CHAPTER III

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(DICHOTOMY OF INNOCENCE AND GUILT)

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PART I

EVOLUTION AND THE PHILOSOPHICAL BASIS OF THE 'MATRIMONIAL OFFENCE' THEORY AND ITS TRANSFORMATION INTO THE 'FAULT' THEORY OF DIVORCE

The Roman Catholic Church had viewed the marriage as a sacrament and in turn as an indissoluble union over which the ecclesiastical courts exercised jurisdiction treating it to be governed by the Canon law. This had so much of profound effect on the subsequent legal developments that the Roman Catholic doctrine of indissolubility of marriage became a tenet of English law. Divorce was beyond the scope of the doctrine of indissolubility of marriage, but it applied only to the validly contracted marriages. The marriage being invalid (void) due to bigamy or prohibited relationship or non-consent etc., however, came to be annulled by the sentence of the Ecclesiastical court / church from the date of marriage. The notion adopted was that either the marriage was forever or never both in fact and law. In the 16th Century, there came to be a breach of Ecclesiastical

1 Pollock and Maitland, History of English Law (ii), 364-366.
2 Bromley, Family Law, Vth Edn., p. 69.
courts with Rome but the principles referred to above remained the same and applied by English Ecclesiastical courts even after the aforesaid breach with Rome. Therefore, the mere fact that the proper ceremonies and rites have been gone through by the parties to the marriage in breach of the above impediments did not at all confer the validity on such marriage nor any status of husband and wife over the parties to it and the parties in turn could contract another marriage irrespective of the fact whether the decree of nullity had or had not been obtained by the parties from the Ecclesiastical courts. Thus an in-road was made into the concept of indissolubility of marriage which resulted into the termination of the marital bond. A valid marriage was indissoluble only during the life of the either spouse unlike that a Hindu marriage which restrained a Hindu widow to contract remarriage. The jurisdiction of the ecclesiastical courts was further cut down for declaring marriages a nullity after the death of either party in certain cases. The impediments were divided into the 'Civil' and 'Canonical.' The former related to the breach of monogamy which rendered the marriage void ab-initio and there was no need of obtaining its decree and further anybody could question it at any time even after the death of either party. In the latter case the impediment related to the impotency or prohibited relationship of the party or parties and the validity of such marriage was not to be questioned after the death of either party. What all this establishes is this that only a valid marriage was indissoluble and not

3 Ibid.
4 Jackson, Formation and Annulment of Marriage, 2nd Ed., pp. 54-55.
5 Such marriage come to be voidable. Bromley, Supra note 2, p. 70.
the void or voidable. Nullity thus served the purpose of divorce to such an extent. Bromley has very rightly analysed the marriage thus: the annulment and divorce both are the means of terminating a marriage, with the only difference that the latter (divorce) is never retrospective in effect. In *R v. Algar*, Lord Goddard, C.J. seemed to be right where he said that the retrospective effect of the decree was artificial and confusing as well and 'in truth perpetuated a cononical fiction.' It is further proved by another fact also that anomalous nature of voidable marriage was later greatly criticised and the Law Commission had to examine in 1970 whether the concept be altogether abolished and transformed into and as irretrievable breakdown of marriage to be a ground for divorce. Although the proposal was rejected by the Law Commission on three reasons which were not very convincing. Nullity of Marriage Act, 1971 was the outcome of the Commission's recommendations in this regard.

It shows that the concept of monogamy conclusively and exclusively adopted in law perplexed both man and woman in the Christendom for want of dissolubility of their marriage in case of total marital failure between them. The concept of the annulment of marriage served this purpose but only in very limited cases i.e. if the marriage was defective in formation. Rayden has rightly observed, "The doctrine of indissolubility was generally evaded by obtaining a decree annulling the marriage on the ground of pre-contract," i.e. proof of a previous binding contract to marry another.

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7 (1953) 2 All ER 1381, 1384, CA.
9 See Bromley, Supra note 2, p. 71.
10 i.e. proof of a previous binding contract to marry another.
consanguinity or affinity. Elaborate and highly artificial rules had grown up around the table of prohibited degrees... Although the Church doctrine of sacramentality and in turn indissolubility of marriage made it impossible prior to the Reformation to dissolve the validly contracted marriage, by a decree of divorce a vinculo matrimonii without recourse to the Pope who rarely granted the same, another in-road was made by evolving another method of granting a divorce a mensa et thoro. The unstable marriages were on the one hand barred to be dissolved by divorce owing to sacramental and indissolubility character of marriage while on the other hand judicial separation i.e. divorce a mensa et thoro could be granted so that the parties to it might live separate from each other without fulfilling the mutual marital rights and obligations but did not result in the total termination of the marriage bond. Ultimately the Protestant Reformers could not stick to the Church doctrine of indissolubility of marriage. They did restrict the prohibited degrees of relationship to delimit the scope of annulment of marriage to evade indissolubility but also claimed a decree of divorce granted by the Ecclesiastical courts be given full effect of divorce.

The marriage, which once came to be recognised as an exclusive, and inviolable as well as indissoluble union by the Church in Rome and England even after the Reformation, could cease to be exclusive by the encroachment of adultery. Therefore, adultery shook the very foundation of marriage

11 Rayden on Divorce, 13th Edn. p. 3.
12 a mensa et thoro.
13 a vinculo matrimonii.
rendering it neither to be an exclusive nor an inviolable union. In 1542 the Marquis of Northampton had succeeded in obtaining a decree of divorce on the ground of his wife's adultery from Ecclesiastical court and had thereafter married again although he obtained recognition of the validity of his remarriage later in the year 1552 by a Court of Bishops. The Parliament had also to pass an Act pronouncing him to be "separate, divorced, and at libertie by the Laws of God to marrie." Due to heap of controversies the Act was repealed later on the advent of Mary in regime. After the Restoration it came to be a practice to petition in the Parliament by way of private bill for divorce a vinculo matrimoni. Desertion could be remedied and could be cured by the relief of the restitution of conjugal rights. Adultery, cruelty and unnatural offences were regarded as highly disrupting of the marriage bond but sufficient in law only for a divorce a mensa et thoro. The husband could obtain divorce a vinculo matrimoni only by an Act of the Parliament only on his wife's adultery while the wife could obtain divorce by an Act of Parliament not merely on her husband's adultery but the adultery committed by her husband should have been in the aggravated form i.e. bigamous or incestuous or that he had committed an unnatural offence. To obtain divorce through Parliament was so costly (the average cost being £ 500 in each case) that it put relief beyond the hope of the most of the then people. Therefore, it was rarely that a party could afford to apply for the private Act of the Parliament. There were only ten parliamentary divorces upto 1714 and three hundred seven

14 Rayden, Supra note 11, p. 4.
15 Ibid.
16 Bromley, Supra note 2, p. 237.
thereafter but up to 1856.\textsuperscript{17} This shows that indissolubility of marriage was maintained at all costs except in few or rather negligible number of cases of parliamentary divorces despite the irresistible demand for dissolubility of unstable marriages at an irrepairable stage.

Ultimately in 1850 a Royal Commission was set up in England to examine law relating to the matrimonial offence.\textsuperscript{18} It submitted its report in 1853. Pursuant to the recommendations of the Royal Commission the Matrimonial Causes Act, 1857, was passed which for the first time in English law permitted divorce a vinculo matrimonii by judicial process. Divorce *mensa et thoro* was named as 'judicial separation' while the term 'divorce' confined to divorce a vinculo matrimonii. The jurisdiction of granting matrimonial relief was also transferred from the Ecclesiastical courts to the newly created and statutory Divorce court,\textsuperscript{19} and thus the whole administration of matrimonial law was centralised. Even after the commencement of the Matrimonial Causes Act, 1857 the Parliamentary divorces continued to remain available (and remains available) and was resorted to from time to time.\textsuperscript{20}

The *Matrimonial Causes Act*, 1857 provided for divorce a vinculo matrimonii on the same grounds as were recognised and applied by the House of Lords (Parliament) i.e. adultery *simpleriter* in case of the petition by the husband and in case of the wife's petition: the incestuous adultery, or bigamy with adultery, or rape, or sodomy, or bestiality, or adultery coupled with such cruelty as without adultery would

\textsuperscript{17} Rayden, Supra note 11, p. 6.
\textsuperscript{18} Ibid.
\textsuperscript{19} That was thereafter transferred to the High Court in 1875 by the Judicature Acts of 1873 and 1875.
\textsuperscript{20} Rayden, Supra note 11, p. 7 and Jackson, Supra note 4, Chap. 2.
have entitled her to divorce *a mensa et thoro*, or adultery coupled with desertion without reasonable excuse for two or more years. This is not the point that the divorce had been permitted on only one ground. The point is that the stability of marriage in England had been confused with the indissolubility of marriage. The English were more conscious of keeping the indissolubility of marriage than the stability of marriage. They had put stress only on one aspect of the matter that only adultery of the wife rendered a marriage unworkable and unstable while the adultery *simpliciter* of the husband did not. They therefore permitted such marriage to be dissolved even from before the Section 27 of the Matrimonial Causes Act, 1857. They simply maintained the form that is sanctity of marriage but did not bother about the substance that is stability of marriage. They tried more to restrain dissolubility of marriage than to preserve and maintain the stability which was sacrificed at the cost of indissolubility of marriage.

In a male dominated society the distribution of grounds for divorce is generally and always unequal. It was the men who wanted more of the dissolubility of their marriages than the women in England mainly because of the monogamy rule. Though among Hindus marriage *was* sacrament, larger sections of the inferior classes did already have divorce provisions in them by way of custom. Among these large lower classes the marriage was the only sacrament that too in its formation but was also dissoluble. The sacramentality and in turn indissolubility of marriage was confined to and remained only for the caste Hindus. Even among the caste Hindus the marriage was sacrament

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21 Section 27.
and indissoluble for wives alone. Marriage in the upper Hindus had never been in fact sacrament for the men as they could substitute or take any other wives by way of polygamy being recognised until the first quarter of the present century. The male dominated society of the Hindus kept the marriage indissoluble because the indissolubility of marriage did not affect them but rather benefitted to them, since the superseded wives, were either assigned / consigned to kitchens or house upkeeping serving like maidservants with a simple right to bare maintenance.

The existence of the de-facto divorces that is separation of the wife from bed and board of the husband and vice versa in those days cannot be ruled out altogether. The hindu culture had to witness and suffer mischief due to the indissolubility of marriage being an exclusive union clothed with unilateral ideal of sacramentality and had to pay enormous costs by way of emergence of polygamy, concubinage and prostitution. The "wife's paramour" had to come to the fore because of strict and inviolable monogamy rule confined merely to the wives alone. Such unstable marriages did remain but not died their natural death. Moreover, adultery of the wife came to be regarded as the sin of the highest order and also became, not unnaturally, an unavoidable social phenomenon. It was, therefore, the Hindu wives of the upper castes only who suffered mischiefs and untold miseries and were alone to pay every cost to keep the indissolubility of marriage intact in law. The marriage amongst the upper

23 Manu had provided for the supersession of a wife who took to spirituous liquor, was of bad character, rebellious, diseased, mischievous, or wasteful. See Manu, VIII, 90. To the same effect was Yajnavalkya. See Yaj., I, 80.
24 It seems that the Parsara and Narad smritis permitting the wives to remarry in exceptional eventualities and calamities were also not given effect to in the male dominated upper Hindu society.
caste Hindus was not for love but much seized of with the proprietary concepts of 'possession' and 'ownership' which gave birth to the patriarchal society as absolute as in terms that the element of consent of the parties did not see the light of the day in their marriages. The wives had to bear moral fortitude. The wives of the broken homes irrigated the institution of marriage with their blood. The sanctity but not the stability of the whole institution of marriage was thus maintained. The stability of marriage cannot be founded upon one-way-traffic and double-standard in favour of a particular sex. The polygamy amongst the Hindu male worked against the interest, welfare, and allround development both in person and property of the Hindu wives being strictly monogamous kept the marriage as an indissoluble in law but not the stability in fact. The dissolubility of marriage became unnecessary for the Hindu male while a necessity for the Hindu females against the callousness and hazards on the part of their counterpart husbands. Prohibition of remarriage of the Hindu wives even after death of their husbands rendered the dissolubility of their marriage as a shackle.25

Separation was not prohibited. Rather either spouse could resist the claim of the other for restitution of conjugal rights.26 There were some texts which permitted the

25 Sir Thomas Strange was right in his critical analysis that the right of divorce amongst the Hindus in law was 'marital' (of a husband) only. See S.V. Gupte, Hindu Law of Marriage, 1976 Edn. p. 63. But Banerjee held it to be incorrect though theoretically that if divorce meant dissolution it was unobtainable even by the Hindu husbands on the basis of the Manu's Ordinance that a wife could never be released from her husband. Hindu Law of Marriage and Stridhan, 5th Edn. pp. 207-209. Banerjee further said that "If by divorce is meant the right of the either spouse to desert or to live separately from the other, such right belongs, under certain circumstances, to the wife as well as to the husband." (Ibid.)

Hindu husband to abandon (tyaga) his wife. For instance, Manu ordained that a husband could abandon his wife who was addicted to some evil passion, was a drunkard, diseased for three months. He had further ordained that a husband would abandon his wife who was blemished, affected with disease, or previously defiled, or given to him fraudulently. Notwithstanding the existence of this kind of separation or desertion or tyaga in Hindu law, which could very well be characterised as representing the instability of marriage beyond repair, was not the same as divorce, and thus did not result in the complete termination or cessation of the marriage bond. 'Tyaga' could be equated at most with divorce a mensa et thoro but not a vinculo matrimonii, in the western sense.

The shackles of the indissolubility of marriage were loosened for the Hindu females by the Hindu Widow's Remarriage Act, 1856 which permitted the Hindu widows to remarry. The death of the husband came, thus, to be regarded as making the Hindu Shastric marriage as dissoluble. The significance of the provision can be understood when we recall the Hindu social background where child marriage resulted in a large number of child widows. It was only in 1866 the seeds of divorce were sown on the plea of intolerable instability of marriage between a Hindu convert into the Christianity and his non-convert Hindu spouse. — (The Native Convert's Marriage Dissolution Act, 1866.)

27 Manu, IX, 80.
28 Manu IX, 72. Kautilya also ordained for certain cases but for termination of marriage. Also see Kautilya's Artha-shastra, Chap. 72, 188. But this termination was not the so-called divorce granting right to remarry.
30 P.V. Kane, Supra note 29, p. 620.
however, *per se* dissolve the marriage tie between a Hindu convert and his / her Hindu non-convert spouse but through court.) Under the *Native Convert's Marriage Dissolution Act*, 1866 if a person converted to the Christianity and thereupon his / her non-convert spouse refused to live with the convert spouse for six continuous months by deserting or repudiating the marriage. Then the convert would bring an action for restitution of conjugal rights. If a decree for restitution of conjugal rights remained uncomplied with for one year, then only the convert could sue for divorcing his / her non-convert estranged spouse.\(^{31}\)

In 1869, the *Indian Divorce Act*, 1869 was passed which was applicable even when one of the parties to marriage was a non-Christian. The provisions of this Act were extended to the marriage performed under the *Special Marriage Act*, 1872 as amended by the Act of 1923. There came to be passed other Acts like those of the *Baroda Hindu Divorce Act*, 1931 (as referred to in the Hindu Law Committee Report, 1947, p. 27, Paras 109, 110), the *Bombay Hindu Divorce Act*, 1947, the *Saurastra Hindu Divorce Act*, 1952, and the *Madras Hindu (Bigamy Prevention and Divorce) Act*, 1949. The Hindu women in India did ultimately succeed in 1955, in restoring to their long and over due rights of equal monogamy and divorce which had been robbed of them during the realm of the shastras.\(^{32}\)

\(^{31}\) Here it may be stated that the aforesaid Act of 1866 was designed to propagate Christianity and permitting divorce on conversion into it only when the non-convert spouse had refused to live with his / her convert spouse.

\(^{32}\) The *Hindu Marriage Act*, 1955 completely abolished unilateral polygamy and established monogamy equally for both Hindu husband and wife. The marriage has also been made dissoluble.
Though marriages became dissoluble on certain specific grounds the main stress remained on the indissolubility of marriage both in England and India, and consequently was confused with the stability of marriage. Since both in England and India a marriage could be dissolved only on certain specific grounds the parties whose marriage had broken down, yet to whom no ground was available, were condemned to live in their unstable marriage. Originally England recognised only a few grounds which undermined the basic foundation of the marriage such as adultery, desertion and cruelty.

*English Legislative Approach*

Since the adultery of either spouse brought the marriage to be no longer an exclusive union between them the other spouses being aggrieved, injured, offended and victimized was given a legal right to get the offending spouse punished by way of the decree of divorce. Thus the adultery involved a sense of criminality and the divorce made the mode of punishing the offending spouse. This came to be known and evolved as the 'offence' theory or the 'guilt' theory of divorce.\(^{33}\) The offence or the guilt theory then but natural presupposed the other spouse to be an innocent spouse. This dichotomy of the offence and the innocence gave birth to the various other concepts. Since the objective of the divorce since 1857 came to be a mode of punishing the offender spouse the other spouse was required to prove himself / herself to be innocent in the commission of the matrimonial offence like adultery. The innocent spouse had to prove that he had neither connived at or condoned or became accessory or collusive to the commission of the matrimonial offence of

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\(^{33}\) Paras Diwan, Supra note 22, p. 68.
adultery by the guilty spouse. These acts of condonation, connivance and collusion thus became the absolute bar and if proved to have existed could lead the court inevitably to dismiss the petition for and refuse the sentence of divorce to be passed to punish the guilty spouse even if his / her matrimonial offence had been proved beyond doubt. The offence theory of divorce further demanded that an offender spouse could not be punished by sentence of divorce even if the complainant spouse had also himself committed the offence of adultery, cruelty, desertion or conduct conducive to adultery or was delayed in getting the offender - spouse punished through divorce. Therefore the Matrimonial Causes Act, 1857 made the complainant-cum-petitioner's own adultery, delay, cruelty, desertion or conduct conducive to adultery as the discretionary bars on the proof of which in the given case the court could in its discretion refuse to pass the decree of divorce, notwithstanding the fact that the matrimonial offence of the respondent spouse had been duly established and proved. Thus, all criminal standards were provided for so as to be adopted for punishing a matrimonial criminal by way of divorce. Several kinds of efforts had however been made to discourage dissolubility of marriage besides the bars absolute and discretionary referred to above. For example, the decree of divorce should not be made absolute until and unless three months have been elapsed since the date of passing the decree nisi; and special powers were conferred on the Queen's Proctor to show cause why the decree should not be made absolute. This period of three months was

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34 Section 30, MCA 1857.
35 Section 31.
36 The MCA, 1860.
37 Note inadvertently got omitted.
enhanced to six months by the Matrimonial Causes Act, 1866 unless the court reduces the period. Many provisions were made for the award of alimony pendente lite and settlement of property.\(^{38}\) It was in the year 1923 the husband's adultery simpliciter was made a ground for divorce to be obtained by the wife.\(^{39}\) Previously the wife had to prove the aggravated adultery like incestuous adultery, adultery coupled with cruelty or adultery coupled with desertion etc. The Act of 1923 did not bring any novel change in the English law of divorce but put both the sexes on the equal footing as to the grounds for divorce except in case of unnatural offence by which the wife could seek divorce for the husband's adultery simpliciter without its being necessary to allege any further matrimonial offence.\(^{40}\) Both the Acts of 1857 and 1923 had recognised the already existent 'matrimonial offence' basis for divorce which remained as such until the Divorce Reform Act, 1969. It reveals that at that time (1857) adultery but not other wrongs was held sufficient in law to undo the very objective of marriage i.e. the exclusive union of the spouses to the entire exclusion of all others. And the party (spouse) responsible for the same offence of adultery was required to be punished with the pronouncement of death sentence to his / her marriage. The English divorce was, thus, initially based upon the 'matrimonial offence' theory. The above Acts were later on repealed by but re-enacted in the Supreme Court of Judicature Consolidation Act, 1925.\(^{41}\) Gradually it was experienced that adultery alone was not sufficient which destroyed the very foundation of the

\(^{38}\) Ss. 17 and 32, MCA, 1857.

\(^{39}\) MCA, 1923.

\(^{40}\) Rayden, Supra note 11, P.8.

\(^{41}\) See Section 176.
marriage and a ground for the dissolution of marriage. Then again the stability of marriage was confused with the indissolubility of marriage. In the year 1937 the grounds for the dissolubility of marriage were enlarged. Another very objective of the marriage came to be regarded as the mutual cohabitation which includes the performance of marital rights and obligations by either spouse in relation to one another. This very objective of marriage could be destroyed by one of the spouses deserting the other for no excusable and reasonable cause for a certain period of time. The spouse responsible for desertion was said to be an offending and guilty spouse who had committed the matrimonial offence of desertion and disrupted the marriage for all intents and purposes. The desertion was added to adultery ground as another ground for divorce. The third basic objective of marriage was deemed that the spouses would live with each other in harmony and mutual confidence and mutual understanding and normal bickerings and discordance could be definable as the normal wear and tear of the married life. The Cruelty or its apprehension rendered the said third objective, viz. mutual harmony, peace, security, confidence, understanding between the spouses, of marriage impossible of being requitted in the wedlock while living together. The spouse responsible for the commission of such misconduct deliberately was also required to be punished by a sentence of divorce. Therefore, the cruelty did also come to be legally recognised as a matrimonial offence and added to adultery and desertion.

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42 Section 2 of the A.P. Herbert's MCA, 1937.
43 Section 2 (b) MCA, 1937.
44 Section 2 (c) MCA, 1937.
Thus adultery, cruelty and desertion all came to be known as matrimonial offences, giving rise to the claim of divorce to punish the guilty spouse.

These three too came to be regarded as insufficient as the only misconducts of the guilty spouse to have destroyed the very and basic objectives of marriage. There were other acts causes also like insanity of either spouse which could frustrate the basic purposes of marriage but the indissolubility notion was overwhelming in the mind of the legislators who confused it with the stability of marriage and they were in favour of enlarging the grounds for divorce. The insanity of either spouse which could be regarded more as a misfortune than a sheer misconduct or offence of the spouse afflicted with was not befitting within the framework of the offence theory. Ultimately the offence theory of divorce which contained the conscious misconducts of the guilty spouse such as adultery, cruelty and desertion had to be supplemented or rather say transformed into the fault theory of divorce because it was not necessary in all cases that the marriage could be utterly intolerable and failure due to conscious or active misconduct of one of the spouses. Therefore the insanity had also to be added as a ground for dissolving the marriage by a decree of divorce, along with the offence grounds of divorce viz. adultery, cruelty and desertion and continued additionally the wife's ground for divorce for her husband's unnatural offences of rape or sodomy or bestiality. Insanity of either spouse was thus recognised as a fault though more

45 Section 2 (d) MCA, 1937.
46 Section 2 MCA, 1937.
unconscious or passive than to be a guilt or the conscious misconduct of either spouse. The guilt or offence grounds came, thus, to be known as the fault grounds. The fault could either be a conscious or unconscious act of the respondent.

It is evident from the fact that the fault like adultery, cruelty or desertion could although give rise to the other spouse (the aggrieved party) to get the guilty spouse punished by obtaining divorce but the aggrieved party was still to prove his innocence. The petitioner's condonation, connivance and collusion were still the absolute bards for dismissal of the petition for divorce even if the fault was established. The rule of recrimination was also standing to refuse the decree of divorce to be granted by the court to the petitioner. The dissolubility of marriage on the fault grounds was further checked by the curbs provided under the Act, 1937, viz. the delay and accessory to the fault grounds as the discretionary bars to enable the court to refuse the decree of divorce. Moreover the grounds for dissolution of a marriage by a decree of nullity were also enhanced by the same Act of 1937. Grounds enhanced were non-consummation of marriage owing to the wilful refusal of the respondent; insanity; venereal disease and pregnancy per alium of the respondent-wife. Thus we have seen that the emphasis still remained only on the indissolubility of marriage by enhancing the grounds for dissolving the marriage but not on the stability of the marriage. The basic approach

47 In essence it was already socially undesirable that the petitioner should remain tied to the insane respondent by marriage but law did not recognise.  
48 Section 4, MCA, 1937 replacing Section 178 of the Judicature Act, 1925.  
49 Ibid.  
50 Ibid.  
51 Section 7 (1)(a) to (d), MCA, 1937.
of the law started, continued and multiplied wrongly. The stability of marriage does not lie in mere increasing the grounds to dissolve a marriage simultaneously with the maintaining of the sanctity of marriage to let it be undissolved even if paralysed irretrievably.

Then some other type of calamity or exigency emerged which was neither the offence nor guilt nor fault of either spouse but a miracle rather, that was the disappearance of either spouse for a pretty long time enough to give rise to the presumption of death of the missing-spouse. Such was a marriage merely in name and fiction out of which substance or reality had disappeared. This exigency was mitigated differently. It was neither added to the grounds of divorce nor to the nullity but made a separate ground for dissolving the marriage if asked for by the remaining spouse. If the other party had been absenting continuously for seven years or more and there was no reasonable belief that he / she had been living within that time then the absent spouse could be well presumed as dead. The other spouse could ask for the dissolution of his / her marriage through court. Thus sanctity of marriage and not the stability of marriage did prevail. A.P. Herbert's Matrimonial Causes Act, 1937 was only an extension of grounds for divorce.

A further attempt was made to mar the chances of dissolution of marriage by a decree of divorce. The marriages in the state of utter instability and miseries were to stand compulsorily in name and indissoluble upto first three years of marriage, though with some nominal relaxation i.e.

52 See Section 8, the MCA, 1937.
53 Ibid.
54 Section 1, the MCA, 1937.
exceptional hardship of the petitioner or exceptional
depravity on the part of the respondent. Thus, sanctity
of marriage was maintained for three years at least under
the pretext of 'fair trial rule' to be given to every
marriage. It meant, in law, a marriage is supposed to be
stable during its first three years while the fact might
be otherwise.

So the fault theory, the extended shape of the guilt
theory, remained the sole basis of divorce in England before
1969. Still, England tried its best to stick to the
indissolubility of marriage and maintain the sanctity of
marriage, that is the marriage in name only, but on the
other hand it was prolifying the grounds for dissolubility
of marriage both by divorce and nullity.

The Fault theory was not acceptable to the society
and therefore a 'movement for drastic reform' of divorce
law for removing the notion of guilt started but could not
succeed before 1969. The Matrimonial Causes Act, 1937
mainly effected the recommendation of majority of the
members of a Royal Commission set up in 1909. It seems
the emphasis remained on the indissolubility. Some drastic
social changes in England had then taken place after the
Second World War. The enormous increase in the number of
divorces which reflected the increase of marriages which
had broken down. More than ninety per-cent of all the
petitions for divorce were undefended which signified that
they also included consensual divorces. The grounds of

55 Even in most of the Commonwealth countries and in most
of the states in United States of America the offence
theory transformed and fused into the fault theory and
became the legal basis of divorce. See Paras Diwan,
Supra note 22, p. 68.
56 Rayden, Supra note 11, p. 10.
57 Gell Commission.
58 Bromley, Supra note 2, p. 239.
adultery and cruelty could be abused. It could very well be inferred from the data which tended to show that the fault theory had proved to have been failure to restrict the petitions for divorce from being filed. In the year 1938 the total number of petitions in England for divorce was 9,970 which rose, after the Second World War, to a peak in 1947 to 47,041. Owing to the introduction of legal aid provisions, the figures went up from 29,096 in 1950 to 37,637 in 1951. This also seemed that the dichotomy of matrimonial offence and the innocence for divorce as a punishment to offender-spouse as well as a remedy to the innocent spouse alone had flopped and further seemed socially unacceptable as that dichotomy obscured the true social function of divorce. The true social function of divorce exists in enabling the spouses to enter into a fresh matrimony if they so wish.

In the year 1951 Mrs Eirene White, M.P. introduced a Bill into the then British Parliament to become law which might permit divorce at the option of either spouse after their separation for seven years or more. The Royal Commission was set up in 1951 to inquire into the English law of marriage and divorce and the Commission submitted its report which was published in the year 1956. The Bill was later on withdrawn at the stage of the second reading. Only one member out of the nineteen advocated for the total scrap of 'matrimonial offence' as the necessary basis of divorce.

59 Ibid.
60 Id at 238.
61 Ibid.
62 Ibid.
63 Ibid.
64 Ibid.
65 The Morton Commission.
66 Bromley, Supra note 2, p. 239.
The rest eighteen members were equally divided on the issue of introducing the complete breakdown of marriage to be a new and sole ground for divorce. Nine members voted in favour and nine against it. Thus the fault theory of divorce continues to have its sway. The attempt for introducing the non-fault divorce, thus, went abortive. Again an attempt was made by Mr Leo Abse, M.P. who introduced a Bill in the House of Commons but that too was withdrawn.

But a radical change took place in 1963 to relax the rigidity of the guilt / fault grounds. The Matrimonial Causes Act, 1963, which followed the second attempt to remove the guilt or the fault theory as a necessary basis for divorce but the attempt again failed at the behest of the English legislators. They wanted the maximum indissolubility of marriage instead of recognising its reality. However the Matrimonial Causes Act, 1963 converted collusion in a discretionary bar and thus opened the door for divorce by mutual consent. In this way the spouses wishing divorce could now bargain openly for the grounds of their divorce. The guilt theory came thus to be diluted. This also meant that only a lip-service was paid to it i.e. the guilt theory of divorce. So the guilt theory of divorce since now started weakening and the indissolubility started heavily loosening.

Every undissolved marriage does not mean a stable marriage. The social interest lies in removing the guilt notion to continue to be a necessary part for divorce so that people may reposit their confidence and trust in the institutions of marriage which is meant to be an instrument for the allround development of individuals, society and

67 Rayden, Supra note 11, p. 10.
68 Private Member Bill.
69 Section 4, the MCA, 1963; Rayden, Supra note 11, pp.11, 12; Paras Diwan, Supra note 22, p. 68.
the nation as a whole. Social interest lies in the preservation, maintenance and stability of the marriage as a social institution but not in the indissolubility or dissolubility of marriage. Society and in turn individuals have had no concern whether we provide a long list of grounds for dissolubility of marriage or we keep the indissolubility of marriage to the minimum number of grounds for divorce. Society and in turn individuals simply wish one thing that when the marriage once comes out to be an utter failure in its basic objectives — mutual love, trust, understanding, harmony, peace, consortium, security and fidelity etc., it deserves to be buried decently as a dead marriage either for fault of both or either or neither of the spouses of the given marriage so that the stability of the institution of marriage may not be ruined or undermined and further the people may not see marriage as a horror and prison. Still the English legislators tried to continue to maintain the sanctity of marriage by not removing the guilt notion as a necessary basis for divorce which was unacceptable to the society to a large number.

Some major developments took place after 1963. A committee was appointed by the Archbishop of Canterbury which in its report *Putting Asunder* (1966) favoured the irretrievable breakdown theory as the sole ground of divorce. The Archbishop's proposals found favour with the Law Commission. The Commission's preference was to allow as an additional ground for divorce the complete breakdown of marriage based on seven years' separation that too be shorter in case of consensual divorce.

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70 See also *Putting Asunder* (1966).
Ultimately, the British Parliament had to lean to the social demand of removing the fault basis of divorce.\textsuperscript{71} The Divorce Reform Act, 1969 tried to subside the guilt / fault as the basis of divorce and succeeded to a large extent.\textsuperscript{72} Now the objective was that the marriage which has broken down irretrievably should be dissolved. This was therefore made a sole ground for divorce under Section 1 of the Divorce Reform Act, 1969. The social acceptance of the breakdown of divorce could be evident from the fact that many of the dead marriages came to the fore.\textsuperscript{73} There were already 70,574 petitions for divorce in 1970 i.e. a year before the commencement of the Divorce Reform Act, 1969. In 1974 it rose to 1,29,993. This was quite a vexed question to make it debatable whether this was the effect rather than a cause for a massive increase in the number of divorce.\textsuperscript{74} Whether it be 'cause' or 'effect' is immaterial for the individuals or society but the question relevant is that dead marriages pollute the individuals, their families and children who inevitably leave repurcussion on the society as a whole. However, the British parliament could not detach itself altogether from the fault theory.\textsuperscript{75} The breakdown be presumed to have existed as an irretrievable and basis for divorce only if the facts - situations set forth in Section 2 of the Divorce Reform Act, 1969 were duly

\textsuperscript{71} It was a consequence of the Commission's report. The Divorce Reform Act, 1969 contained the compromise between the Archbishop's proposals and the law Commission.

\textsuperscript{72} Rayden, Supra note 11, p. 12.

\textsuperscript{73} There came to be massive increase in the number of divorces - See Rayden, Supra note 11, p. 12.

\textsuperscript{74} Rayden has, uncalled for, raised this issue. See Supra note 11, p. 12.

\textsuperscript{75} Also see, H.A. Finlay, "Reluctant, But Inevitable: The Retreat of Matrimonial Fault" (1975) 38, MLR, pp. 152-173.
proved. These facts situations are more or less based purely on the fault notions viz. adultery, intolerable misbehaviour and desertion. (See Section 2 (a), (b) and (c). Along with the irretrievable breakdown divorce by mutual consent was also recognised by laying down that two years' separation entitled the either party to present the petition provided the other spouse consented to the decree being granted. The five years' separation of the spouses from each other through physically living apart for fault or no fault of the estranged spouses had also been made a ground for establishing the irretrievable breakdown of marriage.

The traditional matrimonial bars viz., condonation, connivance, acquiescence, collusion, delay, recrimination etc., which were the main basis for the innocent spouse under the offence theory of divorce to defend himself or herself and guidance for the court to refuse a decree of divorce have also been done away within the Divorce Reform Act, 1969. The only bar that has been enacted is, if the respondent shows that divorce will cause a grave financial or other hardship and will be wrong in all circumstances to dissolve the marriage.

English Judicial Approach

At one side as we have already seen that Parliament

76 Ibid.
77 See Schedule 2 which repealed sub-section (1), (2), (3) and (4) of Section 5, the MCA, 1965 dealing with the matrimonial-absolute and discretionary bars.
78 This has been discussed in Chapter IX. The same provisions have been incorporated in the Consolidating Act i.e. the MCA, 1973, under its Sections 1, 2, 3, 4, and 5 of the Act, 1973.
had been extending the grounds for dissolubility of a marriage while maintaining that they were in favour of indissolubility of marriage as much as possible. On the other side the British courts, as will be seen here, had also been widening the scope of matrimonial offences viz., adultery, cruelty and desertion in their meaning and extent so as to admit of as much divorces as possible.

At one time it was the considered view that "moral turptitude of a person who commits a matrimonial offence resulted in a tendency to regard adultery and cruelty as similar in character to criminal offences and therefore to apply the M'Naughten rules to them." The insanity of the respondent was in consequence held to be a sound defence for him to refute the petition for divorce filed by his / her counterpart innocent spouse founding his / her petition on the respondent's adultery etc. The courts then made the intention element also as a necessary part of the respondent's conduct to hold his / her matrimonial offences like cruelty duly proved in order to punish the guilty spouse. Gradually the Courts dispensed with the 'insanity' as a defence to the charge of matrimonial offences, particularly cruelty. In the same year i.e. 1963 another case was decided by the House of Lords in which the held and decisively rejected the view that matrimonial offences like cruelty did necessarily contain any intention on the part of the respondent spouse.

79 Bromley, Supra note 2, p. 182.
80 Yarrow v. Yarrow (1892) p. 92; Hanbury v. Hanbury (1892), 8 TLR 559, CA.
81 Westall v. Westall (1949) 65 TLR 337 (CA). Also see Keslerovsky v. Keslerovsky (1951) P. 38 CA; and Eastland v. Eastland (1954) P. 403.
82 Williams v. Williams (1963) 2 All ER 994, HL; (1964) AC 698 in which it was held that just as selfish stupidity was not necessarily a defence to a charge of cruelty, similarly insanity was no more so.
83 Collins v. Collins (1963) 2 All ER 966 HL; (1964) AC 644.
It was further held that to hold or say one's conduct to be cruel it did not matter whether it sprang from a desire to hurt or from a selfish or sheer indifference. What is important is the defendant's conduct and not his mental state. Thus it can be concluded that the insanity and the intention of the respondent had to wipe out as necessary defences from the charges of the matrimonial offences of cruelty and adultery also. 83a It had to be done because the courts could not restrain themselves from dissolving the marriages which had utterly gone out of order without any seemly possibility for reconciliation. Since the courts could not have granted divorce in those cases had they been adhered strictly to the M'Naghten rules. 83b Here from i.e. year 1963 the well apparent and obvious different trend discerned. Now the emphasis shifted from the 'object of divorce law to punish to the guilty spouse' to the grant of 'remedy to the innocent spouse.'

The Courts more widened the concepts of matrimonial offences through the relaxation in the demand of the standard proof. Originally the tendency was to regard adultery and cruelty etc. as akin to a criminal offence and therefore desired to prove them beyond reasonable doubt. The result was that both actus reus and mens rea had to be proved before a case of a matrimonial offence like cruelty could be estab-

83a Bromley Supra note 2, p. 182.
83b R v. M'Naghten (1843), 10 Ch. & Fin. 200, H.L.; that "the defendant will have a good defence to charge of cruelty (as he would to a criminal charge in Common law), if he could prove that, at the time when he committed the acts complained of, he did not know the nature and quality of his acts or if he did, he did not know they are wrong" - Bromley, Supra note 83a, p. 187.
lished as in the case of a criminal offence. But gradually the courts changed their views and took the intermediate position. The controversy had started since Blyth v. Blyth on the point of adopting the correct test to adjudicate upon the proof of matrimonial offence. The court in Bastable v. Bastable said that a high standard of proof or "a decree of probability..." commensurate with the occasion was required in law. This approach complicated the matter more in other side. Bromley reviewed this approach to be vague and unhelpful, and, further complicated the presumption of legitimacy. The Family Law Reform Act, 1969 provided that the presumption of legitimacy could be rebutted on a "balance of probabilities" which could surely be applicable in the case of adultery also and thus saved the more worst situation in which it could be possible earlier to hold that the wife had not committed adultery but that child was illegitimate.

There was no other alternative with the courts in granting divorce in the given cases according to law strictly except broadening the concepts of the matrimonial offences and to apply them in dissolving the unbearable marriages. Both the judgements of Gollins v. Gollins and Williams v. Williams came out with a favour in giving relief to the complainant spouse in an intolerable situation of marital state, than to merely punishing the guilty spouse. The test

84 See also Jamieson v. Jamieson (1952) 1 All ER 875, HL.
85 Bastable v. Bastable (1968) 3 All ER 701, 704, CA.
86 (1966) 1 All ER 524, HL.
87 Supra note 85.
88 Bromley, Supra note 2, p. 182.
89 Ibid.
90 Id at 183.
91 (1963) 2 All ER 966 HL.
92 (1963) 2 All ER 994 HL.
93 Bromley, Supra note 2, p. 184.
laid down by the courts was that every act was cruelty if it was so weighty, grave and such that the complainant spouse could not reasonably be expected to tolerate it. It is now clear that the offence theory of divorce was thus going to be blurred and ruined from within itself but still existed on the statute book. The emphasis was thus laid more on, since 1963, protecting the innocent/victim spouse than punishing the spouse who committed the matrimonial offence. The courts did not stick also to this stage of broadening the concepts, but further broadened the offence grounds in their meaning and extent also. We shall now deal with those offence or fault grounds as regards their meaning and extent attributed by the courts in widening their scope.

Cruelty:

Cruelty was divided in two kinds viz., physical and mental as well. Lopes, L.J., in Russel v. Russel\(^94\) in the Court of Appel said and held:

\[\ldots\] there must be danger to life, limb or health, bodily or mental, or a reasonable apprehension of it, to constitute legal cruelty.

The emphasis also shifted not only upon the necessity to protect the innocent spouse but also upon the effect of the respondent spouse’s conduct.\(^95\) The courts widened and loosened the concept of cruelty even to the extent that there was no more need for injury to have been actually suffered. A reasonable apprehension – that injury will ensue if the

\(^94\) (1895) P. at p. 322.

\(^95\) Russel v. Russel (1897) AC 395, HL which affirmed CA (1895) P. 315.
conduct is persisted in, would suffice on the plea that the court would not wait for the spouse to be actually injured before causing him a remedy. If the wife suffers from a heart disease which is in the notice of her husband and still he gives a sudden shock to her, his conduct therefore is held to be that of cruelty. In Jamieson v. Jamieson Lord Normand (in the House of Lords) had gone to open the door of cruelty to such an extent that each case must depend on the individual circumstances and said:

"The conduct alleged must be judged upto a point by reference to the victim's capacity for endurance, in so far as that capacity is or ought to be known to the other spouse . . . that leaves it open to find, after evidence, that the complainant was the victim of his / her own abnormal hyper-sensitiveness and not of cruelty inflicted by the defendant."

Bromley's observations are striking in this regard:

"Thus, the question becomes one of the fact, and inconclusive as the test may be, it is doubtful how far a more comprehensive one could be devised to cover such a vast class of cases where the court is faced with the difficult task of striking a fine balance between two spouses neither of whom is wholly blameless."

Moreover, the majority of the House of Lords leaned in favour of giving relief even if this might involve stigmatising the respondent spouse guilty of matrimonial offence. The emphasis which they had laid was that cruelty

96 Bromley, Supra note 2, p. 185.
97 Per Bucknill, J., in Barrett v. Barrett (1903), 20 TLR 73.
98 (1952) 1 All ER 875, 877, HL
99 Supra note 2, p. 185.
1 Williams v. Williams, (1963) 2 All ER 994, HL.
did not necessarily denote any guilt, culpability or blame-
worthiness. Moreover Lord Pearce categorically said, "it
is impossible to give a comprehensive definition of cruelty
..." Lord Reid said that one would be guilty of cruelty
"if without just cause or excuse you persist in doing
things which you know that your wife will probably not
tolerate, and which no ordinary woman would tolerate . . .
whatever your desire or intention may have been." The
principle comes out like this, "if the conduct of the
respondent injures the petitioner's health or likely to do
so it will amount cruelty provided it is grave and weighty
and such that the petitioner cannot reasonably be expected
to tolerate it."

The conduct to be grave and weighty may reflect in a
variety of forms both positive and negative. The positive
form of conduct can include assault and other forms of
physical violence, sexual perversion and homosexual
activities, persistent drunkenness, addiction to gambling,
commission of criminal offences, unnatural practices by a
wife with another woman, threats, insults, nagging,

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2 Bromley, Supra note 2, p. 187.
3 Gollins v. Gollins (1963) 2 All ER 966.
4 Id at 974.
5 See Brown, "Cruelty without culpability, Divorce without
Fault," 26 MLR, p. 625 for full analysis of these two
cases on cruelty.
6 Fromhold v. Fromhold (1952) 1 TLR 1522 CA.
7 Raw v. Raw (1947) WN 96 where the husband insisted on the
wife to give him manual satisfaction in place of normal
intercourse.
Jo 544.
12 Usmar v. Usmar (1949) P.1
humiliation, constant dishonesty raising embarrassment,\textsuperscript{12a}
indecent assault on boys and girls shocking to wife,\textsuperscript{13}
maliciously initiating matrimonial proceedings,\textsuperscript{14} obsession
conduct of several types,\textsuperscript{15} infliction of venereal disease.\textsuperscript{16}
The negative acts may include neglect, indifference,
desertion,\textsuperscript{17} boorishness, meanness and wilful refusal to
maintain.\textsuperscript{18} The courts on the other hand also maintained
despite the above conduct to be cruelty for granting divorce
that\textsuperscript{19} we had not yet reached a stage when the remedy could
be granted because he / she found the marriage irritating
and exasperating or the other spouse intolerable.\textsuperscript{19a} In
\textit{White v. White},\textsuperscript{20} the court granted divorce on the ground
of cruelty for husband's insistence on coitus interruptus.
In \textit{Walsham v. Walsham},\textsuperscript{21} the court held cruelty duly proved
on the facts that the husband refused to have sexual inter-
course at all for a long time and then insisted on \textit{coitus
interruptus}, and the wife wanted children. In the case of
\textit{Sheldon v. Sheldon},\textsuperscript{22} the court granted divorce where the
wife suffered injury due to the well-bodied and fit husband

\textsuperscript{13} Cooper v. Cooper (1955) P. 99; Ivans v. Ivans (1955) P.129.
CA and Barnett v. Barnett (1957) P. 78 - husband-carnal
knowledge of wife's sister aged twelve.
\textsuperscript{14} Buxton v. Buxton (1965) 3 All ER 150: (1967) P. 48.
\textsuperscript{15} Howell v. Howell (1964) Times, June 10th - a case of
obsessional cleaning the house all over the night; Crump
v. Crump (1965) 2 All ER 980 - a case of ritual wiping
of everything to kill "cancer germs" etc.
\textsuperscript{18} Gollins v. Gollins, \textit{Supra note 3}, p.966; See also Bromley,
\textit{Supra note 2}, p. 189.
\textsuperscript{19} Per Salmon J. in \textit{Le Brocq v. Le Brocq}, (1964) 3 All ER 464,
CA - a case where the spouses had had highly incompatible
temperaments.
\textsuperscript{19a} Bromley, \textit{Supra note 2}, p. 188.
\textsuperscript{20} (1948) P.330 at p. 330 in which \textit{Baxter v. Baxter} (1948) \textit{AC
\#} 274, was referred to.
\textsuperscript{21} (1949) P.350.
\textsuperscript{22} (1966) 2 All ER 257 CA; (1966) p. 62.
of hers had denied the sexual intercourse for pretty long span of time, that is, 6 years for no convincing reason except that he had been finding satisfaction with other women. (although...an unproven surmise). It is submitted that this is very much a case of incompatibility although sexual between the spouses that had become unbearable to the wife. It is surprising to note here that both Lord Denning, M.R. and Salomon L.J., in instant case, observed that to constitute cruelty the respondent's persistent refusal for a long period of time resulting in the grave injury to the petitioner's health was necessary but also approved four earlier decisions. In two cases of them in which the wife was held guilty of cruelty for having refused the sexual intercourse even though in one of them her refusal was following her total invincible fear of pregnancy and child birth. In rest of the two cases the husband being undersexed and innately disinclined to have sexual intercourse was not found guilty of cruelty even though the intercourse took place on rare intervals and in one case on the interval of fifteen years. If the husband had got sterilised by operation without medical reason and without his wife's knowledge or consent, he was held guilty of cruelty. But if he had undergone this type of operation to the wife's knowledge though without consent and continued love with her

23 Ibid.
24 It was also said by Lord Denning that exceptions might be in cases of ill-health, time of life, age or psychological infirmities.
26 B. v. B (1965) 3 All ER 263; P. v. P. (1964) 3 All ER 919.
for thirteen years. Thus the different standards of sexual participation were demanded from husbands and wives. It comes out to be such that the wife is expected to be submissive to her husband's demand even if she is inhibited by invincible fears while on the other hand a husband cannot be expected to tide over his innate disinclination and indulge in a sort of disciplined act to keep a wife happy and in good health. Bromley has rightly analysed, "this distinction seems as crude as it is out of keeping with the modern views of the spouse's roles in the sexual side of their marriage." Davies L.J. suggested that the result of Gollins v. Gollins and Williams v. Williams would be that refraining from sexual intercourse causing injury to the health of the other spouse could be regarded as cruelty even if it resulted from the respondent's physical or mental affliction. This view was contra to the B. v. B., to the opinion of Salmon L.J. in Sheldon v. Sheldon and to the later decision of Ormrod J., in Walker v. Walter, but "it had logically followed from the principle that culpability was no longer an ingredient of cruelty." Moreover, the court had started coming from generalisation to the particularisation of cases in order to depart from the "reasonable man" theory. Lord Reid said:

28-29 Supra note 2, p. 190.
30 Supra note 3, p. 966.
31 Supra note 1.
32 Supra note 26.
33 Supra note 22.
35 Bromley, Supra note 2, p. 190.
36 Gollins v. Gollins (1964) AC 644.
A judge does, and must try to read the minds of the parties in order to evaluate their conduct. In matrimonial cases we are not concerned with the reasonable man as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumption we make about them the better.

The misconduct to constitute cruelty may although have reference to the marriage but it may also have references to other members of the family or to the outsiders.\textsuperscript{37} Philandering with other women may also be cruelty if it has injured or likely to injure the health of the other spouse.\textsuperscript{38} An indecent assault on a child of the family is also cruelty again if it adversely affects the health of the other spouse.\textsuperscript{39} Moreover, the nagging nature and mood of sulkiness during which the husband ignored his wife have also been held to be cruelty.\textsuperscript{40}

It may be submitted that on the one hand cruelty contained a restricted meaning in law because every act or omission could not be legal cruelty. And on the other hand the courts had deliberately avoided to lay down the exhaustive definition of cruelty.\textsuperscript{41} Now the concept of cruelty is so laxed that it is infinitely variable from case to case. It is dangerous to make one case precedent for another posing similar facts.\textsuperscript{42} The complainant's acquiescence when it is

\textsuperscript{38} Cooper v. Cooper, Supra note 37.
\textsuperscript{39} Daniell v. Daniell (1954) Times, Feb.2.
\textsuperscript{40} Squire v. Squire (1949) p. 51.
\textsuperscript{41} Bromley, Supra note 2, P. 183.
\textsuperscript{42} Ibid.
not voluntary in the respondent's conduct could also be protected holding the latter's cruelty. It may also be mentioned that the decree of divorce could follow even if each party had been guilty of cruelty to the other. This then clearly showed the dilution of the offence theory of divorce. It was a complete blurring of the theory as such which was essentially based on the rule of giving relief of divorce only to the innocent spouse for the guilt of the other. Thus the courts were leaning towards the non-fault divorce.

Further, the courts have maintained only the sanctity of marriage and not the stability of marriage by widening the concepts of cruelty as discussed above and at the same time kept on paying lip-service to the offence theory of divorce. Indissolubility of marriage remained the basis but dissolubility of marriage became unrestrained with no emphasis over the stability of marriage. The same suit was followed in the other matrimonial offence like desertion.

Desertion:

Desertion came to be defined as 'the unjustifiable withdrawal from cohabitation without the consent of the other spouse and with the intention to live separately for good. Viewing desertion too as a matrimonial offence, the various constituents to constitute desertion by the courts

44 Kelly v. Kelly (1968) 1 WLR 152. It was the practice first instituted by Lord Merriman, P.
were laid down viz., the factum of separation, the animus deserdendi, the absence of consent on the part and against the will of the deserted spouse, absence of any reasonable excuse for withdrawal from the matrimonial company, and cohabitation and consortium besides statutory period for three years. The courts widened the scope of desertion for dissolving the unbearable marriages. Hence the doctrine of 'constructive desertion' had to be evolved by the courts. The factum of separation requirement had thus diluted. The desertion could then be presumed to have proved even if the deserting spouse remained in the same matrimonial home in which the deserted spouse was also living. In such cases the principle which emerged was, "It may be the spouse remaining in the matrimonial home and not the spouse who departs from it is in desertion," and "desertion is not the withdrawal from a place, but from a state of things." The test which came out to judge desertion was that there must have been cessation of cohabitation. The desertion according to such test could be as effectively as if the husband and the wife were living in two separate houses. There are two leading cases on the point viz. Naylor v. Naylor and Hopes v. Hopes. In the former case the husband had come back to the matrimonial home after having his cross-petitions for divorce dismissed. It ensued quarrel so much

45 Thomson v. Thomson (1858) 1 S & T 231.
46 Pulford v. Pulford (1923) P. 18, 21, per Lord Mervindale approved in Sotherden v. Sotherden (1940) P. 73; Lane v. Lane (1951) P. 284.
47 Ibid.
48 Pulford v. Pulford, Supra note 46.
49 (1948) 2 All ER 129.
50 (1948) 2 All ER 920; CA. cf. Littlewood v. Littlewood (1943) P. 11; Le Brock v. Le Brock (1964) 3 All ER 464, CA.
so that the wife abruptly repudiated and intended to have ceased to be so any longer. She removed the wedding ring too forever. The wife had totally stopped discharging matrimonial obligations while remaining under the same roof of the matrimonial home. Court held the wife in desertion. In the latter case the husband had stopped sexual intercourse with the wife and slept in the separate bed-room in early times owing to the nature of his job. He wished his wife too to do so. It resulted in the deterioration of the mutual relationship. The wife had been objecting to his going out in night and was used to abuse his friends. The quarrels became frequent. Since he had most meals in common with wife and children, the Court of Appeal held no desertion duly established. The principle propounded was that all matrimonial services and any forms of common life must entirely cease. This created a complex situation in which any judge could hardly be expected to answer straightway. In Beeken v. Beeken 51 the converse question arose whether there could be any desertion if both the spouses were forced to put up together but where they would have lived apart had they been free to do so. Because the statutory period had commenced since July, 1944 in the instant case after they had moved to the different camps the problem ceased to be answered. But Bucknill J. was however of the opinion that there could be desertion in these situations while Lord Merriman, P., opined that there could be desertion if the wife had made all possible efforts to get another accommodation; and Hodson L.J. felt content to say that there was no evidence to justify the finding that they were living apart. 52 In the aforesaid case of Beeken v. Beeken 53 the desertion was proved because

51 (1948) P.302, CA.
52 See pages 311, 307, 312 respectively.
53 Supra note 51.
of the wife's \textit{animus deserendi} shown in her statement that she wished to marry some other man and hence she had no concern with her husband. She was held in desertion. It is submitted that such a case rather indicates the incompatibility of temperament than the sheer matrimonial offence of desertion. This is, further widening the horizons of the so-called matrimonial offence of desertion. Such a judicial approach also tends to point that only lip-service is being paid to the indissolubility of marriage theory by trying to widen the scope and horizons of desertion.

Further, can the stability of marriage be maintained if the wife is not held in desertion while she in fact deserted her husband under the insane delusion that he could commit her murder? In \textit{Perry v. Perry},\textsuperscript{54} L Loyd - Junes,\textsuperscript{J} observed in such situation that there could not be any desertion, only because she believed that she had good cause for leaving her husband. It is submitted that it is nothing but to maintain only the sanctity of marriage. When mutual trust and understanding have ceased between the spouses the marriage remains only in form but not in substance. For contrast we can take the example of \textit{Kaczmarz v. Kaczmars}\textsuperscript{55} where the wife was in belief that her husband was guilty of a grave sin apparently by having sexual intercourse with her - not amounting to a matrimonial offence. The wife had however, been held in desertion when she declined to cohabit with him as a result. It is submitted that such cases were rather cases of sexual incompatibility which resulted into desertion - a matrimonial offence for the purpose of granting remedy of divorce to the innocent spouse.

\textsuperscript{54} (1963) 3 All ER 766.
\textsuperscript{55} (1967) 1 All ER 416.
Moreover, the requirement of 'reasonable cause or excuse' evolved to rebut the matrimonial offence of desertion was also vague. What particular 'excuse' is or is not sufficient in law to constitute desertion involves always a question of great difficulty. This creates in-resoluble confusion and anomaly to loom large in the mind of everybody whether it be client, lawyer or judge. It has been held that although the desertion might have not been justified for want of attention or affection alone, it might be by the fact that the other spouse exercises over-bearing and domineering and always persisted in going his own way. In Forbes v. Forbes, the husband was held to have no defence in the absence of adultery to a charge of desertion if he left her in the circumstances that his wife had told her husband that she had fallen into love with another man and begged her husband to help her. False charges of adultery might also be justified cause for a spouse to leave the other, and so the charges of homosexuality. The conduct of a spouse may entitle the other to withdraw from the cohabitation even if it may not be culpable. The physical or mental illness, held, might justify desertion if it could possibly result into injury or adversely affecting the health or safety of the other spouse or their children.

56 Buchler v. Buchler, (1947) 1 All ER 319, 320, 326, 327.
58 (1954) 3 All ER 461, 467, 468.
59 Marsden v. Marsden (1967) 1 All ER 967.
60 Russel v. Russel (1895) P. 315 CA.
61 Bromley, Supra note 2, p. 201.
62 G.v. G. (1964) 1 All ER 129.
The courts have on the one hand held that insistence on coitus interruptus and/or persistent wilful refusal to have sexual intercourse by a spouse gave good causes to the other for living separate,\(^63\) and hence no desertion. But on the other hand, in Beevor v. Beevor,\(^64\) where a wife refused to have sexual intercourse with her husband due to her invincible repugnance beyond her control, the court had held the husband in desertion when he left her. The courts had thus widened the scope of matrimonial offences so much so that their essential element of motive, intention, or culpability remained no longer necessary part thereof.\(^65\) Moreover the court of Appeal in Lilley v. Lilley\(^66\) had entirely overlooked the possible adverse effect of her return to matrimonial home upon her mental health. In this case the wife owing to her mental illness had developed an invincible repugnance against her husband. After discharge from mental hospital she declined for-ever to return to him. Hence, she was held in desertion.\(^67\) It is submitted that the decision was rationale but hers was entirely a case of incompatibility of temperament rather than the offence of the respondent which led to divorce. The cases like that of

\(^63\) Slon v. Slon (1969) 1 All ER 759, CA; Hutchinson v. Hutchinson (1963) 1 All ER 1; Rice v. Paynold Spring Rice (1948) 1 All ER 168.

\(^64\) (1945) 2 All ER 200.

\(^65\) Particularly in view of Gollins v. Gollins and Williams v. Williams decided by House of Lords in 1963. See Supra notes 3 and 1 respectively. Also see Bromley, Family Law, Supra note 2, p. 202 for the conflict visualised by him between the principle of refusal of sexual intercourse due to an invincible repugnance of the wife enough to amounting to cruelty when affected the husband's health and the corollary that the wife's conduct would now be regarded as sufficiently grave and weighty to justify her husband's leaving her even though there be no threat to his health and notwithstanding that no blame can be attached to her.

\(^66\) (1959) 3 All ER 283, CA.

\(^67\) Ibid.
Lilley\textsuperscript{68} rather leads to injustice in branding such spouse as a deserter and become the precedent for future. Therefore, this case was reluctantly applied in \textit{Tickle v. Tickle}\textsuperscript{69} wherein the court (divisional court) compelled to hold a mentally ailed husband to be in desertion in similar situations even though the medical testimony showed that his return to his wife would surely lead him to go back to hospital.

Moreover, the courts could not retain a uniform approach. Generally they relaxed the essential ingredients of desertion but in some cases they restricted scope desertion by adopting excessive legalism. In \textit{Sullivan v. Sullivan}\textsuperscript{70} the husband petitioned for divorce on the ground of wife's desertion. The cause started was that she was pregnant \textit{per alim} at the time of marriage. The Court of Appeal became very much legalistic. The Court refused the decree of divorce to be granted for the reason that the cause related to the period prior to the marriage and it was the ground for nullity of marriage within three years of marriage which he did not seek. The injustice lay in legal irremediability of the rift. The decision, implied, demands that the husband who leaves his wife in such situations is in desertion himself and has no prompt remedy if he fails to discover the facts within three years. Bromley rightly says that the desirable solution could have been provided if the court had held the pre-marital conduct / cause enough to give rise to the constructive desertion with a rider that it (pre-marital conduct) has necessarily an effect on the relationship of the spouses after marriage,\textsuperscript{70a} particularly when the intention

\textsuperscript{68} Ibid.

\textsuperscript{69} (1968) 2 All ER 154.

\textsuperscript{70} (1970) 2 All ER 168, CA.

\textsuperscript{70a} Supra note 2, p. 206.
to injure was no longer essential in cruelty. Lord Reid observed (obiter) in Gollins v. Gollins,\textsuperscript{71} that the effect of Lang v. Lang\textsuperscript{72} has been the removal of the necessity of intention from the constructive desertion too. To quote him:

> The decision was that if without just cause or excuse you persist in doing things which you know your wife will probably not tolerate, and which no ordinary woman would tolerate, and then she leaves, you have wilfully deserted her whatever your desire or intention may have been.

This statement was in tune with the principle laid down in Hall v. Hall\textsuperscript{73} wherein the husband's constant drunkenness was held responsible for constructive desertion. Here too culpability had gone from the matrimonial offence of desertion. Moreover, the husband was held in constructive desertion for the reason that he failed to render proper help in their shop.\textsuperscript{74} Still this remains to be a question of fact to find out for the court that a particular respondent did not know what the probable effect of his conduct would be either due to mental illness or to any other cause.\textsuperscript{75}

The stress of the courts remained then only on that respondent's conduct must be so weighty and grave that the other spouse could reasonably be expected to leave the matrimonial home. Such approach blurs the offence theory. The other's misconduct provides for want of intention scope both for collusive divorces and the dissolubility of marriage.

\begin{itemize}
\item \textsuperscript{71} Supra note 3, p. 974.
\item \textsuperscript{72} (1954) 3 All ER 571, PC.
\item \textsuperscript{73} (1962) 3 All ER 518, 527, CA.
\item \textsuperscript{74} Saunders v. Saunders, (1965) 1 All ER 838, 841.
\item \textsuperscript{75} Also see, Eckelaar, "Crisis in Divorce Law," 15 ICLQ, 875 at pp. 893-895.
\end{itemize}
In *Walter v. Walter* the divorce could not be granted because one spouse could not prove the fault of the other for desertion. The facts of the instant case were that the spouses were working in two different places of London and one had therefore moved to the place to reside to be near his place of work. The other remained in the former matrimonial house which was already near to be her place of work. Neither of them had consented to separation. Willmer J. held that neither of them could succeed. But this decision has been criticised by Lord Denning although *obiter* by expressing the view that in such case both are in desertion. The cases of mutual desertion do hardly find any solution within the framework of the matrimonial fault theory and thus left without remedy. It has been desired that it is the duty of every spouse to compromise in situations, and if either of them rejects a genuine and reasonable compromise suggested by the other he should be in desertion. If either of them does or does not do so, then each of them is in desertion. Neither of them can demand remedy. Moreover, it is also said that the mutual desertion is not legally possible. Bromley says that it is not supported by any logical basis for this view. The court tries to locate the technical step which either of the spouses has taken first in leaving the other spouse. If neither of them makes any efforts for

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76 (1949) 65 TLR 680.
77 *Hosegood v. Hosegood* (1950), 66 TLR (Pt I) 735, 740, CA.
78 Also see Irvine's "Mutual desertion," 30 MLR 46.
80 *Supra note 2*, p. 209.
81 See *Beigan v. Beigan* (1956) 2 All ER 630, 632, CA; *Price v. Price*, (1968) 3 All ER 543 as reversed by the Court of Appeal cited in (1970) 2 All ER 497 CA.
resuming cohabitation, neither has been held to be in
desertion and the continued separation regarded to be
consensual. Such are the cases in which the matrimonial
offence theory registers its failure because the other
spouse was not innocent.

Adultery:

The motive or intention of the party (spouse), committing
adultery has always been immaterial, for the purpose of
divorce. It is the surrender of the person and mind—though
not necessarily. On the one hand the courts observed that
in these days adultery attached a stigma while on the
other the courts had viewed that adultery no longer entailed
the serious social consequences as compared to the former
times as a result of its discovery. This change in view
of the courts resulted in the reduction of adultery from
the character of the matrimonial offence merely to the fact
to be proved like a fact in the civil proceedings with civil
standard of proof that is the preponderance of probablity
and not the criminal standard of proof i.e. beyond all
reasonable doubt. This became so because of this fact also
that divorce came to be viewed as a civil proceeding in a
civil court but not a criminal proceeding in a criminal
court. Although the requirement of proof 'beyond reasonable

82 Pizey v. Pizey (1961) 2 All ER 658, CA.
84 Robinson v. Robinson and Lane (1958) 1 S & T 362.
85 Gollins v. Gollins (1972) 2 All ER 658, 661.
87 Rayden on Divorce, 13th Edn., p. 200.
doubt' came to be interpreted later on that it did not mean proof beyond any shadow of doubt, but again the character of matrimonial offence was later restored to adultery by requiring the high degree of proof. In *Blyth v. Blyth*, Willmer L.J. has said:

True it is not a criminal offence; it is a matrimonial offence. It is for the petitioner . . . to satisfy the court that the offence has been committed. Whatever the popular view may be, it remains true to say that in the eyes of the law the commission of adultery is a serious matrimonial offence. It follows . . . that a high standard of proof is required in order to satisfy the court that the offence has been committed.

In the early cases the name and identity of the woman with whom the adultery had been committed was necessary to be disclosed in the court. In *Woolf v. Woolf* it was held that it was necessary to give and ascertain the name of the woman with whom adultery was committed. In a chain of cases it has also been observed that it is not necessary to prove the direct act, or even an act of adultery, or time and place to succeed on such an issue. In *Blum v. Blum*, the husband went to a hotel with some woman, not his wife, and booked a room in the fictitious name. The inference in

88 Per Denning J., in *Miller v. Minister of Pension* (1947) 2 All ER 373.
89 (1966) AC 643; (1966) 1 All ER 524 HL. Also see *Bastable v. Bastable* (1968) 3 All ER 701, 704.
91 (1931) P. 134.
92 *Rutton v. Rutton* (1796) 2 Hag Con 6, n; *Burgess v. Burgess* (1817), 2 Hag Con. 223, 226; *Loveden v. Lovedon* (1810), 2 Hag Con 1, 4; *Woolf v. Woolf* (1931) P. 124, 146.
93 (1963) 107, Sol Jo 512, CA.
favour of adultery prevailed; and the explanation offered by the husband was not accepted by the Judge. Moreover, the finding of adultery was upheld. Adultery of the wife found to be duly proved even by the proof of birth to a child of whom blood tests established that the husband could not be his father. In F v. F, the adultery of the wife had been established merely on the basis of the blood samples of the husband, the wife and the child. Adultery was inferred from the facts that the accused couple was found in a juxta-position or in such circumstances that sexual act might be inferred, and, though not where they occupied the same bed as it might be to secure the collusive decree. The courts further widened the concept of adultery by saying that the evidence of the petitioner alone could now be accepted without corroboration, either by a witness or by strong surrounding circumstances except the facts which aroused suspicion of the court to believe that adultery might not have been committed. In case of confession cases too, the courts, earlier stuck so much to the 'indissolubility belief of marriage' that the confession of adultery by the respondent spouse was jealously scrutinised more so if made by the spouse desirous of having divorce. But the modern practice is in favour of accepting such evidence unless the facts arouse doubt of the court that a true case is not coming out that adultery has not been committed.

94a (1968) 1 All ER 242.
96 Rayden, Supra note 87, p. 204.
97 Gollins v. Gollins (1916) 33 TLR 123; Williams v. Williams (1978), 1 Hag Con 299, 304; Marjoram v. Marjoram (1955) 1 All ER 1,7.
98 Rayden, Supra note 87, p. 203.
Inclination coupled with opportunity has been accepted by the court though rebuttable presumption to find that adultery is duly proved. Indecent behaviour of familiarities may also raise very strong presumption of adultery but the court should be convinced that the wife has violated all bounds of delicacy and duty and has surrendered her person besides her mind. Similarly masturbation between the adulterers does not per se prove adultery until and unless inclination and opportunity are also proved. The fact that the wife is virgo intacta though negates the proof of adultery alleged to have been committed by her, is not the conclusive proof that she has not committed adultery. In Jolly v. Jolly and Prayer the correspondent medically testified in the court that according to the medical certificate, the respondent's hymen was not ruptured. Hill J., however, found adultery duly proved.

Although artificial insemination (AID) has got recognition between the husband and the wife the doctors in such cases demand for the consent of the husband. But it is still an open question that if the wife gets artificially inseminated through AID without the knowledge or acquiescence of the husband whether

1 Such expressions were often used by Lord Stowell. See Robinson v. Robinson Lane (1858) 1 S & T 362, Per Cockburn C.J., at 398.
3 Hunt v. Hunt (1856) Dea & SW 121; Rutherford v. Rutherford (1922) P. 144 (CA).
4 Russel v. Russel (1924) AC 687;
5 (1919), 63 SJ 777.
the courts will infer adultery and find it proved by non-access. 7

The definition of adultery that it is willing sexual intercourse between a married person and a person of the opposite sex not his or her spouse came also to be diluted on the count of proof that a wife might obtain a divorce from her husband if the husband raped another woman and no matter that he was prosecuted convicted only for indecent assault. 8 Moreover, the fact of a woman going to brothel with a man furnishes a conclusive proof of her adultery sed quaere, although the evidence would not now be held rebuttable but not easily. 9 Then the adultery can be inferred and proved also by the mere fact that the husband or wife has contracted a venereal disease not from the other spouse during the marriage. 10 It is submitted that such kinds of enlarging the scope of the matrimonial offence of adultery by the courts for dissolving the marriages through divorce cannot thus be ruled out. The scope of adultery was so inflated that even the fake cases by way of collusion have come to the Court. Hotel Bill cases are the best examples of fake and collusive cases.

Thus cruelty, desertion, and adultery which were in the beginning regarded as matrimonial offences gradually started losing their sanctity to be so. They came to be reduced to be simply facts which were probed into by the

7 It is submitted that adultery will not prove if the court insists on the bodily sexual contact.
8 Coffey v. Coffey (1898) P.169 followed in Bosworthick v. Bosworthick (1901) 86LT 123.
9 Williams v. Williams (1798) 1 Hag. Con. 299, 302.
10 See also Poynter, "Marriage and Divorce" (1829), p. 193.
11 Gleen v. Gleen (1900, 17 TLR 62; Lilley v. Pettit (1946) KB 401; Pettit v. Lilley (1946) 1 All ER 593; Andrews v. Gardiner (1947) 1 All ER 777; and Conway v. Rimmer (1968) AC 910.
courts like any other fact in the civil cases and found provable on the basis of "preponderance of probabilities". Besides, the courts widened their scope in meaning, definitions, classifications in various categories. It has how been considered that "the presentation of a petition for divorce on the part of one spouse must prima facie amount to evidence of an intention to bring the marriages to an end for the purpose of desertion.\textsuperscript{12}

The fault ground of insanity has also met with the same fate. Insanity is also therefore discussed.

Insanity:

Due to the legislatively laid down inelastic insanity clause,\textsuperscript{13} (a) that the respondent was of unsound mind; (b) that the respondent was incurable so; and (c) he had been under care and treatment for five years continuously immediately preceding the petition for a divorce, the courts found a lot of difficulty in interpretation and application of the clause of insanity.

The first case under this clause was that of Swettenham \textit{v. Swettenham}\textsuperscript{14} in which the court refused to accept the argument that the test should be whether the unsoundness of mind was such as to warrant the court in dissolving the marriage. The President in the instant case held that there was no distinction in the case between incurability and irrecoverability of unsoundness of mind.\textsuperscript{14a}


\textsuperscript{13} See Section 2(d), MCA, 1937; 1, I (d) and 2, MCA, 1950 and Section I (a) (iv) of the MCA, 1965.

\textsuperscript{14} (1938) P. 218.

\textsuperscript{14a} \textit{Ibid}, at pp 222, 223.
In Randall v. Randall the court said that it was not concerned with the degree of the unsoundness of mind if once it had been proved that it was incurable and fulfilled the statutory requirement of care and treatment for five years. But in Whysall v. Whysall a coalmines had been a certified patient for more than five years and his wife sought for divorce for his incurable unsoundness of mind. The defence argued that on the medical evidence the respondent was curable. The court held that the test was whether the respondent had hope to be restored to a state in which he was capable of managing his own affairs, and hence he was incurably of an unsound mind. The divorce was granted.

Here also we find a paradox that on the one hand the legislature hardened the insanity clause as much as possible while on the other the courts tried to find it established as much as possible by laying down that (i) the degree of unsoundness of mind was not of concern with the courts, and (ii) incurability was synonymous with irrecoverability, and (iii) that the medical test of incurability was not incumbent on the courts to follow but incurability meant that the respondent could not hope to be restored to a state in which he was incapable of managing his own affairs. According to Mason v. Mason a voluntary patient in a mental institution was however qualified to give his consent to a divorce by petition by the other spouse. The Mental Health Act 1959 had also afforded a broader construction. Still

15 (1939) p. 131; and Shipman v. Shipman (1939) P. 147 though overruled in Safford v. Safford (1944) P. 61 CA in which it was held that detention was a status within the meaning of the lunacy Acts rather than a physical fact of being kept in lock and key. And so long as the reception order was in force, absences of a patient could not break the continuity thereof.

16 (1960) P. 52.

17 (1972) 3 WLR 405.

18 See Latey on Divorce, 15th Ed., p. 147.
the insanity could not work well. Ultimately this insanity clause came to be totally abolished statutorily with the passing of the Divorce Reform Act 1969.

The above study points out certain trends posing various problems in the matters of divorce based on the offence or the fault theory. They are the following:

1. In both Hindu law and English law marriage had been sacramental and indissoluble until the judicial divorce had been permitted by law since 1955 and 1857 respectively for the first time for all spouses.

2. The marriages in English law became dissoluble since the invention of the doctrine of nullity even since before the breach of England with the Church of Rome and the same position continued thereafter. In the most unhappy and unbearable marriages the guilty spouses used to be separated from the innocent ones through divorce a mensa et thoro granted by the Ecclesiastical courts. In Hindu law the concepts of 'Tyaag' or abandonment or supersession of wives guilty or not in any way were legally i.e. 'shastrically' recognised and perfectly in vogue. Both the divorce a mensa et thoro in Christian turned English canon law and the 'tyaag' in the 'Shastric' Hindu law bore the same meaning and that was the 'separation' of one spouse from the other but with a difference that divorce a mensa et thoro was required to be decreed by the Church or ecclesiastical courts while the 'tyaag' was suo motu in the shastric texts and that too only of the wives. They did not end the marriage.

19 Also see Bennet v. Bennet (1969) 1 WLR 430.

20 The best example may be of Mother Sita, the wife of Lord Rama in the 'Ramayana' of Valmiki. It could not be wrong if we said it to be defacto divorce.
3 Although divorce a *vinurlo matrimonii* that results in the termination of marriage altogether and in its entirety had been in vogue in England even prior to 1857 that was by Act of the Parliament known as the legislative divorce. Amongst the Hindus the large segments of them known as the non-caste Hindus or lower caste Hindus had from the ancient time had the divorce though by practice by customs as understood like a divorce *vinculo matrimonii* in the English law and still protected to do so under Section 29 of the Hindu Marriage Act, 1955. Only caste Hindus were the rigid adherents to the Shastric law which did not contemplate a divorce notion as understood in English law as regards divorce a *vinculo matrimonii*.

4 The divorce *mensa et thoro* and the *tyaag* and the customary divorces were based on the blameworthiness of one of the spouses to the marriage. The blameworthiness differed in degrees and nomenclatures in both the societies of the Hindus and the English and in their different segments according to their cultural background. The most popular blameworthiness not necessarily guilt for *tyaag* in the upper Hindus was the sterility of the wife and her quarrelsome and undesirable nature unfit for consortium and harmonious living together. Moreover it could base upon the unbearable offences like the adultery howsoever light in degree. The supersession of wives too used to be based on these grounds. The customary divorces too were based on the either party's blameworthiness and guilt. The most popular ground for divorce by way of custom amongst the lower caste Hindus was/is adultery, abandonment and incompatibility of temperament and mutual or unilateral hatredness. Mutual consent has also been a popular base for divorce amongst them.

5 The English had laid emphasis on the theory of indissolubility of marriages about which they confused with the
stability of marriages. They thought that the stability lay in the indissolubility of marriage and the act of the spouse which damaged his/her marriage by breaking its objectives and essentials came to be regarded as his offence or guilt or fault. Therefore, adultery which brought the inviolability and exclusiveness of marriage to cease was the first act of the committing spouse which came to be regarded as offence. If the offence of adultery had been committed by a spouse, the involved spouse was required to be punished by way of granting divorce to the other spouse provided the other spouse proved to be innocent. This dichotomy of the offence theory and the innocence theory gave rise to the evolution of the matrimonial bars which could prove the innocence of the other spouse. To adultery were added desertion and cruelty also. Desertion rendered almost impossible the basic objective of marriage which is the mutual cohabitation and the fulfilment of matrimonial rights and obligations.

Cruelty made the offence because it rendered impossible for the innocent spouse the harmonious living together, peace, and security in the matrimonial shelter. The stringent standards of proofs were also therefore laid down to punish the guilty party. Intention too was made essential in offences.

6 Gradually it came to be realised that there were certain other many acts in which intention to injure was not there to constitute the matrimonial offence but still could be said to render the other spouse virtually impossible to lead the matrimonial home together. The venereal disease, leprosy, and mental diseases etc. were such type of causes acts of one spouse afflicted with but still the intention to injure the other on the part of the spouse afflicted with had been
quite lacking. But the fact is that these diseases could injure the health of the other spouse. Since these were more of the misfortunes than misdeeds or offences on the part of the sufferor-ailed spouse, they did not fit in the framework of the offence theory. The marriage was also seen to be evitably dissolved to protect the innocent spouse. The law and courts did dissolve such marriages in their own ways. So, while stressing on the theory of indissolubility of marriage the law had started increasing the grounds both for divorce and multiply in order to dissolve the marriages and included the insanity turning more to be fault grounds than the guilt ones, diseases and the presumption of death etc. so that the innocent spouse should also be protected. And thus a large number of grounds have legislatively been extended in the English law of dissolution of marriage. The courts also stressing on the indissolubility of marriage theory started widening the concepts of the matrimonial offences and fault grounds so much so that the forged cases like those of 'hotel evidence', and cases of 'incompatibility of temperament' had come to be filed. It is evident from the admittance-turned-warning by Lord Denning that,

if the doors of cruelty were opened too wide one should soon find ourselves granting divorce for incompatibility of temperament... ...

... the temptation must be resisted lest we slip into a state of affairs where the institution of marriage itself is imperilled.

Despite this warning the nagging and scolding and incompatibility of temperament have been included in the definition of cruelty.22 The courts relaxed the matrimonial

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21 Kesley v. Kesley (1950 2 All ER 398 at 403.
fault grounds to such an extent too that the intention element that happened to be a necessary ingredient of every offence had to be abolished as if they were not the matrimonial offences / guilts / faults. The result was that the matrimonial offence theory started suffering tuberculosis and in consequence to blur from the scene of the matrimonial law. Moreover, various compartments and categorisation of the matrimonial offences and faults came to be evolved by the judiciary to make them more widened to cover the given cases. The court did not stop here. It changed the emphasis on the degree of proof. Previously the high standard of proof was required to prove the matrimonial offence like an offence in criminal cases. Therefore every matrimonial offence was to be proved beyond all reasonable doubt. Gradually the courts came to a stage that a matrimonial cause was not an offence but a fact like any other fact in the civil courts to be proved by simple preponderance of probability of evidence. The people therefore started manipulating the desertion and cruelty grounds to obtain divorce in their cases. These cruelty and desertion grounds had come to be flexible that most of the cases had hitherto been filed in the courts for divorce based on desertion and cruelty as compared to other grounds viz. disease, insanity and adultery.

7 The aforesaid approaches of the law and courts for the dissolution of marriages resulted into the fact the matrimonial offence / guilt theory of divorce itself got destroyed from within. Moreover, the only lip-service was paid to the indissolubility theory but the fact remained that the law and courts simply maintained the sanctity of marriage and not the substance by dissolving the marriages as much as possible on one pretext or the other.
Thus the stability of marriage was not only confused with the indissolubility of marriage theory but also ignored; nor touched even.

PART II

THE FAULT THEORY OF DIVORCE IN OTHER COUNTRIES

In German divorce law, a divorce could be granted on the basis of only the so-called matrimonial offence principle until the new Marriage Law of 1976 which came into force from 1 July 1977. The matrimonial offences included adultery, grave matrimonial offence or other like guilt conduct, and spouses' living separate and apart for the minimum three years preceding the application provided the petitioning spouse had not been the cause of marriage breakdown and further that the respondent spouse wished to continue the marriage.

Canada adopted the matrimonial offence principle as a necessary basis for their divorce law until the Divorce Act, 1968 and still continues therein alongside the breakdown theory.

Australia applied the matrimonial offence theory under its Matrimonial Causes Act, 1959, until a completely new

23 DCS. 11. 1421 ff.
24 Section 42, the Marriage Law Act, 1946.
25 Section 43, the Marriage Law Act, 1946.
26 Section 48, the Marriage Law Act, 1946.
legislation of 1975.  

New Zealand embodied and applied the matrimonial offence principle in their divorce law until the Matrimonial Proceedings Act, 1963.

Japan too has embodied the matrimonial offence theory and grounds based thereon for the grant of the judicial divorce besides the divorce by agreement which is always without access to court.  

Finland has been providing divorce mainly on the matrimonial offence principles like adultery and addiction to intoxicants etc.

The French law of 1884 provided divorce only for very seriously bodily harm, cruelty or injuries like matrimonial offences which confirmed to the idea of divorce as a penalty. The French law shifted its emphasis on divorce from its being a penalty to being the remedy by a law of 20 April 1941 regulated by the Ordinance of 12 April 1945 and introduced the divorce as a remedy by considering the circumstances which could render the maintenance of the marriage impossible. Until 1975 however, in France the divorce remained available on two categories of the solely matrimonial offences viz. Obligatory ground i.e. adultery of the wife and adultery of the husband, and optional grounds i.e. bodily harm,  

28 Articles 763 sub-section 1 of Section 4; and 770, sub-section 2 of Section 4 contained in II Civil Code Book IV and Book V, Law No. 9, 21 June 1898.  
29 Jouko Sihvo, "Marriage and Divorce in Finland since Second World War", p. 151; 3/8-81 - photostat copies sent by the Finland Embassy in India.  
31 Id at 103.  
32 Article 229.  
33 Article 230.
cruelty or injuries against one another. Fault grounds still i.e., after 11 July 1975 hang over in the French divorce law beside mutual consent and breakdown grounds.

The Dutch Civil Code (The Netherlands) of 1838 also originally contained the matrimonial offence theory for divorce and recognised adultery and other guilt grounds to punish the guilty spouse while the divorce by mutual consent was expressly prohibited.

The divorce on specific grounds which used to be essentially in the nature and based on 'fault' came to be adopted and prevalent in the whole of Europe both eastern and western at the beginning of the present century with no exceptions.

It was only Prussia which provided the no-fault divorce even at the end of the eighteenth century on having inspired from the Enlightenment and continued it until the abolition of the Prussian Code in 1900.

Switzerland had already got the traditional and specific grounds based on fault or offence for divorce, and included some years after 1900 the non-fault divorce as a remedy.

34 Article 232.
35 Article 229, although ground of adultery has disappeared. For fuller discussion see Jacques Foyer, "The Reform of Family Law in France," The Reform of the Family Law in Europe, Chap. IV at pp. 101-108 (1978).
38 Ibid.
39 Ibid.
The same suit was followed by the Scandinavian countries. Norway had got the matrimonial offence-principle in its entirety until 31 May 1918; Sweden until 11 June 1920; Iceland until 27 June 1921; Denmark until 30 June 1922 and Finland until 13 June 1929.  

The National Socialist Germany too had the entire divorce law based on the specific grounds i.e. fault theory until 6 July 1938.  

It may surely be noted that it was the U.S.S.R which did not have matrimonial offence or guilt theory in their divorce law.  

Yugoslavia does still contain the matrimonial offence principle in their divorce law.  

The countries of the Latin tradition had until recently the sole traditional specific / facult based divorce system therein. Thus Belgium and Luxembourg have been still maintaining the traditional fault divorce system in addition to the breakdown principle - recently introduced.  

The new Italian law still retains also the fault - base divorce.  

The Principality of Liechtenstein does still insist, despite the recent reforms, in a single minded way upon the

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40 Ibid.  
attitude of divorce as a penalty. Divorce cannot be granted to the petitioner if his conduct is gravely at fault. 44

Even the latest Portuguese reforms do also retain the traditional matrimonial offence or fault or guilt grounds for divorce. 45

44 Ehegesetz of 13 December 1973, Article 73 ff.
45 Article 1778 Codigo Civil - reformed by the decreto-lei No. 261/75 (Diario do Governo I, p. 733.)