



**GOVERNMENT OF INDIA**  
**LAW COMMISSION OF INDIA**

**Irretrievable Breakdown of Marriage –  
Another Ground for Divorce**

**Report No. 217**

**March 2009**



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(REPORT NO. 217)**

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Another Ground for Divorce**

**Forwarded to the Union Minister for Law and Justice, Ministry of Law and Justice, Government of India by Dr. Justice AR. Lakshmanan, Chairman, Law Commission of India, on the 30th day of March, 2009.**

**The 18<sup>th</sup> Law Commission was constituted for a period of three years from 1<sup>st</sup> September, 2006 by Order No. A.45012/1/2006-Admn.III (LA) dated the 16<sup>th</sup> October, 2006, issued by the Government of India, Ministry of Law and Justice, Department of Legal Affairs, New Delhi.**

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D.O. No. 6(3)/155/2009-LC (LS)

30th March, 2009

Dear Dr. Bhardwaj Ji,

Subject: Irretrievable Breakdown of Marriage –  
Another Ground for Divorce

I am forwarding herewith the 217<sup>th</sup> Report of the Law Commission of India on the above subject.

Section 13 of the Hindu Marriage Act, 1955 provides grounds for presentation of a petition for divorce. Section 27 of the Special Marriage Act, 1954 similarly provides grounds for grant of divorce in the case of a marriage solemnized under the Act. However, the said Acts do not provide “irretrievable breakdown of marriage” as a ground for divorce. The Law Commission of India in its 71<sup>st</sup> Report titled “The Hindu Marriage Act, 1955 - Irretrievable Breakdown of Marriage as a Ground of Divorce” recommended amendments in the Hindu Marriage Act to make irretrievable breakdown of marriage as a new ground for granting divorce among the Hindus. Recently, the Supreme Court also in *Naveen Kohli v. Neelu Kohli* (AIR 2006 SC 1675) recommended to the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to

incorporate irretrievable breakdown of marriage as a ground for the grant of divorce.

In view of the above, the Law Commission of India *suo motu* took up the study of the subject. The Commission examined the extant legislations as well as a number of judgments of the Supreme Court and High Courts on the subject and is of the view that “irretrievable breakdown of marriage” should be incorporated as another ground for granting divorce under the provisions of the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954. The Court before granting a decree for divorce on the ground that the marriage has irretrievably broken down should also examine whether adequate financial arrangements have been made for the parties and children.

The Commission has accordingly made its recommendations in this Report.

With warm regards,

Yours sincerely,

(Dr. AR. Lakshmanan)

Dr. H. R. Bhardwaj,  
Union Minister for Law and Justice,  
Government of India  
Shastri Bhawan,  
New Delhi-110 001.

# **Irretrievable Breakdown of Marriage – Another Ground for Divorce**

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## I. INTRODUCTION

1.1 Whenever the question of inclusion of irretrievable breakdown of marriage as a ground for divorce is mooted, the opponents argue that “divorce by mutual consent” introduced in the Hindu Marriage Act in 1976 more than covers the situation. It is important to note that “mutual consent” requires the consent of both the parties and if one or the other does not cooperate, the said ground is not available. ‘Irretrievable breakdown of marriage’, on the other hand, is a ground which the Court can examine and if the Court, on the facts of the case, comes to the conclusion that the marriage cannot be repaired/saved, divorce can be granted. The grant of divorce is not dependent on the volition of the parties but on the Court coming to the conclusion, on the facts pleaded, that the marriage has irretrievably broken down.

1.2 **Irretrievable breakdown of marriage-** The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other’s fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven. All

quarrels must be weighed from that point of view in determining what constitutes cruelty in each particular case and always keeping in view the physical and mental conditions of the parties, their character and social status. A too technical and hypersensitive approach would be counter-productive to the institution of marriage. The Courts do not have to deal with ideal husbands and ideal wives. It has to deal with particular man and woman before it.<sup>1</sup>

1.3 In *Naveen Kohli v. Neelu Kohli*<sup>2</sup> the Supreme Court recommended to the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for divorce in the following words:

“Before we part with this case, on the consideration of the totality of facts, this Court would like to recommend the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce. A copy of this judgment be sent to the Secretary, Ministry of Law & Justice, Department of Legal Affairs, Government of India for taking appropriate steps”<sup>3</sup>

1.4 Earlier, in *Ms. Jorden Diengdeh v. S. S. Chopra*<sup>4</sup> the Supreme Court observed:

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<sup>1</sup> *Mayne's Treatise on Hindu Law & Usage* (16<sup>th</sup> Ed.) Revised by Justice Ranganath Misra (New Delhi: Bharat Law House, 2008), page 292.

<sup>2</sup> AIR 2006 SC 1675.

<sup>3</sup> *Ibid.*, para 96.

<sup>4</sup> AIR 1985 SC 935.

“It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases....We suggest that the time has come for the intervention of the legislature in those matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situation in which couples like the present have found themselves.”<sup>5</sup>

1.5 It is pertinent to notice that the Law Commission of India has already submitted a very comprehensive 71<sup>st</sup> Report on irretrievable breakdown of marriage as a ground of divorce. The matter had been taken up by the Commission as a result of a reference made by the Government of India. The Law Commission under the Chairmanship of Shri Justice H. R. Khanna presented its Report on April 7, 1978. The Report considered the suggestion and analyzed the same in extenso. Before embarking upon further action on the suggestion that irretrievable breakdown of marriage should be made as a ground for divorce, the Law Commission considered it appropriate to invite views on the matter by issuing a brief questionnaire. The Commission in its 71<sup>st</sup> Report have accepted in principle irretrievable breakdown of marriage as a ground of divorce and also examined the question as to how exactly to incorporate it into the Act and also further examined the question whether the introduction of such a ground should be coupled with any safeguards. The Commission also in Chapter II of the said Report considered present law under the Hindu Marriage Act, merits and demerits of the theory of irretrievable breakdown of marriage in Chapter IV and retention of

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<sup>5</sup> Ibid., para 7.

other grounds of divorce in Chapter V. In Chapter VI the Commission also considered the requirement of living apart and also suggested many safeguards like welfare of children, hardship and recommended amendments to Sections 21A, 23(1)(a) and also recommended insertion of new sections 13C, 13D and 13E.

1.6 In the light of the above, the Law Commission *suo motu* took up the study on the subject.

## **II. JUDICIAL VIEW/SUGGESTIONS**

2.1 A law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the fault theory, guilt has to be proved; divorce Courts are presented with concrete instances of human behaviour as bring the institution of marriage into disrepute.<sup>6</sup> Once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interest of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie, by refusing to sever that tie, the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. Public interest demands not only that the married status should, as long as possible, and whenever possible, be maintained, but where a marriage has been

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<sup>6</sup> 71<sup>st</sup> Report of the Law Commission of India.

wrecked beyond the hope of salvage, public interest lies in the recognition of that fact. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist. Human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom.<sup>7</sup> The Supreme Court in *Naveen Kohli vs. Neelu Kohli*<sup>8</sup> recommended to the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for divorce.

2.2 The irretrievable breakdown of marriage is not a ground for divorce by itself. But while scrutinizing the evidence on record to determine whether the grounds on which divorce is sought are made out, the circumstances can be taken into consideration. No divorce can be granted on the ground of irretrievable breakdown of marriage if the party seeking divorce on this ground is himself or herself at fault. The decree of divorce on the ground that the marriage has irretrievably broken down can be granted in those cases where both the parties have levelled such allegations against each other that the marriage appears to be practically dead and the parties cannot live together. The power of the Court to grant divorce on the ground of irretrievable breakdown of marriage should be exercised with

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<sup>7</sup> Supra note 1, pages 292 – 293.

<sup>8</sup> Supra note 2.

much care and caution in exceptional circumstances only in the interest of both the parties.<sup>9</sup>

2.3 In *Geeta Mullick v. Brojo Gopal Mullick*<sup>10</sup> the Calcutta High Court held:

“In our considered opinion, the marriage between the parties can not be dissolved by the trial Court or even by the High Court only on the ground of marriage having been irretrievably broken down, in the absence of one or more grounds as contemplated under section 13(1) of the Hindu Marriage Act, 1955.”<sup>11</sup>

2.4 The concept of irretrievable breakdown of marriage cannot be used as magic formula to obtain a decree for divorce where grounds for divorce are not proved.

2.5 In *V. Bhagat v. D. Bhagat*<sup>12</sup> the Supreme Court held :

“Irretrievable breakdown of the marriage is not a ground for divorce by itself. But while scrutinizing the evidence on record to determine whether the ground(s) alleged is made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind.”<sup>13</sup>

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<sup>9</sup> Supra note 1, page 293.

<sup>10</sup> AIR 2003 Cal. 321.

<sup>11</sup> Ibid., para 7.

<sup>12</sup> AIR 1994 SC 710.

<sup>13</sup> Ibid., para 23.

2.6 The Calcutta High Court in *Tapan Kumar Chakraborty v. Jyotsna Chakraborty*<sup>14</sup> held that in a petition for divorce on a ground as mentioned in the Hindu Marriage Act or the Special Marriage Act, court cannot grant divorce on the mere ground of irretrievable breakdown of marriage.

2.7 In *Kanchan Devi v. Pramod Kumar Mittal*<sup>15</sup>, however, 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 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.”<sup>16</sup>

2.8 There is no use of keeping two persons tied by the matrimonial relationship when they cannot live peacefully. Where wedlock has become a deadlock, since parties are living separately, and after marriage the wife has lived only for a few months in the matrimonial home, wife having made allegations of cruelty and desertion against the husband and husband having made counter-allegations against her, the court in *Krishna vs. Som Nath*<sup>17</sup> held that marriage is irretrievably broken and it is in the interest of justice that decree of divorce be granted so that both the parties can live in peace. When the court finds in facts as well as from talks of resettlement or reconciliation between parties that there was no possibility of reunion

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<sup>14</sup> AIR 1997 Cal. 134.

<sup>15</sup> AIR 1996 SC 3192.

<sup>16</sup> Ibid., para 6.

<sup>17</sup> (1996) DMC 667 (P&H).

between husband and wife and refusal of decree of divorce would only prolong the agonies of the spouses, it can dissolve the marriage on this ground.<sup>18</sup> Where the husband and the wife are living separately from each other for the last 19 years and there is no chance of settlement between the parties a decree for divorce can be granted.<sup>19</sup> Where there was no consummation of marriage, wife being adverse to cohabitation, wife disobeyed instructions of the court to undergo medical examination to prove that marriage had not consummated, there was indecent behaviour of wife to her in-laws reflecting her mental imbalance, and the parties have been living separately for a period of 16 years without any serious attempt for reconciliation, a decree dissolving the marriage would be proper.<sup>20</sup>

2.9 The Supreme Court in *Savitri Pandey v. Prem Chandra Pandey*<sup>21</sup> 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, no useful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of the Supreme Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses.

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<sup>18</sup> *Ashok v. Rupa*, 1996 (2) HLR 512 (Guj).

<sup>19</sup> *Shankar v. Puspita*, AIR 2005 Jhar. 92.

<sup>20</sup> *Rita v. Trilokesh*, AIR 2007 Gau.122.

<sup>21</sup> AIR 2002 SC 591.

2.10 In *Vinita Saxena v. Pankaj Pandit*<sup>22</sup>, the marriage between Vinita Saxena and her husband Pankaj Pandit was dissolved by an order of the Supreme Court. The marriage between the parties lasted only for five months. Both of them were living separately for over 13 years. Marriage also was not consummated. Wife filed a petition for the dissolution of marriage on the ground of physical and mental cruelty and insanity on the part of the husband. Trial court however dismissed the petition. High Court also dismissed the appeal despite the failure of the husband to appear before the court. Allowing the appeal of the wife, a division bench of the Supreme Court speaking through Dr. Justice AR. Lakshmanan ( as he then was ) held that the orders of the courts below had resulted in grave miscarriage of justice to the wife who had been constrained into living with a dead relationship for over 13 years and that the fact situation clearly showed that the husband and wife can never ever stay as husband and wife and the wife's stay with the respondent husband would be injurious to her health. Accordingly, a decree of divorce was granted in favour of the wife against the husband. The Court held as follows:

“36. As to what constitute the required mental cruelty for purposes of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home.

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<sup>22</sup> JT 2006 (3) SC 587.

37. If the taunts, complaints and reproaches are of ordinary nature only, the court perhaps need consider the further question as to whether their continuance or persistence over a period of time render, what normally would, otherwise, not be so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer.

.....

44. Spouses owe rights and duties each to the other and in their relationship they must act reasonably. In every case where cruelty exists it is possible to say that the spouse at fault has been unreasonable. The list of cruelty, therefore, should be reach of the duty to act reasonably, whether in omission or commission, causing injury to health. Such a list avoids imputing an intention where in fact none may exist. Further all such matters are foresight, desires, wishes, intention, motives, perception, obtuseness, persistence and indifference would remain relevant but merely as matter of evidence bearing upon the requirement to act reasonably or as aggravation of the matters charged.

....

49. **Humane aspects which this Court should consider:**

- The appellant was 24 years of age when she got married.
- The marriage lasted for four to five months only when she was compelled to leave the matrimonial home.

- The marriage between the parties was not consummated as the respondent was not in a position to fulfil the matrimonial obligation.
- The parties have been living separately since 1993. 13 years have passed they have never seen each other.
- Both the parties have crossed the point of no return.
- A workable solution is certainly not possible.
- Parties at this stage cannot reconcile themselves and live together forgetting their past as a bad dream.
- Parties have been fighting the legal battle from the year 1994.
- The situation between the parties would lead to an irrefutable conclusion that the appellant and the respondent can never ever stay as husband and wife and the wife's stay with the respondent is injurious to her health.
- The appellant has done her Ph.D. The respondent, according to the appellant, is not gainfully employed anywhere.
- As a matter of fact, after leaving his deposition incomplete during the trial, the respondent till date has neither appeared before the trial court nor before the High Court.

50. The facts and circumstances of the case as well as all aspects pertain to humanity and life would give sufficient cogent reasons for us to allow the appeal and relieve the appellant from shackles and chain of the respondent and let her live her own life, if nothing less but like a human being.”

2.11 In *Samar Ghosh vs Jaya Ghosh*<sup>23</sup> the Supreme Court referred to the 71<sup>st</sup> Report of the Law Commission of India on "Irretrievable Breakdown of Marriage" with approval as follows:

“90. We have examined and referred to the cases from the various countries. We find strong basic similarity in adjudication of cases relating to mental cruelty in matrimonial matters. Now, we deem it appropriate to deal with the 71<sup>st</sup> Report of the Law Commission of India on "Irretrievable Breakdown of Marriage".

91. The 71<sup>st</sup> Report of the Law Commission of India briefly dealt with the concept of irretrievable breakdown of marriage. This Report was submitted to the Government on 7th April, 1978. In this Report, it is mentioned that during last 20 years or so, and now it would be around 50 years, a very important question has engaged the attention of lawyers, social scientists and men of affairs, should the grant of divorce be based on the fault of the party, or should it be based on the breakdown of the marriage? The former is known as the matrimonial offence theory or fault theory. The latter has come to be known as the breakdown theory. It would be relevant to recapitulate recommendation of the said Report.

92. In the Report, it is mentioned that the germ of the breakdown theory, so far as Commonwealth countries are concerned, may be found in the legislative and judicial developments during a much earlier period. The (New Zealand) Divorce and Matrimonial Causes Amendment Act, 1920, included for the first time the provision that a separation agreement for three years or more was a ground for making a petition to the court for divorce and the court was given a discretion (without guidelines) whether to grant the divorce or not. The discretion conferred by this statute was exercised in a case *Lodder v. Lodder* (1921 New Zealand Law Reports 786). Salmond J., in a passage which has now become classic, enunciated the breakdown principle in these words:

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<sup>23</sup> (2007) 4 SCC 511.

‘The Legislature must, I think, be taken to have intended that separation for three years is to be accepted by this Court, as prima facie a good ground for divorce. When the matrimonial relation has for that period ceased to exist de facto, it should, unless there are special reasons to the contrary, cease to exist de jure also. In general, it is not in the interests of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of such a separation the essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but mischievous.’

93. In the said Report, it is mentioned that restricting the ground of divorce to a particular offence or matrimonial disability, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet such a situation has arisen in which the marriage cannot survive. The marriage has all the external appearances of marriage, but none in reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a facade, when the emotional and other bonds which are of the essence of marriage have disappeared.

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

95. Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a

petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties.”

2.12 Similarly, in *Sanghamitra Ghosh vs Kajal Kumar Ghosh*<sup>24</sup> the Supreme Court while referring to its earlier decision in *Ashok Hurra v Rupa Bipin Zaveri*<sup>25</sup>, also reproduced some excerpts from the aforesaid 71<sup>st</sup> Report of the Law Commission.

2.13 As stated earlier, the recent decision of the Apex Court in the case of *Naveen Kohli vs. Neelu Kohli*<sup>26</sup> fully establishes the need for immediate amendment of the Hindu Marriage Act to incorporate ‘irretrievable breakdown of marriage’ as a ground for grant of divorce. The Court in that case was dealing with a case where the parties were living separately for ten years. There were, during this period, many proceedings between the parties, mostly by the wife. Allegations of misconduct were made on both sides, maintenance was demanded and paid and the proceedings lingered on causing deep anxiety and frustration to both sides. The husband filed for divorce on the ground available – cruelty. The Trial Court granted him relief but the High Court turned down the divorce petition on the ground that the conduct of the wife did not fall within the parameters of ‘cruelty’ as defined in various judgments. The husband was back

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<sup>24</sup> (2007) 2 SCC 220.

<sup>25</sup> (1997) 4 SCC 226.

<sup>26</sup> Supra note 2.

to square one. On appeal, the Supreme Court granted him relief. This was a classic case of consent being withheld by a spouse just for harassing the other spouse. The Court recommended to the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate 'irretrievable breakdown of marriage' as a ground for grant of divorce.

2.14 It would also be in the fitness of things that the Special Marriage Act, 1954, which deals with the civil marriages, is also considered for an amendment on similar lines.

### **III. RECOMMENDATION**

3.1 It is, therefore, suggested that immediate action be taken to introduce an amendment in the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 for inclusion of 'irretrievable breakdown of marriage' as another ground for grant of divorce.

3.2 The amendment may also provide that the court before granting a decree for divorce on the ground that the marriage has irretrievably broken down should also examine whether adequate financial arrangements have been made for the parties and children.

3.3 We recommend accordingly.

(Dr. Justice AR. Lakshmanan)

Chairman

(Prof. Dr. Tahir Mahmood)

Member

(Dr. Brahm A. Agrawal)

Member-Secretary