Concept of Marriage and Personal Laws in India

Pratishtha Yadav*

Research Scholar, Faculty of Law, Maharishi Arvind University, Jaipur

Abstract – We drink without being thirsty and make love at any time; that is all that distinguishes us from other animals.

Beaumarchais

The ancient human society was a nomadic society. There was perhaps only a herd-instinct type marital relationship before the dawn of civilization. With the passage of time, the nomadic human beings evolved into an agricultural society and it was considered necessary to ascertain the paternity of children. So long as the sex relationship remained unregulated it was maternity alone, which could be known. Paternity could not be determined. It is logical to say that at some stage of human development the necessity arose for demarcating possession and ownership of material belongings as a natural consequence of human behavior and the human male was seized with the idea of knowing his children. This was not possible if sex promiscuity continued to be the rule. If sex relationship could be made an exclusive union of one man and one woman, only then it was possible to determine the paternity of children. Thus, it seems, in man's quest to know the paternity of children laid the seeds of the institution of marriage.[1] Thus the concept of marriage is a sort of man-woman relationship as a responsible one-to-one unit of society-evolved a unique human family system. It's essential components were intercourse, procreation of children and living together with mutual obligations and responsibilities to the care of offspring. The traditional Hindu family was an institution, a joint family system, characterized by homogeneous togetherness of parents, grandparents, sons and daughters, their spouses, even uncles and aunts. There was a distinct family identity with each member knowing his or her roots. The institution of marriage gives respectability to women, enhances their personal happiness & welfare, and provides family support & companionship.

Alas, now a day, family is becoming just an individualistic conjugal family, not even aware of its roots. From times immemorial, Hindus have tried to idealize and sanctify the institution of marriage as no other civil society has done so far. Conjugal fidelity is regarded as the supreme virtue of a woman and it is this character that has protected the Hindu race and Hindu religion down the ages. Purity of the soil and the seed–the sperm and the ovum–alone contributes to the purity of a race and it is with this end in view that so much stress has been laid in our scriptures on the chastity and fidelity of women. Alas! This bedrock of human society as a whole and of Hindu society in particular, is under threat from civilization onslaughts from various sources in modern India.

Keywords: Concept of marriage, Social Institution, Marital relationship, Companionship, Western civilization, Marital Status ,Religion, Religious ceremonies & rites, Pre-independence and Post – independence era etc.

- X -

INTRODUCTION

Marriage is uniquely beneficial to society because it is the foundation of the family and the basic building block of society. It brings significant stability and meaning to human relationships. It remains the ideal for the raising of children. It plays an important role in transmitting culture and civilization to future generations. Marriage is not merely a private contract, but a social institution of great public value and concern. As social science research and government surveys increasingly show, the decline in marriage since the 1960s has been accompanied by a rise in a number of serious social problems.[2]

DEFINITIONS OF MARRIAGE

The supreme happiness of life is the conviction that we are loved; loved for ourselves–say rather, in spite of ourselves.

Victor Hugo: Marriage is one of the most important institutions of human society. It has been

variously defined by sociologists as well as by legal luminaries. Westermarck has defined marriage as a more or less durable connection between male and female, lasting beyond the mere act of propagation till after the birth of the offspring. In The Future of Marriage in Western Civilization (1936), he rejected his earlier definition, instead provisionally defining marriage as "a relation of one or more men to one or more women that is recognized by custom or law".[3]

George A. Lundberg defined marriage as a set of rules and regulations, which define the rights, duties and privileges of the husband and wife with respect to each other.[4]

According to sociologist **Mazumdar**, "marriage is a socially sanctioned union of male and female for the purpose of establishing

(a)   household

(b)   entering into sex relations

(c)   procreating and

(d)   providing care for the offspring".[5]

According to **J.D.M. Derrett**, "marriage sometimes signifies the ceremony or event by means of which the common intention of a man and a woman to marry is publicly contracted that is to say, acknowledged & announced, sometimes the status or estate or state of affairs which prevails when, after undergoing or partaking in the public acknowledgement or announcement, the parties acquire and continue in the condition of having married each other".[6]

Vinogradoff observed that it is not only an institution regulating sexual intercourse and kept by conjugal affection, but also an arrangement for bringing up of children & a partnership for economic ends and social cooperation. Sometimes one side and sometimes another side predominate.[7]

Robert H. Loure opined, "Marriage denoted those unequivocally sanctioned unions, which persisted beyond sexual satisfaction. It thus came to underline family life, since sexual satisfaction could often be amply gratified outside wedlock.[8]

B.P. Beri while explaining the object of marriage says that it is the source of every domestic comfort from infancy to old age; it is necessary for the preservation and well being of our species; it awakens and develops the best feelings of our nature; it is the source of important legal rights and obligations and in its higher forms it has tended to raise the weaker half of human race from a state of humiliating servitude.[9]

The Hon'ble Supreme Court of India[10] has held that the relationship in marriage is considered to be

love, affection, care and concern between the two spouses.

Marriage is a matter of status and legal consequences of a marriage affect not just the two parties but also innocent third parties–children. Therefore matrimonial adjudication law tends to touch the domain of human rights. No institution in society more efficiently transmits the core values of civil society than marriage, especially when it is reinforced by church and other institutions. Having and raising children within the bonds of marriage is a powerful protection against poverty and welfare dependency. Research by The Heritage Foundation demonstrates that two-thirds of children living in poverty today would be lifted above the poverty line immediately if their mother married their father. The benefits of marriage are enormous and transcend the purely economic.[11]

Research begun at The Heritage Foundation and recently updated at Family Research Council underscores the benefits the public derives from marriage in terms of higher educational attainment, reduced sexual activity and pregnancy outside of marriage, lower crime rates, increased personal happiness, and many other social goods. Marriage has "more to do with the morals and civilization of a people than any other institution".

U.S. SUPREME COURT

"When men and women fail to form stable marriages, the result is a vast expansion of government attempts to cope with the terrible social needs that result. There is scarcely a dollar that the state and federal government spends on social programs that is not driven, in large part, by family fragmentation: crime, poverty, drug abuse, teen pregnancy, school failure, mental and physical health problems".

MAGGIE GALLAGHER

"Marriage is a gift that society bestows on its next generation. Marriage (and only marriage) unites the three core dimensions of parenthood--biological, social and legal--into one pro-child form: the married couple".

David Blankenhorn[12]: Marriage is an exclusive union between man and a woman and it implies that they will live with each other in harmony and in mutual confidence. Thus, adultery, cruelty and desertion are destructive of the very foundations of marriage necessitating social as well as legal intervention.

Marriage among Hindus is one of the sixteen Sanskar – a sacrament, indissoluble union of flesh with flesh, bone with bone, to be continued over in the next world. It is thought to be a 'janam–janmantar ka bandhan' viz. the marital tie once

Pratishtha Yadav*

created is supposed to continue throughout life i.e. in this world and it could not be broken on any pretext, excuse or grounds. Sanskar literally means impressions gathered during life but in Hindu tradition, it means the value system. Sanskar comprise values imbibed since birth enabling one to deal skillfully and wisely with any type of relationship and situations that one comes across in life. These are a combination of value system, social skills and inherent traits that help in the development of one's character. Manu, the seer, who is regarded to be the expounder of Hindu Law, explains the thesis of sacred relationship of marriage as follows: 'Let mutual fidelity continue until death'. This may be considered the summation of the highest law for husband and wife.[13]

Buddhist marriage is a simple ceremony and it is purely a social contract. According to Buddhist law, as soon as the girl attains the age of 20 years, she has the privilege of an independent choice of husband. The Buddhists have no inhibitions in regard to caste or consanguinity. Divorce by mutual consent is permissible.[14] The Buddhist view of marriage considers marriage a secular affair and as such, it is not considered a sacrament. Buddhists are expected to follow the civil laws regarding marriage laid out by their respective governments.Jainism like Buddhism rejected the sacramental notion of marriage but accepted many of the marriage customs of the Hindus that is how intermarriage between the Hindus and Jains slowly came into practice. In Sikhism, too, marriage is a sacramental bond for life. The concept of eternal marital bond has an echo in Gurbani "Nanak Satgur Tinah Milaya Jinnah Dhuron Paya Sanjog", meaning thereby that it is with God's grace that the marital bond is created from the very beginning of life.

Muslim Marriage unlike Hindu marriage, where proper ceremonies are sine qua non of valid marriage, no special marriage ceremony is prescribed under Muslim Law except a religious discourse by a Qazi. There is a fundamental difference between the nature & character of Hindu and Muslim marriage, as in the former case it is a sacramental union and in the later cases it is purely a contractual union. However, in Muslim society, a marriage proposal by the male and its acceptance by the female is necessary for a valid (Sahih) marriage. Spousal consent is not important in traditional Hindu marriage.

According to Paras Diwan,[15] from the concept that a Muslim marriage is a civil contract, flows another notion of Muslim law, namely, that for a Muslim marriage no elaborate ceremonies or religious rites are prescribed. The only essential requirement of form is that a contract of marriage must come into existence.

The Prophet of Islam is reported to have said, "Marriage is my Sunna and those who do not follow this way of life are not my followers and there is no mockery in Islam".

Muslim marriage is potentially a polygamous marriage as the husband is allowed to have up to four wives, as polygamy is a part of personal law of the Muslims.

Christian Marriages are just as sacrosanct and binding as any Hindu marriage. Marriage vows conducted in the church by a priest are equally as serious and meaningful as a marriage around the fire in a Hindu Vedic ceremony. Both are legally contractual. One can get married in a church or in a registry office. The priest in a church is authorized to legalize the marriage but all marriages must be registered. Non-Christians can get married at their own places of worship but the marriage has to be preceded by a civil ceremony where the official registrar is present to legalize the marriage. Church does not condone divorce but remarriage after divorce is normal practice.

According to Cheshire[16] the form of marriage recognized by English law is generally described as a "Christian Marriage". Here the reference to religion is misleading. Whatever may be the religion of the parties or of the country in which they marry, their union is a marriage in the English sense provided that, in the eyes of the relevant law, it possesses two attributes of indefinite duration and the exclusion of all other persons. The English matrimonial law was adapted to the Christian marriage. Under the English domestic law marriage is defined as a voluntary union for life between one man and one woman to the exclusion of all others. English courts have adopted this very concept of marriage to the conflict of law cases, which has come in conflict with respect to polygamous marriages under different personal laws of the marrying parties.

Polygamy is classified as Polygyny and polyandry. Polygyny means marriage of one man with two or more than two wives at a time. Polyandry is a form of marriage in which one woman marries more than one man at a specified time. Polyandry as custom was practically unknown to Hindu Society, however there existed Polyandrous arrangements among a few non-Aryan tribes of the Kashmir and Tibet. It is also prevalent in Sikkim, Ladakh, and certain parts of Himachal Pradesh.[17]

HISTORICAL BACKGROUND OF MARRIAGE

Polygamy and polyandry was prevalent in ancient times. As the civilization process went ahead, marriage came to be recognized as a religious, holy and indissoluble sacramental bond and wife was considered to be a respectable member in the home.

Vedic literature generally endorsed monogamy and was considered the best practice of the highest virtue. However, polygamy was also in practice, especially among the nobles. Polygamy was sanctioned by the ancient lawgivers under certain circumstances, such as the barrenness or lack of religious- mindedness, that is, if the wife was unfit to participate in the performance of religious rites of her husband. The husband had the right to remarry if the wife failed to deliver a male child. Dasharatha had three wives for the want of a son although his four sons had vowed to practice monogamy.

Polyandry was a sporadic phenomenon. In the Mahabharata, Daraupadi was married to five Pandav brothers under special circumstances to abide by the wish of their mother Kunti whom they adored very much. Even then, this marriage was bitterly opposed by the family of Daraupadi herself. Yudhishtra, the eldest Pandav had to use all his persuasive skill to convince them by citing a precedent to support his arguments. This incident, if anything, shows that polyandry was not the customary practice in the Vedic period.[18] With the passage of time, polygamy and polyandry was gradually replaced by monogamy as a social norm but bigamy in one or other form is still seen in society. Manu was strictly opposed to widow remarriage. He clearly lay down, "In the mantras on marriage such a commission (widow remarriage) is never mentioned and the second marriage of a widow is not spoken of in the rule of marriage".[19]

However, widow remarriage was permitted under special circumstances in the Vedic age as evident in a hymn in the Rig Veda, which is addressed, to a widow weeping beside the body of her dead husband. Her husband's brother tells her:

"Rise, come into the world of the living, O woman, come, he is lifeless by whose side thou liest. Wifehood with thy husband was thy portion, who took thy hand and wooed thee as lover".[20]

This system of remarriage with the husband's brother is called Niyoga. The Atharva Veda also refers to remarriage of a widow when it says, "whenever a woman having married one husband, marries another, if they offer a goat with five rich dishes, they would not be separated from each other".[21] The word Punarbahu (meaning wife again) is generally applied to a widow who has remarried.[22] Narad mentions another category of Punarbahu that is a maiden whose hand was taken in marriage but whose marriage was not consummated.The recognition of a Punarbhava son i.e. a son brought by a widow and being regarded as son of his putative (supposed) father on his mother's remarriage, confirms widow remarriage in early India.[23] Divorce was an uncommon phenomenon in olden times among Hindus. However, in a number of cases and social circumstances, divorce was permitted as caste custom.[24]

Nevertheless, caste system has held the field with firm social support. Customary arranged marriage with the consent of the concerned parties, love marriages, inter-caste and inter-faith marriages are a recent phenomenon in Indian Hindu society. More recent trend is of inter-continental (NRI) marriages with their attendant problems of cultural clash and fraudulent matrimony with or without the connivance of the so-called marriage bureaus.

MUSLIM PERIOD

During Muslim invaders rule over India, there was a spate of kidnappings, rapes, forcible marriages and mass religious conversion. The native Hindu society developed protective measures to combat individual insecurity in the form of purdah, polygamy and child marriages, still seen in the most invasion prone belt like Rajasthan & Gujarat states. Sati Pratha also came into existence as widows were forced to commit self-immolation in order to save themselves from the brutal and bigoted Muslim rulers and their cohorts. In places like Rajputana, women committed mass self-immolation called 'jauhar barat'-a horrible rite by females to save themselves from captivity when a state fell into the hands of the Muslims. The Hindus felt endangered and to preserve their religious and caste entity, early marriages strictly along endogamous caste units became the order of the day. Finding a suitable bridegroom for a daughter within a narrow caste grouping became more and more difficult. Desperate parents began giving their young daughters away even to old infirm men. Thus, polygamy and child marriage became predominant with the attendant problems like child-mothers, child-wives, child– widows and high female mortality rate. The birth of a girl child came to be considered a burden and a curse.

BRITISH PERIOD

During the British period, movements for social reforms in married family set-up were initiated by some well-intentioned workers like Ram Mohan Roy, Ishwar Chander Vidyasagar, Maharishi Dayanand Saraswati and legal luminaries like Rai Sahib Harbilas Sarda. These measures were given legal shape in the concept of codification of Hindu Marriage laws.

Legislation of Hindu Marriage Laws began in the year 1829 when Sati Pratha was abolished by law at the instance of Raja Ram Mohan Roy. In 1856, Hindu Widows Remarriage Act was passed. In 1860, Indian Penal Code prohibited Polygamy in Hindus. In 1866, Native Converts Marriage Dissolution Act was passed for conversion of Hindus into Christian Faith. In 1872, Special Marriage Act was passed but it excluded Hindus. In 1909, Anand Marriage Act legalized marriage ceremony common in the Sikh faith called Anand Karaj.It has now been amended as Anand

Marriage (Amendment)Act 2012, In 1923, The Special Marriage Act was further amended to legalize inter-religious marriage between Hindus, Budhists, Sikhs and Jains. In 1929, Child Marriage Restraint Act or Sarda Act was passed. In 1939, Arya Marriage Validation Act recognized inter-caste marriage and marriage with reconverts to Hinduism. In 1946, Hindu Marriage Disabilities Removal Act legalized inter-marriages between the sub-divisions of same caste and those within same Gotra or Parivar. In 1946, Hindu Married Women's Right to Separate Residence and Maintenance Act was passed. In 1947, The Hindu Code Bill was drafted by Rau Committee and was reviewed by the select committee of the Constituent Assembly. It was, however, opposed in the Provisional Parliament. Thus, it had to be split into different Bills to facilitate their passage.

Hindus firmly believe in complete physical, mental and spiritual union of man and woman as husband and wife yet with the devaluation in morals, the reverse picture has emerged with social, economic and even psychobiological subjugation of women. The position of woman and wife had degraded so much during the pre-independence centuries that the wife was considered inferior to man. The woman became dependent upon the father during maidenhood, upon the husband during married life and upon the sons during widowhood. Even the inheritance laws were in favor of the husband or sons only. The very being of the woman was suspended during the marriage and incorporated & consolidated into that of the husband.

INDEPENDENCE ERA

After independence with the promulgation of The Constitution of India 1950, the personal laws of marriage particularly of Hindus have been codified and all citizens irrespective of sex, caste or creed have been given equal rights in the eyes of law. Many progressive legislative measures have been enacted to empower women to assert their individual as well as spousal rights on par with men yet traditional inertia of the society as a whole has kept the pace of change in slow motion so far. Public opinion is being shaped by many NGOs to enlighten women in particular to assert their political, legal and individual rights. Courts are also becoming sensitive to social causes and newer innovative judicial pronouncements are aiding social change in keeping with the changing times. The outstanding feature of both The Hindu Marriage Act, 1955 as well as The Special Marriage Act, 1954 is the introduction of monogamous form of marriage. Wife burning, mental & physical torture, desertions and other bodily abuses have become a common phenomenon in society these days.There is a deep-rooted preference for son in Hindu society. Older parents rely on sons and their wives for support in old age. The tradition demands that a son must perform the last rites of parents and offer ancestor-worship called Shraadh every year. The notion of girl being the

beast of burden has been engraved right from the prenatal stage resulting in female foeticide recently despite stringent laws to ban prenatal sex determination, a bye-product of technological medical advancement. The skewed sex ratio will result in a deficit of adult women, thereby, affecting the stability of the entire marriage system. Many men will be unable to marry, creating social unrest and sexual violence against women. However, marriage as a social institution is losing its original position and the legislative law and the courts are aware of this social upheaval. Western cultural values, in which 'only the flesh matters', have started eroding the age old family values and instincts of personal bonding by sincerity and mutual faith.

CONCLUSION

The concept of marriage is purely based on union of man and woman as a soul mate but it is governed by certain Personal laws related to conditions for valid marriage because that only defines the status of a person after the solemnization of marriage in proper well defined manner. Marriage is a socially supported union between individuals in what is intended to be a stable, enduring relationship. It is the basis for the family and the institution, defined by six social functions: regulation of sexual behaviour, reproduction, nurturance and protection of children, socialization, production, consumption, and the passing on of ascribed statuses such as race. Marriage and the family rest on many beliefs, the most important of which is kinship.In the *shastras* marriage was viewed as a sacrament. The relationship of husband and wife, once established through proper customs and rituals, was believed to be irrevocable. In Hindu marriage, custom is sacrosanct, which is why a marriage ceremony is said to be complete only when the customary rites and rituals are fully performed. Of course, customs vary from place to place and society to society. The sanctity attached to the institution of marriage in the Islamic system has neither been comprehended nor sufficiently appreciated by outsiders. Marriage is recognized in Islam as the basis of society. It is a contract but it is also a sacred covenant. Marriage as an institution leads to the uplift of man and is a means for the continuance of the human race. The main aim of the institution of marriage is to protect the society from foulness and unchastely. It has also been said that marriage is so holy a sacrament, that in this world it is an act of ibadat or worship, for it preserves mankind free formulation. The Christian concept of marriage has been that marriage being obligatory for human being (except the churchman) and having being ordained by God. It is indissoluble solemn union entered into by the parties with their full and free volition for life so as prevent fornication and with a view to providing safeguards against depopulation. Further changes were made in the concept of marriage when the Christian world divided into Catholic and Protestant. The impact of English law on the

Pratishtha Yadav*

Christian marriage is visible and practically it has been imported in India from England and planted here. All other formalities and solemnization of marriage are also of English origin. Indian Christian marriage is dissolved in more or less on the same grounds as under English law. So at last it can be concluded that the institution of marriage can be saved only by making certain amendments to the existing Laws of different religions governing the personal life of the member of that particular religion or we can also move ahead with the proposal of Uniform Civil Code for governing institution of marriage. The discrimination between various Indian communities inherent in this legal situation is too clear to be ignored.

REFERENCE

1. Paras Diwan and Peeyushi Diwan (2005) Modern Hindu Law Codified and Un-codified, 62 (Allahabad Law Agency, Faridabad, 16th Ed.).

2. Available at: http://wikipedia.org/wiki/marriage, (visited on May 1, 2017)

3. Westermarck Edward (1936). The Origins and Development of Moral Ideals, (Macmillan Co. London, 1906). Also see, Westermarck Edward, The Future of Marriage in Western Civilization, (Macmillan Co., London).

4. George Andrew Lundberg (1958). Sociology 133 (Harper and Brothers, New York).

5. H.T. Mazumdar (1966). Grammar of Sociology, 502 (Asia Publishing House).

6. J. Duncan M. Derrett (1995). Introduction to Modern Hindu Law, 136 (Cambridge Univ. Press, 10th Edition).

7. Vinogradoff, Grammar of Sociology, 502 (Asia Publishing House, 1966).

8. Robert H. Loure (ed), (1957). Encyclopedia of Social Sciences.146-155, Vol. IX & X,(The Macmillan Co., NY)

9. B.P. Beri (1982). Law of Marriage And Divorce in India, 3 (Eastern Book Co. Lkh.).

10. Shobha Rani v. Madhukar Reddi, AIR 1988 SC 121.

11. Available at http://www.heritage.org/Research/Features/Marriage/ upload/48119_1.pdf (visited on March 29, 2017).

12. Available at http://www.mappingamericaproject.org/special collection (visited March 31, 2017)

13. Manu Smritis IX- 101, available at http://www.hindubooks.org/ manusmriti.pdf (visited on April, 08, 2017).

14. A.K. Sur (1973). Sex and Marriage in India, 53 (Allied Publishers).

15. Paras Diwan (1987). Muslim Law in Modern India, 48 (Allahabad Law Agency, Faridabad).

16. Cheshire and North's, Private International Law, 3 (Oxford Univ.Press, 1999), First Indian Reprint (2006).

17. Anant Sadashiv Altekar (1978). The position of Women in Hindu Civilization, 114.

18. Basu Monmayee (2004). "Hindu Women and Marriage Law, From Sacrament to Contract", Women & Law in India, 28.

19. Ibid

20. Rig Veda HYMN XVIII, 8, available at http://sacred-texts.com/hin/rigveda (visited on April 08, 2017).

21. K.N. Chatterjee (1972). Hindu Marriage–Past and Present, 44 (Tara Publications, Varanasi).

22. P.V. Kane (1975). History of Dharamshastra, Vol. I, Part II, 517 & 608 (Bhandarkar Oriental Research Institute, Poona).

23. M.N. Das,(ed)A.N. Saha (2002). Marriage & Divorce, 6th ed.5-7 (Eastern Law House New Delhi).

24. Banerjee Sir Goroo Dass (1963). "Hindu Law of Marriage and Stridhan", 207 & 345 (Mittal Pub., Delhi, 1984), Bombay Law Reporter, 1984., J.D.M. Derrett, "Divorce by Caste Custom", 161, Vol. 65 Bom I R.

Corresponding Author

Pratishtha Yadav*

Research Scholar, Faculty of Law, Maharishi Arvind University, Jaipur