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Incompatibility as a Ground for Divorce: An Aspiration or Reality

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ABSTRACT

It is said that marriages are made in heaven, but in reality, it requires two human beings to build it together. Alas, there is no heavenly hand to save or construct the same, but it boils down to two mortals. The historical reasons for making marriage an infallible institution has undergone a sea change since post-independence. The growth of strong individualism, gender equality and woman empowerment make it now necessary to revisit the grounds on which separation can be awarded. The law, in its inception, tried to control the institution with almost restrictive choices to the individual spouses, but the concept of Incompatibility now would empower a mature spouse to take a decision of his or her choice when it becomes 'incompatible'. What is incompatible can easily be enshrined by law or recognized by judicial principles so that one spouse does not exploit this freedom.

I. MAIN CONTENT

"The ceremony took six minutes. The marriage lasted about the same amount of time, though we didn't get a divorce for almost a year", said the meritorious American-Austrian actress Hedy Lamarr, highlighting the gaps in the legal system. A close reading of this quote establishes the narrative of this essay. Marriage as a concept has been seen as a sacred institution across the globe, and thus, society has the constant need to protect the sanctity of this institution. However, the disappointing part is that society often overlooks the pain, unhappiness and suffering of the individuals and puts this sham of 'togetherness' above all. The main reason for this is the religious sentiments attached to this

institution, and these religious texts call upon marriage to be the ultimate home for a man and woman, which provides unconditional happiness.

*"Marriage is a social institution is an affirmation of civilized social order where two individuals, capable of entering into wedlock, have pledged themselves to the institutional norms and values and promised to each other a cemented bond to sustain and maintain the marital obligation."*²

However, more often than not, there is a complete violation of this pledge by either one of the spouses or both, and this violation elucidates a craving for freedom from the institutional and individual bond.

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² (2014) 7 SCC 640

Hindu texts have on multiple occasions given extreme weightage to the idea of marriage. For example, the Vedas describe an ideal marriage as one that “*is that of perfect monogamy and the life-long companionship of two people.*”³ The Bhagavad Gita’s famous saying “*bhaaryaa daivakrita sakha*”,⁴ which means “*a man’s God-given friend is his wife*”, to does the same. The Quran, too, has a separate section that talks about promoting marriage as a means to discourage immorality and states that “*God will enrich them from His grace*”. It also talks about divorce and highlights the fact that nothing but “*blatant misconduct*”⁵ on the part of the wife will be accepted as a reason for divorce. Most religious texts such as these make use of terms like ‘god’, ‘life-long’, ‘sacred’, etc., to give this institution of marriage an immortal status, which must remain untouched by individualistic mortal feelings.

Divorce can be defined as the legal separation of man and wife, effected, for cause, by the judgement of a court, and totally dissolving the marriage relation.⁶ The dissolution is termed “*divorce from the bond of matrimony*”. There are a plethora of acts that govern divorce laws in India and provide relief to estranged couples in troubled marriages. These acts include The Hindu Marriage Act, 1955; The Dissolution of Muslim Marriage Act, 1939; The Divorce Act, 1869; The Special Marriage Act, 1854; etc. These acts formally recognize the separation of two people in a marriage and lay down various

grounds for divorce. The grounds listed in these acts are not only restrictive in number but also in thought. The courts have been following the same archaic grounds for generations and failed to incorporate the growing complexity of modern society. The courts have more often than not shown utter disdain towards intangible issues in marriage by connoting them as trivial and piffling.

In the case of *Gurbux Singh v Harminder Kaur*⁷, the Court rejected the divorce petition on the ground that the plaint contained “*trivial irritations, quarrels, normal wear and tear of married life*”. The Petitioner alleged that the Respondent had misbehaved by calling “*nuisance, idiot and mental to the parents of the petitioner and the respondent openly said that she did not want to live with the petitioner if he lives with his old parents.*” Further the Petitioner claimed that the Respondent did not have any love and affections towards Petitioner and his family members. There were also allegations about beating her child and not feeding him. Labelling these aforesaid matters as trivial is belittling the vehemence and dignity of the Petitioner. Contrary to what is said in this case, the Court in the case of *Dr. (Mrs.) Malathi Ravi, M.D. Versus Dr B.V. Ravi, M.D.*⁸ in their submissions stated that “*total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.*” The Court highlights the fact that the

³ The Call of the Vedas, page 259, Bharatiya Vidya Bhavan, 1970

⁴ The Bhagavad Gita

⁵ The Qur’an, 24:32

⁶ *Atherton v Atherton*, 181 U.S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794

⁷ (2010) 14 SCC 301

⁸ (2014) 7 SCC 640

appellant is not interested in pursuing the marriage due to the Respondent's misbehaviour and wants a divorce by any means. By not granting a divorce, the Court has pushed the couple into loveless and cold wedlock at the cost mental and physical well-being of the family. Further, the Court justifies its decision by saying, "*except the grounds enumerated in Section 13, a Hindu Marriage solemnized under the Act cannot be dissolved on any other grounds.*" which buttresses the restrictive and conservative attitude of the courts on the matters of divorce.

Divorces usually carry the widespread narrative of being messy and involving vile and nightmarish fights. However, contrary to this belief, many troublesome marriages stem out of ordinary problems such as Incompatibility or irreconcilable differences, and there is no specific reason, like adultery, for the breakdown of the relationship. Incompatibility though being a subjective term has been defined by Webster's New International Dictionary as a "*Quality or state of being incompatible; inconsistency; incapable of harmonious combination; incongruous; as incompatible colours; incapable of harmonious association or acting in accord; disagreeing as incompatible persons.*"⁹ While the Pope's Legal Definitions to reads, "*Incompatibility. The elements and qualities which create Incompatibility between persons elude exact definition; so varied are the circumstances and so dependent is such a state of feeling upon education, habits of thought and peculiarities of character.*" This term

'incompatibility' as a ground for divorce is believed to have its origin in the recent past, with more importance being given to individualism and women's rights. It is essential to understand that the fact that even one of the spouses wishes to get out of the marriage is enough evidence to prove permanent damage has been done. Living in a marriage that has no love or affection would make the marriage a fiction that is merely supported by a legal tie. Lord Keith in R v. R¹⁰ declared, "*marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband.*" The quote 'partnership of equals' is what is essential here to understand that both the spouses hold equal rights, and neither of them should be trapped in this falsehood where there is a blatant disrespect of the idea of 'togetherness'.

Incompatibility is a subjective term as each marriage has a different journey. The most common meaning would be the possibility of the couple growing apart through the years and discovering that their personalities or beliefs are no longer the same. However, there are two facets to Incompatibility, one which is evident on the face of it and recognized by the courts, and the other which is veiled and belittled as tempestuous emotions. Incompatibility as something more tangible would include problems like infidelity, intimacy issues, strained finances, desertion, mental or physical disorders and conversion of religion. It is essential to note that no two people are the same. Every single

⁹ Neilson, W. A. (1953). Webster's new international dictionary. Springfield, MA: G. & C. Merriam.

¹⁰ (1991) UKHL 12

person has different emotional and physical wants and needs, not to mention personality types, concluding that all couples might have slight incompatibilities. With the growth of complex relationships, the willingness to remain in a state of continual compromise has reduced, thus leading to couples wanting separation. A recent survey revealed that emotional Incompatibility had been ranked the topmost reason as to why young Indians want to get separated. While it can be argued that a large percentage of this lot might have frivolous issues, it must also be noted the rest of them with serious incompatibilities have no remedy at their disposal.

To understand the importance of Incompatibility as a ground for divorce, one must look into the history of this ground and the rationale that other countries have provided to justify this. One of the earliest places to accept Incompatibility as a ground for divorce was Denmark in the 18th century. Divorce became more frequent in Denmark and was given on new grounds, among which was 'irremediable disharmony in the common life.' The virgin islands, prior to the acquisition by the United States, followed the Danish Law and had Incompatibility of temperament as a ground for divorce. After the acquisition of the Virgin Islands, more states in the American jurisdiction started realizing the importance of this ground and how it stands for individual choice. The rationale here must not be misunderstood for the idea of a spouse walking in and out of the

marriage at his/her convenience because that would show scant regard for the feelings of the other party and would be highly problematic. *Burch v Burch*¹¹, 1952 was a landmark case in the United States, where the Court set aside the idea that Incompatibility must necessarily involve both parties, i.e. "If there is a clash of personalities, both must clash." The Court took the position that even though one of the spouses may be largely responsible for the acts creating the Incompatibility in the other, nevertheless it is inconceivable that one partner's temperament can be compatible with the other if the other is incompatible with him or her.¹² After years of reviewing, many countries in the world now accept No-fault divorce and have legalized this.

The increase in awareness about life and rights and independence amongst Indian women are all contributing to marriages failing. It is important to note that many women today are in a position to support themselves financially, therefore not depending on their husbands. In such situations, not granting divorce to a woman who wants out just because her husband has not tangibly hurt her would be unfair.

The Indian judicial system and Legislature have often shown slight hints about the intention to permit courts to grant divorces on grounds closely resembling Incompatibility as we recognize it today. The most obvious example would be the presence of Mutual Consent divorce in almost all of the acts that govern Divorce laws in India. The Union cabinet, too, through The Marriage Laws (Amendment) Bill 2010,

¹¹ 195 F.2d 799 (3d Cir. 1952)

¹² Graham Kirkpatrick (1964) Incompatibility as a

Ground for Divorce. Volume 47, Marquette law review.

amended two acts governing marriage - the Hindu Marriage Act 1955 and the Special Marriage Act 1954 and made it easier for couples to obtain a swift divorce in situations of "irretrievable breakdown of marriage". While this could be seen as a great relief for many couples, the courts still behave in a very stingy manner, making this separation process lengthier and more bothersome—the Hon'ble Supreme Court in the case of *Visnu Dutt Sharma Vs. Manju Sharma*¹³ held that on a bare reading of section 13 of the Hindu Marriage Act, it is clear that no such ground of irretrievable breakdown of marriage is provided by the Legislature for granting a decree of divorce. The Court cannot add such a ground to section 13 of the Act as that would be amending the Act, which is a function of the Legislature.¹⁴

In the case of *Hitesh Bhatnagar v Deepa Bhatnagar*¹⁵ the Court stated the following, “*from the language of the Section, as well as the settled law, it is clear that one of the parties may withdraw their consent at any time before the passing of the decree. The most important requirement for a grant of a divorce by mutual consent is free consent of both the parties.*” In other words, unless there is a complete agreement between husband and wife for the dissolution of the marriage and unless the Court is completely satisfied, it cannot grant a decree for divorce by mutual consent. What is problematic here is the fact that any one of the

spouses can withdraw the petition at their whim and fancy without even consulting the other party, leaving them in a choiceless state. The inclusion of emotional/mental cruelty as a ground for divorce was a much needed and very important clause. In *A . Jayachandra vs Aneel Kaur*,¹⁶ the Court observed cruelty need not be physical. If from the conduct of the spouse, same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse about his or her mental welfare, then this conduct of cruelty”. The Supreme Court in *Praveen Mehta v. Inderjit Mehta*¹⁷ held that there is no exact way to establish mental cruelty by direct evidence, but only a matter of interpretation to be observed from the facts and circumstances of the case. Therefore, giving the courts extreme amounts of discretion in these matters only leads to the courts putting more limitations on this ground. An important observation made by the Court in the case of *A. Jayachandra v. Aneel Kaur*¹⁸ was that “*for it to constitute cruelty, the conduct complained of should be **grave and weighty***”. The courts in India have constantly contradicted themselves in this matter, for example, while we have a decision like *Gurbux Singh v Harminder Kaur*, there are also decisions like *Narendra vs K. Meena*¹⁹, wherein the Supreme Court has held that “*if the wife forces and exerts pressure on the husband to live separate from his old aged parents or from the joint family without any*

¹³ (2009) 6 SCC 379

¹⁴ Justice N. Santosh Kumar. Divorce under fault and no fault, Paper presentation before the District Level Workshop for Judicial Officers.

¹⁵ (2011) 5 SCC 234

¹⁶ (2005) 2 SCC 22,

¹⁷ I (2001) DMC 361

¹⁸ (2005) 2 SCC 22.

¹⁹ (2016) 9 SCC 455

reasonable excuse/ground, the same would amount to cruelty”.

Lord Denning, L.J. in *Kaslefsky v. Kaslefsky*²⁰, *"If the door of cruelty were opened too wide, we should soon find ourselves granting divorce for Incompatibility of temperament. This is an easy path to tread, especially in undefended cases. The temptation must be resisted lest we slip into a state of affairs where the institution of marriage itself is imperilled."* One of the main reasons for the absence of such kind of law would be the threat it would pose to the permanency of marriage as an institution. This is why more often than not, judges consider most of the no-fault problems as petty quarrels and minor bickering. Reflecting back to the very first line of this essay, where Hedy Lamarr highlighted the discrepancies in the legal system with regard to divorces, ironically, she was referring to her sixth divorce. The courts are inherently afraid of this very situation as marriages are the primary units of society, which, if shaken, would leave the society in shambles. This school of thought is what leads to the taboo that surrounds the topic of divorce in society. A more liberalized approach of the judiciary would lead to the relaxation of certain procedural and customary rules like taboos around divorce. In the recent judgments given out by the Supreme Court, the judges extensively talk about constitutional morality and social morality. It was felt that the realization of the constitutional vision requires the existence of a commitment to that vision. This commitment can be seen as the presence of

constitutional morality among the members of society.²¹ In India, a truly progressive society can only be achieved when Social morality and Constitutional morality become synonymous.

In countries like India, where systems like misogyny and patriarchy are so entrenched, it has become essential for the legal system to step up and protect the women of the nation. Women in India, mostly in the social sphere, have always had to live a very restrictive life, which only translated into a loss of freedom and low participation in paid work. This means that women have to look back at their matrimonial homes for financial support and have no other path to pick, making them helpless. If Incompatibility becomes a ground, it will give men the power to walk out of the marriage with an easy ticket. The courts then become very alert and try to prevent any kind of misuse of any law. The inclusion of Incompatibility as a ground for divorce would only make this job more arduous.

The Court's approach towards overly protecting this institution of marriage does more harm than good. Their intention to protect the family and children, if looked at holistically, would fail as the courts themselves fail to understand that a 'life together' does not always mean a 'happy life.' Depression in India is at an all-time high, and a large contributor to these numbers are married persons who do not have supportive spouses. The so-called 'petty quarrels' at home are only amplifying this situation, pushing the person in question to the edge. 'Marriage is known to be a protective measure globally. But

²⁰ (1950) 2 AII ER 398.

²¹ Babasaheb.R. Ambedkar, *Annihilation of Caste*, Navayana Publishing (2014);

in India and other such low-income countries, marriage isn't a protective measure. It acts as an aggravating factor. Inability to adjust to a new environment and solve interpersonal issues plays a major role in pushing under-30 women to commit suicide.'; 'Twice the number of married women committing suicide in India versus the rest of the world is indicative of how much stress a married woman faces in India, especially when it comes to balancing a career and attempting to fulfil a traditional domestic role.'²² If the woman in this situation does not find her spouse to be supportive and wants out of the marriage, what remedy must she seek? The problem lies here. The courts might not even consider this problem as a tangible one. As a result of this, the woman is just trapped in the unhappy cycle of her daily life.

Though marriage is an important institution in society, by overburdening it, we are threatening its very existence. Forcing a spouse to live in an unhappy marriage is going to do no good. There already exist laws to protect the more vulnerable spouses, like providing maintenance and alimony. Hence, these spouses rather live alone with dignity than live in a marriage full of despising and resentment. Thus, in my view, taking into consideration the compatibility between couples while granting a divorce is cardinal for the well-being of themselves and the people around them.

²² Team, T., Here, P., -, S., -, M., & -, S. (2018). Suicides high among married women: Crisis in Indian marriages or mental health stigma? <https://theprint.in/talk-point/suicides-high-among->

[married-women-crisis-in-indian-marriages-or-mental-health-stigma/117338/](https://theprint.in/talk-point/suicides-high-among-married-women-crisis-in-indian-marriages-or-mental-health-stigma/117338/)