

# Matrimonial Hindu laws and Changing Family system in the light of recent Supreme Court judgments

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**Abstract:** The article specifically deals with the Hindu matrimonial life undergoing severe turmoil in the light of various judicial judgments. The diversity of the Hindu way of life has given rise to several kinds of problems in marital life. The menace of child marriage amongst the illiterate and the lower middle class is hardly reducing, also they are infested with the dowry problems despite several strong legislations whereas the educated middle class and the upper middle class is opting out of the conventional matrimonial life. The newly emerging trends in live-in relationships are creating new challenges for the legal fraternity. The society stands at a crossroad. The criminalisation of different aspects of marital life has shown that there is a need to adopt a more sociological and psychological approach to deal with this crisis which cannot be handled with a mere legal whip; instead, they have to be resolved with a social will.

**Keywords:** matrimony, child marriage, dowry, divorce, cruelty, adultery.

## Introduction

Family life has been initiated through marriage in all the societies and is the oldest institution in the hitherto existing societies in the world. The marital relations will decide what society is or will be. Religion and customary practices have been the source of matrimony. With the advent of codification of laws coupled with the earlier system of running the family, a new challenge has been created before the society as to what should be given primacy: whether customs and practices or codified law. The dilemma between is and ought, has created a severe pause in family life in general and marital life in particular.

Though the marital life was accepted as a universal institution of the family system, it was never uniform. Various types of marriages even in Hindu tradition have been in practice. In the ancient period, matrimony was not a universal phenomenon. Eight types of marriages were prescribed by the different shastras, which included:

1. Brahma: where the couple getting married were to be from good families and belong to the same Varna. The boy's family propose to the girl's family. Where dowry had no place, but Kanyadaan was observed.
2. Prajapatya: This was similar to the Brahma vivah, except here it was the girl's family which proposed to the boy's family. And instead of kanyadaan, Panigrahan was followed where the protection of the girl was handed over to the boy by her father.
3. Gandharva: Where the couple exercised their will and lived with each other. They did not wait for consent from their families. No rituals were followed.

4. Arsha: In this type of wedding, the boy's family presented the girl's family with a pair of cattle in return for the girl.

5. Daiva: Here, the girl is married off to a priest, as her family was unable to find a suitable groom for her.

6. Rakshasa: In this type of marriage, the girl wished to marry the groom, but her family was against the alliance, so the groom's family forcibly took the girl away.

7. Asura: This was like the Arsha wedding, except the bride groom was not of the same level as the bride's family.

8. Paishacha: In this, the girl was either drugged or intoxicated and married off without her consent.<sup>1</sup>

Of these, the first four marriages were commonly followed. The diversity did not end here; there are several other forms of marriages which were practised in the Hindu tradition and are still practised in India with exceptions. They are:

**Polygamy:** The man was allowed to have more than one wife. This was usually done by those who could afford to keep more than one wife.

**Polyandry:** Here, the woman could have more than one husband.

**Monogamy:** here it was only one for each other. This has been stressed upon and still followed till date.

These are the divisions based on numbers.

The others are those based on groups –

**Endogamy:** here, it is compulsory to marry within one's community.

**Exogamy:** this is the opposite of endogamy, and one is prohibited from marrying certain groups. This has been followed from long and is divided into two parts: Sagotra (same family lineage) and sapinda (within the family)

**Hypergamy:** the rule here is that the status of the husband is always higher than that of the girl. Anuloma (man with higher status) is given prominence while Pratiloma (marrying the man of lower status) is prohibited.

Apart from these diversities based on offer and consent and the number of persons involved in matrimony the Vedic tradition was more scientific in gender sensitivity. In the Vedic traditions, women were treated at par with man. The Rig Veda says, *"The wife and husband, being the equal halves of one substance, are equal*

<sup>1</sup> Shubamoy Das, '8 Types of Hindu Marriage in the Laws of Manu', Indian Arts and Culture Hinduism, Retrieved on 27.04.2019 from <https://www.learnreligions.com/types-of-hindu-marriage-1770476>

*in every respect; therefore, both should join and take equal parts in all works, religious and secular.*"<sup>2</sup> It also allowed the woman to take the lead in ruling the nation and society and gave them equal rights in the inherited property. It is also stated in the Rig Veda, *"The entire world of noble people bows to the glory of the glorious woman so that she enlightens us with knowledge and foresight. She is the leader of society and provides knowledge to everyone. She is a symbol of prosperity and daughter of brilliance. May we respect her so that she destroys the tendencies of evil and hatred from society."* (1.48.8)<sup>3</sup>

Atharva Veda also attributes the woman with characteristics of being fearless, scholarly, prosperous, intelligent, and knowledgeable. When a bride enters a family through marriage, she is to *"rule there along with her husband, as a queen, over the other members of the family."* (14.1.43-44)<sup>4</sup>

According to the Yajur Veda, *"The scholarly woman purifies lives with her intellect."* (20.84)<sup>5</sup> In the Mahabharata too, Bhishma Pitamah sermons, *"The teacher who teaches true knowledge is more important than ten instructors. The father is more important than ten such teachers of true knowledge, and the mother is more important than ten such fathers. There is no greater guru than mother."* The Manusmriti<sup>6</sup> is one of the Dharma Shastras, based on which most of the marriages are solemnised even today amongst the Hindus.

The equality achieved during the Vedic age could not continue for long in Indian tradition. As a woman who was at the centre of any family system became a prisoner of it. Whether she was performing the role of a mother, daughter, sister, or wife, her oppression had been complete.<sup>7</sup>

With the advent of industrialisation and subsequent liberation of women due to socio-economic and systemic changes coupled with the technological revolution, the woman started getting reinvented equality in the family life. Efforts were on even during the British period to bring about reforms in the matrimonial structure of Hindu and Muslim personal laws. The Hindu matrimony was infested with several practices which were against the very principles of natural justice and the then prevailing common law. Neither they were based on equity nor good consciousness; instead, they were criminalising, arbitrary, and maintained one kind of dominance.

The gender jurisprudence did not let women have their full share in the society at large. The traits of women were put to the second-grade category, whereas macho characteristics were always glorified.

With the process of secularisation and codification of law, the various matrimonial acts were passed.

2 Nirmal Laungani, 'Status of women in ancient India' India facts staff, commentary, Jan 3, 2015 Retrieved on 8.4.19 from <http://indiafacts.org/status-women-ancient-india/>

3 ibid

4 Vishwajeet, 'What is marriage according to Vedas?' Sweet Blog nectarine divine literature. Aug 11,2010 Retrieved on 27.4.2019 from [http://kunjeshwari.com/sweetblog/sweet\\_motivations/what-is-marriage-according-to-vedas/](http://kunjeshwari.com/sweetblog/sweet_motivations/what-is-marriage-according-to-vedas/)

5 Nirmal Laungani, 'Culture: Women's Status in Ancient India', Hinduism Today, Magazine Web Edition, Retrieved on 8.04.2019 from <https://www.hinduismtoday.com/modules/smartsection/item.php?itemid=5566>

6 Jayaram V, 'Manusmriti the Laws of Manu – Introduction', hinduwebsite.com, Retrieved on 27.04.2019 from <https://www.hinduwebsite.com/sacredscripts/hinduism/dharma/manusmriti.asp>

7 National Commission for Women "Between November, 1999, the National Commission for Women received the following complaints: - Dowry Death-232, Rape-93, Murder-69, Harassment-591, Property disputes-132, Desertion-66, Kidnapping-36". Retrieved on 9.4.19 from <http://wcdel.in/ncfw.html>

The Indian penal code, which provided some insight into how the marital life and the crimes committed during this process would be dealt with. The article seeks to understand the changing notion of marital life with a new set of problems it is facing. The concept of consensual relations within the live-in parameters has posed another challenge for the legal fraternity to confront. The matrimonial practices and rituals used to be dealt with dos and don'ts. Since the codification of laws, the matrimonial relations have been under severe strains. Judiciary is now flooded with matrimonial disputes.

Apart from these matrimonial turmoil's a new extra-legal behaviour witnessed in the society of live-in relationship, where the law still needs to be codified. Whatever we have is primarily based on judicial judgements. The gender crimes are on the rise. The celebration of marriage more often ends with dowry allegations, complaints of adultery, mental harassment, physical assault, or sometimes dowry deaths.

With the dawn of independence, women were hopeful that they would get justice and equality denied by religion, tradition, and unconcerned colonial rule. Though the framers of the Constitution wanted to give women their due by enforcing uniform civil code; but their voice could not be heard by those who wanted to continue with a patriarchal system of domination under the garb of personal law.

The problem faced by various communities may be different, but the result is the same, wherein the women are facing hardship in getting maintenance and shelter. The Muslim counterparts are facing much more intensive brunt. However, since this article deals explicitly with Hindus, I will restrict my discussion on Hindu matrimonial legal issues.

The article at length will deal with the various issues faced in the Hindu matrimonial life which includes child marriage, dowry, cruelty, adultery, divorce and extra-legal live –in relations in the light of various legislation and Supreme Court judgements.

### ***Child Marriage***

Despite child marriage being declared illegal, it is still prevalent in several parts of India. In India, legislation related to child marriage is much more elaborate than in other countries. A 1978 amendment to the Child Marriage Restraint Act increased the minimum legal age for marriage from 15 to 18 for females and from 18 to 21 for males. In some rural areas, nearly half the girls between 10 and 14 still get married. Because there is pressure on women to prove their fertility by conceiving as soon as possible after marriage, adolescent marriage is synonymous with adolescent childbearing: roughly 10-15 per cent of all births take place to women in their teens.<sup>8</sup> *“Child marriages contribute to virtually every social malaise that keeps India behind in women's rights. The problems include soaring birth rates, grinding poverty and malnutrition, high illiteracy and infant mortality and low life expectancy, especially among rural women.”*<sup>9</sup> UNICEF in 2017

<sup>8</sup>An-na'im, 'India, Republic of', Islamic family law, "The Child Marriage Restraint Act 1929 introduced under the British provided penal sanctions for contracting marriages below the specified minimum age, originally established at 18 and 15 years. As the Act currently stands in India (amended by Act 2 of 1978), the minimum marriage age is 21 for men and 18 for women.." Retrieved on 9.4.19 from <https://scholarblogs.emory.edu/islamic-family-law/home/research/legal-profiles/india-republic-of/>

<sup>9</sup> John F Burns, 'though illegal, child marriage is popular in part of India', The New York Times, May 11, 1998 Retrieved on 9.04.2019 from <https://www.nytimes.com/1998/05/11/world/though-illegal-child-marriage-is-popular-in-part-of-india.html>

had given the percentage of marriages in India as 18% for children married before 15 years and 47% for children married by 18 years, and the total is 15,509,000.<sup>10</sup>

Those who commit this illegal act are seldom punished. Judiciary has mostly turned deaf ears to this social menace despite strong legislation.

Child marriage does not only create malnourishment and hindrance in the overall growth of women; rather it has given birth to a new type of illegality as the age for consensual sex has been given as 18 years. The Supreme Court expressing dismay over 23 million child marriages said that one out of 5 marriages is illegal.<sup>11</sup>

By taking a progressive stand, the Supreme Court has also delivered a landmark judgement by stating that “under no circumstance can a child below 18 years of age give consent, express or implied, for sexual intercourse” and hence sex with a minor wife in itself constitutes rape.<sup>12</sup>

### ***Dowry***

Apart from child marriages, dowry has also stigmatised the Hindu matrimonial affair which has perpetrated cruelty and claimed several women’s lives. This reality exists even though the Dowry Prohibition Act has been in existence for 58 years. To fight this social menace and to make the law highly effective, the Parliament has amended several laws subsequently.

The Indian Penal Code 1860 has been amended time and again to add specific, stringent punishment for offences against women, which includes section 498A in 1983<sup>13</sup>, 304B in 1986.<sup>14</sup> The law in Section 498A of the Indian Penal Code makes it mandatory for the police to file charges against the husband, his parents and other relatives/friends (whoever being named on the complaint by the wife or her close relatives) and put them in jail. There is no penalty for filing a false case. Many individuals have claimed this is being abused by the wife or her close relatives.

<sup>10</sup> Girls not brides, ‘What’s the child marriage rate? How big of an issue is child marriage?’ *Girls Not Brides* Feb 1,2018 Retrieved on 27.04.2019 from <https://www.girlsnotbrides.org/child-marriage/india/>  
<sup>11</sup> 23 million child brides in India, Supreme Court expresses dismay: 12 Oct 2017, 08:53 PM IST Retrieved on 10.4.19 from <https://www.livemint.com/Politics/PRft3fAiTAnZj6KVZR3FHN/23-million-child-brides-in-India-Supreme-Court-expresses-di.html>

<sup>12</sup>Independent Thought vs Union Of India on 11 October, 2017 ; Retrieved on 10.4.19 from <https://indiankanoon.org/doc/87705010/>

<sup>13</sup> (by the Dowry Prohibition Act 1986) Section 304B IPC - Dowry Death – (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called “dowry death” and such husband or relatives shall be deemed to have caused her death. Explanation – For the purposes of this sub section, “dowry” shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961.(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

<sup>14</sup>The Criminal Law (Second Amendment) Act, 1983 – Section 498-A IPC -Husband or relative of husband of a woman subjecting her to cruelty.- Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation.- For the purpose of this section, “cruelty” means– (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.”

In urban India, the majority of families are well literate regarding section 498A. Under the Prevention of Dowry Act, although both giving and taking of dowry are illegal, the dowry seeker generally faces greater punishment. Several studies have been directed to infer the causes and affect of dowry on the social life of people in India. A December 1997 article in India Today entitled, Victims of Sudden Affluence states, "A woman on fire has made dowry deaths the most vicious of social crimes; it is an evil endemic to the subcontinent but despite every attempt at justice the numbers have continued to climb. With get-rich-quick becoming the new mantra, dowry became the perfect instrument for upward material mobility." A study was done by a policy think-tank, the Institute of Development and Communication, states, "the quantum of dowry exchange may still be greater among the upper classes, but 80 per cent of dowry deaths and 80 per cent of dowry harassment occurs in the middle and lower strata's."<sup>15</sup> The Malimath committee<sup>16</sup> in 2003 proposed amendments to section 498A IPC to make it bailable and compoundable so that family life could be restored in a meaningful manner. However, the women's groups have opposed the proposed amendments.

Dowry Prohibition Act could not contain the offence of dowry in any way. Exchange of dowry is on a continuous rise in lower- middle and upper-middle class with consent or sometimes with coercion. Dowry-related cases accounted for nearly half of the increase in crimes against women between 2003 and 2013.

In Dowry cases, there is a 300% increase, and 498-A cases have seen a 135% increase and a 30% increase in the number of dowry death cases. All of these three kinds of crimes are substantially higher than the rate of growth of all cognisable cases on average, which was 21%.<sup>17</sup> Statistics of 2016 by National Crime Record Bureau states that 34% of the crimes against women are of cruelty by husband and his relatives.<sup>18</sup>

The litigation involved in the given issues has created a jungle of cases more often genuine but sometimes frivolous. Even the Supreme Court had expressed different opinions at different times regarding the methods to deal with cases of section 498A IPC like initially when the Dowry Prohibition Act was passed, they were quite strict regarding the deaths caused due to cruelty and demand of dowry, but later they changed their opinion.<sup>19</sup>

15 Ramesh Vinayak, 'Rural Punjab witnesses alarming spurt in dowry cases as it becomes means to get rich quick.' *India Today – From the Magazine*, December 15, 1997. Retrieved on 18.4.19 from <https://www.indiatoday.in/magazine/states/story/19971215-rural-punjab-witnesses-alarming-spurt-in-dowry-cases-as-it-becomes-means-to-get-rich-quick-832008-1997-12-15>

16 K. Deepalakshmi, 'The Malimath Committee's recommendations on reforms in the criminal justice system in 20 points', *The Hindu*, January 17, 2018. Retrieved on 18.4.19 from <https://www.thehindu.com/news/national/the-malimath-committees-recommendations-on-reforms-in-the-criminal-justice-system-in-20-points/article22457589.ece>

17 Rukmini S, 'Dowry: what the data says and what it doesn't' *The Hindu*, July 07, 2014. Retrieved on 11.4.19 from <https://www.thehindu.com/opinion/blogs/blog-datadelve/article6186330.ece>

18 Crimes in India 2016 Statistics Retrieved on 11.4.19 from <http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf>

19 Jyotika Kalra, 'Misuse of dowry laws and the failure of the system', *The Hindu*, August 06, 2017 Retrieved on 11.4.19 from <https://www.thehindu.com/opinion/open-page/misuse-of-dowry-laws-and-the-failure-of-the-system/article19435399.ece>

The Supreme Court has stated in *Preeti Gupta vs. state of Jharkhand & Anr.*, in 2010<sup>20</sup> “*It is a matter of common experience that most of these complaints under section 498-A IPC are filed in the heat of the moment over trivial issues without proper deliberations. We come across a large number of such complaints which are not even bona fide and are filed with oblique motive. At the same time, the rapid increase in the number of genuine cases of dowry harassment is also a matter of serious concern.*” They also felt that though the laws were made stringent to protect the women, the misuse of this law is far more rampant in today’s world, with the woman being quick to slap a case of dowry harassment, wherein the husband is actually being harassed.

In 2017, The Supreme Court felt that as the statistics showed a large number of arrests and fewer convictions in cases under section 498A. The so-called victims were misusing the said section and in the case of *Rajesh Sharma vs State of Uttar Pradesh & Ors*<sup>21</sup> had given direction to institute family welfare committees, who would look into the complaints of Section 498A IPC, before the police could make an arrest and that only if there are specific facts stated against each accused named in the complaint, could they be arrested.

Then the Supreme Court later in 2018 in the case titled “*Social Action Forum for Manav Adhikar and Another Vs. Union of India Ministry of Law and Justice and Others*”<sup>22</sup> removed the family welfare committees by stating that they are impermissible under the IPC, and issued direction to the officers investigating under S 498-A to follow the principles propounded in the landmark Supreme Court judgments of *Joginder Kumar v. State of U.P and others*<sup>23</sup>, *D.K. Basu v. State of W.B*<sup>24</sup>, *Lalita Kumari v. Government of Uttar Pradesh and others*<sup>25</sup> and *Arnesh Kumar v. State of Bihar and another*<sup>26</sup>.

Despite the strong laws on dowry and cruelty, most of the marriages are solemnised with giving and take of hefty dowry, and subsequent disputes arising in matrimonial life incurring cruelty of all kind. Dowry and cruelty are the days to day affair of most households.

20 Preeti Gupta & Anr vs State Of Jharkhand & Anr on 13 August, 2010 Retrieved on 21.4.19 from <https://indiankanoon.org/doc/46704/>

21 Rajesh Sharma vs The State Of Uttar Pradesh on 27 July, 2017 Retrieved on 21.4.19 from <https://indiankanoon.org/doc/182220573/>

22 Social Action Forum for Manav Adhikar and Another Vs. Union of India Ministry of Law and Justice and Others [Writ Petition (Civil) No. 73 of 2015][Criminal Appeal No. 1265 of 2017][Writ Petition (Criminal) No. 156 of 2017] Retrieved on 20.4.19 from <https://www.advocatekhoj.com/library/judgments/announcement.php?WID=10509&WID=10509>

23 Joginder Kumar vs State Of U.P on 25 April, 1994; Equivalent citations: 1994 AIR 1349, 1994 SCC (4) 260 Retrieved on 25.4.19 from <https://indiankanoon.org/doc/768175/>

24 D.K.Basu Vs State of W.B (1997) 1 SCC 416. Retrieved on 25.4.19 from <https://dullbonline.wordpress.com/2017/08/15/d-k-basu-v-state-of-w-b-1997-1-scc-416/>

25 Lalita Kumari vs Govt.Of U.P.& Ors on 12 November, 2013 416 Retrieved on 25.4.19 from <https://indiankanoon.org/doc/10239019/>

26 Arnesh Kumar Vs State of Bihar (2014) 8 SCC 273. Retrieved on 25.4.19 from [HTTPS://DULLBONLINE.WORDPRESS.COM/2017/07/30/ARNESH-KUMAR-V-STATE-OF-BIHAR-2014-8-SCC-273/](https://dullbonline.wordpress.com/2017/07/30/ARNESH-KUMAR-V-STATE-OF-BIHAR-2014-8-SCC-273/)

## *Divorce*

Since the Hindu matrimonial arrangement was mainly practised by the religious shastras and practices, there was no arrangement comparing talaq or divorce. The modern term "divorce" comes from the Latin term "divortere," meaning to turn different ways or separate.<sup>27</sup> The Hindu matrimony was a sacred affair, for procreation and not for sexual pleasure. The religion prohibited separation on personal or selfish grounds, but there are strong instances in the Hindu tradition where men have abandoned their wives on the mere suspicion of infidelity as depicted in the Ramayana. There are other diametrically opposite instances also wherein woman enjoyed lavish liberty for choosing their partner and exercising their mind and will as given in the Mahabharata.

However, with the evolution of the society and changing lifestyle, the family structure has immensely changed wherein the marital life has seen the creation of different kinds of rights, duties for both men and women. The family system is no longer just a sacred institution for procreating and division of labour. Now with time, it has become an oppressive mechanism to curtail the freedom of women. Manu<sup>28</sup>, the famous ancient lawmaker, viewed women with suspicion and curtailed their independence in the name of morality and customary sanctions involved in matrimony. He believed that women needed to be kept under the protection of their father, brother, husband and son all the time. The women in modern times have revolted against the closed four walls of family and demanded greater rights to get equality and liberty not only in their public but personal life also.

As mentioned elsewhere several times, the codification of laws tried to secularise and bring about the uniformity in the personal lives of Hindus in consonance with the trends available in the western countries. Hindu Marriage Act was enacted by the Parliament of India, in 1955 to make provisions to deal with the matrimonial crisis affecting the personal lives of men and women. Despite the hesitation of society to accept the rules of divorce, the lawmakers had to embrace the reality wherein the matrimonial crimes and crisis could be mitigated.

The Hindu Marriage Act, 1955, governs all Hindus, including Buddhists, Sikhs and Jains and under the act, polygamy was prohibited. One could not marry if one's spouse were living at the time of marriage, was of unsound mind or suffering from epilepsy.

There are around 16 separate reasons for which divorce could be granted in most Western nations. But in India, only five main reasons are generally accepted as sufficient grounds for divorce viz.: Adultery,

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27 Robin Elizabeth Margolis, 'What Is the Origin of Divorce?' Legal Zoom. Retrieved on 18.4.19 from <https://info.legalzoom.com/origin-divorce-20686.html>

28 Jayaram V, 'Hinduism and Divorce', Excerpts from the Manusmriti regarding the duties of a chaste wife. '(Chapter 5):149. She must not seek to separate herself from her father, husband, or sons; by leaving them she would make both (her own and her husband's) families contemptible.' [Hinduwebsite.com](http://Hinduwebsite.com) Retrieved on 20.4.19 from [https://www.hinduwebsite.com/hinduism/h\\_divorce.asp](https://www.hinduwebsite.com/hinduism/h_divorce.asp)



Desertion, Cruelty, impotence and Chronic Disease<sup>29</sup>. The jurisprudence of divorce has come a long way as a consequence of legislative and judicial intervention.

Cruelty: No precise definition for mental cruelty is given in the Act, which has led to enormous litigations which the Courts find challenging to adjudicate. There have been many judgements about defining cruelty. The most recent being in 2017 of the Allahabad High Court in ‘Gurpreet Kaur vs. Rajeev Singh’<sup>30</sup> case which gave a wider interpretation of the word cruelty. It stated that ‘*there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered.*’ It also mentioned that human behaviour and mind are incredibly complicated and cannot be accurately defined and will change from time to time. ‘*The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values, and their value system.*’ Thus cruelty must be evaluated for each case separately. That is why the question has been raised about the validity and effectiveness of section 498A IPC. The nuances of deciding what constitute cruelty have affected the matrimonial disputes to an extent where more often people have started concocting such slogans as the matrimonial structure in today’s context swings between love at first sight and divorce at first sight.

Adultery, as contemplated under the Hindu Marriage Act, 1955, is one of the grounds for divorce:

*Section 13. 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.*

Adultery had to be established by presumptive proof based on a confession by the party and circumstantial evidence.<sup>31</sup>

Adultery, which was considered as one of the most serious crimes, committed by a spouse, has been diluted over the years in the evolution of social life.

Section 497 IPC read with Section 198(2) of the criminal procedure code allowed the aggrieved husband to file a criminal complaint against another man with whom his wife had committed adultery. The first such case came before the Supreme Court in 1951 as Yusuf Abdul Aziz vs. The State of Bombay<sup>32</sup> wherein the complainant contended that the adultery laws available in India violate the fundamental rights available under

<sup>29</sup> Michael Fried, ‘Divorce in India’, Postcolonial Studies @ Emory. Retrieved on 26.04.2019 from

<http://www.eng.fju.edu.tw/worldlit/link/Divorce.html>

<sup>30</sup>Smt. Gurpreet Kaur vs Shri Rajeev Singh on 18 December, 2017 Retrieved on 20.4.19 from

<https://indiankanoon.org/doc/19989797/>

<sup>31</sup> Vandana Shah, ‘The Supreme Court Says Adultery Is Not Cruelty, But Is It Worth It? Extramarital affairs can leave a trail of tragedy and destruction.’ Huffpost, Edition IN. Retrieved on 20.4.19 from

[https://www.huffingtonpost.in/vandana-shah/-the-supreme-court-says-adultery-is-not-cruelty-but-is-it-worth\\_a\\_21629154/](https://www.huffingtonpost.in/vandana-shah/-the-supreme-court-says-adultery-is-not-cruelty-but-is-it-worth_a_21629154/)

<sup>32</sup>Yusuf Abdul Aziz vs The State Of Bombay ... on 10 March, 1954 Equivalent citations: 1954 AIR 321, 1954 SCR

930Retrieved on 20.4.19 from <https://indiankanoon.org/doc/1343950/>

Articles 14, 15 of the Indian Constitution. The argument raised during the case was that Section 497 only holds men guilty for the offence of adultery and not their counterpart women. It was further argued that this section grants clean chit to a woman for committing the crime of adultery. Three years later, the Supreme Court, while delivering the judgment opined that Section 497 IPC does not grant a free license to women to commit adultery. Supreme Court ruled that special provision for escaping culpability is very well within the ambit of article 15 (3) of the Constitution. However, the Supreme Court did not grant a woman to file a case of adultery against her husband.

In 1985, in *Soumithri Vishnu vs. Union of India & air*<sup>33</sup>, the Supreme Court held that the women should not be involved in deciding the cases relating to adultery nor the men should be allowed to prosecute their wives or vice versa for keeping the sanctity of marriage. The ambiguity regarding adultery laws continued. In a similar case, in 1988, *V Revathy vs. Union of India*<sup>34</sup>, the Supreme Court again upheld its judgment by ruling that non - inclusion of women in the prosecution of adultery promotes social good. It would allow the couple to iron out their differences. However, taking a different line, the law commission of India report of 1971( 42<sup>nd</sup> report) and Malimath Committee on criminal law reforms of 2003 unequivocally expressed that the offences related to adultery embedded in S 497 should be made gender neutral<sup>35</sup>.

Moving forward from the reports submitted by the abovementioned commission and committee, the Supreme Court virtually abolished this crime in law by declaring it unconstitutional and untenable as we can read in *Joseph Shine vs. Union of India*<sup>36</sup> though it still stands as a ground for divorce and a criminal complaint could be filed for cruelty.

Divorce by mutual consent – The lawmakers did not want the frequency of divorce to rise, but to avoid expensive and extensive litigations to resolve matrimonial disputes; the Hindu Marriage Act was amended in 1976 by adding Section 13(B) to grant a divorce by mutual consent. This section states:-

*13B 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 solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 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.*

*(2) On the motion of both the parties made not 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 meantime, the court shall, on being satisfied, after hearing the parties and after*

<sup>33</sup>Smt. Sowmithri Vishnu vs Union of India & Anr on 27 May, 1985 Equivalent citations: 1985 AIR 1618, 1985 SCR Supl. (1) 741 Retrieved on 20.4.19 from <https://indiankanoon.org/doc/449750/>

<sup>34</sup>V. Revathi vs Union Of India & Ors on 25 February, 1988 Equivalent citations: 1988 AIR 835, 1988 SCR (3) 73 Retrieved on 20.4.19 from <https://indiankanoon.org/doc/921415/>

<sup>35</sup> Prashanth K Dutta, 'Section 497: 3 past Supreme Court judgments on adultery law', *India Today*, September 27, 2018. Retrieved on 20.4.19 from <https://www.indiatoday.in/india/story/adultery-law-section-497-3-past-supreme-court-judgments-1349993-2018-09-27>

<sup>36</sup>Joseph Shine vs Union Of India on 27 September, 2018 Retrieved on 20.4.19 from <https://indiankanoon.org/doc/42184625/>

*making such inquiry as it thinks fit, that a marriage has been solemnised 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.*

Subsequently, to carry forward the process of ease in litigation, the Supreme Court gave several relaxations for attaining divorce by mutual consent as several cases came before the apex court on issues arising out of mutual consent. Mainly these litigations pertained to cases of backing out during the process of seeking divorce during mutual consent and waiver of the interim period. The Supreme Court, in 2017 while deciding in ‘Amardeep Singh vs. Harveen Kaur’<sup>37</sup>, has been of the view that ‘the statutory period of six months is not mandatory, but a directory provision under the statute,’ and can be waived off by the Courts if they are satisfied

1. that the six months period in addition to the statutory period of one year of separation of parties has already been over before the filing of the first motion,
2. that there is no possibility of any reconciliation between the parties, and the waiting period would only increase their agony and
3. that all the differences including alimony, custody of the child or any other pending issues between the parties have been amicably solved between the parties.

While in cases of backing out during the process of seeking divorce by mutual consent, the Supreme Court held that there is a need for continued free consent by both parties till the finality of the case as that is the very base of the section dealing with divorce by mutual consent.<sup>38</sup> The Apex Court ruled that ‘mutual consent is a *sine qua non* for passing a decree of divorce and the said consent must be valid and subsisting until the time a final decree of divorce is passed.’<sup>39</sup>

Though India stands at the lowest in ranking in divorce and separation yet, it is astonishingly rising. There is hardly any statistics available regarding divorce and separation since these are considered a social stigma, that is why people are not willing to disclose their status. The census in India gives her citizens right to choose their status whether married, divorced, separated, widowed and never married and according to this, the statistics state that 1.36 million people in India are divorced. Also, the statistics show that separation is almost thrice the number of divorce cases.<sup>40</sup> However, the statistics do not truly reveal the gravity of the crisis under which the matrimonial life is going under in India. Marriage, as an institution, has come under severe strains. Due to changing beliefs in religious practices, customs, and traditions, a segment of the population, especially the middle class and upper middle class, are opting out of this system. The statistics

<sup>37</sup>Amardeep Singh vs Harveen Kaur on 12 September, 2017 Retrieved on 20.4.19 from <https://indiankanoon.org/doc/79830357/>

<sup>38</sup>Hitesh Bhatnagar vs Deepa Bhatnagar on 18 April, 2011 Retrieved on 20.4.19 from <https://indiankanoon.org/doc/1430929/>

<sup>39</sup>Smt. Sureshta Devi vs Om Prakash on 7 February, 1991 Equivalent citations: 1992 AIR 1904, 1991 SCR (1) 274 Retrieved on 20.4.19 from <https://indiankanoon.org/doc/965482/>

<sup>40</sup>Soutik Biswas, ‘What divorce and separation tell us about modern India’, *BBC News*, September 29,2016.Retrieved on 21.4.19 from <https://www.bbc.com/news/world-asia-india-37481054>

of divorce is much higher in other countries like the USA, where the divorce rate is 76%, Belgium 72%, Hungary 67%, and France 55 %, <sup>41</sup>

Now to escape from cumbersome, expensive and prolonged litigation, people have started living together without matrimonial bond. Over the years, the problem of live-in relationships has also begun surfacing. Several countries have come out with different laws to resolve the disputes occurring in live-in relationships. However in India, since live-in relationships are considered a social stigma and society have not given a green signal to such relations, there is hardly any legislative framework within which the disputes arising out of live-in relations could be resolved, but the legality of live-in relationship has been upheld by the Courts. The Allahabad High Court in *Payal Sharma vs Nari Niketan* <sup>42</sup> ruled that “a man and a woman, even without getting married, can live together if they wish to. This may be regarded as immoral by society, but it is not illegal. There is a difference between law and morality.” In continuation to this case, expressing the same kind of opinion, the Supreme Court opined in *Revanasiddappa & Anr vs. Mallikarjun & Ors* on 31 March 2011 as “*With changing social norms of legitimacy in every society, including ours, what was illegitimate in the past may be legitimate today.*” <sup>43</sup> As the Courts upheld the legality of live-in relationship, several cases have come before the courts to decide the inheritance, legitimacy of children, issue of maintenance, and domestic violence.

In *Madan Mohan Singh v. Rajni Kant*, it was held that a long term live-in a relationship is not a “walk-in and walk-out” relationship and marriage between the parties can be presumed. <sup>44</sup>

We can see in *Chanmuniya v. Chanmuniya Kumar Singh Kushwaha* <sup>45</sup> how the Supreme Court held that women in live-in relationships are equally entitled to all the claims and relief which are available to a legally wedded wife and that provisions of Section 125 CrPC must be considered in the light of Section 26 of the Protection of Women from Domestic Violence Act, 2005 <sup>46</sup> thereby turning down the High Court’s order which declined maintenance under S.125 Cr.P.C stating that only legally wedded wife was entitled to it. This has been reiterated recently in *Lalita Toppo vs. The State of Jharkhand* on 30 October 2018 <sup>47</sup> by the Apex Court.

<sup>41</sup> Hina Khan, Top 10 Countries with highest Divorce Rate in the World 2017, World Blaze, October 3<sup>rd</sup>, 2017, Retrieved on 29.04.2019 from <https://www.worldblaze.in/countries-with-highest-divorce-rate-in-the-world/>

<sup>42</sup> Payal Sharma alias Kamla Sharma Vs. Superintendent, Nari Niketan, Agra and others. Retrieved on 21.4.19 from <http://www.lawskills.in/FreeRes/judgments/MANUUP02882001.htm>

<sup>43</sup> *Revanasiddappa & Anr vs Mallikarjun & Ors* on 31 March, 2011. Retrieved on 21.4.19 from <https://indiankanoon.org/doc/138849/>

<sup>44</sup> *Madan Mohan Singh & Ors vs Rajni Kant & Anr* on 13 August, 2010. Retrieved on 21.4.19 from <https://indiankanoon.org/doc/479268/>

<sup>45</sup> *Chanmuniya vs Virendra Kumar Singh Kushwaha & ...* on 7 October, 2010. Retrieved on 22.4.19 from <https://indiankanoon.org/doc/1949767/>

<sup>46</sup> Section 2(f) of the Domestic Violence Act, 2005 defines: Domestic relationship means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.

<sup>47</sup> *Lalita Toppo vs The State Of Jharkhand* on 30 October, 2018. Retrieved on 24.4.19 from <https://indiankanoon.org/doc/6354756/>

Through a two-Judge Bench, of the Supreme Court, constituting of K.S.P. Radhakrishnan and Pinaki Chandra Ghose, JJ. in *Indra Sarma v. V.K.V. Sarma*,<sup>48</sup> the apex court in 2013 looked into the issue of live-in relationships in detail and issued guidelines for testing under what circumstances, a live-in relationship will fall within the expression “relationship in the nature of marriage” under [Section 2\(f\)](#) of the Protection of Women from Domestic Violence Act, 2005<sup>49</sup> as regards the duration of the relationship, the sharing of household, financial interdependence, responsibilities of the house, socializing in public and among friends, and the common intention of the parties. The Court held that each case is unique, and hence, one must look into these details carefully to render justice.

## Conclusion

To conclude the discussion, the family structure as a whole has come under radical changes due to the ongoing changes in the socio-economic and technological developments. The family jurisprudence has yet to develop in accordance with the cyclonic change. Law is moving from one extreme to another without doing real-time justice. The cost and time involved in the process of litigation have not served the real purpose. People are opting out of the matrimonial system due to one or other reasons. The judiciary is trying its best to deal with the new ways and means with which the men and women are trying to spend their life.

The ancient customs and practices were in some manner, advanced than the modern one. The contemporary society is trying to find some means to get solace from the newly emerging matrimonial turmoil. The young generation is trying to experiment with more primitive methods of cohabitation like live-in relations, consensual companionship, LGBTQ relations, etc. There is so much of diversity amongst the Indian population that no single law has been able to do justice to the affected parties. The issues faced by the couples and their offspring have different effects according to their social status, their class, their profession, their cultural values, size of their families, religious leanings, emotional attachment, etc.

The issues faced by the upper – middle class are radically different from those of the lower – middle class or lower class. The middle class, which is called the midrib of any society, is also walking out of the matrimonial relations. Either they are staying single, or even after marriage, they are seeking divorce or staying separated.

The Supreme Courts decision to set a new tone for gender neuter laws is a welcome step. The declaration of unconstitutionality of S.497 and S.377 IPC in different cases is giving a new direction to the society where the courts feel that the laws can only provide relief to some extent but not cure the disease. In cases related to Section 498A IPC, the courts have given diverse views, gives a signal to the society that no happy matrimonial life could be ensured through draconian laws. The society has to find a way out to deal with the ongoing crisis, as universalising a monogamous marriage, putting too much burden of convicting laws on men and treating all matrimonial disputes with a single yardstick, will not serve any purpose.

<sup>48</sup>*Indra Sarma vs V.K.V.Sarma* on 26 November, 2013. Retrieved on 24.4.19 from <https://indiankanoon.org/doc/192421140/>

<sup>49</sup>Section 2(f) in The Protection of Women from Domestic Violence Act, 2005 (f) “domestic relationship” means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;

The legislature will have to take responsibility to make such laws which are socially acceptable. The lawmakers will have to create legislation by well calculating their diverse implications. The courts are flooded with matrimonial cases. It is an unforeseen situation for the judiciary. The bill is enacted without understanding their financial consequences and the workforce needed to deal with such matters. There is a scarcity of judicial manpower in dealing with matrimonial disputes arising out of the plethora of legislative enactments coping with every aspect of matrimonial relations.

The Indian society stands at a crossroad, and there is a need for sociological and psychological interventions. The overdeveloped laws for underdeveloped nations can create as much problem as the underdeveloped laws for an overdeveloped society. There has to be a consonance between social will and legal whips.

