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Law

CHANGES UNDER MARRIAGE PHENOMENA AND CONCEPT OF DIVORCE: IN INDIAN PERSPECTIVE

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ABSTRACT

Since marriage is no more indissoluble as it was in earlier days. All the personal laws now permit to dissolve the marriage. Therefore, it becomes necessary to dissolve the marriage with minimum bitterness, distress and humiliation to the parties. Further, keeping in mind the sanctity of the marriage and protecting the family interest by keeping intact, the divorce should not be made so liberal that the on each and every trivial ground, the parties to the marriage should not be allowed to take divorce.

Marriage implies attachment and union, whereas divorce implies separation. Marriage is necessarily the basis of social organisation and the foundation of important legal rights and obligations. The right to marry is also protected under international instruments. Article 9 of EU Charter of Fundamental Rights states, that right to marry and right to found a family is a fundamental right. The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights. "Men and women of full age, without any limitation due or race, nationality or religion have the right to marry and to found a family. They are entitled to equal rights as to marriage during marriage at its dissolution." Marriage is an institution, based not only on sex satisfaction services but starts on unbreakable ties of two families and evolves the foundation of a new family out of those existing ties. The right to marry is an integral part of the right to life under Article 21 of the Constitution of India, which says, 'No person shall be deprived of his life and personal liberty without due process established by law. This right has been recognized even under Article 16 of the Universal Declaration of Human Rights 1948. In *Lata Singh v State of Uttar Pradesh*, the Supreme Court opined that the right of marriage as a component of right to life under Article 21 of the Constitution of India.

Hindu marriage resembles the features of both, sacrament and contract. It is a sacrament since there is emphasis on the performance of the customary rites and ceremonies including *saptapadi*, wherever it is treated as an essential ceremony for the completion of the marriage. It is contract because Section 5 of Hindu Marriage Act, 1955 deals with the capacity of the spouses to enter into an alliance of a marriage. Marriage is undoubtedly a social institution in which the State is vitally interested. If, therefore, a State compels Hindus to become monogamists, it is a measure of social reform and the State is empowered to legislate with regard to social reform under Article 25 (2) (b) of the Constitution notwithstanding the fact that it may interfere with the right of a citizen to profess, practice and propagate religion freely.

Under Muslim Law, a marriage is considered as a civil contract for the purpose of legalizing sexual intercourse and procreation of children, since bride groom makes an offer of marriage; the bride may or may not accept the offer. The consideration is the dower, which the husband is required to pay to his wife, before, at the time or after the marriage. There are divergences of opinion with regard to the nature of Muslim Marriage. Some jurists are of the opinion that the Muslim marriage is purely a civil contract while others consider the same as a religious sacrament. Another view is that that marriage is not purely a civil contract but a religious sacrament too. No religious ceremonies are required for solemnization of a Muslim marriage. "Whatever religious ceremonies are appended to the civil ceremonies are merely to give it sanctity; their performance or non-performance does not affect its legality."

Parsi marriage is also a contract; however, a religious ceremony

'Ashirwad' (means blessing) is compulsory for its validity. A priest solemnizes Parsi marriage in presence of two Parsi witnesses. Marriages among the Indian Jews are regarded as contracts. For the valid marriage of a Jew, written contract called 'Katuba' is necessary in addition to religious ceremonies. A Christian marriage in India is also regarded a contract, which is solemnized by a Minister of Religion, licensed under the Indian Christian Marriage Act or by the Marriage Registrar.

Irrespective of the fact that in some communities marriage is considered as a sacrament, whereas in another contract, it confers the status of husband and wife upon the parties to the marriage. The children born out of such marriages get the status of a legitimate child. Hence, marriage is the foundation of establishing a family. Marriage is a sacred institution; it is the very foundation of a stable family and civilized society. There are, however, certain prerequisites for a valid marriage. All personal laws lay down some or other conditions, which need to be complied with to enter into or solemnize a legal marriage. "Institution of marriage is the foundation of peace and order of the society and considered as sacred even by those who view it as a civil contract."

Divorce

Under the general uncodified Hindu Law divorce was not recognized; it was rather unknown to the old textual Hindu law of marriage. The reason is very simple that the marriage was an indissoluble tie between husband and wife. Vedic text as well as *Smithies* contains no advertence at all to divorce. *Manu* declares "Let mutual fidelity (between husband and wife) continue till death: this in brief may be understood to be the highest dharma of man and wife. Divorce was thus not recognized unless it was allowed by custom. Section 13 therefore, introduces a vital and dynamic change in the marriage law of Hindus. Thus, Hindu marriage Act, 1955 has brought about drastic changes in the institution of marriage, destroying the sacramental aspects of marriage.

Divorce is the legal cessation of a matrimonial bond, therefore, in India; all the matrimonial laws provide for divorce and lay down certain conditions. Though there are different Acts for different religions, nonetheless the conditions and ground of divorce are more or less similar, except under Muslim law it differs. Earlier marriage was considered as indissoluble union among Hindus and Christians and one even could think of the divorce. However, due to fast changing socio-economic conditions marriage is no more indissoluble, which is now an accepted fact; therefore, divorce law came in existence. "Not before a few decade back, divorce was abhorred as an evil; the grounds for divorce were very limited and it was sought only under compelling circumstances. Things have, however, changed now." Therefore, a comprehensive law which is applicable to all Hindus was passed in the year 1995 in the form of Hindu Marriage Act, 1955, which was based on English Matrimonial Causes Act, 1950. In English law, a valid marriage may be terminated only by the death of one of the parties or by a decree of dissolution or divorce pronounced by a court of

competent jurisdiction.

It is well known through Hadith and holy Quran that divorce is acceptable only as unavoidable. Justice Krishna Iyer in *Yusuf Rowthan V. Sowramma* said that "since infallibility is not an attribute of judiciary, the view has been ventured by Muslim Jurists that Indo-Anglican Judicial exposition of Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book, Indeed a deeper study of the subject discloses a surprisingly rational and modern law of divorce.

Causes of divorce are quite complex and complicated. There is usually not one single factor that causes the dissolution of a marriage. However, poor communication, financial problems, lack of commitment, dramatic changes in priorities, and infidelity are the some of the major factors leading towards divorce. Causes of divorce may also include physical, mental or emotional abuse, substance abuse, and lack of conflict resolution skills, unmet needs, failed expectations, and significant discrepancies in parenting. Sometimes a trivial cause may lead to divorce.

Theories of Divorce

The provisions relating to divorce is contained in Sec 13 of Hindu Marriage Act, 1955. The Act recognizes two theories of Divorce: the fault theory and divorce by mutual consent. Under the fault theory, marriage can be dissolved only when either party to the marriage had committed a matrimonial offence. Under this theory it is necessary to have a guilty and an innocent party and only innocent party can seek the remedy of divorce. However the most striking feature and drawback is that if both parties have been at fault, there is no remedy available.

Another theory of divorce is that of mutual consent. The underlying rationale is that since two persons can marry by their free will, they should also be allowed to move out of their relationship of their own free will. However, critics of this theory say that this approach will promote immorality as it will lead to hasty divorces and parties would dissolve their marriage even if there were slight incompatibility of temperament.

Conclusions

The introduction of the system of divorce under section 13 of Hindu Marriage Act, 1955 may be regarded as a changing pattern in the Hindu jurisprudence of marriage. Institution of marriage is sacred indeed, and the domestic system is respectable, divorce is abominable therefore; it is an essential duty of society to remove the causes, which lead to divorce so far as possible. However, there cannot be a total ban on divorce system in any matrimonial law. There should always be a way of out of a deadlock for both man and woman.

Earlier, the object of a matrimonial law was to punish the guilty spouse, which was shifted to protect the innocent party of the marriage. In any case the better object is to so far as possible, to keep the marital tie intact. Initially industrialization and now due to globalization has adverse impact upon the family life. While discussing the various theories of divorce and its relevance in Indian society with diverse culture, what could be the best solution to protect the matrimonial houses so far as possible, and if not, the dissolve with minimum distress and bitterness.

REFERENCES

1. Article 16(1) UDHR (1984).
2. Kr. D. P. Nigam, Law of Marriage and Divorce, 1st edn. 1990, Vinod Publishing House, Delhi, p. 1.
3. Men and Women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
4. Marriage shall be entered into only with the free and full consent of the intending spouses.
5. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
6. AIR 2006 SC 2522
7. Mayne's, Hindu Law and Usage, Revised by Justice Rangnath Misra, 15th edn. 2003, Bharat Law House, New Delhi, p.180.

11. Justice S. C. Jain, Law Relating to Marriage and Divorce, 4th edn. 2001, Universal Law Publishing Co. Pvt. Ltd., Delhi, p.25
12. Dr. Paras Diwan, Family Law, 9th edn. 2009, Allahabad Law Agency, Allahabad, p.26
13. Kusum, Family Law Lectures, 1st edn., 2003, LexisNexis Butterworths New Delhi, p.3
14. Dr. Basant K. Sharma, Hindu Law, 2nd edn.2008, Central Law Publication, Allahabad, p.34
15. B. M. Gandhi, Hindu Law, 2nd edn., 2003, Eastern Book Company, Lucknow, p. 207.
16. Kusum, Family Law Lectures, New Delhi, LexisNexis Butterworth's, 2nd edn, 2008, p. 175.
17. P. M. Bromley and N. V. Lowe, Bromley's Family Law, 8th edn., 1992, Butterworth & Co. (Publishers) Ltd., London, p. 180
18. London, p. 180
19. A.I.R.1971 Ker.261.