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Judicial Services Exam

CIVIL JUDGE (Junior Division)

Haryana Public Service Commission (HPSC)

Paper - 2

Civil Law - 2

SIERRA INNOVATIONS

HARYANA JUDICIAL SERVICES

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प्रिय विद्यार्थी, टॉपर्सनोट्स चुनने के लिए धन्यवाद।

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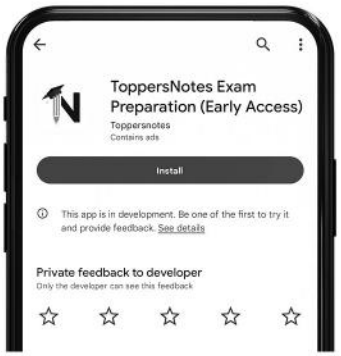

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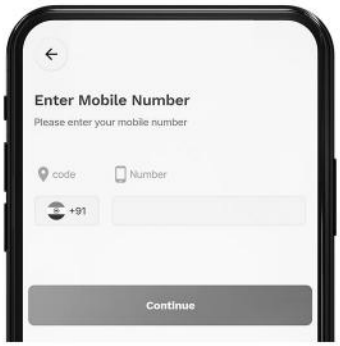

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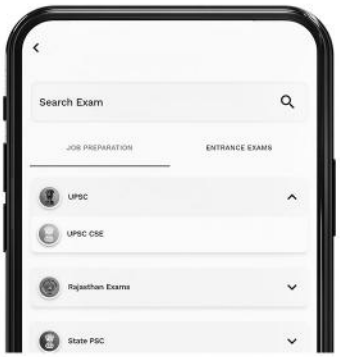

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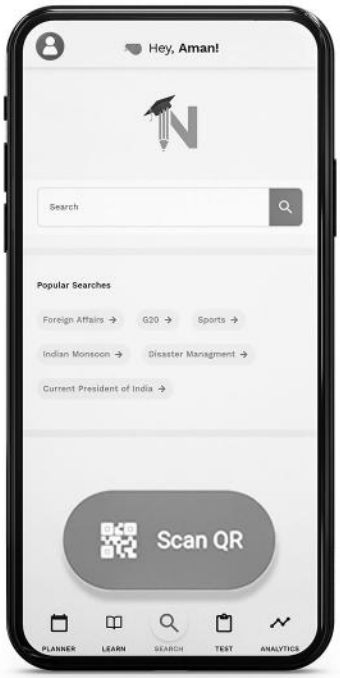

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HINDU LAW

Introductory

What is Hindu Law?

Law, according to Hindu jurists, is the enforceable part of *Dharma.* It is unlike the Austinian concept of law where law is taken to be the command of sovereign in a political society.

According to *Mayne*, Hindu Law of 'Smritis' as expounded in the Sanskrit Commentaries and Digests which as modified and supplemented by custom, is administered by the courts.

Madras High Court, had explained the term 'Hindu Law' in the following words

"What is ordinarily understood as Hindu Law is not like the customary law of the country like the common Law of England. Neither is it a statute in the sense that some King or Legislature framed the law and enforced its acceptance by people. Hindu Law as is commonly understood is a set of rules contained in several Sanskrit books which the Sanskritists consider as book of authority on the law governing the Hindus".

Origin of Hindu Law

There are two extreme views about the origin of Hindu Law.

1. **According to Hindus**

   Hindu Law, according to Hindus, is one of divine origin, having been derived from the *Vedas,* which are revelations from the Almighty.

   According to this theory, law was independent of the State and it was binding on the sovereign as well as on his subjects.

2. **According to Western Jurists**

   It is based upon immemorial customs, which existed prior to and independent of Brahmanism. When the *Aryans* penetrated into Indian Territory, they found that there were a number of usages either the same as, or not wholly different from their own.

Effect of Migration

Hindu Law is not a" lex-loci" i.e., territorial law but a" personal law". It means that a Hindu, in whatever country he may be, is governed by Hindu Law in all personal matters. Territorial law of that country would not apply on the personal matters of that Hindu.

Where a Hindu migrates from one part of the country to another, the presumption is that he retains the laws and customs of the region from which he comes and is not subjected to the law of the place to which he migrates. This presumption has to be rebutted by showing that the family has adopted the law and usages of the state to which it has migrated. But if a person has a permanent residence in one state, the mere fact that he is living in another state in connection with his employment would not amount to migration.

Sources of Hindu Law

The main sources of Hindu law are as follows:-

1. Srutis
2. Smritis
3. Commentaries and Digests (Nibandhas)
4. Puranas

5. Judicial precedents
6. Legislation
7. Justice, equity and good conscience.
8. Custom and usages

1. **Srutis** - "Sruti literally means that which was heard. The name (Sruti) is derived from the root "Sru (to hear) and signifies "what is heard".
   Manu has defined Sruti as follows - "By Sruti or what was heard from above is meant the Veda". Veda is believed to contain the very words of Deity (God). It is the primary and paramount source of Hindu Law that Vedas are the ultimate and traditional sources of Hindu Law. It is the oldest and the primary source.
   The Srutis are believed to contain the very words of God. They are supposed to be divine utterances to be found in the four Vedas, the six Vedangas i.e. appendages to the Vedas and the eighteen Upanishads.
   Mayne pointed out that Sruti in theory is primary and paramount source of Hindu law and is believed to be the language of divine revelation. They are supposed to contain the direct words of revelation and are thus held to be infallible. But now they have little practical value.

2. **Smritis**. -The word "Smriti" literally means "what is remembered" and is believed to be based on the last text on the Vedas, although not in the exact language of the revelation. Their authors do not claim to be divinely inspired but being perfectly familiar with the Vedas, they profess to compile from memory the divine rules handed down by tradition.
   It is of human origin and is believed to be the recollections handed down to us by rishis and sages of antiquity constituting the principal sources of Hindu Law.
   Smritis are Dharamsutras and Dharm
   Both Sruti and Smriti refer to the utterances and precepts of the Almighty which have been heard and remembered respectively and handed down by the Rishis from generation to generation.
   The Smritis are of two kinds,
   (a) In Prose Style-Those in prose called " Dharamsutras" and are inferior to those in verse. The principal authors thereof are Gautama, Vasishtha and others.
   (b) In Poetry Style-Those in verse are called the " Dharamashtra". The most eminent authors are Manu, Yajnavalkya, Narada, Vishnu and Vrihaspati etc.
   Vyasa observed that: "When there is a conflict between the Vedas and the Smritis, the Vedas should prevail."

3. **Commentaries and Digests (Nibandhas)-**All the Smritis did not agree with one another in all respects, and this conflict led to several interpretations put upon them. This, in turn, gave rise to commentaries called Nibandhas.
   Nibandhas are thus nothing but the interpretations put on the Smritis by various commentators. However, it is interesting to note that what these commentators did was not merely interpreting the Smritis, but they also recited the customs and usages which the commentators found prevailing around them.
   In other words, while professing to interpret the law as laid down in smriti, these commentators introduced modifications in order to bring it in harmony with the current usages.
   The authority of the several commentators varied in different parts of India giving rise to what are known as different Schools of Hindu Law.

4. **Puranas**-The Puranas are also a source of Hindu law. They are codes which illustrate the law by instances of its application. As observed by the Court in the Ganga Salai's case, the position of Puranas is as follows:
"Somewhere in order of prudence, either between the Srutis and the Smritis, or more probably after them, comes the Puranas, which the celebrated author Colebrooke states are reckoned as a supplement to the Scripture and as such constitute a fifth Veda."
It has been remarked by authors that Puranas are not authoritative on law. They are occasionally treated as authoritative.

5. **Judicial Decisions**. -About judicial decisions being a source of law there are two views.
One view is that judges are makers of law while the other view is that judges do not make the law but they declare the law. First view is known as Judge-made-Law-Theory, second is known as Declaratory Theory.
Strictly speaking, it cannot be said that judicial decisions are a source of law. This is so because judge is supposed to interpret and explain the existing law, and not to create new law.
Nevertheless, since all the important aspects of Hindu Law have now found their way into Law Reports, these may be considered as a source of Hindu Law. Such decisions have played an important part in ascertaining and sometimes in developing and crystallizing Hindu Law.
The judicial decisions are regarded as precedents for future cases. The courts of Law are bound to follow the precedents.

6. **Legislation**. -Legislation is also a source of Hindu Law.
Several enactments had come into force with the advent of British Rule in India and kept coming with greater gusto after the British departure.
These legislative enactments, which declare, abrogate or modify the ancient rules of Hindu Law, also form an additional modern source of Hindu Law. The Hindu Law Committee, appointed in 1941 recommended that this branch of Law should be codified in gradual stages and most important enactments were those which came in force in 1955 and 1956, Indian Parliament passed four major enactments which made vital and dynamic changes in the law of marriage, succession, adoption, guardianship and maintenance.
The ancient Hindu Law stands substantially changed by passing of the following important enactments during British regime and by Indian Parliament
In 1856, Hindu Widows' Remarriage Act legalised the marriage of Hindu Widows.
In 1860, Indian Penal Code prohibited polygamy.
In 1866, Native Converts Marriage Dissolution Act facilitated divorce for Hindus accepting Christian faith.
In 1872, Special Marriage Act was passed but it excluded Hindus.
In 1869, the Indian Divorce Act was passed but this too remained inapplicable to Hindus.
In 1894, a penal Law enforced in the State of Mysore, punishment for men marrying girls below the age of eight years and for males above the age of fifty marrying girls below fourteen years.
In 1909, the *Anand Marriage Act* legalised the marriage ceremony common among the Sikhs called *Anand*.
In 1923, by an amendment of Special Marriage Act, inter-religious civil marriages between Hindus, Buddhists, Sikhs and Jains were legalized.
In 1929, Child Marriage Restraint Act was passed.

In 1937, Arya Marriage Validation Act recognised the legality of inter-caste marriages and marriages with converts to Hinduism among the followers of Arya Samaj.

In 1946, Hindu Marriage Disabilities Removal Act legalized inter-marriage between the sub-divisions of same caste and those within one's gotra and pravara.

In 1946, Hindu Married Women's Right to Separate Residence and Maintenance Act was passed.

7. **Justice, Equity and Good conscience**. - Justice, equity and good conscience is also regarded as a source of Hindu Law. In the absence of any specific law in Smriti, or in the event of a conflict between the Smritis, the principles of equality, justice and good conscience would be applied.

   In other words, what would be most fair and equitable in the opinion of the judge would be done in a particular case.

   It has been held by the Supreme Court, that in the absence of any clear Shastric text, the courts have authority to decide cases on principles of justice, equity and good conscience

8. **Custom and Usage**. -Custom is a rule which in a particular family or in a particular class of persons or in a particular locality, has from long usage, obtained the force of law.

   The Judicial Committee explained Custom thus: "Custom is a rule which in a particular family or in a particular district has from long usages obtained the force of law".

   It must be ancient, certain and reasonable and being in the derogation of general rules of law, must be construed strictly.

   The obligatory character of customs is so much recognised by the ancient text-writers that every custom is supposed to be based on the text of the revelations. The modern authorities are equally empathic in their acceptance of the binding force of customs.

   For instance, the Privy Council has remarked: "Clear proof of usage will outweigh the written text of the law" [Remand's Case, A.I. R. 1942 All 100]. It is said that Smritis and digests were largely based upon Customary Laws. On matters not covered by the Smritis and Commentaries, usage supplements the law laid down in them.

Schools of Hindu Law

Introduction

Schools of Hindu Law came into being when different commentaries appeared to interpret 'Smritis' with reference to different local customs in vogue in different parts of India.

Process of development

In *Collector of Madura v. Mottoo Ramalinga,* the privy council held that: "The remoter sources of Hindu Law (that is Smritis) are common to all different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received become the subject of subsequent commentaries."

Properly speaking there are two schools of Hindu Law, namely, **Mitakshara School** and the **Dayabhaga School.**

Mitakshara

It is the supreme authority throughout India except in Bengal. It is the running commentary on the code of ***Yajnavalkya*** and was written by ***Vijneshwara*** in the latter part of the eleventh century. The Mitakshara School is thus divided into five sub-schools. They materially differ on the law of adoption and inheritance. All these schools acknowledge the supreme authority of the Mitakshara, but give preference to certain treaties and to commentaries which contains certain passages of the Mitakshara.

The five sub-schools are namely:-

- Benaras School
- Mithila School
- Dravida School
- Bombay or Maharashtra School
- Punjab School

Mayne writes that the variances between the sub-division of the Mitakshara Schools are comparatively few and slight. Except in respect of the Maharashtra School, this division serves no useful purpose; nor does it rest upon any true or scientific basis.

Reason of difference between various schools of Mitakshara

1. The glosses and commentaries upon the Mitakshara are received by some of the schools but are not received by all.
2. Commentaries in a particular province which follows the Mitakshara put a particular gloss on it and agree to collect it collectively.

Dayabhaga

This school prevails in West Bengal as well as is Assam with some variances based on the authority of customs. It was written by ***Jimutvahana.*** According to Dr. Jolly it is one of the most striking compositions in the whole department of Indian jurisprudence. According to Mayne, 'Dayabhaga' was written in the 13th century. The Dayabhaga has permitted the women to let in the coparcenary. The Dayabhaga is more dynamic and is definitely an improvement upon Mitakshara.

The following authorities are accepted in this school

- Dayabhaga
- Dayatatva
- Daya-Sangraha
- Viramitrodaya
- Dattaka-Chandrika

Difference between Mitakshara and Dayabhaga School

	Mitakshara	**Dayabhaga**
1. As regards Joint property	Right to property arises by birth (of the claimant); hence the son is a co-owner with the father in ancestral property. Father has a restricted power of alienation, and son can claim partition even against father. The interest of a member of the joint family would, on his death, pass to the other members by survivorship.	Right to property by death (of the last owner); hence son has no right to ancestral property during father's lifetime. Father has absolute power of alienation, and son cannot claim partition or even maintenance. The interest of every person would, on his death, pass by inheritance to his heirs, like widow or daughters.
2. As regards Alienation	Members of joint family cannot dispose of their shares while undivided.	Any members of joint family may sell or give away his share even when undivided.

3. As regards Inheritance	The principle of inheritance is consanguinity (i.e., blood-relationship). Cognates are postponed to agnates.	The principle of inheritance is spiritual efficacy (i.e., offering of *pindas*). Some cognates, like sister's sons are preferred to many agnates.
4. As regards Doctrine of Factum Valet	"A fact cannot be altered by hundred texts". It is recognized to a very limited extent.	Doctrine of *factum valet* is fully recognized.

The other basis of difference between Mitakshara and Dayabhaga arose out of their difference in the meaning of the word" Sapinda".

According to Dayabhaga: 'Sapinda' means of the same 'pinda' and pinda means a ball of rice which is offered by a Hindu as obsequies to their deceased ancestors. The term 'Sapinda' thus connotes those related by the duty of one to offer 'pinda' to other.

According to Mitakshara: **Vijaneshwara** defined 'Sapinda' relationship as the relationship arising between two persons through their being connected by particles of one body.

Migration and the Schools of Law

On migration the family continues to be governed by the law of locality of origin and the burden is heavy on the party alleging otherwise.

"Where a Hindu family migrates from one part of India to another, *prima facie* they carry with them their personal law, and if they alleged to become subject to a new local custom, this new custom must be affirmatively proved to have been adopted but when such a family emigrates to another country and being themselves Mohammedans, settle among Mohammedans, the presumption that they have accepted the law of the people whom they have joined seems to their Lordships to be one that should be much more readily made. The analogy is that of a domicile on settling in a new country rather than the analogy of a change of custom on migration within India."

The Hindu Marriage Act, 1955

Introduction

Marriage according to Hindu Law is a *sanskar* (sacrament) and not a contract unlike Muslim Law. The maxim "*Conjuctic martitet peminae eet de nature*" means that to keep husband and wife together is the law of nature and the maxim "*Virctunor consentur in lege una pensona*" means that the husband and wife are considered one in Law.

Kanyadan (formal donation of the daughter by her father to a groom) and *Saptpadi* (circumambulation of holy fire by the bride and the groom) have basic importance in Hindu Marriages.

Eight forms of marriages were described, four of which were *dharmya* (regular) forms and the rest were *adharmya* (irregular) forms.

The choice of life partner was limited only to one's own dharma (religion) and jati (caste) only. Polygamy was permitted in Hindu society but not polyandry. Widow remarriage was also not permitted.

Legislation of laws relating to Hindu marriage began from the year 1829 when sati was abolished by Law and declared an offence at the instance of Raja Ram Mohan Roy.

In 1955, the Hindu Marriage Bill was introduced in the Parliament which was passed by both the Houses of Parliament.

Act 25 of 1955

Hindu Marriage Act, 1955 (25 of 1955) received the assent of President on 18th May, 1955 after being passed by both the Houses of Parliament.

Who is 'Hindu'?

A. Under the uncodified Hindu Law

The following are the instances of persons who were held to be Hindus by various Courts before 1956

1. Hindus by birth, and also to Hindus by religion, i.e., converts to Hinduism.
2. Illegitimate children where both parents are Hindus.
3. Illegitimate children where the father is a Christian and the mother is a Hindu and the children are brought up as Hindus.
4. Jains, Buddhists in India, Sikhs and Nambudri Brahmans except, so far as such law is varied by custom and to Lingayats who are considered as Shudras.
5. Hindus by birth, who had renounced Hinduism, but reverted back to the Hindu faith after performing the prescribed religious rites.
6. Sons of Hindu dancing girls of the Naik caste converted to Mohammedanism, where the sons are taken into family of the Hindu grand-parents and are bought up as a Hindu.
7. Brahmos, Arya Samajists, and Santhal of Chota Nagpur, and also Santhals of Manbhum except so far as it is not varied by customs
8. Hindu who made a declaration that they were not Hindu for the purpose of the Special Marriage Act
9. A person who is born Hindu and not renounced the Hindu religion, does not cease to be a Hindu merely because he departs from the standard of orthodox in matters of diet and ceremonial observances.

B. Under the codified Hindu Law (Section 2 of the Hindu Marriage Act)

1. Any person who is Hindu by religion in any of its forms or developments, including –
   (a) A Virashaiva,
   (b) A Lingayat,
   (c) A follower of the Brahmo, Pranthana or Arya Samaj.
2. Any person who is either –
   (a) Buddhists by religion; or
   (b) Jain by religion; or
   (c) Sikh by religion.
3. Any other person domiciled in the territories to which these Acts extend who is not –
   (a) A Muslim by religion; or
   (b) A Christian by religion; or
   (c) A Parsi by religion; or
   (d) A Jew by religion;

   Unless it is proved that any such person would not have been governed by Hindu Law, or by any custom or usage as part of that law, in respect of any of the matters dealt with in the act.

   The following persons are Hindus, Buddhists, Jains or Sikhs by religion: –
   (a) Any Child, legitimate or illegitimate, both of whose parents (father and mother) are Hindus, Buddhists, Jains or Sikhs by religion;

(b) Any Child, legitimate or illegitimate, one of whose parents either (father or mother) is a Hindu, Buddhist, Jain or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;

(c) Any person who is converted to the Hindu, Buddhists, Jain or Sikh religion.

Persons, who have been declared to be members of the Schedule Tribe within the meaning of clause (25) of Article 366 of the Constitution, are not to be treated as Hindus unless the Central Government, by notification in the Official Gazette, declares them so.

Hindu converts to *Mohammedanism* he will be, as a general rule, governed by the Mohammedan Law.

But a well-established custom in the case of such converts following their old law in matters of succession and inheritance has been held to override the general presumption. Thus several classes of Mohammedans, who were formerly Hindu like the *Khojas* and the *Cutchi Memons* of Bombay, the *Halwai Memons* of Kathiawar and *Sunni Bohras* of Gujarat had by custom, retained the Hindu Law of Succession and inheritance.

Nature of Hindu Marriage

According to Vedas, a marriage is, "the union of flesh with flesh and bone with bone". So long as the husband is alive, the wife is enjoined to regard him as her God, similarly the wife is declared as half the body of her husband (*Ardhangini*) who shares with him equally the fruits of all his acts whether they be good or bad.

The Vedic rules expressly declare that a man may have several wives but a woman cannot have many husbands. Husband was treated as God for the wife. Wives were always associated in all the religious offerings and rituals with their husbands. The women were respected and honoured. Manu said, "Women must be honoured and adored by their fathers, brothers, husbands and brothers-in-law who desire their own welfare. Where women are honoured, there the Gods are pleased, but where they are not honoured, no sacred rite yields rewards". Many old writers said, "A woman is half of her husband and completes him".

The object of marriage according to Hindus is the procreation of children and the proper performance of religious ceremonies. The sanctity of marriage was held to be so great that it was regarded to have some divine origin and was thought to be predestined.

Marriage as a sacramental union implies several things first the marriage between man and woman is of religious or holy character but not a contractual union. It is not a mere contract in which a consenting mind is indispensable. For a Hindu, marriage is obligatory not merely for begetting a son in order to discharge the debt of his ancestors but also for the performance of other religious rites, and Manu has commented "In the Vedic period, the sacredness of the marriage tie was repeatedly declared the family ideal was decidedly high and was often realized.

Only the present Hindu Marriage Act has no divorce, Manu disapproves divorce and remarriage of women. None can trace out divorce in ancient Hindu Law. According to Narada and Kautilya "If the husband, be missing dead, or retired from the world, or impotent, or degraded, in these five calamities a woman may take another husband". But Manu had opposed this idea

Doctrine of Factum Valet

The maxim *'que fieri non debuit*' which is popularly known as *factum valet* means "what should not be done, yet being done, shall be valid." From this maxim emerges the Hindu doctrine that "a fact cannot be altered by a hundred texts".

The help of this doctrine was sought where certain irregularities such as want of consent of guardian, etc., occurred in a marriage in order to get the deficiency condoned and to save the marriage from becoming invalid.

In Rajammal v. Mariyammal, AIR 1954 Mys 38: ILR 1953 Mys 558, it was held that when the marital relation has been accepted by the caste and relatives the doctrine of factum valet protects it from being declared null and void.

The doctrine of factum valet has been indirectly adopted by the Hindu Marriage Act, 1955 in this way that marriages in contravention of clauses (iii) and (iv) of section 5 will not become invalid due to irregularity in respect of the conditions provided in these clauses.

Custom Before the Court and Hindu Marriage

In case of R.B.S.S. Munnalal v. S.S. Raj Kumar, AIR 1962 SC 1493 the Supreme Court held that "It is well settled that where a custom is repeatedly brought to the notice of the courts of a country, the courts may hold that custom introduced into law without necessity of proof in each individual case".

According to the Vedic mythology after marriage the couple leave in love just as the birds *Chakva* and *Chakvi* live. These species of birds is an ideal of life. The male and female bird live together and if one dies the other also dies of heartbreak. As per Hindu custom at the time of ceremony of marriage, when the bridegroom holds the hand of the bride, he says to her." I hold your hand for good luck (Subhagya) that you may grow old with me, your husband; you are given to me by the just, the creator, the w and by these learned persons".

Again, after taking the Seven Step of marriage the husband tells his wife inter alia "Be, thou my life-mate as we walk up seven steps together thus though go together with me forever.

Further the marriage is a spiritual union, a holy bond and therefore after saptpadi, the man says to his wife, "Into my will 1 lake heart, thy mind shall follow mine. It is also further said that those who haw wives can fulfill their due obligations in this world; those that have wives truly have a family; those that have wives can lead a full life.

Thus, Hindus conceive their marriage as a sacramental union, as all around union.

Prohibited Degrees Under Hindu Law

Section 3(f) "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;

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

Section 3(g) of the Hindu Marriage Act, 1955 provides

"Degrees of prohibited relationship. -Two persons are said to be within the "degrees of prohibited relationship

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

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

(iii) If one was the wife of the brother or of the father's or mother's brother or of the grandfather's or grandmother's brother of the other; or

(iv) If the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters.

Explanation. For the purposes of clauses (f) and (g), relationship includes

(i) relationship by half or uterine blood well as by full blood;

(ii) illegitimate blood relationship as well as legitimate;

(iii) relationship by adoption as well as by blood;

and all terms of relationship in those clauses shall construed accordingly."

"Full blood and "half-blood"-Two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife and by half-blood when they are descended from a common ancestor but by different wives; [Section 3(c)]

"Uterine blood". -Two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands, [Section 3(d)].

Explanation. In classes (c) and (d) "ancestor" includes the father and "ancestress" the mother.

Exceptions. The Hindu Marriage Act, 1955, has made an exception in laws where custom or usage governing each of the parties permits a marriage within the prohibited degrees. It is due to the fact that custom has played an important part in the making of the Hindu Law and it is one of the three sources of Hindu Law.

The Marriage Laws (Amendment) Act, 2003 w.e.f. 23 December, 2003 made a transitory provision for sections 3 and 5.

Transitory Provision. All decrees and orders made by the court in any proceedings under the Special Marriage Act or the Hindu Marriage Act shall be governed under the provisions contained in section 3 or section 5, as the case may be, as if this Act came into operation at the time of the institution of the suit

Provided that nothing in this section shall apply to a decree or order in which the time for appealing has expired under the Special Marriage Act or the Hindu Marriage Act at the commencement of this Act

The expressions "custom" and "usage" signify any rule which having been continuously and uniformly observed from a long time, has obtained the force of law among Hindus in any local area tribe community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy, and provided further section the case of a rule applicable only to a family it has not been discontinued by the family. [Section 3(a)].

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

1. Physical degeneracy of the race which the marriage between near relations would lead to;
2. Moral degeneracy and consequent evil results which are apt to effect a society built on the edifice of Joint family system.

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

Clause (g) of the section 3 defines **degrees of prohibited relationship.**

Section 5 [CI (iv) lays down as one of the conditions of a valid marriage that the parties must not be related to each other within the prohibited degrees, unless such marriage is sanctioned by custom or usage governing both the parties.

The rules laid down in this clause relating to sapinda relationship are based on the principle of exogamy. The general rule of Hindu law was that parties to a marriage should not be sapindas of each other. However, this relationship was interpreted in different ways and the rule itself has been subjected to modification by custom. A definition of prohibited degrees was necessary because there was great diversity among Hindus in different parts of India as to what were the prohibited degrees of marriage. Some limit had to be prescribed to prevent incestuous marriages and it was necessary that the rules should if possible be in conformity with the principles of exogamy and eugenics which were all the basis of the ancient rule which prohibited marriages between persons belonging to the same *gotra* or the same *pravara*.

Custom had materially modified the rigour of that rule and the rules laid down in this and the preceding clause obviously aims at uniformity and certainty on this important question. It will be noticed that in some cases the prohibition laid down in clause 5(f) and (g) will be overlapping.

The degrees of prohibited relationship enumerated in sub-clause (1) to (iv) of clause (g) are between persons of very close relationship, some of them being related only by marriage. Sub-clauses (i) and (m) which refer to wives or some very close relations, include persons with whom relationship by marriage may have ceased to subsist by reason of divorce or remarriage. Thus, for instance a wife of the brother or of the father's brother or of the mother's brother would be within the degrees of prohibited relationship under sub-cl. (iii), even if she had been divorced or even if she had been remarried to some other person after divorce or death of that brother or father's brother or mother's brother and the subsequent marriage had ceased to subsist.

As per section 4 of the Act any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of Hindu Marriage Act cease to have effect in respect of this Act.

Further any other law in force immediately before 18 May, 1955 i.e., commencement of Hindu Marriage Act, 1955 ceases to have effect only reason that it is inconsistent with any of the provisions of such Act.

Hindu Marriage-Essential Conditions

Section 5 of Hindu Marriage Act, 1955, provides

"Ceremonies for a Hindu Marriage. -A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

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

(ii) At the time of the marriage, neither party
   (a) Is incapable of giving a valid consent to it 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) (c) Has been subject to recurrent attacks of insanity or epilepsy.

(iii) The bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of marriage;

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

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

Man and woman living under the same roof and cohabiting for a number of years; the law would raise presumption that they lived as husband and wife; S.P.S. Balasubramanyam v. Surultayan, AIR 1992 SC 756

A second marriage while a previous married wife is living, is null and void; Mohammed Ibram v. State of Uttar Pradesh. AIR 1964 SC 1625. This clause provides the rule of monogamy and prohibits polygamy.
Section 5(ii) the conditions under this clause have been re-asserted by Andhra Pradesh High Court in Balakrishan v. Lalitha, AIR 1984 AP.

Section 5(iii)-Contravention of this clause does not vitiate the marriage and does not make it null and void under section 11: Duryodhan v. Bengabati, AIR 1977 Ori 36. According to Act 2 of 1978, the bridegroom must have completed the age of twenty-one years and the bride must have completed age of eighteen years at the time of marriage.

Section 5(iv)-If the parties to marriage are related to each other within prohibited degrees or within sapindas relationship, the marriage is void and such parties are liable for punishment under section 18 of the Act.

Section 5(v)-The rules relating to Sapinda relationship' are prescribed in the definition clause Further, section 7 of the Hindu Marriage Act, 1955 provides

"Ceremonies for a Hindu Marriage

(1) A Hindu Marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.
(2) Where such rites and ceremonies include the saptapadi (that is, taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken."

In *Ashok Kumar v. Usha Kumari, AIR 1984 Del 347*, it was held that if the parties are recognised as husband and there is a strong presumption in favour of validity of marriage form and ceremony of the marriage and the legitimacy of the offspring.
Following are the conditions of a valid Hindu Marriage in detail:

I. Monogamy [Section 5(i)]

This clause provides the rule of monogamy and prohibits polygamy and polyandry.
Before the Act of 1955, a Hindu could marry any number of wives, even if he had a wife or wives living (Viraswami v. Appaswami, (1865) 1 Mad HC 375), although this practice was always looked with disfavor.

The condition laid down in this clause for a valid marriage is one of those conditions, contravention of which would make the marriage void under section 11 of the Act.

Section 17 would further render the offending party liable for prosecution under sections 494 and 495 of the Indian Penal Code.

Section 17 of the Hindu Marriage Act lays down-"Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either part y had a husband or wife living; and the provisions of the Indian Penal Code (45 of 1860) shall apply accordingly." The provisions which prohibit bigamy, do not contravene article 25 of the Constitution (Ram Prasad v. State of Uttar Pradesh, AIR 1961 All 334).
The Supreme Court in Yamunabai Anant Rao Adhar v. Anant Rao ThiraramAdhar, AIR 1988 SC 644, held that the marriage becomes null and void where it is in violation of the first condition of section 5.It becomes void *ab initio ipso facto*.

The Apex Court observed further that the wife in a void marriage cannot claim maintenance under section 125 of the Criminal Procedure Code, AIR 1988 SC 644.Similarly, where a person is prosecuted for having contracted a second marriage and there is lack of proper and adequate religious or customary ceremonies as evidence of such marriage, he cannot be punished for bigamy; D.N. Mukerji v. State, 1969 All 489, In Shanta Dev Berma v. Kanchan Prava Devi, AIR 1991 SC 816, the Supreme Court held that the proof of the performance of ceremonies is essential for a valid marriage.

II. Sanity [Section 5(ii)]

As regards the second condition, it is necessary 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, and therefore, it is laid down under the Marriage Laws (Amendment) Act, 1976 that neither party at the time of marriage is incapable of giving a valid consent to it in consequence of unsoundness of mind or has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and for the procreation of children, or neither party has been subject to recurrent attacks of insanity or epilepsy.

Before the Amendment Act of 1976 mental incapacities consisted of idiocy and lunacy. The courts interpreted these two terms in wider connotation so as to include all kinds of unsoundness of mind. An objection to a marriage on the ground of mental incapacity must depend on a question of degree of the defect in order to rebut the validity of a marriage which has in fact taken place. The onus of bringing a case under this clause lies heavily on the petitioner who seeks annulment of the marriage on the ground of unsoundness of mind or mental disorder; R. Lakshmi Narayan v. Santhi, 2001 (45) ALR 515 (SC)

Marriage solemnized in contravention of this condition is not void; it is voidable under section 12 of this Act. In Ajit rai Shiva Pd. v. Bai Vasumati, AIR 1969 Guj 48 it was laid that if the condition in section 5(ii) is not fulfilled the marriage is not a void marriage as provided in section 11 but a voidable marriage under section 12.

III. Age of parties to marriage (Section 5(iii)]

Under this condition the minimum age for marriage is fixed. Originally, according to Hindu Marriage Act, 1955, the age provided for the bridegroom was 18 years and for the bride was 15 years. Though where the bride was below 18, the consent of her guardian was necessary under clause (vi) of this section.

Now, the Child Marriage Restraint (Amendment) Act, 1978, has revised the minimum age fixed for marriage to 21 years in case of bridegroom and 18 years in case of bride.

A contravention of this clause would neither render the marriage void under section 11 of the Act nor voidable under section 12 of the Act. The party at fault will be liable to imprisonment which may extend to 15 days, or to a fine of Rupees one thousand or with both under section 18(a) of the Hindu Marriage Act.

In the case of Duryodhan v. Bengabati, AIR 1977 Ori 36, it was laid down that contravention of section 5(ii) does not vitiate the marriage and does not make it null and void under section 11. Such contravention may only result in punishment but the marriage continues to be valid.

According to The Marriage Laws (Amendment) Act, 1976, where the marriage of a girl (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years, the girl can obtain a decree for dissolution of marriage. This is an additional ground for divorce made available to a wife under section 13(2)(iv) of the Act.

IV. Beyond prohibited degree [Section 5(iv)]

This clause prohibits marriage between persons who are within the prohibited degrees of relationship with each other.

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.

In *Shakuntala Devi v. Amar Nath, AIR 1982 P&H 22,* the Punjab High Court has held that the validity of marriage under section 5(iv) is subject to customs and usage accepted in a particular Hindu community. It simply implies that if a marriage could take place between two Hindus of prohibited degrees by force of customs, its validity cannot be challenged.

Proof of Marriages or Registration of Marriages

Section 8 of the Act provides that "for the purpose of facilitating the proof of Hindu marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner subject to such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose."

In Seema v. Ashwani Kumar, AIR 2006 SC 1158: 2006 AIR SCW 858: (2006) 2 SCC 578, the Supreme Court made the directions that the marriages of all persons who are citizens of India belonging to various religions should be made compulsorily registrable in their respective States, where the marriage is solemnized.

The Court directed the States and the Central Government to take following steps:

(i) The procedure for registration should be notified by respective States within three months, by amending the existing rules or framing new rules.

(ii) However, before bringing the said rules by force, the objections from members of the public shall be invited by due publicity and matter shall be kept open for objections for a period of one month;

(iii) The officer appointed under the said rules of the States shall be duly authorised to register the marriages. Registration clearly states age and marital status of the parties.

(iv) The consequence of non-registration of filing false declaration shall also be provided for in the said rules.

(v) As and when the Central Government enacts a comprehensive statute, the same shall be placed the Court for scrutiny;

(vi) Counsel for various States and Union Territories shall ensure that the directions are carried out immediately.

Restitution of Conjugal Rights

Section 9 of the Act speaks about "Restitution of conjugal rights. When either the husband or the wide has, without reasonable excuse, withdrawn from the society of other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Explanation Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.

"*In Deepa Suyal v. Dinesh Chandra Suyal, AIR 1993 All 244*, it was observed:

The burden to prove withdrawal from the society of the is on that spouse who withdraws spouse from the society and refuses to discharge his or her marital obligations. If the husband or wife refuses to discharge their matrimonial obligations, they have t lead strong evidence in support of their refusal to discharge their obligations.

The refusal to discharge obligations can be said to be reasonable or justified only when it is impossible for one of them to live with the other. It was held that the withdrawal by the wife from the society of husband was not justified and unreasonable as there was no demand for dowry and there was no possibility of maltreatment by the husband.

The foundation of the right to bring a suit for restitution of conjugal rights is the fundamental rule of matrimonial law that one spouse is entitled to the society and comfort-consortium of the other spouse and where either spouse has abandoned or withdrawn from the society of the other without reasonable excuse or just cause, the court should grant a decree for restitution. The object of restitution decree is to bring about cohabitation between the estranged parties so that they could live together in the matrimonial home in amity;

Constitutional Validity of Section 9

In *T. Sareetha v. T. Venkata Subbaiah, AIR 1983 AP 356*, the Court held that the restitution of conjugal rights is a 'uncivilised', 'barbarous', 'engine of oppression and assailed section 9 as being violative of articles 14, 19 and 21 of the Constitution.

Holding a restitution decree is violation of article 21 of the Constitution which guarantees rights to life and personal liberty the Court held that right to privacy is a party of article 21 and is bound to include body's inviolability and inequity and intimacy of personal identity, including marital privacy.

A decree for restitution of conjugal rights constitutes the grossest form of violation of an individual's right to privacy; it denies the woman her free choice whether, when and how her body is to become the vehicle for the procreation of another human being.

But the Supreme Court in *Saroj Rani v. Sudarshan Kumar Chadha, AIR 1984 SC 1562*, held that the right of the husband or the wife to the society of the other spouse is not merely a creature of the statute.

Such a right is inherent in the very institution of marriage itself..... There are sufficient safeguards in section 9 to prevent it from being a tyranny.

The Court remarked that restitution of conjugal rights serves a social purpose as an aid to the prevention of breakup of marriage. It is not against the articles 14, 19 and 21 of the Constitution.

Cruelty and Restitution of Conjugal Rights

In *Harvinder Kaur v. Harminder Singh, AIR 1984 Del 6* and *Pushpa Rani v. Vijay Pal Singh, AIR 1994*, it was observed that cruelty is a ground for divorce also and cruelty can be offered as a defence in a suit for restitution of conjugal rights.

The allegations made by the wife that the husband is a drunkard and indulge in gambling is a feeble attempt made by the wife to show cruelty as a defence against restitution of conjugal rights.

The courts in their decisions have held the following to be valid grounds for separate living disentitling the other spouse to a decree for restitution of conjugal rights

1. Grossly indecent behaviour.
2. Extravagance of living on the part of wife affecting the financial position and prospect of the husband.
3. Excessive drinking carried to such a degree as to render it impossible for the duties of married life to continue or to be discharged.
4. Persistence in a false charge against the respondent of having committed an unnatural offence.
5. Refusal of marital intercourse without sufficient reason.
6. Apprehension of violence d to development of insanity in the petitioner.
7. Agreement to live separate.
8. Misconduct approaching cruelty but falling short of it.
9. Imputation of unchastity by the husband persistently.