CHAPTER IX
CHANGING CONCEPTS OF MARRIAGE STABILITY

I. INTRODUCTION

In all systems of law marriage is the backbone of the society. The opinion of Prof. Letourneau in the 'The Evolution of Marriage And Family', that the primary cause of the family is purely biological is not true any more. So, the institution of marriage has its own importance in every civilized society. Marriage, it has been said, is the usual fate of most of the adult persons. According to Bentham:

"Under whatever point of view the institution of marriage is considered, nothing can be more striking than the utility of this noble contract, the tie of society and the basis of civilization, and that to perceive its benefits, it is only necessary to imagine for a moment what men would be without that institution."¹

The institution of marriage is as old as the dawn of civilization. However, the nature and concepts of marriage under different personal laws keep on changing with the changes in society and social order. The general concepts of marriage requires the subsistence of the social unit of 'Family', which is the foundation of every society.²


² Endre Nizsalovsky, Order of the Family (1968), p. 15.
The nature and concepts of marriage also differs from community to community. But under most of the personal laws, marriage is considered to be an exclusive union between a male and a female. It is not merely meant for sexual enjoyment but also for a long and happy association of man and woman to constitute an orderly 'Family' which contributes to the progress of society. Mutual love, affection and understanding must build the bonds of matrimony and bind them together for a happy, harmonious conjugal life. The happiness in life to a great extent depends not only upon the state of their physical health but also upon the health and well being of their marital relations. A happy married life is undoubtedly a great boon and bliss. If we trace out the history of some of the stalwarts we find that their domestic happiness, inner strength and support extended by their life partners while facing turmoil and difficulties of life, contributed a lot to their achievements. Mahatma Gandhi and Pt. J.L. Nehru are examples of the same. Thus from time immemorial, marriage has been regarded as the basis of civilization and civilized society of sound morals and domestic affection by different systems of Law.

Sick marital relations pose a problem not merely for the related spouses, they have wider implications. As the family is basic unit of the society, the disturbances and disharmony in this primary unit have their repercussions and impact upon the society also Harmony in society is inconceivable where there are dissatisfied spouses that make a home and a family which is the most crucial unit in the hierarchy of social institutions. So, stability of marriage is the sine-qua-non of every society. To stabilise the institution of marriage various pieces of legislations and Acts have been passed under
different personal laws in India and abroad. The emphasis of all marital laws is to avoid hasty dissolution marital moralities.

II. DEFINITION OF MARRIAGE

It is not possible to define Marriage in exact words, which constitutes a family, the basic unit of society, as its nature varies from community to community. However, some of the sociologists and jurists have tried to define it in their own words.

Prof. Vinogradoff observed that:

"It is not only an institution regulating sexual intercourse and kept by conjugal affection, but also an arrangement for bringing up of children and a partnership for economic ends and social cooperation, sometimes, one side and sometimes another predominates."

Robert H. Lowie observed that, "Marriage denoted those unequivo-cally sanctioned unions, which persisted beyond sexual satisfaction. It, thus, came to underlie family life, since sexual satisfaction could often be amply gratified outside wedlock."

According to Ajay K. Vashvesha:

"Marriage is an institution which is in vogue since time immemorial and it is almost uniformly regarded as a sine-qua-non for upgrading and cherishing moral and ethical values in the society and to discipline the man who is distinguished from animal because of his rational sense which is wanting in animal." \(^5\)

Mrs. Raj Kumari Agrawala states:

"Institution of marriage is one of the neatest tricks of human ingenuity to tame the primary instinct of sex in man and woman. Mating is the starting point of family, the foundation of the superstructure of society and, therefore, too important an area of conduit to be left to individual discretion, will and caprice. It has as a result been deliberately encircled with an aura of religiosity, morality and a sense of social responsibility and given the dignified label of 'Marriage' accompanied with rules and conditions for attaining and living the label.\(^6\)

Like the nature of marriage, the definition of marriage also varies under different personal laws and religious beliefs. Lord Penzance in Hyde V-Hyde\(^7\) case, gave the classic

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7. (1866) LRI P & D. 130, 133.
definition of Marriage in English Law as under:

I conceive that marriage, as understood in Christendom may..... be defined as the voluntary union for life of one man and one woman to the exclusion of other.

If we accept the above definition, the following are the essential elements of a marriage:

(a) It must be a voluntary union  
(b) It must be for life.  
(c) The union must be hetero sexual.  
(d) It must be monogamous.

The above definition may be true when the marriage was considered to be indissoluble and sacral mental under English Law. But after the recognition of divorce, it is not essential that the union must be for life. It can be dissolved during the life time of spouses on some specific grounds or in case of break-down of marriage.

But the most accepted and simple definition of Marriage is: "It is a union between a male and a female recognized by Law". As the union is given legal recognition, the rights and obligations arises from this prime social institution. Some of the rights and obligations are of basic nature and are of great importance to the spouses for their marital bliss and happiness.

III MARRIAGE, A PRIME INSTITUTION:

In India, great importance has been attached to this social institution. It was based on the fidelity to the
highest ideal of pursuing harmony in material and spiritual plane, which made Indian marriage a class in itself. According to Indian-legal culture, there can't be a contradiction between the eternal and territorial aims of man. In Indian civilization the aims are described by a twin phrase of "Sreya and Preya" which necessitates not only reconciliation between the twin but also implies harmony and coherence.

So, there is a need of maintaining harmony and stability to achieve worldly, spiritual and intellectual pleasures. The institution of the marriage has facts which are both public as well private in nature. Marriage is not so much a concession to human weakness as a means of spiritual growth. It is prescribed for the sake of the development of personality as well as the continuance of the family ideal. Thus, the institution of marriage has social dimensions also. A social duty is imposed upon the spouses, whatever be the form of the marriage, to strive for compatibility. They must not exaggerate and let loose their passion, frivolous dislikes and abnormal impulses. So, more and more emphasis is on the social aspects of marriage.

Dr. Radhakrishnan says: "Man is not a tyrant nor is woman slave, but both are servants of higher ideal to which their individual inclinations are to be subordinated, sensual love is sublimated into self-forgetful devotion. Irreducible peculiarities there


will always be, and the task of institution of marriage is to use these differences to promote a harmonious life. Instincts and passions are the raw materials which are to be worked up into the ideal whole". 10

Emphasizing the importance of this institution Prof. Vinogradoff observed:

No social institution has been found to be more enduring than the institution of marriage. In every civilized society people are unimmensely interested in the maintenance of institution of marriage as it is the foundation of family as well as of society. Marriage being a complex phenomenon, cannot be explained by one single principle idea or notion, as it represents a synthesis of several principles, Ideas and notions, and one cannot draw from it perfectly logic set of rules". 11

As the nature of marriage varies under different systems of law, some consider it as a purely contract, while others treat it a religious institution. For instance it was given utmost importance under the old Hindu Law.

As declared by the Vedas, Every Aryan is born with three debts to be discharged. "He owes the study of the Vedas to the Rishi, sacrifices to the Gods and a son to the manes" and "He is free from debt who has offered sacrifices to Gods, who has begotten a son, and who lived as student with a

11. Supra Note 3 at pp 163-66.
"The opinion which have divided the world or Writers at least, on this object, are generally two. It is held by some persons that, marriage is a contract merely civil, by others, that it is a sacred, religious and spiritual contract, and only to be so considered. The jurisdiction of the Ecclesiastical Court was found on the ideas of this last described nature; but in a more correct view of the subject, I conceive that neither of these opinions is perfectly accurate. According to juster notions of the nature of the marriage contract, it is not merely either a civil or a religious contract; and, at the present time it is not be considered as originally and simply one or the other. It is a contract according to the law of nature, antecedent to civil institution, and which may take place to all intents and purposes wherever two persons of different sexes, engage, by mutual contracts; to live together. It cannot be a mere casual and temporary commerce, "but must be a contract atleast extending to such purpose of a more permanent nature, in the intention of the parties. The contract, thus formed in the state of nature, is adopted as a contract of the greatest importance in civil institutions, and it is charged with a vast

12. Taittirya-Samhita, VI, 3,10,5, See also Manu, VI-35-37; IX-45,106,107,137,138 and XI-66 Yajnavalkya, 1-78.
13. (1811) 1 Hagg-Con.216 at pp. 230,231 & 232.
variety of obligations merely civil. Rights of property are attached to it on very different principles in different countries. In most countries it is also clothed with religious rites, even in rude societies, as well as in those which are more distinguished for their civil and religious institution”.

Marriage is the very foundation of civil society, and no part of the laws and institutions of a country can be of more vital importance to its subjects than those which regulate the manner and conditions of forming and if necessary of dissolving the marriage. 14

George Bernard Shaw in his preface to getting married says:

"A man defends marriage because he is really defending his pleasure. The woman is more vehement on the same side because she is defending her only means of livelihood. To a woman without property or marketable talent, a husband is more necessary than a master to a dog".

The learned judge of Delhi High Court, Mr. Justice A.B. Rohtagi in Harvinder Kaur v. Harmander Singh, 15 has rightly observed: "Whether it is English Law or the Indian Act, Marriage is a voluntary union for life of one man and one woman to the exclusion of others". 16

15. AIR 1984, Delhi, 66.
16. Ibid at p. 77.
Thus, marriage is one of the prime institutions of society. It is a union of man and woman for love, respect, assistance and looking after each other, to live in harmony, to engage in production, to care for the children and to strive jointly for the welfare of family and for the building up for a new society. It is the central idea of most of the personal laws. It is an institution, in the maintenance of which the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.\textsuperscript{17}

The public policy relating to marriage is to foster and protect it, to make it permanent and public institution, and to prevent separation.\textsuperscript{18}

Thus, stability of marital relationship has rightly been considered as one of the most sought conditions of civilized society.

\section*{IV INCIDENCES OF MARRIAGE}

The marriage gives rise to number of incidences. According to Lundberg, consists of, "the rules and regulations which define the rights, duties and privileges of husband and wife, with respect to each other".\textsuperscript{19} Thus, a number of legal rights, obligations and consequences arise from marriage. Sir Gooroo Dass Banerjee says:

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\textsuperscript{17} Bizik v Bizik, 124 1-A, 146.
\textsuperscript{18} Hill v. Hill, 23 Cal. 2d 82.
\textsuperscript{19} Sociology, p. 133.
"It is the source of every domestic comfort from infancy to old age, it is necessary for the preservation and well being of our species, it awakens and develops the best feelings of our nature, it is the source of important legal rights and obligations, and, in its higher forms, it has tended to raise the weaker half of human race from a state of humiliating Servitude."

To the Hindus, the importance of marriage is heightened by the sanction of religion. "By no people", says Sir T. Strange, "is greater importance attached to marriage than by the Hindus". The obligations arising out of marriage are reciprocal. As regards rights efforts have been made to provide and confer equal rights on both the spouses. But perfect equality of rights has not so far been recognised by any system of law. If there be inequality, it has always been in favour of man.

To use the language of Bentham:"In his hands the power maintains itself. Give the authority to the woman, and every moment a revolt would break out on the part of her husband".

Both the spouses are supposed to discharge marital obligations fairly so that the desired aims of marriage may be achieved. Family is the unit of reception, preservation and transmission of culture Gibbons says 'that the main reason for Roman empire's down fall was the family disorganisation. Mackenzie opines that "the public seems to have forgotten that the


strength and vigour of national life depends directly on strong and vigorous family units.\textsuperscript{23} Marriage, whether considered as a contract or sacrament confers a number of rights upon the parties. Like Hindu law in Muslim law, A Quranic verse depicts the aim and object of Marriage as under:

"And of his signs is this: He created for you helpmates from yourselves that he might find rest in them and he ordained between you love and Mercy. so, herein indeed are portents for folk who reflect".\textsuperscript{24}

The following are some of legal incidence of marriage:

(a) Legal Status of Husband and Wife:

The marriage confers the legal status of husband and wife upon the spouses. If a male is not legally wedded to a female, the female will have only the status of a concubine. If some one calls her a concubine, she has no right to sue for defamation. The legal status confers some legal obligations on the spouses. The wife has a right to claim maintenance from her husband under S.125 of the criminal procedure code, if she has no independent source of income sufficient to support her. The marital status also entitles one to claim matrimonial remedies which are available under the provisions of personal laws.

\\textsuperscript{23} Mackenzie, Spiritual Values and the Family, in, 'Court And Law' (Vol. 18).

\textsuperscript{24} Quran XXX, 21.
(b) Right of Consortium And cohabitation:

After marriage the spouses get the right of consortium and cohabitation. One spouse is entitled to the conjugal company of the other spouse. If one spouse withdraws from the conjugal company of the other spouse without a reasonable cause or excuse and without the consent of the other spouse, the aggrieved spouse has a right to seek the remedy for Restitution of conjugal rights by filling a petition in the court of competent jurisdiction. If one spouse has deserted the other without a sufficient cause, the aggrieved spouse can also seek divorce.

The sexual intercourse is also legalized after marriage. The physical relations without marriage are considered to be adulterous. The spouses get legal right to procreate the children also. These incidences of marriage are emphasized in the following words:

"Besides the procreation and education of children, marriage has for its object the mutual society, help and comfort, that, the one ought to have of the other both in prosperity and adversity. Marriage is the most solemn engagement which one human being can contract with other. It is contract formed with a view not only to the benefit of the parties themselves, but to the benefit of third parties; to the benefit of their common offspring, and to the moral order of civilized society".25

It is further emphasized in the Encyclopedia Britannica that:

"Marriage is a physical, legal and moral union between man and woman in complete community of life for the establishment of a family".\(^{26}\)

The physical union takes the first place. The procreation of children is other essential element on which depends the creation of the family. The welfare of nation depends on families. So it is right pointed out:

"Marriage is rooted in the family rather than the family in the marriage".

(c) Legitimate Status of Children:

The children of valid marriage are conferred legitimate status. The illegitimacy is considered to be a sin and an illegitimate child is looked down upon in the society. Efforts have been made to confer legitimate status to children of void and voidable marriages under S.16 of the Hindu Marriage Act, 1955. But the children of such marriages though conferred legitimate status, still suffer from disability as far as the right of inheritance in the ancestral property of the joint family is concerned.

In addition to the above the marriage aims at providing a protective environment for the long duration of utter dependency of the human child after birth and ensures of support to the woman while occupied in child-bearing and child

(d) Right of Inheritance

The mutual rights of inheritance and succession are also conferred on the parties. The children also get a right to inherit from the property of their parents. Thus, the consequences of the marriage are too numerous to be given in exact numbers.

(V) CHANGING CONCEPT OF MARRIAGE UNDER DIFFERENT PERSONAL LAWS

Law and society are interrelated. Law must serve the social needs. Laws and the social concepts must keep on changing with social changes. The age-old institution of marriage is the foundation on which the whole super-structure of civilisation and prosperity is built. Stability in marital relationship has rightly been considered as one of the most important conditions of civilised societies ancient as well as modern. However, the strategies adopted to achieve this plausible objective have been varied depending upon the socio-economic conditions, the ethic-religious values and beliefs of different societies. In the context of newly emerged industrialised societies and the resulting increase in social awareness among the people, especially the females, about their rights to equality and personal liberty, the stability in marital relationship cannot be maintained by adopting an extremely rigid attitude and making the marriage an indissoluble union. Thus, with the passage of time, the old concepts regarding the nature of marriage under have undergone a sea change with the changes in mental attitude and passing
of different personal laws providing for the various matrimonial remedies of divorce, judicial separation etc.

VI NATURE OF MARRIAGE UNDER HINDU LAW

(a) Marriage under Old Hindu Law

Hindu marriage has been considered to be sacramental affair from the beginning of civilization. The aims of Hindu Marriage are said to be Dharma, Praja (Progeny) and rati (pleasure). Though sex is one of the functions of marriage, it is given third place, indicating there by that it is the last desirable aim of marriage. So Dharma was considered as the highest aim of marriage and it was desired for the fulfillment of one's religious duties. The Hindus considered it indissoluble and an eternal union. Derrett emphasises:

"The intention of the sacrament is to make the husband and wife one, physically and psychically, for secular and spiritual purposes, for this life and for after lives".27

The great Hindu sage Manu says; "The husband is declared to be one with the wife. Neither by sale nor by repudiation is a wife released from her husband. Once only a maiden is given in marriage".28

It was further said; "A true wife must preserve her chastity as much after as before her husband's death". So, a


widow was supposed to maintain the purity of her bed and widow remarriage was not allowed. In the patriarchal society it also assumed the form of 'Kanyadaan', a gift of the girl by the father or the guardian. The sacramental relationship between a Hindu couple, through the performance of various religious rites can be best depicted in the Milton's famous line: "He for God only, she for God in him". Keeping in view its religious nature it was solemnised through Vedichymns.

The Hindu Shastras have also idealized marriage as an indissoluble tie. According to them, marriage is an eternal union of two soul, it is not made in this world, it is made in heaven by God before a boy or a girl is born in this world and it continues from birth to birth in all yonis i.e. forms of life. So, the Hindus have always put the institution of marriage on the highest pedestal. The Rigveda exhalation of the Husband to the wife is:

"Be though mother of my heroic children devoted to the Gods, be though queen in thy father-in-law 'household. May all Gods unite the hearts of us two into one".

In Manu Smriti in the following Saloka the husband exalts the wife:

"I hold you hand for Saubhagaya, that you may grow old with your husband, you are given to me by the just, the creator, the wise and the learned people".29

For a Hindu wife is not just Patni, she is Dharampatni.

Sahadharmini. In the idealised form she is Samarajyi, Patrani, Bharya, Sachiva, Sakhi, Griha Lakshmi, Hirdeyswami. In the most idealized form she is considered to be the source of Dharma, Artha, Kama and Moksha. Manu lays down:

Wife is a divine institution given by God. One should not think that one has obtained her choice. Her unity (with her husband) is established by Vedas. A woman is half of her husband and completes him. Let mutual fidelity continue till death, this, in words, may be considered as the highest Dharma of Husband and wife.

Let a man and woman united in marriage constantly be beware, least at any time disunited, they violate their mutual fidelity.

A woman must be honoured by father, husband and brother-in-law, who desire their own welfare. Where women are honoured, the gods are pleased, but where they are not honoured, no sacred rites yield any reward.

Marriage was considered to be one of Ten Samskaras to be performed by every Hindu, so every one was supposed to marry. "To be mothers were women created and to be fathers men, the Vedas ordain that Dharma must be practiced by man together

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30. Manusmriti, IX, 95
31. Manusmriti, IX, 96.
34. Manusmriti, X, 102.
35. Manusmriti, III, 58.
He only is a perfect man who consists of his wife, himself and his offspring. 37 "Those who have wives, truly have family life; those who have wives can be happy, those who have wives can lead a full life." 38 "Dharma" plays a great role in the institution of Hindu marriage. It is by a process of religious and ethical revolution that, "marriage develops into a religious sacrament in Hindu Law and is regarded as a samskar or sacrament, one of the ten samskaras through which the life of a well conducted Hindu progresses to its appointed end." 39 The sacramental aspect of the Hindu marriage implies the following elements:

(1) The Hindu marriage was obligatory for begetting a son in order to discharge the ancestors debt and for performance of religious and spiritual duties. Wife was not only patni but Dharamapati

According to Satpatha Brahmana "The wife is the very half of the husband". 40 Man is only half, not complete until he marriages. 41 Along with the idealised picture of wife, the Hindu sages hold in clear terms that husband is "the Lord and

36. Manusmriti, IX, 96.
37. Manusmriti, IX, 96.
38. Mahabharat AdiParv, 74, 30-41.
40. Satpatha Brahmana, V. 16.10.
master of his wife, he must be adored and obeyed even if devoid of all virtues". He should be worshipped like a God even though he is a man of bad character with no qualities or a Goonda.".  

The ideals of Pativratya i.e. being devoted to the husband alone, popularized by the puranic writers, not merely implied fidelity to the husband but made service to the husband, the only duty of the wife and her main purpose in life. As a river merging itself in the ocean loses its identity, so a wife was supposed to merge her individuality with that of her husband. Her only concern in life was to see that all services needed by her husband were properly performed by her, the satisfaction of her husband being her sole joy in life. The duty of a wife continues even after death of her husband "let her emaciate her body by living voluntarily on pure flowers, root, fruit, but let her not, when her Lord is deceased, even pronounce the name of another man.  

The remarriage of either widow or divorced woman was not approved by the Smritikaras. According to Manu, "If a man has gone to a foreign land for doing some religious duty, the wife should wait for him for eight years, six years if he has gone for acquiring knowledge or fame.  

42. Manusmriti, V, 147-54.  
43. Manusmriti, I, 154-6 Yaj, I, 77;Vishnu, XXV, 13 Katyayana, 886.  
44. Manusmriti, IX, 157-58.  
45. Ibid.
Thus, marriage is regarded essential for sacred purpose. Marriage is not so much a concession to human weakness as a means of spiritual growth. Generally speaking he who runs back from marriage is in the same boat with one who runs away from battle. So marriage was enjoined as a sacred duty and leading of an unmarried life was condemned for ordinary man. So, marriage is a necessity to save a Hindu from the place of torment, called "put" and for the repayment of the debts due to ancestors and, therefore, marriage, as a primary means to that end, became a religious necessity. such being the necessity of marriage for the common man.

Manu pointed out the necessity for a Brahman in another ways, thus:

"A Brahman immediately on being born in produced a debtor in three obligations—to the holy saints, for the practice of religious duty; to the Gods for the performance of sacrifice; to his forefathers, for offspring and that after he has read Vedas in the form prescribed by law, has legally begotten a son and has performed sacrifices, to the best of his power, he had paid his three debts and may then apply his heart to eternal bliss. However, if a Brahman has not read Vedas if has not begotten a son and if he has not performed sacrifices, yet shall aim at final beatitude, he shall sink to a place of degradation".

46. The sanskrit word for son, Putra means literally, one who saves from put or Hell—the Hell into which parents without sons fall.

47. Manusmriti, VI, 35,36,37.
2) Keeping in view its sacramental nature, it was also considered to be indissoluble. It was only in exceptional cases, the sages allowed a woman to abandon her husband and take another.

Vasistha said: A damsel betrothed to one devoid of character and good family or afflicted by impotency, blindness and the life of an out-caste or an epileptic or an infidel or incurably diseased should be taken away from him and married to another.\textsuperscript{48}

Manu declared mutual fidelity till death as the essence of Dharma for the husband and wife because, according to him, man and woman, united in marriage, should constantly so exert themselves that they may not be disunited and may not violate their mutual fidelity. Manu emphasizes that "The husband must constantly be worshipped as a God by a faithful wife, even if he be destitute of character or seeking pleasure elsewhere or devoid of good qualities". A good wife desirous of living in this as well as the next world with her husband, must never do anything that would displease him, either alive or dead. A woman attains paradise not by virtue of any austere penance but as a result of her obedience and devotion to her husband. Divorce was considered to be a taboo. Moreover, nowhere in the text dissolution was prescribed, except in extreme circumstances with sufficient proof.

The Shastric Hindu Law did not provide for either divorce or judicial separation in the strict sense.\textsuperscript{49} Divorce was not

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\textsuperscript{48} Supra Note 41 at p. 15.
\textsuperscript{49} Ram Keshav Ranade, The Hindu Code, 1948.
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allowed or favoured by the Shastras, customary divorce was only an exception, not the rule, as after the marriage, the wife on her introduction into the family become a limb, as it were, of an organised whole. The indissolubility is simply an integral part of this oldest system of law—Hindu Law—Mayne does not exaggerate when he says, Hindu Law has got the oldest pedigree of any known system of jurisprudence and even now, it shows no sign of decrepitude. This idea of indissoluble union and completed personality between husband and wife led to the fiction of the identity or unity of husband and wife. Regarding this fiction Grihyastras provide:

"Marriage, is not a contract entered into by two contacting parties but a spiritual union—a holy bond of unity. The words addressed to the bride just after the Saptpadi are, "Into my will, I take thy heart, thy mind shall follow my mind."Thus a Hindus marriage, "once tied, cannot be untied and once a maiden is given in marriage "neither by sale nor by repudiation is the wife released from her husband".

It is one of the most important samskar necessary for man of all classes and the only one for the woman. The husband and wife have to adjust their tastes and temper, their ideas and interests instead of breaking with each other when they

find that these differ. It involves sacrifices on the part of both the husband and the wife and each is called upon to overcome the incompatibility of the other. So, the Hindu marriage is not an ordinary affair wherein the weakness of flesh plays a dominant part.

However, with the passage of time it was realized that due to the limited role of the women, the institution of polygamy, concubinage and prostitution emerged. The marriage became monogamous only for the women. The husband could marry another woman even when his wife was alive. However, polygamy was not practiced by the Hindus on a large scale it remained a privilege of the few and in conformity with customary law.

3) The Hindu marriage was also considered to be internal and it was valid not only during the life time of spouses but also in lives to come. It was not only meeting of bodies but meeting of souls also. So, widow remarriage as a rule was not recognised. The ideal was that a widow who remains chaste reaches heaven after her death even though she has no son\(^5\(^4\), a widow who becomes unfaithful to her husband has no claim to his property, not even for maintenance; she may even be excommunicated.\(^5\(^5\) The widow remarriage was inconceivable in Dharmasastric law. In fact, a widow remarriage has always been a taboo in India, especially among higher castes.\(^5\(^6\) The female was often given a new name and she acquired special

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54. Manusmriti, V, 151; Yaj, 1-76; Vishnu, XXV, 13-14.
55. Manusmriti, V, 169; Yaj, 1,75; Parasara, IV, 26, Vishnu, XXV, 17.
relationship in husband's family. Her union with husband was conceived as a condition of one body' and a widow was her husband's surviving half. Some of the writers even began to idealize widowhood. Kalapi wrote:

There is a greater purity in widowhood than in married state (saubhagya). There is greater purity in Bhakti (life dedicated to God) than in Srangara (life of material pleasures). God gives even misery to a person for his own good. We with a limited vision fail to probe that sublime purpose. It is a privilege to suffer in life and preserve the memory of one whom you loved and with whom you enjoyed your life.57

4) As the Hindu marriage was considered sacramental union, for its solemnisation, the essential religious ceremonies were performed. The marriage could not be solemnised without the performance of sacred rites and ceremonies. The details of these ceremonies are given in Grihasutras. The main rites are homa or offerings to the holy fire, Panigrahana or taking the hand of the bride and sapatpadi. The bride and the bride-groom take seven joint steps round the holy fire. This is followed by the address by the bridegroom to the bride. Water is then poured on the hands of the couple and certain prayers are recited. Upon the completion of the prayer, the bridegroom joins hand with the bride and says to her, "Give thy heart to my religious duties, may thy mind follow mine. Be thou consentient to my speeches. May Brihaspati unite thee into

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The Madras High Court after noting the original traits in Hindu Law observed the importance of these ceremonies as under:

"Religious rites and ceremonies that create the indissoluble tie between the husband and wife, that these ceremonies are essential for all forms of marriage among Hindus that it should not be to the will of some people to alter the forms of marriage preserved by the shastras or by custom".

In the words of Derrett, "In fact, in no other respect are feelings of Hindus so acutely sensitive as when their concept of, and belief in the importance of marriage as institution are questioned or attacked. This is largely the work of the Dharamshastras, which after more than two milleunia of relentless propaganda, have produced an effect which the western world unhesitatingly labels puritanical.60

(B) Marriage Under Modern Hindu Law

The changes in the nature of Hindu marriage are the outcome of Industrial revolution and of its lofty ideas of liberty and equality. Raja Ram Mohan Roy and other social reformers started a social movement against sex inequality, against the practice of "Sati" and enforced widowhood. He tried to convince the people that widow-remarriage was sanctioned by the shastras and by the religion preached in the

60. Derrett, Hindu Law - Past And Present, (1957) 82.
Vedas, and the Smritis did not sanction enforced widowhood. He stood by the government when the inhuman practice of sati was penalized by law and pleaded successfully for it before the Privy council against the petition filed by the orthodox Section of the community to repeal the Act. The agitation started, culminated in the passing of the Hindu Widow Remarriage Act, 1856.

So, the first weakening of the sacramental tie is exhibited in the passing of the Hindu Widow Remarriage Act, 1856, which gave rise to considerable conflict and agitation concerning marriage and which attacked on the sacramental aspect of the Hindu Marriage. By this enactment the sanctity of holy verses of Manusmriti, which manifest the sacramental concept of a Hindu marriage, i.e. 'husband and wife are united to each other not merely in the life but in lives to come' and 'a true wife must preserve her chastity as much after as before her husband's death; came to an end.

The second blow to the sacramental character was given by the passing of the Hindu Marriage Act, 1955, which recognizes the rights of the spouses to seek divorce, judicial separation and also introduced other matrimonial remedies. In the ancient period the state was only to maintain law and order. Modern welfare state is interfering in every aspect of human life, so, the marriage has ceased to be a private affair of the spouses. The concept of indissolubility of marriage has changed due to the influence of a number of factors. The legislature introduced divorce in order to bring an end to the untold miseries of suppressed wives. The sacrosanctness has been eroded on account of foreign invasions and impact of foreign ideas. Moreover, industrialization, urbanization, the
sweeping changes in the religious and moral outlooks and dissipation of Hindu joint family system have also contributed in changing the concept of a Hindu marriage. The society is never static, there are always changes in the society. So, it becomes the duty of the state and the legislature to modify laws in accordance with the changing needs of the society. The Law Commission, being aware of this rightly pointed out:

"Hindu law was never static; it was dynamic and was changing from time to time. The structure of any society, which wants to be strong, homogeneous and progressive, must, no doubt, be steady but not static; stable but not stationary; and that is exactly the picture we get if we study the development of Hindu law carefully before the British rule began in India.61

The Hindu Marriage Act, 1955, originally based divorce, on the fault theory. The divorce could be sought by one spouse only if the other spouse is at fault or a guilty party. The more emphasis was on the punishment of the guilty spouse rather on the protection of the innocent spouse. So, nine fault grounds were enshrined in Sec. 13 (1) of the Hindu Marriage Act on which either of the spouse can sue for divorce. Two special grounds for divorce were provided for the wife under S. 13 (2). In 1964 by the Hindu Marriage (amendment) Act, a form of breakdown theory was introduced in Hindu Law by modifying the last two clauses of S.13(1), viz clauses (viii) and (ix). These clauses were renumbered as clauses (i) and (ii) of S. 13 (1A). The Marriage Laws (Amendment) Act, 1976 inserted two additional fault grounds of

divorce for the wife and a new Section 138 was incorporated under which divorce by mutual consent can be sought by the spouses. Thus, under the modern Hindu Law all the three theories, Fault Theory, Breakdown Theory and Mutual Consent Theory of divorce, are recognized and divorce can be sought on the basis of any one of them. Further, the customary mode of divorce has also been retained by Section 29(2) of the Hindu Marriage Act, 1955, looking into the peculiar features of the Hindu society where custom has played a very important role.

So, Hindu marriage has not remained a sacrament except that one important sacramental element has still been retained. Under Section 7 of the Hindu Marriage Act, the performance of essential ceremonies is must for the validity of a Hindu Marriage. The marriage must be solemnised—either—by the performance of shastric ceremonies, which must include sapatpadi, or, by the performance of the customary rites and ceremonies which prevail in the caste or community to which one of the parties belongs. So, the Hindu marriage, primarily, has not remained a sacrament and it has also not become a contract altogether though it has semblance of both.62

Before the amending Act of 1976, opines Derrett63 that H.M.A has trimmed these characteristics but not destroyed. But after the amendment in 1976, he doubted, if it still remained a sacrament.64 But still holding the last straw he argued, "A marriage which, though starts in the form a samskara,

62. Supra Note 58 at p. 68.
64. Derrett, The Death of a Marriage Law, p. 156.
is capable of being ended by judicial divorce, is apparently no samskara at all. But, here, I disagree—it can be ended, but so far as Dharma is concerned only with the death of the surviving spouse (it can be ended) and that too subject to the rejoining of the spouses in the future existence".65

It may be submitted that the views of Derrett are not very convincing because under the contract Act of 1872, the contract of a minor and a person of unsound mind is null and void. If a Hindu Marriage is looked upon as contract, the agreement of the parties must be a condition precedent. But it is not so under S.5 and S. 12 of the Hindu Marriage Act. Though, under S. 5 (iii), marriageable age is given both for the male and female, but, a marriage solemnized in the violation of age condition is perfectly a valid marriage. The marriage of a person of unsound mind is also valid. But under Section 12 of the Hindu Marriage Act, it can be annulled by the court at the option of the other spouse. So, the views expressed in Tikait v. Basant Kumar66 that "in Hindu law marriage was a sacrament, a union—an indissoluble union of flesh with flesh, bone with bone—to be continued even in the next world" had much relevance under old Hindu law but as far as modern Hindu law is concerned it has become a mixture of sacramental and contractual elements.

Change in the nature of marriage, an overwhelming majority of the population in this country still has faith in the permanent and life long bond between husband and wife as

65. Ibid at 157.
propounded in the Dharamashastras. In this regard Mr. Derrett has rightly assessed:

"The 90 per cent of Hindus for whom I am showing concern, whose laws have been tampered with, at the behest of those who have better access to the legislature, still equate law as an ideal standard with Dharma, and are (i) most reluctant to dissociate with the two and (ii) reluctant to take statute law seriously (except when it offer them cash benefits or the equivalent) or to think of it or the manipulation of it as morally binding. For that 90 percent, religion is still a matter of social identity and cohesion.

"On this basis, the acceptance of marriage as a samaskara is left to the conscience of the individual. If it operates there, it will follow that divorce will not be accepted internally even if occurs practically. Even among the 10 percent, there must be many who envisage marriage as a samskara for themselves and even more so for others; but they regard divorce as a remedial measure for hard cases, to be applied as a matter not of righteousness, but of therapy for the distressed.

Thus, the majority of the Hindu population, unlike Muslims, regard marriage as a life long bond which is indissoluble in all senses: their social system collapse unless they did so regard it. But the process of modernization has left the elite to consider it as a matter to be dealt with in internal forum—and when the individual conscience, unsupported by public opinion, can no longer endure a one-to-one matrimonial relationship the law has, within these famous thirty years, taken their part, and as a matter of compassion given them a route for escape and a chance of new life. The new marriage will
not be a samskara, but this will be no problem. It will be a union undertaken by the spouses voluntarily and within the definition of their own judgements, consciences and religions (if any). As a matter of practice divorced-and-remarried couples will find each other the best and easiest company, for couples who, whatever their comfort soldier on in a traditional type of remarriage, are likely, unless they are afraid that if you display your divorce-decree to the house-boy when he opens the door to you it may, by no means, turns out to be a ticket to the friendship, sympathy, and patience of hosts whose own marriage has been floated, by time, off a great many rocks and shocks and must therefore regard you with contempt, what is as bad, pity"67

Thus the old concept of Hindu marriage has undergone a change.

VII NATURE OF MARRIAGE UNDER MUSLIM LAW

The term "Marriage" has been defined in various ways by the authorities in Muslim Law. Chapter IV, page 8, of the Quran says:

'O men, fear your lord, who had created you out of one man, and out of him half created his wife, and from them two hath multiplied many men and women".

AShbah says, "Marriage is an institution ordained for the protection of society, and in order that human beings may guard themselves from foulness and unchastity. Marriage is a a sacrament, in so much that in

67. Supra Note at pp. 157-159.
this world it is an act of ibadat or worship, for it preserves mankind free from pollution. It is instituted by Divine command among members of the human species---Marriage when treated as a contract is a permanent relationship by based on mutual consent on the part of man and a woman between whom there is no bar to lawful union).

According to Dr. Tahir Mahmood, "Marriage (Nikah) among Muslims is a 'solemn Pact' (Mithaq-e-ghalid) between a man and a woman, soliciting each other's life companionship, which in law takes the form of a contract (aqd)".

There is a great controversy as far as the nature of a Muslim marriage is concerned. Some jurists consider it a pure civil contract, while the other consider it a religious duty also. The matter came for interpretation in India in Abdul Quadir v. Salima68 case in 1886, when the plaintiff sought the intervention of the Court where the defendant had refused to cohabit with him. Mr Justice Mahmood instead of arriving at a conclusion on his own relating to the exact nature and effects of it on the parties, preferred to adopt the language employed in Tagore lecture (1873) delivered by Jadoo Nath Sarkar where it was said that:

"Marriage in Mohammedan law is not a sacrament, but purely a civil contract—though it is solemnized generally with recitation from the Kuran, yet Muhammedan Law does not positively prescribed any service peculiar to the occasion. That it is a civil contract is manifest from the various ways and circumstances in and under which marriage

68. (1886) 3 All 149.
are contracted or presumed to have been contracted. Though a civil contract, it is not positively prescribed to be reduced to writing, but the validity and operation of the whole are made to depend upon the declaration or proposal of the one, and the acceptance or consent of the other, of the contracting parties or of their natural or legal guardians before competent and sufficient witnesses, and also upon the restrictions imposed, and certain of the conditions required to be abided by according to the peculiarity of the case."

Mr. Justice Mahmood strengthened the validity of his opinion by referring to certain other authentic commentaries which assert that the said Tagore Law lectures gave an "accurate summary" of Mohammedan Law, quoted Mr. Baillie:

"Marriage is a contract which has for its design or object the right of enjoyment and procreation of children. But it was also instituted for the solace of life, and is one of the prime or original necessities of man. It is, therefore lawful in extreme old age after hope of offspring has ceased, and even in the last or death illness. The pillars of marriage, as of other contracts are Ejab-o-Kabool, of declaration and acceptance. This first speech from which ever side it may proceed, is the declaration, and the other the acceptance".

He quoted Hamilton's translation of Hedaya in support of his argument that:

"Marriage is contract—i.e., to say, is affected and legally confirmed—by mean of declaration and consent, both expressed in preterite".
Shama Charan Sarkar gave his opinion as Under:

"Marriage among the Muslims is not a sacrament but purely a civil contract. The contractual aspect is emphasized from the nature of the marriage and the mode by which it is performed. Thus, only one civil ceremony, i.e., an offer made by party and accepted by the other in one and the same meeting in the presence of two competent witnesses (among the sunnis) is sufficient for entering into the contract of marriage. Ameer Ali categorically stated, "A Muslim marriage is essentially a contract needing no Mullahs, requiring no sacred rites. Validity depends on proposal of the one side and acceptance on the other."

In Muslim Law, marriage depends upon the free volition of the parties concerned, so does its dissolution, though the wife's volition in this regard is subordinated to that of the husband, since the Muslim jurists subscribe to the notion that of the two partners, the husband, on account of physical and intellectual superiority, has to play a dominant role, and the wife, is, therefore, subordinated to him, so much so that she practically enjoys no marital freedom.

Some theorists treat the dower as consideration for the alienation of her marital freedom. As the wife is considered as subordinate to husband, the husband is conferred with absolute powers of divorcing his wife, but no such freedom is

69. Shama Charan Sarkar, Mohammadan Law, (Tagore Lectures, 1873), 30.
70. Mohammadan law, Vol. II at 27.
71. Paras Diwan, Muslim Law in Modern India, (1990), p. 42.
made available to the wife, she consents to release her from the marital bond.

It is in this context Schacht observed: "Marriage (Nikah, Zawithe husband; Zawaya, the wife) is a contract of civil law, and it shows trace of having developed out of the purchase of bride; the bridegroom concludes the contract, with the legal guardian (wali) of the bride, and, he undertakes to pay the nuptial gift (Mahar Sadak) or dower to the wali as was customary in the pre-Islamic period, but to the wife itself."

Wilson defines a Muslim marriage as "a contract for the purpose of legalising sexual intercourse and the procreation of children." Fitzgerald goes to the extent of saying that, "although a religious duty marriage is emphatically not a sacrament. There is no sacrament in Islam. Nor it is a overture."

In addition to contract it is considered as a religious duty also. Abdul Rahim says:

"The main idea behind Islamic concept of marriage is to control the sexual relations between opposite sexes with a view to the preservation of the human species, the fixing of descent, restraining men from debauchery, the encouragement of chastity and the promotion of love and union between the husband and the wife and of mutual help in

73. Anglo Mohammadan Law, 94.
74. Muslim Law, 37.
According to B.R. Verma, "that according to the established tradition of Prophet Mohammad marriage is considered to be a religious matter, in fact a religious duty. The main aim of a Muslim marriage is sukun (satisfaction or comfort or peace of mind), muaddat (love) and rahmat (kindness, sympathy or compassion)."  

The Privy council in Shoharat Singh v. Jafri Begam said that Nikah (marriage under the Muslim Law) is a religious duty. Among the Muslims a marriage partakes the nature of Ibadat (devotional Act) and Muamlat (dealing among men). Men marry for beauty, for ranks, for wealth, for piety, chose piety. According to Prophet a marriage is sunnat (or order) and who do not obey it are not his followers.

Krishna Iyer, J. concurs with the view in his paper "Reform of the Muslim Personal law." He said:

"The impression that a Muslim marriage is a mere contract and not, therefore, sufficiently solemn or sacred is another fallacy of the Hindu and Western student."  

Chief Justice Sir Shah Sulaiman evaluated "purely civil

75. Abdul Rahim, Muhammadan Jurisprudence, at 327.
76. B.R. Verma, Muslim Marriage and Dissolution Act, 1939 at 1
78. Islamic Law in Modern India, 23.
contract doctrine" in Anis Begam v. Mohammad Istafa case. He criticized the application of the principles governing sale of goods to a Muslim marriage. He pointed out:

"The line of reasoning based on the analogy of sale has naturally been very severely criticized at pages 148 and 149 in Wajid Ali Khan's case by the Oudh bench and, so, also by Mr. Ameer Ali in his Mohammedan law vol. II, pages 459 and 460. No doubt, the Muslim commentators have, by way of illustrations applied certain principles governing a contract of sale of goods to the contract of marriage, but that was by way of analogy only. The similarity cannot be pushed too far, nor can the principles governing the sale of goods applied in all their details. Indeed, if one were to pursue the analogy far enough there would be a redudic and absurdum. The contract of sale of goods can be canceled if a portion of the price has not been paid. Even if the goods have been once delivered they may in such event be returned. But if the consummation of marriage has taken place and the part of the dower remained unpaid, it would be absurd to suppose that the marriage can be cancelled by the wife at her will.

The dower can't be said consideration for marriage. The object of the marriage is the protection of the chastity of sexes and not mere gratitude of sexual lust. A woman is not a plaything but a spiritual and moral being who on the basis of sacred pledge is to provide man with a co-partner for making the life of selves, that of the family and ultimately of the whole humanity meaningful. Different purposes that a marriage

79. (1933) 55 All. 743, 756 (Oudh Cases).
80. (1912) 15 Oudh Cases 127.
may fulfill have been sufficiently indicated in Book which states:

"And among his signs
Is this, that He created
For you mates from among
Yourselves, that ye may
Dwell in tranquility with them,
And He has put Live
And mercy between your (hearts):
Verily in that are signs
For those who reflect" 81

The union which the marriage denotes is really of two souls which are essentially one. The Quoran states:

"...(Your wives)
They are your Garments
And ye are thier garments." 82

The propagators of the religious duty also denounce the fallacies of woman as a property; and dower as a price. The courts have treated woman as property while dealing with controversies connected with the nature of marriage. The concept is considered to be foreign to the institution of Islamic marriage. It was a custom in Arabs to inherit woman

like any other property. It is emphasized that the book heaped scorn on the Arabs' traditional attitudes towards female in the following verses:

"When News is brought
To one of them, of (the birth) a female (child), his face
Darkens, and he is filled
with inward grief
"With shame does he hide
Himself from the people,
Because of the bad news
He has had!
Shall he retain it
On (Sufferance and) contempt
Or bury it in the dust?
Ah: What an evil (choice)
They decide on?"

So, it can be categorically asserted that the person of a woman can not be regarded as a price. Similarly, dower can never be equated with price which is paid for acquiring some property in the commercial sense. Dower is an expression of love while is offered by the bride-groom to the bride.

"The payment of the dowr", says the author of Hedaya, "is enjoined by the law, merely as a token of respect for the bride but the


mention of it is not absolutely essential for the validity of marriage and for the same reason, marriage is also valid". 86

To reconcile the conflicting views Dr. Paras Diwan says:

Human being at some stages of the development of the institution of the marriage have attached some sanction—some going to the extent of calling it a sacrament, a permanent union, just as Hindus and Christians did— to marriage and to that extent a Muslim marriage, too may be called an Ibadat but the most remarkable feature of Muslim jurisprudence is, that even at the beginning of the development of their juristic thought, they squarely considered marriage essentially as a civil contract—a concept which developed into the western world fully only after the industrial revolution. Thus, it is submitted that in its formation a Muslim marriage is essentially a contract, though in its dissolution the dominant position of the husband is recognized. 87

After the passing of The Dissolution of Muslim marriage act, 1939, a woman has been given the right to seek dissolution of marriage on some specific grounds. So now it can be inferred that a Muslim marriage is a civil contract. This is the most accepted and recognized view in the modern period. However the observations of Kerala High Court in the modern period are most convincing and upright. Mr Justice Kalliat, comprising a bench of the Hon. V. Bhaskaran Nambiar

86. Imam Muslim, Sahih Muslim, vol. II at 718 footnote 1864.
and himself in *Amina v. Hassan Koye*\(^8\)\(^8\), considered the concept of marriage under three broad headings, namely, legal, social and religious. Juristically, his Lordship observed that it may be contract as opposed to a sacrament. But it can not be considered as a contract pure and simple to be governed exclusively by the provisions of the *Contract Act*. Rules to be applied for interpreting a Muslim marriage are not exclusively confined and combined within the four walls of the general statutes – *Contract Act* and allied Acts. Thus, it can be concluded that a Muslim marriage is a civil contract with some religious tinge.

**VIII NATURE OF MARRIAGE UNDER CHRISTIAN LAW**

**(A) Marriage Under the Old Christian Law**

Like a Hindu marriage, a Christian marriage was also a sacramental affair. But it was not considered to be an eternal union unlike a Hindu marriage. If we trace out the historical development of the institution of marriage, we find that in the pre-Christian period, marriage and divorce were not governed by the state. They were considered to be outside the scope of State activities. The parties were free to enter into marital ties and it could also be dissolved at their sweet will. But, with the advent of the Christianity, marriage began to be considered as a sacramental affair. The church of Rome began to occupy the supreme ecclesiastical authority in matrimonial matters also. The Canon law proclaimed and enjoined the absolute doctrine of indissolubility of marriage.

\(^8\)\(^8\). *1985 Cri L.J.* 1996.
The Canon law held that by marriage man and wife were made of one flesh by the act of God—marriage being a holy tie a sacrament. It was a trite saying, "Marriage are made in heaven." 89

It was, therefore, proclaimed, "what God hath joined together, no man put asunder". The sacramental and indissoluble union be likened the relationship of man and his wife to that of Christ and His Church. 90

Marriage was solemnized by the mutual consent of the parties and on its consummation it became complete, provided there was no impediment. The Church had always insisted on a public religious ceremony. Though the marriage was considered to be sacramental and indissoluble, yet separation from bed and board was recognized. Parties could live separately from each other till life but there was no right to remarry during the life of the other spouse.

Christianity regarded the institution of marriage as one which had been obtained and enacted by God. Cesti Conupi declares the Christian doctrine of marriage as immutable, inviolable and fundamental union, marriage being instituted by God and not by man--God, being the author of the nature, promulgated the law of marriage and it was proclaimed by the Christ 91 According to Him:

89. Supra Note, p. 16.
90. Ibid.
Let it be repeated as an immutable and inviolable fundamental doctrine that matrimony was not instituted, or resorted by man but by God, nor by man were laws made to strengthen and conform and elevate it but by God, the Author of Nature, and by Christ, our Lord by whom nature was redeemed, and hence these laws cannot be subject to any human decrees or to any contrary pact even of spouses themselves. This is the doctrine of holy scriptures which declare and establishes from the words of Holy writ itself that God is the Author of the perpetual stability of the marriage bond, its unity and its firmness.

Thus, marriage was considered beyond the scope of man made laws and God was the author of law of sacramentality and indissolubility of marriage. It was He who constantly supervised and ordained the stability of marital ties and firmness. The asceticism of Christian fathers radically changed the concept of Roman marriage and made it an indissoluble union. The Church exalted virginity as the highest spiritual state, fornication being regarded as a sin, and marriage was meant to prevent it. The Ecclesiastical court was the Supreme holder of religion and dispenser of justice, so such court had the authority to pass a decree of annulment of marriage.

Dr. Paras Diwan has rightly pointed out:

So, the concept of marriage has been that marriage being obligatory for every human being is a sacrament, having been ordained by

God, and an indissoluble solemn union entered into by the parties with their full and free volition for life. So as to prevent fornication (a moral sin) and with a view to providing safeguards against depopulation, since it was ordained by God, no one can put it as under". 93

(B) Marriage Under Modern Christian Law:

The Reformation brought about a change in the outlook of the people. The industrial revolution, spread of liberalism, ideal of equality gave a further impetus to liberate marriage from the fetters of Church. The Christian world was divided into Catholics and Protestants. The Protestants began to think that marriage is a human institution which has come into existence due to the free will of the parties. They can err; they can blunder. 94 They should be given the right to dissolve the marital ties if they think that the marriage has failed, so that they maybe able to rectify their error. The Protestants believed that marriage is a bond but not a bondage and is subject to the jurisdiction of civil courts, while the Catholics continued to adhere to the notion that it is indissoluble and only Church has jurisdiction over it. The Protestants believed that marriage is only man made contract and is a social institution, which must be preserved and protected. So due to the change in outlook, the marriage ceased to be indissoluble but it could be dissolved only in those cases where a party to marriage by his act or omission had fundamentally undermined it. The Matrimonial causes Act,

93. Supra Note 87, p. 18.
94. Supra Note 92, p. 175.
1857 introduced divorce for the Christians in England and it gave the last blow to the indissoluble concept of marriage.

In India, the Christians are governed by the Indian Divorce Act, 1869, and The Indian Christian Marriage Act, 1872, in the matters of matrimonial remedies and solemnization of marriage respectively. Basically, the two acts incorporated the ideology of the English matrimonial Causes Act, 1857. The object of the Indian Christian Marriage Act, 1872, is not to prevent people from marrying as they wish but to enable them to protect themselves and their posterity by a lawful and binding marriage if they wish to be married as Christians.

A Christian marriage may be religious in form but it is a contract. It is usually solemnized by a Minister of Religion licensed under the Christian Marriage Act, 1872. it can also be solemnized by the Marriage Registrar. The marriage being a contract, Section 10 of the Indian Divorce Act, provides for its dissolution by a decree of divorce. Thus, the Christian marriage is a civil contract under modern law.

IX NATURE OF MARRIAGE UNDER PARSI LAW

(A) Marriage under Old Parsi Law

Like other systems of law, marriage was given great importance under old Parsi law. According to the sacred text

95. AIR 1918 All. 172.

of Zoroastrianism, marriage is divinely favoured.\(^97\) The second of the happiest place in the world is that in which a religious man sets up his household.\(^98\) In Gathas, the pair who wed are urged to strive to live a life of righteousness and to help one another in good deed.\(^99\)

As the marriage was regarded as a religious duty, Zoroastrians held it to be a meritorious act to help their co-religionists to enter the wedded state and such assistance may even atone for sin.\(^100\) Parsis used to make provision of money through their will or by trust to help the poor brides to enter into marital ties. Making of such provision was considered to be meritorious help which could help them in attaining the desired goal of life.

For the validity of a Parsi marriage, the performance of a religious ceremony, known as Ashirvad is must. At the beginning of the Ashirvad or blessing known the Paevanand--Namah, which is recited at the wedding ceremony, the officiating Priest declares that the ceremony is according

\(^{97}\) Vendidad, IV 47 (The Vendidad, The Priestly Code of the Parsis has 22 Chapters and contains a dualistic account of creation).

\(^{98}\) Vend. iii. 2.

\(^{99}\) Yas. iii. 5 The Yasna is a part of Avesta. It is principal liturgical book of the Parsi which contain texts recited by the Priests at the Yasna ceremony, general sacrifice in honour of all dieties. The gathas f part of Avesta. It contains the discourses, exhortations, revelations of the Prophet Zoraster, written in a metri style and archaic language.

\(^{100}\) Vend. IV 44; XIV. 15.
(B) Marriage under Modern Parsi Law:

But under the Parsi marriage and divorce Act 1936, the marriage is regarded as a contract because consenting mind is essential. According to 3.3(b) of the Act, the "Ashirvad" ceremony is performed by a priest in the presence of two Parsi witnesses other than such priest.

Every marriage contacted under the Parsi Marriage and Divorce Act, 1936, is to be certified by the officiating priest in the form contained in Schedule II. The certificate shall be signed by the said priest and the said priest shall there upon send such certificate together with a fee of rupees two to be paid by the husband to the registrar of the place at which such marriage is solemnized. The Registrar on receipt of the certificate and fee shall enter the certificate in a register to be kept by him for the purpose and shall be entitled to retain the fee. The marriage register is open for public inspection. Under s.32 of the Act, grounds for divorce are given. Any married person may sue for divorce on any one of the grounds given under Section 32 of the Act. Divorce can also be sought by mutual consent under Section 32 (B) or on the breakdown grounds which have been incorporated in the Act under Section32(A) by The Parsi Marriage and Divorce (amendment) Act, 1988. So, a Parsi marriage is also a contract like a Christian Marriage.

X  NATURE OF MARRIAGE UNDER JEWISH LAW

The Indian Jews also regard their marriage as a contract though a religious ceremony is essential for its solemnization. In a Jewish marriage a written contract called Katuba, is essential for the validity of marriage.102

XI  STABILITY OF MARRIAGE AND MATERMONIAL REMEDIES

The old concepts of marriage have changed with passage of time. Today, we are living in a welfare state. The State is interfering in every sphere of human life. Gone are the days when an individual was left free to live or languish. Prof. Sarkar has also said: "

In a given welfare society social justice may require state intervention in the behavior of an individual to maintain social Equilibrium."103

So, a movement started throughout the whole of the world to rationalise and humanise laws regulating marriage and other matrimonial remedies. The marriage, has ceased to be a sacramental affair under all personal laws. Divorce, judicial separation and other matrimonial remedies have been provided to the spouses under different personal laws. However, the stability of marriage is sinequanon of every civilized society. The matrimonial remedies recognized and provided under law are instruments of social control to promote harmony


in the society. Harmony in the society is unimaginable where there are dissatisfied parties that make a home.

It has been rightly observed:

"Matrimonial reliefs, therefore, are granted not only as the personal claim of the spouses, but also to ensure a bigger purpose of society, viz. peace and stability which is initiated from the home and hearth by the efforts of man and woman, the husband and wife".  

Justice, Beg of Supreme Court has also expressed:

It is essential that a relationship which is meant to serve an essential biological need and purpose and provides a basis for the moral, mental and spiritual advancement of the human species, does not become a breeding ground for human misery, frustration and degradation.

So, there is every possibility that some differences may arise between the spouses and the differences may be of serious nature also. The public policy which finds expression in the statues authorizing matrimonial reliefs is based upon the assumption that it is better for the spouses who have been living in extreme hardships and have found that reconciliation is hopeless, to have an opportunity to remarry and reestablish a family relationship. Man has evolved the institution of


family for the sake of his emotional peace and stability and, therefore, sickness of the family is inevitably the sickness of the individual. Divorce ends misery and brings misery. We have to balance misery in a miserable marriage and misery arising out of the dissolution of marriage.\textsuperscript{106}

The main emphasis of all matrimonial laws is on the stability of marriage, but there is no use of retaining the empty cell if there is total breakdown and failure of marriage. The purpose of the divorce laws is only to provide relief in those cases where the spouses are unable to pull on together. Divorce is a necessity, where marriage has broken down, it is an antithesis of marriage. According to Bentham, "To live under the perpetual authority of a man whom you hate, is of itself a state of one too painful for slavery."\textsuperscript{107}

So, our parliament has recognized various theories of divorce and has incorporated the same under Hindu Law and other personal laws. According to Dhillon J.:

"From the various amendments made in the provisions of S.13 of the Hindu marriage Act by the Parliament, one thing is obvious that the parliament, thought it fit to liberalize the dissolution of marriage between the parties where there is no possibility of the spouses continuing matrimonial relations."\textsuperscript{108}

\begin{flushleft}
\textsuperscript{106} J.N. Kaushal in his welcome Address at All India Family La Conference held in the Deptt. of law, P.U. Chandigarh, 'La Towards Stable Marriages' p. 8.
\textsuperscript{107} Cited by Querasi, in, Marriage And Matrimonial Remedies, p 331.
\end{flushleft}
In Parihar V Parihar\textsuperscript{109} case, also, it was observed by the Rajasthan High Court:

It appears, therefore, that a marriage in which the parties could no more live together deserved to be dissolved... This is now only an empty shell which should be destroyed with the maximum fairness and minimum bitterness. I am satisfied that marriage deserves to be dissolved. It they cannot bury the hatchet let them buy the marriage.

Some jurists were of the view that by recognition of divorce, the stability of marriage institution will be in damage. But all such apprehensions have not proved true and even after recognition of divorce and judicial separation, the courts try for reconciliation between the spouses. Divergent views have been expressed relating to the nature of divorce.

Letourneau viewed divorce, "as the formal and very important milestone in the process of liberating women from the position of slavery of men in marital relationship".\textsuperscript{110}

Dr. Peterson regards divorce as a part of shifting out process, designed to produce a more rewarding and stable life in society. He views divorce as a sort of preparation and a kind of training for happy second marriage.\textsuperscript{111} Modern sociologists such as Goode, Kapadia are trying to establish

\textsuperscript{109} AIR 1978 Raj. 140.

\textsuperscript{110} Letourneau, The Evolution of Marriage And the Family, (189 p. 247.

\textsuperscript{111} Peterson, Voice of America, Series No. 5,4.
that divorce is only a formal recognition of an already existing fact of disorganized and disturbed marital life. According to Mrs. R.K. Agrawala, "Divorce is an index of imperfect marital life many times divorce serves as a legal insurance or safety valve in legal sense for avoiding bad matrimonial risks by remarriage." 112

Goode remarks that divorce does express high degree of matrimonial hostility between spouses and breaks the bonds of marriage which once united two families. 113 Finally Goode admits that it is a symbol of misfortune for one or both spouses...but accept the misfortune as a social invention, one escape value from the inevitable tension of marriage....

The indissolubility of marriage is no guarantee for its stability. Stability of marriage does not simply mean enduring marital relationship but essentially imply the continuance of a happy, congenial, cordial and harmonious relationship between couples. Stability cannot be forced through legal sanctions. It can be ensured through creating an atmosphere of mutual fidelity, confidence and understanding rather than the legislative and judicial prescriptions. It has been aptly remarked by the then chief Justice P.V. Dixit that:

In Marital matters it is the attitude of mind and the feelings that counts and no decree of the court can force the parties to live together. 114

112. Supra Note 104 p. 86.
Marriage is a social institution in the stability of which society is interested, but "legislation should not under any circumstances force a person to continue to live under a marriage from which he wishes to free himself."  

So, the courts are adopting a very cautious approach while granting the matrimonial relief of divorce or judicial separation. The trivial differences are ignored by the courts as these are considered to be the ordinary wear and tear of marital life.

Justice Iyer has rightly said:

"There is no merit in preserving in fact, the connection of marriage when the parties are not able and fail to live within the limits of Allah that is to fulfill their mutual marital obligations and there is no desertion involved in dissolving a marriage which has failed. The entire emphasis is on making the marital union a reality and when this is not possible, and the marriage becomes injurious to parties, Quran enjoins a dissolution".

He further observed

"Trivial differences get dissolved in course of time and may be treated as teething troubles of early matrimonial adjustment. The stream of life lived in married mutuality washes away smaller pebbles but that it not the case when the incompatibility of minds breaks up the flow of stream. In such cases the breakdown of marriage is evident. So, we


recognize fact and accord divorce.\textsuperscript{117}

So, when the conflicts between the spouses are of extreme nature, it is be unreasonable and a criminal act to force the unwilling couple to continue the marital tie in name of stability. The cause of stability can be better served if the couples are allowed to separate smoothly in case they are not in a position to live together so that they may be able to resettle in life.

Former C.J.D.S. Tewetia has nicely explained the situation in \textit{Krishna Rani v. Chuni Lal}\textsuperscript{118} case, while allowing a decree of divorce on ground of cruelty:

"In the nature of things, neither it would be conducive for a married life nor it thinkable that the moment a spouse commits an act which constitute cruelty, the other spouse should rush to the court for relief. A normal married couple would naturally make allowance for difference of temperament and allow time in order to stabilize the marital relations and would thus ignore the misbehaviour of the other spouse in the hope that things would improve with the passage of time. Where the mental cruelty is said to have been caused by constant nagging, taunts, gestures full of disrespect towards the other spouse and towards those whom he or she either out of filial relationship or friendship greatly respects, it is only when the misconduct of the other spouse does not show any sign of improvement and a stage is reached where the last such taunt, nagging or gesture proves

\textsuperscript{117} Ibid., p. 263.

\textsuperscript{118} AIR 1981 P&H p. 119.
the proverbial "last straw" and the spouse throws up the sponge, give up the hope that time would mend the matters and knocks at the doors of the court.\textsuperscript{119}

So, the stability of the marriage is not affected due to the availability of the divorce and judicial separation under different personal laws.

\textbf{XII DUTIES OF RECONCILIATION}

Even when the estrangement between the parties to the marriage seems to be acute, it is the duty of the court to make every endeavor to bring about the parties to reconciliation. The Allahabad High court is of the view that efforts at reconciliation may be made right from the start of the proceedings.\textsuperscript{120} The court cannot help if in spite of its endeavour, no reconciliation can be brought about, but an endeavour nonetheless has to be made.\textsuperscript{121} But, sometimes the court has to face great difficulty to effect any reconciliation due to adamant attitude of the spouses. The difficulty which the court faces is made clear by the following passage:

"But an expression of regret, would not even move, Aloka (wife)--a whit because she was unable to rely upon her husband's words, so it was futile to proceed further and much to our disappointment, our endeavour to bring about a reconciliation between the parties failed. For that we blame neither wife or husband. If wife (Aloka) is within her right to refuse to return to matrimonial home, Bejoy is equally within his right not to go further than he has gone. We, therefore, enter into merits of the appeal with an open

\textsuperscript{119} Ibid. p. 123.
\textsuperscript{120} Raghunath v. Urmila, AIR 1973 All. p. 203.
\textsuperscript{121} Jivubai v. Ningappa, AIR 1963 Mys. 3 at 5.
mind and without the slightest prejudice to either, for the stance each takes, during our attempt to effect a reconciliation". 122

Similarly T.S. Misra J. in Raghunath Parshad v. Smt. Urmila Devi, 123 pointed out:

It is not the discretion of the court not to make endeavour to bring about reconciliation. In fact it is the duty of the court to make every endeavour in that behalf regard being had to the nature and the circumstances of the case before proceeding to grant any relief under the said act.

S.K. Raj J. of the Orissa High Court also held, that the court is given the power to make reasonable efforts to prevent disruption of marriage and thereby advance the social objective and stability.

Such endeavour for reconciliation is mandatory and is contained in various statues. Section 45 of the Indian Divorce Act, 1869, provides for the regulation of all proceedings under the Act by the code of civil procedure, which ultimately provides for a reconciliation effort by the court. Rule 3 order XXXII of the code of civil procedure casts a duty on the court to strive for settlement between the parties.

Section 34 of the Special Marriage Act, 1954, also contains the relevant provision. The Hindu Marriage Act,

123. Supra Note 120.
In addition to this, the court has also jurisdiction to grant the remedy for 'Restitution of conjugal rights', if conjugal company is not being provided by one spouse to the other. Consortium and cohabitation between the spouses are the basic ingredients of every marital life. The main purpose of the remedy for Restitution of the conjugal rights is also to stabilise the marital ties and also to provide necessary relief to the aggrieved spouse.

Thus, the stability of marriage and marital ties is the main object of all matrimonial laws and matrimonial remedies provided under different laws. Even though the old concepts

of marriage have changed, the divorce has been recognized under different personal laws, yet the emphasis of all matrimonial remedies is on the stability of marriage and marital ties. The purpose of the matrimonial remedies is not to undermine the stability of marital ties but to provide relief to the aggrieved spouse. The decree of restitution also aims at stabilizing the strained marital relations.

However, the stability of marriage rests on three pillars, namely, mutual trust bilateral respects, and sympathetic understanding. Out of these three, which sustains a matrimonial home, 'trust' is by far the most important prop. 'To be trusted' says George MacDonald, 'is a great compliment than to be loved', Trust begets trust, suspicion breech suspicion.125

However, whether the remedy is serving the real purpose or not is a debatable point which needs through examination. The incorporation of the remedy is not just sufficient, it must also serve the real purpose. However, even after the changing of the old concepts, stability of the Marriage institution is the most desired goal of all matrimonial laws and remedies.