

Chapter- III

THE CHANGING CONCEPT OF MARRIAGE- UNDER HINDU LAW

This chapter deals with how the concept of Hindu marriage and how it has undergone changes from the Vedic period to present day legislation. Thus the study includes the changes that took place in various forms of marriages, conditions for valid marriage and its consequences for the violation both under old Hindu law and the Hindu Marriage Act, 1955. It also deals with caste system under ancient Hindu law and its modifications by the Hindu Marriage Act, 1955.

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

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

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

Forms of marriage:

Under old Hindu law, there were eight forms of marriages of which, four are approved and four are unapproved. *Brahma, Daiva, Arsha* and *Prajapatya*

falls under the former category and *Asura*, *Gandharva*, *Rakshasa* and *Paisacha* are under the latter¹.

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

Approved Forms:

i) Brahma form:

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

ii) Daiva form:

In this form of marriage, the damsel is given to a person who operates as a priest in a sacrifice performed by the father, in lieu of the fee due to the priest. It is inferior to the Brahma because the father derives a benefit, which is not deemed reprehensible³.

lii) Arsha form:

In Arsha form of marriage, the bridegroom makes a present of a cow and a bull or two cows and two bulls to the bride's father which is accepted for religious purpose only⁴.

¹. Prof. G.C.V.Subba Rao- Family Law in India, 9th edn. 2009, p.178, S.Gogia&Company, Hyderabad.

². Prof. G.C.V.Subba Rao- Family Law in India, 8th edn. 2005, p.159, S.Gogia&Company, Hyderabad.

³. Manu iii, 28; cited in R.K. Agarwala- Hindu Law, 21st edn. 2003, p.33, Central law Agency, Allahabad.

⁴. Manu iii, 29; cf: R.K. Agarwala- Hindu Law, 21st edn. 2003, p.33, Central law Agency, Allahabad.

iv) *Prajapatya form:*

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

Unapproved forms:

i) *Asura form:*

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

ii) *Gandharva form:*

The gandharva marriage was the union of a man and a woman by mutual consent. In this form, the bride with own consent, gives herself away to the bridegroom. She is old enough to function without a guardian for the marriage⁶.

iii) *Rakshasa form:*

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

⁵. Manu iii, 30; cf: R.K. Agarwala- Hindu Law, 21st edn. 2003, p.33, Central law Agency, Allahabad.

⁶. Prof. G.C.V. Subba Rao- Family Law in India, 9th edn. 2009, p.180, S. Gogia & Company, Hyderabad.

⁷. R.K. Agarwala- Hindu Law, 21st edn. 2003, p.34, Central Law Agency, Allahabad.

iv) *Paisacha form:*

This form of marriage was the most reprehensible as being marriage of a girl by a man who had committed the crime of ravishing her either when asleep or when made drink by administering intoxicating drug or when in the state of mental disorder. In both Rakshasa and Paisacha, there is a subsequent marriage with sacred texts and it is the original mode of securing the maiden that stamps these marriages as 'unapproved'⁸.

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

2) *Conditions of marriage:*

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

- i. Identity of caste between parties. i.e., the parties should belong to same caste, unless sanctioned by custom.
- ii. Parties to be beyond the prohibited degrees of relationship. i.e., were not of the same gotra or pravara and were not the sapinda of each other;
- iii. Proper performance of ceremonies of marriage.

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

The text prescribed the following conditions as mandatory:

⁸. Prof. G.C.V. Subba Rao- Family Law in India, 9th edn. 2009, p.179, S. Gogia & Company, Hyderabad.

1. The bride should not be a sapinda of the bridegroom.
2. She should be separated by seven degrees on the father's side and five degrees on the mother's side.
3. She should not have the same 'gotra' or 'pravara' as the bridegroom.
4. She should not have been married to another earlier⁹.

The recommendatory conditions are:

1. She should be good looking.
2. She should be younger in years.
3. She should be healthy.
4. She should have brothers¹⁰.

The shastric conditions mentioned in Yajnavalkya smriti have been considerably modified by the Hindu Marriage Act, 1955.

Firstly, modifications have taken the form of dispensing with conditions prescribed by Yajnavalkya. According to Yajnavalkya;

1. The bride should be '*Ananya Purvika*'¹¹.

So, a widow marriage was not sanctioned.

2. The bride and bridegroom should not be of the same gotra or pravara.

Secondly, the modifications of the pre-existing law have been effected by laying down conditions not prescribed by Yajnavalkya. Thus:

⁹. Prof. G.C.V. Subba Rao- Family Law in India, 8th edn. 2005, p.144, S. Gogia & Company, Hyderabad.

¹⁰. Ibid.

¹¹. Ibid.

1. Neither party should have a spouse living at the time of the marriage. This entails a prohibition of polygamy not found in Yajnavalkya. It also forbids polyandry¹².

2. At the time of the marriage, neither party-

a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and procreation of children; or

c) has been subject to recurrent attacks of insanity or epilepsy¹³.

3. The bridegroom should have completed 21 years of age and the bride, 18 years at the time of the marriage.

Thirdly, the modifications have taken the form of relaxing the conditions prescribed by Yajnavalkya. Thus-

The Hindu Marriage Act, 1955 as well as Yajnavalkya prohibits marriages between sapindas. But according to Yajnavalkya, sapinda relationship extends up to 7 degrees on the father's side and 5 degrees on the mother's side. The Act lowers these limits to 5 degrees on the father's side and 3 degrees on the mother's side.

Conditions under Hindu Marriage Act, 1955:

Section 5 of the Act of 1955 prescribes conditions for a valid Hindu Marriage. A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely-

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

¹². Prof. G.C.V. Subba Rao- Family Law in India, 8th edn. 2005, p.145, S. Gogia & Company, Hyderabad.

¹³. Ibid.

ii) at the time of the marriage, neither party-

a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and procreation of children; or

c) has been subject to recurrent attacks of insanity (or epilepsy)¹⁴

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

iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two.

v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two¹⁵.

i) Number of spouses:

From Vedic period, though monogamy has been the rule, polygamy as an exception, existed side by side. The rules relating to '*anuloma*' marriages allowed a man more than one wife. But the wife who was first wedded was alone the wife in the fullest sense. *Apastamba* says that: "if a man has a wife who is willing and able to perform the religious duties and who bears sons, he shall not take a second wife"¹⁶.

Manu allowed a second marriage to a man only after the death of his wife. But under certain circumstances, he allowed a second wife. It was only

¹⁴. The word "epilepsy" has now been omitted from the Hindu Marriage Act, 1955 by the Marriage Laws (Amendment) Act, 1999.

¹⁵. Prof. G.C.V.Subba Rao- Family Law in India, 9th edn. 2009, p.161. S. Gogia & Company, Hyderabad.

¹⁶. *Apastamba*,ii, 5,11,12-13; Mayne's Hindu Law & Usage, 14th edn.,1998, p.155, Bharat Law House, New Delhi.

when a wife was barren, diseased, or vicious, that could be superseded and a second marriage was valid; as also when she consented¹⁷. On the supersession of a wife, the husband had to make provision for her¹⁸. However, a peculiar sanctity seems to have been attributed to the first marriage, as being that which was contracted from a sense of duty, and not merely for personal gratification. The first married wife had precedence over the others and her first-born son over his half-brothers¹⁹.

However, in some cases, the custom prevents any second marriage without the consent of the first wife and without making provision for her²⁰. Section 2 (4) of the Married Women's Right to Separate Residence and Maintenance Act, 1946 allowed the first wife to separate residence and maintenance, if her husband marries again.

The first condition of Sec.5 of Hindu Marriage Act, 1955 provides that "neither party has a spouse living at the time of marriage"²¹. This clause strictly enforces monogamy and prohibits polygamy and polyandry. Before 1955, a Hindu could marry any number of wives, even if he had a wife or wives living. But only few states²² prohibited polygamy and polyandry. In Bombay, it was prohibited by a Statute of 1947²³ and in Madras, by an Act of 1949²⁴. The Hindu Marriage Act, 1955 prohibited polygamy and polyandry. Section 5 of the Act say 'neither party has a spouse living at the time of marriage'. Under Section 11²⁵ of

¹⁷. Manu ix, 77-82; Yajn, i, 73; Mayne's-Hindu Law & Usage, 14th edn. 1998, p.155, Bharat Law House, New Delhi.

¹⁸. Manu ix, 77-82; Yajn, ii, 148; *ibid*, p.156.

¹⁹. Manu iii, para 12, 14; ix, Paras 117, 133-135; cf: Mayne's- Hindu Law & Usage, 14th edn. 1998, p.156, Bharat Law House, New Delhi.

²⁰. Palaniappa Chettiar v. Alagan Chetti (1921)48 I.A 539, 543; *ibid*.

²¹. Clause (i) of Section 5.

²². Bombay prohibited by Statute of 1947, Madras by an Act of 1949.

²³. The Bombay Hindu Divorce Act, 1947.

²⁴. The Madras Hindu (Bigamy Prevention and Divorce) Act, 1949.

²⁵. Section 11 deals with 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 contrivances any one of the conditions specified in clauses (i), (iv) and (v) of Section 5.

the Hindu Marriage Act, 1955, bigamous marriages are void. Section 17²⁶ of the Act makes it a penal offence for both Hindu males and females under Sections 494²⁷ and 495 I.P.C²⁸.

Bigamy includes both polygamy and polyandry. Polygamy permits a male to have more than one wife simultaneously. Polyandry permits a female to have more than one husband simultaneously. Polyandry was not recognized by Hindu law, though by custom it prevailed in some regions in North and South. In Lahaul valley in Himachal Pradesh and among Thiyyas of South Malabar, polyandry was recognized.²⁹

The offence of bigamy is committed by a Hindu marrying again during the life time of his or her spouse, provided that the first marriage is not null and void. If the subsisting marriage is voidable, then also offence of bigamy is committed³⁰. The solemnization of marriage is proved by showing that the marriage was performed with the proper and essential rites and ceremonies of marriage prescribed under the law or custom applicable to parties³¹.

In bigamous marriage, the “second wife” has no status of wife³². But in case she files a petition for nullity, she can claim both interim and permanent maintenance. If a husband/wife is about to take a second wife/husband, the first wife/husband can ask for an injunction from the court. A suit for perpetual

²⁶. Section 17 deals with punishment of bigamy: “Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of Section 494 and 495 of the Indian Penal Code shall apply accordingly.

²⁷. “Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

²⁸. “Whoever commits the offence defined in the last preceding Section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

²⁹. *Krishnan v. Ammalu*, 1972 Ker 91 cf: *DR. Paras Diwan- Modern Hindu Law*, 18th edn. 2007, p.105, Allahabad Law Agency, Faridabad (Haryana).

³⁰. *DR. Paras Diwan-Modern Hindu Law*, 18th edn. 2007, p.105 Allahabad Law Agency, Faridabad (Haryana).

³¹. *Ibid.*

³². *Jayalakshmi v. Gayatri*, AIR 1998 Kant 169; *Savitri Devi v. Manorama Bai*, AIR 1998 MP 114.

injunction by one spouse against the other can be filed under Section 9, C.P.C.³³ read with Section 38, Specific Relief Act, 1963³⁴.

The first wife of a bigamous marriage has no right to file a petition for nullity under the Hindu Marriage Act, 1955 since Section 12 clearly lays down that a petition for a declaration that the marriage is null and void can be filed only by either party to the marriage. But the first wife can file a suit in a civil court for a declaration under Section 9, C.P.C. read with Section 34, Specific Relief Act, 1963³⁵ that the second marriage of her husband is null and void. She can also file a petition for divorce under Section 13 (1) (i) of H.M.Act, 1955³⁶ on the ground of Adultery³⁷.

In *Megh Prasad v. Bhagwanti Bai*,³⁸ respondent married appellant with the consent of his first wife. At the time of alleged marriage of respondent with appellant, both parties i.e. appellant and respondent were having spouses and

³³. Section 9 of C.P.C. reads as under:

“The court shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

³⁴. Section 38 deals with Perpetual Injunction when granted: (1) subject to the other provisions contained in or referred to by this chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) when any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

(3) when the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely-

(a) where the defendant is trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(c) where the invasion is such that compensation in money would not afford adequate relief;

(d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

³⁵. Section 34 of the Specific Relief Act, 1963 deals with discretion of court as to declaration of status or right: “Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

³⁶. Section 13 (1) “Any marriage solemnized, whether before or after the commencement of this Act, may on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party:

(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse.

³⁷. DR. Paras Diwan- Modern Hindu Law, 18th edn. 2007, p.106, Allahabad Law Agency, Faridabad (Haryana).

³⁸. AIR 2010 Chhattisgarh 25 (para 9).

their marriages were not dissolved by a decree of divorce or by any recognized custom. Such marriage is in violation of Section 5 (i) of the Hindu Marriage Act, 1955. Respondent is not legally wedded wife or lawful wife of appellant. The words 'Hindu wife' used in Section 18 of the Hindu Adoptions and Maintenance Act, 1956³⁹ only include lawful wife or legally wedded wife and does not include any wife of second marriage during subsistence of her first marriage.

Further in *Smt. Sushma Choure v. Hetendra Kumar Borkar*,⁴⁰ the court held that the second marriage during subsistence of first marriage is void.

In *Gurmit Kaur v. Buta Singh*,⁴¹ it was held that when the marriage being void from its inception, no amount of delay can stand in the way of obtaining declaration as to nullity of marriage.

In *Ms. Bhavna Sahar Wasif v. Flg. Off. Rajiv Gakhar*,⁴² petition was presented by the husband under Section 11 of the Hindu Marriage Act, 1955 for declaring marriage as null and void on the ground that his wife was already married to person belonging to Muslim religion. It was held that wife being converted to Muslim and was no longer a Hindu, the Hindu Marriage Act, 1955 will have no application to entertain a petition.

ii) Soundness of mind:

The second condition of a valid marriage requires that the parties to marriage are of sound mind and are not suffering from any mental disability so as to be unfit for giving a valid consent. The Hindu Marriage Act, 1955 originally laid down that neither party to the marriage should be an idiot or lunatic. Under this Act, the marriage of the idiot or lunatic was only voidable⁴³.

³⁹ Section 18 of the Act of 1956 deals with maintenance of wife. Section 18 (1) subject to the provisions of this Section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her life-time.

⁴⁰ AIR 2010 Chhattisgarh 30 (DB) (paras 12 and 14).

⁴¹ AIR 2010 (NOC) 440 (P & H).

⁴² AIR 2010 (NOC) 444 (P & H).

⁴³ Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.609, Orient Publishing Company, Allahabad.

According to 'Smritis', mental soundness was not a condition for marriage. It necessarily implies that a person of unsound mind could marry and his marriage was legally safeguarded in the name of *samskara*⁴⁴.

Originally, Section 5(ii) of the Hindu Marriage Act, 1955 laid down that: "Neither party to the marriage should be an idiot or lunatic at the time of marriage". The Marriage Laws (Amendment) Act, 1976 has reframed this clause thus-

⁴⁵ [At the time of the marriage, neither party-

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

b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind (or) to such an extent as to be unfit for marriage and the procreation of children; (or)

c) has been subject to recurrent attacks of insanity (or epilepsy)⁴⁶

These three sub-clauses of Section 5(ii) are independent of each other. If a case is covered under any of these clauses the marriage can be annulled. Under sub-clause (a), every kind of 'unsoundness of mind' is not covered. The unsoundness of mind should be such, which incapacitates a person from giving a valid consent to marriage. It need not be persistent or continuous unsoundness of mind. It may exist just before the marriage⁴⁷.

Under sub-clause (b), the words "has been suffering" requires that mental disorder should be of some duration. The duration will differ from case to

⁴⁴. Manu ix, 201-203; Yaj.ii, 140-42; Amrithammal v. Vallimayil Ammal AIR 1942 Mad 693 ILR 1942 Mad 807; Ratneshwari v. Bhagwati AIR 1950 PC 142; R.C. Nagpal- Modern Hindu Law, 2nd edn. 2008, p.103, Eastern Book Company, Lucknow.

⁴⁵. Subs. By Act No.68 of 1976; the old clause read as follows: "(ii) Neither party is an idiot or lunatic at the time of the marriage".

⁴⁶. The word epilepsy has been omitted from the H.M.Act, 1955 by the Marriage Laws (Amendment) Act, 1999.

⁴⁷. DR. Paras Diwan- Modern Hindu Law, 15th edn. 2004, p.106, Allahabad Law Agency, Faridabad.

case, and no hard and fast rule can be laid down. It is not every 'mental disorder' which renders the marriage voidable, but should satisfy two conditions: (i) it renders him unfit for marriage, and (ii) of procreation of children⁴⁸.

In *Smt. Alka Sharma v. Abhinesh Chandra Sharma*⁴⁹, the Madhya Pradesh High Court held that, nullity of marriage under the word "and" between expression "unfit for marriage" and "procreation of children", in Sec. 5 (ii) (b) should be read as "and" / "or". The court can nullify marriage if either condition or both conditions contemplated exist due to mental disorder making living together of parties highly unhappy. The word "procreate" includes capacity to rear up children besides capacity to beget them.

Under sub-section (c), recurrent attacks of insanity (or epilepsy)⁵⁰ makes a person unfit for marriage. He can not marry even during a lucid interval. This sub-section has made a substantial difference between the original provision and the present provision. The original provision was that, neither party was an idiot or a lunatic at the time of the marriage. It could mean that a person who was suffering from recurrent attacks of insanity could marry during a lucid interval because then it could not be said that he was an idiot or a lunatic at the time of marriage.

The Marriage Laws (Amendment) Act, 1976 provided in Section 5 (ii) (c) epilepsy also along with 'recurrent attacks of insanity' as a disqualification for marriage. The Marriage Laws (Amendment) Act, 1999 has omitted epilepsy. Thus now there is no condition of marriage that a party to marriage should not suffer from 'recurrent attacks of epilepsy'⁵¹.

The present condition is that at the time of marriage, he has not been subject to such recurrent attacks. Even that person who is in a good order or in

⁴⁸. DR. Paras Diwan- Modern Hindu Law, 15th edn. 2004, p.106, Allahabad Law Agency, Faridabad.

⁴⁹. AIR 1991 MP 205.

⁵⁰. Omitted by Marriage Laws (Amendment) Act, 1999.

⁵¹. R.C. Nagpal- Modern Hindu Law, 2nd edn. 2008, p.102, Eastern Book Co., Lucknow.

a sound state of mind at the time of marriage is covered by this condition if he has been subject to such attacks before the marriage. The original condition took in to account, the mental state at the time of marriage only. This condition looks at the mental state even before marriage and is a salutary amendment⁵².

The marriage which takes place in contravention of this condition is not *per se* void but voidable under Sec.12 (1) (b)⁵³ of the Act of 1955⁵⁴. Mental conditions specified in the clauses relate to pre-marriage conditions and not to post-marriage mental conditions though for post-marriage mental disability, divorce or judicial separation may be available⁵⁵.

Before passing of the Act of 1955, a “consenting mind” was not necessary. Consequently, an idiot or a lunatic could marry. The Hindu Marriage Act, 1955 puts an end to this system. The Hindu Marriage Act, 1955 makes “free consent” a necessary element of a valid Hindu marriage⁵⁶.

An “idiot” is “he, that a fool from his birth and knoweth not how to count or number, or can not name his father or mother, nor of what age he himself is, or such like easy and common matters; so that it appeared that he has no manner of understanding, or reason, or government of himself, or what is for his profit or disprofit⁵⁷. A marriage which takes place in contravention of this condition is not *per se* void but voidable u/s.12 (1) (b) of the Act of 1955.

iii) Age:

Under Section 5 (iii) of the Hindu Marriage Act, 1955 the minimum age at the time of marriage for the girl is 18 and 21 for the boy. The Shastric law does not lay down any age for marriage. There is an injunction for men that they

⁵². R.C. Nagpal- Modern Hindu Law, 2nd edn. 2008, p.102, Eastern Book Co., Lucknow.

⁵³. Section 12 (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- (b) that the marriage is in contravention of the condition specified in clause (ii) of Section 5 of the Act of 1955.

⁵⁴. R. Lakshmi Narayana v. Santhi (2001)4 SCC 688.

⁵⁵. DR. Paras Diwan- Modern Hindu Law, 15th edn. 2004, p.107, Allahabad Law Agency, Faridabad.

⁵⁶. B.M. Gandhi- Hindu Law, 3rd edn. 2008, p.268, Eastern Book Company, Lucknow.

⁵⁷. Strouds Judicial Dictionary, 2nd edn. p.906; *ibid* p.269.

should marry on the completion of the *Brahmacharya Ashram* i.e., Study of the Vedas. Originally, this is at the completion of 25 years but at places, it is observed that this is at the attainment of the age of 12 or 24 or 36 or 48 years⁵⁸. Man is permitted to live a life of celibacy but marriage is made indispensable for women.

The marriageable age of girls is indicated in the *Grihya Sutras*⁵⁹ by the terms *Nagnika* and *Gauri*. According to *Vaikhyanas*, a girl between 8 and 10 years is known as a *Nagnika* and a girl between 10 and 12 years is called a *Gauri*. It is laid down that a girl should be married before she attains youth or before attaining puberty. Thus the age of 8 years is the minimum age for the marriage of a girl. Manu is of the view that if a worthy bridegroom is available, a girl may be married at a still younger age⁶⁰. Thus the Shastras do not prescribe any floor age for the marriage of a girl.

Yagnavalkya Smriti requires a male to marry after finishing his education (*Avipluta Brahmacharya*). This naturally meant that the bridegroom should be a major. Further, he has to receive the *kanyadana* (gift of the bride). This also seems to suggest that he should be a major⁶¹.

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

The Act of 1929 was passed by the efforts of Rai Saheb Harbilas Sarda for the object of checking the evil of the child marriage. In this enactment, it was laid down that at the time of marriage, the bride must have completed 14 years and the bridegroom 18 years. Later on, by an amendment, the marriageable age of girls was raised to 15 years. A boy or a girl younger than this was

⁵⁸. P.V. Kane- History of Dharma Shastras, vol. II; Part I, 438; cf: R.C. Nagpal- Modern Hindu Law, 1983 edn. p.89, Eastern Book Company, Lucknow.

⁵⁹. The Grihya Sutras prescribe very elaborate rites and ceremonies for marriage.

⁶⁰. Manu, IX, 88; cf: R.C. Nagpal- Modern Hindu Law, 1983 edn. p.89, Eastern Book Company, Lucknow.

⁶¹. Prof. G.C.V. Subba Rao- Family Law in India, 8th edn. 2005, p.148, S. Gogia & Co. Hyderabad.

declared a “child” and child marriage was made punishable. Nevertheless, it was a valid marriage⁶².

The original Hindu Marriage Act 1955 did not differ from this state of law. But by the Child Marriage Restraint (Amendment) Act, 1978 the marriageable floor age is enhanced by three years for both the parties in both the Acts⁶³.

The Sarda Act, 1929 was enacted with a modest purpose in view. It does not purport to prohibit child marriages; it merely wants to restrain them. The Child Marriage Restraint (Amendment) Act, 1978 does not purport to render child marriages void. Instead, it prescribes some penalties for those persons who are responsible for child marriages. The offences under the Act are not cognizable offences. This means that unless a complaint is filed, no proceedings can be launched in a court⁶⁴.

The 1929 Act was replaced by a new Act called Prohibition of Child Marriage Act, 2006. According to that Act, the minimum age for the bride is 18 years at the time of marriage and for the bridegroom it is 21 years. Whoever performs, conducts, directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he had reasons to believe that the marriage was not a child marriage⁶⁵.

Whoever, being a male adult above 18 years of age, contracts a child marriage, shall be punishable with rigorous imprisonment which may extend to 2 years or with fine which may extend to one lakh rupees or with both⁶⁶.

Where a child contracts a child marriage, any person having charge of the child, whether as parent or guardian or any other person or in any other capacity, lawful or unlawful including any member of an organization or

⁶². R.C. Nagpal- Modern Hindu Law, 2nd edn. 2008, p.104, Eastern Book Company, Lucknow.

⁶³. Ibid.

⁶⁴. Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.609, Orient Publishing Company, Allahabad.

⁶⁵. Section 10 of the Prohibition of Child Marriage Act, 2006 (Act No.6 of 2007).

⁶⁶. Section 9; *ibid*.

association of persons who does any act to promote the marriage, or permits it to be solemnized or negligently fails to prevent it from being solemnized, including attending or participating in a child marriage, shall be punishable with rigorous imprisonment which may extend to 2 years or with fine which may extend to one lakh rupees. Provided that no woman shall be punishable with imprisonment⁶⁷. For the purpose of this Section, it shall be presumed, unless and until the contrary is proved that where a minor child has contracted a marriage, the person having charge of such minor child has negligently failed to prevent the marriage from being solemnized⁶⁸.

Where a child, being a minor-

- a) is taken or enticed out of the keeping of the lawful guardian; or
- b) by force compelled or by any deceitful means, induced to go from any place; or
- c) is sold for the purpose of marriage and made to go through a form of marriage or if the minor is married after which, the minor is sold or trafficked or used for immoral purposes, such marriage shall be null and void⁶⁹.

Every child marriage whether solemnized before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage. Provided that, a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage⁷⁰. If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend along with the child marriage prohibition officer⁷¹.

⁶⁷. Section 11(1) of the Prohibition of Child Marriage Act, 2006.

⁶⁸. Section 11(2) *ibid*.

⁶⁹. Section 12 *ibid*.

⁷⁰. Section 3 (1) *ibid*.

⁷¹. Section 3 (2) of the Prohibition of Child Marriage Act, 2006.

Under the Hindu Marriage Act, 1955, a marriage solemnized in contravention of the conditions prescribed for a valid marriage was treated as valid. By invoking the doctrine of *Factum Valet*, validity was given to the child marriages. Later, the Marriage Laws (Amendment) Act, 1976 through 13 (2) (iv), provided a relief to a Hindu wife if her marriage was solemnized before attaining 15 years, can repudiate after attaining 15 years and before attaining 18 years. Now the Prohibition of Child Marriage Act, 2006 made a child marriage, voidable.

The petition under this Section may be filed at any time but before the child completes 2 years of attaining majority⁷². Any child marriage solemnized in contravention of an injunction order issued prohibiting such marriage, shall be 'void ab initio'⁷³. Notwithstanding any thing contained in the Code of Criminal Procedure 1973, offences punishable under this Act shall be cognizable and non-bailable⁷⁴.

In the Hindu Marriage Act, 1955 in Section 18, for clause (a), the following clause shall be substituted, namely—

“a) in the case of contravention of the condition specified in clause (iii) of Section 5, with rigorous imprisonment which may extend to 2 years or with fine which may extend to one lakh rupees or with both”⁷⁵.

According to the Marriage Laws (Amendment) Act, 1976 where the marriage of a girl (whether consummated or not) solemnized before she attained the age of 15 years and she has repudiated the marriage after attaining that age but before attaining the age of 18 years, the girl can obtain a decree for dissolution of marriage. This is an additional ground made available to a wife⁷⁶.

⁷². Section 3 (3) of the Prohibition of Child Marriage Act, 2006.

⁷³. Section 14 *ibid*.

⁷⁴. Section 15; *ibid*.

⁷⁵. Section 20 *ibid*.

The old clause reads as follows:

“a) in the case of a contravention of the condition specified in clause (iii) of Sec.5, with simple imprisonment which may extend to 15 days or with fine which may extend to 1000 rupees or with both.

⁷⁶. Section 13(2) (iv) of The Hindu Marriage Act, 1955.

This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976.

iv) Prohibited degrees of relationship:

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

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

- i) if one is a lineal ascendants of the other; or
- ii) if one was the wife or husband of a lineal ascendant or descendant of the other; or
- iii) if one was the wife of the brother or of the father's or mother's brother or of the grand father's or grand mother's brother or of the other; or
- iv) if the two are brother and sister, uncle and niece, aunt and nephew or children of brother and sister or of two brothers or of two sisters;⁷⁷

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

The degrees of prohibited relationship of a male and female can be seen in foot notes.⁷⁸

⁷⁷. Prof. G.C.V. Subba Rao- Family Law in India, 9th edn. 2009, p.150, S. Gogia & Co. Hyderabad.

⁷⁸. 1. A female ascendant in the line. 2) Wife of a descendant in the line. 3) Wife of the brother. 4) Wife of the father's brother.5) Wife of the mother's brother. 6) Wife of the grand father's brother.7) Wife of the grand mother's brother .8) Sister. 9) Brother's daughter. 10) Sister's daughter.11) Father's sister. 12) Mother's sister. 13) Father's sister's daughter. 14) Father's brother's daughter. 15) Mother's sister's daughter. 16) Mother's brother's daughter.

A lineal descent is a descendant in the male line. There is no limit of degrees and all descendants in the male line are lineal descendants counted down wards in unbroken line⁷⁹.

The Hindu texts went to the extent of prohibiting a man marrying a girl even of the same “gotra” or “pravara” on the theory that his father and the girl’s father were both descendant of a common ancestor in the male line and all such marriages were held invalid until the Hindu Marriage Disabilities Removal Act, 1946 was passed. However the rule did not apply to *Sudras*, the reason given being that *Sudras* had no *gotra* of their own⁸⁰.

Marriage between parties related with each other within the degrees of prohibited relationship is forbidden to prevent:

- a) physical degeneracy of the race which the marriage between near relations would lead to;
- b) moral degeneracy and consequent evil results which are apt to affect a society built on the edifice of joint family system⁸¹.

A “Karewa” marriage between a father-in-law and daughter-in-law among the “jats” (who are presumed to be *Sudras*) is invalid and cannot be validated by custom⁸². A custom must not be opposed to public policy or abhorrent to decency and morality.

Among the Jats of Punjab, marriage with brother’s widow and in South India, maternal uncle’s daughter and paternal aunt’s daughter are treated as

The following will be within the prohibited degrees of a female:

1. Her lineal ascendant like Father, Father’s Father. 2) The husband of a lineal ascendant. 3) The husband of a lineal descendant. 4) Brother. 5) Father’s brother. 6) Mother’s brother. 7) Brother’s son. 8) Sister’s son. 9) Father’s brother’s son. 10) Father’s sister’s son. 11) Mother’s brother’s son. 12) Mother’s sister’s son.

⁷⁹. R.K. Agarwal- Hindu Law, 21st edn. 2003, p.43, Central Law Agency, Allahabad.

⁸⁰. Ibid p.45.

⁸¹. Ibid.

⁸². Jagnahar singh v. Sadharam (1934)15 Lah 688; 149 IC 94; AIR 1934 Lah 283.

eligible for marriage. This is based upon local custom or '*Desa Achara*'. In Andhra Pradesh, custom permits marriage with sister's daughter⁸³.

A marriage between persons who are related to each other within prohibited degrees would become void under Section 11 of the Hindu Marriage Act, 1955. The person procuring a marriage in contravention of this provision would be punishable under Section 18 (b) of the Act.⁸⁴

v) *Sapinda relationship*:

In the Hindu texts, the word *sapinda* has been used in two senses; firstly, it means a relation connected through the same body; and secondly, it means relation connected through oblation of food. The prohibition of *Sapinda* marriage is also based on the rule of exogamy. The *Dharmashastra* considered sex relationship with one's mother or one's sister or one's daughter or even with one's son's wife as '*mahapataka*', the highest sin. According to *Vishnu*, for such a person, there was no *prayaschitta*⁸⁵ except that he should throw himself into the blazing fire⁸⁶.

Theories of Sapinda relationship:

In the ancient Hindu law, two theories of sapinda relationship were propounded:

- a) Oblation theory; and
- b) Particles of the same body theory.

a) *Oblation theory*:

⁸³. Prof. G.C.V. Subba Rao- Hindu Law, 8th edn. 2004, p.136, Gogia & Co. Hyderabad.

⁸⁴. Simple imprisonment which may extend to one month or with fine which may extend to 1000 rupees or with both.

⁸⁵. Prayaschitta or penance as a mode of expiation.

⁸⁶. Vishnu Smriti, XXXIX, 1.10; cited in Dr. Paras Diwan- Modern Hindu Law, 16th edn. 2005, p.94, Allahabad Law Agency., Faridabad.

This theory was propounded by *Medhatithi* and *Kullukabhata*. According to this theory, when two persons offer “pindas” to the common ancestor, they are Sapindas of each other. Before Vijñaneswara, the sapinda relationship was linked with the oblations that one offered to his departed ancestors. The Hindus believe in ancestor worship and offer pindadan to their departed ancestors. Every year in the Shradha ceremony, offerings are made to departed ancestors. These offerings are mainly in the form of pinda. The pinda literally means a ball and is usually made from rice⁸⁷.

The rule is that, one offers one full pinda each to his three paternal ancestors and one full pinda to his two maternal ancestors. One also offers one divided pinda each to his three next paternal ancestors and one divided pinda each to his maternal ancestors. Thus, he is connected by ‘pindadan’ to the six ancestors on the paternal side and four ancestors on the maternal side and is sapinda to them. When two persons offer pindas to the same ancestor, they are also sapindas to each other⁸⁸.

b) Particles of the same body theory:

This theory was propounded by *Vijñaneswara*. According to Vijñaneswara, “pinda” means “Body”. “Sapinda” means “connected by particles of the same body”. He changed the meaning of pinda from ball to particles of the same body. According to Vijñaneswara, the sapinda relationship arises between two persons on account of their being connected by particles of one body. He however limited this relationship up to 7th degree on the father’s side and up to 5th degree on the mother’s side, counting upwards in ascending order from each⁸⁹.

The “pindas” theory also regarded two persons as sapindas of each other, because they offered pindas to 6 ancestors ascending on the father’s side and 4 ancestors ascending on the mother’s side. If the persons offering

⁸⁷Dr. Paras Diwan- Modern Hindu law, 16th edn. 2005, p.94, Allahabad Law Agency, Faridabad.

⁸⁸. Ibid. p.95.

⁸⁹. R.K. Agarwala- Hindu law, 21st edn. 2003, p.46, Central Law Agency, Allahabad.

“pinda” is included as himself being of one generation, it means 7 degrees on the father’s side and 5 degrees on the mother’s side⁹⁰.

The passage in the Mitakshara in relation to sapinda relationship runs as follows: “He should marry a girl who is non-sapinda with himself. She is called his sapinda, who has particles of the body of some ancestor in common with him. Non-Sapinda means not his sapinda. Such a one he should marry. Sapinda relationship arises between two people through their being connected by particles of one body. Thus the son stands in sapinda relationship to his father because of particles of his father’s body having entered his. In like manner stands the grandson in sapinda relationship to his paternal grandfather and the rest, because through his father, particles of his grandfather’s body have entered into his own. Just so is the son a sapinda relation of his mother, because particles of his mother’s body have entered into his⁹¹.

Likewise, the grandson stands in sapinda relationship to his maternal grandfather and the rest through his mother. So also is the nephew a sapinda relation of his maternal aunts and uncles, and the rest, because particles of the same body have entered into his and theirs; likewise he stand in sapinda relationship with paternal uncles and aunts, and the rest⁹².

So also the wife and the husband are sapinda relations to each other, because they together beget one body (the son). In like manner, brother’s wives are also sapinda relations to each other, because they produce one body (the son) with those (severally) who have sprung from one body (i.e., because they bring forth sons by their union with the offspring of one person, and thus their husband’s father is the common bond which connects them). Therefore one ought to know that wherever the word sapinda is used, there exists between the persons to whom it is applied a connection with one body, either immediately or by descent⁹³.

⁹⁰. R.K. Agarwala- Hindu law, 21st edn. 2003, p.46, Central Law Agency, Allahabad.

⁹¹. Mayne’s- Hindu Law & Usage, 14th edn. 1998, p.134, Bharat Law House, New Delhi.

⁹². Ibid.

⁹³. Mayne’s- Hindu Law & usage, 14th edn. 1998, p.134, Bharat Law House, New Delhi.

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

According to the *Mitakshara*, the rule of non-sapinda marriage applies to all classes, because sapinda relationship exists every where. Therefore, it applies to sudras and others who may have no gotras of their own⁹⁴.

Vijnaneswara's definition of sapinda relationship and the rules he lays down for the limitation of sapinda relationship as given in the '*Acharadhyaya*' (chapter on established rules of conduct) are applicable not only to marriage but also to inheritance; for he says expressly that “one ought to know that wherever the word “sapinda” is used, there exists between the persons to whom it is applied a connection with one body, either immediately or by descent”⁹⁵.

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

- 1) Sama gotra or 'sagotra' sapindas, and
- 2) Bhinna gotra sapindas or '*Bandhus*'⁹⁶.

⁹⁴. Vidyarnava's trans. of *Acharadhyaya*, 106; cited in Mayne's - *Hindu Law & usage*, 14th edn. 1998, p.135, Bharat Law House, New Delhi.

⁹⁵. Maynes- *Hindu Law & usage*, 14th edn. 1998, p.135, Bharat Law House, New Delhi.

⁹⁶. *Ibid.*

The sagotra sapindas are *agnates* within seven degrees of the common ancestor; the Bhinnagotra sapindas are cognates within five degrees of the common ancestor.

The reasons for limiting the 'sagotra' sapindas to seven degrees and 'Bhinnagotra' sapindas to five degrees are obvious: For, one is the giver of the pinda and three- father, grand father and great grand father are recipients of pindas, and three-beginning with great grand father are recipients of divided pinds (LEPAS)⁹⁷ or as *vijnaneswara* himself puts it, the first pinda is efficacious up to the 4th ancestor, the second pinda up to 5th and the third pinda up to the 6th⁹⁸.

As regards 'Bhinnagotra' sapindas, the reason for the limitation of five degrees was that, as a woman causes a change in the family, one had to offer oblations to mother's father, grand father and great grand father and counting also the mother and himself, it became five degrees. Though *Vijnaneswara* altered the basis of sapinda relationship from the oblation theory in to real consanguinity, as he felt that some limitation of sapinda relationship was necessary, he retained the old limitations for both 'sagotra' sapindas and 'bhinnagotra' sapindas. *Vishnu* and *Yajnavalkya*, if not Manu himself, established the rule of offering pindas to the mother's three immediate male ancestors⁹⁹.

The correct rule regarding limitation of five degrees to all 'bhinnagotra' sapindas is: count inclusive of the common ancestor in the line or lines in which a female intervenes, five degrees and in the line in which there is no female, seven degrees; if the claimant and the propositus in their respective lines are within those degrees, they are bandhus (relatives) of each other; but if either or both of them are beyond those degrees, they are not bandhus of each other. To count it, begin with the claimant and the propositus (or the bride and the

⁹⁷. Mayne's- Hindu Law & usage, 14th edn. 1998, p.136, Bharat Law House, New Delhi.

⁹⁸. Mit., on Yajn.,I, 254; Vidyarnava's trans.,340; *ibid*.

⁹⁹. Yaj.I, 242-243; Vishnu, LXXV,7; Manu, IX,136; cited in Mayne's- Hindu Law & usage, 14th edn. 1998, p.136, Bharat Law House, New Delhi.

bridegroom as the case may be) and count inclusive of both; seven degrees or five degrees upwards as their relationship with the common ancestor is in the father's line or in the line where a female intervenes respectively; and if the common ancestor is reached within those degrees on both sides, then they are sapindas. They are 'sagotra' sapindas, if in neither line, a woman intervenes. And they are 'bhinnagotra' sapindas if in either or both lines, a woman intervenes.

Section 3 (f) of the Hindu Marriage Act, 1955 defines sapinda relationship. According to clause (f) of Section 3;

- i) "*Sapinda relationship*" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation;
- ii) two persons are said to be "sapindas" of each other within the limits of sapinda relationship, or if they have a common lineal ascendant who is within the limits of sapinda relationship with reference to each of them.

Section 5 (v) of the Hindu Marriage Act, 1955 lays down that the parties to marriage should not be sapindas of each other. The Act of 1955 modified *Vijnaneswara's* theory. It restricts the sapinda relationship to five degrees on the father's side and three degrees on the mother's side. Thus the sapinda relationship extends up to five degrees on the paternal side and three degrees on the maternal side.

It should be noted that, sapinda relationship shall be computed upwards either through the mother or through the father or both and the person concerned shall always be counted as one degree. Thus the Hindu Marriage Act, 1955 prohibits marriage between persons who are sapindas of each other.

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

3) *Caste system:*

Under the ancient Hindu law, one of the conditions for a valid Hindu marriage is the identity of caste between the parties. If the parties did not belong to the same caste, the marriage was invalid, unless it was sanctioned by custom. Even before the period of Dharma sutras (600-200 B.C.), inter-marriages between the four varnas were not allowed.

In the Vedic literature, the society is classified in to four varnas; Brahmin, Kshatriya, Vaishya and Sudra. In the Vedic period, the class system and occupations of persons belonging to the four varnas were not rigid. An individual was free to engage himself in any occupation irrespective of the class to which he belonged. There were no regulations of food and drink for various classes. There were also no restrictions on inter-class marriages.

In the shastric literature, there are various theories of the varnas. One of them is God himself created these classes. The Brahmanas originated from the mouth of Brahma, the Kshatriyas from his arms, the Vaishyas from his thighs and the Sudras from his feet. The other theory is that, the classes are not differentiated by birth, but by their respective qualities and deeds. Thus according to this theory, varnas are based on Dharma.

The Dharma of the four classes is as follows: teaching, self-control and the 'tapas' (austerities) are the duties of the Brahmanas. The duties of the Kshatriyas are the study, protecting people, performing sacrifices, making gifts. The duties of the Vaishyas are study, making gifts, celebrating sacrifices,

¹⁰⁰. Section 11 of the Hindu Marriage Act, 1955.

¹⁰¹. Simple imprisonment up to the period of one month or with fine up to Rs. 1000 or with both.

acquiring wealth by fair means and to serve the first three is the duty of the sudras.

According to Manu, among the social duties, the most creditable are: teaching the Vedas for the Brahmanas, protecting the people for the Kshatriyas and trading for the Vaishyas¹⁰². According to the Smritikars, the common Dharma (duties) for all the four classes are; abstention from injury to any living creature, pursuit of truth, abstaining from taking unlawfully what belongs to another, purity of conduct and life, control of organs, self-restraint, uprighteousness and generosity¹⁰³.

Visvarupa, the earliest commentator on Yajnavalkya commenting upon Yaj. I, 56; states that the marriage of a Sudra girl by a twice-born is prohibited¹⁰⁴. In his gloss on Yajn.II, 125, he reiterates that no son by a Sudra wife is sanctioned for the twice-born¹⁰⁵. The *Smritichandrika* also prohibited such marriages: “Even a son of the body does not become legitimate son when he is born of a wife of an unequal class, the marriage of a woman of unequal caste being itself prohibited in the kali age”¹⁰⁶.

The Smritikars mentioned two forms of inter-varna or inter-caste marriages. These are- pratiloma marriages, i.e., marriages between a woman of a superior caste and a man of an inferior caste were altogether prohibited and no rites were prescribed for them in grihya sutras¹⁰⁷. The issue of such unions were declared to be outside the pale of the sacred law. The kautilya’s Arthasastra also regarded ‘Pratiloma’ sons as sons born of unlawful union¹⁰⁸.

¹⁰². Manu Smriti, X, 80; cited in Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.46, Orient Publishing Co. Allahabad.

¹⁰³. Manu, X, 63; Yaj, I, 122; Vishnu, II, 16-17; *ibid*.

¹⁰⁴. Visvarupa’s Balakrida, 65 (Trivandrum edn.); cited in Mayne’s- Hindu Law & usage, 14th edn. 1998, p.151, Bharat Law House, New Delhi.

¹⁰⁵. *Ibid*, p.247.

¹⁰⁶. Smriti Chandrika (Krishna Swami Iyer’s trans.), p.142, X,7 (Mysore edn.), Vyavahara Kanda, 669; cited in Mayne’s- Hindu Law & usage, 14th edn. 1998, p.151.

¹⁰⁷. Mayne’s- Hindu Law & usage, 14th edn. 1998, p.149, Bharat Law House, New Delhi.

¹⁰⁸. Arthas; Shamasastri, 203; Mayne’s- Hindu Law & usage, 14th edn. 1998, p.151.

Anuloma marriages between a male of a higher caste and a female of a lower caste which was held valid. In the Vedic period, when the Hindu caste system had not become rigid, inter-religious and inter-caste marriages were performed. The Hindu princes have taken wives from other lands and other religions, and this practice continued to prevail till the codification of Hindu law of marriage¹⁰⁹. Before passing of the Hindu Marriage Act, 1955, in *Chandramani Dubey v. Dubey*¹¹⁰, the courts expressed the view that there was no rule of Hindu law which forbade the subsistence of a marriage between parties one of which was a non-Hindu and the other was a Hindu.

When the caste system or 'Varna' system of Hindus came to be firmly established, the inter-caste and even inter-sub-caste marriages came to be prohibited. Earlier in the Vedic age, when Hindu caste system had not become rigid, inter-caste or inter-varna marriages were performed¹¹¹.

In the *Anuloma* form of marriage, a male of superior caste married a female of inferior caste. For instance, a marriage between a Brahmin male and Kshatriya, Vaishya or Sudra female or a marriage between a Kshatriya male and Vaishya or Sudra female or a marriage between Vaishya male and Sudra female fell in this form¹¹².

In *Pratiloma* marriage, a male of inferior caste married a female of superior caste. Thus, when a sudra male married a Brahmin, Kshatriya or Vaisya female or a Vaishya male married a Brahmin or Kshatriya female or a Kshatriya married a Brahmin female, the marriage was called Pratiloma marriage¹¹³.

Therefore marriages between persons belonging to different castes are invalid in the absence of a usage to the contrary. In a number of cases, marriages between persons of different castes were held to be prohibited

¹⁰⁹. Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.584, Orient Publishing Co. Allahabad.

¹¹⁰. AIR 1951 All 529.

¹¹¹. Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.583, Orient Publishing Co. Allahabad

¹¹². Ibid p.584.

¹¹³. Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.584, Orient Publishing Co. Allahabad.

without distinguishing between anuloma and pratiloma marriages¹¹⁴. But marriages between persons belonging to different divisions of the same main caste are held valid¹¹⁵.

The status of such marriages was improved by legislation. The Arya Marriage Validation Act, 1937 provided that no inter-caste marriage between the Arya Samajists was invalid. The Hindu Marriage (Removal of Disabilities) Act, 1946 validated marriages between Sub-divisions of the same caste. The Hindu Marriages Validity Act, 1949 validated a marriage between parties belonging to different religions (within the frame work of Hinduism), castes, Sub-castes or Sects. The Hindu Marriage Act, 1955 has repealed the latter two Acts. The Act of 1955 prescribed conditions for a Hindu marriage. There is no requirement under Section 5 of the Act that the parties to a Hindu marriage should belong to the same caste. So inter-caste marriages are now perfectly valid under Hindu law. Under this Act, “any two Hindus” can marry¹¹⁶.

The requirement of pure Hindu law that both parties to the marriage must belong to the same caste was changed from time to time through legislations providing inter-caste marriages. Similarly the prohibitions on the basis of gotra and pravara were also relaxed through legislation. Marriages between Hindu, Jain, Sikh and Buddhists were also legalized. The Hindu Marriage Act, 1955 validated such marriages.

4) *Gotra and pravara:*

Hindus subscribed to the rule of exogamy where under a person is not permitted to marry within the same tribe. The shastric prohibition of sagotra and

¹¹⁴.a) Lakshmi v. Kalim Singh (1900)2 Bom LR 128 (Kshatriya and Brahmin woman); b).Munnial v. Shiama (1926)48 All 670 (Sudra and Vaisya woman); c) Padam Kumari v. Suraj Kumari (1906)28 All.458 (Brahmin and Chhattri woman); Mayne’s- Hindu law & usage, 14th edn. 1998, p.151, Bharat Law House, New Delhi.

¹¹⁵.a) Inder Singh v. Sadhu Singh ILR (1944)1 Cal 233; (marriage between a Sikh man, who professes to be a Hindu and a Brahmin by caste and a woman who is a Brahmin Hindu); b) Manickam v. Pongavanammal 1933 MWN 185 (Marriage between a Sudra and an Adi Dravida); c) Raghava Doss Jee v. Sarju Bayamma (1942)1 MLJ 205 (marriage between two bairagis); d) Nagappa v Subramaniam ILR 1946 Mad 103 (marriage between Nuttukottai Chettiar with a dancing girl); *ibid.* p.152.

¹¹⁶. Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.584, Orient Publishing Co. Allahabad.

saprarava marriages relate to this rule. Hindus believe that each of them is a descendant from one sage or the other. All those who trace their descent from the sage have a common gotra. Thus two persons belonging to the same gotra are gotraja, if they trace their descent to a common rishi¹¹⁷.

A man therefore cannot marry a girl of the same gotra or pravara as the girl and boy are deemed to have descended from a common ancestor in the male line. Even among the higher castes, sagotra marriages may be recognized by custom e.g., among the Vaishya Agarwalas. The issues of such marriages are perfectly legitimate¹¹⁸.

Thus, two persons are gotrajas or belonged to the same gotra, if they are descendants in the male line from one of the ancient sages after whose name, the gotra is designated¹¹⁹. Originally, gotra meant "bond". Later on, it came to mean "family" and descendants of the same family were not permitted to intermarry. This is prohibition of sagotra marriage. Both the Smritis and Grihya Sutras prohibit sagotra marriages. The three lineal male ancestors of the founder of the gotra are referred to as "Pravara".

Pravara is also defined as the group of sages distinguishing the sage who is the founder of the gotra. The word "Pravara" literally means "invocation" or "summons"¹²⁰. It may be traced back to the cult of fire worship among Indo-Aryans. The purohit officiating at a sacrifice to agni, used to recite the names of famous rishi-ancestors to carry libations to gods¹²¹. It seems that the term pravara came to denote such ancestors.

During British period, in many parts of India, marriages performed in violation of the saprarava rule were valid¹²². The gotras of the Brahmans are defined as being the various branches descended from the different rishis or

¹¹⁷. Dr. Paras Diwan on Hindu law, 2nd edn. 2005, p.584, Orient Publishing Co. Allahabad.

¹¹⁸. R.K. Agarwala- Hindu Law, 21st edn. 2005, p.35, Central Law Agency, Allahabad.

¹¹⁹. Dr. Paras Diwan- Modern Hindu Law, 16th edn. 2005, p.93, Allahabad Law Agency, Faridabad.

¹²⁰. Dr. Paras Diwan on Hindu law, 2nd edn. 2005, p.585, Orient Publishing Co. Allahabad.

¹²¹. Dr. Paras Diwan- Modern Hindu Law, 16th edn. 2005, p.93, Allahabad Law Agency, Faridabad.

¹²². Ibid.

sages. Therefore, in theory, there is at any rate, a blood relationship between such descendants. The gotra of Kshatriyas and Vaishyas however, was the gotra of the family purohit, and nothing more. Therefore there was no blood link between such disciples and the idea of the gotra among these two latter classes was that of congregations as opposed to families.

Viswamitra, Jamadagni, Bharadwaja, Goutam, Atri, Vasistha, Kasyapa and *Agastya* are the eight rishis; the progeny of these 8 sages is declared to be gotra¹²³. The principal sages of a gotra or race by whom, that race or its branch is distinguished from other gotra or the rest of the same gotra are called "pravaras". For instance, in the Viswamitra gotra, three pravaras namely, Viswamitra, *Marichi* and *Kaushika* of whom, Viswamitra is the founder of the gotra which is distinguished from other gotras by having for its pravara, the sages Marichi and Kaushika. All persons have not only a gotra but also a pravara. The number of rishis included in pravara is usually three but never exceeds five.¹²⁴

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

The rule is that persons of the same gotra or pravara cannot validly marry each other. A marriage celebrated between them is absolutely void. When the Aryan families expanded, a large number of close relations such as cross-cousins were living under the same roof. Unless a prohibition based upon exogamy (i.e., requirement of marriage outside the family), is recognized, incestuous relations might develop in such circumstances.

¹²³. R.K. Agarwala- Hindu Law, 21st edn. 2007, p.35, Central law Agency, Allahabad.

¹²⁴. Ibid.

Further, if a marriage outside the family becomes necessary and is sought, it would be difficult to procure a match for a girl since there would be suspicion that the male members of her own family eligible for marriage might have had illicit relations with her. To do away with these difficulties, the prohibition against sagotra marriages was evolved.

The Hindu Marriage (Removal of Disabilities) Act, 1946 validated sagotra and sapravara marriages. Such marriages are also valid under Hindu Marriage Act, 1955. It removed all the restrictions on inter-caste, inter-sub-caste, sagotra and sapravara marriages.

5) *Widow Re-marriages:*

There are conflicting provisions in the smritis on the issue of widow re-marriage. Manu says on the one hand that “a second husband of a good woman is nowhere prescribed and the remarriage of a widow has never been spoken of in the ordinances about marriage; but on the other hand, he talks about the son born out of remarriage. A text of Parasara which is found in the Narada smriti also says, another husband is ordained for a woman in five cases namely, her first husband having perished or died naturally or become a sanyasi or if he be impotent or has lost his caste. Then follow the periods during which a woman is to wait for her absent husband and the whole thing is made into sense by the direction that, when the time has expired, she may take herself to another man¹²⁵.

Manu declared that a man may only marry a virgin, and that a widow may not marry again¹²⁶. The only exception which he allows is in the case of a girl whose husband has died before consummation, who may be married again to the brother of the deceased bridegroom¹²⁷.

¹²⁵. Narada, XII, paras 106-110; cited in Mayne's- Hindu law & Usage, 13th edn. 1991, p.146, Bharat Law House, New Delhi.

¹²⁶. Manu, VIII, para 240; V, paras 173-175; cited in Mayne's- Hindu law & usage, 14th edn. 1998, p.157, Bharat Law House, New Delhi.

¹²⁷. Manu, IX, paras 78-79; *ibid*.

Tribal practices:

Among the “*jat*” population of the Punjab, not only a widow, but a wife who has been deserted or put away by her husband, may marry again and will have all the rights of a lawful wife. The same rule exists among the Lingayats of South Kanara. In western India, the second marriage of a wife or widow called “*pat*” (by the Maharattas and Natras in Gujarat) is allowed among all the lower castes¹²⁸.

In south India, including Cochin and Travancore, the widows’ remarriage is not forbidden by either religious or caste custom to the majority of the population. The prohibition exists among the Brahmins, Kshatriyas and Vaisyas and also among the higher classes of Sudras who claim either equality or wear the sacred thread or who are otherwise high in the social scale or who emulate or follow Brahmin customs¹²⁹.

Widow remarriage is recognized among the Namosudras of Bengal. In Bihar, the Banias adopt widow remarriage. In the Northern parts of Bihar, in Orissa and in Chota Nagpur, it is generally practiced except among the Brahmins, Kayasthas, Rajputs and Banias. It is universal among the Darjeeling tribes and also in Assam except a few of the higher castes¹³⁰.

The remarriage of widows had been legalized by the Hindu Widows Remarriage Act, 1856. It is valid and legal under the provisions of Hindu Marriage Act, 1955. Under the Act of 1955, a provision for dissolution of marriage through divorce, annulment of marriage has been made, so ‘when a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or if there is such a right of appeal, the time for appeal has expired (without an appeal having been presented or an appeal has

¹²⁸. Mani v. Zaboo AIR 1926 Nag 488; Rewaram Balwant Khati v. Ramratan Balwant Khatal AIR 1963 MP 160; Bahadur Singh v. Kartar Singh 1950 MB Ill Madh BLR 425; cited in Mayne’s- Hindu law & usage, 14th edn. 1998, p.158, Bharat Law House, New Delhi.

¹²⁹. Mayne’s- Hindu law & Usage, 14th edn. 1998, p.158, Bharat Law House, New Delhi.

¹³⁰. Ibid.

been presented but has been dismissed), it shall be lawful for either party to the marriage to marry again'¹³¹.

6) *Ceremonies of marriage:*

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

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

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

Shastric ceremonies and rites:

For a valid Hindu marriage, performance of certain shastric ceremonies is still necessary. The ceremonies and rites are laid down in the grihyasutras. The grihyasutras prescribe very elaborate rites and ceremonies for marriage. Although the performance of some of the ceremonies and rites begins a few days before the actual solemnization of marriage both at the place of the bride and bridegroom, all the essential ceremonies are performed at the place of the bride.

On the forenoon of the day, when marriage is scheduled to be performed, the father of the bride or in his absence, the next male relative performs '*Vridhi Sraddha*' in which, offerings are made to the departed ancestors with a view to obtaining their blessings for the marriage. On the same

¹³¹. Section 15 of the Hindu Marriage Act, 1955.

fore noon is performed with the chanting of the mantras, the ceremony of giving bath to the bride¹³².

In the olden days, there was the practice of setting apart, a cow for the wedding feast. But later on, when beef eating was prohibited, practice of tying a cow and then letting it loose on the arrival of the bridegroom is still observed in some parts of the country. On the arrival of the bridegroom at the bride's house, begins the performance of several important ceremonies. The first of these is the ceremony of 'Sampradana'. In this ceremony, *padya* (or water) for washing the feet, *araghya* (water mixed with flowers, *durva*-grass, rice and sandal paste) for washing the head, a cushion to sit upon, and *madhuparka* (mixture of honey, curd and ghee) are given to the bridegroom along with other presents. This ceremony is performed with the chanting of mantras and recitation of prayers¹³³.

This is followed by one of the main ceremonies of marriage, the 'Kanyadana' ceremony, in which the father of the bride or in his absence, the next guardian for marriage, pours out a libation of water symbolizing the gift of the bride. Some times the right hand of the bride is tied with that of the bridegroom with *durva* grass with chanting of mantras. In this manner, the bride is formally given in gift to the bridegroom who recites the *kama sukta* and accepts the gift. Certain presents are also made to the bridegroom which include a piece of gold as *dakshina*. Then the father of the bride invokes the bridegroom and tells him never to fail the bride in his pursuit of *Dharma*, *Artha*, *Kama* and *Moksha*, to which the bridegroom replies thrice that he shall never fail her¹³⁴.

The next important ceremony is 'Vivaha-homa' i.e., lighting of holy fire, symbolizing it as divine witness and sanctifier of the vivaha samskara. On the west of the fire, is placed a mill-stone and on the North-East, is placed a water pot. The bridegroom and the bride offers oblations to the holy-fire in which,

¹³². Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.617, Orient Publishing Co. Allahabad.

¹³³. Ibid.

¹³⁴. Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.618, Orient Publishing Co. Allahabad.

bride participates by grasping the hand of the bridegroom. These oblations include '*mahavayahritu-homa*', in which oblations are offered in honour of earth, sky and heaven. The bridegroom also recites certain sacred mantras¹³⁵.

This is followed by the third important ceremony, the '*Panigrahana*', in which the bridegroom takes the hand of the bride. This is to be done by the bridegroom standing up and facing west, while the bride sits in front of him facing east. Holding the hand of the bride, the bridegroom recites certain vedic hymns¹³⁶.

Then is performed, the '*Laja-homa*' by the bride in which she offers oblations to *Aryama*, *Varuna*, *Pushan* and *Agni* so that the gods may be pleased to free her from their bonds.

The next ceremony is '*Agni-Parinayana*'. According to the Grihya sutras, parinayana are three, though in practice they are usually seven or five (in all sacramental marriages they are even now invariably performed). The '*agni-parinayana*' is the rite of going round the nuptial fire, where the bridegroom leads the bride three times round the nuptial fire and water-pot, the couple keeping to the right side of the nuptial fire and water-pot. At the end of each round around the holy fire, the bride with the helping hand of the bridegroom mounts the mill-stone. The bridegroom recites certain hymns. At the end of the final round, the bridegroom loosens two locks of her hair chanting the hymn, "I release thee now from the bondage of *varuna*"¹³⁷.

The last ceremony of the rites and ceremonies of a Hindu marriage is '*Saptapadi*' which is the most important and must be performed in all sacramental marriages. Near vivaha-mandap, the bridegroom leads the bride for seven steps in the North-Eastern direction while reciting certain hymns¹³⁸. This is followed by an address by the bridegroom to the bride. Water is then

¹³⁵. Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.618, Orient Publishing Co. Allahabad.

¹³⁶. Ibid.

¹³⁷. Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.619, Orient Publishing Co. Allahabad.

¹³⁸. Ibid.

poured on the hands of the couple and certain prayers are recited. Upon the completion of the prayer, the bridegroom joins hand with the bride and says to her, “give thy heart to my religious duties, may thy mind follow mine, Be thou consentient to my speech, May Brihaspati unite thee unto me”¹³⁹. On the completion of the seventh step, the marriage becomes final and irrevocable.

The ‘Saptapadi’ is the most material of all the nuptial rites, and marriage becomes complete and irrevocable on the completion of the seventh step. According to Manu, “The nuptial texts are a certain rule in regard to wed-lock; and the bridal contract is known by the learned to be complete and irrevocable on the seventh step of the married pair, hand in hand, after those texts have been pronounced”¹⁴⁰.

The last ceremony that is performed is known as ‘Uttara Vivaha’. This ceremony consists of two parts: one, in which the bridegroom shows the bride, the polar star, the emblem of stability and exhorts her to be stable in her husband’s family. The other part is the one in which, the husband takes a part of meal and the wife takes the remainder. After the completion of this ceremony, the bride is conducted in solemn procession to her husband’s house where several hymns are recited¹⁴¹.

In most of the Hindu marriages, all the above ceremonies are not performed. There are very few marriages where bride and bridegroom recite the hymns. The function of reciting hymns is performed by the priest or the pundit who officiates at the ceremony and the bride and bridegroom go on nodding. The chanting of hymns, mantras, verses and sacred text is not essential in modern Hindu law for the validity of marriage.

¹³⁹. Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.621, Orient Publishing Co. Allahabad.

¹⁴⁰. Manu Smriti, VIII, 227; cited in Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.620, Orient Publishing Co. Allahabad.

¹⁴¹. Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.621, Orient Publishing Co. Allahabad.

Section 7 of the Hindu Marriage Act, 1955 deals with ceremonies of marriage. Section 7 says that, “a Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. Sub-Section (2) of Section 7 says that, where such rites and ceremonies include the saptapadi, the marriage becomes complete and binding when the seventh step is taken”.

The Act does not prescribe any particular form of marriage. In Sub-Section (1), the word “may” has been used. This word has been used here in the sense of “must”.

In order to convict a person for the offence of bigamy, it has to be established that the first marriage of that person was solemnized by observing the accepted ceremonies. If there is no evidence of ceremonies like ‘saptapadi’ having been observed in the prior marriage, the person can not be convicted for the offence of bigamy in case he/she marries again.

In *Deivayani Achi v. Chidambara Chettiar*¹⁴², the Madras High court after examining all the relevant texts, came to the conclusion that in reality the ceremonial validity of a Hindu marriage, only two ceremonies are essential: one consists of the secular element, i.e., the gift of the girl (this will include sampradana and kanyadana); and the second consists of religious element, i.e., the performance of panigrahana and saptapadi.

In *Mallikharjunappa v. Eramma*¹⁴³, it was held that, in Lingayat Reddy community in Andhra Pradesh, the only essential ceremonies are tying of ‘thali’ and *Kankan Bandan*, *Kanyadana* and *Saptapadi* do not form essential part of the ceremonies. In *Mallayya vs Bhomayya*¹⁴⁴, it was held that, ceremonies in non-regenerate class in Telangana area of Andhra Pradesh are to be performed according to the custom and not according to smritis. In *gandharva* form of marriage, the ceremony of ‘kanyadana’ is not essential.

¹⁴². AIR 1954 Mad 657.

¹⁴³. ILR 1971 AP 163.

¹⁴⁴. 1971 An WR 143; AIR 1971 AP 270.

The necessary ceremonies of marriage, 'shastric' or 'customary', whichever are prevalent on the side of the bridegroom or bride, must be performed. Otherwise, marriage will not be valid. Thus, if a Jain and a Sikh marry, it is necessary that either the '*Saptapadi*' (which is a Jain ceremony) or the '*Anand Karaj*' (which is a Sikh ceremony) must be performed. Otherwise, the marriage will not be valid. If the parties are able to show that in their case, a marriage can be validly entered in to without any ceremonies and rites such as the 'Chadar Andazi' and 'Karewa' marriages of Punjab, then such a marriage will be valid even though no ceremonies are performed.

In *Bhaurao v. State of Maharashtra*¹⁴⁵, the Supreme court observed that in order to attract Section 494 I.P.C, the marriage should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married will not make the ceremonies prescribed by law or approved by any established custom.

The offence of bigamy is committed by a Hindu marrying again during the life time of his or her spouse provided that the first marriage is not null and void. If the subsisting marriage is voidable, then also offence of bigamy is committed. The offence of bigamy is committed only if the required ceremonies of marriage are performed.

Mock ceremonies:

No one is free to innovate ceremonies. The solemnization of marriage is proved by showing that the marriage was performed with the proper and essential rites and ceremonies of marriage prescribed under the law or custom applicable to parties. A prosecution for bigamy will fail if what is established is that some sort of ceremonies (not the essential ceremonies as prescribed by law or custom) were performed with the avowed purpose that the parties were to be taken as married, and it is immaterial even if it is established that the

¹⁴⁵. AIR 1965 SC 1564.

parties intended seriously to marry and thought that the ceremonies performed by them would confer marital status on them. If the second marriage of the accused is declared void, no prosecution for bigamy can be made. The mere intention of parties however serious, will not make them husband and wife and the accused will escape prosecution even if he deliberately performed defective ceremonies.

In *Dr. A.N. Mukerji v. State*¹⁴⁶, a physician was prosecuted u/S. 493 of I.P.C. Dr. Mukerji performed three different ceremonies of marriage at three different times, with one Smt. Harsbans Kaur (who was a married woman and whose husband was living). The first ceremony was performed in a moonlit night in the open where Dr. Mukerji after reciting a few Sanskrit verses embraced Smt. Harsbans Kaur and exclaimed: "Moon, you are my witness. I am marrying Harbans and she is my wife and I am her husband".

The accused narrated to her, the stories of *Drupadi* and *Shakuntala* from the Hindu epics and told her that a Hindu woman can marry more than one husband. He explained to her that he wanted to marry her in the 'Gandharva' form as king Dushyant had married Shakuntala. She believed the representation of the accused and agreed to such marriage without understanding its significance.

The second ceremony was performed eight years later in a Kali temple where the parties exchanged garlands in front of the deity and the put tilak on the forehead of the complainant and walked seven steps together. The third ceremony was performed a day later before '*Guru Grandh Saheb*', an imitation of Sikh ceremony, 'Anand Karaj'; since the woman was a Sikh. None of these ceremonies were acceptable either in the community of bride or bridegroom.

It was held that performance of such mock ceremonies of marriage does not constitute valid solemnization of marriage.

¹⁴⁶. AIR 1969 All 489.

Creation of new ceremonies of marriage:

No one, whether a community, organization or movements is free to alter, vary and create ceremony of one's pleasure. The question of innovation of new ceremonies and rites came before the Madras High Court in *Deivanai Achi and another vs. Chidambaram Chettiar and others*.¹⁴⁷ In Tamilnadu, there exists an organization known as Self-Respectors cult, an anti-purohit association. This is an inter-caste organization. The main objective of which is to do away with the traditional rites and ceremonies prevalent among the Hindus.

It has also innovated some very simple rites and ceremonies of marriage. Such marriages are known by the name of '*Suryamariyathai*' or '*Seerthiruththa*' marriages. When such a marriage is to be performed, then the relatives and friends of the bridegroom and bride and the notable persons of the locality are invited, and among the invitees, some one is required to preside over the function. The bride and bridegroom are introduced to the guests, and in their presence, the simple ceremony of exchanging garlands and rings between the bride and the bridegroom is performed¹⁴⁸. The marriage is given wide publicity.

Two other alternative ceremonies may be performed:

- 1). A simple ceremony of tying the thali or
- 2). the bride and bridegroom may declare in any language understood by them that each takes the other to be his wife or as the case may be, her husband¹⁴⁹.

When the validity of such a marriage being questioned, the Madras High Court¹⁵⁰ held that, "it may be very laudable object to simplify the procedure applicable to marriages as laid down in the shastras and custom, but it will be a dangerous doctrine to lay down that a community should have liberty to

¹⁴⁷. AIR 1954 Mad 657.

¹⁴⁸. Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.623, Orient publishing co. Allahabad.

¹⁴⁹. Ibid. p. 624.

¹⁵⁰. Raghbir v. Shammugvadiyar AIR 1971 Mad 330; *ibid*.

prescribe the requisites of a valid marriage without any statutory authority. No one can alter personal law". The marriage was held void.

The decision led to statutory recognition of such ceremonies and rites¹⁵¹. The result of this statutory modification is that, a mere execution of a document by the spouses that they have become husband and wife or a declaration in the presence of friends and other persons will confer the status of husband and wife on the parties to the marriage.

Customary ceremonies and rites:

The 'Grihya Sutras' while prescribing elaborate ceremonies and rites, also lay down that a marriage may be solemnized in accordance with "the customs of the different countries and villages"¹⁵². It has been the settled law even before coming into force of the Hindu Marriage Act, 1955 that if a community does not recognize any of the 'shastric' ceremonies and rites of the marriage, their omission will not render a marriage invalid provided the ceremonies and rites prescribed by the community are performed¹⁵³. The courts recognized numerous customary ceremonies and rites. Among the 'Santhals', the only ceremony necessary for solemnization of a marriage is the smearing of vermilion on the forehead of the bride by the 'Santhal' bridegroom.

Among 'Nayahans' of the South India, the only ceremony necessary is the tying of a 'Nadu veeta thali' in the neck of the bride¹⁵⁴.

In *Benodebehary v. Shashi Bhushan*¹⁵⁵, it was held that a marriage amongst a community called 'Jativaishnabas', by exchange of garlands called the '*Kantibadal*' ceremony was according to custom and is valid.

¹⁵¹. The Madras Legislature amended the Hindu Marriage Act, i.e., Hindu Marriage (Madras Amendment) Act, 1967, by inserting a new Section 7-A, which validates such marriages. The new provision came into effect from January 7, 1968 and it applies only to the marriages performed in the state of Tamil Nadu.

¹⁵². Asvalayana Grihyasutra, 1,7,3-22; Apastamba Grihyasutra IV, V, VI, VII; Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.622, Orient Publishing Co. Allahabad.

¹⁵³. *Authikesavalu v. Ethirajammah* (1909)32 Mad 512; *Muthusami v Masilmni* (1910)33 Mad 342; Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.623, Orient Publishing Co. Allahabad.

¹⁵⁴. *Tirumali v. Ethirajammah* (1946)1 M.J 438; cf. Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.623, Orient publishing co. Allahabad.

Amongst Buddhists, no ceremony is necessary. Mutual consent is enough¹⁵⁶.

In Karewa marriages of Punjab which is prevalent among the lower castes of Hindus, no ceremony is necessary. If the parties live together as husband and wife with an intention to live as such, that is enough for the validity of the marriage¹⁵⁷.

In *Re-Ponnuswami*¹⁵⁸ case, it was held that, tying of a thali in the presence of an idol in the temple was a form of customary marriage and that even without any priests to officiate at the ceremony, there was a complete marriage. The court accordingly upheld the conviction of bigamy when the second marriage was performed.

According to Section 7 of the Hindu Marriage Act 1955, if a marriage is solemnized by the customary rites and ceremonies recognized on the side of one of the parties to the marriage (it may not be recognized on the other side), then the marriage will be valid. These ceremonies may be very elaborate or very simple. For the performance of customary ceremonies and rites, it is essential to establish that the caste or community has been continuously following such rites and ceremonies from ancient times and the caste or community regards performance of such ceremonies as obligatory, provided such customary ceremonies and rites are not against morality, law and public policy.

If the ceremonies and rites prevalent in the communities of both the parties to the marriage are the same, then marriage must be solemnized in accordance with those ceremonies and performance of those ceremonies will

¹⁵⁵. (1919)24 CWN 968; cf: Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.623, Orient publishing co. Allahabad.

¹⁵⁶. *Mi Me v. Shwe* (1912)39 Cal 492; Dr. Paras Diwan- Modern Hindu Law, 16th edn. 2005, p.89, Allahabad Law Agency, Faridabad.

¹⁵⁷. *Charan Singh Haram Singh another v. Gurdial Singh Haram Singh and another*, AIR 1961 Punj 301 (F.B); *ibid.* p.90.

¹⁵⁸. 1950 Mad 777; Prof. G.C.V. Subba Rao- Family Law, 8th edn. 2005, p.158; S.Gogia &Co, Hyderabad.

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

May” means “shall”:

Though cl:(i) of Section 7¹⁵⁹ uses the word “may” denoting option for the observance of customary rites and ceremonies for a marriage, the courts have held in a number of cases that the rites and ceremonies are compulsory¹⁶⁰. This means that the word “may” occurring in Section 7 (i) is to be construed as “shall”. If the marriage ceremonies are not celebrated, no man and woman can become husband and wife simply because they call themselves so. They do not become husband and wife even by long cohabitation. If marriage is proved, law presumes that the necessary ceremonies were celebrated. But if a party alleges that no ceremonies were observed, the court will enter into the enquiry whether or not they were celebrated.

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

The Hindu Marriage Act, 1955 has made changes in the law of marriage. These changes are summarized as under¹⁶¹:

- The marriage amongst Hindus, Jains, Sikhs and Buddhists are now valid.¹⁶²

¹⁵⁹. ‘A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto’.

¹⁶⁰. Bhaurao v. State of Maharashtra, AIR 1965 SC 1564; Parameshwari Bai v. Muthoji Rao, AIR 1981 Kant 40; Ram Singh v. R. Susila Bai AIR 1970 Mys 201.

¹⁶¹. B.M. Gandhi- Hindu Law, 3rd edn. 2008, p.251, Eastern Book Company, Lucknow.

- The divergence between the Mitakshara and Dayabhaga Schools in relation to the expression “Prohibited degrees of relationship” for the purpose of marriage is now removed. The strict rule prohibiting marriages within the limits of Sapinda relationship as laid in the ‘Smritis’ has been considerably relaxed. Some new degrees of relationship have also been added.
- Monogamy amongst the Hindus is introduced for the first time. Bigamy is now punishable under the Indian Penal Code 1860¹⁶³. The conditions and requirements of a valid marriage are now very much simplified.
- Caste considerations for inter-caste and inter-communal marriages have now been made irrelevant, eliminating all restrictions thereupon.
- It does not recognize any particular form of a Hindu marriage.
- The ancient Hindu law did not prescribe any age for marriage; but it is now a condition of marriage that the bridegroom must have completed 21 years and the bride 18 years at the time of marriage.¹⁶⁴
- No particular ceremony is prescribed.
- Provision for registration of Hindu marriage has been provided.

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

¹⁶². Section 2 of the H. M. Act, 1955.

¹⁶³. Section 494 of I.P.C.

¹⁶⁴. [Section 5(iii)].

