CHAPTER-II

DIVORCES IN HINDU LAW AND IN NON HINDU LAW

2.1 CONCEPT OF MARRIAGE AND DIVORCE:

Marriage, whether considered as a sacrament or contract, confers a status of husband and wife on the parties to the marriage, of legitimacy on the children of the marriage and gives rise to certain spousal mutual rights and obligations of spouses. Against marriage is also conjugal union of a man and woman which arises only from the free consent of each spouse, but this freedom relates to the question whether two persons really wish to enter into matrimony, it is entirely independent from the free will of spouses. In the institution of marriage "Divorce" is not the anti thesis of marriage, but a necessary social evil. As the marriage has been regarded as a civil contract or socio legal contract, it is the logical next step to recognize that it is also dissoluble union. The term divorce is an origin from "divortium", which means to turn aside, to separate from diversion". Divorce is also said to be form "divertendo" because a husband is diverted from his wife. This divorce may be either absolute when marriage stands dissolved, or limited when the marriage relation is suspended and the duties and obligations are modified, though the matrimonial bond remains in full force. In this type of divorce there is only separation from bed and board. In legal language, it is well known as “Judicial separation”.

The common ground for these two matrimonial remedies, such as, absolute divorce and judicial separation has already provided in different statutory provisions of matrimonial laws governing different communities in India.

Divorce is one of the legalized forms to enable marital and in turn familial disorganization. It is here submitted by the researcher that all human beings live in familial groups and when these groups are imperfect they are called disorganized. Disorganization is of different kinds. One kind of disorganization is from an Act of God i.e. death. This is totally beyond the purview of present thesis. The second disorganization takes place by an Act of human beings i.e. by divorce. Today, jural separation is the most important family disorganization.

The idea or the concept of divorce is very old and its origin is not traceable. In western society the condition of women was very pitiable. But with the advent of civilization the condition of women improved and men’s control gradually removed. He maintains that the process of emancipation began with the man being prohibited from treating the wife as chattel with liberty to sell or kill her. Later on, man was prevented from repudiating a validity married woman without a concrete and reasonable cause. Thus, divorce as a part of the gifting out process designed to produce a more rewarding and stable family life for society. In view of the researcher divorce where, necessary is a preparation or an experience for a better and happier
second marriage. The prevalent legal theory of divorce is not always based upon innocence of the plaintiff and guilt of the respondent. Sometimes it is the consequence of 'failure' or fault of both the spouses.

The Indian society after covering the periods of sanscritization and modernization, at present arrived at the post industrialization period. The effect during aforesaid period has far-reaching consequences. As a result of which the institution of marriage also in all communities of India are changing from orthodox value to progressive value.

Now, due to the wide spread of higher education, almost all universities and colleges are indeed flooded by the fair sex, where half a century back the presence of any of them was an extra ordinary sight. Again in spite of chronic unemployment in India, women are occupying manual, clerical as well as professional posts, often successfully competing with their male counter parts. The educated newly wedded wife, either employee or unemployed are more conscious of their rights and privileges, rather than matrimonial duties and responsibilities. Thereby, the traditional concepts of marriage institution have been water down to the secular level. With the advancement of Indian society many progressive matrimonial laws have come to lime light. Thus, easy and quick divorce is spreading like wild-fire in all communities.
2.2 DIVORCES AMONG HINDUS:

In this part of the thesis, the present researcher primarily concerned with the phenomenon of divorce among the Hindus. Hence, it is worth while to examine the traditional Hindu view of marriage as well as divorce in details.

For centuries, under the classical law, marriage was considered one of the most important Sanskars for a Hindu. Marriage, being a pious obligation, was treated as eternal indissoluble holy union, especially when completed by performance of Homa and/or Saptapadi- two essential ceremonies of a Hindu marriage wherever they are in operation or some other ritual or ceremony prevailing in a region.

The Hindu Dharmasastra inculcated concept of marriage and indissolubility of marriage which existed even beyond death. Thus, in Manu Smriti, Manu, the ancient law given, seems emphatic enough that the marital union can be released neither by sale nor by other way; as he says let mutual fidelity continue till death since it is the highest dharma.

Narada and Parasara, in their commentaries are accepted to have permitted to a wife for taking of another husband; it does not establish that divorce, as such, was recognized in old Hindu law.

Kautilya, another ancient law giver did not repudiate the sacramental concept of marriage and also indissolubility of Hindu marriage but he provided for some cases where divorce could be permitted. According
to him, marriage performed in a unapproved form can be dissolved by mutual consent; but marriage performed inapproved form were indissoluble. However, in a number of cases and social circumstances divorce was acceptable as caste custom. Thomas strange, authority on customary practices in India also says that divorce by custom did prevail and it was permitted in some places in addition to the customary divorce, there was also 'Tyaga' prevalent in Hindu Society. 'Tyaga' as distinguished from Moksha was not an unfamiliar concept. Dr. K.P Jayswal observes that “Tyaga is a technical term denoting separation from conjugal intercourse, as opposed to Moksha the technical divorce. In other words, she remained a legal wife according to Manu Dharmasastra, though given by the husband”.

J.D.M. Derrett opines that under the old Hindu law the concept of nullity was recognized. However, this remedy was available only in very limited cases. N.C. Sengupta says that according to the later Smritis “a man could discard a wife and marry another under certain limitations, but the wife still remained the legal wife and her marriage tie as a result of her Sanskara could not be snapped”. Under the ancient Hindu law even an adulterous wife was not allowed to be divorced. She could, at best, be punished if she had committed adultery with men of inferior castes. Where she had committed such adultery she turned out of her husband's house and the marriage tie was never dissolved. As such, she could not lawfully marry another. However, if she became pregnant as a result of adulterous intercourse she could be renounced. She could not lawfully marry another. Thus, husbands were
allowed to discard their wives but the wives had originally no power whatsoever to discard or leave their husbands on any account or remarry even after their death. India being a vast country, the concept of divorce differed from caste to caste and place to place. Legally divorce was never allowed but by custom it was always and ever allowed in many parts of the country.

From the aforesaid discussion, it has been crystal clear that excluding customary divorces, the real concept of divorce was unknown to the traditional Hindu law. Here the present researcher submits that ancient doctors of law like Narada, Parasara and Kautilya enumerated divorce in certain extra-ordinary circumstances. To them a separation between two spouses was made possible. In view of the researcher, extra ordinary circumstances means (a) concealment of the defects of the bride by her father or Kinsmen and (b) concealment of defects in the husband may be the grounds. To went a step further, A.S. Altkar inform us that in the case of bride and groom of pure character and high conduct, however, the question of rejection on any other account can never be raised. He informs us that divorces were permitted before the beginning of the Christian era. To support his argument, he quotes one of Manu's statements which say that a wife is not to be blamed if she abandons a husband who is important, insane or suffering from incurable or contagious disease. But the abandonment does not necessarily imply divorce, because women were allowed to contract a second marriage only if the previous marriage is not consummated. Once the marriage was consummated, the union of the husband and wife was
considered indissoluble. There are certain occasions mentioned by Manu, when a wife could be superseded. But even before doing so, sufficient efforts were to be made. A husband is said to forbear a hating wife for one year. A woman was not to be turned away even in the case of grievous sins. If the wife disregards her husband owing to her insanity, disease or intoxication, she should be deprived of ornaments and abandoned for three months. Drunker, false, rebellious, diseased or mischievous wife’s are to be superseded. A barren wife may be superseded in eighth year after marriage, if the children die, in the tenth year; and if she bears only one daughter, in the eleventh year.

P.V. Kane has mentioned that even for adultery, a wife could not be abandoned. Gautam has said that when a woman becomes unchaste, she had to do penitence’s, yet, she had the right to receive maintenance. Yanjralkya has said that when woman loses her chastity, she should be deprived of her authority in the house, she should be given dirty clothes to wear, and just enough food for subsistence and she should be scolded and asked to sleep on the floor. After her next menstrual period, she should be considered clean. If a wife has become pregnant through adultery, she should be abandoned. Mitakshara has interpreted Yanjvalkya by saying that if a Brahmin, Kshatriya or Vaishya wife committed adultery with a sudra, but has not become pregnant, she can be received back after making remission. Leaving a wife did not mean throwing her out, but denying her rights to perform religious functions and cohabitation with her husband. Narad has
written that an adulteress's head should be shaved off, she should be asked to sleep on the floor, she should be provided with low type of food and clothes and she should be assigned to clean the husband’s gate. Vyas also has written that a woman caught in adultery should be kept in the home, but she should be denied the right to perform religious sacraments and also the right of cohabitation with the husband. But after the menses, if she does not engage in adultery again, she should be granted against her rights as a wife. Thus, we can conclude that even adultery was not considered as a reason enough for divorce or desertion. Again, Narada and Parasara have allowed a wife to dissolve the marriage if the husband is found to be impotent. In the opinion of Narada, the woman is the field and the man is the seed giver, so, the field must be given to one who has seed. Thus, if a woman finds her husband devoid of virility, she should wait for six months and then choose another husband. Further Narada and Kautilya allow a woman to seek a second husband if the first one is missing, dead, becomes an ascetic, is impotent, or has fallen from caste.

Furthermore Narada adds that even if the woman is not eager to take another husband, she should be persuaded by her relatives to do so. Kautilya permitted the woman to abandon her husband if he is a bad character or is long abroad, or has become a traitor to the king or is likely to endanger her life or has fallen from his caste, or has lost virility. Kautilya also speaks of divorce. A divorce may be obtained only in the case of mutual enmity and hatred between the husband and the wife, neither the husband
nor the wife could dissolve the marriage against the wishes of the other\textsuperscript{17}. Kautilya being a progressive commentator at that time he is the only author who writes about the possibility of divorce, and also stresses that the marriages performed according to Brahma, Daiva, Arsha and prajapatya forms cannot be dissolved at all. In view of the researcher that means where Hindu marriage already performed in approved form of marriage.

Further, relating to the views of different writers in Hindu civilization with regard to divorce or dissolution of marriage. It would appear that there is considerable similarity and in some respects dissimilarity in the views expressed by the writers. As such there is a difference between the smritis and the Arthasastra with regard to the indissolubility of marriage. In view of the researcher, this may be due to the fact that the Dharma school or the Smritis considered marriage as a sacrament, where as the Artha school regarded it as a contract and this is pointed out in the Artha laws. When marriage is considered as a sacrament, it becomes indissoluble where as if it is viewed as a contract, it can be terminated. As referred earlier, even Kautilya did not allow divorce for the first four forms of marriage out of those eight forms of Hindu marriage. Evidently, the circle for which the Arthasastra was written were aware of the Brahmana view of marriage, but had not accepted it fully. The growth of Brahmanism which followed the Maurya period was responsible for strengthening the orthodox view, and the possibility of divorce was almost forgotten. Having said this, now the researcher turns his attention to examine some of the Buddhist texts. In an in-depth examination he found
that, there is no reference to divorce, but there are certain stories in the Jatak as to support the possibility of super session of a wicked wife. In spite of such sporadic mention of the possibility of putting a sunder the marital bond, for a true Hindu, marriage remained an eternal bond. As a rule marriage for a Hindu was considered to be an indissoluble union. There by, in an important verse of manu smriti, manu, the primordial ancient law giver remarks "I hold your hand for good luck that you may grow old with your husband, you are given to me by the just, the creator, the wise and by the learned people."\(^{18}\) Added to this, in the great epics of India; Mahabharat. It is also stated that those who have wives can fulfill their due obligations in this world; those who have wives, truly have a family life; those who have wives can be happy, those who have wives can lead a full life."\(^{19}\) Therefore, Hindus conceived of marriage as a sacramental union which also implies that it is a sacrosanct union. Even today the ordinary Hindu believed that when they get married, the parties are bound to each other until the death of either of them, and the wife bound to her husband even after his death. The idea that the marriage is an indissoluble one is a truly lofty one. It encouraged, persuaded and pressurized the spouses to adjust to each other, in spite of, differences, difficulties and problems. It enabled them to overcome incompatibility that may have existed. Thus, marriage came to be looked upon as the highest ideal and value of human life and Hindu Men and particularly women were taught to make sacrifices in order to sustain the marital bond.
In olden days the problems of marital conflict which we come across usually in the present day marriage was out of question. As the marriage for Hindus was a religious and social obligation primarily, the individual interests hardly mattered. The authority and control exercised by the joint family and caste regulations were so rigid that it hardly allowed any flexibility to suit individual tastes, interests and expectations. In past all inter-personal relationships including those between husband and wife were strictly regimented to well-established patterns. Moreover, when a woman joins the traditional joint family as a newlywed wife, she becomes such an integral part of the whole family that the question of severing herself from it even in the eventuality of her husband’s death becomes impossible.

In India, though marriage was equally binding on both husband and wife theoretically, in practical life, the burden of maintaining the martial bond fell upon women. The ancient law givers as stated earlier cleverly maneuvered the minds of women in such a way that they accepted their lords most submissively and devotedly. As such, wife completely surrenders of her entire life in her husband’s service alone. As a river merges with an ocean and loses its identity, so the wife was supposed to merge with an ocean and loses its identity, so the wife was supposed to merge with her husband and lose her own personality and individuality. He is the centre of her life, her interests, thoughts and Activities. For her to live is only through him, and apart from him she has no existence. In view of the researcher, it is rather illogical to think that such a traditional Hindu woman ever dared to take advantage of
the provisions made by the law-givers for obtaining divorce. Thus, it can
safely be concluded that, ordinarily divorce is not known to the Hindu
institution of marriage. Husband and wife are bound to each other, not only till
death, but even after death, in the other world.

It was in this orthodox and traditional background, hesitant efforts to
legalize divorce among the Hindu originated. The first legislation with regard
to dissolution of marriage was enacted by Kolhapur State in the 1920's. The
state of Baroda followed in 1942. The Bombay Government also passed an
Act in 1947, permitting divorce. Subsequently, Madras and Saurastra followed
the example of Bombay in 1949 and 1952 respectively.

In the meantime, a committee known as the B.N. Rau committee
was appointed by the government of India in order to advise upon the law to
remove any injustice. Rau committee issued a questionnaire and received
many responses. In their report, it was concluded that "The Hindu law is a
complicated organic structure, the various parts of which are interconnected.
So that alternations of one part many involve the alternation of others". They
recommended for attempting a code of Hindu law. In 1944, the Government of
India entrusted the Hindu law committee with the work of formulating a code
of Hindu law as early as possible. The committee prepared a draft of Hindu
code and circulated it for public opinion. It also visited important cities of the
country and heard views of individuals and representative bodies. The
necessary changes were made in the code. In April 1947, the Bill was
introduced in the central Legislative Assembly. The Bill could not be
discussed or passed due to other burning issues like partition and independence. There were also lot of agitations and opposition against Hindu code Bill. Nehru and other congress leaders were determined to pass the bill. The bill however, could not be passed in bloc, but was passed in the form of different Acts, out of which the Hindu Marriage and Divorce Act of 1955, being one of the most significant among the same.

2.3 DIVORCE AMONG MUSLIM:

The Arabic world "Nikah" literally means carnal conjunction of the union of the sexes and in law this term means "Marriage". In Arabic marriage is also called as "izdiwaj".

Muslim have, from the very beginning, regarded their marriage as a contract, which has for its object legalization of sexual intercourse and procreation and legalization of children. In the opinion Anwar Ahmed Qadri, the definition of marriage as a contract for the purpose of legalizing generation, proves impliedly the paternity of the man begot the child in the wedlock. "Hedaya" speaks the purpose of marriage as (1) Cohabitation, (2) Society and (3) equal friendship. Whereas A.A.A. Fyzee considers marriage in its three aspects (1) legal, (2) social and (3) Religious.

Anyhow, the object of marriage among Muslims are (1) the restraint of sexual passion, (2) the ordering of domestic life, (3) the increase of the family, (4) the upbringing of virtuous children and (5) the discipline of the soul.
in the care and responsibility for wife and children. Further, the legal incidents of marriage in Islam are very simple. Marriage may be performed without any ceremony or rites. Neither writing nor any religious ceremony is necessary. There are no irksome formalities. The essential requirements are offered (ijab) and acceptance (qubul). It is essential for the validity of marriage that there should be a proposal made by or on behalf of one of the parties to the marriage and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two males or one male and two females witnesses, who must be same and adult Mohammadans. The witness requirement is essential for Sunni law but it is not so under Shia law. The declaration and acceptance may be made by the parties or by their agents. In case of legal incompetence like minority or unsoundness of mind, a guardian may validity enter into a contract of marriage on behalf of his ward? The proposal and acceptance must both be expressed at one meeting. A proposal made at one meeting and acceptances made at another meeting do not constitute a valid marriage. Though solemnized generally with the recitation of certain verses of the holy Koran by the Mulla, Muslim law does not prescribe any religious service essential for its solemnization. Further the Muslim law is silent as to when the discretion should be presumed. In Mohammadan law a marriage may be either (1) valid (Sahih), (2) Void (Batil), or Irregular (Fasid)

Turning our attention towards the key question of divorce among Muslim as depicted in Islamic theology, marriage as referred above is a civil contract, so it follows that divorce is a comparatively simple matter. The ideas
of arbitration and mutual agreement between spouses so far ahead of the times are put forward more than once in the Holy Quoran:

"If ye fear a breach between man and wife, than send a judge chosen from his family and a judge chosen from her family; if they are desirous of agreement, God will effect reconciliation between them"  

And again:

"And if a wife fears ill usage or aversion on the part of her husband, then shall it be no fault if they can agree with mutual agreement, for agreement is best."

Unfortunately, however, it is not this kind of divorce that became current in Arabia, nor is it this which prevails in India today. What prevails, and has become almost synonymous with the word divorce in Muslim Law, is unilateral divorce, i.e. a talaq pronounced arbitrarily by a husband against the wife.

Let us see what the prophet had to say about this kind of divorce. He warned his people saying:

The thing which is lawful but most disliked by God is divorce.

Look at this in conjunction with another Hadith:

That which is lawful is clear, and that which is unlawful likewise, but there are certain doubtful things between the two forms which it is well to abstain.
In the opinion of the researcher, even though the Quoran recognizes the right to divorce, it recognizes it only with numerous injunctions to observe justice and fair play, generosity and kindness.

Having said this let the research allow for noting one of the important commentary on the Holy Quoran Maulana Mohammad Ali said:

Divorce is one of the institutions in Islam regarding which much misconception prevails, so much so that even the Islamic law, as administered in the courts, is not free from these misconceptions.

Unilateral divorce has always been detested as harsh and unjust to women: but, strange enough it has never been discontinued and still hangs at the sword of Damocles over the head of every Muslim woman. On this point of discussion J.N.O. Anderson has aptly observed:

It is the Islamic law of divorce not polygamy which is the major cause of suffering to Muslim women....The Muslim wife indeed has always lived, so far as the law is concerned, under the ever-present shadow of divorce, a shadow mitigated only in comparatively rare cases by certain precautionary devices.

It is submitted herewith by the present researcher that in an archaic society where the ideas of honour and decency are at low ebb and human values, are not well defined. The laws regulating the relation between the sexes take their imprint from a coarse imperiousness of male desires and favour the stronger sex.
The idea on which unilateral divorce is based is that men are superior to women. However, why despite the expanding ideas of meaning and purpose of marriage in other matrimonial laws, the Muslim law of marriage still remains unelevated to a higher plane of thought, is a big question mark.

In the opinion of the researcher, the domination of the Muslim divorce is asserted by the fact that the man was permitted to divorce his wife at his own pleasure and without justifying his Action. It is interesting here to note that the Holy Quoran and traditions of Prophet Mohammad has nowhere authorized the Muslim husband to dissolve their marriages arbitrarily, but in spite of that they have acquired arbitrary power of divorce by the way of custom.

As referred earlier, Muslim husbands are exercising the power to end their marriages at their unrestrained option and the wives may do the same. If the husbands confer such a power upon them which is popularly known as delegated divorce (Talaq-ie-tafwiz), this delegation to the power of pronounce a Talaq may be given by the husband either at the time of the marriage or at any time after the marriage.

According to Tahir Mahmood, the Muslim Law in India recognizes several forms of extra-judicial divorce those to be effected (a) by the husband, (b) by the wife and (c) by the husband and the wife jointly.
The law relating to these is complicated and it can be said that these does not fully represent the true law of Islam. More particularly, some non-legal rules relating to those, which had their own rational, are in India treated as judicially enforceable legal principles.

Judicial divorce is also fully recognized by the Muslim law in India. It is partly regulated by India legislation contained in the Dissolution of Muslim marriages Act, 1939, and its local substitutes in some states and partly by judicial precedent.

**Unilateral Divorce-by husband:**

The first form of 'Non-statutory divorce under Muslim law is called "Talaq". A Muslim husband under all schools of Muslim law can divorce his wife by his unilateral Action and without the intervention of the court. It is not necessary to provide for such a power in the marriage contract, the husband derives it from the law itself. This power is known as the power to pronounce a Talaq.

**Bilateral divorce by mutual consent:**

Among the various personal laws of India, the law of Islam was historically, the first to provide for a divorce by mutual agreement of the spouses. It is now recognized as one of the forms of judicial divorce also under several other laws applicable in India.
In Muslim law, dissolution of marriage by mutual consent of the spouses takes the form of Khula irrespective of whether only the wife wants it or both spouses desire it. Another form of divorce Known as Mubbarat is not in popular use.

Khula is a divorce at the instance of wife but Mubbarat is a divorce jointly at the instance of both the husband and the wife.

Divorce by Death of Spouse:

Marriage in Islam stands absolutely dissolved by the death of either spouse. In India as well, the death of husband or the wife operates in law as dissolution of marriage. When the wife dies the husband is free to remarry immediately, but if the husband dies the widow has to wait for a certain period before she exercises her right to remarry in view of the biological compulsions in the interest of ascertainment of Paternity of child, if any, she had with the deceased husband. The waiting period obligatory on her is called “Iddat” in Muslim law. The period of “Iddat” often her husband’s death is four months and ten days w.e.f. with death of her husband and if she is pregnant then this period elongates till the delivery of the child or till abortion depending upon the legal necessity to that effect.

Muslim law of divorce like all other ancient laws “Favours the stronger sex”. At present the Muslim husband is absolutely free to divorce his
wife just by pronouncing the word "Talaq" which is contrary to Quoranic injunctions.

A divorce is a necessary social evil. It becomes necessary only when the husband cannot do his duty i.e. when he is impotent or a eunuch.

In the opinion of the researcher, the Muslim law is not, therefore, impartial in dealing with the two sexes i.e., Male and female. To be more specific, at one place it gives unfettered right of divorce to Muslim males and on the other hand, it does not give the same unfettered right of divorce to women.

2.4 DIVORCE AMONG CHRISTIANS:

Among the Christians whether catholic or protestant, marriage is a sacred institution. According to the Holy Bible, the first marriage of human society was performed at the initiative of God Himself. After the creation of the entire universe, the first man, Adam was created by God. But, then, Adam was alone, and, therefore God said "it is not good that the man should be alone; I will make him a help meet for him." Thus, Eve, the first woman, was created from out of Adam, and God gave her to him. Since the woman was made out of the man. God ordained, "Therefore, shall a man leave his father and his mother, and shall cleave unto his wife, and they shall be one flesh." The Christian Church and Christian community everywhere consider marriage and family as the basis and most pivotal institutions. To went a step further,
King Solomon wrote, "Who so findeth a wife findeth a good thing, and attaineth favour of the lord."

Even the priests are not forbidden to marry, but they are asked to lead a holy and ideal family life. For instance, St. Paul wrote, "Let the deacons (priests) be the husband of one wife. Ruling their children and their own house well". Sanctity of marriage is emphasized in Christian religion, as St. Paul declared, "Marriage is honourable in all, and the bed undefiled.

Christian Church advocates monogamy and the practice of polygamy and adultery is forbidden.

In view of Old Testament, the Mosaic Law (the Hebrew Law) permitted divorce for adultery. But Christ made it very clear that Moses (the great Hebrew Leader of the Old Testament permitted divorce "because of the hardness of your hearts but from the beginning it was not so". In other words, Christ said that divorce was permitted in olden times by the Mosaic Law (law given by Moses) because of the hardness of the heard of the people at that time, and not because it was ordained so. To Christ, Marriage is indissoluble, and so, no divorce be permitted, for Christ declared "What God hath joined together, let no man put asunder". Nevertheless, he recognized the practical difficulty in this matter, when he pointed out, "All men cannot receive this, save (except) they to whom it is given."
In spite of the fact that the Holy scriptures of the Christians do not permit divorce. It was permitted in the course of time in the history of the Church. After the division of the Church into the Eastern (Greek orthodox) and Roman Catholic (A.D. 843), the Greek Church condoned divorce for adultery, and more recently, for other offences. When Martin Luther precipitated the protestant Reformation and rejected the catholic dictum of the sacramental nature of marriage, he paved the way for the civil marriage. Nevertheless, Luther never completely divested himself of a belief in its sacramental character. Neither have protestant churches ever entirely relinquished the idea. B.H. Lee has correctly pointed out that: the church has been preaching the indissolubility of marriage as the union prearranged by God, and many people have been and are still under the influence of the church. Yet public sentiment in favour of easier divorce has been growing steadily.

The basis of the prevailed of indissolubility is essentially religious, it is the idea of the sacrament of marriage, which is God made. Yet, “The Church admits that the human will enter into the marriage.”

In India, the church and the Christian community still maintain the view that marriage is an indissoluble institution. The Roman Catholics and the Syrian Christians of South India are firmed on this, while the Protestants are relatively less firm. Some of the factors such as the following may be helpful directly or indirectly or in order to minimize the incidence of divorce among the Christians in India today (1) Marriage ceremonies are performed in
the Church (ii) Entries are made in all marriage register of the Church soon after the wedding ceremony in the church, with the signatures of the Bridegroom, Bride, the priest, and witnesses, with full particulars; (iii) Banns are called in the congregations of the Bride and Bridegroom before the marriage, so that anybody can raise legitimate objections; (iv) most of the marriages are still arranged by the parents or elders; and (v) The legislation concerning marriage of 1872 is still very old and the movement of uniform legislation for all religious communities has not yet yielded much fruits.

Legislations such as the Indian Divorce Act (Act IV of 1869), the Indian Christian marriage Act (Act XV of 1972 and the special marriage Act (Act 43 of 1954) make provision for divorce among Christians in India.

The Indian divorce Act, 1869 and the Indian Christian marriage Act, 1872, dealing with the law of divorce and marriage is very old. Further the last mentioned legislation of 1954 is to provide a special form of secular marriage which can be taken advantage of by any person in India, and by citizens of India in foreign countries, irrespective of the faith which either party to the marriage professes. The parties may observe any ceremonies for the solemnization of their marriage, but certain facilities are prescribed before marriage can be registered under this Act by the marriage officers. Provisions is also sought to be made for permitting persons who are already married under other forms of marriage to register their marriage under this Act, and thereby avail themselves of the provisions under this Act.
It seems that "The Christian marriage and divorce law appears outdated compared to other matrimonial laws which have been more recently enacted."

It is submitted by the researcher that in order to change the law, the consent and cooperation of the Christian church and community are needed. The Church is still not inclined to liberalize the law generally they belief that Lord's principle and standard of marriage is a lifelong and indissoluble union for better or for worse of one man with one woman to the exclusion of all others on either side. Therefore the matter concerning the change of law concerning marriage and divorce pertaining to the Christians is to be dealt with great caution and consideration.

Anyhow, at present the parties to a Christian marriage may approach the court of law to dissolve the marriage under the provisions of the Indian Divorce Act 1968. The Act provides that unless parties to the marriage are domiciled in India at the time when the petition is presented, the courts have no jurisdiction to dissolve the marriage. In determining the domicile of the parties in a proceeding for dissolution of marriage it is the domicile of the husband alone which is to be considered in as much as a wife takes the domicile of her husband upon her marriage to went a step further, "Domicile means a permanent home, or place where one resides with the intension of remaining there for an indefinite period. Domicile is not the same thing as residence. Residences implies a purely physical fact, the fact of just
being and living in a particular place. But domicile is not only particular place. But domicile is not only residence; it is residence coupled with intention to live indefinitely in the place. Domicile is the place where a person intends eventually to return and remain. It is distinguished from residence in that residence comprehends no more than a fixed abode where one actually lives for the time being.

If court has passed the decree for dissolution of marriage having no jurisdiction, the marriage would subsist and either of the parties going through a subsequent form of marriage would be guilty of bigamy and any issue from such subsequent union would not be legitimate. Section 7 as a residuary section of the Act permits court to interpreted the provisions of Act with the help of the principles and rules of English courts. But this section 7 cannot be read as interfering with extending the ground of dissolution of marriage as incorporated in section 10 of the Act. Hence dissolution of marriage cannot be sought for on grounds not mentioned under section 10 of the Act.

As referred earlier the law relating to divorce amongst Christians is already contained in the Indian Divorce Act, 1869. This age old Act is based on the law as it then stood in England. Since then considerable charges have taken place in the social conditions in India. In India, the said law as originally enacted has remained practically unchanged, and the Criticism that, it has become antiquated and to some extent absolute is well founded. The need has thus arisen for enacting a law on divorce such as, will be suitable to the present conditions.
The law commission in its fifteenth report in 1960 and its twenty second report in 1961 recommended replacement of this legislation by a comprehensive new legislation. A bill entitled Christian marriage and Matrimonial Cause's Bill was accordingly drafted and was presented in Lok Sabha in 1962 which, however, lapsed with the dissolution of the House. Not only the Government though the law commission, and the large Christian community in India. But also the courts have condemned and branded the existing legislations as absolutely ill-turned and out of date.

In the draft, Christian marriage and Matrimonial Cause's Bill prepared by the law commission of India. It has been provided, inter alia, that a marriage may be dissolved by a decree of divorce on a petition presented either by the husband or the wife on the ground that the respondent, "has ceased to be a Christian by conversion to another religion". Thus, if enacted, would bring the law on the point in accord with the relevant provisions of the Hindu marriage Act, section 13(1) (ii) and the Parsi marriage and divorce Act, section 32 (i). But such a provision, if enacted, would run counter to the provisions of the Caste Disabilities Removal Act, 1850. Section 1 of the aforesaid Act of 1850, otherwise known as the freedom of religion Act, has virtually abrogated all laws which effect any "Right of property" of any person by reason of his or her renouncing any religion. It is now settled law that the world "Rights" in the expression "Rights of property" includes all non-proprietary rights like right to guardianship conjugal or marital
rights etc. In that view of the matter, any law providing a spouse with a right to have the marriage dissolved on the ground that the other spouse has embraced another religion, cannot but be violative of the provisions of this Caste Disabilities Removal Act of 1850. It is true that this Act being on ordinary legislation, a later legislation may prove to the contrary.

2.5 DIVORCE AMONG PARSÍ'S:

"Parsi's" are the followers Zoroastrianism; they apparently did not bring any law with them from Persia. They gradually started adopting Hindu Laws and Customs, which finally became the personal Law of the Parsi's in India. For the administration of justice among them, they established Panchayats at various places. The Parsi Panchayat of Bombay had the Supreme authority and its ruling was followed by the other Panchayats.

During the British period the judicial system established by the English men in India under Warren Hastings's judicial plan of 1772 applied the Parsi customary law, in so far as it existed, to the Parsi's. In the remaining matters it applied English common law on the ground of equity, justice and good conscience.

Later, in the 19th century people realized the difficulty in and the inequity of applying English Law to the personal affairs of Parsi's. Demand was then made to codify the Parsi Law relating to marriage, divorce, inheritance and succession by the members of the Parsi Community.
As far back in 1935, efforts were made by the members of the Parsi community to have laws. Suitable to their social requirements, but these early efforts proved abortive. Ultimately, in 1855, the Parsi Law Association was established for the purpose of drafting special Bills for law applicable to Parsi community, relating inter alia to the law of marriage and divorce. In 1837, the Parsi chattels Real Act were enacted to make the English Rule of Primogeniture inapplicable to the Parsi in India. Subsequently another Act was passed called the Parsi Marriage and Divorce Act, (Act XV of 1865). As a result the aforesaid Act of 1837 was repealed.

Thus the Parsi Law Association in its mission succeeded in getting the Parsi Marriage and Divorce Act of 1965. Since this Act was based on the English Matrimonial Cause’s Act of 1857. In the Act of 1965 its principal effect was to make Parsi marriages monogamous. Since then, circumstances changed. However, the Parsi’s Marriage and Divorce Act of 1865 was itself defective in many respects. Adultery by itself or adultery coupled with some other offence serve as the only ground for divorce under that Act. On no other ground could marriage be dissolved by divorce under it. Again, a section of that Act empowered only the wife to ask for judicial separation on the ground of cruelty, or, because, her husband brought a prostitute in his house, the husband had no remedy by way of seeking judicial separation. To remedy these defects and to bring the law of marriage and divorce in conformity, the Parsi Marriage and Divorce Act, 1936, was enacted. There by, the various
defects of the former Act of 1865 were tried to be rectified and the law was made in conformity with the changed conditions of the community.

In the Act of 1936 a Parsi husband or wife may file a suit to dissolve the marriage tie under section 31 of the Act, here the marriage of such husband or wife shall, with the compliance of the requirements contained under the provisions of said section, be dissolved parties of the Parsi marriage may sue for divorce on any one or more of the grounds provided under section 32 of the Act. When a court passes a decree for divorce, the court shall send a copy of the decree to the Registrar of marriages within its jurisdiction appointed under section 7 of the Act. The Registrar shall enter the same in a register to be kept by him for the purpose and the provisions of part II (section 3-17) applicable to the Registrars and registers of marriages shall be applicable, so far as may be, to the Registrars and registers of divorces.

Furthermore, on the basis of this legislation of 1936, we may mention that the following are the important features of marriage and divorce among the Parsi's.

(I) A Parsi is a person who professes the Zoroastrian religion;
(II) In the case of marriage of a Parsi who has not completed the age of 21 years, the previous consent of his or her father or guardian is necessary for a valid marriage;
(III) No bigamy is permitted;
(IV) Every marriage will be certified by the officiating Priest.
(V) In any case where consummation of marriage is impossible for natural causes, such a marriage may be declared null and void; and

(VI) Both the husband and wife have the right to apply for divorce under specified grounds.

Still the Act of 1936 had to be brought up to date in keeping with other matrimonial legislations. In order to introduce the required changes the Parsi Marriage and Divorce (Amendment) Act, 1988 was passed. But for those in the state of Jammu and Kashmir, this Act is applicable to all Parsi's in India irrespective of their place of residence.

In the Act of word Parsi has only a radical significance and has nothing to do with his religious profession. The word "Parsi" is derived from "Pers" or "Fars" - a province in Persia from when the original Persians migrated to India and came to be known as parsi's.

Once it was held that an Iranian who temporarily resides in India and is registered as a foreigner whose domicile continues to be Persian does not become a Parsi merely because he or she is a Zoroastrian, since this Act applies only to those parsi's who are residing in India as Indians. Thus even a Zoroastrian, need not necessarily be a parsi in India.
Grounds of Divorce:

Under the Parsi Marriage and Divorce Act, 1936, lunacy made a ground for divorce which was formerly a ground for nullity. It is also provided that not only a subsisting Parsi Marriage but also a non-Parsi Marriage would be bar to a new marriage under this Act and that a Parsi would be prohibited from remarrying even if he or she changed his or her religion or domicile unless his or her previous marriage was dissolved under the Act.55

Further, section 32 of the Act provides the following grounds for divorce.

(I) Willful refusal to consummate the marriage within one year of its solemnization;

(II) Commission of adultery, bigamy, fomication, rape or an unnatural offence;

(III) Causing grievous hurt;

(IV) Causing infection with a venereal disease;

(V) Sentence of imprisonment for seven years;

(VI) Desertion for three years;

(VII) Lapse of three years after an order for judicial separation or separate maintenance was passed;

(VIII) Failure to comply with a restitution decree for one year; and

(IX) Ceasing to be Parsi.
Besides these grounds, husband was given an additional ground of divorce - pregnancy of the wife by another man unknown to him at the time of marriage and the wife and additional ground of being forced into prostitution. The court was empowered to make such orders as it considered reasonable for payment of interims or permanent alimony by the husband to the wife so long as the wife remained chaste and unmarried.

New provisions brought by Parsi Marriage and Divorce (Amendment), 1988:

As per the provisions of section 32-B of the Parsi Marriage and Divorce Act a suit for divorce by Mutual consent may be filed by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Parsi marriage was solemnized before or after the commencement of the Parsi Marriage and Divorce (Amendment) Act, 1988. Section 32-B of the Act makes it abundantly clear that its provision will have a retrospective effect. Divorce by mutual consent can therefore be sought by a Parsi couple irrespective of when their marriage was solemnized, i.e. before or after the commencement of the Amending Act of 1988.

As such, the requirements for seeking divorce by mutual consent are:

(I) Both spouses should together present a suit for divorce;
(II) The spouses should have been living separately for a period of one year or more;

(III) The spouses could not adjust with each other and had not been able to live together; and

(IV) When a motion is made by the parties for obtaining a decree of divorce on the ground of mutual consent, the court is to be satisfied that:
(a) there has been solemnization of the marriage and the parties under the Parsi Marriage and Divorce Act, 1936; (b) the court has also to be satisfied that the consent of both parties was not obtained by force, fraud or under influence.

When the decree for divorce by mutual consent is passed, the marriage - tie gets dissolved from the date of decree and not with effect from the date of the presentation of petition\textsuperscript{59}.

2.6 DIVORCE AMONG JEWS:

The law of marriage and divorce of Jews are not codified in India. Even today they are governed by their religious laws. Generally, one important book on “Marriage and Divorce” written by David Melzinar is followed in the courts. In one case Benjamin V Benjamin \textsuperscript{60}, the entire law of marriage and divorce among Jews in India has been discussed by Justice Crumps.

The Jews regard marriage not as a civil contract but as a relation between two persons involving very sacred duties \textsuperscript{61}. The Jews may, however,
marry under the Special Marriage Act, 1954, in lieu of religious formalities as prescribed by their personal law because this Act is applicable to all citizens of the country irrespective of their religious affiliations. No doubt, the spouses of Jews are fully guided by the customary laws. But if it is registered under the Special Marriage Act, 1954, their divorce cases shall be settled within the provisions provided under the Act.

2.7 DIVORCE AMONG THE TRIBALS:

Most of the primitive peoples have allowed dissolution of marriage under certain circumstances, although it differs more. Among them, there is considerable variation in the degree of marital stability.

Divorce is commonly practiced among the Indian tribal also, and may be obtained by one of the parties refusing to continue to live in wedlock by abandoning the spouse. The Khasis permit divorce for reasons of adultery, barrenness and compatibility of temperament, but the separation can take place only after mutual consent. In some cases, the party desiring the dissolution may have to pay compensation to the other party. There is no possibility of remarriage between two such people who have separated by divorce. The divorce has to be a public ceremony. The mother gets the custody of the children.

The Gond allows divorce freely on ground of marital infidelity, carelessness in household work, barrenness and quarrelsome disposition.
Either party can take the initiative in obtaining dissolution. Instances of divorce can be cited from other Indian tribes too.

Finally, a word of conclusion of this chapter regarding divorce in different religious communities by social legislation is enacted by the Government.

The conceptual analysis of marriage and divorce reveals factual and legal unanimity than contract in various matrimonial laws governing the relations and marital status of men and women in different communities. These religion oriented matrimonial laws have been moulded in practice by trustworthy customs prevalent in various communities. The sacramental character of marriages has been shattered by the incorporation of contractual element in them as part of the secularization of the religious laws. The concept of divorce is infused statutorily in the body of all the matrimonial laws. It shows more uniformity than contradiction in them.

Furthermore, except in the case of the Hindus all other legislations are old. Today, there is a national debate on the needs of a uniform social legislation relating to marriage and divorce for all communities in India, instead of separately for Hindus, Muslim, Christians, Parsi's, Jews and so on. There are difficulties in this connection, yet, there may be several common factors that could be applied to all alike.
Notes and References

3. Debila Vs Nand Kishore (1992) 1 pat. 266.

17. Ibid P. 192.


23. Ibid at verse 127.


26. Tahir Mahmood, the Muslim Law in India (1980) p. 96.

27. Ibid P 114.

28. The special Marriage Act, 1954 (See 24) and the Hindu Marriage Act 1955 (See 13 B).


33. Proverbs (Bible) 18:22.

34. I. Timothy (Bible) 3:12.

36. St. Mathew (Bible) 19:8.
38. ibid, 19:11.
42. The Indian Divorce Act, 1869, Sec. 2.
43. AIR 1953 Cal. 530.
44. Burgin and Fleacher, conflict of Law (3rd Edn.) P .60.
49. Law commission of India, 15th reporter, P. 63.
50. AIR 1964 All 21-22.
51. In fact, one of the conditions of their immigration to India imposed by the Hindu ruler on them was that they would adopt Hindu customs of marriage. op. cited Paras Diwan, Family Law, 1994 Second Ed. P-7.


56. Sections 39-41 of the Parsi Marriage and Divorce Act, 1936.


60. 28 Bombay Law reporters (BLR).

61. David Sasson EZee Kiel Vs Najia Nouri Raben 33 BLR 725.