



MARRIAGE IN TRANSITION: LEGAL CHALLENGES SURROUNDING MARITAL RAPE, IRRETRIEVABLE BREAKDOWN OF MARRIAGE, AND LIVE-IN RELATIONSHIPS IN INDIA

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ABSTRACT

Marriage in India is a precarious meeting point between rigid socio-cultural conventions and a rights-oriented constitutional regime. The article studies three interconnected legal challenges that test the robustness of India's matrimonial laws—the enduring debate on criminalization of marital rape, the controversial effectiveness of the judicial interpretation of cohabitation and the notion of "irretrievable breakdown of marriage" as a basis for divorce. Each of these challenges in some manner or the other captures a basic disconnect between a progressive constitutional outlook and hesitant legislative response. The exemption from marital rape based on its historical context in Sir Matthew Hale's seventeenth century thesis of implied wife's consent has a deep hold on Indian legal architecture despite a fragmented Delhi High Court judgment of 2022 and immense constitutional pressure. The exception, this paper contends, is utterly incapable of standing constitutional scrutiny on the anvil of the Indian Constitution includes Articles 14, 19, and 21. With regard to the grounds of divorce, judicial recognition of 'irreversible collapse of marriage' through the use of Article 142 by the Supreme Court shows both judicial pragmatism and legislative inadequacy. Parliament has failed to provide clear grounds for the dissolution of such marriages. The use of 'irretrievable breakdown' needs to be codified as a distinct, gender neutral ground for divorce. Lastly, in matters of live-in relationships while recognition has improved since Khushboo and Velusamy, it still does not reflect adequate legal protection for women and children. Relying on constitutional law, comparative jurisdiction and legislative history, the article argues for comprehensive, rights-sensitive legislative reforms in all the three areas.

KEYWORDS : Marital Rape; Irretrievable Breakdown; Live-in Relationships; Matrimonial Law; Article 21; Domestic Violence Act; Bharatiya Nyaya Sanhita 2023(BNS)

I. INTRODUCTION

In relation to family law that the discord between the ideals promised by the Constitution and the realities of social existence is arguably at its starkest. Whereas the BNS 2023 which substituted the IPC 1860 continued to preserve the marital rape exception, cementing the notion that marriage inherently serves as a continuing consent to intercourse, the major statutes governing the personal laws of Hindus and those entering into interfaith or civil unions—the Hindu Marriage Act 1955, and Under the Special Marriage Act, 1954 in the absence of a decree for the dissolution of marriage which is irreparable continue to insist on proof of fault rather than the irreparable dissolution of the relationship; despite forty years of legislative attempts and a continuous recommendation by the Law Commission, there has been no separate and distinct ground for divorce based on irretrievable breakdown is acknowledged. While the judiciary has managed to uphold the validity of live-in relationships through key judgments, legislative recognition of these partnerships remains fragmented and underdeveloped. Collectively, these lacunae contribute to the pervasive inequality in the legal system; wives are unable to refuse sexual access to their husbands, partners in a marriage may be unable to divorce each other, however dysfunctional and undeniably broken, based on the requirement of proving a specific matrimonial fault, and those in live-in relationships continue to be guided by the benevolence of the judiciary rather than the stability of legislative codification. This article examines each of these areas in turn drawing upon constitutional provisions, judicial pronouncements and cross-border comparisons before making recommendations for reform.

II. The Marital Rape Exception: An Unconstitutional Anachronism

A. The Statutory Framework and Its Origins

The exception for rape in the erstwhile IPC, now carried over in BNS s. 63, states that nothing is rape when a husband, not less than eighteen years of age, has sexual intercourse with his wife, provided She is not yet 15 years old, etc. (which latter exception has been rightly struck down by this Court in Independent Thought). The intellectual lineage of this provision traces back to an obiter dictum by Sir Matthew Hale, whereby a wife, by virtue of the matrimonial bond, consents irrevocably to intercourse—a concept which was eventually repelled by practically every common law jurisdiction that once embraced it.

B. The Division Bench of the Delhi High Court and the constitutional argument

In *RIT Foundation v. Union of India*, the Division Bench of the Delhi High Court delivered a divided verdict on the constitutionality of the exception. Justice Rajiv Shakhder ruled it unconstitutional for violating Articles 14, 19(1)(a) and 21 since the exception discriminates against married women as it eradicates bodily autonomy within

marriage, and Justice C. Hari Shankar upheld the exception finding that Parliament has the legislative competence to classify rape within marriage as a different phenomenon to be treated as a family rather than criminal matter. The issue now awaits adjudication of the Supreme Court.

C. The Constitutional Case for Criminalization

The Justice Verma Committee on amendments to criminal law, formed in the wake of the Delhi gang-rape in 2012 unequivocally recommended removal of the exception for marital rape, which recommendation also gains credence from the superior court holding in *State of Maharashtra v. Madhukar Narayan Mardikar* said all female, irrespective of marital status, enjoys an inalienable right to sexual autonomy. The notion that criminalization would 'destabilise' the institution of marriage cannot withstand constitutional scrutiny under Article 21, because dignity is not a transient factor that dissipates at the threshold of matrimony. Additionally, several High Courts have, in the absence of a direct statutory offense, taken the view that marital rape constitutes an aggravating factor in cruelty proceedings against a husband; Judicial consciousness is clearly lagging behind legislative inaction.

Looking globally, the United Kingdom legislated against *R v R* [1991] 3 WLR 767, rape after marriage, South African Criminal Law (offenses against sex and associated matters) Amendment Act 32 of 2007: and all fifty American states have done away with marital rape exemptions by 1993. India continues to hold the anomalous position of being a solitary anomaly, which cannot hold water in the transformative constitutionalism which the Supreme Court has been successively endorsing.

III. Irretrievable Breakdown of Marriage: Between Judicial Pragmatism and Legislative Silence

A. The Current Fault-Based Regime

Indian matrimonial law remains fundamentally fault-based. Under the Divorce with mutual consent has been provided for by the Hindu Marriage Act, 1955 and Special Marriage Act, 1954 requires a mandatory waiting period and agreement between parties. Contested divorce demands proof of enumerated grounds adultery, cruelty, desertion, conversion, and so forth placing parties in adversarial postures even where both recognise the marriage to be beyond redemption. The Supreme Court case *Naveen Kohli v. Neelu Kohli* candidly compelling parties remain in a dead marriage causes 'greater misery' and earnestly appealed to Parliament For irreparable breakdown as a ground for divorce.

B. Judicial Invocation of Article 142

Even without a statutory ground, the apex court has increasingly taken recourse to its residuary the authority under Article 142 of established

principles which effect a dissolution of an irretrievably broken marriage. In *Samar Ghosh v Jaya Ghosh*, it was observed that persistent mental cruelty amounting to refusal of conjugal society for a long period or institution of divorce proceedings by one spouse could amount to proof of irretrievable breakdown. Recently in *Sivasankaran v Santhimeenal* it was held that Article 142 powers can be invoked in cases where spouses have lived apart for a long time and all attempts at reconciliation have been exhausted without fault. This is an aspect of judicial activism. However, this leads to a peculiar situation wherein recourse can be sought to Art 142 only by one who has access to the apex court and hence the denial of this right to others cannot be justified on any logic. Moreover, it makes the law so discretionary and fact dependent that *lex supremus* and fairness is seriously affected.

C. Argument for Legislative Reform

This void has been considered by the Law Commission as early as in 1978 (71st Report) and in 2009 (217th Report). The Law Commission also recommended codification of Irreconcilable differences considered a solid factor in breaking a marital status subjects certain safeguard provision. Marriage Laws (Amendment) Bill 2010 proposed introduction of the ground. This was passed in Rajya Sabha in 2013 and lapsed due to failure in the Lok Sabha. It is possible to counter the objection that the ground will lead to irresponsible husbands deserting their wives with mandatory provision for financial settlement, prolonged waiting period before unilateral petition could be made and also retaining the discretion with the court to refuse divorce where it would entail serious hardship on the respondent. These safeguards exist in England and Wales (Matrimonial Causes Act 1973) and Scotland (Family Law Act 2006) and serve as models to codify the law.

IV. Live-in relationships: judicial recognition and statutory vacuum

A. Scope of protection by the judiciary

The earliest and probably the most comprehensive statutory protection was obtainable for cohabitation due to PWDVA Act 2005 included definition domestic relationship and covers "living under the same roof whether or not Are linked by kinship or by a marriage ". Before PWDVA, it was largely on a sporadic basis although it was on rise. In *S. Khushboo v Kanniammal*, the SCI observed no offense in a relationship between two adults. The is kept inside the meaning of Individual Liberty in Article 21. Later through case *Lata Singh v State of Uttar Pradesh*. The Highest Court emphasized that "an adult woman has the right to decide to choose her partner, outside of marriage and live with him in a live-in relationship.

B. The requirements for it to be treated as associating through natural marriage

D. Velusamy v. D. Patchaiammal case, the biggest court of law set out specific conditions which a couple needs Would be required to demonstrate in order to be considered in 'a relationship in the nature of a marriage'. for the purposes of PWDVA. They include, the parties presenting themselves to the world as having recognised as couples, parties being adult to marry, parties being eligible in all respects to marry one another and parties residing the two of you spent an enormous amount of time together voluntarily. In *Indra Sarma v. V.K.V. Sarma* courts differentiated between relationships that were like a marriage, affairs where parties were already married and mere domestic arrangements, so as to know when to apply PWDVA. However, the presumptions regarding marriage from living maximum period laid down via *Chanmuniya v. Virendra Kumar Singh Kushwaha* case may also offer protection in matters relating to maintenance and children from a live-in relationship.

C. Statutory Lacuna and the Necessity of Reform

However, no comprehensive law relating cohabit association exists in Republic of India Due to ineffective statutory guidelines relating to property rights of the surviving partner on the death of the live-in partner; maintenance rights to the live-in partner upon separation; and the status of children of live-in partners results in a situation whereby live-in partners are given all the social incidents of marriage without having corresponding certainty under the law. The passage of a separate statute, drawing inspiration from the United Kingdom's Cohabitation Rights Bill or New Zealand's Property (Relationships) Act 1976, is long overdue.

V. CONCLUSION

This article has argued that there is a unifying principle underlying the three issues: matrimonial law is far behind the constitutional ideals of dignity, autonomy and equality that are foundational to the rights-based regime that began in 1950. The marital rape exemption has no

constitutional legitimacy and needs to be removed from the BNS; the omission of unrepairable wed lock as an additional ground for divorce further reason for separation has effect of keeping alive dead marriages and forcing parties to seek out extraordinary remedies in the courts; and the non-recognition of lived-in relationships through legislation gives rise to unnecessary complications and suffering. Reform in all three areas is both constitutionally mandated and implementable.

Criminalisation of marital rape will reinforce the marriage contract as an institution that promotes equal partnership, not one of superiority; incorporating statutory recognition of irretrievable breakdown, with sufficient protection for the poorer partner, will bring the divorce law into accord with real life; and the introduction of a specific statute to govern cohabitation will bring the constitutional principle of dignity within the purview of more and more Indians who organize their sexual relationships without formal matrimony. Parliament's failure to act on these issues reflects a deliberate choice to continue an inequitable situation, and it is that choice that the legislature, and not solely the courts, must repudiate.

CASE LAWS

- *Chanmuniya v. Virendra Kumar Singh Kushwaha*, (2011) 1 SCC 141.
- *D. Velusamy v. D. Patchaiammal*, (2010) 10 SCC 469.
- *Independent Thought v. Union of India*, (2017) 10 SCC 800.
- *Indra Sarma v. V.K.V. Sarma*, (2013) 15 SCC 755.
- *Lata Singh v. State of U.P.*, (2006) 5 SCC 475.
- *Naveen Kohli v. Neelu Kohli*, (2006) 4 SCC 558.
- *RIT Foundation v. Union of India*, W.P.(C) 284/2015 (Delhi High Court, 11 May 2022).
- *R v. R* [1992] 1 AC 599 (House of Lords, United Kingdom).
- *S. Khushboo v. Kanniammal*, (2010) 5 SCC 600.
- *Samar Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511.
- *Shayara Bano v. Union of India*, (2017) 9 SCC 1.
- *Sivasankaran v. Santhimeenal*, (2021) 14 SCC 414.
- *State of Maharashtra v. Madhukar Narayan Mardikar*, AIR 1991 SC 207.

Law Commission Reports

- Law Commission of India, 71st Report, 'The Hindu Marriage Act 1955 - Irretrievable Breakdown of Marriage as a Ground of Divorce' (1978).
- Law Commission of India, 217th Report, 'Irretrievable Breakdown of Marriage - Another Ground for Divorce' (2009).
- Justice J.S. Verma Committee Report on Amendments to Criminal Laws (January 2013).

ARTICLES AND BOOKS

Atri Bhattacharya, 'Marital Rape and the Indian Penal Code: A Critical Appraisal' (2021) 63 *Journal of the Indian Law Institute* 200.

REFERENCES

- Statutes and Legislative Materials
- *Bharatiya Nyaya Sanhita 2023*, s.63.
- *Hindu Marriage Act 1955*, ss.13, 13B.
- *Protection of Women from Domestic Violence Act 2005*, s.2(f).
- *Special Marriage Act 1954*, ss.27, 28.
- *Marriage Laws (Amendment) Bill 2010*.

FOOTNOTES

1. Exception to BNS s.63 (previously IPC s.375, Exception 2).
2. *Freedom of Thought vs. Union of India*, (2017) 10 SCC 800 (India).
3. *RIT Foundation v. Union of India*, W.P. (Delhi High Court, 11 May 2022) (India). 284/2015, slip op. (Delhi High Court, May 11, 2022) (India).
4. Justice J.S. Verma Commission, Report of the Committee on Amendments to Criminal Law 114 (2013).
5. *State of Maharashtra v. Madhukar Narayan Mardikar*, A.I.R. 1991, S.C. 207 (India).
6. *Dilip Pandey v. State of Chhattisgarh*, CRR 571/2021; *Nimeshbhai Bharatbhai Desai v. State of Gujarat*, (2018) 3 GLR 2017.
7. *Protection of Women from Domestic Violence Act 2005*; BNS ss. 85-86 (domestic cruelty).
8. *Hindu Marriage Act of 1955 Section 13B*; *Special Marriage Act of 1954 Section 28* on mutual consent divorce.
9. *Ibid.*, para 89; see also *Sandhya Rani v. Kalyanram Narayan*, AIR 1994 SC 1176; *Naveen Kohli v. Neelu Kohli*, (2006) 4 SCC 558.
10. *Jaya Ghosh v. Samar Ghosh*, 4 SCC 511 (2007).
11. *Santhimeenal v. Sivasankaran*, 14 SCC 414, para 43 (2021).
12. *Law Commission of India*, 71st Report (1978); "Irretrievable Breakdown of Marriage - Another Ground for Divorce," 217th Report (2009).
13. *Marriage Laws (Amendment) Bill 2010* (passed Rajya Sabha 2013; Lok Sabha expired).
14. Section 2(f) of the *Protection of Women from Domestic Violence Act of 2005*.
15. *S. Khushboo v. Kanniammal*, 5 SCC 600, para. 31 (2010).
16. *State of U.P. v. Lata Singh*, 5 SCC 475 (2006).
17. *D. Velusamy v. D. Patchaiammal*, 10 SCC 469, para. 33 (2010).
18. *V.K.V. Sarma v. Indra Sarma*, 15 SCC 755 (2013).
19. *Virendra Kumar Singh Kushwaha v. Chanmuniya*, 1 SCC 141 (2011).