

RECOGNITION OF IRRETRIEVABLE BREAKDOWN AS BASIS OF DIVORCE IN INDIA: JUDICIAL INTERPRETATION 2016-2020

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Abstract

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. The more individualistic approach in living has made divorce acceptable in society. With this advancement, divorce rates are also increasing especially amongst Hindus. According to data of 2017 among divorced Indian woman 68% are Hindu (Govt. of India, 2017). 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 reasons and other is unable to prove any fault. With the same old grounds of divorce, judiciary has played a key role to resolve the issues raised due to new kinds of facts. So the object of the research is to highlight the role played by the judiciary in progressive development of irrevocable failure of marriage as ground of dissolution of marriage and the requirement of it as a reason of divorce under Hindu Marriage Act, 1955 (hereinafter mentioned as Act or HMA) and suggest certain circumstances under which the marriage can be treated as broken down beyond repair..

Key words: Divorce, Hindu law, irretrievable breakdown, Marriage

Introduction

The credit goes to New Zealand for introducing the concept of irrevocable failure of marriage. The law was perceived to cater the necessity, where there was no guilt or other reason for a life partner to need to quit a marriage and the only explanation was that the marriage did not work. (Masarati v. Masarati, 1969)

The Hindu Marriage Act of 1955 permits divorce basically on the grounds falling under the category of 'fault' theory. While interpreting the laws enumerated in the Act of 1955, the Courts have alternatively relied upon 'fault' and 'breakdown' theory. (Raj Kumar Agarwala, 2019) It is apparent in the judicial decisions that despite the silence of the statutory law, break down theory finds a place in Hindu law of divorce. Not only break down theory but many other new grounds are developed by the judiciary. In a landmark caseⁱ 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. (Preeti Kumari v Neelkanth Kumar, 2018) Not only divorce grounds but the procedure is also modernised as per change in the society. One such change that is required is irreparable failure of marriage 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. So the object of this study is to find out whether a specific provision introducing irreparable failure of marriage as a reason for divorce be incorporated in Hindu Marriage Act and what should be the circumstances a court can consider while granting divorce on this particular ground.

Breakdown theory under Hindu Law

Irreparable failure of wedlock is not recognised as reason for dissolution in the codified Hindu law. The law commission of India in its 71st report had propagated the idea of introducing the concept of Breakdown theory should in Hindu law (The Law Commission of India Report, 1978). The report, "The Hindu Marriage Act, 1955 irretrievable breakdown of marriage as a ground of divorce" registered that lawyers and others have become familiar with the concept and can come up with circumstances which clearly shows that the marriage is broken down permanently. (Vijender Kumar, 2010) It emphasized taking only guilt theory into consideration for

granting dissolution will result into being unfair to the couples who do not have any guilt to prove, no emotional bonding left between the couple and their marriage has no viability.

While discussing about the need of irreparable failure of marriage as a reason for divorce, the law commission of India in its 71st report 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.”*

The report also deals with the important question that can irreparable failure of marriage be made a basis of dissolution under the codified law of Hindus or not and if yes, then what conditions and circumstances should be considered while applying this ground?

Introduction of Irreparable failure of wedlock as a reason for divorce through amendments in the codified Hindu Law

The HMA had the grounds of divorce based only on fault theory, and divorce could be granted in the situation a spouse could prove guilt of other one and he/she was innocent (Paras Diwan, 2007). An arrangement was made to bring the failure theory under Hindu Law through the Hindu Marriage (Amendment) Act, 1964. Clauses (viii) and (ix) were inserted in section 13 (1), which provided that if the cohabitation between parties did not resume after the judgement delivered for judicial separation or restitution of conjugal rights by the Court within or after two years; then a divorce can be granted on this basis (Paras Diwan, 2007). Further, to ease the situation as per the requirement of time and society, in the year 1976 the term of two years prescribed by the Act was lower down to one year, and the new Sec 13(1A) was 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 parties”(Section 13(1A) of the Act).

The Law Commission of India’s 217th Report on irreparable failure of the wedlock

The idea of incorporation of irretrievable breakdown theory as a ground for divorce was once again proposed by the Law Commission of India in its 217th report in which it suggested that it was demand of time and in interest of public policy that if there is a broken marriage beyond repair, it should be dissolved by the court on the basis of irreparable failure of wedlock (The Law Commission of India Report, 2009).

It is a major question which arises whether there is a need to add one more ground of divorce based on the irretrievable breakdown of marriage under Hindu Law when there is already “divorce by mutual consent” which enfolds the case aptly. There is a major difference between the two grounds which is ignored, that is consent of both the parties is needed in case of dissolution with the consent of both the spouses and if consent is denied by either of the spouses, then dissolution cannot be permitted on the basis of mutual consent. Whereas in case of breakdown of marriage, if the judge while relying upon the facts concludes that the marital bond is no more remaining, such marriage can be dissolved. So the consent of the spouses is not material for permitting divorce but it can be granted relying on the facts pleaded that the marital bond is no more and cannot be revoked. Therefore, consent of parties is the major difference between both the grounds.

Judicial Analysis of the cases

As per the fault theory, guilt of either party has to be proved based on the evidences but if fault is not proved no divorce is granted (71st Law Commission of India Report, 1978). It is one of the biggest lacuna because this does not cover the cases where marriage is broken down irreparably. Because if there is a broken marriage beyond repair, and this fact is not considered, it can be detrimental to the interest of the parties and against the public interest too. Though there is a desire of public interest to maintain the marriage intact as long as feasible, but if there is no hope of reconciliation and restoration of marriage, then ending the marriage by granting divorce will be in the public interest. There is no gain to keep the parties tied in the marriage which actually no more exist.

Human life is very short and miserable situations and problems should not be allowed to continue endlessly. They need to be halted at some stage. Law should not ignore such circumstances intentionally and deny adequate justice to the needy (Mayne, 2008). In *Naveen Kohli v. Neelu Kohli* (2006) The Supreme Court suggested the central government for sincerely considering this issue and incorporate changes in the Hindu Marriage Act, 1955 to introduce a specific provision relating to the cases of irretrievably broken marriages.

There is no specific ground of divorce relating to irreparable failure of wedlock in the Act in true sense but while determining the question of granting the divorce on the ground sought based on the evidence on record, the judiciary has come 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 had to use its inherent power under Article 142 and allowed divorce on the basis of broken marriage irretrievably. But this inherent power only lies with the Supreme Court and other Courts are helpless to consider this situation as a basis of divorce.

In *Geeta Mullick v. Brojo Gopal Mullick* (2003), the High Court of Calcutta 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* (2016), divorce could not be granted to the parties who stayed separate for 12 years and denied to resume cohabitation because the ground of cruelty could not be proved. The High Court of Delhi held that it does not have the authority to order dissolution on the basis of irreparable failure of wedlock even after having clear evidence that the marriage is broken down.

In case of *Badal Chandra Saha v. Smt. Sima Saha* (2017), both the parties were living separately since 1991. The husband filed divorce in the year 2008 taking the ground of desertion by wife but the wife denied all the allegations. Husband clearly shown his disinterest to live with his wife 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, though it is evident from the circumstances of the case, that marriage is broken down beyond repair 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 irreparable failure of wedlock should be made a basis of dissolution because justice should not only be done it should have seen to be done. Courts in various other judgements have highlighted circumstances where marital bond cannot be revoked.

In *Kanchan Devi v. Pramod Kumar Mittal* (1996), the Apex Court decided:

“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.”

In *Kunal Ranawat v. Rativa Jahan* (2017), the wife applied for the dissolution on the basis of desertion by husband. Respondent got a job abroad but he was unable to leave because of the petition. Later on they a compromise deed was signed by both the parties to convert the petition into that of mutual consent divorce. The question was raised as to 6 month cooling period. Then parties' sought divorce on breakdown ground. The high court denied divorce. Finally, Supreme Court waived away the cooling period and granted divorce. But the question was raised that 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 and they had to take recourse of the Supreme Court.

In case of *Smt. Shashi Prabha v. Ashok Dhawan* (2018), the wife filed the petition for dissolution on the basis of dereliction. As stated in the petition, 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 unwillingness for resumption of cohabitation. Delhi High Court of 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* (2016), 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 to give divorce because of some ill-motive, then it can be treated as cruelty and divorce can be granted.

In a recent judgement in case of *Monika Gandhi v. Jitendra Gandhi* (2020), Supreme Court held that where both the spouses have levied such allegations against each other from which it appears that the marriage has come to an end and there is impossibility for them to stay together peacefully, dissolution can be granted in such cases. 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.

In *Salome v. Dr Prince D. Immanuel* (2017), where wedlock has become a deadlock, because the wife had stayed with her husband only for short span of time and then wife made accusation of her husband being cruel and also of dereliction and husband also made accusations. Since then husband and wife are living separately. The court decided for granting a decree of divorce to hold the justice so that both the spouses can live in peace. When it is evident from the facts that there is no probability of reconciliation between the spouses then dismissing the petition and not granting divorce would only prolong the sufferings of both the parties, so, court should grant divorce in such situation.

But, on the other hand, in *Savitri Pandey v. Prem Chandra Pandey* (2002), the Apex Court decided that unless proved with the support of evidences, dissolution of marriage cannot be granted barely on the statements given by one of the spouses regarding the broken status of their marriage.

Divorce cannot be granted on the basis of irreparable failure of wedlock if the petitioner is not having clean hands. Court should exercise the power to dissolve the marriage on the basis of irreparable failure of wedlock with utmost caution and alertness. The divorce as per this ground should be granted in exceptional circumstances where interest of both the parties is served (Mayne, 2008).

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 sanctity of marriage to force it on any of the party to continue in the marriage. 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 has failed to cater the need of the time and has not move towards working in this direction and provide the dissolution of marriage on this much needed ground despite the observation and recommendation of the Supreme Court.

Analysis and discussion

Judiciary has time and again recommended for the need of incorporation of the irreparable failure of wedlock as a basis of dissolution under Hindu law. The analysis of the judgements makes it 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 divorce (Saema Jamil, 2020). 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 had to utilise its inherent power under Article 142 to grant dissolution on the basis of fact of broken marriage beyond repair in order to do complete justice. As per the above study, some of the major reasons for the irreparable failure of wedlock are-

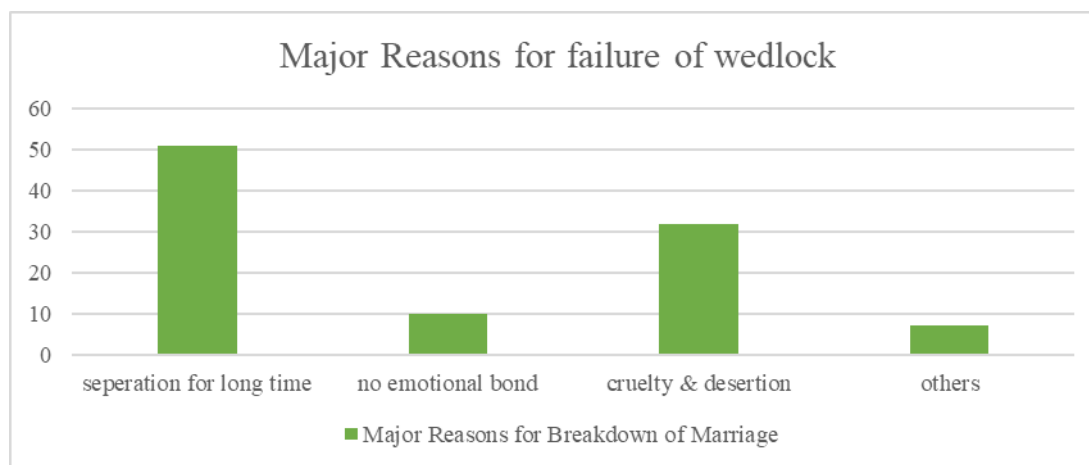


Figure 1

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 the care for each other, 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 the other. No emotional bond basically refers to situations where after marriage both the parties have not resided with each other, hence no emotional bond is formed between both of them since the beginning, which leads to irretrievable breakdown of the marriage. Then there are few other reasons such as 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 the law commission of India has also suggested in its various reports that irreparable failure of wedlock should be made a specific 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, Supreme Court has also intervened and granted the dissolution on basis of irreparable failure of wedlock for multiple times. Figure 2 shows the increase in cases where the apex court has allowed the decree of divorce on the basis of the above ground.

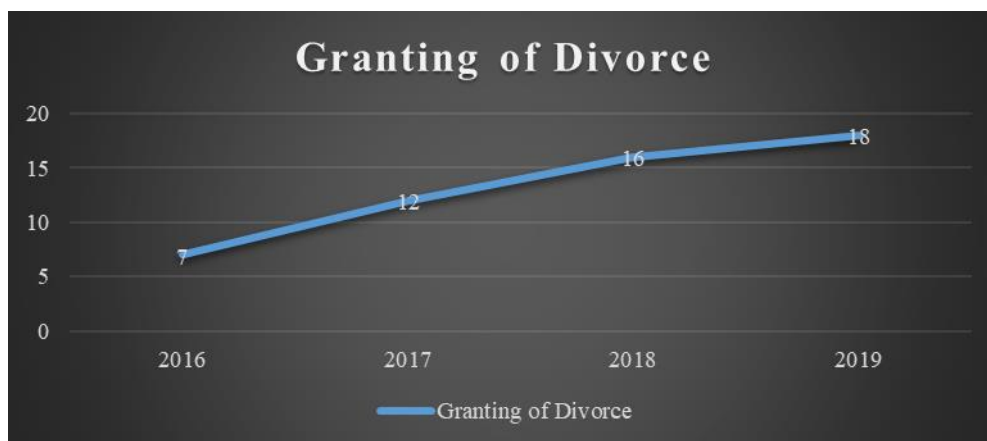


Figure 2

Figure 2 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.

Changing the nature of society and marriage are the major reason which has led the judiciary to recommend the irreparable failure of wedlock as a ground of divorce. Modernisation as well as individualisation have affected all spheres of lives and marriage is no exception. Unlike earlier times when both the parties cannot live together peacefully and happily, 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. The existing researches suggest 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.

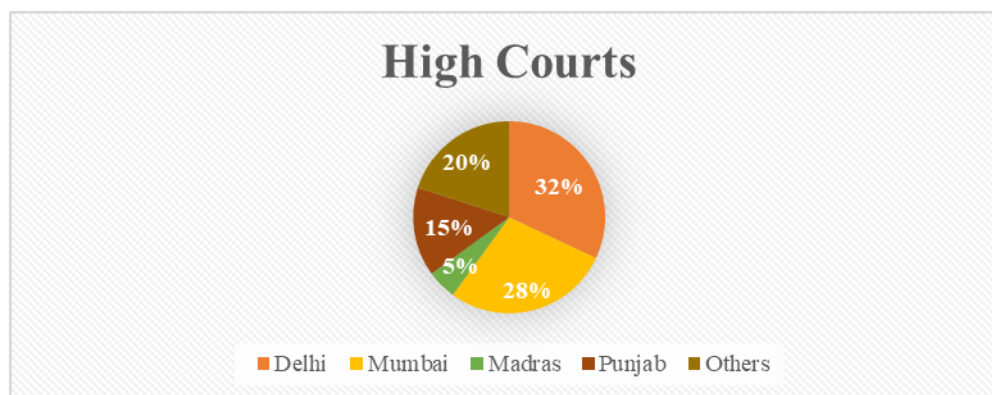


Figure 3

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

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 irreparable failure of wedlock also the basis for dissolution. 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.

Conclusion and suggestions

Where both the spouses stay separately for a considerably long time, it can be assumed that the marital ties cannot be resumed. The bond has become a myth, which is sustained by law only. If the law refuses dissolution in such circumstances, it does not cater the purpose of marriage, rather it appears that there is no respect for the sentiments of the parties (Parul Lakhan, 2018).

Law commission of India time and again suggested and reminded the legislature to bring changes in the Act and insert irreparable failure of wedlock as a basis of dissolution. It suggests 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 (Parul Lakhan, 2018). Because it is not a marriage in its literal sense and is merely a legal tie forced by law.

It is, therefore, concluded that the change in society and mind set of people, who instead of living in a toxic or incomplete relationship like to opt for divorce, now require amendment in Hindu law. Therefore, it is suggested that legislature should take action to bring change in the Act and settle the 'irreparable failure of wedlock' as a new basis for dissolution. The newly inserted section may also have a provision that the court should ensure that the marital bond has been failed beyond resumption and analyse whether sufficient measures have been taken to settle the finances between the spouses and children before ordering a dissolution on this reasoning (Saema Jamil, 2020).

Lastly, analysing the Law Commission of India's reports and decided cases, researchers 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. (tenure of separation can be decided by legislature)
- Failure of any reconciliation or mediation proceedings due to certain circumstances can be considered as breakdown of marriage. Such as-
 - a) When both the parties are just denying all options of settlement proposed by the mediator of court and happy to see another party suffering which is evident from the facts.
 - b) 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* (2019) 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 the status of marriage and their reports should be considered to check whether there is any scope of peaceful co-habitation between parties. If not, then divorce should be granted on breakdown ground.

- Wife or husband, have neither lived together for more than a few months after marriage nor are ready to live together. There are very few chances of any affection being developed.
- In case there is a child, abandoning the child by one of the spouses with no intention to keep any relation with child.

These are certain situations that can be considered while granting a dissolution on breakdown basis. But the Court should always be very cautious while granting a divorce on any of such grounds because there are

chances of its misuse. So, it is suggested that breakdown theory should be given place in the Act and specific provision should be incorporated to make it more specific. So that wedlock does not become deadlock or mere legal fiction.

The researchers further suggest the draft of the section relating to irretrievable breakdown of the marriage as under-

Sec 13C- irreparable failure of wedlock -

- 1) Either party to marriage can file a petition for the dissolution of marriage by a decree of divorce to the district court, on the ground that the marriage has failed irrevocably.
- 2) The court will not reach to the conclusion unless there are evidences of separation of the parties which prove 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.
- 3) If the court is satisfied, on the evidence as to the fact mentioned in sub section (2) and circumstances hereinafter mentioned, it shall grant a decree of divorce considering following circumstances-
 - a) Any kind of settlement mechanism is not successful
 - b) Both the parties together or respondent has laid marriage to be broken beyond repair
 - 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) 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.

Researchers suggests this draft because by doing this we can overcome one of the major argument against the irreparable failure of wedlock that it will be easy to seek dissolution of marriage. 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.

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