CHAPTER I

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The institution of marriage is not the outcome of a day but of centuries, and has a remarkable history of its own origin and development. Man traversed a long journey in reaching the present concept of marriage. Probably the institution of marriage did not exist in the primitive society. It appears that in the march of humanity towards the progress and civilization, there emerged the proprietary concepts of 'possession' and 'ownership.' It also appears that with the emergence of the notions of 'possession' and 'ownership' some incipient idea of marriage - something like this having exclusive possession over / of woman - came into existence. It seems that the man was seized of with the idea of knowing the paternity of his own children. In this, there appears to lie the seeds of institution of marriage. When mankind reached the patriarchal stage, the hold of man over woman came to be established securely and safely. With this, the marriage came to be established as an exclusive union i.e. all men other than the husband are excluded from the cohabitation with the woman i.e. the wife.

In our contemporary society, the institution of marriage is of vital importance to the society. For man and woman, the marriage has certain objectives of attaining mutual love, trust, understanding and fidelity, happiness, satisfaction of sex drives, division of labour, regularisation of sexual intercourse between the spouses, perpetuation and protection
of society, protection of the interests of the parties, procreation of children and economic and social security to the wives and children.

In its most idealised form, the marriage among the Hindus came to be regarded as an utmost sacrament and a holy union - a permanent, indissoluble, and eternal union. The marriage for the Hindus came to be known as a religious necessity without which the existence of a Hindu was not complete. A Hindu marriage was as such considered to be necessary not merely for the performance of spiritual and religious rights and duties but also for the fulfilment of the temporal duties and social acts. The wife was treated to be the source of attaining - 'Dharma, Kama, Artha and Moksha' - the four mythological goals of the life of man.

The Hindu religion since its inception has been a duty oriented system, and, therefore, every Hindu was enjoined to marry a Hindu woman in order to attain the above four goals of life. Every Hindu was further enjoined to beget a son of his own, who could relieve him from the torments of hell, and that was possible only through the act of marriage. Mutual fidelity was, consequently, recognised to be the highest 'dharma' for both the spouses under Dharma-shastras. Such a union was not dissoluble / could not be dissolved under any circumstances. Even the death could not disunite and dissolve it. This is evident from the fact that once the parties got married, every Hindu wife was to respect her husband even if he were devoid of all virtues and merits.

So far as the duties of the husband and the wife are concerned, the Hindu Shastric Law ordains that the wife is the 'graha-laxmi' i.e. 'the good lady of the house' to
manage its internal affairs, while the husband is the 'pati' or lord i.e. 'protector' and bread-earner to protect and support his wife as well as his family. So, both the spouses were / are required, traditionally, to lead their conjugal life harmoniously as much as possible, and that they must see that there are no differences between them and that they remain faithful to each other, and thus enjoy the fulness of life.

Under the Hindu Textual Law (Dharamashastras) the marriage was highly idealized so much so that it differed a great deal from all forms of marriage in the rest of the world, so far as its sanctity and contents were concerned, as it is evident from the fact that a Hindu marriage was regarded as an indissoluble union not only in this world but in all the worlds to come.

There are many social, scientific, political, economic and other forces / factors which are responsible to bring the Hindu concept of marriage under a thorough and radical change. Those factors / forces are the modernisation, urbanisation, mechanisation, industrialisation, tremendous mobility, freedom of movement, rapid and wide spread of education, revolutionary changing - culture as well as habits of the people, high advancements in science, technology and means of communication, and the over all unforeseeable changes in the attitudes of the masses in all the spheres of their lives, including the family and marital lives. Furthermore, the family beyond the primitive rural areas remains no longer of necessity held together by physical and economic ties. The livelihood of the families particularly in the Hindus now no longer depends upon the common toil of all. With the sudden and unprecedented emancipation of
women, Indian women also in particular the wives who take jobs, exercise professions, conduct business, actively participate in politics, occupy high and key positions, are legally free to hold and dispose of even the inherited property, and exercise the right to equality in fact as well as in law given and guaranteed them under the Constitution and other laws of modern India. Moreover, the children also today relieve their mothers of their daily care and custody due to their long stay outside the family either because they go for work or subject themselves to increasingly long periods of their school and college education at least for the major part of the working day. These revolutionary social, political, scientific and economic changes imply a philosophy to regard women—increasingly as equal in rights to move about, develop their faculties and personalities the way they like, and manage their affairs at their own accord, while under the—formerly predominant social pattern, the husband's freedom of movement was always relatively greater than that of their wives.

All this has brought the total attitudinal change in the peoples particularly the Hindus with regard to their outlook at the sanctity of the marriage. With the result, a new philosophy has taken birth which, stressed the individual self fulfillment and realization of personal happiness as against the stern duty imposed by the unalterable status. This put the social interest subservient to the individual interest/happiness and this type of transformation of interests from collectivism to individualism gave birth to the liberalisation of the concept of marriage. In this way, the marriage came to be emphasised more as a civil contract than as a sacramental union and
consequently we shift the emphasis from the sacramental to the contract, and therefore, it was but a next logical step to accept marriage as a dissoluble union.

The concept of divorce has emerged slowly but surely. It was at one time recognised that if one party to the marriage did something which undermined or shook the very foundation of marriage then the other party to the marriage was as of right to be entitled to seek divorce. This gave rise to the 'offence' theory of divorce.

The offence theory was in the beginning considered to be the most appropriate basis of divorce so much so that it found a place in the laws of England since 1857, and of most of the Commonwealth countries as well as of the U.S.A. This theory assumes that a marriage can be dissolved only if one of the parties to it has, after solemnisation of marriage, committed some matrimonial offence which may have been recognised as a ground of divorce only under the law, and not on the free volition of the parties. Since this theory did not imply the innocence of the party, seeking divorce on the ground of his or her spouse having committed the matrimonial offence, and therefore, this theory gave way to the emergence of the 'guilt' theory of divorce.

The guilt theory of divorce demands that there is 'a guilty spouse' who has committed some matrimonial offence / guilt (i.e. desertion, adultery or cruelty etc.) and further at the same time demands that the other spouse being innocent has no way been or is a party to, or responsible for, the commission of such offence / guilt by his or her spouse. If the other spouse is not innocent then he / she cannot seek divorce. Since the assumption of
the guilt theory that one of the parties seeking divorce must be innocent gave rise to various matrimonial bars such as taking advantage of its own wrong, condonation, connivance, collusion, acquiescence, recrimination and delay etc.

Originally the adultery, desertion, and cruelty were only the main grounds of divorce befitted in within the frame work of the offence or guilt theory, but later on some other grounds of divorce viz., insanity, communicable and incurable diseases - leprosy and venereal diseases and other disabilities were also added further which did not fit in within the frame work of the offence or guilt theory because they were rather misfortunes of a spouse than his or her own misconduct or guilt. Hence this theory of guilt or offence for divorce was renamed as the 'fault theory' of divorce which, thereby, meant that if one of the parties to the marriage had some fault viz. insanity, disease, conversion of religion, renunciation of the world, desertion, cruelty, and adultery etc. in him or her then the marriage could be dissolved irrespective of the fact whether the fault was his or her own conscious or unconscious act. Many a country therefore adopted this fault theory of divorce along with the same matrimonial bars in the legal systems for the grant of divorce.

Another development which took place in the law of divorce was the inception of the 'consent' theory of divorce popularly known as divorce by mutual consent, and gained good ground in the legal systems of many countries facilitating for divorce. It means that the law recognises the situation that has existed for sometime, that if both the spouses feel it difficult to pull on together any more
smoothly and to live together harmoneously or rather find it impossible to continue to live together by one or the other reason, then in such hard and critical circumstances the parties are free to get their marriage dissolved but through the court of law. This further implies that marriage is a contract based on the free volition of the parties, and, therefore, they should have equal rights to dissolve it. 

The rationality of it lies in the fact that the theory of mutual consent for divorce provides an opportunity to the spouses to correct their errors and to weed out the burden which has become onerous and intolerable for them. The disharmony and strained relations in marriage affects not only the physical life of a man but destroys his or her family as well as his or her moral life also and in such circumstances they have no other alternative except to go astray or commit suicide, murder and the like offences owing to intense frustrations and depressions. Such a broken family is a breeding ground for the delinquency of children.

The consent theory of divorce being based upon the mutual consent of the parties leads either to easy divorce or makes a divorce rather impossible.

In the present time, a new theory of divorce has emerged which is known as "the irretrievable breakdown of marriage" and it has acquired recognition in the legal systems of England, the U.S.S.R, Germany, Australia, Canada, New Zealand, and some states of the U.S.A. This newly emerged theory assumes two things: (i) that the law must lay down that if a marriage has been broken down beyond all possibilities of repair and has failed in all its intents and purposes, it should be dissolved. The question whether marriage has really broken down or not is to be determined
by the court; and (ii) that the law must also lay down the criterion of the breakdown of marriage and if once that is established, the courts have no option but to dissolve it. This would, however, be immaterial as to which one of the parties was/is at fault. The rationale behind this breakdown theory might be that there seems no use in keeping the marriage bond alive out of which the substance has already gone, and such marriages are in name only. They are like an empty shell which deserves to be done away with. The breakdown theory of divorce represents the modern view of divorce according to which an irreparable broken marriage is liable to be brought to an end irrespective of the fault of either or neither or any of the parties to such marriage. The breakdown of marriage is said to be such a state of marital failure as no reasonable probability remains for the spouses again living together as husband and wife.

The objective test of the breakdown of marriage lies in the factual separation of the spouses for a certain period prescribed as the minimum variously in the various divorce laws of the different countries, say for four years, five years or so on to be a condition precedent to obtain the relief of divorce on the ground of the breakdown of marriage. Apart from the objective tests, there are some versions also in which the break-down theory has been adopted variously by the various countries.

In India the Hindu Shastric or Textual law did not permit divorce to the Hindus on the analogy of having the Hindu marriage accepted to be the utmost sacramental and pious in character which implies infiniteness, indissolubility and eternity. Although a very few Hindu sages did permit divorce but that, too, in very exceptional cases. But these Hindu Sages, permitting divorce, could not get any recognition
in the Hindu Society being negligible in number. So, the general rule of the Hindu Law did not know anything of divorce. During those days, certain Hindu societies had evolved their own practice of divorce and in the course of time, this practice transformed into customs of divorce having the force of law but for those particular communities only which practised divorce. In this way even during the days when the divorce was not at all recognised under the Shastric Hindu Law, the Hindus of certain communities, classes, and castes could obtain divorce though only if a custom governing them allowed to do so. This is a notable fact that the large sections of the Hindus among the lower castes and many regional and tribal groups practised divorce permissible to them, under their customs, either by the mutual consent or by the unilateral divorce at the pleasure of the husband or by the abandonment of the wife, or by deed of the parties in certain forms i.e. tyaag-patra, bill of divorcement and Kagli etc. Though there were not any rigid or prescribed grounds of divorce by customs but probably adultery, conversion to another religion or degradation of caste or excommunication from caste/society were the common grounds. It was only the upper castes' Hindus who constituted small sections in the then Hindu Society, and they were the upholders and rigidly adhered to the indissoluble character of the Hindu marriage. In this way, the Hindu Law, by way of customs only, had accepted the dissolution of marriage as a desired solution of serious marital problems under certain conditions and among certain classes of the Hindu society.

In the year 1955, the Hindu Marriage Act was passed while recognising divorce as a matrimonial remedy therein, for the first time in the whole history of the Hindu Textual
Law to be availed itself of by any Hindu alike but on certain specified grounds only. Originally, the Act did not prescribe adultery, desertion and cruelty to be the grounds of divorce, but only for the judicial separation (until 1976). The Act in the start included both fault and guilt grounds of divorce, viz. living in adultery, insanity, venereal disease, leprosy, conversion to another religion, presumption of death, renunciation of world, and non-resumption of cohabitation between the spouses for a period of two or more years after the decree of judicial separation, and non-compliance of the decree of restitution of conjugal rights for a period of two or more years. Two additional grounds viz. Husband's pre-Act polygamous marriages and the husband's guilt of having committed rape, sodomy, or bestiality were also provided for seeking divorce but for the wife alone.

In 1964 the breakdown of marriage was also indirectly introduced by an Amendment Act in the divorce provisions of the Hindu Marriage Act, 1955. Accordingly the divorce could be obtained by either party (a) if it is shown that a decree for restitution of conjugal rights has not been complied with for two or more years, or (b) if it is shown that cohabitation has not taken place for a period of not less than two years after passing the decree of judicial separation (now the requirement of minimum two years has been reduced to one year by the Marriage Laws (Amendment) Act, 1976. Thus the breakdown theory has been partially incorporated in the present Hindu Marriage Act 1955 permitting divorce both to the so-called guilty and innocent parties (though matrimonial bars are still part of the Act) while previously defaulting spouse could not obtain divorce in such cases.
The year 1976 witnessed many changes brought about by the Marriage Laws (Amendment) Act in the divorce provisions of the Hindu Marriage Act, 1955. Desertion, cruelty, and adultery have also been incorporated as the new grounds of divorce which were formerly the grounds for judicial separation only. Despite the other changes, one more new theory of divorce known as 'the divorce by mutual consent' has also been introduced into the Hindu Marriage Act in 1976.

Thus in the present, the Hindu Marriage Act, 1955 contains the three theories of divorce viz. the guilt or faulty theory, the consent theory and the breakdown theory of divorce for the Hindus.

It is, therefore, evident from the above discussion that 'divorce' has come to stay permanently in our contemporary society.

The entire research study spreads over ten chapters.

Besides the chapter I as introduction, the chapter II traces the origin, growth and development of the concept of marriage from the socio-anthropological and legal points of view. In this connection, much help has been sought from the works of some noted anthropologists and sociologists in tracing the evolution and development of marriage. The main focus, however, remains on the English and the Hindu concepts of marriage.

Chapters III, IV, VII and VIII deals in detail with the various theories of divorce, viz. 'the Fault Theory', 'the Consent Theory', and 'the Breakdown Theory.'

Chapter III is devoted to the philosophical basis of the offence theory leading to its transformation into the fault theory of divorce. For this purpose, England is taken
as a model. It also contains discussion of the English legislative and judicial approach towards the fault theory in terms of the stability of marriage, and the fault theory in some other countries.

Chapter IV deals with the evolution of the traditional fault grounds, viz. adultery, desertion, and cruelty under the Hindu Marriage Act, 1955, and chapter V deals with the remaining fault grounds.

Chapter VI and IX deals with the traditional and modern hindrances and bars to a divorce respectively.

Chapter VII deals with the philosophical basis of consent theory. An attempt has also been made to evaluate and review the various forms of the consent theory popular and prevalent in some of the countries of the world.

Chapter VIII traces the evolution and philosophical basis of the irretrievable breakdown of marriage in backdrop of the fault and consent theories. An attempt has also been made to discuss and analyse the different forms of the breakdown theory as prevailing in some countries.

Chapter X deals with the machinery of reconciliation and structure of family courts.

The study on the whole reveals that the fault theory has been eroded by two modes: (1) by extending the grounds for dissolution of marriage, and (2) by way of extending the scope and horizons of the grounds like cruelty to the extent to include even the incompatibility of temperament.\(^1\)

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Despite Lord Denning's warning in 1950, "if the doors of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility of temperament." England had virtually accepted incompatibility of temperament as to be covered under cruelty. And ultimately in 1969 Sachs LJ in *Masarati v. Masarati* observed, "Today we are perhaps faced with a new situation as regards weight to be attached to one particular factor that is, the breakdown of marriage." In 1955 when we enacted the Hindu Marriage Act we virtually accepted this English version of divorce.

A broken home is as much a problem as the destabilized marriage multiplying the miseries of both the spouses, becoming breeding-ground for juvenile delinquency and serving no social purpose. However, even when marriage has become dissoluble, it is a paradox nevertheless true that the main stress remains on the indissolubility of marriage by providing few fault grounds of divorce, with the result the stability of marriage was confused with the indissolubility of marriage. In fact, the stability of marriage does not lie in keeping the unstable marriages intact but lies in their dissolution if repair is beyond hope. It is to be realised that when divorce becomes inevitable there should be respectable mode of divorce with maximum of fairness and speed, and the minimum of bitterness, distress and humiliation. It has, therefore, been realised in most countries that the irretrievable breakdown of marriage is

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3 For example see *Williams v. Williams* (1963) 2 All ER 994; *Gollins v. Gollins* (1963) 2 All ER 966.
4 (1969) 1 WLR 393.
only a viable mode which ensures the two objectives of a 
good divorce law,\textsuperscript{5} namely, "to buttress, rather than to 
undermine the stability of marriage; and when regrettably 
broken down, to enable the empty legal shell to be destroyed 
with maximum fairness, and the minimum bitterness, distress 
and humiliation."

It is also realised by sociologists and jurists equally 
that broken marriages need a therapeutic treatment. The 
adversarial litigation system adds to the misery of the 
discordant couple torturing one another and ultimately he 
is compelled to expose the obscenities of his married life 
before the lawyers and the court and thus to wash the dirty 
linen in the public.

Therefore, it is submitted that the irretrievable 
breakdown of marriage to be evidenced by two-year-living-
apart should be the sole ground of divorce. This will, 
it is submitted, foster the stability of marriage. It 
is further submitted that adversarial system should be 
replaced by a less formal, therapeutic treatment of the 
problems of the broken homes. This will mean: (i) an 
effective reconciliation machinery well equipped with modern 
techniques and satisfactorily assisted by sociologists, 
psychiatrists, social workers, investigators and marriage-
counsellors. They will help the spouses in repairing marital 
rift, in sorting out their problems in view of the serious 
implications of divorce, and if the divorce is the only 
alternative then to come out with respectable conciliation 
as to maintenance, distribution spousal property, and

\textsuperscript{5} Laid down by the English Law Commission in its report 
\textit{Field of Choice}, para 15.
custody, and maintenance of the children, (ii) establishment of a special kind of court which may be nomenclatured as the 'Family Court' with auxiliary services.