

Research Article

A Case for Statutorily Recognition of Irretrievable Breakdown of Marriage

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Abstract

Since antiquity, the concept of union in Hindu marriage has always been considered sacred and indissoluble. The Shastri-religious understanding of Hindu marriage is that heavenly-made unions are merely united and tied into a knot on this earth. Hence, once the union is formed, and the ceremonies and rites concluded, there is no scope for a couple to seek “divorce”. The traditional concept of Hindu marriage, although altered by India's post-colonial enactment of the Hindu Marriage Act in 1955 (“the Act”), aimed to reflect the country's identity as a liberal constitutional democracy by providing for certain grounds for seeking divorce, including mutual consent. However, the state's broader policy reflected in the overall objective scheme of the Act remained incongruent with the Shastri-religious understanding of Hindu marriage. Thus, divorce was only the last remedy, and was granted by the courts only after the aggrieved couples fulfilled due procedural requirements as per the mandate of the Act. Hence, it is against this backdrop that the recent constitutional bench judgment in *Shilpa Sailesh v. Varun Sreenivasan* (2023) of the apex court regarding the waiver of the procedural requirements under section 13-B of the Act by the court using its constitutional powers of ‘complete justice’ under Article 142 of the Indian Consitution, is limited only to certain exceptional circumstances. This paper argues for recognising the Irretrievable Breakdown of Marriage (“IRB”) as a legal ground in the Hindu Marriage Act of 1955 (“the Act”). It traces the evolution of Hindu marriage and discusses why Fault, Frustration, and Consent theories are inadequate, advocating for IRB to accommodate diverse situations. It analyses the Act's scheme, shows the presence of breakdown theory, and examines legal developments regarding IRB as a divorce ground, noting some limitations. It addresses objections from women's groups and calls for social reforms ensuring women's financial independence and reducing divorce stigma.

Keywords

Irretrievable Breakdown of Marriage, Hindu Marriage, Divorce, Legal and Social Reforms

1. Introduction

The fundamental aspiration of any state is for orderliness, crucial for peaceful coexistence, where citizens not only refrain from challenging its sovereignty but also become agents serving the state's interests. This central aim of a state pushes it to conceptualise society in a way that is easily gov-

erned and managed. Thus, the conception of families, a community of people tied with bonds of blood, love and property becomes the natural choice of a state for it being the most stable fundamental unit of society. Thus, “family becomes fundamental to the government of social.” [8] Moreo-

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ver, the conceptualisation of family emerges as a positive solution to various social, economic, moral and ethical problems of “regulation of morality, health and procreation posed by a liberal definition of the limits of legitimate state action.”¹ Thus familial units act as a state instrument to achieve various social, economic and political objectives. This importance of families in government initiatives makes marriage central to state policies, as it is crucial for family structures. This explains why states are concerned about family breakdowns like divorce. Hence, states always try to mediate on the so-called “interest of individuals and society” to protect the institution of marriage.²

2. Evolution of the Concept of Hindu Marriage

Since antiquity, the concept of union in Hindu marriage has always been considered sacred and indissoluble. The understanding of Hindu marriage has been that heavenly-made unions are merely united and tied into a knot on this earth. Hence, once the union is formed, and the ceremonies and rites concluded, there is no scope for a couple to seek “divorce”. This traditional understanding of Hindu marriage was altered by India's post-colonial enactment of the Hindu Marriage Act in 1955 (“the Act”), including its subsequent amendments,³ as it provided for the remedy of divorce on various grounds based on theories of fault, frustration and consent.⁴ This leads to two conclusions. First, the introduction of divorce as a remedy on certain grounds fundamentally altered the sacred-unbreakable conception of the Hindu marital union. Second, the liberalization of divorce, through amendments widened the scope on which divorce can be sought is testimony to the dynamicity of the conception of Hindu marriage in consonance with socio-economic advancements in society. Therefore, “the spirit of forced tolerance of yesteryears is disappearing.” [11] Hence, the recognition of the spousal choice of living happily separated rather

than forcefully united is readily apparent. However, such a choice is limited by the substantive procedural checks and limitations,⁵ providing a rational opportunity for spouses to rethink their decisions. Furthermore, the imposition of duties on the courts to make every possible effort for reconciliation between the spouses⁶ is a testament to the state's choice of public policy to protect the institution of marriage as far as possible.

3. Different Theories of Divorce and the Need for IRB

The Act provides for divorce based on fault and frustration theories, i.e., grounds stipulated under section 13(1) with some additional grounds to women under section 13(2).⁷ Additionally, section 13B provides for divorce based on consent theory, wherein prior consent of both parties is required to seek divorce. Thus, the scope of getting a divorce is limited and does not consider various situations that do not fit into either of these sections. Situations like when all reconciliation fails, where a couple has no desire to live together and has been living apart for years more than stipulated in section 13B, where false allegations of cruelty, and of criminal nature have been made by both spouses against each other and their respective families? These are cases, where there is no actual proof of cruelty, and a waiting period to get a divorce via mutual consent is only going to increase hardship and suffering for both spouses and their respective families.

Nevertheless, there might also be situations where one party does not want to seek a divorce due to socioeconomic reasons, irrespective of a total failure of the marital union [4]. In such cases, the remedy of mutual consent does not work and both the fault and consent theories fail to provide the required relief to aggrieved parties. Hence, the ground of “Irretrievable breakdown of marriage” works as the only logical solution in such circumstances as mentioned earlier.

Moreover, the 71st Law Commission points out the incapacity of fault-based theory referring to the report of the Moral and Social Welfare Board of the Church of Scotland:

“Matrimonial offences are often the outcome rather than the cause of the deteriorating marriage. An accusatorial principle of divorce tends to encourage matrimonial offences, increase bitterness and widen the rift that is already there. Separation for a continuous period of at least two years consequent upon a decision of at least one of the parties not to live with the other should act as the sole evidence of marriage breakdown.” [5]

Thus, the foundation of marriage is based on sound understanding, trust and mutual compatibility between the partners. Therefore, when such a conjugal agreement is violated it leads to despair and misery for both spouses and thus the

1 see reference [8] page 70, Nikolas Rose referring to Jacques Donzelot's “The Policing of Families”.

2 Here the author is restricting himself from making any normative arguments of whether such an interference is well-intentioned or not, or whether such move would in actuality would affect the overall social order. Rather, it is to highlight that there is an interest of state to protect marital unions beyond merely individual and social interest. This interest is to ensure that the process of social reforms need not be performed through legal sanctions but by depolyming the instruments of influence and persuasion of what Foucault calls “governmentality”.

3 The Marriage Laws (Amendment) Act, 1964; The Marriage Laws (Amendment) Act, 1976.

4 Law Commission of India, *The Hindu Marriage Act, 1955 - Irretrievable Breakdown of Marriage as a Ground of Divorce* (Law Com No 71, 1978) see pages 8 and 9. The basis for fault theory is some wrong committed by a spouse i.e., adultery, cruelty, and desertion and on petition of wife specific grounds of bigamy, certain sexual offences, and failure to pay maintenance (See sections 13(1)(i), (ia) and (ib) of the Act). Frustration means “circumstances which, though not constituting fault on the part of any party, render dissolution of the marriage necessary since by reason of these supervening circumstances which do not amount to matrimonial fault a material change is introduced; conversion of the spouse, insanity, disease, renunciation of the world, absence for a long period of time (see sections 13(1)- iv, v, vi, vii, viii). Mutual consent (see section 13B).

5 see section 13, 13(B), 14 of the Act.

6 see Section 23(2) of the Act.

7 see sub-sections (1) and (2) of section 13.

choice of separation and forming new unions sounds better, than lingering on broken promises. This is also supported by the NCRB data which shows that more people commit suicide because of bad marriages rather than divorce.⁸ Therefore staying separate rather than staying in a bad marriage, and facing everyday toxicity explains the reason for higher suicide rates in marriages than because of divorce.

Hence, these recognitions bring the theory of the “Irretrievable breakdown of marriage” into the primary focus of debate.

Scheme of the Act: the presence of the germ of the breakdown theory:

The introduction of breakdown theory, although not in its absolute sense, but with a germ of the concept was accomplished through various amendments to the Act to liberalise the seeking of divorce. In 1964, the amendment to section 13(1)(viii)(ix),⁹ and the substitution of new subsection 13(1A)¹⁰ allowed the non-decree holders to apply for divorce on the grounds of failure to cohabit for two years¹¹ from the date of the decree of judicial separation or restitution conjugal rights. Thus, the change from only the decree-holder could apply for divorce to either party, introduced the germ of breakdown theory to fault-based theory.¹² However, pertinent to note is that still, the initial decree of restitution of conjugal rights or judicial separation under sections 9 and 10 respectively were given based on fault-based grounds under section 13.

Observing the impact of such an amendment, the Bombay High Court in *Madhukar v Saral*¹³ pointed out:

*“The enactment of Section 13(1-A) in 1964 is a legislative recognition of the principle that in the interest of society if there has been a breakdown of the marriage there is no purpose in keeping the parties tied down to each other.”*¹⁴

8 Nikhil Rampal, “Many more people commit suicide due to bad marriage than divorce, NCRB data shows” (*The Print*, 15 November 2021) <Many more people commit suicide due to bad marriage than divorce, NCRB data shows (the-print.in)> accessed on 12 May 2024.

9 Prior to 1964 amendment, section 13(1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party -

(viii) has not resumed cohabitation for a space of two years or upwards after the passing of a decree for judicial separation against that party, or

(ix) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree.

10 Post 1964 amendment, 13(1A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground-

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

(ii) that there has been no restitution of conjugal rights as between the parties to a marriage for a period of two years⁴ or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

11 Post 1976 amendment to the Act the waiting period has been reduced from two years to one year, thus further making the process of securing divorce easier than before.

12 Kusum, ‘Irretrievable Breakdown of Marriage: A Ground for Divorce’ (1978) 20(2) Journal of the Indian Law Institute 288-303 see page 291.

13 A.I.R. 1973 Bom. 55, see at 57.

14 Kusum, ‘Irretrievable Breakdown of Marriage: A Ground for Divorce’ (1978) 20(2) Journal of the Indian Law Institute 288-303 see page 290.

Additionally, the introduction of the mutual consent theory further recognised the principle of breakdown theory. It was a recognition that if spouses have decided to part ways, without indulging in any mud-slinging on each other in the open proceedings of the court, they shall be allowed to end their union in a dignified and mutually respectful way. However the limitation of such a remedy is the necessity of prior mutual consent of both parties, therefore unilateral petition is non-maintainable. This prior necessity of mutual consent precisely leads to the situation of false accusations of cruelty and criminal offences as stated earlier in cases where irrespective of marital breakdown one of the partners does not want to seek divorce.

Furthermore, within the scheme of the act, Section 14 of the Act already empowers the competent courts to allow petitions before a year elapses on the grounds of exceptional hardship to the petitioner or exceptional depravity to the respondent.

Therefore it could be safely submitted that the introduction of IRB as a ground to seek divorce will not go against the broader scheme of the Act.

4. Jurisprudential Development and Its Limitations

The jurisprudential development of the principle of Irretrievable breakdown of marriage in India has evolved through rulings by the Hon’ble Supreme Court, particularly on the question of the mandatory or directory nature of the procedural requirement under section 13B(2) to seek divorce through mutual consent. The question of whether the apex court has the power under Article 142 of the Indian Constitution to provide for complete justice and thus to overlook the requirement of a waiting period of 6 months after the movement of the first motion under section 13B(1).

In *Neeti Malviya v Rakesh Malviya*,¹⁵ while hearing the disputing parties via a transfer petition the apex court refused to directly answer the question, as the correctness of the position laid down in *Anjana Kishore v Puneet Kishore*,¹⁶ was suspected by division bench judgments of the Supreme court in *Manish Goel v. Rohini Goel*¹⁷ and *Smt. Poonam v. Sumit Tanwar*.¹⁸ In both these cases Supreme Court showed its reluctance to invoke such a power [3]. Thus, the apex court in *Neeti Malviya*, referred the question of power under Article 142 to bypass the procedural requirement under 13B(2) to a larger bench to decide.

Ultimately, the constitutional bench of the Apex Court in

15 (2010) 6 SCC 413.

16 See para 3 (2002) 10 SCC 194, “An application for curtailment of time for grant of divorce shall also be filed along with the joint petition. On such a being moved the Family Court may, dispensing with the waiting for six months, which is required otherwise by subsection(2) of Section 13B of the Hindu Marriage Act, 1955, pass the final order on the petition within such time as may deem fit.”

17 AIR 2010 SC 1099.

18 AIR 2010 SC 1384.

*Shilpa Sailesh vs. Varun Sreenivasan*¹⁹ settled not only the question of power under Article 142 to bypass the procedural requirement under section 13B on the grounds of “*court being satisfied beyond doubt that marriage has shattered beyond repairs*”²⁰ but also gave itself discretionary power to grant divorce on grounds of irretrievable breakdown of marriage.

Thus, the court while reading section 13(1)(i-a) along with section 23 of the Act underscored the change in the concept of legal cruelty to the changing needs of society and held:

*“...apportioning blame and greater fault may not be the rule to resolve and adjudicate the dispute in rare and exceptional matrimonial cases.....the essence and objective behind section 13(1)(i-a) of the Hindu Marriage Act that no spouse should be subjected to mental cruelty and live in misery and pain is established... Fault theory can be diluted to do ‘complete justice’ in a particular case, without breaching self-imposed restraint applicable when this court exercises power under Article 142(1).”*²¹

Furthermore, the court laid down several factors to be considered to determine the irretrievability of a marital union such as when the parties last cohabited, the nature of allegations made by the parties against each other and their family members, cumulative impact on the personal relationship, etc.²²

Although, such a pronouncement is progressive in its outlook, falls short of resolving the problems posed by the non-recognition of IRB as a statutory ground to seek divorce. The inability of the majority of cases especially from people of marginalised communities to reach at the level of apex court due to costly proceedings hinders access to justice [6] and thus forces them to indulge in the usual mud-slinging, false accusations and character assassination in open court proceedings affecting themselves as well as their children and respective families. So, the key question that arises is why despite the continuous push by the apex court to the legislature to amend the Act and insert the new ground of IRB to seek a divorce, backed by the recommendations made by the law commissions the legislature has been reluctant in bringing such amendments to the Act.

5. Dealing with Objections of Women Organisations

Interestingly, the parliament has time again tried to push through relevant amendments to the Act to include IRB as an additional ground to seek a divorce, but constant objections through various women's rights organisations²³ have acted as

a stumbling block in such an endeavour. A recent of these example is the Marriage Law Amendment Bill, of 2010. The opposition to the bill was that it sought to make divorce easier thus adversely affecting “the interests of women who have limited rights on separation and divorces [10].”

These objections were supported by various surveys, showing that separation/divorce results in financial disasters for women and children, while at the same time leaving a separated male with enough income and assets to lead a comfortable life.²⁴ Such objections were addressed by the parliamentary standing committee which recommended other than a prior assurance of maintenance by the husband, the share of property acquired during the subsistence of marriage in which the wife contributed should be divided equally between the spouses but the non-recognition of non-financial contributions of a wife was left unaddressed by the committee.²⁵

Thus the demand of women's organisations was precisely to look into the Indian context and ensure women with equal property rights, or even more to ensure the welfare interests of children, on movable and immovable property to ensure justice.

Nonetheless, it is important to mention that fault-based and consent-based remedies to seek divorce would leave women practically at the same level irrespective of what has been the route of seeking a divorce, but the unilateral seeking of divorce by the husband through the IRB route curtails bargaining power with women. Thus, IRB as a ground of divorce does affect the interests of women and their bargaining power to seek divorce best to their interests.

Hence, the objections raised by women's rights organisations are well supported, but the solution to assure them sufficient property rights firstly are important but still a myopic solution to the “women question” and secondly ignores the fact that “a large number of cases where husbands file for maintenance” [7] being financially dependent on their wives. Thus, the bill only sought to safeguard women on grounds of financial hardship to oppose a divorce petition ignoring the circumstances where men may require similar safeguards. Additionally, the objections overlook the reality that many women do not pursue divorce because of the social stigma attached to it, rather than solely due to their financial independence [2].

Moreover, even taking the question of gender apart, the question one needs to think about is whether it would be right to force people into a marital union where the bedrock of trust, understanding and mutual respect has long vanished. Furthermore, the mere socio-economic dependence of women as a ground to deny a divorce remedy would also mean in certain cases pushing and conditioning women to continue facing domestic violence and marital abuse because of their inability to lead a financially independent life [1].

Thus, the author believes that the ultimate solution to this problem does not lie in forcing a failed union to protect the

¹⁹ 2023 SCC OnLine SC 544.

²⁰ *ibid* see para 17.

²¹ *ibid* see para 30.

²² *ibid* see para 33.

²³ All India Democratic Women's Association, All India Women's Conference, Centre for Women's Development Studies, All India Dalit Mahila Adhikar Manch, National Federation of Indian Women, Guild of Service, Young Women's Christian Association, Joint Women's Programme and Muslim Women's Forum mentioned in a

letter dated 21 May 2012 to Salman Khurshid.

²⁴ *ibid*.

²⁵ *ibid* 18.

financial interests of women but rather in taking farsighted measures to make women financially independent. In one of his works, the author has pitched for social reforms coupled with legal reforms to ensure property rights for women, same social reforms focusing on “representation and awareness”²⁶ for “the change required in the patriarchal mindset, to secure transformation towards an egalitarian society” [9] should be employed to make women financially self-independent which would address the rightful concerns raised by women right’s organisations.

The deployment of means of education, personality enhancement, employment opportunities, financial literacy programs, and community participation through NGOs and Self Help Groups, would go a long way in empowering women and instilling confidence in them to lead a financially independent life rather than forcing them to continue their broken marriages. Social reforms would also help in confronting the social stigma associated with divorce.

6. Conclusion

Marital unions are a lifelong commitment, they are the foundation on which civilisations progress. Once tied into this union, it assures various rights, and at the same time imposes various obligations on both spouses. In this paper, the author while going through various jurisprudential developments including the statutory scheme of the Act by looking through its various amendments pushes for the recognition of IRB as a statutory ground for seeking divorce to ensure justice. The recognition of such a ground would ensure the marginalised communities seek divorce on grounds that otherwise is highly placed fruit available for resourceful people in the orchards of the Hon’ble Supreme Court. Additionally, the deployment of social reforms to ensure the financial independence of women and addressing the social stigma attached to divorce would go a long way to ensure they are not forced into broken marital unions. Thus, it is high time for parliament to look at “divorce as a solution, an escape route out of the difficult situation.”²⁷

Abbreviations

IRB	Irretrievable Breakdown of Marriage
NCRB	National Crime Records Bureau

²⁶ Representation- Ensuring women's representation in leadership positions provides women with an equal voice in decision-making processes to put forward their opinions and demands as a community, which would bring a ripple effect in society. It will provide common women with the confidence to put forward their opinions and assert their rights and feel more empowered. Awareness-The most important part of the process of bringing social reforms is using the tool of awareness efficiently. The deployment of the means of education, personality development, employment opportunities, financial literacy programs, community participation through NGOs, Self Help Groups, and so on.

²⁷ Law Commission of India, *The Hindu Marriage Act, 1955 - Irretrievable Breakdown of Marriage as a Ground of Divorce* (Law Com No 71, 1978) see page 12.

NGOs Non-Governmental Organisations

Author Contributions

Lokinder Sharma is the sole author. The author read and approved the final manuscript.

Conflicts of Interest

The author declares no conflicts of interest.

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