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Shedding Light on the Dark Themed Concept of Divorce

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ABSTRACT

Divorce has always been seen under a negative light in our society, the provisions for divorce that exist today in India throughout different acts do not seem progressive enough. Marriage is seen as an indissoluble relationship between a man and a woman under Hindu Law, and even though this hypothesis may sound timeworn, the concept of Restitution of Conjugal Rights stands upright to back this up. Until the enactment of the Hindu Marriage Act in 1955, Hinduism did not recognise the separation of a wife from her husband due to any reason, be it abandonment or domestic violence in the household. These reasons led people to believe that a broken marriage or a marriage which results in divorce is something that is against God's will, making divorce even a larger taboo in the Hindu community. Islam, on the other hand has recognised divorce as a matrimonial relief from the very start, however, it is something that is suggested to be avoided. One starts to question why divorce is seen as such a taboo in India and the answer to this question is often found in the very root of different religions. The Prophet has listed divorce as one of the worst things that have been permitted under Muslim Law, and it is not an option that one should opt for until and unless it becomes an absolute necessity. There are multiple theories of divorce under both the Hindu Law and the Muslim Law, this paper will seek to analyse these theories and compare the important grounds listed in them, providing more focus towards the divorce at will theory and the rather controversial theory of the Irretrievable Breakdown of Marriage under both the Hindu and Muslim Law.

I. INTRODUCTION

Divorce primarily corresponds to ending a marriage by dissolving the marital ties between two partners. After the court has allowed a decree for obtaining a divorce, the marriage between both partners is legally dissolved, and they no longer remain husband and wife. Divorce is governed by the Hindu Marriage Act, 1955 under Hindu Law, and Section 13 of this act primarily deals with concept of divorce. Muslim Law allows two different types of

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divorce, Judicial Divorce, which is governed by Dissolution of Muslim Marriages Act 1939 and Extra-Judicial Divorce, which is governed by the Muslim Personal Law. There are essentially five theories of divorce that are recognised under Muslim Law and Hindu Law. These theories are the following,

- 1) Divorce at Will Theory.
- 2) Frustration of Marriage Theory.
- 3) Fault Theory.
- 4) Mutual Consent Theory,
- 5) Irretrievable Breakdown of Marriage Theory.

These five theories present the essence of divorce in India, the Divorce at Will theory is only recognised under Muslim Law and not under Hindu Law. In contrast, the others are recognised under Hindu Law and are administered by the Hindu Marriage Act, 1955. These five theories essentially cover most of the grounds for divorce present under both Hindu and Muslim Law in India.

II. DIVORCE AT WILL THEORY

This theory is exclusively available under Muslim Law and as per this theory a person can divorce his/her spouse at their own will. The theory recognises the importance of free will and provides a unique platform for getting a divorce in India. Even though the divorce at will theory might make it seem like divorce is seen as an accepted tradition in Islam, the same is not the case. Islam ascertains divorce as an exception in the category of marriages, and the holy Quran expressly forbids a man to seek pretexts to divorce his wife as long as she remains faithful and obedient to him.² Furthermore, the prophet has stated that any man who leaves his wife for simple caprice brings upon himself the divine anger and the curse of Allah and no Muslim can justify this divorce in the eyes of the religion or the law.³ It can clearly be seen that even though Islam allows the Divorce at Will theory it is surely seen under disapproving light. There are two types of divorce under Muslim Law, Extra Judicial Divorce and Judicial Divorce. There is no interference of the court in case of Extra Judicial Divorce as its governed by the Muslim Personal Law whereas Judicial Divorce is available to only Muslim married woman through the Dissolution of Muslim Marriages Act, 1939 and requires the interference of the court to pass the decree of divorce. However, since the Divorce at Will

² The Qur'an, 4:34.

³ Ibrāhīm al-Ḥalabī, *Multaqā al-Abḥur*, 1517.

theory is governed by Muslim Personal Law, it is associated with the grounds present under the category of Extra Judicial Divorce as we'll further explore in this paper.

Extra Judicial Divorce contains three categories, the first category is divorce given by husband. This category essentially includes three ways to get a divorce, by the way of Talaq, Ila or Zihar. Ila and Zihar are seen as prominent practices in Muslim countries like Philippines, Middle East, Nigeria but not in India. Talaq is essentially the most used form of divorce by a husband, the concept of Talaq is further divided into three sub-categories, Ahsan, Hasan and Talaq-ul-biddat. Ahsan and Hasan are revocable forms of divorce whereas Talaq-ul-biddat is an irrevocable form of divorce which was recently made illegal by the supreme court by passing the Muslim Women (Protection of Rights on Marriage) Act, 2019 on 26th July, 2019. The main reason behind the ban was that this form of divorce was being misused by Muslim husbands as it allowed them to get a divorce just by uttering the word talaq three times in oral, written or, more recently, electronic form. Ahsan is the most used form of divorce, and it requires one single pronouncement in a period of tuhr⁴, followed by abstinence from sexual intercourse during the period of tuhr as well as during the whole of iddat⁵. The husband may revoke this talaq before the expiration of the period of iddat. Hasan is the second most used form of talaq, it requires three successive pronouncements during three consecutive periods of Tuhr. No sexual intercourse should've taken place in the periods of Tuhr when the husband makes the pronouncements, and the husband can revoke the first and second pronouncement, but the divorce is final after the third pronouncement. This form of divorce was essentially put into place by the prophet to avoid harassment of women as husbands used to pronounce talaq and revoke it several times which would often lead to the ill-treatment of women.

The second category in Extra Judicial Divorce is divorce given by the wife at her own will. This category essentially includes two ways to get a divorce, by the way of Talaq-e-tafwid: Delegated Divorce and Khula. Talaq-e-tafwid requires the husband to provide an agreement in which he can list under which circumstances would the wife have authority to divorce him. This is delegated form of divorce and such delegation is usually stipulated in divorce prenuptial agreements. This delegation can either be conditional or unconditional depending upon the husband. Since most of these agreements are in control of the husband in this form of divorce it can be argued that this form of divorce is given by the husband to his wife rather than the other around. The second form of divorce in this category is Khula, for a divorce to

⁴ Tuhr essentially means a period of purity i.e. when the woman is free from her menstrual courses.

⁵ Iddat is a period that a Muslim woman has to go through in which she cannot remarry, it is generally a period of three months from the date of declaration or if the woman is pregnant it extends until delivery.

be completed under this category it should satisfy three elements. Firstly, the wife must provide an offer to the husband for her release, secondly, there should be consideration flowing from the wife to the husband for the same offer and lastly, after the husband accepts the offer made by the wife, the divorce is complete. Most of the grounds for divorce by the act of the wife depend largely on the actions of the husband and therefore, ends up questioning the biasness of the divorce at will theory as the same is not the case when the husband wants a divorce. Furthermore, even though there are provisions under the Dissolution of Muslim Marriages Act that allow the wife to obtain divorce under different grounds, nothing comes close to amount of freedom and liberty given to the husband by the Muslim Personal Law, and hence, clearly highlighting the patriarchal structure of these laws. If both the husband and the wife want a divorce, then this results in Mubarat which can be classified under the Mutual Consent theory of Muslim Law.

III. FAULT THEORY

The fault theory provides a rubric for people to get out of marriages at the expense of their spouses committing a fault listed under Section 13(1) of the Hindu Marriage Act, 1955. Under the Muslim Law, fault theory is only exclusive to women through grounds listed under the Dissolution of Muslim Marriages Act, 1939, however, the primary focus of this paper for the fault theory as well as the frustration theory would be on the grounds listed under the Hindu Marriage Act as its not exclusive to one gender and leaves a broader definition to analyse. Adultery, Cruelty and Desertion are the three grounds listed under Section 13(1) of the Hindu Marriage Act for obtaining a divorce. Adultery can be understood as voluntary sexual intercourse between a married person and someone other than their spouse. Section 13(1)(i) states that a decree for divorce maybe be granted if the respondent is at fault under this section by committing the act of adultery.⁶ A single act of adultery is sufficient to seek divorce, however, there are several contingencies attached to the same. Firstly, the act of adultery should've been voluntary. Secondly, there should be a soundness of mind, that means any act committed under intoxication or unconsciously or without the mental capacity to consent or by force or fraud wouldn't qualify as adultery. Lastly, if the act is done mistakenly by the woman, i.e. if she mistakes another man for her husband then she's not guilty of adultery as well. Adultery has been recently removed as a criminal offence, in the case of *Joseph Shine v. Union of India (2018)*⁷, the supreme court found that it violated Article 14 of the Indian Constitution as the section 497 of the Indian Penal Code treated men

⁶ Section 13(1)(i), The Hindu Marriage Act, 1955.

⁷ *Joseph Shine v. Union of India*, (2018) SCC OnLine SC 1676.

and women unequally by allowing only the wife to prosecute their husbands for adultery. The second ground for claiming divorce under this theory is Cruelty, even though there isn't any definition for cruelty mentioned under the HMA, interpretation can be drawn from different statutes like the section 498 of the Indian Penal Code. Any conduct that gives rise to reasonable apprehension of danger to life, limb or health, bodily or mental to the spouse may be categorised as cruelty. The intention of a cruel mind is not necessary for an act to qualify under this statute. The court aims to protect any of the spouse who's suffering in the marriage. The cruelty under this ground may be mental or physical, intentional or unintentional. There is no objective test for cruelty, but the court opts for a subjective test by looking at the facts and circumstances that would've affected the victim in the case. There are four defences that one can opt for cruelty, insanity, provocation, self-defence and condonation. Even though some of these defences might not be able to act as a complete defence but can surely help in reducing punishment for the same as cruelty is also a criminal offence under section 498A of the Indian Penal Code. The last ground that we'll be exploring under this theory is that of Desertion, this ground essentially comes into play when there is a case of abandonment of one spouse by the other without reasonable cause and without consent. Desertion may not necessarily mean abandonment from a particular place but can also imply withdrawal from the state of things and marital obligations. There are further two types of desertion, actual and constructive. Actual desertion means an actual abandonment and withdrawal of a matrimonial home accompanied with an intention to leave or desert. Constructive desertion means creating an environment which makes it impossible for the other spouse to live in and hence, is forced to leave the matrimonial house. Constructive desertion may also be caused due to some conscious negligence of one spouse that forces the other to leave. Section 13(1) (ib)⁸ of the HMA gives a condition for the act of desertion to be of minimum two years before a claim can be brought under the same. One major drawback of the fault theory is that if both parties are at fault then a decree for divorce would not be granted by the court.

IV. FRUSTRATION OF MARRIAGE THEORY

This theory provides a way out for a frustrated spouse out of marriage. Divorce is provided as a relief if the reasons for frustration qualify the definitions of the grounds mentioned under Section 13(1) of the Hindu Marriage Act⁹. According to this theory there are five grounds that one can opt for putting an end to a marriage due to frustration. A spouse may put an end

⁸ Section 13(1) (ib), The Hindu Marriage Act, 1955.

⁹ Section 13(1), The Hindu Marriage Act, 1955.

to the marriage under this theory on the basis of conversion of religion by the other party, unsoundness of mind of the other party, if the other party is suffering from a venereal or communicable disease, renunciation of world by the other party and lastly if the other party has been declared legally dead. Unsoundness of mind relates to a mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind as mentioned under Explanation(a) of Section 13(1)¹⁰. Furthermore, for a person to be pronounced legally dead, the party should've not been heard of being alive for seven years by people who would've heard had the party been alive. The rest of the grounds under this theory are to read as exactly as they are written, and no further elaboration is needed to explain those. Leprosy used to be a valid ground under this theory however due to medical advances it has become curable now and hence, it has been removed as valid ground for seeking divorce.

V. MUTUAL CONSENT THEORY

The concept of obtaining a divorce through mutual consent is available in both Muslim Law and Hindu. This theory provides a platform for spouses to end a marriage through smooth proceedings without going through many arguments. Both the spouses have the option to jointly present a petition for divorce under the Hindu Law. Section 13B of the Hindu Marriage Act allows mutual consent as ground for divorce under Hindu Law. However, there are contingencies attached to the same, firstly the parties must've been living separately for at least a period of one year before filing a petition under this ground, living separately implies that the parties have no desire to perform marital obligations and they have not been able to live as husband and wife. The reference living separately has little to do with the place of living and more to do with the mental surety of not living as a married couple. The supreme court in the case of *Sureshta Devi v. Om Prakash (1991)*¹¹, found that consent for divorce under this ground is revocable and therefore, shall continue till the decree for divorce is passed. Mutual consent for divorce under Muslim Law is known as Mubarat and its very similar to the Hindu Law, however, one prime difference under Mubarat is that once consent is given it becomes final and is irrevocable.

VI. IRRETRIEVABLE BREAKDOWN OF MARRIAGE THEORY

The theory is based on the principle that marriage is based on love and respect that the spouses share for each other and it believes that if the very basis on which a marriage is based

¹⁰ Explanation(a), Section 13(1), The Hindu Marriage Act, 1955.

¹¹ *Sureshta Devi v. Om Prakash*, (1992) AIR 1992 SC 1904.

on is hampered then there is little or no reason left for the spouses to continue with the marriage. Even though Muslim Law does recognise this theory to a certain extent, the Hindu Marriage Act has very little mention of the theory. A new section was inserted in 1964 as Section 13 (1A) which factors in the concept of ‘irretrievable breakdown of marriage’ but nothing concrete has been laid down yet. There have been respectively two law commission reports in 1978 and 2009 which recommended amendment to the Hindu Marriage Act to contain irretrievable breakdown of marriage as a valid ground for seeking divorce, no change has been made with respect to the same. Moreover, the supreme court in the case of *Naveen Kohli v. Neelu Kohli (2006)*¹², recommended the same amendment in the Hindu Marriage Act, however, there has been no amendment made till date. There are demerits and critiques to this theory as well, the 71st report of the law commission of India¹³ dealt mainly with two demerits of this theory. Firstly, it will allow spouses more flexibility to obtain divorces as they could now do it through their own will and secondly, it would allow the guilty party to take advantage of a fault committed by him/her by getting separated and claiming divorce under this section. It is imperative to highlight here that the first point that the Law commission raises against this theory is already a practised form of divorce under Muslim Law as we’ve explored in the divorce of will theory and hence, makes one question the authenticity of a broken marriage.

VII. CONCLUSION

The aim of this paper was to highlight that be it any of the two religions, Hinduism or Islam, both consider marriage to be the purest of bond. There is a belief that marriage, if broken, will result in repercussions in front of both, the society and the ultimate god. The lack of amendment in the Hindu Marriage Act to include the irretrievable breakdown of marriage theory despite several suggestions by the Law Commission and the supreme court highlights the reluctance of people to confront a concept as common as Divorce. However, something as personal as marriage requires the interference judiciary to be very cautious and hence, ultimately makes the judiciary reluctant to interfere with the already laid down rules in the Muslim Personal Law and the Hindu Marriage Act.

¹² Naveen Kohli v. Neelu Kohli, (2006) AIR 2006 SC 1675.

¹³ Law Commission of India, Seventy First Report on the Hindu Marriage Act, 1955- Irretrievable Breakdown of Marriage as a Ground of Divorce, 1978.