CHAPTER - III

A BRIEF NOTE ON THE HINDU MARRIAGE ACT, 1955

To whom It is Applied

India is a country which abounds in personal law. Each community has its own personal law. The Hindus, the majority community have their separate family law. Although each of the communities is a religious community yet it is not necessary that their personal law is essentially religious law. It is also not necessary for the application of the personal law that members of the community should be ardent believers or followers of that religion. In most of the cases if he is a member of the community by birth or conversion that will suffice, even though in actual persuasion he may be atheist, non-religious, non-conformist, anti-religious or even decry his faith. So long as he does not give up his faith and embrace another religion he will continue to be governed by the personal law of the community to which he belongs.1

It is difficult to define the term “Hindu” in reference to religion since Hindu religion is so diverse and multifaced that the definition of the term “Hindu” in terms of Hindu religion is almost an impossible task. From the point of view of the application of the Hindu Marriage Act, 1955, the term “Hindu” is of a very wide connotation. The persons to whom this Act applies may be put in the following three categories:

(a) All those persons who are born of Hindu, Sikh, Jain or Budhist by religion. In this category are also included converts and reconverts to Hinduism, Sikhism, Jainism or Budhism.2

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1 Dr Paras Diwan, Family Law, (3rd edition, 1996) p. 2
2 Sections 2(1) (a) and 2(1)(b) and clause (c) of Explanation, Hindu Marriage Act, 1955
(b) All those persons who are born of Hindu, Sikh, Jain or Buddhist parents (in case only one parent is a Hindu, then the child must be brought up as Hindu). In this category are included both legitimate and illegitimate children of such parents.3.

(c) All those persons who are not Muslims, Christians, Parsis or Jews, who are domiciled in India and to whom no other law is applicable.4

**Hindu by religion**

Section 2(1)(a) and 2(1)(b) provides that the Act applies to a Hindu, Buddhist, Jain or Sikh by religion. Any person who follows Hindu religion in any of its form or development including a Virashaiva, a Lingayat or a follower of the Brahma, Prarthana or Arya Samaj either by practising it or by professing it is a Hindu. Hindu religion is multifaced and it is difficult to say with precision what is Hinduism.5 The assumption that Hindu law is applicable only to those who believe in the Hindu religion in the strictest sense has no basis in fact. Apart from the fact that Hindu religion has in practice, shown much more accommodation and elasticity than it does in theory, communities so widely separate in religion as Hindus, Jains and Buddhists have followed substantially the broad features of Hindu Law as laid down in the Smritis. In *Yagnapurushdasji v. Vaishya*6, the Supreme Court considered elaborately the question as to who are Hindus and what are the broad features of Hindu religion. It observed that the word Hindu is derived from the word Sindhu otherwise known as Indus which flows from the

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3. Clauses (a) and (b) of Explanation to section 2(1), Hindu Marriage Act, 1955.
4. Section 2(1)(c), Hindu Marriage Act, 1955.
Punjab. ‘This part of the great Aryan race’ says Monier William ‘which immigrated from Central Asia through the mountain passes into India settled first in the districts near the river Sindhu (now called Indus). The Persians pronounced this word Hindu and named their Aryan brethren Hindus’. The people on the Indian side of the Sindhu were called Hindus by the Persian and later western invaders. That is the genesis of the word Hindu. The term Hindu according to Dr. Radhakrishan had originally a territorial and not a cradle significance. It implied residence in a well defined geographical area. Aboriginal tribes, savage and half-civilized people, the cultured Dravids and the Vedic Aryans are also Hindus as they were sons of the same mother. The Supreme Court further observed that it is difficult if not impossible to define Hindu religion or even adequately describe it. The Hindu religion does not claim any prophet, it does not worship any one philosophic concept; it does not follow any one set of religious rites or performances; in fact it does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more. The Supreme Court also pointed out that from time to time saints and religious reformers attempted to remove from the Hindu thoughts and practices, elements of corruption, and superstition and that led to the formation of different sects. Budha started Buddhism, Mahavir founded Jainism, Basava became the founder of Lingayat religion, Dhyaneswar and Thukaram initiated the Varakari cult, Guru Nanak inspired Sikhism, Dayananda founded Arya samaj and Chaitanya began Bhakthi cult and as a result of the teaching of Ramakrishna and Vivekananda, Hindu religion flowered into its most attractive, progressive and dynamic form. If we study the teachings of these saints and religious reformers we would notice an
amount of divergence in their respective views; but under that divergence there is a kind of subtle indescribable unity which keeps them within the sweep of the broad and progressive religion. The Constitution makers were fully conscious of the broad and comprehensive character of Hindu religion: and so while guaranteeing the fundamental right of the freedom of religion, Explanation II to Article 25 has made it clear that the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion and reference to Hindu religious institution shall be construed accordingly. Consistently with this constitutional provision the Hindu Marriage Act, 1955 and the Hindu Succession Act, 1956, the Hindu Adoption and Maintenance Act, 1956 and the Hindu Minority and Guardianship Act, 1956 have extended the application of these Acts to all persons who can be regarded as Hindus in this broad comprehensive sense.

**Hindu by convert or reconvert**

Under clause (c) of the Explanation to section 2(1) of the Act any person who is convert or reconvert to the Hinduism, Budhism, Jainism or Sikhism religion, would also be a Hindu. A convert is a person who renounces his faith and adopts another. The usual way of conversion is by undergoing ceremonies of a conversion prescribed by the religion to which the conversion is sough. However, the Dharmashastra did not prescribe any ceremony for conversion to Hinduism. Hindus did not contemplate the followers of other religion would convert to Hinduism. By judicial interpretation following modes of conversion have also

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8. Supra note 5 at p.5
been developed. Thus a person will be a Hindu by conversion or re-conversion if any one of the following modes is adopted:

(a) If a person undergoes a formal ceremony prescribed by the religion, caste, community or sect which he wants to enter.

(b) If a person expresses a bonafide intention to become Hindu accompanied by a conduct unequivocally expressing that intention coupled with the acceptance of him as its member by the community of caste into the fold of which he has ceased.

(c) If a person bonafide declares that he has accepted Hinduism as his faith and he has been following Hinduism for some time, he becomes a Hindu.

Among the Hindus, it is only the Arya Samajists who prescribed a ceremony of conversion known as Sudhi. A person who undergoes the ceremony of Sudhi converts to Hinduism but he is Arya Samajists Hindu. In *Kusum v. Satya*, it was held that a non-Hindu become a Hindu if he had undergone the ceremonies of conversion. However, the performance of ceremony of conversion is not always necessary in all the cases of conversion. In *Peerumal v. Poonuswami*, the Supreme Court has laid down that a person may also become Hindu if after expressing an intention, expressed or impliedly, he lives as a Hindu and the community or caste into the fold of which he is ushered in accepts him as a member of that community or caste. In such a case one has to look to the intention and conduct of the convert and if the consensus of the community into which he was initiated

9. Supra note 1 at p.4; ibid. p 6
is sufficiently indicative of his conversion, then the lack of some formalities cannot negative what is an accomplished act. In such a case no formal ceremony of purification or expiration is necessary to effectuate conversion. The Kerela High Court in *Mohandas V. Devasan Board*,\(^\text{15}\) has gone a step further from the proposition propounded by the Supreme Court in *Peerumal*. It held that when a person declares that he is a follower of Hindu faith and if such a declaration is bonafide and not made with any ulterior motive or intention, it amounts to his having accepted the Hindu approach to God. He becomes a Hindu by conversion. In this case one Jesusdas, a Catholic Christian by birth and a famous playback singer used to give devotional music in a Hindu temple and worshipped there like a Hindu. He had also filed declaration, "I declare that I am a follower of Hindu faith". On these facts the court held that Jesudas was a Hindu and could not be prevented from entering the temple.

Under the Codified Hindu law also any person converts to Hinduism, Jainism, Budhism or Sikhism is a Hindu. A person who is a reconvert to Hinduism, Jainism, Budhism or Sikhism is also a Hindu both under the uncodified Hindu law and codified Hindu law. A person who ceases to be Hindu by converting to a non-Hindu religion will again become Hindu if he reconverts to any of the four above mentioned religions of the Hindus. Here it must be noted that a Hindu does not cease to be a Hindu if he becomes an atheist, dissents or deviates from the central doctrine of Hinduism or lapses from orthodox, religious practices or adopts another way of life, or decries Hinduism, or eats beef and does anything or everything which ordinarily a

\(^{15}\) 1975 Ker.L.T.55
Hindu will never indulge in. A convert from Hinduism will regain his original caste on reconversion to Hinduism. In *Arumugam v. Rajagopal*, \(^\text{16}\) it was held that on reconversion to Hinduism a person becomes a member of the caste to which he originally belonged. In a recent decision of the Supreme Court is *Kailash v. Maya Devi*, \(^\text{17}\) the Supreme Court had to decide the question whether the old caste of a person or his progeny who belonged to the scheduled caste or tribe but embraced Christianity or Islam or any other religion would revive on his or his progeny’s reconversion to Hinduism. The Supreme Court held that the main test would be whether the reconvert had a genuine intention to adjust his new religion and to go back to his old fold and adopt the practices and customs of the said fold without any protest from the member of his erstwhile caste. It is not necessary that there should be direct proof of the expression of the views of the community and it would be sufficient if no exception or protest is lodged by the community members. If a child is born he is incapable of choosing his religion until the age of discretion. After he has grown up and is able to decide his future he ought not to be bound by what his parents have done. If by his clear and conclusive conduct he reconverts to his old faith his caste automatically revives.

**Hindu by birth**

The Explanation to section 2(1) of the Act expands the scope of the expressions “Hindu” “Budhist”, “Jains” or “Sikhs”. Under clause (a) of the Explanation any child legitimate or illegitimate, both of whose parents are Hindus, Budhist, Jains or Sikhs, belongs to that religion respectively.

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Under clause (b) of the explanation if one of whose parents is a Hindu, Budhist, Jain or Sikh by religion, the child legitimate or illegitimate who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged will be a person of the religion. Therefore, under modern Hindu Law, a person will be a Hindu by birth in any one of the following cases:

(i) If he is born of Hindu parents (i.e. when both parents are Hindus), or

(ii) If he is born to a Hindu parent (i.e. one of the parents is Hindu) and he is brought up as a Hindu

Children born of Hindu parents are Hindus. It is necessary that both the parents should be Hindus, Sikhs, Jains or Budhists. If one parent is Hindu and the other is Jain, Sikh or Budhist, then also the child will be a Hindu. Such a child may be legitimate or illegitimate. It is immaterial that such a child does or does not profess, practise or have faith in the religion, of its parents. He may grow into adulthood as a totally irreligious person or as an atheist. The emphasis is on birth. If after the birth of the child both or one of the parents become convert to another religion, the child will continue to be a Hindu child, unless, in the exercise of parental right the child is also converted into the religion in which the parent or parents have converted.

A person will also be a Hindu if at the time of his birth one of the parents was Hindu and he is brought up as a member of the tribe, community, group or family to which parent belonged at the time of birth of the child. This was the position even before the codified Hindu law. Under the modern Hindu law, the child's religion is not necessarily that of the father. If the mother of the child at the time of child's birth was a Hindu and the child as brought up as a Hindu, the
child would be a Hindu. In the codified Hindu law it is made evident by the use of the word “belonged” in explanation (b) to section 2(1) of the Hindu Marriage Act, 1955. For instance, a child is born of Hindu mother and Muslim father, the child is brought up as Hindu. Subsequently mother converts to Islam. If at this point of time the question arises whether the child is Hindu, we find that neither of the parents is a Hindu but nonetheless the child is Hindu.18

Is it necessary that the child should be brought up as a member of tribe, community, caste, group or family to which the Hindu belonged at the time of the birth of the child? Suppose the Hindu parents belonged to the Brahmin community and the child is brought up as a Kshetriya child or the Hindu parent was a Jain and the child was brought up as a Sikh or the Hindu parent belonged to Jat community and the child was brought up as a Buddhist monk, does it mean that the child will not be Hindu? The test is that the child should be brought up as a Hindu and if a Hindu parent’s child is brought up in any form or development of Hinduism, Buddhism, Jainism or Sikhism, he will be Hindu. It is submitted that the bringing up of the child in any of the religions of Hindus is not necessary, the requirement being that the child should be brought up in the Hindu way of life.19

Persons who are not Muslims, Christians, Parsis or Jews by religion

Apart from the above discussed categories of persons on whom Hindu Marriage Act, 1955 is applied section 2 (1) (c) of the same Act provides that the Act applies to any other person domiciled in the territories to which this Act applies.

18 Supra note 8 at p 7
19 ibid.
extends who is not a Muslim, Christian, Parsis or Jew by religion unless it is proved that 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 matters, dealt with by this Act. For example, there are several tribes who though they do not belong to Muslim, Christian, Parsi or Jew religion are not governed by Hindu law but by their own customs.

It is well established that Hindu law applies to every Hindu unless he could establish a valid local tribal or family custom to the contrary. It applies to Aryan Hindus as well as to non-Aryan Hindus. For Non-Aryan Hindus it is not necessary to establish as to whether they have accepted the law as laid down in the Smritis and the commentaries. Thus the Adi-Dravidians and Chamars were held to be Hindus. So were the Dravidians of non-Aryan decent. Similarly, many aboriginal tribes were considered to be sufficiently Hinduized so as to be governed by Hindu law. Whether a person has been sufficiently Hinduized or not is a question of fact. Complete Hinduization is not necessary. If a person is sufficiently Hinduized, Hindu law will apply to him. Thus, Bhuryjahs, Jats, aborigins of Assam, Radbansis, Kurmis, Mahtos, Santhals of Chhota Nagpur, and Thattaus, followers of Makhathayan Thiyas and Ezhuvas of Malbar were held to be Hindu governed by Hindu law. Followers of the Marumakkattayam law in Malabar and the Aliyasantana law in Kanara and the Jats and other tribal communities of Punjab which are governed in most matters by their customary law were held to be Hindu. The Khojahas, the Cutchi Memons, the Bohars, Mopals and the Halai Memons are Muslims but, subject to the provisions of the Shariat Act, 1937, they

20. Rafail Uraon v. Baiha, A.I.R. 1957 Pat. 70
are governed in matters of succession and inheritances by Hindu law or custom. The Vannia Tamil Christians of Chittur district are governed by Hindu law in matters of inheritance and succession, but section 14 of the Hindu Succession Act, 1956 does not apply to them.\textsuperscript{22}

Section 2 (1) (c) of the Hindu Marriage Act, 1955 seems to be added by way of abundant caution. Sometimes it may be difficult to prove whether a person is Hindu, though negatively, it may be easier to prove that a person is not a Muslim, Christian, Parsi or Jew. If the negative is proved, such a person will be presumed to be a Hindu, unless this presumption is rebutted by proving that Hindu law is not applicable to such a person.\textsuperscript{23}

**Act not to apply to tribes unless notified**

Wide as the connotation of the term “Hindu” for the purpose of the Act is, its application has been expressly excluded to members of the Schedules Tribes as defined in Article 366 (25) of the Constitution of India. The Central Government has reserved powers to make the Act applicable by notification in the official gazette. The reason obviously is that if the life-style of the members of the tribe so demand or their members so desire the Act could be made applicable to them by mere executive notification.\textsuperscript{24} Section 2(2) of the Hindu Marriage Act provides that the Act will not apply to members of any Scheduled Tribe within the meaning of Article 366, clause 25 of the Constitution, unless the Central Government by notification in the official gazette, otherwise directs. This clause does not

\textsuperscript{22} Supra note 18 at p.8
\textsuperscript{23} ibid.
mean that the Scheduled tribes which were, prior to the codified Hindu law, governed by Hindu Law will not, now, be governed by the Hindu law. If before codification, any Scheduled tribe was governed by Hindu law, it will continue to be governed by it.\textsuperscript{25} However, it will be uncodified Hindu law that will apply to them.\textsuperscript{26}

**Overriding Effects of Customs on the Hindu Marriage Act, 1955**

The Hindu Marriage Act came into force on 18th May, 1955. The Act abrogates all the earlier rules of the law of marriage, applicable to the Hindus under the texts of Hindu law or interpretation thereof or under any custom or usage having the force of law.\textsuperscript{27} the Act also supersedes any other law contained in Central or State legislation in force prior to its coming into effect in so far as such legislation is inconsistent with the provisions contained in it.\textsuperscript{28} However, section 4 starts by using the expression “save as otherwise provided by this Act”. In other words if there are provisions in the Act which expressly save any text rule, custom or usage, then section 4(a) has no application. For example, under sections 5(iv) and 5(v) of the Act a marriage cannot be solemnized between the parties within the degrees of prohibited relationship or who are sapindas of each other, unless the custom or the usage governing each of them permits such marriage. Again under section 7, it is provided that a marriage may be solemnized in accordance with customary rites and ceremonies of either party thereto. Section 29(2) saves rights recognized by custom or confirmed by special enactment to obtain dissolution of marriage.

\textsuperscript{25} A.I.R. 1991 Pat.138
\textsuperscript{26} Supra note 22 at p.8
\textsuperscript{27} Section 4(a)
\textsuperscript{28} section 4(b).
The Act deals with the question of the degrees of prohibited relationship for the purpose of marriage. Presumably it is to ensure avoidance of incestuous alliances.\textsuperscript{29} The degrees of prohibited relationship are defined in section 3(g) which states: "Two persons are said to be within the degrees of prohibited relationship (i) if one is a lineal descendant of the other; or (ii) if one was the wife or husband of a lineal ascendant or descendant of the other; or (iii) if one was the wife of the brother or of the father's or mother's brother or of the grandfather's or grandmother's brother of the other; or (iv) if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or the two sisters". It is made clear that relationship under the clause includes relationship of half or uterine blood as well as by full blood, illegitimate blood relationship as well as legitimate and relationship by adoption as well as by blood. Section 5(iv), however, saves custom and usage governing both the parties which permits of marriage within the degrees of prohibited relationship. Contravention of the condition in section 5(iv) makes the marriage void under section 11. It also renders every person who procures a marriage of himself or herself in violation of the condition liable to punishment under section 18(b) of the same Act.

There are numerous customs all over India which validate marriages between relations coming within the prohibited degrees of relationship. For instance, marriage between the children of brother and sister is common among the marumakkathayees of Kerela. A marriage with one's eldest sister's daughter is common in some parts of Tamil Nadu.\textsuperscript{30} Wherever custom is relied upon, it must

\textsuperscript{29} Venkataraman, \textit{A treatise on Hindu Law}, (1st edition, 1972) p.175.
\textsuperscript{30} Prof. M. Krishna Nair, \textit{Family Law}, (vol.1, 1985) p.25.
be valid custom as defined in section 3(a) of this Act. Where a custom was pleaded of marrying a daughter’s daughter it was held illegal on the ground of immorality although there was a custom in Reddiar community of Tirenalveli District to that effect.\textsuperscript{31}

Under section 5(v) of the Hindu Marriage Act, no marriage is valid if it is contracted by parties related to each other as sapindas unless such marriage is permitted by custom governing each of them. Under section 11, a marriage between sapindas is void. The person procuring such a marriage for himself or herself is liable to be punished under section 18(b). Sapinda relationship is defined in section 3 (f), which states; “(i) sapinda relationship is with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth generation (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation ; or (ii) two persons are said to be “sapindas” of each other if one is a lineal ascendant of the other within the limits of sapinda relationship, or they have a common lineal ascendant who is within the limits of sapinda relationship with reference to each of them.” The definition taken with the explanation makes it clear that sapinda relationship includes relationship by half or uterine blood as well as by full blood, and legitimate and illegitimate relationship as well. There is much overlapping in the two prohibitions under clauses (iv) and (v) of section 5. Hence it would have been better to omit “sapinda” from the Hindu Marriage Act after specifying the degrees of prohibited relationship.

\textsuperscript{31.} Balusami Reddiar v Balakrishna Reddiar, A.I R. 1957 Mad. 97.
The Act does not prescribe any particular ceremonies for a Hindu marriage. Section 7(1) of the Act states that a Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. No preference is shown to the rites and ceremonies of the communities of the bridegroom as against those observed in the community of the bride. Section 7(2) of the Act makes it clear that if the form of marriage ceremony adopted includes the saptapadi, that is the taking of seven steps by the bridal pair jointly before the sacred fire, the marriage becomes complete with the taking of the seventh step. The Act gives saptapadi a statutory recognition, but it does not make saptapadi an obligatory one, it must be noted.32

The expression “may be solemnized”, means that it “shall be solemnized”. This seems to be the intention. The word “may” has been advisedly used to leave the option in the matter of ceremonies and that too of either partly thereto. But it proceeds on the assumption that the transaction of marriage is ordinarily accompanied by some ceremony and such a ceremony has to be undergone to lend solemnity to the relationship. Under section 7 of the Act, the validity of a marriage depends on the observance of the customary rites and ceremonies of either party with no hard and fast connection with those religious ceremonies as enjoined in the Hindu Shastras. It naturally means those ceremonies which the caste or the community to which the parties belong have customarily followed.33

Though not specifically mentioned as essential conditions under section 5 of the Act some more conditions are implied from other provisions of the Act. For instance, under section 7 marriage ceremonies are required. Section 12(1)(c)

33. supra note 24 at pp.23-24.
shows that free consent of both the parties is essential for the validity of a marriage.\textsuperscript{34} The word "solemnize" in section 7 of the Act means in connection with a marriage "to celebrate the marriage with proper ceremonies and due form". So unless a marriage is celebrated or performed with proper ceremonies and due form it cannot be said to be solemnized.\textsuperscript{35} It is essential for the purpose of section 17 of the Act making bigamy punishable that the marriage to which sections 494 and 495 of the Indian Penal Code apply should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married will not make them ceremonies falling within the purview of section 7 and is no marriage in the eyes of the law as would attract sections 494 and 495 of the Indian Penal Code.\textsuperscript{36}

Before the coming into force of the Hindu Marriage Act, 1955, Hindus could obtain divorce only if a custom governing them allowed it. The Hindu Marriage Act preserves customary divorce. Section 29(2) of the Act runs as under:

"Nothing contained in this Act shall be deemed to affect any right recognized by custom or conferred by any special enactment to obtain the dissolution of a Hindu Marriage whether solemnized, before or after the commencement of this Act."

The Supreme Court in \textit{Shakuntalabai v. Kulkarni},\textsuperscript{37} said that ancient and unbroken custom of divorce would be recognized and a valid marriage could be

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\item 34. Supra note 30 at p 27
\item 35. \textit{Bhaurao Lokhande v State of Maharashtra}, A.I.R. 1965 S C 1564
\item 36. ibid.
\item 37. A.I.R 1989 S.C. 1309.
\end{itemize}
dissolved by customary mode of divorce. To such divorces, neither one year's bar
to divorce under section 14, nor bar to marriage under section 15, nor any of the
bars laid down in section 23 (bars to matrimonial relief), sections 24 and
25 (maintenance and alimony) and section 26 (custody of children) does not
apply to customary divorces. In short, no provision of the Hindu Marriage
Act, 1955 applies to such divorce. No petition in the court is required. The
customary divorces may still be obtained through the agency of gram
panchayats or caste tribunals or caste panchayats, by private act of parties, orally
or in writing. Under customary law divorce may also be obtained under an
agreement, oral or written, such as bill of divorcement, tyaga-patra or farkat-
nama.38 A custom permitting divorce must fulfil all the requirements of a valid
custom. A custom permitting divorce to one spouse against the wishes of the
other is void, being unreasonable and against public policy.39 There is no general
custom of divorce among Hindus. It varies from caste to caste, from place to
place. It is difficult to classify different modes of divorce recognized under
custom. Here some illustrative cases are discussed. Most communities
recognized divorce by abandonment. In Vaishya community, a custom which
abandonment or desertion of the wife by the husband brings about dissolution of
marriage is valid.40 The custom among Sikh Jats of Amritsar according to which a
husband can divorce a marriage out of court preferably by written instrument is
saved by this section.41

40. Gopi Krishna v Jagga, 63 IA 295.
Saving clause (2) of section 29 of the Hindu Marriage Act, 1955 is quite significant. This clause protects the sources of divorce. The present Act, therefore, did not oust the earlier source and allow to remain in tact.\(^\text{42}\) In *Savitri Devi v. Manoama Bai*,\(^\text{43}\) the Madhya Pradesh High Court held that section 29 (2) protected customary divorce but the party relying on custom must prove the existence of such custom and that it was ancient, certain, reasonable and not opposed to public policy. Thus where after going through the evidence adduced by the parties the court was of the opinion that there was no divorce, the marriage could not be said to have been dissolved simply because the wife was living at one place and the husband at another with the alleged second wife. There must be a definite proof of divorce according to the caste custom which was lacking in this case.

**Some Other Salient Features of the Act**

The Hindu Marriage Act, 1955 is one which amends and codifies the Hindu law relating to marriage. A codifying statute is one which purports to state exhaustively the whole of the law upon a particular subject. This enactment introduced a bundle of reforms which aimed at changing at the very root, the shape of marital relationship between Hindu men and women. The primary mission of these reforms was to extend a protecting hand to the Hindu women against the tyranny of their husbands. At times the protection came in the form of measures aimed at preserving marriage and saving the honour of Hindu wives e.g. the enforcement of monogamy in the Hindu society.\(^\text{44}\) This Act has made radical

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44. Sunil Gupta, 'Legal Problems of Marriage and Divorce in Post-Independence Hindu Society (India)', 1985 *All. L.J. (Jrn.)*, Vol. LXXXIII, p.27.
and substantive changes in the institution of marriage under the ancient Hindu Law. These salient features may be summarized as under:

1. The Act, provides for a set of uniform and comprehensive rules regarding marriage applicable to all Hindus (section 2)

2. A Hindu marriage is now not so much concerned with religion. It is more a result of mutual consent than sacramental. (Sections 5(ii), (iii), 7 and 11 to 13)

3. The divergence between the Mitakshara and Dayabhaga schools in connection with the expression “prohibited degrees of relationship” for the purpose of marriage is now removed. (Section 3)

4. Monogamy has been made compulsory for the first time. Bigamy is now punished under Indian Penal Code (Section 5(i) and 17)

5. The ancient law did not prescribe any age of marriage but it is now a condition of marriage that the bridegroom must have completed 21 years and the bride must have completed the age of 18 years. {Section 5(iii)}

6. No particular ceremony is prescribed. The Act requires solemnization in accordance with the customary rites and ceremonies of any one of the parties to the marriage (Section 7)

7. Provisions for registration of Hindu marriage has been provided for the first time, though not compulsory, to facilitate proof of such marriage. (Section 8)

8. Specific remedies are made for restitution of conjugal rights, judicial separation, annulment of marriages and divorce. (sections 9 to 13)

9. From the time of 1976 Amendment, divorce by mutual consent has been recognized. (section 13 B)
10. Provision is made for legitimacy of children born of alliances which are void or voidable. (Section 16)

11. The Act provides for award of alimony pendente lite and permanent alimony and maintenance. (sections 24 and 25)

12. The Act provides for the custody, maintenance and education of minor children during the pendency of legal proceedings as also after passing of decree (Section 26)\(^45\).

The Hindu Marriage Act, 1955 was pushed in the lap of Hindu society by the Parliament with the sincere hope and expectation that the Hindu society, in spite of all reservations and hostile attitude towards it by the orthodox section, would accept it in a sporting spirit in due course of time. But the time has shown that it with an ostrich like attitude has refused to accept the obvious merits of the Act too gladly uptil now. Why is it so? Perhaps the answer lies in the fact that in spite of the best efforts of the law makers, the Act has not been successful in guaranteeing the Hindu couple that much of conjugal peace and happiness as was intended to be conferred on them by the legislators at the time of passing of the Act. There is one more feeling in the minds of the Hindus that though divorce in few cases might be a better solution to help the unhappy couples but in majority of cases it jeopardises the interests of Hindu women and children irreparably when rate of divorce cases increases enormously. It is also an acknowledged fact that divorce not only disrupts family life, but it also imperils the future of innocent children and deprives them of a proper home, education and family environment.\(^46\)

\(^{45}\) B.M. Gandhi op. cit. pp 212-213; Prof. Krishna Nair, op. cit. pp.19-20.

One is compelled to agree with Justice Desai of the Gujarat High Court that the Hindu Marriage Act cannot be regarded as a work of art or be noted for its good drafting\(^4\). It is not feasible nor needed presently to enumerate in detail various occurrences of ill drafting and resulting confusing. Illustratively speaking, section 9 mentioning the remedy of restitution of conjugal rights is so ambiguously worded that it has caused sharp division of opinion regarding admissible defences to plead against a restitution petition. Again, section 11 stating the conditions that make a marriage void is so inexhaustive that when this is read together with sections 5, 7 and 15 it leaves status of a marriage open to conjectures, which might have been contracted in contravention of some of the conditions mentioned in sections 5, 7 and 15 but not included in section 11. In case of divorce, section 29 (2) which saves the customary law of divorce of the parties does not make it clear whether the saving implies 'absolute exclusion' or 'exemption upon choice' from the operation of the provisions of the Act\(^4\). To permit the authority of two sets of laws operating simultaneously in the given context is capable of leading to uncalled for complicating situations. R.K. Agarwala suggests\(^4\) that parties controlled by the customary law of divorce should be specifically excluded from the operations of the Act and that an appropriate amendment in that regard should be made in section 29 of the Act. She feels that if this is not done each spouse may start proceeding under different forums (under the Hindu Marriage Act and under the customary law) and it may happen that at one place divorce may be allowed while

\(^4\) Supra note 46 at p.78
at the other it may be rejected leading to confusion. Through such a possibility cannot be ruled out, it is not shown how this would lead to any confusion. Those enjoying customary law of divorce have obtained additional ground of divorce, which may not be available to them under the custom. If each spouse starts proceeding under different forums, the result may be as follows:

(a) Divorce is granted under both the forums.
(b) Divorce is granted under one of the two forums.
(c) Divorce is not granted under both the forums.

In case of (a) and (b) there will be valid divorce and in case of (c) there will be no divorce. There would, thus, be no confusion. Marriage among Hindus is solemnized either by observing the customary rites and ceremonies of the community to which the parties belong or by performing the Dharmashastric Ceremonies. The customary rites and ceremonies relating to marriage are so varied in the Indian subcontinent that it is not possible to state with any degree of certainty what formalities are required to be observed for the creation of the status of husband and wife. It is indeed a question of fact to be ascertained from the social practices of the community to which the parties belong. It is, however, significant that even though the Act recognizes customary rites and ceremonies for the validity of marriage, it has iterated the provisions relating to shastric ceremonies\(^5\). It is noteworthy that the Act, while retaining the shastric ceremonies, did not introduced a purely secular mode of solemnization even though it expressly enacted a provision for registration under section 8 of the Act. Indeed, this stand of the Act is deliberate, for, if legislators had made up

50. Section 7(2)
their mind to eschew the religious element from the marriage law, they would have provided as under the law of adoption a mode of solemnization of ceremony of adoption which of total irrelevance of religious ceremonies. The proviso under section 11 of the Hindu Adoption and Maintenance Act, 1956 emphasises the irrelevance of the shastric ceremonies. However, dharma-shastras themselves have specified elaborate and complex ceremonies for establishing the matrimonial nexus. Beginning with set of simple Vedic ceremonies, the Hindu society has formulated by a gradual process of addition and elaboration a plethora of ceremonies. The baffling number of ceremonies have come into existence due to the practice of Hindu sacredotalism which has ceremonialized each and every activity relating to marriage. For instance, the arrival of the bridegroom at the residence of the bridge has been made Varapuja, throwing a party in his honour has become madhuparka, giving new clothes to the bridegroom for wearing on the occasion vatra paridhanam, gifting of the bride by the father of guardian Kanyadana, hand clasping panigrahana and so on. Even though there exist some differences regarding the observance of certain ceremonies and their order, there is wide agreement among the leading work with regard to the performance of certain necessary ceremonies such as kanyadana, panigrahana, saptapadi and lajahoma. It is indeed very difficult to say with any degree of certainty which of these ceremonies occasions the creation of matrimonial status. However, from the legal standpoint it is the ceremony of ‘saptapadi’ which effectuates the matrimonial status, for, this ceremony alone according to judicial dicta puts the stamps of finality on the

transaction. The only slight modification made by section 7 of the Hindu Marriage Act is that where the parties to marriage belong to two different communities with differing customary rites, the parties have a choice to opt for either of them. Such a provision has become necessary in view of the wide connotation of the term ‘Hindu’ under the modern Hindu law enactment52.

However, India is experiencing numerous and varied customary rites and ceremonies of Hindu marriage. Moreover, custom and usage have, in course of time, modified the scriptural marriage rites in different parts of the country. There still remains an open question as to where customary non-scriptural rites are observed what will be the stage of completing of such marriage. The Act only says that where the scriptural rite of saptapadi is observed, the seventh step will mark the finale of the ceremony. On the other hand, it may be a burdensome to the judiciary to ascertain whether the alleged rites and ceremonies of marriage are valid according to the custom of the particular community of the Indian society, a museum of diverse religions, cultures, races, languages and communities.

Apart from cases where the spouses knowingly avoid the ancient ceremonial there may be a significant number of Hindus who are agnostics or who do not subscribe to Hindu ritualism and who may, for conscientious reason, be unwilling to marry under the traditional system. In this context, Derrett submitted53 that apart from cases where the spouses knowingly avoid the ancient ceremonial, the intention of the spouses should be the criterion. Did they intend

52. Supra note 46 at pp. 271-272
53. J. Duncan M Derrett, A critique of Modern Hindu Law (1st publication, 1970) p 300
to become man and wife? If they did so the choice of ceremony seems irrelevant. Particularly if the customs are somewhat vague and plastic it would not be sufficient to ascertain the intention from the form of the ceremony, which is placing the cart before the horse. It is now desired that Central Government should give its anxious consideration. The observation of Bombay High Court in S. Shah v. Smt. Lata Saha,\textsuperscript{54} shows that emphasis should be given more to the factum of marriage that is intention to enter into matrimony than to observance of customary rites and ceremonies. The Madras legislature considered on a different footing the Hindu marriage popularly known as Suyamariyathai and Seerthiruththa marriages, enacted Madras Amendment Act 21 of 1967, amending the Hindu Marriage Act, 1955, gave retrospective effect of the Amendment Act by validating such marriages held before the date of coming into effect of the Amendment Act. According to section 7A thus amended, where a Hindu marriage popularly known as Suyamariyathai and Seerthiruththa is solemnized in the presence of relatives, friends and other persons by the parties to the marriage in any of the following ways (a) by a mere declaration by the parties to the marriage that each takes the other to be his or her spouse, or (b) by garlanding each other on putting the ring upon any finger of the other, or (c) by the tying of Thali, such a marriage is valid.

It will be seen that the Madras Legislature has given more emphasis on substance that on declaration or intention to enter into matrimony than on observance of customary rites and ceremonies in such marriage. In Baby v. Jagtab,\textsuperscript{55} the Bombay High Court in discussing the modern trend of marriage has made more emphasis on the intention to enter into matrimony than the observance

\textsuperscript{54} A.I.R. 1994 Bom. 43.
\textsuperscript{55} A.I.R. 1981 Bom 283.
of customary rites and ceremonies in a modern marriage under the Hindu Marriage Act, 1955 as suggested by the Maharashtra State Law Commission in its report by incorporating section 7A, somewhat in lines of Madras Amendment Act No.21 of 1967. In the proposed amendment it is stated that where a Hindu marriage is solemnized in presence of relatives, friends or other by a solemn declaration by the parties to the marriage that each takes the other to be his or her spouse by garlanding each other, such marriage is valid. In the proposed amendment it has also been suggested that who wish to follow the customary rites and ceremonies for solemnization, can perform the ceremonies prevalent to the community to which either party to the marriage belongs. The said commission stated in the report that the proposed amendment would be step in the right direction to legalise the simpler and economic form of marriage prevalent in different sections coming under the Hindu fold. It is now desired that the Central Government should give its anxious considering to the amendment of section 7 of the Hindu Marriage Act, 1955 by stating that the intention to enter into matrimony will get preponderance over observance of customary rites and ceremonies and also by stating that who wish to follow the customary rites and ceremonies for solemnization of marriage can perform the ceremonies prevalent to the community to which either party to the marriage belongs in the lines suggested in the report of State of Maharashtra Law Commission56.

Under the Hindu Marriage Act, 1955 the concept of Hindu marriage has undergone a tremendous change, according to which marriage means a lawful consensual union of a man and women to the exclusion of others, accompanied

by certain formalities which may be religious, customary and statutory. The dharmic institution of marriage, in which marriage was meant to be an indissoluble religious union of man and women, is sought to be transformed into a union of convenience. The sacramental concept ‘once tied cannot be untied’ has been dispensed with by section 13 and 13A of the Act as divorce has been recognized under the Act. Monogamy\textsuperscript{57} is now made legally compulsory for all married Hindus putting an end to the evil practice of polygamy. The innocent party to a bigamous marriage may obtain a declaration of the nullity of such a marriage under section 11. It does not mean, however, that so long as the declaration has not been obtained the bigamous marriage subsists. Section 17 provides for punishment for bigamy as laid down in sections 494 and 495 of the Indian Penal Code. The boy and the girl must have attained the statutory necessary marriageable age and they must be mentally sound\textsuperscript{58}. The Hindu Marriage Act began with fifteen years for girls and eighteen years for boys, requiring parental consent in the case of girls in the age group of fifteen to eighteen. Compelled by the need to adopt strict population control measures, the Government has now amended it. Now under section 5(iii) of the Act, at the age of twentyone a boy and the age of eighteen a girl can freely marry without consulting or even against the wishes of parents and other guardians. The age-old Hindu marriage- guardianship stands abolished by one stroke of legislation\textsuperscript{59}. The rigidity of the Indian Law is, of course, considerably mitigated in the cases governed by the Hindu Marriage Act by the fact that it provides only a penal sanction against minors’ marriage\textsuperscript{60}, and does not regard under-age marriage as a ground for nullity of marriage. The

\textsuperscript{57} Section 5(i)
\textsuperscript{58} Sections 5(iii) and (ii)
\textsuperscript{60} Section 18(a).
Hindu Marriage Act as well as the Child Marriage Restraint Act do not prohibit child marriage but prevent it by sanctioning penalties for contravening the relevant provisions of the Acts. However, this rule seeks to abolish the evil practice of child marriage\(^{61}\).

The parties to be married much not come within the prohibited degrees of relationship and much not be sapindas to each other.\(^{62}\) This aims at avoiding the practice of incestuous and immoral alliances between persons closely related by blood, affinity and adoption. The disqualification based on religion, caste, gotra, pravana have been dispensed with. Intercaste or intersect marriages are made legally valid, though socially they are still unacceptable in major sections of the society. A significant feature of the present Act is that it provides for new matrimonial remedies such as, restitution of conjugal rights, judicial separation, annulment of marriage and the right to get divorce.\(^{63}\) These provide relief and a sense of security to women who may be driven to seek anyone of these remedies in times of necessity. A valid marriage gives rise to mutual rights and obligations which can be legally enforced in the courts of law against each other.\(^{64}\) This Act aims at a secular law of marriage for all Hindus, doing away with all religious moorings, it still has loopholes in many aspects. However, this Act seems to have had limited impacts on the practice, customs and beliefs of the people. This partly is due to allowing religion, caste and custom to continue to have their way on the people.\(^{65}\) For instance, allowing customary marriage ceremony and customary divorce practices.

\(^{61}\) Supra note 52 at p. 60

\(^{62}\) Sections 5 (iv) and 5 (v)

\(^{63}\) Sections 9-13

\(^{64}\) For example, sections 9, 13, 24, and 25.

\(^{65}\) Supra note 61 at p. 62
Section 9 of the Hindu Marriage Act provides for the relief of the restitution of conjugal rights. It is observed that section 9 of the Act has lost its vivid life and practical utility these days. The remedy as envisaged in section 9 of the Act, may prove to be quite helpful in those cases where the couples are mostly illiterate and guided by social-religious ideals of the past but where couples happen to be educated and too western minded and leave the spouse with a calculated and final determination and with a vow not to meet each other again in future, this remedy may prove to be quite useless. No court can force a couple to live together by a decree only and that is all. But can the fear of punishment deter a determined couple to resume cohabitation and revive conjugal happiness where they had or have none in real conjugal life? Owing to the weaker force and sanction attached to the said section, a view has advanced that it should be deleted from the Act. But here it may be submitted that if such a view is accepted with a free hand, it will close the doors of resumption of cohabitation in those cases too, where it has ceased, due to sheer misunderstanding of the parties to the marriage or by sudden loss of temper and imbalanced of the mind of quarrelling couples, where escape from matrimonial home is more governed by sentimental and physiological reasons the relief by way of restitution of conjugal rights helps maintaining the sanctity of marriage institution and also the healthy growth and development of a civilized society. If restitution of conjugal right can successfully be ordered in few cases, the retention of section 9 would not be wholly unjustified, because, after all, one can reasonably feel, that it may work in few other cases too, where life is not too mechanical and sensitive, the family life is not vitally affected and remedies like restitution of conjugal rights possess their usefulness. But where the life is too fast people too busy outside their
homes, it may of course lose its practical utility. And where divorce is not much appreciated, restitution of conjugal rights alone serves the purpose of the society.66

Section 10 of the Act, grants a decree of judicial separation to an aggrieved spouse. According to one view this decree does not guarantee couples a permanent conjugal peace, rather in the long run it encouraged them to seek divorce. The judicial separation too, in many cases, it is said, fails patch up the difference between the estranged couples. This section was enacted by the Parliament for avoiding easy and hasty divorces on the ground that Hindu society does not favour divorce and further, divorce creates many social problems. Section 10 thus offers the excited and estranged couples the cooling off period and an opportunity to dissolve their marital differences like a good sportsman and a good old friend. But it may be submitted that the decree to judicial separation can help those who either abhor the idea of divorce or do not appreciate it. But what about those who want divorce and are not interested in leading a cruel married life.67

In a country like India the luxury of going to the court and seeking matrimonial relief even in just cases belong either to a very rich class of people or to the people who like litigation, no matter how much they loose in it. The socio-religious prejudices also play a vital role in debarring a Hindu to seek matrimonial relief in actual practice. It is, therefore, observed that the actual gain which one expects by snatching these relief from an acknowledged dialatory judicial process of the court is available to the estrange spouses much at the cost of

66. ibid. p. 102.
67. ibid.
his or her prestige and reputation and by involving him or her in the high cost of litigation. A divorce decree when obtained too late and at a high cost with so much of social embarrassment and stigma to a couple, give him or her a sad feeling as well as artificial satisfaction that there will be relief from conjugal frustration of domestic life and make him or her happy again. It is also an acknowledged view that the divorce decrees very rarely provide a real satisfaction to the divorced couples in the longer run of their lives in India, where divorce is disfavoured, depreciated, publicized especially while contracting remarriage or marriage of the relation of divorce couples. Where illiteracy rules among masses, unemployment and unstable economic status deprives a person to earn his daily bread for livelihood, the luxury of having divorce decrees becomes the exclusive domain of very restricted class of people.