

LAW COMMISSION OF INDIA

SEVENTY-FIRST REPORT

ON

**THE HINDU MARRIAGE ACT, 1955—
IRRETRIEVABLE BREAKDOWN OF
MARRIAGE AS A GROUND OF
DIVORCE**

April, 1978

CHAIRMAN
LAW COMMISSION
GOVERNMENT OF INDIA

April 7, 1978.

My dear Minister,

I forward herewith the Seventy-first Report of the Law Commission of India concerning amendment of the Hindu Marriage Act, 1955 whereby irretrievable breakdown of marriage is sought to be made a ground of divorce.

The first Chapter of the Report sets out the circumstances in which the matter was taken up for consideration by the Law Commission. After taking up the matter, the Commission issued a questionnaire inviting views of interested parties and bodies on the salient points arising for consideration.

On receipt of the replies to the questionnaire, a draft Report was prepared and discussed at length before being put into the final shape.

I place on record my appreciation of the valuable assistance received from Shri P. M. Bakshi, Member-Secretary of the Commission in the preparation of the Report.

With regards,

Yours sincerely,
Sd/-
(H. R. Khanna)

Hon'ble Shri Shanti Bhushan
Minister of Law, Justice & Company Affairs,
New Delhi-110001.

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INTRODUCTORY

1.1. This Report deals with an important question concerning the Hindu Marriage Act, 1955, namely, should the irretrievable breakdown of marriage be made a ground for divorce under that Act and if so, to what extent and subject to what conditions? The matter has been taken up by the Law Commission as a result of a reference made by the Government of India in the Ministry of Law, Justice and Company Affairs¹. Introductory

1.2. Irretrievable breakdown of marriage is now considered, in the laws of a number of countries, a good ground of dissolving the marriage by granting a decree of divorce. The Delhi High Court in a Full Bench decision in *Ram Kali v. Gopal Das*², took note of the modern trend not to insist on the maintenance of a union which has utterly broken down, and observed : Irretrievable
breakdown.

“It would not be practical and realistic approach, indeed it would be unreasonable and inhumane, to compel the parties to keep up the facade of marriage even though the rift between them is complete and there are no prospects of their ever living together as husband and wife.”

In the case of *Blunt v. Blunt*³, Viscount Simon, L.C., while specifying the considerations which should prevail in matrimonial matters, observed :

“To these four considerations I would add a fifth of a more general character, which must indeed be regarded as of primary importance, viz., the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. It is noteworthy

¹ Note of the Minister for Law, Justice and Company Affairs dated 3rd November, 1977 recorded in Legislative Department File No. F. 14(4)/68-Leg. II, Vol. XII, page 27.

² *Ram Kali v. Gopal Das*, (1971) I.L.R. 1 Delhi 10 (F.B.).

³ *Blunt v. Blunt*, (1943) 2 All. E.R. 76, 78 (H.L.).

that in recent years this last consideration has operated to induce the Courts to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have been refused."

The British Parliament has since then enacted the Matrimonial Causes Act, 1973 (which replaces the Divorce Reform Act, 1969). According to section 1 of that Act, a petition for divorce may be presented on the ground that the marriage has broken down irretrievably.

Suggestion analysed.

1.3. A suggestion has been made by a distinguished jurist to the effect that the following ground of divorce should be added to section 13(1) of the Hindu Marriage Act, 1955 :—

"That the marriage has irretrievably broken down and that the parties had been living apart for a period, not less than five (or ten) years, immediately preceding the presentation of the petition."

It has been stated in support of this suggestion that the Hindu Marriage Act of 1955 has proved to be inadequate to deal with the question where the marriage has proved to be a complete failure, and that a social reform is imperative in the field. Proof of such a breakdown would be that the husband and wife have separated and have been living apart for, say, a period of five or ten years and it has become impossible to resurrect the marriage or to re-unite the parties. It is stated that once it is known that there are no prospects of the success of the marriage, to drag the legal tie acts as a cruelty to the spouse and gives rise to crime and even abuse of religion to obtain annulment of marriage. It is further pointed out that the Muslim, Christian and Parsee marriage laws allow divorce more easily than the Hindu law and it is only the Hindus who are put under severe restrictions and have to resort to conversion in several cases. This social discrimination in personal life ought to be removed, particularly in view of the fact that many Hindu marriages are brought about at an early age without the consent of the parties and, in consequence, break down at a later stage. Finally, it is stated that the Hindu law of divorce should be liberalised and brought in conformity with the modern trends in Europe and elsewhere, as well as with the law applicable to the other communities in the country. The suggestion sums up the essence of the proposal in these terms :—

"The essence of the proposal is that the Hindu marriage should be allowed to be dissolved if the husband

and wife have lived apart for a period of say 5/10 years and the marriage is irretrievably broken due to incompatibility, clash of personality or similar other reasons, as is permissible under many systems of law of advanced countries.”

1.4. The suggestion has raised an important question concerning section 13 of the Hindu Marriage Act, 1955. The Act came up for consideration before the Law Commission a few years ago¹, but the question of introducing breakdown of marriage as a ground of divorce was not before the Commission. Such reference to, or reliance on², the breakdown principle as occurred in the Report was only incidental. Fundamental question not discussed in past Report.

No doubt, the consideration that it is impossible to continue the marriage relationship underlies many of the specific grounds of divorce provided in the present Act. But, in itself, it is not a ground of divorce under the Act. In this sense, the suggested provision raises an important question.

1.5. The relevant provisions of the Hindu Marriage Act regarding divorce are contained in sections 13, 13A and 13B. It may be mentioned that section 13B provides for a decree of divorce by mutual consent, and was inserted in 1976. Hindu Marriage Act.

A petition for divorce on the ground of irretrievable breakdown of marriage as visualised by us would not make it necessary for the court to go into the question as to which party was at fault before granting a decree of divorce, and it would be enough to prove that the relations between husband and wife have reached such a breaking point that there is no possibility of reconciliation. This would obviate the necessity of producing evidence of acrimony and other incidents during the married life, some of which the parties may not like to reveal.

1.6. Before taking any further action on the suggestion that irretrievable breakdown of marriage should be made a ground for divorce, we considered it appropriate to invite views on the matter by issuing a brief Questionnaire³. We are grateful to all those who have expressed their views in response to our Questionnaire. Questionnaire.

¹ 59th Report of the Law Commission (Hindu Marriage Act, 1955 and Special Marriage Act, 1954), (March, 1974).

² 59th Report of the Law Commission (Hindu Marriage Act, 1955 and Special Marriage Act, 1954), page 12, para 1.20; page 22, para 2.18 and page 66, para 7.5.

³ See Appendix

Scheme of
discussion.

1.7. The scheme of our discussion will be as follows :--

We shall first examine the present grounds for divorce under the Hindu Marriage Act. We shall then deal with the theory of irretrievable breakdown and consider the merits and demerits of the theory. In case the theory of irretrievable breakdown is to be adopted, the question would fall to be considered whether the other grounds of divorce should be retained, or whether merely the broad and exclusive category of irretrievable breakdown should be substituted as absorbing the grounds already provided in the law. We shall deal with that question *in due course*.

If the principle of irretrievable breakdown is adopted, the next question will be how exactly to incorporate it into the Act.

We will also examine the question whether the introduction of such a ground should be coupled with any safeguards.

CHAPTER 2

PRESENT LAW UNDER THE HINDU MARRIAGE ACT

2.1. The present statutory law relating to grounds of divorce as applicable to Hindus is contained in sections 13, 13A and 13B of the Hindu Marriage Act, 1955. In section 13(1)¹ and 13(1A)², certain grounds are mentioned in which either the husband or the wife can seek dissolution of the marriage. In subsection (2) of section 13, certain additional grounds³ are laid down in this behalf which can be made use of by the wife only. Section 13B is a special provision inserted recently⁴ to provide for divorce by consent after living apart for one year. In this case, the law requires a joint petition by both the parties.

Present law under the Hindu Marriage Act.

The grounds for divorce under the Hindu Marriage Act reflect, in the main, three categories of grounds. The first is the traditional theory of matrimonial fault. The second is the theory of frustration by reason of specified circumstances. The third is the theory of consent. There is, however, no theory of breakdown of the marriage,—except to a very limited extent as will be mentioned in due course.⁵

2.2. It may be convenient to set out very briefly the present grounds of divorce under the Act. Section 13(1) of that Act—to state the gist—allows divorce on a petition presented by either spouse on the ground that the other party—

Present position under the Hindu Marriage Act, 1955—section 13(1).

(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(ii) has, after such solemnization, treated the petitioner with cruelty; or

¹ Nine grounds in section 13(1). See paragraph 2.2, *infra*.

² Two grounds in section 13(1A). See paragraph 2.3, *infra*.

³ Four grounds in section 13(2). See paragraph 2.4, *infra*.

⁴ See paragraph 2.5, *infra*.

⁵ Paragraphs 2.3 and 2.5, *infra*.

(iii) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(iv) has ceased to be a Hindu by conversion to another religion; or

(v) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent; or

(vi) has been suffering from a virulent and incurable form of leprosy; or

(vii) has been suffering from venereal disease in a communicable form; or

(viii) has renounced the world by entering any religious order; or

(ix) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive.

There are two Explanations, explaining the meaning of the expressions "mental disorder" and "desertion", which are not material for the present purpose.

Section
13(1A)

2.3. A petition for dissolution of marriage by a decree of divorce can also be presented by either party under section 13(1A) of the same Act on the ground—

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

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

2.4. Besides this, under section 13(2) *the wife may also* present a petition for dissolution of her marriage on the ground that the marriage was solemnized before the commencement of the Act and that, the husband had married again before such commencement, or that the husband had, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality, or that there has been passed a decree or order for maintenance against the husband notwithstanding that the wife was living apart and that since the passing of the decree or order, cohabitation between the parties has not been resumed for one year or upwards, or that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she had repudiated the marriage after attaining that age (15 years), but before attaining the age of eighteen years.

Section
13(2).

2.5. It may be noted that although traces of the concept of breakdown of marriage could be found in the special provision for dissolution of marriage by decree of divorce at the instance of either party under section 13(1A) summarised above,¹ it is an essential condition of the application of that sub-section that the proceedings for divorce must have been preceded by either a decree for judicial separation or a decree for restitution of conjugal rights. A decree for judicial separation, in its turn, could not have been passed² unless circumstances which prove what may be called marital offence or marital disability were established. In this sense, a petition for divorce under section 13(1A) indirectly brings in a consideration of fault or disability.

How far
concept of
breakdown
adopted in
section
13(1A).

Similarly, a decree for the restitution of conjugal rights could not have been passed unless it has been proved that the respondent had "without reasonable excuse"³ withdrawn from the society of the other. Thus, a petition under section 13(1A), in so far as it is based on a prior decree of restitution, also involves consideration of fault.

Section 13B provides for divorce by mutual consent by bringing in the concept of divorce *de hors* any fault of a party. All that is necessary in such cases is that there should be a petition for dissolution of marriage to be presented together by both the parties to a marriage, on the ground that they have been

¹ Para 2.3, *supra*.

² Section 10, Hindu Marriage Act, 1955.

³ Section 9 Hindu Marriage Act, 1955.

living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. After the presentation of the petition, on a motion of both the parties made not earlier than six months and not later than eighteen months after the date of the presentation of the petition, if the petition is not withdrawn in the meantime, the court shall, on being satisfied after hearing the parties and after making such inquiries as it thinks fit about the correctness of the averments in the petition, pass a decree of divorce.

The legislature in India has not, as yet, adopted any provision directly and specifically granting divorce on the ground of irremediable breakdown of the marriage.

Various theories of divorce

2.6. On a broad conspectus of the grounds of divorce in various countries, it would appear that divorce has been granted on several theories. There is, in the first place, the theory of divorce on the ground of fault, which is one of the principal theories adopted in the Hindu Marriage Act, 1955. Illustrations of this theory in that Act are the legally recognised grounds of adultery, cruelty, and desertion¹ and (on a wife's petition) bigamy, certain sexual offences and failure to pay maintenance.²

Next, there is the theory of divorce on the basis of what may be broadly described as frustration of the marital relationship by supervening circumstances of a specific nature. They may arise circumstances which, though not constituting fault on the part of any party, render dissolution of the marriage necessary since, by reason of these supervening circumstances which do not amount to matrimonial fault, a material change is introduced.

Examples of this theory are furnished by the grant of divorce in the Hindu marriage Act on the ground of—

- (a) conversion of the other spouse,³
- (b) insanity,⁴
- (c) disease,⁵

¹ Section 13(1)(i), (ia) and (ib), Hindu Marriage Act, 1955.

² Section 13(2)(i), (ii) and (ii), Hindu Marriage Act, 1955.

³ Section 13(1)(ii), Hindu Marriage Act, 1955.

⁴ Section 13(1)(ii), Hindu Marriage Act, 1955.

⁵ Section 13(1)(iv) & (v), Hindu Marriage Act, 1955.

(d) renunciation of the world by the other spouse,¹

(e) absence of the other spouse for a long period.²

It may be added that divorce is also granted on the basis of what may be called "securing conformity with the legal system". Where a marriage does not, in certain respects, comply with the requirements laid down by the law, the legislature, in its wisdom may allow the grant of divorce, instead of a provision for nullifying the marriage. An example of it is furnished by the grant of divorce (at the instance of the wife) on the ground that the age of the wife was below the statutory minimum at the time of the marriage³ a ground introduced in the Hindu Marriage Act by a recent amendment.

Next, in some legal systems divorce is granted on demand, the theoretical assumption being that consent given to the marital relationship is revocable and can be revoked without the necessity of showing fault or other supervening circumstances.

Marriage is viewed in a number of countries as a contractual relationship between freely consenting individuals.⁴⁻⁵

A modified version of the basis of consent is to be found in the theory of divorce by mutual consent.⁶

The basis in this case is also consent, but the revocation of the relationship itself must be consensual, as was the original formation of the relationship. The Hindu Marriage Act, as amended in 1976, recognises this theory in section 13B

None of these theories is based on the breakdown of the relationship, in the sense in which it is understood in

¹ Section 13(1)(vi), Hindu Marriage Act, 1955.

² Section 13(1)(vii), Hindu Marriage Act, 1955.

³ Section 13(2)(iv), Hindu Marriage Act, 1955.

⁴ See e.g., New York Domestic Relations Law (McKinney 1964), section 10, which provides that marriage "so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable of making a contract is essential." See note, "Patterns of Divorce Reform" (1971-72) 57 Cornell Law Review, 649 fn. 1.

⁵ Note, "Patterns of Divorce Reform" (1971-72) 57 Cornell Law Review 649.

⁶ Section 13B, Hindu Marriage Act, 1955.

modern times, even where it can be said that these theories and the breakdown theory have certain common elements.

Contract
with the
theory of
breakdown.

2.7. In contrast with all these theories, the distinctive feature of the theory of breakdown of marriage, as visualised by us for providing a basis of divorce, is that, irrespective of the fault or other circumstances relevant to the conduct or position of the parties, divorce is to be granted if the marriage has actually broken down. Whether the substantive requirement of breakdown is accompanied by certain evidentiary requirements is a matter of detail, as is the actual legislative formulation in which this ground may be couched.

CHAPTER 3

IRRETRIEVABLE BREAKDOWN : THE THEORY

3.1. It would now be convenient to deal briefly with the theory of irretrievable breakdown of marriage. During the last twenty years or so, in many countries of the world, a very important question has engaged the attention of lawyers, social scientists and men of affairs, namely, should the grant of divorce be based on the fault of the party, or should it be based on the breakdown of the marriage? The former is known as the matrimonial offence theory or fault theory. The latter has come to be known as the breakdown theory.

Germ of
the theory.

The germ of the breakdown theory, so far as Commonwealth countries are concerned, may be found in the legislative and judicial developments during a much earlier period. For example, the (New Zealand) Divorce and Matrimonial Causes Amendment Act, 1920, included for the first time the provision that a separation agreement¹ for three years or more was a ground for making a petition to the court for divorce and the court was given a discretion (without guidelines) whether to grant the divorce or not. The discretion conferred by this statute was exercised in a case in New Zealand reported in 1921. Salmond J., in a passage which has now become classic, enunciated the breakdown principle in these words² :—

“The Legislature must, I think, be taken to have intended that separation for three years is to be accepted by this court, as *prima facie* a good ground for divorce. When the matrimonial relation has for that period ceased to exist *de facto*, it should, unless there are special reasons to the contrary, cease to exist *de jure* also. In general, it is not in the interests of the parties or in the interest of the public that a man and woman should

¹ Patricia M. Webb, “Recent Changes in U.K. and New Zealand Divorce Law” (1965) 14 I.C.L.Q. 194, 195.

² *Ladder v. Loller*, (1921) New Zealand Law Reports 876 quoted in Jeffries, “Matrimonial Fault—Is it now relevant?” (1972) New Zealand Law Journal 513, 515.

remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of such a separation the essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but mischievous."

Theoretical
basis of
irretrievable
breakdowns

3.2. The theoretical basis for introducing irretrievable breakdown as a ground of divorce is one with which, by now, lawyers and others have become familiar. Restricting the ground of divorce to a particular offence or matrimonial disability, it is urged, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet there has arisen a situation in which the marriage cannot be worked. The marriage has all the external appearances of marriage, but none of the reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a facade, when the emotional and other bounds which are of the essence of marriage have disappeared.

After the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce. The parties alone can decide whether their mutual relationship provides the fulfilment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances.

Defects of
the
matrimonial
fault theory.

3.3. The defects of the "matrimonial fault" theory have been described more often than once. On May 22, 1969, the General Assembly of the Church of Scotland accepted the Report of their Moral and Social Welfare Board, which suggested the substitution of breakdown in place of matrimonial offences. It would be of interest to quote what they said in their basic proposals¹—

"Matrimonial offences are often the outcome rather than the cause of the deteriorating marriage. An accu-

¹ These proposals were referred to by the Lord Chancellor in House of Lords Debates dated 30th June, 1969, Col. 319.

satorial principle of divorce tends to encourage matrimonial offences, increase bitterness and widen the rift that is already there. Separation for a continuous period of at least two years consequent upon a decision of at least one of the parties not to live with the other should act as the sole evidence of marriage breakdown."

Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a *source of misery for the parties*.

These, in brief, are the main postulates of the theory of irretrievable breakdown as a ground of divorce.

CHAPTER 4

MERITS AND DEMERITS OF THE THEORY OF IRRETRIEVABLE BREAKDOWN

Question 1. 4.1. Question 1 of our Questionnaire invited views on the principal question and was as follows¹:—

“Q. 1. Do you agree with the suggestion that the Hindu Marriage Act be amended with a view to making irretreivable breakdown of marriage as a good ground for grant of a decree of divorce ?”

Reasons in support. 4.2. In seeking answer to this question we have to bear in mind the changing nature of the family. The family is becoming more democratic, and more egalitarian. Both the husband and wife share not only the family house ; in some cases they also share the earnings of each other. Because of the rising rate of female activity, the family unit is more of a coalition. It is, therefore, necessary that if the coalition cannot be worked, the legal sanction for it must be withdrawn.

In answer to the objection that the ground of irretreivable breakdown of marriage is vague, it may be stated that the petitioner has to satisfy the court of a concrete fact—living apart for a sufficient length of time. Judges have thus to adjudicate on facts (not on some vague concepts) the question whether or not, on the evidence before them, the parties have been living apart for the specified period.

A law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the fault theory, guilt has to be proved ; divorce courts are presented concrete instances of human behaviour as bring the institution of marriage into dispute. Because of the doctrine of matrimonial offence, judges and lawyers are sometimes reduced to the role of scavengers. The lawyers have to look for and expose, and the Judges are confronted with, the worst obscenities within a married life. It is, therefore, not surprising that with the present

¹. Question.

adversary system all types of allegations are freely hurled across the courtroom.

We need not stand on an old divorce law which demands that men and women must be found innocent or guilty. It is desirable to get rid of the public washing of dirty linen which takes place in long drawn-out cruelly cases or in cases based on fault. If divorce is allowed to go through on the ground of marriage breakdown, such an unhappy spectacle will be avoided.

One cannot say that it is an enhancement of the respect for marriage if there are tens of thousands of men and women desperately anxious to regularise their position in the community and they are unable to do so. People should be able to marry again where they can obtain a death certificate in respect of a marriage already long since dead.

4.3. The objection that irremediable breakdown as a ground of divorce is vague has been already dealt with.¹ Other objections to it may be dealt with. Objections

(a) Irremediable breakdown allows the spouses, or even one spouse, to terminate the marriage at will, thus transforming marriage from a union for life into one which can be ended at pleasure.

(b) It is contrary to the basic principle that no man should be allowed to take advantage of his own wrong; a spouse who was responsible for the breakdown of marriage should not be able to rely on such breakdown in order to obtain a divorce against his or her partner's will. By authorising one spouse to divorce the other against the latter's will after separation for a specific period, the law will have given statutory recognition for the first time to the principle that a person may take advantage of his or her own wrong.

These objections, advanced at one time or other against the grant of divorce on the ground of irremediable breakdown of marriage, cannot, in our opinion, succeed in their entirety. They can result only in the insertion in the relevant legislation of certain safeguards, intended to meet some of the objections and to allay some of the apprehensions.

¹ Para 4.2, *supra*.

Principle of not taking advantage of one's own wrong already modified.

4.4 The theory that one cannot take advantage of one's own wrong has not been adhered to in the Hindu Marriage Act in the past. We may, in this context, refer to clause (ii) of sub-section (1A) of section 13 of the Act. According to that clause, either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition for the dissolution of the marriage by a decree of divorce on the ground that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or afterwards after the passing of a decree for the restitution of conjugal rights in proceedings to which they were parties. This provision clearly contemplates that even the party which has been in the wrong in so far as it has failed to comply with a decree for restitution of conjugal rights can also apply for a decree of divorce on the ground that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of the decree for restitution of conjugal rights in a proceeding to which they were parties. Such a party, though at fault, would thus be taken advantage of its own fault. It cannot, therefore, be said that under the provisions of the Hindu Marriage Act, as they stand at present, no person can be allowed to take advantage of his own wrong.

Recommendation as to breakdown.

4.5. On a consideration of the merits and demerits of the theory of irretrievable breakdown of marriage, we have come to the conclusion that such a breakdown of marriage should be a good ground for the grant of a decree of divorce under the Hindu Marriage Act, 1955, if proved by the parties living apart for the specified period,¹ and subject to the safeguards which we are recommending later in this Report.²

We need not repeat the various arguments in support of introducing such a ground, to which we have already made a reference in the preceding discussion. In reaching our conclusion, we have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties if the legal bond is sought to be maintained notwithstanding the disappearance of the emotional substratum.

¹ As to the specified period, see Chapter 6, *infra*.

² As to safeguards see Chapter 7, *infra*.

Such a course would encourage continuous bickering, perpetual bitterness, and may often lead to immorality. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases do not serve the sanctity of marriage ; on the contrary, it shows scant regard for the feelings and emotions of the parties.

Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but also that the court should be empowered to declare defunct *de jure* what is already defunct *de facto*. Where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond.

Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist. Marriage is life-long cohabitation in the home. When the prospect of continuing cohabitation has ceased, the legal tie should be dissolved.

4.6. We may state that majority of the replies received to our Questionnaire have favoured the introduction of this ground of divorce in the Hindu Marriage Act.

Replies to
the Ques-
tionnaire.

It has been stated in a reply received from a lady Advocate¹ that it is only case where relief (of divorce) ought to be granted and cannot be granted by reason of certain difficulties, that we should now provide for. While recognising the desirability of reducing the necessary of unwilling partners being forced to live together, the reply emphasises that at the same time divorce should not be made absolutely easy, because it will lead to tremendous insecurity for women. The reply states that to arrive at a conclusion that the marriage has broken down irretrievably, there should be some evidence in the form of a commission of matrimonial offence ; at the same time, the reply states that we should obviate the necessity of

¹ S. No. 19.

apportionment of the guilt. Our approach, however; as already stated, is to make provision for divorce in cases of irretrievable breakdown of marriage, irrespective of the fact as to whether any party is or is not at fault.

4.7. A High Court Judge¹ has expressed disagreement with the suggestion that the Hindu Marriage Act, 1955 should be amended with a view to making irretrievable breakdown of marriage as a good ground for grant of a decree of divorce. His comment is :

“In my opinion, such an amendment would put human ingenuity at a premium and throw wide open the doors to litigation, and will create more problems than (are) sought to be solved.”

We are, however, inclined, for reasons mentioned elsewhere,² to agree with the majority view that breakdown of marriage is a good ground for the grant of a decree of divorce.

Objection
of one High
Court
considered

4.8. We may note that the Judges of one High Court³ have expressed themselves against the introduction of irretrievable breakdown as a ground of divorce. One of the points made in the reply of the High Court is that it is extremely difficult to say that the husband and wife would never live together merely because there has been a rift between them and for the time being it appears that there may not be any prospect of their living together. We agree that the mere fact that there has been a rift between the parties or that they are for the time living apart does not mean that the marriage has come to an end. But we may, with respect, point out that our proposal contemplates not merely a breakdown of the marriage, but a breakdown which is irretrievable. Of course, it is possible that what may appear to one person to be irretrievable may appear to another as not yet beyond repair. But such a state of things cannot be allowed to continue indefinitely, and there must arrive a point of time when one of the parties should be permitted to seek the judgment of the court as to whether there is or there is not a possibility of the marriage being retrieved. Human life has a

¹ S. No. 25.

² Para 4.5, *supra*.

³ S. No. 30.

short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor decline to give adequate response to the felt necessities arising therefrom.

It seems to us that the social interest and balance of justice lie in favour of giving due weight to the fact that where the parties have lived apart for the specified period, they should be taken to be married only in name. It may be very unfortunate that such a situation has come about ; but once it has come about, wisdom lies in accepting it as an established fact and in proceeding to consider how best to deal with the situation, rather than in turning a blind eye to realities. The Gujarat Government,¹ while supporting the suggestion that irretrievable breakdown of marriage should be made a ground of divorce, has observed that it would be advisable that the spouses should be allowed to re-construct the marriage where the first was "wrecked beyond the possibility of reconciliation". We find considerable force in this view.

4.9. The Government of India, Ministry of Education, Department of Social Welfare, has expressed the view² that "making irretrievable breakdown of marriage" a ground for grant of a decree of divorce is redundant in the light of the fact that sufficient grounds covering 'irretrievable breakdown of marriage' exist in the Hindu Marriage Act and the Marriage Laws Amendment Act, 1976, for the purpose of seeking divorced".

Objection of
Department
of Social
Welfare
considered.

We have given careful consideration to this view, but are unable to subscribe to it. As pointed out earlier,³ the grounds contained in the Hindu Marriage Act, even after its amendment in 1976, do not specifically deal with irretrievable breakdown of marriage. Some of the amendments made in the Hindu Marriage Act in 1976 no doubt take into account, by necessary implication, irretrievable breakdown of marriage as a relevant factor. There is, however, no ground in the Act, even after the amendments of 1976, which expressly provides for divorce on the ground of irretrievable breakdown of marriage. As indicated earlier,⁴ the purpose of the amendment suggested by us is to provide for divorce on the ground of

¹ S. No. 31.

² S. No. 33.

³ Paragraphs 2.2 to 2.7, *supra*.

⁴ Paragraph 2.5, *supra*.

irretrievable breakdown of marriage even if one of the spouses does not join together in the filing of the petition, or even opposes, such a petition. Our amendment further suggests that the living apart of the husband and wife for a sufficient length of time would be presumptive proof of breakdown of marriage. There is no provision in the existing law to meet such an eventuality. It may also be reiterated that the change in law recommended by us would obviate the necessity of washing dirty linen of marital life in public.¹

CHAPTER 5

RETENTION OF OTHER GROUNDS OF DIVORCE

5.1 One of the questions which has posed itself for decision is whether the introduction of irretrievable breakdown of marriage as a ground of divorce under the Hindu Marriage Act should result in elimination of the other grounds of divorce, which already exist in the Act, e.g. adultery, cruelty or desertion, or whether those other grounds should also be retained. Some foreign writers have expressed the view that after the introduction of the ground of irretrievable breakdown of marriage the other grounds might not be retained. We are, however, unable to subscribe to the above view as, in our opinion, the introduction of irretrievable breakdown of marriage as a ground for divorce does not render the other grounds for divorce which already exist on the statute book as superfluous. There is no inherent contradiction or fallacy in having both the new and the old grounds.

Question of retention of other grounds.

Section 1 of the English Matrimonial Causes Act, 1973, is the only section in that Act which deals with a decree for divorce. According to that section¹, a petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably. Sub-section (2) of that section enumerates the circumstances from which the court may infer that marriage has broken down irretrievably. Those circumstances are :—

(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

¹ Section 1, Matrimonial Causes Act, 1973.

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted ;

(e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

It would appear from the above that according to the law in England, an inference of irretrievable breakdown of marriage can be drawn from a variety of circumstances. As against that, according to the amendment suggested by us¹, irretrievable breakdown of marriage can be inferred from the fact that the parties to the marriage have been continuously living apart for a period of more than three years. The English law on the subject of irretrievable breakdown of marriage, unlike the amendment suggested by us, is much more comprehensive and brings within its ambit such circumstances as adultery, cruelty or desertion. As we are not bringing in, for proof of irretrievable breakdown of marriage, considerations like adultery, cruelty or desertion, it is essential that the express provisions which we have already got in the Hindu Marriage Act relating to allegations of adultery, cruelty or desertion against one of the spouses should stand. We are, therefore, of the opinion that the ground of irretrievable breakdown of marriage for obtaining decree of divorce shall be in addition to the grounds as are already there in the existing provisions of the Hindu Marriage Act.

Retention favoured.

5.2 Notwithstanding the theoretical attractiveness of the contrary view, we think that there are certain practical considerations which cannot be brushed aside.

Existing grounds of divorce.

5.3 Take, for example, some of the grounds of divorce provided in the Hindu Marriage Act¹. The Act provides for divorce on various grounds like adultery or cruelty. Such grounds should, in our opinion, be sufficient for the grant of divorce.

¹ Section 13(1), Hindu Marriage Act, 1955.

It would not be proper in such cases to require the additional ground of irretrievable breakdown of marriage because of the said misconduct of the spouse in committing acts of adultery or cruelty. To do so would have the effect of making the present provision much more stringent. It may be that such misconduct of a spouse may also result in a large number of cases in irretrievable breakdown of marriage. The question to be considered, however, is whether in the event of such misconduct, it should be necessary to ask for further proof of irretrievable breakdown of the marriage. Our answer to this question is in the negative. The various grounds of divorce provided in the Hindu Marriage Act should, therefore, be retained. It may be that there will sometimes be overlapping where the specific ground of divorce (*e.g.* cruelty) has also led to the parties living apart and breakdown of the marriage. However, that in itself is not a conclusive consideration for abolishing the present grounds of divorce.

We do not, therefore, favour the omission of the existing grounds of divorce as an essential consequence of the adoption of irretrievable breakdown as a ground of divorce.

We may note that a High Court Judge has, in her reply¹, specifically stated as follows :—

“This ground should be in addition to the grounds already specified under the Hindu Marriage Act, as amended.”

¹ S. No. 34 (under Q. 2).

CHAPTER 6

THE REQUIREMENT OF LIVING APART

Living apart. 6.1 We may now deal with the yardstick to be applied by the courts in drawing an inference of an irretrievable breakdown of marriage. The yardstick would have to be factual and tangible, and not abstract or one pertaining purely to a state of mind.

Accordingly, in most countries it has usually been considered desirable to give some guidance to the court as to how irretrievable breakdown is to be evidenced. For this purpose, the legislative provision allowing divorce on the ground of irretrievable breakdown of marriage is usually made subject, *inter alia*, to the condition that there must be proof that the parties have lived apart for a specified period.

Questions 2 and 3. 6.2 Taking note of this aspect of the matter, our questionnaire invited views as to the circumstances that would constitute sufficient proof of breakdown.

The question was in these terms :¹

“Q. 2. If the reply to the question No. 1 be in the affirmative, what circumstances, in your opinion, should be considered to be sufficient to prove irretrievable breakdown of marriage ?”

In regard to the period of living apart as evidencing breakdown, question 3 of our questionnaire was as follows :²

“Q. 3. How long should the parties have lived separately before the court can come to the conclusion that there has been an irretrievable break down of marriage ?”

Points made to replies to Question 2. 6.3 We give below the important points made in regard to Question 2. We shall deal later³ with the replies to question 3.

¹ Question 2.

² Question 3.

³ See para 6.7, *infra*.

Some of the points made are :—

“Agreement by the two married people should be enough.”¹

“Not co-habiting” should be sufficient proof of irretrievable breakdown of marriage.²

“Separate living of (the) spouses for more than five years” should be sufficient to prove irretrievable breakdown of marriage.³

“Continuous separate living of the spouses in the prime period of youth, and desire of not coming together in the mind of one is sufficient to prove the irretrievable breakdown of marriage.”⁴

“(i) After a continuous separation arising out of the rift and no petition of conjugal right from either side (party) is filed during the period of one year, “separation” should be deemed to be conducive ground for irretrievable breakdown of marriage.

or

(ii) Continuous separation for more than one year, coupled with suspicion of misconduct from either side, mental or physical cruelty arising out of admission. Discovery of either of spouse regarding adultery covering pre-marital illicit relations rendering their living together impossible.”⁵

“Continuous separate living of the spouses for long time” should be sufficient proof of irretrievable breakdown.”⁶

The circumstances sufficient to prove irretrievable breakdown, according to some others, are :—⁷

(a) proof that “both the spouses are living separately for not less than one year on account of internal disputes and have no willingness to comply with conjugal rights .”;

(b) if a case for judicial separation or divorce or restitution of conjugal rights is pending for three years, and “no attempts to settle the dispute or to compromise are made by either party”.

¹ S. No. 1.

² S. No. 2.

³ S. No. 5.

⁴ S. No. 6.

⁵ S. No. 7.

⁶ S. No. 10.

⁷ S. Nos. 11 and 13.

(c) "in some cases, it is even enough to take into account a simple submission of the spouse that he or she cannot live together

Other circumstances mentioned in some of the replies are as under :—

"Present grounds of divorce (in the Hindu Marriage Act) should be sufficient to prove irretrievable breakdown of marriage".¹

"Separation of the spouses, for whatever reasons, for a sufficiently reasonable time, should be considered sufficient to prove irretrievable breakdown of marriage."²

The circumstances sufficient to prove breakdown may be "somewhat like" those given below, but "they are by no means exhaustive";³

"(a) where the thinking of husband and wife on some vital aspects of life are so divergent that there is no possibility of reconciliation and co-ordination between them . . . ;

"(b) absence of sex appeal in either spouse qua each other ;

"(c) aversion to sex on the part of either spouse and their lack of warmth for each other ;

"(d) emotional disintegration between the two spouses".

The court should be satisfied that the other party "has been living away from the petitioner without cohabitation for a continuous period of not less than three years".⁴

"The suggestion (in Question 1)⁵ can be accepted only if the law would also provide new facts which would result in breakdown."⁶

¹ S. No. 15.

² S. No. 17.

³ S. No. 19.

⁴ S. No. 19.

⁵ Question 1 was as follows :—

"Do you agree with the suggestion that the Hindu Marriage Act be amended with a view to making irretrievable breakdown of marriage as a good ground for grant of a decree of divorce ?"

⁶ S. No. 19.

According to another reply,¹ "breakdown of marriage is a matter of fact for the court to decide, after satisfaction that all possible means of reconciliation have been tried out and have failed".

6.4. After giving our earnest consideration to the matter we would express the view that irretrievable breakdown may be presumed from the fact that the husband and wife have been living apart for a continuously long time. How much long that period should be, will be dealt with subsequently.²

Recommendation as to Q. 2—living apart as proof of breakdown.

6.5. We would add that living apart for the specified period should be the only proof of irretrievable breakdown. In formulating a conclusion on this question, several considerations have to be borne in mind.

It is, in our opinion, not enough for a party to aver that there has been an irretrievable breakdown of marriage. Such an averment must be substantiated. What better material can there be to substantiate that averment than the fact the husband and wife, despite their marital relationship, have been living apart for a long period? The fact that the parties to the marriage have not lived together for a number of years can reasonably be taken to be a tangible presumptive proof of the breakdown of marriage.

Moreover, the essence of marriage is a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life, an experience of the joy that comes from enjoying, in common, things of the matter and of the spirit and from showering love and affection on one's offspring. Living together is a symbol of such sharing in all its aspects. Living apart is a symbol indicating the negation of such sharing. It is indicative of a disruption of the essence of marriage—"breakdown"—and if it continues for a fairly long period, it would indicate destruction of the essence of marriage—"irretrievable breakdown".

6.6. As to Question 3, which deals with the period of living apart,³ the only consideration that should be borne in mind is that the period should not be so long as to prove intolerable and be tantamount to a denial of relief, nor should it be too short as to amount to an encouragement to the seeking of divorce in haste

Period not to be too long or too short.

¹ S. No. 19A.

² See *infra*.

³ Para 6.2, *supra*.

without considering the possibility of working the marriage in future notwithstanding its temporary failure in the past. Notwithstanding such temporary failure and loosening of the bond that is expected to bind the parties together, there still may be hope of saving the marriage. There may have been a disruption of the essence of marriage, but not its destruction. The line between disruption and destruction may be a fine one, but is nevertheless one which no wise legislator should be ready to disregard. On this reasoning, it is our view that a period of living apart for three years should be required before the breaking-down may be said to be irretrievable.

Replies to
Question 3.

6.7 We may note that the replies received to Question 3 of our Questionnaire suggest periods ranging from six months to ten years. The period of six months has been suggested by one lady Advocate,¹ while the period of ten years has been suggested by a retired Judge of the High Court.²

In between the two extremes (six months and ten years), there is a wide range. Thus several replies to the Questionnaire favour a period of one year.³ One of them,⁴ however, states that the marriage itself must have subsisted for at least three year.

The period of two years has been suggested in one of the replies.⁵

The period of three years has been suggested by a High Court Judge.⁶

A State Government suggests a period of four years.⁷

A woman lawyer suggests three or five years.⁸

Preference for a period of five years has been expressed in several replies,⁹ including that of a High Court Judge.¹⁰

One reply suggests a period of seven years.¹¹

¹ S. No. 19.

² S. No. 17.

³ S. No. 1, 7, 11, 13 and 19A.

⁴ S. No. 19A.

⁵ S. No. 15.

⁶ S. No. 25.

⁷ S. No. 31.

⁸ S. No. 19.

⁹ S. No. 5, 6, 10 and 19 (3 or 5 years).

¹⁰ S. No. 34.

¹¹ S. No. 2.

6.8. On a careful consideration of the matter, we have come to the conclusion that a period of three years' continuous living apart would be just and fair. We note that the period in the English Act¹ is five years. But we should point out that matrimonial proceedings in India take a considerable time for their disposal. By the time the decree is passed, the period of continuous living apart would, in practice, exceed even five years in the majority of cases. We are, therefore, of the view that a period of three years' continuous living apart immediately before the presentation of the petition should be enough. While, on the one hand, it would leave adequate time for reflection and would not be inconsistent with the stability of marriage, on the other hand, it would not be intolerably long so as to promote immorality or further bitterness.

Recommendation as to Question 3, Period of living apart.

6.9 We may state that according to the English Act,² in considering the length of period for which the husband and wife have been living apart, no account is taken of any one or more periods, not exceeding six months in all, during which the parties resumed living with each other. Such resumption of living together is resorted to sometimes with a view to finding out as to whether the parties can still get reconciled despite living apart for a long time on account of rift in marriage. We do not want to discourage such resumption of living with each other. Such living with each other can also sometimes become necessary because of situations like death in the family or the illness of a child. In case, however, the law were to require that the period of living apart would have to be calculated afresh from resumption of living with each other, the spouses would be averse to resuming living with each other. We would, therefore not take into account temporary resumption of living with each other. The total period of such resumed living with each other, in our view, should be three months. We are applying this cut in the period of resumed living with each other in the period of six months mentioned in the English law, as we have also applied³ a corresponding cut in the period of five years prescribed by the English law.

Calculation of continuous period.

¹ Section 1(2)(e), Matrimonial Causes Act, 1973.

² Section 2(5), Matrimonial Causes Act, 1973.

³ Paragraph 6.8, *supra*.

CHAPTER 7

SAFEGUARDS

Introduction 7.1. In most countries, certain safeguards have been provided in legislation permitting divorce on the ground of breakdown of the marriage. These safeguards proceed on two important considerations. First, a marriage that is worth preserving ought to be preserved, and secondly, where dissolution of the marriage becomes unavoidable, care should be taken to ensure that the interests of those who are likely to suffer as a result of divorce are taken care of.

The safeguards that are usually provided by legislation in other countries are the following :—

I. Provision for the welfare of children.

II. Provision permitting the court to refuse divorce in case of hardship to the respondent.

III. Provision restricting divorce within a certain period after the marriage.

This safeguard is built-in in the amendment recommended by us,¹ as a petition for divorce on the ground of irretrievable breakdown of marriage can, in the very nature of things, be filed only after more than 3 years from the date of the marriage.

IV. Provision for reconciliation.

Provision for this purpose already exists in the Hindu marriage Act.²

While dealing with cases of irretrievable breakdown of marriage, it may be stated that current thinking is that compulsory counselling is likely to prove a waste both of time and of resources as most couples will not, in any event, be reconciled and that resources should be concentrated on those parties who

¹ Para 6.8, *supra*.

² Section 23(2), Hindu Marriage Act, 1955.

show a positive interest in their marriage.¹ It has been suggested that² counselling is unrealistic where the spouses do not show a positive interest in the future of their marriage and do not seek counselling voluntarily. It may, however, be appropriate to mention that section 23(2) of the Act imposes a duty on the court to make every endeavour to bring about reconciliation "where it is possible so to do consistently with the nature and circumstances of the case".

Where conciliation within the terms of section 23(2) of the Act is possible, it would sometimes be desirable to utilise the services not only of qualified persons but also of members of the family, in effecting reconciliation. In this context we may refer to Order 32A of the Code of Civil Procedure, 1908, inserted in 1976.³ The Order applies to suits and proceedings relating to matters concerning the family. Rule 3 of the Order imposes a duty to make efforts for settlement in such suits and proceedings.

Rule 4 of the Order reads as follows :—

"4. In every suit or proceedings to which this Order applies, it shall be open to the court to secure the services of such person "(preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the Court may think fit, for the purpose of assisting the Court in discharging the functions imposed by rule 3 of this Order.

Assistance
of Welfare
expert.

Matrimonial Courts can resort to this rule whenever suitable occasion arises.

V. Restrictions arising out of the financial position of the respondent.

¹ Max Rheinstein, "The Law of Divorce and the Problem of Marriage Stability" (1956) 9 Vanderbilt Law Review 633, referred to by Frank Bates, "The Enforcement of Marriage Revisited" (July-September, 1977) Vol. 6, No. 3, Anglo-American Law Review, 172, 181.

² Scildson, "Systematic Marriage Investigation and Counselling in Divorce Cases : Some Reflections on its Constitutional propriety and general desirability" (1967) 36 George Washington Law Review 60, 70, referred to by Frank Bates, "The Enforcement of Marriage Revisited" (July-September, 1977), Vol. 6, No. 3, Anglo-American Law Review, 172, 181.

³ Order 32A, Rules 3-4, Code of Civil Procedure, 1908.

I. WELFARE OF CHILDREN

Welfare of
children

7.2. Concern has been expressed about the adverse effects of divorce on children. The view has been put forth that while, in some cases, divorce may alleviate the stress caused by constant conflict between the parents, yet the rise in divorces means that we are creating a new society with "multiple" parents, and in that situation the children may be found to be the sufferers. Adults who divorce and re-marry are searching consciously a better way of being happy, but children are being carried along these processes without choice.¹

Provision as
to children
in the
English Act.

7.3 In this context, the English Act contains an important restriction on the grant of a decree absolute for divorce.² Section 41 of the Act is quoted below :—

"41. (1) The Court shall not make absolute a decree of divorce or of nullity of marriage, or grant a decree of judicial separation, unless the court, by order, has declared that it is satisfied:—

(a) that for the purposes of this section there are no children of the family to whom this section applies; or

(b) that the only children who are or may be children of the family to whom this section applies are the children named in the order and that—

(i) arrangements for the welfare of every child so named have been made and are satisfactory or are the best that can be devised in the circumstances; or

"(ii) it is impracticable for the party or parties appearing before the court to make any such arrangements; or

(c) that there are circumstances making it desirable that the decree should be made absolute or should be granted, as the case may be, without delay notwithstanding that there are or may be children of the family to whom this section applies and that the court is unable to make a declaration in accordance with paragraph (b) above.

¹ Interview with Salvador Minuchin, Director, Philadelphia Child Guidance Clinic, as quoted in U.S. News of the World Report (13 January, 1975), pages 44, 46.

² Section 41, Matrimonial Causes Act, 1973.

(2) The court shall not make an order declaring that it is satisfied as mentioned in sub-section (1)(c) above unless it has obtained a satisfactory undertaking from either or both of the parties to bring the question of the arrangements for the children named in the order before the court within a specified time.

(3) If the court makes absolute a decree of divorce or of nullity of marriage, or grants a decree of judicial separation, without having made an order under sub-section (1) above the decree shall be void but, if such an order was made, no person shall be entitled to challenge the validity of the decree on the ground that the conditions prescribed by sub-sections (1) and (2) above were not fulfilled.

(4) If the court refuses to make an order under sub-section (1) above in any proceedings for divorce, nullity of marriage or judicial separation it shall, on an application by either party to the proceedings, make an order declaring that it is not satisfied as mentioned in that sub-section.

(5) This section applies to the following children of the family, that is to say—

(a) any minor child of the family who at the date of the order under sub-section (1) above is—

(i) under the age of sixteen, or

(ii) receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also in gainful employment; and

(b) any other child of the family to whom the court by an order under that sub-section directs that this section shall apply; and the court may give such a direction if it is of opinion that there are special circumstances which make it desirable in the interest of the child that this section should apply to him.

(6) In this section 'welfare', in relation to a child, includes the custody and education of the child and financial provision for him."

Provision in the Hindu Marriage Act.

7.4. The Hindu Marriage Act has a limited provision as to the restriction on the grant¹ of divorce in the interests of children. Under section 14(1), the court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before one year has elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent.

Section 14(2) provides—

“In disposing of any application under this section for leave to present a petition for divorce before the expiration of one year from the date of the marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said one year.”

Question 4 in Questionnaire and replies thereto.

7.5. As to the presence of children, Question 4 of our Questionnaire was as follows² :—

“Q. 4. Should the presence of children operate as a bar to the grant of a decree of divorce on the ground of irretrievable breakdown of marriage? If so, should the bar be absolute or partial?”

We may state that the replies received on this Question, by and large, do not consider it necessary to regard the existence of children as a total bar. One reply, however, regards that fact as constituting a partial bar if the child or children be under the age of ten years and are attached to both the spouses in an exceptionally affectionate manner.³

Recommendation as to children.

7.6. We do not think that the presence of children should operate as a total bar to the grant of a decree of divorce. However, we are of the view that where divorce on the ground of irretrievable breakdown of marriage is sought, the court should take into account the interests of children. Where financial provision needs to be made for the maintenance, support and education of children, there exist provisions on the subject in the Act. The fact that there are children is obviously a matter that lends emphasis to the need for making appropriate orders under these provisions.

¹ Section 14, Hindu Marriage Act, 1955.

² Question 4.

³ S. No. 17.

Accordingly, we are recommending¹ the insertion of a provision on the subject.

The principal objective sought to be achieved by the provision relating to children of the marriage may be stated at this stage.

The Court shall not pass a decree of divorce under the new provision relating to irretrievable breakdown unless the Court is satisfied that adequate provision for the maintenance of children, born out of marriage, referred to below has been made consistently with the financial capacity of the parties to the marriage.

This provision will apply to—

- (a) minor children;
- (b) unmarried or widowed daughters who have not the financial resources to support themselves; and
- (c) children who, because of special condition of their physical or mental health, need looking after and have not the financial resources to support themselves.

II. HARDSHIP

7.7. Then there is the question of hardship that may be caused Hardship to the respondent by the grant of divorce. The English Act² enables the respondent to a petition for divorce based on five years' separation as constituting breakdown to oppose the petition on the ground that "the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage". The following is the text of the entire section :

Refusal of decree in five year separation cases on grounds of grave hardship to respondent.

5. (1) The respondent to a petition for divorce in which the petitioner alleges five "years" separation may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage.

¹ See Chapter 8, *infra*.

² Section 5, Matrimonial Causes Act, 1973.

(2) Where the grant of a decree is opposed by virtue of this section, then—

(a) if the court finds that the petitioner is entitled to rely in support of his petition on the fact of five years' separation and makes no such finding as to any other fact mentioned in section 1(2) above, and

(b) if apart from this section the court would grant a decree on the petition.

the court shall consider all the circumstances, including the conduct of the parties to the marriage and the interests of those parties and of any children or other persons concerned, and if of opinion that the dissolution of the marriage will result in grave financial or other hardship to the respondent and that it would in all the circumstances be wrong to dissolve the marriage it shall dismiss the petition.

“(3) For the purposes of this section hardship shall include the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage were not dissolved.”

Case law as to “hardship” 7.8. This defence, therefore, requires proof of two distinct elements. First, grave financial or other grave hardship to the respondent if the marriage is dissolved and, secondly, facts and matters which in the opinion of the court, would in all the circumstances make it wrong to dissolve the marriage. In considering both these elements, the court is expressly directed to “consider all the circumstances, including the conduct of the parties to the marriage and the interests of these parties and of any children or other persons concerned.”

Question 5. 7.9. By question 5 of our Questionnaire, we solicited views on the question whether the decree should be refused on the ground of special circumstances¹.

“Q. 5. Are there any special circumstances in which, in your opinion, a decree for divorce should not be granted even if irretrievable breakdown of the marriage is established? If so, please specify the circumstances.”

We may state that while many of the replies on this question are in the negative, one of the replies² suggests that if it is

¹ Question 5.

² S. No. 19.

felt that the introduction of the proposed ground may cause hardship or prejudice to women, then the right to seek divorce on the proposed ground may be limited to the wife.

The reply of a High Court Judge is more specific. She says¹ :

“When the parties to a marriage have lived apart for a continuous period of at least 5 years immediately preceding the presentation of the petition, that fact should be considered as a prima facie proof that the marriage has irretrievably broken down. In no case should a decree for divorce be passed on the ground that the marriage has irretrievably broken down unless the parties to the marriage have lived apart for a continuous period of at least 5 years immediately preceding the presentation of the petition. The Court should be further satisfied in each such case that the dissolution of marriage will not result in grave financial or other hardship to the respondent. Payment of a suitable lump sum alimony to the wife when the respondent is the wife should be a condition precedent to the grant of such a divorce. The amount should be determined by the Court. In the alternative the Court may grant a monthly amount as maintenance to the wife if the Court is satisfied that such future monthly payments are adequately secured.

Either party should be able to present such a petition, and the consent of the other party should not be necessary for presenting such a petition.”

7.10. We are of the view that there is something to be said for conferring a discretion on the Court to refuse divorce on the ground of irretrievable breakdown of marriage where a divorce would cause grave financial hardship to the respondent and it would be wrong in all the circumstances to dissolve the marriage. At the first sight, it may appear that once it is established that the marriage has broken down irretrievably, it would be illogical to allow a party to oppose the divorce on the ground of hardship. It is, however, to be remembered that the grant of divorce—or, for that matter, any other matrimonial relief—on a particular statutory ground is not necessarily mandatory on the proof of facts constituting the statutory ground. There would be nothing

Recommendation as to hardship to the wife.

¹ S. No. 24 (under Q. 2).

theoretically wrong in vesting a discretion in the court to refuse relief if the special circumstances of the case require that the relief should be refused. Such a course would be adopted only in exceptional circumstances, but the vesting of a statutory discretion would be intended to promote the interests of justice, and is therefore supportable on that ground.

At the same time, we do not consider it just to give such a discretion to the court in every case—as is the position in England.¹ We do not think that there is any need for conferring such a discretion on the court in cases where the petition is by the wife. The fact that a woman has commenced proceedings would, in Indian conditions, imply in most cases that she finds conjugal life intolerable. We do not think that in such circumstances it would be just or fair to leave any scope for refusal of relief on the ground of hardship to the respondent husband. Where the wife is the petitioner and the husband is the respondent, there could hardly arise any situation in which the hardship likely to be caused to the husband (respondent) by the grant of a decree of divorce would be more grave than the hardship that would be caused to the wife (petitioner) if the divorce is not granted. The situation may not be inconceivable, but would not be very frequent.

7.11. It may be mentioned that unlike the English Act, which grants discretion to the court to refuse decree of divorce in cases of both grave financial and other hardship, we have confined in the proposed amendment the discretion to refuse relief only in cases of grave financial hardship when the court considers that it would, in all circumstances, be wrong to dissolve the marriage. We have omitted cases of “other hardship” as, in our opinion, the words “other hardship” would open the way for all kinds of pleas which might render the proposed provision contained in section 13C, in case of petition by the husband, to be more or less illusory in a large number of cases.

7.12. We, therefore, recommend that where the wife is the respondent to a petition for divorce on the ground of irretrievable breakdown of marriage, the court should have a discretion to refuse divorce where it is satisfied that the grant of divorce might cause grave financial hardship to the respondent, and that in all the circumstances it would be wrong to dissolve the marriage.

Recommendation as to Question 5 on the basis of hardship of hardship to the wife.

¹ Section 5, Act of 1973, paragraph 7.7, *supra*.

7.13. It is desirable to explain another departure which we are making from the English Act. Section 5(3) of the English Act provides that for the purposes of the section "hardship" shall include the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage were not dissolved. We are of the view that such a provision should not be included in the Act. It seems to cover mere chances, possibilities and expectancies and could be stretched to cover even the loss of the expectancy that the wife might survive the husband and might then inherit his estate by way of intestate succession. We do not, therefore, propose to insert the definition of "hardship" as contained in the English Act.

Definition of
"hardship"
in the
English Act
not inserted

CHAPTER 8

RECOMMENDED AMENDMENTS

8.1. The following is a rough draft of the new sections to be inserted in the Hindu Marriage Act, 1955, in order to implement our recommendations¹ on the several matters of a substantive nature² dealt with in this Report so far :

Insertion of new sections 13C, 13D and 13E.

Divorce on the ground of irretrievable breakdown of marriage.

Compare section 1(1), English Act, 1973.

Compare section 1(2) (c), English Act, 1973.

Compare Section 1(4), English Act, 1973.

Compare section 2(5), English Act, 1973.

“13C. (1) A petition for the dissolution of a marriage by a decree of divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably.

(2) The court hearing such a petition shall not hold the marriage to have broken down irretrievably unless it is satisfied that the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition.

(3) If the court is satisfied, on the evidence, as to the fact mentioned in sub-section (2), then unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall, subject to the provisions of this Act, grant a decree of divorce.

(4) In considering for the purpose of sub-section (2) whether the period for which the parties to a marriage have lived apart has been continuous, no account shall be taken of any one period (not exceeding three months in all) during which the parties resumed living with each other, but no period during which the parties lived with each other shall count as part of the period for which the parties to the marriage lived apart.

¹ Paragraph 4.5	Breakdown as a ground of divorce.
Paragraph 6.4	Living apart as proof of divorce.
Paragraph 6.8	Period of living apart.
Paragraph 6.9	Continuity of the period.
Paragraph 7.6	Provision relating to children.
Paragraphs 7.10 to 7.12	Question of bardship.

² For procedural and consequential amendments, see paragraphs 8.2 and 8.3, *infra*, which deal with sections 21A and 23(E).

(5) For the purposes of sub-sections (2) and (4), a husband and wife shall be treated as living apart unless they are living with each other in the same household, and references in this section to the parties to a marriage living with each other shall be construed as references to their living with each other in the same household.”

Compare section 2(6), English Act, 1973.

“13D. (1) Where the wife is the respondent to a petition for the dissolution of a marriage by a decree of divorce under section 13C, she may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial hardship to her and that it would in all the circumstances be wrong to dissolve the marriage.

Wife's right to oppose the petition on the ground of hardship. Compare section 5, English Act, 1973.

(2) Where the grant of a decree is opposed by virtue of this section, then—

(a) if the court finds that the petitioner is entitled to rely on the ground set out in section 13C, and

(b) if apart from this section the court would grant a decree on the petition.

this court shall consider all the circumstances, including the conduct of the parties to the marriage and the interests of those parties and of any children or other persons concerned, and if the court is of opinion that the dissolution of the marriage will result in grave financial hardship to the respondent and that it would in all the circumstances be wrong to dissolve the marriage it shall dismiss the petition, or in an appropriate case stay the proceedings until arrangements have been made to its satisfaction to eliminate the hardship.”

“13E. (1) The Court shall not pass a decree of divorce under section 13C unless the court is satisfied that adequate provision for the maintenance of children born out of the marriage referred to in sub-section (2) has been made consistently with the financial capacity of the parties to the marriage.

Restriction on decree for divorce affecting children.

(2) This section shall apply to—

(a) minor children ;

(b) unmarried or widowed daughters who have not the financial resources to support themselves ; and

(c) children who, because of special condition of their physical or mental health, need looking after and have not the financial resources to support themselves.”

Amendment of section 21A. 8.2. In view of the proposed insertion of a new section, it will also be necessary to make consequential changes in section 21A(1), clauses (a) and (b).

Power to transfer petition in certain cases.

Section 21A, sub-section (1) and sub-section (2) read as follows :—

“21A. (1) Where—

(a) a petition under this Act has been presented to a district court having jurisdiction by a party to a marriage praying for a decree for judicial separation under section 10 or for a decree of divorce under section 13, and

(b) another petition under this Act has been presented thereafter by the other party to the marriage praying for a decree for judicial separation under section 10 or for a decree of divorce under section 13 on any ground, whether in the same district court or in a different district court, in the same State or in a different State.

the petitions shall be dealt with as specified in sub-section (2).

(2) In a case where sub-section (1) applies,—

(a) If the petitions are presented to the same district court, both the petitions shall be tried and heard together by that district court ;

(b) if the petitions are presented to different district courts, the petition presented later shall be transferred to the district court in which the earlier petition was presented and both the petitions shall be heard and disposed of together by the district court, in which the earlier petition was presented.”

In sub-section (1), clause (a) and clause (b), newly added section 13C should find a mention. In clause (a), after the word and figure “section 13”, the words, figure and letter “or section 13C” should be inserted. In clause (b), after the word and figure “section 13”, the words, figure and letter “or section 13C” should be inserted.

8.3. Attention may also be drawn to section 23(1)(a) of the ^{Amendment} Hindu Marriage Act which relates to decree in the proceedings. ^{of section} 23(1)(a). Section 23(1)(a), in so far as it is material, reads as follows :—

“23. (1) In any proceeding under this Act, whether defended or not, if the court is satisfied that—

(a) any of the grounds for granting relief exists and the petitioner [except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of section 5] is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

then and in such a case, but not otherwise, the court shall decree such relief accordingly.”

In our opinion, it is desirable that the petition under the new section 13C would be excluded from the scope of section 23(1)(a). Once divorce is decided to be granted on the basis of irretrievable breakdown of the marriage, any allegation that the fault of a party contributed to the conditions leading to the breakdown should be regarded as irrelevant. To allow section 23(1)(a) to operate in all its severity in such cases might defeat the object of the recommended amendment. The general and categorical prohibition contained in section 23(1)(a) would thus be *inappropriate in a case of irretrievable breakdown*.

Accordingly, we recommend that in section 23(1)(a), after the word and figure “section 5”, the words, figure and letter “and except in cases where the petition is presented under section 13C” should be inserted. The added matter will, of course, appear before the closing rectangular bracket in section 23(1)(a).

Sd. (H. R. Khanna)

Chairman

Sd. (P. M. Bakshi)

Member-Secretary

New Delhi, the 7th April, 1978

APPENDIX

LAW COMMISSION OF INDIA

QUESTIONNAIRE

ON

HINDU MARRIAGE ACT : DIVORCE ON THE GROUND
OF IRRETRIEVABLE BREAKDOWN OF MARRIAGE

Irretrievable breakdown of marriage is now considered, in the laws of a number of countries, a good ground of dissolving the marriage by granting a decree of divorce. The Delhi High Court, in a Full Bench decision in *Ram Kali v. Gopal Das*,¹ took note of the modern trend not to insist on the maintenance of a union which has utterly broken down, and observed :

"It would not be practical and realistic approach, indeed it would be unreasonable and inhuman, to compel the parties to keep up the facade of marriage even though the rift between them is complete and there are no prospects of their ever living together as husband and wife."

In the case of *Blunt v. Blunt*², Viscount Simon, L.C., while specifying the considerations which should prevail in matrimonial matters, observed :

"To these four considerations I would add a fifth of a more general character, which must indeed be regarded as of primary importance, viz., the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. It is noteworthy that in recent years this last consideration has operated to induce

¹ *Ram Kali v. Gopal Das* (1971) 1 L.R. 1 Delhi 10 (F.B.).

² *Blunt v. Blunt* (1943) 2 All E.R. 76, 78 (H.L.)

the Courts to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have been refused.”

The British Parliament since then has enacted the *Matrimonial Causes Act, 1973* (which replaces the *Divorce Reform Act, 1969*). According to section 1 of that Act, a petition for divorce may be presented on the ground that the marriage has broken down irretrievably. Sections 1, 2 and 3 of the aforesaid Act have been reproduced in an Annexure to this Questionnaire.¹

A distinguished jurist has suggested that irretrievable breakdown of marriage may also be made a ground of divorce by making the necessary amendment in the *Hindu Marriage Act, 1955*. The relevant provisions of the *Hindu Marriage Act* regarding divorce are contained in sections 13, 13A and 13B which are also reproduced in the Annexure to this Questionnaire.² It may be mentioned that section 13B provides for a decree of divorce by mutual consent.

A petition for divorce on the ground of irretrievable breakdown of marriage in a majority of cases would not make it necessary for the court to go into the question as to which party was at fault before granting a decree of divorce and it would be enough to prove that the relations between husband and wife have reached such a breaking point that there is no possibility of reconciliation. This would obviate the necessity of producing evidence of acrimony and other incidents during the married life, some of which the parties may not like to reveal.

Before taking any further action on the suggestion that irretrievable breakdown of marriage should be made a ground for divorce, it has been considered appropriate to invite views on the matter by issuing a brief Questionnaire. It is requested that if there be no objection, a considered reply may be sent to the undersigned within six weeks of the date of receipt of this Questionnaire.

Q. 1. Do you agree with the suggestion that the *Hindu Marriage Act* be amended with a view to making irretrievable breakdown of marriage as a good ground for grant of a decree of divorce?

¹ The Annexures to the Questionnaire have not been reproduced here.

² The Annexures to the Questionnaire are not reproduced here.

Q. 2. If the reply to the question No. 1 be in the affirmative, what circumstances, in your opinion, should be considered to be sufficient to prove irretrievable breakdown of marriage ?

Q. 3. How long should the parties have lived separately before the court can come to the conclusion that there has been an irretrievable breakdown of marriage ?

Q. 4. Should the presence of children operate as a bar to the grant of a decree of divorce on the ground of irretrievable breakdown of marriage ? If so, should the bar be absolute or partial ?

Q. 5. Are there any special circumstances in which, in your opinion, a decree for divorce should not be granted even if irretrievable breakdown of the marriage is established ? If so, please specify the circumstances.

