

RETHINKING THE GROUNDS FOR DIVORCE IN GENERAL LAW OF SRI LANKA: A COMPARATIVE ANALYSIS.

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Introduction

This paper examines the legal framework relating to divorce law in Sri Lanka. It addresses the question whether the existing grounds for law of divorce, which are solely based on matrimonial fault in general law, are adequate. Fault based divorce law may fail to identify real reasons for divorce at times. Moreover, proving fault could be a mammoth task which may take a toll on other aspects of marital relationships such as custody of children. Hence, there is an incompatibility between the circumstantial reality of the family breakdown and the available legal procedure for dealing with breakdown of marriage. Therefore, this paper seeks to introduce 'irretrievable breakdown of marriage' as a ground for divorce into the general law of Sri Lanka.

The fault – based system requires proof of at least one ground recognized by law for the dissolution of marriage. If the married party fails to prove adultery, malicious desertion or incurable impotency at the time of marriage, he/she will not be able to dissolve the marriage even if their union has broken down due to any other reason. In the modern context, the inability to obtain a divorce through law could even result in the violation of human rights of the parties involved. Hence, the study has been carried out with a view to reform an entirely fault based divorce system into a system that recognizes irretrievable breakdown.

Sri Lanka has a plural legal system which is comprised of general law as well as special laws. There are three main racial groups in Sri Lanka: Sinhalese, Tamils and Muslims. Prior to western domination, different customs were followed by those groups. While Sinhalese and Tamils followed their own customs, the Muslims were governed under customs based on Islamic principles. Under that period, dissolution of marriage was based on the breakdown of marriage concept according to the customary laws.¹

Earlier in England, marriage was considered as holy sacrament for lifetime because of the influence of the Christian church.² Sri Lanka has a mixed legal system consists of Roman Dutch Law and English Law. Under British colonial era, Sri Lankan statutes also enacted according to the English law. Therefore, general law has established with the grounds relating to matrimonial fault.

Currently, the consequences of marriage and divorce are governed by different laws applicable to various groups. Customary divorce law was replaced by the introduction of the doctrine of matrimonial fault through statutory laws. Tamils, low country Sinhalese and up country Sinhalese (who have consented to be governed under general law) are governed under Marriage Registration Ordinance³ and the Civil Procedure Code.⁴ Muslims are governed by Muslim Marriage and Divorce Act.⁵ Kandyan Marriage and Divorce Act⁶ affects up country Kandyans who are willing to get married under Kandyan Law. These Acts were established during the western domination period. The special laws are based on religion and customs. Through these Acts and Ordinances, simple divorce law and procedure have metamorphosed into the complicated battle of evidence and proof that one experiences under the Sri Lankan law today.

The research was carried out to remedy a lacuna in law pertaining to divorce. An entirely fault based system of law does not serve the purpose of divorce laws. This in consequence leads to 'shell marriages' and persistence of marriages that are irretrievably broken down. Hence law should be amended to recognize both fault-based as well as non-fault based ground.

Therefore, legislative intervention is needed in order to revisit the existing legal framework to introduce the 'irretrievable breakdown of marriage' rather than proving the guilt or innocence of the parties. It is expected that this would help to ensure the protection of individual rights such as right to privacy. It further argues that court procedure should facilitate divorce rather than converting it to a war of guilt.

Existing General Law on Divorce in Sri Lanka

The Marriage Registration Ordinance No. 19 of 1907 constitutes the general law on Divorce in Sri Lanka. This Ordinance is applicable mainly to the Tamils and low country Sinhalese. Moreover, Kandyan Sinhalese are allowed to choose either Kandyan

¹ R. Wijeysekera, Divorce Law in a Plural Society: The need to preserve multiculturalism with special reference to Sri Lanka, (Sri Lankan Journal of International Law, 2004).

² *ibid*

³ Marriage Registration Ordinance No.19 of 1907

⁴ Ordinance No. 18 of 1889

⁵ Act No. 13 of 1951

⁶ Act No. 44 of 1952

Law or general law for the divorce. There are three grounds for divorce under section 19(2) of the Marriage Registration Ordinance, such as adultery, malicious desertion and incurable impotence at the time of marriage.

Professor Shirani Ponnambalam states in relation to adultery [...] *the essential ingredient of this offence is that it involves sexual intercourse with a person out of lawful wedlock. Consequently, the adulterer must necessarily be a married person irrespective of the civil status of the other*.⁷ Even though, adultery is a civil offence, the standard of proof required is equal to that of a criminal offence in that requires proof beyond reasonable doubt. That is the highest level of burden of proof. In *Jayasinghe v. Jayasinghe*⁸ and *Dharmasena v. Navarathna*⁹ cases reiterate that the burden of proof is beyond a reasonable doubt. This is an extra burden for the innocent party because proving evidence for adultery is not an easy task. On the other hand, adultery cannot be considered as a simple offence because it affects one's personal dignity. Subsequently, in *Gunasekara v. Gunasekara*¹⁰, *Alarmalammal v. Nadaraja*¹¹ and *Pushpakumara v. Marmet and others*¹² the court has stated that clear and cogent evidence is sufficient for proving adultery.

The second ground for divorce is malicious desertion. Even though, cruelty is not a ground for divorce that can also be included under this ground. In order to obtain a divorce under this ground, parties have to prove both elements of *animus* and *factum*.¹³ Furthermore, malicious desertion can be divided into two, namely simple and constructive malicious desertion. The distinction between the listed categories lies in the nature of proving the element of *factum*.¹⁴ In simple desertion, deserting spouse leaves the matrimonial home and in constructive desertion, circumstances compel and force the innocent spouse to leave home.¹⁵ The intention of the termination of the marital relationship is the important fact for this ground. In *Silva v. Misinona*¹⁶ the court interpreted malicious desertion as a party permanently giving-up the matrimonial duties and responsibilities without consent of the spouse. Further, there should not be any reasonable cause for abandoning.

The other ground for divorce is incurable impotency at the time of marriage. Parties are expected to prove it through medical reports. If the disease is curable, they will not be able to get the divorce.

In addition to the above mentioned grounds under the Marriage Registration Ordinance, the Civil Procedure Code authorizes a party to obtain a divorce in two ways. Either spouse may request permission from the court for judicial separation for a period of two years. After completing that period without any association between the parties, they are allowed to get the decree of divorce. Moreover, if the parties live separately for seven years, either spouse is permitted to request the decree for dissolution of marriage from the court. Under the Civil Procedure Code, it is not necessary to prove the grounds relating to matrimonial fault. It can be argued that through these provisions policy makers attempted to introduce the doctrine of breakdown of marriage rather than seek the guilt or innocence of the parties.

In *Muthurani v. Thureisingham*¹⁷ Thambaiah J. held that petitioner's adultery was not a bar for obtaining the divorce, even though, later judicial approach appears different from this stance. In *Thennakoon V. Thennakoon* and *Thennakoon v. Somawathie Perera* court took a different approach and declared that it is impossible to change the substantive law. Marriage Registration Ordinance clearly stipulates that, if the parties need to obtain a divorce they should have to prove any of the given grounds under section 19.¹⁸ An opportunity that was opened up in Muthurani case to introduce breakdown of marriage as a ground for divorce has been barred by strict interpretation of the law.

Currently, Sri Lankan general law on divorce is clear; parties have to prove matrimonial fault of the spouse for dissolution of marriage.

Comparative analysis with special laws in Sri Lanka

a) Kandyan Law

Kandyan law governs the up country Sinhalese who may get marry under Kandyan Marriage and Divorce Act. The Act recognizes different grounds which are based on both matrimonial fault and irretrievable break down of marriage. Under section 32 of the Act¹⁹ there are six grounds for dissolution of marriage. 'Inability to live happily together, of which actual separation from bed and board for a period of one year shall be the test' and mutual consent are the important grounds which are based on the breakdown of marriage concept. Through these two grounds, parties will be able to get the divorce without having to prove guilt of the other spouse.

⁷ S.Ponnambalam, Law and the Marriage Relationship in Sri Lanka, (Stamford Lake (PVT) LTD, Book Publishers, Pannaipitiya, 1982) P.312

⁸ 1954 55 NLR 410

⁹ 1962 72 NLR 419

¹⁰ 1970 79 CLW 71

¹¹ 1972 76 NLR 56

¹² 2003 (2) SLR 244

¹³ S.Ponnambalam, Law and the Marriage Relationship in Sri Lanka, (Stamford Lake (PVT) LTD, Book Publishers, Pannaipitiya, 1982) P.339

¹⁴ *ibid*

¹⁵ *ibid*

¹⁶ (1924) 26 NLR 113

¹⁷ 1984 1 SLR 381

¹⁸ Marriage Registration Ordinance No.19 of 1907

¹⁹ Kandyan Marriage and Divorce Act No. 44 of 1952

Furthermore, procedural law is flexible for dissolution of marriage because parties will be able to file the application to the District Registrar.²⁰ Since, judicial interference excluded from procedural law, it can be argued that this is an informal and non- inquisitorial approach which is unique to Kandyan law pertaining to divorce.²¹

Other unique feature of Kandyan law is that it authorizes the parties to make a joint application in the event they seek a divorce on mutual consent. According to the author's point of view, since both substantive and procedural laws are flexible in Kandyan Law, dissolution of marriage can be done without struggling and wasting much time. It will further help to maintain their dignity and protect individual rights. Right to privacy of the parties is also highly protected through this system because proving the guilt is not an essential requirement for divorce.

b) Muslim Law

Muslim law is a personal law in Sri Lanka, which has recognized different grounds for divorce for husband and wife. In this law, both fault and non-fault based grounds exist for divorce. There are four main different forms of divorce, such as *Talaq*, *Fasah*, *Mubarat* and *Khula*. Under sections 27 and 28 of Muslim Marriage and Divorce Act No. 13 of 1951, husband shall follow the second schedule and wife shall follow the third schedule for obtaining a divorce.

'*Talaq*', which is commonly used for divorce in Muslim law, is defined as the '*dissolution of marriage effected by the husband making a pronouncement to the effect that the marriage is dissolved*'²² Without following any prescribed judicial procedure the husband may pronounce *Talaq*²³ and with immediate effect be allowed to dissolve the marriage. Through *Talaq* divorce as a first step husband should inform his intention of dissolution the marriage to the Quazi (judge of the Quazi court). Then according to the procedure the Quazi should attempt to reconcile the matter with the assistance of relatives of the parties. In the event of failure of reconciliation, the Quazi register the divorce as *Talaq*. According to the 3rd rule of the Schedule, it is not necessary to provide reason to register *Talaq*. Because of this practice it can be argued that in Muslim law break down of marriage concept is recognized as a ground for divorce.

Under section 28,²⁴ the wife can submit the application for divorce indicating the ground for divorce to the Quazi. This is unaccompanied by too many formalities. According to the 10th rule of the third Schedule, the Quazi is required to investigate the real reasons for divorce. However, that investigation can only be conducted upon receiving the wife's consent. The divorce will be however, only granted after exercising maximum efforts to reconcile the parties.

The other form of divorce available in Muslim Law is *Khula*. If the wife needs to dissolve the marriage, she is able to make an agreement to return the Mahr (Dowry given by husband at the time of marriage) and is permitted to compel her husband to pronounce *Talaq*. Through this divorce the wife does not expect reasons for divorce.

'*Mubarat*' is a form of divorce which is based on mutual consent of the parties. If the parties cannot continue the marriage life happily and peacefully, parties are permitted to dissolve the marriage and register it as '*Mubarat*'. It is not expected to prove matrimonial fault or breakdown of marriage. According to the above discussion it can be argued that in Muslim law both fault based grounds and breakdown of marriage concepts are recognized for divorce. Hence, comparatively, Muslim law is flexible than general law relating to law on divorce.

Comparative analysis with other jurisdictions

Many jurisdictions have recognized and introduced marriage breakdown as a ground for divorce instead of the archaic fault based system.²⁵ Therefore, there is a possibility to extract those laws from other jurisdictions such as South Africa and England.

a) South African Divorce Law

In South Africa, prior to the Divorce Act, the decree of divorce was granted on grounds related to matrimonial fault. Adultery, malicious desertion, incurable insanity for not less than seven years and imprisonment of the defendant for at least five years after the spouse has been declared to be a habitual criminal were the grounds for divorce. The 1979 Divorce Act²⁶ introduced two grounds²⁷: irretrievable break – down of the marriage and mental illness or the continuous unconsciousness of either spouse, as grounds for divorce.

²⁰ Section 33 of the Kandyan Marriage and Divorce Act No. 44 of 1952

²¹ R.Wijeysekera, The Uncompromising partners: The theory of breakdown of marriage and the adversarial judicial procedure, (Academic Conference on "Law in Context: An Agenda for Reform", 2008). P14.

²² M.S.Jaldeen, The Muslim Law of Marriage Divorce and Maintenance in Sri Lanka, (Haji Omar Foundation for Peace, Education and Research, 1990) P. 70

²³ Two types of *Talaq* (*Talaq – al – rajith*, *Talaq - al – bain*)

²⁴ Marriage and Divorce (Muslim) Act No. 13 of 1951

²⁵ R.Wijeysekera, The Uncompromising partners: The theory of breakdown of marriage and the adversarial judicial procedure, (Academic Conference on "Law in Context: An Agenda for Reform", 2008). P3.

²⁶ Divorce Act No. 70 of 1979

²⁷ Section 3 (a) and (b) of the Divorce Act No. 70 of 1979

For obtaining a divorce on the ground of irretrievable breakdown of marriage, the applicant should be able to satisfy the court that the relationship between the parties has become non - existence.²⁸

Section 4(2) states that the circumstances which the court may accept as proof of irretrievable breakdown such as that the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of institution of the divorce action, that the defendant has committed adultery and that the plaintiff finds it irreconcilable to continue marital relationship and that the defendant has in terms of a sentence of a court been declared a habitual criminal and is undergoing imprisonment as a result of such sentence. If the parties prove any situation as mentioned above or by evidence of any other facts to the satisfaction of the court, the parties will be able to obtain the divorce.

b) English Law

Prior to 1969, in England marriage was considered as a holy sacrament which was an agreement for life time.²⁹ Dissolution of marriage was based on the ground of matrimonial fault. After implementing the Divorce Reforms Act of 1969, irretrievable breakdown of marriage was introduced as a ground for divorce.

Under section 1(1), decree of divorce may be granted to either party by the court on the ground that the marriage has broken down.³⁰

Moreover, the petitioner has to prove the marriage had broken down irretrievably based on the grounds³¹ which are stated in section 1(2) of Matrimonial Causes Act of 1973.

The ground of matrimonial fault was not completely removed from the Matrimonial Causes Act because first three facts in the section 1(2) were based on matrimonial fault. However, in England when the marriage breaks down, the parties are able to dissolve their marriage in a flexible manner rather than engaging in time – consuming, guilt – assuming processes.

According to the above survey, both England and South African law have moved to irretrievable break down of marriage concept from the fault – based system. The Court procedure also facilitated the substantive law in order to develop the law on divorce.

Reforms for Sri Lankan Law

In Sri Lanka, divorce law was introduced more than hundred years ago in 1907³² which is now regarded unsuitable to the modern context. In 2007, the Law Commission proposed a Matrimonial Causes Act relating to family matters. This Bill was to be made applicable to all marriages except those contracted under Kandyan and Muslim law. Unfortunately it has not become an Act and still exists as a draft.

According to the Commission, the adoption of a no – fault approach will help facilitate a good relationship between the parties even if the marriage has broken down. However, this remains impossible as parties are compelled to premise the divorce on fault.³³ The commission further notes that the Bill recognizes irretrievable breakdown of marriage and it is supported by clause 3 of the Bill which reads as follows: *any party to a marriage may, on a plaint presented thereof, seek to have such marriage declared dissolved on the ground that the marriage has broken down irretrievably.*³⁴

²⁸ Naidoo v. Naidoo

²⁹ R.Wijeysekera, Divorce Law in a Plural Society: The need to preserve multiculturalism with special reference to Sri Lanka, (Sri Lankan Journal of International Law, 2004) p1.

³⁰ The Divorce Reforms Act of 1969

³¹ Section 1(2) of Matrimonial Causes Act of 1973

- (a) The respondent had committed adultery and the petitioner found it intolerable to live with the respondent;
- (b) The respondent had behaved in such a way that the petitioner could not reasonably be expected to live with the respondent;
- (c) The respondent had deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consented to a decree being granted.;
- (d) The parties to the marriage had lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consented to a decree being granted;
- (e) The parties to the marriage had lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

³² Marriage Registration Ordinance No.19 of 1907

³³ Draft Matrimonial Causes Act proposed by the Law Commission of Sri Lanka, 2007

³⁴ Section 3(1) Draft Matrimonial Causes Act proposed by the Law Commission of Sri Lanka, 2007

Though the Law Commission report recommended that the divorce should be granted on the ground of irretrievable breakdown of marriage because there is no point of trying to keep the marriage relationship between the parties after the union has already broken down. Moreover, proving fault could be detrimental on other aspects of consequences of the marital relationship such as in relation to the custody of children. According to custody concepts, more often than not, the court attempt to grant custody of the child to the innocent spouse of the divorce case. Sometimes the best interests of the child would not be compatible with the innocent spouse. Therefore, fault based system affects not only parties to the marriage but also the rights of the children.

Under the general law in Sri Lanka, divorce cases are taken up at the District Court. The Sri Lankan court system functions according to the adversarial judicial procedure. Under the adversarial procedure, parties have to prove the other spouse's matrimonial fault for dissolution of marriage. According to the current law judicial procedure is consistent with the substantive law meaning that it too purely facilitates fault – based divorce. Therefore, it can be argued that if the breakdown of marriage concept is to be introduced to the law, simultaneously the court procedure ought to be changed to an inquisitorial system. If not it will be difficult to achieve the expected outcome through the reforms.

All the family matters are heard either in District Court or Magistrate Court. According to the author's point of view Family Courts should be introduced with the inquisitorial judicial system to achieve both specialization and efficiency. Right to privacy will be highly ensured in the Family Courts as such courts can hear matters in private thus protecting the dignity of the parties.

In light of flexibility that can be noted in some of the analysed special laws of Sri Lanka and the laws of South Africa and England, the Sri Lankan law can bring in much needed reforms.

Conclusion

The existing divorce law fails to recognize the real reasons for marriage breakdown. If the parties fail to continue the marital relationship, there is no way to obtain a divorce because there are no grounds that authorize a divorce based on mutual consent or breakdown of marriage. The problem is if either party does not have any matrimonial fault there is no mechanism for dissolution of marriage unless they fabricate a non – existent guilt and prove it in a court of law which further complicates matters as the system seems to encourage fabrication of evidence.

The stringent fault based divorce laws in Sri Lanka have encouraged de jure marriages which do not value real relationships. This has successfully curbed the divorce rate. However, it doesn't serve the real purpose of safeguarding the institution of marriage, since under an entirely fault based system parties are compelled to stay together, even when the marriage has irretrievably broken down. This system is an example for any jurisdiction to understand what laws they shouldn't encourage, in terms of divorce.

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