Canterbury, the senior bishop and principal leader of the Church of England, who requested to permit him a divorce with Catherine so that he could marry Anne Boleyn. The bishop, finally, granted the King to dissolve his conjugal rights with Catherine. He married Anne Boleyn and hence, unable to bear a male child became another ground of divorce. Thus, the concept of divorce in Christianity grew with time.<sup>25</sup>

From 1533 to 1857, in England, the law of dissolution of marriage was governed by Ecclesiastical law i.e., the Canon Law subject to the permission of the Church. The Church imposed a tax on a couple for marriage under a regulatory law named '**The Marriage Duty Act**,

<sup>15</sup> No.138: "If a man wishes to separate from his wife who has borne him no children, he shall give her the amount of her purchase money and the dowry which she brought from her father's house, and let her go."

<sup>16</sup> No.142: "If a woman quarrels with her husband, and say: "You are not congenial to me," the reasons for her prejudice must be presented. If she is guiltless, and there is no fault on her part, but he leaves and neglects her, then no guilt attaches to this woman, she shall take her dowry and go back to her father's house."

<sup>17</sup> Bible at Mark 10:2-12 "What God has joined together, let no one separate." retrieved from: [https://www.christianbiblereference.org/faq\\_marriage.htm](https://www.christianbiblereference.org/faq_marriage.htm)

<sup>18</sup> Matthew 19:9 "And I tell you, whoever divorces his wife, except for sexual immorality, and marries another, commits adultery."

<sup>19</sup> Bible, Mark chapter-10: verses 1- 9

<sup>20</sup> Gospel of Matthew, 19: 1-10.

<sup>21</sup> Thomsett, Michael C. (2014), *Heresy in the Roman Catholic church: A History*, McFarland & Co. ISBN-0786485396.

<sup>22</sup> 1491 –1547.

<sup>23</sup> Smith, Lacey Baldwin. (1971). *Henry VIII: The Mask of Royalty* ISBN 978-0-89733-056-5.

<sup>24</sup> Elton, G. R. (1977). *Reform and Reformation: England, 1509–1558*. ISBN 0-7131-5952-9.

<sup>25</sup> Williams, Neville (1971). *Henry VIII and his Court*. Macmillan Publishing Co. ISBN 978-0-02-629100-2.



1695' and a marriage license was made mandatory.<sup>26</sup> Later, the first statutory legislation, 'The Marriage Act, 1753' provided that a marriage would be considered valid if solemnized in the Church in the presence of at least two witnesses obtaining a license of marriage. This Act determined the age of marriage also and required consent of the parents in case the marrying person was under 21 years of age.<sup>27</sup> The Churches were the only courts empowered to declare a marriage dissolved. In 1857, **The Matrimonial Causes Act, 1857** was introduced and the notion of divorce became familiar.<sup>28</sup> The Act abolished the authority of the Church about divorce. The Act introduced the Court of Divorce and Matrimonial Causes to hear issues of divorce.<sup>29</sup> This was the first civil court to hear matters relating to divorce separately. It allowed common law barristers and civil law advocates to represent the case on behalf of the parties in divorce petitions.

The Act permitted both husband and wife to approach the court to seek divorce on the grounds of cruelty, desertion, and adultery.<sup>30</sup> This was probably the first instance in the history of English law when gender equality in matters relating to divorce was created. However, in the case of adultery by the wife, the court considered it more serious and the petition of divorce by the husband on this ground was easily and quickly resolved. On the other hand, the attitude of the court was not so strict against adultery by the husband. The wife had to prove one another ground along with adultery i.e., out of cruelty or desertion to succeed in case of divorce.<sup>31</sup>

The Act prescribed a restriction that parties to the marriage, generally, could not claim divorce before completion of two years from the date of marriage. However, the court could allow a party to apply for divorce only in exceptional circumstances.<sup>32</sup> The Act prescribed that when a spouse had been continuously absent for seven years, the court could award a decree of divorce on the presumption of death.<sup>33</sup>

<sup>26</sup> Probert, Rebecca. (2009). *Marriage Law & Practice in the Long Eighteenth Century: A Reassessment*. Ch-2. SSRN 1504026.

<sup>27</sup> 26 Geo. II. c. 33 (popularly known as Lord Hardwicke's Marriage Act, 1753).

<sup>28</sup> The Matrimonial Causes Act 1857, Section 5-

(1) A petition for a decree of dissolution of marriage Dissolution may be presented to the Court by either party to a marriage on the ground that the marriage has broken down irretrievably.

(2) Subject to sub-section (3). in proceedings for a decree of dissolution of marriage the ground shall be held to have been established, and such decree shall be made, if, and only if. the Court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than twelve months immediately preceding the date of filing of the petition for that decree.

(3) A decree of dissolution of marriage shall not be made if the Court is satisfied that there is a reasonable likelihood of cohabitation being resumed.

<sup>29</sup> Carnelley, Marita. (2013). *Laws on Adultery: Comparing the Historical Development of South African Common-law Principles with those in English Law*. Vol-19, Pp-185-21.

<sup>30</sup> Nelson, Horace. (1889). *Selected cases, statutes and orders*. London Stevens and Sons Limited. P-112.

<sup>31</sup> Nelson, Horace (1889). *Selected cases, statutes and orders*. London: Stevens and Sons Limited. P-114.

<sup>32</sup> The Matrimonial Causes Act, 1857,

Section 8:-(1) No petition for a decree of dissolution of marriage presented, without the leave of the Court, unless at the date of the presentation of the petition two years have passed since the date of the marriage.

(2) A Judge of the Court may, upon application being made to him in accordance with rules of court, grant leave for a petition to be presented before two years have passed if he is satisfied that one of the parties has with the assistance of an approved marriage counsellor attempted a reconciliation and there are special circumstances that would justify the hearing of the petition.

<sup>33</sup> The Matrimonial Causes Act, 1857,

Section 9(2)- In any such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead until the contrary is proved.

In the year 1869, **The Indian Divorce Act, 1869** was introduced to govern matters of divorce exclusively for Christian residents of India and the same is still in existence with significant changes. The Act provides some grounds of divorce i.e., adultery, disbelief in religion, rape, sodomy, or bestiality under section 10.<sup>34</sup> The Act widened the scope of divorce for Christian wives.

After the First World War the voice of gender justice was raised and **The Matrimonial Causes Act, 1923** was passed by the British Parliament. This Act established gender equality for the first time and made the wife competent to get a divorce on the ground of adultery without proving any other additional ground.

In 1937, another '**The Matrimonial Causes Act, 1937**' was introduced. The Act 1937 enhanced the scope and provided some other grounds i.e., drunkenness, insanity, and desertion.<sup>35</sup>

The Act of 1937 was not exhaustive and perfect to meet all matrimonial disputes. Hence, in the year 1969, the British Parliament introduced a tremendous change. **The Divorce Reform Act, 1969** was passed and divorce was allowed based on the breakdown or no-fault theory.<sup>36</sup> Both spouses were permitted to get a divorce on the grounds of living alone for two years.<sup>37</sup> When one of them was willing to take a divorce, a minimum of 5 years of continued duration of separation was to be proved.<sup>38</sup> The Act 1969 later consolidated in **The Matrimonial Causes Act, 1973** which is dynamic and includes all theories and grounds to provide judicial separation or divorce.<sup>39</sup>

<sup>34</sup> The Indian Divorce Act 1869, section-10 :- When husband may petition for dissolution: Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

When wife may petition for dissolution-Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since, the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman; or has been guilty of incestuous adultery, or of bigamy with adultery, or of marriage with another woman with adultery, or of rape, sodomy or bestiality or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et toro or of adultery coupled with desertion, without reasonable excuse, for two years or upwards, (before Amend. 2001).

<sup>35</sup> The Matrimonial Causes Act, 1937, Section 5:

Either party to a marriage could petition for divorce on the grounds that the other:

(a) had since the celebration of the marriage committed adultery; or  
(b) deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or  
(c) since the celebration of the marriage treated the petitioner with cruelty.<sup>2</sup>  
(d) A spouse could also petition on the ground that the other was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

<sup>36</sup> The Divorce Reforms Act, 1969, Section-1: After the commencement of this Act the sole ground on Breakdown of which a petition for divorce may be presented to the court by marriage to be either party to a marriage shall be that the marriage has broken down irretrievably.

<sup>37</sup> The Divorce Reforms Act, 1969,

Section-2(d)-that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted.

<sup>38</sup> The Divorce Reforms Act, 1969,

Section (e)-that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

<sup>39</sup> The Matrimonial Causes Act 1973.

In the ancient era of **Hinduism**, the concept of divorce was different. In the shadow of Vedas and other Dharma Shastras, to Hindu spouses, the meaning of separation was something different. They decided to leave another not for worldly pleasure but for some divine purpose. Dissolution for them was a part of spiritualism. When we try to find out the origin of the dissolution of marriage in the Hindu religion, we can find that there was no expressed evidence of the dissolution of marriage among Hindus. The concept of divorce is alien to Hinduism. Marriage in Hindus has been considered divine, spiritual, ethical, and moral. In its beginning era, the plurality of marriage was common in Hindus and even women could have the company of another man for bearing children. There were few restrictions on meeting even without marriage, as in the case of princess Kunti and Lord Surya, we read in Mahabharat. This freedom made it a difficult task to determine the actual paternity of the child. This issue made Swetaketu restless.<sup>40</sup> Swetaketu<sup>41</sup> was a great sage, a son of Uddalaka.<sup>42</sup> He wrote an Upanishad<sup>43</sup> and advocated the concept of marriage.<sup>44</sup> He objected to adultery and supported the view that marriage ought to be the only way of life where the paternity of the children could be determined easily. He allowed a woman to have another man other than her husband only in case of impotency of her husband and for bearing children, it was termed as Niyoga.<sup>45</sup>

The Naradasmriti Dharma shastra<sup>46</sup> declares five circumstances when existing marriage may be considered dissolved and the wife re-marry another man, these are:

- when her husband is lost, or
- when her husband is dead,
- when her husband becomes an ascetic, or
- when her husband is impotent, or
- when her husband is expelled from caste.

Section-1(l) Subject to section 3 below, a petition for divorce on may be presented to the court by either party to a marriage on breakdown of the ground that the marriage has broken down irretrievably.

(2) The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say-

- (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
- (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
- (c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
- (d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition (hereafter in this Act referred to as "two years' separation ") and the respondent consents to a decree being granted;
- (e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition (hereafter in this Act referred to as " five years' separation ")

<sup>40</sup> H. C. Raychaudhuri (1972), *Political History of Ancient India*, University of Calcutta, pp. 8-9, 21–25.

<sup>41</sup> Svetaketu, is a character from the Chandogya Upanishad. He was the son of sage Uddalaka (8th century BCE)

<sup>42</sup> Uddalaka Aruni was one of the first philosophers in recorded history, the guru of Yajnavalkya.

<sup>43</sup> Shvetaketu appears in three principal (mukhya) Upanishads, namely, the Brhadaranyaka Upanishad S. 6.2.1 to 6.2.8, Chandogya Upanishad S.5.3 and in the Kausitaki S.1. Shvetaketu is the recipient of the knowledge enshrined in the Mahavakya which appears in the sixteen chapters of the 6th section (Prapathaka) of the Chandogya Upanishad.

<sup>44</sup> Mahabharat, Mahabharata Santi Parva, Chapter 35, Verse 22.

<sup>45</sup> Swami Lokeshwarananda, Chandogya Upanishad, (2017), chapter 6 publisher Ramakrishna Mission Institute of culture, ISBN-13: 9788185843919.

<sup>46</sup> Naradasmriti XII- 97, Raj Kumari Agarwal, (1974), *Matrimonial Remedies under Hindu Law*, p-66.



Manu<sup>47</sup> and Narada<sup>48</sup> advocated remarriage by the wife in case her husband absents for a duration not less than eight years. According to Gautam<sup>49</sup> after six years and according to Vasistha<sup>50</sup> after five years of the continued absence of the husband, a wife should be allowed to remarry. Vasistha gave his opinion that in the case when there is no child, the wife can remarry after a four-year absence of her husband.<sup>51</sup>

Katyayana,<sup>52</sup> including the above grounds, added some other grounds for dissolution of a marriage as mentioned below:

- when the husband converts himself into another caste, or
- when they both are from the same gotra, or
- when the husband is found guilty of misdeeds.

There were many grounds in the ancient history of Hinduism when re-marriage was allowed, or in simple words, we can say that existing marriage could be dissolved but this was also a fact that the grounds were created only for re-union or re-marriage, there was no evidence when a husband or wife could divorce. Hence, the basic concept of divorce that we experience today, was unavailable in the ancient history of Hinduism. In Mahabharat, we see that after the birth of Kapila, his father Kardama abandoned his wife Devahuti and left home for deep meditation.<sup>53</sup> The same is the story of Jaratkaru who abandons his wife after the birth of their son.<sup>54</sup>

Thus, there were a lot of examples of separation between husband and wife among Hindus but the objective was spiritual, ethical, and moral. The separation was rather a sacrifice of married life in the name of God to approach salvation.

Divorce in **Islam** has been an indivisible part of the legal and religious ideology. In Muslim law, divorce is generally termed talaq which refers to the husband's unlimited and uncontrolled power to dissolve the marriage by mere announcement showing his unwillingness to his wife that he repudiates her. The classical jurists write that most of the spiritual thinkers considered the right to declare talaq forbidden and disagreed to use this power without a resalable ground. Even though it was considered bad, it was common in practice. The Muslim husbands used to leave their truly wedded wives on the ground of impossibility of cohabitation, might be physical or mentally. The right to divorce was not subject to any legal approval and could not be challenged.<sup>55</sup>

Among pre-Islamic Arabs, constructive divorce was also very common. There was no restriction in the name of a pre-defined ground. The Muslim husbands had unrestricted, unlimited, and uncontrolled powers of divorce, they could announce divorce even without any reason at any time and of course for pleasure. A Muslim wife was subject to the willingness of

<sup>47</sup> Manu IX - 76.

<sup>48</sup> *Supra note*167.

<sup>49</sup> Goutam IV, 6-15.

<sup>50</sup> Vasistha, XVII:78, cited in Chakravarty, Subodh,1992. (ed). Vidyasagar Rachanavali, Kamini Prakashalay, Calcutta, p-583.

<sup>51</sup> *Ibid*.

<sup>52</sup> Madhukar M. Patkar, (1978) *Narada, Brhaspati and Katyayana: A Comparative Study in Judicial Procedure*, Published by MunshiramManoharlal Publishers Pvt. Ltd, Lakhnow.

<sup>53</sup> Sen, Gunada Charan (1986). *Srimadbhagavatam: A Concise Narrative*, MunshiramManoharlal Publishers. Lakhnow, pp. 26–28. ISBN 81-215-0036-2.

<sup>54</sup> *Ibid*.

<sup>55</sup> Wael B. Hallaq, (2009), *Shari'a: Theory, Practice, Transformations*. Cambridge University Press (Kindle edition). Pp- 7921–7950.

her husband. The husband could deny physical relations with his wife in the future, without any announcement of divorce, it was a situation of constructive divorce.<sup>56</sup>

Ayatullah Ibrahim Amini, an eminent scholar and jurisprudent from Tehran (Iran), writes that Islamic law recognizes the norm of divorce of marriage in an expressed manner. He writes that in comparison to other religions, Islam is the first religion that has adopted the way of talaq to dissolve a marriage to meet the abnormal circumstances of the matrimonial life. The concept of talaq has been a part of religion since its occurrence. Though the Holy Prophet never supported divorce, it was common among Muslims. He is of the view that no doubt divorce is hateful and against the personal feelings of the Holy Prophet, but there may be certain circumstances when the use of this right cannot be avoided.

Amini gives an illustration in support of his view that when a part of the body is found defective or badly injured as in the case of cancer, through a surgical operation such part is removed. Though it is detestable, painful, and severe, it is done for the benefit of the affected person. In the same way, when the spouses to marriage find their marital relations torturous and intolerable or there is no physical and mental bonding is possible between them, divorce becomes the only way of getting rid of such an untenable situation.<sup>57</sup>

With the commencement of Islam through the Holy Quran, the unlimited and uncontrolled power of divorce in the hands of Muslim husbands was restricted on certain moral, religious, and legal grounds by The Holy Prophet. The Prophet, no doubt admitted the need for divorce as an essential evil but only to face untenable matrimonial situations. He enacted certain rules relating to the amount of dower, recession or reconciliation of talaq, and prohibition on re-marriage between the parties. He considered talaq to be an essential evil but as the most detestable, cursed and ominous in all permitted things by Allah.<sup>58</sup>

<sup>56</sup> Ibrahim Abdel Hamid- 3 (1956) *Dissolution of Marriage*, Islamic Quarterly, pp-166-75, 215-223.

<sup>57</sup> : Ibrahim Amini. (1990) *An Introduction to The Rights and Duties of Women In Islam*. Author., Translated: Abuzar Ahmadi., ABWA Publishing and Printing Centre, p-68.

<sup>58</sup> Verma B.R., *Islamic Law*, (1986). Law Publishers (India) Private Limited. Ed- 6, p-203.