



INTERACTION OF PROVISIONS OF HINDU LAW IN LIGHT OF CONTEMPORARY ISSUES

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ABSTRACT

India is a multi-cultural and multi-religious Country representing a mark of unity in diversity for world. Personal law in India is not of general application and based on religion of individuals. Religion plays a significant role pertaining to the personal matters of the citizens. Legal framework pertaining to the personal law has been developing significantly. In Post-independence the personal laws in India have witnessed a major pace of development and reform. Among personal laws, the Hindu law is specifically a vibrant and considerably a matured civil law however, in view of contemporary modern globalised world, there is a dire need of revisiting certain provisions of the Hindu Law as the current law is unable to meet the requirements of ever changing dynamic societies, which are influenced by various internal and external factors. The Indian societies are facing new developments and challenges pertaining to matrimonial relationship. It is the need of hour to relook the existing legislation in order to meet the challenges in most efficient manner.

Key words: Hindu Law, Marriage, Adoption, Custody, Women equality, Development, Reform.

1. Introduction

Personal law is the branch of law which governs the personal affairs of citizens such as marriage, divorce, adoption, succession, minority, guardianship, maintenance etc. In India religion dominates the personal affairs of citizens to the larger extent. Since ancient times, Indian

societies have followed the religion based applicability of personal laws. Indian Constitution which guarantees the religious freedom to the citizens also empowers the legislators to legislate for personal matters in accordance with religion. At the same time, the constitution of India¹ also directs the legislators to achieve the goal of Uniform civil code by replacing the existing religion based personal laws. For centuries the personal laws such as Hindu and Muslim law were considered immutable from the preview of legislators due to various socio-political and religious reasons. However, with the change in Indian societies, the effects on personal laws are also evident. The personal laws in India have gone through the drastic progression of reform specifically by the initiatives of the legislators and judiciary.

The reflection of genesis of reform and codification may be traced from the beginning of British era in India. The Britishers followed the basic ideology of non-interference in personal matters of Indians and with reference to the disputes relating to inheritance, marriage, caste and other religious usages and institutions provided that the Hindu and Muslims will be governed by their own personal laws.² However, efforts were made by various social reformers and legislators during British era to replace the customary practices pertaining to personal matters with codified legislations in just, equitable and well defined manner. Before independence many major legislations were passed and implemented for various communities.³ But, major developments in personal laws took place after the Independence by enacting four major legislations⁴ pertaining to the personal affairs of the majority community of the country i.e. Hindus and enacting the secular law⁵ for all communities irrespective of religion. At the same time the current societies are influenced by western culture and other social reasons. The personal relationship is also affected by the social change in societies. The societies are facing new challenges in personal relationship such as frequent divorces, custody battles, maintenance, adoption related issues herein the current law is not able to tackle the new emerging issues in effective manner. With the initiatives of legislators and progressive approach of judiciary, the personal laws are undergoing a slow however, constant process of development and progress in order to align with the

¹ Article 44 of the Indian Constitution: the State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.

² The Warren Hastings Plan of 1772.

³ For example: The Indian Divorce Act, 1869; The Indian Christian Marriage Act, 1872; The Kazis Act, 1880; The Anand Marriage Act, 1909; The Indian Succession Act, 1925; The Child Marriage Restraint Act, 1929; The Parsi Marriage and Divorce Act, 1936; The Dissolution of Muslim Marriage Act, 1939.

⁴ The Hindu Marriage Act, 1955; The Hindu Adoption and Maintenance Act, 1956; The Hindu Succession Act, 1956 & The Hindu Minority and Guardianship Act, 1956.

⁵ The Special Marriage Act, 1954.

development of dynamic and ever changing societies but there must be a constant and progressive change in the law to meet the requirements of ever-changing dynamic societies.

2. Pre independence developments in Hindu Law

In India majority community is Hindu. The term Hindu includes the Hindus, Buddhist, Jaina & Sikh⁶ citizens and also includes the various forms and developments of Hindu religion such as Virashaiva, Lingayat and the follower of the Arya, Brahmo and Prarthana Samaj⁷. For centuries the Hindus were governed by the ancient divinely inspired texts such as shruties (Vedas), smrities, commentaries, digests and prevalent customs in respective societies. The authority of ancient texts, not only in personal matters but also in other matters was considered infallible. Smrities such as *Manusmiriti*, *Naradsmirti* and *Brihaspatismirti* have been among others recognised for their significant value for detailed discussion on civil law and ideal concept of Dhrama.

In medieval India with rise in Muslim rule the Qazis administered the application of law in light of Muslim scriptural. However, Hindus continued to be governed by their earlier customary and traditional law. During British rule in India they continued with almost the similar pattern of administration of justice as was in Muslim rule, as the fundamental objective of East India Company was only trade, commerce and exploitation of resources.

In early British era, for personal matters the Indians were excluded from the jurisdiction of their courts like Mayors' courts and it was specified that the matters pertaining to Indians should be determined by themselves unless they submit themselves to the jurisdiction.⁸ Furthermore, The Warren Hastings plan of 1772 which propounded the Regulations for civil justice administration, followed by the Regulations of 1781 prescribed that Hindus and Muslims were to be governed by its "personal" law in matters relating to inheritance, marriage, religious usage and institutions⁹ which further endorses the approach of non-interference of Britishers.

On consolidation in India, the Britishers shifted their approach pertaining to non-interference in personal laws to the extent of reform, equity, women and child care. In the development and codification process of Hindu law the impact of British Raj is very much evident.

⁶ Section 2(1)(b), The Hindu Marriage Act, 1955.

⁷ Section 2(1) (a), The Hindu Marriage Act, 1955.

⁸ The Charter of 1753.

⁹ *Sarla Mudgal v. Union of India*, (1995) 3 SSC 635.

Post-independence, some progressive initiatives were taken by some steps with respect to regulate and reform personal laws pertaining to Hindus.¹⁰ However, a considerable opposition was seen on account of infringement of religious freedom of Hindus. Among others, another major reason for antagonism was due to non-interference in Muslim law which allowed the polygamy. In early development process of Hindu law the judiciary played a significant role by considering that the practice of religion is subject to State regulation. The courts also considered that state can regulate or restripe a religious practice, in case State believes that in the interest of social welfare and reform it is necessary to do so.¹¹ While considering the validity of The Bombay Prevention of Bigamous Marriages Act, 1947, Bombay High Court also observed that making polygamy as cognizable and non-compoundable offence among Hindus by the Act is a measure of social welfare and reform and did not violate any religious practice¹². After the enactment of the Hindu Marriage Act, 1955 and prohibition of bigamy¹³, the Allahabad High court took the view as was taken by Madras and Bombay High Courts and observed that Hinduism does not sanction the polygamy and even if it sanctions, the prohibition among Hindus is a measure of social welfare and reform.¹⁴ However, the view of Madras, Bombay and Allahabad High Courts was weakened by the contrary observations of the supreme Court in its decision, nevertheless, the view of High courts so as to considering the prohibition of bigamy as a social welfare and reform was upheld.¹⁵ Post-independence initiatives by legislators were well supported by the judicial interpretations in order to ensure the progression of social welfare and reform in early independent India.

3. Developments in Hindu law after independence: An era of codification

At the time of independence India continued with heterogeneous societies as it was before independence, however, the principles of gender justice, non-discrimination, equity and equal protection of law enshrined in the Indian Constitution was on precedence for the post-independence government particularly in first decade of the independence. Despite the fact that the development process of Hindu law began in 18th century during British rule, the major

¹⁰ E.g. Madras Hindu (Bigamy Prevention and Divorce) Act, 1949, The Bombay Prevention of Bigamous Marriages Act, 1947.

¹¹ *SrinivasaAiyar v. Saraswathi Ammal*, AIR 1952 Madras 193.

¹² *State of Bombay v. Narasu Appa*, AIR1952Bombay 85.

¹³ Section 5(i) of the Hindu Marriage Act, 1955.

¹⁴ *Ram Prasad v. State of UP*, AIR 1957Allahabad 411.

¹⁵ *The Commissioner, Hindu Religious Endowment, Madras v. Sri Lakshmindra Thirtha Swamiar*, (1954) SCR 1005.

accomplishment was in the first decade of the independence with specific reflection of women empowerment. Reformation and codification of the Hindu law proved to be very humongoustask as there was no existence of any uniform set of principles. Each society and group of people were following their customary and traditional practices wherein some of the traditions were not having any reference in ancient texts. Post-independence codification process appeared to be more composed to the approach followed by Britishers during colonial era in their efforts of codification as they followed the principles of Jeremy Bentham¹⁶ wherein the efforts were made to unify the law of heterogeneous societies with various different customary and traditional practices into the homogenous societies. To some extent the colonial era could succeed in codification, unification and development of Hindu law by enacting various social welfare legislations such as the Sati regulation Act, 1829, the Caste Disabilities Removal Act 1850, the Hindu Women Remarriage Act 1856, and Child Marriage Restraint Act of 1929, the Hindu Women's Rights to Property Act, 1937 etc. These legislations among others had the significant social and political impact on Indian societies especially towards the women and to some extent paved the way for unification and codification of Hindu law. The decade of 1940-1950 became the vital period for the development of the Hindu law and subsequent years for the codification of the Hindu law. The first major step towards codification was taken with appointment of a committee¹⁷ under the chairmanship of B N Rau. In order to achieve a progressing and just society the committee observed and recommended to codify the entire Hindu law in gradual manner¹⁸ The view of the Committee was welcomed by the government and the committee submitted two drafts to the government pertaining to succession and marriage. In order to prepare a complete set of Hindu code including all possible aspects pertaining to Hindu law, the committee was revived¹⁹ and committee prepared an exhaustive draft which covered the intestate and testamentary succession, marriage, maintenance, divorce, minority, guardianship and adoption. The committee after due deliberation and incorporation of suggestions, recommendations of various stakeholders presented the final report with draft Hindu Code bill²⁰ which was subsequently submitted to the Central legislative assembly which sought public opinion on the same. Subsequently, another committee under his chairmanship of Dr Ambedkar, the then law minister was constituted, which re-examined the bill and produced a

¹⁶Principle of utilitarianism.

¹⁷ Resolution of Government of India dated 25 January, 1941.

¹⁸ Report of the Committee dated 08 June 1941.

¹⁹Resolution of Government of India dated 20 January, 1944.

²⁰ Dated 21 February, 1947.

revised draft of Hindu code bill with minor changes and rearrangements. The bill with some resistance was taken up by the assembly on 17 February 1949. However due to conflicting opinions and controversies in public the bill could not come for consideration till 1951. The provisional parliament²¹ took up the bill for consideration in February 1951 however, the consistent opposition on one or other ground continued whereby the progress towards achieving the codified Hindu law remained insignificant. In 1952, the Hindu Marriage and Divorce bill, 1952 was presented before the *Rajya Sabha* (Council of States) by the then, law Minister with an aim to amend and codify the prevalent traditional and customary Hindu law and practices in India. The every aspect of the draft bill had extensive debates with range of opinions and views by the members which leads to government in realisation that the codification of entire Hindu code in single attempt is extremely difficult especially due to religious and traditional point of views of members of assembly as well as outside the assembly by public. The process of codification though continued but in very negligible manner which could not get any concrete result till 1954. Again in 1954 the bill was referred to the joint committee of *Lok Sabha* and *Rajya Sabha* which considered the opinion and views of various stakeholders and presented the report²² along with the restructured draft of the Hindu Marriage and Divorce bill, which was passed by the *Rajya Sabha*²³ with modification in the title of the bill as the Hindu Marriage Bill. Immediately after the same, the government presented another segment of draft codified law pertaining to intestate succession of Hindus²⁴. After an extensive continuous debate of six days the country witnessed the much awaited and proper codified law and whereby the long awaiting codified legislation pertaining to marriage was given to country. The same paved further way to the government to get other three significant legislations i.e. the Hindu Succession Act, 1956; the Hindu Minority and guardianship Act, 1956 and the Hindu Adoption and maintenance Act 1956. In view of the same the codification process of Hindu law took decades in getting proper codified, just and equitable legislations contrary to the prevailing traditional and customary laws among Hindus except the specifically recognised areas.

²¹ The constituent Assembly of India (Legislative).

²² On 26 November 1954.

²³ On 16 December 1954.

²⁴ On 22 December 1954.

4. Scheme of modern Hindu law under various statute

Modern Hindu law basically includes four legislations²⁵ which deals with various aspects of personal relationship such as marriage, divorce, maintenance, adoption, succession etc. Modern Hindu law attempted to give an ideal and liberated equal status to women in holistic manner. Aspects which were not guaranteed in traditional and customary practices such as prohibition on polygamy, divorce, annulment etc. were ensured in modern codified law.

The modern Hindu law though considered inclusive but has undergone a constant process of development by legislators and also a significant contribution was given by the Indian judiciary in ensuring the liveliness and the spirit of codified Hindu law. While the Hindu law is maturing with the span of time, the legislators and judiciary have tried to match with the overall development of societies specifically in light of changing dimensions of personal relationship in globalised era. The preamble of the Hindu Marriage Act, 1955²⁶ reflects the true spirit and intent of the Act. However, the Indian societies, in spite of well codified law facing a challenge to align the law with the major shifts which the societies are undergoing pertaining to ethics, culture, value, morality and in the personal relationship. The nature of Indian societies is very dynamic and is influenced by various socio-economic, political, globalisation etc., and the true spirit of law may be survived only if law is also synchronising with the development of societies.

The four codified legislations though provided the well settled, just and gender balanced legal propositions however, failed to match with the pace of progress which India societies had specially in recent two decades. Modern and contemporary Indian societies are facing new unprecedented issues which were either alien or considered against the ethics and religious values during the codification process of the Hindu law. The modern societies however are largely influenced by such challenges such as breakdown of marriage, interreligious marriage, homosexual and heterosexual marriages, live in relationship, prenuptial agreements etc. are among others. The framers were not ready with such contemporary issues in Indian societies and hence had not included the same. Often the codified Hindu law is criticised on provisions related to divorce, maintenance, gender justice and equality etc. The Indian judiciary has taken a prospective and progressive view on many contemporary issues, but it is inadequate in comparison to the progress and development, the nation is witnessing. The legislators for decades remained still and dormant on many fronts pertaining to synchronisation of Hindu law

²⁵ The Hindu Marriage Act, 1955; the Hindu Succession Act, 1956; the Hindu Minority and Guardianship Act, 1956 and the Hindu Adoption and Maintenance Act, 1956.

²⁶ *'An Act to amend and codify the law relating to marriage among Hindus'*

with the needs of societies and importantly in ensuring the gender just Hindu societies. The codification though was a positive and progressive move, but the same spirit should be adopted to relook the age old provisions in light of various social developments.

5. Critical analysis of various issues in Hindu law

A. Ceremonies and Customs

The codification and consolidation of the law pertaining to the Hindu marriage and associated matters was indeed progressing and landmark move of the legislators which could come up after due deliberations of decades. The Hindu Marriage Act, 1955 introduced the drastic changes in *shastric* customary practices by giving overriding effect to the provisions of the Act over religious texts, rules etc.²⁷ pertaining to Hindu marriage and associated matters whereby the old age customary practices were disregarded in the eyes of law. The law provided significant important provisions pertaining to divorce, maintenance, restitution of conjugal rights, conditions for marriages, annulment etc. which were either strange or discouraged in customary practices. Although the Act provided exhaustive, inclusive and progressive provisions but time and again criticised in many ways. Some of the provisions of the Act are required to be relooked by the legislators.

The Hindu Marriage Act, 1955 provides for the discretion of parties to observe the ceremonies of either of the party to the marriage.²⁸ The Apex court makes it clear that the marriage cannot be considered as 'solemnised', if the ceremonies performed are not in accordance with the provisions of the Hindu Marriage Act and thus, if any marriage is solemnised without proper ceremonies as per section 7, the marriage cannot be called as solemnised.²⁹ Since, the Hindu Marriage Act, 1955 is also applicable to all forms and developments of Hindu religion, the ceremonies are required to be performed by follower of other forms and developments such as *Arya Samaj*.³⁰ A large number of Hindus, however are not aware with the said requirement

²⁷ Section 4 (a) of the Hindu Marriage Act, 1955: any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

²⁸Section 7 of the Hindu Marriage Act, 1955: Ceremonies for a Hindu marriage: (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 taking 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.

²⁹*Gopal Law v. State of Rajasthan*, AIR 1979 SC 713.

³⁰*Ram Awadh v. Krishna Nand Lal*, AIR 1981 All 432.

stipulated in law hence, follow the practice or instructions of elderly people or priest. Unfortunately, blurred position of law and its ignorance creates difficulties as the customs may vary from family to family, community to community or region to region and more importantly the questions may also be raised with respect to the validity and authenticity of such customs followed. Though the Supreme Court considered the constitutional validity of Section 7 of the Hindu Marriage Act, 1955³¹ the probability of misuse is always there. The provision is especially detrimental to women who generally due to unawareness or under the instructions follow the ceremonies during marriage which in the eyes of law may not be valid, hence undue emphasis on the ceremonies may be relooked or reconsidered by the legislators in order to avoid undue harassment.

B. The Restitution of Conjugal Rights

The provision of restitution of conjugal rights³² which provide the remedy to aggrieved spouse in case of withdrawal from matrimonial relationship without reasonable excuse has been an advanced provision for Indian law in favour of aggrieved spouse. Though the constitutional validity of restitution of conjugal right has been challenged³³ in many cases, the judiciary has upheld its validity.³⁴ Nevertheless the provision has brought relief to parties to the marriage but requires reconsideration as it drag the unwilling party into the conjugal relationship without his or her wish. A matrimonial relationship in which the parties are dragged into the resumed relationship unwillingly may become hazardous. The Act is also silent on the reasonableness of withdrawal which gives the scope of wider or open ended scope of interpretation. The provision in contemporary world is required to be reconsidered especially when either of the party withdraw from the matrimonial relationship by agreement. Unfortunately the Hindu Marriage Act, 1955 does not provide such provisions and recognition of pre-nuptial agreements whereby, the party can live separately.³⁵

³¹*S.Nagalingam v. Sivagami*, (2001) 7 SCC 487,

³²Section 9: Restitution of conjugal rights.- When either the husband or the wife has, without reasonable excuse, withdrawn 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. Explanation- Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.

³³*Harvinder Kaur v. Harmander Singh Choudhry*, AIR 1984 Del. 66 Also *T Sareetha v. VenkataSubbaiah*, AIR 1983 AP 256.

³⁴*Saroj Rani v. Sudharshan*, AIR 1984 SC 1562.

³⁵*A.E. Thirumal Naidu v. Rajammal Alias Rajalakshmi*, (1967) 2 MLJ 484.

C. Registration of Marriage and Divorce

The Hindu Marriage Act, 1955 does not make the Registration of marriage compulsory and does not render unregistered marriage as void or voidable. In pursuant to the decision of the Supreme Court³⁶ various steps were taken in this regard. The Law Commission of India in its reports³⁷ also recommended the compulsory registration of marriage. In order to attain the desired objective and considering the Indian structure of the societies wherein diverse, poor and uneducated shares major share of Indian population, the process of registration should be initiated at local level only. The local bodies which are easily accessible to every person at their doorsteps should be empowered rather to confine their role within spreading awareness.

The provision may be further relooked in light of the provision of the Parsi Law³⁸ wherein the registration certificate is issued by officiating priest immediately on the solemnisation of marriage³⁹ which makes the process of registration very easy to the parties. Although the same may seem challenging especially for majority community but may have long lasting effects especially with respect to ensuring evidentiary value pertaining to the validity or solemnisation of marriage. Similarly, according to the provisions of the Hindu Marriage Act, 1955 the divorce can only take place in accordance with the provisions of the said Act by the decree of the court. However, there is no provision in the Act whereby the information pertaining to dissolution of marriage could be provided to the registrar of marriages, where the marriage was registered. The absence of such provision may lead to the existence of marriage in records of respective officers even after the dissolution of such marriage by the competent court. The provisions may be introduced in the Hindu Marriage Act, 1955 in lines with the worthy provisions of the Parsi Marriage and Divorce Act, 1936⁴⁰

³⁶ *Seema v. Ashwani Kumar*, AIR 2006 SC 1158.

³⁷ 205th and 211th report of the Law Commission of India.

³⁸ The Parsi Marriage And Divorce Act, 1936.

³⁹ Section 6- Certificate and Registry of Marriage: Every marriage contracted under this Act shall, immediately on the solemnization thereof, be certified by the officiating priest in the form contained in Schedule II. The certificate shall be signed by the said priest, the contracting parties and two witnesses present at the marriage; and the said priest shall thereupon send such certificate together with a fee of two rupees to be paid by the husband to the Registrar of the place at which such marriage is solemnized. The Registrar on receipt of the certificate and fee shall enter the certificate in a register to be kept by him for that purpose and shall be entitled to retain the fee.

⁴⁰ Section 10 of the Hindu Marriage Act, 1955- Registration of Divorces: When a Court passes a decree for divorce, nullity or dissolution, the Court shall send a copy of the decree for registration to the Registrar of Marriages within its jurisdiction appointed under section 7; the Registrar shall enter the same in a register to be kept by him for the purpose, and the provisions of Part II applicable to the Registrars and registers of marriages shall be applicable, so far as may be, to the Registrars and registers of divorces and decrees of nullity and dissolution.

D. Divorce

Another area of concern is the law related to divorce. Under Hindu law the divorce is possible only in accordance with the provisions of the Act. Section 13 of the Act provides the mechanism of divorce, whereby the disgruntled parties to the marriage are only confined to take divorce with the framework of stipulated law even after having no desire to live in conjugal relationship.⁴¹ Although the law has provided sufficient ground for dissolution of marriage nonetheless, when situation arise up, where staying in conjugal relationship for parties is no longer possible or practical, directing the parties to live together or not providing legal resort of termination specially in lack of provisions in this regard, may prove marriage a futile and meaningless. Hindu law does not recognise the dissolution of marriage in case of irretrievable breakdown of marriage. The judicial approach in this regard is very progressive and to the larger extent is aligned with the development of society and international practices. The observation of Apex court⁴² considers the ground of irretrievable breakdown of marriage as ground for divorce along with caution for courts that the courts must not lightly dissolve the marriage⁴³. It is in extreme circumstances that the court may dissolve the marriage on this ground. Such judicial consideration in view of progressive societies is very much desired but the need still persist, of having the same included in law. The Law Commission of India also recommended the inclusion of provision in this regard⁴⁴ but the legislature in order to align the law with societal and judicial developments, is yet to act upon the suggestions.

The liberalised concept of divorce by mutual consent under the Hindu Marriage Act⁴⁵ is very good move, however the provision though prescribed for mutual separation put certain

⁴¹Section 13 of the Hindu Marriage Act, 1955: Divorce- (1) Any marriage solemnized, whether before or after the commencement of the 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 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 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.(iv) has been suffering from a virulent and incurable form of leprosy; or (v) has been suffering from venereal disease in a communicable form; or (vi) has renounced the world by entering any religious order; or (vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive.

⁴²*Shyam Sunder Kohli v. Sushma Kohli*, AIR 2004 SC 5111.

⁴³*Sima Palit v. Pradip Kumar Palit*, AIR 2005 Gauhati 140.

⁴⁴71st report and 217th Report of the Law Commission of India

⁴⁵Section 13(B) of the Hindu Marriage Act, 1955- Divorce by mutual consent: (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 Laws (Amendment) Act, 1976, on the ground that they have been living

conditions whereby the purpose of provision is frustrated. Even if the parties are interested to dissolve their marriage mutually they have to fulfil the prescribed conditions as the provision seems directory. The view taken by Madras High Court⁴⁶ as the requirement of six months period is mandatory and cannot be waived is not legally sustainable and if section 13-B(2) is read as mandatory, then the very purpose of liberalised concept of divorce by mutual concept will be frustrated. The apex court also considered the view as “*We are of the view that the period mentioned in Section 13B (2) is not mandatory but directory; it will be open to the court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation,....Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the court should not be powerless in enabling the parties to have a better option,*”⁴⁷ In view of considerate and progressive interpretation, the legislature should act accordingly which is the need of societies.

E. Maintenance

The provisions related to maintenance in section 25 of the Hindu Marriage Act, 1955 and in section 18 of the Hindu Adoption and Maintenance Act, 1956 are similarly required to be reconsidered as the maintenance is the right of indigent party, provided other party has resources to provide. However, the provisions are discriminatory for females as the condition for females, to be a chaste is broader in interpretation and meaning in comparison to the condition applicable to husband as to having sexual intercourse.⁴⁸ The enabling provisions which provides social security to the parties are required to be reconsidered especially in light of equality to females.

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. (2) On the motion of both the parties made earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the mean time, the Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

⁴⁶*Thiruvengadam and C. Shilaja v. Nil*, AIR 2008 Mad 76.

⁴⁷*Amardeep Singh v. Harveen Kaur*, Civil Appeal no. 11158 of 2017.

⁴⁸Section 25 (3) of the Hindu Marriage Act, 1955 (3): If the Court is satisfied that the party in whose favour an order has been made under this Section has re-married or, if such party is the wife, that she has not remained chaste or if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just.

Section 18 (3) of the Hindu Adoption and Maintenance Act 1956: A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

F. Law Relating to Succession

The Hindu Succession Act, 1956 which provides the rules relating to devolution of property of Hindu is also required to be reassessed on various fronts, the discriminatory provision for daughters though has been amended in 2005 but a long way is to be achieved for the social security, welfare and to ensure the equality. Furthermore, many significant discriminatory provisions are still associated with the devolution of property of male and female. The Hindu Succession Act, 1956 provides differential treatment for devolution of male and female's property. Section 9 provides the order of devolution of the property of male Hindu⁴⁹ which ensures the weightage to his own mother in class I and father in class II. The scheme does not include the mother or father of the spouse either in class I and class II. However the same treatment is not given to the parents of female. The scheme as stipulated in legislation⁵⁰ gives the priority to heirs of the husband over her own parents except in the cases of inherited property from her mother or father⁵¹. The same provision which provides for differential treatment in selection the heirs after death for the purpose of property, seems to a greater extent in violation of the principle of equality as enshrined in the Constitution of India.⁵² More over retaining the provisions for devolution of property on the basis of its source⁵³ curtail the spirit of earnest

⁴⁹ Section 8 of the Hindu Succession Act, 1956- General rules of succession in the case of males:

The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter-

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased.

⁵⁰Section 15 (1) of the Hindu Succession Act, 1956: General rules of succession in the case of female Hindu-

The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16:(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;(b) secondly, upon the heirs of the husband;(c) thirdly, upon the mother and father;(d) fourthly, upon the heirs of the father; and(e) lastly, upon the heirs of the mother.

⁵¹ Section 15 (2) of the Hindu Succession Act, 1956.

⁵² Article 15(1) of the Constitution of India.

⁵³Section 15 (2) (2) Notwithstanding anything contained in sub-section (1)-

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

provision of section 14 which determines, subject to provisions of section 14(2), the absolute ownership of female in property.⁵⁴

F. Guardianship and Adoption

Section 6 of the Hindu Minority and Guardianship Act, 1956 to some extent also gives an impression of gender inequality by prescribing father as having priority over a child for the purposes of guardianship.⁵⁵ Apex court considered the issue of constitutionality of the provision and in its true spirit upheld the validity in line with the constitution of India.⁵⁶ Nevertheless, the provisions portray the gender biasness which by suitable modification can be avoided. Furthermore, another provision of the Hindu Minority and Guardianship Act, 1956 portrays the similar image under section 7⁵⁷ wherein, the legislation specifically provides for the passing on, of guardianship to adoptive father. The Act is having no further provision providing the same precision about an adoptive daughter. The probable reason for the same seems to be that the Hindu Minority and Guardianship Act, 1956 was enacted before Hindu Adoption and Maintenance Act, 1956 and therefore at the time of enactment daughters could not be adopted. Nevertheless, the natural guardian of an adopted daughter is the adoptive father and after him the adoptive mother by virtue of Section 6 of the Hindu Minority and Guardianship Act, 1956 but in view of bringing equality the specific express provision is required to be incorporated.

6. Conclusions

In view of discuss above, the Hindu law is very progressive and the judiciary has taken noble initiatives to interpret legal provisions in progressive manner and to provide the relief to parties even in lack of express provisions. The same approach is somehow invisible in the legislature. For instance, the long awaited initiative of the legislators could see some light through the introduction of the Marriage Amendment Bill, 2010 which proposed various amendments in the

⁵⁴Section 14 of the Hindu Succession Act, 1956. Property of a female Hindu to be her absolute property
(1) Any property possessed by a Female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

⁵⁵ Section 6, The Hindu Minority and Guardianship Act 1956: Natural guardians of a Hindu minor.- The natural guardians of a Hindu, minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are- (a) in the case of a boy or an unmarried girl-the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

⁵⁶*Githa Hariharan and Anr v. Reserve Bank of India and Anr*, (1999) 2 SCC 228

⁵⁷ Section 7 of the Hindu Minority and Guardianship Act 1956, Natural guardianship of adopted son- The natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother.

current Hindu Marriage Act, 1955. The initiative proved ineffectual as the bill was introduced in 2010, and was passed in the *Rajya Sabha* in 2013 but not in the *Lok Sabha*. Since then it has not been re-introduced in either house of the Parliament. It took decades in securing the rights of the daughters in coparcenary property which was introduced in 2005. The Hindu Adoption and Maintenance Act, 1955 provided the right to adoption to female in 2010. Such instances clearly reflect the slow approach of legislature towards having progressive law. The Hindu law which governs the majority community of country should be relooked in light of new challenges and major developments which are taking place globally in order to align with the needs of modern, dynamic societies. To keep the spirit of law alive it's pertinent to relook the utility of legislation in light of societal developments and requirements otherwise the purpose of law may prove to be futile. In order to achieve the same and considering the diverse and multi-religious societies in India, there should be a permanent 'Family Law Commission' in lines of Law Commission of India. The need of permanent commission is upsurge especially in lack of the Uniform Civil Code. Till the time India achieve the mandate of Uniform Civil Code, the commission or permanent body should ensure the alignment of personal laws of nation with changing needs of the societies.