
IRRETRIEVABLE BREAKDOWN OF MARRIAGE AS GROUND OF DIVORCE UNDER HINDU LAW: JUDICIAL ANALYSIS

Kanu Priya, GD Goenka University

ABSTRACT

Hindu law has been gradually nurturing and evolving after independence. Modernisation has affected the concept of marriages just like all the other aspects of life. Now instead of the relation between two families; it has become relation between two individuals. With this advancement divorce rates are also increasing especially among Hindus. According to data of 2017 among divorced Indian woman 68% are Hindu¹. Many new kinds of facts and grounds of divorce come before the judiciary. With the same old grounds of divorce; judicial activism has played a key role to solve these issues and evolution in grounds of divorce. The more individualistic approach in living has made divorce acceptable in society. We have come to a stage where instead of living in a relationship which can no more work parties opt for divorce. In such a scenario some time law act as a hindrance when even after living separately; one party refuses to divorce out of revenge or many reasons and other is unable to prove any fault. So the object of the research is to highlight the need of irretrievable breakdown as a ground of divorce under Hindu law under and suggest certain circumstances under which the marriage can be treated as broken down beyond repair and the role played by the judiciary, in progressive development of irretrievable breakdown of marriage as ground of divorce.

KEYWORDS: Divorce, Hindu law, irretrievable breakdown, Marriage

¹ <https://data.gov.in/keywords/divorced>

RESEARCH QUESTIONS

- Should a specific provision be introduced in HMA 1955 making IBM as a ground of divorce?
- What role judiciary has played to bring an irretrievable breakdown of marriage as a ground of divorce?
- What circumstances should be considered to be sufficient to prove irretrievable breakdown of marriage?

RESEARCH OBJECTIVE

The main object of study is to analyse the position of irretrievable breakdown of marriage as a ground of divorce and to:-

- To study and analyse the judicial approach and recent developments relating to Irretrievable breakdown of marriage.
- to highlight some of the essentials that should be kept in mind while granting divorce under this grounds and circumstances that can be treated as breakdown of marriage.

INTRODUCTION

This concept of irretrievable breakdown of marriage was introduced in New Zealand for the first time. The law was recognized to cater the requirement, where there was no fault or other reason for a spouse to want to opt-out of a marriage, the only reason was that the marriage is that it is a failed marriage.² Similarly, in 1969 a case was considered by the court in England where both the parties to the marriage had committed infidelity. Subsequently the court on the spouse's request observed breakdown of marriage and allowed a divorce. This case opened the gate for the theory in England. The court of appeal in that case has held that "Today we are perhaps faced with a new situation as regards the way to be attached to one particular factor i.e. the Breakdown of Marriage"³.

Marriage in India, especially, under Hindu law was considered a *sanskar* (sacrament), a pious obligation and, therefore, indissoluble⁴. The separation was obscure to the *shastric* law and the

² Masarati v. Masarati, 1969 1 WLR 393 CA.

³ Kapadia K. M. Changing Patterns of Hindu Marriage and Family. Sociological Bulletin, 4(2). Retrieved from <https://www.jstor.org/stable/42864506>.

⁴ Mayne, Hindu Law 101 (11th ed. 1953).

Hindu society for around 2,000 years⁵. But the ancient Hindu jurists were farsighted and reasonable enough to realise that high ideals of morality and concept of mutual fidelity, howsoever desirable they might be, would not be possible for one and all. Consequently, the law was based on a two-tier system, one for the intellectual or cultural elite and the other for the people who were not that sensitive or were ill-informed⁶. Accordingly, customary Hindu law approved the divorce which was applicable on non-caste Hindus⁷. Absence of divorce was the general rule and acceptance of it was due to custom and exception. But gradually with the impact of western culture and invasions in our country, some legislations were introduced in certain individual states. But this too did not mean that divorce was accepted by the Hindu law, as these instances were only exceptions. It is only in the year 1955 that divorce was introduced as a matrimonial remedy in the Hindu law. But, still, neither the earlier statutes nor the 1955 Act contemplated unconditional divorce.⁸ The divorce was granted on certain grounds provided by the act. The Hindu Marriage Act of 1955 permits divorce on grounds of adultery, conversion to another religion, incurable insanity for three years, virulent and incurable leprosy, virulent venereal disease, renunciation, unheard of for seven years and in case where decree for restitution of the conjugal rights or judicial separation is passed for over one year and there is no eruption of cohabitation between parties⁹. While interpreting the provisions of the 1955 Act, the Courts have alternatively relied upon 'fault' and 'breakdown' theory¹⁰. There are instances such as in case of *In P.L. Siyal v. Sarla Rani*,¹¹ the Court observed that regardless of whether the spouse directed a 'love portion' provoked by the good objective to bring harmony. But, the husband could have refused it. The court was concerned about the idea that it even discarded to analyse whether the utilization of such mixture might cause the evil wellbeing complained of by the applicant spouse and granted a divorce because such things had a place with the uneducated area of society which trusts in enchantments. Similarly in *Trimbak Narain Bhagwat v. Kumudini Bhagwat*,¹² it was held that the conduct of an insane person if it was cruel otherwise, shall not cease to be so due to the want of intention alone. In these cases court looking at the breakdown of marriage awarded a divorce. In the recent case of *Aamardeep*

⁵ Ibid.

⁶ Mulla, Hindu law Law 659 (13th ed. 1966).

⁷ Banerjee, Marriage and Stridhana 207 (5th edition).

⁸ Agarwala R.K (2020). Changing basis of divorce and Hindu law, Indian law institute. Retrieved from <https://www.jstor.org/stable/43950149>.

⁹ Hindu Marriage Act, s. 13, as amended by the Hindu Marriage (Amendment) Act of 1964.

¹⁰ Agarwala R.K (2020). Changing basis of divorce and Hindu law, Indian law institute. Retrieved from <https://www.jstor.org/stable/43950149>.

¹¹ A.I.R. 1961 Punj. 125.

¹² A.I.R. 1967 Bom. 80.

Singh vs Harveen Kaur,¹³ the Supreme Court held that the cooling period of 6 months in divorce with mutual consent is not mandatory. But then there is another approach in cases of desertion where intention becomes very basis of the divorce and if not proved divorce is not granted.

It is apparent that despite the silence of the statutory law, break down theory finds a place in Hindu law of divorce. Consequently, separation occasionally becomes the basis of dissolution, even if there is no intention on the part of the legislature. Though the practice is not universal the Indian courts are gradually moving in a direction admits the breakdown theory¹⁴. Not only break down theory but many other new grounds are developed by the judiciary. In a landmark case¹⁵ Punjab and Haryana high court held that act of sodomy, forcible sex or adoption of unnatural means forcibly on other spouse is a ground of divorce. Not only divorce grounds but the procedure is also modernised as per change in the society. One such change that is required is irretrievable breakdown as a ground of divorce because we have come to a stage where instead of living in a relationship which can no more work, parties intend to go for divorce. In such a scenario sometimes law act as a hindrance when even after living separately one party refuses to divorce out of revenge or many other reasons and the other party is unable to prove any fault.

BREAKDOWN THEORY UNDER HINDU LAW

Codified Hindu law did not recognise irretrievable breakdown of marriage as ground of divorce. The debate in India as to, introduction of irretrievable breakdown of marriage as a ground of divorce is indeed an old one but the 71st law commission of India report has been considered as the first major step to propagate that concept of Breakdown theory should be introduced in Hindu law¹⁶. The report, "The Hindu Marriage Act, 1955 irretrievable breakdown of marriage as a ground of divorce" registered that theoretical basis for introducing breakdown theory as a ground of divorce is that this is a ground with which by now, lawyers and others have become familiar and can come up with circumstance which clearly shows that the marriage is broken permanently¹⁷.

¹³ 2017 8 SCC 746

¹⁴ *Jaya V.S.* irretrievable breakdown of marriage as an additional ground for divorce. Indian Law Institute. Retrieved from <https://www.jstor.org/stable/43952052>.

¹⁵ *Preeti Kumari v. Neelkanth Kumar*, 2018 SCC P&H 491.

¹⁶ *Ashu Dhiman*. Irretrievable Breakdown Theory of Divorce under Hindu Law: An Evaluation, *Law Mayantra* 5(6). Retrieved from journals.lawmayanta.co.in.

¹⁷ *Kumar V* (2010). Irretrievable Breakdown of Marriage: Rights of a married couple, 5(1), 17, *NALSAR Law Review*.

It emphasized that limiting separation grounds dependent only on faults shall cause injustice to those couples who are stuck in a circumstance when neither one of the parties have any fault with the marriage having become merely an outer appearance without any efficacy¹⁸. It also referred to a situation where there is no emotional bonding left between the couple. While discussing about the need of irretrievable breakdown of marriage as a ground of divorce the 71st report of law commission explains that, “A *petition of divorce on the ground of Irretrievable Breakdown of Marriage as visualized 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 at 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.*”¹⁹

The 71st report of Law Commission also argue that "Human life has a short span and situation causing misery cannot be allowed to continue indefinitely.”²⁰ The report deals with the important question concerning the Hindu Marriage Act, 1955, which is, whether Irretrievable Breakdown of Marriage can be made a ground of Divorce under the Act or not and if so to what extent and subject to what conditions and circumstances?

Law commission of India also suggested certain circumstances from which it can be presumed de facto that a marriage has been broken down irretrievably. Those situations are as under²¹:

1. Agreement of separation between the parties.
2. Non-cohabitation shall be considered as an adequate certainty to prove irretrievable breakdown of marriage.
3. Separation for over 5 years should be sufficient evidence.
4. When the parties are living separately from young age and does not want to reconcile or live together, this situation shall be considered as sufficient proof.
5. No petition for restitution of conjugal rights has been filed from either side after a continuous separation arising out of the dispute or argument, it shall be a conducive ground of irretrievable breakdown of marriage.

¹⁸ *Ibid.*

¹⁹ The Hindu Marriage Act, 1955, Irretrievable Breakdown of marriage as a ground of divorce, Law Commission of India, 71st Report 1978.

²⁰ Kusum, Irretrievable Breakdown of Marriage: A Ground for Divorce. JILI 20(2). Retrieved from <https://www.jstor.org/stable/43950531>.

²¹ *Ibid* 28.

6. Continuous separation for the period over one year along with instances of misconduct, mental or physical cruelty, from either party. Discovering adultery or pre-marital illicit relationship which has rendered their living together impossible.
7. If no attempt for settling the dispute relating to which the case is pending for judicial separation or restitution of conjugal rights or Divorce has been made over three years by either party.
8. In some of the cases, the mere submission of either party that he or she cannot live together with other should be enough to consider that marriage is irretrievably broken.

Irretrievable Breakdown of Marriage under the Hindu Marriage Act, 1955

The divorce under Hindu Marriage Act, 1955 was based on fault theory, it could only be granted if one of the spouse was guilty of any matrimonial offences provided in the act and the other was innocent²². In, 1964, the Hindu Marriage Amendment Act was passed, and a form of breakdown theory was introduced under Hindu Law. It was introduced by amending the last two clauses of section 13 (1), which were; Clauses (viii) and (ix)²³. These clauses, provided that if after, the passing of the decree of judicial separation or restitution of conjugal rights by the Court, the cohabitation between parties did not resume, within or after two years; then a divorce can be granted on this basis. These clauses were again amended, and a new section was inserted as clause sec 13 (1A)²⁴. Further, to ease the situation as per the requirement of time and society, in the year 1976 the period of two years as provided by the act was reduced to one year, and the new Sec 13(1A) as added which reads as:

“Either party to marriage whether solemnized before or after the commencement of this Act may also present a petition for the dissolution of marriage by a decree of divorce on the ground –that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upward after the passing of a decree for judicial separation in a proceeding to which they were parties; or that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upward after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties²⁵”.

217th Report of Law Commission on Irretrievable Breakdown of Marriage-

²² Paras Diwan, MODERN HINDU LAW, Allahabad Law Agency, Faridabad (Haryana), 18th edn. 2007, p73.

²³ *Ibid.*

²⁴ The Hindu Marriage Act, 1955, Irretrievable Breakdown of marriage as a ground of divorce, Law Commission of India, 71st Report 1978.

²⁵ Section 13 (1A,) The Hindu Marriage Act, 1955 (Act 25 of 1955).

Irretrievable breakdown theory as ground for divorce was once again taken up by the 217th report of Law Commission of India ²⁶, which suggested that it shall be inserted under Hindu Marriage Act, 1955. The report proposed that it is the need of hour and in interest of public policy that the marriages which are broken down irretrievably or if they seem to be beyond repair the court shall dissolve such marriage based on ground of Irretrievable Breakdown of marriage.

The major question which arises whenever it is suggested to add the irretrievable breakdown of marriage as a ground of divorce under Hindu Law is that there is already “divorce by mutual consent” which covers the situation well then why do we need to add one more ground. But there is a major difference between the two grounds which is ignored, which is, in divorce by mutual consent, the consent of both the parties is required. And if one of the parties denies the consent, then divorce cannot be granted on the ground of mutual consent²⁷. On the other hand, the irretrievable breakdown of marriage, is a ground on which the court can rely on the facts of the case and if it concludes that, the marriage in question is beyond repair or is broken down beyond repair, the court can dissolve the marriage. It means that divorce under this ground would not be granted on the will of the parties but will be granted based on the facts pleaded, that the marriage has been irretrievably broken down. Therefore, the major difference between both the grounds is of consent of parties.

The Supreme Court invoked its inherent powers provided under article 142 to do ‘complete justice’, and granted a decree of divorce to a judge of district court, West Bengal²⁸. He was married to a District Judge both of them were living separately for the past 17 years. The Supreme Court pointed out that, “There is no likelihood of the appellant and the respondent; living together and for all practical purposes there is irretrievable breakdown of marriage”²⁹.

There are various instances where the Supreme Court had to intervene and it has provided divorce on the ground of irretrievable breakdown of marriage using its inherent powers. But, this ground is not made as a ground of divorce as such under Hindu law; by Supreme Court which is the reason that no lower court can grant divorce solely on this ground because it is the

²⁶ 217th law commission report March 2009.

²⁷ Jaya V.S. irretrievable breakdown of marriage as an additional ground for divorce. Indian Law Institute. Retrieved from <https://www.jstor.org/stable/43952052>.

²⁸ Ibid.

²⁹ Samar Ghosh v Jaya Ghosh,(2007) 4 SCC 511.

duty of the parliament. The Supreme Court in various judgements have urged the parliament to add it as a ground of divorce³⁰.

Therefore, to address this problem this should be made a ground of divorce looking at the current scenario. As suggested by the Supreme Court in its various judgements and Law Commission in its various reports.

JUDICIAL ANALYSIS

The divorce law which is, based mainly on the guilt theory or fault ground is not adequate to deal with a broken marriage in today's society. As per fault theory, guilt of either party has to be proved; concrete instances of human behaviour are to be presented before Courts to prove that the institution of marriage is at disrepute³¹. But if fault is not proved no divorce is granted. It is one of the biggest lacuna because this not cover cases where marriage is broken down irreparably. Because if the marriage has broken down beyond repair, it would be unfair and unreasonable for the law not to consider this fact, and it would be against public interest and injurious to the interest of the parties. Public interest demands that married status should be maintained as long as possible, but where a marriage has been broken beyond any hope of reconciliation, the actual public interest lies in the recognition of this fact and end the marriage by granting divorce. Since there is no acceptable way in which one spouse can be compelled to resume life with the consort, there is no gain in keeping the parties tied in marriage which practically doesn't exist³².

Human life has a short span and situations which cause misery and problems should not be allowed to continue indefinitely. It needs to be stopped at some stage. Law cannot deliberately ignore such circumstances, nor can it deny adequate justice to the necessities emerging therefrom³³. The Supreme Court in *Naveen Kohli vs. Neelu Kohli*³⁴ recommended the union government to seriously consider this issue and bring an amendment in the Hindu Marriage Act, 1955 to include irretrievable breakdown of marriage as a ground for divorce.

The irretrievable breakdown of marriage is not a ground for divorce under Hindu law in its true sense. But while examining the evidence on record to determine whether the divorce is to be

³⁰ Naveen kohli v. neelu kohli (2006) 4 S.C.C. 558

³¹ 71st Report of the Law Commission of India.

³² Suchita Saigal and Uttara Gharpure (2006) Naveen Kohli v. Neelu Kohli, (2006) 4 S.C.C. 558, Student Bar Review, 18(2), 113-124. Retrieved from <https://www.jstor.org/stable/44306659>.

³³ Mayne's Treatise on Hindu Law & Usage (16th Ed.) Revised by Justice Ranganath Misra (New Delhi: Bharat Law House, 2008), page 292.

³⁴ AIR 2006 SC 1675.

granted on the ground sought, the judiciary comes across various circumstances which proves that marriage is broken down beyond repair but cannot grant divorce on this reasoning because it is not ground of divorce. Therefore, the Supreme Court on various occasions have to use its inherent power under Article 142 and granted divorce on the ground of irretrievable breakdown of marriage. But, this inherent power only lies with the Supreme Court and no other Court can grant a divorce on this ground.

In the case of *Geeta Mullick v. Brojo Gopal Mullick*³⁵ the Calcutta High Court held that:

“In our considered opinion, the marriage between the parties cannot be dissolved by any court only on the ground irretrievable breakdown of marriage, in the absence of any ground as provided under section 13(1) of the Hindu Marriage Act, 1955. This concept of irretrievable breakdown of marriage cannot be used as a magic formula to obtaining a decree for divorce where the grounds for divorce are not proved. It is evident that irretrievable breakdown of marriage is not a ground of divorce and divorce cannot be sought on solely on its basis”.

Similarly in *Minni Appa Kanda v. M. Indra*³⁶, where both the parties were living separately for 12 years and were not ready to resume cohabitation, could not grant a divorce because the ground of cruelty was not proved. The Delhi High Court held that, even after clear evidence that the marriage is broken down, court cannot grant a decree of divorce on the ground of irretrievable breakdown of marriage, as it is not within its jurisdiction.

In another case of *Badal Chandra Saha v. Smt. Sima Saha*³⁷, both the parties were living separately since 1991. The husband filed divorce in the year 2008 on the ground of desertion by wife. But, the wife denied all the allegations. Husband clearly stated that he is not going to live with the respondent and wife also levied many derogatory allegations on the husband. But, still, the divorce was not granted because desertion was not proved. Honourable Justice Goswami, held in his judgement that, from the circumstances of the case, it evident that marriage is broken down irretrievably but the court cannot grant a divorce.

In such circumstances, the law turns its back towards reality and fail to grant proper justice. Parties have to approach the Supreme Court for justice. This is one of the major reasons that irretrievable breakdown of marriage should be made a ground of divorce. Because justice

³⁵ AIR 2003 Cal. 321.

³⁶ 2016 SCC Del. 5312.

³⁷ 2017 SCC Cal 9859.

should not only be done it should seem to be done. Courts in various other judgements have highlighted circumstances where marriage is broken beyond repair.

In the case of *Kanchan Devi v. Pramod Kumar Mittal*³⁸, the Supreme Court held:

“The marriage between the appellant and the respondent has irretrievably broken down and that there was no possibility of reconciliation, we in the exercise of our powers under Art. 142 of the Constitution of India hereby direct that the marriage between the appellant and the respondent shall stand dissolved by a decree of divorce.”³⁹

In *Kunal Ranawat v. Ratna Jahan*⁴⁰, the case was filed by the wife under sec 13 of Hindu Marriage Act, 1955 on the ground of desertion by husband. Respondent got a job in a foreign country but he was unable to leave because of the petition. Later on, they compromised and a compromise deed was signed between both the parties to convert the petition into that of mutual consent divorce. The question was raised as to 6 month cooling period. Parties' sought divorce on breakdown ground. The high court denied divorce. Then final verdict was given by Supreme Court where it waived away the cooling period. But, the question raised was where it was evident that parties do not want to live together and they were admitting breakdown, still the High Court could not grant a divorce. They had to take recourse of Supreme Court.

In another case of *smt. Shashi Prabha v. Ashok Dhawan*⁴¹, the petition of divorce was filed by husband on the ground of desertion. As per the facts of case, wife deserted the husband and she even disowned their adoptive son and gave threat of false dowry complaint. On the other hand, the husband clearly showed his intention to not resume the matrimonial relation. The High Court of Delhi did not grant a divorce because the ground was not proved and held that one cannot be given the advantage of his own wrong.

But, as per recent trend, the apex court has delivered progressive judgement in favour of irretrievable breakdown of marriage.

In *Sandhya Kumari v. Manish Kumar*⁴² the Supreme Court held that, the concept of cruelty can be blended with irretrievable breakdown of marriage. This means that where from the evidence on record it is proved that marriage is broken down beyond repair and another party is not ready

³⁸ AIR 1996 SC 3192.

³⁹ *Ibid.*

⁴⁰ 2017 SCC H.P. 1020.

⁴¹ 2018 SCC Del 12225.

⁴² 2016 SCC Del. 3869.

to give divorce because of some ill-motive, then it can be treated as cruelty and divorce can be granted.

In a very recent judgement of *Monika Gandhi v. Jitendra Gandhi*⁴³, Supreme Court held that decree of divorce on the ground of irretrievable breakdown of marriage can be granted in such cases where both the spouse have levied such allegations against each other from which it appears that the marriage is practically dead and the parties cannot live together peacefully. It further held that there is no use of forcing them to live together, where they cannot reside peacefully, just because no guilt can be proved.

Where wedlock has become a deadlock, because husband and wife are living separately, and after marriage, the wife has lived with her husband only for a few months, and then wife made allegations of cruelty and desertion against the husband and husband made counter-allegations against her, the court in *Salome v. Dr Prince D. Immanuel*⁴⁴ held that marriage is irretrievably broken and it is in the interest of justice that decree of divorce be granted to the parties so that they can live in peace. When it is evident from the facts as well as from talks of resettlement or reconciliation between parties that there was no possibility of a reunion between husband and wife then dismissing the petition and not granting divorce would only prolong the sufferings of both the parties, so, court should dissolve the marriage on this ground.

But, on the other hand, the Supreme Court in *Savitri Pandey v. Prem Chandra Pandey*⁴⁵ held that marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down. It should be proved from fact and circumstances that no useful purpose would be served to keep the marriage alive.

No divorce can be granted on the ground of irretrievable breakdown of marriage unless the party seeking divorce come to court with clean hands. The power of the Court to grant a divorce on the ground of irretrievable breakdown of marriage should be exercised with much care and caution. The divorce as per this ground should be granted in exceptional circumstances where interest of both the parties is served⁴⁶.

Therefore, to sum up, the apex Court in its various judgements have suggested that where it can be seen that the marriage is broken down beyond repair then it is against the public interest and

⁴³ AIR 2020 All.13.

⁴⁴ 2017 SCC Mad. 1651.

⁴⁵ AIR 2002 SC 591.

⁴⁶ Mayne's Treatise on Hindu Law & Usage (16th Ed.) Revised by Justice Ranganath Misra (New Delhi: Bharat Law House, 2008), page 292.

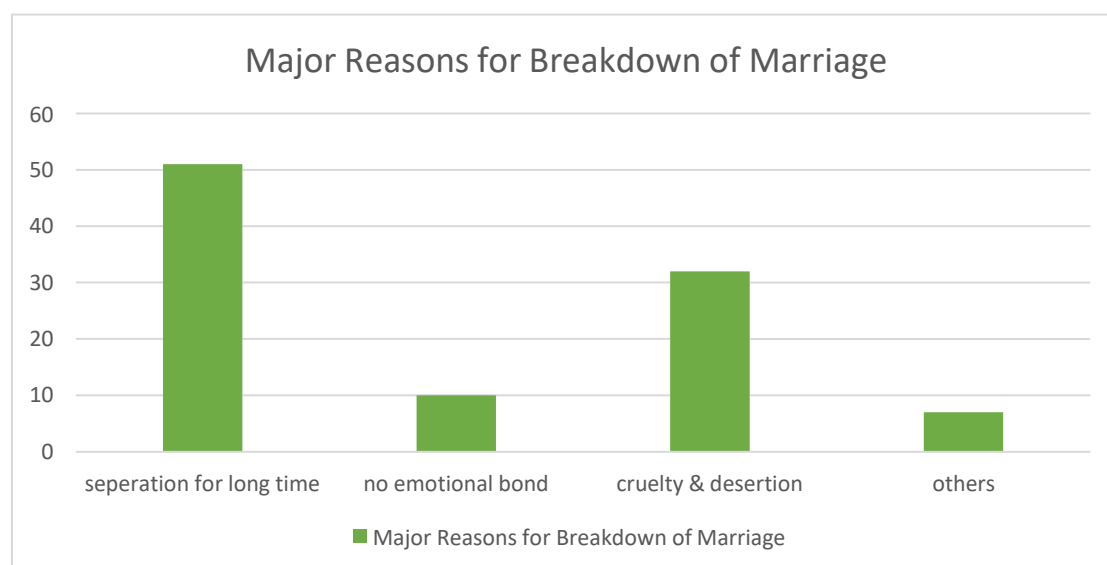
sanctity of marriage to force it on any of the party. So it is better to end it rather than forcing them to stay in marriage due to lacuna in law, which can be filled by the legislature.

The legislature despite the observation and recommendation of the Supreme Court has not; considered it appropriate to provide for the dissolution of the marriage on such averments or such ground. It has failed to cope up with the need of time. There are cases where it is found that marriage has become practically dead because of contributory acts of commission and omission of the parties. Therefore, no useful purpose would be served by keeping such marriages alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses.

ANALYSIS

Judiciary has time and again recommended that the legislature should consider the irretrievable breakdown of marriage and add it as the ground of marriage under Hindu law. From the judgements studied it is clear that the lower courts find it difficult to do complete justice to parties where it is clear that marriage is broken beyond salvage, just because it is not a ground of divorce⁴⁷. Due to this, the parties have to approach the Supreme Court to seek divorce under breakdown ground, which increases the unnecessary burden.

The Supreme Court has granted the divorce on the basis of irretrievable breakdown of marriage using its inherent power provided under article 142 in order to do complete justice. As per the above study, some of the major reasons for the irretrievable breakdown of marriage are:-



⁴⁷ Saema Jamil, An Analysis of Irretrievable Breakdown of Marriage as a Ground for Divorce, LMOMJ Vol 3 (April 10, 2020, 09:00 p.m.), <https://ssrn.com/abstract=2672107.research.org.in>.

Figure: 1

As per figure: 1 separation for a long time is a major reason for the irretrievable breakdown of a marriage. Long separation usually leads to divorce because it leads to breakage of the emotional bond between parties and they do not feel our care for one another, which is one of the essential of a happy marriage. Another major reason is cruelty and desertion. Cruelty can make it difficult for persons to live with each other. Usually in such cases due to cruelty one of the spouses denies to reconcile or live with others. No emotion bond here basically refers to situations where after marriage both the parties have not resided with each other so no emotional bond is formed between both of them from the beginning, which leads to irretrievable breakdown of the marriage. Then there are few other reasons such as, as observed by the researcher that whenever a case of cruelty comes before the court, both the parties allege various allegations against each other which leads to the feeling of enmity against each other etc.

Since it is evident that not only judiciary but law commission has also recommended in its various reports that irretrievable breakdown of marriage should be made the ground of divorce because of changing nature of society and marriage. The number of cases seeking divorce on irretrievable breakdown of a marriage is increasing not only this but, the cases in which the Supreme Court has granted the divorce on grounds of irretrievable breakdown of a marriage is also increasing. The figure given below shows the increase in cases where the apex court has granted the divorce on the basis of irretrievable breakdown of a marriage.

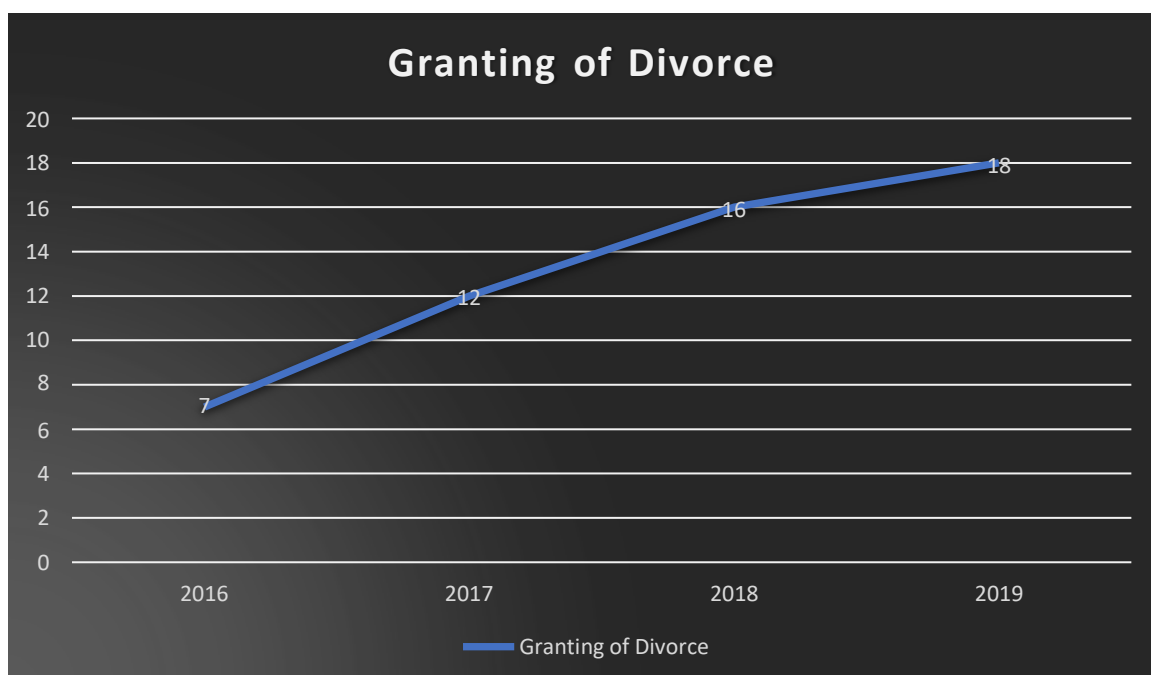
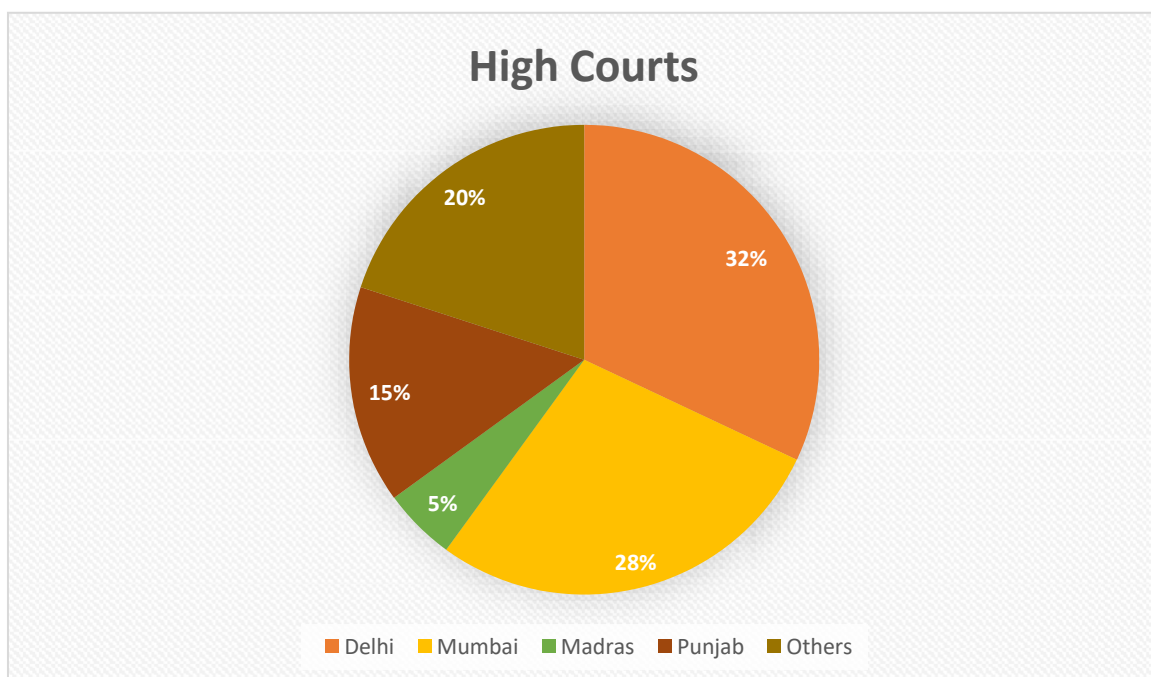


Figure: 2

The figure clearly shows an upwards line, which means that the cases in which divorce is granted by the court considering irretrievable breakdown marriage as a factor are increasing. There is an evident rise in cases from 2016 to 2019.

One of the major reason which has led the judiciary to recommend the irretrievable breakdown of marriage as a ground of divorce is changing the nature of society and marriage. Modernisation and individualisation have affected all spheres of lives and marriage is no exception. Marriage is no more relation between families but is a relation between two individuals. Moreover, unlike earlier times when both the parties cannot live together peacefully and happy they like to end such marriage. This changed attitude is one of the major reason that divorce has become acceptable in society and is no more a taboo as it used to be. As per the research, the researcher analysis that this changing nature is one of the major reason that the Supreme Court is in favour of irretrievable breakdown of marriage and divorce cases under this ground is increasing. As explained in figure 3.

**Figure: 3**

The figure shows that the High Courts which have supported irretrievable breakdown of marriage are most of those states which are developed and modernised states. Delhi and Mumbai having the highest percentage. These are High Courts of modernised places lifestyle

here is individualistic and westernised. And so are Punjab and Madras. Therefore it clearly shows that the changing perspective of people has affected judicial decisions.

Further, the judiciary has always delivered progressive judgements when it comes to irretrievable breakdown of the marriage. E.g. cruelty blending with breakdown theory and attempt to apply the beyond reasonable doubt principle while deciding irretrievable breakdown of the marriage.

Through its judgements, the judiciary has laid down various examples and incidents that can be considered by the legislature while making irretrievable breakdown of marriage a ground of divorce. No doubt that the judiciary has always supported the breakdown theory but it has also time and again stated that this ground should be used cautiously by judiciary while granting the divorce, where marriage is broken down beyond repair. In another word, it has become and deadlock instead of wedlock.

CONCLUSION

Where there has been a long period of continuous separation between the parties, it may fairly be inferred that the matrimonial bond is beyond repair. “The marriage merely becomes a fiction, which is supported by a legal tie, by refusing to sever that tie, the law in such cases does not serve the sanctity of marriage; on the contrary, it shows minimal regard for the feelings and emotions of the parties”⁴⁸.

Law commission of India in its various reports have recommended that irretrievable breakdown of marriage should be made ground of divorce. It suggest that two essentials of marriage are co-habitation and sexual intercourse and if from the facts and circumstances it is proved that there is no scope of any reconciliation then there is no point of protecting such marriage. Because it is not a marriage in its literal sense and is merely a legal tie forced by law⁴⁹.

It is, therefore, concluded that the change in society and mindset of people, who instead of living in a toxic or incomplete relationship like to opt for divorce, now require amendment in Hindu law so it is suggested that legislature should take action to introduce an amendment in the Hindu Marriage Act, 1955 for the inserting 'irretrievable breakdown of marriage' as a new

⁴⁸ Suchita Saigal and Uttara Gharpure (2006) Naveen Kohli v. Neelu Kohli, (2006) 4 S.C.C. 558, Student Bar Review, 18(2), 113-124. Retrieved from <https://www.jstor.org/stable/44306659>.

⁴⁹ Jaya V.S. irretrievable breakdown of marriage as an additional ground for divorce. Indian Law Institute. Retrieved from <https://www.jstor.org/stable/43952052>.

ground for grant of divorce⁵⁰. The newly inserted section may also provide that the court before granting a decree for divorce on this ground should ensure that the marriage has been irretrievably broken down and should also examine whether adequate financial arrangements have been made for the parties and children. Lastly, based on research, the researcher would like to suggest certain circumstances that could be seen as proof to consider marriage as broken down beyond repair.

- Long separation without any efforts to bring cohabitation by both parties. And the situation cannot be considered as desertion. In such circumstance, it becomes difficult for one party to seek a divorce, when another party denies. So, breakdown theory should be applied in such circumstances because long separation means no emotional bond. Moreover, the very purpose of marriage, i.e. cohabitation, is not fulfilled.
- Failure of any reconciliation or mediation proceedings due to certain circumstances can be considered as breakdown of marriage. Such as:
 - When both the parties are just denying every settlement proposed by the mediator of court just to see another party suffering, and it is evident from the facts.
 - The facts and circumstances which prove no scope of reconciliation. It means that where both the parties have levied such allegations which clearly show hate for each other and feeling of revenge and they cannot live together.
 - For instance in the case of *Munish Kakkar v. Nidhi Kakkar*⁵¹ all the efforts were made through mediation and conciliation to bring reconciliation, but, it failed. The councillor in its report mentioned that both the parties due to long separation and toxic feelings about each other, cannot cohabit with each other. Their marriage is broken down beyond repair. In such cases, the breakdown theory should be allowed.

In such cases it is recommended that, the report of mediator or conciliator should be considered or given weightage; as to status of marriage. It means that their reports should be considered to check that, whether there is any scope of peaceful co-habitation between parties. If not then divorce should be granted on breakdown ground.

⁵⁰ Suchita Saigal and Uttara Gharpure (2006) Naveen Kohli v. Neelu Kohli, (2006) 4 S.C.C. 558, Student Bar Review, 18(2), 113-124. Retrieved from <https://www.jstor.org/stable/44306659>.

⁵¹ 2019 SCC SC 1636.

- Wife or husband, have not lived together more than a few months after marriage and neither are ready to live together. It is because in such cases there are very fewer chances of any affection being developed. For instance in the case of *Salome v. Dr Prince*⁵², just five months after marriage the wife left the husband and they have been living separately for 12 years. It is evident that there is no emotional bond. So, there is no point in giving legal status to marriage.
- In case there is a child, abandoning the child by one of the spouses. With no intension to keep any relation with child or co-habit.

These are some of the circumstances that can be taken into consideration while granting a divorce on breakdown ground. But, having said that, the Courts should always be very careful while granting a divorce on any such ground because there are chances of its misuse. So, it is suggested that breakdown theory should be given place in the Hindu Marriage Act, 1955 and specific provision should be incorporated to make it more specific. So that wedlock do not become deadlock or mere legal fiction.

Further, suggested draft of the section relating to irretrievable breakdown of the marriage:-

“Sec- 13C- irretrievable breakdown of marriage-

- 1) A petition for the dissolution of marriage by a decree of divorce may be presented to the district court by either party to a marriage, on the ground that the marriage has broken down irretrievably.
- 2) The court hearing a petition referred to in sub-section (1) 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 not less than five years immediately preceding the presentation of the petition.”⁵³
- 3) If the court is satisfied, on the evidence as to the fact mentioned in subsection (2) and circumstances hereinafter mentioned and, 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.
 - a) Any kind of settlement mechanism is not successful
 - b) Both the parties together or respondent has laid marriage to be broken beyond repair

⁵² 2017 SCC Mad. 1651.

⁵³ The marriage law (amendment) act, 2010.

- c) If after solemnisation of marriage it subsisted only for 2 months
 - d) Where the respondent does not consent to mutual consent divorce and, it is proved that there is ill intention involved.
 - e) Where it is proved that the consent under mutual consent petition is withdrawn maliciously
 - f) The court is convinced that marriage is broken beyond salvage and parties cannot live peacefully even if divorce not granted.
- 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 anyone period (not exceeding three months' in all) during which the parties resumed living with each other, but no other 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.
- 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 reference in this section to the parties to a marriage living with each other shall be construed as a reference to their living with each other in the same household.
- 6) The divorce under this ground shall be granted in a rare situation, where it is proved beyond a reasonable doubt that marriage is broken down beyond repair.”⁵⁴

Researcher suggests this draft because by doing this we can overcome one of the major argument against the irretrievable breakdown of a marriage that it will make divorce easy to seek. This will lay down certain circumstance under which divorce can be granted, acting as safeguards and make the law relating to irretrievable breakdown of marriage stricter.

REFERENCES

1. Mayne, Hindu Law 101 (11th ed. 1953).
2. Mulla, Hindu Law 659 (13th ed. 1966).
3. Banerjee, Marriage and Stridhana 207 (5th edition). Bertrand Russell, Marriage and Morals 221 (1929)
<http://www.pensamientopenal.com.ar/system/files/2017/04/doctrina45128.pdf>.
4. Raj kumara Agarwala, changing basis of divorce and Hindu law, Indian law institute(sep 20, 2019,11:00p.m.), <https://www.jstor.org/stable/43950149>

⁵⁴ Ibid.

5. S. POTHEN, “Divorce in Hindu society”, university of toronto press (sep 24, 2019 11:14 p.m.), <https://www.jstor.org/stable/41602038>.
6. K.M. Kapadia, changing pattern of Hindu marriage and family II, *Sociological Bulletin*, Vol.3,No.2,pp.131-157(Sep26,2019,01:00p.m.), <https://www.jstor.org/stable/42864494>
7. K.M. Kapadia, changing pattern of Hindu marriage and family III, *Sociological Bulletin*, Vol.3,No.2,pp.161-192(Sep26,2019,01:00p.m.), <https://www.jstor.org/stable/42864494>.
8. V.S Jaya, irretrievable breakdown of marriage as an additional ground for divorce, Indian Law Institute,(19-01-2020 12:20), <https://www.jstor.org/stable/43952052>.
9. Mayne’s Treatise on Hindu Law & Usage (16th Ed.) Revised by Justice Ranganath Misra (New Delhi: Bharat Law House, 2008), page 292.
10. Simran, divorce under Hindu law, lawctopus (sep 23, 2019, 12:30 a.m.), <https://www.lawctopus.com/academike/divorce-under-hindu-law/>.
11. Hindu Marriage Act, s. 13, as amended by the Hindu Marriage (Amendment) Act of 1964.
12. P.L. Siyal v. Sarla Rani, A.I.R. 1961 Punj. 125
13. Trimbak Narain Bhagwat v. Kumudini Bhagwat, A.I.R. 1967 Bom. 80
14. Aamardeep singh vs Harveen kaur, 2017 8 SCC 746
15. Krishna veni nagam vs Harish nagam, 2017 4 SCC 150