KLE LAW ACADEMY BELAGAVI

(Constituent Colleges: KLE Society's Law College, Bengaluru, Gurusiddappa Kotambri Law College, Hubballi, S.A. Manvi Law College, Gadag, KLE Society's B.V. Bellad Law College, Belagavi, KLE Law College, Chikodi, and KLE College of Law, Kalamboli, Navi Mumbai)

STUDY MATERIAL

for

FAMILY LAW II

Prepared as per the syllabus prescribed by Karnataka State Law University (KSLU), Hubballi

Compiled by

Dr. Jyoti G. Hiremath, Asst.Prof.

Reviewed by

Dr. B Jayasimha, Principal

B.V. Bellad Law College, Belagavi

II SEMESTER LL.B. AND VI SEMESTER B.A.LL.B.

COURSE - V : FAMILY LAW - II : MOHAMMEDAN LAW AND INDIAN SUCCESSION ACT

CLASS NOTES

Contents

References

1. Mulla, "Principles of Mohomedan Law", 22nd Edn, Lexiz Nexis
2. Diwan Paras, "Muslim Law in Modern India", 14th Edn., Allahabad Law Agency
3. Online Articles

WHO IS A MUSLIM –application of muslim law

-- Hindu law prevailed over all aspects of individual during ancient period. During muslim rule except personal law, every individual is governed by Mohammadan Law, when Britishers came that time also freedom in personal laws continued.

-- In India, whenever personal matters come before a court of law, the first question that arises is : which law applies to the parties to litigation? If the parties are Hindus, then Hindu Law and so on. Hence it is necessary to see who is a Muslim in India?

-- Muslim law or Mohammadan Law means –that portion of Islamic law which governs the Indian Muslims in their personal matters.

-- Who is a muslim in India ?

i) Muslim by origin and

ii) Muslim by conversion:- a. Muslims who profess Islam

b. Muslims who undergo formal conversion.

i) Muslim by origin- A person who subscribes to the basic tenets of Islam, is a muslim.

-Basic tenets of Islam are :-

i) The principle of the unity of God.

ii) Muhammad is the prophet of God.

- Other essential beliefs- i) Holy book –Kuran.

ii) Hazarat muhammad was the first Rasul (prophet)

iii) there is a day of Judgement (Kayamat) followed by life after death (Akhirat)

-- If a person is born to muslim parents, he will be a muslim and is not necessary to establish that he is orthodox believer of muslim tenets.

-- Mere observance of some of rituals of hinduism / any religion, will not by itself make that person a non-muslim.

-- Even one of the parents is muslim, their child is muslim but general law in India is that a child carries religion of father. Muslim law can't be modified by customs.

ii. Muslims by conversion—

a. Muslim who profess Islam - A non-muslim may become a muslim by professing Islam i.e. acknowledging that there is only one God and Mohmmad is his prophet or by undergoing the ceremonies of conversion to Islam. Such Muslim is governed by the Shariat Act.

-Profession with or without conversion is necessary and sufficient to remove the disability/ having another religion—observed by Lord Macnaughten .

1. Abdul Razak v. Aga Mohammad (1893)21 I A at p. 64 -- A wealthy muslim died without heir. One AbdulRazak made claim to his estate on the plea that he was the son of the pre-deceased brother of Abdul - that brother married a burmese woman Mah Thai, buddhist by religion but it was not established that she had been converted to Islam before and after marriage- but she use to recite muslim prayers—held—marriage of Abdul's brother with Buddhist woman was void under Muslim Law and Abdul Razak become illegitimate child, hence can't inherit property of the deceased.

2) Resham bibi V Khuda Baksha 1938 Lah 277- A Muslim wife to end her unhappy married life renounced Islam and prayed that muslim law of apostasy shall be applied to her & to dissolve marriage. The Judge ordered to eat her pork which she denied – showed that her apostasy was insincere –person's religious belief is not a tangible thing-but is mental statues--- still court accepted her say of not having faith in allah etc. and granted her prayer.

b. Conversation to Islam

- By ceremonies of conversion like -
    - Going to mosque
    - Affirmation to Imam's questions like 'Are u voluntarily accept Islam ?'
    - Recitals of kalma- Imam gives muslim name to convert
    - Registration in a register kept in the mosques.
- Conversation of a muslim from one sect to another doesn't amount to apostasy- when a convert doesn't practice the new faith, he will continue to be muslim
- Conversation should be bonafide - Skinner v. order (1871) 14MIA309 – a Christian women related to married Christian man – to legalize both converted to Islam by

ceremony of conversation - issue of validity of marriage arose wherein the Court held it as null and vide as is done to deceive only.

- Many cases of fraudulent & dishonest conversation came up before courts.
  - Ram kumari Case, 1891 wherein a Hindu woman adopted Islam for automatic dissolution of marriage and married another.
  - Rakeyabibi v Anil Kumar (1948)22 Cal 119- a wife to get rid of impotent husband converted to Islam. In both the cases conversion was held as not a bonafide conversion.

Effects of conversion : can be discussed based on following questions-

- How far conversation can change the existing rights & status of the convert?
- How far muslim law applies to the convert & his descendants?

Rights & status of the convert –

1. On marriage he can enjoy polygamy -
   -- Sarla Mudgal v UOI AIR 1995 SC1531- if monogamously married husband converts to Islam & takes another wife, taking advantages of polygamy, he will be guilty of bigamy u/s 494 of IPC & second marriage will be void.
2. Conversion & dissolution of marriage – when one party accept Islam – if other spouse accepts within 3 months, marriage unaffected but in India marriage can't be dissolved on the ground that other spouse demise for conversion.
3. Application of Muslim law to convert.
   - On conversion, usually muslim law of succession applies.
   - During British period several laws were passed stating a person may continue to be governed by custom after his conversion. But lastly the Shariat Act 1937 passed which prohibited application of customary laws in place of Muslim Personal Law.
   - The Shariat Act, 1937 under Sec.2 enumerates 10 matters in which every muslim will governed by Muslim law (Marriage, dissolution of marriage maintenance, dower guardianship, gifts, trust and trust properties and wakf) Agricultural lands, charities other than Wakf, Charitable and Religious endowments are excluded.
   - In certain matters, a convert may still be governed by customs – i) A convert may governed by custom in respect of adoptions, wills &

legacies unless he files a declaration on a prescribed from that he desires tobe governed by muslim law Ex. Khojas, Boharas, Kacchi & Halai memons & Girasias of broach – before Shariat and now also.

Let us see in brief about history of these converts in India -

- Khojas – Originally trading class of Hindus lived in Sind & Cutch- After conquest wholesale conversion taken place. Aga Khan was the head (Hazar Imam) –believe that he is final interpreter of religion after prophet – religious book is Desaavatar—khojas divided into 3 sects as —

  i) Ismaili ii)Ithana Ashari iii) Hanafi

  -- Before Shariat their Inheritance & Succession governed by custom now intestate by muslim law & testamentary under customary law. It means Khojas can will entire property but muslim can do 1/3rd only.

  Ii) Boharas- Original hindus now Ismails belonging to Gujarat- by profession they were traders & businessmen—divided into Daudis & Sulaymanis – head of Bohra was Dail-Multaq who written a holy book named Da'imce I-Ilam

  - before 1937 they were governed by custom for inheritence, now intestate succession is under muslim law & testamentary under custom.

  - Girias of Broach have similar position as Boharas.

  iii)Menons—Original hindus of i) Porbandar & Kathiawar called Halai memons & ii)Cutchi memous.

  - Prior to 1920 Cutchi memons were governed by hindu law of succession & for other matters u/ muslim law. The Cutchi Memon Act, 1920 gave choice to adopt muslim law of succession by a declaration.

  __After Shariat,the Ccutchi Memon Act 1938 provides that there are ruled by Hanfi school for inheritance.

  --Halai memons governed by hindu law for inheritance before Shariat & now purely under muslim law.

  iv) Mapillas - South Indian who governed by customs of Mapilla Succession Act, 1918 & Mapilla Wills Act, 1928 made applicable muslim law even to succession. But it doesn't apply to Mapilla Tarwad –

they governed under Mapilla Marumakkattayam Act, 1939, but once a tarwad is partitioned, partitioned shares are governed by muslim law of succession.

v) Kashmiri muslims—Shariat not apply to them but customary muslim law observed which include- right of widow of kashmirs muslim to inherit estate of husband during her life time to the exclusion of all other his share of Khana muslim daughter in the property of father excluding other daughters, right of adoptive son in adoptive fathers property. Shri. Pratap J&K Law (Consolidation)Act,1977 now codified these customs.

vi) Muslim tribes of Panjub & Haryana- Customary succession laws applied to marriage, minority, divorce, adoption, guardianship, special property of female, will , gift partition etc. but now Shariat law applies.

3.A convert may still be governed by customary laws in matters which are not covered by Sec. 2 & 3 of Shariat Act for ex. Ancestral prop concept is with muslims of Punjab & Haryana.

4. Sec. 2 of Shariat Act exclude agriculture land but in A.P., Kerala & Madras Shariat applicable to Agricultural lands also, similarly to religious institutions.

5. Several British statutes now stand repealed by Shariat Act.

- When a person ceases to be a muslim—if muslim convert to another religion/ he may renounce Islam, he is not a muslim.

Historical antecedents, Concept and Schools of Muslim Law

Part I. Historical Antecedents:

1. The First Period: Prophet Mohmmad born in 570 AD and in his adulthood often used to meditate. At the age of his 40 years got his first revelations (termed as AH 1). Initially only his wife and few others use to believe on his preaching. Abu Bakr, who after the death of Mohmmad became the First Caliph. These were followed by Ali, who, later became the fourth Caliph; Omar, who later became the Second Caliph and Osman, who later became the third Caliph. With his band of followers were persecuted, and they fled to Madina in 622 AD, the date from which begins the Hegira era.

At Madina, Mohammad was well received. Ultimately, he succeeded in not only having a large following, but also in establishing a political organisation called the Umma. By 632 AD, the Prophet ruled not only at Mecca and Madina but also over the entire region. Prophet breathed his last in 633 AD i.e. AH11.

The period between AH1 to AH11 - the last 10 years of the Prophet's life is the most glorious and fruitful in the history of the development of Muslim Law. During this period, all the verses of the Koran were composed and most of the Ahadis came into existence. Koran contains direct words of God, whrere as Ahadis contains sayings and deeds of the Prophet i.e. indirect revelations.

2. The Second Period : Since the Prophet had not appointed a Successor, by way of election his followers elected the first Caliph - Abu Bakr and the institution of Caliphate initiated resulting into the second period of development of Muslim law.

The election of Abu Bakr to the Caliphate led to turmoil and dissensions in the Muslim world, giving birth to two main factions of Muslims, the Sunnis and Shias. Abu Bakr died in 634 AD, two years after election. Then Omar was elected as the Second Caliph, but on his assassination in 644 AD, Osman became the Third Caliph. On Osman's assassination in 656 AD, Ali became the Fourth Caliph but he too assassinated in 661AD.

It was during this period that the collection and edition of texts of the Koran was undertaken and completed. The final reception of the Koran took place in the reign of Osman and his edition of Koran is considered to contain most authentic text of the Koran, being free from interpolations.

3. The Third Period : With the death of Ali, the Fourth Caliph, begins the third period in the development of Muslim law upto 300AH. On Ali's death, his first son Hasan, resigned in favour of

Muavia, the founder of the Ommayad dynasty. Ali's second son, Hussain revolted and died fighting at Karbala. With this, the division of the Muslim world between the Sunnis and the Shias became final and permanent.

Muavia became the temporal and spiritual head of the Arabs, after his death, the herediatary principle of succession was introduced in the caliphate. The Omamayad dynasty continued to rule till its fouteenth Sovereign was overthrown by the Abbasides who proclaimed themselves to be the spiritual head of the muslims. During this period came into existence the Schools of Sunnis and Shias. During this period a systematic drive was made to collect the traditions.

4. The Fourth period: This period begins at about 962 AD when Abbasides were ruling the Muslim world. Abbasides first used the title "Imam" i.e. the Supreme Leader. According to Sunnis , the Imam is their Leader , but he is a servant of the law, while Shia believed that he is the Supreme law giver. During this period, a sustained effort was made by the jurists of each School to develop law. Muslim law was elaborated in detail by the scholars of various Schools. The doctrine of ijtihad or independent reasoning and doctrine of Taqlid i.e. no one is permitted to deduce rules and principles independently from the Koran, the Sunna and the ijma but one must follow the rules and the principles as formulated by the various recognised schools of law, have developed during this phase.

5. The Fifth Period : According to Fyzee, the fifth period commences with the abolition of the caliphate or the Sultanate. In this phase, the spontaneity in the development of Muslim law had been lost. The ijma and kiyas had spent their force as vehicles of legal development. The jurist were not allowed to formulate new rules and principles. Already there was abolition of Caliphate and Sultanate taken place and a stage was reached when the law could develop only through the process of Legislation. This is what precisly happened in most of the countries including India. In India the fifth period begins with the establishment of the British rule in India. Once the Muslim rule was over and the British rule was firmly established, process of abrogation of Muslim law in many areas began. Many of the subjects are covered in common law system and what left was Muslim Personal Law only. The Shariat Act,1937 was passed to make the grip of Muslim law strong on all those persons who professed to be Muslims. Only one major reform has been made, viz. the Muslim Dissolution Of Marriage Act, 1939, which enables a Muslim wife to sue for dissolution of marriage on certain grounds.

Part II : Concept of Muslim Law :

A. Fundamental tenets of Muslim Law-

i. Belief in the existence of God

ii. Principle of tawhid / belief in the unity of God

iii. Acceptance of Prophet Mohammad as a Rasul / Messenger of God

Based on these principles only concept of Muslim law flows. Muslim holds that the law is of divine origin. It is a revealed law(Given by God). Law must be for human beings hence developed doctrine of Ilmul - yakin (certitude) i.e. the ability to distinguish between good and evil and the same was done by the Prophet.

Muslim law further believes that the revealiations of God to Prophet are in the form og the Koran, Ahadis are supplementary to the Koran. the Ijam (consensus of the learned) supplements the Koran as well as Ahadis. Kiyas (analogy) are there to support if any matter are not covered in Koran or Ijmas or Ahadis.

On all the above principles, the Shariat is based which literally means "a road to the watering place or path to be followed". The Shariat is based on the principle that "all actions are tobe judged according to ethical principles and emphasis on duties of a man in all walks of life".

B. Religious Commandments : The Shariat lays down that the religious commandments are of five types :

i. Fard - which one must do, such as five daily prayers

ii. Haram - which one must not do, such as drinking of wine

iii. Mandub - which one may do, such as additional prayers on Id

iv. Markrum - which one may not do, such as certain types of fishes may not be eaten and

v. Faiz - acts towards which the Shariat is indifferent, such as travel by air.

Thus a distinction is made between mandatory rules and recommendary rules, between what is legally enforceable and what is morally enjoined.

C. Concept of Fiqh or Law :

Fiqh literally means 'intelligence' and under Muslim law it means 'Science of jurisprudence'. The term 'Usulul Fiqh' is the 'knowledge of those rules which directly or proximately lead to the science of Fiqh. It discusses the nature of the sources or authorities, law giver, the law, the objective of law i.e. acts, rights, obligations and tthe subjects of law i.e. those to whom law applies 'persons'. A jurist is called as 'Faquid'. According to Fyzee, 'Fiqh or the science of Islamic Law is the knowledge of one's rights and obligations derived from the Koranor the Sunna of the Prophet, or the consensus of opinion among the learned (the ijma) or analogical deductions (the Kiyas).

Muslim Law givers divide Fiqh into --

i. Usul - deals with Muslim jurisprudence

ii. Furu - deals with substantive law i.e. law applicable in daily life.

Part III. Schools of Muslim Law

The Muslim Law is based on the teachings of the Quran and Prophet Mohammad. In all the circumstances where the explicit command is provided, it is faithfully provided but there have been many areas which are not covered by these sources and as a result, the great scholars had themselves devised their interpretation of what should be done in such a situation. As these scholars provided their interpretations (Qiyas) regarding the Muslim Law, it led to various opinions among many of them and out such difference, different schools of Muslim Law originated. Each school has its own explanation and reasons for their interpretation and it often leads to conflict in judgments. In the absence of express rules, it cannot be said that one school is better or higher positioned than other school and thus all the schools have been accepted as valid and if a person follows any of these schools, he is considered to be on the right path.

Following are the two types of Schools --

a. Ancient Schools

b. Modern Schools

a. Ancient Schools : During the period of Umadayyas, the important step of appointing Kadis was taken. The pre-Islamic institution of arbitrators no longer remained adequate to needs of new arab society and therefore it became imperative to supplant Arab Hakim by Kadis i.e. judges, who tendering decisions in cases, coming before them exercised a very wide discretion. Thus Kadis

laid foundation of Muslim law. They worked on custom, practice, administrative regulations and the Koranic norms. Till 1800, Kadis became highly specialists in law and practice of appointing specialists in law was started. Kadis were also called as Muftis of Islam. This ancient School developed in Kufa and Basrain, Iran , at Mecca and Madina and Syria. There arose difference between Kadis because of different geographical factors, social conditions, customs and practices. They use to make rules from religious and ethical body of Koran. Two opposite tendencies developed viz--- i. islamicising law and ii. rationalizing and systematizing the law. Gradually rules developed, settled but freedom enjoyed by the jurists suppressed and fanaticism started.

b. Modern Schools : In modern period, in Islam, the people have been divided into two sects having different views regarding certain aspects of Islam. Thus, the schools of Muslim law can be broadly classified into two categories:

1.Sunni Schools and 2. Shia Schools

1. Sunni Schools :

In Sunni sect, there are four major schools of Muslim law which are as follows:

A. Hanafi School - Hanafi School is the first and the most popular schools in Muslim law. Before being named Hanafi, this school was known as Koofa School which was based on the name of the city of Koofa in Iraq. Later, this school was renamed as Hanafi School based on the name of its founder Abu Hanafee. The Prophet had not allowed his words and traditions from being written, the Hanafi School relied on the customs and decisions of the Muslim community. Thus, Hanafi School codified the precedent which in prevalence during that time among the Muslim community. The founder of this school Abu Hanafee had not written any book for laying down the rules of this school and therefore this school had grown through his two disciples- Imam Muhammed and Imam Abu Yousuf. Both of them gave to the Juristic preference (Isthi Hasan) and codified the Ijma's of that period.

This school became widely spread in various territories, as a result, the majority of Muslims in countries such as India, Pakistan, Syria, and Turkey belong to Hanafi School. In India, since the majority of Muslims are from Hanafi School, the Courts decide the case of a Sunni Muslim as per the Hanafi School unless it is specified that they belong to other schools. In Hanafi School, Hedaya is the most important and authoritative book which was created over a period of 13 years by Ali bin Abu Baker al Marghinani. This book provides laws on various aspects except for the law of inheritance. Lord Warren Hasting tries to translate the Hedaya to English. He

appointed many Muslim Scholars to translate the book. But the Sirajiyya is considered as the authoritative book of the Hanafi Law of Inheritance. The book is written by the Sheikh Sirajddin, and the first English translation is written by Sir William Jones.

B. Maliki School - This school gets its name from Malik-bin-Anas, he was the Mufti of Madeena. During his period the Khoofa was considered as the capital of Muslim Khaleefa where Imam Abu Haneefa and his disciples flourished with Hanafi Schools. He discovered about 8000 traditions of Prophet but complied only about 2000 of them. When the disciples of Imam Abu Haneefa codified their law based on Ijma'a and Isthihsan. The maliki school gives the importance to the Sunna and Hadis whereas the Hanafi school gives the importance to the people and Isthihsan. As per Maliki School and Law, they rarely accept the Ijma'a. As per the Law, the person gave Fatwa challenging the sovereign authority of Khaleefa, he faced enmity and of lack of support from Muslim governments. Thus, this Maliki school did not get much popularity.

In India, there are no followers of this school but when the Dissolution of Muslim marriage act 1939 came in the picture, some of the laws and provision of this school was taken in account as they are giving more rights to the women than any other school. In Hanafi School, if the women not get any news of her husband, she has to wait till 7 years for Dissolution of the marriage, whereas in Maliki School the women have to wait 2 years for Dissolution of the Marriage. Mu-atha of Imam Malik is considered as the most authoritative book of the Maliki School. This book is also the first book written on the Hadis in Islam and this book is considered as the authority over all Muslims in the World.

C. Shafi School - The Shafi School gets its name on the name of Muhammad bin Idris Shaffie, his period was between 767 AD to 820 AD. He was the student of Imam Malik of Madeena. Then he started working with the disciples of Imam Abu Haneefa and went to Khoofa. He conclude the idea's and the theories of Hanafi School and Maliki School in a friendly manner. The Imam Shaffie was considered as one of the greatest jurist of Islam. He created the classical theory of the Shaffie Islamic Jurisprudence. According to this school, they considered Ijma'a as the important source of the Muslim law and provide validity to the customs of the Islamic people and follows more methods of Hanafi School. the main contribution of Shaffie School is the Quiyas or Analogy. The Al-Risala of Imam Shaffie was considered as the only authoritative book of Islamic Jurisprudence. In that book they discuss and interpret the Ijma'a (Consensus), Quiyas (Analogy), Ijthihad (Personal reasoning) Isthihsan (Juristic preference) and Ikhthilaf (Disagreement) in separate chapter in his book Risala. His other book Al-Umm is the authority on Fiqh (science of

way of life). The followers of Shafi School are spread in Egypt, Southern Arabia, South East Asia, Indonesia and Malaysia.

D. Hanbal School - The Ahmad bin Hanbal is the founder of the Hanbali School. He found the Hanbali school in 241 (AD 855). He is the disciple of Imam Shaffie and supports Hadis. He strongly opposed the Ijthihad methods. He introduced the theory of tracing the root of Sunna and Hadis and try to get the answer all his question. His theory was to return to the Sunna of the Prophet. When the Imam Shafie left for Baghdad, he declared that the Ahmad bin Hanbal was the only one after him who is the better jurist after him. The followers of Hanbali school found in Syria, Phalastine and Saudi Arabia.

2. Shia Schools :

As per Shia Sect, there are three schools of law. Shia Sect is considered as the minority in the Muslim world. They enjoy the political power only in Iran though they don't have the majority in that state also. Following are the Schools under Shia sect-

A. Ithna-Asharis - These schools are based on the following of Ithna-Ashari laws. The followers of these schools are mostly found in Iraq and Iran. In India also there is the majority of the Shia muslim who follows the principles of the Ithna-Asharis School. They are considered political quietists. This school is considered as the most dominant school of the Shia muslims. the ja'fari fiqh of the Shias in most cases indistinguishable from one or more of the four Sunni madhahib, except mutah is considered as the lawful marriage. The people who follow the Ithna Asharis school believe that the last of the Imams disappeared and to be returning as Mehdi(Messiah).

B. The Ismailis - According to Ismailis school, in India there are two groups, the Khojas or Western Ismailis represents the followers of the present Aga Khan, who they considered as the 49th Imam in this line of Prophet, and the Bohoras i.e. the Western Ismailis are divided into Daudis and Sulaymanis. The Bohoras and Khojas of Mumbai are considered as the followers of this school. It is considered that the follower of these schools has special knowledge of religious doctrine.

C. Zaidys - The followers of this school are not found in India but are maximum in number in South Arabia. This sect. of the Shia school is the most dominant among all in Yemen. The followers of these schools are considered as political activism. They often reject the twelver Shia school philosophies.

Other schools : Besides the schools under Shia and Sunni sects, there are some other schools which are also present which are:

1. Ibadi School - Ibadi is a school which belongs neither to the Shia nor Sunni sect and this school claim that its history traces back to the times of 4th Khaleefa Ali. The Ibadi school gives more preference to the Quran and they do not give the Sunna much importance. This school has its followers in Oman. One of the most important points about this school is that besides the Quran, it has provided principal consideration to Ijtihad (personal reasoning) which has been partially accepted by the Sunnis and has been completely rejected by the Shias.

2. Ahmadiya School - The followers of Ahmadiya school claim to be Muslims but they do not follow Prophet Muhammed. This school has a recent origin and they are followers of one Ahmed who was alive in the 19th century. This school is said to have a British-Indian origin and Mirza Ghulam Khadiani is the founder of this school, who served the British Government. Even though this school claims to be a follower of Islam, none of the Muslim Government has accepted them as Muslims because they believe this school's faith is completely against the faith of Muslims. The Khadiyan village which is situated in Punjab in India is said to be the birthplace of Ahmed and thus it is their holy place and the followers are also known as Kadhiyani. There is no authoritative book of this school and because its origin is also recent, it has no recognition by the other authoritative books of Islam. There are many differences between the Ahmadiya School and Muslims therefore, they are not regarded as part of Islam. The major points of difference between them are as follows:

1. The Muslims believe that Prophet Mohammad was the Messenger of God on Earth and he was the last Prophet who had spoken with God. Thus, his teachings are an important part of the lives of Muslims but the Ahmadiyas believe that God still communicates with his holy servants even after Prophet Mohammad.

2. The Ahmadiyans claim that the list of Prophets before Mohammad includes Buddha, Krishna, Zoroaster and Ramchandra and they claim it is according to the Quran but the non-Ahmadiyans do not accept such claims and refuse to acknowledge them as Prophets.

3. Unlike the Muslims, the Ahmadiyans do not accept the claim of the Sultan of Turkey as the Caliphate and they claim that every Muslim person should remain loyal to the Government of their country.

4. While Muslims believe that Mahdi will have a holy war or Jihad and Islam will be spread by the sword, the Ahmadiyas believe that it will be spread by arguments and heavenly signs and not through violence.

The Muslim law is governed by the teachings of the Quran and the Prophet Mohammad. There have been many different schools which follow their own interpretations of these teachings on points on which the Quran is silent. While the major schools of Muslims can be divided under the two sects of Shia schools and Sunni schools, even the schools under these sects have been further divided into various schools. Each school has its own beliefs and practices and because is no set rule regarding the matters on which the Quran is silent, one school cannot be said to be better positioned than the other schools and thus even though there are many schools in Muslim law, they all lead to one path. Thus, the teachings of these schools can be compared to different paths which all lead to the same destination.

SOURCES of MUSLIM LAW

Various sources of Islamic law are used by Islamic jurisprudence to elucidate the Sharia, the body of Islamic law. The primary sources, accepted universally by all Muslims, are the Koran and Sunnah. The Koran is the holy scripture of Islam, believed by Muslims to be the direct and unaltered word of Allah. The Sunnah consists of the religious actions and quotations of the Islamic Prophet Muhammad and narrated through his Companions and Shia Imams. However, some schools of jurisprudence use different methods to judge the source's level of authenticity.

As Islamic regulations stated in the primary sources do not explicitly deal with every conceivable eventuality, jurisprudence must refer to resources and authentic documents to find the correct course of action. According to Sunni schools of law, secondary sources of Islamic law are consensus among Muslims jurists, analogical deduction, independent reasoning, benefit for the Community and Custom. Hanafi school frequently relies on analogical deduction and independent reasoning, and Maliki and Hanbali generally use the Hadith instead. Shafi'i school uses Sunnah more than Hanafi and analogy more than two others. Among Shia, Usuli school of Ja'fari jurisprudence uses four sources, which are Koran, Sunnah, consensus and aql. They use ijma under special conditions and rely on aql (intellect) to find general principles based on the Koran and Sunnah, and use usul al-fiqh as methodology to interpret the Koran and Sunnah in different circumstances, and Akhbari Jafaris rely more on Hadith and reject ijtihad. According to Momen, despite considerable differences in the principles of jurisprudence between Shia and the four Sunni schools of law, there are fewer differences in the practical application of jurisprudence to ritual observances and social transactions.

I. Ancient sources : A. Preliminary Sources

The Koran

The Koran is the first and most important source of Islamic law. Believed to be the direct word of God as revealed to Muhammad through angel Gabriel in Mecca and Medina, the scripture specifies the moral, philosophical, social, political and economic basis on which a society should be constructed. The verses revealed in Mecca deal with philosophical and theological issues, whereas those revealed in Medina are concerned with socio-economic laws. The Koran was written and preserved during the life of Muhammad, and compiled soon after his death.

Muslim jurists agree that the Koran in its entirety is not a legal code (used in the modern sense); rather its purpose is to lay down a way of life which regulates man's relationship with others and God. The verses of the Koran are categorized into three fields: "science of speculative theology", "ethical principles" and "rules of human conduct". The third category is directly concerned with Islamic legal matters which contains about five hundred verses or one thirteenth of it. The task of interpreting the Koran has led to various opinions and judgments. The interpretations of the verses by Muhammad's companions for Sunnis and Imams for Shias are considered the most authentic, since they knew why, where and on what occasion each verse was revealed.

Sunnah

The Sunnah is the next important source, and is commonly defined as "the traditions and customs of Muhammad" or "the words, actions and silent assertions of him". It includes the everyday sayings and utterances of Muhammad, his acts, his tacit consent, and acknowledgments of statements and activities.

According to Shi'ite jurists, the sunnah also includes the words, deeds and acknowledgments of the twelve Imams and Fatimah, Muhammad's daughter, who are believed to be infallible.

Justification for using the Sunnah as a source of law can be found in the Koran. The Koran commands Muslims to follow Muhammad. During his lifetime, Muhammad made it clear that his traditions (along with the Quran) should be followed after his death. The overwhelming majority of Muslims consider the sunnah to be essential supplements to and clarifications of the Koran. In Islamic jurisprudence, the Quran contains many rules for the behavior expected of Muslims but there are no specific Quranic rules on many religious and practical matters. Muslims believe that they can look at the way of life, or sunnah, of Muhammad and his companions to discover what to imitate and what to avoid.

Much of the Sunnah is recorded in the Hadith. Initially, Muhammad had instructed his followers not to write down his acts, so they may not confuse it with the Koran. However, he did ask his followers to disseminate his sayings orally. As long as he was alive, any doubtful record could be confirmed as true or false by simply asking him. His death, however, gave rise to confusion over Muhammad's conduct. Thus the Hadith were established. Due to problems of authenticity, the science of Hadith (Arabic: `Ulum al-hadith) is established. It is a method of

textual criticism developed by early Muslim scholars in determining the veracity of reports attributed to Muhammad. This is achieved by analyzing the text of the report, the scale of the report's transmission, the routes through which the report was transmitted, and the individual narrators involved in its transmission. On the basis of these criteria, various Hadith classifications developed.

B. Secondary sources

All medieval Muslim jurists rejected arbitrary opinion, and instead developed various secondary sources, also known as juristic principles or doctrines to follow in case the primary sources (i.e. the Koran and Sunnah) are silent on the issue.

Ijma

Ijma can be interpreted as Judge made law or their interpretations based on the wisdom. Koran and Sunna look into past, but Ijma and Kiyas looked into future. The orthodox muslim held that human beings have to exercise their intallect to understand them, but in that process that can't be modified and hence developed Ijma. Ijma is also termed as "Foundation of foundations". Validity of Ijma is based on a Sunna of Prophet which declares "God will not allow his people to agree on an error". Sunni jurisprudence is based on Ijmas. Hanafi's believe that the law must change with the changing time that is what reflected in Ijma.

According to a Sunni doctrine, the Muslim Mujtahids(jurists) alone can have a say in the formation of the Ijma, who must be deeply learned in law and able to render correct judgement. All the schools of Sunnis accept Ijma as a source of law except Hanbals who formed usul from Sunna and gave liberal interpretation to the traditions of the Prophet. During the expansion of Islam in various parts of world Koran and Sunnas felt insufficient and their developed Ijmas.

Qiyas / Kiyas

Qiyas or analogical deduction is the fourth source of Sharia for the Sunni jurisprudence. Shiites do not accept qiyas, but replace it with reason. Qiyas is the process of legal deduction according to which the jurist, confronted with an unprecedented case, bases his or her argument on the logic used in the Koran and Sunnah. Qiyas must not be based on arbitrary judgment, but rather be firmly rooted in the primary sources.

Supporters of qiyas will often point to passages in the Koran that describe an application of a similar process by past Islamic communities. According to Hadith, Muhammad said: "Where there is no revealed injunction, I will judge amongst you according to reason." Further, he extended the right to reason to others. Finally, qiyas is sanctioned by the ijma, or consensus, amongst Muhammad's companions.

The success and expansion of Islam brought it into contact with different cultures, societies and traditions, such as those of Byzantines and Persians. With such contact, new problems emerged for Islamic law to tackle. Moreover, there was a significant distance between Medina, the Islamic capital, and the Muslims on the periphery on the Islamic state. Thus far off jurists had to find novel Islamic solutions without the close supervision of the hub of Islamic law (back in Medina). During the Umayyad dynasty, the concept of qiyas was abused by the rulers. The Abbasids, who succeeded the Ummayads defined it more strictly, in an attempt to apply it more consistently.

The general principle behind the process of Kiyas is based on the understanding that every legal injunction guarantees a beneficial and welfare satisfying objective. Thus, if the cause of an injunction can be deduced from the primary sources, then analogical deduction can be applied to cases with similar causes. For example, wine is prohibited in Islam because of its intoxicating property. Thus qiyas leads to the conclusion that all intoxicants are forbidden.

Abu Hanifa developed a new source called istihsan, or juristic preference, as a form of analogical deduction (qiyas). Istihsan is defined as:

- Means to seek ease and convenience,
- To adopt tolerance and moderation,
- To over-rule analogical deduction, if necessary.

The source, inspired by the principle of conscience, is a last resort if none of the widely accepted sources are applicable to a problem. It involves giving favor to rulings that dispel hardship and bring ease to people. This doctrine was justified directly by the Koran: "Allah desires you ease and good, not hardship". Though its main adherents were Abu Hanifa and his pupils (such as Abu Yusuf), Malik and his students made use of it to some degree. The source was subject to extensive discussion and argumentation, and its opponents claimed that it often departs from the primary

sources.

II. Custom - a source of Muslim law

Hindus as early as in 1868 believed that it is an established rule that a Custom, if otherwise valid, overrides a rule of sacred law. Privy Council expressed same in case of Muslim law in respect of those converts who wish to accept Islam but want to retain their personal laws, but Orthodox rejected this view and hence the Shariat Act,1937 came into existence. Though all schools believe in Four ancient sources still they do not discard the existence of Customs. Prophet also retained age old customs of Arabia but seen that those were not in conflict with Muslim law.

Customs are accepted as supplementary to the Muslim law. In initial period, a Code of Islamic law was not there hence the Prophet and his companions left some of the matters on customs. For ex. Remuneration of foster mother, compensation for civil wrongs, etc. Muslim Jurists laid down four conditions of a valid Custom :

1. a custom must be of regular occurrence i.e. continuous and certain
2. it should be universal
3. it should be reasonable
4. It should not be in contravention of any express text of the Koran or the Sunnas
5. It need not to be ancient and immemorial

III. Modern Sources of Muslim Law:

1. Equity, justice and conscience - Istihsan of the Hanafi school and the doctrine of *maselihul mursala* of Maliki school used to override the Kiyas and allowed jurists to deduce law on public good . Though this principle of equity is developed by the Britishers , some of the schools of Muslim law have applied it. Many of the cases under Muslim law which are decided by the British Courts naturally used this principle of equity.

2. Precedent - It is not a part of Muslim law. The decisions of Kazis never constituted a precedent in the sense of English **law**. Nearest approach to this doctrine in Muslim law are 'Fatwas'. which possess merely moral sanctions and also a legal authority. Mufti used to pronounce Fatwa one who was a scholar yet the KAzi was not bound by it. Various collections of Fatwa of which Fatwa-al-alam-

giriyya, is most famous one. Many of the traditions of gift nad Wakf have been modified to protect women and there is a mixture of precedent under Muslim law. Doctrine of *Stare Decisis* is a part of Muslim law today.

3. Legislation - Hanbali school recognised some part of legislations by name Nizam (Ordinance / decree), Farmans and dastarul amals, but they were not related to personal laws. Britishers never interfered in personal laws, hence Muslim law suffered a lot by not having proper legislations. Only the Shariat Act, 1937 and the Musalmman Wakf Validating Act, 1913 were few legislations in this regard. The Dissolution of Muslim marriage Act, 1939 made innovation in Muslim law as it confers right of judicial divorce on a muslim wife on certain grounds. After independence, in 1963 a proposal to reform Muslim personal law moved to Parliament backed by progressive sections of Muslims but opposed by the orthodox and hence no much improvements are observed in this source.

MARRIAGE IN MUSLIM LAW

Islam, unlike other religions is a strong advocate of marriage. There is no place of celibacy in Islam like the Roman Catholic priests & nuns. The Prophet has said There is no Celibacy in Islam. Marriage acts as an outlet for sexual needs & regulates it so one doesn't become slave to his/her desires. It is a social need because through marriage, families are established and the families are the fundamental entity of our society. Furthermore marriage is the only legitimate or halal way to indulge in intimacy between a man and woman. Islamic marriage although permits polygamy but it completely prohibits polyandry. Polygamy though permitted was guarded by several conditions by Prophet but these conditions are not obeyed by the Muslims in toto.

Marriage:-Pre Islamic Position

Before the birth of Islam there were several traditions in Arab. These traditions were having several unethical processes like:-

(i) Buying of girl from parents by paying a sum of money.
(ii) Temporary marriages.
(iii) Marriage with two real sisters simultaneously.
(iv) Freeness of giving up and again accepting women

These unethical traditions of the society needed to be abolished; Islam did it and brought a drastic change in the concept of marriage.

Nature of Marriage : It is quiet relevant to know whether the Muslim marriage is a sacrament like the Hindu marriage, for this let us get acquainted with some of the definitions of Muslim marriage. Some of the philosophers have following opinion about the marriage -

a) Hedaya - Marriage is a legal process by which the several process and procreation and legitimation of children between man and women is perfectly lawful and valid.
b) Bailies Digest - A Nikah in Arabic means Union of the series and carries a civil contract for the purposes of legalizing sexual intercourse and legitimate procreation of children.
c) Ameer Ali - Marriage is an organization for the protection of the society. This is made to protect the society from foulness and unchestity.
d) Abdur Rahim :- The Mahomedan priests regard the institution of marriage as par taking both the nature of Ibadat or devotional arts and Muamlat or dealing

among men.

e) Mahmood J. :- Marriage according to the Mahomedan law is not a sacrament but a civil contract.

(f) Under Section 2 of Muslim Women (Protection of Rights on Divorce) Act, 1986 Marriage or Nikah among Muslims is a 'Solemn Pact' or

'Mithaq-e-ghalid' between a man & a woman ,soliciting each others life companionship, which in law takes the form of a contract or aqd.

Muslim marriage can also be differentiated from a civil contract on the basis of following points:-

(a) It cannot be done on the basis of future happenings unlike the contingent contracts.

(b) Unlike the civil contract it cannot be done for a fixed period of time. (Muta Marriage being an exception.)

Purpose of Marriage : The word Zawj is used in the Quran to mean a pair or a mate. The general purpose of marriage is that the sexes can provide company to one another, procreate legitimate children & live in peace & tranquility to the commandments of Allah. Marriage serves as a mean to emotional & sexual gratification and as a mean of tension reduction.

Marriage compulsory or not? - According to Imams Abu Hanifa, Ahmad ibn Hanbal & Malik ibn Anas, marriage in Islam is recommendatory, however in certain individuals it becomes Wajib or obligatory. Imam Shafi considers it to Nafl or Mubah (preferable). The general opinion is that if a person , male or female fears that if he/she does not marry they will commit fornication, then marriage becomes Wajib. However, one should not marry if he does not possess the means to maintain a wife and future family or if he has no sex drive or if dislikes children, or if he feels marriage will seriously affect his religious obligations.

Prophet said:- "When a man marries he has fulfilled half of his religion, so let him fear Allah regarding the remaining half." This very wording of Prophet marks the importance of marriage, thus it could be well concluded that marriage in Islam is must.

Capacity for Marriage : The general essentials for marriage under Islam are as follows:-

(i) Every Mohammadan of sound mind and having attained puberty can marry. Where there is no proof or evidence of puberty the age of puberty is fifteen years.

(ii) A minor and insane (lunatic) who have not attained puberty can be validly contracted in marriage by their respective guardians.

(iii) Consent of party is must. A marriage of a Mohammadan who is of sound mind and has attained puberty, is void, if there is no consent.

Essentials of Marriage: The essentials of a valid marriage are as follows:-

(i) There should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other party.

(ii) The proposal and acceptance must both be expressed at once meeting.

(iii) The parties must be competent.

(iv) There must be two male or one male & two female witnesses, who must be sane and adult Mohammadan present & hearing during the marriage proposal and acceptance. (Not needed in Shia Law)

(v) Neither writing nor any religious ceremony is needed.

Further explanation on essentials:

(i) A Muslim marriage requires proposal 'Ijab' from one party and acceptance 'Qubul' from the other side. This must be done in one sitting.

(ii) The acceptance must be corresponding to what is being offered.

(iii) The marriage must be effectively immediate. If the Wali says I will marry her to you after two months, there is no marriage.

(iv) The two parties must be legally competent; i.e. they must be sane and adult.

(v) The women must not be from the forbidden class.

(vi) The consent given must be free consent,. It must not be an outcome of compulsion, duess, coercion or undue influence.

Kinds of Marriage : Under Muslim law, generally two types of marriage is recognized

(i) Regular Marriage and

(ii) Muta marriage

Muta Marriage:

It is a survival of pre-Islamic custom whereby the Arab women used to entertain men in their own tents. Muta marriage is a temporary marriage. Muta marriage is recognized in Shia only. Sunni law doesn't recognize it. A Shia of the male sex may contract a Muta marriage with a woman professing the Mohammadan, Christian or Jewish religion, or even with a woman who is a fire worshipper but not with any woman following any other religion. But a Shia woman cannot contract a Muta marriage with a non muslim.

The essentials of Muta marriage are:-

(1) The period of cohabitation should be fixed.

(2) Dower should be fixed.

(3) If dower specified, term not specified, it could amount to permanent or regular marriage.

(4) If term fixed dower not specified, it amounts to void marriage.

Effects of Muta marriage :

1. Parties have no right to mutual inheritance

2. Muta wife is not entitled for maintenance - But if in their contract it is so mentioned then husband is bound to pay or she may file Petition under Sec.125 of Cr.P.C.

3. If marriage is not consummated, wife is entitled for half of the dower. Also if wife leaves husband before the contracted period, still she is entitled for proportionate dower.

4. When marriage is consummated, wife required to undergo idda of three months

5. In muta, husband has the right to refuse procreation Children of muta treated as the legitimate and inherit property of mother only.

6. Children of muta treated as the legitimate and inherit property of mother only.

7. Muta comes an end after expiry of term, if husband want to end it early then by mutual consent , he can do so by making gift of remaining term.

Classification of Marriage under Sunni Schools:

i) Sahih or Valid ii) Fasis or irregular iii) Void or Batil

(i) Valid or Sahih Marriage: Under the Muslim law, a valid marriage is that which has been constituted in accordance with the essential conditioned prescribed earlier. It confers upon the wife; the right of dower, maintenance and residence, imposes on her obligation to be faithful and obedient to her husband, admit sexual intercourse with him & observe Iddat.

(ii) Irregular or Fasid Marriage: Those marriages which are outcome of failures on part of parties in non fulfillment of prerequisites but then also are marriages; to be terminated by one of the party is termed to be Irregular marriages. They are outcome of-

(a) A marriage without witness (Not under Shia Law)
(b) Marriage with fifth wife.
(c) Marriage with a women undergoing Iddat.
(d) Marriage with a fire-worshipper.
(e) Marriage outcome of bar of unlawful conjunction.

An irregular marriage has no legal effect before consummation but when consummated give rise to several rights & obligations.

(iii) Void or Batil Marriage:A marriage which is unlawful from it's beginning. It does not create any civil rights or obligations between the parties. The offspring of a void marriage is illegitimate. They are outcome of-

(a) Marriage through forced consent.
(b) Plurality of husband.
(c) Marriage prohibited on the ground of consanguinity.
(d) Marriage prohibited on the ground of affinity.
(e) Marriage prohibited on the ground of fosterage.

Effects of valid Marriage (Sahih) : The lawful obligations which arise after marriage are as follows-

(i) Mutual intercourse legalized and the children so born are legitimate.

(ii) The wife gets power to get 'Mahr'

(iii) The wife entitles to get maintenance.

(iv) The husband gets right to guide and prohibit the wife's movement(for valid reasons only)

(v) Right of succession develops.

(vi) Prohibition of marriage due to affinity.

(vii) Women bound to complete Iddat period & not to marry during Iddat period; after divorce or death of husband.

The obligations and rights set between the two parties during and after the marriage are to be enforced till legality. On the basis of a marriage husband and wife do not get the right on one another's property.

Formal Validity of Muslim marriages on the completion of following conditions

I. Formalities of the marriage under Muslim Law :

1. Offer / Ijab and acceptance/ qubul on same day :

2. Presence of witness - 2 male witness or 1 male and 2 female among Sunnis

- Shias do not require witnesses.

3. No uttering of particular words are necessary but in Arabic or local language some words as to intention of parties are conveyed.

II. Deed of marriage / Kabin namah - contains amount of dower, conditons for it's payment and custody of child etc.

III. Consent of parents: Usually marriages are performed in bride's father's or guardian's house. Hanafi and Shia believe that if parties are adult then there is no consent of father / guardian is required. But a person below the age of puberty or of unsound mind has no capacity to enter into marriage without the consent of father or guardian.

IV. Registration of marriage is not compulsory - but Mutawalli of Jamayat / Jamat can issue Marriage Certificate in the States of Bihar and West Bengal under the Muslim Marriage and Divorce Registration Act, 1935.

V. Presumption of Marriage :

i. Prolonged continous cohabitation is established between husband and wife who have no legal barrier against their marriage

ii. When a man acknowledges woman to be his wife.

iii. When a man acknowledges a child as his legitimate offspring

Unlike Hindu where the marriage is a sacrament, marriages in Muslims have a nature of civil contract. Marriage is necessary for the legitimization of a child. When the marriage is done in accordance to the prescribed norms it creates various rights and obligations on both the parties.

Dower or Mahr under Muslim Law

Introduction and Meaning :

Mahr or Dower is a sum of money or other property to be paid or delivered to the wife. It is either specified or unspecified but in either case, the law confers a mandatory right of Mahr or Dower on wife. The Mahr (Dower) belongs to wife and she can deal with it in the manner she likes it and neither her husband nor husband's relations nor even her relations can dictate her in matter of using the Mahr money or property. No doubt, Mahr was originally analogous to sale price, but since the inception of Islam, it is hardly correct to regard it as the price of sexual intercourse.

Muslim marriage is like a contract where wife is the property and Mahr is the price or consideration. However, it is also true that non-payment of Mahr does not void the marriage, so Mahr is not purely a consideration. In pre-Islamic Arbia, Sadqua was a gift to wife but Mahr was paid to the wife's father and could therefore, be regarded as sale-price. But after Islam, Mahr payment is required to be paid to wife and not to her father, it could no longer be regarded as Sale Price.

Mahr or Dower has to be given to wife however she is vested with discretion to remit it. Mahr is non-refundable even after divorce (unless she remits it at her sole discretion) and it becomes the property of wife in perpetuity. Payment of Mahr is mandatory even if marriage is not consummated. But in that case, Mahr is half of the amount of consideration. In a way, Mahr provides a check on the capricious exercise by the husband of his almost unlimited power of divorce.

Mahr amount : Differes from one sect to another like under Hanafi Law - 10 Dirhams,

Malaki Law - 3 Dirhams, hariya Law etc. The Mahr paid by Prophet for his favourite daughter Fatima, wife of Ali was 500 Dirhams. A dirham (derived from the Greek) is the name of Silver coin of 2.97 grams in weight. However, it would be a sad mistake to lay too great stress upon the monetary value of the Mahr amount. It is said that in the case of an extremely poor man, the Prophet requested him to teach the Quran to his wife. It is said in one Hedaya that the payment of Mahr is enjoined by the law merely as a token of respect for the woman. No maximum amount of dower is prescribed, even though the husband is not capable can fix higher amount of dower but his parents are not liable to pay the same in case he fails to pay. Mahrnama may be executed but is not necessary.

Types of Dower :

A. Specied dower (mahrul-musamma) : The Mahr is usually paid at the time of marriage but it can also paid after the marriage. Mahr paid by the father on behalf of his minor son is binding on the minor son on his majority. However, under Hanafi Law, the father is not personally liable for the Mahr but in Ithna Ashari Law, father is also held liable. Where the amount has been specified, the husband will be compelled to pay the whole of it, howsoever excessive it may be.

There are two sub-types of Specified dower as - Prompt (muajjal) and deferred (muvajjal) Mahr

i. A technical term for Prompt is Muajjal and for Deferred is Muvajjal. The term Muajjal is derived from a root meaning 'hasten', 'to proceed' whereas the term Muvajjal is derived from the root meaning 'delayed' or 'deferred.'

ii. The prompt dower is payable immediately after the marriage but the deferred Dower becomes payable either on the dissolution of the marriage or on the happening of a specified event. When dower is paid, it is usual to split it into two equal parts, one part is paid at once or on demand and the other on the death of the husband or on divorce or on the happening of some specified event. In Ithna Ashari Law, the presumption is that the whole of the dower is prompt but in Hanafi Law, the position is different.

iii. Ideally and usually, the whole Mahr is required to be promptly awarded but in earlier case, the Full Bench held that the usage (custom) of the wife's family is the main consideration and in absence of proof of custom, the presumption is that one half is prompt. However, the proportion may be changed to suit particular cases.

iv. Wife can deny to perform conjugal rights if prompt dower is not paid and also the husband can't restrict wife's movement till the payment.

B. Unspecied or Proper dower (mahrul misal) :

The obligation to pay dower is a legal responsibility on the part of the husband and is not dependent upon any contract between the parties. Hence, the husband's liable to pay Mahr even if it is not specified. The only question would be the quantum. If no Mahr is paid, wife will be entitled to receive the amount which is customary in the community or in respective society or what is proper in each individual case. What is proper dower in each individual case will be determined as under -

i. With reference to the social position of her father's family.

ii. Her own personal qualifications.

iii. Social position of the husband. But the means of husband are of little account.

iv. Her age, beauty, fortune, understanding and virtues.

v. Mahr paid earlier in the family (i.e., Mahr paid for father, brother, uncle, sister etc. of the wife's family).

Increase or decrease of dower : The Husband may at any time increase the Dower. Like-wise, the wife may remit the Dower wholly or partly. The remission of the Mahr by wife is called as Hibatul Mahr or Hiba-I-Mahr. when a wife was being ignored by husband and thought that only way to win him back was to waive Mahr, her remission of Mahr was considered without her consent and was not binding on her.(Shah Bano v. Iftikhar Mohammad 1956 Karachi HC)

Confirmation of dower: Hanafi's believe that a wife is entitled for dower - i. on consummation ii. on valid retirement iii. on death of a party

Remedies of a Muslim woman to recover dower

The right to dower is an inherent right of every Muslim wife. But, unless this right is effectively enforced, it is of no use to her. Under Muslim law, following means of enforcement of the right to dower are available to a wife (or widow):

1. Refusal of Conjugal Rights : Before consummation of the marriage, the wife is entitled to deny cohabitation to the husband till he gives her Prompt Dower on demand. It is to be noted that under Muslim law a husband has right to cohabit with his wife and she cannot refuse the same without any reasonable excuse. But non-payment of Prompt Dower before consummation is a lawful justification for the wife to refuse cohabitation. A Muslim-wife can refuse to live with her husband and refuse to him the sexual intercourse so long as the Prompt Dower is not paid to her.

In case of Nasra Begam v. Rizwan Ali AIR 1980 All 119 - The Allahabad High Court held that the right to dower comes into existence before cohabitation and Prompt Dower may be demanded even before the cohabitation. Where the wife is minor or insane, her guardian can refuse to allow the husband to take his wife with him till the Prompt Dower has been paid. If the minor wife is already in the custody of her husband, such guardian can take her back on the ground of nonpayment of Prompt Dower. But, where the consummation

has taken place even once, the wife's right to refuse consummation is lost. If the marriage has already been consummated, the husband's suit for restitution of conjugal right will not fail on the ground of non-payment of Prompt Dower. However, the court has discretion, even in such a case, to pass a decree for restitution of conjugal rights subject to the condition of payment of Prompt Dower.

In another case of Anis Begum v. Muhammad Istafa Wali Khan AIR 1933 All 634 - the marriage of Anis Begum and Md. Istafa, the Prompt Dower was Rs. 15,000. The husband and wife lived together for some time and a daughter was born to them. Later on, Anis Begum left the house of her husband and refused to come back till her Prompt Dower was satisfied. Md. Istafa, the husband, led a suit for the restitution of conjugal rights. It was held by Sulaiman, C.J., that there was no absolute right in a husband to claim conjugal rights unconditionally. The courts have discretion to make the decree of restitution of conjugal rights conditional on payment of wife's unpaid Prompt Dower even where the marriage has already been consummated. Accordingly, the decree for restitution of conjugal right was passed in favour of the husband subject to his payment of Rs, 15,000/-.

Where the marriage has been consummated, the wife cannot enforce her claim by refusing conjugal rights to the husband. In such a situation the wife can recover her unpaid dower by maintaining an action in a court of law. She may realise it from husband in the same manner as a creditor recovers his loan.

If the husband dies, the widow is entitled to recover the amount by ling a suit against the legal heirs of the deceased husband. But the legal heirs of the husband are not personally liable to pay the dower. The dower is a debt against the estate of the deceased husband which is inherited by heirs.

2. Widows Right of Retention : After the death of husband the most effective method of enforcement of dower is the exercise of right of retention. A widow, whose dower remains unpaid, has a right to retain the properties of the husband till her dower debt is satisfied. This right is termed as the right of retention in lieu of unpaid dower and it is available to a widow, whether there is any agreement between the parties for this right or not.

Under this right if a wife has taken possession of her husband's properties lawfully (with free consent of the husband) in lieu of unpaid dower, then she is entitled to retain that possession after the death of her husband, until her dower is paid out of the properties retained by her.

This right is exercised against the creditors, if any, of her deceased husband, and his legal heirs. The legal heirs of the husband cannot get possession (and benefits) of the properties of the deceased until they make payments towards unpaid dower in proportion of their respective shares. Thus, this may be said to be a coercive method of recovery of unpaid dower from husband's legal heirs.

Right to retention doesn't include right to transfer that property. In Maina Bibi v. Vakil Ahmad (1924)52 IA 145 - In 1902, a possession suit was brought against Maina bibi who hold suit property to recover her dower amount, Court therein ordered to pay her dower amount first with interest. But till the payment she made gift of that property and the same is challenged in the present case. The Privy Council held that Mainabibi can't transfer that property but she can only hold the property till the satisfaction of her dower amount.

Effects of Right of retention :

a. Widow is liable to render full account of acquired property

b. She is not having right of alienation

c. No bar to file a suit for recovery of dower possession

Right of retention is lost when --

i. from the income of said property, dower is satisfied

ii. wife voluntary handovers the property

iii. when wife alienates property together with possession to alienee, other heirs get immediate right of possession to property.

3. Dower as a debt- Dower is a debt but not a secured debt, only a thing is that wife became first among other creditors. Wife/divorcee /widow can recover dower from husband or from his estate when he is dead. In case of her death, her hiers can also inherit the right to recover that dower.

Period of limitation to recover dower is -- 1. 3 years from dissolution of marriage or death of husband 2. in case of right of retention, till the amount is satisfied.

Suit for recovery of dower amount is maintainable under Sec.3 of the Muslim Women (Protection on Divorce)Act, 1986 before the Magistrate.

DISSOLUTION OF MARRIAGE AND MATRIMONIAL RELIEFS

Part I - Dissolution of Marriage

Firm union of the husband and wife is a necessary condition for a happy family life. Islam therefore, insists upon the subsistence of a marriage and prescribes that breach of marriage contract should be avoided. Initially no marriage is contracted to be dissolved but in unfortunate circumstances the matrimonial contract is broken. One of the ways of such dissolution is by way of divorce Under Muslim law the divorce may take place by the act of the parties themselves or by a decree of the court of law. However in whatever manner the divorce is effected it has not been regarded as a rule of life. In Islam, divorce is considered as an exception to the status of marriage.

The Prophet declared that among the things which have been permitted by law, divorce is the worst . Divorce being an evil, it must be avoided as far as possible. But in some occasions this evil becomes a necessity, because when it is impossible for the parties to the marriage to carry on their union with mutual affection and love then it is better to allow them to get separated than compel them to live together in an atmosphere of hatred and disaffection. The basis of divorce in Islamic law is the inability of the spouses to live together rather than any specific cause (or guilt of a party) on account of which the parties cannot live together. A divorce may be either by the act of the husband or by the act of the wife. There are several modes of divorce under the Muslim law, which will be discussed hereafter.

Modes of Divorce:

A husband may divorce his wife by repudiating the marriage without giving any reason. Pronouncement of such words which signify his intention to disown the wife is sufficient. Generally this done by talaq. But he may also divorce by Ila, and Zihar which differ from talaq only in form, not in substance. A wife cannot divorce her husband of her own accord. She can divorce the husband only when the husband has delegated such a right to her or under an agreement. Under an agreement the wife may divorce her husband either by Khula or Mubarat. Before 1939, a Muslim wife had no right to seek divorce except on the ground of false charges of adultery, insanity or impotency of the husband. But the Dissolution of Muslim Marriages Act 1939 lays down several other grounds on the basis of which a Muslim wife may get her divorce decree passed by the order of the court.

There are two categories of divorce under the Muslim law:

1. Extra judicial divorce, and

2. Judicial divorce

The category of extra judicial divorce can be further subdivided into three types, namely,

I. Unilateral divorce at the instance of husband

II. Unilateral divorce at the instance of wife

III. Divorce by Mutual Consent

I. Unilateral divorce at the instance of husband Talaq:

Talaq in its primitive sense means dismission. In its literal meaning, it means "setting free", "letting loose", or taking off any "ties or restraint". In Muslim Law it means freedom from the bondage of marriage and not from any other bondage. In legal sense it means dissolution of marriage by husband using appropriate words. In other words talaq is repudiation of marriage by the husband in accordance with the procedure laid down by the law. The following verse is in support of the husband's authority to pronounce unilateral divorce is often cited: " Men are maintainers of women, because Allah has made some of them to excel others and because they spend out of their property (on their maintenance and dower)".

When the husband exercises his right to pronounce divorce, technically this is known as talaq. The most remarkable feature of Muslim law of talaq is that all the schools of the Sunnis and the Shias recognize it differing only in some details. In Muslim world, so widespread has been the talaq that even the Imams practiced it . The absolute power of a Muslim husband of divorcing his wife unilaterally, without assigning any reason, literally at his whim, even in a jest or in a state of intoxication, and without recourse to the court, and even in the absence of the wife, is recognized in modern India. All that is necessary is that the husband should pronounce talaq; how he does it, when he does it, or in what he does it is not very essential.

In Hannefa v. Pathummal, Khalid, J., termed this as "monstrosity" .Among the Sunnis, talaq may be express, implied, contingent constructive or even delegated. The Shias recognize only the express and the delegated forms of talaq.

A. Express Talaq (by husband): When clear and unequivocal words, such as 'I have divorced thee" are uttered, the divorce is express talaq which fails in to to categories --

1. Talaq-i-sunnat,
2. Talaq-i-biddat.

1. Talaq-i-sunnat has two forms:

Talaq-i-ashan (Most approved)
Talaq-i-hasan (Less approved).

Talaq-i-sunnat is considered to be in accordance with the dictats of Prophet Mohammad.

- The ashan talaq: consists of a single pronouncement of divorce made in the period of tuhr (purity, between two menstruations), or at any time, if the wife is free from menstruation, followed by abstinence from sexual intercourse during the period if iddat. The requirement that the pronouncement be made during a period of tuhr applies only to oral divorce and does not apply to talaq in writing. Similarly, this requirement is not applicable when the wife has passed the age of menstruation or the parties have been away from each other for a long time, or when the marriage has not been consummated. The advantage of this form is that divorce can revoked at any time before the completion of the period of iddat, thus hasty, thoughtless divorce can be prevented. The revocation may effected expressly or impliedly.
- The hasan talaq - wherein the husband has to pronounce talaq consecutively in three tuhrs. If menstruation of wife stopped then three declaration after every 30 days , 3 times. After the last pronouncement, talaq is irrevocable. It is necessary that each of the three pronouncements should be made at a time when no intercourse has taken place during that period of tuhr. It was a pre-Ismalic practice where pronouncement of divorce in one tuhr, followed by its revocation and again pronouncement of divorce-- like that lead to harassment and misery of wife, Prophet laid down the divorce will become final and irrevocable at the third pronouncement. Further condition was imposed that parties were not free to remarry unless the wife married another man who had actually consummated the marriage and then divorced her. On the completion of idda, the woman could marry her husband. This is a penal provision meant to chastise the husband who repudiates his wife thoughtlessly.

2. Talaq -ul-bidda - This form came in to vogue during the second century of Islam. It is practiced in two forms - i. the triple declaration of talaq made in a period of tuhr /purity, either in one sentence, such as 'I divorce thee triply or thrice' or in three sentences such as 'I divorce thee, I divorce thee, I divorce thee', the moment pronouncement is made, marriage stands dissolved irrevocably.

ii. a single irrevocable pronouncement of divorce made in a period of purity or even otherwise, results in irrevocable divorce.

This type of talk is not recognised among the Shias. This type of divorce is also condemned and considered heretical as is irrevocable.

In Khlemniss v. State of UP Writ Petition no. 57 of 1993 - Tilhari J. had held that triple divorce was unconstitutional, as it perpetrated male authoritarianism. also held as is contrary to Art. 15, 15 and 21 of the Constitution of India.

Recent decision of Supreme Court on Triple Talaq Talaq-ul-bidda –

The decision of Supreme Court in invalidating triple talaq has long history which will be understood by going through following cases –

1. Shamin Ara v. State of UP 2002(7) SCC 518 :
    a. The Supreme Court invalidated instant triple talaq quoting the case – Rukia Khatun v. Abdul Laskar(1981) 1 GLR 375 - the Court held that the law of talaq as ordained by the holy Kuran is – i. the talaq must be for a reasonable cause

        ii. that it must be preceeded by an attempt of reconciliation between husband and wife by two arbitrators, one from each family. If their attempt fails, then talaq be affected.
    b. Talaq to be effective has to be pronounced i.e. to proclaim, utter formally or to declare.
    c. A plain affidavit or talaqnama without any efforts of reconciliation can't effectuate a talaq.
    d. Plea taken by the husband that he had given talaq to his wife at an earlier date doesn't amount to dissolution of marriage, unless talaq is duly proved with pre-condition of arbitration and valid reason.
2. Dagadu Pathan v. Rahimbi Pathan (2002) DMC 315 Bom –

    A muslim husband can't repudiate the marriage at will. The right to divorce of wife without reason, only to harm her or to avenge her for resisting husband's unlawful

demands and to divorce her in violation of the procedure prescribed by the Shariat is haram i.e. unlawful.

3. Mansoor Ahmed v. State of Delhi 2008(103)DRJ 137 (Del) – while interpreting Shamim Ara case held that a revocable talaq, the dissolution of marriage doesn't take place at the time of pronouncement but it automatically deferred till the end of iddat period – which provides the man to review and reconcile with his decision. Hasan and Ashan are revocable talaq and accordingly talag-e-biddat is also a single revocable talaq.
4. Shayara Bano v. UOI LNIND 2017 SC 415 –

   Shayara Bano and other Petitioners along with Supreme Court's own suo motu Public Interest Litigation are jointly heard to consider the issue of "Whether certain aspects of Islamic Personal Laws amount to gender discrimination and hence violates Constitution?" and challenges validity of triple talaq on the touchstone of Articles 14, 15, 21 and 25 of the Indian Constituion.

   The Court held that – i. Religious offices of Islam who propagate, support and authorize practices like talaq-e-biddat, nikah halaa and polygamy are grossly misusing their position, influence and power to subject to muslim women to treat them as chattel and hence violate their Fundamental Rights under Articles 14,15, 21 and 25.

   ii. Muslim Personal laws in India permit practice of talaq-e-biddat /badai/ unilateral triple talaq which practically treats women like chattel is neither harmonious with modern principles of human rights and gender equality nor an integral part of Islamic faith, according to various noted scholars.

   iii. Triple talaq is not an essential tenet of religious belief of muslims and is not protected under Art.25, but the Petitioner no where questions the inherent discretion given to muslim husband to pronounce talaq to wife rather it challenges practice of triple talaq. Hence Shayara Bano petition doesn't bring out the ills of triple talaq, as it stands today.

   iv. All India Muslim Personal Board filed counter affidavit and plead that the Supreme Court has no jurisdiction to adjudicate over Muslim Personal Law since it is part of Islam which is based on Quoranic injunction and not a law enacted by the Parliament. But this argument not hold good as the Supreme Court has in innumerable cases intervened in personal laws in reforming personal legal position.

v. Triple talaq is instant and irrevocable hence no attempt of reconciliation is made between parties which is essential to save marital tie, that too without valid reason from Rashid Ahmad by Privy Council to Shamim Ara, it is clear that Triple Talaq is manifestly arbitrary, hence be held violative of Article 14 and Sec.2 of the Shariat Act, 1937 be also declared void.

B. Implied and Contingent Divorce : Only Sunnis recognise this type of divorce. When the words of talaq are not clear but gives intention of the husband, then is considered as implied talaq.

If husband pronounce divorce so as to take effect on the happening of future event, it is termed as the Contingent talaq which become effective only on happening of contingency.

In Hamid Lai v. Imtiazan (1878) 2 Bill 71 - husband puts a condition to wife that if you go to your father's house, I will treat you as sister. Despite this wife left for her father's house. The wordas used by the husband appears as implied divorce, but condition performed by wife made it contingent, hence Court held it as a divorce.

In Baschoo v. Bismillah 1936 All 387 - the husband gave an undertaking in writing that he would pay her the amount of maintenance within the specified period and that if he defaulted in making the payment, it would operate as talaq. On the husband's failure to pay the amount within the stipulated period, the court held that the writing took effect as a valid talaq.

C. Delegateddivorce (talaq-i-Tafweez) - Talaq-i-tafweez or delegated divorce is recognized among both, the Shias and the Sunnis. The Muslim husband is free to delegate his power of pronouncing divorce to his wife or any other person. He may delegate the power absolutely or conditionally, temporarily or permanently . A permanent delegation of power is revocable but a temporary delegation of power is not. This delegation must be made distinctly in favour of the person to whom the power is delegated, and the purpose of delegation must be clearly stated. The power of talaq may be delegated to his wife and as Faizee observes, "this form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain freedom without the intervention of any court and is now beginning to be fairly common in India".

This form of delegated divorce is usually stipulated in prenuptial agreements. In Md. Khan v. Shahmai 1972 J&K 8 - under a prenuptial agreement, a husband, who was a Khana Damad, undertook to pay certain amount of marriage expenses incurred by the father-in-law in the event of his leaving

the house and conferred a power to pronounce divorce on his wife. The husband left his father-in-law's house without paying the amount. The wife exercised the right and divorced herself. It was held that it was a valid divorce in the exercise of the power delegated to her. Delegation of power may be made even in the post marriage agreements. Thus where under an agreement it is stipulated that in the event of the husband failing to pay her maintenance or taking a second wife, the will have a right of pronouncing divorce on herself, such an agreement is valid, and such conditions are reasonable and not against public policy . It should be noted that even in the event of contingency, whether or not the power is to be exercised, depend upon the wife she may choose to exercise it or she may not. The happening of the event of contingency does not result in automatic divorce.

D. Constructive divorce - Two types of constructive divorce have existed in Muslim Law as-

i. Ila - This divorce is construed by the conduct of husband and abstains wife's company for 4 months, then talk get confirms. It is also irrevocable in nature. Shafis and Shias believe it is not itself a talk, but gives a ground for wife to go for judicial divorce. Ithana Ashari believe that this form of divorce is possible only after consummation of marriage.

ii. Zihar - In this form, the husband expresses his dissatisfaction with his wife by comparing her with the back of his mother or sister or any other woman within the degrees of prohibited relationship. In such a case wife acquires a right to refuse cohabitation with her husband and can get judicial divorce.

Formalities of Talaq :

1) Capacity: Every Muslim husband of sound mind, who has

attained the age of puberty, is competent to pronounce talaq. It is not necessary for him to give any reason for his pronouncement. A husband who is minor or of unsound mind cannot pronounce it. Talaq by a minor or of a person of unsound mind is void and ineffective. However, if a husband is lunatic then talaq pronounced by him during "lucid interval" is valid. The guardian cannot pronounce talaq on behalf of a minor husband. When insane husband has no guardian, the Qazi or a judge has the right to dissolve the marriage in the interest of such a husband. Thus before the completion of iddat, the husband resumes cohabitation with his wife or says I have retained thee" the divorce is revoked. Resumption of sexual intercourse before the completion of period of iddat also results in the revocation of divorce.

2) Free Consent: Except under Hanafi law, the consent of the husband in pronouncing talaq must be a free consent. Under Hanafi law, a talaq, pronounced under compulsion, coercion, undue influence, fraud and voluntary intoxication etc., is valid and dissolves the marriage. Talaq pronounced under forced or involuntary intoxication is void even under the Hanafi law. Under the Shia law (and also under other schools of Sunnis) a talaq pronounced under compulsion, coercion, undue influence, fraud, or voluntary intoxication is void and ineffective.

3) Formalities: According to Sunni law, a talaq, may be oral or in writing. It may be simply uttered by the husband or he may write a Talaqnama. No specific formula or use of any particular word is required to constitute a valid talaq. Any expression which clearly indicates the husband's desire to break the marriage is sufficient. It need not be made in the presence of the witnesses.

According to Shias, talaq, must be pronounced orally, except where the husband is unable to speak. If the husband can speak but gives it in writing, the talaq, is void under Shia law. Here talaq must be pronounced in the presence of two witnesses.

4) Express words: The words of talaq must clearly indicate the husband's intention to dissolve the marriage. If the pronouncement is not express and is ambiguous then it is absolutely necessary to prove that the husband clearly intends to dissolve the marriage.

Divorce by mutual agreement: Khula and Mubarat: They are two forms of divorce by mutual consent but in either of them, the wife has to part with her dower or a part of some other property. A verse in the Holy Quran runs as: "And it not lawful for you that ye take from women out of that which ye have given them: except (in the case) when both fear that they may not be able to keep within the limits (imposed by Allah), in that case it is no sin for either of them if the woman ransom herself." The word khula, in its original sense means "to draw" or "dig up" or "to take off" such as taking off one's clothes or garments. It is said that the spouses are like clothes to each other and when they take khula each takes off his or her clothes, i.e., they get rid of each other.

In law it is said is said to signify an agreement between the spouses for dissolving a connubial union in lieu of compensation paid by the wife to her husband out of her property. Although consideration for Khula is essential, the actual release of the dower or delivery of property constituting the consideration is not a condition precedent for the validity of the khula. Once the husband gives his consent, it results in an irrevocable divorce. The husband has no power of cancelling the 'khul' on the ground that the consideration has not been paid. The consideration can be anything, usually it is mahr,

the whole or part of it. But it may be any property though not illusory. In mubarat, the outstanding feature is that both the parties desire divorce. Thus, the proposal may emanate from either side. In mubarat both, the husband and the wife, are happy to get rid of each other . Among the Sunnis when the parties to marriage enter into a mubarat all mutual rights and obligations come to an end.

The Shia law is stringent though. It requires that both the parties must bona fide find the marital relationship to be irksome and cumbersome. Among the Sunnis no specific form is laid down, but the Shias insist on a proper form. The Shias insist that the word mubarat should be followed by the word talaq, otherwise no divorce would result. They also insist that the pronouncement must be in Arabic unless the parties are incapable of pronouncing the Arabic words. Intention to dissolve the marriage should be clearly expressed. Among both, Shias and Sunnis, mubarat is irrevocable. Other requirements are the same as in khula and the wife must undergo the period of iddat and in both the divorce is essentially an act of the parties, and no intervention by the court is required.

II. Divorce at the instance of wife:

The divorce by wife can be categorized under two categories:

(i) The Khul or Khula
(ii) Talaq-ul-tafweex / delegated talaq (discussed above)
(iii) Judicial divorce

i. The Khul / Khula - literally means 'to put off' - when both the husband and wife are not ready to follow the rights and obligations of marriage, wife has to give some property to husband in return of Khula and is called as Talk-ul-bain also. Only a major and sound minded wife can obtain Khula or in case of minor, her guardian can exercise Khula. Once the husband consents for this then it become irrevocable. Khula can be given in consideration of dower also. The wife can take back the proposal of Khula before its acceptance by the husband, otherwise it become irrevocable.

Most of the textbook writers discuss Khul under the tiele 'Divorce by Mutual Consent', but as in the Khul the desire to separate emanates from the wife and she has to make her husband agree to it by giving consideration, it would be proper to call it divorce at the instance of wife.

iii. Judicial Divorce (Turkaf / separation) -

Prophet mohammad applied Koranic verses regarding judicial divorce as - 'in case of dispute between husband and wife let the be referred to two muslim arbitrators, free and just (one from each family), who will see as to the possibility of reconciliation and their decision shall be binding on them.'

Ameer Ali said 'when husband is guilty of conduct which makes matrimonial life intolerable to wife / neglects her or fail to fulfill matrimonial duties, wife has right of preferring a complaint before Kazi or judge and take divorce.'.

Before the Dissolution of Muslim Marriage Act, 1939 Indian Courts granted a Decree of divorce to wife only on two grounds viz. - i. Lian and ii. Apostasy

i. Lian: If the husband levels false charges of unchastely or adultery against his wife then this amounts to character assassination and the wife has got the right to ask for divorce on these grounds. Such a mode of divorce is called Lian. However, it is only a voluntary and aggressive charge of adultery made by the husband which, if false, would entitle the wife to get the wife to get the decree of divorce on the ground of Lian. Where a wife hurts the feelings of her husband with her behaviour and the husband hits back an allegation of infidelity against her, then what the husband says in response to the bad behaviour of the wife, cannot be used by the wife as a false charge of adultery and no divorce is to be granted under Lian. This was held in the case of Nurjahan v. Kazim Ali by the Calcutta High Court.

ii. Apostasy - It means either renouncing Islam or conversion to other religion than Islam and is an offence under Muslim law. It may be express or implied, but is valid ground for dissolution of marriage.

Now under the Dissolution of Muslim Marriage Act, 1939 -

a. Apostasy of husband results in instant dissolution of marriage hence if wife marries during idda, it is not an offence,

b. if muslim wife of other faith reconverts to her original faith, immediate dissolution of marriage takes place,

c. Apostasy of muslim wife doesn't result in apostasy.

Dissolution of Muslim Marriages Act 1939:

Qazi Mohammad Ahmad Kazmi had introduced a bill in the Legislature regarding the issue on 17th April 1936. It however became law on 17th March 1939 and thus stood the Dissolution of Muslim Marriages Act 1939. It is amended in 1959 and is applicable to whole of India and to all muslims irrespective of the Sect or School they may belong.Section 2 of the Act runs there under: " A woman married under Muslim law shall be entitled to obtain a decree for divorce for the dissolution of her marriage on any one or more of the following grounds, namely:-

1. that the whereabouts of the husband have not been known for a period of four years: if the husband is missing for a period of four years the wife may file a petition for the dissolution of her marriage. The husband is deemed to be missing if the wife or any such person, who is expected to have knowledge of the husband, is unable to locate the husband. Section 3 provides that where a wife files petition for divorce under this ground, she is required to give the names and addresses of all such persons who would have been the legal heirs of the husband upon his death. The court issues notices to all such persons appear before it and to state if they have any knowledge about the missing husband. If nobody knows then the court passes a decree to this effect which becomes effective only after the expiry of six months. If before the expiry, the husband reappears, the court shall set aside the decree and the marriage is not dissolved.

2. That the husband has neglected or has failed to provide for her maintenance for a period of two years: it is a legal obligation of every husband to maintain his wife, and if he fails to do so, the wife may seek divorce on this ground. A husband may not maintain his wife either because he neglects her or because he has no means to provide her maintenance. In both the cases the result would be the same. The husband's obligation to maintain his wife is subject to wife's own performance of matrimonial obligations. Therefore, if the wife lives separately without any reasonable excuse, she is not entitled to get a judicial divorce on the ground of husband's failure to maintain her because her own conduct disentitles her from maintenance under Muslim law.

3. That the husband has been sentenced to imprisonment for a period of seven years or upwards: the wife's right of judicial divorce on this ground begins from the date on which the sentence becomes final. Therefore, the decree can be passed in her favour only after the expiry of the date for appeal by the husband or after the appeal by the husband has been dismissed by the final court.

4. That the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years: the Act does define 'marital obligations of the husband'. There are several marital obligations of the husband under Muslim law. But for the purpose of this clause husband's failure to perform only those conjugal obligations may be taken into account which are not included in any of the clauses of Section 2 of this Act.

5. That the husband was impotent at the time of the marriage and continues to be so: for getting a decree of divorce on this ground, the wife has to prove that the husband was impotent at the time of the marriage and continues to be impotent till the filing of the suit. Before passing a decree of divorce of divorce on this ground, the court is bound to give to the husband one year to improve his potency provided he makes an application for it. If the husband does not give such application, the court shall pass the decree without delay. In Gul Mohd. Khan v. Hasina A.I.R. 1988 J&K 62 the wife filed a suit for dissolution of marriage on the ground of impotency. The husband made an application before the court seeking an order for proving his potency. The court allowed him to prove his potency.

6. If the husband has been insane for a period of two years or is suffering from leprosy or a virulent veneral disease: the husband's insanity must be for two or more years immediately preceding the presentation of the suit. But this act does not specify that the unsoundness of mind must be curable or incurable. Leprosy may be white or black or cause the skin to wither away. It may be curable or incurable veneral disease is a disease of the sex organs. The Act provides that this disease must be of incurable nature. It may be of any duration. Moreover even if this disease has been infected to the husband by the wife herself, she is entitled to get divorce on this ground.

7. That she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years, provided that the marriage has not been consummated.

8. That the husband treats her with cruelty, that is to say-

a. Habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill treatment, or

b. Associates with women of ill-repute or leads an infamous life, or

c. Attempts to force her to lead an immoral life, or

d. Disposes of her property or prevents her exercising her legal rights over it, or

e. Obstructs her in the observance of her religious profession or practice, or

f. If he has more than one wives, does not treat her equitably in accordance with the injunctions of the Holy Quran.

In Syed Ziauddin v. Parvez Sultana, (1979) II Andh LT 179 - Parvez Sultana was a science graduate and she wanted to take admission in a college for medical studies. She needed money for her studies. Syed Ziaudddin promised to give her money provided she married him. She did. Later she filed for divorce for non-fulfillment of promise on the part of the husband. The court granted her divorce on the ground of cruelty. Thus we see the court's attitude of attributing a wider meaning to the expression cruelty.

In Zubaida Begum v. Sardar Shah, (1943) 210 IC 587. a case from Lahore High Court, the husband sold the ornaments of the wife with her consent. It was submitted that the husband's conduct does not amount to cruelty.

In Aboobacker v. Mamu koya, (1971) KLT 663 - the husband used to compel his wife to put on a sari and see pictures in cinema. The wife refused to do so because according to her beliefs this was against the Islamic way of life. She sought divorce on the ground of mental cruelty. The Kerela High Court held that the conduct of the husband cannot be regarded as cruelty because mere departure from the standards of suffocating orthodoxy does not constitute un-Islamic behaviour.

In Itwari v. Asghari,1960 All 694 the Allahabad High Court observed that Indian Law does not recognize various types of cruelty such as 'Muslim cruelty', 'Hindu cruelty' and so on, and that the test of cruelty is based on universal and humanitarian standards; that is to say, conduct of the husband which would cause such bodily or mental pain as to endanger the wife's safety or health.

Irretrievable Breakdown as a ground of divorce :

Divorce on the basis of irretrievable breakdown of marriage has come into existence in Muslim Law through the judicial interpretation of certain provisions of Muslim law. In 1945 in Umar

Bibi v. Md. Din ,1954 Lah 51 it was argued that the wife hated her husband so much that she could not possibly live with him and there was total incompatibility of temperaments. On these grounds the court refused to grant a decree of divorce. But twenty five years later in Neorbibi v. Pir Bux, A.I.R. 1971 Ker 261 again an attempt was made to grant divorce on the ground of irretrievable breakdown of marriage. This time the court granted the divorce. Thus in Muslim law of modern India, there are two breakdown grounds for divorce: (a) non-payment of maintenance by the husband even if the failure has resulted due to the conduct of the wife, (b) where there is total irreconcilability between the spouses.

III. Divorce by Mutual Consent :

The Khul and the Mubarra are considered as types of mutual consent divorce. It is proper to call Khula as divorce at the instance of the wife.

In Munbarra/ Mubarat the aversion is mutual and proposal for divorce may emanate from either party, it alone falls under the ground of Mutual consent.

Among Sunnis, when the parties to marriage enter into a Mubarra, all mutual rights and obligations come to an end. The Shia law is stringent as it requires that both the parties must bona fide find the marital relationship tobe irksome. Among Sunnis no specific form is laid down, but the Shias insist on a proper form. Among both Shias and Sunnis, Mubarra is irrevocable divorce. Other requirement of Mubarra are like Khula and wife wife must undergo idda. In both Khula or Mubarra it is an act of parties, hence no intervention of the Court is required.

Conclusion:

In contrast to the Western world where divorce was relatively uncommon until modern times, and in contrast to the low rates of divorce in the modern Middle East, divorce was a common occurrence in the pre-modern Muslim world. In the medieval Islamic world and the Ottoman Empire, the rate of divorce was higher than it is today in the modern Middle East. In 15th century Egypt, Al-Sakhawi recorded the marital history of 500 women, the largest sample on marriage in the Middle Ages, and found that at least a third of all women in the Mamluk Sultanate of Egypt and Syria married more than once, with many marrying three or more times. According to Al-Sakhawi, as many as three out of ten marriages in 15th century Cairo ended in divorce. In the early 20th century, some villages in

western Java and the Malay peninsula had divorce rates as high as 70%.In practice in most of the Muslim world today divorce can be quite involved as here may be separate secular procedures to follow as well.

Usually, assuming her husband demands a divorce, the divorced wife keeps her mahr, both the original gift and any supplementary property specified in the marriage contract. She is also given child support until the age of weaning, at which point the child's custody will be settled by the couple or by the courts. Women's right to divorce is often extremely limited compared with that of men in the MiddleEast. While men can divorce their spouses easily, women face a lot of legal and financial obstacles. For example, in Yemen, women usually can ask for divorce only when husband's inability to support her life is admitted while men can divorce at will. However, this contentious area of religious practice and tradition is being increasingly challenged by those promoting more liberal interpretations of Islam.

PART II : MATRIMONIAL RELIEFS

Apart from dissolution of marriage, following are the other matrimonial reliefs available under law:

I. Restitution of Conjugal Rights –

This remedy made available by the Britishers to all the communities. Both the husband and wife can file this suit, when any of them withdraw without lawful reason. After filing the suit following are the defences available to the defendant :

i. cruelty by the petitioner ii. Void marriage

iii. plaintiff is guilty of apostasy iv. Non-payment of of dower

v. valid separation agreement

II. Enforcement of agreements between the spouses:

Mohmmedan law permits agreement between the spouses relating to – i. regulation of matrimonial life and ii. Stipulation for dissolution of marriage on happening of stipulated contingency.

Only lawful agreements are enforceable like Husband will not contract second marriage, husband will not remove wife from the house or husband will not remain absent from the house beyond certain period, certain amount of dower will be paid immediately, etc.

i. In one of the case the Privy Council held that the agreement to live in parents house after marriage by the wife is invalid, but in case of "Khana Damad" is valid.
ii. Mydeen v. Mydeen 1951 Mad 292 – upon taking a second wife, the husband entered into an agreement with first wife and settled some properties in her name. Later the husband divorced her and hence she filed a suit for recovery which was dismissed by the trial court. Here High Court held that she is entitled for recovery of amount as per their agreement.
iii. Khwaja Mohd. V. Husaini Begum (1910) 37 IA 152 – the father of minor husband agreed at the time of marriage that he will pay Rs.500/- to wife after marriage with his son. But after marriage he denied to pay the same. On her petition to the Court, her plea was accepted and enforced that agreement.

III. Declaratory Suits and annulment of marriage :

When the marriage is dissolved by a decree of the court, Muslim law term it as "Furquat". Such declaratory Suit can be filed under Sec.24 of the Specific Relief Act, 1963 for the following reliefs –

i. That the marriage of the plaintiff with the defendant is null and void,
ii. That the defendant who is claiming himself or herself to be the husband or wife of plaintiff is in fact not so,
iii. The plaintiff is lawfully wedded husband or wife of the defendant,
iv. The plaintiff repudiate marriage with the defendant,
v. The plaintiff's marriage with the defendant has been validly dissolved.

But the suit for the breach of promise to marry is not possible / entertained.

IV. Option of puberty and repudiation of marriage

1. When the child is given in marriage by the father or grandfather , said minor has the right of repudiation of such marriage on attaining majority. If every aspects including the dower

is correct then minor can't repudiate said marriage. If a minor doesn't repudiate on attainijg majority, then said marriage remains valid.

2. Option of puberty – A minor who is given in marriage by a person other than father or grandfather, then it is the absolute right of the minor immediately on attaining majority can repudiate the marriage without showing any case. This right of minor is called as "Option of Puberty". According to Shias, in such a case marriage is wholly ineffective unless ratified by the minor or attaining puberty. The option of puberty is subject to the following limitations – i. the option should be exercised immediately on attaining puberty,

   ii. the marriage should not have been consummated.

In Bismilla v. Nur Md. (1921) 44 All 61 – the Courts held that the minor wife does not loose her right of repudiation of marriage is she does not know that she has the right and therefore, she can exercise the right after she has come to know for it.

Same liberal interpretation has been given to the second limitation also. In Abdul v. Aminabai (1935) 59 Bom 426 , the court held that the consummation must have taken place with the consent of wife.

Under the Dissolution of Muslim Marriage Act, 1939, a muslim female can file a suit for dissolution of her marriage on the ground that she was given in marriage before she attained age of fifteen by the father, grandfather or any other guardian. In Mustafa v. Khurshida AIR 2006 Raj 31 – the girl was married at the age of 7 years, fact was proved by birth certificate and marriage was not consummated, she lawfully exercised option of puberty by filing the suit and held that she is entitled for the divorce.

I. PARENTAGE

ILLEGITIMACY IN earlier days subjected a bastard to severe disabilities and was a much greater stigma than it is nowadays. On the whole, our general social attitudes have become more relaxed and tolerant towards individual shortcomings and permissiveness is becoming increasingly fashion-able. Islamic law embodies the principles of strict enforcement of sexual morality and holds that any sexual relationship is a crime unless it is between husband and wife (or master and slave-concubine in the old days). Under its provisions, therefore, legitimacy is strictly insisted upon.

Legitimation : Legitimation and legitimacy are quite distinct. In a Privy Council decision, Lord Dunedin laid down the difference as under:

" Legitimacy is the status which results from certain facts. Legitimation is a proceeding which creates a status which did not exist before. In the proper sense there is no legitimation under the Mohammadan law".

Legitimation by subsequent marriage is now widely recognized in the common law world. The Legitimacy Act 1926 introduced the principle of Legitimation into English law. Its effect is to render legitimate a living illegitimate child whose parents marry at any time after his birth. Since the enactment of the Legitimacy Act 1959, legitimation operates although either or both the parents were married to a third person at the time of the child's birth, but it applies only if the father was domiciled in England at

the time of the marriage. The legal rights and duties of a legitimated person are generally speaking the same as those of a person born legitimate. A child of a valid marriage is treated as legitimate provided that at the time when its conception must have taken place or, if later, at the time of the celebration of the marriage either parent, or both, reasonably and honestly believed that their marriage was valid.

About the Muslim law of legitimacy, N.J. Coulson observes:

" Islamic law embodies the principle of strict enforcement of sexual morality in the severe punishment it prescribes for the offence of *zina,* or fornication. Under English law a sexual relationship outside marriage is not a legal offence unless it is aggravated by circumstances such as lack of consent, the young age of the girl, the blood relationship of the persons concerned, or unnatural behaviour which will amount to the criminal offences of rape, unlawful carnal knowledge, incest, bestiality, or sodomy. Islamic law, on the other hand, holds that any sexual relationship is a crime unless iris between husband and wife or was, in the old days, between a master and his slave concubine".

Under the Mohammedan Law a child to be legitimate must be the offspring of a man and his wife. Legitimacy is proved by showing that the child‘s parents had been lawfully married to each other at the time of the birth of the child. Sometimes there may be no direct proof of the marriage, in such case under Mohammedan Law proof of an acknowledgement of paternity is taken as presumptive proof of the marriage. Once a marriage is presumed to be valid, children born of such marriage are also legitimate. Thus, it is the establishment of a valid marriage that

gives rise to proper legitimacy or paternity of children in Islamic Law.

There is a saying in Islamic Law that *Firash*, i.e. matrimonial authority belongs to the husband. All the jurists agreed that commission of illicit relations by a wife or a husband does not affect the validity of marriage. The Prophet and all the Jurists condemn it ―If as a result of illicit relation the wife becomes pregnant and if the husband is aware and keep mute for sometimes with her after his awareness and then the paternity established through Lian, it shall not be allowed and the child shall be affiliated to him. The jurists further held, the commission of adultery by the wife does not affect the marriage contract but it is recommended that the husband should divorce her.

Muslim Law provides that, an illegitimate child is a *filius nullius* owing no *nasab* to parent. According to Shias, a child born outside the lawful wedlock is related neither to the father nor to the mother. On the other hand, Hanafis do not take such rigid stand, according to them, an illegitimate child for certain purpose such as wearing and nourishment is related to the mother. Under no School of Muslim Law, an illegitimate child has any right of inheritance in the property of his putative father. Muslim Law also does not provide for the guardianship of illegitimate child, but in modern India by judicial system, it has established that guardianship of an illegitimate child vests in its mother. There is no mode or method recognized by Muslim law to legitimize an illegitimate child, for the western doctrine of legitimation is not recognized at all. Muslim law insists that conception in order to render a child legitimate should take place after the marriage, actual or semblable.

There are only two methods through which parentage is established in Muslim law --

(a) by birth during a regular (also irregular but not void) marriage, or

(b) by acknowledgement (adoption is not 'recognized in Islam).

The doctrine of acknowledgment of paternity is quite different from the doctrine of legitimation. Whereas legitimation proceeds upon the principle of legitimating children whose illegitimacy is proved and admitted, the rule of acknowledgment proceeds upon the assumption that the acknowledged child is not only the offspring of the acknowledger by blood, but also the issue of a lawful union between the acknowledger and the mother of the child.

Presumptions of legitimacy and period of gestation

The presumptions of legitimacy in Muslim law are well summarized by Fyzee :

1. A child born within six months of the marriage is illegitimate unless the father acknowledges it.

2. A child born after six months of the marriage is legitimate, unless the father disclaims it.
3. A child born after the termination of marriage is legitimate if born :
   i. within 10 lunar months under Shia Law
   ii. within 2 lunar years uner Hanafi Law

iii. within 4 lunar years yner Maliki and Shafi law within 10 lunar months within 2 lunar years within 4 lunar years.

The above periods lay down earliest viable age and gestation. The shortest period of gestation in the human species is taken as 6 months.

Section 112 of the Indian Evidence Act limits for conclusive presumption the period of gestation to 280 days after the dissolution of marriage to render the child legitimate.

The minimum and maximum limits of gestation fixed by Muslim law have been criticised on the ground that they are not borne out by modern scientific knowledge of gestation and pregnancy. With regard to the minimum period of 6 months, this limit has not been exactly fixed by the *Koran.* The shortest period of gestation which has been accepted by English courts is 174 days. The 6 months being lunar months, the period may be less than 180 days. The criticism is mainly directed against the maximum limit, which in itself is so divergent.

Application of Sec.112 of the Evidence Act lays down a conclusive presumption of legitimacy. It provides that a child born during the continuance of a valid marriage or within 280 days after its dissolution, the mother remaining unmarried, is conclusively presumed to be legitimate, unless there was no access when he could have been begotten.

II. ACKNOWLEDGEMENT OF PATERNITY

The word paternity derived from a Latin word "*paternitas*" which used in the canon law to signify a kind of spiritual relationship,‘ it also means fatherhood. According to Black‘s Law Dictionary, paternity defines the identity of the father of a child both legally and biologically.

A child gets born with lots of blessings and happiness for the parents. Generally, if the Mother was married at the time the baby is born or ten-month period before the baby is born then the husband become the legal father of the child. However, if the parents are not married then paternity needs to be legally recognized in order to identify the father and secure the father‘s rights. Until the paternity has been established the child does not get legal father as well as legal identity. But it is not a process of legitimation of a child. Muslim law doesn't recognise legitimacy. Acknowledgement means legally accepting someone, which creates some legal rights. When a man legally recognize any baby who did not biologically belong to that man, then it is called Acknowledgement of Paternity‘ under Mohammedan Law, this concept is also known as Adoption‘ under Hindu Law. This doctrine of Acknowledgement of Paternity‘ under Mohammedan Law applies only when there is uncertainty and paternity of the child has been proved from any other person, the child is not a result of any *Zina* (i.e. adultery, fornication, incest, or illicit relation) and the circumstance of his birth are such that he could be a legitimate child of his father.

Establishment of paternity

The acknowledgement of paternity under Muslim Law is in the nature of a declaration by the father that a child is his legitimate offspring but it is not a process of legitimating of an illegitimate child.‘ A valid marriage is essential element, for acknowledgement of paternity under Mohammedan Law some proofs are also needed. A man can acknowledge another either expressly or impliedly as his lawful child. Under Islamic Law, Paternity may be established through: - Marriage, Acknowledgement, and Evidence.

Conditions for Valid Acknowledgement

1. The paternity of the child should be doubtful that means it should neither be proved nor disproved that the child is illegitimate. It was held in a case that, "if the child is known to be illegitimate, it cannot be acknowledged to be legitimate". The doctrine applies only to cases of uncertainty as to legitimacy and in such cases acknowledgement has its effect, but that effect always depend upon the assumption of a lawful union between the parents and acknowledge child.

2. The acknowledger should acknowledge the child as his legitimate child, not just as his child. Generally, when one person calls another as his child, he means to call him as his legitimate child. The intention to confer the status of legitimacy must be clear.‘ So whenever any acknowledge any child he must have to declare that child as his legitimate child and have to express that clearly.

3. The age of the acknowledger and acknowledged person should be such that they appear to be father and child. The acknowledger should be at least twelve and a half years senior to the person acknowledged.

4. The person acknowledged must not be the offspring of adultery or a result of any kind of *zina*. If the child is an outcome of *zina* then the child cannot be acknowledged as a legitimate child. That child is not able to get any acknowledgement of paternity. That child has no right under law and the society will not also accept the child.

5. The paternity of the person acknowledged must not be established by anyone else. If the paternity is certain and established by any other person then that acknowledgement is not legal and as well as the husband of the mother of that will not be able to acknowledge paternity of that child.

6. The acknowledgement must not be repudiated by the acknowledged person. Under Muslim law, a person who has the ability to understand the transaction has the right to repudiate the acknowledgement. For the validity of acknowledgement of paternity, no confirmation by the person acknowledgement is necessary. Once an acknowledgement of paternity is made, it cannot be revoked.

Rights created by getting acknowledgement of paternity

When a valid acknowledgement of paternity is made, the following rights and consequence flow from it:

1. It raises a presumption of valid marriage between the acknowledger and the mother of the person acknowledged.

2. The acknowledger and the acknowledged person have mutual rights of inheritance.

3. The mutual rights of inheritance also arise between the acknowledger and the mother of the acknowledged person.

4. It also has some benefits to establishing paternity for the mother, the father, and the child.

For the child : 1. Legal record of the identity of both parents.

2. Father‘s name on the birth certificate.

3. Information on family medical history if needed for the purpose of the child‘s medical treatment.

4. Emotional benefits of knowing both parents.

5. Financial support from both parents, including child support, Social Security benefits, veterans benefits, military allowances, and inheritance.

6. Health or life insurance from either parent, if available.

For the mother : 1. Help in sharing parental responsibilities.

2. Information about medical history if needed for the purpose of the child‘s medical treatment.

3. Improved financial security for the child.

4. Access to health insurance, if available.

For the father : 1. Legal establishment of parental rights.

2. Father‘s name on the birth certificate.

3. Right to seek court ordered custody or visitation.

4. Right to be informed and to have a say in adoption proceedings, if any.

ILLEGITIMACY :

In *Pavitri* v. Katheesumm case a question arose on the maintenance of an illegitimate daughter, born of a mohammedan male and a hindu woman, against his putative father and his assets. The court held that the Mohammedan law imposes no burden of maintenance of an illegitimate child on the putative father. An illegitimate child is not entitled to be maintained by either parent under the shia law and only from mother under the hanafi law.

However in the case of *Nafees Ara* v. Asif Sadat AlKhan Petition was filed under Section 488 of the Criminal Procedure Code of 1898 claiming right of maintenance for an illegitimate child. In this case the court held that the Muslim

law does not make any specific provision provide for granting or prohibiting the grant of maintenance to an illegitimate child against the father, does not mean that the civil or criminal court have no jurisdiction to grant maintenance.

The practical scenario of the society is far different from the guideline of the law prescribed in the statutes. The child who is illegitimate in the eye of law, the society is also considering the same. However, no one does not consider his innocence although the child himself does not bring him in this world. He is the result of *zina* but he does not commit that *zina.* Moreover, the whole world goes against him. Thus, the word illegitimate should not be added with the child. Meanwhile, the biological father should have the right to acknowledge his own child.

I. GUARDIANSHIP

In Muslim law there are many rules for minor's property and not for his person as it is matter of custody. According to *Radd-ul-Muhatar*, "Right of Guardianship of property of a minor goes to father, if he dies without appointing executor than grandfather. In case of death of a grandfather, the Kazi himself be a Guardian or nominate others as Guardian. The sources of law of Guardianship and custody are certain verses in the Koran and a few Ahadis.

Classification of Guardianship –

1. Natural Guardian
2. Testamentary Guardian
3. Guardians appointed by the Court

I. Natural Guardian: Both among Shais and Sunnis father is considered as Guardian. Even after the death of father, mother can't be Guardian. Even mother gets custody of child and Guardianship with father. Father can control education, religion, upbringing and movement of a child. Father can get Guardianship over his minor legitimate child but she can get custody of that child. Among Sunnis, after father, Guardianship passes to an Executor.

Among Shias, after father Guardianship passes to grandfather even if executor is appointed. A grandfather can't represent child in case father is alive.

2. Testamentary Guardian : Among Sunnis, father can appoint Guardian and in case of absence of the father his executive or grandfather can appoint Guardian. Among Shias, father's appointment of Guardian is valid when grandfather is not alive.

Among Shias and Sunnis, the mother has no power of appointing a testamentary Guardian for her legitimate and illegitimate child only – 1. When she has been appointed a general executrix by the will of child's father, 2. In respect of her own property which will devolve after her death.

Among Sunnis, appointment of a non-muslim mother as testamentary Guardian is valid, but among Shias it is not valid. According to both the Schools, a non-muslim (zimmi) or alien can't be appointed as a testamentary Guardian and such appointment is null and void. Zimmi is allowed among Malikis and Shafi for the property of minor but not to his person i.e. custody.

Durr-ul-Muhtar, states that if a zimmi appointed as a guardian, then he can be replaced by Kazi but his acts done before removal are valid. Fatwa Alamgiri said appointment of a minor or insane person as Guardian is void, even a profligate can't be appointed. Appointment may be orally or in writing. The testator must be major and sound minded one who appoints a Guardian through will. Guardian is called as Wasi or Amin(trustee) or Kaim Mukam.

3.Guardian appointed by the Court : After the failure of natural Guardian and testamentary Guardian, Kazi can appoint a Guardian. But now said practice was replaced by the Guardians and Wards Act,1890 where Guardian can be appointed for a minor of any community. The District Court within which that minor and his property is situated have jurisdiction to appoint a Guardian. Sometimes the concern High Court also has the power to appoint a Guardian. Gauhati High Court once opined in one of the case that when mother had remarried after the death of her husband, she should not be appointed as a Guardian of her minor daughter, in that case a paternal grandmother can be a Guardian. In case of second marriage of mother, custody of child belongs to her former husband or mothers mother or full sister.

Powers of natural or testamentary Guardian :

1. Acts of Guardian or executor are classified by Hedaya as -

    i. acts of Guardianship such as contracting a child in marriage or selling - buying goods for him,

    ii. acts arising from the want of child such as food, clothing, shelter etc.

    iii. acts which are advantageous to the minor ex. accepting a gift and presenting for him.

2. Other authorities on Muslim Law classify acts of Guardian as below -

    i. acts which are beneficial or to minor

    ii. acts which are absolutely injurious to minor

    iii. acts which are mid-way between the first two.

3. Powers of Guardian :

a. Power of Alienation - A Guardian can alienate movable and immovable property of a minor but in case of necessity only. The Hedaya said that whenever the Guardian can sell movable property for an adequate consideration and invest the sale proceeds in a more profitable undertaking, the sale will be justifies. Not merely this, the Guardian is allowed to take all reasonable risks which are involved in the world of business in his handling of movable property. The sale of movable property can be set aside by minor on attaining majority on the ground of fraud.

The power of alienation of immovable property are limited. The *Durr-ul-Muhatar* lays down that it is lawful for the executor to sell immovable property if there is an imminent danger of its being lost or to sell it if can get double of its value or for the maintenance of minors or for the discharge of debts of the testator or for the payment of legacies which cannot be paid otherwise or where the income of the property does not exceed the cost of its up-keep. The consensus of the authorities is that the sale of a minor's immovable property by his legal Guardian is valid in the following cases:

i. when the Guardian can fetch the double of its value,

ii. when the sale is to manifest advantage of the minor,

iii. when there are some general provisions in the Will, such as payment of legacies, which cannot be carried into effect, without the sale of the property,

iv. when there are debts of the testator and they cannot be liquidated, save by the sale of property,

v. where the income of the property is less than the cost of its up keep,

vi. when it is imminent danger of being lost or destroyed by decay etc.,

vii. where the property is in the hands of an usurper and the Guardian has reasonable belief that there is no chance of recovery and

viii. when the minor has no other property and the sale is absolutely necessary for his maintenance.

In Meethiyan v. Md. Kunj AIR 1996 SC1003 - father as a natural Guardian has right to sell property minor but sale by mother who is not legal Guardian nor testamentary Guardian, sale void.

b. Power to grant lease : - In case of need, a Guardian also have the power to pledge the goods or movable property but not for long period. In Zeebuniss v. Danaghar (1936)49 Mad 942, the court said that a guardian of the minor has the power to lease out minor's property if it is for the benefit of minor, but he cannot give leases of the minor's property extending beyond the period of minority of the child.

c. Power to carry on business : - Guardian must carry business like an ordinary prudent man and has power to enter into partnership on behalf of minor. The Fatawai Alamgiri empowers an executor to invest minor's property in partnership and he may enter into partnership with others. In Jaffer v. Standard Bank Ltd. 1929 PC 130, the Privy Council held that though the guardian had the power to enter into partnership on behalf of the minor, the minor's liability was only to the extent to which he had share in the partnership, in no case minor is personally liable.

d. Power to incur debts and enter into contracts in case of any necessity of minor and a debt contracted without any necessity is not binding on the minor.

e. Power to make partition - if all are minors, partition is invalid but if some of them are minor and some are adults, then if the adults are present, the executor can separate their share from the share of the minors and hand it over to them and retain the share of the minors with himself. But in no case the guardian should separate the shares of each minor as it is unlawful, whole partition will result in invalidity.

f. Any other powers as per requirement : The Bombay and Allahabad High Courts hold the opinion that the guardian has the power to assert a right of pre-emption on behalf of the minor or to refuse or accept an offer of a share in pursuance of such right and the minor will be bound by such act, if done in good faith. The *de jure* guardian i.e. legal guardian has power to acknowledge debts on behalf of the minor.

Certificated Guardian (Guardian appointed by the Court) - He has the powers as per Sec.27 of Guardians and Wards Act, 1890 which entrusts general powers and obligations of the guardian. the generality of the power is limited by the rule that the guardian should deal with minor's property in the same manner as a man of ordinary prudence deals with his own property. Sec. 20 lays down the limitations laid down in respect of guardian's powers of

alienation of property. Sec. 33 of the same Act, empowers Court to restrict or extend powers of Guardian from time to time.

II. CUSTODY (HIZANAT)

Muslim Law recognise mother's right of Hizanat. Mother has preferential right to custody of child provided, she should not guilty of misconduct. According to *Radd-ul-Muhatar,* "the right of mother to the custody of her child is re-established whether she be a Mosalman or a Kitabia or a majoosia, even though she be separated from her husband. But she should not be an apostate". Since Muslim law considers the right of Hizanat as no more than the right of rearing of the children, it terminates at an early age of the child. In this regard Muslim law makes a distinction between the son and the daughter.

A. Mother's right for Hizanat of child:

i. For a son - According to Fatwai Alamgiri mother's Hizanat upto 7 years and also Hanafis. Uner Shias, mother is entitled for Hizanat until he is weaned (upto 2 years). According to Malikis, mothers rights extend upto age of puberty.

ii. For a daughter - Hanafis believe that a mother has custody over daughter till she attains puberty but Malikis, Shafis and Hanbalis believe that custody can be retained by mother upto her marriage and Ithana Asharis said it as upto 7 years of her age.

Mother has right to custody of her children upto above ages for both legitimate and illegitimate child. Father has to provide mother, sufficient maintenance for rearing of child.

B. Other females right to Hizanat : Under Shia law, after mother Hizanat goes to father, but among the Hanafis, following females are, after the mother entitled to Hizanat of the minor children of the age upto which the mother is entitled to it :

a. Mother's mother how high so ever

b. FAther's mother how high so ever

c. Full Sister

d. uterine Sister

e. Consanguine sister

f. Full sister's daughter

g. Uterine sister's daughter

h. Consanguine sister's daughter

i. Maternal aunts in like order as sisters and

J. Paternal aunts, in like order as sisters.

The rule is that among the females, the nearer excludes remoter.

C. Father's right of Hizanat:

Father is entitled for the Hizanat in two cases -

i. on completion of age by child upto which mother is entitled

ii. in absence of mother or other female members.

Father's Hizanat continues till the age of puberty. But in case of the absence of the father, following persons are entitled for the custody :

a. Nearest paternal grandfather

b. Full brother

c. Consanguine brother

d. Full brother's son

e. Consanguine brother's father

f. Full brothers of the father

g. Consanguine brother of the father

h. Father's brother's son and

i. Father's consanguine brother's son

Among Shias, in the absence of the father, grandfather only gets Hizanat. But in case of the absence of grandfather who will get Hizanat is not clear.

D. When the right of Hizanat may be lost by Hazina (mother or other females having Hizanat) -

First requirement is that being a Hazina, that lady must be of sound mind, good moral character and living at such a place where there is no risk of morality or physical to the child. In case if Hazina is a mother of child and if she is minor, then it is valid.

A Hazina with above qualification may loose her custody over a child on -

i. her apostasy

ii. her marriage to a person not related to child

iii. her misconduct, negligence or cruelty towards the child

iv. remove child from house for her benefit

v. when mother separates from father and goes to her native

E. When a Hazin will loose Hizanat:

i. if he is minor or of unsound mind

ii. if he is leading a immoral life.

F. Defacto Guardian (Self appointed Guardian)-

When a person having no right to do so, assumes the charge of another's estate and carries on the administration of estate, this continuous course of conduct results in conferring on 'defacto Guardian / manager' status on that person.

Powers of defacto Guardian include sale or pledge of goods for minor's profit, but not power of alienation of immovable property.

In Md. Amin v. Vakil Ahmad (1920) 47 Cal 713, the brother of minor had entered into family arrangement on behalf of minor. It was held that minor is not bound by such partition.

MAINTENANCE

- Muslim law differs from law of maintenance in other systems of law
- persons entitled for maintenance under the Muslim law are -
  - i) Wife / husband
  - ii) Children
  - iii) Parents & grandparents
  - iv) Other relations

1. **The wife** : Muslim husband's obligation to maintain his wife arises in following two circumstances
   - i. On account of status arising out of a valid marriage &
   - ii. On account of a pre-nupital agreement entered by parents to the marriage.

- Muslim husband bound to maintain his wife even if she is rich.
- wife's right to maintain is a debt against husband and has priority over the right of all other persons to receive maintenance.
- Muslim husband bound to wife of
  - i. Valid marriage only
  - ii. Who attained the age of puberty
  - iii. Till she remains faithful to him.

- Muslim wife doesn't lose her right to maintenance if
  - a) she refuses to access to husband on lawful grounds.
  - b) marriage not consummated because of
    - i) husband not attaining puberty.
    - ii) husband's absence
    - iii) illness.

  Quantum of one based on status and financial position of wife.

- Hanafi position of both parties be seen
- Shia i) only position of husband seen.
  ii) requirement of wife as to food, clothing, residence, service.
  iii) wife entitled to a separate residence in case of more than one wives.

* Divorced wife's right to maintenance and dower
  - divorced wife is not entitled for maintenance after idda
  - if marriage dissolved by death she is not entitled for maintenance even during idda.
  - if she is ordered U/Sec. 125 of Cr.P.C. and later if husband divorce her, she can't claim maintenance.
  - C. J. Chandrachard says that even after divorce obligation of husband to maintain wife runs and he gave instances of --

  i) 241 & 242 verses of Koran – provision should be made for divorced woman in addition to her dower – is the prior obligation of husband

  ii) Kuran always provided for maintenance of divorced wife.

Maintenance under pre-nuptial agreements --

- Wife can put condition of maintenance in case of --

  i. ill-treatment by her husband/

  ii. husband takes second wife – she is not only entitled to maintenance but also live separately.
- Wife entitled for special allowance of kharch-i-pandam i.e. regular expensed tobe incurred by the wife

Maintenance U/Sec. 125 Cr.P.C. (S-488 of old Cr.P.C.)

- A wife whether Muslim/non Muslim is entitled to claim maintenance against the husband on the ground of the husband's neglect/ refusal to maintain.
- Obligation to maintain wife, children / upto majority/unsound / parents
- Sec. 125(3)- if wife lives separately, magistrate must see reasonability of the ground.
- Sec. 125 (3)- no wife is entitled for maintenance if lives in adultery/ lives separately without any reason.
- But Muslim husband had privilege to give Talak on filing of maintenance petition by the wife and responsible only to pay maintenance for 3 months of idda.
- Bai Tahira Vs. Ali Hussain (1979) Cr LJ 154
- J. Krishna Iyer- Every divorcee wife Muslim /non Muslim entitled for maintenance and dissolution of marriage under personal doesn't make any difference.

- Sec. 125- include wife divorced by Talak/ who obtains divorce Under dissolution of Muslim Marriage Act, 1939

Alteration and cancellation of maintenance order possible --

- On change in circumstances.
- Amount of maintenance can be changed on retirement of the husband / any ailment etc.
- Maintenance order can be cancellation on following grounds.
  i) Remarriage
  ii) Receipt of full amount
  iii) Voluntary surrender of the right of maintenance by wife.

Payment of dower and cancellation of maintenance order U/ Sec. 125

- till the decision of Shah Bano Case, under Sec. 127 (3) (b) of Cr.P.C. "whole of the sum which under the customary and personal law applicable to the parties, was payable on such divorce" was interpreted as payment of dower amount by Muslim husband on divorce.
- This raised a question as to whether a muslim wife's right to claim maintenance is forfeited after getting dower ? - These issues are discussed in following cases-
  1) Bai Tahira Vs. Ali Hussain AIR 1979 Sc 362
- parties married in the year 1956 & were blessed with a son. But in 1962 the marriage break down and husband pronounced Talak. Dispute started on a flat in which husband kept his wife resulted in a comprise to held said flat by the wife and Rs.5000/- as mehar and in return wife renounced her right over the property of husband. After some days wife financial crises, hence filed petition U/ sec. 125 for her and minor son. Wife succeeded in JMFC, but husband took matter to High Court and won there- matter came to S.C.
- Two main contentions i) since parties living separately by mutual consent U/Sec. 125 (4)- wife not entitled for maintenance. ii) under compromise of 1962, Mehar money paid to wife and all claims adjusted, hence can't claim maintenance U/Sec. 127(3)
- J. Krishna Iyes said provisions of law be interpreted as per values of society and legal system. and Art. 15(3) also provides for special law to women, hence for her survival maintenance is necessary. Rs.5000/- Mehar amount can't satisfy one day need also.

Hence she can ask maintenance again but Sec.127(3)(b) not allows wife for double benefit like one under customary law and another under statutory law.

- This decision was protested by Muslims.

2) Md. Ahmed Khan Vs. Shah Bano Begum AIR 1985 SC 945

- Shah Bano- married to Ahmad Khan one who was an Advocate but profession in 1932 gave birth to 3 sons and 2 daughters. In 1975 she was driven out of matrimonial home by her husband and hence applied for maintenance in 1978 of Rs.500/- . On 6-11-1978 he pronounced talak in talak-ut- biddai form (irrevocable divorce) and pleaded not liable for maintenance. He paid her maintenance of Rs.200/- p.m. by way of Mehar money but JMFC directed to pay 25/- p.m. Later the wife went in appeal to High Court wherein amount enhanced to Rs.179:20 per month as income of husband claimed to be Rs.6000/- p.m. Husband came to Supreme Court.
- Held – if wife is unable to maintain herself after period of idda on talak, she can claim maintenance U/Sec. 125.

To invalidate the decision of Shah Bano the Muslim Women (Protection on Divorce)Act,1986 was passed under which a muslim divorcee can ask maintenance from husband, in case of failure can ask from her heirs and lastly from the Wakf Boards.

Still; even if a divorcee files a petition under Sec.125 of Cr.P.C, her claim will be entertained by the Courts.

Arrears of maintenance- a wife can claim arrears of the amount of maintenance has been fixed by an agreement / under an order of the court.

MAINTENANCE TO THE CHILDREN

- Liability on father to maintain minors but not illegitimate but U/sec. 125 he has to.
- If father neglects then children can ask maintenance
- After divorce, father has to maintain child and if child is in custody of mother, father has to pay maintenance to child
- Mother's obligation to maintain children if father is poor, mother is rich then she has so, but under Shia in case of father is poor, grandfather has to maintain.
- Parental obligation to maintain major children.
- In case of disability, disease, mental disability
- Both mother and father has to maintain in 2/3 : 1/3
- In case of girl till her marriage.

1) Mohammad V. Noorjahan 1995 Hyd G18.

- After divorce, daughter was living with mother, father obtained custody but didn't execute if daughter continued to stay therein, daughter entitled for maintenance.

2) Dinsab V Md. Hussain 1945 Bom 490 – father of 2 daughters, mother alive took second marriage, whereupon the former wife together with her and daughters left husband and lived separately. The father offered to keep daughters with him but the offer was rejected –held – daughters not entitled to maintenance.

PARENTS AND GRAND PARENTS

- Conditions :
  i. Maintenance be in easy circumstances.
  ii. Claimant should be poor.

- Ithana Ashari – both mother and father entitled for maintenance
- Both son and daughter have obligation.
- In case of aliveness of parents, need to look after grandparents.
- No need to maintain persons of prohibited degree.

The Muslim Women (Protection of Rights on Divorce) Act, 1986

It was a controversially named landmark legislation passed by the Parliament of India in 1986 to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto. The Act was passed to nullify the decision in the Shah Bano case.

It is administered by any magistrate of the first class exercising jurisdiction under the Code of Criminal Procedure, 1973. As per the Act, a divorced Muslim woman is entitled to reasonable and fair provision and maintenance from her former husband, and this should be paid within the period of idda.

According to the Statement of Objects and Reasons of this Act, when a Muslim divorced woman is unable to support herself after the idda period that she must observe after the death of her spouse or after a divorce, during which she may not marry another man, the magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim Law. But when a divorced woman has no such relatives, and does not have enough means to pay the maintenance, the magistrate would order the State Waqf Board to pay the maintenance. The 'liability' of husband to pay the maintenance was thus restricted to the period of the idda only.

The High Courts have interpreted "just and fair provision" that a woman is entitled to during her iddat period very broadly to include amounts worth lakhs (hundreds of thousands) of rupees. More recently the Supreme Court in *Danial Latifi v. Union of India* read the Act with Articles 14 and 15 of the constitution which prevent discrimination on the basis of sex and held that the intention of the framers could not have been to deprive Muslim women of their rights. Further the Supreme Court construed the statutory provision in such a manner that it does not fall foul of Articles 14 and 15.

The provision in question is Section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 which states that "a reasonable and fair provision and maintenance to be made and paid to her within the idda period by her former husband".[6] The Court held this provision means that reasonable and fair provision and maintenance is not limited for the idda period (as evidenced by the use of word "within" and not "for"). It extends for the entire life of the divorced wife until she remarries. In *Shabana Bano v Imran Khan*, the Supreme Court held that a Muslim divorced woman who has no means to maintain

herself is entitled to get maintenance from her former husband even after the period of idda and she can claim the same under S.125 CrPC.

Divorced women are entitled to maintenance not only for iddat period from their former husband but also to reasonable and fair provisions for future maintenance. S.3 of the Muslim Women (Protection of Rights on Divorce) Act has to be given under the liberal interpretation to help divorced women.

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986

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ARRANGEMENT OF SECTIONS

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SECTIONS

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986

ACT NO. 25 OF 1986

[19*th May*, 1986.]

An Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Thirty-seventh year of the Republic of India as follows:—

1. Short title and extent.—(*1*) This Act may be called the Muslim Women (Protection of Rights on Divorce) Act, 1986.

(*2*) It extends to the whole of India except the State of Jammu and Kashmir.

2. Definitions.—In this Act, unless the context otherwise requires,—

(*a*) "divorced woman" means a Muslim woman who was married according to Muslim law, and has been divorced by, or has obtained divorce from, her husband in accordance with Muslim law;

(*b*) "*iddat*period" means, in the case of a divorced woman,—

(*i*) three menstrual courses after the date of divorce, if she is subject to menstruation;

(*ii*) three lunar months after her divorce, if she is not subject to menstruation; and

(*iii*) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier;

(*c*) "Magistrate" means a Magistrate of the First class exercising jurisdiction under the Code of Criminal Procedure, 1973 (2 of 1974) in the area where the divorced woman resides;

(*d*) "prescribed" means prescribed by rules made under this Act.

3. *Mahr*or other properties of Muslim woman to be given to her at the time of divorce.—(*1*) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to—

(*a*) a reasonable and fair provision and maintenance to be made and paid to her within the *iddat*period by her former husband;

(*b*) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

(*c*) an amount equal to the sum of *mahr* or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and

(*d*) all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

(*2*) Where a reasonable and fair provision and maintenance or the amount of *mahr* or dower due has not been made or paid or the properties referred to in clause (*d*) of sub-section (*1*) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, *mahr* or dower or the delivery of properties, as the case may be.

(*3*) Where an application has been made under sub-section (*2*) by a divorced woman, the Magistrate may, if he is satisfied that—

(*a*) her husband having sufficient means, has failed or neglected to make or pay her within the *iddat* period a reasonable and fair provision and maintenance for her and the children; or

(*b*) the amount equal to the sum of *mahr*or dower has not been paid or that the properties referred to in clause (*d*) of sub-section (*1*) have not been delivered to her, make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as it and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for the payment of such *mahr*or dower or the delivery of such properties referred to in clause (*d*) of sub-section (*1*) the divorced woman:

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

(*4*) If any person against whom an order has been made under sub-section (*3*) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or *mahr* or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974), and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.

4. Order for payment of maintenance.—(*1*) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the *iddat* period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit he property and at such periods as he may specify in his order:

Provided that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay

such maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her:

Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.

(*2*) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (*1*) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (*1*), the Magistrate may, by order, direct the State Wakf Board established under section 9 of the Wakf Act, 1954 (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (*1*) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order.

5. Option to be governed by the provisions of sections 125 to 128 of Act 2 of 1974.—If on the date of the first hearing of the application under sub-section (*2*) of section 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of sections 125 to 128 of the Code of Criminal Procedure, 1973 (2 of 1974), and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly.

Explanation.—For the purposes of this section, "date of the first hearing of the application" means the date fixed in the summons for the attendance of the respondent to the application.

6. Power to make rules.—(*1*) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(*2*) In particular and without prejudice to the foregoing power, such rules may provide for—

(*a*) the form of the affidavit or other declaration in writing to be filed under section 5;

(*b*) the procedure to be followed by the Magistrate in disposing of applications under this Act, including the serving of notices to the parties to such applications, dates of hearing of such applications and other matters;

(*c*) any other matter which is required to be or may be prescribed.

(*3*) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

7. Transitional provisions.—Every application by a divorced woman under section 125 or under section 127 of the Code of Criminal Procedure, 1973 (2 of 1974) pending before a Magistrate on the commencement of this Act, shall, notwithstanding anything contained in that Code and subject to the provisions of section 5 of this Act, be disposed of by such Magistrate in accordance with the provisions of this Act.

GIFT / HIBA

Introduction:

- Gift is a generic term that includes all transfers of property without consideration. In India, Gift is considered equivalent to Hiba but technically, Gift has a much wider scope than Hiba. The word Hiba literally means, the donation of a thing from which the donee may derive a benefit. It must be immediate and complete.
- The most essential element of Hiba is the declaration, "I have given". As per Hedaya, Hiba is defined technically as:- "Unconditional transfer of property made immediately and without any exchange or consideration, by one person to another and accepted by or on behalf of the latter".
- According to Fyzee, Hiba is the immediate and unqualified transfer of the corpus of the property without any return.

Essentials:

- Since Muslim law views the law of Gift as a part of law of contract, there must be an offer (izab), an acceptance (qabul), and transfer (qabza).
- Thus, the following are the essentials of a valid gift -

1. A declaration by the donor - There must be a clear and unambiguous intention of the donor to make a gift.

2. Acceptance by the donee - A gift is void if the donee has not given his acceptance. Legal guardian may accept on behalf of a minor.

3. Delivery of possession by the donor and taking of the possession by the donee. In Muslim law the term possession means only such possession as the nature of the subject is capable of. Thus, the real test of the delivery of possession is to see who - whether the donor or the donee - reaps the benefits of the property. If the donor is reaping the benefit then the delivery is not done and the gift is invalid.

Following are the conditions which must be satisfied for a valid gift.

1. Parties - There must be two parties to a gift transaction - the donor and the donee.

A. Conditions for a Donor - (Who can give)

-- Must have attained the age of majority - Governed by Indian Majority Act 1875.

-- Must be of sound mind and have understanding of the transaction.

-- Must be free of any fraudulent or coercive advice as well as undue influence.

-- Must have ownership over the property to be transferred by way of gift.

- A gift by a married woman is valid and is subjected to same legal rules and consequences. A gift by a pardanashin woman is also valid but in case of a dispute the burden of proof that the transaction was not conducted by coercion or undue influence is on the donee.
- Gift by a person in insolvent circumstances is valid provided that it is bona fide and not merely intended to defraud the creditors.

B. Conditions for Donee:

-- Any person capable of holding property, which includes a juristic person, may be the donee of a gift. A Muslim may also make a lawful gift to a non-Muslim.

-- Donee must be in existence at the time of giving the gift. In case of a minor or lunatic, the possession must be given to the legal guardian otherwise the gift is void.

-- Gift to an unborn person is void. However, gift of future usufructs to an unborn person is valid provided that the donee is in being when the interest opens out for heirs.

Mental Conditions in Hiba:

Hussaina Bai v. Zohara Bai 1960 MP 60

-- A parda-nasheen Muslim lady was brought from Nagpur to Burhampur. She has a fit of hysteria and soon after it, she was made to sign the impugned gift-deed without affording her any opportunity of taking independent advice and without her as to what were the contents of the document. The Court said that the gift deed was executed

from the lady under compulsion, it was not her voluntary act and hence the deed was held invalid

2. Subject matter of Gift :

- It must be designable under the term “maal-thing or goods”.
- It must be in existence at the time when the gift is made. Thus, gift of anything that is to be made in future is void.
- The donor must own the gift.
- Muslim law recognizes the difference between the corpus and the usufructs of a property.
- Corpus means the absolute right of ownership of the property which is heritable and is unlimited in point of time, while, usufructs means the right to use and enjoy the property. It is limited and is not heritable.
- The gift of the corpus of a thing is called Hiba and the gift of only the usufructs of a property is called Areeat.
- Gift of an indivisible property to more than one persons.- not possible as are not having physical possession which is essential of a gift.
- Gift of actionable claims or incorporeal property – not possible as they do not have physical existence.

4. Extent of Donor's Right to Gift

- General rule is that a donor’s right to gift is unrestricted.
- In Ranee Khajoorunissa vs Roushan Jahan, it was recognized by the Privy Council that a donor may gift all or any portion of his property even if it adversely affects the expectant heirs.
- However, there is one exception that the right of gift of a person on death bed (Marz ul maut) is restricted in following ways - He cannot gift more than one third of his property and he cannot gift it to any of his heirs

5. Kinds of Gift:

- There are several variations of Hiba.
    - Hiba bil Iwaz,
    - Hiba ba Shart ul Iwaz,
    - Sadaq
    - Areeat

I.Hiba Bil Iwaz : Hiba means gift and Iwaz means consideration.

- Hiba Bil Iwaz means gift for consideration already received.
- It is thus a transaction made up of two mutual or reciprocal gifts between two persons. One gift from donor to donee and one from donee to donor. The gift and return gift are independent transactions which together make up Hiba bil Iwaz.
- In India, it was introduced as a device for effecting a gift of Mushaa in a property capable of division. So a Hiba Bil Iwaz is a gift for consideration and in reality it is a sale. Thus, registration of the gift is necessary and the delivery of possession is not essential and prohibition against Mushaa does not exist.
- The following are requisites of Hiba bil Iwaz -

1. Actual payment of consideration on the part of the donee is necessary.

-- In Khajoorunissa vs Raushan Begam, held that adequacy of the consideration is not the question. As long is the consideration is bona fide, it is valid no matter even if it is insufficient.

2. A bona fide intention on the part of the donor to divest himself of the property is essential.

3. Gift in lieu of dower debt - In Gulam Abbas vs Razia AIR 1951, All HC held that an oral transfer of immovable property worth more than 100/- cannot be validly made by a muslim husband to his wife by way of gift in lieu of dower debt which is also more than 100/-. It is neither Hiba nor Hiba bil Iwaz. It is a sale and must done through a registered instrument.

II. Hiba ba Shartul Iwaz:

- Shart means stipulation and Hiba ba Shart ul Iwaz means a gift made with a stipulation for return.
- The payment of consideration is not immediate but the delivery of possession is essential.
- The transaction becomes final immediately upon delivery.
- When the consideration is paid, it assumes the character of a sale and is subject to premption (Shufa).
- As in sale, either party can return the subject of the sale in case of a defect. It has the following requisites –
- Delivery of possession is necessary.
    - It is revocable until the Iwaz is paid.
    - It becomes irrevocable after the payment of Iwaz.
    - Transaction when completed by payment of Iwaz, assumes the character of a sale.
- In general, Hiba bil Iwaz and Hiba ba Shart ul Iwaz are similar in the sense that they are both gifts for a return and the gifts must be made in compliance with all the rules relating to simple gifts.

Hiba	Hiba bil Iwaz	Hiba ba Shart ul Iwaz
Ownership in property is transfered without consideration.	Ownership in property is transferred for consideration called iwaz. But there is no express agreement for a return. Iwaz is voluntary.	Ownership in property is transferred for consideration called iwaz, with an express agreement for a return.
Delivery of possession is essential.	Delivery of possession is NOT essential.	Delivery of possession is essential.
Gift of mushaa where a property is divisible is invalid.	Gift of mushaa even where a property is divisible is valid.	Gift of mushaa where a property is divisible is invalid.
Barring a few exceptions it is revocable.	It is irrevocable.	It is revocable until the iwaz is paid. Irrevocable after that.
It is a pure gift.	It is like a contract of sale.	In its inception it is a gift but becomes a sale after the iwaz is paid.

6. Exceptions in delivery of possession

- The following are the cases where delivery of possession by the donor to the donee is not required -

1. Gift by a father to his minor or lunatic son.
2. When the donor and the donee reside in the same house which is to be gifted. In such a case, departure of the donor from the house is not required.
3. Gift by husband to wife or vice versa. The delivery of possession is not required if the donor had a real and bona fide intention of making the gift.
4. Gift by one co-sharer to other. Bona fide intention to gift is required.
5. Part delivery - Where there is evidence that some of the properties in a gift were delivered, the delivery of the rest may be inferred.
6. Zamindari villages - Delivery is not required where the gift includes parcels of land in zamindari if the physical possession is impossible. Such gift may be completed by mutation of names and transfer of rents and incomes.

7. Subject matter in occupation of tenant - If a tenant is occupying the property the gift may be affected by change in ownership records and by a request to the tenant to attorn the donee.

8. Incorporeal rights - The gift may be completed by any appropriate method of transferring all the control that the nature of the gift admits from the donor to the donee. Thus, a gift of govt. promissory note may be affected by endorsement and delivery to the donee.

9. Where the donee is in possession - Where the donee is already in possession of the property, delivery is not required. However, if the property is in adverse possession of the donee, the gift is not valid unless either the donor recovers the possession and delivers it to donee or does all that is in his power to let the donee take the possession.

7. Void Gifts

- The following gifts are void -
- 1. Gifts in future - A thing that is to come into existence in future cannot be made. Thus, a gift of a crop that will come up in future is void.
- 2. Contingent gift - A gift that takes effect after the happening of a contingency is void. Thus a gift by A to B if A does not get a male heir is void.

Gift of a condition:

- A gift must always be unconditional. When a gift is made with a condition that obstructs its completeness, the gift is valid but the condition becomes void.
- Thus, if A gifts B his house on a condition that B will not sell it or B will sell it only to C, the condition is void and B takes full rights of the house.
- **Doctrine of Mushaa**
- Mushaa means undivided share in a property. The gift of undivided share in an indivisible property is valid under all schools but there is no unanimity of opinion amongst different schools about gift of undivided share in a property that is divisible. In Shafai and Ithna Asharia laws it is valid if the donor withdraws his control over the

property in favour of the donee. But under Hanafi law, such a gift is invalid unless it is separated and delivered to the donee.

- **Illustration**

- A, B, and C are the co-owners of a house. Since a house cannot be divided, A can give his undivided share of the house to D in gift.

- A, B, and C are the co-owners of 3 Tons of Wheat, under Shafai and Ithna Ahsharia law, A can give his undivided share of the wheat to D if he withdraws control over it but under Hanafi law, A cannot do so unless the wheat is divided and the A delivers the possession of 1 ton of wheat to D.

- Gift of mushaa where property indivisible- A valid gift may be made of an undivided share (mushaa) in property which is not capable of partition.

- Gift of mushaa where property divisible- A gift of an undivided share (mushaa) in property which is capable of division is irregular (fasid) but not void (batil). The gift being irregular, and not void, it may be perfected and rendered valid by subsequent partition and delivery to the donee of the share given to him. If possession is once taken the gift is validated.

- Exceptions: A gift of an undivided share (mushaa), though it be a share in property capable of division, is valid from the moment of the gift, even if the share is not divided off and delivered to the donee, in the following cases:

  (1) Where the gift is made by one co-heir to another;

  (2) Where the gift is of a share in a zamindari or taluka;

  (3) Where the gift is of a share in freehold property in a large commercial town

- It is observed that Mushaa is an undivided share in property, either moveable or immoveable; that a valid gift may be made of an undivided share in property, which is not capable of partition, and, that a gift of an undivided share in property, which is capable of division, except in the three cases as mentioned above, is only irregular, and not void; but, if possession is once taken under the gift, it is validated. In the three exceptions, however, the gift is valid from the moment of the gift.

Revocation of a gift:

- Under muslim law, all voluntary transactions are revocable and so under Hanafi law a gift is also generally revocable.
- In Shia law, a gift can be revoked by mere declaration while in Sunni law, it can be revoked only by the intervention of the court of law or by the consent of the donee.
- The following gifts, however, are absolutely irrevocable -

1. When the donor is dead.
2. When the donee is dead.
3. When the donee is related to the donor in prohibited degrees on consanguinity. However, in Shia law, a gift to any blood relative is irrevocable.
4. When donor and the donee stand in marital relationship. However, in Shia law, a gift to husband by wife or vice versa is revocable.
5. When the subject of the gift has been transferred by the donee through a sale or gift.
6. When the subject of the gift is lost or destroyed, or so changed as to lose its identity.
7. When the subject of the gift has increased in value and the increment is inseparable.
8. When the gift is a sadaq.
9. When anything has been accepted in return.

ADMINISTRATION OF ESTATES

- Muslim law did not recongnise this concept but it merely laid down a machinery for the distribution of the estate of the deceased among the legatees and the heirs. This concept was actually brought in India by the Britishers by the Probate and Administration Act,1881, later it is replaced by the Indian Succession act,1925.
- For all religions in modern India, the administration of estate of the deceased is as per the Indian Succession Act 1925
- Administration of estates means that the estate of the deceased is to be applied successively to the payment of funeral expenses (not the amount spent in ceremonies performed for securing the peace of the soul of the deceased) of proceedings for obtaining probate/ letters of administration, wages and services rendered to the deceased within 3 months of his death, debts of the deceased and legacies. The remaining estate is to be distributed among the heirs.
- Legal representatives means the executor / administrator (or in the absence, the heirs) of a deceased Muslim is his legal representatives and all the assets of the deceased vests in him.
- When deceased dies leaving behind a will, the probate may be obtained and in case he dies intestate, the letters of administrator may be obtained. During his lifetime, if successor not able to manage property, can appoint successor otherwise after his death court can appoint.
- According to traditional Muslim law non-Muslim can't be executer but in modern Indian is allowed.
- The letters of administrator may be granted to a person who is an heir, legatee/ creditor of the deceased.

VESTING OF ESTATE:--- the estate of the deceased vests in the executor, where there is one and it vests in him. Even if no probate was obtained by him. If there is neither an executor nor can administrator then property vests in the heirs.

Rules As To Vesting :-

a) When a Muslim dies leaving behind a will where under he had appointed an executor, then his estate vests in him as he is legal representative of deceased.

In particular : i) bequeathable 1/3rd vests in him for the purpose of the will &

ii) the rest vests in him as a bare trustee for heirs.

iii) an executor required to do --

a. to collect all assets of deceased and debts.

b. to pay all charges against estate.

c. to pay debts.

d. to pay legacies

e. to distribute remaining property among heirs.

b) When a Muslim dies interstate and letters of administration obtained, then assets vests in administrator. The administrator is legal representative of deceased. An administrator has to do above functions.

c) When a Muslim dies without appointing an executor or dies intestate and no letters of administration have been obtained then property of deceased vests in heirs. Now heirs can become legal representative, but no adverse orders are passed unless heir get a Succession Certificate U/Sec. 15A, of the Indian Succession act, 1925.

- estate vests in heirs not jointly but in severalty as from the time of the death of the deceased in proportion to their respective shares.

Legal action against and on behalf of the estate of the deceased :

Under Muslim Law, the estate of the deceased devolves on the heirs, the moment he dies and heirs are free to distribute it among themselves.

- each heir is liable to pay the debts to their proportionate share in the property of deceased.

1. Suit by creditors: creditors can sue against executor/ administrator/ legal heirs for the realization of the debts.

Md. Sule man vs. Md. Ismail 1966 SC 794

Facts - Where deceased was Muslim, three persons A, B & C mortgaged certain immovable properties in favour of one R. After the death of A, R filed suit for the enforcement of the mortgage against B & C and the three widows and a daughter of A. the suit was decreed. During execution properties were sold through court and purchased by R. R alienated that property to someone. Later plaintiff claiming son of A filed a suit for partition of mortgaged properties / in alternative entitled to redeem the properties/ a partition there of equal to his

share in the mortgaged properties. The plaintiff's suit was resisted by R and decree obtained by R was binding on plaintiff as estate of deceased was fully represented by those who were in possession at that time.

Held - 1) plaintiff was bound by decree as estate of A was fully represented.

2) the creditors is not requested to sue all the heirs and decree may be enforced against individual heirs in proportion to their shares in the estate.

2. Recovery of Debts due to the deceased : by filing a Suit by an executor, administrator / heir.

3. Heirs liability to pay debts – each heir has to pay in proportion to the estate he gets.

4. Alienation : 1) by an heir of his share before payment of debts - as heirs immediately succeed to the property of deceased, freely can alienate property without payment of debt and pass a good title to a bonafide purchaser.

a. Land mortgage Bank Vs. Bilaya Uddin (1870) 7 Cal LR 460,

Facts : -- the heirs sold entire estate of the deceased to one P without discharging the debts of the deceased. Subsequent to sale, Q a creditor of deceased obtained decree for his debts and applied for execution by attaching property in possession of P. The attachment application of Q dismissed holding that a creditor of deceased Muslim can't follow the estate in the hands of a bonafide purchaser for value.

b. Wahid Missa Vs. Shubrattun (1970) 5 IA 211

Facts -- A a Muslim died leaving behind 2 sisters as his only heirs. Subsequently one P creditor of A obtained decree against sisters. Later on, one Q a creditor of the sisters also obtained a money decree against them. In execution of Q's decree the property was sold at court sale and purchased by R. Then P filed proceeding to attach property of A in the hands of R. The Court denied as sisters passed good title.

c. Bazayat Hussain Vs Dooli Chand (1878) 5 IA 211

Facts - A, a Muslim died leaving behind a widow and a son's widow dower debt was outstanding against A. S mortgaged his share in estate to P without paying dower. Subsequently widow obtained money decree for her dower debt against S and got his share in estate attached. Then P obtained decree on mortgage against S for sale of S's share and it

was purchased by Q. Held since the mortgage was made by S before widow got share attached in execution of the decree, it was held that Q was entitled to the property.

d. Mohemed Wazid Vs. Bazayat Hussein (1874) 4 Cal 402

Facts -- A, a Muslim died leaving behind three widows X, Y, and Z and sons X, Y, Z brought a suit against who was in possession of estate of A for administration and for payment of dower debt. The suit was decreed and charge was created on estate and S was directed to render accent, widows applied for execution. During pendency of execution, S mortgaged his share to P. P sued S and obtained decree for sale and sold to Q.

- Held on suit of X, Y and Z, Q took properties subject to charge of X, Y, and Z

2. Alienation by an heir for payment of debt- a heir can sell only that part of property which is his share for payment of debt.

SUCCESSION

- The Muslim Law of inheritance is superstructure based on foundations of pre-Islamic customary law of succession and on the patriarchal organisation of the family.
- In Muslim Law there is no bifurcation of property and no reorganization to joint family property.
- General principles.

A. Customary principles of succession :

- In pre-Islamic Arabia, wife and children were excluded from inheritance.
- based on principles of agnatic preference and exclusion of females
- four basic principles of pre-Islamic succession-

i) the nearest male agnate succeeded to the total exclusion of remoter agnates i.e. son exclude grandson.

ii) females were excluded from inheritance.

iii) the descendants were preferred over ascendants and ascendants over collaterals i.e. in presence of son father could not succeed.

iv) where there were more than one male agnates of equal degree, all of them inherited the property and share it equally.

B) Islamic principles of succession developed by the Prophet--

i) husband and wife being equal are entitled to inherit each other.

ii) some near females and cognates are also recognized as heirs.

iii) parents and other ascendants are made heir even when there are descendants.

iv) newly created heirs are given specified shares.

v) newly created heirs inherit the specified shares along with customary heirs and not to their exclusion.

vi) customary heirs act as resudiaries.

-- Koran gave amended and modified customary law of succession.

-- Superimposition of the Koranic principles on the customary law of inheritance has led to divergence of opinion among the Shias and sunnis

Cognate- £ÀAn£À ü / one who related to other by female side Agnate - ¦vÀÈªÀA²AiÀÄ ¸ÀA§A¢ /relative of father's side.

C) The Hanafi law general principles

Hanafi's interpret principles of customary law and Islamic law in such a manner as to blend them together in harmonious manner- customary heirs are not deprived of their shares but the same was reduced and given to Koranic share.

i) basic structure of agnatic preference retained as Koranic succession taken agnatic principles by recognizing right of females agnates.

ii) if Koranic heir nearer to customary heir, specified portion will be given to Koranic heir first and residue to customary heir.

iii) if Koranic & customary heirs equally near to the deceased, double portion is given to customary heir.

iv) The general rule of distribution of the estate is per capita and not per strips.

Per capita per person

* Doctrine of representation and stirpital succession :-

- Hindu law recognize both of above

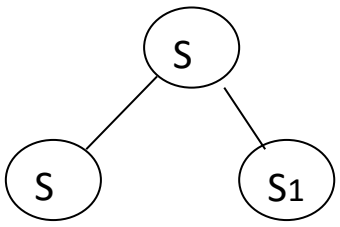
- The doctrine of representation is utilized for 2 purposes.

  i) for determining the heirs.

  ii) for determining the quantum of share of an heir / a group of heirs.

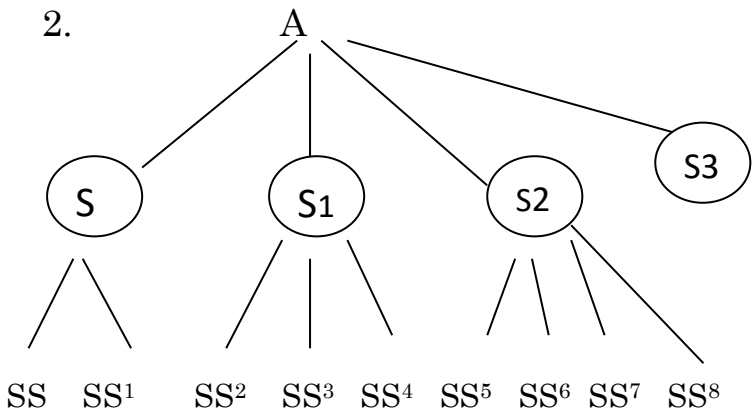
- The per stirpes rules means that where there are branches, the division of property taken place according to stock is at the places where branches bifurcate for

Ex. 1.



S & SS get 1/2

2.



By virtue of doctrine of representation all the grandsons will succeed along with sons S3

By virtue of per strips rule the share will be decided at stock that each S1, S2, S3 and S4 get 1/4 and further divided.

Under Hanafi law, only son will take and not grandson.

HANAFI LAW OF INHERITANCE :

Who are heirs and what is their share ?

1) Heirs / Sharers : i) spouses ii) son / son's son how low so ever

iii) Father & Mother iv) others mentioned below

2) Resudiaries – in the absence of sharers and resudiaries the estate is passed to other relation called as distant kindred /uterine heirs.

Thus under Hanafi law, the heirs of a deceased muslim male/ female, fall under following classes –

i) the sharers ii) the residuaries

iii) the distant kindred iv) the state lay escheat

- Sharers are 12 in numbers as below:

A. Relations by affixing of marriage : 1) wife or 2)husband

B. Relations by blood :

a) female agnatic descendants : 3) daughter

4) son's daughter how low so ever.

b) female agnatic collaterals : 5) Full sister

6) consanguine sister

c) cognatic collaterals : 7) uterine brother

8) uterine sister.

d) female ascendants : 9) mother

10) true grandmother.

e) male ascendants : 11) father

12) true grandfather.

(Refer table A, B and C from Paras Diwan text)

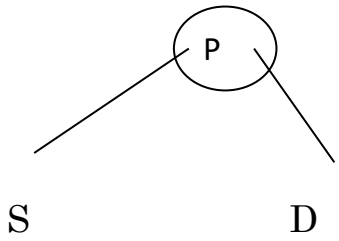
* **Distribution of assets among sharers and residuaries**.

- Class I and Class II heirs share together.
- nearer heir excludes remoter
- among resudiaries, descendants are preferred over ascendants and collaterals.

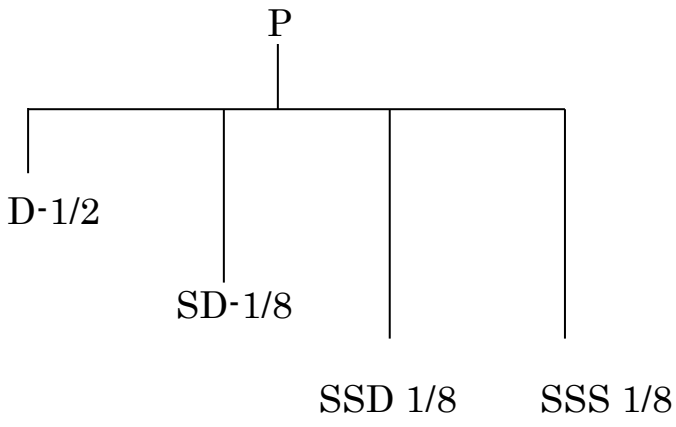
- when all the heirs claiming property are equally near they share equally, with the rider that a made heir taken double that female.

Illustrations:

1. Muslim male dies leaving behind widow W sons and daughters D.



2. P dies leaving behind daughter D, son's daughter SD and son's son's daughter SSD and Son's son's son SSS

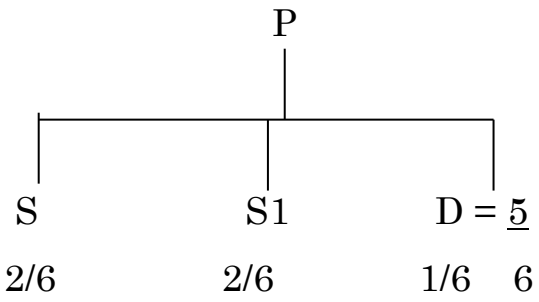


3. P dies leaving behind 2 daughters D and D1, and son's daughter SD and son's son's son SSS - then both D and D1 will get 2/3, SD and SSS together get 1/3 i.e. SSS will get 2/9 and SD will get 1/9

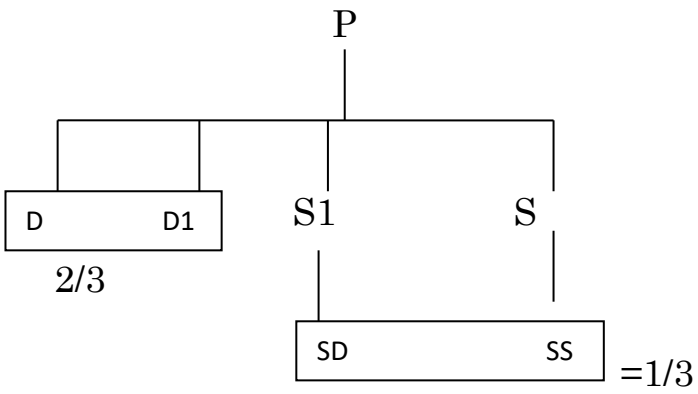
4. P dies leaving behind his father F and daughter P - then father gets 1/6 as sharer and 1/3 as residuary whereas daughter gets 1/2 as sharer

5. Muslim female died leaving behind her husband H, mother M, two uterine brothers UB and UB1 and one full brother FB then husband get 1/2 as sharer, mother get 1/6, full brother becomes residuary and uterine sisters will not getting anything.

6. P dies leaving his mother M. two son's and S1 and daughter D.



7. P dies leaving behind 2 daughters D & D1, don's son S S and son's daughter SD



8. P dies leaving behind & daughter D & D1 son's son's son SSS, son's daughter SD and son's son's daughter SSD then D and D1 together get 2/3, SSS, SD and SSD are the residuaries, son get double to daughters hence SSS get 2/12, SD get 1/12 and SSD get 1/12.

Doctrine of Aul (increase) and Radd (return).

In a system of law, which assigns fixed shares to heirs and anomalous situations are likely to arise.

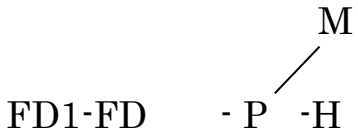
The sum of shares allotted to various heirs according to their entitlement : i) may be in excess of the unity or ii) may be less than unity.

Former situations is solved by application of doctrine of Aul and later by Radd.

* Doctrine of aul/ increase :- when the sum total of the shares elected to various heirs in accordance with their entitlement exceeds the unity, then the doctrine of aul lays down that the share of each heir, should be proportionately reduced.

This is done by reducing the fractional shares to the common denominator by increase in it hence named as aul.

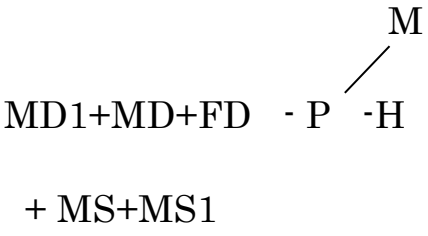
P dies leaving behind her husband, full sisters FD & FD1 and mother M.



H	= 1/2 = 2/6	
FD+FD1	= 2/3 = 4/6	7/6
M	= 1/6 = 1/6	

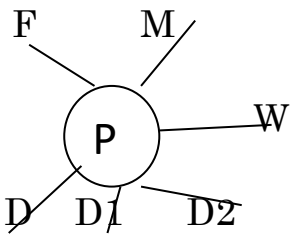
Proportionate reduction in share is achieved by increasing denominator from 6 to 8. Hence H=3/8, M=1/8 and FD & FD1=4/8

P dies leaving behind husband H, full sister FD, …….uterine sisters MD and MD1, two uterine brothers MS and MS1 and mother M.



M	= 1/6 reduced to 1/9	9/9
H	= 1/2 reduced to 3/9	
FD	= 1/6 reduced to 3/9	
MD+MS+ MS1+MD1	= 1/3 reduced to 2/9	

P dies leaving behind mother M, father F, wodow W and three daughters.



F	=1/6x 4/4	reduced to 4/24	8/48
M	=1/6x 4/4	reduced to 4/24	8/48
W	=1/8x 3/3	reduced to 3/24	6/48
D+D1+D2 = 2/3 x 8/8		reduced to 16/24	32/48

1-(1/6+1/6+1/8)=1(4+4+3/24)= 1- 11/24=13/24

Doctrine of radd / return

When there is surplus left after allotting the shares in accordance with their share and hence are no residuaries to take surplus, then doctrine of return lays down that the surplus is to be distributed among the sharers in proportion to their respective shares.

But husband and wife are not entitled to return so long as there is a sharer /distant kindred alive – if there are no distant kindred then surplus return to husband and wife.

P dies leaving behind his mother M and his daughter D.

M= 1/6 increased to 1/4

D= ½=3/6 increased to ¾

[1-(1/6+1/2) = 1-(1+3/6)=1-5/6 =2/6 remained

Formula reduce the common denomination P dies leaving behind mother M and husband H.

M = 1/3 increased to ½
H= 1/2 ⎫ 1-(1/3+1/2) 1-5/6 =1/6

M dies leaving behind wife only get 1/4th share and 3/4 as return.

Distant kindred (DK)

In the absence of sharers and resudiaries, estate devolves on the DK only once, DK inherits along sharer – when the only surviving sharer is a husband / wife and there is no residuary then H/W takes his/her share and rest goes to DK.

i) female agnates and ii) cognates (male & female) are included in DK.

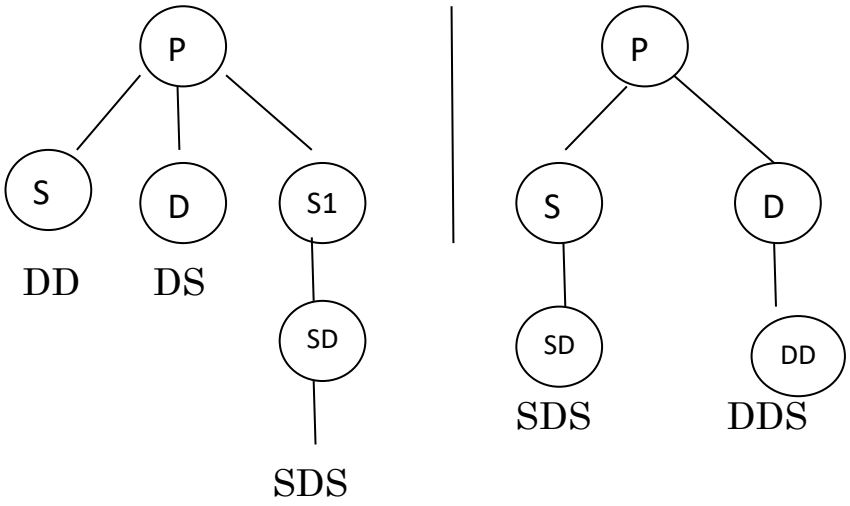
For the distribution of assets, DK's are classified into

i) descendants	ii) ascendants	iii) collaterals
a. daughter's children b. son's daughter	a. false grandfather b. false grandmother	a. full brother's daughter b. cousin brother's daughter c. uterine brother's daughter d. children of sister e. descendants of grandparents.

Rules of distribution :

i) descendants are preferred over ascendants
Ascendants over the collaterals.

ii) 1) When all claimants are descendants', then one who has fewerdegree of descent be preferred.
2) If all of them have equal degree of descent, then the children of sharers and residuaries are preferred over children of DK.
A) DD and DS preferred.



iii) The order of preference among the descendants is as under :- (i) daughter's children (ii) son's daughter's children (iii) daughter's grandchildren (iv) son's son's daughter's children (v) daughter's great grandchildren

iv) If claimants have the same degree of descent and the sexes of intermediate ancestors do not differ, all the claimants take per capita, males taking double potion

Ex. If P dies leaving behind daughter's daughter DD and daughter's son DS, DD will take 1/3 and DS will take 2/3.

v) If the intermediate ancestors differ in their sexes, then to stop at that stage of descent where sexes differ and assign the share at this stage assigning double portion to male and one to female ex. P dies leaving behind his daughter's son's daughter DSD and daughter's daughter's son DDS. In the first line of descent, sexes are same hence 2/3 to DS and 1/3 to DD i.e. DDS will get 1/3 and DSD will get 2/3

<u>Ascendants</u> :- on failure of descendant distant kindred, the property will go to ascendant DKS.

a) Mother's father is nearest and get entire estate.

b) on his failure, estate will devolve on false grandfather/ grandmother.

c) on their failure, estate will devolve on third degree ascendants.

Collaterals : i) a claimant near in degree excludes remoter and ii) among claimants of equal proximity, children of resudiaries are preferred to DK.

State as heir by escheat :- subject to any trust, charge or liability effecting it, State can become heir to the property of deceased.

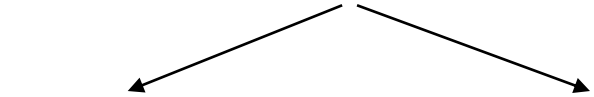
THE SHIA LAW OF INHERITANCE

The right to succession to the property on two principles :-

i) Nasab/ Blood relationship and

ii) Sadab / Special cause.

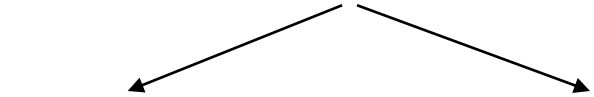
i) Nasab s



Dhufard (Karanichairs)

Dhu Qurabat (blood relations)

ii) Sadab



Zawjiyyat (Statutes of spouse)

Wala (Special legal relationship)

Qualifications of heirs

i) Heirs by marriage : Husband and wife

ii) Heirs by consanguinity

a) i. Parents

ii. children and other lineal descendants how low so ever

b) i. Grandparents

ii. brothers, sisters and their descendants how low so ever

c) i. paternal uncles, aunts of the deceased of parents and grandparents how low so ever and their descendants how low so ever

iii) state by escheat

Distribution of assets :-

Husband and wife always inherits

Priority given to

(A) i) parents and

ii) children and other lineal descendants how low so ever nearer excludes remoter.

(B) i) Grand parents how high so ever (true/false) nearer exclude remoter

ii) Brothers and sisters (full blood preferred over consanguine) – nearer exclude remoter.

(C) i) Paternal uncles and aunts of deceased & his /her parents and grandparents and their descendants

ii) maternal uncle and aunts, his /her parents and grandparents how high so ever

Distribution of heirs among class I heirs:-

i) Husband and wife ii) Parents iii) Children and lineal descendants.

H- 1/4 or 1/2 parents father 1/6 as share + resi

W – 1/8 or ¼ parents mother 1/6 or 1/3.

Daughter: if no son 1/2 two/more 2/3, son- always residenary

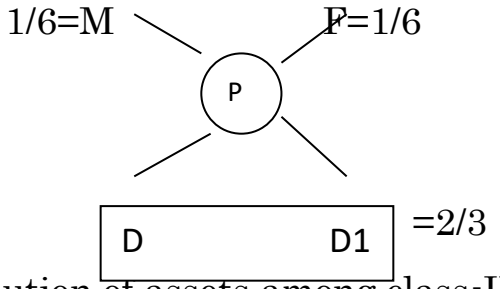
Grandchildren : on failure of children, grandchildren step in their shoes and take share equal to their parents.

Distribution of assets among remoter lineal descendants

P dies leaving behind husband H, father F, mother M.

Share 1/3 = M, F= 1/6 as residuary, H= 1/2 share

P dies leaving behind 2 daughters D & D1, father F and mother M.



Distribution of assets among class-II heirs

i) When only grand parents how high so ever are claimants

a) Where there exists all 4 grandparents, the paternal grand parents take 2/3 and maternal grand parents take 1/3. The paternal grand parents divide 2/3 between themselves on the basis of double portion to make but maternal grand parents divide it equally.

b) If there is only one grand parents on the paternal side, he/she will take 2/3 or 1/3.

c) where there are no grandparents but higher grand parents then property will be divided according to above rules a and b.

ii) When claimants may only brothers and sisters i.e. no grand parents then-

a) brothers and sisters of full blood inherit along with consanguine brothers and sisters

ex. One uterine brother/ sister take 1/6 while 2/ more takes 1/3.

b) In the absence of full brothers, full sisters takes as sharer i.e. ½ or 2/3 if more.

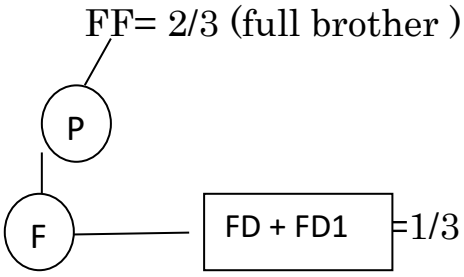
c) In the absence of consanguine brother, consanguine sister takes as sharer.

Ex. P dies leaving behind her husband H, full sister FD, H will take 1/2 and FD 1/2

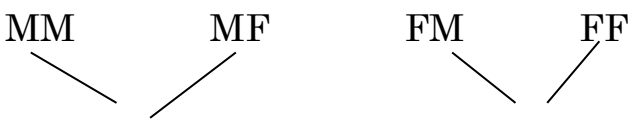
iii) When there are grandparents (remoter grand parents) with brothers and sisters / their descendants, after taking out sharer of husband & wife.-

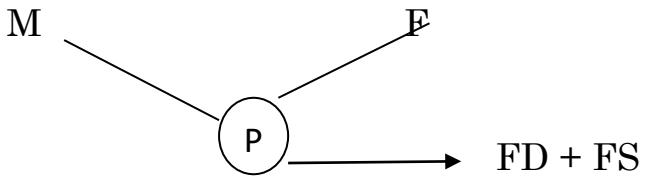
a) a maternal grandfather counts for one uterine brother and a maternal grandmother as one uterine sister.
b) A paternal GF counts for one full/consanguine brother and a paternal gm counts for one full consanguine sister.
c) If there are no grand parents then remoter grand parents step into their shoes.
d) If there are no brothers and sisters as their descendants step into their shoes.

P dies leaving behind a paternal GF FF and 2 full sisters FD and FD1, FF= 2/3 (full brother)



P dies leaving behind maternal grandmother MM, maternal GF, MF, paternal GF, FF, paternal GM FM full brother FS and full sister FD.





FS (full brothers)
FF (full brothers) ⎫ 2 full brothers = 8/18

FD (full sister)
FM (full sister) ⎫ 2 full sisters = 4/18

MM (one uterine sister)
MF (one uterine brother) ⎫ = 6/18

FS= 4/18, FF= 4/18

FD=2/18, FM=2/18

MM=3/18, MF=3/18

Distribution of assets among Class –III heirs –

In the absence of heirs of class-I and II after taking out share of husband/wife, property develop on Class-III, they are divided into following categories accordance with the priority (heirs in earlier category will exclude heirs in later categories).

A) Paternal and maternal uncles and aunts of deceased.

B) descendants of (a) how low so ever , the nearer degree exclude remoter.

C) Paternal and maternal uncles and aunts of the parents.

D) The descendants of (c) how low so ever nearer in degree exclude remoter.

E) Paternal and maternal uncles and aunts of grandparents.

F) The descendants of (e) how low so ever and

G) Remoter uncles and aunts and their descendants like order.

Rules of distribution :

i) If there is husband and wife, share be given.

ii) Where there co-exist paternal uncles and aunts as well as maternal uncles and aunts, then paternal side is to be organized 2/3 and maternal side 1/3.

iii) Among full and uterine, uterine get 1/3 and full get as residencies.

Ex. P dies leaving behind full paternal uncle, FPU one full paternal aunt FPA, four uterine paternal uncles UPU, UPU^1, UPU^2, UPU^3, 2 uterine paternal aunts UTA and UPA are uterine maternal uncle UMU^4, one uterine maternal aunt UMA.

Thus there are 8, together take 2/3 maternal UMU^4, and UMN = 1/3

* Distribution of assets amongst the descendants of uncles and aunts :- in the absence of uncles and aunt, property develops on their descendants.

* Doctrine Aul and Radd applied in similar manner to Sunni law of inheritance.

WASSIYAT / WILL

A Muslim may dispose of his entire property by gift *intir - vivos,* but can make will of only one- third of his property.

- Will of a Muslim is governed by Muslim Law.

Capacity to make will – sound mind and major as per Indian Majority Act.

- A minor's will can be ratify on attaining the age of majority, but a will of unsound minded can't be ratified on attaining sanity.
- Muslim authorities held that will made by same person become invalid if subsequently becomes insane.
- Under Shia Law a will made by a person to taken poison /wounded himself to commit suicide is invalid, but if a person writes a will and then will is valid.
- A will made by a person under coercion, undue influence/ fraud is invalid. Will by Pardanaseen lady be carefully scrutinized by a court.

Formalities of a Will : It may be oral/ written

- May not be signed by testator / witnesses but intention of the testator be clear. Ex. A letter written by a Muslim shortly before his death containing directions for the disposition of his property was accepted to constitute a valid will.
- No form of declaration for oral will but is tough to establish.
- Under Muslim law, a will may be made by gestures provided if his meaning be understood.

Subject matter of a Will :

- Property may be corporeal / incorporeal, movable/ immovable capable of being transferred.
- Existence of subject matter is necessary at the time of death of testator and not at the time of writing will.

"Bequeathable one- third" means one third of the estate of a testator as it is left after the payment of his funeral expenses, debts and other charges.

i) Except Ishan Ashari all schools held that bequest of more than bequeathable 1/3 is invalid unless consented to by heirs after the death of testator.

ii) Ishana Ashari hold that consent can be given during life time of testator.

iii) Under a valid custom, a Muslim be allowed to dispose of his entire property by will.

iv) If testator no heirs, he may dispose of his entire property by Will and state can't interfere.

v) Consent of heirs validate will for more than one-third as said rule is made for the benefit of heirs and if they want to forgo the benefit, they are free to do so.

Ex. Property bequeaths his entire property in favour of X a stranger will a attested by P's two sons A & B who are the only heirs. After P's death, X enters into possession of property and recovers rents with full knowledge of A & B. these facts are sufficient to indicate the implied consent on the part of ! & B consent once given can't be rescinded.

vi) Where a testator dies leaving behind only wife/ husband as sole heir and no blood relations, then if testator is a female, she can bequest 2/3 if testator is a male, he can bequest 5/6 remaining goes to state by escheat

vii) If a Muslim married/ registered under Special Marriage Act 1954, he is governed by Indian Succession Act 1925 and therefore he can bequeath his entire property by a will.

-- Bequest in future and contingent bequeaths- void

-- Bequest for pious purpose can be made hence a Wakf can be created by way of will called as "Testamentary Wakf"

Statement of legacies :- When a testator bequeaths in violation of 1/3 rule and heirs refuses to give consent, the bequeaths under Hanafi law abate ratably.

Ex. A dies leaving behind a will under which he directs Rs.100/- to be paid to his relatives, Rs.100/- to Fakirs and Rs.40/- for expiration of prayers. He leaves behind estate worth Rs.216. The total amount of legacies come of Rs.240, while bequeathable 1/3 is only Rs.72. Hence, legacies must abate in proportion of Rs.72 to 249 i.e. 30, 30 and 12.

Under Shia law, bequest of prior date takes priority over those of later date unless the later bequest was intended to revoke earlier.

Ex. (1) Shia bequeaths 1/3 of his estate to A, 1/4 to B and 1/2 to C heirs do not consent. Result to a will take 1/3, B and C will take nothing.

(2) If a gives 1/12 to P, 1/4 to Q and 1/6 to R, P will take 1/12 and Q take 1/4 as it completes 1/3, R will not get anything, but if same 1/3 successively bequeathed to A, B and C, last bequest is in revocation of forever two. Then C will take 1/3 and A and B take nothing.

-

Who can be a Legatee :

- A bequest to a person not in existence at the time of testator's death is void but bequest to a child in womb is valid provide it is born within 6 months of death of testator.
- A legacy made to a person who doesn't survive the testator, lapses and forms part of estate of the deceased.
- A legacy can be made to man/woman, adult/minor, Muslim/non-Muslim/ Charitable or religious purpose not opposed to Islam.

Bequests for heirs : No bequest can be made unless the other heirs consent to it after the death of testator under Hanafi Law or at any time under Shia Law.

- It is not necessary that all heirs content
- Ex. P makes will of 1/3 of his estate to grandfather he dies surviving father, grandfather and son, father and son become sharer and grandfather take 1/3 without consent of son and father.
- Ex. P bequeaths 1/3 to grandfather after his death survived by grandfather and son, both are sharers, hence son has to consent for such bequest.
- Ex. P bequeaths entire property to 2 of his 5 sons only, he died survived by five sons, bequeath is invalid.
- Consent of heirs may be express/ implied but silence can't amount to consent.
- Legacy of murderer – murderer is excluded from taking legacy.

Construction of will is based on –

A) i) rules of construction as per Muslim law.
   ii) language used by testator
   iii) sorrow ending circumstances.

B) General Rule :

i) will effected from the death of testator

ii) court try to give effect to the intention of restator.

iii) if a testator used such ambiguous language that its construction is not possible by giving usual meaning to the words used, then it is left to the heirs to give it whatever internship they want

ex, i) "" I leave a garment/ book to Q - may give new/old cloth or books of any subject.

ii) in case testator bequeaths anything which is not in possession of testator at the time of his death, legacy fails unless the intention is to bequeath the value of the article indicated.

Revocation of the will - may revoke Will/ any part of it at any time either expressly/ by implication. Testator can make any additions to his will. Revocation is possible in following two ways --

i) Express revocation – by earring it off/ burning it. If testator makes a bequeath of some property to a person and by subsequent will he bequeaths same to another, first bequest is revoked. But bequest of same property to one person in earlier portion of the will and to another in later portion, doesn't revoke the earlier but both legatees share equally.

ii) Implied revocation – an act inconsistent with bequest will go to revoke will -

--- Bequest of plot stands revoked on construction of building over it.

SHUFAA / PRE - EMPTION

- Muslims introduced concept of Shufaa in India
- Sources of Shufaa : i) In major parts as personal law of Indians
  ii) In Punjab under statute.
  iii) In Bihar and Gujarat as a customs under Hindus.
  iv) by contract.

- Concept of Shufaa

– Right of Shufaa is a right which the owner of an immovable property possess to acquire by purchase another immovable property which has been sold to another person.

- Necessity of right to shufaa – 1) the human desire to avoid inconvenience and disturbance which is likely to be caused by the introduction of a stranger into the land.

2) under Muslim law, death of a person results in the division of this property in fractions, if an heir is allowed to dispose of his share without offering to other heirs, then it is introduce strangers in a part of estate.

- hence law of shufaa imposes limitation / disability upon the ownership of property to the extent that it restricts the owner's unfettered right of transfer of property and compels him to sell it to his co-heirs/ neighbor.

Classification of pre-emptors (who can pre-empt) :

i) Shafi Sharik/ co-owner in property – right of a co-sharer in property – by full owner and not lease holder.

ii) The shafii Sharik / participation in appendages for ex. In right of way/right to discharge water.

iii) The shafii- i -jan/ owner of an adjoining property – right based on neighborhood.

When does the right of pre-emption arises :-

i) during Sale and

ii) during Exhange which is complete, bonafide and valid

- Allahabad H.C. held- transfer of a property by a husband to his wife in lieu of dower is sale and therefore preemptionaries
- Right to Shufaa not apply to gift, mortgage, inheritance etc.
- the basis on which right of pre-emption is claimed, must continue to subsist till the passing of the decree, Ex. If person claims presumption as owner of contiguous property by filing a suit but sale property after suit then suit be dismissed.

Right of presumption when parties belong to different sects / schools and when some of the parties are non-muslims-

- presumption involves 3 parties- pre-emptor – vendor and vendee
- when all parties are of same sect/ school problem will not arise.
- right of possession applies only if vendor recognizes the vendor's religion.
- when law of possession is lex-loci/ arises by custom or contract, it is immaterial that same of the parties are non-Muslims.

Right of Shaffi to claim possession : if one Shaffi sells his property to another Shaffi then remaining Shaffi can't interfere.

Formalities necessary for the exercise of right of possession – Following formalities are essential to claim possession.

i) First demand / talab- i – mowasibat – preemptor assets his claim immediately on hearing of sale - no specific form

ii) Second demand/ talab-i- ishhad- as soon as practicable affirm the intention of asserting his right by making second demand in presence of i) two witnesses, ii) vendor / buyer.

iii) Third demand/ talab- i – tamlik- after making two demands, when parties files a suit to enforce his right, then is called third demand - It will arise only when first 2 demands not fulfilled.

When right to possession lost – i) by acquiescence / waiver

ii) by death of preemptor iii) by misjoinder iv) by release.

Effect of pre-emption: once suit is decreed parties stands in the shoes of vendee and takes the property.

I. WAKFS

A Wakf under Muslim Law is essentially a religious and pious obligation, though sometimes also made for charities and for the benefit of oneself.

- Wakf originated during prophet is tenure-
- Basis of tradition of wakf – During the lifetime of Prophet, one Omer Ibn al-khatiab made wakf of lands in Khyaber on the guidance of prophet.
- Definition of Wakf -

  a. Abu Haufa – the tying up of the substance of a property in the ownership of the wakif and the devotion of usufruct, amounting to aryia/ commodate loan for some charitable purpose. i.e. ownership in the Wakf property continued to be vested in the owner and its usufruct was spent for charitable/ pious purpose.
- By definition there are 3 essentials –
  - i) ownership of founder / wakif is extinguished
  - ii) the property is vested in the ownership of God perpetually and irrevocably.
  - iii) the usufruct of the property is used for the benefit of mankind.

b. Under Shia Law Wakf is defined as a contract, the fruit/ effect of which is to tie up the original of a thing and to leave its usufruct free is known as Wakf.

c. Sec. 2 of the Wakf Act 1913 defines 'Wakf means the permanent dedication by a person professing the Mussalman faith of any property for any purposes recognized by Mussalman law as religious, pious/ charitable.

- Characteristic features of a Wakf

i) Property vests in God - Under both Shia & Sunni law, property under wakf vests in god, The Supreme court also held that in a wakf for family also property vests in God and not in Mutawalli

ii) Wakf must be permanent – i.e. perpetual and

iii) Wakf must be irrevocable- In Abdul Sattar V Noorbai 1933 Bom 8 : Wakfnama contained a condition that at anytime the Wakf would be revoked by a deed/ will / codicil by anyone of two wakfs, but said clause was held as void.

However; a wakif has right at the time of dedication to reserve to himself the power of altering the beneficiaries either by adding to their no/ by excluding some of them.

A testamentary wakf may be revoked by the settler at any time before his death. Therefore a testamentary wakf is nothing more than a bequest and therefore it can be revoked like any other bequest. It comes into existence after death of wakif.

iv) Wakf properties are inalienable :

but sometimes, it is permissible that a Mutawalli (Manager of Wakf) may alienate, may sell/ lease with prior permission of court. When a Wakfnama allows a Mutawalli to sell wakf properties in certain circumstances, then the Mutawalli has power to alienate wakf properties during these circumstances.

Family wakfs/ wakfs for Alal-Aulad- This typr of Wakf is based on *ijma* and is valid from the Prophet's time but in 1894 the Privy Council held it as invalid, in Abu Fata case.

- A family wakf in substance is an institution under which a Muslim can provide for himself his family, descendants, children and kindred for an indefinite period to which there can't be an end.
- The Privy Council held such Wakf are invalid since they go against the public policy of not allowing a person to tie up the corpus of this property pertaining and resume the income of it for his children indefinitely.
- But this decision created dissatisfaction in Muslim community and obtained Mussalman Wakf validating Act, 1913, which validate family wakf.
- Act of 1913 requires following conditions to create family wakf -
  - i) It may be created wholly /partially for family, children and descendants of settler.
  - ii) Ultimate benefit must go expressly / impliedly to poor/ religious, pious / charitable purpose

Wakf for family - Act of 1913 doesn't define the term 'family'

- it has been given a fairly wide interpretation
- a family include daughter –in-law and adopted son of consanguine brother or son of paternal uncle or son of consanguine sister also.
- these persons be living under one roof and brought up as a family.

- Wakf to a stranger is void.
- Wakf for wages and provisions of servants and dependents is valid.

Ultimate benefit of Wakf property is for charity that may be express/ implied benefit for charity.

Muslim religious institutions for which Wakf can be created are as below:

1) Mosques: is a place where Muslims offer prayer in congregation / individually.

- a valid dedication for public mosque require-

  i) the founder must declare his intention to dedicate property for the purpose of a mosque- no specific form of deduction.

  ii) the founder must divest himself completely of the ownership of the prop- divestion can be inferred from the fact that he had delivered possession to mutawalli/ imam of mosque – even if there is no actual delivery still permission to offer prayer within azan will create irrevocable wakf.

  iii) the founder must make a separate entrance to the mosque which is to be used by the public to enter it.

  Public and private mosque and right to worship : - there is no Shia/ Sunni Mosque

- every mosque is dedicated to God and is open to all sects and schools.
- the right to pray in mosque is legal right and can be enforced by court of law.

  -- In Md. Wasi Vs. Bachchan Sahib 1955 All 68 – Certain Muslim belonging to Hanfi sect sought to prevent Shia from offering their prayers in accordance with their rites and ceremonies in a mosque built by Hanafi and where the service was performed in accordance with the rites and ceremonies of Hanafi- The Court dismissed suit holding a public mosque is dedicated is open for all the sects.

- Muslim law allows creation of wakf for a private mosque- which has no entrance opening outside it.

  Is mosque a juristic person ? - There is difference of opinion regarding this as --

  in 1926- Lohere High Court. said Yes, but in 1940 - Privy council said No as it was not an artificial person in the eyes of law. Again in 1976- Raj High Court also said No.

(2) Graveyard / quabristan, Takia & dargah – It may be also public and private

- under Muslim Law dedication of property may be made for graveyard on completion of dedication Wakf II come into existence.
- private graveyard – when its use is confirmed to burial of corpses of founder, his children, descendants and relatives.
- a wakf for graveyard doesn't come into existence merely the owner of the land had given license for the burial of the dead as a license can be revoked at any time.
- can the graves be shifted ? Abdul Jalil Vs. St. of UP 1984 SC 882- shifting was not an un-Islamic / contrary to the Koran. Grave of Mumtaj Mahal was shifted from Burhanpur to Agra and Jahangir from Kashmir to Lahore. Certain graves remained constant source of riots between Shias and Sunni. The court held Fundamental Rights. guaranteed under Art. 25 and 26 is not absolute and thus the direction given by the court to shift the controversial graves is in the larger interest of society for the purpose of maintaining public order.

a) Dargah: A Tomb of a Muslim saint and used for religious prayer and Mujawar is its officer.

b) Takia –i.e a resting place or burial place/ platform in graveyard where prayers offered.

J. Banapati Iyer observed that the place /abode of fakir is called takia before he attains sufficient public importance and when fakir attains public importance and large number of disciples gather around him, then the place is called Khanqah it becomes dargah after his death and his burial therein.

c) Sajjadanashin: religious head of Khanqah is called as Sajjadanasin i.e. one who sits at the head of a prayer carpet.

d) Imambara : is a Shia religious institution and is a private apartment set apart for the performance of certain ceremonies at Moharam and other occasions, is a public Wakf.

Capacity to make a Wakf – A muslim who is major and sound minded can make a Wakf of is property. Wakf created by guardian on behalf of minor is not valid.

Subject matter of wakf- earlier only wakf of immovable property was made but now movable like animal, books, swords etc., also the subject matter of will.

- subject matter be a tangible property and capable of being used without being consumed.
- Wakf of Musha i.e. property which is capable of division is not valid.

Object of wakf is same for rich and poor or both and is to acquire merit in the eyes of God.
- It must be religious, pious/ charitable.

Formalities of a Wakf – Wakf can be made inter-vioves / by will.

- if Wakf is created by will then valid upon bequeathable 1/3rdonly.
- no specific form of creation is mentioned.
- Wakif can declare himself as first mutawalli
- Registration – for property worth more than Rs.100/- , registration is compulsory U/Sec. 17(1) of Registration Act.

II. The Mutawalli –

He is a manager of Wakf property.

1) Appointment by : i) Founder i.e Wakif
ii) Mutawalli's power
iii) Court's power
iv) Appointment by congregations

2) Who may be Mutawalli – a Major and sound minded person can be a Mutawalli.

- minor can be a Mutawalli in case of hereditary Mutawalli
- female can also hold part of Mutawalli.

3) Nature of Mutawalli– he is a manager and not trustee as property vests in God.

4) Remuneration of Mutawalli, Officers and servants of Wakf – is made through wakfnama,

Powers of mutawalli -

i. He has the power of manage and administration of wakf properties.
- Power to utilize property for the purpose of wakf.
- He can sue for possession of property.-
Md. Usuf V. Md. Sadiq 1933 Lah 501 – a Wakf deed provided for the sale of wakf property and to construct and to maintain a rest-house from the sale proceeds at Mecca. Court held that Mutawalli is having right to do so.

ii) Alienation with the permission of the court for ---For sale, mortgage / exchange.
An alienation without permission is voidable.

ii) Mutawalli's power of granting lease- not for more than 3 years if it is agricultural land and for more than 1 year if it is non agricultural land.

iii) Power of taking debt – no power of incurring debt

iv) Power to file suit- after Wakf Act 1945, the power to file suit vests in Wakf board under whose supervision Mutawalli have to work.

Removal of Mutawalli :

- Founder has no power to remove Mutawalli unless such power is reserved in Wakf deed.

-Court may remove on the ground of misfeasance, brach of trust/ unfitness/ any other reason.

-A Mutawalli even if protect by Wakfnama can also be removed by court to consider interest of Wakf.

-Thus a Mutawalli who is insolvent/ neglects to perform his duties, claims adversely to wakf property can be removed by court.

-Procedure for removing Mutawalli is by way of a suit in District Court.

III. STATUTORY CONTROL OVER WAKF

(The Wakf Act, 1955)

-Most Wakfs are nothing but stinking, breeding grounds of fanaticism, backwardness and orthodoxy , hence for proper administaration of Wakfs Parliament passed Wakf Act, 1955 replacing 1923 Act and is further amended in 1964 for better administration of Wakfs of connected matters.

A) Survey of Wakfs- Each State Govt. is required to appoint a survey commission of Wakf, Addl. And Assistant survey officer who will give report to State Govt. as to –

i) number of Shia and Sunni Wakf

ii) nature and object of Wakf

iii) its gross income.

iv) land revenues, taxes etc., to be paid by wakf.

v) expenses incurred in realization of income and other particulars.

- cost of survey be borne by the Mutawallies of those Wakf whose annual income exceeds Rs.500/-.

B) Central Wakf Council – State Govt. establish to advise Central Govt. on matters concerning working of Wakf Boards and due administration of Wakf.

- Composition – Union Minister incharge of Wakf – Chairman
- Members - 3 - representing Muslim Organization in India.
  - 4 member of national eminence in administration/ finance.
  - 3 member of parliament (1 from Rajyasabha + 2 from Lokasabha)
  - Chairpersons of 3 boards.
  - 2 persons from Judge of H.C. /S.C.
  - One advocate of national eminence.
  - One represent member of Wakf having gross annual income of Rs.5 Lakh and above.
  - 3 eminent scholars' of Muslim Law.
- Finance of Council – each Wakf board has to pay from Wakf fund 1% of aggregate income.

C) Board of Wakfs – Each State have one Board but if income of Shia Wakf property is more than 15% of total Wakf property then a separate Wakf Board for Shias.

- Wakf Board constituted as a separate body having perpetual succession and common seal and held and transfer property. Wakf Board can sue and be sued in its name.
- Composition – Chairperson.
    - One and not more than 2 members as State Govt. to be elected from each of electoral colleges consisting of --
        i) Muslim member of Parliament from State.
        ii) Muslim Member of state legislature.
        iii) Muslim member of Bar Council of State.
        iv) Mutawalli of Wakf income less than 1 lakh.
    - One and not more than 2 members nominated by State Govt. representing eminent Muslim organization.
    - One and not more than 2 members to be nominated by State Govt. each from reorganized scholar in Islamic theology.
    - Officer of state Govt. not below rank of Dep. Sec…

-Members themselves have to elect chairman

-members work for 5 years.

-Disqualification - non Muslim or below 21 years age or unsound mind, insolvent, convicted for the offence of moral turpitude.

-State Govt. shall appoint Chief Ex. Officer with special functions of investigation, inspection etc.

INDIAN SUCCESSION ACT,1925

Succession means : *"The law and procedures under which beneficiaries become entitled to property under a testator's will or on intestacy".*

The whole Act is lengthy hence following topics of syllabus are discussed :

- **Domicile: Part II**
- **Consanguinity : Part IV**
- **Christian Succession: Part V**
- **Parsis Succession: Part V**
- **Testamentary Succession: Wills & Codicils : Part VI**
- **Protection of the property of deceased(by Curator): Part VII**
- **Probate & Letters of Administration: Part IX**
- **Succession Certificate : Part X**

…TO WHOM THE INDIAN SUCCESSION ACT 1925 APPLIES

(1) Europeans by birth or descent domiciled in India.

(2) Persons of mixed European and Native blood and East Indians.

(3) Indian Christians: For the purposes of the Indian Succession Act, a Christian is a person who professes any form of the Christian religion.18 Section 33 A of the Act is not made applicable to them.

(4) Jews: After the Indian Succession Act 1865 was passed it was held that the Jews were governed by that Act and the personal laws of the Jews were not recognized as regards testamentary and intestate jurisdiction.

(5) Parsis: All Sections of Part VI of the Act, relating to testamentary succession, apply to Parsis

(6) Hindus: The word “Hindu” is used in the Act in a theological sense as distinguished from a national or racial sense. The word Hindu includes Arya Samajis and Brahmos.

(7) Jains: Although Jains are governed by Hindu Law ordinarily, yet they posses the privilege of being governed by their own peculiarities and customs. Nonetheless, the term Hindu includes Jains too.

(8) Sikhs: the terms Hindu, it was held that, includes Sikhs too.25 But Sikh converts to Christianity are governed by this Act and not by laws and customs of the community to which they belong.

(9) Buddhists: It was held that Burmese known as Kalias who married Burmese women were governed by this Act.

DOMICILE : PART II

- **4. Application of Part.-This Part shall not apply if the deceased** was a Hindu, Muhammadan, Buddhist, Sikh or Jaina.
- Succession to a deceased person's immovable property in British India was regulated by the law of British India wherever he may have had his domicile at the time of his death; and succession to his movable property is regulated by the law of the country in which he had his domicile at the time of his death.
- "Immovable property" includes land, incorporeal tenements, and things attached to the earth, or permanently fastened to anything which is attached to the earth. "Movable property" means property of every description except immovable property.

- S.5 - (1) Succession to the immoveable property in [India] of a person deceased shall be regulated by the law of [India], wherever such person may have had his domicile at the time of his death.
- (2) Succession to the moveable property of a person deceased is regulated by the law of the country in which such person had his domicile at the time of his death.
- Illustrations
- (i) A, having his domicile in India dies in France, leaving moveable property in France, moveable property in England, and property, both moveable and immoveable, in India]. The succession to the whole is regulated by the law of [India
- (ii) A, an Englishman, having his domicile in France, dies in India, and leaves property, both moveable and immoveable, in India. The succession to the moveable property is regulated by the rules which govern, in France, the succession to the moveable property of an Englishman dying domiciled in France, and the succession to the immoveable property is regulated by the law of India.

- **6. One domicile only affects succession to moveable-A person can have only one** domicile for the purpose of the succession to his moveable property.
- **7. Domicile of origin of person of legitimate birth.-The domicile of origin of every** person of legitimate birth is in the country in which at the time of his birth his father was domiciled; or, if he is a posthumous child, in the country in which his father was domiciled at the time of the father's death.
- Illustration
- At the time of the birth of A, his father was domiciled in England. A's domicile of origin is in England, whatever may be the country in which he was born.
- **8. Domicile of origin of illegitimate child.-The domicile of origin of an illegitimate** child is in the country in which, at the time of his birth, his mother was domiciled.
- **9. Continuance of domicile of origin.-The domicile of origin prevails until a new** domicile has been acquired.

10. Acquisition of new domicile.- A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin.

Explanation.--A man is not to be deemed to have taken up his fixed habitation in India merely by reason of his residing there in the civil, military, naval or air force service of Government, or in the exercise of any profession or calling.

Illustrations

(i)A, whose domicile of origin is in England, proceeds to India, where he settles as a barrister or a merchant, intending to reside there during the remainder of his life. His domicile is now in India.

(ii) A, whose domicile is in England, goes to Austria, and enters the Austrian service, intending to remain in that service. A has acquired a domicile in Austria

- **11. Special mode of acquiring domicile in India.-Any person may** acquire a domicile in India by making and depositing in some office in India, appointed in this behalf by the State Government, a declaration in writing under his hand of his desire to acquire such domicile; provided that he has been resident in India for one year immediately preceding the time of his making such declaration.
- **12. Domicile not acquired by residence as representative of foreign Government, or as part of his family. -A person who is appointed** by the Government of one country to be its ambassador, consul or other representative in another country does not acquire a domicile in the latter country by reason only of residing there in pursuance of his appointment; nor does any other person acquire such domicile by reason only of residing with such first-mentioned person as part of his family, or as a servant.
- **13. Continuance of new domicile.-A new domicile continues until** the former domicile has been resumed or another has been acquired.
- **14. Minor's domicile. -The domicile of a minor follows the** domicile of the parent from whom he derived his domicile of origin.
- Exception.--The domicile of a minor does not change with that of his parent, if the minor is married, or holds any office or employment in the service of Government, or has set up, with the consent of the parent, in any distinct business.

- **15. Domicile acquired by woman on marriage.-By marriage a woman** acquires the domicile of her husband, if she had not the same domicile before.
- **16. Wife's domicile during marriage.-A wife's domicile during her** marriage follows the domicile of her husband.
- Exception.--The wife's domicile no longer follows that of her husband if they are separated by the sentence of a competent Court, or if the husband is undergoing a sentence of transportation.
- **17. Minor's acquisition of new domicile.-Save as hereinbefore** otherwise provided in this Part, person cannot, during minority, acquire a new domicile.
- **18. Lunatic's acquisition of new domicile. -An insane person** cannot acquire a new domicile in any other way than by his domicile following the domicile of another person.
- **19. Succession to moveable property in India in absence of proof of domicile elsewhere. -If a person dies leaving moveable property in** India, in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of India.

CONSANGUINITY: PART IV

- **23. Application of Part. -Nothing in this Part shall apply to any** will made or intestacy occurring before the first day of January, 1866, or to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi.
- **24. Kindred or consanguinity.-Kindred or consanguinity is the** connection or relation of persons descended from the same stock or common ancestor.
- **25. Lineal consanguinity. -(1) Lineal consanguinity is that which** subsists between two persons, one of whom is descended in a direct line from the other, as between a man and his father, grandfather and great-grandfather, and so upwards in the direct ascending line; or between a man and his son, grandson, great-grandson and so downwards in the direct descending line
- (2) Every generation constitutes a degree, either ascending or descending.
- (3) A person's father is related to him in the first degree, and so likewise is his son; his grandfather and grandson in the second degree; his great-grandfather and great-grandson in the third degree, and so on.
- **26. Collateral consanguinity.-(1) Collateral consanguinity is** that which subsists between two persons who are descended from the same stock or ancestor, but neither of whom is descended in a direct line from the other.
- (2) For the purpose of ascertaining in what degree of kindred any collateral relative stands to a person deceased, it is necessary to reckon upwards from the person deceased to the common stock and then downwards to the collateral relative, a degree being allowed for each person, both ascending and descending.

- ***27.*** For the purpose of succession, there is no distinction—

(a) between those who are related to a person deceased through his father, and those who are related to him through his mother; or

(b) between those who are related to a person deceased by the full blood, and those who are related to him by the half blood; or

(c) between those who were actually born in the lifetime of a person deceased, and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive.

- **28. Mode of computing of degrees of kindred. -Degrees of kindred** are computed in the manner set forth in the table of kindred set out in Schedule I.

Illustrations

(i) The person whose relatives are to be reckoned, and his cousin-german, or first cousin, are, as shown in the table, related in the fourth degree; there being one degree of ascent to the father, and another to the common ancestor, the grandfather; and from him one of descent to the uncle, and another to the cousin-german, making in all four degrees.

CHRISTIAN SUCCESSION: PART V

- Christianity is the third most populous religion in India. Indian Christians, though united in the essence of their faith, are diverse in their practices with different denominations.
- Synergetic influences have led to cultural variations that have gained legal recognition either statutorily or judicially. This has led to multiplicity in application of laws whereas ambiguity most noticeable is in the laws of succession for Christians.
- It is this multiplicity and ambiguity that led to enactment of the Indian Succession Act, 1865 and finally the Indian Succession Act, 1925.
- Succession, in brief, deals with how the property of a deceased person devolves on his heirs. This property may be ancestral or self-acquired, and may devolve in two ways:
- 1. By Testamentary Succession, i.e. when the deceased has left a will bequeathing his property to specific heirs
- 2. By Intestate Succession, i.e. when the deceased has not left a will, hereby the law governing the deceased (according to his religion) steps in, and determines how his estate will devolve.

EFFECT OF CONVERSION

- At this juncture in the year ***1863 the effect of conversion from one religion to another*** on the law applicable to the convert was considered by the Privy Council in ***Abraham v. Abraham*** 1863 (9) MIA 195, ***Abraham's ancestors were Hindus who were converted into*** Christianity.
- On the death of M. Abraham his widow brought the suit for recovery of his property. This suit was resisted by his brother F. Abraham who contended that his ancestors continued to be governed by the Hindu Law in spite of conversion. He accordingly claimed that he was entitled to the entire property according to the Hindu Law of survivorship applicable to a joint Hindu family.

The Privy Council held: —

- (1) The effect of conversion of a Hindu to Christianity is to sever his connection with the Hindu family.

(2) Such a person may renounce the Hindu Law but is not bound to do so. He may elect ‘to abide by the old law, notwithstanding that he has renounced the old religion’.

(3) The course of conduct of the convert after his conversion would show by what law he had elected to be governed.

- Under the third principle it was found that M. Abraham had married a Christian woman who was born to an English father and a Portuguese mother, that he adopted English dress and manner.
- It was clear, therefore, that he had elected against the Hindu Law and so the defendant’s contention based upon the Hindu Law of survivorship was rejected.

- The principle in ***Abraham v. Abraham6 was also found favour in Sri Gajapathi Radhika v. Sri Gajapathi Nilamani*** (1870) 14 W.R. P.C. 33). ***The Privy Council reiterating Abraham*** principle held that on own volition a converted Christian can either renounce Hindu Law or impliedly continue to be governed by Hindu Law.
- In ***Sri Gajapathi Radhika v. Sri Gajapathi Nilamani, it was said by their Lordships that the case of Abraham v. Abraham shows that a family ceasing to be Hindus in religion may still*** enjoy their property under Hindu Law.
- At this juncture the Indian Succession Act, 1865 for the first time enacted to govern mainly the principles of succession for the British Christians including Indian Hindu converts and exempted Hindus and Muslims from its scope, but the utility of the Act lay in the codification of law of succession as regards other persons.
- In ***Ponnusami Nadan v. Dorasami Ayyan*** ILR (2) Mad. 209 (1880) ***it*** was held after Act 1865, the members of native Christian families, cannot adhere to Hindu Law of succession, though such converts who were governed by Hindu Law of succession cannot be deprived of their rights acquired by them under Hindu Law prior to their conversion to Christianity.
- Calcutta High Court in ***Kulada Prasad Pandey .v. Haripada Chatterjee*** ILR (40) Cal. 407 (1912) ***while holding that if one member of joint*** family converts to Christianity, it would result in complete dissolution of entire family and from that time, the members of Hindu family cannot be treated as members of Joint Hindu Family. It was also held that if all the members of family become Christians, it would not affect the right of coparcenarship as they can still adhere to old law notwithstanding conversion.

- In view of vast scatteredness, the British Parliament felt the need for consolidation of law of succession. Responding to this need that the British legislatives enacted Indian Succession Act, 1925.
- The Act consists of 11 parts, 391 sections and 7 schedules. This Act is applicable to intestate and testamentary succession.

WHO IS A CHRISTIAN?

- The Indian Christian Marriage Act, 1872 defines the term ‘Christian’ as a person professing the Christian religion, he may profess Christianity in any of its forms. Under the act the term ‘Indian Christian’ includes Christian descendants of native Indians converted to Christianity, as well as such converts.
- Ordinarily a person who is baptized is Christian but a person does not become Christian just because at the time of his birth he is baptized particularly when he is not in a position to tell the world as to what is his faith.
- Thus, when at the time of marriage, one refuses to be married as a Christian and ultimately solemnizes his marriage by Hindu Ceremonies and rites, the facts that he attended a Christian School and dresses like a Christian are immaterial. He is not a Christian.
- A child born to Christian parents is a Christian. A person who professes to be a Christian is a Christian even though he has not been baptized. The words ‘persons who profess the Christian religion’ mean not only adults who profess Christianity but also their children.

INTESTATE SUCCESSION AMONG INDIAN CHRISTIANS

- S. 30 of the Indian Succession Act, 1925 defines intestate succession thus: A person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.
- Thus any property which has not already been bequeathed or allocated as per legal process, will, upon the death of the owner, insofar as he is an Indian Christian, devolve as per the rules contained in Chapter II of the Act.
- It would be worthwhile to note at this point that intestacy is either total or partial.
- There is a total intestacy where the deceased does not effectively dispose of any beneficial interest in any of his property by will.
- There is a partial intestacy where the deceased effectively disposes of some, but not all, of the beneficial interest in his property by will.

RIGHTS OF THE WIDOW AND WIDOWER

- S. 33, S. 33-A, S. 34 of the Act govern succession to the widow. Together they lay down that if the deceased has left behind both a widow and lineal descendants, she will get **one-third share** in his estate while the remaining two-thirds will go to the latter.
- If no lineal descendants have been left but other kindred are alive, **one-half of the estate passes to the** widow and the rest to the kindred. And if no kindred are left either, the whole of the estate shall belong to his widow.
- S. 35 lays down the rights of the widower of the deceased. It says quite simply that he shall have the same rights in respect of her property as she would in the event that he predeceased her (intestate).

RIGHTS OF CHILDREN AND OTHER LINEAL DESCENDANTS

- If the widow is still alive, the lineal descendants will take **two-thirds of the estate**; if not, they will take it in whole. Per capita (equal division of shares) applies if they stand in the same degree of relationship to the deceased. This is as per Sections 36-40 of the Act.
- Importantly, case law has determined that the heirs to a Christian shall take his property as tenants-in-common and not as joint tenants. Also, the religion of the heirs will not act as estoppels with regard to succession. **Even the Hindu father of a son who had converted to Christianity was held entitled to inherit from him after his death.**
- As per S. 48, where the intestate has left neither lineal descendant, nor parent, nor sibling, his property shall be divided **equally among those of his relatives who are in the nearest degree of kin to him.**
- If there are no heirs whatsoever to the intestate, **the doctrine of escheat** can be invoked by the Government, whereupon the estate of the deceased will revert to the State.

TESTAMENTARY SUCCESSION AMONG INDIAN CHRISTIANS

- A will is the expression by a person of wishes which he intends to take effect only at his death. In order to make a valid will, a testator must have a testamentary intention i.e. he must intend the wishes to which he gives deliberate expression to take effect only at his death.
- Testamentary Succession is dealt with under Part VI of the Indian Succession Act, 1925.

EFFECT OF SECTION 26 OF THE HINDU SUCCESSION ACT

- **26. Convert's descendants disqualified.--**Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens.
- The right to inheritance is not a choice but it is by birth and in some case by marriage, it is acquired.
- Therefore, renouncing a particular religion and to get converted is a matter of choice and cannot cease relationships which are established and exist by birth.
- Therefore, a Hindu convert is entitled to his/her father's property, if father died intestate, but the children of the convert cease to claim right as descendant of grandparent.

WHO IS A PARSI?

- The Parsis came and settled down in India as a result of their persecution in their native land, Persia.
- It seems that the word ‘Parsi’ has both a religious connotation and a racial significance.
- The Indian Parsis belong to the Zoroastrian faith, and in that sense, in India, the words ‘Parsis’ and ‘Zorastrian’ are synonyms.
- Zoroastrianism is founded on the belief in one God and on the basic tenets of good thoughts, good words and good deeds.

- The Parsi community in India initially had no law of their own.
- The Parsi immigrants came to settle in India to escape religious persecution by the Arab conquerors of Persia and brought with them Zoroastrianism and at the same time they adopted the customs of the place where they had first taken shelter in India

DEVELOPMENT OF PARSI LAWS IN INDIA

- It is not clear whether Parsis brought any of the laws with them to India.
- While preserving their separate identity they had adopted the customs of residents of the area where they had first taken shelter.
- The first permanent settlement in India was at a village called Sanjan around the year 716 AD. The place was then ruled by the Hindu Chief Jadi Rana, who gave the Parsis permission to settle there and reside on. four conditions that were: (a) that the Parsis would adopt the language of the Country; (b) that they would not bear arms; (c) that their women would dress in Hindu fashion; and (d) that they would perform their marriage ceremonies after sunset in accordance with Hindu customs.
- Their customary laws mainly influenced by the Hindu and Muslim .communities, underwent various modifications following a series of enactments like Parsi. Chattels Real Act 1837; The Parsi Marriage and Divorce Act 1865; The Parsi Intestate Succession Act 1865; The Indian Succession Act 1925 passed for Parsis by the British Indian Legislature.
- The present succession law, though considerably modified and vitally different from the initial customary laws, still indicate the deep influence of Hindu and Muslim laws on the Parsi system of inheritance.

- The Indian Succession Act, 1925 now governs the Parsi community in India, in the matter of succession. The Act is not retrospective.
- It applies when a Parsi dies intestate, i.e. without leaving a will, and to all intestates occurring under a testamentary or non-testamentary document even where such document is executed before the passing of this Act, provided the intestacies under such document occur after the passing of this Act.
- Sections 50 to 56 of the Indian Succession Act regulate intestate Succession among Parsis

- Section 50 provides that-

(a) there is no distinction between those who were actually born in the lifetime of a person deceased and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive

(b) a lineal descendant of an intestate who had died in the lifetime of the intestate without leaving a widow or a widower or any lineal descendant or a widow or widower of any lineal· descendant shall not be taken into account in determining the manner in which the property of which the intestate has died intestate shall be divided; and

(c) where a widow or widower of any relative of an intestate has married again in the lifetime of the intestate, such widow or widower shall not be entitled to receive any share· of the property of which the intestate has died intestate and such widow or widower shall be deemed not to be existing at the intestate's death.

- Old sections 51 and 52 of the Act have been recast as section 51 by the Indian Succession (Amendment) Act 1991, w.e.f. 9.12.1991.
- Section 51 runs as-
- Division of intestate property among widow, widower, children and parents-(!) Subject to the provisions of sub-section (2), the property of which a Parsi dies intestate shall be divided-
- (a) where such Parsi dies leaving a widow or widower and children, among the widow or widower, and children so that the widow or widower and each child receive equal shares;
- (b) where such Parsi dies leaving children, but no widow or widower, among the children in equal shares.
- (2) where a Parsi dies leaving one or both parents in addition to children or widow or widower and children, the property of which such Parsi dies intestate shall be so divided that the parents or each of the parents shall receive a share equal to half the share of each child.

- Example
- (a) Widow and children

Son	Widow	Daughter
1/3	1/3	1/3

- (b) C, a Parsi died intestate leaving behind his widow G, three sons, T, B and D and two daughters D1 and D2. The division of property amongst the successors of C will be as follows:
- G .... 1/6 share;
- T son of C .... 1/6 share;
- B son of C .... 1/5 share;
- D son of C .... l/6 share;
- D1 daughter of C .... 1/6 share;
- D2 daughter of C .... 1/6 share.

- Sub-section (2) is new. In the case of a male Parsi dying intestate leaving a widow and children or leaving children only, and also his parents, father and mother are given a share for the first time by the amending Act of 1939.
- If both the parents survive, then the father's share is equal to half that of the son and the mother's share is equal to half that of the daughter. If one of the parents survives he or she gets the same share.
- It may be noted that the parents get a share under this section in the case of the son dying intestate only and not in case of the daughter dying intestate.
- The word 'parents' include father and mother but not a stepfather or a stepmother.
- Section 52 repealed vide Act 51 of 1991

- **Section 53 runs as:**
- **Division of share of pre-deceased child of intestate leaving lineal descendants-In** all cases where a Parsi dies leaving any lineal descendants, if any child of such intestate has died in the life-time of the intestate, the division of the share of the property of which the intestate has died intestate which such child would have taken if living at the intestate's death.
- (b) If such deceased child was a daughter, her share shall be divided equally among her children.
- (c) If any child of such deceased child has also died during the life-time of the intestate, the share which he or she would have taken if living at the intestate's death, shall be divided in the like manner in accordance with clause
- (a) or clause (b), as the case may be.
- (d) Where a remoter lineal descendant of the intestate has died during the life-time of the intestate, the provisions of clause (c) shall apply *mutatis mutandis to the division of any share to which he or she would have been* entitled if living at the intestate's death by reason of the pre-decease of all the intestate's lineal descendants directly between him or her and the intestate.

- In present sub-section (a) of section 53 the following changes are made. In the Acts of 1925 and 1865 there was no distinction whether the predeceased child was a son or a daughter. The word used was 'child'. In the present section the distinction is made between the predeceased child being a son and sub-section (a) deals with the share of such predeceased son and the division under this sub-section will be as follows:
- *Examples*
- Examples under sub-section (a) when a male Parsi dies-

  share of predeceased son when he leaves a widow and children-

Father	Mother	Widow	Daughter	Son	Predeceased Son
1/10	1/10	1 /5	1 /5	1/5	1/5

Daughter	Son	Widow
1/15	1/15	1/15

- But if the widow of the predeceased son has remarried in the lifetime of her father-in-law she will be excluded under section 50(c).
- Example under sub-section (a) when a female Parsi dies leaving-

widower	Son	Daughter	Predeceased Daughter	Predeceased Son
1/5	1/5	1/5	1/5	1/5

- **Section 54 runs as:**
- Division of property where intestate leaves no lineal descendant but · leaves a widow or a widower or a widow or widower of any lineal descendant,
- Where a Parsi dies without leaving any lineal descendant but leaving a widow or widower or a widow or widower of a lineal descendant, the property of which the intestate dies intestate shall be divided in accordance with the following rules, namely:

(a) if the intestate leaves a widow or widower but no widow or widower of a lineal descendant, the widow or widower shall take half the said property

(b) if the intestate leaves a widow or widower and also a widow or widower of any lineal descendant, his widow or her widower shall receive one-third of the said property and the widow or widower of any lineal descendant shall receive another one-third, and there is more than one such widow or widower of lineal descendants, the last mentioned one-third shall be divided equally among them;

Testamentary Succession: Part VI

- **57. Application of certain provisions of Part to a class of wills made by Hindus, etc. -The provisions of this Part which are set**
- out in Schedule III shall, subject to the restrictions and
- modifications specified therein, apply--
- (a) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina,

Chap. II: Wills and Codicils

- **59. Person capable of making wills. -Every person of sound mind** not being a minor may dispose of his property by will.
- Explanation 1.--A married woman may dispose by will of any property which she could alienate by her own act during her life.
- Explanation 2.--Persons who are deaf or dumb or blind are not thereby incapacitated for making a will if they are able to know what they do by it.
- Explanation 3.--A person who is ordinarily insane may make a will during interval in which he is of sound mind.
- Explanation 4.--No person can make a will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.

60. Testamentary guardian. -A father, whatever his age may be, may by will appoint a guardian or guardians for his child during minority.

61. Will obtained by fraud, coercion or importunity. -A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

Illustrations

(i) A, falsely and knowingly represents to the testator, that the testator's only child is dead, or that he has done some undutiful act and thereby induces the testator to make a will in his, A's favour; such will has been obtained by fraud, and is invalid.

62. Will may be revoked or altered. -A will is liable to be

revoked or altered by the maker of it at any time when he is competent

to dispose of his property by will.

CHAPTER III

Of the Execution of unprivileged Wills

- **63. Execution of unprivileged wills.-Every testator, not being a** soldier employed in an expedition or engaged in actual warfare, 1*[or an airman so employed or engaged,] or a mariner at sea, shall execute his will according to the following rules:
- (a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.
- (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.
- (c) **The will shall be attested by two or more witnesses**, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

- After death, property should go to heirs is natural but the right of execution of will is a legal privilege and is not absolute
- If legal safeguards are not followed strictly then weak and incompetent person can be forced with fraud etc.
- Attestation and execution of will—
  - Document with registration , prima facie carries presumption of genuineness
  - Sign/affix mark by other persons in his presence and by his direction
  - Sign usually at the end of document
  - Will attested by the two or more witnesses – in front of the testator, presence of both at a time not necessary
  - Once “execution of will” proved burden on objector to disprove it

- Who can be a witness?
  - Major, sound mind and must sign in the presence of the testator with knowledge of the concrn document
  - Sub-Registrar, Scribe, typist may be also a witness
  - An attesting witness has to prove all the ingredients of due execution of will
- Suspicious circumstances:
  - Sign of testator may be shaky and doubtful
  - Mental condition of the testator might be feeble
  - Disposition may be unnatural, improbable and unfair
  - Dispositions not observe as his free will
  - The pro[pounder takes prominent part in the execution of the will
  - Testator signed blank papers
  - Incorrect recitals of essential facts

64. Incorporation of papers by reference. If a testator, in a will or codicil duly attested, refers to any other document then actually written as expressing any part of his intentions, such document shall be deemed to form a part of the will or codicil in which it is referred to.

65. Privileged wills.

- **Any soldier being employed in an expedition** or engaged in actual warfare, or
  - an airman so employed or engaged,or
  - any mariner being at sea, may,
  - if he has completed the age of eighteen years, dispose of his property by a will made in the manner provided in section 66. Such wills are called privileged wills.
- Illustrations
- (i) A, a medical officer attached to a regiment is actually employed in an expedition. He is a soldier actually employed in an expedition, and can make a privileged will.
- (ii) A is at sea in a merchant-ship, of which he is the purser. He is a mariner, and, being at sea, can make a privileged will.

66. Mode of making, and rules for executing, privileged wills.-

- (1) Privileged wills may be in writing, or may be made by word of mouth.
- (2) The execution of privileged wills shall be governed by the following rules:--
- (a) The will may be written wholly by the testator, with his own hand. In such case it need not be signed or attested.
- (b) It may be written wholly or in part by another person, and signed by the testator. In such case it need not be attested.
- (c) If the instrument purporting to be a will is written wholly or in part by another person and is not signed by the testator, it shall be deemed to be his will, if it is shown that it was written by the testator's directions or that he recognised it as his will.
- (d) If it appears on the face of the instrument that the execution of it in the manner intended by the testator was not completed, the instrument shall not, by reason of that circumstance, be invalid, provided that his non-execution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intentions expressed in the instrument.

- (e) If the soldier, airman or mariner has written instructions for the preparation of his will, but has died before it could be prepared and executed, such instructions shall be considered to constitute his will.
- (f) If the soldier, airman or mariner has, in the presence of two witnesses, given verbal instructions for the preparation of his will, and they have been reduced into writing in his lifetime, but he has died before the instrument could be prepared and executed, such instructions shall be considered to constitute his will, although they may not have been reduced into writing in his presence, nor read over to him.
- (g) The soldier, airman or mariner may make a will by word of mouth by declaring his intentions before two witnesses present at the same time.
- (h) A will made by word of mouth shall be null at the expiration of one month after the testator, being still alive, has ceased to be entitled to make a privileged will.

CHAPTER V :
Of the Attestation, Revocation, Alteration and Revival of Wills

- **67. Effect of gift to attesting witness. –**
- **If an attesting witness or his wife gets bequest through a will, then bequest is void, but if he attest codicil and bequest is in will, then is valid.**
- Not apply to hindu, Buddhist, Sikh and Jain

- **68. Witness not disqualified by interest or by being executor. –No** person, by reason of interest in, or of his being an executor of, a will, shall be disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.

- **69. Revocation of will by testator's marriage. -Every will shall** be revoked by the marriage of the maker, except a will made in exercise of a power of appointment, when the property over which the power of appointment is exercised would not, in default of such appointment, pass to his or her executor or administrator, or to the person entitled in case of intestacy.
- Explanation.--Where a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property.
- **70. Revocation of unprivileged will or codicil. -**by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same
- Illustrations
- (i) A has made an unprivileged will. Afterwards, A makes another unprivileged will which purports to revoke the first. This is a revocation.
- (ii) A has made an unprivileged will. Afterwards, A, being entitled to make a privileged will, makes a privileged will, which purports to revoke his unprivileged will. This is a revocation.

- **71. Effect of obliteration, interlineations or alteration in unprivileged will. -No obliteration, interlineations or other alteration** made in any unprivileged will after the execution thereof shall have any effect, except so far as the words or meaning of the will have been thereby rendered illegible or indiscernible, unless such alteration has been executed in like manner as hereinbefore is required for the execution of the will:
- Provided that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

- **72. Revocation of privileged will or codicil. -A privileged will** or codicil may be revoked by the testator by an unprivileged will or codicil, or by any act expressing an intention to revoke it.
- Explanation.--In order to the revocation of a privileged will or codicil by an act accompanied by such formalities as would be sufficient to give validity to a privileged will, it is not necessary that the testator should at the time of doing that act be in a situation which entitles him to make a privileged will.

- **73. Revival of unprivileged will. -(1) No unprivileged will or** codicil, nor any part thereof, which has been revoked in any manner, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same.
- (2) When any will or codicil, which has been partly revoked and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as has been revoked before the revocation of the whole thereof, unless an intention to the contrary is shown by the will or codicil.

Of the Construction of will

- **74. Wording of will. -It is not necessary that any technical words** or terms of art be used in a will, but only that the wording be such that the intentions of the testator can be known there from.
- **75. Inquiries to determine questions as to object or subject of will. -For the** purpose of determining questions as to what person or what property is denoted by any words used in a will, a Court shall inquire into every material fact relating to the persons who claim to be interested under such will, the property which is claimed as the subject of disposition, the circumstances of the testator and of his family, and into every fact a knowledge of which may conduce to the right application of the words which the testator has used.
- Illustrations
- (i) A, by his will, bequeaths 1,000 rupees to his eldest son or to his youngest grandchild, or to his cousin, Mary. A Court may make inquiry in order to ascertain to what person the description in the will applies.
- (ii) A, by his will, leaves to B "my estate called Black Acre". It may be necessary to take evidence in order to ascertain what is the subject-matter of the bequest; that is to say, what estate of the testator's is called Black Acre.
- (iii) A, by his will, leaves to B "the estate which I purchased of C". It may be necessary to take evidence in order to ascertain what estate the testator purchased of C.

- **76. Misnomer or mis-description of object. -(1) Where the words** used in a will to designate or describe a legatee or a class of legatees sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect.
- (2) A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name.
- Illustrations
- (i) A bequeaths a legacy to "Thomas, the second son of my brother John". The testator has an only brother named John, who has no son named Thomas, but has a second son whose name is William. William will have the legacy.
- (iii) The testator bequeaths his property "to A and B, the legitimate children of C". C has no legitimate child, but has two illegitimate children, A and B. The bequest to A and B takes effect, although they are illegitimate

- **76. Misnomer or mis-description of object. -(1) Where the words** used in a will to designate or describe a legatee or a class of legatees sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect.
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- Illustrations
- (i) A bequeaths a legacy to "Thomas, the second son of my brother John". The testator has an only brother named John, who has no son named Thomas, but has a second son whose name is William. William will have the legacy.

- **77. When words may be supplied. -Where any word material to the** full expression of the meaning has been omitted, it may be supplied by the context.
- Illustration
- The testator gives a legacy of "five hundred" to his daughter A and a legacy of "five hundred rupees" to his daughter B. A will take a legacy of five hundred rupees.
- **78. Rejection of erroneous particulars in description of subject. -**
- If the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the will, but some parts of the description do not apply, such parts of the description shall be rejected as erroneous, and the bequest shall take effect.
- Illustrations
- (i) A bequeaths to B "my marsh-lands lying in L and in the occupation of X". The testator had marsh-lands lying in L but had no marsh-lands in the occupation of X. The words "in the occupation of X“ shall be rejected as erroneous, and the marsh-lands of the testator lying in L will pass by the bequest.

- **79. When part of description may not be rejected as erroneous. –If** a will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be considered as limited to such property, and it shall not be lawful to reject any part of the description as erroneous, because the testator had other property to which such part of the description does not apply.
- Illustrations
- (i) A bequeaths to B "my marsh-lands lying in L and in the occupation of X". The testator had marsh-lands lying in L, some of which were in the occupation of X, and some not in the occupation of X. The bequest will be considered as limited to such of the testator's marsh-lands lying in L as were in the occupation of X.

80. Extrinsic evidence admissible in cases of patent ambiguity -

Where the words of a will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended.

Illustrations

(i) A man, having two cousins of the name of Mary, bequeaths a sum of money to "my cousin Mary". It appears that there are two persons, each answering the description in the will. That description, therefore, admits of two applications, only one of which can have been intended by the testator. Evidence is admissible to show which of the two applications was intended.

81. Extrinsic evidence inadmissible in case of patent ambiguity or deficiency. -Where there is an ambiguity or deficiency on the face of a will, no extrinsic evidence as to the intentions of the testator shall be admitted.

Illustrations

(i) A man has an aunt, Caroline, and a cousin, Mary, and has no aunt of the name of Mary. By his will he bequeaths 1,000 rupees to "my aunt, Caroline" and 1,000 rupees to "my cousin, Mary" and afterwards bequeaths 2,000 rupees to "my before-mentioned aunt, Mary". There is no person to whom the description given in the will can apply, and evidence is not admissible to show who was meant by "my before mentioned aunt, Mary". The bequest is therefore void for uncertainty under section 89.

82. Meaning of clause to be collected from entire will. –The meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other.

Illustrations

(i) The testator gives to B a specific fund or property at the death of A, and by a subsequent clause gives the whole of his property to A. The effect of the several clauses taken together is to vest the specific fund or property in A for life, and after his decease in B; it appearing from the bequest to B that the testator meant to use in a restricted sense the words in which he describes what he gives to A.

83. When words may be understood in restricted sense, and when in sense wider than usual. -General words may be understood in a restricted sense where it may be collected from the will that the testator meant to use them in a restricted sense; and words may be understood in a wider sense than that which they usually bear, where it may be collected from the other words of the will that the testator meant to use them in such wider sense.

Illustrations

(ii) The testator (a sailor on ship-board) bequeathed to his mother his gold ring, buttons and chest of clothes, and to his friend, A (a shipmate), his red box, clasp-knife and all things not before bequeathed. The testator's share in a house does not pass to A under this bequest.

(iii) A, by his will, bequeathed to B all his household furniture, plate, linen, china, books, pictures and all other goods of whatever kind; and afterwards bequeathed to B a specified part of his property. Under the first bequest B is entitled only to such articles of the testator's as are of the same nature with the articles therein enumerated.

- **84. Which of two possible constructions preferred. -Where a clause** is susceptible of two meanings according to one of which it has some effect, and according to the other of which it can have none, the former shall be preferred.
- **85. No part rejected, if can be it reasonably construed. -No part** of a will shall be rejected as destitute of meaning if it is possible to put a reasonable construction upon it.
- **86. Interpretation of words repeated in different parts of will. -**
- If the same words occur in different parts of the same will, they shall be taken to have been used everywhere in the same sense, unless a contrary intention appears

- **87. Testator's intention to be effectuated as far as possible.-**
- The intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.
- Illustration
- The testator by a will made on his death-bed, bequeathed all his property to C for life and after his decease to a certain hospital. The intention of the testator cannot take effect to its full extent because the gift to the hospital is void under section 118, but it will take effect so far as regards the gift to C.
- **88. The last of two inconsistent clauses prevails. -Where two** clauses of gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.
- Illustrations
- (i) The testator by the first clause of his will leaves his estate of Ramnagar "to A," and by the last clause of his will leaves it "to B and not to A". B will have it.
- (ii) If a man, at the commencement of his will gives his house to A, and at the close of it directs that his house shall be sold and the proceeds invested for the benefit of B, the latter disposition will prevail.

- **89. Will or bequest void for uncertainty. -A will or bequest not** expressive of any definite intention is void for uncertainty.
- Illustration
- If a testator says "I bequeath goods to A," or "I bequeath to A,“ or "I leave to A all the goods mentioned in the Schedule" and no Schedule is found, or "I bequeath "money,' 'wheat,' 'oil,'" or the like, without saying how much, this is void.
- **90. Words describing subject refer to property answering description at testator's death. -The description contained in a will of** property, the subject of gift, shall, unless a contrary intention appears by the will, be deemed to refer to and comprise the property answering that description at the death of the testator.

- **91. Power of appointment executed by general bequest. - Unless a** contrary intention appears by the will, a bequest of the estate of the testator shall be construed to include any property which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power;
- **92. Implied gift to objects of power in default of appointment.-** Where property is bequeathed to or for the benefit of certain objects as a specified person may appoint or for the benefit of certain objects in such proportions as a specified person may appoint, and the will does not provide for the event of no appointment being made; if the power given by the will is not exercised, the property belongs to all the objects of the power in equal shares.
- Illustration
- A, by his will, bequeaths a fund to his wife, for her life, and directs that at her death it shall be divided among his children in such proportions as she shall appoint. The widow dies without having made any appointment. The fund will be divided equally among the children.

- **93. Bequest to "heirs," etc., of particular person without qualifying terms.-Where a bequest is made to the "heirs" or "right** heirs" or "relations" or "nearest relations" or "family“or"kindred“ or "nearest of kin" or "next-of-kin" of a particular person without any qualifying terms, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person and he had died intestate in respect of it, leaving assets for the payment of his debts independently of such property.
- Illustrations
- (i) A leaves his property "to my own nearest relations". The property goes to those who would be entitled to it if A had died intestate, leaving assets for the payment of his debts independently of such property.
- (ii) A bequeaths 10,000 rupees "to B for his life, and, after the death of B, to my own right heirs". The legacy after B's death belongs to those who would be entitled to it if it had formed part of A's unbequeathed property.

- **94. Bequest to "representatives," etc., of particular person.-**
- Where a bequest is made to the "representatives" or "legal representatives" or "personal representatives" or "executors or administrators" of a particular person, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person and he had died intestate in respect of it.
- Illustration
- A bequest is made to the "legal representatives" of A. A has died intestate and insolvent. B is his administrator. B is entitled to receive the legacy, and will apply it in the first place to the discharge of such part of A's debts as may remain unpaid: if there be any surplus B will pay it to those persons who at A's death would have been entitled to receive any property of A's which might remain after payment of his debts, or to the representatives of such persons.
- **95. Bequest without words of limitation.-Where property is** bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him.

- **96. Bequest in alternative.-Where a property is bequeathed to a** person with a bequest in the alternative to another person or to a class of persons, then, if a contrary intention does not appear by the will, the legatee first named shall be entitled to the legacy if he is alive at the time when it takes effect; but if he is then dead, the person or class of persons named in the second branch of the alternative shall take the legacy.
- Illustrations
- (i) A bequest is made to A or to B. A survives the testator. B takes nothing.
- (ii) A bequest is made to A or to B. A dies after the date of the will, and before the testator. The legacy goes to B.

- **97. Effect of words describing a class added to bequest to person.-Where property is bequeathed to a person, and words are added** which describe a class of persons but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the will.
- Illustrations
- (i) A bequest is made--

  to A and his children,

  to A and his children by his present wife,

  to A and his heirs,

  In each of these cases, A takes the whole interest which the testator had in the property.
- (ii) A bequest is made to A and his brothers. A and his brothers are jointly entitled to the legacy.

- **98. Bequest to class of persons under general description only.-** Where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not in their ordinary sense applicable shall take the legacy.
- **99. Construction of terms.-In a will--**
- (a) the word "children" applies only to lineal descendants in the first degree of the person whose "children" are spoken of;
- (b) the word "grandchildren" applies only to lineal descendants in the second degree of the person whose "grandchildren" are spoken of;
- (c) the words "nephews" and "nieces" apply only to children of brothers or sisters; etc……

- **100. Words expressing relationship denote only legitimate relatives or failing such relatives reputed legitimate.-In the absence** of any intimation to the contrary in a will, the word "child," the word "son," the word "daughter," or any word which expresses relationship, is to be understood as denoting only a legitimate relative, or, where there is no such legitimate relative, a person who has acquired, at the date of the will, the reputation of being such relative.
- Illustrations
- (i) A having three children, B, C and D, of whom B and C are legitimate and D is illegitimate, leaves his property to be equally divided among "my children".
  The property belongs to B and C in equal shares, to the exclusion of D.

- **101. Rules of construction where will purports to make two bequests to same person.-Where a will purports to make two bequests to** the same person, and a question arises whether the testator intended to make the second bequest instead of or in addition to the first; if there is nothing in the will to show what he intended, the following rules shall have effect in determining the construction to be put upon the will:--
- Explanation.--In clauses (a) to (d) of this section, the word "will" does not include a codicil.
- Illustrations
- (ii) A, having one diamond ring, which was given him by B, bequeaths to C the diamond ring which was given by B. A afterwards made a codicil to his will, and thereby, after giving other leagacies, he bequeathed to C the diamond ring which was given him by B. C can claim nothing except the diamond ring which was given to A by B.

- **102. Constitution of residuary legatee.-A residuary legatee may** be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.
- Illustrations
- (i) A makes her will, consisting of several testamentary papers, in one of which are contained the following words :--"I think there will be something left, after all funeral expenses, etc., to give to B, now at school, towards equipping him to any profession he may hereafter be appointed to." B is constituted residuary legatee.

- **103. Property to which residuary legatee entitled.- Under a** residuary bequest, the legatee is entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect.
- Illustration
- A by his will bequeaths certain legacies, of which one is void under section 118, and another lapses by the death of the legatee. He bequeaths the residue of his property to B. After the date of his will A purchases a zamindari, which belongs to him at the time of his death. B is entitled to the two legacies and the zamindari as part of the residue.

- **104. Time of vesting legacy in general terms.-If a legacy is** given in general terms, without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and, if he dies without having received it, it shall pass to his representatives.
- **105. In what case legacy lapses.-(1) If the legatee does not** survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person.
- (2) In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.
- Illustrations
- (i) The testator bequeaths to B "500 rupees which B owes me". B dies before the testator; the legacy lapses.

- **106. Legacy does not lapse if one of two joint legatees die before testator.-If a legacy is given to two persons jointly, and one** of them dies before the testator, the other legatee takes the whole.
- Illustration
- The legacy is simply to A and B. A dies before the testator. B takes the legacy.
- **107. Effect of words showing testator's intention to give distinct shares.-If a legacy is given to legatees in words which show** that the testator intended to give them distinct shares of it, then, if any legatee dies before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.
- Illustration
- A sum of money is bequeathed to A, B and C, to be equally divided among them. A dies before the testator. B and C will only take so much as they would have had if A had survived the testator.

- **108. When lapsed share goes as un-disposed of.-Where a share which** lapses is a part of the general residue bequeathed by the will, that share shall go as un-disposed of.
- Illustration
- The testator bequeaths the residue of his estate to A, B and C, to be equally divided between them. A dies before the testator. His one-third of the residue goes as un-disposed of.
- **109. When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime.-Where a bequest has** been made to any child or other lineal descendant of the testator, and the legatee dies in the lifetime of the testator, but any lineal descendant of his survives the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the will.
- Illustration
- A makes his will, by which he bequeaths a sum of money to his son, B, for his own absolute use and benefit. B dies before A, leaving a son, C, who survives A, and **having made his will whereby he bequeaths all his property to his widow**, D. The money goes to D.

- **110. Bequest to A for benefit of B does not lapse by A's death.-** Where a bequest is made to one person for the benefit of another, the legacy does not lapse by the death, in the testator's lifetime, of the person to whom the bequest is made.
- **111. Survivorship in case of bequest to described class.-Where a** bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as are alive at the testator's death.
- Illustrations
- (i) A bequeaths 1,000 rupees to "the children of B" without saying when it is to be distributed among them. B had died previous to the date of the will, leaving three children, C, D and E. E died after the date of the will, but before the death of A. C and D survive A. The legacy will belong to C and D, to the exclusion of the representatives of E.

CHAPTER VII : of void Bequests

- **112. Bequest to person by particular description, who is not in existence at testator's death.-Where a bequest is made to a person by** a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.
- Illustrations
- (i) A bequeaths 1,000 rupees to the eldest son of B. At the death of the testator, B has no son. The bequest is void.
- (ii) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator, C had no son. Afterwards, during the life of B, a son is born to C. Upon B's death the legacy goes to C's son.

- **113. Bequest to person not in existence at testator's death subject to prior bequest.-Where a bequest is made to a person not in** existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.
- Illustrations
- (i) Property is bequeathed to A for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death, A has no son. Here the bequest to A's eldest son is a bequest to a person not in existence at the testator's death. It is not bequest of the whole interest that remains to the testator. The bequest to A's eldest son for his life is void.

- **114. Rule against perpetuity.-No bequest is valid whereby the** vesting of the thing bequeathed may be delayed beyond the life-time of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.
- Illustrations
- (i) A fund is bequeathed to A for his life and after his death to B for his life; and after B's death to such of the sons of B as shall first attain the age of 25. A and B survive the testator. Here the son of B who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B; and the vesting of the fund may thus be delayed beyond the lifetime of A and B and the minority of the sons of B. The bequest after B's death is void.

- **115. Bequest to a class some of whom may come under rules in sections 113 and 114.-If a bequest is made to a class of persons with** regard to some of whom it is inoperative by reason of the provisions of section 113 or section 114, such bequest shall be 1*[void in regard to those persons only, and not in regard to the whole class].
  Illustrations
- (i) A fund is bequeathed to A for life, and after his death to all his children who shall attain the age of 25. A survives the testator, and has some children living at the testator's death. Each child of A's living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. But A may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of A. **The bequest to A's children, therefore, is inoperative as to any child born after the testator's death;**

- **116. Bequest to take effect on failure of prior bequest.-Where** by reason of any of the rules contained in sections 113 and 114, any bequest in favour of a person or of a class of persons is void in regard to such person or the whole of such class, any bequest contained in the same will and intended to take effect after or upon failure of such prior bequest is also void.
- Illustrations
- (i) A fund is bequeathed to A for his life, and after his death to such of his sons as shall first attain the age of 25, for his life, and after the decease of such son to B. A and B survive the testator. The bequest to B is intended to take effect after the bequest to such of the sons of A as shall first attain the age of 25, which bequest is void under section 114. The bequest to B is void.

- **117. Effect of direction for accumulation.-(1) Where the terms** of a will direct that the income arising from any property shall be accumulated either wholly or in part during any period longer than a period of eighteen years from the death of the, such direction shall, save as hereinafter provided, be void.
- (2) This section shall not affect any direction for accumulation for the purpose of--
- (i) the payment of the debts of the testator or any other person taking any interest under the will, or
- (ii) the provision of portions for children or remoter issue of the testator or of any other person taking any interest under the will, or
- (iii) the preservation or maintenance of any property bequeathed; and such direction may be made accordingly.

118. Bequest to religious or charitable uses.-No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons:

2*["Provided that nothing in this section shall apply to a Parsi."]

Illustrations

A having a nephew makes a bequest by a will not executed and deposited as required--

for the relief of poor people;

for the maintenance of sick soldiers;

for the erection or support of a hospital;

for the education and preferment of orphans;

for the support of scholars;

for the erection or support of a school;

for the building and repairs of a bridge;

for the making of roads;

for the erection or support of a church;

for the repairs of a church;

for the benefit of ministers of religion;

for the formation or support of a public garden;

All these bequests are void.

Vesting of Legacies – 119 to 121

- Onerous bequest- 122 to 123
- Contingent bequest – 124 to 125
- Conditional bequest - 126 to 137

Specific Legacies : Sections 142 -1 49

- **142. Specific legacy defined**.-Where a testator bequeaths to any person a specified part of his property, which is distinguished from all other parts of his property, the legacy is said to be specific.
- Illustrations
- (i) A bequeaths to B-- "the diamond ring presented to me by C": "my gold chain“, "a certain bale of wool“, "a certain piece of cloth":
- **143. Bequest of certain sum where stocks, etc., in which invested are described.** - Where a certain sum is bequeathed, the legacy is not specific merely because the stock, funds or securities in which it is invested are described in the will.
- Illustration
- A bequeaths to B-- "10,000 rupees of my funded property“, "10,000 rupees of my property now invested in shares of the East Indian Railway Company": "10,000 rupees, at present secured by mortgage of Rampur factory. No one of these legacies is specific.
- **144. Bequest of stock where testator had, at date of will, equal or greater amount of stock of same kind.-**Where a bequest is made in general terms of a certain amount of any kind of stock, the legacy is not specific merely because the testator was, at the date of his will, possessed of stock of the specified kind, to an equal or greater amount than the amount bequeathed.
- Illustration
- A bequeaths to B 5,000 rupees five per cent. Government securities. A had at the date of the will five per cent. Government securities for 5,000 rupees. The legacy is not specific.

- **145. Bequest of money where not payable until part of testator's property disposed of in certain way.-A money legacy is not specific** merely because the will directs its payment to be postponed until some part of the property of the testator has been reduced to a certain form, or remitted to a certain place.
- Illustration
- A bequeaths to B 10,000 rupees and directs that this legacy shall be paid as soon as A's property in India shall be realised in England. The legacy is not specific.
- **146. When enumerated articles not deemed specifically bequeathed.-** Where a will contains a bequest of the residue of the testator's property along with an enumeration of some items of property not previously bequeathed, the articles enumerated shall not be deemed to be specifically bequeathed.

- **147. Retention, in form, of specific bequest to several persons in succession.- Where property is specifically bequeathed to two or** more persons in succession, it shall be retained in the form in which the testator left it, although it may be of such a nature that its value is continually decreasing.
- Illustrations : (i) A, having lease of a house for a term of years, fifteen of which were unexpired at the time of his death, has bequeathed the lease to B for his life, and after B's death to C. B is to enjoy the property as A left it, although, if B lives for fifteen years, C can *Collected by the All India Christian Council, www.christiancouncil.in Page 53 of 123* take nothing under the bequest.
- (ii) A, having an annuity during the life of B, bequeaths it to C, for his life, and, after C's death, to D. C is to enjoy the annuity as A left it, although, if B dies before D, D can take nothing under the bequest.
- **148. Sale and investment of proceeds of property bequeathed to two or more persons in succession.-Where property comprised in a** bequest to two or more persons in succession is not specifically bequeathed, it shall, in the absence of any direction to the contrary, be sold, and the proceeds of the sale shall be invested in such securities as the High Court may by any general rule authorise or direct, and the fund thus constituted shall be enjoyed by the successive legatees according to the terms of the will.
- Illustration : A, having a lease for a term of years, bequeaths all his property to B for life, and, after B's death, to C. The lease must be sold, the proceeds invested as stated in this section and the annual income arising from the fund is to be paid to B for life. At B's death the capital of the fund is to be paid to C.

Demonstrative Legacies – 150,151

- **150. Demonstrative legacy defined.-Where a testator bequeaths a** certain sum of money, or a certain quantity of any other commodity, and refers to a particular fund or stock so as to constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative.
- Explanation.--The distinction between a specific legacy and a demonstrative legacy consists in this, that-- where specified property is given to the legatee, the legacy is specific; where the legacy is directed to be paid out of specified property, it is demonstrative.
- Illustrations : (iii) A bequeaths to B-- "10,000 rupees out of my estate at Ramnagar," or charges it on his estate at Ramnagar: "10,000 rupees, being my share of the capital embarked in a certain business.“ Each of these bequests is demonstrative
- **151. Order of payment when legacy directed to be paid out of fund the subject of specific legacy.-Where a portion of a fund is** specifically bequeathed and a legacy is directed to be paid out of the same fund, the portion specifically bequeathed shall first be paid to the legatee, and the demonstrative legacy shall be paid out of the residue of the fund and, so far as the residue shall be deficient, out of the general assets of the testator.
- Illustration :A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him

from W. The debt due to A from W is only 1,500 rupees; of these 1,500 rupees,

- **152. Ademption explained.-If anything which has been specifically** bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the legacy is adeemed; that is, it cannot take effect, by reason of the subject matter having been withdrawn from the operation of the will.
- Illustrations
- (i) A bequeaths to B-- "the diamond ring presented to me by C": "my gold chain": "a certain bale of wool": "a certain piece of cloth": "all my household goods which shall be in or about my dwelling-house in M. Street in Calcutta, at the time of my death". But A in his lifetime,-- sells or gives away the ring: converts the chain into a cup, converts the wool into cloth, makes the cloth into a garment, takes another house into which he removes all his goods. Each of these legacies is adeemed.

153. Non-ademption of demonstrative legacy.-A demonstrative legacy is not adeemed by reason that the property on which it is charged by the will does not exist at the time of the death of the testator, or has been converted into property of a different kind, but it shall in such case be paid out of the general assets of the testator.

154. Ademption of specific bequest of right to receive something from third party.-Where the thing specifically bequeathed is the right to receive something of value from a third party, and the testator himself receives it, the bequest is adeemed.

Illustrations

(i) A bequeaths to B-- "the debt which C owes me".

"2,000 rupees which I have in the hands of D":

"the money due to me on the bond of E":

"my mortgage on the Rampur factory."

All these debts are extinguished in A's lifetime, some with and some without his consent. All the legacies are adeemed.

Possible questions

- Explain types of wills under ISA,1925.
- Explain the rules as to “Construction of Will”
- Explain procedure of the execution of a privileged will.
- Explain procedure of the execution of an unprivileged will.
- Write a note on “Void Bequests”
- Write a note on “Types of Legacies”
- Write a not on “Vesting of Legacies”
- Write a note on “Types of Bequests”

SUCCESSION CERTIFICATE

Succession means : *"The law and procedures under which beneficiaries become entitled to property under a testator's will or on intestacy."* A certificate granted by a competent court to collect the debts and securities of the deceased, as also to receive interests or dividends on and to negotiate or transfer securities. A document through which the disposition of deceased's property is made is called succession certificate. This certificate is given under section 370-390 of the succession act. The detail is provided below. The Indian Succession Act, 1925 defines a succession certificate as a certificate issued by a court to the legal heirs of a deceased to establish the authenticity of the heirs and give them the authority to inherit debts, securities and other assets of the deceased. The purpose of a succession certificate is limited in respect of debts and securities such as provident fund, insurance, deposits in banks, shares, or any other security of the central government or the state government to which the deceased was entitled.

Its main objective is to facilitate collection of debts on succession and afford protection to the parties paying debts to the representatives of the deceased person. A succession certificate may be used in situations where banks, financial and private institutions release funds to the nominee (where such nominee is not the legal beneficiary of the asset) and the nominee refuses to cooperate in distribution of the asset to the legal beneficiary. A succession certificate, strictly speaking, does not effect adjudication of title of the deceased far less than that of the holder as regards the debts and securities covered thereunder. Yet, simply to afford protection to the parties paying the debts. The grant of succession certificate is conclusive against the debtor. A succession certificate is effect throughout the whole India as per section 380 of The Indian Succession Act,1925 (herein after referred as the Act).

According to sections 381 and 386 of the Act, a succession certificate is conclusive as against the person/persons liable to whom full indemnity is afforded (make available) for payments made. But, despite the succession certificate is only conclusive of the representative title of the holder thereof as against the debtors, a suit of declaration will not lie that the holder of the certificate is not the legal representative of the deceased. Similarly, a succession certificate may be useful to prove genuineness of the claimant where the inheritance amount is substantial. Additionally, in certain states, a probate (meaning a copy of the will, if it exists, authenticated by the Court) and a succession certificate are compulsory to transfer the title of an immovable property.

Who can apply Succession Certificate?

Following are the person who can apply for succession certificate:

(i) Sound mind person

(ii) Major person

(iii) Person having an interest in estate of deceased

(iv) Secretary of state

(v) Person having beneficial interest in the debt or security of deceased person.

Application for Certificate

Application for succession certificate shall be made to the District Judge by a petition signed and verified by or on behalf of the applicant in the manner prescribed by the C.P.C for the signing and verification of a plaint by or on behalf of a plaintiff. Following are the particulars for the application of succession certificate.

(i) Date of death of deceased

(ii) Place of residence of deceased

(iii) Family of Deceased and their respective residences.

(iv) Right of Petitioner - The application must show some title or interest in the debt or security, in respect of which they has applied for the certificate. If two or more persons apply, the court must decide who has the preferential claim.

(v) Absence of any impediment

(vi) Debts or security in respect of which the certificate is applied for.

How to apply for ''Succession Certificate''?

i) An application should be made to The District Judge under section 372 of the Indian Succession Act, 1925

ii) The petitioner must sign and verify the petition;

iii) The residences of the relatives and family of the deceased must be mentioned;

iv) In case of The Hindu Succession Act (Act XXX OF 1956), the names of the heirs must be mentioned in the petition;

v) The right of the petitioner should be mentioned;

vi) Either Ordinary residence of the deceased, at the time of death, or the property of the deceased should be within the limits of the Jurisdiction of the Court concerned;

vii) The debts and securities as to which the succession certificate is applied for should be mentioned;

viii) The absence of any impediment u/sec. Sub section (1) of Section 370 of the Act or any other provisions of the Act or any other enactments to the grant of succession certificate or to the validity of it in case of it was granted, must be mentioned.

ix) When the District Judge grants a succession certificate, he shall specify the debts and securities set forth in the application for the certificate, and may thereby empower the person to whom the certificate is granted (a) to receive interest or dividends on the securities; or (b) to negotiate or transfer the securities; or (c) both to receive interest or dividends or negotiate or transfer the securities.

x) With respect to costs involved, the Court typically levies a fixed percentage of the value of the estate as its fees (which is more particularly prescribed under the Court-fees Act, 1870, (7 of 1870)).This fee is to be paid in the form of judicial stamp papers of the said amount. In addition to Court fees, the applicant will also be required to pay requisite fees to its lawyer.

Competent Court to grant succession certificate:

Section 371 of the Act explains that - "The District Judge within whose jurisdiction the deceased ordinarily resided at the time of his death, or if at that time he had no fixed place of residence, the District Judge, within whose jurisdiction any part of the property of the deceased may be found, may grant a certificate under this part." Following are the some important points of section 371

(I) Application : Application for succession certificate will be presented before a District Judge.

(ii) Residence of Deceased with his Jurisdiction : The application will be presented before such District Judges within whose jurisdiction the deceased was ordinarily residing at the time of his death.

(iii) No fixed place of Residence : If the deceased had no fixed place of residence at the time of his death, then application will be presented before such-district Judge within whose jurisdiction any part of the property of the deceased may be found.

Grant of Succession Certificate- Certain Restrictions:

Under the following circumstances, no succession certificate can be granted.

I) under section 370 (1) of the Act, as to any debt or security to which a right is required to be established by probate or letters of administration;

ii) that too, if sections 212 of the Act applies;

iii) if section 213 of the Act applies;

iv) that is to say that where law requires probates or letters of administration as mandatory to establish right to property as in the cases of Parsis, Jews, East Indians, Europeans and Americans.

v) Provided that nothing will prevent as to granting a succession certificate to any person entitle to the effects of a deceased Indian Christian or any part thereto pertaining to any debt or security, that the right can be established by letters of administration.

Effect of Succession Certificate:

To know the effect of succession certificate, it is apt to see section 381 of the Act. The succession certificate simply affords protection to the parties paying debts. It is thus cleat that there is absolutely no adjudication of title of the deceased.

Section 376 of the Act provides that the succession certificate can be extended in respect of any debt or security not originally specified therein and if such extension is ordered, it shall have the same effect as if the debt or security to which the succession certificate is extended had been originally specified. The District Judge can extend a succession certificate only on the application of the holder of a succession certificate and not of any other person.

Case laws:

In the case of *Muthia v. Ramnatham, 1918 MWN 242,* it was held that the grant of certificate gives to the grantee a title to recover the debt due to the deceased, and payment to the grantee is a good discharge of the debt."

In the case of *Srinivasa v. Gopalan,* , it was held that " The question whether the debt belonged to the deceased is not a matter to be decided on an application for a succession Certificate."

In the case of *Paramananda Chary v. Veerappan, AIR 1928 Madras 213:82 IC 604,* it was held that "The grant of succession certificate is conclusive against the debtor. Even if another person turns out to be the heir of the deceased, it does not follow that the certificate is invalid."

In the case of *Ganga Prasad v. Saudan ,* it was observed that section 381 of the Act protects the debtors and affords full indemnity to the persons liable to pay the debts and in respect of the securities covered by the certificate as persons having the same paid in "good faith".

Distinction between Succession Certificate and Wills

In the event a person dies leaving a Will, a succession certificate may not be required for inheriting the assets of the deceased since the entire estate of the deceased shall vest on the executor of the Will for distribution as per the instructions set forth in the Will. Although Section 370 of the Indian Succession Act, 1925, specifically provides that a succession

certificate shall not be granted with respect to any debt or security in cases where a right to such property is required to be established by obtaining letters of administration or a probate, in certain states, a probate and a succession certificate are compulsory to transfer the title of an immovable property. It is to be further noted that in the absence of a Will, banks and financial institutions typically rely on the succession certificate and/or a legal heirship certificate.

Legal Heirship Certificate

A number of other documents such as legal heirship certificate, nominations and death certificate may be procured, as an alternative to a succession certificate, for the purpose of establishing an inheritance or aiding in the transfer of assets from the deceased. It is comparatively easier to obtain these documents. In some cases, a legal heirship certificate may be relied upon in the place of a succession certificate merely because family members are able to obtain a legal heirship certificate with much ease and speed. Therefore, families typically first apply for a legal heirship certificate and in the event a legal heirship certificate is not accepted by the relevant authority for any reason, then a succession certificate is applied for. A legal heirship certificate establishes the relationship of the heirs to deceased for claims relating to pension, provident fund, gratuity or other service benefits of central and state government departments, specifically when the deceased has not selected a nominee. Banks and private companies also accept such certificates for allowing transfer of deposits, balances, investments, shares, etc.

How to obtain a Legal Heirship Certificate

While the Indian Succession Act, 1925 does not prescribe a method for obtaining a legal heirship certificate, it can be easily issued by revenue officers such as tahsildars, revenue mandal officers or talukdars, in every taluk. A legal heirship certificate can be issued and relied upon for certain limited purposes only. Legal heirship certificates are not conclusive when it comes to determining the legitimate class of heirs of a deceased person under the laws of succession or the title of heirs to any disputed property that belonged to the deceased. In case of any disputes between the heirs of the deceased, the revenue officer cannot issue a legal heirship certificate and is required to direct the heirs to approach a civil court for determination of the rightful heirs.

Legal Heirship Certificate vis-à-vis Succession Certificate

A legal heirship certificate is issued to identify the living heirs of a deceased person whereas succession certificate is issued to establish the authenticity of the heirs and give them the authority to inherit debts, securities and other assets that the deceased may have left behind

Conclusion :

Succession certificate is to provide speedy remedy and quick decision in succession matters so that legal heirs of deceased may have their share in movable assets ascertained, allocated and disbursed as there may be a needy family requiring immediate disbursement of amount to meet, its merging and day to day needs of life.

THE FAMILY COURTS ACT, 1984

ACT NO. 66 OF 1984

[14*th September*, 1984.]

An Act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith.

BE it enacted by Parliament in the Thirty-fifth Year of the Republic of India as follows:—

CHAPTER I
PRELIMINARY

1. Short title, extent and commencement.—(*1*) This Act may be called the Family Courts Act, 1984.

(*2*) It extends to the whole of India except the State of Jammu and Kashmir.

(*3*) It shall come into force on such date1 as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different States.

2. Definitions.—In this Act, unless the context otherwise requires,—

(*a*) "Judge" means the Judge or, as the case may be, the Principal Judge, Additional Principal Judge or other Judge of a Family Court;

(*b*) "notification" means a notification published in the Official Gazette;

(*c*) "prescribed" means prescribed by rules made under this Act;

(*d*) "Family Court" means a Family Court established under section 3;

(*e*) all other words and expressions used but not defined in this Act and defined in the Code of Civil Procedure, 1908 (5 of 1908) shall have the meanings respectively assigned to them in that Code.

CHAPTER II
FAMILY COURTS

3. Establishment of Family Courts.—(*1*) For the purpose of exercising the jurisdiction and powers conferred on a Family Court by this Act, the State Government, after consultation with the High Court, and by notification,—

(*a*) shall, as soon as may be after the commencement of this Act, established for every area in the State comprising of city or town whose population exceeds one million, a Family Court;

(*b*) may establish Family Courts for such other areas in the State as it may deem necessary.

(*2*) The State Government shall, after consultation with the High Court, specify, by notification, the local limits of the area to which the jurisdiction of a Family Court shall extend and may, at any time, increase, reduce or alter such limits.

4. Appointment of Judges.—(*1*) The State Government may, with the concurrence of the High Court, appoint one or more persons to be the Judge or Judges of a Family Court.

(*2*) When a Family Court consists of more than one Judge,—

(*a*) each of the Judges may exercise all or any of the powers conferred on the Court by this Act or any other law for the time being in force;

(*b*) the State Government may, with the concurrence of the High Court, appoint any of the Judges to be the Principal Judge and any other Judge to be the Additional Principal Judge;

(*c*) the Principal Judge may, from time to time, make such arrangements as he may deem fit for the distribution of the business of the Court among the various Judges thereof;
(*d*) the Additional Principal Judge may exercise the powers of the Principal Judge in the event of any vacancy in the office of the Principal Judge or when the Principal Judge is unable to discharge his functions owing to absence, illness or any other cause.
(*3*) A person shall not be qualified for appointment as a Judge unless he—
(*a*) has for at least seven years held a judicial office in India or the office of a Member of a Tribunal or any post under the Union or a State requiring special knowledge of law; or
(*b*) has for at least seven years been an advocate of a High Court or of two or more such Courts in succession; or
(*c*) possesses such other qualifications as the Central Government may, with the concurrence of the Chief Justice of India, prescribe.
(*4*) In selecting persons for appointment as Judges,—
(*a*) every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counselling are selected; and
(*b*) preference shall be given to women.
(*5*) No person shall be appointed as, or hold the office of, a Judge of a Family Court after he has attained the age of sixty-two years.
(*6*) The salary or honorarium and other allowances payable to, and the other terms and conditions of service of, a Judge shall be such as the State Government may, in consultation with the High Court, prescribe.

5. Association of social welfare agencies, etc.—The State Government may, in consultation with the High Court, provide, by rules, for the association, in such manner and for such purposes and subject to such conditions as may be specified in the rules, with a Family Court of—
(*a*) institutions or organisations engaged in social welfare or the representatives thereof;
(*b*) persons professionally engaged in promoting the welfare of the family;
(*c*) persons working in the field of social welfare; and
(*d*) any other person whose association with a Family Court would enable it to exercise its jurisdiction more effectively in accordance with the purposes of this Act.

6. Counsellors, officers and other employees of Family Courts.—(*1*) The State Government shall, in consultation with the High Court, determine the number and categories of counsellors, officers and other employees required to assist a Family Court in the discharge of its functions and provide the Family Court with such counsellors, officers and other employees as it may think fit.
(*2*) The terms and conditions of association of the counsellors and the terms and conditions of service of the officers and other employees, referred to in sub-section (*1*), shall be such as may be specified by rules made by the State Government.

CHAPTER III
JURISDICTION

7. Jurisdiction.—(*1*) Subject to the other provisions of this Act, a Family Court shall—

(*a*) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the *Explanation*; and
(*b*) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.
Explanation.—The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:—
(*a*) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;
(*b*) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;
(*c*) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;
(*d*) a suit or proceeding for an order or injunction in circumstance arising out of a marital relationship;
(*e*) a suit or proceeding for a declaration as to the legitimacy of any person;
(*f*) a suit or proceeding for maintenance;
(*g*) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.
(*2*) Subject to the other provisions of this Act, a Family Court shall also have and exercise—
(*a*) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and
(*b*) such other jurisdiction as may be conferred on it by any other enactment.
8. Exclusion of jurisdiction and pending proceedings.—Where a Family Court has been established for any area,—
(*a*) no district court or any subordinate civil court referred to in sub-section (*1*) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the *Explanation* to that sub-section;
(*b*) no magistrate shall, in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);
(*c*) every suit or proceeding of the nature referred to in the *Explanation* to sub-section (*1*) of section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974),—
(*i*) which is pending immediately before the establishment of such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any magistrate under the said Code; and
(*ii*) which would have been required to be instituted or taken before such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established,
shall stand transferred to such Family Court on the date on which it is established.

CHAPTER IV

PROCEDURE

9. Duty of Family Court to make efforts for settlement.—(*1*) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.

(*2*) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(*3*) The power conferred by sub-section (*2*) shall be in addition to, and not in derogation of, any other power of the Family Court to adjourn the proceedings.

10. Procedure generally.—(*1*) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings [other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)] before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court.

(*2*) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(*3*) Nothing in sub-section (*1*) or sub-section (*2*) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.

11. Proceedings to be held *in camera*.—In every suit or proceedings to which this Act applies, the proceedings may be held *in camera* if the Family Court so desires and shall be so held if either party so desires.

12. Assistance of medical and welfare experts.—In every suit or proceedings, it shall be open to a Family Court to secure the services of a medical expert or such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the Court may think fit, for the purposes of assisting the Family Court in discharging the functions imposed by this Act.

13. Right to legal representation.—Notwithstanding anything contained in any law, no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner:

Provided that if the Family Court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as *amicus curiae*.

14. Application of Indian Evidence Act, 1872.—A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872).

15. Record of oral evidence.—In suits or proceedings before a Family Court, it shall not be necessary to record the evidence of witnesses at length, but the Judge, as the examination of each witness proceeds, shall, record or cause to be recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witness and the Judge and shall form part of the record.

16. Evidence of formal character on affidavit.—(*1*) The evidence of any person where such evidence is of a formal character, may be given by affidavit and may, subject to all just exceptions, be read in evidence in any suit or proceeding before a Family Court.

(*2*) The Family Court may, if it thinks fit, and shall, on the application of any of the parties to the suit or proceeding summon and examine any such person as to the facts contained in his affidavit.

17. Judgment.—Judgment of a Family Court shall contain a concise statement of the case, the point for determination, the decision thereon and the reasons for such decision.

18. Execution of decrees and orders.—(*1*) A decree or an order [other than an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)], passed by a Family Court shall have the same force and effect as a decree or order of a civil court and shall be executed in the same manner as is prescribed by the Code of Civil Procedure, 1908 (5 of 1908) for the execution of decrees and orders.

(*2*) An order passed by a Family Court under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) shall be executed in the manner prescribed for the execution of such order by that Code.

(*3*) A decree or order may be executed either by the Family Court which passed it or by the other Family Court or ordinary civil court to which it is sent for execution.

CHAPTER V

1[APPEALS AND REVISIONS]

1. Subs. by Act 59 of 1991, s. 2, for "Appeals" (w.e.f 28-12-1991).
2. Ins. by s. 2, *ibid.* (w.e.f. 28-12-1991).
3. Sub-section (*4*) renumbered as sub-section (*5*) thereof by s. 2, *ibid.* (w.e.f. 28-12-1991).
4. Sub-section (*5*) renumbered as sub-section (*6*) thereof by s. 2, *ibid.* (w.e.f. 28-12-1991).

19. Appeal.—(*1*) Save as provided in sub-section (*2*) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

(*2*) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties 2[or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991 (59 of 1991).]

(*3*) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court.

2[(*4*) The High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under

Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and as to the regularity of such proceeding.]

3[(*5*)] Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court.

4[(*6*)] An appeal preferred under sub-section (*1*) shall be heard by a Bench consisting of two or more Judges.

CHAPTER VI

MISCELLANEOUS

20. Act to have overriding effect.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

21. Power of High Court to make rules.—(*1*) The High Court may, by notification in the Official Gazette, make such rules as it may deem necessary for carrying out the purposes of this Act.

(*2*) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(*a*) normal working hours of Family Courts and holding of sittings of Family Courts on holidays and outside normal working hours;

(*b*) holding of sittings of Family Courts at places other than their ordinary places of sitting;

(*c*) efforts which may be made by, and the procedure which may be followed by, a Family Court for assisting and persuading parties to arrive at a settlement.

22. Power of the Central Government to make rules.—(*1*) The Central Government may, with the concurrence of the Chief Justice of India, by notification, make rules prescribing the other qualifications for appointment of a Judge referred to in clause (*c*) of sub-section (*3*) of section 4.

(*2*) Every rule made under this Act by the Central Government shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

23. Power of the State Government to make rules.—(*1*) The State Government may, after consultation with the High Court, by notification, make rules for carrying out the purposes of this Act.

(*2*) In particular and without prejudice to the generality of the provisions of sub-section (*1*) such rules may provide for all or any of the following matters, namely:—

(*a*) the salary or honorarium and other allowances payable to, and the other terms and conditions of Judges under sub-section (*6*) of section 4;

(*b*) the terms and conditions of association of counsellors and the terms and conditions of service of the officers and other employees referred to in section 6;

(*c*) payment of fees and expenses (including travelling expenses) of medical and other experts and other persons referred to in section 12 out of the revenues of the State Government and the scales of such fees and expenses;
(*d*) payment of fees and expenses to legal practitioners appointed under section 13 as *amicus curiae* out of the revenues of the State Government and the scales of such fees and expenses;
(*e*) any other matter which is required to be, or may be, prescribed or provided for by rules.
(*3*) Every rule made by a State Government under this Act shall be laid, as soon as may be after it is made, before the State Legislature.

The Indian Divorce (Amendment) Act, 2001
(No51 OF 2001)

CONTENTS

An Act further to amend the Indian Divorce Act, 1869

Be it enacted by Parliament in the fifty-second Year of the Republic of India as follows:-

1. Short title and commencement. – (1) This Act may be called the Indian Divorce (Amendment) Act, 2001.

(2) It shall come into force on such date as the Central government may, by notification in the Official Gazette, appoint.

2. Amendment of Section 1 - In Section 1 of the Indian Divorce Act, 1869 (4 of 1869) (hereinafter referred to as the principal Act), the word "Indian" shall be omitted.

3. Amendment of Section 3.- In section 3 of the principal Act,-

(a) in clause (3), for the words "or of whose jurisdiction under this Act", the words "or of whose jurisdiction under this Act the marriage was solemnized or" shall be substituted;

(b) Clauses (6) and (7) shall be omitted.

4. Omission of Section 7-Section of the principal Act shall be omitted.

5. Substitution of new section for Section 10- For Section 10 of the principal Act, the following section shall be substituted, namely:-

"10. Grounds for dissolution of marriage-(1) Any marriage solemnized, whether before or after the commencement of the Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent-

(i) has committed adultery; or

(ii) has ceased to be Christian by conversion to another religion; or

(iii) has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(iv) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a virulent and incurable for of leprosy; or

(v) has, for a period of not less that two years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or

(vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive; or

(vii) has wilfully refused to consummate the marriage and the marriage has not therefore been consummated; or

(viii) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; or

(ix) has deserted the petitioner for at least two years immediately preceding the presentation of the petition; or

(x) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.

(2) A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.".

6. **Insertion of new Section 10-A.**- After Section 10 of the principal Act, the following section shall be inserted,, namely:-

"10-A. Dissolution of marriage by mutual consent.-(1) subject to the provisions of this Act and the rules made thereunder, a petition for dissolution of marriage may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Indian Divorce (Amendment) Act, 2001, on the ground that they have been living separately for a period of two years or more, that they have not been able to live together and they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn by both the parties in the meantime, the court shall, on being satisfied, after hearing the parties and making such inquiry, as it think fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of decree."

7. **Substitution of new section for Section 11.**- For section 11 of the Principal Act, the following section shall be substituted, namely:-

"11. Adulterer or adulteress to be co-respondent.- on a petition for dissolution of marriage presented by a husband or wife on the ground of adultery, the petitioner shall make the alleged adulterer or adulteress a co-respondent, unless the petitioner is excused by the court from so doing on any of the following grounds, namely:-

(a) that the wife, being the respondent is leading the life of a prostitute or the husband, being respondent is leading an immoral life and that the petitioner knows of no person with whom the adultery has been committed;

(b) that the name of the alleged adulterer or adulteress in unknown to the petitioner although the petitioner has made due efforts to discover it;

(c) that the alleged adulterer or adulteress is dead.".

8. Amendment of Section 13.-In section 13 of the principal Act, the last paragraph shall be omitted.

9. Amendment of Section 14.- In Section 14 of the principal Act, in Paragraph 4, the words "in the manner and subject to all the provisions and limitations in Sections 16 and 17 made and declared" shall be omitted.

10. Amendment of Section 15.-In Section 15 of the principal Act,-

(a) the words "without reasonable excuse" shall be omitted;

(b) for the words "her adultery and cruelty", the words "her adultery or cruelty or desertion" shall be substituted;

(c) for the words "such cruelty"' the words "such adultery, cruelty" shall be substituted.

11. Amendment of Section 16.- In Section 16 of the principal Act, the words, "not being a confirmation of a decree of a district Court," shall be omitted.

12. substitution of new section for Section 17.-For Section 17 of the principal Act, the following section shall be substituted, namely:-

"17. Power of High Court to remove certain suits.-During the progress of the suit in the Court of the District Judge, any person suspecting that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce, shall be at liberty, in such manner as the High Court by general or special order from time to time directs, to apply to the High Court to remove the suit under Section 8, and the court shall thereupon, if it thinks fit, remove such suit and try and determine the same as a court of original jurisdiction, and the provisions contained in Section 16 shall apply to every suit so removed; or it may direct the District Judge to take such steps in respect of the alleged collusion as may be necessary, to enable him to make a decree in accordance with the justice of the case."

13. Omission of Section 17-A.-Section 17-A of the principal Act shall be omitted.

14. Amendment of Section 18.-In Section 18 of the principal Act, the words "or to the High Court" shall be omitted.

15. Amendment of Section 19.-In Section 19 of the principal Act, in the last paragraph, for the words "jurisdiction of the High Court", the words "jurisdiction of the District Court" shall be substituted.

16. Omission of Section 20.-Section 20 of the principal Act shall be omitted.

17. Amendment of Section 22.-In Section 22 of the principal Act, the words "without reasonable excuse" shall be omitted.

18. Amendment of Sections 23, 27 and 32.-In Sections 23, 27 and 32 of the principal Act, the words "or the High Court" shall be omitted.

19. Omission of Section 34.-Section 34 of the principal Act shall be omitted.

20. Omission of Section 35.-Section 35 of the principal Act shall be omitted.

21. Amendment of Section 36.-In Section 36 of the principal Act, the proviso shall be omitted.

22. Amendment of Section 37.-In Section 37 of the principal Act, for the portion beginning with the words "The High Court" and ending with the words "the husband shall", the words "Where a decree of dissolution of the marriage or a decree of judicial separation is obtained by the wife, the District Court may order that the husband shall" shall be substituted.

23. Omission of Section 39.-Section 39 of the principal Act shall be omitted.

24. Amendment of Section 40.-In Section 40 of the principal Act, for the portion beginning with the words "The High Court" and ending with the words "may inquire into", the words "The District Court may, before passing a decree fore dissolution of the marriage or a decree of nullity of marriage, inquire into" shall be substituted.

25. Amendment of Section 43.-In Section 43 of the principal Act, for the portion beginning with the words "In any suit for obtaining" and ending with the words "deems proper", the words "In any suit for obtaining a dissolution of marriage or a decree of nullity of marriage instituted in a District Court, the court may from time to time before making its decree, make such interim orders as it may deem proper" shall be substituted.

26. Amendment of Section 44.-In section 44 of the principal Act, for the portion beginning with the words "The High Court" and ending with the words "may upon application", the words "Where a decree of dissolution or nullity of marriage has been passed the District Court may, upon application" shall be substituted.

27. Amendment of Section 45.-In Section 45 of the principal Act, for the words "Code of Civil Procedure", the words and figures "Code of Civil Procedure, 1908 (5 of 1908)" shall be substituted.

28. Amendment of Section 52.-In Section 52 of the principal Act, for the portion beginning with the words "by a wife" and ending with the words "without reasonable excuse", the words "by a husband or a wife, praying that his or her marriage may be dissolved by reason of his wife or her husband, as the case may, having been guilty of adultery, cruelty or desertion" shall be substituted.

29. Amendment of Section 55.-In Section 55 of the principal Act,-

(a) the first proviso shall be omitted;

(b) in the second proviso, for the words "Provided also", the words "Provided" shall be substituted.

30. Substitution of new section for Section 57.-For Section 57 of the principal Act, the following section shall be substituted, namely:-

"57. Liberty to parties to marry again.-Where a decree for dissolution or nullity of marriage has been passed and either the time for appeal has expired without an appeal having been presented to any court including the Supreme Court or an appeal has been presented but has been dismissed and the decree or dismissal has become final, it shall be lawful for either party to the marriage to marry again.".

31. Amendment of Section 62.-In Section 62 of the principal Act, for the words "Code of Civil Procedure", the words and figures "Code of Civil Procedure, 1908 (5 of 1908)" shall be substituted.

32. Repeal.-The Indian and Colonial Divorce Jurisdiction Act, 1926 (16 and 17 Geo. 5, C.40, 3 and 4 Geo. IV C. 35, 9 Geo. VI C. 51), the Indian and Colonial Divorce Jurisdiction Act, 1940 and the Indian Divorce Act, 1945 are hereby repeated.

NECESSITY OF UNIFORM CIVIL CODE IN INDIA

Introduction :

In India, only Muslim men may practice polygamy, and Hindu sons inherit greater shares of their parents' estates than their sisters do. While one's religion determines which law will apply to him or her regarding marriage, divorce, maintenance, guardianship, adoption, inheritance, and succession, a common thread woven through all of India's religious personal law systems is the patriarchal dominance of men and the unequal treatment of women. Given the seemingly strong protections of gender equality in India's Constitution, however, it is puzzling that the Indian government can uphold facially discriminatory laws against women, especially when such laws affect women's lives so intimately. In the name of protecting the rights of religious communities, Parliament has thus far skirted its responsibilities to some of the most vulnerable individuals within those communities—the women.

The religious personal law systems of India have not helped Indian women, nor have they been effective in protecting the rights of the religious communities in which Indian women live. Rather, the preservation of these separate laws has served to deepen the division between the majority Hindu population and minority religions, particularly Islam. The personal laws have also perpetuated—and arguably enhanced— tensions between these two groups by reinforcing identities that oppose one another.

Hence it is necessary that India must take care to move away from religious personal laws and toward a uniform civil code, as envisioned by Article 44 of the Indian Constitution. At present, the debate over a uniform civil code appears hopelessly divided along both political and religious lines. However, the turmoil is rooted in concerns over the process—and who controls that process—much more so than the concept itself. A uniform civil code constructed by a majority Hindu Parliament will not be accepted as legitimate among minority groups no matter how fairly it may be drafted. The answer, then, lies with promoting a process that brings all concerned voices to the table: men and women of all religious communities must be included. To be successful, a uniform civil code needs to reflect India's diversity as well as its commitment to equality.

Uniform Civil Code:

The word uniform civil code consist three terms ‘uniform’ ,’civil’, ’code’. The term uniform means all people are same in all circumstances ; the term civil derives from the Latin word ‘civil’ means citizen when use as a adjective to the term ‘ law’ meaning the right of citizen ; the word code derived from Latin word ‘ codex’ which means book. So therefore it denotes the meaning that uniformly laws that are applicable to all citizen of India irrespective of their caste, religion, birth, sex, tribe.

Personal laws in India:

India has a verity of family laws. The Christian have their Christian marriage act 1872 the Indian separation act 1869 and the Indian progression act 1925. The Jews have their unmodified standards marriage law and in their progression matter they are administer by progression demonstration of 1925. In the same way the Parsis, Hindu, Muslim has their own marriage and divorce act and their own separate law of inheritance contained in the succession act. They have their separate personal law. Hindu laws have large secularized and modernized by statutory enactment. On the other hand Muslim law is still unmodified and traditional. There is also a law of special Hindu marriage act 1956 which is a secular code of marriage under which two Indian irrespective of their religion may marry with each other but what law should be apply is totally depends upon the religion thus for this matter Muslim law is non-statutory portions and is divided into a number of schools and sub schools. In the same way the Hindu schools are also divided into several sub schools. In present day personal law is thus a mess.

Uniform civil code is the term which is originated from the concept of CIVIL LAW CODE. Which govern the people of different community, religion; regions .which ids basically, based upon right of citizen subject t their personal laws.

The main areas covered by civil code that includes:

- Succession and administration of property
- Marriage, divorce and adoption of child

All these terms are mentioned in the Constitution of India to lay down the administration of Uniform Civil Code as a directive principal but in India it has not been implemented. the secular uniform civil code is opposed by different communities such as Muslims, Christian and many others. Thus there are some communities they are in favor of uniform civil code. Thus in India those who are the opponents of this law are called as "Secularists" and those who are in favor of secular law are called as "communalists".

Practically looking the Uniform civil code is the uniform form of law which replaced the personal law based on the customs of each religious community for which there is a common set of rules governing the citizen. Article 44 of Directive Principal of State Policies in the Indian Constitution ("the state shall Endeavour to secure for citizen a uniform civil code through the territory of India") sets the duty of state to implement all the duties.

Apart from this regarded the issue of secularism in India. The topic became the most controversial topic regarding this issue in the case of SHAH BANO CASE in 1985 from this case the debate raised on the Muslim personal law. Basically the Muslim personal law is based upon the SHARIA LAW. The conflict between the issue of secular and religious authority over the issue of uniform civil code under this case the main issue was Bano seeks maintenance from her husband. He had given divorce to Bano after 40 years of his marriage and he gave divorce by pronouncing "Talaaq" thrice. she was granted ,a inheritance by local court but the decision was challenged in supreme court and according to " maintenance of wives, children , parents" provision under Section 125 of the all Cr.P.C. which applied to all citizen irrespective of their religion from this judgment the uniform civil code was came into effect . The case soon became nationwide political issue. From this case Muslim Women (right to protection on divorce) act 1986 comes under force.

Thus after the issue in many cases such as: State of Bombay v. NarasuAppa Mali wherein while deciding the validity of Hindu bigamous marriage act 1946 the court comes to the conclusion that the framers of the Indian constitution did not wish to challenged the personal laws of a community by fundamental right. Later on in the case of Ahmadabad Women Action Group v. Union of India in this case a writ petition was challenged in the personal Muslim laws

which allows polygamy as offending the article 14 and 15 of Indian constitution but refused as the matter of state policy which is outside the courts domination Kerala high court in P.E. Mathew v. Union of India in this case high court said that Christian personal laws are outside the scope of fundamental rights.

In the case of Sarla Mudgal v. Union of India in this case Supreme Court directed the guidelines of Article 44 of Indian constitution. The question was raised whether a Hindu husband married according to Hindu law and changed his religion according to Islam that person can do second marriage. The court held that a marriage performed according to Hindu law shall be dissolved according to Hindu law under certain grounds specified under the Hindu marriage act 1955. But the conversion of religion in Islam and marrying itself dissolved the Hindu marriage Act and second marriage after converting religion is against the Islamic law under Section 494[5] of the Indian penal code. Supreme court remind to the government of India that the obligation to enact uniform civil code came in July 2003 [6] when a Christian priest go to the doors of court and challenge the validity of constitution of Section 118[7]of the Indian S, 1925uccession Act. The priest from Kerala, John Vallamatton field a writ petition in the Supreme Court in the year of 1997 saying that the section 118 caused discrimination against Christian and it imposed unreasonable restriction on the account of donation of property for the religious purpose. The bench compromising of Justice V.N.Khare, JusticeS.B.Sinha and Justice A.R.Lakshamanan and said that the Section 118 it to be unconstitutional. The Chief Justice Khare stated that: “The Article 44 provides uniformity in state through the territory of India secure the common purpose of uniform civil code. He said that it is a very great matter of regret that the article 44 is not still in the effect. The Parliament is still developing the common civil code in the country”.

After dealing with all these cases the Supreme Court come to a conclusion that Uniform Civil Code should be implemented in India. The Supreme Court asserted that “ a common civil code will help in national integration by removing disparate loyalties of laws which came in the results of conflicting ideologies” but the parliament was not agree with the conclusion of supreme court they thought it never ripe enough to bring a uniform civil code in India . But there is one state which brings all the religious community under the umbrella of a common law that is Uniform Civil Law in the State of Goa.

Secularism v/s Uniform Civil Code

In the spin of controversy we live in a secular state and according to preamble of the Indian constitution state that the India is a “secular democratic republic”. This means that there is no state religion a secular state should not intervene with the customs of others religion and make discrimination against other community people on the grounds of their religion which means there should not any intervention with other community people rights. In the case of S.R.Bommai v. Union of India as per justice Jeevan Reddy it was held that the religion is the matter of individual communities people faith and to follow their own customs a law cannot mixed it with a uniform law and the secular activities can be regulated by them with their own personal law .In India the concept of “positive secularism “. The concept is basically deals with the separation of positive individual spiritualism with individual faith. Article 25 of Indian Constitution guarantee right to freedom of religion and also that every person can follow their own religion and practice their own religion. But this right is always subjected to right of public order, morality, peace and order.

Actually looking the Uniform civil code is not opposed to secularism and against the Freedom of religion guaranteed under Articles 25 and 26 of the Indian Constitution. Article 44 is basically is that the religion, their customs their personal laws can be prevailed. Marriage, succession other matters related to secular nature of state. The purpose of Uniform Civil Code is not to interfere with the customs and their tradition the basic purpose behind is the equality should be given to each and every citizen of India. While explaining the reason why Uniform Civil Code should be imposed in India is that the atmosphere should be created from which all section of society feel secure and sits together and there will be no riots in the community. For this matter the law minister DR. Ambedkar said that "for the unity in the country there should be a codified civil law"