

4. Civil Marriage Law Compared with Personal Laws—II [Dissolution of Marriage]

Form of divorce

The law of divorce ordinarily applicable to Hindus, Sikhs, Buddhists and Jains is now contained in the Hindu Marriage Act, 1955. The Christians are governed by the Indian Divorce Act of 1869. Divorce among Parsis is regulated by the Parsi Marriage and Divorce Act, 1936. As regards Muslims the law relating to divorce by women is now found in the Dissolution of Muslim Marriages Act, 1939. Divorce by Muslim men is uncodified, unreformed and based on the traditional principles. The Special Marriage Act specifies the grounds on which the courts can dissolve a marriage, whether originally solemnized under its own provisions or contracted under any of the various personal laws but later registered under the said provisions. As noted earlier, according to a Rajasthan decision,¹ even without such registration a religious marriage can be dissolved under the Special Marriage Act. The law of divorce contained in the Act thus furnishes an alternative to each of the personal laws of divorce.

An extrajudicial divorce is an impossibility under the Special Marriage Act under which only the court can dissolve a marriage—the parties to a marriage themselves, or one of them, can never do so. The (codified) personal laws of Christians, Parsis, Hindus, Buddhists, Sikhs and Jains also do not allow a divorce outside the court. As regards Muslims, their personal law recognizes various forms of extrajudicial divorce (*e.g.*, *talaq*, *khul'*, *mubara'at*, *talaq-e-tafwid*, *etc.*), besides a judicial divorce (*infisakh*). However, in India it has been held that Muslim women cannot dissolve their marriage privately and *de hors* the provisions of the Dissolution of Muslim Marriages Act.² The fact is that while the court said in the *Nafeesa* case that only a 'delegated divorce' (*talaq-e-tafwid*) is allowed outside the court,^{2a} even *khul'* does take place privately. Muslim men have a traditional right to divorce their wives unilaterally. Though Islam itself frowns upon an

1. *C.A. Neelakantan v. Mrs. Anne Neelakantan*, A.I.R. 1959 Raj. 133.

2. *K.C. Moyin v. Nafeesa*, 1972 K.L.T. 785. For a comment on this case see T. Mahmood, *An Indian Civil Code and Islamic Law*, 92-97 (1976).

2a. *Ibid.*

irresponsible exercise of this power, unlike many Muslim countries, no statutory restrictions have been imposed in India on unilateral divorce by men.

Probation

As a general rule, the Special Marriage Act originally did not allow a petition for divorce during the first three years of marriage, except in cases of "exceptional hardship" for the petitioner or "exceptional depravity" on the part of the respondent.³ An identical rule was found also in the Hindu Marriage Act, 1955.⁴ The Marriage Laws (Amendment) Act of 1976 has reduced this period, under both the Acts, to one year, keeping still intact the courts' power to relax the requirement in extraordinary cases. Ordinarily, thus, persons governed by the Special Marriage Act, as also those subject to the Hindu Marriage Act, cannot ask for a divorce till the expiry of one year from the date of marriage.

There is no parallel rule in the Dissolution of Muslim Marriages Act, 1939, the Indian Divorce Act, 1869 and the Parsi Marriage and Divorce Act, 1936. Persons married under any of these laws are not required to wait, generally, for a particular period before asking for a divorce.

Medical grounds for divorce

Till 1976, incurable mental insanity, leprosy and venereal disease in a communicable form, constituted grounds for divorce under the Special Marriage Act, provided that their duration had been three years at a stretch.⁵ The provisions of the Hindu Marriage Act, 1955 in regard to these diseases were substantially the same.⁶ The Marriage Laws (Amendment) Act, 1976 has modified both the Acts. The new provisions, shared by both the Acts, are notable for the following features:

1. No time limit is now imposed on any of the three diseases constituting grounds for divorce.
2. The concept of insanity has been enlarged so as to include "mental disorder" (both continuous and intermittent) covering mental illness, arrested or incomplete development of mind, psychopathic disorder and schizophrenia.⁷

3. Special Marriage Act, 1954, s. 29.

4. S. 14.

5. S. 27 (i) (e), (f) and (g).

6. S. 13 (i), (iii), (iv) and (v).

7. S. 27 (I) (e), explanation. Psychopathic disorder is defined as "a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in an abnormally aggressive or seriously irresponsible conduct, whether or not it requires or is susceptible to medical treatment".

Under the Dissolution of Muslim Marriages Act, 1939 husband's insanity lasting for two years and leprosy and venereal disease (without any fixed duration) are grounds for divorce available to the wife.⁸ In Parsi law, venereal disease is a ground for divorce only if the respondent has infected the petitioner with such a disease; and insanity can be pleaded as a ground for divorce only if it existed at the time of marriage and continues in a "habitual" form.⁹ Under the Indian Divorce Act, 1869 none of these diseases is mentioned as a ground for the dissolution of marriage.

Desertion, disappearance and imprisonment

Desertion without a reasonable cause lasting for two years is a ground for divorce under the Special Marriage Act.¹⁰ There is a similar rule under the Parsi Marriage and Divorce Act, with the difference that the duration mentioned in that Act is three years.¹¹ Under the Hindu Marriage Act, desertion (of two years' duration) constituted a ground for judicial separation. However, after the 1976 amendment the grounds for judicial separation and divorce have been merged under that Act into a unified list. The civil marriage law and the Hindu law are, thus, now identical in respect of desertion as a ground for divorce.¹²

In the Dissolution of Muslim Marriages Act, 1939 desertion is not specified as a ground for divorce; but if the husband "neglects" the wife or fails to provide maintenance to her, both for two years, she can apply for a divorce.¹³ Under the Indian Divorce Act, desertion lasting for two years and without excuse is a ground for judicial separation.¹⁴

If a spouse is missing for a long period, the other spouse gets a ground for divorce under all the systems of law except the divorce law of Christians. The minimum duration of disappearance which will create such a right is seven years under the Special Marriage Act,¹⁵ Hindu Marriage Act¹⁶ and the Parsi Marriage and Divorce Act.¹⁷ Under the Dissolution of Muslim Marriage Act this period is four years (this is based on the *Maliki* law).¹⁸

8. S. 2 (vi).

9. Parsi Marriage and Divorce Act, 1936, s. 32 (e) and (b).

10. See s. 27(1)(b) and explanation, which define desertion in detail.

11. S. 32(g). Originally it was three years also under the Special Marriage Act. It was reduced to two years in 1976.

12. See Hindu Marriage Act, 1955, s. 13(1) (ib).

13. S. 2(ii), and (iv).

14. S. 22. See the same section for the effect of a decree of judicial separation.

15. S. 27(1)(h).

16. S. 13(1)(vii).

17. S. 31.

18. S. 2(i).

If a spouse is undergoing imprisonment for seven years or more, the other spouse can seek a divorce under the Special Marriage Act.¹⁹ There are parallel provisions in the Dissolution of Muslim Marriages Act²⁰ and the Parsi Marriage and Divorce Act.²¹ Whereas Muslim law imposes no restriction as to when the ground can be availed, under the Act of 1954 a petition for divorce could, originally, be presented after the detained spouse had already served at least three years of the total duration of the sentence. However, by removing this requirement the 1976 amendment of the Special Marriage Act has wholly eliminated the difference on this point between the Act of 1954 and the statutory Muslim law. Hindu and Christian divorce laws are silent on the point, whereas in Parsi law where a spouse, sentenced to imprisonment for seven years, has completed the first year of the sentence, the other spouse can seek a divorce.

Cruelty

Cruelty is a ground for divorce under the Special Marriage Act,²² Hindu Marriage Act (as amended in 1976)²³ and the Dissolution of Muslim Marriages Act, 1939.²⁴ But while in the civil marriage law (as also, now, under Hindu law) the concept of cruelty is left undefined, Muslim law specifies the following as acts of cruelty:²⁵

- (i) habitual assault or cruelty of conduct;
- (ii) leading an infamous life, or association with women of ill repute;
- (iii) compulsion to lead an immoral life;
- (iv) interference with personal property;
- (v) obstruction in the observance of religious practices; and
- (vi) inequitable treatment in the case of bigamy.

In Parsi law "grievous hurt" and compulsion to "submit to prostitution" are specified as grounds for divorce.²⁶ For the Christians, cruelty is a ground for judicial separation which may eventually lead to divorce.²⁷

19. S. 27(1)(c).

20. S. 2(iii).

21. S. 36.

22. S. 27(d).

23. Under this Act cruelty, as defined in it, was originally a ground for judicial separation. Now the Special Marriage Act and the Hindu Marriage Act share an identical provision. Neither of these laws defines cruelty and both make it available as a ground for divorce.

24. S. 2(viii).

25. *Id.*, clauses (a) to (f).

26. Parsi Marriage and Divorce Act, 1936, s. 32(e).

27. Indian Divorce Act, 1869, s. 22.

Extra-marital sex: natural and perverted

Adultery is a ground for divorce under the Special Marriage Act²⁸ as well as the Hindu Marriage Act.²⁹ Under both the Acts a wife can also apply for divorce if her husband has committed rape, sodomy or bestiality.³⁰ Under the Indian Divorce Act, 1869 a man can obtain a divorce if his wife has been guilty of adultery; and a wife can seek a divorce if her husband has been guilty of 'incestuous adultery', 'bigamy with adultery', 'adultery coupled with cruelty', desertion for two years, rape, sodomy or bestiality.³¹ Ordinarily, adultery is, under that Act, a ground for judicial separation available to both spouses.³² In Parsi law, adultery, fornication, rape and unnatural offence, are grounds for divorce. The Dissolution of Muslim Marriages Act, 1939 does not specifically mention adultery as a ground for divorce; it only refers to husband's "association with women of ill repute" and "leading an infamous life" as instances of cruelty forming a ground for divorce.

Judicial separation

Under the Special Marriage Act, as originally enacted, all the aforementioned grounds for divorce also constituted grounds for judicial separation.³³ A decree for judicial separation ripened in the hands of the spouse who obtained it into a ground for divorce if cohabitation was not resumed by the time of the expiry of two years from the date of the decree. This law was first amended in August, 1970 when non-resumption of cohabitation for two years or more following a decree of judicial separation was made a ground for divorce available to either spouse. The change marked partial acceptance of the 'breakdown theory' of divorce. Then, in 1976, the aforesaid period of two years was reduced to one year.³⁴ So, under the present law when either party obtains a decree of judicial separation on any ground and it lasts for one full year, that party or the other spouse can move the court for a divorce. Under another important rule introduced in 1976 whenever a divorce has been

28. S. 27(1) (a) as amended in 1976.

29. S. 13 (1) (i) as amended in 1976 when the original concept of "living in adultery" was repealed.

30. Special Marriage Act, 1954, s. 27(1A) (i); Hindu Marriage Act, 1955, s. 13(2) (ii). 31. S. 10.

32. S. 22.

33. S. 23. A decree for judicial separation does not dissolve the marriage. However, after it is passed, it is no longer obligatory for the petitioner to cohabit with the respondent. The decree can be rescinded by the court on the application of either party on just and reasonable grounds.

34. S. 27(2) (i).

asked for on any statutory ground (except disappearance of the respondent for seven years or more), the court may, instead, grant a decree for judicial separation, if it considers it just.³⁵ One year later, if cohabitation is not resumed, either party can ask for a divorce.

Under the Hindu Marriage Act, 1955, since the drastic amendments of 1976, the provisions relating to judicial separation are substantially the same as under the Special Marriage Act. The only notable point of difference is that while under the latter Act disappearance of the respondent for seven years or more is the only ground on which the petitioner can insist on being granted a divorce at the first instance, under the former Act a petitioner can do so also on the ground that the respondent has changed his religion or is suffering from leprosy.³⁶

In Parsi law failure to resume cohabitation following a decree of judicial separation must have lasted for at least three years since the date of the decree before it is pleaded as a ground for divorce.³⁷ A decree of judicial separation granted under the Indian Divorce Act, 1869 effects what is known in law as "divorce *a mensa et toro*".³⁸ To Muslim law the concept of judicial separation is not known.

Restitution of conjugal rights

Where either spouse withdraws from the society of the other without a reasonable excuse (to be proved by the withdrawing spouse), the remedy for the aggrieved party under the Act of 1954 lies in seeking a decree for restitution of conjugal rights.³⁹ Failure to comply with such a decree is a ground on which the aggrieved party can seek a judicial separation.⁴⁰ However, if the decree is not complied with till the expiry of one year (this duration was two years before the 1976 amendment) from the date of the decree, either spouse can apply for a divorce.⁴¹ This is another instance of the introduction of 'breakdown theory' of divorce into the Special Marriage Act.

The provisions of the Hindu Marriage Act relating to restitution of conjugal rights are, after the amendment of the Act made in 1976, substantially the same as under the Special Marriage Act.⁴² Both these Acts now conform to the Parsi law under which after the expiry of

35. S. 27A.

36. Hindu Marriage Act, 1955, s. 13A.

37. Parsi Marriage and Divorce Act, 1936, s. 32(h).

38. S. 22

39. Special Marriage Act, 1954, s. 22.

40. S. 23 (1) (b).

41. S. 27(2) (ii).

42. Hindu Marriage Act, 1955, ss. 9, 13 (1-A) (ii).

one year from the date of a decree for restitution of conjugal rights the court may grant a divorce.⁴³ The relief of restitution is also recognized by the laws of Muslims and Christians; and under the Dissolution of Muslim Marriages Act, 1939 husband's failure to perform "marital obligations" for three years without a reasonable excuse is a ground for divorce irrespective of whether or not a decree for restitution has been obtained.⁴⁴

Maintenance of a wife living separate

The Marriage Laws (Amendment) Act, 1976 has added to both the Special Marriage Act and the Hindu Marriage Act a new ground for divorce—failure of the husband to resume cohabitation for one year or more following a decree or order for maintenance of wife living separate from him, passed under section 18 of the Hindu Adoptions and Maintenance Act, 1956 or section 125 of the Criminal Procedure Code, 1973 (corresponding to section 488 of the old Code of Criminal Procedure).⁴⁵

The remedy of "separate maintenance" is also found in Parsi law and under that law non-resumption of cohabitation by the the husband till the expiry of three years from the date of a decree granting such a remedy is a ground for divorce available to the wife.⁴⁶ Under the Dissolution of Muslim Marriages Act, 1939 husband's failure to provide maintenance for two years is a ground for divorce⁴⁷ irrespective of whether or not a maintenance order has been obtained under the provisions of Muslim law or under the Criminal Procedure Code.

Divorce by mutual consent

Before 1954 it was only the Muslim personal law which allowed parties to a lawful marriage to dissolve their marriage by mutual consent. This was, and still is, possible under the Muslim legal concepts of *khul'* and *mubara'at*.

In 1954 the Special Marriage Act laid down that parties to a marriage governed by its provisions could present a petition for divorce on the ground that they:

43. *Supra* note 37, cl. (h).

44. S. 2 (iv).

45. Special Marriage Act, 1954, s. 27(IA); Hindu Marriage Act, 1955 s. 13 (2) (iii). Under both the legal provisions, mentioned in these sections of the two Acts, a court can grant maintenance without directing the wife to join her husband, in the circumstances specified by law which include certain diseases and matrimonial offences.

46. *Supra* note 37.

47. S. 2 (ii).

- (i) had been living separately for one year or more;
- (ii) had not been able to live together; and
- (iii) had mutually agreed that the marriage be dissolved.⁴⁸

On a motion by both spouses after the expiry of at least one year, but not later than two years, from the date of the presentation of the petition, the court could dissolve the marriage.⁴⁹ In 1976 these minimum and maximum waiting periods have been reduced to six months and one year respectively. The rest of the law as enacted in 1954 remains intact.

Till 1976 no other law, except Muslim law and the Special Marriage Act, allowed a divorce by mutual consent. The Marriage Laws (Amendment) Act, 1976 has now introduced the concept into the Hindu Marriage Act of 1955—and now the Special Marriage Act and the Hindu Marriage Act⁵⁰ share identical provisions in this regard. The concept is, however, still foreign to the personal laws of Parsis and Christians.

Conversion and sanyas

Conversion to another religion is a ground for divorce in the statutory laws of Hindus and Parsis.⁵¹ In Hindu law, there is no conversion so long as a person remains a Hindu, Buddhist, Sikh or Jain.⁵² When a "Hindu" spouse seeks a divorce on the ground of the conversion of the other spouse, the court cannot grant the alternative relief of judicial separation.⁵³ Under Muslim law, as applicable in India, if the husband ceases to be a Muslim the marriage is dissolved instantly.⁵⁴ Where a wife renounces Islam the marriage does not come to an end *ipso facto* (though the husband can divorce her) unless by renouncing Islam the wife has re-accepted her original faith.⁵⁵ Under the Indian Divorce Act, 1869 husband's conversion coupled with a bigamous marriage is a ground for divorce available to the wife.⁵⁶ The Act is, however, silent regarding the effect of the wife's conversion.

The Special Marriage Act is based on the principle of secularism. Therefore, a change in the religion of either party, or both parties, to the

48. S. 28 (1).

49. S. 28 (2).

50. S. 13B inserted in 1976.

51. Hindu Marriage Act, 1955, s. 13 (1) (ii); Parsi Marriage and Divorce Act, 1936, s. 32 (j).

52. See the Hindu Marriage Act, s. 2, defining the term 'Hindu'.

53. See s. 13A.

54. See Tyabji, *Muslim Law*, 195 (1968); Mulla, *Mahomedan Law* 321 (1977).

55. Dissolution of Muslim Marriages Act, 1939, s. 4., effecting a reform in the traditional law under which a wife's apostasy, too, dissolves the marriage *ipso facto*.

56. S. 10.

marriage does not affect the marriage solemnized or registered under the Act. In the case of conversion by either spouse, if the parties cannot pull on the only remedy available to them is divorce by mutual consent provided that all its conditions are fulfilled.

In Hindu law *sanyas*, i.e., renunciation of worldly life by entering into a holy religious order, is a ground for divorce.^{56a} This, being an exclusively Hindu religious concept, has no place either under the Special Marriage Act or under any other personal law.

Option of puberty

Under the Dissolution of Muslim Marriages Act, 1939 a wife who is given into marriage by her father or guardian before attaining the age of fifteen years can repudiate it before completing the age of eighteen years, while the marriage remains unconsummated. In such a case she can apply for a divorce claiming that she has exercised her "option of puberty" (*khiyar al-bulugh*).⁵⁷ The concept has been introduced, in 1976, also into the Hindu Marriage Act, 1955.⁵⁸ The provisions, in this regard, under the Dissolution of Muslim Marriage Act and the Hindu Marriage Act are substantially identical; the only notable point of difference being that, unlike Muslim law, even wilful consummation of the marriage does not affect the girl's option of repudiation.⁵⁹

Under the Special Marriage Act, a minor cannot be given in marriage by his or her guardian and, therefore, the question of repudiation does not arise.

Post-divorce rights and reliefs

Till 1976, the Special Marriage Act and the Hindu Marriage Act, both did not permit the parties to a marriage dissolved by a decree of divorce to marry again till the expiry of one year from the date on which the divorce became finally effective.⁶⁰ Both were amended in 1976 in order to remove this restriction. In Muslim law there is no restriction on men's marriage after divorce, but a woman divorcee cannot lawfully marry during

56a. Hindu Marriage Act, 1955, s. 13(1) (iv).

57. S. 2(vii). For the difference between this Act and the traditional Muslim law and for a different law enforced in Kashmir, see T. Mahmood, *Muslim Personal Law: Role of the State in the Subcontinent* 58-59 (1977).

58. S. 13(2) (iv), inserted by the Marriage Laws (Amendment) Act, 1976.

59. The courts have held that in Muslim law consummation of the marriage against the will of the girl does not affect her right.

60. Special Marriage Act, 1954 s. 30; Hindu Marriage Act, 1955, s. 15.

the period of *'idda* (which lasts for nearly three months). A marriage during *idda* is invalid in Shi'a law and irregular (*fasid*) under the *Hanafi* law.

Under the Special Marriage Act the court dealing with a case for restitution of conjugal rights, judicial separation, divorce or nullity of marriage, may grant in favour of the wife alimonies, *pendente lite* as well as permanent.⁶¹ Under the Hindu Marriage Act both kinds of alimonies may be granted in favour of either the husband or the wife depending on their respective financial conditions.⁶² In the laws of the Parsis and Christians, the rules on this point are the same as under Special Marriage Act;⁶³ alimonies, both *pendente lite* and permanent, can be granted only in favour of the wife.

In Muslim law a man is bound to provide maintenance to the divorced wife only during the period of *'idda*. This is in addition to his obligation regarding unpaid dower (*mahr*) which becomes payable immediately on divorce. A woman obtaining a divorce under the Dissolution of Muslim Marriages Act, 1939 has no obligation towards the man even if he is destitute. On the contrary, in that case too she is entitled to her unpaid *mahr* and maintenance of *'idda*.⁶⁴

The provisions of sections 125-128 of the Criminal Procedure Code, 1973—which entitle the court to grant maintenance orders in favour of divorced wives with due regard to the fulfilment of their entitlement under the personal law applicable to a particular case—are available to all divorced women alike, whether their marriage was governed by the Special Marriage Act or by any of the personal laws.

61. Ss. 36-37.

62. Ss. 24-25.

63. Parsi Marriage and Divorce Act, 1936, ss.39-40; Indian Divorce Act, 1869, ss. 36-37.

64. See the Dissolution of Muslim Marriages Act, 1939, s. 5.