

Chapter-I

INTRODUCTION

The Hindu marriage is a sacramental. The aim and objective of the institution of Hindu marriage is to achieve, by cohabitation of man and woman, the supreme values of Dharma, Artha, Kama and Moksha. These are the material determinants of the concept of marriage. Marriage is one of the essential *samskaras* (sacraments) for every Hindu.

According to Manu, a famous Dharma shastrakar, "every Hindu must marry. To be mothers, were women created and to be father, men: The Veda ordained that Dharma must be practiced by man together with his wife".¹ Marriage as a sacramental union implies that primarily it is a 'sacrosanct union', meant for the performance of religious and spiritual duties. Secondly, a sacramental union means that it is a 'permanent union'. Marriage is a tie which once tied, cannot be untied. This implies that marriage can not be dissolved. Thirdly, sacramental union means that it is an 'eternal union'. It is valid not merely in this life but in lives to come.

According to Manu, husband and wife are united to each other not merely in this life but even after death, in the other world. Its implication has been that the widow re-marriage as a rule was not recognized in Hindu law. The rule is that, "once is a maiden given in marriage. A true wife must preserve her chastity as much after as before her husband's death".²

A Hindu marriage is a sacrament in the sense that, a wife could never ask for divorce or for another husband even if her husband was a lunatic, impotent, a leper, a deserter, a chronic patient of venereal diseases or even a eunuch or a dead man. The marriage became monogamous for the woman alone.

Marriage was considered to be an indissoluble union. It was only in some exceptional cases, the sages allowed a woman to abandon her husband and take another. '*Vasistha*', a famous '*Dharma sutrakar*' said: "a damsel betrothed to one devoid of character and good family or afflicted by impotency, blindness

¹. Manu Smriti, ix. 96; cf: Dr. Paras Diwan on Hindu law- 2nd edn. 2005, p.547, Orient Publishing Company, Allahabad.

². Manu Smriti, v. 160-161: cited *ibid*.

and the like or an out caste or an epileptic or an infidel or incurably diseased... should be taken away from him and married to another". But this is confined to betrothal.

Old Hindu law³ does not recognize divorce because it considered marriage as an indissoluble union. But it was recognized by custom. Some *smritikars* allowed a wife to abandon her husband in some exceptional cases. Narada and Parasara, the famous *smritikars* mentioned five cases in which, a woman may abandon her husband and take another; 1) when the husband is missing; 2) when he is dead; 3) when he has become an ascetic; 4) when he is impotent; and 5) when he is an out-caste.⁴ The Hindu Marriage Act, 1955 originally contained separate provisions for judicial separation and divorce. It declared certain marriages as void and voidable under Sections 11 and 12 on its failure to fulfill the mandatory conditions prescribed under this Act for the validity of marriage and on the existence of the defects or faults stated under Section 12 of the Act.

The matrimonial relief of dissolution of marriage stated under Section 13(1) is based upon fault grounds. On proving defect or fault on the part of one of the party, the other party can apply for divorce. The Hindu Marriage Act, 1955 was amended in the year 1964 which inserted section 13(1-A) there by making the relief of divorce available to both parties.

The Marriage Laws (Amendment) Act, 1976 made the grounds of judicial separation and divorce identical. More over, the Amendment Act of 1976 provided for divorce by Mutual consent under Section 13-B, thereby making the relief of divorce available to the parties to the marriage without proving any fault on either party. Hence there is a need to study the legislations relating to marriage and divorce and its impact on the law of marriage and divorce.

In Arabia, before the advent of Islam, women were treated as animals. They had no legal rights. A man can take any number of wives. Divorce was

³. Law prior to passing of the Hindu Marriage Act, 1955.

⁴. Narada xii, 81; Parasara, x. 26-35; cf: Dr. Paras Diwan on Hindu law-2nd edn. 2005, p.548, Orient Publishing Company, Allahabad.

very easy and female infanticide was common. Female slavery and concubinage were common. Before advent of Islam, the prohibited degrees of relationship were very narrow and were confined only to close degrees.

When Islam came into being, the females were given due social status and they were regarded as dignified members of the society. The prophet was determined to raise the status of woman. He asked people to see their brides before marrying them, and taught that nobility of character is the best reason for marrying a woman. Through Islam, the prophet brought about a reform in the society. Prophet introduced *Nikah* through which, the females could be placed on a footing of perfect equality with males.

Marriage among Muslims is a civil contract. Upon completion of proposal and acceptance, all the rights and obligations arise immediately and simultaneously. There is only one form of marriage called "Nikah". Since no term is fixed in normal *nikah*, a Muslim marriage is a permanent marriage. However, the Ithna Asharis recognizes temporary marriage known as "Muta" marriage.

All the schools of the Sunnis classify marriages into *Sahi* (valid), *Batil* (void) and *Fasid* (irregular). The Ithna Ashris does not recognize the irregular marriages. Such marriages are void according to them. Islam permits a man to take up to 4 wives at a time. The reason is that during pre-Islamic Arabia, unlimited polygamy was prevailed. To prevent it, prophet himself restricted it to four. Where as a Muslim woman cannot take more than one husband.

Every Muslim is under an obligation to pay *dower* to his wife. It is inherent in the concept of marriage. Every Muslim has to pay *dower* or *mahr* to his wife as a mark of respect to his wife. It may be fixed either before marriage or at the time of marriage or after marriage. She can claim it as of right.

The Dissolution of marriage under Muslim law takes place either on the death of either party to the marriage or at the instance of one of the parties or both the parties or through court. A Muslim husband can dissolve the marriage unilaterally without any cause, without approaching the court of law and even in the absence of the wife.

But a Muslim wife has no such power of pronouncing talaq, unless delegated to her (*Talaq-i-tafweez*). It can be dissolved at the instance of wife by paying some consideration to her husband (*khula*) for releasing her from the matrimonial bond. It can also be dissolved by mutual consent of both parties (*mubaraat*). The other grounds are: *ila*, *Zihar*, *Lian* and *Apostasy*.

The dissolution of Muslim Marriage Act, 1939 contains several fault grounds of divorce which are available to a Muslim wife. On proving any one of the fault grounds, she can apply for divorce. The Act of 1939 saves the existing fault grounds which are there before passing of the Act of 1939. Apart from this, clause (ix) of section 2 of the Act of 1939 contains 'Residuary clause'. Under this clause, the court can dissolve a marriage even in the absence of any of the grounds stated in the Act, if it is satisfied with the ground shown by her.

Hence there is a need to study the concept of marriage and divorce before Islam and the changes brought by the Islam and also legislations passed and its impact.

Need for the study:

Various legislations were passed in the sphere of Hindu marriage and divorce which modified the existing conditions relating to marriage. The Hindu Marriage Act, 1955 brought so many changes in the law of marriage and divorce. This Act was amended in the year 1964 which brought liberalized the law of divorce. Further, the Marriage Laws (Amendment) Act, 1976 brought so many changes in the law of divorce which almost altered the nature of Hindu marriage and provided for easy divorce without showing any cause. Hence there is a need to study the various legislations relating to marriage and divorce under Hindu law and its impact.

Research Problem:

In the light of the above, the researcher has formulated the following research problem.

1. Whether the impact of legislation on marriage and divorce under the Hindu law altered the nature of marriage?
2. Whether there is any undue encroachment in the sphere of Hindu divorce?
3. Whether the Marriage Laws (Amendment) Act, 1976 is in conflict with the nature of Hindu marriage?
4. Whether legislative interference in the sphere of Hindu marriage is justifiable?
5. Whether the matrimonial reliefs provided to the parties under Hindu law are more liberal?
6. Whether Islam improved the conditions of women?
7. Whether Islam introduced necessary changes in the law of marriage?
8. Whether Muslim women are on par with Muslim men in dissolving their marriages?
9. Whether the Dissolution of Muslim Marriage Act, 1939 provided satisfactory relief to women of unhappy marital tie?

Scope of study:

The scope of study of this thesis is confined to the effects of legislation on marriage and divorce under Hindu and Muslim Personal Laws. It covered a period from Vedas, Smrities, to the present day position in relation to the marriage and divorce under Hindu law and from Pre-Islamic Arab society to the present day Indian Muslims position in relation to the marriage and divorce under Muslim law and the impact of legislation on marriage and divorce on both Hindus and Muslims. Hence the study is restricted to various legislations relating to marriage and divorce under Hindu and Muslim laws.

Objectives of the study:

Keeping in view, the liberalization of the law of marriage and divorce under Hindu and Muslim personal laws, the study may be spelt out as the following:

1. To analyse the concept of marriage and divorce under old Hindu law.

2. To review the impact of legislation in the sphere of marriage and divorce under Hindu law.
3. To study the concept of marriage before advent of Islam.
4. To analyse the changed concept of marriage of marriage after advent of Islam.
5. To find out the impact of legislation on Muslim wife's right of dissolution of marriage.
6. To give suitable suggestions to improve the stability of the institution of marriage and divorce.

Hypothesis:

Keeping in view, the broad objectives of the study, the research is undertaken with the following hypothesis:

1. Too much legislative interference into the Hindu law caused the threat of altering its divine nature.
2. There is a threat to the sacramental nature of Hindu Marriage because of-
 - a) liberalization of the grounds of divorce by the Hindu Marriage (Amendment) Act, 1964 and
 - b) too much liberalization of the grounds of divorce by the Marriage Laws (Amendment) Act, 1976.
3. Conferring absolute power of unilateral divorce to a Muslim male is creating hardship to the innocent and downtrodden Muslim women.
4. The necessity of focusing light on the discriminative system of divorce and need for enacting Muslim Marriage Act.
5. The new grounds inserted by the Marriage Laws (Amendment) Act, 1976 and also relaxation of few existing grounds by it are not necessary.
6. The conditions of Muslim women before advent of Islam are not satisfactory.
7. Islam improved the conditions of women.
8. The various grounds of divorce introduced in Islam are not at all substitute for *talaq*.
9. The system of polygamy in Islam is not satisfactory.

10. The Muslim women are in a bad situation because of the threat of talaq.

The methodology adopted:

The research methodology adopted in this thesis is purely analytical and socio-legal approach to the study of the institution of marriage and divorce under Hindu and Muslim personal laws.

The purpose of study:

As the sacred institution of Hindu marriage has undergone greater change in its nature and purpose and transformed under the influence of western culture and civilization from religious to secular union in its nature and content, the researcher has been prompted to examine the various factors of change from traditional to modernity. The researcher has also made modest study of modern challenges to the stability of the institution of marriage and divorce by the increasing incidence of due altered conditions of the Hindu society and changes in the law of marriage and divorce under Muslim law.

Chapterization:

The thesis is presented by dividing it into the following chapters:

Chapter I: 'Introduction'. It contains introduction to the topic of thesis, the theme of research work, the methodology adopted to deal with the issues involved, the hypothesis formulated for the purpose.

Chapter II: 'The concept of Hindu and Muslim marriages'. It explains the nature and importance of Hindu and Muslim marriages separately under two distinct heads. It explains about the importance of marriage, the sanctity attached to the institution of marriage from the Vedic period under Hindu law and from pre-Islamic period to the present day position under Muslim law, the objectives and purpose of marriage and the status arising out of marriage.

Chapter III: 'The changing concept of marriage under Hindu law'. This chapter deals with changes which took place in marriage, conditions of marriage, caste

system, *gotra* and *pravara*, inter-caste marriages, widow remarriage, conditions of marriage prescribed by the statute and ceremonies of marriage.

Chapter IV: 'The changes in the law of marriage under Muslim law'. It deals with the changes which took place in the Muslim law of marriage. In this chapter, various kinds of marriage like *Muta* and *Nikah* are discussed. It also deals with classification of marriage such as valid, void and irregular. Guardianship in marriage and presumption of marriage are also discussed.

Chapter V: 'The changes in the law of divorce under Hindu law'. It explains the changes that were introduced in the Hindu law of divorce through legislative enactments and how it altered the nature of Hindu marriage.

Chapter VI: 'The changes in the law of divorce under Muslim law'. This chapter deals with the changes introduced in the law of divorce under Muslim law through legislation.

Chapter VII: 'Conclusion'. It gives a brief account of the findings of the researcher after examination of the effects of legislations on the personal laws and offer suggestions for the stability of the institution of marriage.
