



CHAPTER

1

Institutional Framework - Marriage and Divorce

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Learning Outcomes

After the completion of this chapter, the students will be able to:

- Explain the evolution of family laws and establishment of Family Courts in India
- Analyse the role of counsellors and lawyers in Family Courts
- Critically evaluate the existing gender bias in Personal Laws in India
- Compare types of marriage and conditions of a valid marriage under various family laws
- Evaluate the theories and grounds for divorce

I. Nature of Family Laws in India

Family Laws or Personal Laws consists of family or personal matters like marriage, dowry, dissolution of marriage, guardianship, adoption, maintenance, gifts, wills, inheritance, succession, and so on. In India, religion and personal laws are largely interlinked. So Hindus, Sikhs, Jains and Buddhists follow Hindu Family laws, (Sikhs have their own marriage law but are covered under Hindu Law for other family matters); Muslims, Christians, and Parsees have their own laws; and other traditional communities, like the tribal groups, follow their own customary practices or customary laws. The Hindu law, the Sikh marriage law, the Parsee Law, and the Christian law are codified or passed by the Indian Parliament as Acts or laws. The Muslim Law is uncodified and is based on the Sharia, which is the moral and religious law primarily grounded on the principles of the Islamic religious text, the holy Quran and examples laid down in the Sunnah by the Islamic Prophet Muhammad.

To this extent, India follows a peculiar conception of a secular state; although these varied communities are one nation, they co-exist as independent and distinct communities in the matters of family laws. As described herein, unlike other laws in force in India, such as criminal and civil

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laws, family laws are not uniform. However, the Constitution of India, in Article 44, provides for a goal or aspiration for achieving a uniform civil code in family and personal matters. This provision is merely a directive or aspirational and is not enforceable by a court of law.

A. Ancient Period

The Laws in ancient India were based mainly on religious texts such as Dharmashastras and Dharmasutras. They are Sanskrit written texts on religious and legal duties. They provided rules for the life of an ideal householder and contained the Hindu knowledge about religion, law, ethics and so on.

B. Medieval Period

The Hindu legal system in the medieval period was also based on the *smriti* literature and the *Dharmashastra* as well other later digests. Since the medieval period, starting from the 8th century, two major schools of personal laws have been followed; Mitakshara, followed in North and South India, and Dayabhaga, followed in the Bengal region.

The Muslims follow Shariat, which is uncodified law based on Quran. The Hindu Law and the Muslim *Shariat* covered all aspects of life and did not differentiate much between morals, customs, and laws. Even during the Mughal Empire in the Indian subcontinent, between the 16th and 18th centuries, Hindus and Muslims were ruled largely by their own sets of local customs and Personal Laws.

C. British-India

The British came to the Indian subcontinent in the early 17th century. In the initial years, they were not concerned with the various regional and local laws practiced in the subcontinent. In 1772, when the East India Company established themselves as the civil administrators, Warren Hastings, the first Governor-General of Bengal, introduced the uniform criminal law with the idea of equality before the law for both Hindus and Muslims.

However, in matters of Personal Law, he established that the laws of the holy Quran would be applicable to the Muslims, and the Shastras for the Hindus. As the British had no knowledge of the Personal Laws, they appointed the Hindu pandits and the Muslim jurists as consultants in their courts, and this led to the administration and development of the Anglo-Hindu and the Anglo-Islamic Personal Laws.

After 1864, the system of court Hindu pandits and Muslim jurists was abolished due to dissimilar interpretations and some suspicions of corruption, and the court judges interpreted the Personal Laws themselves. During the British rule, both the Anglo-Hindu personal law and the Anglo-Islamic Personal Laws continued to develop through reforms, law commissions, and mainly through case laws.

D. Post-Independence

After India's independence in 1947, efforts were made to develop a uniform civil code for dealing with matters of Personal Law. It started with the uniform Hindu Code Bill, which attempted to combine the varied regional customs and usages. In 1951, it was shelved due to much opposition. Since the Constitution of India had adopted the word 'secular' as an important feature of the Indian republic, the uniform family law was seen as biased in favor of the Hindu majority community and unsecular.

In a similar manner, in 1955-56, the Parliament adopted and codified the four different major legislations governing the family and personal law matters of the Hindu community: Hindu Marriage Act (1955), Hindu Succession Act (1956), Hindu Minority and Guardianship Act (1956), and Hindu Adoptions and Maintenance Act (1956).



Accordingly, Christians, Parsees, and Sikhs have their own codified Marriage Acts; Muslims are governed by the Sharia; and the traditional communities continue to practice their uncoded customary laws.

As mentioned earlier, although the Constitution of India, in Article 44, provides for a goal or aspiration for achieving a uniform civil code, this has never been taken up seriously for the fear of widespread communal violence.

II. Human Rights and Gender Perspective

There are various provisions in the Constitution of India that are specified for gender equality. The preamble (or the introduction) to the Constitution of India resolves to secure justice, liberty, equality, and dignity of all. Furthermore, Article 14 provides equal treatment before the law for every person, and Article 15 prohibits discrimination based on religion, race, caste, sex or place of birth. Thus, the idea of equality is strongly emphasized in the Constitution.

However, exceptions exist too, for example, Articles 25 and 26 of the Constitution provide for freedom of religion that includes freedom of conscience and free profession, practice and propagation of religion as well as freedom to manage religious affairs. The religious communities have used these provisions to argue that modifying their family laws would be interfering with their freedom of religion.

For those who promote the traditional religious values, the above gender equity provisions are contrary to their customary methods of law. For example, the traditional Hindu religious legal methods found in *The Laws of Manu* provide for unequal treatment of law and punishment based on gender as well as caste. Gender inequalities also exist within the Islamic legal traditions. Such competing gender inequalities of the two communities in particular, also prevented the adoption of a uniform civil code, which has continued to remain an unrealised aspirational provision in the Constitution.

The modern Hindu family laws were adopted by reconfiguring the traditional religious laws and further based on modern constitutional values. However, complete gender equity has not been achieved.

The instances of gender inequality existing in the present day Hindu family law include: 1) the Hindu Marriage Act (Section 5.iii) prescribes marriageable age for girl as 18 and boy as 21. Recently the government has proposed the marriageable age of girls to be increased from 18 to 21 years. 2) The Hindu Succession Act provides different methods of intestate (without a will) succession of property for male and female intestates; 3) the Hindu Minority and Guardianship Act (Section 6) prohibits a mother to act as a child's natural guardian unless the father is dead or otherwise disqualified; and 4) the Hindu Adoptions and Maintenance Act (Section 6) prohibits a mother to give her child in adoption unless the father is dead or otherwise disqualified.

Some examples believed to promote gender inequities in the Islamic family laws include: 1) the practice of polygamy is permitted in Islamic law; 2) the common view that a husband can divorce his wife by the triple *talaq*, and 3) a Muslim husband is to pay maintenance to a divorced wife only during the *iddat* period of three months.

There are other practical challenges in achieving gender equity in the realm of family laws, one of the foremost being lack of information about family laws that are applicable to respective communities. Most residents of rural India, know neither the minimum age of marriage nor that dowry is prohibited. Also, they are unaware of legal grounds of divorce and prohibition of the practice of bigamy or polygamy.

In Islamic law, there are three types of divorce:

Talaq-e-Ahsan: Talaq-e-Ahsan is the most ideal way of dissolving a marriage.

Talaq-e-Hasan: In Talaq-e-Hasan, talaq is pronounced once a month, over a period of three

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months. If cohabitation is not resumed during this period, divorce gets formalised after the third utterance in the third month.

Talaq-e-Biddat or Instant Triple Talaq: Instant Talaq or 'Triple Talaq' or 'Talaq-e-Biddat' is an Islamic practice that allows men to divorce their wives immediately by uttering the word 'talaq' three times. The pronouncement to end the marriage can be oral or written, or by electronic means i.e., telephone, SMS, email or social media.

The practice of divorce by the consecutive utterance of talaq three times i.e., Talaq-e-Biddat or Instant Triple Talaq has been deemed invalid. Under the new law, **Talaq-e-Biddat or instant triple talaq in any form –spoken, written, or by electronic means such as email or SMS** – is illegal and void, with up to three years in jail for the husband. The other two forms of talaq (divorce) – Talaq-e-Ahsan and Talaq-e-Hasan remain valid under the Muslim law.

III. Institutional Framework - Family Courts

In 1984, the Family Courts Act was enacted for creation and functioning of family courts with expertise to deal with matrimonial and family law matters. The Act is procedural and does not override the substantive family laws, and accordingly, the rights and obligations of parties to disputes are based on the family, personal or matrimonial laws.

During the late 1980s and 1990s, many family courts were established in most major cities in India and the matrimonial and family law cases were shifted from the district, civil and criminal courts to the newly created special courts.

Family courts were created with many distinct features and goals including: 1) Reduction in formality and intimidation in litigation process; 2) Speed in justice delivery; and 3) Facilitation in conciliation and settlements.

The personal or family law subject matters that fall within the jurisdiction of family courts include: nullity of marriage (to declare a marriage as null and void); restitution of conjugal rights (if either of the spouse leaves the common matrimonial home without any reasonable excuse, then the aggrieved spouse can file a petition for restitution of conjugal rights whereby the courts asks the spouse to return back to the common matrimonial home); judicial separation (the marriage is not dissolved but suspends the marital rights and obligations); validity of marriage; matrimonial status; disputes regarding property of either of the parties or joint property; injunction arising out of marital relations; legitimacy of any person; maintenance; and guardianship, custody and access to any minor.

The relevant statutes that come within the purview of **Family Courts Act** include the following:

- The Hindu Marriage Act, 1955:** This Act codifies the marriage law of the Hindus and primarily deals with the validity and conditions for invalidity and applicability of marriage.
- Special Marriage Act, 1954:** The Act affords a special method of civil contractual marriage (and divorce) for all Indian nationals regardless of religion or faith followed by the parties. This act does not require the customary or religious rites or ceremonies of marriage to be observed.
- Dissolution of Muslim Marriage Act, 1939:** This Act explains the dissolution of marriage by women married under Muslim law and the effects of the renunciation of Islam by a married Muslim woman.
- Foreign Marriages Act, 1969:** This statute deals with marriages of citizens of India living outside India.
- The Indian Divorce Act, 1869:** The law relates to the divorce of persons professing the Christian religion.



- f. **The Parsi Marriage and Divorce Act, 1936:** This law deals with marriage and divorce among the Parsis.
- g. **Muslim Women (Protection of Rights on Divorce) Act, 1986:** The Act deals with the matters of the divorced Muslim women and governs their right to maintenance from their former husband.
- h. **Muslim Personal Law/Application of Shariat Act, 1937:** This Act requires the application of the Islamic Law Code of Shariat to Muslims in India in their family or personal matters.
- i. **Hindu Adoption and Maintenance Act, 1956:** The law codifies the legal process of adopting children by a Hindu adult and the legal obligations to provide maintenance to the various family members.
- j. **The Indian Christian Marriage Act, 1872:** This law regulates the formalization of marriages among Indian Christians.
- k. **Hindu Minority and Guardianship Act, 1956:** The statute explains the guardianship relationships of Hindus involving the adults and minors as well as between people of all ages and their respective property.
- l. **Guardian and Wards Act, 1890:** This is a non-religious and universally applicable law regarding the issues relating to guardianship of a child in India.
- m. **Chapter IX of the Criminal Procedure Code, 1973 (S-125 to 128) :** This deals with the issues of maintenance of wives, children and parents.
- n. **Protection of Women from Domestic Violence Act, 2005:** This statute provides safeguards to the wife or female live-in partner against domestic violence by husband or male live-in partner or his relatives. This law also provides protection to other women living in a household including sisters, widows, or mothers.
- o. **Muslim Women (Protection of Rights on Marriage) Act 2019:** The Act made triple talaq a cognizable offence and punishable.

The Family Courts Act provides mandatory powers to the state governments to set up family courts in cities and towns with population over one million, and discretionary powers for areas with less than one million. However, some States have failed to create family courts; the reasons cited range from financial and space constraints to lawyers blocking any such move.

IV. Role of Women in the Creation of Family Courts

Women associations and organizations have played critical role in the creation of family courts. In the 1980s, the women's rights movement groups were vocal about legislative reforms, such as the creation of special courts to deal with family matters to curb violence against women including wife murder. These issues of gender justice were an important motivating factor for the creation of family courts.

Accordingly, family courts aimed at creating women-friendly court procedures that were less formal and more accessible to women, especially those from the marginalized section. For this the family courts intended to rely less on the traditional lawyers and to depend more on counselors to help the parties to the dispute to reach at mutually amicable solutions. The conciliators were to increase the power of negotiation of women in reconciliation and settlement in issues such as quantum of maintenance upon divorce, custody and access of children, protection against domestic violence, and right of residence in the matrimonial home.



The need to establish the Family Courts was first emphasized by late Smt Durga Bai Deshmukh after her visit to China in the year 1953, where she had the opportunity to study the working of Family Courts. She discussed the subject with Hon'ble Mr Justice M.C. Chagla of Bombay High Court and also Hon'ble Mr Justice P.B. Gajendragadkar, then the Judge, Bombay High Court. She also discussed the matter of setting up of the Family Courts with the then Prime Minister Pandit Jawahar Lal Nehru. Several women associations, welfare organisations and individuals also mounted pressure for setting-up of the Family Courts to provide a forum for speedy settlement of family related disputes.

The emphasis was on a non-adversarial method of resolving family disputes and promoting conciliation and securing speedy settlement of dispute relating to marriage and family affairs.

V. Role of Lawyers and Counselors in Family Courts

The Family Courts Act restricts the role of lawyers and increases the role of counselors in the dispute resolution to encourage mutually amicable settlements. This is peculiar as well as contrary to the practices of other courts, which commonly employ the English legal method of practice called the adversarial system of adjudication.

In the adversarial system of adjudication, the judge plays the role of a neutral arbiter and decides based on the merits of the case presented to him/her by the lawyers of the opposing parties.

The Family Courts Act limits the role of the lawyers as legal experts or '**amicus curiae**' whom the courts may consult for opinion. The Act does away with lawyers with the hope to prevent excessive litigation costs, corruption, manipulative and subversive tactics, extended and bitter court battles and refusal to settle or compromise, and so on.

However, critics have argued that lawyers are necessary to help clients with complex cases and court procedures in which the counselors may not have that kind of expertise. Moreover, there has been no mechanism created to ensure the availability of '**amicus curiae**' or '**legal experts**' for the constant needs of courts. Accordingly, family courts have routinely allowed lawyers to represent clients.

As described earlier, the Family Courts Act has given the counselors high preference over lawyers in the family courts in order to promote efforts for settlement between the parties. However, in practice the role of counselors is mere superficial.

Majority of the States do not adequately integrate the requirement of counselors with the legal practice of family courts; the role of the counselors is limited to the task of ascertaining if the dispute can be reconciled, and even this not beyond the preliminary stage and not in the actual trial of the case.

The role of counselors in court practice is a new idea and neither the judges nor the lawyers are oriented to this concept. There exists a wide disparity among states with respect to the process adopted to appoint the counselors, their qualifications and remunerations, their role, and the counseling techniques employed. While some states have used non-governmental organizations as counselors, others have used trained personnel, individual volunteers, as well as lawyers.

VI. Role of Counselors and Gender Issues

There are a few states such as Maharashtra, where counselors play a considerable role in promoting negotiations and settlements. Women groups contend that counselors should be trained with gender-sensitivity as the neutral stands of counselors usually ends up being anti-women, influenced by long standing patriarchal biases against women.



The women groups have demanded clearly defined frameworks for gender justice in the practice of the family courts, especially with respect to the roles of counselors in order to avoid gender biases in the process of fulfilling the statute mandate of 'speedy settlement' and 'protect and preserve' the family.

For example, in order to accomplish the mandate of 'reconciliation', some counselors coerce women to reconcile and return to the spousal home disregarding women's human dignity, physical safety and economic rights.

In other instances, where women have been physically abused and thrown out of their matrimonial homes and have demanded maintenance (under section 125 of the Criminal Procedure Code), the counselors and lawyers have regularly and successfully sought reconciliation, which is argued to be a legal trick that undermines women's claim to maintenance. Section 125 of the Code of Criminal Procedure is a safeguard that makes maintenance mandatory for neglected children and women.

Likewise, family issues are nuanced and have legal complexities; gender-sensitivity may help counselors to not merely take neutral positions but consider the unequal power relationships between men and women in reconciliation and settlement processes.

One of the major criticisms by the women groups, about the Family Courts Act and the family justice system as a whole, is that the conceptual basis of 'gender justice', the prime objective of the women's movement, is left out. Instead, the Family Courts Act focuses on 'preservation of the family' through conciliation and in a speedy manner. Women's groups have always maintained that 'preservation of family' is not synonymous with 'gender justice' or 'rights of women'.

VII. Marriage and Divorce

A. Marriage

Marriage is defined as a social and legal union between a man and a woman; through this institution the spouses create kinship. Kinship is a system of social organization between people who are related by blood, marriage, or adoption. Marriage is a social union because both the spouses are entitled to each other's company and conjugal rights, which are mutual rights and privileges between two individuals that arise from the state of being married. These rights and privileges include affection, companionship, co-habitation, joint property rights, and sexual relations.

If either of the spouses detaches herself or himself from the social and emotional companionship of her/his spouse without reasonable cause (i.e., sound judgment, which is just, fair and rational) then the aggrieved party can approach the court for relief. In such cases, the court may direct the accused spouse to return with the other spouse to their matrimonial home, which is called as restitution of conjugal rights.

Marriage is also a legal union as certain legal consequences follow after marriage; for example: parties get the status of husband and wife; legitimacy is conferred on children who are born after marriage; and it confers rights of maintenance and inheritance of property on husband and wife.

The majority of marriages are based on monogamy, i.e. a union between one woman and one man. Some societies have also allowed polygamous marriages, which is generally referred to multiple spouses or multiple marriages that include either multiple husbands or multiple wives. Whether monogamous or polygamous, the marriage system does not emerge in vacuum. These different forms of marriage serve a purpose. The practice of polygyny (or multiple wives) was often a strategy for increasing the population size. It also ensured that all women in the society were taken care of when men were in short numbers. Similarly, polyandry (or multiple husbands) is associated with shortage of women (sometimes due to female infanticide and poverty).

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Most societies also define marriage rules with respect to endogamy and exogamy. Endogamy is about marriage to a person within one's own group. Such group may be based on caste (a Brahmin will marry a Brahmin; a Kshatriya will marry a Kshatriya and so on), class (social categories based on economic and educational status), ethnic group (socially defined category based on common culture or nationality), or a religious group or even a village.

Exogamy is a rule that requires an individual to marry outside the tribe, family, clan, or other social unit. It is especially with regard to descent groups on the basis of descent from a common ancestor or ancestress. The group can consist of children of the same father/mother, of grandchildren of the same grandmother/father, great-grandchildren of the same great-grandparent etc., or of the descendants of these persons.

Accordingly, in exogamy, certain degree of social or relationship distance must exist; else exogamic taboo is attached to such marriages that take place within close social or relationship proximity.

As stated in the introduction of this section, different laws of marriage govern people belonging to different religions. For example, the Hindu Marriage Act, 1955, governs a Hindu marriage; the Parsi Marriage and Divorce Act of 1936 govern the marriage between Parsis; and the Christian Marriage Act, 1872, governs the Christian marriage. Muslims do not have any codified law for marriage; they are governed by their religious texts.

Conditions of a Valid Marriage

For a valid marriage, certain conditions are to be fulfilled by the parties to the marriage. These conditions may vary from religion to religion.

Firstly, there is a rule of monogamy among Hindus, Parsis, and Christians; in that, they can marry only once. Their first marriage must be dissolved if they want to marry again. The dissolution of marriage can take place either by divorce (i.e., dissolution of marriage by the court) or by death of other spouse. However, Muslim law permits 'polygamy', where a Muslim man can have four wives.

Secondly, no religious ceremony is required to constitute a valid marriage under the Muslim law. The offer and acceptance to marry is often required of a Muslim couple. But this is not so among the other religious groups like, Hindus, Parsis, or Christians. If any Hindu marriage has been solemnized without the performance of customary rites or ceremonies prevailing in the community of either of the parties, such marriage is legally void. Hindus follow the ceremony of 'Saptapadi' or taking of seven steps before a sacred fire. Sikhs solemnize their marriage by 'Anandkaraj' ceremony where Lavan or the four hymns of Laav are performed during the four nuptial rounds. Parsi marriage must be solemnized in accordance with a ceremony called 'Ashirwad'; this ceremony binds the couple in matrimony spiritually. Both the bride and the groom promise to remain faithful to each other and to not be led astray by any external temptations.

For Christians in India, certain people are recognized as authorities under the Christian law who can perform the marriage; else the marriage is void. These include persons who have received episcopal ordination (consecration or installation by authority); any Clergyman of the Church of Scotland; any Minister (or priest) of Religion licensed under this Act to solemnize marriages. Such persons grant certificates of marriage to the Christian couples.

Thirdly, different religions prescribe different age for marriage. For example, Hindu, Christian and Parsi law prescribe age of 18 years for girls and 21 years for boys; Muslim law mentions age of puberty, which is generally attained at 15 years of age.

Fourthly, a person cannot marry anyone who belongs to his or her close relations. All the religions recognize that parties should not be within the prohibited degrees of consanguinity (prohibition of marrying certain blood relations) or affinity (prohibition of marrying certain persons with



whom relationship has arisen by marriage). For example, a person cannot marry his or her brother or sister.

Lastly, a person must be of sound mind at the time of marriage. The sound mind refers to the ability of individuals to understand the nature of marriage, and responsibilities towards their spouses once they get married.

Criteria	Hindu	Muslim	Christian	Parsi	Sikh
Age	Girls - 18 years Boys - 21 years	Age of puberty-15 years	Girls - 18 years Boys- 21 years	Girls - 18 years Boys- 21 years	Girls - 18 years Boys- 21 years
Monogamy	Essential	Polygamy upto 4 wives is allowed. Polyandry is not allowed	Essential	Essential	Essential
Prohibited relationships	Sapinda Relationships, Consanguinity And Affinity	Consanguinity and affinity based	Consanguinity and affinity	Consanguinity and affinity	Consanguinity and affinity
Sound mind-when a person can judge the consequences of his/her act	Both parties	Both parties	Both parties	Both parties	Both parties
Religious ceremonies	Saptpadi (seven steps around the fire)	Civil contract-offer, acceptance and consideration (husband pays a sum of money-mehr/ dower; in return wife promises to follow the husband)	Priest-certificate of marriage	Aashirwad ceremony	4 laav

B. Concept of Void and Voidable Marriage

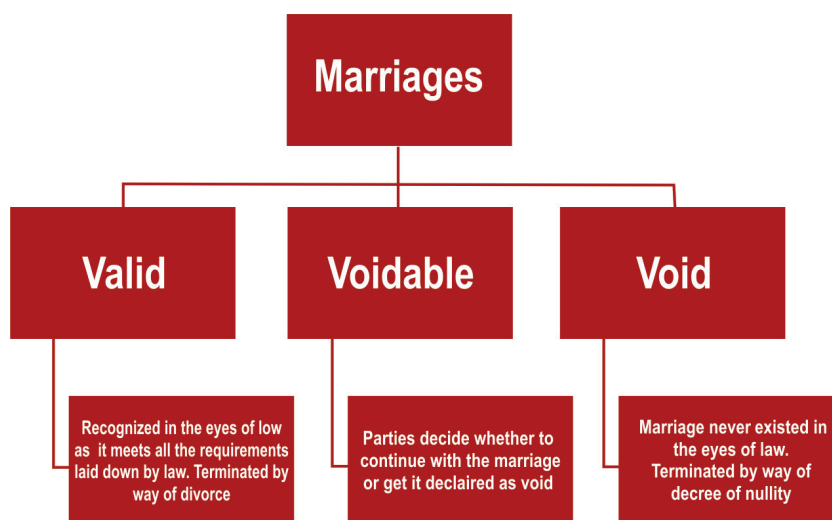
When all the conditions prescribed by the Personal laws, as discussed above, are fulfilled and there is no legal impediment, the marriage is considered as valid. A party may contravene any of the above-mentioned conditions. In such case, different status would be ascribed to the marriage i.e. void or voidable marriage. Such status of void or voidable marriage is dependent upon the nature of conditions so violated.

A voidable marriage is a perfectly valid marriage as long as it is not annulled (set aside) by any court of law. Only the aggrieved party to the marriage can file the petition for annulment. The court can annul the voidable marriage by passing a decree of nullity.

A void marriage is no marriage.



The word 'marriage' describes that the two persons have undergone the ceremonies of marriage; the ceremonies being a pre-requisite to a valid marriage.



The Hindu Marriage Act, 1955 makes the distinction between void and voidable marriage. It provides *three grounds for void marriage*:

First, marriage with any person falling within sapinda relationship (if one is a lineal descendant of the other person as far as third generation in the line of ascent through mother and fifth generation in the line of ascent through father including the persons whose relationship is being tested) is void. Blood relations are covered under it; for example, a person cannot marry his maternal or paternal uncle's daughter.

Second, one cannot marry with any person falling within the ambit of prohibited relationship (one cannot marry persons with whom relationship has arisen by marriage). For example, there cannot be marriage between uncle and niece or aunt and nephew. The concept of prohibited relationship is wider than sapinda relationship as it covers relationship by blood as well as by marriage.

Lastly, if any Hindu re-marries during the lifetime of his or her spouse then the second marriage is void.

The Hindu Marriage Act also provides *four grounds for voidable marriages*.

Firstly, if marriage cannot be consummated due to impotency of one spouse, then, other spouse can get it annulled. Here, impotency does not mean barrenness or sterility (inability to have child) rather it is failure to have sexual intercourse.

Secondly, when the consent for marriage is obtained by force or fraud, then the aggrieved party can get the marriage annulled.

Thirdly, the pre-marriage pregnancy of wife (when the wife is pregnant before marriage by some person other than the husband) is another ground for voidable marriage. But husband must be ignorant of this fact at the time of marriage.

Lastly, unsoundness of mind is also a ground for voidable marriage.

Muslim Law

Under Muslim law, void marriage is known as 'Batil' marriage. The term 'nullity' (non-existence) is applicable to void marriage as marriage does not exist from the very beginning and court



merely passes a declaration as to its nullity.

There is no concept of voidable marriage under Muslim law rather they recognize concept of irregular (Fasid) marriages. Irregular marriage is that, which can become valid if the defect is cured. For example, marriage with fifth wife is irregular and can be regularized if any of the earlier four wives either dies or obtains divorce from the husband. Irregular marriages are recognized only by the Sunnis and not by the Shia sect among the Muslims. The concept of void marriage is also recognized under the Muslim family law.

Marriage is void on grounds of polyandry, consanguinity, affinity and fosterage.

Polyandry means that a married woman cannot contract a second marriage during the subsistence of the first marriage.

Consanguinity means prohibition of marrying certain blood relations. For example, a Muslim cannot marry his mother, grandmother, daughter, granddaughter, paternal and maternal uncles and aunts etc.

Affinity means prohibition of marrying certain persons with whom relationship has arisen by marriage. For example, a Muslim cannot marry wife's mother or grandmother, wife's daughter (from another husband) or granddaughter if his marriage with wife is consummated.

Fosterage means when a woman, other than the mother of the child, has suckled a child under the age of two years, the woman becomes the foster mother of the child. A man cannot marry his foster-mother or her daughter, or his foster sister.

Christian Law

The Indian Divorce Act, 1869, governs Christians. It also provides for nullity of marriage. But *the Act does not distinguish between void and voidable marriage*. It only states that marriage may be declared as null and void on certain grounds.

First, aggrieved party can get the decree of nullity on ground of impotency of other spouse at the time of marriage.

Secondly, decree of nullity can be obtained if parties are within the prohibited degrees of consanguinity or affinity.

Thirdly, marriage may be revoked if the former husband or wife of either party was living at the time of marriage.

Lastly, it may be annulled if either party was of unsound mind at the time of marriage.

Parsi Law

Parsees do not recognize this distinction between void and voidable marriage. Under the Parsi Marriage and Divorce Act, 1936, declaration as to nullity of the marriage can be obtained in one situation where consummation of marriage is impossible due to natural causes.

C. Divorce

Theories of Divorce

Marriage is a social institution. There is a social interest in its protection and preservation. But sometimes it is not possible for the parties to continue with their marriage. As a consequence, concept of divorce came into being.

Divorce is the termination of a marital union. It results in the cessation of matrimonial tie between husband and wife. The status of husband and wife ceases after divorce. The concept of

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divorce has evolved in the form of different theories. Situations like adultery (sexual intercourse outside wedlock), cruelty, and desertion (when one spouse leaves the other spouse of never coming back) affects the very foundation of marriage. The divorce on these grounds merely enables the other party to put to an end to the form from which substance has already been destroyed.

Divorce is regarded as a mode of punishing the guilty party who had rendered him or her unworthy of consortium. This gave rise to the **guilt or offence theory of divorce**. According to this theory, a marriage can be dissolved only if one of the parties to marriage has, after its solemnization, committed some matrimonial offence. The offence must be one that is recognized as a ground of divorce.

The **guilt theory** on the one hand implies that there is a **guilty party**, i.e. a party who has committed matrimonial offence and on the other **an innocent party** who is a victim.

Later on insanity was added as a ground of divorce. Insanity did not fit in within the framework of guilty or matrimonial offence theory, as the party suffering from insanity could hardly be called a guilty party. This led to **renaming of the guilty theory** as **fault theory**. If one of the parties has some fault in him or her, marriage could be dissolved, **whether that fault is his or her conscious act or providential**.

Another theory is the theory of **divorce by mutual consent**, which originated due to the loopholes in the fault theory of divorce. The biggest drawback of the fault theory has been the presumption that there is one innocent party and one guilty party. Sometimes, husband and wife are not able to live together and there is no fault of either of them. In that case both of them are left with no remedy. Thus, a new theory had to be evolved where marriage could be dissolved by mutual consent of both the husband and the wife where they are not able to live together. Divorce by mutual consent means that the law recognizes the situation where parties can also obtain divorce by mutual consent. But mutual consent alone will not automatically terminate the relationship. It is essential to obtain a decree of the court.

For example, under the Hindu Marriage Act, 1955, parties must live separately for a period of one year or more before filing a joint petition. Then, after filing of petition, there will be a **cooling off** period for six months during which the court will not examine the petition. Thereafter, the parties have to file a joint motion to initiate the divorce proceedings.

In the landmark case of *Amardeep Singh v. Harveen Kaur*, the Supreme Court stated that it is not compulsory to wait for a cooling off period of 6 months as proposed under Section 13 B (2) of the Hindu Marriage Act.

Even the Parsi Marriage and Divorce Act, 1936 provides this ground. But there is no requirement of filing of joint petition under it.

The concept of divorce by mutual consent is also recognized under Muslim law in the form of Khula (redemption) and Mubarat (mutual release). In *Mubarat*, both the parties mutually decide to release each other from marital bond. In Khula, offer is from the wife's side and she has to pay consideration (voluntarily giving away something of monetary value in exchange for a promise) to the husband in lieu of acceptance.

The next theory is the theory of **ir-retrievable breakdown of marriage**. Divorce by mutual consent requires the consent of both the parties, and if one of the parties withholds his or her consent, divorce can never be obtained. Therefore, with the passage of time there arose a necessity for another ground that gave birth to this new theory of ir-retrievable breakdown of marriage. The basic postulate of 'breakdown theory' is that, if a marriage has broken down without possibility of repair (or irretrievably) then it should be dissolved without looking at the fault of either of the party.



In 1964, the Archbishop of Canterbury appointed a Committee under the Chairmanship of Dr. Mortimer Bishop of Exeter to look into the matter. The Mortimer Committee in its report recommended that the 'breakdown of marriage' should be the sole ground of divorce replacing all the fault grounds of divorce. The Committee defined such breakdown of marriage as such failure in the matrimonial relationship, or such circumstances adverse to the relationship that offers no reasonable probability of comfort and support.

The Matrimonial Causes Act, 1959 of the Commonwealth of Australia, provides that, if a decree of restitution of conjugal rights is not complied with for a period of one year, then either party may seek divorce.

Further, a divorce could also be obtained on the ground that the parties have not resumed cohabitation for a period of one year or more after a decree of judicial separation.

The Parsi Marriage and Divorce Act, 1936; Hindu Marriage Act 1955 and Special Marriage Act 1954 also has this ground.

In 1960's an agitation started to reform English law of divorce. This agitation produced a rapid response in India, which led to 1964 amendment in the Hindu Marriage Act, 1955. It tried to introduce the 'breakdown principle' along the lines of Australian Matrimonial Causes Act, 1959.

However, **this ground in its entirety has not been specifically included in the Hindu Marriage Act, 1955** but Supreme Court has, in the case of *Naveen Kohli v. Neelu Kohli*, 2006, strongly recommended that ir-retrievable breakdown of marriage should be made a ground for divorce. The Indian parliament has introduced Marriage Laws Amendment Bill, 2010 with the aim of making ir-retrievable breakdown of marriage as a ground for divorce in the Hindu Marriage Act, 1955.

Grounds for Divorce

Different laws of divorce govern people belonging to different religions. The Hindu Marriage Act, 1955, governs divorce among Hindus. The Parsi Marriage and Divorce Act, 1936 governs the divorce among Parsis. The Indian Divorce Act, 1869, governs divorce among Christians. Muslims do not have a codified law for marriage and divorce; they are governed by their religious texts.

Decree of court is required for dissolution of marriage by divorce. But Muslims are an exception to this rule. In Muslim law, husband enjoys special privilege in the area of divorce. He can divorce his wife at his will without citing any reason. Earlier, the Muslim wife had no corresponding right of divorce. It is only after passing of Dissolution of Muslim Marriage Act, 1939 that wife has been conferred right to obtain divorce.

The Hindu Marriage Act, 1955 governs Hindus in matters of marriage and divorce. Both husband and wife are entitled to file petition for dissolution of marriage. This petition can be filed on grounds of adultery (sexual intercourse outside wedlock), cruelty (conduct of such a nature that it is not possible for the aggrieved party to live with the spouse who has committed that act), desertion (physical separation as well as intention to leave the matrimonial home permanently on the part of deserter), unsoundness of mind (mental disorder of such a kind that it is not possible for the petitioner to live with the respondent) and so on.

Parsis as well as Christians recognize adultery, cruelty, desertion and unsoundness of mind as grounds of divorce. The Indian Divorce Act, 1869 governs Christians in matters of divorce. Under this Act, husband can file petition of divorce only on the ground of adultery on the part of wife, whereas wife can file petition on the above-mentioned grounds. If husband is guilty of rape or sodomy or bestiality, then wife can file petition for divorce. This remedy is available to Hindu, Parsi and Christian wife.

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D. Matrimonial Rights and Obligations

Marriage confers on husband and wife certain marital rights and obligations like conjugal rights, rights of maintenance and inheritance. These are discussed below.

i. Conjugal Rights

Marriage confers conjugal rights on the parties. These are the rights and privileges arising from the marital relation, especially the mutual rights of companionship, aid, and sexual relations. The basis of this right is 'consortium', which means an association or alliance, or a legal right of one spouse to have comradeship and support with the other.

Parties get right of cohabitation. 'Cohabitation' means the act or state of dwelling together, or in the same place with one another. The living together of a man and woman is supposed to be the quintessence sexual relationship. It means an emotional and physical intimate relationship, which includes a common living place known as 'matrimonial home'.

ii. Right of Maintenance

A man, who marries, takes on an obligation to support his wife out of his earnings or other income in a style, commensurate with his total income. This obligation remains in force for the duration of the marriage and sometimes longer, even if the wife has an adequate income of her own. Earlier, there used to be division of work between husband and wife. Husband used to earn livelihood and his duty was to maintain and protect the wife. Wife's duty was to live under roof and protection of the husband.

Under Hindu Law, the wife has an absolute right to claim maintenance from her husband. Her right to maintenance is codified in the Hindu Adoptions and Maintenance Act, 1956. In assessing the amount of maintenance, the Court takes into account various factors, like financial position and liabilities of the husband.

There does not exist such parallel right for the husband. But, if any matrimonial dispute is brought before the Court, then the Hindu Marriage Act, 1955 provides that either husband or wife who has insufficient means can claim maintenance pendent lite (maintenance during pendency of the proceedings) as well as permanent alimony (maintenance at the time of final disposal of the case), which is different from litigation expenses.

In fixing the quantum of permanent alimony, the Court will determine what is just, bearing in mind the ability of husband to pay, wife's own assets and conduct of the parties. The order will remain in force as long as wife remains chaste and unmarried.

The Parsi Marriage and Divorce Act, 1936 also recognizes the right of husband as well as of the wife to claim maintenance pendent lite as well as permanent alimony. The parameter for granting the maintenance is same as in the case of Hindus.

Under the Muslim Law, the Muslim Women (Protection of Rights on Divorce) Act, 1986 protects rights of Muslim women who have been divorced by or have obtained divorce from their husbands. Failure on the part of the husband to pay maintenance to wife entitles her to obtain divorce from the husband.

The Indian Divorce Act, 1869 governs maintenance rights of a Christian wife. This Act does not apply to any of the above-mentioned categories i.e. Hindus, Muslims and Parsis. The provisions of this Act are the same as those under the Parsi law and the same considerations are applied in granting maintenance, both alimony pendent lite and permanent alimony.

iii. Right of Inheritance

When one person dies without making a will, his property devolves (passes on) under the



law of succession. When two persons get married, they get mutual rights of inheritance. Different laws of succession govern persons belonging to different religions. Under the Undivided Hindu family, if a male or female dies without making a will, then the property is distributed as per rules of succession prescribed in the Hindu Succession Act, 1956. Under the Act, both husband and wife are included in the category of most preferred heirs. Both of them can make a will of his or her separate properties and can give them to anyone. But, the ancestral property has to be disposed off according to the Hindu Succession Act, 1956.

Under Muslim law, in the case of death of wife, the share of husband is 1/4th of the property when there is a son or child of a son; but when there is no such child then husband is entitled to 1/2 of the estate of wife. In case of the death of the husband, the share of the wife is 1/8th when there are children; but if there are no children, then her share increases to 1/4th. Under the Muslim law, there is a restriction that a Muslim cannot dispose of by a will more than 1/3rd of his property.

iv. Matrimonial Property

Property and gifts received at or about the time of marriage belongs jointly to the husband and wife. But, there are certain properties belonging exclusively to each one of them. For example, there is a concept of 'stridhan' in the Hindu law. Any gifts given to wife by her parents and in-laws exclusively belongs to her. She deals with it the way she likes.

Concept of 'dower' under Muslim law is another example of such property, which belongs exclusively to the wife. Dower is a sum of money or property that the wife is entitled to receive from the husband in consideration of marriage. In fact, it would be more correct to say that dower is an obligation imposed upon the husband as a mark of respect for the wife.

E. The Prohibition of Child Marriage Act, 2006

Minor is a person who has not completed the age of 18 years under the Indian Majority Act, 1875. With respect to the age of marriage, the Hindu Marriage Act, 1955, the Parsi Marriage and Divorce Act, 1936 and the Christian Marriage Act, 1872 has prescribed the age of 18 years for girls and 21 years for boys.

In India, child marriages (marriage which takes place before a girl attains the age of 18 years, and 21 years in case of boys) were prevalent. When the Hindu Marriage Act, 1955 was drafted, it did not affect the validity of child marriages. Only some minor penalties (15 days simple imprisonment or fine which may extend to 1000 rupees) were imposed; else, large number of marriages would fall under category of void or voidable marriages.

The Prohibition of Child Marriage Act, 2006 has changed the position in this regard. It has made child marriage voidable. Rigorous imprisonment of 2 years or fine, which may extend up to one lakh rupees, may be imposed in case of contravention of any provision of this Act. But even now, child marriage is valid.

The Prohibition of Child Marriage (Amendment) Bill, 2021 proposes to increase the marriageable age of girls from 18 to 21 years to bring parity in the marriageable age of the girls and boys. The Bill adds that the provisions of the Act shall have an overriding effect over any other law, custom, usage or practice governing the parties to the marriage.

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VIII. Exercises

Based on your understanding, answer the following questions:

Q-1 Give one point of difference between the following –

1. Exogamy and endogamy
2. Void and voidable marriage
3. Monogamy and polygamy
4. Marriage and divorce

Q-2 Write brief notes on-

1. Fosterage
2. Significance of Article 44
3. Role of Lawyers and Counselors in Family Courts
4. Gender inequality in Hindu Family Law
5. Objectives of Family Court

Q-3 Answer the following questions-

1. Give any two examples of gender inequality in the Islamic family law.
2. Explain the grounds for voidable marriage provided in the Hindu Marriage Act.
3. What is divorce? What are the various grounds for divorce?
4. What are the conditions for a valid marriage?

Q-4 Identify the marital right and explain-

1. The obligation of a man to support his wife out of his income
2. Devolution of property after the death of spouse in Hindu and Muslim laws

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