CHAPTER-II
GROUND OF DIVORCE UNDER HINDU RELIGION OR HINDU LAW
UNIT-A

Married as it was to the doctrine of indissolubility of marriage (marriage being a sacramental union was an in rolable and immutable union—thus even death did not dissolve the marriage), the Dharmashastra did not recognise divorce, and any attempt to deduce from s ray Smiriti texts. (1) the proposition that divorce was recognised by some Smritikars is nothing but owe’s inability to comprehend the basic concepts that the dharmashastra propounded. However, the dharmshastra’s adherence to the doctrine of indissolubility of marriage didnot hamper the recognisition of the people’s need of divorce, and a large section of Hindus (i.e., the lower classes) did enjoy the right of divorce. This was under the custom which prevailed over the sacred law. (2) Customary modes of divorce were easy. In some cases a marriage could be dissolved by mutual consent. (3) Some times divorce could also be purchased. (4) Very little formats for dissolving a marriage where needed many a time it on purely a private act of parties in some communities a form was necessary it was either a Panchayat or family concil cuslomary divorce was the privilege of the lower castes and higher castes selfom had a custom which permitted divorce. (5)

Later on when insanity was added as a ground for
divorce the guilt or offence theory suffered a jolt, since it could not be said that the party suffering from insanity or unsoundness of mind was guilty of matrimonial offence of insanity. Insanity is a misfortune, not a guilt. With insanity being recognised as a ground some other diseases like leprosy also came to be recognised. This led some to re-name the doctrine and it was given the name of fault theory, i.e., if the respondent has some such fault which makes continuance of cohabitation almost impossible or very difficult, then the petitioner is entitled to divorce.

It was in this background of English law, that the special Marriage Bill and Hindu Marriage and Divorce Bill came before Parliament. It may be noted that in 1950 the Matrimonial Causes Act was passed by the English Parliament which consolidated and reformed the then existing English matrimonial law. A basic knowledge of the provisions of the Matrimonial Causes Act, 1950 is essential as we have freely (it is submitted, at times, thoughtlessly) drawn from it. Section 1 of the Act recognized four grounds of divorce on the basis of any one of which either party to the marriage could present a petition: viz., adultery, desertion, cruelty and insanity. Wife could also present a petition on the ground that since the solemnization of marriage the husband is guilty of rape, sodomy and bestiality. Section 2 laid down a
three years bar to divorce (which is also known as the fair trial clause). We have adopted this section almost verbatim in section 14 of the Hindu Marriage Act, 1955 and in section 29 of the Special Marriage Act, 1954. Section 4 deals with the bars to relief which we have substantially copied in section 23, the Hindu Marriage Act, and in section 34, the Special Marriage Act. The basic modification we introduced is that we have made all of them as absolute bars. This basic structure of divorce in English law was adopted by us in both the statutes, viz., the Special Marriage Act, and the Hindu Marriage Act. The guilt or fault theory was also adopted by us without much ado. In respect of grounds of divorce in the Hindu Marriage Act, what we did was to adopt a conservative stance and made all the three traditional fault grounds of divorce, i.e., adultery, cruelty and desertion, as grounds of judicial separation. We thought one act of adultery should not be sufficient for divorce and, therefore, we laid down the ground as 'living in adultery' (to be more precise 'respondent is living in adultery', is the ground of divorce). We made insanity, venereal diseases and leprosy as common grounds of divorce and judicial separation (with a very irrational distinction of period and use of some superficial words), and added some typical Hindu grounds of divorce, such as conversion and renunciation of the world. "Presumption of death and dissolution of marriage" which is a separate provision under the
Matrimonial Causes Act, 1950 was made as one of the nine grounds of divorce. Divorce on the basis of non-compliance of decree of restitution of conjugal rights and non-resumption of cohabitation after a decree of judicial separation are the provisions borrowed from the state laws of the Commonwealth of Australia. What need to be emphasised is that in both the statutes Parliament enshrined the guilt or fault theory of divorce, though under the Special Marriage Act, the consent theory had also been accorded recognition.

The Divorce Law Reform Act, 1969 substantially accepted the third alternative proposal of the Law Commission. It also accepted the recommendation of the Mortimer Committee inasmuch as it accepts only one single ground of divorce. But curiously enough, what has been done is this that indirectly the three traditional grounds of divorce too have been retained. The Mortimer Committee's recommendation is incorporated in section 1 which lays down that after the commencement of the Act the breakdown of the marriage shall be the sole ground of divorce. Section 2 formulates certain criteria of breakdown; these are: (a) adultery of the respondent, but then the petitioner has also to establish that on this count he finds it impossible to live with the respondent; (b) cruelty of the respondent, (which is stated in the following terms: the respondent has behaved in such a way,
that the petitioner cannot reasonably be expected to live
with the respondent); (c) two years desertion; (d) two
years living apart of the spouses, provided the
respondent agrees to divorce (this is the English version of divorce
by mutual consent); and (e) five years living apart of the
spouses (in this consent or non-consent of the respondent
is immaterial).

Section 2 of the Matrimonial Causes Act, 1973 lays down something in the nature of condemnation and clarification in respect of the first three facts of breakdown of marriage (from sub-section (1) to sub-section (5). Sub-section (6) explains the meaning of living apart. A husband and wife shall be treated as living apart unless they are living with each other in the same household. Section 3 of the Matrimonial Causes Act, 1973 enacts the three bar (or fair trial to marriage clause) in the same as it had existed in earlier Matrimonial Causes Acts. However, a petition for divorce on the ground of five years separation may be opposed "on the ground that the dissolution of marriage will result in grave financial or other hardship to him and that it would in all circumstances be wrong to dissolve the marriage." When the petition on the ground of five years separation is opposed,

the court shall consider all the circumstances, including the conduct of the parties to the marriage and the interest of those parties and of any children or other persons concerned, and if it
is of opinion that the dissolution of the marriage will result in grave financial or other hardship to the respondent and that it would in all circumstances be wrong to dissolve the marriage it shall dismiss the petition.\(^{(12)}\)

Under the Act the court has a duty to attempt reconciliation.\(^{(13)}\) The Matrimonial Causes Act, 1973 makes adequate provisions for financial relief for parties to marriage and children of the family.\(^{(14)}\)

In Australia also in 1966 the breakdown principle was accepted as a ground for divorce. Five years separation is considered to be evidence of breakdown of marriage. Thus divorce may the obtained on the ground that the parties to the marriage have separated and thereafter have lived separately and apart for a continuous period of not less than five years immediately preceding the date of petition, and there is no likelihood of cohabitation being resumed.\(^{(15)}\)

However, a clarification is made:"The parties to a marriage may be taken to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of only one of the parties, whether constituting deseration or not".\(^{(16)}\)
It is in this background—of the world laws of divorce—that the Indian provisions of divorce in the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955 and the proposal of the Ministry of Law for reforms and the recommendations of the Law Commission are to be looked at and judged, in our own social background, and also realizing that there is a basic unity in the matrimonial law all over the world.

When the Rau Committee submitted the Draft Hindu Code Bill, 1948 it had no model like the Matrimonial Causes Act, 1950. The divorce provisions of the Hindu Code Bill make a strange reading as an attempt had been made for blending the law of nullity and divorce. But when the Special Marriage Bill and the Hindu Marriage and Divorce Bill were drafted, the Matrimonial Causes Act, 1950, was readily available and our draftsmen had no hesitation in freely drawing on it, though hither and thither they made their own innovations. Probably, the Special Marriage Bill was meant to be a progressive measure, a measure for the educated and enlightened and, therefore, it seems, that both the fault theory and consent theory of divorce are given a place in the Act.

Section 27 of the Special Marriage Act, lays down eight fault grounds. The three traditional guilt grounds, adultery, cruelty and desertion (three years); three grounds pertaining to certain diseases, such as insanity,
incurable and continuous venereal diseases in a communicable form, leprosy (all of at least three years duration); and seven years sentence of imprisonment, presumption of death (it may be interesting to note that under the Dissolution of Muslim Marriage Act, 1939 the divorce may be obtained if whereabouts of the husband are not known for a period of four years). The three additional guilt grounds on which the wife alone can seek divorce are: rape, sodomy or bestiality. The divorce by mutual consent was enacted in section 28. It is ensured that no hasty divorce may be obtained on this ground. Every petition must precede by a separate living for a period of at least two years and no decree can be passed dissolving the marriage unless a period of one year elapses after the presentation of the petition (that also only on a motion moved by either parties). At that time divorce on the breakdown principle was not even in the contemplation of Parliament.

The breakdown principle was also not in the contemplation of Parliament when the Hindu Marriage Act was passed in 1955. Rather, the Hindu Marriage Act displays a strange conservatism, a strange faltering attempt at reform, a half-hearted endeavour to march with the time. The feeling, the psychosis that Hinduism is conservatism, orthodoxy and almost a make-belief that Hindu society will not tolerate any rapid or radical reforms of its law, make one proceed very cautiously. One
point that is forgotten is that the dharmashastras have touched the common people only at the fringe. The lower classes of Hindus—who have always formed a large section of society—have always a very liberal law of divorce. Conservatism and Orthodoxy have prevailed mostly among the elite, the purohits, the ruling classes and the Vaishyas. Dharmashastras have not been conservative. The Law Commission is as much aware of this as any one of us:

Hindu law was never static; it was dynamic and was changing from time to time. The structure of any society, which wants to be strong, homogeneous and progressive, must, no doubt, be steady but not static; stable but not stationary; and that is exactly the picture we get if we study the development of Hindu law carefully before the British rule began in India. (18)

But unfortunately that is not the picture of Hindu law ever since the Britishers left India.

Suffering from the psychosis that Hinduism symbolizes conservatism and orthodoxy, the reforms that were made in Hindu law of marriage and divorce are far from being satisfactory. The Hindu Marriage Act, 1955 did not represent a picture of progressive law when it was enacted and the reforms that are proposed by the law ministry and the recommendations that have been made by the Law Commission fail to make the Hindu matrimonial law
(even if all the recommendations are accepted) an example of progressive law. One may be permitted to quote what the Law Commission had quoted in its introduction to the report from Radhakrishnan:

To survive, we need a revolution in our thoughts and outlook. From the alter of the past we should take the living fire and not the dead ashes. Let us remember the past, be alive to the present and create the future with courage in our hearts and faith in ourselves.

Let us then look at the revolution in thoughts and examine the matrimonial law that we are going to reform from that angle.

Even a cursory glance at the provisions of Hindu Marriage Act, 1955 will indicate that the framers of divorce structure of Hindu Marriage Act founded their grounds on the guilt or fault theory. In fact it is the guilt theory which loomed large in the minds of the framers of the Act and which is still looming large in the mind of the Ministry of Law and the Law Commission. But even the guilt theory was made more rigid by the framers of the Hindu Marriage and Divorce Bill so much so that in the Act of 1955 it becomes virtually a reactionary theory. The three traditional fault or guilt grounds, adultery, desertion and cruelty, are not grounds of divorce. Starn-gely, one signle act of adultery is not considered
to undermine the foundation of marriage and, therefore, 'living in adultery' is made a ground of divorce. Then virulent leprosy, incurable and continuous insanity and venereal diseases (all for at least three years) are made grounds of divorce. Conversion to another religion and renunciation of the world as grounds of divorce are included in the typical background of Hindu society. Then there were added two more grounds: the non-compliance of a decree of restitution of conjugal rights and non-resumption of cohabitation for a period of two years or more after the decree of judicial separation entitled the petitioner for the restitution of conjugal rights or judicial separation, as the case may be, to divorce. These too were based on the fault theory. The wife is entitled to sue on the ground of rape, sodomy or bestiality by the husband after the marriage. Thus section 13 of the Hindu Marriage Act contains the matrimonial offences or fault theory and section 23 contains the matrimonial bars. The dichotomy of fault theory viz., one party at fault and the other innocent, was enacted in Hindu Marriage Act.

In 1964 it occurred to a member of Parliament to introduce breakdown principle in Hindu law of divorce on the basis of the Australian Matrimonial Causes Act, 1959. He moved a private member's Bill and very quietly the breakdown principle was enacted in the Hindu Marriage Act by remodelling clauses (viii) and (ix) of section 13(1)
and numbering the provision as section 13(1A). The provision runs as under:

Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground-

i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of two years or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of two years or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they are parties.

It is obvious that under this provision even the guilty party is entitled to seek divorce. Only basis of divorce is that despite the decree of restitution of conjugal rights, there is no cohabitation between the parties for a period of two years or more or cohabitation has not been resumed for a period of two or more after the decree of judicial separation. This way of living apart is considered to be evidence enough of the breakdown of the marriage. That this was so is abundantly
clear from the statement of objects appended to the Bill. It was stated therein:

The right to apply for divorce on the ground that cohabitation has not been resumed for a space of two years or more after the passing of a decree for judicial separation or on the ground that conjugal life has not been restored after the expiry of two years or more from the date of decree for restitution of conjugal rights should be available to both the husband and the wife as in such a case it is clear that the marriage has proved complete failure. Therefore, there is no justification for making the right available only to the party who has obtained the decree in each case. (25)

The breakdown principle was thus introduced in the Hindu matrimonial law very quietly, without the Ministry of Law making any proposals of reform and the Law Commission its recommendation. And probably this quietness caused the difficulties of interpretation. It is interesting to note that with a similar quietness a similar provision was introduced in the Special Marriage Act, in 1970, though in each case the minimum period is one year.

This is the divorce structure of Hindu Marriage
Act, 1955, (basically this is also the divorce structure of the Special Marriage Act, 1954). It is in this background that the proposals of the Ministry of Law and the recommendations of the Law Commission should be taken into consideration. The proposals of the Ministry of Law and the recommendations of the Law Commission with regard to dissolution of marriage may be divided into three heads: (i) some modification in the guilt grounds; (ii) reduction of period from two years to one in the breakdown grounds; and (iii) addition of new grounds. The Law Commission accepts some of the proposals of the Ministry of Law and recommends their implementation. The members of the Law Commission have also made their own recommendations all of which fall under head (i), i.e., some modification in the guilt grounds. We would proceed to consider the proposals of the Ministry of Law and the recommendations of the Law Commission together.

In the report of the Law Commission some new grounds of divorce have been recommended under the Hindu Marriage Act, 1955 and some of the existing grounds have been recommended to be reformed. The general approach of the Law Commission on divorce is based on the fault theory. It has been observed:

"...our approach in this regard has been that while all reasonable efforts must be made to protect stability of the marriage, at the same time, if
circumstances exist which show that conjugal life is impossible either by reason of a matrimonial offence or by reason of disease, or other specified circumstances, then reality must be recognized and provision should be made for terminating the bond of marriage. (26)

Thus, it seems that breakdown of marriage is not within the approach of the commission. (27)

Adultery has been suggested to be made a ground of divorce under the Hindu Marriage Act, 1955. The proposed language of this ground runs: "has, after the solemnization of the marriage, (28) had voluntary sexual intercourse with any person other than his or her spouse". This is the language of clause (f) of section 10(1), only the word 'voluntary' has been added before the word 'sexual'. It is a common knowledge that adultery means voluntary extramarital sexual intercourse. It is submitted that one is at a loss why two works "committed adultery" have not been considered sufficient (clause(a) of section 1(l) of the Matrimonial Causes Act, 1950, it may be interesting to note, uses the words; "has since the celebration of marriage committed adultery").

In this connection the Law Commission uses the words, "after the solemnization of the marriage", but in connection with "cruelty" it insists that these words should not be used. (29) It is obvious that one cannot
commit adultery before marriage, but one can commit cruelty. It is submitted that these words should either be used with both the clauses or should be omitted from both. It is needless to say that cruelty and adultery should be grounds of divorce, and should have been so even in 1955, since the former is the destructor of "mutual confidence", the very basis of marriage, and the latter of the very foundations of marriage, marriage being an exclusive union.

The Law Commission also suggests two years desertion as a ground of divorce and adopts the definition of "desertion" given under section 9(1)(a) and explanation to that section of the Hindu Marriage Act, for both the Hindu Marriage Act, and Special Marriage Act.

Thus, the three traditional guilt grounds of divorce which have been recognized almost all the world over from the nineteenth century onwards are now proposed to be made grounds of divorce under Hindu law in the latter part of the twentieth century. (30)

The Law Commission has also suggested some reforms in the three grounds of divorce relating to certain diseases, both under the Hindu Marriage Act and the Special Marriage Act. First recommendation relates to insanity. (31) It is recommended that the three years period of insanity should be deleted; and the clause
should be reworded as, "incurably of unsound mind". The second recommendation is in respect of venereal diseases. It has been already seen that the Law Commission has recommended the deletion of the words, "the disease not having been contracted from the petitioner" from section 10(1)(d), the Hindu Marriage Act. A similar suggestion is made in regard to the similar provision in section 27(1)(f) of the Special Marriage Act. The Law Commission observes:

In conformity with our recommendation as to the corresponding provision (provision has been marked with footnote number and footnote number 1 runs: "See discussion as to section 13, Hindu Marriage Act, with reference to venereal disease. No page number is stated) in the Hindu Marriage Act, we recommend that from section 27(1)(f) of the Special Marriage Act, (i), the period should be removed, and (ii) the requirement that the disease should not have been contracted from the petitioner, should also be removed. (32)

It is submitted that no suggestion as to the removal of the period has been made by the Law Commission in connection with venereal diseases under the Hindu Marriage Act, (33) though on reading the passage quoted above one tends to believe that, that is what the Law Commission recommended earlier. Further, in the summary of recommendations of the Law Commission given in the report
In respect of leprosy, the Law Commission, while making recommendations on the reform of the Special Marriage Act observes:

In conformity with our recommendation as to ('to' is marked with footnote number 2 and in footnote number 2 it is stated: "See recommendation as to section 13, Hindu Marriage Act, with reference to leprosy. Again, no page number is mentioned) the corresponding provision in the Hindu Marriage Act, we recommend that the period should be removed. The clause should, therefore, be revised so as to read as follows: "has been suffering from leprosy, the disease not having been contracted from the petitioner." (34)

The Ministry of Law has suggested an additional ground of divorce to the wife in the following terms: "that an order has been passed against the husband by a Magistrate awarding separate maintenance to the petitioner, and the parties have not had marital intercourse for three years or more since such order". It seems (and the Law Commission also thinks so), (35) that the Ministry of Law proposed to make the grounds at par with section 13(1A) of the Hindu Marriage Act, with this basic distinction that under section 13(1A) either husband or wife may present a petition, while under the proposal of Ministry of Law only the wife can present a petition.
The question, therefore, arises if this proposal is on the analogy of section 13(1A), why both the parties should not have the right of divorce, as, after all if failure of conjugal life for three years (or two or one year) is indication of breakdown of marriage under section 13(1A) it is equally an indication when parties are living separate after an order in favour of the wife has been passed under section 488, Criminal Procedure Code). Probably in this International Year of Women, the Ministry of Law wants to put up a show of special privilege to the wife, by denying the equal right to man. It is interesting to note that the Law Commission has considered the question of husband being granted the relief, but rejected it.

The Law Commission has rejected the husband's claim of seeking divorce on this ground as it has converted it into a fault ground. It observed:

Moreover, we do not think that the guilty party namely the husband who is proved to have neglected or refused to maintain his wife, should be allowed to take advantage of his own wrong and get rid of the obligation imposed by the order for maintenance. (36)

Earlier the Law Commission gave another reason too: ....having regard to the social conditions prevailing in our country, if liberty is given to
the husband to apply for a decree of divorce in cases under which an order has been passed under the code, in a large majority of cases, it may work great hardship to the wife.\(^\text{(36)}\)

This social problem has been a focus of attention in several countries and we are well in a position to take advantage of their experience. In the past we have been modelling our laws, including matrimonial laws, on common English laws. We have drawn a good deal in the Hindu Marriage Act, and the Special Marriage Act, from the English Matrimonial Causes Act, 1950, even the Law Commission has drawn copiously from the English law. But it has ignored the recent trends in English law, the Divorce Law Reform Act, 1969, whose provisions have now been re-enacted in the consolidation statute, the Matrimonial Causes Act, 1973 has given new direction to divorce law. The Law Commission has also ignored the experience of other countries with the breakdown principle.

The proposals for the reform of the Hindu Marriage Act and the Special Marriage Act have been made after twenty-five years of their enactment and yet these are half-hearted, ill-conceived and not-very-thoughtful measure. It is very unfortunate, and is a dereliction of duty that we owe to posterity. The members of the Law Commission are very proud that they have coompleted "the work within a month and a half" and that in the total
pile-up of reports it was their fifty-ninth report. The author wishes that how nice it would have been had the country taken the pride that the members of the Law Commission have produced a document which goes to a great extent to subserve the social needs of our contemporary society. In that respect the author feels that this report of the Law Commission is singularly disappointing.

It is submitted that the country should accept without any reservation the breakdown principle as the basic structure of divorce in both the statutes. In the present state of social development probably the Soviet pattern would not suit, but we can once again draw from the English experience and make suitable modification to suit our conditions. Section 13 of the Hindu Marriage Act, and sections 27 and 28 of the Special Marriage Act may be drafted on the following lines:

(1) Any marriage solemnized, whether before or after the commencement of this Act may, on a petition presented by either party to a marriage, be dissolved by a decree of divorce on the ground that the marriage has broken down irretrievably.

(2) Any one of the following set of facts, when proved, shall constitute breakdown of marriage irretrievably:

(i) that cohabitation between the parties has been disrupted (or the parties have not been cohabiting
(i) that cohabitation has not been resumed between the parties for a period of one year or more after the passing of the decree of judicial separation;

(iii) that there has been no restitution of conjugal right for one year or more after the passing of a decree of restitution of conjugal rights;

(iv) that the parties have been living separate and apart for a period of one year and the respondent consents to a decree being passed;

(v) that the respondent has committed sodomy or bestiality;

(vi) that the respondent has treated the petitioner with cruelty or has been guilty of wilful neglect of the petitioner;

(vii) that the respondent has deserted the petitioner for a period of one year or more;

(viii) that the respondent has committed adultery;

(ix) that the marriage has not been consummated on account of wilful refusal of the respondent or on account of his incapacity to consummate it for a period of one year or more;

(x) that the respondent has been suffering from insanity for a period of one year or more;
(xi) that the respondent is suffering from leprosy for a period of one year or more:
provided that if leprosy is in virulent form the petition may be presented earlier;
(xii) that the respondent is suffering from a venereal disease in a communicable form;
(xiii) that for any other reason the petitioner finds it impossible to cohabit with the respondent.

(3) On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged by the petitioner and the respondent. (38)

It is evident that some of the grounds mentioned in section 13 of the Hindu Marriage Act do not find a specific mention in the grounds suggested above. It is submitted that all these grounds will be covered either under clause (2)(i) or clause (2) (xiii), disruption of cohabitation under clause (2)(i) may be on account of the imprisonment of the respondent for a period of two or more years, or it may be on account of renunciation of the world or because the whereabouts of the respondent are not known for a period of two years or more. Conversion will be covered under clause (2) (xiii). It is submitted that conversion per se should not be a ground of divorce. If the petitioner finds it impossible to cohabit with the respondent on account of his conversion, then she may seek
divorce. Clause (2)(xiii) is contemplated to include all types of other cases where the cohabitation stands disrupted on account of some reasons for which the petitioner finds it impossible to cohabit with the respondent.

In clause (2)(i) the language of section 1(2)(d) of the Matrimonial Causes Act, 1973, "the parties...have lived apart"-has not been used, because in the Indian social background it is possible that the parties are living in the same home, but cohabitation stands disrupted. The words "separate and apart" have existed in some state statutes and now exist in the Matrimonial Causes Act, 1959-1966. There is a divergent interpretation of these words. In Main v. Main(39) it was held that these words mean both physical and spiritual dissociation, a destruction of the consortium vitae was not enough. In Murphy v. Murphy(40) where the wife finding it difficult to get a separate dwelling after a decree of judicial separation continued to live in the matrimonial home, but completely estranged from her husband, the court held that parties were living separate and apart.
CHAPTER-II

REFERENCES

UNIT-A

(1) The Law Commission in its Fifty-nine Report at p.65 quotes Parasara, IV. 30, because, it seems that it is ordained that Parasara is to be followed in Kalyuga. See also Narada, XIII. 93.

(2) Collector of Madura V. Mootoo Ramalinga, 12 M.I.A. 397 (1868).

(3) Sankeralingoma Chetty, I.L.R., 17 Mad. 475 (1894); Thangammal V. Gengammal, (1945) 1 M.L.J. 299; Jina Mangan V. Bai Jethi, (1941) I.L.R. Bom. 535; Memabai v. Vhannooolal, 1963 P.M. 57; Kishenlal V. Piabhu, A.I.R. 1963 Raj. 95; Madho V. Shakuntala, A.I.R. 1972 All. 1119. Divorce by mutual consent was also recognised under certain regional statutes. Just as under the Cochin Marumakhthyama Act, 1938; the Cochin Nair Act. 1931; the Travancore Ezhava Act, 1925; the Travancore Nayyar Act, 1925; the Madras Marumakhthayam Act, 1933; the Madras Alisanthana Act, 1924, See also Nangu v. Appi, A.I.R. 1966 Ker. 41 (F.B.); Vasappan V. Sarda, A.I.R. 1958 Ker. 39 (F.B.).

(4) Sankaralingam v. Subhan Chetty, supra note 2; Kashibai v. Bai Gandi, (1915) I.L.R. 39 Bom. 538 (consent of the other party is essential).


(6) See ss. 10 and 13 of the Hindu Marriage Act, 1955. The words, "disease having not been contracted" are part of clause (d) of s. 10(1) and are not used in clause (v) of s.13(1). If at all these words were necessary these should have been added with clause (v) of s. 13(1) since divorce is bigger matrimonial cause, though as has been submitted these words are of no significance. One year's virulent leprosy is a ground for judicial separation, while it is three years for divorce : s. 10(1)(c) and s. 13(1) (iv). Three years' venereal disease is a ground both for divorce and judicial separation : s. 13(1) (v) and s. 10(1) (d).


(9) S. 2. Now sub-ss.(1) and (2) of s. 2 of the 1973 Act


(12) S. 5(2). See also sub-s.(3) Which is based on the observation of Begnell, J. in Rule v. Rule, (1971) 3 All E.R. 368.


(15) S. 28(m) of the Matrimonial Causes Act, 1959-1966.

(16) S. 36(1).

(17) See clauses 35 and 36 of the Draft Hindu Code Bill


(19) S. 10 of the Act.


(21) Cls. (iii) to (v) of s. 13(1).

(22) Cls. (ii) and (vi) of s. 13(1).

(23) Before the amendment of 1964 they were cls.(viii) and (ix) of s. 13(1).

(24) 13(2) (ii) of the Act.

(25) Gazette of India, Extra, Part II, s. 2, 1963, p.86

(26) Supra note 44, para 7.5 p. 71.

(27) It may be of interest to note that the Law Commission has used the words, "irretrievably broken down" only once and that too in connection with the Philosophy that the Law Commission had behind these recommendations: see p. 12. Basically the approach of the Law Commission is based on the fault theory. It observes:

But we may state, at the outset, that our general approach in this regard has been that while all reasonable efforts must be made to protect the stability of marriage, at the same time, if circumstances exist which show that conjugal life is impossible either by reason of a matrimonial offence or by reason of a decease of other specified circumstances, then the reality must be recognized, and provision should be made for terminating the bond of marriage.

(p.66, emphasis given by the author)
(28) This goes very well with the general flaw of fault or guilt grounds: The Law Commission has formulated legal cruelty thus: "has treated the petitioner with cruelty." the report, supra note 44 at 22.

(29) Id. at 71.

(30) These recommendations should be looked into the background that most of the countries of our contemporary society (including the United Kingdom, which still continues to be our model in most legal matters) have almost totally abandoned the guilt theory and have based their divorce law on consent theory or breakdown theory and sometimes on both.

(31) Supra note 44, para 7.13, p. 62.


(33) Id. para 2.18, p. 19. (34) Id. para 9.20, p. 102.

(35) Supra note 44, para 2.20, p. 23.

(36) Id. para 2.25, p. 26.

(37) Ibid.

(38) This is based on s. 1(3) of the Matrimonial Causes Act, 1973.

(39) (1949) 78, C.L.R. 636.

(40) (1956) C.L.Y. 25, 8 A.C.
CHAPTER-II

UNIT-B

GROUNDS OF DIVORCE IN ISLAM (MUSLIM LAW)

Dissolution of Marriage:- The Muslim Jurists and Qâdîs used to follow faithfully the following injunction laid down in the Qur'an, "To keep them (the wives) with kindness or separate (from them) with humanity." (1) Imam Mohammad has stated a very useful rule in this connection. He says that if a marriage causes injury to the wife on account of any defect in the husband then let the marriage be dissolved. (2) The Qâdîs in earlier times used to follow this rule of law. They used to be realistic in considering the wife's complaint and scrupulously guarded her happiness. They would free a wife from the marriage tie if they were unsatisfied that it was impossible for her to live happily with her husband owing to some defect in him. Thus in a case a wife was granted divorce when her husband was found suffering from halitosis (foul breath) to such a degree that the wife could not tolerate it. (3)

In course of time, however, the wives' right to get their marriages dissolved became greatly restricted due to incorrect and sometimes adverse interpretation of law. Many of their rights have however, been restored to them during the last decade. The Dissolution of Muslim Marriage Act, 1939 (now in force in Pakistan and India).

Adoption of Other Laws by the Hanafis:- The Hanafi Law is favourable to women in many respects, but in some matters
it is very hard (in its application) as Abu Hanifah was prove to be over cautious, and a wife is sometimes put to great hardship on this account. Later Hanafi Jurists have tried to overcome the difficulty in several cases. Thus al-Radd al-Muhtar has stated that the Hanafis have adopted the Maliki law in some cases and it states that Abu'l-Layth Samar Kandi has written in his book Ta'sis-un-Naza'ir that in case no authority of Hanafi law can be found in any particular case then return may be had to the law of Maliki because his law is more akin to the Hanafi law.(4 ) It is also stated in al-Radd al-Muhtar that when a wife is put to hardship for not being maintained by her husband it is open to a Hanafi Qad'i to have recourse to Shafi'i law. He can not however, decide the case himself according to the Hanfi law, but he can appoint a Shafi'i Qad'i as his agent (deputy) to decide the case according to the Shafi'i law. The decision of the latter shall be binding on the parties.(5 ) Again, in the case of a missing husband the Hanafis have adopted the Maliki law.(6) These cases seem to lay down the rules of law that it is a open to a Hanafi Qad'i to have recourse to the law enunciated by another Imam of the Sunni seat whose law may be more equitable in a particular case. This is borne out by some cases discussed by them. This rule was made use of by the Hanafi Qad'is of old when they would refer a wife to a Shafe'i, Maliki or Hanbali Qad'i for the discision of her case. Unfortunately the courts during the
British rule in India ignored this very useful rule and decided the cases according to the law of the particular sect to which the parties belonged. They ought to have followed the rule to decide a case according to the law laid down by any of the Imams necessary in the interest of justice, equity and good consequence. Besides, a Court should take a broad view in cases of separation and should not lose sight of the spirit of the law. Such a view can be supported by many traditions of the Prophet (peace be on him) who repeatedly commanded that women should be treated with kindness.

**Reasons of Difference in Sunni and Shi'i Law:** There is a difference in some rules applicable to marriage and divorce under the Sunni and the Shi'i Laws. It is important to understand the basic principles underlying these differences. The Sunni Jurists seem to consider that a marriage brings about a new and a very important change in the status of the spouses. They consider it essential that all necessary safeguards should be taken so that the newly acquired status is not jeopardized in any way. They, therefore make it a condition for the validity of a marriage that all necessary precautions should be taken to establish the creation of the new status. Hence, they want full publicity of a marriage and insist on the presence of at least two witnesses at the time of its celebration as necessary under a tradition of the Prophet (peace be on him).
They, however, seem to think that a divorce merely restores the spouses to their original status, and so, while greatly approving of the presence of witnesses at the time of divorce, they do not consider the presence of witnesses at that time an essential condition for its validity. They also consider that the presence of witnesses at the time of marriage is necessary to discourage immorality for, in the absence of such a condition, it can always be open to a man and woman charged with adultery, which is a very serious offence under Muslim law, to plead that they had been secretly married in the absence of witnesses and so escape the consequences of their immoral conduct.

The Shi'i Jurists, on the other hand, relying on their interpretation of a verse of Surah at Talaq, insist that the Qur'an commands the presence of two witnesses for a valid divorce. The verse leads: "So when they have reached their prescribed time limit, retain them with kindness, and call to witness two just ones from among you, and give upright testimony for Allah."(7) As pointed out at another place, the Sunnis consider that the injunction about calling of witnesses relates to retraction or rajah.(8)

They further seem to think that it is not necessary for the Qadi to probe into the conduct of the parties and he must accept the statements of a man and woman charged with adultery that they have been married
secretly as correct—particularly when they shall have to live in future as husband and wife in view of their explanation.

**Failure of Marriage:** The failure of marriage can be due to certain circumstances. It may also be due to certain defects or faults in one or both of the spouses. The spouse at fault is held responsible for failure of the marriage and the other spouse becomes entitled, under certain conditions, to the dissolution of the marriage on that account.

**Marriage when to be Dissolved:** As already stated, the Muslim Jurists are guided in the matters of marriage and divorce by injunction of the Qur'an, "Retain them (the wives) in kindness or separate (from them) with kindness."(9) The Muslim Jurists state that a husband cannot be said to be keeping his wife in a becoming or kindly manner when the wife cannot live happily with him because of a defect or fault in him and that under such circumstances the husband becomes a transgressor of this injunction of the Qur'an. The Qaḍi can, therefore, dissolve such a marriage in order to remove. The husband's transgression and to give relief to the aggrieved party.

There is another verse in the Qur'an, which is equally important in this connection and defines the rights of the spouses. It states, "And women have rights
similar to those against them in a just manner."(10) This verse shows that men and women have similar rights and obligations against one another. A party failing to discharge his or her obligations will thus be a transgressor of this injunction of the Qur'an. In such a case marriage shall have to be dissolved on the complaint of the aggrieved party. It is not an essential condition for the dissolution of marriage that the party at fault should have actually committed some act which results in misery for the other party. It is quite possible that the husband or the wife may be the victim of causes beyond his or her control. Whether the aggrieved party can live with the other spouse in a manner where by the objectives of marriage are not defeated. If that is not possible then the dissolution of marriage becomes desirable.

Marital Obligation:- It is also to be seen for the dissolution of a marriage whether the spouses are faithfully and sincerely fulfilling the marital obligations incumbent on them.

(1) The following are some of the important obligations of a husband according to the Muslim Jurists:
(a) to protect the wife;
(b) to maintain her;
(e) to pay her dower to her;
(d) to make himself attractive and to be equally fit so that she (the wife) should not feel completely neglected or be dissatisfied with the marriage on that ground;
(e) to treat the wife with affection and kindness. This includes permission to her visit her parents and relatives;
(f) not to obstruct her in the performance of her religious duties and
(g) to grant her freedom from the bond of marriage when he has no inclinations towards her.

(2) The important marital obligations of the wife are;
(a) to lookafter the domestic comforts of her husband;
(b) to be respectful, obedient and faithful to him;
(c) to make herself available to him at all reasonable times;
(d) to make herself attractive to him;
(e) to suckle the children during the prescribed or usual period of time, if so desired by the husband, and to bring up the children properly.

Some of these obligation cast a legal duty on the husband or the wife, as the case may be, while others are in the nature of moral obligations only.

It is not every failure of the marital obligations on the part of one party that entitles the other party to the dissolution of the marriage and such right can be
exercised only when the failure is of a serious nature.

A marriage can be dissolved when a wife has an 'invincible' repugnance or aversion for her husband. The dissolution of marriage at the instance of the wife will be dissolved in the chapter on Khula.

As already stated, a marriage can also be dissolved when one of the spouses suffers from some serious defect physical, social, cultural or moral. It may, however, be stated that when one or more of the objects of a marriage are lost due to a defect in one of the spouses, the marriage does not ipso facto cease to exist but that it gives option to the other party who may or may not like to continue such a marriage. Thus, a man may marry a woman who may be beyond her age at which she can bear children simply to escape from loveliness or to have someone to attend to his domestic requirements. Similarly, a woman may, for the sake of financial support, marry a man who she knows is suffering from incapacity.

**Right to Dissolve Marriage:** A Muslim marriage is ordinarily a relationship for life based on mutual consent of the parties. But under the Muslim law, unlike some other systems of law, marriage is a special type of civil contract. It follows that the parties continue to it have a right, as in other contracts, to continue the contract of marriage or to discontinue it on reasonable grounds.
Who can Dissolve Marriage:-- A marriage can be dissolved by either the husband or the wife or by their mutual consent or by the Qaḍi or the Arbitralor. It can also get terminated automatically on the happening of certain contingencies. The cause, that constitutes a ground for dissolution of marriage can be the conduct or physical or mental condition of the husband or of the wife. The marriage can also be dissolved when it is ill-assorted.

Dissolution of Marriage by the Husband:-- A marriage can be dissolved by the husband through divorce ila or Zihar.

(a) Divorce: The present Muslim practice allows the husband full powers to dissolve the marriage at his sweet will without assigning any reason or without even there being a reasonable ground for the divorce. All the Muslim sects, with the exception of the Mu'tazilites, concedes this absolute power to the husband. Some of them do admit that marriage being commended, it can be terminated only in case of urgency for its dissolution and that when there is no valid necessity for its termination then the husband is not justified in dissolving it. But in spite of it, they do not hold a divorce without justification to be legally invalid; they only consider it to be sinful. The view of the vast majority of the Jurists' may, for all practical purpose, be taken in the present times to be the Muslim law on the point. The matter is fully
discussed in a subsequent chapter.

(b) Ila' and Zihar: These are two other methods of dissolving the marriage by the husband, that will be discussed in subsequent chapter.

Dissolution of Marriage by the Wife:- A wife can herself dissolve her marriage by the exercise of Khiyar al-bulugh (option of puberty) or under tafwid, that is, when the power of divorce has been delegated to her by the husband. She can also have recourse to Khula.

Dissolution of Marriage by Mutual consent:- It is always open to the spouses to mutually agree to the termination of their marriage for a consideration or without it. This they can do by Khula, mubarah, or talâq bi'iwaq al-mal.

Dissolution of Marriage by the Qaṭi:-

At the instance of the husband. A husband can get his marriage dissolved by the Qaṭi without usually becoming liable for the payment of the dower in the following cases:

(a) If the wife or the guardian of a minor wife has been guilty of fraud in certain respects;
(b) When the husband was married during his minority by his guardian for a dower unreasonably high;
(c) When the spouse's non-Muslim and the husband embraces
Islam but the wife refuses to do so;
(d) When the wife is suffering from some serious defects: physical, social or mental.

The Malikis, the Shafi' and the Hanabalis among the Sunnis, and the Shi'is hold that a marriage can be dissolved by the Qadi at the instance of the husband on serious blemish in the wife. The Hanafis do not agree with this view and do not allow the termination of marriage on this ground as it deprives the wife of a portion of her dower.

At the Instance of the Wife:- A marriage can be dissolved by the Qadi at the instance of the wife on the following grounds:
(a) When the husband's conduct is such as has been specifically disapproved of by Islam;
(b) When the husband is suffering from a serious mental or physical defect which renders the continuation of the marriage unsafe or undesirable for the wife;
(c) When she was given in marriage by her guardian and her dower is unreasonably low, that is, is lower than the customary dower;
(d) When she was a minor at the time of her marriage;
(e) When the spouses are non-Muslim and the wife embraces Islam but the husband refuses to do so;
(f) When the husband accuses her of unchastity;
(g) When she embraces Islam and chooses a Muslim state for her domicile but her husband remains dwelling in a non-Muslim state. (Applicable to non-Muslims).

The above grounds are briefly discussed below:

**Undesirable Conduct of the Husband:** The conduct or behaviour of the husband that becomes cause for the dissolution of marriage must be such as injuriously effects the wife, such as when the husband:

(i) attributes unchastity to the wife;
(ii) takes a vow not to be intimate with his wife for a period of four months or more and this constitutes ila';
(iii) makes it unlawful for himself to be intimate with his wife by Zihar;
(iv) absents himself from the conjugal domicile for a period of four years or longer, and his whereabouts, are not known or
(v) is guilty of inequality between two or more wives, etc.

**Automatic Dissolution of Marriage:** Under Muslim law marriage becomes automatically dissolved on

(i) the death of one of the spouses;
(ii) apostasy of one of the spouses;
(iii) under the Sunni law, on the fulfilment of a condition in the case of a conditional divorce, or
(iv) Change of domicile in case of non-Muslims.

The various methods of dissolution of marriage shall be discussed in detail in the subsequent chapters.

If a marriage is dissolved for a cause imputable to the husband then it has, generally speaking, the effect of talaq or divorce on the ground the dissolution of the marriage has been brought about on account of the husband and so he should be deemed to have divorced his wife. Thus, if the marriage is dissolved on the ground that the husband is important or insane and the like, then the dissolution of the marriage will have the effect of talaq even though the marriage is dissolved by the Qādi at the instance of the wife. The dissolution of marriage by or at the instance of a wife is called Faskh (termination). If the marriage is dissolved due to a cause attributable to the wife then also it shall have the effect of Faskh or termination of the marriage by the wife. Thus, if it is dissolved by the wife in the exercise of the option of puberty or by the Qādi on the ground of some serious blemish in her, then it shall be deemed to be Faskh by the wife. It may be added here that the above is not an invariable rule of law and there are certain exceptions to it. Thus, if a marriage is dissolved on account of the apostasy or conversion to Islam of the husband or his adoption of a domicile in dar al-harb when the wife resides in dar al-Islam, then the dissolution shall be
considered to be Faskh, although the marriage is dissolved for a cause attributable to the husband.

The effect of both these methods, namely, talaq and Faskh is the same as for as dissolution of marriage is concerned. The difference lies in the extent of the husband's liability for payment of dower and the number of divorce effected.

The termination of marriage by the Qaḍi either on his own initiative or at the instance of the wife or a third person is called Faskh. The automatic termination of marriage is called a Furqah (separation).

**At the Instance of a Third Party:** A marriage can be dissolved at the instance of certain near relations of the wife if she contracts a marriage for a dower which is less than the customary dower in her family or if the husband is otherwise unequal to the girl's family.

**By the Qaḍi on his Own Instiative:** It is duty of the Qaḍi to dissolve a marriage if he comes to know that it is Fasid or irregular.
CHAPTER-II
UNIT-B

REFERENCES

(1) Qur'ān, II:231.

(2) Ibn al-Humam, Fath al-Qadir, III:268.


(4) Shami, op., cit, p. II:552-674.

(5) Ibid.


(7) Qur'ān, LXV:2

(8) See point on classification in Raj'ah. (retraction).

(9) Qur'ān, II:231.

(10) Qur'ān II:228.

(11) Shami, op,cit., II:315