CHAPTER-I

UNIT-A

Divorce according to the leading Hindu Sources Books – Vedas Shastras Manu Shastras Yajnavalkya etc and Government Acts (Hindi court Bill) and various Schools.

1. The Nature of Hindu Marriage:– In Hindu law, that is to say, in the dharma Shastras or 'orthodox' Juridical theory of India, marriage (Vivaha) is one of the ten samkaras necessary for men of the twice born classes and the only Vedic sacrament for women. (1) As in canon law and moral theology matriminum is treated under sacraments, so in Hindu law vivaha is not treated under vyavahara (litigation) but under samskara. A samskara is a sacrament or a purificatory act. Marriage is considered sacred because it is said to be complete only on the performance of the sacred rites attended with sacred procedure. This samskara gives rise to the status of wifehood and its performance cannot be annulled by the fact that the husband or wife lapses from virtues i.e. by committing adultery. (2) It is almost impossible to define marriage in legal terms but the Shastric concept of marriage would seem to be as a union between a man and a woman which arises at the time when the ceremony of marriage (i.e.) (samskara) has been completed, the bridegroom having the requisite qualifications for taking a girl in marriage and the bride the qualifications for being given in marriage, and this procedure having been completed before the nuptial fire. (3) Marriage is a sacramental rite, which is performed for the girl for the purpose of making
her a wife and is marked by the holding of hands along with its entire procedure and subsidiary details. (4) It gives the status of husband and wife to the married couple. The mantras used in ceremony of wedding create a wife. The sacrament becomes complete by the use of those mantras. As regards the marriage of a Sudra, there are no mantras but other rites apply excluding the mantras. (5)

2. The Purpose of the Samskaras:— The exact purpose of Samskaras was left rather vague in our authorities. A critical look at the list of Samskaras will reveal that their purposes were manifold. According to ancient Hindu religious belief man was surrounded by superhuman influences which were powerful for good or evil consequences. These influences could interfere in every important occasion in man's life. Therefore, the Hindus tried to remove hostile influences and attract beneficial ones, so that man might grow and prosper without external hindrances and receive timely directions and help from gods and spirits. Another purpose of the Samskaras was the attainment of heaven. It had also a psychological value, impressing on the mind of the person concerned that he had assumed a new role and must strive to observe its rules. (6)

The Vivaha-Samskara consists essentially in an acceptance, which produces the mental impression that the girl is man's wife, and wifehood arises from her having undergone the Samskara, which Samskar itself could not occur but for the marriage. (7)
During the samskara of marriage a bride groom is said to be an active receiver of the bride, who is taken by him and given by her father or other guardian. From the Shastric point of view the religious aspect of marriage was so highly rated that a father was supposed to be under a sacred duty to give his daughter in marriage at the appropriate age, neglect of which duty was regarded as a sin.(8) A critical look at the concept of Hindu Shastric marriage will show that it has underwent changes from time to time.

3. Marriage in the Vedic Period:— It was a simple religious ceremony consisting of grasping the hand of the bride by the bridegroom. The Rigveda enjoins, "I take the hand for good fortune, that thou mayest attain old age with me as thy husband; the gods have given thee to me that I may be master of the household."(9)

4. Marriage in the Sutra Period:— The procedure of marriage became complex during the Sutra period. The bridegroom was to lead the bride three times round the nuptial fire, and the ceremony was completed on taking the seven steps by the couple. The wife was shown the pole star, which was symbolic of the fact of her stability in her husband's home.(10)

5. Marriage in the Smriti Period:— During this period we
During this period we notice various forms of marriage, eight of which are briefly dealt with below.

(i) **The Brahma:** The gift of a daughter, after deckimg her with costly garments and honouring her by presents of jewels, to a man learned in the Vedas and of good conduct, whom the father himself invites, is called the Brahma rite. Medhatithi on Manu XXVII comments that there is nothing to indicate the connection of special dressing with either the bride only or with the bridegroom only; hence they should be taken as relating to both. This seems to be the correct view, because in practice even today both the bride and the bridegroom are specially dressed and adorned for the wedding.

(ii) **The Daiva:** This was a gift of a daughter whom her father had beautifully clothed when the sacrifice had already begun, to the officiating priest, who performed that act of religion.

(iii) **The Arsha:** When the father gave away his daughter according to the rule, after receiving from the bridegroom, for the fulfilment of the sacred law, a cow and a bull or two pairs, that marriage was termed the Arsha. On the face of this text it appears that the taking of the consideration from the bridegroom rendered this form inferior to the above two and the Prajapatya below. But this is doubtful, for Medhatithi on Manu III, 29 comments that such receiving of the cattle by the father was done in obedience to law, and not with the idea of receiving it in exchange for the price of the girl.

(iv) **The Prajapatya:** When the father gave away his
daughter with honour saying distinctly, "May both of you perform together your civil and religious duties." Again Medhatithi (14) comments that the formula implies the condition that the daughter is to be given to the bridegroom only if he fulfills his duty, properly and pleasure along with her. Therefore, this form was regarded as inferior by reason of this condition. Ludwick Sternbach (15) whose study is based on the Dharmasastra, Arthashastra, Kamasutra, Grihya-Sastras, and the Mahabharata, concludes that when the forms of marriage are closely examined there existed in ancient India not eight but eleven forms of marriage. The difference between the Projapaty and the Brahma is that the bridegroom in the former is the suitor, i.e., he has solicited the girl, and is not invited by the father of the bride. He is an applicant for the bride's hand and this makes it inferior to the Brahma form, where the bridegroom is voluntarily and respectfully invited by the father of the bride to accept his daughter. A Hindu marriage, being a gift of the bride, loses a part of its merit if it is not voluntary or wilful, but has to be applied for. The Prajapaty was probably used only for a monogamic and husband could not renounce his wife and take to the order of Sanayasa or Vanaprastha without her consent or her company. In fact the Brahma was originally identical with the Prajapaty, because Apastamba and Vasishtha do not mention Prajapaty at all. The Prajapaty was added later, therefore, the
Smriti writers fail to bring out the difference between the two.(16) Prajapatya is the second best and approved form.(17) As in the Brahma form so in the Prajapatya one the bridegroom is invited and honourably received by the father of the bride.(18)

(v) **The Asura:** The bridegroom having given as much wealth as he could afford to the father, Paternal Kinsman and to the girl herself took her as his bride. This being a sale of the bride was regarded as a base form of marriage and was prohibited by Manu.(19) This form was recognised by the Hindu law during the British period. In Kailasanatha V. Parasakthi.(20) It was hold that the distinctive feature of the Asura form of marriage is the giving of or money's worth to the bride's father for his benefit or as consideration for his giving the girl in marriage. However, a courtesy or complimentary present given to the bride or her family has to be distinguished from bride-price.(21) Money paid by the bridegroom for the specific purpose of making jewellery for the bride is not bride-price and does not make the marriage an Asura one.(22) Now after India Independence the whole situation was reviewed by the Supreme Court,(23) which held that the Asura is an unapproved form of marriage and the test of it is that there shall be not only benefit to the bride's father, but that benefit shall form a consideration for the sale of the bride.

(vi) **The Gandharva:** This was a marriage arising out of
mutual desire of a man and a woman, and can be compared with the modern love marriage. It was enjoined by the Sastra that a Brahmana could contract a marriage legitimately in one of the first four forms. However, in practice at least according to the Mithila School of law the Brahmins. In Bhaoni V. Maharaj the Gandharva was equated with concubinage. It was held that this form had become obsolete as a form of marriage giving the status of wife and making the issue legitimate. This case is unlikely to be followed in view of the Hindu Marriage Act, 1955 and changing public opinion, which tends to encourage grown up persons to make their own decision in the choice of their life partners.

(vii) The Rakshasa: This was a marriage by seizure of a girl by force from her house while she wept and called for assistance, after her kinsmen and friends had been slain in battle or wounded and their house broken open.

(viii) The Paisacha: Where the suitor secretly reduced the girl while she was asleep or drunk or disordered in intellect that sinful marriage was called Paisacha. This is the eight and the basest.

The first four marriages are regarded as "approved" marriages. It was a Hindu religious belief that sons born of these marriages were radiant with knowledge of the Vedas and were honoured by good men. Having these qualities of beauty and goodness, possessing wealth and
fame, obtaining as many enjoyments as they desire and being most righteous, they would live a hundred years. The remaining four are regarded as blameworthy, from which spring sons who are cruel and liars, who hate the Vedas and the sacred law. (27) Rakshasa and Paisacha, which were condemned by Manu as base and sinful, (28) however did not legalise force or fraud as the marriage ceremony had in theory to be performed with sacred rites, (29) without which the marital relationship did not arise. Their recognition can be justified on the ground that they existed in order to validate the circumstances of which the unfortunate woman was the victim. The jurists were concerned with the results flowing from the circumstances preceding the marriage and classified those circumstances accordingly.

According to the sastra inferior forms of marriage, namely, Asura, Gandharva, Rakshasa and Paisacha do not involve a change of the gotra of the bride, (30) which is an essential part of the ceremony of the Vedic marriage, because in such forms there is no voluntary gift of the bride by her father to the bridegroom. Approved forms were meant for Brahmans (31) who were an important caste. According to Manu the first six forms of marriage were lawful for a Brahmana, the four last for a Kshatriya, and the same four, excepting the Rakshasa, for a Vaisya and a Sudra. (32) The significance of the approved and
unapproved forms of marriage was that it determined the devolution of a woman's property on her death. In the former the husband and his family, while in the latter the father and his family succeed to her Stridhana. Where a woman was married in the unapproved forms, her death ceremonies were to be performed by a member of the gotra of her father, whereas in case of the approved marriage, they might be performed either by her husband's gotra or her father's. The reason for this distinction seems to be that approved marriages were authorised by the families of the couple concerned, while the unapproved were contracted against the wish of family of the woman concerned, if we reserve the case of the Asura marriage, which originally did not imply a sacramental transfer but only a sale-spiritually (so the sastra seems to imply) she remained a member of her natal gotra. That is why she retained the gotra of her father.

If we look critically at the above mentioned eight forms of marriage, it will be evident that they were a mere elaboration of the concept of marriage (vivaha). They took account of local custom and usage, which were developing alongside the sastra. A survey of the Dharma-Sastra smritis, Nibandhas and the Commentaries will prove that Hindu law was never static, but was modified by the practice of the time to suit the just demands of the people. With the advent of the British
rule, the ancient sources of Hindu law began to be modified by judicial decisions and legislative enactments, while Hindu society assumed a new character because of its contact with the Western education, civilisation, economic and scientific progress. In fact the Hindu Marriage Act, 1955 is the result of the influence which had started in the British period. Thus the dharma-sastra's contact with actual usage, though sometimes difficult to trace, has been, in practice, continuous.

According to Kautilya, whose Arthasastra (a predominantly secular book), reflects practical usages, there can be no divorce in case the marriage is contracted in one of the approved forms. But if the marriage is in an unapproved form, then it can be dissolved by mutual consent, if both have come to hate each other. There can be no release at the instance of only one party to the marriage who has begun to feel aversion to the other party in whatever form the marriage may have been performed. Kautilya actually says amokso dharma-vivahnan "The law does not allow the dissolution of marriage between spouses who have undergone a dharmic vivaha." The first four marriages are dharmya, i.e., connected with righteousness, because they are brought about under the authority of the father. Such marriages do not admit divorce.
6. **Nuptial Ceremonies**: According to the plain smriti texts marriages in the unapproved forms do not require the performance of the religious ceremony, but the sastric law as applied by the courts during the British period in India held that such ceremony was essential for the validity of the marriage.\(^{(37)}\) This is so even in modern Hindu Law. It was held in Deivani V. Chidambaram\(^{(38)}\) that there are two essential elements to constitute a valid marriage, viz.; a secular element, which is the gift of the bride in the four forms, the transference of dominion for consideration in the Asura form, and mutual consent of the spouses in the Gandharva form. These must be supplemented by the actual performance of marriage by going through the forms prescribed by the Grihya-Sutras, of which the essential elements are 'panigrahana' (joining of hands of the bride and the bridegrooms) and 'saptapadi' (taking of seven steps by the bridal couple). In the case of Rakshasa and Paisacha forms also (should these be capable of validity in modern times), there should be a marriage ceremony prescribed by the sastras. In Bhaurao V. State of Maharashtra\(^{(39)}\) it was laid down that solemnisation of the marriage with proper rites and ceremonies was essential in the Gandharva 'form'. Similarly it was recently held by the Supreme Court\(^{(40)}\) in a case of bigamy that in order to prove the validity of the second marriage it is necessary to prove that the essential nuptial ceremonies were performed.

The performance of rites and ceremonies according
to religious beliefs (e.g., saptapadi) or according to custom and usage has been reserved by the Hindu Marriage Act. 1955. The modern law has been developed in such a way as to show that the ceremony though vital to the religious purpose is no longer vital to the working of secular rights. Thus where a man and woman live as husband and wife and have children who are recognised as such by their community by the custom the rights of the spouses and their children will not be destroyed merely by someone's attempting to bring forth evidence that no ceremonies of marriage were performed on the couple.

Whether or not such ceremonies are essential, their non-performance or wrong performance can be excused under certain circumstances by the doctrine of factum valet, e.g., where the saptapadi (taking of seven steps) is not completed because of an accidental fire or some other mishaps, the validity of such a marriage cannot be upset subsequently. Where a marriage takes place under a custom according to which saptapadi is not an essential ceremony, the non-performance of saptapadi does not invalidate the marriage. In considering the validity of a marriage it is necessary to distinguish between the essentials and non-essentials of the custom. The presumption that a valid marriage took place can be raised where it is established that the marriage was duly solemnised but some unessential ceremony was not performed.
or there was some defect in the completion of the rite. (44) Thus the sacramental and sastric characteristic of the Hindu marriage so far as the performance of the religious ceremonies is concerned is still in existence.

According to the sastric view the spiritual aspect of marriage was so important that the husband was said to have received his wife from the gods and not wedded her according to his own will, for he was doing what was agreeable to gods. (45) The consequence of marriage was that man and woman became one person, as the Veda expresses, "Her bones become identified with his bones, flesh with flesh, skin with skin." (46) From the time of the marriage, they are united in body and mind as well as in religious ceremonies. (47) As a river loses its identity by merging itself into the ocean, so a wife was supposed to merge her individuality with that of her husband. In the revealed texts of the Veda, in the traditional laws of the Smritis, and in the popular usage, the wife is declared to be half the body of her husband, equally sharing the outcome of good and evil act. (48) So a Hindu marriage was a sacred union of two personalities into one for the purpose of the continuance of the society and for the uplistment the two by self-restraint, self-sacrifice and mutual co-operation for the performance of holy rites. (49) This is the central concept of Hindu ethics and law.
7. **The Object Of Marriage:** It was threefold, namely dharma (the performance of religious and righteous duties), praja (progeny) and rati (pleasure). Where the Hindu lawgivers regarded dharma as the first and the highest aim of marriage, and procreation as the second, dharma, according to the sastra, dominated marriage. Marriage was a means not merely for satisfying sexual desire or to obtain progeny, but to secure a partner for the performance of religious duties. It enabled a man, by becoming a householder to perform religious sacrifices to the gods and to procreate sons. It was the duty of the husband to require and the right of the wife to give co-operation in all religious acts. Manu on the authority of the Veda declares that religious rites must be performed by the husband and wife together. Women were not allowed to perform any sacrifice, vow or fast apart from their husbands. They could obtain heaven merely by being obedient to their husbands.

It was a Hindu belief that a Hindu from his birth is born with three debts, i.e., he owes brahmacarya (study of the Vedas) to the sages, sacrifice to the gods, and progeny to pitris (ancestors). The second purpose of the marriage was to procreate sons, who were supposed to save a man from hell. A son is called putra because he delivers his father from the hell called put. So much importance was attached to the birth of a son that a man
was said to have conquered the spiritual worlds and obtained immortality and heaven by having a son.  

Immediately upon the birth of his first-born son a man was freed from his debt to the ancestors. Legitimate progeny being the objective, marriage was a religious necessity.

The purpose of the marriage is further evidenced by the procedure of the marriage ceremony, when the bridegroom addresses the bride as, "I am heaven you are earth, Come! Let us join together so that we may generate a male child, a son, for the sake of the increase of wealth, a blessed offspring of strength." Marriage enabled a man to make himself complete by the association of his wife and his son. His sacred obligations, i.e., the proper performance of his religious duties, faithful service to gods, his offspring, highest conjugal happiness, heavenly bliss for himself and his ancestors, depended on his wife alone, as he was incompetent to perform the above mentioned acts without the help and presence of the latter.

8. The Dissolution of Hindu Sastric Marriage:— It has been seen that a Hindu marriage, being a sacrament, once performed before the nuptial fire with the sacred texts, becomes irrevocable on the completion of the ceremony of taking seven steps by the couple. There is no evidence as to the practice of divorce as such during the Vedic and
Post Vedic periods. It was a holy union of mind, body and soul of the spouses and, it was believed, that even death did not put an end to it, for the wife remained linked with her husband in soul after death in the next world. It was the highest duty of husband and wife to remain united in marriage and be utterly faithful to each other. It was ordained by the Creator that a husband could not release his wife by sale or repudiation. The wife was required to be obedient to her husband under all circumstances. She was expected to worship him as God even if he was lacking in good qualities and virtue.

According to Apastamba if the solemn vow of marriage is transgressed both husband and wife certainly go to hell. Hindu marriage was regarded as an eternal and sacred bond which united the husband and wife for the performance of their religious sacrifices. Dissolution of marriage was thus not contemplated by the sastra, for it was un-dharmic, unrighteous and sinful.

9. Remarriage of Females:– It has been seen that the sastra did not countenance divorce. From this the question arises whether the remarriage of females was allowed? The procedure of performing sastric nuptials was available only for virgins, and never for girls who had lost their virginity. A girl was fit for being given in marriage only once as Manu has said, "Once is a maiden given in marriage and once does a man say, 'I will give', this is
done only once.\(^{(67)}\) The bride is free to be transferred from the father's house to that of the husband; but she is not allowed to leave her husband's home and go elsewhere, i.e., take another husband. This is supported by a hymn of the Atharvaveda, which reads, "Hence from the father's house, and not thence from the husband's house, I send the bride free. I make her softly fettered there so that she may live with her husband blessed in fortune and offspring."\(^{(68)}\) This shows that no separation was allowed between husband and wife.

According to the sastra a woman was expected to lead a life of chastity and self-denial and was not to mention even the name of another man after the death of her husband.\(^{(69)}\) She who remains virtuous and chaste after the death of her husband reaches heaven, although she may have no son.\(^{(70)}\) On the contrary a woman who from a desire to have offspring violates her sacred duty towards her deceased husband, brings on herself disgrace in this world and loses her place in heaven.\(^{(71)}\) "Nowhere is a second husband prescribed for a virtuous woman."\(^{(72)}\) Thus the non-existence of nuptial ceremonies for a second marriage and the prohibition of remarriage of women are evidence against the recognition of divorce in the matrimonial system known to the sastra.

However, Narada, Parasara and Vasishtha authorise a woman to take another husband in five cases, i.e., when
her husband is lost or dead, when he becomes a religious ascetic, when he is impotent and when he has been expelled from caste. A wife must wait for six years if her husband had disappeared, twelve years if he went to a foreign country for the purpose of studying. If he was heard of she should go to him. According to Narada if the husband had gone abroad a Brahmana wife should wait for eight years, or four years if she had no issue. A lesser number of years was prescribed for Kshatriya and Vaisya wives. After that period she was entitled to take another husband. Manu says that if the husband went abroad for sacred duty, the wife should wait for eight years, six years if he went for knowledge and fame, and three years if he went for pleasure or for another wife. He does not mention what the wife should do after these years of waiting, but remarriage is obviously envisaged in such a case.

Narayana, Kulluka and Raghava following Vasishtha say that she should go to see her husband in the place where he might be expected to be present. But Nandana and Devala are of the opinion that she could take another husband and in doing so there would be no sin at all. It is argued on the authority of these texts that the second marriage of the wife presupposes the dissolution of the first. It is also contended on the authority of the Atharva-Veda IX. 5, 27-28, that a widow could remarry
on performing the 'Aja Panchoudana' sacrifice. A second husband dwells in the same world with his re-wedded wife if she offers the 'Aja Panchoudana' to the memory of her deceased husband. This argument is supported by the funeral hymn in the Rig-Veda X. 18. 8, which reads, "Rise woman, thou art lying by the side of one whose life is gone; come to the world of the living away from him, thy husband that is dead, and become the wife again of him who is willing to take thee by the hand and marry thee."(80)

However, this view did not find favour with Sir Gooroodas Banerjee,(81) who explained these texts on the ground that these rules either, like the practice of raising up issue by a kinsman on an appointed wife, relate to an earlier stage of Hindu society in which rapid multiplication of the race was regarded as an important object, or they merely show the existence of some difference of opinion among the Hindu sages on a point on which absolute unanimity of opinion can hardly be expected. The prevailing sentiment of Hindu society has always been repugnant to the second marriage of women. The true explanation seems to lie rather in the need of the sastra to recognise utilitarian practices. This is evident from the Arthasastra of Kautilya, whose provisions reflect customary law and usage. Kautilya(82) allows a woman to remarry under certain circumstances, e.g., where her husband had gone away on a long journey, or had become an
ascetic or was dead. She was expected to wait for certain periods of time depending upon whether she had children and was maintained by her husband's family. Remarriage of women in such cases could be attributed to custom and usage which were developing alongside the sastra. The texts authorising or presumed to be authorising a woman to take a second husband may alternatively be construed as cases of presumption of death-actual death and civil death-and could be seen by the orthodox as only apparent breaches of the sastric pattern of the indissolubility of marriage.

According to the commentaries and digests the above mentioned texts do not apply to the present (Kali)\(^{(83)}\) age. The human race having degenerated from its original virtue and purity, the sages of Hindu law, for the benefit of human race declared that the remarriage of widows in the 'Kali' age is forbidden. A.S. Altekar\(^{(84)}\) on the authority of the Adityapurana, Devanabhatta and Madhava, the commentator on parasara, admits that widow-remarriage is no longer valid in the 'Kali' age. Widow-remarriage in the present age was so much disapproved of that an extended meaning was given to the word 'widow' so as to include the betrothed girl whose prospective husband had died before the performance of the marriage ritual. If by mistake a man happened to marry such a girl, he was to perform a penance and abandon her.
However, this practice did not find much approval in a society which continued to be guided by Manu's sensible opinion that no marital tie arises before the marriage ceremony is performed.

The stigma attached to the twice-married woman proves that widow-remarriage was not prevalent in orthodox Hindu society to which especially the sastra applied. She was called a punarbhu, who might be of three kinds, namely a 'widow' whose marriage had not been consumated, one who after having left the husband of her youth and betaken herself to another, returns to the house of her former husband, and the woman, who on failure of brothers-in-law, is delivered by her relations to a sapinda (blood-relative) of the same caste. (85)

The Punarbhu was regarded as an inferior wife, (86) but her issue were legitimate, (87) though according to the quality of her marriage they occupied an inferior status, (88) as her son (paunarbhava) did not inherit his father's property as an heir but as a Kinsman. (89) He was not fit for being invited to a sradha (90) (a feast given to the Brahmans in the memory one's ancestors). The husbands of remarried women were not to be associated with nor to be invited to the sraddha. (91) The daughters of the Punarbhus were to be avoided and regarded as girls of the lowest birth. (92) They were treated as equal to the "mothers of Sudras."
(The mothers of Sudras were fourth-caste wives of a Brahmana, wedded for lust, and of low social status). The children of these women were not admitted to social meetings; they were considered as unfit for society. Apastamba enumerates the twice-married woman among those who are unfit for being taken in marriage. He condemns remarriage of females altogether when he says, "If one has intercourse with a woman who had already another husband, then sin is incurred; in that case the son also sinful."

According to Vatsyayana who harmonises Kama with dharma so that they may not clash in any way, there was no regular marriage for a widow, but if a woman who had lost her husband was of weak character and was unable to restrain her desires, she might unite herself to a man, who was a seeker after pleasure and was an excellent lover, and such a woman was called punarbhu. In the choice of such a lover it was best for her to follow the natural inclinations of her own heart. However, the connection with her was of a loose character. She was more independent than the wife wedded according to sacramental rites. She assumed the place of a mistress, patronised his wives, was generous to his servants and treated his friends with familiarity. She was expected to show greater knowledge of the arts than his wedded wives and to please the lover with the sixtyfour arts of love (kamakalas). She
participated in sports, festivities, drinking parties, garden picnics and other amusements. Vatsyayana says that it was improper to establish sexual relations with the punarbhu, but such an act was not absolutely condemned, because pleasure was the guiding motive in all such connection. Thus the position of the punarbhu was quite distinct from that of the wedded wife who participated with her husband in all religious performances and had to live with decency. The inferior position accorded to the punarbhu, the imposition of social penalties upon her children, and sometimes upon her husband are evidence against the approval of widow-remarriage by orthodox Hindu society.

Divorce, in the sense of dissolution of marriage whereby the status of husband and wife ceases to exist as such, marital rights and duties are severed by law and the spouses are free to remarry, was not recognised at Hindu law by the sastra. This is also supported by a hymn of the Atharva-Veda, which reads, "Be not divided, O husband and wife; live together all your lives, sporting with sons and grandsons, rejoicing in your happy home." According to Vatsyayana even the Gandharva marriage (an approved form) when solemnised before the holy fire could not be dissolved. He treated this form of marriage as the best. In this respect he seems to be more humanitarian than religious. By marriage a girl normally
became integrated into her husband's family. She formed part of the household, which consisted of his parents, brothers, unmarried sisters and sisters-in-law together with their children, all of whom enjoy commensality and worship jointly. Whether or not her marital relationship with her husband was happy, she could not be uprooted from the family by abandonment or supersession. Therefore, there was no divorce acknowledged by the dharmasastra.

However, a husband could abandon or supersede his wife under certain circumstances (see later the distinction between abandonment and supersession). Such an abandonment had to be just and reasonable otherwise a very humiliating punishment is prescribed for such an act by Apastamba (99) who says, "He who has unjustly forsaken his wife shall put on an ass's skin skin with hair turned outside, and beg in seven houses saying, 'Give alms to him who forsook his wife.' That shall be his livelihood for 6 months." Similarly if a wife forsook her husband she had to perform a hard penance for twelve night. According to Manu (100) a wife is punished for her sin of disloyalty to her husband in her next life by being born in the womb of a jackal and tormented by disease. Narada (101) enjoins that if a man leaves a wife who is obedient, of pleasant speech, skilful, virtuous and the mother of male issue, the king shall make him mindful of his duty by severe punishment. A person who leaves a blameless wife should be punished as a
thief. Vasishtha makes a sweeping remark when he states that though tainted by sin, whether she be quarrelsome, or left the house or has suffered criminal force or has fallen into the hands of thieves, a wife cannot be abandoned.

She should be abandoned, however, if she yields herself to her husband's pupil, or to his teacher, or a man of degraded caste or attempts to kill her husband. This shows that even unjust abandonment was not allowed by Hindu law, let alone the dissolution of marriage. Steele as a result of his enquiries in the early British period understood 'abandonment' in the above case as equal to divorce, but it is submitted that this was incorrect. 'Abandonment' could be treated as relating to the worldly and/or the spiritual purposes of marriage. The former would be frustrated, where a wife was addicted to drink, was of bad conduct, was diseased, insane, guilty of adultery, had attempted to kill her husband or committed other heinous crime including procuring abortion. The latter purpose of the marriage would be frustrated, if she was barren, bore daughters only and had reached the menopause. Therefore, the husband would be justified in ceasing to cohabit with such a wife, but this 'abandonment' never had the effect of divorce.

10. The Distinction Between Abandonment and Supersession:

Since it might be apprehended that the right to
abandon was tantamount to a right to divorce even under sastric law, the vocabulary needs to be examined. The Sanskrit word used for 'abandonment' is tyaga. Medhatithi defines tyaga as giving up all intercourse with her and forbidding her to do household work. He says that for the wife going off in anger, caused by supersession, there are two optional alternatives in the shape of confinement or divorce. Here Jha's translation needs to be checked. Medhatithi in fact says tyaga or samnirodha, abandonment or confinement in that order are alternatives. Tyaga denotes separation from conjugal intercourse as opposed to Moksa, which might be technical divorce. It is not clear whether after being abandoned by her husband, a wife was free to marry again. Therefore, the word 'tyaga' can denote several things. It implies supersession, e.g., where the husband abandoned an obedient, pleasant speaking, sonbearing and skilful wife. It may imply a divorcium a mensa et-thara, where the wife became pregnant by another, or attempted to kill her husband, or committed heinous crime. In such cases she was abandoned from marital intercourse and religious ceremonies. It may mean temporary separation, where a wife was abandoned for three months for the purpose of reforming her. But abandonment in any case did not amount to dissolution of marriage whereby the status of the husband and wife ceased to exist as such and the marriage-tie was severed at law. Some coincidence with
Christian teaching on divorce is visible here, but the point is not appropriate for further exploration here.

Manu says, "But she who shows aversion towards a mad man or an outcaste, a eunuch, one destitute of manly strength or one afflicted with such diseases as punish crimes, shall neither be cast off nor deprived of her property." (113) G. Banerjee on the authority of Kulluka and Jagannatha (114) rightly states that what Manu excuses here is 'aversion', which means want of diligent attention, and not absolute abandonment. (115) Thus the text does not authorise even abandonment. This is supported by a popular verse which says that a husband could not release his wife by sale or repudiation. (116)

The object of 'abandonment' was to punish the wife for her misdeeds, e.g., a wife who had committed adultery was required to wear clothes smeared with clarified butter, and was to sleep on a mat of grass, or in a pit filled with cowdung; until her penance had been performed. (117) The 'abandonment' consists in not allowing her to participate in religious rites and conjugal matters, not casting her away onto the streets. She was to be kept apart in one room and provided with food and raiments. She was to wear dirty clothes and was treated with scorn. But after her periodical illness the sin was expiated and she was to be restored to her original position with her usual rights of a wife. (118) Similarly a
wife who was disrespectful to her husband; was addicted to some evil passion; was a drunkard or diseased should be abandoned for three months after depriving her of her ornaments and furniture. (119) The object of this temporary punishment was to correct the wife and bring her to the right way. A husband should bear for one year with a wife who hated him. After that he should deprive her of her property and cease to cohabit with her. (120) Abandonment under the above circumstances is regarded as virtually legal dissolution of marriage. (121) This is not justifiable, for divorce as such did not exist at sastral Hindu law. Abandonment in the above cases is reasonable, because according to Manu, (122) a husband must be constantly worshipped as a god by a virtuous wife. The wife was expected to follow the same principle as her husband. By doing the above mentioned disgraceful acts, she was violating her sacred duty of obedience to her husband and was accordingly punishable.

Supersession (like 'abandonment') could be treated as relating to the worldly and/or the spiritual aspects of marriage. The former would be defeated and the wife would become unfit for the society of her husband, who might supersede her at any time, if she was addicted to spiritual liquor, was of bad conduct, rebellious, diseased, mischievous or wasteful. (123) Manu allows supersession of a barren wife in the eighth year, one all
of whose children die in the tenth year, of her who is quarrelsome without delay. Baudhyana allows supersession of a barren wife in the tenth year of marriage, bearing daughters only in the twelfth year, all of whose children die in the fifteenth year and uttering unpleasant word at once. Kautilya allows supersession if a wife remains barren for eight years, if she bears still-born children for ten years and if she bears only females for twelve years. Then if he is desirous of having sons, he can marry again.

Supersession under the above circumstances is justifiable. As the purpose of the Hindu sastric marriage is to perform religious rites and beget male progeny, if either of the two is frustrated, a man is entitled to take another wife. The above grounds defeat the religious aspect of marriage, because the delivery of the ancestors from hell after the death is considered to be brought about only by the continuation of the line through sons. The supersession had to be just and reasonable, and in the case of a sick wife who was virtuous and kind to her husband her consent had to be obtained. However, in practice husbands could supersede their wives without their consent and even against their wishes merely on the ground that the wife was of a harsh and disagreeable nature. Sometimes she was superseded even if she was virtuous and was the mother of male issue. But in
such a case she continued to occupy her status as a wife, and her marital rights remained unimpaired. She must be maintained properly and be given compensation as Vijananesvara comments, "Though superseded by another wife, she must be treated with courtesy, and receive gifts and respect as before," (131) In fact, she had precedence over her husband's subsequent wife in the performance of religious sacrifices. (132) But if superseded wife goes out of her husband's home in anger, she must either be instantly confined or abandoned in the presence of the family. (133)

Both in abandonment and supersession the wife retained her status of a wife and had to be maintained. In the former she lost her conjugal, religious and household rights unless and until she was restored to her former position after the performance of the appropriate penance. Unjust abandonment was punishable. Prof. Indra (134) on the authority of Daksha Smriti, IV, 45 asserts that the wife even though she be fallen should not be abandoned, and a man violating this principle is born as a woman in his next life and bears the agony of barrenness. Thus according to the sastra a Hindu marriage being a sacrament cannot be dissolved, because the wife is a gift from gods which cannot be revoked by the act of human beings.

11. Divorce Under Custom or Usage:— The position under the sastra has been indicated briefly. How then is it
possible to claim that Hindus in India are familiar with divorce? The answer lies in the field of custom. The sastra itself recognised custom as a source of law. The acts productive of merit which form part of the customs of daily life, as they have been settled by the agreement of those who know the law, have authority.\(^{135}\) The time-honoured institutions of each country, caste and family should be preserved intact.\(^{136}\) The laws of countries, castes and families, which are not opposed to the sacred law, have also authority.\(^{137}\) The Veda, the sacred tradition, the customs of virtuous men, and one's own pleasure are means of defining the sacred law.\(^{138}\) When it is impossible to act up to the precepts of sacred law, it becomes necessary to adopt a method founded on reasoning, because custom decides everything and overrules the sacred law.\(^{139}\) Customs prevalent in a country must be acknowledged as authoritative.\(^{140}\) There is evidence that the smritis themselves represented the existing practices.\(^{141}\) Thus custom is transcendent law according to the sages so far as it is consistent with the sastric principles. The Vedas, the smritis and the practices of good men are the sources of law.\(^{142}\).

The right of dissolution of marriage recognised by custom has been preserved by S. 29 (2) of the Hindu Marriage Act, 1955\(^{143}\) The writers belonging to high castes attribute this to the low cultural level and high
degree of illiteracy of tribes rendering the enforcement of the provisions of the Act both inexpedient and difficult. (144) According to O' Malley (145) divorce is opposed to the saramental idea of marriage, but is permitted by many law castes, on such grounds as the unchastity of the wife or be failure to bear sons. Even among them, however, it is regarded as a concession to a husband rather than as a right. Divorce or deviations from the ordinary Hindu law are to be found only among the aboriginal tribes and the lower classes of Aryans; they are to be met with among the higher castes of Aryans only where (as in Southern India) they are surrounded by non-Aryans or have been influenced by non-Hindu communities (146) However, this view popular to higher caste written is not correct for divorce is known in communities which are not necessarily low, e.g., in the states of Maharashtra and some parts of the Punjab. (147) Divorce is practised custom even by Brahmins.

Widows can validly remarry under the custom of 'Karewa' or 'Darewa'. The most usual form of 'Darewa' is when a widow marries the brother of her deceased husband. (148) The origin of this custom can be traced from the time of the RigVeda. (149) The second marriage is contracted under the form known as Chaddar Andazi. (150) The fact, that dissolution of marriage and remarriage of females are recognised by customary law, is no evidence
that people governed by such customs are of low culture or of low morality. On the contrary it rather militates against it, for public morality is better served by a good system of divorce than by ineffective orthodoxy. Moreover, the courts do not recognise a custom which is contrary to reason, morality and public policy.

Among the Khasas in the Himalaya districts of Uttar Pradesh, marriage is not a sacrament, but a secular transaction. The main features are the transfer of dominion over the woman for consideration and her actual or constructive appropriation as a wife. No stigma is attached to divorce and widow-remarriage. Whether a wife divorces her husband for just cause, e.g., leprosy or impotency, apostacy, etc., or without such a cause, the second husband is in all cases required to refund the marriage expenses.\(^{(151)}\) The marriage can also be dissolved by mutual consent of the spouses among the Khasas and the Patwas\(^{(152)}\) of Madhya Pradesh. Widow-remarriage is also frequently practised.\(^{(153)}\)

In the Assam valley, among some agricultura classes, the interchange of pan-leaf constitutes the ceremony of marriage, and tearing of the pan-leaf by the husband and the wife indicated its dissolution.\(^{(154)}\) Second marriage is contracted in the forms of 'Sagai' and 'Shugna' in northern India.\(^{(155)}\) Among the Lingayat of
south Canara the remarriage of a wife deserted (i.e., divorced) by her husband is valid. The remarriage is called Serai Udiki. The ceremony consists in tying a toli (necklace) and giving a new cloth to the woman. (156) This could only happen if the original bond of matrimony were severed.

Among the lower castes women can remarry under certain circumstances, e.g., where the husband is impotent or where there are constant quarrels between the spouses, and the husband with the consent of his wife breaks her neck ornament and tears her saree and gives her a chor chitti, i.e. a deed of release. (157) After this the wife is free to contract a second marriage, which is called the Pat in the Maharashtra and Natra in Gujarat. (158)

According to the custom prevailing in Manipur divorce or Khainaba is permissible even amongst the Hindus. There is no condition attached to it, and it can be obtained at the pleasure of either spouse, even on a slight pretext. The remarriage of a divorced woman is also recognised. (159) The caste system is still practised by the orthodox Hindus in India. Particular communities governed in their social relations by their castes recognise the authority of the Panchayats (i.e. important and influential members of the caste) to dissolve the marriage. The proceedings of the Panchayats are informal
and their judgements are not recorded.\textsuperscript{(160)} Therefore, there is lack of material and knowledge on the working of divorce under caste rules. The courts do not recognise the authority of the caste Panchayat to dissolve a marriage without the consent of both parties.\textsuperscript{(161)} However, if such divorce is obtained by custom, its existence has to be proved by the party alleging it.\textsuperscript{(162)}

As it has been shown (above at p.33) S. 29 (2) of the Hindu Marriage Act, 1955 does not disturb the position which a customary divorce occupied before the enactment. For the operation of this section it must be proved as a fact that such customary dissolution of marriage was effected.\textsuperscript{(163)} In Andhra Pradesh in the Shepherd's community, divorce in accordance with custom is prevalent. Where such divorce is obtained it is not necessary for the parties to have again to go before the court under S. 10 or 13 of the Hindu Marriage Act, 1955 and obtain sanction of the court to render the divorce valid.\textsuperscript{(164)}

From all that has been said earlier it must be concluded that divorce as such was not recognised by the sasrta. Marriage being a sacrament once solemnised with the sacred rites before the nuptial fire was irrevocable, and was believed to exist even after the death of the husband. So a widow was not allowed to remarry, and it was not until the passing of the Hindu Widow's Remarriage Act, 1856 that the harshness of this sastric principle was abolished by
legalising the remarriage of widow. It is the most fashionable view of Indian writers belonging to the high castes that dissolution of marriage was actually practised by the aborigines and lower communities of non-Aryans to Hindu culture cannot be calculated with certainty. As we have seen before there has been a mixture of the sastric principles and the practice of the people. This is testified to by the Arthasastra of Kautilaya and other customs. Customary divorce is practised by many communities which are by no means completely tribal or low. such customs have been rightly preserved by the Hindu Marriage Act, 1955, which recognises a utilitarian concept of law.

12. **Legislative Measures:** The Native Converts' Marriage Dissolution Act, 1866 provided an indirect way of divorce for converts to Christianity. Under this Act when one of the spouses adopts Christianity and the other refuses to live with the convert on that ground for a period of six months, the latter may apply to the court or alternatively to dissolve the marriage.

Under the Indian Divorce Act, 1869, the Indian Christians could get divorce on the following grounds. Under Section 10 any husband could petition for divorce on the ground that his wife has, since the solemnisation of the marriage, been guilty of adultery. Similarly a petition could be presented for divorce by a wife on the
ground that her husband has exchanged his Christian religion for that of some other, and had married another woman; or has been guilty of incestuous adultery; or of bigamy with adultery; or of marriage with another woman with adultery; or of rape, sodomy or bestiality; or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa at thoro; or of adultery coupled with desertion, without reasonable excuse for two years or upwards.

The Indian Divorce Act, 1869, applicable to Christians, was also made available to Hindus marrying under the Special Marriage Act, 1872. This was repealed and replaced by the Special Marriage Act, 1954, which provides under S. 27 that either spouse could petition for divorce on the ground that the other has committed adultery; or has been guilty of desertion for three years; or is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code (Act XLV of 1860) provided that divorce shall not be granted on this ground, unless the respondent has prior to the presentation of the petition undergone at least three years imprisonment out of the said period of seven years; or has treated the petitioner with cruelty; or has been incurably of unsound mind for a continuous period of not less than three years; or has for a period of not less than three years immediately preceding the
presentation of the petition, been suffering from venereal disease in a communicable form, the disease not having been contracted from the petitioner; or has not been heard of as being alive for a period of seven years or more; or has not resumed cohabitation for a period of two years or upwards after the passing of a decree for judicial separation against the respondent; or has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; and by the wife on the ground that her husband has been guilty of rape, sodomy, or bestiality. Section 28 provides for divorce by mutual consent.

**Drastic changes were effected in the personal laws of the Hindus by the Hindu Marriage Act 1955.** The introduction of divorce was an innovation for a proportion of Hindus and not all, because by S. 29 (2) of the same Act any right recognised by custom or conferred by any special enactment, such as the Travancore Nayar Act (2 of 1100), to obtain the dissolution of Hindu marriage, whether solemnised before or after the commencement of the Hindu Marriage Act, 1955 has been saved. The motive behind this enactment was to open the way towards a progressive society and to recognise the independence of women. It abolished polygamy and introduced divorce and judicial separation, which are based on the principles borrowed
from the (English) Matrimonial Causes Act 1950 (as modified by the (English) Matrimonial Causes Act, 1965).

Under S. 13 (1) of the Hindu Marriage Act, 1955 divorce is available on the following grounds, namely, that the other spouse is living in adultery; or has ceased to be a Hindu by conversion to another religion; or has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition; or has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or has renounced the world by entering any religious order; or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive; or has not resumed cohabitation for a space of two years or upwards after the passing of a decree for judicial separation against that party; or has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree.

The following additional grounds are provided for a wife petitioner. In the case of any marriage solemnised
before the commencement of this Act, that the husband had
married again before such commencement or that any other
wife of the husband married before such commencement was
alive at the time of the solemnisation of the marriage
provided that in either case the other wife is alive at
the time of the petition; or that the husband has been
guilty of rape, sodomy or bestiality.

The Act is based mainly on the provisions of the
Matrimonial Cause Act, 1950, whereby under Section 1 (1)
either spouse may petition for divorce on the ground that
the other has since the celebration of the marriage
committed adultery; or has deserted the petitioner without
cause for a period of at least three years immediately
preceding the presentation of the petition; or has treated
the petitioner with cruelty; or is incurably of unsound
mind and has been continuously under care and treatment
for a period of at least five years immediately preceding
the presentation of the petition; and by the wife on the
ground that her husband has, since the celebration of the
marriage, been guilty of rape, sodomy or bestiality.

Under Section 14 either spouse can petition for a
decree of judicial separation on the same grounds as are
available for divorce, or on the ground of failure to
comply with a decree for restitution of conjugal rights,
or on any ground on which a decree for divorce a mensa et
thoro might have been pronounced before the Matrimonial
Kenya followed the Indian example by passing the Hindu Marriage and Divorce Ordinance, 1960 for Hindus domiciled there. Under Section 10 (i), either party can petition for divorce on the ground that the respondent has since the celebration of marriage committed adultery; or has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the petition; or has ceased to be a Hindu by reason of conversion to another religion; or has renounced the world by entering a religious order and has remained in such order apart from the world for a period of at least three years immediately preceding the presentation of the petition; or a decree of judicial separation has been in force between the parties for a period of at least two years immediately preceding the presentation of the petition, and the parties have not cohabited since the date of the decree.

A wife can petition on the additional ground that her husband has since the celebration of the marriage, been guilty of rape, sodomy or bestiality; or in the case of a marriage solemnised before the commencement of the ordinance, at the time of the marriage was already
married; or married again before such commencement, the other wife being in either case alive at the date of the presentation of the petition.

Uganda Passed the Hindu Marriage and Divorce Ordinance, 1961. Under Section 9 (2) in addition to the grounds for divorce mentioned in the Divorce Ordinance, Matrimonial Causes, Chapter 112, a petition for divorce may be presented by either party to a marriage on the ground that the respondent has ceased to be a Hindu by reason of conversion to another religion; or has renounced the world by entering a religious order and has remained in such order apart from the world for a period of at least three years immediately preceding the presentation of the petition; and by the wife, in the case of a marriage solemnised before the commencement of this Ordinance, on the ground that her husband at the time of marriage was already married; or married again before the commencement of this Ordinance, the other wife being in either case alive at the date of the presentation of the petition.

The Divorce Ordinance (1904) Section 5 (1) provides that a husband may petition for the dissolution of his marriage on the ground that since the solemnisation thereof his wife has been guilty of adultery. Under Section 5 (2), a wife may petition for the dissolution of her marriage on the ground that since the solemnisation
thereof her husband has changed his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman; or has been guilty of incestuous adultery or of bigamy with adultery; or of marriage with another woman with adultery; or of rape, sodomy, or bestiality; or adultery coupled with cruelty; or adultery coupled with desertion, without reasonable excuse, for two years or upwards.

In 1923 Tanganyika had passed the Marriage, Divorce and Succession (Non Christian Asiatics) Ordinance (Laws of Tanganyika, Cap. 112). This, in brief, gave the High Court jurisdiction to hear and determine all matrimonial suits and suits arising out of marriages which were valid marriages within the Ordinance, and authorised the court to apply the 'law of the religion', in matters of succession, the law of the religion including caste custom in the case of Hindus, and being specifically open to be determined by the court by any means which if thought fit, whether evidence on the subject were legal evidence or not Under Section 8, text books on Hindu law, such as those of Mulla and Mayne, will be used, and the Indian cases upon which they rely. (166)

Kenya Ordinance, 1960 is similar to the (English) Matrimonial Causes Act, 1950 in this, that adultery is a ground for divorce. Both of these differ from the Hindu Marriage Act, 1955, under which 'living in adultery' forms
a ground for divorce, but single act of sexual intercourse by the husband or wife with some one who is not his or her spouse gives the other party a ground for judicial separation. Uganda differs from all of these because in the case of a wife petitioner, adultery has to be incestuous or coupled with bigamy; or coupled with marriage with another woman; or coupled with cruelty, or coupled with desertion without reasonable excuse for two years or upwards in order to provide a ground for divorce. The provision for presumption of death does not appear in the Kenya or Uganda ordinances.

The Keya and Uganda ordinances are more in accord with (English) Matrimonial Causes Act, 1950 than with the Hindu Marriage Act, 1955. This is evident in the provisions and phraseology of the former. Yet the prohibition of second marriage of the husband is common to both the East African ordinances and the Hindu Marriage Act, 1955, and so are the grounds for renunciation of the world and conversion to another religion. However, the provisions for venereal disease and leprosy do not occur in the Kenya or Uganda statutes. The provision of care and treatment for unsoundness of mind does not appear in the Hindu Marriage Act, 1955, because the large number of population makes it impracticable that such mental patients are properly looked after in the mental hospitals. Here poverty is one of the causes. But care and
treatment is provided for both in the (English) Matrimonial Causes Act, 1950 and the Kenya Ordinance, 1960, S. 10 (2). Failure to resume cohabitation for a period of two years or upwards after a decree of judicial separation has been granted does not appear as a ground for divorce under the Uganda Ordinance. The Kenya and Uganda Ordinances differ from each other as they do from the Hindu Marriage Act, 1955 and the (English) Matrimonial Causes Act, 1950.

Though the provisions of the English and Hindu statutes have been adopted by the Kenya and Uganda ordinances, the result of the application may not be the same in every case, e.g., the economic, social, educational and cultural outlook of the Hindus in East Africa is different from those in India and from the English. However, the concept of divorce was unfamiliar to the Hindus there as it was in India and was first introduced by the legislature and divorce laws were enacted on the western notion of marriage and divorce. This is claimed by many vocal critics to have destroyed the purely sacramental nature of the Hindu marriage and has turned it into a civil contract, which like any other contract can be terminated by the parties on the prescribed grounds. This is a superficial view. Society has its own notions of what marriage is. Conventionally
these are contained within the juridical concept of "Sacrament". It may be more true to say that remedies have been provided for those to whom their sacrament is no longer meaningful.
CHAPTER-I

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UNIT-A


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(158) Rahi V. Govind (1876) I Bom. 97; J.S. Siromani, Commentary on the Hindu Law, Calcutta, 1885, p. 83. (It seems that Natra is capable of being confused with concubinage. See Laxmansingh V. Kesharbai, A.I.R. 1966 Madh. Pr. 166 at p. 169).


(165) Laws of Uganda, Cap. 112.

A Muslim marriage, unlike marriages 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 Muslim marriage is not a mere civil contract. Great importance has been given to marriage by Islam and al-Durr-ul-Mukhtar, Al-Ashbah wan Nazair and Hedayah and other books have called in on act of devotion. The former has stated it to be incumbent on a person whose passion is ungovernable. The Holy Prophet (peace be on him) has said, "Marriage is my Sunnah", But in spite of the above point it is ot to be considered a sacred and indissoluble tie and al-Durr-ul-Mukhtar goes so far as to state that when there is any fear of injustice, marriage becomes abominable. Similarly it is stated in Tahtavi that marriage when injustice is certain is unlawful. A sacrament can not be violated but Muslim Law unquestionably allows divorce. On the other hand there is no virtue attached to a civil Contract but marriage in Islam is considered a virtuous act. Hence to say that it is a sacrament or to describe it as a mere civil contract is not correct. As pointed out by Abdur Rahim in his well-known book, Muhammaden Jurisprudence, marriage under
Muslim Law Partakes of the nature of both a sacrament and a civil contract. Being commended by religion it tends to be treated as a holy injunction. It holds a position midway between the two. But so far as the rights and obligations of the parties in relation to each other are concerned, they are governed by the ordinary law of contracts. It is open to the spouses to specify and restrict each other's rights and obligations wising out of the marriage and fix the conditions for its termination by mutual consent. Muslim writers treat it as something between religious matters and worldly affairs. The Muslims have been enjoined to contract marriages safeguard against loose living. A marriage also unites two different individuals by love and affection and two different families by a bond of Kinship. When these objects, amongst others, fail, the continuance of a marriage may not be in the interest of the spouses and so its dissolution is permitted. Divorce is not regarded as a disgrace in Islam nor necessarily a sequel that follows misconduct by either the husband and the wife or by both.

Muslim law does not compel the spouses to lead a miserable life when their marriage has proved a failure, but grants them the right to separate. At the same time it does not contemplate separation on frivolous and trivial grounds, such as are now recognized sufficient in some parts of the world.
In Arabia itself divorce, prior to Islam, was a frequent occurrence without any regard to marital obligations and every individual took as many wives as he could afford and then divorce them at his sweet will.

In Islam Divorce, when not absolutely necessary, is strongly disapproved of and discouraged. Talaq (divorce) is strongly condemned by the Mohammadan religion and it should not be pronounced unless it has become quite impossible for the parties to live together in peace and harmony, but once it is pronounced it is upheld and valid although there may be no good cause for it. It is described in a precept of the Holy Prophet (PBUH) as the worst of all the things that law permits. It has been done in two ways namely, condemning divorce except in certain circumstances and commending forbearance and the continuation of marital relationship even in the case of disagreement and some suffering. The Holy Prophet (peace be on him) has said, "of all the permitted things divorce is the most abominable with Allah."(1A) 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."(2) The Holy Prophet (Peace be on him) has said, "That man is better amongst you who is better to his wife."(3) On another occasion he said, "The most perfect amongst the faithful in respect of faith is he who is best in disposition among them (women) and better among you are those who are better towards their wives."(4)
Abu Hurayrah (Raḍ) reports that the holly Prophet (peace be on him) said, "Let not the faithful man hate the faithful woman; if he dislike some of her habits, he may like others."(5) He is also reported to have said, "Marry, donot divorce, for Allah does not like men and women who relish variety in sex matters."(6) In short, the husbands have been enjoined not to divorce their wives except in the case of their being unfaithful.(7)

**Divorce, when permitted**: If it is established that a husband and wife can not 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. Divorce is obligatory on a husband when he is incapable of matrimonial intimacy or can not maintain his wife, and the like.(8) This rule is based on a Qur'ānic text wherein the husbands have been enjoined, "to keep the wives with kindness.(9)

Divorce is permitted as a matter of necessary for the avoidance of greater evil which may result from the continuance of a marriage. But even in such cases an attempt is first to be made for reconciliation by referring the matter to arbitration. Thus it is laid down in the Qur'ān, "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."(10) According to the spirit of the law, it is only when disagreement continues and efforts to bring about a reconciliation prove unavailing that the parties may dissolve the marriage. 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 Muslim Law. The reason for this is that the objects of marriage are not restored by judicial separation, while it may result in immorality which in Islam is an evil far greater than divorce. The Muslim Law, while it permits divorce, insists that there shall be some guarantee that the husband or the wife if not acting from caprice or frivolity or on the impulse of a momentary provocation. For this purpose certain restrictions are imposed by the law upon the spouses, right to dissolve their marriage. The object of these restrictions, as stated above, is to ensure that the spouses should not act in haste such as under the influence of wine, anger, excitement, and the like, and that an opportunity is provided to the parties for rapprochement. This cautious attitude towards divorce forms the basis of the al-talaq al-sunnah under which marriage is terminated only after a minimum period of there terms of the wife's menstrual courses from the time of the pronouncement of divorce. During this period the husband has the option to take the wife back.
The above discussion will make it clear that a Muslim husband can not justly divorce his wife in the absence of reasonable grounds and without having recourse to an attempt at reconciliation. It is unfortunate that this basic principle regarding divorce has been lost sight of and divorce given capriciously and without any justification, whatever, is considered good in law though it is strongly discouraged in religion. This conception of law ignores the strong condemnation and disapproval of divorce in Islam and has led many a husband to make an unscrupulous use of his power misery and unhappiness for the wife and has made marriage insecure and the wife's possession very precarious.

Muslim jurists have held different views regarding divorce in Islam. According to some, divorce is prohibited but is permissible in case of necessity. It is stated in al-Radd al-Muhtar, dealing with Hanafi Law, that no doubt it (divorce) is forbidden, but it becomes mubah (permitted) for certain outside reasons. Its ibahah (permission) arises from the necessity for release (from the marital tie) in certain cases. Therefore, when there is no cause for separation whatever, there is no necessity for release, and if there is no legal ground for talaq, or release, then it must be considered unlawful, Holy for the Qur'an says, "So if they (your women) obey you, seek not away against them". (11) The Hanafi Jurists also assert that divorce in itself is a pernicious thing and is
a disapproved procedure, as it dissolves marriage, a tie or relationship which involves many considerations of temporal as well as spiritual nature nor is its propriety at all admitted except on the ground of urgency of release from an undesirable wife. (12) They further add that the propriety of divorce rests upon the cause of the urgency. The urgency itself being a matter concealed and unascertainable (but by virtual proof) and the act of proceeding to divorce is proof of the urgency. (13) The explanation of the Hanafi Jurists is based on too technical a ground. The underlying principle is however, clear. Most of the Muslim Jurists, while discussing talaq, say that 'talaq being in itself a pernicious and disapproved procedure, it is only the urgency of release that can give sanction to it. (14) It is a very reasonable and sound view of the matter and it is not clear why it was not adopted by all the jurists who, however, agree that divorce is pernicious and should be discouraged. Hence, if a person divorces his wife without there being an urgent need for release, he shall be guilty of sin. Abu Hanifah (Ra) is of the opinion that if there is no urgent need for release from the marriage-tie, the divorce is 'haram' (Forbidden). (15)

The author of al-Bada'i'wa l-Sana'i' has discussed the matter at length. He says, "Marriage is a beneficial union which becomes the means for obtaining
benefits in the hereafter and in this world and divorce destroys it and the destruction of a good thing is reprehensible. Allah has said, "And verily Allah does not like mischief. And this means that in law it (divorce) is undesirable, for Allah does not love it. It can happen that sometimes on account of disparity in temperament and nature or due to disputes the advantage of marriage is lost; the husband knows that the benefits bypass him because of his marriage with a particular woman and on account of his living with her, and that is such cases advantage would lie in divorce so that the objectives of marriage might be fulfilled by marriage with another woman. However, there is constant likelihood that he may not have thought over the matter as carefully as its gravity requires and he might not have visualized all the possible consequences, so the Shari'ah and reason both require that he should reconsider the matter and for this reason he is expected to give her one revocable divorce so that the woman may repent her sin and dislike (for him) and might return to the path of rectitude. But when she has tasted the betterness of separation and does not repent, the husband will consider his over situation whether he can stay away from her. And if he facts he will not be able to bear a separation, he might bring her back, but if he feels that he will be able to bear the separation, he may divorce her again in the second tuhr"(16)
It is unfortunate that some later jurists have overlooked this basic concept regarding divorce, nor have they taken into consideration the hardship caused to a wife as a result thereof. It can not be gainsaid that the present practice which allows a husband to divorce his wife unscrupulously, does not only contravene the basic principle of Muslim law of marriage and divorce but also very often ruins the life of the wife and even leaves her absolutely destitute. There is no Bayt al-Mal (public treasury) to support her now, and it is, therefore necessary that this outlook should be changed and a reasonable view in keeping with the basic principle of Muslim Law be adopted.

**Modifications in Muslim Law:** Many Muslim Jurists of the past did not hesitate to modify the law to make it suit the needs of their own times and we should also do the same. These Jurists considered themselves bound only by express injunctions of the Qur'an and the traditions regrading obligations to do a thing or to abstain from doing a certain thing. But, where the law was not obligatory and was merely permissive, they allowed its modification however necessary. Muslim law is very elastic. The muslim jurists in later times, however, considered themselves absolutely bouned by the law laid down by the early jurists, without caring to see if it suited the needs and conditions of their times and so they
made the law very rigid.

Muslim law however, is full of instances where necessary modifications, to meet the requirements of their own times had been made by the jurists. To quote a few instances drinking was punishable with forty stripes during the caliphate of Abu Bakr, but 'Umar increased the number to eighty in order to put a stop to the evil habit. Pronouncement of three divorces at one and the same time was considered tantamount to one divorce in the time of Prophat (peace be on him) and Abu Bakr, and during the first two or three years of the caliphate of 'Umar. People, however, used to wantonly repeat the pronouncement many times simultaneously by ignoring the seriousness of divorce. Umar considered it necessary to discourage this practice and held that repetition of three pronouncements at the same time would amount to three divorces. To give another example, conquered lands were distributed amongst the Muslim warriors by the Prophet (peace be on him), but 'Umar stopped this practice in the public interest. Again, marriage with a Kitabiyah (Christian or Jewish woman) was permitted by the Prophet (peace be on him) and the first three caliphs, though the second caliph discouraged it, and when a Governor had married a Jewess, the caliph ordered him to divorce her. But 'Ali, the fourth Caliph, took up a very strong attitude and according to the majority of Shi'i'ulama' such a marriage is absolutely forbidden.
According to some other Shi'i Jurists the marriage is not forbidden though it is considered highly undesirable. The Supreme Court of Pakistan has accepted the latter view. For a learned and interesting discussion of the subject, see Syed Ali Nawaz Shah Gardezi V. Lt-Col Mohammad Yusuf Khan, P.L.D.1962 (w.p.), Lahore.558.

This practice of modifying rules of law continued even after the orthodox caliphs as can be seen from the following instance.

(a) Formerly, if a husband wanted to take his wife to another place and she refused to accompany him, then, according to Abu Hanifa, Abu Yusuf, and Imam Mohammad, she was considered disobedient and lost her right to maintenance. But later, Abu Qasim Şaffar held that the rule was applicable in the times of those Imams, but in Şaffar's time the husband could not take her to another city (against her wishes).(19) The modification in the rule is probably due to the fact that travelling had become dangerous in later times. Also, because the Muslims had then spread out to very distant lands and means of communication were difficult and it was not considered desirable to force a wife to leave her relations and country in such circumstances.

(b) In the 'Alamgiriyah it is stated, " If a person divorces his wife while under the influence of hemp or
bhang, then, according to Tandhib, divorce would not be
effectected. But a divorce under such circumstances would now
be given effect to and the husband would also be liable to
punishment because of the prevalence of the vice (of the
taking) of bhang or hemp amongst the people in our times
and the Fatwa in our time is in accordance with view."(20)
To give instances of our own times, we may quote some
important changes introduced in the Muslim law of divorce
by the dissolution of Muslim Marriages Act of 1939. The
bill was introduced in the Central Legislative Assembly by
the late Muhammad Ahmad Kazimi, a member of the working
Committee of the Jamiyyat al-Ulama'-i Hind, because it was
considered necessary to bring about certain important
modifications in the then prevalent provisions of Muslim
law. The following will show the extent to which
modifications were made:
(1) A Muslim girl could not formerly exercise her option
of puberty on attaining majority if she had been given
away in marriage, while a minor, by her father or paternal
grandfather. This rule was based on the reasoning that
they were so closely related to the girl that it could be
presumed that they must have acted in the best interests
of the girl and must have given her away in marriage to
the most suitable person. But, in course of time, it was
found that a father or a grandfather gave away his
daughter or granddaughter in marriage to a very
undesirable person or even to a man of depraved character.
either through carelessness or simply for the sake of some monetary or other gain and thus sacrificed the girl's future happiness. The law was, therefore, amended to meet this situation and a girl can now exercise her option of puberty even when she is given away in marriage by her father or grandfather during her minority.

(ii) The Hanafi law did not allow the dissolution of a marriage on the basis of the husband's cruelty to the wife or for his failure to maintain her which was found to result in great hardship to her. The Act now allows the dissolution of a marriage on these grounds.

(iii) Under the Hanafi law, the wife of a missing husband had to wait for at least sixty years before contracting a second marriage. But under the Maliki law, the period of waiting is four years only. The act has adopted the latter rule with some modifications in order to save the wife from obvious hardship.

(iv) There was a great difference of opinion amongst the Muslim Jurists about the effect of the conversion of a Muslim wife to a revealed religion. The majority of Muslim Jurists held the view that the marriage would get dissolved on the renunciation of Islam by the wife, but the 'Ulama' of Ma-wara al-Nahr
(Transoxiana) held a different opinion and stated that the marriage would not be dissolved under these circumstances. The Act has adopted the latter opinion.

**Reason for Differences of Opinion:** We sometimes find that the Muslim Jurists have expressed different views on a particular point. It may be mentioned here that the difference is often due to a difference in the mode of interpretation as explained below:

(a) One group of Muslim Jurists considers that a verse of the Qur'an or a tradition is to be interpreted literally, but the other group prefers to look into the underlying idea and to apply the basic principle according to the changed conditions and to meet the requirements of their own times. They consider that the spirit of a rule cannot be changed, but its application changes with time, environment, circumstances, conditions etc. It is obvious that these two modes of interpretation will result in a difference in the application of the rule though there is no difference in the basic rule applied by them.

(b) The other ground for difference lies in the application of a certain rule of law. Thus, some Jurists hold that a rule should be followed and applied strictly so that people should not take undue advantage in any way and may not lightly ignore it and
commit a breach of it. But there are other Jurists who are of the opinion that Allah wants to be merciful and does not want to be hard on man kind and so we should lenient in applying the rule of law in order to avoid the infliction of hardship on the people.

It can thus be seen that after there is no real difference in the basic rule applied by the jurists, but the difference arises out of the process of application of a rule.

As the basic rule in each case is generally the same, it is open to us to adopt such interpretation of law as us meets the needs and requirements of our own times.

Some one has aptly stated that all kindness and leniency is due to the injunctions of Allah and the Prophet (peace be on him) while all hardships and difficulties arise out of the rules laid down by Ulama. Ibn Qayyum has nicely explained that the Shariah (Muslim Law) is based on wisdom and is meant for the worldly and spiritual benefit of the people, and means complete justice for all and absolute kindness and wisdom. Hence we cannot consider that code of law, a law of the Shariah in which there is cruelty instead of justice, hardship in place of leniency, loss instead of advantage and foolishness in place of reason. He stresses that law changes with the change of environment time, place,
financial conditions, and customs of the people and that misunderstanding has arisen among people due to their ignorance of the relation between human society and the law, which has constricted the scope of Islamic Shariah. They do not realise that such narrow-mindedness can have no place in a system which has given most consideration to the welfare of the people.(23)

**Wife's Right to Dissolve Marriage:** Under the provisions of Muslim law, the right to the dissolution of marriage does not rest with the husband alone, but the wife has also been given this right though it is not as absolute as that of the husband. She can herself terminate her marriage under certain conditions or get it dissolved through a Qaḍi if there are genuine grounds for such a step. But generally speaking, the right of the wife is not coextensive with that of the husband. The difference lies in the fact that where as the husband can himself divorce his wife, the wife can, except under special circumstances or conditions, obtain the dissolution of her marriage only through the intervention of a Qaḍi or an Arbitrator.

**Difference in Powers of Husband and Wife:** There are two Holy verses in the Qur'an which deal with this matter. It is stated in the first verse, "They (the women) have rights similar to those (of men) even them in kindness and men are a degree above them".(24) The other says, "Men are
the maintainers of women with that Allah has made some of them to excel others and with that they spend out of their wealth."(25)

Reasons for the above mentioned difference:-
The superiority of men over women has been explained in the second verse to be due to two reasons, namely:
(a) because they spend of their property (for the support of women), and
(b) because Allah has made one of them to excel the other.
This shows that superiority has been given to man because of his responsibility to support and his capacity to protect his wife. He has to bear a greater burden of domestic life than the wife and so, consequently, enjoys greater rights in some matters than she does. As regards the second ground, it is generally accepted that men are physically superior to women.
CHAPTER-I

REFERENCES


(1A) Sunan, Abu Dawud, l: 296.

(2) Qur'an, IV:19.

(3) Wali al-Din al-Khatib, Mishkat al-Masabih, Delhi, P. 181.


(8) Ibid, (9) Qur'an, ll: 231.

(10) Qur'an, IV; 35. (11) Qur'an, IV; 34.


(14) Sami op,cit, II:426-7.


(16) Al-Kasani, Ala'al-Din, Bada'i' al-Sana'i', Cairo, III:95 p. 95


(20) Ibid. p. 145.

(21) Shami, op.cit., II:338.

(22) Ibid, ll:402-3.


(24) Qur'an, II:228.

(25) Ibid., IV: 34.