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NAVIGATING THE EXIT: EXPLORING LEGAL AND SOCIETAL DIMENSIONS OF IRRETRIEVABLY BROKEN MARRIAGES

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Abstract

This research embarks on an intricate exploration of the evolutionary trajectory of Hindu marriage, transitioning from its ancient perception of indissolubility to its contemporary acceptance of divorce. This transformative journey is propelled by legal reforms initiated through the Hindu Marriage Act of 1955 and subsequent amendments. Imbued with rich insights, the paper navigates through four key theories influencing modern Hindu divorce, delving into the contentious Irretrievable Breakdown Theory, and highlighting the conspicuous absence of explicit provisions for irretrievable breakdown within the Hindu Marriage Act.

Within the purview of Article 142(1), the Supreme Court emerges as the linchpin in cases related to irretrievable breakdown, wielding exclusive authority. A meticulous analysis of judicial decisions, reports, and critiques underscores the imperative for legislative intervention, urging the official recognition of irretrievable breakdown as a bona fide ground for divorce. Navigating through the intricate terrain of concerns surrounding fault-based divorce laws and the pragmatic feasibility of acknowledging irretrievable breakdown, the paper engages in thoughtful discussions on the proposed Marriage Laws (Amendment) Bill, 2010. A resounding advocacy for legislative amendments echoes throughout, urging the formal incorporation of irretrievable breakdown as a recognized ground for divorce. This impassioned recommendation resonates with the pulse of contemporary societal dynamics, delicately prioritizing individual well-being within the age-old tapestry of Hindu marriage.

Introduction:

In ancient India, the institution of Hindu marriage was deeply rooted in the belief of an enduring and timeless union known as "janam janmatro ka bandhan" – a bond designed to transcend lifetimes¹. The influential perspective of Manu reinforced the notion that spouses were

¹ Navneet Kaur Chahal and Nasrullah Rezaie, "Irretrievable Breakdown of Marriage" 10(3) *International Journal of Creative Research Thoughts* c112 (2022).

inseparable, with death being the sole acceptable means of parting ways². However, the introduction of divorce has brought about a significant transformation in the landscape of Hindu marriage, challenging the traditional perception of its permanence. In the contemporary era, Hindu marriage no longer stands as an absolute and indissoluble union, thanks to the codification of legal provisions related to divorce. The changing societal perspective on marriage has shifted away from viewing it as an unbreakable bond. This shift is evident in the substantial liberalization of divorce laws over the years, with the pivotal Hindu Marriage Act of 1955 initially emphasizing fault-based grounds for divorce. Subsequent amendments in 1964 and 1976 further advanced the concept of breakdown and introduced divorce by mutual consent, illustrating legislative efforts to adapt to evolving societal dynamics³.

Despite these transformative changes, the core objective of Hindu marriage remains centered on its preservation rather than termination. Judicial interventions have emerged as a significant avenue for resolving matrimonial disputes, with a clear focus on safeguarding marriages. This research paper seeks to explore the changing notion of divorce in Hindu law, thoroughly investigating the concept of irretrievable breakdown as a basis for ending the marital union. It also seeks to shed light on the contemporary dynamics shaping divorce based on this breakdown theory within the intricate fabric of Hindu marriages.

Theories of Divorce:

In modern Hindu Law, divorce is guided by four main theories, each providing distinct grounds and provisions:

1. **Guilt Theory:** This theory revolves around one spouse being at fault or guilty of committing a matrimonial offense, such as cruelty or adultery. The innocent party can file for divorce based on the guilt of the other party. The Hindu Marriage Act of 1955 initially centered divorce on the fault theory, outlining nine grounds for divorce in Section 13(1) that either the husband or wife could use to file for divorce. Additionally, Section 13(2) specified two fault grounds solely applicable for the wife seeking divorce⁴.

² Rishika Agarwal, "MARRIAGE LAWS WITH RESPECT TO MANUSMRITI" 9(5) International Journal of Creative Research Thoughts a876 (2021).

³ Law Commission of India, "71st Report on The Hindu Marriage Act, 1955- Irretrievable Breakdown of Marriage as a ground for divorce" (April 1978).

⁴ The Hindu Marriage Act, 1955 (Act 25 of 1955), s.13.

2. **Frustration Theory:** In accordance with this theory, divorce functions as a liberation from dissatisfaction caused by elements such as mental illness, physical illness, religious conversion, withdrawal from worldly pursuits, or extended periods of absence. Grounds for divorce under this theory, covered by Subsection 1 of Section 13 but it excludes typical marital infractions.
3. **Mutual Consent Theory:** Under this theory, divorce is attained through the mutual consent of the couple. The spouses can terminate their marriage amicably by collaboratively submitting a petition for divorce. The key requirement is the free and uncompelled consent of both parties. Section 13B of Hindu Marriage Act addresses divorce through mutual consent. The provision has been inserted through the Criminal Law Amendment Act of 1976⁵ following the recommendations laid down in 59th Law Commission Report.
4. **Breakdown Theory:** In accordance with Section 13(1A) of the Hindu Marriage Act of 1955, either party within a marriage has the right to pursue divorce on the basis of the absence of cohabitation for a duration of one year or more following a judicial separation decree. Alternatively, divorce can be sought if there has been no restitution of conjugal rights for a similar period after a decree for the same⁶. This theory acknowledges the breakdown of the marriage as a valid reason for divorce.

Irretrievable Breakdown Theory: Historical Emergence and Status in India

Irretrievable breakdown of marriage refers to a significant failure in the marital relationship or adverse circumstances that make it highly unlikely for the spouses to continue living together as husband and wife, sharing mutual solace and assistance⁷. The emergence of the breakdown theory in Commonwealth nations can be linked to legal and judicial modifications that occurred in a preceding era. The concept of the irretrievable breakdown of marriage was first introduced in New Zealand, acknowledging that it was unnecessary for one spouse to be at fault in desiring the termination of a marriage. Consequently, the law should recognize and cater to this requirement. In 1921, the initial divorce granted on the grounds of the irretrievable breakdown of marriage

⁵ The Criminal Law Amendment Act, 1976 (Act 25 of 1976).

⁶ The Hindu Marriage Act, 1955 (Act 25 of 1955), s.13 (1A).

⁷ Paras Diwan, *Hindu law* 563 (Allahabad Law Agency, 2nd edition, 2005).

occurred in a New Zealand court during the case of *Lodder v. Lodder*⁸. The court determined that when marital relations no longer exist, it is not in the best interests of the parties or the public to legally constrain them in the roles of husband and wife⁹. In England, the breakdown concept became prominent through the *Masarati v. Masarati*¹⁰ case, and the 1943 House of Lords decision in *Blunt v. Blunt*¹¹ further solidified the acceptance that there was no public interest in maintaining a legally active marriage that had genuinely broken down. The Matrimonial Causes Act of 1959 in the Commonwealth of Australia permitted divorce on the grounds of marriage breakdown¹². In India, despite suggestions from the Law Commission and numerous Supreme Court decisions endorsing the incorporation of marriage breakdown as a valid reason for divorce, it has not been formally acknowledged to date. The Hindu Marriage Act, even following its 1976 amendment, does not explicitly incorporate provisions addressing the irretrievable breakdown of marriage. Although certain amendments introduced in 1976 (specifically, two clauses of Section 13 (1A)) may indirectly acknowledge this concept as a pertinent consideration, the Act does not contain a distinct provision expressly permitting divorce on the grounds of irretrievable breakdown of marriage.

Power to grant Divorce Based on Irretrievable Breakdown of Marriage:

According to Article 142(1) of the Indian Constitution, the Supreme Court has the competence and jurisdiction to issue divorces based only on the irretrievable breakdown of the marriage. Article 142 explicitly grants the Supreme Court this unique prerogative and gives the Court the authority to issue any necessary orders to guarantee full justice in a given case¹³. This interpretation was affirmed by the Supreme Court itself in the cases of *Anil Kumar Jain v. Maya Jain*¹⁴ and *Manish Goel v. Rohini Goel*¹⁵.

Further, in the case of *Shilpa Sailesh v. Varun Sreenivasan*¹⁶, The court underscored the importance of adhering to the established procedure and disallowed parties from circumventing

⁸ (1921) New Zealand Law Reports 876.

⁹ *Ibid.*

¹⁰ 1969(1) WLR 392.

¹¹ *Blunt v. Blunt*, 198 Okla. 138, 176 P.2d 471 (Okla. 1947).

¹² The Matrimonial Causes Act, 1959 (Act 104 of 1959).

¹³ The Constitution of India, art.142.

¹⁴ (2009) 10 SCC 415.

¹⁵ (2010) 4 SCC 393.

¹⁶ 2023 SCC OnLine SC 544.

it by resorting to the writ jurisdiction under Article 32 or 226 of the Constitution of India. This restriction is in place because the remedy under Article 32 is specifically crafted for enforcing the rights enumerated in Part III of the Constitution and can only be pursued upon establishing a violation of those rights. Consequently, it is not permissible for a party to initiate a writ petition under Article 32 before the Supreme Court, seeking a direct remedy for marriage dissolution.

It is crucial to underscore that the exclusive authority to grant divorce based on the irretrievable breakdown of marriage lies solely with the Supreme Court of India under Article 142 of the Constitution. While some argue that the inclusion of Section 13(1A) in the Hindu Marriage Act, 1955, in 1964, marks a modest stride towards acknowledging the concept of irretrievable breakdown of marriage, it is important to emphasize that this provision does not formally recognize irretrievable breakdown as an independent ground for divorce. Rather, its significance emerges only after the issuance of decrees for judicial separation and restitution of conjugal rights, rendering this provision relevant in those specific circumstances.

Judicial Decisions advocating for insertion of Irretrievable Breakdown Theory as a Ground for Divorce

In the case of *Naveen Kohli v. Neelu Kohli*¹⁷, The Supreme Court recommended to the Union of India a careful consideration of amending the Hindu Marriage Act, 1955, to incorporate the notion of irretrievable breakdown of marriage as a legitimate ground for divorce. In the case of *Kanchan Devi v. Pramod Kumar Mittal*¹⁸, The Supreme Court declared that the marital bond between the husband and wife had suffered irreparable damage, justifying a divorce on the basis of irretrievable breakdown. The Court emphasized the importance of contemplating the inclusion of irretrievable breakdown of marriage and mutual consent as valid grounds for divorce in all instances. It recommended legislative action, underscoring the pressing need for a consistent civil code overseeing marriage and divorce. The Court urged the legislature to enact laws that could provide a remedy for couples undergoing challenging circumstances akin to those in the specific case. In *Samar Ghose v. Jaya Ghose*¹⁹, divorce was granted due to the parties living separately since 1990, with no emotional connection left. In *Naveen Kohli's*²⁰ case, Supreme Court held

¹⁷ AIR 2006 SC 1675

¹⁸ AIR 1996 SC 3192

¹⁹ (2007) 4 SCC 511

²⁰ *Naveen Kohli v. Neetu Kohli*, AIR 2006 SC 1675

that in a divorce case centered on marital breakdown, the examination should cover the following inquiries:-

- a) Is the marriage irreparably damaged?
- b) If it is, is there a realistic chance of reconciliation?
- c) In the absence of a breakdown, are there any public policy considerations, encompassing justice for both parties and the welfare of the children that argue against dissolving the marriage?
- d) In case of a breakdown, what suitable arrangements should be put in place for the individuals involved, including the parties and the child²¹?

Criticism of the Ground:

The endorsement of divorce based on the grounds of irretrievable breakdown of marriage has encountered noteworthy criticism, particularly from Justice Markandey Katju in the case of *Vishnu Dutt Sharma v. Manju Sharma*²². This particular instance involved a two-judge bench facing censure for granting divorce on a non-statutory basis, suggesting an encroachment into legislative functions. Despite this criticism, the Neelu Kohli judgment, delivered by a larger three-judge bench, continues to uphold a comprehensive perspective on irretrievable breakdown of marriage.

The Ministry of Education, Government of India, Department of Social Welfare argues that incorporating irretrievable breakdown as a divorce ground is superfluous. They assert that the Hindu Marriage Act and the Marriage Laws Amendment Act, 1976, already encompass ample grounds for seeking divorce²³.

In the context of the Indian Judicial System, there exists a prevailing notion that preserving marriages is preferable for the well-being of children in unhappily married families. This perspective is frequently used as an argument against divorce, irrespective of the grounds²⁴. However, contrasting opinions suggest that if parents are discontentedly married, divorce might

²¹ *Ibid*

²² (2009) 6 SCC 379

²³ *Supra* note 3 at 14-20.

²⁴ Ashisht Jain "Irretrievable Breakdown of Marriage" 2(2) *International Journal of Legal Science and Innovation* 165-172 (2020).

be in the best interest of the children.

A dissenting view comes from a High Court Judge who opposes the proposal to amend the Hindu Marriage Act, 1955, to include irretrievable breakdown as a valid ground for granting divorce. The judge contends that such an amendment could lead to heightened litigation, creating more problems than it aims to solve, thereby placing a strain on human ingenuity²⁵.

71st Law Commission Report, 1978

The 71st Report of the Law Commission highlights the drawbacks of divorce laws based on fault, stressing the adverse effects on the institution of marriage due to the requirement of proving guilt. The report criticizes the current system for exposing private and unpleasant aspects of married life in court. It advocates for a shift away from the traditional approach, recommending the adoption of grounds for divorce based on marriage breakdown to mitigate the contentious and public nature of fault-based cases²⁶.

The report deals with criticisms of the irretrievable breakdown theory, specifically addressing reservations about spouses having the ability to terminate the marriage at their discretion and the perceived inconsistency with the principle of not benefiting from one's own wrongdoing²⁷. While acknowledging these concerns, the report asserts that legislative safeguards can effectively mitigate them. The report refers to the Hindu Marriage Act, pointing to Section 13(1A) as an instance where there has not been strict adherence to the principle of refraining from benefiting from one's own wrongdoing²⁸. This establishes a precedent for permitting divorce even when one party is at fault. Underscoring the importance of acknowledging a marriage that has suffered irreparable damage, the report considers it impractical and potentially detrimental to society to uphold the legal tie when the emotional connection has diminished.²⁹ The report underscores the necessity of implementing safeguards to address objections and concerns related to this concept.

²⁵ *Supra* note 3 at 14-20.

²⁶ *Supra* note 3 at 14, 15.

²⁷ *Supra* note 3 at 15.

²⁸ *Supra* note 3 at 16.

²⁹ *Supra* note 3 at 16.

217th Law Commission Report, 2009

The report recognizes the pragmatic reality that when a marriage is irreparably damaged, it is impractical for the law to overlook this circumstance. Insisting on preserving a legal bond in situations where the marriage has essentially become a facade fails to uphold the sanctity of marriage and demonstrates minimal regard for the emotions of the parties involved. Although the irretrievable breakdown of marriage is not the exclusive reason for divorce, the factors that contribute to this breakdown can be taken into account when evaluating the grounds for divorce. It is emphasized that divorce cannot be awarded solely on the grounds of irretrievable breakdown if the party seeking it is responsible for the breakdown³⁰. The divorce decree based on irretrievable breakdown applies in cases where both parties have made accusations against each other to such an extent that the marriage appears practically lifeless, rendering cohabitation unfeasible. The report underscores the importance of the court exercising its power judiciously when awarding divorce on the basis of irretrievable breakdown. It advises thorough consideration and caution, asserting that such decisions should be rendered only in exceptional circumstances and with the utmost regard for the best interests of both parties. The report suggested expeditious actions to modify both the Hindu Marriage Act, 1955, and the Special Marriage Act, 1954, by incorporating 'irretrievable breakdown of marriage' as an extra ground for the grant of divorce³¹.

The Marriage Laws (Amendment) Bill, 2010

The Marriage Laws (Amendment) Bill, 2010, introduced in the Lok Sabha on August 4, 2010, by the Minister of Law and Justice, Shri M. Veerappa Moily, underwent examination by the Standing Committee on Personnel, Public Grievances, Law, and Justice. The Committee was assigned to present its findings by January 31, 2011³². The suggested amendment to both the Hindu Marriage Act, 1955, and the Special Marriage Act, 1954, incorporates the provision for divorce based on the irretrievable breakdown of marriage. To initiate such a petition, both parties must have resided separately for a minimum of three years. Significantly, the Bill provides the wife with the privilege to challenge the divorce if she can prove that it would lead to considerable financial adversity³³. In determining whether to approve a divorce, the court is required to take into account

³⁰ Law Commission of India, "Irretrievable Breakdown of Marriage – Another Ground for Divorce Report No. 217" at 13,14 (March, 2009).

³¹ *Ibid* at 23

³² The Marriage Laws (Amendment) Bill, 2010, *PRS Legislative Research*, available at: <https://prsindia.org/billtrack/the-marriage-laws-amendment-bill-2010> (last visited on January 20, 2023).

³³ The Marriage Laws (Amendment) Bill, 2010 (Bill No. 41 of 2010).

multiple factors, such as the behavior of the parties and the well-being of the children. Moreover, the court must guarantee sufficient financial arrangements for any children, including unmarried or widowed daughters³⁴. Despite receiving approval from the Rajya Sabha on August 26, 2013, unfortunately, the bill was not discussed in the Lok Sabha.

Recommendations and Suggestions:

Therefore, it is strongly recommended that immediate steps be taken to amend both the Hindu Marriage Act, 1955, and the Special Marriage Act, 1954, to include 'irretrievable breakdown of marriage' as an additional and recognized ground for granting divorce. The suggested amendment should explicitly state that, before issuing a divorce decree grounded in irretrievable breakdown, the court must carefully evaluate whether satisfactory financial arrangements have been made for the welfare of both the individuals concerned and any dependent children.

The evolving demands of contemporary society, culture, and values, all of which contribute to the irreversible disintegration of marriages make this change necessary. This assessment needs to take into account a number of factors, including a person's sensitivity, psychological and emotional wellness, conformity to social standards and principles, the general significance and sanctity of marriage for the individual as well as the community, and the critical preservation of the parties' respect and value, even in the face of marital discord. Therefore, there is a strong case to be made for the legislative body to fully accept irretrievable marital disintegration as a valid and justified basis for divorce in order to keep up with the evolving expectations of society and personal welfare.

Conclusion:

The examination of the Irretrievable Breakdown of Marriage as a basis for divorce in India illuminates the profound transformation from the ancient belief in the indissolubility of marriage to the contemporary acceptance of divorce. The legal evolution instigated by the Hindu Marriage Act of 1955 signifies a departure from traditional permanence towards a more adaptive framework. A scrutiny of the Irretrievable Breakdown Theory reveals the absence of explicit provisions in the Hindu Marriage Act, despite judicial support. The exclusive authority bestowed upon the Supreme Court under Article 142(1) to grant divorce based on irretrievable breakdown is of paramount importance. Decisions by the judiciary, reports, and the proposed Marriage Laws

³⁴ *Ibid.*

(Amendment) Bill, 2010, underscore the legislative imperative to officially acknowledge irretrievable breakdown. Recognizing irretrievable marriage breakdown as a valid ground for divorce is deemed essential in harmonizing legal frameworks with the dynamic nature of relationships and the evolving values of modern society.

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