

THEORIES OF DIVORCE UNDER HINDU LAW-WITH REFERENCE TO THE CHANGES BROUGHT ABOUT BY THE MARRIAGE LAWS AMENDMENT ACT (1976)

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Divorce was unknown to general Hindu Law as marriage was regarded as an indissoluble union of the husband and wife. Manu has declared that a wife cannot be released from her husband either by sale or by abandonment, implying that the marital tie cannot be severed in any way. It, therefore, follows, that the textual Hindu Law does not recognise a divorce. Although Hindu Law does not contemplate divorce yet it has been held that where it is recognised as an established custom it would have the force of law. In the absence of a custom to the contrary, there can be no divorce between a Hindu husband his wife, who by their marriage had entered into a sacred and indissoluble union, and neither conversion, nor degradation nor loss of caste. Nor the violation of an agreement against polygamy dissolved the marriage tie. Manu does not believe in discontinuance of the marriage relationship. He declares, "Let mutual fidelity continue till death; this in brief may be understood to be the highest dharma of husband and wife". The duty of a wife continues even after his death. She can never have a second husband. Under Hindu Marriage Act, 1955 primarily there are four theories under which divorce is granted:

- (i) Guilt theory or fault theory
- (ii) Supervening circumstances theory or frustration of marriage theory
- (iii) Irretrievable Breakdown theory
- (iv) Consent theory

Guilt theory or fault theory[Sec. 13{(1)(i),(i-a),(i-b)},{(2)(i)-(iv)}]:

When one of the spouses commits a matrimonial offence, the other may seek divorce from the delinquent spouse. The expression matrimonial offence is important; it includes (1) Adultery (2) Cruelty (3) Desertion (4) Bigamy (5) Rape (6) Sodomy (7) Bestiality (8) Refusal to obey court's order to pay maintenance to wife (9) Marrying an underage person. Offences other than these i.e. murder, dacoity, cheating, theft, treason, smuggling, hoarding, blackmarketing, bribery etc. do not provide a ground for divorce. In other words there should be personal injury to the marital relations of the spouses, not any other injury.

Supervening circumstances theory or frustration of marriage theory Sec.13 (1) (ii)-(vii)

Without there being any marital offence and marriage is frustrated when one of the spouses has changed his religion, or incurably of unsound mind, or suffering from any physical ailment, or venereal disease, or has renounced the world or has disappeared for a very long period. In such a case the other spouse should be free to put an end to the marriage by getting divorce.

Irretrievable breakdown theory Sec.13 (1-A)

Whenever a decree for judicial separation is granted and at least one year has elapsed from the date of the decree any one of the spouses may apply for the divorce on that ground provided that there has been no resumption of cohabitation between the parties to the marriage. Second clause is that when a decree of restitution of conjugal rights is granted by the court against the erring spouse and that erring spouse ignoring the decree does not comply with it until the expiry of at least one year from the date of the decree divorce can be granted at the instance of either spouse. The irretrievable breakdown theory of divorce is 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 of the reason and if the matrimonial relation between the spouses reach to such an extent from where it becomes completely irreparable that is a point where neither of the spouse can live peacefully with each other and acquire the benefits of matrimonial relation, than it is better to dissolve the marriage as now there is no point of stretching such a dead relationship, which exists only in name and not in reality. The breakdown of relationship is presumed defacto. The fact that parties to marriage are living separately for reasonably longer period of time, with any reasonable cause or even without any reasonable cause and all their attempts to reunite failed, it will presumed by law that relationship is dead now. There is an outgoing debate about whether divorce should be granted solely on the basis of the "fault of the party", or whether it should be based on the breakdown of marriage. The judicial trend seemed to be moving towards an acceptance of "irretrievable breakdown" as ground of divorce.

Consent theory Sec.13-B

Divorce by mutual consent means that the case is not like usual ones wherein one party petition against the other for divorce and the other party resists the same. Here both the parties make a joint petition to the court for divorce between them. The genuinely desire to get rid of each other and they part amicably for good. If divorce is not given their life would be spoiled and it would result in moral degradation. A petition is required to be moved jointly by the parties to marriage on ground that they have been living separately for a period one year or more and they have not been able to live together and also that they have agreed that the marriage to be dissolved with effect from the date of decree. There are unfounded objections against this type of divorce that consent of the unwilling party would be obtained by force, fraud or some other contrivance, and this is a divorce by collusion. But both these arguments and doubts are unfounded.

Change in law brought about by the Marriage Laws (Amendment) Act, 1976: The change brought about by the Amending Act is revolutionary in character and it has made the law of divorce in India more speedy and liberal but, at same time, the basic idea of reconciliation between parties has been kept alive:

Change in fault theory: Before passing of the Marriage Laws (Amendment) Act 1976, in order to obtain divorce on this ground, the petitioner had to prove that the other party was living in adultery which would cover more or less continuous and habitual course of action. An isolated act of immorality was not sufficient. But after the passing of the Act of 1976, even a single and isolated act of infidelity would be a sufficient ground to obtain divorce.

The Marriage Laws (Amendment) Act, 1976 which makes cruelty also a ground for divorce, has changed the wording of the clause thus: “respondent has treated the petitioner with cruelty”. The change in the definition of cruelty will signify that an act or omission or conduct which constitutes cruelty is a ground for judicial separation or divorce. Even if it causes no apprehension of any sort in the mind of the petitioner

Desertion was a ground only for judicial separation under Hindu Marriage Act, 1955. However, after passing of the Act of 1976, this is a ground for both divorce as well as judicial separation under Section 13 (1) (i-b).

Section 13 (2) (ii) provides three additional grounds of divorce to a Hindu wife. They are Rape, Sodomy and Bestiality committed by the husband after the marriage. Section 13 (2) (iii) lays down that, where a wife obtains a decree or order for maintenance either under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 or under Section 125 of the Code of Criminal Procedure, 1973 if cohabitation between the parties had not been resumed for one year or upwards after the decree, can avail herself of this provision for obtaining divorce, notwithstanding that she was living apart. Repudiation of marriage clause has been added by the Marriage laws (Amendment) act 1976. Under this clause a wife whose marriage was solemnised before she attained the age of 15 years, can repudiate the marriage after attaining the age of 15 years but before attaining the age of 18 years. It is immaterial whether the marriage was consummated or not.

Change in supervening circumstances theory: After passing of the Marriage Laws (Amendment) Act 1976, incurable unsoundness of mind or continuous or intermittent mental disorder of such a nature as to disable the petitioner to live reasonably with the respondent makes the petitioner eligible to get a decree of divorce. The term “mental disorder” has been widely interpreted so as to include mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia.

The Marriage laws (Amendment) Act 1976 has made leprosy, a ground for both judicial separation and divorce. It omitted the period of three years. Under this clause, the petitioner is required to show that the respondent has been suffering from virulent and incurable leprosy.

The Marriage Laws (Amendment) Act, 1976 has simplified the ground of venereal disease. Prior to amendment, the disease was required to be of three years duration. The amendment has done away with the period. Now under the Hindu Marriage Act, 1955 the venereal disease to be a ground of judicial separation or divorce, should be in a communicable form.

Change in Breakdown theory: The Marriage Laws (Amendment) Act, 1976 has liberalised the ground of divorce under breakdown theory. By this Amendment the period prescribed in sec.13 (1-A) has been reduced from two years to one year.

Change in consent theory: The most important changes brought about by Marriage Laws (Amendment) Act, 1976, are introduction of new section 13B i.e. divorce by mutual consent and 21B, special provisions relating to trial and disposal of petitions under the Act. Section 13B provides for divorce by mutual consent of both the parties to marriage. This provision has been given retrospective effect and is applicable to marriages whether solemnised before 27th May, 1976, the date on which the marriage laws (Amendment) Act. 1976, became effective or thereafter. The new provision denotes an implied suggestion that marriage is a contract and hence it could be dissolved by the consent of the parties.

References:

- 1.Hindu Marriage Act,1955
- 2.Marriage laws (Amendment) Act,1976
- 3.Hindu Law: B.M.Gandhi
- 4.Modern Hindu Law: U.P.D. Kesari
- 5.Modern Hindu Law: Dr.ParasDiwan
6. Hindu Law: R.D.Agarwal