Divorce Under Hindu Law

Divorce means the dissolution of marriage by a competent court. This paper discusses divorce under Hindu Law. It analyses how the concept was non-existent under ancient law due to the sacramental nature of marriage but was introduced under the Hindu Marriage Act, 1955. It studies the different theories of divorce- fault, mutual consent, breakdown; and also describes the grounds for divorce under this Act, with focus on adultery and cruelty, and how these grounds were modified through amendments. It briefly dwells on the grounds that are only available to a wife. The paper addresses the pros and cons of the addition of irretrievable breakdown as a ground for divorce amidst the growing debate about its merits.

Introduction

Earlier divorce was unknown to general Hindu law as marriage was regarded as an indissoluble union of the husband and wife. Manu declared that a wife cannot be released by her husband either by sale or by abandonment, implying that the marital tie cannot be severed in any way. Although Hindu law does not contemplate divorce yet it has been held that where it is recognized as an established custom it would have the force of law.

According to Kautilya’s Arthashatra, marriage might be dissolved by mutual consent in the case of the unapproved form of marriage. But, Manu does not believe in the discontinuance of marriage. He declares” let mutual fidelity continue till death; this, in brief, may be understood to be the highest dharma of the husband and wife.”

However, this changed when divorce was introduced in the Hindu Marriage Act, 1955.

Theories Of Divorce

There are basically three theories for divorce-fault theory, mutual consent theory & irretrievable breakdown of marriage theory.

Under the Fault theory or the offences theory or the guilt theory, marriage can be dissolved only when either party to the marriage has committed a matrimonial offence. It is necessary to have a guilty and an innocent party, and the only innocent party can
seek the remedy of divorce. However, the most striking feature and the drawback is that if both parties have been at fault, there is no remedy available.

Another theory of divorce is that of mutual consent. The underlying rationale is that since two persons can marry by their free will, they should also be allowed to move out of the relationship of their own free will. However, critics of this theory say that this approach will promote immorality as it will lead to hasty divorces and parties would dissolve their marriage even if there were slight incompatibility of temperament.

The third theory relates to the irretrievable breakdown of the marriage. The breakdown of marriage is defined as “such failure in the matrimonial relationships or such circumstances adverse to that relationship that no reasonable probability remains for the spouses again living together as husband & wife.” Such marriage should be dissolved with maximum fairness & minimum bitterness, distress & humiliation.

Some of the grounds available under the Hindu Marriage Act can be said to be under the theory of frustration by reason of specified circumstances. These include civil death, renouncement of the world etc.[iii]

**Grounds For Divorce Under Hindu Marriage Act**

It is conceded in all jurisdictions that public policy, good morals & the interests of society require that marital relationship should be surrounded with every safeguard and its severance be allowed only in the manner and for the cause specified by law. Divorce is not favored or encouraged and is permitted only for grave reasons.

In modern Hindu law, all the three theories of divorce are recognized & divorce can be obtained on the basis of any one of them. The *Hindu Marriage Act, 1955* originally, based divorce on the fault theory, and enshrined nine fault grounds in **Section 13(1)** on which either the husband or wife could sue for divorce, and two fault grounds in **Section 13(2)** on which wife alone could seek the divorce. In 1964, by an amendment, certain clauses of Section 13(1) were amended in the form of Section 13(1A), thus recognizing two grounds of the breakdown of the marriage. The 1976 amendment Act inserted two additional fault grounds of divorce for wife & a new section 13B for divorce by mutual consent.

The various grounds on which a decree of divorce can be obtained are as follows-
Adultery
While adultery may not have been recognized as a criminal offence in all countries, the matrimonial offence of adultery or the fault ground of adultery is recognized in most. Even under the Shastric Hindu law, where divorce had not been recognized, adultery was condemned in the most unequivocal terms. There is no clear definition of the matrimonial offence of adultery.
In adultery there must be voluntary or consensual sexual intercourse between a married person and another, whether married or unmarried, of the opposite sex, not being the other’s spouse, during the subsistence of marriage. Thus, intercourse with the former or latter wife of a polygamous marriage is not adultery. But if the second marriage is void, then sexual intercourse with the second wife will amount to adultery.

Though initially a divorce could be granted only if such spouse was living in adultery, by the Marriage Laws Amendment Act, 1976, the present position under the Hindu Marriage Act is that it considers even the single act of adultery enough for the decree of divorce[iii].
Since adultery is an offense against marriage, it is necessary to establish that at the time of the act of adultery the marriage was subsisting. Also, it follows that unless one willingly consents to the act, there can be no adultery. If the wife can establish that the co-respondent raped her, then the husband would not be entitled to a divorce.

In Swapna Ghose v. Sadanand Ghose[iv] the wife found her husband and the adulteress to be lying in the same bed at night and further evidence of the neighbors that the husband was living with the adulteress as husband and wife is sufficient evidence of adultery. The fact of the matter is that direct proof of adultery is very rare. The offence of adultery may be proved by:

- Circumstantial evidence
- Contracting venereal disease

Cruelty
The concept of cruelty is a changing concept. The modern concept of cruelty includes both mental and physical cruelty. Acts of cruelty are behavioral manifestations stimulated by different factors in the life of spouses, and their surroundings and therefore; each case has to be decided on the basis of its own set of facts. While physical cruelty is easy to determine, it is difficult to say what mental cruelty consists of. Perhaps, mental cruelty is lack of such conjugal kindness, which inflicts the pain of such a degree and duration that it adversely affects the health, mental or bodily, of the spouse on whom it is inflicted. In Pravin Mehta v. Inderjeet Mehta,[v] the court has defined mental cruelty as ‘the state of mind.’
Some Instances of Cruelty are as follows[vi]—
false accusations of adultery or unchastity
demand of dowry
refusal to have marital intercourse/children
impotency
birth of child
drunkenness
threat to commit suicide
wife’s writing false complaints to employer of the husband
incompatibility of temperament
irretrievable breakdown of marriage

The following do not amount to cruelty-

ordinary wear & tear of married life
wife’s refusal to resign her job
desertion per se
outbursts of temper without rancor.

Desertion
Desertion means the rejection by one party of all the obligations of marriage - the permanent forsaking or abandonment of one spouse by the other without any reasonable cause and without the consent of the other. It means a total repudiation of marital obligation.

The following 5 conditions must be present to constitute desertion; they must co-exist to present a ground for divorce:

- the factum of separation
- animus deserendi (intention to desert)
- desertion without any reasonable cause
- desertion without consent of other party
- statutory period of two years must have run out before a petition is presented.

In Bipinchandra v. Prabhavati[vii] the Supreme Court held that where the respondent leaves the matrimonial home with an intention to desert, he will not be guilty of desertion if subsequently he shows an inclination to return & is prevented from doing so by the petitioner.

Conversion
When the other party has ceased to be Hindu by conversion to any other religion for e.g. Islam, Christianity, Judaism, Zoroastrianism, a divorce can be granted.
Insanity
Insanity as a ground of divorce has the following two requirements-

1. i) The respondent has been incurably of unsound mind
2. ii) The respondent has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Leprosy
Contagiousness of leprosy and repulsive outward manifestations are responsible for creating psychology where man not only shuns the company of lepers but looks at them scornfully. Thus, it is provided as a ground for divorce. The onus of proving this is on the petitioner.

Venereal Disease
At present, it is a ground for divorce if it is communicable by nature irrespective of the period for which the respondent has suffered from it. The ground is made out if it is shown that the disease is in communicable form & it is not necessary that it should have been communicated to the petitioner (even if done innocently).

Renunciation
“Renunciation of the world” is a ground for divorce only under Hindu law, as the renunciation of the world is a typical Hindu notion. Modern codified Hindu law lays down that a spouse may seek divorce if the other party has renounced the world and has entered a holy order. A person who does this is considered as civilly dead. Such renunciation by entering into a religious order must be unequivocal & absolute.

Presumption Of Death
Under the Act, a person is presumed to be dead, if he/she has not been heard of as being alive for a period of at least seven years. The burden of proof that the whereabouts of the respondent is not known for the requisite period is on the petitioner under all the matrimonial laws. This is a presumption of universal acceptance as it aids proof in cases where it would be extremely difficult if not impossible to prove that fact[viii]. A decree of divorce granted under this clause is valid & effective even if it subsequently transpires that the respondent was, in fact, alive at the time when the decree was passed.

Wife’s Special Grounds For Divorce
Besides the grounds enumerated above, a wife has been provided four additional grounds of divorce under Section 13(2) of the Hindu Marriage Act, 1955. These are as follows-
**Pre-Act Polygamous Marriage**

This clause states the ground for divorce as, “That the husband has another wife from before the commencement of the Act, alive at the time of the solemnization of the marriage of the petitioner. For example, the case of *Venkatame v. Patil*[ix] where a man had two wives, one of whom sued for divorce, and while the petition was pending, he divorced the second wife. He then averred that since he was left only with one wife, and the petition should be dismissed. The Court rejected the plea. Such a ground is available if both the marriages are valid marriages & the other wife (2nd wife) should be present at the time of filing of the petition. However, today this ground is no more of practical importance.

**Rape, Sodomy Or Bestiality**

Under this clause, a divorce petition can be presented if the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

**Non-Resumption Of Cohabitation After A Decree/Order Of Maintenance**

If a wife has obtained an order of maintenance in proceedings under Section 125, Cr.P.C., 1973 or a decree under Section 18, Hindu Adoption & Maintenance Act, 1956 & cohabitation has not been resumed between parties after one year or upwards, then this is a valid ground for suing for divorce.

**Repudiation Of Marriage**

This provision provides a ground for divorce to the wife when the marriage was solemnized before she attained the age of fifteen years, and she has repudiated the marriage, but before the age of eighteen. Such repudiation may be express (written or spoken words) or may be implied from the conduct of the wife (left husband & refused to come back). Moreover, this right (added by the 1976 amendment) has only a retrospective effect i.e. it can be invoked irrespective of the fact that the marriage was solemnized before or after such amendment.

**Irretrievable Breakdown Of Marriage**

Irrespective of the three remedies available to parties that is: restitution of conjugal rights, judicial separation, and divorce, the judiciary in India is demanding irretrievable breakdown of marriage as a special ground for divorce, as sometimes courts face some difficulties in granting the decree of divorce due to some of the technical loopholes in the existing theories of divorce.
Both the Supreme Court and Law Committee consider the implementation of such a theory as a boon to parties who for one or the other reasons are unable to seek the decree of divorce. Therefore in the opinion of the Supreme Court and Law Commission of India, it is very essential to make it a special and separate ground mission that introduction of irretrievable breakdown of marriage, as a special ground will do any public good.

Under the Hindu Marriage Act, 1955 primarily there are three theories under which divorce is granted:

(i) Guilt theory or Fault theory,

(ii) Consent theory,

(iii) Supervening circumstances theory.

The Irretrievable breakdown theory of divorce is the fourth and the most controversial theory in legal jurisprudence, based on the principle that marriage is a union of two persons based on love affection and respect for each other. If any of these is hampered due to any reason and if the matrimonial relation between the spouses reaches to such an extent from where it becomes completely irreparable, that is a point where neither of the spouses can live peacefully with each other and acquire the benefits of a matrimonial relations, than it is better to dissolve the marriage as now there is no point of stretching such a dead relationship, which exist only in name and not in reality. The breakdown of the relationship is presumed de facto. The fact that parties to marriage are living separately for reasonably longer period of time (say two or three years), with any reasonable cause (like cruelty, adultery, desertion) or even without any reasonable cause (which shows the unwillingness of the parties or even of one of the party to live together) and all their attempts to reunite failed, it will be presumed by law that relationship is dead now.

Recently the Supreme Court (Naveen Kohli v. Neelu Kohli) has recommended an amendment to the Hindu Marriage Act, whereby either spouse can cite irretrievable breakdown of marriage as a reason to seek the divorce. Expressing the concern that divorce could not be granted in a number of cases where marriages were virtually dead due to the absence of the provision of irretrievable breakdown, the court strongly advocated incorporating this concept in the law in view of the change of circumstances. The Court observed that public interest demands that the married status should, as far as possible, as long as possible and whenever possible, be maintained. However, where a marriage has been wrecked beyond any hope of being repaired, the public interest requires the recognition of the fact. The judgment notes that there is no acceptable way
in which a spouse can be compelled to resume life with the consort and that situations causing misery should not be allowed to continue indefinitely as the law has a responsibility to adequately respond to the needs of the society. The profound reasoning is that in situations when there is absolutely no chance to live again jointly or when it is beyond repair, in such a case it would be futile to keep the marital tie alive. Here the ground of irretrievable breakdown is really needed. But it should not be oblivious that the ground, when introduced, needs to provide safeguards to ensure that no party is exploited.

Merits
The only merit of the theory as has been propounded by the jurists is that a marriage, which in practice is considered to be a sacramental institution, should be based on grounds on which a sound marriage is built- that is tolerance, adjustment and respecting each other. If any of the party to the marriage is not ready to live with the other party the relationship will not be a happy relationship. Stretching such a relationship will do no good, rather will develop hatred and frustration among the parties for each other. Therefore to protect the sanctity of marriage, to reduce the number of unhappy marriages and to prevent from getting wasted the precious years of the life of the spouses, it is necessary to dissolve such a marriage.

Demerits
The Law Commission Of India in Chapter 4 of the 71st report has dealt in detail the demerits of the irretrievable breakdown theory. The two main oppositions discussed in the report are as follows:

(i) It will make divorce easy. It will allow the spouses or even to any one of the spouses to dissolve the marriage out of their own pleasure.

(ii) It will allow the guilty spouse to take advantage of his own fault by getting separated and dissolving the marriage.

Conclusion
Hindus consider marriage to be a sacred bond. Prior to the Hindu Marriage Act of 1955, there was no provision for divorce. The concept of getting divorced was too radical for the Indian society then. The wives were the silent victims of such a rigid system. However, the time has changed; situations have changed; the social ladder has turned. Now the law provides for a way to get out of an unpleasant marriage by seeking divorce in a court of law. The actual benefactors of such a provision are women who no longer have to silently endure the harassment or injustice caused to them by their husbands.
But the manner in which the judiciary is dealing with the subject of irretrievable break
down of marriage, it is feared that it will completely pause the system of marriages.
Every theory has its negative and positive traits. Their applicability differs from
situation to situation. Therefore it is very essential that the lawmakers of our country
should deal with the subject in a very cautious manner after considering in detail its
future implications.