A COMPARATIVE STUDY OF DIVORCE UNDER THE HINDU AND THE MUSLIM LAW

ABSTRACT

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ABSTRACT

In this thesis I have attempted to deal with various aspects of Talaq (divorce) in Hindus and Muslims. Now-a-days divorce has become so frequent in our society that in almost all the courts of law in India there are a large number of cases of divorce rather than the performances of marriage in the court. Hence, the laws of divorce in both the communities are sometimes required to be amended as per requirements of the circumstances.

So far as Hindu Shastras are concerned, no provisions for divorce are found. It was only in 1955 that the government has passed an act in this regard so that the spouses involved may not come across any situation which make complicate their existence. This act has further been amended according to the circumstances and condition prevailing in the society.

In the first chapter of this work various aspects and effects of divorce in religious books of both the religion has been given. Condition prevailing in pre and post independent India is also surveyed in this chapter. Hindu Shastric Law, as I have been pointed out here, attached great sanctity to the concept of marriage by declaring it as a sacrament and holding it as an indissoluble bond between the spouses which is supposed to subsist not only during the life times but also in next existence in heaven. From the religions and spiritual point of view even the death of one of the marriage partner does not mean dissolution of the marriage. That is why a Hindu widow was not allowed to remarry, although
there are some Shastric laws which are capable of being construed either as authorising a woman to take a second husband in some cases, e.g. when her husband is impotent, lost, died, or becomes a religious ascetic, or as countenancing customs permitting remarriage provided those conditions obtained such other analogous texts may alternatively be interpreted in part as cases of presumption of death actual death or civil death and would conceivably be seen by the orthodox as venial breaches of the Shastric pattern of the indissolubility of marriage.

Apastamba says, "He who has unjustly forsaken his wife shall put on an ass's skin with the hair turned outside and beg in seven houses saying, 'Give alms to him who forsook his wife'. That shall be his livelihood for six months." Manu, Narada and Vasishtha also provide sanctions against the unjust abandonment of a wife. This shows that even abandonment; which is comparable to judicial separation in English law and Islamic Law, was not recognised at Hindu Shastric Law. In fact the prevailing sentiment of Hindu society has always been repugnant to the idea of divorce and remarriage of females, excepting the regions where divorce is practised by custom.

(1) Apastamba I.10.28, 19-20, S.B.E., II.

(2) Manu IX, 30, S.B.E., 25; Narada XII, 95, S.B.E., 33; Vasishtha XXVIII, 2-3, S.B.E., 14; these texts are discussed earlier at chapter I.

The existence of rigid orthodox Shastric rules against permitting divorce inevitably had given rise to various problems to the couple as well as the society and created cases of real hardship which necessitated legislative measure, e.g., Baroda Hindu Nibandha, 1937; Bombay Hindu divorce act, 1947; Madras Hindu (Bigamy Prevention and divorce) Act, 1949; Saurashtra Hindu Divorce act, 1952 and finally the Hindu Marriag Act, 1955. The Marriage Laws (Ammendment) Act, 1976 (No 68 of 1976) was passed by the Parliament. This act has further amended the Hindu Marriage Act, 1955 and the Special Marriage act, 1954 (Received the assent of the president on 27th May, 1976) provided a uniform system of marriage or divorce for all Hindus in India.

I have also discussed in details in this chapter (Unit-D) about divorce in the light of Islamic Law, Talaq (divorce) is strongly condemned in Islam and it should not be resorted unless it becomes impossible for the spouses to live together in peace and harmony. But once it is pronounced by the husband it will upheld and valid although there may be no appropriate cause for it. It is described in a precept of the Holy Prophet (PBUH.) as the worth of all the things that law permits. Islam takes a realistic and sympathetic view of human affairs and therefore it attaches great importance to the happiness of both the spouses. In Islam marriage in the ordinary course is to last till one of the spouses dies. But if a husband
and wife can not live happily together so that the very objects of marriage are defeated and it becomes a mere farce, then its continuance is no longer considered desirable. Under such circumstances, divorce and dissolution of marriage are allowed under Islamic law.

A Muslim marriage, unlike marriage in certain other religions, is not a sacrament. It has been stated by some writers and also held in some cases that it is a civil contract. But this view is equally incorrect and a Muslim marriage is not a mere civil contract. Great importance has been given to marriage by Islam and al-Durr-ul-Mukhter and Ashbah wan Nazair and other books have called it an act of devotion. The Holy Prophet (P.B.U.H.) has said, "Marriage is my Sunnah." But in spite of the above it is not to be considered as sacred and indissoluble tie. A sacrament cannot be violated but Muslim Law unquestionably allows divorce. The Holy Prophet (P.B.U.H.) has said, "of all the permitted things divorce is the most abominable with Allah." (4) Even when a man is not satisfied with his wife, the Holy Qur'an enjoins forbearance. It says, "And retain them (the wives) kindly. Then if you hate them, it may be that you dislike a thing while Allah has put abundant good in it." (5)

If it is established that a husband and wife cannot live together in peace and harmony, they are given the option

to separate. Divorce is also permitted when the wife's conduct is undesirable as when she does injury to her husband or is not chaste. This rule is based on a Qur'anic text wherein the husbands has been enjoined "to keep the wives with kindness". (6) Thus it is laid down in the Qur'an, "And if you fear a breach between the two (husband and wife), then appoint an arbiter from his (husband's) people and an arbiter from her (wife's) people. If they desire agreement, Allah will effect harmony between them". (7) Judicial separation in which the aggrieved spouse is allowed to live separate from the other without the marriage being dissolved is an institution not recognized by the Islamic Law. The reason for this is that the objects of marriage are not restored by the judicial separation, while it may be result in immorality which in Islam is an evil far greater than divorce. The Islamic law, while it permits divorce, insists that there shall be some guarantee that the husband or the wife is not acting from caprice or frivolity or on the impulse of a momentary provocation. For this purpose certain restriction are imposed by the law upon the spouses right to dissolve their marriage.

In the second chapter grounds of divorce in both the religions is discussed at length (in details). It is under this chapter that the grounds for divorce have been

(6) Qur'an, II:231.  (7) Qur'an, IV:35.
discussed and compared with Islamic law. Hindu Law of divorce is by no means identical with Islamic law which is resorted to for the sake of clarification of legal terms. In interpreting the concept of desertion, cruelty and other matrimonial faults Indian courts frequently look at the English case-law in order to find out how English judges have construed the same words. Consequently English decisions seem to have a strong persuasive authority in this respect. Where there are no judicial precedents, not only English decisions but also Indian decisions under different statutes, e.g., the Indian Divorce Act, 1969 and Special Marriage Act, 1954, are referred to if they throw light on a similar point. This is obvious from a study of case-law.

"Living in adultery" is a ground for divorce under S.13,(I)(i) of the Hindu Marriage Act, 1955. Here this term has a wider meaning than in S.297 of the Indian Penal Code and S. 488 of the Criminal Procedure Code. Modern Hindu law gives a right of divorce on the ground of "living in adultery", while a single act of sexual intercourse with a person other than his or her spouse entitles the innocent party to a decree of judicial separation. It is interesting to compare this with the situation at Hindu Shastric Law and see what amounted to adultery in these days.

The grounds for divorce, as I have discussed, are
based on the doctrine of matrimonial offence, namely, the commission by one spouse (the guilty) of a matrimonial offence on which the other (the innocent spouse) petitions for relief by way of dissolution of marriage. The relief may be refused if the petitioner is not so innocent, as for instance, where he has committed adultery or other matrimonial affence and the court's discretion is not exercised in his favour.

Under Islamic law, if the family peace is disturbed which is not returnable then husband can give divorce unilaterally or the wife can take divorce. The other grounds of divorce are, (1) when any one of the spouses renounces Islam (2) if the wife embraces Islam. If the husband embraces Islam and his wife, belongs to a non-scriptural refuses to embrace. In such cases divorce is spontaneous. All this grounds of divorce are analysed in great large in this chapter.

While in the third chapter various modes of divorce, ways of dissolution of marriage (For Hindu & Muslim) are dealt with. Various modes of divorce under Islamic law are very clear and it can be taken directly from Hadith and Qur'an. Specially the details description can be obtain in different books of Fiqh by deferent outhers. I have used the various descriptions of Holy Qur'an, Hadith and the books of Fiqh for the deferent circumstances.

As divorce is not allowed in Hindu Shastric law so
there is no question of getting or obtaining any way or mode of divorce in Hindu Shastra. But in judicial law two types of modes or ways are available to take or gives divorce for Hindu. These are the features of this chapter.

Under which conditions or from which time the divorce will come into effects are the matter of discussion of fourth chapter. For the Hindu divorce comes into effect after the judicial court comes to a final decision on the petition filed by any one of the couple and the parties are bound to wait up to the final decision of the court about the divorce. As full descriptions are available in Hadith and in the books of Fiqh so the conditions and the time from which divorce comes into effect are discussed in the light of Islamic law. The various important words of the Holy Qur'an and the Holy Prophet (PBUH.) have been quoted with full explanation.

In fifth chapter I have discussed the modification of the divorce law in Independent India for both the communities the divorce laws for the Hindu have been modified many times from time to time. The details description of this modification, after independence, have been given in this chapter.

Where as the rules and conditions of divorce are available in Islamic books so there were no need of new rules of divorce for the Muslim. It has been taken from
Islamic books without any considerable change. And hence there was no need of further modification. It was 1939 when the divorce laws for Muslim were described in a little different manner, without any change in original laws.

In sixth chapter a qualitative comparison and the points of the similarities and dissimilarities of divorce laws for both the Hindu and the Muslim, in respect of grounds, Modes, effects, etc, have been discussed.