

THE CONCEPT OF MARRIAGE UNDER HINDU LAW AND ITS CHANGING DIMENSIONS

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ABSTRACT

The concept of marriage under Hindu Law is a sacrament in name of God by performing religious ceremonies in order to attain *moksha* by controlling *artha* and *kama* by practicing *dharma*, which is consequence of Hindu philosophy of life and marriage by doing ones social and religious duties. Accordingly rules and regulations were developed by ancient text writers and then by state from time to time resulting in evolution of the concept of marriage due to social change in society from *Vedic* mantras to religious duty and finally to sacrament as well as a contract. The dimensions of Hindu marriage have been further changed by advent of emerging varying relationships that are in the nature of marriage. The paper elaborately analyzes the concept of marriage under Hindu law in socio-legal perspective. It seeks to delve upon how far the traditional concept of marriage has changed among Hindus.

- I. Introduction
- II. Evolution of the Concept of Marriage
- III. Hindu Philosophy of Life and Marriage
- IV. Marriage as a Sacrament
- V. Marriage as a Contract
- VI. Emerging Varying Relationships that are in the Nature of Marriage
- VII. Legislative Response to Changing Concept of Marriage
- VIII. Judicial Response to Changing Concept of Marriage
- IX. Conclusion

I. Introduction

HINDUS BELIEVE that, “the marriages are arranged in heaven, but are solemnized on earth” as marriages are preoriented by God.¹ This is a sacrament concept which is performed

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¹ Paras Diwan and Peeyushi Diwan, *Hindu Law* 548 (Wadhwa & Company, Allahabad, 2nd edn., 1995). This can be interpreted by *Vedic* Hym recited by bridegroom in ceremony of *panigrahana*: I take thy hand in mine,

with *Vedic* mantras and rituals in order to own high character, moral and beget intellectual progeny for improved human race to attain *moksha*. Hindu Law text writers like Apastamba, Baudhayana, Katyayana, Gautama, Paraskara, Kautilya, Manu, Yajnavalkya, Narda, Jimutavahana etc., formulated norms by taking into consideration *Vedas* pertaining to marriage so as to maintain social and religious order in society thereby attaining welfare for all. It is through marriage that everything and anything in society is maintained by householders-the man and his wife. The Hindu marriage is thus linked with Hindu philosophy of life. The marriage thus remained indissoluble and eternal union in name of God for more than 2500 years. By social changes in society such as industrialization, urbanization, individualism, women empowerment etc., the sacrament concept of marriage has changed.

By enactment of first state law pertaining to dissolution of marriage the Kolhapur Divorce Act, 1919 and further with enactment of the first central statute the Hindu Marriage Act, 1955, applicable to all Hindus, Hindu marriage has become sacrament as well as a contract. It is more in the form of a contract. Still a vestige of sacrament concept continuous as *shastric* ceremonies and other religious and customary ceremonies are necessary for solemnization of Hindu Marriage. This is in interest of state and society that the institution of marriage is preserved. Because public will live happily then there will not be any social disorder creating problems for state and society. Due to further changes in society, “emerging varying relationships that are in the nature of marriage” have started impacting Hindu marriage as without fear of society two major unmarried man and woman start living together as husband and wife without solemnization of marriage. In such relationships law protects the woman who cohabits as a wife with a man of her choice without performance of marriage ceremonies. Courts have differentiated such relations from other illegal relationships like one night stand, adultery, live-in relationship *per se* etc. The concept of marriage has thus changed from one era to another and is being now impacted by emerging varying relationships that are in the nature of marriage.

II. Evolution of the Concept of Marriage

The genesis of sacrament concept of marriage can be seen during *Vedic* period when marriage was solemnized through *Vedic* mantras in presence of God. It was a spiritual

Yearning for happiness, I ask thee to live with me, As thy husband, Till both of us, with age grow old, Know this, as I desire that the Gods, Bhrgu, Aryama, Savita and Purandhi, Have bestowed thy person upon me, That I may fulfil my *Dharma*, of the householder with thee.

unification of man and woman by recitation of *Vedic* mantras. A prescribed way of entering into marriage was practiced in order to have a high intellectual race so that the progeny be intellectual with moral and spiritual abilities, this was practiced after strict *Brahmachary*. During *Vedic* period mantras were recited right from marriage proposal till last ceremony of marriage which meant giving strained clothes to priest for purification after consummation ceremony.² The marriage being indissoluble union could not be broken by anyone. Indissoluble union was between two adults knowing and understanding about ceremonies. Girls used to marry the persons of their choice. Inter-caste marriages were practiced during this period. Man could not do anything without his wife. Every act in society was regarded under grab of God with rituals. Accordingly the importance of marriage with ones choice and to live happily could not be ignored during this period. This we find in the following points in the law as laid down by *Vedas*³ viz:

The spouses should live in peace and love like the birds called Chakva and Chakai,⁴ both should be happy and not that one should be sacrificed at the alter of marriage; enjoying the good in their life. Thus and thus only would the house become a real home a home for both of them, and then they may be blessed with capable and good natured issue.⁵

Thus, the verse also depicted truthfulness and satisfaction in marriage.

However, the concept of Hindu marriage evolved from *Vedic* mantras to religious duty to sacrament as well as contract. Accordingly Hindu marriage has been one of the religious ceremonies enumerated in Hindu *Shastras*, *Manusmriti* and under other Hindu Law text like Yajnavalkya Smrti, Kautilya's Arthashastra, Puranas, Commentators and Digest Writers etc. With development in society during ancient times, the Customary Law established certain norms for different societies among Hindus for the performance of marriage and some of these customs-norms have been incorporated by the authors, who consolidated Hindu Law as part of ceremonies for solemnization of marriage.

III. Hindu Philosophy of Life and Marriage

² Nilakshi Sengupta, *Evolution of Hindu Marriage* 1-86(Popular Prakashan, Bombay, 1965).

³ B.N Chobe, *Principles of Dharmshastr* 18 (B.N. Chobe Vakil at Hyderabad D.N., Hyderabad, Akshaya Tritiya Vaishakh, 2007 Vikram).

⁴ Atharva Veda, XIV. 2 64.

⁵ Atharva Veda, XIV.2.43.

The concept of marriage under Hindu Law has been linked to Hindu philosophy to life which aims to attain *moksha* through *dharma* and this is possible through marriage. The *ashrams* were established fully where man had to adhere to practice of *ashram* system. This is connected to Hindu social arrangement of the *ashrama*. According to Hindu researchers there are four stages of man's life *Brahmachary* (celibacy), *Grhastha* (family life), *Vanaprastha* (partial receding from mundane life) and *Samnyasa* (asceticism).⁶ *Dharma* is to be practiced by man together with his wife in order to perform five *Mahayajnas* in holy fire in *Grhastha* (family life). The narration of *Vedas*, *pitrs* and *tarpana* gave satisfaction to Brahman and he was also satisfied by *sraddha* gods by the burnt oblations, *bhutas* by Bali offerings and men by the reception of guests.⁷ By practicing this man could control *artha* and *kama* and achieve *dharma*. In this regard parents, teachers, spouse, guests were granted status of God. Moreover, householder the man had to take care of *brahmacharie* as well as the old persons. Along with many other things came under the ambit of *Grhasthasrama* such as looking after the needy in society, pregnant women, sick people, animals, environment down the line community and country as a whole.⁸ *Grhasthasrama* became the epicenter of control of society by doing one's religious and social duties. Thus, man the householder had to bring wife for accomplishment of his religious and social duties accordingly man is regarded complete only when he has a wife. As he has to accomplish all duties of householder as well as "towards divine, father and creator of the world."⁹ This importance was given by all text writers till seventeenth century and finally ended in Jainism and Buddhist period as Jainism and Buddhists did not believe in sacramental notion of marriage and rejected the sanctity of *Vedas*. The real aim of Jainism is liberation and Buddhist is celibacy which in turn makes marriage a secondary option among them. Thus, in ancient India the marriage was believed to be protected by spiritual powers, rewarding those who observe matrimonial duties meticulously and piously and punishing those who neglect these.¹⁰ Hence, Hindu marriage fulfills all needs of men physical, emotional, psychological and religious.

⁶ Hari Singh Gour, *The Hindu Code 3* (Law Publishers, Allahabad, 5th edn., 1974).

⁷ Pandit Rajmani Tigunait, *Seven Systems of Indian Philosophy* 31 (The Himalayan International Institute of Yoga, Honesdale, 1983). See also: K.M Kapadia, *Marriage and Family in India* 30 (Oxford University Press, Calcutta, 3rd edn., 1982).

⁸ Chandogya Upanisad, VIII,15 and III,17,4, A very high code of morality in the form of charity, hospitality, truthfulness, regular performance of religious duties, self-restrain, respect for parents and the elders, and kindness to animals,- was enjoined upon the householder.

⁹ Raj Bali Pandey, *Hindu Samskara* 233 (Motilal Banarsidass, Varanasi, 2nd edn., 1969).

¹⁰ Chanchal Kumar Chatterjee, *Studies in the Rites and Rituals of Hindu Marriage in Ancient India* 46 (Sanskrit Pustak Bhandar, Calcutta, 1st edn., 1978).

It is important to note that from *Vedic* age till the age of commentators and digest writers, wife was given utmost importance and relationship of husband and wife was abysmal. This can be seen in *Rig Veda* where it is stated that “loving the loving one, as wives by their husbands.”¹¹ During this period wife was regarded as a house herself as she had to take care of everyone and the house. Accordingly, there was co-operation among husband and wife. She was regarded as the very center of domestic world and empress (*samrajini*) of her house,¹² She is a home and dwelling¹³ she is auspicious (*kalyani*)¹⁴ the most auspicious (*sivatama*),¹⁵ who brings blessings and prosperity to bipeds and quadrupeds,¹⁶ this she brings to her husband on marriage, thus the oneness and unity of marriage could not be questioned. In *sutra* and epic age husband was considered as *bharti*, *pati* and *swami*. And wife was considered as *jaya*, *sakhi*, *grihini* and *sachive*. She is known as *grihalakshmi*, *samrajini* and *ardhangini*. As man could not sit without wife in *yajna* she is called *dharmapatini*. The wife was given respect during this period as well. The high status of wife can be seen in *Manusmriti*. Manu also stated that it is through Gods benediction that wife is obtained and it is through good *karma* of man that he gets good wife. This we can see how marriage was considered high in *Manusmriti*:

Wife is a divine institution given by Gods, one should not think that one has obtained her by choice.¹⁷

Her unity (with her husband) is established by the *Vedas*.¹⁸

A woman is half of her husband and completes him.¹⁹

A woman must be honoured by her father, brother, husband, and brother-in-law, who desire their own welfare. Where women are honoured the gods are pleased, but where they are not honoured, no sacred rites yield any reward.²⁰

Neither by sale nor by desertion can a wife be released from her husband, this, we understand is the law ordained by the creator in former times.²¹

Let mutual fidelity continue till death, this, in few words, may be considered as the highest *Dharma* of husband and wife.²²

¹¹ Rig Veda, I, 71, 5.

¹² Rig Veda, X, 85, 46.

¹³ Rig Veda, X, 85, III, 53, 4.

¹⁴ Rig Veda, X, 85, III, 53, 6.

¹⁵ Rig Veda, X, 85, 37.

¹⁶ Rig Veda, X, 85, 43, 44.

¹⁷ Manusmriti, IX, 95.

¹⁸ Manusmriti, IX, 96.

¹⁹ Manusmriti, IX, 26.

²⁰ Manusmriti, III, 58.

²¹ Manusmriti, IX, 46.

²² Manusmriti, IX, 101.

Let a man and woman united in marriage constantly be beware lest at any time disunited, they violate their mutual fidelity.²³

Manu also emphasized that sparkled wife brings sparkle in the family. The house is regarded as empty if wife is not there to supervise it even when children, son, daughter in law and grandchildren are present.²⁴ This shows that wife encircled everything and anything of her husband. This practice continued even till Ramayana and Mahabharata period. Also, in the age of *Smritis* and *Puranas* the respect of woman continued. Yajnavalkya has also regarded that wife has to be obedient to her husband. Yajnavalkya “have bequeathed that wife, it seems, to all ages undoubtedly to the great satisfaction of the Hindu Husband.”²⁵ Moreover, the importance of wife could not be left in the age of commentators and digest writers. Medhatithi equated wife to goddesses of wealth and stated that man is powerless and poor without a wife.²⁶ Thus, importance of marriage and wife is seen in *Vedic* and all Hindu periods.

But during medieval period the status of women was derogated and was in state of wretchedness. This made Hindu women to do things beyond odds in order to worship her husband.²⁷ Nevertheless the emancipation of women is seen during British period. During this period many changes were brought which raised the status of women like there was abolition of sati system, widow-remarriage, female education, women employment, legislative measures like passing of the Prohibition of Child –Marriage Act in the year 1929, etc. This resulted in erosion of the sacrament concept of marriage.²⁸ As a result, the importance of wife and partner faded during this period. And it got further deteriorated in Modern times when liberty, individualism and economic conditions of individuals improved. As the liberty and equality among individuals increased as stated under Article 14 of the Constitution so did the understanding receded towards the understanding of the roles of husband and wife in marriage there by impacting the very fabric of sacrament concept of marriage under Hindu law. As a result, marriage is also considered as physical and economic need rather than religious and social duty in Modern times.

²³ Manusmriti, IX, 102.

²⁴ Patrick Olivelle *Manu's Code of Law*, 111 (Oxford University Press, New Delhi, 2006).

²⁵ K.P. Jayaswal, *Manu and Yajnavalkya-A Comparison and a Contrast: A Treatise on the Basic Hindu Law* 232 (Butter Worth & Co. Ltd., Calcutta, 1930).

²⁶ On Manusmriti, IX, 28.

²⁷ See: the verse of Brahma Vaivarta, Krisna Janma Khand , 57.15-25 , To a woman, her husband constitutes her God. The husband is as pure as the Gods and represents all virtues. Also see, Verse of Ayodhya Kanda, 2.62, A husband whether he has any merit or not is a very deity.

²⁸ Thomas P., *Indian Women Through the Ages* 285-361 (Asian Publishing House, New York, 1964).

IV. Marriage as a Sacrament

As *dharma* is embedded in Hindu philosophy of life so it is practiced in marriage. Hindu Marriage is regarded as sacrament in different senses.²⁹ Firstly, the *Vedas* have stated that *dharma* must be practiced by man together with his wife. As man the householder has to perform *Panch Mahayajnas* in order to fulfill his household and religious duties and this he could achieve only through marriage. If the wife dies, then the man used to marry second time in order to practice *Mahayajnas*. Secondly, marriage is a religious ceremony and has to be solemnized by performance of marriage ceremony in front of God. It is through this ceremony that the girl becomes wife and in this manner the status as husband and wife is achieved by parties to the marriage. Religious ceremony is very important for validity of marriage. As males in later part of centuries could practice all *samskara* however, females could not practice these like males so marriage became important *samskara* to be practiced by every woman. Further, to discharge the debt towards his ancestors a man has to beget a son in order to free his ancestors from hell by performing *sraddha*. Finally, marriage was considered important for fulfillment of physical need by sexual gratification. Thus, sacrament of Hindu marriage is accomplished in presence of God with religious ceremonies, without consideration, in order to accomplish spiritual duties and is considered as indissoluble and eternal union. As a result, marriage as a sacrament made man and woman to adjust among themselves and if they could not even then they were supposed to adjust in temper, behaviour, experience, belief etc. so, as to achieve *dharma*, progeny and to fulfill physical need.

According to Hindu *Dharmasastra* marriage is a sacrament, a holy union—a permanent and indissoluble union—between a man and a woman for the performance of religious duties.³⁰ *Dharmasastra* emphasized the long term loyalty of wife towards her husband. Manu declared “mutual fidelity till death as the essence of *dharma* for the husband and the wife because,

²⁹ K.M Kapadia, *Marriage and Family in India* 167-170 (Calcutta, Oxford University Press, 3rd edn., 1982).

³⁰ *Gopalakrishna v. Venkatanarasa*, ILR 37 Mad 273.

according to him, man and woman, unite in marriage, should constantly exert themselves that they may not be disunited and may not violate their mutual fidelity.”³¹

There were different parameters pertaining to sacrament concept of marriage. The important parameters were choice of marriage, examination of the antecedents of family, qualification and disqualification of bride and bridegroom, marriage age, caste system, prohibitions etc. This we can see in Ashvalayana *Grhyasutra* which has given importance to family that family should be seen from mother and fathers side. Manu gave the view that person should marry in good family. He said that “those should be always made relatives, who are pure from their deeds done in accordance with the injunction of the *Sruti* and the *Smriti*; who are born in good families and observe unbroken *Brahmachary*; who are contented, gentlemen, agreeable, saintly and equitable; who are devoid of greed, attachment, envy, pride and infatuation; and those who are not given to anger and are always tranquil in their minds.”³² As a result families who were not honest, did illegal acts, and did not practice *Vedas* were rejected for marriage. In regard to qualification of bride and bridegroom Ashvalayana *Grhyasutra* has stated that in addition to beauty, good character and being free from disease a girl should also be intelligent. The accomplishments of a bridegroom are that he must be endowed with good family, a good character, auspicious characteristics, learning and good health.³³

Further, in *Vedic* and *Grhyasutra* period there was no child marriage. The marriage was between grownups that they could understand the ceremonies of marriage. But *Gobhila* and *Manava Grhyasutra* have talked about child marriage. It was in period of Manu that child marriage started. As marriage was considered important so intercaste marriage were prevalent. “that a *Brahmana* may take as wife a woman of any caste, a *Ksatriya* may marry a woman of his own caste or a *vaisya* or *sudra* woman and a *sudra* only a *sudra* woman.”³⁴ Intercaste marriages were never banned during any Hindu period. Thus, till tenth century intercaste marriages were seen. Later the view relating to intercaste marriage changed and it became stricter in twenty first century.

³¹ Manusmriti, IX 101-2.

³² Manusmriti, III, 6. See also: Manusmriti, III, 17.

³³ Apastamba *Grhyasutra*, 3, 20.

³⁴ Pandurang Vaman Kane, *History of Dharmasastra* 448 (Bhandarkar Oriental Research Institute, Poona, 1941); Baudhayana *Dharmasutra*, I, 8.2., Sankha, Manu III.13, Vishnu *Dharmasutra*.S.24.1-4.

There were different forms of marriage during Hindu period when marriage as a sacrament was practiced. These are *Brahma*, *Daiva*, *Arsha*, *Parjapatya*, (approved ones), *Gandharva*, *Ausra*, *Rakshasa* and *Pisacha* (unapproved ones).³⁵ These were eight ways of entering into marriage and religious ceremonies were important for validity of marriage. Even in present times *Brhama* form of marriage is practiced.

Furthermore, there were prohibitions on entering into Hindu marriage. Prohibitions were strongly on *sapinda*, *pravara* and *gotra* marriages. These prohibitions were applicable for all *varnas* and caste. The prohibitions differed from law text writers like Vashishta stated from fourth generation to mothers side and Narada stated from seventh generation to fathers side. *Dharamshastra* and *Manusmitha* have banned these forms of marriages. Gautama has stated punishment in this regard, that the couple is to be regarded as outcaste. There were other prohibitions like one should not give two daughters in same family nor should be daughter and son be exchanged for marriage. Even paying bride price was banned and “in *Aitareya Brahmana* a bargain marriage is called *Pasuvivaha*, “animal marriage.”³⁶

Dowry system was not there in ancient times. The bridegroom had never dreamed of taking dowry from his in-laws.³⁷ The sacrament of marriage was in a joint family. The members of joint family together practiced all the roles and kept the sacrament of marriage intact by doing everything together under the head of family-*Karta*. The roles of everyone in the family were defined as a result the members of joint family lived in discipline and fulfilled their duties well.

Morality rate was very high during all Hindu periods. Sacrament concept of marriage was being practiced except the customary law where divorce was valid and the marriage was considered as a contract. But it was exceptional to the rule of indissoluble union. If we penetrate deep into the psycho-socio-legal aspect of dissolution of marriage we find the concept of indissolubility is simply an integral part of this oldest system of law-Hindu Law-Known to the world.³⁸

³⁵ S.Venkataraman (ed.), *N.R. Raghavachariar's Hindu Law Principles and Precedents* 35 (The Madras Law Journal Office, Madras, 1980).

³⁶ *Aitareya Brahmana*, I, 16.

³⁷ Deepali Bhargava, *Manu Smriti A sociological Analysis* 16 (Rawat Publications, Jaipur, 1989).

³⁸ Prafulla C. Mishra, “Marriage: An Indissoluble Union” in Paras Diwan, Virendra Kumar (eds.), *Law Towards Stable Marriages* 51 (1984).

Customary marriages are accepted under Hindu law because there are many Hindu tribes, sect, groups and families who do not follow Hindu marriage practices but follow their own customary ceremonies while entering marriage and have been accepted by Hindu text writers in different parts of India like Lingyats, Sikhs, Gosavins, Santals etc. Thus, it is seen that sacrament concept of marriage was between people who had very high character, morals and accompanied with all-time intention to accomplish duties in name of God. This lead to practices by society with high character building and doing ones duties which were governed by *Vedic* and Hindu Text Law Writers from time to time. It is important to note that the sacrament concept of marriage is also practiced by Catholic Christians the only difference is that Hindus consider marriage as eternal union and Christians consider marriage for life time and both have mysticism attached to marriage. The marriage rituals which were practiced during *Vedic* period were also practiced in Europe like *Vahuti* ceremony was custom of marriage ceremony in Greece.³⁹

V. Marriage as a Contract

With changing times marriage has become a contract. There are two characteristics of marriage these are contractual and status. Marriage gives legal status to parties consequently rights and duties arise between them. This makes marriage a contract. Unlike commercial contract it is a *sui generis* in many aspects. But it presents similar problem like other contracts like void, voidable, consent obtained by fraud, dissolution of marriage etc.⁴⁰ In regard to status of parties to the marriage belonging to a specific group that is married persons, whatever the form of contract may be, marriage constitutes, if not an express, at all events, an implied contract between the parties that the husband shall maintain the wife⁴¹ and wife will be loyal to her husband and both will do their matrimonial duties well. It is important to note that unlike other contract the marriage contract is regulated by judicial decision of which parties have no control. It is one way process after entering into marriage both parties themselves cannot exit except through will of court. Thus, both parties cannot themselves exit from the marriage contract at their own will like other contracts.

³⁹ Edward Westermarck, *History of Human Marriage* 470-479 (Macmillan and co., Limited, New York, 3rd edn., 1901).

⁴⁰ P.M. Bromley, *Family Law* 16 (Butterworths, London, 6th edn., 1981).

⁴¹ *Ardasur Cursetjee v. Piroze Boye*, 2 Bom.624.

Accordingly, marriage entails rights and duties of parties and is enforceable like other contracts such as claim of maintenance, right of residence, custody of children etc. Hindu marriage is enforced according to provisions of personal laws such as Hindu Marriage Act, 1955, Hindu Adoption and Maintenance Act, 1956, Hindu Succession Act, 1956, Maintenance provision under Criminal Law etc. In this regard marriage is neither a sacrament nor a contract but semblance of both. If a Hindu marries in special circumstances under Special Marriage Act, 1954 then marriage would be regarded as a civil contract as no essential marriage ceremonies are necessary for solemnization of marriage. As marriage is solemnized in the office of registrar, this is a civil contract and requires no marriage ceremonies apart from thirty days' notice prior to registration of marriage along with presence of three witnesses.⁴² The parties should be competent to marry like age of bride be eighteen years and bridegroom be twenty one years.⁴³ The marriage is declared voidable if consent of parties is obtained by force, fraud or coercion as stated in Indian Contract Act, 1872.⁴⁴

Authors like Mulla, B.K Sharma, B.N Sampath and Derrett, has stated that Hindu marriage is a sacrament and not a contract. Mulla has stated that Hindu marriage is sacrament and divorce is creation of law. B.K Sharma ha stated that "Inspite of the amendment in 1976 in Hindu Marriage Act, the Allahabad High Court has held that the marriage under Hindu Law is still a sacrament and endeavor should be made to restore the relation."⁴⁵ B.N Sampath has talked that Hindu marriage once performed cannot be undone by judiciary. Derrett has argued that once *samskara* is performed it cannot end. But certain secular rights can be terminated as the rights and obligations which arise in marriage ends after divorce. But Mayne and Paras Diwan have stated that Hindu marriage is a sacrament as well as a contract. Consent of parties is not important for validity of marriage. Section 12(1)(c) of Hindu Marriage Act, has prescribed about consent of parties if it is obtained by force and fraud then marriage is voidable. Sections 5, 11 and 12 have ingredients of contract which makes Hindu marriage a contract. Thus, from the views of different authors it is analyzed that the Hindu Marriage is neither a sacrament nor a contract but is semblance of both and divorce is created by legislature.

⁴² The Special Marriage Act, 1954 (Act 43 of 1954), s. 11

⁴³ *Id.*, s. 4(c).

⁴⁴ *Id.*, s. 25(iii).

⁴⁵ *Gopal Krishan v. Mithilesh Kumari*, AIR 1979 All 316.

The sacrament concept of marriage has been weakened since third decade of twentieth century.⁴⁶ There are many reasons for changing concept of Hindu marriage like non-accessibility of India's spiritual learning, perplexity relating to India's own spiritualism, loosening religious ties, devolution of *varnadharma*, lack of control in *Brahmachary asrama*, no respect for religious ceremonies in marriage, egocentric attachment, industrial revolution, urbanization, democratic ideal, free mixing of sexes, development of new sex mores, women empowerment, changing arrangements of marriage among spouses, change in value system, the growth of individualism, family disintegration, joint family system, disrespect to elders, work life and enactment of laws.⁴⁷ There are also many other reasons for breakdown of marriage like dowry, lack of satisfaction in marriage, ego problem, false impression at the time of marriage, information technology, lack of tolerance, use of mobile phones, tabs, smart phones and other electronic communication devices, pornography, premarital relationships, premarital pregnancy, extramarital associations, emerging varying relationships that are in the nature of marriage, economic needs, renouncing duties, etc.⁴⁸ It is important to note that a person cannot circumscribe the reasons of breakdown of marriage as it differs from person to person in different circumstances.

The consequences of contractual marriage have encouraged intercaste and interreligious marriages but its percentage is low, people are deviating from customary marriage, there is a change in selection process like dowry, high salary of a boy, wealth, inheritance of property from parents of boy and girl, working woman wants her husband to cook food, women does not want to live with their parents-in-law etc have become a criteria of selection of boy or a girl. Now present generation is unable to do their duties well and this has brought gaps in society indeed the overall development of the nation as practice of *dharma* has been abandoned by Hindus and *Grhythaasrama* is unable to merge with new ways of life and law

⁴⁶ C.A., Hate, *The Socio-Economic Conditions of Educated Women in Bombay City*, (School of Economics and Sociology, Bombay University, Bombay 1980). See also: K.T. Merchant, *Views on Marriage and Family* (B.G Paul and Company, Madras 1935) cited in Deep Punia, R.K .Punia in "Changing Marriage Values in Marriage and Family in India" in Jasmeet Sandhu (ed.), *Marriage and Family in India: Trends and Emerging Challenges* 79 (Rawat Publications, Jaipur, 2016).

⁴⁷ Steven J. Rosen, *Essential Hinduism* 38 (Praeger, London, 2006); M.N. Srinivas, *Social Change in Modern India* 125-126 (Orient Longman Ltd, New Delhi, 1977); William Goode, *World Revolution and Family Patterns New York* 204 (New York, Free Press, 1963).

⁴⁸ Pratima K.Chaudhary, *Changing Values among Young Women* 126 (Amar Prakashan, Delhi, 1988); S.Pothen, *Divorce: Its Causes and Consequences in Hindu Society* 147 (Shakti Books, Ghaziabad, India, 1986); M.Tariq, "Cyber Pornography in the Changing Legal Scenario and Techno-Legal Scenario and Techno-Legal Therapeutic Measures: A Critique" in Vimlendu Tayal, *Cyber Law Cyber Crime Internet and E-Commerce* 147 (Bharat Law Publications, Jaipur, 2011).

as society is still dependent upon it, as individual happiness has become more important than kin, family and society. Moreover, *artha* and *kama* are being more practiced than *dharma*.

VI. Emerging Varying Relationships that are in the Nature of Marriage

Emerging varying relationships that are in the nature of marriage can only be explained and there is no concise definition in any text or statute. These are described as relationship in the nature of marriage, *de facto* relationship, marriage like relationship, cohabitation, couple relationship, etc. These relationships have different nomenclature in different parts of the world like 'relationship-in the nature of marriage' in India, 'defacto relationship' in New Zealand, 'couple relationship' in Queensland, 'cohabitation' in Hungary, 'Live-in relationship' in France etc. These relationships are between a man and a woman who are unmarried but have competency to enter into legal marriage, have a legal age of entering into marriage and to accept each other in society as husband and wife. They "must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time."⁴⁹ In India laws recognizes these relationships as relationship in the nature of marriage and are protected under the Protection of Women from Domestic Violence Act, 2005 with riders as stated by court from time to time.⁵⁰ The man and woman should live in a domestic relationship and shared household as per sections 2(f) and 2(s) of the Protection of Women from Domestic Violence Act, 2005. If all the legal and judicial parameter are fulfilled then only relationship would be regarded as relationship in the nature of marriage and woman will get protection under law like residence, monetary relief and compensation but will not get all benefits which a legally wedded wife gets under Hindu Marriage Act, 1955.

There are different factors which are responsible for emerging varying relationships that are in the nature of marriage these are for seeking compatibility, lack of responsibility towards marriage, circumstances, sexual liberation, anonymity, disposable income, phone sex, porn and sexual messages, long working hours, age of un-innocence, workplace, limited avenues outside work place, sexual relationship at workplace, age of pleasure, fun, sex offenders, late

⁴⁹ *D. Velsusamy v. Patchaiammal*, AIR 2011 SC 484(para 33).

⁵⁰ *Indra Sarmav v. V.K.. Sarma*, AIR 2014 SC 309; *Bhardwaj v. Jyotsna*, Criminal Revision No. 166 of 2015.

marriage, etc.⁵¹ Ways of living have changed; as a result pressure is not being taken by present generation with this there is a degradation of value system which has resulted into 'emerging varying relationships that are in the nature of marriage.' As a result, sexual activeness has become common and different marital institutions have developed in India. Accordingly living of a man and woman without marriage has started without any fear of law and society.

In 'emerging varying relationships that are in the nature of marriage' so long the man and woman are satisfied with the behaviour of either of the two they continue to live together though they are not husband and wife. Thus, if one relation fails parties to the emerging varying relationships that are in the nature of marriage do not require court proceedings to separate and to create new relations. This change in society has taken birth when the sacrament concept of marriage has failed and under new circumstances the contractual concept of marriage has been interpreted under matrimonial laws which resulted in emerging varying relationships that are in the nature of marriage. Thus, a change is seen in modern India where the present generation is moving away from responsibilities of marriage and is entering into emerging varying relationships that are in the nature of marriage. In emerging varying relationships that are in the nature of marriage free entry and free exit policy is being practiced. These are short lived relationships as partners don't carry obligations. Till the time there is no pain these relationships go on working sweetly but when pain and tolerance is needed it breaks, accordingly, it not only disturbs one's life but also affects the society as the relations do not carry any commitment.

There are drawbacks of emerging varying relationships that are in the nature of marriage these are low quality marriage, impact on marriage decisions, impact on stability of matrimonial life, lesser developed relationships of married persons, impact on children and alienation of married person from his or her family.⁵² Accordingly these relationships have created imbalance in society and have impacted the importance and balance of the Institution of marriage which is more committed and gives more benefits, more particularly its quality to society as a whole.

⁵¹ Exclusive Annual Sex Survey India Today, March 12, 2018; Judith P.M. Soons and Matthijs Kalmijn, "Is Marriage More than Cohabitation? Well-Being Differences in 30 European Countries" 71 *Journal of Marriage and Family* 1143 (2009).

⁵² M.L.Clements, S.M.Stanely (etals), "Before they say I do: Discriminating among Marital Outcomes Over 13 Years" 66 *Journal of Marriage and Family* 613-626 (2004); *S.P.S Balasubramanyam v. Suruttayan Andalli Padayach*, AIR 1992 SC 756. See also: *Indra Sarmav v. V.K.. Sarma*, AIR 2014 SC 309.

VII. Legislative Response to Changing Concept of Marriage

Legislature in its wisdom enacted one law after the other to meet the needs of society from seventeenth century to present times like Bengal Sati Regulation, 1829, Hindu Widow Remarriage Act 1856, Special Marriage Act, 1872, Child Marriage Restraint Act, 1929, Caste Tyranny Removal Act, 1937, Bombay Prevention of Hindu Bigamous Act, 1946, Bombay Hindu Divorce Act, 1947, Hindu Marriage Validity Act, 1949, Madras Hindu Bigamy Prevention and Divorce Act, 1949, Hindu Marriage Act 1955, Protection of Women from Domestic Violence, 2005, etc. The Hindu Marriage Act, 1955 is exclusive Act which governs marriage among Hindus. The Act for the first time introduced divorce and made Hindu marriage a dissoluble union. The main aim of the Act is to maintain marriage. The Act under section 29(2) has kept the customary marriage valid. Under section 7 sacrament concept of marriage has been kept alive, as well as customary rites and ceremonies of either party are essential for validity of marriage. Where *saptapadi* is essential marriage ceremony of either party thereto then marriage becomes complete on seventh step. Now only sacrament ceremonies make marriage sacrament while other provisions have ingredients of contract and have made Hindu marriage a contract.

With changes in different societies in India, the legislature incorporated new legislation to meet the need of society. The legislature drafted the Hindu Marriage Act, 1955 taking into consideration the ancient Hindu Law as well as matrimonial laws of UK, USA and Australia. The conditions of validity of marriage have been stated under section 5 of the Act, which have made monogamy a rule along with the other provisions that neither party is of unsound mind and is capable of giving a valid consent, has not been suffering from mental disorder of such a kind or to such extent as to be unfit for marriage and the procreation of children or is subject to recurrent attacks of insanity, the bridegroom has completed the age of twenty one years and the bride the age of eighteen years at the time of marriage and the parties are not within the degree of prohibited or *sapinda* relationship unless the custom or usage governing each of them permits of such a marriage between the two.⁵³

⁵³ The Hindu Marriage Act, 1955 (Act 25 of 1955), s. 5. See also: Basant K. Sharma and Divya Sharma, *Hindu Law* 45-60 (Central Law Publications, Allahabad, 2nd edn., 2008).

The causes of divorce are detailed under section 13 of the Act. Either spouse in marriage can file divorce on the following grounds: adultery, conversion to another religion, insanity and contagious venereal disease, and renunciation of world, disappearance for seven years and non-restoration of conjugal rights after decree of conjugal right or decree for judicial separation. Section 13 clause (2) further gave two more grounds for divorce only to women. These are since the passing of decree of maintenance no cohabitation between the parties has taken place and that the girl married before the age of fifteen has repudiated the marriage at fifteen or before attaining the age of eighteen years.⁵⁴ The object of Hindu Marriage Act, 1955 is to reform and bring uniformity in matrimonial law.

The legislature in 1976 has amended Hindu Marriage Act, 1955 when tolerance of people became unbearable in marriages. The Hindu Marriage Act, 1955 has incorporated provision of conjugal rights under section 9 of the Act which was not there in Hindu Law. The application of this provision was limited as it entitled respondents to plead facts which could be the grounds of judicial separation, nullity for marriage or for divorce in their defence.⁵⁵

But in 1976 clause 2 of the section has been deleted by Marriage Laws Amendment Act, 1976. Before 1976, the ground for separation by the respondent should be sufficient to get judicial separation, divorce or nullity of marriage under section 9 Clause (2). Now after amendment even grounds other than detailed above are sufficient to deny relief of restitution of conjugal rights. Not complying with the decree of restitution of conjugal rights under original Act for two years was a ground of divorce under section 13(1A)(ii) of the Act. But after the 1976 amendment the period of two years has been reduced to one year.⁵⁶ Thus, the legislature has given a way to breakdown theory of marriage. The sacrament concept of marriage was further impacted when the waiting period of judicial separation was reduced to one year.⁵⁷ To make divorce easy the legislature made grounds of judicial separation as ground of divorce under section 13. Section 13A is added which authorizes the courts to grant decree of judicial separation instead of decree of divorce if marriage can be revived. By Personal Laws Amendment Act, 2019 leprosy as a ground of divorce is repealed as leprosy can be cured.⁵⁸

⁵⁴ The Marriage Laws (Amendment) Act, 1976 (Act 68 of 1976), s.7(c)(ii).

⁵⁵ The original Hindu Marriage Act 1955, s. 9(2) stated in the Gazette of India Extraordinary published by Ministry of Law 273 (1955).

⁵⁶ *Supra* note 54, s. 7(b). See also: Paras Diwan, "Week-End Marriages and Restitution of Conjugal Rights" 10 *JILI* 1-28 (1978).

⁵⁷ *Ibid.*

⁵⁸ The Personal Laws (Amendment) Act, 2019 (Act 6 of 2019), s. 4.

The 1976 Amendment Act has substituted sexual intercourse of one spouse other than his or her spouse under section 13(1)(i) of the Act instead of adultery. The 1976 Amendment Act has added cruelty, desertion, unsoundness of mind, Incurable and virulent leprosy, and venereal disease as new grounds of divorce instead of judicial separation. The provisions of conjugal rights and for judicial separations were renumbered under section 13(1A) and two new provisions were added under this section.⁵⁹ These are 13(2)(iii) and (iv) regarding dissolution of marriage by wife on the grounds that “a decree has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upward or that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.”⁶⁰ The legislature added section 13A to the Hindu Marriage Act, 1955 which gives power to courts to grant alternative relief of decree of judicial separation instead of divorce.

Further, the legislature by incorporating section 13B has made divorce easy as the parties to marriage after living separately for one year can file joint petition for divorce that they cannot live together as their marriage has broken down. The parties then are given time for six months to think before seeking divorce and if parties say that they cannot live together then divorce is granted by the court. Sometimes keeping in view the circumstances regarding future prospects of parties courts have been condoning the waiting period from six months to lesser period.⁶¹ However a rider has been added to this section by section 23 that the consent for divorce under section 13B has not been “obtained by force, fraud or undue influence.”⁶² Accordingly this provision has brought end to sacrament concept of Hindu marriage.

Furthermore, in original Hindu Marriage Act divorce could be taken after three years of separation and divorce was given after extreme hardship to the petitioner on the exceptional depravity by the respondent. The divorce person could remarry only after one year of getting divorce. Thus, the sacrament concept of marriage was too much extent preserved as to get divorce was very much time consuming. However, the Marriage Laws Amendment Act, 1976

⁵⁹ *Supra* note 54, ss.7 (b), 7(c)(i).

⁶⁰ *Id.*, s. 7(c)(ii).

⁶¹ *Amardeep Singh v. Harveen Kaur*, Civil Appeal No. 11158 of 2017, Supreme Court of India, decided on September 12, 2017, available at: <https://indiankanoon.org/doc/79830357/> (last visited on February 19, 2022).

⁶² *Supra* note 53, s. 23(1)(bb).

has liberalized provisions pertaining to divorce and has made provision for speedy disposal of cases.⁶³

With a view to keep marriage alive, legislature in its wisdom has enacted section 23 of the Hindu Marriage Act, 1955 as a rider, wherein certain conditions precedent before grant of any relief to the parties, have to be looked into and decided by the Learned Court. These conditions are that the parties are not colluding with each other for seeking matrimonial relief at the same time the length of marriage and the delay in seeking relief has also been taken note of by the court. Not only this, another important ingredient is that the petitioner is not taking benefit of his own wrong. Thus, keeping in view the sacrament concept of marriage section 23 is a proviso to reliefs under Hindu Marriage Act. Not only this another important provision as contained in section 23 (2) and (3) of the Act pertains to efforts made by the court for saving marriage by reconciliation between husband and wife.⁶⁴

The legislature has also established legal authorities for settling the disputes of parties under the Legal Authorities Act, 1987. The family matters have to be settled by welfare expert in terms of order 32 A (4) of the Code of Civil Procedure, 1908. The matrimonial disputes are also settled through conciliation and Lok Adalat under section 89 of the Code of Civil Procedure, 1908.⁶⁵ Moreover, the Family Courts Act, 1984 provides provision of settlement of disputes through conciliation in short period of time. Section 12 of the Act provides “assistance of medical expert including psychologists or such other person professionally engaged in promoting the welfare of the family for assisting the court in discharging the functions imposed by the Act”.⁶⁶ So that reconciliation between the parties may be achieved.

Sections 25, 26 and 27 of the Hindu Marriage Act, 1955, provide provisions of permanent alimony and maintenance, custody of children and disposal of property for settlement of parties in future through a decree of divorce. The permanent alimony differs from person to

⁶³ Flavia Agnes, II *Family Law: Marriage, Divorce and Matrimonial Litigation* 50-51 (Oxford University Press, New Delhi, 2011).

⁶⁴ *Supra* note 53, ss. 23(2), 23(3). See also: Paras Diwan and Peeyushi Diwan, *Modern Hindu Law* 200-201 (Allahabad Law Agency, Faridabad, 19th edn., 2008) .

⁶⁵ Avtar Singh, *Law of Arbitration and Conciliation and Alternative Dispute Resolution Systems* 495-524 (Eastern Book Company, Lucknow, 10th edn., 2013).

⁶⁶ The Family Courts Act, 1984 (Act 66 of 1984), s.12.

person as per the status of parties. In some cases a few thousands are given while in others consolidated huge alimony is granted which may amount to lakhs and even crores.⁶⁷

Furthermore, with changing times where inter-caste and interreligious marriages started, the legislature enacted the Special Marriage Act, 1954. The marriage solemnized under the Act is a civil ceremony. Any two persons of any religion can solemnize marriage after fulfilling the conditions provided under section 4 of the Act. Also, a marriage solemnized between two Hindus is a valid marriage under this Act. But if a Hindu solemnizes marriage with religious rights and ceremonies and subsequently marries under this Act then “marriage subsequently solemnized would be an exercise in futility.”⁶⁸ The conditions provided under section 4 of the Act have made rule of monogamy, besides this condition other conditions are that neither party is incapable of giving a valid consent because of unsoundness of mind or has been suffering from mental disorder of such a kind to be unfit for marriage and procreation of children or has been subject to recurrent attacks of insanity, the age of male is twenty one years and of female is eighteen years and the parties are not within the degree of prohibited relationship.⁶⁹

The Act provides other provisions of solemnization of Special Marriages from section 5 to 14 where parties have to adhere to civil ceremony. The parties to marriage are to present themselves before the marriage officer and are to fulfill the necessary requirements regarding their proof of age, religion and to perform such other formalities as per rules. Their applications are supported by affidavits and three witnesses to identify them.⁷⁰ The marriage officer shall issue a notice to general public as well as in the area of residence of applicants to file any objection, 30 days is period of notice and if any objection to the proposed marriage is filed the same shall be decided by marriage officer within the four corners of special marriage Act.⁷¹ If no objection is filed or filed objections are rejected, the marriage officer shall issue the marriage certificate under the Special Marriage Act for marriage having been performed. No other ceremony is required. Furthermore, the parties can go for any ceremony for solemnization of marriage, then the marriage has to be registered according to conditions prescribed under section 15 of the Act.

⁶⁷ *Renu Devi v. Krishan*, AIR 2012 (NOC) 145 (HP); *Dimple v. Subhash*, 2016 AIR CC 1236; *Talereja v. Kavita Talreja* AIR 2017 SC 2138.

⁶⁸ AIR 1987 Cal 191.

⁶⁹ The Special Marriage Act, 1954 (Act 43 of 1954), s. 4.

⁷⁰ *Id.* at s.11.

⁷¹ *Id.* at s.7.

The provisions of judicial separation, nullity of marriage and divorce are provided under sections 23, 24, 25 and 27 of the Act. The provision of judicial separation includes grounds of divorce and an additional ground that the decree of restitution of conjugal rights has not been complied with, which is not there under Hindu Marriage Act, 1955.⁷² The provisions of restitution of conjugal rights are identical under both the Acts. Under section 24 of the Act marriage is void if conditions specified under section 4 are not complied with or that the respondent is impotent at the time of solemnization of marriage and at the time of filing of suit. Under section 25 of the Special Marriage Act, the marriage is voidable on the grounds that the marriage did not consummate due to willful refusal of the respondent, pregnancy of the wife of which the husband was not aware and that marital intercourse has not been taken place since the knowledge of the same and that the petition is presented within one year of marriage or that the petitioner consent was obtained by coercion or fraud as stated under the Indian Contract Act, 1872. Provided that the petitioner did not live with respondent on the discovery of such force and that the petition was presented within one year after discovery of coercion or fraud. Further, grounds of divorce under section 27 of the Act are adultery, desertion, sentence of imprisonment for seven years, cruelty, insanity, venereal disease, leprosy, presumption of death, rape, sodomy, bestiality, non-resumption of cohabitation after passing of a decree for maintenance and non-resumption of cohabitation after passing of a decree for judicial separation or restitution of conjugal rights. However, leprosy as a ground of divorce has been deleted by Personal Laws (Amendment) Act, 2019 as it can be cured completely.⁷³

The Act in its commencement has provisions of divorce by mutual consent under section 28. This provision is identical to provision of divorce by mutual consent stated under section 13 B of the Hindu Marriage Act 1955, which was inserted vide Marriage laws Amendment Act 1976 under the Hindu Marriage Act, 1955. Accordingly the Act has reformed Indian Marriage Laws.

The provision of permanent alimony and maintenance to wife is provided under section 37 of the Special Marriage Act, 1954. It is pertinent to note that the provision is gender specific as it is available only to wife. The court at the time of passing of any decree or application made thereafter shall secure wife's maintenance and if it is important then property of husband

⁷² *Supra* note 42 at s. 23.

⁷³ *Supra* note 58.

would be attached till her lifetime. The court would also see the conduct of parties and circumstances of the case. Section 38 of the Act provides provision of custody of children.

It is important to note that if a Hindu who is a member of undivided family marries a non-Hindu under this Act then he shall have to face consequences stated under sections 19 of the Act that “he shall be deemed to effect severance from such family.”⁷⁴ And Indian Succession Act would be applicable to parties in marriage in case of intestate succession. Accordingly the Act holistically provides provisions for special form of marriage and certain other marriages and their registration including the provision of divorce.⁷⁵

The Act was amended in 1976 vide Marriage Laws (Amendment Act) which brought radical change in diluting the concept of marriage. The most important change was decrease in period of taking divorce from three years to one year after solemnization of marriage. The amendment widened the scope of insanity by mental disorder which included mental illness, arrested or incomplete development of mind, psychopathic disorder and schizophrenia. Another new change came in which grounds of desertion and judicial separation were added as grounds for divorce. The period of judicial separation was reduced to one year from two years for taking divorce. If parties do not cohabit for one year after the decree of judicial separation then they can seek divorce.⁷⁶ Thus, with changing times legislature has enacted laws for reconciliation of parties in a dispute, or to get a divorce in a peaceful manner without cleaning each other’s dirty lining.

VIII. Judicial Response to Changing Concept of Marriage

Judiciary has played pivotal role in maintaining marriage. Initially courts while deciding cases used to take into consideration ancient Hindu Law for interpreting the provision of Hindu Marriage Act, 1955, but where precedents under Hindu Law were not available courts used to apply English Law through English principles and precedents. In *Kshitish Chandra v. Emperor*,⁷⁷ the Session Judge convicted appellant under Indian Penal Code on committing fraud against the complainant as it was shown that her daughter would be married to a high class Brahmin. However, girl got married to a Brahmin to whom her class did not match. The court held that as there is no proof of fraud in marriage or that facts have been concealed

⁷⁴ *Supra* note 42 at s. 19.

⁷⁵ *Id.* at Preamble.

⁷⁶ *Supra* note 38 at s. 27 (2) (i).

⁷⁷ AIR 1937 Cal 214.

accordingly the marriage was regarded as valid and the conviction of accused is set aside. The court further observed that Hindu marriage is a sacrament and not a contract and if marriage is solemnized with proper ceremonies then there is no impediment to hold that marriage is invalid. The court further said that marriage between different castes of same *varna* was held not even invalid as per Hindu *Shastras*.

In present times as well courts have given a view that the marriage is a sacrament and it cannot be dissolved at whims and fancies of parties. In *Nirmal Singh v. Reeta*,⁷⁸ the husband has contended that wife is suffering from Hepatitis B and because of that he cannot have access to woman as it is infectious and it amounts to cruelty. Therefore, her medical examination should be conducted. But court dismissed the appeal and held that communicable disease is not a ground of divorce under section 13 of the Hindu Marriage Act, 1955. Thus, even in present times divorce is not granted to parties as per their will until and unless there is any valid ground laid down under the Hindu, Marriage Act, 1955.

Further, with changing times due to social change and development in society, courts started granting divorce if marriage is a dead wood and cannot be reconciled. The trend of courts in granting divorce has not been consistent as it differs from case to case. The courts have given decision on grounds of cruelty and desertion in enormous cases after enactment of Hindu Marriage Act, 1955. With passage of time the courts have developed the connotation of cruelty and desertion. At times courts in this regard have taken into consideration English cases while interpreting cruelty along with what law has provided.

With changing times wife has started inflicting cruelty towards husband which was never seen in *Vedic* and *Manu* period down to the period of Commentators and Digest writers. It was men who used to inflict cruelties on women during *Manu*, *Mahabharata* and *Pativratya* period. Now there are plethora of cases where courts have held cruelty by wife such as false allegation, insults in front of friends, does not want to live with parents-in-law, not doing household duties, not cooking, threat to commit suicide, blame of extra marital relationship, etc.⁷⁹ In *Narendra v. K. Meena*,⁸⁰ husband filed appeal against the judgment of Lower Court where the court dismissed the petition of divorce on ground of cruelty. The appeal was filed

⁷⁸ C.R.No.237 of 2014 (O&M) of Punjab and Haryana High Court Chandigarh, date of decision 04.11.2015.

⁷⁹ See: A.G. Gupte, *Cruelty by Wife* (Premier Publishing Co., Allahabad, 2018).

⁸⁰ AIR 2016 SC 4599.

on the ground that the conduct of wife in imputing false allegations regarding extra-marital relationship, she is of suspicious nature, does not want to live with parents-in-law and wants to live separately and threats to commit suicide amounts to cruelty. The court upheld that the conduct of wife amounts to mental cruelty if she commits suicide then husband will have to face adverse consequences.

The court further said that “A son brought up and given education by his parents, has a moral and legal obligation to take care and maintain the parents, when they become old.”⁸¹ The court gave the reason that wife wanted to enjoy her husband income as there is no convincing reason of her to live separately and sway away from normal custom. The court said that Indian society is different from western society. Thus, court dissolved marriage under section 13(1)(ia) of the Hindu Marriage Act, 1955 thereby protecting aged old parents and the society. As cruelty cannot be demarcated courts in India have given divorce as per circumstances of case such as different value system, no compatibility, not doing ones duties, demand of dowry etc.⁸²

Moreover, in present scenario where wife is working and husband is unemployed the question whether the courts can grant maintenance to a husband has arisen. Although the provisions under sections 24 and 25 of the Hindu Marriage Act, 1955 are gender neutral but the courts are still cautious while granting maintenance to husband. In *Bhagyashri Jagdish Jaiswal v. Jagdish Sajjanlala Jaiswal*,⁸³ writ petition is filed by wife against the orders of grant of maintenance to husband by District Court Nanded. The High Court dismissed the petition of wife and upheld, the decision of Lower Court for grant of interim maintenance to husband under section 24 of the Hindu Marriage Act, 1955 as application under section 25 of the Hindu Marriage Act, 1955 for permanent alimony to husband is pending. In this case the husband filed application under section 24 and 25 of Hindu marriage Act, 1955 for grant of maintenance pendent lite and permanent alimony of rupees 15000 per month after passing of decree of divorce in Trial Court. The husband contended that the wife was earning for the family by taking tuitions and then acquired educational qualification of M.A., B.Ed. and started her job as a teacher. The husband specifically pleaded that he had to set aside his own

⁸¹ *Id.* at 4602 (para 11).

⁸² *Vishwanath Sitaram Aggrawal v. Sarela Vishwanath Agarawal*, AIR 2013 SC 2586. See Also: ML Bhargava, *Law on Cruelty Against Women* (Kamal Publishers, New Delhi, 2018); Mahipal Singh Verma, *Cruelty by wife* (Tomar Law Book Company, Meerut, 2014).

⁸³ AIR 2022 Bom 116.

ambition and had to manage household affairs so that wife could complete her education. Besides, this he also aided and assisted wife's parents and contributed some amount for family by working with her father.

However, the petitioner wife strongly opposed his contention that he is not working. The trial Court granted maintenance pendent lite of rupees 3000 per month from the date of application till disposal of petition. The High Court held that "the provision of maintenance/permanent alimony being a beneficial provision for the indigent spouse, the said section can be invoked by either of the spouse, where a decree of any kind governed by sections 9 to 13 has been passed and marriage tie is broken, disrupted or adversely affected by such decree of the court."⁸⁴ Accordingly the Court further held that "the application for interim maintenance filed under section 24 of the Act of 1955, has been rightly entertained by the learned Judge and the husband has been held entitled to interim maintenance while the proceedings under section 25 are pending"⁸⁵

Besides, if husband stops earning in order to get maintenance from his wife then he will not be entitled to claim maintenance from his wife. In *Govind Singh v. Vidya*,⁸⁶ the husband, who stopped his business of running auto-rickshaw, is not entitled for maintenance from his wife. Further, the view of Karnataka High Court in recent decided case also shows that court grants maintenance to wife rarely in circumstances where husband is incapacitated or handicap.⁸⁷ In this case the husband had lost his job in COVID-19 and is not working since then. Instead of granting maintenance to wife he filed application of maintenance from his wife of two lakh rupees. The court said that a husband must remember that "it is better to wear out than rust out" The court further said that if he does not have job at present, it does not mean that he does not have capacity to earn. The court held that it will promote idleness and would be an anathema to the spirit of section 24 of the Hindu Marriage Act, 1955 if maintenance is granted to husband even when the section is gender neutral. The Court observed that "it can be irrefutably concluded that the husband has decided to lead a leisurely life by seeking maintenance from the hands of the wife."⁸⁸ Accordingly the court rejected the appeal of

⁸⁴ *Id.* at 119 (para 16).

⁸⁵ *Id.* at 120 (para 18).

⁸⁶ AIR 1999 Raj 304.

⁸⁷ The Hindu Bureau, "A husband must remember that 'it is better to wear out than rust out': Karnataka HC", *The Hindu*, Jan. 24, 2023, available at: <https://www.thehindu.com/news/national/karnataka/wife-paying-maintenance-to-able-bodied-husband-will-promote-idleness-karnataka-hc/article66427063.ece> (last visited on February 19, 2023).

⁸⁸ *Ibid.*

husband for grant of maintenance from his wife instead court directed him to pay maintenance of 10,000 rupees to his wife.

Marriage is being considered as a contract by taking into consideration elements of contract such as essential ingredients of a valid contract, fraud in marriage, impossibility to contract, void contract of marriage etc. If marriage is not solemnized then gifts given at the time of betrothal after acceptance of proposal is regarded as consideration in marriage and should be given back as per provisions of Contract Act, 1872.⁸⁹ But the contract of marriage is dissolved by court and not by conduct of parties. In *Poonam v. Naveen*,⁹⁰ husband played fraud upon wife in seeking divorce. Husband told his wife that in order to have chances of going abroad he needs to get divorce. Accordingly a petition for divorce was filed and divorce was secured by husband. The wife has filed case to get her divorce annulled. The Court held that “marriage is the only contract that cannot be annulled by mere wish of the parties outside the court. Without the imprimatur of the court, the relationships cannot be driven asunder to a dissolution.” The court further said that decree of divorce cannot be annulled if once it has been granted. Parties have sought divorce to go for job abroad accordingly marriage contract cannot be revived at the will of parties. Thus, society for fulfilling their desires and greed goes for sham marriages and divorces. The problem arises when one of the parties is interested in separation and other wants to live.

With changing times society has started entering into relationships without performance of marriage ceremonies. Accordingly courts have started solving problems arising out of such relationships. The courts in India have differentiated relationship in the nature of marriage from other illegal relationships like one night stand, concubinage, adultery, live-in relationship *per se* etc which have no sanctity under law. The law relating to relationship in the nature of marriage has developed over the years. The first landmark case in this regard is seen in 2001 in *Payal Sharma v. Superintendent, Nari Nikeetan Kalindri Vihar, Agra*.⁹¹ where the question arose whether a man and a woman can live together without marriage. The court held that two majors can live together with anyone they like without marriage under article 19 and 21 of the Constitution of India, 1950. Further in *M. Palani v. Meenakshi*⁹² the court granted maintenance to a woman who had consensual sex with a man

⁸⁹ *Rajendra Bahadur v. Roshan Singh*, AIR 1950 All 592.

⁹⁰ CR No. 4141 of 2015 (O&M), in the court of Punjab and Haryana, Chandigarh, date of decision January 21, 2016.

⁹¹ AIR 2001 All 254.

⁹² AIR 2008 Mad 162.

without marriage and also did not live together with him. The Court held that they have had lived in shared household temporarily. Thus, woman can claim maintenance.

However, in *D. Velusamy v. D. Patchaiammal*,⁹³ the Supreme Court gave landmark judgement and explained what is relationship in the nature of marriage as it is not defined under any Act or in any case. The court stated that relationship in the nature of marriage is different from live-in-relationship and all live-in-relationships do not come under the ambit of relationship in the nature of marriage. The court held that relationship in the nature of marriage is akin to common law marriage and requires essential ingredients of common law marriage to be fulfilled. These are:⁹⁴

- (a) The couple must hold themselves out to society as akin to spouses.
- (b) They must be of legal age to marry.
- (c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.
- (d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

And that parties must have “lived together in a shared household”⁹⁵ as defined under section 2(S) of the Act. Thus, all live-in-relationships do not get protection under law. Only relationship in the nature of marriage will get protection under the Domestic Violence Act, 2005 as legislature has stated relationship in the nature of marriage and not live-in-relationship.

In another landmark case of *Indra Sarma v. V. K. Sarma*,⁹⁶ the Supreme Court further elaborated the concept of relationship in the nature of marriage. In this case the Supreme Court differentiated live-in relationship from relationship in the nature of marriage. Appeal is filed in High Court and then in Supreme Court against the orders of Lower Court for giving maintenance to unmarried woman who has lived for eighteen years in a shared household with married man having two children. The court held that “maintaining an adulterous relationship that is having voluntary sexual intercourse with a married person, who is not one’s husband or wife, cannot be said to be a relationship in the nature of marriage.”⁹⁷ The court said that live-in relationship is an arrangement where if parties depart, it ceases to exist.

⁹³ AIR 2011 SC 479.

⁹⁴ *Id.* at 484 (Para 33).

⁹⁵ *Ibid.* 484.

⁹⁶ AIR 2014 SC 309.

⁹⁷ *Id.* at 328 (para 56).

Accordingly, relationship has to be proved by identifying characteristics of relationship as legislature has used the expression in the nature of. The court stated grounds for relationship in the nature of marriage are duration of period of relationship, shared household, pooling of resources and financial arrangements, domestic arrangements, sexual relationship, children, socialization in public and intention and conduct of parties.⁹⁸ But these are not exhaustive. If all these are affirmative then relationship would be a relationship in the nature of marriage and parties will have all the legal rights if it is broken. As the woman knew that husband is a married man and has two children therefore court gave status of concubine to woman.

There is no exclusivity of relationship and relationship is not monogamous. Accordingly relationship cannot be regarded as relationship in the nature of marriage. Also, the parties should have lived in said household as stated under section 2(f) of the Protection of Women from the Domestic Violence Act, 2005. Thus, courts in India protect only relationship in the nature of marriage where an unmarried woman lives as a wife, but is not a legally wedded wife, with an unmarried man with certain riders as detailed above.

Further, the question arises whether long term cohabitation of a man and a woman amounts to presumption of marriage or not. Supreme Court analyzed presumption of legality of marriage in *Karedla Parthasaradhi v. Gangula Ramanamma (D)*.⁹⁹ This is the case regarding the share of immovable property of deceased wife. The brother of deceased has questioned the legality of marriage of deceased wife and has stated that the property of deceased should devolve to his brothers and sisters. The Court stated that the long term cohabitation of defendant with deceased for 33 years and affection shown towards her by deceased along with other circumstances like fixed deposits in joint name and deceased wrote letter that the amount should be transferred in her account is a strong circumstance which shows that she was wife of deceased husband as long term cohabitation of a man and woman raises a rebuttable presumption that they are husband and wife. Thus, the wife is entitled to the house property being Class- I heir.¹⁰⁰

⁹⁸ *Id.* at 327-328 (para 55).

⁹⁹ AIR 2015 SC 891.

¹⁰⁰ *Id.* at 899 (Para 30).

Further in a recent case of *Kattukandi Edathil Krishnan v. Kattukandi Edathil Valsan*,¹⁰¹ the Supreme Court granted share to an illegitimate son under Mitakshara Law of Inheritance on the presumption of long term cohabitation of his parents under section 114 of the Indian Evidence Act, 1872. In this case the plaintiff's parents had passed away accordingly suit is instituted by plaintiff being legal heir of his parents. The court in this case analyzed that there is no direct evidence that the plaintiffs parents have ever married but circumstances and long term cohabitation has resulted in presumption of their marriage. The record shows that the mother of plaintiff used to get money from fathers family till her death along with this many circumstances like name of parents in his. birth certificate and voters card of his parents show that they were husband and wife. The court further analyzed that the defendants have failed to rebut the presumption in favour of a marriage between plaintiff's parents on account of their long term cohabitation.¹⁰² Accordingly the court set aside the High Court Judgement and restored the Trial Court judgement "for partition of the suit property into two shares and one such share was allotted to the plaintiffs." Thus, it can be seen that judiciary is also changing the dimension of Hindu Marriage by interpreting the law strictly in present changing times thereby protecting the institution of marriage.

IX. Conclusion

Hindu marriage is sacrament and is solemnized through *Vedic* mantras in presence of God for fulfilling religious and social duties in order to attain *moksha*. Accordingly Hindu marriage is scientifically designed to regulate and maintain order in society by protecting children as well as the old parents indeed everything and anything of man's life, thereby keeping the nation happy, prosperous and successful. Consequently the importance of wife remained intact in all ancient periods. With passage of time due to social change the concept of marriage has changed from sacrament to a contract. It has been further impacted by emerging varying relationships that are in the nature of marriage there by impacting quality and stability of marriage and deteriorating the institution of marriage in terms of lesser developed relationships of married persons, impact on marriage decisions and alienation of married person from his or her family. Legislature in order to meet the need of time enacted laws one after the other to fulfill the needs of changing times from 1829 to 2006. Further judiciary has played pivotal role in maintaining the institution of marriage by its classical interpretations in

¹⁰¹ AIR 2022 SC 2841.

¹⁰² *Id.* at 2847 (Para 27).

large number of cases. Moreover, with changing times the laws have been enacted to protect the unmarried woman who is cohabiting as a wife in a relationship in the nature of marriage with an unmarried man but is not a legally wedded wife, by enactment of Protection of Women from Domestic Violence Act, 2005 with certain riders.