

Divorce by Mutual Consent

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BERTRAND RUSSELL observed that "Perhaps easy divorce causes little unhappiness than any other system".¹ Divorce by mutual consent is one of the modes of easy divorce. Here I propose that divorce by mutual consent should be made a ground for divorce under the Hindu Marriage Act, 1955.

Marriage is a condition precedent to divorce. The primary meaning and basis of marriage in English law, *i.e.*, of so-called Christian marriage is that it is a voluntary union for life of one man with one woman to the exclusion of all others. According to Hindu law marriage is a holy union for the performance of religious duties.² The religious duties include the procreation of progeny. Thus marriage is a union of man and woman to found a family, to set up a home, and to legalize intercourse and legitimize issues born therefrom. A Christian marriage is necessarily a monogamous union, a contract, while a Hindu marriage according to the *dharmashastras* is a permissible polygamous union, a sacrament. No doubt the institution of marriage has religious sanctity and social stability, and it is also true that the state has interest in preserving marriage and in minimizing divorce. It is said that marriages are made in heaven and are dissolved in heaven, but in practice it is found that marriages are required to be dissolved under certain circumstances and hence enters the devil of divorce. "Divorce is the fruit of marriage" remarked Tartullian, the Roman wit.

The word "dissolution" relates to the marriage bond itself, whereas the word "divorce" relates to the parties to the marriage bond; and it is apt to refer to "divorce" when speaking of parties and "dissolution" when separating of the bond. David Morris has quipped "Divorce is not so much the end of one marriage, as a licence to contract another".³

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1. Bertrand Russell, II *Autobiography of Russell*.

2. *Sundrabai v. Shivanarayan*, (1908) 32 Bom. 81

3. David Morris : *The End of Marriage* 8.

II

Till the last century the English law was very orthodox about divorce. In ancient days the church claimed jurisdiction over marriage and divorce, and divorce in the form of judicial separation was granted by ecclesiastical courts in England. Till the passing of the Matrimonial Causes Act, 1857 divorce *a vinculo matrimonii* could be obtained only through a private parliamentary Act and it was indeed a costly affair. From 1715 to 1852 only 184 parliamentary divorces were recorded.⁴ This statute created a new court for divorce and matrimonial causes and permitted divorce on the grounds of adultery, cruelty and desertion for 2 years, *etc.*

Divorce by mutual consent was allowed under the Roman law. The position in Roman law in the late republic and early empire is thus described by Lachy.

Being looked upon merely as a civil contract, entered into for the happiness of the contracting parties, its continuance depended upon mutual consent. Either party might dissolve it at will, and the dissolution gave both parties a right to remarry.

In the seventh century in England the Penitentials of Theodore declared marriages dissoluble either by mutual consent, or for adultery, desertion, impotency, long absence and captivity. This was of course when the Romans ruled England. In England divorce necessarily related to the clear and intelligible principle of matrimonial offence. According to the Law Commission of England the objectives of good divorce law are :

(i) To buttress, rather than to undermine, the stability of marriage ; and (ii) 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.⁵

However, nine members of the said commission recommended that there should be provision for divorce in cases where quite apart from the commission of a matrimonial offence, the marriage has broken down completely ; accordingly, where husband and wife have lived separate and apart for a period of at least seven years immediately preceding the application, should it be possible for either spouse to obtain a decree dissolving the marriage, provided that the other spouse does not object.^{5a}

4. *Raydon On Divorce* 6 (11th ed.),

5. *The Field of Choice* (Cmd. 3123), para 15.

5a. Cmd. Papers 9678 para 70.

Accordingly, the Divorce Reform Act, 1969 was passed. It provides for divorce by mutual consent of the spouses after two years of living separately and after five years of continuous living apart irrespective of the respondent's consent.

The Divorce Reform Act, 1969 was enforced on 1st January, 1971 in England and it provides for irretrievable breakdown of marriage as a sole ground for divorce and judicial separation but it limits the proof of breakdown. The court hearing a petition for divorce should not hold the marriage as to have broken down irretrievably unless the petitioner satisfied the court of one or more of the following facts, (i) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent ; (ii) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent ; (iii) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition ; (iv) 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 ; (v) 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. Here irretrievable breakdown of marriage is the test for divorce and living apart for a continuous period of two years is accepted as a proof of breakdown. Thus, for the first time in England divorce by mutual consent is introduced.

The expression 'living apart' is construed to mean that the spouses have been living separate and apart, within the meaning of section 4 (I) (e), where they lead separate lives, have no sexual intercourse, live in separate rooms of the same suite and perform no services for each other, although the husband pays the wife a sum for maintenance, the sharing of the suite being necessary because their jobs as joint caretakers of the building required them to be or appear to be, husband and wife : "two households have been created, however cramped the actual living space may have been." According to McIntyre, J. : "there must be withdrawal from the matrimonial obligation with the intent of destroying the matrimonial consortium, as well as physical separation".⁶

Lady Summerskill ridiculed this Act as 'Casanova's Charter'. Some called it the shifting sands of easy divorce. However, generally the English people welcomed the measure. In Ree's Divorce Handbook the editors have

6. *Rushton v Rushton*, (1969) 2 D.L.R. (3d) 25 (Brit. Col.) cited in *Raydon on Divorce* 270 (11th ed.).

remarked that this Act has introduced a most fundamental change in divorce policy of Parliament.⁷ Thus, the British Parliament has taken the same view that what cannot be mended should be ended.

Law is not uniform throughout the U.S.A. because each state enjoys a lot of autonomy. In the State of New York adultery is the sole ground for divorce, While in the State of Nevada there are nine grounds of divorce. The ninth ground is that when the husband and wife have lived separate and apart for three consecutive years without cohabitation, the court may, in its discretion, grant an absolute decree of divorce at the suit of either party.⁸ Thus, divorce by mutual consent is available at least in some states of the U.S.A.

Arthur Philips and Henry Morris after a survey of African laws state that in Africa marriages are terminated by the desire of the parties under the customary law. The Tanganayka law recognizes divorce by mutual consent without grounds.⁹

III

Divorce by mutual consent is permissible under the Mahommedan law, e.g., divorce of the types of *khula* and *mubara'at khula* is divorce by mutual consent at the instance of the wife in which she agrees to give a consideration to the husband for the release of the marriage tie. *mubara'at* is a divorce by mutual consent when both spouses desire dissolution. In *talak-i-tafiveez* a wife can get divorce pursuant to a pre-marital or post-marital agreement vesting the wife with the right of divorce.

There is no provision for divorce by consent under the Parsi Marriage and Divorce Act, 1936 or the Indian Divorce Act, 1869.

Section 28 of the Special Marriage Act, 1954 provides for divorce by mutual consent to those parties who are either married under the Act or whose marriage is registered subsequently under the said Act, irrespective of the original form of marriage. Section 28(1) runs as follows :

Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the district court by both the parties together on the ground that they have been living separately for a period of one year or more, that they have

7. *Ree's Divorce Handbook* p.V.

8. Karlen, *The Citizen in Court* 82.

9. *Marriage Laws in Africa* 25.

not been able to live together and that they have mutually agreed that the marriage should be dissolved.¹⁰

It is true that a Hindu couple married according to the Vedic rites can get their marriage registered under section 15 of the Special Marriage Act, and the effect of such registration is that the marriage will be deemed to have been solemnised under the Special Marriage Act.^{10a} And thereafter the couple can avail if necessary, of the procedure of consent divorce as provided for under this Act. However, there are a number of factors which impede this procedure. Under section 29(1) of the Special Marriage Act no petition for divorce shall be presented to the court, unless three years have passed since the date of entering the certificate of marriage in the marriage certificate book. This three years limit is subject to relaxation by the court in its discretion in cases of exceptional hardship, *etc.* Further, one year of separate living is necessary under section 28(1) of the Act. In addition to this passage of time at least one year's period of incubation must elapse under section 28(2) before the court can take up the petition for hearing and disposal. Under section 34(2) the court has to make every reasonable endeavour to bring about a reconciliation between the parties. The court has also to satisfy itself that the consent of the respondent is not obtained by force, fraud or undue influence.^{10b}

Thus, to invoke the relief of consent divorce under the Special Marriage Act is a matter of years of suspense and separation. It is a matter of true hardship to those couples whose marriages break down in the initial impact of conjugal association.

Divorce was not known to the ancient Hindu law. The reason is that a marriage from the Hindu point of view, creates an indissoluble tie between the husband and the wife. Neither party, therefore, to a marriage can divorce the other unless divorce is allowed by custom¹¹. In many states, however, divorce is allowed on certain grounds as the result of legislation like the Bombay Divorce Act, 1946.

Prior to the Hindu Marriage Act, 1955 Hindu law did not recognize the right of divorce, but dissolution of marriage was recognized by customary law.¹¹ The Kerala High Court has pointed out that in the case of Hindus

10. *Kudomee v. Joteeram*, (1878) 3 Cal. 305.

10a. See section 18 of the Special Marriage Act.

10b. Section 34 (1)(c).

11. *Kamala Nair v. Narayan Pillai*, 59 Bom. L.R. 536,

three modes of marriage were available, under special enactments, or by custom or under the Special Marriage Act.¹²

It is for the first time that section 13 of the Hindu Marriage Act provides the relief of divorce to all Hindus on all India basis. The customary divorce was not permissible to the three regenerate classes under the traditional Hindu law. However, the statutory grounds of divorce do not include divorce by mutual consent. It is, therefore, suggested that this ground should be incorporated in section 13 of the Act.

The reasons for this suggestion are : divorce by mutual consent is a ground for matrimonial relief under the Roman law, in the U.K. under the Divorce Reform Act, 1969 and in some states of the U.S.A. It is in operation in Africa by way of custom. In India, the Muslims have this facility. Hindus can avail of this relief under the Special Marriage Act, provided they get their original marriage registered under the said Act. But as has been pointed out it is a long drawn out process extending over years of agony and antagonism. The fact, however, remains that the Indian legislature has answered the felt necessities of times and recognized it by providing for divorce by mutual consent and extended its benefit to the community irrespective of religion and caste under the Special Marriage Act.

Section 29(2) of the Hindu Marriage Act reads:

Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.

The clause saves the right of divorce available to the non-regenerate classes whose numbers are countless. Courts uphold the customary divorce if it is not opposed to public policy.¹³

Hence, the Hindu Marriage Act, preserves the customary right of divorce which include divorce by mutual consent of the parties. And the adding of the ground of divorce by mutual consent to section 13 of the Hindu Marriage Act would mean no innovation but extension of a well recognized ground of relief already embodied in the sister statute like section 28 of the Special Marriage Act and section 29 (2) of the Hindu Marriage Act which are both post-independence measure. It is true that state leans to preserve

12. *Chellapan Nair v. Madhavi Amma*, A.I.R. 1961 Ker. 311.

13. *P.L. Singh v. M.M. Singh*, A.I.R. 1956 Manipur 18,

the marriage tie, but sometimes there are exceptional circumstances which require dissolution of marriage bonds. Further, it is reasonable to argue that in case of monogamous marriages procurement of divorce should be made liberal.

In modern times with the advancement of education and growth of understanding the social stigma of divorce is fast disappearing. It is no more odd to come across a divorce even in middle-class society. With the advent of the movement of women's lib social norms are undergoing fast changes for a number of reasons. Working women inevitably come in contact with men and such official association breeds non-official interest. Divorce is no doubt an unpleasant fact of life. If some are worried about the increase in divorce statistics it is as well to remember the words of the Bishop of Durham, who spoke in the House of Lords on 24 June 1937, that "If the number of divorces were a safe indication of social morals it were indeed possible to make the whole community pure at a stroke by prohibiting divorce."

David Morris, an astute English divorce lawyer, observes that "One of the reasons I like divorce by consent is that for the vast majority of those whose marriages do not end in divorce, it emphasizes the voluntary nature of the continuing bond."¹⁴

If divorce by mutual consent is provided under the Hindu Marriage Act, it will minimize the number of collusive marriage petitions which get through as uncontested (not *ex parte*) matters. This fraud on justice can be spared in many matters. Honesty and sincerity would take the place of fraud and collusion. In introducing the Divorce Reform Bill, on the second reading in the House of Lords, while speaking of divorce by consent Lord Stow Hill said :

Your Lordships may hope that if divorce on this ground is allowed this is the method which more and more will be used by well-behaved people, and the sordid recitals of adulterous behaviour which now degrade our courts will be increasingly consigned to the dustbin where they belong.

The question whether the respondent's consent is free from fraud, force or undue influence is of course the responsibility of the court. Hence, a provision similar to section 34 (1) (c) of the Special Marriage Act may be introduced in the Hindu Marriage Act by way of abundant caution. The question of alimony, maintenance, custody of children, *etc.*, would be deter-

14. *Supra* note 3 at 77,

mined as in other cases of divorce. Hence, it is proposed that divorce by mutual consent should be made available under the Hindu Marriage Act, but one year's incubation period as under section 28(2) of the Special Marriage Act may be dispensed with. Besides the period of three years after marriage as a condition precedent to the presentation of divorce petition may be reduced to one year.

It is hoped that the Law Commission and government would consider this plea and act accordingly. This proposal is indeed a measure of social reform. It would certainly go a long way in encouraging honesty and in cleansing the temple of justice from undesirable practices of fraud and collusion.

Recently the Kerala Government has amended the Hindu Marriage Act, 1955 by providing for divorce by mutual consent.