

SACRAMENT CHARACTER OF HINDU MARRIAGE : A MYTH OR REALITY

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INTRODUCTION

In all systems of law marriage is the backbone of the society. The opinion of Prof. Letourneau in the 'The Evolution of marriage and Family', that the primary cause of the family is purely biological is not true anymore. So, the institution of marriage has its own importance in every civilized society. The institution of marriage is as old as the dawn of civilization. However, the nature and concepts of marriage under different personal laws keep on changing with the changes in society and social order. The general concept of marriage requires the subsistence of the social unit of 'Family', which is the foundation of every society.

The nature and concepts of marriage also differs from community to community. But under most of the personal laws, marriage is considered to be an exclusive union between a male and a female. It is not merely meant for sexual enjoyment but also for a long and happy association of man and woman to constitute an orderly 'Family' which contributes to the progress of society. Mutual love, affection and understanding must built the bonds of matrimony and bind them together for a happy, harmonious conjugal life. The happiness in life to a great extent depends not only upon the state of their physical health but also upon the health and well being of their marital relations. A happy married life is undoubtedly a great boon and bliss. If we trace out the history of some of the stalwarts we find that their domestic happiness, inner strength and support extended by their wife and parents while facing turmoil and difficulties of life, contributed a lot to their achievements. Mahatma Gandhi and Pt. J.L. Nehru are examples of the same. Thus, from time immemorial, marriage has been regarded as the basis of civilization and civilized society of sound morals and domestic affection by different systems of Law. Sick marital relations pose a problem not merely to the related spouses but also, they have wider implications. As the family is basic unit of the society, so, the disturbances and disharmony in this primary unit have its repercussions and impact upon the society also. Harmony in society is inconceivable where there are dissatisfied spouses that make a home and a family which is the most crucial unit in the hierarchy of social institutions. So, stability of marriage is the sine-qua-non of every society. To stabilise the institution of marriage various pieces of legislations have been passed under different personal laws in India and abroad. The emphasis of all marital laws is to avoid hasty dissolution of marital ties.

Marriage is an important social institutions. From marriage, the other social unit i.e. 'family' comes into existence. Institution of marriage is the foundation of any civil society. It is such an institution in the maintenance of which not only the spouses but even public at large is also deeply interested. A number of legal and social incidents arises out of Marital ties. In the absence of marital ties, a number of social problems are bound to arise. Hence, it has been given importance under all personal laws in India. The present day institution of marriage has evolved gradually in various steps. In every society great emphasis is given to the stability of marital ties. Every effort is made to preserve the marital ties, so that there may be peace and progress in the society. However, with the passage of time divorce has also been recognized under all personal laws.

EVOLUTION OF MARRIAGE

It seems to be well established now that the institution of marriage did not exist among the primitive man. At that time man lived more or less like other animals. He was so much engaged in the satisfaction of his primary needs i.e. hunger and shelter that there was no time or occasion to think of refinement. Sex life was absolutely free. Sex promiscuity was the rule.

So long as the sex relationship remain unregulated, it was maternity alone which could be known. Paternity could not be determined. This was not possible if sex promiscuity continued to be the rule. If sex relationship could be made an exclusive union of man and woman, then only, it was possible to determine the paternity of children. Thus, it seems that man's quest to know the paternity of children laid down the seeds of the institution of marriage. It is obvious that marriage as an exclusive union of man and a woman could not have emerged at one stroke. The process was naturally slow and prolonged.

Thus, in the era of man's ascendancy to power, the institution of marriage came into existence as an exclusive union. Man, on the one hand, tried to impose fidelity on the woman by the power which he had acquired over her; on the other hand, he tried to idealize the institution of marriage with a view to dominating the will and mind of the woman. Although in most systems of the world, the individual has the freedom to marry or to remain celibate, yet, marriage is regarded all over the world as a social institution.

SOCIAL REFORM

Hindu society kept on changing with the passage of time. It observed other cultures carefully, and then tried to assimilate their best of ideas or ideals. This change from time to time reshaped it. Though its exposure to Islamic culture in India was not so useful but with the advent of Britishers in India, it got acquainted with Christian cultural pattern. With this Hindu society got an opportunity for the comparison between the two.

During British rule, there was an introduction of English language. It was not merely studied but widely used by Indians. This resulted in the opening of the wide windows for Indians upon the West, its mind and life. The doctrines of equality and liberty also being adopted widely. Educated Indians started favouring the fresh Western ideas and became impatient to introduce these in the traditional norms and attitudes. But nothing much could be done. Though in the later part of the 19th century, divorce was introduced by statute for two classes of persons:

- (i) those who converted to Christianity and consequent there of their spouses refused to live with them, and
- (ii) those who were Christians and performed Christian marriage.

With regard to high caste Hindus, the position remained the same. Although among them, some of those who had the impact of the western education worked for the social reforms and advocated for introduction of

divorce in Hindu Law also. Their attempts did not succeed at All-India level but these succeeded in an Indian state, Baroda and the Baroda Hindu Lagnavichcheda Nibandha (Hindu Dissolution of Marriage Act) was passed in 1931. Similarly, some other piecemeal reforms took place in the provinces of Bombay and Madras, namely the Bombay prevention of the Hindu Bigamous Marriage Act, 1946 which was followed by the Bombay Hindu Divorce Act, 1947. In the same way in 1949, the Madras Province and in 1952, the Savrashttra state passed the similar statutes.

HINDU MARRIAGE ACT 1955

In 1944, the Hindu Law Reform Committee under the chairmanship of Sir Benegal Narsing Rao was constituted, which submitted its report in 1947 containing the proposal for introduction of divorce, other matrimonial causes and a uniform civil code applicable to all Hindus. It faced a tough opposition from the orthodox section of Hindu society. And unfortunately, the Bill lapsed with the dissolution of interim parliament in 1951.

The very first step towards reform of traditional Hindu law taken was the presentation of five separate Bills covering five areas of Hindu Law in the first parliament of free India in the year of 1954-56. These Bills dealt with marriage and divorce, succession, adoption, maintenance and minority and guardianship.

With the passing of the Hindu Marriage Act, 1955, concept of divorce was introduced to the sacramental Hindu marriage which was earlier considered to be a status which once acquired was inviolable under all circumstances and conditions. But this act changed the entire perspective. Although, it was a rude shock to the conservative section of Hindu society, but, legislature asserted that the sole purpose of the act is to uplift the status of the poor downtrodden Hindu woman who was not getting a fair deal in marriage.

MARRIAGE UNDER OLD HINDU LAW

Hindu marriage has been considered to be sacramental affair from the beginning of civilization. The aims of Hindu Marriage are said to be Dharma, Praja (Progeny) and rati (pleasure). Though sex is one of the functions of marriage, it is given third place, indicating there by that it is the last desirable aim of marriage. So Dharma was considered as the highest aim of marriage and it was desired for the fulfillment of one's religious duties. The Hindus considered it indissoluble and an eternal union. Derrett emphasizes :

“The intention of the sacrament is to make the husband and wife one, physically and psychically, for secular and spiritual purposes, for this life and for after lives.”

The great Hindu sage Manu says : “The husband is declared to be one with the wife. Neither by sale nor by repudiation is a wife released from her husband. Once only a maiden is given in marriage.”

It was further said : “A true wife must preserve her chastity as much after as before her husband's death.” So, a widow was supposed to maintain the purity of her bed and widow remarriage was not allowed. In the patriarchal society it also assumed the form of ‘Kanyadaan’, a gift of the girl by the father or the guardian. The sacramental relationship between a Hindu couple, through the performance of various religious rites can be best depicted in the Milton's famous line : “He for God only, she for God in him.” Keeping in view its religious nature it was solemnized through Vedichymns.

The Hindu Shastras have also idealized marriage as an indissoluble tie. According to them, marriage is an eternal union of two soul, it is not made in this world, it is made in heaven by God before a boy or a girl is born in this world and it continues from birth to birth in all yonis i.e. forms of life. So, the Hindus have always put the institution of marriage on the highest pedestal. The Rigveda exhalation of the husband to the wife is :

“Be though mother of my heroic children devoted to the Gods, be though queen in thy father-in-law 'household. May all Gods unit the hearts of us two into one”.

In Many Smriti in the following Saloka the husband exalts his wife:

“I hold your hand for Saubhagaya, that you may grow old with your husband, you are given to me by the just, the creator, the wise and the learned people”.

For a Hindu wife is not just Patni, she is Dharampatni, Sahadharmini. In the idealized form she is Samarajyi, Patrani, Bharya, Sachiva, Sakhi, Griha Lakshmi, Hirdeyswamini. In the most idealized form she is considered to be the source of Dharma, Artha, Kama and Moksha, Manu lays down:

Wife is a divine institution given by God. One should not think that one has obtained her choice. Her unity (with her husband) is established by Vedas. A woman is half of her husband and completes him. Let mutual fidelity continues till death, this, in words, may be considered as the highest Dharma of Husband and wife.

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

A woman must be honoured by father, 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.

Marriage was considered to be one of Ten Samskaras to be performed by every Hindu. So every one was supposed to marry. "To be mothers were women created and to be fathers men, the Vedas ordain that Dharma must be practiced by man together with his wife.

He only is a perfect man who consists of his wife, himself and his offspring. "Those who have wives, truly have family life; those who have wives can be happy, those who have wives can lead a full life." "Dharma" plays a great role in the institution of Hindu marriage. It is by a process of religious and ethical revolution that, "marriage develops into a religious sacrament in Hindu Law and is regarded as a samskar or sacrament, one of the ten samskaras through which the life of a well conducted Hindu progresses to its appointed end." The sacramental aspect of the Hindu marriage implies the following elements:

(iii) The Hindu marriage was obligatory for begetting a son in order to discharge the ancestors debt and for performance of religious and spiritual duties. Wife was not only patni but Dharamapatni.

According to Satpatha Brahmana "The wife is the very half of the husband." Man is only half, not complete until he marriage. Alongwith the idealized picture of wife, the Hindu sages hold in clear terms that husband is "the Lord and master of his wife, he must be adored and obeyed even if devoid of all virtues." He should be worshipped like a God even though he is a man of bad character with no qualities or a Goonda."

The ideals of Pativratya i.e. being devoted to the husband alone, popularized by the Puranic writers, not merely implied fidelity to the husband but made service to the husband, the only duty of the wife and her main purpose in life. As a river merging itself in the ocean loses its identity, so a wife was supposed to merge her individuality with that of her husband. Her only concern in life was to see that all services needed by her husband were properly performed by her, the satisfaction of her husband being her sole joy in life. The duty of a wife continues even after death of her husband "let her emaciate her body by living voluntarily on pure flowers, root, fruit, but let her not, when her Lord is deceased, even pronounce the name of another man.

The remarriage of either widow or divorced woman was not approved by the Smritikaras. According to Manu, "If a man has gone to a foreign land for doing some religious duty, the wife should wait for him for eight years, six years if he has gone for acquiring knowledge or fame.

Thus, marriage is regarded essential for sacred purpose. Marriage is not so much a concession to human weakness as a means of spiritual growth. Generally speaking he who runs back from marriage is in the same boat with one who runs away from battle. So marriage was enjoined as a sacred duty and

leading of an unmarried life was condemned for ordinary man. So, marriage is a necessity to save a Hindu from the place of torment, called "put" and for the repayment of the debts due to ancestors and, therefore, marriage, as a primary means to that end, became a religious necessity. Such being the necessity of marriage for the common man.

Manu pointed out the necessity for a Brahman in another ways, thus:

"A Brahman immediately on being born in produced a debtor in three obligations – to the holy saints, for the practice of religious duty; to the Gods for the performance of sacrifice; to his forefathers, for offspring and that after he has read Vedas in the form prescribed by law, has legally begotten a son and has performed sacrifices, to the best of his power, he had paid his three debts and may then apply his heart to eternal bliss. However, if a Brahman has not read Vedas if has not begotten a son and if he has not performed sacrifices, yet shall aim at final beatitude, he shall sink to a place of degradation."

(iv) Keeping in view its sacramental nature, it was also considered to be indissoluble. It was only in exceptional cases; the sages allowed a woman to abandon her husband and take another.

Vasistha said : A damsel betrothed to one devoid of character and good family or afflicted by impotency, blindness and the life or an out caste or an epileptic or an infidel or incurably diseased should be taken away from him and married to another.

Manu declared mutual fidelity till death as the essence of Dharma for the husband and wife because, according to him, man and woman, united in marriage, should constantly so exert themselves that they may not be disunited and may not violate their mutual fidelity. Manu emphasizes that "the husband must constantly be worshipped as a god by a faithful wife, even if he be destitute of character or seeking pleasure elsewhere or devoid of good qualities." A good wife desirous of living in this as well as the next world with her husband, must never do anything that would displease him, either alive or dead. A woman attains paradise not by virtue of any austere penance but as a result of her obedience and devotion to her husband" Divorce was considered to be a taboo. Moreover, no where in the text dissolution was prescribed, except in extreme circumstances with sufficient proof.

The Shastric Hindu Law did not provide for either divorce or judicial separation in the strict sense. Divorce was not allowed or favoured by the Shastras, customary divorce was only an exception, not the rule, as after the marriage, the wife on her introduction into the family become a limb, as it were, of an organized whole. The indissolubility is simply an integral part of this oldest system of law-Hindu Law-Mayne does not exaggerate when he says, Hindu law has got the oldest pedigree of any known system of jurisprudence and even now it shows no sign of decrepitude. This idea of indissoluble union and completed personality between husband and wife led to

the fiction of the identity or unity of husband and wife. Regarding this fiction Grihyastras provide:

"Marriage, is not a contract entered into by two contacting parties but a spiritual union – a holy bond of unity. The words addressed to the bride just after the Saptpadi are, "Into my will, I take thy heart, thy mind shall follow my mind."

Thus a Hindus marriage, "once tied, cannot be united and once a maiden is given in marriage "neither by sale nor by repudiation is the wife released from her husband."

It is one of the most important samskar necessary for man of all classes and the only one for the woman. The husband and wife have to adjust their tastes and temper, their ideas and interests instead of breaking with each other when they find that these differ. It involves sacrifices on the part of both the

husband and the wife and each is called upon to overcome the incompatibility of the other. So, the Hindu marriage is not an ordinary affair wherein the weakness of flesh plays a dominant part.

However, with the passage of time it was realized that due to the limited role of the woman, the institution of polygamy, concubinage and prostitution emerged. The marriage became monogamous only for the women. The husband could marry another woman even when his wife was alive. However, polygamy was not practiced by the Hindus on a large scale it remained a privilege of the few and in conformity with customary law.

(v) The Hindu marriage was also considered to be internal and it was valid not only during the life time of spouses but also in lives to come. It was not only meeting of bodies but meeting of souls also. So widow remarriage as a rule was not recognized. The ideal was that a widow who remains chaste reaches heaven after her death even though she has no son, a widow who becomes unfaithful to her husband has no claim to his property, not even for maintenance; she may even be excommunicated. The widow remarriage was inconceivable in Dharmasastric law. In fact, a widow remarriage has always been a taboo in India, especially among higher castes. The female was often given a new name and she acquired special relationship in husband's family. Her union with husband was conceived as a condition of one body' and a widow was her husband's surviving half. Some of the writers even began to idealize widowhood, Kalapi wrote :

There is a greater purity in widowhood than in married state (saubhagya). There is greater purity in Bhakti (life dedicated to God) than in Sringara (life of material pleasures). God gives even misery to a person for his own good. We with a limited vision fail to probe that sublime purpose. It is a privilege to suffer in life and preserve the memory of one whom you loved and with whom you enjoyed your life.

(vi) As the Hindu marriage was considered sacramental union, for its solemnization, the essential religious ceremonies were performed. The marriage could not be solemnized without the performance of sacred rites and ceremonies. The details of these ceremonies are given in Grihasutras. The main rites are homa or offerings to the holy fire, Panigrahana or taking the hand of the bride and sapatpadi. The bride and the bride-groom take seven joint steps round the holy fire. This is followed by the address by the bridegroom to the bride. Water is then poured on the hands of the couple and certain prayers are recited. Upon the completion of the prayer, the bridegroom joins hand with the bride and says to her, "Give thy heart to my religious duties, may thy mind follow mine. Be thou consentient to my speeches. May Brihaspati unite thee into me" The Madras High Court after noting the original traits in Hindu Law observed the importance of these ceremonies as under:

"Religious rites and ceremonies that create the indissoluble tie between the husband and wife, that these ceremonies are essential for all forms of marriage among Hindus that it should not be to the will of some people to alter the forms of marriage preserved by the shastras or by custom."

In the words of Derrett, "In fact, in no other respect are feelings of Hindus so acutely sensitive as when their concept of, and belief in the importance of marriage as institution are questioned or attacked. This is largely the work of the Dharmashastras, which after more than two millennium of relentless propaganda, have produced an effect which the western world unhesitatingly labels puritanical.

MARRIAGE UNDER MODERN HINDU LAW

The changes in the nature of Hindu marriage are the outcome of Industrial revolution and of its lofty ideas of liberty and equality. Raja Ram Mohan Roy and other social reformers started a social movement against sex inequality, against the practice of "Sati" and enforced widowhood. He tried to

convince the people that widow-remarriage was sanctioned by the shastras and by the religion preached in the Vedas, and the Smritis did not sanction enforced widowhood. He stood by the government when the inhuman practice of sati was penalized by law and pleaded successfully for it before the Privy council against the petition filed by the orthodox Section of the community to repeal the Act. The agitation started, culminated in the passing of the Hindu Widow Remarriage Act, 1856.

So, the first weakening of the sacramental tie is exhibited in the passing of the Hindu Widow Remarriage Act, 1856, which gave rise to considerable conflict and agitation concerning marriage and which attacked on the sacramental aspect of the Hindu Marriage. By this enactment the sanctity of holy verses of Manusmriti, which manifest the sacramental concept of a Hindu marriage, i.e. 'husband and wife are united to each other not merely in the life but in lives to come' and 'a true wife must preserve her chastity as much after as before her husband's death; came to an end.

The second blow to the sacramental character was given by the passing of the Hindu Marriage Act, 1955, which recognizes the rights of the spouses to seek divorce, judicial separation and also introduced other matrimonial remedies. In the ancient period the state was only to maintain law and order. Modern welfare state is interfering in every aspect of human life, so, the marriage has ceased to be a private affair of the spouses. The concept of indissolubility of marriage has changed due to the influence of a number of factors. The legislature introduced divorce in order to bring an end to the untold miseries of suppressed wives. The sacrosanctness has been eroded on account of foreign invasions and impact of foreign ideas. Moreover, industrialization, urbanization, the sweeping changes in the religious and moral outlooks and dissipation of Hindu joint family system have also contributed in changing the concept of a Hindu marriage. The society is never static, there are always changes in the society. So, it becomes the duty of the state and the legislature to modify laws in accordance with the changing needs of the society. The Law Commission, being aware of this rightly pointed out:

"Hindu law was never static; it was dynamic and was changing from time to time. The structure of any society, which wants to be strong, homogeneous and progressive, must, no doubt, be steady but not static; stable but not stationary; and that is exactly the picture we get if we study the development of Hindu law carefully before the British rule began in India.

The Hindu Marriage Act, 1955, originally based divorce, on the fault theory. The divorce could be sought by one spouse only if the other spouse is at fault or a guilty party. The more emphasis was on the punishment of the guilty spouse rather on the protection of the innocent spouse. So, nine fault grounds were enshrined in Sec. 13(1) of the Hindu Marriage Act on which either of the spouse can sue for divorce. Two special grounds for divorce were provided for the wife under S. 13(2). In 1964 by the Hindu Marriage (amendment) Act, a form of breakdown theory was introduced in Hindu Law by modifying the last two clauses of S. 13(1), viz. clauses (viii) and (ix). These clauses were renumbered as clauses (i) and (ii) of S. 13(1A). The Marriage Laws (Amendment) Act, 1976 inserted two additional fault grounds of divorce for the wife and a new Section 13B was incorporated under which divorce by mutual consent can be sought by the spouses. Thus, under the modern Hindu Law all the three theories, fault theory, breakdown theory and mutual consent theory of divorce, are recognized and divorce can be sought on the basis of any one of them. Further, the customary mode of divorce has also been retained by Section 29(2) of the Hindu Marriage Act, 1955, looking into the peculiar features of the Hindu society where custom has played a very important role.

So, Hindu marriage has not remained a sacrament except that one important sacramental element has still been retained. Under Section 7 of the Hindu Marriage Act, the performance of essential ceremonies is must for the validity of a Hindu Marriage. The marriage must be solemnized-either by the

performance of Shastric ceremonies, which must include sapatpadi, or, by the performance of the customary rites and ceremonies which prevail in the case or community to which one of the parties belongs. So, the Hindu marriage, primarily, has not remained a sacrament and it has also not become a contract altogether though it has semblance of both.

Before the amending Act of 1976, opines Derrett that H.M.A. has trimmed these characteristics but not destroyed. But after the amendment in 1976, he doubted, if it still remained a sacrament. But still holding the last straw he argued, "A marriage which, though starts in the form a samskara, is capable of being ended by judicial divorce, is apparently no samskara at all. But, here, I disagree it can be ended, but so far as Dharma is concerned only with the death of the surviving spouse (it can be ended) and that too subject to the rejoining of the spouses in the future existence."

It may be submitted that the views of Derrett are not very convincing because under the contract Act of 1872, the contract of a minor and a person of unsound mind is null and void. If a Hindu Marriage is looked upon as contract, the agreement of the parties must be a condition precedent. But it is not so under S. 5 and S. 7 of the Hindu Marriage Act. Though, under S. 5 (iii), marriageable age is given both for the male and female, but a marriage solemnized in the violation of age condition is perfectly a valid marriage. The marriage of a person of unsound mind is also valid. But under Section 12 of the Hindu Marriage Act, it can be annulled by the court at the option of the other spouse. So, the views expressed in *Tikait v. Basant Kumar*, that "in Hindu Law marriage was a sacrament, a union an indissoluble union of flesh with flesh, bone with bone to be continued even in the next world" had much relevance under old Hindu law but as far as modern Hindu law is concerned it has become a mixture of sacramental and contractual elements.

Change in the nature of marriage, an overwhelming majority of the population in this country still has faith in the permanent and life long bond between husband and wife as propounded in the Dharamashastras. In this regard Mr. Derrett has rightly assessed:

"The 90 per cent of Hindus for whom I am showing concern, whose laws have been tampered with, at the behest of those who have better access to the legislature, still equate law as an ideal standard with Dharma, and are (i) most reluctant to dissociate with the two and (ii) reluctant to take statute law seriously (except when it offer them cash benefits or the equivalent) or to think of it or the manipulation of it as morally binding. For that 90 percent, religion is still a matter of social identity and cohesion.

"On this basis, the acceptance of marriage as a samaskara is left to the conscience of the individual. If it operates there, it will follow that divorce will not be accepted internally even if occurs practically. Even among the 10 percent, there must be many who envisage marriage as a samskara for themselves and even more so for others; but they regard divorce as a remedial measure for hard cases, to be applied as a matter not of righteousness, but of therapy for the distressed.

Thus, the majority of the Hindu population, unlike Muslims, regard marriage as a life long bond which is indissoluble in all senses: their social system collapse unless they did so regard it. But the process of modernization has left the elite to consider it as a matter to be dealt with in internal forum and when the individual conscience, unsupported by public opinion, can no longer endure a one to one matrimonial relationship the law has, within these famous thirty years, taken their part, and as a matter of compassion given them a route for escape and a chance of new life. The new marriage will not be a samskara, but this will be no problem. It will be a union undertaken by the spouses voluntarily and within the definition of their own judgments, consciences and religions (if

any). As a matter of practice divorced and remarried couples will find each other the best and easiest company, for couples who, whatever their comfort soldier on in a traditional type of remarriage, are likely, unless they are afraid that if you display you divorce decree to the house boy when he opens the door to you it may, by no means, turn out to be a ticket to the friendship, sympathy, and patience of hosts whose won marriage has been floated, by time, off a great many rocks and shocks and must therefore regard you with contempt, what is as bad, pity”.

Thus the old concept of Hindu marriage has undergone a change.

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