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Marriages under Different Laws

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ABSTRACT

In this paper, we will be dealing with the marriages and marriages under different law. Marriage is considered as the most important institution of human society. In this we will discuss about the eligibility of marriage under different law i.e Hindu marriage and Muslim marriage. How many marriages will be allowed in different marriage act? We will see the basic features of marriage and the functions of marriage. We will discuss some points on Christian Marriage, Sikh Marriage, Parsi Marriage, Buddhist Marriage, Jain Marriage, Court Marriage and Mixed Marriage but in detail we will discuss about Hindu and Muslim marriages. We will be dealing with the sources of marriages and types of sources in Hindu and Muslim law i.e Ancient and Modern source & Primary and Secondary source. Types of schools under Hindu law are Mitakshara School and Dayabhaga School. Further Mitakshara School is divided under 5 category i.e Banaras Hindu Law School, Mithila Law School, Maharashtra Law School, Punjab Law School, Madras Law schools and under Muslim law Schools are Shia School and Sunni School. Both schools are further divided into 7 categories i.e Marriage, Dower, Divorce, Maternity, Guardianship, Maintenance and Waqf. Difference between schools, conditions of a valid marriage and when the marriage will be considered as void and voidable will be discussed in this paper. We will also dealing with the types of marriages under Muslim law and difference between void and voidable marriage. Restitution of conjugal rights under section 9: when either of the spouse i.e. husband or wife without any appropriate cause is withdrawn from the society of the aggrieved map apply by petition to the District Court for restitution or conjugal rights and the court on been satisfied with the truth of the statements made in such petition without any legal ground and while the applications shouldn't be granted, may decree restitution of conjugal rights.

Keywords: Hindu Law, Muslim Law, Void, Voidable, Marriage, Conjugal Rights.

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I. INTRODUCTION

Marriage³ and family sociologically signify the stage of greater special announcement. It is the indication of man's entry into the world of emotion and feeling, harmony and culture.

Marriage is the most important institution of human society as it is a universal phenomenon. Marriage creates a new social relationships and reciprocal rights between the spouses. Each society recognizes certain procedures for creating such relationships and rights. On the other hand, the society prescribes rules or prohibitions, preferences and prescriptions in deciding marriages.

Basic features of marriage⁴ as an institution:

- A heterosexual group, consist of one female and a male.
- A public affair rather than a private or personal matter
- New statutes to man and women in the shape of husband and wife and father and mother.
- Development of personal intimate and affectionate relationships between the spouses and patent and children.

Functions of marriage:

- Basic personality formation.
- Status ascription.
- Socialization
- Replacement of members
- Economic cooperation
- Reproduction
- Stabilization of adults

Types of marriages are as follows:

- Monogamy (ek vivah)
- Polygamy (bahu patni or bahu pati vivah)

In the western society's marriage is taken as a social contract between a woman and a men while in some other parts polygamy is considered as the most common form of marriage.

³ Joel A Nichols, Marriage and divorce in a multicultural context

⁴ Mohsin Ehsan, The manual of family laws: with the Christian Marriage Act, 1872, the Divorce Act, 1869, the Hindu Marriage Act, 1955, the Sindh Hindus Marriage Act, 2016, the Hindu Marriage Act, 2016: bare act with index (Popular Law Book House) (2017)

Polygamy can be bifurcated into two parts – (i) Polygyny – bahu patni vivah i.e. (a) sororal polygamy and (b) non-sororal polygamy (ii) Polyandry – bahu pati vivah i.e. (a) fraternal polyandry (b) non-fraternal polyandry. Other types of marriage include hypergamy, exogamy, endogamy and preferential (Adhiman vivah) marriage which always remains a controversial issue for some of the states all over the world.

Considering India as a whole, which consists of 28 states and 7 union territories is enriched with rich cultural heritage and different religion with various types of caste system along with social norms to be aware of as they provide a wide diversity of religious ceremonies. Based on this type of marriages are found in India which are as follows:

- 1) Hindu Marriage⁵ – One has to get married under the Hindu Marriage Act, 1955 following the social norms and other religious customs which are very much prevalent among Hindus. It is a long and elaborate process which takes place for a certain period of time at a particular month. The bride (i.e. women) and the groom (i.e. the man) get into a legal relationship after getting themselves registered in the office of the registrar. If there is a marriage where two persons belonging to different religion or inter-caste marriage (i.e. between a Hindu and a non-Hindu), it will take place under the Special Marriage Act, 1954.
- 2) Christian Marriage⁶ – Under the Christian Marriage Act, 1872, Christian marriages are performed in churches by a minister or a priest in a church. So Christian marriages in India see the bride in traditional attires like sarees, mekhlis and traditional sarongs and even the groom opts for such traditional attires in whatever way they may wear it. The presence of the holy Bible is a must as it is been used by the priest to chant certain holy words for the fulfillment of the marriage. Inter-caste marriages is also very prevalent among them, under the Special Marriage Act, 1954 or if the marriage takes place outside the territories of the state then it is done under the Foreign Marriage's Act.
- 3) Sikh Marriage⁷ – Earlier Sikh Marriages were registered under the Hindu Marriage Act, but now these are registered under the Punjab Sikh Anand Karaj Marriage Act, 2018. The marriage usually takes place in the Gurudwaras where bride and groom meet each other and certain ceremonies related to Sikh religion are performed.

⁵ Gyan Prakash, *The Hindu marriage act: act no. XXV of 1955* (Allahabad Law Agency) (1956)

⁶ H. D. Pithawala, *Law of marriage & divorce governing Christians & Parsis: a critical commentary on the Indian Christian Marriage Act, 1872, the Divorce Act, 1869 & the Parsi Marriage & Divorce Act, 1936* (C. Jamnadas & Co.) (2016)

⁷ Gyan Prakash, *The Hindu marriage act: act no. XXV of 1955* (Allahabad Law Agency) (1956)

- 4) **Muslim Marriage**⁸ – A Muslim marriage comes under the purview of Muslim Personal Law (Shariat) Application Act, 1937. Islamic traditions are followed in a Muslim marriage and they can go for traditional Indian attire of their choice. The whole process of wedding which is known as Nikah is solemnized by the Maulavi. The Nikah is followed by a religious act of Kanyadan which is too followed by the reading of the holy Quran which the groom's proposal and the bride's acceptance. Before the Nikah takes place, some inspired wedding customs are to be considered which are Isktikhara and Imam zamin, ubtan, ratjagga then the Nikah comes. On the other hand, it is followed by Ruksati, Walima and Chauthi. In Muslim marriages faith is to be given on the holy Quran.
- 5) **Parsi Marriage**⁹ – Parsi Marriage and Divorce Act of 1936 is the authoritative law under which Parsi Marriages are solemnized and registered. Some of the ceremonies followed in the Parsi marriages are exchange of gold and silver coins between the families of bride and the groom.
- 6) **Buddhist marriage**¹⁰ – A Buddhist marriage is registered under the Special Marriage Act, 1954. There are no strict rituals or complex ceremonies among them as they need to belief in religious teachings and spirituality by carrying out the vows. This is usually an engagement solemnized by the Monk.
- 7) **Jain Marriage**^{11 12} – Buddhist and Jain can register their marriage through the Hindu marriage act, 1955 or through the Special Marriage Act, 1954. These are two types of marriage acts which can be used by people of different religion
- 8) **Court Marriage** – Inter-caste marriage or inter-faith marriage are a reality to India which is frequent in number. People who avoid religious ceremonies as well as elaborate rituals often opt for court marriages. For this purpose, the Registrar is given a 30-day notice with residential and birth details of the bride and the groom. Then on the day of the marriage which had been fixed need to be present along with 3 witnesses in order to sign on the legal documents and read the vows.

⁸ Anwar Ahmad. Qadri & Vijay Malik, Muslim law of marriage, divorce, and maintenance: being a revised and enlarged version of A.A. Qadri's commentary on the dissolution of Muslim Marriage Act, 1939 (Eastern Book Co.) (1988)

⁹ H. D. Pithawala, Law of marriage & divorce governing Christians & Parsis: a critical commentary on the Indian Christian Marriage Act, 1872, the Divorce Act, 1869 & the Parsi Marriage & Divorce Act, 1936 (C. Jamnadas & Co.) (2016)

¹⁰ The Special Marriage Act: Act 43 of 1954, with short notes (Ram Narain Lal) (1957)

¹¹ Gyan Prakash, The Hindu marriage act: act no. XXV of 1955 (Allahabad Law Agency) (1956)

¹² The Special Marriage Act: Act 43 of 1954, with short notes (Ram Narain Lal) (1957)

- 9) Mixed Marriages - In case of inter-faith marriages both bride and the groom follow each other's rituals and customs accordingly and this marriage come under the Special Marriages Act, 1954.

II. MARRIAGES UNDER HINDU LAW:

SOURCES¹³:

Basically, we can divide sources of Hindu law into two parts.

1. Ancient source
2. Modern source

Ancient Source:

According to Manu there were four sources of Hindu law in ancient times, those are:

1. Shruti:

The name Shruti is derived from the word 'Shru'. It means to 'hear' and signifies 'what is heard'. In ancient times Vedas and Upanishads are being learnt orally by listening them. This Vedas and Upanishads are the greatest source of Hindu law. Thus, all these Hindu laws carried on by the people of ancient times to us. From this Shruti the Hindu law have being found.

- 2) Smriti:

Smriti means 'what is remembered'. This is also an important source of Hindu law. Smriti was being remembered by two ways – a) Prose style b) poetry style

Smriti can be divided into two parts:

- a) Dharmasutras- the rules and principles given by Gautam, Buddiyan, Vishnu and others in the form of prose are known as the rules of 'Dharmasutras'
- b) Dharmashatras- The principles and rules laid down regarding Hindu marriage Property, guardianship by Manu Yajnavalkya and Narada in the form of poetry are known as 'Dharmashastra'.

- 3) Digest and Commentaries:

Digest and commentaries (Nibandhas) are the modified and mixed form of Shruti and Smritis. This also plays a vital role in formation of Hindu law

- 4) Customs and Usages:

The rules and regulation followed in a community for many years are called usage and customs.

¹³ Paras Diwan, Family law: (law of marriage and divorce in India) (Sterling Publishers Private Limited) (1983)

This custom and usage also have some importance in the origin of Hindu law.

Modern Source:

According to modern sources of Hindu law there are three types of sources:

1) Equity, justice and good conscience

- a) The reasonable and justified rules like Satidah are being abolished in the society.
- b) New rules were made on the basis of this principle.

2) Precedent:

- a) This is also an important source of Hindu law
- b) The decisions of the Supreme Court and Privy Council is bending over all the subordinate courts.

3) Legislation:

- a) Legislation plays an important role in forming Hindu laws.
- b) Acts of Parliament
- c) Codified Law
E.g. The Hindu Marriage Act, 1955 and The Hindu Succession Act, 1956
- d) Codified law is final
- e) Legislation are concrete easily accessible, ascertainable and have authority.

(A) SCHOOLS¹⁴ OF HINDU LAW:

Mitakshara School: The most important schools of Hindu law is Mitakshara. It is a running commentary of Yajnavalkya, Smriti written by Vijaneshwara. The Mitakshara has a very wide jurisdiction. However different customary rules are followed by them.

Mitakshara is further divided into 5 sub schools namely:

- a) **Banaras Hindu Law school.**
- b) **Mithila Law school.**
- c) **Maharashtra Law school.**
- d) **Punjab Law school**
- e) **Madras Law schools**

These schools came under the purview of Mitakshara School. They enjoy all the fundamental principle but different in certain circumstances.

¹⁴ Paras Diwan, Family law: (law of marriage and divorce in India) (Sterling Publishers Private Limited) (1983)

Dayabhaga school is predominant in Assam and West Bengal. It's primary focus is to deal with portion, inheritance and joint family.

Difference between Mitakshara and Dayabhaga,

a) Joint family:

In Mitakshara son, grandson and great grand son acquire a birth right in the ancestral property.

In Dayabhaga the son can arise its ownership after the death of his father. There is no right by birth. The father has un-controlled of alien

b) Survivorship:

Brothers have right of survivorship in inherited property

Under Dayabhaga there is no such right of survivorship.

c) Sapinda:

According to Mitakshara the word 'Sapinda' means a person is connected by the same 'Pinda' i.e, the same baby i.e. a blood relation.

In Dayabhaga it arises by means of Pinda offerings to deceased ancestors.

(B) CONDITIONS OF VALID MARRIAGE:

Section 5 of Hindi Marriage Act, 1955 says that a marriage can be commemorated between two Hindus, if the succeeding conditions are fulfilled—

- i) Neither parties have a spouse living at the time of the marriage.

Monogamy:

Specifically, section 5(i)of Hindu marriage act introduced monogamy which means a husband can have 1 wife or wife can have 1 husband at a time.

In early Hindu law polygamy was recognized which means a husband can have one wife simultaneously. Now bigamy is prohibited under, section 11, bigamous marriage is void.

For example, in case of Ramesh Chandra Ram pratabji Daga vs Ramesh Daga, the first marriage was not divided in accordance with a provision of the Act by obtaining a decree of divorce from the court. Thus, the court held that due to the absence of such decree in the first marriage, the second marriage is void.

- ii) The bridegroom has completed the age of 21 years and the bride, the age of 18 he time of years at time of marriage.

In ancient India child marriage was very common. But in 1978, the Child Marriage Restrain Act raises the minimum age of girls to 18 years and 21 years for boys. However, marriage

perform in violation of this rule is valid and children born out of such a marriage would be considered as a legitimate. And is punishable offence.

For example, in case of *Pinninti Venkatraman vs state*, it was held that the marriage were the parties or any of the party is under the minimum required age is a legal marriage. The only consequence of such marriage is that it is punishable under section 18 of the Hindu Marriage Act and under section 13(2)(iii) and option to repudiate the marriage has been given to the wife if her marriage have been solemnized before the age of 15 years, after attending that age but before attaining the age of 18 years . Hence in the present case though the parties are below the prescribed age at time of marriage the marriage is not void.

iii) According to section 5 (ii), another condition for valid marriage is mental capacity. Neither parties to the marriage must be an idiot or lunatic at the time of marriage

First Clause- unsoundness of mind can be temporary or permanent in nature

Second clause- It deals with recurrent attack of insanity which makes a person unfit for marriage

For example, in case of *Balakrishna vs Lalitha* the court held that recurrent attack of insanity for capacity is enough. It doesn't matter whether its incurable or curable

iv) Both the parties must be in the degrees of prohibited relation ship for valid marriage section 11 says that marriage perform within the degrees of prohibited relationship is void. But if custom and usages permit then the marriage is valid.

Two persons will be considered within the degrees of prohibited relationship –

- a) When one is lineal ascended of other. There is no limit of degree
- b) One cannot marry with a wife or husband of on's lineal ascended or descended. there is no limit of degrees
- c) One cannot marry with a wife of- brother, father's brother, mothers brother grandfathers' brother (both paternal and maternal side) and grandmothers' mother (both paternal and maternal side).

Two persons cannot marry each other with a following relationship which are as follows,

- Brother and sister
- Uncle and niece (both paternal and maternal side)
- Aunt and nephew (both paternal and maternal side)
- Children of brother and sister, children of two brothers and two sisters

- v) Section 5 lays down that it is one of the conditions that both parties to marry must not be within Sapinda relationship under section 11, this type of marriage is void but if customs and usages permits them it is valid marriage.

Two persons will fall in sapinda relationships if they are –

- Three degree of ascend to mother (inclusive)
- Five degree of ascend through father (inclusive)

(C) DIFFERENCE BETWEEN VOID AND VOIDABLE MARRIAGES:

Section 11 and 12 of Hindu marriage act provides the contact of void and voidable marriage respectively.

Void Marriage

Section 5 of Hindu marriage Act 1955 mention about the essential condition of valid marriage it contains certain such condition which if violated shall result into void marriage. Section 11 of this act considered the following the marriage to be void –

- a) Were at the time of marriage any party has a living husband or wife be
- b) when parties to the marriage fall between sapinda relationship
- c) were parties to the marriage come with degree of prohibited relationship.
for example,

- i) Rampyari vs Dharamdas

Allahabad high court held that an application for declaring a marriage to be void is not required to be presented by this victim only

- ii) Leela vs Lakshmi

Court held that the void marriage was not required even after the decree of a court.

Voidable Marriage:

Section 12 of the act mention about the voidable marriage. The court can declare the marriage null and void in following conditions:

- 1) were marital cohabitations has not occurred due to impotency of the respondent
- 2) where at the time of marriage any party fail to give valid consent due to unsoundness or has been affected by mental unsoundness to such extent that he is incapable to marriage.
- 3) Where the consent of guardian is necessary for the marriage and such consent has been obtain by force or by fraud as to nature of rituals or any actual facts or circumstances as to the respondent

- 4) If the marriage is voidable due to pregnancy of wife then such marriage shall declare null only when the court is satisfied:
- a) The applicant was unaware of pregnancy of the wife at the time of marriage
 - b) If the marriage has been solemnized before this act came into force then the applicant shall be presented within 1 year from the date of enforcement of the act or if the marriage has been solemnized after the Act came into force then the application shall be presented within 1 year from such marriage
 - c) The applicant has not voluntarily prohibited after the knowledge of pregnancy of wife.
 - d) Wife has been pregnant from a person other than the applicant
 - e) She was pregnant before marriage
 - i) Impotency – it means the incompetency of any party to be cohabited due to any physical or mental situation
For example, in case of *Digvijay vs pratab Kumar* it was held that nullity of marriage requires the existence of impotency at the time of first cohabitation.
 - ii) Fraud or Force concealment of caste religion, false praising or concealing of prior marriage are good examples of fraud.

(D) RESTITUTION OF CONJUGAL RIGHTS UNDER SECTION 9:

When either of the spouse i.e. husband or wife without any appropriate cause is withdrawn from the society of the aggrieved map apply by petition to the District Court for restitution or conjugal rights and the court on been satisfied with the truth of the statements made in such petition without any legal ground and while the applications shouldn't be granted, may decree restitution of conjugal rights.

For example,

- a) In case of *Selva Madhavan vs Sulochana*,
 - i) Selva married Sulochana with a condition that she will leave her job after marriage.
 - ii) She agreed to leave job after marriage and they got separated due to job into different places
 - iii) Selva put a case so the lower and appellant court held that as per the provision of Hindu marriage act, wife has to live with husband.
Madras high court reversed saying that selva himself never tried to relocate as Sulochana's job was better than Selvas job

- b) In case of Chand Narayan vs Saroja Devi the court held that wife's reason to be in separate residence is justiciable as husband forced her to consume alcohol and non-vegetarian foods.

III. MARRIAGE UNDER MUSLIM LAW:

Islamic law is based on various traditional sources. These sources can be primary or secondary.

Primary sources:

- 1) The Quoran:

The Quoran which all Muslims consider to be their holy book, contains direct revelations of God through Prophet Muhammad. It is basis of the foundation of all Islamic laws

- 2) Sunnat or Hadis:

Whenever the Quoran did not explain something, the Prophet's actions and words become the authority. This is because people believe that even his spirituality and actions derive inspiration from God. These precedents of the Prophet are Hadi's and their legal deductions are Sunnat.

- 3) Ijma:

The Ijma, is the third source of Islamic law or or unanimity amongst Muslim jurists on a particular legal issue.

- 4) Urf or Tamul (custom):

Customs and usages of the Arabs which are not abolished by the Prophet-The Shariat Act, 1937 abolishes most of the customs but excludes customs related to agricultural lands, charities and religious and charitable endowments.

Secondary sources

1. Judicial Decisions
2. Legislations
3. Justice, Equity and Good conscience

(A) SCHOOLS OF MUSLIM LAW:

There are mainly two types of school under Islamic law which can represent the Islamic laws regarding marriage which takes place under various traditions and customs which are as follows:

Shia School:

- 1) Marriage:

- (a) Muta or Temporary marriages is recognized.
 - (b) Only the father and grandfather are recognized as legal guardians for marriage. Marriages contracted by other have no legal effect.
 - (c) Presence of two witnesses is essential at the time of dissolution of marriage, while presence of witnesses is not necessary at the time of marriage.
 - (d) Marriage cannot be concealed on the ground of inequality between the two parties.
 - (e) The doctrine of valid retirement (i.e. the presumption of consummation of marriage if the husband and wife retire into the nuptial chamber and there is no impediment, to sexual intercourse) is not recognized.
 - (f) Ten months is the longest period of gestation.
 - (g) Marriage are either valid or void
- 2) Dower (Mahr):
 - (a) The minimum amount for dower is not fixed.
 - (b) Presumption of 500 dirhams as the maximum in case there is no stipulation.
 - (c) Presumption of entire prompt dower in absence of any stipulation.
 - 3) Divorce:
 - (a) Talaq must be pronounced orally in Arabic language.
 - (b) Divorce under compulsion or threat or intoxication is void.
 - (c) Talaq pronounced in implied or ambiguous terms is void.
 - 4) Maternity:

A child born of fornication is deemed to have no parents at all
 - 5) Guardianship:

The mother is entitled to the custody of boy up to two years and of a girl up to 7 yrs.
 - 6) Maintenance:
 - (a) It is not obligatory to maintain the father if he is able to earn.
 - (b) In case there are more per sons than one who are liable to maintain, the burden is shared according to the means and ability of each of each

Sunni School:

- 1) Marriage:
 - (a) Muta marriage is not recognized
 - (b) Besides father and father's father how high-so-ever brothers, other paternal relations, mother and maternal uncle, etc. are also recognized legal guardians for marriage

(c) Presence of two witnesses is not necessary at the time of dissolution of marriage, but necessary at the time of marriage.

(d) Marriage can be concealed on the ground of inequality between the two parties.

(e) The doctrine of valid retirement is recognized.

(f) The period of gestation is two years.

(g) Marriages may be irregular or valid or void

2) Dower (Mahr):

(a) 10 dirhams is the minimum amount of the dower.

(b) No upper limit is prescribed,

(c) In the absence of any stipulation, the presumption is that the part is prompt and the part is differed.

3) Divorce:

(a) It may be oral or in writing

(b) Divorce under compulsion or threat or intoxication is void

(c) Not void if proved that it was clearly intended.

4) Maternity:

(a) It is obligatory to maintain even if he is able to earn himself

Maternity is established in the women who give birth to the child whether by fornication (Zina) or by valid marriage.

5) Guardianship:

She is entitled to the custody of the boy up to 7 years and of a girl until she attains puberty.

6) Maintenance:

(a) It is obligatory to maintain even if he is able to earn himself.

(b) The liability of maintenance is shared equally.

7) Waqf:

(a) Mere declaration is enough for a valid waqf

(B) TYPES¹⁵ OF MARRIAGE UNDER MUSLIM LAW

a) Batil Marriage – void marriage

i) A married woman cannot contract another marriage while her husband is alive

ii) The bar of consanguinity renders a marriage void

iii) Marriage is also prohibited on ground of affinity.

¹⁵ Maaike Voorhoeve, *Family law in Islam: divorce, marriage and women in the Muslim world* (American University of Cairo Press) (2016)

- iv) Fosterage is another impediment to valid Muslim marriage
- b) Fasid marriage – irregular marriage- voidable
 - A fasid marriage is a marriage i.e. with the process of removing irregularity
 - i) Without witnesses (by acknowledgement before witnesses)
 - ii) With is fifth wife (by divorcing one of the four wives)
 - iii) With a woman undergoing iddat (by expiration of iddat period)
 - iv) Prohibited by reason of difference of religion (conversion of religion, women can adopt Islam, Christianity or Jewish religion but man has to adopt Islam)
 - v) With a woman so related to the previous wife, that if one of them had been a male, they couldn't have lawfully intermarried. (by divorcing he wife who is the obstacle)
- c) Sahid marriage – It is a valid marriage which works according to the Shariat law and forms a legal bonding for the fulfillment of the Nikah.

IV. CONCLUSION

According to this comparative study of both the Muslim and the hindu marriages it is to be said that both needs to be done according to the rules and regulations given tin the authoritative and texts and are binding upon every person whether it is related to adoption, or marriage or divorce of a person which is to be enforced by these acts and if foreign marriages are done then he needs to work according the Foreign marriages act.
