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DIVORCE: ADULTERY

“PEOPLE DO NOT GET MARRIED PLANNING TO DIVORCE. DIVORCE IS THE RESULT OF A LACK OF PREPARATION FOR MARRIAGE AND FAILURE TO LEARN THE SKILLS OF WORKING TOGETHER AS TEAMMATES IN AN INTIMATE RELATIONSHIP.”¹

-Grey Chapman

ABSTRACT:

A family law is a body of laws that address issues including marriage, divorce, infertility, succession, adoption, paternity, and guardianship.

In India, the laws governing these affairs are divided into several categories, including Hindu law (which governs all Hindus, including Jains, Buddhists, and Sikhs), Muslim law, Christian law, Parsi law, and special law, which includes a special Marriage Act).

In this paper the main focus is on divorce in the view of HINDU MARRIAGE ACT, 1956.

Divorce refers to the dissolution of marital ties and the ending of the marriage. It is the judicial or other competent court's lawful dissolution of a marriage. Parties are no longer allowed to be married after a divorce. Each party is free to enter into new marriages as they see fit under the terms of the divorce order. In the present era, divorce is an option for partners who are unable to coexist in harmony. The Hindu Marriage Act of 1955 governs divorce under Hindu law. We have different grounds for divorce out of which this paper deals with adultery as the ground of divorce. As in the back ground of adultery, criminal liability, etc.

¹ A quote by Grey Chapman.

In our nation, adultery has always been demoralizing. In India, the discouragement has actually gotten worse over time. Until the year 1976, adultery in our country was only grounds for divorce if the spouse was actually engaging in adultery. However, today, a divorce or judicial separation petition can be filed even if there has only been one occasion of willing sexual activity with someone other than the spouse.

Adultery is considered as a ground for divorce but is it only a ground for divorce or an offence. Talking about various grounds of divorce there are in total 16 grounds but this article deals with only adultery as a main ground how it was and how it evolved over the times.

KEYWORDS: Divorce, Adultery, Criminal offence, Theories of divorce, Amendments, landmark case, etc.

HYPOTHETICAL ANALYSIS:

Adultery can also be referred as an offence.

INTRODUCTION:

Marriage is both a sacrament and a contract. It is a contract because it is founded on an offer and acceptance and is comparable to a living arrangement. Sacrament because of its connection to religion. Tolerance, flexibility, and mutual respect are the foundations of an effective marriage. The marriage will not be happy if one of the parties is not prepared to coexist with the other party.

Stretching such a relationship won't help but will only lead to the spouses' growing resentment and unhappiness. Therefore, it is vital to dissolve such marriages in order to preserve the sanctity of marriage, to lower the number of unhappy marriages, and to avoid wasting the valuable years of the spouses' lives.

Divorce is the legal dissolution of a marriage by an experienced judge. This essay explores Hindu law's views on divorce. Due to the sacramental nature of marriage, the concept was non-existent under ancient law, but it was introduced by the Hindu Marriage Act of 1955. The various philosophies of divorce; fault, mutual consent, and breakdown are examined. The grounds for divorce under this Act are also discussed, with an emphasis on adultery and cruelty, as well as how these reasons have been altered through revisions. It briefly discusses the exclusive grounds that a wife has access to.

As long as marriage was seen as an unbreakable bond between the husband and woman, divorce was previously illegal under general Hindu law. Manu stated that a wife could not be released by her husband by either sale or abandonment, meaning that there was no means to break the marriage. Even though Hindu law does not yet address divorce, it has been ruled that in cases where it is acknowledged as an established custom, it will have legal standing.

According to Kautilya's Arthashastra, 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.²

It is widely accepted that the marital connection must be protected from all sides and that only compelling reasons should be given for ending a marriage. Divorce was not recognized under general uncodified Hindu law, unless it was permitted by tradition. Divorce is only permitted under specific, serious conditions and is never promoted nor supported.

The Hindu Marriage Act, which was passed in 1955, established guidelines for divorce. The provisions of Sections 13, 13(1A), 13A, 13B, 14, and 15 deal with divorce and everything linked to it. In Arthashastra, Kautilya asserts that an unrecognized kind of marriage can be ended by mutual consent. Manu, on the other hand, held the view that marriage, as a sacrament, could not be abandoned and that faithfulness between a husband and wife should endure until death. However, after the Hindu Marriage Act of 1955 legalized divorce, the terms were altered.

THEORIES OF DIVORCE:

There are three types of theories which are as follows: -

Fault Theory:

According to the fault theory, offences theory, or guilt theory, a marriage can only be dissolved if either spouse has committed a matrimonial offense. There must be a guilty and an innocent person, and only the innocent party may seek divorce as a remedy. The most notable aspect and disadvantage, however, is that there is no recourse if both parties were at fault.

Mutual Consent Theory:

² Agarwal, R.K, Hindu law Book.

The mutual consent divorce theory is another theory. The fundamental assumption is that since two people can choose to get married, they should also be able to end their partnership voluntarily. However, opponents of this notion claim that this strategy will encourage immorality because it will result in hurried divorces and cause partners to end their marriages even if there is just a tiny temperamental incompatibility.

Irretrievable Breakdown Theory:

The third theory focuses on the marriage's unrecoverable dissolution. "Such failure in the matrimonial relationships or such circumstances adverse to that relationship that no reasonable probability remains for the spouses to again live together as husband and wife" is the definition of a marriage breakdown. Such a marriage should be ended amicably and with the least amount of hurt, suffering, and shame possible.

Frustration Theory:

According to this view, the idea of divorce provides relief from annoyance. The spouses may become frustrated for a variety of reasons. One spouse's long-term emotional grief, disappointment, and frustration brought on by the actions of the other spouse may result in mental cruelty. According to this belief, either spouse can abandon a marriage due to a mental illness, a physical condition, a change in religion, renunciation of the outside world, or going unnoticed for an extended length of time. Any form of marital infractions will not be included in this idea and only these reasons will remain as grounds for divorce. According to this theory, a person's preference for divorce based on the aforementioned reasons is seen as a valid premise.

GROUNDS FOR DIVORCE:

It is acknowledged in every jurisdiction that public policy, good morals, and the interests of society demand that marriage be protected in every way possible and that its dissolution be permitted only in the ways and for the reasons permitted by law. Divorce is neither favoured or encouraged, and it is only allowed under extreme circumstances.

A 1964 amendment changed some provisions of Section 13(1) to become Section 13(1A), recognizing two reasons for a marriage's dissolution. Two new fault grounds for divorce for wives were added by the 1976 amendment act, along with a new section 13B allowing divorce by permission of the parties. It also provides four more grounds of divorce available

to only wife. In total there are 16 grounds of divorce out of which 4 are only dedicated to wife. Valid grounds for divorce are **Adultery, Cruelty, Desertion, Conversion, Insanity, Leprosy, Venereal disease, Renouncing the world, Not heard of, Judicial separation, Restitution of conjugal rights, Mutual consent, Bigamy, Rape Sodomy or Bestiality, Decree or order Awarding Maintenance and Repudiation of Marriage**. In this article we are dealing about adultery only, on how it became the ground for divorce after the amendment of 'Hindu Marriage Act, 1976.'

Adultery:

Adultery means any person either wife or husband after the solemnisation of marriage has a voluntary sexual intercourse with someone else other than his or her spouse is known as adulterous relation. Adultery is always been considered as a crucial matter. However, on attempt to commit adultery does not amount to adultery and cannot therefore be the basis of a petition for judicial separation.

Earlier adultery was not at all considered a ground for divorce. Earlier it was regarded to be immoral behaviour. Even while adultery was a gravely shameful offense, it was not a reason for divorce. The grounds for divorce and judicial separation became the same under this change, which was noted as a notable advancement in the field of Hindu personal law.

Sexual contact is a requirement for adultery to exist; conversing or being intimate with the other spouse does not qualify. For instance, if a man has a void marriage, marries another woman, and then maintains a sexual contact with his first wife, he will be guilty of adultery, and the second wife may apply for divorce in accordance with section 13 of the Act.

Marriage Laws (Amendments) Act, 1976:

Many laws were amended in the Marriage Laws (Amendments) Act, 1976 out of which adultery was considered as a ground for divorce and marked its sign as an offence to his or her spouse. The petition for adultery can be filed by either of the party under section 13(1)(i) of the Hindu Marriage Act.

"Living in adultery" is a ground for divorce. Contrast this with "adultery," which is the grounds for divorce that are typically listed in law in other nations as well as in the Special Marriage Act. In 1955, the Indian Parliament adopted the position that, for a Hindu marriage, a single act of infidelity to the marriage bond should only be grounds for judicial separation

rather than a decision of divorce. Therefore, it is currently necessary for one of the participants to the marriage to be continuing their adulterous lifestyle. The practice of adulterous "living" must still be going on now rather than being a thing of the past.

Since adultery is a crime against marriage, it is important to prove that the marriage was still intact when the adultery was committed. Furthermore, it follows that adultery is impossible unless both parties agree to it voluntarily. If the woman is able to prove that the co-respondent sexually assaulted her, the husband will not be granted a divorce.

This amendment not only added adultery as a ground for divorce but also considered divorce as mutual consent a valid ground for divorce under section 13B of Hindu Marriage Act.

Criminal Charges For Adultery:

Section 497 of Indian Penal Code, 1860 dealt with the offences related to adultery. Previously, adultery was a crime punishable by five years in prison or a fine or with both. under Indian criminal law, or the Indian Penal Code. The rule made it illegal for a man to have sex with another man's wife without getting her permission; nevertheless, a woman engaging in extramarital affairs or having sex with a guy could not be punished. The elimination of India's adultery laws was largely a result of this prejudice. Since the Supreme Court's 2018 ruling, **Joseph Shine v. Union of India** adultery is no longer a criminal. It merely continues to be one of the divorce grounds in India.

But now, at present there are no criminal offences or criminal charges for adultery. It is a ground for divorce only.

CASE ANALYSIS:

Joseph Shine v. Union of India³

The constitutionality of Section 497 of the Indian Penal Code, 1860 (IPC), which dealt with the criminal offense of adultery, and Section 198(2) of the Code of Criminal Procedure, 1973 (CrPC), which stated that only the husband of a person accused of adultery would be considered to be harmed by the commission of an offense under Section 497, was challenged in 2017 by Joseph Shine, an Indian citizen living in Italy.

³ Joseph Shine v. Union of India AIR 2018 SC 4898

Although adultery was no longer a crime, the court recognized that it was nonetheless a civil wrong and a viable reason for divorce. It was said that while adultery belonged within the category of personal difficulties, criminal offenses were committed against the society as a whole. The Court ruled that by criminalizing adultery, the State had intruded into people's private affairs. The Court also ruled that when an adultery has occurred, the husband and wife should be free to decide together based on their own judgement.

Because it contravened Articles 14, 15, and 21 of the Constitution, the Supreme Court invalidated Section 497 of the IPC. The five-judge bench ruled unanimously in four concurring decisions that the statute violated a woman's liberty, dignity, and privacy and was outdated, arbitrary, and patronizing. The CrPC's Section 198(2), which restricted who could file charges under Section 497 of the IPC to a husband, was also declared invalid.

Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors⁴.

The 'Right to Privacy' jurisprudence in India is founded on this decision. In this instance, the nine-judge bench unanimously reiterated that everyone has the constitutional right to privacy. The Supreme Court ruled that maintaining one's privacy is essential to the freedoms afforded by other fundamental rights and is also a vital component of one's sense of worth, autonomy, and liberty.

Notably, the judgment presented an outline of the judicial review method that must be used in situations where the State invades a person's private while simultaneously concluding that the right to privacy was not absolute in nature. According to its ruling, the right to privacy may be limited where an invasion satisfies the three criteria of the existence of law is predicated by legality; need is defined in terms of a justifiable governmental goal. A sensible connection between the goals and the methods used to attain them is ensured by proportionality.

Additionally, the Court emphasized how important sexual orientation was as a component of privacy. It also covered the negative and positive aspects of the right to privacy, including how the State was both prohibited from violating the right and required to take the appropriate steps to protect a person's privacy.

According to the ruling, the right to privacy includes the privacy of personal information. While acknowledging the necessity for a data protection law, the Court left it up to Parliament to enact legislation.

⁴ Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors AIR 2017 SC 4161

CONCLUSION:

Hindus regard marriage as a holy union. Divorce was not permitted before the Hindu Marriage Act of 1955. The thought of getting divorced was too radical for the Indian society then. The silent victims of such a strict regime were the women. But times have changed, things have changed, and the social order has changed. The law now offers a mechanism to end a bad marriage by filing for divorce in a court of law. Women who no longer have to suffer abuse or injustice at the hands of their husbands in silence are the true winners of such a policy. Hindus consider marriage to be a sacred connection. Before the Hindu Marriage Act of 1955, divorce wasn't even an option. Divorce was considered too radical at the time for Indian society. Women were the silent victims of such a rigorous system. However, things have changed, the social order has altered, and the times have changed. The legislation now provides a way to end an unhappy union by requesting a divorce from a judge. The real beneficiaries of such a program are women who are no longer forced to suffer violence or injustice at the hands of their husbands in quiet.

In our nation, adultery has always been demoralizing. In India, the discouragement has actually gotten worse over time. Until the year 1976, adultery in our country was only grounds for divorce if the spouse was actually engaging in adultery. However, today, a divorce or judicial separation petition can be filed even if there has only been one occasion of willing sexual activity with someone other than the spouse.

Along with Section 497 of the IPC, Section 198 of the CrPC was also found to be unconstitutional, decriminalizing adultery as a crime. The history of Section 497, according to Justice DY Chandrachud, shows that the legislation on adultery was intended for the benefit of the husband, allowing him to secure control over the sexuality of his wife. It was intended to restrict the woman's ability to exercise her sexual agency.

The judiciary in India has adopted a serious stance toward the idea of adultery. It has taken into account the diverse social situations, the situation of the party who filed for divorce, and the presence of children. When there are children involved, it is not taken seriously when a petition submission has been delayed.

The Supreme Court declared a 150-year-old legislation on adultery that views the husband as the master of his wife unlawful. The adultery ban is arbitrary and insults a woman's dignity, says India's then-chief justice.

Therefore, our hypothetical analysis is wrong. Adultery cannot be considered as an offence it is merely a ground for divorce.

REFERENCES:

<https://www.legalserviceindia.com/article/1291-Adultery.html#:~:text=In%20India%20the%20offence%20of,be%20punished%20even%20as%20abettors.>

1. <https://www.legalserviceindia.com/legal/article-1140-decriminalization-of-adultery-in-india.html>
2. <https://blog.ipleaders.in/punishment-for-adultery-in-india/#:~:text=Punishment%20for%20the%20offence%20of,case%20of%20Joseph%20Shine%20v.>
3. <https://www.indiafilings.com/learn/adultery-a-ground-for-divorce-in-india/>
4. https://www.lawctopus.com/academike/divorce-under-hindu-law/#_edn4