



Impotency as a Ground for Annulment/Divorce: An Analysis across different jurisdictions

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ABSTRACT

Impotency is the inability to consummate a marriage by engaging in sexual intercourse due to physical, mental or psychological incapacity. Impotency has its repercussions on not only the intimate life of the married couple but is also one of the most popular causes of seeking dissolution or annulment of marriages. Despite India being the impotence capital, impotency is a topic of discussion that is often considered taboo. The fear of not proceeding to be vocal about prevalent issues such as impotency arises from societal pressures and impressions that arise from the same. It is important to not only understand the commonality of impotence in a marital relationship but also to make aware about how different laws across different nations govern and provide remedies for the same. It is to be noted that impotency as a ground of annulment in personal laws across jurisdictions results in different consequences, leading to a marriage being void, voidable or dissoluble. This is largely due to the historical, cultural and religious influences that have led up to codification of these laws. However, what is often left undiscussed and is now a cause for concern, is how impotency laws and consequent judicial pronouncements are archaic and inconsiderate of human rights considerations by introducing invasive medical testing that is often humiliating and degrading to go through, by neglecting to consider or discuss asexuality is a factor leading to impotency, by not laying down preventive mechanisms to make sure that couples through collusion do not take impotency as a route to seek annulment of marriages. Therefore, there lies a duty and responsibility on the courts to decide matters on impotency with great detail and consideration as well as adapt the law to the everchanging societal beliefs while accounting for the generational gap.

KEYWORDS: IMPOTENCY, MARRIAGE, ANNULMENT, DIVORCE



INTRODUCTION

Impotency is the physical, mental or psychological inability to engage in sexual intercourse leading to the consummation of marriage. Sexual intercourse is referred to as the basic, intrinsic as well as inherent need of human beings and different several jurisdictions and laws consider it to be the root or the foundation upon which a marital relationship develops.

However, not all marital relationships are able to satisfy these needs due to either of the spouses' inability to consummate. Personal laws provide for this contingency in order to seek dissolution or annulment of marriages in case consummation of marriage is impossible and the purpose of the marriage is frustrated. Therefore, as a consequence of which petitions are filed before courts seeking annulment of marriages on the ground of impotence of the parties.

The courts while addressing these petitions in the proceedings have further developed and expanded the boundaries and scope of this law while placing limitations on when such proceedings can be initiated.

This article aims to assess different personal laws of India to analyse what the law states on impotency as a ground for annulment. Mainly 3 personal laws have been analysed namely, Hindu Marriage Act, 1955, India Divorce Act as well as Dissolution of Muslim Marriage Act. It further analyses how the law under all 3 statutes has been expanded by the courts through its judicial pronouncements. The next part of the article analyses the law on impotency in different foreign jurisdictions such as the United Kingdom and the United States of America as well as criticises the shortcomings of this law and recommend the possible changes or reforms that can be incorporated by the legislature.



IMPOTENCY AS A GROUND OF ANNULMENT/DIVORCE UNDER THE PERSONAL LAWS OF
INDIA

I. HINDU MARRIAGE ACT, 1955

A. Legal Framework

Section 12(1)(a)¹ of the Hindu Marriage Act, 1955 prescribes the ground for annulment of a marriage on the grounds of non-consummation of a marriage due to the impotency of a party.

The Hindu Marriage Act has taken inspiration and developed its jurisprudence from the English laws rather than traditional Hindu practices. It declares a marriage that is not capable of being consummated as voidable which is contrary to the old Hindu Law which regarded such marriages as valid. The reason behind declaration of non-consummated marriages as voidable is the belief that sexual intercourse or joining of the bodies forms as a part of the foundation of the marriage.² The inability to consummate goes to the root of the marital relationship and affects the future of such marriage and the maintenance of the same.

Section 12(1)(a) is attracted if due to the physical or mental condition of the party consummation of marriage becomes a practical impossibility.

1. Definition of impotence.

The court in the case of *Rita Nijhawan v. Bal Krishnan Nijhawan*³ has defined impotency as the lack of the ability of a party to perform full and complete sexual intercourse with their spouse. If it is shown to the court that the parties have consummated the marriage even once, then the decree of nullity will not be provided.

Further, this lack of ability is not restricted to only physical incapability but also accounts for the party's mental condition makes consummation of the marriage a practical impossibility.⁴

¹ Hindu Marriage Act, 1955, §12. No. 25, Acts of Parliament, 1955 (India).

² S.S. Nigam, *A Plea for a Uniform Law of Divorce*, Journal of Indian Law Institute. 47-80 (1963).

³ *Rita Nijhawan v. Bal Krishnan Nijhawan*, 1973 SCC OnLine Del 52.

⁴ *Yuvraj Digvijay Sinhji v. Yuvrani Pratap Kumari*, AIR 1970 SC 137.



The court also clarified its position on relative impotency when it held that impotency does not strictly mean the incapability to have sexual intercourse with anyone. It refers to such incapability towards the spouse itself even if the party may be able to engage in sexual intercourse with someone else.⁵

The court in the case of *Sunil K Mirchandani v Reena S Mirchandani*⁶ held that mere refusal to engage into sexual intercourse does not amount to impotency.

2. When should impotency exist?

It is essential for an issue such as impotency which attacks the root of the conjugal union to establish when such impotency had existed during the course of the marriage and whether the marriage was entered into while such impotency was present.

With the amendment to the Hindu Marriage Act by the amending act of 1976 and the Supreme Court in the case of *Digvijay Singhji v Pratap Kumari*⁷ clarified the position to hold that impotency should be in existence during the initiation of proceedings. It is also not necessary for the party to prove that the other is wholly impotent. Impotency has to be proved vis-a-vis the spouse.

3. Burden of Proof:

In order for the marriage to be annulled on the ground of impotence, such has to be established and proved before the court by the party who seeks such annulment. Therefore, the petitioner is the one upon whom the onus lies to establish the existence of impotence as the time of the initiation of the proceedings.

For example, in the case of *Surinder Singh v Nirmaljit Kaur*⁸, the court held that if the wife who has initiated the proceedings successfully establishes the impotence of the husband, the onus then shifts upon the husband to prove that such impotency does not exist. If the husband then fails to provide any evidence for the same, an inference can be made by the court against the husband and an order of annulment can be passed.

⁵ Suvarna v. G M Acharya, AIR 1979 AP 169.

⁶ Sunil K Mirchandani v. Reena S Mirchandani, AIR 2000 Bom 66.

⁷ Digvijay Singhji v. Pratap Kumari, AIR 1970 SC 137.

⁸ Surinder Singh v. Nirmaljit Kaur, AIR 2000 P&H. 139.



4. Lack of proper approach to consummate the marriage:

The unwillingness of a party to consummate may not only arise out of impotency, it also is dependent upon the attitude and behaviour of the other spouse while engaging into sexual activities. The lack of a proper approach by the party in order to seek consummation can also be one of the reasons for the non-consummation of the marriage⁹.

5. Impotence amounting to cruelty:

Accounting for the fact that sexual intercourse lies at the root of a marriage as well as is an inherent need of the human body, the denial of the same could severely affect the physical and mental health of the parties.

The court in the landmark case of *Rita Nijhawan v. Bal Krishnan Nijhawan*¹⁰ held that, if either of the parties to a marriage, being of good health and physical capacity, refuses to have sexual intercourse, the same would amount to cruelty entitling the other party to a decree. It does not matter that denial is due to sexual weakness or because of any wilful refusal by a spouse. Either way, it will result in frustration and misery to the other spouse.

The Court in the case of *Sri Kant v. Anuradha*¹¹ recognised sexual intercourse as an obligation of the marital life and the denial of which would amount to subjecting the spouse with cruelty.

6. Delay in the initiation of proceedings:

There is also an implied responsibility vested upon the courts to make sure that applications for annulment on grounds of impotency are not misused by the parties in order to nullify the marriages.

The court in the case of *Vinod Chandra Dube v. Smt. Aruna Dube*¹² held that a delay has to be explained by the petitioner before he could be granted relief. However, when the respondent refuses to attend the proceedings of the court and the matter is heard ex parte, the court may itself make the objection in cases when the delay is obvious.

⁹ *Yuvraj Dignvijay Sinbji v. Yuvrani Pratap Kumari*, AIR 1970 SC 137.

¹⁰ *Rita Nijhawan v. Bal Krishnan Nijhawan*, 1973 SCC OnLine Del 52.

¹¹ *Srikant Rangacharya Adya v. Anuradha*, AIR 1980 Kant 8.

¹² *Vinod Chandra Dube v. Smt. Aruna Dube*, AIR 1977 Del 24.



The courts have also held in cases such as *S v. R*¹³ that delay in institution of proceedings have to be decided on the facts of the case. No hard and fast rules can be applied to deciding that question.

7. Medical examination for proof of impotence:

Medical examination forms a very crucial and irreplaceable element of annulment proceedings on the ground of impotency as physical examination of the alleged party helps the courts to form a definite opinion and thereby deliver their decision.

The courts in such proceedings may insist on medical evidence or order physical examination, which however may not be compelled.¹⁴

However, the refusal to undergo a medical examination may lead to the court drawing adverse inferences.¹⁵

The courts were also faced with the repeated contentions over the legality of the medical examinations arguing that they violate Article 21 in terms of the right to privacy as well as personal liberty. The court clarified its position and held that a medical examination on the behest of the court of the party does not violate the right of personal liberty under of the Constitution of India.¹⁶

8. Curability of impotency:

The courts have established a position of law that a person who becomes potent or becomes capable of engaging in sexual intercourse after a surgery, operation or medical treatment is considered as not impotent and thus a decree nullity cannot be granted.¹⁷ However, if such ability is not acquired after the medical treatments, the spouse is considered to be impotent.¹⁸

9. Fraud resulting from impotency:

The contention before the court upon fraud is that if the party was aware of the existence of such impotence and refused to inform the spouse of such defect and misrepresented to the contrary, the party can be held liable for fraud and can be mandated to award compensation for the same.

¹³ *S v. R*, AIR 1968 Del 79.

¹⁴ *Debashis Chakraborty v. Mausumi Bhattacharjee*, AIR 2007 Gau 178.

¹⁵ *Ganeshji v. Hastuben*, (1967) 8 Guj L.R. 966.

¹⁶ *Venkatanarayanan v. Karupati Laxmidevi*, AIR 1985 AP 1.

¹⁷ *Rajinder v. Shanti* AIR 1972 P&H.181.

¹⁸ *Manjit Kaur v. Surinder Singh* AIR 1994 P&H. 5.



The position of law in the case of *Balasaheb S. Takalkar v Vijayamala P. Londhe*¹⁹, held that if the consent was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent, then such act would amount to as fraud on the part of the respondent. If a party to a marriage is suffering from some abhorrent disease such as leprosy or general disease and this is not disclosed, it will be definitely concealment and consequently fraud as to material fact and circumstance.

II. INDIAN DIVORCE ACT, 1869

A. Historical Background

The traditional functions of the church and beliefs of Christianity worked towards regulating and legitimising sexual intercourse among individuals with the bond of marriage in order to avoid loose living and concupiscence.²⁰ Thus, sexual intercourse developed as the sole purpose of the sustainability of marriage and therefore, the incapacity to consummate was a strike at the root of the foundation of marriage. A valid consummation of marriage is the one where the parties are satisfied through the practice of sexual intercourse.

The Indian Divorce Act as well as the Parsi Marriage and Divorce Act, drew upon heavily from the Christian practices and English law thereby framing the law that impotence or impossibility of consummation makes the marriage null and void rather than voidable.

B. Legal Framework

Section 19(1)²¹ of the act prescribes that a decree may be passed that would hold the marriage as null and void if the party in the relationship is impotent at the time of the institution of the proceedings.

1. Psychological Conditions:

¹⁹ Balasaheb S. Takalkar v. Vijayamala P. Londhe, 78 Bom. L.R. 85.

²⁰ S.S. Nigam, *A Plea for a Uniform Law of Divorce*, Journal of Indian Law Institute. 47-80 (1963).

²¹ Indian Divorce Act, 1869, §19. No. 4, Acts of Parliament, 1869 (India).



The court in the case of *John v. Mary*²² have also accounted for the effect of Mental defect, mental block, or psychological conditions which precludes consummation of marriage as a ground for annulment leading to a physical shortcoming. The courts have amicably and readily granted dissolution in cases where the marriage was not consummated within the first 9 days of marriage.²³

Such lack of desire may be temporary and passing in nature due to certain circumstances or problems pertaining in one's life. Such a phase would not result in one being impotent and would not render the marriage as void.²⁴

2. Fraud resulting from impotency:

The courts have also observed and taken account for the element of fraud in such cases when the fact that the party is impotent is known to them however an alternate impression is made upon the spouse to bind them into a marital relationship. Such was the case in *Augustine v Kunjamma*²⁵ where the court demanded the husband to pay damages worth Rs. 2 Lakhs to the wife while the court dissolved the marriage.

III. DISSOLUTION OF MUSLIM MARRIAGE ACT, 1939

A. Legal Framework

Section 2(v)²⁶ read with 2(ix) prescribes the ground for seeking dissolution of marriage under the act due to the impotence of the husband.

In the act, the wife has the right to demand for the dissolution of the marriage due to the pertaining impotence of the spouse that she was unaware of at the time of the marriage.

1. Ground for divorce:

The impotence of the party under the Muslim law does not attack the foundation of the root of the marriage. It does not have an effect on the validity of the marriage. The validity of such

²² John v. Mary, AIR 1994 Cal 76.

²³ Suprava Joel Gaikwad v. Joel Solomon Gaikwad, 1997 (1) DMC 306.

²⁴ Mary Kurian v. T T Joseph, AIR 1980 Ker 131.

²⁵ Augustine v. Kunjamma, AIR 2001 Mad. 480.

²⁶ Dissolution of Muslim Marriage Act, 1939, §2. No. 8, Acts of Parliament, 1939 (India).



marriage is not dependent upon the party's capability to consummate the marriage and therefore its absence does not nullify the original marriage. Under the Muslim law, impotence is only a ground for divorce.

The intent of the provision is to make sure that the wife is not forced to stay with the husband and be compelled to submit herself to the experiments of a humiliated husband on account of his impotency.²⁷

2. Demand of Maintenance by the wife:

If the husband is not able to fulfil his marital obligations on account of impotency, the wife is eligible to claim maintenance under Section 125(3) of CrPC as such refusal to consummate by the husband amounts to cruelty. If the wife is made to live a life of celibacy, it has detrimental effects to her physical as well as mental health.²⁸

3. Curability of impotency:

The act also talks about the curability of such impotency. If the husband in a case is amenable to go through surgery or treatment to get rid of impotency, then the husband cannot be said to be impotent and therefore the decree of dissolution will not be provided by the court. However, if he refuses to do so, an adverse inference can be drawn.

IMPOTENCY AS A GROUND OF ANNULMENT/DIVORCE IN FOREIGN JURISDICTIONS

I. UNITED KINGDOM

A. Historical Background:

In order to grasp a better understanding of the present law on impotence and its implications on the validity of marriage, it's imperative to understand how this ground was developed as one that could hold a marriage voidable. In the old English Law, impotence was a part of the canonical disabilities which formed one of the many the grounds for annulment. Canonical disabilities

²⁷ Abdul v. Fahimunisa, AIR 1969 Mys 226.

²⁸ Siraj Mohmed Khan Janh Mohamad Khan v. Hafizuna Yasinkhan and Anr., (1981) 4 SCC 250.



included consanguinity, affinity and impotency which rendered a marriage voidable and provided an opportunity to the parties to avoid the marriage.

In the landmark case of *D.E. v. A.G.*²⁹, the judges interpreted impotence to mean the incapacity to consummate a marriage through sexual intercourse between the husband and the wife. This inability or incapacity directly attacks the foundation of a marriage as it is undeniably one of the central objects of a marriage and therefore would serve as a valid ground to hold the marriage as voidable.

Due to the invasive nature of medical examination as well as the uncertainty of its authenticity, the English courts obtained an alternate and different approach in order to arrive at the conclusion of whether a party was impotent during the marriage. Therefore, the doctrine of Triennial Cohabitation was developed.

1. The Doctrine of Triennial Cohabitation:

The doctrine provided that if the parties have cohabited for a period of 3 years and if the wife at the end of that 3-year period remained a virgin, the presumption was made as to the impotency of the husband. The impotence of the man was considered to be established if the act of consummation of the marriage did not take place within the 3-year period of cohabitation after the marriage.³⁰

However, this period of cohabitation does not infer that the parties should live in absolute continuous cohabitation. A general cohabitation suffices and if the either party has been absent during that period due to valid reasons, and then they shall be allowed to compensate for such absence by the allowance of an extended period of cohabitation.³¹ This doctrine is not to be mandatorily complied with if enough evidence exists after such impotence is medically examined and the result indicates that due to such infirmity the party is absolutely incapable of consummating the marriage. A cohabitation for a period of 3 years then becomes unnecessary and a burden for the parties.

²⁹ *D.E. v. A.G.*, (1845) 163 E.R. 1039.

³⁰ DePaul College of Law, *Impotency as Ground for Annulment*, 3 DePaul L. Rev. 284 (1954).

³¹ WILLIAM HARDCASTLE BROWNE, COMMENTARY ON THE LAW OF DIVORCE AND ALIMONY (Palala Press 2015).



The case of *C. v. D*³². was the first case to go against the doctrine and set a precedent where even though the period of 3 years of cohabitation was not completed, due to the fact that the wife had proved the incurable impotency of her husband, the annulment was granted. The court believed that after confirmation of such impotence, if the wife was made to cohabit to complete the period of 3 years, it would frustrate the purpose of this doctrine and cause unnecessary suffering upon the wife.

B. Legal Framework

Section 12³³ of the Marriage Causes Act of 1973 lays down the grounds on which a marriage can be rendered voidable and be annulled.

Section 12(a) specifically provides for as a ground for annulment where the marriage has not been consummated by either party due to their incapacity or inability to do the same.

1. Filing of the suit:

The English courts have emphasized upon the inexcusable excuse of delay in filing of an application of annulment on the ground of impotence since it questions the bona fide nature of the application. Long acquiescence with knowledge, or the means of procuring knowledge, would operate as a bar to the prosecution of such suits.³⁴

2. Burden of proof:

In the case of *Russell v. Russell*³⁵, the court stated clear in its decision that in order to prove such impotence of the party, the petitioner has the burden of proof in pursuance of which he has to show that the impotence of the party is incurable in nature, that it existed during the period of the marriage. Further, the court also stated that just because a child was born out of such wedlock does not render to be conclusive and definite evidence towards the consummation of such marriage.

³² C v. D, (2007) EWCA Civ 1282.

³³ Matrimonial Causes Act 1973, §12, No. 18, Acts of Parliament, 1973 (United Kingdom).

³⁴ DePaul College of Law, *Impotency as Ground for Annulment*, 3 DePaul L. Rev. 284 (1954).

³⁵ *Russell v. Russell*, (1924) AC 687.



3. Medical examination:

The English courts have held that they may appoint medical professionals to examine the necessary organs of the parties in order to analyse their capability to consummate the marriage. However, such examination shall not take place until it's absolutely necessary in order for the court to come to its decision. The statute of the Matrimonial Causes Act makes no provision for the courts to do the same. This power constitutes an inherent power of the courts from which no appeal lies. It has become a part of the settled practice to ascertain evidence as to the impotency of a party.³⁶

4. Relative impotency:

The court in the case of *Singh v. Singh*³⁷, has acknowledged the fact that it is not necessary and it's not always the fact that the party is inherently and incurably impotent. However, this relative impotence has not been considered by the courts in annulment.

5. Impotency amounting to Cruelty:

The courts have also acknowledged how the impotence of the party can serve as a mode of cruelty towards their spouse. In the case of *Sheldon v. Sheldon*³⁸, Lord Denning held that a husband's refusal to consummate the marriage for an extended period of time can lead to injury to wife's physical and mental health and can result in cruelty on the part of the husband. He also stated that the limits or boundaries of what act constitutes as cruelty is not exhaustive or constrained. Persistent refusal to consummate is not to be excluded from such boundaries and would very well amount to cruelty.

Fraud:

The courts have acknowledged that the marriage in its essence is a contract and if a party is aware of its incapability to consummate due to his impotence and represents or convinces the other party of the opposite, he commits a grievous injury on the other party.³⁹ Even if the party is not aware of such infirmity, it would still lead to a violation of the contract leading to injury. Fraud however is not an essential element in the law of impotence in order for the marriage to be annulled.

³⁶ S.S. Nigam, *A Plea for a Uniform Law of Divorce*, Journal of Indian Law Institute. 47-80 (1963).

³⁷ *Singh v. Singh*, (1971) 2 All E.R. 828

³⁸ *Sheldon v. Sheldon*, (1966) 2 All E.R. 257.

³⁹ WILLIAM HARDCASTLE BROWNE, COMMENTARY ON THE LAW OF DIVORCE AND ALIMONY (Palala Press 2015).



Curability:

The incapacity to consummate must exist at the date of the petition and must be permanent and incurable or only curable by a dangerous operation.⁴⁰

II. UNITED STATES OF AMERICA

A. Legal Framework:

The conflict in understanding the laws pertaining to impotence in the United States is based on diversity of laws among different states since every state has its independent laws on annulment and dissolution of marriages. The courts of the different states have their own principles and decisions set as precedents as well as differ on whether impotence is a ground of annulment or divorce.

The case of *Anonymous v. Anonymous*⁴¹ represents a summary of the opinion and decisions of the New York Courts which have provided annulments on the ground of impotency of the party. The court believes that consummation is an integral part of a marriage contract and if a spouse is proven to be impotent at the time of the marriage till the institution of the proceedings, and an action is brought against the same, the New York Statute provides the courts the power to grant annulment of such marriage.

1. Impotency v. Sterility:

Further, the courts have also demarcated a distinction between impotency and sterility of a party through cases such as *Devanbakh v. Devanbakh*⁴² where the court has held that impotency can be defined as the inability to engage into sexual intercourse whereas sterility leads to impossibility to procreate. The courts hold that the ability to have sexual intercourse is the test to be applied to determine impotency, and not the ability to procreate.

2. Burden of Proof:

⁴⁰ S v. S, (1954) 3 All E.R. 736.

⁴¹ *Anonymous v. Anonymous* 24 NJ. Eq. 19 (1873).

⁴² *Devanbakh v. Devanbakh*, 5 Paige. 554.



Further, the courts have also discussed upon the burden of the proof to establish impotency. Although the burden will lie upon the petitioner to prove how the spouse is impotent, however, this burden can also shift on the spouse in order to establish how they are not impotent at the time of the marriage.

3. Delay in initiation of proceedings:

Such was held in the case of *Lewis v. Hayward*⁴³ where after a cohabitation of 14 years a woman presented a petition for a decree of nullity of marriage on the ground of husband's impotency due to the non-consummation of marriage. It was held by the court that the woman was entitled to a decree that the marriage was null and void on the ground that the cohabitation had been for a much more lengthened period than was required to raise the presumption against a husband and that the onus was thrown upon the husband either of disproving the facts that allege impotency.

B. Transsexual Marriages

In 1976, the court of New Jersey in the case of *M.T v. J.T*⁴⁴ was the first one to deliver a unique and important judgment upon transsexual marriages and its implications upon impotence as a ground of annulment. While the court addressed an important area of law, the approach taken and the decision delivered by the court was advanced, just and progressive in nature.

The appellate division panel declined to declare void a marriage between a man and a male-to-female transsexual. The court ruled that even though the couple have a transsexual marriage, their mode of consummation is irrelevant as long as such consummation is taking place to the satisfaction of the parties. Judge Handler who delivered the judgment concluded that the capacity should be scrutinised rather than the mode of consummation. It is important to consider the function that the sexual activity serves rather than what it should look like.⁴⁵

C. Doctrine of Triennial Cohabitation

The doctrine of Triennial Cohabitation was also applied by American courts and the first case it was applied to was *Tompkins v. Tompkins*⁴⁶ where there was an unconsummated marriage for a

⁴³ *Lewis v. Hayward*, (1866) 35 LJ P. & M. 105.

⁴⁴ *M.T v. J.T*, 140 NJ Super. 77.

⁴⁵ Lawrence Drew Borten, *Sex, Procreation and the State Interest in Marriage*, Columbia Law Review. 1089-1128 (2002).

⁴⁶ *Tompkins v. Tompkins*, 92 NJ. Eq. 113.



period of five years when the wife petitioned for a decree of annulment.⁴⁷ The annulment was awarded on the grounds that the virginity and aptness of the wife after more than three years of cohabitation raised the presumption of impotency of the husband which was not rebutted by him.

CRITICAL ANALYSIS

1. Medical Examination:

The law on impotence protects the interests of the parties and prevents them from being in a marital relationship where their sexual interests are in jeopardy which can have detrimental and injurious effects on their physical and mental health. However, while the approach taken by the court to ensure the potency of the party is established by taking the best interest of the parties into consideration, subjecting them to medical examination can prove to be a traumatic and uncomfortable experience for the spouses. Although such examinations as not in violation of the fundamental rights, in a country like India where the marriages are considered as holy, proceedings before the court of impotence are humiliating enough and if examinations are taken place, it often causes public shame and societal disengagement.

2. Asexuality:

As the society is becoming more aware of different sexualities and sexual preferences, it is imperative for the courts to acknowledge asexuality and individuals who are asexual who do not prefer sexual interaction with others and differentiate from those who are impotent in order to not put them into the same bracket. It is highly unfair for one who is asexual to be eliminated from a marital relationship with no defect or fault of their own. There needs to be better propagation of knowledge upon asexuality and the consequences it has on a traditional marriage whether sexual intercourse is considered as the basic foundation and the root of the purpose of a marriage.

3. Collusion among spouses:

Further, the ground of impotency is often used as a method of collusion among parties to opt out of the marital relationship without the hassle of divorce proceedings and thereby making the marriage null and void as if they never entered into matrimony. Every young couple who marry in haste and subsequently want to get the marriage dissolved could very easily bring a petition. The courts, therefore, need to analyse the facts and the circumstances of a case with great detail

⁴⁷ DePaul College of Law, Impotency as Ground for Annulment, 3 DePaul L. Rev. 284 (1954).



and attention because the parties could very easily bring a petition of this type alleging impotency of one of the parties towards the other and not general impotency as the sole ground for annulment of the marriage, thereby avoiding the allegation of adultery and cruelty against each other which are ordinarily put forward as grounds for divorce.

4. Impotency amounting to Cruelty:

Impotency has constantly been considered as a form of cruelty through several statutes discussed above. Although impotency disturbs the well-being of a marital relationship for both the spouses, to consider the same as a form of cruelty is to view impotency through archaic and traditional lens. There arises no need to criminalise impotency when the same is a physical, mental and psychological condition that cannot be controlled by an individual. This is not to say that a spouse's right to seek maintenance upon dissolution of such marriage should be taken away on account of impotency. However, to consider the same under the larger ambit of cruelty is wrongful and unjust.



CONCLUSION

Laws on impotency and its classification as a ground for seeking annulments have been present in personal laws of various jurisdictions, such as India, United Kingdom as well as the United States of America as discussed before. However, the characteristic differences among these laws arise from their evolution as well as their consequences on a marital relationship. These laws have been developed by a long history of the beliefs and cultures of their beliefs, cultures and relations and have gone through modification over the years through judicial pronouncements. These laws also concur on several aspects such as the duration of initiation of proceedings and the element of burden of proof as determining elements while deciding a case. However, the laws on impotency also include elements which are inherently archaic and unjust. These include the pronouncement of medical examination orders, including impotency under the ambit of cruelty or the inconsideration towards asexual individuals which may not be able to consummate a marital relationship. There is also a growing need for the judiciary to intervene, modernise and adapt these laws to the current social atmosphere prioritising spouses' privacy as well as carefully evaluate petitions to prevent impotency being used as an instrument to escape marital relationships.

Reference: <https://lexforti.com/legal-news/>