
NO FAULT DIVORCE IN INDIA: IS IT TIME TO MOVE BEYOND THE “FAULT-BASED” THEORY IN PERSONAL LAWS?

Monty (Research Scholar), School of Law and Constitutional Studies, Shobhit University
Gangoh, Saharanpur (U.P)

Dr. Anil Kumar LL.D., U.G.C. (N.E.T.), (Associate Professor) School of Law and
Constitutional Studies, Shobhit University Gangoh, Saharanpur (U.P)

ABSTRACT

Marriage is a portrayal of an attachment and union whereas divorce implies separation. It is a fundamental right of a person to get married and to form a family which is given under Article 9 of European Union (EU) Charter of Fundamental Rights. The customary Indian legal set-up that governs matrimonial disputes has been anchored in the no-fault theory for a long time ago, where to dissolve the marriage the judicial evidence of specific matrimonial grounds like cruelty, adultery, or desertion is a vital aspect. However, the contemporary evolution of gregarious dynamics and the escalating emphasis on personal autonomy have exposed the drawbacks of this adversarial system. The research even looks into the paradoxical situation in India where, despite repeated recommendations by the 71st and 217th reports of Law Commission of India, the law-making body has abjured from formally codifying irretrievable breakdown, a statutory ground of marriage. In this legislative vacuum, the judiciary of India has surfaced as a beacon of reform. Thus, no-fault divorce is not merely a legal necessity but a humanitarian requirement to preserve the dignity of individuals trapped in dead shells of nuptials. Therefore, it advocates for a shift from a ‘blame-centric’ to a ‘remedy-centric’ jurisprudence. This research paper catches the eyes upon the structure dealing with irretrievable breakdown as a ground for no-fault divorce, historical context of divorce laws in India, socio-legal implications of adopting a no-fault theory, role played by judiciary, legal recognition of no-fault theory worldwide and analytical view of the transition from the ‘punitive’ to the ‘pragmatic’ approach of no-fault divorce regime. Furthermore, it concludes with the suggestions for policymakers and lawmakers to deal with the issue of no-fault divorce in India.

Keywords: Cruelty, Adultery, Desertion, Dissolution, Matrimonial disputes, Emotional death, Humanitarian, No-Fault Theory, Irretrievable Breakdown, Punitive, Pragmatic, Legislative reform, Personal Autonomy.

INTRODUCTION

The right to marry is not only a substantial part of right to life¹ but this right has also recognised by Article 16 of The Universal Declaration of Human Rights (UDHR), 1948.² Hindu marriage is both a sacrament and contract. Out of 16 sanskaras, marriage is one of them as per the Hindu law. This union is eternal and it can only be dissolved by death. However, this archaic contemplation has now eroded. In Muslim law, a marriage is considered as a civil contract for the motto of legality of sexual intercourse and procreation of children. Hence, there are diverse set of opinions with regard to the context of marriage among the Muslims. The complex procedure of modern life, rapid change of economic circumstances, breakdown of joint families, education of women and employment issue have a substantial influence on the marriage concept. Marriage is no more seen as an intimate relationship.³ No fault divorce means a marriage has broken down completely which is beyond repair. The terms irretrievable breakdown and no-fault divorce are not only used interchangeably but also; they both resembles the legal concept. Couple is no more able to live as husband and wife with a no hope of reconciliation. It means a divorce is granted irrespective of whose fault it is. It is immaterial whether both give their consent for the marriage dissolution by way of divorce or not as it is a unilateral divorce. Traditionally, divorce was granted merely on the base of specific kind of misconduct by any one of the spouses. However, with a change of time 'no-fault' divorce or 'irretrievable breakdown' of marriage has widely accepted in India though this as a wreck of divorce in Indian laws is not yet available. The concept highlights it is a mere toothless tiger when the matrimonial relations are broken and only exists on paper then it serves no point for its continuation.⁴ As per the Indian context, divorce can be obtained in one of three ways; first being conventional paragon of marriage guilt, second being frustration, third being by mutual consent of parties.⁵ Except third way, the other aforesaid ways of getting divorce are tedious and indefinite. However, the contemporary legal landscape is witnessing a move from this traditional sanctity towards a more contractual understanding of marital autonomy. Under the

¹ INDIA CONST. art. 21.

² Dr. Anil Kumar, Changes under marriage phenomena and concept of divorce: in Indian perspective, 7 Paripex- I.J.R, 31 (2018),

https://www.worldwidejournals.com/paripex/recent_issues_pdf/2018/April/April_2018_1522931033_75.pdf.

³ RK Aggarwal, Hindu Law (Central Law Agency 25th ed. 2016).

⁴ Vijendar Kumar, Irretrievable breakdown of marriage: Right of a married couple, 5, Nalsar Law Review, 16-17 (2010),

https://www.academia.edu/1891806/IRRETRIEVABLE_BREAKDOWN_OF_MARRIAGE_RIGHT_OF_A_MARRIED_COUPLE.

⁵ G. Bhargavi, Need of No-fault Divorce in India- An Analysis, Jus Corpus, (Aug 18, 2021) <https://www.juscorpus.com/need-of-no-fault-divorce-in-india-an-analysis/>.

Hindu law, a petitioner has to prove presence of particular matrimonial wrong such as cruelty, adultery, or desertion so to satisfy the conscience of court of law. This adversarial approach often coerce couple into a 'litigation trap' where the procedure of proving fault becomes more egregious than the breaking of the relationship itself. When a marital tie has attained to a level of irretrievable breakdown then the law ought to act as a facilitator for a respectful exit rather than a hindrance. The genesis of the no-fault divorce philosophy is suggestive of fact that the end of emotional bond is in itself an enough ground for dissolution.

EVOLUTION OF NO-FAULT DIVORCE

Archaeologically, the matrimonial institution in India was regarded a sacramental union that is an indissoluble bond surpassing lifetime. The conception of no-fault divorce has initiated in the Western world. In 1920, The Divorce and Matrimonial Causes (Amendment) Act of New Zealand introduced a new provision specifying that an agreement of separation of three or more years could serve as a base for petitioning the court for a divorce.⁶ This concept formed through a historical ruling embracing terrible breakdown as a mode for divorce if the parties are observing separation above three years on the presumption that matrimonial tie has an error literally broken down.⁷ It is neither for the welfare of the parties nor for the public to bound the couple to live as husband and wife in law. Thereafter, this idea has incorporated by a numerous nation such as United States of America (U.SA), the United Kingdom (U.K), Australia and Canada into their legal systems. Additionally, such a separation results in the main motto of the wedlock being frustrated and it is not mere useless to further continue it but wicked. Thereby, in law it results in breakdown theory related to marriage.

LEGALITY OF NO-FAULT DIVORCE

The prime motive of this study is to throw the light upon legal scenario of the research of irretrievable breakdown concept in India along with its comparison to other countries.

A) NATIONAL PERSPECTIVE:- Every holy religion is governed by its own personal legislations regarding divorce in India. In 1955, the Hindu Marriage Act was introduced

⁶ Ramji Kumar P, Exploring the imperative & implementation challenges for irretrievable breakdown of marriage as a ground for divorce in India- A comparative study with other jurisdictions, 6, I.J.L.M.H, 1863 (2023), <https://www.ijlmh.com/wp-content/uploads/Exploring-the-Imperative-and-Implementation-Challenges-for-Irretrievable-Breakdown-of-Marriage-as-a-Ground-for-Divorce-in-India-pdf>.

⁷ Lodder v. Lodder, (1921) N.Z.L.R. 876.

to alter the marriage law among Hindus stating diverse grounds for obtaining divorce (Section 13) and Section 13(1)(a) of said Act gives an indirect legal recognition to irretrievable breakdown theory. Even Section 13 B of aforesaid Act outlays the divorce by mutual consent. However, Muslims are governed by Dissolution of Muslim Marriage Act that was passed in 1939. For Christians in 1869, the Indian Divorce Act was introduced. For individuals irrespective of religion, there is a Special Marriage Act passed in 1954 that provides for registration and divorce provisions. However, irretrievable breakdown is not directly recognized a wreck for divorce in any enactments. Although, this is no longer a new concept to consider above-said ground in Indian laws but the 71st report of the Law Commission of India which was presented in 1978 under the leadership of Justice H.R. Khanna was often taken as vital proponent of this concept which elucidates that ‘Life of human is for a very short period and misery that is the cause often not allowed to catch up it indefinitely.’⁸ It prescribes that if grounds of divorce are restricted on basis of faults then it will cause prejudice to those who got diverted in a circumstance when no party has any guilt within the wedlock but lead to an external outlook without any efficacy.⁹ According to Indian Law Commission, if cause of divorce is remain confined to matrimonial incapacity then it will cause biasness in circumstances. Where there is no guilt of either party or if the flaw is such that the partners are afraid to disclose it then the marriage will not be restored. The shell which is empty is to be destroyed with almost fairness and minimum bitterness and humiliation. It was stated by Justice V.R. Krishna Iyer, ‘Where there is neither rose nor its thorns but if you hold its all thorns and no rose better throw it away.’¹⁰

Additionally, 217th Report of the Indian Law Commission which was presented in 2009 under the control of Dr. Justice AR. Lakshman recommended to add irretrievable breakdown a new ground for decree of divorce in Indian laws within the ambit of statues like The Hindu Marriage Act, 1955 (HMA) and The Special Marriage Act, 1954. This report not only put emphasis upon the requirement for implementing this Amendment but also highlights the prerequisite for assessing whether myriad provisions related to financial are made for spouses and their offshoots preceding to a divorce decree based on irretrievable breakdown.¹¹ It results in the

⁸ Id. at 10.

⁹ Id. at 10.

¹⁰ Yousuf v. Sowramma, AIR 1971 Kerala 261.

¹¹ Ramji Kumar P, Exploring the imperative & implementation challenges for irretrievable breakdown of marriage

introduction of The Marriage Laws (Amendment) Bill in 2010 which considers a new cause of irretrievable breakdown for extending a decree of divorce if the parties are living apart for minimum 3 years. Upon the satisfaction of the court on this cause the forum should end the marriage irrespective of an objection whichever raised by one party. The above Bill also seeks to implement certain security protocols to shield the rights not only of spouse but also the children and even to eliminate the current six-month waiting period which is required for filing a mutual consent divorce but it never saw light of the day and remains a dream line for people who just wish for divorce.

B) INTERNATIONAL SCENARIO:- The other countries also recognised the concept of an Irretrievable breakdown theory which is explained as follows:-

A) **Australia:** In 1975, Section 48 of The Family Law Act specifies the grounds for divorce filing in Australia by which an order of divorce to be granted only if there is error in marriage. It terribly broken down the couple for separate residence from a continuance period of at least 12 months immediately preceding the application date for the divorce. However, after the court determines that the likelihood of cohabitation then it do not result in divorce. However, various factors will be taken into account by the court before granting the divorce such as length of the separation, communication gap, the conflict between the parties, impact on children and attempts of reconciliation while determining whether there is a breakdown of marriage irretrievably or not. Adultery, cruelty, desertion grounds are also recognised in Australian law. Each case has to be considered according to the individual circumstances. In **Stanford v. Stanford**¹² the Australian High Court held that irretrievable marriage breakdown is a factual matter in spite of a legal one and the court must have the satisfaction that the marital tie has reached to such an extent that there found no probability to resume the cohabitation.

B) **Canada: Section 8(2) of The Divorce Act** in the Canada provides for the discretion of the forum to give a divorce upon the satisfaction of marriage break down on the reasons inclusive of infidelity, physical or emotional abuse, financial encumbrances or

as a ground for divorce in India- A comparative study with other jurisdictions, 6, I.J.L.M.H, 1864 (2023), <https://www.ijlmh.com/wp-content/uploads/Exploring-the-Imperative-and-Implementation-Challenges-for-Irretrievable-Breakdown-of-Marriage-as-a-Ground-for-Divorce-in-India-pdf>

¹² Stanford v. Stanford, 2012 HCA 52.

communication breakdown. The marriage breakdown is recognised in two particular circumstances; firstly, when the spouses lived apart for a minimum of 1 year immediately preceding the divorce and were living separately when the proceedings were commenced. Secondly, if the spouse has committed the adultery against whom the divorce proceeding initiated or the physical or mental cruelty with the other spouse that has made continued cohabitation beyond tolerance. It is to mention here is that suppose a reasonable chance of reconciliation prevails then the divorce on the basis of irretrievable breakdown. In **Moge v. Moge**,¹³ the Apex Court of Canada held that irretrievable breakdown was an enough ground for getting divorce as far as there was no reasonable result of reconciliation.

C) **Russia:** Article 22 of the Russian Family Code of 1995 deals with the marriage dissolution in Russia stating if a spouse objected to dissolve a marriage, then the court might grant the dissolution if it determines that continued cohabitation and the preservation of family is quite impossible. The forum may attempt for reconciliation and may delay the proceedings for at least three months or to facilitate this process. If the reconciliation efforts not successful and one spouse insist on the marriage dissolution then the dissolution may be granted by the court. The main point to be considered by the court is the welfare, interest and need of the scion. The object is to protect the parties' interest in a fair and equitable manner.

D) **United Kingdom:** The law relating to divorce proceeding in the United Kingdom (U.K) is a primarily governed by The Matrimonial Causes Act,1973. Section 1 of said Act stipulates that either or both parties can make a request for divorce on the ground of marriage breakdown subject to Section 3. The court may issue a conditional order if the applicants confirmed that they want to continue the application which cannot occur until after 20 weeks from the starting of the proceedings. However, in 2020 with the passing of The Divorce, Dissolution and Separation Act significant developments were brought into light to the existing law according to which couples can choose for a decree of divorce by making a statement before the forum about the breakdown of marriage irretrievably and there is no need to establish any wrongdoing on either spouse. In **White v. White**,¹⁴ the U.K court held that while dividing assets in a proceeding of

¹³ Moge v. Moge, (1992) 3 SCR 813.

¹⁴ White v. White, (2000) UKHL 54.

divorce equality should be the initial objective which means both parties should be entitled to a share equally the assets unless there are justifiable reasons.

ROLE OF BENCH

The right to marry is regarded as a part of right to life by virtue of Article 21 of the Indian Constitution which has been opined by Hon'ble Apex Court in *Lata Singh v. State of Uttar Pradesh*.¹⁵ Justice V.R. Krishna Iyer in judgement *Aboobacker Haji v. Mamu Koya & Ors*¹⁶, quoted that miniscule nitpicks get dissolved by the time passes and may be regarded as deeping a red rag to a bull of early marital adjustments. Married mutually wipe off small pebbles but when there is difference of minds then marriage breakdown is evident. This fact ought to recognise and divorce to be granted. In case of *Ram Kali v. Gopal Das*,¹⁷ the full bench of the Delhi High Court acknowledged the current trend of non-continuation of a marriage that has irretrievably collapsed. The court commented that it would be impractical and irrational to force the parties to marriage to keep the appearance of a marital tie when the rift between them is total and there left no chance of living together as spouses. The High Court of Delhi in the case of *Subash Chander Sharma v. Anjali Sharma*¹⁸ observed that if breakdown of marriage irretrievably is made a ground of dissolution of marriage in the Hindu Marriage Act, then the courts should be very vigilant in dissolution of marriage under this ground. The court states that the relationship between husband and wife is the delicate emotional bond and requires constant nurturing, tolerance and understanding. The top court observed in *Samar Ghosh v. Jaya Ghosh*¹⁹ that if marriage is merely regarded as a shell out of which substance is gone then there is no utility to maintain the marriage as fasad when emotional and other connections which are the need of wedding are often disappeared. The court no doubt ought to make serious in divorce to do the reconciliation between the parties yet if it is found that breakdown is beyond the repair then the divorce ought not to be withheld.

In *Ms. Joden Diengdeh v. S.S. Chopra*,²⁰ the Hon'ble Apex Court said about the significance of adding 'irretrievable breakdown' and mutual consent divorce as legitimate grounds for dissolving the marriage in every case. The legislature ought to interfere in matters concerning

¹⁵ Lata Singh v. State of Uttar Pradesh, AIR 2006 SC 2522.

¹⁶ Aboobacker Haji v. Mamu Koya & Ors, AIR 1971 Ker 216.

¹⁷ Ram Kali v. Gopal Das, 1971 ILR 1 Del 10 (FB).

¹⁸ Subash Chander Sharma v. Anjali Sharma, 174 (2010) DLT 564.

¹⁹ Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511.

²⁰ Ms. Joden Diengdeh v. S.S. Chopra, 1935 AIR 935.

the marriage institution and divorce to frame a consistent set of rules and regulations. The Hon'ble Supreme Court ruled in case of **V. Bhagat v. D. Bhagat**²¹ that merely a breakdown of a marriage irretrievably is not a sufficient base for divorce. However, this factor may be taken into account in reviewing the evidence so as to determine whether the grounds for divorce are established while deciding on an appropriate relief.

The court have considered the following humane aspects in **Vinita Saxena v. Pankaj Pandit**,²² where the marriage lasts for 4 to 5 months before the appellant (wife) was compelled to leave her matrimonial obligations. The parties have been living separately since 1993 without seeing each other for 13 years. Hence, it is quite impossible for the parties to marriage to live together as couple and the living of wife with the respondent is quite harmful to her health. Thus, there are strong and compelling reasons to accept the appeal and grant relief to the appellant. Appellant cannot be kept in chains and she must be allowed to live a life of dignity. There was grave miscarriage of justice. So, Article 136 enshrined under the Constitution of India should be invoked in order to reverse the findings of lower court and to restore the justice.

Later, in **Naveen Kohli v. Neelu Kohli**,²³ where it was observed by the top court that the respondent was not ready to a divorce by mutual consent with volition. Uncaring and stubborn attitude of her causing mental anguish to the appellant resulting in breakdown of marriage irretrievably and no chance of reconciliation left. Thus, it is an obligation of the Union of India to take into account and to modify the Hindu Marriage Act, 1955 inclusive of 'irretrievable breakdown', a ground for divorce. When there is breakdown of marriage irretrievably then it would not only prejudice the parties to marriage but also harmful to the society. The marriage just becomes a fiction that is supported by a legal tie.

Moreover, to live with a man or woman you hate is slavery and to be compelled to yield his or her physical nurtured even much more than slavery as it was analysed in **Anita Jain v. Rajendra Kumar Jain**.²⁴ The top court observed in **Manish Goyal v. Rohini Goyal**²⁵ that divorce given on the basis of breakdown of marriage irretrievably can be granted by use of Article 142 of the Indian Constitution where marriage is absolutely unworkable beyond salvage. Most of the time the agony faced by parties would be saved which is basic aspect of

²¹ V. Bhagat v. D. Bhagat, AIR 1994 SC 710.

²² Vinita Saxena v. Pankaj Pandit, 2006 (3) SCC 778.

²³ Naveen Kohli v. Neelu Kohli, AIR 2006 SC 1675.

²⁴ Anita Jain v. Rajendra Jain, 2009 Supreme (Raj) 1320.

²⁵ Manish Goyal v. Rohini Goyal, 2010 INSC 82.

the right to live a life rooted in Article 21 of the Constitution of India. In the case of *Shilpa Sailesh v. Varun Sreenivasan*,²⁶ where by exercising its inherent powers conferred by the Indian Constitution under Article 142 the Apex Court grant divorce in case laws of broken-down marriages, bypassing statutory waiting periods to ensure complete justice.

Therefore, few decades ago the divorce was a taboo. It was an evil and grounds of divorce were very limited. Divorce was only under compelling circumstances. Even the courts were not very eager to give divorce decree. Therefore, in so many judgements we have seen in which they would prefer to give judicial separations rather than divorce. However, as the time passes and with expeditiously changing sociological set up, we watch that the things have changed and one of revolutionary times because suddenly which was unthinkable few decades ago is a common norm now that has made all the difference. That's why a path has move from no divorce to divorce on demand and now it is moving slowly towards irretrievable breakdown.

CRITICAL ANALYSATION

It is quite enigmatic to prove breakdown of marriage irretrievably in the court. Unlike other grounds specified for divorce in marriage such as adultery or cruelty, the irretrievable breakdown does not require a specific happening of an event to have taken place. However, the court has to look into the evidences presented in light of it. In some jurisdictions, it is required for the couples to undergo counselling or mediation proceedings before giving the application for divorce on the basis of breakdown of marriage irretrievably. The intension behind this is to give the parties the last way to try to work things out and prevent their marriage. If these efforts are unsuccessful then it is the discretionary power of the court to grant a decree of divorce. Once the divorce is granted on the ground of irretrievable breakdown then the couple have to address innumerable issues such as division of property, support to the spouse, custody of the child and so on.

CONCLUSION AND SUGGESTIONS

Hearts cannot be stitched by law. There is requirement to change the divorce laws in India with changing times. Although a relief in form of mutual consent divorce is available but out of the couple any one of them may refrain from such kind of divorce at any time. Since the grounds are clearly written the law of divorce hence becomes a water tight compartment. Many times,

²⁶ Shilpa Sailesh v. Varun Sreenivasan, 2023 SCC Online SC 544.

court feels helpless though they can watch the marriage breakdown but the dispute of couple do not come into parameters of The Hindu Marriage Act, 1955 under Section 13. So, on various situations the judiciary have found themselves incapable of providing an effectual remedy to litigants when there is a clear marriage breakdown but due to lacuna of scientific proof it often fails. That's why jurists, law commissions all have gave the recommendation that breakdown of marriage irretrievably should become another ground of marriage. The attitude of courts regarding time period also changed towards marriage and divorce. Earlier, divorce was a taboo and court thinks 20 times before grant of a divorce. Now, the Apex Court has the power described under Article 142 of the Indian Constitution to dissolve so many marriages and given the divorce under irretrievable breakdown even though it is not a ground. It is digital era and now women work shoulder to shoulder with men. Its' high time that breakdown of marriage irretrievably should be made specifically and expressly a ground in marriage not only in legislation dealing with the Hindus but also in the Act dealing with special marriages. Moreover, it is not specifically mentioning anywhere a clear-cut formula of financial settlement, the amount of compensation which has to be provided when woman left matrimonial house or when she loses her status. In our Indian society marriage not only confers a status on women but also grants her respectability in the environs. On the other hand, marriage dissolution by way of divorce will not affect the status of man. The man will become an eligible bachelor immediately after outcome of divorce. It is facile for him to delve into another marriage. Comparatively, a woman who has come out of the marriage tie is generally seen in a disrespectful way by the society whatever may be cause for doing so. It is a necessity to bring more women oriented legal reforms. The government should amend the Marriage Laws Bill that was passed in 2010 and pass it. Therefore, wedding is a bond of trust and sacrifices. Both male and female are obliged to prevent the marriage institution at utmost priority to the extent it is possible. Thus, it is an institution run by both of them.

“Man and woman alike two pillars of same cart, both of them are incomplete without each other's support.”

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