

Hindu Marriage Act

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I. NEED FOR THE STUDY

According to Wex Legal Dictionary, marriage is defined as the legal union of a couple as spouses¹. The word marriage comes from the French word 'marier' which means 'marry'. In India, a relation between husband and wife is regarded as pure, sacred and eternal, but this statement doesn't inculcate the gist of what the actual scenario is. Marital rape, domestic violence, violence or emotional abuse for dowry, cruelty are some of the unseen aspects of the so-called sacred bond of a marriage. All these actions have an adverse effect on the well-being of the bride, often resulting in deteriorating health, insanity and even death.

Since the ascent of The Hindu Marriage Act, 1955, the remedy of divorce has been included for both men and women to dissolve a troubled marriage, and has been a tool for administering justice in case of abusive or dysfunctional marriages. This case study is being done to figure out whether the provisions of The Hindu Marriage Act, 1955 are feasible enough and if there are any loopholes through which the eyes of the justice can be impaired².

II. HISTORY OF MARRIAGE IN HINDUISM

In Hinduism, marriage is considered a sacred bond which marks the beginning of a new phase of a person's life. The main objective of marriage, in ancient times, was to procreate and carry on the family lineage, not for sexual pleasure. It was also considered an obligation for both the parties in a marriage, a duty which they had to carry out throughout their lives. Thus, marriage was labeled as a holy vow, which cannot be dissolved by the way of a divorce on the grounds of personal interest or selfish motive. Women had limited rights in the ancient India, with slavery and prostitution prevalent in the society. As soon as a female stepped out of her parent's house after marriage, she was at the mercy of her husband and his family. In case the husband wasn't happy with her wife, he would abandon her, and the aggrieved woman wouldn't have any remedy at her disposal, as divorce was not included in the Sastrik law, and due to the conservative nature of the male dominant society, there was no way that such a change would come about soon enough. Even Manusmriti (a codified book of laws created by Manu, the first law giver), women were said to be not worthy of trust, and considered as part of the society that must be and was dependent on men³. The Hindu scriptures are discriminatory in providing

¹Cornell Law School's website - www.law.cornell.edu/wex/marriage

²Research question

³Manusmriti, Chapter 5, Para 147-165

remedies, as for men there are remedies but the scriptures do not give such remedies to a woman, the essence of which is that the woman is supposed to be loyal to her husband and her duty is to serve the husband throughout her life. The discrimination against women is evident, as the male is allowed to separate from his wife on grounds of infidelity, childlessness, an incurable disease such as leprosy or insanity, etc. In Hinduism, there were no provision for separation and divorce, according to the Sastrik Law, not until The Hindu Marriage Act, 1955 came into force which codified and amended the Sastrik Law, including provisions for divorce. Divorce is defined as putting an end to the marital relations by dissolution, so that the parties can no longer be addressed as husband and wife, and is mentioned in Section-13 of The Hindu Marriage Act, 1955. The Hindu Marriage Act, 1955, applies to all the Hindus, as well as any person who is a Buddhist, Sikh or Jain by religion, living in India, and who isn't a Muslim, Christian, Parsi or Jew by religion⁴.

III. THE HINDU MARRIAGE ACT, 1955 WITH RESPECT TO DIVORCE:

Divorce has been defined in Section 13 of The Hindu Marriage Act, 1955, and its sub-sections define the clauses and conditions for a divorce to take place. The grounds on which a divorce can take place are:

- **Adultery**

In the Hindu culture, adultery is widely condemned. It is thought that a woman or a man once tied up by the vows of their marriage shouldn't seek solace in the shadow of a third person. 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 course 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 issuing the decree or petition for divorce⁵.

Since adultery is an offence 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 divorce.

*Swapna Ghose v. Sadanand Ghose*⁶

The wife found her husband and the adulteress to be lying in the same bed at night and further evidence of the

⁴ Section 2(c), The Hindu Marriage Act, 1955

⁵ *Vira Reddy v. Kistamma*, 1969 Mad. 235

⁶ AIR 1979 Cal 1

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 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*⁷, the court has defined mental cruelty as ‘the state of mind.’

Instances of Cruelty⁸ are as follows–

1. false accusations of adultery or unchastity
2. demand of dowry
3. refusal to have marital intercourse/children
4. impotency
5. birth of child
6. drunkenness
7. threat to commit suicide
8. wife’s writing false complaints to employer of the husband
9. incompatibility of temperament
10. irretrievable breakdown of marriage

The following do not amount to cruelty-

1. ordinary wear & tear of married life

⁷AIR 2002 SC 2528

⁸Legal Service India’s website: <http://www.legalserviceindia.com/articles/irrbdom.htm>

2. wife's refusal to resign her job
3. desertion per se
4. outbursts of temper without reason.

- **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 a desertion; they must co-exist to present a ground for divorce:

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

In *Bipinchandra v. Prabhavati*⁹, 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, Zorostranism, a divorce can be granted.

- **Insanity**

Insanity as a ground of divorce has the following two requirements-

- The respondent has been incurably of unsound mind
- 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 a psychology where man not only shuns the company of lepers but looks at them scornfully. Thus, it is provided as a ground

⁹ AIR 1957 SC 176

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 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 are 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. 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.

***Venkatame v. Patil*¹⁰:**

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

¹⁰ AIR 1963 Mys 118

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.

IV. THEORIES OF DIVORCE:

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

- Guilt theory or Fault theory
- Consent theory
- 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 spouse 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 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*¹¹ has recommended an amendment to the Hindu Marriage Act, whereby either spouse can cite irretrievable breakdown of marriage as a reason to seek divorce. Expressing the concern that divorce could not be granted in 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, 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 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 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 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 life of the spouses, it is necessary to dissolve such a marriage.

- **Demerits**¹²

(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 the advantage of his own fault by getting separated and dissolving the marriage.

¹¹ 2006(3) SCALE 252

¹² Ch. 4, 71st report of The Law Commission of India

V. CONCLUSION:

In India, especially among Hindus, marriage is considered as a sacred bond and a sacrament. Prior to the ascent of The Hindu Marriage Act, 1955, there was no provision of divorce whatsoever, which made the females in the society an item of discrimination and was subjected to cruelty and harsh situations in their marriage. It was a shameful period, as the right of divorce was granted as a remedy in The Hindu Marriage Act, 1955, which was five years after The Constitution of India came into force in which Article 14 ensured right to equality. Though, in the modern era, women are comparatively more vocal about their rights, and The Hindu Marriage Act, 1955 has been a facilitator in helping them do so. Though there are some loopholes, the act has been a stone pillar to protect married women's interests in a male dominant society.

VI. SUGGESTIONS:

- There should be equality among the distribution of shares and property among husband and wife. The Marriage Laws (Amendment) Bill, 2013 stated that a share in the man's property would be granted. As to the equality point of view, the share must be nothing less than fifty per cent.
- There must be a financial aid to the women who cannot bear the expenses of a legal battle in the court against her husband, as a majority of married women in India are housewives with no source of financial security.
- There must be a minimum sustainable compensation to be awarded to the wife in case of cruelty, abuse relating to dowry, etc. so as to send a powerful message to the people indulged in these practices.
- Marital rape should also be included in the list for granting a divorce, and a severe punishment must be awarded to the husband if he is proved guilty of marital rape.
- Fast track courts should be open to aid the speedy disposal of divorce cases, as prolonging them cause a financial as well as emotional misbalance to both the parties in the suit.