CHAPTER VII

STABILITY OF MARRIAGE
AND
CONSENT THEORY OF DIVORCE

Evolution and development of divorce by mutual consent

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EVOLUTION AND DEVELOPMENT
OF
DIVORCE BY MUTUAL CONSENT

The matrimonial offence theory originally became
the basis of the most of the civilised societies / countries.¹ but this theory came to be deficient in many a respect
and case as revealed from the preceding chapters. This
theory covered merely those cases in which there existed
the specified matrimonial faults like adultery, desertion,
cruelty and insanity etc. The offence theory did not cover
those hard cases in which either both or none of the
parties was / were responsible for de facto termination of
his / her or their marriage. During such a long course of
time the attitude of the people individually and society
collectively underwent a major change. The collectivism gave
way to the individualism. The marriage once a divine
institution came to be shaped not only as a human institution
but also simply as a contract. The contract implies freedom
to enter into it. This freedom was also felt necessary
and justified on the part of the parties to it to get out
of it as and when the contract became infructuous, unbearing
and cumbersome on the anvil of self respect and human
dignity. The parties if they had erred should be allowed
to correct their errors. To err is human and not wicked
or malicious. On this premise, this was voiced that marriage

¹ Chloros, The Reform of the Family Law in Europe, pp. 4–6 (hereinafter referred to as the Reform) (1978).
was nothing more than a contract and if the parties had entered into it mistakingly or felt it, at any juncture of time, to be impossible to endure it, they must be allowed to come out of the torturous bond of marriage. Marriage may be a sweet bond but not a bitter bondage. It is very inhuman to force the parties to perpetrate in the committing and continuing of the errors. An onrous and intolerable burden of marriage needs to be cast off for it saps vitality of life and renders one's life as jejune, and the parties are forced to commit the act of sacrilege and matrimonial offence(s). The constantly burdensome marriages are the breeding ground for juvenile delinquencies. Therefore freedom of marriage came to be thought of as producing the corresponding and necessary corollary of freedom of divorce.

This approach gave way to the emergence of the free consent theory even in respect of divorce. Mutual consent should bring the marriage and divorce in existence between the parties to it. According to the protagonists the consensual divorces would vanish the unbearable marriages and serve the interests of the spouses, children and the society to a large measure in order to secure the mutual love and gain the mutual fidelity in married life. If for any reason the parties think that they are unable to continue the mutual fidelity, they should have freedom to dissolve the marriage for the fidelity can be preserved only by dissolution.

In this context, it is worthwhile to quote Engels:  

What will most definitely disappear from monogamy, however, is all the characteristics stamped on it in consequences of its having arisen

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2 The Origin of the Family, Private Property and the State, p. 135 (1884).
out of property relationship. These are: firstly, the dominance of the man, and secondly, the indissolubility of marriage. The predominance of the man in marriage is simply a consequence of his economic predominance and will vanish with it automatically. The indissolubility of marriage is partly the result of the economic conditions under which monogamy arose, and partly a tradition from the time when the connection between these economic conditions and monogamy was not yet correctly understood and was exaggerated by religion. Today it has reached a thousandfold. If only marriages that are based on love are moral, then also only those are moral in which love continues.

Really speaking, the entire human relationship was governed by the status as the basis until the start of the Industrial Revolution. Germany, the U.S.A. and Japan after 1850, the Civil War and the nineteenth century respectively had come to be transformed by industrialism. Economic philosophy was wholly and predominantly metamorphosised by the policy of Laissez faire - a doctrine of Adam Smith and this Laissez faire left the lasting and emancipational effect on the Family Law, too. So it was from the Industrial Revolution the society moved towards the contract from the status, and the free volition of the individual became the governing factor of all the human relationship - including that of the marriage also. It is therefore submitted that the seeds of the consent theory of marriage and divorce can be traced and seen into the Marxism.

3 It relates primarily to the time between 1750-1850 in the English history during which the notable and land-mark changes in the economic structure came to be produced by the transition from the stable agriculture and commercial society to the modern industrialism. This became the world wide phenomenon.

4 Sir Henry Maine, Ancient Law, Ch. X.
According to Lenin, another communist philosopher,\(^5\)

As a matter of fact, freedom of divorce will not breakdown relationship in the home, but on the contrary it will consolidate it on the basis of democracy, that is, on the only possible basis of a civilised society.

Mr T.R. Tillet has most categorically and emphatically sounded and advocated the consent theory of divorce. In his words,\(^6\)

"No deduction about the standard of morality in any country can be drawn ... from the fact that they recognise divorce by mutual consent except, perhaps, to refute the charge that divorce by mutual agreement necessarily means widespread licence and immorality."\(^7\)

It was both individualistic as well as socialistic sources which led to the emergence of the free-volition theory in the matter of divorce. The individualistic philosophy postulates the individual's right to happiness as the sovereign governing factor and holds that the people should be able to live their lives as much joyful as possible and under such conditions as enable them to develop their personal capacities and potentialities. To enter into and get out of marriage in the event of not going well should entirely depend on the free volition of both the parties to it. The embittered marital relations are

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6 The *Law and People*, p. 157, referred to by Paras Diwan at *Ibid*.
neither in the interest of the individual nor of the society. The individualistic approach is much more responsible than that of the collectivistic leading towards the consent theory for marriage is considered to be a contract based on its revocable character.

No engenders the freedom of dissolution of marriage in turn strengthens the institution of marriage. In consensual divorces, a situation has arisen which has existed for sometime and which soothingly says to the spouses, "If you think that your marriage cannot continue, and if you both are convinced that it should be dissolved, then marriage will be dissolved."10

Even Madame Teng Ying-chao11 is reported to have said that the origin of chaos lies not in the freedom of marriage and divorce but it originates for such reasons as "First, it is due to the feudal marriage system specially the fact that there had been no freedom of marriage and divorce. This is most fundamental cause. Secondly, it is due to

8 Supra note 2, pp. 117-135.
9 Mirmal Yadav, Supra note 7, p. 185.
10 Ibid.
11 Her speech delivered on May 14, 1950 - quoted by Mirmal Yadav, Supra note 7, p. 185.
misconception of freedom of marriage. . .”

The free-volition-cum-mutual-consent came to be conceptualised in the course of time as a theory of divorce the seeds of which lay mainly in the marxism. This theory / concept was given a full legal effect and de-jure recognition by the Soviet Union in its puritan form immediately after and on the morrow of the 1917 - Russian Revolution.\textsuperscript{12} The Soviet Russia granted to the spouses the full freedom of divorce as and when they desired to do so even without any recourse to the courts of law.\textsuperscript{13} It was the intention solely to live together which followed by actual living together, was regarded enough to call two persons as husband and wife. It was also provided subsequently by this Russian Marriage Code of 1926 that in the life time of both the spouses the marriage might be dissolved either by mutual consent of both the parties or upon an ex parte application of either of them.\textsuperscript{14} No recourse to the courts of law was thought necessary to pass the divorce by mutual consent\textsuperscript{15} except the mere registration formality at the Civil Registry Office\textsuperscript{16} for the fact of divorce.

"It may also be noted that even the Universal Declaration of Human Rights provides under Article 16 as follows:

\begin{quote}
(1) Men and Women of full age, without any limitation due to race, nationality or religion, have right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and after its dissolution.
\end{quote}

11a Ibid.
12 See (1917) I Sob Ùzak, R.S.F.S.R. No. 10 item 152.
13 Ibid.
14 Article 18, the Russian Marriage Code 1926.
15 Article 19.
16 Ibid.
(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

In this lies the view to regard the institution of marriage as a free and consensual union and the divorce by mutual consent is quite compatible thereto.

The Chinese matrimonial law also provides,\(^\text{17}\)

Divorce shall be granted when the husband and wife both desire it. In the event of either the husband or the wife insisting upon divorce, it may be granted only when mediation by the sub-district People's Government and sub-district judicial organ has failed to bring about a reconciliation.

Thus the Chinese idea of marriage goes on the promise that the freedom of marriage includes the freedom to marry as well as to divorce. Mr. Chang Chin-Jang, the Vice-President of the Supreme People's Court is quoted to have clarified the Chinese Divorce law as under,\(^\text{18}\)

In a positive respect, freedom of divorce will bring about more happy marriages and reduce the number of unhappy ones. It will help both husband and wife to live in harmony and consolidate the unity of the family so that they may fully engage in their career. However, this positive function of freedom of divorce is easily overlooked. Since there is freedom, both men and women are forced to take a very serious and sincere attitude towards the problem of marriage. One has to be very careful

\(^{17}\) Article 17 of the Law of Marriage and Divorce in China.

\(^{18}\) People's Daily: A much needed Marriage Law, April 17, 1950.
before marriage lest one should report and one should also be very frank and honest so that the other may not feel regretful. Thus there will be very happy marriages in society.

The Chinese law of divorce not only recognises the divorce by mutual consent, but it also provides the easy and simple procedure therefor. Both the spouses intending divorce are required to register the fact of divorce with the sub-district People's Government which issues the divorce certificate without taking much of time when needed. It means the administrative authorities are not supposed to delay the grant of divorce certificates in case of divorce by mutual consent especially when the issues regarding custody and care of children and property have been settled or not existed. So, the underlying presumptions of the Chinese concept of divorce is that there will be ensured an increase in the number of happy marriages in an atmosphere where freedom of marriage actually prevails. This strengthens the belief all the more that the freedom of divorce will cement marriage in the bond of love and mutual fidelity instead of breaking the matrimonial and familial relationship between the spouses and will confirm the conviction that the idea of divorce will rarely occur to the couples. The non-freedom of divorce may lead to the couples to indulge in extramarital sex relationship with mutual consent and though not oftenly even in the presence of each other. This possibility of such maladies cannot be ruled out altogether. 'Hotel Bill' cases occurred in England are the best examples of such cases.

19 Paras 2 and 3 of Article 17 of the People's Law of Marriage and Divorce.(1950).
20 Ibid.
The Swedish Marriage Code, 1920 are contained provisions regarding the dissolution of marriage almost by mutual consent. Two married people may obtain separation decree by way of applying jointly therefor. Divorce may then be obtained after one year by either spouse if they had lived separately for one year after the separation decree.

The Asian country Japan has since 1893 allowed the 'Divorce by agreement'. The Article 763 under Sub-section 1 of Section 4 of the II Civil Code Book IV and Book V, Law No. 9, June 21, 1898 is reproduced below -

Husband and wife may effect divorce by agreement.

Even existence of children does not bar the Japanese spouses to effect divorce by agreement. Although the Japanese law enjoins upon both the spouses to come to an agreement in regard to care and custody of their children, if any, in case when they desire to divorce each other by mutual agreement but it authorises the Family Court to determine such matters of care and custody of children if the spouses who have effected divorce by mutual agreement have or could not come out with an agreement thereto. The procedure for divorce by agreement is also very simple that is, by notification of divorce as prescribed by the Family Registration Law.

Although divorce by voluntary act had already been popularly known at the beginning of the nineteenth century which could be characterised also as a solution inspired

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21 See Article 766 of the II Civil Code Book IV and Book V, Law No. 9, June 21, 1898.
22 Article 767.
by the theory of Enlightenment. The French Civil Code had accepted divorce by mutual consent in its original form. Divorce by mutual consent has been reintroduced in France in the year 1975, and in Portugal also in 1975. Belgium and Grand Dutchy of Luxembourg not only maintained divorce by mutual consent but recently improved also.

Italy, the country of the Roman Catholics, which stuck to the notion of indissolubility of marriage as a sacrosanct and inviolable union up to much late period as compared to their counterpart the Protestants' country England, has now permitted divorce though on a mixed system. Under the new Italian law, divorce is regarded as a remedy obtainable in the case of a physical separation lasting at least for five years if the respondent 'does not object to the passing of the decree of divorce.' This period extends over seven years when the respondent objects to the petition of the guilty spouse. The former ground may be characterised as divorce by consent though not expressly.

Although in the earlier law of divorce in Germany the so-called principle of the matrimonial offence was the governing factor, the fact remained that from 80 per cent

23 See the Reform, supra note 1, p. 4.
to 90 per cent of divorce petitions initiated on the
grounds of adultery or cruelty etc. resulted from collusion
which emphasised the broad gulf between law and reality.  
So particularly when both the spouses wished a divorce and
decided between themselves who would plead guilty: 'falsi-
fying facts and feigning an offence in order to obtain
satisfactory court judgement.' This clearly shows that
although divorce by consent was not expressly provided
in the erstwhile German divorce law yet the spouses used
to obtain divorce by collusion clandestinely under the
banner of matrimonial offence principle. The various
proposals were moved for reform for a variety of issues to
inculcate the system to replace the matrimonial offence
principle. Some advocated the complete contractual freedom
for divorce, "a demand familiar to the readers of John
Milton's Doctrine and Discipline of Divorce' of 1643." The
others advocated for divorce by mutual consent though
under some lines of safeguard. The Commission on Marriage
Law set up by the German Protestant Churches proposed the
introduction of breakdown principle which was adopted almost
verbatim by the Roman Catholic study group for marriage
law and was approved of by the legal luminaries on Family
law. It may also be noted that a large majority of 1970
Congress of Representatives of the German Legal Profession
suggested that the marriage should be dissoluble when the
spouses had lived apart for one year and both spouses agreed
to the passing of the decree of divorce. Thus divorce by
mutual consent has been supposedly mingled into the breakdown

30 The Reform, Supra note 1, p. 120.
31 Ibid.
32 Ibid.
33 Ibid.
34 Deutscher Juristentag.
principle to be applied when unilateral application for divorce has been filed for divorce on the cause of the breakdown of marriage. The introduction of divorce by mutual consent could not be adopted in the German divorce law both in old and new perhaps for the obvious reason that divorce by consent was a contrary phenomenon to Article 6 of the German Constitution which can be read as declaring that the marriage is to be a union for life, and further that the divorce by agreement might reduce the life long intended union to an ordinary contract. It may be further reiterated that from 80 per cent to 90 per cent of current divorces until 1 July 1977 were really by the mutual consent.

Like Italy, Spain has also now enacted a divorce law after a stagnation of no-divorce law for over forty years. A full dissolution of marriage was however permitted in Spain only during the short period of the republic in 1931-39 under then enacted Law of March 2, 1932 and thenafter lapsed on defeat of the republic in the Spanish Civil War in 1939. Under the New Law of Divorce marriage is not only dissoluble but also obtainable by both spouses who have brought the petition for divorce or by one with the consent of the other. A petition should however contain a proposed agreement between the spouses on the matters listed in Articles 90 and 103 of the Civil Code. It may also be

35 See Sections 1564 ff. BGB, as effective from 1.7.1977 BGBl I. 1421 ff.
37 TheReform, Supra note 1, p. 123.
39 Law No. 30/1981.
40 Articles 81 and 86 of Civil Code.
41 Article 3 (5) of Law of Divorce March 2, 1932.
noted that extant Spanish divorce law although runs on the lines of the Divorce Law of 1932 is not much bold for it, the latter, provided divorce by mutual consent with no precondition or "for causes none of which required any further waiting period except on the grounds of one's desertion" and actual living apart for three years. The most beneficial way of divorce in the present law of divorce of 1981 seems to be under Article 86 (3a) of the Civil Code because the waiting period is two years of effective and continuous living apart after a freely agreed actual separation of the spouses. So the petition presupposes an agreement between the spouses to obtain divorce.

In the year 1970 the Finnish Government set up a new body for reviewing the matrimonial law. The point was a new definition of marriage as a voluntary form of coexistence of two equal partners based on mutual feelings of affection. The body so set up suggested not only that marriages be contracted before the civil authorities but also sounded that the court should grant divorce without delay at the moment when both spouses are in agreement on the matter of judicial dissolution of their marriage. Such a simplification of divorce procedure was held to be justified on the plea that marriages should remain a basically emotional union and not to be confined by laws and economic sanctions.

Although the Dutch Civil Code of 1838 of the Netherlands had expressly prohibited divorce by mutual consent but this now appears to have been permitted in the Act of 6 May, 1971.

42 Article 3(5) of Law of Divorce March 2, 1932.
43 Ibid., Article 3 (12).
44 Supra note 41, p. 681.
45 Jouko Sihvo, "Marriage and Divorce in Finland Since Second World War." This is the article the photostate copy of which was sent to me by the Finnish Embassy in India on 3.8.1981.
The Consent Theory of divorce is de jure prevalent not only in the Latin states of America but also in some states of the United States and most of the Commonwealth and East European countries. Australia before 1975 did and New Zealand does recognise five years' living apart which enable the spouses to obtain consensual divorce.

The 'freedom of marriage implying the freedom of divorce' doctrine did not acquire any recognition in the English divorce law. It was only by the Divorce Reform Act, 1969 the divorce by consent was incorporated under its Section 2(1) (d). It may be submitted that only a lip-service has been paid to the consent theory of divorce under the English matrimonial and divorce law. The consent theory has not at all been adopted by England in its puritan form as was done by Russia since 1917 on the morrow of Revolution, 1917 inspired by the marxism. Divorce by consent has been legally adopted by England only as one of the facts - situation of irretrievable breakdown of marriage evidenced clearly by two years' separation whether voluntary or involuntary between the couples and the other spouse consents to the passing of the decree of divorce on this ground. This is nothing but an uneasy compromise between fault base divorce notion and consent divorce as a breakdown notion,49 qualified by the two years' separation. Such approach of law has made the quite simple things complicated. In Mouancr v. Mouancr,50 the case was apparently of the broken marriage

46 See Article 153-1.
48 See also Passingham, The Divorce Reform Act 1969, p.2, para 4; and Freeman, "The Search for a Rational Divorce Law" (1971) 24 CLP 178.
50 (1972) 1 All ER 289.
but the decree was however refused. It was a case clearly
under Section 2(1)(d), that is, two years' separation plus
consent although the parties during that period had lived in
the same household with no physical relation at all. The
relations were quite strained. They fulfilled the 'separation
test' laid down in *Hopes v. Hopes*. The judgment in the
*Mouncer* case started clearly that "there is no reason to
suppose the marriage has not been broken down irretrievably,"
but the decree was refused in view of the Section 2(5) of
the Act 1969 which spoke that "for the purpose of this Act
husband and wife shall be treated as living apart unless
they are living with each other in the same household." But
Bagnall J. does not seem to be proper when he has said
and characterised divorce under Section 2(1)(d) to be
'divorce by consent.' But H.A. Finlay has very characterised
divorce under Section 2(1)(d) to be a divorce on breakdown
than on consent. The consent theory in England is thus
overshadowed by the breakdown ground under Section 2(1)(d)
of the *Divorce Reform Act*, 1969. The same ground has been
carried forward and incorporated in the current *Patrimonial
Causes Act*, 1973 under its Section 1(2)(a) which is
reproduced below:

Section 1 (1) A petition for divorce may be
presented to the court by either
party to a marriage on the ground
that the marriage has broken down
irretrievably.

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51 (1949) P. 227.
52 Supra note 50, p. 290.
53 But *aliter* in *Fuller v. Fuller* (1973) 2 All ER 650 where
the parties had lived in the same household but not "with
each other."
54 *Harnett v. Harnett* (1973) Fam 156 affirmed by the Court
of Appeal in (1974) 1 All ER 764.
55 The Retreat of Matrimonial Fault" (1975) 38 MLR, p.170.
Section 1 (2) A court can not hold that a marriage has been broken down irretrievably unless the petitioner proves one or more of the facts laid down in that section viz.

(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition; and consents to the passing of the decree of divorce.

Moreover Section 1(2) guidelines though are necessary but not always the sufficient proof of irretrievable breakdown of marriage particularly in view of Section 1(4) of the Matrimonial Causes Act, 1973. The consent ground still enshrined in Section (1) (2) (d) seems to have been flouted by the courts also by following a tendency to take a strict and legalistic approach when interpreting this Section, mainly on the requirement of 'living apart for two years' contained in Section 1(2)(d) and explained under Section 2(6) of the Matrimonial Causes Act, 1973. In Santos v. Santos the court held that the physical separation too of the spouses for one or the other reason was not necessarily 'living apart' for the purposes of the Act as long as both recognised their marriage as a valid subsisting relationship as husband and wife. But, on the other, in Fuller v. Fuller the spouses were held to have lived apart when the wife had been cohabiting with a third

56 Pheasant v. Pheasant (1972) 1 All ER 587 and Santos v. Santos (1972) 2 All ER 246.
57 The Reform, Supra note 1, p. 59.
58 Santos v. Santos, Supra note 56.
59 Ibid.
60 (1973) 2 All ER 650.
party in a house where her husband also lived. Such conflicting glosses put on Section 1(2)(d) speaking on 'divorce on being consented' rather and further frustrate the consent theory overshadowed by the so-called breakdown ground. It has further been held that two years are to be strictly reckoned and should not include the first day of living separately. Furthermore, the spouse must also have the capacity while consenting to divorce as is required necessary to consent to marriage.

The above is the position of divorce by consent emerged from the notion of 'freedom of marriage implies freedom of divorce'.

At home the consent theory of divorce was recognised neither under the original Special Marriage Act, 1872, nor under the Indian Divorce Act, 1869 as the latter Act was modelled entirely on the English Matrimonial Causes Act, 1857 in respect of the ground for divorce. The Parsi Marriage and Divorce Act, 1936 too does not recognize divorce by mutual consent for the Parsis in India despite the fact that the Special Marriage Act, 1954 which repealed its ancestor Act 1872, has now accepted divorce by mutual consent under its Section 28 for the persons whether the Hindu, Muslim, Christian, Parsi and the Jew whose marriages have been contracted under this Act. So, in the year 1954 only divorce by consent registered its first appearance in

61 See Warr v. Harr (1975) 1 All ER 85.
62 Mason v. Mason (1972) 3 All ER 315. See also Section 10(1), the MCA, 1973.
62a Section 17 of the Act provided, "The Indian Divorce Act shall apply to all marriages contracted under this Act and any such marriage may be declared null or dissolved in the manner therein provided..."
63 Consent divorce showed its some signs only under the Divorce Reform Act, 1969; yet the Indian Divorce Act, 1869 is still unamended.
the Indian matrimonial statutory law. It may be noted that the Special Marriage Act 1954 has, of course, accepted the consent theory for divorce but only conditionally and not in its puritan form as adopted in Japan of Russia. The condition is that the parties to marriage must "have been living separately for a period of one year or more preceding the presentation of the petition for divorce and further that they "have not been able to live together" and in the last that "they have mutually agreed that the marriage should be dissolved." The second condition is that the court will not grant divorce by mutual consent until a period of one year (now six months) has passed since the presentation of the petition for such divorce and not later than two years (now 18 months) after the date of petition presented for such divorce. Such waiting period of 'one year' and 'two years' has been reduced to 'six months' and 'eighteen months' by the Marriage Laws Amendment Act 68 of 1976. Thus Indian secular divorce law, that is the Special Marriage Act, 1954 had been quite ahead of the English matrimonial and divorce laws which introduced divorce by consent although as a breakdown ground only since 1 January 1971 the date on which the Divorce Reform Act, 1969 became effective.

The divorce by mutual consent was originally not allowed under the Hindu Marriage Act, 1955 though it was permitted under the Special Marriage Act, 1954 under its Section 28. This was due to the fact that the Hindu Marriage Act, 1955 was modelled almost on the pattern of the English Matrimonial Causes Act, 1950 which too did not permit divorce by mutual consent. It may be noted that even the Central Law Ministry of the Indian Government did not refer the

64 Section 28(1).
65 Section 28 (2).
inclusion of divorce by mutual consent in the Hindu Marriage Act, 1955 to the Law Commission of India while sending the draft Bills for being examined by it in regard to bring amendments in various sections of the Hindu Marriage Act, 1955 including the divorce grounds.\textsuperscript{65a} The Hindu legal luminaries Dr Justice P. C. Gajendragadkar then Chairman of the Law Commission of India too did not even think over the issue of divorce by mutual consent whether or not to include it in the Hindu Marriage Act, 1955 while revisiting the 59th Report in March, 1974 in response to the terms and reference and letter on 17 January 1974 of the Central Law Ministry.\textsuperscript{66} Even the national Seminar of the Jurists, Lawyers and Judges of India at the Indian Law Institute, New Delhi in February 1975 did not recommend divorce by mutual consent to be incorporated under the Hindu Marriage Act, 1955.\textsuperscript{66a} It was the 'Status of Women Committee' vide its Report Inter alia recommended the 'divorce by mutual consent' not only for the Hindus but for all persons of all other communities also.\textsuperscript{67} It appears that it was for this reason the 'divorce by mutual consent' came to be incorporated by the Marriage Laws (Amendment) Act 68 of 1978\textsuperscript{68} under the newly inserted section 13B of the Hindu Marriage Act, 1955 on the lines of Section 28 of the Special Marriage Act, 1954.

\textbf{THE CONSENT THEORY OF DIVORCE UNDER HINDU LAW}

It may be further reiterated that divorce by mutual

\begin{itemize}
  \item \textsuperscript{65a} See the D.C. No. F.14(4)/68-Leg II dated January 17,1974 under signature of then Hon'ble Minister H.R. Gokhale.
  \item \textsuperscript{66} See 'Summary Recommendations and Conclusions' appended in the 59th Report Chapter 10, pp. 108-116 of the Law Commission of India.
  \item \textsuperscript{66a} But see H.S. Ureker, "Divorce by Mutual Consent," The Studies in the Hindu Marriage and Special Marriage Acts, ILL (1975) 5, 235 at p. 237 - divorce by mutual consent pleased for being adopted in Hindu law also.
  \item \textsuperscript{67} Umrigar Sanai Main Striven Ki Prasthitit: Sereet Mein Pehtion Ki Talee Samaylii Hastriye Samiti Ke Swar, Sankshop, p. 54(1971-74).
  \item \textsuperscript{68} Section 3, 27.5.1976.
\end{itemize}
consent came to be added in 1976 as a new species of divorce under Section 133 of the Hindu Marriage Act, 1955 until then there was no divorce by mutual consent provided under the Act 1955. Section 133 provides divorce by consent in the following way and form,

13.8 Divorce by mutual consent -

(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by the parties to a marriage together, whether such marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition has not been withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such enquiry as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

The plain reading of the heading and wordings employed under Section 133 reproduced above reveals at the outset that the heading 'divorce by mutual consent' is inconsistent with the conditions attached therewith in Sub-section (1) and (2) disqualifying the petitioners if their cases do not fall within the pre-requisitional conditions, that is, one year's living separately from each other and the positive /
active assertion from both the spouses that they have not been able to live together during the preceding year(s) and in the last that they have mutually agreed that the marriage should be dissolved. In our submission it is a misnomer to call such divorce as divorce by mutual consent in view of the conditions required to be fulfilled first to enable the spouses to petition for divorce by consent under Section 133 of the Act 1955. It is submitted that such phraseology used in the whole Section 133 characterises such divorce near though not exactly to a breakdown ground. The mere fact that the words "that they have mutually agreed that their marriage should be dissolved cannot call it a divorce by mutual consent. We can at most call it as an only conditional consensual divorce over shadowed by the breakdown of marriage especially in view of wordings employed that is, "that they have not been able to live together" in Sub-section (1) of the Act 1955. In the English divorce law the pre-condition for living separately is for two years, and it seems that on being inspired from such English divorce by consent after two years' living apart the more or less same type of divorce has been incorporated into the Hindu matrimonial and divorce legislation in 1976 without bothering the least about the functional adequacy and efficacy of such divorce for the Hindus in the indigenous social, economic, political, legal and ethical situations obtaining at the present time in the Hindu society. It seems to be an imitational work that has been done although the period has been reduced to one year instead of two years as in English divorce law in order to make the spouses eligible to apply for such type of divorce. It appears more a breakdown ground than divorce by mutual consent in the so-called sense.  

69 Section 1(2)(d), the MCA, 1973.
Moreover there are many difficulties which are bound to arise in the interpretational task and in its real application by the courts. The long phraseology used in Section 13B does not appear to be within the common understanding of the average men and rather make such divorce to be only a lawyers' preserve that will involve a lot of time, money and energy in obtaining such divorces by the needy spouses.

The expression 'living separate' in sub-Section (1) of Section 13B may lead everyone including judges, lawyers and common men as well the parties seeking divorce to difficulty because the expression is not at all defined any where in the Act or the purpose of such divorce. It is quite a matter of apprehension today whether 'living separate' is meant actually living separately! And if it is so, whether it is a separate living under the same roof or at different places. Or 'living separate' means the total destruction of the matrimonial cohabitation / consortium which can take place even while living together under the same roof and bed. We have already seen that desertion as a matrimonial cause both under Section 10 before 1976 and 13 of the Hindu Marriage Act, 1955 after 1976 has been so variously interpreted by the courts that it came to include even constructive desertion and virtual desertion which meant repudiation of matrimonial obligations by the respondent all alone at his / her own. This happened also because of the fact that 'desertion' as such was not defined though explained under the Act or the purpose of divorce. The whole concept of 'desertion' which once was to be meant only abandonment that too physically has come to be much diluted. In the same way we may well apprehend here also when the interpretation issue will arise on the meaning of the simple-looking-word 'living separate' under Section 13B (1) of the Act 1955. It may also be noted that in English
law too such questions have been arising over and again and the English courts howsoever higher have not been able to define 'living apart' finally and once for all despite the glaring fact that the phrase 'living apart' has been defined in the Divorce Reform Act, 1969 as well as in the current Matrimonial Causes Act, 1973 under its Section 2(6). The interpretation depends on the vagaries of the individual judges and the law has not done judiciously to have left the interpretation of the words "Living separately" entirely to the courts alone under Section 13B(1) of the Hindu Marriage Act, 1955.

Further there seems to be no rational necessity of putting the precondition of having lived apart for one year or more where there was already a bar on filing petition for obtaining divorce within one year as laid down in Section 14 of the Hindu Marriage Act 1955. This clause of one year's separate living just before filing the joint petition for divorce under Section 13B is open to be manipulated by the unscrupulous who can file the joint petition and have the divorce granted from the courts thereupon. The courts are not to be blamed for this at all as they have no divine eye to see whether the spouses had really lived separately from each other in the preceding year or not. Then there seems hardly any rationale in having put one year's minimum living apart from each other in order to enable them to file a joint petition for divorce under Section 13B. Such things of law make the spouse prone to manipulate the clause of one year's separate living before

70a Section 2(1)(d) the Divorce Reform Act, 1969 and Section 2 (1)(d), of the MCA, 1973.

71 Previously to the Marriage Laws Amendment Act 1976, it was three years.
the petition in spite of the fact that the various matrimonial bars do also apply to such divorces by mutual consent.\textsuperscript{72} Raghvachariar sees the application of the Section 23(1) (a) of the Act as impossible to a divorce proceedings by mutual consent.\textsuperscript{73} They may seek divorce thus even without actually living separate and apart. The Act has nowhere provided effective mode of checking the fact except only to rely the assertion made by the spouses.

Such approach or law to a divorce by mutual consent made divorce inflexible further by laying down the conditions required to be fulfilled before and after the filing of petition. Besides one year separate living before the petition, another six months also after filing of petition for a divorce the spouses will have to wait for actual hearing of and obtaining decree of divorce by consent under Section 13B, has put divorce by mutual consent, if any, very stringent.\textsuperscript{74}

It is also not laid down in Section 133 that both the spouses signing the joint petition for divorce by mutual consent should be present before the presiding judge of the court having jurisdiction of granting a divorce under the Act. The worst implication of this not requiring the spouses to be present essentially before the court under Section 133 is that the wives may otherwise be compelled

\textsuperscript{72} Paras Diwan, \textit{Modern Hindu Law}, Reprint Ed. 1982, p. 148 according to whom the bars laid down in Section 23 also apply to divorce by mutual consent.

\textsuperscript{73} See his \textit{Hindu Law}, p. 1044 (1980), See also Per Chinnappa Reddy J; in Bindu Devi v. Singh Raj, AIR 1977 P & H 167, 177.

\textsuperscript{74} See also Paras Diwan, \textit{Family Law}, 1st Ed. pp. 40-41.
to sign over the petition elsewhere not the actual court by subjecting them to a variety of manners affectionate as well as depressive. In actual practice, there may be every possibility that wife, better if illiterate, may be asked to put her thumb impression over the petition and affidavit thereto and that the petition for divorce my mutual consent can be granted by the courts some without insisting on the wives also to be present before them and enquiring whether they really consented to the grant of divorce or not and the vice versa. It thus appears that the 'divorce by mutual consent' has not been thoughtfully phrased and worded under Section 133. There are more chances of misuse of the Section 133 than of real and genuine utilization thereof.

But on the other, though more than eight years time has expired since the introduction of the divorce by mutual consent under the Hindu Marriae Act, 1955, only few cases that is only eleven cases approximately are on the Reports which go a long way to show that divorce by mutual consent is harshly worded makes a divorce much stringent to be availed itself of by the genuine spouses in real practice.

In Kanwal Jit Kaur v. Kulwant Singh, the District judge dismissed the joint petition for divorce under Section 133 merely on the technical ground that the parties did not reside within his local jurisdiction which barred the court from assuming jurisdiction to grant divorce. But the High Court held and favoured the spouses seeking divorce by granting the same by their mutual consent on the plea that where the court did not lack inherent jurisdiction the court could not deprive itself of the jurisdiction on the ground

75 (1978) HLR 542 (P & H).
of territorial jurisdiction. 75a In the instant case, the parties had stayed in Chandigarh for a short while on the basis of which the High Court assumed its jurisdiction. It is submitted that this is another flaw of the matrimonial law which needs to be redressed and rectified so that divorces may not withhold merely on technical grounds.

In the actual practice, the occasion arose when the original petition for divorce was by husband on the fault ground that is, desertion of the wife but dismissed for non-proof thereof by the additional district judge and the appeal was filed by the husband in the High Court. During the appeal the parties had compromised to the passing of the decree of divorce which the High Court passed under Section 13B that is, divorce by mutual consent without strictly adhering to the strict requirements as regards the period of time or without obtaining the fresh joint petition for divorce under Section 13B in the case of Jagjit Singh v. Gunwant Kaur. 76 It may be argued that there was no sense on the part of the legislature to have prescribed the 'one year' living separately before filing the joint petition and waiting for another six months at least after filing the joint petition for divorce under Section 13B. It may also be argued whether compromise could not be regarded as a mild form of euphemism of collusion which is a bar under Section 23 of the Hindu Marriage Act, 1955 to the grant of decree of divorce even under Section 13B. In the instant case the court granted 'divorce by mutual consent' under Section 13B on a petition filed for divorce on fault ground under Section 13(1) (ib) of the Act, 1955 that too during appeal, in the event of compromise. In our

75a Id at 542-543.
76 1978 HLR, pp. 696-697.
submission it is only a compromise decree, not a so-called divorce by mutual consent, in consideration of Rs 9000/- paid by the husband to the wife in court. And thus the appeal was accepted by the court on compromise under Order 23, Rules 1 and 3 of the Civil Procedure Code. It may well be questioned in the instant case that when the original petition for divorce was filed so as to say why the spouses not took recourse to Section 13B at the very initial stage instead of going on the fault ground under Section 13(1) of the Hindu Marriage Act, 1955.

The words employed in Section 13B for divorce by mutual consent are so malphrased that even the trial court of the District Judge rank had erred in laying the proper construction over the phraseology employed and spirit underlying Section 13B. In the case of Ravi Shanker v. Sharda 78 the trial court, that is, 4th Additional District Judge, Jabalpur dismissed the petition for divorce by mutual consent taking the view that the proof of the ingredient contained in the newly added Section 13B was not sufficient for the grant of divorce, 79 while the fact was that all the requirements were obviously of Section 13B had been fulfilled in the instant case. 80 But the High Court came to the rescue of the spouses on appeal and favoured them with the passing of the decree of divorce under Section 13B by holding that there was nothing to indicate that the spouses demanding divorce by mutual consent were required to prove anything more in addition to that

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77 Ibid.
78 AIR 1978 MP 44, 45.
79 Ibid.
80 Ibid.
laid down in Section 133 else it would result in nullifying the very object of the divorce by consent under this Section. The court further observed that no useful purpose would serve by letting the marriage bond between them continuing any longer and it is in the fitness of the things to dissolve their marriage, especially when their decision to have their marriage dissolved continued unchanged.

In Dhanawir v. Dr (Mrs) Promila the parties got the petition initially filed on one of the fault grounds of divorce converted into one for divorce by mutual consent from 27 May 1976 by virtue of the newly added Section 133 by the Marriage Laws (Amendment) Act, 1976 under the Hindu Marriage Act, 1955. The amendment in the petition was therefore allowed by the High Court to convert into one for divorce by mutual consent as the parties were away with each other since 1973 and the decree of divorce by mutual consent was thus granted by the High Court.

In other case of Joginder Kaur v. Mohan Singh, the parties had been living separately for the last four years, that is, since March 1974. The marriage was sought to be dissolved by annulment on various grounds noted in the unamended petition. It was only during the appeal the parties agreed and filed an application for amending the petition originally filed to get that converted into one for divorce by mutual consent and the High Court granted the decree thereof observing that it was in the interest of both of

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81 Ibid.
82 Id at 46.
83 1979 HLR, p. 151 (P & H)
84 Ibid.
85 (1979) HLR p. 310 (P & H).
It may be submitted that it is again a compromise not initially a mutual consent between the parties to agree to the grant of divorce by mutual consent. The court has endeavoured to, it is submitted make Section 13B to be a breakdown ground instead.

In one more case that is of Gurdev Kaur v. Malkiat Singh the wife originally filed the petition for divorce against the respondent husband on grounds of desertion and cruelty but the petition was dismissed by the Additional District Judge, Patiala on February 9, 1979 there upon the wife appealed against the dismissal of her petition. But during pendency of the appeal the wife moved for amending her petition to get it converted into one for divorce by mutual consent which the High Court granted on not being objected to by the respondent husband. Thereupon the court granted divorce by mutual consent under Section 13B.

It appears that the spouses in general first seek the divorce on fault ground(s) because they know that they will have to wait for a long time to get divorce by mutual consent at least eighteen months excluding court adjournments while for filing the petition of divorce on fault grounds there is no such mandatory bar of period in law. When the petitioning spouse fails to prove the fault ground(s) he / she gets the petition converted into one for divorce by mutual consent. It is evident from the plain reading of the instant case in which the parties could have initially sought divorce by mutual consent instead of first resorting to the fault base

86 Ibid.
87 1980 HLR pp 331-332 (P & H).
88 Id at 332.
divorce. This is further proved by one more case, that is, of Jagmohan v. Smt. Sudesh, the wife had filed, first, the petition for divorce on fault grounds in the court of Additional District Judge, Ludhiana but during the Civil Revision No. 1498 of 1978 the High Court granted divorce by mutual consent on the petition having been converted into, during Civil Revision, one for divorce by mutual consent under Section 133 by observing that it was impossible for the parties to continue living together as husband and wife. It is a strange matter that there is one more case of the compromise decree passed at the appeal stage for divorce by mutual consent under Section 133 of the Hindu Marriage Act, 1955 while the original petition was one for annulment of marriage. In Krishan Lal v. Parveen Kumari, the marriage was first sought to be dissolved by nullity decree on the petition of the husband but the petition thereof was dismissed by the trial court. The husband went in appeal against to the High Court. During pendency of the appeal, the wife agreed to a decree of divorce by mutual consent in consideration of Rs. 7,000/- of payment being made by husband. The compromise deed was then filed whereupon the High Court passed the decree or divorce by mutual consent. The actual story behind the case of annulment and / or divorce was that the respondent had been suffering from tuberculosis due to which they did not continue to live together and the healthy spouse that is, husband was wanting dissolution whether by annulment or divorce decree whatever may be available at every cost. In this case the parties could have resorted the divorce more by mutual consent.

89 1979 HLR, p. 303, 304 (R & H).
90 1981 MLR, p. 142, 143.
consent at the very initial stage under Section 133 of the Act of 1955 than file the petition for annulment of marriage under Section 12 of the Act, 1955. It appears that one-year-separat-living requirement before filing petition for divorce might have prevented them from taking direct recourse to Section 133. Actually the period of the total eighteen months is too much to wait for actually obtaining divorce by mutual consent. The hardship due to the waiting time of six months after filing the joint petition for divorce by mutual consent required under Section 13B of the Act is again highlighted in the case of Dr Surinder Pal Kaur v. Mohinder Partap. 92 In the instant case the parties filed a petition for divorce by mutual consent 93 under Section 13B. The case had earlier came before Mr Justice M.A. Sharma on 17 October 1980 on which the judge found that there was no likelihood of the parties burying their hatchet and continuing to live together as husband and wife. The case was then adjourned so that statutory period of six months might, after petition, elapse before the decree could be granted. On the expiry of six months, the court granted the divorce under Section 13B of the Hindu Marriage Act, 1955.

How courts took extra-factors in granting and refusing the petition for divorce by mutual consent is illustrated in the case of Jagroop Singh and Balvinder Kaur v. The General Public. 94 In this case the joint petition was filed by the parties under Section 13B for divorce by mutual consent under Section 13B but it was dismissed by the District Judge, Faridkot by holding that the spouses were of a fairly

92 1981 HLR 593, 594.
93 At appeal stage or trial stage, it is not knowable from the facts reported.
94 1981 HLR pp 269-70 (P & H)
advanced age and further that they had got quite grown-up five children—two sons and three daughters, and, in the last, the Judge was not satisfied about the truth of the averments made in the petition for divorce by consent. Both the parties appealed to the High Court which upset the dismissal made by the trial court and granted divorce by mutual consent under Section 13B sought for by the parties and held that simply because that the parties had five grown up children and were of fairly advanced age could not be a ground for refusing the divorce on mutual consent demanded by both the spouses. It is submitted that in the instant case it can be doubted whether the parties had really lived separately for the last one year since the presentation of the petition for divorce in the trial court because the full facts had not been reported in the Reporter nor had any mention to that effect been discussed in the judgement reported.

Not only High Courts of Punjab / Haryana but also of Uttar Pradesh has passed the compromise decree of divorce characterising it to be a decree of divorce by mutual consent. In 

95 Id at 270.
96 Ibid.
97 AIR 1981 All 151
for compromise was filed by the parties. The learned Judge Deoki Nandan took pains to decide first whether the compromise should be validly accepted and the matter decided in terms thereof. The learned judge held that "It cannot, therefore, be said that the compromise is in any manner unlawful." It is transpired from the reading of the judgement in the instant case that the wife too did not want to live with husband respondent in whose favour the decree of divorce had been passed by the trial court finding the charges of adultery, cruelty and desertion duly proved against her and she also wanted divorce but all that she was aggrieved from were findings recorded against her by the trial court. On this the husband was prepared not to press the allegations provided the decree for divorce was not upset and the wife who also made counter-allegations withdrew the allegations made by her against the husband. The result was that both agreed that the marriage be dissolved by the decree of divorce by mutual consent sought for by compromise under Section 133 of the Act, 1955.

The above study presents the clear picture that divorce by mutual consent as presently phrased under Section 13B is so stringent and harsh that the parties do not generally take recourse to such divorce but go for divorce on fault grounds. Further, some of the spouses have obtained divorce by consent under compromise and at the appellate level when the fault-oriented divorce structure did not help them at the trial stage at least and no hope for any help from the appellate court. Furthermore, the courts have granted divorce by consent almost in the cases referred to above on the plea that divorce was in the interest of the

98  Id at 152•
spouses and children and it was impossible for the estranged spouse to join again and continue to live together despite the endeavours made by the courts to bring about reconciliation between the spouses before granting divorce by mutual consent under Section 133. It is also revealed from the sketch of the cases discussed above that the courts did not effectively investigate the causes and reasons whether spouses had been voluntarily or involuntarily enable to live together during the period of one year just preceding the presentation of the petition for divorce by consent. The sub-Section (1) of Section 133 requires that both the spouses "have not been able to live together." The words "have not been able" whether means and involves voluntary separation also? And if not then the causes of separation must have been investigated by the courts before granting decree of divorce by consent. If not to be investigated, then the legislature has preposterously used the words "have not been able to live together." This brings the consensual divorce near to but not make it a breakdown ground of divorce and, paradoxically in that case the legislature and law in turn believes the statement of the spouses alone who are in law presumed to be the best judges to say whether or not their marriage has broken down irretrievably which warrants immediate dissolution under Section 133 under the garb of the divorce by mutual consent. It is submitted that it is a clandestine approach of the law to judge the breakdown of marriage enough to be dissolved by decree of divorce by mere mutual consent. The stability of marriage is thus confused and misled both in fact and in law.

Moreover, divorce by agreement is loaded with the stringent requirements for the accrual of the eligibility for seeking divorce by mutual consent especially in view
of the waiting period of one year ordained under Section 14 of the Hindu Marriage Act, 1955 and the applicability of the various matrimonial bars laid down in Section 23 of the said Act. The requirements as to time before and after the filing of petition for divorce by consent under Section 133 make the simple thing complicated. Besides, the divorce by mutual consent will be refused also when the consent has been obtained by force, fraud or undue influence under newly added Section 23(1) (bb) of the Hindu Marriage Act, 1955 by the Marriage Laws (Amendment) Act, 1976. It is also not stated as to what meaning whether dictionary or legal as defined in the Indian Contract Act shall be attributed to these terms viz. force, fraud or undue influence. Nor is there any reported case on the point to illustrate the same and to see what interpretations shall be laid by the courts in real application and use of them. It is also not expressly laid down in the Act as what would be the effect on the decree of divorce by mutual consent passed by the court if it is later delected that the consent of either party was obtained by force, fraud or undue influence.

The less or say the negligible number of cases appeared in the Reporters what also testifies that the parties could not avail themselves of the consensual divorce probably for this fact also that the other spouse might have not consented or withheld his or her consent to obtaining divorce by mutual consent under Section 133 of the Act as revealed also from the study of those cases above in which the other spouses become impelled in the last to enter into compromise that too at the appellate stage. Had the other spouses consented easily earlier the cases could have been at the very initial stage and directly filed under Section 133 of the Act than first to go under Section 13(1) on the fault ground(s). The divorce by mutual consent in the extant form
seems to be unworkable being hard and stringent. It may be recalled that it is in Japan divorce by mutual agreement is available in its puritan form with no qualifications hedged therewith.

It is also transpired that the Indian legislature was so much preoccupied and seized with the notion of indissolubility of marriage that even divorce by consent *simpliciter* too could not be provided under the *Hindu Marriage Act* and the *Special Marriage Act*. But on the other hand the legislature has been expanding the number of fault grounds and other species of divorce such as 'divorce by conditional consent' to meet the actual need of dissolubility of marriages in the given cases and still the present divorce structure is quite deficient in one or the other respects. The legislature does not seem to be prepared with open mind and heart to accept the straight proposition that it is only decent and simple dissolution that can protect the stability of marriage.

At last it is submitted that divorce by common consent of the spouses has always as one of modes and grounds recognised in the caste customs of the Hindu communities whose population is vast which practise customary, non-judicial, divorces as before and that are still protected by Section 29(2) of the *Hindu Marriage Act*. In *Pemabai v. Channulal* the marriage of the parties was dissolved on the basis of mutual consent of the spouses. Later the wife filed a suit in court for declaring that the marriage was still subsisting on the plea that at the time of the

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1 AIR 1966 HP 57.
consent alleged to have been given by her she was only fourteen years of age and therefore did not have enough of understanding to give a valid consent. The suit was rejected by the court by observing that the wife had at that time sufficient understanding and further such divorces are recognised in the caste and, therefore, the marriage stood duly dissolved by divorce by mutual consent. Moreover, some erstwhile Indian states of Travancore and Cochin much before the Hindu Marriage Act, 1955 came into effect had enacted several statutory laws which recognised divorce by mutual consent or by a deed executed by the parties, for in matriarchal societies like Marummakkatayama and Aliasatana marriage has always been regarded as a consensual union and not a sacrament and therefore could be dissolved by mutual consent. The Special or local enactments then passed in Travancore and Cochin are still in operation notwithstanding the Hindu Marriage Act, 1954. In both customary divorces and divorces under erstwhile special enactments the provisions of Section 14 and 23 do also not apply as regards the divorce petition within one year of marriage and matrimonial bars. The most noteworthy fact is that there does not seem any marital chaos in these societies due to divorce by agreement simpliciter.

2 The Madras Aliasatana Act, 1924; The Travancore Ezhava Act, 1925; the Cochin Act, 1931; the Madras Maruma-Khatayama Act, 1933; and the Cochin Marumakhatayama Act 1938 and see also Paras Diwan, Supra note 99, p. 149 its footnote 16.

3 Ibid.

4 See Ayappan v. Parakketty, AIR 1971 Ker 44 (P3); Prerna v. Ananda, AIR 1972 Ker 69.

5 The HWA, 1975.
EVALUATION OF CONSENT THEORY OF DIVORCE

It is quite rational if the spouses themselves think and decide whether mutual fidelity and love can be protected any more while continuing in marriage. If they feel that mutual fidelity cannot, for any reason, be maintained any longer than it is better they should have freedom of dissolving their marriage rather than to suffer drift and go astray, for the protection, maintenance and stability of institution of matrimony which is a boon to mankind from every angle both materially and spiritually. The argument holds water more when it is believed that freedom of marriage implies freedom of divorce. The staunch protagonists like Engels, Lenin, Marx, N.R. Tillet etc. base every human institution including marriage and divorce on the 'freedom' and 'full consent' or the parties to opt as well opt out of marriage like a contract as and when they feel that the marriage contract has turned out to be insufferable and miserable and dislikened for any reason whatsoever. So, if marriage is a contract founded entirely on the mutual consent of the parties then marriage should be well dissoluble by mutual consent also of the parties for or without reason(s).

Professor Paras Divan remarks that 'the free volition' concept of marriage if taken to its logical end implies that the parties should have the same freedom of divorce as they have of marriage. This also seems quite logical that 'to err is human' and 'man is never infallible'. May be that the parties have first entered into the marriage contract sooner or later they realize that they have made a mistake to do so or feel their marriage has turned out to be a bad

5a Paras Divan, Family Law, 1st Ed. p. 39.
6 Id at 38-39.
bargain for whatsoever be the reason for which both or either or none of them are / is responsible / blemished or incompatibility of temperament is not being cured then they should have the freedom to get out of it by their mutual desire. To err or commit mistake is not wickedness or malicious. The parties to the marriage should be allowed to correct their errors even if they want to do so by opting out of marriage. It may not be disregarded or forgotten that a party becomes wicked or malicious or goes astray or commits a matrimonial offence when he finds no other alternative to get out of marriage straightway. Frustration and depression may also overtake him or they take the victim in their absolute grip at which stage the party loses his balance in order to commit any sin / offence either to others or to himself or herself by resorting to violence whether physical or mental. Personal happiness is the supreme for every individual as against the social interest to a large measure the contemporary world inspired by the individualism and the marxism. Personal interest is not subservient to the social interest in the present era. Marked by wide spreading education, mobilisation, urbanisation and most increasing employment to both male and female in all fields including military and other hazardous jobs which once used to be male-preserve and freedom of thought and action coupled with constitutionally guaranteed the equality of the sexes and equal opportunities of public employment and personal liberty etc. the individual has become most conscious about himself. Arranged marriages are being decried everywhere and substituted by self-choice marriages in which the mutual desire of the parties is the governing factor. Dissolubility of marriage by mutual consent can also be said to be a necessary corollary of mutual consent to enter into matrimony. So if the parties at any time feel that they cannot happily and harmoniously live in marriage the permanent separation by way of divorce will be a blessing for the both the parties
as well as for society including the children, if any. As seen earlier the scholars and thinkers like N.R. Tillet maintain that the freedom of dissolving the marriage will rather work in favour and interest of the spouses and society by reducing unhappy marriages to an end and creating more happy marriages. The spouses will live in harmony and consolidate the unity and solidarity of the marriage and family in turn. It is also presumed and believed by the protagonists of the consent theory of divorce that the freedom of divorce compels the spouses to take a serious and sincere view of one another inter se.

But on the other hand, the consent has been criticised also. The first and foremost drawback of the consent is that it reduces the marriage concept from being a social institution to the mere ordinary contract like others to be entered into and repudiated the way the parties like. Secondly, the consent is criticised on the count that it will bring chaos in the family and society and lead to hasty divorces. Thirdly, the marriage will be contracted irresponsibly by the parties when they know that at any time they have the freedom to repudiate it.

In practice although Japan had introduced bare 'divorce by agreement' as early as 1898 but did not solely base on it and provided unilateral divorces too on the ground of the utter failure of marriage. The U.S.S.R which had recognised the consent theory in marriage and divorce to the full-swing on the morrow of Revolution-1917 did not later stick to it alone. And the procedure for it was made cumbersome in 1936, and made expensive too. It was replaced in 1944 by judicial procedure instead of the administrative procedure. So

8 Engels F., Origin of Family, Private Property and State, p. 135.
9 Sobranie Zakonov (1936) No. 34 Art. 309.
previously the divorce came to be characterised as 'divorce by post card' being entirely voluntary, in Russia, had to be later in 1944 judicially alone obtainable. And ultimately since 1968 though divorce by voluntary divorce has been reintroduced by administrative act but in effect, "if the two spouses wish to obtain a divorce" by mutual consent and if they have no minor children, the dissolution of marriage is pronounced by the organ having jurisdiction to register acts of civil status. It means that divorce mutual consent is not allowed, in Russia where there is minor child or there are children, by the administrative act though obtainable only by judicial procedure that too when both spouses have requested the court to pronounce divorce for the impossibility of continuation of common life of the spouses. Thus the U.S.S.R. too has not solely based on the consent theory but has the breakdown theory in case of one of the spouses wanting divorce alongside of the consent divorce. So the U.S.S.R. has found the bare consent theory of divorce not only unworkable but the worst in consequence. The Republic of China too does not base purely on the consent theory keeps the breakdown ground too for divorce. In other countries like France, Portugal, Belgium, Great Britain, Sweden, Norway, some states of the USA and most of the Commonwealth countries and East European countries whenever the consent theory of divorce is has been provided in their divorce laws, various safeguards in the form of 'hardship', 'waiting time', 'interest of children', 'social interest' etc. have also been attached inherently as well as separately with the consent theory of

10 Ibid.
divorce. It proves that the consent theory in its puritan and simple form is also quite deficient. It fact the consent theory has now been all over overshadowed by the breakdown principles of divorce. The bare consent theory cannot bring the stability of marriage.

Finally it is submitted that theoretically the consent theory seems to be very beautiful and ideal but in practice the consent theory makes divorce either too easy or too difficult. The consent theory may also inflate the ego of the other spouse to whom his / her spouse requests to consent to the grant of divorce at the wish of the latter alone. Here the human dignity of the other spouse i.e. the seeker of consent comes to be seriously jeopardised in case if the consent is withheld. It is also very much likelihood that spouses many a time magnify their problems, differences, pains, discomforts and then rush to court for divorce leading to the irreparable consequences not only to themselves but also to the whole family and in turn to the future society.

Divorce by mutual consent is again assailable on this count that this theory seems to be magnificent in outside inspection and concept only but if one of the spouses withholds his / her consent by whatever reason, say belief in indissolution of marriage, sheer malice, bigotry or avarice, and obstinacy etc., then divorce is never possible. It was therefore expressly refuted in England by the Royal Commission on Marriage and Divorce. England has adopted from the beginning of the consent theory only as a fact-situation of breakdown of marriage irretrievably but not simpliciter.

Divorce has been pleaded to be the consequence of failure or fault of both the spouses which leads to the proposition that it is the defeat of both the spouses jointly and not of the particular spouse but the same does not seem to have been accepted on two counts, viz. (1) the inherent belief of not allowing easy divorce in which case conduct of the respondent is irrelevant and (2) the peculiar psyche of law, that is the intense consciousness of its social responsibility. Therefore the most legal systems do not allow the distinction to be permissible upon mutual consent but upon the proof of the factual separation for a specific period. New Zealand, Canada, Australia, the U.K., Germany and Belgium are the best examples of it. Since the factual separation with absence of hope of reconciliation has become the common practice to be allowed for divorce in various legal systems referred to above; for example, it may be logically submitted that except for psychological aversion to the term 'by consent' 'Breakdown' has been arguable to be regarded not materially different from the consent. So, the divorce by mutual agreement simpliciter is merely a utopian ideal and much removed from reality in its actual application, implementation and consequences.

To call a divorce by agreement it is submitted, following the factual separation and judicial procedure to be the divorce by mutual consent is entirely a misnomer. Divorce by mutual consent in its simple meaning is the dissolution of marriage by mutual agreement for or without reason and with no intervention or interference from law, courts or third parties - in the same way as they got into marriage.

17 Ibid.
18 B. Mackenna, "Divorce by Consent and Divorce for Breakdown of Marriage" (1967), 30 MLR, pp.121-128.
The bare consent theory is not possible to be permitted in law as evidenced from the experiences and actual provisions of divorce by consent in the various legal systems of the countries who have attached factual separation for a specific period to be a condition precedent to avail itself of the provision of divorce by mutual consent that too with judicial intervention. So it is neither the breakdown ground also of divorce. It is most implausible that a marriage may be taken to have been irretrievably broken down merely by will on the spouses.

The only question here is not of dissolubility or indissolubility of marriage in the given era. This is an undeniable fact that divorce has come to stay. Therefore the only question here is how best effect can be given to the utter failure of cohabitation between the parties which has gone to a point of irreparable. So it is not always that free dissolubility will necessarily bring about the stability of marriage which is the main task today of the legislators and society. Both fault base divorce and voluntary mutual divorce alone being deficient cannot produce the stability of marriage as an institution. The 'stability' lies in the true sense of the term in the immediate dissolution of an unstable marriage as and when so desired by either of the spouses even and their marriage has actually broken down.