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From Constitutional Guarantee to Enforceable Rights: The Evolving Role of the Indian Judiciary

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ABSTRACT

The Indian Constitution guarantees Fundamental Rights as essential safeguards against arbitrary

State action and as foundations of individual liberty and dignity. However, constitutional guarantees acquire meaningful value only when they are effectively enforceable. This article examines the evolving role of the Indian judiciary in transforming Fundamental Rights from textual guarantees into practical and enforceable rights. It traces the development of judicial review and constitutional remedies under Articles 13, 32 and 226, with particular focus on the

evolution of Article 21 through landmark decisions *Asok Kumar*, *Maneka Gandhi*, *Vishaka*, *K.S. Puttaswamy* and *Navtej Singh Johar*. The article further analyses Public Interest

Litigation and judicial activism as mechanisms that have expanded access to constitutional justice and strengthened rights protection. At the same time, it critically examines concerns of

judicial overreach, separation of powers and institutional limits. It argues that effective rights protection requires both robust judicial enforcement and principled judicial restraint.

KEY WORDS Fundamental Rights; Indian Judiciary; Judicial Review; Constitutional

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Remedies; Article 21; Judicial Activism; Public Interest Litigation; Judicial Overreach; Separation of Powers; Constitutional Interpretation.

Introduction

In India, the main issue which is quite noticeable is that despite social changes and the influence of westernization over the last three decades, dissolution of marriage is still a taboo and considered immoral in our society.² It can be truly said that

² Premchand Dommaraju Divorce and Separation in India, 42 Population & Dev. Rev. (2016)

though marriage is an important social institution in India, but when that marital relationship becomes a means of cruelty, continuous conflict, or unnecessary hardship, it is the law that must provide a fair and humane means of separation. Moreover, divorce is not merely a termination of marriage; it also involves questions of individual liberty, equality, financial security and welfare of the children.³ As we know, divorce is governed by different personal laws which provide legal frameworks for dissolution of marriage and these laws recognise grounds of divorce such as cruelty, desertion, mutual consent etc. whilst also providing remedies related to maintenance and child custody.⁴ The development of divorce jurisprudence reflects an increase in the level of recognition that the preservation of marriage must be balanced with the dignity and personal liberty of individuals. This article examines the major divorce laws in India, their procedures and grounds, and the role of judicial pronouncements in addressing matrimonial disputes. It further discusses the challenges faced by the spouses and the necessity for reforms to ensure a more equitable, accessible and justifiable divorce system.

Legal Framework governing divorce in India

³ Hindu Marriage Act, No. 25 of 1955, India Code (1955)

⁴ Special Marriage Act, No. 43 of 1954, India Code (1954)

The legal framework governing divorce in India is based on a combination of personal laws and secular legislation. The reason behind it is that different communities are governed by different statutory provisions, whilst marriages solemnised under the civil marriage law are governed by the Special Marriage Act, 1954. The Hindu Marriage Act, 1955, is one of the principal statutes governing Hindu marriages and provides specific grounds and procedures for divorce. The framework also includes provisions relating to maintenance, child custody, and the jurisdiction of courts.

Hindu Marriage Act, 1955

The Hindu Marriage Act, 1955 was enacted to amend and codify the laws related to marriage among Hindus. There are certain sections particularly Section 2 that specifies the persons to whom the Act applies, Section 13 provides the main grounds for divorce which includes adultery, cruelty, desertion, conversion, renunciation of the world, unsoundness of mind, leprosy, venereal diseases, non-resumption of cohabitation. The Act also recognises divorce by mutual consent under Section 13B. Some sections provide legal remedy where a marriage can continue due to the circumstances recognised by law particularly Section 24 talks about maintenance pendente lite and expenses, Section 25 talks about permanent alimony and maintenance, Section 26 talks about the custody of children.

Special Marriage Act, 1954

This Act mainly provides a legal framework for civil marriages and their dissolution. The particular sections which describe the grounds for divorce are Section 27 which allows either spouse to petition for divorce on specific grounds including adultery, desertion for two years, imprisonment for seven years or more, cruelty, incurable mental disorder, virulent and incurable venereal disease, or the respondent being missing for seven years. There are certain additional grounds which include specific sexual offenses, non-resumption of cohabitation after a maintenance order, or non-compliance with a decree of restitution of conjugal rights, and Section 28 provides a simplified process for amicable separations it says that parties must live separately for at least a year, unable to cohabit, and have mutually agreed to dissolve the marriage. Moreover, a joint petition is filed, followed by a second

⁵ Hindu Marriage Act, No.25 of 1955, India Code (1955)

motion between 6 and 18 months later, after which the court grants a decree if the petition remains unwithdrawn.⁶

Muslim Personal Law and Shah Bano Case

As we already know that there are certain acts of the Muslim personal laws which talk about the dissolution of Muslim marriage. There is a historical landmark judgment that shaped the legality of dissolution of marriage under Muslim personal laws. It is the case of *Mohd. Ahmed Khan versus Shah Bano Begum*⁷ in which the Supreme Court held that Section 125 of CrPC was a secular provision and it is applicable to all the persons irrespective of their religion. A divorced Muslim woman who is unable to maintain herself could claim maintenance from her former husband, but the statutory conditions must be satisfied.⁸

After the judgment of the Shah Bano case, Parliament enacted Muslim Women (Protection of Rights on Divorce) Act, 1986. However, this act was also challenged in the case of *Danial Latif versus Union of India*⁹ on the basis that Section 3 of the 1986 Act overrides Section 125 of CrPC, in this *Danial Latif* argued that Section 3 begins with a non-obstante clause, stating that it applies notwithstanding anything contained in other laws, which in simple words means that the Act was a special law governing divorced Muslim women and therefore excluded divorced Muslim women from availing remedy under section 125 of CrPC. However, the Supreme Court upheld the constitutional validity of the Act and rejected the restrictive interpretation.¹⁰

Grounds and Methods of Divorce

There are mainly two methods of divorce i.e. contested divorce and divorce by mutual consent. The main statutory provisions are Section 13 and 13B of the Hindu Marriage Act, 1955.

A. Contested Divorce

Contested divorce refers to a situation where one spouse seeks dissolution of marriage and the other spouse does not agree to the divorce, or the parties disagree about the grounds or relief. Under Section 13(1) of the Hindu Marriage Act, 1955, either spouse may file a petition for divorce on specified grounds. These include

⁶ Special Marriage Act, No. 43 of 1954, India Code (1954)

⁷ *Mohd. Ahmed Khan versus Shah Bano Begum*, (1955) 2 SCC 556

⁸ Saurav Thampam, *The Interplay Between Muslim Women (Protection of Rights on Divorce Act), Section 125 CrPC and Family Courts Act*, LiveLaw (2020)

⁹ *Danial Latif v. Union of India*, (2001) 7 SCC 740 (India)

¹⁰ SCC Times. "Comprehensive Breakdown of the Supreme Court Verdict on Divorced Muslim Women's Right to Claim Maintenance Under Section 125 CrPC" (2024)

adultery, cruelty, desertion, conversion, renunciation of the world, unsoundness of mind, leprosy, venereal diseases, non-resumption of cohabitation.¹¹

- Divorce on the ground of Adultery

Though adultery is not considered an offence in our country. But as per the Hindu Marriage Act adultery is considered as one of the most important ground for seeking divorce. Adultery means the consensual and voluntary intercourse between a married person with another person, married or unmarried of the opposite sex. In the case of Joseph Shine versus Union of India¹² the Supreme Court quashed adultery as a criminal offence under Section 497 of the Indian Penal Code, 1860. Moreover, in the case of Swapna Ghose versus Sadanand Ghose¹³ the wife found her husband with other girl lying on the same bed and the neighbour also confirmed the same, so as a result the wife gets a divorce on this ground.

- Divorce on the ground of Cruelty

The concept of cruelty includes mental as well as physical cruelty. The physical cruelty means when one spouse causes bodily injury to the other spouse. But the concept of mental cruelty was added as the spouse can also be mentally tortured by the other spouse. In the case of Balaram Prajapati versus Susheela Bai¹⁴ the petitioner filed the divorce petition against his wife that behaviour with him and his parents was aggressive and many times she has filed a false complaint against the husband. The court grants the divorce on the ground of cruelty.

- Divorce on the ground of Desertion

Before the 1976 Amendment, desertion was only a ground for judicial separation and not divorce. But after the amendment, desertion is ground of divorce under Section 13 of the Hindu Marriage Act. According to the Act, it means abandoning one spouse by the other without any reasonable cause or without the spouse's consent for a continuous period of 2 years from the time the petition has been presented. In the case of Malathi Ravi versus B.V. Ravi¹⁵ the Supreme Court held that if there is no evidence to prove that wife had an intention to end the marriage or whether she has deserted her husband, then the court will not pass a decree of divorce, it means a minus desertion must exist.

¹¹ Parshav Gandhi & Monesh Mehndiratta, What are the Grounds of Divorce Under the Hindu Marriage Act, 1955? Pleadings (2023)

¹² Joseph Shine v. Union of India, (2019) 3 SCC 39 (India)

¹³ Swapna Ghosh v. Sadananda Ghosh And Anr AIR (1989) CAL193CWN231

¹⁴ Balaram Prajapati v. Susheela Bai II (2003) DMC708

¹⁵ Malathi Ravi M.D v. Dr. B.V. Ravi M.D AIR (2014) SC 2881

Divorce on the ground of Conversion

If any of the spouses gets converted to another religion and ceases to be a Hindu, amounts to conversion, the aggrieved spouse can seek a decree from the court to dissolve the marriage. In the case of *Suresh Babu versus Leela*¹⁶ the husband converted himself into Muslim and married another woman, then the wife files a case and demanded the divorce on the ground of conversion without her consent and cruelty.

Divorce on the ground of Unsoundness of Mind

A person can file for divorce on the ground of unsoundness of mind or insanity of the spouse, under Section 13 of the Act. For the ground of insanity, the spouse must be suffering from incurable unsoundness of mind, either continuously or intermittently from a mental disorder of such a kind or to such an extent which makes it impossible to live with each other. In the case of *Vinita Saxena versus Pankaj Pandit*¹⁷ the petitioner filed a case to get the divorce from the respondent on the ground that the respondent was suffering from Paranoid Schizophrenia which means mental disorder, she came to know about this after the marriage. The court grants divorce on the ground of insanity of husband.

Divorce on the ground of Leprosy

Leprosy is an infectious disease of the skin, mucous membranes, nervous system etc. this disease is transmitted from one person to another. Hence, it is considered as the valid ground for divorce.¹⁸ In *Swarajya Lakshmi vs G. G. Padma Rao*¹⁹, the husband filed the case for granting the divorce on the ground of leprosy. He claimed that his wife is suffering from incurable leprosy with the expert's reports. Here he succeeds in getting the divorce on the ground of leprosy.

Divorce on the ground of Venereal Disease

Under the Hindu Marriage Act, if any of the spouses is suffering from a venereal disease (commonly termed as sexually transmitted diseases) in a communicable form, such a spouse can seek a divorce from the court under section 13.

¹⁶ *Suresh Babu v. Leela* 2006(3) KLT 891

¹⁷ *Vinita Saxena v. Pankaj Pandit* 2006 (3) SCC 778

¹⁸ Aarush Jain, *Primer on Divorce in India: Practice and Procedure*, Manupatra

¹⁹ *Swarajya Lakshmi v. G.G. Padma Rao* 1974 AIR 165

Divorce on the ground of Renunciation

If one spouse renounces the world by entering any religious path without the consent of the other spouse, it is one of the grounds for divorce under Section 13 of the Act.

Divorce on the ground of Presumption of Death

If a person goes missing for 7 years and is not heard or seen as being alive, it is presumed that he or she is dead. The Act recognises the concept of presumption of death as a ground for divorce under Section 13 of the Act. In the case of *LIC of India versus Anuradha*²⁰ the Supreme Court held that the death of a person can be presumed only after the lapse of seven years.

A. Divorce by Mutual Consent

It is a method of dissolution of marriage where both the spouses agree that the marriage should end, Section 13B of the Act provides for this procedure. The essentials of divorce by mutual consent are as follows:

- Parties should be living separately

Section 13B of the Act prescribes that in order to mutually dissolve a marriage, the spouses should be living separately for a period of at least 1 year before filing the petition. This period of one year where the parties have lived separately must be immediately before the filing of the petition. "Living Separately" in the context of Section 13B does not necessarily mean physically living in different places. The parties could be living in the same house, sharing the same roof but there can still be a distance between the two. If that is the case then they are not considered to be living as husband and wife, which qualifies as living separately.

It was held by the Hon'ble Supreme Court in the case of *Sureshta Devi v. Om Prakash*²¹, and it was made clear that living separately does not necessarily mean living in different places. The parties can be living together but not as spouses.

- Parties have not been able to live together

In a marriage it may happen that the spouses can't stand each other and can no longer live together happily. That is when they file for divorce by mutual consent. It

²⁰ LIC of India v Anuradha 2004 (3) SCR 629

²¹ Sureshta Devi v. Om Prakash 1992 AIR 1904

merely happens that the parties are not able to live together even after trying mediation and reconciliation and putting multiple efforts, before filing a divorce petition by mutual consent.

In *Pradeep Pant & Anrv. Govt of NCT Delhi*²², the parties were married and had a daughter from their wedlock. However, due to temperamental differences between them, they were not able to live together and decided to live separately. Despite putting efforts they were unable to reconcile their marriage and could not see themselves living together as husband and wife ever again. A divorce petition was jointly filed and issues such as maintenance and custody of their child were decided and agreed upon by both. The wife would get custody of their daughter and the husband would reserve visitation rights, it was mutually agreed upon by both of them. Both parties gave their free consent without any undue influence. The court observed that there was no scope of reconciliation and granted a decree of divorce.

Generally after filing a petition for divorce by mutual consent, the parties are given a waiting period of 6 months, also known as a cooling period and it may extend up to 18 months. During this time the parties must introspect and think about their decision.²³

They have mutually agreed that marriage should be resolved-

In some situations, the parties may choose to give their marriage another chance and mutually resolve their marriage. During the waiting period, the parties may sometimes be able to reconcile and make their relationship work. After the first motion has been passed, the parties have a total of 18 months to file for second motion and if they fail to do so within those 18 months, both parties are deemed to have withdrawn their consent mutually.

Theories of Divorce and their statutory recognition

There are three theories of divorce and all of them have been recognised under the Hindu Marriage Act. They are as follows:

- Fault theory of Divorce the name of the theory suggests, it focuses on the fault of one of the parties to the marriage. As per fault theory, if one of the spouses is at fault then the other party becomes entitled to apply to the court seeking decree of

²² *Pradeep Pant & Anr v. Govt. of NCT Delhi* 2012 Supreme (Del) 1129

²³ *Parshav Gandhi & Monesh Monesh Mehndiratta* What are the Grounds of Divorce Under the Hindu Marriage Act, 1955 *JPleaders* (2023)

divorce. The Hindu Marriage Act primarily recognises fault-based theory as a ground of divorce. It provides for various grounds for applying to the court for decree of divorce.

-Consent Theory of Divorce: This theory is based on the idea that when two consenting adults marry each other and they are of the view that the marriage is not working between them and are mutually of the view that both the spouses should seek dissolution of marriage then it is in the interest of the spouses and the society that the marital ties between the parties should be dissolved. The legislature has in consonance with the mutual consent theory inserted Section 13B of The Hindu Marriage Act vide amendment act of 1976.

-Irretrievable Breakdown Theory: According to this theory of dissolution of marriage, the marriage between the parties can be dissolved if the marital tie between the parties has been broken down irretrievably and there is nothing remaining in the marriage. Irretrievable Breakdown of Marriage as a ground of divorce is not statutorily recognised as a ground of divorce by the parliament under Hindu Marriage Act and Special Marriage Act. The traces of Irretrievable breakdown of marriage can be found in Section 13(1A) of The Hindu Marriage Act which provides that if the party does not comply with decree of restitution of conjugal rights for a period of one year, then it avails a ground for seeking divorce.²⁴

Judicial Developments and Emerging issue

-Amardeep Singh versus Harveen Kaur²⁵: the Supreme Court held that the 6-month cooling off period under Section 13B (2) is directory and not mandatory and it may be waived when the statutory conditions are satisfied.

-Shilpa Sailesh versus Varun Sreenivasan²⁶: the Supreme Court recognised its power under Article 142 to dissolve a marriage on the ground of irretrievable breakdown of marriage in appropriate cases, even though that ground is not independently available under the HMA.

-N.G. Dastane versus Dastane²⁷: this case is useful in explaining the standard of proof in matrimonial cases, particularly the principle of preponderance of probabilities.

²⁴ Pradyumn Tiwari, Irretrievable Breakdown of Marriage as a Ground of Divorce: A Critical Analysis, Delhi J. Contemp. L. 286 (2023)

²⁵ Amardeep Singh v. Harveen Kaur AIR 2017 SUPREME COURT 4417

²⁶ Shilpa Sailesh v. Varun Sreenivasan (2003)/2023 INSC 468

²⁷ Dr. N.G. Dastane v. S. Dastane AIR 1975 SUPREME COURT 1534

Challenges and need for reform

Delay in litigation Matrimonial disputes may continue for years, increasing emotional and financial hardship.

Financial insecurity A spouse who is financially dependent may struggle to meet basic needs during and after the divorce.

Gender inequality Women may face social pressure, economic dependence, or difficulty accessing legal remedies, and the men are at a disadvantageous position when it comes to divorce laws in India.²⁸

Child welfare: Disputes concerning custody, education, and maintenance must be resolved in the best interests and welfare of the child.

Lack of awareness Many people are unaware about the free legal aid, mediation, or their statutory rights.²⁹

Conclusion

From the above discussions, we conclude that the purpose of divorce law is not simply to end a marriage but to ensure justice, dignity, and fairness for all parties. A balanced legal framework should protect the institution of marriage while recognising the individual's rights to personal liberty and dignity. The effective reforms such as accessible courts, and protection of children and financially vulnerable spouses are essential for a humane divorce system.³⁰

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