

## IRRETRIEVABLE BREAKDOWN THEORY OF DIVORCE UNDER HINDU LAW : AN EVALUATION\*

### Abstract

There are three matrimonial remedies available to parties, that is, Restitution of conjugal rights, Judicial Separation and Divorce, but Indian Judiciary is demanding Irretrievable Breakdown of Marriage as a special Ground for Divorce, because sometimes, while granting decree of Divorce, the court faces some difficulties due to some technical loopholes in all the other theories of Divorce. This paper studies the theory on which the ground which has been discussed is based. Here, I have made an attempt to find out that how far the Irretrievable Breakdown of Marriage as ground of Divorce, has been accepted in India especially under Hindu Law through this paper. As we know Judiciary and Law Commission of India, consider the implementation of irretrievable breakdown of marriage theory as a boon to parties who for one or the other reasons, are unable to get the decree of Divorce. That is why Indian Judiciary and Law Commission have time to time shown their intention about making it as a separate ground of Divorce. Sometimes court finds itself helpless while dealing with such dead relationships which are just beyond repair, where attempt to repair is waste, where nothing can be done except granting a Decree of Divorce. Law commission itself has shown its intentions by recommending it through its 71<sup>st</sup> and 217<sup>th</sup> reports, respectively. This concept surely leads to divorce being provided by the courts more easily but it also necessary to underline the fact that according to the provisions, such divorces have to be granted only after a thorough understanding of the circumstances by the courts and an assessment if the marriage is actually broken beyond repair. In this paper the detailed study of theory of irretrievable breakdown has been made, Law commission Reports have been analyzed and finally recommendations have been made about the implementation of the theory as a remedial ground.

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## **Introduction**

Manu declares<sup>1</sup>, “*Let mutual fidelity continue till death; this in brief may be understood to be the highest dharma of husband and wife.*” It is often said that marriages are made in heaven and solemnized on earth. Under ancient Hindu law, the object of marriage was sublime. According to *Apasthamba*, marriage was meant for good deeds and for attainment of *Moksha*<sup>2</sup>. From ancient times, Marriage has been considered as indissoluble and eternal sacrament. In *Tikait Munmohiniti v. Basant Kumar*<sup>3</sup>. It was observed that, under Hindu Law, Marriage was a sacrament, a Union, an indissoluble union of flesh with flesh, bone with bone to be continued even in the next world. Manu made a declaration that the wife cannot be released by Husband, neither by sale nor desertion. But that declaration applied to Women and not Men. Therefore, there was an element of an inherent injustice on the wife under Hindu Law. To protect women from such injustice and to save sacramental aspect of marriage, The Hindu Marriage Act, 1955, was enacted and certain matrimonial remedies were provided in it. After the enactment of Hindu Marriage Act, 1955, Marriage under Hindu Law no longer remained a sacrament. Marriage under Hindu Law lacks some of the essential requirements of contracts therefore it cannot be considered as a contract. The Hindu Marriage Act, 1955, provided the concept of Divorce. Before going through the modern concept of Divorce, one must be aware of traditional Hindu concept of Divorce. The term Divorce has been derived from the Latin word ‘Divortium’, which means to turn aside or to separate. The Legal cessation of marriage is called Divorce. Literally, Divorce means a legal separation of two persons (i.e. Husband and Wife) of opposite sex who desire to respect and honor each other. According to Derret<sup>4</sup>, “Divorce was introduced into Hindu Law for the protection of helpless women when they were

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<sup>1</sup> RK Aggarwal, HINDU LAW, Central Law Agency, 25<sup>th</sup> edn. 2016, p85.

<sup>2</sup> *Ibid.* p36.

<sup>3</sup> ILR 28 cal 758.

<sup>4</sup> Kusum, FAMILY LAW LECTURES, FAMILY LAW-I, LexisNexis, 4<sup>th</sup> edn. 2017, p.25

ill-treated. It was never parliament's intention to give husbands matrimonial variety at their option so long as they could retain a pleader." Under the general uncodified Hindu Law Divorce was recognized, it was rather unknown to the old Hindu law of the marriage. Under classical Hindu law, Divorce was out of question while under custom, divorce has been recognized in some Hindu communities and tribes. *Kautilya's Arthshashtra* permitted divorce only on the grounds of mutual enmity and, with the consent of both the parties<sup>5</sup>.

### **Present scenario Hindu Marriage Act, 1955**

The parliament enacted law on divorce and has introduced dynamic and important changes. There are clear provisions related to divorce. The subject comes under section 13, 13B, 14 and 15 of Hindu Marriage Act, 1955. Now, a marriage may be dissolved, by obtaining a decree of divorce on the grounds mentioned under section 13 of the Act. The divorce can be granted only on the basis of grounds provided under Hindu Marriage Act, and Court cannot create a new ground for divorce.<sup>6</sup>

### **Theories of Divorce**

***Divorce at Will Theory-*** This theory has not been recognized by Hindu law. It is a Muslim concept. Here, the husband can ask for divorce at any point of time according to his desire and that also without the consent of his wife.

***Frustration of Marriage Theory-***A spouse is free to put the marriage at an end if the condition of the other spouse frustrates the marriage, without the involvement of any offence. For example, if the other spouse is suffering from any physical ailment or unsoundness of mind, or changes his religion or renounces the world or disappears for a very long period. The Hindu marriage act, 1955, recognizes this theory under sec. 13 (1) sub clauses (iii), (iv), (v), (vi).

***Guilt or Fault Theory-***Under this theory if a spouse commits any of the offence to marriage like adultery, cruelty, rape, desertion etc., the other spouse may obtain a decree of divorce. The grounds provided under Hindu Marriage Act, 1955, for divorce under sec. 13 prove that the Hindu Law has recognized this theory. The guilt theory is based on the rule that there should be personal injury to marital relationship of the spouse. It is important for one party to be innocent to obtain a decree of divorce under this theory. If by any means the act of guilty party is condoned by the aggrieved party the divorce cannot be granted.

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<sup>5</sup> Mayank Madhav, SINGHAL'S FAMILY LAW, Singhal's, Law Publication, 3rd edn. 2013 p127.

<sup>6</sup> *A v. H*, AIR 1993 BOM 70.

**Mutual Consent Theory-** When both the parties to divorce make a joint petition to the court for divorce, that situation comes under the mutual consent theory. It means that the case is not like usual ones where one party claims divorce and other resists the same. When, both the parties, genuinely, desire to get rid of each other and they part amicably for good. Not granting of divorce may lead to spoil their lives and may result in moral degradation. The Hindu Marriage Act has given place to this theory under section 13-B.

**Irretrievable Breakdown Theory-** The fifth and the most controversial theory of Divorce is the Breakdown theory in the legal jurisprudence based on the principle that marriage is a union of two persons based on love, affection & respect for each other. If any, out of love, respect and affection is hampered due to any of the reasons like cruelty, desertion, adultery, insanity etc & if the matrimonial relation between the spouses reaches to such a situation from where it becomes totally irreparable, or it comes to a point where neither of the spouse can live peacefully, happily and with each other & acquire the benefit of a matrimonial relations, then it is better to end the marriage as for now there is no reason and point of stretching such a numb relationship which exist only in name & not in actual form.

The fact that parties to marriage is living separately for reasonably longer period of time (e.g. 2 years or 4 years), with any reasonable cause or even without any reasonable and all their attempts to reunite failed, it will be pronounced by Law that relationship is dead now.

The basic human and social problem is of the maladjusted couples. Many marriages fail not because of the wickedness of one party or the other, but they just fail. Many couples try, and try their best to make their marriage a success but they fail. Sometimes marriages fail because of selfishness, boorishness, callousness, indifference and thinks like these on the part of one of the parties to the marriage. All this does not amount to any matrimonial offence. Yet, the marriage is not get-going. There are several cases in which parties live separate and apart from each other for several years and just because one of the parties wants the marital bond to continue, there is no way out for the other. In the context of Muslim case, VR Krishna Iyer J. Said, “*daily trivial differences get dissolved in the course of time and may be treated as the teething troubles of early matrimonial adjustment. While the stream of life, lived in married mutuality, may wash away smaller pebbles, what is to happen if intransigent incompatibility of minds breaks up the flow of the stream? In such a situation, we have a breakdown of the*

*marriage itself and the only course left open is far law to recognize what is a fact and accord a divorce*<sup>7</sup>.

In the countries of the world the breakdown principle has found recognition in three forms: (i) the determination of the question of fact whether in fact a marriage has broken down is left to the court; if the court, in a case before it, is convinced that a marriage has broken down, it passes a decree of divorce. (ii) The legislature lays down the criterion of break-down and the criterion that has been laid down in most countries is that if parties are living separate and apart for a certain duration ranging from one year to seven years it is sufficient proof of breakdown of marriage, and a decree of divorce may be granted at the instance of either party. (iii) If parties are living separate for certain duration one year to two years under a decree of judicial separation, or of a decree of restitution of conjugal rights is not complied with for certain duration – one year to two years – the either party may seek divorce. It should be noticed clearly that in breakdown principle of divorce culpability or guilt or innocence of either party does not figure anywhere. A marriage is dissolved just because it has broken down<sup>8</sup>.

In Hindu law the breakdown principle in the third form of divorce was introduced in 1964, and in 1970 in the Special Marriage Act. This was done by amending the last two clauses of divorce of the two statutes. The new Section 13(IA) of the Hindu Marriage Act laid down that if parties have not resumed cohabitation for a period of two years or more after a decree of judicial separation, or if a decree of restitution of conjugal rights has not been complied with for a period of two years or more, then either party may sue for divorce. The provision in Section 27(2) of the Special Marriage Act is identical except that the period therein is only one year. When the Hindu law provision came for interpretation before our courts, our courts tested it on the touchstone of guilt theory and looked in the question very closely whether the petitioner is thereby not taking advantage of his own wrong, and if they found culpability in him, they refused the relief<sup>9</sup>. In most of the cases the question came in this form: a wife obtained a decree of restitution of conjugal rights but the husband did not comply with it. After a period of two years the husband sued for divorce. The courts said that since he himself has not complied with the decree, he is in the wrong, and if divorce is allowed to him, it will

<sup>7</sup> *Abubacker Haji v. Mamu Koya*, 1971 KLT 663.

<sup>8</sup> Paras Diwan, THE BREAKDOWN THEORY IN HINDU LAW, 1969 Lawyer (J) 192-204.

<sup>9</sup> *Chamanlal v Mahinder Devi*, 1968 Punj 287; *Laxmibai v. Laxmichand*, 1968 Bom 332; *Raghuvir v. Satyapal*, 75 PLR 70; *Kanak v Aman*, 1970 Cal 328; *Shakuntla v. Sardari lal*, 1972 P&H 29; *Sayal v Sayal*, 1968 Punj 489; *Someswra v. Lilawanti*, 1968 Mys 274; *Ram v. Kripa*, 1975 Raj 28.

amount to giving him an advantage of his own wrong<sup>10</sup>. Looked at in this manner the argument is not merely plausible but appears convincing. But the point is, if non-compliance is a criterion of breakdown of marriage, then divorce should be granted, without bothering which of the two parties bears the blame for the disintegration of marriage.

It is very unfortunate that neither the Law Commission, the report of which constitutes the basis of the Marriage Laws (Amendment) Act, 1976, nor the framer of the Marriage Laws (Amendment) Bill, 1976 looked at this aspect of the matter. In this regard only suggestion that has been made is this that the period of two years separation under the Hindu Marriage Act, 1955 should be reduced to one year<sup>11</sup>. One wished very much that parliament should have enacted a simple provision that if parties have ceased to cohabit for a period of two years (irrespective of fact whether there is a decree of judicial separation or restitution), then either party may sue for divorce. A provision like this would help us in achieving the goal of a uniform civil code, as such a provision would be, it is submitted, acceptable to all communities. It will not work hardship on the women, as, even after divorce, under both the statutes, a wife, who has no means of livelihood, can claim maintenance from her divorced husband.

#### **Applicability of Breakdown theory under Hindu Law**

The concept of irretrievable breakdown of marriage was for the first time introduced in New Zealand where it was recognised that it need not be necessary for there to be some fault or other for a spouse to want to opt out of a marriage and hence the law has to recognize and cater to that requirement<sup>12</sup>. In 1969 a case was considered by the court in England where both the parties to marriage had committed adultery. Thus the court on the wife's petition observed Breakdown of Marriage and granted a Divorce.<sup>13</sup> The case had opened the gate for the theory in England. The court of appeal in the same 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*".

The debate in India on introducing irretrievable breakdown of marriage as a ground of divorce is indeed an old one but the 71<sup>st</sup> report of law commission of India has been considered as the first major proponent of the concept of Breakdown theory. The report titled, "The Hindu

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<sup>10</sup> *Ibid.*

<sup>11</sup> See the amended sec 13(1A), Hindu Marriage Act, 1955.

<sup>12</sup> *Masarati v. Masarati*, 1969 1 WLR 393 CA.

<sup>13</sup> *Ibid.*

Marriage Act, 1955 irretrievable breakdown of marriage as a ground of divorce” hence registered that theoretical basis for introducing irretrievable breakdown of marriage as a ground of divorce is one with which by now, lawyers and others have become familiar.<sup>14</sup> It emphasized that restricting divorce grounds based on faults shall cause injustice to those couples who are struck in situation when neither party have any fault with the marriage having become merely an external appearance without any efficacy.<sup>15</sup>

While talking about the need of introduction of irretrievable breakdown of marriage as a ground of divorce the 71<sup>st</sup> report of law commission said, “*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.*”

The 71<sup>st</sup> report of Law commission of India also opined that, “Human life has a short span and situation causing misery cannot be allowed to continue indefinitely.”<sup>16</sup> The report dealt with the important question concerning the Hindu Marriage Act, 1955, whether Irretrievable Breakdown of Marriage can be made a ground of Divorce under the Act and if so to what extent and subject to what conditions? The Law commission observed that restricting Divorce to matrimonial disability results in an injustice in those cases where neither is at fault, or if the fault is of such a nature that the parties do not wish to divulge it and yet the marriage cannot be worked out. It refers to the situation where emotional bonding of the couple has disappeared. The sole purpose of the commission seems to take out the marital couple from such relation which is totally dead and serving no purpose to the family as well as society.

### **The recommendations of Law Commission and its impact**

In chapter 6 “*Requirement of living apart*” of 71<sup>st</sup> report of Law commission of India, the situations from which a court can presume de facto that a marriage has been broken irretrievably are described. Those situations are as under:

1. Agreement of separation between the married couple.

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<sup>14</sup> Vijender Kumar, “*Irretrievable Breakdown of marriage: Rights of a married couple*” Vol.5 No.1, NALSAR Law Review 2010 p.17

<sup>15</sup> *Ibid.*

<sup>16</sup> The Hindu Marriage Act, 1955, Irretrievable Breakdown of marriage as a ground of divorce, Law Commission of India, 71<sup>st</sup> Report 1978.

2. Non cohabiting shall be considered as a sufficient fact to proof irretrievable breakdown of marriage.
3. Separation for more than 5 years should be a sufficient proof.
4. When the couple is living separate during young age and do not want to reconcile, 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 (during the period of one year) arising out of rift, shall be a conducive ground of irretrievable breakdown of marriage.
6. Continuous separation for the period of one year along with suspicion of misconduct, mental or physical cruelty, from either party. Discovering adultery covering pre marital illicit relationship which has rendered their living together impossible.
7. If no attempt to settle the dispute relating to which the case is pending for judicial separation or restitution of conjugal rights or Divorce for three years or more has been made by either party.
8. In some of the cases, mere submission of either party that he or she cannot live together is enough to consider the case of marriage being irretrievably broken.

Irretrievable Breakdown of Marriage as a basis of divorce is recognized under Hindu Marriage Act, the Parsi Marriage Act and divorce act and the special marriage act. It has been judicially legislated upon in Muslim law also. No other personal law recognizes it.<sup>17</sup>

#### **Irretrievable Breakdown of Marriage under Hindu Marriage Act, 1955**

The divorce originally was based on guilt theory, it could only be obtained if one of the parties to the marriage was guilty of matrimonial offences and the other was innocent.<sup>18</sup> In, 1964, by the Hindu Marriage Amendment Act, a form of breakdown theory was introduced under Hindu Law by modifying the last two clauses of section 13 (1), viz. Clauses (VIII) and (IX).<sup>19</sup>

The two clauses of section 13(1) viz. Clauses (VIII) & (IX) were modified and remembered as clause (I) & (II) of sec 13 (1A). These clauses has been modified by the marriage laws (amendment) Act, 1976 under which the period of two years has been reduced to one year, Sec 13(1A) runs as: *“Either party to a 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*

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<sup>17</sup> *Meera Bai v Rajendra Kumar Sabti*, AIR 1986 Del.136.

<sup>18</sup> Paras Diwan, MODERN HINDU LAW, Allahabad Law Agency, Faridabad (Haryana), 18<sup>th</sup> edn. 2007, p73.

<sup>19</sup> *Ibid.*



*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 parties*<sup>20</sup>”.

**The 217<sup>th</sup> Report of Law Commission of India on Irretrievable Breakdown of Marriage-**

Irretrievable Breakdown of Marriage-another Ground for Divorce is taken up by The 217<sup>th</sup> report of Law Commission of India, viewed that it shall be inserted under Hindu Marriage Act, 1955. The report suggested that it is the need for the society that the marriages which are broken down irretrievably or if seem to be beyond repair to the court, than it should be mandatory for the court to dissolve such marriage on the basis Irretrievable Breakdown of marriage. The report says that whenever a question arises as to adding the irretrievable Breakdown of Marriage as a ground of Divorce under Hindu Law the opponents argue that the inclusion of “Divorce by Mutual Consent” covers the situation well than what is the need to add one more Ground. But it is of the foremost consideration that for filing the petition under, “Divorce by Mutual Consent” the consent of both the parties is required. And if one of the parties denies cooperating, the said ground is not available. On the other hand, the “Irretrievable Breakdown of Marriage”, is a ground on which the court can rely and if on the facts of the case, the court concludes that, the marriage in question is beyond repair, the court can dissolve the marriage. The divorce here would not be granted on the will of the parties but on the basis of the court coming to the conclusion, on the facts pleaded, that the marriage in question has been irretrievably broken down. As the Supreme Court while invoking its inherent powers to do ‘complete justice’, has granted a decree of Divorce to a district judge of West Bengal who was married to a District Judge as they were living separately for the past 17 years. Referring to the case the Supreme Court said, *“There is no likelihood of the appellant and the Respondent living together and for all practical purposes there is irretrievable breakdown of marriage”*<sup>21</sup>.

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<sup>20</sup> Section 13 (1A,)The Hindu Marriage Act, 1955 (Act 25 of 1955).

<sup>21</sup> *Samar Ghosh v Jaya Ghosh*,(2007) 4 SCC 511.

Irretrievable Breakdown of Marriage as a basis of divorce is recognized under Hindu Marriage Act, The Parsi Marriage Act and divorce act and the special marriage act. It has been judicially legislated upon in Muslim law also. No other personal law recognizes it.<sup>22</sup>

### **Conclusion**

Marriage is an institution in maintenance of which the public at large is interested. No civilization exists without the basic social element i.e. family. A healthy society cannot be imagined with an unhappy marriage and unhappy family. Courts have on several occasions found themselves helpless to give effective relief to the parties where there is an evident breakdown of marriage but the technical evidence is not enough to prove a matrimonial fault ground within the framework of the statutory provisions. Jurists, academicians, and courts, as well as the law commission of India, have recommended that irretrievable breakdown of marriage should be made a ground of divorce. The Supreme Court in its judgments has recommended the inclusion of irretrievable breakdown as a ground of divorce. Such law is in the offing now<sup>23</sup>.

The laws relating to divorce are being liberalized so as to meet the needs of changing time and facilitate liberation of the parties living in unworkable marriage. The major step in this direction is divorce by mutual consent but not often even when a marriage has utterly broken, one of the spouses might withhold consent to a mutual divorce.<sup>24</sup> On one hand it would be right to say that irretrievable breakdown theory provides the scope for spouses to take advantage of their wrongs as even the wrong party can cite this Ground for a divorce petition. It may bring a rise in divorce cases in India and once again women can be a soft target as well. However, it must be noted that irretrievable breakdown of marriage is a concept that is necessary to be recognized judicially. This concept surely leads to divorce being provided by the courts more easily but it also necessary to underline the fact that according to the provisions, such divorces have to be granted only after a thorough understanding of the circumstances by the courts and an assessment if the marriage is actually broken beyond repair. Since decades, there have been numerous judgments that re-iterated the need for this concept and having finally been enacted, this amendment comes as a blessing for numerous couples stuck in a broken marriage without

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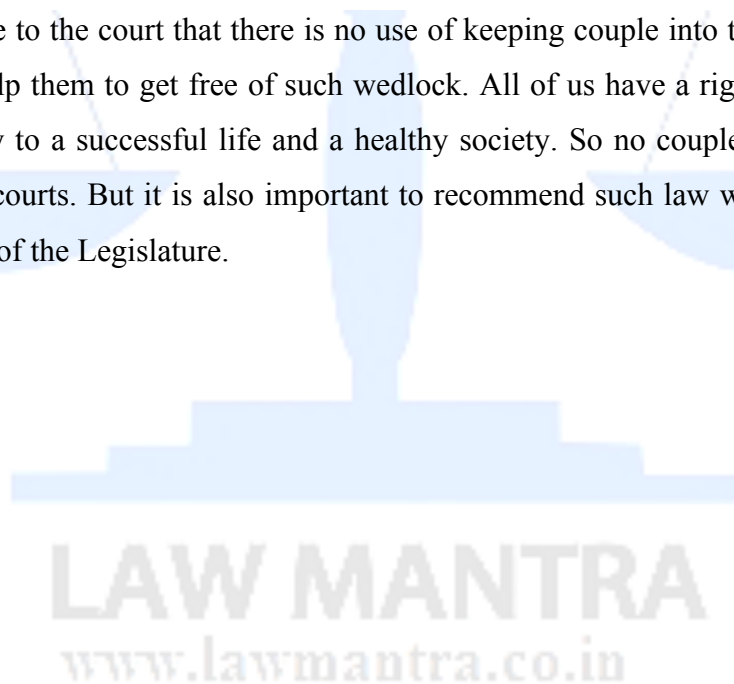
<sup>22</sup> *Meera Bai v. Rajendra Kumar Sabti*, AIR 1986 del.136.

<sup>23</sup> Kusum, FAMILY LAW LECTURES, FAMILY LAW, LexisNexis, 4<sup>th</sup> ed. 2015, p 209.

<sup>24</sup> *Ibid.*

any recourse<sup>25</sup>. Owing to the present understanding of marriage which is part sacramental and part contractual, it is to be understood that a marriage which is not working and lacks any substance irretrievably is better off broken. I think at the contemporary era, the time is good for our country to try to push Uniform Civil Code through. To sum up in last, it can be said for citizens belonging to different religions and denominations, it is imperative that for promotion of national unity and solidarity a unified code is an absolute necessity on which there can be no compromise. Different streams of religion have to merge to a common destination and some unified principles must emerge in the true spirit of Secularism. Apart from this as discussed above, the irretrievable breakdown of marriage as an independent ground should be made available to the persons of all religions, so that notion of equal protection of law and equality before law should be viewed to all apparently and not only in law books. India needs a unified code of family laws under an umbrella of all its constituent religions. Whether it is the endeavor of the State, the mandate of the court or the Will of the people is an issue which only time will decide.

Where it is visible to the court that there is no use of keeping couple into the cage of marriage the court must help them to get free of such wedlock. All of us have a right to live and living happily is the key to a successful life and a healthy society. So no couple should spend their youthful days in courts. But it is also important to recommend such law which does not harm the true intention of the Legislature.



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<sup>25</sup> Akash Mishra, "Irretrievable Breakdown of Marriage" available at <https://www.lawctopus.com/academike/irretrievable-breakdown-marriage> (visited on January 29, 2018 ).