Chapter 1

Evolution of Marriage as a Social Institution

We drink without being thirsty and make love at any time; that is all that distinguishes us from other animals.

Beaumarchais

1.1 Historical Perspective

The ancient human society was a nomadic society. There was perhaps only a herd-instinct type marital relationship before the dawn of civilization. With the passage of time, the nomadic human beings evolved into an agricultural society and it was considered necessary to ascertain the paternity of children. So long as the sex relationship remained unregulated it was maternity alone, which could be known. Paternity could not be determined. It is logical to say that at some stage of human development the necessity arose for demarcating possession and ownership of material belongings as a natural consequence of human behavior and the human male was seized with the idea of knowing his children. This was not possible if sex promiscuity continued to be the rule. If sex relationship could be made an exclusive union of one man and one woman, only then it was possible to determine the paternity of children. Thus, it seems, in man’s quest to know the paternity of children lie the seeds
of the institution of marriage.\textsuperscript{1} Thus the concept of marriage—a sort of man-woman relationship as a responsible one-to-one unit of society-evolved a unique human family system. Its essential components were intercourse, procreation of children and living together with mutual obligations and responsibilities to the care of offspring. The traditional Hindu family was an institution, a joint family system, characterized by homogeneous togetherness of parents, grandparents, sons and daughters, their spouses, even uncles and aunts. There was a distinct family identity with each member knowing his or her roots. The institution of marriage gives respectability to women, enhances their personal happiness & welfare, provides family support & companionship.

Alas, now a days, family is becoming just an individualistic conjugal family, not even aware of its roots. From times immemorial, Hindus have tried to idealize and sanctify the institution of marriage as no other civil society has done so far. Conjugal fidelity is regarded as the supreme virtue of a woman and it is this character that has protected the Hindu race and Hindu religion down the ages. Purity of the soil and the seed—the sperm and the ovum—alone contributes to the purity of a race and it is with this end in view that so much stress has been laid in our scriptures on the chastity and fidelity of women. Alas! this bedrock of human society as a whole and of Hindu society in particular, is under threat from civilizational onslaughts from various sources in modern India.

\textsuperscript{1} P. Diwan and Peeyushi Diwan, Modern Hindu Law Codified and Uncodified, 62 (Allahabad Law Agency, Faridabad, 16\textsuperscript{th} Ed. 2005).
Marriage is uniquely beneficial to society because it is the foundation of the family and the basic building block of society. It brings significant stability and meaning to human relationships. It remains the ideal for the raising of children. It plays an important role in transmitting culture and civilization to future generations. Marriage is not merely a private contract, but a social institution of great public value and concern. As social science research and government surveys increasingly show, the decline in marriage since the 1960s has been accompanied by a rise in a number of serious social problems.\(^2\)

### 1.2 Definitions Of Marriage

*The supreme happiness of life is the conviction that we are loved; loved for ourselves—say rather, inspite of ourselves.*

*Victor Hugo*

Marriage is one of the most important institutions of human society. It has been variously defined by sociologists as well as by legal luminaries. Westermarck has defined marriage as a more or less durable connection between male and female, lasting beyond the mere act of propagation till after the birth of the offspring. In The Future of Marriage in Western Civilization (1936), he rejected his earlier definition, instead provisionally

defining marriage as “a relation of one or more men to one
or more women that is recognized by custom or law”.³

George A. Lundberg defined marriage as a set of rules
and regulations, which define the rights, duties and
privileges of the husband and wife with respect to each
other.⁴

According to sociologist Mazumdar, “marriage is a
socially sanctioned union of male and female for the
purpose of establishing (a) household (b) entering into sex
relations (c) procreating and (d) providing care for the
offspring”.⁵

According to J.D.M. Derrett, “marriage sometimes
signifies the ceremony or event by means of which the
common intention of a man and a woman to marry is
publicly contracted that is to say, acknowledged &
announced, some times the status or estate or state of
affairs which prevails when, after undergoing or partaking
in the public acknowledgement or announcement, the
parties acquire and continue in the condition of having
married each other”.⁶

Vinogradoff observed that it is not only an institution
regulating sexual intercourse and kept by conjugal
affection, but also an arrangement for bringing up of

⁴ George Andrew Lundberg, Sociology 133 (Harper and Brothers, New York, 1958).
children & a partnership for economic ends and social cooperation. Sometimes one side and sometimes another side predominate.⁷

Robert H. Loure opined, “Marriage denoted those unequivocally sanctioned unions, which persisted beyond sexual satisfaction. It thus came to underline family life, since sexual satisfaction could often be amply gratified outside wedlock.⁸

B.P. Beri while explaining the object of marriage says that it is the source of every domestic comfort from infancy to old age; it is necessary for the preservation and well being of our species; it awakens and develops the best feelings of our nature; it is the source of important legal rights and obligations and in its higher forms it has tended to raise the weaker half of human race from a state of humiliating servitude.⁹

The Hon’ble Supreme Court of India¹⁰ has held that the relationship in marriage is considered to be love, affection, care and concern between the two spouses.

Marriage is a matter of status and legal consequences of a marriage affect not just the two parties but also innocent third parties—children. Therefore matrimonial adjudication law tends to touch the domain of human rights. No institution in society more efficiently transmits

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the core values of civil society than marriage, especially when it is reinforced by church and other institutions. Having and raising children within the bonds of marriage is a powerful protection against poverty and welfare dependency. Research by The Heritage Foundation demonstrates that two-thirds of children living in poverty today would be lifted above the poverty line immediately if their mother married their father. The benefits of marriage are enormous and transcend the purely economic.\textsuperscript{11}

Research begun at The Heritage Foundation and recently updated at Family Research Council underscores the benefits the public derives from marriage in terms of higher educational attainment, reduced sexual activity and pregnancy outside of marriage, lower crime rates, increased personal happiness, and many other social goods. Marriage has “more to do with the morals and civilization of a people than any other institution”.

\textit{U.S Supreme Court}

“When men and women fail to form stable marriages, the result is a vast expansion of government attempts to cope with the terrible social needs that result. There is scarcely a dollar that the state and federal government spends on social programs that is not driven, in large part, by family fragmentation: crime, poverty, drug abuse, teen pregnancy, school failure, mental and physical health problems”.

\textit{Maggie Gallagher}

\textsuperscript{11} Available at \url{http://www.heritage.org/Research/Features/Marriage/upload/48119_1.pdf} (visited on March 07, 2011).
“Marriage is a gift that society bestows on its next generation. Marriage (and only marriage) unites the three core dimensions of parenthood—biological, social and legal—into one pro-child form: the married couple”.

David Blankenhorn

Marriage is an exclusive union between man and a woman and it implies that they will live with each other in harmony and in mutual confidence. Thus, adultery, cruelty and desertion are destructive of the very foundations of marriage necessitating social as well as legal intervention.

Marriage among Hindus is one of the sixteen Sanskar—a sacrament, indissoluble union of flesh with flesh, bone with bone, to be continued over in the next world. It is thought to be a ‘janam–janmantar ka bandhan’ viz. the marital tie once created is supposed to continue throughout life i.e. in this world and it could not be broken on any pretext, excuse or grounds. Sanskar literally means impressions gathered during life but in Hindu tradition, it means the value system. Sanskar comprise values imbibed since birth enabling one to deal skillfully and wisely with any type of relationship and situations that one comes across in life. These are a combination of value system, social skills and inherent traits that help in the development of one’s character. Manu, the seer, who is regarded to be the expounder of Hindu Law, explains the thesis of sacred relationship of marriage as follows: ‘Let mutual fidelity continue until death’. This may be

12 Available at http://www.mappingamericaproject.org/special collection (visited March 07, 2011)
considered the summation of the highest law for husband and wife.\textsuperscript{13}

**Buddhist marriage** is a simple ceremony and it is purely a social contract. According to Buddhist law, as soon as the girl attains the age of 20 years, she has the privilege of an independent choice of husband. The Buddhists have no inhibitions in regard to caste or consanguinity. Divorce by mutual consent is permissible.\textsuperscript{14} The Buddhist view of marriage considers marriage a secular affair and as such, it is not considered a sacrament. Buddhists are expected to follow the civil laws regarding marriage laid out by their respective governments.

**Jainism** like Buddhism rejected the sacramental notion of marriage but accepted many of the marriage customs of the Hindus that is how intermarriage between the Hindus and Jains slowly came into practice.

In **Sikhism**, too, marriage is a sacramental bond for life. The concept of eternal marital bond has an echo in Gurbani “*Nanak Satgur Tinah Milaya Jinnah Dhuron Paya Sanjog*”, meaning thereby that it is with God’s grace that the marital bond is created from the very beginning of life.

**Muslim Marriage** unlike Hindu marriage, where proper ceremonies are *sine qua non* of valid marriage, no special marriage ceremony is prescribed under Muslim Law except a religious discourse by a Qazi. There is a fundamental difference between the nature & character of


Hindu and Muslim marriage, as in the former case it is a sacramental union and in the later cases it is purely a contractual union. However, in Muslim society, a marriage proposal by the male and its acceptance by the female is necessary for a valid (Sahih) marriage. Spousal consent is not important in traditional Hindu marriage.

According to Paras Diwan,\textsuperscript{15} from the concept that a Muslim marriage is a civil contract, flows another notion of Muslim law, namely, that for a Muslim marriage no elaborate ceremonies or religious rites are prescribed. The only essential requirement of form is that a contract of marriage must come into existence.

The Prophet of Islam is reported to have said, “Marriage is my Sunna and those who do not follow this way of life are not my followers and there is no mockery in Islam”.

Muslim marriage is potentially a polygamous marriage as the husband is allowed to have up to four wives, as polygamy is a part of personal law of the Muslims.

**Christian Marriages** are just as sacrosanct and binding as any Hindu marriage. Marriage vows conducted in the church by a priest are equally as serious and meaningful as a marriage around the fire in a Hindu Vedic ceremony. Both are legally contractual. One can get married in a church or in a registry office. The priest in a church is authorized to legalize the marriage but all marriages must be registered. Non-Christians can get

married at their own places of worship but the marriage has to be preceded by a civil ceremony where the official registrar is present to legalize the marriage. Church does not condone divorce but remarriage after divorce is normal practice.

According to Cheshire\textsuperscript{16} the form of marriage recognized by English law is generally described as a "Christian Marriage". Here the reference to religion is misleading. Whatever may be the religion of the parties or of the country in which they marry, their union is a marriage in the English sense provided that, in the eyes of the relevant law, it possesses two attributes of indefinite duration and the exclusion of all other persons. The English matrimonial law was adapted to the Christian marriage. Under the English domestic law marriage is defined as a voluntary union for life between one man and one woman to the exclusion of all others. English courts have adopted this very concept of marriage to the conflict of law cases, which has come in conflict with respect to polygamous marriages under different personal laws of the marrying parties.

Polygamy is classified as Polygyny and polyandry. Polygyny means marriage of one man with two or more than two wives at a time. Polyandry is a form of marriage in which one woman marries more than one man at a specified time. Polyandry as custom was practically unknown to Hindu Society, however there existed Polyandrous arrangements among a few non-Aryan tribes

of the Kashmir and Tibet. It is also prevalent in Sikkim, Ladakh, and certain parts of Himachal Pradesh.  

1.3 Definition of ‘Hindu’ & Legal Implications

The word “Hindu” refers comprehensively to various groups of people for purposes of personal law. It does not denote any particular religious faith or community. It encompasses all those who have continued to live under the Hindu law as enunciated and practiced since centuries. Thus, the word ‘Hindu’ has been defined in its broadest, all embracing context, keeping in view the cultural and civilizational roots of Indian society as a whole.

Hinduism is both a civilization and a conglomerate of religions, with neither a beginning, a founder, nor a central authority, hierarchy, nor organization. Every attempt at a specific definition of Hinduism has proved unsatisfactory in one way or the other.  

Thus, Hinduism is not, or say Hindu Dharma is not, analogous or is not similar to the religions or faiths like Christianity or Islam. It is a way of life and culture and it has tried to express, in itself all that is good for the well being of the human beings as well as other animate-inanimate beings of the universe and their improvement.

A Hindu for the purpose of the Hindu Marriage Act, 1955 is not strictly a Hindu. He may be a non-Hindu like a Buddhist, Jaina or Sikh or he may be a non-Hindu who is

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19 *Indumati Koorichh v. Family Court*, (1994)1 Civ LJ 79, 93 (Luck.).
also not a Christian, Muslim, Jew or Parsi, but who is domiciled in India.\textsuperscript{20}

Before the codification of Hindu law, the Jains were regarded as Hindus and as such in the definition of the term Hindu the mention of Jains is by way of abundant caution.\textsuperscript{21}

Section 2(1) of the Hindu Marriage Act, 1955 provides that the Hindu Marriage Act applies to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of Brahmo or Prarthana or Arya Samaj; to any person who is a Buddhist, Jaina or Sikh by religion; and to any other person domiciled in India (excluding Jammu & Kashmir) who is not a Muslim, Christian, Parsi or Jew by religion unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt

\textsuperscript{21} Wealth Tax Commissioner v. Champa Kumari, AIR 1972 SC 2119.
Similarly Sikhs too were always regarded as Hindus. Rani Bhagwan v. JC Bose, (1904) ILR 31 Cal 11.
with in the Hindu Marriage Act if the Hindu Marriage Act 1955 had not been passed.

The explanation to Section 2 (1) of the Hindu Marriage Act 1955 provides as follows: Explanation; the following persons are Hindus, Buddhists, Jains or Sikhs by religion as the case may be, (a) any child, legitimate or illegitimate, both of whose parents are Hindu, Buddhist, Jain or Sikh by religion; (b) any child, legitimate or illegitimate, one of whose parents is Hindu, Buddhist, Jain or Sikh by religion and who is brought up as a member of tribe, community, group or family to which such parent belongs or belonged; (c) and any person who is a convert or re-convert to the Hindu, Buddhist, Jain or Sikh religion. This explanation expressly provides for the conferment of the status of Hindu on a person even though such status is doubtful when the personal law of the parties is invoked. A child in Hindu family and brought up as Hindu has been held to be a Hindu.22

The word “include” in Section 2, sub-Section (3) of the Hindu Marriage Act widens the scope largely and is always interpreted as a word of enlargement. It is intended to be enumerative and not exhaustive.23

Definition of a ‘Hindu’ as detailed in Section 2, sub-Section (b), derives its validity from Article 25, Section 2, sub-clause (b) that reads explanation (II) in sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain,

or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.\textsuperscript{24}

1.4. **Concept of Hindu Marriage**

The concept of Hindu Marriage goes much deeper than just man-woman relationship. It has been called as essential Sanskar as it imbibes all the humane ethos of Hindu Culture from birth of human life, endurance through trials & tribulations of married life and destiny of future generation after death of marriage partners.

1.4.i **Past & Present Status**

In every civilized society, marriage possesses two attributes, firstly indefinite duration and secondly exclusion of all other persons viz. monogamy. However, if a husband is entitled by his personal law that determines the nature of marriage to take a plurality of wives, his marriage is considered to be potentially polygamous even if at the time, when the question is raised, he has not exercised that right or even intends to do so.\textsuperscript{25} Marriage under all the matrimonial laws is a union between man and woman imposing upon each of the spouses certain marital duties and gives to each of them certain legal rights. Each spouse is entitled to comfort consortium of the other.

Consortium means “companionship, love, affection, comfort, mutual services, sexual intercourse”. All these belong to married state. Taken together they make up

\textsuperscript{24} Constitution of India 1950, Article 25, Section 2, Sub Clause (b) Explanation II.

\textsuperscript{25} Supra note 16.
“consortium”. It has been defined as “a partnership of association; but in matrimonial sense it implies much more rather than these cold words suggest. It involves a sharing of two lives, a sharing of joys and sorrows of each party; of their successes and disappointments. In its fullest sense it implies a companionship between each of them, entertainment of mutual friends, sexual intercourse—all those elements, which combined, justify the old common law dictum that a man and his wife are one person.26

Marriage between male and female has become a social institution much beyond the biological sexual gratification. A knit-work of social do’s and don’ts has been woven around this network by tradition, social customs and community sanctions, whether codified or not codified specifically.

According to Hindu Law, marriage is a holy union. The relationship between husband and wife imposes upon each other certain legal marital duties and gives each of them legal marital rights. The marriage imposes a duty on the husband to protect his wife, to give her a home, to provide her with comforts and necessities of life within his means and to treat her nicely. It enjoins on the wife the duty of attendance, obedience to and veneration for the husband and to live with him wherever he may choose to reside.27

The western concept of marriage includes only the personal, social and legal status as first and main components where as Hindu traditional concept includes

another component i.e. Dharam. Dharam is not an exact linguistic equivalent of religion. It encompasses a whole gamut of duties, devotion and discipline of mind, compassionate emotions & virtuous voluntary obligations towards each other for the attainment of a higher spiritual goal in life. It is a sort of legal testament of individual behavior. There is no exact equivalent word in English language for this Hindu conceptual word – Dharam.

Dharam is the principle on which society is based. It is an accretion of universal eternal values. It is an enlightened enunciation of principles and duties and responsibilities to be followed in the relationship between wife & husband; son & father; daughter & mother etc. Thus, according to Hindu traditions, marriage is an instrument for the pursuance of higher goals of life, rather than a means for personal sexual gratification only. Dharam is the most important ingredient of traditional Hindu marriage. A man has to perform various religious rites and ceremonies throughout his life and these ceremonies would remain incomplete without the presence of a wife. The couple, both husband and wife, are supposed to perform these.

The second important aim of marriage is Prajanan or procreation of a progeny for the continuation of the family line. A son, it is said, saves his father from going to hell\(^28\). Procreation especially of a son is said to repay the debt of ancestors-pitririn.

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The perpetuation of one’s kula or family traditions/lineage, according to Dharamshastras is the cardinal function of marriage for the preservation and continuity of culture and customs of the family. Marriage, therefore, involves a union not only for the purpose of biological reproduction but also to maintain an orderly replacement of the family culture acquired through centuries of innovations, trials and tribulations.29

The third aim of marriage is Rati kreeda or sexual act in marriage, which is regarded as very insignificant in Hindu tradition although it is an essential biological function of marriage. Sex is treated primarily an essential means of procreation where as the basic aim of marriage is ordained to be the achievement of higher spiritual goals in life. That is one reason why so many people endure so much bodily and mental sufferings in silence.

1.4.ii. Forms of Hindu Marriage

The Grihyasutras have mentioned eight forms of marriages, Braham, Daiva, Arsha, Prajapatya, Asura, Gandharav, Rakshasha and Pishaach marriages. These forms are uniformly referred to in all the Dharamshastras-religious treatises on Dharam-its contents, chronology and other related matters. These different forms of marriage have been translated by Kane in the following words:30 the gift of a daughter, after decking her (with valuable garments) and honoring her (with jewels) to a man learned

in Vedas and of good conduct whom the father himself invites is called Braham form of marriage.

When the father gives away his daughter after decking her (with ornaments) to a priest who duly officiates at a sacrifice during the course of its performance, it is Daiva form of marriage.

When there is a gift of one’s daughter after taking one pair of cattle (a cow and a bull) or two pairs only as a matter of fulfilling the law (and not as a sale of the girl) that is known as Arsha marriage.

The gift of a daughter after the father has addressed the couple with the words ‘may both of you perform your religious duties together’ and after he has honored the bridegroom (with madhuparka) is declared to constitute the Prajapatya form of marriage.

When the girl is given away at the father’s will after the bridegroom gives as much wealth as he can afford to pay to the relatives of the girls and to the girl herself, that is called the Asura form of marriage.

The union of a girl and the bridegroom by their mutual consent is known as Gandharv marriage, which springs from the passion of love and has intercourse as its purpose.

The forcible abduction of a maiden from her house while she weeps and cries aloud after her kinsmen have been slain, wounded and their homes are broken open is called Rakshasha form of marriage.
When a man has intercourse with a girl stealthily while she is asleep or intoxicated or disordered in mind (or unconscious) that is the Pishaach form, which is the most sinful form of marriage.

These different forms represent the evolution of the institution of marriage in India from the earliest times. Kautilya stated that the first four forms belonged to the dharmiya category and the other four forms belong to the adharmiya category.

The first four forms i.e. Braham, Daiva, Arsha and Prajapatyaya forms were regarded as the best forms of marriage in the Sutra period and in Smriti period.31

The concept of Swayamvar was prevalent in some upper castes during ancient times, where the girl was allowed to choose her own groom as husband. In the lower castes, however, usually the girl had no choice or role in the selection of her husband and was bound by the family or parental tradition or custom. Wife was an important member of the family and was considered as Ardhangini of husband. Hindu marriages are regarded as a means to establish relations between two families. Therefore, utmost care is taken to ensure maximum cultural compatibility between the two families of the marrying spouses. In the selection of mates, therefore, a number of prohibitions and restrictions are followed, firstly the spouses must be of different Gotra and secondly to avoid marrying a Sapinda, persons having common ancestors are called Sapindas. The

In science, the word ‘consanguineous relation’ means the siblings from the same blood and consanguineous marriages are a common cause of many inherited diseases at birth due to the aggregation of genetic defects.

In the Rig Veda, the word Gotra means descendants and the word Sapinda in Sanskrit means ‘of the same body’ or a connection of particles of the same body.

Exogamy was accepted generally during Vedic period. Manu has prohibited marriage between identical gotras. Sapinda Exogamy has been propagated by all the Sutrakars and Smritikars, although there is a difference of opinion regarding the degrees of blood relationship to be avoided. Manu maintained that Sapinda relationship extended to the seventh degree from the father side and five degrees from mother side. Praashara, however, maintained that marriage should be prohibited to fifth degree from a common male descent, but if there is a local or family tradition, marriage in the fourth degree can be accepted. There is no doubt that in Hindus, tradition is supreme and if custom prevails, marriage between sapindas or within the prohibited degrees of relationship are also permissible. For example, in South India, marriage between a maternal uncle and niece is valid where as in North India it is unthinkable in the absence of any custom.

Some castes practice direct exchange, where the marriage of a boy is fixed on the condition that his sister
would simultaneously get married to a boy of his bride’s family.\textsuperscript{32}

The institution of exogamy compels a man to seek his mate from outside his own clan. On the origin of the institution of exogamy, N.C. Sengupta\textsuperscript{33} quotes the anthropologist Kohler that exogamy arose out of the necessity for alliance between different clans. So, as soon as human society stepped out of its primitive barbarism, it felt the necessity for a combination or alliance of clans for defensive and offensive purposes and there were only two different ways in which clans might come together. One was the assumption of a common origin and the other was on the basis of matrimonial relationship.

The perpetuation of one’s ‘kula’ or lineage, according to Dharamshastras is the cardinal function of marriage. According to K.N. Chatterjee, in most of the sutras, Gotra and Parivaar, which meant one or more illustrious ancestors, had the same significance and marriages were prohibited within the same Gotra or Parivaar.\textsuperscript{34}

A gotra is somewhat akin to genes of the ancient Romans. Gotra is the eponymous sage from whom descent is claimed having as its genesis the common pastoral land of the villagers of a village or two, they being descendants of a sage. Marriage within the same gotra was not permissible. Castes other than Brahmans generally follow

\begin{itemize}
\item \textsuperscript{33} Sengupta Nares Chandra, \textit{Evolution of ancient Indian Law}, 52-53 (Calcutta, 1953).
\item \textsuperscript{34} \textit{Supra} note 31.
\end{itemize}
the gotra of their priests. However, in some cases inferior castes invented altogether new gotras. On marriage, a woman loses her ancestral gotra and becomes affiliated to that of her husband.\textsuperscript{35}

Endogamy means marriage within the same tribe, caste or Varna. Hindu ethos uphold marriage within one’s own caste or Varna. In the Purusha Sukta, four Varnas are described, Brahaman, Kshtrya, Vaishya and Shudras. The first three upper castes formed one endogamous unit as distinct from the fourth caste i.e. Shudras who were the lowest caste. Although intermarriage could take place among the first three castes, there were social barriers between the Shudras and other three castes as far as marriage was concerned. Slowly, however, the distinctions among the three upper castes, too, became rigid and the four-fold division took a concrete shape. The Satpath Brahman clearly mentions the four castes and lays stress on the superior qualities of the Brahmans. From this emerged the concept of Anuloma and Pratiloma marriages. The marriage between men of a higher caste with a woman of a lower caste is called Anuloma marriage and if the man from a lower caste marries a woman from the higher caste, it is called Pratiloma marriage.

The Sutras have recognized such marriages, although they seem to have been more prevalent in the Upanishadic period. The Sutras, the Smritis, the Epics and the Dharamshastras regarded Pratiloma marriages with disfavor while the Grihyasutras never mention Pratiloma marriages. The Apastamba Dharamshastra goes a little
further and looks upon Anuloma marriage with scorn. Manu was also averse to Anuloma marriages besides his disdain for Pratiloma marriage as he says, “Children of Brahanman by women of the three lower castes, of a Kshtrya by wives of two lower castes and Vaishya by a wife of the Shudra caste, all these six are called base born”.36

Over the centuries, caste system in India has proved to be divisive instead of integrating the society. Thus to promote inter-caste marriages, two legislative attempts were made, firstly The Hindu Marriage Validity Act XXI of 1949 conferring validity on inter-caste marriages with retrospective effect and secondly, The Special Marriage Act, 1954 enabling persons belonging to different castes to marry validly. The Hindu Marriage Validity Act XXI of 1949 conferred validity on inter-caste marriages with retrospective effect. This was followed by adoption of Constitutional Directive Principles in 1950, for creating a casteless society. Still, the traditional sway continues even in the 21st century India.

The Khap Panchayat is a gotra-centric panchayat. All the members of the Khap are supposed to be related to one another with ties of blood relationships called bhaichara (brotherhood). Marriage within the same khap is taken as a threat and is treated as an unpardonable sin, which invites punishment including death. Since daughter is treated as a repository of family honor, she bears the brunt when she deviates from the Khap norms in matrimonial alliance and

her male partner too meets the same fate if caught together. The Apex Court has declared these Khap panchayats illegal.\textsuperscript{37}

Justice Ashok Bhan and Justice Markandey Katju, JJ.\textsuperscript{38} has held that “we sometimes hear of ‘honor’ killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honorable in such killings and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal minded persons who deserve harsh punishment, only in this way we can stamp out such acts of barbarism”.

It is women who are paying the price for upkeep of patriarchy, says Neelam Raaj.\textsuperscript{39} Many surveys reveal that women are usually thrown out when they are caught having extra-marital affairs. Men on the other hand, get away with their escapades with married women, perhaps because of convention or because women are unwilling to break their homes and cause insecurity to their children, says Vimla Patil.\textsuperscript{40}

For emerging as a powerful nation, inter-caste marriages have to be accepted by society and a heavy hand

\textsuperscript{37} D.R. Chaudhry, “Root Out Khap Panchayats”, \textit{The Tribune}, August 21, 2007 at 11.
\textsuperscript{38} 2006 Cri LJ 3309-3312(P&H).
\textsuperscript{39} “Deep Focus: Bound by Honour”, \textit{Sunday Times of India}, October 29, 2006 at 6.
\textsuperscript{40} “Spouse Stealing”, \textit{Spectrum The Tribune}, October 29, 2006 at 3.
is required to check the menace of archaic practices like honor killings.  

1.5 March from Polygamy and Polyandry to Monogamy

Polygamy and polyandry was prevalent in ancient times. As the civilization process went ahead, marriage came to be recognized as a religious, holy and indissoluble sacramental bond and wife was considered to be a respectable member in the home.

Vedic literature generally endorsed monogamy and was considered the best practice of the highest virtue. However, polygamy was also in practice, especially among the nobles. Polygamy was sanctioned by the ancient lawgivers under certain circumstances, such as the barrenness or lack of religious-mindedness, that is, if the wife was unfit to participate in the performance of religious rites of her husband. The husband had the right to remarry if the wife failed to deliver a male child. Dasharatha had three wives for the want of a son although his four sons had vowed to practice monogamy.

Polyandry was a sporadic phenomenon. In the Mahabharata, Daraupadi was married to five Pandav brothers under special circumstances to abide by the wish of their mother Kunti whom they adored very much. Even then, this marriage was bitterly opposed by the family of Daraupadi herself. Yudhishtra, the eldest Pandav had to use all his persuasive skill to convince them by citing a precedent to support his arguments. This incident, if

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anything, shows that polyandry was not the customary practice in the Vedic period. With the passage of time, polygamy and polyandry was gradually replaced by monogamy as a social norm but bigamy in one or other form is still seen in society. Manu was strictly opposed to widow remarriage. He clearly lay down, “In the mantras on marriage such a commission (widow remarriage) is never mentioned and the second marriage of a widow is not spoken of in the rule of marriage”.

However, widow remarriage was permitted under special circumstances in the Vedic age as evident in a hymn in the Rig Veda, which is addressed, to a widow weeping beside the body of her dead husband. Her husband’s brother tells her:

“Rise, come into the world of the living, O woman, come, he is lifeless by whose side thou liest. Wifehood with thy husband was thy portion, who took thy hand and wooed thee as lover”.

This system of remarriage with the husband’s brother is called Niyoga. The Atharva Veda also refers to remarriage of a widow when it says, “whenever a woman having married one husband, marries another, if they offer a goat with five rich dishes, they would not be separated from each other”.

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43 Infra note 44.
45 Supra note 31.
The word Punarbahu (meaning wife again) is generally applied to a widow who has remarried. Narad mentions another category of Punarbahu that is a maiden whose hand was taken in marriage but whose marriage was not consummated.

The recognition of a Punarbhava son i.e. a son brought by a widow and being regarded as son of his putative (supposed) father on his mother’s remarriage, confirms widow remarriage in early India.

Divorce was an uncommon phenomenon in olden times among Hindus. However, in a number of cases and social circumstances, divorce was permitted as caste custom.

Nevertheless, caste system has held the field with firm social support. Customary arranged marriage with the consent of the concerned parties, love marriages, inter-caste and inter-faith marriages are a recent phenomenon in Indian Hindu society. More recent trend is of inter-continental (NRI) marriages with their attendant problems of cultural clash and fraudulent matrimony with or without the connivance of the so-called marriage bureaus.

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46 Supra note 30.
1.5.i Muslim Period

During Muslim invaders rule over India, there was a spate of kidnappings, rapes, forcible marriages and mass religious conversion. The native Hindu society developed protective measures to combat individual insecurity in the form of purdah, polygamy and child marriages, still seen in the most invasion prone belt like Rajasthan & Gujarat states. Sati Pratha also came into existence as widows were forced to commit self-immolation in order to save themselves from the brutal and bigoted Muslim rulers and their cohorts. In places like Rajputana, women committed mass self-immolation called ‘jauhar barat’-a horrible rite by females to save themselves from captivity when a state fell into the hands of the Muslims. The Hindus felt endangered and to preserve their religious and caste entity, early marriages strictly along endogamous caste units became the order of the day. Finding a suitable bridegroom for a daughter within a narrow caste grouping became more and more difficult. Desperate parents began giving their young daughters away even to old infirm men. Thus, polygamy and child marriage became predominant with the attendant problems like child-mothers, child-wives, child-widows and high female mortality rate. The birth of a girl child came to be considered a burden and a curse.

1.5.ii. British Period

During the British period, movements for social reforms in married family set-up were initiated by some well-intentioned workers like Ram Mohan Roy, Ishwar Chander Vidyasagar, Maharishi Dayanand Saraswati and legal luminaries like Rai Sahib Harbilas Sarda. These
measures were given legal shape in the concept of codification of Hindu Marriage laws.

Legislation of Hindu Marriage Laws began in the year 1829 when Sati Pratha was abolished by law at the instance of Raja Ram Mohan Roy. In 1856, Hindu Widows Remarriage Act was passed. In 1860, Indian Penal Code prohibited Polygamy in Hindus. In 1866, Native Converts Marriage Dissolution Act was passed for conversion of Hindus into Christian Faith. In 1872, Special Marriage Act was passed but it excluded Hindus. In 1909, Anand Marriage Act legalized marriage ceremony common in the Sikh faith called Anand Karaj. It has now been amended as Anand Marriage(Amendment)Act 2012. In 1923, The Special Marriage Act was further amended to legalize inter-religious marriage between Hindus, Buddhists, Sikhs and Jains. In 1929, Child Marriage Restraint Act or Sarda Act was passed. In 1939, Arya Marriage Validation Act recognized inter-caste marriage and marriage with reconverts to Hinduism. In 1946, Hindu Marriage Disabilities Removal Act legalized inter-marriages between the sub-divisions of same caste and those within same Gotra or Parivar. In 1946, Hindu Married Women’s Right to Separate Residence and Maintenance Act was passed. In 1947, The Hindu Code Bill was drafted by Rau Committee and was reviewed by the select committee of the Constituent Assembly. It was, however, opposed in the Provisional Parliament. Thus, it had to be split into different Bills to facilitate their passage.
Hindus firmly believe in complete physical, mental and spiritual union of man and woman as husband and wife yet with the devaluation in morals, the reverse picture has emerged with social, economic and even psychobiological subjugation of women. The position of woman and wife had degraded so much during the pre-independence centuries that the wife was considered inferior to man. The woman became dependent upon the father during maidenhood, upon the husband during married life and upon the sons during widowhood. Even the inheritance laws were in favor of the husband or sons only. The very being of the woman was suspended during the marriage and incorporated & consolidated into that of the husband.

1.5.iii. Independence Era

After independence with the promulgation of The Constitution of India 1950, the personal laws of marriage particularly of Hindus have been codified and all citizens irrespective of sex, caste or creed have been given equal rights in the eyes of law. Many progressive legislative measures have been enacted to empower women to assert their individual as well as spousal rights on par with men yet traditional inertia of the society as a whole has kept the pace of change in slow motion so far. Public opinion is being shaped by many NGOs to enlighten women in particular to assert their political, legal and individual rights. Courts are also becoming sensitive to social causes and newer innovative judicial pronouncements are aiding
social change in keeping with the changing times. The outstanding feature of both The Hindu Marriage Act, 1955 as well as The Special Marriage Act, 1954 is the introduction of monogamous form of marriage. Wife burning, mental & physical torture, desertions and other bodily abuses have become a common phenomenon in society these days.

There is a deep-rooted preference for son in Hindu society. Older parents rely on sons and their wives for support in old age. The tradition demands that a son must perform the last rites of parents and offer ancestor-worship called Shraadh every year. The notion of girl being the beast of burden has been engraved right from the prenatal stage resulting in female foeticide recently despite stringent laws to ban prenatal sex determination, a bye-product of technological medical advancement. The skewed sex ratio will result in a deficit of adult women, thereby, affecting the stability of the entire marriage system. Many men will be unable to marry, creating social unrest and sexual violence against women.

However, marriage as a social institution is losing its original position and the legislative law and the courts are aware of this social upheaval. Western cultural values, in which ‘only the flesh matters’, have started eroding the age old family values and instincts of personal bonding by sincerity and mutual faith.
1.6. Components of Hindu Marriage

*The essence of life is individuality and this sense of individuality comes from our emotional profile.*

*K.K. Dhiman, Psychologist*

Concept of marriage and components of marriage are inter-related as individual motive for committed marital relationship varies with each and every person. Some marry for companionship, others marry for procreation but most of the persons marry as a socio-biological duty. Legally speaking, marriage has two mandatory components viz. mutual consent and marriage ceremony (Court procedure in a civil Court marriage). However, what precedes consent and what follows marriage ceremony are also important components of married life. To comprehend law related to matrimonial affairs one must consider all aspects of married life i.e.

1. Matrimonial Alliance
2. Solemnization of Marriage
3. Consummation of Marriage
4. Procreation i.e. child bearing, family harmony and maintenance of family, which includes not only mutual spousal relationship between husband and wife but also other members of collateral family.
1.6.i. Matrimonial Alliance

The first step in a matrimonial alliance is proposal/introduction/coming together of prospective spouses. The modus of proposal has undergone a significant change from family connection/relative or friendly introducers to matrimonial advertisement/marriage bureaus/websites like shadi.com, or workplace/professional interaction.

Out of all these methods, the traditional method of family connection/relative or friendly introducer system is still the most prevalent method although it has also undergone a radical change from the age-old inter-family or intra-family network. Why it still works well is understandable as it has elements of familiarity, religio-economic parity and social security for both sides to the alliance.

In traditional arranged marriages the essential points of consideration, as is evident from the matrimonial advertisements, are caste, age, qualification, physical culture of the spouses, family status and composition, place of residence & profession.

If the match making is at family or personal acquaintance level, many aspects of matrimonial matching tally are taken for granted but if it is through matrimonial match maker who takes commission from both sides, the first thing is dowry level and photogenic compatibility apart from caste & other considerations. Every detail is worked out and agreed upon beforehand. Inter-spousal compatibility is taken for granted as traditional mental and familial training helps as a cementing force. Religious and
social code plays a vigilant & balancing role. Once the mutual consent of the prospective spouses is secured by both the families and symbolic ceremony done, marriage is *ipso-facto* fixed. The usual personal, social and customary contact is established till actual marriage ceremony is solemnized according to custom of the family. Legal sanction/marital status gets established only after marriage ceremony. Any dispute, disruption prior to marriage ceremony does not usually invite Court intervention unless specifically pleaded by the aggrieved party.

Betrothal or sagai is a contract of marriage, which, however, cannot be legally enforced, though an action for damages is maintainable. A marriage contracted in contravention of betrothal agreement is valid.49

Why are arranged marriages so widely prevalent? What makes traditional marriages long lasting? What are the factors, which upsets this delicate balance?

Recent upsurge of unsavory indecent incidents of matrimonial discord and disputes have been a damper for this traditional method. Not many relatives or friends are willing to bet their own peace of mind on such social obligations of far reaching consequences. That is why matrimonial advertisements, marriage brokers in the form of marriage bureaus, internet and e-mail correspondence and workplace intimacy are becoming the latest modes of alliance for marriage.

Caste is still the dominant consideration in matrimonial alliance. Matrimonial advertisements encompass a whole spectrum of matrimonial alliances. The most striking fact is the classification of advertisements along caste & religious lines. Even among the Sikhs, who profess themselves as a caste-less society, the classification is as follows: Jat Sikh, Sikh Khatri, Sikh Arora, Sikh Khatri/Arora, Majahabi Sikh, Ahluwalia, Ramgarhia, Saini, Dhiman.

Among the Hindus, caste lines are further compounded by their Gotras. Manglik group according to horoscope in itself is a distinct group since jyotish still enjoys a role in spouse selection. Mahajan, Vaish, Aggarwals, Jains, Brahmans, Khatris, Arora etc are all classified separately. Even among the Scheduled Caste and other Backward Classes the classification into Adharmi, Mazabi, Balmik, Ramdasi, Chamar Jatak, Tonk, Khurmi etc are assorted into different groups.

At individual level main points of consideration are girl’s biodata like beauty, skin color & complexion, education, height, personal nature viz. homely, traditional, cultured, smart; family set-up i.e. well settled, status family, reputed family, upper class, service class, Punjabi or Non-Punjabi, Chandigarh based or other metro-city based; horoscope matching, manglik, non-manglik; photogenic features of the girl. Every point is well designed to convey the intentions of the prospective parties for marriage.

For the groom’s selection, his capacity to earn, type of profession, residential place, family composition and
parental status are highlighted in addition to personal and physical bio-data. "Dowry seekers may please excuse" is also an echo of some bride’s guardians while on the other hand, "status family" is an allurement for dowry seekers.

Love marriages or better-called mutually fixed/consented marriages are basically of three types:

- Between same caste– intra-caste & intra-faith marriages
- Inter-caste marriages
- Inter-faith marriages

Love marriage is a misnomer because love in matrimonial context is sexual interplay, which includes dating, courtship, live-in arrangement, infatuation and even sexual contact/violence. Any of these may or may not fructify into a solemnized legal marriage. More often than not, this results in void, voidable or bigamous marriage than a legal marriage. From legal point of view, these relationships or marriages form a great chunk of matrimonial disputes and matrimonial violence.

In love marriages or self-seek matrimonial alliances, sexual relationship or even courtship before marriage are quite common. Both these aspects have grave legal implications. Therefore, utmost secrecy by both partners sometimes lands them into the arena of criminal offences. Premarital pregnancy either is aborted clandestinely or leads to forced marriage with its attendant problems.
Vimla Patil reports\textsuperscript{50} that more and more couples are going in for live-in relationship, not only celebrities but even middle class couples are choosing to live together for various personal or social reasons. Some of these reasons are: society and families no longer frown upon ‘live-in relationship’ as much as before and couples who do not wish to make lifelong commitments prefer to live together before getting married. Others say that they need to know each other better before they tie the nuptial knot. Yet others live together due to circumstances such as work requirements or for saving money by keeping one house rather than two. Lastly, young men and women live together because they no longer believe in the traditional sanctity of marriage.

A division bench of Allahabad\textsuperscript{51} has held such live-in arrangement as legal though immoral. A marriage of convenience or companionate marriages throw a challenge to the traditional and conventional institution of marriage in Indian society.

This trend is fast growing and is giving rise to a different type of legal and social problems. When a live-in couple decides to have children, who should have the custodial rights in case of a separation?

When the live-in couple decides to split, what are the rights of the woman regarding maintenance? What is the legal scenario when the relationship sours? Matrimonial


\textsuperscript{51} AIR 2001 All 254.
jurisprudence is widening its spectrum involving questions of conflict of laws, changing sociological perceptions and statutory innovations.

There is another group who have affairs clandestinely though they are partners in regular marriages & have children. Work place or college romances often result in pregnancies or even out of wedlock children.

Legal issues concerning the union of live-in couples and status of their progeny will increasingly come under the scanner of law as the same have become an accepted norm in some sections of society.

According to counselors quoted by Vimla Patil, many young women today believe that having an affair with a married man is exciting and flattering. Husband or wife stealing has become common also because of the greater social mobility and liberal sexual mores, which are sweeping society today. Some of the most famous law cases e.g. Nanawati case, Naina Sawhney case, have been about murders by cuckolded husbands.

Rajasthan based Ekal Nari Shakti Sangathan (ENSS) has thrown up some unpleasant statistics. Kinnaur & Lahaul Spiti in Himachal have recorded a steep rise in “fake marriages” with one fourth of women falling prey to such alliances, resulting in un-wed mothers left in the lurch by already married men. Most of them were lured into such alliances by government officials working in the

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area, who deserted them the moment they were posted out of the area.\textsuperscript{53}

\textbf{1.6.i.a. Age for Marriage}

Attainment of puberty, i.e. when a girl starts menstruation and the boy shows typical physical features of manhood, is the biological indicator for sexual cohabitation between a male and a female.

It has been argued that early marriages generally result in a shorter inter-generational interval, long childbearing period, high cumulative fertility and many other psychological advantages in sex life.

Child marriages were a historical bye-product of insecurity and illiteracy of the past era, but unfortunately, it is still seen in some parts of the country.

Child marriage, with all its social implications, was common in the past. The Child Marriage Restraint Act, 1929 was the first legal step to restrain solemnization of child marriages in India. Its Section 2 (a) defined: "child" as a person who, if a male, is under eighteen years of age and if a female, is under fifteen years of age". This definition was changed by The Child Marriage Restraint (Amendment) Act, 1978 as:

"Child" means a person, who if a male, has not completed twenty one years of age and if a female, has not completed eighteen years of age".

Section 2 (d) of the same Act defines a minor as a person of either sex who is under eighteen years of age.

After this amendment, all the marriage laws like the Hindu Marriage Act, 1955, Special Marriage Act, 1954 and the Foreign Marriage Act, 1969 have also prescribed minimum age of 18 years for the bride and 21 years for the bridegroom for a valid marriage.

However, it is important to note that for registration of marriage solemnized under other personal laws, the requirement of minimum age, under Section 15 (d) of Special Marriage Act, 1954, for both the spouses is 21 years of age.

Now, the Prohibition of Child Marriage Act, 2006 (No. 6 of 2007) has been enacted & under Section 2(a), of the new Act definition of the term “child” also conforms to the earlier amendments of Hindu Marriage Act, 1955 and Special Marriage Act, 1954. “Child” now means a person who, if a male, has not completed twenty one years of age and if a female, has not completed eighteen years of age but the provisions of this Act are more stringent, not only for the marrying minors but also for those who get the alleged marriage between minors solemnized under Sections 9, 10 and 11 of the new Act. Section 15 makes the offences to be cognizable and non-bailable. Moreover, the ambiguity about the validity of the Child marriages has been removed by making child marriages voidable at the option of contracting party being a child under Section 3; under Section 12 as well as Section 14 of the same Act marriage of a minor child is to be null and void in certain
circumstances or in contravention of injunction orders of the Court.

Section 18 (a) of the Hindu Marriage Act, 1955 also stands substituted as under: “(a) in case of contravention of the condition specified in clause (iii) of Section 5, with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both”.

Though a boy or a girl becomes an adult at 18 years legally speaking, it is not necessary that simultaneously he or she acquire the maturity of a man or a woman.

Law Commission has recently recommended “marriages for both girls and boys below 18 years should be prohibited and that marriage below 16 be made void, while those between 16 and 18 be made voidable”. The Law Commission has recommended bringing a legislation declaring all marriages between minors as null and void and not just voidable as at present. Consensual age for a woman for sexual relation has been retained at 16 years as defined under Section 375, Indian Penal Code 1860.

The Law Commission has, thus, recommended to lower the legal age for marriage to 18 years for boys also as for girls at present while making sexual relation with girl or even wife below 16 years as a crime punishable under law.\(^\text{54}\)

The Union Cabinet has recently approved amendment to the Protection of Children from Sexual Offences Bill, 2011, which

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\(^\text{54}\) Legal Correspondent, “Law panel recommendations-ban marriage below 18 years”, The Tribune, February 7, 2008 at 1&16.
would make sexual contact with a girl below the age of 18 a criminal offence, even if it is consensual, punishable with life imprisonment.55

Late marriages are the new trend in modern India, especially among the ambitious, career-hunting new generation. A workingwoman has more problems of adjustment some are apprehensive of heartbreak and broken marriage. Therefore, “right–time syndrome” causes long delays in marriages. The average age for a girl seeking marriage through matrimonial advertisements varies from 24 to 30 years.

A study conducted by Indian Council of Medical Research in rural areas of 22 districts of 14 States revealed that only 4.8% boys wanted to marry below 21 yrs and only 0.0035% girls wanted to get married below 18 yrs of age. Practice of very early marriage has virtually disappeared in urban areas and become rare in rural areas.56

Men, too, are delaying marriages due to a variety of reasons. The job oriented professional courses are lengthy and taxing, both physically as well as economically. Some persons delay marriage to sort out family and parental responsibilities before committing themselves for a serious and permanent married life. Moreover, early exposure to man-woman relationships at every social level and easy availability of contraceptives, there is less urgency to

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legalize a relationship. The average age for boys seeking marriage through matrimonial advertisements varies from 26 to 32 years.

1.6.i.b. Consent of the Parties

In traditional Hindu Marriage, consent of the marrying parties presupposes the consent of the families on both sides. Unlike Muslim marriage, the spousal consent in Hindu marriage, more so of the girl, is rather a recent phenomenon. Sometimes, this element of consent produces legal and matrimonial problems of far reaching consequences.

Since Hindu marriage was considered to be a sacrament duty, the consent of the prospective spouses did not occupy a significant place in fixing a marriage alliance by the families on both sides. The result was that the absence of consent of the bride or the bridegroom did not render a marriage as invalid. Thus, the person married may be a minor or even otherwise invalid and yet if the marriage rites are duly solemnized, there is valid marriage.\(^{57}\)

It is common knowledge that under traditional Hindu arranged marriage, consent is basically a family matter where the consent of the marrying spouse may or may not be obtained before marriage. Even if consent is given, it is under influence of many other matters concerning the family like caste or economic considerations. Many a times coercion, fraud or violence is alleged in getting consent. In

\(^{57}\) Venkatcharyalu v. Rangacharyala, AIR 1980 Mad. 816.
NRI marriages falsehood and malafide intentions are also used to secure the consent of the parties.

In the Special Marriage Act, 1954 as well as the Foreign Marriage Act, 1969 consent of each of the marrying spouse is essential before a marriage certificate is issued. Under the Hindu Marriage Act, 1955, consent of the spouse has some ambiguity.

Section 5 (ii) of the Hindu Marriage Act, 1955 prescribes a valid consent of the spouse as a condition for validity of marriage. Section 12 (1)(c) declares a marriage voidable if the consent of the guardian or the parties in marriage of the petitioner was obtained by force or fraud as to the nature of the ceremony or as to any material fact or circumstances concerning the respondent.

In love marriages or self-arranged marriages, mutual consent is a *sine qua non* and it is the family of the spouses that are the complaining party. When such cases reach the Courts, the adjudication is mostly based on human considerations.

**1.6.i.ii. Solemnization of Marriage**

Solemnization of marriage literally means a process by which a marriage bond is made a solemn affair. For this, a symbolic ceremony is prescribed by tradition or custom of the community to which the marrying parties belong.

Marriage is a sacrosanct social institution with an element of a legal contract. The sanctity of marriage flows out of the customary and religious ceremony. The strength
and stability of marital bond between the spouses is powered by faith and mutual trust while law intervenes only after the breach of faith or any destabilization of mutual trust. Marriage ceremony is a refined way of declaration of marriage as a sacred bond as compared to a contractual union. According to Paras Diwan, Hindus conceived of their marriage as a union, primarily meant for the performance of religious and spiritual duties. Such a marriage cannot take place without the performance of sacred rites and ceremonies.58

Section 7 of The Hindu Marriage Act, establishes the sacramental element of marriage on firm footing by its emphasis on Ceremony of Marriage, thereby, preventing the mockery of marriage. However, it still gives ample scope for variations according to custom and usage but not by whims of marrying parties.

The Hindu Marriage Act, 1955, under Section 7, Ceremonies for a Hindu Marriage states:-

Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party there to. Where such rites and ceremonies include the Saptapadi, that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire, the marriage becomes complete and binding when the seventh step is taken.

Thus, the Act does not prescribe any specific form of marriage but simply calls for a marriage ceremony in

58 Supra note 1.
accordance with the customary rites & ceremonies of either party to the marriage.

The Special Marriage Act, 1954 under Section 12 prescribes the place and form of solemnization of marriage ceremony after having complied with Section 5 and 6 of the Act regarding the mandatory written formal notice of intended marriage and publication of such notice to invite objections within 30 days.

The Act further prescribes under Section 11, a declaration by the marrying parties and three witnesses, countersigned by the marriage officer, before solemnization of marriage.

Under Section 12 (2) of The Special Marriage Act, 1954, the marriage may be solemnized in any form as the parties are at liberty to choose any form provided that it shall not be complete and binding on the parties, unless each party says to the other party in the presence of the Marriage Officer and three witnesses in any language understood by the parties: I (A) take thee (B) to be my lawful wife (or husband).

Section 13 of the same Act prescribes the issuing of a marriage certificate signed by the marrying parties and three witnesses under the seal of Marriage Officer. This certificate will be deemed to be conclusive evidence of marriage under The Special Marriage Act, 1954. Before 1969, the Special Marriage Act 1954 was available to spouses living in foreign countries also.

The Foreign Marriage Act, 1969 is also a secular Act to make provision relating to marriages of citizens of India
outside India. It lays down conditions relating to solemnization of foreign marriages under Section 4, where at least one of the spouses is a citizen of India;

Section 9 provides for solemnization of marriage where no objection is made within the period specified in section 8 to an intended marriage;

Section 13 prescribes the place and form of solemnization under subsection (2) in any form, which the parties may choose to adopt; provided that it shall not be complete & binding on the parties unless each party declares to the other in the presence of the Marriage Officer and the three witnesses and in any language understood by the parties “I, (A) take thee (B) to be my lawful wife (husband)”. Provided, further, that where the declaration referred to in the preceding proviso is made in any language which is not understood by the Marriage Officer or by any of the witnesses, either of the parties will interpret or cause to be interpreted the declaration in a language which the Marriage Officer or, as the case may be, such witness understands. Section 11 prohibits marriage in contravention of local laws in force in the foreign country in which the marriage is solemnized. Section 17 provides for registration of marriages solemnized under other laws.

Changes suggested by Law Commission of India, Report No. 212-A Proposal to Resolve Certain Conflicts: The word “Special” be dropped from the title of the Special Marriage Act, 1954 and it be simply called “The Marriage

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Act, 1954” or “The Marriage and Divorce Act, 1954”. The suggested change will create a desirable feeling that this is the general law of India on marriage and divorce and that there is nothing “special” about a marriage solemnized under its provisions. It is in fact marriages solemnized under the community-specific laws, which should be regarded as “special”. A provision be added to the application clause in the Special Marriage Act, 1954 that all inter-religious marriages accept those within the Hindu, Buddhist, Sikh and Jain communities, whether solemnized or registered under this Act or not, shall be governed by this Act.

1.6.ii.a Marriage Ceremony

The marriage ceremony and rites fall under two heads:

The Shastric ceremonies

The customary ceremony and rites prevalent under caste or community to which one or both parties to marriage belong.

1.6.ii.a.1 Shastric Marriage Ceremony

Performance of some Shastric Ceremony is still necessary for a valid Hindu Marriage under The Hindu Marriage Act, 1955. There are great variations in the performance of marriage ceremony but the main components of Shastric Marriage and rites are, one of the important ceremonies is Kanyadaan or gift of the bride (daughter or girl) by the bride’s parents or legal guardians in the presence of a baarat or assembly of relatives from
both sides. Next important ceremony is Vivaha-Homa or lighting of Nuptial fire symbolizing it as divine witness and sanctifier of Vivaha sanskaar. It includes performance of a Yagya by offering oblations (Aahuties) in the name of Earth, Sky & Heavenly gods amidst chanting of mantras by the bridegroom, bride and the priest. Third important ceremony is Panigrahan when the bridegroom takes the hand of the bride. The fourth & the most important and legally indispensable ceremony is Saptapadi in which the bridegroom and the bride take seven steps jointly, making holy vows of chastity and conjugal responsibilities.

In modern times all the ceremonies prescribed by the ancient Shastras are not performed. The priest or the Pundit/ Purohit who officiates at the ceremony, recites the hymns with the nodding assent of the marrying parties. The performance of all the ceremonies is, however, not necessary for the legal validity of marriage. According to Sub-Section (2) of Section 7, Hindu Marriage Act, 1955, the marriage becomes complete and binding when the seventh step of Saptapadi is taken.\textsuperscript{60}

In the marriage ceremony according to Arya Samaj rites, the bridegroom and the bride make only four rounds of the sacred fire as compared to seven rounds according to customary Hindu rites. The seven rounds of sacred fire is not the same thing as Saptapadi. Saptapadi is a ceremony, which follows immediately after the four rounds of the sacred fire taken together according to strict vedic rites as in Arya Samaj ceremony or after seven rounds of sacred

\textsuperscript{60} Patal Sundari v. Asidharini, 70 Cal. WN 28; Kastoori v. Chiranji Lal, AIR 1960 All 446; Rabindra v. Protiva, AIR 1970 Tripura 30.
fire as in customary Hindu rites. The essentials of Anand Karaj form of marriage ceremony among the Sikhs are the recitation of four Hymns known as 'laavans' as the groom followed by the bride walks around the Holy Guru Granth Sahib Ji amidst the chanting of these Hymns composed by Guru Ram Das Ji. The Anand Karaj Ceremony for marriage is governed by the Sikh 'rehat maryada' or the Sikh code of conduct, determined by Shiromani Gurudwara Prabhandhak Committee (SGPC), according to which only those who follow the Sikh religion may marry under this ceremony. According to an edict by Akal Takht, Anand Karaj ceremony is to take place only in a Gurudwara, and Guru Granth Sahib cannot be taken to a marriage hall for this purpose. Salient features of Anand Karaj (Marriage) Act, 1909 are:

All marriages which may be or may have been duly solemnized according to the Sikh marriage ceremony called the ‘Anand’ shall be deemed to have been with effect from the date of the solemnization of each respectively, good and valid in law; nothing in this Act shall apply to: (a) any marriage between persons not professing the Sikh religion, or (b) any marriage which has been judicially declared null and Void, (c) nothing in this Act shall affect the validity of any marriage duly solemnized according to any other marriage ceremony customary among the Sikhs,(d) nothing in this Act shall be deemed to validate any marriage between persons related to each other in any degree of consanguinity or affinity which would, according to

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customary law of the Sikhs, render a marriage between them illegal.62

There was no provision for registration of marriage under the Anand Karaj (Marriage) Act, 1909. As such the Sikhs have to get their marriages registered either under the Hindu Marriage Act, 1955 or Special Marriage Act, 1954. However, Punjab Assembly has passed the Punjab Compulsory Registration of Marriages Bill, 2008, paving the way for registration of marriages under the Anand Karaj (Marriage) Act, 1909 in the state. Recently, Parliament has passed the Anand Marriage (amendment) Act, 2012, in which it a clause has been inserted allowing the Sikhs to get their marriage registered directly under this Act. The absence of any provision for divorce in the amendment had become controversial.63

The Madras High Court concluded that there are two essential ceremonies necessary for the performance of a Hindu marriage. One, a secular ceremony viz. the gift of the girl or Kanyadaan and the other, a religious ceremony viz. Panigrahan and Saptapadi64 Andhra Pradesh High Court, however, held that Kanyadan was not an essential ceremony in performing the valid marriage under the Hindu Marriage Act, 1955.65

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64 Deivani Achhi v. Chidamabaram Chettiar, AIR 1954 Madras 657.
1.6.ii.a.II. Customary Marriage Ceremonies

Section 7 (1) of The Hindu Marriage Act, 1955 provides that marriage may be solemnized in accordance with customary rites and ceremonies of the parties.

The expression customary rites and ceremonies means such shastric ceremonies which the caste or community, to which the party belongs, customarily follow. It must be shown to have been followed definitely from ancient times and that the members of the caste or community recognized such ceremonies as obligatory. Custom to be held as established must be continuous & uniformly observed for a long time and should have acquired the force of law.

According to Section 2 (1)(a) of Hindu Marriage Act, 1955, a Hindu includes all forms of Hindu religion including its sects & communities and Section (1) (b) even include a Budhist, Jain, or Sikh by religion while Section 2(1)(c) excludes a Muslim, Christian, Parsi or Jew by religion. Thus, the performance of customary ceremony prevalent on the side of either party is enough for the validity of marriage.

The Shastric ceremony may be substituted by a customary ceremony of marriage even by one of the parties. The expression “customary ceremonies” cannot be taken to mean that shastric ceremonies have been totally ignored. The expression “customary rites and ceremonies” means such shastric ceremonies which the caste or

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68 Supra note 66.
community to which the parties belong is customarily following. It must be shown that such custom as an essence of marriage ceremony had been followed definitely from ancient times & members of the particular caste or community regarded it as obligatory.  

However, an irregular ceremony is not valid. For instance, if a Jain and a Sikh marry either Saptapadi or Anand Karaj which are Jain and Sikh ceremonies respectively, must be performed. Any other form of ceremony will be invalid. Mock ceremony of marriage is invalid. If it is proved that no valid ceremony was performed, restitution of conjugal right cannot be granted. Warning against a dangerous doctrine of prescribing new ceremonies without statutory authority, Madras High Court held the exchange of garlands before a gathering of friends and relatives as void. However in 1967, Tamil Nadu Legislature amended the Hindu Marriage Act, 1955, by inserting Section 7-A validating such marriages by garlanding or putting a ring upon any finger of the party or tying a Thali. The customary marriage ceremony may not include any of the shastric ceremonies. It may be a totally non-religious ceremony or very simple ceremony. For example: Vivaha–homa is not necessary among Shudras. Sapatpadi with only four rounds around sacred fire is essential among Arya Samajist Marriage. Kanyadan is not essential in the Gandharav form. Smearing of vermilion by bridegroom on the forehead of the bride is the only

69 \textit{Supra} note 66.  
70 \textit{Supra} note 66.  
71 The Hindu Marriage Act, 1955, (Act XXV of 1955), Section 7-A. Special provision regarding Suyamariyathal and Seerthiruththa marriages.
essential ceremony among Santhals, Tying of Vadu Veeta Thali into the neck of the bride among Nayahans in South India.\textsuperscript{72} In Karewa form where the widow can contract marriage with the brother or some male relative of the deceased husband, is a customary marriage in Punjab. This requires no religious ceremony.\textsuperscript{73} However, if the widow likes to marry stranger, customary marriage ceremonies must be observed otherwise the matrimonial relationship cannot come into being.\textsuperscript{74} However if the woman during the lifetime of her husband contracted second marriage in Karewa form, the same is opposed to public policy and it cannot be upheld.\textsuperscript{75}

\textbf{1.6.ii.b Dowry}

Dowry has become a fact of life and part and parcel of marriage ceremony. As to the origin of dowry or daaj, primarily it was a contribution by the wife’s family, or by the wife herself, intended to assist the husband in bearing the expenses of the conjugal household.\textsuperscript{76} An approved marriage among Hindus has always been considered a Kanyadaan, which is not complete till the bridegroom was also given a Dakshana. This twin aspect of the meritorious act of Kanyadaan & Var-dakshana found expression in the enjoyment after decking his daughter with costly garments and ornaments and honoring her with presents of jewels, the father should gift the daughter to a bridegroom whom

\textsuperscript{72} Dhruma Manjhi v. Emperor, AIR 1943 Pat. 109; Baby(Smt) v, Jayant Mahadeo, AIR 1981 Bom 283, Tirumalai v. Ethirajamah, (1946) 1. MLJ 438.
\textsuperscript{73} Sohan Singh v. Kabla Singh, AIR 1928 Lah 706.
\textsuperscript{74} Garja Singh v. Surjit Kaur, AIR 1991 Punj 177.
\textsuperscript{75} Parkash Chander v Parmeshwari, AIR 1987 Punj 37.
\textsuperscript{76} Mayne, \textit{Early History of Marriage Institution}, 319 (Bharat Law House, New Delhi).
he has himself invited and who is a learned of Vedas and of
good conduct.\textsuperscript{77} While dowry previously belonged to
husband, his right over it being unrestricted, all the
property of the wife not included in the dowry was called
her paraphera and was her absolute property over which
her husband had no control.\textsuperscript{78} Voluntary presents given at
or before or after the marriage to the bride or bridegroom,
as the case may be, of a traditional nature, which are given
not as a consideration for marriage but out of love,
affection or regard, by parents, friends and relatives, would
not fall within the mischief of the expression Dowry, made
punishable under the Dowry Prohibition Act, 1961.\textsuperscript{79} The
words “as consideration for marriage” have now been
substituted with words “in connection with the marriage”. This
new definition meets the objection of the Joint
Parliamentary Committee and also widens its scope. This
comes into clear relief when one notes that wedding
presents, whatever be their value, are excluded from the
purview of dowry. In a recent judgment, the Apex Court, in
\textit{Appasaheb v. Bhimabai appeal} case, has ruled that “a
demand for money on account of some financial stringency
or for meeting some urgent domestic expenses or for
purchasing manure can not be termed as a demand for
dowry as the said word is normally understood. As per the
definition of dowry as given in Dowry Prohibition Act,
1961, the giving or taking of property or valuable security
must have some connection with the marriage of the
parties and a correlation between the giving and taking of
property or valuable security with the marriage of the

\textsuperscript{77} \textit{Supra} note 13.
\textsuperscript{78} \textit{Supra} note 48.
parties is essential. Being a penal provision, it has to be strictly construed. Dowry is a fairly well known social custom or practice in India. It is a well settled principle of interpretation of statute that if the Act is passed with reference to a particular trade, business or transaction & words are used which everybody conversant with trade or transaction knows or understands to have particular meaning in it, then the words are to be construed as having particular meaning.80

By tradition, dowry was in the first place, given by parents and relatives to create an economic space for the bride in her matrimonial family and secondly, it was a virtual indirect part payment and informal recognition of her share in the property of her parents. Subsequently gifts at or on festival days by parents and brothers were virtually the rent of her deemed share in the ancestral property. This system, recognized by social customs, was the share of girls in their parental wealth & helped foster family bonds and affection from generation to generation. The will-deed by the head of family usually earmarked a sum or share in the property for the future welfare of the married daughters of the family which was kept as a trust of wealth by the next generation. This system still works but some element of greed and ill faith has virtually made it a demonic system. This malaise of dowry system has become so deep that it does not spare even those who belong to poor Section of society and do not have much to pay their daughters.

80 Criminal Appeal No. 1613 of 2005.
In course of time dowry has become a widespread evil and it has now assumed menacing proportions. Cases have come to courts where brides, on account of their failure to bring the promised or expected dowry have been beaten up, kept without food for days together, locked up in dingy rooms, tortured physically and mentally, strangulated or burnt alive or led to commit suicide. Unfortunately, the spread of education has not helped in curbing the social evil of dowry, rather the educated youth has become more demanding and think that marriage is a source of fulfilling all their unfulfilled and unsatisfied material wants.\textsuperscript{81} The genesis of dowry as it is understood in the present social set up practically lies in hyper-gamy, a system under which the husband for a girl is secured from higher or affluent social group. According to Kapadia\textsuperscript{82} the main concern of the man as found in many of the hyper-gamous castes, is the exploitation of the woman and her people economically and ill treatment, humiliations and abuse were the natural corollaries. A person, in order to get a son-in-law from a higher level of hierarchy, is often prepared to pay an extravagant sum as dowry. The indirect result of this is that the fathers of the girls in the higher level are forced into competition with ambitious lower groups. Others look to the dowry of their sons to meet their obligations in finding husbands for their own daughters. Thus, the vicious circle starts, the amount of dowry goes on increasing and hyper-gamy is perpetuated. Legislation against dowry will have little effect until it is visualized in this perspective.

\textsuperscript{81} Supra note 1.
Definition of Dowry: According to Section 2 of The Dowry Prohibition Act, 1961, Dowry means any property or valuable security given or agreed to be given either directly or indirectly (a) by one party to a marriage to the other party to the marriage or (b) by the parents of either party to a marriage or by any other person to either party to the marriage or to any other person; at or before or after the marriage as consideration for the marriage of the said parties but does not include dower or mehar in the case of persons to whom the Muslim Personal Law (Shariat) applies. Thus, the Act contemplates two stages. The first stage is taking or giving or abetting of giving or taking of dowry. The second stage is, after taking dowry and pending transfer of the same to the beneficiary, the person holds it in trust for the benefit of the woman. Under the first stage, namely taking or giving or abetting of giving or taking of dowry is punishable and is a void transaction. However, under the second stage, the legislature itself has provided that the person who took the dowry shall hold it in trust for the benefit of the woman pending transfer in her favor.

Therefore, it is open to woman to file a suit for recovery of the dowry amount or valuables from the person holding it in trust, if that person has not transferred the trust property in favor of the woman for her benefit.83

The Joint Parliamentary Committee on dowry has opined that the giver of the dowry should not be treated as an offender as he is more a victim. When the giver of the dowry is considered to be as much an offender as the taker of dowry, the prosecution of the taker or demander of

dowry becomes difficult. The parents do not give dowry out of their free will but are compelled to do so. Further, when both the giver and taker are punishable, no giver can be expected to come forward to make a complaint. Section 7 (b) of Dowry Prohibition Act, 1961 as amended in Haryana, no Court shall take cognizance of an offence under this Act except on a complaint made by any party to the marriage within a period of one year from the date of marriage. Here the intention of the legislature seems to be that the post-marriage period is a sensitive time for the spouses and no element of criminality should surcharge the atmosphere.\textsuperscript{84} Delhi High Court took a contrary view on interpretation of Section 7(b), Dowry Prohibition Act, 1961, and held that complaint is to be lodged within one year from the date of marriage.\textsuperscript{85}

The Section 7 as substituted by Act 63 of 1984 is conspicuously silent about the time limit. Thus, the bar of time limit has been liquidated by the Amending Act of 1984. Dowry is a deep-rooted social evil and legislation alone cannot eradicate it. Legislation can only help the social movement for the eradication of dowry. Supreme Court has also held\textsuperscript{86} “that the receipt and payment of dowry has to be controlled not only by effective implementation of the Act but also by society as well. Society has to evolve ways and means to curb this menace”.

\textsuperscript{84} Rashina Rani v. Ravinder Pahwa, 1985 Cri LJ 1980 (Punj).
\textsuperscript{86} Vikas v. State of Rajasthan, AIR 2002 SC 2830.
1.6.c. Consummation of Marriage

Consummation of marriage is not synonymous with conception or pregnancy. It is essentially cohabitation, coitus and sexual gratification. The term consummation in common parlance means an act by which parties perfected their marriage and had sex relation. In legal parlance, consummation means full and complete penetration; a partial penetration or an abortive attempt at intercourse (an incomplete act of coitus) would not constitute consummation. Non-consummation of marriage due to impotence of the respondent is a ground for a voidable marriage under Section 12 (1)(a) of the Hindu Marriage Act, 1955. Impotence means incapacity or inability for normal co-habitation. Such incapacity or inability may be on account of many factors. Impotency is the lack of ability to perform full and complete sexual intercourse. Degree of sexual satisfaction is irrelevant. The criterion is the practical impossibility of consummation of marriage on account of impotency of either the husband or the wife. It may be caused by mental or physical condition, which would render normal intercourse impossible. It may be pathological or psychological, permanent or temporary. Capacity for sexual intercourse does not depend upon capacity to conceive. A person is impotent if his or her physical or mental condition makes sexual intercourse and consequently consummation of marriage practically impossible, which is a good ground for annulment of marriage.

marriage under Section 19 of the Divorce Act, 1869. The fact that a wife is incapable of conceiving a child is not a sufficient ground for a decree, if she is otherwise apta viro; the test is consummation and capacity to consummate. Neither is sterility of the husband, whether or not artificially engendered, a ground for relief provided that he is vera copula. The term apta viro literally means ready for a man. It is generally used in the sense of ability on the part of woman to consummate the marriage. Vera copula means masculine power of effecting erectio and intromissio. The fact that a husband had undergone a vasectomy operation renders him sterile but not impotent. Sexual gratification soon after honeymoon period starts giving physical and mental problems for the bride. If she be physically and psycho-biologically fit to bear the burden with ease and pleasure, the next phase becomes harmonious. However, many brides start getting medical/surgical problems of sexual organs or even of other body organs soon after marriage.

Traditional family set up of Hindus have over the centuries developed in-built customs to look after the interest of such newly weds by joint family support system on both sides. In the modern society, all these support systems have been put out of gear, producing grievances, temperamental skirmishes, denials and deprivations. The simmering discontent soon leads to discord. This happens more in working women who are caught between the cross

92 Rayden William, Law and Practice in Divorce, 179 (Butterworths 1979).
fire of devotion towards the husband, occupational duty and household responsibility. The sympathy, understanding and mutual will to co-operate go a long way in bridging over these daily problems. However, a little empathy, misunderstanding, dictation or interference upsets the whole atmosphere of family life. Sex in marriage is important. It is like salt in food, relishing, nourishing & energizing. Without salt, food is tasteless & so is marriage without sex. Extramarital sex, however, can spoil the whole dish. In fact, this is one of the significant factors in marital breakdown in every society.

1.6.d. Procreation

Procreation after marriage is a natural biological function ordained for women by nature. Maternity is a fulfilling mission of every woman’s life. Society adores womanhood for her maternal role in its varied form. Law has kept pace in protecting women during pregnancy, childbirth as well as post-natal care of the infants. Recent Maternity Benefit Act for working women is a laudable step in this direction. Still procreation process has many pitfalls, hurdles and problems. Firstly, infertility is quite common, both female and male infertility. In legal sense, infertility can be the cause for marital discord, divorce or bigamy. Infertility is different from sterility. Infertility means inability to conceive by a woman or to make a woman conceive by a man due to intrinsic reasons. Sterility means infertility caused by external reasons like vasectomy in man and removal of uterus or ovaries in woman. Family planning norm of two children produces problems of contraception, pill toxicity, menstrual
abnormalities, abortions and even feticide. Reproductive life of a woman extends till menopause but childbearing activity has to stop around 30 to 35 years of age. This puts constraints on sexual life of a different nature.

Working women in higher echelons of society have started shunning childbirth altogether to escape hassles of child bearing and child caring. They either prefer a live-in relationship or tend to part ways after initial phase of love or physical gratification to fulfill their personal and professional ambitions/commitments. Many celebrity personalities can be cited as examples. They have even become role models for the new generation.

1.7 Validity of Hindu Marriage

India is a land of diversities. Indian society, more so Hindu society, shows a variety of customs, tribes, communities and family traditions. Hindu Marriage Law, 1955 has shown remarkable adaptability to preserve this inherent unity in diversity. There are many sections with statutory exceptions and explanations to accommodate this variety at the level of customs of a tribe, community, group or family. (Section 3-A, Hindu Marriage Act, 1955). The intention of Hindu matrimonial law is not to compel or coerce the individual spouse or the family but to preserve, protect and reconcile the litigating party’s interests under law. Hindu Marriage Law, 1955 is designed to accommodate even the errant marriages under the classification of void, valid and voidable marriages. No wonder, then, the bigamous & adulterous marriages are rampant under the very nose of law. Then, law is made for
the society and not the vice versa. Validity of marriage confers certain rights and obligations on both the spouses in all matters related to matrimonial as well as non-matrimonial disputes between each other, socially and legally. Validity of marriage is a pre-requisite for any adjudication on matrimonial cases in the Court. A valid marriage is a norm in society. It acquires its formal validity when it is solemnized/celebrated according to custom of both or either of the marrying parties (lex loci celebrationis) and gets substantially/essentially validated by following the dictates of the personal law or the marriage law of the marrying partners and the place where the marriage takes place (lex loci domicilii). The formal validity of marriage is not as vital as the essential validity to a particular society. Non-observance of any formality renders a marriage voidable only, not void.

Any departure from the norms makes a marriage either void or voidable and can be declared null and void by the courts under the law. Sometimes, due to the factor of a foreign element, the marriage may come under the crossfire of conflict of laws making it a ‘limping marriage’, which is valid in one place but invalid in the other place.

There is no rule more firmly established in Private International law than that, which applies the maxim locus regit actum to the formalities of marriage. Whether any particular ceremony constitutes a formally valid marriage depends solely upon the law of the country where the ceremony takes place. The question whether the status of
husband and wife has been acquired must be determined once for all by reference to *lex loci celebration* is as it stood at the time when the parties went through the ceremony of marriage.\(^{94}\) To prove the solemnization of marriage the production of photographs is not necessary.\(^{95}\) For registration of marriage celebrated under the Hindu Marriage Act, 1955 through Section 8 of the Act, proper celebration of marriage according to provisions of the same Act is necessary.\(^{96}\) Thus, the capacity to marry constitutes the substantial validity of marriage. The personal law of each party, that is to say, the law of the place where he or she is domiciled (*lex loci domicilii*) governs the substantial validity of marriage. Both these factors and aspects of matrimonial law follow the married couple during the subsistence of marriage and even beyond it, whereever they reside after marriage either together or separately.

### 1.7.1 Presumption of Validity of Marriage

There is in law a presumption in favor of the validity of marriage.\(^{97}\) When continuous cohabitation for a number of years between a male and a female is proved and they are treated as husband and wife, then a presumption of marriage is raised. Section 114 of Evidence Act, 1872, lays down that where evidence of solemnization of marriage is not available, it will be presumed to be valid marriage by continuous cohabitation between the parties, unless contrary is proved.

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\(^{94}\) *Supra* note 16 at 316-317.

\(^{95}\) Amar Prakash v. Prakash Wati, AIR 1982 Del 143.

\(^{96}\) *Shaji v Gopinath*, AIR 1995 Mad 161, (SC) 2LW 95.

\(^{97}\) *Manikyam v Atchamma*, (1953) 1 Mad LJ 34.
A heavy onus lies on the petitioner to show that marriage as a fact took place, particularly when the respondent female disputes the *factum* of marriage.\(^9^8\) A presumption of marriage does not arise merely on the ground of cohabitation but it must be cohabitation with "habit" and "repute" which can be established under Section 50 of the Indian Evidence Act, 1872, by opinion expressed by the conduct of any person who as a member of the family or otherwise has special means of knowledge of the relationship.\(^9^9\) If a marriage in fact is established, generally, presumption that a valid marriage took place must be drawn.\(^1^0^0\) The proof of valid marriage can be achieved by direct evidence of the marriage ceremonies or registration of marriage or by circumstantial evidence like long cohabitation between the spouses. The second marriage during the subsistence of the first marriage cannot be sanctified or validated by any length of cohabitation, as the second marriage is void under the Hindu Marriage Act, 1955.\(^1^0^1\) The consent of the first wife cannot make the second marriage of the husband valid under the provisions of the Hindu Marriage Act, 1955.\(^1^0^2\) The presumption of valid marriage arising out of continued cohabitation may be strengthened from several circumstances, namely:

(a) Birth entry of an issue born to them;

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\(^1^0^0\) Ramchandran Chettiar v. Rajammal, (1995) Mad WN 951.
\(^1^0^1\) Chinnamal v. Elumalai, (2000) 2 DMC 278.
(b) A statement of Tehsildar that the man told him that his pension might be continued in favor of the lady—his wife;

(c) Mutation entry in favor of the lady that she was the widow entitled to succeed to the man;

(d) Document executed in the nature of a marriage settlement that the executant decided to perform marriage with the woman and in that connection had gifted some land to the son of the lady by former husband;

(e) Creditor obtaining a decree against the lady as legal representative of the husband.103

Validity of marriage under various marriage laws concerning Hindus: The differences in “conditions for valid marriage” under different marriage laws, namely, Hindu Marriage Act, 1955, Special Marriage Act, 1954 and Foreign Marriage Act, 1969, are due to the differences in the nature of marriages in each of these Acts. Marriages under Hindu Marriage Act, 1955 are mostly traditional Hindu marriages with the active support & consent of not only the marrying spouses but also the parents/guardians on both sides of marrying parties. Marriages under Special Marriage Act, 1954 are mostly secular marriages of liberal, inter-communal and highly individualistic marrying spouses with or without, sometimes even against the will of one or both families of the marrying parties. In so-called love-marriages, sometimes, it may be a forced marriage either due to premarital sex relations, to circumvent social

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103 Basanti v Pholo, AIR 1955 HP 37.
stigma or to escape the wrath of caste resistance from the
community.

Marriages under Foreign Marriage Act, 1969 in
foreign lands are by men and women, at least one of them
being an Indian, of individual choice who may have even
gone through divorce in their previous matrimony. Keeping
in view this mosaic of social composition, different
legislative clauses have been designed under these
different personal marriage laws. Under the Hindu
Marriage Act, 1955, Section 5, marriage is limited to,
“between any two Hindus”. Thus, there cannot be a Hindu
marriage between a Hindu and a non-Hindu. There are five
more conditions to be complied with under Section 5 as
amended by various subsequent marriage Acts:

Sub Section (i) neither party has a spouse living at
the time of marriage;

Sub Section (ii) at the time of 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 the procreation of children; or

(c) Has been subject to recurrent attacks of
insanity.

Sub Section (iii) the bridegroom has completed the
age of 21 years and the bride the age of 18 years at the
time of marriage;
Sub Section (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;

Sub Section (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.

Thus, Section 5 of the Hindu Marriage Act prescribes five conditions for a Hindu marriage, which confer substantial validity to the marriage. These are: Monogamy; valid consent excluding unsoundness of mind, unfit for marriage & procreation and insanity; age for marriage; degrees of prohibited relationship; not sapindas of each other. These conditions may be categorized into three types:

Firstly, mandatory conditions, violation of which renders a marriage void/voidable of Hindu Marriage Act, 1955 under Section 5 (i) & (ii).

Secondly, obligatory conditions, the violation of which may stand waived in view of the custom to the contrary, under Section 5 (iv) & (v) of Hindu Marriage Act.

Thirdly, a condition where the violation did not affect the validity of marriage but never the less was punishable under the Child Marriage Restraint Act, 1929, under Section 5 (iii) of Hindu Marriage Act, 1955. It has now been amended by The Prohibition of Child Marriage Act, 2006, whereby under Section 3 of the said new Act such marriages have been made voidable at the option of
contracting party being a child and the punishment too has been enhanced under Sections 9, 10 and 11 of the new Act.

Section 7 of the Hindu Marriage Act, 1955 by prescribing formal ceremonies for the marriage between any two Hindus, whether domiciled in India or in a foreign land, confers a formal validity to the marriage.

Sub Section (1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

Sub Section (2) Where such rites and ceremonies include the saptapadi (that is, taking of seven steps by the bridegroom & the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

Under the Special Marriage Act, 1954, Section 4, a marriage between “any two persons” may be solemnized. Thus it excludes the need of wedding persons even to be Indian citizens. So any two foreigners, namely two non-citizens domiciled in India may have their marriage solemnized under the Special Marriage Act, 1954. It is also a secular Act where religion or caste of the marrying parties is not relevant.

Section 4 of the Special Marriage Act, 1954 prescribes conditions relating to solemnization of Special Marriages, namely:

Sub Section (a) neither party has a spouse living;

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Sub Section (b) neither party:

(i) Is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(ii) 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

(iii) Has been subject to recurrent attacks of insanity;

Sub Section (c) the male has completed the age of 21 years and the female the age of 18 years;

Sub Section (d) the parties are not within the degrees of prohibited relationship; Provided that where a custom governing at least one of the parties permits a marriage between them, such marriage may be solemnized, not withstanding that they are within the degrees of prohibited relationship; and

Sub Section (e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends.

Section 12 of the Special Marriage Act, 1954 prescribes the place and form of solemnization of marriage.

Sub Section (1), the marriage may be solemnized at the office of the Marriage Officer, or at such other place within a reasonable distance there-from as the parties may
desire, and upon such conditions and the payment of such additional fees as may be prescribed.

Sub Section (2), the marriage may be solemnized in any form, which the parties may choose to adopt. Provided that it shall not be complete and binding on the parties, unless each party says to the other in the presence of the Marriage Officer and the three witnesses and in any language understood by the parties – “I, (A), take thee (B), to be my lawful wife (or husband)”.

Thus, it is a civil marriage or what is popularly known as Court marriage because the presence of marriage officer & payment of Court fee is essential. There is no specific ceremony prescribed in law except the personal affirmation of consent & acceptance of each other as husband & wife in the presence of three witnesses & the Marriage Officer. Moreover, one set procedure of notice under Sections 6, 7, 8, 9, 10 & 11 of the Act has to be followed before a marriage certificate signed by three witnesses under the seal of the Marriage Officer is issued. This elaborate procedure is so designed because many a times marriage under this Act is undertaken by the marrying couples against the wishes of their respective families or to legitimize their otherwise adulterous relationships.

This marriage certificate confers a formal validity on marriage. It operates as a conclusive evidence of two facts: (1) the marriage under the Act had been solemnized and (2)
that the formalities respecting signatures of witnesses have been complied with.\textsuperscript{105}

Thus, Section 4 of the Special Marriage Act, 1954 prescribes four conditions for a secular marriage, which confer substantial validity to the marriage. These are: Monogamy; valid consent excluding unsoundness of mind, unfit for marriage and procreation and insanity; age for marriage; degrees of prohibited relationship. These are similar to those prescribed under Hindu Marriage Act, 1955 also.

In this Act, the clause for prohibition for marriage between \textit{Sapindas} of each other has been omitted because of the nature of marrying parties disregarding their religion or caste.

Section 12 of the Special Marriage Act, 1954 by prescribing formalities for the marriage between any two persons, in the presence of the Marriage Officer and three witnesses, confers a formal validity to the marriage.

Under the Foreign Marriage Act, 1969, Section 4, a marriage between parties “one of whom at least is a citizen of India” may be solemnized in a foreign country. Thus, citizenship of the spouse is more relevant than the religion or caste. It is also a secular Act. Section 4 of the Foreign Marriage Act prescribes four conditions to be fulfilled namely:

Sub Section (a) neither party has a spouse living;

Sub Section (b) neither party is an idiot or a lunatic;

\textsuperscript{105} Madhubala v. Jagdish Chandra, (1978) 4 All LR 457.
Sub Section (c) the bridegroom has completed the age of 21 years and the bride the age of 18 years at the time of the marriage.

Sub Section (d) the parties are not within the degree of prohibited relationship: Provided that where the personal law or a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degree of prohibited relationship.

Section 13 of the Foreign Marriage Act, 1969 prescribes the place and form of solemnization:

(1) A marriage by or before a Marriage Officer under this Act shall be solemnized at the official house of the Marriage Officer with open doors between the prescribed hours in the presence of at least three witnesses.

(2) The marriage may be solemnized in any form, which the parties may choose to adopt.

Provided that it shall not be complete and binding on the parties unless each party declares to the other in the presence of the Marriage Officer and the three witnesses and in any language understood by the parties “I, (A) take the (B) to be my lawful wife (or husband)”. Provided further that where the declaration referred to in the preceding proviso is made in any language which is not understood by the Marriage Officer or by any of the witnesses, either of the parties shall interpret or cause to be interpreted the declaration in a language which the Marriage Officer, or as the case may be, such witness understands.
Section 15 specifically declares the validity of such a foreign marriage in India to be good and valid in law.

Thus, Section 4 of the Foreign Marriage Act, 1969 prescribes four conditions for a secular marriage, which confer substantial validity to the marriage. These are: - Monogamy; absence of idiocy or lunacy; age for marriage; degrees of prohibited relationship. These are almost similar to those prescribed under Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 also.

However, in this Act instead of the second condition of a valid consent, absence of idiocy & lunacy has been added because of the free volition of the marrying parties under this Act. Like the Special Marriage Act, 1954, the clause for prohibition for marriage between sapindas of each other has been omitted in view of the nature of marrying parties disregarding their religion or caste.

Section 13 of the Foreign Marriage Act, 1969 by prescribing formalities for the marriage between any two persons, in the presence of the Marriage Officer & three witnesses, in the prescribed language, confers a formal validity to the marriage. Thus, this Act lays down both conditions for essential validity of marriage as also formal validity of marriage performed abroad between two persons one of whom at least is a citizen of India.

1.8. Void and Voidable Marriages

The statutory classification of marriages into Void and Voidable marriages as also the provision for the protection of legal rights of children born of such
marriages is the humane face of Hindu law because waywardness is a fact of life.

1.8.1. Void Marriages

Hindu Marriage Act, 1955, Section 11, reads as follows Void marriages, any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party be so declared by a decree of nullity if it contravenes any one of the conditions specified in Clauses (i), (iv) and (v) of Section 5 (of this Act). It is to be noted that this Section is not applicable to the marriages solemnized before the commencement of this Act because such marriages were not uncommon under indigenous Hindu Law. After the commencement of Constitution of India 1950, guaranteeing equality before law for both.

1.8.ii. Voidable Marriages

Section 12 of the Hindu Marriage Act 1955 reads as follows:
Voidable marriages–
(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:-
(a) that the marriage has not been consummated owing to the impotence of the respondent; or
(b) that the marriage is in contravention of the condition specified in clause (ii) of section 5; or
(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under section 5 as it stood immediately before the commencement of the Child Marriage
Restraint (Amendment) Act 1978 (Act 2 of 1978), the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstances concerning the respondent; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage –

(a) On the ground specified in clause (c) of sub-section (1) shall be entertained if –

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied –

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that the proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground.