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BREAKING TIES AMICABLY: AN ANALYSIS OF DIVORCE BY MUTUAL CONSENT

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Abstract

In Hindus, marriage was seen as a permanent and lifelong institution. However, with evolving times the provision of divorce was introduced to fulfill the needs of the changing society. Divorce involving mutual consent of the husband and wife is considered to be the most cooperative and amicable form of divorce. In this research paper an analysis of the statutory provisions of this form of divorce under the Hindu Marriage Act, 1954 and the judicial interpretation of its provisions are covered. It is further analyzed by going through the procedure for this divorce and its various advantages.

A study was also conducted to know about the awareness and public perception of Divorce by Mutual consent under Hindu law. Quantitative data was collected from 70 people through an online questionnaire. The key findings from the data collected and analyzed were that there is high awareness of this provision, and that divorce is still seen as a disgrace and dishonor upon the family and thus spouses continue their unhealthy marriage despite willingness to separate. The opinion of public on waving of the cooling off period and the need for legal reforms in it were also taken.

Keywords: No-Fault divorce, Divorce by mutual consent, amicable divorce

Introduction

Hindu marriage is not just a meeting of two bodies but of two souls. It is a holy institution and considered as a sacrament. Earlier Hindu marriages were permanent in nature there was no provision for dissolving marriage but with evolving time and society the concept of divorce was introduced. It allowed married couples to dissolve Marriage if things were not going well between them and it was impossible to sustain the marriage Divorce in Hindu law is primarily governed by Hindu Marriage Act, 1955 which provides for dissolving marriage under certain conditions.

The No Fault Theory in Divorce allows married couples to end or dissolve marriage without

proving fault of each other. Divorce by mutual consent is a part of No-Fault Theory. It is an amicable and cordial way to end marriage with mutual understanding. Divorce by mutual consent gives equal freedom to the parties to dissolve the marriage not because they are wicked or malicious people, but it has just happened that the marriage has turned out to be impossible to continue due to some unforeseen condition. It would not be good for husband and wife to continue such an unhappy marriage as it will take a toll on their physical as well as mental health. Also, the upbringing of children will also be adversely affected. Divorce by mutual consent in Hindu law is covered under section 13B of Hindu Marriage Act, 1955. The critics of the consent theory of divorce

consider that divorce by mutual consent gives husband and wife license to divorce therefore making divorce easy in Hindu's where in ancient times it was a permanent institution. This leads to hasty and unnecessary divorce in cases where it could have been prevented. To avoid this a safeguard has provided in Section 13(B) of Hindu Marriage Act, 1955 that before a petition for divorce by mutual consent is presented before the court the parties should be living separately for a period of one or more year. A further safeguard has also been provided that is a six-month cooling off period for possible reconciliation between the parties before taking this extreme step.

This paper seeks to explore the legal framework surrounding divorce by mutual consent in Hindu law, focusing on its advantages and drawbacks. It involves examining the relevant statutory provisions and judicial interpretations to offer a thorough understanding of the subject. It includes a survey through online questionnaire to know about the perception and awareness of public about mutual consent divorce.

Literature Review

Divorce by mutual consent under Hindu law has paved way for couples to end their marriage in an amicable way. Over the period of time judgements by courts and legislative amendments have shaped its way of interpretation. This review explores the evolution of mutual consent divorce under Hindu law, analyzing key legislative provisions and judicial perspectives.

Legislative Framework

The provision for mutual consent divorce was inserted into Hindu law by addition of Section 13B of the Hindu Marriage Act, 1955 through the Marriage Laws (Amendment) Act, 1976. According to Legal scholar Paras Diwan (2019) this provision helps in a progressive change by acknowledging the fact that marriages should not be forcefully continued when both parties have agreed to separate. However, the mandatory six-month waiting period required

under Section 13B(2) has been criticized for unnecessarily prolonging the process, sometimes being distressful to the individuals involved.

Judicial Interpretations

The Section 13B(2), according to which there should be a mandatory six month cooling off period between the first and second motion for divorce, has been subject to various judicial interpretations. In the case of Amardeep Singh v. Harveen Kaur (2017), the Supreme Court ruled that the six month cooling off period is not mandatory but upon the discretion of the court, allowing courts to waive it. Similarly, in Nikhil Kumar v. Rupali Kumar, the Court used its power under Article 142 to provide complete justice and end the marriage by waiving the cooling off period. However, in Manish Goel v. Rohini Goel, the Court took a rigid view, holding that Article 142 cannot be used to waive off the cooling period as it will be misuse of this article. In Supreme Court Bar Association v. Union of India, the Constitution Bench of the Supreme Court ruled that under Article 142, the Court cannot completely disregard the substantive provisions of a statute. However, the Court considered that Article 142 may be invoked in exceptional circumstances where a marriage is irretrievably broken and beyond reconciliation.

Statutory Provisions and Judicial Interpretations

As per Section 13(B) of the Hindu Marriage Act, 1955, both spouses can jointly file a petition for divorce by mutual consent, provided they meet the following criteria:

1. They have been living apart for at least one year.
2. They are unable to cohabit.
3. They have mutually agreed to separate.

All these conditions must be satisfied before a divorce can be granted.

In the case of *Davidar Singh Narula vs. Meenakshi Nangia*, the Supreme Court acknowledged that the mandatory six-month

waiting period could be waived if circumstances justified it. Similarly, in *Harcharan Kaur vs. Nachhatar Singh*, the court affirmed that either party has the right to withdraw the petition at any stage.

The Supreme Court, in *Anil Kumar Jain vs. Maya Jain*, ruled that mutual consent must persist until the final decree is issued. If one party withdraws consent, even after six months have elapsed, the petition is liable to be dismissed. However, the court retains the authority to grant divorce under Article 142 of the Constitution, a power exclusively vested in the Supreme Court.

Living Separately

Physical separation under different roofs is not a prerequisite for proving that the parties are living separately. In *Sureshta Devi vs. Om Prakash*, the Supreme Court clarified that “living separately” does not refer to the physical location but rather to the state of not cohabiting as husband and wife. Spouses may reside under the same roof due to circumstances but still live separately if they have ceased fulfilling marital obligations. Conversely, they may live in different residences and still maintain a marital relationship. The crucial factor is the absence of intent to continue the marriage, sustained for at least one year prior to filing the petition.

Unilateral Withdrawal of Consent

In *Sureshta Devi vs. Om Prakash*, the Supreme Court emphasized that a decree of divorce cannot be granted based solely on the initial petition if mutual consent no longer exists. The court ruled that consent must remain intact until the final decree is passed. More recently, the Orissa High Court, in *Doyel Dey vs. The Judge, Family Court, Balasore & Anr.*, held that a spouse retains the right to unilaterally withdraw consent at any time before the final decree is issued, even after arguments have been concluded.

Cooling-Off Period

Under Section 13(B) of the Hindu Marriage Act, once the first motion for mutual consent divorce is filed, the law mandates a waiting period of at

least six months and up to 18 months before the second motion can be presented. This ‘cooling-off period’ is designed to allow spouses time for introspection and reconciliation.

In *Shilpa Sailesh vs. Varun Sreenivasan*, a Constitution Bench held that the six-month waiting period under Section 13B(2) could be waived under Article 142, but this discretion must be exercised judiciously.

Earlier, in *Amardeep Singh vs. Harveen Kaur* (2017), the Supreme Court identified factors that justify waiving the cooling-off period, including:

- Completion of the statutory separation period before filing the first motion.
- Failure of all mediation and reconciliation efforts.
- A genuine settlement regarding alimony, child custody, and other pending issues.
- Avoiding unnecessary prolongation of the couple’s suffering.

The court further outlined key considerations, such as the duration of the marriage, the length of pending litigation, the period of separation, the existence of other legal proceedings, mediation attempts, and whether the settlement fully resolves all outstanding matters.

Irretrievable Breakdown of Marriage

In *Ashok Hurra vs. Rupa*, the Supreme Court exercised its powers under Article 142 to dissolve a marriage despite one spouse withdrawing consent, as the relationship was deemed irretrievably broken. The court held that in such cases, it could grant divorce under Section 13(B) of the Hindu Marriage Act to ensure justice.

More recently, in *Smt. Prabhavathi @ Prabhamani vs. Lakshmeesha M.C.*, the Supreme Court clarified that the concept of an irretrievably broken marriage cannot be misused to benefit the party responsible for the marital breakdown.

The Constitution Bench in *Shilpa Sailesh vs. Varun Sreenivasan* reaffirmed that Article 142

should be applied with extreme caution to ensure complete justice.

Procedure for filing divorce by mutual consent

Filing of petition

The spouses jointly file a petition for the dissolution of their marriage to obtain a divorce decree. This petition must be submitted to the Family Court with signatures from both parties. They must state that they have been living separately for at least one year and that reconciliation is not possible. Additionally, they must confirm their mutual decision to divorce, as outlined in the law. If either spouse is absent, a family member can file the petition on their behalf. The court schedules a hearing date after a minimum of six months but within a maximum of eighteen months. This interval, known as the cooling-off period, allows time for reconsideration. If no action is taken or if the parties withdraw the case, the petition is dismissed. The court's jurisdiction can be determined by the couple's last place of residence, the location where their marriage was solemnized, or the wife's current residence.

First Motion Hearing:

Both spouses must appear before the court for the initial hearing, where the judge ensures that their decision to divorce is mutual and voluntary. The court may attempt reconciliation by encouraging the couple to reconsider their decision. If they remain firm, a mandatory cooling-off period of at least six months is granted.

Second Motion Hearing:

After the cooling-off period, the couple must attend a second hearing, where the court reconfirms their consent to divorce. The judge also reviews the agreed-upon terms of settlement, ensuring that financial, property, and custodial matters have been addressed. If no disputes arise, the case proceeds to the final stage.

Final Decree of Divorce:

Upon verifying that both parties have complied with legal requirements and remain committed to their decision, the court grants the decree of divorce, officially dissolving the marriage and granting both individuals legal separation.

Research Methodology

This research paper comes under the category of mixed method approach in which I have used both qualitative and quantitative data to do the analysis of divorce by mutual consent under Hindu law. The qualitative data used included secondary sources such as articles, law journals and legal research papers.

In Quantitative research I used an online questionnaire in Google form to collect primary data as responses from individuals of varying age, gender, education and marital status. It aimed to know about the public opinion and awareness about the basic provisions and concepts of mutual consent divorce. The sample included 70 respondents and the responses were taken in form of multiple choice questions. Charts were used for better visualization of the key findings of the study.

Limitations of the study:

The sample size taken for the study was limited. A larger sample size would have been more insightful.

The respondents can be biased.

The data was collected through an online questionnaire uploaded on Google forms

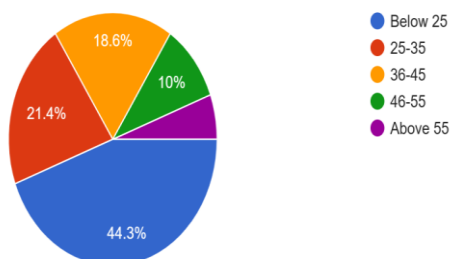
Findings and Analysis

To learn more about and gather more Information about the public perception and awareness of Divorce by Mutual Consent under Hindu law I Performed a Survey using a series of questionnaires, which was filled up by 70 respondents.

All the responses that have been collected through the questionnaire are presented in the form of graphs and charts for better Understanding

Age of the participants

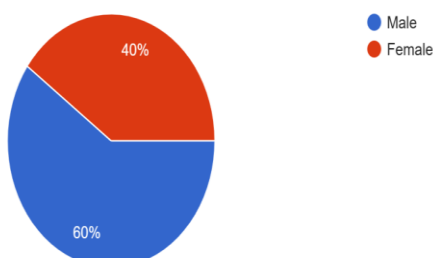
Age
70 responses



The chart represents the age group to which the participants belong. Most of the participants were below 35 years of age. This is because younger people have easy access to online surveys through their smartphones than the older age group who have little or no access to modern smartphone devices.

Gender of the participants

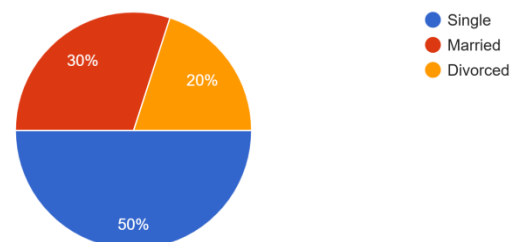
Gender
70 responses



From the above chart we can observe that the number of men respondents were a little more than that of women respondents. The data was collected to know the perception and awareness of both men and women of Divorce by Mutual Consent under Hindu Law.

Marital Status of the participants

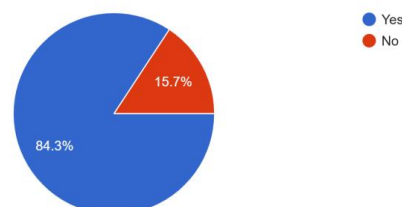
Marital Status
70 responses



We can observe from the above chart that most of the participants were single and unmarried almost 50% of them. The participants also included married and divorced individuals in 30% and 20% respectively. This ensured that awareness of the single and divorced about mutual consent divorce and the experience of divorced is reflected in the survey.

Awareness of the Participants

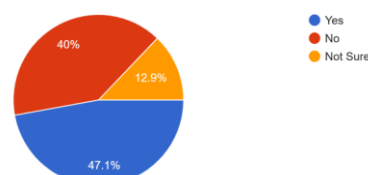
Are you aware of the concept of divorce by mutual consent under Hindu law?
70 responses



Around 84.3% of the participants were aware of the concept of divorce by Mutual Consent under Hindu law only 15.7% of the participants were unaware. This shows high legal awareness among the participants as the Google form was widely circulated among law students.

Whether mutual consent divorce provides an effective way to end a marriage amicably or not?

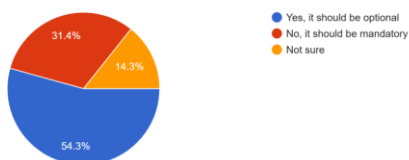
Do you think mutual consent divorce provides an effective way to end a marriage amicably?
70 responses



We can observe from the chart that majority which is 47.1% of the participants think that Divorce by mutual consent is an amicable way to end a marriage. This indicates that growing social acceptance of mutual consent divorce as a peaceful and cooperative way to end marriage. 40% of the participants still believe that this form of divorce involves distress and there is a need for legal reform.

should the six-month waiting period be made optional in cases where reconciliation is impossible?

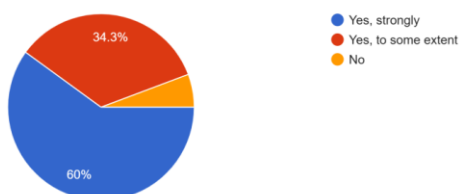
In your opinion, should the six-month waiting period be made optional in cases where reconciliation is impossible?
70 responses



In this chart we can observe that majority of the participants 54.3% believe that the 6-month cooling off period should be optional where reconciliation is impossible as an unnecessary delay by mandatory cooling off period will be more stressful. While 31.4% support that the cooling off period should be mandatory to prevent impulsive decision of divorce done in heat of the moment.

Do you believe societal pressure influences couples to stay in unhappy marriages?

Do you believe societal pressure influences couples to stay in unhappy marriages?
70 responses

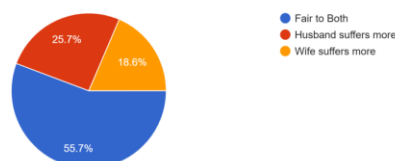


In the chart 57.1% of the participants considered that the societal pressure influences the couples to stay in unhappy marriage, this highlights the social stigma around divorce. Divorced individuals are looked down upon by the society which leads to couples continuing unhappy marriages despite enduring emotional

and mental trauma. There is a need for social reform and awareness so that couples can make decision on divorce without any external pressure.

Do you think mutual consent divorce is fair to both spouses, or does one partner usually suffer more?

Do you think mutual consent divorce is fair to both spouses, or does one partner usually suffer more?
70 responses



Majority of the participants 55.7% consider that mutual consent divorce is fair to both husband and wife. This is because both the spouses have voluntarily agreed to terms of divorce and the Section 13B of the Hindu Marriage Act, 1954 also provides for an equitable process the divorce would be fair.

Conclusion

Divorce by mutual consent has become a popular way for spouses to end marriage, provided in Section 13B of the Hindu Marriage Act, 1954, it allows ending marriage in a time friendly, amicable and feasible way. The mandatory separation and cooling-off periods of one year and six months respectively are meant to ensure that both partners have not taken the decision to divorce impulsively and in heat of moment. However, these waiting periods can sometimes be an unnecessary impediment, especially when there is no chance of reconciliation between the parties.

Like any other law mutual consent divorce also has its shortcomings. The social stigma surrounding divorce discourages couples to go for it especially for women who may be financially dependent on their spouse. Also, the consent should be mutual, if one party refuses to give consent other party cannot pursue for mutual consent divorce. Courts have given judgements to address such issues by waiving the cooling off period in cases where there is

irretrievable breakdown of marriage, but there is still room for further legal reforms. From the responses received from Online questionnaire we found that a large number of respondents were aware of Divorce by Mutual consent and majority of them considered it to be the most amicable way to end marriage. The respondents were in favor of waving the cooling off where reconciliation is impossible which is conforming with recent court judgement. The societal stigma around divorce is also evident from the responses as majority of them believe that societal pressure has undue influence on married individuals who are forced to continue their unhappy marriage. The respondents considered the procedure of the mutual consent divorce to be fair to both parties.

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