



AN ANALYSIS OF IRRETRIEVABLE BREAKDOWN OF MARRIAGE AS A GROUND FOR DIVORCE*

INTRODUCTION

Marriage in Hindu Law is seen as a sacrament as opposed to a contract. Before the enactment of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act), divorce was not provided for in Hindu law since marriage was seen as a permanent union of two people. The Act for the first time permitted filing a petition for divorce on certain specified grounds.¹ These grounds were based on fault on the part of the respondent. Subsequently, in 1964 grounds partially based on breakdown of marriage were added² and in 1976 divorce by mutual consent was introduced.³ Thus, over the years, the Indian legislature has been open to the introduction of new grounds on which divorce can be sought according to the changing practices in society. However, discussions for almost half a century have not led to a consensus on whether irretrievable breakdown of marriage as a ground for divorce should be introduced or not. The Law Commission of India submitted a report on the issue in 1978 and recommended the introduction of such a ground in the Act⁴. In 2009, the Law Commission once again recommended the inclusion of such a ground⁵ and a Bill to that effect was introduced in 2010⁶. The Rajya Sabha passed this Bill with amendments on August 26, 2013.⁷ However, the Bill lapsed when the Lok Sabha dissolved in 2014. There are divergent views on whether the ground should be introduced and if yes, then what safeguards should be provided to prevent the provision's misuse.

This paper would address a few questions relating to irretrievable breakdown of marriage in particular and the theories of divorce in general. Part I would briefly discuss the theories of divorce: fault theory and no fault theory. Part II would question whether the distinction between fault theory and no fault theory is viable and practical and would examine if grounds based on fault creep into no fault grounds also. This is important to understand as irretrievable breakdown of marriage is considered to be a no fault ground. Part III would critically analyse

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¹ See Section 13 of the Act

² See Section 13 (1A) of the Act.

³ See Section 13B of the Act

⁴ See Law Commission of India, 71st Report on The Hindu Marriage Act, 1955- Irretrievable Breakdown of Marriage as a Ground for Divorce, April, 1978.

⁵ See Law Commission of India, Irretrievable Breakdown of Marriage- Another Ground for Divorce, Report No. 217, March 2009

⁶ The Marriage Laws (Amendment) Bill, 2010

⁷ The Marriage Laws (Amendment) Bill, 2013

the various provisions of the Bill that introduced the new ground of irretrievable breakdown of marriage and lastly Part IV would make suggestions⁸.

I. Theories of Divorce

Divorce has, until recently, been based exclusively on the fault of one party. However with changing societal mores, new theories of divorce have emerged. Marriage is no longer seen as irrevocable and the dominant view is that if spouses do not wish to live with each other and if living with each other becomes torture, they should be legally allowed to part ways.⁹ This view has brought in other theories of divorce that do not require the fault of one party in order to obtain divorce. The theories of divorce can broadly be categorised into the fault theory and the no fault theory.

A. Fault theory

This is the traditional theory that requires an innocent party to approach the court to file for a divorce due to a fault on the part of the other party. Here, it is possible to distinguish between two kinds of faults: which are directed towards the petitioner and which are not directed towards the petitioner. The latter may be referred to as a separate theory- “theory of frustration of marital relationship”¹⁰.

Both the kinds of faults have been incorporated in the Act as grounds for obtaining divorce. The following are examples of grounds based on fault that is directed against the petitioner under the Act: adultery, cruelty, desertion, bigamy, rape, sodomy or bestiality and failure to pay maintenance¹¹.

The grounds for divorce on the basis of fault not directed towards the other party are: conversion to another religion, insanity, virulent or incurable form of leprosy, venereal disease in a communicable form, renunciation of the world and being missing for seven years or more.¹²

Thus the fault can either be inherent in the person or be a result of his/her actions; nonetheless there must be a fault in the person.

The Act provides for certain defences to a petition for divorce.¹³ No person in order to get relief can take advantage of his own wrong or disability, can connive, condone or collude with the respondent and unnecessarily delay the filing of the petition. Any of these circumstances would result in denial of the grant of divorce even if the fault is proved.

⁸ It must be clarified that the scope of the paper is not to analyse the entire Bill that introduces the ground of irretrievable breakdown of marriage for divorce but only to analyse a few aspects of it. Certain provisions like the necessity to ensure adequate provision for the maintenance of children born out of the marriage before granting divorce have not been dealt with at all.

⁹ The courts have also subscribed to this view. See generally *Dastane v. Dastane* 1975 SCR (3) 967, *Ashok Hurra v. Rupa Bipin Zaveri* 1996 (2) HLR 512 (Guj)., *Naveen Kohli v. Neelu Kohli* AIR 2006 SC 1675., *Krishna v. Somnath* (1996) DMC 667 (P&H)., *Samar Ghosh v. Jaya Ghosh* (2007) 4 SCC 511.

¹⁰ *Supra* Note 4 at 8.

¹¹ See Sections 13 (1) (i), 13 (1) (ia), 13 (1) (ib), 13(2) (i), 13 (2) (ii), 13(2) (iii) of the Act

¹² See Sections 13 (1) (ii), 13 (1) (iii), 13 (1) (iv), 13 (1) (v), 13 (1) (vi), 13 (1) (vii) of the Act

¹³ See Section 23 (1) of the Act.

Thus, the theory requires an innocent party in need of relief and a guilty party against whom the relief is granted. If the guilty party is able to show that the party claiming to be innocent is also guilty, no relief would be granted to the petitioner.

B. No Fault Theory

No-fault theory does not require any one of the parties to be guilty; no fault needs be proved. It is also referred to as the “breakdown of marriage”. A divorce based on the no fault theory can be through mutual consent or without the consent of the opposite party due to an irretrievable breakdown of marriage¹⁴. Only the former has been incorporated in the Act by virtue of Section 13 B.¹⁵ The Section allows for divorce to be granted if both parties agree for it provided they have been living separately for one year or more.

Section 13 (1A) which was inserted in 1964 in the Act has been said to be based on the theory of breakdown of marriage. It is actually a hybrid provision- based on a combination of fault theory and no fault theory. It states that divorce can be sought by either of the parties subsequent to the passing of a decree for restitution of conjugal rights or for judicial separation, provided there has been no cohabitation for one year or more after the decree. This means that even a party at fault can file a petition for divorce. However, the provision is not based on the no fault theory since it requires that a decree of restitution of conjugal rights or judicial separation must have been passed. These decrees are passed only when the respondent is at fault. Hence to be able to file a petition under this Section, fault is a pre requisite. Also, the legal position is as follows: Section 23 (1) (a) of the Act is applicable to Section 13 (1A) provided the wrong is a fresh wrong and not merely non-compliance of the decree of restitution of conjugal rights or judicial separation.¹⁶

So far we do not have a provision which allows for a party irrespective of fault to file a petition for divorce on the ground that there has been an irretrievable breakdown of marriage. Bills have been introduced but have not been concretised as Acts.

II. Fault even within No Fault Theory

As seen above, the difference between a ground based on fault and a no fault ground lies in the fact that in a no fault ground even a party at fault would be able to file a petition for divorce and the general defences to divorce would not be applicable.

Under the no fault theory of divorce, fault is not a requirement at all. However, fault in one way or the other does creep into no fault grounds also.¹⁷ Let us consider the proposed provisions for no fault divorce in Section 13 C of the Marriage Laws (Amendment) Bill, 2013 (hereinafter referred to as the 2013 Bill). In order to grant a divorce on the ground of irretrievable breakdown, the court must be satisfied that the marriage has broken irretrievably. A three year separation is a prerequisite to grant divorce but is not the deciding criterion. The court must consider other facts and circumstances before deciding whether there has been an

¹⁴ Some jurisdictions have used the term “incompatibility of temperament”. See Alaska Statutes, Title 25, Chapter 24, Section 50.

¹⁵ This Section was inserted in 1976

¹⁶ See Dharmendra Kumar v. Usha Kumar AIR 1977 SC2213; T. Srinivasan v. T. Varalakshmi I (1991) DMC 20; Hirachand v. Sunanda AIR 2001 SC 1285.

¹⁷ See generally See generally Norman N. Robbins, *Have We Found Divorce in No Fault Divorce? The Family Coordinator*, VOL. 22, NO. 3 (JUL., 1973), pp 359-362.

irretrievable breakdown of the marriage or not. While deciding this issue, it would invariably consider the reasons for irretrievable breakdown which would be generally caused because of the fault of one of the parties.

Apart from the court looking into why irretrievable breakdown of marriage was caused, the question of fault would also arise for two more purposes. Firstly, while exercising the discretion given to the court not to grant the decree for divorce on account of grave financial hardship being caused to the wife (respondent)¹⁸, the court is supposed to look into the conduct of the parties and interest of the parties involved. The conduct of the parties might entail faults on the part of both the parties. Secondly, the court would have to decide on questions relating to fault for deciding compensation to be made by the husband (petitioner) to the wife and children, if any.¹⁹ The compensation is for settling the claims of the wife. What claims are to be settled would be dependent on the facts and circumstances of the case and any fault on the part of the husband would definitely be one of the many things to be considered.

Under the no fault theory, fault per se does not furnish the basis for granting a divorce²⁰ but fault does play a role in the determination of issues in the divorce proceeding. When seen in this light, the time old distinction between fault and no fault theories of divorce seems to blur. The Law Commission favoured introducing the ground of irretrievable divorce and stated that it would prevent “*public washing of dirty linen which takes place in long drawn out cruelty cases or in cases based on divorce*”²¹ This may be true in some cases but not in most. The ground of irretrievable breakdown of marriage would be used when both parties do not consent²² and in such cases, it is likely that the respondent would be keen to contest the case. It is human tendency to want to fix responsibility for a particular happening on somebody; even if under the ground for irretrievable breakdown no fault needs to be proved, the parties would want to fix the responsibility for the breakdown by attributing fault to one another.²³

III. Analysis of proposed Bill introducing irretrievable breakdown of marriage as a ground for divorce

The Marriage Laws (Amendment) Bill, 2013 introduced irretrievable breakdown of marriage as a ground for divorce and attempts to provide for safeguards to prevent its misuse. Some of these provisions are discussed below:

A. Discretion given to court to deny divorce if grave financial hardship caused to wife and to order compensation to be paid to the wife

Irretrievable breakdown of marriage as a ground for divorce would allow even a guilty party to obtain divorce. It is imperative to introduce certain safeguards to prevent its misuse and to ensure that it does not result in grave injustice to the opposite party. Consequently, Section 13 D and Section 13 F of The Marriage Laws (Amendment) Bill, 2013 have been added in the

¹⁸ See Section 13 D of the 2013 Bill

¹⁹ See Section 13F of the 2013 Bill

²⁰ See *Marital Fault V. Irremediable Breakdown: The New York Problem And The California Solution*, 16 N. Y. L. F. 119 1970

²¹ *Supra* Note 4 at 15

²² If both parties consented, they would go in for divorce by mutual consent

²³ See generally Richard Ingleby, *Matrimonial Breakdown and the Legal Process: The Limitations of No-Fault Divorce*, 11 LAW & POL'Y 1 1989. The article with the help of an empirical study concludes that even when parties have the option of not focusing on fault they feel it important to address issues relating to who was responsible for the breakdown and that notions of fault permeate no fault grounds.

2013 Bill and these sections are gender specific. They deal with discretion given to court to dismiss or stay a proceeding and order payment of compensation respectively. Each of these Sections would be discussed in the subsequent paragraphs.

Section 13 D allows the court the discretion to dismiss the petition or stay the proceedings unless appropriate arrangements are made if the grant of divorce on the ground of irretrievable breakdown of marriage would (i) cause grave financial hardship to the wife and (ii) that granting divorce would be wrong to dissolve the marriage in light of all the circumstances. The proposed Section limits the discretion to be exercised only when both the conditions are fulfilled and when the respondent is the wife. The Law Commission of India while recommending this provision conceded that it might not be fair to allow a party to contest the divorce on the ground of hardship caused but stated that theoretically it would not be wrong to allow such discretion. It warned that the provision must be used sparingly only in exceptional circumstances and that its inclusion would promote the ‘*interests of justice*’²⁴ In the very next paragraph, the Commission gave its reasons for making the Section gender specific. It reasoned,

*The fact that a woman has commenced proceedings would, in Indian conditions, imply in most cases that she finds conjugal life intolerable. We do not think that in such circumstances it would be just or fair to leave any scope for refusal of relief on the ground of hardship to the respondent husband. Where the wife is the petitioner and the husband is the respondent, there could hardly arise a situation in which the hardship likely to be caused to the husband by the grant of a decree of divorce would be more grave than the hardship that is caused to the wife if the divorce is not granted.*²⁵

It did recognise that the opposite might be true in infrequent cases²⁶. However it did not think wise to provide for such “rare” situations. Apart from not providing for the cases which might arise (albeit infrequently), the report reinforced stereotypical versions of Indian women by saying that they would file a case only when they find marital life intolerable. The author fails to understand how making the provision gender neutral would have done any injustice. It is to be used by the courts after analysing the facts and circumstances of the case and it is patently wrong not to allow the courts the discretion to deny the relief when it is causing grave financial hardship to a husband respondent (even if such cases are very rare). Using the language of the Commission itself, it would not be “theoretically wrong” to allow such discretion.

Section 13F of the Bill allows the court to order compensation to the wife (respondent) in form of immovable (not inherited or inheritable property) and movable property to settle any claims of the wife. This Section, once again provides that compensation would be payable only to the wife (respondent) and not to the husband. It might be true that in majority of the cases, the wife would be entitled to property and not the husband but there is a possibility for the opposite kind of cases. Moreover, the Section does not make it obligatory for the court to order compensation but says that the court “may” do so.

While analysing these Sections, it is imperative to bear in mind that these are to be inserted in the Hindu Marriage Act which was enacted in 1955. Even six decades back, the Act included a gender neutral provision for maintenance. The reasonableness of making the maintenance

²⁴ *Supra* Note 4 at 38.

²⁵ *Ibid*

²⁶ *Ibid*

provision gender neutral then might have been debatable²⁷ but introducing gender specific provisions in 2015 is definitely an issue that needs to be dealt with today.

There is no doubt that the society is still unequal for women and many women are financially dependent in need of assistance. However, is this reason enough to enact a gender specific provision? The history of the application of the Act demonstrates that gender neutral provisions are not always applied equally. Stereotypes based on gender invariably influence the decisions of courts.²⁸ A gender neutral Section 13 D or Section 13 F would not do injustice to women as if facts of individual cases are taken into account, the provisions would be applied in favour of wives mostly. Making the provision gender specific serves no positive function. In fact it has two negative effects: (i) it does injustice to the husbands who might deserve compensation or who might suffer grave financial hardship due to the grant of divorce and (ii) it assumes that women would be victims whenever divorce on the ground of irretrievable breakdown of marriage is filed, thus reinforcing their identity as victims and it indicates that status quo should be maintained.

B. Three year separation required to file a petition for divorce on the ground of irretrievable breakdown

The 2013 Bill requires a three year separation before a divorce on the ground of irretrievable breakdown of marriage can be granted. The rationale is to have a minimum standard according to which it could be said that the marriage has irretrievably broken down. The Bill clarifies that separation means that the spouses are not living with each other in the same household²⁹. Thus, to obtain a divorce, the petitioner must show that the parties have been living in different households from each other for at least three years. This provision limits the scope of the provision considerably if the phrase “*in the same household*” is interpreted to mean “*under the same roof*”. Without a definition of the word “*household*”, this question would definitely be raised.

The Family Law Act, 1975 in Australia abolished fault based grounds for divorce and introduced the sole ground of irretrievable breakdown of marriage which could be granted only when the court was satisfied that the parties had been living separately and apart for at least twelve months.³⁰ It further stated that parties could be living separate and apart despite the fact that they had been living under the same roof. Cases where the parties claimed to be living separately under one roof came before the court in many cases.³¹ The court held that they could be granted divorce but that they would have to show why they continued to live under the same roof.

The Australian position demonstrates that it is possible to require separation without limiting separation to mean living in different houses. In *Sureshta Devi v. Om Prakash*³², the Supreme Court held that parties might be living under the same roof and yet might be living separately if they are not living as husband and wife. Thus, it might be possible for a husband and wife to be

²⁷ See FLAVIA AGNES, FAMILY LAW VOLUME 1 FAMILY LAWS AND CONSTITUTIONAL CLAIMS (2011). It has been argued that having a gender neutral provision for maintenance was an unwise decision as it was unfair to bring in absolute equality in an unequal world with unequal laws.

²⁸ For instance, restitution of conjugal rights is a gender neutral provision but has been mostly been used by husbands to coerce wives to quit gainful employment and reside with the husband or to counter maintenance proceedings.

²⁹ See Section 13C (5) of the 2013 Bill

³⁰ Family Laws Act, 1975, Part VI, Section 48

³¹ Pavey and Pavey (1976) 25 FLR 450, and Falk and Falk (1977) FLC 90-257.

³² 1991 SCR (1) 274

living under the same roof and yet in two different households. The reasons for neither of the spouses moving out of the house they reside in could be several.³³ In the Indian situation where a woman once married is seen as belonging to the family of only her husband, the avenues for a wife who does not want to live with her husband are limited. In such a scenario, there might be no option for her but to live in the same house as her husband despite the marriage being irretrievably broken. There could be other reasons for not living in different houses. For example, if the house is bought jointly, neither of the parties would want to relinquish their claim to it.

It would have been better if either the term “household” would have been defined to include situations where the parties are living together under the same roof or an explanation would have been provided to clarify the situation.

Also, the three year requirement does not cater to situations where there might not have been a separation for three years but the marriage might have broken down irretrievably. For instance—where both parties commit adultery and have not been living separately but where their marriage is utterly wrecked. In such a situation, divorce cannot be filed on the grounds based on fault by virtue of Section 23 (1) of the Act and divorce cannot be filed on the ground of irretrievable breakdown of marriage since the parties have not been living separately for three years or more.

The provision drafted for irretrievable breakdown of marriage does not cater to situations that the Apex court has time and again asked the legislature to remedy.

IV. Suggestions

The preceding part of the paper critiqued some of the provisions of the 2013 Bill. This part would suggest some changes that could be made to the Bill to eliminate the loopholes and flaws in it. The suggestions made are independent of each other and it is possible that incorporation of one of the suggestion might render another suggestion redundant.

A. Fault and no fault grounds should be combined.

Presently Sections 13 (1) and 13 (2) deal with grounds based on fault and the 2013 Bill seeks to insert a provision providing for the ground of irretrievable breakdown of marriage. The Sections thus segregate grounds based on fault theory and no fault theory. This scheme is not sound because as discussed in Part II of this paper, fault and no fault theories are not entirely mutually exclusive.

A better way to insert the ground of irretrievable breakdown of marriage would be to allow divorce if the marriage has irretrievably broken down. The provision providing this should enumerate the circumstances which would amount to irretrievable breakdown of marriage. These circumstances would be fault based grounds as well as the no fault ground that requires a minimum separation of three years. For the purpose of giving a solution to problems where both parties are at fault and the marriage has completely broken down but the parties have not been staying separately, two alternatives are possible.

First, a sub-section could be added that empowers the court to grant divorce even if none of the enumerated circumstances are fulfilled but when the facts and circumstances warrant such an action. In such a case, the court should be obligated to provide reasons as to why it thought that

³³ See generally Terry Buddin, *Irretrievable Breakdown: Final Solution?*, 2 LEGAL SERVICE BULL. 83 1976-1977

the marriage had irrevocably broken down. The second alternative could be to abolish the defences to divorce provided in Section 23 (1). The second alternative is preferred by this author as the first leaves to much discretion in the hands of the courts.

England has only one ground for divorce, i.e. irretrievable breakdown of marriage. The court can grant a divorce on the ground only if any of the conditions given in the provision are fulfilled.³⁴ These facts are based on fault theory as well as no fault theory of divorce. This paper suggests a similar provision but with an addition that would ensure that the court is empowered to grant divorce in appropriate cases even if the case does not fall within any of the facts mentioned in the provision.

B. Irretrievable breakdown should also be a ground for judicial separation

The Bill introduces the ground of irretrievable breakdown of marriage only for divorce and not for judicial separation. This is an anomaly since under the Act judicial separation can be prayed for on any of the grounds enumerated in Sections 13 (1) and 13 (2) of the Act. Ideally, it should also be possible to ask for judicial separation on the ground of irretrievable breakdown of marriage.

This would increase chances for reconciliation as the parties would get the opportunity to suspend their marriage without dissolving it. In case, they are unable to resolve their problems, they would have an option to approach the court under Section 13 (1A) or Section 13 C.

C. No gender specific provision

The Hindu Marriage Act was introduced in 1955. At that time, the number of financially independent women was way lesser than now and yet maintenance was a gender neutral provision. It might not have been fair to make it gender neutral then, however it makes no sense to make provisions relating to distribution of property gender neutral now. As discussed in Part III, making the provisions gender specific entrenches the status of a woman as a victim and does not provide any remedy to the husband in the rare cases where he might suffer grave financial hardship or might deserve property belonging to the woman.

Even if the provisions are made gender neutral, they would be used sparingly against women keeping in mind the Indian situation. A gender specific provision leads to retarding of the process by which women and men are becoming financially equal. Cases where there are house husbands and working women might hardly exist but such a provision prevents such cases to increase in number.

D. Define “Household”

The problems which the word “household” might create have been discussed in Part III of this paper and would not be repeated here. The suggestion is to either add an explanation or define “household” to clarify that two different households can exist even under the same roof.

In conclusion, the debate around the pros and cons of introducing irretrievable breakdown of marriage as a ground for divorce is necessary and fruitful. Each proposed provision needs to be debated and analysed before being introduced again. This paper basically supports the introduction of the ground of irretrievable breakdown of marriage. It has attempted to critically analyse the 2013 Bill that introduced the ground of irretrievable breakdown of marriage to expose its flaws and has made suggestions to improve it.

³⁴ See Section 1 of Matrimonial Causes Act, 1973.