FAMILY LAW

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I

Introductory

In India each community has its own family law. Hindus, the majority community, have their separate family laws; so have the Muslims, the biggest minority community. Smaller minorities, like Christians, Parsis, and Jews, whose number, in the context of the population of India, is insignificant, too have their own separate family laws. Hindus and Muslims have all along claimed that their law is of divine origin. No such claim is made by other communities. The modern Hindu law, by judicial interpretation and legislative modification, has undergone so much change that any claim of divinity for it can hardly be sustained. Muslim law, as administered in modern India, too has undergone similar changes, though legislative modifications are only a few, yet not insignificant.

Apart from law, in personal matters custom still plays an important role. Some communities are wholly or partly governed by custom. The Jewish family law in India is entirely customary law. Custom also modifies or supplements personal law of practically every community, though after the Shariat Act, 1937 this is least in the case of Muslims. The Khojas of Maharastra and Meos of Haryana are still not entirely governed by Muslim law; in their case, particularly in the case of the latter, it is mostly customary law which is applicable to them. In Punjab and Haryana the concept of ancestral property in the rural areas is different from the *Mitakshara* concept of joint family property and is still recognized in these states by virtue of custom; Hindu law to that extent stands modified. In rural areas of Punjab and Haryana this custom uniformly applies to practically all communities, including Hindus and Sikhs. Hindu law, codified and uncodified, does not apply to scheduled tribes, who are governed by their tribal customs. Amongst some communities of south India also Hindu law is modified by custom. Custom is also important in the case of other communities.

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In India we have another aspect of family law, which can come into operation if parties choose to be governed by it. Any two persons belonging to any community or nationality may opt to marry under the Special Marriage Act, 1954, and thus bring into application to themselves not only the matrimonial law as laid down in the Act but also some other laws, such as the Succession Act, 1925, and the succession to the property of such persons will be governed by this Act, and parties have no choice in this matter. In the case of a Hindu male it means automatic severance of his status from the joint family. And if parties belong to different communities (except in the case of Muslims where a Muslim male can validly marry a non-Muslim) and neither wants to convert to another's faith, or if parties want to have a civil marriage, they have no option but to marry under the Special Marriage Act, 1954. There is a uniform family law applicable to both persons, though they profess different faiths, once they marry under the Act.

In India family law does not differ from state to state. Every community is governed by one single system of law. Though its members may be settled, domiciled or residing in any part of the country, they will be governed by the same law. However, within this single system of law there coule be some variations; two groups of people belonging to the same community may be governed by different sets of rules, as each constitutes a separate caste, sub-caste or sect or sub-sect or has its own regional peculiarities. These variations, as seen above, may also occur on account of custom, which may create variations on the basis that the group belongs to a region, to a caste, community or tribe or a family.

Hindu law and Muslim law have their schools. In the case of the former, schools have some regional connotation, while it is not so in the case of the latter. The *Dayabhaga* school of Hindu law prevails in Bengal, Assam, Tripura and Manipur. In the rest of India it is the *Mitakshara* school that prevails. The *Mitakshara* school is further sub-divided into four sub-schools, *viz.*, the *Mithila*, the *Benares*, the *Maharastra* or *Bombay* and the *Dravida* or the *South India* school, which, broadly speaking prevails in their respective jurisdictions. The peculiarity of schools of Hindu law is that if a Hindu governed by a particular school migrates to another region, he would continue to be governed by his own school, unless he gives it up and adopts the law of the place where he has settled. The sub-schools in respect of certain matters have precedence over the law of the *Mitakshara*; otherwise it is the law of the *Mitakshara* that prevails. Another important aspect of Hindu law is that if the parties are able to prove that they are governed by custom, then in all those matters where statutory law does not override it, custom prevails. These schools have still relevance in respect of uncodified Hindu Law, particularly joint family and partition. As to marriage, matrimonial causes, minority, guardianship, adoption, maintenance and

successions, Hindus are uniformly governed by one single system of law-the codified portion of Hindu law. This includes the Hindu Marriage Act, 1955, the Hindu Minority and Guardianship Act, 1956, the Hindu Adoptions and Maintenance Act, 1956 and the Hindu Succession Act, 1956 and a few more.

In respect of Muslims, the schools have no territorial or regional connotation in the sense in which they have in relation to Hindus. The *Hanafi* school (one of the four schools of *Sunni* sect) covers a vast majority of Muslims all over India. Most of the *Shias* are governed by the *Ithna Ashari* school. Ismailis who constitute the smallest minority group of Muslims and who are mostly found in western India are governed by *Ismaili* school. Muslims belonging to *Shafi* school are mostly found in southern India. Mention may also be made of the three commercial communities of Muslims, the *Khojas*, the *Bohras* and the *Cutchi Memons* who before the Shariat Act, 1937 were governed by their own customs and in some matters by Hindu law. After the year 1937 it is not so. The former two belong to *Shite Ismaili* sect and the last belong to *Sunnite Hanafi* School. The *Khojas* still retain the option of being governed by customary law but others have lost the option by accepting the application of Muslim law. The *Mopilla* Muslims of Kerala were another Muslim community, which was at one time governed by customary law. They still retain the customary law of *tarvad.*

In the case of other communities of India, there are no schools of law though local variations still exist, such as between those living in urban areas and those living in the *mofussil.* These variations exist either on account of historical developments of the law of the community or on the basis of custom, which overrides the law or supplements it.

Under the Constitution of India all aspects of personal law are in the concurrent list (entry 5). Both Parliament and the state legislatures have power to legislate in respect of them. Apart from legislation relating to Muslim *wakfs* and Hindu endowments, state legislatures have not exercised this power to any appreciable extent. The entire codified Hindu law has been enacted by the Union Parliament, though some state legislature have made some modifications; for instance, the Uttar Pradesh enactment, the Hindu Marriage (the Uttar Pradesh Sanshodhan) Adhinyam, 1962 has made, *inter alia*, cruelty a ground of divorce. This may be deemed to be superseded by the Marriage Laws (Amendment) Act 1976, which made cruelty a ground of divorce. The Shariat Act, 1937 and the Dissolution of Muslim Marriage Act, 1939; were passed by central legislature. So were the Parsi Marriage and Divorce Act, 1936; the Christian Marriage Act, 1872 and the Indian Divorce Act, 1869 and several Hindu personal law reform enactments before independence.

Most of the Indian communities which have their separate family law are religious communities, but their law is not necessarily religious law. It is also not necessary for the application of the law that the members or

individual member should be an ardent believer or follower of that faith. In most cases, if he is a member of the community by birth or conversion, that will suffice, though in actual persuasion he may be atheistic or non-religious or even anti-religious; and though he may even decry the religion so long as he does not leave it (mere renunciation of faith may not be sufficient) he will continue to be governed by that law. Community cannot expel him since ex-communication or outcasting is unconstitutional.

In this context sometimes it becomes difficult to define who is a Hindu, Muslim, Christian, Parsi or Jew and more often the attempt is not to define them but to specify the categories of persons governed by a particular personal law.This is also what is proposed to be done here.

Broadly speaking, Hindu law applies to any person (i) who is a Hindu, Jain, Buddhist or Sikh by religion,[1] (ii) who is born of Hindu parents, *i.e.*, parents who are Hindus, Jains, Budhists or Sikhs (and in case one of the parents is a non-Hindu, then if the child is brought up as Hindu) and (iii) who is not a Muslim, Christian, Parsi or Jew (Hindu law will not apply to him if it is proved that such person is not governed by Hindu law). In the first category are also included those persons who are converts to Hinduism, Jainism, Budhism, or Sikhism. It is a remarkable feature of Hindu law that for conversion no religious ceremony is necessary: intention of the convert and his acceptance by the community is enough.[2] A person may be a Hindu even if he does not profess, practice or believe in any of these religions, as mere deviation or dissent from the doctrines of Hinduism or lapse from orthodox Hindu religious practices or his becoming an atheist will not render him any the less a Hindu.

Sikhs, Jains and Budhists are governed by Hindu law, but it cannot be said that they are Hindus by religion. Similarly, a person who is not a Muslim, Christian, Parsi or Jew is governed by Hindu law but such a person is not Hindu by religion. Looked at in this perspective, Hindu law applies to all persons within the territories of India (except the State of Jammu and Kashmir) who are not Muslims, Christians, Parsis or Jews. This implies that in modern Hindu law the term "Hindu" has lost its religious connotation; if Hindu religion has any relevance in modern Hindu law, then it is in relation to religious endowments.

A Muslim is one who believes that (i) there is only one God and (ii) that Muhammad is His Prophet. According to Ameer Ali:

> The Mahommedan law applies to all Musalmans whether they are so by birth or conversion... Any person who professes the religion of Islam, in other words, accepts the unity of God and

1. *Shastri Yagnapurushadashji* v. *Muldas* AIR 1966 SC 1119. See also Paras Diwan, *Modern Hindu Law: Codified and Uncofieid*, 2nd ed., 1974, pp. 2-5.
2. *Perumal* v. *Ponnuswami* AIR 1971 SC 2352.

> the prophetic character of Mohammed is Moslem and is subject to Musalman law.[3]

A person who professes to be a Muslim will be taken to be so, unless it is proved otherwise. Thus profession of Islam is enough; practice is not necessary. A totally non-religious person (for instance, one who neither performs *namaj* nor observes fast during *Ramzan*) may be regarded as a Muslim. However, pretension will not be enough, nor will a colourable[4] or fraudulent[5] conversion.

Hindus and Muslims are respectively governed by Hindu law and Islamic law as modified by statutes.

Each community in India has its own family law. It is easy to substantiate this statement in respect of Hindu and Muslim communities. But when one is concerned with other communities such as Parsis, Christians and Jews, difficulties start creeping in. These communities do not really have their own integrated system of law. Only a few branches of their family law are codified. In respect of matters not covered by statutory law, it is easy to say that they are not governed by any system of law than to indicate the law that applies to them. To say that they are governed by common law or custom will be too vague to be of any utility. In India, Indians or any community does not have anything like common law in the sense in which the term is commonly understood. Custom abounds in India and it is its abundance that makes matters worse confounded.

Parsis came and settled down in India as a result of their persecution in their native land. Very few British or European Christians came to India to settle here, but a large number of Christian Missions were successful in converting some Hindus and Muslims to Christianity. And mostly it is these people (*i.e.*, original converts and their descendants) who constitute the Christian community in India. To this may be added the Anglo-Indians.

It seems that the word 'Parsi' has both a religious connotation and a racial significance. Indian Parsis belong to Zoroastrian faith and in that sense in India, Parsi and Zoroastrian are synonyms. In modern India, Parsi law applies to the following three sets of persons: (a) persons who are descendants of the original Persian emigrants and are born of Zoroastrian parents, (b) those persons whose father is (or was) a Parsi and mother an alien but admitted to Zoroastrian faith and (c) Zoroastrians from Iran, who

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3. Ameer Ali, II *Mahommedan Law*, 5th ed., p. 22.
4. *Skinner* v. *Orde* (1871) 14 MIA 309.
5. *Khambatta* v. *Khambatta* AIR 1934 Bom. 93 and *Ali Nawaz* v. *Mohammed Yusuf* PLD (1963) SC 51.
6. Phiroze K. Irani, "*The Personal Law of the Parsis of India*" in Anderson (ed.) *Family Law in Asia and Africa*, 1968, p. 273 at 286. See also *Sir Dinshaw M. Petit* v. *Sir Jamsetji Jijibhai* (1909) 11 Bom. LR 85 at 128 and *Jamshed Irani* v. *Banu Irani* (1967) 68 Bom LR 794.

are either temporarily or permanently residing in India.[6] In accordance with the Indian Christian Marriage Act, 1872, 'Christians' means persons professing the Christian religion and 'Indian Christians' include 'the Christian descendants of natives of India converted to Christianity'. In respect of marriage, matrimonial causes and succession Parsis and Christians are governed by statutory law.

After immigration to India, Parsis were greatly influenced by Hindu customs and some of the Hindu customs were adopted by them. The native converts to Christianity were mostly Hindus and in many cases they retained their customs. With the establishment of East India Company's rule in India, a dual system of administration of justice came into being. In the Presidency towns, the Supreme Court of Judicature was enjoined in 'all matters arising out of inheritance and succession to land and goods, and all matters of contracts and dealing between party and party to apply Muslim law and usage in case parties were Muslims; and Hindu law and usage in case parties were Hindus, and, the usage of defendant in case one of the parties was a Muslim or a Hindu'. The courts in the mofussil, were enjoined to apply 'Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations the usage of the country in which the suit arose; if none such appears, the law of defendant; and, in the absence of specific law and usage, the rule of justice, equity and good conscience alone'.[7] The result seems to have been that with the exception of Hindus and Muslims, all other British Indian subjects in the Presidency towns came to be governed by the rules of English common law so far as it was applicable and in the mofussil by the customary law so far as it existed and was ascertainable, otherwise by rules of justice, equity and good conscience which were construed to mean mainly the rules of English law if found applicable to Indian society and circumstances.[8] How much of the English common law is applicable to these communities is really difficult to say, though there are some decided cases, which lay down which rule of English common law is applicable or is not applicable. It is established that in respect of marriage and matrimonial causes Jews are governed by their customary law. It is not so well established in respect of other matters.

With each community having its own personal law, there was a possibility of problems of conflict of laws arising, but since interpersonal relations in family matters are not permitted, the conflict of personal laws has not arisen. Thus inter-communal marriages are not permitted, unless one of the parties accepts the faith of the other (in which event the question of conflict cannot arise) or they marry under the Special Marriage Act, 1954,

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7. See the Government of India Act, 1915, s. 112, quoted in Phiroze K. Irani, *supra* note 6 at 278.
8. *Waghela Rajsanji* v. *Shekh Masludin* (1887) 14 I.A. 89.

(in which case personal law of both parties ceases to apply) the problem of conflict of personal laws is eliminated. Such problems have arisen in a few cases where a person becomes a convert to another faith (the cases have been mostly of Hindus, Christians or Parsis adopting Islam) and takes another spouse.[9]

II

Law of Marriage

Before 1955, India was the largest country of the world which allowed the vast majority of its people-Hindus and Muslims-to practice polygamy (unlimited in the case of Hindus and limited to four wives in the case of Muslims). Then it was also the country on whose border region polyandry prevailed. However, polygamy was practiced only nominally and polyandry was confined to a very insignificant number of people (a few thousand people of Lahaul Valley, on the border of Tibet). After 18 May 1955, when the Hindu Marriage Act, came into force, polygamy is a criminal offence punishable with imprisonment which may extend to seven years and, if the fact of the first marriage was concealed from the spouse, punishable with a term of imprisonment which may extend to ten years.[10]

Modern India still permits its Muslims population to practice limited polygamy, though very few Muslims have a plurality of wives. In India Muslims alone are permitted to practice polygamy limited to four wives. Under the Hanafi Law, if a Muslim takes a fifth wife, the marriage is not void or voidable, it is irregular, which he can regularize at any time by divorcing any one of the earlier four wives.[11] A Sunni Muslim thus taking a fifth wife is not guilty of bigamy. Among the Shias the fifth marriage is void, and thus a Muslim Shia male will be guilty of criminal offence of bigamy on his marrying a fifth wife.[12]

From very early times marriage was considered a sacrament under Hindu Law. Marriage as a sacramental union implied that it was sacrosanct, inviolable and immutable. Immutability of marriage coupled with polygamy did not present any hardship to Hindu males, but in the case of females it implied that a woman even when she became a widow could not remarry. The modern Hindu law-the Hindu Marriage Act, 1955, does away with practically every aspect of sacramental tie. Just as the widowers are permitted to remarry so are the widows. Divorce is allowed. Marriage still

9. Ved Prakash Verma, "*Conflict of Personal Laws in Divorce Cases in India*", XXII-2 The Law Review, 1969, pp. 78-93 and the cases cited there.
10. The Indian Penal Code, 1860, ss. 494 and 495.
11. See Paras Diwan: *Muslim Law in Modern India*, 1993, p.42.
12. *Id.*

retains its sacramental character only in the sense that in most Hindu marriages a sacred ceremony is still necessary. At the same time it is difficult to say that Hindu marriage has become a contract. Non-consent or non-age does not render the marriage invalid, not even voidable. The same is true of the non-consent of the guardian. If consent is obtained by fraud or force, the marriage is voidable at the instance of the innocent party. The same is the position when one of the parties is an idiot or lunatic.

Muslim law has always considered Muslim marriage as a civil contract. 'Marriage is a civil contract which has for its object the procreation of children.' Marriage being essentially a civil contract, there must be a proposal on one side and acceptance on the other. In other words, it is constituted by *ijab wa kabul* or declaration and acceptance. What is essential is that proposal and acceptance must be made at one and the same meeting. Muslim law does not lay down any particular form in which proposal and acceptance are to be made. Neither writing nor presence of witnesses is necessary for its validity, though Sunni law requires presence of witnesses and their absence renders the marriage irregular. The irregularity is cured by consummation. No religious ceremonies are required, though some verses from the *Quran* are usually recited. Their recitation is not essential and does not affect the validity of the marriage.

Parsi marriage is a civil contract, though religious ceremony called *ashirvad* is essential for the validity of the marriage. The presence of two Parsi witnesses is also necessary. Christian marriage is a voluntary union of a man and a woman for life to the exclusion of all others. The Indian Christian Marriage Act, 1872 is modelled on the then existing English matrimonial law. One of the peculiar features of the Act is that it provided that even if one of the parties to the marriage is a Christian other being a non-Christian, marriage has to be performed under the Act. The marriage may be solemnized before a minister or a marriage officer or any person licensed under the Act.

Marriage among Indian Jews is a contract. A written contract called *Katuba* between the parties is essential for the validity of marriage. A religious ceremony is also required.

Capacity to marry

Under Hindu law certain prohibitions relating to marriage were based upon peculiar Hindu notions of consanguinity and caste. Inter caste marriages and even inter-sub caste marriages were not allowed, though marriage with a non-Hindu was not invalid.[13] *Sagotra* and *sapravara* marriages were also

13. See AIR 1951 All. 529 at 540: AIR 1954 Mysore 38. See also Paras Diwan, *supra* note 1 at 89.

prohibited. In the modern Hindu law all these restrictions have been done away with and now any two Hindus can marry. Hindu law recognizes prohibition on the basis of blood relationship, called *sapinda* relationship. In the modern Hindu law *sapinda* relationship exists upto five degrees on the paternal side and three degrees on the maternal side. The other prohibition is based upon degrees of prohibited relationship. Two persons within such degrees of relationship cannot marry. Relationships thus prohibited are based on either blood relationship or relationship by marriage. However, two persons even if they are *sapinda-s* or within the prohibited degrees can marry each other when custom permits such a marriage.[14]

The other requirements of a Hindu marriage are: the bridegroom should have, at the time of marriage, completed the age of twenty-one years and the bride, the age of eighteen years. In case of a contravention of the condition the violator is liable to a punishment of simple imprisonment extending to fifteen days or a fine which may extend to Rs. 1000 or both.[15] In addition to this, any person who performs, conducts, directs, promotes a child marriage can be punished under the Child Marriage Restraint Act, 1929. The maximum punishment under the Act is three months' simple imprisonment.

The Hindu Marriage Act 1955, as amended by the Marriage Laws (Amendment) Act, 1976 and 1999, also lays down that neither party to the marriage should be (i) incapable of giving valid consent to it in consequences of unsoundness of mind or (ii) though capable of giving a valid consent has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and procreation of children or (iii) has been subject to recurrent attacks of insanity.[16] Violation of this condition renders the marriage voidable.

A Muslim is not allowed to marry certain foster relations, such as foster-mother or her daughter. There are two other prohibitions on the basis of relationship by consanguinity or by affinity. On account of consanguinity one cannot marry one's mother or grandmother how high soever, one's daughter or grand-daughter how low soever, one's sister, full consanguine or uterine, one's niece or grand-niece how low soever, or one's paternal or maternal aunt or great-aunt how high soever. On the basis of affinity one cannot marry ascendants and descendants of one's wife or the wife of one's ascendant or descendant, though one is permitted to marry the descendants of one's wife if marriage has not been consummated. Yet another prohibition is recognized which is called prohibition on the ground of unlawful conjunction. A Muslim is not permitted to have simultaneously two wives who are so related to each other that they could not have intermarried

14. The Hindu Marriage Act, 1955, ss. 5 (iv) and (v).
15. *Id.*, s. 18.
16. Words "or epilepsy" omitted by s. 2 of the Marriage Law (Amendment) Act, 1999 (39 of 1999).

if one of them had been a male.

Muslims belonging to different schools or sects can inter-marry. A Shia Muslim male is not permitted to marry a non-Muslim except in a *muta* form. A Shia female is not permitted to marry a non-Muslim even in a *muta* form. A Sunni Muslim male can marry a *kitabiya* non-Muslim woman though he cannot marry a fire-worshipping or idol-worshipping woman. A *kitabiya* woman is one who believes in a revealed religion possessing a divine book which is acknowledged by Muslims. In India it includes only Christians and Jews. A Hanafi woman cannot marry any non-Muslim man. A Muslim male or female, can marry a Christian under the Christian Marriage Act, 1872, if such a marriage is permitted by the personnel law. A Muslim, male or female, can marry a non-Muslim in a civil marriage form under the Special Marriage Act, 1954.

Muslim law lays down that a Muslim who has attained puberty and who is of sound mind has capacity to marry. Muslim law-givers are not unanimous as to the age of majority, but after the Child Marriage Restraint Act, a Muslim male under eighteen and a Muslim female under fifteen cannot marry. A Muslim, who is a minor or of unsound mind, can be married by his guardian. In such a case the minor has the option of repudiating the marriage on attaining majority. A Mohammedan girl of fifteen years who has attained the age of puberty is competent to marry without the consent of her parents.[17]

On the basis of capacity and of prohibitions as to marriage, Muslim law-givers classify marriages into valid (*sahih*), void (*batil*) and irregular (*fasid*) marriages.

The Parsi rules of prohibition of marriage on the basis of consanguinity and affinity are stated in scheduled I of the Parsi Marriage and Divorce Act, 1936. A Parsi cannot marry a non-Parsi under Parsi law, though he or she may enter into such a marriage under the Special Marriage Act, 1954. Neither insanity nor minority is a bar to marriage. The Child Marriage Restraint Act applies to Parsis and thus a Parsi male under twenty-one years of age and Parsi female under eighteen years cannot marry. The Parsi Marriage and Divorce Act, 1936 lays down that if one of the parties is less than twenty-one years of age, the consent of the guardian for marriage is necessary. In case one of the parties to a marriage was insane at the time of marriage, then the other party can petition for divorce provided insanity continues till the presentation of the petition.

Like the Hindu and Parsi marriages, a Christian marriage is essentially a monogamous marriage. The marriage of a Christian with a non-Christian under the Indian Christian Marriage Act, 1872 is valid. Under the Act of

17. *Md. Idnis* v. *State of Bihar* (1980) II LJ 764.

1872, the male must have completed the age of twenty-one years and the female, the age of eighteen years for a valid marriage. Surprisingly, the Act is silent as to the other requirements of capacity or prohibitions of marriage. The Act merely says that no certificate of marriage shall be issued if there are any impediments of consanguinity or affinity and then the last section (section 88) lays down that 'Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into'. Some guidance is provided by section 19 of the Indian Divorce Act, 1869 which applies to Christian marriages. It lays down four grounds on which a Christian marriage may be declared null and void, *viz.*, impotency of the respondent, parties being related to each other within the prohibited degrees of consanguinity or affinity or the marriage being a bigamous marriage.

The Special Marriage Act, 1954 which is of general application, but applies only when parties choose to marry under it, permits marriage between any two persons. Section 4 lays down four conditions for marriage, *viz.*, (a) neither party is incapable of giving a valid consent to it in consequence of unsoundness of mind or 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 has been subject to recurrent attacks of insanity or epilepsy, (b) the bride has completed the age of eighteen years and the bridegroom the age of twenty-one, (c) the parties are not within the degrees of prohibited relationship (which are detailed in schedule I of the Act though if a custom governing one of the parties permits a marriage between them, then such a marriage will be valid) and (d) neither party has a spouse living.

Ceremonies of marriage

Under the earlier Hindu law elaborate ceremonies of marriage were prescribed. Under the modern Hindu law parties are required to perform ceremonies which are in accordance with the customary rites and ceremonies of either party to the marriage. Under the Hindu Marriage Act, 1955 custom is assigned a specific role in the ceremonies of marriage. Thus for the formal validity of a Hindu marriage, the parties should either perform *sastric* ceremonies and rites as prescribed by Hindu law or any customary ceremonies and rites which prevail in the caste or community to which one of the parties to the marriage belongs. Among the *sastric* ceremonies, performance of *saptapadi* is absolutely necessary. It seems that performance of *vivahahoma* is also desirable. No other *sastric* ceremony or rite need to be performed. As to customary ceremonies any ceremony, very elaborate or very simple, which is recognized on the side of the bride or bridegroom is necessary and sufficient. If custom permits performance of marriage without any ceremonies, then a marriage performed without any

ceremonies will be valid. For instance, in the Punjab, for customary marriages known as *chadar-andazi* and *kareva*, no ceremonies are necessary; mutual consent of the parties followed by actually living together as husband and wife is enough.

Registration of Hindu marriages is not essential. The state government may provide facilities for the registration of Hindu marriages. They may also make such registration compulsory. However, failure to register the marriage does not affect its validity. Most of the states have framed rules for the registration of marriage. In the absence of proof of performance of requisite ceremonies of marriage, mere registration of marriage does not constitute conclusive proof of marriage.[18]

Muslim law provides the simplest possible ceremonies of marriage. The essential requirements are that there must be a proposal by or on behalf of one of the parties to the marriage and it should be accepted by or on behalf of the other at one and the same meeting. It may be oral or it may be in writing. Muslim law does not insist on any type of writing or any religious ceremonies. Neither *mulla* is needed nor the presence of *Kazi* is necessary.[19] The Hanafi school requires that proposal and acceptance must be made in the presence and hearing of two male witnesses or one male witness and two female witnesses. Shia law does not require presence of witnesses. No religious ceremony is essential. No writing is required either.

Under the Parsi law it is essential that the ceremony of *ashirvad* should be performed by a Parsi priest in the presence of two Parsi witnesses. Registration of Parsi marriages is essential, but failure to register the marriage does not affect its validity.

Following English law, the Christian Marriage Act, 1872, lays down elaborate procedure and ceremonies of marriage. Three sets of authorities are provided for the solemnization of marriages, *viz.*, ministers of religion, marriage registrars and persons licensed to solemnize marriages. When a marriage is to be solemnized by a minister of religion, notice of the intended marriage, publication of such notice, and a declaration by one of the parties to the marriage are essential requirements. The minister is free to solemnize the marriage in such form of ceremonies as he thinks fit to adopt, though the presence of at least two witnesses, other than the minister, is essential. Registration of such marriages is also compulsory. When the marriage is to be solemnized by the marriage registrar, then more or less the same procedure is to be followed. In such a case parties are free to choose such form and such ceremonies as they think fit, though marriage has to be solemnized in the presence of the marriage register and two or more credible witnesses. Parties are also required to declare in some part of

18. *Sanjai* v. *Jobe* AIR 1993 MP 54 and *Shajit* v. *Gopinath* AIR 1993 Mad 165.
19. *Rahima Khatoon* v. *Saburjanessa* AIR 1996 Gau 33.

ceremony: "I do solemnly declare that I know not of any lawful impediment why I, A. B. may not be joined in matrimony to C.D." and "I call upon these persons here present to witness that I, A. B., do take thee, C. D., to be my lawful wedded wife (for husband)." Registration of marriage is also essential.

Under part VI of the Christian Marriage Act, a marriage between Indian Christians may be solemnized, without the preliminary notice required in the other two cases, by any person licensed to solemnize marriages in the presence of at least two credible witnesses, on parties saying to each other, "I call upon these persons here present to witness that I, A. B. , in the presence of Almighty God, and in the name of our Lord Jesus Christ, do take thee, C. D., to be my lawful wedded wife (or husband)". Such a marriage may also be registered.

For the solemnization of a civil marriage under the Special Marriage Act, the procedure and formalities are laid down in sections 5 to14. Notice of the intended marriage is required to be given to the marriage officer of the district within whose jurisdiction one of the parties resided at least for thirty days. The notice is to be published and if objections are made, they have to be disposed of. The ceremony necessary for the marriage is that in the presence of the marriage officer and three witnesses, parties should say to each other, "I (A) take thee (B), to be my lawful wife (or husband)". On the solemnization of marriage the marriage officer is required to enter a certificate thereof in the marriage certificate book. Under chapter III of the Act, marriages solemnized in any other form under any law may also be registered under the Act. Sections 15-17 lay down the procedure. The effect of registration of such marriages is that such marriages also are deemed to have been solemnized under the Special Marriage Act.

III

Matrimonial Causes

The old Hindu law did not provide for settlement of matrimonial causes. [20] Muslim law did not recognize divorce from very early days, but then it has always been the private affair of the parties, and in the sense in which we use the term in modern law, it could hardly come within the ambit of matrimonial causes. In a limited sense judicial divorce was first introduced in India under the Converts' Marriage Dissolution Act, 1866. This was followed by the Indian Divorce Act, 1869, which introduced all the four matrimonial causes known to English law. But then it was available only to

20. This is maintained here despite Ludo Rocher's valiant effort to establish matrimonial causes in the *Dharamsastra*, Anderson (ed.) *supra* note 6 at pp. 90-117.

Christians, though later on it was also made available to persons who performed their marriage under the Special Marriage Act, 1872. But even then it applied to a very limited number of persons. The Special Marriage Act, 1954 introduced civil marriages and matrimonial causes. The Hindu Marriage Act, 1955 made matrimonial causes available to Hindus. The Parsi Marriage and Divorce Act made them available to Parsis.

The Indian Divorce Act, the Parsi Marriage and Divorce Act, the Special Marriage Act and the Hindu Marriage Act recognize all the four matrimonial causes, *viz.*, divorce, judicial separation, and restitution of conjugal rights and nullity of marriage.

Nullity

The Hindu Marriage Act makes a distinction between void and voidable marriages. So does the Special Marriage Act. No such distinction is made under the Indian Divorce Act and the Parsi Marriage and Divorce Act.

Under section 11 of the Hindu Marriage Act, 1955, a marriage may be declared null and void on the ground that the marriage was bigamous or parties were *sapindas* to each other or parties were related to each other within the degrees of prohibited relationship. To these may be added one more ground: necessary ceremonies had not been performed. A marriage may be annulled on the ground: (a) that it has not been consummated owing to the impotence of the respondent, (b) that the respondent was incapable of giving valid consent to it in consequence of unsoundness of mind, or though capable of giving valid consent was suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and procreation of children, or was subject to recurrent attacks of insanity, (c) that the respondent was pregnant at the time of the marriage provided that the pregnancy was not caused by the petitioner and the petitioner was ignorant of the fact of pregnancy at the time of marriage. (In this case, it is necessary that the marital intercourse with the consent of the petitioner did not take place since the discovery of the ground by the petitioner and the petition was presented within one year of the marriage), and (d) that the consent of the petitioner or of the guardian, as the case may be, was obtained by fraud or force, provided that the petitioner did not live with his or her full consent with the respondent after the discovery of fraud or cessation of force and the petition was presented within one year of the discovery of fraud or cessation of force.

Section 11 of the Act can be invoked by only those persons who are parties to a marriage as would clearly appear from the words "either party thereto" used therein. The relief of declaring a marriage void has been intentionally confined to the parties to the marriage and it is not open to any other person to make an application under section 11. The real question is whether any third party has a right to file an application under section 11, to

have the marriage declared null and void. The language used in that section admits of no doubt that the right cannot be exercised by any one except the parties to the marriage which is challenged.[21] This is so because the expression "neither party thereto" in section 11 means two actual parties to the marriage and not the third party.[22]

The outstanding feature of the Special Marriage Act, 1954, is that any marriage solemnized under any law may be registered under chapter III of the Act, thus making available to the parties all the matrimonial causes, though the law of nullity of marriage under the Act differs in some respects from such law in respect of marriage solemnized under any other law and registered under the Act. A former marriage may be declared null and void on the ground that (a) the marriage was bigamous, (b) either party was incapable of giving valid consent to marriage in consequence of unsoundness of mind, or though capable of giving valid consent, was suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and procreation of children, or was subject to recurrent attacks of insanity, (c) parties were within the degrees of prohibited relationship, (d) either party was below the age of marriage required by law or (e) the respondent was impotent at the time of marriage and continued to be so at the time of the presentation of the petition. Marriages, which are solemnized under other law but are registered under the Act, cannot be declared null and void on any of these grounds, though registration may be cancelled in certain cases. Such a cancellation may be made on the ground that no ceremony of marriage had taken place between the parties, that the marriage registered was bigamous, either party was a lunatic or idiot at the time of registration, the parties did not complete the age of twenty-one at the time of registration, or the parties were within the degrees of prohibited relationship other than where custom permitted such marriage.

The law of annulment of marriages is not applicable to all marriages registered under the Act. A marriage solemnized under the Special Marriage Act may be annulled on the ground that the marriage was not consummated owing to the willful refusal of the respondent or that the respondent was pregnant before her marriage by someone other than the petitioner or that the consent of either party was obtained by fraud or force. The last two grounds are the same as under Hindu law.

A marriage may be declared null and void under the Indian Divorce Act on any of the following grounds, *viz.*, (a) that the respondent was impotent at the time of marriage as well as at the time of the presentation of the suit,

21. *Naurang Singh* v. *Supla Devi* AIR 1968 All 412 and *Sikhairam* v. *Gunthibai* 1991 (1) HLR 32 (MP).
22. *Amarlal* v. *Vijayaji* AIR 1959 MP 400. Also see, *Mathura Bai* v. *Ramwati* 1991 (11 HLR 80 (MP), holding that a third person cannot file a petition under s. 11.

(b) that parties were within prohibited degrees of consanguinity or affinity, (c) that either party was an idiot or a lunatic at the time of marriage, and (d) that the marriage was bigamous. The High Court may also declare a marriage null and void on the ground that the consent of either party was obtained by force or fraud.[23] A marriage may also be declared null and void if the marriage was performed within six months of the confirmation of the degrees of dissolution of the former marriage,[24] or on the ground of non-performance of essential ceremonies of marriage.

A Parsi marriage may be declared null and void on the ground that parties were within the degree of consanguinity of affinity, necessary formalities and ceremonies of marriage were not performed, the consent of the guardian was not taken by the party who had not completed the age of twenty-one years at the time of marriage or respondent was impotent (consummation being impossible from natural causes).

A declaration that a Muslim marriage is null and void can be obtained by filing a declaratory suit under the Specific Relief Act, 1963. Apart from this, there is nothing like the matrimonial cause of nullity of marriage under Muslim law.

Restitution of conjugal rights

The provision relating to restitution of conjugal rights has been enacted in section 9 of the Hindu Marriage Act. The way it has been worded has led to some controversy. Sub-section (1) lays down that a petition for restitution may be made on the ground that the respondent has without reasonable excuse withdrawn from his or her society and the court may pronounce the decree for restitution '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'. Sub-section (2) then lays down that 'Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce'. Sub-section (2) has now been repealed by the Marriage Laws (Amendment) Act, 1976.

The provision of restitution of conjugal rights in section 22 of the Special Marriage Act, 1954, is substantially the same as found in sub-section (1) of section 9 of the Hindu Marriage Act, 1955. The Provision for restitution of conjugal rights is also substantially the same in section 36 of the Parsi Marriage and Divorse Act, 1936 though it has been worded slightly

23. When the husband represented at the time of marriage that he was Christian, though later on it was discovered that he was a Muslim, the marriage was declared null and void. See *Aykut* v. *Aykut* AIR 1940 Cal. 75.
24. S. 57 of the Act. Also see *Battie* v. *Brown* ILR 38 Mad. 452.

differently. Section 32 of the Indian Divorce Act, 1869, enacts the remedy of restitution of conjugal rights, which is again substantially the same. Section 33 of the Act lays down:

> Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which would not be a ground for a suit for judicial separation or for a decree of nullity of marriage.

This is the source of section 9(2) of the Hindu Marriage Act, 1955. The draftsman of the Hindu Marriage Act merely added the words, 'or for divorce'. The source of section 9(1) of the Hindu Marriage Act is section 32 of the Indian Divorce Act of which it is almost a verbatim copy. The source of the provisions of sections 32 and 33 was the then existing English law. The result has been that Indian courts interpreting section 9 of the Hindu Marriage Act are torn between two views: is reasonable excuse equivalent to a ground of matrimonial relief or is it to be given its natural meaning where under reasonable excuse or reasonable cause may fall short of a ground for matrimonial relief.[25] Under the Parsi Marriage and Divorce Act, 1936 and the Special Marriage Act, 1954, the provision has created no difficulty of interpretation, as they do not have anything like sub-section (2) of section 9 of the Hindu Marriage Act. It is in this context that sub-section (2) of section 9 of the Hindu Marriage Act has been repealed. This brings the provision at par with the Special Marriage Act and the Parsi Marriage and Divorce Act. The Marriage Law (Amendment) Act, 1976 has added an explanation under which it is laid down that the burden of proving reasonable excuse shall be on the person who has withdrawn from the other's society.

It seems that under its Letters Patent jurisdiction High Courts continue to have the power of giving the relief of restitution of conjugal rights to Jews and other communities. In fact, the lower courts have also been giving this relief to both Hindus and Muslims and other communities under the provisions of Specific Relief Act read with the Code of Civil Procedure. Communities, whose personal law does not recognize restitution of conjugal rights, can still take advantage of those provisions.

Judicial separation

The statutory law of Hindus, Parsis and Christians recognizes the matrimonial relief of judicial separation. It is also recognized by the Special Marriage Act, 1954. Muslim law does not recognize anything like it. Probably in the case of non-Hindus and non-Muslims, the high courts have inherent jurisdiction to provide the relief. Persons belonging to any

25. See Paras Diwan, "The Matrimonial Relief of Restitution of Conjugal Rights through the Punjab High Court," XIX, *The Law Review*, 1967, pp. 1-8 (and cases referred to there.

community are free to enter into separation agreements under the general law of contract.[26]

The grounds on which judicial separation may be granted differ widely from statute to statute. Under the Special Marriage Act, 1954, it may be obtained on any ground on which divorce can be obtained under section 27 as well as on the ground that the respondent has failed to comply with the decree of restitution of conjugal rights. Similarly, under the Parsi Marriage and Divorce Act, 1936, judicial separation may be granted on any ground on which divorce may be obtained as well as on the ground that the defendant has been guilty of such cruelty to him or her or their children, or has used such personal violence, or has behaved in such a way as to render it, in the judgment of the court, improper to compel him or her to live with 'defendant'. Under the Indian Divorce Act either party may obtain a decree of judicial separation on the ground of 'adultery or cruelty or desertion without reasonable excuse for two years or upwards.'

Under the Hindu Marriage Act the grounds of judicial separation are given more elaboration. The reason seems to be that the grounds, which are conventionally considered grounds of divorce, are recognized only as grounds of judicial separation. Section 10 lays down six grounds, *viz.* continuous desertion of at least two years (willful neglect is included in the definition of desertion), cruelty, virulent leprosy of at least one year's duration, venereal disease in a communicable form of at least three years' duration, continuous insanity of at least two years and respondent having' sexual intercourse with any person other than his or her spouse'. The last ground would include adultery as well as non-consensual intercourse. Cruelty has been interpreted considering the wide meaning given in western countries[27] as well as considering Indian conditions.[28] Desertion includes actual, constructive and willful neglect. Under the Marriage Laws (Amendment) Act 1976, now a party to a marriage may seek judicial separation on any ground on which he or she is entitled to divorce. Cruelty, desertion and adultery have now been made grounds of divorce.

Divorce

Originally, the statutory law of divorce was based on the matrimonial

26. See *Thirumal* v. *Rajammal* (1967) 2 M.L.J 484 and *Thaknr Dei* v. *Dharam Raj* AIR 1953 All. 134. Agreements for future separation are void under s. 23 of the Contract Act but not for present separation. See Mulla, *The Indian Contract Act*, 8th ed., 1967.
27. For instance, *Gollins* v. *Gollins* (1963) 2 All. E. R. 966 and *Williams* v. *Williams* (1963) 2 All. E.R. 994 have been followed in *Bhagwat* v. *Bhagwat* AIR 1967 Bom. 80, but our courts are not likely to go to such extent as to include snoring within its ambit.
28. Considering the Indian context, 'cruelty' has been given typical Indian interpretation in *P.L. Sayal* v. *Sarla Rani* AIR 1961 Punj. 125 and *Shyamsundar* v. *Shantamanj* AIR 1962 Ori. 50.

offence theory or guilt theory. Consent theory was accepted in the Special Marriage Act side by side with the guilt theory. The breakdown theory was introduced in Hindu Law by an amendment of 1964 and in the Special Marriage Act by an amendment of 1970. With the recognition of fault theory, the dichotomy of fault and innocence was recognized. The strange thing that has happened in the statutory law of divorce in India is that the matrimonial bars, which are concomitants of guilt theory (establishing the innocence of the petitioner), are made applicable to consent theory and breakdown theory leading to anomalous results. Customary mode and forum of divorce are still recognized in Hindu law. Muslim law of divorce mostly continues to be non-judicial though judicial divorcee for wife has been statutorily recognized. Divorce by unilateral declaration is still recognized in Muslim law.

The Indian Divorce Act, 1869 openly adopted English matrimonial causes and English grounds of divorce. Section 7 of the Act still permits courts to apply principles and rules of English matrimonial law as nearly as possible. The grounds of divorce were and are still the same as existed in 1869 in English law. A marriage may be dissolved on the petition of husband on the ground of wife's adultery and on wife's petition on the ground that the husband has changed his religion and has married again, or has been guilty of incestuous adultery[29] or bigamy with adultery or marriage with another woman with adultery, or adultery coupled with cruelty or adultery coupled with desertion without reasonable cause for a period of at least two years or of rape, sodomy or bestiality.

Since Parsi law does not recognize annulment of marriage, some of the traditional grounds of annulment of marriage have been made grounds of divorce. A Parsi marriage may be dissolved on any one of the following Ten grounds.[30] There are three grounds which are related to pre marriage impediments such as willful refusal to consummate the marriage by the defendant, even though one year has elapsed since its solemnization; the defendant was of unsound mind at the time of marriage and continuous to be so till the filing of the suit which should be filed within three years of marriage and the plaintiff should not have been aware of the defendant's insanity at the time of marriage; pre-marriage pregnancy of the defendant (the requirements are the same as under Hindu law). The rest of the grounds relate to post-marriage guilts or faults. These are: that defendant committed adultery, fornication, bigamy, rape or an unnatural offence (petition on any one of the grounds should be filed within two years of the knowledge of the act); that defendant caused grievous hurt to the plaintiff, or infected her

29. For distinction between this and the preceding ground, see *Susama* v. *Sailendra Nath* AIR 1961 Cal. 373.

30. Two grounds were added by the Amenetment Act of 1988 and one was deleted.

with venereal disease or compelled (when defendant is husband) her for prostitution (the suit must be filed within one year of the infliction of grievous hurt, knowledge of the infection or cessation of last act of prostitution, as the case may be); that defendant is undergoing a sentence of imprisonment for seven years or more for an offence under the Indian Penal Code (petition cannot be filed before the expiry of at least one year's imprisonment) ; at least two years desertion or non-resumption of marital intercourse for a period of two years or more after the passing of a decree of judicial separation or of an order granting separate maintenance to the plaintiff ; the defendant's failure to comply with the decree of restitution of conjugal rights for a period of one year or more; or the defendant has ceased to be Parsi, though a suit will not be allowed if it is filed two years after the knowledge of defendant's conversion. Insanity and cruelty on the same pattern as under the Hindu Marriage Act, 1955 were added to ground of divorce by the Amending Act of 1988.

The Special Marriage Act, 1954 as amended by the Marriage Laws (Amendment) Act, 1976 has recognized eight grounds based on guilt on which either party may seek divorce and two additional ground on which wife may seek divorce, *viz.*, rape, sodomy or bestiality of the husband. The eight grounds are: adultery; desertion lasting at least three years; respondent undergoing a sentence of imprisonment for seven years or more for an offence under the Indian Penal Code; cruelty; venereal disease in a communicable form, leprosy (only if the disease was not contracted by the respondent from the petitioner); incurable insanity or continuous or intermittent mental disorder[31] of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent, and presumption of death (respondent not been heard of as alive for a period of seven years or more).

The Hindu Marriage Act, 1955 as amended by the Marriage Laws (Amendment) Act, 1976 lays down seven grounds, based on guilt for divorce; adultery; conversion to a non-Hindu religion; incurable insanity or mental disorder,[32] virulent and incurable leprosy; venereal disease in a communicable form, taking to *sanyasa* (*i.e.*, renunciation of world by entering into a holy order) and presumption of death.

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31. Mental disorder has been defined as mental illness, arrested or incomplete developments of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia. The expression 'psychopathic disorder' means a persistent disorder or disability of mind (whether or not including sub-normality or intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the respondent whether or not it requires or is susceptible to medical treatment.
32. The definition of insanity and mental disorder is the same as under the Special Marriage Acts 1954-76. See the note above.

All the aforesaid four statutes recognize the usual matrimonial bars of English law. Doctrine of strict proof applies; collusion and unreasonable delay bar all reliefs. The residuary clause that there should be no other legal ground for refusal of relief has been enacted in all statutes except the Indian Divorce Act. Condonation, connivance and accessory bars apply to all grounds under the Parsi Marriage and Divorce Act. Under the Hindu Marriage Act, condonation applies to cruelty and adultery, while connivance and being accessory apply only to adultery. The same is the position under the Special Marriage Act. All the three bars apply to adultery under the Indian Divorce Act. Under the Indian Divorce Act petitioner's own adultery, cruelty or desertion are bars to relief and resumption or continuation of cohabitation is essential to constitute condonation. The Hindu Marriage Act contains something akin to English law's 'conduct conducing' and lays down that the petitioner should show that he or she is not taking advantage of his own wrong or disability. The bar does not apply when annulment of marriage is sought on the basis of respondent's insanity.

The Special Marriage Act and the Hindu Marriage Act, as amended by the Act of 1976, provide for divorce by mutual consent. Requirements for the presentation of petition are: parties have been living separate for one year or more, they have not been able to live together and they have mutually agreed for divorce. The decree of divorce may be passed on the motion of both the parties, made not earlier than six months and not later than eighteen months after the date of the presentation of the petition, provided the court is satisfied particularly as to the fact that consent has not been obtained by force, fraud or undue influence.

Section 27 (2) of the Special Marriage Act, 1954, and sections 13 (1A) and 6 of the Hindu Marriage Act, 1955, recognize the breakdown theory of divorce after the amendments in the year 1976. In the Hindu Marriage Act before the amendment of 1964 and in the Special Marriage Act before the amendment of 1970, it was laid down that a petitioner who had obtained a decree of restitution of conjugal rights or judicial separation, might present a petition for divorce on the ground of non-compliance with the decree by the respondent for a period of two years or more in the former case, and on the ground of non-resumption of cohabitation for two years or more in the latter case. The breakdown principle was introduced in both the enactments by laying down that in either case either party may present a petition. Under the Special Marriage Act the period of non-compliance or non-resumption was reduced to one year, while under the Hindu Marriage Act the period of two years was retained in both cases. Now the Marriage Laws (Amendment) Act, 1976 has reduced this period to one year under the Hindu Marriage Act also. This came for interpretation before the courts and they held that so far as it concerns the respondent in the original petition he cannot be granted

relief if it would amount to giving him or her advantage of his or her own wrong.[33]

Divorce under Muslim law may be discussed under the following three heads: (a) unilateral divorce, *i.e.*, divorce by husband, (b) divorce by mutual consent and (c) judicial divorce which is available only to the wife. In the first two, no intervention of the court is required.

A Muslim who has attained puberty and is of sound mind has the power to divorce his wife whenever he wants to do so, and he need not assign any cause for doing so. He can do so even in the absence of the wife. This is known as *talak*. *Talak* may be oral or in writing. Intention to divorce must be clear and unequivocal. Under Shia law *talak* must be pronounced orally in the presence of two competent witnesses; only in very exceptional cases it may be in writing, such as when husband is incapable of pronouncing it. *Talak* may be classified under two heads: (a) *Talak-i-sunna* (in approved form), and (b) *Talak-ul-bidaat* (unapproved form). The former has two forms, *ahsan* and *hasan*. *Ahsan* form consists of a single pronouncement during *tuhr* (period between two menstruations) followed by abstinence from sexual intercourse during the period of *iddat*. It becomes effective and irrevocable after the expiry of the period of *iddat*. *Hasan* form takes the shape of three pronouncements made during three successive *tuhrs*. It is essential that no sexual intercourse should take place during any of the three *tuhrs*. Divorce is complete and irrevocable on the third pronouncement. *Talak-ul-bidaat* may be either three pronouncements made during one *tuhr*, in one sentence, such as "I divorce thee thrice" or in three separate pronouncements, such as, "I divorce thee, I divorce thee, I divorce thee". It may also be a single pronouncement made during a *tuhr* indicating an intention to divorce irrevocably. It is effective and irrevocable the moment it is pronounced.

Muslim law not merely empowers the husband to divorce his wife by *talak*, it also empowers him to delegate this power to any third person or the wife herself. This is known as *talak-i-tafweez*. Contingent divorce is also recognized. A *talak* may be pronounced so as to take effect on the happening of a future event. Similarly, an agreement entered into between husband and wife before or after marriage under which it is provided that the wife would be at liberty to divorce herself in specified contingencies is valid. Conditions should be reasonable and not opposed to public policy. Muslim law recognizes divorce under compulsion, or in a state of voluntary intoxication. In such a case words must be expressed to indicate an intention to divorce irrevocably.

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33. See Paras Diwan, "The Breakdown Theory in Hindu Law of Divorce", *Lawyer*, 1969, pp. 191-204 and cases discussed there.

Muslim law also recognizes constructive divorce. It has two versions *ila* and *zihar*. *Ila* is effected by taking a vow of abstinence from sexual intercourse for at least four months and when the vow is fulfilled it means divorce. According to the Shafei school this does not operate as divorce but entitled the wife to seek judicial divorce. In *zihar* form the husband compares his wife to a woman within prohibited degrees, such as mother. This entitles the wife to seek judicial divorce unless the husband undergoes some penance by way of expiation. Despite the fact that they have been mentioned in the Muslim Personal Law Application Act, 1937, they may be treated as obsolete forms in India.

The divorce by mutual consent has two forms: *khula* and *mubaraat*. In both forms two elements are necessary: (i) common consent of the husband and the wife (ii) some consideration *(iwad)* must pass from the wife to the husband and in this sense it is more in the nature of purchased divorce.[34] The distinction between the two is that in the former aversion is on the side of the wife and desire to separate emanates from her, while in the latter aversion is mutual and proposal may emanate from either side. Once the offer is accepted, divorce is complete and irrevocable. The *iwad* may be money or other property, movable or immovable, though generally it is dower *(mahr)* or some portion of it that she undertakes to give up.

Apostasy from Islam results in dissolution of marriage. In the case of Muslim husband it is automatic, while in the case of Muslim wife, because of the Dissolution of Muslim Marriage Act, 1939, she has to sue for divorce.

Muslim wife had, as may be obvious from the foregoing, practically no right of divorce. In 1939 legislature intervened and Muslim wife was given right to seek judicial divorce by suit on certain grounds. The grounds under the Dissolution of Muslim Marriages Act are: (a) whereabouts of the husband are not known for a period of four years, (when suit is filed on this ground near relations of husband are to be given notice and they have a right to be heard, and a decree passed pursuant to this ground will not be effective for a period of six months from its date, and if the husband appears within this period, the decree will not be effective); (b) husband's failure or neglect to provide maintenance to the wife; (c) husband being sentenced to imprisonment for a period of seven years or more (sentence of imprisonment should be final); (d) husband's failure without reasonable cause to perform marital obligations for a period of three years or upwards; (e) husband's impotency at the time of marriage and its continuance till the filing of the suit; (f) husband's insanity for at least two years or leprosy or virulent venereal disease; (g) exercise of right of repudiation by the wife, *i.e.*, if the wife was married by a guardian when she was minor (*i.e.*, below 15 years) and she repudiated it before attaining the age of eighteen years and

34. See Fyzee, *Outlines of Muhammadan Law*, 4th ed., 1974 pp. 163-166.

before the consummation of marriage; (h) the husband's cruelty; and (i) any other ground on which wife may divorce her husband under Muslim law. Cruelty has been given a very wide meaning. It includes both physical cruelty and mental cruelty. The following acts on the part of the husband constitute cruelty; husband's association with women of evil repute, his leading infamous life, husband's attempt to force her to lead an immoral life, husband's disposal of wife's property or preventing her from disposing of her property, husband's obstruction in the observance of her religious practices, and unequal treatment in case husband has more than one wife.

It seems that the only ground that Muslim law recognized on the basis of which wife could divorce the husband was *lian* or imprecation, *i.e.*, false charge of adultery. This was available only in the case of a valid marriage, and not when marriage was irregular. The husband's retraction of the charge before the commencement of the proceeding nullifies the ground. On the question whether husband's retraction after the filing of the suit will have the same effect, judicial opinion is divided.[35]

Jurisdiction and procedure

Both under the Special Marriage Act and the Hindu Marriage Act the jurisdiction to entertain matrimonial proceedings is conferred upon the district court. Any petition for nullity of marriage, restitution of conjugal right, judicial separation or divorce can be presented to the district court within the local limits of whose jurisdiction (a) the marriage was solemnized, or (b) the husband and wife reside, or (c) last resided together or (d) the petitioner is residing, in a case where respondent is residing abroad or has not been heard of as being alive for a period of seven years.[36] Under the former statute a petition for nullity of marriage or divorce may also be presented to the district court by a wife who is domiciled in India (including Jammu and Kashmir) or if she is resident in India and has been ordinarily resident there for a period of three years immediately preceding the presentation of the petition, even if the husband is not resident in India. Under the Hindu Marriage Act jurisdiction may also be conferred on a subordinate civil court by any state government by issuing a notification in the official gazette. The Marriage Laws (Amendment) Act, 1976, now lays down that the trial of a petition under the Hindu Marriage Act 'shall', so far as is practicable consistently with the interest of justice in respect of the trial, be continued from day to day until its conclusion, unless the court

35. *M.M.E. Querashi* v. *Hazrabai* AIR 1955 Bom. 265 (retraction can be made at any time before the close of trial) and *Kalloo* v. *Imaman* AIR 1949 All. 445 (it cannot be made after the filing of suit). See also Mulla, *Principles of Mahomeden Law*, 17th ed. 1972, p. 276.

36. This jurisdictional ground has been added by the Marriage Laws (Amendment) Act, 1976.

finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded. It is also laid down that the court shall endeavor to conclude the trial within six months and appeal within three months, from the date of service of notice of the petition or appeal, as the case may be.

The Parsi Marriage and Divorce Act visualizes establishment of special courts: Parsi chief matrimonial courts in the Presidency and Parsi district matrimonial courts in the *mofussils*. The former is presided over by a judge of the high court and the later by the district judge. In the trial of the suit, the court is to be assisted by seven delegates selected from a panel appointed by the state government. All questions of law and procedure are decided by the court; and, of facts by majority of delegates; if the delegates are equally divided, the judge also decides the question of fact. A suit for any matrimonial relief may be brought before the court within whose jurisdiction the defendant resides at the time of the institution of the suit and in case the defendant has left India, before the court within whose jurisdiction the parties last resided together. The court has also discretion to allow a suit to be filed on the basis of plaintiff's residence at the time of the suit or at a place where the parties last resided together.

Under the Divorce Act jurisdiction is conferred on the high courts as well as on the district courts. 'District Court' is defined, in reference to any petition under the Act, as the court of district judge within the local limits of whose ordinary jurisdiction the husband and wife reside or last resided together. A petition under the Act may be filed either in the high court or in the district court. A decree of dissolution of marriage passed by the district court is subject to the confirmation by the high court. Similarly, a decree of nullity of marriage also needs confirmation by the high court. High court also has the extraordinary jurisdiction to remove to itself for trial any suit or proceedings instituted in the district court.

The Dissolution of Muslim Marriages Act does not provide that the suit for divorce is to be filed in any specific court. It can be filed in any civil court depending on how the suit is valued.

The provisions of the Code of Civil Procedure have been modified by statutes that are applicable to matrimonial proceedings. The Law Commission of India in its 59th Report has stressed the need for simplification of the procedure in respect of family disputes so as to enable the parties to get speedy redressal, and in compliance of the Report of the Law Commission, certain amendments have been brought in 1976 for the Code of Civil Procedure incorporating order 32-A which provides for a special procedure for matrimonial matters and other family disputes. However, the courts are continuing to deal with the family matters in a routine manner, as a regular civil dispute, and the object of bringing about the amendments to the Code of Civil Procedure have not been achieved.

Thereby the Parliament felt necessary to enact a special law and special Code for effective settlement of the family disputes, and thus came the enactment of Family Court Act, which was enacted in the year 1984, bringing in its fold all family matters between husband and wife, and their children.

A family court is supposed to provide a more informal forum for settling disputes between spouses. The judges of the family court are required to try and bring about reconciliation between the parties and settle the dispute amicably. The judges routinely refer the parties to marriage counseling. This does not mean that divorce or separation is not available. The judges will grant the divorce or any other matrimonial relief sought for if reconciliation fails.

The peculiarity of the family court is that it covers all sections of people, irrespective of caste, creed and religion. The disputes which can be entertained under various enactment are brought under the purview of the family courts, whether the disputes are under the Hindu Marriage Act, 1955 or Special Marriage Act,1954 or under the Christian Marriage Act, the parties have to approach the family court. Wherever a family court is constituted, the jurisdiction of other civil court is ousted and the matters have to be brought only before the family courts.

Alimony, maintenance and dower

The English concept of alimony has been adopted in the Indian Divorce Act, 1869. The matrimonial court has the power to pass orders for permanent as well as temporary alimony irrespective of the fact whether the petition is filed by the husband or the wife. Section 36 lays down that the amount of alimony *pendente lite* in no case can exceed one-fifth of the husband's average net income for three years next preceding the date of the order. Order for temporary alimony can be made in all the four matrimonial causes. Orders for permanent alimony can be made only in matrimonial causes of judicial separation and divorce. Such claim can be made only when a decree granting judicial separation or divorce is made. The court has power to secure to the wife such gross sum of money or such annual sum of money as having regard to her other resources, if any, to the ability of the husband, and to the conduct of the parties, it thinks reasonable. The court has also power to make an order requiring the husband to pay to the wife such monthly or weekly sum for her maintenance and support as the court may think reasonable. The court also has power to modify the orders subsequently on sufficient cause being shown.

Substantially the same provisions relating to alimony *pendente lite* and permanent alimony are found in the Parsi Marriage and Divorce Act. Section 40 specifically lays down that orders for permanent alimony shall remain effective only so long as wife remains chaste and unmarried. The

Parsi matrimonial court has also the power to require 'a proper instrument to be executed by all necessary parties and suspend the pronouncing of its decree until such instrument' is executed.

The English concept of alimony implies that an order can be passed against the husband. It can never be passed against the wife, with one exception, namely, when the wife obtains a decree on the ground of husband's insanity. The term permanent alimony is used when orders are passed against the husband in proceedings for judicial separation. The term 'maintenance' is used when orders are passed against the husband in proceedings for divorce. English law has now extended this provision in respect of nullity proceedings also. Such orders can be passed only after a decree has been made absolute. The Indian Parliament while enacting the Special Marriage Act deemed it proper to make the provision applicable to all matrimonial causes. Under the Hindu Marriage Act orders can be passed not merely against the husband but also against the wife. What amount of temporary and permanent alimony is to be fixed is left to the discretion of the court. The court is required to take into consideration all factors, such as incomes and property of both the parties, ability to pay and the conduct of the parties. Such payments can also be secured, if necessary, by a charge on immovable property. Such orders can be varied, modified and rescinded on change of circumstances being shown by either party. Orders for permanent alimony and maintenance may be rescinded if it is shown that the party in whose favour such orders were made has remarried or is leading an immoral life. In both the enactments permanent alimony is called "permanent alimony and maintenance".

There has been nothing like alimony and maintenance in Muslim law. After the dissolution of marriage the obligation to maintain continues during the period of *iddat*. On the completion of *iddat*, the husband has no obligation whatsoever to provide maintenance to the wife. The reason seems to be the existence of another provision in Muslim law, namely, dower (*mahr*). *Mahr* is an integral part of every Muslim marriage, whether or not agreed upon before or after the marriage and it is implied in every marriage. Even when it is not specified, the wife is entitled to proper dower (*mahr-i-misi).* She is entitled to *mahr-i-misi* even if marriage is contracted with the express stipulation that she would not claim any such sum. In determining what is proper dower, regard is usually had to the amount of dower settled upon other women in her father's family. *Mahr* is defined as 'a sum of money or other property which the wife is entitled to receive from the husband in consideration of marriage'.[37] However, it should be noted that the word 'consideration' is not used in the sense it is used in the law of contract. A marriage without any stipulation of dower is valid. The amount

37. Mulla, *Principles of Mahomedan Law*, 17th ed., 1972 and Ameer Ali, *Supra* note 3 at 432.

of dower is usually split into two, *prompt* which is payable on demand immediately after marriage and *deferred* which is payable on the dissolution of marriage. Where it is not split up into two, the Shia law holds that the whole amount is payable as prompt dower, while Sunni law regards part as prompt and part as deferred.

The wife has power to remit the whole or any part of the dower. The dower is recoverable as debt and the wife can sue for it, and, after her death, her heirs can sue for it. However, dower is not a secured debt. But if she is in possession of property of her deceased husband, she can retain possession till her dower is paid. The moment she is paid the amount, the right is extinguished. She is accountable for rents or profits of the property during the period she has been in possession.

The Supreme Court decision in *Shah Bano's*[38] case was subject to a prolonged agitation by Muslim fundamentalists, resulting in the passing of the Muslim Women (Protection of Rights on Divorce) Act, 1986. It is claimed, *inter alia*, that the Muslim women would get much more under the Act than section 125 of the Code of Criminal Procedure, 1973 and that the Act should be welcomed as the first step towards codification.[39] The Preamble of the Act spells out the objectives of the Act as "the protection of the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands". The Act makes provisions for matters connected therewith or incidental thereto. It is apparent that the Act no where stipulates that any of the rights available to the Muslim women at the time of enactment of the Act, has been abrogated, taken away or abridged.

The Act lays down that a divorced woman is entitled to have a reasonable and fair provision of maintenance from her former husband, and the husband must do so within the period of *iddat* and his obligation is not confined to the period of *iddat*. If she fails to get maintenance from her husband, she can claim it from relatives, failing which, from the Wakf Board. An application of the divorced wife can be disposed of under the provisions of sections 125 to 128 of the Code of Criminal Procedure, 1973, if the parties so desire. Applications pending under section 125 of the Code are required to be disposed of under the Act.[40] There is no provision in the Act, which nullifies order passed under section 125 of the Code. The Act also does not take away any vested right of the Muslim women.[41] The provision is made under the Act and the rules framed thereunder for the expeditious disposal of applications, and hearing should be ordinarily, continued from day-to-day. All obligations of maintenance end with her

38. *Mohammed Ahmed Khan* v. *Shah Bano Begum* (1985) 2 SCC 556.
39. Paras Diwan, *Law of Marriage and Divorce*, 2002, p.750.
40. *Hafigabai* v. *Suleman* AIR 1999 Bom. 79.
41. *Idris Ali* v. *Rashma Khatun* AIR 1989 Gau 24.

marriage.

The Act, thus, secures to a divorced Muslim woman sufficient means of livelihood so that she is not thrown on the street without a roof over her head and without any means of sustaining herself.

Custody of children

Following English law all the four Indian statutes—the Hindu Marriage Act, the Special Marriage Act, the Parsi Marriage and Divorce Act and the Indian Divorce Act—empower the court to pass orders for custody, access, education and maintenance of children, during the pendency of proceedings as well as after a decree is passed granting the relief in a matrimonial cause.

The proviso has been inserted in section 26 of the Hindu Marriage Act, 1955[42] and section 38 of Special Marriage Act, 1954[43] providing for disposal of application for maintenance and education of the minor children within sixty days from the date of service of notice on the respondent.

In these matters the court is invested with broad powers and wide discretion. In all proceedings in respect of children, the court considers primarily the welfare of the children. The court no longer denies custody to the party who was responsible for breaking up the marriage.

No such statutory provision exists in Muslim law. The matter is covered under the Muslim law of guardianship and custody *(hizanat).*[44]

IV

Legitimacy And Adoption

Legitimacy

Ancient Hindu law recognized as many as thirteen types of sons in an effort to minimize illegitimacy. Wherever there was a semblance of marriage, the child born within the wedlock was recognized as letigimate. A Hindu male could have a son by contract (*svyamdatta* and *kritrima)*, by gift (*datta*) or by purchase (*krita*). Most of such sons had an inferior status and were called secondary sons. Children born outside wedlock were considered illegitimate but they were members of their father's family and were entitled to life-long maintenance against their putative father and after his death against his property. Hindus did not consider an illegitimate child *filius nullius.* Most categories of secondary sons became obsolete in the post-*Dharmasastra* period and during the British period only *aurasa* (natural born legitimate

42. Ins by Act 49 of 2001, s. 9 (w.e.f. 24-09-2001).
43. Ins by Act 49 of 2001, s. 7 (w.e.f. 24-09-2001).
44. For details see Paras Diwan, *Parental Control, Guardianship and Custody of Minor Children.*

child) and *dattaka* (adopted child) remained and thus the distinction between primary and secondary sons disappeared.

Following English law, and taking a step ahead now in Indian law, the Hindu Marriage Act and the Special Marriage Act, confer a status of legitimacy on children of voidable and void marriages.[45] But unfortunately, the effort is half-hearted. We qualify this status of legitimacy by laying down that such children will inherit the property of none else but their parents. Thus we have re-created a category of secondary sons.

Hindu laws as well as laws of other communities do not recognize legitimation of illegitimate children.

Like that of Hindu law-givers, the effort of Muslim law-givers was also to minimize illegitimacy. This is the reason for the existence of the notion of irregular (*fasid*) and temporary (*muta*) marriages.[46] But if there was no semblance of marriage, the child was bastard, a *filius nullius*. Muslim law-givers did not create any mechanism by which somebody else's child could be made one's own. Muslim law also does not recognize legitimation.

Muslim law recognizes another principle, namely acknowledgement of paternity. It is not legitimation, as under Islamic law an illegitimate child cannot be legitimated by acknowledgement. But it is akin to legitimation in the sense that it confers a status of legitimacy on children of doubtful paternity, *i.e.*, when it is neither proved that child is legitimate nor it is proved that child is illegitimate. Acknowledgement may be express or implied. The conditions of acknowledgment are: children should not be off-springs of *zina* (adultery, incest or fornication); the child acknowledged must not be known to be the child of another person; acknowledger should accept the child as his legitimate son or daughter; the difference in the age of the acknowledger and of the child should be such that the former can be the father of the latter, and the child must not repudiate the acknowledger as his father. Acknowledgement once validly made is irrevocable. Acknowledgment not merely confers a status of legitimacy on the child but it also raises a presumption of a valid marriage between the acknowledger and the mother of the child acknowledged.

Adoption

Only Hindu law recognizes adoption. However, the adoption and appointment of son is allowed in some communities by custom.[47] Hindu

45. See s. 26 of both the statutes as amended by the Marriage Laws (Amendment) Act, 1976.
46. It is recognized only among Shias.
47. It seems that by custom Parsis can adopt in two forms: *palukaputra* and *dharamputra*. Sikhs and Jats of Punjab and Haryana had the power of appointing a son (or heir) under their customary law. This power has been taken away by the Hindu Adoptions and Maintenance Act, 1956.

law of adoption has now been codified in Chapter II of the Hindu Adoptions and Maintenance Act, 1956.

Before 1956 it was a moot point whether adoption in Hindu law was a purely secular act or a religious act. That controversy no longer exists and adoption under modern Hindu law is essentially a secular act. Hindus perfected the institution of adoption so well that distinction between natural son and adopted son was almost blurred; distinction was made only between an adopted son and a subsequently born natural son. That distinction has also been done away with. Adoption is based upon a legal fiction recognized for the furtherance of individual interest. Now it is also used for the furtherance of the social interest of providing a home to orphans, and to destitute and abandoned children. The law of adoption enables a childless person to have a child and also enables a parentless child to have a parent. Hindus refined the institution and in the past held the view that adopted son must bear the reflection of a natural son and laid down many rules to enable an adopter to achieve that aim. According to Hindu law adoption means removal of the child from the natural family and its transplantation in the adoptive family so much so that all his ties with the natural family are broken except the blood relationship for the purpose of marriage, and corresponding ties in the adoptive family come into existence. He is not merely related to adopters, but he is also related to all relations both on maternal and paternal side. An adoption validly made cannot be cancelled. Nor can an adopted child renounce its adoptive parents and return to its natural family. An adopted child can also not be again given in adoption. Old Hindu law did not permit adoption of girls except by custom. A female was also not allowed to adopt a child except in the Mithila School where she could do so in *kritrima* form. Now adoption of both a male and a female child is permitted. But one cannot still adopt more than one son or one daughter.

Under the Hindu law any Hindu male or female who is a major and of sound mind has capacity to adopt. If a Hindu male adopter is a married person, the consent of the wife is essential, and if he has more than one wife, consent of all of them is essential. However, consent of wife may be dispensed with if she has renounced the world or has ceased to be a Hindu or has been declared to be of unsound mind by a court of law. A married woman cannot adopt a child even with the consent of her husband. However, in case the husband has ceased to be a Hindu, has renounced the world or has been adjudged as of unsound mind, she can adopt. After the death of her husband also she can adopt. A Hindu can adopt a male child only when he or she has no son, son's son or son's son's son, and a female child when he or she has no daughter or son's daughter. If a Hindu adopts a child of the opposite sex, he or she must be senior to the child by at least twenty-one years. Two persons, unless they are husband and wife, cannot

adopt the same child.

Under the old Hindu law only parents have capacity to give the child in adoption. Under the modern Hindu law a guardian can also give a child in adoption. So long as father is alive, he alone has the right to give the child in adoption though he can do so only with the consent of the mother of the child. After the father, the mother has the capacity to give the child in adoption. However, mother may give the child in adoption even during the lifetime of the father, if father has ceased to be a Hindu, has renounced the world or has been adjudged as of unsound mind. Father does not mean adoptive father, step father or putative father. Mother also does not mean adoptive mother or step-mother. The mother of an illegitimate child can give the child in adoption and consent of the putative father is not necessary. His dissent is immaterial. After the parents, the guardian can give the child in adoption; the guardian includes both *de jure* and *de facto* guardian. Guardian can also give the child in adoption if parents have renounced the world or have been declared to be of unsound mind, or have abandoned the child. A child, whose parentage is not known, like a refugee child or foundling, can also be given in adoption. An illegitimate child can also be adopted. Adoption can be made only of a Hindu child who is not already an adopted child. It is also required that the child should not have completed the age of fifteen years and should not have been married. But if custom permits adoption of a married child or a child of fifteen or above, then such an adoption will be valid.

Under Hindu law when a parent gives the child, no adoption order of any court is required. The act is regarded as essentially a private act. But when the guardian proposes to give the child in adoption, an order is necessary. The court will not pass an order unless it comes to the finding that the proposed adoption is for the welfare of the child. The court will also see that no bargain is involved in adoption.

The only formality that is required for adoption is the ceremony of giving and taking. The ceremony of *dattahoma* or any other religious ceremony is no longer necessary. The registration of adoption is also not necessary though parties are free to execute a registered deed. The Act lays down that a registered deed raises a presumption that the adoption has been validly made.

The Hindu Adoptions and Maintenance Act lays down that adoption will be valid from the date it is made there by abolishing the doctrine of relation back. It also lays down that the child will not be divested of any property vested in him or her before he or she was given in adoption. Similarly, no person will be divested of the property already vested in him or her by reason of the adoption. It further lays down that in case a person having more than one wife adopts, the senior wife (senior by marriage) will be adoptive mother and rest will be step-mothers of the adoptive child.

When a bachelor, a widower or unmarried woman or a widow adopts a child, and, subsequently marries, the spouse will be the step-parent of the child. The Act does not lay down the relationship of the child with the ex-spouse, such as divorced spouse, deceased spouse, spouse of a void marriage declared null and void and spouse of an annulled voidable marriage. Nor does it lay down the relationship of the child in those cases where a married person adopts a child dispensing with the consent of his spouse because the latter has renounced the world, or ceased to be a Hindu or been adjudged of unsound mind. It is submitted that it was not necessary to provide for such cases, as there cannot be any relationship. But the Supreme Court has held that a child adopted by a widow is related to her deceased husband as adoptive child.[48] So there may be relationship by implication in the other cases also. The Supreme Court has also held that a son adopted by the widow of the deceased coparcener will also be a coparcener with the surviving coparceners of the deceased husband.[49]

V

Minority and Guardianship

Under the old Hindu law the age of majority was attainment of fifteen or sixteen years of age, according to the school of Hindu law to which one belonged. Now in all matters it is the age of eighteen years. In Muslim law the attainment of puberty is considered to be the age of majority. Attainment of fifteen years raises the presumption of puberty. In matters of marriage, dower and divorce, this is still the age of majority. Otherwise it is the attainment of the age of eighteen years. Leaving aside the age of marriage, the provisions of the Indian Majority Act, 1875 apply to all communities. Under the Act on the attainment of the age of eighteen years a person attains the age of majority. If a guardian of the person has been appointed under the Guardians and Wards Act, 1890 then the age of majority is raised to twenty-one.

The Guardians and Wards Act, 1890 which contains the law of guardianship (predominantly relating to guardians appointed by court), applies to all persons irrespective of the community to which they belong. The modern Hindu law of guardianship is codified by the Hindu Minority and Guardianship Act, 1956, the provisions of which are in addition to, and not, save as expressly provided, in derogation of the Guardians and Wards Act. The Guardians and Wards Act also applies to Muslims.

Guardians may be classified as (i) natural guardians and (ii) appointed guardians. The latter are of two types—testamentary guardians appointed by

48. *Sawan Ram* v. *Kalawant* AIR 1967 SC 1761.
49. *Sitabai* v. *Ramchandra* 1970 SC 343. See also Paras Diwan, *supra* note 1 at 208-213.

a natural guardian under a will and certificated guardians appointed by the court. Hindu law also recognizes guardians by affinity and *de facto* guardians. Guardians may also be classified as general guardians and particular guardians. Under the former would come guardians of person or property and under the latter would come certain types of guardians who exist only for a specific purpose, such as guardians for marriage and guardians in litigation (guardians *ad litem).* Here we would review the legal position of some of these types of guardians.

Natural guardians

Under the modern Hindu law father is the natural guardian of his minor legitimate children though mother is entitled to custody of the child upto the age of five. Mother is the natural guardian of her illegitimate children and after the death of the father of her legitimate children.[50] Husband is the natural guardian of his minor wife.[51] This implies that the parent ceases to be the guardian of a girl on her marriage. After the death of the mother, putative father is the natural guardian of his illegitimate children. A step-parent is not a guardian of step-children. A minor may be the natural guardian of the person of his children, but cannot be of property. A natural guardian of a minor is not the guardian of minor's interest in coparcenary property.

Regarding the custody of minor below five years of age, the court has interpreted these provisions quite ingeniously. Section 6 of the Minority and Guardianship Act, which purports to specify a natural guardian of a minor with reference to his person or property, makes a distinction between guardian and custody. The father is first declared to be the natural guardian in the case of a boy or an unmarried girl. Only thereafter, the claim of the mother as a guardian is provided for. This is with reference to guardianship, which in its original connotation takes in custody and care of the minor, which could be equated to the guardianship of a person and custody and control of the property which is really guardianship with reference to the property of the minor. The proviso to section 6 (a) carves out a special right relating to custody in favour of a mother in cases where the infant has not completed the age of five years. In such a case, a preferential claim for custody is conferred statutorily on the mother and the father, though he would still be the natural guardian of an infant, would not be, as of right, entitled to the custody of the infant if the infant has not completed the age

50. See *Jijabai* v. *Pathankhan* AIR 1971 SC 315 where the Supreme Court held that in certain circumstances mother can act as natural guardian even during the life time of the father.

51. See paras Diwan, *Parental Control, Guardianship and Custody of Minor Children, supra* note 1, at 167-183.

of five years.[52]

The mother of the child shall not suffer disqualification to have custody of the child for the mere fact that she is not residing with her husband or that she had not forsaken voluntarily her husband's company, she should not be penalized. That apart, importance must be attached to the main rider, namely, she resides "at a distance from the father's place of residence." Indeed the court must read the underlying meaning of the rider. Even if the mother must have custody of the child of the tender age, till he attains the age of seven years, the father must not be denied access to the child.[53]

Under Muslim law father is the natural guardian of the person and property of his minor legitimate children.[54] Muslim law does not provide for the guardianship of illegitimate children. Mother is not the guardian of her minor children even after the death of the father. This deficiency is more than off-set by the Muslim law of *hizanat (*commonly translated as custody, though in the submission of the original writer it is more in the nature of 'care and control'). Under the Hanafi school the mother is entitled to the *hizanat*, and father is not, of male children up to the age of seven years, and of female children up to the age of puberty. Under the Shia law the age is lower, of male child up to the age of two, of female child up to the age of seven. Among the Malikis, Shafeis and Hanbalis *hizanat* of female child continues till she is married and of male child till he attains puberty. On attaining puberty, *hizanat* belongs to the father. If the girl is married before attaining puberty, then mother's right of *hizanat* continues and the husband cannot claim custody either under section 25 of the Guardians and Wards Act or by filing a petition for restitution of conjugal rights. After the mother, the right of *hizanat* to which mother is entitled goes to certain females, then to father and other male relatives.

Under Hindu law, no person can remain a natural guardian if he ceases to be a Hindu or has become a *vanaprasthi* or *sanyasi* or *yati* (*i.e.*, has renounced the world). Under Muslim law, in the case of mother (unless she is a non-Muslim) apostasy is a disqualification. Other disqualifications are the following her marriage with a *ghair-mahram* (a person not related to the child within prohibited degrees), her misconduct, her insanity, her neglect of, or cruelty to, the child and her going away to reside at a distant place.

Among Parsis, Christians and other communities, father is the natural guardian of his minor legitimate children and after the father, mother is the natural guardian.

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52. *Kauppannan* v. *Sudhamathi* 1993 (2) HLR 506 (Mad.).
53. *Mumtaz Begum* v. *Mubarak Hussain* AIR 1986 MP. 221.
54. See Paras Diwan, *Parental Control, Guardianship and Custody of Minor Children, supra* note 1 at 167-183.

Testamentary guardians

In Hindu law, a parent who is competent to act as natural guardian can appoint a testamentary guardian. The power in the first instance belongs to the father. After the father, it belongs to the mother. If mother survives the father, the testamentary guardian appointed by the father will be ineffective. If mother dies without making a testamentary appointment, the testamentary guardian appointed by father will act as such. If mother dies after appointing a testamentary guardian, it will be mother's appointee who will be the testamentary guardian. Such appointments can be made by Will or other testamentary dispositions. Acceptance of guardianship by the appointee is necessary and it may be either express or implied.

A Hindu father, who is entitled to act as the natural guardian of his minor children, is competent to appoint a guardian, by will, for any of them in respect of the minor's person or property, except the undivided interest of the minor in joint family property under the management of an adult member of the family, or in respect of both. Thus, it is clear that a Hindu father/ natural guardian is only entitled to appoint a testamentary guardian for the legitimate children and not for the illegitimate ones. However, what is to be seen is that whether the Hindu father was entitled to act as a natural guardian and the crucial time for such a consideration is the time of his death, because the will operates only after death. Clearly, therefore, if before the death, the father ceases to be a natural guardian by reason of his conversion to any other religion or on account of any disability earned by him, the power conferred on him by this provision will cease to have effect.[55]

Testamentary guardian has all the powers of a natural guardian unless they are limited by the deed appointing him as guardian.

Under Muslim law the power of appointment of testamentary guardian belongs to father and mother has no such power. Testamentary guardian is known as *wasi*. After the father, *wasi* can be appointed by father's executor, grandfather, or grandfather's executor. Under the Shia law, grandfather has precedence over father's executor. No other person has the power of such appointment. A testamentary appointment cannot affect the right of persons entitled to *hizanat*. Acceptance by the *wasi* is necessary and it may be either express or implied.

Guardians by judicial appointment

The court has the power of appointing guardians of minors belonging to any community. The district court makes the appointment under the Guardians

55. Acharya Shuklendra, *Hindu Law*, Modern Law Publications, 2002, p. 90.

and Wards Act and the high court under its inherent powers or special power conferred under statues. The district court has power to appoint a guardian of the person or property or of both of a minor, though the power does not extent to the Hindu minor's undivided interest in the joint family property. In respect of the latter the chartered high courts have inherent powers. The district court has power to appoint or declare any person as guardian of a minor whenever it is called upon to do so. The welfare of the minor is the paramount consideration though the court takes into account various other factors, such as age, sex, wishes of the child, wishes of the parent, and the personal law of the minor. There is a controversy how far the personal law of the minor can be subordinated to the welfare of the children.[56] Section 19 of the Guardians and Wards Act also lays down that guardian not to be appointed by the court for a minor whose father is not unfit or of a minor wife whose husband is not unfit. Courts have tried to subordinate this rule to the welfare of the children, with some limited success.[57]

Guardians of person and property have various duties, obligations and power. A guardian of the person of the child is charged with the custody of the child and must look to its upbringing and education. He has the right to the custody of the child; right to determine its religion (particularly if he is a natural guardian), right to control education, right to give it in marriage (in case there is no guardian for marriage) and right of personal and other chastisement (particularly in the case of a natural guardian). A guardian of person under old Hindu law has very large powers but in the modern Hindu law by the Minority and Guardianship Act, they have been curtailed to a great extent and have been brought almost at par with those of a certificated guardian. Under Muslim law the powers of the guardian of property have always been limited. He has the power of alienation of property in certain specified cases. His powers over movables are slightly wider. The powers of a guardian appointed by court are strictly controlled by the court and he cannot alienate the minor's properties save with the prior permission of the court. He has the power to do all things necessary for the realization, protection and benefit of the minor's property.

Guardians for marriage

Old Hindu law laid down detailed rules as to guardianship in marriage, particularly in respect to minor girls. The modern Hindu law has simplified the law. The Hindu Marriage Act, 1955 contains the list of persons who can successively act as guardians of marriage: father, mother, paternal grandfather, paternal grandmother and maternal uncle. It is required that the

56. *Supra* note 1 at 151-166.
57. *Mata Din* v. *Ahmed Ali* (1911) 34 All 213 and *Imambandi* v. *Mutsaddi* (1918) 45 Cal. 878.

guardian for marriage must have completed the age of twenty-one years. A person of unsound mind cannot be the guardian. If a person otherwise entitled to guardianship is unfit or unwilling to act, guardianship goes to the one next in order. If there is no guardian for marriage, or the guardians are unwilling, unfit or refuse to act, then the minor girl is free to choose her husband herself. If the consent of the guardian is not obtained the marriage remains valid, though it may entail a fine extending up to one thousand rupees. But if the consent of the guardian was taken by fraud or force, the marriage is voidable at the instance of the girl.

The paternal power of acting as marriage guardian of the minor children is known in Muslim law as the right of *jabr*. According to the Hanafis and the Shias the right of *jabr* over children of both sexes comes to an end on their attaining puberty. Under the Maliki and the Shafei law father's power of *jabr* over unmarried daughters continues till they are married. If a girl is divorced before attaining puberty, the father's right of *jabr* revives.

Only a person of sound mind, of the age of puberty and of Muslim religion can be guardian for marriage. The schools of Muslim law differ as to who can act as marriage guardian after the father. Among the Hanafis, after the father, it passes to agnates, then to certain cognates, then to *maula* (successor by contract) and lastly to the ruler. Among the Shias, after the father, the guardianship goes to the grandfather. No other person is entitled to guardianship in marriage. The Shafeis and Malikis hold the view that the presence of the guardian for marriage is necessary for every marriage of a minor boy and for the marriage of a girl of any age.

When a minor child is given in marriage, the Muslim law gives power to the minor to repudiate or ratify the marriage on attaining majority. If the minor has been given in marriage by the father or the grandfather, ordinarily the contract of marriage is valid and binding on the minor. But if he can show that the guardian acted negligently, or fraudulently or that the marriage is to his manifest disadvantage, the child can repudiate the marriage on attaining majority. In case the marriage is brought about by any other guardian of the child, he can repudiate the marriage on attaining majority without showing any cause. This is called option of puberty (*khyar-ul-bulugh*). Under the Shia law the marriage is wholly void unless ratified by the child on attaining puberty. We have seen earlier that under the Dissolution of Muslim Marriages Act, 1939 the wife can file a suit for divorce on this basis.

In case there is no guardian in marriage of a minor, irrespective of the community to which he belongs, the guardian of the person of the minor (including certificated guardian) may give the child in marriage.

Guardianship by affinity

Guardianship by affinity is a peculiar notion of Hindu law. Under Hindu law

on marriage a girl passes into the *gotra* of her husband and becomes a member of her husband's family. When she is minor, her husband is her guardian. On the death of her husband, a minor widow is under the guardianship of her husband's *sapindas*. This is known as guardianship by affinity. In the absence of the husband's kin, the guardianship goes to her paternal relations. The nearest relation of the husband entitled to guardianship is the father-in-law of the minor widow. There is a divergence in judicial opinion whether guardianship by affinity comes into being by operation of law or whether an appointment by court is necessary. It seems that a guardian by affinity has the same powers as a natural guardian.

On the remarriage of the minor widow, guardianship by affinity comes to an end.

De facto guardians

Hindu jurisprudence has propounded the principle that if liability has been incurred by one on behalf of another where its incurring is justified, then the person on whose behalf liability has been incurred is liable even if no authorization was made for incurring the liability. It was on this basis that the institution of *de facto* guardian emerged in Hindu law.

A mere intermeddler is not a *de facto* guardian. An isolated or fugitive act of intermeddling with child's property by a person will not elevate him to the status of *de facto* guardian. A *de facto* guardian is a person who looks after the property or person of the minor and generally acts in his interest. Some continuous course of conduct in respect of the minor is necessary to constitute a person a *de facto* guardian. Thus, *de facto* guardian is a person who is not a legal guardian, but has himself assumed the charge of the minor or management of his property. *De facto* guardianship is a concept where past acts result in a present status.

In Hindu law a *de facto* guardian has almost the same powers as a natural guardian. Section 11 of the Hindu Minority and Guardianship Act, 1956 lays down:

> after the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor.

Even before 1956 he was not "entitled" to dispose of or deal with the property of the minor. But if he dealt with it or disposed of it, in certain cases his acts were recognized.

It seems that on the basis of certain texts, it was possible to develop the institution of *de facto* guardian in Muslim law also, but the Privy Council did not look at these text with favour and held that the *de facto* guardian has no power of alienation of minor's property. But it seems that the *de facto*

guardian even now has the power to sell and pledge the goods and chattels of the minor in his charge of the minor's imperative necessities.[58]

De facto guardian does not exist under the law of any other community in India.

VI

Hindu Joint Family

The institution of joint family is a fundamental and integral part of Hindu life. The two schools of Hindu law, the *Mitakshara school* and the *Dayabhaga school*,[59] differ fundamentally on the concept of the joint family. The Mitakshara joint family is composed of the common ancestor and all his lineal male descendants up to any generation, together with their wives (or widows) and the unmarried daughters. The common ancestor's existence is necessary for bringing the joint family into being, for its continuance his existence is not necessary. The death of the common ancestor does not mean dissolution of the joint family: so long as the male line does not become extinct (even if there remains only a widow of a coparcener, she can revive the joint family at any time by making an adoption), or all coparceners do not divide, the joint family continues to exist. Thus, the joint family can continue to exist in perpetuity. However, a Hindu joint family is not a corporation; it has no separate legal entity from its members. It is not a juristic person, though it constitutes a unit, and in all matters, legal and otherwise, it is represented by its *karta,* head of the family. It confers a status on its members, which can be acquired only by birth (or adoption) in the family or by marriage to a male member.

The institution of joint family is so much a fundamental aspect of Hindu society, that there is a presumption in Hindu law that every Hindu family is a joint family. Jointness and undividedness is the normal characteristics of a Hindu family. It is the normal state of every Hindu family that it is joint in food, worship and estate. The presumption is stronger among the nearer relations; remoter we go, weaker is the presumption. Although there is a presumption that every Hindu family is a joint family, there is no presumption that properties held by its members are also joint family properties.

Within the joint family there is a narrower body consisting of father, son, son's son and son's son's son, called coparcenary. Again, for the coming into being of the coparcernary, the father-son relationship is necessary; for its continuance this relationship is not necessary. A Mitakshara coparcenary can continue to exist indefinitely so long as no one

58. Mulla, *supra* note 39 at 345.
59. Reference to these schools has already been made.

is removed by more than four generations from the last holder of the property.[60] Thus a Mitakshara coparcenary can consist of grandfather and grandsons, brothers, uncles and nephews and even remoter male relations. No female can be a coparcener under the Mitakshara school. The two outstanding features of the Mitakshara coparcenary are: (a) the doctrine of son's birth right (here son includes son's son and son's son's son) and (b) the doctrine of survivorship. The former means that as soon as a person is born as a son, son's son or son's son's son, he acquires an interest in the joint family, though till a partition takes place this is an unspecified, unascertained and fluctuating interest. The latter means that if a coparcener dies his interest devolves on the surviving coparceners. In other words, when a coparcener dies his interest does not go by succession to his heirs, but to the surviving coparceners.[61] The other characteristics features of the Mitakshara coparcenary are: all coparceners have a right to be in joint possession and enjoyment of the entire joint family property; every coparcener has a right to be maintained out of the joint family property (this right is enjoyed by the female members and non-coparcener male members of the joint family also): every coparcener is bound by the proper alienations[62] made by the *karta*, and every coparcener has a right to object and challenge any improper alienation made by the *karta*. Every coparcener also has a right to partition.

Under the *Dayabhaga* school the concept of the joint family and coparcenary is different. Strictly speaking, under the *Dayabhaga* school, there is no joint family, since so long as the father is alive he is the absolute master of all properties, ancestral as well as others. The nature of the Dayabhaga coparcenary is also different. A Dayabhaga coparcenary comes into existence on the death of the father, when sons jointly succeed to his property. The sons or son's son or son's son's sons are not coparceners with their father, grandfather or great grandfather. Thus, the Dayabhaga school does not recognize son's birth right in the joint family property. The shares of the sons who succeed to the property of their father are specified shares, which do not fluctuate. The brothers who thus constitute a coparcenary are entitled to joint possession of the entire properly. If a son dies leaving behind a son, or a daughter, or a widow, then he or she will be coparcener along with the surviving brothers. If the son of a brother dies leaving behind

60. For illustrations and details see, Mayne, *Hindu Law and Usage*, 11th ed., 1953, p. 327 and Paras Diwan *supra* note 1 at 225.

61. S. 6 of the Hindu Succession Act, 1956 now lays down that if a Mitakshara coparcener dies leaving behind a widow, mother, daughter, daughter's son or widow of a predeceased son, son, daughter or widow of a predeceased son of a predeceased son, or son or daughter of a predeceased daughter, his undivided coparcenary interest will devolve by succession and not by survivorship.

62. For what is proper alienation see *infra*.

his son or daughter, then he or she will also be a coparcener. Beyond this, there cannot be a coparcenary under the *Dayabhaga* school. Females can be coparceners under the *Dayabhaga* school, though there cannot be a coparcenary exclusively of females. Just as the doctrine of son's birth right is not recognized by the *Dayabhaga* school so is the doctrine of survivorship. All properties devolve by succession.The Dayabhaga coparceners have the right to maintenance. They also have the right to restrain and challenge improper alienation made by the *karta*. Similarly, they have the right to partition.

Nature of property

Under the family law of Hindus, property is classified under two heads: (i) joint family property, and (ii) separate property. The joint family property is the most important aspect of the Hindu joint family. It is that property which is commonly owned by all coparceners, and out of which all members of the joint family have the right of maintenance. It is like a big reservoir into which properties flow in from various sources, and from which all members of the joint family draw out to fulfill their needs. The joint family property falls into various categories.

What is called "ancestral property" is the main source of joint family property. The property inherited by a Hindu male from his father, father's father or father's father's father alone is called ancestral property. Property inherited from other ancestors is not ancestral property.[63] When a partition takes place in a joint family, the property coming into the share of a coparcener constitutes joint family property in respect of his own son, son's son and son's son's son, but as regards other persons it is his separate property. When the father makes a gift of his separate property to a son, then whether it will be his separate property or joint family property (so far as it concerns his own son) depends upon the intention of the father.[64] When coparceners jointly acquire property with the aid and assistance of the joint family property, it constitutes joint family property. When property is jointly acquired by coparceners without the aid and assistance of the joint family property, then such property is presumed to be joint family property. When a coparcener throws into the common hotchpotch his separate property or blends his property with the joint family property, then his property will become joint family property, if his intention to treat his property as part of the joint family property is clearly discernible. Any

63. In *Venkayyamma* v. *Venkataramanayamma* (1902) 25 Mad. 678, the Privy Council said that the property inherited by two brothers from their maternal grandfather constitutes joint family property. It is submitted that the decision is not correct: See Paras Diwan, *supra* note 1 at 242 and Mulla, *Hindu Law*, 14th ed., 1974, pp. 271-272.
64. *Arunachala* v. *Muruganatha* AIR 1953 SC 495.

income of the joint family property or any property acquired with the income constitutes joint family property. The same is true of the property exchanged with joint family property.

This is a unique feature of the Hindu joint family (in both the schools) that side by side with joint family property, there also exists separate property. A Hindu can have an interest in joint family property, as well as hold separate property. The fundamental notion of separate property is that any property acquired by a coparcener without any detriment to the joint family property constitutes separate property. Like joint family property, separate property also falls under several categories.

"Gains of learning" constitute separate property. The Hindu Gains of Learning Act, 1930, defines gains of learning as all acquisitions made substantially by means of learning (*i.e.*, education or training), irrespective of the fact whether the education or training (whatever be the nature of training, specialized or ordinary) was wholly or partly imparted to him out of the joint family funds, and irrespective of the fact that whether he or his family was wholly or partly supported out of the joint family funds when he was receiving the training or the education. The question whether the salary and other remuneration received by coparcener who is a director or manager in a corporation on account of the investment of the joint family funds is not free from doubt. The position seems to be that if the salary, remuneration, profit or commission is received by a coparcener on account of substantial investment of the joint family funds in the corporation, business or enterprise, then such acquisitions will constitute joint family property, even if the personal skill or labour of the coparcener is a contributory factor in the earnings. On the other hand, if substantial investments are not made, or the joint family is receiving dividends or profits on those investments, independently of the salary or remuneration of the coparcener, then such acquisitions will be the separate property of the coparcener. It seems that the saving of the income of the joint family allotted to a coparcener for his maintenance, or anything acquired with the savings of the income will constitute the separate property of the coparcener.[65] The same seems to be true of the benefits of the insurance policy standing in the name of a coparcener, the premia of which are paid out of the joint family funds.[66] The other heads of separate property are: government grants, unless specially given as joint family property; and income of the separate property or anything acquired with the aid or assistance of the income of the separate property. Over the separate property the coparcener has absolute rights of enjoyment and alienation.

65. *Nagayasami* v. *Kochada* AIR 1969 Mad. 329.
66. *Sidramappa* v. *Babajappa* AIR 1962 Mys. 38; *Karuppa Gounder* v. *Palaniammal* AIR 1963 Mad. 245 and *Narayanlal* v. *Controller, Estate Duty* AIR 1969 AP 188.

Under the Mitakshara school, a coparcener cannot make a gift *intervivos* of his undivided interest in the joint family property, except with the consent of all other coparceners. However, now he can dispose of his undivided interest by a will. According to the Bombay, Madras and Madhya Pradesh High Courts, a Mitakshara coparcener can also alienate his undivided interest for value. According to other High Courts he cannot do so, save with the consent of other coparceners. A Mitakshara coparcener has also the power of renouncing his interest in the joint family property without the consent of other coparceners. Renunciation to be valid must be of the entire interest and in favour of all other coparceners. The undivided interest of a Mitakshara coparcener can also be attached and sold in execution of a personal money decree against him. The Dayabhaga coparcener has full power of alienation over his share in the joint family property.

The karta

The *karta*[67] is the head of the Hindu joint family, and it is through him that the joint family acts in all matters. The senior-most male member is the *karta* of the joint family. A junior member may also become *karta* with the consent of other coparceners. Sometimes, as when the joint family is engaged in big business, two members may act as *kartas*. The position of the *karta* in Hindu law is *sui generis*. Though, when superficially looked at, he resembles a business manager, a partner in a firm or a trustee in a trust; in reality he is much more than these put together. He looks like a manager since he manages the affairs of the family, but then his powers of management are so vast and almost absolute that he may manage or mismanage or non-manage; nobody can question him. He has full power over the income of the joint family property. All income must be brought to him, and he has a free hand in its disbursement; he may even discriminate against some members. He can be made liable only when charges of misappropriation, fraud or conversion are made against him. If some members is not satisfied with the management, his only remedy is suit for partition. The *karta* looks like a partner, since he acts on behalf of the entire joint family. But his powers of representing the family are much wider. He represents the family in all matters, legal and otherwise. Nobody else can do so. He can sue and can be sued, and an order or decree of the court passed in such a suit will be binding on the entire joint family. He can compromise any dispute on behalf of the joint family. He may also refer any dispute to arbitration, and the award will bind the entire joint family. The *karta* has also

67. The term *karta* has been translated into English as "manager", which is wholly inadequate in understanding the unique position that the *karta* has in Hindu law. It is rather misleading.

the power of acknowledging any debt or liability on behalf of the joint family. He may be superficially called a trustee, since he stands in fiduciary relationship with other coparceners. But his powers are much more than those of a trustee and the liabilities are much less than those of a trustee.

However, from the above one should not infer that the *karta* is a person of unlimited powers. The *karta* is essentially a person of limited powers, though within the limits his powers are limitless. The basic limitations of the *karta* are in two spheres: debts and alienations. A *karta* can incur debt only for family purposes. If he is a *karta* of a trading family, then he can incur debt in the course of family trade or businesses. Similarly, he can alienate the joint family property only for legal necessity, benefit of estate of indispensable duties. The term "family purpose" used in connection with debts also means these things. What constitutes "legal necessity", "benefit of estate", or "indispensable duties" (*dharmarthe*) has not been defined. Broadly speaking, legal necessity includes all those things, which are considered necessary for the members of the family. It is not used in the sense of the actual compelling necessity, but what, according to the notions of Hindu law, may be regarded as proper and reasonable. "Benefit of estate" has now come to include all those acts, which a prudent man is permitted to do in respect of his own property.[68] "Indispensable duty" means those acts which a Hindu is bound to perform, and includes performance of all *samskaras*, such as *upananyana* or *sradha*. It also includes the marriage of daughters.

The positions and powers of the *karta* are the same under the *Dayabhaga* school.

Whenever a coparcener challenges an alienation on the ground that the alienation made by the *karta* is not for "legal necessity", "benefit of estate" or "indispensable duty", the burden of proof is on the alienee to establish that the transaction was for any one of these purposes. This is because anyone who deals with a person of limited powers must make enquiries. And, under Hindu law, if the alienee shows that he made proper and *bona fide* enquiries he is protected.

Suggested Readings

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