

CHAPTER - II

EVOLUTION OF THE CONCEPT OF DIVORCE UNDER THE ANCIENT HINDU LAW

Woman is said to be an enigma, and the question of her equal status with man a myth. Most religions have declared a woman equal to man. Yet every effort to render an equal status to her has only emphasised her subservience and vulnerability.

The Dharmasastra has ordained the woman with a divine role. She is to be cherished and worshipped everywhere and always. But this ideology does not find support in all the Hindu scriptures. In vedic times, the glorification of women was limited to literature alone. On one hand Manu stipulates that women should be honoured and adored by father, brother, husband and brothers-in-law. His ultimate verdict is that where women are honoured there the gods dwell, where women are dishonoured and live in sorrow, the household perishes for a curse dwells in that house and no religious rituals yield any reward¹. But on the other hand Manu is so much biased and prejudiced against women that he denies her any property and marital rights². Even certain verses of the vedas proclaim that the mind of a woman is uncontrollable and there can be no friendship with women for they have wicked hearts³. Later works of Sruti have

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1. G. Buhler, The Laws of Manu, Chapter III, Verse 54-59, Page 85, Motilal Banarasi Das, (1964). For Original text of the Sanskrit Verse see, Kulluk Bhatta, Manusmrti Chapter III, Verses 54-59, Page 91, Motilal Banarasi Das (1983).
 2. Ibid, Verses II, 213-214, IV, 205-206, V, 146-148, VIII, 416, IX, 2-3, 14-20, 45-46, 104, XI, 36-37.
 3. Rig Veda Samhita, X. 95.15 VIII 33.17 Vaidika Samsadhana Mandala (Vedic Research Institute (1951). Rg. Veda with commentaries by Vishveshwara Vedic Research Institute (1965).

also described women as weak and wretched⁴ and no sympathy or kindness must be shown to a woman. In the medieval society the position of women sunk to an all time low level.

Surprisingly enough, the western philosophers too were not to be left behind in their condemnation of women. Aristotle says, woman is to the man as the slave to the master, the manual to the mental worker, the barbarian to the Greek. Woman is an unfinished man, left standing on a lower step in the scale of development. The male is by nature superior and the female inferior. The one rules and the other is ruled, and this principle extend of necessity to all mankind. Women, according to Aristotle are weak of will and therefore incapable of independence of character or position. Finally Aristotle declares that the best condition for a woman is a quiet home life in which while ruled by the man in her external relations, she may be supreme in domestic relations. He says the dissimilarity between men and women should be increased⁵.

The same thought is reflected in the works of Friedrich Nietzsche when he declares that equality between men and women are impossible, because war between them is eternal. There can be no peace without victory and peace will not come till either the man

4. Pandurang Vaman Kane, History of Dharmasastra, Vol II Part I Page 576-580. Bhandarkar Research Institute (1941)

5. Aristotle, The Politics, ch-1 , p-13, R.G. Mulgan, Aristotles Political Theory, Pages 20, 44-47, 61, 79. Clarendon Press (1977)

or the woman is acknowledged as the master. It is dangerous to try equality with women for she will never be content with mere equality⁶.

The question corollary to the above findings is that, inspite of the high status conferred to her in the scriptures at what point did her decline begin and why. The answer it appears, lies in the fact that the primitive man had to wage war with his fellowmen whose savage instincts rendered their own existence precarious and that of the women and children almost impossible as they were physically much weaker than them. This naturally resulted in the formation of groups and alliances. Women, children, and slaves, in the same order of priority, formed the vulnerable group. The stronger group of men began to bestow their protection on these groups, because women by giving birth to a child assures the continuation of a community, a social group. Hence she is valued and needs to be protected for her procreative power. This, perhaps also, concealed the proprietary rights in its embryonic form. In return of the protection given, man began to demand unquestionable services. This heralded the curtailment of liberties to this vulnerable group which resulted in absolute suppression in later years. Infusion of religious ideas into the social fabric rendered the situation a

6. Generally read will Durant, The Story of Philosophy, Pages 430-433. Washington Square Press, New York (1961); Schopenhauer, Herbert Spencer all have given an inferior status to women.

solemn rationality. The suppression, perhaps also flows from the fear that given a chance the woman may really live up to the exalted position allotted to her by religion and ideology and may even be able to do justice to that role.

The institution of marriage may have evolved out of the need, based on quid pro quo, the role of the man in this institution being that of a protector especially in view of the woman's procreative powers and of the woman in rendering unquestionable service. As the institution of marriage became unquestionably the most vital social institution the question of her subservience became eternal. Since marriage is the most important of all social institutions, the law must decide as to what is meant by marriage.

The interest of the community is in a married partnership, which treats each party on an equal basis. Law has come far from the original approach which treated the wife as a mere chattel under the control of her husband. Originally marriage was seen in terms of contract, dissolution in terms of property and marital offence. But the recognition of the individuality of married women has been a slow process. What is equally important as physical freedom is economic independence. Law must recognise that the unity of married life lies in the oneness of the husband and wife, however this should not be used to justify the preservation of the unity of family life at any cost and to reduce the wife to a subordinate position.

For the Hindus marriage tie is irrevocable but for the Hindu man he can enter into several such irrevocable ties. The Hindu woman can enter into only one such relationship. The irony is that Hinduism is essentially in favour of monogamy yet this is more effective in unilateral violation. The violation is universal because the men marry several times often by simply taking another wife. As a result polygamy flourished, and the fact that Hinduism discouraged divorce made very little difference to men.

Once the institution of marriage is recognised legally, divorce must be recognised per se. yet the Smrti, srutis and the scriptures prima facie denied the right of divorce. However, Narada and Parasara recognise the contingent situations where a woman should be permitted to remarry.

Narada says that a woman can seek another husband if

1. the husband is unheard of (for a long time).
2. the husband is dead.
3. the husband adopts another religious order.
4. the husband is fallen (patita).
5. the husband becomes impotent⁷.

She can marry again after waiting for three months⁸. There is a

7. Narada Smriti Ch. XII Verse 16, 24, 97, 98 as referred to in Bhagbat N. Deshpandey, "Divorce And Hindu Smritis", AIR 1934 Jour 204 See also Krishna Nath Chatterjee, Hindu Marriage Past and Present, Tara Publications, Varanasi (1972) p. 263.

8. Ibid Verse 24.

title confusion here as Narada uses the words kanya and it may mean a maiden, a woman or a betrothed girl. Logically, however, it must be understood to mean a woman because at the time of Narada, a maiden or a betrothed girl could not have been expected to know whether her would be husband is an impotent or not.

Parasara Smriti is in agreement with Narada Smriti. According to Parasara a woman may marry again for all the reasons cited by Narada⁹.

The word "Patita" used by Parasara¹⁰ is of wide significance for this word is capable of several interpretations. Within it is included a man who is excommunicated, a man who is suffering from sinful diseases like leprosy, venereal diseases and a man who is guilty of crimes like rape, adultery, murder, incest etc. conversion from one religion to another was not significant or relevant at the time of Narada or Parasara but conversion is a significant factor in the present context. It can be well understood what a conversion would have amounted to in the days of the aforementioned srutis. Any action, omission or behaviour not in keeping with the normal norms of behaviour was a good cause for excommunication. A excommunicated man is a patita. Thus in view of this wide backdrop

9. Parasara IV. 28. Madhavacharya, Parasara Smriti, Parasara Madhava, Volumes II & III, Prayaschitta Kanda And Vyavhara Kanda Edited with note by Chandrakanta Tarkalankar, The Asiatic Society, (1973).

10. Ibid.

of various causes and interpretations, it becomes clear that a woman could avail of any of the above causes for divorce if she claimed that her husband had become a patita.

More than Narada, Parasara makes himself very clear on the issue by clearly using the word 'Pati' which means a husband. Contextually too Parasara's intention is very clear. He refers to a situation where the husband is unheard of for a long time, or has left the grihasthasrama^{10a} for Sanyasa^{10b} and refers to the impotency of the husband. All these situations can arise only after marriage. Thus laying a quiet emphasis on the question of divorce.

Kautilya too is very clear on the matter of divorce, but exempts the first four types of marriage from the right of divorce. The first four superior form of marriage are those that Kautilya refers to as dharmya, namely Brahma, Prajapatya, Arsa, Daiva. For the remaining four types that is Gandharva, Asura, Rakshasa and Paisacha he concedes divorce¹¹. According to him, a disaffected

10a. Grihasthasrama means domestic life

10b. Sanyasa is the assumption of the ascetics life after renouncing the domestic life.

11. V.K. Gupta, Kautilyan Jurisprudence, Book III, Ch. III Verse 15-19. B.D. Gupta Publication (1987), also R.P. Kangle, The Kautilya Arthasastra, 3.3. 15-19 Part I, University of Bombay (1969).

wife is not to be granted divorce from the husband who is unwilling nor the husband from the wife. By mutual disaffection alone a divorce shall be granted. Or if the husband seeks divorce because of the wife's offence, he shall give her whatever he may have taken. Or if the wife seeks divorce because of the husband's offence, he shall not give her whatever may have been received. There is no divorce in pious marriage. Thus ends disaffection¹².

Therefore, in the thus existing scenario a new element of mutual disaffection is introduced. To this Kautilya adds¹³ a husband who has become degraded or gone to a foreign land or has committed the offence against the king or is dangerous to her life or has become an outcast or even impotent, may be abandoned¹⁴.

Very clear concepts emerge from the above discussion of Kautilya in that he recognises desertion, cruelty, apostasy, impotency and mutual consent.

When, the husband leaves the wife and goes to a foreign land, if the husband is unheard of for a long time or if the husband has withdrawn himself from the society of his wife, it amounts to desertion. Cruelty however, is a wider term, though Kautilya's use

12. Literal translation by R. P. Kangle, The Kautilya Arthashastra, 3.3.15-19, Part II, University of Bombay (1969).

13. Ibid, Book III, Ch. II Verse 48.

14. Ibid, Literal translation of Kangle.

of this term is only restricted to physical violence, but still it may include not only personal violence but the fact that the husband is a drunkard, rake or is a degraded man, apostasy is more relevant today than the medieval society. Impotency of the husband is a vital factor in all times and mutual consent or divortium bona gracia is unique in that in Hindu law Kautilya uses it for the first time. Add to these concepts the eloquent concept of patita and we get a wide spectrum of causes and reasons when the wife may divorce her husband.

This reflects a picture of the society where the woman has a right of sex and happy marriage and was assured against neglecting husbands. Interestingly, all the smritikars have given when the right to divorce laying down very special and exceptional grounds. Most of these grounds are not made available to the husbands, which can only mean that the husbands were to follow monogamy except in the case of adultery or mutual disaffection when he could cast his wife away. However only the reverse situation was true. There was a rising rate of polygamy on one hand and incidents of divorce being almost nil.

The reason for this reverse situation inspite of the noble intention of the sages appears to be two. The men did not really need any special reason to marry again except for a flight of fancy. Their physical and economic supremacy gave them an edge over the women. On the other hand physical vulnerability, economic dependence, and social prejudices made women stick to their unhappy marriages.

They dare not even dream of divorce let alone ask for one. The reason for this rigid attitude of women also lay embedded in the precepts of the Primus Patriae of Hindu Law, Manu. He was also the reason why divorce was not accepted by the higher caste and the intelligentsia of the patriarchal society as they could not afford any freedom to women.

Manu, whose precepts are largely anti women says about marriage that¹⁵, neither by sale nor by repudiation is a wife released from her husband, such we know the law to be which the lord of Creatures (Prajapati) made of old¹⁶. Once is the partition (of the inheritance) made, (Once is) a maiden given in marriage, (and) once does (a man) say 'I will give' each of those three (acts is done) once only¹⁷. Let mutual fidelity continue until death, this may be considered as the summary of the highest law for husband and wife¹⁸. Let man and woman united in marriage constantly exert themselves, that (they may not be) disunited (and) may not violate their mutual fidelity¹⁹. In spite of this bigamy or polygamy was not

15. Kulluka Bhatta, Manu Smriti, Ch. IX Verses 46, 47, 101, 102 Edited by J.L. Sastri, Motilal Banarasidas (1983).

16. F. Max Muller, The Sacred Books of the East, Ch. IX Verse 46. Translated by B. Buhler, Volume XXV, Motilal Banarasidas (1964).

17. Ibid, Ch. IX Verse 47.

18. Ibid., Ch. IX Verse 101.

19. Ibid, Ch. IX Verse 102.

unknown, but the woman once discarded by her husband could never hope to be legally married to another man because for her the marriage never dissolves.

Still even in Manu's work there are certain discrepancies, Manu says if the husband went abroad for some sacred duty, (she) must wait for him eight years, if (he went) to (acquire) learning of fame six years, if (he went) for pleasure three years²⁰. He is silent on what should the woman do after the expiry of the waiting period, even though he admits that there is a possibility of her becoming corrupt²¹. Buhler opines that she must remain chaste and support herself by blameless occupation, which by Manu's own admission does not appear to be possible. The only logical consequence could be that Manu may have implied by his eloquent silence that she should seek another husband.

Again Manu says that if a woman abandoned by her husband, or a widow, of her own accord contracts a second marriage and bears (a son), he is called the son of a remarried woman (Paunarbhava)²². Manu could not have formulated the concept of a Paunarbhava son if such incidents did not exist in the society then. Thus behind the iron-strong commandments regarding marriage there is a tacit acceptance of divorce.

20. Ibid, Ch. IX Verse 76.

21. Ibid, Ch. IX Verse 74.

22. Ibid, Ch. IX Verse 175.

The earliest example of this tacit acceptance is found in the Atharva Veda. In Atharva Veda it is stated that whenever a woman having married one husband marries another and if they two offer a goat with five dishes of rice, they would not be separated from each other. The second husband secures the same world with his remarried wife when he offers a goat accompanied by five rice dishes and with the light of fees²³.

The Superiority of Manu over all the teachers of law is not in dispute. However, one would have expected Manu to take his cue from the above mentioned vedic verse and develop upon the issue. Instead, it is seen that, smritikars and law teachers posterior to Manu have been more liberal on the point. But for some reason or another Manu Smriti had a greater binding effect on the society than the Veda or its implied nuances. The custom of divorce continued to prevail among the sudras and other low castes, but marriage became a Samskara, a sacrament and a religious institution for the upper castes. For them it became a spiritual union or a holy unity without any possibility of its dissolution.

The reason for this, perhaps is the fact that some parts of Manu appear to be of later origin. This is further emphasised and proved by Julius Jolly. To quote Jolly:

"The author of our M (Manu) at all events already knew various older law books as he speaks of Dharmasastras in general as well as mentions several teachers of law by name. The Vaikhanasa school for example which he refers

23. Atharva Veda (Saunaka) Navam Kandam Su. V. M. 27-28 with The Padapatha and Sayanacharyas Commentary, Edited by Vishvabandhu, Part II (Kanda VI-X). Vishveshvarananda Vedic Research Institute, Hoshiarpur (1961).

to when dealing with the duties of the Vanaprastha has left us a Dharmasutra, which though a very late work in its present form, yet in that particular section about Vanaprasthas shows a remarkable point of agreement with Manu"²⁴.

Julius Jolly also establishes a link between Manu and Manava School which he traces through Vishnu and Kathaka School and arrives at the conclusion that,

"It should not, therefore, be doubted that the author had made use of works of various schools when he intended to write a didactic poem on Dharma binding on all castes and to set it off with the name of Manu, who had so long been glorified as the first parent of mankind and was considered to be descended from Brahman, the universal soul, or was identified with it and was said to be the founder of the social order in this world, and was renowned as the inventor of sacrificial usages and as the religious law giver"²⁵.

The contention of Jolly is further substantiated by a reading of the text of Manu Smriti²⁶.

As a result of this Manu developed a comprehensive and well planned text which was naturally appreciated by and suited the intelligentia and the upper castes. And since it suited their interest it was implemented with tremendous vigour and zeal. Thus the woman found herself more bound by these commandments. The prevailing social custom and background^k also helped in this.

24. Julius Jolly, Hindu Law And Custom, Page 37 Authorised translation by Batekrishna Ghosh. Bharatiya Publishing House (1975).

25. Ibid, Page 38.

26. G. Buhler, The Laws of Manu, Pages XVII, XXIII, XXI, Motilal Banarasi Das (1964).

The unique institution of custom had a major contribution to make towards the developments of marital relationships. Custom is a perfectly democratic means of evolving social norms²⁷, and as the new norms evolved the older and untenable ones are destroyed. As a result, on one hand no specific matrimonial remedies took shape and on the other hand, due to their dependence both economic and protectorial, women were reduced to absolute suppression and submission. The consequence was casuistry, distortions of commonsense values and human transactions and behaviours²⁸.

Considering all the foregoing discussion, the statement that divorce is an idea which is foreign to Hindu law is incorrect. The sastras really did not overcome the customary element of the Hindu society. The rewaZ-e-am of the agricultural class known as Jats in the district of Jullundher in the present state of Punjab is known to have followed the custom of divorce by simply repudiating the marriage after which the spouses could remarry. It is also a well known fact that among the scheduled castes and certain tribes divorce is easily obtained. This fact is also recognised by the Parliament because while enacting the Hindu Marriage Act in the year 1955, the Parliament instead of abolishing customary divorce gave it a special recognition under S. 29 of that Act. Customary divorce thus were and remain available to millions of Hindus in India.

27. Virendra Kumar "The working of formal Adversary Procedure In The Resolution Of Matrital Conflict Problems", Banaras Law Journal (1983) p. 6083.

28. Virendra Kumar, "Isn't Law Rising From Dogmatic Slumber", Punjab University Law Reform. p. 5 (reprint).

The Parliament has relied upon the ubiquity of that right among the lower caste to introduce judicial divorce among the upper caste.

However the introduction of divorce has not interfered with the Samskara of marriage, still less abolish it. Divorce has not turned Hindu Marriages into contracts. Marriage performed correctly according to sastra is still a samskar, Judicial divorce does not affect that aspect of marriage, it merely terminates the secular right of one spouse against the other, and frees each other to enter into another union²⁹.

The society has taken a very long time to realise this. The first attempt at making written statutory provision for divorce as late as in the 20th century, that is in the year 1931 in the form of the Divorce Act, 1931. Under this both the husband and the wife were given the right to divorce for impotency, adultery, bigamy, desertion, conversion, cruelty, intoxication and in addition to these, if the wife was pregnant at the time of marriage or if either of the spouses disappeared for seven years or more. This enactment was soon followed by the Madras Act, 1933. After this the boldest attempt towards the granting of divorce was made in the form of the Hindu Marriage Act, 1955. Which was applauded spontaneously and received a tremendous response.

While talking of the Hindu Marriage Act, 1955, one must realise that this enactment, by introducing divorce merely universalised what was hithertofore applicable only to the lower castes.

29. Harisingh Gour, The Hindu Code, Pages 8-12 , Vol 1, Law Publishers (1974).

Divorce was and is even now enjoyed by the lower castes, not withstanding the norms of Dharmasastra or any other legal precepts. However this universalisation has not made any significant change in the status of the woman as this study reveals.

Keeping the oppressed condition of women as a common denominator, the situation is still the same to day. Majority of women do not claim divorce because of their dependence, especially economic dependence on their husbands. Today divorce has taken the form of punishment, where a person has a defacto power to inflict evil on another, for instance, because of the latter's economic and moral dependence on him, where the sovereign neither authorises nor forbids the exercise of that power.

To understand the inner mechanics of divorce one must understand what marriage involves socially as well as legally.

Socially speaking, when the marriage takes place, the woman, as her newly gained status of a wife get a specific domestic, economic and sexual status. These changes are quite significantly different from what she enjoyed during her maiden days. In her maiden days, domestically, she remains as one of the many members of her fathers family. On marriage she assumes the role of a manageress, either immediately or gradually. Economically she remains dependant. Only the nature of dependence changes. Sexually her status undergoes an overwhelming change. For in her fathers house, she is only a member of the family, she does not have any specific significance as the procreator or propagator of her fathers lineage, but she, on marriage gets an added significance as pro-

genetrix. She is the procreator or propagator of her husband's lineage. To this extent she acquires a special right which was unknown to her before marriage. This perhaps is the most significant social change a woman undergoes on marriage, her status changes in many ways but the role of the progenetrix is the most important one.

In short, therefore, marriage is the institution whereby men and women are joined in a special kind of social and legal dependence for the purpose of founding a family.

Marriage, therefore is jural relationship involving the transfer of certain jural consequences in shape of rights, duties obligations and disabilities between the parties to the marriage. This transference or creation of the jural rights is true of all marriages.

On marriage, according to the Hindu law, the gotra of the woman changes to that of the husband. This legal fiction is followed only to signify the change of the rights, duties and obligations qua her husband and his family. That is the reason why the change of gotra is signified irrespective of the form of the marriage. On the death of the husband also the wife does not revert to the gotra of her father and according to the ancient Hindu law her sexual right continued to be vested in the family of her husband³⁰.

30. Panjab rao vs. Atmaram AIR 1926 Nag 124.

The principal right acquired by the woman is that of the pro-genetrix of her husband's family. As a consequence she gets an absolute right to her husband's society. This is an express condition in the nuptial vows. That is why one party can sue the other for the restitution of conjugal rights and marital fidelity is held in such high esteem even in the Modern Hindu Law. Under the Hindu law the question of sexual morality was carried to the extent that the widow of the deceased brother was taken by the other brothers³¹. Instances of such a nature are found in the Rg Veda as well³². Accordingly in Hindu law the marriage of the woman or the bride is not only with her husband but also to his kula i.e. family.

This was perhaps aimed at preventing the passage of the family property to another family and so the brother of the husband or any body who could represent him or by a pupil or by an old servant could prevent the widow from ascending her husband's funeral pyre³³. However this practice was put an end to by Apastamba and Manu. If the sole reason for owning the woman sexually was to prevent passage of property to another family then they succeeded admirably.

31. K.M. Kapadia, Marriage & Family in India, Chapter 4 pp. 52-63 etc., Oxford University Press, Calcutta, 3rd Edition.

32. Rg. Veda X. 188 Vaidika Samsodhana Mandala (Vedic Research Institute (1951); Rg Veda with commentaries by Vishveshwara Vedic Research Institute (1965).

33. Krishna Nath Chatterjee, Hindu Marriage Past and Present, Page 258, Tara Publications, Varanasi (1972).

But on the other hand if the *raison d'etre* behind this system was carriage of one's own name and thereby his family name then beyond doubt the problem remained unsolved, Kane thinks that the great hankering for a son, evinced by all Vedic times was the most important cause of this age old system, because the son was a religious necessity³⁴. So in default of a natural son from her husband, the woman in her role of a pro-genetrix could beget a son through the system of *niyoga* and in such cases, according to Manu the property remains within the family and confined to the husband as he remains the owner of both the wife and the son³⁵.

The jural relationship of the Marriage was very well discussed by Justice A.M. Bhattacharjee in Kamal Kumar Basu Vs Kalyani Basu³⁶. where the appellant husband sought divorce on the ground of desertion by the wife who had been forced to leave her matrimonial house because of a broken down relationship between herself and her sister-in-law who had brought up her husband and also due to the uncompromising attitude that was adopted by her husband. It was admitted that the wife never misbehaved with her elder sister-in-law. While upholding the wife's claim for a separate matrimonial

34. Pandurang Vaman Kane, History of Dharmasastra, Page 606, Vol II Part I, Bhandarkar Research Institute (1941).

35. Kullaka Bhatta, Manu Smriti, Ch. IX Verse 54 and 181, Edited by J.L. Sastri, Motilal Banarasi Das (1983) see also F. Max Muller, The Sacred Books of the East, Translated by G. Buhler, Vol XXV, Motilal Banarasi Das (1964).

36. 92 CWN 323 (Feb 1988).

home, Justice Bhattacharjee asserted in no uncertain term that in the context of the set up of our modern society, with Articles 14 and 15 of the Indian Constitution³⁷ staring in the face, the wife cannot be exposed to unreasonable unpleasantness in her matrimonial home. The wife is entitled to the society, comfort and consortium of the husband and those rights come within her rights to personal liberty under Article 21 of the Constitution³⁸. So the wife can insist on a separate matrimonial home away from the unpleasant in-laws and the husband cannot have either a casting vote or a veto in this regard.

That being so, the woman today is no longer married to the Kula or family of her husband but to the husband alone, her right in pro-geneticem is confined with the husband and both acquire certain rights and liabilities against each other which by logical extension of the above discussion includes the right to a separate matrimonial home and as well as a right to divorce.

37. These Articles of the Indian Constitution mandate equality before law and countermands any discrimination on the ground of sex, caste etc.

38. Article 21 not only guarantees the right to life but also defines right to life as a right to live with dignity. The scope of this Article was expanded to the widest possible amplitude in cases like Maneka Gandhi Vs Union of India AIR 1978 SC 597; Francis Corrali Mullin AIR 1981 SC 746 and other subsequent cases.