

There exists a co-relation between legal change and social change. Law cannot be understood without social facts which gave it birth. Law is a social derivative and it depends upon the environmental conditions and human behavior at a particular time and place, perhaps, cannot be denied in our contemporary society because denial of these would lead to bigger results and it will clog all social progress and the institutions which have outlived their age and utility, would lead to wholesale disintegration and degeneration of society and humanity. If society is to live in peace and individual in happiness our matrimonial laws must show a progressive development so that their conflicting interests could be adjusted.

The matrimony plays a significant role in the social set-up of a nation. It is the basis of the institution of marriage which signifies a complete physical, mental and spiritual union of man and woman as husband and wife to establish a family. Happy homes are sign of a healthy and prosperous society. But, unfortunately, the matrimonial disputes are increasing day by day and this lead to disintegration of family which badly affects social structure. The lines by Mr. Justice (Retd.) H.R. Khanna of the Supreme court of India is relevant in order to look into the real problem.

"Sick marital relations pose a problem not merely for the related spouses, they have much wider implications. They have their repercussions and impact upon society and the same can give rise to social problems. Harmony in society is inconceivable where there are dissatisfied parties that make a home which is one of the most crucial units in the hierarchy of social institutions... Broken homes, strained marital relations are only a source of extreme anguish for the individual concerned, they are also symptomatic of social malaise and call for rational and sympatric approach."¹

With the fast changing attitude towards marriage as an institution and its liquidity in India, the subject of dissolution of marriage is receiving and will continue to receive increasing importance in the field of family law. Lawyers, Judges, Professors, Legislators, and Sociologists are paying great attention towards this

¹ Speech delivered at the inaugural session of the seminar on Hindu Marriage Act and Special Marriage Act, ILI, New Delhi, (1978)

problem. A study therefore which includes the steps of evolution of marriage, divorce and judicial separation to the present day, the complex considerations which are passed into service in resolving the problems is likely to be helpful. Divorce is a large aspect of Indian personal laws of every community. No longer is marriage an indissoluble union among any community in India. Only question is how copiously it is available and how much it is availed of. Probably our use of divorce jurisdiction is not large as it is in many western countries, yet it is an ever increasing source of litigation and our District Courts and Family Courts (where ever they have been established) have more than usual share of matrimonial litigation.

In the present research work an effort has been made to explore the common issues in the existing Indian matrimonial legal system by way of conceptual analysis of the nature of marriage and divorce.

Chapter I, is a detailed study about the concept of marriage and divorce under different personal laws in India. It starts from the evolution of the institution of marriage and its development with the advancement of time. If evolution of the institution of marriage is traced it seems to be well established that the institution of marriage did not exist among the primitive men. At that time man lived more or less like any other animal. He was so much engaged in the satisfaction of his primary needs, hunger and shelter, that there was not time or occasion to think of refinement. Sex life was absolutely free. Sex promiscuity was the rule. So long as the sex relationship remained unregulated, it was maternity alone which could be known. Paternity could not be determined. So the man's quest to know the paternity of children laid the seeds of the institution of marriage. At Patriarchal stage we find that marriage as an exclusive union comes to be firmly established, though the exclusiveness of the union for male was not as strict as for female. At this stage monogamy in west and polygamy in east came to be established. At that time woman was placed at men's absolute power. Thus in this era the marriage came into existence as an exclusive union. Marriage among the Hindu and Christians came to be considered as a sacrament.

The detailed study about the journey of marriage from sacrament to civil contract has been discussed in this chapter. Hindu marriage was regarded as a *samskara* or a sacrament. It is a necessary *samskara* for every Hindu. Since it is a

sacrament and not a contract, it creates an indissoluble union between the parties.² Derrett puts it succinctly, "the intention of the sacrament is to make the husband and wife one, mentally and psychically, for secular and spiritual purposes for this life and for after lives"³. 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.⁴ The injunction is: "May mutual fidelity continues till death".⁵

Side by side with this idealized picture of the wife, the Hindu sages hold in clear terms that husband is, "the lord and master of his wife, he must be adored and obeyed as long as he lives and the wife should remain faithful to his memory even after his death".⁶ He should be worshipped like God even though he is a man of bad character with no qualities. Later on there emerged institution of polygamy, concubinage and prostitution. The marriage becomes monogamous for the woman alone. It became a sacrament for her alone. A Hindu marriage was a sacrament in the sense that a wife could never ask for divorce or for another husband even if her husband was a lunatic, impotent, a leper, a deserter, chronic patient of venereal diseases, or even an eunuch or a dead man. As regards the husband, he could always mock at this sacrament with impunity and arrogance by taking another wife into another and similar sacramental fold ; and he could do so as many times as he liked. When some reforms were introduced in India, marriage did not become a contract; rather courts took the view that marriage of lunatics and idiots was valid.

The institution of marriage was regarded as a sacrament initially under Hindu law and with the enactment of the Hindu Marriage Act, 1955, concept of divorce was introduced and its sacramental nature changes it into a contract.

Marriage i.e., *Nikah* in pre-Islamic Arabia, mint different forms of sex relationship between a man and woman established on certain terms. In pre-Islamic days, woman were not treated equal and were not given any right of inheritance and were absolutely dependent. It was Prophet Mohammed who brought about a complete change in the position of women. He placed women on a footing almost perfect equality with men in the exercise of all legal powers and functions.⁷ Under Muslim Law marriage is considered as a civil contract, but some jurists are of opine that it is

² Paras Diwan, *Modern Hindu Law*, 62-67 (1990).

³ J. Duncan M. Derrett, *A Critique of Modern Hindu Law*, 287 (1970).

⁴ Manusmriti, IX, 48.

⁵ *Ibid.* at 102.

⁶ J.D. Mayne, *Hindu Law and Usage*, 136 (1953)

⁷ Charles Himilton, *The Hedaya: Commentary on the Islamic Laws*, 25 (1989).

devoid of none but the blending of two. Abdur Rehman is of view "The Mohammedan Jurists regard institution of marriage a partaking both of the nature of "ibaadat" or devotional acts and 'muamalat' or dealings among men."⁸ Dr. Jang is of opinion "Marriage though essentially a contract is also a devotional act; its objects are rights of enjoyments and procreation of children and regulation of social life in interest of society."⁹ In *Shoharat v. Jafri Begum*,¹⁰ the Privy Council said that Nikah under Muslim Law is a religious ceremony.

In *Anis Begum v. Mohammad Istafa*,¹¹ C.J. Sir Shah Sulaiman has balanced the view of the Muslim marriage by holding it both civil contract and religious sacrament. Justice Sulaiman observed, "It may not out of place to mention the Maulvi Samiullah (D.J. Raibarielly) collected some authorities showing that marriage is not regarded as a mere civil contract but a religious sacrament." Though the learned C.J. does not himself say that marriage is a sacrament, but from the context in which he said, it is clear that he supported the view of Maulvi Samiullah. In *Sirajmohmedkhan v. Hafizunnisa*,¹² the Supreme Court has described it as a 'sacrosanct contract'.

The difference between Hindu concept of marriage and Christian concept is that former regard it as an immutable union, a union for all lives to come, (thus death did not dissolve it) while the latter considered it to stand dissolved on the death of either party. Both agree that it is a sacrament. Christian marriage has been described as a "secular reality" which has become a "saving mystery." Indeed, in the "new creation" in which we live, marriage has acquired a new purpose. Besides being for "mutual help" and "procreation of children", it is there to "save and sanctify." Christians perceived this new elevation of the old institution right from the beginning, although they did not systematically explain it until the twelfth century, when the Scholastics classified marriage as one of the seven sacraments.¹³

The Industrial Revolution's ideas of liberty, equality and pursuit of happiness gave a further impetus to liberate marriage from the fetters of the church. Once the marriage was accepted as a contract it was next logical step to consider it as dissoluble union. Marriage came to be recognized as a human institution based on free

⁸ Abdur Rehman, *The Principles of Mohammedan Jurisprudence*, 327 (1958).

⁹ Dr. M.U.S. Jang, *Desertion on the Development of Muslim Law in British India*, 2 (1932).

¹⁰ Qureshi, *Marriage and Matrimonial Remedies*, 43 (1978).

¹¹ (1993) 55 APP 743.

¹² AIR 1981 SC 1972.

¹³ Ladislav Orsy, S.J., *Faith, Sacrament, Contract, and Christian Marriage: Disputed Questions*, <http://www.jstor.org/stable>, visited on 18-3-2013.

volition of men and women who were undoubtedly responsible though not infallible individuals.

A Parsi husband or wife can not remarry in the life time of his wife or husband until his or her marriage is dissolved by a competent court although he or she may have become a convert to any other faith.

Marriage in Judaism may not be viewed as an "outward sign of inward and divine grace", yet it is respected as a sacred institution.

A critical analysis of marriage provisions in different legal systems reveals factual and legal uniformity more than the contrast in them. The sacramental nature of marriages has been shattered with the induction of contractual elements in them.

Any person may, however, marry under 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. It is secular optional law applicable to all Hindus, Muslims, Christians, Parsis and Jews.

Chapter II, Grounds available for the dissolution of Marriage, is a critical analysis of 'divorce grounds' to explore the uniform standards and contrast in them has been done in formulating the unification equation on the issue of making one law throughout the territory of India. Terminating the marriage contract by dissolution of marriage and divorce is one of the legal measures, which has gone through various stages in the course of history of nations and countries and has undergone changes as well. About divorce different ideas and opinions are expressed. Some people considered it is harmful and dangerous so condemned it, and some people believe some times divorce is necessary and better than a life with suffering and conflict.¹⁴

Just as culture constitutes a set of techniques for living that occasionally promote as many problems as they solve, so divorce may be regarded as a problem-solving technique in culture. In any community divorce bears a systematic relationship to other features of social life and its meaning for individual and group varies according to dominant patterns of ideology in the community.¹⁵

A critical conceptual analysis of 'divorce grounds' to explore uniform standards and contrast in them will be beneficial in formulating the unification equations on the issue of making one law throughout the territory of India to all the

¹⁴ Seyed Javad Seyed Alizade Ganji, *Women's Rights In Dissolution Of Marriage; A Comparative Study Between Iranian Muslim-Shia And Indian Hindu Laws*, 2nd International Conference on Humanities, Historical and Social Sciences, (2011).

¹⁵ John J. Honigmann, *A Comparative Analysis of Divorce*, 37 (1953).

citizens. To cover the organized debate for the improved coverage of the different 'divorce grounds' contained under various matrimonial laws, it can be classified under the heads: 1) Fault Grounds, 2) No fault Grounds, 3) Breakdown theory.

The central concern while transforming marriages from a status to contract was to obtain the right to dissolve the marriage through a judicial decree, which would entitle the spouses to enter into a subsequent marriage, Once the sacred tie of marriage was severed, the bondage of marital servitude ended. This was a significant step for both Christians and Hindus¹⁶. There are several ways through which a marriage can be dissolved; the 'fault theory' was the first step in this direction. It forms the core of the matrimonial litigation. When the right to divorce or the right to dissolve the matrimonial bond was first introduced into matrimonial law, it was based on the 'guilt theory'. According to this theory, a marriage can be dissolved if one of the parties to the marriage, after the solemnization of the marriage, commits some matrimonial offence. It was assumed that the purpose of the right to dissolve the marriage and set free the innocent spouse was to punish the party that had committed a matrimonial offence by depriving him or her of conjugal access of the other.¹⁷ The basic ingredients of a fault ground divorce are:

- i) There must exist a guilty party or a party who is responsible for having committed one of the specified matrimonial offences.
- ii) There must also exist an innocent party who has suffered due to the misconduct of the guilty party.
- iii) The innocent party should have no role in the cause of the misconduct i.e. there must be no collusion.
- iv) The petitioner should prove that the respondent was guilty of one or more grounds of divorce stipulated in the statutory provisions governing the divorce laws of the parties, i.e., petitioner and respondent.

The factors responsible for the dissolution of marriage when either party to the marriage is on fault, viz., cruelty, adultery, conversion or apostasy, desertion, conviction of crime, bigamy, unnatural offences (rape, sodomy and bestiality) and renunciation of world have been critically discussed with the help of different provisions of divorce laws prevalent throughout the territory of India.

There are precious objectives of the marriage in all legal systems in India and

¹⁶ Flavia Agnes, *Family Law Vol. II: Marriage, Divorce and Matrimonial Litigation*, 29 (2011).

¹⁷ *Ibid.*

when probability come to disturb them, the dissolution of marriage automatically gets berth in the matrimonial tie to hold the social descriptions among human beings. The factors responsible for annoying objectives of marriage are many, in them there are situations when the parties of the marriage are not at any fault, but certain inability in either of them due to disease etc. disturb the objective of the marriage and which results the interruption in marriage life, consequently the dissolution of marriage remains the only cure to save the disorder in relations of the spouses. The various grounds for the dissolution of marriage without the fault of the either of the spouses, viz., communication of venereal disease, insanity, leprosy, impotency, have been discussed thoroughly with the help of numerous judicial interpretations of divorce laws based on the religious faith of the persons in the Indian matrimonial legal system.

Large number of countries recognizes separation between parties to marriage. Separations are made in the hope that the parties will come together again in near future and in most of the cases success remains simply at arms length and which can be easily bagged by giving an opportunity to the parties to have some sort of adjustment. But, unfortunately, it is not true in all cases. Cases do exist, as they existed in the past, in which such a hope had always been a sweet dream of reconciliation.¹⁸ Separation is based on the fact that marriages very often fail not because of the fault or guilt of one of the spouses but because the spouses are not compatible in their temperament. Despite their best efforts, they are unable to live together as husband and wife.¹⁹ Separation may be of two kinds:

- (1) Separation by mutual consent.
- (2) Separation by judicial pronouncement.

Separation by mutual consent or by an agreement is a sort of voluntary separation. Fault or ground based matrimonial litigation is time consuming and expensive. It also involves a lot of mud-sling there by further embittering the relationships and thwarting prospects of amicable resolution of ancillary issues like maintenance, child-custody/visitation and, so on.²⁰ Before the introduction of the theory of mutual consent the only avenue open to such a couple was to fabricate a fault ground where one spouse accuses the other of a matrimonial fault and the other

¹⁸ Shiv Sahai Singh, *Unification of Divorce Laws in India*, 179 (1993).

¹⁹ *Supra* note 16, at 49.

²⁰ Professor Kusum, *Family Law Lectures Family Law I*, 153 (2011).

does not contests it. This is termed as a 'collusive' decree and is specifically prohibited under the matrimonial statutes. However, left with no other option, the couple would be forced to collude to secure their release from the matrimonial bondage. To remedy the problem faced by such couples, the notion of a 'consent divorce' came to be included in matrimonial laws. The purpose was to enable couples to adopt honest rather than fraudulent or collusive means to achieve legitimate ends.²¹

Non-resumption of cohabitation after a decree of judicial separation or non-compliance with a decree for restitution of conjugal rights is a ground for divorce under various statutes. Infact, when parties have not been able to resume marital life despite court decree of restitution or when a period of judicial separation has not brought any change of mind in them, it is desirable to treat the relationship as beyond repair. If two or more years have passed without resumption of marital life in spite of decree by a competent court, it was considered unrealistic to expect that some day spouse will unite and marriage will work. Permitting only a decree-holder to move the court for divorce led to a settlement. If he chose not to do so a curious situation could arise. Opposite party was left with no remedy and the marriage was, as it were, a limbo. This "fault" theory was, therefore, pushed and "break-theory" had been pushed step further.²² Having progressed from fault to consent theory of divorce, arriving at the break theory was a logical step ahead.²³

The basic common factor in these two sorts of separation is the non-cohabitation of the parties during such separation.

The Supreme Court have granted divorces on the ground of irretrievable break down of marriage in various case, but the said ground is not available independently in any statutory law. The Supreme Court has granted divorces on the ground of irretrievable break down of marriage while exercising its powers under Article 142 of the Constitution of India. Where factually marriage has broken down irretrievably, in such cases no useful purpose will be served in finding out the guilt or innocence of the parties and for such cases law proceeds to cut-off the tie.²⁴ A detailed discussion has been done on these issues shows that there should be one single ground of divorce, viz. irretrievable breakdown of marriage. Irretrievable Breakdown of marriage and

²¹ *Supra* note 20.

²² Tuteja Rajinder, *Tuteja's Commentary on Marriage, Divorce and Maintenance*, 162 (1994).

²³ *Supra* note 16, at 59.

²⁴ *Supra* note 18, at 180.

divorce by mutual consent should be made uniformly a ground to dissolve the marriage of spouses irrespective of their religious faiths.

The critical analysis of different existing grounds of divorce contained under various divorce laws shows more uniformity and less contrast in them. Therefore, the conceptual analysis of the different existing ground of divorce paves the way to push up the matter of uniformity in them legislatively.

Chapter III, is Judicial Trends towards Dissolution of Marriage. Courts play an important role in striking a balance between the changing needs of the society and protection of the freedom of the individual. Freedom can never exist without order. It is essential that freedom be exercised under authority and order should be enforced by authority which is vested solely in the executive. The Supreme Court and the High Courts are the protectors of constitutional rights. Courts by way of several judgments have elaborated the exact extent and nature of the guarantee given by the Constitution. These judgments in fact have clarified the law to a large extent. The judges as human beings have their prejudices, reactions, likes, dislikes, etc., which creates plus and minus reactions in judicial pronouncements. The real law is what they do in actual judicial behaviors. The life of law is not logic but experience and what the court decide and this stresses the empirical and pragmatic aspects of law. Making new rules is legislation and it also includes judicial legislation.²⁵ According to Dias and Hughes:

"Legislation is law made deliberately in a set form by an authority which the courts have accepted as competent to exercise that function."²⁶

In India judges fully realize that the legalistic approach cannot exclusively further or cater the social goals of the community. The process of social change was very slow in pre-independence period because of British domination and Parliamentary law had no real relationship with social justice in keeping with the life of the people. After independence the judiciary under new framework of Indian polity adopted the attitude of promoting social economic justice for the masses in order to promote the welfare of people.

Unification of different matrimonial laws has its historical perspective. In the matter of unification of matrimonial laws, the judicial efforts is of utmost importance and effectiveness because it constitutes the most important ameliorative agency of social reforms and change by inserting new ideas in the science of legal jurisprudence.

²⁵ Webster's New International Dictionary, 1412 (1995).

²⁶ Dias and Haghese, *Jurisprudence*, 77 (1964).

In this chapter both pre - independence and post - independence judicial trends towards dissolution of marriage have been discussed.

Before 1947 the law was an instrument of political coercion imposed by alien ruler upon the Indian people without any consideration of welfare of the people. Judges were bound themselves to follow precedents. British judges were not authorized to go beyond law. Wherever law permitted them to exercise inherent judicial power, particularly in case of customs in India, they applied their own methods. They tried to apply British rules of interpretation and to some extent moulded the traditional personal laws by infusing traditional legal institutions with English legal concept. The survey of the judicial decisions before 1947 shows the non-interference in religious laws of the Indians and the application of British judicial system by British judges in India. This process casually provided the application of universal principles of justice and uniform pattern of law throughout the territory of India.²⁷

After Independence, India adopted a democratic Constitution with Fundamental Rights and Directive Principles of State Policy which indicates the method and process of social change. The concept of independent judiciary along with the power of judicial review came in existence which was imagined as protector and guarantor of Fundamental rights and the Constitution. The Indian judiciary is empowered to examine the validity of laws made by the legislature along with the authorization to interpret them. This power is vested in the Court under the various provisions of the Constitution of India.²⁸ Article 13 of the Constitution provides for the judicial review of all laws of India. This power is conferred on the High Courts and on Supreme Court by virtue of which any law inconsistent with the provisions of the Constitution can be declared as unconstitutional hence void by these courts. In *Keshavanand Bharti*,²⁹ in which Judicial Review was declared as the basic feature of the constitution which cannot be destroyed by amending the Constitution, it was said:

"Judicial Review has thus become an integral part of our Constitutional system and a power has been vested in the High Court and the Supreme Court to decide about the validity of the provisions of the statutes. if the provisions of the statutes found to be violative of any of the Article of the constitution which is the touch stone for the

²⁷ *Supra* note 18, at 257.

²⁸ The Constitution of India, Articles 13, 32, 136, 226.

²⁹ *Keshavanand Bharti v. State of Kerala*, AIR 1973 SC 1461.

validity of all laws the High Court and the Supreme Court are empowered to strike down the said provisions."

After considering deeply the judicial trend it can be said that the courts have given different opinions in different cases and there is no uniformity. On the one hand in 2006, in Naveen Kohli case, the Supreme Court has recommended the Government of India to amend the Act but on the other hand after three years, recently in *Vishnu Dutt Sharma v. Manju Sharma*,³⁰ the Supreme Court has not granted the divorce on the ground of irretrievable breakdown of marriage.

Our High courts are making several brave attempts to judicially modify the procedure and provisions. In *Ammi E.J. v. Union of India*³¹, the court held section 10 of the Indian Divorce Act, 1869 is ultra virus of the Constitution, by saying that since cruelty and desertion are grounds of divorce available to all communities in India but not to the Christian wife and therefore Section 10 of the Act is discriminatory on the ground of religion only.

However, the lack of will on the part of the Indian legislature to enact a compulsory law for registration of marriages has not gone unnoticed by the courts. The Supreme Court of India in *Seema v. Ashwani Kumar*,³² has directed all states in India to enact rules for compulsory registration of marriages irrespective of religion, in a time bound period. This reform, which has been spearheaded by the National Commission for Women, has struck a progressive blow to check child marriages, prevent marriages without consent of parties, check bigamy/polygamy, enable women's rights of maintenance, inheritance and residence, deter men from deserting women, and for checking the selling of young girls under the guise of marriage. The Supreme Court felt that this ruling was necessitated by the need of time as certain unscrupulous husbands deny marriage, leaving their spouses in the lurch, be it for seeking maintenance, custody of children or inheritance of property.³³ The litigation in respect of any matter concerning family, whether, divorce, maintenance and alimony or custody should not be viewed in terms of failure or success of legal action but as a social therapeutic problem.

Chapter IV, is Uniform Civil Code. Under this chapter the meaning and need of uniform civil code is discussed in detail. The term civil code is used to cover the

³⁰ AIR 2009 SC 2254.

³¹ AIR 1995 Ker. 252.

³² Judgments Today, 2006 (2) SC, 378.

³³ *All marriages must be registered.*, The Times of India, 15 Feb., 2006.

entire body of laws governing rights relating to property and otherwise in personal matters like marriage, divorce, maintenance, adoption and inheritance. The demand for a uniform civil code essentially means unifying all these personal laws to have one set of secular laws dealing with these aspects that will apply to all citizens of India irrespective of the community they belong to. Though the exact contours of such a uniform code have not been spelt out, it should presumably incorporate the most modern and progressive aspects of all existing personal laws while discarding those which are retrograde.³⁴

The spine of controversy revolving around Uniform Civil Code has been secularism and the freedom of religion enumerated in the Constitution of India. The preamble of the Constitution states that India is a "Secular Democratic Republic" this means that there is no State religion. A secular State shall not discriminate against anyone on the ground of religion. A State is only concerned with the relation between man and man. It is not concerned with the relation of man with God. It does not mean allowing all religions to be practiced. It means that religion should not interfere with the mundane life of an individual.

Attempts have been made from time to time for enacting a Uniform Civil Code after independence and the Supreme Court in various cases has been giving directions to the government for implementing Article 44 of the Constitution and to reform the personal laws specially those relating to the minorities and to remove gender bias therein. While a uniform civil code is not particularly high on the national agenda, value-based progressive changes, preserving the separate identity of each religious group, is a feasible project avoiding insult and injury to any minority. This may be a preliminary step to pave the way for a common code. Mobilization of Muslim, Christian and Parsi opinion in this direction is sure to yield salutary results and reduce fundamentalist resistance.

In *Sarla Mudgal (Smt.), President, Kalyani and others v. Union of India and others*,³⁵ Kuldeep Singh J., while delivering the judgment directed the Government to implement the directive of Article 44 and to file affidavit indicating the steps taken in the matter and held that, "Successive governments have been wholly remiss in their duty of implementing the Constitutional mandate under Article 44, Therefore the Supreme Court requested the Government of India, through the Prime Minister of the

³⁴ <http://economictimes.indiatimes.com/cms.dll/html/uncomp/article>, visited on 18-3-2013.

³⁵ AIR 1995 SC 1531

country to have a fresh look at Article 44 of the Constitution of India and endeavor to secure for its citizens a uniform civil code through out the territory of India.”

Irretrievable breakdown of marriage and divorce by mutual consent should be made uniformly a ground to dissolve the marriage of spouses irrespective of their religious faiths. The critical analysis of different existing grounds of divorce contained under various divorce laws shows more uniformity and less contrast in them. Therefore, the conceptual analysis of the different existing ground of divorce paves the way to push up the matter of uniformity in them legislatively.³⁶ The Article 44 of the Constitution of India requires the state to secure for the citizens of India a Uniform Civil Code throughout the territory of India. As has been noticed above, India is a unique blend and merger of codified personal laws of Hindus, Christians, Parsis and to some extent of laws of Muslims. However, there exists no uniform family related law in a single statutory book for all Indians which is universally acceptable to all religious communities who co-exist in India.

In the matter of a Uniform Civil Code, India’s binding obligation under international law have also started attracting attention of legal and other experts. Satyabrata Rai Chawdhuri, rightly observed in 2003³⁷:-

[Since] different treatment for any religious group is violative of the UN Covenant on Civil and Political Rights and the Declaration on the Rights to Development adopted by the world conference on Human Rights, it is hoped that Parliament will frame a common civil code without further delay, divesting religion from social relations and personal law.

The time has come to place personal laws of all religions under a scanner and reject those laws that violate the Constitution. Personal laws of all religions discriminate against women on matters of marriage, divorce, inheritance and so on. There is an urgent need to cull out the just and equitable laws of all religions and form a blueprint for a uniform civil code based on gender justice. India needs a unified code of family laws under an umbrella of all its constituent religions. Whether it is the endeavor of the State, the mandate of the court or the Will of the people is an issue which only time will decide.

Chapter V, the last chapter is Conclusions and Suggestions, It is a sum of the

³⁶ *Supra* note 18, at 376.

³⁷ Satyabrata Rai Chawdhuri, “A *Common Civil Code: It is a Constitutional Obligation*”, The Tribune, 30 July, 2003.

entire work spread in Chapters I to IV.

Suggestions

The institution of marriage is sacred and pious one. Marriage being the most important social institution, a last effort must necessarily be made to find out the true cause of break and the corrective steps still possible.

While we talk about marriages and its significance in the life, it is important that we also discuss the intricacies of the separation as it is a right provided to all men and women on different grounds to be separate if the marriage is not considered happy. Also Indian women have their own rights to file for a divorce if not treated well. Even though we observe that women are ill treated in our country in rural as well as urban areas of India; a very small percentage of women who initiate for separation. While this is one side of the tale, there are also cases where the law is twisted and turned and misused by both men and women. However, we must discuss the other side of the heavenly knot. Divorce is the dissolution of a valid marriage in law, in a way other than the death of one of the spouses, so that the parties are free to remarry either immediately or after a certain period of time.³⁸

The Concept of divorce was introduced in India in the latter part of the 19th century among two classes of Christians. It was introduced for Hindus in 1955 in the form of the Hindu Marriage Act 1955. Under the Hindu Marriage Act 1955, initially, adultery, cruelty, and desertion were not made grounds of divorce but of judicial separation. These grounds were based on the fault theory. At present, divorce is governed by different Acts among different communities in India. All major religions have their own laws which govern divorces within their own community, and separate regulations exist regarding divorce in interfaith marriages. Hindus, including Buddhists, Sikhs and Jains, are governed by the Hindu Marriage Act, 1955; Christians by the Divorce Act, 1869; Parsis by the Parsi Marriage and Divorce Act, 1936; and Muslims by the Dissolution of Muslim Marriages Act, 1939, which provides the grounds on which women can obtain a divorce, and the uncodified civil law. Civil marriages and intercommunity marriages and divorces are governed by the Special Marriage Act, 1954.

³⁸ Animesh Kumar, *Divorce and threat to institution of marriage in India: Socio-Legal study*, (2004), (Unpublished Assignment, Institute of Judicial Training & Research, U.P.)

The institution of Marriage is undergoing a rapid change. With the advent of legislations such as the Hindu Marriage Act 1955, the Divorce Act 1869, the Special Marriage Act 1954, the Parsi Marriage and Divorce Act 1936, the Dissolution of Muslim Marriage Act 1939, divorce has hit the permanency of marriage and where marriages were indissoluble union now they are dissoluble. Now even Christians and Hindus personal laws have concept of Divorce is there. The marriage institution is derogating day by day. Although these legislation are there but even then they are suffering from many flaws and loopholes in them. If we would have a look at the Indian matrimonial laws we will find a strange spectacle of divorce laws.

In *Hirachand Srinivas v/s Sunanda*³⁹ it was held that Section 23 would apply to Section 13(A) and the Court is not bound to grant divorce on mere proof of non-cohabitation for the stipulated period and that further Section 10(2) does not vest right to get decree for divorce in the spouse. In the instant case the husband was living an adulterous life and continued to do so after passing the decree of judicial separation. On the expiry of one year he filed the petition for divorce under Section 13(1A). He had also not paid any maintenance to the wife, In the view of above two facts the Court held him to be wrong and refused his petition. The following observations of the court may be noted-

"It has to be kept in mind that relationship between spouses is a matter concerning human life. Human life does not run on dotted lines or charted course laid down by the statue. It has also to be kept in mind that before grating prayer to the petitioner to permanently snap the relationship between the parties to the marriage every attempt should be made to maintain the sanctity of relationship which is of importance no only for the individuals or their children but also for the society."

In the view of above observation it is submitted that the learned judges though appreciate the fine nuances of human life but fail to see the whole issue in large perspective. It is agreed that a settlement as to the maintenance has to be made before the grant of divorce. But an important fact has been overlooked by the learned judges that the petitioner was and is living in adultery which means that he has no intention of cohabiting with his wife. The fact amply shows that the marriage is in fact irretrievably broken down and by refusing the decree what the court is retaining is an

³⁹ AIR 2001 SC 1285

empty shell. The Supreme Court in *Naveen Kohli v/s Neelu Kohli*⁴⁰ held that irretrievable breakdown of marriage is ground for divorce. The Court strongly urged the Government of India to amend the Hindu Marriage Act 1955 to make this reason as a ground for divorce. The Bench held "this court would like to recommend the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act 1955 to incorporate it as ground for the grant of divorce." The bench said "once the parties have separated and separation has continued for a sufficient length of time and one them has presented a petition for divorce it can well be presumed that marriage has broken down." The Court no doubt should seriously make an endeavor to reconcile the parties; yet if it is found that breakdown is irreparable, then divorce should not be withheld.⁴¹ The determinant of dissolution of marriage should not be to find out who is guilty, and who is innocent, because no single party is totally guilty or innocent.⁴²

The Supreme Court have granted divorces on the ground of irretrievable break down of marriage in various cases, but the said ground is not available independently in any statutory law. The Supreme Court has granted divorces on the ground of irretrievable break down of marriage, even though initially the ground on which divorce was claimed was cruelty while exercising its powers under Article 142 of the Constitution of India.⁴³ It is significant to note that special powers to make any order in a given case with object of doing complete justice is vested only in the Supreme Court under Article 142 of the Constitution. Hence in several cases the High Courts have declined to invoke irretrievable breakdown of marriage as a ground to dissolve the marriage.⁴⁴ But still high courts are granting the relief where the marriage has been broken factually, they however found support from section 13(1)(ia), viz. cruelty and granted divorce.⁴⁵

⁴⁰ (2006) 4 SCC 558

⁴¹ "Courts should seriously endeavor to reconcile the parties in matrimonial cases.", 204, Law Teller (2006).

⁴² Virendra Kumar, "See the rift, not the fault", 12, The Tribune, 21 May, 2006.

⁴³ *K. Srinivas Rao v. D.A. Deepa*, 2013 STPL (Web) 152 SC; *Durga Prasanna Tripathi v. Arundhati Tripathi*, AIR 2005 SC 3297; *A. Jayachandra v. Anil Kumar*, AIR 2005 SC 534; *Vinita Saxena v. Pankej Pandit*, AIR 2006 SC 1662; *Rishikesh Sharma v. Saroj Sharma*, (2007) 2 SCC 263.

⁴⁴ *Mohinder Singh v. Jaswinder Kaur*, AIR 2010 (NOC) 639 (P&H); *Piyasa Ghosh v. Somnath Ghosh*, AIR 2009 Cal. 90; *P.P.Bingi v. P.A.R. Bingi*, AIR 2010 (NOC) 991 Bom.

⁴⁵ *Manisha Tyagi v. Deepak Tyagi*, (2007) 1 HLR 297 (P&H)(now overruled by Supreme Court in *Manisha Tyagi v. Deepak Tyagi*, AIR 2010 SC 1042); *Sudhanshu Mauli Tripathi v. Meena Kumari*, AIR 2010 (NOC) 637 Pat.; *Poornima Mishra v. Sunil Mishra*, AIR 2010 (NOC) 803 All.; *Jasminder Singh v. Prabhinder Kaur*, AIR 2008 P&H 13.

In a significant ruling, *Vishnu Dutt Sharma vs. Manju Sharma*⁴⁶, the Supreme Court ruled that a Hindu couple cannot be granted divorce on the ground that there was “irretrievable breakdown” of marriage. The bench passed the order while dismissing the appeal of Vishnu Dutt Sharma who sought divorce from his wife Manju Sharma on the ground that their marriage has irretrievably broken down. Though the husband had sought divorce the wife was unwilling for the same. The husband filed the appeal in the apex court after the matrimonial court and Delhi High Court both dismissed his plea. The apex court rejected his plea said that it was crystal clear from the bare provisions of section 13 of the Act that no such ground of irretrievable break down of marriage is provided by the legislature of granting a decree of divorce. “This court cannot add such a ground to section 13 of the Act as that would be amending the Act, which is a function of legislature” , the bench observed. The bench observed, “A mere discretion of the court without considering the legal position is not a precedent. If we grant divorce on the ground of irretrievable breakdown then we shall by judicial verdict be adding a clause to Section 13 of the Act to effect the irretrievable breakdown of the marriage is also a ground for divorce.⁴⁷” The Supreme Court in the case of *Manish Goel v. Rohini Goel*,⁴⁸ while refusing to dissolve the marriage on the ground of irretrievable breakdown of marriage, held: "Therefore, the law in this regard can be summarised to the effect that in exercise of the power under Article 142 of the Constitution, this Court generally does not pass an order in contravention of or ignoring the statutory provisions nor is the power exercised merely on sympathy." Similarly the Supreme Court denied the relief on the ground of irretrievable breakdown of marriage in *Hitesh Bhatnagar v. Deepa Bhatnagar*,⁴⁹ on 18 April, 2011.

In this day and age we have to give a new look to the jurisprudence of divorce. In Indian society divorce has traditionally been looked as a stigma, a thing not done, whereas in western societies it is an accepted part of life, we would have to shift our focus as to what is the purpose of good divorce law - Is it to punish the offending spouse or to discontinue a connection which has in fact been severed in reality though does not have stamp of law? However, while expediency demands that no marriage which has completely lost its sanctity and fervour should be kept in vegetative

⁴⁶ (2009) 6 SCC 379

⁴⁷ “No divorce for ‘irretrievable breakdown’ of marriage: SC”, 18, The Tribune, 9 March, 2009.

⁴⁸ (2010) 4 SCC 393.

⁴⁹ Civil Appeal No.6288 of 2008.

existence, nonetheless, caution and fairness demand that irretrievable breakdown as a ground should not become an agent of offence to be misused to the detriment of the innocent and the ignorant. While explicit existence of the ground on the statute book might facilitate the task of a judge who, today, seeks alibis under the provisions to grant relief in the marriages which have indeed disastrously failed, yet it is important that the said ground for divorce, if and when incorporated in law, should be hedged with sufficient safeguards and applied with utmost discretion.

While purely a civil matrimonial dispute can be amicably settled by a Family Court either by itself or by directing the parties to explore the possibility of settlement through mediation, a complaint under Section 498- A of the IPC presents difficulty because the said offence is not compoundable except in the State of Andhra Pradesh where by a State amendment, it has been made compoundable. Though in *Ramgopal v. State of Madhya Pradesh*⁵⁰, the Supreme Court requested the Law Commission and the Government of India to examine whether offence punishable under Section 498-A of the IPC could be made compoundable, it has not been made compoundable as yet. In *B.S. Joshi & Ors. v. State of Haryana*⁵¹, the Supreme Court stated that while dealing with matrimonial disputes and the complaint involving offence under Section 498-A of the IPC can be quashed by the High Court in exercise of its powers under Section 482 of the Code if the parties settle their dispute. Even in *Gian Singh v. State of Punjab*⁵², the Supreme Court expressed that certain offences which overwhelmingly and predominantly bear civil flavour like those arising out of matrimony, particularly relating to dowry, etc. or the family dispute and where the offender and the victim had settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may quash the criminal proceedings if it feels that by not quashing the same, the ends of justice shall be defeated.

In Islam apostasy results in dissolution of marriage, but here also discrimination is there. If a Muslim wife renounces Islam and converts to any other religion the marriage is automatically dissolved. But if Muslim man converts to any other religion, because of Dissolution of Muslim marriage Act, 1939, she has to sue for divorce. A Muslim husband can divorce his wife when ever he wants to do so

⁵⁰ (2010) 13 SCC 540

⁵¹ AIR 2003 SC 1386

⁵² (2012) 10 SCC 303

even in her absence. The triple talaq is a controversial matter even now. Many countries have either abolished it or have made it ineffective or unpractical. In India three muftees of Jamiat Ahl-i-Hadith issued fatwa holding that if Muslim husband pronounces talaq, talaq, talaq to his wife at a single sitting it will not be considered a valid Divorce. Talaq, Talaq, Talaq is no final Talaq.⁵³ In this way Muslim divorce law is discriminatory and Muslim husband holds much powerful rights as compare to a Muslim woman. The Muslim wife has no similar freedom. In Khula and Mubarat form, she can get divorce with the consent or her husband but then she had to forgo her claim to dower or give him some money or property in consideration of his agreeing to dissolve the marriage or in other words she can buy the divorce from her husband with his consent. An article "Islam and Reform"⁵⁴ by Rafia Zakria reiterated that the century old traditions which are prevalent in Muslim society should need to be reformed keeping in view, the changing needs of society, remaining within the praxis faith.

In India Monogamy is, and must remain, the norm of married life. Both the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955 have attempted to enforce this norm as and absolute ideal in itself under Section 4 a, 24 (1), 43, 44 of the Special Marriage Act, 1954 and Section 5(ii), 11 and 17 of the Hindu Marriage Act, 1955. The Question is - what relief does the Indian law gives to a Hindu wife whose husband marries again for no reason? A husband who is more cautious and does not want to incur even the risk of prosecution, would announce a sham conversion to Islam and then marry again, Under the law the poor wife will have to file a petition against the husband to declare the bigamous marriage null and void as decided in *Parma Sami v/s Sarnathammal*.⁵⁵ Judicial opinion is that this is not violative of the equality clause of constitution.

The law of Divorce for the Christians is based on English statute of 1857. The Indian Divorce Act, 1869 has been amended in 2001, before this amendment the husband could get divorce simply on the ground of wife's adultery but wife could not obtained divorce simply on the ground of husband's adultery. It had to be plus adultery - adultery with incest, adultery with bigamy, adultery with desertion, adultery with cruelty or change of religion with marriage, or rape, sodomy or bestiality of the

⁵³ *Fatwa*, Jareida Tarjuman, Delhi vol. xiii, 21 May, 1993. (A weekly brought out by Jamiat Ahl-i-Hadith)

⁵⁴ Rafia Zakaria, "Islam and Reforms", 50, Frontline, 2 June, 2006.

⁵⁵ AIR 1969 Mad. 124.

husband.

But still our High Courts are making several brave attempts to judicially modify the procedure and provisions. In *Ammini E.J.v/s Union of Inida*,⁵⁶ the Court held Section 10 of the Indian Divorce Act, 1869, is ultra vires of the Constitution, by saying that since cruelty and desertion are grounds of divorce available to all communities in Indian but not to Christian wife and therefore Section 10 of the Indian Divorce Act, 1869 is discriminatory on the ground of religion only. In this land mark decision Court further said that since works "adultery coupled with" desertion, etc. are severable and liable to be struck down as ultra vires of Art. 14, 15 and 21 of the Constitution of India. The Christian wife may sue for divorce on ground of adultery, desertion or cruelty. Taking a cue from the Kerela High Court, Bombay High Court has also held this provision violative of the Constitution in *Pragati Varghese v/s Cyril Verghese*.⁵⁷ The Andhra Pradesh High Court had also exhorted Parliament to immediately take notice of this anomaly and fill in the void by suitable legislation.⁵⁸ Further in *Annu Thomas v. Thomas Koshy*,⁵⁹ and *Lavina Yorke v. Terence York*,⁶⁰ the divorce was granted to wife on the ground of cruelty. In the former case the wife had alleged sodomy and beastly behaviour on the part of husband and in the latter husband used to maltreat her after consuming liquor. So in order to give same grounds for Divorce to Christian wife as available to Christian husband the Indian Divorce Act, 1869 has been amended in 2001. Now both have same ground for Divorce under the Divorce Act, 1869.

So although the judicial trend is shifting but yet the goal is quite far, whereas is family law matters conciliation is a better serving method than adversial type of litigation. Rather litigation in respect of any matter concerning family, whether, divorce, maintenance and alimony or custody should not be viewed in terms of failure or success of legal action but as a social therapeutic problem. It should not be viewed as litigation in which parties and their counsel are engaged in winning or defeating but as a social problem needing solution.

One should not forget that nationhood is symbolized by one Constitution, a single citizenship, one flag and a common law applicable to all citizens and India's

⁵⁶ AIR 1995 Ker 252

⁵⁷ AIR 1997 Bom. 349.

⁵⁸ *N.Sarada Mani v. G. Alexander*, AIR 1998 AP 157.

⁵⁹ AIR 1997 Del 345.

⁶⁰ AIR 1997 Del 346.

obligations under international law and requirements of various international instruments relating to the human rights of women such as Universal declaration of Human Rights, 1948 and the Declaration on the Elimination of Discrimination Against Women, 1967, also demand that even if one rules out Article 44 the Union of India cannot evade its international obligation to make laws to remove all discrimination against women.⁶¹ For that, just as 37 years ago, the Equal Remuneration Act, 1976 was enacted for the benefit of all working women, “The next logical step is to make a law to secure equal rights to women. An Equal Right Act would largely achieve the objective of common civil code. In the alternative, parallel reform of each personal law to give effect to the Human Rights declared by the United Nation would help in the emergence of common pattern of personal laws, paving the way for uniform code, and a beginning could be made in the direction but it seems that the Political will is lacking.”⁶²

Art, 44 of the Constitution of India impose an obligation on the state to Endeavour to secure for the citizen a Uniform Civil Code throughout the country. State should come out with the specified steps to perform this obligation. The Supreme Court ruled in *Seema v. Ashwani Kumar*⁶³ that all marriages irrespective of their religion be compulsorily registered. The Court felt that "this ruling was necessitated by the need of time as certain unscrupulous husbands deny marriage, leaving their spouses in the lurch, be it for seeking maintenance, custody of children or inheritance of property."⁶⁴ By this judgement, Supreme Court order first step toward the Uniform Civil Code⁶⁵

All major religions thus have their own laws that govern divorces within their own community, and there are separate regulations under the Special Marriage Act, 1956 regarding divorce in interfaith marriages. Under a common civil code, one law would govern all divorces. Bowing to pressure from opposition parties and women's rights organisations, to make marriage laws more women-friendly, the government recently approved a host of recommendations made by the Group of Ministers on divorce and inheritance in the Marriage Laws Amendment Bill, 2010. It is admitted

⁶¹ Jyoti Rattan, “*Uniform Civil Code in India: A Binding Obligation Under International And Domestic Law*” 46 JILI 577 (2004).

⁶² P.P. Rao “*Uniform Civil Code is a Necessity: An Optional Common Law can be Enacted*”, 10 The Tribune, 6 Aug., 2003.

⁶³ (2006) 2 SCC 578

⁶⁴ *Ibid.*

⁶⁵ Dhanajay Mahapatra, "All marriages must be registered", The Times of India, 15 Feb, 2006.

that the Marriage Laws (Amendment) Bill, 2010 is an appreciable and welcomed step. But it is only to amend the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954. Irretrievable breakdown of marriage as a ground for divorce is still not available to the persons of other religions. It would be more appreciated if all other laws should also be amended through this Marriage Laws (Amendment) Bill 2010. Rather, a new single divorce law should be enacted with the name Indian Marriage and Divorce Act, in spite of various divorce laws under the names of various religions.

In this backdrop, one can say that in our country, personal laws continuously affect the lives and rights of a large number of women of all most all the communities. Although various efforts are being done by the means of international instruments, reforms of national laws, changing judicial trends, recommendations of Law Commissions and other social elite groups to ensure gender equality but still women in our country are not treated equally and discriminated in the field of family law especially in cases of marriage, divorce, maintenance, inheritance etc. In these situations, a gender- just code is the need of the time. So a Uniform Civil Code is very important for the protection of oppressed women, to protect their human rights, to remove discrimination against them irrespective of their religion or community they belong and, lastly to make our national laws in accordance with the international instruments which are legally binding on India through various international conventions and international Human Rights instruments which are ratified by India. I think at the present time, the time is ripe for us to try to push it (Uniform Civil Code) through. To sum up in last, it can be said for citizens belonging to different religions and denominations, it is imperative that for promotion of national unity and solidarity a unified code is an absolute necessity on which there can be no compromise. Different streams of religion have to merge to a common destination and some unified principles must emerge in the true spirit of Secularism. Apart from this as discussed above, the irretrievable breakdown of marriage as an independent ground should be made available to the persons of all religions, so that notion of equal protection of law and equality before law should be viewed to all apparently and not only in law books. India needs a unified code of family laws under an umbrella of all its constituent religions. Whether it is the endeavor of the State, the mandate of the court or the Will of the people is an issue which only time will decide.