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Universidad de Navarra
Facultad Derecho Canónico

Shijo Antony KANJIRATHAMKUNNEL

Hindu Marriage Law

A Comparative approach from a Catholic Perspective

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Hindu Marriage Law

A Comparative approach from a Catholic Perspective*

Shijo Antony KANJIRATHAMKUNNEL**

Summary: INTRODUCTION; A. *General Observations*; 1. Ancient Law; 2. Indian Marriage Acts; a. Legislation during the British Regime: b. The Indian Christian Marriage Act, 1872; c. The Special Marriage Act, 1954; d. The Hindu Marriage Act, 1955; B. The 'Sacrament' of Marriage in India Society; 1. Hindu Marriage; 2. *Samskaras*; C. *Hindu Marriage as a 'Sacrament'*; 1. Origin of the Concept of Sacrament in Hinduism; 2. Current Understanding of Hindu Marriage as a Sacrament; D. *Comprehending Hindu Marriage Act, 1955*; 1. A Hindu in the Hindu Marriage Act, 1955; 2. Customs Obtain the Force of Law; 3. Sacramental Nature of Hindu Marriage; 4. Ends of Matrimonial Union; 5. Indissolubility in Hindu Marriage; 6. Capacity to Marry; 7. Consanguinity and Affinity in Hindu Marriage; 8. Consent in Marriage; 9. Mental Incapacity; 10. Nullity in Hindu Marriage; E. *Form (Forms) of Marriage*; F. *Judicial Separation and Divorce*; 1. Separation under Old Law; 2. Judicial Separation after passing the Hindu Marriage Act, 1955; 3. Divorce; G. *The Effects of Hindu Marriage*; 1. General Notion; 2. Conjugal Right in the *Dharmasastras*; 3. Restitution of Conjugal Rights in the Hindu Marriage Act; 4. Legitimacy of the Children; H. *Mixed Marriages*; I. *Marriage Celebrated in other Forms*; J. *Hindu Marriage Law – an Appraisal*; 1. Loss of Sacramental Nature of Marriage; 2. Disappearance of Indissolubility; 3. Loss of Religious Perspective; K. *Issues Related to Hindu Marriage and Catholic Marriage in India*; 1. Civil Recognition of Canon Law in India; 2. Legislation Applicable to Christians in India; 3. Need for a Common Code; 4. Non-civil Recognition of Annulment of Catholic Marriage; L. *Suggestions*; 1. Suggestions Related to Hindu Marriage Law; 2. Suggestions Related to Catholic Marriage in India; Conclusion; Contents of the Dissertation; Bibliography.

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** Abbreviations:

AV.	Atharva Veda
Can.	Canon
CIC	<i>Codex Iuris Canonici</i> (1983)
CCEO	<i>Codex Canonum Ecclesiarum Orientalium</i>
CBCI	Catholic Bishops' Conference of India
Manu	Laws of Manu
RV.	Rig Veda
vol.	volume

INTRODUCTION

Marriage, no doubt, is one of the oldest institutions known in the human history. It is not a human institution convenient to sort out social responsibilities but it is of divine origin. «Marriage and the family are not in fact a chance sociological construction, the product of particular historical and financial situations. On the other hand, the question of the right relationship between the man and the woman is rooted in the essential core of the human being and it is only by starting from here that its response can be found.»¹ Marriage as an important social institution has evolved and developed with the socio-religious progress of mankind. «The future of humanity passes by way of the family»² observes Pope John Paul II. All individuals have the fundamental right to marry and marriage as a social institution is recognized by the State or a religion or both. It is viewed as a contract as well as a sacrament depending on its tradition and social practices. In a marriage man and woman by mutually giving and accepting establishes an exclusive and perpetual interpersonal relationship. «The natural family, as an intimate communion of life and love, based on marriage between a man and a woman, constitutes “the *primary place of ‘humanization’* for the person and society”, and a “*cradle of life and love*”. The family is therefore rightly defined as the first natural society, “*a divine institution that stands at the foundation of life of the human person as the prototype of every social order.*”»³

The major religion in India is Hinduism. As any of the customs in Hinduism, the practice of marriage has also undergone a considerable evolution from its traditional customs described in the sacred texts of *Vedas* and *Upanishads* and *Smriti* to the Hindu Marriage Act, 1955, the marriage law applicable to Hindu in India today. The aim of this study however is not to concentrate

¹ BENEDICT XVI, *Address of His Holiness Pope Benedict XVI to the participants in the Ecclesial Diocesan Convention in Rome*, Basilica of Saint John Lateran, Rome, 6 June 2005. [http://www.vatican.va/holy_father/benedict_xvi/speeches/2005/june/documents/hf_ben-xvi_spe_20050606_convegno-famiglia_en.html] [24.10.2011].

² JUAN PAUL II, Apostolic Exhortation *Familiaris Consortio*, 86.

³ BENEDICT XVI, *Message of His Holiness Pope Benedict XVI for the celebration of the World Day of Peace*, 1 January 2008. The quotes within the quote in italics have reference to *Christifideles Laici* Apostolic Exhortation of Pope John Paul II and the *Compendium of the Social Doctrine of the Church* by Pontifical Council for Justice and Peace. [http://www.vatican.va/holy_father/benedict_xvi/messages/peace/documents/hf_ben-xvi_mes_20071208_xli-world-day-peace_en.html] [24.10.2011].

on the mixed marriages between Catholics and Hindus in India but rather it is a comparative study between two different known religious practices which have consistently upheld the values and practices of marriage as an important social institution. Hinduism and Catholicism are generally thought as representing two different spectrums of the world religions. Therefore, this study is an effort to know the rich diversity and common elements of marriage law within these two religions from a comparative perspective. It is pertinent to remember that in doing this comparative study, the Catholic concepts of marriage is not explained taking into consideration that it is presented in a Catholic ambience.

A. *General Observations*

Hindu law is not a new concept of the modern era. «It has evolved through centuries and today it holds its position as a major legal system of the world, often despised and largely unrecognized, but massively present in the new millennium.»⁴ Despite its traditional aspects, Hindu Law should be seen as a dynamic system which has its capacity to adapt to the changing patterns of social life. Hindu laws may be closer to African laws or informal East Asian laws than of the legal traditions coming from the Middle East. Some argue that in the ancient Indian society a legal system did not exist. It is mainly because the Indian law is conceived as different from Western Cultures. Hindu law is widely acknowledged as representing a culture-specific form of natural law.⁵

It is frequently stated that Hindu Law as an internal ordering system and it is based on some form of divine revelation. The root word used in Sanskrit is *Sanatanadharma*,⁶ which literally means eternal law or Universal Righteous-

⁴ W. F. MENSKI, *Hindu Law: Beyond Tradition and Modernity*, Oxford, 2008, p. 3.

⁵ *Ibid.*, p. 43.

⁶ *Sanatanadharma* in Sanskrit means «Eternal Law» or «Universal Righteousness». It is the original name of what is now popularly called Hinduism. *Sanatana Dharma* comprises of spiritual laws which govern the human existence. *Sanatana Dharma* is to human life what natural laws are to the physical phenomena. Just as the phenomena of gravitation existed before it was discovered, the spiritual laws of life are eternal laws existed before they were discovered by the ancient *rishis* (sages) for the present age during the vedic period. *Sanatana Dharma* declares that something cannot come out of nothing and therefore the universe itself is the manifestation of the Divine Being.

ness. «It is eternal truth and contains all that is necessary for salvation.»⁷ The classical Hindu law was not enacted and promulgated on a particular day but rather it a matter of considerable evolution. «The concept of *Sanatanadharma* or Hindu understanding of eternal order does not necessarily contradict this, since there can be dynamics within an ancient system, which do not change the system itself, only its external manifestations.»⁸ Therefore, the Hindu law should be seen today as having gone through evolutionary process from the Vedic Period through *Manusmriti* and later as a result of the changes that were brought about under the British subjugation and presently the Indian Marriage Act of 1955 which is binding till today.

1. Ancient Law

The institution of marriage as we have today is a matter of considerable evolution. But for the Hindus when the idea of ‘marriage’ emerged, it was invested with purely a religious meaning. Because it was a settled belief system that one must have a son to save from the place of torment or hell. Therefore, towards this end, marriage and a son became a necessity. And so it came to be regarded as one of the most important *samskara* or sacrament through which the life of a well-conducted Hindu progressed to its appointed end.⁹

The Vedic Period is the era during which the Vedas, the oldest sacred texts of the Indo-Aryans, were being composed. The Vedas are perhaps the oldest written literature available for man today. There are four Vedas namely, *Rig Veda*, *Sama Veda*¹⁰, *Yajur Veda* and *Atharva Veda*. These Vedas are the primary texts of Hinduism and these give much information about the Hindu marriage customs and rituals that existed during that time of human history.

*Manusmriti*¹¹ is the most important and earliest metrical work of the *Dharmasastra* textual tradition of Hinduism. Manu’s conception of marriage

⁷ R. C ZAEHNER, *Hinduism*, New York, 1966, p. 157.

⁸ W. F. MENSKEI, *cit.*, p. 47.

⁹ Cfr. S. V. GUPTA, *Hindu Law of Marriage*, Bombay, 1976, p. 5.

¹⁰ *Rgveda* is also written as *Rig Veda* and *Sam Veda* as *Samaveda*. From here on the short form RV will be used for *Rigveda*.

¹¹ The real title of the work was «The Dharma code of Manu». It is believed to be composed between the time periods of 170 B.C to 150 B. C. It is generally known as Laws of Manu. *Dharmasastra* is a genre of Sanskrit texts and refers to the *sanstra* or Indic branch of learning pertaining to Hindu Dharma, religious and legal duty. It was first translated into English by Sir William Jones in the year 1794.

attracts a great deal of attention because of the importance of its perspectives on marriage. However it does not clarify very well the concept of marriage. It is taken for granted that «the traditional Hindu view of meaning of this institution, according to which it is the union of a man and a woman with the sole object of procreating a son regarded as the incarnation of the father and charged with the duty of offering oblations to his forbears.»¹² *Manusmriti*, no doubt, is one of the most important texts because of its influence it has had on the society from the early periods. However, his laws on the status of the women, widow remarriage and inter-caste marriage have provoked controversies. The tides of social customs, practices and thinking have already changed. Whatever flaws it may contain as we read it today, the vision and the juridical mind of Manu is to be appreciated.

2. Indian Marriage Acts

a) *Legislation During the British Regime*

After a few years of British rule in India Alexander Dow, an army officer of East India Company, wrote in 1772 that «to leave the natives to their own laws would be to consign them to anarchy and confusion, averse beyond measure to one another. It is therefore absolutely necessary for the peace and prosperity of the country that the laws of England in so far as they do not oppose prejudices and usages which cannot be relinquished by the natives should prevail.»¹³ The main reason for this statement could be understood as, though the customs and traditions of ancient India remained static till recent times, there were no legal systems except a few molded and altered customs and usages under British rule. «The impact of the European civilization on the Indians after the establishment of the British rule in India did however create a few ripples on the otherwise calm sea of Hindu Law.»¹⁴ The legislature of British government started the ball rolling on the reforms of Hindu marriage law. Reforms were brought about in widow remarriage, child marriage and inter-cast marriage, however the educated and advanced classes of Hindu society started agitating against these reforms.¹⁵

¹² N.V. BANERJEE, *Studies in Dharmasastra of Manu*, New Delhi, 1980, p. 53.

¹³ A. C. BANERJEE, *English Law in India*, New Delhi, 1984, p. 28.

¹⁴ S.V. GUPTA, *cit.*, p. 4.

¹⁵ *Ibid.*, p. 4.

In the pre-1955 legislation, the first attempt was to restrict the practice of *sati*.¹⁶ It was abolished by law and was declared as an offence in the year 1829. Later in 1856, Hindu Widow's re-marriage Act was passed which removed the incapacity of the Hindu widow to re-marry. The Special Marriage Act was passed in 1872 which was originally applicable to persons who did not profess Christian, Jewish, Hindu, Mohamedan, Parsi, Buddhist, Sikh or Jain religion. With the amendment in 1923 the application was again extended to persons who professed the Hindu, Buddhist, Sikh, or Jain religion. This was done to validate certain marriages that would have been invalid according to the personal laws of the parties such as marriage between different casts or religions.¹⁷ Thus in about hundred years there was a gradual development of law concerning Hindu marriage and marriage laws related to other confessions.

b) *The Indian Christian Marriage Act, 1872*

The first law relating to the Indian Christian marriage contains in the chapter 84 of the statute passed in the parliament during the 58th reign of King George III. It was an «Act to remove doubts as to the validity of certain marriages had and solemnized within the British territories in India.»¹⁸ An Act for Marriages in India received the Royal assent on the 24th of July, 1851 by Queen Victoria. Later in 1872 there was an urgent need to amend the existing laws relating to the solemnization of marriages of Christians in India. It was mainly attributed to two reasons; firstly, necessitated by the implications of the law and the second, the grievance of the Indian Christian community.¹⁹

c) *The Special Marriage Act, 1954*

The reason behind passing the Special Marriage Act of 1954 was to provide a uniform law of marriage for the citizens of India and also for the Indian nationals residing in foreign countries.

¹⁶ *Sati* is described as a Hindu custom in India in which the widow was burnt to ashes on her dead husband's pyre. Sati, the feminine of 'sat' for 'true' is a religious funeral practice among some Hindu communities in which a recently widowed Hindu woman either voluntarily or by use of force and coercion immolates herself on her husband's funeral pyre. The term is originated from the goddess Sati who immolated herself because she was not able to bear her father's humiliation of her living husband.

¹⁷ Cfr. S. V. GUPTA, *cit.*, p. 4.

¹⁸ K. P. RAO, *Law Applicable to Christians in India*, vol. I, Delhi, 2003, p. 1.

¹⁹ *Ibid.*, p. 14.

The parties may follow any form of ceremonies for the solemnization of marriage but certain formalities are prescribed for the registration of the marriage. There are also provisions for the persons already married, to register their marriage to avail legal provisions of this Act. This act also deals with divorce applicable to the persons under this Act. Also it permits inter-caste and inter-communal marriages.²⁰

The marriage performed under the Special Marriage Act is a civil contract. The interested parties shall file a Notice of Intended Marriage in the specified form to the Marriage Registrar which will be published for one month in the place of his office and if there is no objection from anyone, the marriage is solemnized before three witnesses. When a marriage has been solemnized the Marriage Officer enters in the Marriage Certificate Book and shall be signed by the parties of the marriage together with three witnesses.²¹

d) *The Hindu Marriage Act, 1955*

The Hindu Marriage Act, 1955 is a milestone in the history of the law of marriage among Hindus. This Act was passed to amend and codify the law relating to marriage among Hindus and came to force on the 18th of May 1955. Three other important acts namely the Hindu Succession Act, 1956, the Hindu Minority and the Guardianship Act, 1956, and the Hindu Adoptions and Maintenance Act, 1956, were also enacted during this time. All these acts were put forth under the leadership of Jawaharlal Nehru, the first Prime Minister of Independent India and were intended to modernize the then current Hindu legal tradition. Although the title of the Act refers to marriage, it also deals with other terms related to marriage like divorce, juridical separation, restitution of conjugal rights and maintenance.²²

B. *The 'Sacrament' of Marriage in Hindu Society*

Hindus have given predominant importance to marriage from time immemorial. A life without marriage is often unimaginable for a Hindu. Though there are concepts of *sages* who do not marry for the sake of God, it is difficult for them to understand a religious or priestly life without being married. «Life

²⁰ Cfr. S. C. JAIN, *The Relating to Marriage and Divorce*, 1986, p. 335.

²¹ *Ibid.*, pp. 338-340.

²² Cfr. S. V. GUPTA, *cit.*, p. 88.

without marriage is almost unthinkable in this country and there is a sharp social stigma attached to those who remain unmarried for a long time.»²³ It is a deep-rooted and wide spread tradition in India.

1. Hindu Marriage

According to the Hindu belief, marriage is a union between a male and a female with a commitment so that they can pursue *Dharma*²⁴, *Artha* (possessions): gaining wealth and worldly success, and *Kama* (physical desires): experience pleasure and in particular sexual pleasure, together. It joins two families. It is at once a gateway to earthly life of pleasure, progress, prosperity and joy as it is also an altar of elevation to a level of spiritual experience.²⁵ The common term used in India for marriage is *vivaha*.²⁶ It is a holy union for begetting a son which according to the Hindu faith is essential for salvation.

Marriage is so important and indispensable among Hindus that a person, who does not marry is disdained. The happiness of a married person depends upon the male descendents he has because it is the duty of the male descendent to make timely offering for the peace of the soul. Usually the elder son performs the *Anteshti Kriya*,²⁷ and if the son is not available the husband or the wife of the deceased have to do it. If they are not available the brother has to do it.²⁸

According to the Hindu tradition, marriage is a step towards spiritual perfection, with a strong emphasis given to the social benefits accruing from there.²⁹ Marriage in Hinduism is a sacred relationship. It is both an obligatory

²³ C. N. SHANKAR RAO, *Sociology of Indian Society*, New Delhi, 2004, p. 102.

²⁴ Dharma: Hinduism describes dharma as natural universal law whose observance humans to be content and happy. Dharma is the moral principle combined with spiritual discipline that guides one's life. Hindus consider dharma as their basic foundation of life.

²⁵ Cfr. P. OBENG, *Shaping Membership, Defining Nation: The Cultural politics of African Indians in South Asia*, Plymouth, 2007, p. 164.

²⁶ The word *vivaha* means in Sanskrit «carrying away», «leading away», «taking a wife» or «marriage with».

²⁷ *Kriya* in Sanskrit means an «action, deed or effort» which commonly refers to a complete action. *Anteshti Kriya* is a ceremony to give a send-off to the soul of the bygone by the family members. It is said that the soul remains in the vicinity of the death until the *Anteshti Kriya* is not completed.

²⁸ Cfr. C. SINGH, P. NATHA, *Hindu Manners, Customs and Ceremonies*, New Delhi, 2010, p. 23.

²⁹ Cfr. S. S. CHAKRAVARTI, *Hinduism: A Way of Life*, 2001, p. 30.

duty (*dharma*) and a *samskara*³⁰ (sacrament). Unless a person renounces life and accepts the life of a renouncer (*sannyasi*)³¹, he is expected to marry and lead a householder's life. Hindus believe that the marital relationship does not end with life in this world. It extends to more lives during which couples help each other to progress spiritually. Two souls come together and marry because their *karmas* are intertwined and they have to resolve many things together on earth in order to ensure their mutual salvation.

Though marriage for men is generally considered as a natural state of life, those who for pious motives remain unmarried are also treated with utmost respect.³² This respect and social acceptance is given only to those who have renounced the world for a way of contemplation and who have taken the vow of celibacy. The *sannyasi* lives a celibate life without possessions, and practices yoga meditation with prayers to their chosen deity or God. The purpose of the celibate life is *Moksha*³³ or salvation which is the concomitant suffering involved in being subject to the cycle of repeated death and rebirth. But this privilege which men possess of remaining single, and giving themselves up to a life of contemplation, is not shared by woman.³⁴ The general idea in India among the Hindus is that women are created for the procreation so as to sustain the species and to satisfy man's desire. All women are therefore obliged to marry and parents will see to it that marriage is arranged when the daughter reaches the marriageable age.

If a girl after the puberty remains unmarried, it is considered as a shame for the family and displeasure for gods.³⁵ Therefore parents will start looking for a suitable boy when the girl has reached the age of puberty or in some cultures marriage is arranged between the relatives when the boy or girl is an infant. For a Hindu marriage, horoscope plays an important role. The horoscope is a document drawn up by the family priest at the birth of every boy and

³⁰ *Samskara* means «accomplishment, embellishment, or consecration» which are *vedic* rite of passage finding varied acceptance among religious adherents of Hinduism. *Samskaras* are a series of sacraments. We will be explaining it in detail when we speak about marriage as a sacrament in Hinduism.

³¹ *Sanyasa* in Sanskrit means «renunciation or abandonment». In Dravidian language «sanyasi» is the person who renounces everything to follow a life of asceticism.

³² Cfr. A. A. DUBOIS, *Hindu Manners, Customs and Ceremonies*, New Delhi, 2009, p. 231.

³³ In Indian religions *Moksha* (from Sanskrit) means «release», «to let loose», «to let go» is the liberation from the cycle of repeated death and rebirth. In other words it means the salvation.

³⁴ Cfr. A. A. DUBOIS, *cit.*, p. 233.

³⁵ Cfr. C. SINGH, P. NATHA, *cit.*, p. 24.

sometimes of a girl, showing the date and even the moment of the birth, the state of the planetary system at the time.³⁶ The horoscope which is written at the moment of birth is used as reference for any future event. During the time of marriage if the horoscope is favorable, that is if the horoscope is matching between the boy and girl according to the science of the planets, both families sit together and talk about the marriage.

2. Samskaras

In Hinduism, *samskara* is a rite of passage. Rites of passages are important ceremonies that mark the important events in the life of an individual. «*Samskara* is defined as purificatory acts making both body and mind pure and thereby helping one in spiritual upliftment.»³⁷ These purifying ceremonies are to be performed throughout the life stages of a person, from birth to death. The equivalent word used in English for *samskara* is sacrament. In Hinduism *samsakaras* are rituals performed by a Hindu priest in the presence of family and friends. Interestingly there is no conclusiveness among authors from the ancient times till today on the number of *samsakaras*. Some authors like Gautama and Vishnu among the *Dharmasutra* writers mention by name and number the *samsakaras*;³⁸ they are eleven. Authors like Manu mention twelve *samskaras*.³⁹ However today in Hinduism sixteen *samskaras* are socially accepted which will cover the entire life span of a person from birth to death. They are: *Garbhadan*, *Pumsvan*, *Seemantonayan*, *Jatakarma*, *Nama-karma*, *Nishkramana*, *Annaprashana*, *Chudakarana*, *Karna-vedha*, *Upanayana* and *Vedarambha*, *Keshanta*, *Samavartan*, *Vivaha*, *Vanaprasta*, *Sanyasa* and *Antyeshthi*.⁴⁰ Though different traditions mention various rites, only

³⁶ Cfr. J. E. PADFIELD, *The Hindu at Home*, Delhi, 2006, p. 91.

³⁷ C. K. CHATTERJEE, *Rights and Rituals of Hindu Marriage in Ancient India*, Calcutta, 1978, p. 1.

³⁸ *Ibid.*, p. 3.

³⁹ *The Laws of Manu*, Penguin Classics, Noida, 2000, p. 355.

⁴⁰ 1. *Garbhadan*: the first coming together of the husband and wife for bringing about conception. 2. *Pumsvan*: ceremony performed when the first signs of conception are seen, and is to be performed when someone desires a male child. 3. *Seemantonayan*: a ceremony of parting of the hairs of the expectant mother to keep her spirits high and positive. Special music is arranged for her. 4. *Jatakarma*: After the birth of the child, the child is given a secret name, he is given taste of money and ghee (a class of clarified butter), and mother starts the first breast-feeding after chanting of a mantra. 5. *Nama-karana*: In this ceremony the child is given a formal name, performed on the 11th day. 6. *Nishkramana*: In this the formal 'darshan' (vision, apparition, or glimpse) of sun and moon is done for the child. 7. *Annaprashana*: This ceremony is performed, when the child

four are currently popular today, namely, *Jatakaram* (birth ceremonies), *Upanayana* (initiation, the sacred thread ceremony), *Vivaha* (marriage), *Antyeshti* (funeral and rites of the dead). The main purpose of these ceremonies are to purify oneself with reference to his own body.

There are also authors like Manu who believe that observance of these ceremonies will help to attain *Moksha* or salvation. As in Christianity baptism is considered a gateway to other sacraments, in Hinduism *Upanayana* which is the initiation ceremony is considered as very important to start any religious ceremonies. The *samskara* called *Upanayana* is held to be a passport for cultural regeneration with the right to study of the sacred literature, namely *Vedas* and this is regarded as the second birth.⁴¹ Similarly the *samskara* called *vivaha* entitles the married persons to be installed to the householder's stage of life or *Grabasthya Asharama*.⁴² The principal reason behind the recognition of the householder's stage of life lies in the fact that a man could effectively discharge his duties in this stage of life.⁴³

C. Hindu Marriage as a 'Sacrament'

It is pertinent to mention that the concept of sacrament is not the same as it is used in the Catholic Church for the sacrament of marriage.

1. Origin of the Concept of Sacrament in Hinduism

Though we don't find direct mention of the word *samskara* in the *Vedas*, it is believed to have originated from the *Vedas* as there is a reference to it in

is given solid food (*anna*) for the first time. 8. *Chudakarana*: Cuda means the «the lock or tuft of hair» kept after the remaining part is shaved off. 9. *Karna-vedha*: done in 7th or 8th month, piercing of the years. 10. *Upanayana and vedarambha*: The thread ceremony. The child is thereafter authorized to perform all rituals. Studies of Vedas begin with the Guru. 11. *Keshanta*: Hairs are cut, guru *dakshina* (donation) is given. 12. *Samavartan*: Returning to the house. 13. *Vivaha*: marriage ceremony. 14. *Vanaprastha*: As old age approaches, the person retires for a life of jobs and studies. 15. *Sanayas*: Before leaving the body a Hindu sheds all sense of responsibility and relationships to awake and revel in the timeless truth. 16. *Antyeshti*: the last rites done after the death.

⁴¹ Cfr. C. K. CHATTERJEE, *cit.*, p. 2.

⁴² *Asbrama*: The life of Hindu in ancient India was divided into four stages or *Asbramas*. These are *Brabmacarya*, *Garbasthya*, *Vanaprasthya*, and *Samnyasa*. Of these the *Garbasthya Asbrama* or householder's stage of life is very much praised. After the completion of studies and the *Brabmacarya* stage one gets married and enters the householder's stage of life.

⁴³ Cfr. H. C. SANSTRI, *The social background of the forms of marriage in ancient India*, Calcutta, 1972, p. 8.

the later writings of *Drhyasutras*⁴⁴ which are based on *Vedas*. «*Samskaras* are certain performance and undertakings which are aimed at making the life and the personality of a person complete, and marriage is one of them.»⁴⁵ In the light of the *Sastras*, marriage was considered as a sacrament. It gave rise to the status of husband and wife and the mutual union as partners evolved mutual rights and duties.⁴⁶ The relationship between husband and wife was believed to be irrevocable once it was established through proper customs and rituals. In Hindu marriage, custom is a sacrosanct and therefore the marriage ceremony is considered to be complete only if all the customary rites are performed.⁴⁷

Going back to the *Smriti texts* to seek roots for considering marriage as a sacrament, we come to understand that those texts attempted to elevate the marriage to a sacramental level. There are many texts that give the idea about other unions other than sacramental union.⁴⁸

Among the eight forms of marriages discussed, four types of marriages were of the nature that seeks to satisfy the natural urges and other four were socially unapproved forms of marriage. Four among these forms of marriages were not only given social approval but also it permitted to separate the matrimonial union on certain grounds. From the texts of *Manu* it is clear that he seeks to elevate the Hindu Marriage to a sacramental union of the two from a purely worldly aspect to a religious realm, in accordance with the desire of the families to establish pure lineages, a marriage based upon a secure foundation on religious morals.⁴⁹

⁴⁴ *Grhyasutras* are ancient Indian texts dealing with domestic rites and ceremonies. The importance of these texts consists in its content because it provides a detailed description of primitive Indian society.

⁴⁵ B. MONMAYEE, *Hindu Woman and Marriage Law, from Sacrament to Contract*, Oxford, 2001, pp. 21-22.

⁴⁶ Cfr. K. N. CHATTERJEE, *Hindu Marriage – Past and Present*, Varanasi, 1972, p. 30.

⁴⁷ Cfr. B. MONMAYEE, *cit.*, p. 22.

⁴⁸ It is called the demonic law when a man takes the girl because he wants her himself, when he has given as much wealth as he can to her relatives and to the girl himself. It is to be recognized as a centaur marriage when the girl and her lover join with one another in sexual union because they want to, out of desire. It is called the rule of the ogres when a man forcibly carried off a girl out of her house, screaming and weeping, after he has killed, wounded, and broken. The lowest and most evil of marriages, known as that of ghouls, takes place when a man secretly has sex with a girl who is asleep, drunk, or out of her mind. *Manu*, III, 31-34.

⁴⁹ Cfr. U. SHARMA, *Marriage in Indian Society: from Tradition to Modernity*, New Delhi, 2005, p. 107.

2. Current Understanding of Hindu Marriage as a Sacrament

As mentioned before it has to be understood that the concept of sacrament is a passage of rite for the whole life, each stage with its own *samskara*. Among these stages of passage of rite which is considered as a sacrament, marriage is the most important one.

The sacrament of marriage within the Hindu Law was founded upon a notion of a complete spiritual union of the spouses. Marriage which gave rise to a household was considered by all a necessary aspect and was desired by all. It was believed that marriage alone could help a person to discharge his religious and secular duties. It is important to note that the only Hindu Law prescribed for a woman is the sacrament of marriage.⁵⁰

The Hindu marriage is not merely a contract but also a sacrament in the sense that it makes the husband and wife one, physically and mentally for secular and spiritual ends.⁵¹ Further, Hindu Marriage is understood as a sacred relationship in which a man and woman are bound in permanent relationship for physical, social and spiritual purposes which is oriented towards the procreation and sexual pleasure.⁵²

There are other authors who believe that marriage is a sacred religious union brought about by divine dispensation and not a contract. The sacrament of marriage united the parties in an indissoluble union. Husband and wife were on equal footing and prayed that their love and friendship should be lasting, genuine, and indissoluble. It has also references to fact that it was not only for a union here on earth but even after life.⁵³

To define the sacrament of marriage in Hinduism will be a difficult task because it is a sum total of many concepts. The concept of sacrament of marriage can be understood in its proper sense only if one goes further to analyze the aims or end of marriage in Hinduism. For this purpose the end of marital union will be explained below in one of the sub-sections so that the proper sense of the term can be understood.

⁵⁰ Cfr. R. PATEL, *Hindu Women's Property Rights in Rural India: Law, Labor and Culture in Action*, England, 2007, p. 83.

⁵¹ Cfr. J. PRICKETT (ed.), *Marriage and the Family*, Cambridge, 1985, p. 28.

⁵² Cfr. R. K. SHARMA, *Indian Society, Institutions and Change*, New Delhi, 2004, p. 107.

⁵³ Cfr. W. F. MENSKI, *cit.*, p. 278.

D. *Comprehending Hindu Marriage Act, 1955*

To comprehend Hindu marriage law in general, one has to refer back to the Vedic periods, travelling through the customs, manners and the ceremonies existed in the Indian society till today. But today while speaking of Hindu Marriage Law, the immediate point of reference is the Hindu Marriage Act, 1955, as it is the marriage law binding for a Hindu today. In the following sub-sections I study in detail the important marriage concepts in the Hindu Marriage Act, 1955 with a comparative approach from a catholic perspective.

1. A Hindu in the Hindu Marriage Act, 1955

According to the preamble of the Hindu Marriage Act, 1955, it applies only to the marriages of Hindus. And in the section 2 it explains who are Hindus according to this Act.⁵⁴ This section gives three categorical divisions of the persons who are regarded as Hindus. First, a Hindu is any person who is a Hindu by religion. This decision incorporated in the Act was settled before the Act. The British Indian Courts were directed to apply Hindu Law to Hindus in certain matters but the question was who is a Hindu. The word Hindu itself is not used in Sanskrit. Etymologically, the inhabitants of *Hindustan* are called Hindus but in that case the Muslims and the Christians in India are also to be called Hindus. And therefore, in the Indian Succession Act of 1925 the term 'Hindu' had been used to apply the law to whosoever was a Hindu within the meaning of those statutes. Also in the Indian Limitation Act of 1908 the term 'Hindu' was used for a person who had the legal status of a Hindu and was governed by Hindu Law.⁵⁵

Therefore, a person could be a Hindu either by birth or religion. Here those persons who are converted to Hinduism are also included. A person is

⁵⁴ This act applies to (a) to any person who is a Hindu by religion in any of its forms or developments including a *Virashaiva*, a *Lingayat* or a follower of a the *Brabmo*, *Prarthana* or *Arya Samaj*; (b) to any person who is a Buddhist, Jaina or Sikh by religion; and (c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt within herein if this Act had not been passed. The Hindu Marriage Act, 1955, sect, 2.

⁵⁵ Cfr. S. V. GUPTA, *cit.*, p. 95.

governed by this Act if he or she is Hindu by birth and has not renounced Hindu religion though he or she has departed from the standard of orthodoxy in the matter of diet and ceremonial observance. Not only are the followers of Brahminical religion are Hindus, but also a person who belongs to a sect dissenting from Hinduism for the purpose of the application of Hindu Law. Persons of illegitimate birth in the case of both the parents who were Hindus or only mother and in that case brought up as a Hindu are also considered as a Hindu. The out casts and degraded persons and their descendants are also considered Hindus under this law. It also included the descendants of aborigines of India provided they are sufficiently Hinduised.⁵⁶

In the section 2 clause (b) of the Act, Buddhists, Jains and Sikhs are considered as religions. Before the Act Hindu law was applied to Hindus by religion or birth including Buddhists, Jains and Sikhs, notwithstanding the claim and the criticism that Jains, Buddhists and Sikhs were not dissident of Hinduism. It is to be noted that Hindu law was applied to Jains as a matter of law and not of custom. In the present clause Jains, Sikhs and Buddhists are treated as a religion separate from Hinduism and not merely a dissenting sect. It is a change in the new law.

Clause (c) of the Section 2 says that persons other than Muslims, Christians, Parsis or Jews are included under Hindu law. The Act is applicable to such persons unless it is proved that any such person would have been governed by Hindu law or by any customs in respect to the matters dealt in the Act.⁵⁷

Sub-section two of the Section 2 deals with the Scheduled Tribes. The Hindu Marriage Act is not applicable to the members of the Scheduled Tribes unless the Central Government makes provisions applicable to them by a Gazette notification. Also the sub-section three of the Section 2, of the same Act, lays down that even when a person is not Hindu by religion whenever the word *Hindu* occurs in the Act, it is understood as the person to whom the Act is applicable.⁵⁸

⁵⁶ *Ibid.*, pp. 96-97.

⁵⁷ *Ibid.*, pp. 98-99.

⁵⁸ Cfr. S. C. JAIN, *cit.*, p. 6.

2. Customs Obtain the Force of Law

In the following paragraphs the use of ‘customs’ and ‘usage’ is analyzed in detail to understand these terms as expressed in the Act. Section 3 (a) of the Act lays down what it means by customs and usage in the Act.⁵⁹

According to this Act, a custom attains the force of law when it is practiced for a long time in a family, in a district or in a particular class or tribe. There are mainly three attributes for a custom to be a law; continuity, uniformity and notoriety. That it has to be a practice for a long time is a disputed question because some authors say that nothing can be said as existing from time immemorial and therefore it should be a legal memory. In the texts of Hindu Law a usage is recognized if it is practiced beyond 100 years.⁶⁰ Two other important points are that for a custom to be valid, it must be consciously accepted having the force of law and that it should not oppose the moral and public policies and must not be forbidden by an enactment of legislation.⁶¹

3. Sacramental Nature of Hindu Marriage

In the Vedic period the sacredness of marriage was held in high esteem. This concept is expressed in a hymn; «Be thou, mother of heroic children, devoted to the gods, be thou queen in thy father-in-law’s house hold. May all the gods unite the hearts of us two into one.»⁶² This concept was later influenced by the entire Hindu thinking. So when Hindu Scriptures speak of marriage as *samskara*, it has its own religious and spiritual connotations. It is a religious performance that removes evil and creates good qualities in man. It uplifts the soul of the couples to pure love and spiritual and materi-

⁵⁹ In the Act the context otherwise requires, (a) the expression «custom» and «usage» signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family: Provided that the rule is certain and not unreasonable or opposed to public policy; and Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family; (...) The Hindu Marriage Act, 1955, sect, 3 (a).

⁶⁰ Cfr. S. V. GUPTA, *cit.*, pp. 109-110.

⁶¹ *Ibid.*, pp. 111-112.

⁶² Since I could not get access to the original source, this quote is taken as given the book, *Law and Illegitimate Child: from Sastric Law to Statutory Law* by HARI DEV KOHLI. The full detail of the reference is given on the following note.

al benefits through children.⁶³ Moreover, in the *Rigvedic* patriarchal society marriage was considered as a sacramental union not only binding in this life but also the life after.⁶⁴ The Hindu concept of marriage as a sacrament implies mainly three things.

Firstly, the marriage union between a man and a woman is explained as having a divine nature and therefore not a contractual one, however the contractual nature of marriage is not left out. So it implies that the essence of the marriage consisted in the consent of the parties. However, it is relatable to state that the parties of the marriage were not the man and the woman, but the consent was expressed between the man and the father or the guardian of the girl. Wife could never ask for the dissolution of marriage even when the husband suffered from physical and mental incapacities. Neither husband nor wife could ever ask for divorce. However it was a mockery to the sacramental union that men could take other women in a sacramental bond with impunity. The Hindu Marriage Act, 1955 has given both man and woman to dissolve the marriage under determined circumstances.

Secondly, the sacramental union implied that it was a permanent union. Once the ceremonies were completed, no power on earth could dissolve it.

Thirdly, the sacramental union meant that it was an eternal union and it was considered that even death could not separate the bond. This was the reason that Hindu widows were not allowed to remarry in the Indian society.⁶⁵

When we come to the Hindu Marriage Act of 1955, it says, «A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto»⁶⁶ But in the Special Marriage Act of 1954, it is «The marriage may be solemnized in any form which the parties may choose to adopt.»⁶⁷ Thus in the Special Marriage Act, the Hindu marriage lost its mandatory religious character. It is the choice of the parties in which rite they want to celebrate. However, the Hindu Marriage Act has tried to keep intact the character of sacramental union by permitting religious ceremonies.⁶⁸

⁶³ Cfr. H. D. KOHLI, *Law and illegitimate Child: from Sastric Law to Statutory Law*, New Delhi, 2003, p. 245.

⁶⁴ Cfr. M. A. QURESHI, *Marriage and Matrimonial Remedies: A Uniform Civil Code for India*, Delhi, 1978, p. 39.

⁶⁵ *Ibid.*, pp. 39,40.

⁶⁶ The Hindu Marriage Act, 1955, 7 (1).

⁶⁷ The Special Marriage Act, 1954, 12 (2).

⁶⁸ Cfr. H. D. KOHLI, *cit.*, p. 262.

It is clear that the concept of marriage as a sacrament in Hinduism does not fall in line with the understanding of the Catholic Church. According to our understanding, the sacramental dignity of a marriage between two baptized consists in its elevation to the supernatural plane. «The will of Christ that constitutes marriage as a sacrament means that the spouses, when both have received baptism, are constituted as a sign, receive a particular supernatural grace to live their conjugal condition, and are called to undertake a role and task in the context of the ecclesial community. For this reason sacramentality is found in the marriage itself, that is, in the two members of the faithful in their relationship as spouses, hence the identity between sacrament and marriage.»⁶⁹

Also it is to be noted that the essential properties of Catholic marriage are unity and indissolubility,⁷⁰ whereas in Hindu Marriage these properties are seen as integrated in the concept of sacramental nature of marriage itself. Thus it was not treated as a separate concept but marriage as a whole, having all these aspects integrated in the sacramental nature of marriage. So we are not treating the essential properties of marriage as a separate title.

4. Ends of Matrimonial Union

Hindu tradition considers three important ends of marriage: religious duty (*dharmā*), progeny (*praja*), conjugal love (*rati*),⁷¹ and it was also considered as a means to establish relations between two families.⁷² «According to the Hindu traditions, marriage is an instrument for the pursuance of higher goals of life, rather than a means for personal gratification which was given the least priority.»⁷³ Now we treat in detail the main ends of Hindu marriage as it was understood in the tradition.

* * *

The first end of Hindu marriage is considered to be a *dharmā* or a religious duty. According to the Hindu belief, a Hindu from his birth is born with

⁶⁹ J. I. BAÑARES, *Commentaries to the canons 1055-1165*, in A. MARZOA, J. MIRAS, R. RODRÍGUEZ-OCAÑA (eds.), *Exegetical Commentary on the Code of Canon Law*, Canada/Chicago, 2004, vol. III/2, p. 1044.

⁷⁰ CIC, can. 1056.

⁷¹ *Rati* literally mean «erotic desire». *Rati* is the Hindu goddess of love, carnal desire, lust, passion and sexual desire. *Rati* is often associated with arousal and delight is sexual activity.

⁷² Cfr. B. MONMAYEE, *cit.*, pp. 25, 26.

⁷³ *Ibid.*, p. 25.

debts; so to offer sacrifices to gods, he had to beget a son who will save him from hell and lead to the highest conjugal happiness.⁷⁴ In the *Mahabharatha*⁷⁵ it says that the wife is the very source of the *purusharthas*,⁷⁶ and those that have wives can fulfill their due obligations in the world, and can live a happy and fulfilled life.⁷⁷ This concept is seen also in Manu as «children, the fulfillment of duties, obedience, and the ultimate sexual pleasure depend upon a wife, and so does heaven, for oneself and one's ancestors.»⁷⁸ Manu continues to say that, «a man is only as much as his wife, himself, and his progeny...»⁷⁹ Thus according to the Hindu belief, a man has to perform various religious ceremonies, and without his wife these ceremonies would be incomplete because these ceremonies are suppose to be performed together.⁸⁰

The second end of marriage is *praja* or progeny or procreation. According to Manu, a son saves his father from hell. He says, «a man wins worlds through a son, and he gains eternity through a grandson, but he reaches the summit or the chestnut horse through the grandson of the son. Because the male child saves his father from the hell called *put*, therefore he was called a son (*putra*) by the self-existent one himself.»⁸¹ Manu goes on to say that the elder son free the father from the ancestral debt.⁸² Further, the marriage of a daughter was seen only as a mere drain of wealth from her father to her husband's house, whereas a son performs the religious duties and the last rite for the parents that pave way for the salvation. Also a son continues the inher-

⁷⁴ Cfr. P. K. VIRDHI, *The Grounds for Hindu and English Law: a Study in Comparative Law*, Delhi, 1972, pp. 18-19.

⁷⁵ The *Mahabharatha* is the world's longest epic poem. This poem is said to have been written by an ancient sage named Ved Vyasa who played a prominent role in the history of *Bharatas*. Though the English call it an 'epic' it is considered as an '*itibasa*' or a history, a history of the descendents of *Bharata*, the legendary king from whom India takes its name *Bharata*. Cfr. M. UBEROI, *The Mahabharata*, Madras, 1996, p. 6.

⁷⁶ *Purushartha* means objectives of man. *Purusha* means a human being and *artha* means object or an objective. According to the Hindu way of life a man should strive in his life to achieve mainly four objectives; *dharma* (righteousness), *artha* (material wealth), *kama* (desire) and *moksha* (salvation).

⁷⁷ Cfr. R. K. SHARMA, *cit.*, p. 107.

⁷⁸ Manu, IX, 28.

⁷⁹ Manu, IX, 45.

⁸⁰ Cfr. B. MONMAYEE, *cit.*, p. 24.

⁸¹ Manu, IX, 137, 138.

⁸² As soon as his eldest son is born a man becomes a man with a son, and no longer owes a debt to his ancestors; that is why the (the eldest) deserves to have the whole (estate). Manu, IX, 106.

itance through the succession of the property.⁸³ Thus in Hinduism, progeny is considered as an important end of Hindu marriage.

Sexual pleasure is the third end of marriage. However, it is accepted as one end which is less than *dharmā* and *praja*. According to Manu, «the ordinary life of a husband and wife, which is always auspicious, has thus been described. Now learn the duties regarding progeny, which lead to future happiness both here on earth and after death.»⁸⁴ The reason for this concept is that in Hinduism, the three upper castes, namely, *Brāhmins*, *Kshatriyas* and *Vaishyas* are believed to be born for a higher function in life. Thus sexual pleasure did not play a vital role in their life rather it was considered to be a means for the perpetuation of the progeny. Though the establishment between two families is not directly considered as an end of Hindu marriage, utmost care is taken to ensure maximum cultural compatibility.⁸⁵

Hindu marriage thus seemed to have been aimed at living the principles of *dharmā* by discharging social duties by having progeny. This principle is said to have originated from *Upanishads* that spoke of salvation as the ultimate end of man. Thus, it was natural to emerge such an attitude towards marriage. *Dharma* regularized the basic instincts towards the attainment of the higher end, that is *moksha* or salvation.⁸⁶

The Hindu Marriage Act 1955 does not say anything about the end of marriage. It may be because the Act concentrated more on the legalizing marriage than explaining the principles of marriage.

5. Indissolubility in Hindu Marriage

According to the traditional Hindu belief, marital bond is said to be inseparable, which means, once married it cannot be dissolved at will. The belief states that the wife is bound to her husband not only until death but even after his death.⁸⁷ Marriage is a permanent and stable union and it stands through various vicissitudes of life to grow stronger each day in the marriage bond. This firm companionship was expressed after the marriage

⁸³ Cfr. B. MONMAYEE, *cit.*, p. 24.

⁸⁴ Manu, IX. 25.

⁸⁵ Cfr. B. MONMAYEE, *cit.*, p. 25.

⁸⁶ Cfr. K. N. CHATTERJEE, *cit.*, p. 29.

⁸⁷ Cfr. C. N. SHANKAR RAU, *cit.*, p. 113.

mainly in two concepts. Firstly, the wife had to be firm and fixed in life like a pole star among thousands of moving bodies in the firmament. Secondly, they prayed together so that the marriage may last for a hundred years which was considered as a normal life span of a human being.⁸⁸ There are no evidences to claim that divorce existed during the *Vedic* or post *Vedic* periods. It was a holy union of mind, soul and body which should last forever. Dissolution of marriage was not contemplated by the *sastra* for it was considered as a sin and an unrighteous act.⁸⁹ And Manu said that the wise men will understand that marriage is sealed after the required rituals are performed. «The Vedic verses for wedding ceremony joining hands are the sure mark of a (legitimate) wife; but wise men should know that they are sealed in the seventh step.»⁹⁰

However, contrary to the general notion that Hindu marriage is indissoluble, there were customary forms of divorce which were recognized both socially and judicially and were widely practiced among the lower castes. Commonly known three forms of divorces were, by mutual consent, unilaterally, that is by the pleasure of husband and by a deed of divorce.⁹¹ Divorce by mutual consent was a valid custom among some castes of Mumbai, Mysore, Madras, Kerala and Madhya Pradesh. According to the customs prevailing in Manipur and Uttar Pradesh, a husband can abandon his wife for his pleasures. The third form of customary divorce is practiced in some parts towards Southern India. Under the customary law there is no waiting period after divorce to remarry. With the introduction of divorce in the Hindu Marriage Act of 1955, it became a common law for all the Hindus.⁹²

Thus it can be said that by the introduction of divorce in the Hindu Marriage Act of 1955, the concept of marriage as a permanent and indissoluble union lost its ground. However traces of considering marriage as a holy union can be found in the section 7 of the Hindu Marriage Act 1955 by the introduction of religious rituals. According to Kohli, «Hindu Marriage

⁸⁸ Cfr. R. PANDEY, *Hindu Samskaras: Socio-religious Study of the Hindu Sacraments*, Delhi, 2002, p. 228.

⁸⁹ Cfr. P. K. VIRDI, *cit.*, pp. 19-20.

⁹⁰ Manu, VIII. 227.

⁹¹ Cfr. M. MAJUMDAR, *Encyclopaedia of Gender Equality through Women Empowerment*, vol. I, New Delhi, 2005, p. 13.

⁹² Cfr. M. QURESHI, *Social Status of Indian Woman*, New Delhi, 2003, pp. 222-223.

Act 1955 has definitely cast a shadow by which Hindu marriage looks like a semblance of having some non-sacramental character.»⁹³ We will be dealing with the divorce in the Hindu Marriage Act 1955 in another separate title below.

6. Capacity to Marry

The age of marriage for both man and woman varied from time to time depending on the area, the cultural and religious practices. Here what is to be considered is the age of women. The traditional custom that a girl had to be given in marriage before the age of puberty existed due to the importance of chastity of woman that a girl had to be married before she lost her virginity.⁹⁴

Most authorities agreed in the ancient time that the marriageable age for a girl was between seven to ten years. In the ancient times, the common belief was that the ideal marriage was a marriage in which the bride was one-third of the age of the groom. For example, it is very evident from the thinking of Manu; a thirty year old man should marry a twelve year old girl.⁹⁵

The Hindu Marriage Act, 1955, added a clause in the section 5 about the valid age for the Hindu marriage. Conditions for a Hindu Marriage: «the bridegroom has completed the age of (twenty one)⁹⁶ years and the bride the age of (eighteen) years at the time of the marriage.»⁹⁷ It is to be noted that the age was higher from the moment of the enactment in the Special marriage Act, 1954. It says, «the male has completed the age of twenty-one years and the female the age of eighteen years.»⁹⁸ The Special Marriage Act, 1954 adopts the completion of a particular age at the time of marriage as the test of the capacity. The amendment of 1978 of the Hindu Marriage Act has risen the age from eighteen and fifteen to twenty one and eighteen respectively. In the old Hindu Law, a minor was considered to be competent to marry. Even the Child Restraint Act of 1929 did not affect the validity of child marriage since it

⁹³ Cfr. H. D. KOHLI, *cit.*, p. 261.

⁹⁴ Cfr. R. SINHA, *Dynamics of Change in the Modern Hindu Family*, New Delhi, 1993, p. 76.

⁹⁵ Manu, IX. 94.

⁹⁶ The ages of the bride and the bridegroom is given in bracket because it is the amendment of the year 1978 of the Hindu Marriage Act. In the first Act of 1954 it was eighteen for the boy and the fifteen for the girl.

⁹⁷ The Hindu Marriage Act, 1955, Sect, 5 (3).

⁹⁸ The Special Marriage Act, 1954, Sect, 4 (c).

sought only to punish those who followed the system of child marriage. Thus a marriage which was celebrated by observing the Hindu laws were considered valid till 1978, the time of the amendment of the Hindu marriage Act. Today, both the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955 (amendment 1978) follows a uniform rule for the whole country fixing the completion of a particular age for the validity of marriage for Hindus in India.⁹⁹

7. Consanguinity and Affinity in Hindu Marriage

Historians point out that from about 1000 B C, Brahmins began to group out people into different *Gotras*¹⁰⁰. Each *gotra* was given a name of a *vedic* seer and all who belong to the same *gotra* were considered as his descendants. There were two important rules in the *gotras*. First, the women were expected to leave their father's *gotra* and adopt their husband's *gotra*. Secondly, the members of the same *gotra* could not marry. Contrary to this fact, the archeological studies point to the fact that there existed polygamies and marriages within the kin.¹⁰¹ However in the early Hindu literature, texts prohibiting marriage among blood-relations are also found. One text says, «for now kinsfolk live sporting and rejoicing together saying, “in the fourth or third generation we unite.”»¹⁰²

The Hindu Marriage Act, 1955 has made clear the concept of prohibited marriages of consanguinity and affinity.

«“Degrees of prohibited relationship” – two persons are said to be within the “degrees of prohibited relationship”

- i. if one is a lineal ascendant of other; or
- ii. if one was the wife or husband of the lineal ascendant or descendant of the other; or

⁹⁹ Cfr. S. V. GUPTA, *cit.*, p. 136.

¹⁰⁰ *Gotra* is a term applied to a clan or a lineage of group of families in the patrimonial line, who trace their descendents from a common ancestor. *Gotra* is an immense importance for a Hindu for it shows his origin and identity. In the olden times every *gotra* has a specific duty to perform and they had a priest to perform the religious rites. The people of the same *gotra* were not allowed to marry in order to avoid inbreeding.

¹⁰¹ Cfr. R. RAI, *Themes in Indian History*, New Delhi, 2010, p. 54.

¹⁰² Cfr. R. C. DATT, *History of India*, vol. I, New York, 2008, p. 154. Unfortunately I am not able to get access to the original source. This quote is cited from the above mentioned book from *Satapatha Brahmana*.

- iii. if one was the wife of the brother or of the father's or mother's brother or of the grandfather's or grandmother's of the other; or
- iv. if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters...»¹⁰³

The Act further explains the nature of the relationship as «full blood» and «half-blood».¹⁰⁴ Two persons are said to be related to each other by full blood if they have a common ancestor by the same wife and two persons are said to be related to each other if they have a common ancestor but by different wives. The concept of «uterine blood»¹⁰⁵ is understood as that two persons are related to each other when they have a common ancestress but different husbands.

Another concept of consanguinity in Hindu marriage is *Sapinda*¹⁰⁶ relationship. *Sapinda* relationship¹⁰⁷ extends to the third generation inclusive from the ascent through the mother, and to the fifth generation in the line of ascent from the father. Both are inclusive. The line is to be traced towards upwards in each case from the person concerned who is considered as the first generation.

Also in the section 5¹⁰⁸ among the other conditions for marriage, two conditions are related to blood relations. According to the law before the Act, two persons could not marry who were blood relations unless the customs prescribe otherwise. Therefore the present Act while maintaining the fundamental rule has brought about a uniform norm that governs all. According to

¹⁰³ The Hindu Marriage Act, 1955, sect, 3 (g).

¹⁰⁴ «Full blood» and «half blood» – two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife and by half-blood when they are descended from a common ancestor but by different wives. The Hindu Marriage Act, 1955, sect, 3 (c).

¹⁰⁵ «Uterine blood» – two persons are said to be related to each other by uterine blood when they are descended from a common ancestor but by different husbands. The Hindu Marriage Act, 1955, section (d).

¹⁰⁶ *Sapinda* means literally, *sa* – together, and *pinda* – food offered to the deceased ancestor. Thus it means that deceased relative who is connected to the greater body of ancestors by the sharing of the sacrificial offering. In other words a person connected by the same *pinda* that is particles of the same body.

¹⁰⁷ «Sapinda relationship» with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned who is to be counted as the first generation. The Hindu Marriage Act, 1955, sect, 3 (f. i).

¹⁰⁸ Cfr. The Hindu Marriage Act, 1955, sect, 5 (iv, v).

this clause, it has a wider significance concerning the degrees of prohibited relationship. It has no limit to lineal ascendancy and it includes each and every ascendant *ad infinitum*.¹⁰⁹

According to the Hindu Marriage Act, 1955 two persons cannot marry if they are *sapindas* of each other. There are two categories of *sapindas* according to the Act; a lineal ascendant within the limits of *sapinda* relationships and persons having common lineal ascendant within those limits. The expression of «lineal ascendant» includes line of both male and female and it has a wider application. Under the common lineal ascendant it is within the fifth degree through his or her immediate male ascendant and within the third degree through his or her immediate female ascendant.¹¹⁰

Thus no valid marriage can take place between persons who are *sapindas* unless permitted by custom or usage, and this custom or usage must be equally governing both the parties of the marriage.

8. Consent in Marriage

Before the Hindu Marriage Act, 1955 a minor girl given in marriage was valid. The girl was usually given in marriage before the onset of puberty and the girl was a passive subject. It were the parents or the guardian who gave the girl as a gift to the bridegroom. The *Sastras* had laid down mainly three conditions for a Hindu marriage. Firstly, the marriage should be within the same caste. Secondly, the parties should not have the same *gotra* and thirdly, the parties should not be within the prohibited degrees.¹¹¹

Until the amendment (1976) of the Hindu Marriage Act, 1955, the word 'consent' did not appear in the conditions for a Hindu marriage in the section 5 of the Act. Among the six¹¹² conditions for a valid marriage, two were

¹⁰⁹ Cfr. S. V. GUPTA, *cit.*, p. 123.

¹¹⁰ *Ibidem*.

¹¹¹ Cfr. K. B. AGRAWAL, *Family Law in India*, Bedfordshire, 2010, p. 109.

¹¹² (i) either party has a spouse living at the time of the marriage (ii) neither party is an idiot or a lunatic at the time of marriage (iii) the bridegroom has completed the age of eighteen years and the bride the age of fifteen years at the time of marriage (iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between two (v) the parties are not *sapindas* of each other, unless custom or usage governing each of them permits of a marriage between the two (vi) where the bride has not completed the age of eighteen years, the consent of her guardian in marriage if any, has been obtained for the marriage. The Hindu Marriage Act, 1955, section 5.

amended and one was taken out. This amendment can be considered as a turning point in the history of the Hindu marriage law because of the two important clauses that were introduced in this section. The first is the change in the second clause; from the original statement that «neither party is an idiot or a lunatic at the time of marriage» is changed to a clause having three sub-clauses.¹¹³ In the first clause it says that «incapable of giving consent» due to the mental sickness, and the second clause the word «though capable of giving a valid consent» should not be to such an extent that he or she is unfit for marriage and the procreation of children. Thus the amendment of the Hindu Marriage Act, 1955 which is called the Marriage Laws (amendment) Act 1976, has brought about a radical change in the consent of the parties in the marriage.

Another important aspect is the raising of age which we have seen already under the age for marriage. However, here it is worth discussing because the sixth clause has been removed by the Amendment Act 1976, which is the role of the guardians to give consent if the party is a minor. Since the age has been raised from fifteen to eighteen for the girl, now there is no question of the consent of the guardian because the party cannot be a minor. Thus, the consent of the parties is requisite for a valid Hindu marriage.

9. Mental Incapacity

In the old Hindu Law, a woman could never ask for divorce, even if the husband was a lunatic, an impotent, a leper, a deserter, a chronic patient with venereal diseases or even a eunuch. This understanding of divorce was based on the sacramental union of marriage that once married nothing can separate the bond of marital relation even after death.¹¹⁴ Manu said, «but if the impotent man and the others should somehow desire wives, the children of those of them that produce offspring have a right to an inheritance.»¹¹⁵ Because of the belief system that a son is necessary to perform the last rites of the parents to obtain salvation, having a son was considered as a matter of great importance in the Hindu society

¹¹³ (ii) (a) is capable of giving a valid consent to it in consequence of unsoundness of mind; or (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or (c) has been subject to recurrent attack of insanity.

¹¹⁴ Cfr. M. A. QURESHI, *cit.*, p. 40.

¹¹⁵ Manu, IX. 203.

and so in the cases of a man who was impotent, he was given the right to invite friends and relatives to have sexual intercourse and have a son. This practice was legitimate in those days but today it is considered as obsolete.¹¹⁶

In the Hindu Marriage Act, 1955 it is said, «neither party is an idiot or a lunatic at the time of marriage.»¹¹⁷ According to the Act, an idiot is the one who is deficient in mind so as to be permanently incapable of rational conduct. The term idiot is applied for a person whose mind has been defective from birth, whereas a lunatic person is unsound in his mind which usually has a later traumatic origin and not at birth. This is also interpreted as the necessity to look into the various degrees of insanity and so a prudent judgment to determine whether a person is capable of marrying or not. A person who does not suffer from complete mental aberrations and who can manage his affairs may have sufficient reason to understand what is marriage and the nature of marriage bond.¹¹⁸ In short «the requirement is a simple one which does not demand any high degree of intelligence on the part of the parties to comprehend that marriage is being solemnized and there is always a very strong presumption that the required mental capacity was present.»¹¹⁹

There is an important change in the concept of mental capacity to give consent in marriage with the amendment of the Hindu Marriage Law in 1976. Section 5 of the clause 2 gives three sub-clauses where unsoundness of mind in the context of law is understood as, if at the time of marriage, either party, a) is incapable of giving a valid consent in consequences of unsoundness of mind; or b) though capable of giving valid consent, has been suffering from mental disorder of such a kind or to such an extent to be unfit for marriage and procreation of children; or c) has been subject to recurrent attacks of insanity.

The concept of mental incapacity is expressed as a complete loss of reason and is incompetent to accept the gift of the bride which is a necessary part of the marriage. Thus a reasonable degree of mental soundness is a pre-condition for a valid marriage for both the parties. The Act specifies the soundness of mind «at the time of marriage». Therefore an ailment consequent to the marriage does not contribute to the reasons for annulment of a marriage. The term «procreation of the children» in the second sub-clause is to be under-

¹¹⁶ Cfr. M. A. QURESHI, *cit.*, p. 60.

¹¹⁷ The Hindu Marriage Act, 1955, sect. 5 (ii).

¹¹⁸ Cfr. S. V. GUPTA, *cit.*, pp. 134-135.

¹¹⁹ K. DESAI, *cit.*, p. 53.

stood in the proper sense. For example a spouse although medically fit to give birth to a child may still be unfit due to her mental illness to look after and bring them up. Therefore, the case where one of the spouses is unfit due to the mental illness to discharge the marital obligations towards the other spouse and the parental obligations to the children is considered to be disqualified to contract a marriage.

The authority to decide the level of mental capacity is the tribunal; however no court can compel a person to undergo medical examination. Directing a person to undergo medical examination is illegal and without jurisdiction. But if a party is unwilling to go for a medical examination, it may be considered as a reason favorable to the appealing party for the nullity of the marriage.¹²⁰

10. Nullity in Hindu Marriage

As we have seen above under the mental capacity that a woman could not ask for divorce or separation under whatever circumstances, the concept of nullity of marriage was also said ruled out in the ancient times. However, traces of the same can be found in the writings of Manu. «If anyone gives away a daughter with a flaw and does not mention it, that (gift) from the evil-hearted daughter-giver may be annulled.»¹²¹ Here it is to be noted that it refers only to the woman and not to the man.

Under the Hindu Marriage Act, 1955, two terms are introduced namely, void marriages and voidable marriages. A void marriage is understood as the one that will be regarded by every court in any issue of nullity solicited, as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it. Whereas avoidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a competent court.

Three conditions are given in section 11 of the Act for a marriage to be a void marriage. These conditions are the clauses (i), (iv) and (v) of section 5¹²².

¹²⁰ Cfr. A. SHUKLENDRA, *Hindu Law – an Exhaustive Commentary on the Hindu Marriage Act, 1955*, New Delhi, 2011, pp. 50-54.

¹²¹ Manu, IX. 73.

¹²² (i) neither party has a spouse living at the time of the marriage, (v) the parties are not within the degree of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two and (v) the parties are not *sapindas* of each other, unless the custom or usage governing each of them permits of a marriage between the two. The Hindu Marriage Act, 1955, sect. 5, (i), (iv) and (v).

Section 11 points out that the marriage is void under three conditions: if the spouse is living of the party at the time of marriage, that they are not within the *sapindas* and they are not within the prohibited degrees. A void marriage is void *ab initio* and does not alter the status of the parties nor does it create any rights or obligations that would normally arise from a valid marriage.¹²³

Section 12 gives four clauses for a marriage to be voidable which can be annulled by a decree of nullity.¹²⁴ The clause enumerates that «the marriage has not been consummated owing to the impotence»; first we will try to understand what is meant here by consummation and then proceed to the impotency. Incapacity to consummate a marriage is said to be the incapacity to render complete and natural sexual intercourse (between parties). This can occur due to many reasons. It may be due to physical or organic defect, or due to some incurable diseases, or hatred for sexual intercourse in general or in relations to a particular individual.¹²⁵ Capacity to have sexual intercourse does not depend on the capacity to conceive. The sexual inter-course in order to constitute proper consummation of marriage should be full and complete penetration and not partial or an abortive attempt of penetration.¹²⁶

According to Hindu Marriage Act, a marriage is voidable on proof of impotence by the other party. However the petitioner's own affirmation cannot be considered as sufficient proof to nullify the marriage. And the court observes that a true test of impotence is practically impossible. The impotence leading to inability to perform a full sexual act can be absolute or relative. It may be due to the malformation of the sex organs such that there is no possibility of intromission or psychological inability due to the hatred, fear or passion on the attempt to consummate.¹²⁷

¹²³ Cfr. A. SHUKLENDRA, *cit.*, pp. 148-149.

¹²⁴ (a) that the marriage has not been consummated owing to the impotence of the respondent; or (b) that the marriage is in contravention of the condition specified in clause (ii) of the section 5 (that is the parties are not within the prohibited degree of relationship); or (c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner (was required under section 5 as it stood immediately before the commencement of the Child Marriage Restraint (amendment) Act, 1978), the consent of such guardian was obtained by force (or by fraud as to the nature of the ceremony or as to any material fact or circumstances concerning the respondent); or (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner. The Hindu Marriage Act, 1955, sect. 12. (a), (b), (c) and (d).

¹²⁵ Cfr. S. V. GUPTA, *cit.*, p. 237.

¹²⁶ Cfr. A. SHUKLENDRA, *cit.*, p. 160.

¹²⁷ *Ibid.*, p. 162.

The clause of the Act before the Amendment (1976) said that the respondent was impotent at the time of marriage and continued to be so until the institution of the proceeding. The party had to be impotent, firstly at the time of marriage and secondly it continues to be so till the petition is given. Or if the respondent party was not impotent at the time of marriage but subsequently became impotent and even continue to be so till filing the petition, the petitioning spouse would not be entitled for a decree of nullity. This clause is removed in the Amendment Act of 1976. Furthermore sterility is not a ground to apply for the nullity of marriage.¹²⁸

The other three clauses are: the parties should not be within the prohibited degree of relationship; consent obtained by fraud or force and the respondent was pregnant at the time of marriage by another person other than the petitioner.

E. *Form (Forms) of Marriage*

The discussion concentrates in detail on all the eight forms of marriage that were in practice in the Hindu traditions. The first one is *Brahma Vivaha* form of marriage which is considered as the purest one, in which father offers the daughter as a gift to a man of character and leaning. The second form of marriage considers giving the girl as a sacrificial fee to the priest who performs the *yajna*¹²⁹ which is arranged by him. This form is called *Daiva vivaha* because it is a gift to god on the occasion of a sacrifice. *Arsba* form of marriage is that form in which the father after receiving a cow or a bull gives his daughter to the bridegroom. The fourth form of ancient Hindu marriage is called *prajapatya vivaha*. Here the girl is given as a gift with a clear understanding that together both of them will perform the civic and religious duties.

Under the undesirable marriage, the first one is *Asura vivaha* where the bridegroom has to give money to the father or the guardian to marry the girl. The fifth form of marriage is called *Gandharva vivaha* in which the girl and the boy meets on their own account and the meeting is consummated in copulation born of passion. *Rakshasa vivaha* is the seventh form of marriage

¹²⁸ Cfr. S. V. GUPTA, *cit.*, pp. 235-245.

¹²⁹ *Yajna* is the performance of a religious duty involving *agni* or the sacrificial fire with the chanting of *mantras*. The word is derived from the root word 'yaj' means to worship. It is meant to please various deities.

where the girl is taken in force. The eighth form of marriage is *Paisacha vivaha* in which the man seduces the girl with force or intoxication or disordered intellect.

Among these eight forms of marriage that we discussed above, only the *Brahma vivaha* is considered to be the best form of marriage in which the girl is given to a boy of merit in the same caste and both the bride and bridegroom are supposed to be mutually agreeable to the marriage. Only in the *Brahma vivaha* form of marriage a clear mutual consent of the parties is seen.¹³⁰

A Hindu marriage was considered to be legally binding and complete if the *saptavadi*¹³¹ was performed. It is highlighted in Manu as well as in *Dharmasastras* and later in the Hindu Marriage Act. According to Manu «the Vedic verses for the wedding ceremony of joining hands are the sure mark of a (legitimate) wife; but wise men should know that they are sealed in the seventh step.»¹³² According to a *Sastric* definition, «a marriage is a union between a man and a woman which arises at the time when the ceremony has been completed, the bridegroom having the qualifications to accepting a girl in marriage, and the couple having formally or nominally accepted each other in front of a marriage fire, in which their oblations as a married pair will thenceforward be given.»¹³³

With the advent of the Hindu Marriage Act, 1955, Hindu marriage has lost its sacramental dimension. However the Hindu Marriage Act 1955, section 7,¹³⁴ says that a Hindu marriage may be solemnized in accordance with the customary rites and ceremonies. With this section there is an attempt to maintain the continuance of the performance of the customary rites of the age old tradition. Section 7 prescribes that where either party opt to marry by performing the ceremonial rites, *saptapadi* –the taking of seven steps by the bride and bridegroom jointly around the sacred fire– is to be celebrated. Marriage

¹³⁰ Cfr. C. N. SHANKAR RAU, *cit.*, pp. 104-106.

¹³¹ *Saptapadi* or seven steps is one of the very important rites in Hindu Marriage as it marks the final stage in the principal marriage rite. This rite is very vital in a marriage ceremony and once it is performed the father of the bride cannot break the transaction of marriage.

¹³² Manu, VIII. 227.

¹³³ U. SHARMA, *cit.*, p. 109.

¹³⁴ (1) A Hindu Marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. (2) Where such rites and ceremonies include the *saptapadi* (that is, the talking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken. The Hindu Marriage Act, 1955, sect. 7, (1), (2).

becomes complete when the seventh step is taken. However from the clause two, it is clear that *saptapadi* is not essential for the validity of every marriage. It is essential only when customary rites and ceremonies of either parties to the marriage includes it.

According to the Hindu Tradition a Hindu marriage ceremony consists, firstly, in the invocation before the sacred fire (*vivah homa*) which consist of recitation of *vedic mantras* and giving away of the bride. Secondly, *Saptapadi*, that is, bride and bridegroom jointly taking seven steps around the sacred fire. Section 7 of the Act does not dispense any form of celebration but the word solemnization means that a marriage is celebrated in due form.¹³⁵

Section 8 clause (1)¹³⁶ of the Act gives provisions to register a Hindu marriage. Further in the clause (5)¹³⁷ it says that the validity of the marriage is in no way affected by the omission to make the entry. Thus the registration of marriage does not constitute a condition for making the marriage valid and binding. A registration made under Hindu Marriage Act furnishes a proof of marriage which had been solemnized according to the customary rites and ceremonies.¹³⁸

F. *Judicial Separation and Divorce*

Divorce was unknown to high caste Hindus as they believed that marriage was indissoluble not only for this life but even after this life. This social belief was based on the pre-ordained destiny. The Hindu society was inextricably bound by their caste ethics and discipline that they did not break any rules of the society. If anyone violated the rule, it resulted in an immediate ex-communication from the caste community. In the ancient Hindu society marriage was considered as a sacred union or a sacrament. The practice was that women could never ask for divorce or for another husband under any circumstance, whether the husband was a lunatic, a leper, a deserter or a chronic

¹³⁵ Cfr. K. B. AGRAWAL, *cit.*, p. 116.

¹³⁶ For the purpose of facilitating the proof of Hindu Marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose. The Hindu Marriage Act, 1955, sect, 8 (1).

¹³⁷ Notwithstanding anything contained in this section, the validity of any Hindu Marriage shall in no way be affected by the omission to make the entry.

¹³⁸ Cfr. A. SHUKLENDRA, *cit.*, pp. 70-72.

patient with venereal deceases. As for the husband he could take another wife or as many wives as he wanted.¹³⁹ This is also a proof for the existence of polygamy in the tradition.

1. Separation under Old Law

Hindu marriage being a *samskara* or a sacrament was indissoluble and so the judicial separation was unheard during the *Sastric* Hindu law. Manu even goes to the extreme that the marital tie does not end even if the husband sells her or abandons her.¹⁴⁰ If we carefully observe the *Dharmasastra* literature, we find that divorce was permitted under certain circumstances. Manu observes that wife is not to be blamed if she abandoned her husband who is impotent, insane, or incurable disease and he permits such a wife to remarry.¹⁴¹

At about the fifth century B C a wave of asceticism passed over the Hindu society, and the consequence was that the society began to hold that a girl can be given in marriage only once. To divorce one husband and remarry another one seemed to be a difficult and sensual issue in the society. However, it was applicable only to the higher castes and not to the lower castes.¹⁴²

It was for the first time that by virtue of the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, the Hindu married woman got a statutory right to claim the separation and maintenance from her husband. Later, the Bombay Divorce Act, 1947 introduced the remedy of judicial separation in the Hindu world.¹⁴³ There are other provisions of the law that existed before the Hindu Marriage Act, 1955.¹⁴⁴

¹³⁹ Cfr. M. UMAR, *Bride Burning in India*, New Delhi, 1998, p. 84.

¹⁴⁰ A wife is not freed from her husband by sale or rejection: we recognize this as the law formulated by the Lord of Creatures long ago. Manu, IX. 46.

¹⁴¹ But if she hates him because he is insane, fallen, impotent, without seed, or suffering from a disease caused by his evil, she should not be deserted or deprived of her inheritance. Manu, IX, 79. If a woman is deserted by her husband or becomes a widow and willingly remarries and bears a child, he is called a son born of a remarried woman. If she still has her maidenhead intact or returns to a man she had left, she should perform the transformative ritual (of marriage) again with her husband (who thus becomes the husband) of a remarried woman. Manu, IX. 175-176.

¹⁴² Cfr. U. SHARMA, *cit.*, p. 91.

¹⁴³ Cfr. Cfr. M. A. QURESHI, *cit.*, p. 97.

¹⁴⁴ The Dissolution of marriage by Kolhapur State in 1920, The State of Baroda Suit in 1942, The Special Marriage Act of 1872 and 1926. For more details please refer to M. Umar, *cit.*, p. 84.

2. Judicial Separation after Passing the Hindu Marriage Act, 1955

The successive individual and collective efforts to mitigate the hardship of women and elevate their marital status lead to passing of the Hindu Marriage Act, 1955. After this Act, Hindu marriage is no more considered as a union for life or indissoluble union. The husband or the wife now can file a judicial petition in the court requesting for a separation or a divorce.

Section 10 of the Hindu Marriage Law, 1955 (amendment 1976) says that,

«(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1)¹⁴⁵ of section 13, and in the case of wife also on any of the grounds specified in sub-section (2)¹⁴⁶ therefore, as grounds on which a petition for divorce might have been presented.

(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for a petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.»¹⁴⁷

¹⁴⁵ Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party – (i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than that his or her spouse; or (ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or (ib) has, deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition or, (ii) has ceased to be a Hindu by conversion to another religion; or (iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent. The Hindu Marriage Act, 1955, section 13, (1). It is the Marriage Laws (amendment) Act of 1976.

¹⁴⁶ (2) A wife may also present a petition for the dissolution of her marriage by decree of divorce on the ground: (i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner; Provided that in each case the other wife is alive at the time of the presentation of the petitioner; or (ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or (bestiality); or (iii) (...) (iv) 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. The Hindu Marriage Act, 1955, section 13, (2). (amended 1976)

¹⁴⁷ The Hindu Marriage Act, sect, 10.

Judicial separation as provided in the section 10 lead to either reconciliation or divorce. In exceptional cases it may also lead to permanent separation. However the judicial separation is considered as lesser evil as it can lead to a reconciliation. The Hindu Marriage law (amendment) 1976 makes the ground for judicial separation and divorce common.¹⁴⁸ Passing one year after the judicial separation either party is entitled to use this as a valid ground for getting divorce. This means that judicial separation is considered as the preliminary step to divorce.

3. Divorce

Section 13 (1) of the Marriage Laws (amendment) 1976, provides the following grounds for the divorce: voluntary sexual intercourse (adultery); Cruelty; Desertion; Conversion to another religion; Incurable and serious mental disorder; Incurable form of leprosy; Venereal disease; Renunciation of the world; Presumption of death if not heard for seven years.

In the Hindu law of divorce section 13B was introduced in the Marriage Laws (amendment) Act, 1976, to give a statutory facility to the parties to dissolve the marriage by mutual consent.¹⁴⁹ When the marriage between two spouses is dead emotionally or mentally, rationally and practically, a relationship between the two makes impossible and simply it means that continuance of marriage is for the sake of marriage.

G. *The Effects of Hindu Marriage*

Under this section we discuss mainly two points. The first one is the restitution of conjugal right as it is termed in the Hindu Marriage Act, and secondly the legitimacy of the children. To arrive at the notion of the restitution of the conjugal right we deal with the topics like the *Sastric* understanding of the obligations of Hindu Marriage.

¹⁴⁸ Cfr. M. UMAR, *cit.*, p. 85.

¹⁴⁹ 13B of the Marriage Laws (amendment) Act, 1976: (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Law (amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

1. General Notion

The meaning of the term restitution of conjugal right is vague. However it has been defined as matrimonial rights, «the rights which a husband and wife have to each other's society, comfort and affection (...) it also include enjoyment of association, sympathy, confidence, domestic happiness, comforts of dwelling together in the same habitation, eating means at the same table¹⁵⁰, and profiting by joint property rights as well as intimacies of domestic relations.»¹⁵¹

Today, there is a different understanding of marital duties from the traditional understanding that it was a holy union for the performance of religious duties. The law imposes upon the husband and the wife certain legal marital right. These marital duties are fixed by the law and it include husbands right to protect the wife, to give her home, to provide her with comfort and necessities of life within his means, treat her kindly and humanly and on the other hand it is the duty of the wife to stay in the house of the husband. And finally both of them, to grow in the relationship created by the marriage.

2. Conjugal Right in the *Dharmasastras*

In the Laws of Manu,¹⁵² it clearly states the conjugal right and duties of wives and husbands. First we discuss the rights and duties of a wife in *Manusmriti*. Women were pictured here as a one who is having love for bed, seat and ornaments. By sacred tradition woman is declared to be the soil and man is declared to be the seed. Once married, a wife is not to be separated from the husband by sale or repudiation. It is the law of the Creator of the uni-

¹⁵⁰ It has to be understood that in India, in many of the cultures males eat first and then females of the family. Women always had a second position in the family. So women used to eat only once served to their husbands and often left outs from the plate of the husband. Thus here in this explanation of conjugal right, it mentions the right to eat from the same table though might sound strange to a non-Indian who does not know the old traditions and practices of India.

¹⁵¹ S. C. JAIN, *cit.*, p. 28.

¹⁵² The bed and the seat, jewellery, lust, anger, crookedness, a malicious nature, and bad conduct are what Manu assigned to women. Manu, IX. 17. The woman is traditionally said to be the seed; all creatures with bodies are born from the union of the field and the seed. Manu, IX. 33. A wife is not freed from her husband by sale or rejection; we recognize this as the law formulated by the Lord of Creatures long ago. Manu, IX, 46. Women are created to bear children, and men to carry on the line; that is why the revealed canon prescribes a joint duty (for a man) together with his wife. Manu, IX. 96.

verse. Women are created to bear children and so to be mothers and men to be fathers. Therefore, both husband and wife are ordained to perform their religious duties together. In the Hindu society it was considered as a duty of wives to submit to the authority of the husbands and remain under his roof and protection. Residing with her husband she was expected to perform her religious duties.¹⁵³

Manu speaks the following points as the duty of the husbands.¹⁵⁴ Here what Manu specifies is that a wife must be guarded against evil inclinations. If she is not guarded, she will bring disgrace to both the families. The son born of them is like a husband born again in her. Therefore, the husband should guard his wife in order to keep his offspring pure. Never a man knowing *veda* should cohabit with another's wife. He is perfect only when he consists in three persons united, his wife, himself and his offspring. A man who goes for a business trip for a long time must secure the maintenance of his wife for even a virtuous wife may be corrupted when she is distressed of maintenance.¹⁵⁵

3. Restitution of Conjugal Rights in the Hindu Marriage Act

During the British period, there was a statutory provision for the restitution of conjugal rights. Therefore the courts assumed the authority and power to use the discretion when to award the remedy or to refuse it. The court judgments often refused restitution to women even when there were serious reasons for it.¹⁵⁶

¹⁵³ Cfr. A. SHUKLENDRA, *cit.*, p. 83.

¹⁵⁴ Women should especially be guarded against addictions; even trifling ones, for unguarded (women) would bring sorrow upon both families. Regarding this as the supreme duty of all the classes, husbands, even weak ones, try to guard their wives. For by zealously guarding his wife he guards his own descendants, practices, family, and himself, as well as his own duty. The husband enters the wife, becomes embryo, and is born here on earth. That is why a wife is called a wife (*jaya*), because he is born (*jayate*) again in her. The wife brings forth a son who is just like the man she makes love with; that is why he should guard his wife zealously, in order to keep his progeny clean. Manu, IX. 5, 6, 7, 8 and 9.

A man is only as much as his wife, himself, and his progeny, the priests, say, and also this: «The wife is traditionally said to be what the husband is.» Manu, IX. 45.

A man may go away on a journey on business only after he has established a livelihood for his wife; for even a steady woman could be corrupted if she is starving for lack of livelihood. Manu, IX. 74.

¹⁵⁵ Cfr. A. SHUKLENDRA, *cit.*, p. 84.

¹⁵⁶ Cfr. QURESHI, M. A., *cit.*, pp. 82,83.

Section 9¹⁵⁷ of the Hindu Marriage Act, 1955, lays down the following conditions to request for restitution of conjugal rights. In this section, first it is to be noted that it is only a discretionary remedy and not a mandatory remedy because the words used are «may apply and may decree restitution of conjugal rights».

The conditions that lay down this clause are, first, the husband or wife has withdrawn from the society without a reasonable cause. The second requirement is that the court must be satisfied with the truth of the petition. The third condition is that there should be no legal ground why the relief should not be granted. One important point to be noted is that it is applicable only if both parties are Hindus. For example, if the husband is a Christian and the wife is a Hindu, their marriage cannot be treated under these provisions of the Act. Thus the Act to be applicable under this provision both must be Hindus.¹⁵⁸

4. Legitimacy of Children

Under Hindu law, the children born out of lawful wedlock have always been recognized for one or the other purpose. Under most of the statutes of India, the practice is to confer legitimacy to a child born out of wedlock. The Hindu Marriage Act, 1955 also recognized some provisions for the void and voidable marriage.¹⁵⁹

Prior to the enactment of Marriage Laws (amendment) Act, 1976 section 16, showed that a decree of nullity of marriage was necessary, before a child begotten or conceived before that decree could be given the status of legitimate child. Now the lacuna has been removed by the Marriage Laws (amendment) Act, 1976.¹⁶⁰ Under this section of the Act, any child of a void

¹⁵⁷ When either husband or the wife has without reasonable excuse withdraw from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. The Hindu Marriage Act, 1955, sect, 9 (1).

¹⁵⁸ Cfr. A. SHUKLENDRA, *cit.*, pp. 88,89.

¹⁵⁹ Cfr. K. B. AGRAWAL, V. SINGH, *Private International Law in India*, Bedfordshire, 2010, p. 205.

¹⁶⁰ The Hindu Marriage Act, 1955 (amendment 1976) 16(1) Notwithstanding that a marriage is null and void under 11, and child of such a marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such a child is born before or after the commencement of the Marriage Laws (amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

marriage who had been legitimate if the marriage had been valid, shall be legitimate, whether or not a decree of nullity of marriage is granted in respect of that marriage.

With regard to the inheritance of the legitimate children, according to the Hindu law, the right to inheritance is natural but however according to the section 16 (3)¹⁶¹ of the Hindu Marriage Act, 1955, the child made legitimate through a declaration of the nullity of a void or voidable marriage can only succeed to the father and not collateral of the parents or the ascendants of the parents. The effect of the rule laid down in this sub-section is that such children cannot rely on the rights conferred, claim any right or right to the property of any person other than their parent.¹⁶²

H. *Mixed Marriages*

Inter-caste marriage means, marriage between a man and a woman belonging to two different castes. The practice of inter-caste marriages existed in ancient India. For example, Manu¹⁶³ though highly recommended same caste marriage, inter-caste marriage was also admissible. Rituals also varied according to the status of the persons. Popularly in the tradition there were two forms of inter-caste marriages considered acceptable; *anuloma* and *pratiloma*. *Anuloma* marriage is a system of marriage where men of higher class wed women of lower class. *Pratiloma* marriage was a form of marriage in which men of lower caste married women of higher class.¹⁶⁴

An inter-faith marriage occurs when two spouses follow two different religious traditions. It can be called as inter-faith marriage, inter-religious

¹⁶¹ The Hindu Marriage Act, 1955 (amendment 1976) 16(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section, 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of passing or acquiring any such rights by reason of his not being the legitimate child of his parents.

¹⁶² S. C. JAIN, *cit.*, pp. 153-155.

¹⁶³ A woman of the same class is recommended to twice born men for the first marriage. Manu, III.12. According to the tradition, only a servant woman can be the wife of a servant; she and one of his own class can be the wife of a commoner. Manu, III. 13. The transformative ritual of taking the bride by the hand is prescribed for woman of the same class (...) when a woman marries a man of superior class, a woman of the ruler class must take hold of an arrow, a commoner girl a whip, and a servant woman must grasp the fringe of (his) garment. Manu, III. 43-44.

¹⁶⁴ Cfr. R. K. SHARMA, *cit.*, p. 116.

marriage, and mixed-faith marriage.¹⁶⁵ There are different views on inter-religious marriages in India. In the rural India an inter-religious marriage is considered as a taboo while many Hindus in Britain consider it as a betrayal of the tradition by both families. Also it is observed that within as well as outside India it is becoming increasingly acceptable.

The Hindu Marriage Act, 1955, extends a statutory recognition of inter-caste marriage. It does not make a difference between a caste-Hindu and a non caste-Hindu. The Hindu Marriage Act, 1955, is a uniform code for all the Hindus in India. There is no difference in Hinduism as there is among the Christians that Catholics have a particular law called Canon Law, and other denominations either depending on their particular laws or the civil law of their country. It is clearly defined in the section 2¹⁶⁶ of the Hindu Marriage Act, 1955. The application of this Act is to any person who is a Hindu by religion. Vedic Hindu religious system formed and developed into different sects under various circumstances. By belonging to a sect, a person does not change his/her religion and so those persons who belong to different sects also are governed by the Hindu Law. The Hindu Marriage Act, 1955, makes mention of Lingayat,¹⁶⁷ Buddhist, Jaina or Sikh and also those who are non-Muslims, Christian, Parsi or Jew by religion. By this the Act wants to make it clear that even tribes are also governed by Hindu Law.¹⁶⁸

There is no personal law applicable to Buddhists, Jainas or Sikhs in India other than the Hindu Law. The Buddhists in India cannot be governed by Chinese Buddhist law or Burmese Buddhist law. When a person changes his domicile to a country where there is Buddhist personal law it becomes applicable. Also the Indian courts always applied Hindu Law to the Jainas. As the Hindu Marriage Act, 1955, clearly defines who is a Hindu, there is no conflict between the personal laws of the different sects of Hinduism. There is a uniform code of marriage for all Hindus in India; the Hindu Marriage Act, 1955.

The Indian Christian Marriage Act of 1872 permitted a marriage between a catholic and a protestant. For Catholics in India, Canon Law is rec-

¹⁶⁵ Inter-faith marriage is explained in detail in the fourth chapter.

¹⁶⁶ This clause is already sited in the footnote under the title comprehending the Hindu Marriage in chapter two and also it is given in the appendix under Hindu Marriage Act, 1955. To avoid the repetition section 2 is not sited again here.

¹⁶⁷ *Lingayatism* is a Shaivite denomination of Hinduism in India who makes many departures from the main stream Hinduism and bases themselves on monotheism.

¹⁶⁸ Cfr. K. DESAI, *cit.*, p. 43.

ognized (though not explicitly) by the Supreme Court of India as personal law of Catholics in India. However, so far there is no uniform code of marriage for Christians in India. Canon Law permits mixed marriage, which is a marriage between a Catholic party and a baptized non-Catholic party under certain conditions. Other than the conditions given in the canon 1125¹⁶⁹, canon 1127¹⁷⁰ lays down that when a Catholic receives permission to enter into a mixed marriage he or she is not exempted from the canonical form.

The exchange of consent is to take place in the context of the prescribed liturgical rite. Mixed marriages are normally not celebrated during the Eucharist, however the local ordinary can permit mixed marriage during the Eucharist for individual cases or in general according to his discretion. A non-Catholic minister may be present during the liturgical celebration and may be invited to say an additional prayer, or a blessing however only the Catholic minister may validly ask and receive the consent of marriage in the name of the Church. However the Catholic party first should first seek permission and dispensation from the canonical form from his or her local ordinary.¹⁷¹ It is forbidden to have after the canonical celebration another religious celebration of the same marriage for the purpose of giving or renewing the consent.

I. *Marriage Celebrated in other Forms*

As we have seen above the Special Marriage Act, 1954, provides for a civil form of marriage which can be availed by anyone domiciled in India irrespective of religion. The section 15¹⁷² of the same Act treat the registration of

¹⁶⁹ The conditions given in this canon is already explained under the title disparity of cult.

¹⁷⁰ ... Nevertheless, if a Catholic party contracts marriage with a non-Catholic party of an Eastern rite, the canonical form of the celebration must be observed for licity only; for validity, however, the presence of a sacred minister is required and the other requirements of law are to be observed. Can. 1127.

¹⁷¹ Cfr. J. P. BEAL, *Marriage*, in J. P. BEAL., J. A., CORIDEN., T. J. GREEN (eds.), *New Commentary on the Code of Canon Law*, New York, 2000, pp. 1348-1349.

¹⁷² Any marriage celebrated, whether before or after the commencement of this Act, other than a marriage solemnized under the Special Marriage Act, 1872 (3 of 1872), or under this Act, may be registered under this Chapter by a Marriage Officer in the territories to which this Act extends if the following conditions are fulfilled, namely. (a) a ceremony of marriage has been performed between the parties and they have been living together as husband and wife ever since; (b) neither party has at the time of registration more than one spouse living; (c) neither party is an idiot or a lunatic at the time of registration; (d) the parties have completed the age of twenty-one years at the time of registration; (e) the parties are not within the degrees of prohibited

marriages celebrated in other forms. The conditions for the solemnization of marriage and the conditions for the registration of the marriage given in the Special Marriage Act, 1954, are mutually exclusive. It is also to be noted that the section does not say that a marriage celebrated in other forms 'should' be registered but rather 'may be' registered. The effect of registration of such a marriage is the recognition by the statutory law. After the registration, their status will be governed by the provisions of this Act and not by the law under which the marriage was originally solemnized. No doubt a Catholic person can marry a non-baptized person after obtaining the dispensation for the disparity of cult. Though such marriage is valid, it is advised to register the marriage for the civil effects.¹⁷³

J. *The Hindu Marriage Act, 1955 – An Appraisal*

The Hindu marriage customs which have stood the test of the time for centuries without being influenced by any foreign legal system, have fallen prey to the modern influences in the name of equality of women, taking a diversion from the mainstream concept of marriage by introducing the concept of divorce in the Hindu Marriage Act, 1955. The totally unheard praxis of divorce is introduced in the present codification of Hindu law and the sacramental nature is overpowered by contractual plane. Marriage as a social institution is now purely founded on the material basis neglecting the spiritual significance. However the present Hindu marriage law has many positive elements which were very much necessary for a country like India where there is plurality of culture, tradition and customs.

1. Loss of Sacramental Nature of Marriage

Hindus have a widespread and deep-rooted tradition in relation to the practices of marriage in the society. As we have already seen, Hindu marriage was a sacred union and had three *dharmas*; fulfillment of the religious duties, procreation of the children and the proper enjoyment of sexual pleasure.

relationship: (...) (f) the parties have been residing within the district of the Marriage Officer for a period of not less than thirty days immediately preceding the date on which the application is made to him for registration of the marriage. The Special Marriage Act, 1954 sect, 15.

¹⁷³ Cfr. W. E. PINTO, *Law of Marriage and Matrimonial Relief for Christians in India*, Bangalore, 1991, pp. 46-47.

No doubt, the enactment of the Hindu Marriage Act has tried, not to miss the traditional religious elements in the modern Hindu marriage law. For example, the ritual of *saptapati* is introduced in the Act which is a traditional ritual by which it is understood that marriage is complete and binding when the ritual is performed. However the modern Hindu marriage law has lost its pure sacramental nature of marriage and the spiritual perspective as it was understood in the Hindu tradition. Thus the spiritual values and ideals underlying the traditional Indian family practices have disappeared with the introduction of civil practices of marriage.

2. Disappearance of Indissolubility

Hindu marriage as it was understood in the tradition was indissoluble. Marriage bond remained intact according to the old Hindu law even after the death of a spouse. Though it can be argued that the concept of indissolubility was mainly practiced among the high class Brahmins and not among the low class, it does not justify the introduction of divorce in the Hindu Marriage Act. Divorce can be considered as a deviation from the classical Hindu legal marriage system. Adopted from the western legal praxis, divorce is a practice against the classical Hindu legal texts which attest forms of matrimonial remedies on the ground of nullity. With the introduction of divorce in the Indian Hindu legal system, marriage has lost its traditional practices of social and religious obligations, and now it has turned out to be a relationship that is flexible and self-fulfilling which can make or break at will of the individuals.

3. Loss of Religious Perspective

In the Hindu tradition marriage was essentially a religious act. The *sas-tric* tradition gave priority to the spiritual aspect of the marriage, and went to the extreme of thinking that the husband receives his wife as a gift from gods and not married her according to his own will.¹⁷⁴ His sacred obligation therefore was to perform the religious duties being a faithful servant to the gods together with his wife, procreation of children with highest conjugal happiness. Since Hindu marriage was considered as a sacred union, once the rituals were performed before the nuptial fire, the matrimonial relation

¹⁷⁴ Cfr. P. K. VIRDI, *cit.*, p. 16.

was believed to be irrevocable. It was a union of mind, body and souls, and even death could not separate this union according to their belief. Therefore divorce was totally unheard in the old Hindu law. But in the modern Hindu law, with the introduction of divorce Hindu marriage has lost its pure sacramental nature and it has become a civil contract and people can break the bond on determined grounds. Today the old concept of marriage as a sacrament has lost its sense and marriage is looked upon more as a civil act than a religious function.

K. Issues Related to Hindu Marriage and Catholic Marriage in India

1. Civil Recognition of Canon Law in India

Canon Law is codified in accordance with the Catholic faith for ordering the public religious life of the Catholic believers and it necessitates total submission, respect and sincere observance from the part of the Catholics. With its characteristic features of a body of law it is endowed with the force of personal law for Catholics throughout the world irrespective of the culture, nation or frontiers.¹⁷⁵

However, the problem arises when the Civil Courts does not recognize the Canon Law in the country, or when the courts does not take cognizance on the decision of the nullity of marriage by an ecclesiastical court in accordance with the Canon Law. In India the situation is not different. One of the major problems faced by the Catholics in India today, related to marriage, is the non-recognition of the decision of the Ecclesiastical Court on the nullity of marriage by the Civil Courts of India. Despite the dissolution of marriage granted by the Ecclesiastical Court in the eyes of Civil Law he/she continues to be a married person.¹⁷⁶

Article 19¹⁷⁷ of the Constitution of India speaks on the fundamental rights of the citizens. Right to freedom of religion, covered in Articles 25, 26,

¹⁷⁵ Cfr. V. JOSEPH, *Marriage Laws in Canon Law and Civil Law*, Cochin, 1992, p. 40.

¹⁷⁶ *Ibid.*, p. 41.

¹⁷⁷ All citizens shall have the right – a) to freedom of speech and expression; b) to assemble peaceably and without arms; c) to form associations or unions; d) to move freely throughout the territory of India; e) to reside and settle in any part of the territory in India; (clause f is removed in the amendment) g) to practice any profession or to carry out any occupation, trade or business. *The Constitution of India*, Art. 19.

27 and 28¹⁷⁸ provides religious freedom to all citizens of India. The objective of this right is to sustain the principle of secularism in India. According to the Constitution, all religions are equal before the State and no religion shall be given preference over the other. Citizens are free to preach, practice and propagate any religion of their own choice. Also, nothing in this article shall affect the operation of any existing law or prevent the State from making any further law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practices, or providing for social welfare and reform.

The freedom assured by the Constitution of India in the articles 25, 26 27 and 28, to Indian citizens to profess, practice and propagate one's own religion implies at least an implicit recognition of the Canon Law by the civil authority. At the present condition in India today there is a lacuna between the civil law and those who profess the Catholic faith, especially in relation to the status of marriage of the Indian citizens. Under the rigor of the present civil law, the Civil Courts are not obliged to recognize the nullity of the Catholic

¹⁷⁸ 25. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law— (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) Providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindu religious institutions shall be construed accordingly.

26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right— (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.

27. No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

28. (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognized by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

The Constitution of India, Articles, 25-28.

marriage declared by the Ecclesiastical Tribunal.¹⁷⁹ However, the Constitution keeps open the possibilities for an implicit recognition.

Indian Civil Law has many personal laws. Hindus, Muslims and Parsis¹⁸⁰ have their personal laws and are recognized by the Civil Courts of India. For Christians in India their personal law is the Indian Christian Marriage Act, 1872, which was promulgated during the time of British regime and it lacks many elements as the present situation in India is very different from that of during British subjugation. But it is still quite unfortunate that Christians in India have to follow a set of rules that was promulgated during the colonial time.

In the Indian Christian Marriage Act, 1872, art. 88¹⁸¹, there is a reference to the personal law of the parties. Personal law contemplated in this section is the personal law relates to impediments such as prohibited degrees of consanguinity and affinity according to the norms of the Churches. In India, a marriage celebrated according to the form prescribed in the Canon Law is valid before the Civil Law because it is recognized as personal law for Catholics. However the problem arises with regard to the nullity of marriage declared by the Ecclesiastical Court as it is not recognized by the Civil Courts. Thus the question is why the Civil Law does not explicitly recognize Canon Law in all its respects, not just limiting to the form of the celebration of the marriage only.¹⁸²

2. Legislation Applicable to Christians in India

Though India is a pluralistic society with its multi-cultural, multi-linguistic, multi-religious and multi-ethnic groups but the people generally live in harmony. It is a society in which diverse cultural, ethnic, racial and religious groups maintain its autonomous participation in and development of the country. So also are the Christian communities in India. Christians in India are a minority group but a homogeneous body. Each group like Catholic Church, Jacobite Churches, Episcopal Churches, Church in South India,

¹⁷⁹ Cfr. V. JOSEPH, *cit.*, p. 41.

¹⁸⁰ Parsis are a body of Zoroastrians emigrated to western India from Persia about 1300 years ago. These emigrants professed the Zoroastrian religion founded by prophet Zarathustra in ancient Persia. The local people of India (probably) knew little of the religion of the emigrants but knew they were from Pers or Pars and so called the emigrant a Parsi or collectively Parsis.

¹⁸¹ Non-validation of marriage within prohibited degrees. Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into. The Indian Christian Marriage Act, 1872, 88.

¹⁸² Cfr. W. E. PINTO, *cit.*, pp. 14-16.

Church in North India etc., are governed by different personal laws. These Christians in India have to rely on the codified law of the county except the Catholics.¹⁸³ The Acts those are applicable to Christians in India at present are; a) The Indian Divorce Act, 1869, b) The Indian Christian Marriage Act, 1872, c) The Indian Succession Act, 1925, d) The Child Marriage and Restraint (as amended in 1978) Act, 1929, and e) The Special Marriage Act, 1954.¹⁸⁴ As it could be observed, most of these Acts were passed during the British time in accordance with the English matrimonial laws. It is true that there is no uniform code of marriage in India that is applicable to all the citizens in India equally. However as there is a personal law for Hindus, Muslims and Parsis, an amended uniform code for all the Christians in India with an explicit recognition of Canon Law, which meets the requirements to be particular law for Catholics is a great need.

3. Need for a Common Code

The Christian Marriage Act, 1872, is the result of an attempt to codify a uniform code for Christians in India during the British regime. As Catholics have Canon Law, the Roman Catholics in India strongly opposed certain provisions to be enacted in the laws applicable to Christians in India. The British Government conceded to the demand of the Roman Church, with regard to the solemnization of marriage, that Clergymen should be authorized to solemnize the marriages, according to the form prescribed by the Bishop of the Diocese concerned, and have to send the registration of marriages directly to the Registrar General. However in spite of the oppositions from the part of the Catholics the Indian Divorce Act, 1869, was enacted. The section 10¹⁸⁵ of

¹⁸³ Since Catholics have the code of Canon Law the dependency on the codified laws of the state is less than other denominations. However as we have seen since there is no explicit approval of Canon Law as Personal Law for Catholics, the conflict between the Civil Law and Canon Law in certain cases like declaration of nullity continues to exist.

¹⁸⁴ Cfr. W. E. PINTO, *cit.*, pp. 14-15.

¹⁸⁵ When husband may petition for dissolution: Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

When wife may petition for dissolution: When wife may petition for dissolution.-Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman; or has been guilty of incestuous adultery, or of bigamy with

the same Act states is clearly against the sentiments and the conviction of the Catholics.¹⁸⁶

After the independence, the situation continued to be the same. First attempt to amend the existing marriage laws for Christians was done through the Christian Marriage and Matrimonial Causes Bill, drafted to be presented in the parliament in 1962. Members of the Catholic Church in the committee opposed the provision for dissolution of marriage in the law applicable to Christians and demanded that the decrees of nullity of marriage passed by the Ecclesiastical Courts be recognized by the State.¹⁸⁷ When the Law Commission under the Ministry of Law referred to the same, Catholics again strongly opposed and pressed the commission not to recognize divorce as it is opposed to the Catholic faith. And finally the Christian Marriage and Matrimonial Causes Bill, 1962, was not passed in the parliament.¹⁸⁸

In a later attempt in 1990 the Catholic Church co-operated with the other Churches in their effort to revise the law applicable to Christians in India. The Catholic Bishops' Conference joined the National Council of Churches of India to participate in the national workshop to draft the Marriage and Matrimonial Causes Bill, 1990. After this aborted attempt to revise the law for Christians in India, the Christian Law Committee was formed in 2007 to study the amendment and revision of Christian law which will function as a Liaising Body between the Government and the Christian Community in India.¹⁸⁹

4. Non-Civil Recognition of Annulment of Catholic Marriage

One of the serious problems that Catholics face in India today, from the point of view of marriage law, is said to be the non-recognition of nullity of marriage declared by the Ecclesiastical Courts by Civil Law. In spite of the

adultery, or of marriage with another woman with adultery, or of rape, sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *mensa et toro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

Contents of petition: Every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded.

The Indian Divorce Act, 1869, Sect. 10.

¹⁸⁶ Cfr. K. P. RAO, *Christian Law in India*, New Delhi, 2010, pp. 443-445.

¹⁸⁷ *Ibid.*, p. 447.

¹⁸⁸ *Ibid.*, p. 448.

¹⁸⁹ *Ibid.*, pp. 449, 512.

vehement opposition from the Catholics Bishops in India, the Indian Divorce Act, 1869, was enacted by the British Regime in India for Christians. And it continues to be binding till today for Christians in India without any exception to Catholics.

With regard to the civil recognition of nullity of marriage declared by Ecclesiastical Tribunals, the Supreme Court of Kerala observed that the jurisdiction of Ecclesiastical Tribunals cannot affect the civil right of the parties and the rights flowing out of a legal marriage cannot be interfered by the Ecclesiastical Tribunal. And that a marriage may be solemnized according to the personal law of the parties¹⁹⁰ but once marriage is solemnized, the legal status acquired is recognized by the civil law and therefore it is a concern of the statutory law, because statutory law governing the area has primacy over the personal law.¹⁹¹

Indian Constitution article 372¹⁹² deals with the continuance of existing law and their adaptation. This expression in the Constitution «all laws in force» implies both customary law and particular laws. Therefore, it is clear that Canon Law also is implicitly recognized as it was in force before the Constitution came into force. This is evident from one of the judgments of the Bombay High Court during the British Rule in 1929. The British Court observed that any marriage invalid for any reason before the Canon Law must also be invalid in a Civil Court.¹⁹³

According to the provisions of the Indian Divorce Act, 1869, section 57¹⁹⁴, a party can marry again after the six months of receiving the decree of disso-

¹⁹⁰ Here it should be understood that in India the present situation given, only the canonical form is recognized but not the whole canon as a judicial system.

¹⁹¹ Cfr. K. P. RAO, *cit.*, pp. 513-514.

¹⁹² ... all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority. Explanation: The expression «law in force» in this article shall include a law passed or made by the Legislature, or other competent authority, in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas. *Indian Constitution*, 372.

¹⁹³ Cfr. S. CHAMPAPILLY, *Christian Civil Law and Penal Provisions*, 2008, p. 5. In [

¹⁹⁴ Liberty to parties to marry again: When six months after the date of an order of a High Court confirming the decree for a dissolution of marriage made by a District Judge have expired, or when six months after the date of any decree of a high Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate juris-

lution of marriage from the District Court and if no one has presented against that decree to the High Court in its appellate jurisdiction. Further to safeguard the rights and obligations of the English Clergyman, Indian British administration added another clause to the same Act that an English Clergyman cannot be compelled to solemnize a marriage or persons divorced for adultery.¹⁹⁵

Catholics in India are not able to solemnize remarriages without obtaining a civil divorce even if they have obtained a decree of dissolution of their marriage from the Ecclesiastical Court. It is because according to the Indian Penal Code, section 494¹⁹⁶, the parties are liable to prosecution for bigamy with imprisonment or fine. Also the priest who solemnizes a second marriage under the above said situation is liable to prosecution by the same Act. According to the section 107 and 109¹⁹⁷ of the Indian Penal Code, the priest, who solemnizes a remarriage without the parties obtaining the civil divorce, can be prosecuted for the offence committed in consequence of abetment or as an aid which constitutes the abetment.¹⁹⁸

Thus, the actual situation of Catholics in India concerning the matters of matrimonial relief is really complicating. For one side according to their faith they have to obtain a sentence of nullity of their marriage from the Ecclesiastical Tribunal. But in the case of a remarriage, to avoid prosecution under the Indian Penal Code, they are compelled to obtain a civil divorce.

diction (...) When such appeal has been dismissed, or when in the result thereof the marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death. *The Indian Divorce Act, 1869*, section 57.

¹⁹⁵ English Clergyman not compelled to solemnize marriages persons divorced for adultery: No clergyman in orders (...) shall be compelled to solemnize the marriage of any person whose former marriage has been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty or censure for solemnizing or refusing to solemnize the marriage of any such person. *The Indian Divorce Act, 1869*, sect, 58.

¹⁹⁶ Marrying again during lifetime of husband or wife.--Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. The Indian Penal Code, section 494.

¹⁹⁷ Abetment of a thing; A person abets the doing of a thing, (...) intentionally aids, by any act or illegal omission, the doing of that thing. Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence. The Indian Penal Code, sect, 107, 109.

¹⁹⁸ Cfr. S. CHAMPAPILLY, *cit.*, p. 5.

L. *Suggestions*

1. Suggestions Related to Hindu Marriage Law

One of the main defects of Hindu marriage law could be said as the concept of divorce introduced in the new law. At the same time the concept of nullity of marriage is to be highlighted as a milestone in the Hindu marriage law. The age of marriage, the consent in marriage and the other concepts related to marriage have reached its maturity in accordance with the human and ethical values based on the natural law.

India being a multi-religious society, it may be impossible to dream of a uniform code of law for all the citizens of India, especially in relation to the marriage laws. As given the present situation, each religion has laws of marriage in accordance with their belief systems and traditions, however these laws cannot be enacted at the whims and fancies of a few, but rather these laws should be based on the human and the eternal principles of righteousness.

Now, for the Hindu marriage law to be in accordance with the tradition and the belief systems of Hinduism, who follow the eternal principle of *Dharma*, the clause of divorce is to be removed from the Hindu Marriage Act, and the concept of nullity of marriage could be given more emphasis and expand the causes that constitute the nullity in relation to natural values of marriage, especially in regard to the consent, thereby assuring the protection of liberty and autonomy of the parties. Hinduism bases its foundation in the principle of eternal righteousness and therefore for the Hindu marriage law to be based on these values, it has to follow the essential truths that sustain the Hindu religion and its way of life. Attributing civil nature of laws to the laws of a religion that has always tried to sustain the human and natural values is a dangerous move from the part of the civil authorities.

When the modern legal system in India takes purely a secular approach in the matters of Hindu marriage law, what will happen to the *Dharma*? The concept of *Dharma* though not completely absent, it is been outlined as if it is irreverent for the law. It to be observed that there is a conscious split from the traditional legal concepts or ignorance of the academic analysis of the old laws, while the modern law tries to be in conformity with the modern legal systems of other countries. It is visible from the present Hindu marriage law that something has gone seriously wrong in the Hindu society in relation to the eternal righteousness or *dharma* on which Hindu religious is based.

The *dharmic* institution of marriage was meant to be an indissoluble union of man and woman but now, it has sought to be a contractual plane rather

than the sacramental nature. The age-old sacramental nature of marriage has evaporated by the introduction of divorce as a remedy for the marital conflicts. Therefore, the Hindu marriage law to be in accordance with the *Dharma*, the clause of divorce is to be eliminated from the present Hindu Marriage Act so that legal system could be faithful in its traditions and do justice to the millions of people who live with the principle of *Dharma* in their daily lives.

2. Suggestions Related to Catholic Marriage in India

Christians in India are a minority group and all the denominations depend on the civilly enacted law for regulations of marriage except Catholics. The problem as discussed earlier, there is no explicit civil recognition of Canon Law in India. Canon Law meets all the elements necessary to be considered as personal for Catholics. Therefore, I would like to suggest the following points as probable solutions for the existing issues between the Catholic Church and the State in relation to the laws regulating the marriage in India.

a. The Indian Christian Marriage Act, 1872, should be abrogated as it is outdated and instead of that, a new Marriage Bill for Christians in India should be enacted respecting the natural law and the Christian principles. Here, as the Canon Law is a Personal Law for Catholics, it should be recognized explicitly in a special clause, giving authority to the Catholic Church to regulate the impediments, form, consanguinity, causes of nullity, separation, con-validation etc., according to the norms prescribed in the Canon Law.

b. The Indian Divorce Act, 1869, which is applicable to Christians in India, should be abrogated and provisions are to be made in the civil courts to declare the nullity of invalid marriages of the Christians in India. For Catholics, what is regulated by the Canon Law should be recognized by the civil authorities.

c. Indian Government and the Vatican should enter into mutual agreement in the matters of the regulation of Catholic marriages in India, in the form of a concordat, thus guaranteeing the religious freedom assured by the Constitution of India.

CONCLUSION

After having discussed all the important aspects of Hindu marriage from a Catholic perspective, we have seen the civil status of Christian marriage in India. Most of the traditional Hindu concepts of marriage seem to have a close

relation with the Catholic understanding of marriage. The terms like sacraments –as a rite of passage, a purificatory acts making body and mind pure and thereby helping one in spiritual upliftment– may be surprising for those who come across this concept for the first time; however the use of the term is not exactly as it is expressed in the Catholic Church. Also marriage as an indissoluble relationship is a strong concept in the Hindu tradition. But with the advent of the Hindu Marriage Act 1955, and the Special Marriage Act 1954, the Hindu marriage has lost many of its religious dimensions and has become almost purely a civil marriage.

The Hindu Marriage Act, 1955, no doubt, is a turning point on laws relating to marriage and matrimonial causes for Hindus in India. Though it takes a diversion from the mainstream orthodox concepts like marriage as an indissoluble sacred bond, it has brought about a modern legal order in the life of the Hindus in India. A change and set of written norms are necessary for any developed society. And so it can be seen as a need of the time to establish norms for an institution like marriage which is as old as human beings. When a law is promulgated by civil authorities, there is less chance to talk about religion. This may be the reason why in the Hindu Marriage Act, 1955, the original religious concepts are not reflected.

There were many practices in the Hindu tradition against natural law relating to marriage in India. The equivalent word used for natural law in Hinduism is *Dharma*. It is a comprehensive term that covers religion, philosophy, morals, culture and scripture-oriented activities. It is an internal ordering system and is deeply rooted in the religion based on the divine revelation. Among the inhuman practices against natural law that existed in the Hindu tradition, most of them were against women and children. Today legally these practices are abolished; however one may find still traces of these practices in some of the cultures in India.

When comparing the Hindu marriage laws with the Catholic marriage from the point of view of civil laws in India, we find that Hindus have a set law as their personal law while Canon Law has no explicit civil recognition. Because of this reason, Catholics in India have to face many challenges to live the values that the Church transmits to the society through families. One of the major problems is the non-recognition of the dissolution of marriage in the Ecclesiastical Courts by the Civil Court and the proposal of the effects of divorce.

I would like to conclude this study with a final observation, that when we compare the Hindu marriage laws with the Catholic marriage laws, we come

across many common elements and similarities in the traditional practices. However I feel that, while appreciating the positive values in the Hindu Marriage Act, 1955, it has lost many traditional religious concepts that upheld the moral values of the sacred institution of marriage. Joseph Cardinal Ratzinger considers the loss of fundamental values in family and marriage as a blind spot. He states, «it is urgently necessary to fill in the gaps in the list of values that our society appreciates and to demythologize those values that have undergone a mythical distortion.»¹⁹⁹ The Pope Benedict XVI observes, «no law made by man can override the norm written by the Creator without society becoming dramatically wounded in what constitutes its basic foundation. To forget this would mean to weaken the family, penalizing the children and rendering the future of society precarious.»²⁰⁰ This is one of the major defects of the Hindu marriage law today that it has overridden some of the principles of *Dharma* on which the Hinduism is founded. Perhaps the price paid for the abolition of the principal customs against the natural law in the Hindu Marriage Acts of the 19th and 20th centuries has been the emptying-out of some of the deep rooted values of Hindu Marriage. As the Pope Benedict XVI teaches, «Today, if they are to give a truly human face to society, no people can ignore the precious good of the family, founded on marriage. “The matrimonial covenant, by which a man and a woman establish between themselves a *partnership* of the whole of life, is by its nature ordered toward the good of the spouses and the procreation and education of offspring” (can. 1055): this is the foundation of the family and the patrimony and common good of humanity.»²⁰¹

¹⁹⁹ J. CARDINAL RATZINGER, *Values in a Time of Upheaval*, New York, 2006, p. 28.

²⁰⁰ BENEDICT XVI, *Address of His Holiness Pope Benedict XVI to the participants in the International Congress on Natural Moral Law*, Clementine Hall, February 2007.

[http://www.vatican.va/holy_father/benedict_xvi/speeches/2007/february/documents/hf_ben-xvi_spe_20070212_pul_en.html] [27.10.2011].

²⁰¹ BENEDICT XVI, *Letter of His Holiness Pope Benedict XVI to the participants in the Fifth World Meeting of Families*, 17 May 2005.

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