

Reviewing Judicial Separation in Malaysia: Creating a Need for Certainty

Daleeleer Kaur Randawa*
Akbar Kamaruddin**

Abstract: This article intends to explore the law relating to judicial separation in Malaysia from the perspective of its importance and the issues that have arisen with respect to its effectiveness, as an avenue to encourage the preservation of a marriage. The investigation extended to an analysis on the lacuna in law on judicial separation in Malaysia, specifically with respect to the need for a time frame, which would essentially create certainty and encourage reconciliation between the parties. A comparative legal research methodology is employed in comparing the positions in Malaysia and India. It is hoped that the findings of this paper on judicial separation, particularly related to the need for a statutory time frame, will encourage reconciliation between the parties and preserve the sanctity of marriage, as is envisioned in the concept of a judicial separation.

Keywords: judicial separation, divorce, certainty, reconciliation, time frame

Abstrak: Artikel ini bercadang untuk meneroka undang-undang yang berkaitan dengan perpisahan kehakiman di Malaysia dari perspektif kepentingannya dan isu-isu yang timbul berkenaan dengan keberkesannya, sebagai satu cara untuk menggalakkan pemeliharaan perkahwinan. Siasatan itu diperluaskan kepada analisis mengenai lacuna dalam undang-undang mengenai perpisahan kehakiman di Malaysia, khususnya berkenaan dengan keperluan untuk kerangka waktu, yang pada dasarnya akan mewujudkan kepastian dan menggalakkan perdamaian antara pihak-pihak yang terlibat. Metodologi penyelidikan undang-undang perbandingan digunakan dalam membandingkan

*Senior Lecturer, Faculty of Law, Universiti Teknologi MARA, Shah Alam, Selangor Darul Ehsan. Email: dolly_uitm@yahoo.com

**Senior Lecturer, Faculty of Law, Universiti Teknologi MARA, Shah Alam, Selangor Darul Ehsan. Email: akbaruitm@gmail.com

kedudukan di Malaysia dan India. Diharapkan penemuan artikel ini mengenai pemisahan kehakiman, khususnya yang berkaitan dengan keperluan untuk tempoh masa berkanun, akan menggalakkan perdamaian antara pihak-pihak yang terlibat dan memelihara kesucian perkahwinan, seperti yang dibayangkan dalam konsep perpisahan kehakiman.

Kata Kunci: pemisahan undang-undang, perceraian, kepastian, perdamaian, tempoh masa

Introduction

Marriage, which is understood as the conjugal union of husband and wife, really serves the “good of children, the good of spouses, and the common good of society” (Sherif et al., 2013). Married life may not be a bed of roses all the time. Every marriage has its ups and downs and sometimes it may even turn into a combat zone. However, somewhere in a marriage subtle changes happen which may result in resentment and disagreement. Some couples don’t linger very long in a relationship enduring discontentment.

Mnookin and Kornhauser (1979) suggest an alternative mind-set to the role of law at the time of divorce which is concerned primarily with the impact of the legal system on negotiations and bargaining that occur outside the courtroom. In their article, they first examine the degree to which the law today authorizes private ordering at the time of divorce: to what extent can divorcing a spouse create their own legally enforceable commitments? On the same note, Parvin, Kalantari, Davoodi, & Mohammadi (2011) endeavored to study the emotional dimension of divorce in Iranian society (city of Tehran) and the sociological elements which influence the decision to divorce. Parvin et al., (2011) indicated that almost 6.5 percent of Tehrani families believe that divorce enticed emotional stress. According to their research, Tehran has the highest amount of legal divorce cases and to some extent the awkwardness of a divorce vanishes when the couples in conflict separate prior to obtaining a divorce. Therefore, the emotional separation leads to real divorce and there are no suppressed emotions between couples later. Parvin et al., (2011) study reveals that there is a lack of emphasis on the emotional needs of couples dealing with divorces as opposed to couples dealing with a judicial separation as a couples’ emotional needs during separation is essential in saving a marriage. Even premarital

planning based on communication can strengthen the partnership before marriage if a lawyer ends up drafting an agreement to best protect the couple in the event of divorce, without reciting the possibility of divorce (Doherty, 2016). Studies have shown that divorce has negative impacts on children. These children are exposed to separation and divorce during childhood which affects their mental and physical health later (Haimi & Lerner, 2016). On the same note, Poortman & Voorpostel (2009) in their study showed that children from divorced families more often have conflict-laden relationships during adulthood in contrast to children from intact families.

This paper seeks to fill the void in the current research on judicial separation in Malaysia by discussing its relevance and application in the context of Malaysian family law. The purpose of this study is to evaluate the existing legal framework relating to judicial separation in Malaysia. This study will therefore consider the statutory provisions and case law on judicial separation in Malaysia. This study will determine the need for certainty when dealing with judicial separation cases. This study will also be useful as parties undergoing separation will be able to strategise the right consequences upon their divorce in a more amicable manner. Furthermore, creating a time frame that will lead to clarity in the law.

Research Methodology

This study adopts a doctrinal analysis of primary and secondary sources which deals with judicial separation. This included legislation in Malaysia as well as a comparative methodology by analyzing law from India, as India provides for some form of certainty in dealing with judicial separation. This study suggests a much-needed reform to be undertaken to safeguard and strengthen the sanctity of marriage in Malaysia.

This study adopts a critical analysis approach of the legislation (Gawas, 2017). Its aim is to explore, revise and improve the concept, theory, principles, and application of law. In other words, the research adopts a discrete method of legalistic analysis that emphasizes on legal problems and issues (Hutchinson & Duncan, 2012). Legal research relies on primary and secondary data with the former referring to legislation and court cases from Malaysia and foreign countries. In this study, court cases have been adopted to explore judicial separation in Malaysia.

Significance of a Judicial Separation

Judicial separation is a form of legal separation which allows a husband and a wife to be separated while remaining legally married. A person who does not wish to apply for a divorce but wants to live separately from the spouse may opt to apply for judicial separation (Ibrahim, Hashim, Zin, Mohd, Hak, Malek, Soh, & Kamal, 2014). This legal separation is granted by a court order and allows the husband and wife to cease cohabitation without dissolving the marriage. A legal separation is a court order that mandates the rights and duties of a couple while they are still married, but living apart. Kamariah (1999) opines that the decree granted by court enables parties to live separately without committing any matrimonial offence. However, during this separation parties are not allowed to marry anyone else unless and until they obtain a decree of divorce.

The importance of a judicially decreed separation is that the separation can be a time of forgiveness and renewed commitment to the marriage instead of heading towards a divorce. When there is a problem in the family, mutual forgiveness is needed as forgiveness will prevent the splitting up and it will also restructure the relationship (Saikia, 2017). At times couples prefer short-term separation in the hope of saving their marriage as there is a possibility to renew their marriage. This provisional distance from an unpleasant, situation can provide couples an opportunity to reconcile their relationship after experiencing temporary break-up and what would their lives be if living apart. Similarly, Wragg (2010) states a decree of judicial separation is a need for some people who do not wish to terminate the marriage due to religious objection and may require some form of recognition of the breakdown of the marriage, since judicial separation does not terminate the marriage as it only relieves the parties of the duty to cohabit. On the same point, Bhaie (2009) explains that an order denoting a legal separation rather than a divorce is useful in instances where a spouse has a conscientious or religious objection to divorce or an elderly spouse whose marriage has broken down will remain entitled to a widow's or widower's pension on the death of the other, which may be of substantial financial importance. Norhayati (2014) explained in her study that families in Malaysia will only get counselling service when the situation has become critical and this shows that Malaysians do not have the awareness about the importance of family counselling as a

preventive measure as cooperation from the family members is needed in analysing, evaluating and creating suitable intervention for the family issues.

Alternatively, divorce is a permanent separation which will legally end the marriage relationship. In a divorce, the spouses are no longer married. Legal separations are not too common, but can be helpful to a situation where the spouses work through any emotional or financial issues affecting the marriage. Parvez (2011) study reveals that women who initiated divorce in Dhaka. face and suffer severe post-divorce consequences such as social exclusion and stigma, harassment in working place, difficulties in a second marriage, downswing changes in lifestyle in the face of social expectations, and psychological and physiological disturbance in post-divorce situations.

However, quite commonly, separation can be implied as a first step that leads to a divorce. The temporary distance which was expected to heal the marriage may at times break the marriage indefinitely. According to Chapman (2005), it is not to be assumed that separation always lead to a divorce. Separation may just as well lead to a restored, enriched and growing marriage.

The Law of Judicial Separation in Malaysia

Malaysia has a dual system of family law, one for the non-Muslims and the other for the Muslims. Family law governing non-Muslims is regulated by the Law Reform (Marriage & Divorce) Act 1976 (LRA). For the Muslims, they are governed under the Islamic Law of the States and the Federal Territories of Malaysia (Randawar, Rahmat & Shukur, 2018). The LRA is an Act to provide for monogamous marriages and the solemnization and registration of such marriages; to amend and consolidate the law relating to divorce; and to provide for matters incidental thereto.

The provision on judicial separation is section 64(1) LRA which states that a petition for judicial separation may be presented to the court by either party to a marriage on the ground and circumstances set out in section 54 and that section shall, with the necessary modifications, apply in relation to such a petition as they apply in relation to a petition for divorce. This section clearly specifies that judicial separation can be obtained on the same grounds as a divorce.

A decree of judicial separation granted by the court, confirms that the couple is no longer obliged to live together as a married couple. Section 64(2) LRA provides:

Where a court grants a decree of judicial separation it shall no longer be obligatory for the petitioner to cohabit with the respondent.

Since judicial separation is obtained based on the same grounds as divorce, parties may petition on the grounds of adultery, behavior, desertion and living apart. This clearly indicates that the facts used in obtaining judicial separation can later subsequently be used as proof of a fact in later divorce proceedings. Hence, if either party has obtained judicial separation on the ground of desertion, and if the spouse against whom the decree of judicial separation has been made, has reasonable cause for the desertion, that spouse may petition to rescind the decree. Section 64(3) LRA provides:

The court may, on an application by petition of the spouse against whom a decree of judicial separation has been made and on being satisfied that the allegations in the petition are true, rescind the decree at any time on the ground that it was obtained in the absence of the applicant or, if desertion was the ground of the decree, that there was reasonable cause for the alleged desertion.

Judicial separation also does not create a bar to a petition for divorce. Section 65(1) LRA clearly provides:

A person shall not be prevented from presenting a petition for divorce, or the court from pronouncing a decree of divorce, by reason only that the petitioner has at any time been granted a judicial separation upon the same or substantially the same facts as those proved in support of the petition for divorce.

In short, if either party subsequently wishes to end their marriage, then a petition for divorce can be filed. Section 65(1) LRA clearly mentions that parties are not hindered or stopped from petitioning for a divorce if they wish to end their marriage. The law on judicial separation in Malaysia provides a platform for the parties to end their differences and negotiate their disputes first before they actually decide to end their marriage.

Although, the law is clear in terms of what is a judicial separation, there is a lacuna in terms of the time frame of separation. Parties cannot be allowed to live separate for as long as they wish. The LRA does not provide a time frame for judicial separation. The law must formulate a time frame for parties to live judicially separated. This form of time frame provides certainty and puts some form of pressure upon the parties on repenting and reconciling their differences. Some parties use religious beliefs as a reason to oppose a divorce. Judicial separation also helps parties who for some religious or cultural reasons oppose divorce as these firm religious beliefs focus on the sanctity of marriage. These religious reasons opposing for divorce may sometimes lead to parties being separated for a long time. The issue on religious belief was discussed in the case *Satheesan a/l TA Menon v Ayginus Shirley a/p John* (2013) 7 MLJ 257, in which the husband, an engineer, left the matrimonial home after about eight years of marriage to the wife who quit her job with a bank six months after the marriage to become a housewife. She relied entirely upon her husband for financial support for the upkeep of the matrimonial home and maintenance of the couple's only child, a daughter. The daughter was about 13 years old when the husband left the matrimonial home. About 10 years after the parties had lived apart, the husband filed the instant petition for divorce from the wife. By the time the petition was heard the daughter was 25 years old and a degree holder. Due to wife's religious beliefs, as a practicing Catholic, she cross-petitioned for a judicial separation order instead. After considering the totality of the evidence the court was of the view that the marriage had irretrievably broken down and the parties could no longer be expected to live with one another. The marriage ought to be dissolved irrespective of the religious beliefs of the respondent, a practicing Catholic. Decree nisi was granted to be made absolute in three months. Moreover, attempts by the conciliatory body to reconcile the marriage have failed and a certificate dated 19 December 2000 was issued certifying that it has failed to reconcile the parties.

The husband in *Satheesan's* case only petitioned for divorce after ten years of living apart from the wife. Living apart for ten years with unsuccessful reconciliation is itself an obvious ground for divorce. Parties should not be allowed to be judicially separated for as long as they wish. Parties who try to shield and save their marriage using

religious grounds should not be allowed to use judicial separation as a hindrance for the other party who wishes to move on in his or her life.

Referring to the principle in *Chee Kok Choon v Sern Kuang Eng* (2005) 4 MLJ 461 the court is of the view that the marriage ought to be dissolved irrespective of the religious belief of the respondent a practicing Catholic and the order of decree nisi was granted. The parties in this case were married in 1990. There was one child in the marriage. The parties had been living in separate bedrooms since early 1997. In June 1997, the husband left the matrimonial home as the relationship of the parties had deteriorated, and there was no longer any communication between them. The basic principle is that while there is a need to respect the sanctity of marriage, it is contrary to public policy to insist on the maintenance of a marriage which has in fact ceased to exist.

The issue of sanctity of marriage has been dealt with in *Kathi-Rasen v Kathi-Rasen* (1960) MLJ 57, where the court decided that the marriage bond has become no more than a detested shackle, it is in the public interest that the tie should be severed. In *Moses v Moses* (1968) 1 MLJ 96, the court granted the divorce under the Act even to Catholic parties, who by their religion may claim that their religion does not consent to a divorce. Stafford (2016) suggests that one's perception of the sanctity of one's marriage might be manifested in one's engagement in relational maintenance behaviours and association between one's belief in the sanctity of one's marriage and one's spouse's marital satisfaction.

The issue on prolonged separation was further discussed in the case of *C v A* (1998) 6 MLJ 222, whereby the husband and the wife had lived apart for more than 20 years. The husband prayed for a dissolution of the marriage. It was stated in his petition that attempts at reconciliation were made by his relatives without success. Kamalanathan Ratnam J at p. 230 explained that:

I hold that the very fact that both parties had lived apart with no contact with one another for well over 20 years is prima facie evidence that each of them is entitled to a dissolution of the marriage which to my mind has been a marriage in name only and not in substance, in law only yet not in fact. I further hold that it is not conducive to public interest that a man and a woman should remain bonded in matrimonial permanence, when the duties and responsibilities of such a hallowed institution have long ceased to be observed by either party.

Any further continuance of this union might possibly lead to immorality and infidelity.

In the case of *Shudesh Kumar a/l Moti Ram v Kamlesh a/p Mangal Sain Kapoor* (2005) 5 MLJ 82, the husband petitioned for a divorce and the wife filed for judicial separation. However, the court allowed the divorce petition as there was no doubt that there was much unhappiness and physical confrontations between the parties. In view of the protracted separation of 11 years before the filing of the petition, it cannot be denied that this marriage had irretrievably broken, on the ground of their having lived apart for such a long time. This suggests that judicial separation becomes futile in cases wherein parties who have been separated for many years.

It is obvious that judicial separation emphasizes on the rule of sanctity of marriage and it does not terminate the marriage. Judicial separation only allows separation between the parties. Parties are allowed at any time to reconcile and resume cohabitation as husband and wife. People have religious or moral beliefs that make them want to live apart without terminating the marriage may want to use judicial separation to protect the sanctity of marriage, but it must not be made for an indefinite period that may cause injustice to either party. The decree of judicial separation should simply relieve the parties of their duty and obligation to live together for a specific period and not to dampen their right to terminate their marriage. Having a proper time framed law on judicial separation may perhaps save a marriage.

Islamic Law Perspective of Judicial Separation in Malaysia

Islamic law recognizes dissolution of marriage or divorce and does not have the concept of judicial separation. The Civil law views judicial separation as permission for the spouses to live separately and waive responsibilities as husband and wife. However, the practice of judicial separation as a way for the spouses to think about their future marital relationships is related to the Islamic law by looking at the types of divorce such as revocable *talaq*, *ta'liq*, *khulu'* and *fasakh*.

Under *talaq*, the husband is given the right to pronounce *talaq* which leads to divorce. *Talaq* can only be pronounced three times by the husband. The first two *talaq* is known as revocable divorce whereas the third one is recognized as irrevocable *talaq*. *Ta'liq* denotes divorce

by stipulations agreed upon by the husband and the wife during the solemnization of the marriage. Any breach of the stipulations by either party is considered as revocable divorce. *Muta'ah* relates to the act of the husband pronouncing *talaq* without any valid reason. Although divorce is legal under the Islamic law, it is condemned by Allah the Almighty. The husband has to pay the wife monetary compensations as the consequence of the *talaq*. The wife is also given the right to ask for divorce by way of *khulu'*. *Khulu'* allows the wife to propose to the husband to pronounce divorce with monetary consideration. Thus, the wife will pay the husband certain amount of money agreed upon by both of them prior to the pronouncement of divorce. *Fasakh* is another way for the wife to dissolve the marriage. The court will order the dissolution if the grounds of *fasakh* is fulfilled. Examples of the grounds of *fasakh* are failure of the husband to provide maintenance to the wife and the family, the desertion committed by the husband against the wife and the family, and the illness of the husband (Zaydan, 1985a; Zaydan, 1992b; Muhammad, 1996; Al-Zuhayli, 2000a; Al-Zuhayli, 2004b; Kharoufa, 2004).

The revocable *talaq*, *ta'liq*, *khulu'*, and *fasakh* have one similar connection which is the three-month period of '*iddah*'. The period of '*iddah*' denotes a waiting or rest period for the wife before she can exercise her right to contract a new marriage with another man. During the period, the husband is still under the responsibility to act as the husband and the father. However, the end of the '*iddah*' period results to the end of the husband's responsibilities towards the wife although his parental responsibilities towards the children continue as usual. The period of '*iddah*' also provides the husband with a chance to continue the marital relationship with the wife. It means that during the period, other men cannot contract a marriage with the wife. In revocable *talaq* and *ta'liq*, the husband may continue the marital relationship with the wife by way of *ruju'*. Thus, remarriage between the husband and the wife is not needed at all. However, in *khulu'* and *fasakh*, the husband needs to remarry the wife (Zaydan, 1985a; Zaydan, 1992b; Muhammad, 1996; Al-Zuhayli, 2000a; Al-Zuhayli, 2004b; Kharoufa, 2004).

The practice of the revocable *talaq*, *ta'liq*, *khulu'*, and *fasakh* is recognized in Malaysia through the Islamic law of the Federal Territories and the States. In Malaysia, the Islamic law is a State matter under the protection of the Sultans whereas the Yang Di-Pertuan Agong is vested

with the power to protect the Islamic law in the Federal Territories. The Islamic Family Law (Federal Territories) Act 1984 or IFLA is the role model law governing the Islamic family law. Thus, all States base their Islamic family law enactments or ordinances on the provisions of the IFLA. Part V of the IFLA is the relevant part concerning the revocable *talaq*, *ta'liq*, *khulu'*, and *fasakh*. Thus, basically, the spirit of Part V is similar to the legal principles governing the revocable *talaq*, *ta'liq*, *khulu'*, and *fasakh* (Ahmad, 1997; Mimi Kamariah, 1999; Zaleha, 2005).

Examples of the case law of the period of '*iddah*' are *Siti Hawa v. Mohamed Redzuan* (1990) 7 JH 180 and *Noryati v. Hamid* (1990) 9 JH 117. In *Siti Hawa v. Mohamed Redzuan*, the husband divorced the wife on 14th of August 1989. He then executed *ruju'* in front of two witnesses on 27th of August 1989 in order to continue with the marital relationship with the wife. The court held that the *ruju'* as valid. In *Noryati v. Hamid*, the husband and the wife married on May 1977. On November 1988, the husband divorced the wife. On February 1989, the husband performed *ruju'*. However, the wife contended that the *ruju'* as not valid. The court held in favour of the wife. It stated that the *ruju'* performed by the husband was not complete because of lack of witnesses, uncertainty as to the time of the *ruju'* either within or after the end of the '*iddah*' period, and the non-consent of the wife to the *ruju'*. The two-case law manifest the situation where the husband performed the *ruju'* within the '*iddah*' period. More importantly, the court recognizes the consent of the wife to the *ruju'* in order to continue with the marital relationship.

In short, the Islamic law only recognizes judicial separation from the aspect of the parties to think whether they should continue with the marital relationship. The Islamic law does not subscribe to the idea that the husband and the wife may live apart from each other together with the consent of the parties to waive responsibilities and obligations.

The Law of Judicial Separation in India

Judicial separation is a provision under the Indian marriage laws, wherein both the husband and the wife get an opportunity to decide about giving a chance to their marriage, before going on with the divorce proceedings. Section 10 of the Hindu Marriage Act 1955 (HMA), provides for judicial separation in India. Section 10(1) and (2) HMA 1955 clearly provides:

(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.

(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

In India, before the courts can permanently end a marriage relationship between parties, every attempt should be given to maintain the sanctity of marriage. It is also interesting to note that in India, there is a specific time frame for parties to resume cohabitation after the passing of a decree for judicial separation has been made. Section 13(1A)(i) Hindu Marriage Act 1955 clearly provides:

(1A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground—

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties;

The provisions mentioned above in the India Act provides a period of one year for parties to resume cohabitation as husband and wife. Parties in the marriage are allowed to petition for a divorce if there has been no resumption of cohabitation within the period of one year.

An interesting case to be illustrating judicial separation is the case of *Hirachand Srinivas v Managaonkar v Sunanda* (2001) 2 LRI 22, in which a decree of judicial separation was passed by the High Court on a petition filed by the wife seeking judicial separation from her husband. The High Court also ordered the husband to pay Rs100 per month to the wife and Rs75 per month for the daughter. However, this order was not complied with by the husband. Thereafter, the husband presented

a petition for dissolution of the marriage by a decree of divorce on the ground that there has been no resumption of cohabitation between the parties for a period of more than one year after passing of the judicial separation. The wife contested the petition for divorce on the ground that the husband had failed to pay the maintenance as ordered by the court. The High court did not grant the husband a divorce. The husband brought an appeal to the Supreme Court of India, in which the court dismissed his appeal.

This case clearly shows that the decree of judicial separation does not sever or dissolve the marriage tie which continues to subsist. It affords an opportunity to the spouse for reconciliation and re-adjustment. Even after the decree of judicial separation was passed by the court on the petition presented by the wife, it was expected that both spouses will make sincere efforts for reconciliation and cohabitation with each other, which means that the husband should behave as a dutiful husband and the wife should behave as a devoted wife. In the case of *Hirachand*, the husband has not only failed to make such attempt but has also refused to pay the small amount of Rs100 as maintenance for the wife. He also had been marking time for expiry of the statutory period of one year after the decree of judicial separation so that he may easily get a decree of divorce.

Following the case of *Soundarammal v Sundara Mahalinga Nadar AIR 1980 Mad 294*, in which the judge explained that the husband who continued to live in adultery even after decree at the instance of wife could not succeed in a petition seeking a decree for divorce. The learned judge held that illegality and immorality cannot be countenanced as aids for a person to secure relief in matrimonial matters.

In *Chaman Lal Chuni Lal vs Smt. Mohinder Devi AIR 1968 P H 287*, an appeal filed by the husband against the judgment of the learned District Judge, Amritsar, dismissing his petition under Section 13 of the Hindu Marriage Act, 1955 for a decree of divorce against his wife. The court held that it was his duty to make efforts to comply with the said decree. He could not avoid the restitution of conjugal rights for two years after the decree and then make a petition for divorce on that ground, thus taking advantage of his own wrong.

Hence, unlike a divorce, in a decree of judicial separation, the squabbling couple are granted a one-year time for reconciliation. If they

fail to reconcile, then the aggrieved party can file a suit for divorce as provided under the Hindu Marriages Act. Judicial separation merely suspend cohabitation between the parties in connection with their marriage and does not end the matrimonial tie. The one-year statutory period is given to encourage parties to put right things between them and reconcile as husband and wife. Lucile (2012) study showed that many married couples in Ontario want to be separated without being divorced, because they want to simultaneously cease living together and yet remain married, in case of a reconciliation. Wilcox and Dew (2016) study focused on marital generosity which is defined as freely giving to one's spouse by regularly engaging in small acts of service, forgiving one's spouse, and displaying high levels of affection and respect; religiosity is also positively associated with marital generosity and the most potent predictor of generosity in this study is commitment, where spouses are personally dedicated to their partner and to continuing the relationship.

Comparison and Gap between Malaysia and India

Section 13(1A)(i) Hindu Marriage Act 1955 of India allows either party to a marriage to present a petition for the dissolution of the marriage by a decree of divorce if there has been no resumption of cohabitation between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for judicial separation. This act has seemed to compel parties to at least stay judicially separated for one year before finally deciding to terminate their marriage. However, it is important to note that, unlike under the Malaysian Act, the section does not impose any time frame as to how long are the parties required to be judicially separated before they can proceed in deciding to terminate their marriage. By not imposing a time frame under the Malaysian Act, it has allowed parties to be judicially separated endlessly prohibiting parties to move on and perhaps make better future choices in their lives. Loggerheads parties cannot be pressed with perennial obligation to maintain in a relationship. Religious commitments, moral grounds, societal norms or responsibility of their children has led to some parties opting for judicial separation instead of divorce.

Although ostensibly the Law Reform (Marriage & Divorce) Act 1976 (LRA) Act seems to contain everything that is required to ensure the operation of judicial separation between the parties, there are areas which are left unclear and need to be amended to make the Act effective.

1. There are ambiguities about the time frame of judicial separation which need to be clarified. It should include proper time frame such for a period of [one year] or upwards before parties can proceed to petition to terminate their marriage permanently.
2. Considering the vulnerability of parties in a marriage especially children and the sanctity of the marriage, provision should be made so that cases involving the judicial separation are dealt within a rapid and cost-effective manner.
3. In order to hinder parties from jumping the gun to petition for divorce, the mechanism for judicial separation with time frame should be made mandatory.
4. With a decree of judicial separation passed both spouses are expected to make sincere efforts for reconciliation and cohabitation with each other, which means that both spouses are required to behave as a dutiful husband and the wife and should ensure that legal obligations to pay maintenance for children and wife is also emphasized. [Hirachand Srinivas v Managaonkar v Sunanda (2001) 2 LRI 22]
5. The LRA Act should cater judicial separation as a guidance which affords an opportunity to the spouse for reconciliation and re-adjustment.

Conclusion

It is evident, that a judicial separation is more than just decreeing that a husband and wife live apart. A marriage which is in trouble may not necessarily end, and a divorce may not be inevitable. Some marriages can be saved and for such troubled marriages, judicial separation is the best option. Judicial separation protects the sanctity of marriage as it emphasized as a mode to prevent the cultivation of divorce.

India has recognized the fact that reconciliation is an important element in judicial separation cases. The decree for judicial separation does not sever or dissolve the marriage tie which continues to subsist. It affords an opportunity to the spouse for reconciliation and re-adjustment. Parties should not let any reasons to be put as an option of divorce in their mind. Therefore, it is important to include a time frame for judicial

separation as this will help parties to seek for reconciliation but at the same time allow parties to move on if at all there is still acrimony and resentment between the parties. There is a dire need for an appropriate support system to help parties who are seeking a separation. This can be done by changing people's mindsets into believing that a judicial separation is indeed a proper approach to save marriage. Helping people to understand the many intricacies of human nature, its traits, and how a single human interaction may complicate relationships or promote insight, catharsis, and set the stage for alliance repair (Mahaffey & Wubbolding, 2016). The incorporation of a statutory time frame should be incorporated into the Malaysian Family Law Act as it will provide some assistance to parties in saving the marriage. With the inclusion of a time frame in judicial separation cases, parties may not put in a failed attempt to continue in a futile marriage. Parties who may have religious reasons for not wanting to commence divorce proceedings may commence judicial proceedings as the separation process does not dissolve the marriage. The one-year time frame should be sufficient for parties to decide on the continuance of their marriage. It also gives an aspiration and plan to people that they still have an opportunity to save their marriage.

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