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**Unbiased Justice; A perusal to Dharam Shastra and Modern  
Hindu Law with special reference to  
The Silence! the court is in Session from women' perspective**

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**Abstract:** In Hinduism, Dharma denotes behaviours that are in accord with Rta—the "order and custom" that makes life and universe possible. This includes duties, rights, laws, conduct, virtues and "right way of living". The concept is believed to have a transtemporal validity and is one of the four Puruṣārthas.

Dharma can't be allied with religion.

The Dharma sutras can be called the guidebooks of dharma as they contain guidelines for individual and social behaviour, ethical norms, as well as personal, civil and criminal law. They discuss the duties and rights of people at different stages of life like student hood, householder ship, retirement and renunciation. According to Manu, Dharma is to be known through the Vedas, Smritis, conduct of saints, and finally through one's own purified intellect. By following Dharma, one attains perfection. Ancient Hindu legal system recognized different sources of law such as Vedas, Smrities, and Customs. Our ancient law architects and sociologists always consider marriage as a sacred duty towards one's family and society than an individual relationship to enjoy sex. Marriage is a sacred Samskaras where bride is gifted to bridegroom to perform the duties together as house-holder (Grhastha).

पिता दत्तां वसं कश्यपं प्रता वनुमते पितुः  
पितामहो मातुल्यं सुकुश्या वाक्श्ववतेषां॥

Nr. XII, 20.

Marriage dissolution is always considered against the will of God. Ancient Hindu law does not permit divorce because it is considered a sacred act, a holy samskara, and a set of purifying ceremonies that every Hindu must perform. Divorce is still a sin. What were and are the grounds of divorce, whether it was also easy for women to take in earlier times is being discussed and interpreted from ancient and modern law makes's point of view.

Divorce is a miscellaneous phenomenon, deeply associated with cultural norms,

values and legal system. From ancient times to the modern time the laws had undergone a significant change, reflecting the shifting of cultural and societal norms of each era. This Article explores the evolution of divorce laws across diverse cultures and societies. The paper compares and contrast the ancient and modern Hindu laws for the dissolution of Marriage.

**Keywords:** Marriage, Ancient Law, Hindu Law, Divorce, Modern Grounds, Comparison.

**Introduction:** Marriage is considered as a union of two persons they can be of opposite sex as well as same sex which give them a legal recognition as Husband and Wife. In India marriage is a culturally significant institution that carries various meanings and traditions. It is not only considered as a union between man and woman but also a bond between two families.

The process of Divorce was recognized in ancient civilizations and is evolving with the time. In this Article, discussion is on How the perception of divorce evolved over the years and how does it vary across different cultures and societies? As it is an important process of everyone's life and we must be aware of how this process evolves, we will focus on divorce laws in India from ancient to modern times.

Marriage is regarded as a samskara or sacrament in Hindu law. Divorce on the other hand, is a contentious subject. Divorce is prohibited under Hindu law, with the exception of a few groups, primarily from the lower socioeconomic strata, where traditions and customs allow it; and there was strong opposition to any provision for divorce in the new legislation that was being drafted. Although some of the Smriti Karas did not address divorce in the usual sense, it is now thought that they did state that a woman might take a second spouse in certain conditions. Narada says "A lady may pick another husband from these five tragedies if her spouse is lost, dead, secluded from the world, impotent, or humiliated." However, the Hindu Marriage Act, 1955 allows for divorce on nine grounds listed in sub-Section 13(1), as well as two additional grounds listed in sub-Section 13(2). Both parties to the marriage have access to the grounds mentioned in the said act.

1. Saldhana v Saldhana, (1930) AIR Bom 105 (India).
2. Prabhash Saxena v Ranjana Saxena, (2001) S.C.C OnLine Del 620 (India).

The Vedas, which are considered divine law.. Vedas were considered as the supreme law in ancient India. The sacred divine law held that the marriage union was indissoluble once the seven steps, which is commonly known as Satpadi, is completed. It cannot be declared invalid even in the absence of consummation. When the Vedas were spoken aloud, they were referred to as Shruti, and they were thought to direct people's behaviour. Smriti, means "what is remembered," is another type of legislation existed in

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ancient India.

Hindu law has several sources including the Vedas, Upanishads, Smritis, commentaries, and customs. The key ancient texts are the Shrutis (Vedas) and Smritis. The most important Smritis are the Manu Smriti, Yajnavalkya Smriti, and Narada Smriti.

**Sources of Hindu Law:** Sources of Hindu Law can be divided into:

**\* Ancient Source:**

- Shruti (Vedas)
- Smritis
- Digest and Commentaries
- Customs

**\* Modern Source:**

- Equity justice and good conscience
- Legislation
- Precedent

In Buddhism, dharma (Pali: Dhamma) refers to "cosmic law and order" no single-word translation exists for dharma in English (or other European languages), the term is commonly understood as referring to behaviors that are in harmony with the "order and custom" that sustain life; "virtue", or "religious and moral duties"

- Justice, equity, good conscience, precedents and legislation are considered as modern sources of law.
- Smriti means what was heard and remembered by the sages, i.e. what they heard directly from the Deity.

\* The early smritis were termed as Dharma Sutras. Acara(rites), vjavahara (dealings) (Óयवहार) and prayaschitta (penance) (यिÖ×IÖ) are the subject matters of smritis.

\*The principles of law were mostly covered under the part vyavahara.

\* Smritis are neither mere law books, nor are they like the constitution of a country, or of an organized society.

\* These are not even commandments, but are shastras, scriptures. Shastra means 'that which governs' and is applied to a book only if it teaches the ways and means to attain Mukti- the supreme goal of life.

\* Books like Manusmriti are considered a shastra because they teach how a person who performs his Svadharma (duties) (ÖÖ×Ö×Ö) faithfully can attain self-realization.

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\* The principles of religion that are in the Vedas are unchangeable, but the religious practices that are based upon the social position and correlation have to change with the variation in the society.

\* For example, in matters of food, the climatic and other changes make it necessary to change the rules that govern them. Similar is the case with many such habits and practices.

\* For this reason, the Smritis have varied from time to time, and place to place. Thus, the Smritis of the various yugas like Satya Yuga and Treta yuga are different from each other. And since they are not absolute, Smritis are treated as secondary in importance to the Vedas. From time to time, the great lawgivers amended the existing laws that had become obsolete. They made alterations, adaptations, readjustments, additions and deletions to suit the needs of the time so that a person could live his life in accordance with the Vedic ideals, despite the changed conditions.

There are eighteen main Smritis or Dharma Shastras: Manu, Yajnavalkya, Parasara, Vishnu, Daksha, Samvarta, Vyasa, Harita, Satatapa, Vasishtha, Yama, Apastamba, Gautama, Devala, Sankha-Likhita, Usana, Atri and Saunaka.

\* Custom(यथा) is recognized as transcendent law. The essentials of a valid custom are that it must be ancient, certain and reasonable. Any behaviour which come into existence for a certain time become custom and goes generation to generation.

\* Any custom which is contrary to public policy is rejected by the court.

\* Disuse of custom puts an end to them.

\* A local custom is not put to an end by non-user.

\* Custom is combination of two words –परंपरा और ढी

\* Parampara(परंपरा) always changes with time and according to the situation but ढी is fixed and unchangeable

\* Naradasmṛti is ancient law text which is devoted to Vyavahara. It deals with civil and criminal laws and judicial procedure. It made original contribution to the field of ancient law.

\* The written law in all probability known as the court of law comes to its real supreme status in this work of Narada.

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\* Another feature of this text is, it is liberal in handling the rights and freedom of women. It allows women to have divorce, nullification of marriage, and rights of inheritance.

Narada Smriti is exclusively deals with forensic law, both substantive and procedural with any reverence to self-punishments and other religious matters.

Narada was independent in his views and did not allow himself to be bound by the earlier texts. The Procedural law laid down by this smriti contains provisions relating to pleading, evidence (oral and documentary) as also the procedure required to be adopted by the courts of law. The conditions required for a valid marriage under the Special Marriage Act are as follows:

- \* Neither party should have a husband or wife living at the time of marriage;
- \* Neither party is a lunatic or incapable of giving a valid consent due to unsoundness of mind;
- \* Neither of the parties are unfit for marriage and procreation of children;
- \* The bridegroom must have completed the age of twenty-one and the bride the age of eighteen years;
- \* The parties are not within the degrees of prohibited relationship. Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within prohibited degrees.
- \* The older Dharma Shashtra's, we discover that divorces were legal prior to the advent of Christianity in certain cases. It's noteworthy to note that even Manu himself says in another chapter of his book that a woman is not at fault if she leaves a husband who is sterile, demented, or afflicted with an infectious or incurable disease.
- \* This husband's departure amounted to a virtual divorce since Manu allows such a woman to remarry if her first marriage was not legally completed. Here lies the self-contradiction in Manu's statement.
- \* In accordance with Kautilya's Arthashastra, an unrecognized type of marriage may be ended by mutual agreement. Manu, however, rejects the idea of ending a marriage. In a nutshell, this might be seen as the ultimate dharma of the husband and wife. He says, "Let mutual fidelity continue till death."
- \* Kautilya provides comprehensive divorce guidelines for couples who are unable to coexist as a pair. However, they were only applicable to marriages between Asuras,

Gandharvas, Kshatriyas, and Paisachas.

\* Even though these marriages were more frequent among the lowest layers of society, they were also prevalent among Brahmanas and Kshatriyas; consequently, divorce must have been somewhat common among the upper castes as well.

अथर्ववेदोदा या निददन्ना नाहममिता । बह्विभसामिभ्योऽप्यानिबन्धः ऽवयमायेत ॥॥

218 / नारदस्मृतिः।

विवाहसे पूर्व पुरुष के किसी अतदोष का विवाह के उपरांत पता चलने पर उस दोष को झेलने अथवा उससे समझौता करने को अनुमति दी है। केदसूरे पुरुष का वर्ण करने के लिए उसके बह्विभों के पास छोड़ देना चाहिए। बह्विभों के अभाव में स्त्री को स्वयं अपने लिए किसी दूसरे पुरुष का खोज के लिए अवतार कर देना चाहिए।

\* A lady remarries in the Atharvaveda at one point, most likely within the previous husband's lifespan. Of course, her second marriage implied a divorce. Writers of the Dharmasutra (400 BC to 100 AD) stipulate that a Brahmana lady must wait for her husband to return after a long voyage for five years;

श्रौतिप्रधानी पश्चात् वर्षाद्यापसीत् । ऊर्ध्वपण्ड्योऽप्येतत्सकलं ह्येतत्

\* Kautilya shortens this time to only ten months. Arthasatra of Kautilya, which requires judicial permission before contracting the second marriage. The potential of a divorce from the prior marriage is plainly implied by Parasara's permission to remarry granted to the wife of a person who is impotent or has become a religious hermit in seclusion.

\* The Naradasmruti Dharmasatra (X11 97), a Hindu law book says: 'when her spouse is missing, or dead, becomes an ascetic, is impotent, or is exiled from caste, in these five cases, a woman may remarry.'

\* According to Katyana, the woman may remarry if the husband turns out to be from a different caste, the same gotra, or if he has committed bad deeds.

\* Can we interpret this scripture to mean that divorce was formerly permitted in Hinduism? Many more references are available. We must remember that the word "Hinduism" is a general one and cannot be limited to the "higher" castes.

यापश्यत्वाश्वरसंविधवावहेत्यया । उर्यपदयेऽपुनमुश्वसपैनमवउयते ॥ स चेद्वर्गिनः, ऽवदत्तुः स्यात्तापिवा  
पैनमपेन भक्तं सा पुनः संस्कारमहति ॥

A woman who does not serve her husband who is a gambler, an alcoholic or is sick, should take his jewelery and leave it for three months, but the woman who is mad, degenerate, impotent, seedless or suffering from sin, who serves her husband, should not abandon him or snatch anything. In the above circumstances, if the wife abandons

her husband, there is no fault in her. Manu is in favor of giving the right to remarry to a woman who has not had cohabitation with her husband before marriage. Also, a woman abandoned by her husband or widowed could marry again –

\* When Nala goes away in the Nala and Damayanti epic, Damayanti's father arranges a swayamvara so that she might find a new spouse. Is that only because Nala is referred to as a Nishadha or as being from a tribe?

The Bhagavata Purana describes how Kardama wed Devahuti but left her after she gave birth to his son Kapila. To make good on his obligation to his forefathers, he must father a child. To be a husband, though, is not what he wants. He prefers to live a hermit's life. The tale of Jaratkaru, who consented to marriage but left their husbands who tried to dominate them, is similar. As a result, Ganga left Shantanu, and Urvashi left Puruvara.

\* Can we classify this as divorce?

अनुकूलामवापुः कदां सा देवः प्रजावतीम् । अयन् भाषामवधायोऽपि ददौ तेन भूषसा ॥ ५ ॥

The king should restore the woman to the dignity of a wife by giving a reasonably severe punishment to a man who renounces a woman endowed with the following qualities, that is, he should force the man to respect his wife. It is the duty of the king never to allow a man to do injustice to a virtuous and innocent woman and to teach discipline to a man who calls himself a husband when he does arbitrarily. Always favourable to her husband and relatives, i.e., polite.

Sweet and polite speaker. Housewife skilled.

Sadhvi, that is, chaste and Putravati.

\* The Brahmanical tradition does not accept divorce cases that have been documented. However, we only encounter a handful in Buddhist literature.

\* As a result, when she discovered that her husband had entered into a second marriage while she was away, a lady by the name of Kana reportedly refused to return to him. She was brought in for adoption at Buddha's suggestion and later married off to a nobleman.

\* However, there aren't many divorce instances that have been documented, and the Buddhist literature itself provides proof that divorce was uncommon in more cultivated parts of society. Thus, a lady tells her husband in the Kanhadipayana Jataka (No. 444) that even though she had no love left for him, she refrained from getting married again since it was against the rules of that household for a married woman to marry a new

spouse.

\* It is evident that women in higher social levels were adamantly opposed to abusing the practice of divorce, which was more common among the poorer classes.

\* Modern Hindu Law: Grounds of Divorces-

**Modern law has also given the same grounds as were in ancient times:**



\* Another example of literary works which shows power of judiciary on a common girl existing in modern society which is called modern and free society.

- The play Silence! the court is in Session by Vijay Tendulkar – in this justice is presented as an instrument of oppression of women and vulnerable sections of society.

\* Justice become the face of a very repressive and dehumanised system.

\* There should not be unnecessary questions on women' identity and she shouldn't be treated unequal in our society.

\* She has all rights and freedom as men have earlier or today.

\* If she must take divorce, her decision should be supported by family and society instead on questioning her life and character.

\* Law whether ancient or modern is there to maintain the law and order in the society.

\* Bu some unbiased things need to be amended timely so proper and equal order can be maintained in the society.



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\* Marriage and divorce should never be used as tools under the veil of dharma to hide the conflicts existing in our society.

\* Women or men should never be tortured under the title dharma.

\* Women should never be looked with degraded eyes just because she had voiced her thoughts and rights.

\* It is a very pious term for 'DUTY'.

\* DHARMA can't be without NITI (law) and NITI can't be without DHARMA.

\* There are similarities to some extent in the basic reasons for divorce given by Manu and the other ancient lawmakers and the present-day's lawmakers.

Manusmriti says that 'the gods reside in the house where a woman is treated with respect.'

\* This is feasible only if the ideal of marriage is extremely high.

\* Earlier love marriage was also there under the title SwayamVara.

Both the husband and wife must learn self-control and a great sense of responsibility towards each other.

Despite of the fact that domestic violence prevailed during the ancient era, no Smriti kara ever thought about providing a ground of cruelty for divorce for women against their husband. There are certain grounds provided by Manu like a wife indulging in immoral conduct or to do what is unpleasant to her husband, should be divorced, can be considered as tantamount to mental cruelty which is a valid ground for divorce up to now. According to certain Smriti karas, adultery, including extramarital affairs, was a legal basis for divorce in ancient times too. Narada's views seem to be only at one place where he considers mother and father on equal level.

नारदाचार्योऽपि विनयसंयमवर्गीकृतानि तानि ततोऽपराधं पौरुषं पिदुमन्तु धमस्त ॥

च. XII, 59

Choices of maiden for bridegroom is given first preference by Narada against Manu's elaborate stress on bridegroom's choice of his bride. Narada allows remarriage and widow marriage in the five cases, i.e. when husband is lost, dead, entered in religious order, impotent and outcaste. In the same chapter he talked about the inheritance rights and how she is equal to son in continuing lineage of father. All such statements show that

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Narada not only treated women equally but bestowed dignity on them.

ऽनृतः कथं विदुः पितृकुले जातः अपि विदुः । अंवातं यमतं तासां । जापितरकापयत् ॥

Nr. XIII, 30.

In any matrimonial dispute, divorce is still the last resort. Indians, whether in the ancient era or in modern times, consider marriage as an eternal bond and see husband and wife as a pious entity.

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