

Introduction

Law permeates every aspect of human life, conduct and relationship, whether it is a commercial transaction or question of protection of life, health, property or personal liberty or even regulation of very personal and intimate relationships like marriage, divorce and other ancillary issues. The past few years have witnessed the development of several new areas of law like environment, human rights, intellectual property, information technology, international trade etc. It cannot be denied that the personality and status of a person is vitally affected by the relationship of marriage. The emotional stability of a society is linked with the institution of marriage. Concepts underlying matrimonial relations affect not only happiness of individual, but are also concerned with social norms and ethical mores. The complexity of modern life has had a tremendous impact on the institution of marriage, and the rights and obligations of the spouses as also their children. This has led to change, reform and amendment of various statutes governing family relationships, from time to time.

In the forgoing chapters of the present work an attempt has been made to explore the minimum common unanimity in theory by way of conceptual analysis of different matrimonial laws (marriage and divorce). It is well known fact that the institute of marriage is an unavoidable social need for the establishment and stability of a family which preserves culture and ultimately the society as a whole. Hence, marriage has come to stay as a social institution by becoming the nucleus for a family which is the basic unit of the society. It would not, therefore, be inappropriate to state that marriage is the foundation on which stands society and its superstructure. There is no denying the fact that both are equally related to an individual. Hence, dissolution of marriage has direct impact upon the society.

The resolution of conflicts require special procedure-designed to help people in trouble, to reconcile and resolve there differences. Today in most countries of the world the concept of Family Court has caught up. We too

have the Family Court Act. The objective should be resolution and settlement of disputes and not merely decisions in litigation. We have enacted the Family Court Act in 1984, and in some cities Family Court have been constituted. From Family Court we have stipulated to banish lawyers, yet we have not evolved any simple and non formal procedure. We have hardly constituted any support services.

For a stable and orderly growth of the society, divorce laws operate as an effective and efficient contributory agency. Under divorce laws, especially in case of women, the greater the time is taken in disposing of the divorce petitions, the lesser will be the chances of remarriage. Therefore, if the interest of society has to be preserved, the women should be granted on expeditious divorce and allowed to remarry according to their volition before they cross their child bearing age.

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. The sanctity of marriage cannot be allowed to be undermined by the whims of one of the annoying spouses. The law allows divorce by mutual consent, but its intent is not to facilitate the dissolution of marriage. To save marriage and not to hasten its dissolution should be the core concern of courts.¹

After independence, Indians inherited from British a heterogeneous society which became a conglomeration of different religions and sects. There are several marriage and divorce laws, applicable to various religious communities on the basis of religion. These different laws in the country are bound to be detrimental to unity of society, because of different norms and standards incorporated therein for the dissolution of marriage. The Indian citizens, though wedded to different religious faiths, have been living continuously under same climatic and ecological conditions, thereby mouldings their life-styles and psychology towards uniformity on number of

¹ Virendra Kumar, Divorce by Mutual Consent, *The Tribune*, June 25, 2011; <http://www.tribuneindia.com/2011/20110625>, visited on 6-11-2013.

issues, although, the British rulers pursued one policy to see the Indians divided by permitting various religious laws, especially the laws on marriage and divorce. After independence, under the new Constitutional set-up, the state was entrusted with the task of building one new welded and integrated state by eradicating various social anomalies and absurdities so that the imagined objectives of a welfare state of the founding fathers of the Indian Constitution may come into reality. The concept of secularism has been poured into the body of Constitution to project the idea of "Indianness or oneness" in order to supersede religious flavour in personal laws which have so long divided the Indians. To achieve the objectives of welfare state as well as one welded and integrated State founding fathers of the Constitution, entrusted upon the State task of unifying the Civil laws by incorporating Article 44 under chapter IV of the Indian Constitution. Since the commencement of the Indian Constitution, it has been the subject of continuing debate on the States endeavour to secure a Uniform Civil Code. In the present study 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.

The present study had been undertaken with the basic objective to analyse and examine the position of the remedy of divorce under different personal matrimonial laws and to make sincere efforts to critically evaluate the general statutory provisions of divorce including the judicial approach towards the comparative provisions regarding dissolution of marriage under personal laws in India. An analytical approach is undertaken in order to make this study a scientific, unbiased and logical. An in-depth study is undertaken to evaluate all the legal provisions regarding dissolution of marriage, to point out the short comings and flaws and infirmities in substantive and procedural laws. In this respect the case laws particularly controversial decisions of different High Courts are discussed. The actual working of administrative agencies, courts vis-à-vis the existing legislative provisions of divorce laws

are studied and examined. The present study is arranged in following chapters:

Chapter I, is a detailed study about the **Concept of Marriage and Divorce Under Personal Laws in India**, is discussed in this chapter. It starts from the evolution of the institution of marriage and its development with the advancement of time. The detailed study about the journey of marriage from sacrament to civil contract has been discussed in this chapter. 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 change it into a contract. Under Muslim Law, it is regarded as a civil contract, but some jurists are of opine that it is devoid of none but the blending of two. 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. 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, A Comparative Study of Grounds available for the Dissolution of Marriage Under Personal Laws in India, 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. 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 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 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. 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. 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. 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 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 Approach towards Dissolution of Marriage. 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. In this chapter both pre - independence and post - independence judicial trends towards dissolution of marriage have been discussed. 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*,² 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 *Ammini E.J. v. Union of India*³, 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*⁴, has directed all states in India to enact rules for compulsory registration of marriages

² AIR 2009 SC 2254.

³ AIR 1995 Ker. 252.

⁴ Judgments Today, 2006 (2) SC 378.

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.⁵ 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 - A Need of the Hour. Under this chapter the meaning and need of uniform civil code is discussed in detail. 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

⁵ All marriages must be registered, *The Times of India*, 15 Feb, 2006.

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*,⁶ 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 country to have a fresh look at Article 44 of the Constitution of India and endeavour 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.⁷ 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.

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,

⁶ AIR 1995 SC 1531

⁷ Shiv Sahai Singh, *Unification of Divorce Laws in India*, 376 (1993).

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 endeavour 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 entire work spread in Chapters I to IV.