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Divorce Under Muslim Law & Christian Law: An Analysis

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ABSTRACT

Matrimonial disputes and conflicts have been prevalent in India, and divorce and annulment are the matrimonial remedies available to couples who wish to come out of their marital relationship. These remedies are governed by the personal laws of the respective religious groups viz., Hindu, Muslim, and Christian personal laws. This research article aims to provide a comparative analysis of the grounds for divorce under Muslim, and Christian personal laws. The primary objective of this study is to evaluate these grounds' adequacy in providing remedies to individuals in distress. The study will adopt a qualitative research approach and analyze the relevant personal laws and judicial decisions on matrimonial disputes. The article will begin by briefly introducing the concept of marital remedies, followed by an overview of the legal framework governing divorce under Muslim, and Christian personal laws in India. Next, the analysis section will provide an in-depth analysis of the grounds for divorce under each personal law, highlighting their advantages and limitations. The conclusion will summarize the study's findings and evaluate the adequacy of the grounds for divorce under Muslim and Christian personal laws to provide remedies to the distressed individuals.

Keywords: Divorce, Grounds, Muslim Law, Christian Law.

I. INTRODUCTION

Marriage is an essential institution in Indian society and is often viewed as a sacrament and lifelong commitment between two individuals. Marriage ceremonies in India are a celebration of not just the union of two individuals but also of two families. And divorce is a subject that is often met with disapproval and stigma.

However, in some situations, the law recognizes that divorce may be necessary if the marriage cannot be saved. Divorce is a legal right and a necessary option for those who find themselves in an unhappy or untenable marriage. In this article, we will explore the various aspects of divorce in India, with special focus on Muslim and Christian Laws and the court's stance on the matter.

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(A) Divorce under various personal laws:

In India, several personal laws govern divorce proceedings for individuals belonging to different religions and communities. Hindus are governed by the Hindu Marriage Act, 1955 for the matters relating to Divorce and other matrimonial reliefs. Muslims are governed by the Muslim Personal Law, the Shariat (Application) Act, 1937, the Dissolution of Muslim Marriage Act, 1939, the Muslim Women (Protection of Rights on Divorce) Act, 2019 and the Muslim Women (Protection of Rights on Marriage) Act, 2019. Christians are governed by the Divorce Act, 1869 with Divorce (Amendment) Act, 2001 which has made so many changes in the law of Divorce of Christians. Divorce by mutual consent is available in almost all personal laws in India.

II. DIVORCE UNDER MUSLIM LAW

A contract of marriage under the Muslim law may be dissolved:

- i by the husband at his will, i.e., talaq;
- ii by the wife under a power delegated to her, i.e., talaq-i-tafweez;
- iii by mutual consent of the husband and wife, i.e., khula and mubara'at; and
- iv by judicial decree under the Dissolution of Muslim Marriage Act, 1939.

Talaq in its original sense means repudiation, or rejection, but under Muslim law, it means a release from the marriage tie. Any Mahomedan of sound mind, who has attained puberty, may divorce his wife whenever he desires, without assigning any cause. A talaq pronounced under compulsion or intoxication or fraud is also effective under Sunni law, void under Shia law. A talaq may be effected either orally, by spoken words or in written document called talaqnama.

Forms of Talaq:

Talaq-ul-Sunnat:

This means talaq as sanctioned by the sunnat or according to the traditions laid down by the prophet. These can be of two types. One is Talaq Ahasan and the other is Talaq Hasan.

Talaq Ahasan:

This is the most proper method of divorce. The requirements of this form are:

- a) The husband must make a single pronouncement of divorce.
- b) This pronouncement must be made during a tuhr (period between menstruation).
- c) The husband must abstain from sexual intercourse for the period of iddat.

A pronouncement made in the Ahasan form is revocable during iddah. Such revocation may be either in express words or implied. Cohabitation is an implied revocation. After the expiration of iddat, the divorce becomes irrevocable.

Talaq Hasan:

This is the proper method of divorce but not the most proper method. The requirements of this talaq are:

- a) There are three pronouncements of talaq made during successive tuhrs.
- b) There must be abstinence from sexual intercourse until the third pronouncement.

About more than hundred years back, the Privy Council in *Moonshee Bazloor Ruheem v. Shumsoonnisa Begum*², said that matrimonial law of the Muhammadan like that of every ancient community favours the stronger sex where the husband can dissolve the marital tie at his will. In *Moonshee Buzl-un-Raheem v. Luteefutoon-Nissa Begum*³, the court said that a divorce by talaq is more arbitrary act of the husband who may repudiate his wife with or without any cause. This attitude of the court continued even after the advent of independence.

In the case of *Musst. Rebun Nessa vs. Musst. Bibi Ayesha & others*⁴, the Gauhati High Court stated that, as per the holy book of the Quran, there should be a reasonable cause for talaq. The couple must try to reconcile first by using arbitration, where two arbitrators, one from each side of the family along with the couple, try to resolve their problems. Only if the attempt at reconciliation fails should the couple move ahead with the talaq. Divorce between the married couple cannot take place due to small issues that can be solved through discussion. Only when grave matters are in question should the option of talaq be used by the married couple.

Talaq-ul-Biddat:

Talaq-ul-biddat is one of the disapproved forms of talaq. The essential feature of this talaq is its irrevocability. It is of two kinds. One is talaq-ul-bain and another one is talaq-i-bain. The three pronouncements should be made in within one tuhr. These pronouncements may be made either in one sentence or in separate sentences. The triple repetition is not a necessary condition of talaq-ul-biddat, and the intention to render talaq irrevocable may be expressed even by a single declaration. Thus, if a man says 'I have divorced you by a talaq-ul-bain (irrevocable) divorce' the talaq is talaq-ul-biddat, and it will take effect immediately. The Shia law does not recognize the validity of this form of talaq. As a general rule, the effect of an irrevocable divorce is that

² (1867) 11 MIA 551.

³ (1861) 8 Moo Ind App 379.

⁴ AIR 2011 Gauhati 36.

the mutual rights of inheritance between the husband and wife immediately cease. But where an irrevocable divorce is given during the husband's death-illness and he dies before the expiry of iddat.

In India, this form of divorce is considered unconstitutional. The Supreme Court in the case of *Shayara Bano vs. Union of India (2017)*⁵ recognised triple talaq as unconstitutional. On 22nd August 2017, the Supreme Court ruled on the constitutionality of the practice of triple talaq by a 3:2 majority and deemed this practice as unconstitutional and held that it violated fundamental rights under Article 14, Article 15 and Article 21 of the Indian Constitution. The decision not only aimed to uphold gender equality but also set a precedent for future reforms in personal law and foster a more secure and just environment for Muslim women in India. The Supreme Court by a 3:2 majority held the practice of triple talaq unconstitutional and ruled that it violated fundamental rights under Article 14 and Article 15. The Court highlighted that the practice, primarily followed by the Hanafi school, was both sinful and lacked Quranic sanction. It referenced global Islamic reforms and ruled that triple talaq was not an essential religious practice protected by Article 25 of the Constitution of India. Justice Nariman, Justice Lalit and Justice Joseph viewed triple talaq as arbitrary and violative of gender equality.

Dissenting, Justice Khehar and Justice Nazeer held that uncodified personal laws like those governing talaq should not be subject to judicial review under constitutional scrutiny.

Following the Shayara Bano judgment, the government enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019 which criminalized triple talaq with up to 3 years of imprisonment. The Shayara Bano judgment marked an important step towards equality by declaring triple talaq as unconstitutional. The Supreme Court's verdict on triple talaq supports gender equality and the rights of Muslim women and promotes a more secure and just life in line with constitutional values. The decision also provides a strong foundation for future reforms in personal law and reflects a commitment to secularism.

The Chief Justice of Allahabad High Court in the case of *Rahmat Ullah vs. State of UP (1994)* observed that Talaq-ul-Biddat is a type of divorce that is irrevocable in nature. This type of divorce is an instant divorce, where it takes place in only a single sitting or when pronounced in tuhr. Talaq-ul-Biddat does not give any reconciliation chance or a waiting period nor does it allow Allah's will for reunion, which can be possible by getting rid of differences and helping the married couple reconcile. This is opposite to what is stated in the holy book of the Quran.

⁵ AIR 2017 Supreme Court 4609.

Ila:

Ila or vow of abstinence is another form of divorce. It is a species of constructive divorce, which is effected by abstinence from sexual intercourse for a period of not less than four months pursuant to a vow. Ila may be cancelled by the husband by resuming intercourse with his wife within the period to which it refers, provided he has not already completed four months of abstinence. This form of divorce is more or less obsolete now.

Zihar:

Zihar is a form of inchoate divorce. If the husband compares his wife to any of his female relations within such prohibited degrees as renders marriage with such person as unlawful, the wife has a right to withdraw from him until he has performed penance. If the husband does not expiate, the wife has a right to apply for a judicial divorce.

Talaq-i-tafwid (Delegated Divorce):

A husband, under the Mahomedan law, has the power to delegate his own right of pronouncing divorce to some third person or to the wife herself. This power could be delegated either absolutely or conditionally, for a particular period, or permanently. A temporary delegation of the power is irrevocable, but a permanent delegation may be revoked.

Khula and Mubara'at:

A marriage may also be dissolved by agreement between the husband and wife. A dissolution of the marriage by agreement may take the form of khula or mubara'at.

Khula:

Khula is a divorce with the consent, and at the instance of the wife. Khula or redemption literally means, 'to lay down'. In law it means laying down by a husband of his right and authority over his wife. The essential features of khula are:

- i. there is an offer from the wife;
- ii. the offer is accompanied by some consideration or compensation by the wife to the husband in lieu of her release from the marital bond;
- iii. the offer must be accepted by the husband.

Mubara'at:

Like khula, mubara'at is also a form of divorce where marriage is dissolved by agreement between the parties. The difference between the two is that in khula, the aversion is on the side of the wife and she desires a separation, whereas in mubara'at the aversion is mutual and both

the parties desire a separation. It takes place in the form of bilateral agreement between the husband and wife without the intervention of the court.

Li'an (False Charge of Adultery):

Adultery is a very grave offence under Islamic law. It therefore takes a serious view of an imputation of unchastity against a married woman. If a Muslim husband charges his wife with adultery and the charge is false, the wife has a right to seek divorce on that ground. She has a right to file a regular suit for dissolution of marriage and a mere application to the court is not sufficient. The marriage continues until the decree is passed.

Judicial Divorce:

Unlike the husband, a wife has no absolute right to divorce her husband. She can, however, seek a divorce under certain conditions and grounds through a court.

Prior to Shariat Act:

Prior to Shariat Act, i.e., the Muslim Personal Law, the wife could sue the husband for divorce on the following grounds, viz:

- i. Impotence: It had to be proved that:
 - a) The wife was a virgin at the date of filing the suit.
 - b) The husband was impotent at the time of marriage.
 - c) The wife had no knowledge of his impotency at the time of marriage; and
 - d) The husband was unable to consummate the marriage during the one year during which period the case was to be adjourned.
- ii. Li'an, i.e., false charge of adultery.

Divorce under the Dissolution of Muslim Marriage Act, 1939:

The statutory ground for divorce available to a Muslim wife are contained in the Dissolution of Muslim Marriage Act, 1939 (a Muslim husband does not need any ground as such to divorce his wife). Section 2 of this Act states:

Grounds for decree for dissolution of marriage:

A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

- i. that the whereabouts of the husband have not been known for a period of four years;
- ii. that the husband has neglected or has failed to provide for her maintenance for a period

- of 2 years;
- iii. that the husband has been sentenced to imprisonment for a period of 7 years or upwards;
 - iv. that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
 - v. that the husband was impotent at the time of the marriage and continues to be so;
 - vi. that the husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease;
 - vii. that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years; provided that the marriage has not been consummated;
 - viii. that the husband treats her with cruelty, that is to say
 - a) habitually assaults her and makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment; or
 - b) associate with women of evil repute or leads an infamous life; or
 - c) attempts to force her to lead an immoral life; or
 - d) dispose of her property or prevents her exercising her legal rights over it; or
 - e) obstructs her in the observance of her religious profession or practice; or
 - f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran.
 - ix. On any other ground which is recognized as valid for the dissolution of marriages under Muslim Law. Provided that:
 - a) no decree shall be passed on ground (iii) until the sentence has become final;
 - b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and
 - c) before passing a decree on ground (v) the court shall, on application by the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within

such period, no decree shall be passed on the said ground.

The above is the legal position on grounds statutorily provided for seeking a divorce. Apart from these grounds, where one party files a petition against the other, Muslim law provides for divorce by mutual consent as well.

III. DIVORCE UNDER CHRISTIAN LAW

The Indian Divorce Act, 1869, which has been substantially amended in 2001, provides for divorce on the following grounds.

Section 10. Grounds for Dissolution of Marriage — (1) any marriage solemnized whether before or after the commencement of the Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent

- i has committed adultery;
- ii has ceased to be a Christian by conversion to another religion
- iii has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; or
- iv has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or
- v has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or
- vi has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive; or
- vii has willfully refused to consummate the marriage and the marriage has not therefore been consummated; or
- viii has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; or
- ix has deserted the petitioner for at least two years immediately preceding the presentation of the petition; or
- x has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent;

(2) A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality. The provision of section 10(2) giving exclusive grounds for divorce to wife was challenged as being violative of the right to equality under Article 14 of the Constitution, in *Anil Kumar v. Union of India*⁶, 1994 (2) HLR 11 ISC, the court held that in view of a woman's general vulnerable physical and social condition, in this country specially, there is nothing offensive about it.

IV. CONCLUSION

Marriage is playing a pivotal role in the formation of a family. But all the married couples may not be able to enjoy successful life because of various reasons like lack of understanding, ego, domination, dependency and so on. Divorce is the permanent relief for them to come out of the marital tie. Divorce is a challenging and emotional process that can take a toll on individuals and families. In India, the laws governing divorce have been evolving to keep pace with changing societal norms and to ensure a more streamlined and fair process for all parties involved. But at the same time, customary practice is playing a predominant role in religious laws in one way or the other. Comparatively, the Muslim Personal Laws are more fully influenced by customary practice. The personal laws of various religious groups are different in terms of grounds and the process for obtaining relief. This research paper has highlighted various grounds for obtaining a decree of divorce under Muslim Law & Christian Law.

⁶ 1994 (2) HLR 11 ISC.