BEST: International Journal of Humanities, Arts, Medicine and Sciences (BEST: IJHAMS)
ISSN(P):2348-0521; ISSN(E):2454-4728
Vol. 3, Issue 10, Oct 2015, 9-22

HINDU LAW OF DIVORCE – A JOURNEY FROM 'GUILT' TO 'IRRETRIEVABLE BREAKDOWN'*

P. B. PANKAJA

Associate Professor, Law Centre 1, Faculty of Law, University of Delhi, Delhi, India

ABSTRACT

Bringing in 'irretrievable breakdown of marriage' as a ground for getting divorce, through an amendment to the Hindu Marriage Act, 1955, has been gaining momentum since later part of 1960s, as the existing grounds prove to be inadequate to address certain situations. The legislative lacuna received the attention of the judiciary, the government, the Law Commission and the people equally paving the way for bringing in the Marriage Laws (Amendment) Bill, providing for irretrievable breakdown of marriage as a ground for divorce in 1981, 2010 and 2013. But in spite of repeated legislative endeavor, the Bill could not get through the legislative scanner owing to one reason or other which signifies the undeniable fact that the proposed Bill has great potential to impact the institution of marriage, the rights of the parties to the marriage, the welfare of the children and ultimately on the social fabric of the nation in a multifarious ways. On one hand there is a heavy pressure from the Law Commission of India and the Apex court to bring an amendment in the Hindu Marriage Act, 1955, as a progressive measure of matrimonial reform and on the other hand there is a mixed response from the community for whom the proposed reform is intended. Some women's organizations oppose it saying that the Bill, if enacted, has the potential of misuse by the unscrupulous husbands who would desert their wives and children and take advantage of this easy provision to take divorce. Representations from various men's organizations say that the Bill in the present form, if enacted would result in misuse of law by wife to the disadvantage of the husband. Some groups who believe in preservation of the sanctity of marriage contend that the proposed amendment would de-stabilize the institution of marriage and encourage non-marital live-in-relationships. There are voices which want the amendment to come in, so as to rescue spouses from broken down marriages and the shelving of it would be an unwarranted concession to moral conservatism. The government is sandwiched between the various pressures and the subject receives all the more importance in the light of the government's recent decision to shelve the Bill for the present to prevent a hasty legislation. In view of strong arguments on either side of the issue, a meaningful public debate is not possible without a grasp of the subject in its entirety.

The author in this article tries to highlight the existing law on divorce governing the Hindus under Hindu Marriage Act, 1955, how it is deficient to address ever growing situations of breakdown of marriages, whether the proposed but shelved Bill is a correct prescription to fill the lacuna and how the Bill can be made gender neutral and have smooth legislative passage in future with minimum resistance. Though the Bill proposed to bring changes in Hindu Marriage Act as well as Special Marriage Act, the author limits the scope of this article to Hindu marriage Act only.

* This is a research paper published as a part of Research project, with the R&D Grant (2014-15), University of Delhi, Delhi, 110007.

KEYWORDS: Matrimonial Fault or Guilt, Mutual Consent, Breakdown of Marriage, Irretrievable Breakdown of Marriage, Restitution of Conjugal Rights and Judicial Separation

INTRODUCTION

The Hindu law of divorce, as codified[*] under the Hindu Marriage Act, 1955, has accommodated three theories namely 'Fault' or 'Guilt' theory, 'Break down' theory and 'Consent' theory and now a stage has come to have one more theory called 'Irretrievable breakdown of marriage' theory suggesting for a more rational form of dissolution of marriage for certain unhappy matrimonial relationships which the existing three forms do not address. A marriage which has lost all its beauty and fragrance and remains as an empty shell without substance is commonly known as breakdown of marriage and if it continues to be so beyond repair, it gets tagged as 'Irretrievable breakdown of marriage'. But in legal language, if either party to the marriage files a petition for divorce averring that the parties have been living apart for a continuous period of not less than three years immediately preceding the presentation of the petition and the court, if, satisfied that the marriage is broken down irretrievably, may declare the marriage as dissolved on the ground of irretrievable breakdown of marriage.[†] This paper tries to highlight the journey of law of divorce under codified Hindu law and the need for 'Irretrievable breakdown of marriage' as a specific ground for divorce but with various safeguards to prevent possible misuse of the ground in the light of 'gender-neutral-justice'.

Journey of Divorce Started with Grounds of 'Matrimonial Fault' or 'Guilt'

When the Hindu Marriage Act was passed in 1955, it was widely regarded as a legislation bringing about a radical change in the institution of marriage because section 13(1) of the Act introduced, for the first time, the matrimonial remedy of divorce by providing that either party can apply for divorce if the other party (i) has, after the solemnization of marriage, had extra marital sexual relationship or (ii) has converted to another religion or (iii) has been suffering from unsoundness of mind or (iv) has been suffering from incurable form of leprosy or (v) has been suffering from Venereal disease in a communicable form or (vi) has not been heard of for seven years or (vii) has renounced the world or (viii) has not resumed cohabitation for a period of 2 years or upwards in spite of getting the decree of judicial separation against him or her or (ix) has failed to comply with the decree of Restitution of conjugal rights for a period of two years or upwards. These grounds are commonly called as 'fault or guilt grounds' as the fault or guilt of one party enables the other party to get the relief of divorce. They are considered as 'offences against marriage'. In spite of a common tag, it is to be noted that grounds (iii) to (vi) cannot be treated as matrimonial guilt because they are the supervening circumstances beyond the control of the party but still having the potential to frustrate the marital relationship. Hence they were rightly symbolized as grounds of 'frustration' for divorce by the Law Commission of India.[‡] Nevertheless they are popularly recognized as grounds of guilt only. Cruelty and desertion, which were the grounds for judicial separation under the original Act were later on added as grounds S.13 (1) (i-a) and (i-b) for divorce by bringing an amendment in 1976. Besides these eleven grounds, Section 13(2) of the original Act provides for four more special grounds for wife as additional grounds namely (i) Bigamy of her husband committed prior to coming into force of the HM Act 1955 (ii) her husband being guilty of rape, sodomy or other unnatural sexual offences (iii) her marriage having taken place prior to her 15th year and she had

[*] Section 13 of the Hindu Marriage Act, 1955 provides for dissolution of marriage
[†] Proposed Section 13 C of the Hindu Marriage Act, 1955
[‡] The Law Commission of India, Report No.71 (1978) included ground (ii) and (vii) also but the author respectfully views it in a different way because they are the voluntary acts of the party having the capacity to destabilize the marital bond and cause inconvenience to the other.

repudiated it before attaining 18 years and (iv) she is a maintenance holder for a period of not less than one year under either Section 125 of Cr. P. C. or Section 18(2) of Hindu Adoptions and Maintenance Act, 1956.

Journey from 'Guilt' to 'Marital Stalemate' or 'Breakdown'

Among all the grounds mentioned in section 13(1), enforcement of the grounds mentioned as (viii)[§] and (ix)[**] had created practical difficulties. These two grounds pre-suppose earlier matrimonial battle in the court of law between the parties for the relief of judicial separation or restitution of conjugal society respectively. These two grounds, as it stood before the 1964 amendment, permitted only the decree holder of Judicial separation and Restitution of conjugal rights to apply for the relief of divorce; the party against whom the decree was passed was not given that right because non resumption of cohabitation after Judicial separation and non compliance with Restitution of conjugal society by the respondent were treated as matrimonial guilt and were denied the opportunity to seek divorce on the principle of equity laid down in section 23(1) (a) which says 'no one shall take advantage of one's own wrong'. This created a legislative vacuum in the sense that in many cases, where the decree holder happened to be the wife, she did not take initiative to get divorce, because divorce was viewed as an evil of grave consequences and was abhorred. When women preferred to live as separated wife than as a divorced woman it resulted in marital stalemate and the respondent, who did not try to resume cohabitation after Judicial separation or comply with the restitution order, was left with no option to end the marriage except to suffer the marital stalemate.

Hence with a view to bring such marital stalemate to an end, the Hindu Marriage (Amendment) Act, 1964 was passed removing clauses (viii) and (ix) from section 13(1) and making them as a new provision as Section 13 (1-A) (i) and (ii) providing that either party can file a petition for divorce on the ground that there has been no resumption of cohabitation between the parties for a period of one year or upwards after the passing of the decree of judicial separation or there has been no restitution of conjugal rights as between the parties for a period of one year or upwards after the passing of the decree of restitution of conjugal rights. As evident from the Statement of objects and Reasons appended to the amendment Bill, the legislature intended that living in separation for a period of one year or more after a decree of Judicial separation or RCR is a clear proof of breakdown of marriage which justifies no retention at all and which does not invite proof of guilt or innocence of the parties. Thus legal recognition to the principle of breakdown of marriage as a ground for divorce is accorded in Section 13(1-A) in 1964 and it is still continuing though the provision is not specifically worded so.

But Section 13(1A) has two limitations. Firstly, it does not give relief to those spouses who have not initiated either RCR or Judicial separation as a preliminary matrimonial innings but have been living separately for many years either with no fault of either party or with the fault of both the parties. Secondly, as the amendment of 1964 did not mention any corresponding change in Section 23(1) (a) as to its applicability in cases coming under the amended provision, whenever, post 1964, a petition was filed by the non-complying party to get divorce, Section 23(1) (a) was invoked by the other party and judiciary's approach was not uniform. Decisions varied differently. In Ram Kali v. Gopal das,[††] Gajna Devi v. Purushotham Giri,[‡‡] and Dharmendra Kumar v. Usha Kumari[§§] the approach of the judiciary was that Section 23(1) (a) is to be given a new interpretation that mere non resumption of cohabitation and non compliance with RCR do not

---

[§] If the respondent has not resumed cohabitation for a period of 2 years or upwards in spite of getting the decree of judicial separation against him or her.

[**] If the respondent has failed to comply with the decree of Restitution of conjugal rights for a period of two years or upwards.

[††] ILR (1971) 1 Del. 6

[‡‡] AIR 1977 Del. 178

[§§] AIR 1977 SC 2213

constitute 'wrong' within the meaning of 'wrong' mentioned in section 23(1) (a) because the object of amendment was not to abrogate S. 23 (1) (a) but to extend the benefit to the Judgment debtor to save him or her from breakdown of marriage. So irrespective of the fact that he or she has not resumed cohabitation after judicial separation or not complied with RCR, divorce could still be granted and S. 23(1) (a) could not be attracted. Even cases of non cooperation simpliciter to the willing party could not be tested under S.23 (1) (a). If divorce is refused on the basis of noncompliance, it would make S.13 (1A) nugatory and meaningless. It would amount to depriving him of his statutory right given under the statute. The seeming conflict between Ss. 13 (1A) and 23 (1) (a) was thus resolved by applying the principle of 'harmonious construction' and the courts further held that in order to be a 'wrong' within Section 23 (1) (a), the conduct alleged has to be something more than mere disinclination to comply with the decree of RCR or disinclination to resume cohabitation or non cooperation to an offer of reunion. It must be misconduct serious enough to justify denial of the relief. Non compliance accompanied with some fresh misconduct or positive acts of wrong by the petitioner would alone constitute 'wrong'. In Saroj Rani v. Sudarshan Kumar[***] it was urged by the appellant wife that section 23 (1) (a) must be construed in such a manner as would not make the Indian wives suffer at the hands of cunning and dishonest husbands and the relief of divorce should be denied to such husbands, the Supreme Court held that even if there is any scope for accepting this broad argument, it requires legislation to that effect. The conduct of the husband could not possibly come within the expression 'his own wrongs' and furthermore as it is evident from the situation that this marriage has broken down and the parties can no longer live together as husband and wife, it is better to close the chapter.

A different approach can be seen in T. Srinivasan v. T. Varalakshmi,[†††] Geeta Lakshmi v. Sarveswar Rao[‡‡‡] and Hira Chand Srinivas v. Sunanda,[§§§] wherein the concerned courts held that right to divorce under section 13(1A) (i) and (ii) is not an absolute right and the court is not bound to grant it without testing it on the touchstone of section 23(1) (a). Before dissolving the relationship between the parties permanently, the courts said, every attempt should be made to preserve the sanctity of the relationship and the guilty should not be allowed to take advantage of the provision. Provision 13(1A) cannot be taken out of the limits of Section 23(1)(a) and if the Parliament had intended otherwise, it would have specifically excluded or excepted petitions filed under S.13 (1A) from the ambit of S.23(1)(a). In these cases the courts found some misconduct on the part of the petitioner other than non compliance and non cooperation and treated them as positive wrongs coming under the meaning 'wrong' mentioned in Section 23(1) (a). However denial of divorce in these cases had ultimately resulted in marital stalemate. In the light of above discussion it is to be accepted that the grounds provided under section 13(1-A) (i) and (ii), though contain traces of the concept of breakdown of marriage in a limited sense, they involve indirectly the consideration of a matrimonial guilt or fault and do not address irretrievable breakdown of marriage in the correct sense of the term.[****]

[***] AIR 1984 SC 1562
[†††] AIR 1999 SC 595
[‡‡‡] AIR 1983 AP 111
[§§§] AIR 2001 SC 1285

[****] The term irretrievable breakdown of marriage relies on the proposition that the marriage is broken down beyond repair either with the fault of both or without the fault of any one.

Journey from 'wrong-based breakdown'†††† to 'consent'

'Divorce by mutual consent' was not made originally in Hindu Marriage Act, 1955. During 1970s, this remedy came to be viewed as a better option for couple who do not want their incompatibility known to public and may mutually agree to separate through court of law.‡‡‡‡ Hence Section 13 B was added to the HMA, 1955 by the Marriage Laws (Amendment) Act, 1976 whereby if the parties have agreed to dissolve their marriage they may do so in an amicable manner by jointly moving an application with an affidavit that they were living separate for a period of more than one year and that they were not able to live together and that they have mutually agreed to dissolve their marriage.§§§§ Law requires the parties that they have to once again move the court, either by themselves or through their counsels, confirming their original consent. The waiting period of minimum six months is for the purpose of giving time to the parties to rethink about their drastic step. They are not required to plead and prove any guilt of the other party, even if there exists any. The court, on satisfying that the initial consent lasts till the date of decree and there is no collusion between the parties, shall pass the consent decree.*****

This remedy has enabled thousands of couples to settle their relationship softly in a most matured and dignified manner after arriving at certain compromises between themselves. However the chances of consent being taken by force or threat cannot be ignored in this remedy. The provision that parties are at liberty to withdraw their consent at any time till the decree is passed has been pressed into service in many such cases.†††††Another limitation of this remedy is that it does not address such situations where in spite of non workability of marriage, one of the parties may not be willing to consent for divorce.

Instances Beyond the Scope of SECTIONS 13(1), 13(2), 13 (1-A) and 13-B

From the foregoing discussion it is to be seen that the law of divorce under HMA has been constantly enlarged so as to accommodate extraordinary situations of marital disturbances from time to time. In spite of this development from 'guilt theory' to 'wrong based-breakdown theory' to 'consent theory', the law proves to be inadequate to deal with 'total breakdown of marriages' which do not otherwise fit into the above said categories. What is total breakdown of marriage is a very tough question to be answered and that is one reason why it has not be able to legally recognized as a ground for divorce in Indian law in general and in Hindu law in particular.

The Response of the Law Commission of India

Taking inspiration from western countries, the Law Commission of India in its 71st Report‡‡‡‡‡ has taken cognizance of this inadequacy and recommended that 'irretrievable breakdown of marriage' should be introduced as an independent ground for divorce as it exists in England and many other European countries. In contrast with all other grounds, the distinctive feature of IBM is that such divorce is unconcerned with the wrongs of the past, and hence does not attract the provision of section 23(1) (a). The proof of such a breakdown would be that the parties have separated and have been living for a continuous period of three years and it has become impossible to resurrect the marriage or to reunite the parties. It would not make necessary for the court to go into the question as to which party was at fault before granting a

†††† The author wishes to use this term to denote its application to cases tested on the touch stone of 'wrong' mentioned in Section 23 (1)(a) of HMA, 1955

‡‡‡‡ Hindu law does not permit parties to dissolve their marriage even with mutual consent without court's intervention, unless saved under custom.

§§§§ Section 13-B (1)

***** Section 13-B (2)

††††† *Sureshta Devi* v. *Om Prakash* (AIR 1992 SC 1904)

‡‡‡‡‡ The Government of India referred the subject to the Law Commission of India for its consideration and recommendations and the report was submitted in 1978.

decree of divorce and it would be enough to prove that the marriage relations has reached such a breaking point that there is no possibility of reconciliation. This would obviate the necessity of proving evidence of acrimony-which the parties may not like to reveal.§§§§§ The Commission was also of the view that when the marriage has all external appearances of marriage, but none in reality, it is merely a shell out of which the substance is gone. In such circumstances divorce should be seen as a solution and an escape route out of a difficult situation.****** It was also the view of the Commission†††††† that 'one cannot say that denial of divorce is an enhancement of the respect for marriage. There are tens of thousands of men and women desperately anxious to regularize their position in the community and they are unable to do so. People should be able to marry again when they can obtain a death certificate in respect of a marriage already long since dead'.‡‡‡‡‡‡ The Commission in its concluding part gave a legal formulation§§§§§§ for the provision to be incorporated as Sections 13-C to 13-E in the Hindu Marriage Act, 1955. After three decades, the subject has been once again suo motto taken up by the Law Commission of India and reiterated the same view in its 217th report submitted in 2009.*******

The Judicial Response

The judiciary also has been responding to such a lacuna since 1970s and has been stressing the need for an amendment to that effect. The approach of the Courts can be perceived in three ways – restricted approach, liberal approach and constitutional approach. The restricted approach is discernible wherein the courts felt helpless to grant divorce due to lack of legal sanction to irretrievable breakdown of marriage to be recognized as a ground for divorce. This category covers those cases where the petitioner fails to prove the ground alleged against the respondent but the state of affairs clearly proved that the marriage had broken down beyond repair. In Gulabrai Sharma v. Pushpa Devi,††††††† the Delhi High court had to reluctantly deny divorce to the husband who could not prove wife's desertion but the marriage had by all means broken beyond repair. The courts also expressed their inability to grant divorce in cases where both the parties are equally at fault and there is nothing left but all ill will and negative emotions against each other, because, their hands are tied to grant relief on a ground which is not there in the HMA.‡‡‡‡‡‡‡ In Vishnu Dutt Sharma v. Manju Sharma,§§§§§§§ the Supreme Court entered a caveat by holding that 'If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts'.

The second approach is that the Supreme Court granted divorce on the basis of proved cruelty or desertion or adultery – yet at the same time held that there was irretrievable breakdown of marriage where the marriage had broken down beyond repair. In Naveen Kohli v. Neelu Kohli******** the Supreme Court, considering the 10 years of separation and

§§§§§ Report no.71 of the Law Commission of India, 1978 Para 1.5
****** *Ibid.* Para 3.2
†††††† *Ibid.* Para 4.2
‡‡‡‡‡‡ The author respectfully submits that the wording sounds quite harsh demeaning the sanctity attached to marriage under Hindu jurisprudence though the sanctity is incapable to be maintained by some owing to unfortunate circumstances.
§§§§§§ Infra sub topic VI
******* The report took note of cases decided by the Supreme Court post 1978 and also recommended for incorporation of an additional provision relating to Section 13-B of HMA, 1955 in the proposed Bill.
††††††† (1979) ILR 2 Del 220;
‡‡‡‡‡‡‡ *Rajinder* v. *Anita* (AIR 1993 Del 135); *Geeta Mullick* v. *Brojo Gopal Mullick* (AIR 2003 Cal 321); *L.Hemalatha* v. *N.P.Jaya Kumar* (AIR 2008 Mad 98)
§§§§§§§ AIR 2009 SC 2254
******** (2006) 4 SCC 558

inferring from the conduct of the wife her intention to make the petitioner's life miserable, granted divorce to the husband on the ground of proved cruelty and stated that 'once the marriage is broken down beyond repair, it would be unrealistic for law not to take notice of that fact and it would be harmful to society and injurious to the interest of the parties. When the marriage becomes a fiction though supported by a legal tie, law by refusing to sever that tie does not serve the sanctity of marriage'. The Court also directed government to seriously consider bringing in an amendment to incorporate 'irretrievable breakdown of marriage' as a ground for divorce. Later in Samar Ghosh v. Jaya Ghosh[††††††††] the wife neither agreed for mutual consent nor willing to live with her husband but filed many criminal complaints against him and strongly protested against grant of divorce to him. The Supreme Court, while granting divorce on the ground of mental cruelty, took note of 17 years of futile matrimony during which the parties lived without emotions and observed that 'It is a clear case of irretrievable breakdown of marriage. In our considered view, it is impossible to preserve or save the marriage. Any effort to keep it alive would prove to be totally counter-productive'.

The third approach is taken up by the Supreme Court exclusively and granted divorce on the basis of irretrievable breakdown of marriage by invoking its jurisdiction under Article 142(1) of the Constitution[‡‡‡‡‡‡‡]. In V.Bhagat v. D.Bhagat[§§§§§§§§] the Apex court took note of eight long years of litigation roaming from trial court to High Court and twice to the Supreme Court revolving round allegations and counter allegations of adultery and unsoundness of mind and arrived at the finding that 'consequent irretrievable breakdown of marriage, though not a ground by itself, will be a very important circumstance to be considered while deciding whether divorce should be granted or not'. The Supreme Court has granted divorce in few other cases[********] where it concluded that the marriage was dead emotionally or practically or the spouses have been fighting like 'kilkenny cats'. The decision of the Division Bench of the Supreme Court in Ashok Hurra v. Rupa Zaveri[†††††††††] needs special mention here. The Supreme Court granted a conditional decree of divorce in a petition filed under S.13-B by invoking its power under Article 142 of the Constitution on the ground of irretrievable breakdown of marriage. The court granted divorce on mutual consent in favour of the husband in spite of wife's withdrawal of her consent after 18 months on the ground that the marriage had broken down due to husband's second marriage with another woman during pendency of the litigation and wife's failure to withdraw her consent before 18 months would mean her implied consent. This decision raised various legal questions and attracted many fair comments. Whether non appearance of a party within 18 months would mean implied consent? Whether court can pass consent decree even if there was no mutual consent at the time of decree? Whether the Apex court can invoke its special jurisdiction under Article 142 to grant relief to a party who has committed an offence of bigamy lis pendence and want to take advantage of his own wrong? Whether there can be a conditional order of divorce? etc., and academicians pointed out that the decision was an anomaly in many ways.[‡‡‡‡‡‡‡‡‡] However in Anil Kumar Jain v. Maya Jain[§§§§§§§§§] the Supreme Court clarified that 'no court except supreme court can pass a decree when one of the parties withdrew the consent'.

In cases of litigation for divorce for many years and if subsequently parties prefer to change their petition from Section13 to 13-B, the Supreme Court dispensed with the waiting period of six months and itself granted divorce in

---

[††††††††] 2007 (3) SCJ 253

[‡‡‡‡‡‡‡] The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing 'complete justice' in any cause or matter pending before it.

[§§§§§§§] (1994) 1 SCC 337

[********] *Ramesh Chander* v. *Savithri* [(1995) 2 SCC 7]; *Ashok Hurra* v. *Rupa Bipin Zaveri* [(1997) 4 SCC 226]; *Shyam Sunder Kohli* v. *Sushma Kohli* [(2004) 7 SCC 747;

[†††††††††] (1997) 4 SCC 226; Also pl.see *Rupa Ashok Hurra* v. *Ashok, Hurra* (AIR 2002 SC 1771)

[‡‡‡‡‡‡‡‡] Kusum, 'FAMILY LAW LECTURES–FAMILY LAW 1' Lexis Nexis, Butter Worths, Wadhwa, Nagpur (2010) p.169

[§§§§§§§§§] AIR 2010 SC 229.

exercise of its powers under article 142(1) of the Constitution on being satisfied that the marriage had broken down irretrievably.[**********] However High Courts do not possess the power conferred on the Supreme Court by Article 142(1) and they are bound by the statutory provisions which do not allow divorce on the ground of irretrievable breakdown of marriage.

It is pertinent to note that in all the above mentioned cases, there is a judicial note of irretrievable breakdown of marriage due to some matrimonial guilt and in no case it was 'breakdown simpliciter sans guilt' for granting divorce.

Legislative Formulation

In the backdrop of legislative inadequacy, judicial note and recommendations of the Law Commission of India, a legal atmosphere was created to consider the necessity of bringing in an amendment to the HMA, 1955, providing for 'irretrievable breakdown of marriage' as an independent ground for divorce. Accordingly the Marriage Laws (Amendment) Bill 1981 was introduced but was lapsed due to dissolution of Lok Sabha in 1984. The Marriage Laws (Amendment) Bill 2010 could not see the light of the day because of apprehension over possible misuse of the provision by unscrupulous husbands. Attention is invited to the recent fact that when the Bill 2013 was on the anvil to become an Act waiting to be introduced in the Lok Sabha, the government is also reported[††††††††††] to have given a second thought to it and caused it to be shelved because of objections from many quarters questioning its gender bias. Paralelly there are voices which want the amendment to come in and the shelving of it is viewed as an unwarranted concession to moral conservatism.[‡‡‡‡‡‡‡‡‡]

In the light of its checkered journey it is pertinent to have a glimpse at the provisions of the Bill.

Salient Features of the Proposed Bill[§§§§§§§§§]

- Either party can unilaterally file an application for divorce on the ground that the marriage has broken down irretrievably.[S.13-C (1)]
- Court shall not hold the marriage to have broken down irretrievably unless it is satisfied that the parties have lived apart for a period of not less than three years preceding the presentation of petition. [S.13-C (2)]
- No account shall be taken of any one period not exceeding three months in all, during which the parties have resumed living with each other. [S.13-C (4)]
- The court, if satisfied on all the evidence for breakdown of marriage, shall grant a decree of divorce. [S.13-C (3)]
- Wife, as a respondent, has the right to oppose the petition filed under S.13-C on the ground that grant of divorce would result in grave financial hardship to her and in all the circumstances it would be wrong to dissolve the marriage.[13-D (1)]
- The court shall consider all circumstances, including the conduct and the interest of the parties and the interest of the children before passing an order. [13-D (2)]
- The court shall not pass a decree of divorce unless it is satisfied that adequate provision for the children has been made consistently with the capacity of the parties. [13-E]

[**********] *Swati Verma* v. *Rajan Verma* [(2004) 1 SCC 123]
[††††††††††] 'Bill to make divorce easier may be dropped' -'The Hindu', dated February 21, 2015.
[‡‡‡‡‡‡‡‡‡] 'Dealing with broken marriages' Editorial column, 'The Hindu', dated February 21, 2015.
[§§§§§§§§§] The author gives the gist of the provisions of the proposed Bill as available in the website www.prsindia.org.

- At the time of passing a decree, on a petition filed by respondent wife, the court shall make an order for a fair and equitable settlement of a share in the movable and immovable property of the husband (other than inherited and inheritable immovable property as compensation to the wife by creating a charge on the immovable property of the husband. [13-F] This is a new clause incorporated in the proposed '2013 Bill', not found in '2010 Bill'.
- The scope of Section 21 A is extended to a petition filed under S.13-C
- Petition under S.13-C is exempted from the scope of S.23 (1) (a) on par with Section 5 (ii) (a), (b) and (c) of HMA i.e., the fact as to responsibility of the petitioner for irretrievability of marriage is irrelevant for the court to grant divorce.[**********]

Important Questions to be Addressed

The proposed Bill has raised more questions than the answers it intended to provide. Jurists are divided on their opinions. Some have expressed their apprehension that it would put human ingenuity at a premium and would throw wide open the doors to litigation and will create more problem than are sought to be solved.[††††††††††] While others viewed that human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage.[‡‡‡‡‡‡‡‡‡‡] For some it is a progressive legal measure and for others it is punitive. It appears to be 'a high breed' legislative measure wherein fault need not be proved, consent need not be mutual, 'clean hand' policy not attracted and preliminary matrimonial innings not required. What is required is just a separation for three years as 'prima facie proof' to be substantiated with a pleading of 'Irretrievable breakdown of marriage' and proof to the satisfaction of the court. In this context the crucial questions to be addressed are –

- Whether continuous separation for three years is a reasonable period to presume breakdown of marriage? Can it be surmised so? Whether 'three years' suggested in 1978 stands the test of the time? Because the author opines that most of the cases which the judiciary reckoned as of marital breakdown, related to separation of ten years, seventeen years etc.,[§§§§§§§§§§] and in no case it was of 3 years. Three years separation will undoubtedly lead to hasty and premature presumption of irretrievable breakdown in the absence of a clear case of serious matrimonial guilt.
- Can a matrimonial guilt be placed on equal footing with Section 5 (ii) (a), (b) and (c) of HMA so as to take S.13-C away from the application of Section 23 (1) (a) of HMA as proposed in the Amendment Bill 2013?
- If separate living for three years is a prima facie proof of breakdown of marriage and S.13-C is outside the scope of S.23(1)(a) then what are further considerations that will weigh in favor of granting divorce? What are the yardsticks?
- Can a spouse be allowed to take advantage of his or her wrong and create conditions of breakdown and then ask for divorce as against the innocent party? If husband happens to be the innocent respondent, can divorce be allowed to be slapped on his face?
- Does not a combined reading of S.13-D (1) (Wife's right to oppose) and S.13 (F) (Property settlement) appear to be punitive against the husband for having initiated the divorce proceeding?

[**********] S.5 of the proposed '2013 Bill'
[††††††††††] Report no.71 of the Law Commission of India, 1978 (Para 4.8)
[‡‡‡‡‡‡‡‡‡‡] *Ibid*
[§§§§§§§§§§] Pl. see *supra* n. 29 and 30

- Whether the legal presumption that 'only a wife will be put to grave financial hardship and not the other way' is well-founded or ill-founded?
- Whether the argument that 'since irretrievable breakdown theory is functioning well in England and commonwealth countries and hence it shall also be adopted in India' is well reasoned? While advancing the argument, it is crucial to understand that in England 'irretrievable breakdown of marriage' is the sole ground of divorce and law on the subject is much more comprehensive. S. 1(1) of Matrimonial clauses Act 1973 provides that 'A petition for divorce may be presented on the ground that marriage is broken down irretrievably' and S. 1(2) of the Act enumerates adultery, unlivable behavior, desertion, separation by consent for two years or separate living for at least five years as the circumstances, on proof of which inference of irretrievable breakdown of marriage shall be drawn by the court. But the proposed Bill contemplates 'breakdown simpliciter' to be an independent ground.
- In the light of above narration a trivial question requires to be answered – Whether matrimonial offence becomes a cause or be an outcome of irretrievable breakdown of marriage?

CONCLUSIONS AND SUGGESTIONS

The Marriage Laws (Amendment) Bill 2013, though shelved at present, has all chances of cropping up in future with further modifications due to the fact that judiciary is time and again highlighting the need for such an amendment in the light of inadequacy of existing law and the limitations on judicial law making. The Bill, in the present form, patently appears to be tilted against husband and the 'property clause' in the Bill created lot of apprehension in the minds of men folk that it is a threat to their economic stability and unjust deprivation. The safeguards provided in the Bill are, no doubt, rightly intended, but may be wrongly put to service. For an unscrupulous husband, absence of safeguard is like a license to arbitrary power to divorce. For an innocent husband, presence of safeguard is like, a relief from burdensome marriage yoke at the cost of a heavy divorce yoke. For an innocent wife the law is a necessary evil. In the hands of a caprice woman, the same law is a whip to bring the man to her terms. Multi- behavioral patterns are not unknown to legal system and all the more to the justice administration. The onus rests heavily on the courts to use their discretion to arrive at correct inferences and uphold the scales of justice.

When the 'Bill 2010' was on the anvil, men were eagerly waiting for the law to take effect. More and more marriages oscillating between stability and break up were apprehended to be ended up in divorce. When the 'Bill 2013' came to the public domain, reports in media[**********] were rampant that women were adopting a 'wait and watch' approach before rushing for divorce to get benefit from the upcoming law. The situation visualized, which is the logical outcome of the proposed law, is synchronizing with the husband's power of 'talaq' under Islamic jurisprudence with a rider of 'Dower' hanging like a sword on his neck, except the difference between the two, the former mandating pre-decree judicial intervention and the latter optionalising post-declaration judicial scrutiny.[††††††††††]

[**********] 'Women put off divorce to benefit from Marriage Laws (Amendment) Bill 2013', Times of India, 2nd October, 2013.

[††††††††††] The validity of '*talaq*' pronounced by the husband forms a substantial bulk of cases decided by the Courts under Muslim law.

It is also time to ponder over the possibility of an alternative provision by bringing in an amendment in Section 13(1) of HMA, 1955,‡‡‡‡‡‡‡‡‡‡‡‡ in lieu of independent Section 13 C to F, as clause (viii), 'or on any other ground, which makes the petitioner to believe reasonably that the marriage is broken down irretrievably'. An explanation to the effect can also be appended that 'the court, while passing a decree, shall make fair and equitable settlement of properties, movable and immovable, between the spouses, acquired by both during the matrimonial period, taking into consideration the interest of children and their custody'.

Such a provision, in the opinion of the author, will be devoid of any gender bias against husband or wife, leaving little scope for misuse by either party to the marriage. Those women who really contributed for the family but do not have any property on their name would benefit and those men who ignored wife's contribution in non-monetary terms and would like to walk out of the marriage easily with the property on which the wife's sweat is deliberately erased, would be made to shell out. The onus of proof of the alleged fact that 'the marriage has been reasonably believed to be broken down beyond repair' would rest on the petitioner which would prevent him or her to use 'irretrievable breakdown' as a straight jacket formula. Any specific reference to 'minimum three years of separation' as a yardstick to measure irretrievable break down, may be dropped, which otherwise, would become a subject for judicial scrutiny and would be seen as a limitation to access to justice in certain deserving cases.

The proposal under the Bill regarding non-application of S. 23(1) (a) to cases of irretrievable breakdown may be retained so as to have functional distinction between the existing grounds and the ground under discussion.

It may be said at the cost of repetition that liberal outlook in the matter of divorce does not mean the law would allow the party to get a easy way out of marriage to the marital detriment to the other party. Similarly riders against misuse cannot be used to create legal terrorism.

Apart from the rights of parties, the impact of law should be seen on larger issues affecting the children,§§§§§§§§§§§§ encouraging backdoor entry to live-in-relationships********** and social health††††††††††††. As long as 'marriage and family' remain to be the founding pillars of a healthy society and 'gender equality and equal protection of law' remain to be the core constitutional guaranties, the legal approach to the institution of divorce should be to maintain the fine balance between 'stability' and 'social change'. It underscores ultimately, the need to have a fine legislative drafting, which would stand the test of time without being subjected to frequent legislative tinkering and judicial law making.

REFERENCES

1. This is a research paper published as a part of Research project, with the R&D Grant (2014-15), University of Delhi, Delhi, 110007.
2. Associate Professor, Law Centre 1, Faculty of Law, University of Delhi, Delhi, 110007. Mail Id: pbpankaja@gmail.com

‡‡‡‡‡‡‡‡‡‡‡‡ A corresponding amendment in Special Marriage Act, 1954 is to be made on the same lines.

§§§§§§§§§§§§ The important concern should be about the adverse effect on children. Children are carried through the process of divorce and remarriage of their parents, their choice and voice being sidelined.

********** Apprehension of easy divorce drives youth to lose faith in the institution of marriage and resort to non-committal live-in-relationships.

†††††††††††† Single parenting and sole living, though, are necessary ingredients of social diversity, their increasing number speaks volumes about psychological maladjustments among individuals constituting society leading to social pathology, an issue required to be addressed by sociologists.

3. Section 13 of the Hindu Marriage Act, 1955 provides for dissolution of marriage
4. Proposed Section 13 C of the Hindu Marriage Act, 1955
5. The Law Commission of India, Report No.71 (1978) included ground (ii) and (vii) also but the author respectfully views it in a different way because they are the voluntary acts of the party having the capacity to destabilize the marital bond and cause inconvenience to the other.
6. If the respondent has not resumed cohabitation for a period of 2 years or upwards in spite of getting the decree of judicial separation against him or her.
7. If the respondent has failed to comply with the decree of Restitution of conjugal rights for a period of two years or upwards.
8. ILR (1971) 1 Del. 6
9. AIR 1977 Del. 178
10. AIR 1977 SC 2213
11. AIR 1984 SC 1562
12. AIR 1999 SC 595
13. AIR 1983 AP 111
14. AIR 2001 SC 1285
15. The term irretrievable breakdown of marriage relies on the proposition that the marriage is broken down beyond repair either with the fault of both or without the fault of any one.
16. The author wishes to use this term to denote its application to cases tested on the touch stone of 'wrong' mentioned in Section 23 (1)(a) of HMA, 1955
17. Hindu law does not permit parties to dissolve their marriage even with mutual consent without court's intervention, unless saved under custom.
18. Section 13-B (1)
19. Section 13-B (2)
20. *Sureshta Devi* v. *Om Prakash* (AIR 1992 SC 1904)
21. The Government of India referred the subject to the Law Commission of India for its consideration and recommendations and the report was submitted in 1978.
22. Report no.71 of the Law Commission of India, 1978 Para 1.5
23. *Ibid.* Para 3.2
24. *Ibid.* Para 4.2

25. The author respectfully submits that the wording sounds quite harsh demeaning the sanctity attached to marriage under Hindu jurisprudence though the sanctity is incapable to be maintained by some owing to unfortunate circumstances.
26. Infra sub topic VI
27. The report took note of cases decided by the Supreme Court post 1978 and also recommended for incorporation of an additional provision relating to Section 13-B of HMA, 1955 in the proposed Bill.
28. (1979) ILR 2 Del 220;
29. *Rajinder* v. *Anita* (AIR 1993 Del 135); *Geeta Mullick* v. *Brojo Gopal Mullick* (AIR 2003 Cal 321); *L.Hemalatha* v. *N.P.Jaya Kumar* (AIR 2008 Mad 98)
30. AIR 2009 SC 2254
31. (2006) 4 SCC 558
32. 2007 (3) SCJ 253
33. The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing 'complete justice' in any cause or matter pending before it.
34. (1994) 1 SCC 337
35. *Ramesh Chander* v. *Savithri* [(1995) 2 SCC 7]; *Ashok Hurra* v. *Rupa Bipin Zaveri* [(1997) 4 SCC 226]; *Shyam Sunder Kohli* v. *Sushma Kohli* [(2004) 7 SCC 747;
36. (1997) 4 SCC 226; Also pl.see *Rupa Ashok Hurra* v. *Ashok, Hurra* (AIR 2002 SC 1771)
37. Kusum, 'FAMILY LAW LECTURES–FAMILY LAW 1' Lexis Nexis, Butter Worths, Wadhwa, Nagpur (2010) p.169
38. AIR 2010 SC 229.
39. *Swati Verma* v. *Rajan Verma* [(2004) 1 SCC 123]
40. 'Bill to make divorce easier may be dropped' -'The Hindu', dated February 21, 2015.
41. 'Dealing with broken marriages' Editorial column, 'The Hindu', dated February 21, 2015.
42. The author gives the gist of the provisions of the proposed Bill as available in the website www.prsindia.org.
43. S.5 of the proposed '2013 Bill'
44. Report no.71 of the Law Commission of India, 1978 (Para 4.8)
45. *Ibid*
46. Pl. see *supra* n. 29 and 30
47. 'Women put off divorce to benefit from Marriage Laws (Amendment) Bill 2013', Times of India, 2nd October, 2013.
48. The validity of '*talaq*' pronounced by the husband forms a substantial bulk of cases decided by the Courts under Muslim law.

49. A corresponding amendment in Special Marriage Act, 1954 is to be made on the same lines.
50. The important concern should be about the adverse effect on children. Children are carried through the process of divorce and remarriage of their parents, their choice and voice being sidelined.
51. Apprehension of easy divorce drives youth to lose faith in the institution of marriage and resort to non-committal live-in-relationships.
52. Single parenting and sole living, though, are necessary ingredients of social diversity, their increasing number speaks volumes about psychological maladjustments among individuals constituting society leading to social pathology, an issue required to be addressed by sociologists.