LLB **Paper Code: 203**

Subject: Family Law – I **L4 C4**

Objective: The objective of the paper is to apprise the students with the laws relating to family matters applicable to different communities in India.

Unit – I: Marriage Laws **(Lectures– 10)**

a. Hindu Marriage Act, 1955
   i. Evolution of the institution of marriage
   ii. Concept of marriage
   iii. Forms, validity, voidability

b. *Nikah* (Muslim Marriage)
   i. Definition, objects and nature
   ii. Essentials and validity
   iii. Obligations arising out of marriage – Mahr, Maintenance etc.

c. Laws governing Christian and Parsi marriages
d. Civil Marriages

Unit – II: Dissolution of Marriage **(Lectures– 10)**

a. Theories of Divorce
b. Separation and Dissolution of Marriage under Hindu Law
   i. Judicial separation
   ii. Grounds of Divorce
   iii. Divorce by mutual consent
   iv. Jurisdiction and procedure

c. Dissolution of Marriage under Muslim Law
   i. By death
   ii. By the act of either party
   iii. By mutual consent
   iv. By court
   v. Indian Divorce Act and *Parsi* Marriage Act

Unit – III: Adoption and Maintenance **(Lectures – 10)**

a. Hindu Adoption and Maintenance Act, 1956
b. Adoption
    (i) Ceremonies
    (ii) Capability
    (iii) Effect
c. Maintenance
    i. Entitlement
    ii. Enforcement
d. Muslim Women (Protection of Rights on Divorce) Act, 1986
e. Maintenance under the Code of Criminal Procedure, 1973

Unit – IV: Guardianship **(Lectures – 10)**

a. Hindu Minority and Guardianship Act, 1956
b. Guardianship – Meaning
c. Kinds of Guardianship
d. Right, obligations and disqualification of guardian
e. Guardianship under Muslim Law
f. Entitlement to guardianship
g. Rights, obligations and disqualification of a guardian

Subject: Family Law-I

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Unit-I: Marriage laws

(a) Hindu Marriage Act, 1955

(i)Evolution of the Institution of marriage

The Hindu Marriage Act is a law enacted by the Indian Parliament in 1955 as part of the Hindu Code Bills. Three other important acts were also enacted during this time: the Hindu Succession Act (1956), the Hindu Minority and Guardianship Act (1956), and the Hindu Adoptions and Maintenance Act (1956). All of these acts were meant to modernize the Hindu legal tradition.

Purpose

As part of the Hindu Code Bill, the Hindu Marriage Act was enacted in 1955 by the Indian parliament. It is an Act to amend and codify the marriage law among Hindus. Its purpose was to regulate personal life among Hindus, especially the institution of marriage, its validity, conditions for invalidity and applicability.

"When a woman born in a scheduled caste or a scheduled tribe marries to a person belonging to a forward caste, her caste by birth does not change by virtue of the marriage. A person born as a member of a scheduled caste or a scheduled tribe has to suffer from disadvantages, disabilities and indignities only by virtue of belonging to the particular caste which he or she acquires involuntarily on birth. The suffering of such a person by virtue of caste is not wiped out by a marriage with the person belonging to a forward caste. The label attached to a person born into a scheduled caste or a scheduled tribe continues notwithstanding the marriage. No material has been placed before us by the applicant so as to point out that the caste of a person can be changed either by custom, usage, religious sanction or provision of law."

Applicability

The Act was viewed as conservative because it applied to any person who is Hindu by religion in any of its forms, yet clumps other religions together into the act (Jains, Buddhists, or Sikhs) as specified in Article 44 of the Indian Constitution. This Act also applies to any person who is a permanent resident in the jurisdiction where this Act applies who is not Muslim, Jew, Christian, or Parsi by religion. However, with the passage of Anand Karj marriage act, Sikhs now also have their own personal law related to marriage.

Hindu view of marriage

According to the tenets of Hinduism, marriage is a sacred relationship, a sacrament, and a divine covenant meant for procreation and continuation of family lineage. It is a vow between two people to stay together and uphold traditional family values in accordance with Dharma. In the traditional Hindu system of marriage, there is no role for the state as marriage remained a private affair within the social realm. Within this traditional framework reference, marriage is undoubtedly the most important transitional point in a Hindu's life and the most important of all the Hindu ''sanskaras'' (life-cycle rituals).

Therefore there was fierce religious opposition to enacting such laws for marriage, succession and adoption. The greatest opposition was to the provision of equal inheritance by sons and daughters (male and female heirs) whereas until then only the sons inherited property. These Acts were put forth under the leadership of Prime Minister, Jawaharlal Nehru, who strongly believed in enactment of modern laws for Hindus.

Some persons have argued that Hindu marriage cannot be subjected to legislative intervention. Derrett predicted in his later writings that despite some evidence of modernization, the dominant view in Hindu society for the foreseeable future would remain that marriage is a form of social obligation.

Conditions

The conditions of marriage are specified in Section 5 of the Hindu Marriage Act. The act expressively prohibits polygamy by stipulating that a Hindu marriage can be solemnized between two Hindus if neither party has a living spouse at the time of marriage; The conditions also stipulate that at the time of the marriage, neither party

is incapable of giving valid consent or suffering from a mental illness that inhibits their fitness for marriage or procreation of children or suffering from recurrent episodes of insanity or epilepsy. In the original Act, the age of valid marriage was fixed at 18 for the boys and 15 for the girls, however this age requirement was later raised to 21 and 18 respectively for the boys and the girls though the Child Marriage Restraint (Amendment) Act 1978. Finally, the Act specifically disallows marriages between prohibited degrees of relationships.

Guardianship

Section 6 of the Hindu Marriage Act specifies the guardianship for marriage. Wherever the consent of a guardian in marriage is necessary for a bride under this Act, the persons entitled to give such consent are the following: the father; the mother; the paternal grandfather; the paternal grandmother; the brother by full blood; the brother by half blood; etc. The Guardianship for Marriage was repealed in 1978 after the Child Marriage Restraint Amendment was passed. This was an amendment that increased the minimum age requirement for marriage in order to prevent child marriages.

Ceremonies

Section 7 of the Hindu Marriage Act recognizes the ceremonies and customs of marriage. Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party. Such rites and rituals include the Saptapadi—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.

Registration

As stated in Section 8 of the Act, the state government may make rules for the registration of Hindu marriages that the parties to any of such marriages may have particulars relating to their marriages entered in such a manner and subject to such conditions as may be prescribed in the Hindu Marriage Register. This registration is for the purpose of facilitating the proof of Hindu marriages. All rules made in this section may be laid before the state legislature. The Hindu Marriage Register should be open for inspection at all reasonable times and should be admissible as evidence of the statements contained therein.

Nullity of Marriage and Divorce

Any marriage can be voidable and may be annulled on the following grounds: the marriage has not been consummated due to impotency, contravention of the valid consent mental illness condition specified in Section 5, or that the respondent at the time of the marriage was pregnant by someone other than the petitioner. Divorce can be sought by husband or wife on certain grounds, including: adultery, cruelty, continuous period of desertion for two or more years, conversion to a religion other than Hindu, mental abnormality, venereal disease, and leprosy. A wife can also present a petition for the dissolution of marriage on the ground of if the husband marries again after the commencement of his first marriage or if the husband has been guilty of rape, sodomy, or bestiality. Despite the fact that marriage is held to be divine, the act does permit one spouse to separate if he/she is unhappy, if he/she can prove or identify the circumstances that have made the union untenable. Newly married couples cannot file a petition for divorce within one year of marriage.

Supreme Court ruling in 2012

The Supreme Court of India exercised its powers under Article 142 of the Constitution of India and ruled in August 2012 that marriages can be ended by mutual consent before expiry of the cooling period of six months stipulated in the Hindu Marriage Act, 1955. Section 13-B of the Hindu Marriage Act provides for the couple seeking divorce through mutual consent to wait for a period of six months after making first joint application for divorce. It's only after the expiry of the six months that the couple can move second application for the dissolution of their marriage.

Pronouncing the judgment, Justice Altamas Kabir said: "It is no doubt true that the legislature had in its wisdom stipulated a cooling period of six months from the date of filing of a petition for mutual divorce till such divorce is actually granted, with the intention that it would save the institution of marriage. But there may be occasions when in order to do complete justice to the parties it becomes necessary for this court to invoke its powers under Article 142 in an irreconcilable situation (between the couple). When it has not been possible for the parties to live together and to discharge their marital obligations towards each other for more than one year, we see no reason to continue the agony of the parties for another two months."

Marriage Laws (Amendment) Bill, 2010

Based on recommendations of the Law Commission, legislation was proposed. The Marriage Laws (Amendment) Bill, 2010 to amend the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 to making divorce easier on ground of irretrievable breakdown of marriage was introduced in the parliament in 2012. The Bill replaces the words "not earlier than six months" in Section 13-B with the words "Upon receipt of a petition."

It also provides a better safeguard to wife by inserting section 13D by which the wife may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial hardship to her and that it would in all the circumstances be wrong to dissolve the marriage.

New section 13E provides restriction on decree for divorce affecting children born out of wedlock and states that a court shall not pass a decree of divorce under section 13C unless the court is satisfied that adequate provision for the maintenance of children born out of the marriage has been made consistently with the financial capacity of the parties to the marriage.

Marriage Laws (Amendment) Bill, 2010 makes similar amendments to the Special Marriage Act, 1954 by replaces the words "not earlier than six months" in Section 28 with the words "Upon receipt of a petition." and provides restriction on decree for divorce affecting children born out of wedlock.

However, there was strong opposition to this bill due to the objection that it will create hardships for women and that the bill strongly supports one party while both parties should be treated equal in divorce. Therefore the bill was amended to provide for wife's consent for waiver of six-month notice with the words "Upon receipt of petitions by the husband and the wife."

The Bill had not been passed by the parliament until April 2013.

(ii)Concept of marriage

This deals with how the concept of Hindu marriage and how it has undergone changes from the Vedic period to present day legislation. Thus the study includes the changes that took place in various forms of marriages, conditions for valid marriage and its consequences for the violation both under old Hindu law and the Hindu

Marriage Act, 1955. It also deals with caste system under ancient Hindu law and its modifications by the Hindu Marriage Act, 1955.

This chapter also deals with legislative changes from ancient law on 'gotra' and 'pravara' and its modifications, inter-caste marriages and its modifications, widow re-marriages under Hindu Widow Re-marriage Act, 1856 to its present position under the Hindu Marriage Act, 1955. The ceremonies of marriage prescribed and the consequences in case of its non-observance there.

Marriage as an exclusive and sacramental union also gave birth to polygamy, concubinage and prostitution. The marriage became monogamous for the woman alone. It became a sacrament for her alone. Hindus refined the institution of marriage and idealized it. In this process, they have laid down detailed rules covering practically all aspects of marriage. While maintaining some continuity with the past, the Hindu Marriage Act, 1955 has simplified the law of marriage.

Under old Hindu law, the conditions required for a valid marriage were strict and elaborate. With the passing of various legislative enactments, those conditions were modified, liberalized or removed.

Forms of marriage:

Under old Hindu law, there were eight forms of marriages of which, four are approved and four are unapproved. *Brahma, Daiva, Arsha* and *Prajapatya* falls under the former category and Asura, Gandharva, Rakshasa and Paisacha are under the latter

The Hindu marriage is based upon the extinction of the dominion of the father over his daughter and the creation of the relationship of husband and wife by a religious function. The religious ceremony is essential for all the forms of marriage. The mode of extinction of the dominion of the father differs in the various forms of marriage.

Approved Forms:

i) Brahma form:

The gift of a daughter, after decking her with ornaments and honoring her with jewels to a man learned in the Vedas, whom the father of the girl himself invites, is called the "Brahma marriage"2. In this form, the father invites the bridegroom and makes a gift of his daughter, thereby putting an end to his dominion over daughter. The important feature of this form is that, the parents of the bride do not receive any consideration for giving the girl in marriage.

ii) Daiva form:

In this form of marriage, the damsel is given to a person who operates as a priest in a sacrifice performed by the father, in lieu of the fee due to the priest. It is inferior to the Brahma because the father derives a benefit, which is not deemed reprehensible.

iii) Arsha form:

In Arsha form of marriage, the bridegroom makes a present of a cow and a bull or two cows and two bulls to the bride's father which is accepted for religious purpose only.

iv) Prajapatya form:

The last kind of approved marriage is called "prajapatya" which does not materially differ from the Brahma, but in this the gift is made with condition that "you two be partners for performing secular and religious duties5.

Unapproved forms:

i) Asura form:

In the Asura form of marriage, the dominion of the father over the daughter ceases by his sale of the girl to the bridegroom. The acceptance of some consideration by the father for giving his daughter in marriage is the factor that stamps this marriage as one in the unapproved form.

ii*) Gandharva form:*

The gandharva marriage was the union of a man and a woman by mutual consent. In this form, the bride with own consent, gives herself away to the bridegroom. She is old enough to function without a guardian for the marriage.

iii) Rakshasa form:

The forcible abduction of the bride from her paternal home is the essence of the Rakshasa form. This form of marriage is still practiced among certain classes of Gond tribals of Berar and Betul. This kind of marriage was affected by forcible capture and was allowed only to the kshatriyas or military classes.7.

iv) Paisacha form:

This form of marriage was the most reprehensible as being marriage of a girl by a man who had committed the crime of ravishing her either when asleep or when made drink by administering intoxicating drug or when in the state of mental disorder. In both Rakshasa and Paisacha, there is a subsequent marriage with sacred texts and it is the original mode of securing the maiden that stamps these marriages as 'unapproved'. Prof. G.C.V. Subba Rao- Family Law in India, 9th edn. 2009, p.179, S. Gogia & Company, Hyderabad.

The Hindu Marriage Act, 1955 has not prescribed any particular form of marriage. It simply lays down the conditions for a valid marriage. The Act calls marriages solemnized under the Act as Hindu marriages which may be performed in accordance with the customary ceremonies prevalent in the community to which, the bride belongs.

2) Conditions *of marriage*:

Under old Hindu law, three conditions were required for a valid marriage. These were:

i. Identity of caste between parties. i.e., the parties should belong to same caste, unless sanctioned by custom.

ii. Parties to be beyond the prohibited degrees of relationship. i.e., were not of the same gotra or pravara and were not the sapinda of each other;

iii. Proper performance of ceremonies of marriage.

Yagnavalkya in the chapter dealing with marriage stated the conditions necessary for a valid Hindu marriage. The commentators have treated some of the conditions mentioned in this text as mandatory and some as recommendatory.

The text prescribed the following conditions as mandatory:

1. The bride should not be a sapinda of the bridegroom.
2. She should be separated by seven degrees on the father's side and five degrees on the mother's side.
3. She should not have the same 'gotra' or 'pravara' as the bridegroom.
4. She should not have been married to another earlier.

The recommendatory conditions are:

1. She should be good looking.
2. She should be younger in years.
3. She should be healthy.
4. She should have brothers.

The shastric conditions mentioned in Yajnavalkya smriti have been considerably modified by the Hindu Marriage Act, 1955. Firstly, modifications have taken the form of dispensing with conditions prescribed by Yajnavalkya. According to Yajnavalkya; 1. The bride should be '*Ananya Purvika'*. So, a widow marriage was not sanctioned. 2. The bride and bridegroom should not be of the same gotra or pravara. Secondly, the modifications of the pre-existing law have been effected by laying down conditions not prescribed by Yajnavalkya. Thus: 1. neither party should have a spouse living at the time of the marriage. This entails a prohibition of polygamy not found in Yajnavalkya. It also forbids polyandry. 2. At the time of the marriage, neither party- a) is incapable 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 procreation of children; or c) has been subject to recurrent attacks of insanity or epilepsy. 3. The bridegroom should have completed 21years of age and the bride, 18 years at the time of the marriage. Thirdly, the modifications have taken the form of relaxing the conditions prescribed by Yajnavalkya. Thus- The Hindu Marriage Act, 1955 as well as Yajnavalkya prohibits marriages between sapindas. But according to Yajnavalkya, sapinda relationship extends up to 7 degrees on the father's side and 5 degrees on the mother's side. The Act lowers these limits to 5 degrees on the father's side and 3 degrees on the mother's side.

Conditions under Hindu Marriage Act, 1955:

Section 5 of the Act of 1955 prescribes conditions for a valid Hindu Marriage. A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely- i) neither party has a spouse living at the time of marriage; ii) at the time of the marriage, neither party- a) is incapable of giving a valid consent to it inconsequence 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 procreation of children; or c) has been subject to recurrent attacks of insanity (or epilepsy) iii) the bridegroom has completed the age of 21 years and the bride, the age of 18 years at the time of the 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 the two. 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.

i) Number of spouses:

From Vedic period, though monogamy has been the rule, polygamy as an exception, existed side by side. The rules relating to '*anuloma'* marriages allowed a man more than one wife. But the wife who was first wedded was alone the wife in the fullest sense. *Apastamba* says that: "if a man has a wife who is willing and able to perform the religious duties and who bears sons, he shall not take a second wife. Manu allowed a second marriage to a man only after the death of his wife. But under certain circumstances, he allowed a second wife. It was only when a wife was barren, diseased, or vicious, that could be superseded and a second marriage was valid; as also when she consented. On the supersession of a wife, the husband had to make provision for her18. However, a peculiar sanctity seems to have been attributed to the first marriage, as being that which was contracted from a sense of duty, and not merely for personal gratification. The first married wife had precedence over the others and her first-born son over his half-brothers.

However, in some cases, the custom prevents any second marriage without the consent of the first wife and without making provision for her. Section 2 (4) of the Married Women's Right to Separate Residence and Maintenance Act, 1946 allowed the first wife to separate residence and maintenance, if her husband marries again. The first condition of Sec.5 of Hindu Marriage Act, 1955 provides that "neither party has a spouse living at the time of marriage". This clause strictly enforces monogamy and prohibits polygamy and polyandry. Before 1955, a Hindu could marry any number of wives, even if he had a wife or wives living. But only few states prohibited polygamy and polyandry. In Bombay, it was prohibited by a Statute of 1947 and in Madras, by an

Act of 1949. The Hindu Marriage Act, 1955 prohibited polygamy and polyandry. Section 5 of the Act say 'neither party has a spouse living at the time of marriage'. Under Section 39 the Hindu Marriage Act, 1955, bigamous marriages are void. Section 1726 of the Act makes it a penal offence for both Hindu males and females under Sections 494 and 495 I.P.C. Bigamy include both polygamy and polyandry. Polygamy permits a male to have more than one wife simultaneously. Polyandry permits a female to have more than one husband simultaneously. Polyandry was not recognized by Hindu law, though by custom it prevailed in some regions in North and South. In Lahaul valley in Himachal Pradesh and among Thiyyas of South Malabar, polyandry was recognized. The offence of bigamy is committed by a Hindu marrying again during the life time of his or her spouse, provided that the first marriage is not null and void. If the subsisting marriage is voidable, then also offence of bigamy is committed. The solemnization of marriage is proved by showing that the marriage was performed with the proper and essential rites and ceremonies of marriage prescribed under the law or custom applicable to parties. In bigamous marriage, the "second wife" has no status of wife. But in case she files a petition for nullity, she can claim both interim and permanent maintenance. If a husband/wife is about to take a second wife/husband, the first wife/husband can ask for an injunction from the court. A suit for perpetual injunction by one spouse against the other can be filed under Section 9, C.P.C read with Section 38, Specific Relief Act, 1963. The first wife of a bigamous marriage has no right to file a petition for nullity under the Hindu Marriage Act, 1955 since Section 12 clearly lays down that a petition for a declaration that the marriage is null and void can be filed only by either party to the marriage. But the first wife can file a suit in a civil court for a declaration under Section 9, C.P.C. read with Section 34, Specific Relief Act, 1963 that the second marriage of her husband is null and void. She can also file a petition for divorce under Section13 (1) (i) of H.M.Act, 1955 on the ground of Adultery.

In *Megh Prasad v. Bhagwanti Bai*, respondent married appellant with the consent of his first wife. At the time of alleged marriage of respondent with appellant, both parties i.e. appellant and respondent were having spouses and their marriages were not dissolved by a decree of divorce or by any recognized custom. Such marriage is in violation of Section 5 (i) of the Hindu Marriage Act, 1955. Respondent is not legally wedded wife or lawful wife of appellant. The words 'Hindu wife' used in Section 18 of the Hindu Adoptions and Maintenance Act, 1956only include lawful wife or legally wedded wife and does not include any wife of second marriage during subsistence of her first marriage. Further in *Smt. Sushma Choure v. Hetendra Kumar Borkar*, the court held that the second marriage during subsistence of first marriage is void. In *Gurmit Kaur v. Buta Singh*, it was held that

when the marriage being void from its inception, no amount of delay can stand in the way of obtaining declaration as to nullity of marriage. In *Ms. Bhavna Sahar Wasif v. Flg. Off. Rajiv Gakhar*, petition was presented by the husband under Section 11 of the Hindu Marriage Act, 1955 for declaring marriage as null and void on the ground that his wife was already married to person belonging to Muslim religion. It was held that wife being converted to Muslim and was no longer a Hindu, the Hindu Marriage Act, 1955 will have no application to entertain a petition.

ii) Soundness of mind:

The second condition of a valid marriage requires that the parties to marriage are of sound mind and are not suffering from any mental disability so as to be unfit for giving a valid consent. The Hindu Marriage Act, 1955 originally laid down that neither party to the marriage should be an idiot or lunatic. Under this Act, the marriage of the idiot or lunatic was only voidable. According to *'Smritis'*, mental soundness was not a condition for marriage. It necessarily implies that a person of unsound mind could marry and his marriage was legally safeguarded in the name of *samskara*. Originally, Section 5(ii) of the Hindu Marriage Act, 1955 laid down that: "Neither party to the marriage should be an idiot or lunatic at the time of marriage". The Marriage Laws (Amendment) Act, 1976 has reframed this clause thus- a) is incapable of giving a valid consent to it inconsequence 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 attacks of insanity (or epilepsy) These three sub-clauses of Section 5(ii) are independent of each other. If a case is covered under any of these clauses the marriage can be annulled. Under sub-clause (a), every kind of 'unsoundness of mind' is not covered. The unsoundness of mind should be such, which incapacitates a person from giving a valid consent to marriage. It need not be persistent or continuous unsoundness of mind. It may exist just before the marriage.

Under sub-clause (b), the words "has been suffering" requires that mental disorder should be of some duration. The duration will differ from case to case, and no hard and fast rule can be laid down. It is not every 'mental disorder' which renders the marriage voidable, but should satisfy two conditions: (i) it renders him unfit for marriage, and (ii) of procreation of children. In *Smt. Alka Sharma v. Abhinesh Chandra Sharma*, the Madhya Pradesh High Court held that, nullity of marriage under the word "and" between expression "unfit for marriage" and "procreation of children", in Sec. 5 (ii) (b) should be read as "and" / "or". The court can nullify marriage if

either condition or both conditions contemplated exist due to mental disorder making living together of parties highly unhappy. The word "procreate" includes capacity to rear up children besides capacity to beget them. Under sub-section (c), recurrent attacks of insanity (or epilepsy) makes a person unfit for marriage. He cannot marry even during a lucid interval. This sub-section has made a substantial difference between the original provision and the present provision. The original provision was that, neither party was an idiot or a lunatic at the time of the marriage. It could mean that a person who was suffering from recurrent attacks of insanity could marry during a lucid interval because then it could not be said that he was an idiot or a lunatic at the time of marriage. The Marriage Laws (Amendment) Act, 1976 provided in Section 5 (ii) (c) epilepsy also along with 'recurrent attacks of insanity' as a disqualification for marriage. The Marriage Laws (Amendment) Act, 1999 has omitted epilepsy. Thus now there is no condition of marriage that a party to marriage should not suffer from 'recurrent attacks of epilepsy'. The present condition is that at the time of marriage, he has not been subject to such recurrent attacks. Even that person who is in a good order or in a sound state of mind at the time of marriage is covered by this condition if he has been subject to such attacks before the marriage. The original condition took in to account, the mental state at the time of marriage only. This condition looks at the mental state even before marriage and is a salutary amendment. The marriage which takes place in contravention of this condition is not *per se* void but voidable under Sec.12 (1) (b) of the Act of 1955. Mental conditions specified in the clauses relate to pre-marriage conditions and not to post-marriage mental conditions though for post-marriage mental disability, divorce or judicial separation may be available. Before passing of the Act of 1955, a "consenting mind" was not necessary. Consequently, an idiot or a lunatic could marry. The Hindu Marriage Act, 1955 puts an end to this system. The Hindu Marriage Act, 1955 makes "free consent" a necessary element of a valid Hindu marriage. An "idiot" is "he, that a fool from his birth and knoweth not how to count or number, or cannot name his father or mother, nor of what age he himself is, or such like easy and common matters; so that it appeared that he has no manner of understanding, or reason, or government of himself, or what is for his profit or disprofit. A marriage which takes place in contravention of this condition is not per se void but voidable u/s.12 (1) (b) of the Act of 1955.

iii) Age:

Under Section 5 (iii) of the Hindu Marriage Act, 1955 the minimum age at the time of marriage for the girl is 18 and 21 for the boy. The Shastric law does not lay down any age for marriage. There is an injunction for men that they should marry on the completion of the *Brahmacharya Ashram* i.e., Study of the Vedas. Originally, this is at the completion of 25 years but at places, it is observed that this is at the attainment of the age of 12 or 24 or

36 or 48 years. Man is permitted to live a life of celibacy but marriage is made indispensable for women. The marriageable age of girls is indicated in the *Grihya Sutras* by the terms *Nagnika* and *Gauri*. According to *Vaikhanas*, a girl between 8 and 10 years is known as a Nagnika and a girl between 10 and 12 years is called a Gauri. It is laid down that a girl should be married before she attains youth or before attaining puberty. Thus the age of 8 years is the minimum age for the marriage of a girl. Manu is of the view that if a worthy bridegroom is available, a girl may be married at a still younger age. Thus the Shastras do not prescribe any floor age for the marriage of a girl. Yagnavalkya Smriti requires a male to marry after finishing his education (Avipluta Brahmacharya). This naturally meant that the bridegroom should be a major. Further, he has to receive the kanyadana (gift of the bride). This also seems to suggest that he should be a major.

Position under the Child Marriage Restraint Act, 1929: (Sarda Act)

The Act of 1929 was passed by the efforts of Rai Saheb Harbilas Sarda for the object of checking the evil of the child marriage. In this enactment, it was laid down that at the time of marriage, the bride must have completed 14 years and the bridegroom 18 years. Later on, by an amendment, the marriageable age of girls was raised to 15 years. A boy or a girl younger than this was declared a "child" and child marriage was made punishable. Nevertheless, it was a valid marriage. The original Hindu Marriage Act 1955 did not differ from this state of law. But by the Child Marriage Restraint (Amendment) Act, 1978 the marriageable floor age is enhanced by three years for both the parties in both the Acts.

The Sarda Act, 1929 was enacted with a modest purpose in view. It does not purport to prohibit child marriages; it merely wants to restrain them. The Child Marriage Restraint (Amendment) Act, 1978 does not purport to render child marriages void. Instead, it prescribes some penalties for those persons who are responsible for child marriages. The offences under the Act are not cognizable offences. This means that unless a complaint is filed, no proceedings can be launched in a court.

The 1929 Act was replaced by a new Act called Prohibition of Child Marriage Act, 2006. According to that Act, the minimum age for the bride is 18 years at the time of marriage and for the bridegroom it is 21 years. Whoever performs, conducts, directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he had reasons to believe that the marriage was not a child marriage. Whoever, being a male adult above

18 years of age, contracts a child marriage, shall be punishable with rigorous imprisonment which may extend to 2 years or with fine which may extend to one lakh rupees or with both. Where a child contracts a child marriage, any person having charge of the child, whether as parent or guardian or any other person or in any other capacity, lawful or unlawful including any member of an organization or association of persons who does any act to promote the marriage, or permits it to be solemnized or negligently fails to prevent it from being solemnized, including attending or participating in a child marriage, shall be punishable with rigorous imprisonment which may extend to 2 years or with fine which may extend to one lakh rupees. Provided that no woman shall be punishable with imprisonment. For the purpose of this Section, it shall be presumed, unless and until the contrary is proved that where a minor child has contracted a marriage, the person having charge of such minor child has negligently failed to prevent the marriage from being solemnized.

Where a child, being a minor-

a) Is taken or enticed out of the keeping of the lawful guardian; or

b) By force compelled or by any deceitful means, induced to go from any place; or

c) Is sold for the purpose of marriage and made to go through a form of marriage or if the minor is married after which, the minor is sold or trafficked or used for immoral purposes, such marriage shall be null be void.

Every child marriage whether solemnized before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage. Provided that, a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage. If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend along with the child marriage prohibition office. Under the Hindu Marriage Act, 1955, a marriage solemnized in contravention of the conditions prescribed for a valid marriage was treated as valid. By invoking the doctrine of *Factum Valet*, validity was given to the child marriages. Later, the Marriage Laws (Amendment) Act, 1976 through 13 (2) (iv), provided a relief to a Hindu wife if her marriage was solemnized before attaining 15 years, can repudiate after attaining 15 years and before attaining 18 years. Now the Prohibition of Child Marriage Act, 2006 made a child marriage, voidable. The petition under this Section may be filed at any time but before the child completes 2 years of attaining majority. Any child marriage solemnized in contravention of an injunction order issued prohibiting such marriage, shall be '*void ab initio*'. Notwithstanding anything contained in the Code of Criminal

Procedure 1973, offences punishable under this Act shall be cognizable and non-bailable. In the Hindu Marriage Act, 1955 in Section 18, for clause (a), the following clause shall be substituted, namely— "a) in the case of contravention of the condition specified in clause (iii) of Section 5, with rigorous imprisonment which may extend to 2 years or with fine which may extend to one lakh rupees or with both". According to the Marriage Laws (Amendment) Act,1976 where the marriage of a girl (whether consummated or not) solemnized before she attained the age of 15 years and she has repudiated the marriage after attaining that age but before attaining the age of 18 years, the girl can obtain a decree for dissolution of marriage. This is an additional ground made available to this clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976.

iv) Prohibited degrees of relationship:

Section 3, cl. (g) and Sec.5 (IV) of the Hindu Marriage Act, 1955 deals with prohibited degrees of relationship. Section 5, cl. (IV) prohibits marriage between persons who are within the prohibited degrees of relationship with each other.

According to Section 3(g), two persons are said to be within the degrees of prohibited relationship:

i) If one is a lineal ascendants of the other; or

ii) If one was the wife or husband of a lineal ascendant or descendant of the other; or

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 brother or 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; But if the "custom" or "usage" governing each of the parties to the marriage allows the marriage within the degrees of prohibited relationship, then such marriage will be valid and binding.

The degrees of prohibited relationship of a male and female can be seen in foot notes: A lineal descent is a descendant in the male line. There is no limit of degrees and all descendants in the male line are lineal descendants counted down wards in unbroken line. The Hindu texts went to the extent of prohibiting a man marrying a girl even of the same "gotra" or "pravara" on the theory that his father and the girl's father were both descendant of a common ancestor in the male line and all such marriages were held invalid until the Hindu Marriage Disabilities Removal Act, 1946 was passed. However the rule did not apply to *Sudras*, the reason

given being that *Sudras* had no *gotra* of their own. Marriage between parties related with each other within the degrees of prohibited relationship is forbidden to prevent: a) physical degeneracy of the race which the marriage between near relations would lead to; b) moral degeneracy and consequent evil results which are apt to affect a society built on the edifice of joint family system. A "Karewa" marriage between a father-in-law and daughter-in-law among the "jats" (who are presumed to be Sudras) is invalid and cannot be validated by custom. A custom must not be opposed to public policy or abhorrent to decency and morality. Among the Jats of Punjab, marriage with brother's widow and in South India, maternal uncle's daughter and paternal aunt's daughter are treated as eligible for marriage. This is based upon local custom or '*Desa Achara'*. In Andhra Pradesh, custom permits marriage with sister's daughter. A marriage between persons who are related to each other within prohibited degrees would become void under Section 11 of the Hindu Marriage Act, 1955. The person procuring a marriage in contravention of this provision would be punishable under Section18 (b) of the Act.

v) Sapinda relationship:

In the Hindu texts, the word *sapinda* has been used in two senses; firstly, it means a relation connected through the same body; and secondly, it mean relation connected through oblation of food. The prohibition of *Sapinda* marriage is also based on the rule of exogamy. The *Dharmashastra* considered sex relationship with one's mother or one's sister or one's daughter or even with one's son's wife as '*mahapataka*', the highest sin. According to *Vishnu*, for such a person, there was no *prayaschitta* except that he should throw himself into the blazing fire. Theories of Sapinda relationship: In the ancient Hindu law, two theories of sapinda relationship were propounded:

a) Oblation theory; and

b) Particles of the same body theory.

a) Oblation theory:

This theory was propounded by *Medhatithi* and *Kullukabhatt*. According to this theory, when two persons offer "pindas" to the common ancestor, they are Sapindas of each other. Before Vijnaneshwara, the sapinda relationship was linked with the oblations that one offered to his departed ancestors. The Hindus believe in ancestor worship and offer pindadan to their departed ancestors. Every year in the Shradha ceremony, offerings are made to departed ancestors. These offerings are mainly in the form of pinda. The pinda literally means a ball and is usually made from rice.

The rule is that, one offers one full pinda each to his three paternal ancestors and one full panda to his two maternal ancestors. One also offers one divided pinda each to his three next paternal ancestors and one divided pinda each to his maternal ancestors. Thus, he is connected by 'pindadan' to the six ancestors on the paternal side and four ancestors on the maternal side and is sapinda to them. When two persons offer pindas to the same ancestor, they are also sapindas to each other.

b) Particles of the same body theory:

This theory was propounded by *Vijnaneswara*. According to Vijnaneswara, "*pinda*" means "Body". "*Sapinda*" means "connected by particles of the same body". He changed the meaning of *pinda* from ball to particles of the same body. According to Vijnaneswara, the *sapinda* relationship arises between two persons on account of their being connected by particles of one body. He however limited this relationship up to 7th degree on the father's side and up to 5th degree on the mother's side, counting upwards in ascending order from each. The "*pindas*" theory also regarded two persons as *sapindas* of each other, because they offered *pindas* to 6 ancestors ascending on the father's side and 4 ancestors ascending on the mother's side. If the persons offering "*pinda*" is included as himself being of one generation, it means 7 degrees on the father's side and 5 degrees on the mother's side. The passage in the *Mitakshara* in relation to *sapinda* relationship runs as follows: "He should marry a girl who is non-*sapinda* with himself. She is called his *sapinda,* who has particles of the body of some ancestor in common with him. Non-*Sapinda* means not his *sapinda*. Such a one he should marry. *Sapinda* relationship arises between two people through their being connected by particles of one body. Thus the son stands in *sapinda* relationship to his father because of particles of his father's body having entered his. In like manner stands the grandson in *sapinda* relationship to his paternal grandfather and the rest, because through his father, particles of his grandfather's body have entered into his own. Just so is the son a *sapinda* relation of his mother, because particles of his mother's body have entered into his. Likewise, the grandson stands in *sapinda* relationship to his maternal grandfather and the rest through his mother. So also is the nephew a sapinda relation of his maternal aunts and uncles, and the rest, because particles of the same body have entered into his and theirs; likewise he stand in *sapinda* relationship with paternal uncles and aunts, and the rest. So also the wife and the husband are *sapinda* relations to each other, because they together beget one body (the son). In like manner, brother's wives are also *sapinda* relations to each other, because they produce one body (the son) with those (severally) who have sprung from one body (i.e., because they bring forth sons by their union with the offspring of one person, and thus their husband's father is the common bond which connects them). Therefore

one ought to know that wherever the word *sapinda* is used, there exists between the persons to whom it is applied a connection with one body, either immediately or by descent. Then after denying certain objections to his explanation of the word *sapinda, Vijnaneswara* proceeds thus: In the explanation of the word "non-sapinda", (ASAPINDAM, verse 52), it has been said that *sapinda* relationship arises from the circumstance that particles of one body have entered into the bodies of the persons thus related either immediately or through transmission by descent. But in as much as this definition would be too wide, since such a relationship exists in the eternal circle of births, in some manner or other, between all men.

According to the *Mitakshara,* the rule of non-*sapinda* marriage applies to all classes, because *sapinda* relationship exists everywhere. Therefore, it applies to sudras and others who may have no gotras of their own. *Vijnaneswara's* definition of *sapinda* relationship and the rules he lays down for the limitation of *sapinda* relationship as given in the *'Acharadhyaya'* (chapter on established rules of conduct) are applicable not only to marriage but also to inheritance; for he says expressly that "one ought to know that wherever the word "*sapinda*" is used, there exists between the persons to whom it is applied a connection with one body, either immediately or by descent".

He defines the prohibited degrees within which, a man or woman cannot marry; within those degrees are also to be found the heritable *sapindas* of the deceased owner, whether of the same family or of another family. Taking his comments in the '*Acharadhyaya*' and the '*Vyavaharadhyaya*' together, his scheme is perfectly clear and logical. He divides all *sapindas* into two categories:

1) Sama gotra or 'sagotra' sapindas, and

2) Bhinna gotra sapindas or '*Bandhus*'.

The sagotra *sapindas* are *agnates* within seven degrees of the common ancestor; the Bhinnagotra sapindas are cognates within five degrees of the common ancestor. The reasons for limiting the '*sagotra*' *sapindas* to seven degrees and *'Bhinnagotra' sapindas* to five degrees are obvious: For, one is the giver of the pinda and three-father, grandfather and great grandfather are recipients of *pindas*, and three-beginning with great grandfather are recipients of divided *pinds* (LEPAS) or as *vijnaneswara* himself puts it, the first *pinda* is efficacious up to the 4th ancestor, the second *pinda* up to 5th and the third pinda up to the 6th. As regards 'Bhinnagotra' sapindas, the reason for the limitation of five degrees was that, as a woman causes a change in the family, one had to offer

oblations to mother's father, grandfather and great grandfather and counting also the mother and himself, it became five degrees. Though *Vijnaneswara* altered the basis of sapinda relationship from the oblation theory in to real consanguinity, as he felt that some limitation of *sapinda* relationship was necessary, he retained the old limitations for both '*sagotra*' *sapindas* and 'bhinnagotra' *sapindas*. *Vishnu* and *Yajnavalkya,* if not Manu himself, established the rule of offering pindas to the mother's three immediate male ancestors. The correct rule regarding limitation of five degrees to all *'bhinnagotra' sapindas* is: count inclusive of the common ancestor in the line or lines in which a female intervenes, five degrees and in the line in which there is no female, seven degrees; if the claimant and the propositus in their respective lines are within those degrees, they are bandhus (relatives) of each other; but if either or both of them are beyond those degrees, they are not bandhus of each other. To count it, begin with the claimant and the propositus (or the bride and the bridegroom as the case may be) and count inclusive of both; seven degrees or five degrees upwards as their relationship with the common ancestor is in the father's line or in the line where a female intervenes respectively; and if the common ancestor is reached within those degrees on both sides, then they are *sapindas*. They are '*sagotra*' *sapindas*, if in neither line, a woman intervenes. And they are 'bhinnagotra' *sapindas* if in either or both lines, a woman intervenes. Section 3 (f) of the Hindu Marriage Act, 1955 defines *sapinda* relationship. According to clause (f) of Section 3; i) *"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; ii) two persons are said to be "*sapindas"* of each other within the limits of *sapinda* relationship, or if they have a common lineal ascendant who is within the limits of *sapinda* relationship with reference to each of them. Section 5 (v) of the Hindu Marriage Act, 1955 lays down that the parties to marriage should not be *sapindas* of each other. The Act of 1955 modified *Vijnaneswara'*s theory. It restricts the *sapinda* relationship to five degrees on the father's side and three degrees on the mother's side. Thus the *sapinda* relationship extends up to five degrees on the paternal side and three degrees on the maternal side. It should be noted that, *sapinda* relationship shall be computed upwards either through the mother or through the father or both and the person concerned shall always be counted as one degree. Thus the Hindu Marriage Act, 1955 prohibits marriage between persons who are *sapindas* of each other.

A Hindu marriage in contravention of this rule is null and void100. Such a marriage is also punishable under Section 18 (b) of the Act.101 However, where custom or usage governing each of the parties to the marriage

allows marriage between *sapinda* relations, such marriage is valid. Section 11 of the Hindu Marriage Act, 1955. Simple imprisonment up to the period of one month or with fine up to Rs. 1000 or with both.

3) Caste system:

Under the ancient Hindu law, one of the conditions for a valid Hindu marriage is the identity of caste between the parties. If the parties did not belong to the same caste, the marriage was invalid, unless it was sanctioned by custom. Even before the period of Dharma sutras (600-200 B.C.), inter-marriages between the four varnas were not allowed. In the Vedic literature, the society is classified in to four varnas; Brahmin, *Kshatriya, Vaishya* and Sudra. In the Vedic period, the class system and occupations of persons belonging to the four varnas were not rigid. An individual was free to engage himself in any occupation irrespective of the class to which he belonged. There were no regulations of food and drink for various classes. There were also no restrictions on inter-class marriages. In the shastric literature, there are various theories of the varnas. One of them is God himself created these classes. The Brahmanas originated from the mouth of Brahma, the Kshatriyas from his arms, and the Vaishyas from his thighs and the Sudras from his feet. The other theory is that, the classes are not differentiated by birth, but by their respective qualities and deeds. Thus according to this theory, varnas are based on Dharma. The Dharma of the four classes is as follows: teaching, self-control and the 'tapas' (austeries) are the duties of the Brahmanas. The duties of the Kshatriyas are the study, protecting people, performing sacrifices, making gifts. The duties of the Vaishyas are study, making gifts, celebrating sacrifices, acquiring wealth by fair means and to serve the first three is the duty of the sudras.

According to Manu, among the social duties, the most creditable are: teaching the Vedas for the *Brahmanas*, protecting the people for the *Kshatriyas* and trading for the *Vaishyas*. According to the *Smritikars*, the common Dharma (duties) for all the four classes are; abstention from injury to any living creature, pursuit of truth, abstaining from taking unlawfully what belongs to another, purity of conduct and life, control of organs, self-restraint, uprighteousness and generosity. *Visvarupa*, the earliest commentator on Yajnavalkya commenting upon Yaj. I, 56; states that the marriage of a Sudra girl by a twice-born is prohibited. In his gloss on Yajn.II, 125, he reiterates that no son by a Sudra wife is sanctioned for the twice-born. The *Smritichandrika* also prohibited such marriages: "Even a son of the body does not become legitimate son when he is born of a wife of an unequal class, the marriage of a woman of unequal caste being itself prohibited in the kali age". The Smritikars mentioned two forms of inter-varna or inter-caste marriages. These are- pratiloma marriages, i.e., marriages between a woman of a superior caste and a man of an inferior caste were altogether prohibited and no

rites were prescribed for them in grihya sutras. The issues of such unions were declared to be outside the pale of the sacred law. The kautilya's Arthasastra also regarded 'Pratiloma' sons as sons born of unlawful union Anuloma marriages between a male of a higher caste and a female of a lower caste which was held valid. In the Vedic period, when the Hindu caste system had not become rigid, inter-religious and inter-caste marriages were performed. The Hindu princes have taken wives from other lands and other religions, and this practice continued to prevail till the codification of Hindu law of marriage. Before passing of the Hindu Marriage Act, 1955, in *Chandramani Dubey v. Dubey,* the courts expressed the view that there was no rule of Hindu law which forbade the subsistence of a marriage between parties one of which was a non-Hindu and the other was a Hindu.

When the caste system or 'Varna' system of Hindus came to be firmly established, the inter-caste and even inter-sub- caste marriages came to be prohibited. Earlier in the Vedic age, when Hindu caste system had not become rigid, inter-caste or inter-varna marriages were performed. In the *Anuloma* form of marriage, a male of superior caste married a female of inferior caste. For instance, a marriage between a Brahmin male and Kshatriya, Vaishya or Sudra female or a marriage between a Kshatriya male and Vaishya or Sudra female or a marriage between Vaishya male and Sudra female fell in this form. In *Pratiloma* marriage, a male of inferior caste married a female of superior caste. Thus, when a sudra male married a Brahmin, Kshatriya or Vaisya female or a Vaishya male married a Brahmin or Kshatriya female or a Kshatriya married a Brahmin female, the marriage was called Pratiloma marriage. Therefore marriages between persons belonging to different castes are invalid in the absence of a usage to the contrary. In a number of cases, marriages between persons of different castes were held to be prohibited without distinguishing between anuloma and pratiloma marriages. But marriages between persons belonging to different divisions of the same main caste are held valid. a) Inder Singh v. Sadhu Singh ILR (1944)1 Cal 233; (marriage between a Sikh man, who professes to be a Hindu and a Brahmin by caste and a woman who is a Brahmin Hindu); b) Manickam v. Pongavanammal 1933 MWN 185 (Marriage between a Sudra and an Adi Dravida); c) Raghava Doss Jee v. Sarju Bayamma (1942) MLJ 205 (marriage between two bairagis); d) Nagappa v Subramaniam ILR 1946 Mad 103 (marriage between Nuttukottai Chettiar with a dancing girl).

The status of such marriages was improved by legislation. The Arya Marriage Validation Act, 1937 provided that no inter-caste marriage between the Arya Samajists was invalid. The Hindu Marriage (Removal of

Disabilities) Act, 1946 validated marriages between Sub-divisions of the same caste. The Hindu Marriages Validity Act, 1949 validated a marriage between parties belonging to different religions (within the frame work of Hinduism), castes, Sub-castes or Sects. The Hindu Marriage Act, 1955 has repealed the latter two Acts. The Act of 1955 prescribed conditions for a Hindu marriage. There is no requirement under Section 5 of the Act that the parties to a Hindu marriage should belong to the same caste. So inter-caste marriages are now perfectly valid under Hindu law. Under this Act, "any two Hindus" can marry. The requirement of pure Hindu law that both parties to the marriage must belong to the same caste was changed from time to time through legislations providing inter-caste marriages. Similarly the prohibitions on the basis of gotra and pravara were also relaxed through legislation. Marriages between Hindu, Jain, Sikh and Buddhists were also legalized. The Hindu Marriage Act, 1955 validated such marriages.

4) Gotra and pravara:

Hindus subscribed to the rule of exogamy where under a person is not permitted to marry within the same tribe. The shastric prohibition of sagotra and sapravara marriages relate to this rule. Hindus believe that each of them is a descendant from one sage or the other. All those who trace their descent from the sage have a common gotra. Thus two persons belonging to the same gotra are gotraja, if they trace their descent to a common rishi. A man therefore cannot marry a girl of the same gotra or pravara as the girl and boy are deemed to have descended from a common ancestor in the male line. Even among the higher castes, sagotra marriages may be recognized by custom e.g., among the Vaishya Agarwalas. The issues of such marriages are perfectly legitimate. Thus, two persons are gotrajas or belonged to the same gotra, if they are descendants in the male line from one of the ancient sages after whose name, the gotra is designated. Originally, gotra meant "bond". Later on, it came to mean "family" and descendants of the same family were not permitted to inter-marry. This is prohibition of sagotra marriage. Both the Smritis and Grihya Sutras prohibit sagotra marriages. The three lineal male ancestors of the founder of the gotra are referred to as "Pravara". Pravara is also defined as the group of sages distinguishing the sage who is the founder of the gotra. The word "Pravara" literally means "invocation" or "summons". It may be traced back to the cult of fire worship among Indo-Aryans. The purohit officiating at a sacrifice to agni, used to recite the names of famous rishi-ancestors to carry libations to gods. It seems that the term pravara came to denote such ancestors. During British period, in many parts of India, marriages performed in violation of the sapravara rule were valid. The gotras of the Brahmans are defined as being the various branches descended from the different rishis or sages. Therefore, in theory, there is at any rate, a blood

relationship between such descendants. The gotra of Kshatriyas and Vaishyas however,was the gotra of the family purohit, and nothing more. Therefore there was no blood link between such disciples and the idea of the gotra among these two latter classes was that of congregations as opposed to families. *Viswamitra, Jamadagni, Bharadwaja, Goutam, Atri, Vasistha, Kasyapa* and *Agastya* are the eight rishis; the progeny of these 8 sages is declared to be gotra123. The principal sages of a gotra or race by whom, that race or its branch is distinguished from other gotra or the rest of the same gotra are called "pravaras". For instance, in the Viswamitra gotra, three pravaras namely, Viswamitra, *Marichi* and *Kaushika* of whom, Viswamitra is the founder of the gotra which is distinguished from other gotras by having for its pravara, the sages Marichi and Kaushika. All persons have not only a gotra but also a pravara. The number of rishis included in pravara is usually three but never exceeds five.

Although Kshatriyas and Vaishyas have neither a gotra nor pravara of their own, yet the gotra or pravara of their purohit are to be applicable. But the rule as to gotra and pravara does not apply to Sudras as they have no gotra of their own. In the Vedas, the word pravara is not found, but the word "Arsha" is found and it is regarded as a synonym for pravara. When two persons belong to the same gotra, it means that each is descended from the same common ancestor in an unbroken male line.

The rule is that persons of the same gotra or pravara cannot validly marry each other. A marriage celebrated between them is absolutely void. When the Aryan families expanded, a large number of close relations such as cross-cousins were living under the same roof. Unless a prohibition based upon exogamy (i.e., requirement of marriage outside the family), is recognized, incestuous relations might develop in such circumstances. Further, if a marriage outside the family becomes necessary and is sought, it would be difficult to procure a match for a girl since there would be suspicion that the male members of her own family eligible for marriage might have had illicit relations with her. To do away with these difficulties, the prohibition against sagotra marriages was evolved. The Hindu Marriage (Removal of Disabilities) Act, 1946 validated sagotra and sapravara marriages. Such marriages are also valid under Hindu Marriage Act, 1955. It removed all the restrictions on inter-caste, inter-sub-caste, sagotra and sapravara marriages.

5) Widow Re-marriages:

There are conflicting provisions in the smritis on the issue of widow re-marriage. Manu says on the one hand that **"**a second husband of a good woman is no where prescribed and the remarriage of a widow has never

spoken of in the ordinances about marriage; but on the other hand, he talks about the son born out of remarriage. A text of Parasara which is found in the Narada smriti also says, another husband is ordained of a woman in five cases namely, her first husband having perished or died naturally or become sanyasi or if he be impotent or has lost his caste. Then follow the periods during which a woman is to wait for her absent husband and the whole thing is made into sense by the direction that, when the time has expired, she may be take herself to another man. Manu declared that a man may only marry a virgin, and that a widow may not marry again. The only exception which he allows is in the case of girl whose husband has died before consummation, who may be married again to the brother of the deceased bridegroom.

Tribal practices:

Among the *"jat"* population of the Punjab, not only a widow, but a wife who has been deserted or put away by her husband, may marry again and will have all the rights of a lawful wife. The same rule exists among the Lingayats of South Kanara. In western India, the second marriage of a wife or widow called "pat" (by the Maharattas and Natras in Gujarat) is allowed among all the lower castes. In south India, including Cochin and Travancore, the widows' remarriage is not forbidden by either religious or caste custom to the majority of the population. The prohibition exists among the Brahmins, Kshatriyas and Vaisyas and also among the higher classes of Sudras who claim either equality or wear the sacred thread or who are otherwise high in the social scale or who emulate or follow Brahmin customs. Widow Remarriage is recognized among the Namosudras of Bengal. In Bihar, the Banias adopt widow remarriage. In the Northern parts of Bihar, in Orissa and in Chota Nagpur, it is generally practiced except among the Brahmins, Kayasthas, Rajputs and Banias. It is universal among the Darjeeling tribes and also in Assam except a few of the higher castes. The remarriage of widows had been legalized by the Hindu Widows Remarriage Act, 1856. It is valid and legal under the provisions of Hindu Marriage Act, 1955. Under the Act of 1955, a provision for dissolution of marriage through divorce, annulment of marriage has been made, so 'when a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or if there is such a right of appeal, the time for appeal has expired (without an appeal having been presented or an appeal has been presented but has been dismissed), it shall be lawful for either party to the marriage to marry again'. Section 15 of the Hindu Marriage Act, 1955.

6) Ceremonies of marriage:

Hindus have prescribed very elaborate ceremonies and rites for a marriage though in modern Hindu law, all these ceremonies are not mandatory. However, which of these ceremonies and rites are still essential, the law is not yet certain. Under the modern Hindu law, a Hindu marriage may be validly solemnized in the following two modes:

1. By performing the shastric rites and ceremonies recognized by Hindu law, or
2. By performing customary ceremonies which prevail in the caste, community or tribe to which, one of the parties (or both) belong. These rites and ceremonies may be religious, secular, elaborate, brief or nominal.

The status of husband and wife is constituted by the performance of marriage rites whether prescribed by shastras or by custom.

Shastric ceremonies and rites:

For a valid Hindu marriage, performance of certain shastric ceremonies is still necessary. The ceremonies and rites are laid down in the grihyasutras. The grihyasutras prescribe very elaborate rites and ceremonies for marriage. Although the performance of some of the ceremonies and rites begins a few days before the actual solemnization of marriage both at the place of the bride and bridegroom, all the essential ceremonies are performed at the place of the bride. On the forenoon of the day, when marriage is scheduled to be performed, the father of the bride or in his absence, the next male relative performs *'Vridhi Sraddha'* in which, offerings are made to the departed ancestors with a view to obtaining their blessings for the marriage. On the same for noon is performed with the chanting of the mantras, the ceremony of giving bath to the bride. In the olden days, there was the practice of setting apart, a cow for the wedding feast. But later on, when beef eating was prohibited, practice of tying a cow and then letting it loose on the arrival of the bridegroom is still observed in some parts of the country. On the arrival of the bridegroom at the bride's house, begins the performance of several important ceremonies. The first of these is the ceremony of *'Sampradana'*. In this ceremony, *padya* (or water) for washing the feet, *araghya* (water mixed with flowers, *durva-grass*, rice and sandal paste) for washing the head, a cushion to sit upon, and *madhuparka* (mixture of honey, curd and ghee) are given to the bridegroom along with other presents. This ceremony is performed with the chanting of mantras and recitation of prayers.

This is followed by one of the main ceremonies of marriage, the *'Kanyadana'* ceremony, in which the father of the bride or in his absence, the next guardian for marriage, pours out a libation of water symbolizing the gift of

the bride. Sometimes the right hand of the bride is tied with that of the bridegroom with *durva* grass with chacting of mantras. In this manner, the bride is formally given in gift to the bridegroom who recites the *kama sukta* and accepts the gift. Certain presents are also made to the bridegroom which include a piece of gold as *dakshina*. Then the father of the bride invokes the bridegroom and tells him never to fail the bride in his pursuit of *Dharma, Artha, Kama* and *Moksha*, to which the bridegroom replies thrice that he shall never fail her. The next important ceremony is *'Vivaha-homa'* i.e.,lighting of holy fire, symbolizing it as divine witness and sanctifier of the vivaha samskara. On the west of the fire, is placed a mill-stone and on the North-East, is placed a water pot. The bridegroom and the bride offer oblations to the holy-fire in which, bride participates by grasping the hand of the bridegroom. These oblations include *'mahavayahritu-homa'*, in which oblations are offered in honour of earth, sky and heaven. The bridegroom also recites certain sacred mantras.

This is followed by the third important ceremony, the *'Panigrahana'*, in which the bridegroom takes the hand of the bride. This is to be done by the bridegroom standing up and facing west, while the bride sits in front of him facing east. Holding the hand of the bride, the bridegroom recites certain vedic hymns. Then is performed, the *'Laja-homa'* by the bride in which she offers oblations to *Aryama, Varuna, Pushan* and *Agni* so that the gods may be pleased to free her from their bonds. The next ceremony is *'Agni-Parinayana'*. According to the Grihya sutras, parinayana are three, though in practice they are usually seven or five (in all sacramental marriages they are even now invariably performed). The *'agni-parinayana'* is the rite of going round the nuptial fire, where the bridegroom leads the bride three times round the nuptial fire and water-pot, the couple keeping to the right side of the nuptial fire and water-pot. At the end of each round around the holy fire, the bride with the helping hand of the bridegroom mounts the mill-stone. The bridegroom recites certain hymns. At the end of the final round, the bridegroom loosens two locks of her hair chanting the hymn, "I release thee now from the bondage of *varuna*". The last ceremony of the rites and ceremonies of a Hindu marriage is 'Saptapadi' which is the most important and must be performed in all sacramental marriages. Near vivaha-mandap, the bridegroom leads the bride for seven steps in the North-Eastern direction while reciting certain hymns. This is followed by an address by the bridegroom to the bride. Water is then poured on the hands of the couple and certain prayers are recited. Upon the completion of the prayer, the bridegroom joins hand with the bride and says to her, "give thy heart to my religious duties, may thy mind follow mine, Be thou consentient to my speech, May Brihaspati unite thee unto me". On the completion of the seventh step, the marriage becomes final and irrevocable.

The 'Saptapadi' is the most material of all the nuptial rites, and marriage becomes complete and irrevocable on the completion of the seventh step. According to Manu, "The nuptial texts are a certain rule in regard to wed-lock; and the bridal contract is known by the learned to be complete and irrevocable on the seventh step of the married pair, hand in hand, after those texts have been pronounced". The last ceremony that is performed is known as 'Uttara Vivaha'. This ceremony consists of two parts: one, in which the bridegroom shows the bride, the polar star, the emblem of stability and exhorts her to be stable in her husband's family. The other part is the one in which, the husband takes a part of meal and the wife takes the remainder. After the completion of this ceremony, the bride is conducted in solemn procession to her husband's house where several hymns are recited. In most of the Hindu marriages, all the above ceremonies are not performed. There are very few marriages where bride and bridegroom recite the hymns. The function of reciting hymns is performed by the priest or the pundit who officiates at the ceremony and the bride and bridegroom go on nodding. The chanting of hymns, mantras, verses and sacred text is not essential in modern Hindu law for the validity of marriage. Section 7 of the Hindu Marriage Act, 1955 deals with ceremonies of marriage. Section 7 says that, "a Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. Sub-Section (2) of Section 7 says that, where such rites and ceremonies include the saptapadi, the marriage becomes complete and binding when the seventh step is taken". The Act does not prescribe any particular form of marriage. In Sub-Section (1), the word "may" has been used. This word has been used here in the sense of "must". In order to convict a person for the offence of bigamy, it has to be established that the first marriage of that person was solemnized by observing the accepted ceremonies. If there is no evidence of ceremonies like 'saptapadi' having been observed in the prior marriage, the person cannot be convicted for the offence of bigamy in case he/she marries again. In *Deivayani Achi v. Chidambara Chettiar*, the Madras High court after examining all the relevant texts, came to the conclusion that in reality the ceremonial validity of a Hindu marriage, only two ceremonies are essential: one consists of the secular element, i.e., the gift of the girl (this will include sampradana and kanyadana); and the second consists of religious element, i.e., the performance of panigrahana and saptapadi. In *Mallikharjunappa v. Eramma*, it was held that, in Lingayat Reddy community in Andhra Pradesh, the only essential ceremonies are tying of 'thali' and *Kankan Bandan*, *Kanyadana* and *Saptapadi* do not form essential part of the ceremonies. In Mallayya vs Bhomayya, it was held that, ceremonies in non-regenerate class in Telangana area of Andhra Pradessh are to be performed according to the custom and not according to smritis. In *gandharva* form of marriage, the ceremony of 'kanyadana' is not essential.

The necessary ceremonies of marriage, 'shastriac' or 'customary', whichever are prevalent on the side of the bridegroom or bride, must be performed. Otherwise, marriage will not be valid. Thus, if a Jain and a Sikh marry, it is necessary that either the '*Saptapadi*' (which is a Jain ceremony) or the *'Anand Karaj'* (which is a Sikh ceremony) must be performed. Otherwise, the marriage will not be valid. If the parties are able to show that in their case, a marriage can be validly entered in to without any ceremonies and rites such as the 'Chadar Andazi' and 'Karewa' marriages of Punjab, then such a marriage will be valid even though no ceremonies are performed. In *Bhaurao v. State of Maharashtra*, the Supreme court observed that in order to attract Section 494 I.P.C, the marriage should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married will not make the ceremonies prescribed by law or approved by any established custom. The offence of bigamy is committed by a Hindu marrying again during the life time of his or her spouse provided that the first marriage is not null and void. If the subsisting marriage is voidable, then also offence of bigamy is committed. The offence of bigamy is committed only if the required ceremonies of marriage are performed. Mock ceremonies: No one is free to innovate ceremonies. The solemnization of marriage is proved by showing that the marriage was performed with the proper and essential rites and ceremonies of marriage prescribed under the law or custom applicable to parties. A prosecution for bigamy will fail if what is established is that some sort of ceremonies (not the essential ceremonies as prescribed by law or custom) were performed with the avowed purpose that the parties were to be taken as married, and it is immaterial even if it is established that the parties intended seriously to marry and thought that the ceremonies performed by them would confer marital status on them. If the second marriage of the accused is declared void, no prosecution for bigamy can be made. The mere intention of parties however serious, will not make them husband and wife and the accused will escape prosecution even if he deliberately performed defective ceremonies. In *Dr. A.N. Mukerji v. State*, a physician was prosecuted u/S. 493 of I.P.C. Dr. Mukerji performed three different ceremonies of marriage at three different times, with one Smt. Harsbans Kaur (who was a married woman and whose husband was living). The first ceremony was performed in a moonlit night in the open where Dr.Mukerji after reciting a few Sanskrit verses embraced Smt. Harsbans Kaur and exclaimed: "Moon, you are my witness. I am marrying Harbans and she is my wife and I am her husband".The accused narrated to her, the stories of *Drupadi* and *Shakuntala* from the Hindu epics and told her that a Hindu woman can marry more than one husband. He explained to her that he wanted to marry her in the 'Gandharva' form as king Dushyant had married Shakuntala. She believed the representation of the accused and agreed to such marriage without understanding its significance. The second ceremony was performed eight

years later in a Kali temple where the parties exchanged garlands in front of the deity and the put tilak on the fore head of the complainant and walked seven steps together. The third ceremony was performed a day later before *'Guru Grandh Saheb'*, an imitation of Sikh ceremony, 'Anand Karaj'; since the woman was a Sikh. None of these ceremonies were acceptable either in the community of bride or bridegroom. It was held that performance of such mock ceremonies of marriage does not constitute valid solemnization of marriage.

Creation of new ceremonies of marriage:

No one, whether a community, organization or movements is free to alter, varies and creates ceremony of one's pleasure. The question of innovation of new ceremonies and rites came before the Madras High Court in *Deivanai Achi and another vs. Chidambaram Chettiar and others.* In Tamilnadu, there exists an organization known as Self-Respectors cult, an anti-purohit association. This in an inter-caste organization. The main objective of which is to do away with the traditional rites and ceremonies prevalent among the Hindus. It has also innovated some very simple rites and ceremonies of marriage. Such marriages are known by the name of *'Suryamariyathai'* or *'Seerthiruththa'* marriages. When such a marriage is to be performed, then the relatives and friends of the bridegroom and bride and the notable persons of the locality are invited, and among the invitees, someone is required to preside over the function. The bride and bridegroom are introduced to the guests, and in their presence, the simple ceremony of exchanging garlands and rings between the bride and the bridegroom is performed. The marriage is given wide publicity.

Two other alternative ceremonies may be performed:
1) A simple ceremony of tying the thali or 2) the bride and bridegroom may declare in any language understood by them that each takes the other to be his wife or as the case may be her husband.
When the validity of such a marriage being questioned, the Madras High Court held that, "it may be very laudable object to simplify the procedure applicable to marriages as laid down in the shastras and custom, but it will be a dangerous doctrine to lay down that a community should have liberty to prescribe the requisites of a valid marriage without any statutory authority. No one can alter personal law". The marriage was held void. The decision led to statutory recognition of such ceremonies and rites. The result of this statutory modification is that, a mere execution of a document by the spouses that they have become husband and wife or a declaration in

the presence of friends and other persons will confer the status of husband and wife on the parties to the marriage.

Customary ceremonies and rites:

The *'Grihya Sutras'* while prescribing elaborate ceremonies and rites, also lay down that a marriage may be solemnized in accordance with "the customs of the different countries and villages". It has been the settled law even before coming into force of the Hindu Marriage Act, 1955 that if a community does not recognize any of the 'shastric' ceremonies and rites of the marriage, their omission will not render a marriage invalid provided the ceremonies and rites prescribed by the community are performed. The courts recognized numerous customary ceremonies and rites. Among the 'Santhals', the only ceremony necessary for solemnization of a marriage is the smearing of vermillion on the forehead of the bride by the 'Santhal' bridegroom. Among 'Nayahans' of the South India, the only ceremony necessary is the tying of a 'Nadu veeta thali' in the neck of the bride. In *Benodebehary v. Shashi Bhushan*, it was held that a marriage amongst a community called 'Jativaishnabas', by exchange of garlands called the *'Kantibadal'* ceremony was according to custom and is valid.

Amongst Buddists, no ceremony is necessary. Mutual consent is enough. In Karewa marriages of Punjab which is prevalent among the lower castes of Hindus, no ceremony is necessary. If the parties live together as husband and wife with an intention to live as such, that is enough for the validity of the marriage. In *Re-Ponnuswami* case, it was held that, tying of a thali in the presence of an idol in the temple was a form of customary marriage and that even without any priests to officiate at the ceremony, there was a complete marriage. The court accordingly upheld the conviction of bigamy when the second marriage was performed. According to Section 7 of the Hindu Marriage Act 1955, if a marriage is solemnized by the customary rites and ceremonies recognized on the side of one of the parties to the marriage (it may not be recognized on the other side), then the marriage will be valid. These ceremonies may be very elaborate or very simple. For the performance of customary ceremonies and rites, it is essential to establish that the caste or community has been continuously following such rites and ceremonies from ancient times and the caste or community regards performance of such ceremonies as obligatory, provided such customary ceremonies and rites are not against morality, law and public policy. If the ceremonies and rites prevalent in the communities of both the parties to the marriage are the

same, then marriage must be solemnized in accordance with those ceremonies and performance of those ceremonies will be sufficient. But if the ceremonies of marriage are different in their communities, then marriage may be solemnized either in accordance with the rites and ceremonies observed in the community of the bridegroom or the bride.

May" means "shall":

Though cl:(i) of Section 7 uses the word "may" denoting option for the observance of customary rites and ceremonies for a marriage, the courts have held in a number of cases that the rites and ceremonies are compulsory160. This means that the word "may" occurring in Section 7 (i) is to be construed as "shall". If the marriage ceremonies are not celebrated, no man and woman can become husband and wife simply because they call themselves so. They do not become husband and wife even by long cohabitation. If marriage is proved, law presumes that the necessary ceremonies were celebrated. But if a party alleges that no ceremonies were observed, the court will enter into the enquiry whether or not they were celebrated.

Marriage as an exclusive and sacramental union also gave birth to polygamy, concubinage and prostitution. The marriage became monogamous for the woman alone. It became a sacrament for her alone. Hindus refined the institution of marriage and idealized it. In this process, they have laid down detailed rules covering practically all aspects of marriage. While maintaining some continuity with the past, the Hindu Marriage Act, 1955 has simplified the law of marriage.

The Hindu Marriage Act, 1955 has made changes in the law of marriage. These changes are summarized as under:

- the marriage amongst Hindus, Jains, Sikhs and Buddists are now valid.
- the divergence between the Mitakshara and Dayabhaga Schools in relation to the expression "Prohibited degrees of relationship" for the purpose of marriage is now removed. The strict rule prohibiting marriages within the limits of Sapinda relationship as laid in the 'Smritis' has been considerably relaxed. Some new degrees of relationship have also been added.
- Monogamy amongst the Hindus is introduced for the first time. Bigamy is now punishable under the Indian Penal Code 1860. The conditions and requirements of a valid marriage are now very much simplified.

- Caste considerations for inter-caste and inter-communal marriages have now been made irrelevant, eliminating all restrictions thereupon.
- it does not recognize any particular form of a Hindu marriage.
- the ancient Hindu law did not prescribe any age for marriage; but it is now a condition of marriage that the bridegroom must have completed 21 years and the bride 18 years at the time of marriage.
- No particular ceremony is prescribed.
- Provision for registration of Hindu marriage has been provided.

Under old Hindu law, the conditions required for a valid marriage were strict and elaborate. With the passing of various legislative enactments, those conditions were modified, liberalized or removed; which is a welcome change.

Concept of Marriage

Marriage - Sacramental or Contractual?

Historical Perspective - Manu, ardhangini, marriage is an essential sanskara, man is incomplete without wife. Once performed, it cannot be dissolved. Modern Perspective - Civil contract. Can be dissolved. Cannot force to live together. Equality of sexes. Can't be done without consent.

Why is it Sacramental?	**Why is it Contractual?**
As per Contract Act 1872, contract with a minor is void ab initio. Even though section 5(2) says that valid consent is required and section 5(3) says that the boy should be above 21 yrs and the girl should be above 18 yrs, marriage done in contravention of these provisions is not void. Marriage with a minor is not even voidable only on that ground. In the case of **Venkatacharyalu vs Rangacharyalu 1980**, it was held that the person married may be a minor or even of unsound mind, yet if the marriage rite is duly solemnized, it is a valid	The fact that consent of the boy and the girl is required means that it is contractual. If the consent is obtained by force or fraud, the marriage is voidable.

marriage.	
Section 7 of HMA1955 requires that religious ceremonies are a must to complete a marriage. A marriage done without "saptapadi"is void. In the case of Dr. A N Mukherji vs State 1969, a person could not be convicted of bigamy because he performed 3 marriages without doing necessary ceremonies.	Marriage is no more permanent since divorce is available by mutual consent.
	Marriage is no more eternal since widow remarriage is permissible.
Even now bachelors are not eligible to perform several religious ceremonies. Only married couples are allowed. Thus, it still retains its sacramental property.	Marriage is no more holy because a marriage can be done without all the ceremonies such as vivah homam. Only saptapadi is required.
No-fault divorce, as available in western countries, is not available in HMA 1955. Thus, breaking up of a marriage is very difficult.	

Conclusion: It is has a unique blend of sacramental and contractual characteristics.

Essential conditions of a valid Hindu marriage. Is there a provision for punishment for violating the conditions? Section 5

1. Section 5 (1) Must not have a spouse alive. *Kanwal Ram vs H. P.* - Essential ceremonies are a must for committing the offence of second marriage. *Priya vs Suresh* - Mere admission by the parties is not enough. Proof of essential ceremonies is required.
2. Section 5 (2) neither party is
    1. Incapable of giving consent due to unsoundness of mind.

2. Though capable of giving consent, is unfit for marriage and procreation of children due to mental disorder.

   Alka vs Abhinash - MP HC held that "and" must be read as "or".

3. Suffers from recurrent attacks of insanity. *Balakrishna vs Lalitha* - "Incurable" is not a requirement. Only recurrent attacks, irrespective of whether curable or incurable provided enough ground.

3. Boy is over 21 and girl is over 18. *Rabindra vs Sita* - Marriage in contravention of this clause is, nevertheless, valid.
4. Parties are not within degrees of prohibited relationship.
5. Parties are not sapindas

Punishment

Section 17 says that section 494 (bigamy without concealment - 7yr + fine) and 495 (bigamy with concealment - 10 Yrs + fine) of IPC will apply for bigamy.
Section 18(a): 15 days + 1000/- for contravention of 5(3)
Section 18(b) : 30 days + 1000/- for contravention of 5(4) and 5(5)

What is the difference between Void and Voidable marriage? What are the consequences of a Void marriage?

Void	Voidable
Defined by section 11	Defined by section 12
Grounds - 1. Performed in contravention of 5(i), 5(iv), or 5(v) 2. Ceremonies in section 7 not performed. 3. In contravention of section 15 - Divorce not granted yet or time to	Grounds: 1. Unable to consummate - Impotence (not same as incapacity to conceive or impregnate) Samar vs Snigdha - Full and complete penetration (vera copula) is an essential ingredient of ordinary intercourse though degree of satisfaction is immaterial. Kanthy vs Harry - Unduly large male organ amounts

appeal has not elapsed.	to physical abnormality and thus impotence. Laxmi vs Babulal - Absence of vagina, even though an artificial vagina was created, was held impotence. Jagdeesh vs Seela - Husband lived with wife for 3 days and nights immediately after marriage but could not consummate. Held that it was because of incapacity, nervousness, or hysteria. Thus, was impotent. Shewanti vs. Bharua 1971 - Wife was sterile and suffering from non-menses, though she was capable of normal sexual intercourse. Held not impotent because capacity to bear children is not impotence. Impotence only refers to sexual intercourse. 2. In contravention of 5(ii) - Mentally unsound. Alka vs Abhilash, Balakrishna vs Lalitha (see above) 3. Consent obtained by force or fraud. Force - Rice vs Rice - threatened with pistol. Fraud - Rama vs Mohinder 1996 - Did not tell that she had a child with cesarean. Fraud - Purbi vs Basudev 1969 - Husband's pre-marriage boasting about high prospects in life is not fraud. Fraud - Som Dutt vs Raj Kumar 1986 - Wife concealed her age. She was 7 yrs elder. 4. Girl was pregnant by some other person Mahendra vs Sushila 1965 -Girl's admission to pre-marriage pregnancy when husband had no access to her.
Marriage does not exist at all.	Marriage is fully valid until it is declared void by the court.
No consequences of marriage - right in	Full consequences while marriage lasts.

property, conjugal rights, maintenance.	
No decree of court is necessary. Decree can be obtained by either person.	Court decree is necessary. Marriage can be avoided only on the petition of one spouse. If one person does not petition for annulment, marriage will remain valid. If one person dies, the marriage will remain valid for ever.
If someone calls the wife a concubine, it will not amount to defamation.	Decree is given retroactively.

Effects of a void marriage

Section 16 - Children of void (sec 11) or annulled voidable (sec 12) marriage, though termed legitimate under section 16, do not get any right in the joint family of parents. They have right in personal self earned property of parents. Spouses cannot claim any matrimonial reliefs. Illustration - A and B are brothers. W is B's wife but marriage is void. A dies without any children. B can claim all of A's property.
In the case of *Sudarsan vs State 1988*, it was held that this legitimacy is conferred only in cases when marriage is void on account of sec 11 and not if a marriage is void due to another reason such as lack of proper ceremonies.

Explain Judicial separation. What is the difference between Judicial Separation and Divorce? On what grounds can a decree of Judicial Separation be passed?

Judicial separation is a state of marriage authorized by the court where a husband and wife do not live like a married couple. In many situations it becomes impossible for either spouse to live with the other person. At the same time, they either do not want a divorce or do not have enough ground for divorce. In such a situations, court may grant a decree of judicial separation.

Judicial Separation	Divorce
Section 10 - Marriage still exists therefore cannot do	Section 13 - Marriage ends. Can remarry subject to sec

adultery etc.	15.
Not obligatory for the petitioner to cohabit with the partner.	Cannot be undone.
Can be rescinded by petition of either party if court is satisfied.	

Grounds for Judicial separation are same as given in section 13(1), which are applicable for divorce. A wife has the grounds given in section 13(2) as well. These are given below under Divorce. Section 13 (1) at fault Grounds

(i) Adultery –Voluntary intercourse with third person. Does not include rape. *Vira Reddy vs Kistamma 1969* - One single act of adultery is enough for divorce or judicial separation. Burden of proof is on the petitioner. Earlier it had to be proved beyond doubt but now only high probability is required. *Sanjukta vs Laxmi 1981* - Circumstantial evidence is sufficient. Cruelty Legal concept of cruelty has varied from time to time, place to place, and situation to situation. In early law, intention was considered an essential element of cruelty but in modern law it is not so. The intention of the law is to protect the innocent party from any harm -physical or mental. Scolding or nagging has also been considered as cruelty.

Definition

There is no precise definition of cruelty because the term is so wide. Several situations and cases over past 100 years have shown that cruelty can be mental or physical. In the case of *Dastane vs Dastane 1970 Bom*, it was held that cruelty could be through words, gestures, or even by mere silence. A general explanation of cruelty can be found in the case of *Russel vs Russel 1897*, in which it was held that any conduct that poses a danger to life, limb, or health - physical or mental, or causes reasonable apprehension of such danger, is cruelty. Earlier, the petitioner had to show that the act of the respondent caused reasonable apprehension of danger. Thus, in the case of *Sayal vs Sarla 1961* Punjab, when wife administered love-potion to the husband, causing his hospitalization, it was held to be cruelty even though she did not mean to hurt her husband because it caused reasonable apprehension of danger. However, now it is not required. The clause merely says, "if the respondent

has treated the petitioner with cruelty". In the case of *GVN Kameshwara Rao vs G Jalili 2002,* SC held that it is not necessary that the act has caused a reasonable apprehension in the mind of petitioner. The emphasis will be on the act or conduct constituting cruelty. It further held that social status of the parties, their education must be considered while determining whether the act constitutes cruelty or not. Thus, what amounts to cruelty in one case may not amount to cruelty in another. Intention to be cruel is not material Earlier intention was necessary but now it is not so. In the case of *Jamieson vs. Jamieson 1952*, House of Lords observed that unintentional acts may also amount to cruelty. In *Williams vs. Williams 1963 Allahbad*, the necessity of intention in cruelty was finally rejected in India. In this case husband was insane and constantly accused the wife of adultery. This was cruelty without intention. Thus, in the case of *Bhagwat vs. Bhagwat 1976 Bom*, when husband tried to strangulate wife's brother and he younger son in a fit of insanity, he was held to be cruel. Temporary insanity or schizophrenia cannot be a defense against the plea of cruelty. Cruelty need not only be against the petitioner .In *Bhagwat vs. Bhagwat*, cruelty against his step daughter was held as cruelty against wife.

The act or omission need not only be of the respondent since most women have to live in husband's joint family, they have to put up with their actions also. In the case of Shyam Sundar vs Santa Devi 1962, the wife was ill treated by the in-laws and husband stood their idly without caring for wife. This was held as cruelty. However, in the case of Gopal vs Mithilesh 1979 Allahbad, husband's stand of neutrality regarding wife and mother and his inaction about his mother's nagging of his wife was not considered cruelty because it is normal wear and tear of a married life. Cruelty of Child Generally, cruelty by child towards one parent does not amount to cruelty. However, in the case of Savitri vs Mulchand 1987 Delhi, mother and son acted in concert and the son tortured the father by squeezing his testicles to force him to do what they wanted him to do, was considered cruelty against the wife.

Types of cruelty - Physical and Mental

Physical Cruelty Injury to body, limb, or health, or apprehension of the same. In the case of Kaushalya vs Wisakhiram 1961 Punj, husband beat his wife so much so that she had to lodge police complaint even though injury was not serious. It was held that serious injury is not required.

Mental Cruelty

In *Bhagat vs Bhagat 1994* SC held that a conduct that causes such a mental pain and suffering that makes it impossible to live with that person is mental cruelty. Mental cruelty must be such that it cannot reasonably be expected to live together. This has to be judged on the circumstances of the case.

In the case of *N Sreepadchanda vs Vasantha 1970 Mysore*, wife hurled abuses at the husband and quarreled over trivial matters so much so that he became a laughing stock in the locality. This was held to be mental cruelty against the wife.

In *Saptami vs Jagdish 1970 Calcutta*, false accusations of adultery were held to be mental cruelty. *Yashodabai vs Krishnamurthi 1992* - Mere domestic quarrels with mother in law is not cruelty. *Shobha vs Madhukar 1988* SC-Constant demand for dowry is cruelty.
In the case of *Jyotishchandra vs Meera 1970*, husband was not interested in wife; he was cold, indifferent, sexually abnormal and perverse. It was physical as well as mental cruelty.

Desertion there is Types - Actual Desertion, Constructive Desertion, Willful neglect. Actual Desertion - factum of desertion, animus deserdendi, without reasonable cause, without consent, 2 yrs must have passed.Lachman vs Meena - 1964 - Wife was from rich family. She was required to live in joint family of husband. She went back to parents. Kept making fake promises of return but never did. Held desertion. Jagannath vs Krishna - Wife became brahma kumari and refused to perform marital obligations. Held desertion. Bipinchandra vs Prabhavati SC 1957 - Husband went to England. Husband's friend came to house in India. Husband came back. Alleged affair, which was refuted by wife. Wife went to her parents for attending marriage. Prevented her from coming back. Held no desertion by wife. Sunil Kumar vs Usha 1994 - Wife left due to unpalatable atmosphere of torture in husband's house. Held not desertion.

Constructive Desertion –

If a spouse creates an environment that forces the other spouse to leave, the spouse who created such an environment is considered deserter. Jyotishchandra vs Meera 1970 - Husband was not interested in wife, he was cold, indifferent, sexually abnormal and perverse. Went to England. Then came back and sent wife to

England for PhD. When wife came back, did not treat her well. Abused her and his inlaws physically. Wife was forced to live separately. Held desertion by husband. willful Neglect - If a spouse intentionally neglects the other spouse without physically deserting, it is still desertion. Balihar vs Dhir Das 1979 - Refusing to perform basic marital obligations such as denial of company or intercourse or denial to provide maintenance is willful neglect.

Reasonable Cause

1. If there is a ground for matrimonial relief. (ground for void, voidable marriage or grounds for maintenance under sec 18 of HAMA).
2. If spouse is guilty of a matrimonial misconduct that is not enough for matrimonial relief but still weighty and grave.
3. If a spouse is guilty of an act, omission, or conduct due to which it is not possible to live with that spouse.

Chandra vs Saroj 1975 - Forcing a brahmin wife to eat meat.

Without Consent

Bhagwati vs Sadhu Ram 1961 - Wife was living separately under a maintenance agreement. Held not desertion.

Other Grounds

Section 13 (ii) : ceased to be a Hindu.

Section 13 (iii) unsound mind. - includes mental disorders such a incomplete development of brain or psychopathic disorder or schizophrenia

Section 13 (iv) virulent and and incurable Leprosy

Section 13 (v) communicable venereal disease

Section 13 (vi) renounced the world

Section 13 (vii) presumed dead - not heard of in 7 years.

Section 13 (1-A) Breakdown Theory

(i) no cohabitation for 1 yr after passing the decree of judicial separation.

(ii) no cohabitation for 1 yr after passing the decree of restitution of conjugal rights.

Effected by provisions in section 23.

Section 13(2) Additional grounds for wife

(i) another wife of the husband is alive.

(ii) Rape, Sodomy, Bestiality.

(iii) Wife was awarded maintenance under section 15 of HAM 1956 or under section 125 of CrPC and no cohabitation has occurred for 1 yr after the award.

(iv) If wife was under 15 at the time of marriage and if she repudiates the marriage before 18.

Section 13-A Alternate relief in divorce proceedings - If the judge feels that sufficient grounds do not exist for divorce, he can grant judicial separation.

Section 13-B Divorce by mutual consent

(b)An Overview of Concept of Marriage in Muslim Law

Islam, unlike other religions is a strong advocate of marriage. There is no place of celibacy in Islam like the Roman Catholic priests & nuns. The Prophet has said "There is no Celibacy in Islam".

Marriage acts as an outlet for sexual needs & regulates it so one doesn't become slave to his/her desires. It is a social need because through marriage, families are established and the families are the fundamental entity of our society. Furthermore marriage is the only legitimate or halal way to indulge in intimacy between a man and woman.

Islamic marriage although permits polygamy but it completely prohibits polyandry. Polygamy though permitted was guarded by several conditions by Prophet but these conditions are not obeyed by the Muslims in too.

Marriage:-Pre Islamic Position

Before the birth of Islam there were several traditions in Arab. These traditions were having several unethical processes like:-

(i) Buying of girl from parents by paying a sum of money.

(ii) Temporary marriages.

(iii) Marriage with two real sisters simultaneously.

(iv) Freeness of giving up and again accepting women.

These unethical traditions of the society needed to be abolished; Islam did it and brought a drastic change in the concept of marriage.

Marriage Defined

It is quiet relevant to know whether the Muslim marriage is a sacrament like the Hindu marriage, for this let us get acquainted with some of the definitions of Muslim marriage.

(a) Hedaya 1: - Marriage is a legal process by which the several process and procreation and legitimation of children between man and women is perfectly lawful and valid.

(b) Bailies Digest 2:- A Nikah in Arabic means "Union of the series" and carries a civil contract for the purposes of legalizing sexual intercourse and legitimate procreation of children.

(c) Ameer Ali 3:- Marriage is an organization for the protection of the society. This is made to protect the society from foulness and unchestity.

(d) Abdur Rahim 4:- The Mahomedan priests regard the institution of marriage as par taking both the nature of "Ibadat" or devotional arts and "Muamlat" or dealings among men.

(e) Mahmood J. 5:- Marriage according to the Mahomedan law is not a sacrament but a civil contract.

(f) Under Section 2 of Muslim Women (Protection of Rights on Divorce) Act, 1986 Marriage or Nikah among Muslims is a 'Solemn Pact' or 'Mithaq-e-ghalid' between a man & a woman, soliciting each other's life companionship, which in law takes the form of a contract or aqd.

It's a matter of query still existing whether Muslim marriage is only a civil contract or an Ibadat & Muamlat. While unleashing the various definitions it's quite a big problem to say which one is the most appropriate, in my opinion although the essentials of a contract is fulfilled yet marriage can never be said to be a contract because marriage always creates a bondage between the emotions and thinking of two person. J Sarsah Sulaiman6 has said "In Islam, marriage is not only a civil contract but also a sacrament."

Muslim marriage can also be differentiated from a civil contract on the basis of following points:-
(a) It cannot be done on the basis of future happenings unlike the contingent contracts.
(b) Unlike the civil contract it cannot be done for a fixed period of time. (Muta Marriage being an exception.)

Purpose of Marriage

The word "Zawj" is used in the Quran to mean a pair or a mate. The general purpose of marriage is that the sexes can provide company to one another, procreate legitimate children & live in peace & tranquility to the commandments of Allah. Marriage serves as a mean to emotional & sexual gratification and as a mean of tension reduction.

Marriage compulsory or not?

According to Imams Abu Hanifa, Ahmad ibn Hanbal & Malik ibn Anas, marriage in Islam is recommendatory, however in certain individuals it becomes Wajib or obligatory. Imam Shafi considers it to Nafl or Mubah (preferable). The general opinion is that if a person, male or female fears that if he/she does not marry they will commit fornication, then marriage becomes "Wajib". However, one should not marry if he does not possess the means to maintain a wife and future family or if he has no sex drive or if dislikes children, or if he feels marriage will seriously affect his religious obligations.

Prophet said:-

"When a man marries he has fulfilled half of his religion, so let him fear Allah regarding the remaining half." This very wording of Prophet marks the importance of marriage, thus it could be well concluded that marriage in Islam is must.

Capacity for Marriage

the general essentials for marriage under Islam are as follows:-
(i) Every Mahomedan of sound mind and having attained puberty can marry. Where there is no proof or evidence of puberty the age of puberty is fifteen years.
(ii) A minor and insane (lunatic) who have not attained puberty can be validly contracted in marriage by their respective guardians.
(iii) Consent of party is must. A marriage of a Mahomedan who is of sound mind and has attained puberty, is void, if there is no consent.

Essentials of Marriage

the essentials of a valid marriage are as follows:-

(i) There should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other party.

(ii) The proposal and acceptance must both be expressed at once meeting.

(iii) The parties must be competent.

(iv) There must be two male or one male & two female witnesses, who must be sane and adult Mahomedan present & hearing during the marriage proposal and acceptance. (Not needed in Shia Law)

(v) Neither writing nor any religious ceremony is needed.

Essentials Explored

(i) A Muslim marriage requires proposal 'Ijab' from one party and acceptance 'Qubul' from the other side. This must be done in one sitting.

(ii) The acceptance must be corresponding to what is being offered.

(iii) The marriage must be effectively immediate. If the Wali says "I will marry her to you after two months", there is no marriage.

(iv) The two parties must be legally competent; i.e. they must be sane and adult.

(v) The women must not be from the forbidden class.

(vi) The consent given must be free consent. It must not be an outcome of compulsion, duess, coercion or undue influence.

Kinds of Marriage

Under Muslim generally two types of marriage is recognized

(i) Regular Marriage (essentials discussed earlier)

(ii) Muta marriage

Muta Marriage: -Muta marriage is a temporary marriage. Muta marriage is recognized in Shia only. Sunni law doesn't recognize it. (Baillie, 18). A Shia of the male sex may contract a Muta marriage with a woman professing the Mahomedan, Christian or Jewish religion, or even with a woman who is a fire worshipper but not with any woman following any other religion. But a Shia woman cannot contract a Muta marriage with a non

muslim.

The essentials of Muta marriage are:-

(1) The period of cohabitation should be fixed.

(2) Dower should be fixed.

(3) If dower specified, term not specified, it could amount to permanent or regular marriage.

(4) If term fixed dower not specified, it amounts to void marriage.

Aspects of Marriage

(i) Valid or Sahih

(ii) Irregular or Fasid

(iii) Void or Batil

(i) Valid or Sahih Marriage**: -** Under the Muslim law, a valid marriage is that which has been constituted in accordance with the essential conditioned prescribed earlier. It confers upon the wife; the right of dower, maintenance and residence, imposes on her obligation to be faithful and obedient to her husband, admit sexual intercourse with him & observe Iddat.

(ii) Irregular or Fasid Marriage: **-** Those marriages which are outcome of failures on part of parties in non fulfillment of prerequisites but then also are marriages; to be terminated by one of the party is termed to be Irregular marriages. They are outcome of-

(a) A marriage without witness (Not under Shia Law)

(b) Marriage with fifth wife.

(c) Marriage with a women undergoing Iddat.

(d) Marriage with a fire-worshipper.

(e) Marriage outcome of bar of unlawful conjunction.

An irregular marriage has no legal effect before consummation but when consummated give rise to several rights & obligations.

(iii) Void or Batil Marriage: **-** A marriage which is unlawful from its beginning. It does not create any civil rights or obligations between the parties. The offspring of a void marriage is illegitimate. They are outcome of-

(a) Marriage through forced consent.

(b) Plurality of husband.

(c) Marriage prohibited on the ground of consanguinity.

(d) Marriage prohibited on the ground of affinity.

(e) Marriage prohibited on the ground of fosterage.

Effect of Marriage (Sahih)

The lawful obligations which arise after marriage are as follows-

(i) Mutual intercourse legalized and the children so born are legitimate.

(ii) The wife gets power to get 'Mahr'

(iii) The wife entitles to get maintenance.

(iv) The husband gets right to guide and prohibit the wife's movement (for valid reasons only)

(v) Right of succession develops.

(vi) Prohibition of marriage due to affinity.

(vii) Women bound to complete Iddat period & not to marry during Iddat period; after divorce or death of husband.

The obligations and rights set between the two parties during and after the marriage are to be enforced till legality. On the basis of a marriage husband and wife do not get the right on one another's property.

Conclusion

Marriage is a religious duty of every Muslim and it is considered to be a moral safeguard and a social need. The Prophet has also said "Marriage is my tradition whosoever keeps away there from is not from amongst me."

Unlike Hindu where the marriage is a sacrament, marriages in Muslims have a nature of civil contract. Marriage is necessary for the legitimization of a child. When the marriage is done in accordance to the prescribed norms it creates various rights and obligations on both the parties.

Maintenance U/S 125

The object of this provision is to provide a summary remedy to the dependent wife, children, and parents from destitution and to serve a social purpose. The right under these provisions cannot be defeated by anything in the personal law of the parties.

Who is entitled to maintenance?

1. Wife if she is unable to maintain herself,
2. Legitimate or illegitimate minor child, whether married or not, who is unable to maintain himself or herself
3. Father or mother who is unable to maintain himself or herself,

Relief Available

Where a person having sufficient means refuses or neglects to maintain the persons eligible as above:

A Magistrate of the First Class may, upon proof order such person to pay a monthly allowance at the rate not exceeding RS. 500 on the whole.

In case of a minor female married child the Magistrate may order the father to pay such maintenance, until she attains the age of majority, if the Magistrate is satisfied that the husband of such minor female child is not possessed with sufficient means.

"Minor" means a person who has not completed the age of 18 years.

"Wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

Where to File the Application

The application for maintenance may be filed in the district where

- He is, i.e. where he works for gain or;
- He or his wife resides, or;
- Where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

Limitation

There is no period of limitation prescribed for making an application for maintenance.

Exceptions

No wife shall be entitled to receive an allowance from her husband if:

1. She is living in adultery, or
2. Without any sufficient reason she refuses to live with her husband, or
3. They are living separately by mutual consent.

However if the husband has married another woman or keeps a mistress, it shall be considered to be just ground for the wife's refusal to live with him.

Maintenance cases

Firstly a Dowry case under section 498a and then the maintenance cases under sections 125 and 24. Indian Laws have given full right to extract money from his male partner.

The laws don't even consider the situations and if she is putting any reason then why doesn't the court wait till that is fully proved. Now-a-days girls put a case of 498a and then a case under section 125/24 for maintenance putting the same grounds as reason for staying away from husband then why doesn't the court asks her to prove her reason to stay away from the husband, and if that is the reason given by her then why doesn't teh court ask her to prove, so that the respondent may also be able to understand the reason.

Following are some of the case references that can be used in various conditions against the sections of alimony.

(1) In *Ravinder Haribhau Karamkar V/s Shaila Ravinder Karamkar, 1992, Cr. L.J. 1845 (Bombay)* – in this reference case, it was held that during the pendency of a filed regular civil court petition under Section 24 of

HMA, wife also simultaneously filed a parallel petition under 125 Cr.P.C. of the Code. It was held that the petitioner wife could not be allowed to ride two different horses at the time (two simultaneous proceedings in two different courts) and could not be permitted to continue the maintenance proceedings under section 125 Cr. P.C. when she has already chosen the alternative remedy by filing first a regular civil court suit for maintenance. It is well established that the judgment of the civil court shall prevail over the judgment of the criminal court. The natural justice demands that parallel proceedings cannot be allowed to continue in different courts.

(2) In *Amita Vs Raj Kumar, 2005, Case No. 151/03*, Ms. Ruby Alka Gupta, Hon'ble M.M., Kakardoma Courts (Delhi) – it states that the petitioner has failed to show any sufficient cause for her residing separately with the respondent. The view of the fact that the petitioner has been unable to establish one of the conditions required to be shown by her to be entitled under Section 125 Cr.P.C. the Hon'ble Court is of the opinion that the other questions arising in the matter, viz. whether she is able to support herself and whether the respondent has sufficient means to support her need not be considered.

(3) In *Aleamma Mathew Vs C.M. Mathew, 2004*, Case No. 80/03, Ms. Ruby Alka Gupta, Hon'ble M.M., Kakardoma Courts (Delhi) – it states that bare reading of section 125 Cr.P.C. shows that a person who is able to maintain onself is not entitled to maintenance under this provision. It is an admitted case of the parties that the petitione no. 1 is employed in the private establishment and is earning about Rs. 9000/- per month. Since petitioner no. 1 is able to maintain her, she is not entitled to the maintenance under section 125 Cr.P.C.

(4) In *Namita Rani Bose V/s Dipak Kumar Bose*, 1982 (2) H.L.R. 58 (AII.) – it was observed that the phrase "unable to maintain herself" means unable to earn a livelihood. This obviously means that the earning is such that the wife can maintain herself without depending upon others. But merely because she is earns a paltry sum by engaging herself in some profession, which may not even be sufficient to give one meal a day, it cannot be said that she is unable to maintain herself with the income she earns. The income should be such which is sufficient for an ordinary person to be maintained out of it.

(5) In *Zubedai V/s Abdul Khader,* 1978 Cr. L. J. 1460 (Bombay) – it states that, Karnataka High Court has taken a contrary view in case of Zubedai holding the petitioner must positively aver in her petition that she is unable

to maintain herself in addition to the facts that her husband has sufficient means to maintain her and he has neglected to maintain her.

(6) In *Kavita Vs. Gurdit Singh,2005*, Case No. 76/03,Ms. Ruby Alka Gupta, Hon'ble M.M., Kakardoma Courts (Delhi) – it states that the petitioners have to furnish evidence to show that the respondent is actually running several business. Thus the petitioners have not able to prove an essential requirement of the provision.

(7) In *Geeta Vs Rakesh, 2005*, Case No. 703/03, Ms. Ruby Alka Gupta, Hon'ble M.M., Kakardoma Courts (Delhi) – it states that the petitioner has been unable to show that she is residing separately from the respondent due to sufficient cause or that the respondent has refused to maintain her.

(8) In *Amita Vs Raj Kumar, 2005*, Case No. 151/03, Ms. Ruby Alka Gupta, Hon'ble M.M., Kakardoma Courts (Delhi) – it states that the petitioner has failed to show any sufficient cause for her residing separately with the respondent. The view of the fact that the petitioner has been unable to establish one of the conditions required to be shown by her to be entitled under Section 125 Cr.P.C. the Hon'ble Court is of the opinion that the other questions arising in the matter, viz. whether she is able to support herself and whether the respondent has sufficient means to support her need not be considered.

(9) In *Sudershan Lal V/s Smt. Deepak @ Reema Khurana, 1985* Cr. L.J. (NOC) 52 and Paramjit Kaur V/s Surinder Singh, 1992(2) Criminal Court Judgments 171 (Pb. & Har.)– it was held that the wife can claim only one maintenance. Though there are different forums open to her to claim maintenance, yet there cannot be parallel running of different maintenance orders, for one and the same. Only one of them is enforceable and others remain just decelerate in dormancy or consumed. It is for the wife to choose as to which of the two orders she wants to enforce.

(10) In *Neeta Vs Vijay Kumar, 2005, Case No. 259/03*, Ms. Ruby Alka Gupta, Hon'ble M.M., Kakardoma Courts (Delhi) – it states that based on submissions of the petitioners the petitioners have failed to prove their averments, having not led any evidence in support of their case.

(11) In *Kiran Vs Amar Singh, 2005,* Case No. 52/03, Ms. Ruby Alka Gupta, Hon'ble M.M., Kakardoma Courts (Delhi) – it states that the petitioner no. 1 does not wish to reside with her husband. She has also not been able to assign any cause, much less a sufficient cause for not wanting to stay together at the matrimonial house. The respondent on the other hand, is willing to keep and maintain her. The respondent is, therefore, not guilty of having neglected or refused to keep and maintain the petitioner no. 1. As the petitioner no. 1 left the society of the respondent and refused to join his company, she is not entitled to the relief of maintenance allowance.

Found some helpful S. 24 HMA citations.

(1) (*Dr. N. G. Dastane Vs. Sucheta Dastane*) (AIR 1975, SC 1574 = 1975 (3) SCR 967 DMC 1981 (1) 293) It states as: What standard of proof requires to prove "Cruelty"?> In case of Dastane Vs. Dastane, the Supreme Court held that, the normal rule which governs civil proceedings is that a fact can be said to established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act Section 3, a fact is said to be proved when the court either believes it to exist or consider its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities, he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved.

Section 23 of H.M. Act confers on the court the power to pass a decree if it is "satisfied" on matters mentioned in cls. (a) to (e) of the Section. Considering that proceedings under the Act are essentially of a civil nature, the work "satisfied" must mean "satisfied on preponderance of probabilities" and not "satisfied beyond a reasonable doubt". Section 23 does not alter the standard of proof in civil cases.

"Condonation" means forgiveness of the matrimonial offence the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute Condonation, there must be two things: Forgiveness and Restoration.

Sex plays on important role in marital life and cannot be separated from other factors which lead to matrimony a sense of fruition and fulfillment. Where, therefore there is evidence showing that the spouses led a normal sexual life even after a series of acts of cruelty by one spouse then that is clear proof of Condonation of cruelty by the other spouse.

Further, held that intercourse, of course, is not a necessary ingredient of Condonation because there may be evidence otherwise to show that the offending spouse has been forgiven and has been received back into the position previously occupied in the home. But, intercourse in circumstances as obtain here would raise a strong inference of Condonation with its dual requirement, forgiveness and restoration.

Held, that where Condonation is not pleaded as a defence by the respondent, it is the duty of the court to find out whether the cruelty was condoned by the petitioner in view of the provisions of Sec. 23 (1) (b) of the H.M. Act, which casts an obligation on the court to consider the question of Condonation, an obligation which has to be discharged even in undefended cases.

(2) (*Kamini Gupta vs. Mukesh Kumar Gupta) AIR.1985 Del 241* = 1985 C.C.C 165 D M C 1985 (1)P 136 It states as: Wife making unfounded allegations with an intention to hurt her husband – As to womanizer, drunkard etc., Husband entitled to a decree of divorce on ground of wife's mental cruelty. The parties were married on 6-6-1971. On 19-6-78 they separated and have since then been living apart. There are four daughters of the marriage. They are in the custody of the husband. The husband filed the petition for divorce in June 1979 on the ground of cruelty alleging that at a meeting held on 3-7-78 in the presence of the parties relations when negotiations for the resettlement of the parties were a foot, the wife last her temper and started abusing him and called him a heavy drunkard. She complained in the meeting that the husband has been bringing girls in the matrimonial home. As a result of the imputations and accusations, the talks of reconciliation broke down. Thus, was the husband's positive case in the petition? In her written statement the wife replied that she never falsely accused the character of petitioner's suggesting there by that the charges leveled against the husband were not false. When the case came for trial, the wife in her evidence repeated these charges times out of number. She named three girls namely – Rupa, Mamta and Alka Sayal, with whom the husband had extra-marital relations. About Rupa, the wife said that she was a cabaret. When the parents of husband were away to Simla, one night the husband brought Rupa to the house and started drinking with her. The wife was present. Afterwards, the

husband wanted to "indulge in sex" with Rupa. This the wife could not stand. So in utter disgust, she withdrew herself from the room the husband and Rupa were stayed for the whole night, she says. About Mamta, the wife said that Mamta ill-reputed girl, worked in the husband's office in kamlanagar, and she said that she have seen Mamta herself when she came to our house. About Alka, the wife narrated that the husband had married and she was pregnant from him. The trial judge disbelieved the evidence of wife. It is observed that the husband's father was at the relevant time an Additional District judge in Delhi, just opposite the husband's father's flat was the flat of their near relations. In this environment, it seems most unlikely that the husband will bring a cabaret dancer to the flat that will stay throughout the night in the house in wife's presence. The case of husband's sexual relationship with Mamta and Alka equally remained unproved. There is no cogent evidence on record that the husband was a philanderer or that he was flirting with girls or dangling after women. Found that the charges of immorality leveled by the wife are reckless in the extreme and entirely baseless. Held, that any man with reasonable self-respect and power of endurance will find difficult to live with a taunting wife when such taunts are in fact insults and indignities Human nature being what it is, a reasonable man's reaction to the conduct of the offending spouse is the test. Held that the court cannot accede to her request to allow her to withdraw her allegations against the husband, as it will not do any good to their matrimonial relations.

(3) *(Urmila Devi & other vs. Ravi Prakash)* (DMC 1984 (II), P.339, DEL HC.) It states as: Wife baselessly and falsely alleging the husband as "Drunkard, gambler & womaniser" – Amounts to cruelty. Parties married o 18-11-71 at Meerut and one daughter Neelam and son Neeraj born. The husband was daily traveling by train to attend his duties at Delhi. Husband alleged that she has never bothered to take care of the female child nor she ever tried to meet her and she has ruined the life of the husband and the minor children. In her notice, she made allegations against him and his character by saying that he was a drunkard, gambler and characterless. These allegations caused mental pain and agony in his mind which amounts to cruelty; again she repeated these same allegations in her written statement. Held that, unfounded and false allegations by wife against her husband in her notice, maintenance application and in her written statement that the husband is drunkard, gambler and womanizer are the acts amounted to cruelty and as such having made such allegations, it cannot be said that she was not committing the act of cruelty to the extent required by law to be harmful and injurious for the husband. Further, held that – one act of cruelty is enough to dissolve the marriage and persistence is not required.

(4) (*Sushil Kumar Verma vs. Vsha*) AIR. 1987 (Del) 86 = D.M.C. 1986 (2), 25, Del H.C.)=1986 AIR C.C. 890

1986 Marr L.J. 375=1986 (2) HDR. 104=1987 Mat L.R. 93. It states as: Wife terminated pregnancy without consent of the husband. The parties were married according to the Hindu rites on 23-11-1980 at Delhi. The wife is stated to have left the husband on 15-2-1981. The husband asserted that the wife is guilty of cruelty as she has taken steps to take the medicine and entered a Nursing Home for the purposes of terminating the pregnancy. The husband has deposed that he had not given his consent to the wife for the termination of her pregnancy. From the above facts it is quite apparent that she had got pregnant after having married the appellant husband; that she did not want this child and so she had the pregnancy terminated. Held, that aborting the fetus in the very first pregnancy by a deliberate act, without the consent of the husband, would amount to cruelty. It is already held in case reported as Deepak Kumar Arora V. Sampuran Arora, 1 (1983) D.M.C. 182; "If however, a wife undergoes abortion with a view to spite the husband, the it may, in certain circumstances, be contended that the act of getting herself aborted has resulted in a cruelty."

(5) (*Manorama vs. Karna Singh*) (D.M.C. 1983 (1) 366 (P&H) It states as: Wife adopted continuous disrespectful attitude towards husband and his family members – she even not attending funeral of father-in-law – Wife held guilty of mental cruelty – Divorce decreed. The marriage between the parties was solemnized on 25th April, 1969 and out of that wedlock, a son was boned in the year 1972. Allegations of the husband were that the treatment of the wife towards him has been cruel in as much as, she always adopted disrespectful attitude and misbehavior towards him. She used foul filthy and abusive language towards him in the presence of his parents and other persons. She also did not pursue her domestic affairs and during all this time she used to pick up quarrels with her in laws without any reason or cause. Her behavior and attitude has always been injurious to his health and welfare. The conduct of the wife, according to the husband amount to cruelty affecting his mental peace making him unable to perform his official duty properly, and this caused reasonable apprehension in the mind of the husband that living with her would be mental torture. Even the wife did not come to condole the death of his father who had died on 9-9-1979. Consequently, the husband filed the divorce petition on 24-9-79. The wife denied all the allegations of her bad conduct and cruelty towards her husband his parents, as alleged. According to her, the real bone of contention is that the husband is in the habit of taking liquor and she used to request him to give up this habit, but he used to take it ill and rebuke her. Held, that her conduct has been blame worthy to such an extent that she even did not attend the funeral ceremony of her father-in-law. This certainly hurt the feelings and sentiments of her husband and it appears that on that account the present petition for divorce was filed immediately within a month thereto. Observed that Law does not

require that at the first appearance of a cruel act. The other spouse must leave the matrimonial home lest the continued cohabitation be construed as Condonation. Mere fact that the spouse continued to share a common home during or for some time after the spell of cruelty is not sufficient to prove Condonation… as held in Dr. N.G. Dastane's case.

(6) (*Usha vs. Vimal Kumar*) (D.M.C. 1987 (1), P.164, M.P.) It states as: Wife scuffled with the husband – Slapped him – she living separately and doing service & refused to come back – Her improper behavior with him. Parties married in 1974 and they resided together at Manasa. Thereafter, she has been residing away from her husband's home and is in service. Husband filed divorce suit on the ground that in 1975, he had occasion to meet her and had then directed her to accompany him, she had refused to do so and had engaged herself in marpit (scuffle) with him and had also slapped him, and had also threatened him to kill. Her behavior with him and with the persons of his family was not proper. She used to disobey his mother and she has subjected her to unbecoming behavior. She deserted him. Observed, that in 1977, she without seeking her husband's approval had been to Bhopal for training and thereafter is in service. All this is clearly indicative of the fact that at a very early stage she had taken a decision to live away from the conjugal home. Further, if the husband, from the very inception had any motive of divorcing her and of remarrying he could have instituted suit much earlier. He instituted the suit in 1983 when he found that there is no possibility of her returning to home. Held that, the words "treated with cruelty" imply harsh conduct of a certain intensity and persistence, which would make it almost impossible to operate the marriage. Legislature has left it to the courts to determine on the facts of each case whether the conduct amounts to cruelty and while deciding case, under this provision, courts would keep in mind the principle that relief is granted not only to protect a spouse from physical injury, but also from danger to mental health.

(7) (*Saroj vs. Dashrath*) (D.M.C. 1986 (2) 277, M.P.) It states as: Wife indifferent to household duties – often go to her parents house – quarrels with husband – Got search warrant through her parent on false allegations – Caused humiliation to the husband. The parties were married on 10-5-1987, and they lived as husband and wife at Indore, where her parents also live. A child named Meeraj was born to them. Thereafter, the relations became strained. The wife who has been employed as a Teacher even from before the marriage, became indifferent to the household needs and would not cook the meals and would return to her parent's house which is also in Indore. On opposition by the husband, the wife used to quarrel with the husband. During the continuance of

such strained relations her parents made an application u/s 100 of Cr.P.C. for issuing a search warrant for her production before the Sub Divisional Magistrate. The police searched her out from the husband's house when he was out and produced before the S.D.M. who put her in rescue home and from there; she was set to liberty to her parent's house. In that proceeding, all sorts of false allegations and charges were leveled against the husband. After recording her statement, the learned S.D.M. did not find that her confinement was wrongful. However, since she wanted to keep herself away, from the husband, the aforesaid order was passed. That proceeding resulted in humiliation and mental agony. Held that the wife made false accusation against the husband in the proceeding before the S.D.M. for issue of search warrant. The allegations were found to be false. In such a situation, one cannot escape concluding that the husband must have suffered lot of humiliations followed by mental agony, amounting to cruelty. The decree for divorce is therefore confirmed.

(8) (*Prakashchandra vs. Radharani*) (D.M.C. 1986 (2) 376, M.P.) It states as: Wife insisting the husband to provide money for her parents – Husband failing – Beating the child – Quarrelling – Falsely alleging demand of dowry by husband. The parties are residents of Indore and were married on 19-4-1980 according to Hindu rites. As a result of their wedlock, they have also a son. The appellant-husband alleged that the wife always treated him with cruelty. She used to insist on sparing money for payment to her parents and on refusal always quarreled with him. She expressed her annoyance by indiscriminate beating of the child. On account of her quarrelsome habit, he, on his transfer from Bhopal to Indore was forced to live separate from his parents. She however, continued pressing demands for money for her parents and on his refusal as before, she picked up quarrel with him and finally deserted him o 25-09-1981, after throwing the child at his mother. After about an hour, she came back with their parents and uncle and forcibly took away the child. Observed the falsity of her defince that the husband used to demand dowry of Rs. 1000 and a gold chain is exposed by the fact that she had to admit that she never mentioned about the alleged demand in any of the letters sent by her to her father. This court is legitimately entitled to draw an adverse inference by non-production of those letters and non examination of her father, though alive and available. Held, that she treated the husband with cruelty and she has not been able to substantiate her defense story. The husband has discharged his part of the burden that she treated him with cruelty and deserted him for more than statutory period of two years. Since, she did not justify her separate residence; the husband is entitled to a decree for divorce on both grounds viz. cruelty and desertion.

(9) (*Kuldip Kaur vs. Premsingh*) (DMC 1986 (2), 334, P&H.) It States as: Wife left the matrimonial house

without any justification – was of un-accomadative nature – not willing to do domestic works. Briefly, the fact are that the parties were married on March 9th, 1980, according to Hindu rites at Bhawarigarh, Dist. Sangrur. The petitioner-husband was a Clerk in the Punjab and Sind bank at Samana, while the wife was a teacher in Govt. Girls School, Sector 21, and Chandigarh. It is averred by the husband that the wife was of an unaccommodating nature and was not willing to do domestic work. He, therefore, had to cook meals to avoid confrontation. A son was born to the wife out of the wedlock on 25-8-1981. The husband called his mother for looking after the child, but the wife started misbehaving and picking up quarrels with her on one excuse or other. On 20-2-1982, she left his house and went to reside at her brother's house. In spite of his efforts, no compromise could be arrived at between the parties. Evidence with corrobation by witnesses came on record supporting the contentions of the husband. Held, that the wife has to share the burdens of the husband. According to our culture and heritage, it is considered to be the duty of the lady not only to look after her husband and the children, but also to look after her in-laws. Further, held that the wife should not have left the house of the husband on that ground.

(10) (*Rajni vs. Ashok*) (D.M.C. 1978 (1), P. 286, M.P. High Court) It states as: Wife causing mental tension to husband by her conduct and by her improper development of mind – Held, mental cruelty to husband. After marriage on 20-5-1985, the petitioner wife lived with the husband for about a month and thereafter she is living away from him. During this period the evidence on the side of the husband came on record that her conduct was not that of a person of sound mind. His version is that the resides in the upper storey of a building and the bathroom in half naked condition for the upper storey. When asked for prepare three thalis, she placed six on the table, she falsely accused one of his guest of theft of an egg etc., which evidence is supported by other witnesses. Even the trial judge observed that according to her she has not singe the written statement, she does not know what is meant by guests, she does not know why marriage is performed and what is the relationship between the husband and wife, she does not know what is sexual intercourse she does not know with whom she used to sleep etc., her evidence clearly `proves' that the case is not one of mere dullness of intellect but goes beyond that. Observed that, she is suffering from mental disorder, and the husband cannot reasonably be expected to live with her. In this instant case, it is held that the wife can be said to have treated the husband with cruelty, despite her disabled mind, within the meaning of S. 13(1)(ia). Observed that for legal cruelty for matrimonial cause, it is not necessary that physical violence must be proved. Ordinarily treating a person with cruelty implies an intentional or willful conduct, studied neglect and indifference or calculated and conscious

behavior occasioning pain to the person concerned. But, also already held that `cruelty' as a matrimonial offence may be found without there being the element of intention, as in case of `insanity' – (Jia Lal Abrol's case – (AIR 1978 J & K, 67)

(11) 1995 (II) DMC 444 1995 (II) HLR 97 *Meena Rani Vs. Madanlal* (Punjab & Haryana) Justice: Gharjavani It states as: Sec. 13(1)(ia) and (ib) – Husband's divorce case on ground of cruelty and desertion – wife left matrimonial home without any reasonable ground – she was employed but not accounting for her salary to the husband nor disclosing where she used to spend it-staying away with her parents of and on without informing her husband – Refused to live with husband and rather the wife and her mother pressing him to live at the house of her mother as Gharjavani. Held all these acts amounts to cruelty – Trial Court rightly granted divorce in favour of husband – Appeal of wife also dismissed.

(12) 1987 (1) DMC 259 AIR 1988 Delhi page 37, 1987 Marr. LJ 217 (1987) (I) HLR 354 *Hem Chandra Misra Vs. Smt. Satyh Misra* It states as: Sec. 13 (1)(ia)(ib) – Cruelty – wife living apart for 3 years – Husband making several efforts but she refused to came back – wife abusing towards her husband in presence of other members of the house – Her conduct amounts to cruelty.

Christian Law of Marriage in India

The Christian Law of Marriage in India is governed by the Indian Christian Marriage Act of 1872.

Marriage, as is seen in Christian tradition, is not merely a civil contract nor is it purely a religious contract. It is seen as a contract according to the law of nature, antecedent to civil institutions and by itself an institution. A marriage among Christians is traditionally understood as the voluntary union for life of one man and one woman to the exclusion of all others, and Indian law follows suit, so that India does not allow for the possibility of same-sex marriage as it has been celebrated by some churches in other countries in recent years.

(c)Indian Christian Marriage Act

The law regulating solemnization of marriages among Indian Christians is laid down in the Indian Christian Marriage Act of 1872. It was the British-Indian administration that enacted the law.

Extent of the Act

The Indian Christian Marriage Act of 1872 extends to the whole of India except the territories which, immediately before the 1st November, 1956, were comprised in the State of Travancore-Cochin, Manipur and Jammu and Kashmir. Therefore this Act does not apply to marriages of Christians solemnized in the territories of the former States of Travancore and Cochin which now form part of Kerala and Tamil Nadu. However, civil marriages among Christians in the former State of Cochin are governed by the provisions of the Cochin Christian Civil Marriage Act (Act V of 1095 M.E = 1920 A.D). There is no statute regulating solemnization of marriages among Christians in Jammu and Kashmir and Manipur. It is the customary law or personal law that prevails there.

Applicability of the Act

It is specifically provided under section 4 of the Act that every marriage in India between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of the Indian Christian Marriage Act and any such marriage solemnized otherwise than in accordance with such provisions shall be void.

Persons by whom marriages may be solemnized

Marriages under the Act may be solemnized in India by any person who has received Episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of which he is a Minister; or by any Clergyman of the Church of Scotland, provided that such marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of Scotland or by any Minister of Religion licensed under the Act to solemnize marriage or by, or in the presence of a Marriage Registrar appointed under the Act or by any person licensed under the Act to grant certificates of marriage between Indian Christians.

Grant and revocation of licenses to solemnize marriage

The State Government, may, by notification in the official Gazette, grant licenses to Ministers of Religion to solemnize marriages within such territories, and may, by a like notification, revoke such licenses.

Marriage registrars

The State Government may appoint one or more Christians, either by name or as holding any office for the time being to be the Marriage Registrar or Marriage Registrars for any district subject to its administration. Where there are more Marriage Registrars than one in any district, the State Government shall appoint one of them to be the Senior Marriage Registrar. When there is only one Marriage Registrar in a district, and such Registrar is absent from such district, or ill, or when his office is temporarily vacant, the Magistrate of the district shall act as, and be, Marriage Registrar thereof during such absence, illness, or temporary vacancy.

Time for solemnizing marriage

Every marriage under the Act shall be solemnized between the hours of six in the morning and seven in the evening. However, this restriction will not apply to a Clergyman of the Church of England in India from solemnizing a marriage under a special license permitting him to do so at any hour other than between six in the morning and seven in the evening, under the hand and seal of the Anglican Bishop of the Diocese or his Commissary, or a Clergyman of the Church of Rome in India from solemnizing a marriage between the hours of seven in the evening and six in the morning, when he has received a general or special license in that behalf from the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage is so solemnized, or from such person as the same Bishop has authorized to grant such license, or a Clergyman of the Church of Scotland solemnizing a marriage according to the rules, rites, ceremonies and customs of the Church of Scotland.

Notice of intended marriage before a Minister of Religion

Whenever a marriage is intended to be solemnized by a Minister of Religion licensed to solemnize marriages under this Act, one of the persons intending marriage shall give notice in writing, according to the form contained in the First Schedule in the Act or to the like effect, to the Minister of Religion whom he or she desires to solemnize the marriage, and shall state therein the name and surname, and the profession or condition,

of each of the persons intending marriage, the dwelling-place of each of them, the time during which each has dwelt there and the Church or private dwelling in which the marriage is to be solemnized provided that, if either of such persons has dwelt in the place mentioned in the notice during more than one month, it may be stated therein that he or she has dwelt there one month and upwards.

Publication of such notice

If the persons intending marriage under this Act desire it to be solemnized in a particular Church, and if the Minister of Religion to whom such notice has been delivered be entitled to officiate therein, he shall cause the notice to be affixed in some conspicuous part of such Church. But if he is not entitled to officiate as a Minister, in such Church, he shall, at his option, either return the notice to the person who delivered it to him, or deliver it to some other Minister entitled to officiate therein, who shall thereupon cause the notice to be affixed as aforesaid. If it be intended that the marriage shall be solemnized in a private dwelling, the Minister of Religion, on receiving the notice prescribed in section 12, shall forward it to the Marriage Registrar of the district, who shall affix the same to some conspicuous place in his own office.

Procedure on receipt of notice

The Marriage Registrar or Senior Marriage Registrar, as the case may be, on receiving any such notice, shall affix it to some conspicuous place in his own office, and the latter shall further cause a copy of the said notice to be sent to each of the other Marriage Registrars in the same district who shall likewise publish the same in the manner above directed.

Solemnization of marriage

After the issue of the certificate by the Minister, marriage may be solemnized between people therein described according to such form of ceremony as the Minister thinks fit to adopt provided that the marriage be solemnized in the presence of at least two witnesses besides the Minister. Whenever a marriage is not solemnized within two months after the date of the certificate issued by such Minister as aforesaid, such certificate and all proceedings (if any), thereon shall be void, and no person shall proceed to solemnize the said marriage until new notice has been given and a certificate thereof issued in manner aforesaid.

Marriages to be registered

All marriages solemnized in India between persons one or both of whom professes or profess the Christian religion, except marriages solemnized by the Marriage Registrar or persons licensed under the Act, shall be registered in the manner prescribed under Part IV of the Act.

When any marriage between Indian Christians is solemnized by any Clergyman or Minister of Religion, the person solemnizing the same shall, register the marriage in a separate Register-book, and shall keep it safely until it is filled, or if he leaves the district in which he solemnized the marriage before the said book is filled, shall make over the same to the person succeeding to his duties in the said district. Whoever has the control of the Book at the time when it is filled, shall send it to the Marriage Registrar of the district, or, if there be more marriage Registrars than one, to the Senior Marriage Registrar, who shall send it to the Registrar-General of Births, Deaths and Marriages, to be kept by him with records of his office. Sec 28 of the Act says about "Registration of marriages solemnized by Clergymen of Church of England".

Notice of intended marriage before Marriage Registrar

When a marriage is intended to be solemnized by, or in the presence of, a Marriage Registrar, one of the parties to such marriage shall give notice in writing in the form contained in the First Schedule hereto annexed, or to the like effect, to any Marriage Registrar of the District within which the parties have dwelt, or, if the parties dwell in different district, shall give the like notice to a Marriage Registrar of each district, and shall state therein the name and surname, and the profession or conditions, of each of the parties intending marriage, the dwelling-place of each of them, the time during which each has dwelt therein, and the place at which marriage is to be solemnized provided that if either party has dwelt in the place stated in the notice for more than one month, it may be stated therein that he or she has dwelt there one month and upwards.

Procedure by Marriage Registrar

Every Marriage Registrar, shall, on receiving any such notice, cause a copy thereof to be affixed in some conspicuous place in his office. The Marriage Registrar shall file all such notices and keep them with the records of his office, and shall also forthwith enter a true copy of all such notices in a book to be furnished to him for that purpose by the State Government and to be called the "Marriage Notice-Book"; and the marriage Notice-Book.

Solemnization of marriage by Marriage Registrar after issue of certificate

After the issue of the certificate of the Marriage Registrar, or where notice is required to be given under the Act to the Marriage Registrars for different districts, after the issue of the certificates of the Marriage Registrars for such districts, marriage may, if there be no lawful impediment to the marriage of the parties described in such certificate or certificates, be solemnized between them, according to such form and ceremony as they think fit to adopt.

Whenever a marriage is not solemnized within two months after the copy of the notice has been entered by the Marriage Registrar, as required by section 40, the notice and the certificate, if any, issued thereupon, and all other proceedings thereupon, shall be void: and no person shall proceed to solemnize the marriage, nor shall any Marriage Registrar enter the same, until new notice has been given, and entry made, and certificate thereof given at the time and in the manner aforesaid. According to court act 1861 brother and sister can marriage.

Registration of marriages solemnized by Marriage Registrar

After the solemnization of any marriage by the Marriage Registrar or in his presence, the Marriage Registrar present at such solemnization shall forth-with register the marriage in duplicate; that is to say, in a marriage-register-book according to the form of the Fourth Schedule in the Act, and also in a certificate attached to the marriage-register-book as a counterfoil. The entry of such marriage in both the certificate and the marriage register-book shall be signed by the person by or before whom the marriage has been solemnized, if there be any such person, and by the Marriage Registrar present at such marriage, whether or not it is solemnized by him and also by the parties married and attested by two credible witnesses other than the Marriage Registrar and person solemnizing the marriage. The Marriage Registrar shall keep safely they said register-book until it is

filled, and shall then send it to the Registrar-General of Births, Deaths and Marriages, to be kept by him with the records of his office.

Non-validation of marriages within prohibited degrees

The Indian Christian Marriage Act does not validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into. The word personal law refers to the personal law of the religious community to which either of the parties belongs. The 'Personal Law' contemplated by the Act is only that part of the personal law which relates to absolute impediments to any marriage, such as prohibited degrees of consanguinity or affinity which would render the marriage a nullity. Persons of Indian origin and domicile converted to Christianity of the Roman Catholic persuasion who chooses to marry under the rules and rites of the Roman Catholic Church must be regarded as having adopted the law of marriage of that Church as part of their personal law. The personal law of the Roman Catholics is to be found in the Canon Law.

Marriages of Christians with Non-Christians

The operation of this Act is not confined to a marriage to which both the parties are Christians. A marriage to which one party alone is a Christian is also regulated by the provisions of this Act. In other words, this Act does not stand in the way of a Christian marrying a non-Christian, but such a marriage will have to be solemnized under the provisions of this Act. For a valid marriage under the Christian Marriage Act, two requirements should be satisfied, viz., (a) the marriage should be solemnized under the Act and (b) it should not offend the personal law of any of the parties to it. Therefore in a marriage where one party to it is a Christian or both parties to it are Christians, it should be solemnized under this Act and if not so solemnized, it would be void. In short, in a marriage under this Act, if one party thereto alone is a Christian, such a marriage becomes valid only if the personal law of the non-Christian Party treats such marriage as valid. Where the wife is a Christian woman and the husband is a Hindu, there is no prohibition under Hindu law for such a marriage.

Conclusion

It can be concluded that the Indian Christian Marriage Act is comprehensive enough to deal with matters regarding solemnization of marriages among Christians in India when both the parties to the marriage are

Christians. But where one of the parties to a marriage in India is a Christian and the other party is a non-Christian the best course to adopt is to solemnize the marriage under the Special Marriage Act, 1954. Or in the alternative, if a marriage has been solemnized between a Christian and a non-Christian under the provisions of the Indian Christian Marriage Act, it can be registered again under the provisions of section 15 of the Special Marriage Act of 1954 by way of caution.

(d)Laws Relating to Parsi marriage

The Parsi Marriage and Divorce Act were passed in 1865.The Act is applicable only to the Parsis. Therefore, it is essential to know as to who is a Parsi. It is fairly too well known that the Parsis came from Persian Province of 'Pers' or "Pars' from which the word v Parsi', is derived. The Parsis follow "Zoroastrian" religion. As such, the words "Zoroastrian" and "Parsi" are synonyms. Although the original faith allows conversion, amongst Parsis, Zoroastrian religion is non-convertible religion. It was held that in India, conversion to Zoroastrian religion is against usage and customs. The word Parsi means:

(a) Persons who are descendants of original Persian emigrants.

(b) Person whose father is or was, a Parsi and mother an alien but admitted to Zoroastrian faith.

(c) Zoroastrians from Iran who are residing in India.

The Bombay High Court held that an Irani who temporarily resided in India and was registered as a foreigner and whose domicile continues to be "present domicile" cannot be treated as a Parsi merely because he was a Zoroastrian. But, otherwise, surely, Zoroastrian Iranis a Parsi

In Subsection (2) of Section 52, it is also made clear that even if a Parsi ceases to be a Parsi, he will be governed by the provisions of this Act, if his marriage was solemnized under the Act, notwithstanding the fact that he is not a Parsi and the Parsi Act otherwise ceases to apply.

A. Invalid marriage

A marriage is valid for ever or never. Therefore, if a marriage is not valid, for any reason whatsoever, it is null or void in the eyes of Law. Being no marriage in the eyes of law, it is void initio or that it did not come into existence from its inception.

A void marriage is a marriage on facts because two persons having no capacity to marry have undergone the requisite rites and ceremony of marriage but in the eyes of Law it is no marriage. For instance, in 1990 a man undergoes a ceremony of marriage with his sister and they start living together as husband and wife. That will not make them husband and wife in Law. Their marriage is void initio from 1990 and no legal consequences flow from it.

The rule of nullity is based on the principle of epogomy. It may clearly and expressly be noted that:

i. The void marriage does not alter the status of parties.

ii. The Doctrine of "Factum Valet" (what has been done as a matter of fact cannot be disputed) cannot cure the defect of marriage within the prohibited degrees. However, the statutory Parsi Law in Section 3 (2) makes it clear that even if marriage is invalid, children out of such a void marriage are legitimate.

iii. A void marriage, being no marriage, no judicial declaration of its invalidity is essential in as much as no offence of bigamy is committed if any party to a void marriage enters into a second marriage without getting it annulled. However, it is always better and safer to have a declaration from the Court of Competent Jurisdiction that marriage is void or what is called as Decree of Nullity. Indeed, (1) a third person has no locus standing to file a Petition of nullity.

But he can file a Declaratory Suit under Section 9 of Civil Procedure Code read with Section 34 of Specific Relief Act, 1963. (2) The Second Wife can file a petition for Decree of Nullity on the ground that her husband was already having one wife and as such her marriage with him is Nullity and the (3) First Wife cannot seek Decree of Nullity of her marriage but certainly she may petition for divorce on the ground of husband's adultery.

However, there appears to be controversy amongst various High Courts as to whether the first wife can get an injunction against her husband who wants to take a second wife. This view is also taken Bombay and Rajasthan High Courts have taken a view that suit may be filed under Specific Relief Act, 1963 whereas the contrary view is taken by Mysore and Patna High Courts.

iv. When Court passes a Decree, annulling the marriage, it merely declares an existing fact.

v. A wife of void marriage cannot claim maintenance under Section 125 of Cr. P.C. Although according to modern view, maintenance can be claimed for a prolonged cohabitation as husband and wife.

vi. A marriage is void under the Act, if -

1. Parties are within prohibited relationship of (a) Consanguinity or (b) affinity.

2. Necessary formalities of marriage have not been performed.

3. Male has not completed the age of 21 years and female has not completed the age of 18 years (Section 3).

4. Either party to the marriage was impotent (Section 30).

B. Valid marriage

Although Aashirwad Ceremony is essential for validity of a Parsi Marriage, yet a Parsi marriage is regarded as a "Contract" also. A marriage of a Parsi, in order to become a valid marriage, requires the following requisites. (Section 3)

1. Parties must not be related within the prohibited degree of

(i) Consanguinity or

(ii) Affinity.

2. Marriage must have undergone the "Ashirwad Ceremony", by (a) Priest in the presence of (6) two witnesses.

3. The Parsi Act of 1936 provided that a Parsi below the age of 21 could contract marriage only with the consent of his or her guardian or father. But by the Parsi Marriage and Divorce (Amendment) Act, 1986, a

change has been brought about. Now bridegroom must complete the age of 21 years and the bride must complete the age of 18 years obviously, the concerned provision is abolished.

C. Legitimacy of children of void marriage

No doubt, the Act lies down clearly and distinctly the requirement for a valid marriage, nevertheless, it fails not in recording in sub section (2) of Section 3 that the child of void marriage will not be held illegitimate and such a child is given legitimacy. The oriental view has been that if the marriage is void, the offspring of such an unholy alliance is illegitimate. However, the Parsi Law does not believe in punishing the child for illegitimacy of its parents and accords the status of legitimacy. Indeed, the modern theory as can be seen from foreign rulings is that if parties have acted in 'good faith', they cannot be driven out to vagaries and misfortune.

D. Monogamy

The Parsi Law professes monogamy and, therefore, the second marriage during the subsistence of first marriage is prohibited under the Act. It is noteworthy that the Act makes it abundantly clear that no matter the spouse has changed the religion, the earlier marriage continues and does not abate, disappear or dissolved ipse dixit.

Thus, the earlier marriage continues to follow the spouse like a shadow in the light of earlier marriage. Necessarily, therefore, the either spouse can marry only after the earlier marriage is dissolved (either by Order of Divorce or by a Decree of Nullity) by the Competent Court under the Act.

The same position remains in case of change in domicile. Section 4 of the Act makes it fairly clear that earlier marriage between two Parsis, man and woman remains unchanged even if there is any change either in the religion or change in the Domicile of either spouse. It may, however, be noted that since the Act is not specific on the marriage between a Pars and non Parsi, it is silent on the change of religion of the Parsi spouse. Indeed, the scheme of the Act shows that the Act would apply only if the parties are Parsis and it is obvious that it does not deal with the eventuality of one not being a Parsi. Be it as it is.

However, the Act makes it explicitly clear that even if the second marriage is solemnized under some other Act which provides polygamy, it will be unlawful under Subsection (1) of Section 4 of the Act. Needless therefore

to record that the second marriage (whether performed under this Act (undoubtedly it is impossible but assuming that by some dubious method, the second marriage is solemnized under this Act itself then also] or under any other system of law providing for polygamy or a limited polygamy] will be unlawful and void initio.

Subsection (2) Section 4 of the Act renders the second marriage void in express terms; however, it is silent about the offspring of the child/ children born out of wedlock of second marriage. But it should not be difficult to hold that the child/children born out of second marriage under this Act itself would be legitimate. But if a Parsi solemnizes marriage under some other Act, then the legitimacy of child/ children born out of second marriage would be determined under the Act under which the marriage was solemnized.

E. Penalty for bigamy

The second marriage being void, Section 5 makes the second marriage penal and provides for penalty by subjecting the parties to the provision of Sections 494 and 495 of the Indian Penal Code for bigamy. The Act also makes it expressly clear that even if a spouse has ceased to be a Parsi, he will be subjected to Parsi Law. It only means that the spouse is punished for his infringing the Parsi Law and nothing more than that. Indian Penal Code, Section 494 deals with the marriage during the lifetime of husband or wife. The ingredients of Sections 494 of IPC are:

1. The spouse must have contracted the first marriage;

2. That while the first marriage was subsisting, the spouse concerned must have contracted a second marriage;

3. That both the marriages must be valid in the sense that the necessary ceremonies required by the personal law governing the parties had duly been performed.

The effect of expression "whoever ….marries" (55 Section 494 of IPC must mean "whoever marries validly". Necessarily, therefore, if the second marriage is void, no consequence follows and the charge under Section 494 fail. It should also be noted that Section 495 of IPC renders the act of concealing the earlier marriage penal.

The combined reading of Section 5 of the Parsi Act, Section 494 and 495 of IPC makes it clear that no person or rather no Parsi can knowingly marry second time. But unknowingly, if a second marriage is solemnized, the penalty under Sections 494 and 495 would not strictly follow. Nevertheless the second marriage under the Act would surely be rendered void initio.

It is worthwhile to note that while the spouse undergoing second marriage is punished for the act of bigamy under Section 5 of the Act, the Priest who ventures to solemnize the second marriage too invites punishment for himself under Section 11 of the Act. Punishment for the Priest contravening and violating the provisions of Section 4 of the Act is simple imprisonment up to six months or with fine up to Two Hundred Rupees or with both.

Registration of Parsi marriages

The Parsi Marriage and Divorce Act of 1865 as well as the Parsi Marriage and Divorce Act of 1936 (the present Act) (under Section 6 of 1936 Act) provide for the registration of marriages. Section 7 of the Parsi Act stipulates appointment of Marriage Registrar and invests powers of appointment and removal of Marriage Registrar in the State Government as well in the Hon'ble the Chief Justices of the High Courts.

While the State Government can appoint the Registrar without prescribing local limits within which he (the Registrar) can exercise his powers, the Hon'ble Chief Justice can make appointment only for the local area of the jurisdiction of High Court. Section 9 of the Parsi Act, inter-alia, and casts statutory duty on the Officiating Parsi Priest to send a copy of marriage certificate to Parsi Marriage Registrar violation of Section 9 of the Parsi Act attracts penalty of fine of Rs. 100/ under Section 13 of the Act.

The Parsi Marriage Registrar, in turn, has to register the marriage in the Register. No doubt, the Parsi Act makes it mandatory to have the marriage registered yet Presumption of Marriage, under Section 114 of Evidence Act, would arise on the basis of prolonged cohabitation and so also, such presumption would arise under all Personal laws in India since the evidence Act is applicable to all communities.

The Marriage Register is a public document and therefore, under Section 8 of the Parsi Act, it is open to public inspection.

It may clearly and expressly be noted that Parsi Marriage Registrar is different and distinct from the Marriage Registrar under the Birth, Deaths and Marriages Registration Act, 1886 in as much as the Priest has to send a copy of Marriage Certificate to the (Parsi) Marriage Registrar of the place at which marriage was solemnized who, in turn, has to periodically send the copies of marriage registration to the Registrar General of Births, Deaths and Marriages of the State.

The Hon'ble Supreme Court of India did take notice of the fact that under the Parsi Marriage and Divorce Act, it is compulsory to have marriages registered, however, it is not so in other cases. While dealing with a non-registration of a Hindu Marriage, the apex Court held that though registration of marriage itself cannot be a proof of marriage per se and would not be a determinative factor regarding validity of a marriage, yet it has great evidentiary value in family matters. If the record of marriage is kept, to a large extent, the dispute concerning marriage often is avoided. Discretion was given to file compliance report. Time for 3 months was extended from 25-10-07.

(e) Civil Marriages

Under the present legal system of India citizens have a choice between their respective religion-based and community-specific marriage laws on the one hand and, on the other hand, the general and common law of civil marriages. While the laws of the first of these categories are generally described by the compendious expression "personal laws", the latter law is found in the following two enactments:

(i) Special Marriage Act 1954; and

(ii) Foreign Marriage Act 1969.

The first of these Acts is meant for those getting married within the country and the latter for those Indian citizens who may marry in a foreign country. The Special Marriage Act 1954 is not concerned with the religion of the parties to an intended marriage. Any person, whichever religion he or she professes, may marry under its provisions either within his or her community or in a community other than his or her own, provided that the intended marriage in either case is in accord with the conditions for marriage laid down in this Act [Section 4].

The Special Marriage Act 1954 also provides the facility of turning an existing religious marriage into a civil marriage by registering it under its provisions, provided that it is in accord with the condition for marriage laid down under this Act [Section 15]

The Act provides for the appointment of Marriage Officers who can both solemnize an intended marriage and register a pre-existing marriage governed by any other law [Section 3].The Foreign Marriage Act 1969 facilitates solemnization of civil marriages by Indian citizens outside the country, with another citizen or with a foreigner. This Act also is not concerned with the religion of the parties to an intended marriage; any person can marry under its provisions either within his or her own community or in a different community.

For carrying its purposes the Foreign Marriage Act empowers the Central Government to designate Marriage Officers in all its diplomatic missions abroad. Numerous marriages take place in India which are outside the ambit of various personal laws but cannot be governed by the Special Marriage Act either for the reason of not having been formally solemnized or registered under it. The question which law would then apply to such marriages remains unresolved.

Both the Special Marriage Act 1954 and the Foreign Marriage Act 1969 are meant equally for all Indian communities. Yet they contain some provisions which greatly inhibit members of certain communities to avail their provisions.

The Special Marriage Act 1954

A. Old Special Marriage Act 1872

The first law of civil marriages in India was the Special Marriage Act 1872enacted during the British rule on the recommendation of the first Law Commission of pre-independence era. It was an optional law initially made available only to those who did not profess any of the various faith traditions of India. The Hindus, Muslims, Christians, Sikhs, Buddhists, Jains and Parsis were all outside its ambit. So, those belonging to any of these communities but wanting to marry under this Act had to renounce whatever religion they were following.

The main purpose of the Act was to facilitate inter-religious marriages. The Special Marriage Act 1872 contained no provision for dissolution or nullification of marriage. For these matrimonial remedies it only made

the Indian Divorce Act 1869 applicable to the marriages governed by it. In 1922 the Special Marriage Act 1872 was amended to make it available to Hindus, Sikhs, Buddhists and Jains for marrying within these four communities without renouncing their religion. As so amended, the Act remained in force until after independence.

B. New Special Marriage Act 1954

In 1954 the first Special Marriage Act of 1872 was repealed by and replaced with a new law bearing the same title. This is an optional law, an alternative to each of the various personal laws, available to all citizens in all those areas where it is in force. Religion of the parties to an intended marriage is immaterial under this Act; one can marry under its provisions both within and outside one's community. The Special Marriage Act does not by itself or automatically applies to any marriage; it can be voluntarily opted for by the parties to an intended marriage in preference to their personal laws. It contains its own elaborate provisions on divorce, nullity and other matrimonial causes and, unlike the first Special Marriage Act of 1872, does not make the Divorce Act 1869 applicable to marriages governed by its provisions.

For the Hindus, Buddhists, Jains and Sikhs marrying within these four communities the Special Marriage Act 1954 is an alternative to the Hindu Marriage Act 1955. The Muslims marrying a Muslim have a choice between their uncodified personal law and the Special Marriage Act.

The Indian Christian Marriage Act 1872, however, says that all Christian marriages shall be solemnized under its own provisions [Section 4]. The issue of availability of the Special Marriage Act for a marriage both parties to which are Christians thus remains unresolved.

C. Inter-Religious Civil Marriages

The Special Marriage Act is available also for inter-religious marriages and does not exempt any community from its provisions in this respect. The Hindu Marriage Act 1955 applicable to the Hindus, Buddhists, Jains and Sikhs does not allow them to marry outside these four communities. So, if any member of these communities wishes to marry a person not belonging to these communities, the only choice available would be the Special Marriage Act 1954. The Muslim law allows certain inter-religious marriages to be governed by its own provisions. Under this law a man can marry a woman of the communities believed by it to be Ahl-e-Kitab

(People of Book) – an expression which includes Christians and Jews and may include followers of any other monotheistic faith. Since Muslim law only permits an inter-religious marriage and does not requirethat such a marriage must take place under its own provisions, it does not come in conflict with the Special Marriage Act 1954.

The Indian Christian Marriage Act 1872 says that apart from Christian marriages the marriage of a Christian with a non-Christian must also be solemnized under this Act (Section 4). The Special Marriage Act on the other hand says that any two persons (whatever be their religion) can marry in accordance with its provisions. There is, thus, a conflict-of-law situation in respect of marriage of a Christian with a non-Christian. Unlike the first Special Marriage Act of 1872 the 1954 Act contains its own elaborate provisions on divorce, nullity and other matrimonial remedies. The

Indian Divorce Act 1869 would therefore not apply to marriages governed by it. The Indian Divorce Act, however, says that it will apply even if only one party is a Christian. This is another conflict-of-law situation. In view of these conflicts of various personal laws, all equally recognized in India, it will be in the fitness of things that all inter-religious marriages [except those within the Hindu, Buddhist, Sikh and Jain communities] be required to be held only under the Special Marriage Act 1954. Even if such a marriage has been solemnized under any other law, for the purposes of matrimonial causes and remedies the Special Marriage Act can be made applicable to them. Such a move will bring all inter-religious marriages in the country under uniform law. This will be in accordance with the underlying principle of Article 44 of the Constitution of India relating to uniform civil code.

The word "Special" in the caption of the Act needs reconsideration. In 1872 when the first law of civil marriages was enacted a non-religious marriage could be regarded as "special" as the parties to such a marriage had to denounce their religion. Marriage by religious rites was then the rule and a civil marriage could be only an exception. Now in the twenty-first century calling non-religious civil marriages "special" has little justification. Being a uniform law which the parties to any intended marriage can opt for irrespective of their religion or personal law, it need not be described as a law providing for a "special" form of marriage. It projects such marriages as unusual and extra-ordinary and creates misgivings in the minds of the general public.

The Foreign Marriage Act 1969

A. Solemnization of New Marriages

A Foreign Marriage Act was first enacted in India in 1903 during the British rule. It remained in force till 1969 when a new Foreign Marriage Act was enacted on the pattern of the new Special Marriage Act 1954. Under this Act a marriage may be solemnized, in a foreign country, between two Indians or an Indian and a foreigner, irrespective in either case of the religion and personal law of the parties, if the conditions for marriage laid down in the Act are fulfilled (Section 4).

The Government of India is empowered by this Act to appoint Marriage Officers in foreign countries from amongst its diplomatic and consular staff in those countries (Section 3). The Act does not have any provision relating to divorce, nullity or any other matrimonial remedy or relief. For this purpose the Act makes the relevant provisions of the Special Marriage Act 1954 applicable, mutatis mutandis, also to all marriages solemnized or registered under its provisions (Section 18).

The Act is entirely optional and its provisions do not adversely affect the validity of a marriage solemnized in a foreign country otherwise than under its provisions (Section 27).

B. Registration of Existing Marriages

A marriage solemnized in a foreign country under any other law including the local law of that country can be registered under the Foreign Marriage Act 1969 if it fulfills the conditions for validity of marriages laid down in this Act [Section 17(1) to (3)]. The procedure for registration of pre-existing marriages under the Act is same as for solemnization of new marriages.

Unit-II: Dissolution of Marriage

(i)Hindu law of divorce

Legislative modifications in the Hindu law of divorce and effects of such legislations and modifications. This deals with relief of judicial separation and remedy of divorce. Under the uncodified Hindu law, divorce was not recognized, unless it was allowed by custom. The reason was that, a Hindu marriage was an indissoluble tie between the husband and the wife. However painful cohabitation may be, divorce was not accepted by the old law. In some communities, such customs fulfilled the requisites of a valid custom. The term 'divorce' comes from the Latin word 'divortium' which means 'to turn aside', 'to separate'? Divorce is the legal cessation of a matrimonial bond. Divorce puts the marriage to an end, and the parties revert back to their unmarried status and are once again free to marry. All rights and mutual obligations of husband and wife ceases. In other words, after a decree of dissolution of marriage, the marriage comes to an end and the parties cease to be husband and wife, and are free to go their own ways. There remain no bonds between them except in relation to Section 254 and Section 265of Hindu Marriage Act, 1955. Matrimonial causes (i.e., legal action in respect of marriages) in their real sense did not exist in Hindu law before 1955, although some reliefs in respect of marriage could be obtained under general law. Thus, a suit for a declaration that a marriage is null and void could be filed under Section 9 C.P.C6. read with Section 34 of the Specific Relief Act, 1963

The modern matrimonial law in India has been greatly influenced by and based upon English matrimonial law. In England, the Matrimonial Causes Act, 1857 for the first time permitted divorce by judicial process. Before 1857, divorce could be obtained only by a private Act of parliament and only very rich could afford this luxury. Under the Act, the husband could file a petition for divorce on the ground of wife's adultery (single act was enough), but a wife had to prove adultery coupled with either incest, bigamy, cruelty or two years desertion or alternatively, rape or any other unnatural offence. This was the typical mid Victorian attitude to sexual morality. The Matrimonial Causes Act, 1923 put both spouses at par and wife could also sue for divorce on the ground of adultery simplicities. The Matrimonial Causes Act, 1937 added three more grounds; cruelty, three years desertion and supervening incurable insanity. After the Second World War, a movement developed for the reform of divorce law which accepts the breakdown of marriage as the basic principle of divorce. Later, the Matrimonial Causes Act, 1973 was passed which is a consolidating statute and retains the breakdown of marriage as the basic ground of divorce. The Indian matrimonial law has closely followed the development in

English law. The Converts Marriage Dissolution Act, 1866 was passed to provide facility of divorce to those native converts to Christianity whose spouses refused to cohabit with them on account of their conversion. But the first divorce statute was passed in 1869.

The Indian Divorce Act, 1869 is based on the Matrimonial Causes Act, 1857 and lays down the same grounds of divorce. At the time when the statute was passed, it applied only to Christian marriages. The Indian Divorce Act was extended to marriages performed under the Special Marriage Act 1872. This Act was repealed by the Special Marriage Act, 1954. The Special Marriage Act was passed in 1954 and the Hindu Marriage Act, 1955. Some States introduced divorce by legislation. Section 13 of the Hindu Marriage Act, 1955 has introduced a revolutionary amendment to the shastric Hindu law. It provides for the dissolution of marriage.

Under the Hindu law, divorce does not take place unless it has been granted by a court. Before passing of the Marriage Laws (Amendment) Act, 1976, the grounds for judicial separation and divorce were different. The Marriage Laws (Amendment) Act, 1976 makes the grounds of divorce and judicial separation common. An aggrieved party may sue for divorce or judicial separation. In 1964, Section 13 (1-A) has been inserted containing 2 clauses under which, non-resumption of cohabitation for 2 years or upwards after the decree of judicial separation or restitution of conjugal rights was made a ground of divorce.

This is a modification of clauses (viii) and (ix) of Section 13 of the Hindu Marriage Act, 1955. After the amendment, either party to the marriage can prefer such petitions. However, this facility is not available to the cases where the decrees of judicial separation and restitution of conjugal rights were obtained prior to the passing of the Amendment of 1964. The Marriage Laws (Amendment) Act, 1976 reduced the time limits form two years to one year.12 Section 13 (1-A) introduced Break-down theory in the Hindu Marriage Act, 1955. The Hindu Marriage Act, 1955 permitted divorce to all the Hindus on certain reasonable grounds. Perhaps this permission was given for the first time in the history of Hindu law. The Act of 1955 also saved the customs and special legislation granting the dissolution of marriage before its time. Under Shastric Hindu law, wedlock was unbreakable and the marital bond existed even after the death of a party to marriage. Divorce was known only as a matter of exception in certain tribes and communities which were regarded uncivilized by the Hindu elite. The courts recognized it in these communities due to the binding force of custom. But the general Hindu law did not recognize it. The provisions regarding divorce have been twice amended since the passing of the Hindu Marriage Act, 1955; i) by the Hindu Marriage (Amendment) Act, 1964 and ii) by the Marriage Laws

(Amendment) Act, 1976. The original provisions of the Hindu Marriage Act regarding divorce have been liberalized by the Marriage Laws (Amendment) Act, 1976. It also added a new ground namely divorce by mutual consent of the parties has been made available as a matrimonial relief under the Hindu Marriage Act, 1955.

1. Relief of Judicial Separation: Section 10 of the Hindu Marriage Act, 1955 deals with judicial separation. This Section lays down that Section 10 (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) of Section 13 and in case of a wife also on any of the grounds specified in sub-Section (2) thereof, 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 the 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."

Section 10 provides that either party to marriage may present a petition praying for a decree of judicial separation on any of the grounds specified in sub Section (1) of Section 13 and in case of wife also on any of the grounds specified in sub-Section (2) thereof, as grounds on which a petition for divorce might have been presented. After passing of a decree of judicial separation, the parties are not bound to cohabit with each other. During the continuance of separation, the parties are entitled to separate from each other and all basic marital obligations remain suspended. Mutual rights and obligations of living with each other and marital intercourse no longer remain enforceable; marital obligations and rights are not available to the parties. Nonetheless, marriage subsists. During the course of judicial separation, either party may be entitled to get maintenance from the other if the situation so warrants. It is temporary suspension of marital rights between the spouses. The parties remain husband and wife. If any of them remarries, he or she will be guilty of bigamy. In the event of one of the parties dying, the other party will inherit the property of the deceased spouse.20 Judicial separation can be allowed only if the marriage is valid. If the parties want to resume cohabitation, an order of the court rescinding the decree will be necessary. Generally the court will rescind the decree whenever parties ask for it. If the cohabitation is not resumed for a period of one year or more after the passing of decree of judicial separation, any party may apply for divorce under Section 13 (1-A) (i) of the Hindu Marriage Act, 1955. Before passing of the Marriage Laws (Amendment) Act, 1976, the grounds for divorce are more serious than those for judicial separation. After the amendment of 1976, Section 10 has been completely recast. The various grounds for

judicial separation mentioned in the old Section 10 have been omitted. It is provide that the petitioner may apply for judicial separation on precisely the same grounds that can support a petition for divorce.

The Marriage Laws (Amendment) Act, 1976 has inserted a new Section 13-A in the Hindu Marriage Act, 1955 to give statutory recognition to the judiciary evolved law. Section 13-A runs as under: "In any proceedings under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (ii), (vi) and (vii) of sub-Section (1) of Section 13, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation."Hence if a petition for divorce is filed on the ground of change of religion, renunciation of the world or presumption of death, the court has no power to pass a decree of judicial separation in place of decree for divorce. Under Section 14, no petition for divorce can be presented within one year of marriage. For the lesser remedy of judicial separation, there is no such restriction.

2. Remedy of divorce: Although Hindu law does not contemplate divorce, yet it has been held that it is recognized as an established custom. In Bombay, Madras and Saurashtra, it was permitted by legislation. In the absence of a custom to the contrary, there can be no divorce between a Hindu husband and his wife, who by their marriage, had entered into a sacred and indissoluble union and neither conversion nor degradation nor loss of caste nor the violation of an agreement against polygamy dissolves the marriage tie. Among the Sikh Jats of Amritsar, there is a custom of the husband dissolving a marriage out of court preferably by written instrument which is saved by Section 29 (2) of the Act. The Bombay High Court condemned a custom allowing divorce as a matter of course on payment of a fine fixed by the caste. But the Madras High Court holds a custom valid which enables either spouse to divorce the other with the latter's consent. According to Kautilya's Arthashastra, marriage might be dissolved by mutual consent in the case of the unapproved form of marriage. Manu does not believe in discontinuance of the marriage relationship. He declares, "Let mutual fidelity continue till death; this in brief may be understood to be the highest dharma of husband and wife". The duty of a wife continues even after her death. She can never have a second husband. It was only by the Native Converts Marriage Dissolution Act, 1866, which provided that where a Hindu became a convert to Christianity and in consequence of such conversion, the husband or wife of the convert deserted or repudiated the convert, the court might, on a petition presented by the convert, pass a decree dissolving the marriage, and the parties might then marry again as if the prior marriage had been dissolved by death. Conversion does not operate per se as dissolution of marriage. The Hindu Marriage Act, 1955 originally based divorce on the fault theory and enshrined 9 fault grounds in Section

13 (1) on which, either the husband or the wife could sue for divorce. Section 13 has undergone a substantial change by reason of subsequent amendments. The grounds mentioned in sub-Section (1) and (1-A) are available to both the husband and wife; while the grounds mentioned under sub-Section (2) are available only to the wife. In 1964, Section 13 (1-A) has been inserted containing two clauses under which, non resumption of cohabitation for two years or upwards after the decree of judicial separation or restitution of conjugal rights was made a ground of divorce. This is a modification of clauses (viii) and (ix) of Section 13 of the Hindu Marriage Act, 1955. By the Marriage Laws (Amendment) Act 1976, the period of two years is reduced to one year. Section 13 (1-A) introduced an element of Break-down theory in the Hindu Marriage Act 1955. Prior to the amendments the petition for divorce could be filed on the grounds of non-resumption of cohabitation after the decree of judicial separation and restitution of conjugal rights only by the petitioner. After the amendments, either party to the marriage can prefer such petitions. However, this is not applicable to in the cases where the decrees of judicial separation and restitution of conjugal rights were obtained prior to the passing of the Hindu Marriage (Amendment) Act, 1964. If the decrees are obtained after 1964, the respondent also can take advantage of the new Section. The Hindu Marriage Act, 1955 originally contained two fault grounds in Section 13 (2) on which, a Hindu wife alone could sue for divorce. The Marriage Laws (Amendment) Act 1976 has inserted two additional fault grounds of divorce for wife and a new Section 13-B under which, divorce by mutual consent has been made available as a matrimonial relief. Thus, in the modern Hindu law, the position is that all the three theories of divorce are recognized and divorce can be obtained on the basis of any one of them. Further, the customary mode of divorce is also retained.

The Marriage Laws (Amendment) Act, 1976 has introduced certain changes of far-reaching consequences, which have materially affected the sacramental character of marriage. The relief of divorce may be obtained in respect of any marriage whether solemnized before or after the commencement of this Act. Thus, Section 13 is retrospective as well as prospective operation. Section 13 runs as follows:1) 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 his or her spouse; or(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or (i-b) 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; Explanation:-- in this clause, a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia; b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or]

(iv) has, [xxx] been suffering from virulent and incurable form of leprosy; or

(v) has, [xxx] 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, [xxx]

(viii) [xxx]

(ix) [xxx] [Explanation:-- In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.] 5[1-A. Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition, for the dissolution of the marriage by a decree of divorce on the ground,--

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.]

(2) A wife may also present a petition for the dissolution of her marriage by a 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 either case, the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or [(iii) that in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973 (or under the corresponding Section 488 of the Code of Criminal Procedure, 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or (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.

Grounds of Divorce

The Act originally recognised the fault grounds for obtaining the decree of divorce. For this purpose nine fault grounds were mentioned in the Act. Sec. 13(1) lays down these fault grounds, on which either the husband or wife could sue for divorce. Two fault grounds have been dealt with in the sec. 13(2), on which wife alone, could seek the decree of divorce. In 1976, the grounds for divorce by mutual consent have been recognised through the provision of the sec. 13B.Sec. 13 of the Hindu Marriage Act, 1955 says:

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; 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. Explanation- In this clause-(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia (b) the expression "psychopathic disorder" means a persistent disorder or disability of mind(whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party and whether or not it requires or is susceptible to medical treatment; or(iv) has been suffering from a virulent and incurable form of leprosy; or(v) has been suffering from veneral 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; Explanation.- In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expression shall be construed accordingly.(1-A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground-(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upward after the passing of a decree of restitution of conjugal rights in a proceeding to which they were parties.(2) A wife may also present a petition for the dissolution of her marriage by a 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 the 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 either case the other wife is alive at the time of the presentation of the petition;(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or(iii) that in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, (78 of 1956), or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973, (Act 2 of 1974) or under corresponding Section 488 of the Code of Criminal Procedure, (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife not withstanding that she was living apart and that since the passing of such decree or order, cohabitation between

the parties has not been resumed for one year or upwards; or(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 Explanation.- This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Law (Amendment) Act, 1976.

A decree of divorce can also be obtained through the mutual consent. The provision for the same is given in the Sec. 13B of the Act.

13-B. 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 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.

Under the Hindu Marriage Act, a party may file a petition for divorce and the marriage may be dissolved by a decree of divorce on the following grounds:

1. ADULTERY: i.e. voluntary sexual intercourse with any person other than his/her spouse. Though initially a divorce could be granted only if such spouse was living in adultery, by the Marriage Laws Amendment Act, 1976, even a single voluntary sexual act, with any other person other than the spouse is a sufficient ground for divorce. But the present position under the Hindu Marriage Act is that it considers even the single act of adultery enough for the decree of divorce

1. The intercourse with the wives of pre-Act polygamous marriage will not amount to adultery. To establish this ground in the court, circumstantial evidence will suffice

2. Under sec.497 of the Indian Penal Code, the adultery has been made an offence. In both the criminal law as well as the matrimonial law, it is essential that at the time of offence a valid marriage was subsisting. There should be consent of the respondent to constitute the ground of adultery. The burden of proof is on the petitioner.

2. CRUELTY: Initially cruelty was a ground only for judicial separation, but now forms a ground for divorce under the Amendment Act of 1976. The concept of cruelty has changed from time to time and from society to society. In the early English law, the intention was needed to prove the element of cruelty. But subsequently, it was omitted to be regarded as the ground for cruelty. Under theHindu Marriage Act also, intension has not been regarded as the ingredient of cruelty. There is no precise definition of cruelty. The acts or conducts constituting cruelty be so numerous that it is impossible to fit them into any water-tight compartment. In Bhagwat v. Bhagwat

3, the conduct of the husband to strangulate the wife's younger brother and her younger son has been recognized as an act of cruelty. In A. Jaya Chandra v. Aneel Kaur

4, the Supreme Court has held that the cruelty should be in reference to the human conduct or behaviour. The conduct should be of such nature that it can be concluded that the petitioner spouse cannot be expected to live with the other spouse. In the Indian law, like the English law, it has been held that the cruelty must be pointed towards the petitioner. It has also been held that if the wife is being ill-treated by the members of the family in front of the husband and he looks idly, it amounts to be the willful neglect, and thus amounts to cruelty

5. Both mental cruelty as well as the mental cruelty has been recognized as the grounder under the Act. The acts of physical violence, injury to the limb or the health of the spouse, by the other spouse and even apprehension of the same amounts to the cruelty

6. In the cases of mental cruelty, court has to back "intensity, gravity and stigmatic impact" of cruel treatment, even if such cruel treatment is meted out once

7. While arriving at such conclusion, regard must be had to the social status educational level of the parties, the society they move in, the possibility or otherwise of the parties never living together in case they are living apart and all other relevant facts and circumstances, which it is neither possible or desirable to set out exhaustively. In Praveen Mehta v. Inderjeet Mehta

8, the court defined has defined mental cruelty as the state of mind.

3. DESERTION: This has been added as a ground for divorce by the Amendment Act, though previously it was a ground for judicial separation. It includes the desertion of the petitioner by the other spouse, without any reasonable cause and without the consent of that other spouse. Without previous cohabitation, there cannot be any desertion

9. It is not merely the withdrawal from a place but also, from the state of things. Under the Hindu Marriage Act, desertion falls under following heads:

•Actual desertion

•Constructive desertion and

•Willful neglect

4. CONVERSION: In order to obtain a divorce on this ground it should be proved that such other party has converted. Mere professing or theoretical allegiance to any other religion does not mean conversion. This ground has been added to the act for obtaining divorce, as according to the Hindu Law, a marriage is not dissolved by conversion by one of the parties. Therefore contrary to the belief that conversion by itself resulted in divorce, a person now has to obtain a decree of divorce under the Act.

5. UNSOUNDNESS OF MIND:

Initially it was essential for a party to prove that his/her spouse was incurably of unsound mind for a continuous period of three years. However now this duration has been omitted. In order to obtain a decree under this ground it has to be proved that the spouse is affected to such an extent that the party seeking divorce cannot be reasonably expected to live with him/her. After the amendment of 1976 (Marriage Laws Amendment Act) the

ground of cruelty was not only accepted but also explained in the Act. It considers two distinct mental elements namely: (1) unsoundness of mind and (2) mental disorder.

6. VIRULENT AND INCURABLE LEPROSY.

The amendment act of 1976 lay down that the leprosy must be both virulent and incurable.

7. VENEREAL DISEASES IN COMMUNICABLE FORM.

At present, it is aground for divorce if it is communicable by mature- irrespective of the period for which the respondent has suffered from it.

8. ENTERING NEW RELIGIOUS ORDER: by renouncing the world. This requires the performance of certain ceremonies and the observance of certain formalities. The petitioner has to prove that the other spouse has ceased to be a Hindu. The conversion does not automatically dissolve the marriage. It provides aground for divorce.

9. PRESUMPTION OF DEATH: Under the Act, a person is presumed to be dead, if he/she has not been heard of as being alive for a period of at least seven years. The decree obtained under the Hindu Marriage Act would not be a decree of death of the missing spouse; it would be only of the presumption of death, under sec. 8 of the Indian Evidence Act, 1872.

DIVORCE BY MUTUAL CONSENT: When the husband and wife both agree that their marriage cannot succeed, they may decide to get a divorce by mutual consent. It is not necessary to give any reason to the court for such a divorce. They must file a divorce petition in the District court. However the following should be considered:

• Both the husband and wife are living separately from last 1 year.

• Both of them had agreed that they can't stay together.

• None of them has been forced to give the application.

The court will not take any action on the application for 6 months so that the husband and wife can reconsider their decision. After a period of 6 months from the date of presentation of the petition and not later than 18 months, if the petition is not withdrawn, the court will grant the decree of divorce. The court must however be satisfied about the bonafides and consent of the parties. If one of the parties withdraws the consent, the court makes an inquiry in this regard and if there is no consent at the time of the enquiry, it cannot pass the decree of divorce

CONCLUSION

The Hindus consider marriage to be a sacred bond. Prior to the Hindu Marriage Act of 1955, there was no provision for divorce. The concept of getting divorced was too radical for the Indian society then. The wives were the silent victims of such a rigid system. Now the law provides for a way to get out of an unpleasant marriage by seeking divorce in a court of law. The actual benefactors of such a provision are women who no longer have to silently endure the harassment or injustice caused to them by their husbands. However, to prevent hasty divorces, the law lays down certain restrictions and grounds for obtaining a divorce. Before obtaining divorce, the parties may first obtain a decree for judicial separation after which divorce may be obtained.

(ii)Dissolution of Marriage under Muslim

Firm union of the husband and wife is a necessary condition for a happy family life. Islam therefore, insists upon the subsistence of a marriage and prescribes that breach of marriage contract should be avoided. Initially no marriage is contracted to be dissolved but in unfortunate circumstances the matrimonial contract is broken. One of the ways of such dissolution is by way of divorce. Under Muslim law the divorce may take place by the act of the parties themselves or by a decree of the court of law. However in whatever manner the divorce is effected it has not been regarded as a rule of life. In Islam, divorce is considered as an exception to the status of marriage. The Prophet declared that among the things which have been permitted by law, divorce is the worst. Divorce being an evil, it must be avoided as far as possible. But in some occasions this evil becomes a necessity, because when it is impossible for the parties to the marriage to carry on their union with mutual affection and love then it is better to allow them to get separated than compel them to live together in an atmosphere of hatred and disaffection. The basis of divorce in Islamic law is the inability of the spouses to live

together rather than any specific cause (or guilt of a party) on account of which the parties cannot live together. A divorce may be either by the act of the husband or by the act of the wife. There are several modes of divorce under the Muslim law, which will be discussed hereafter.

Modes of Divorce: A husband may divorce his wife by repudiating the marriage without giving any reason. Pronouncement of such words which signify his intention to disown the wife is sufficient. Generally this done by talaaq. But he may also divorce by Ila, and Zihar which differ from talaaq only in form, not in substance. A wife cannot divorce her husband of her own accord. She can divorce the husband only when the husband has delegated such a right to her or under an agreement. Under an agreement the wife may divorce her husband either by Khula or Mubarat. Before 1939, a Muslim wife had no right to seek divorce except on the ground of false charges of adultery, insanity or impotency of the husband. But the Dissolution of Muslim Marriages Act 1939 lays down several other grounds on the basis of which a Muslim wife may get her divorce decree passed by the order of the court.

There are two categories of divorce under the Muslim law:

1.) Extra judicial divorce, and

2.) Judicial divorce

The category of extra judicial divorce can be further subdivided into three types, namely,

- By husband- talaaq, ila, and zihar.
- By wife- talaaq-i-tafweez, lian.
- By mutual agreement- khula and mubarat.

The second category is the right of the wife to give divorce under the Dissolution of Muslim Marriages Act 1939.

Talaaq: Talaaq in its primitive sense means dismission. In its literal meaning, it means “setting free”, “letting loose”, or taking off any “ties or restraint”. In Muslim Law it means freedom from the bondage of marriage and

not from any other bondage. In legal sense it means dissolution of marriage by husband using appropriate words. In other words talaaq is repudiation of marriage by the husband in accordance with the procedure laid down by the law. The following verse is in support of the husband's authority to pronounce unilateral divorce is often cited: "Men are maintainers of women, because Allah has made some of them to excel others and because they spend out of their property (on their maintenance and dower). When the husband exercises his right to pronounce divorce, technically this is known as talaaq. The most remarkable feature of Muslim law of talaaq is that all the schools of the Sunnis and the Shias recognize it differing only in some details. In Muslim world, so widespread has been the talaaq that even the Imams practiced it. The absolute power of a Muslim husband of divorcing his wife unilaterally, without assigning any reason, literally at his whim, even in a jest or in a state of intoxication, and without recourse to the court, and even in the absence of the wife, is recognized in modern India. All that is necessary is that the husband should pronounce talaaq; how he does it, when he does it, or in what he does it is not very essential. In Hannefa v. Pathummal, Khalid, J., termed this as "monstrosity". Among the Sunnis, talaaq may be express, implied, contingent constructive or even delegated. The Shias recognize only the express and the delegated forms of talaaq.

Conditions for a valid talaaq:

1.) Capacity: Every Muslim husband of sound mind, who has attained the age of puberty, is competent to pronounce talaaq. It is not necessary for him to give any reason for his pronouncement. A husband who is minor or of unsound mind cannot pronounce it. Talaaq by a minor or of a person of unsound mind is void and ineffective. However, if a husband is lunatic then talaaq pronounced by him during "lucid interval" is valid. The guardian cannot pronounce talaaq on behalf of a minor husband. When insane husband has no guardian, the Qazi or a judge has the right to dissolve the marriage in the interest of such a husband.

2.) Free Consent: Except under Hanafi law, the consent of the husband in pronouncing talaaq must be a free consent. Under Hanafi law, a talaaq, pronounced under compulsion, coercion, undue influence, fraud and voluntary intoxication etc., is valid and dissolves the marriage.

Involuntary intoxication: Talaaq pronounced under forced or involuntary intoxication is void even under the Hanafi law.

Shia law: Under the Shia law (and also under other schools of Sunnis) a talaaq pronounced under compulsion, coercion, undue influence, fraud, or voluntary intoxication is void and ineffective.

3.) Formalities: According to Sunni law, a talaaq, may be oral or in writing. It may be simply uttered by the husband or he may write a Talaaqnama. No specific formula or use of any particular word is required to constitute a valid talaaq. Any expression which clearly indicates the husband's desire to break the marriage is sufficient. It need not be made in the presence of the witnesses.

According to Shias, talaaq, must be pronounced orally, except where the husband is unable to speak. If the husband can speak but gives it in writing, the talaaq, is void under Shia law. Here talaaq must be pronounced in the presence of two witnesses.

4.) Express words: The words of talaaq must clearly indicate the husband's intention to dissolve the marriage. If the pronouncement is not express and is ambiguous then it is absolutely necessary to prove that the husband clearly intends to dissolve the marriage.

Express Talaaq (by husband):

When clear and unequivocal words, such as "I have divorced thee" are uttered, the divorce is express. The express talaaq, falls into two categories:

• Talaaq-i-sunnat,

• Talaaq-i-biddat.

Talaaq-i-sunnat has two forms:

• Talaaq-i-ahasan (Most approved)

• Talaaq-i-hasan (Less approved).

Talaaq-i-sunnat is considered to be in accordance with the dictats of Prophet Mohammad.

The ahasan talaaq: consists of a single pronouncement of divorce made in the period of tuhr (purity, between two menstruations), or at any time, if the wife is free from menstruation, followed by abstinence from sexual intercourse during the period if iddat. The requirement that the pronouncement be made during a period of tuhr applies only to oral divorce and does not apply to talaaq in writing. Similarly, this requirement is not applicable when the wife has passed the age of menstruation or the parties have been away from each other for a long time, or when the marriage has not been consummated. The advantage of this form is that divorce can revoked at any time before the completion of the period of iddat, thus hasty, thoughtless divorce can be prevented. The revocation may affect expressly or impliedly. Thus, if before the completion of iddat, the husband resumes cohabitation with his wife or says "I have retained thee" the divorce is revoked. Resumption of sexual intercourse before the completion of period of iddat also results in the revocation of divorce. The Raad-ul-Muhtar puts it thus: "It is proper and right to observe this form, for human nature is apt to be mislead and to lead astray the mind far to perceive faults which may not exist and to commit mistakes of which one is certain to feel ashamed afterwards"

The hasan talaaq: In this the husband is required to pronounce the formula of talaaq three time during three successive tuhrs. If the wife has crossed the age of menstruation, the pronouncement of it may be made after the interval of a month or thirty days between the successive pronouncements. When the last pronouncement is made, the talaaq, becomes final and irrevocable. It is necessary that each of the three pronouncements should be made at a time when no intercourse has taken place during the period of tuhr. Example: W, a wife, is having her period of purity and no sexual intercourse has taken place. At this time, her husband, H, pronounces talaaq, on her. This is the first pronouncement by express words. Then again, when she enters the next period of purity, and before he indulges in sexual intercourse, he makes the second pronouncement. He again revokes it. Again when the wife enters her third period of purity and before any intercourse takes place H pronounces the third pronouncement. The moment H makes this third pronouncement, the marriage stands dissolved irrevocably, irrespective of iddat.

Talaaq-i-Biddat: It came into vogue during the second century of Islam. It has two forms: (i) the triple declaration of talaaq made in a period of purity, either in one sentence or in three, (ii) the other form constitutes a single irrevocable pronouncement of divorce made in a period of tuhr or even otherwise. This type of talaaq is not recognized by the Shias. This form of divorce is condemned. It is considered heretical, because of its irrevocability.

Ila: Besides talaaq, a Muslim husband can repudiate his marriage by two other modes, that are, Ila and Zihar. They are called constructive divorce. In Ila, the husband takes an oath not to have sexual intercourse with his wife. Followed by this oath, there is no consummation for a period of four months. After the expiry of the fourth month, the marriage dissolves irrevocably. But if the husband resumes cohabitation within four months, Ila is cancelled and the marriage does not dissolve. Under Ithna Asharia (Shia) School, Ila, does not operate as divorce without order of the court of law. After the expiry of the fourth month, the wife is simply entitled for a judicial divorce. If there is no cohabitation, even after expiry of four months, the wife may file a suit for restitution of conjugal rights against the husband.

Zihar: In this mode the husband compares his wife with a woman within his prohibited relationship e.g., mother or sister etc. The husband would say that from today the wife is like his mother or sister. After such a comparison the husband does not cohabit with his wife for a period of four months. Upon the expiry of the said period Zihar is complete. After the expiry of fourth month the wife has following rights:

(i) She may go to the court to get a decree of judicial divorce

(ii) She may ask the court to grant the decree of restitution of conjugal rights.

Where the husband wants to revoke Zihar by resuming cohabitation within the said period, the wife cannot seek judicial divorce. It can be revoked if:

(i) The husband observes fast for a period of two months, or,

(ii) He provides food at least sixty people, or,

(iii) He frees a slave.

According to Shia law Zihar must be performed in the presence of two witnesses.

Divorce by mutual agreement:

Khula and Mubarat: They are two forms of divorce by mutual consent but in either of them, the wife has to part with her dower or a part of some other property. A verse in the Holy Quran runs as: "And it not lawful for you that ye take from women out of that which ye have given them: except (in the case) when both fear that they may not be able to keep within the limits (imposed by Allah), in that case it is no sin for either of them if the woman ransom herself." The word khula, in its original sense means "to draw" or "dig up" or "to take off" such as taking off one's clothes or garments. It is said that the spouses are like clothes to each other and when they take khula each takes off his or her clothes, i.e., they get rid of each other. In law it is said is said to signify an agreement between the spouses for dissolving a connubial union in lieu of compensation paid by the wife to her husband out of her property. Although consideration for Khula is essential, the actual release of the dower or delivery of property constituting the consideration is not a condition precedent for the validity of the khula. Once the husband gives his consent, it results in an irrevocable divorce. The husband has no power of cancelling the 'khul' on the ground that the consideration has not been paid. The consideration can be anything; usually it is mahr, the whole or part of it. But it may be any property though not illusory. In mubarat, the outstanding feature is that both the parties desire divorce. Thus, the proposal may emanate from either side. In mubarat both, the husband and the wife, are happy to get rid of each other. Among the Sunnis when the parties to marriage enter into a mubarat all mutual rights and obligations come to an end. The Shia law is stringent though. It requires that both the parties must bona fide find the marital relationship to be irksome and cumbersome. Among the Sunnis no specific form is laid down, but the Shias insist on a proper form. The Shias insist that the word mubarat should be followed by the word talaaq, otherwise no divorce would result. They also insist that the pronouncement must be in Arabic unless the parties are incapable of pronouncing the Arabic words. Intention to dissolve the marriage should be clearly expressed. Among both, Shias and Sunnis, mubarat is irrevocable. Other requirements are the same as in khula and the wife must undergo the period of iddat and in both the divorce is essentially an act of the parties, and no intervention by the court is required.

Divorce by wife:

The divorce by wife can be categorized under three categories:

(i) Talaaq-i-tafweez

(ii) Lian

(iii) By Dissolution of Muslim Marriages Act 1939.

Talaaq-i-tafweez or delegated divorce is recognized among both, the Shias and the Sunnis. The Muslim husband is free to delegate his power of pronouncing divorce to his wife or any other person. He may delegate the power absolutely or conditionally, temporarily or permanently. A permanent delegation of power is revocable but a temporary delegation of power is not. This delegation must be made distinctly in favour of the person to whom the power is delegated, and the purpose of delegation must be clearly stated. The power of talaaq may be delegated to his wife and as Faizee observes, "this form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain freedom without the intervention of any court and is now beginning to be fairly common in India". This form of delegated divorce is usually stipulated in prenuptial agreements. In Md. Khan v. Shahmai, under a prenuptial agreement, a husband, who was a Khana Damad, undertook to pay certain amount of marriage expenses incurred by the father-in-law in the event of his leaving the house and conferred a power to pronounce divorce on his wife. The husband left his father-in-law's house without paying the amount. The wife exercised the right and divorced herself. It was held that it was a valid divorce in the exercise of the power delegated to her. Delegation of power may be made even in the post marriage agreements. Thus where under an agreement it is stipulated that in the event of the husband failing to pay her maintenance or taking a second wife, the will have a right of pronouncing divorce on herself, such an agreement is valid, and such conditions are reasonable and not against public policy . It should be noted that even in the event of contingency, whether or not the power is to be exercised, depend upon the wife she may choose to exercise it or she may not. The happening of the event of contingency does not result in automatic divorce.

Lian: If the husband levels false charges of unchastity or adultery against his wife then this amounts to character assassination and the wife has got the right to ask for divorce on these grounds. Such a mode of divorce is called Lian. However, it is only a voluntary and aggressive charge of adultery made by the husband which, if false, would entitle the wife to get the wife to get the decree of divorce on the ground of Lian. Where a wife hurts the feelings of her husband with her behaviour and the husband hits back an allegation of infidelity against her, then what the husband says in response to the bad behaviour of the wife, cannot be used by the wife as a false charge of adultery and no divorce is to be granted under Lian. This was held in the case of Nurjahan v. Kazim Ali by the Calcutta High Court.

Dissolution of Muslim Marriages Act 1939:

Qazi Mohammad Ahmad Kazmi had introduced a bill in the Legislature regarding the issue on 17th April 1936. It however became law on 17th March 1939 and thus stood the Dissolution of Muslim Marriages Act 1939.

Section 2 of the Act runs thereunder:

A woman married under Muslim law shall be entitled to obtain a decree for divorce for the dissolution of her marriage on any one or more of the following grounds, namely:-

• That the whereabouts of the husband have not been known for a period of four years: if the husband is missing for a period of four years the wife may file a petition for the dissolution of her marriage. The husband is deemed to be missing if the wife or any such person, who is expected to have knowledge of the husband, is unable to locate the husband. Section 3 provides that where a wife files petition for divorce under this ground, she is required to give the names and addresses of all such persons who would have been the legal heirs of the husband upon his death. The court issues notices to all such persons appear before it and to state if they have any knowledge about the missing husband. If nobody knows then the court passes a decree to this effect which becomes effective only after the expiry of six months. If before the expiry, the husband reappears, the court shall set aside the decree and the marriage is not dissolved.

• That the husband has neglected or has failed to provide for her maintenance for a period of two years: it is a legal obligation of every husband to maintain his wife, and if he fails to do so, the wife may seek divorce on this ground. A husband may not maintain his wife either because he neglects her or because he has no means to provide her maintenance. In both the cases the result would be the same. The husband's obligation to maintain his wife is subject to wife's own performance of matrimonial obligations. Therefore, if the wife lives separately without any reasonable excuse, she is not entitled to get a judicial divorce on the ground of husband's failure to maintain her because her own conduct disentitles her from maintenance under Muslim law.

• That the husband has been sentenced to imprisonment for a period of seven years or upwards: the wife's right of judicial divorce on this ground begins from the date on which the sentence becomes final. Therefore, the decree can be passed in her favour only after the expiry of the date for appeal by the husband or after the appeal by the husband has been dismissed by the final court.

• That the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years: the Act does define 'marital obligations of the husband'. There are several marital obligations of the husband under Muslim law. But for the purpose of this clause husband's failure to perform only those conjugal obligations may be taken into account which is not included in any of the clauses of Section 2 of this Act.

• That the husband was impotent at the time of the marriage and continues to be so: for getting a decree of divorce on this ground, the wife has to prove that the husband was impotent at the time of the marriage and continues to be impotent till the filing of the suit. Before passing a decree of divorce of divorce on this ground, the court is bound to give to the husband one year to improve his potency provided he makes an application for it. If the husband does not give such application, the court shall pass the decree without delay. In Gul Mohd. Khan v. Hasina the wife filed a suit for dissolution of marriage on the ground of impotency. The husband made an application before the court seeking an order for proving his potency. The court allowed him to prove his potency.

• If the husband has been insane for a period of two years or is suffering from leprosy or a virulent veneral disease: the husband's insanity must be for two or more years immediately preceding the presentation of the suit. But this act does not specify that the unsoundness of mind must be curable or incurable. Leprosy may be white or black or cause the skin to wither away. It may be curable or incurable. Veneral disease is a disease of the sex organs. The Act provides that this disease must be of incurable nature. It may be of any duration. Moreover even if this disease has been infected to the husband by the wife herself, she is entitled to get divorce on this ground.

• That she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years, provided that the marriage has not been consummated;

• That the husband treats her with cruelty, that is to say,-

(a) Habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill treatment, or

(b) Associates with women of ill-repute or leads an infamous life, or

(c) Attempts to force her to lead an immoral life, or

(d) Disposes of her property or prevents her exercising her legal rights over it, or

(e) Obstructs her in the observance of her religious profession or practice, or

(f) If he has more than one wives, does not treat her equitably in accordance with the injunctions of the Holy Quran.

In Syed Ziauddin v. Parvez Sultana, Parvez Sultana was a science graduate and she wanted to take admission in a college for medical studies. She needed money for her studies. Syed Ziaudddin promised to give her money provided she married him. She did. Later she filed for divorce for non-fulfillment of promise on the part of the husband. The court granted her divorce on the ground of cruelty. Thus we see the court's attitude of attributing a wider meaning to the expression cruelty. In Zubaida Begum v. Sardar Shah, a case from Lahore High Court, the husband sold the ornaments of the wife with her consent. It was submitted that the husband's conduct does not amount to cruelty.

In Aboobacker v. Mamu koya, the husband used to compel his wife to put on a sari and see pictures in cinema. The wife refused to do so because according to her beliefs this was against the Islamic way of life. She sought divorce on the ground of mental cruelty. The Kerela High Court held that the conduct of the husband cannot be regarded as cruelty because mere departure from the standards of suffocating orthodoxy does not constitute un-Islamic behaviour.

In Itwari v. Asghari, the Allahabad High Court observed that Indian Law does not recognize various types of cruelty such as 'Muslim cruelty', 'Hindu cruelty' and so on, and that the test of cruelty is based on universal and humanitarian standards; that is to say, conduct of the husband which would cause such bodily or mental pain as to endanger the wife's safety or health.

Irretrievable Breakdown: Divorce on the basis of irretrievable breakdown of marriage has come into existence in Muslim Law through the judicial interpretation of certain provisions of Muslim law. In 1945 in Umar Bibi v. Md. Din , it was argued that the wife hated her husband so much that she could not possibly live with him and there was total incompatibility of temperaments. On these grounds the court refused to grant a decree of divorce. But twenty five years later in Neorbibi v. Pir Bux, again an attempt was made to grant divorce on the

ground of irretrievable breakdown of marriage. This time the court granted the divorce. Thus in Muslim law of modern India, there are two breakdown grounds for divorce: (a) non-payment of maintenancy by the husband even if the failure has resulted due to the conduct of the wife, (b) where there is total irreconcilability between the spouses.

Conclusion:

In contrast to the Western world where divorce was relatively uncommon until modern times, and in contrast to the low rates of divorce in the modern Middle East, divorce was a common occurrence in the pre-modern Muslim world. In the medieval Islamic world and the Ottoman Empire, the rate of divorce was higher than it is today in the modern Middle East. In 15th century Egypt, Al-Sakhawi recorded the marital history of 500 women, the largest sample on marriage in the Middle Ages, and found that at least a third of all women in the Mamluk Sultanate of Egypt and Syria married more than once, with many marrying three or more times. According to Al-Sakhawi, as many as three out of ten marriages in 15th century Cairo ended in divorce. In the early 20th century, some villages in western Java and the Malay Peninsula had divorce rates as high as 70%.In practice in most of the Muslim world today divorce can be quite involved as there may be separate secular procedures to follow as well. Usually, assuming her husband demands a divorce, the divorced wife keeps her mahr, both the original gift and any supplementary property specified in the marriage contract. She is also given child support until the age of weaning, at which point the child's custody will be settled by the couple or by the courts. Women's right to divorce is often extremely limited compared with that of men in the Middle East. While men can divorce their spouses easily, women face a lot of legal and financial obstacles. For example, in Yemen, women usually can ask for divorce only when husband's inability to support her life is admitted while men can divorce at will. However, this contentious area of religious practice and tradition is being increasingly challenged by those promoting more liberal interpretations of Islam.

(c)Indian Divorce Act

Grounds of divorce after the amendment

Gender discrimination writ large on various provisions in the Act has been amended and gender equality has been made almost a certainty. This is more so in the case of grounds for divorce as provided in section 10 of the Act. As far as the Kerala Christians are concerned, it has helped men more in so far as the grounds for divorce are concerned. Women were already having sufficient grounds to seek a divorce on account of a decision of the Full Bench of the High Court in Ammani E.J Vs. Union of India. After the present amendment, both husband and wife can seek a divorce on the grounds of,

1. Adultery
2. Cruelty
3. Desertion for more than seven years
4. Insanity for more than two years
5. Incurable leprosy for more than two years
6. Conversion to another religion
7. Willful refusal to consummate the marriage
8. Not being heard of for 7 years
9. Venereal disease in communicable form for two years
10. Failure to obey the order for restitution of conjugal rights.

However, the wife has been permitted to sue for divorce on additional grounds if the husband is guilty of:

1. Rape
2. Sodomy
3. Bestiality

All these years, Christian spouses were compelled to mudslinging each other if they desired to go in for a divorce. Now section 10- A is added under which mutual consent has also been made a ground for divorce. But the mutual consent is not the same as Hindu Marriage Act. The Divorce Act 1869 (Amendment 2001) states that the couple should be separated for 2 years before raising the petition.

Unit-III: Adoption and maintenance

(a)Hindu Adoptions and Maintenance Act (1956)

The Hindu Adoptions and Maintenance Act were enacted in India in 1956 as part of the Hindu Code Bills. The other legislations enacted during this time include the Hindu Marriage Act (1955), the Hindu Succession Act (1956), and the Hindu Minority and Guardianship Act (1956). All of these acts were put forth under the leadership of Jawaharlal Nehru, and were meant to codify and standardize the current Hindu legal tradition. The Adoptions and Maintenance Act of 1956 dealt specifically with the legal process of adopting children by a Hindu adult, as well as the legal obligations of a Hindu to provide "maintenance" to various family members including, but not limited to, their wife or wives, parents, and in-laws.

Application

This Act applies to Hindus and all those considered under the umbrella term of Hindus, which includes:

- a Hindu by religion in any of its forms or development;
- a Buddhist, Jain or Sikh;
- a child legitimate or illegitimate whose parents are Hindus, Buddhists, Jains or Sikhs;
- a child legitimate or illegitimate one of whose parents are Hindus, Buddhists, Jains or Sikhs and has been so brought up;
- an abandoned child, legitimate or illegitimate of unknown parentage brought up as a Hindu, Buddhist, etc.; and
- a convert to the Hindu, Buddhist, Jain or Sikh religion.

Persons who are Muslims, Christians, Parsis or Jews are excluded from this definition.

The Act does not also apply to adoptions that took place prior to the date of enactment. However, it does apply to any marriage that has taken place before or after the Act had come into force. Moreover, if the wife is not a Hindu then the husband is not bound to provide maintenance for her under this Act under modern Hindu Law.

(b)Adoptions

Who can adopt?

Under this Act only Hindus may adopt subject to their fulfillment of certain criteria. The first of these asserts that the adopter has the legal right to (under this Act that would mean they are a Hindu). Next, they have to have the capacity to be able to provide for the adopted child. Thirdly the child must be capable of being adopted. Lastly, compliance with all other specifications (as outlined below) must be met to make the adoption valid.

Men can adopt if they have the consent(s) of their wife or of all of their wives. The only way of getting around obtaining the permission of the wife or of the wives is if she or if they are unsound, if they have died, if they have completely and finally renounced the world, and if they have ceased to be a Hindu. Men who are unmarried can adopt as well as long as they are not a minor. However, if a man were to adopt a daughter, the man must be twenty four years of age or older.

Women can adopt if they have the consent of their husband. Again, the only way of getting around obtaining the permission of the husband is if he is unsound, has died, has completely and finally renounced the world, and has ceased to be a Hindu. Women who are unmarried can adopt as well as long as they are not a minor. However, if a woman were to adopt a son, the woman must be twenty four years of age or older. If the child is adopted and there are more than one wife living in the household, then the senior wife is classified as the legal mother of the adopted child.

Who can be adopted?

The adopted child can be either male or female. The adopted child must be fall under the Hindu category. The adoptee needs also to be unmarried; however, if the particular custom or usage is applicable to the involved parties then the adoptee can be married. The child cannot be the age of sixteen or older, unless again it is custom or the usage is applicable to the involved parties. An adoption can only occur if there is not a child of the same sex of the adopted child still residing in the home. In particular, if a son were to be adopted then the adoptive father or mother must not have a legitimate or adopted son still live in the house.

Legal Implications for an Adopted Child

From the date of the adoption, the child is under the legal guardianship of the new adopted parent(s) and thus should enjoy all the benefits from those family ties. This also means that this child, therefore, is cut off from all legal benefits (property, inheritance, etc.) from the family who had given him or her up for adoption.

Adoption is recognized by the Hindus and is not recognized by Muslims, Christian and Parsis. Adoption in the Hindus is covered by The Hindu Adoptions Act and after the coming of this Act all adoptions can be made in accordance with this Act. It came into effect from 21st December, 1956. Prior to this Act only a male could be adopted, but the Act makes a provision that a female may also be adopted. This Act extends to the whole of India except the state of Jammu and Kashmir. It applies to Hindus, Buddhists, Jainas and Sikhs and to any other person who is not a Muslim, Christian, Parsi by religion.

(c)Maintenance

Maintenance of a Wife

A Hindu wife is entitled to be provided for by her husband throughout the duration of her lifetime. Regardless of whether the marriage was formed before this Act was instated or after, the Act is still applicable. The only way the wife can null her maintenance is if she renounces being a Hindu and converts to a different religion, or if she commits adultery.

The wife is allowed to live separately from her husband and still be provided for by him. This separation can be justified through a number of different reasons, including if he has another wife living, if he has converted to a different religion other than Hinduism, if he has treated her cruelly, or even has a violent case of leprosy. If the wife is widowed by her late husband, then it is the duty of the father-in-law to provide for her. This legal obligation only comes into effect if the widowed wife has no other means of providing for herself. If she has land of her own, or means of an income and can maintain herself then the father-in-law is free from obligation to her. Additionally, if the widow remarries then her late husband's father-in-law does is not legally bound by this Act anymore as well.

Maintenance of a Child or of Aged Parent(s)

Under this Act, a child is guaranteed maintenance from his or her parents until the child ceases to be a minor. This is in effect for both legitimate and illegitimate children who are claimed by the parent or parents. Parents or infirmed daughters, on the other hand, must be maintained so long as they are unable to maintain for themselves

Amount of Maintenance Provided

The amount of maintenance awarded, if any, is dependent on the discretion of the courts. Particular factors included in the decision process include the position or status of the parties, the number of persons entitled to maintenance, the reasonable wants of the claimants, if the claimant is living separately and if the claimant is justified in doing so, and the value of the claimant's estate and income. If any debts are owed by the deceased, then those are to be paid before the amount of maintenance is awarded or even considered.

(d)Maintenance of a divorced Muslim wife

Maintenance of a divorced Muslim wife has always been a highly controversial and debatable social issue. The issue of maintenance of Muslim wife has been a very difficult path as compared to Hindu wife. This issue has been subject matter of big fight by both Muslim fundamentalist and Hindu right wing.

Now coming to the legal technicalities of the issue, I would like to highlight the loop holes of statutes and the helplessness of the Legislature. The legal shortcoming of the maintenance law for Muslim Wife was used as a weapon by husbands to protect themselves from the liability of maintaining their wives. Prior to amendment, as per section 125 Cr.P.C.(Criminal Procedure Code), maintenance is granted only to the 'Wife' and therefore the husband started taking defense that the divorced women is no more his wife and henceforth not entitled for any maintenance. Then the legislature amended the section and inserted an explanation which clarifies that 'wife' includes divorced wives. However, husbands used another shield to protect themselves from the liability of maintaining their wife which was available under section 127(3) Cr.P.C. (Criminal Procedure Code), which

says that if women get any customary payment after divorce then husband will not be responsible for her maintenance. In numerous cases, it was held that 'Maher' or 'Dower' is the sum mentioned under sec 127 (3).

Then the next stage came in, when the court recognized Dower as the sum mentioned under the aforesaid clause but emphasized that such amount should be fair & reasonable as observed in Bai Fatima vs. Ali Hussain 1979 which find further approval of the Supreme Court in Fazlunbi vs. Khaderwali 1980 (SC) so as to protect Muslim women from destitution.

Then another stage came when the court held that no matter whether the dower is paid or not, husband is liable to maintain his wife and held that Dower is not included in clause 3 of sec 127 and the court also mentioned verses of the HOLY Quran from chapter 2 verse 241 and 242 to signify that it's a religious duty of a Muslim husband to provide reasonable maintenance to his divorced wife. This all happened in the infamous case of Shahbano Begum v/s Mohd Ahmed Khan (AIR 1986: 945 sc)

However, this led to wide spread demonstrations and controversy which pressurized then Rajiv Gandhi government to pass Muslim Women Protection of Rights on Divorce Act (1986). Once again, this legislation failed to address the real issue. This law created new confusion and contradiction because of loose drafting amongst the views of different High Courts. The most important section relating to controversy was sec 3 which used the word "within the iddat period ".The controversy was on its peak between Gujarat and Andhra High Courts in the cases of Arab Bail and Fathimunnissa Begum.

The constitutionality of this act was challenged in 2000 in the case of:

Though there is no fixed formula to arrive at the calculation of maintenance. Yet, the figure hovers around 30% to 40% of the salary/income. Danial Latifi Vs Union Of India Air 2000 (Sc) It was held that sec 3 of Muslim Women Protection of Rights on Divorce Act entitles a Muslim women for maintenance even beyond IDDAT period and the controversy was set aside once and for all.

Conclusion:

By virtue of judicial pronouncements and other steps, rights of Muslim women has been restored but it will become fruitful only when under lying thinking are changed, the Muslim women should emancipate themselves

educationally, economically and socially for their well being only and then they can understand their rights and worth and thereafter the social upliftment of the whole community is possible. We should always remember that mother is the first teacher and mentor of his child. It is a historical fact that no society ever lived in peace until their women folk are at peace.

(e)Maintenance under the Code of Criminal Procedure, 1973

Introduction:

The advent of the nuclear family, due to globalization and consumerism, ensured the disintegration of the Joint Family system which was prevalent for several Yugas. The dismantling of the Joint family resulted in withdrawal of the support system which acted as a buffer to weather difficult periods during the early phase of marital life. Consequently, a couple had to find both the psychological and financial support within and by dint of hard work respectively which invariably culminated in a stressful life. The Consequence is the breakdown of family bonding resulting in divorce. This arises due to incompatibility between spouses. The children also have to endure the psychological conflict due to differences between parents. The wife and the children required sustenance and the law stepped into ensure they are not subjected to distress.

Genesis

According to Black's legal Dictionary the origin of the expression "Alimony" lies in the Latin Word "Alimonia" which means sustenance. It has not been defined in any of the statutes in India. Sustenance stems from the common Law right of the Divorced wife to support by her husband. "Alimony in Gross" or "in lumpsum" is in the nature of final property settlement. However, Alimony in strict sense contemplates payment of money at regular intervals. It also includes permanent and pendatelite spousal support. Generally it is restricted to money, unless otherwise authorized by statute.

It is a term used to describe the allowance made to married women when she is under necessity to live apart from her spouse. The object of the provision is the prevention of vagrancy and to provide the neglected wife and children sustenance in their distress. It is consistent with Article 15(3) and 39 of the Constitution of India. Bala Nair vs. Bhavani Ammal (1987 Cr.L.J.399).

Statutory Provision:

The Power of the Court to order maintenance, when proceedings are pending for matrimonial relief has been provided under different statutes. Section 24 of the Hindu Marriage Act; Section 36 of the Special Marriage Act and the Divorce Act and Section 39 of the Parsi Marriage Act speak about alimony pendatelite. Section 25 of the Hindu Marriage Act, section 40 of the Parsi Marriage Act and Section 37 of the Special Marriage Act and Divorce Act, provides for permanent alimony and maintenance. Section 85 of the Mohamedan Law states that the wife may get maintenance in accordance with the provisions of Section 125 of the Code of Criminal Procedure. This is to ensure that a derelict Muslim husband cannot take umbrage under his personal law in order to defeat these statutory obligations under the code of Criminal procedure. Ameer Amanullah Vs. P.Maniam Beevi(1985 (1) MLJ (Cri) 164 Code of Criminal Procedure:

Section 125 of the Code of Criminal Procedure reads as follows:

(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

A Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

This Section was introduced, to safeguard the wife, legitimate and illegitimate child (not being a married daughter) who has attained majority, where such child by reason of any physical or mental abnormality or injury unable to maintain itself or a person's father or mother unable to maintain himself or herself.

From the reading of the section it is clear that a person is bound to maintain his wife, children and aged parents, who are unable to maintain themselves. While ordering maintenance the Court has to consider the income and

the status of the person who is liable to pay maintenance and also the income and status of the person claiming maintenance. Though a wife can file a suit for maintenance in a Civil Court, this Section is provided to get maintenance as early as possible. For a person, food, clothing and shelter is essential. While ordering maintenance, Court has to consider whether the wife is living separately on reasonable grounds. The wife can refuse to live with her husband if he lives with a mistress. No wife shall be entitled to receive maintenance from her husband under this Section if she is living in adultery, or husband and wife are living separately by mutual consent. The petitioner can file any number of petitions under Section 125 Cr.P.C for enhancement of

Maintenance when the circumstances change. The Court after considering the change of circumstances can enhance the maintenance accordingly. Originally a magistrate can order Rupees 500 per month as maximum maintenance. After the recent amendment maintenance exceeding Rs.500 can be ordered according to the circumstances of each case.

Wives right to maintenance is not absolute under 125 of the Code. It is circumscribed by the fact that she is unable to maintain herself and further the husband having sufficient means neglected or refused to maintain her. No doubt, there is a clear distinction between the locus standi or competence to file a petition for maintenance under Section 125 of The Code by any of the persons illustrated in the Section and their being entitled on merits to particular amounts of maintenance there under. However, the premises for both is essentially the existence or otherwise of their separate income or means of support besides other factors stipulated in the Section. K.M.Nagammalappa vs. B.J.Lalitha, 1985 Cr.L.J 1706 (KANT) See also Hyma Krishnadass vs. M.Krishnadass, 1985 (2) CRIMES 661 (KER), Habeebulla vs. Shakella, 1984 Cr.L.J 1062.

Quantum of Maintenance

Right of Maintenance under Hindu Law is a substantive right and a continuing right and it is variable from time to time. The Family Court or the District Court may in satisfaction of change of circumstances modify, recind or enhance the maintenance allowance. On proof of change and circumstance, the family Court has jurisdiction under Section 127 Cr.P.C. to revise the earlier order passed under Section 125 of the Code. Uma vs. Lalit Kumar Sharma (1999 (1) DMC 83). In Ekradeshwari Vs. Homeswar (AIR 1929 PC 128), the privy council held, that fixation of maintenance depends upon a number of factors and the same must be determined on the facts of a particular case. The said ruling was rendered prior to the enactment of Hindu Adoption and Maintenance Act 1956.

The Apex Court in Kulbhusan vs. Rajkumari (AIR 1971 SC 234) approved the said observation by the Privy Council under Section 23(2) of the said Act. See also K.Sivakumar vs. K.Sambasiva Rao (2001 (1) DMC 75) and G.C.Gosh Vs.Sushmita Gosh (2001 (1) DMC 469). The wife is entitled to have the same status as her husband. She must have the necessary medical facility, food, clothing etc. While fixing the amount of maintenance, the Court should also take into account considering the inflation and cost of living and his obligation to support the minor child and his parents. S.Jayanthi Vs.S.Jayaraman (1998(1) DMC 699).

There is no fixed Rule, while arriving at the Quantum, in respect of permanent Alimony. It is only the independent income of the payee which is to be considered. While granting relief of permanent alimony, the court has to keep in view the following considerations:

i) Husband's own income.

ii) Income of the Husband from other property;

iii) Income of the Applicant.

iv) Conduct of parties.

Ramlal vs. Surender Kaur (1995 (1) (iv) L.J 204 (Punjab) In Vanaja Vs. Gopa (1992 (1) DMC 347) the High Court Madras has held that the fact that the wife has already got maintenance under Section 125 Cr.P.C. is no bar to her getting alimony pendante lite under Section 24 of the Hindu Marriage Act.

Enforcement:

After ordering maintenance if the respondent husband fails or refuses to pay the maintenance without sufficient cause the magistrate can issue warrant for levying the amount due in the manner provided for levying fines and may also sentence such person for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made. Provided that no warrant shall be issued for the recovery of any amount due under this Section unless applications made to the Court to levy such amount within a period of one year it became due. Proceedings under Section 125 Cr.P.C are considered to be of a civil nature. Though they are wholly governed by the procedure of the code of criminal procedure, they are really of civil nature, but are dealt with summarily in a Criminal Court for the purpose of speedy disposal on grounds of convenience and social order. Pandharinadh

Sakharam Thuve vs. Surekha Pandharinadh Thuve, 1999 Cr.L.J 2919 (BOM). It is to be borne in mind that a petition filed under Section 125 Cr.P.C is not a complaint and the person arrayed as the opposite party is not an accused. Following the decision of the Supreme Court in AIR 1963 SC 1521, which held that instant proceedings under 125 Cr.P.C is a proceedings of a civil nature in which the Magistrate can invoke the inherent powers to recall his earlier order finally disposing a proceedings of this nature, provided, sufficient grounds are shown. S K.Alauddin vs. Khadizebb, 1991 Cr.L.J 20.

Hindu Law Text enjoins upon the husband a mandatory duty to maintain his wife. The duty to maintain is dehors his possession of any property. A decree for maintenance creates a charge on his property. In Raghavan vs. Nagammal (AIR 1979 Mad 200) the High Court of Madras held that an order of maintenance, in term of Section 39 of the Transfer of property Act, creates a charge on the property Act. This principle was extended to an order passed under Section 125 Cr.P.C. in Diwakaran vs. Barghavy Chellamma (1985 (2) DMC 486).

Apart From the above, Section 125 (3) of the Cr. P.C. r/w Section 128 of the Cr.P.C. empowers the Magistrate to enforce the execution in case of default by the person ordered to pay maintenance. Section 51 of the C.P.C. can also be utilized for enforcing the order of maintenance

Validity of Marriage

Validity of the marriage for the purpose of summary proceedings under Section 125 Cr.P.C is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of a marriage in such proceedings is not as strict as is required in a trial of offences under Section 494 IPC. If the claimant in proceedings under Section 125 of The Code succeeds in showing that she and the respondent have lived together as husband and wife the Court can presume that they are legally wedded spouses, and in such a situation the party who denies the marital status can rebut the presumption. Undisputedly marriage procedure followed in the temple, that too, in the presence of the idol of Lord Jaganath, which is worshiped by both the parties is considered to be valid. Once it is admitted that the marriage procedure was followed then it is not necessary to further probe in to whether the said procedure was complete as per the Hindu rites in the proceedings under Section 125 Cr.P.C. Dwarika Prasad Satpathi Vs. Bityut Prava Dixit, (1999) 7 SCC 675 1999 (4) crimes 206 = 2000 Cr.L.J 1, See also Raju Vs. Pushpa Devi, 1999 Cr.L.J 2294.

The High Court of Bombay in K.M. Vyas vs. R.K.Vyas (AIR 1999 Bom 127) held that the second wife is entitled to get maintenance under Section 24 of the Hindu Marriage Act even if the Second Marriage of the husband is void. In Devinder Singh Vs. Jaspal Kaur (1999 (1) MDM (535) the Punjab and Haryana High Court held that the Right to claim maintenance under Section 25 of the Hindu Marriage Act is not defeated even where the marriage is dissolved by a Decree of Nullity. In Malika Vs. P.Kulandai (2001 (1) DMC 354) the court held that when the husband contracted the Second marriage by suppressing the fact of the first marriage, the wife and child are entitled to maintenance under Section 125 of the Cr.P.C.

Recent Trends:-

The Apex Court in Komalam Amma vs. Kumarapillai (2008(14) SCC 345) held that the Hindu Wife is entitled to be maintained by her husband. She is entitled to remain under his roof and protection. She is also entitled to separate residence, if by reason of the husband's conduct or by his refusal to maintain her in his own place of residence or other just cause she is compelled to live apart from him. Right to Residence is part and parcel of wife's right to maintenance. The Right to Maintenance cannot be defeated by the husband executing a will to defeat such right..... For the purpose of maintenance the term "Wife" includes Divorced Wife.

The said court in Sipra Bhattacharyya's case (2009 (4) SCC 366), has held that the trial court is duty bound to dispose of the Application for maintenance before the suit for Divorce is decided and that too within a time frame. In Rajesh Varman's case (2009 (1) SCC 398) the said court held that the term maintenance and support are comprehensive in nature and of wide amplitude and they would take within their sweep medical expenses. However, in Vimalaben Ajithbai Patel's case (2008 (4) SCC 649) the court held that the mother-in-law cannot be fastened with any legal liability to maintain her daughter- in- law from her own property or otherwise. A wife is only entitled to maintenance from her husband.

The recent trend feathering the concept of "live-in" and same sex relationships has created the need to extend maintenance in such relationship also. In Western Countries unmarried relationships and same sex relationships have been recognized by statutes and judicial notice has been taken by courts. The dependent partner in such relationship has been held entitled to support which is termed as "Palimony". The said concept of unmarried

relationship is gaining momentum amongst the youth in India also. Consequently, it would be essential to protect the dependent partner if the relationship is broken.

Conclusion;-

The changing pattern in human thought and attitude has resulted in not only recognizing but also accepting the abnormality existing within the normal nature in human beings. The courts and the Legislature in various countries have recognized the abnormality as a factor which has to be addressed to by the society. Consequently the Right to Maintenance will have to be addressed by giving it more expansive amplitude. However, under the current situation the impediment in enforcing this social legislation lies in the defense which the husband may take. The defense of matrimonial wrong being decided as a precondition adds to the inordinate delay in disposing of the cases and thus has resulted in denying the benefits of the legislation to the dependent spouse. Most often the deprived partner is unable to sustain the protracted legal battle in the courts of law. The enforcement machinery is inadequate and often the deprived person has to approach the court for execution so that the amount ordered is paid. It is essential that the courts should be empowered to dispose of the Right to Maintenance on a Fast Track so that this social legislation is enforced both in letter and spirit.

Maintenance

Obligation of a husband to maintain his wife arises out of the status of the marriage. Right to maintenance forms a part of the personal law.

Under the Code of Criminal Procedure, 1973, (2 of 1974), right of maintenance extends not only to the wife and dependent children, but also to indigent parents and divorced wives. Claims of the wife, etc., however, depend on the husband having sufficient means. Claim of maintenance for all dependent persons was limited to Rs. 500 per month. But, this limit was removed by the Code of Criminal Procedure (Amendment) Act, 2001 (No. 50 of 2001). Inclusion of the right of maintenance under the Code of Criminal Procedure has the advantage of making the remedy both speedy and cheap. However, divorced wives who have received money payable under the customary personal law are not entitled to claim maintenance under the Code of Criminal Procedure.

Under Hindu Law, the wife has an absolute right to claim maintenance from her husband. But she loses her right if she deviates from the path of chastity. Her right to maintenance is codified in the Hindu Adoptions and

Maintenance Act, 1956. In assessing the amount of maintenance, the court takes into account various factors like position and liabilities of the husband. It also judges whether the wife is justified in living apart from husband. Justifiable reasons are spelt out in the Act. Maintenance pendente lite (pending the suit) and even expenses of a matrimonial suit will be borne by either, husband or wife, if the other spouse has no independent income for his or her support. The same principle will govern payment of permanent maintenance.

Under the Muslim Law, the Muslim Women (Protection of Rights on Divorce) Act, 1986 protects rights of Muslim women who have been divorced by or have obtained divorce from their husbands and provides for matters connected therewith or incidental thereto. This Act, inter alia, provides that a divorced Muslim woman shall be entitled to: Reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband

Where she herself maintains children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children

An amount equal to the sum of mehr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to the Muslim Law and

All property given to her before or at the time of marriage or after her marriage by her relatives or friends or by husband or any relatives of the husband or his friends.

In addition, the Act also provides that where a divorced Muslim woman is unable to maintain herself after the period of iddat, the magistrate shall order directing such of her relatives as would be entitled to inherit her property on her death according to the Muslim Law and to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, standard of life enjoyed by her during her marriage and means of such relatives and such maintenance shall be payable by such relatives in proportion to the size of their inheritance of her property and at such periods as he may specify in his order.

Where such divorced woman has children, the magistrate shall order only such children to pay maintenance to her and in the event of any such children being unable to pay such maintenance; the magistrate shall order parents of such divorced woman to pay maintenance to her.

In the absence of such relatives or where such relatives are not in a position to maintain her, the magistrate may direct State Wakf Board established under Section 13 of the Wakf Act, 1995 functioning in the area in which the woman resides, to pay such maintenance as determined by him.

The Parsi Marriage and Divorce Act, 1936 recognizes the right of wife to maintenance-both alimony pendente lite and permanent alimony. The maximum amount that can be decreed by the court as alimony during the time a matrimonial suit is pending in court is one-fifth of the husband's net income. In fixing the quantum as permanent maintenance, the court will determine what is just, bearing in mind the ability of husband to pay, wives own assets and conduct of the parties. The order will remain in force as long as wife remains chaste and unmarried.

The Indian Divorce Act, 1869 inter alia governs maintenance rights of a Christian wife. The provisions are the same as those under the Parsi Law and the same considerations are applied in granting maintenance, both alimony pendente lite and permanent maintenance.

Unit-IV: Guardianship

(a) Guardianship under Hindu Law

The Dharmashastras did not deal with the law of guardianship. During the British regime the law of guardianship was developed by the courts. It came to be established that the father is the natural guardian of the children and after his death, mother is the natural guardian of the children and none else can be the natural guardian of minor children. Testamentary guardians were also introduced in Hindu law: It was also accepted that the supreme guardianship of the minor children vested in the State as parens patrie and was exercised by the courts. The Hindu law of guardianship of minor children has been codified and reformed by the Hindu Minority and Guardianship Act, 1956. The subject may be discussed under the following heads: (i) Guardianship of person of minors, (u) Guardianship of the property of minors, and (iii) De facto guardians, and (iv) guardians by affinity.

Guardianship of the person

Minor Children

Under the Hindu Minority and Guardianship Act, 1956, S. 4(b), minor means a person who has not completed the age of eighteen years. A minor is considered to be a person who is physically and intellectually imperfect and immature and hence needs someone's protection. In the modern law of most countries the childhood is accorded protection in multifarious ways. Guardian is "a person having the care of the person of the minor or of his property or both person and property." It may be emphasized that in the modern law guardians exist essentially for the protection and care of the child and to look after its welfare. This is expressed by saying that welfare of the child is paramount consideration. Welfare includes both physical and moral well-being. Guardians may be of the following types: 1. Natural guardians, 2. Testamentary guardians, and 3. Guardians appointed or declared by the court. There are two other types of guardians, existing under Hindu law, de facto guardians, and guardians by affinity.

Natural Guardians

In Hindu law only three persons are recognized as natural guardian's father, mother and husband, Father. "Father is the natural guardian of his minor legitimate children, sons and daughters." Section 19 of the Guardians and Wards Act, 1890, lays down that a father cannot be deprived of the natural guardianship of his minor children unless he has been found unfit. Me effect of Lh1s provision has been considerably whittled down by judicial decisions and by Section 13 of the Hindu Minority and Guardianship Act which lays down that welfare of the minor is of paramount consideration and father's right of guardianship is 5;ubordinate to the welfare of the child. The Act does not recognize the principle of joint guardians. The position of adopted children is at par with natural-born children. The mother is the natural guardian of the minor illegitimate children even if the father is alive. However, she is the natural guardian of her minor legitimate children only if the father is dead or otherwise is incapable of acting as guardian. Proviso to clause (a) of Section 6, Hindu Minority and Guardianship Act lays down that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. Thus, mother is entitled to the custody of the child below five years, unless the welfare of the minor requires otherwise.

In Gita Hariharan v. Reserve Bank of India and Vandana Shiva v. Jayanta Bandhopadhaya, the Supreme Court has held that under certain circumstances, even when the father is alive mother can act as a natural guardian. The term 'after' used in Section 6(a) has been interpreted as 'in absence of' instead 'after the life-time'. -

Rights of guardian of person. -The natural guardian has the following rights in respect of minor children:

(a) Right to custody, .

(b) Right to determine the religion of children,

(c) Right to education,

(d) Right to control movement, and

(e) Right to reasonable chastisement

These rights are conferred on the guardians in the interest of the minor children and therefore of each- of these rights is subject to the welfare of the minor children. The natural guardians have also the obligation to maintain their minor children.

Testamentary Guardians

When, during the British period, testamentary powers were conferred on Hindus, the testamentary guardians also came into existence. It was father's prerogative to appoint testamentary guardians. By appointing a testamentary guardian the father could exclude the mother from her natural guardianship of the children after his death. Under the Hindu Minority and Guardianship Act, 1956, testamentary power of appointing a guardian has now been conferred on both parents.' The father may appoint a testamentary guardian but if mother survives him, his testamentary appointment will be ineffective and the mother will be the natural guardian. If mother appoints testamentary guardian, her appointee will become the testamentary guardian and father's appointment will continue to be ineffective. If mother does not appoint, father's appointee will become the guardian. It seems that a Hindu father cannot appoint a guardian. of his minor illegitimate children even when he is entitled to act as their natural. Guardian, as S. 9(1) confers testamentary power on him in respect of legitimate children. In respect of illegitimate children, Section 9(4) confers such power on the mother alone.

Under Section 9, Hindu Minority and Guardianship Act, testamentary guardian can be appointed only by a will. The guardian of a minor girl will cease to be the guardian of her person on her marriage, and the guardianship cannot revive even if she becomes a widow while a minor. It is necessary for the testamentary guardian to accept 'the guardianship. Acceptance may be express or implied. A testamentary guardian may refuse to accept

the appointment or may disclaim it, but once he accepts, he cannot refuse to act or resign except with the permission of the court.

Guardians Appointed by the Court

The courts are empowered to appoint guardians under the Guardians and Wards Act, 1890. The High Court's also have inherent jurisdiction to appoint guardians but this power is exercised sparingly. The Hindu Minority and Guardianship Act is supplementary to and not in derogation to Guardians and Wards Act. Under the Guardians and Wards Act, 1890, the jurisdiction is conferred on the District Court: The District Court may appoint or declare any person as the guardian whenever it considers it necessary in the welfare of the child.' In appointing ,a" guardian, the court takes into consideration various factors, including the age, sex, wishes of the parents and the personal law of the child. The welfare of the children is of paramount consideration.

The District Court has the power to appoint or declare a guardian in respect of the person as well as separate property of the minor. The chartered High Courts have inherent jurisdiction to appoint guardians of the- person as well as the property of minor children. This power extends to the undivided interest of a coparcener.

The guardian appointed by the court is known as certificated guardian. Powers of Certificated guardians. Powers of certificated guardians are controlled by the Guardians and Wards Act, 1890. There are a very few acts which he can perform without the prior permission of the court. In the ultimate analysis his powers are co-extensive with the powers of the sovereign and he may do all those things (though with the permission of the court) which the sovereign has power to do. A certificated guardian from the date of his appointment is under the supervision, guidance and control of the court.

Guardianship by affinity

In pre-1956 Hindu law there existed a guardian called guardian by affinity. The guardian by affinity is the guardian of a minor widow. Mayne said that "the husband's relation, if there exists any, within the degree of *sapinda*, are the guardians of a minor widow in preference to her father and his relations."' The judicial. Pronouncements have also been to the same effect. The guardianship by affinity was taken to its logical end by the High Court in Paras Ram v. State[2] In this case the father-in-law of a minor widow forcibly took away the widow from her mother's house and married her for money to an unsuitable person against her wishes. The

question before the court was whether the father-in-law was guilty of removing the girl forcibly. The Allahabad High Court held that he was not, since he was the lawful guardian of the widow.

A question has come before our courts, whether the nearest *sapinda* of the husband automatically becomes a guardian of the minor widow on the death of her husband or whether he is merely preferentially entitled to guardianship and therefore he cannot act as guardian unless he is appointed as such? Paras Ram seems to subscribe to the former view, and the Madras and the Nagpur high Courts to the latter view. Under Section 13, Hindu Minority and Guardianship Act, in the appointment of 'any person as guardian, the welfare of the child is paramount consideration. The fact that under Hindu law father-in-law has preferential right to be appointed as guardian is only a matter of secondary consideration.

In our submission, it would be a better law if the guardianship of the minor wife, both of her person and property, continues to vest in the parents. We do not have much of textual guidance or case law on the powers of the guardians by affinity. Probably his powers may be taken to be at par with those of the natural guardian.

De Facto Guardian

A de facto guardian is a person who takes continuous interest in the welfare of the minor's person or in the management and administration of his property without any authority of law. Hindu jurisprudence has all along recognized the principle that if liability is incurred by one on behalf of another in a case where it is justified, then the person, on whose behalf the liability is incurred or, at least, his property, is liable, notwithstanding the fact that no authorization was made for incurring the liability.'

The term 'de facto guardian' as such is not mentioned in any of the texts, but his existence has never been denied in Hindu law. In Sriramulu, Kanta. said that Hindu law tried to find a solution out of two difficult situations: one, when a Hindu child has no legal guardian, there would be no one who would handle and manage his estate in law and thus without a guardian the child would not receive any income for his property and secondly, a person having no title could not be permitted to intermeddle with the child's estate so as to cause loss to him. The Hindu law found a solution to this problem by according legal status to de facto guardians.

A mere intermeddler is not a de facto guardian. An isolated or fugitive act of a person in regard to child's property does not make him a de facto guardian. To make a person a de facto guardian some continuous course

of conduct is necessary on his part. In other words, a de facto guardian is a person who is not a legal guardian, who has no authority in law to act as such but nonetheless he himself has assumed, the management of the property of the child as though he were a guardian. De facto guardianship is a concept where past acts result in present status. The term literally means 'from that which has been done.'

The de facto guardian was recognized in Hindu law as early as 1856. The Privy Council in Hanuman Pd. said that 'under Hindu law, the right of a bona fide encumbrance, who has taken a de facto guardian a charge of land, created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not affected by the want of union of the de facto with the de jure title.

(b)Guardianship under Muslim Law:

The source of law of guardianship and custody are certain verses in the Koran and a few ahadis. The Koran, the alladis and other authorities on Muslim law emphatically speak of the guardianship of the property of the minor; the guardianship of the person is a mere inference. We would discuss the law of guardianship of custody as under:

(a) Guardianship,

(b) Custody, and

(c) De facto guardian.

Classification of Guardianship

In Muslim law guardians fall under the following three categories:

(i) Natural guardians,

(ii) Testamentary guardians, and

(iii) Guardians appointed by the court.

Natural Guardians

In all schools of both the Sunnis and the Shias, the father is recognized as guardian which term in the context is equivalent to natural guardian and the mother in all schools of Muslim law is not recognized as a guardian, natural or otherwise, even after the death of the father. The father's right of guardianship exists even when the mother, or any other female, is entitled to the custody of the minor. The father has the right to control the education and religion of minor children, and their upbringing and their movement. So long as the father is alive, he is the sole and supreme guardian of his minor children.

The father's right of guardianship extends only over his minor legitimate children. He is not entitled to guardianship or to custody of his minor illegitimate children.

In Muslim law, the mother is not a natural guardian even of her minor illegitimate children, but she is entitled to their custody.

Among the Sunnis, the father is the only natural guardian of the minor children. After the death of the father, the guardianship passes on to the executor. Among the Shias, after the father, the guardianship belongs to the

Grandfather, even if the father has appointed an executor, the executor of the father becomes the guardian only in the absence of the grandfather. No other person can be natural guardian, not even the brother. In the absence of the grandfather, the guardianship belongs to the grandfather's executor, if any.'

Testamentary Guardian

Among the Sunnis, the father has full power of making a testamentary appointment of guardian. In the absence of the father and his executor, the grandfather has the power of appointing a testamentary guardian. Among the Shias, the father's appointment of testamentary guardian is valid only if the grandfather is not alive. The grandfather, too, has the power of appointing a -testamentary guardian. No other person has any such power. Among both the Shias and the Sunnis, the mother has no power of appointing a testamentary guardian of her children. It is only in two cases in which the mother can appoint a testamentary guardian of her property of her minor children: .first, when she has been appointed a general executrix by the will of the child's father, she can appoint an executor by her will; and secondly, she can appoint an executor in respect of her own property. Which will devolve after her death on her children?

The mother can be appointed a testamentary. Guardian or executrix by the father, or by the grandfather, whenever he can exercise this power. Among the Sunnis, the appointment of a non-Muslim mother as testamentary guardian is valid, but among the Shias such an appointment is not valid, as they hold the view that a non-Muslim cannot be a guardian of the person as well as of the property of a minor. It seems that the appointment of none'-Muslim fellow-subject (iiinmi) is valid, though it may be set aside by the kazi. According to the Malikis and the Shafii law, a zimmi can be a validly appointed testamentary guardian of the property of the minor, but not of the person of -the minor. The Shias also take the same view. It appears that when two persons are appointed as guardians, and one of them is disqualified, the other can act as guardian. A profligate, i.e., a person who bears in public walk of life a notoriously bad, character, cannot be appointed as guardian:

Acceptance of the appointment of ...testamentary guardianship is necessary, though acceptance may be express or implied. But once the guardianship is accepted, it cannot be renounced save with the permission of the court.

Muslim law does not lay down any specific formalities for the appointment of testamentary guardians. Appointment may be made in writing or orally. In every case the intention to appoint a testamentary guardian must be clear and unequivocal. A testamentary deposition made by a testator may be invalid, but appointment of the executor may be general or particular. The testator must have the capacity to make the will at the time when it was executed. This means that the feslat8r should be major and of sound -mind, i.e., at the time of execution of the will, he should be in full possession of his senses.

The executor of the testamentary guardian is designated variously by Muslim lawgivers, indicating his position and powers. He is commonly called, wali or guardian. He is also called amin, i.e., a trustee. He is also termed as kaim-mukam, i.e., personal representative of the testator.

Guardian appointed by the Court.-On the failure of the natural. Guardians and testamentary guardians, the kazi was entrusted with the power of appointment of guardian of a Muslim minor. Now the matter is governed by the Guardians and Wards Act, 1890. This Act applies to the appointment of guardians of all minors belonging to any community. The High Court's also have inherent powers of appointment of guardians, though the power is exercised very sparingly.

Under the Guardians and Wards Act, 1890, the power of appointing, or declaring any person as guardian is conferred on the District Court. The District Court may appoint or declare any person as guardian of a minor

child's person as well as property whenever it considers it necessary- for the welfare of the minor, taking into consideration the age, sex, wishes of the child as well 'as the wishes of the parents and the personal law of the minor.

(c)Guardianship under Christian Law

The Guardians and Wards Act, 1890, which resides in the secular realm also, may be resorted to. The relevant provisions are reproduced herein: -

According to section 17 of the above-said Act, the matters of the case should be considered by the court in appointing guardian. The section reads, " (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of the deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference."

Section 19, which prohibits the Court from appointing guardians in certain cases, reads:

S.19. Guardians not to be appointed by the Court in certain cases:-Nothing in this Chapter shall authorize the Court to appoint or declare a guardian of the property of a minor, whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person-

(a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person. Or

(b) of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or

(c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor."

S.25. Title of guardian to custody of ward:

(1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by Section 100 of the Code of Criminal Procedure, 1882.

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship."

In Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, the Court held the principles of law in relation to the custody of a minor appear to be well established. It is well settled that any matter concerning a minor, has to be considered and decided only from the point of view of the welfare and interest of the minor, In dealing with a matter concerning a minor, the Court has a special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the Court has to be guided by the only consideration of the welfare of the minor.

It is, however, noteworthy that under Indian Divorce Act the sons of Indian fathers cease to be minors on attaining the age of 16 years and their daughters cease to be minors on attaining the age of 13 years: S. 3 (5). The Court under the Divorce Act would thus be incompetent now to make any order under Ss. 41 and 42 with respect to the elder son and the daughter in the present case. According to the respondent-husband under these circumstances he cannot approach the Court unless, the Divorce Act for relief with respect to the custody of these children and now that these children have ceased to be minors under that Act, the orders made by that Court have also lost their vitality. On this reasoning the husband claimed the right to invoke S. 25 of the Guardians and Wards Act."

(d)Guardianship under Parsi Law

Although there is no general law of guardianship, yet it is permitted by a statute amongst Hindus and by custom amongst a few numerically insignificant categories of persons. Since adoption is legal affiliation of a child, it forms the subject matter of personal law. Muslims, Christians and Parsis have no adoption laws and have to approach court under the Guardians and Wards Act, 1890. Muslims, Christians and Parsis can take a child under the said Act only under foster care. Once a child under foster care becomes major, he is free to break away all his connections. Besides, such a child does not have legal right of inheritance. Foreigners, who want to adopt Indian children, have to approach the court under the aforesaid Act. In case the court has given permission for the child to be taken out of the country, adoption according to a foreign law, i.e., law applicable to guardian takes place outside the country.

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