



# STATUTORY DIVORCE v/s CUSTOMARY DIVORCE UNDER HINDU MARRIAGE ACT, 1955

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## Introduction-

Marriage is regarded as one of life's most important aspects. And, in a nation like India, it is not just significant but also sacrosanct. In our nation, religious rites and rituals play a significant part in marriage, and because of this religious component, marriage is still seen as a sacred institution. As a result, the notion of sanctity that comes with marriage makes the concept of divorce exceedingly foreign to the religion's mandate. Hindu marriage unites two people for all eternity, allowing them to seek dharma, arth, and karma. It is a union of two people who have been married for a long time and have a sustainable relationship. Marriage in Hinduism is followed by customary consummation rites.

Until 1955, divorce was completely unknown in the Hindu marriage. Manu announced that a spouse can't be delivered by her significant other either by deal or by deserting, suggesting that the conjugal tie can't be cut off in any case<sup>1</sup>. According to the traditional belief, a marriage is considered not only as a relationship or a bond that exists for the existing world but it is a bond which also continues beyond. Thus, the essence of staying together was so imbibed in the Hindu society that a divorced person was stigmatized and prejudiced in the existing world. In Hindu communities particularly in the so-called lower social strata, the practice of divorce prevailed as a custom. However, with the changing needs of society, the Hindu Marriage Act was considered and ultimately the divorce aspect also found a place in the Hindu Marriage Act<sup>2</sup>.

## Theories of divorce-

There are certain theories of divorce through which the concept of divorce was incorporated in Hindu marriage act. These theories are as follows

- Fault theory- The fault theory, often known as the guilt theory, is another name for the fault offense of divorce. As a result, it emphasizes the idea that a marriage can be dissolved if one of the parties inside the marital bonds commits an infraction against the marriage's innocent partner. As a result, within the marriage bonds, it is important to have a guilty and an innocent partner. The

<sup>1</sup> <https://www.latestlaws.com>

<sup>2</sup> <https://www.theasianread.com>

innocent party alone has the right to seek divorce redress. The most remarkable characteristic, however, is that if both parties are at fault, there is no recourse.

- Mutual consent theory- The argument behind this concept is that when two individuals marry one other from their own free will, they should be allowed to move away freely as well. In any event, it is often argued that this technique would promote immorality by causing hasty separations and parties to end their marriages regardless of whether there is a little personality clash.
- Irretrievable breakdown of marriage theory- The irreversible breakdown of marriage theory describes a breakdown in a marital connection caused by such adversity that the couples have no realistic chance of staying together. The husband and wife will never be able to stay together as a result of such difficult and hard circumstances. As a result, we may conclude that there is a stronger justification to live apart compared to the feelings of love, affection, and devotion that should normally predominate between the husband and wife.

### **Statutory divorce-**

All three theories of divorce are accepted in contemporary Hindu law, and divorce can be sought on the basis of any of them. Originally, the Hindu Marriage Act of 1955 established divorce on the fault theory, with nine fault reasons in Section 13(1) that either the husband or wife may file for divorce, and two fault grounds in Section 13(2) that only the wife could suit for divorce. Certain provisions of Section 13(1) were amended in 1964, resulting in Section 13(1A), which recognized two reasons for the dissolution of a marriage. The 1976 amendment act added two new fault grounds for divorce for wives, as well as a new section 13B for mutual consent divorce. The various grounds on which a decree of divorce can be obtained are Adultery, Cruelty, Desertion, Conversion, Insanity, Venereal Disease, Renunciation, Leprosy, Renunciation, Presumption of Death. The wife also has some special rights for divorce such as: If the husband has more than one wife living with him at the same time, or if the husband has committed rape, sodomy, or bestiality after the marriage has been solemnised. Recently on 5<sup>th</sup> august 2021, The Kerala High Court in a significant judgment upheld that marital rape, although not penalised in India, is a good ground to claim divorce.

In the case of statutory divorce with mutual consent, both parties file a joint petition for dissolution of marriage in the family court, stating that they have not had the option to live separately and have mutually agreed to end the marriage or they have been living independently separate for a period of one year or more. The court will keep a close eye on the petition and scrutinise the materials. The court may then attempt to resolve the disputes as it sees appropriate, but if the situation does not normalise, the court may proceed with the procedures. Following the court's review of the petition, the parties' statements are recorded under oath. The court grants the first motion after the parties' statements are recorded. Following that, both parties to a separation are granted a six-month period before they may register the subsequent movement. From the day the divorce petition was filed in family court, the maximum time limit for submitting the following motion is up to 18 months. When the parties have decided to proceed with the processes and appear for the next motion, they might resume the previous hearings. In the case of AMARDEEP SINGH V. HARVEEN KAUR<sup>3</sup>, the Supreme Court had held that a 6 Months Waiting Period for Divorce by Mutual Consent is not mandatory. After this the decree of divorce is passed. In a mutual divorce, both parties are more likely to give their consent, and there will be no disagreements about issues such as a divorce settlement, child custody, support, property, and so on. Along these lines, the spouses should have a complete understanding before making an official decision on the dissolution of a marriage.

### **Customary divorce-**

Although divorce was not recognized by Hindu law in general, it was allowed by custom in particular cultures, and the courts observed the custom when it was not detrimental to public policy. This Act's plan and aim are not to bypass any of the customs that have been recognized as having force and effect by the

<sup>3</sup> Civil Appeal No. 11158 of 2017

provisions of this chapter. In any other case, the spouses are not required to appear in court to seek divorce on the grounds recognized by custom.

Sec 29, Hindu marriage act states that “Nothing contained in this Act shall be deemed to affect any right recognized by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage whether solemnized after, before the commencement of this Act.”

Prior to the Hindu Marriage Act of 1955, Hindus could only divorce if a custom ruling their community permitted it. The Hindu Marriage Act protects customary divorce, and no section of the Hindu Marriage Act applies to customary divorces. section 11, Sections 23 (bars to marital relief), 15 (bar to remarriage), 24 and 25 (maintenance and compensation), and 26 (child custody) do not apply to customary divorces. The reality is that divorce has always been possible under custom among most low caste Hindus; for them, the sacramental aspect of marriage was a form without substance. However, there is no widespread Hindu tradition of divorce. It differs from caste to caste and location to location. It must be proved that the parties are bound by tradition whenever customary divorce is requested. Customary divorces can still be sought in the same manner as they were before the Hindu Marriage Act went into effect.<sup>4</sup> Divorce can be achieved under customary law through the village panchayats, or caste panchayat, or by private act of the parties, orally, in writing, such as through tyaga-patra. A divorce-permitting custom must meet all of the conditions of a legitimate custom. A tradition that allows one partner to divorce without the agreement of the other is void because it is irrational and against public policy. Because customary divorce is an exception to the ordinary law of divorce, it must be contended and proven. Various types of divorce are recognised by customs. Divorce can be achieved with mutual agreement of the spouses, but it is also possible for a husband or wife to grant divorce on dubious reasons. It's hard to characterize the various sorts of divorce accepted by tradition.

In the case of YAMANJI H. JADHAV V. NIRMALA<sup>5</sup>, the court held that customary divorce is only valid if the custom permits or custom of customary divorce prevails in the tradition. After showing the proof of existence of customary divorce in the tradition, Parties may file a declaratory action in court to have the court declare that the divorce deed made between them is lawful, valid, and appropriate.

In the case of TWINKLE RAMESHKUMAR DHAMELIYA V. SUPERINTENDENT, REGIONAL PASSPORT OFFICE, AHMEDABAD, 2006<sup>6</sup>, the Gujarat high court held that under the Hindu Marriage Act of 1955, customary divorce is recognised as one of the ways of dissolution of Hindu marriages. The predominance of customary rights to divorce should be proved by the person proposing such custom only in instances where either party to the deed or any person directly impacted by the deed raises any objection to the custom prevalent in the community.

In the case of DIPIKA AMRUTLAL PATEL V. VISHWAM PAMANAND PATEL<sup>7</sup>, the Gujarat high court held that in a declaratory suit, the Family Court might give a decision declaring that the customary deed performed between the parties is legitimate and legal. Furthermore, the Family court might decide that, as a result of the stated customary divorce deed, the parties to the deed have ceased to be husband and wife as of the date of the customary divorce deed's execution.

In the case of SWAPNANJALI SANDEEP PATIL v. SANDEEP ANANDA PATIL<sup>8</sup>, the man married for the second time on the basis of customary divorce given to first wife but the prevalence of customary divorce was not proven. Justice shah said that the husband had to show that such a customary divorce was legal in his group or caste. In the absence of any such problem or proof, the courts were not justified in concluding that the man and his first wife had divorced according to custom.

<sup>4</sup> Diwan, P. P. D. (2018). Family Law. Allahabad law agency.

<sup>5</sup> AIR 2002 S.C. 971

<sup>6</sup> GLR 3443

<sup>7</sup> GLH (1) 457

<sup>8</sup> SLP (C) NO.25080 OF 2016

In the case of SMT. KRISHNA VENI VS THE UNION OF INDIA AND OTHERS<sup>9</sup>, the court held that the exemption provided by Section 29(2) of the Hindu Marriage Act will very probably not apply to seeking a customary divorce. It goes without saying that in order to use Section 29(2) of the 1955 Act, the party relying on a custom must demonstrate that the party's right to demand the dissolution of a Hindu marriage was recognised by custom.

**Conclusion-** Marriage is regarded as a sacred bond among Hindus. There was no provision for divorce prior to the Hindu Marriage Act of 1955. Divorce was too radical a notion for Indian society at the time. The silent victims of such a strict regime were the women. However, times have changed, circumstances have altered, and the social hierarchy has shifted. Now, the law allows you to get out of an unsatisfactory marriage by filing for divorce in a court of law. Women are the true beneficiaries of such a provision since they no longer have to suffer in silence as a result of their husbands' harassment or unfairness.

The concept of customary law is prevalent in many castes and tribes, most among jats of Punjab. In South India, particularly in Kerala, several castes or groups were designated and governed by specific legislation. Marriage has always been seen as a consensual relationship and dissolvable by mutual consent in matrilineal cultures such as marmakhathayama and alisantana<sup>10</sup>. Marriage and divorce in these groups are governed by unique enactments from the former Madras Province and the erstwhile States of Travancore and Cochin. The Hindu Marriage Act did not remove these statutes, and so divorce is still possible under them.

Being an Indian, I find the shift in Hindu culture and acceptance of the change in the dynamic society to be a source of tremendous joy and pride. Staying in an abusive marriage is a violation of essential human rights such as the right to live in peace, freedom of speech and expression, and so on. Finally, the people must ensure that they do not abuse the powers granted to them by the law, but rather preserve the laws and human feelings of love, loyalty, trust, and compassion.

<sup>9</sup> WPA No. 2346 of 2018

<sup>10</sup> Diwan, P. P. D. (2018). Family Law. Allahabad law agency.