

FAMILY LAW I

COURSE OBJECTIVES:

This course is designed to equip the students of law about the institution of family, types of marriages and the matrimonial remedies inclusive of dissolution of marriages through customary practices as well as dissolution of marriage under personal laws of Parsis, Christians and Muslims and Special Marriages Act. Further, this course enables the students to understand the social evils and their effects on the family institution and update the student about new emerging trends and changing patterns of family in the present scenario of the society. Overall, this course is designed to endow the students with knowledge of both the codified and uncoded portions of Mohammedan Law. The course concerns itself with the sources, schools, institutions, succession, maintenance, the menace of dowry. In addition, the students shall be able to familiarize themselves with the provisions of the Indian Succession Act.

इस पाठ्यक्रम को कानून के छात्रों को परिवार की संस्था, विवाह के प्रकार और परंपरागत प्रथाओं के माध्यम से विवाह के विघटन के साथ-साथ पारसियों, ईसाइयों और मुसलमानों के व्यक्तिगत कानूनों और विशेष विवाह अधिनियम के तहत विवाह के विघटन सहित वैवाहिक उपायों के बारे में तैयार करने के लिए डिज़ाइन किया गया है। इसके अलावा, यह पाठ्यक्रम छात्रों को सामाजिक बुराइयों और पारिवारिक संस्था पर उनके प्रभावों को समझने में सक्षम बनाता है और छात्र को नए उभरते रुझानों और समाज के वर्तमान परिदृश्य में परिवार के बदलते पैटर्न के बारे में अपडेट करता है। कुल मिलाकर, इस पाठ्यक्रम को मुस्लिम कानून के संहिताबद्ध और असंहिताबद्ध दोनों भागों के ज्ञान के साथ छात्रों को संपन्न करने के लिए डिज़ाइन किया गया है। यह पाठ्यक्रम स्रोतों, स्कूलों, संस्थानों, उत्तराधिकार, रखरखाव, दहेज के खतरे से संबंधित है। इसके अलावा, छात्र खुद को भारतीय उत्तराधिकार अधिनियम के प्रावधानों से परिचित कराने में सक्षम होंगे।

COURSE OUTCOMES:

After completing this course, the student will be able to:

1. Recognize the Nature, Scope, Foundation and Sources of various personal laws of Parsis, Christians and Muslims.
2. Familiarize traditional and statutory legal system, which governs personal matters.
3. Understand the subject of family law not merely as a separate system of personal laws based upon religious beliefs, but as one cutting across religious lines, eventually enabling the fulfillment of the Constitutional directive of Uniform Civil Code.

MODULE 1**1.1 Sources of Muslim Law****Shariat Application Act, 1937**

The Muslim Personal Law (Shariat) Act, 1937 is a short statute with five provisions only. With each provision holding its own significance, individual analysis of each of them stands relevant. The scheme of the Act of 1937 is provided hereunder:

1. Section 1: Short title and extent
2. Section 2: Application of Personal Law to Muslims
3. Section 3: Power to make a declaration
4. Section 4: Rule-making power
5. Section 6: Repeals

Application of the Act, 1937

Section 2 of the Muslim Personal Law (Shariat) Act, 1937 talks about the application of Personal Law to Muslims. The provision reads as *“Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, illa, zihar, lian, khula and mubaraat, maintenance, dower, guardianship gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).”* The provision thus covers ten subject matters within its umbrella which are:

1. Intestate succession;(बेवसीयत उत्तराधिकार)
2. Dissolution of marriage that also includes all kinds of divorce as well namely talaq, illa, zihar, lian, khula, and mubarat;
3. Maintenance;
4. Dower;
5. The special property of the females;
6. Marriage;
7. Guardianship;
8. Gift;
9. Trust, and its associated properties; and
10. Wakf.

In order to interpret this provision, two essential phrases present in this Section needs to be highlighted, which are:

1. “Notwithstanding any customs or usage to the contrary”, and
2. “Shall be the Muslim Personal Law (Shariat)”.

These two phrases complement each other, and one loses its meaning in the absence of the other. This is because a harmonious construction between the prevalent custom, and the law of the land have been adopted by this legislation so as to provide necessary importance to both of them. Before delving into the objective of this provision it is necessary to point out the reason behind the existence of such a Section in the Act. As has been discussed previously, the underlying principle of this Act is to eliminate the governing role of religious and customary laws by means of legislative enactments in order to avoid a rise in discriminatory laws. Thus with the introduction of the Muslim Personal Law (Shariat) Act, 1937, such goals have been aimed to be achieved. Section 2 incorporates this reason behind the formulation of the Act thereby mandating the application of the Muslim Personal Law (Shariat). This mandating nature will thus bound the Indian courts to administer only Muslim Law whenever disputes arise in the case of the subject matters provided in this provision. It is to be noted that Section 2 does not talk about adoption, legacies, and wills. This, therefore, does not bound the courts to apply Muslim Law in such cases.

But, this provision comes with its own detriment which is included in the provision itself. Section 2 expressly excludes the domain of agricultural land from its ambit and from the scope of the entire Act thereby reinforcing the inheritance customs that categorically excluded women from being entitled to inherited agricultural land and therefore, women continued to be deprived of their legitimate share on agricultural lands as was provided under the Islamic Law. While the male heirs continued to enjoy their inherited share of agricultural land, the female heirs remained shadowed. The exclusion of agricultural land from the scope of the Act obstructs the Act from achieving its purpose. With the purpose of the Act getting nullified, replacing customs with legislative enactments has no role to play.

Section 3: Power to make a declaration

Section 3 just like Section 2 of the Act categorically excludes females to make a declaration regarding obtaining benefits from agricultural land. The provision reads as,

“(1) Any person who satisfies the prescribed authority

(a) that he is a Muslim, and

(b) that he is competent to contract within the meaning of section 11 of the Indian Contract Act, 1872 (9 of 1872), and

(c) that he is a resident of [the territories to which this Act extends],

may by a declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of [the provisions of this section], and thereafter the provisions of section 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified.

(2) Where the prescribed authority refuses to accept a declaration under sub-section (1), the person desiring to make the same may appeal to such officer as the State Government may, by general or special order, appoint in this behalf, and such officer may, if he is satisfied that the appellant is entitled to make the declaration, order the prescribed authority to accept the same.”

Section 3 of the Act talks about the power to make a declaration. Now, in order to use this power, a person should satisfy three criteria provided by this provision, which are;

1. The person has to be a Muslim;
2. The person is competent (under the meaning of the term provided in Section 11 of the Indian Contract Act, 1872) to enter into a contract; and
3. The person is a resident of India.

The point to be noted in this provision is that all the provided parameters need to be abided by in order to exercise the power vested under Section 3 of the Muslim Personal Law (Shariat) Act, 1937. As we have discussed as to who can avail the power, it is important to understand the consequence that comes with the usage of this power. Section 3 acts as a tool for ensuring mobility of Section 2 of this Act. The Section provides that an individual after abiding by the prerequisites of the provision can declare his desire to acquire the benefit of the provision followed by which Section 2 will be applicable to the declarant of such benefit along with all his minor children and their descendants.

Section 3 also covers a few subjects that Section 2 has not talked about. They include wills, legacies, and adoption. By doing so, the provision provides discretion for the courts to apply Muslim Law in such subjects only if a Muslim declares that he wants to be ruled by the provisions of the Shariat Act, 1937 as he will be for the rest of the ten subjected provided under Section 2 of the Act. Such a declaration should be made in a prescribed form before the prescribed authority and will be governed by the procedure provided under Section 3(2), and Section 4 of the Shariat Act, 1937. As Section 3 provides the power to make a declaration, to a Muslim to be governed by the Muslim Law, in absence of such declaration, the provision provides an implied power to the courts to not be bound by such law while deciding a matter ruled by Section 2, and 3 in dispute.

The rule-making power of the State Governments under the Act of 1937

Section 4 of the Muslim Personal Law (Shariat) Act, 1937 vests the rule-making power in accordance with the provisions and the purpose of the Act on the State governments. The Section reads as,

- “(1) The [State Government] may make rules to carry into effect the purposes of this Act.
 (2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:
 (a) for prescribing the authority before whom and the form in which declarations under this Act shall be made;
 (b) for prescribing the fees to be paid for the filing of declarations and for the attendance at private residences of any person in the discharge of his duties under this Act; and for prescribing the times at which such fees shall be payable and the manner in which they shall be levied.
 (3) Rules made under the provisions of this section shall be published in the Official Gazette and shall thereupon have effect as if enacted in this Act.
 (4) [Every rule made by the State Government under this Act shall be laid, as soon as it is made, before the State Legislature].”*

This provision along with Section 3 of the Act of 1937 governs the procedure for a declaration by a Muslim as provided under Section 3 (1). The prescribing authority and the fees that need to be submitted before such authority for filing of declaration need to be decided by the State governments. It is to be noted that the Act of 1937 is Central legislation and at the time of its promulgation, it could not have been made specifically for the states. Because of this, the Act appears to be flexible enough to incorporate the rule-making power of the state government in accordance with the needs of the Muslims of that state, provided the purpose of the Act should by no way stand defeated.

Repeals under the Muslim Personal Law (Shariat) Act, 1937

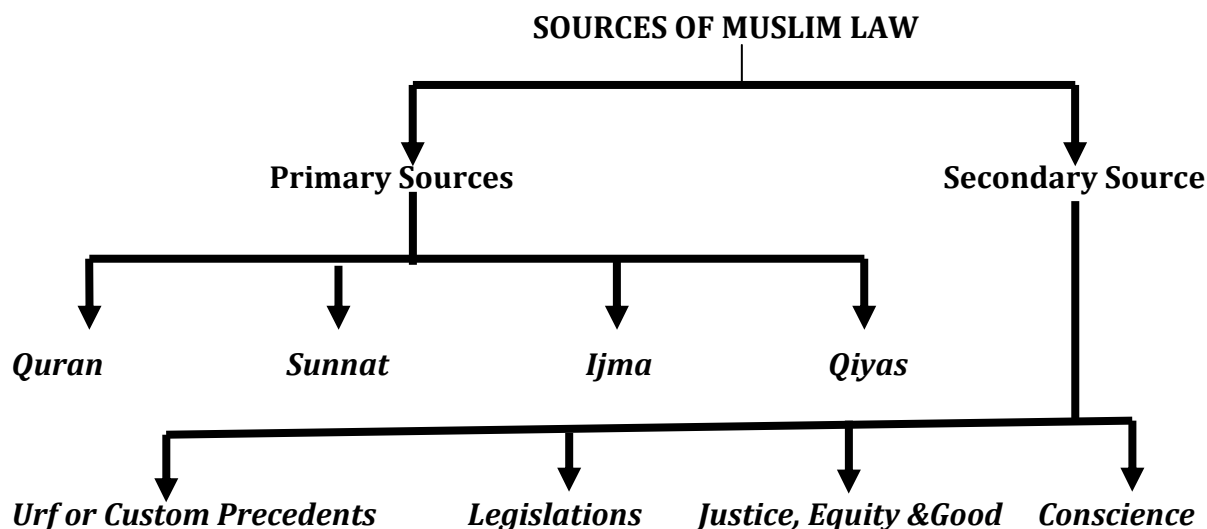
Section 6 of the Shariat Act of 1937 talks about repealing certain provisions of a few statutes which appears to be inconsistent with the provisions of the Shariat Act of 1937. These Acts vested authorities on the courts of India to implement Muslim Law before the Shariat Act of 1937 was promulgated. These Acts were:

1. Section 26 of the Bombay Regulation 4 of 1827;
2. Section 16 of the Madras Civil Courts Act, 1873 (3 of 1873);
3. Section 3 of the Oudh Laws Act, 1876 (18 of 1876);
4. Section 5 of the Punjab Laws Act, 1872 (5 of 1872);
5. Section 5 of the Central Provinces Laws Act, 1875 (20 of 1875); and
6. Section 4 of the Ajmer Laws Regulation, 1877 (Regn. 3 of 1877).

Sources of Mohammedan Law

Islamic jurisprudence draws on a variety of source materials of Islamic law to explain Sharia, meaning the framework of Islamic law. The Quran and Sunnah are the fundamental sources, both of which are uniformly recognized by all Muslims. The Quran is Islam's holy scripture, which Muslims consider to be Allah's direct message. The Sunnah is a collection of the Islamic Prophet Muhammad's religious activities and quotes as recorded by his Followers and Shia Imams. Some schools of law, on the other hand, adopt alternative approaches to determine the validity of a source. The main sources do not address every possible scenario, jurisprudence must rely on sources and genuine texts to determine the appropriate course of action. Secondary sources of Muslim law as per Sunni schools of law are Muslim jurists' customs, judicial decisions, legislation, equity, justice and conscience. The Hanafi school typically employs representational reasoning and logical reasoning, whereas Maliki and Hanbali tend to rely on Hadith. The Quran, Sunnah, consensus, and aql are the four sources used by the Usuli school of Ja'fari jurisprudence among Shia. They focus on aql (intellect) to find broad concepts founded on the Quran and Sunnah and employ usul al-fiqh as a method to understand the Quran and Sunnah in various contexts, while Akhbari Jafaris depend more on Hadith and not follow ijtiḥād. According to Muslim law, there are fewer differences in the actual application of jurisprudence to ceremonial traditions and social interactions between Shia and the four Sunni schools of law, despite crucial differences in jurisprudence foundations.

The personal law of Muslims is based on Islam. Islam had its origin in Arabia and from whence it was transplanted into India. In Arabia, Prophet Hazrat Mohammed, himself an Arab, promulgated Islam and laid down the foundation of Islamic law. The main groundwork of Islamic Legal System was nourished and developed by Arab-jurists, and the real fountainhead of Islamic Jurisprudence is to be found in the pre-Islamic Arabian customs and usages of the 7th century of the Christian era.



Primary sources of Muslim Law

The Muslim law has been derived from various primary sources. These are classified as:

1. Sunna or Ahadis
2. Quran
3. Ijma
4. Qiyas

Quran

It is the original or primary source of Muslim Law. It is the name of the holy book of the Muslims containing the direct revelations from God through Prophet. The direct express or manifest revelations consist of the communications which were made by the angel, Gabriel, under directions from God, to Mohammed, either in the very words of God or by hints and of such knowledge which the Prophet has acquired through the inspiration (Ilham) of God. All the principles, ordinances, teachings and the practices of Islam are drawn from Quran. The contents of Quran were not written during the lifetime of the Prophet, but these were presented during the lifetime of Prophet, in the memories of the companions. There is no systematic arrangement of the verses in the Quran but they are scattered throughout the text. It contains the fundamental principles which regulate the human life. The major portion of the Quran deals with theological and moral reflections. The Quran consists of communications of God; it is believed to be of divine origin having no earthly source. It is the first and the original legislative code of Islam. It is the final and supreme authority.

Sunna (Traditions or Ahadis)

The literal meaning of the term 'Sunna' is 'the trodden path.' It denotes some practice and precedents of the Prophet, whatever the Prophet said or did without reference to God, and is treated as his traditions. It is the second source of Muslim law. Traditions are injunctions of Allah in the words of the prophet. Where the words of Allah could not supply an authority for a given rule of law, Prophet's words were treated as an authority because it is believed that even his sayings derived inspiration from Allah.

According to Muslim law, there are two types of revelations i.e. manifest (Zahir) and internal (Batin). Manifest or express revelations were the very words of Allah and came to the Prophet through the angel Gabriel. Such revelations became part of the Quran. On the other hand, the internal revelations were

those which were the 'Prophet's words' & did not come through Gabriel, but Allah inspired the ideas in his sayings. Such internal revelations formed part of Sunna. Traditions, therefore, differ from Quran in the sense that Quran consists of the very words of God whereas a Sunna is in the language of Prophet.

Sunna or traditions consists of:

- Sunnat-ul-Qual (word spoken)
- Sunnat-ul-Fail (conduct)
- Sunnat-ul-Tahrir (silence)

Ijma (Consensus- सर्वसम्मति)

With the death of the prophet, the original law-making process ended, so the questions, which could not be solved either by the principles of the Quran or the Sunna, were decided by the Jurists with the introduction of the institution of Ijma. Ijma means agreement of the Muslim Jurists of a particular age on a particular question of law, in other words, it is the consensus of Jurist's opinion.

Those persons who had knowledge of law were called Mujtahids (Jurists). When Quran and traditions could not supply any rule of law for a fresh problem, the jurists unanimously gave their common opinion or a unanimous decision and it was termed as Ijma. Not each and every Muslim was competent to participate in the formation of Ijma, but only Mujtahids could take part in it.

There are three kinds of Ijma:

- Ijma of Companions:** The concurrent opinion of the companions of Prophet was considered most authoritative and could not be overruled or modified.
- Ijma of the Jurists:** This was the unanimous decision of the jurists (other than companion).
- Ijma of the people or masses:** It is the opinion of the majority of the Muslims which was accepted as law. But this kind of Ijma has little value.

Once a valid Ijma is constituted, it is regarded equal to Quranic verse i.e. it is equally binding on people. Without Ijma, these rules of Islamic law would have been diffused and incomplete. Its principles cover the vast subject. Ijma authenticated the right interpretation of the Quran and the Sunna.

Qiyas (Analogical deductions - सादृश्य कटौती)

The word Qiyas was derived from term 'Hiaqish' which means 'beat together.' In Arabic Qiyas means 'measurement, accord, and equality.' In other words, it means measuring or comparing a thing to a certain standard, or to 'establish an analogy.' If the matters which have not been covered by Quran, Sunna or Ijma, the law may be deducted from what has been already laid down by these three authorities by the process of analogy (Qiyas).

The Qiyas is a process of deduction, which helps in discovering law and not to establish a new law. Its main function is to extend the law of the text, to cases which do not fall within the purview of the text. For valid Qiyas, the following conditions must be fulfilled:

- The process of the Qiyas can be applied only to those texts which are capable of being extended. The texts should not be confined to a particular state of facts or rules having a specific reference.
- The analogy deduced should not be inconsistent with the dictates of the Quran and authority of Sunna.
- The Qiyas should be applied to discover a point of law and not to determine the meanings of the words used in the text.
- It must not bring a change in the law embodied.

If there is a conflict between two deductions, a jurist is free to accept any one of the deductions from a text. Hence one analogy cannot abrogate the other.

Compared with other sources, Qiyas is of much lesser significance. The reason is that on the analogical deductions, resting as they do, upon the application of human reasons, which is always liable to error.

It may be concluded that the superstructure of Islamic Jurisprudence is founded on Quranic verses and traditional utterance of Prophet, yet other sources have also helped a lot in developing the

sacred law in its present form. It is due to the contribution of all the sources of Islamic law that an orderly and systematic theory of the personal laws of Islam came into existence, which governs the Muslim community.

Secondary sources of Muslim Law

Judicial decision – (Precedent - मिसाल)

Judicial precedent refers to the procedure by which judges follow earlier decisions in cases with relatively similar facts. The idea of judicial precedent is based on the principle of *stare decisis*, or conforming to what has already been declared. In reality, this implies that lower courts must follow the procedural rules established by higher courts in previous decisions. This ensures that the law is satisfactory to both parties. However, it is to be considered that the concept of “precedent” is not covered under Muslim law. Kazis’ judgments were never regarded as precedents under English law. ‘Fatwas,’ which have both moral and legal authority, are the closest approach to this theory in Muslim law. But while a Mufti would declare Fatwa on a scholar, the Kazi was not obligated by it. Several Fatwa compilations exist, the most notable of which is Fatwa-al-alam-giriyya. Many gift and Wakf practices have been altered to safeguard women, and there is a cluster of precedent under Muslim law. Today, the doctrine of *stare decisis* is incorporated into Muslim law.

Custom

Hindus recognized that a custom, if otherwise legitimate, supersedes a provision of sacred law as early as 1868. In the instance of Muslim law, the Privy Council conveyed the same sentiment concerning conversions who prefer to adopt Islam but keep their rules, but the Orthodox refused this viewpoint, and the Shariat Act of 1937 was enacted. Despite the fact that all schools trust in the Four Ancient Sources, they do not reject the concept of Customs. The Prophet also kept existing Arabian customs, as long as they did not contradict Muslim law. Customs are recognised as an addition to Muslim law. Since there was no Islamic law code at the time, the Prophet and his followers had to rely on conventions to resolve some issues. For example, foster mother remuneration, civil wrongs recompense, and so on. According to Muslim jurists, a legitimate Custom must meet four characteristics which are mentioned below:

1. A custom must be repeated regularly, i.e. it must be continuous and noticeable.
2. It should be applicable to everyone and should be rational.
3. It must not contradict any implied text of the Quran or the Sunnah.
4. It does not have to be very old.

Legislation(क़ानून)

Legislation as per Cambridge Dictionary has been defined as “a law or set of laws suggested by a government and made official by a parliament.” The importance of legislation may be seen in the fact that, on the one hand, it establishes rules and procedures through the parliament, while on the other hand, it has state-level authority. Some parts of the legislation were approved by the Hanbali school under the names Nizam (Ordinance/Decree), Farmans, and dastarul amals, but they were not connected to personal laws. The British were never allowed to interfere with personal laws, Muslim law suffered greatly as a result of the lack of effective regulatory frameworks. There were just a few laws in this area, including the Shariat Act of 1937 and the Mussalman Wakf Validating Act of 1913. The Dissolution of Muslim Marriage Act of 1939 was a breakthrough in Muslim law since it granted a Muslim wife the right to a judicial divorce on particular conditions. Following independence, in 1963, a motion to change Muslim personal law was introduced in Parliament, sponsored by progressive Muslims but opposed by the orthodox, resulting in few modifications in this area.

Equity, justice and conscience (समानता, न्याय और विवेक)

One of the origins of Muslim law is the idea of fairness, justice, equity, and excellent conciseness. These Islamic legal doctrines are known as ‘Istihsan’ or ‘Juristic Equity.’ Istihsan means “liberal construction” or “juristic choice,” or what we now refer to as “equity law.” To respond to various

conditions in India, a number of Muslim provinces have been transformed. Although the British originated this notion of equity, it has been adopted by various Muslim law schools. This notion of equity was used in most of the matters handled by British courts under Muslim law.

Precedent (उदाहरण) cases that have given a new dimension to Muslim law

Judges emphasise (ज़ोर देना) the law when they investigate specific cases. These rulings appear to set a precedent for future cases, and the courts will certainly follow the precedents. The rulings are binding on all lower courts and it follows a framework in terms of its application wherein decisions taken by the Supreme Court will by default apply to High Courts and they can't deny rulings cited by the Supreme Court.

Chand Patel v. Bismillah Begum, 2008

In *Chand Patel v. Bismillah Begum* (2008) the following were the issues that court considered adjudicating upon:

1. Whether marriage in Islam with a wife's sister will be considered void?
2. Another issue found was whether the wife will be entitled to maintenance even after marriage with her sister is void or irregular?

Arriving on the fact sheet of the case the appellant married Mushtaq bee who was the elder sister of the respondent. Further, with the consent of his 1st wife (Mushtaq bee); he (the appellant) even decided to marry his wife's sister (Bismillah Begum). In response to this, the respondent stated that a child was born out after they consummated in their marriage. Bismillah Bano claimed that she had been lawfully married to Chand Patel for the past eight years and that a 'Nikahnama' had been performed. She mentioned in her petition that she and her daughter shared a home with Chand Patel's first wife and that the appellant had knowledge about the same and he had raised the daughter. However, after a few years of marriage, her relationship with her husband began to worsen to the point where he began to ignore her and their small daughter. But the appalling argument found was that Chand Patel claimed that the two had never married.

Supreme Court judgment

The Supreme Court ruled that if a Muslim man is married to his wife's sister while still married to his first wife, the marriage will be considered irregular, not unlawful or void. The Supreme Court validated the lower court's verdict, ruling that the illegal marriage would continue to exist and that the Muslim man would be obligated to support his wife until his marriage was pronounced void by a court of competent jurisdiction. Chand Patel was directed by the court to pay maintenance within six months of the date of the judgement, as well as the respondent's legal fees for arguing the case and setting up a landmark judgment.

Shayara Bano v. Union of India, 2017

In *Shayara Bano v. Union of India* (2017), Rizwan Ahmed and Shayara Bano were a married couple and they were living together for 15 years. In 2016, Shayara Bano was divorced through immediate triple talaq (talaq -e biddat) in response to this she filed a writ petition in the Hon'ble Supreme Court of India praying for holding 3 practices talaq-e-biddat, polygamy, nikah-halala as unconstitutional as they infringe Articles 14, 15, 21, 25 of the Constitution. The practice of talaq-e-bidat allows a man to leave his wife by saying 'talaq' three times in one sitting without his wife's agreement. Nikah Halala is a Muslim custom in which a divorced woman who wishes to remarry her spouse must first marry and divorce a second husband before returning to her first husband. Polygamy, on the other hand, is a practice that allows Muslim men to have many wives. On February 16, 2017, the Court requested detailed responses from Shayara Bano, the Union of India, several women's rights organisations, and the All India Muslim Personal Law Board (AIMPLB) on the issues of talaq-e-bidat, nikah-halala, and polygamy. Ms Bano's claim that these practises are unlawful was recognized by the Union of India and women's rights organisations such as Bebaak Collective and Bhartiya Muslim Mahila Andolan (BMMA). The AIMPLB has

maintained that uncodified Muslim personal law is not available for judicial examination under the Constitution and that these are vital Islamic religious traditions safeguarded under Article 25 of the Constitution. The Supreme Court's 5 Judge Bench issued its verdict in the Triple Talaq Case on August 22, 2017, ruling the system unlawful by a 3:2 majority.

The Supreme Court verdict

The aforementioned practice of divorce is arbitrary, in respect that a Muslim husband might break the marital tie unfairly and thoughtlessly without making any effort to communicate to safeguard the marriage. The Supreme Court, in a unanimous decision pronounced on August 22, 2017, declared instant Triple Talaq to be a violation of Article 14 of the Constitution, putting an end to the practice of divorce.

Danial Latifi v. Union of India, 2001

In Danial Latifi v. Union of India (2001), the Supreme Court's decision in Mohd. Ahmed Khan v. Shah Bano Begum appeared to be overruled by the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as MWPRDA, 1986). A Muslim husband was only liable for keeping his divorced wife during the iddat period, according to a prima facie interpretation of the MWPRDA, 1986, and after that term, the responsibility of keeping the lady shifted to her relatives. The issue came to the light when the constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 was questioned on the grounds that the law was discriminatory and violative of Articles 14 and 21 of the Indian Constitution. The fact that Article 14 was being violated because Muslim women were being deprived of the maintenance benefits of Section 125 of Criminal Procedure Code, 1973. Also, it was pointed out that the right to life guaranteed under Article 21 was being violated as the law will leave Muslim women in a state of helplessness.

Judgment in the case

The Supreme Court maintained the validity of the MWPRDA, 1986, based on critical analysis. It was decided that a Muslim husband is responsible for making appropriate and equitable arrangements for his divorced wife's future beyond the iddat period. This approach was founded on the term "provision" in the MWPRDA of 1986, which said that, "*at the time of divorce the Muslim husband is required to contemplate the future needs [of his wife] and make preparatory arrangements in advance for meeting those needs*".

1.2 Schools of Muslim Law

Sunni Schools of Muslim Law - Hanafi School, Maliki School, Shafie School, Hanbali School, Shia Schools of Muslim Law - Zaidya School, Ismailiya School, Ithna Ashari School

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.

Schools under Muslim Law

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
2. Shia Schools

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. Shaffie School

The Shaffie School gets its name on the name of Muhammad bin Idris Shaffie, his period was between 767 AD to 820AD. 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 Shafie School are spread in Egypt, Southern Arabia, South East Asia, Indonesia and Malaysia.

D. Hanbali 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.

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.

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.Zaidy

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:

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.

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.

1.3 Concept of Marriages and Mehr under Muslim Law

India is a secular country. The term 'secular' is interpreted as that there is no religion of the State. It treats all religions equally. The Indian Constitution guarantees that every person has the freedom of conscience and the right to profess, practise, and propagate religion. This leads to the creation of different personal laws with respect to religion. All Muslims are generally governed by Muslim personal law. The Muslim personal law contains different legal provisions regarding marriage, dower, divorce, will, maintenance, etc.

As already stated above, the concept of dower for all Muslims are governed by Muslim personal law. Under Muslim law, dower is known as 'mahr'. Mahr is a sum of money that the husband has to pay to the wife on marrying her. Through this article, we will be understanding the concept of mahr under Muslim law.

Origin of Mahr

In the old pre-Islamic Arabia, the institution of marriage was way different than today it is. At that time, different forms of sexual relationships were prevalent between men and women. The women were usually the victims of abuse. Men used to leave their wives after despoiling them. There was no such proper system of law regarding marriage, thereby men used to refuse to give any monetary help to the wife after leaving them. Shighar form of marriage was observed during those times. In this form of marriage, a man would give his daughter or sister in marriage to another in consideration of the latter

giving his daughter or sister in marriage to the former. In this form of marriage, the wives would not get any dower.

Another form of marriage was Beena marriage. In this form of marriage, the husband visited the wife but did not bring her home, the wife was called Sadiqa and a gift was given to the wife on marriage known as Sadaq. It is believed that in Islam Sadaq was the very first form of dower.

In the Baal marriage, the concept of mahr was introduced. Mahr was a kind of gift or compensation which was given to the parents of the wife in the Baal form of marriage. The mahr usually belonged to the wife's parents or guardians. However, over time, the ancient form of marriage was slowly abolished. Promulgation of Islam gave a new form of nikah to marriage. This form of marriage stated that if a man separates himself from his wife, then he should send her away with generosity, and also so the man cannot take back the goods which were once given to the wife. This custom of marriages in Islam originated the concept of the husband giving payment to the wife on marriage as a means of support in her old age. In Islamic law, Mahr solely belongs to the wife.

Meaning of mahr

In the literal sense, the Arabic term 'mahr' means dower. It is a sum of money that becomes payable by the husband to the wife on marriage. The mahr is executed either by agreement between the parties or by operation of law. Various jurists have tried to define mahr.

According to Wilson, mahr or dower was a form of consideration for the surrender of a person by the wife.

According to Mulla, a dower is either a sum of money or property which the wife is entitled to receive in the consideration of marriage from the husband.

According to Ameer Ali, a dower is a kind of consideration that belongs to the wife. In the case of Abdul Kadir v. Salima, (1886), honourable Justice Mahmood held that dower under Muslim law is a sum of money or property which is promised by the husband to be paid or delivered to the wife in consideration of marriage and even if the dower is not expressly mentioned at the time of marriage, the wife still has the right of dower.

Difference between consideration in contract and consideration in Muslim Law

From the above definitions, we have observed the term 'consideration'. The ambiguity which arises is whether the term 'consideration' is similar to that in contract or is different from it. From various cases, and observations in real life, it has been affirmed that the term 'consideration' is different from that used in the contract. Without consideration, a contract is generally void but if the dower or the consideration is not mentioned during the time of marriage, the marriage does not become void. However, the law requires dower to be paid to the wife on marriage. Under Islamic law, regarding mahr, consideration means an obligation imposed upon the husband by the law as a mark of respect for the wife.

The conflict between the terms 'mahr' and 'dowry'

The literal meaning of the term 'mahr' is dower, however, the two terms have some distinct differences. In Muslim law, the concept of mahr is to ensure women's financial security. However, dowry is a social evil. Dowry is generally asked by the kin of the bridegroom from the bride's family as a gift to the marriage. Under Indian law, dowry has been defined in Section 2 of the Dowry Prohibition Act, 1961. It is thus to be noted that mahr and dowry are two different concepts. One ensures security and the other is a social evil.

Classification of dower (दहेज का वर्गीकरण)

The dower may be classified into:

- Specified dower: In this kind of dower, the amount of dower is stated in the marriage contract. The dower may be settled between the parties either before the marriage or at the time of marriage or after the marriage. If the marriage takes place of a minor or lunatic boy then the

amount of dower can be fixed by the guardian. The husband can settle any amount of dower. However, he cannot settle the amount of dower less than ten Dirhams according to Hanafi law and three Dirhams according to Maliki law. Shia law does not state any minimum amount of dower. In the case of those husbands who are very poor and are not in a position to pay ten Dirhams, then according to the Prophet, they are directed to teach the Quran to the wife instead of the dower. There is no maximum limit on the amount of dower. The specified dower can be classified into:

1. Prompt dower: It is payable immediately after marriage on demand.
2. Deferred dower: It is paid after the dissolution of marriage either by death or divorce.

•**Proper or customary dower:** If a marriage is completed without the amount of dower fixed in the marriage contract or marriage is completed on the condition that the wife should not claim any dower, then the wife is entitled to proper dower. The amount of proper dower is decided by taking into consideration the amount of dower settled upon other female members of the father's family. The proper dower is regulated with reference to the following factors:

1. Personal qualifications of the wife. Like her age, beauty, virtue, fortune, etc.
2. Social position of her father's family.
3. Dower given to her female paternal relations.
4. Economic conditions of husband.
5. Circumstances of time.

Under Sunni law, there is no maximum limit for a proper dower but under Shia law, the proper dower should not exceed 500 Dirhams.

What to do if the amount of dower is intentionally given low and the wife cannot maintain herself

At times, it has been observed that few husbands intentionally give a low amount of dower, even when their economic condition is well. The amount of the dower is observed to be so low. that the woman becomes unable to maintain herself. This problem was eventually making the object of dower futile. To overcome this problem, legislation was made so that a reasonable dower is given. Therefore, the legislature was given full power to maintain the amount of dower providing that the court will not be bound to award the amount of dower according to the marriage deed.

Rights of wife when dower is not paid to her

Every woman under Muslim law has the right to claim a dower on the commission of marriage. Like any other law, if such a right is violated, then the woman has some remedies. Muslim law confers upon a wife or a widow to some rights to compel to get the payment of dower:

Refusal to cohabit (सहवास से इंकार)

If the marriage has not been consummated then the wife has a right to refuse to cohabit with her husband as long as the prompt dower is not paid. If the wife is minor or insane, then the guardian has a right to refuse to send her to her husband's house until the payment of a prompt dower is given. During the period, the wife stays in her guardian's house, the husband is bound to maintain her.

However, if consummation has taken place after marriage, then the wife loses the absolute right to insist on the payment of prompt dower. This is because the husband can file a suit for restitution of conjugal rights. If the wife still refuses to cohabit with her husband, then she is only entitled to a decree conditional payment on dower. In the case of *Rabia Khatoon v. Mukhtar Ahmed*, (1966), it was held that if the suit is brought after sexual intercourse has taken place with her free consent, the proper decree to pass is not a decree of dismissal, but a decree for restitution, conditional on payment of prompt dower. In deferred dower, the payment of dower is a contingent event. Therefore, the question which arises is whether the wife can refuse to the husband is conjugal rights or not. There has been a difference of opinion regarding this. Famous jurist, Abu Yusuf is of the opinion that she can refuse to cohabit if a

deferred dower is not paid. However, famous jurist Imam Mahmood, Shia Law is of the opinion that the wife cannot refuse to cohabit in cases of deferred dower.

Right to dower as a debt (कर्ज के रूप में दहेज का अधिकार)

According to the lordships of Privy Council, it was held that the dower ranks as a debt and the widow is entitled along with other creditors to have it satisfied on the death of the husband, out of his estate. If the husband is alive, then the wife can recover the dower by instituting a suit against him. In cases where the dower debt is remaining unpaid, the widow can enforce her claim for the dower debt by filing a suit against the husband's heirs. However, the heirs are only liable to the extent to which and in proportion to which they inherit the property of the deceased husband.

In the case of Syed David Hussain v Farzand Hussain (1937), it was held that a Shia Muslim stood surety for the payment of the dower by his minor son. After his death, his estate was held liable for the payment of his son's mahr and each heir was made responsible for a portion of the wife's claim in proportion to his share in the estate of the deceased.

Right to retain possession in lieu of unpaid dower (अवैतनिक मेहर के एवज में कब्जा बनाए रखने का अधिकार)

Dower ranks as a debt and the wife is entitled along with the other creditors to have it satisfied on the death of her husband out of his estate. Her right is however no greater than that of any other unsecured creditor except that if she lawfully obtains the position of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom she is entitled to retain such position until it is satisfied. The right to retention does not give her any title to the property. Therefore, she cannot alienate the property.

A widow's right to retain possession of her husband's estate in lieu of a dower is a special purpose. It is by a way of compulsion to obtain speedy payment of the dower which is an unsecured debt.

Effect of apostasy on dower

Apostasy has a huge impact on Muslim personal law. It is believed that the apostasy of man from Islam denotes immediate dissolution of marriage. On the other hand, apostasy by the wife from Islam does not denote immediate dissolution of marriage. As per Section 5 of the Dissolution of Muslim Marriage Act 1939, a married Muslim woman shall have the same rights in the respect of the dower under the dissolution of marriage under this Act. The dissolution of marriage under the Act, even though made after the apostasy of the wife does not take away her right to dower.

Suit for dower and limitation (दहेज और मर्यादा के लिए सूट)

If the dower is not paid to the wife while she is alive, then after her death, her heirs can claim it. The period of limitation as per the Limitation Act, 1963, for a suit to recover prompt dower is three years from the date when the dower is demanded, or refused. In the case of deferred dower, the period of limitation is 3 years, from the date when the marriage is dissolved by death or divorce.

Essential requisites of Valid Muslim Marriage (वैध मुस्लिम विवाह की आवश्यक आवश्यकताएं)

In the landmark case of Abdul Kadir v. Salima And Anr.[i], (J) Mahmood observed nature of Muslim marriage purely as a civil contract rather than a sacrament. Based on his observations, we can conclude that the objective of Muslim marriage is to legalize sexual relationship of male and female and also procreation of child. Thus, a valid contract is necessary for Muslim marriage. The essentials of Muslim marriage are very much similar to that of a Civil Contract.

Essentials of a valid Muslim Marriage

The essentials of a valid Muslim Marriage (*Sahih*) are as follows:

- **Proposal and Acceptance**

In a Muslim Marriage, proposal is referred to as 'ijab' and acceptance of the same as 'qubul'. A proposal should be made by or on behalf of one party and the same should be accepted by the other party. For a

valid Muslim marriage, proposal and acceptance should be carried out at the same meeting. If a proposal is made at one meeting and the acceptance of the proposal is done in the second meeting, it is not considered as valid.

•Competency of Parties

The parties to the contract must be (i) Major, (ii) Of Sound Mind & (iii) Muslims.

Major

For the purpose of Muslim marriage, the age when a person reaches puberty is considered as the age of puberty. According to Hedaya, the age of Puberty for female is 9 years and for male, it is 12 years. The Privy Council in the case of *Muhammad Ibrahim v. Atkia Begum & Anr.*[ii] held that under Muslim law, a girl is considered to have attained the age of puberty if: (a) she has attained the age of 15 Years, or (b) attaining the state of puberty at an earlier age. The same rule is also applicable to a Muslim Boy. Thus, it can also be said that in absence of any contrary, a Muslim is considered to have attained the age of puberty at 15 years. After attaining the age of 15, parties can give their own consent and there is no need of consent of guardians.

If a person is a minor, i.e, not attained the age of puberty, the consent of the guardian is required to make the marriage lawful. The persons recognized as guardian under Muslim law are: (a) Father, (b) Paternal Grandfather, (c) Brother or any other male member of father's family, (d) Mother, (e) Members of Maternal Relation. The right passes from one guardian to other, in absence of the previous one, in order of priority. In absence of any of these guardians, marriage may be contracted by *Qazi* or any other Government Authority.

Soundness of Mind

At the time of marriage, both the parties should be of sound mind. Person of unsound mind has no capacity to enter into a contract and in the eyes of law his consent will be considered as no consent. Unsoundness is of two types: (a) Idiocy: It refers to a complete abnormal state of mind. Person belonging to this category are incompetent to contract, and (b) Lunacy: It refers to a curable mental disease. A lunatic person can enter into a contract in the time interval in which he behaves like sane person.

Muslim

The parties to enter into marriage must be a Muslim irrespective of their sect or sub-sect. A Marriage is considered to be as inter-sect marriage is both the parties are Muslim belonging to different sect but the marriage is valid.

•Free Consent

For a valid marriage free consent of the parties is a must. If the consent is obtained by means of coercion, fraud or mistake of fact, it is considered as invalid and the marriage is considered as void. In the case of *Mohiuddin v. Khatijabibi* [iii], the Court held that a marriage is invalid if it is held without free consent of the parties.

•Dower(दहेज)

It is referred to as '*mahr*'. It refers to the amount of money or other property which a bride groom has to give to bride as a consideration of marriage. Its object is to offer the bride a sense of financial security within and after the termination of marriage. In the case of *Nasra Begum v. Rizwan Ali*[iv], Allahabad High court held that right to *mahr* comes into existence before cohabitation. The Court also concluded that if wife is a minor, her guardians can refuse to send to her husband until payment of dower, and if she is in husband's custody, then she can also be brought back.

•Free From Legal Disability

Under Muslim law, marriage is not permitted under certain circumstances. The restrictions/prohibition can be divided into two parts:

- Absolute Prohibition
- Relative Prohibition
- Miscellaneous Prohibition

Absolute Prohibition

A Muslim marriage cannot take place if the parties are within the within blood relationship or prohibited degree of relationship of each other and the Marriage turns to be void. The absolute prohibited degrees of relationship are as follows:

•Consanguinity(रक्तसंबंध)

It refers to blood relationship in which a man is barred from marrying the following females. They are as follows:

1. His mother or Grand-mother (how high so ever),
2. His daughter or Grand-daughter (how low so ever),
3. His sister (irrespective of full blood/ half blood/ uterine blood),
4. His niece or Great-niece (how low so ever), and
5. His aunt or great aunt, whether paternal or maternal (how high so ever).

A marriage with woman prohibited under consanguinity is void. Also, children born out of that wedlock are considered as illegitimate.

•Affinity(आत्मीयता)

A marriage with certain close relatives is also prohibited in Muslims due to closeness of relationship. The prohibited relationship are as follows:

1. His wife's mother or Grand-mother (how high so ever),
2. His wife's daughter or Grand-daughter (how low so ever),
3. His father's wife or paternal Grand-father's wife (how high so ever), and
4. His son's wife or son's son's wife or daughter's son's wife (how low so ever).

A marriage with woman prohibited under affinity is void.

•Fosterage(पालन पोषण)

It refers to milk relationship. It is a condition when a lady other than the mother of the wife, breastfed/ suckled the child under the age of two years, the lady turns to be foster-mother of the child. A man is restricted from marrying the persons who come under foster relationship. The restrictions are as follows:

1. His foster mother or foster grandmother (how high so ever), and
2. Daughter of foster mother (Foster sister).

Under the Sunni law has a few exceptions with respect to prohibition on ground of fosterage and the following Marriage is considered as valid:

1. Sister's foster mother, or
2. Foster's-sister's mother, or
3. Foster-son's sister, or
4. Foster-brother's sister.

The Shia jurists consider Consanguinity and fosterage at same footing and deny the exception allowed by Sunnis.

Relative Prohibition (सापेक्ष निषेध)

Under Muslim law, certain prohibitions are relative and not absolute. If marriage takes place in violation of such prohibition, it is only irregular and it can't be declared as void. The marriage becomes valid as soon as the irregularities are removed. Relative prohibitions are as follows:

•Unlawful Conjunction(अवैध संधि)

A Muslim man is prohibited to marry two different women if they are related to each other by means of consanguinity, affinity or fosterage as if they would have been of opposite sexes their marriage would have been void (*batil*). After the termination of marriage/ death of his wife, marriage can take place with the other. Under Sunni law, Marriage in violation of unlawful conjunction is irregular (*fasid*) and not void but under Shia law, a marriage violating the rule of unlawful conjunction is void (*batil*).

•Polygamy(बहुविवाह)

Muslim laws allow polygamy but it is restricted to a maximum of four wives. A Muslim man can have four wives at a time, but if he marries the fifth one despite of having four wives, the marriage turns to be irregular and not void. The fifth marriage can be valid after death/ termination of marriage of one of the four wives. However, the Shia law considers marriage with the fifth wife as void. In India, a Muslim marriage can't have a second marriage if his marriage is registered under The Special Marriage Act, 1954.

•Absence of Proper Witness

Contracting of marriage must be done in the presence of proper and competent witnesses. Under the Shia law, presence of witness is not essential and marriage without witnesses is considered as valid. Marriage is contracted by the parties themselves (if major) or by their guardians itself. Under Sunni law, presence of witness is essential else the marriage would be irregular. At least two male or one male and two female witnesses should be present and the witness should be a major, of sound mind and a Muslim.

•Difference of religion

Under the Sunni law, a Muslim male is allowed to marry a female who shows respect for same scriptures, such as Christian, Parsi and Jews, but if he marries with an idol/ fire worshipper, the same is considered as irregular. A Muslim woman is not allowed to marry a non-Muslim man and if it happens, the same is considered as irregular. Under the Shia Law, a marriage with non-Muslim is considered as void. According to Fyzee, such marriage is void, but According to Mulla, such a marriage is irregular.

•Marriage during Iddat

It is referred to as a period of waiting after the death of her husband or after termination of marriage during which she cannot remarry. The purpose of the iddat is to check whether the woman is pregnant or not to clear doubts of paternity of any child born. A divorced woman has to observe for a period of three months whereas a widow observes it for four lunar months and ten days after the death of husband. If the woman is pregnant then it extends up to her delivery. Under Sunni law, marriage during iddat is considered as irregular whereas, under Shia law, it is considered as void.

Miscellaneous Prohibitions

1. Marriage during pilgrimage is considered as void in Shia law.
2. Re-marriage between Divorced Couple: A certain procedure needs to be followed in which a Muslim lady has to perform a valid marriage with another man. Then her husband needs to voluntarily divorce her. Then the lady needs to perform iddat. Now she can marry her previous husband. If this procedure is not followed the marriage is considered as irregular.
3. Polyandry: It refers to a condition in which a woman can have more than one husband. It is not permitted under Muslim law.

•Registration

Registration of Marriage is not necessary according to Muslim Law. However, few states like Assam, Punjab, Bengal, Bihar and Orissa have enacted laws for registration of Muslim Marriage. The registration is not an essential part for a Valid Muslim marriage but it acts as an authentic proof. The apex court in the Case of *Seema v. Ashwani Kumar*[v], held that marriage of Indian citizens irrespective of their religion should be registered in their states where the marriage has been solemnized. Also, in the case of *M. Jainoon v. Amanullah Khan*[vi], Madras High court observed that although registration of Marriage is not necessary, it cannot be said that registration of Marriage is prohibited under Muslim personal Law.

Kinds of Muslim Marriage

The concept of marriage and divorce under Muslim law is developed through ancient perspectives and from a historical point of view among Muslims. The source of development of these are personal laws, which happen to be Quran (holy book of Muslim), Sunna (precedent), Ijma (consensus) and Kiyas (analogical deductions), among these four sources Quran is the primary source. It is considered to be so fundamental and sacred in the Muslim world that it is immutable according to Muslims. Marriage is considered a civil contract under Muslim law, unlike sacrament under Hindu law. It is necessary for the

establishment of a family, which is considered a fundamental entity of society. Under Muslim Law, marriage is only the halal or legal way for the intimate relationship between men and women and legitimacy of children. It is a social necessity that regulates social life through the creation of certain rights and duties which both the partners are required to fulfil.

In Pre-Islamic Arabia condition of women was very pitiable, they were seen as objects, polygamy, buying and selling of women, temporary marriage for the fulfilment of lust, marrying two real sisters simultaneously, freely divorcing wife etc. was prevalent. In short, people were unaccountable towards women. It was only after the emergence of laws/rules made by Prophet Muhammad, in Muslim society status of women became better, but certain patriarchal notions are still prevalent such as polygamy and the notion that men are considered superior to women due to their masculinity and intellectual superiority etc. These thoughts, customs, precedents, Ijtihad (independent individual reasoning based on justice, equity and good conscience) and legislations have shaped the modern Muslim Law of marriage and divorce.

Due to the division of Muslims into various sects and different schools, there are more than one type/form of marriage accepted among Muslims. There are different types of marriages such as Muta marriage, Sahih marriage, Batil marriage. Before entering into the union of marriage there are certain essential conditions that must be fulfilled by both the prospective husband and the prospective wife, such as the age of majority, consent of the parties, Mehr etc. As Muslim marriage is a civil contract by nature, there must be an offer from one party and acceptance from another party. Divorce under Muslim law is divided into different categories such as divorce by husband (Talaq-ul-Sunnat, Talaq-ul-Biddat, Ila, Zihar), divorce by wife (Talaq-e-Tafweez), divorce by mutual consent (khula, mubarat) and divorce by judicial decree under The Muslim Dissolution of Marriage Act, 1939 (lian, fask).

Marriage under Muslim Law

Muslims are broadly divided into two major sects Shias and Sunnis and there are four schools of thought under Muslim law, Hanafi, Hanbali, Maliki, and Shafi. Out of these four, the Hanafi school is dominant in India. Due to these different sects and schools of thought, there are different types of marriages and divorce that are accepted in Muslim society. Different types of marriages are Muta marriage, Sahih (valid) marriage, Batil (void) marriage, Fasid (irregular) marriage.

According to Ameer Ali (political and social reformer and scholar of Islam), marriage is necessary for the protection of society. It is an organisation that protects society from foulness and unchastity. According to Abdur Rahim (Indian jurist), marriage is an institution that partakes in both the nature of devotional acts (ibadat) and dealing among men (Muamalat). Thus, under Muslim law marriage is a solemn pact that gives validity to the intimate relationships between men and women and legitimises children born out of that wedlock.

Nature of marriage

The nature of marriage under Muslim law is the same as a civil contract. It is entered into by both the parties by their free volition. In its formation it also takes the form of contract as there is offer and acceptance between the parties, giving same right to husband and wife. But during the dissolution of marriage, the husband is given more rights than the wife as they are considered superior to women due to the patriarchal notion that men are physically and intellectually superior to women. Though generally marriage under Muslim law is considered a civil contract, some people also treat it as a religious sacrament.

In the case of *Abdul Kadir vs Salima*, it was observed that the character of Muslim marriage is similar to that of a civil contract, as like civil contract marriage under Muslim law requires of offer (Ijab) from one side and acceptance (Qubul) from another side, which must be out of the free will, without any coercion, undue influence and fraud on the part of both the parties. In case of both the parties being minor, they have the right to either set aside or follow the terms of marriage. When they become major, as it is in the case of a contract, unless and until it is opposed to public policy it is right of the parties to enter into antenuptial/prenuptial agreement (शादी से पहले के समझौते), though it is not socially acceptable

there is also a provision for breach of contract of marriage. However, there is a constant debate regarding the nature of marriage, some consider it as purely a civil contract while others consider it as a religious sacrament. Chief Justice Sir Shah Suleman, in the case of *Anis Begum vs Muhammad Istafa*, gave a more balanced view about this unending debate by stating that marriage under Muslim law is both civil contract and religious sacrament.

Essentials of Muslim marriage

Capacity to marry

According to the Koran, a person who is to be married must be of sound mind, attained the age of puberty. In Muslim society age of puberty for a man is considered to be 15 years. The Indian Majority Act 1875 does not apply to Muslims in case of marriage, dower or divorce, but The Prohibition of Child Marriage Act 2006 is secular and it is applicable to all irrespective of religion, thus according to it the age of majority for a girl is 18 years and for a boy is 21 years.

Offer and acceptance

There is an offer (Ijab) from one party and acceptance (qubul) from the other party, the acceptance is subsequent to the terms of the contract and both the offer and the acceptance must happen at one time on the same occasion. If an offer is made at a particular time and it is accepted after some days/months/years, it is not accepted.

Consent of the parties

Both the parties must consent to the terms of the contract in the same sense without any fraud, undue influence, coercion or ill-will.

Mehr

It is a consideration payable to the wife during Muslim marriage, as a mark of respect to her from her husband. Mehr is one of the fundamental criteria for the legitimacy of Muslim marriage.

No legal impediment(कोई कानूनी बाधा नहीं)

For the validity of marriage, there should not be any legal hindrance, some of which are the following:

Absolute impediment(पूर्ण बाधा)

It renders marriage null and void.

Consanguinity (रक्तसंबंध)

Prohibition to marry some of the blood relations, such as a male Muslim cannot marry his mother, grandmother, daughter, granddaughter, niece, aunt or great-aunt (mother and father side both) and sisters full, consanguine or uterine.

Affinity(आत्मीयता)

It prevents a man from marrying all relations of the woman with whom he married, such as once wife's mother, grandmother, grandmother's mother, etc.

Fosterage(पालन पोषण)

It prevents relationships with relations of a foster mother, such as foster grandmother, foster mother's daughter etc.

Relative impediments(अवरोध)

These conditions render the marriage irregular; if irregularities are removed then the marriage becomes valid.

Unlawful conjugation(विकार)

A Muslim male cannot marry women who are related to each other by consanguinity, affinity or fosterage, had they been the opposite gender it would have been unlawful marriage. If the first wife dies, marriage with her ends, then he can marry another. In Sunni Law, unlawful conjugation is merely irregular but under Sharia Law it is void.

Marriage with women undergoing Idda/Iddat

Idda/Iddat is a period observed by women after the death of her husband or divorce, to remove the confusion of paternity in case she is pregnant. The time of observance of Idda/Iddat depends on the manner in which marriage is dissolved. If the marriage is dissolved by divorce a menstruating woman is required to observe Idda/Iddat for a period of three menstruation courses, while a non-menstruating woman is required to observe Idda/Iddat for a period of three lunar months. If a woman is pregnant then the period of Idda/Iddat continues till the delivery of the baby. In case of dissolution of marriage due to the husband's death, a woman is required to observe Idda/Iddat for four lunar months and ten days. If a woman is pregnant at the time of her husband's death then the period of Idda/Iddat is either four lunar months and ten days or until delivery, whichever is earlier. Under Shia Law marrying a woman during the period of Idda/Iddat is void.

Marriage in violation of the doctrine of equality

It is a belief in Muslim society that a man should marry a woman of equal rank, for example, a high ranked marry a high-rank woman. There are several conditions of equality under different sects and schools of Muslim law. Though marriage is not invalid on account of violation of the doctrine of equality, it is merely an irregular marriage.

Polygamy(बहुविवाह)

Polygamy is allowed in Muslim law, but it is restricted to marrying four wives. Thus, one marries a fifth woman while already having four wives, the marriage will be considered irregular and not void.

Marriage with Non-Muslim

Muslim women cannot marry non-Muslim (kitabiyah), but under Sunni law, a Muslim man is allowed to marry a Christian or Jew. However, under Shia Law marriage with a non-Muslim is void.

	Marriage with Non-Muslim	Shia Law	Sunni Law
Woman	Not valid	Void	Irregular
Man	Not valid	Void	Irregular

Types of marriages

The validity of a marriage depends on the conclusion of the marriage contract, no writing is necessary while making a contract, it can be oral or written. The different types of marriages are following:

Temporary marriage (Muta marriage)

This type of marriage is practised among Ithna Ashari of the Shia sect, it is also known as 'pleasure marriage', while all other Muslim sects discard this type of marriage. Ithna male can marry any number of wives, who must be Muslim, Jewish or a fire worshipper but Ithna female is restricted to marry only Muslims. At the time of entering into the contract, all the terms of the marriage must be mentioned and any term entered afterwards is not valid.

Characteristics of muta marriage

- There must be a contract.
- There must be an offer and acceptance between the parties.
- Dower must be specified.

- Duration of marriage must be specified, hours/days/weeks/months/years, if the term is unspecified union is stipulated to be permanent.
- Parties do not have the right to mutual inheritance.
- Unless specified in the marriage contract, the wife is not liable for maintenance.
- If marriage is consummated, the wife is entitled to full dower, if it is not consummated, she is entitled to half dower.
- In case of the consummation of marriage, the wife is required to observe Idda/Iddat.
- Even without the permission of the wife, the husband has the right to refuse procreation.
- Offsprings have the right to inherit the property of both the parents and hence, have the status of legitimate children.
- Unless extended, Muta marriage ends with the expiry of the term of marriage mentioned in the contract.

Permanent marriages

The different aspects of permanent marriages are following:

Sahih (valid) marriage

A marriage between two parties, where all the necessary legal formalities are fulfilled is called Sahih (valid) marriage. This type of marriage is accepted by both Shia and Sunni sects.

Characteristics of Sahih (valid) marriage

- The status of husband and wife is recorded at the parties.
- There exists a mutual right of inheritance between the parties.
- Due to any reason such as death, divorce etc., if marriage is dissolved, then the husband is barred from marrying her wife's sister.
- It confers upon children borne out of this wedlock, a legitimate status.
- In addition to the above-mentioned terms and conditions, any terms and obligations can be added to the marriage contract, which must not be opposed to public policy in Muslim society.

Batil (void) marriage

When there is a violation of absolute or relative impediments(अवरोध) while performing the marriage, it is still called Batil (void) marriage. Though it is still called marriage, as both the parties have performed the necessary formalities of marriage. This type of marriage is void because the parties totally lack the capacity to marry each other, and there are not any legal provisions described in Muslim Law through which their marriage could become valid. This type of marriage is recognised in both Shia and Sunni sects.

Characteristics of Batil (void) marriage

- It is not a marriage as no legal rights and obligations occur from it.
- The status of husband and wife is not confirmed by the parties.
- Children born out of such marriage are illegitimate.
- Both the parties are free to enter into another marriage without committing the offence of polygamy and bigamy.

Fasid (irregular) marriage

Marriage performed in violation of relative impediment is called Fasid (irregular) marriage. It is neither a valid nor void marriage, but it can be validated by removing the relative impediment (irregularity). This type of marriage is also accepted by both the Shia and Sunni sects, except the Itna Asari school of the Shia sect.

Characteristics of Fasid (irregular) marriage

- Until and unless terminated by law it continues to exist.
- Both wife and children and liable to be maintained.
- The marriage becomes effective after confirmation.
- Both the husband and the wife have the right to terminate the marriage at any time.

- Wife is required to observe Idda/Iddat, in the course of death of husband or divorce with him.
- Children born out of this wedlock are fully legitimate and have the right of inheritance.
- Husband and wife do not have the right of mutual inheritance.

Doctrine of Puberty (Option of Puberty) Khyar-ul-Bulugh

According to Mohammedan Law, marriage (nikkah) is a civil contract, the object whereof is to legalise cohabitation and the procreation of children. The institution of marriage is recognised in Islam as the basis of society. It serves the nature of both- a contract and a sacred covenant. The sermons delivered by the Prophet are to this day, repeated (with few variations) in various Muslim marriages, because of the reason of it containing practical advice and many noble sentiments.

As observed correctly by Sir Muhammad Sulaiman, C.J. in *Anis Begum v. Muhammad Istafa* that it may not be out of place to mention that a marriage is not regarded as a mere civil contract but also a sacrament. Unlike other religions, in order to constitute a valid marriage, no formality is desired, nor is there a necessity of a religious ceremony. The mere presence of the basic essence of the contract is sufficient to constitute a valid marriage.

Option of puberty(तरुणाई):

A woman married under Muslim Law is entitled to obtain a decree for dissolution of her marriage if she has been married before she attained the age of 15 by her father or any other legal guardian.

Khyar-ul-Bulugh

A minor cannot legally enter into a marriage contract nor is the contract of marriage entered into by a guardian on his or her behalf, always binding on the minor. The minor on attaining puberty may ratify or revoke such a contract if he or she chooses. This right is called Khayar-ul-Bulugh (the option of puberty). This right is one of the plethora of safeguards which the Islamic Law provides and it pertains against an undesirable marriage. The right to repudiate a marriage by a woman flows from the Hadith and it comes to their rescue if such marriage had been forcefully imposed upon them by the assumption of their mental and physical incapacity to exercise her independent discretion in her marriage.

The Background

Ibn Abbas reported that a virgin came to the Prophet of Allah and narrated that her father had given her in marriage to a person whom she disliked. The Prophet gave her an option. Aisha reported that a girl came and stated that her father had given her in marriage to his nephew and she disliked him. On hearing the discourse, he at once sent a 108 message for the father of the girl and enquired from him whether the facts stated were true, after which the option was left in the hands of the girl whether to stay in such marriage or have it repudiated.

Ibn Umar says-

"Uthman bin Mazum left behind a young daughter. My uncle Qudamah, married her to me, and did not even consult her when the girl came to know of this, she disliked this marriage and wished to marry Mughirah bint Shubah. So she was married to Mughirah."

All these Ahadith provides a freedom to a Muslim girl to repudiate or ratify her marriage contract on attaining the appropriate age. It makes her the sole negotiator of the contract of her marriage. The entire position of marriage is contingent upon her decision when she attains maturity. Under Hanbali Law position is the same as in the Maliki Law and in Shia law, it is the same as in Hanafi Law.

Positions Held By Varied Authors

While Imam Abu Hanifa held the view that such an option must be exercised on an immediate attainment of puberty, other authorities limit its application against unreasonable delays after attaining puberty. The rule basically pertains to a female unaware of her marriage by virtue of her minority. It

provides her an option to reconsider her position in the marriage, when she is fully aware of it and its repercussions. Hence, she has the right to repudiate the marriage and she can exercise that right within a reasonable time.

The option is lost if the wife, after she attains puberty permits the marriage to be consummated but mere consummation is not sufficient unless it happens with the wife's consent. The Qazi's order for the dissolution of marriage is of *prima facie* importance for the dissolution of marriage, while exercising the option of puberty. This is in itself a procedural safeguard giving rise to a plethora of rights and duties flowing from the cancellation of marriage.

Likewise, Qazi's order cannot be passed when the husband is not represented. The dissolution of marriage is incumbent upon the order made by the Qazi. The standard age for attainment of Puberty is presumed to be on completion of fifteen years, in absence of plausible evidence stating otherwise. But, the Mohammedan Law vehemently provides that the guardian has the authority to be a part of the contract of marriage on behalf of a minor boy or girl.

The following have a right to contract the minor's marriage successively. They are:

- Father.
- Paternal grandfather.
- Brother and other male members on the father's side in the order of inheritance.
- In the absence of paternal relations, the right to contract marriage falls upon the mother, maternal uncle or aunt and other maternal relations within the prohibited degrees.
- In default of the mankind kindred, the right to contract marriage devolves upon the ruling authority.

The Dissolution of Muslim Marriages Act, 1939 has removed all restrictions on the exercise of the option of puberty in the case of a minor girl whose marriage has been arranged by her father or grandfather. According to Section 2 (vii) of the Act, the wife can claim dissolution of her marriage if she is able to prove one of the following facts:

- The marriage hasn't been consummated.
- The marriage occurred before the woman attained 15 years.
- That the repudiation of the marriage had been done by her before attaining 18 years.

The right to exercise the option of puberty is contingent upon the facts and circumstances of each and every case. In the modern legal scenario, the Court decree in rendering such marriage invalid is necessary.

Prevalence of Puberty in the Indian Judicial Decisions

In the Indian judgment of ***Musammat Chirag Bibi v. Ghulam Sarwar***, the plaintiff sued and plead for her marriage to be called null and void because of the fact that such marriage was contracted by her step-grandmother, who according to Islamic law couldn't act as her guardian during the lifetime of her father and hence she wanted to exercise the Khayar-ul-Bulugh. The Lahore Court held that the marriage contract was affected by the step-grandmother but, since the father was a party to such marriage, it couldn't be repudiated.

Secondly, in the case of ***Mrs. Tahra Begum v. State of Delhi and ors*** the Delhi High Court held that a Muslim girl could marry as per her choice at the age of 15 years if she had attained puberty and held that the marriage of the minor girl was valid and that she could stay in her matrimonial house.

The judgment of the court states the following :

"This court notes that according to Mohammedan Law, a girl can marry without the consent of her parents once she attains the age of puberty and she has the right to reside with her husband even if she is below the age of 18".

Citing various Supreme Court judgments on rights of Muslim minor girl, the court held that it is clear, that a Muslim girl who has attained puberty can marry and such a marriage wouldn't be a void marriage. However the marriage will be voidable at her option when she turns a major.

Analysis and Conclusion

The option of puberty is one very important aspect in Muslim marriage. In India, the age of puberty is considered to be 15 years in case of males and 13-14 years in case of females. The Privy Council has held the age of a pubescent *Shia* girl to be 9 years. This option of rejecting the marriage performed at a minor age should be upheld as there was no consent when such marriage occurred. Hence it is pertinent to hold that if the male or female refuses to accept the marital contract after attaining the age of puberty, it is considered that the marriage never took place.

Concept of 'Halala Marriage'

Understanding Nikah halala

In Islam, the word Nikah refers to "marriage" and halala refers to something which can be considered "lawful". According to the writings in Quran, a divorced woman in order to remarry her husband has to become *halal* (lawful) by marrying another man, consummate the marriage and then get divorced again. After her second divorce, she has to undergo the period of 'iddat' and only after this it becomes lawful for her to remarry her husband again.

This is an age-old tradition practiced in Islam which empowers a Muslim man to divorce his wife by revocable talaq and remarry the same woman twice. After he divorces his wife for two times she is considered *haram* (unlawful) and in order for the wife to be lawful again, she has to marry another man and have sexual intercourse with him. After ending the marriage which can be through divorce or the death of the husband she becomes lawful and can remarry her first husband.

Legal provisions of Nikah halala in Quran

In the second chapter of the Qur'an, Allah says the following

"Divorce is twice. Then, either keep [her] in an acceptable manner or release [her] with good treatment. And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep [within] the limits of Allah. But if you fear that they will not keep [within] the limits of Allah, then there is no blame upon either of them concerning that by which she ransoms herself. These are the limits of Allah, so do not transgress them. And whoever transgresses the limits of Allah – it is those who are the wrongdoers." Qur'an (2.229)

Allah then says in the Qur'an

"And if he has divorced her [for the third time], then she is not lawful to him afterward until [after] she marries a husband other than him. And if the latter husband divorces her [or dies], there is no blame upon the woman and her former husband for returning to each other if they think that they can keep [within] the limits of Allah. These are the limits of Allah, which He makes clear to a people who know." Qur'an (2.230)

It is believed that this provision was added by the prophet himself to prohibit the barbaric practice of a Muslim man torturing his wife by divorcing and remarrying his wife for many times as he wishes. Dr. Furqan Ahmad, a Research Associate at the Indian Law Institute wrote a detailed account of this in Understanding the Islamic Law of Divorce which said that the prophet by the rule of irrevocability had conveyed that if the husband wishes to take back his wife he would do so but if he doesn't then the divorce is final after the third pronouncement. The third pronouncement is laid down as a final bar after two reconciliation.

Nikah halala and Rape

Many incidents have been reported where Indian Muslim women are openly exploited in the name of Nikah halala. One such incident was when in October 2016, a Muslim woman had claimed that her husband's friend had raped her. Her husband had lost her in a bet during gambling and was forced to divorce her. As after the divorce she was considered to be forbidden, her husband's friend offered to marry her and have sexual intercourse with her in order for her to be lawful again and remarry her husband.

Apart from these incidents several websites and social media pages have emerged which offer services to divorced women to be able to marry their husbands again. For example, there was a twitter page name *halala Nikah* which consisted of men offering services of marrying and sleeping with a divorced woman in exchange for a fee. Women who take up these services offered by these websites are exploited and blackmailed.

In a sting operation done by a newspaper agency, it was found out that maulvis (religious scholars) are offering themselves for one night stands to divorced women for them to restore their marriage with their husbands. They charge between Rs. 20,000 and Rs. 1.5 lakh to participate in the practice of Nikah halala. They offer an entire package in which they promise to marry, sleep and then divorce the women the next day. Women fall prey easily to these services as they think it is their only option in order to save their marriage.

In 2016, a BBC reporter went undercover looking for halala services through Facebook by claiming to be a divorced Muslim woman. She was asked to pay £2,500 by a man to marry and sleep with her.

It is incidents like these when women are downgraded as mere objects with no rights and voice of their own and men rape and exploit them claiming it right in the name of religion.

Taking a stand against the practices of Nikah halala, the *All India Muslim Personal Law Board (AIMPLB)* said that the people misusing Nikah halala as an excuse for rape will be punished under the rape charges. They were referring to the recent case in UP where a woman was forced to consummate her marriage with her father in law, mahali said it is illegal to marry the father in law under the Islamic rules.

Legality of Nikah halala in India

In India, personal laws have dominated for a long period of time and continue to do so. While the centre is keen on eradicating such practices which deprive citizens of their fundamental rights, these practices are being followed by people in the name of religion.

Nikah halala is followed by a small Muslim community as they believe that the personal laws pertaining to marriage and divorces is deeply anchored in their religious texts and no law of the country can trump that. Triple talaq (where a man can divorce his wife by saying talaq thrice) one of such personal laws is the perfect example of a grave and antagonistic issues in our country. However, muta (conditional marriage) is considered a sin in Islam and people practicing it are considered to be sinners under the sharia law.

Defending their disdainful religious views the *All India Muslim Personal Law Board (AIMPLB)* has said that any aberration from the Quranic injunction is considered to be going against the almighty himself. The triple talaq was declared unconstitutional last year and the bill to impose a penal provision is passed in the Lok Sabha. When the issues were raised to impose a law prohibiting polygamy and Nikah halala as well, the apex court said to consider these issues separately and is bound to hear petitions against it.

The former union minister Arif Mohammad Khan, whose advice on triple talaq was sought last year by the government said that Nikah halala is not a relevant issue. According to him Nikah halala in its odious forms practiced in the cases of triple talaq where the husband would give talaq in a fit of rage and then regret his decision. Then the religious scholars would tell him that he can only marry her if she marries someone else and consummates the marriage. He said that if practiced in the original form it is actually empowering for a woman. He had quit the Rajiv Gandhi led government after it had brought a law to overturn the Shah Bano judgment.

Legal validity of Nikah halala today

The Bhartiya Janata Party (BJP) led central government has taken a stand against the practice of polygamy, triple talaq and Nikah halala which are widely practiced across the country under the Muslim personal law. While triple talaq was declared unconstitutional last year and a bill of making the practice of triple talaq as a penal provision has been passed in the Lok sabha. While it is yet to see the light of the

day as it is pending for the approval of Rajya Sabha. The Supreme Court said to hear the petition against the other two separately. Without getting into the accounts of the religious freedom the government plans to take stand on the basis of the gender equality with citing examples of our neighbouring countries which are Pakistan and Bangladesh which have shunned these practices.

It is believed that the *All India Muslim Personal Law Board (AIMPLB)* is said to take strong opposition of the prohibition of Nikah halala and polygamy as they believe that any variation from Quran is the disrespect of the prophet himself. They also believe that all of this is just a political ploy by the government. It is believed that they will agree to codification to the personal laws and it will pave a way for the implementation of the uniform civil code in the country.

In modern India, these laws are misinterpreted and misused to a very large extent. These personal laws are crude and deprive the citizens the basic fundamental rights which are guaranteed by our constitution. These laws have no place in modern India and should be abolished in order to make a way of a country where the citizens have equal rights not just in theory.

Concept of Mehr and its Classification

Dower (Mahr)

Origin

In old pre- Islamic Arabia, institution of marriage was not developed and many sexual relationships between men and women had no name. Men after ruining their wives used to throw them out leaving no means to her for the continuation of her dignified life. In ancient customs, the concept of providing any sum to wife after she was turned out by the husband was treated as disregarded and there was no proper law to provide financial or moral help to those wives.

In that period, there was a concept of SHIGHAR marriage in which a man gives his sister or daughter to latter as consideration of marriage and in return the latter gives his sister or daughter to former in marriage. Therefore, none of the wives gets any dower. False accusation of unchastity were used at times to disinherit the right of wife of her dower.

There was a form of marriage called Beena marriage in which husband used to visit his wife but he did not bring her to her matrimonial home, in which the wife was called Sadiqa (female friend) and the gift which was given to the wife was called Sadaq. In Islam Sadaq simply means dower and it is synonymous with Mahr.

The distinction between Sadaq and Mahr was Sadaq was a gift given to the wife in Beena form of marriage and Mahr was a gift or compensation given to the parents of wife in the Baal form of marriage. A new form of marriage Nikah which was mentioned in Quran dissolved the ancient customs and objected the unjust acts towards fair sex.

Definition

Mahr or dower is a sum of money which becomes payable by the husband to his wife on marriage, either by agreement between the parties or by operation of law. Mahr can either be prompt (Muajjal), or deferred (Muwajjal).

According to Wilson, Dower is a consideration for the surrender of person by the wife. According to Ameer Ali, Dower is a consideration which belongs absolutely to the wife.

According to Mulla, Dower is a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage. The word consideration which is used under this definition is not used with the same meaning as used under the Indian Contract Act. Payment of Mahr is an obligation on the part of husband as a mark of respect to his wife. There was an argument that marriage is a civil contract and dower is the consideration for the contract of marriage.

Therefore, in the case *Abdul Kadir v. Salima*, Justice Mahmood stated that under Muslim Law Dower is a sum of money or other property promised by the husband to be paid to the wife in the consideration of marriage and if the amount of money or other property is not fixed in the marriage ceremony then also the wife has right to demand dower. But the above opinion was considered

inaccurate, because even if the payment of dower is not specified during or before the marriage ceremony that does not make the marriage void.

After many arguments Abdul Rahim correctly observed that Dower is an obligation made on the part of husband as a mark of respect toward his wife and is not a consideration for marriage and it does not affect the validity of marriage.

Nature of Dower

The concept of Mahr was introduced by the Prophet Mohammad and he made it obligatory to husband to pay Dower to his wife in every marriage. Dower is similar to the *donatio propter nuptias* in Roman Law. But in Roman Law it was voluntary and in Muslim Law it is obligatory in nature.

The nature of dower can be defined as follows:

1. Contract of dower and contract of sales is frequently compared and wife is considered as property and mahr as her price.
2. In the case *Abdul Kadir v. Salima*, Justice Mahmood compared marriage with contract for sales and dower as the consideration for such contract and said, Dower may be regarded as consideration for connubial intercourse by way of analogy to the contract for sale. The right to resist her husband so long as the Dower remains unpaid is analogy to the lien of a vendor upon the sold goods while they remain in his possession and so long as the price or any part of it is unpaid and her surrender to husband resembles the delivery of the goods to the vendee

According to some well-known authorities Dower is regarded as a consideration for conjugal intercourse. In the case, *Smt. Nasra Begum v. Rizwan Ali*, Allahabad High Court held that right to claim prompt dower proceeds cohabitation.

Dower is an essential incident and fundamental feature of marriage and even though payment of dower is not fixed during or before marriage wife is still entitled to some dower from her husband.

In the case **Hamira Bibi v. Zubaida Bibi**, Judicial Committee held that Dower is an essential incident under the Muslim Law the status of marriage, to such an extent this is so that when it is unspecified at the time the marriage is contracted, the law declares that it must be adjudged on definite principles. **As Dower is regarded as consideration for marriage, therefore in theory it becomes payable before the consummation of marriage but the law divides it into two parts:**

- i. Prompt dower, which becomes payable before the wife starts living in her matrimonial house.
- ii. Deferred dower, which becomes payable when demanded by the wife dissolution of marriage either by death of any of the parties or on divorce. But after the death of the husband dower is considered as a debt and the widow is entitled for that debt along with other creditors of her deceased husband, which is to be satisfied on his death from his estate.

If the property of the deceased husband is under the possession of the widow, she is entitled to retain the possession until the amount of dower is satisfied from that property and heirs can recover the property after the amount of dower is satisfied by the widow.

Importance of Dower

According to Fatwa-i-Quazi Khan:

Mahr is so necessary to marriage that if it were not mentioned at the time of the marriage, or in the contract, the law will presume it by virtue of the contract itself.

Dower is so essential under the Muslim Law of marriage that even if there is an agreement made by the wife before marriage that she will revoke her right of dower and will not claim for dower in future

or she agrees to marry without any dower, that agreement will be invalid according to law. This is done to protect the wife from the power of husband to give divorce and to prevent its misuse. Under Muslim Law, husband can give divorce to his wife as his will so the object of dower is to prevent the misuse of such power and also to prevent polygamy.

Right to Make A Legislation In Respect of Reasonable Dower

According to Muslim Law, the wife can claim for dower on the dissolution of her marriage and the amount can be very high or very low. In many cases it was found that the husband was having sufficient income but the amount of dower was very less that it was impossible for the wife to maintain herself from such amount, therefore, Legislature was given full power to make laws and the Courts will not be bound to award the amount of dower which was mentioned in the marriage deed.

Section 5 of the Oudh Laws Act, 1876 provided that Court will award the amount of dower which is reasonable according to the income of husband and iddat of the wife and not according to the amount mentioned in the marriage deed.

Object of Dower

The object of Dower are:

- i. to enforce an obligation on husband as a mark of respect towards his wife,
- ii. to place a check on the misuse of power to give divorce by the husband,
- iii. to provide for her livelihood on the dissolution of her marriage, so that she can lead her dignified life after the death of her husband or divorce.

Increase or Decrease of Dower

Husband can increase the amount of dower at any time and also the wife can remit the dower wholly or partially but it should be done by her free consent. A Muslim girl who has attained puberty can relinquish her dower, it is not mandatory that she has attained majority (which is 18 years according to Indian Majority Act) or not. The remission of Mahr by wife is called Hibe-e-Mahr.

In any case after the death of husband, wife suffers mental distress, then remission of dower at that condition will be considered against her free consent and will not be binding on her.

In Karachis case, it was held that in certain circumstances remission of dower will not be binding on her, for instance husband shows indifference towards his wife and he makes it obvious that the only way to resolve those indifference is when she remit the dower, and makes a document for the same, then it will be against her free consent and also against justice and equity.

Classification of Dower

Dower can be classified into two:

- i. Specified Dower (Mahr-i-Musamma)- This type of Dower is further divided into two:
 - Prompt Dower
 - Deferred Dower
- ii. Customary (Proper) Dower (Mahr-i-Misl).

i.Specified Dower

When the amount of dower is specified in the marriage contract, then that dower is known as Specified Dower. The amount of dower may be settled before or during, even after the marriage ceremony. If the marriage is contracted by the guardian due to minority or lunacy of husband, then guardians can fix the amount of dower and the amount fixed by the guardian is binding in nature on boy, after attaining puberty he cannot take plea that he was not a part of the contract when it was made and

even after the marriage of minor or lunatic boy guardians can fix the amount of dower if the boy is still minor or lunatic.

Husband can fix any amount of dower as per his will even if it doesn't leave anything for the heirs after the payment of dower but according to Hanafi School the amount of dower in no case should be less than 10 dirhams and 3 dirhams according to Maliki School. In Shia Law there is no minimum amount fixed for the amount of dower.

But if there are any Muslim husbands who are unable to give 10 dirhams to their wives due to poverty then in such cases Prophet Mohammad has directed them to teach Quran to their wives in exchange for the payment of dower. At present there is no maximum amount of dower and minimum amount is no longer in practice as it is very low according to the present situation.

Specified Dower if further classified into:

a. Prompt Dower (Muajjal Mahr)

Prompt dower becomes payable immediately after the marriage ceremony. According to Ameer Ali, if the payment of prompt dower is not made by the husband, then wife can refuse to enter into the conjugal domicile until the amount of prompt dower is paid. Following points of Prompt Dower are:

- i. Prompt Dower becomes payable immediately during or after the marriage ceremony and it must be paid on demand, unless the other parties have agreed for the delay. If the dower is not paid then wife can refuse to live with her husband until the amount is paid and in case the wife is minor then her parents can refuse to send her to her husband's house and husband has to give maintenance to her wife even if she is not living with him.
- ii. If the marriage has been consummated that does not convert the prompt dower into deferred dower. After consummation, wife cannot refuse to live with her husband on the ground of non-payment of dower, but she can sue her husband for the payment of dower. And if the wife refuses to live with her husband after consummation due to non-payment of dower, then Court can pass the decree of restitution of conjugal Rights on the condition of payment of dower by husband.
- iii. Husband can only file petition for the restitution of conjugal Rights if the amount of dower is not paid when the marriage has been consummated.
- iv. Prompt Dower should be paid on demand, the limitation period of filing the suit for non-payment of dower is three years. The time would begin from the date when the demand was made and was refused by the husband during the subsistence of marriage. If the wife does not make any demand, then the limitation period will begin from the date of dissolution of marriage either by death or divorce.

b. Deferred Dower (muwajjal Mahr)

Deferred Dower becomes payable after the dissolution of marriage either by death or divorce. Following points of Deferred Dower:

- i. Deferred Dower is generally paid after the dissolution of marriage but any agreement in which it is mentioned that deferred dower will be paid before the dissolution marriage, then that kind of agreement will be binding and will not be considered as void.
- ii. Wife cannot claim for the payment of deferred dower during the lifetime or during the subsistence of marriage but husband can treat it as prompt dower and can pay or transfer property, and that payment will be valid and will not be considered as fraudulent preference unless there is actual insolvency of husband involved.

- iii. In case of death of husband, widow can waive off her right to claim for the payment of deferred dower, but this act must be done on her free consent.
- iv. The interest of wife in deferred dower is vested and it is not contingent. Deferred dower does not depend upon the happening of certain contingencies not even on the death of wife, in case of death of wife her legal heirs can claim for the money payable under deferred dower.

Presumption regarding prompt and deferred dower

In case where in the marriage contract (Kabin-nama), it is not specified that which portion of the amount decided for the payment of dower will be prompt and which portion will be deferred, according to Allahabad and Bombay High Courts held that the proportion of amount to be paid will be specified according to the:

- i. position of wife,
- ii. custom of locality,
- iii. total amount of dower,
- iv. status of husband.

Shia Law:

If the amount of dower is specified in the marriage contract but it is not mentioned that which portion will be prompt and deferred, then according to Ithna Ashari Shia Law the whole amount of dower will be regarded as prompt. In Madras Presidency, the whole amount to be paid will be regarded as prompt no matter the person is Shia or Sunni.

Sunni Law:

According to Sunni Law, half of the amount will be regarded as prompt and the other proportion will be regarded as deferred.

Proper (Customary) Dower

When the amount of dower is not specified in the marriage contract and even if it is agreed that the wife will not claim for dower, then also wife is entitled to proper dower. Amount of proper dower is decided on the basis of the amount of dower paid on the marriage of female members of fathers family.

Determination of Proper Dower- The amount of proper dower is decided on the basis of following factors:

- I. Personal qualification of wife, her age, her beauty, fortune, understanding and virtue.
- II. Social Position of her father's family.
- III. Amount of dower given on her female paternal relations marriages.
- IV. Economic condition of her husband.
- V. Circumstances of time.

Wifes Rights And Remedies On Non-Payment of Dower

Under Muslim Law, wife or widows have following rights on non-payment of dower:

i. Refusal to Cohabit:

Under Muslim law, wife has a right to refuse to live with her husband when the amount of prompt dower is not paid, if the marriage has not been consummated. If the wife is minor or a lunatic then her guardians can refuse to send her to her matrimonial home until the payment of prompt dower is done and during that time husband is bound to maintain his wife.

In the case *Abdul Kadir v. Salima*, it was held that wife can refuse to cohabit or to live with her husband and if before the consummation of marriage husband files petition for restitution of conjugal rights, then such appeal will be dismissed.

Similarly in the case of *Nasra Begum v. Rizwan Ali*, it was held by the Allahabad High Court the wife can refuse to cohabit or to live with her husband until the amount of dower is paid by him. Any suit for restitution of conjugal rights will be void before the consummation of marriage. In case the wife is minor or lunatic then her guardian can refuse to send her to her matrimonial home until the amount of dower is paid by her husband and if the minor wife is already in the custody of husband, then her guardians can take her back on the ground that the amount of dower is not paid.

In the case *Rabia Khatoon v. Mukhtar Ahmed*[5], it was held that if the suit for restitution of conjugal rights is brought up after the consummation of marriage with the free consent of wife, then the decree will be passed on the condition of payment of prompt dower.

ii.Right to dower as a debt:

The Privy Council has held that dower is ranked as a debt which must be paid to the widow along with the other creditors out of the estate of the husband on account of his death. If the husband is alive, then wife can claim for dower debt by filing a suit against him. After the death of husband, widow can claim for dower by filing suit against the other heirs of the property from which the amount of dower has to be recovered.

Heirs of deceased husband are not personally liable for the payment of dower debt; they are liable to the extent in which they inherit the property of the deceased. If the property of the deceased husband is already in the possession of the widow, then the other heirs of the deceased are entitled to recover their shares according to the payment of the debt proportionate to their shares.

In the case of *Syed Sabir Hussain v. Farzand Hussain*, a Shia Muslim took legal responsibility for the payment of dower of his minor son that if he fails to do pay then he will pay instead of the son, after the death of the father payment of dower was done from his estate as he was liable to pay his son's dower and every heir was responsible to pay for the dower proportionate to their share.

iii.Right to retain possession in lieu of unpaid dower:

Widow has right to retain the possession of the property of her deceased husband which she has already obtained lawfully and without any force or fraud against other heirs and creditors of the property until the amount of dower is paid. The right to retain the property does not her the owner of the property, therefore she cannot alienate the property. The right to retain the property also arises in case of divorce.

Right to retain the possession of the property by the widow is for special purpose, so she has to satisfy the amount of dower as soon as possible from that property. If the widow is not in possession of the property or has lost it then she cannot claim for the possession of the property.

Features of right to retain the possession are:

1. No right to retain the possession during the continuance of marriage: Wife cannot retain the possession of her husband's property during the continuance of marriage. This right only arises after the dissolution of marriage either by death or divorce.

2. **Actual possession:**

The right of retention means to continue the possession of the property until the dower debt is paid. Therefore, the wife or widow must be in actual possession of the property after the dissolution of the marriage and if the wife or widow is not in actual possession of the property then she cannot retain the possession.

3. **Right of retention not analogous to a mortgage:**

The wife or widow do not have interest in the property, she has retained the property as a mortgage. But in case of mortgage, the mortgagee retains the property under an agreement made between him and the owner of the property and in case of retention by wife or widow, that right has conferred upon him by law.

4. **Not a charge:**

The right to retention does not create a charge on the property as the wife or widow is not a secured creditor. And if the property has been mortgaged to someone by the husband when the wife/widow was having the possession of that property, then the mortgagee can sell the property and dispose the possession of wife/widow.

5. **A possessory lien on property is no title:**

Wife or widow can only satisfy the amount of dower through rents and profits from the property, she does not get the title of the property. The title goes to the heirs of the husband including widow. She has no right to sell or mortgage the property to satisfy the amount of dower, she can only alienate her share in the property not the share of other heirs. And if she alienates the whole property then the other heirs become entitled to recover the possession of their shares, and that share will be given to them without the payment of dower proportionate to their shares. Widow can acquire the possession of the property if she has been dispossessed by the heirs under Section 9 of the Specific Relief Act, within the period of 6 months, and if she fails to do so, then she loses her possession over the property and if the dispossession is caused by the trespasser, then she can file case under Article 12 of Indian Limitation Act within 12 years.

In the case of *Maina Bibi v. Chaudhary Vakil Ahmad*[7], Muinuddin died in 1890 leaving immovable property. In 1902, respondent who were the heirs of the property filed case against the widow (Maina Bibi) claiming immediate possession of the property. Widow pleaded that the property was gifted to her by her husband and therefore she is entitled to retain the possession of the property until the amount of dower is satisfied from the property.

Trial Judge held that the heirs can acquire the possession of the property on the condition that they pay the widow Rs. 25,357 within the period of 6 months and the decree also included that if the respondents fail to pay the amount, then the suit will be dismissed. The respondents did not pay and the widow continued her possession over the property. Later

in year 1907, the widow executed two deeds of transferring the possession of her husband's property to the donees and from the terms of the deeds it was obvious that the widow was giving the title of the property to the donees. In 1915, the respondents again filed suit against the widow claiming the possession of the property unconditionally because under Muslim Law, she cannot transfer the title of the property for which she has only right of retention for the payment of dower.

The appellant pleaded that the suit filed was res judicata and the claim should not be entered entertained by the court as it has limitations. Their Lordship of the Privy Council has held that the possession retained by the widow is lawful and the right to retain the property extends till the payment of dower is satisfied and this right is conferred upon her by Muslim Law. They further observed that the right to retain is only to satisfy the amount of dower, she has no estate or interest on the property as an ordinary mortgagee, she has no right to alienate the property through sell, gift, mortgage, etc.

6. Widow in possession liable to account:

Widow is bound to account the profits and rents received out the property to the other heirs of her deceased husband while she is entitled to charge interest on the dower which is due to her and to set it off against the net profit.

7. Can sue heirs:

widow can sue the heirs of her deceased husband for the recovery of the amount of dower out of their shares.

8. Right of retention whether heritable or transferable:

There is a difference in the judicial opinion on the widows right of retention is whether heritable or transferable.

- a. One view is that the right to retention is a personal right and is not a lien, therefore it cannot be transferred through sale, gift or otherwise and it cannot be transferred to the widows heirs on her death.
- b. The second view is by Mysore High Court that the right to retention is both heritable and transferable as the right to retention can be exercised by the heirs of the widow on her death. In the case Azizullah v. Ahmad, it was held that the right to retention is heritable without expressing any opinion whether it is also transferable.
- c. Allahabad High Court held in a case that the right to retention is both transferable and heritable.

Difference Between Sunni And Shia Law Relating To Dower

Sunni Law	Shia Law
The minimum amount of specified dower is 10 dirhams.	There is minimum amount of specified dower.
There is no maximum amount of proper dower.	The maximum amount of proper dower is 500 dirhams.
There is maximum amount of specified dower.	The maximum amount of specified dower is also

	500 dirhams.
In case the marriage is dissolved by death of husband, and the payment of dower is not specified or it has been agreed that no payment of dower will be done by the husband, in such case the amount will be due whether the marriage has been consummated or not.	Payment of dower will not be due if the marriage has not been consummated.
Any agreement which states that no dower shall be due is void.	Such agreement will be valid if the agreeing party are sane and adult.
In the absence of agreement, a reasonable part of dower will be considered as prompt.	The whole amount of dower will be considered as prompt dower.

Effect of Apostacy (स्वधर्मत्याग)On Dower

The effect of dissolution of marriage through the decree of court is under a statute. According to Section 5 of the Dissolution of Muslim Marriage Act, 1939, a married Muslim woman whose marriage has been dissolved through Act shall have equal right in respect of dower as her marriage has been dissolved through talaq, fasqh, etc.

Amount of Dower and Condition Of Payment

- When the amount of dower is specified in the marriage deed and the marriage has been consummated or any of the party dies, then the whole amount of Mahr will be paid to the wife.
- When the amount of dower is not specified and the marriage has been consummated or any of the party dies, then the wife will receive proper dower.
- When the marriage is irregular and has been consummated, then any of the party dies, then the wife will receive specified or proper dower, whichever is less.
- When the marriage has been dissolved through divorce and the marriage has not been consummated, then the wife is entitled to receive:
 - Half the amount of specified dower.
 - A present of three articles of dresses or of their value
- If the wife has taken divorce, then she is not entitled to receive any dower.

1.4 Dissolution of Muslim Marriage

Kinds of dissolution of Muslim Marriage -Death of Spouse, By the Husband

For understanding the methods of dissolution of marriage, let's first see what is marriage under Muslim law because the only essential for **divorce** under Muslim law is marriage. The dissolution of marriage is known as divorce.

Different religions define marriage differently, such as:-

1. According to the **Hindu Marriage Act, 1955** marriage is a religious sacrament.
2. Under **Muslim Law**, Marriage is a **contractual relationship** between two parties. All the essentials that are required for a contract are present under Muslim Marriage. There is an offer, acceptance, consent, consideration, the capacity of parties, etc. The purpose of such a form of marriage are:-
 - Legalising sexual intercourse.
 - Procreation of children.

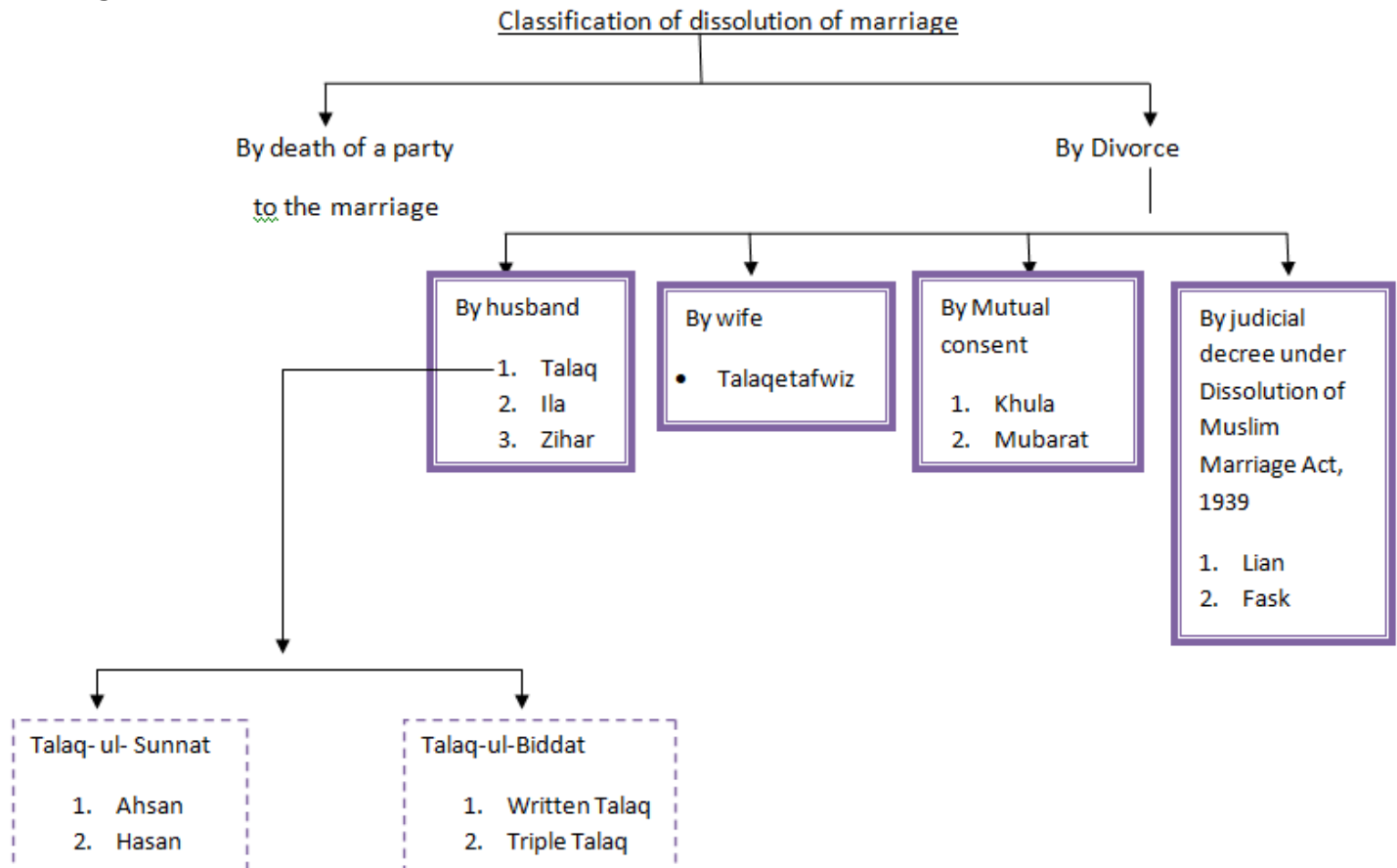
In the case of **Shoharat Singh v Jafri Begum**, the privy council held that marriage under Muslim law is a **religious ceremony**. Under Islam, marriage is recognised as a basis of society. Marriage is an institution which leads to **upliftment of man** and is also a means for the continuance of the human race. Divorce is the end of such a marital relationship, as under Muslim law there are two modes given for the dissolution of marriage-

- Divorce
- Talaq

In daily life, these two terms are alternatively used, but under Muslim law, if a person seeks “divorce”, he will be governed by the provisions of **Dissolution of Muslim Marriage Act, 1939**. Whereas, “Talaq” proceedings are governed by Muslim Personal Laws.

Classification of Dissolution of Marriage

Above the table is provides a brief view about the different kinds of methods for dissolution of marriage under Muslim law.



By Husband

There are four modes available **before a husband** for dissolving the tie of marriage:

1. Talaq- ul- Sunnat

This form of talaq is effective in accordance with the traditions established by the **Prophet**. It is further divided into two parts:-

•Ahsan

It is known as the best form of talaq as the name clarifies the same. The procedure followed by the husband is as follows –

- He has to make a **pronouncement of divorce in a single sentence**, such pronouncement must be made in a **purity state**(when a woman is free from her menstrual cycle).
- A husband must not indulge in any form of **sexual intercourse** during the *iddat period*(*period of chastity a Muslim woman is bound to observe after the dissolution of marriage, either by the death of her husband or by divorce*) and if he does so, then it will be considered as implied revocation of talaq. It is pertinent to note that once the iddat period has expired, the divorce becomes irrevocable.
- When the partners have not consummated, **talaq-e-Ahsan** can be pronounced even if the wife is in her menstruation.

•Hasan

The Arabic meaning of **Hasan** is good, therefore divorce pronounced through Hasan mode is a good but lesser worth than the one pronounced in Ahsan. Husband has to make three successive pronouncements for divorce.

- In the case of a menstruating wife, such three pronouncements should be made in three **consecutive tuhr (state of purity)**.
- In the case of a **non-menstruating wife**, pronouncement should be made at three successive intervals of **30 days**.

No **sexual intercourse** should take place during these periods of three pronouncements and if such an act takes place then the process of divorce will be revoked.

Talaq Hasan becomes **irrevocable** on the third pronouncement irrespective of iddat period.

2. Talaq-ul- Biddat

This form of talaq is introduced by "*Umayyads*" in order to escape from the strictness of Law. This is a sinful form of talaq, as it is recognised among **the Hanafis**. Sunni law recognises this mode of talaq, though recognised as sinful by that too. Whereas Shias and Malikis do not recognise this mode.

- Three pronouncements made in a **single tuhr** either in a single sentence or in separate sentences eg. "Talaq, talaq, talaq" or "**I divorce thee, I divorce thee, I divorce thee.**"
- Single pronouncement clearly indicates an intention to dissolve a marriage and makes it **irrevocable**. It is usually pronounced as – "**I divorce thee irrevocably**".

Partners separated through triple talaq can't remarry without the formality of the woman marrying another man and getting divorced from him, this process is called *Nikah Halala*.

In the recent judgement of **Shayara Bano vs Union Of India And Ors.**, Supreme Court of India declared that the practice of triple talaq is unconstitutional, as this form of Talaq is violative of the fundamental right provided under Article 14 of the Constitution of India.

•Ila (Vow of Continence)

The situation wherein a husband who is of **sound mind** and has attained the age of majority swears in the name of God that he will not have **sexual intercourse** with his wife and leaves her to observe iddat, he is said to make **Ila**.

If the husband resumes sexual intercourse within the iddat period being observed by wife, it will lead to cancellation of **Ila**. It is pertinent to note that Ila is not practised in India.

•Zihar (injurious Assimilation)

A husband must be of sound mind and above the age of 18 years to be eligible to use this mode dissolution of marriage. If he compares his wife to his mother or any of the female within prohibited degrees, the wife has a right to refuse to have sexual intercourse with him. Such refusal can be accepted until he has expiated himself from penance prescribed by law. **Muta marriage** (practised among Shias) which admits no other sort of divorce may be dissolved by **zihar**.

Such form of divorce is no longer in use anymore.

Talaq by the wife

Divorce given by wife under the husband's delegated power.

•Talaq-e-tafweez

This is the only way through which a woman can give divorce to his husband, however, such power to give divorce needs to be delegated by the husband only. It is a form of an **agreement** made either before or after marriage providing that wife will be privileged to get separated from her husband via divorce under the specified condition as:-

1. In case the husband marries a second wife
2. The husband is unable to maintain her for a specified period of time any other condition that must not be opposed to public policy.

If the conditions agreed in the agreement by the husband are well practised by him then, the wife without any prejudice to Law can dissolve her **marital ties**.

The fact that husband delegates the power to the wife does not dispossess him of his right pronounce talaq.

Divorce by Mutual Consent

Although the practice of giving Divorce by **mutual consent** was not recognised in the Muslim Law, it was only available to the Muslim women after the enactment of **Dissolution of Muslim Marriages Act, 1939**.

1. Khula

The literal meaning of khula is “**to lay down**” before the law. The husband lays down his right over his wife. It signifies an arrangement entered into to dissolve a **connubial connection** in lieu of compensation paid by the wife to her husband out of her property, everything that can be given as **dower**.

Khula is a divorce with **mutual consent** and at the instance of a wife in which she agrees to give some consideration to her husband. It is basically a “**redemption**” of the contract of marriage.

Essentials

- There must be an **offer** from the wife’s side
- Offer must be accepted **by the husband** with the consideration for it.
- Observance of the **iddat period** is necessary.

Under **Shia law**, husband can’t revoke divorce once accepted whereas the wife has been given the power to reclaim the consideration during the **iddat period**.

2. Mubarat

It signifies mutual discharge from the **marital tie**. The most essential element is that the mutual consent of both the partners is required in regards to the dissolution of marriage.

In this mode of divorce-

- **Offer** can be made from either of the sides.
- **Acceptance** of offer makes divorce irrevocable.
- **Iddat** is necessary

Under **Shia law**, parties can dissolve their marriage, if it is not possible for them to continue their marriage by way of **mubarat**.

The last mode mentioned in the above table for dissolution of marriage is, by way of judicial separation.

Dissolution of Muslim Marriage Act, 1939.

Further, there are two ways-

• Lian

Lian can simply be described as the wrong charge of **adultery on wife** by her husband. Whenever a husband imposes false adultery charges on his wife, then a wife can sue him and can also obtain a divorce on the same ground under the Act, by filing a regular suit for dissolution of marriage. In case of Zafar Husain v Ummat – ur – Rahman, Allahabad High Court held that a wife under Muslim law is entitled to file a suit against her husband for dissolution of marriage and can obtain decree on the ground that she was falsely charged with adultery by him.

Essentials

- A husband must be adult and sane.
- He charges his wife of adultery.
- Such a charge must be false.
- False charges do not **ipso facto** (by that fact itself) dissolve the marriage, it just provides a ground to the wife to move to the court to dissolve the marriage.
- Marriage will continue until the decree for dissolution of marriage is passed by the court.
- Judicial separation via mode of lian is irrevocable.
- This mode is applicable only to *Sahih* marriages not on *fasid* ones.

Retraction can be made by the husband before the end of the trial, admitting that he made the charge of adultery against her wife and such charge was false.

• **Faskh**

Quran says that husband and wife are duty bound to respect each other and treat each other respectfully and obey all lawful orders of each other.

If both of them find that they can't live as husband and wife further, they can approach qazi who after careful examination may terminate their marriage.

Section 2 of Dissolution of Muslim Marriage Act, 1939 states nine grounds on which a Muslim wife can obtain a decree of divorce:-

Absence of Husband- whereabouts of the husband are not known from the past **four years**. Dissolution of marriage decree on this ground will take effect after six months from the date of such decree is passed, and during that period if the husband appears in person or through an authorized agent. Court if satisfied from same may set aside the said decree.

- **Failure to maintain**- If a husband fails to provide maintenance to his wife for **two years**. There is no defence available before husband on the ground of poverty, failing health or unemployment.
- **Imprisonment of a husband**- If the husband is imprisoned for **seven years** or more.
- **Failure to perform marital duties**- If, without any reasonable cause, the husband is unable to perform his marital obligations for **three years**.
- **Impotency of husband**- husband was impotent at the time of marriage and continues to be so. If the husband within one year from the date of the order obtained by wife for dissolution of marriage on the grounds of impotency on application satisfies the Court that he ceased to be impotent. If the husband satisfies the court, then no decree shall be passed on this ground.
- **Insanity, leprosy or venereal disease**- If the husband is insane or suffering from leprosy, or any venereal disease from a period of two years, judicial divorce by wife can be claimed on the same ground.
- **Repudiation of marriage by wife**- If a girl is married before the age of 15 years by her father or guardian, then under Muslim law she has been provided with a right to repudiate such marriage after attaining the age of 18 years provided that marriage is not consummated. She is entitled to a decree of divorce for same.
- **Grounds of dissolution recognised by Mohammedan Law**- Wife is also entitled to obtain a divorce on the ground recognised valid under the law.
- **Cruelty by husband**- if the husband treats his wife with cruelty, then she can approach the Court and claim for a decree of judicial separation on the same ground.

Some of the ways through which grounds for cruelty could be claimed as follows.

- Physical assault.
- Making defamatory statements affecting her reputation.
- Forces her to lead an immoral life.
- Obstructing her from practising her religion.
- Husband having more than one wife and does not treat them equally.

Talaqnama

Talaqnama is talaq given in the **written form**. Talaq via talaqnama can be provided in the absence of wife and also there is no necessity to be signed in the presence of *Qazi* or wife's father.

- Husband has to execute a proper deed.
- A deed must contain the name of the women whom he has divorced and his name.

Points to be considered for a valid talaq

1. Talaq pronounced under intoxication is not recognised valid under Muslim law.
2. For a valid talaq, intention is not an essential element.
3. Husband may give talaq by mere words without any talaqnama or deed.

Talaq made during death illness

1. An ailing Muslim (generally men) has been given the power to pronounce talaq, just to prevent his right of inheritance moving to his wife after his death.
2. If the man pronounces irrevocable talaq in death illness and dies before the expiry of the iddat period, a wife is entitled to claim her share.
3. In case the husband dies after the expiry of the iddat period then there is no right of inheritance.

Legal effects of divorce

- Mutual rights of inheritances cease.
- Cohabitation becomes illegal, and children born after such intercourse will be illegitimate.
- Dower becomes immediately payable.
- Parties can contract another marriage.
- Wife is entitled to maintenance during the iddat period.

Conclusion

After the **2017 judgement** of the supreme court held and declared **triple talaq** unconstitutional, under Muslim law, both husband and wife are given equal rights to dissolve their marital relationship. When two people enter into a **marital relationship**, they might not know each other so well, as they got to know each other after living together. And after that, if there is no compatibility between the two, living apart is the best choice to be made.

Bad relations may spoil the life of both the individuals and under **Muslim law**, talaq is an ancient practice and is not recognised as a sinful act, unlike under **Hindu law**.

Divorce under Muslim Law

The only essential condition for divorce under Muslim Law is marriage between two parties. There are different forms and ways through which marriage can be dissolved under Muslim Law, which are following:

Divorce by husband

There are four ways a husband can give divorce.

Talaq-ul-Sunnat

This form of divorce is based on Muslim Personal Laws. It is further sub-divided into the following categories:

Ahsan

- Husband has to make an announcement of divorce in a single sentence when the wife is free from the menstrual cycle.
- After divorce women have to observe Iddat for a certain period of time, during which the husband cannot indulge in any form of sexual intercourse, if he indulges then revocation of talaq becomes impliedly revocable, otherwise, it becomes irrevocable.
- This type of talaq can be pronounced even when the wife is undergoing menstruation, but for that marriage must not be consummated between the parties.
- It is the most approved form of talaq.

Hasan

- It is a less approved form of Talaq Ahasan.
- There is a provision for revocation of divorce.
- The word talaq is to be pronounced three times simultaneously.
- Three announcements should be made in the three states of purity if the wife has not crossed the age of menstruation.
- If the wife has crossed the age of menstruation, pronouncement must be made at the 30 days interval between the successive pronouncements.
- During the period of three pronouncements, no sexual intercourse should take place, if it happens divorce is revoked.
- After completion of the iddat period, this type of divorce becomes irrevocable.

Talaq-ul-Biddat

- it is this disapproved/sinful form of divorce.
- It is also known as triple talaq, after pronouncing talaq three times it becomes irrevocable immediately.
- This form of divorce is only recognised under Sunni Law and not by Shias and Malikis.
- Parties can remarry only after performing nikah halala by the female partner, under which she has to marry another man and then get divorced from him.
- This type of divorce is unconstitutional in India, through the judgement of the Supreme Court in the case of Shayara Bano vs Union of India and Others.

Ila

- It is a form of divorce under which the husband has the power to pronounce that he would not indulge in sexual intercourse with his wife.
- Subsequent to this pronouncement, the wife is required to observe iddat.
- If the husband cohabits with the wife during this period, then the Ila is revoked.
- Once the period of iddat is over, divorce becomes irrevocable.
- This type of divorce is not practised in India.

Zihar

- It is also constructive divorce like Ila.
- In this form of divorce, the husband compares his wife with a woman who comes under a degree of prohibited relationship, such as his mother, sister etc, and pronounces that she is like his mother or sister.
- For doing this the husband must be of sound mind and above the age of eighteen years.
- The wife has the right to seek judicial remedies such as restitution of conjugal rights, cohabitation etc., but cannot seek judicial divorce.
- Husband can revoke such divorce by observing two months fast, feeding sixty people and freeing a slave.
- This type of divorce is no longer in practice.

Divorce by wife

Talaq-e-Tafweez

- It is also known as delegated divorce.
- The husband has the power to delegate such power to the wife, he must be of sound mind and above 18 years of age.
- This type of talaq is also called an agreement, which may be entered between the parties before or after marriage.
- If the terms of an agreement are not fulfilled, the wife can ask for a divorce.
- It is the only way through which a woman can ask for a divorce.
- The right of the husband to divorce his wife remains intact, it does not deprive the husband of his right to pronounce the divorce.

Divorce by mutual consent

Khula

- It means 'laying down', where the husband lays down the authority over his wife.
- This is done through mutual consent between husband and wife, where the wife pays the consideration from her property to the husband, for her release.
- Wife releases Mehr and other rights for the benefit of her husband.
- Thus, divorce is purchased from husband by wife.
- There is an offer from the wife, which is accepted by the husband.
- Women are required to observe iddat after Khula.

Mubarat

- It means 'release', it releases/discharges parties from marital rights.

- Divorce is with mutual consent among parties to become free from one another.
- Its formalities are the same as Khula, where there is an offer from one party and acceptance from another.
- Women are required to observe Iddat.

Divorce by judicial decree under Muslim Dissolution of Marriage Act, 1939

Lian

- This type of divorce occurs when a wife is falsely charged with adultery by her husband.
- She can move to court to file a regular suit for dissolution of marriage, under the Muslim Dissolution of Marriage Act, 1939.
- The ground of divorce must be a false charge of adultery on the wife, his husband.
- The husband imposing charge must be sane and above 18 years of age.
- Marriage is not dissolved until dissolution decrees are passed by the court, once it is passed divorce becomes irrevocable.
- The husband can prevent divorce by the withdrawal of false assertion of adultery on the wife, before passing of the decree by the court.

Faskh

- If husband and wife feel that they are not compatible together, they can file for divorce.
- Section 2 of The Dissolution of Marriage Act, 1939, states grounds on the basis of which the wife may sue for divorce.
- Whereabouts of husband not known for 4 years.
- Husband has failed to maintain wife for two years.
- Husband is sentenced for imprisonment of 7 years or more.
- Husband has failed to perform marital obligations for three years, without any reasonable cause.
- The husband is impotent.
- Husband is suffering from insanity (for two years), leprosy or virulent venereal disease.
- Wife being married before 15 years, rejects the validity of marriage after attaining the age of 18 years, provided marriage must not be consummated.
- Husband treats her with cruelty, such as imposing physical assault. making defamatory statements that affect her reputation etc.

Rights conferred by personal laws based on religion is not absolute. For instance, the two most popular and important judgments of the Supreme Court in this regard are discussed hereinafter, in the case of Mohd. Ahmed Khan vs Shah Bano, Shah Bano at the age of 62 was divorced by her husband Mohammed Ahmed Shah, and she along with her five children were disowned and tossed out from her marital home. When she approached Madhya Pradesh High Court to restore her maintenance amount of rupees 200 which was halted by her husband, and to increase its amount to rupees 500, she was divorced by her husband through instant triple talaq or Talaq-ul-Biddat, who used it as a defence not to pay maintenance as she no longer was his wife. But the court granted maintenance to Shah Bano under Section 125 of CrPC on the grounds that she is unable to earn and maintain herself. Though it was against the provisions of Islamic law, Section 125 of CrPC override the personal law and gave effect to the judgement.

Similarly, in the case of Shayara Bano vs Union of India, Shayara Bano married to Rizwan Ahmed, was a victim of domestic violence, while she was visiting her parents, Rizwan Ahmed sent her a divorce letter of Talaq-ul-Biddat declaring instant divorce. She filed a petition before the Supreme Court to declare triple talaq, nikah halala, and polygamy to be unconstitutional. Although the court took into account only the plea of triple talaq declaring it to be unconstitutional and it also held that until the government formulates a law regarding instant triple talaq, there would be an injunction against the pronouncement of triple talaq by husbands on their wives.

Talaq-ul-Biddat or triple talaq is unconstitutional as it violates Article 14 of the Constitution in two ways; firstly, it discriminates Muslim women from Muslim men on the basis of gender, as only Muslim men have the right to declare triple talaq, and secondly, it is discrimination on the basis of religion, women of no other religion are subject to cruelty and unjust behaviour of triple talaq except

Muslim women. Talaq-ul-Biddat also violates Article 21 of the Constitution on the grounds of the right to live with human dignity, Muslim women are subject to derogatory and cruel behaviour of the Talaq-ul-Biddat, which reduces their presence to mere unwanted beings in the eyes of their husband and society. A divorce that is arbitrary, without justified reasoning and a reconciliatory process is never allowed by the Koran. Thus, personal laws of Muslims are given prominence unless and until they are against the right of women to live a dignified life or are unconstitutional.

Changes brought by the Muslim Women (Protection of Rights On Marriage) Act, 2019

The Muslim Women (Protection Of Rights On Marriage) Act, 2019 brought the following changes:

- **Section 3-** Pronunciation of triple talaq on wife by husband in any manner (including electronic), by words either spoken or written, is void or illegal.
- **Section 4-** Any person who pronounces talaq to his wife in a manner prescribed in section 3, shall be subject to imprisonment extendable to 3 years or shall be liable to a fine.
- **Section 5-** Muslim women who are being divorced can seek allowance from their husband to maintain themselves and children dependent on them.
- **Section 6-** Muslim women divorced by husband are entitled to seek custody of their minor child.
- **Section 7-** Magistrate can grant bail to the accused after hearing both the parties, if he feels that reasonable ground exists for granting bail. The offence is compoundable and there is also an option of compromise at the instance of a married Muslim wife, which will drop the charges on the basis of fulfilment of certain terms and conditions.

Need for Uniform Civil Code (UCC)

Implementation of the Uniform Civil Code is the need of the hour. Article 44 of the Indian Constitution talks about the creation of the Uniform Civil Code for all the citizens of India. The creation and implementation of UCC will bring drastic changes in the Muslim personal laws, this is the reason it is being opposed by the Muslims. It will lead to the permanent abolition of triple talaq, all the marriages will be dissolved through Court proceedings. The practice of polygamy will be abolished and monogamy will be the norm. It will also bring change in maintenance provisions; Muslim women will be able to claim maintenance for a lifetime. Civil contractual nature of marriage will be abolished. Registration of marriage will be compulsory practice, and implementation of UCC will also lead to a violation of the period of iddat. These changes are pro-women and are actively welcomed by Muslim women, as it will lead to the positive betterment of women and society as a whole. But these changes are opposed by Muslims as a whole because they feel the imposition of UCC as an imposition of Hindu law over their personal laws, which is the wrong notion. Uniform Civil Code will be secular in nature containing essentials of all the diverse religions in India. Thus, Uniform Civil Code is necessary for strengthening national unity and integrity among citizens of India.

Criminalization of Triple Talaq (Talaq-E-Biddat)

The pre-Islamic Arabian state was supposed to be a time of obliviousness and disarray. This is where man never carried on with a legitimate life. It is just with the proclamation of the Prophet that the circumstances changed. In this period, a man and a woman could marry any number of spouses. The Prophet set out the arrangement of marriage and separation. He halted the training that existed in pre-Islamic Arabian state. Consequently, the Prophet could never uphold this act of triple Talaq which is irreversible. Biddat implies development and henceforth, it is an enhanced type of separation which was not laid down by the Prophet.

Today with innovation, current devices being utilized for the correspondence of triple Talaq, the circumstance has gotten more regrettable. This act of triple Talaq started with the Arabs when they vanquished Syria, Egypt and Persian districts. The men got pulled in to female network of the Syrian and

Egyptian district. The Syrian and Egyptian ladies were prepared to acknowledge them just in the event that they articulated Talaq in three sittings to their spouses at home.

The Muslim men knew about the act of Talaq and realized that this sort of Talaq was void. In this way, they expected that they could marry their spouses moreover. Expecting this, they consented to separate from their spouses with proclamation of triple Talaq.

This is the inception of the training.[6] This occurred during second Caliph Umar's period. At the point when he got the updates on the abuse of Talaq by the men, he proclaimed such Talaq to be official, with the goal that men despise both the ladies. This was only a brief measure received to rebuff the men who deceived their family.

Triple Talaq From The View Of The Indian Constitution:

Article 25 of the Constitution ensures complete freedom to practice and propagate any religion. Like all other Fundamental Rights, it is dependent upon limitations and does not ensure strict practices that can adversely influence the government assistance of residents. Hence, Article 25 is superseded by Article 14, which ensures the Right to Equality as triple Talaq denies a Muslim woman's uniformity under the watchful eye of the law.

Article 25 is additionally liable to Article 15 (1) which expresses that the State will not victimize any resident on grounds just of religion, race, standing, sex. Since triple Talaq does not work in the kindness of the Muslim women, it disregards Article 15 (1) of the Constitution. However, area 2 of the Muslim Personal Law (Shariat) Application Act of 1937[7] perceives triple Talaq as a legal right, bringing it under the ambit of Article 13 of the Constitution. Article 13 characterizes 'law' also, says that all laws, encircled before or after the commencement of the Constitution, will not be violative of the major rights.

The Landmark Judgment:

In the landmark case of Shayara Bano And Ors V. Union Of India And Ors[8], Shayara Bano was married for 15 years. In 2016, her husband divorced her through Talaq-e-biddat (triple Talaq). This is an Islamic practice that permits men to arbitrarily and unilaterally effect instant and irrevocable divorce by pronouncing the word 'Talaq' (Arabic for divorce) three times at once in oral, written or, more recently, electronic form.

Ms.Bano argued before the Supreme Court of India that three practices – Triple Talaq, Polygamy, and Nikah Halala (The practice requiring women to marry and divorce another man so that her previous husband can re-marry her after Triple Talaq) – were unconstitutional. Specifically, she claimed that they violated several fundamental rights under the Constitution of India (Constitution) namely, Articles 14 (equality before the law), Article 15(1) (prohibition of discrimination including on the ground of gender), Articles 21 (right to life) and Article 25 (freedom of religion). Her petition underscored how protection against these practices has profound consequences for ensuring a life of dignity. Further, it asserted that failure to eliminate de jure (formal) and de facto (substantive) discrimination against women including by Non-State actors, either directly or indirectly, violates not only the most basic human rights of women but also violates their civil, economic, social and cultural rights as envisaged in international treaties and covenants.

The Supreme Court bench, comprising of five judges, delivered its verdict on the Triple Talaq case, terming the practice void and illegal. The petitions, filed by five Muslim women, challenged the validity of Triple Talaq (divorce) in the Muslim community.

The five-judge bench, comprising of Chief Justice JS Khehar and Justices Kurian Joseph, RF Nariman, UU Lalit and Abdul Nazeer, delivered a split verdict, with the CJI being in dissent. "Triple Talaq may be a permissible practice, but it retrograde and unworthy. Since triple Talaq is instant, it is irrevocable and the marital tie gets broken. It is violative of Article 14, the right to equality," they said. Here are some of the significant points raised by the judges:

Justice Kurian Joseph: There are four sources of Islamic law. Only the Quran is the first source of law, therefore sources other than the Quran are a supplement to what is in it. Therefore, there can be

nothing more than what is written in the Quran. Quran attributes permanence to matrimony.

Triple Talaq is against the tenets of Quran, and hence, it violates the Sharia. The purpose of the 1937 Act is to declare Shariat as the only law governing Muslims.

Justice UU Lalit: endorsed the view of Justice Kurian.

Justice Rohinton Fali Nariman: It is a disapproved form of divorce. Even the Hanafi law says triple Talaq is sinful. 1937 Act recognizes triple Talaq and therefore does not violate Article 13. Triple Talaq won't fall within confines of Article 13(1) and 25. It is not possible for the court to fold his hands when petitioners come to court. Court has to declare whether practice is legal or not.

CJI Khehar: Triple Talaq integral to Islam in India and part of personal law. Triple Talaq is important to Sunnis of Hanafi school, has to be accepted as important to their culture. Triple Talaq does not violate Article 25, 14 And 21 of the Constitution. Practice being a constituent of personal law, it can't be set aside on the grounds of constitution morality by judicial intervention. Legislative intervention needs to be followed in respect of triple Talaq, if it has to be set aside. Justice S Abdul Nazeer endorsed the view of CJI Khehar.

1.5 Maintenance

General Principles of Maintenance

Persons entitled for Maintenance under Personal Law

Maintenance under Section 125 (1) (a) of Cr. P. C., 1973

Under the Muslim law of Maintenance (*nafaqa*) the obligation of a Muslim arises only if the claimant has no means or property to maintain himself or herself. Under Muslim law the following persons are entitled to maintenance:

- Wife
- Young children
- The necessitous parents
- Other necessitous relations within the prohibited degrees.

Maintenance to Muslim Wife

Under Muslim law, the wife's right to be maintained by her husband is absolute. A Muslim husband is bound to maintain his wife of a valid marriage even if there is no agreement in this regard. A Muslim husband is not bound to maintain the wife of void or irregular marriage except when the marriage is irregular for want of witnesses.

Wife's right of maintenance is a debt against the husband. It is an independent right. The husband's obligation to maintain his wife exists only so long as the wife remains faithful and obeys all his reasonable orders i.e. discharge her own matrimonial duties.

If the consummation is not possible due to wife's own ill health or old age or faulty organ she is not guilty of transgressing her matrimonial obligations towards the husband and may lawfully claim maintenance from the husband.

The wife could also claim future maintenance on account to pre-nuptial agreement viz. sustainable maintenance in the event of ill-treatment. Arrears of maintenance cannot be claimed by any relative other than a wife. The right of the wife to maintenance exists in spite of the fact that she can maintain herself out of her own property.

Maintenance of wife under Criminal Procedure Code, 1973

The refusal of the wife to perform her matrimonial obligation towards husband and her claim of maintenance is to be examined not only under Muslim personal law but also under the Criminal Procedure Code. The claim of wife for the maintenance under this act is an independent statutory right not affected by her personal law.

A Muslim wife, who lives separately due to her husband's second marriage, is entitled to claim maintenance allowance under the provisions of Criminal Procedure Code, 1973.

In **Begum Subanu alias Saira Banu v. A.M Abdool Gafoor**, the Supreme Court held that irrespective of a Muslim husband's right to contract a second marriage, his first wife would be entitled to claim maintenance. A Muslim wife, whose husband neglects to maintain her without any lawful justification, is entitled to file a suit for maintenance in a civil court under her personal law. She is also entitled to enforce her right under the CrPc 1973. Where a Muslim wife is in urgent need, she may apply for an order of maintenance under section 125 of the Criminal Procedure Code; 1973. A magistrate of the first class may then order the husband to provide monthly allowance not exceeding five hundred rupees, for the maintenance of his wife.

Maintenance of the divorced woman

It can be discussed under the following heads

- Muslim personal law
- Section 125 Criminal Procedure Code 1973 and
- The Muslim Women (Protection of Rights on Divorce) Act, 1986

Muslim personal law

A divorced wife can claim maintenance from the former husband only for that period during which she is observing her *Iddat*. The duration of *Iddat* on divorce is three menstruation periods or, if pregnant, till delivery of the child. The former husband's liability extends only up to the period of *iddat*, not beyond that.

Section 125 of the Criminal Procedure Code 1973

The term 'wife' includes a 'divorced wife'. Section 125 is applicable also to a divorced Muslim wife. Section 127(3) provides that the order of maintenance in favour of a divorced wife shall be cancelled, and such woman shall not be entitled to maintenance under the following circumstances:

- Where the divorced woman has remarried
- Where such woman has received the whole sum due to her on divorce under any customary or personal law, and
- Where the woman, after obtaining a divorce from her husband, has voluntarily surrendered the right to maintenance.

In **Mohd. Ahmad Khan v. Shah Bano Begum** AIR 1985 SC 945, the Supreme Court reiterated its stand and held that a divorced Muslim woman, so long as she has not remarried, is a wife for the purpose of section 125, and is entitled to maintenance from her former husband.

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

Maintenance during the Iddat: The divorced woman is entitled to a reasonable and fair amount of maintenance for herself during the Iddat period from her former husband

Maintenance after the Iddat: The divorced woman who remains unmarried after the Iddat, and is unable to maintain herself, is entitled to get maintenance from her such relatives who would inherit her properties upon her death. In the absence of any such relatives or, where they have no sufficient means, then ultimately the liability to maintain her is cast upon the Waqf Board of the state in which she resides. The Muslim Women (Protection of Rights on Divorce) Act, 1986 has now made the operation of section 125-128 of the Criminal Procedure Code optional in respect of Muslim woman.

In **Danial Latifi and others v. Union Of India** all the writ petitioners challenging the constitutional validity of the Muslim Women Act 1986 were clubbed together in this P.I.L. under article 32 of the constitution. The writ petition was dismissed by the Supreme Court challenging the validity of Muslim Women Act 1986. The Court upheld the validity of the Act.

In **A. Yousuf v. Sowramma** it was held by the court that whatever the cause may be the wife is entitled to a decree for the dissolution of her marriage if the husband fails to maintain her for a period of two years, even though the wife may have contributed towards the failure of the maintenance by her husband.

When does the right of maintenance comes to an end?

According to the provisions of Muslim Law, the right of children for their maintenance ceases when they hit adolescence. After this, they cannot claim any money for their maintenance except under some circumstances. The children can claim maintenance after adolescence if they are suffering from any physical or mental illness or they are not in a position to maintain themselves. Under Muslim Law, a person becomes major as soon as he hits adolescence but as per the Indian Majority Act, 1875, a person is said to be a major when eighteen years of age is attained.

Important case law

Noor Saba Khatoon v. Mohd. Quasim (1997)

The facts of the case are: The husband allegedly threw his wife and children out from his house due to some disputes and also refused to pay maintenance to them. The wife was unable to maintain herself and her children. Therefore, she filed an application under Section 125 of CrPC before the judicial magistrate. She contended that her husband has proper means to earn a livelihood from his business. So, she claimed Rs 400 per month for herself and Rs 300 per month for each of her three children. The Trial Court found that the husband has failed to provide maintenance to his wife and children despite having proper means. The court ordered him to pay Rs. 200 per month for his wife and Rs 150 per month to his children till they attain the age of majority. After this, the husband divorced the wife and filed an application before the trial court to modify its previous order by keeping in view the provisions of the 1986 Act. The court held that the rights of children to get maintenance under Sec. 125 of CrPC is not affected by any provision of the 1986 Act.

However, according to it, the wife is entitled to get maintenance only for three months i.e. the Iddat period. He again filed a revisional petition in which the High Court held that the rights of divorced women to get maintenance under Section 3(1) of the 1986 Act was restricted to the Iddat period. And the motive of the 1986 Act was to protect the rights of divorced Muslim women, not their children. The Supreme Court negated this and held that a divorced Muslim woman has a right to claim maintenance from his former husband till their children attain majority. The Court held that the duty of a father to provide maintenance to his children when they are living with their mother is fixed under both Muslim law and Sec. 125 of CrPC. The right was not affected by the divorcee's (wife) right to claim maintenance under Section 3(1) of the 1986 Act. Both are independent of each other.

Muslim women (protection on right to divorce) Act, 1986

Equality and justice have consistently been encircled by issues and summoned by politics and law. Women like Mernieth has been leader of the framework since 3000 BCE and even today women and men together rule over innumerable individuals too, yet this is not similarly spread all through all the networks of the world. There is likewise an comparison of statistical information dependent on the census of 2011 of Muslim people in India contrasting it and reality which exists in the Indian culture and in nations who has lion's share of Muslim populace inside with the provisions of Indian laws and Muslim personal laws.

A "right life" is achieved at the point at which one has rights throughout his life. Each human is brought into the world free; liberated from duties, allowed to pick their method of living and any individual who meddles in their opportunity full life and ties them without their free will and command them, on purpose of making themselves better over the other, parting endlessly the delight and respect of other's life for their own delight, is the person who indeed shouldn't merit the "Right life".

India is a secular and a sovereign nation; it welcomes people from throughout the world carrying whatever history or religion. It purports to treat everybody with equality and dignity and so India is a diverse country. **There are a hundred and eighty-two million Muslims (acc. To 2017 gauge), India's Muslim populace is about the world's third largest and the world's biggest Muslim-minority population. Out of the total no. of Muslims throughout the world, India is home to 10.3% of the world's Muslim populace.**

According to the census report of 2011, there are more than 84 million Muslim women in India compared to more than 88 million Muslim men, this reflects a 5% less birth rate of females over males in Islam.

When we delve into the demographics and statistics of year 2011 we will see that around only 1.7 million females are graduating out of the complete populace of 84 million Muslim ladies though on the off chance that we note on men, at that point in excess of 3 million men have graduated and afterward in the event that we take a gander at the marriage pattern in Muslims an aggregate of very nearly 43 million ladies get married and on the opposite side only 37 million men got married.

We see a blatant infringement on right's to Muslim women not just in India but on Muslim women throughout the world. If we draw a comparative analysis on laws of Muslim's in some different nation, we will note that India provides enjoyment of personal laws and also of legislature made Indian laws. The Muslim women can go to Indian courts and have benefit of Indian rights and of their personal laws. This thing is not available in every country for instance if we pick Article 2 from the constitution of Egypt makes sharia to be the countries law source , hence they only follow Islamic law and so Egypt has very much restrictions on women's maintenance rights also their marriage age is set at 16 with polygamy being permitted, the husband just informs the rest of his wives. This stands uniform for many other Muslim countries.

Statutes

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

Section 3(1)(a) from Muslim women (protection of rights on divorce) Act, 1986 which expresses that "a sensible and reasonable maintenance and support to be made and paid to her inside the iddah period by her previous spouse". If the women is living a life alone and she doesn't have her family or relatives around to look after her needs and requirements also she doesn't have any means to earn her livelihood or any way through which she could earn or look after herself then she shall be paid money by the state Waqf board. Thus, the major reason and objective of this act was also one of its drawback that this act limited the settlement of subsistence living amount by her spouse un till Iddah period and after that either by herself or her relatives or the state Waqf board but later in K Zunnaiddin v. Ameena Begam, in this case the court adhered that the word within in Section 3(1)(a) did not mean that the husband will have to pay only for the time between the time in iddah but what it really means is that he is liable to pay the wife un till she marries again. So, if wife does not marry for her whole life again so husband will have to pay maintenance to her for the rest of her life.

Muslim Personal Laws in India

All Indian Muslims carry freedom to choose their personal laws like The Shariat Application Act, 1937. There are statutes which deals with succession, divorce, marriage among Muslims.

Marriage and divorce in Muslims

In India, marriage in Muslims is a common agreement. Disintegration of marriage is possible at the occurrence of the man (talaq), wife (khula) or commonly (mubarat). The husband has the capacity to articulate talaq to his better half or a third individual by understanding, called talaq-e-tafweez. The Muslim man does not need referring an explanation behind separation.

Unmistakably there is polygamy allowed in Muslim laws. That one man can have numerous spouses regardless of their age religion or number but females are allowed for one husband only additionally under Islam she isn't permitted to wed a non-Muslim yet no such conditions for a Muslim man. He is absolutely free.

Women can seek divorce in a court of law. A woman can ask for divorce in many circumstances one of which is:

if the husband does not be good to her because he is with other wives as in Quran; or completes some other ground perceived as legitimate for the separation of relationships under Muslim law.

Inheritance

- A boy gets twofold the portion of the girl any property they together acquire.
- In instance of death: only one-fourth is given to the wife if both have no children on the contrary if there are children then only one-eighth of the total property.

The Muslim Women (Protection of Right on Marriage) 2019

The Act makes all assertion of talaq, remembering for composed or electronic structure, is void. Talaq-e-biddat alludes to the training under Muslim individual laws where declaration of the word 'talaq' threefold at a time by an Muslim male The act makes revelation of talaq a cognizable offense, pulling in as long as three years' detainment with a fine.

Indian Statutes

Indian Constitution

- The preamble read with Article 25 mentions about secularism and sovereignty which means a person is free to practice any religion and that India does not create difference among its citizens on their religion. Everybody can follow their own laws. Indian constitution guarantees to all women who lives in India many rights. India has done numerous works to uplift women. Some of the rights worth mentioning are:
- Right to equality Article 14: it guarantees that no person due to caste, sex or religion shall be discriminated in India
- Article 15: which provided for reservation to women and Dalit's as well.
- Article 15(3), renounces practices derogatory for a women's dignity.
- Article 16: that every person should get equal opportunity.
- Article 21: No one shall be deprived of his life and liberty. This for sure is available for women as well so no women shall be deprived to live her life and that she deserves liberty to choose her own way of living a dignified and good life. This also give her a right of choosing her husband but some data reviles that not many women gets that right as they get married at very young age and so they didn't got to either live their life their way or choose her life partner.
- Article 39(d): which is a duty of state to ensure everyone in the workplace gets paid according to their work and not their gender or caste or religion etc. Besides them there are Article 42 and Article 51(A)(e) in the DPSP.

Maintenance

Section 125 CrPC: This section allows every woman to claim maintenance from her husband. Husband who has sufficient means and who refuses to take care of his wife or maintain her whoever needs it the courts makes it mandatory for such husbands to maintain their wives with monthly payments.

Polygamy in India

Polygamy is illegitimate in India since 1956 with exception for Muslims and in Goa. Section 494 and 495 makes polygamy a crime, also this is a ground for divorce for those who married under the Hindu Marriage Act as such marriages are null and void.

Right to Education

It is the fundamental parental duty to teach and educate their children up to 14 so that every female gets educated and do not become dependent on the males for every work.

Education

If we talk about India and specially about Indian Muslims, we should go through the education system and trends in Jammu and Kashmir. J&K's social, monetary and political conditions have expanded

sex difference in the locale, with men ruling its financial and political procedures. Ladies' jobs have generally been household, and ladies in country zones don't approach training. As indicated by a 2011 census, the male education rate in J&K was 68.74 percent; education among ladies was 58.01 percent. The female secondary school dropout rate is higher than the male rate, and one out of each three adult ladies in J&K cannot peruse or compose (contrasted and one out of five adult males)

•The Literacy Statistics of Muslim's in India according to Census 2011

Level	Females	Males
Matric Level	45,77,301	63,20,590
Higher Secondary	32,69,797	43,70,518
Not Educated for Degree	1,26,940	1,67,402
Graduate	17,42,203	30,10,652

Table-1

•Marriage status of ever married Muslims in India according to census 2011

Age group	Females	Males
TOTAL	4,28,60,315	3,73,03,113
10-11	3,43,798	82,734
14-15	36,98,100	3,07,337
16-17	73,08,904	9,14,009
20-21	78,75,746	91,64,582
30-31	2,34,176	15,61,545

Table-2

The tabular representation above only considers the Muslim population in India. This is based on the data provided in Census 2011, as we note we see that lesser no. of girls are educated then boys, which is a fundamental right of a child and duty of every parent to give education to children up to at least 16 years of age, but we see discrimination and infringement to equality right towards girls. We can also see a significant dropout rate not just for girls but for boys as well. Number of both girls and boys keep dropping as education level increases which lessens their future chances of opportunities.

On the other hand, now that we look at the marriage statistics, it is really shocking to see the number of girls and boys getting married at such a young age. Most of them are married at their very young age when they might don't even know the meaning of marriage. Almost 3.7 million girls are married at the age of 15 and lesser number of girls is in education at the same age. Up till 7.9 million girls are married till the age of 21. Marriage at such young age takes away their freedom and the opportunity to grow or become independent. They give birth to new lives at such age when it was time for their own life.

Judicial Decisions

Indian courts have put many efforts to improvise the conditions of Muslim women in India. Some of the important judicial decisions taken by the Indian courts are the following.

•Shah Bano case

Justice Chandrachud who passed a verdict in shah bano's favors sixty-year-old divorced women on the matter regarding her divorce and Mehr. Mehr is amount of money the husband pays to his wife at the time of marriage, that money belongs to the wife only. This case was a fight for Muslim Women's right in India, and against their Male gender biased Muslim Personal Laws. Supreme Court helped those Muslim women in fight for their rightful claim over maintenance.

•The award of Triple Talaq

Shayara Bano v. UOI & Ors. this case managed the divorce practice among Muslims, which is if on the off chance that any Muslim man said Divorce three times, at that point he is liberated from his marriage. The

Supreme Court laid its verdict and said that “this non-religious if we check in to the Quran and such thing should be void and illegal” and shall not be encouraged ever at any cost. Presently no man can divorce from the spouse by only multiple times rehashing the words talaq. This additionally fortifies the Muslim women’s status and rights in India.

1.6 Paternity Legitimacy, Parentage and Acknowledgment

Parentage, The legitimacy of children, Presumption of Legitimacy, Acknowledgement of Paternity, Conditions of a valid acknowledgement

In Muslim Law Parentage is based on lawful marriage. Parentage (Rishta) is a relation of parents to their children. Muslim Law insists on the existence of valid marriage between begetter and the bearer of the child at the time of its conception. In Muslim Law a person born out of valid and irregular marriage is legitimate child of the spouses. Legitimacy is based on Parentage; both are interdependent to each other. When the paternity is established, its legitimacy is also established.

PARENTAGE (RISHTA): PATERNITY AND MATERNITY:

Paternity is the relationship between a child and his paternal figure, i.e., his father. Parentage under Muslim law is not a matter of fact. The only way to establish paternity is by marriage to the mother of the child. So as per Islamic law, maternity is by fact but paternity can only be by marriage. Maternity is a legal relation between mother and a child. Maternity is a matter of fact that mother has actually has given birth to the child. Parentage is important to give effect to certain rights and obligation regarding maintenance, guardianship and Inheritance. If there is no marriage between the mother and the father of the child, then such a child is illegitimate. And as per Sunni Law, such child has no paternity. And according to Shia Law, such a child has neither paternity nor maternity. By conclusion parentage under Muslim law is only available to a legitimate child.

LEGITIMACY UNDER MUSLIM LAW:

The legitimacy and parentage under Muslim law are closely related to marriage. So, child will be considered legitimate only if he is born in lawful wedlock. This means that the father (begetter) and the mother (bearer) of the child should have been in a valid lawful marriage at the time of conception. Then the child will be legitimate child with established paternity and maternity. Hence under Muslim law, only direct or indirect marriage between the begetter and the bearer of a child can establish the legitimacy of children. If there is not a lawful and direct marriage between the said people, then an indirect marriage can be established if,

- There is cohabitation of the father and the mother
- The father acknowledges the mother as his wife
- The father acknowledges the child as his own. So, if the marriage cannot be proven between the father and mother, or there is a doubt as to the paternity of the child, the father can choose to acknowledge the child as his own. This is true for both sons and daughters. It is also known as ikrar-e-nasab. Also, such acknowledgement need not be expressed, it can also be implied by conduct.
- A person born in lawful marriage is said to be the legitimate child of the spouses. So, the main point in case of the legitimacy of a child is the marriage between his or her parents.

LAWS OF LEGITIMACY (INDIAN EVIDENCE ACT, 1872):

In India, the legitimacy of any child no matter his religion is decided by the Indian Evidence Act, 1872. This act states that a child will be legitimate if,

1. is born in the continuance of a valid marriage between the mother of the child and any other man (need not be the father of the child)
2. Is born after 280 days of the dissolution of the marriage as long as the mother did not remarry in such a time.

ACKNOWLEDGEMENT OF PATERNITY (IKRAR-E-NASAB):

This is a special mode prescribed by Muhammadan law for establishing the legitimacy of a child and the marriage of its mother. Since a marriage among Muslims may be constituted without any ceremony, the existence of a marriage in a particular case may be an open question. If no direct proof of such marriage is available, indirect proof may be relied upon. Acknowledgment of legitimacy of a child is one of the kinds of indirect proof. Thus, under certain conditions, if a Muslim acknowledges a child to be his legitimate child, the paternity of that child is established in him. But the doctrine applies only to cases where the fact of an alleged marriage is an uncertainty. It cannot be availed of to legitimize a child who is known to be illegitimate^[1]. The doctrine of legitimacy by acknowledgement proceeds entirely upon an assumption of legitimacy and establishment of legitimacy by the force of such acknowledgement.

CONDITIONS OF A VALID ACKNOWLEDGEMENT OF LEGITIMACY:

Muhammadan law prescribes a special mode of establishing the legitimacy of a child. When a man either expressly acknowledges, or treats in a manner tantamount to acknowledgement of, another as his lawful child, the paternity of that child will be established in the man, provided that the following seven conditions are fulfilled:

- The acknowledger must possess the legal capacity for entering into a valid contract.
- The acknowledgement must not be merely of sonship, but of legitimate sonship.
- The ages of the acknowledger and the acknowledged must be such as to admit of the relation of parentage, i.e., the acknowledger must be at least twelve-and-a-half years older than the person acknowledged.
- The person to be acknowledged must not be the offspring of intercourse which would be punishable under Muhammadan law, e.g., adultery, ancestor fornication.
- The parentage of the person to be acknowledged must not be unknown, i.e., the child to be acknowledged must be known to be the child of some other person.
- In **Rashid Ahmed's case**^[2], A, a Muslim, divorced his wife B, by three pronouncements of talaq, but afterwards, continued to cohabit with her, and to treat her as his wife for fifteen years. During this period, five children were born to them, all of whom he treated as his legitimate children. However, the Privy Council held that the children were illegitimate. In this case of divorce by three pronouncements, before A and B could remarry, B should have been married to another man in the interval and divorced by that man. As there was no proof of such marriage with another man and a divorce by him, a presumption of remarriage between A and B could not be raised, and hence, the children were held to be illegitimate, and could not inherit from their father. The observations of the Allahabad High Court on acknowledgement of paternity in *Muhammad Allahabad v. Muhammad Ismail* (1888-10- All. 289) are relevant. In that case, the Court observed: "The Muhammadan law of acknowledgement of parentage, with its legitimating effect, has no reference whatsoever to cases in which the illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible (as in the case of an incestuous intercourse or an adulterous connection), or by reason of a marriage, necessary to render the child legitimate, being disproved."

CONCLUSION:

The doctrine of legitimacy by acknowledgement proceeds entirely upon an assumption of legitimacy and establishment of legitimacy by the force of such acknowledgement. This doctrine relates only to cases where either the fact of the marriage itself or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is not proved in the sense of law, as distinguished from disproved. In other words, the doctrine applies only to cases of uncertainty as to legitimacy, and in such cases, acknowledgement has its effect, but that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child.

1.7 Guardianship

Custody (Wali) & Hijnat, Definition of Guardian, Classification of Guardianship, Power of Guardian, Disqualification of Guardian

Marriage dissolution leaves many problems to be resolved. These relate to parties to the marriage, their property and most importantly their children. Most deficient we are in the provisions relating to the solution of the aftermath of divorce problems, particularly of children.

Since the dawn of humanity, the protection of rights and interest of minor has been the concern of civilized system of law. The need for such provision emanates from the immaturity of the minor by the reason of his age and his preowned incapacity to take adequate care for himself. Usually, the parents do take care but the necessity for the society safeguarding the child's interests through the machinery of law arises where the parents are divorced or separated.

With the first signs of matrimonial discord, the question of guardianship and custody raises its head and inevitably leads to bitter quarrels even long after the marriage is ended. Both the father and mother feel natural affection for the child and want its custody. In such a situation some difficulty arises regarding the children's guardianship and custody, – who is to take charge of them, the father or mother? A minor is supposed to have no capacity to protect his or her own interest. Law therefore requires that some adult person must safeguard the minor's person or property and do everything on his or her behalf because such a minor is legally incompetent. A person who is authorized under the law to protect the person or property of a minor is called a guardian. Under Muslim law, the guardian is required for the purpose of marriage, for protecting the minor's persona and protecting the property.

The source of the law of guardianship and custody are certain verses in the *Quran* and a few *Ahadis*. The *Quran*, the *Ahadis* and other authorities on Muslim law emphatically speak of the guardianship of the property of the minor, the guardianship of the person is a mere inference. Guardian includes any person having legal custody or control over the child.

Under Muslim Law, the notion of guardianship is subsisting from the beginning. Its source is found in some verses of the *Quran* and *Ahadis* though a little is found about guardianship of a person. For example, according to Rudd-ul-Mukhtar, the right of guardianship of the minor's property belongs to the father and in his absence to his executor, but if an executor has not been appointed, then to the grand-father. After the death of grandfather, the right goes to grandfather's executor, and if the executor has not been appointed by him then to the *Kazi* who may himself act as such, or may appoint someone to act on his behalf.

The term 'guardianship' (Wilayat) connotes the guardianship of a minor. The Quran is the basis of the law relating to guardianship. Muslim Law makes a distinction between guardian of the person, guardian of the property and guardian for the purposes of marriage (Wilayat-ulnikah) in case of minors. Father or his executor or in his absence, the paternal grandfather, being the natural guardian, are in charge of the minor's person, on the other side "custody of the child" simply means a physical possession (custody) of the child upon a certain age. Although mother is not the natural guardian of the child under Muslim law, but she has a right to the custody of the child, till the child attains a specific age. But the father or the paternal grandfather has a control over the minor during the whole period of the minority. **Tahir Mohmood** states that:

"Guardianship of a person in relation to a child belong primarily to its father, the mother's being only a pre-emptive right to keep the father away for a legally prescribed period only from a particular aspect of the guardianship of person, namely, the custody and physical upbringing of the child"

DEFINITION OF GUARDIAN

The term 'guardian' is defined in the Guardians and Wards Act, 1890 as a person having the care of the person of a minor or of his property, or of both his person and his property. So, there is no doubt that individual who has by law the right and duty of disposing of a boy or a girl in marriage may be said to have, for that Limited purpose, the care of his or her person. But there is no mention of disposal in marriage in any part of the act, and nothing to indicate that it was intended to interfere with the rules of Muslim law which assigns that function. Under the name of Jabr, it relates to who are not necessarily those

entitled to the general care and custody(hizanant) of the ward's person (Wilson). The Quaran is the basis of the Sunni and Shia schools.

STATUTORY DEFINITION

A person who has the legal responsibility for providing the care and management of a person who is incapable, either due to age (very young or even very old or to some other physical, mental or emotional impairment, of administering his or her own affairs. In the case of a minor child, the guardian is charged with the legal responsibility for the care and management of the child and of the minor child's estate.

The term 'guardian' has been defined under many Acts and there is almost similarity in the meaning given under these Acts. Under section 2 of the Children (Pledging of Labour) Act, 1933 'guardian' includes any person having legal custody of or control over a child. According to section 2(k) of the Children Act, 1960, 'Guardian' in the opinion of the competent authority having cognizance of any proceeding in the relation to a child, has, for the time being, the actual charge, or control over, that child,

According to the section 4(2) of the Guardian and Wards Act, 1890, 'Guardian' means a person having the care of the person of a minor or of his property, or of both his person and property. Under section 4(b) of the Hindu Minority and Guardianship Act, 1956, "Guardian" means a person having the care of the person of a minor or his property or of both his person and property.

DEFINITION OF GUARDIANSHIP UNDER MUSLIM LAW

Under Muslim law, it is called HIZANAT. Guardian means legal authority and corresponding duty of a person to care for another person (a child, a disabled, an aged old, etc) relating to his body or property. A person under the protection of another is commonly known as ward.

WHO IS A MINOR?

A minor is one who has not attained the age of majority and who doesn't have legally right over anything and consider as incapable of making legal decision and who will be under custody of someone known as parents or guardian.

Even the Muslim are governed by the India Majority Act, 1875, except in matter relating to marriage, divorce and dower. According to **Section 2 of the Child Marriage Restrain Act, 1929** (as amended in 1978), the minimum age for marriage is **21 years** for male and **18 years** for female.

Fifteen years is the age of majority in general. As regards other matter of guardianship of person and property, Muslim will be governed by the majority act which of guardianship of person and property, Muslim will be governed by the majority act which prescribe 18 years as the age of majority. Thus, in the case of wills, waqfs, etc., the majority will terminate on the completion of 18 years.

Under Muslim law, any person who has attained puberty is entitled to act in all matter affecting his or her status or his or her property. But that long has been materially altered by the Indian Majority Act, the only matter is which a Muslim is not entitle to act on attaining the age of 15 years, are:

- 1. Marriage**
- 2. Dower**
- 3. Divorce**

In all other matters, his minority continuous until the completion of 18 years. Until then the court has power to appoint a Guardian of his person or property or both under Guardians and wards act in which case the age of minority is prolonged until the minor has completed the age of 21 years.

It differs from the Indian Majority Act after the completion of the eighteenth year of the child then he/she becomes an adult. And once in the instance where the marriage has been conducted by arrangement between the parents of the major boy and girl and has been misrepresented or concealed in any way then the status of the marriage shall be invalid.

This has been similarly held in the case of *Sayid Mohaddin v. Katijabai*.^[2] On the other hand, the marriage of a minor child shall be permitted by the parent or the guardian. This power is given to the parents or the guardian because it is expected of them to act in the interest of the child. There obviously exists a trust relationship between the minor child and the parent. But the relationship between the

guardian and the child is fiduciary in nature. This is to ensure that the minor child is not acting unfavourably to their own interest.

Therefore, assuming that the minor child is incapable to maintain himself there is need for resorting to the appointment of a guardian who shall be an adult and shall be capable to make decisions on behalf and in the interest of the minor child be it a girl or a boy.

APPOINTMENT OF GUARDIAN: Guardianship under Muslim law

When the court will be satisfied that it is for the welfare of a minor that an order will be made for appointing a guardian of his or her person or property or both as declaring a person to be guardian, thus the Court take an order accordingly.

Section 15(1) of the Guardians and Wards Act, 1890 permits for the appointment of a joint guardian where the court has appointed a joint guardian and any one of them has died, the survivor continues to act as guardian.

Section 19 of the Act says that in case the superintendence of the property of a minor has been assumed by a court of wards under any local law in force: (i)The court shall not be able to appoint a guardian of property under the Guardian and Wards Act. (ii)in case the court has been empowered to appoint a guardian of the person for the minor, the same cannot be done by a court under the Guardians and Wards Act. State Governments are also empowered to appoint a court of wards. The main aim of these courts is to constitute ward courts for the purpose of regulating, constitution, working, and powers of courts of wards.

Sections 6, 19 and 21 of the Guardian and Wards Act provides that in the following matters, the courts should not interfere with the question of guardianship of a minor: Where a guardian of the minor's person, property or both has been lawfully appointed under a will in accordance with the law to which the minor is subject. If a guardian is not performing his duty properly, the court may remove him.

Section 20 of the Guardian and Wards Act 1890 imposes a duty on the guardian to deal with the ward's property carefully and honestly. **Section 21** of the above act provides that minor not competent to act as guardian of another minor, will not act as the guardian.

Section 24, 25 and 26 of the Guardian and Wards Act provides for the custody of the child by one appointed under the Act as guardian of the person. This is a duty to look to the minor support, health and education, and such other matters as the law to which the ward is subject required.

Section 27 of the above deal with the duties and the limitations on the power of guardians. The statutory Guardian of the property is required to deal with the minor's property as a man of ordinary prudence would deal with his own property. This is the duty of the guardian to obtain prior approval of the court for disposing of minor's property.

1. Section 41 of the above Act says that a guardian appointed by the court or a testamentary guardian shall cease to be a guardian on the happening of any one of the following incidents:in the case of the death, removal or discharge of the guardian;
2. on attaining majority by the minor;
3. in the case of guardianship of the person, Guardian shall cease to have any power:
 - (i) on the marriage of the minor, if female to a person not unfit to be Guardian of her person;
 - (ii) on attaining majority by the minor;
 - (iii) in the case of guardianship of the person, guardianship shall cease to have any powers-
 - (a) on the marriage of the minor, if female to a person not unfit to be the guardian of her person
 - (b) The revival of guardianship right of the person in whose disability another person acted as the guardian;
1. In case of a guardianship of property a guardian shall not be entitled to act as guardian on the assumption of the superintendence of the minor's property by a court of wards.

In appointing or declaring the guardian of a minor the court shall take into consideration the Welfare of the child. In considering what will be for the Welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and the capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed Guardian with the minor or his property. If the minor is old enough to form an intelligent preference, the court may consider that preference.

School	Age and sex of child	Custody
(sub-school of Sunni Hanafi)	Male child until attains the age of 7 years Female child until attains puberty	Mother
Maliki/Shafis/Hanabalīs	Male child until attains puberty Female child until she is married	Mother
Shia Law	Male child till the age of 24 Female child till the age of 7 age	Mother
Hanafi Law	Male child over 7 years of age Unmarried girl child until she attained puberty	Father
Shia Law	Male child over 2 years of age Unmarried female child of 7 years of more	Father

KINDS OF GUARDIANSHIP/ GUARDIANSHIP UNDER MUSLIM LAW

Muslim Law makes a Distinction between Guardian of the person, guardian of the property and guardian for purposes of marriage (wilayat-ul-nikah) in the case of minors.

Mohammedan Law recognizes three kinds of guardianship. Guardianship under Muslim Law recognizes the following kind of guardianship:

- Guardianship in marriage (jabr)
- Guardianship of the person of the minor for custody (Hizanat).
- Guardianship of property which has been subdivided into:
 - (1) De jure guardianship/ Legal / Natural Guardian
 - (2) De facto guardianship
 - (3) Certified guardianship/ Guardian appointed by the Court

GUARDIANSHIP IN MARRIAGE (JABR)

It is one of the essentials of a valid marriage that the parties are competent to enter into marriage which means they must have attained the age of puberty. However, this general rule admit one exception that is., where the marriage is contracted on behalf of the minors by the guardian. This exception is the most distinguishing feature of Islamic jurisprudence because it empowers a father to impose the status of marriage on his minor children.

This power of imposition is called (*jabar*), the abstract right of guardianship (*wilayat*), and the Guardians so empowered is known as *Wali*. Thus, under the Muslim law of all schools, the father has the power to give his children of both sexes in marriage without their consent, until they reach the age of puberty – known as *bulugh*.

Under the Muslim law the father has the power to give his children of both sexes in marriage without their consent to enter into marriage but it is before the Shariri stage. It is to be noted, however, that in respect of marriage guardianship no one can be appointed Guardian by the court. It is the substantive law itself that declared who, for the purpose of marriage, possesses the patria potestas; the court cannot appoint wali for marriage although, in some cases, the Quazi or Court itself can act as a marriage guardian.

PERSON ENTITLED:

The following is the list of the persons who can act as Guardians in the marriage of a minor, in the order of enumeration.

1. The father.
2. The father's father, how high soever.
3. Full brother and other male relations on the father's side, in order of inheritance given under residuary.
4. Mother.
5. Maternal relations within Prohibited degree
6. The Qazi or the court.

Shia Law recognizes only the father and failing him the father's father how high so ever as guardian in the marriage of a minor.

TESTAMENTARY GUARDIAN FOR MARRIAGE

Under Muslim law testamentary guardian for marriage are not recognised. A father has no power to appoint any person as guardian for marriage by his will.

MARRIAGE PERFORMED BY REMOTER GUARDIAN IS VOID

The rule of Muslim law is that when a remote guardian allowed a boy or a girl to marry when the nearer one is present, the validity of the marriage is dependent upon the latter's ratification and consent.^[4] This rule contemplates a case where the boy or girl is given in marriage by a person who in order of priority comes immediately after the proper guardian at that time.

In fact, the consent of the nearer guardian may have the effect of transferring the authority to the remoter guardian and exactly the same happens when the nearer guardian resides at a distance and no communication is possible with him. This rule cannot apply to a case where as between the nearer guardian and the one who actually disposes of the minor in marriage, there are other relations who have preferential rights of guardianship.

Such a marriage by a remoter guardian when the nearer Guardian is present and has given his consent is not only irregular but also void. The legal consequences would be that it may be terminated by a single declaration on either side, consummation of marriage does not stand in the way of terminating it when the marriage is invalid.

Under the Muslim Law, where the marriage is contracted for the minor by the father or father's father, the minor has no option on attaining puberty, unless the contract is to the manifest disadvantage of the minor or has been fraudulently or negligently entered into.

Under the **Dissolution of Muslim Marriage Act, 1939** the right of repudiation of Muslim female has been modified. **Section 2(vii) of The Dissolution of Muslim Marriage Act, 1939** says that a woman married under Muslim law will be entitled to obtain a decree for the dissolution of her marriage if she proves (i) that she having been given in marriage by her father or other Guardian before she attained the age of 15 years, repudiated the marriage before attaining the age of 18 years, and (ii) that the marriage has not been consummated.

The Guardian and Wards Act, 1890 is silent regarding the appointment of Guardian in marriage. Under this act, the court is having jurisdiction only in the matter of guardianship of person and guardianship of property. Similarly, a person appointed or declared by the court can act as marriage guardian.

EFFECT OF APOSTASY ON GUARDIANSHIP OF MARRIAGE:

The question whether a convert From Muslim to another faith is capable of contracting a valid marriage of a Muslim minor as the guardian of the minor is still an open issue. Under pure Muslim law, a person loses his right to guardianship in marriage as soon as he gets converted to another faith. However, the Caste Disability Removal Act of 1850 provides that a person does not lose his right to property if he is converted to another faith.

On the strength of this Act, the Honorable High Court of Calcutta in *Muchoo v. Arzoon*,^[6] held that the duties of the director attached to the office under Mohammedan law and affecting the interest of

other Mohammedans Can be validly performed by an unbeliever of Islam and a convert Muslim father was allowed the custody of his Muslim minor children and to direct their education.

Honorable Chief Court of Punjab relied on Muchoo's case in *Gul Mohammad v. Mst Wazir*,^[7] in a case where the father had converted from Mohammedanism to Christianity but he was the only parent alive of a boy of 8 years and a girl of 4 years and the grandmother of children was contesting for guardianship of the 2 minors and their property. However, none of these cases is a direct authority on the above subject, i.e., guardianship in marriage.

There is one single authority, viz., *Mahni Bibi case*,^[8] decided by Calcutta High Court. In this case, it was held that under the Muslim system, an apostate cannot be a guardian for marriage, so the marriage of a minor girl contracted by her mother against the consent of her father, who was converted to another faith was held valid.

GUARDIANSHIP OF THE PERSON OF THE MINOR FOR CUSTODY (HIZANAT).

The guardianship of minor's person for custody (hizanat) has to be studied with reference to the age of the minor and his relationship to the guardian.

MOTHER

The mother is entitled-

- (1) in Hanafi law to the custody (hizanat) of her male child until he has completed the age of 7 years and of her female child until she has attained puberty, and
- (2) In Shia law to the custody of her male child till the age of 2 years and to the custody of her female child Until the age of 7 years. The right continues though she is divorced by the father of the child unless she marries a second husband in which case the custody belongs to the father.

A mother is the de facto guardian. She cannot execute a waqf on behalf of the minor. Such execution is void as de facto guardian had no right to alienate minor's property unless appointed as guardian by Court.

FEMALE RELATION IN DEFAULT OF MOTHER

Under Hanafi Law, failing the mother, the custody of a boy under the age of 7 years, and of a girl who has not attained puberty goes to the following female relatives in the order given below:

1. Mother's mother, how high soever.
2. Father's mother, how high soever.
3. Full sister.
4. Uterine sister.
5. Consanguine sister.
6. Full sister's daughter.
7. Uterine sister's daughter.
8. Consanguine sister's daughter.
9. Maternal aunt (Father's sister) in like order as sisters; and
10. Paternal aunt, also in like order as sisters.

However, this right of the mother or any of these female relations is lost in the following cases:

- if she leads an Immortal life, or
- if she neglects to take proper care of the child; or
- if she marries a person not related to the child within prohibited degrees;
- if, during the subsistence of the marriage, she goes and resides at a distance from the father's place.

In *Rahima Khatoon v. Saburjanessa* the court held that the mother loses the guardianship of the minor daughter in case she remarries with another person not related to the child within prohibited degrees of relationship. In the present case, the court granted the certificate of guardianship to the parental grandmother with regard to the minor's persons and property.

OTHER MALE RELATIONS

In default of the mother and other female relations the right of custody (hizanat) in Hanafi Law, belongs to the following persons in order of enumeration:

- Father.
- Nearest paternal grandfather
- Full brother.
- Full brother's son.
- Consanguine brother.
- Consanguine brother's son.
- Full brother of the father.
- Consanguine brother of the father.
- Son of father's full brother.
- Son of father's consanguine brother

Provided that no male is entitled to the custody of an unmarried girl, unless he stands within the prohibited degrees of relationship to her. If there were none of the above guardian, it is for the court to appoint a Guardian of the person of a minor. In Shia Law, failing the mother, the father, and failing the father, the father's father is entitled to the custody of a minor's person. It is doubtful who would be the guardian failing the father's father.

FATHER

Father is entitled in Hanafi Law to the custody of a boy over 7 years of age and of an unmarried girl who has attained puberty (in Shia Law to the custody of a male child over 2 years and an unmarried girl of 7 years or more).

In *Farzanabi v. S.K. Ayub Dadamiya*,^[12] the Bombay High Court held that there is no doubt that under Muslim law the father is entitled to the custody of a son over 7 years of age. The court observed that as far as possible the ordinary rule of Muslim law should be adhered to. The children were above 7 years of age.

The court also found that the welfare of the minors did not lie in favour of residing with your mother. The children also expressed the desire to live with their mother. But the court observed that they were not of an age when they could make an intelligent preference. The court therefore awarded the custody of the child to the father.

The husband is not entitled to the custody of his minor wife unless she attains puberty or such an age as would permit the consummation of marriage. The mother is entitled to the custody of the minor married girl as against her husband.

If none to the above-noted maternal and paternal relation is to be found, it is for the court to appoint The Guardian of the person of the minor.

ILLEGITIMATE CHILD

A bastard belongs legally speaking to neither of its parents and it is in every sense of the word filius nullius but for the purpose of securing its due nourishment and support, it should, until it has attained the age of 7 years and be left in charge of the mother. After that it may make his or her own choice to parents with whom he or she want to stay or it may live apart from them altogether.

In the case of *Gohar Begum V Suggi Begum*^[13] where Gohar Begum was a singing woman in the keeping of one Trivedi, a Hindu. She was the unmarried Muslim mother of a natural daughter, Anjum, acknowledged by Trivedi as his daughter. Anjum was sent to stay with a friend of her mother Nazma Begum who later refused to part with her claiming that she had great affection for the child and had sufficient means to look after Anjum. It was held by the Supreme Court that the mother of an illegitimate daughter is in Mohammedan law entitled to its custody; and the refusal to restore the child to its mother was illegal detention. Thus, by the order of Supreme Court, Anjum was handed over to her mother.

RIGHTS OF HIZANAT

All the schools of Muslim law recognize father's right of hizanat under two conditions that are:

- On the completion of the age by the child up to which mother or other females are entitled to custody.
- In the absence of mother or other females who have the right to hizanat of minor children.
- Father undoubtedly has the power of appointing a testamentary guardian and entrusting him with the custody of his children.

Other male relations entitled to hizanat are:

1. nearest paternal grandfather
 2. foil brother
 3. consanguine brother
 4. foil brother's son
 5. consanguine brother's father
 6. foil brother of the father
 7. consanguine brother of the father
 8. father's foil brother's son
 9. father's consanguine brother's son
- Among the Shias hizanat belongs to the grandfather in the absence of the father

It was held in *Smt. Aninunnisa v. Mukhtar Ahmad and Others*,^[14] that where a minor aged 10- 11 years is in the custody of his mother and has intelligently exercised his preference to continue to stay with her, his custody cannot be disturbed and given to his father, though he is the legal guardian of the Minor under the personal law. A mere claim to legal guardianship in such a situation will not stand on a higher footing than the claim of the real mother to continue to have the custody of the minor who has remained in her custody or in the custody of the mother since the birth of the child.

It was further observed by the court that it is true that the father is a natural guardian of his minor son under Muslim law. But still, as it is too well established to be disputed, in proceedings under **Section 25** of The Guardians and Wards Act it is not the guardianship of the minor which is of importance but the welfare of the minor which has to be taken into consideration while deciding about the custody of the minor.

GUARDIANSHIP OF MINOR'S PROPERTY

If a minor owns movable or immovable property, a guardian is necessary to manage it. Muslim law prescribes certain person in an order of preference who can be Guardian of a minor's property. The guardianship of the property of the minor under Muslim law may be classified as follows:

1. Legal (de jure) or natural guardian.
2. Guardian appointed by the court (or certified guardian)
3. De facto guardian

1. LEGAL GUARDIAN

The person entitled in the order mentioned below to be guardian of the property of a minor are:

- The father,
- The executor appointed by the father's will,
- The father's father and
- The executor appointed by the will of the father's father.

Thus, mother, brother, uncles etc. are not entitled as of right to be the legal guardians of the property of the minor. Of course, the father or father's father may appoint any of them (Mother, brother, uncle, etc.) or any other person as his executor or executrix and the latter shall hold as much power as the father or father's father holds.

Except father and father's father, no other person, not even the mother, is legally authorized to appoint, by will, any person as executor or executrix.

In *Amar Ahmad Khan v. Shamim Ahmad Khan*,^[15] the Jharkhand High Court has held that on the death of a Mohammedan his property immediately devolves on his heirs separately to the extent of share they are entitled under personal law. Thus, immediately on death, each of his heir becomes absolute owner of property proportionate to his share. Therefore, under Islamic law, there is no concept of jointness of ownership of properties of a deceased Muslim.

Muslim heirs are independent owners of their specific shares and their liability is also proportionate to the extent of their share in the estate. Under said circumstances, one share holder has no right, title and interest to alienate property of another share-holder.

The court further held that a mother is not a de jure guardian of her minor children under Muslim law and therefore has no right to sell interest of her minor children in immovable property and such transaction is not merely voidable but void.

Power of legal Guardians regarding immovable property

Under Muslim law, a legal guardian of the property of a minor can sell the immovable property of the minor, when the sale is necessary for the maintenance and when the minor has no other property. The word “maintenance” does not exclude other necessary expenses for mental and physical wellbeing of a minor, acceding to the status in society of the family.^[16] Thus, the expenses of ordinary and reasonable education of a child form part of his maintenance.

In the present state of the society, which is rapidly advancing in all direction education up to higher secondary stage cannot be said to be extravagant. So as to be excluded from maintenance. Thus, in the following cases the legal guardian is authorized to deal with the minor’s property:

- When there are debts of the deceased, and no other means of paying them;
- When the minor has no other means of livelihood and the sale is absolutely necessary for his maintenance;
- When double the price of the property can be obtained by him;
- Where the expenses exceed the income of the property;
- When the property is falling into decay;
- When the property has been usurped and the guardian has reason to fear that there is no chance of fair restitution;
- Where there are legacies to be paid, and no other means of paying them.

The guardian has no power to carry on business of his ward, especially if the business is one which may involve the minor’s estate in speculation or loss. From the fact that minor member was held entitled to the benefits of the business cannot be held to have been carried on, on his behalf in the sense of holding him liable for the debts of the business.

In India, the **Guardians and Wards Act, 1890** imposes on every guardian of property the duty to deal with the minor’s property as carefully as a man of ordinary prudence would deal With it if it were his own and entitles every such guardian to do all acts which are reasonable and proper for the realisation, protection or benefit of the property.

Relative rights of the heirs of a deceased person in the property inherited by them

In the case *P. Narsimhai v. Bai Bhabu*,^[17] a widow was in possession of her two minor children’s property. She was required to pay certain loans of her deceased husband. She, therefore, disposed of some of the property which also included the share of the minors. This transaction was challenged. She contested that since the sale was affected for the purpose of paying off the dues under a decree obtained against all the heirs, it should be binding on the two children also.

Thus, it was held by the Gujarat High Court that one of the Muslim co-heir’s property cannot be lawfully alienated his latter’s share for any purpose whatsoever.

2. GUARDIAN APPOINTED BY THE COURT (OR CERTIFIED GUARDIAN)

In absence of legal guardian, the duty of appointing a guardian for the protection and preservation of the minor’s property fall in the court.

While appointing a guardian the court takes into consideration the welfare of the minor and, as such, may appoint mother instead of paternal uncle, as the guardian of the property of the minor. The court also takes into consideration the will of the father. If the mother is appointed the guardian, the fact that she is a pardanashin lady will not be considered as an objection to the appointment.

The court must pay due regard to the wishes of the minor's father and the interest and the welfare of the minor, whatever that may be in a particular case and a guardian must be appointed with due regard to these two considerations by the court. Without the previous permission and sanction of the court a guardian of the property appointed by the court cannot-

- charged immovable property of the minor;
 - (ii) mortgage;
 - (iii) transfer by sale;
 - (iv) transfer by gift;
 - (v) exchange; and
 - (vi) lease any part of the immovable property for a term exceeding **5 years** or for any term extending more than **1 years** beyond the date with the ward will cease to be a minor
- Thus, he can lease the immovable property even without the permission of the court-
- for a term not exceeding 5 years, or
 - (ii) for a term not extending more than one year beyond the date on which the minor will cease to be a minor, whichever is shorter.

If search guardian alienates the minor's property in contravention of the provision, given above, such alienation will be voidable at the instance of the minor or any other person affected thereby.

Permission for such alienation as given above must not be granted by the court except in the case of necessity or for an evident advantage to the ward.

Powers of legal guardian regarding movable property

Legal guardian the property of a minor has power to sell or pledge the goods and chattels of the minor for the minor's imperative necessities, such as, food, clothing and nursing and de facto guardian has similar rights. But guardian appointed by the court has larger power. Such a guardian is bound to deal with the property as carefully as the man of ordinary prudence would deal with it as if it were his own.

DE FACTO (वास्तव में) GUARDIANS

A person, who is neither a legal guardian, nor a guardian appointed by the court but has voluntarily placed himself in charge of the person and property of the minor, is known as de facto guardian.

A de facto guardian is a mere custodian of the minor's person and property but has no right over either. He has only responsibilities towards the minor's person or property or both but no rights in respect thereof. Usually de facto guardians are relatives of the minor but without right to be the guardian under Islamic law unless appointed by will or by the court. He is thus an officious intermeddle (fazooli) with the minor's property and has no status or position to alienate it without court's permission.

Legal guardians and guardians appointed by the court are de jure guardian. The mother, brother, uncle and all relations other than the father and father's father are de facto guardians unless they are appointed executors by the will of the father or father's father or appointed guardians by the court.

No power to alienate immovable property

The position of de facto guardian is quite different from that of the legal guardian and guardian appointed by the court. He has no power authority to alienate the minor's property. "An alienation of minor's immovable property without the authority of the court by a de facto guardian is absolutely void".[18]

1. He cannot refer any dispute regarding the immovable property of the minor to any arbitration;
 - ✓ He cannot give consent on behalf of the minor so as to validate a bequest to his co-heirs;

- ✓ He cannot enter into a contract of partnership or to allow the continuance of the partnership business dissolved by the death of the minor's father;
- ✓ He cannot bind the minor by executing a bond in lieu of his father's debts;
- ✓ He cannot make agreements on minor's behalf for even purchase of immovable property.

In the case of *Immambandi v. Mutasaddi*, [19] where one Zohra, a widow of one Ismail Ali Khan, conveyed the shares of herself and her minor children, for Rs. 10,000 and the sale was opposed in a suit by the two other widows and children, it was held that a de facto guardian has no power to convey to another any right or interest in the immovable property which the transferee can enforce against the Infant; nor can such transferee, if let into possession of the property under such unauthorized transfer, resist an action in ejectment as trespasser, on behalf of the Infant.

Alienation, not only voidable but void

A sale by a de facto guardian of the minor's immovable property without courts permission is void and not merely voidable. The question of ratification by the minor or attaining majority does not arise as the alienation is void in its inception.

If a minor seeks to assail the legality and the binding nature of the alienation made by de facto guardian, it is always open to him to avoid the contract as being void. But when it is not challenged, it is not open to the third parties to impugn the alienation.

Mother, brother and uncle, etc., as de facto Guardians

Under the Mohammedan law, mother is entitled to the custody of her minor children up to a certain age according to the sex of child. But she is no natural guardians of their property. The father alone or if he is dead, his executor is the legal guardian. The mother has no longer power to deal with her child's property then any outsider or non-relative. When the mother is the father's executrix or is a certified guardian, she has all powers of a de jure guardian; otherwise any deed made by her on the minor's behalf will be void ab initio.

Thus, a deed of partition to which a Mohammedan minor is a party represented by his mother as de facto guardian is void and not binding on the minor irrespective of the consideration that it benefits him or the arrangement was followed for a long period. The same remark applies to brother, uncle and relation of the minor.

In *Mohammed Amin v. Vakil Ahmad*, [20] the Supreme Court has held at a de facto guardian has no authority to enter into a family settlement in respect of a minor's benefit, even though the settlement might be for his benefit.

Testamentary guardianship in property

Quran specifically provides for the appointment of a testamentary guardian. Father and the father's father are competent persons to be appointed by will a guardian of the property of their minor sons and grandsons respectively. Under Shia law, the testamentary guardian or executor must be major, sane, professor of Islam and of good character.

It is, however, not clear whether in the presence of grandfather, the father possesses the capacity to appoint a testamentary guardian. In *Mst. Atkia Begum v. Mohammad Ibrahim* [21] it was held that in the presence of grandfather, the father has no right to appoint a guardian.

Alienation of movable property

A de facto guardian has the same power to sell and pledge goods and chattels of the minor in his charge for the minor's imperative necessities, such as food, clothing, or nursing as a legal guardian of his property.

Disqualification of Guardian

Disqualifications of guardianship of person

1. In case of mother and other female relation:
2. If she married a person who is not related to the child within the prohibited degrees by consanguinity
3. If she leads an immoral life
4. If she resides during the subsistence of marriage at a distance from the father's place of residence.
5. If she converts to another religion.
6. In case of a male: if the minor is an unmarried girl and is not related to him within the prohibited degrees. If a non-agnate within the prohibited degrees, such as a maternal uncle is available he should be preferred over an agnate not within prohibited degrees. The object of this Islamic rule is to avoid the custody of a male haziin who may marry the girl. However this rule is not recognized by the shias.
7. In case of a husband: if the minor wife hasn't attained the age of puberty or is not of such an age as to allow consummation of marriage.

Termination of guardianship of person

- Death of the guardian
- His removal
- Court of wards taking over the superintendence of the minor's person.
- The minor attaining majority
- The minor girl marrying a person capable to her hazing
- The father of the male minor again qualifying to be his guardian.

MODULE 2**2.1 General Principles of Inheritance under Muslim Law**

Definition of Inheritance, Conditions for Inheritance, Nature of property, Relinquishment of shares, Rights of Females

Intestate succession (बेवसीयत उत्तराधिकार) under Islamic law is a religious law, based on the principle that there must exist mandatory rules for the passing of property from generation to generation. These rules are made on the presumed closeness of the heirs to the deceased, who are segregated amongst different classes. The Islamic laws of inheritance can be divided into Hanafi law of succession and Shia law of succession, both of which derive from the common law of India. They have the force of law by virtue of the Muslim Personal Law (Shariat) Application Act, 1937. The source of the rules of succession under Islamic law comes from the Holy Quran, Hadith, Ijma, and Qiyas. The rules of succession come into play only upon the death of the ancestor, and only then does his property vest in his heirs.

Intestate succession in Islamic law

Succession refers to the transmission of the property of an ancestor upon his death, to the rightful heir. Where the inheritance of property is carried out according to the Will of the deceased, it is called testamentary succession. In some cases, the deceased dies without leaving a will, and hence the succession is executed according to the general rules. This is called Intestate succession. The fundamentals of intestate succession were compared to pre-emptive rights in the case of Gobind Dayal vs Inayatullah (1885). The Islamic succession is derived from the customary law of succession and is based on a patriarchal family system. After attaining the age of majority, a girl, as well as a boy, have equal rights to hold and dispose of the property inherited. They can lease it, mortgage it, or bequeath the property for themselves. The Surah IV of the Quran states that "From what is left by parents and those nearest related, there is a share for men and a share for women, whether the property is small or large- a determinate share."

In order to understand the rules of succession, it is crucial to know the meaning of the following:

- **Agnates:** A person who is descended from the same male relation. For eg.: son, son's son, son's son's son, etc.
- **Cognates:** A person who is related to the deceased through a female relation. For eg.: Daughter's son, mother's father, etc.
- **Collaterals:** Descendants in parallel lines from the ancestors. They can be either agnate or cognate. For Eg.: Consanguine brothers, Paternal aunts, etc.
- **Heir:** A person who is entitled to inherit the property of another, after his death is an heir.

General principles of inheritance

Following are the general principles followed while under Islamic law:

1. **Nature of Property:** The property of the deceased becomes heritable only after the payment of funeral expenses, debts, and legacies. The remaining property, whether movable or immovable, is heritable. Muslim law does not differentiate between corpus or usufruct, corporeal or incorporeal property. There is no concept of 'joint family property' and 'separate property'.
2. **The Doctrine of Representation:** Doctrine of representation refers to the principle of representation of a pre-deceased father by his son for the purpose of inheritance of the property of the pre-deceased father's father. However, this doctrine is not recognized under Islamic law. The nearer heir excludes the remoter one in Muslim law. This means that if two people claim the inheritance, it will be determined according to the degree of closeness to the deceased.
3. **No birthright:** The Islamic inheritance can only be availed upon the death of an ancestor. A person cannot be an heir of a living person. The right of inheritance, thus, is not a birthright. Until the death of an ancestor, a heir apparent is a mere spes successionis (chance of succession).

4. **The Succession of murdered deceased:** A person who causes the death of the deceased is not entitled to inherit property, whether the murder was intentional or by accident. Any act committed by the heir apparent which causes the death of his ancestor, punishable under the law, forbids him to inherit the ancestor's property.
5. **Illegitimate child:** An illegitimate child is considered to be the child of the mother only. Hence, it cannot inherit from the father, and neither can the father inherit from it. Inheritance rights exist only between the child and its maternal relations.
6. **Missing person:** The Islamic law is not clear regarding the period for which the share of a missing person should be held. This is because of the uncertainty of the fact as to whether he is alive or dead. The Indian Evidence Act, 1872 prescribes under Section 108 that if it is proved that a person is missing for 7 years and has not been heard of, then the burden of proof of his life is on the person to affirm it. In other words, a person who has not been heard of for 7 years is legally presumed dead and the inheritance of his properties is commenced.
7. **Apostasy:** A person who changes into a different faith than Islam or an apostate is not entitled to inherit the property of a deceased Muslim under Islamic law. However, Section 3 of the Caste Disabilities Removal Act, 1850 abolished this disability. In India, an apostate is entitled to inherit the property of a deceased Muslim, but his descendants are not entitled to inherit.
8. **Escheat:** In the cases where a deceased dies without leaving behind any heirs, then his property is inherited by the State. The State is considered to be the heir of every deceased.
9. **Child in the womb:** A child in the womb is considered to be a living person provided that he is born alive. Hence, a child in the womb can inherit the property of the deceased.

Classes of heirs

The heirs under Islamic law can be divided into three classes. This division is made keeping in mind the closeness to the deceased. Under intestate succession, two primary questions are required to be answered:

- (i) Who are the heirs of the deceased?
- (ii) What is the share of each of the heirs?

The Islamic law divides heirs into 7 classes, 3 principal classes and 4 subsidiary classes. The principal classes are:

1. Quranic heirs or Sharers or *dhawul-furud*
2. Agnatic heirs or Residuaries or *asabat*
3. Uterine heirs or Distant kindred or *dhawul-arham*

The subsidiary classes are:

1. Successor by contract
2. Acknowledged kinsman
3. Sole legatee
4. Escheat

Upon the death of the deceased, the first step is to make the payment for funeral expenses, debts and legacies of the deceased. Next, the property is divided amongst the respective relations or sharers in proportion to the shares they are entitled to receive. If any residue (अवशेष) remains, it is then divided among the residuary. If there are no sharers and residuary, the whole property will be inherited by the distant kindred.

A successor by contract is a person who entered into a contract with the deceased before his death, in consideration to receive a payment. This payment can be interest, fine etc. An Acknowledged kinsman is a person with whom the deceased made an acknowledgement of kinship. Like, a man can acknowledge another as his brother, who becomes an acknowledged kinsman. In the absence of any relation in the principal classes and the first two subsidiary classes, a person who is entitled to inherit the property of the deceased is known as the sole legatee. Finally, in the absence of any of the principal or subsidiary classes, the property of the deceased is inherited by the State and his whole estate would escheat to the Government.

Quranic heirs

The Quranic heirs or the sharers are those relations of the deceased whose shares have been determined by the Quran. Their share and the order of preference in succession is fixed under the Quran. There are 12 Quranic heirs. Let us discuss the sharers and their allotted shares.

1. **Husband:** A surviving husband inherits his wife's property. In case he has a child or child of a son how low soever, his share is $\frac{1}{4}$ of the heritable estate. But if he does not have a child or child of a son how low soever, then he inherits $\frac{1}{2}$.
2. **Wife:** A surviving wife is entitled to receive $\frac{1}{4}$ of the heritable property where the husband has not left any child or son's or grandson's child. If the husband has left a child, then the wife inherits $\frac{1}{8}$. In the exceptional cases where there is more than 1 wife, then they have to divide this share equally amongst themselves.
3. **Father:** The father becomes a Quranic sharer only if the deceased has left a child or son's or grandson's child. Otherwise, he is not a Quranic sharer. A father who is a Quranic heir inherits $\frac{1}{6}$ of the deceased estate.
4. **Mother:** There are 3 distinct scenarios for the mother's inheritance:
 - $\frac{1}{6}$ share – Where there is a child or son's child how low so ever or where there are 2 or more brothers or sisters or 1 brother and 1 sister, whether full, consanguine or uterine.
 - $\frac{1}{3}$ share – When there is no child or child of the son how low so ever and no brothers or sisters.
 - $\frac{1}{3}$ of remaining share after deducting the wife's/husband's share – Where there is a father and a wife/husband.
5. **Maternal Grandmother:** In cases where the mother of the deceased is absent, the maternal grandmother will be entitled to inherit $\frac{1}{6}$ of the share.
6. **Paternal Grandmother:** Only in those cases where both the parents of the deceased are absent, the paternal grandmother becomes a Quranic heir. She is entitled to get $\frac{1}{6}$ share of the heritable estate. If there are 2 or more grandmothers of the deceased (maternal or paternal) who become Quranic sharers, then both the grandmothers will get a joint share of $\frac{1}{6}$ which they have to share equally.
7. **Paternal Grandfather:** A paternal grandfather becomes a Quranic sharer only when the father of the deceased is absent. He is entitled to receive $\frac{1}{6}$ of the share. Maternal grandfather is not a Quranic sharer in any case.
8. **Daughters:** The daughters of the deceased become Quranic heirs only in the absence of a son. Single daughter receives $\frac{1}{2}$ share, but if there are more than 1 daughter, then all of them inherit $\frac{2}{3}$ share collectively, which they share equally.
9. **Son's Daughter:** The son's daughter becomes a Quranic sharer only if she has predeceased the son of the deceased and such a son has not left behind any son of his own. So, a single son's daughter receives $\frac{1}{2}$ share while 2 or more son's daughters receive $\frac{2}{3}$ collectively, which they are required to share equally. If such grand-daughters survive with a single daughter of the deceased, they collectively get $\frac{1}{6}$ share.
10. **Full sister:** A single full sister receives $\frac{1}{2}$ share of the heritable estate when there is no son how low so ever, father, grandfather, daughter, son's daughter or brother. When there are 2 or more full sisters and no excluder, the sisters will get $\frac{2}{3}$ share collectively.
11. **Consanguine sister:** When there is only 1 consanguine sister with no full sister and no excluder, then she is entitled to receive $\frac{1}{2}$ share. But if there is 1 full sister, then she will get only $\frac{1}{6}$ share. 2 or more consanguine sisters take $\frac{2}{3}$ share collectively in the presence of no excluder. But if there are 2 or more surviving full sisters, then the consanguine sister is not a Quranic heir.
12. **Uterine sister-brother:** Uterine sisters and brothers become Quranic heirs only if there is no child, son's child how low soever, father and grandfather of the deceased. The share of one such sister or brother is $\frac{1}{6}$ and if there are 2 or more, they collectively inherit $\frac{2}{3}$ share and divide it equally.

Agnatic heirs(अज्ञेय उत्तराधिकारी)

Agnate heirs or residuaries come into the picture only when after dividing the heritable estate between the Quranic heirs, there is still some estate left. This residue estate goes to the residuaries. All the residuaries are related to the deceased through males only. The residuaries are further divided into the following sub-categories:

Residuaries in their own rights

This class involves the agnatic male relations of the deceased. No female is included in this line of relationship. Residuaries in their own rights is divided into:

1. Offspring of the deceased, that is the son of the deceased or the male lineal descendants.
2. The root of the deceased, which is the father or the grandfather of the deceased, how high so ever.
3. Offspring of the father, that is the full brothers, consanguine brothers and their male lineage.
4. Offspring of the true grandfather, how high so ever.

Residuaries in another's rights

Those females who become residuaries, only when they coexist along with certain males fall under this category. This means that the females become residuaries when there exist males on the same degree, or of a lower degree who would receive such share. These are:

1. Daughters with sons
2. Son's daughters with a son's son or a male descendant
3. Full sister with the full brother
4. Consanguine sister with her brother

Residuaries together with another

There are only two residuaries together with another:

1. Full sisters, with the daughters or son's daughters
2. Consanguine sisters, with the daughters or son's daughters

Uterine heirs(गर्भाशय के वारिस)

Only in the absence of sharers and residuaries, the heritable estate of the deceased is inherited by the uterine heirs or the distant kindred. One exceptional circumstance is that only when the wife or husband of the deceased survives, leaving behind no other sharer or residuary, then the distant kindred can inherit the rest of the estate remaining after the share of the wife or husband. In this class of heirs, all those relations who do not fit in the above classes are included. Meaning thereby, the female agnates and the cognates are placed in this class. Uterine heirs can be divided into 4 categories:

Descendants of the deceased

1. Daughter's children and their descendants
2. Children of son's daughters how low so ever and their descendants

Ascendants of the deceased

1. False grandfathers, how high so ever.
2. False grandmothers, how high so ever.

Descendants of parents

1. Full brother's daughters and their descendants.
2. Consanguine brother's daughters and their descendants.
3. Uterine brother's children and their descendants.
4. Daughters of full brother's sons how low so ever.
5. Daughters of consanguine brother's sons how low so ever.
6. Sister's (full, consanguine or uterine) children and their descendants.

Descendants of immediate grandparents

1. Full paternal uncle's daughters and their descendants.
2. Consanguine paternal uncle's daughters and their descendants.

3. Uterine paternal uncles and their children and their descendants.
4. Daughters of full paternal uncle's sons how low so ever.
5. Daughters of consanguine paternal uncle's sons how low so ever.
6. Paternal aunts (full, consanguine or uterine) and their children.
7. Maternal uncles and aunts and their children.
8. Descendants of remote ancestors how high so ever (true or false).

Doctrine of Aul

There may be cases where the arithmetic sum of the functional shares allotted to the heirs of the deceased is more than equity or less than equity. Where the sum of the shares is less than equity, then the doctrine of Aul or doctrine of increase is applied. When the total shares exceed unity, then the shares of each sharer is reduced by making a common denominator and increasing the denominator in order to equate it to the sum of numerators.

Let us understand with the help of an illustration.

Where the husband gets $\frac{1}{2}$ share and 2 full sisters get $\frac{2}{3}$ share, the total becomes $\frac{7}{6}$ which is greater than 1. This means that the doctrine of Aul is to be applied.

Step 1: Make a common denominator. So, the common denominator is 6.

Step 2: Increase the denominator and make it equal to the sum of the numerators. So, $\frac{3}{6} + \frac{4}{6}$ changes to $\frac{3}{7} + \frac{4}{7} = \frac{7}{7} = 1$.

Now, the shares are divided proportionately. The husband will get a $\frac{3}{7}$ share and the sisters will get $\frac{4}{7}$ share collectively.

Doctrine of Radd

After the division of shares, the total allotted shares are less than 1, and there is no residuary to inherit the residue, then the residue reverts back to the sharers in the same proportion of their shares. The only exception to this rule is that the wife or husband is not entitled to receive the return in the presence of an heir. This is the doctrine of radd or doctrine of return.

Following is an illustration for better understanding.

The Mother of the deceased has $\frac{1}{6}$ share and the daughter has $\frac{1}{2}$ share of the estate. The total is $\frac{2}{3}$, which is less than 1. Hence, the doctrine of radd will be applied.

Step 1: Make a common denominator. Here, the common denominator is 6.

Step 2: Decrease the denominator and make it equal to the sum of the numerators. So, $\frac{1}{6} + \frac{3}{6}$ becomes $\frac{1}{4} + \frac{3}{4}$ which is equal to 1.

Thus, the mother will get $\frac{1}{4}$ share and the daughter will get $\frac{3}{4}$ share.

2.2 Sunni Law of Inheritance (विरासत का सुन्नी कानून)

Rules or General Principles of Sunni Law of Inheritance, Classes of Heirs in Sunni Law

Sunni Law of Inheritance

Sunni and Shia laws of inheritance are distinct in their fundamental model as well as specific conclusions, although both are encouraged from the Quranic tone of inheritance. As a result of the fact that Sunnis are in majority, their law of inheritance is well known by people, while Shia law of inheritance does not have such a benefit.

This article aims to present in a simple manner the basic features of Shia law of inheritance. The article also provides a brief of the Sunni law of inheritance. While dealing with the basic features of Shia law, it gives a comparative analysis with corresponding features of Sunni law. The article explains how these features are involved in discussing various shares to legal heirs in Shia and Sunni laws of inheritance. There is also an amplification of the space which is shared by both Shia and Sunni traditions of inheritance in Islam.

Introduction

It is common under Islamic law that the major striking difference between Sunni and Shia legal systems is their variant laws of inheritance. These distinctions are so deep-rooted that it is almost

impossible to judge them. It does not mean that there exists no similarity between the two. At least there are quite a few ways where these distinct legal customs depend on the same types of shares and recommend the same type of solutions to practical problems. Taking into account their variant structures, it is a rising task to justify them within one scale of explanation.

Classes of Legal Heirs:

Proper recognition of these classes helps one understand Shia law of inheritance since details of the system in one manner or another are linked to it. These classes are classified as follows:

Class 1

- Parents, and
- Children (male and female). The children also include their descendants how low so ever irrespective of the fact whether they are descendants of male or female children.

Class 2

- Grandparents (true or false) how high so ever, and
- Brothers and sisters (full, consanguine, and uterine) and their descendants, howsoever low irrespective of their gender.

Class 3

- Paternal uncles and aunts,
- maternal uncles and aunts, and
- their children howsoever low irrespective of their gender.^[1]
- Birth right not recognized

As per Sec.52, birth-right is not accepted. The right of an heir-supposed or assumed to come into continuance for the first time on the death of the forefather, and he is not designated until then to any right in the property to which he would inherit as an heir if he survived the forefather.

• Per-Capita and Per-Strip Distribution (Rule of Distribution)

Succession among the heirs of the same class but associated with various branches may either be per-capita or per-strips. The per capita sharing process is largely used in Sunni law. According to this process, the property left over by the forefathers gets equally divided among the heirs. Hence, the part of each person depends on the number of heirs.

The per strip division process is accepted in Shia law. According to this process of estate inheritance, the property gets shared among the heirs according to the strip they belong to. Hence, the amount of their inheritance also lays upon the branch and the number of persons that belong to the branch.

• Doctrine of Representation

The doctrine of representation is a well-known rule accepted by the Roman, English, and Hindu laws of inheritance. Under the theory of representation, as is accepted by these systems of laws, the son of a predeceased son represents his father for purposes of inheritance. The doctrine of representation defines that if during the life of the forefather, any of his or her legal heirs die, but the latter's heirs still alive, then such heirs shall become designated to a share in the property as now they shall be performing their immediate generation. But, this doctrine of representation does not find its position in the Muslim law of inheritance. Hence, it is said that the closer heir refrains the distant heir from inheritance.

The Muslim scholars explained the reason for refusing the right of representation on the belief that a person has not even an elementary right to the property of his forefather until the death of that forefather. It is further contended that a right which was not rested in any possibility cannot give surge to the alleged through a deceased person.

• Female's Right of Inheritance

Under the Islamic Law, men and women have equal rights of inheritance. Upon the death of a Muslim, if his heirs also consists of females then, men and woman inherit the properties together. Men have no choice against the right of inheritance over females, but usually, the share of a man is double the shares of a woman. Particularly the law of double share for men 'also known by the Parsi Law mentioned in the Indian Succession Act, 1925, and has not been altered even by the 1991 Amendment of the Act.

In simple words, although there is no distinction between men and women heirs in so far as their respective rights of inheritance are considered but usually, the amount of property inherited by a female heir is half the property given to a male of equal status. The rule that usually the share of a male is double the share of a female has some explanation attached to it. Under Islamic law, while a woman heir gets additional money or property as her Mehr or dower and maintenance from her husband, her male partner gets none of the two advantages. However, the male heir is responsible for the maintenance of his children while the female heir may have this responsibility only in special cases.

•Widow's right to succession

Under Muslim law, no widow is refrained from succession. A childless Muslim widow is designated to one-fourth of the property of the deceased husband, after completing his funeral and legal expenses and debts. Moreover, a widow who has children or grandchildren is designated to one-eighth of the deceased husband's property. If a Muslim man marries during an illness and consequently dies of that medical condition without an abrupt recovery or accomplishing the marriage, his widow has no right of inheritance. But if her diseased husband divorces her and afterward, he dies from that ailment, the widow's right to inheritance continues until she remarries.

•A Child in the Womb

A child in the womb of its mother is capable enough to inherit given it is born alive. A child in the embryo is considered as a living person and, as such, the property rests immediately in that child. But, if such a child in the womb is not born alive, the property already lies in it is divested and, it is assumed as if there was no such heir at all.

Grounds of Disqualifications

Disqualifications which debar the heirs to succeed the property of the intestate are—

•Murderer

Under the Sunni Law, a person who has caused the death of another, whether intentionally, or by mistake, negligence, or accident, is refrained from inheriting to the property of that other. Assassination under the Shia Law is not a bar to inheritance unless the death was caused deliberately.

• Illegitimate Children

Under the Hanafi School, an illegitimate child is not authorized to inherit. Such a child cannot inherit from his/her father but can inherit from his/her mother and all relatives of the mother. The mother can also inherit the property of her illegitimate children. If a woman has two children, one legitimate and the other illegitimate, they do not inherit from one another[2]. Insanity, bodily deceases, infirmity, and unchastity, do not disqualify any heir from inheriting property.

•Difference of Religion

A Hindu could not inherit from a Muslim but the Caste Disabilities Removal Act of 1850 eliminated this rule. If a Hindu accepts Islam and then dies, the Act of 1850 cannot guarantee the nature of his conversion law of succession to his property; the Muslim Law will apply in such a case. Where a person converts to Islam and died leaving behind only a daughter, as against the claim of his Hindu relatives she is entitled to all his property, half share as her fixed share as Quranic heir and the rest by way of return[3].

•Step-Children

The step-children are not designated to inherit the properties of their step-parents. Similarly, the step-parents are refrained from inheriting the property of step-children. The step-father and step-son or daughter cannot inherit each other's properties. The step-child is capable to inherit from its natural father or natural mother. Similarly, the natural father and natural mother can inherit the property from their natural sons or daughters.

• Simultaneous Death of two Heirs

When two or more persons die in such a situation, it is not significant as to who died first (i.e. who survived whom), both of them refrain to be an heir for each other. In other words, where two or more heirs die together and, it is not possible to determine who died first, then, under Muslim law, all the heirs are assumed to have died at the same moment. The result is that such heirs are known as if they did not present at all.

• **Escheat**

When a deceased Muslim has no legal heir then under Muslim law, his properties are inherited by the Government through the process of escheat.

2.3 Shia Law of Inheritance

Classification of Heirs, Principles or Rules of Succession, Principles or Doctrines of Distribution of Shares

Introduction

The Islamic law of inheritance, like rest of the Islamic personal law is a combination of the pre-Islamic customs and the rules introduced by the Prophet. According to Fyzee “The law consists of two distinct elements: the customs of ancient Arabia and the rules lay down by the Quran and the founder of Islam”.

The Quran gives specific shares to certain individuals on humane considerations while the pre-Islamic customary law deals with the residue left and distributes among the agnatic heir and failing them to the uterine heirs. The customary law alone can explain the reason why different classes of rights are given to the various relations, and why some who might be supposed to be equally entitled to similar rights are debarred from them.

Comparison of Sunni and Shia interpretation of Quran

The greater part of Mohammedan Law of Inheritance is founded upon the Quran. It did not sweep away the existing laws of succession, but made a great number of amendments based on few common principles. These amendments have been differently interpreted by the Sunnis and Shias.

The Sunni to some extent allows the principles of the pre-Islamic custom to stand and they add or alter those rules in the specific manner mentioned in the Quran and by the Prophet.

The Shias deduce certain principle which they consider to underlie the amendments mentioned in the Quran and fuse these principles with the principles of the pre-existing customary law, thus bringing up a completely altered set of rules.

Shia Law

Classification of heirs

Shia law divides the heirs on two grounds:-

1. Heirs by consanguinity (Nasab), that is blood relationship

Heirs by consanguinity are divided into three classes and each class is sub-divided into two sections.

i) Class I

(a) Parents

(b) Children and other lineal descendants how low so ever.

ii) Class II

(a) Grandparents (true or false) how high so ever.

(b) Brothers and sisters and their descendants how low so ever.

iii) Class III

(a) Paternal and

(b) Maternal uncles and aunts of the deceased, and of his parents and grandparents how high so ever, and their descendants how low so ever.

Class I excludes Class II and Class II excludes Class III. But the heirs of different sections within a class inherit together and do not exclude each other. However, the nearer degree in each section excludes the more remote in that section.

2. Heir by special cause (Sabab), which is heir by marriage (husband and wife).

The heirs by special cause may be divided into two kinds:

- i) Heir by marriage (Zoujiyat), that is husband and wife
- ii) Heir by special relationship (Wala).

The heirs by special (legal) relationship are not recognised in India. However originally they were such persons who acquired the right of inheritance by virtue of spiritual headship, or delicts committed by the deceased or emancipation.

Order of Succession

The heirs will inherit the heritable property of a person in the following order:-

- 1) Among the heirs by consanguinity the first group excludes the second and the second excludes the third. That is to say in the presence of an heir of the first group, the heirs of the second or third group will not be entitled to share and so on.
- 2) As we have noticed each of the groups is divided into two sections. Now among these two sections of the heirs of each group, the claimants succeed together, that is, if there are heirs of both the sections, they will succeed together.
- 3) In each section there can be various heirs, e.g. in section (ii) of Group I, there can be a son and son's son. The question arises as to who will then inherit. The rule in this regard is that the nearer in degree in each section will exclude the more remote in that section.
- 4) The decision is *per stripes* i.e. in each of these three groups of heirs by consanguinity, the descendants get *per stripes* or according to the branch.
- 5) The husband or wife is never excluded from the inheritance, but inherit together with the nearest heir by consanguinity.

Allotment of shares

After determining the people who are entitled to succeed to the property of the deceased in accordance with the rules the next problem that comes up for a solution is allotment of shares, i.e. which heir will get what amount of shares.

For the purpose of determining the shares, the heirs are divided into two classes, viz. Sharers and Residuaries. There is no class of distant kindred under Shia Law.

Residuaries

The heirs who are not Sharers are, Residuaries, they are not entitled to any fixed share in the property. They get the residue (what is left). The descendants how low so ever of Residuaries are also Residuaries.

There are total of nine sharers under Shia Law. Of these sharers, four inherit sometimes as Sharers and sometimes as residuaries. These are:

- 1) Father
- 2) Daughter
- 3) Full Sister
- 4) Consanguine Sister

The descendants of a person, who, if living, would have taken as a Sharer, succeed as Sharers. The descendants of a person, who, if living, would have taken as Residuary, succeed as Residuaries.

How the distribution of property is affected

If a Muslim at the time of his death left only heir the whole property would go to that heir except a wife. The rationale behind this exception is that a wife is not entitled to the surplus by return, even if there be no other heir. If she is the sole heir, she takes $\frac{1}{4}$ and the surplus passes to the Imam, now the Government of India. As there is no machinery to take charge of the Imam's share, the surplus should pass to the wife.

If there are two or more heirs, left by the deceased, the first step is to give the share to the husband or wife. The second step is to see which of the surviving relations are entitled to succeed. The property, after giving the share of the husband or wife, is divided among the other claimants, according to the rules of distribution applicable to three classes of heirs by consanguinity. It should be noted here that husband or wife is always entitled to succeed with the other claimants. The shares of the husband or

wife are $\frac{1}{4}$ and $\frac{1}{8}$ when there is a lineal descendants, when there is no lineal descendants, their shares is $\frac{1}{2}$ and $\frac{1}{4}$.

Rule of representation

This rule requires interpretation, because it has more than one meaning as follows:

- 1) Determination of heirs, what persons are entitled to inherit from the deceased (First meaning).
- 2) Determination of the quantum of share, what he is entitled to inherit.⁶ (Second meaning).

So far as the determination of heirs is concerned, the Rule of Exclusion applies, that is, the nearer in degree excludes the more remote. Both Sunnis and Shias do not recognise the principle of representation as qualifying the rule of exclusion. For example if A, a Muslim dies leaving him surviving son D and grandson by a pre-deceased son B, the grandson are excluded from inheritance by their uncle C. The grandson does not take in their father's place though he (B) would have been an heir, had he survived his father A.

If in the above example both sons B and C are pre-deceased the deceased A who died leaving three grandson D, E and F by B and two grandsons G and H by C, then all the grandsons are heirs. The principle of representation is to be applied for deciding to quantity of the share that is for ascertaining the share of each grandson.

According to the principle of representation, the sons of B will get $\frac{1}{2}$ ($\frac{1}{3}$ each grandson) and the sons of C will get $\frac{1}{2}$ ($\frac{1}{4}$ each grandson).

Under the Sunni Law, the rule of representation is not applied in calculating the grandson's share. Under the Sunni Law, in the above example, each grandson would take the same share that is $\frac{1}{5}$, because the division of shares among grandsons would be per capita and not per stripes.

The Shia Law accepts the principles of representation for the limited purpose of deciding the quantity of the share of each heir as different from the purpose of deciding the heirs. According to the rule of representation, the children of a deceased son, if they are heirs, take the portion which he (deceased son) if living would have taken and in that sense represent the daughter, if they are heirs, they take the portion which would have taken and in that sense represents the son. In the same way, the children of a deceased daughter represent the daughter, if they are heirs; they take the portion, which the daughter if living would have taken. This principle in the same limited sense is applicable to the children of a deceased brother, sister or aunt.

Similar is the principle applicable to great grandparents who take the portion which the grandparents, if living, would have taken.

Succession among the heirs of the same class

Succession among descendants in each of the three classes of heirs by consanguinity is per stripes and not per capita.

Example: - A Shia Muslim dies having two grandsons D and E by a predeceased son B and a grandson F by another predeceased son C. The succession in this example is per stripes among the descendants of two sons, B and C of A. Each son notionally takes $\frac{1}{2}$ B's share $\frac{1}{2}$ will go to his two sons, D and E they will get $\frac{1}{4}$, and C's share $\frac{1}{2}$ passes to his son F. This division in other words, is according to the stocks, and not according to the claimants. Here in this example, under the Sunni law all grandsons D, E and F takes per capita that is each grandson takes $\frac{1}{3}$, without reference to the shares which their respective father, if living, would have taken. But under the Shia Law B's two sons represent B and stand in his place and C's son represents C and stands in his place. There is no such representation under the Sunni Law.

The Rule of succession among descendants

The rule is that the descendants of a person, who if living, would have taken as Sharer, succeed as Sharers. In the same way, the descendants of a person, who if living, would have taken as a Residuary succeed as Residuaries.

Example: - A Shia Muslim dies leaving a full brother's daughter and uterine brother's son. Uterine brother, had he survived, would have taken as a Sharer, his Quranic share 1/6. In the same way, the full brother, had he survived would have taken 5/6 as a residuary. Here the uterine brother's sons, being the descendant of a sharer, will succeed as sharer and representing his father takes his father's share 1/6. The full brother's daughter, being the descendants of a Residuary, will succeed also as a Residuary and representing her father, takes her father's share 5/6. Under the Sunni Law, both a full brother's daughter and uterine brother's son are distant kindred of the third class.

Distribution among heirs of the first class

The heirs of the first class are entitled to succeed to the property of a deceased Shia Muslim along with the husband or wife, if any. First the share is allotted to the spouse (husband or wife as the case may be) and then to the rest of the heirs.

Example:-

1) When no lineal descendant is present:-

- a) Husband will inherit $\frac{1}{2}$ as sharer when there is no lineal descendant
- b) Mother will inherit $\frac{1}{3}$ as sharer when there is no lineal descendant
- c) Father will inherit $\frac{1}{6}$ as residuary as when there is no lineal descendant

2) When lineal descendant is present:-

- a) Father will inherit $\frac{1}{6}$ as sharer when lineal descendant is present
- b) Mother will inherit $\frac{1}{6}$ as sharer when lineal descendant is present
- c) Son will inherit $\frac{2}{3}$ as residuary

Distribution among heirs of the second class

Heir in the line of paternal side get double share with maternal relations. If there is only one grandparent in the maternal line, he or she would get $\frac{2}{3}$. Similarly, if there is only grandparent in the maternal line, he or she would get $\frac{1}{3}$.

- a) Father's father would get $\frac{2}{3}$ as sharer
- b) Mother's mother would get $\frac{1}{3}$ as sharer

Distribution among heirs of the Third class

First of all the surviving spouse is allotted his share and then the residue is divided among the following relations in order or property:

- i. Paternal and maternal uncles and aunt of the deceased
- ii. Their descendants h.l.s., the nearer excluding the remoter
- iii. Paternal and maternal uncles and aunts of the parents on the descendants and, iv. Their descendants; h.l.s, the nearer excluding the remoter
- v. Paternal and maternal uncles and aunts of the grand-parents
- vi. Their descendants how low so ever, the nearer excluding the remoter vii. Remoter uncles and aunts and their descendants in like order.

Of the above groups each in turn must be exhausted before any member of the next group can succeed.

Doctrine of Increase (Aul)

The Shia law does not recognise the Doctrine of Increase. Under Shia Law if the total share of sharers exceeds the heritable property i.e., exceeds unity, the share of all the sharers is not proportionally reduced but it is always deducted from the sharers of the following two heirs:-

- a) Daughter
- b) Full or consanguine sister

Example: A, a Shia Mohammedan wife dies leaving (i) Husband and (ii) Two full sisters.

According to Shia Law

- i. The husband will get $\frac{1}{2}$ as sharer as there is no lineal descendant of the deceased.
 - ii. Full sister will get $\frac{2}{3}$ as sharer when there is no lineal descendant, father or full brother
- Since there are two sisters they will get $\frac{2}{3}$ each which will turn out to be as $\frac{4}{6}$ share of two full sister and thus husband will receive $\frac{3}{6}$ share.

Total share (without reduction) = $\frac{7}{6}$ i.e. more than unity (1)

In the above case, in order to make total sharer equal to unity, the share of the sisters will be reduced to $\frac{1}{2}$ and the share of the husband will not be touched. Thus each sister will take $\frac{1}{4}$.

Doctrine of Return (Rudd)

Under Sunni Law if there is a residue and there are no residuaries then the residue returns to the sharers. But such is not the case in Shia Law of Return. Under Shia Law the total absence of the residuaries as a class is not required, only if the residuaries in the class to which the sharers belong is absent, it will be sufficient for the application of the Doctrine of Return.

Exception

There are certain exceptions to the Doctrine of Return which are as follows:-

- i. **Husband:** - The husband is not entitled to the 'Return' as long as there is any other heir of the deceased. If there is no other heir, the husband will take the whole estate by Return.
- ii. **Wife:-** Like the husband, the wife too is not entitled to a 'Return' of share as long as any other heir of the deceased exist. The old view was that if there was no other heir, the wife would not take the whole estate; she would take only her share $\frac{1}{4}$ and the surplus would escheat to the Government. But in *Abdul Hamid Khan v. Peare Mirza*⁷, the Oudh Court followed the opinion of Ameer Ali,⁸ and held that the rule now enforced is that the widow is entitled to take by return.
- iii. **Mother:-** The mother is not entitled to share the 'Return' if the deceased dies leaving a father and a daughter and also any of the following;
 - a. Two or more full or consanguine brothers
 - b. One full consanguine brother, and two full consanguine sisters
 - c. Four full or consanguine sister

The brother and sisters are heirs of the second class. Though they are excluded from inheritance, prevent the mother from taking by Return, and the surplus reverts to the father and the daughter in proportion of their respective share. This is the only case in which the mother is excluded from the Return.

- iv. **Uterine brothers and sisters-** Uterine brothers and sisters are not entitled to the 'Return' if they co-exist with full sisters and sisters divide the return in proportion of their sharers. The 'Return' in such cases goes to the full sister. This rule does not apply to consanguine sisters.

2.4 Life Estate

Under the Sunni law, gift of the 'life-interest' or 'life estate' is not possible because a gift for life operates as an absolute gift. But, under Shia law, the gift of life-interest (or life-estate) is possible. Where a Shia donor makes a gift 'for life', the donee can enjoy the property during his life but after his death the property reverts back to donor or to donor's legal heirs.

Under Muslim law, whenever the term property is used in its general sense it means and includes its corpus as well as the usufruct. Therefore, ordinarily a transfer of property means transfer of the corpus together with all the beneficial interests (usufruct) of that property.

In other words, unless otherwise provided, in the transfer it is implied that the transferee would have all the incidental benefits i.e. usufruct. But technically, the ownership of the corpus i.e. the property itself may be distinguished from the ownership of the usufruct of that property.

For example, a garden is the corpus and is owned by its owner but its usufruct, that is to say, the producer of the garden (fruits and the flowers) may be allowed to be owned for sometime by another person. Thus, where the owner of a mango-grove sells only the mangoes to another person for one year, the purchaser gets the ownership in all the mangoes for one year but he does not get the ownership of the mango-grove as such.

As the owner of a property can sell the usufruct while retaining the property with him, he may also make a gift only of the usufruct for a specified duration. In such a case, the donee may not get any interest in the property but he may get the absolute interest in its produce or benefits for a specified duration.

This distinction between the ownership of a corpus and the ownership of an usufruct of a property has been the basis of validating a gift of life-interest under the Shia law in Nawazish Ali Khan's case given below:

Nawazish Ali Khan v. Ali Raza Khan:

Facts:

Nawab Nasir Ali Khan, a Shia Muslim, executed a will under which he appointed his nephew Fateh Ali Khan as the successor of his properties with all the powers, including the power of possession and enjoyment as owner provided he be alive. The Will further provided that after the death of Fateh Ali Khan, Mohd. Ali Khan would be the successor of the said properties.

After the death of this successor (i.e. Mohd. Ali Khan) testator's another nephew Hidayat Ali Khan was made the successor, provided he was alive. The Will further provided that the last successor (Hidayat Ali Khan) was authorised also to nominate his own successor of the said properties.

But Hidayat Ali Khan died before the death of Mohd. Ali Khan 'therefore, Mohd. Ali Khan became the last successor. And, under the power of appointment (given under the will to the last surviving Successor) he appointed Nawazish Ali Khan (son of Hidayat Ali Khan) to succeed after his death. In the language of law, successive life interests were granted under this will and the last successor was given also the vested remainder.

This appointment was challenged by Ali Raza Khan who was a grandson of the testator Nawab Nasir Ali Khan. The questions to be decided in this case were:

- (i) Whether the creation of successive life interests was valid under Muslim law and
- (ii) Whether Muslim law recognises a vested remainder?

Decision:

The Privy Council held that if it is found that a gift has been made of limited interest; the gift can take effect out of the usufruct, leaving the ownership of the corpus unaffected except to the extent to which its enjoyment is postponed. In other words, gift of a limited or life interest is valid because it may be accepted as a gift of absolute interest in the usufruct of the property for a fixed period.

Regarding the second issue, namely, the validity of the power of appointment given to a life tenant, the Privy Council held that the power of appointment was not valid because no concept of 'vested remainder' is recognised under Muslim personal law.

The court observed that where an Ithna Asharia Shia testator bequeaths his property to A, B and C successively, and then provides that the last surviving devisee should have the power to nominate his successor from among the descendants of the three life tenants, such power was not known to any school of Muslim law as received in India.

Accordingly, it was held by the Court that Fateh Ali Khan and Mohd. Ali Khan took the life interests lawfully and after the death of Mohd. Ali Khan, the property should revert back to the natural heir of the

testator. Thus, Ali Raza Khan, being the grandson of Nawab Nasir Ali Khan (testator) was entitled to succeed the properties as a natural heir in preference to Nawazish Ali Khan.

Note:

It may be noted that the interest created in favour of the last two successors were contingent interests. Contingency was their survival at the death of the preceding successor. Being contingent interests, the interest of the last two successors were void. But neither of the parties to the litigation was interested in raising this point.

The reasoning and the law laid down in the above case was followed in another Shia case, *Anjuman Ara v. Nawab Asif Kadar*, where the Calcutta High Court, after analysing all the provisions of Muslim law on the point, observed:

“In the Mahomedan law, there is a clear distinction between the corpus or ‘the substance’ and the usufruct. Over the corpus that law recognizes only absolute, complete and indivisible ownership and there it countenances no detraction or limitation. In the usufruct however, limited interests can be created and the limitation may well be in point of time or duration, e.g. for life or for a fixed period.”

It is interesting to note that the validity and enforceability of a gift of life interest has been recognised-also in a Sunni case. In *Shaik Mastan Bi v, Shaik Bikari Sahab* which was a Sunni case, the Andhra Pradesh High Court held that although a Hanafi Muslim cannot make a gratuitous transfer of ownership of a property with limitation for the life of the donor “but when the absolute ownership is transferred to A, and only the enjoyment of the property is reserved to B, then both the gifts are valid.

In other words, the court held that limitations in the enjoyment of a property are permissible but limitations in the ownership are not allowed. According to Fyzee, normally Hiba is a gift of the corpus therefore, Hiba for life is not valid; Ariyat on the other hand, is gift of the usufruct, therefore, Ariyat for life is legal and permissible in the Hanafi law.

2.5 Testamentary Succession/ Concept of Wills (Vasiyyat)

There are enormous ways to make disposition of property in Hindu law as well as in Islamic Law. Under Islamic law, a Muslim can dispose of his property by gift, by creating a wakf or by accessing his testamentary powers i.e. by making a Will.

The concept of a Will under Islamic law is a sort of bargain between two different propensities. One, the view of the prophet is clear that after the death of a person, his property has to be distributed to his heirs and this rule is considered as divine law and any interference to it is unacceptable. On the other hand, it is a moral duty of every Muslim to make appropriate arrangements for his property after his death.

Meaning and nature of Will

Conventionally, a Will, also called ‘testament’ is an implement which enables a person to dispose of his own property to someone whom he wants to give after his death. A Will comes into effect only after the death of the person who created the Will. A Will is a legal declaration of transfer of property by a person after his death.

In Islamic law, a Will executed by a Muslim is known as ‘Wasiyat’. The person who executes the Will is called ‘legator’ or ‘testator’ and the person in whose favour the Will is made is known as ‘legatee’ or ‘testatrix’. A very famous Muslim scholar *‘Ameer Ali’ defined a Will from the point of view of Mussalman as a divine institution because its exercise is regulated by the Holy Quran*. At the same time, Prophet had proclaimed that such testamentary powers must not exert any damage to the lawful heirs.

There is a strict rule in Islamic law that governs the validity of a Will. According to this rule, a Muslim can make a Will in favour of anyone, only to the extent of one-third of his total property. If the Will is made beyond one-third of the property, the consent of the legal heirs is mandatory no matter in whose favour the Will is made.

It can be hypothesized that a Will is a kind of gratuitous transfer of ownership made through a testamentary document which comes into play after the death of the legator. As far as the legal concept of Will is concerned, basically it is a gift testamentary.

Essentials of a valid Will

If we talk about the legal validity of a Will under Muslim law, there are certain requisites which make a Will apt and capable of taking effect. Thus, the following discussed requirements must be satisfied:

- The legator must be competent to make a Will.
- The legatee must be capable of taking such endowment.
- The property which is endowed by the legator must be a bequeathable property.
- Free consent of the legator and the legatee.
- The legator must possess testamentary rights over the property.

Who can make a Will?

In order to constitute a valid Will, the competency of the legator is the foremost requirement. A legator is considered to be capable to make a Will if he holds the following discussed features.

- He must be a Muslim

A Will made by a Muslim only is considered as an authentic Will under Islamic law. If a legator is Muslim at the time of execution of the Will then only the Will is governed by the Muslim Personal Law.

In a case where a Muslim has married under the Special Marriage Act, 1954, the Will made by such Muslim is regulated by the provisions of the Indian Succession Act, 1925 and not by the Muslim Personal Law.

A situation may arise where the legator is a Muslim when he executed the Will but afterwards renounced Islam, thus recognized as a non-muslim at the time of death. A Will created by such a Muslim is considered as a valid Will under Muslim law.

Since there are two schools of Muslim with different views, so, it must be noted that a Will is governed by the rule of that school to which the legator belongs at the time of the declaration of the Will. For example, if a legator is a Sunni Muslim at the time of the creation of the Will, then the Sunni Laws of Will is pertinent.

- Soundness of mind

When the Will is being made, the legator must be sane. Under Muslim law, it has been quoted that a legator must possess a perfect 'disposing mind' at the time of execution of a Will. In other words, a legator must be competent to understand his actions and the legal consequences of what he is doing not only for the particular time period when the Will is being made but also sustain the same till his death.

If a legator is of sound mind when the Will is declared and subsequently turns insane and remains the same till death then, the Will made by such legator becomes void. On the other hand, if a legator executed a Will while he is insane then also the Will is considered as null and void even if he recovers the insanity afterwards and remains the same till death.

A Will made by an insane during his lucid interval will remain valid only if the insanity does not last for more than a period of 6 months. An insane person cannot ratify the Will after reattaining his sanity.

- Age of majority

The legator must attain the age of majority at the time of execution of the Will. In general, the age of majority under Muslim law is regulated by the Indian Majority Act, 1875, with the exception in the case related to marriage, dower and divorce.

Under the Indian Majority Act, the age of majority is specified as 18 years in ordinary case and 21 years if the person is under the supervision of Courts of Wards. Any Will executed by a minor is considered to be void. The validity of such Will is suspended till the legator attains majority. Therefore, in order to create a valid Will, a legator should be of 18 years or 21 years as the case may be. As soon as the legator turns into a major and ratifies the Will, the Will becomes valid in nature.

- Attempt to suicide by Legator

If a Will is executed by a person who has attempted to commit suicide, such a Will is contemplated as void under the Shia law. The logic behind this rule is that if a person has attempted suicide, he cannot be held in his normal state of mind rather, he is assumed to be mentally unstable and disturbed.

For example, a person who takes poison or seriously hurt himself and executes a Will before his death then, the Will is declared as null and void.

However, under Sunni law, a Will executed in such circumstances is completely valid. Moreover, both Shia and Sunni law upheld the validity of a Will declared by a legator before attempting to commit suicide.

- **Consent of Legator**

While executing a Will, the free consent of the legator is mandatory. Any Will, if found to be executed by a legator under coercion, undue influence or fraud Will be treated as null and void and the legatee Will not be entitled to get any property under that Will.

The free consent is generally presumed by the law unless proved. But in case of pardanashin lady, the free consent is not presumed and the legatee has to prove that the Will has been executed by the lady exercising her independent discretion.

Who can take property under a Will?

Besides competency of legator, there is one more essential requirement of a valid Will and that is the competency of the legatee. The following are the characteristics of a legatee who is capable of taking a Will executed by a legator.

- **He must be a person in existence**

A legatee is competent to take a Will on condition that he must be living at the time of death of the legator. This is because a Will comes into effect only after the death of the legator and not when it is made by the legator. Thus, a legatee has to be a person in existence at the time of death of the legator.

A Will can be declared in favour of a non-muslim, minor or an insane person. What is important is that a legatee must be in existence and competent to hold the property. The age, sex, caste, religion, gender and state of mind is insignificant in order to become a lawful legatee. A charitable or religious institution is also capable legatee and any Will in favour of it is lawful.

- **Child in mother's womb**

A child in a mother's womb is treated as a living person and thus, is a competent legatee under Islamic law under two conditions. Firstly, he must be in existence in the mother's womb at the time of declaration of the Will. Secondly, the child must be born alive within six months from the date of execution of Will under Sunni law and within 10 months under Shia law.

- **Murderer of Legator(दूत)**

A Will comes into effect only after the death of legator. Thus there is a possibility that an avaricious and impatient legatee may cause the death of the legator in order to grab the property as soon as possible.

A legatee kills or causes the death of the legator either intentionally or unintentionally is not allowed to take the Will and generally disentitle to take the property. However, under Shia law, if a legatee causes the death of the legator either unintentionally, negligently or accidentally, then he is qualified to take the property and the Will is treated as a valid Will.

- **Consent of Legatee(वसीयत करने वाला)**

Before transferring legal title to the legatee under a Will, it is important to take the consent of the legatee to know whether he wants to accept the Will or not. The acceptance can be expressed or implied. A legatee has a complete right to disclaim the Will. So, if a legatee declines to own any property bequeathed to him, then the Will is considered to be incomplete and invalid.

- **Joint Legatee**

Sometimes, legator issues Will jointly in favour of several legatees. In such circumstances, the legatees are known as joint legatees. A Will can be made in favour of joint legatees in two ways-

Where the share is specified

If the share of all the legatees is specified explicitly by the legator himself under the Will, then there arises no point of confusion regarding the share. The property Will be distributed as per the ratio mentioned by the legator in the Will and each legatee Will get the respective share allotted to him.

For example, if a legator executes a Will in favour of his three sons, mentioning that the ratio of the distribution of S1: S2: S3 should be 3:2:1 respectively. Here the property Will be distributed among the three sons in the same ratio as specified by the legator.

Where the share is not specified

It might be possible that under some cases, the share of each legator is not explicitly described. In such cases, applying the general rule, the property is supposed to be divided equally among the legatees. When a Will is made in favour of a class of persons, such class is treated as a single legatee only and each person gets the equal property.

For example, if a legator makes a Will under which the property is to be given to a mosque and the poor people of the locality of the legator, then half of the bequeathable property Will be given to the mosque and the remaining half Will be distributed equally among the poor people in the locality.

Formalities of a Will

Muslim law does not expressly propound any specific formalities for the execution of the Will. The intention of the legator plays a crucial role in validating a Will. The intention must be explicit, clear and unequivocal in nature.

A Will can be made either orally or in writing or even by gestures.

Oral Will

A simple oral declaration is also considered as a valid Will. It is not abiding to follow any particular process or formality in order to constitute a Will. A mere oral declaration is enough. But the burden to corroborate such Will is very hefty. Eventually, an oral Will has to be proved with extreme fidelity with precision in date, time and place.

Written Will

For a Will to be declared in writing, no specific form is described. A Will is valid even if it is not signed by the legator or attested by the witnesses. The name of the document is immaterial. If it possesses the essential characteristics of a Will, then it Will be treated as a valid Will.

Will made by Gestures

Under Islamic law, a Will may be made by gestures. For example, if a sick person makes an endowment and cannot speak due to weakness, gives a nod with his head in a comprehensive way and if it is understood what he is trying to convey and subsequently, he dies without regaining his ability to speak, the bequest is valid and lawful.

The subject matter of a Will

Any type of property, corporeal or incorporeal, moveable or immovable, can constitute the subject matter of the Will. But a legator can bequest a property in a Will only under two conditions-

- If he owns the property at the time of his death.
- The property must be transferable.

A property bequeathed under a Will may or may not exist at the time of execution of Will but it is mandatory that the bequeathed property must be in ownership of the legator at the time of his death. The logic behind this rule is very simple. A Will comes into operation after the death of the legator and the transfer of property to legatee takes place from the date of legator's death and not from the date of execution.

For example, 'A' executes a Will giving all his property to 'B'. Suppose 'A' owns a house at the time of execution of Will but at the time of his death, he owns a car as well. Thus, 'B' is entitled to have the house as well as the car under the Will.

Principle limitations on testamentary powers

Contrary to the general rule, there are certain restrictions on the testamentary powers of a Muslim. There are two types of restrictions:

- With respect to the extent of the property that can be bequeathed

If a Muslim desire to make a Will of his property, he is allowed to do so only to the extent of one-third of the bequeathable property. This extent of one-third is calculated after the expenses of his debts and funeral etc. Any bequest exceeding the limit of one-third Will not come into effect unless the heirs of the legator give their consent to it. In case the heirs do not give their consent, then the bequest Will be valid to the extent of one-third only and the remaining two-thirds Will be transferred through intestate succession.

A Muslim who does not has any heir may bequest his property to anyone and in whatsoever amount he may desire to give. But if a Muslim bequest his property to a non-heir or a stranger, then the consent of the legal heirs is of utmost significance if the property exceeds the one-third of his total property.

The reason is to protect the rights and interests of the legal heirs which may adversely affect in case of such bequest. If heirs give their consent to give an entire property to a stranger, the Will is valid otherwise it is valid to the limit of one-third.

- With respect to the legatees to whom the property is given

Furthermore, the second restriction comes into action only where the legatee is one of the heirs of the legator. Whether the property bequeathed is one-third or less, the consent of the other legal heirs of the legator is a dominant factor in order to establish a valid Will. The ground of this rule is that a legator may make a bequest in favour of one of the legal heirs giving more precedence to him which may result in a feeling of jealousy and enmity among the other heirs.

On the other hand, Shia law doesn't discriminate between an heir or a non-heir. A bequest can be made in favour of anyone till the extent of one-third of the property is treated to be valid. Thus, it can be concluded that Shia law provides ample powers to make a Will as compared to Sunni law.

Construction of a Will

Generally, a Will has to be construed in accordance with the rules laid under Islamic law and scrutinizing the language and intention of the legator. A Will is a document which is made by a person during his lifetime and comes into effect after his death. So, a Will must be interpreted to accomplish the intentions of the legator after his death. At certain times, the language may not be clear and the intention of the legator is ambiguous. In such circumstances, it is left to the discretion of the heirs to elucidate such Will in whatever way they want.

For example, a legator bequests a house and a shop for his two sons but doesn't specify what is given to whom. Here, the content of the bequest is perplexed. Thus, it is up to the option of heirs to mutually decide who wants to take what.

Revocation of a Will

Muslim law grants an emancipated right to legator exercising which he can revoke the Will or any part of the Will executed by him anytime. Similarly, he can add something reasonable to the Will as well. A legator may revoke the Will either expressly or impliedly.

Express Revocation

An express revocation may be done in oral or in writing. For example, if a legator bequests some of his property to a person and by making a subsequent Will he bequeaths the same property to another person, then the first Will is considered to be revoked automatically.

If legator burns or tears off a Will executed by him, then also the Will is said to be expressly revoked. It is to be noted that mere denial of a Will is not sufficient to amount a Will as revoked. Some action must be taken by the legator which indicates his clear intention for the revocation of the Will.

Implied Revocation

Any act done by legator contrary to the bequest Will revoke the Will. In other words, an act which leads to the annihilation of the subject-matter of the bequest is considered as an implied revocation of the Will. For example, if a legator executed a Will giving land to a person and builds a house on the same

land, or if he sells or gifts that land to someone else, then consequently, the Will is said to be impliedly revoked.

Abatement of Legacies

When a bequest exceeds the limit of one-third and heirs deny to give their consent, the ratio of the legatees is subsidised in order to maintain the rule of bequeathable one-third. This reduction in the legacy of the legatees is known as abatement of legacies. Under the Sunni law, the abatement occurs in a rateable manner (proportionally) whereas in Shia law it is done preferentially.

Rateable distribution

This rule of abatement is followed in under Sunni law. In this method, if a Sunni Muslim bequeaths his property in a certain ratio which the limit of one-third, then the abatement is done in the same ratio in which the property was distributed.

For example, 'T' is a Sunni Muslim who makes a Will in favour of A, B and C. Under the Will, he directs to give Rs. 4,500/- to A, Rs. 3,000/- to B and Rs. 1,500/- to C and his total property amounts to Rs. 9,000/-. Now, as per the rule, only one- third of the total property is bequeathable. So, one-third of Rs. 9,000/- equals to Rs. 3000/- which is the required bequeathable property. It can be observed that the legator divided the property among A, B and C in the ratio 3:2:1 respectively. Applying the rateable abatement rule, the shares of A, B and C Will be reduced in the same ratio i.e. 3:2:1. Thus, the share of A Will become Rs. 1,500/-, the share of B becomes Rs. 1,000/- and the share of C turns to be Rs. 500/-.

Preferential distribution

The Shia law recognizes a different rule for abatement. According to this school, if the bequeathable property exceeds one-third of the total property and heirs refuse to give their consent, then the rule of preferential distribution is applied. This implies that no reduction Will be done in the shares of the legatees rather the share Will be given on the preference.

The preference is decided by the order in which the name of the legatees is mentioned under the Will. The legatee whose name is mentioned first Will get his full share as specified in the Will and the remaining Will be passed in favour of the second legatee and so on. As soon as one-third of the property is finished, the distribution comes to its end. Therefore, it can be concluded that either a legatee Will get his full share or he Will get nothing.

For example, 'T' is a Shia Muslim who executed a Will under which the share of A is Rs. 2,000/-, the share of B is Rs. 1,000/- and share of C is also Rs. 1,000/-. The total property is Rs.9,000/- which is beyond one-third of the bequeathable property. So, one-third of Rs. 9,000/- comes out to be Rs. 3,000/- which is the required bequeathable amount. Now, according to the preferential rule, A Will get his full share i.e. Rs. 2,000/-, B Will get the remaining Rs. 1,000/- which constitutes his full share and C Will not get any share because the bequeathable property exhausted after the share of B.

Comparison of Sunni and Shia law of Will

The two schools of Muslim law differs at various points when the concept of wasiyat (Will) is considered. Following is a comparison table depicting the points of differences between Sunni and Shia law of Will.

Basis for Comparison	Sunni law	Shia law
A bequest to an heir	It is invalid even to the one-third of property without the consent of other heirs.	It is valid up to one-third of property and for more than one-third, consent is a must.
Time of Consent	Consent of heirs must be given after the death of the legator.	Consent can be given either before or after the death of the legator.
Legatee causing the death of Legator	If legatee commits murder or causes the death of the legator, he cannot take legator's property under a Will.	If the death is caused intentionally, legatee can't take the property whereas if the death is caused accidentally or negligently, then he can take the property.
Suicide attempt by Legator	A Will is valid if a legator commits suicide before or after the execution of the Will.	A Will is valid only if the legator commits suicide after executed the Will.
Child in Womb	Bequest for an unborn child is valid if he is born within 6 months of making the Will.	Bequest for an unborn child is valid if he is born within 10 months of making the Will.
Abatement of Legacies	The rule of rateable distribution is followed.	The rule of preferential distribution is applied.
Legatee dies before Legator	If so happened, the legacy reverts to the legator.	The legacy Will lapse only when legatee dies without leaving an heir or the legator revokes the Will himself.

MODULE 3

3.1 The Parsi Marriage and Divorce Act 1936:

Parsi Marriage, Dissolution of Parsi Marriage, Alimony, Custody of Children, Parsi Matrimonial Courts.

The Parsi marriage is also considered important for its validity to be a contract via an Ashirvad religious ceremony. The word 'Ashirvad' literally means blessings. A prayer or God's call to the parties to comply with their marital duties of trust. The marriage and divorce are stated in a separate act for Parsis, known as the Parsi Marriage and Divorce Act, 1936. The same will be discussed below in the given article.

Parsi Marriage and Divorce Act 1936

Important definitions

Section 2 of the Parsi Marriage and Divorce Act, 1936 states the important definitions given below-

1. "Chief Justice" includes senior Judge;
2. "Court" means a Court constituted under this Act;
3. to "desert" together with its grammatical variations and cognate expressions, means to desert
4. the other party to marriage without reasonable cause and without the consent, or against the will, of such party;

"grievous hurt" means—

- (a) emasculation;
- (b) permanent privation of the sight of either eye;
- (c) permanent privation of the hearing of either ear;
- (d) privation of any member or joint;
- (e) destruction or permanent impairing of the powers of any member or joint;
- (f) permanent disfiguration of the head or face; or
- (g) any hurt which endangers life;

"husband" means a Parsi husband;

"marriage" means a marriage between Parsis whether contracted before or after the commencement of this Act;

a "Parsi" means a Parsi Zoroastrian;

"priest" means a Parsi priest and includes Dastur and Mobed; and

"wife" means a Parsi wife".

Applicability

- Marriage shall not apply if, in any degree of consanguinity that is both contracting parties relate to each other and share the same ancestry.
- Marriages are not valid in Parsi Law when marriages are not solemnized by the priest with two Parsi witnesses in attendance.
- A marriage shall not be accepted if the husband is 21 years old and the wife is 18 years old.
- When marriage is not valid as set out above, a child born out of that marriage will be illegitimate.

Marriage between Parsis

Requisites of a valid marriage

No Marriage shall be valid if—

- (a) the Contracting Parties, in the presence of two other Parsi witnesses other than that priest, have a relationship with each other at any level of consanguinity or affinity as defined in Schedule I; or
- (b) such marriage shall be solemnized by any Parsi form of a ceremony called "Ashirvad" by a priest or
- (a) any Parsi (if that Parsi has changed).

Punishment for bigamy

Any Parsi, who has been married during his or her life, is subject to the penalties provided for by the India Penal Code for an offence to return to marriage during the lifetime of a Parsi or not, without

being legally divorced by a wife or husband or having his or her previous marriage declared invalid or dissolved.

Remarriage when unlawful

(1) No Parsi shall, in the lifetime of a wife or a husband, marry, whether or not a Parsi, except after he has divorced or married that wife or husband legally, or after marriage to that wife or husband has been declared null, or is void of or is dissolved and, if so, whether he or she has been legally made null and void or dissolved.

(2) Any marriage which does not agree to the above-stated provision will be considered void.

Registration of divorce

In the case of a court decree concerning divorce, nullity or dissolution, the Court shall transmit to the Registrar of Marriages within the jurisdiction referred to in Section 7 a copy of that decree for registration; the Registrar shall enter the same in a registry for the purposes of its preservation and shall apply the provisions of Part II which are applicable to Registrars and marriage registers,

The penalty under the Act:

- The Priest, in his or her opinion, shall be penalized by the single prison for a term of six months, or by a fine that may amount to two hundred rupees, or for both, on conviction of any priest who wilfully and knowingly celebrates marriage contrary to and in violation of Section 4.
- Any priest who fails to comply with any provision found in Section 6 shall be punished with a single sentence of imprisonment or with a fine extending to one hundred rupees or with both, on conviction of such an offence.
- Any other person to subscribe to, or authorize the certificate in compliance with section 6 who willfully fails to do so or fails to do so may, on conviction, be punished with a fine of no more than one hundred rupees for all such offences.
- Each person making, signing or attesting to a false declaration that he knows or thinks is false shall be punished for the period extending to 3 months by simple imprisonment or by an additional penalty extending into 1000 rupees, or by both; and if the act is equivalent in counterfeiting, as specified in the Indian Penal Code (Act 45 of 1860).
- Any officer who has not entered such a certificate under paragraph 6 shall be disciplined for a period of one year or one thousand rupees or with all of them with simple imprisonment.
- Any person sealing the register, destroying it, or altering it in any section, unlawfully, or fraudulently shall be punished with imprisonment for a period of five years, which may extend to five years, of either category as specified in the Indian Penal code (45 of 1860), or, where he is registered, of the Indian Penal Code (45 of 1860).

Dissolution of Parsi Marriage

The dissolution of a Parsi marriage, also known as divorce, follows certain procedures and guidelines under Parsi personal laws. The Parsi community in India follows the Parsi Marriage and Divorce Act, 1936, which governs matters related to marriage, divorce, and inheritance among Parsis.

Here are some key points to understand about the dissolution of a Parsi marriage:

Jurisdiction: The Parsi Marriage and Divorce Act applies to Parsis or Zoroastrians who are domiciled in India. If both parties are Parsis and married under the Parsi Marriage and Divorce Act, they can seek divorce under this law.

Grounds for Divorce: The Act provides for both fault-based and no-fault divorce. The fault-based grounds include adultery, cruelty, desertion, conversion, or incurable insanity for a continuous period of two years or more. No-fault divorce can be sought by mutual consent, where both parties agree to end the marriage without any specific fault being attributed.

Filing for Divorce: To initiate the divorce process, either spouse can file a petition before the appropriate family court. The petition should state the grounds for divorce and other relevant details. The court will then issue notices to the other party, and the legal process will proceed accordingly.

Counseling and Reconciliation: The court may refer the spouses to a marriage counselor or a conciliation officer to explore the possibility of reconciliation and resolve any disputes amicably. If reconciliation fails, the court will proceed with the divorce proceedings.

Division of Property: The court will consider the distribution of matrimonial property, including assets acquired during the marriage, while deciding on issues related to alimony and maintenance.

Child Custody and Maintenance: If there are children involved, the court will determine child custody and visitation rights based on the best interests of the child. It will also decide on the amount of maintenance to be paid for the child's upbringing and education.

Legal Representation: It is advisable for both parties to seek legal representation from qualified lawyers specializing in family law. They can provide guidance and ensure that the legal procedures are followed correctly.

Alimony in Parsi law

Under Parsi personal laws, which are governed by the Parsi Marriage and Divorce Act, 1936, provisions for alimony or maintenance are included for both spouses in the event of divorce or separation. The Act outlines the following key points regarding alimony in Parsi law:

Maintenance for Wife: The Act provides that the husband has an obligation to provide reasonable and suitable maintenance to his wife during the subsistence of the marriage and even after divorce. The maintenance can include a monthly or periodic payment, a lump sum amount, or the transfer of property or assets, depending on the circumstances.

Factors Considered: In determining the amount of alimony, the court takes into account various factors, including the financial status and earning capacity of the husband, the needs and standard of living of the wife, the duration of the marriage, the wife's contribution to the household, and other relevant circumstances.

Maintenance for Husband: In certain situations where the wife has the means to provide maintenance, the court may order her to pay maintenance to the husband if he is unable to support himself due to illness, disability, or other valid reasons.

Modification and Termination: The court has the authority to modify or terminate the alimony order based on changed circumstances or upon the death or remarriage of the recipient spouse.

Child Support: In addition to alimony, the court also considers the financial support of children in divorce cases. The Act provides for the maintenance and education of minor children, and the court can order the husband to provide financial support for the children's upbringing, education, and other necessary expenses.

Parsi Matrimonial Courts

In each of the Presidency towns of Calcutta, Madras and Bombay, and in certain other locations within the territories of the various State government agencies, a Special Court shall be formed for the purposes of the hearing suits pursuant to this Act.

The Parsi Chief Matrimonial Court of Calcutta, Madras, or Bombay, as the case may be, is so founded in each Presidency-town.

•**Chief Matrimonial Courts**-The local limits of the Parsi Matrimonial Court competence shall correspond with the local limits of the High Court's ordinary original civil competence, alimony and maintenance, both continuous and pendente lite, shall be supported by a Chief Justice of the High Court or by any other judges of the Supreme Justice from time to time appointed by the Judge of that Matrimonial Court, and, when dealing with cases under this Act, by one [five delegates, except in relation to —

- (a) interlocutory applications and cases of proceedings;
- (b) care, protection and education of children and
- (c) matters and prosecutions other than routine trials of cases; and
- (d) other cases and other prosecutions.

•**District Matrimonial Courts**-The Parsi District Matrimonial Court of this place is the title of a court so constituted in a place other than President Itself. The geographical limits of the jurisdiction of the Tribunal shall correspond with the limits of the district in which it is located, subject to the provisions of section 21. (a) The Judge of the main Court of original civil jurisdiction shall be the Judge of that Marriage Court and in proceedings against cases under this jurisdiction. (b) alimony and care, both the pendente lite and the permanent one; (c) custody of children, care and training; (d) all matters and procedures other than the usual hearing of cases.

Any district which the State government finds inappropriate to include in the jurisdiction of any District Matrimonial Court because of the insufficient existence of the Parsi residents shall be included within the jurisdiction for those Territories in which that Court applies, under the jurisdiction of the Parsi Chief Matrimonial Court. Unless the delegate is dead, is over, refuses to give up, or is unable or unable to work, or ceases to be a Parsi, or is convicted of a violation under the Indian Penal Code (45 of 1860) or other law for a period 1 (including a moral tort), then and so often State Government can be considered as insolvent.

The delegates chosen by the State Government pursuant to Sections 19 and 20 for assistance with the administration of the suits under this Act are, by the orders of the President Judge of the Court, taken from delegates designated by the State Government in accordance with Section 24, under proper rotation.

Any suit brought in pursuant to this Act shall, at the time of commencement of proceedings, be brought to trial under its jurisdiction [or where a wedding has been solemnized in compliance with this Act]. When the accused has at that time left (the jurisdictions protected by this law) the case shall be brought before the Court where the complainant and the accused have lived together for the last time.

Matrimonial suits

In Parsi Divorce Act one of the partners may dissolve marriages by three means:

Nullity cases: Unless the consummation is unlikely because of natural causes, the marriage may be declared null or void.

Grounds for divorce:

1. Any married person may sue for divorce on one or more of the following grounds, under the Parsi Law Act of divorce: Marriage has not been consummated within 1 year of its officialization on grounds of the defendant's deliberate failure to conduct it.
2. The defendant at the time of the marriage was mentally ill or of unsound mind and has been habitually so up to the date of the suit.
3. That the defendant was at the time of the marriage pregnant by some person other than the plaintiff: Provided that divorce shall not be granted on this ground, unless the plaintiff was at the time of the marriage unaware of the fact alleged, the suit has been filed within 2 years of the date of marriage, and marital intercourse has not taken place after the plaintiff came to know of the fact.

Reasons for marriage dissolution: When a husband or wife are separated from one another for a period of seven years.

The complainant shall take the co-defendant in any proceedings in relation to adultery divorce unless otherwise directed by the Court, and the Court shall, in all other proceedings in connection with which the adultery is supposed to have been committed, order the adulterer to pay the whole or part of the proceedings' costs. If a husband has abandoned his cohabitation with his wife, deserted or, without a valid reason, has ceased to co-exist with his spouse, the party so deserted or with whom co-existence so stopped may, if satisfied with the truth of the claim in the plea, sue for reimbursement of his or her conjugal rights and the Court.

Children of the Parties

In any proceeding under the present Act, the Court may from time to time pass these interim orders in respect of the custody, maintenance and training of children under 6 years of age (till 18 years) in a definitive judgment which it finds fair and proper to marry the parent to which the case relates, and may, upon request, apply for the final order.

If it has been made to the Tribunal that a wife has a right to any possession or reversal of property, the Court may order a settlement of that right which it finds it fair to make of any part of that property not exceeding one-half of it for the benefit of thin any case in respect of which a decree of divorce or judicial separation for the adulteries of a wife is given.

3.2 The Indian Christian Marriage Act, 1872

Essentials for solemnization of marriage - An authorized person for solemnization of marriage, Time, Place & Registration of Marriage, Registration of Marriage, Marriages of Indian Christian, Penalties and Miscellaneous provisions.

The laws regulating the solemnization of marriages among the Christian community in India is laid down by the Indian Christian Marriage Act of 1872. Initially enacted by the British-Indian administration, Christian marriages in the country are performed by an authorised Minister or Priest in a church. After the marriage ceremony is completed, the minister or priest registers the marriage and issues a certificate of marriage in the name of the couple and thereby, makes it official. To register a marriage officially, it is essential for each party to the union to make an application to the concerned authority that is located in their vicinity regarding the intention of marriage. This article talks about the necessary details of the Indian Christian Marriage Act and its features.

The Act

For the marriage to be valid under the Indian Christian Marriage Act of 1872, specific requirements need to be fulfilled. According to the Act, it is a necessity that either one or both the parties involved in the marriage be Christians. Therefore under the Act, a marriage may be termed as void and redundant unless one of the parties taking part in the union is governed by a different law that forbids such a wedding on the grounds of prohibited degrees of relationship.

Essential Requirements

According to The Indian Christian Marriage Act of 1872, the following are required to be fulfilled to constitute a valid marriage.

1. The age of the Bridegroom must not under twenty-one years and, the age of the Bride must not be under eighteen years.
2. Both the parties of the marriage must give voluntary consent to the ceremony and should not be obtained by misrepresenting facts or under compulsion or undue influence.
3. Neither of the party should have a living spouse at the time of the marriage.
4. The marriage must be performed in the presence of a person licensed to grant a certificate of marriage and at least two reliable witnesses.

Documents Required

The following documents are required for the registration of a marriage under the Indian Christian Marriage Act.

1. A completed application form with precise details.
2. Passport-sized photographs of both the parties to the marriage.
3. The Certificate of Marriage issued by the Minister or the Priest who performed the marriage.
4. Two photographs from the Wedding of the rituals along with an Invitation to the Wedding.
5. Residence proof and the proof of Age of both the parties to the marriage.
6. An affidavit certifying the mental condition and the marital status of both the parties.

Individuals Eligible to Solemnise

The following individuals are authorised to solemnise a Christian marriage as per the Indian Christian Marriage Act.

1. By an individual who has received the episcopal ordination and is authorised to solemnise a marriage according to the rules, rites, ceremonies and the customs of the Church of which he is a Minister.
2. By an individual who is a Clergyman belonging to the Church of Scotland and is authorised to solemnise a marriage according to the rules, rites, ceremonies and the customs of the Church of Scotland.
3. By an individual who is a Minister of Religion who is authorised to solemnise marriage with a license as per the Act.
4. By an individual who is licensed under the Act to grant Certificated of marriage between Christians in India.

Marriage Registrar Conditions

Various conditions are mentioned in the Act that has to be followed by the Marriage Registrar to perform a Marriage ceremony. The following terms have to be met if the Marriage Registrar has to perform the marriage as stated by the Act.

Notice of Intended Marriage (इच्छित विवाह की सूचना)

Either of the party must submit a written application or a notice of the intended marriage to Marriage Registrar that resides in the same vicinity as the parties. This is done to notify the concerned authority of their intention to get married. If both the parties live in different locations, it is essential that each party makes a separate notice in writing to the Marriage Registrar that is located within their area of residence. The written application or notice of the intended marriage is recorded into the “marriage notebook” and is put up in the notification area of the office for public viewing.

Pledge before the Registrar (रजिस्ट्रार के समक्ष प्रतिज्ञा)

Either of the party to the marriage must make a personal appearance before the Marriage Registrar before the certificate of notice has been issued. The party should appear before the Registrar by pledging the following.

1. That there are no obstacles, natural inclinations or other legitimate impediments to the intended marriage.
2. That the place of their residence is within the locale of the marriage registrar.

If either of the parties is a minor, the consent of one of the persons that are listed below is of great importance to perform the marriage.

- Father of the Minor, if alive and well.
- The authorised Guardian of the Minor if available.
- The Mother of the Minor, if no other individual is authorised to such a consent resides in the country.

Certificate of Notice

Once the pledge is taken before the Marriage Registrar by either one of the parties to the intended marriage, a Certificate of Notice is issued. Once the pledge is done, the Registrar wait for four days to issue the certificate. After the period has lapsed, the Marriage Registrar has the power to grant the Certificate of Notice. Information such as the address of the Church or the Chapel or any other place that

the marriage rituals are expected to be performed are stated in the Certificate of Notice. This Notice would not be issued if it is stopped by anyone stating apparent reasons why the testament ought not to be granted. The issuance of the certificate of notice makes it mandatory for the marriage to be performed with two months from the date of publication. Failing to do so would make the certificate of notice redundant and new certificate would be required.

Performance of the Marriage

Under the Indian Christian Marriage Act, a Christian Marriage is performed between the parties to the marriage with accordance to the rituals which is considered to be essential and proper by the Minister or the Priest designated to perform the wedding. The presence of two eligible witnesses other than the minister or the priest performing the marriage is a mandatory requirement at the marriage ceremony. A marriage cannot be performed if it is not performed within two months from the issuance of the certificate of notice. In such a case, a new certificate of notice has to be applied for and issued to solemnise the marriage.

Time and Place

The Indian Christian Marriage Act clearly states where Christian marriages should take place at and the time at which it should be performed. The time for performing a Christian marriage ritual has to be scheduled between the timeframe of six in the morning to seven in the evening. The place that Christian marriage has to be performed is at a Church or a Chapel. Some special considerations and requests are granted that give flexibility to the time and place to conduct the marriage ceremony.

Registration of Marriage

An application for registration of the marriage is made by both the party to the concerned authority in whose jurisdiction either of the parties has been residing. The wedding is registered by the Marriage Registrar who was present at the marriage and performed the union of the couple in the Marriage Register. An acknowledgement slip of the registration with the authorised signatory of both the parties along with the witnesses present at the time is recorded. This is then attached to the Marriage Register and thereby indicating that the marriage was registered officially. These slips of acknowledgement are sent out at the end of the month to the Registrar General of Births, Deaths and Marriages. Christian marriages in India may also be endorsed under a special provision without prior notice.

Correction of Errors

Any person who comes across an error in the form or substance of a marriage entry in the Register of Marriages must bring it to the notice of the person who registered the marriage in the first place. The authorised individual should make the changes within one month of discovering the error. The error must be corrected in the presence of the persons married or, in the case of either of their deaths or absence, in the presence of two other credible witnesses. The correction must be made by the entry in the margin without any alteration to the original entry. The authorised person has to sign the marginal entry and add the date of such a correction made. This marginal correction should be made in the certificate of the marriage as well. Every entry made under this section should be attested by the witnesses in whose presence the correction was made.

Marriages of Indian Christian

Marriages of Indian Christians are governed by various personal laws depending on the Christian denomination to which the individuals belong. In India, there are different Christian personal laws applicable to different groups, such as the Indian Christian Marriage Act, 1872, which is primarily applicable to Protestants and other non-Catholic Christian denominations. Additionally, the Canon Law of the Catholic Church applies to marriages of Catholics.

Here are some key points regarding marriages of Indian Christians:

Christian Marriage Act, 1872: The Indian Christian Marriage Act, 1872, provides for the solemnization and registration of marriages for Indian Christians who are not governed by the Canon Law of the Catholic Church. This Act applies to various Christian denominations, including Protestants, Anglicans, Baptists, and others.

Marriage Ceremony: A Christian marriage is typically solemnized through a religious ceremony conducted by a priest or minister in a church. The ceremony may include prayers, vows, the exchange of rings, and blessings.

Requirements for Marriage: To have a valid Christian marriage, certain requirements must be fulfilled, including:

Both parties must be Christians.

- They must have attained the legal age of marriage (18 years for the bride and 21 years for the groom).
- They should not be within the prohibited degrees of relationship.
- Consent of the parties is essential, and they must not be under any legal incapacity to marry.

Marriage Registration: Following the marriage ceremony, it is advisable to register the marriage under the relevant marriage registration laws. The registration is usually done with the local Registrar of Marriages or the Marriage Officer appointed by the government.

Canon Law: For Catholics, the Canon Law of the Catholic Church governs their marriages. The Catholic Church has its own requirements and procedures for the solemnization and validity of marriages, which must be followed in addition to any civil registration requirements.

Divorce and Dissolution: In the event of the breakdown of a Christian marriage, divorce and dissolution procedures are subject to the specific laws applicable to the respective Christian denomination. Each Christian personal law has its provisions for divorce, including grounds, procedures, and legal requirements.

Penalties and Miscellaneous provisions

Under the Indian Christian Marriage Act, 1872, there are certain penalties and miscellaneous provisions that govern various aspects of Christian marriages in India. Here are some key points:

Penalties for False Declarations: If any person knowingly and willfully makes a false declaration or statement in any marriage notice or certificate, they may be subject to penalties prescribed under the Act. The penalties may include fines or imprisonment.

Marriage Officiating Without Authority: Any person who solemnizes a Christian marriage without being duly authorized to do so under the Act may be liable for penalties. Only persons who are authorized by the Act, such as priests, ministers, or recognized religious authorities, can perform the solemnization of marriages.

Offenses and Prosecution: The Act provides for the prosecution of offenses committed under its provisions. If any offense is committed against the Act's provisions, the affected party or any person authorized by the Act may file a complaint before the appropriate court. The court has the authority to inquire into the offense and impose penalties as prescribed.

Maintenance of Marriage Registers: Every person solemnizing Christian marriages is required to maintain a register of marriages in the prescribed format. The register should contain accurate and complete information regarding the marriages solemnized, including the date, names of the parties, and witnesses. Failure to maintain the register or providing false information may lead to penalties.

Registration of Marriages: The Act also provides for the registration of Christian marriages. It is advisable for the parties to register their marriage with the local Registrar of Marriages or the Marriage Officer appointed by the government. Failure to register the marriage may not invalidate the marriage itself, but it may have legal implications and impact rights related to inheritance, property, and other legal matters.

3.3 The Indian Divorce Act 1869

Dissolution of Marriage (Nullity of Marriage, Divorce, Judicial Separation, Restitution of Conjugal Rights), Protection orders Alimony, Settlements, custody of Children, remarriage Court Procedure and Miscellaneous

The Indian Divorce Act, 1869, also known as the Divorce Act, 1869 was introduced to govern the divorce laws for Christian couples in India. It deals with the dissolution of marriage between a man and a woman in the Christian community. It is a codified Indian personal law. It states that when either the husband or the wife files a petition for divorce, the court of law grants separation in accordance with the provisions of this Act. The provisions of this Act deal with various rights after divorce, which include grounds for dissolution of marriage, custody of the child, alimony, distribution of property, visiting the child, and likewise. It also specifies the power of the courts and situations that can nullify the decree.

Background of the Indian Divorce Act, 1869

The Indian Divorce Act, 1869, amends the laws that govern the divorce of people who profess Christianity. The British had enforced this Act before independence. This Act came into effect on 1st April, 1869, and is applicable to the whole of India, though the state of Jammu and Kashmir is excluded. In India, the Hindus, Sikhs, Buddhists, and Jains are governed by the Hindu Marriage Act, 1955, the dissolution of Muslim marriages is governed by the Muslim Marriage Act, 1939, the Parsis are governed by the Parsi Marriage and Divorce Act, 1936, and inter-community by the Special Marriage Act, 1954. In the same way, parties professing Christianity and residing in India are administered by the Indian Divorce Act, 1869.

Grounds for dissolution of marriage

According to Section 10 of the Indian Divorce Act, 1869, it encompasses various grounds for dissolution of marriage. The wife or husband has to present a petition to the district court for a divorce. It is also necessary to file that petition in the court under whose jurisdiction they have formalised their marriage or in which they reside or have last resided together.

The various grounds under which a court can grant a divorce are as follows:

- If either of the parties commits adultery; or
- If either party ceases to be a Christian; or
- If either party is of unsound mind for a period of two years; or
- In case any of the party is suffering from a disease like leprosy or a venereal disease for a term of two years; or
- If either of the parties willingly refuses to consummate the marriage; or
- If either party deserts the other for a period of two years or more; or
- In case any of the party treats another cruelly.

In addition to the above grounds, a wife is also allowed to file a petition for divorce if the husband is guilty of committing rape, bestiality, etc., after their marriage.

Different ways for obtaining divorce

Divorce by mutual consent of the parties

When the parties mutually agree to present a petition for divorce under Section 10A of the Indian Divorce Act, 1869, the court will regard it as a divorce by mutual consent. To get divorced under this heading, the parties filing the petition must have lived separately for at least two years. Otherwise, the court will not accept the petition. The couple has to prove the following factors, which are as follows-

- They have been living separately, i.e., not as husband and wife, for a minimum of two years.
- They are unable to stay with each other due to certain reasons.
- They have mutually agreed to share those rights regarding custody of the children, property, and maintenance without any conflict.

Rights regarding maintenance

If the couple who are mutually filing for divorce have reached a consensus on the issue of maintenance or alimony, then they can easily obtain a divorce from the court. There is no maximum or minimum limit prescribed for maintenance.

Rights regarding the custody of the children

The rights regarding the custody of the children must be taken into consideration for those divorces that happen with mutual consent. The spouses can have joint, shared, or exclusive custody of the children with their mutual understanding.

Rights regarding property

The couple, with their mutual understanding, must decide who will enjoy which part of the property. The property includes movable as well as immovable property.

Divorce that is not by mutual consent

Either of the parties can present a petition for divorce under this Act. The various circumstances for which they can file for dissolution of marriage are as follows-

Petition filed by husband

A husband can submit a petition for divorce to the district court or the high court, pleading with the court to dissolve their marriage as his wife has been guilty of adultery since the solemnization of their marriage.

Petition filed by wife

A wife can submit a petition for divorce to the district court or the high court, pleading with the court to dissolve their marriage on the following grounds-

- If her husband has professed a different religion by converting to any other religion for the purpose of profession.
- If her husband has married another woman by following all the rituals.
- If her husband has been guilty of adultery for a continuous period since the solemnization of their marriage.
- If he is guilty of bigamy along with adultery.
- If he has married another woman along with adultery.
- If he is guilty of rape, sodomy, or bestiality.
- If he is guilty of adultery along with cruelty, as in the case where he was not guilty of adultery, then also she would have been entitled to a divorce mensa et toro.
- If he is guilty of adultery together with desertion without any sufficient and reasonable excuse for a term of two years or more.

Grounds on which a petition can be dismissed

The petition can be dismissed by the court under the following circumstances-

- If proper evidence is not produced to the court, and the court is not satisfied with the evidence, or the case of the petitioner has not been proved, or
- If the court is not satisfied with the evidence presented by the petitioner, which proves that the alleged had committed adultery since the solemnization of marriage, or
- If the petition is filled or prosecuted in collusion with either of the respondents, or
- In any other case, the petition shall be dismissed by the court.

If a district court dismisses a petition for divorce under this Act, a similar petition can be presented to the high court.

Decree for dissolution of marriage

If the evidence presented by the petitioner is proved, and the court is satisfied with the evidence, then the court will declare its judgement by stating that the marriage is dissolved. The court will not be obligated to pronounce its judgement under the following circumstances-

- In case the petitioner has been found guilty of adultery, or
- If the court finds that the petitioner has unreasonably delayed in presenting or prosecuting such petition, or
- If the court finds that the petitioner has treated another party with cruelty, or
- If the petitioner has willingly deserted or separated himself or herself from the other spouse before it has been proved that the other party is guilty of adultery and without a proper and reasonable excuse, or
- If the petitioner willfully neglected the other party or did any misconduct towards the other party, which led to adultery by the other party.

Confirmation of dissolution of marriage

Any decree or judgement for the dissolution of marriage awarded by the district court needs to be confirmed by the high court.

Verification of decree by high court

The decree passed by the district court for dissolution of marriage shall be verified by the high court. If the panel consists of three judges, the majority opinion will be upheld. On the other hand, if the panel consists of two judges, then the senior judge's opinion will be taken into consideration. If the high court wants to do further enquiry or obtain additional evidence, it can do that to its satisfaction. After enquiring and examining all the evidence provided to the high court by the district court, the high court will pass a decree affirming the decree for dissolution of marriage.

Decree of nullity of marriage

A marriage may be declared null and void under Section 19 of the Indian Divorce Act, 1869. Other than dissolution of marriage, this Act also has provisions regarding nullity of marriage. Either of the spouses can file a petition with the District Court or High Court, pleading that the court declare his or her marriage null and void. A marriage may be declared null and void on any of the following grounds-

- The respondent was impotent at the time of solemnization of marriage and at the time of instituting the proceeding; or
- The parties to the marriage are within the prohibited degrees of consanguinity or affinity; or
- In case either of the spouses was lunatic or idiot during the time when marriage was solemnised; or
- If, at the time the marriage was solemnised, the previous marriage of either of the spouses was in effect or the former husband or wife of either party was alive at the time of the marriage.

The high court may pass a decree of nullity of marriage in cases where the consent of either party to the marriage was obtained by force or fraud.

Judicial separation

Judicial separation may be granted by a court when either the husband or the wife files a petition for legal separation. Judicial separation is a situation when the marriage between the parties is not dissolved. The marriage continues to exist, and they are not free to remarry. Either of the spouses can apply for judicial separation on any of the following grounds-

- Adultery; or
- Cruelty; or
- Deserted the other party for two years without any reasonable excuse.

If the district court or high court under whose jurisdiction the petition is filed is satisfied that the statements made in the petition are true, it will grant the decree for judicial separation under this Act.

Custody of children

When a divorce takes place without the mutual consent of the parties, the court will grant custody of the child after examining the capabilities of the father or mother as a parent to the child. In most of the families, where the mother is a housewife, custody of the child is given to her, and the father is directed to provide financial support and the occasional visits.

Alimony or maintenance

The court, while deciding the alimony that needs to be paid, takes into consideration the earning potential of the husband. The court sees whether the husband has the capacity to regenerate his fortune and his duties and liabilities. If the wife is economically dependent, then the property is given to her. The alimony is given to the spouse, dependent children and aging parents.

Judicial pronouncements

- In the case of *Major Frank Ralston Samuel Raj v. Kezia Padmini Swarna Pandian (2016)*, the husband presented an appeal against the petitioner, his wife, who had filed for restitution of conjugal rights. The Madras High Court observed that the parties had been living apart for more than fifteen years, so there was no emotional attachment between them. The wife had refused to consummate the marriage. The court held that a marriage can be dissolved under Section 10 of the Indian Divorce Act, 1869. If either party, after the solemnization of marriage, does not cooperate to consummate the marriage and therefore the marriage has not been consummated, the other is entitled to divorce.
- In the case of *Tomy Joseph v. Smitha Tomy (2018)*, the couple, by their mutual consent, filed a divorce petition in the family court. The court dismissed the petition on the ground that there is no provision to waive the six month period to file for dissolution of marriage under Section 10A of the Indian Divorce Act. The couple appealed to the Kerala High Court where the court held that divorce by mutual consent is secular in nature. There should not be any kind of discrimination on the basis of religion. The High Court waived the time for 'cooling off' for dissolution of marriage for a Christian couple.

The Indian Divorce (Amendment) Act, 2001

The Indian Divorce Act, 1869, was amended, and the new Act was introduced. This Act was repealed, and the Indian Divorce (Amendment) Act, 2001, was enacted with the assent of the President on 24th September, 2001. This amended Act not only revolutionised the Christian divorce laws but also made a positive impact towards the goal of a uniform divorce law. The Act was amended to have a uniform civil code for all the citizens of India. The objective can be achieved by reforming various personal laws.

Protection orders under The Indian Divorce Act 1869

Under The Indian Divorce Act, 1869, which primarily applies to Christians in India, provisions are made for the issuance of protection orders to safeguard individuals from various forms of harm or harassment within the context of marriage. These protection orders aim to provide legal remedies and protection to individuals who may be experiencing domestic violence or other forms of abuse. Here are the key protection orders available under The Indian Divorce Act, 1869:

Protection Order: The court may issue a protection order to protect an aggrieved spouse or child from any act of domestic violence, harassment, or harm. The order may include directives to prohibit the offending party from committing any further acts of violence, contacting the aggrieved party, or approaching their place of residence or work.

Residence Order: The court may issue a residence order to provide the aggrieved spouse or child with exclusive possession of the matrimonial home or an alternative residence. This order may specify that the offending party must vacate the premises and refrain from entering or causing any disturbance.

Protection of Property Order: The court may issue an order to protect the aggrieved party's right to their personal belongings, assets, or financial resources. It may direct the offending party to refrain from disposing of or causing damage to any property shared or owned by the aggrieved party.

Monetary Relief Order: The court may grant a monetary relief order to provide financial support or maintenance to the aggrieved spouse or child. The order may include provisions for monthly maintenance payments, medical expenses, child support, or any other necessary financial support.

Custody and Visitation Order: In cases involving children, the court may issue orders regarding child custody, access, and visitation rights. These orders aim to ensure the well-being and proper upbringing of the children involved, while considering the best interests of the child.

Alimony, Settlements, custody of Children, remarriage

Under The Indian Divorce Act, 1869, which primarily applies to Christians in India, provisions are made for various aspects related to alimony, settlements, custody of children, and remarriage. Here's an overview of these provisions:

Alimony (Maintenance): The Act provides for the payment of alimony or maintenance to the wife (and children) by the husband, either during the subsistence of the marriage or after divorce. The court may order the husband to provide reasonable and suitable maintenance to the wife, considering factors such as the husband's financial capacity and the wife's needs and standard of living.

Settlements: The Act allows parties to a divorce to enter into settlements and agreements regarding matters such as property division, custody of children, and financial support. These settlements can be made by mutual agreement and can help in resolving disputes outside of the court.

Custody of Children: The Act provides for the welfare and custody of children in divorce cases. The court, while determining custody, takes into consideration the welfare and best interests of the child. It may award custody to either the mother or the father based on factors such as the child's age, moral and physical fitness of the parents, and the child's own preference (if they are old enough to express it).

Remarriage: The Act allows either party to a divorce to remarry after the dissolution of their marriage. Once the divorce is finalized, both parties are free to enter into new marital relationships if they wish to do so. Remarriage does not have any legal restrictions under the Act.

Court Procedure and Miscellaneous

Under The Indian Divorce Act, 1869, which primarily applies to Christians in India, there are specific court procedures and miscellaneous provisions related to divorce proceedings. Here's an overview of these aspects:

Court Procedure: The Act provides a framework for initiating and conducting divorce proceedings. The general court procedure includes the following steps:

- a. **Petition:** The spouse seeking divorce (the petitioner) files a petition in the appropriate court, stating the grounds for divorce and providing relevant details of the marriage and relationship.
- b. **Service of Notice:** The court serves a copy of the petition to the other spouse (the respondent) and provides an opportunity for them to respond to the allegations made in the petition.
- c. **Response:** The respondent may file a written response to the petition, either admitting or denying the allegations. They can also file a counterclaim seeking divorce or other relief.
- d. **Evidence and Hearings:** The court conducts hearings, allows both parties to present evidence and witnesses, and examines the merits of the case. The court may consider factors such as grounds for divorce, allegations of cruelty, adultery, desertion, etc.
- e. **Judgment:** After considering the evidence and arguments presented, the court delivers a judgment on the divorce petition. The judgment may grant or deny the divorce, and it may also address issues such as alimony, child custody, and property division.

Appeals: If either party is dissatisfied with the judgment of the trial court, they may have the right to appeal to a higher court. The appellate court reviews the case based on legal grounds and evidence presented and may uphold, modify, or reverse the lower court's decision.

Miscellaneous Provisions: The Act includes various miscellaneous provisions, including:

- a. **Discretion of the Court:** The court has discretionary powers to make orders regarding alimony, custody of children, and property matters, based on the specific circumstances of the case and the welfare of the parties involved.
- b. **Recognition of Foreign Divorces:** The Act recognizes divorces obtained outside of India if certain conditions are met, such as the divorce being obtained under a law that is applicable to the parties or if both parties consented to the jurisdiction of the foreign court.
- c. **Punishment for False Statements:** The Act includes provisions to punish individuals who make false statements or provide false evidence during divorce proceedings.
- d. **Power to Make Rules:** The government has the authority to make rules for carrying out the provisions of the Act and for regulating the practice and procedure of courts in divorce cases.

MODULE 4:**Indian Succession Act, 1925****4.1 Introduction****Scheme of the Act, Application of the Act**

The law of succession is the law governing the devolution of property (transfer of property from the owner of the property to his legal successors because of his death). The laws dealing with inheritance in India are not uniform. Diversity of laws are involved and their application depends on multiple factors like the religion of the tribe or the domicile of the parties; communities or sects in the communities to which they belong, marital status of the parties, and also the religion of the spouse. Succession can be classified into Intestate succession and Testamentary succession.

This article has been written to acquaint a common man with some important concepts and succession rules for Christians, Jews, and Parsis. It will give an overview of the legal provisions and basic principles related to testamentary and intestate succession across these religions. It will also briefly analyse the provisions and point out the loopholes.

Testamentary succession

Testamentary succession or disposition by wills refers to a case when the deceased leaves behind a will and the devolution of property take place as per his wishes expressed in his will.

Intestate succession

Intestate succession refers to a case when the deceased person has passed away (a) leaving behind the property for which he has not left succession plan i.e. a will (b) if the bequest of property is for illegal or immoral purposes (Section 127 of the Indian Succession Act, 1925). In such instances, the devolution of property of the deceased happens as per the laws applicable to the succession of the property of the deceased which in India depends upon the religion followed by the deceased at the time of death.

Intestate and testamentary succession across religions

Before the advent of British rule in India, major laws of inheritance either had their roots in religion or were deeply influenced by Personal Laws which owed their emergence to customs and religion. It was only after the enactment of the Indian Succession Act, 1865 which was later replaced by the Indian Succession Act, 1925 that many communities (Christians, Jews, and Parsis) in India started being governed by codified laws.

•For Hindus, Jains, Buddhists, and Sikhs

For intestate succession, the devolution of property happens according to the scheme laid down under Chapter III of the Hindu Succession Act, 1956. For testamentary disposition, provisions of Part VI of the Indian Succession Act, 1925 are applicable.

•For Christians and Jews

For intestate succession, the provisions under Sections 31 to 49 of the Indian Succession Act, 1925 are applicable. For testamentary disposition, provisions of Part VI of the Indian Succession Act, 1925 are applicable.

•For Parsis

For intestate succession, the provisions under Sections 50 to 56 of the Indian Succession Act, 1925 are applicable. For testamentary disposition, provisions of Part VI of the Indian Succession Act, 1925 are applicable.

•For Muslims

The Muslim Personal Law (Shariat) Application Act, 1937 is applicable for intestate succession. However, for testamentary succession Muslim law states that a will shall be valid for only 1/3rd property of the deceased if it is not given formal consent by all the heirs of the deceased.

For marriages registered under the provisions of the Special Marriage Act, 1954

The laws for succession to the property for a person whose marriage is registered under this Act, are governed by the Indian Succession Act, 1925 unless both of them are Hindus.

Important concepts of testamentary succession

The Indian Succession Act, 1925 is identically applicable for Testamentary succession across all religions (Hindus, Sikhs, Jains, Buddhists, Christians, Jews, and Parsis), other than Muslims. Therefore, rules regarding the construction of wills, the validity of wills, concepts of capacity and restrictions, clauses for revocation and revival of will, and many more important concepts are elaborately defined in Part VI under Sections 57 to 391 of the Indian Succession Act, 1925. Some important concepts of Testamentary succession are stated below.

1. Persons capable of making wills

Section 59 of the Indian Succession Act, 1925 states that a person who is of sound mind and is not a minor can transfer his property by will. A blind, deaf or dumb person or a married woman is not incapacitated from making a will if they know the consequences of it. Thus, only people devoid of making the will, are the people who are of unsound mind or in an improper state of mind due to intoxication, illness, etc.

2. Testamentary guardian

Section 60 of the Indian Succession Act, 1925 states that a guardian or guardians can be appointed by will by a father for his minor child.

3. Revocation of will by testator's marriage

Section 69 of the Indian Succession Act, 1925 states that all kinds of wills that were made before one's marriage, stand revoked by the marriage of the testator.

4. Probate of will

'Probate' means a copy of a will certified by the court granting the administration of the property of the testator. In case of Parsi dying after the commencement of the Act, probate is mandatory, if the will is made or the immovable property to be devolved under the will is situated within the jurisdiction of three presidencies; Calcutta, Madras, and Bombay. On the other hand, a Christian does not need to obtain Probate for his will. The will alone would suffice.

5. Privileged and unprivileged wills

Every testator (who is not a soldier, mariner, or airman) can execute an unprivileged will by fulfilling some essential conditions of Section 63 of the Indian Succession Act, 1925, which are :

- Every will must be signed by the testator or his mark should be affixed to the will, or the testator can get it signed by some other person in his presence and by his direction.
- The testator's signature or mark, or the signature of the person signing for him, shall appear intentional.
- The will must be signed/attested by at least two witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person signing the will for the testator. All the witnesses shall sign the will in the presence of the testator. However, the presence of all the witnesses at the same time is not mandatory. Also, no particular format of attestation is required.

A privileged will, on the other hand, is made by a soldier engaged in warfare or expedition, or, an airman, or a mariner at sea. These wills are made under Section 66 of the Indian Succession Act, 1925, the was and can be either oral or in writing. The will must be handwritten by the testator himself. Though the testator needs to sign the privileged will, it does not need to be attested.

6. Bequeath of property to religious or charitable causes

Section 118 of the Succession Act, 1925 (applies to Christians and not Parsis) states that a person having a nephew or niece or nearer relative can bequeath his property to religious or charitable causes only if he fulfills two conditions:

- Such a will has been executed at least twelve months before his death.

- Such a will has been deposited within six months from its execution in the safe custody of wills of living persons, provided by law.

However, in the case of *John Vallamattom v. Union of India*, (2003) 6 SCC 611, Supreme Court declared Section 118 as invalid and unconstitutional as it was discriminatory and violative of Articles 14,15, 25, and 26 of the Constitution.

As a consequence, Christians and Parsis can bequeath their property to charity without fulfilling the above conditions.

Intestate Succession under Indian Succession Act, 1925 for Christians and Jews

Before the enactment of the Indian Succession Act, 1865 which was later replaced by the Indian Succession Act, 1925, the Jews were regulated by their customary practices in matters of inheritance and succession. They were governed by the 'Pentateuch' (religious text of Jews) and by the conciliation committees formed by the Jews in their settlements.

Similarly, Christians living in mofussil areas (rural districts) were governed by their customary laws while those living in the provincial area were governed by British Laws.

The rules of succession among the Christians have been codified under the Indian Succession Act, 1925. Cochin Christian Succession Act, 1921 and the Travancore Christian Succession Act, 1916 were revoked and now the Christians follow the provisions of inheritance under the Indian Succession Act, 1925.

Portuguese Civil Court 1867 governs the Christians in the State of Goa and the Union Territories of Daman and Diu, whereas the governing laws for Christians in Pondicherry are French Civil Court 1804, Customary Hindu Law, or Indian Succession Act. On the other hand, customary practices are also influencing the principles of succession. Customary laws of inheritance govern the inheritance for Protestant and Tamil Christians (residing in certain talukas) to date. Further, the Garos of Meghalaya still follow their customary matrilineal system of inheritance and not the provisions of the Succession Act.

Who is an 'Indian Christian'?

- Section 2(d) of the Indian Succession Act defines an 'Indian Christian' as a native of India who claims to be of unmixed Asiatic descent and who practices any form of Christianity.
- The definition of 'Indian Christian' was clarified in the case of *Abraham v. Abraham* wherein a Tamil liquor vendor died without any will and the judiciary had to decide whether his brother or his Anglo-Indian wife would inherit the property of the deceased. This case highlighted that a Hindu who has converted to Christianity shall not be governed by Hindu laws of Succession anymore and any forceful exercise of Hindu laws on him shall stand void. However, he was given an option to permit the old law to be exercised on him, despite the religious conversion.

In the case of testamentary succession for Christians and Jews, where there is a will executed by the deceased, the general provisions under Sections 57 to 391 of the Indian Succession Act, 1925 apply.

However, intestate succession for Christians and Jews is governed by the provisions laid down in Chapter II, Part V under Sections 31 to 49 of the Indian Succession Act, 1925.

This Act recognizes three types of heirs:

1. Spouse (widow/widower)
2. Lineal Descendants (Section 25 of the Act defines lineal descendants as a descendant born out of a lawful marriage, in a direct line e.g. children, grandchildren)
3. Kindred or consanguinity (Section 24 of the Act defines kindred as blood relations through a lawful marriage, in a direct line.)

Kindred of an intestate can be divided into three categories as; a) descendants- children, grandchildren; b) ascendants- his father, mother, grandfather, grandmother; c) collaterals- firstly includes his brothers and sisters and their descendants and secondly, his uncles, cousins and other relations of either sex, who are not the descendants of the siblings of the deceased.

Note: The husband or wife of the deceased is not his or her kindred.

A. Basic principles regarding intestate succession among the Christians and Jews

- No differentiation between paternal and maternal relations. If the paternal and maternal relations are equally related to the intestate, they are entitled to an equal share of the property.
- No distinction between half-blood/full blood/uterine relations.
- A posthumous child is treated as a lawful successor, as long as he is born alive and was in the womb of the mother when the intestate died.
- No recognition is given to illegitimate children who are born out of wedlock.
- Recognizes adoption and the rights of a natural born child are given to the adopted child.
- No recognition is given to polygamous marriages.

Succession in Christians and Jews can be done in two ways

1. 'Per capita': Each heir of the same degree of relationship is given one share each.
2. 'Per stirpes': When the degrees of relationship are discrete, the division is done according to the branches.

B. Intestate Succession laws in Christianity and Jews

Section 32 of the Indian Succession Act, 1925 states that the property of the intestate shall devolve upon the widow/widower or the kindred (lineal descendants, collaterals, and ascendants) of the intestate in the following manner:

Rights of the widow and the widower

Sections 33, 33A and 34 codifies the rules of succession to the widow of the intestate, which are summarized in the table below:

S.No.	Particulars	Rules of succession	Section
1(a)	If the intestate has left the widow as well as lineal descendants.	Widow (1/3rd) and the remaining (2/3rd) will be shared equally by the lineal descendants.	33
(b)	If the intestate has left the widow, no lineal descendants but some people who are kindred to him.	Widow (1/2) and the remaining (1/2) to be shared by the kindred.	33
(c)	If the intestate has left the widow, no lineal descendants and no kindred	The entire property will devolve to the widow/widower	33
(d)	If the intestate leaves behind a widow but has no lineal descendant or kindred and if the net value of his property does not exceed Rs. 5000/-	The entire property will devolve to the widow/widower	33A
2(a)	If the intestate is not survived by the widow, then the property shall devolve to his lineal descendants and in absence of lineal descendants, to those who are kindred to him, (either ascendants or collaterals).	The property shall devolve (as the case may be) as per the provisions of Sections 42 to 48.	34
(b)	If the intestate has left no kindred (lineal descendants, ascendants, collaterals)	The entire property shall go to the government.	34
3.	The rights of the widower/husband of the intestate woman.	The widower has the same rights as the widow in respect of the property of his intestate spouse.	35

Rights of children and other lineal descendants

Section 36 of the Act specifies that the rules for the distribution of the intestate's property (which will be 2/3rd, after deducting 1/3rd share of the survived widow and one whole if the intestate has left no widow) amongst his lineal descendants are codified in Sections 37 to 40, which are summarized in the table below:

S.No.	Particulars	Rules of succession	Section
1.	If the intestate has left only a child or children and no more lineal descendants.	The property belongs to the surviving child or equally divided amongst the surviving children.	37
2.	If the intestate has left no child, but only a grandchild or grandchildren and no more remote descendant through deceased grandchild.	The property belongs to the surviving grandchild or is equally divided amongst the surviving grandchildren.	38
3.	If the intestate has left only great-grandchildren or other remote lineal descendants to the same degree only.	The property belongs to the surviving great-grandchildren or other remote lineal descendants, equally for both males and females.	39
4.	If the intestate is survived by lineal descendants not all in the same degree of kindred to him, and those through whom the more remote are descended are dead.	The property is shared equally by all the lineal descendants of the intestate who qualifies in the nearest degree of the kindred to him at the time of his death or of the like degree of the kindred to him, who died before him leaving lineal descendants. For Example, A has three children, X, Y, and Z; X died leaving four children; Y died leaving one child; Z alone is the surviving child of his father. On the death of A, the intestate, 1/3rd of the property's share of A will devolve to Z; 1/3 rd to Y's only child; and the remaining 1/3rd will be equally distributed amongst X's four children in the ratio 1/12 each.	40

Succession laws when there are no lineal descendants

Section 41 of the Act specifies that the rules for the distribution of the intestate's property (which will be 1/2 share after deducting 1/2 share of the survived widow and one whole if the intestate has left no widow) when the intestate has died without leaving behind any lineal descendants but only kindred are codified in Sections 42 to 48, which are summarized in the table below:

S.No.	Particulars	Rules of succession	Section
1.	If the intestate's father is living	Widow (1/2 share) and Father (1/2 share); or Father (one whole if no widow of intestate), even if there are other kindred	42
2.	Where the intestate's father is dead, but his mother, brothers, and sisters are living.	Widow (1/2 share) and remaining (1/2 share) to be shared equally between mother, sisters, and brothers or full share to be shared equally between them, if no widow of intestate.	43
3.	Where the intestate's father is dead and his mother, a brother or sister, and children of any deceased brother or sister, are living.	Widow (1/2 share) and remaining (1/2 share) to be shared equally per stirpes by mother, brother, sister and children of deceased brother or sister (such children if more than one, would equally divide the share of their deceased parent amongst themselves).	44
4.	Where the intestate's father is dead and his mother and children of any deceased brother or sister are living.	Widow (1/2 share) and remaining (1/2 share) to be shared equally per stirpes by mother and children of deceased brother and sister (such children if more than one, would equally divide the share of their deceased parent amongst themselves)	45
5.	Where the intestate's father is dead, but his mother is living and has no brother, sister, nephew, or niece.	Widow (1/2 share) and mother (1/2 share) or if no widow of the intestate, then the entire property will go to the mother.	46
6.	Where intestate has left neither lineal descendant, nor father, nor mother	Widow (1/2 share) and remaining (1/2 share) to be equally divided per stirpes between his brothers and sisters and children of deceased brothers and sisters (such children if more than one, would equally divide the share of their deceased parent amongst themselves)	47
7.	Where intestate has left neither parent, nor lineal descendant, nor any sibling	Widow (1/2 share) and remaining (1/2 share) to be divided equally amongst the kindred (blood relatives) who are at the nearest degree to the intestate. e.g. If the intestate is survived by grandfather and grand-mother (both being in the second degree), the property will be equally shared by them. Any surviving uncles, aunts, great-grandfather, great-grandmother will be excluded as they are third-degree kindred. On the other hand, if second-degree kindred is not living, then the property will be equally divided amongst all the kindred in the third-degree, fourth-degree kindred will be excluded, and so on. The entire property to be divided if the intestate leaves no widow.	48

Intestate succession under Indian Succession Act, 1925 for Parsis

In matters of succession, Parsis have followed various customary laws till the codification of laws during British times in 1865. As per these customs, Parsi Panchayats (also called Parsi Anjuman) were given the authority to pass jurisdiction on matters related to succession, land disputes, marital disagreements, and domestic conflicts. The composition of these Panchayats would be influential persons from the Parsi community.

The term 'Parsi' is not defined in the Indian Succession Act, 1925. However, it was held by the Bombay High Court that the succession laws codified in the Act for 'Parsi' would not only cover the Parsi Zoroastrians but also the Zoroastrians of Iran.

After the enactment of the Indian Succession Act, 1925 Parsi were made to be governed by this codified law. There is a separate scheme of succession for Parsi codified under Sections 50 to 56 of the Act for Intestate succession for Parsi.

In the case of testamentary succession for Parsi, where there is a will executed by the deceased, the general provisions under Sections 57 to 391 of the Indian Succession Act, 1925 apply.

A. Basic principles regarding intestate succession among Parsis (Section 50)

- A posthumous child is treated as a lawful successor similarly to those born during the lifetime of the intestate, as long as he is born alive and was in the womb of the mother when the intestate died.
- A lineal descendant of the intestate who dies during the lifetime of the intestate, without leaving his widow or children, shall be completely ignored when the distribution of the property of the intestate is done after his death.
- If the widow of any lineal descendant of the intestate marries during the lifetime of the intestate, then she will not be entitled to any share in the intestate's property after his death and shall be considered as non-existing.

B. Intestate succession laws in Parsis

Section 51 of the Indian Succession Act, 1925 codifies the rules for the division of intestate property among widows, widower, children, and parents. Section 52 of the Act has been repealed. Section 53 defines the rules for the division of share of the predeceased child of intestate leaving lineal descendants. Section 54 specifies the rules where intestate leaves no lineal descendant but leaves a widow or widower or a widow or widower of any lineal descendant. Section 55 defines the rules for the division of property where a Parsi who dies intestate is not survived by the widow/widower, no lineal descendants, no widow of any lineal descendant. Section 56 states laws for the division of property where there is no relative entitled to succeed under the other provisions of Chapter 3 of Part V, in which the Parsi has died intestate.

All these rules of succession have been summarized in the table below:

S.No.	Particulars	Rules of succession	Section
1 (a)	When a Parsi dies leaving behind a widow or widower and children, but no parents	Each child and widow/widower will receive equal shares	51
(b)	When a Parsi dies leaving children, but no widow or widower, and no parents	The property will be divided amongst the children in equal shares.	51
(c)	When a Parsi dies leaving behind one or both parents, along with children and widow/widower	The parent or both the parents shall receive a share equal to half the share of each child.	51
2 (a)	If an intestate dies leaving a deceased son	Widow and children of the deceased son take shares as if he had died immediately after the intestate's death.	53

(b)	If an intestate dies leaving a deceased daughter	The share of the daughter is divided equally among her children.	53
(c)	If any child of the deceased child has also died	Then his/her share shall also be divided in like manner following the rules applicable to the predeceased son or daughter.	53
(d)	Remoter lineal descendant has died	Provisions set out in 2(c) shall apply mutatis mutandis to the division of any share to which he or she would have been entitled to	53
3(a)	Intestate dies without lineal descendants and leaves a widow or widower but no widow or widower of any lineal descendants	The widow or widower shall take 1/2 of the intestate's property; The residue shall be divided as below:	54
(b)	Intestate dies without lineal descendants and leaves a widow or widower and also widow or widower of lineal descendants	Widow or widower of intestate (1/3rd), Widow or widower of lineal descendant (1/3rd), and residue (1/3rd) as below:	54
(c)	Intestate dies without lineal descendants and leaves no widow or widower, but leaves one widow or widower of lineal descendants	Widow or widower of lineal descendant (1/3rd); and the residue (2/3rd) as below:	54
(d)	Intestate dies without lineal descendants and leaves no widow or widower, but leaves more than one widow or widower of lineal descendants	Widows or widowers of the lineal descendants together (2/3rd) to be divided equally; and the residue (1/3rd) as below:	54
(e)	The residue after division as above	To be distributed among the relatives of the intestate in the order outlined in Schedule II Part I, male and female in the same degree shall receive equal shares.	54
(f)	If no relatives entitled to the residue	The whole of the residue shall be distributed among the persons entitled to receive shares under this section, in proportion to the shares specified.	54
4.	If the Parsi dies intestate leaving behind no widow/widower, no lineal descendants, no widow of any lineal descendants	The whole of the property of the intestate shall be succeeded by the next-of-kin, in the manner defined in Schedule II Part II (where the next-of-kin standing first is given preference over those standing second, third, and so on, also the property is shared by next-of-kin in the same degree, others are excluded.)	55
5.	No relative entitled to succeed under the other provisions of Chapter 3 of Part V, in which a Parsi has died intestate.	The property shall be shared equally by the intestate's kindred who are at the nearest degree to him	56

Analysis of Christian, Jews, and Parsis succession laws

The principles of the succession of property shared by Christian, Jews, and Parsis are:

1. No distinction between paternal and maternal relations. If the paternal and maternal relations are equally related to the intestate, they are entitled to an equal share of the property.
2. No distinction between half-blood/full blood/uterine relations.
3. A posthumous child is treated as a lawful successor, as long as he is born alive and was in the womb of the mother when the intestate died.
4. No recognition is given to illegitimate children who are born out of wedlock.
5. Recognizes adoption and the rights of a natural born child are given to the adopted child.
6. No recognition is given to polygamous marriages.
7. Daughters and sons enjoy equal rights of inheritance in parental property.
8. No distinction between an inherited, self-acquired and ancestral property. All the property owned by the intestate is treated as self-acquired. This gives an absolute right to the intestate to dispose of the property at his discretion during his lifetime.

Critical Analysis of Christian and Parsi succession laws

1. Sections 42-46 of the Indian Succession Act, 1925: Unjust and unfair for Christian or Jewish mothers.

- The mother of the intestate is not entitled to inherit along with the father of the intestate (Section 42 of the Indian Succession Act, 1925). Even if the father of the intestate is not alive, the mother gets share equal to brothers and sisters of the intestate, rather than getting the share that her husband (intestate's father) would have been entitled to, had he been alive (Section 43 of the Indian Succession Act, 1925).
- Injustice runs through Sections 44 and 45 as well. It is only when the intestate's father is dead, no brother, sister, nephew, or niece are living, then the property goes to the mother under Section 46.

These provisions seem to be obscure and highly discriminatory against the mother of the deceased.

- On the other hand, according to the provisions of Section 53 of the Indian Succession Act, which governs succession rules for Parsi, the surviving parent or both the parents of the intestate receive a share equal to half the share of each child. Thus, this provision seems to do justice to the mother of the Parsi intestate.
- This leads us to conclude that the provisions codified under Section 42-46 of the Indian Succession Act, 1925 need to be rectified to ensure that the law is fair and just towards Christian women and does not provide superior status to men in inheriting the property of the deceased.

This matter has been raised by many Christian organizations. Several representations with suggestions, expressing this unfair and unjust treatment had been addressed to the Government and the Ministry of Law and Justice at different times in the past few years. The decision from the Ministry of Law and Justice is still awaited and pending.

2. The spouse of the son and daughter (i.e. daughter-in-law or son-in-law) is not the legal heir

- If the sons or daughters of the Christian or Jews intestate are deceased, then their lineal descendants are entitled to inherit the property, the spouse of the deceased son and daughter have no share. This can be observed in Section 38 of the Indian Succession Act, 1925 which governs succession laws for Christians and Jews.
- Whereas in Section 53 of the Indian Succession Act, 1925 which governs succession laws for Parsis, if the deceased child of the Parsi intestate is a son, his widow and children will take his share. But, if the deceased child is a daughter, her share will go to her children, not her spouse.

4.2 Domicile

Kinds of Domicile

The concept of domicile as envisaged under **Chapter 2 of the Succession Act of India, 1925** clearly intends to be used as a yardstick for the determination of the civil status of an individual to the exclusion of any person under the following faith Hindu, Muslim, Buddhist, Sikh.

DEFINITION

Domicile is the attribution of being or seeing a place as a person's permanent abode. For a place to be seen as the acceptable domicile of a person, there must be evidence to the effect that the person sees the said domicile as his permanent abode.

Irrespective of the fact that a person has lived in a given place, state or jurisdiction for a long time in the absence of that mental acceptance of such person showing that the said jurisdiction shall be his permanent abode it will not be deemed as that person's domicile.

Therefore, the mere act of residing in a place in the absence of the will of accepting such place as a permanent abode vitiates such place as a domicile.

While within a country domicile can be determined by state but it can also be limited to a country where the person lives beyond the shores of his country of origin. The illustration is Amman, a citizen of India, who had lived all his life from the age of 4 years in England. He lives all his life according to the dictates of the English culture but still insists that he is an Indian and upon his demise, his remains must be buried in India according to his culture or religion.

From the above definition of domicile, it is obvious that while Amman's residence may be Southampton in the UK but his domicile is in India. See the case of **Bestolov vs. Povarenkin** 2017 where the domicile of wealthy Russians residing in UK was extensively discussed and determined.

Again, Taj is an indigene of Delhi but resides in Punjab all within India, provided that he consistently expresses the desire to live all his life in Punjab, his domicile is unequivocally Punjab. See the case of **Joshi vs. the State of Madhya Bharat** for the stance of the Indian court pertaining to the extent of domicile.

KINDS OF DOMICILE

1. Domicile by origin
2. Domicile by choice
3. Domicile by operation of law

DOMICILE BY ORIGIN

In discussing domicile by origin the following classes of a person shall be considered. They are a legitimate child, an illegitimate child, and a posthumous child. Every person upon birth is vested with a domicile. Birth is the medium through which a person gets the first contact with the law and environment.

In other words, this kind of domicile (by origin) is also known as a domicile by birth. A legitimate child upon birth by virtue of **Section 7 of Succession Act of India 1925** acquires the domicile of the father at the time of his birth.

By virtue of **Section 8** of the same Act of 1925, an illegitimate child is clothed with the domicile of the mother at the time of the child's birth. In the case of a posthumous child, his domicile is the domicile of the deceased father prior to his death; see **Section 7 of the Succession Act of India, 1925** above.

DOMICILE BY CHOICE

On attaining the age majority one is faced with a lot of decisions which he is at liberty to take and bear the responsibility. One of such decisions is the choice of domicile. A person of age and sound mind acquires the domicile of a place when he voluntarily decides to live indefinitely in a place.

By establishing a permanent desire to live in a given place the law will recognize the new place as the domicile by habitation, in the absence of such the law will not foist a domicile on a person. An illustration to buttress this point is Jeane a Canadian from Quebec, migrated to India in the case of performing a mandatory military service until he retired and continued to live in India. He took up a

teaching job in a college and continued to live in India without expressing the slightest desire to go back to Quebec, clearly, Jeane's domicile by habitation is India.

A scenario may also arise where a person after living in India for about one year will make an application in a prescribed manner to a designated government department expressing the desire to take India as his domicile.

The above instances of domicile by choice are governed by the provisions of Sections, 9, 10, 11, 12 and 13 of the Succession Act of 1925.

DOMICILE BY OPERATION OF LAW

The above form of domicile is also called domicile by dependence. It is the instrumentality of the law that will lead to ascertaining where is the domicile of the person in question This arises where the domicile of a person is determined by the domicile of another person.

The Act recognized three (3) categories of persons as persons whose domicile may be classified and determined under this heading. These persons are:

1. minors,
2. persons of unsound mind, and
3. married women.

The domicile of a minor including an adopted child is by the provision of **Sections 14 and 17 of the Succession Act, 1925** dependent on the domicile of the parents and maybe interwoven as the case in domicile by origin. However a child's domicile may be distinct from that of his parents if:

1. He is married.
2. He is under the appointment or the service of the government of India.
3. With the consent of his parents, he had set up a business.

The domicile of a person under legal disability particularly unsound mind is by the provisions of **Section 18 of the Succession Act, 1925** dependent on the domicile of the following persons:

1. He is a guardian,
2. Spouse if married, and
3. Parents.

Married women by virtue of marriage acquire the domicile of their husbands. Her domicile shall continue to rely on the changes to the domicile of her husband through the subsistence of her marriage.

It follows therefore that only two instances can lead to cessation of a married woman's domicile, if a court of competent jurisdiction grants a decree of dissolution of marriage between the woman and her spouse automatically her domicile shall no longer be dependent on that of the husband, likewise where the husband is serving a prison term the reliance on the husband's domicile abates until he is released from the prison.

Illustration: Advika married Hannah since 2011, they had lived together in Prague for the eight years of their marriage while they are both Indians from Bombay.

Advika had always cherished the years and the memories of living in Pakistan but maintains that if the occasion arises he will go back to India and broker a partnership with Bajaj a company in India. From the above illustration notwithstanding the supposed comfortable life Advika and Hannah are living in Prague, the domicile of Advika is India. It follows that Hannah's domicile due to marriage in India. Also from the above scenario, if the couple had children by origin and dependency the domicile of the children shall be India. If in the cause of living in Prague Advika is tried and convicted for an offence and subsequently imprisoned even if the prison term served is as short as one day the domicile of Advika from which that of Hannah is determined shall abate until he is out of prison.

THE LAWS REGULATING DOMICILE

The justice of this discussion will not be served if the relevance of domicile is not discussed pertaining to succession and administration of an estate.

In the administration and succession of an estate the law is trite that the doctrine of *lex situs* and *lex domicile* determines how the immovable and movable properties of a deceased who died intestate

will be distributed.

The doctrine of *lex situs* simply posits that in succession the law governing the jurisdiction where an immovable property is situate shall govern the succession and administration of such immovable property upon the demise (intestate) of the owner while *lex domicile* posits that the law of the last domicile of a deceased shall be relied upon in the distribution of his movable properties where he dies intestate. See section 5(1) and (2) of the Succession Act of 1925.

4.3 Inheritance (For other than Parsis)

Meaning of Intestacy, Meaning of Consanguinity, Rules of Inheritance

Inheritance refers to the transfer of property, assets, and rights from one person to another after their death. It involves the distribution of the deceased person's estate among their heirs or beneficiaries according to the laws or provisions they have made through a will.

Intestacy refers to the situation where a person dies without leaving a valid will or without making provisions for the distribution of their estate. When someone dies intestate, the distribution of their assets and property is determined by the laws of intestacy, which vary from country to country. These laws generally outline the order of priority for potential beneficiaries, typically starting with the closest relatives.

Consanguinity, in the context of inheritance, refers to the degree of blood relationship between individuals. It refers to the kinship or familial connection based on shared ancestry or descent. Consanguinity is often a factor in determining the order of priority for potential heirs when distributing the estate of someone who has died intestate.

Rules of inheritance vary depending on the legal system and cultural practices of a particular country. Here are some general principles that may apply:

Intestate Succession: When a person dies without a will, the laws of intestacy determine how their estate will be distributed. These laws typically prioritize spouses, children, parents, and other close relatives in a specified order.

Spousal Share: In many jurisdictions, the surviving spouse is entitled to a specific share of the deceased spouse's estate, regardless of the presence of a will. The exact share may vary depending on the jurisdiction.

Per Stirpes and Per Capita: These terms are used to determine how the estate is divided among the descendants of the deceased. "Per stirpes" means that the estate is divided by branch of the family, while "per capita" means it is divided equally among the surviving members.

Degree of Relationship: In cases where there are no direct descendants or surviving spouse, the estate may be distributed among other relatives based on their degree of relationship to the deceased. This can include parents, siblings, nieces, nephews, and more distant relatives.

It is important to note that inheritance laws can be complex and vary greatly across different jurisdictions. It is advisable to consult a legal professional or refer to the specific laws of your country to understand the precise rules and regulations governing inheritance in your region.

meanings of "intestacy," "consanguinity," and an overview of the rules of inheritance:

- **Intestacy(निर्वसीयतता,इच्छापत्रहीनत्व):**

Intestacy refers to the condition or state of a person dying without leaving a valid will or without making provisions for the distribution of their estate. When someone dies intestate, their assets, property, and belongings are distributed according to the laws of intestacy, which are the legal rules governing the inheritance of an individual's estate in the absence of a will.

Consanguinity:

Consanguinity refers to the degree of blood relationship between individuals. It represents the kinship or familial connection based on shared ancestry or descent. In the context of inheritance, consanguinity is relevant when determining the order of priority for potential heirs or beneficiaries in the distribution of an estate. Generally, the closer the blood relationship, the higher the priority in the order of inheritance.

Rules of Inheritance:

The rules of inheritance vary depending on the legal system and cultural practices of a particular country. However, some common principles or rules often found in inheritance laws include:

Spousal Share: In many jurisdictions, the surviving spouse is entitled to a specific share of the deceased spouse's estate, regardless of the presence of a will. The exact share may vary depending on the jurisdiction.

Intestate Succession: When a person dies without a will, the laws of intestacy come into effect. These laws typically prioritize certain relatives, such as spouses, children, parents, and other close family members, in a specified order. The order of priority may differ between jurisdictions.

Per Stirpes and Per Capita: These terms determine how the estate is divided among the descendants of the deceased. "Per stirpes" means that the estate is divided by branch of the family, while "per capita" means it is divided equally among the surviving members.

Degree of Relationship: In cases where there are no direct descendants or surviving spouse, the estate may be distributed among other relatives based on their degree of relationship to the deceased. This can include parents, siblings, nieces, nephews, and more distant relatives.

4.4 Law of Inheritance for Parsis

Rules of Inheritance

The Parsis, a religious and ethnic community in India, have their own unique system of inheritance known as the Parsi Intestate Succession Act. This Act governs the distribution of property and assets when a Parsi individual dies without leaving a valid will or without making provisions for the distribution of their estate.

Under the Parsi Intestate Succession Act, the rules of inheritance are as follows:

Spouse's Share: The surviving spouse is entitled to a significant share of the estate. If the deceased has no children, the spouse is entitled to one-half of the estate. If there are children, the spouse is entitled to one-third of the estate. However, if the deceased has more than one spouse, the share may be divided among them.

Children's Share: The children of the deceased are entitled to a share of the estate. The Act specifies that the children, including adopted children, share equally in the remaining estate after the spouse's share has been allocated.

Parent's Share: If the deceased has no spouse or children, the parents are entitled to a share of the estate. The father and mother share equally in this case.

Siblings' Share: If there are no surviving parents, spouse, or children, the siblings of the deceased are entitled to a share of the estate. Siblings share equally.

Other Relatives: If there are no surviving spouses, children, parents, or siblings, the estate may pass to more distant relatives such as nieces, nephews, and other collateral relatives, according to the rules of consanguinity.

4.5 Testamentary Succession.

Wills

Sec. 21 of the Special Marriage Act, 1954, reads as under:

"Notwithstanding any restrictions contained in the IS Act, 1925, with respect to its application to members of certain communities, succession to the property of any person whose marriage is solemnized under this Act and to the property of the issue of such marriage shall be regulated by the provisions of the said Act and for the purposes of this section that Act shall have effect as if Chapter III of Part V (Special Rules for Parsi Intestates) had been omitted.

Part VI of the Indian Succession Act deals with the testamentary succession.

Any property can devolve in two ways:

1. Testamentary Succession:

Where any person governed under the Act leaves behind any will or codicil which instructs the executor how the property has to use or those who have rights over that property.

2. Intestate Succession:

A person is said to have died intestate when he dies without making any testamentary disposition concerning any of his properties.

Will is defined under section 2(h) of The Indian Succession Act, 1925 as follows:

"Will" means the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death.

Characteristics:

The essential characteristics of a will are as follows:

- a) It is a legal declaration of the intention of the testator;
- b) The declaration is with respect to the testator's property;
- c) The intention manifests only after the testator's death, i.e., posthumous disposition of his property. Till the testator is alive, the will has no validity. He can dispose of all his properties in a manner contrary to that stated in the will and such action would be totally valid. E.g., A makes a will bequeathing all his properties to his brother. However, during his lifetime itself, he transfers all his properties to his son with the effect that at the time of his death he is left with no assets. Such action of the testator cannot be challenged by his brother on the ground that he was bound to follow the will since the will would take effect only after the death of the testator. In this case as the property bequeathed would not be in existence, the bequest would fail.
- d) The will can be revoked at any time by the testator in his lifetime. Thus, the will is a testamentary document executed by a living person which takes effect on his death. A will may also be called a 'testament'. A will can never be irrevocable. The very nature of a will is such that it the person making it can change it as often as he likes.

For a valid will conditions must be satisfied. According to section 63 of the Indian succession act, 1925:

Conditions:

- i. The testator should sign or affix his mark. (e.g., thumb mark)
- ii. The Will must be attested by 2 or more witnesses.
- iii. The witnesses must have seen the testator sign or affix his mark to the Will.
- iv. Each witness shall sign the Will in the presence of the testator.
- v. The witness should not be a beneficiary under the Will.

In general, the order of preference to distribute asset to legatees and their alternates is:

1. Spouse
2. Children
3. Parent(s)
4. Brothers/Sisters
5. Other Relatives
6. Friends. Many people prefer giving something to charity too.

Rules governing transfer of property through will:

- I. The Indian Succession Act, 1925
- II. The Code of Civil Procedure, 1908
- III. The Indian Registration Act, 1908
- IV. The Indian Stamp Act, 1899

Wills made are of many types such as:

1. Conditional / contingent will

A conditional or contingent will is one which depends for its operation upon the happening of a specified condition or contingency. If the condition fails, the will is inoperative and void thereafter.

2. Joint will

A joint will is a legal document executed by two (or more) people, which merges their individual wills into a single, combined last will and testament. Like most wills, a joint will lets the will-makers name, the person who will be getting their property and assets after they die. Joint wills are usually created by married couples. In such Joint Wills when all the testators are alive, a single testator cannot revoke the will alone. He/ She would require the consent of other testators to revoke their joint will. Only when all other testators have died, the sole surviving testator can revoke the will alone.

3. Mutual will

Mutual will is a type of will, usually executed by a married or committed couple, which is mutually binding. After one party dies, the remaining party is bound by the terms of the mutual will.

4. Duplicate will

As the name suggests, when there are two copies of a will, then those wills are called Duplicate Wills. There are two copies of the will although it is considered as a single will. It is very simple to create a duplicate of the will. The testator has to make a second copy of the will and shall sign it and get it attested in the way that he did for the original will as per Section 63 of the Indian Succession Act, 1925. One copy can be kept with the testator and the other might be kept in safe custody somewhere like in a bank locker, with a trustee, the drafting attorney or with the executor. The testator with an intention to protect the execution of the will after his death makes a copy of the will. If the testator destroys the copy of the will that he has in his custody then, that would automatically revoke the other will.

5. Concurrent will

Concurrent Wills are written by one person wherein two or more Wills provide instructions for disposal of property for the sake of convenience. For instance, one Will could deal with the disposal of all immovable property whereas another Will deals with the disposal of all movable property.

6. Unprivileged Will

Will created by a person who is not a soldier employed in an expedition or engaged in actual warfare or a mariner at sea is known as an unprivileged Will. For an unprivileged Will to be valid, it must satisfy the following conditions:

- The person creating the Will must sign or affix his/her mark to the Will. Else, some other person should sign as per the directions of the testator (Person creating the Will) in his/her presence.
- The signature or mark of the testator or the signature of the person signing for the testator must be placed so that it appears that it was intended to give effect to the writing as Will.
- The two or more witnesses should attest to the will. The witnesses must have seen the testator sign or affix his mark to the Will or has seen some other people sign the Will, in the presence and by the direction of the testator.

7. Privileged Will

Privileged wills are wills that may be in writing or made by word of mouth by those in active services like a soldier, airman or mariner. The legal requirement for the validity of a privileged Will has been reduced to enable certain persons to quickly make a Will. The following conditions are applicable for a privileged Will:

- The testator writes the whole will with his own hand. In such a case, it need not be signed or attested.
- The testator should sign the privileged Will written wholly or in part by another person. In such a case, there is no requirement for attestation.
- A Will written wholly or partly by another person and not signed by the testator is a valid Will if it is proved that it was written by the testator's directions or that the testator recognized it as his/her Will.
- A half-completed privileged Will is also considered valid if it is proved that non-execution was due to some other reason and does not appear to be an abandonment of intentions to create a Will.
- A privileged will can be made by word of mouth by declaring intentions.
- If a soldier or airman or mariner has given written or verbal instruction for the preparation of a Will but has died before it could be prepared and executed. And such will is a valid Will.
- In the case of *Sunita Shivdasani vs. Geeta Gidwani*, it was held that although privileged wills are oral but requirements of Section 66[6] of the Act must be complied with including the presence of two witnesses at the time when the oral will is made. A will made by word of mouth is null at the expiry of one month.

8. Sham Wills

Sham Wills are executed but held invalid if the testator does not intend to execute as per his/her wishes. As per the Indian Succession Act, a Will made by fraud or coercion or by taking away the free agency of the testator is considered invalid.

9. Holograph Wills

The testator writes this holograph wills entirely in its own handwriting.

Residuary Legatees (अवशिष्ट विरासत)

Residuary legatees are individuals or entities named in a will to receive the remaining assets or estate after specific gifts, bequests, and debts have been settled. They are the beneficiaries who inherit the residue or remainder of the estate once all other specific gifts and obligations have been satisfied.

When creating a will, the testator (the person making the will) may choose to distribute their assets by specifically naming certain beneficiaries for particular items or sums of money. These beneficiaries are referred to as "specific legatees." After these specific gifts have been distributed, the residue of the estate is left to the residuary legatee(s).

The residuary legatee(s) typically receive the remaining portion of the estate, which may include any property, assets, or funds that were not explicitly bequeathed to specific individuals or entities. They are entitled to receive the residue in proportion to their designated share or as specified in the will.

The role of a residuary legatee is significant because they inherit what remains after all specific bequests have been fulfilled. Their inheritance can encompass various assets, such as real estate, investments, personal property, and any other remaining items of value.

Lapsing of Legacies (विरासतों का व्यपगत होना)

Lapsing of legacies refers to a situation where a specific gift or bequest in a will fails or becomes void because the intended beneficiary predeceases the testator (the person making the will) or dies during the testator's lifetime. In such cases, the gift does not pass to the intended beneficiary or their estate, but instead, it "laps" or fails to take effect.

The rules regarding the lapsing of legacies can vary depending on the jurisdiction and the specific provisions of the applicable laws. However, there are some common principles to consider:

No Contingent Gift: In some jurisdictions, if a beneficiary's right to receive a gift is contingent upon a certain event, such as surviving the testator, and the beneficiary dies before that event occurs, the gift generally lapses.

Anti-Lapse Statutes: Many jurisdictions have enacted anti-lapse statutes to address situations where a beneficiary predeceases the testator. These statutes provide that if the intended beneficiary was a close relative (such as a child or grandchild) of the testator, and they leave behind their own descendants, the gift may pass to those descendants instead of lapsing. This allows the intended beneficiary's descendants to inherit the gift in place of the deceased beneficiary.

Residuary Clause: If the will includes a residuary clause, which designates a beneficiary or beneficiaries to receive the residue of the estate after specific gifts have been distributed, the lapsed gift may become part of the residue and pass to the residuary beneficiary or beneficiaries.

Failure of Gift Provision: If the gift provision fails due to the lapsing of legacies, the assets or property intended for the beneficiary may be treated as part of the testator's residuary estate or may be distributed according to the laws of intestacy if no residuary clause exists.

Bequest to Unborn Person or Non- Existing Person

A bequest to an unborn person or a non-existing person refers to a provision in a will where the testator designates a gift or inheritance to an individual who is not yet born or who does not exist at the time the will is created. This situation can present certain legal challenges and uncertainties.

The treatment of a bequest to an unborn or non-existing person depends on the laws of the jurisdiction and the specific provisions outlined in the will. Here are some general principles to consider:

Contingent Interest: In some jurisdictions, if a bequest is made to an unborn or non-existing person, it may be considered a contingent interest. This means that the gift will only take effect if and when the person is born or comes into existence. If the person never comes into existence, the bequest may fail or lapse.

Per Stripes or Per Capita Representation: In situations where the bequest is made to a class of individuals (such as "all my grandchildren" or "all children of X"), the principle of per stirpes or per

capita representation may apply. Per stirpes means that if a named beneficiary in the class is unborn or does not exist, their share would pass to their descendants if they have any. Per capita representation means that if a beneficiary does not exist, their share is divided equally among the living members of the class.

Trusts and Alternative Provisions: To address the uncertainty surrounding bequests to unborn or non-existing persons, the testator may choose to create a trust or include alternative provisions in the will. A trust can hold the bequest until the person comes into existence or reaches a certain age or condition specified by the testator. Alternative provisions could include naming an alternate beneficiary if the intended beneficiary does not come into existence.

Rule against Perpetuity (शाश्वतता के विरुद्ध नियम)

The rule against perpetuity is a legal principle that limits the duration of certain property interests and prevents the creation of future interests that may potentially last indefinitely into the future. Its purpose is to avoid tying up property in perpetuity and to promote the free alienation and transferability of assets.

The specific rules and application of the rule against perpetuity can vary across jurisdictions, but there are some common principles:

Validity Period: Generally, a property interest or future interest must vest, if at all, within a specified period of time after the death of a life in being at the time the interest is created. This period is often referred to as the "measuring life" or "lives in being" plus a certain number of years, typically known as the "perpetuity period."

Vesting of Interest: The future interest or property right must vest in an identifiable person or entity within the perpetuity period. In other words, the interest must become legally enforceable within the prescribed time frame.

Suspension of Alienation(हस्तांतरण): The rule against perpetuity prevents the creation of interests that effectively suspend the alienation or transfer of property for an unreasonable duration. It aims to ensure that property remains freely transferable and not tied up indefinitely.

"Wait and See" Doctrine: Some jurisdictions have adopted the "wait and see" or "cy-près" doctrine, which allows the validity of a future interest to be determined at the end of the perpetuity period, rather than at the time of its creation. This approach provides flexibility and allows the interest to stand if it complies with the rule at the end of the period.

Onerous Gifts (महँगे उपहार), Conditional Gifts(सशर्त उपहार)

Onerous Gifts:

Onerous gifts, also known as burdensome gifts, are gifts or bequests in a will that come with specific conditions or obligations attached to them. These conditions or obligations may require the recipient of the gift to perform certain actions, meet specific requirements, or assume responsibilities related to the gift. In other words, the recipient must fulfill the conditions or obligations in order to receive or maintain the gift.

For example, a testator may leave a property to someone on the condition that they take care of an elderly relative living on the property for the rest of their life. In this case, the recipient of the property must fulfill the care giving obligation as specified in the will to inherit and retain ownership of the property.

Conditional Gifts:

Conditional gifts, as the name suggests, are gifts or bequests in a will that are subject to certain conditions. These conditions may be time-based, event-based, or based on specific actions or circumstances. The gift is only given or takes effect if the specified conditions are met.

For instance, a testator may leave a sum of money to a beneficiary, but specify that the beneficiary must reach a certain age (e.g., 25 years old) before they can receive the gift. In this case, the condition is reaching the specified age, and the beneficiary will only receive the money once they have reached that age.

It's important to note that the conditions or obligations attached to onerous gifts and conditional gifts must be legal and enforceable. They should not violate public policy or be impossible to fulfill. If the conditions or obligations are not met, the gift may be subject to modification, partial invalidation, or may fail entirely, depending on the laws of the jurisdiction.

Kinds of Legacies (विरासत के प्रकार)

There are several different kinds of legacies that can be included in a will. The specific type of legacy chosen will depend on the testator's intentions and the assets they wish to distribute. Here are some common types of legacies:

Specific Legacy: A specific legacy refers to a gift of a particular item or asset, such as a specific piece of property, a valuable possession, or a sum of money. The testator clearly identifies the specific asset or item to be given to the beneficiary.

General Legacy: A general legacy is a gift of a specific amount of money or a specific portion of the testator's estate, rather than a particular item. The testator designates a specific sum or percentage to be given to the beneficiary without specifying a particular asset.

Demonstrative Legacy: A demonstrative legacy is a combination of a specific and general legacy. It involves a gift of a specific amount of money or property that is to be paid from a particular source or fund. If the designated source or fund is insufficient to cover the legacy, it may be paid from the general assets of the estate.

Residuary (बचत का) Legacy: A residuary legacy refers to the portion of the estate that is left after all specific and general legacies have been distributed and debts and expenses have been paid. The testator may designate one or more beneficiaries to receive the residue of the estate.

Conditional Legacy: A conditional legacy is a gift that is subject to certain conditions. The beneficiary will receive the legacy only if they fulfill the specified conditions or requirements. If the conditions are not met, the legacy may fail or pass to an alternate beneficiary.

Contingent (आकस्मिक) Legacy: A contingent legacy is a gift that depends on the occurrence or non-occurrence of a specific event or circumstance. The beneficiary will only receive the legacy if the specified condition is met. If the condition does not occur, the legacy may fail or pass to an alternate beneficiary.

Ademption of Legacies (विरासत की मुक्ति)

Ademption of legacies refers to a situation in which a specific gift or legacy mentioned in a will is no longer available or does not exist at the time of the testator's death. Ademption can occur when the testator disposes of the gifted property during their lifetime, or if the property is destroyed, lost, or otherwise unavailable at the time of their death. As a result, the intended beneficiary of the specific gift may not receive the intended asset or item.

The ademption of a legacy can have different consequences depending on the jurisdiction and the specific circumstances. Here are a few common scenarios:

Ademption by Extinction (विलुप्त होने से मुक्ति): Ademption by extinction occurs when the gifted property no longer exists at the time of the testator's death. For example, if the testator bequeaths a specific piece of artwork, but they sell or dispose of the artwork before their death, the legacy is said to be adeemed by extinction. In such cases, the beneficiary typically receives nothing in place of the adempted asset.

Ademption by Satisfaction (संतोष द्वारा मुक्ति): Ademption by satisfaction happens when the testator, during their lifetime, provides the intended beneficiary with a similar or substitute gift that is intended to satisfy the legacy. For instance, if the testator bequeaths a specific sum of money to a beneficiary in their will but, prior to their death, gives a substantial gift of money to the beneficiary, it may be considered an ademption by satisfaction. In such cases, the value of the lifetime gift may be applied to satisfy the legacy, either partially or fully.

Anti-Ademption Statutes (मुक्ति-विरोधी क़ानून): Some jurisdictions have anti-ademption statutes that provide for certain exceptions to the general rule of ademption. These statutes may allow the beneficiary to receive a substitute or replacement asset of similar value if the original asset is no longer available. The application of anti-ademption statutes can vary depending on the jurisdiction and the specific circumstances.

The End