
MARRIAGE

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1. Hindu Marriage – Nature and Scope

Hindu Law is a body of principles or rules called 'Dharma'. Dharma according to Hindu texts embraces everything in life. According to the Hindus, 'Dharma' includes not only what is known as law in the modern sense of the term but all rules of good and proper human conduct. Dharma is used to mean justice what is right in a given circumstance, moral, religious, pious or righteous conduct, being helpful to living beings and things, duty, law and usage or custom having in the force of law and also a valid Rajashasana.

The Hindu system as modified through centuries has been in existence for over five thousand years and has continued to govern the social and moral patterns of Hindu life with harmonizing the diverse elements of Hindu cultural life. Magne says, "Hindu law has the oldest pedigree of any known system of Jurisprudence and even now it shows no signs of decrepitude".

Hindu law, though believed to be of divine origin, is based essentially on immemorial custom and many of the acts of the people which were purely of a secular nature. But the secular nature of the acts have been modified to suit the religious preferences of a Brahmin community. With a desire to promote the special objects of religion or policy, they have used their intellectual superiority and religious influence to mould the customs of the people.

The term 'Hindus' denotes all those persons who profess Hindu religion either by birth from Hindu parents or by conversion to Hindu faith. In *Yagnapurush dasji v. Muldas* [AIR 1966 SC 1119], the Supreme Court accepted the working formula evolved by Tilak regarding Hindu religion that 'acceptance of vedas' with reverence, recognition of the fact that the number of Gods to be worshiped at large, that indeed is the distinguishing feature of Hindu religion.

According to Hindu Jurisprudence a Man only attains Moskha, the ultimate pleasure of life after death if he gets a pind daan from his biological sons.

Marriage is a civil and religious contract whereby a man is joined and united to a woman for the purpose of civilized society. In law 'marriage' may mean either the acts, agreements, or ceremony by which two persons enter into wedlock, or their subsequent relation created thereby. Marriage is the civil status or personal relation of one man and one woman joined together in a matrimonial union which was lawfully entered into.

Marriage is universal, It is for the formation of family, It forges a new social link, It fixes the responsibility of bringing up children on the parents, It is a result of civil or religious ceremony, Legitimization of children born out of such union which is a social need, In marriage, the male and female get the right of mutual relationship in economic, social and biological spheres.

The Institute of Marriage evolved in an evolutionary manner. In the earliest form of groupings of people, sex was absolutely unregulated and the children were considered to be the children of the group. According to Morgan, marriage institution started with group marriage, then polygamy and lastly monogamy.

The institute of marriage regulates and socially validates relatively long-term legitimate sexual relation between males and females, Marriage serves to start reproductive process, Marriage is also a way to acquire new Kinsmen. It is only after marriage a family comes into being.

Hindu Marriage - Matrimonial Rights and Obligations

- **Duties of a Husband are:** to protect his wife, to give her a home, to maintain her by providing her with comforts and necessities of life within his means, to treat her kindly with affection and courtesy, to honour the wife, not to assault or commit battery against his wife's person.
- **Rights of a Husband are:** he is entitled to the custody and the conjugal society of his wife, he is entitled to succeed to her if she predeceases him without issue, and can utilise her Istridhana property to relieve himself in circumstances of extreme distress.
- **Duties of a Wife are:** to attend to the needs of her husband both in religious and household activities, to show obedience and veneration for the husband, to live with him wherever he may choose to reside unless he is guilty of cruelty or misconduct.
- **Rights of a Wife are:** right for maintenance throughout her life, right of equality in the house of her husband, right to bring suit for the restitution of conjugal rights, right to get divorce for the cruelty, insults, etc.

Hindu Marriage Act, 1955 has reformed Hindu law of Marriage. It is a landmark in the history of social legislation. It has not simply codified the Hindu law of marriage but has introduced certain important changes in many respects. The Hindu marriage contemplated by the Act hardly remains sacramental. The Act has brought in some changes of far reaching consequences which have undermined the sacramental nature of marriage and rendered it contractual in nature to a great extent.

The Hindu law of marriage, as interpreted by the British Rulers of India

- i. Marriage was a holy sanskar, it could be solemnised in one of the eight forms recognised by law;
- ii. The solemnisation would be according to the Shastric or customary rites;
- iii. One could marry at any age, as there was no lowest age of marriage;
- iv. Inter-religious and inter-caste marriages were prohibited, but the latter could be sanctioned by custom;
- v. Marrying within one's gotra or pravara was not allowed, except among the Shudras;
- vi. Husband and wife would live together, the latter would be submit to the wishes of the former, and the former would maintain the latter;
- vii. Marriage was indissoluble; divorce was not permitted unless recognised by custom;
- viii. Death did not dissolve a marriage and therefore a widow could not remarry unless permitted by custom so to do.

The courts in India recognised, interpreted and applied all these principles in their minute's details. Changes brought about by the Hindu Marriage Act, 1955 are radical and substantial for the institution of marriage.

The following changes are important:

- i. A Hindu marriage is now not so much concerned with religion. It is more a result of mutual consent than sacramental [Sections 5(ii), (iii), 11 to 13 and 7].

- ii. Marriages amongst Hindu, Jains, Sikhs and Buddhists are now valid Hindu marriages in the eyes of the law (Section 2).
- iii. As per Section 3 the divergence between the Mitakshara and Dayabhaga schools in connection with the expression “prohibited degrees of relationship” for the purpose of marriage is now removed. The strict rule prohibiting marriages within the limits of Sapinda relationship, as defined in the Smritis, have been considerably relaxed. Some new degrees of relationship have also been added. Thus one cannot now marry a person who was the wife of the brother of the other.
- iv. Monogamy amongst the Hindus is introduced for the first time by the Act. Bigamy is now punished under the Indian Penal Code. The conditions and requirements of a valid marriage are now very much simplified as is evident from the provisions of Sections 5 and 17 of the Act.
- v. Caste considerations for inter-caste and inter-communal marriages have now been made irrelevant, eliminating all restrictions thereupon.
- vi. There were different kinds of marriages in vogue before the Act. Now they are of no consequence and the only form of marriage will be that accepted by the parties as prevailing in his or her community (Section 7).
- vii. The Act now makes no distinction between the marriage of a maiden and the marriage of a widow.
- viii. The ancient Hindu law did not prescribe any age for marriage but it is now a condition of marriage that the bridegroom must have completed 21 years and the bride must have completed the age of 18 years (Section 5).
- ix. The Act now lays down conditions of a valid marriage and does not recognise any particular form of a Hindu marriage (Section 5).
- x. For a valid Hindu marriage no particular ceremony is prescribed by the Act. Sections 5 and 7 lay down that such a marriage can be solemnised in accordance with the customary rights and ceremonies of any one of the parties to the marriage.
- xi. Provision for registration of Hindu marriages has been provided for the first time (Section 8).
- xii. Eliminating restrictions based on gotra, pravara and Sapinda relationship the Act makes provisions for judicial separation, for divorce and for annulment of marriages (Section 10 to 14).
- xiii. Provisions for restitution of conjugal rights of the parties (Section 9).
- xiv. After a valid divorce either party may remarry (Section 15).
- xv. Provisions for legitimacy of children born out of alliances which may be subsequently declared annulled or void or voidable (Section 16).
- xvi. Provisions for maintenance pendente lite and for expenses of legal proceedings (Section 24).
- xvii. Permanent alimony and maintenance (Section 25).

The custody, maintenance and education of minor children during the pendency of legal proceedings as also after passing of decree (Section 26).

2. Who are Hindu

Till this day there is no precise definition of the term 'Hindu' available either in any statute or in any judicial decision. However since Hindu law applies to all those persons who are Hindus. It is necessary to know who are Hindus.

The persons to whom Hindu law applies may be put in the following three categories.

1. Any person who is a Hindu, Jain, Sikh or Buddhist by religion, i.e., Hindus by religion.
2. Any person who is born of Hindu parents (when both the parents or one of the parents is a Hindu, Jain, Sikh or Buddhist by religion), i.e., Hindus by birth, and
3. Any person who is not a Muslim, Christian, Parsi or Jew, and who is not governed by any other law.

Explanation to Section 2(1) further categories Hindu into two:

- (i) Hindu by Religion
- (ii) Hindu by Birth

Hindu by Religion

This category includes two types of persons:

- (a) Those who are originally Hindus, Jains, Sikhs or Buddhists by religion.

As rightly observed by the Supreme Court in *Chandrasekhar v. Kulandaivelu*, Any person who is a Hindu, Jain, Buddhist or Sikh by religion is a Hindu if: (i) he practises, professes or follows any of these religions, and (ii) he remains a Hindu even if he does not practice, profess or follow the tenets of any one of these religions. Thus, a person does not cease to be a Hindu if he becomes an atheist, or dissents or deviates from the central doctrines of Hinduism, or lapses from orthodox practices, or adopts western way of life, or eats beef.

- (b) Those who are converts or reconverts to Hindu, Jain, Sikh or Buddhist religion.

A person who ceases to be a Hindu by converting to a non-Hindu religion; will again become Hindu if he reconverts to any of the four religions of Hindus.

A non-Hindu will become a Hindu by conversion:

- (i) If he undergoes a formal ceremony of conversion or reconversion prescribed by the caste or community to which he converts or reconverts; or
- (ii) If he expresses a bona fide intention to become Hindu accompanied by conduct unequivocally expressing that intention coupled with the acceptance of him as a member of the community into the fold of which he was ushered into.

Further, when a person declares that he is a follower of Hindu faith and if such a declaration is bona fide and not made with any ulterior motive or intention, it amounts to his having accepted the Hindu approach to God. He becomes a Hindu by conversion.

Hindu by Birth

Under Modern Hindu Law, a person will be a Hindu by birth if:

- (i) Both his parents are Hindu; or
- (ii) One of the parents is a Hindu and he is brought up as a Hindu.

Such child is Hindu irrespective of fact he/she is legitimate or illegitimate.

In case after the birth of the child both or one of the parents convert to another religion, the child will continue to be a Hindu unless, in the exercise of their parental right, they also convert the child into the religion in which either or both of the parents have converted.

A relevant judgement in this context is *Maneka Gandhi v. Indira Gandhi*, wherein the Court held that Sanjay Gandhi was a Hindu because: (1) one of the parents, namely his mother was a Hindu and (2) he was openly brought up as a Hindu.

Section 2(2) provides that nothing contained in this Act shall apply to the members of any Scheduled Tribes (even if they are Hindus) unless the Central Government by notification in the official gazette otherwise directs. Most of the scheduled tribes are still governed by customs.

Marriage: Sacrament or Contract

Marriage being one of the essential Samskaras is sacramental in nature. The sacramental nature of marriage has three characteristics:

1. It is a permanent union i.e. once tied cannot be untied.
2. It is an eternal union i.e. valid not only in this life but in lives to come.
3. It is a holy union i.e. performance of religious ceremonies is essential.

Since Hindu marriage was considered to be sacrament, the consent of the parties did not occupy any important place. Thus the person married may be a minor or even of unsound mind, if the marriage is duly solemnised there is valid marriage. Under the Contract Act, the contract of a minor or of a person of unsound mind is void. Further, Section 12 of Hindu Marriage Act does lay down that a marriage is voidable if consent is obtained by fraud or force, but it is not laid down that if one's consent was not obtained the marriage is voidable. This shows that despite the fact that a party is able to prove the absence of consenting mind, the marriage will continue to remain valid.

The modern concept of marriage is contractual in nature. It receives the ideals of liberty and equality (free volition of individuals). Today, it is an established notion of the west that marriage, to be effective, must be an agreement voluntarily entered into by both parties.

In the light of modern concept of marriage could we say that Hindu marriage continues to be sacrament? By recognising the divorce and widow remarriage the first two characteristics of sacramental marriage have been waived. However, the third characteristic is still retained.

To sum up the Hindu marriage has not remained a sacrament and has also not become a contract, but it has a semblance of both.

3. Essentials of Hindu Marriage

Parties must be Hindus under Section 2(3) of Hindu Marriage Act. According to this section both the parties to the marriage under the Act must be Hindus. If one of them is a Hindu and the other a non-Hindu or both are non-Hindus, the marriage will not be a subject matter of this Act but will relate to some other law i.e. Special Marriage Act etc.

Hindu Ceremonies

Marriage among Hindus being a religious and sacred tie, performance of certain ceremonies is still necessary for a valid marriage. There were three important stages wherein certain ceremonies were to be performed. They were:

1. Betrothal or Sagai: it is a formal promise to give the girl in marriage.
2. Kanyadan: It is actual giving away of the girl in marriage by her father.
3. Saptapadi: it consisted in performing a ceremony of taking seven steps before the sacred fire by the bride and the groom. The performance of Saptapadi marked the completion of a marriage. It made the marriage irrevocable.

As per Section 7, a marriage is a ceremonial affair. Saptapadi is an essential part of the ceremonies of marriage, its non-performance will invalidate the marriage. The performance of vedic rights is not enough to solemnise the marriage.

Customary ceremonies may not include any one of the Shastric ceremonies including Saptapadi. It may be totally non-religious ceremony or it may be very simple ceremony. For instance, among santhals smearing of vermilion by bridegroom on the forehead of the bride is the only essential ceremony.

Necessary ceremonies, shastric or customary, whichever are prevalent on the side of the bride or bridegroom, must be performed otherwise marriage will not be valid. No one can innovate new ceremonies and a marriage performed with the innovated ceremonies and rites is invalid. Hindu Marriage Act allows inter-caste marriages. But marriage between a Hindu and a non Hindu is not permissible under Hindu Marriage Act and such a marriage if performed in India, will be invalid. But foreign country such marriage is valid. Such marriage is also valid in India, if performed under the Special Marriage Act, 1954.

Conditions for the validity of marriage (Section 3 and 5)

A marriage may be solemnised between any two Hindus, if the following conditions are fulfilled, namely :-

- i. Neither party has a spouse living at the time of the marriage;

- ii. At the time of the marriage, neither party:
 - a. Is incapable of giving a valid consent to in consequences of unsoundness of mind; or
 - b. Though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
 - c. Has been subject to recurrent attacks of insanity or epilepsy.
- iii. The bridegroom has completed the age of twenty one (21) years and the bride the age of eighteen years at the time of marriage.
- iv. The parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;
- v. The parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.

Detailed Explanation

I. Monogamy

This condition implies monogamy and prohibits bigamy or polygamy. The expression “neither party has a spouse living” depicts that the spouse must not be alive at the time of marriage. If the spouse is alive at the time of marriage that could bar the remarriage of a person. However one must note that the first marriage of a person should be a legally valid marriage. In spite of one’s valid marriage if the person remarries in violation of Section 5(i), the second marriage will be null and void and he will be subjected to penal consequences. The Scheduled Tribes are exempted from the application of the Act. But there must be a proved custom to this effect.

Section 5(i) prohibits bigamy or polygamy. Section 11 makes a bigamous marriage void and Section 17 makes it a penal offence for both Hindu males and females under Section 494 and 495 of IPC. The offence of bigamy is committed only if the required ceremonies of marriage are performed. The second marriage cannot be taken to be proved by the mere admission of the parties; essential ceremonies and rites must be proved to have taken place. In the case of a bigamous marriage, the “second wife” has no status of wife.

II. Mental Health and Reproductive Capacity

Sub clause (a) requires that at the time of marriage neither party is incapable of giving a valid consent to marriage due to unsoundness of mind.

Sub clause (b) – Mental disorder: According to sub-clause (b) at the time of marriage neither party to marriage should be suffering from a mental disorder of such nature and to such a degree as to be unfit for two purposes (i) marriage and (ii) procreation of child. In *Tarlochan Singh v. Jit Kaur*, the court held the marriage void on the ground that wife was suffering from schizophrenia within short period after marriage and the disease was not disclosed to the husband before marriage.

Sub clause (c) – Recurrent attacks of insanity: If a person has been subject to recurrent attacks of insanity he is also not qualified for marriage under Hindu Marriage Act. He cannot marry even during a lucid period.

Post marriage mental illness: If a party to a marriage is not suffering from any mental defect described under section 5(ii) but fails ill mentally after the marriage, there is no violation of this condition.

III. Age

According to this clause, at the time of marriage the bride must have completed the age of 18 years and the bridegroom of 21 years. Thus a child marriage is prohibited under Hindu Marriage Act. However, violation of this condition does not make the marriage void or voidable. It means that it is valid though it may attract penalties. But it can become a valid ground for repudiation of the marriage. The Hindu Marriage Act and the Child Marriage Restraint Act provide for punishment for such marriage.

According to Section 18 of Hindu Marriage Act, anyone who procures a marriage for himself or herself in contravention of Section 5(iii) may be punished with upto 15 days imprisonment or with a fine upto Rs. 1000 or with both. Under the Child Marriage Restraint Act, 1929, a male above the age of 25 years marrying a girl below 15 years is punishable with upto 3 months imprisonment and is also liable to fine. The Child Marriage Restraint (Amendment) Act 1978 has also raised the age of marriage of girl to eighteen.

IV. Prohibited Degree of Relationship

The parties to marriage must not fall within the degree of prohibited relationship. This relationship is defined under Section 3(g) of the Act.

According to Section 3(g) “degree of prohibited relationship” means when two persons are related to each other in any of the following manners:

- (i) By lineal ascent: If one is a lineal ascendant of the other. This relationship covers the Sapinda relationship which extends upto fifth degree in the line of father and third degree in the line of the mother. The distinction of this category is that it extends even beyond the Sapinda ascendants.
- (ii) By affinity: If one is the husband or wife of the lineal ascendants or descendants of the other. For example, father-in-law and daughter-in-law, mother-in-law and son-in-law, step mother and step son or step-father and step daughter are thus within the degrees of prohibited relationship.
- (iii) Wives of certain brother relations if one was the wife of:

- a. The brother, or
 - b. The father's brother, or
 - c. The mother's brother, or
 - d. The father's father's brother, or
 - e. The mother's father's brother, or
 - f. The father's mother's brother, or
 - g. The mother's mother's brother.
- (iv) Certain close relations if both are:
- a. Brother and sister, or
 - b. Niece and uncle (paternal or maternal), or
 - c. Nephew and aunt (paternal or maternal), or
 - d. Children of a brother and a sister, or
 - e. Children of two brothers, or
 - f. Children of two sisters.

According to Section 11 of Hindu Marriage Act, a marriage in contravention of this condition is void. It is also punishable under section 18(b) of the Act.

(i) 'A' marries his adopted sister. This is not a valid marriage, as it falls within the degrees of Prohibited relationship. (ii) 'A' marries with the wife of Pre-deceased brother. It is not a valid marriage as it falls within the degree of Prohibited relationship. (iii) 'A' marries his stepmother's sister. It is not a valid marriage, 'A' is related to his step-mother by half-blood relationship.

V. *Avoidance of Sapinda Relationship*

According to the Dharmashastra the Sapinda relationship is very important in the matter of marriage. According to Mitakshara Law of Marriage 'Pinda' means body and therefore those who are related by body or blood or consanguinity are sapindas among themselves. The Hindu Marriage Act has adopted Mitakshara definition but has limited the extent of Sapinda relationship to 5 degrees in line of ascent through the father and 3 degrees in the line of ascent through the mother.

According to Section 3(f)(ii) two persons are said to be "sapindas" of each other if one is a lineal ascendant of the other within the limits of sapindas relationship, or if they have a common lineal ascendant to each of them.

Whereas Section 3(f)(i) states that "sapinda relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation.

Rules for determining sapinda relations:

1. The relationship extends as far as the third generation in the line of ascent through the mother in case of both the parties.

2. The relationship extends as far as the fifth generation in the line of ascent through the father in case of both the parties.
3. Sapinda relationship may submit in case of both the parties through the father or in case of both through the mother; or it may subsist in case of one of them through the father and on case of the other through the mother.
4. The line is traced upwards in case of both the parties counting each of them as the first generation; the generations in the line of ascent whether three or five are to be counted inclusive of the persons concerned and the common ancestor or ancestress.

Sapinda relationship includes relationship by half or uterine blood as well as by full blood and by adoption. It also includes both, legitimate and illegitimate blood relationship.

VI. Solemnization of Marriage

In connection with marriage the word 'Solemnise' means to celebrate marriage with proper ceremonies and in due form. Unless the marriage is celebrated or performed with proper ceremonies and in the due form, it cannot be said to be solemnised.

Section 7 provides that (i) A Hindu marriage may be solemnised in accordance with the customary rites and ceremonies of either party thereto. (ii) where such rites and ceremonies include the saptapadi, the marriage becomes complete and binding when the seventh step is taken.

Section 7 provides two kinds of ceremonies (i) Customary Ceremonies and (ii) Shastric Ceremonies.

As the rites and ceremonies to be observed are customary, they should possess all the qualities which are necessary for the validity of a custom defined under section 3(a) of the Act.

According to Section 3(a) the expression 'custom' and 'usage' signify any rule which having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family: provided that the rule is certain and not unreasonable or opposed to the public policy; and in the case of a rule applicable only to a family it has not been discontinued by the family.

It is not necessary that the customary rites or ceremonies must be very old. What section 3(a) of Hindu Marriage Act requires is that for maturing into a custom a rule should have been observed for a long time, continuously and uniformly.

When essential ceremonies consulting a Hindu marriage are not proved, the mere issuance of certificate under Special Marriage Act cannot validate the marriage if the marriage has not been solemnised as per the requirements of this Act.

The Act does not, however prescribe the ceremonies requisite for solemnisation of the marriage but leaves it to the parties to choose a form of ceremonial marriage which is in accordance with any custom or usage applicable to either party; and where the form adopted includes the Saptapadi—that is the taking of seven steps by the bridegroom and the bride jointly before the sacred fire—marriage becomes complete when the seventh step is taken.

The essential rites which may, however, be said to be the requirement common in all ceremonial marriages are: (i) invocation before the sacred fire; and (ii) saptapadi.

VII. Registration of Marriage

Section 8(1) of Hindu Marriage Act provides that for the purpose of facilitating the proof of Hindu marriages, the state government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered on such manner and subject to such conditions, as may be prescribed in a Hindi Marriage Register kept for the purpose.

Section 8(2) of the Act provides that the State Government may, if it is of opinion that it is necessary or expedient so to do, provide that the entering of the particulars referred to above, shall be compulsory in the state or in any part thereof, whether in all cases, or in such cases as may be specified.

There was no requirement for the registration of Hindu marriages before the Hindu marriage Act, 1955. Generally, Hindus do not get their marriages registered unlike Adoption, Will Transfer of Property and Partition. The Act does not contain the rules of registration and the State Government have been authorised to frame them.

The purpose of registration is only to furnish a convenient evidence of marriage Clause (4) provides that Hindu Marriage Registers will be admitted as evidence. The certificate is however not a conclusive proof of marriage.

Besides the evidentiary value, the national commission for women has pointed that registration of marriage has critical importance to various women related issues, such as:

- (a) Prevention of child marriage.
- (b) Prevention of marriage without the consent of the parties.
- (c) Prevention of illegal bigamy or polygamy.
- (d) Enabling married women to claim their right to live in the matrimonial home, maintenance, etc.
- (e) Enabling the widows to claim various rights after the death of their husbands.
- (f) Deterring men from deserting their wives after marriage.
- (g) Deterring the sale of girl under the garb of marriage.

It is explicitly laid down in this Act that non registration does not affect the validity of marriage. Thus marriage can be valid without registration.

In *Seema v. Ashwini Kumar*, the Supreme Court has dwelt at length on the topic of registration of marriages. It suggested for the compulsory registration of marriages in all the states.

4. Violation of Conditions and Ceremonies of Marriage

There are three types of marriages under this Act: (i) valid, (ii) void, and (iii) voidable. Section 11 deals with void marriages and Section 12 deals with the voidable marriage. All other marriages which are not covered by these two sections are valid.

Void Marriage

Section 11 states that any marriage solemnized at the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party be so declared by a decree of nullity if it contravenes any of the conditions specified in clauses (i), (iv) and (v) of Section 5.

Thus a marriage will be void ab initio:

- i. If any party to marriage has a spouse living at the time of the marriage [Section 5(i)].
- ii. If the parties are within the degree of prohibited relationship unless the custom or usage governing each of them permits such a marriage [Section 5(iv)].
- iii. If the parties are sapindas of each other, unless the custom or usage governing each of them permits such a marriage [Section 5(v)].

Section 11 of this Act is prospective in nature. It is only applicable to marriages solemnised after the commencement of the Hindu Marriage Act, 1955.

Effect of Void marriages

A void marriage is no marriage. It is void since its inception. No legal rights and duties flow from it. Therefore, the relationship of husband and wife does not come into existence from a void marriage. No declaration of the court is necessary to this effect. The issues from a void marriage are illegitimate unless legitimatised by law in some way. If one withdraws from the society of the other, the other party has no right to the restitution of conjugal rights. If one of them marries again, he or she is not guilty of bigamy and the validity of later marriage is not affected because of the first so called marriage.

Voidable Marriage

A marriage which can be annulled or avoided at the option of one or both the parties is known as a voidable marriage. Section 12 of Hindu Marriage Act contains relevant provisions of Voidable Marriage.

This section lays down four grounds on which a Hindu marriage becomes voidable. These are:

- I. Inability of the respondent to consummate the marriage on account of his or her impotency.
- II. Respondents incapacity to consent or suffering from a mental disorder.
- III. Consent of the petitioner being obtained by fraud or force.
- IV. Concealment of Pre-marriage pregnancy by the respondent.

Impotency [Section 12(1)(a)]

Section 12(1)(a) can be dissected as under:

- i. That the marriage has not been consummated; and
- ii. That the non-consummation is due to the impotence of the respondent.

Consummation of marriages means full and normal sexual intercourse between married person. A marriage is consummated by sexual intercourse. It consists in the penetration by the male genital organ into the female genital organ. Full and complete penetration is an essential ingredient of ordinary and complete intercourse. Partial, imperfect or transient intercourse is not Consummation. The degree of sexual satisfaction obtained by the parties is irrelevant. Consummation may be proved by medical evidence.

Impotency is the inability to have complete and normal sexual intercourse. It may arise from a physical defect in either partner or from a psychological barrier amounting to invisible repugnance on the part of one to sexual relations with that partner. Sterility is irrelevant and does not imply impotency. Absence of uterus in the body of the one's female partner does not amount to impotency but the absence of a proper vagina would mean impotency. Similarly organic malformation making a woman sexless would mean impotency. If a husband fails to satisfy his wife's abnormal appetite for sex that cannot be regarded as impotency. Thus impotency means practical impossibility of consummation of marriage. Sexual intercourse which is incomplete occasionally does not amount to impotency. It includes discharge of healthy Semen containing living sperms in the case of men and discharge of menses in the case of women.

Regarding impotency, the various principles laid down by the courts could be summarised as follows:

- i. Full and complete penetration is an essential ingredient of ordinary and complete intercourse, though degree of sexual satisfaction obtained by the parties is irrelevant. If one spouse is oversexed and the other is not, it does not amount to impotency.
- ii. Impotency is usually either (a) physical, or (b) mental. Physical impotency includes malformation of, or structural defects in the organs, such as unduly large male organ or abnormally small vagina.
- iii. Mental or psychological impotency includes emotional, psychological or moral repugnance or aversion to the sexual act. In *Shantabai v. Tara Chand*, the wife was alleged to have an absolute repugnance towards sexual intercourse although she had normal sexual organs. Held that it amounts to impotency. Where immediately after marriage the husband lived for three nights and days in the same room with his wife and failed to consummate the marriage, it was a fair inference that non-consummation was due to husband's knowing refusal arising out of incapacity, nervousness or hysteria. In *Nijhawan v. Nijhawan*, a liberal interpretation of the word 'impotence' was made by the court. In that case, the wife felt depressed and frustrated owing to the failure of husband to perform full and complete sexual intercourse. Held that vigorous and harmonious sexual activity is the foundation of marriage and a marriage without sex is anathema. The court considered the husband's impotency to be a cause of mental and physical cruelty to the wife.

- iv. If impotency can be cured by medical treatment or surgery, it would not amount to impotency, unless the respondent refuses to undergo treatment. In *Rajendra v. Shanti*, where the size of wife's vagina was after surgical operation one and half inch, but was fit for intercourse, the court said that wife was not impotent.
- v. Mere barrenness or incapacity to conceive a child or sterility does not amount to impotency. In *Shewanti v. Bhaura*, the wife was sterile but was capable of having sexual intercourse held that she was not impotent.

Burden of Proof: The Burden of Proof lies on petitioner but when once the impotency is proved there is a rebuttable presumption in favour of its continuance.

Consent obtained by force or fraud [Section 12(1)(c)]

For marriage the consent of the parties concerned must be free. This is not because marriage is a contract but because the sweetness and success of a married life depends upon harmony between both the parties. If the consent to marriage is not free, this harmony is a remote possibility. That is why it is quite just and reasonable that a party whose consent is not free should be permitted to come out of the wedlock. Section 12(1)(c) allows this. It makes the marriage voidable where consent to it was obtained by force or fraud.

Section 12(1)(c) provides that a marriage is voidable on the ground that the consent of the petitioner or of the guardian has been obtained by force or fraud. After the Child Marriage Restraint Act the consent of guardian has become irrelevant as the minimum marriageable age was set 21 years and 18 years for bridegrooms and bride.

Provided no petition for annulling a marriage:

- (1) If the petition presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered [Section 12(2)(a)(i)]; or
- (2) The petitioners has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or as the case may be the fraud had been discovered [Section 12(2)(a)(ii)].

Force: The word Force is not defined by the Act. But it may include all cases of compulsion, coercion or duress. Abduction, terror, coercion and threat to commit suicide will definitely be covered by the term force. Whenever owing to some natural weakness of mind or on account of some fear, whether entertained reasonably or unreasonably, but nonetheless really entertained or when a party is in such a mental state that he finds it almost impossible to resist the pressure, it will amount to force.

However, mere pressure or strong advice, persuasion etc., will not amount to force.

Fraud: This section does not speak of fraud 'in any general way or every misrepresentation or concealment which may be fraudulent' but 'fraud as to the nature of the ceremony' or 'as to any material fact or circumstance concerning the respondent'.

The clause prior to its amendment by the Amending Act of 1976, did not contain the words 'or' is to any material fact or circumstance concerning the respondent. The operation of the clause was considerably extended so as to include within its ambit any material fact or circumstance concerning the respondent. Whether a misrepresentation or false statement or

concealment is as to any such material fact, must to a large extent depend on the facts and circumstance of the case.

However, it must be something vital, touching or affecting the respondent and such as had definitely induced or influenced consent. The petitioner must show that; but for such false representation or statement or concealment he or she would not have married the respondent.

Some important grounds of fraud: (1) Nature of ceremony, (2) Identity of the party, (3) Concealment of disease, (4) Concealment of religion or caste, (5) Concealment of previous marriage, (6) Concealment of unchastity, (7) Concealment of illegitimacy, (8) Concealment of age, (9) Petitioner's father's fraud, (10) Concealment of financial status and nature of employment.

A petition for nullity must be filed within one year of the discovery of fraud or cessation of force. This condition is mandatory.

Thus the operation of Section 12(1)(c) has been considerably winded by the 1976 Amendment.

Pre-marriage Pregnancy [Section 12(1)(d)]

Section 12(1)(d) provides that a marriage is voidable on the ground that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

Section 12(1)(d) is to be read with Section 12(2)(b) which lays down three further conditions which are to be satisfied in order to avail of the remedy under Section 12(1)(d). These are:

- (1) That at the time of the marriage the petitioner was ignorant of the facts alleged;
- (2) That the petitioner has started proceedings under Section 12 within one year of the marriage;
- (3) That the petitioner did not have, with his consent, marital intercourse with his wife ever since he discovered that the wife was pregnant by some other person.

Thus the requirements of this ground are:

- (1) The respondent was pregnant at the time of marriage.
- (2) The respondent was pregnant from a person other than the petitioner.
- (3) The petitioner was ignorant of this fact at the time of marriage.
- (4) The proceeding is started within one year of the marriage.
- (5) Absence of marital intercourse by the petitioner husband with his wife since such discovery.

If the girl becomes pregnant by some person before her marriage and subsequently the same fellow marries her the section has no application. If the bride becomes pregnant by some other person than her husband after marriage the section has no relevance.

Onus of proof lies on the petitioner husband to prove this wife's admission of pre-marriage pregnancy plus the fact that husband had no access to her before marriage is sufficient to establish her pre marriage pregnancy.

In *Nishit v. Anjali*, where a bride gave birth to a mature child within 167 days from the date of marriage, it was held that it was for the wife to raise a reasonable doubt that she was pregnant by the person who became her husband.

A blood test for the ascertainment of the child's paternity is also possible. If the wife volunteers for the same then it is well and good, but it cannot be forced upon her.

S.No.	Void Marriage	Voidable Marriage
1.	A marriage which is <i>void ab initio</i> is a total nullity. A marriage is non-existent in such a case and does not affect or alter the status of the parties. Moreover, it does not create any rights and obligations of the parties, which normally result from a valid marriage.	A voidable marriage remains valid and binding till avoided. It is and continues to be valid marriage for all the purposes till a decree annulling it is passed under Section 12.
2.	Parties to a void marriage are criminally liable.	No penalty is laid down for a voidable marriage.
3.	A void marriage is void ab initio and it can be held to be so without a formal declaration by a court under Section 11.	While for a voidable marriage, to put an end to it, annulment is necessary.
4.	Section 11 applies to a void marriages only contracted after the commencement of the Act.	Section 12 applies to marriages contracted before or after the commencement of the Act.
5.	In case of Section 11 the Act itself declares a marriage to be null and void without any action on the part of any spouse. Of course, nobody can stop a spouse from getting a declaration of nullity for the purpose of precaution and for the record. Children born out of void and voidable marriages are legitimate (Section 16).	The remedy available under Section 12 is an optional remedy, <i>i.e.</i> , the party concerned has to take the aid of a court for an annulment decree.
6.	It is not necessary that a decree declaring a void marriage as void is passed. The parties to a void marriage may perform another marriage without getting a decree declaring their marriage as void and neither will be guilty of bigamy.	But a voidable marriage will remain a valid marriage till a decree annulling it is passed.

5. Muslim Marriage

Marriage i.e. nikah meant different forms of sex relationship between man and a woman established on certain terms. In ancient age women were treated as chattels and were not given any right of inheritance and were absolutely dependent. It was Prophet Mohammad who brought about a complete change in the position of women. The improvement was vast and striking and their position is now unique as regards their legal status. After marriage woman does not lose her individuality and she remains a distinct member of the community. Under the Muslim Law marriage is considered as Civil Contract. The contract of marriage gives no power to anyone over her person or property beyond what the law defines. Woman remains the absolute owner of individual rights even after marriage.

Marriage (nikah) literally means the union of sexes and in law this term means, 'marriage'. Marriage has been defined to be a contract for the purpose of legalising sexual intercourse and procreation of children."

In Hedaya, it is defined as, "Nikah in its primitive sense means carnal conjunction." Some have said that, "it signifies conjunction generally and finally in the language of law it implies a particular contract used for the purpose of legalising generation." The Prophet of Islam is reported to have said, "That Marriage is my sunna and those who do not follow this way of life are not my followers."

Thus marriage according to Muslim Law is a contract for the purpose of legalising sexual intercourse and the procreation of legitimating of children and the regulation of social life in the interest of the society.

Nature of Muslim Marriage: There are divergence of opinion with regard to the nature of Muslim marriage. Some jurists are of the opinion that Muslim marriage is purely a civil contract while others say that it is a religious sacrament in nature. In order to better appreciate the nature of Muslim marriage it would be proper to consider it in its different notions.

Muslim marriage by some writers and jurists is treated as a mere civil contract and not a sacrament. This observation seems to be based on the fact that marriage under Muslim Law has similar characteristics as a contract. For example:

- i. A marriage requires proposal (Ijab) from one party and acceptance (Qubul) from the other so it is the contract. Moreover there can be no marriage without free consent and such consent should not be obtained by means of coercion, fraud or undue influence.
- ii. Similar as in the case of contract, entered into by a guardian on attaining majority so can a marriage contract in Muslim Law, be set aside by a minor on attaining the age of puberty.
- iii. The parties of the Muslim marriage may enter into any ante-nuptial or post-nuptial agreement which is enforceable by law, provided that it is reasonable and not opposed to the policy of Islam. Same is in the case of a Contract.
- iv. The terms of a marriage contract may also be altered within legal limits to suit individual cases.

- v. Although discouraged both by the holy **Quran** and **Hadith**, yet like any other contract, there is also provision for the breach of marriage contract.
- vi. In the leading case of **Abdul Qadir v/s Salima-1886**, it emphasise the contractual aspect and analogy of Muslim Marriage contract with contract of sale.

Thus marriage according to Muslim Law is a contract for the purpose of legalising sexual intercourse and the procreation of legitimating of children and the regulation of social life in the interest of the society. However it is further viewed that marriage is not purely a civil contract but a religious sacrament too. Though sacramental nature of marriage is considered as an orthodox view but it is also supported by the judiciary in the leading case of **Anis Begum v/s Mohammad Istafa-1933**, in the case Sulaiman has tried to put a more balanced view of the Muslim marriage by holding it both civil contract and a religious sacrament.

6. Essentials Conditions of a valid Muslim Marriage

Muslim Law in India means " that portion of Islamic Civil Law which is applied to Muslims as a personal law". It consists of injunctions of Quran and has been further supplemented and modified by state Legislation and modern judicial precedents of the High Courts and the Supreme Court of India and also of the Privy Council.

Marriage/'Nikah' according to Muslim Law is a contract underlying a permanent relationship based on mutual consent.

1. A Muslim marriage requires proposal (Ijab) from one party and acceptance (Qubul) from the other as is required for a contract. Moreover there can be no marriage without free consent and such consent should not be obtained by means of coercion, fraud or undue influence.
2. Just as in case of contract, entered by a guardian, on attaining majority, so can a marriage contract in Muslim Law, be set aside by a minor on attaining the age of puberty.
3. The parties to a Muslim marriage may enter into any ante-nuptial or postnuptial agreement which is enforceable by law provided it is reasonable and not opposed to the policy of Islam. Same is the case with a contract.
4. The terms of a marriage contract may also be altered within legal limits to suit individual cases.
5. Although discouraged both by the holy Quran and Hadith, yet like any other contract, there is also provision for the breach of marriage contract.

The solemnization of marriage requires adherence to certain forms and formulas. They are called the essentials of a valid marriage. If any of these requirements is not fulfilled the

marriage becomes either void or irregular, as the case may be. Thus the essentials are as follows:

1. Proposal and Acceptance
2. Competent parties
3. No legal Disability

Procedure:

1. Marriage like any other contract is constituted by ijab-o-qabool, that is by declaration and acceptance. One party to the marriage must make an offer (Ijab) to the other party. The marriage becomes complete only when the other party has accepted the offer.
2. According to Muslim Law it is absolutely necessary that a man or someone on his behalf and the woman or someone on her behalf should agree to the marriage at one meeting and the agreement should be witnessed by two adult witnesses.
3. The Words conveying proposal and acceptance must be uttered in each other's presence or in the presence of their agents, who are called Vakil's.
4. The other condition for a valid marriage is that the transaction must be completed at one meeting. A proposal made at one meeting and an acceptance at another meeting do not constitute a valid marriage.
5. There must be reciprocity between offer and acceptance. The acceptance must not be conditional
Under the Sunni Law, the proposal and acceptance must be made in presence of two males or one male and two female witnesses who are sane, adult and Muslim. Under Shia Law, witnesses are not necessary at the time of marriage. They are required at the time of dissolution of marriage.
6. The parties contracting marriage must be acting under their free will and consent.

7. Competent Parties & Legal Disabilities

The Parties to a marriage must have the capacity of entering into a contract. They must be competent to marry. Muslim who is of sound mind and who has attained puberty may enter into a contract of marriage. The parties must be able to understand the nature of their act.

Legal Disability

Means the existence of certain circumstances under which marriage is not permitted. These prohibitions have been classified into four classes:

1. Absolute incapacity or prohibition

2. Relative incapacity or prohibition
3. Prohibitive incapacity
4. Directory incapacity

Absolute Incapacity Or Prohibition

1. *Consanguinity*

Consanguinity means blood relationship and bars a man from marrying:

- His mother or grandmother how high-so-ever,
- His daughter or grand-daughter how low-so-ever,
- His sister whether full, consanguine or uterine,
- His niece or great niece how low-so-ever,
- His aunt (fathers sister, mothers sister) or great aunt, how high-so-ever, whether paternal or maternal A marriage with a woman prohibited by reason of consanguinity is void. Issues from such marriage are illegitimate.

2. *Affinity*

Affinity prohibits a man from marrying:

- His wife's mother or grand-mother how high-so-ever
- His wife's daughter or grand-daughter how low-so-ever
- Wife of his father or paternal grand-father how high-so-ever
- Wife of his son or son's son or daughter's son how low-so-ever
- A marriage with a woman prohibited by reason of affinity is void.

3. *Fosterage*

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

Exceptions

Under the Sunni law, there are a few exceptions to the general rule of prohibition on the ground of fosterage and a valid marriage may be contracted with:

1. Sister's foster mother, or
2. Foster's sisters mother, or
3. sons sister, or
4. Foster brother's sister.

The Shia jurists place fosterage and consanguinity on the same footing and refuse to recognize the exception permitted by the Sunnis. The above mentioned prohibitions on account of 'consanguinity', 'affinity' or 'Fosterage' are absolute and the marriages contracted in contravention of these rules are void.

Relative Incapacity or Prohibition

Springs from cases which render the marriage invalid only so long as the cause which creates the bar exist. The moment it is removed, the incapacity ends and the marriage become valid and binding. The following are the cases:

i. Unlawful conjunction

Means contemporaneously marrying two women so related to each other by consanguinity, affinity or fosterage, which they could not have lawfully intermarried with each other if they had been of different sexes. Thus a Muslim cannot marry two sisters, or an aunt and her niece.

Under the Shia Law, a Muslim may marry his wife's aunt, but he cannot marry his wife's niece without her permission. Marriage prohibited by reason of unlawful conjunction is void under Shia Law.

ii. Polygamy, or marrying a fifth wife

Means plurality of wives, i.e. marrying a fifth wife. It is unlawful for a Mohammedan to have more wives than four.

A Muslim woman cannot marry more than one husband. If a woman marries a second husband, she is liable for bigamy under Sec.494, Indian Penal Code and the issues of such a marriage are illegitimate. In India no Muslim marrying under or getting his marriage registered under **The Special Marriage Act, 1954**, can marry a second wife during the lifetime of his spouse.

iii. Absence of proper witnesses

It is essential amongst the Sunnis that at least two male witnesses or one male or two female witnesses must be present to testify that the contract was properly entered into between the parties. The witnesses must be of sound mind, adult and Muslim.

In Shia Law, a marriage contracted by the spouses themselves or their guardians in private are held valid. Presence of witnesses is not necessary.

iv. Differences of religion

A Sunni male can marry a Muslim female (Of any sect) or a Kitabia. Marriage with the Kitabia, i.e. a woman who believes in a revealed religion possessing a Divine Book viz Islam, Christianity and Judaism is valid under the Sunni Law. But he cannot marry an idolatress or a fire-worshiper. A marriage, however with an idolatress or a fire worshiper is merely irregular in Sunni Law, but void in Shia Law. A Muslim woman cannot marry any man who is not a Muslim, whether he is Kitabia (i.e. man believing in a revealed religion possessing a divine book) or not. According to Mulla, a marriage between a Muslim woman and Non-Muslim male is irregular. But according to Fyzee, such a marriage is totally void.

Under Shia Law, no Muslim, whether male or female can marry a non-Muslim in the Nikah form. Thus a marriage between a Muslim and a non-Muslim can only take place under The Special Marriage Act, 1954.

v. Woman undergoing IDDAT

Iddat is a period during which it is incumbent upon a woman, whose marriage has been dissolved by divorce or death of her husband to remain in seclusion and to abstain from marrying another husband.

Under Sunni Law marriage with a woman undergoing Iddat is irregular and not void. But under Shia law marriage with a woman who is undergoing Iddat is void.

Prohibitive Incapacity

1. **Polyandry:** means the fact of having more than one husband. Polyandry is forbidden in the Muslim system and a married woman cannot marry second time so long as the first marriage subsists.
2. **Muslim woman marrying a Non -Muslim:** A marriage of a Muslim female with a non-Muslim male, whether he be a Christian, or a Jew or an idolator or a Fire-Worshiper is irregular under Sunni Law and void under Shia Law.

Directory Incapacity

This may arise from:

1. **Marrying a woman 'enceinte':** It is unlawful to marry a woman who is already pregnant by her former husband.
2. **Prohibition of divorce:** When the marriage is dissolved by the pronouncements of divorce three times, re-union is prohibited except after the lawful marriage of the woman with another man and then its being dissolved after consummation.
3. **Marriage during pilgrimage:** Under Shia Law, Marriage during pilgrimage is void.
4. **Marriage with a sick man:** Marriage with a sick man suffering from disease which is likely to be fatal is invalid. If however, he recovers and the marriage is consummated, it is valid.

Polygamy

Even in the present context, when all other religions enjoin monogamy, polygamy i.e. authority to marry up to four women is a privilege of Muslim men. Since it is one of the religious practices it is claimed to be immune from any legislative enactment.

Conversion to Islam

Skinner v. Orde (1871) 14 M.I. A. 309. Helen Skinner was married according to Christian rites with George Skinner who died in the lifetime of Helen. Thereafter she cohabited with John Thomas who was married to Christian Wife, who was alive at that time. In order to legalize their union Helen and John both converted themselves into Islam. However their conversion was not held to be bona fide. It was held that this conversion was pretended for the purpose of Bigamy that was not permissible under the law.

Classification of Marriage

a. Valid (sahih)

When all the legal requirements are fulfilled and there are no prohibitions affecting the parties, then the marriage is correct or 'sahih'. The prohibitions can be permanent as well as temporary, in case of permanent prohibitions: the marriage will be void and if the prohibitions are temporary then the marriage is irregular.

Effect of a Valid Marriage

- The cohabitation between the husband and the wife becomes lawful.
- The children born out of a valid marriage are legitimate and they have right to inherit their parent's properties.
- Mutual rights of inheritance between husband and wife are established. That is to say, after the death of the husband, the wife is entitled to inherit the husband's properties and after the wife's death, husband may also inherit her properties.
- Prohibited relationship for purposes of marriage is created between the husband and wife and each of them is prohibited to marry the relations of the other within prohibited degrees.
- The wife's right to claim dower is fully established just after the completion of marriage.
- The marriage gives to the wife also the right of maintenance from her husband with immediate effect.
- After the dissolution of the marriage, the widow or the divorced wife is under an obligation to observe the Iddat, during which she cannot remarry.

b. Void (Batil)

The marriage being void ab initio creates no rights or obligations and the children born out of such marriage are illegitimate. A marriage forbidden by the rules of blood relationship, affinity or fosterage is void. Similarly, a marriage with the wife of another or a divorced wife during iddah period is also void.

c. Irregular (Fasid)

Due to lack of some formality, or the existence of an impediment which can be rectified, a marriage becomes irregular. However, this irregularity is not permanent in nature and can be removed. Thus, the marriage itself is not unlawful. It can be made valid once the prohibitions are rectified. Marriage in such circumstances or with following prohibitions are called 'Fasid'.

1. A marriage contracted without required number of witnesses;
2. A marriage with women during her Iddat period;
3. A marriage with women without the consent of her guardian when such consent is considered necessary;
4. A marriage prohibited on account of difference of religion;
5. A marriage with a woman who is pregnant, when the pregnancy was not caused by adultery or fornication;
6. A marriage with a fifth wife.

8. Dower

As it is evident from Quran, “if you separate yourself from your wives, send them away with generosity, it is not permitted to you to appropriate the goods you have once given them.”

Thus the custom originated in ancient times with the payment which husbands often made to their wives as means of support in their old age or when turned out by them. **Mehr** in the baal form of marriage was also recognised by the prophet to ameliorate the position of wife in Islam and it was combined with **sadaq**, so that it became a settlement or a provision for the wife. According to **K.P.Sexena**, “Dower is a sum of money or any property promised by the husband to be paid or delivered to the wife as a mark of respect for the surrender of her person after the marriage contract but generally said to be consideration for marriage.”

Dower or mehr is a sum that becomes payable by the husband to the wife on marriage either by agreement between the parties or by the operation of law. It may either be prompt or deferred. **According to Wilson**, “dower is a consideration for the surrender of person by the wife. It is the technical Anglo Mohammedan term for its equivalent ‘Mehr’ in Arabic. **According to Amir Ali**, “Dower is a consideration which belongs absolutely to the wife.” **Mulla said**, “Dower is a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage.”

Dower may be divided into two kinds:

1. *Specified Dower*

If the amount of dower is stated in the marriage contract, it is called the specified dower. Dower is settled by the parties to the marriage either before the marriage or at the time of the marriage or even after the marriage. If the parties to the marriage attained the age of puberty and are of sound mind they are competent to settle themselves the amount of dower. Guardian can settle the amount of dower provided that at the time of settlement of dower the boy is still minor or lunatic. Specified dower is again sub divided into:

a) *Prompt Dower*

It is payable immediately after marriage on demand. Ameer Ali, a wife can refuse to enter into conjugal domicile of husband until the payment of the prompt dower. 2. Prompt dower does not become deferred after consummation of marriage. 3. It is only on the payment of the prompt dower the husband entitled to enforce the conjugal rights. 4. Prompt dower is payable on demand.

b) *Deferred Dower*

It is payable on dissolution of marriage either by death or divorce. 2. The wife is not entitled to demand payment of deferred dower. 3. The widow may relinquish her dower at the time of her husband’s funeral by the recital of a formula. 4. The interest of the wife in the deferred dower is a vested one and not a contingent one.

2. Customary Dower

When the amount of the dower is not fixed in the marriage contract or even if the marriage has been contracted on the condition that she should not claim any dower, the wife is entitled to proper dower. The amount of proper dower is settled by female members of the father's family such as her father's sisters.

Determination of Proper Dower

The proper dower is regulated with reference to the following factors:

- i. Personal qualification of wife, her age, beauty, fortune, understanding and virtue.
- ii. Social position of her father's family.
- iii. Dower given to her female paternal relations.
- iv. Economic condition of her husband.
- v. Circumstances of the time.

There is no limit to the maximum amount of proper dower under the Sunni Law but under the Shia law the proper dower should not exceed the 500 dhirams. This amount was fixed in the Marriage of Fatima the Prophet daughter. In the Shia Muslims it is therefore considered a point of Honour not stipulate for a sum higher than the sum of dower fixed by the Prophet for his Daughter Fatima.

Legal Significance of Dower in Muslim Law

The following are the legal significance of Dower in Muslim Law:

- i. The reason of its significance lies in the protection that it imparts to the wife against the arbitrary exercise of the power of divorce by the husband.
- ii. Dower is a right of the wife is fundamental feature of marriage contract and has a pivotal place in the domestic relation affecting the mutual rights.
- iii. According to Muslim Law on the dissolution of marriage the wife can claim her dower money. It may be higher or it may be low depends upon on the source of income of the husband.
- iv. Legislature has given the power to make law providing that, the court will not be bound to award the amount of dower according to marriage deed (Sec. Of Oudh Law Act.1876). but only such sum as shall be reasonable with reference to the means of husband and the **Iddat** of the wife as held in a case of **Adul Rehman v/s Inayati Bibi-1931**.
- v. Another Significance of Dower is to place a check on the capricious use of divorce on the part of husband.
- vi. To impose an obligation on the husband as a mark of respect of the wife.
- vii. To provide for her subsistence after the dissolution of her marriage so that she may not become helpless after the death of the husband or termination of marriage by divorce.

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