# Vicissitude of Time—Divorce and the Law

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*We take each other to love, and to cherish, in sickness and health, for better, for worse until death do us part*

THE CHRISTIAN concept of marriage is intended to last for life, whereas under the Hindu *shastric* law marriage is deemed to be a sacramental bond continuing up to heaven. However, the strains of rapidly changing socio-economic conditions, industrialisation, literacy among women, economic independence of women and changing religious and ethical values have not only tremendously affected marital relationships but also have subscribed to the increased rate of discontentment in family life. In addition to other factors, the nuclear family pattern has also been found to have adversley affected the interests of the children and spouses, as due to insulation of family there are more chances of tensions and frictions being triggered off easily. In the Western countries where the extended family is being rapidly supplanted by the nuclear family on account of urbanization and its concomitant consequences the prevalent Indian joint family system is coveted for :

> This system is one that has existed for centuries in that country and has apparently met many needs which are taken care of by other devices in Western cultures....The entire family lives as a communal group. If one son loses his job he becomes the ward of the others. The whole scheme operates as an indigenous social security system including old age insurance, unemployment insurance, aid to the indigent and maternal and child welfare.
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> In our nuclear family system where the spouses and children live to themselves, tensions are quickly recognized. The isolation of the family increases the emotionally charged inter-family relationships and the children become actually aware of and affected by parental conflict.[1]

The traditional notion of marriage as a sacred union of the husband and wife is being replaced by the modern view of companionship of the spouses. There is rapid and irrational change in the social matrix which is threatening the very foundation of marriage.

Expectations from marriage have swelled, thereby giving rise to lack of

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1. Fowler Harper and Miriam Harper, Lawyers and Marriage Counselling, 1 *Jour. of Family Law* 73 at 78 (1961).

understanding, patience and perseverance to bear with the tensions and frustrations of married life, a natural reaction of any close human relationship. Spouses have lost patience to endure the normal wear and tear and shocks of married life.[2] The fallibilities and frailties of human behaviour are magnified into episodes, whereas earlier, the policy and the mores were clear to maintain the solidarity of marriage at all costs.[3]

II

However, marriage breakdown is not a totally new phenomenon. In the past also marriages have broken down. Even at that time when the doors of divorce were apparently closed with the lock of religious considerations, ways and means were found through custom to provide room for divorce. The evolution of Hindu law is also indicative of the fact that it has never been static and immutable rather it has been accommodative and perceptive enough to correspond to the growing needs of the society.[4] The enactment of the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 are no doubt significant attempts to fundamentally modify the institution of marriage by providing equal opportunities of divorce to both husband and wife in consonance with the guarantees of equality enshrined in the Constitution, though in a few states divorce through legislation was already introduced prior to the passing of these two Acts.[5] Two decades of experimentation with these Acts reveal that the provisons of the divorce laws are too inadequate and unsatisfactory to provide expeditious and appropriate relief to the parties involved in matrimonial wrangles. The procedural maze is exhaustive, cumbersome, time-consuming and expensive ; nearly a decade of one's life is required to go through the procedural rigmarole to procure the final dissolution of marriage through courts. There has, therefore, been a considerable ferment of opinion regarding the existing divorce laws.

Recognising the difficulties encountered by the parties in obtaining divorce, the legislature referred the matter to the Law Commission for examining the question of liberalising the provisions of divorce law and for formulating the scheme whereby the period involved in procuring the decree of divorce can be reduced. However, the recommendations of the Law

2. *Om Prakash Sharma* v. *Nirmal Sharma*, (1964) P.L.R. 620 at 624.

3. *Supra* note 1 at 74.

4. The legislature has intervened from time to time to bring about desirable cnanges in Hindu law to meet the social demands of the society. For instance, the Hindu Widow's Re-marriage Act, 1856, the Hindu Inheritance (Removal of Disabilities) Act, 1928, the Hindu Gains of Learning Act, 1937 and the Hindu Women's Right to Separate Residence and Maintenance Act, 1946.

5. For example, the Baroda Hindu Act, 1937, the Bombay Hindu Divorce Act, 1946, the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 and the Saurashtra Prevention of Hindu Bigamous Marriage Act, 1950,

Commission in its *Fifty-ninth Report* are commendable inasmuch as expeditious disposal of the divorce cases and reduction in waiting period for divorce are concerned, but in general they are merely piecemeal patching in the Act.

The Law Commission also seems to be favourably inclined to incorporate certain salutary measures required for a good divorce law in the Marriage Acts yet, instead of suggesting appropriate machinery for their implementation it favoured their postponement for an indefinite period. Further, certain provisions of divorce law which have lost their utility with the passage of time and have become archaic and require deletion from the statute book are not touched upon.

The remedy of restitution of conjugal rights provided under section 9 of the Hindu Marriage Act is based on the assumption that both the husband and wife have a reciprocal right to claim the society of each other. If one of the spouses abandons the other without any reasonable cause, the aggrieved spouse can seek the return of the other to the matrimonial fold through the intervention of the court. The underlying object of this provision is to achieve harmony in matrimonial relationship and afford a chance to the parties to make endeavours to live happily and peacefully thereafter. In practice it is found that judicial intervention in the delicate and sensitive relationship of husband and wife has failed to achive the desired objective. "In marital matters it is attitude of the mind and the feelings that count and no decree of the court can force the parties to live together."[6] The attitude and values of life have changed and to apply the yardstick of fidelity prescribed by Manu to measure the depth of husband-wife relationship will be totally inappropriate.

Thus, the relief of restitution of conjugal rights has proved ineffective in cementing the relations between the husband and wife, rather it works like a wedge between them and paves a direct way for obtaining release from each other. The parties also consider it as a stepping stone for claiming the relief of divorce under section 13(1A) of the Hindu Marriage Act, as non-compliance with the decree of restitution of conjugal rights for a period of two years or more enables a party to claim divorce on that ground, and non-compliance with the decree for one year provides the ground for divorce under the Special Marriage Act. The decree of restitution of conjugal rights also provides leverage to the parties to claim maintenance under sections 24 and 25 of the Hindu Marriage Act. Therefore, the remedy of restitution of conjugal rights has become fossilised and redundant.

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6. *Alopbai* v. *Ramphal*, A.I.R. 1962 M.P. 211.

## III

The three years waiting period for seeking dissolution of marital ties after the celeberation of marriage proceeds on the assumption that the couples who have entered into the sacred marriage bond should not be easily allowed to dissociate themselves from it. If their relations with one another have become discordant they should be allowed a period of grace to strike a note of harmony instead of rushing hastily out of it. Exceptional circumstances apart, parties should not be allowed to approach the court for the dissolution of marriage before the expiry of three years after solemnization of their marriage. Hence, the recommendation of the Law Commission to delete section 14 of the Act, dealing with the initial three years period of waiting would create in majority of the cases hardships for illiterate women, unless the provisions for setting up conciliation bureaus and family courts are incorporated in the Act.[7]

The amendments proposed by the Law Commission for speedy disposition of the matrimonial cases, if carried out successfully, will help in alleviating the dfficulties faced by the parties during the prolonged trial. The proposted new section 21B reads :

(1) The trial of a petition under this Act shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(2) Every such petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date on which the notice of the petition is served.

(3) Every appeal under this Act shall be heard as expeditiously as possible, and endeavour shall be made to conclude the hearing within three months from the date on which the notice of the appeal is served.[8]

The above recommendations of the Law Commission are directed to mitigate the hardships suffered by the parties seeking dissolution of their

7 Section 14 of the Hindu Marriage Act in ordinary circumstances inhibits the court from entertaining the petition for dissolution of marriage within three years of the celebration of marriage unless the case is that of exceptional hardship suffered by the petitioner or exceptional depravity on the part of respondent. Similar provisions are found under section 29 of the Special Marriage Act.

8. The Law Commission, *Fifty-ninth Report* 78 (1974).

marriages. However, the dry legal formalities and technicalities are not suitable to matrimonial wrangles as they leave a trail of bitterness in the lives of the spouses. The prevailing adversary system of adjudication with accompanying accusations of guilt leaves no chance of viability of marriage, as the defaults and failings of both the parties have to be highlighted. The process involved in ferreting out the truth is rigid and hedged with rules of evidence. The adversary system is a combat between the contestant parties in which everyone tries to pull the string to his side by establishing the necessary legal grounds and completing the technical formalities prescribed by the law.[9] Practically little attention is paid to the real problems of family life of the spouses. The accusations levelled by the petitioner before the court and counter-accusations pleaded by the respondent help only in hardening the attitude of the parties towards each other. The system has proved ineffective in providing cure to the spouses whose marriage is in troubled waters. Rather it provides "solely the knife to sever the nuptial knot, in every step it has the effect of deepening marital wounds and rendering the possibility of reconciliation increasingly more difficult."[10]

The existing system of adjudication of family problems is unwieldly and inefficient. Different courts have jurisdiction over family matters, whereas consolidated and integrated jurisdiction of the court over all family matters would help in promoting the peace and harmony of family. Since the purpose of a sound divorce law is to preserve as far as possible the stability of marriage and family unity but where it is found that marital relationship has reached saturation point and no return seems possible, the marriage ties should be disentangled peacefully without hurling vituperations and invectives. And to achieve the desired purpose the informal constructive system of trial applicable to family court is required and not formal legalistic and punitive approach of the adversary process to tackle the emotionally surcharged, delicate and sensitive problems of family. The integrated jurisdiction of the court over all the family matters would also help in reducing the costs of the court and the litigants, as multiple suits and scattered jurisdiction of the courts are costly to the litigants and the exchequer.

Nearly three years ago, the Law Commission in its *Fifty-ninth Report* had reeognised the necessity of setting up family courts in India. Again in its *Fifty-ninth Report*, while reiterating its stand, the Law Commission has not

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9. See for adversary system of trial, Dinesh C. Pande and V. Bagga, *Abridged Tria Procedure* 21. (I.L.I., 1963).

10, Louis H. Burke quoted in Paul McLane Conway, "To Insure Domestic Tranquillity : Reconciliation Services as an Alternative to the Divorce Attorney", 9 *Jour. of Family Law 411* (1969).

only shown concern for establishing family courts for suits involving family problems but has also acknowledged the fact that the application of the existing procedure of adjudication to matrimonial proceedings is undesirable :

> In our Report on the Code of Civil Procedure, we have had occasion to emphasise that in dealing with disputes concerning the family, the court ought to adopt a human approach—an approach radically different from that adopted in ordinary civil proceedings, and that the court should make reasonable efforts at settlement before commencement of the trial. In our view, it is essential that such an approach should be adopted in dealing with matrimonial disputes. We would suggest that in due course, States should think of establishing family courts, with presiding officers who will be well qualified in law, no doubt, but who will be trained to deal with such disputes in a human way, and to such courts all disputes concerning the family should be referred.[11]

While proposing the appropriate changes in divorce law, the Law Commission should have devised proper machinery for setting up family courts contemporaneously instead of shelving the proposal indefinitely. The informal system of trial applicable to the family courts would prove constructive and render useful service to the society. The family courts should have consolidated jurisdiction over all the matters pertaining to marriage, annulment, divorce, legal separation, maintenance, alimony, custody of children, juvenile delinquency, adoption of children and cases of assault between husbands and wives unlike the existing system wherein these matters are heard and determined by different courts. The judge presiding over the family matters should have experience and training in handling the delicate and sensitive problems of human relationship. He should be assisted by a staff of experts, as matrimonial disputes are interlaced with emotional issues, and their solution do not lie in formal decrees of the court but in unravelling the tangled skein by clarifying each strand with understanding, patience and sympathy. However, it is not that all the family problems would be eliminated by setting up family courts, but it is reckoned to mitigate many of their sufferings, if not to hold a panacea for all family disputes.

The very fact that discordant spouses have approached the court vouches for the existence of the disease infecting the marital relations. The prophylactic treatment by trained psychologists and sociologists is required to remedy the diseased marital relations and not merely entrustment of the matter to the

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11. *Supra* note 8 at 113.

court, which is an expert only in adjudicating upon the claims of contestant parties by applying the yardstick of legal formalities. To solve human problems a realistic, therapeutic, psychological and sociological approach is required and not legal sanction which could be used for those marital malaise which have exhausted all other remedies.

## IV

Section 23(2) of the Hindu Marriage Act and section 34(2) of the Special Marriage Act enjoin upon the court dealing with matrimonial proceedings to make endeavours to effect reconciliation between the parties in consonance with the nature and circumstances of the case. Despite the mandatory provisions, in practice it is done only perfunctorily, the reasons being lack of time at the disposal of the court and non-existence of proper machinery to assist the court. To overcome the procedural difficulties which obstruct the court in carrying out the objective of attempting reconciliation between the spouses during the trial, the Law Commission has proposed an additional clause in section 23 of the Hindu Marriage Act. The suggested clause reads :

> For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceeding for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether a reconciliation can be and has been effected, and the court shall, in disposing of the proceeding, have due regard to the report.[12]

The court ought to be empowered with wide discretionary powers while dealing with matrimonial cases. In *C.* v. *C.*[13] and *S.* v. *S.*[14] opportunities were given to the parties to make an attempt at reconciliation and the cases were also adjourned for that purpose, but the court had no power to issue an injunction with regard to any particular course to be followed. The problem becomes more intricate where one of the spouses is keen on having conciliation and the other is nonchalant. The peremptory duty of the court looses its significance and it cannot be performed realistically unless a serious attempt has been made by the court to ascertain whether reconciliation can be effected. Consequently, in England for the effective implementation of the provision, a well-devised machinary was attached to the

12. *Supra* note 8 at 82-83.
13. (1967) 1 All E.R. 928.
14. (1967) 3 All E.R. 139.

court.[15] According to this machinery, cases where there is a possibility of reconciliation are referred by the court to the welfare officer of the court and the welfare officer has discretion to refer the case to a probation officer or to a fully qualified marriage counsellor recommended by the branch of appropriate organisation concerned with marriage guidance or to some other appropriate person or body indicated by the special circumstances of the case.

A comprehensive arrangement has been designed under section 3 of the Divorce Reform Act, 1969 (and carried on to section 6 of the Matrimonial Causes Act, 1973) to promote reconciliation between the spouses. A solicitor is required to certify that he has not only discussed with the parties about the chances of reconciliation but has provided them with the addresses of qualified persons.[16] And the court is empowered to adjourn the case at any stage of the proceedings to consider the possibility of conciliation between the parties.[17] Similarly, parties are encouraged to attempt reconciliation in certain circumstances by living together for a limited period without jeopardising their right to petition for divorce in case the attempt at reconciliation is failed.[18]

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15. See Practice Direction, (1967) 1 All E.R. 894.

16. See also clause iv of s. 3 of the Divorce Reform Act, 1969.

17. Clause (2) of s. 3 of the Divorce Reform Act (now s. 6 of the Matrimonial Causes Act, 1973) empowers the court to adjourn the proceeding for such period as it deems fit to enable the parties to effect reconciliation.

18. Attempts at reconciliation are encouraged by allowing the parties to live together without prejudicing the right to divorce by clause (3) of s. 3 of the Divorce Reform Act.

(3) Where the parties to the marriage have lived with each other for any period or periods after it became known to the petitioner that the respondent had, since the celebration of marriage, committed adultery then,—

(*a*) if the length of that period or those periods together was six months or less, their living with each other during that period or those periods shall be disregarded in determining for the purposes of section 2(*1*)(*a*) of this Act whether the petitioner finds it intolerable to live with the respondent, but

(*i*) if the length of that period or of those periods together exceeded six months, the petitioner shall not be entitled to rely on that adultery for the purposes of said section 2(1)(*a*).

(4) Where the petitioner alleges that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him but the parties to the marriage have lived with each other for a period or periods after the date of the occurrence of the final incident relied on by the petitioner and held by the court to support his allegations that fact shall be disregarded in determining for the purposes of section 2(1)(*b*) of this Act whether the petitioner cannot reasonably be expected to live with the respondent if the length of that period or of those periods together was six months or less.

These provisions are now incorporated in s. 2 of the Matrimonial Causes Act, 1973.

Likewise, most of the states in the U.S.A. have provisions for statutory and voluntary conciliation services attached with the courts. The conciliation counselling has become an integral and indispensable part of divorce laws. It provides safeguards against easy divorces and preserves the stability of marriage.

However, the Law Commission's recommendations with regard to the adjournment of the matrimonial case for fifteen days and reference of the matter for the purposes of conciliation to the person either nominated by the court or suggested by the parties will not help to achieve the desired purpose of conciliation between the parties. Fifteen days time for identifying the delicate problems of a disrupted marriage is very short and one man's arbitration is not sufficient to resolve the acute differences cleaving apart the spouses, who are mostly in need of sympathetic and patient hearing to air their grievances against each other. Moreover, with respect to the choice of an arbitrator, it is very difficult to expect two erring parties to choose the same person.

In view of the proposed suggestion of the Law Commission relating to section 23 of the Hindu Marriage Act, it is suggested that the services of conciliation bureaus are required to check the inflation, if any, in the divorce rate after the liberalization of grounds of divorce. After the filing of the petition, the case should be referred by the court to a well constituted conciliatory statutory board attached to the court. The proceedings of the case be commenced after the receipt of the report of the conciliatory board. The report should be treated as a secret document except where its disclosure is necessary in the interest of the parties. The informal atmosphere of conciliatory counselling helps to bring the parties together in finding out amicable solution of their problems by easing of tensions and reduction of hostilities. Steps should be taken to encourage the setting up of voluntary and statutory conciliatory agencies to buttress the union by harmonizing the cogs of discordant marital machinery.

V

In western countries also during the past decade a number of modifications have been introduced to make the divorce law adjustable to the current needs of the society. Prior to the passing of the Divorce Reform Act, 1969 in England like other countries, the concept of matrimonial offence was the basis of divorce. The Divorce Reform Act, 1969 aimed at adopting a realistic view of what causes married people to seek divorce by dispensing with the time-worn concept of matrimonial offence. In the Divorce Reform Act, the various grounds of divorce dealing with matrimonial offences were replaced by the sole non-fault ground of irretrievable

breakdown of marriage. Nevertheless, to establish that the marriage has irretrievably broken down five guidelines have been set in the Act which are not grounds for divorce but only guidelines. The party seeking divorce has to substantiate the fact that the marriage has irretievably broken down by establishing one or more of the following five guidelines :

(*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 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 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.[19]

The incorporation of irretrievable breakdown of marriage as the ground for divorce in the divorce law is based on the fundamental assumption that the aims of a good divorce law are to strengthen the solidarity of marriage and when "regrettably a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation."[20]

In both the Hindu Marriage Act and the Special Marriage Act, to some extent, the irretrievable breakdown of marriage as a ground for divorce and partial non-fault element is perceptible.[21]

Under the Special Marriage Act, mutual consent of the spouses as one of the grounds for divorce is an evidence of the fact that marriage has irretrievably

19. These guidelines are now enumerated under s. 1 of the Matrimonial Causes Act, 1973.

20. Cmnd. Paper 3123 H.M.S.O. (1966) Para 15 (*ii*) at 10.

21. Justice V. S. Deshpande, Divorce Under the Hindu Marriage Act, A.I.R. 1971 (*Journal*) 113 at 114.

broken down. Similarly the amended section 13(1A) of the Hindu Marriage Act vouches for the introduction of non-fault element in that Act. Under section 13(1A) either party to the proceedings is given a right to ask for a decree of divorce if there has been no resumption of cohabitation for a period of two years or more after the passing of a decree of restitution of conjugal rights or judicial separation, irrespective of the fact that in whose favour the initial decree was passed.

The traditional concept of granting divorce only to the innocent party against a matrimonial wrong committed by the other is giving way to the rational view that when the breakdown of marriage has reached the saturation point and it is no longer possible to tie down together two warring partners, the remedy of dissolution of marriage be made available to either party to the marriage without declaring any one of them to be responsible for the breakdown.

## VI

Apart from the recommendations of the Law Commission, the matters which necessitate urgent consideration are :

1. Mutual consent as a ground for divorce on the lines of section 28 of the Special Marriage Act be introduced with sufficient safeguards to protect the financial or other interests of children. The refusal or grant of the divorce should be left to the discretion of the court.

2. Provisions for setting up conciliation service be made to ensure as far as possible the stability of marriage and every matrimonial case before it is adjudicated upon by the court should be first processed through the conciliation board. The conciliation board should consist of psychologists, sociologists and other experts dealing with marital problems. The report of the conciliatory board be treated as a secret document unless its disclosure is desirable in the interest of the parties.

3. Adversary system of trial should be done away with matrimonial cases. Informality in procedure be introduced by establishing family courts in every state and jurisdiction of such courts be extended to cover all disputes pertaining to the family.

4. The grounds of divorce affecting physical fitness of married couples, *e.g.*, unsoundness of mind, suffering from a virulent form of

leprosy and venereal diseases under section 13 of the Hindu Marriage Act be consolidated under one head and in these cases the requirement of three years for filing a divorce petition be dispensed with.

5. Statutory provisions for free legal aid be made for those spouses who have no means and owing to their penurious conditions are unable to claim maintenance or alimony from each other.

The assumption that liberalization of divorce laws is detrimental to the peace and stability of married life is erroneous where marriages have already broken down, and individuals involved in them seek release from the intolerable bond through the assistance of law. And to refuse such release by rigid formulations of grounds for divorce would only mean that both the society and legislators are indifferent to marital sufferings and to the undesirable consequences of keeping two warring individuals in one cell perpetually.

If marriage is not irreparably damaged and there are reasonable prospects of reconciliation, efforts should be made to maintain the marital links between the parties. Nevertheless, where inexplicable forces have militated against its preservation, the dissolution of marriage should be facilitated with less rancour, humiliation, bitterness and mud-slinging to avoid its pernicious effects on children and the family.