Position of Hindu Women under the Hindu Marriage Act And the Special Marriage Act

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THE YEAR 1975 has been declared by the United Nations as the International Women's Year. All the nations lent support to this announcement by various measures as seminars, publications, resolutions and appointment of committees and commissions. In this Seminar, which held in the International Women's Year, it was, therefore, but apt to make an attempt to evaluate the two statutes under discussion, with special reference to their impact on the position of Hindu women. More than a century back began the march of Hindu women towards the goal for equality of status. At present a Hindu woman has gained equality with man in her legal status though not in her social and economic status. The enactment of the Hindu Marriage Act 1955, and the Special Marriage Act 1954, is a milestone on her path leading to equality of status.

The matrimonial status of a Hindu women under the ancient Hindu legal system was far from satisfactory. Marriage was the most important event in the life of a Hindu woman and was considered absolutely essential for her as it was the only *samskara* or purifying ceremony prescribed to her by religion. She was firmly wrapped by the sanctity of marriage which, according to *dharmashastras,* was a holy union for the life and beyond. The purity required from her for the sanctity of marriage claimed her as a wife even in her childhood. The child marriage gave her no opportunity for education and made her ignorant and miserable. The concept of husband and wife as counterparts merged her individuality with that of her husband, and the accomplished husband learned in Vedas dominated her in all respects. As the 'holy union' of a Hindu man was not limited to one woman, the child wife had to spend her days often in the company of co-wives.

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The ideal of *pativrata, i.e.*, being devoted to the husband alone, not merely implied fidelity to the husband, but also service to the husband as the only duty of the wife and her main purpose in life. The *puranas* made her believe the thrilling miracles a woman could do with her *pativrata*, quoting the instances of Savitri getting back her husband after his death and Damayanti burning the hunter to ashes, by sheer *pativrata*. The *puranic* literature records another instance where a husband, suffering from leprosy demanded of his wife to take him to the house of a prostitute on her shoulder. The lofty ideal of sacredness and permanency of marriage made it indissoluble in all circumstances whether he was cruel, ill-tempered, vicious, diseased, drunkard, adulterer or even murderer. On the death of her husband she had either to follow her husband by immolating herself with his body on the funeral pyre or to lead chaste life however young she might be renouncing all the joys of life. But a husband immediately after the death of his wife was expected to marry because the company of a wife was essential to keep the sacred fire kindled. Thus, under the ancient Hindu law the two partners of the marriage were not considered as being equals in their obligations and privileges.

The concept of marriage put forth by our ancient sages as the most sacred sacrament irrevocable and indissoluble is a very lofty ideal, but they did not provide for the natural unfortunate problems which might crop up after the marriage. This was because marriage was considered as a social duty towards the family and the community and there was little or no heed paid to the interest of individual. The social background provided by the authoritarian joint family and caste with its dominion in all spheres of life, perhaps, afforded no scope for the evil effects of the child marriages, polygyny, irrevocability of marriage and denial of remarriage to widows. In the ancient Hindu society of peace and plenty, where most of the people were occupied only with religious and agricultural duties, the elder members of the joint family must have affectionately protected the women, who were married into their family after their selection, whether she was a child wife or a co-wife or a widow and must not have given any chance for any disharmony between the co-wives or the husband and wife. The matrimonial law laid down by our ancient sages, therefore, was with an optimistic view unhampered by pessimistic fears and was fitting in only with the ancient set-up, The law was quite unsuitable for a changing society. In a later period these evils as child marriage and polygyny and also denial of divorce and remarriage of widows resulted in the ruin of women and made them the caged birds of of the household. The position of women deteriorated considerably and they were merely the houseworkers and child bearers at the mercy of men.

With the beginning of this century people became conscious about the injustices done to women, and individual efforts of social reformers and collective efforts of various movements and missions for the uplift of women began to bear fruits. The concrete result of the constant efforts of both celebrated men and women for elevating the matrimonial status of a Hindu woman is the passing of the various statutes as the Hindu Widows Remarriage Act, 1856 and the Child Marriage Act of 1929. But the culmination of such statutory measures was the passing of the Hindu Marriage Act, 1955 which gives statutory protection and equality in matrimonial status to a Hindu woman. The Act has introduced many radical and revolutionary changes in the Hindu matrimonial law and has tried to wipe away the tears of a Hindu wife by its provisions of monogamy, matrimonial reliefs and maintenance even after divorce.

II

The first provision of the Act which affects a Hindu woman is section 2 of the Act, which gives a very wide scope to the expression 'Hindu'. The Act permits a Hindu girl to marry a Hindu of any four castes or a Hindu who may be a Virashaiva, Lingayat or follower of Brahmo, Prarthana or Arya samaj, or a Hindu by conversion from any other religion, or to a person who is a Buddhist, Jain or Sikh by religion. Previously, the bridegroom was to be selected from the same subcaste so that the girl would easily fit into the family of the groom, having the same custom, manners and ways of living. The Act has given a very wide scope for the selection of a groom making it an easier task. This progressive step of permitting intercaste marriage, no doubt, is in keeping with the modern views of a cosmopolitan society. But the time is not yet ripe for a Hindu father to utilise this provision as he is still bound by his customs, belief and social prestige.

The introduction of the rule of the monogamy among conditions of valid marriage under section 5(*i*) of the Act is the most welcome change supported even by the orthodox Hindus. The *Rau Committee Report* reveals that some objections had been raised even against this rule. The arguments of the opponents were that monogamy would lead to increased concubinage and conversion to Islam which permits four wives. They were of the view that "if a man is healthy and wealthy he should be allowed to marry again" and "why should he be deprived of a right which has been enjoyed by him for three thousand years ?" There is not much force in their arguments. The apprehension that Hindus will become Muslims to enjoy the benefit of polygyny was neatly countered by a lady witness before the Rau Committee that if monogamy were not enforced a Hindu woman might turn Christian to secure the benefit of monogamy. Though monogamy has been the ideal of a Hindu

marriage, and has been prevalent, polygamy in many cases and polyandry in rare cases tarnished the sanctity of Hindu marriage. The rule of monogamy is the rule of law of nature, it has brought the Hindu men in the same position as Hindu women, under the provisions of the law and thereby made them the real equal partners of life. It is this provision of the Act which has made our law regarding Hindus on par with the laws of the civilized countries of the world.

The enforcement of the rule of monogamy is strictly effected by section 11 and section 17 of the Act. A marriage in contravention of this clause is invalid under section 11 and on petition by either party to such marriage it may be declared null and void. Section 17 declares a marriage in contravention of clause (*i*) of section 5 void and such marriage is punishable as an offence under section 494 and section 495 of the Indian Penal Code. The rule of monogamy as laid down in section 5(*i*) that "neither party has a spouse living at the time of the marriage", is extended by interpretation to a spouse who is divorced. In *Biswanatha Mitra* v. *Anjali Mitra*,[1] Anjali got a decree of divorce under the Special Marriage Act but after two months, before the lapse of one year, she married Mitra. It was held that under the existing circumstances it must be deemed to have a spouse living at the time of the marriage within the meaning of section 5 (*i*) of the Act and such marriage would be a nullity.

The contravention of section 5(*i*) makes the marriage void only on petition by either party to such marriage. In case a husband marries a second time the first wife is not entitled to present a petition for nullity of the second marriage under section 11[2] and she is left without a remedy under this Act except to surrender her husband to the second wife and get judicial separation. To protect such women it is necessary to permit an "aggrieved party", instead of "either party of such marriage", to present a petition for nullity of marriage.

The conditions for a valid marriage do not prescribe that the bride should be a maiden. A widow or a divorcee is dealt on equal footing with a maiden. A Hindu widow is permitted to marry from 1856 but few widows had the courage to take advantage of the law due to fear of the social structure. A widow with children, sometimes may not prefer a remarriage apprehending bad treatment towards the children. But the problem of a young widow without children may be the non-availability of a

1. A.I.R. 1975 Cal. 45.

2. See *Amarlal Goru* v. *Vijayabai*, A.I.R. 1959 M.P. 400; *Lakshmi Ammal* v. *Ramaswami Naicker*, A.I.R. 1960 Mad. 6.

good match. The legislation has made room for the remarriage of a widow and now it is in the hands of the social reformers to improve her lot. A legislative provision prohibiting the marriage of a maiden with a widower will no doubt induce him to marry a widow.

The Hindu Marriage Act prescribing fifteen years as the marriageable age of a girl has simply retained the provision of the Child Marriage Act, 1929 which was passed when early marriage was the characteristic feature of Hindu society. The Hindu Marriage Act has ignored later developments and subsequent trends of thought on this subject of capital importance. The age limit prescribed about half a century back is being continued as the law today. This deserves a review, and the age limit should be raised at least to eighteen years as warranted by the recent changes in the family set-up. There has been a distinct change in the outlook of the people which has been reflected in a gradual rise in the age at the time of marriage. A girl of fifteen years may be only a school going girl unaware of the responsibilities or implications of a wedded life. Education has become indispensable not only for economic independence but also for making a woman worthy partner. A young man nowadays prefers to enter into married life only after getting himself duly employed which is usually attained by the time a man reaches the age of thirty, and for him a girl of 15 years is a misfit partner.

The legislation should give expression to the changed conditions and concept and fix the marriageable age for a girl and a boy at eighteen and twenty years respectively, in whieh case there is no need for enumerating the guardians of marriage. The difference of age between the spouses should be limited by the Act in order to save a young girl from being sacrificed to an old man. Vatsyayana in his *Kamasutra*[3] suggests that the bride should be younger than the bridegroom by at least three years. Though the suggestion made by the sage may be ideal, various practical difficulties in the selection of a suitable groom may render it not always possible.

However, it is essential to limit the difference of age between bride and bridegroom to a maximum of ten years. It is also necessary to prohibit a marriage if the bride is more than five years older than the bridegroom for the legislation should not give any room for a Hindu to invade the sanctity of marriage by foreign ideas. Even after the passing of this Act, child marriage is valid because a contravention of section 5(*iii*) requires only an additional expenditure of an amount up to rupees 1,000 as fine. Law lends support to such marriages and at the will of the guardians child marriage can be effected. If their is a strict provision which lays down

3. *Kamasutra* III 1.2.

that contravention of clause (*iii*) of section 5 of the Act, nullifies the marriage on the petition by either party of such marriage within one year of attaining majority, there will be little or no chance for the performance of a child marriage.

Consent of the parties and consent of the guardians of the bride who has not completed the age of eighteen years are necessary for the validity of a marriage as section 12 (*c*) makes the marriage voidable if the consent was obtained by force or fraud. Nowadays there are many girls and boys who have to march to the marriage *mandapam* against their consent under the domination of their elders. Instead of making these marriages voidable at a later stage there should be a provision in the Act to present a petition for getting an injunction not to perform such marriage without consent. This may save many boys and girls from absconding or committing suicide and also from the mental torture after marriage.

In the enumeration of guardians for marriage the mother is given a place next to the father.[4] Keeping in view, the modern concept of equal rights to woman it is in the fitness of things to change section 6(*a*) to "father and mother" so that the consent of both the father and mother is absolutely necessary for the performance of the marriage of a girl below 18 years. When section 7 of the Hindu Adoptions and Maintenance Act does not permit a father to adopt without the consent of his wife, it is anomalous to permit a father to give the daughter in marriage without the consent of mother.

III

The matrimonial reliefs provided under the Act are the very boons for which Hindu women had been praying for many centuries. The declaration of Manu that "neither by sale nor by desertion is a wife released from the husband"[5] was hitherto, applied only to women and not to men. Irrevocability of marriage did not adversely effect the men because they were free to marry again. Any matrimonial relief which annulled a marriage was considered by our ancient sages as cutting at the very root of their cherished ideals of social purity and matrimonial sanctity. Among the reliefs provided under the Act, nullity of marriage, judicial separation and divorce are quite contrary to the law of our sages while restitution of conjugal rights falls in line with their ideals of marriage.

The remedy of restitution of conjugal rights embodied in section 9 of the Act, is only a statutory recognition of the age old rights of the spouses [6] Several

4. See s. 6 (i) of the Hindu Marriage Act, 1955.

5. *Manu* IX, 46.

6. *Manu* VIII. 389, *Yajnavalkya* 1.76, *Narda* XII. 95 and *Vishnu* V. 163, all agree that one who forsakes an obedient wife should be punished.

courts have also established the conjugal right of the wife. In the case of *Purushotam Das* v. *Bai Rukshmani*,[7] it was held that even physical malformation was no ground for defence as it was not merely the physical side of the conjugal act that was contemplated in suits of restitution of conjugal rights but there were other aspects, social and intellectual of the married life which either party had a right to demand. Though the provision for restitution of conjugal rights aims at upholding the marriage and gives an opportunity for resuming the marital obligation, it has lost its practical utility. The order of the restitution of conjugal rights is observed more by its breach than by its obeyance. A mere order of the court will not change the mind of a spouse who has withdrawn from the society of the other for any reason appealing to him or her. Compelling such estranged spouses to live together may invite further complications and involve even risk to the life. If this provision is intended to make room for compromise between the spouses, there should be a conciliatory board to take initiative for bringing them together. The conciliatory board should consist of altogether three persons from a panel of persons maintained by the court. The spouses may select one each and the third may be selected by the two already selected persons. In the absence of a conciliatory machinery the provision for restitution of conjugal rights serves no purpose except as a stepping stone for the relief of divorce and divorce can be climbed at even without any stepping stone.

Section 9 of the Act, indirectly permits a wife to withdraw from the society of the husband if there is a reasonable excuse. But sub-section 2 of section 9 limits the reasonable excuses to the grounds for judicial separation, nullity and divorce.[8] If the wife has an excuse which does not fall under section 10 to section 13 which may be reasonable, she is expected to resume her conjugal rights. A study of the various cases[9] decided on the subject reveals that there are many cases where the courts have not protected the interest of the wife when there was no possibility of the parties living together happily due to misdeeds of the husband falling short of legal cruelty, or grave and authoritative dealings of the husband or mother-in-law, desertion without cause for a period of less than two years, constant insulting behaviour of the husband bringing disrespect to her and her family, habitual drinking and gambling of the husband, employment of spouses at different places, *etc.* Though by a liberal interpretation of section 9, even grounds outside

7. 39 Bom. L.R. 458.

8. *K. Ramoki* v. *K. Kameswri*, A.I.R. 1975. A.P. 3; *Annap-rnn mma* v. *Appa Rao*, A.I.R. 1963 A.P. 312.

9. See generally, *Mst. Gurdev Kaur* v. Sarwan Singh, A.I.R. 1959 Punj. 162; *Mollawa Shiddappa* v *Shiddappa Bhimappa*, A.I.R. 1950 Bom. 112; *Smt. Alaibai* v. *Ramphal*, A.I.R. 1962 M.P. 211; *Baburao* v. *Sushila Bai*, A.I.R. 1964 M.P. 73, *Smt. Kusarani* v, *Ashit*, A.I.R. 1965 Cal. 162; *Bejoy* v. *Aloka*, A.I.R. 1969 Cal. 77.

sub-section 2 of section 9 are considered as good defence, and to make the law precise, deletion of sub-section (2) is required.

Whereas the Hindu Adoptions and Maintenance Act gives the wife a right to live separately and claim maintenance under section 18 (2) (*g*) of the Act ; if there is any other cause justifying her living separately "it is anomalous to limit the grounds of defence in this Act. For any, "justifying cause" or "reasonable excuse" appealing to the equitable mind of the judge, the wife should be permitted to withdraw from the society of her husband. In case, the relief of restitution of conjugal rights continues to be in the statute, in spite of its futility of legal enforcement, it is high time that it may not be granted if the other spouse has any reasonable excuse unhampered by any limits.

Among the grounds for nullity of marriage, concealed pregnancy of a woman at the time of marriage is one of the grounds where required standard of proof should be so high that no innocent wife could be blamed and abandoned.[9a] The medical opinion[10] regarding paternity is that a blood grouping test reveals only that a suspected person could not 'possibly' have been the father or that he, (like many others), might have been. The period of gestation for some women may be a lesser one of 210 days, instead of 270 days.[11] When a medical expert finds it difficult to give a definite opinion regarding paternity a judge is called upon to take a decision basing on circumstantial evidence of access to each other as laid down in section 112 of the Indian Evidence Act. In the modern society a boy after engagement may move freely with the girl. Many a young man may use it as a ruse to discard the wife, when the attraction of the marriage is over or the dowry is after being squandered away, therefore, caution should be taken that this section might not be used as a weapon against her. In view of the serious consequences it may have on the woman and the child born, the section may be carefully guarded by the addition of the words "beyond reasonable doubt" or "the court being fully satisfied with the fact" so that only a conclusive proof of concealed pregnancy established by the husband beyond reasonable doubt would lead to nullity of marriage.

The judicial separation is a relief quite contrary to the restitution of conjugal rights. The real purpose of judicial separation is to enable the estranged spouses, keeping the marriage intact, to taste 'single living' sepa-

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9a. See s. 12 (i) (*d*) of the Hindu Marriage Act.
10. Samson Wright's *Physiology* 38.
11. Mody's Treatise on *Medical Jurisprudence and Toxicology*, 305 (12th ed.).

rately, with a chance of coming together again. Here also a conciliatory machinery may help for the re-union of the spouses as intended by the statute. The grounds include the three matrimonial offences—desertion, cruelty and adultery. In the interest of women some more grounds as habitual drunkenness, habtiual taking of intoxicating drugs, habitual gambling, not supporting the family with maintenance, violent temper and impotency may be added in the statute.

Introduction of divorce in the Act is the corollary of the enforcement of monogamy. This provision was most vehemently attacked by the orthodox Hindus because the Hindu belief was that marriages were done in heaven and what was done by God man cannot undo. Though divorce in the ordinary sense of the word was not permitted under Hindu law, cessation of conjugal rights, not amounting to dissolution of marriage was permitted in the form of *tyaga* or abandonment by wife and supersession by the husband. Manu observes that a wife is not to be blamed if she abandons a husband who is impotent, insane, or suffering from an incurable or contagious disease. He permits such a wife to remarry if the previous marriage is not consummated. A text of Parashara quoted in *Narada* is to the following effect. "Another husband is ordained of woman in five calamities namely if the husband is unheard of or be dead or adopt the order of an ascetic or be impotent or become an out caste". But this text is refering to cases of betrothal. Manu lays down the law of supersession as, "a barren wife may be superseded in eight years, she who bears only daughter in the eleventh year, she whose children all die in the tenth year but she who is quarrelsome without delay."[12]

Kautilya is the only lawgiver who permits divorce ; but only in disapproved forms. The grounds of mutual consent and apprehension of danger provided by him are those grounds which are not achieved even by this modern statute.

Denial of divorce, so far was the most unfair and uncharitable attitude towards the fair sex. No doubt, divorce is a social evil. But divorce as a last resort is a great blessing to a woman also. In the present set-up where both the parties are active members of marriage with equal marital rights and obligations and where both the parties are equally educated and equally earning there should be a provision for the dissolution of marriage if they cannot pull on together and if both of them desire so. Therefore, it is essential that two more grounds as incompatability of temperament, and mutual consent for divorce may be added to the grounds mentioned under section 13. Whether these grounds keep in with the fault theory or break down

12. *Manu* XI 81.

theory or not, society demands such a change to save many a couple. Becau-e customary divorces under existing statutes are saved by section 29 (2) of the Act. in Karala divorce is permitted under Nair Act, 1925 for incompatability of temperament. Under statutes as Madras Marumakkathayam Act, 1933 and Ezhava Act, 1925 divorce is permitted by mutual consent or even without showing any reason. This freedom for divorce has been existing for a very long period and yet there were only a few divorces in practice. If freedom allowed is genuine the parties feel the responsibility all the more.

The period of three years for presenting a divorce petition, has proved too long due to the late marriages prevalent in the society and it is gratifying to note that recommendation is made by the Law Commission to reduce it to one year. There should be a limit on the number of divorces a spouse is entitled to get during his or her life time to one or in exceptional cases to two, so that a Hindu may not be driven to the fashion of changing the partner so often, like his dress. To discourage a spouse to remarry at an elderly age, no divorce should be granted in case they have already lived a married life of twenty-five years. The divorce on the ground of unsoundness of mind, leprosy and venereal diseases may not be granted after fifteen years of marriage because when the spouse requires affection and protection from the other partner, with whom he or she has lived for long happily, should not be discarded for no fault of the spouse. Instead of the ordinary courts, if matrimonial courts deal with matrimonial matters, in camera, full justice can be done to the parties.

Grant of legitimacy to the children of marriage a which is declared null and void or annulled by a decree of nullity, thereby entitling the child to get the property of the father, has relieved the mother of her worry regarding her children. By providing maintenance to the legally wedded wife and children, the statute upholds the spirit of the ancient Hindu law that even by doing hundred misdeeds, the wife and children should be maintained. Provisions for maintenance will save many women from leading a vagrant life. By imposing the duty of providing maintenance on both husband and wife, the equality of the rights of the partners is maintained in the statute.

IV

The Hindu Marriage Act and the Special Marriage Act are two definite steps towards a uniform civil code cherished under article 44 of the Constitution of India. The Hindu Marriage Act brings uniformity in the matrimonial laws of the Hindus, Buddhists, Jains and Sikhs which cover over 8 per sent of population in India, while the Special Marriage Act aims at a

matrimonial law which can be accepted by persons in India, and Indian citizens abroad, irrespective of their religion. The Special Marriage Act confers more responsibility on a Hindu woman by permitting her to select anyone Indian as a groom and seek divorce by mutual consent. The special from of marriage which consists only of registration before a marriage officer is so simple that it can be performed without any expense and without anybody's co-operation. This simple form may be prescribed even under the Hindu Marriage Act, if the parties so desire, because at present two Hindus who marry under the Special Marriage Act have to face many disabilities like severance from the joint family and devolution of property under the Indian Succession Act The disintegration of the Hindu couple from the family is not justifiable, and the above suggestion may accommodate them under the provisions of Hindu Law. The marriage officer may be directed to send a copy of notice to the parents or near relatives of the parties before the registration of the marriage. In view of the modern way of life the age prescribed for the spouses may be raised from eighteen and twenty-one to twenty-one and twenty-five for a girl and a boy respectively, so that they may have sufficient maturity of mind to realize the consequences of their act. The statute has taken a lenient view towards woman by blessing her with permanent alimony and maintenance, while a corresponding benefit is not given to the husband.

The basic approach of both the statutes is secular and rational. The legislative ideal behind them seems to have been the elevation of the position of Hindu women. The modern Hindu law of matrimonial relations makes no distinction between man and woman as to their legal position and confers upon her many valuable rights. But only a few women are aware of this. The law, therefore, should be made known to all women of urban and rural areas so that they may utilize the provisions intended for them. The legislature and judiciary have adorned a Hindu woman with matrimonial rights equal to that of man. But the Hindu society should be prepared to swim along with the current of the time and improve conditions of life which may enable her to exercise her legal rights.

Hindu law has never been static and it has always been dynamic and progressive. Let us hope that its progress will soon reach the climax by achieving a uniform civil code.