

LEGALFOXES LAW TIMES

THE CONCEPT OF DIVORCE AND ITS STANDING IN VARIOUS PERSONAL LAWS OF INDIA

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Abstract:

The divorce laws in India are pluralistic and hard to disentangle. They have several basic commonalities but differ in ideology and principle. The Acts we have so far talked about only encompass people who are citizens of India, living within India. The Foreign Marriage Act is one such act which talks about marriage of an Indian citizen outside Indian territory as well. The conditions for filing for divorce under this Act adhere to the rules laid down under the SMA itself. However, the procedure for divorce is different as defining the jurisdiction is more complicated; the courts need to look at domicile status, matrimonial residence and residence of the petitioner as well.

The enactment of the various legislations thereby introducing the concept of Divorce in Hinduism (includes Jains, Buddhists and Sikhs) through The Hindu Marriage Act, 1955 and The Dissolution of Muslim Marriage Act 1939 for Muslims particularly empowering the rights of Muslim women concerning to the divorce rights has been a major step towards overriding the divorce aspects of their personal laws. The Parsi Divorce Act 1936 for Parsis and The India Divorce Act 1869 applicable to Christians is also a step forward over their personal laws.

The applicability of foreign decrees of divorce was discussed in detail by the Supreme Court in *Y. Narasimha Rao. v Y. Venkata Lakshmi*¹. The courts ruled that unless it is by mutual consent, only a court which recognizes the law under which the parties were married has jurisdiction over divorce proceedings. Further, any such ruling should respect the merit of provisions given by the applicable personal law and if the court does not have jurisdiction, both parties must have unconditionally submitted to this foreign courts' jurisdiction.

Under all uncodified personal laws in India, except Muslim law, marriage is considered as unbreakable and eternal. Christian law, Hindu law, and Parsi law do not provide for the marriage dissolution. under the Muslim law only a marriage is considered as a dissoluble bond. With the passing years, it was recognized that it is very difficult to continue the marriage sometimes. This resulted in the enactment of various statutory personal laws, enabling marriage dissolution by competent court's decree.

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¹ *Y. Narasimha Rao. v Y. Venkata Lakshmi*, (1975) 1 SCC 120

Full Length Paper:

The Indian legal system has a pluralistic approach when it comes to divorce, that is there are several methods to attain the same under different marriage codes as compared to the uniform civil code in many Western countries. There are currently six different enactments that govern divorce laws in India. The Hindus, Buddhists, Sikhs and Jains adhere to

- 1) The Hindu Marriage Act (HMA), 1955,
- 2) The Muslims to the Dissolution of Muslim Marriages Act (DMMA), 1939,
- 3) The Parsis to the Parsi Marriage and Divorce Act (PMDA), 1936 and
- 4) The Christians to the Indian Divorce Act (IDA), 1869.,
- 5) The Special Marriage Act (SMA) of 1956, governs all legitimate marriages which are not within the confines of the previously mentioned Acts or of the people who choose to adhere to the SMA.
- 6) The Foreign Marriage Act (FMA), 1969, is availed by parties between whom at least one person is a citizen of India and the marriage takes place in a foreign country while adhering to the conditions given by this Act.

Apart from difference in opinion as to the regulation of marriage and divorce, some religions also have varying definitions of marriage. The Hindu community did not recognize divorce as an option till the codification of the Hindu Code Bill, while the Muslim community has always had many formal and informal means of divorce pursuant to invalidity or dissolution of contract. Unlike in the Indian Divorce Act which governs Christian divorce proceedings, women cannot file for divorce amongst Muslims, subject to some exceptions such as adultery, impotency or insanity. Under the HMA and the PMDA either spouses can file for a divorce, and the grounds for such divorce are very similar to the ones given by the Special Marriage Act. The similar grounds available under HMA as well as the SMA under which either spouse can file for divorce against the other include adultery, desertion for two or more years, conviction with imprisonment of seven years or more, cruelty, insanity, contraction of communicable venereal disease or having a status of legal death.

The PMDA has many commonalities to the HMA and SMA as well, however it has many provisos as to the statute of limitations to file a suit. Further, it also allows for divorce on grounds of grievous hurt or the husband forcing his wife into prostitution. The HMA and the

Parsi Marriage and Divorce further allow for divorce on grounds of conversion of religion, as well as failure to abide by decree of restitution of conjugal rights for more than a year or non-reconciliation after judicial separation for more than a year. All of these acts now recognize divorce by mutual consent as a valid form of divorce.

Most of these personal laws give further provisions for women to seek divorce on other grounds in an attempt to reconcile the inherent inequality they face as a result of our patriarchal matrimonial traditions and customs. For this reason, Section 17(1-A) of the SMA allows for women to file for divorce on grounds of sodomy, rape or bestiality. The HMA also gives women under the age of 18 an option to repudiate the marriage if she was a victim of child marriage before the age of 15, thus creating *option of puberty* as an alternative suit for women. There are provisions in the DMMA as well as other acts, which battle child marriage as well. As per the DMMA, if a girl has been given in marriage by her guardians before she turned 15, she can repudiate the marriage provided that it should not have been consummated.

The DMMA was enacted for the purpose of consolidating the methods of Muslim marriage dissolution under different school, however unlike in Hindu law, the *Sharai* remains mostly un-codified. Under the Hanafi law, women do not have the right to file for divorce, but Hanafi Muslim jurists found this harsh and thus used the Maliki law, which allows for women to file for divorce under certain circumstances. This was possible due to the interpretation that when the application of Hanafi law causes hardship then provisions of Maliki, Shafi's or Hambali law can be applied instead. This was the academic discourse kept in mind when Section 2 of the DMMA was enacted. Except for the conditions mentioned in Section 2, a woman cannot seek divorce however a man can. This Section provides grounds such as neglect or failure to pay maintenance for more than two years, failure to perform marital obligations, conviction with jail time of more than seven years, insanity, cruelty, impotency, or any other valid grounds which are recognized by Muslim law, to name a few.

Till the 2017 judgment of the Supreme Court in *Shayara Bano v UOI* case, men could instantly divorce their wives by the *triple talaq* method without giving reason. This practice was outlawed only on 22nd August 2017.

Apart from seeking judicial interference, the Shariat also allows for extra-judicial methods of divorce such as Talaq-e-Sunnat, Talaq-i-biddat, *ila* and *zahar*. These come within customary divorce, which is an accepted practice in India. Apart from within Muslim law

however, no reference can be found in the HMA or the IDA as to customs which would be considered as a valid to invoke customary divorce. However, there is a mention of the validity of customary divorce in itself in Section 29(2) of the HMA. It often happens that the customary divorce, when challenged, is not accepted by courts as valid custom. This is because courts have interpreted “custom” under Section 29(2) to mean a continually and uniformly observed long standing tradition in a community, and they hold any alleged custom to a high standard of compliance to ensure that there is no frivolous use of customary divorce.

“Divorce was introduced into Hindu Law for the protection of helpless women when they were ill treated. It was never Parliament’s intention to give husband matrimonial variety at their option so long as they could retain a pleader”.

The present act has introduced vital and dynamic changes in the Hindu law of marriage and divorce. It is laid down clear provisions for divorce under certain circumstances under sec.13 of the Act. Sec.14 renders the provision of divorce a bit difficult as it provides that no petition for divorce can be presented within one year of the marriage except when the case is of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent. Sec.15 lays down the limitations on the rights of divorced persons to marry again.

Adultery, Conversion, Desertion, Cruelty, Divorce by mutual consent, Unsoundness of mind, Presumed death, Leprosy, Veneral diseases, Failure to comply with a decree for restitution of conjugal rights, marriage Are the divorce grounds, which are common under all these acts. If we compare the grounds for Divorce that are given under all these acts, we will see that the Parsi Marriage and Divorce Act has the most number of Divorce grounds that is 17. The Indian Divorce Act has the least number of grounds for Divorce that is 10. The Indian Divorce Act does not have Renunciation of the world as a ground of Divorce. Similarly, the other acts such as the Parsi Marriage and Divorce Act and the Special Marriage Act do not have this ground of Divorce. Therefore, Renunciation of the World should be added as a ground of Divorce under all these acts as it would be unfair for the other spouse to continue the marriage when his/ her renounces the world.

A woman in India is although awarded with the fundamental right of gender equality and right to life and liberty, ensuring dignified and equal status to that of a man under the constitution of India. But in actual practice they are observed more in breach than in compliance position. In India, it is particularly the personal laws that principally govern the lives of women. Women

professing any religion; Hindu, Muslim, Christian, Parsis and Jews etc enjoy some rights which govern various aspects of their lives such as marriage, divorce, maintenance and inheritance. Her virtues, vices, strength, and her weakness are assumed on religious practices and religious norms. The evaluation of the status of women in India has been a continuous process of ups & downs throughout the history. It is indeed ironical that when Indian mythology places women on a very high pedestal and they are worshiped and honoured as Goddess; in practice we show no concern honour. It is a sorry reflection mirroring the attitude of indifference of the society which results in a total negation of the human rights of women in which gender justice noses dives.

Historical research has shown that it was the normal practice, from ancient times through the post-colonial era of the last century, for people, whether conquerors or the conquered, to continue to live under 'personal laws' based usually on a combination of custom, tradition and religion that defined them as a people. Patriarchy is the basis of personal laws, regardless of community. In a patriarchal kinship system, a son is the father's natural apprentice, successor and supporter of the parents in the old age. Therefore, a father believes that he will continue to live in the world through his son. A daughter in the other hand cannot effectively take the place of a son. Discrimination against the girl child starts the moment she enters into the mother's womb. All personal laws, the one feature is that they govern unequal and lesser rights to women. These personal laws ensure the secondary status of women within the family as well as they continued social and economic dependence of the women upon the male members of the family be they fathers, brother, husband or son. Traditional India had seen a woman only as a member of the family or a group – as daughters, wives and mothers – and not as an individual with an identity or rights of her own.

The 'ideals' of Indian womanhood is the passive, chaste, devoted and faithful like 'Sita' rather than other strong independent women found in Hindu mythology.

It is said that no Nation has held their women higher esteem than the Hindus. But did she continue to enjoy this position in real practical life so long? The Vedic period held her high esteem and conferred her honourable and respectable position. The marriage was regarded as sacrosanct and the family ideal was decidedly high. The woman on marriage acquired an honourable position and considerable status. The Rig-veda provides a glimpse of the position "we the queen in the father-in-law household". But the day was not far off she became subservient due to evolution of Brahmanical doctrine. The Brahmanas dominated on Manusmriti and did

not allow the women to live an independent life of her own. The woman should be under the protection of man during her whole life was the theme of Manusmriti. The so called honourable status earned by a Hindu women in Vedic era showed the sign of decay during the period of Dharmashastra. This period made her subordinate and dependent on male. Even today his laws keep millions helplessly in prison of orthodoxy. The male dominated society had a great bias and discriminatory attitude towards women. According to Anjani Kant; Thus debarring her in claiming a separate and independent identity, status and personality, she had to grow and develop the personality under the umbrella of the men which in real and practical life was unfeasible.

It was declared that the discrimination which the world has created between man and woman is absurd and baseless. The whole mankind is the offspring of the single human soul. The most important thing is, Islam has assigned woman a prominent position at social level. Hence, she can lead an honoured and dignified life without becoming a victim of any inferiority complex. The right of Divorce enjoyed by husband in Muslim law had come under much hammering and criticism. The most disturbing is the Talaq-ul-Bidat for every married Muslim woman. It is against the spirit of the Holy Qu'ran and Sunnah. It is banned in some Muslim Countries. The spirit of Islam is monogamous not polygamous. Polygamy is allowed on the condition of equal and just treatment in all respects which is not possible. The divorced woman is entitled to get maintenance from her former husband till she observes iddat. The question now arises as to who will maintain her if she has no supporter or is of old age. All this happened in the name of Islam. Inheritance laws have created less noise and a debate than marriage and divorce laws. Mainly in this regard social inequalities has cut across communities and women, for most part repressed and unaware of even the rights that exists, have been unable to secure them.

Following independence, personal laws have undergone piecemeal reforms through judicial and legislative intervention. Such reforms have, however, been largely limited to the laws of the majority community in every country. Reforms in personal status or Family law never take place in the absence of social opposition. On the contrary, government interference in the field of personal status has always drawn the fierce resistance of ethno-religious communities whose norms and institutions have been targeted by reforms. Hindu law in India has been modified by a series of statutes; Muslim law has been reformed by the Muslim Family Laws

Ordinance of 1961 in Pakistan, and supplemented by the Muslim Marriages and Divorces (Registration) Act of 1974, and the Family Courts Act of 1985 in Bangladesh. In contrast laws applicable to minorities in each country remain as crystallised during the Colonial period.

