



# IS IT A WAITING PERIOD OR JUST A WASTE OF TIME?

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## ABSTRACT

The idea subtly hinted in the title of this research paper is regarding the waiting period that a spouse has to undergo before dissolving their marriage. It's particularly about the case of abandonment. As we know, there are many provisions with outdated conditions attached to them. One of them is regarding a missing spouse.

The life-span of human beings used to go up to more than 100 years in ancient times. But now, crossing the age of 60 is a rare thing to witness. This is due to the shift in lifestyle, eating habits, extreme reduction in physical activities like cycling, jogging, running, etc.

In this short life, all that a person desires is a good job, good pay, a secure future and a loving spouse. The attitude and lifestyle of people is such that they constantly want someone to comfort them, be there for them through thick and thin. If one goes, they feel bad but eventually move on with another.

Life has to go on and in this fast moving world, one cannot afford to spend the same amount of time as they used to for anything. Time is precious. Time is everything. If one feels that he is wasting his time by adhering to a 70 year old provision, then maybe the lawmakers should look into the matter.

Divorces and remarriages are something we are hearing about a lot more often now than we used to. Old people with culture deeply rooted in them may oppose such ideas by saying that it is bad for our society. But today, people are more open minded and are willing to go for divorces and remarriages if the previous one didn't work out.

What if the reason why it didn't work out was that the spouse had abandoned them? Must they, for a considerable portion of their life, be made to wait for their spouse who left them with no proper explanation, justification or closure?

This research paper revolves around the concept of abandonment, its types, possible reasons for abandonment, provisions and other laws and customs relating to it, loopholes- to name a few.

## INTRODUCTION

During war periods, many newly wedded men and new fathers who would have chosen to serve their country by joining the army, may have been caught by the alien enemies and either imprisoned for life or executed. It's not unknown that during those times, communicating with families living far from these soldiers was very difficult. If the mission fails, the families are never to hear from their beloved, brave soldiers again. One may wonder how long exactly should the family wait before assuming that he is never coming back? Although this might not exactly be a perfect example to show, we see that abandoning doesn't necessarily need the intention of leaving a spouse. It is merely the fact that the spouse was abandoned.

Cases of abandonment are very uncommon these days. Couples usually just apply for divorce. But what if abandonment is not by choice? With all these technological developments, how long can a person be forced to stay away from their family and spouse digitally? 7 years?

Today, if a person stays inactive on social media for a few months, even if it is for “digital detox”, his relatives and friends, who aren't physically (geographically) in contact, tend to get all worried about that person or may even think that the person may be dead if he/she was someone who used to be active on social media a lot.

In shows and movies, well mostly Indian serials, we may have seen many characters dying and coming back to life or disappearing and appearing again after many years when their family had already considered them dead. But that concept is only limited to entertainment. It has no scope of occurrence in the real world. Once dead is dead and once abandoned is abandoned. There is hardly any chance for them to come back (Unless they are fictional characters). Human rights groups say not a single disappeared husband has returned so far in the past 24 years.

Losing a spouse by death is painful, traumatic and overwhelming. But at least the ones in pain know that they are never coming back. There is no uncertainty. They can remarry if they wish to do so. But what is to happen if a spouse goes missing? The abandoned spouse faces socio-economic and financial uncertainties. The emotional phase they go through is unimaginable. A state of utter confusion, chaos in head, anxiety and fear that their spouse may be in a situation similar to Schrodinger's paradox. They are left clueless, not knowing what to do, where to seek help, whether the spouse will come back or is he/she even alive. One never wishes to be in such a state of despair.

Hope keeps them going. It becomes a reason for the spouse left abandoned to wake up everyday. Try to be positive and not think of the worst case scenario. Put on a brave front and be mentally prepared for whatever news is coming or for never getting one.

Putting up a brave face becomes extremely difficult especially in case the one left alone is a mother with responsibilities. She has to answer her children about where their father is, face the society, bare with insincere sympathies from two faced people who make her feel like somehow it was her fault that her husband felt the need to just disappear from her and their children's lives without prior warning.

### **What could be the possible reasons for abandoning a spouse?**

It could be that they found the matrimonial obligations overwhelming and wanted to go away for a while; or unexpected pregnancy and the fear that her husband will not take it well. So the wife decides to have the child and raise it on her own; or if she knows it's a girl and her life would be in danger if her husband and/or in laws found out (female foeticide); or the husband may not be ready to assume the role of father and wants an out; or that either of them committed a crime and is trying to evade law. And for that purpose, they have to leave their spouse behind.

### **TYPES OF ABANDONMENT**

#### **1. Criminal abandonment**

If the spouses have children who are financially dependent on the spouse that abandoned them, and they were abandoned without support, some states can charge that spouse with criminal abandonment if they ever find that spouse.

#### **2. Constructive abandonment**

If the spouse left the family because it was made challenging for them to remain in the marital home, they might be guilty of constructive abandonment. The punishment is comparatively less severe because they have a serious reason for leaving. For example, if the wife decides to leave her abusive, alcoholic husband without prior notice, the punishment for abandoning him is lesser than it would be if there was no fault on his part.

### 3. *Emotional abandonment*

It is the feeling of being neglected, feeling left out, not loved by one's spouse anymore. It is somewhat similar to mental cruelty. The concept of 'a 7 years wait period before applying for divorce' doesn't come under this type of abandonment.

### SEPERATION V ABANDONMENT

*Separation* is when both the spouses mutually decide to part ways. There is agreement and knowledge. The duration of separation (if temporary) or whether it is to be permanent separation and the consequences that will follow is decided beforehand by both the spouses.

*Abandonment* means leaving the spouse without the intention of coming back. There is absence of communication on the part of the spouse planning to leave.

### DESERTION V ABANDONMENT

The meaning of desertion and abandonment, as used in the sections of the acts, only has one slight difference.

In case of *desertion*, the spouse who was deserted knows that the other is alive and doesn't want to cohabit with them. In case of *abandonment*, the abandoned spouse has no idea about where their spouse is, whether they are doing well or even sound and alive. The intention of leaving the spouse is not expressly conveyed.

### ABANDONMENT AS PER INDIAN LAW AND ENGLISH LAW

#### English law

If a person is said to be missing for 7 years or more, it is not merely presumed but actually *declared* that the person is dead. This was observed in the case of *Greathead v Greathead*.

#### Indian law

If a person is said to be missing for 7 years or more, it is merely *presumed* that the person is dead. If there is anyone claiming that that spouse is alive, the burden of proof is on them to prove their stand.

### DIFFERENT WAITING PERIODS

The presumption of death in ancient Indian Hindu law isn't like presumption under modern law. According to the ancient law, there should have been a lapse of 12 years to presume that a person is dead.<sup>1</sup>

The lapse time is decreased to 7 years in the modern world. However, this presumption isn't inflexible and death might be presumed even before the lapse of 7 years from proof of special instances.

In Alabama, if a spouse leaves home without the intent of returning, the court views that as abandonment, which can lead to the other spouse filing for a "fault" divorce after 1 year of the spouse's absence.<sup>2</sup>

The customs of the Karewa marriage permits remarriage after the husband has not been heard of for 2-3 years. However, in the case of *Parkash Chander v. Parmeshwari*, the Court held that the husband cannot be presumed to be dead unless the matter comes to the Appropriate Court, even so, the period of seven years under Section 108 of the Indian Evidence Act may not be whittled down to only 2-3 years.

In Kashmir, the muslim women whose husbands go missing are called 'half-widows' (and the other half being half-wives). The clerics in Kashmir have ruled that these women can remarry after waiting for 4 years.<sup>3</sup> It is provided under the Muslim Marriage Act, 1939.

<sup>1</sup> B.P. Beri, *Law of Carriage and Divorce in India* (1982) (last visited on December 8 2022)

<sup>2</sup> <https://www.divorcenet.com/resources/abandonment-and-desertion-in-divorce.html> (last visited on December 8 2022)

<sup>3</sup> <https://indianexpress.com/article/india/india-others/the-other-half/> (last visited on December 8 2022)

According to the Hanafi sect of Sunni Muslims, the wife of a disappeared person was supposed to wait for 90 years, after which she can remarry. However, Mufti Qamar-ud-Din, an Islamic scholar, says that the waiting period now stands reduced to 4 years and 10 days.<sup>4</sup>

According to another Islamic scholar of Deobandi sect of Sunni Muslims, Mufti Abdul Rashid of Srinagar, a woman whose husband remains disappeared has to seek help from a Muslim judge in locating her husband for 1 year. If the judge fails to trace her husband, he can dissolve the marriage and allow her to perform another nikaah (marriage). And if the first husband appears after her second marriage, the latter will be dissolved. It will automatically break, and she has to abandon her second husband and live with her first husband.<sup>5</sup>

## LEGAL PROVISIONS REGARDING ABANDONMENT

According to the provisions given in Hindu Marriage Act of 1955 and Special Marriage Act of 1954 and The Indian Evidence Act of 1872, an abandoned spouse has to wait for 7 long years before they could get remarried. These provisions were enacted around 7 decades ago when the means of communication were rudimentary as compared to today. One may wonder if this waiting time is fair or just a waste of time as of 2024.

This provision cannot be interpreted to mean that the abandoned spouse can deem themselves to be a widow or a widower and remarry as soon as the time has lapsed. There is a legal formality that has to be complied with first.

For the purpose of the said presumption, the law provides that a spouse has to approach the Civil Court seeking declaration that the court has presumed their spouse to be dead. Only if the remarriage happened after the declaration, it will be considered a valid one.

In the case of the *Union of India and Ors. vs K.L. Micheal*<sup>6</sup>, instead of approaching the civil court and obtaining a decree, the respondent, a retired railway employee, had presumed that his first wife must have died and he contracted a second marriage, which on the face of it is misconduct. It was held that he had committed bigamy and his pension was reduced.

The spouse can be booked under bigamy in 2 situations. One, if he remarries before the 7 years time lapse; and two, if he remarries after the time lapse but without obtaining declaration first.

Without the declaration of the presumption of death and the death certificate, the abandoned spouse wouldn't have been able to claim their share in property of the missing spouse. The need to get the property becomes vital in case the abandoned ones have no other means of income.

### Procedure for divorce on the ground of abandonment

Section 13(7) of the Hindu Marriage Act, 1955 gives abandonment as a ground for divorce. The abandoned spouse needs to file a petition and then prove the following things;

1. There has been a lapse of 7 years from the date they last saw their spouse,
2. They had no means of contacting their spouse for all those 7 years, and
3. They had made attempts to take all reasonable steps to find their spouse but failed.

The spouse cannot remarry immediately after filing the petition. They have to wait till the decree is passed.

<sup>4</sup> <https://www.aljazeera.com/news/2013/10/12/the-dilemma-of-kashmirs-half-widows> (last visited on December 8 2022)

<sup>5</sup> Id. at 5

<sup>6</sup> <https://www.daaman.org/jd/Union-of-India-and-Ors-Vs-K-L-Micheal/Bigamy-by-government-servant-is-misconduct> (last visited on December 8 2022)

Once the decree is passed, the spouse is completely free and gets the status of being unmarried. Even if the spouse appears the very next day, they cannot claim any marital rights on that spouse. Meaning, restitution of conjugal rights cannot be imposed.

### **Procedure for custody of children in case of abandonment**

Since there is no possibility of negotiation in case of abandonment, the custody of children naturally goes to the spouse who was left abandoned.

### **REASON BEHIND MAKING THIS PROVISION**

This provision is, no doubt, very essential because if we hadn't had this provision, the abandoned spouse would have to stay with all those marital obligations and have no way out. Meanwhile, there is a probability of the spouse who abandoned to have remarried and started over a new life. This wouldn't be fair and there has to be some time limit after which the abandoned spouse can get a remarriage or live alone without being associated with the other spouse's name. In a way it can be said as 'the right to move on' - somewhat informally stating.

### **CRITICISM**

There are 3 different criticisms from 3 different angles that are given below.

By keeping the number still fixed at 7, the law makers themselves are encouraging a kind of mental cruelty on the abandoned spouse. Their mental health is severely affected. They might stay in that state for even more than 7 years if proper help is not sought at the right time. The more the wait, the more psychologically affected they become. Is it right to risk leading the citizens of one's nation towards such a mental state from which they might never be able to get over?

What if the spouses were having issues and the spouse didn't have the guts to go for divorce because of family name and reputation but didn't wish to stay with the spouse anymore either and so decided to abandon. Here there is a plausible reason for abandoning and it's also known that the spouse is probably never coming back, but the abandoned spouse still has to wait for 7 years!

Sometimes, due to religious and social pressures, an abandoned wife is unable to remarry even after the time period lapses.

### **Loophole**

There is certainly a loophole with this 7 years time frame. If the one that abandoned their spouse happens to appear again in their life after 6 years and re-disappear, the spouse has to wait for another 7 years and not just 1 more year!

### **IS THERE A NEED TO REDUCE THE TIME PERIOD?**

7 years is a long waiting time and in the case of a wife, she might end up spending her fertile years waiting for her husband if he disappeared a few months after the marriage.

Imagine a scenario of a pregnant lady or a new mother. That is the time when she needs a partner more than at any other point in her life. Who will provide her that emotional support the way a husband would?

### **Technology**

Not having contact for a long time may have been understandable and excusable 70 years ago when there was no proper, convenient means of communication available. But in this 21st century that we now live in, it is impossible to live without a phone. Technology has made communication extremely easy and news spreads faster than ever. You can tweet about anything, anytime. Contacting someone even if you are in a difficult situation may be challenging but possible. Technology has made it so easy that a click of 1 button can facilitate sharing of our live location to someone and let them know exactly where we are.

## SUGGESTION

Is it even fair and justified to make a person wait for 7 whole years of their life for someone who may never return? 7 years is not a small time. It is too long for contemporary application and needs to be amended. It should be noted that the Indian Evidence Act was introduced in 1872 and the means of communication have improved considerably since then.

The waiting period should be reduced to something fair and acceptable in the eyes of the current generation.

The question about how long a person has to wait for the spouse to come back before going for remarriage should be left on the facts and circumstances of the particular cases. Instead of staying firm with the '7 year waiting period' rule, the law makers should be more flexible. Take various dimensions and factors into account. The wait time should depend on the age of the spouses, the age of their child or children (if they have any), the income of the missing spouse, the income of the other spouse (if they are working).

The Parliament may fix the maximum and minimum time frame to lessen the judges' dilemmas and worries about what time frame to decide for each case.

Also, if and when the wait time period becomes a little more flexible, it has to be properly circulated and notified to every single Indian.

Many women may not be able to come forward and file for divorce on the grounds of abandonment because of the fear that if their husband comes back, they will be punished for applying for divorce instead of waiting for their husbands to come back. The inaction on the women's part may also arise because they don't want to get into all the legal complications. Some may still be unaware about this option and end up spending the rest of their lives waiting for their husbands. There is a need to spread awareness and educate them that it is their right to seek a way out, and they need not feel obligated towards a missing person for the rest of their lives. Life is too short to waste it by waiting for a long time.

## CONCLUSION

The fact that the waiting period depends on facts and circumstances of the case would mean that each case will have a different waiting period. Can we say that this variation in waiting time would be a violation of the right to equality? Not really. In the Indian Penal Code, there are few punishments that have the lower and upper limit fixed. And the exact punishment depends on the facts of the case. But there never is an argument saying it is violative. So the variations in the waiting time too, wouldn't be in violation of any rights.

The issue of the need to reduce the time frame isn't a new one and now it is entirely up to the law-makers to bring some change to the provisions to satisfy the needs of the people.

