CHAPTER – VIII

CONCLUSION AND SUGGESTIONS

A. Conclusion

The institution of marriage was created by various societies to provide a safe lifestyle and environment for the perpetuation of the human race. Within this system of dealing with responsibilities and safeguards of property rights and family lines, the family unit of husband, wife and children born to them, establish, preserve and maintain morals. They also cultivate, improve and perpetuate our civilization, legal, social and ethical codes both explicitly and implicitly. Societies throughout history, as a whole, have upheld and maintained the concept that marriage is a powerful commitment between a man and a woman to become husband and wife. That commitment has peripheral legal and personal responsibility factors.

While the actual dynamics of marriage functions have changed throughout the centuries, the concept of a man and a woman as husband and wife bonding together in love, forming a family unit, with the potential of having children born of the marriage, has not changed. The beginning of marriage as a necessary social institution was first recognized from a religious point of view. This view has gradually shifted to that of a civil point of view, while still retaining the original religious influences. With the change in time the institution of marriage is becoming more and more vulnerable to frequent breakings due to increasing social and economical pressures. When there is absence of mutual bonding between husband and wife marriage becomes more of a burden and only a divorce can put an end to the miseries of such bad marriages.

Divorce laws vary considerably around the world but in most countries it requires the sanction of a court or other authority in a legal process. Where monogamy is law, divorce allows each former partner to marry another; where polygyny is legal but polyandry is not legal, divorce allows the woman to marry another. Divorce refers to the often messy and painful end of a marriage. For better or for worse, divorce is a very common event these days. Almost everyone has been touched by it, either by going

\[1\] http://www.angelfire.com/in/HisName/marriage.html.
through it themselves as a spouse or a child’s divorce, or knowing someone who has gone through it as a spouse.

Roman civil law embraced the maxim, “matrimonia debent esse libera” (“marriages ought to be free”) and either husband or wife could renounce the marriage at will. This unlimited freedom to divorce continued in western society until the ninth or tenth century of the Christian era, when it was greatly curtailed by the influence of the Christian church. The Christian church considered marriage a sacrament instituted by God and Christ indissoluble by mere human action.

The Sacrament of Marriage produced one person from two, inseparable from each other: “By marriage the husband and wife are one person in law: that is, the very being of legal existence of the women is suspended during the marriage or at least incorporated and consolidated into that of the husband: under whose wing, protection and cover, she performs everything.”

Later on marriage came to be considered a civil contract and civil authorities gradually asserted their power to decree divorce. Since no precedents existed defining the circumstances under which marriage could be dissolved, civil authorities heavily relied on the previous determinations of the ecclesiastic courts and freely adopted the requirements set down by those courts. Divorce was granted only because one party to the marriage had violated a sacred vow to the “innocent spouse.” If both husband and wife were guilty, “neither would be allowed to escape the bonds of marriage.”

Difficulties began to develop between Church and State. In 1164 A.D. King Henry II wanted to abolish many of the privileges of the clergy and forbade appeals to Rome. But later, the King had to give up his efforts. In 1532 A.D. King Henry VIII forbade marriage case appeals to the Pope in the Statute of Appeals. This was followed by the Act of Submission of the Clergy. Finally, when the King could not get an annulment of his marriage by the Pope, he proclaimed himself ‘Supreme head in Earth of the Church of England’, in the year 1534. By another Act, it was provided that dispensations for marriage could be given only by the Crown, but at the same time, there was to be no

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2 Kent’s Commentaries on American Law, p. 96 (14th ed. 1896).
4 Kent’s Commentaries on American Law, p. 401.
departure from the true Faith of the Catholic Christian Church. The Church courts became royal courts after Henry VIII, but retained their independence of the Common Law Courts.

The Statutes subordinated the Church to the State, and the Church Courts to the law of the land. But it would be wrong to suppose that the Church was to lose her liberty in toto. The position that emerged out of the conflicts was that the state law was to have predominance over the Church law only when there was a conflict between the two. Otherwise, the Church law was to have its way.

But an Act of 1836 had paganized marriages by providing for marriages before a civil Registrar. In England, before 1857, the relating to marriage became a part of canon law over which the ecclesiastical courts (Church courts) claimed exclusive jurisdiction. In this way jurisdiction over matrimonial causes was exercised by these courts. Then divorce was unknown. In the rapidly advancing English society of eighteenth and nineteenth centuries the need for divorce was so pressing that its recognition became imperative. All the ingenuity of the Church failed to avert its reception in English law. In 1857 the first Matrimonial Causes Act was passed which not only repudiated the doctrine of indissolubility of marriage, but also transferred the entire jurisdiction in matrimonial causes from ecclesiastical courts to civil court. The Matrimonial Causes Act of 1857 established a new temporal (civil) court to exercise jurisdiction in all matrimonial causes. Thus, marriage, which had once been a sacrament, became merely a civil contract in England and the logical sequel was that it could no longer be held to be indissoluble.

Under Jewish law, a man can divorce a woman for any reason or no reason. The Talmud specifically says that a man can divorce a woman because she spoiled his dinner or simply because he finds another woman more attractive, and the woman’s consent to the divorce is not required. The approach to divorce in the Zoroastrian community seems to have changed considerably in the period following the Arab conquest.

For the Hindus marriage tie is irrevocable, but for the Hindu man he can enter into several such irrevocable ties. The Hindu woman can enter into only one such relationship. The Kanya can be given in Dana only once, but many such Kanyadana can be received. The irony is that Hinduism is essentially in favour of monogamy yet this is more effective in unilateral violation and sastric lapses. Once the institution of marriage is recognized
legally, divorce must be recognized as perse, yet the Smritis, srutis and the scriptures prima facie denied the right of divorce. However Narada and Parasara recognize the contingent situations where a woman should be permitted to remarry.

That divorce is now becoming an acceptable part of Indian society in modern times is evident in the matrimonial columns of newspapers. We find divorcées seeking new partners, with or without ‘encumbrance’, consummated or unconsummated. Even applications of divorcées are considered ‘acceptable’. Today pre-married state is equated with post-married state with a word called single.

Divorce is multidimensional and it involves multifactor social events. It can be found in each and every society, which may be either in customary, or in legal form. Basically it occurs easily within more open and industrial society. It is emerging as a form of new sociological event due to the pattern of socio-cultural changes by the process of modernization and simultaneously urbanization.

Thus we find a very outmoded law of divorce for the Christians, a law based on the discredited fault theory of divorce with judicial discovery of irretrievable breakdown of marriage dissolution for the Muslims, and a copious law of divorce for Hindus and for non-conformists i.e. people marrying in civil marriage form. The Hindus can have divorce on fault grounds, by mutual consent and on basis of breakdown of marriage. To wit, the Law Commission in its 71st Report has suggested (and Parliament introduced a Bill on that basis though it has been abandoned on account of opposition, inter alia, from certain, women’s organizations) yet another basis of divorce (please note that this does not replace old bases of divorce), viz., the irretrievable breakdown of marriage on the basis of living apart for a continuous period of at least three years, but an interruption of three months at any time during this period of three years separate living will not be treated as break in the continuity if such interruption was with a view to effect reconciliation.

The entire provision is a bad copy of the English Matrimonial Causes Act, 1973. This raises several questions. One can understand as why this benediction has been conferred on the majority community. One can also understand the reluctance of Parliament to confer similar benedictions on the minorities. But why would we have three year separation and not five year separation as basis of irretrievable breakdown of
marriage has not been explained? It is submitted that deduction of the period is not the result of any social research conducted by the Law Commission but of pure mathematics. The logic seems to be something like this; one year’s non-compliance of a decree of restitution or one year’s non-resumption of cohabitation after a decree of judicial separation entitles either party to divorce. English law is a conservative law, therefore, it has five years’ period: the mean of the existing Indian and English periods is three years.

Then, one fails to understand why this multiplication of the bases of divorce. Do we want to say; come one, come all, have a decree of divorce this way or that way, but please do have it. It is submitted that blindly aping the west without keeping our social context in view and thoughtlessly multiplying the bases of divorce, to say the least, is not fair to Hindus, or for that matter to any community. We may have two simple bases of divorce:

1. Divorce by mutual consent where there are no children, and

2. Divorce on the basis of irretrievable breakdown of marriage. The irretrievable breakdown of marriage:

   a. has to be established as a fact in each individual case, whether or not a marriage has broken down irretrievable will be determined by the court, or

   b. May be treated as established where there has been cessation of cohabitation for a period of two years or more.

The expression cessation of cohabitation is used here as in many cases wife may not be able to find a place to live apart from her husband and is per force compelled to live in the same matrimonial home. The period of two years is suggested because prior to total cessation of cohabitation in Indian homes a lot of family efforts are made to bring parties together. When all efforts prove fruitless that in fact cessation of cohabitation occurs. Therefore, in our submission the two years period of cessation of cohabitation should be treated as sufficient indication of irretrievable breakdown of marriage. Marriage dissolution leaves many problems to be resolved. These relate to parties to the dissolved marriage and their children, and settlement of property.
As to maintenance of the spouses of the dissolved marriage, we have in alimony. A similar provision exists in other Indian matrimonial laws, with this difference that under Hindu Marriage Act either party—wife or husband—can claim maintenance or alimony, while under others it is only wife who can claim it. The provision merely lays down that the court may order the other party to pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant after taking into account certain factors. Such payments may also be secured. Such orders also come to an end on the remarriage of the applicant. Such orders may also be modified on change of circumstances. We do not take care of the liability or expenses incurred by the applicant for maintaining herself or any child of the marriage before the application was made. If a petition for divorce is dismissed, no order for maintenance can be made.

Our matrimonial laws singularly lack in the provisions relating to the settlement of properties of the spouses and the matrimonial home. Section 27, Hindu Marriage Act provides only for the settlement of the property presented jointly to the husband and wife at or about the time of marriage; it does not talk about the settlement of the property of spouses owned by them jointly or separately. The fact of the matter is that if our Law Commission and the drafters of the Amending Bill would have looked at the Matrimonial Causes Act, 1973 carefully they would have found that two-thirds of the Act deals with the aftermath of marriage dissolution. If we want to have a socially just law of divorce it is mandatory that we pay more attention to the aftermath of divorce as that alone can lead to stability of marriage. Thus it is imperative for us to have a provision like that of Section 24, Matrimonial Causes Act which stipulates for the transfer of property from one party to another as well as settlement of the spousal property for the benefit of the needy party and the children. The court has also power to vary any ante-nuptial settlement including the will of either party in the interest of the needy spouse and children. In the modern urban life the matrimonial home plays a very important role during the subsistence of marriage as well as after its dissolution. England has a Matrimonial Homes Act, 1967 and the Domestic Violence and Matrimonial Proceedings Act, 1976. The former protects the right of the wife (because it is she who needs protections, though occasionally husband may also need it) in the matrimonial home and the latter protects her from domestic violence. It
provides adequate protection to battered wives, i.e., woman who has suffered serious or repeated physical injury form the man with whom she lives. Abuse may include emotional assaults as well as physical attacks. In India, we are aware of the problem yet we are not showing adequate consciousness and will to tackle it. And unless we allow ourselves to be more aware of the problem and more willing to take active steps to remedy it, it will remain with us. It will help us if we decide to set up something like crisis centers which would be open for 24 hours a day to which wives in distress could go for advice and support.

The same niggardly treatment we have given to the problem of children as an aftermath of divorce. In this regard the Indian provisions do not go beyond the provisions of the Matrimonial Causes Act, 1950. Children are still treated as part of ancillary proceedings, as subject-matter of dispute between their parents and not as independent parties. We have no provisions for settlement of property in their favour. Under the Indian Divorce Act, 1867 and the Parsi Marriage and Divorce Act 1936 we have penal provision for the settlement of the property of the adulterous wife. Apart from this, no matrimonial statute stipulates for the settlement of the property of the parties in favor of the children. Even the provisions relating to maintenance, custody and education of children are inadequate. If we would have looked to the provisions of the Matrimonial Causes Act, 1973 we would have got sufficient light on the matter. Reference to English law is made here repeatedly since we have been drawing very freely from it. Thus we have no provision of ward ship of children. The divorce Court has no power to declare that both the parents or either of them is unfit for the custody of the children, and that custody be given to a third person or an institution. It is submitted that children should be treated as separate parties and it should be their interest which should be the uppermost consideration. The children should be represented by an independent counsel of their own and should not depend upon the counsel of their parents, particularly in cases of contested custody or neglect matters.
B. Suggestions

In particular, modern men and women under the influence of westernization, modernization and urbanization are resorting to divorce much more easily than earlier and thereby the stability of institution of marriage and harmonious happy marital life of young men and women is at stake. Getting easy divorce is not the sign of divorce and prosperity of life. On the other hand it is a retrograde step in the sense that it destroys family life and thereby the very foundation of society; namely the institution of marriage and family are sought to be revived affecting the very superstructure of modern society, which rests on the fundamental foundation of family life. Women in the rural areas are still subjected to cruelty and harassment in the hands of their husbands, and parents- in- law. This has to be changed by suitable modifications either by the statute of Marriage Laws Amendment Act or by a separate legislation meant for rural women.

The strength and stability of the institutions of marriage and family could be ensured by a happy successful matrimonial life that depends upon the mutual love, affection, and understanding and faith between the spouses are essential. These very tenets of Hindu law of marriage shall not be adversely affected under any circumstances. Then only the harmony of life partners and their successful realization of marital bliss can be ensured, so that the modern young men and women could flourish with happy living condition, strengthening the stability of modern Hindu society. The survival of the future mankind depends upon the present generations cherishing the values of love, affection, mutual faith and understanding among themselves. Every human being cherishes certain values such as power, wealth, enlightenment, respect, rectitude, love, and affection. If the social institutions of marriage and family are to be strengthened ensuring stability of these institutions, spouses are required to cherish the values of love, affection respect and rectitude amongst themselves, but not power, and wealth.

Husbands and parent-in-law must be endowed with human values by treating their wives and daughter-in-law with humanity, affection and must stop authoritarian attitude towards their wives and daughter-in-law. Moreover, as in Japan and few other countries family counseling centers have to be established so that easy divorces can be reduced and the stability of the institution of marriage and family can be ensured so that modern men
and women would cherish the values of love and affection, mutual faith and understanding on the foundations of which modern men and women, boys and girls would cherish the values of happy matrimonial life so that divorce can be granted in cases where it would be difficult for spouses to live happily and where divorce is inevitable.

It is desirable that divorce law should neither be too easy not, as to reduce the institution of marriage into a mockery in the modern society and at the same time the law should not be too rigid so as to inflict damage on the mind and the person of the affected spouse. The family courts are also doing lot of rescue work to women who seek to establish those rights. In order to prevent and resolve the problem of divorce, the present study suggests the following recommendations:

1. There is great need for marital and familial counselling. There must be marriage and Family Bureau accessible to all kinds of people. In a team of counsellors, there must be sociologists, psychiatrists, social workers, doctors, lawyers and priests.

2. The basic instruction regarding sex and marriage as well as family living may be imparted to the youth in schools, colleges and other institutions so as to remove the inhibitions from the minds of youth.

3. As the success of marriage depends on ability to make adjustments, both spouses are required to make all efforts in this direction to develop a good compatibility.

4. Too high expectations about the success in marriage are utopian or unachievable and therefore should not be insisted upon.

5. Unnecessary interference by parents and in-laws should be avoided. After marriage, couples should be allowed freedom and privacy.

6. When a marriage is irrevocably broken, it should be ended.

7. Social security measures should be put into operation by the Government to look after deserted women and their children, so that they do not become destitute and orphans after divorce.

8. There must be social education and awakening among lower castes, classes and tribes for healthy married life.
9. In dowry cases, exploitation should be seriously dealt with.

10. All marriages must be registered, whether they are held at home, in temple or anywhere else to avoid the misuse of marital laws.

11. Provisions of the legislation for divorce should not be misused. There must be restricted use of legislation so that the interests of the individuals, families and communities are protected in a healthy manner.

12. Better and greater efforts for reconciliation must be made by courts as well as other agencies.

13. Scientific and sociological research is to be conducted about the causes, effects and trends of familial adjustments and disruptions in India periodically to estimate the status of women in the society.

14. Prolonged and protected court proceedings delaying relief to the aggrieved spouse may be avoided. In many cases, it is found that a substantial part of the youth is depleted due to court cases. By the time the final decree is received, the spouses are already in the middle age and their energy and enthusiasm to start a new life dwindle. Family courts, Mutual Consent divorces to some extent can expedite the divorce procedure. Hence these are to be encouraged.

15. If the retention of the fair trial clause is deemed necessary, then the period of such a trial should be reduced by half, preferably to one year, and the divorce should be made available even earlier if the continuance of marriage would lead to hardships.

16. India has taken the necessary first step in the direction of establishing the family courts.5 But much more needs to be done before the family court system can be brought to effective functioning. Need for continuous training and research in family law matters and allied subjects is imperative for the success of the system. This will require the establishment of some permanent bodies or institutions. We

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5 Raj Kumar Bansal v. Anjana Kumari, AIR 1995 P&H 18. The family Court appointed certain arbitrators for ascertaining the truth of the allegations regarding the ground of cruelty and without doing anything more just passed the judgment in terms of the award given by the arbitrators. This was highly criticized by the High Court. It is, therefore, submitted that the persons who are engaged in teaching and research of Family Law in various Law Schools and research institutions should be made eligible to be appointed as judges of the Family Court.
may have family law training centers in each State and an institute of family court system at the national level. If family court system is to succeed, we should proceed to make adequate arrangements and provide adequate facilities for the same.

17. Need for enhancing family counseling centers. It is obvious that in family disputes not only parties’ concerned but innocent children and family are affected adversely.

18. It can be said that an ideal form of disposal of divorce cases is by Alternative Dispute Resolution Technique (ADR).

19. A broken home is a veritable abode of hell. While every endeavour should be made to sustain and achieve the former, there is no point in sustaining the other if endeavours to set that right bear no fruit.

20. Due to the recently developed deceases caused by HIV/AIDS to human societies, the very institution of Marriage is at peril. HIV test before marriage to the parties should be made compulsory so that the right to establish a healthy marriage life can be made possible.

21. Husband and wife should remember that although they may no longer be together, they will always both be the children’s parents.

22. Door should always be kept open to dialogue.

23. The estranged couple should substitute politeness if love has gone.

24. Readiness to compromise an agreement between husband and wife is more likely to work than an order imposed by the Court.

The consequences of divorce are many and grave. Between birth and death of person, the most important event in the life is marriage. Marriage changes the personalities, the attitudes and the life style of men and women. Marriage is entered into with great hopes and expectations. Divorce is the failure of marital life and, therefore, it has serious repercussions on the individual, family and community. Many researches and observations have shown that the negative results of divorce bring about personal, familial and social disorganization. Divorce represents a fundamental change in status and role for
all concerned. This change is a crisis in their lives. Those with a strong well integrated, or highly egoistic life organization may survive it with comparative ease. But such an adjustment is not possible for those with weaken personalities or for those who care to deeply. They cannot forget. They cannot immediately adjust to their new status and role.

It has to be kept in mind that relationships between spouses are a matter concerning human life. Human life does not run on dotted lines or chartered course laid down by the statute. It has to be kept in mind that before granting the prayer to petitioner to permanently snap the relationship between the parties to the marriage every attempt should be made to maintain the sanctity of the relationship which is of importance not only for the individuals or their children but also for the society.

Hence, broader outlook of each individual within a Family is the call of the nation’s conscience. Large goal of unity and integrity of the nation ultimately depends on the quantum of peaceful existence within each family and all sections of the society inter se. As such, besides the proper interpretation and enforcement of law what is needed most is the development via education, health and necessary wealth at least equitably to all as far and as early as possible. To that effect, mere law—that too the family laws devoid of proper interpretation and enforcement seem to be of no lasting solution for widespread individual and social maladies in and outside a ‘family’ due to wavering human behaviour defying description day after day. This is only a humble academic exercise towards that end for peaceful co-existence of all individuals within a family.