Subject :

Family Law - II

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SOURCES OF MUSLIM LAW

INTRODUCTION: -

Islam means "submission to the will of God and establishment of peace". Muslim Law had its origin in Arabia, where the Prophet Mohammed started it and the Mohammedan invaders in India brought the religion to India. Before the advent of Islam in Arabia, the Arabians were following various superstitions and were not leading a disciplined life.

According to the Muslim religion, God created the universe and He prescribes a pattern of behavior which the human beings must observe.

THE HOLY QURAN

It is the divine communication of Prophet Mohammed with the Allah, the only God according to the Muslim religion.

The Quron is the holy of sacred book and the basic text of the Muslim religion.

The Muslim Law is founded upon Quron.

Sources of Islamic law

CLASSICAL SOURCES OF MOHAMMEDAN LAW

- Quran or The Holy Kuran
- Sunna
- Ijmaa
- Qiyas

OTHER SOURCES OF MUSLIM LAW IN INDIA

- Legislative Enactments
- Judicial precedents
- Texts of Jurisprudence
- Customary practices

Mohammedan people are governed by both codified laws that are enacted by the State as well as the informal laws based on customary practices which differs from cultural, social and political scenario.

Shariat Application Act

Dissolution of Muslim Marriage Act

Muslim Women (Protection on Divorce) Act

Schools of Islamic Law

SUNNI SCHOOL

On the death of the Prophet, Mohammed Abubeker was elected as the successor. Those who supported the election were called Sunnies. They are predominant Muslims in India.

SUB SCHOOLS AMONG THE SUNNIES

The Hanafi School

The Maliki School

The Shafei School

The Hanbali School

The Zaydi School

The Ismaili School

The Ibadi School

POPULAR SCHOOLS IN INDIA

The Hanafi School

The Shafei Schoo

The Ismaili School

SHIA SCHOOL

Those persons who did not support the election to fill the vacancy of the Prophet were considered Shias. They supported the succession to the office by inheritance and by election.

CONCEPT OF MARRIAGE

Definition, object, nature, essential requirements of a Muslim marriage

INTRODUCTION

According to Mohammadan law, the marriage is a civil contract and not a sanctity. So, all the requirements of a valid agreement are also required for Mohammadan marriage. But for the capacity of parties, the Mohammadan law prescribes 15 years as puberty.

ESSENTIALS OF A VALID MARRIAGE

According to Muslim Law, Marriage or `Nikah` as the Muslims call the nuptial ceremony is an agreement underlying a permanent relationship based on mutual approval.

Essential Features of Muslim Nikah

A Muslim marriage requires proposal called the Ijab from one party and acceptance or Qubul from the other as is necessary for a contract.

There can be no marriage except for the free consent and such consent should not be obtained by means of compulsion, deception or unjustified influence.

Just as in case of agreement, entered by a guardian, on attaining majority, so can a marriage contract in Muslim Law, be set aside by a minor on attaining the age of puberty.

The parties to a Muslim marriage may enter into any ante-nuptial or post-nuptial agreement, which is enforceable by law, provided it is sensible and not opposed to the policy of Islam. In the case with a contract the same policies are followed.

The terms of a marriage contract may also be changed within the legal limitations to suit individual cases.

Although discouraged both by the holy Quran and Hadith, yet like any other contract, there is also provision for the violation of marriage contract.

Requirements of Muslim Nikah

The solemnization of a Muslim marriage needs strict following of certain rules and regulations. They are called the basic fundamentals of a valid marriage. If any of these requirements is not fulfilled the marriage becomes either void or irregular, as the case may be.

The essentials of Muslim marriage are as follows:

- Proposal and Acceptance
- Competent Parties
- No legal Disability
- Absolute Prohibition

There is absolute prohibition of marriage in case or relationship of consanguinity. In this case the situation is such that the relationship has grown up of the person through his/her father or mother on the ascending side, or through his or her own on the descending side. Marriage among the persons associated by affinity, such as through the wife it is not permitted. Marriage with foster mother and other related through such foster mother is also not permitted.

Procedure for Muslim Nikah: -

- According to Muslim Law it is necessary that a man or someone on his behalf and the woman or someone on her behalf should give their consent to the marriage at one meeting and two adult witnesses should witness the agreement.
- The words meaning proposal and acceptance must be spoken in each other`s presence or in the presence of their agents, who are called Vakils or Qazi.
- The other circumstance for a valid marriage is that the contract must be completed at one meeting. A proposal made at one meeting and an acceptance at another meeting does not constitute a valid marriage.
- There must be exchange of views between offer and acceptance. The acceptance must not be restricted.
- Under the Sunni Law, the proposal and acceptance must be made in presence of two males or one male and two female witnesses who are sane, adult and Muslim. Under Shia Law, witnesses are not necessary at the time of marriage. They are required at the time of dissolution of marriage.

- The parties arranging the marriage must be giving their free will and consent.

Divorce – Marriage under Islam is only a civil agreement and not a sacrament. A husband can leave his wife without any reasons or merely by pronouncing the word "Talak" thrice. However, for a Muslim woman to obtain divorce certain circumstances are necessary. The husband and the wife with mutual agreement can also put an end to the marriage.

Like Hindu law, followers of Islam have their own personal law, which states that Nikaah or marriage is a contract, may be permanent or temporary, and permits a man four wives if he treats all of them equally. There should be a proposal or `offer, ` made by or on behalf of one of the two parties;

The Muslim marriage law also states that to have a valid marriage under the Muslim law, if a person is of sound mind, normal and has attained puberty at the age of 15 his or her marriage cannot be performed without his or her consent. There are certain prohibited relationships, whose marriage is considered void. Like mother and son, grandmother and grandson, uncle and niece, brother and sister and nephew and aunt. An `acceptance` of such proposal or `offer` by or on behalf of the other party; The `offer` and `acceptance, ` both, must be expressed in the same meeting. There is no prescribed form for proposal and acceptance. However, a proposal, made at one meeting and an acceptance, made at another meeting, will not constitute a valid marriage;

The offer and acceptance must be made in the presence of two male witnesses, or one male and two female witnesses, who must be adult Mohammedans of sound mind; iv. A marriage, contracted without witnesses, is not void but is considered irregular. Such irregularity can be cured by consummation. However, according to Shia law, the presence of witnesses is not necessary in any matter.

A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

- That the whereabouts of the husband have not been known for a period of four years;
- That the husband has neglected or has failed to provide for her maintenance for a period of two years;
- That the husband has been sentenced to imprisonment for a period of seven years or upwards;
- That the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years.
- That the husband was impotent at the time of the marriage and continues to be so;
- That the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease.
- That she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years.

CLASSIFICATION OF MARRIAGE

- Legal effects of valid
- Void and irregular marriage
- Relative Prohibitions

Unlawful union

- Marrying a fifth wife
- Marrying a woman undergoing iddat
- Marrying a non-Muslim
- Absence of proper witnesses
- Woman going for a second marriage even after the existence of the first marriage.
- Marrying pregnant women
- Marrying during pilgrimage
- Marrying own divorced wife
- Muta marriage
- It means a temporary marriage.
- The marriage is for a fixed period.
- This type of marriage is recognized in the Shia Law – Ithna Ashari School

Essentials of Muta Marriage

- The amount of dower must be fixed. It is not fixed then the marriage becomes void.
- If the marriage is consummated, half the amount of the dower should be paid to the wife.
- The period of co-habitation must be fixed. If the period is not fixed, then it is not a Muta Marriage but becomes a normal marriage.
- A Shia can make a valid Muta Marriage with a non-Mohammedan woman. But a Shia female cannot marry a non-Mohammedan male
- The Muta marriage comes to an end when the fixed period is over. Even after expiry of the fixed period, if they live together then it is presumed that the term of Muta marriage is extended.

Divorce cannot take place in Muta marriage but the husband by paying the full amount of dower, can put an end to the marriage even before the expiry of the term The children born out of the Muta marriage are legitimate. They can inherit the property of the parents. But the wife and husband cannot inherit the property of each other. The Muta marriage is obsolete in India.

Polygamy

The Muslim law permits a Muslim man to have four wives, provided he treats all of them equally.

Dower

INTRODUCTION:-

Dower is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of marriage, It is an obligation imposed upon the husband at the time of the marriage as a mark of reverence to the wife. The wife can receive it by instituting an action as if it was a debt due to her. This is primarily because Mohammedan marriage contract is easily dissoluble, and the husband has the freedom of divorce and also in order to restrict polygamy, the concept of payment of dower was introduced.

The object of dower

to create an obligation on the husband to place his wife in respect to restrain the frequent use of divorce by the husband; and to provide for the wife's living after the dissolution of her marriage or death of her husband

TYPES OF DOWER

Specified Dower:

In this case, the amount of dower is stated in the marriage contract. It can be settled by the parties to the marriage either before the marriage or at the time of the marriage or even after the marriage. The minimum dower amount is ten dirhams. However, Shia Law does not fix any minimum amount of dower. According to the Prophet, the Muslim husbands who are not in a position to pay even 10 dirhams to the wife as dower, should teach Quran to the wife in lieu of dower. In the case of marriage of a minor, the guardian contracting the marriage of a minor or lunatic boy can fix the amount of dower.

TYPES OF SPECIFIED DOWER

Specified dower is divided into Prompt Dower & Deferred Dower.

Prompt Dower

Prompt Dower is payable on demand by the wife, unless otherwise stated at the time of the Marriage. The entire dower is considered as prompt dower in the Shia Law whereas it is usual to regard half as prompt dower and half as deferred dower in Sunni or Hanafi Law. It can be paid any time before or after the marriage. If the prompt dower is not paid, the Wife may refuse herself to her husband. If the wife is minor, her guardian may refuse to allow her to be sent to the husband's house till the payment of Prompt Dower. In such circumstances, the husband is bound to maintain the wife. Ever after the consummation of marriage, amount of prompt dower can be sued for recovery. The wife refused for consummation of marriage until the prompt dower is paid. Even after consummation of marriage, the amount of prompt dower is not paid on demand by the wife. If the husband sues for restitution of conjugal rights, a conditional decree may be granted by the Court, that the husband should pay the prompt dower within the times fixed by the Court.

When the wife makes a demand for prompt dower, it becomes a debt and as such the wife can sue for the recovery of the debt within a period of three years.

DEFERRED DOWER

Deferred dower is payable only on the dissolution of the marriage or on the death of the husband. But if there is any agreement as to the payment of deferred dower earlier than the dissolution of marriage, such agreement would be valid and binding. Since, the husband can divorce his wife at any point of time without assigning any reasons, the deferred dower acts as a security to the wife and is usually very high. If there is no divorce, then the deferred dower becomes payable only on the death of the husband. Immediately on the death of the husband. the deferred dower becomes a debt, which is recoverable within a period of three years subject to the Law of Limitation.

Proper Dower or Customary Dower:

In the case of dower not fixed by the parties to the marriage before the marriage or if there is a condition that the wife should not claim for any dower amount, still the wife got a right to claim dower. Such dower is called 'Proper Dower' or 'Customary Dower'. It is determined after considering the personal qualifications of wife such as age, social position of her family, economy condition of her husband, etc.

Remedies for a divorced woman or widow to enforce the dower debt

IN THE CASE OF DIVORCE

If the husband is alive and if the wife is not yet divorced, the prompt dower is immediately payable on demand by the wife. However, the deferred dower becomes payable only after divorce by the husband.

The dower debt is an unsecured debt and so it is an actionable claim and ranks with the other unsecured debts of the deceased husband.

The limitation period is three years as in case of a general debt.

If the wife is in possession of her husband's property after the divorce, she can utilize the property to satisfy her debt. There is no limitation period for this.

IN THE CASE OF DEATH OF HUSBAND

When there is no divorce, the deferred dower becomes payable only after the husband's death.

If the prompt dower is not demanded by the wife during the husband's lifetime, then it becomes payable only after the husband's death.

Q. Describe the sources of Muslim Law in detail.

INTRODUCTION: -Muslim Law in India means, "that portion of Islamic Civil Law which is applied to Muslims as a Personal Law. It consists of the injunctions of Quran of the traditions introduced by practice of the Prophet of the common opinion of the jurists of the analogical deductions of these three Qiyas. Muslim mean who believes in Islam and Islam means, "submission to the will of God." A person born as Muslim continues to be a Muslim until he renounces Islam after attaining majority. Any person who professes the Mohamadan religion is Muslim that he acknowledges that, there is one God and the Mohamed is his prophet.

"**Queen Empress v/s Ramzan and Abraham v/s Abraham**: It was held that a person may be a Muslim by birth or by conversion. If one the parents of child are Muslim the child is deemed as Muslim. If Parents turned to some other religion the child is Mohamadan.

The following are the sources of Muslim Law: -

Primary Sources

1. **QURAN** : The Quran is the primary source of Muslim Law in point of time as well as in importance. Quran is the first source of Muslim Law. The Islamic religion and Islamic society owes its birth to the word of Quran. It is the paramount source of Muslim Law in point of Important

because it contains the very words of God and it is the foundation upon which the very structure of Islam rests. Quran regulates individual, social, secular and spiritual life of Muslims. It contains the very words of God as communicated to Prophet Mohammad through angel Gabriel. The Quran has now been codified..

2. **Sunnat or Ahadis:**

Sunnat has three classes:

I. **Sunnat-ul-fail**: This is being done by Prophet himself.

II. **Sunnat-ul-qual**: Which Prophet enjoyed by words.

III. **Sunnat-ul-tuqrir**: Things done in his presence without his disapproval.

Ahadis has also three classes:

I. **Ahadis-i-muturatir:** Traditions are of public & Universal property & held as absolutely authentic.

II. **Ahadis-i-mashorora**: Though known to a majority of people do not possess the character of universal propriety.

III. **Ahadis-e wahid**: which depend on isolated individuals?

When **Quran** is silent on any one of the subject and then that problem is solved by Ahadis and Sunnat. But while giving the solution to a problem it must be kept in mind that solution is not adverse to the basics of **Quran**. Thus such type of acts which the Prophet himself did or supported it, they came to be known as Adadis and Sunat.

3. IJMAA:- It is third important source of Muslim Law. The origin of Ijma although Quran, Sunnat and Ahadis had developed as the source of Muslim Law. It takes place when new problem stated arising with the development of society which were not possible to be solved by Quran. The principle of Ijma based upon the text, "That God will not allow His people to agree on an error and whatever Muslims hold to be good is good before God."

Kinds of IJMA: -i) **IJMA of Jurists**. ii) **IJMA of companions of the Prophet**:- It is universally accepted. **iii)** IJMAA of People:- This kind of IJMAA has not much importance.

4. The Qiyas (Analogical deduction):- It is originated source of Muslim Law, when any problem or question could not be solved by Quran, Sunnat, Ahadis and Ijma. Qiyas in the light of Holy Quran which says that spend out of your good things because as you dislike taking back bad things others also may dislike." In such situations the problem are being solved by comparative study of the above three sources.

i) It is the last primary source.

ii) Qiyas means reasoning by analogy.

iii) Qiyas does not purport to create new law but merely to apply old established principles to the new circumstances.

iv) Hanbals shias & shafis do not accept Qiyas.

While solving problem through Qiyas it has to be considered that such things shall not be adverse to basics of Quran, sunnat, ahadis and Ijmma.

Secondary Sources

1. Urf or Custom: Custom never recognized as source of Muslim Law but sometimes referred as supplementing the law. Muslim Law includes many rules of pre-Islamic customary law, which have been embodied in it by express or implied recognition.

Requirements of a valid custom:- **i)** Custom must be territorial. **ii)** it must be existing from memorable time i.e. ancient. **iii)** It must be continuous and certain and invariable. **iv)** Custom should not oppose the public policies. **V)** Custom must not in contravention of Quran & IJMAA.

Smt. Bibi v/s Smt. Ramkali-1982: It was held that the customs of case and sub case acquire it to be proved for their validity that they are ancient, definite and earnable.

2. **Judicial Decisions**:- These includes the decisions of Privy Council, the Supreme Court & High Courts of India, Judges explain what law is. These decisions are regarded as precedents for future cases. It becomes a source of Law. **Hammeera Bibee v/s Zubaida Bibi**: In India interest on loan is not allowed, but in this case the Privy Council allowed interest on the amount unpaid dower.

3. Legislation: - In India Muslims are also governed by various legislation passed either by Parliament or by state legislature e.g.:- **i)** Guardian & Wards Act, 1890. **ii)** The Shariat Act, 1937. **iii)** Muslim Woman Protection of Right & Divorce Act, 1986. iv) The Mussalman Waqf Act, 1923. **V)** The Dissolution of Muslim Marriage Act, 1939.

Justice, Equity & Good Conscience: It is also regarded as one of source.

a) **Abu Hanifa:** Expounded principle that rule of law based on analogy. These principles are "Isihsan" or Jruistic equity. b) **Maliki:- Ibn-Anas** proposes the use of **Istiah** i.e. seeking peace or amending & he followed it up by distinct method of juristic interpretation known as **Istidal**. However the main sources are Quran, **Ahadis** and **Ijmaa.**

Q. Discuss the various Schools of Muslim Law and point out their differences.

INTRODUCTION:-There are two main schools of Muslim Law the Sunni and the Shia. In India the majority of the Muslims are of Sunnis and hence it is presumed that the parties to a suit are Sunnis unless proved otherwise.

Shia law has been applied to Shia since the decision of **the Privy Council in Rajah Deedar Hossein v/s Ranee Zuhor-oon-Nissa-1841.** The division between the Sunnis and the Shias originated in the dispute concerning the question of **Imamat** or the spiritual Leadership of **Islam.**

Schools of Muslim Law:- After the death of Prophet the question arose who would be his successor. On this point the Muslim community was divided into two factions. The **Shias** advocate that the office should go by the right of succession and thus **Imamat** i.e. headship should be

confined to Prophet's own family as his prophet. Whereas on the other hand the **Sunnis** advocated the principle of election by the **Jamat** and chose out their Imam by means of votes.

The majority of Muslims suggested that there should be election to choose successor of the Prophet. This group was led by the youngest wife of the Prophet. Thus the difference between the two lies in political events.

Mohammadans

1 Sunni	2 **Shia**	3 **Motazila**	
1.1 Hanafis	2.1 Ithna-Asharia or Imamia	(2.1.1) Akhbari	(2.1.2) Usuli
1.2 Malikis	2.2 Ismailiyas—	(2.2.1) Khoja	(2.2.2) Bohra
1.3 Shafeis	2.3 Zaidais		
1.4 Hanbalis			

Sunni Sub-Schools:

(i) Hanafi: This school is the most famous school of Sunni Law. Abu Hanifa was the founder of this school, he recognized Qiyas, urf, Ijma.

(ii) **Maliki:** It was founded by Malik, leaned more upon traditions. He was not different from Hanifa's.

(iii) **Shafei**: Imam Shafie was the founder of this school. He was the founder of doctrine of Qiyas based upon Quran, Ahadis or Ijma.

(iv) **Hanbali:** - It was founded by Ibn Hanbal who stressed on traditions and allowed very narrow margin to the doctrine of analogy.

SHIA SUB SCHOOLS: -

I) **Athana Asharia School**: - This school is very orthodox. The supporter of this school is the followers of twelve Imams and regards them.

II) **Ismailia School**: - The sixth Imam Jafar-us-Sadiq had two sons 1. Ismail and 2.Musa-ul-kazim. The followers of this school called Ismailas.

III) **Zaidia School**:-Zaid who was the son of fourth Imam, Imam Ali ashgar was the founder of this school.

MUSLIM MARRIAGE

Islam, unlike other religions is a strong advocate of marriage. There is no place of celibacy in Islam like the Roman Catholic priests & nuns. The Prophet has said There is no Celibacy in Islam.

Marriage acts as an outlet for sexual needs & regulates it so one doesn't become slave to his/her desires. It is a social need because through marriage, families are established and the families are the fundamental entity of our society. Furthermore marriage is the only legitimate or halal way to indulge in intimacy between a man and woman.

Islamic marriage although permits polygamy but it completely prohibits polyandry. Polygamy though permitted was guarded by several conditions by Prophet but these conditions are not obeyed by the Muslims.

Marriage:-Pre Islamic Position

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

(i) Buying of girl from parents by paying a sum of money.

(ii) Temporary marriages.

(iii) Marriage with two real sisters simultaneously.

(iv) Freeness of giving up and again accepting women

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

Marriage Defined

It is quiet relevant to know whether the Muslim marriage is a sacrament like the Hindu marriage, for this let us get acquainted with some of the definitions of Muslim marriage.

(a) **Hedaya 1**: - Marriage is a legal process by which the several process and procreation and legitimation of children between man and women is perfectly lawful and valid.

(b) **Bailies Digest 2**:- A Nikah in Arabic means Union of the series and carries a civil contract for the purposes of legalizing sexual intercourse and legitimate procreation of children.

(c**) Ameer Ali 3:**- Marriage is an organization for the protection of the society. This is made to protect the society from foulness and unchestity.

(d) **Abdur Rahim 4**:- The Mahomedan priests regard the institution of marriage as par taking both the nature of Ibadat or devotional arts and Muamlat or dealings among men.

(e) **Mahmood J. 5:-** Marriage according to the Mahomedan law is not a sacrament but a civil contract.

(It's a matter of query still existing whether Muslim marriage is only a civil contract or an Ibadat & Muamlat. While unleashing the various definitions it's quite a big problem to say which one is the most appropriate, in my opinion although the essentials of a contract is fulfilled yet marriage can never be said to be a contract because marriage always creates a bondage between the emotions and thinking of two person.

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

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

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

Purpose of Marriage

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

Marriage compulsory or not?

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

Prophet said:-

When a man marries he has fulfilled half of his religion, so let him fear Allah regarding the remaining half.

This very wording of Prophet marks the importance of marriage, thus it could be well concluded that marriage in Islam is must.

Capacity for Marriage

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

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

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

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

Essentials of Marriage

The essentials of a valid marriage are as follows:-

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

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

(iii) The parties must be competent.

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

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

Essentials Explored

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

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

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

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

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

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

Kinds of Marriage

Under Muslim generally two types of marriage is recognized

(i) Regular Marriage (essentials discussed earlier)

(ii) Muta marriage.

Muta Marriage:

Muta marriage is a temporary marriage. Muta marriage is recognized in Shia only. Sunni law doesn't recognize it. A Shia of the male sex may contract a Muta marriage with a woman professing the Mohamadan, Christian or Jewish religion, or even with a woman who is a fire worshipper but not with any woman following any other religion. But a Shia woman cannot contract a Muta marriage with a non muslim.

The essentials of Muta marriage are:-

(1) The period of cohabitation should be fixed.

(2) Dower should be fixed.

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

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

Aspects of Marriage

(i) Valid or Sahih

(ii) Irregular or Fasid

(iii) Void or Batil

(i) Valid or Sahih Marriage:

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

(ii) Irregular or Fasid Marriage:

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

(a) A marriage without witness (Not under Shia Law)

(b) Marriage with fifth wife.

(c) Marriage with a women undergoing Iddat.

(d) Marriage with a fire-worshipper.

(e) Marriage outcome of bar of unlawful conjunction.

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

(iii) Void or Batil Marriage:

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

(a) Marriage through forced consent.

(b) Plurality of husband.

(c) Marriage prohibited on the ground of consanguinity.

(d) Marriage prohibited on the ground of affinity.

(e) Marriage prohibited on the ground of fosterage.

Effect of Marriage (Sahih)

The lawful obligations which arise after marriage are as follows-

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

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

(iii) The wife entitles to get maintenance.

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

(v) Right of succession develops.

(vi) Prohibition of marriage due to affinity.

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

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

Q. **A Muslim marriage is a civil contract. Discuss the nature of the Muslim marriage**.

INTRODUCTION: -

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

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

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

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

NATURE OF MUSLIM MARRIAGE: - There are divergence of opinion with regard to the nature of Muslim marriage. Some jurists are of the opinion that Muslim marriage is purely a civil

contract while others say that it is a religious sacrament in nature. In order to better appreciate the nature of Muslim marriage it would be proper to consider it in its different notions.

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

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

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MUSLIM DIVORCE OR TALAQ

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

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

Modes of Divorce:

A husband may divorce his wife by repudiating the marriage without giving any reason. Pronouncement of such words which signify his intention to disown the wife is sufficient. Generally this done by talaaq. But he may also divorce by Ila, and Zihar which differ from talaaq only in form, not in substance. A wife cannot divorce her husband of her own accord. She can divorce the husband only when the husband has delegated such a right to her or under an

agreement. Under an agreement the wife may divorce her husband either by Khula or Mubarat. Before 1939, a Muslim wife had no right to seek divorce except on the ground of false charges of adultery, insanity or impotency of the husband. But the Dissolution of Muslim Marriages Act 1939 lays down several other grounds on the basis of which a Muslim wife may get her divorce decree passed by the order of the court.

There are two categories of divorce under the Muslim law:

1.) Extra judicial divorce, and

2.) Judicial divorce

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

- By husband- talaaq, ila, and zihar.
- By wife- talaaq-i-tafweez, lian.
- By mutual agreement- khula and mubarat.

The second category is the right of the wife to give divorce under the Dissolution of Muslim Marriages Act 1939.

Talaaq: Talaaq in its primitive sense means dismission. In its literal meaning, it means "setting free", "letting loose", or taking off any "ties or restraint". In Muslim Law it means freedom from the bondage of marriage and not from any other bondage. In legal sense it means dissolution of marriage by husband using appropriate words. In other words talaaq is repudiation of marriage by the husband in accordance with the procedure laid down by the law.

The following verse is in support of the husband's authority to pronounce unilateral divorce is often cited:

Men are maintainers of women, because Allah has made some of them to excel others and because they spend out of their property (on their maintenance and dower) . When the husband exercises his right to pronounce divorce, technically this is known as talaaq. The most remarkable feature of Muslim law of talaaq is that all the schools of the Sunnis and the Shias recognize it differing only in some details. In Muslim world, so widespread has been the talaaq that even the Imams practiced it . The absolute power of a Muslim husband of divorcing his wife unilaterally, without assigning any reason, literally at his whim, even in a jest or in a state of intoxication, and without recourse to the court, and even in the absence of the wife, is recognized in modern India. All that is necessary is that the husband should pronounce talaaq; how he does it, when he does it, or in what he does it is not very essential.

Conditions for a valid talaaq:

1) **Capacity:** Every Muslim husband of sound mind, who has attained the age of puberty, is competent to pronounce talaaq. It is not necessary for him to give any reason for his pronouncement. A husband who is minor or of unsound mind cannot pronounce it. Talaaq by a

minor or of a person of unsound mind is void and ineffective. However, if a husband is lunatic then talaaq pronounced by him during "lucid interval" is valid. The guardian cannot pronounce talaaq on behalf of a minor husband. When insane husband has no guardian, the Qazi or a judge has the right to dissolve the marriage in the interest of such a husband.

2) **Free Consent**: Except under Hanafi law, the consent of the husband in pronouncing talaaq must be a free consent. Under Hanafi law, a talaaq, pronounced under compulsion, coercion, undue influence, fraud and voluntary intoxication etc., is valid and dissolves the marriage.

Involuntary intoxication: Talaaq pronounced under forced or involuntary intoxication is void even under the Hanafi law.

Shia law:

Under the Shia law (and also under other schools of Sunnis) a talaaq pronounced under compulsion, coercion, undue influence, fraud, or voluntary intoxication is void and ineffective.

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

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

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

Express Talaaq (by husband):

When clear and unequivocal words, such as "I have divorced thee" are uttered, the divorce is express. The express talaaq, falls into two categories:

- Talaaq-i-sunnat,
- Talaaq-i-biddat.
- Talaaq-i-sunnat has two forms:
- Talaaq-i-ahasan (Most approved)
- Talaaq-i-hasan (Less approved).

Talaaq-i-sunnat is considered to be in accordance with the dictates of Prophet Mohammad.

The ahasan talaaq: consists of a single pronouncement of divorce made in the period of tuhr (purity, between two menstruations), or at any time, if the wife is free from menstruation, followed by abstinence from sexual intercourse during the period if iddat. The requirement that the pronouncement be made during a period of tuhr applies only to oral divorce and does not apply to talaaq in writing. Similarly, this requirement is not applicable when the wife has passed the age of menstruation or the parties have been away from each other for a long time, or when the marriage has not been consummated. The advantage of this form is that divorce can revoked at any time

before the completion of the period of iddat, thus hasty, thoughtless divorce can be prevented. The revocation may effected expressly or impliedly.

Thus, if before the completion of iddat, the husband resumes cohabitation with his wife or says I have retained thee" the divorce is revoked. Resumption of sexual intercourse before the completion of period of iddat also results in the revocation of divorce.

The Raad-ul-Muhtar puts it thus: "It is proper and right to observe this form, for human nature is apt to be mislead and to lead astray the mind far to perceive faults which may not exist and to commit mistakes of which one is certain to feel ashamed afterwards"

The hasan talaaq:

In this the husband is required to pronounce the formula of talaaq three time during three successive tuhrs. If the wife has crossed the age of menstruation, the pronouncement of it may be made after the interval of a month or thirty days between the successive pronouncements. When the last pronouncement is made, the talaaq, becomes final and irrevocable. It is necessary that each of the three pronouncements should be made at a time when no intercourse has taken place during the period of tuhr. Example: W, a wife, is having her period of purity and no sexual intercourse has taken place. At this time, her husband, H, pronounces talaaq, on her. This is the first pronouncement by express words. Then again, when she enters the next period of purity, and before he indulges in sexual intercourse, he makes the second pronouncement. He again revokes it. Again when the wife enters her third period of purity and before any intercourse takes place H pronounces the third pronouncement. The moment H makes this third pronouncement, the marriage stands dissolved irrevocably, irrespective of iddat.

Talaaq-i-Biddat:

It came into vogue during the second century of Islam. It has two forms: (i) the triple declaration of talaaq made in a period of purity, either in one sentence or in three, (ii) the other form constitutes a single irrevocable pronouncement of divorce made in a period of tuhr or even otherwise. This type of talaaq is not recognized by the Shias. This form of divorce is condemned. It is considered heretical, because of its irrevocability.

Ila:

Besides talaaq, a Muslim husband can repudiate his marriage by two other modes, that are, Ila and Zihar. They are called constructive divorce. In Ila, the husband takes an oath not to have sexual intercourse with his wife. Followed by this oath, there is no consummation for a period of four months. After the expiry of the fourth month, the marriage dissolves irrevocably. But if the husband resumes cohabitation within four months, Ila is cancelled and the marriage does not dissolve. Under Ithna Asharia (Shia) School, Ila, does not operate as divorce without order of the court of law. After the expiry of the fourth month, the wife is simply entitled for a judicial divorce. If there is no cohabitation, even after expiry of four months, the wife may file a suit for restitution of conjugal rights against the husband.

Zihar:

In this mode the husband compares his wife with a woman within his prohibited relationship e.g., mother or sister etc. The husband would say that from today the wife is like his mother or sister. After such a comparison the husband does not cohabit with his wife for a period of four months. Upon the expiry of the said period Zihar is complete.

After the expiry of fourth month the wife has following rights:

(i) She may go to the court to get a decree of judicial divorce

(ii) She may ask the court to grant the decree of restitution of conjugal rights.

Where the husband wants to revoke Zihar by resuming cohabitation within the said period, the wife cannot seek judicial divorce. It can be revoked if:

(i) The husband observes fast for a period of two months, or,

(ii) He provides food at least sixty people, or,

(iii) He frees a slave.

According to Shia law Zihar must be performed in the presence of two witnesses.

Divorce by mutual agreement:

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

In law it is said is said to signify an agreement between the spouses for dissolving a connubial union in lieu of compensation paid by the wife to her husband out of her property. Although consideration for Khula is essential, the actual release of the dower or delivery of property constituting the consideration is not a condition precedent for the validity of the khula. Once the husband gives his consent, it results in an irrevocable divorce. The husband has no power of cancelling the 'khul' on the ground that the consideration has not been paid. The consideration can be anything, usually it is mahr, the whole or part of it. But it may be any property though not illusory. In mubarat, the outstanding feature is that both the parties desire divorce. Thus, the proposal may emanate from either side. In mubarat both, the husband and the wife, are happy to get rid of each other . Among the Sunnis when the parties to marriage enter into a mubarat all mutual rights and obligations come to an end.

The Shia law is stringent though. It requires that both the parties must bona fide find the marital relationship to be irksome and cumbersome. Among the Sunnis no specific form is laid down, but

the Shias insist on a proper form. The Shias insist that the word mubarat should be followed by the word talaaq, otherwise no divorce would result. They also insist that the pronouncement must be in Arabic unless the parties are incapable of pronouncing the Arabic words. Intention to dissolve the marriage should be clearly expressed. Among both, Shias and Sunnis, mubarat is irrevocable. Other requirements are the same as in khula and the wife must undergo the period of iddat and in both the divorce is essentially an act of the parties, and no intervention by the court is required.

Divorce by wife:

The divorce by wife can be categorized under three categories:

(i) Talaaq-i-tafweez

(ii) Lian

(iii) By Dissolution of Muslim Marriages Act 1939.

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

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

Lian:

If the husband levels false charges of unchastity or adultery against his wife then this amounts to character assassination and the wife has got the right to ask for divorce on these grounds. Such a

mode of divorce is called Lian. However, it is only a voluntary and aggressive charge of adultery made by the husband which, if false, would entitle the wife to get the wife to get the decree of divorce on the ground of Lian. Where a wife hurts the feelings of her husband with her behaviour and the husband hits back an allegation of infidelity against her, then what the husband says in response to the bad behaviour of the wife, cannot be used by the wife as a false charge of adultery and no divorce is to be granted under Lian. This was held in the case of Nurjahan v. Kazim Ali by the Calcutta High Court.

Dissolution of Muslim Marriages Act 1939:

Qazi Mohammad Ahmad Kazmi had introduced a bill in the Legislature regarding the issue on 17th April 1936. It however became law on 17th March 1939 and thus stood the Dissolution of Muslim Marriages Act 1939.

Section 2 of the Act runs thereunder:

A woman married under Muslim law shall be entitled to obtain a decree for divorce for the dissolution of her marriage on any one or more of the following grounds, namely:-

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

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

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

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

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

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

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

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

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

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

(c) Attempts to force her to lead an immoral life, or

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

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

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

Q. What are the grounds of dissolution of Marriage under Dissolution of Muslim Marriage Act - 1939?

INTRODUCTION:

An Act to consolidate and clarify the provisions of Muslim Law relating to suits for dissolution of marriage by women married under Muslim Law and to remove doubts as to the effect of the renunciation of Islam by a married woman on her marriage tie. These are as under: -

i. By stipulation in the marriage contract that she shall have such rights as to effect a divorce. **ii** By an option to divorce from the husband. **iii** By judicial divorce on ground of impotency false charge of adultery**. iv** By Lian. **v** By Khula **vi** By Mubarat.

Whereas it is expedient to consolidate and clarify the provisions of Muslim Law relating to suits for dissolution of marriage by women married under Muslim Law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage; it is hereby enacted as follows:

2. Grounds for decree for dissolution of marriage:- A woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds provided under Dissolution of marriage Act-VIII of l939:-

(i) that the whereabouts of the husband have not been known for a period of four years;

(ii) that the husband has neglected or has filed to provide for her maintenance for a period of two years;

(ii-A) that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961; but wife is not entitled to maintenance in the following situations and it is the reason that she cannot present a litigation of divorce against her husband on the following grounds :

a) When she lives separately without any reasonable cause. A case of **Yusuf Saramma -1971**.

b) When she is unchaste to her husband case: **Mu. Khadiza v/s Abdula-1942.**

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) That the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(v) That the husband was impotent at the time of the marriage and continues to be so.

(vi) That the husband has been insane for a period of two years or is suffering from leprosy or venereal disease. **Mulla** the wife may obtain a decree for the dissolution of her marriage if the husband has been insane for a period of two years and suffering from leprosy or a verneral diseases.

(vii) That she, having been given in marriage by her father or other guardian before she attained the age of sixteen years, repudiated the marriage before attaining the age of eighteen years: Provided that the marriage has not been consummated.

(viii) **That the husband treats her with cruelty**, that is to say,

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

II. associates with women of evil repute of leads an infamous life, or

III. attempts to force her to lead an immoral life, or

IV. disposes of her property or prevents her exercising her legal rights over it, or

V. obstructs her in the observance of her religious profession or practice, or

VI. if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran. **Noorjahan Bibi v/s Kazim Ali-1977:** a false charge of adultery by husband over wife was considered to be cruelty.**Begum Zohar v/s Mohammad Isfaq ut Majid-1955**: The use of abusive language by husband and use of defamatory words by husband was held to be cruelty.

VII. **on any other ground** which is recognized as valid for the dissolution of marriages under Muslim Law. They are known as **Traditional Grounds**: such as : IIa, Zihar, Khula, Mubarat and Tafweez.

(a) no decree passed on ground (i) shall take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court he is prepared to perform his conjugal duties the Court shall set aside the said decree; and

(b) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfied the Court within such period, no decree shall be passed on the said ground.

(c) If husband converts to another religion the marriage is dissolved at the instance, so if husband changes religion wife has ground for divorce under section 4 of the Act-1939.

3. Notice to be served on heirs of the husband when the husband's where abouts are not known. In a suit to which clause (i) of section 2 applies

(a) the names and addresses of the persons who would have been heirs of the husband under Muslim Law if he had died on the date of the filing of the plaint shall be stated in the plaint.

(b) notice of the suit shall be served on such persons, and

(c) such persons shall have the right to be heard in the suit:

Provided that paternal-uncle and brother of the husband, if any, shall be cited as party even if he or they are not heirs.

4. Effect of conversion to another faith:- The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage: Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree

for the dissolution of her marriage on any of the grounds mentioned in section 2; Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

5. Right to dower not be affected:- Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage

6. (Repeal of section 5 of Act, XXVI of 1937)

Rep. by the Repealing and Amending Act, 1942 (XXV of 1942), section 2 and First Sch.

MAINTENANCE

Under Muslim law, 'maintenance' is called 'nafaqa' and it includes food, clothing and lodging. Muslim personal law imposes limited obligation on the husband to maintain his wife after divorce. The Muslim law imposes the liability to maintain the divorced wife only during the period of Iddat and not thereafter. The Muslim Women (Protection of Rights on Divorce) Act 1986 ("The Act") was passed to protect the rights of Muslim women who have been divorced by, or have obtained a divorce from, their husbands

The era of Shah Bano Begum :-

The landmark judgment of Ahmed Khan v. Shah Bano Begum[2] shows the struggle that Muslim women face in maintenance cases. Shah Bano, 62-year-old Muslim women was married to Ahmad Khan who had pronounced talaq or divorce against her. Since she could not maintain herself and her 5 children, she had approached the court under section 125 of the Code of Criminal Procedure (Cr.P.C.) which imposes a duty upon the husband to provide for his divorced wife, in case she is unable to provide for herself. Her husband relied on the argument that the issue would fall under the purview of Muslim personal law and as per Muslim personal law, he would only be liable to pay maintenance for the iddat period along with the return of the mehr.

The case, however, was decided in favor of Shah Bano and it was held that Muslims were not excluded from exercising their rights accruing from secular laws. In this case, the Supreme Court attempting to ensure continuing respect for Muslim women's claim to equal treatment, regardless of their membership into a particular religion.[3] However, the Muslim orthodoxy severely condemned it. They saw this case, which had created a breakthrough for Muslim women to address their grievances as an encroachment into the Muslim Shariat Law that they were bound by.

The Muslim Women Act (Protection of Rights on Divorce), 1986:- During this time, the Bharatiya Janata Party, a right Hindu dominated party were growing in popularity, making the Muslim minority in India anxious.[4] There was a rise of communal tensions even before the Shah

Bano case with regards to the issue of Babri Masjid in Agra and the passing of the judgment further added to the general air of distrust between the religious groups. Moreover, the Congress Party, which was the ruling party then, had a looming sense of insecurity with regards to the coming elections where they had feared that there would be a shift in power towards the BJP.The then Rajiv Gandhi government "recognized their alarm" towards this ruling and had therefore legislated the Muslim Women Act (Protection of Rights on Divorce), 1986 to gain the support of Muslim voters in an increasingly hostile political climate. The Act is declaratory and codifies important pre-existing rules of Muslim Law. The Act makes provision for:

- Maintenance of a divorced Muslim wife during and after the period of Iddat.
- For enforcing her claim to unpaid dower and other exclusive properties.

It was enforceable against the former Husband, relatives and the Waqf Board. The Act had provisions that in essence went against the decision by the court in Shah Bano. The bill had exempted Muslim women from availing reliefs under section 125 of the Cr.P.C, which had been used to override Muslim.

The section also stipulates that if after the lapsing of the iddat period, the woman is unable to support herself, then the court would order her relatives (who would inherit her property on death or otherwise) to pay a reasonable and fair maintenance to her and if she does not have any such relatives, the State Waqf Board would be liable to pay maintenance to her.

The word "provision" with respect to the impugned section meant an act of providing something in advance in order to ensure that the needs of the divorced wife are met (these could include food, clothes and garments and other articles conditional upon the husband's means.). This might appear to be for the benefit of the woman and making it seem like women are beneficiaries of the Act, but this is not the case.

Beyond this facade lay many other aspects that are arbitrary and unfair towards women. For instances, the Act does not empower the woman to avail maintenance after the lapsing of the period of Iddat since there are words such as 'within'. Secondly, the Act also espouses the restricted application of the secular provision of Section 125 of the Cr.P.C. to divorced Muslim women. For this purpose, the judiciary began to adopt different lines of interpretation due to the vagueness and the ambiguity of several provisions and words of the Act, including the preamble. The lawyer in the Shah Bano case filed a writ petition under Article 32[5] challenging the constitutional validity of the Act. This was the case of Daniel Latifi v Union of India[6]. The case made Section 3 of the Act the pivotal point due to its restrictive application.

In this judgment, the Supreme Court upheld the validity of the Act after coming to a compromise but decided that the secular provision for maintenance would be applied equally to the Muslim community. Sections 3 and 4 were interpreted liberally and it was stated that a divorced Muslim woman is entitled to reasonable and sufficient provision for livelihood along with maintenance. However, this maintenance was held to not be limited to the Iddat period, and a Muslim wife is also eligible to be paid maintenance for a period beyond *iddat* through her life until she has remarried.

The case had first analysed the preamble of the Act, the *Shah Bano* case and ultimately upheld the validity of the Act. The court had stated that the 'reasonable' and 'fair' provisions for the future included maintenance extended beyond the *iddat,* but had to be paid by the husband within the *iddat* period in terms of Section 3(1)(a) of the Act. Further, under Section 4 of the Act, the divorced wife may also proceed against her relatives who are liable to maintain her in proportion to the properties which they inherit from her after her death. This includes her children and parents. If none of these relatives has means of maintaining her, the duty would shift to the State's Waqf Board, wherein the court may order the Board to pay her such maintenance.

The court had held that the Act does not contravene Article 14, 15 and 21 of the Indian Constitution. The judgment stated that the Legislature does not intend to enact unconstitutional laws and that "an appropriate" reading of the Act must be adopted in order to understand that nowhere the Parliament has limited the reasonable and fair provision for maintenance to the *iddat* period and it would extend to the whole life of the divorced wife up until she gets married for the second time.

This provision continues to be problematic because the vagueness of the words continue to give window to regressive judgments being passed by the courts. For instance, in the case of Haseena v. Abdul Jaleel[7], the issue of whether provision for educational expenses is a "reasonable and fair" criterion for fixing the quantum of maintenance was mooted. The court did hold in this case that the divorced wife may claim a sum on these grounds given her circumstances. The reasoning adopted however, was the fact that she was pursuing her education at the time before marriage and that is also a relevant factor in fixing "reasonable and fair provision and maintenance"

Application of Secular Laws

Section 125 of the Code of Criminal Procedure, 1898 also enables a muslim wife to claim maintenance after divorce. While Section 125 seemed to have uniform applicability, however, the consent of both husband and the wife is required. In such situation, realistically, the husband will never agree to file an application under Section 125 of the Code when he has a choice of enjoying lesser liability under the Act. If the husband cannot or refuses to provide her with maintenance her

only recourse becomes to rely on the Waqf board or her family. Thus, in practice, there is no usage of such secular law.

There was confusion that existed until it was clarified in the case of Shamim Bano v Ashraf Khan. This case is a milestone towards protecting the rights of Muslim women as it interprets Section 125 of the Code of Criminal Procedure to be universally applicable to women regardless of the dicta of personal laws on the matter. Taking the lead from the popular Shah Bano case, the Supreme Court of India held that Section 125 would apply to Muslim women, and they would be entitled to maintenance irrespective of Mahomedan law's views on the matter.

In the Shamim Bano case, the court had considered for the first time that if it made joint petition mandatory, there would be a gross miscarriage of justice putting additional pressure on the woman who was already at a vulnerable position due to the social pressures and legal pressures (in addition to financial insecurity) that accrues from divorce. In this particular case the court realized that if the application under Section 125 were not accepted, Shamim Bano would be remediless as the Magistrate's order only ensured her Mahr and did not give her any maintenance. Thus, the court reasoned that Section 125 parameters should be applied in order to prevent any further and future travesty of justice.

2. **When a Muslim woman is not entitle to claim maintenance under Muslim law?**

Following are the situations where a muslim woman is not entitle to maintenance:

a. When she has not attained puberty

b. When she has abandoned her husband and marital obligations and duties for sufficient reason

c. When she eloped with other man

d. When she disobeys the reasonable commands of her husband.

Maintenance under Muslim Women (Protection of Rights on Divorce) Act 1986 :-

To water down the stringent principles enunciated by the Apex court in Shah Bano judgment, passed against the Muslim husband in contravention to the established Personal laws with regard to maintenance of a divorced wife, the legislators enacted a new law to govern Muslim divorce provisions i.e. **Muslim Women (Protection of Rights on Divorce) Act 1986.**

This act was enacted in the backdrop of the Shah Bano case and attempted to restrict the application of Section 125 of Crpc regarding the maintenance of divorced Muslim wife.

Protection to the divorced wife

Sub-section (1) of Section 3 of the said Act lays down that a divorced Muslim woman is entitled to:

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

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

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

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

In case on divorce, the husband has failed to secure any of the above, the wife or her authorized agent may sue the husband by making an application before the Magistrate for necessary orders.[6] In case the Magistrate is satisfied that compliance with the aforesaid have not been made by the husband, he will make an order, within one month of the date of filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of his life enjoyed by her during her marriage and the means of her former husband, or as the case may be.[7]

Maintenance to Muslim divorced woman until her remarriage :-

The Apex court in **Danial Latifi v. Union of India[8]**, has held that in terms of Section (3) (a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986, a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which also includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3 (1) (a) of the Act.

The court further held that the liability of Muslim husband to his divorced wife arising under Section 3 (1) (a) of the Act to pay maintenance is not confined only to the iddat period.

A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period is entitled to claim maintenance under Section 4 of this act from her relatives who are entitled to her property after her death.
If her relatives are not able to maintain her then, in that case, the Magistrate may direct the State Wakf board established under the Act to pay maintenance.

Further, Section 5 of the Act provides an option to a divorced woman and her former husband to prefer and chose whether they want to be governed by the provisions of Section 125 to 128 of the CrPc and not by the provision of the said Act by submitting an affidavit or a declaration in writing in this behalf to the Magistrate.

Section 125 in The Code Of Criminal Procedure, 1973

125. Order for maintenance of wives, children and parents.

(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means. Explanation.- For the purposes of this Chapter,-

(a) " **minor"** means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority;

(b) **" wife"** includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month' s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made: Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due: Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such

Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing. Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him.

(4) No Wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

Which wife cannot claim maintenance?

- If she had remarried to someone else then she cannot claim for maintenance **under section 125 of crpc**.
- Is she is practicing adultery
- If she has sufficient means to maintain herself.
- If she refuses to stay with her husband without any sufficient cause.
- If there is a separation due to mutual consent.

Q.11. Define Maintenance. Discuss the provisions regarding maintenance of divorced woman according to Muslim Women Protection Rights on Divorce-1986. OR What are the arrangements for maintenance under Muslim Law? Who are entitled for Maintenance? Discuss. OR Maintenance of Muslim Women.

INTRODUCTION: -

The Muslim Law, like the English Law treats the property as primarily and naturally individual. It does not like the Hindu system contemplate as the normal state of things. The existence of mass of family property kept together thorough several generations as common fund for the common needs. Under Muslim Law a man is bound maintain his wife irrespective of his and her means and his minor children if he is not indigent.

Definition of Maintenance: - Maintenance is equivalent to Arabic '**Nafqah'** which means, "What a person spends over his family" however in legal sense maintenance signifies and includes three things: (**i) Food (ii) clothing (iii) lodging.**

According to Hedaya: "Maintenance as all those things which are necessary to the support of life such as food, clothes and lodging."

Provisions regarding maintenance of divorced woman:- In Shah Bano Beguum v/s Mohammad Ahmed Khan-1985, the five judges bench held that a Muslim husband having sufficient means must provide maintenance to his divorced wife who is unable to maintain herself. Such a wife is entitled to the maintenance even if she refuses to live with the Muslim husband. The court also held that the ability of the husband to maintain his divorced wife till the expiration of the iddat period extends only in case the wife is able to maintain herself. **The following are the rights of maintenance of divorced wife:-**

1. Maintenance during the subsistence of marriage:-The husband is liable to maintain the wife from the date when the wife attains puberty and as long as she is obedient and faithful to her husband. The husband is bound to maintain her even though she may have the means to maintain herself. A Muslim wife who is living separately may claim maintenance against him for example

if the husband treats her cruelty or marries with second wife without her consent or if he paid prompt dower to her as held in a case of **Itwari v/sAshgari-1960**.

2. Maintenance of a divorced wife:-Under Muslim Law a divorced wife is entitled to obtain maintenance from husband up-to her period of **Iddat.** In a case of **Mohammad Ahmad Khan v/s Shah Bano Begum-1985,** although the Muslim law limits the husband's liability to provide maintenance for his divorced wife up to the period of **Iddat**. The court held that if the divorced wife is unable to maintain herself after the period of **Iddat** she is entitled to recourse to sec. 125 Cr.P.C.

3. Maintenance of a Widow: - According to **Hedaya says**, "That a widow shall not have any right of maintenance after the death of her husband. Under the **Shia Law** a Widow is not entitled to any maintenance though she was pregnant at the time of the death of her husband. There are some authorities in Mohammadans who recognised widow's right if on the death of her husband she was pregnant to maintenance until delivery, out of share in estate of her husband which child borne by her entitled to inherit.

In order to nullify the effect of the **Shah Bano's decision**, Parliament passed the **Muslim Women's Protection of Rights on Divorce Act-1986, the following are the provisions :-**

1. A reasonable and fair provision and maintenance to be made and paid to her within the **Iddat** period by her former husband.

2. Where she herself maintains the Children born to her before or after her divorce a reasonable a reasonable and fair provision and maintenance for a period of two years from the respective dates of birth of such children.

3. An amount equal to the sum of **mehr** or dower agreed to be paid to her at the time of her marriage or at any time thereafter according **to Muslim Law**.

4. All the properties given to her before or at the time of marriage or after the marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

GIFT(HIBA)

Q. What is the object behind making a gift under Muslim Law? Who can make a valid gift? Explain Is Registration is necessary?

Introduction: - In India it is often assumed that term 'gift' is the exact equivalent of 'hiba' and both are understood to connote all transfer of property without consideration. Gift however an expression of much wider explanation than hiba is. **According to Baillie**, "The conferring of a right in something specific without an exchange."

In Muslim Law, it is treated as a contract consisting of a proposal or offer on the part of donor to give a thing and the acceptance of it by the donee. The word hiba literally means the donation of a thing from which the donee may derive a benefit, the transfer must be immediate

and complete. It is also to mention here the most important ingredient of Hiba is the declaration, **"I have given".**

DEFINITION OF GIFT:- Under Muslim Law a person is allowed to lawfully make a gift of his property to another during his life time or he may transfer it by way of will which take effect after his death**.**

In its technical sense, it is defined as, "unconditional transfer of property made immediately and without any exchange or consideration by one person to another and accepted by or on behalf of the latter.**"**

According to Mulla, "Gift is a transfer of property, made immediately and without any exchange by one person to the other and accepted by or on behalf of the latter."

A leading case in this regard is of **Smt. Hussenabi v/s Husensab Hasan-1989**, gist of the case that offer of gift was made by grandfather to his grand children who were living with him and on behalf of minor children the acceptance was made by the doner but no express or implied acceptance of gift was made by the major grandson. The court held that when the three essentials are not there to complete, it cannot be a complete gift. Gift-deed was valid for the minor children but the gift in favour of the major sons was set aside.

Object Behind Making a Gift under Muslim Law

The following are the objects for making a gift under Muslim Law:-

1. **The conferring of a right in something specific without an exchange:-** When a **doner** declare to make a gift to anybody, without any consideration of it.

2. **Following lawful methods while making of a gift:-** Some of the important observations that the doner adopts lawful methods for making a gift of property in the possession and such a gift is valid provided the donor either obtains and gives possession.

3. **Thickness in relations comes out by making gifts:-** For developing strengthens and to create a co-operation in the society it is necessary that there must be transaction of gifts in between each other's which will give strengthen to the society and respect to the donors.

4. **To make a person the owner of the substance of a thing:-** Under Muslim Law a person becomes the owner of the substance of a thing without any consideration and to make him the owner of the profits also.

Is Registration of Gift Necessary

Under Muslim Law writing is not essential to the validity of a gift either of movable or of immovable property. Sec. 122 to 129 of the Transfer of Property Act, 1882, deals with gifts. As per provisions laid down in Sec. 123 of this act, Gift of immovable property must be effected by a registered instrument signed by the donor and attested by at least two witnesses, and that a gift of movable property may be effected either by a registered instrument signed as aforesaid or by delivery. **But these provisions of Sec. 123 do not apply to Muslim gifts; Section 129** of this act also states that nothing in the chapter shall be deemed to **affect any rule of Mohammedan Law**.

As per the Registration Act the gift of immovable property worth over Rs.100/- is required to be by registered instrument. Mohammedan law permits oral gift of immovable property irrespective of value of the property. Hence the provisions of sec.123 do not apply to gifts covered by Mohammedan law.

KINDS OF GIFT OR HIBA

Gifts (hiba), in Muslim law, are of the following four kinds:

1. Sadaquah

2. Hiba-bil iwaz

3. Hiba-ba-shart-ul-iwaz

4. Areeat

1. Sadaquah:

Where the object of the donor is to acquire merit in the eyes of the Lord and a recompense in the next world, the gift is called Sadaquah. It is a gift with a religious motive. Like hiba, it is not valid unless accompanied by delivery of possession. Unlike hiba, it cannot be revoked, the reason being that the object of such a gift is acquisition of religious merit and that has already been acquired.

Sadaquah is a transfer of property or rights in all respects like a hiba, except that —

1. In the case of hiba, the object is to manifest affection towards the donee, or win his regard or esteem. In the case of sadaquah, the object is to acquire merit in the sight of the Lord and a recompense in the next world.

2. Unlike hiba, a sadaquah, once completed by delivery of possession, cannot be revoked, whether made to a rich or poor man.

3. Unlike hiba, sadaquah need not be expressly accepted.

Like hiba, sadaquah is not valid unless accompanied by delivery of possession; nor is it valid if it consists of an undivided share (mushaa) in property capable of division. It is not invalid if made to two or more persons, all of whom are poor.

2. Hiba-Bil-Iwaz:

Hiba-bil-iwaz is a gift for a consideration. It resembles a sale in that (a) transfer of title is complete without delivery of possession, and (b) all the incidents of sale attach to it, including —(i) the liability of being pre-empted, where the law of pre-emption is in force, and (ii) the right to return a thing for a defect.

To constitute a valid Hiba-bil-iwaz, the following two conditions must be present:

(a) Actual and bona fide payment of consideration (iwaz) on the part of the donee; and

(b) A bona fide intention on the part of the donor to divest himself in present of the property, and to confer it upon the donee.

A hiba-bil-iwaz literally means a gift for an exchange. It is of two kinds, namely (i) the hibS-bil-IWa2 followed in India, and (ii) the true hiba-bil-iwaz, as defined by older jurists. The true hiba-bil-iwaz of older jurists consisted of two independent acts, namely, (a) hiba, or gift, and (b) iwaz or return gift, not stipulated at the time of the gift.

Thus, if A, without having stipulated for a return, makes a gift of his book to B, and B in consideration of the book, without having promised it, subsequently makes a gift of a rupee to A, saying that it is iwaz or return for the gift of the book, and delivers the rupee to A, the transaction is a true hiba-bil-iwaz, and neither A nor B can revoke it.

But in the hiba-bil-iwaz as practised in India, there is only one act, the iwaz or exchange being involved in the contract of gift as its direct consideration. Thus, in the illustration given above, if A says to B "I have given this book to you in consideration of your paying me a rupee," it is a hiba-bil-iwaz of India.

Thus, it is in reality a sale, while the true hiba-bil-iwaz is not a sale either in its inception or completion. In fact, the Calcutta and the Lahore High Courts have held that a transaction of this character is nothing but a sale, and that where it affects immovable property of the value of a hundred rupees and above, it must be effected by a registered instrument, as required by S. 54 of the Transfer of Property Act.

The hiba-bil-iwaz of India was introduced here by Muslim lawyers as a device for effecting a gift of mushaa in property capable of division.

3. <u>Hiba-ba-Shart-ul-Iwaz:</u>

Where a gift is made with a stipulation (shart) for a return it is called hiba-ba-shart-ul-iwaz. As in the case of hiba, in the case of hiba- ba-shart-ul-iwaz also, delivery of possession is necessary, and the gift is revocable until the iwaz is paid. On payment of iwaz (consideration) by the donee, the gift becomes irrevocable. The transaction, when completed by payment of iwaz is, however, not very common in India.

4. <u>Areeat:</u>

An areeat is the grant of a licence, revocable at the grantor's option, to take and enjoy the usufruct of a thing.

The four essentials of an areeat are that (i) can be revoked; (ii) it must be a transfer of ownership in the property; (iii) it must be for a definite period, and (iv) it does not devolve upon the heirs of the donee on his death.

Gift of Mushaa: The Hanafi Doctrine of Mushaa:

The word Mushaa has been derived from the Arabic word Shuyua which literally means 'confusion'. Under Muslim law, Mushaa signifies an undivided share in a joint property. Mushaa is therefore, a co-owned or joint property.

If one of the several owners of this property makes a gift of his own share, there may be a confusion as to which portion or part of the property is to be given to the donee In other words, there may be a practical difficulty in the delivery of possession if gift of a joint property is made by a donor without partition of the gifted share.

To avoid any such confusion and difficulty at the stage of delivery of possession, the Hanafi jurists have evolved the principle of Mushaa. Where the subject-matter of a gift is co-owned or joint property, the doctrine of Mushaa is applied for examining the validity of the gift.

Under the Hanafi doctrine of Mushaa, gift of a share in the co-owned property is invalid (irregular) without partition and actual delivery of that part of the property to the donee. However, if the co-owned property is not capable of partition or division, the doctrine of Mushaa is inapplicable. Hedaya lays down this doctrine in the following words:

"A gift of part of thing which is capable of division is not valid unless they said part be divided off and separated from the property of the donor; but a gift of part of an indivisible thing is valid……"

A Mushaa or undivided property may be of two kinds: (a) Mushaa indivisible i.e. a property in which the partition or division is not possible and (b) Mushaa divisible i.e. property which is capable of division. Law relating to both the kinds of Mushaa properties is given below.

Mushaa Indivisible:

Gift of Mushaa indivisible is valid. There are certain properties which are by nature indivisible. The physical partition or division of such properties is not practical. Moreover, if against the nature of such properties, their partition or division is affected at all, their identity is lost; they do not remain the same properties which they were before the partition. For example, a bathing ghat, a stair case or a cinema house etc. are indivisible Mushaa properties.

If, on the bank of a river or tank, there is bathing ghat which is in the co-ownership of two or more persons, then each owner has right to deal with his share as he likes including the right to make a gift of his share.

But, if a sharer attempts to separate his share, the utility of the ghat would be finished. Where a stair case is co-owned by, say two persons, then each being the owner of half of the stair-case, is entitled to make a Hiba of his share.

But, if the stair-case is divided into two parts, it would either be too narrow to be used by any one, or the upper half may come in the share of one and the remaining lower half in the other's share. In both the cases the stair case would become useless for both of them and also for the donee.

The doctrine of Mushaa is not applicable where the subject-matter of gift is indivisible. According to all the schools of Muslim law, a gift of Mushaa indivisible is valid without any partition and actual delivery of possession.

Thus, a gift of a share in the business of a Turkish-bath, or a gift of an undivided share in the banks of a tank (or river) are valid gifts even if made without separating the specific shares.

Mushaa-Divisible:

Under Hanafi law, gift of Mushaa-divisible property is irregular (fasid) if made without partition. A co-owned piece of land, house or a garden, is Mushaa-divisible. The land may be divided and the specific share may be separated by a visible mark of identification.

Similarly, a co-owned house may be divided by a partition wall without changing its identity. In other words, a Mushaa-divisible may be divided easily without changing the nature and without affecting the utility of the property.

Where the subject-matter of a Hiba is Mushaa-divisible, the Hanafi doctrine of Mushaa is applicable and the gift is not valid unless the specific share, which has been gifted, is separated by the donor and is actually given to the donee. However, under the Hanafi doctrine of Mushaa, the gift without partition and actual delivery of possession is not void ab initio, it is merely irregular (fasid).

The result is that where such a gift has been made, it may be regularised by a subsequent partition and by giving to the donee the actual possession of the specified share of the property. It is evident, therefore, that the doctrine of Mushaa is limited, both in its application as well as in its effects. The operation of the rule is subject to following limitations:

(i) The rule of Mushaa is not applicable where the property is indivisible.

(ii) Where the property is divisible, the doctrine is applicable but only under the Hanafi School. In other words, the doctrine of Mushaa is applicable only where the donor is a Hanafi-Sunni.

(iii) Even under the Hanafi school, if a gift is made against the rule of Mushaa the gift is not void, it is merely irregular (Fasid).

(iv) Hanafi law recognises certain exceptions to this doctrine and in those exceptional cases the gift is valid, though made in violation of this doctrine.

Exceptions to the Doctrine of Mushaa:

The doctrine of Mushaa is limited in its application and is subject to certain exceptions where the doctrine is not applicable. Exceptions to the doctrine of Mushaa are given below:

(1) Gift of Mushaa to Co-heir:

Donor and the donee are co-heirs, if they are entitled to inherit simultaneously the properties of a person. Gift of undivided property is valid even if made without partition where donor and donee are co-heirs. If a person dies leaving behind a son, a daughter and the mother, then the son, daughter and mother are all co-heirs as they all are entitled to inherit the properties of the deceased.

Thus, after the death of a Muslim male, his widow and his daughter are the co-heirs; therefore, the widow (i.e. mother of the daughter) can make a lawful gift of her undivided share in the lands to her daughter without separating her share physically. In Mahomed Buksh v. Hosseini Bibi, a Hanafi woman died leaving her mother, son and a daughter, as her only heirs.

The mother of the deceased made a gift of her share to the son, without separating her 1/6 share in the properties of the deceased. It was held by the Privy Council that the gift of the undivided 1/6 share by grandmother to her grandson or to the granddaughter or to both jointly, was valid even without partition.

(2) Gift of Share in Zamindari:

Where a part of the erstwhile Zamindari or Taluka was gifted away by one of its co-sharers, the doctrine of Mushaa was not applicable. In the Zamindari systems, it was possible that two or more persons were the co-sharers having their definite shares of which they used to be respective owners.

If any of them made a gift of his share, the gift was valid without actual delivery of possession and without physical partition of the gifted share from the rest of the property. Similarly, a gift of Kaimi raiyati land (undivided share) was held valid although there was no actual division of the share before the gift was made.

Note:

This exception is only of academic interest because the Zamindari system has now been abolished in India.

(3) Gift of a Share in Landed Company:

The Hanafi doctrine of Mushaa originated with an object of avoiding confusion at the stage of taking the possession by donee. In the landed companies or big commercial establishments where the ownership consists of several definite shares, gift of a share by separating the share physically from the rest, would create confusion and inconvenience and this would be against the very purpose of this doctrine. Therefore, in such cases, the doctrine is inapplicable.

In Ibrahim Goolam Ariffv. Saiboo, the donor owned a large number of shares in six limited liability companies together with several pieces of freehold land and some buildings thereon in Rangoon.

He notionally divided the whole property into one thousand shares and made a gift of 100 such shares each to four donees and also 25 such shares each to the two other donees.

The whole property could be, inconveniently though, physically partitioned from the rest. But no such partition was made by the donor. It was held by the Court that the gift was valid without actual division because the property was not conveniently divisible.

The Court further observed that it would be inconsistent to apply the doctrine of Mushaa to shares in the companies because the doctrine originated for very different kinds of properties.

(4) Gift of Share in Freehold Property in Commercial Town:

Where a freehold landed property situates in commercial towns or in big cities, its frequent partition is disfavoured. In big cities the houses are well planned and the partition may require approval of a fresh map which may take considerable time. Therefore, where a part of such property is gifted, the gift is complete without any prior partition.

Gift of a part of a house situated in Rangoon was held valid without prior partition because the house was situated in a large commercial town. Similarly, it has been held that the doctrine of Mushaa has no application in commercial towns like Lahore, Bombay or Calcutta.

Device to Overcome the Doctrine of Mushaa:

The Hanafi doctrine of Mushaa is applicable only to gifts. It is not applicable to any other kind of transfer e.g. sale, exchange etc. We have already seen that the strict application of the doctrine invalidates the gifts of co-owned properties and operates disadvantageously in most of such cases. Because of this reason, the Hanafi jurists themselves have evolved a method by which the mischief of the doctrine is avoided.

The device to overcome the doctrine of Mushaa is simple. The donor may sell the undivided share without any prior partition and may return the consideration (price) immediately to the donee. Legally, this transaction would be as sale in which the doctrine is not applicable; but, in effect it would mean a gift. According to Ameer Ali:

"A gift of a moiety of a house (which otherwise would be bad for Mushaa), may validly be effected in this way… the donor should sell it first at a fixed price and then absolve the debtor of the debt, that is, the price".

Doctrine of Mushaa in the Present Society:

In the present Indian society, the doctrine of Mushaa is neither legally required nor has any practical significance. As mentioned earlier, the doctrine of Mushaa originated for avoiding confusion in the simple cases of gifts of small undivided properties. In the old days, no such technical formalities were needed in making divisions of the joint properties as are required to-day.

But, at present, instead of avoiding the confusion the application of this doctrine may create inconvenience and complications. In the present commercially advanced society, the Mushaa doctrine may operate as a restriction upon the right of a person to deal with his properties.

Gifts are not trade oriented transactions; they are voluntary and gratuitous transfers. Therefore, the gifts should be free from as much restrictions as possible. Moreover, where a constructive delivery of possession is sufficient to complete the gift, there is no need of making actual division; a symbolic possession by the donee of the gifted share in property validates the gift.

In Masoom Sab v. Madan Sab, the Andhra Pradesh High Court held that a gift of Mushaa is not invalid if the donor makes a constructive delivery of possession therefore; there is no legal difficulty if the Mushaa doctrine is not applied to a gift of an undivided property.

The devices to avoid the Mushaa rule have been favoured by the courts. In Sheikh Muhammad Mumtaz v. Zubaida Jan the Privy Council too had observed that the doctrine of Mushaa is unadaptable to progressive state of society and would be confined within strictest limits. It is submitted, therefore, that the Hanafi doctrine of Mushaa is neither legally necessary nor practically meaningful for the present society.

Shia Law:
Shia law does not recognize the doctrine of Mushaa. Under the Shia law, a gift of a share of divisible joint property is valid even if made without partition.

WAQF

What is the meaning of Waqf?

If we look at the word 'Waqf', in its literal sense it is referred to as 'detention', 'stoppage' or 'tying up'. According to the legal definition, i**t means a dedication of some property for a pious purpose in perpetuity**. The property so alienated should be available for religious or charitable purposes. Such a property is tied up forever and becomes non-transferable.

It has been observed in the case of **M Kazim vs A Asghar Ali** that waqf in its legal sense means the creation of some specific property for the fulfilment of some pious purpose or religious purpose. A lot of eminent Muslim jurists have defined Waqf in their own way. According to Abu Hanifa, "Waqf is the detention of a specific thing that is in the ownership of the waqif or appropriator, and the devotion of its profits or usufructs to charity, the poor, or other good objects, to accommodate loan." "As defined by Abu Yusuf, waqf has three main elements. They are-

- Ownership of God
- The extinction of the founder's right

- The benefit of mankind

Definition under Mussalman Waqf Validating Act, 1913- Section 2 of the Act defines waqf as, "the permanent dedication by a person professing the Mussalam faith of any property for any purpose recognised by Musalman Law as religious, pious or charitable."

Wakf Act, 1954 defines Wakf as, "**Wakf** means the permanent dedication by a person professing the Islam, of any movable or immovable property for any purpose recognized by Muslim Law as religious, pious, or charitable." A **waqf** can be either in writing or can be made by an oral presentation. In the case of an oral agreement, the presence of words emphasising on the intention of the parties is a prerequisite.

Essentials of Waqf

Waqf Under Sunni Law

The essential conditions of a valid waqf, according to the **Hanafi Law (Sunni Law)** are:

1. A **permanent dedication** to any property.
2. The **dedicator (waqif)** should be a person professing the Mussalman faith and of sound mind and not a minor or lunatic.
3. The dedication should be for a purpose recognised by the Mussalman law as **religious, pious or charitable.**

1. **Permanent dedication of property**

The most important essential of a valid waqf is that it should be '**a permanent dedication of property.'** It has the following prerequisites.

- There must be a dedication.
- The dedication must be permanent.
- The dedication must be of any property.

The Waqf himself has the right to donate such property and give it for any purpose recognized under the Muslim Law. If the wakf is made for a limited period, it cannot be considered as a valid wakf.

In the case of **Karnataka Board of Wakfs v. Mohd. Nazeer Ahmad**, it was held that "if a Muslim man provides his house to the travellers irrespective of their religion and status for their stay, this

cannot be considered as a **valid Wakf** on the ground that under Muslim law a Wakf has a religious motive, that it should be created for the benefit of Muslim community. When a Wakf is constituted, it is always a presumption that it is a gift of some property, made in favour of God. This is a legal fiction.

2. **By a person professing Mussalman faith**

The person creating a waqf should be an adult Muslim of **sound mind.**

3. **For any purpose recognised by Muslim Law**

The main objective behind creating a waqf is that it should be dedicated for a purpose recognised as **religious, pious or charitable** under Muslim law.

Waqf Under Shia law

The essential conditions for creating a valid Waqf according to **Shia Law** are:

1. It must be **perpetual.**
2. It must be **absolute and unconditional.**
3. Possession of the thing **appropriated** must be given.
4. The waqf property should be entirely **taken out of waqif**.

- Who Can Create a Waqf?

1. The person constituting the waqf of his own properties is known as the **'founder of waqf' or Waqif**. To become a waqif, a person dedicating the property must be competent enough to do so according to the provisions of law. Following are the conditions, which need to be fulfilled to become a waqif and constitute a waqf.

(i) The person constituting the waqf should be a Muslim.

(ii) Should be a person of sound mind.

(iii) Should have attained the age of majority.

The **Madras and Nagpur High Courts** have held that a non-Muslim can also create a valid waqf provided the objective of the waqf so created is not against the principles of Islam. According to

the Patna High Court, a valid waqf can also be constituted by a non-Muslim. However, such a waqf would only be constituted under a public waqf ie. a non-Muslim cannot create any private waqf **(e.g. an Imambara).**

A person of unsound mind is incompetent to constitute a waqf property as such a person cannot judge the legal consequences of such a transaction. Therefore, a waqf constituted by an insane or minor person **is void.**

2. A person may profess the capacity but may not have any right to constitute a **waqf**. Such a person cannot constitute a valid waqf. The subject matter of waqf should be owned by the waqif at the same time when waqf is being constituted. Whether a waqf can be created by a particular person depends upon whether there exists a legal right for the dedicator to transfer the ownership of the property or not.

A waqf of any property held by a widow **in lieu of her unpaid dower** cannot be constituted by her because she is not an absolute owner of that property.

In case a waqif is a **pardanashin lady**, it is the duty of the beneficiaries and the mutawalli to prove that the women had exercised her mind independently for constituting the waqf after fully understanding the nature of the transaction.

3. A person can dedicate his entire property for the creation of waqf but in the case of the testamentary waqf, more than one-third of property cannot be dedicated.

Doctrine of Cypress :-

The word cypress means **'as nearly as possible.'** The **doctrine of cypress** is a principle of the English law of trusts. Under this doctrine, a trust is executed, or carried out as nearly as possible, according to the objects laid down in it.

Where a settlor has specified any lawful object which has already been completed or the object cannot be executed further, the trust is not allowed to fail. In such cases, the doctrine of cypress is applied and the income of the property is utilised for such objects which are as nearly as possible to the object already given.

The **doctrine of cypress** is applicable also to waqfs. Where it is not possible to continue any waqf because of (a) lapse of time or, (b) changed circumstances or, (c) some legal difficulty or, (d) where

the specified object has already been completed, the waqf may be allowed to continue further by applying the doctrine of cypress.

Legal Incidents of Waqf :-

The following are the legal incidents of Waqf.

- Irrevocability
- Perpetuity
- Inalienability
- Pious or charitable use of usufruct
- Absoluteness

Modes Of Creation of Waqf :-

Waqf can be created in the following ways.

- **By an act inter vivos**– This type of waqf is created between living voices, constituted during the lifetime of the waqif and takes effect from that very moment.
- **By will**– A waqf created by will is contradictory to a waqf created by an act inter vivos. It takes effect after the death of the waqif and also known as 'testamentary waqf'. Such a waqf cannot operate upon more than one-third of the net assets, without the consent of the heirs.
- **During death or illness (marz-ul-maul)**– Like the gifts made while the donor is on the death bed, will operate till the extent of one-third of the property without the consent of the heirs of the property.
- **By immemorial user**– Limitation of time also applies to the creation of waqf property, but waqf property can be established by way of immemorial use.

Completion Of Waqf

Waqf can be completed by the following modes.

1. Where a third person is appointed as the first mutawalli.
2. Where the founder constitutes himself as the first mutawalli.

Kinds Of Waqf

1. **Public Waqf**– It is created for the public, religious or charitable purposes.
2. **Private Waqf-** This type of Waqf is created for the settlor's own family and his descendants and is also known as '**Waqf-ulal-Aulad'**. It is a kind of family settlement in the form of waqf.

Kinds Of Waqf from the view of their purpose :-

- **Waqf Ahli:** The waqf is basically created to cater to the needs of the waqf's founder's children and their descendants. But, the nominees do not have a right to sell or dispose of the property which is the subject-matter of waqf.
- **Waqf Khayri:** This kind of waqf is established for charitable and philanthropic purposes. The beneficiaries in such a kind of waqf may include the people belong to the economical sections of the society. It is used as an investment for building mosques, shelter homes, schools, madrasas, colleges and universities. All of this is built to help and uplift the economically challenged individuals.
- **Waqf al-Sabil**: The beneficiaries of such a waqf, is the general public. Although similar to Waqf Khyari, this type of Waqf is generally used to establish It is very similar to waqf khayri, though generally used for establishment and construction of the public utility (mosques, power plants, water supplies, graveyards, schools, etc).
- **Waqf al-Awaridh:** In such a kind of waqf, the yield is held in reserve so that it can be used in case of emergency or any unexpected events that affect the livelihood and well-being of a particular community, in a negative manner. For example, waqf may be assigned to cater to the specific needs of the society like providing medication for sick people, who cannot afford expensive medicines. Waqf al-awaridh may also be used to finance the maintenance of the utility services of a particular village or a neighbourhood.

Kinds of waqfs from the view of its output nature

- **Waqf-Istithmar:** Such a kind of waqf is created for using the assets for investment purposes. The said assets are managed in such a way so that the income is applied for constructing and reconstructing waqf properties.
- **Waqf-Mubashar:** The assets of such a waqf are used to generate services which would be of some benefit to some charity recipients or other beneficiaries. Examples of such assets include schools, utilities, etc.

Waqf Act, 1913

- **The Mussalman Waqf Validating Act of 1930 came into effect on July 25, 1930, which was applied retrospectively on the waqfs created before March 7,1913.**

1.
    1. Under this act, a Muslim can tie his property for **perpetuity for the support** of his family, children and descendants, provided that he makes a provision in such a manner that the ultimate benefits go to a charitable object of a permanent nature, made either **expressly or impliedly**.
    2. Under this act, a **Hanafi Muslim** cannot enjoy the whole income or a life interest in the income of trust property.
    3. A Hanafi Muslim selling the property can make payments of his **debts out of the rents** and the profits of the property dedicated.

- **The objective of the Act**

According to **Section 3** of this Act, it is lawful for a Muslim person to create a waqf which in all other aspects in accordance with the provisions of Muslim Law, for the following purposes

1. For the maintenance and support wholly or partially of his family, children or descendants.
2. Where the person creating a waqf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated:

In the case of **Radha Kanta Deb v. Commissioner AIR 1981 SC 798**, Hindu Religious Endowments, Orissa, the Hon'ble Supreme Court observed that the Muslim Law recognises the existence and creation of a private trust as a charitable trust. It is also known as '**waqf-allal-aulad'.** In this type of Waqf, the ultimate benefit is reserved for God but the property vests in the beneficiaries and the income from the property is used for the maintenance and support of the family of the founder and his descendants. The Administrative And Statutory Control Of Waqfs In India

The following enactments provide for the creation and protection of public endowments:

- Official Trustees Act II of 1913.
- Charitable Endowments Act VI of 1890.
- Religious Endowments Act XX of 1863, Section 14.
- The Code of Civil Procedure, 1908, Sections 92-93.
- Charitable and Religious Trusts Act XIV of 1920

Mutawalli :-

The manager or the superintendent of the waqf is known as the 'Mutawalli'. Such a person appointed has no powers, either to sell or exchange or mortgage the waqf property, without the prior permission of the court, unless he has been empowered by the waqf deed expressly to do so.

Who can be appointed as a Mutawalli?

Any person who has attained the age of majority, is of a sound mind and is capable of performing the functions to be discharged under a particular waqf, can be appointed as a **mutawalli** of the waqf. A foreigner cannot be appointed as theTrustee of a property in India.

- **Who can appoint a Mutawalli?**

According to the general rule, the founder of the waqf appoints at the time of the creation of the waqf. But, in case a waqf is created without the appointment of a mutawalli then the following persons are eligible to appoint the Mutawaali:

- The executor of the founder;
- The mutawalli on his death-bed;
- The Court, which shall be guided by the following rules:

- As far as possible, the Court should not disregard the directions of the settlor.
- Preference should be given to a member of the settlor's family over an utter stranger.
- In case of a contest between settlor's lineal descendant and the one who is not a lineal descendant, the court is free to exercise its discretion.
- Under some circumstances, a mutawalli may also be appointed by congregation.

Powers and Duties of Mutawalli :-

Being the manager of the wakf, he is in charge of the usufruct of the property. He has the following rights –

- He has the authority to use the usufructs to the best interest of the wakf. He is authorised to take all reasonable actions in good faith to ensure that the end beneficiaries are able to enjoy all the benefits from the wakf. As he is not the owner of the property, therefore he is barred from selling the property. However, he could be bestowed upon such rights by the wakif by the explicit mention of them in waqf nama.

- He can take authorisation from the court to sell or borrow money by showing the existence of appropriate grounds or the existence of urgency.
- He can file a suit to protect the interests of the wakf.
- He also has the power to lease the property for the agricultural purpose for less than three years and for the non-agricultural purpose for less than one year. He can get the term extended with due permission from the court.
- He is entitled to remuneration as provided by the wakif. If the remuneration is too small, he can apply to the court for getting it enhanced.

Removal Of Mutawalli

- **By the Court**– Once a mutawalli is appointed, he cannot be removed by the waqif. But the mutawalli can be removed by the Court only on following grounds.
- he denies the waqf character of the property and sets up an adverse title to it in himself.
- He although having sufficient funds neglects to repair the waqf premises and allows them to fall into despair;
- He causes damage or loss to the waqf property or commits a breach of trust knowingly and intentionally.
- The mutawalli is rendered insolvent.

1. **By the Wakf Board**– According to section 64 of the Wakf Act, 1995, the Wakf Board has the authority to remove the mutawalli from his office under the conditions mentioned therein.
2. **By the Wakif –** There are different views related to this concept. According to Abu Yusuf, even if the wakif has not reserved a right to remove the mutawalli in the wakf deed he can, nevertheless, remove the mutawalli. However, Imam Mohammed differs on this and believes that unless there is a reservation, the wakif cannot do so.
3. **Management of Waqf Property**

Waqf distinguished from Sadqah, Hiba and Trust:-

	Sadqah	**Waqf**

1.	The **legal estate** and not merely the beneficial interest passes to the charity to be held by the trustees appointed by the donor.	The **legal estate or the ownership** is not vested in the trustee or the mutawalli but is transferred to God.
2.	Both the **corpus and the usufruct** is age given away. Therefore, the trustee has the right to sell away the property itself.	The trustees of a waqf cannot alienate the corpus of the property, except in the case of necessity with the prior permission of the Court or when authorised by the settlor to do so.
3.	It is in the form of a **donation or a gift.**	It is an **endowment.**

	Hiba	**Waqf**
1.	The dominion over the object passes from one human being to another.	The right of waqif is extinguished and passes in favour of the Almighty.
2.	Delivery of possession is essential.	In a waqf i**nter vivos,** no delivery of possession is essential. It is created by the mere declaration of endowment by the owner.
3.	There is no limitation with regard to the object for which it has been created.	It is contracted only for religious, charitable or pious purposes. A waqf for family purposes should also be charity.
4.	The property passes from one person to another and the absolute right is transferred.	The right of waqif is absolutely extinguished and passes in favour of the Almighty, and a mutawalli is appointed to administer the waqf. The beneficiaries have only the interest in the trust to the extent mentioned in the trust.

	Trust	Waqf
1.	The existence of a religious motive is not necessary for trust.	There should exist a religious motive behind creating a waqf.
2.	A trustee **may** be beneficiary.	A settlor, except a Hanafi one, is not entitled to keep aside any **benefit for himself.**
3.	There has to a lawful object.	The object has to be one which is charitable, pious or religious according to the Muslim faith.
4.	Involves double ownership- equitable and legal. The property vests in the trustee.	The ownership of the waqf is extinguished and the ownership is vested in God.
5.	The trustee has superior powers of alienation because he is the legal owner.	Mutawalli is a mere receiver and manager.
6.	A trustee does **not** have the power to demand remuneration.	Mutawalli has the power to **demand remuneration**
7.	It is not necessary that a trust may be perpetual, irrevocable or inalienable.	Property is **inalienable, irrevocable and perpetual**
8.	Indian Trusts Act, 1882 **applies** to trust.	Indian Trust Act, 1882 is **not applicable** to

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INHERITANCE OF LAW

GENERAL PRINCIPLES OF INHERITANCE: -

The. Quran says:. God hath thus commanded you concerning your children. A male shall have as much as the share of two females but if they be females only and above two in number, they shall have two-thirds part of what the deceased shall leave, and if there be but! one, she shall have the half, and the parents of the. deceased shall have each of them a sixth part of what he

shall leave, if he had a child; but if he have no child, and his parents be his heirs then his mother shall have the third. part and if he have brethren, his mother shall have a sixth part after the legacies; which he shall bequeath, and his debts be paid. whether your parents or your children be of greater use unto you. Moreover, you may Claim half of what your wives shall leave, if they have no issue; but if they have issue, then ye shall have the fourth part of what they shall leave, after the legacies which they shall bequeath and their debts be paid; they also shall. have the fourth part of what ye shall leave in case ye have no issue; but if ye have issue, then they shall have the eighth of what ye shall leave after the legacies which he shall bequeath and your debts be paid. And if a man or woman's substance be inherited by a distant relation and he or she have a brother or sister, each of them two shall have a sixth part of the estate; but if there be more than this number they shall be equal sharers in the third part, after payment of the legacies' which shall be bequeathed, and the debts without prejudice to the heirs. .

They will consult thee for thy decision in certain cases, say unto them. God; giveth you these determinations concerning the more remote degrees of kindred. If a man die with6ut issue and have a sister, she shall have the half of what he shall leave, and he shall be heir to her; in case she have no issue; but if there be two sisters, they shall have, between them, two third parts of what he shall leave; and if there be several both brothers and sisters, a male shall have as much as the portion of two females.

It was observed by the Privy Council in Murtaza Hussain Khan vs. Mohammad Ali Khan that the Quran did not sweep away the then existing laws of succession, but made a great number of amendments. The Sunnis and the Shias have differently interpreted those. amendments. The Sunnis to .some extent allow the principles of the pre-Islamic customs to stand, and they add or,

alter those rules in the specific manner mentioned in the Quran and by the Prophet: The Shias, on the other hand .have deduced principles and fused these principles with the pre-existing customary 'law~ In doing so they have raised a completely altered set of rules. Both the Sunnis and the Shias are generally agreed on the principle by which the individuals who are entitled to inheritance' in the estate of the deceased can be distinguished from a numerous body 'of relations of the , deceased- that is, a distinction between the inheriting and non-inheriting relations. Certain settled principles have emerged in making a distinction been the inheriting and non-inheriting relations. It is to be remembered that no court is permitted to recognize a "line of succession unknown to Muslim law, unless it is amended by Parliament as has. been done in Pakistan by the Muslim Family Law Ordinance, 1961, where the arrangements made by a deed of settlement .were an' attempt to limit the succession of male heirs only to the exclusion of the female heirs, it was held that the disposition in disguise created a !line of succession unknown to the Muslim law and as such the deed was bad in the eye of law

(i**). PROPERTY**

The Muslim law makes no distinction between movable and immovable property for the purposes of inheritance. Only one distinction recognized by the Shia law is that a childless widow is not entitled to a share in the land belonging to her husband. Land does not include buildings or trees standing on it; she is entitled to a share in the value of such buildings etc.

Under Muslim law, there is no 'joint family property' or 'separate property'. Heirship does not necessarily go with membership of the family. A 'member' of the family may not be an heir, and vice versa. The institution of joint family is a foreign concept in Muslim law. **It** is not contrary to law, however, .for a Muslim adult male to hold assets and carry on business on behalf of other members of the family. Such practice is common in' Andhra Pradesh~ Such a case will be an instance of partnership (express or implied) and the adult will stand in fiduciary relationship to other members. Thus when it was found that two brothers had used for themselves the. goodwill of their father's firm after his death and also the shares of other members under their control entirely to their own advantage, it was held that they stood in' fiduciary relationship to the other members and the provisions (Section 23 and 28) of the Trusts Act applied to the two Joint family property not being recognized, the principle of survivorship is also not known to Muslim law. The heirs of the deceased take their shares' as tenant in common, and not as joint tenants with rights of survivorship. They are separate co-sharers. Acquisitions by one member are not thrown in a common purse, nor debts incurred by one are to be shared by others. In case of a joint business, the rules of partnership will apply and the partnership would

PRINCIPLE OF REPRESENTATION :-

Fyzee says that the word 'representation' has several meaning in law. For instance, we may speak of representation to the estate of a deceased man, and in this context we speak of 'personal representatives' i.e., executors or administrators. The second meaning is the process whereby one person is said to 'represent' the share receivable by him through another person, who. was himself an heir. Here, we are concerned with this second meaning.

The doctrine of representation (or, more properly. of Stirpital Succession), however, could be used in a limited way; that is, for deciding the quantum of the share of any given person, in case he is entitled to inherit.

According to the Sunni Law, the expectant right of an heir-apparent cannot pass by succession to his heir, nor can it pass by bequest to a legatee under his will. According to the Shia Law, it does pass by succession in some cases.

NEARER IN DEGREE EXCLUDES THE MORE REMOTE Within the limits of each class of heirs, an heir nearer in blood excludes

the more remote. Both schools, though really covered by the former, recognize this rule, but there is great divergence as to the mode of its application in consequence of the difference in the classification of heirs. For example, the Sunni group the heirs under two heads, viz. agnates and cognates; the agnates and cognates are again respectively subdivided into descendants, ascendants and. collaterals. The object of this division and subdivision is to indicate the order of succession, and the rule applies to each class of heirs, but not to the heirs of the different classes. For instance, a son will take in preference to a son's son; both being the first class of heirs; but a son's son will take the residue in preference to the father; although the latter is nearer than the former, because the father is included in the second class of heirs,

Similarly, the Shias divide the heirs into three classes without the distinction between agnates and cognates .. Each of these classes is subdivided into two branches; the above rule applies to the heirs of the different classes, but not to heirs of the two branches of the same class. For instance, the parents and descendants from the first class and are its two branches; accordingly, a great grandson, although he will not exclude the father, will take in preference to the grandfather or brother notwithstanding that these are nearer in kinship, for they belong to different classes.

Similarly, a grandfather cannot exclude a brother's grandson, for they belong to different branches of the same class. Thus the rule must be understood to be subject in its application to the classification of heirs; in which respect only there is a distinction between the. two schools, the Sunnis prefer the nearer in degree to the more remote, in the succession of male agnates only, whilst the Shias apply the rule of nearness or propinquity to all classes without distinction of class or sex. If a person dies leaving behind him. a brother's son and a brother's grandson, and his own daughter's son,' ---- among the Sunnis, the brother's son being a male agnate and nearer to the deceased: than' the brother's grandson, takes the inheritance in. preference to the others; whilst among the Shias the daughter's son, being nearer in blood, would exclude the others.

SPES SUCCESSIONIS NOT RECOGNISED

.The right of an heir-apparent comes into existence for the.' first time on

. .

the death of the ancestor, and until then his right to succeed is' rioting more

than a mere spes successionis . The Muslim Law "does not recognize any ... interest expectant on the death of another! and till that death occurs which by force of that law gives birth to the rights as heir in the person entitled' to it according to the rules of succession, he possesses no right at all". As such, when a son sued the donee in whose favour a gift was made by the father alleging that gift was procured by undue influence must be dismissed

VESTED INHERITANCE

A 'vested inheritance' is the share, which vests in an heir at the moment of the ancestor's death. If the heir dies before .distribution, the share of -the

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.inheritance, which has vested in him, will pass to such persons, as are his heirs at the time of his death. The shares therefore are to be determined at each death

SUCCESSION TO DECEASED (MURDERED)

A person causing the death of another, under the Sunni Law, cannot inherit to the latter, no matter whether the person is killed intentionally or by accident. But under the Shia Law, homicide is not a bar to succession unless the death was caused intentionally.

An act, however, committed by an infant or an insane person which causes death, does not exclude such infant or such insane person from succeeding to the estate of the deceased. Or, if a person were to kill another in justifiable war, or when inflicting punishment under the direction of the law, such person would not be excluded from the inheritance of the person killed. Being the indirect cause of a person's death without any intention is not a sufficient ground for excluding from his inheritance, as for instance, when a person has dug a well into which another falls,

In other words, any act committed by one person which causes the death of another leads to the forfeiture by the former of his right of inheritance to the latter, if the act is such as would render him punishable under the law

ILLEGITIMATE CHILD :-

A bastard is considered to be the son of his mother only. He has no father; as such neither he inherits from 'father' (the husband of his mother) nor the 'father' iriherits from him. The reciprocal right of inheritance. exists between him and his maternal relations and his mother. They are also his residuary heirs. Of course his other descendants are his/ her spouse, and his descendants, except his father and the latter's relations.

An illegitimate child, in Hanafi Law, cannot inherit from the father, but he or she may. inherit from the mother and its relations and they also inherit from such child. Thus, where a Hanafi woman dies leaving an illegitimate son of her sister and her husband, in Bafata vs. Bilaibi Khanum[38] it was held that the husband will take Y2and the sister's son, though illegitimate, will take the other half as a distant kinsman, being related to the deceased through her mother.

In Rahamat-Ullah vs. Maqsood Ahmad'", it was held that an illegitimate son couldn't inherit from the legitimate son of the same mother. This decision rests on the principle that the "mother's relations" do not include her relations by a subsequent marriage. Following this logic it can be said that the "mother's relations" do not also include her relations by a previous marriage -

On the question of linheritanceby or.from an illegitimate child, the Shia Law is altogether different from the Hanafi Law. Under this School, an illegitimate child does not inherit at all, not even from his mother or her relations. They also do not inherit from the illegitimate child.

APOSTASY

Under the pure Islamic Law, an apostate, (non-Mohammedan) is not entitled to inherit the property from a deceased Mohammedan. In India, the position is different. Section 3 of the Caste Disabilities Removal Act, 1850 removed this disability. A non-Mohammedan is entitled ,to inherit in the property of a deceased Mohammedan whose heir he is, but his non-Mohammedan descendants will not be entitled to inherit the property of a deceased Mohammedan.

SLAVERY

The status of slavery is a bar to succession under the Sunni as well as under the Shia Law. Under the Shia Law, if a person dies leaving no other heir but a bondsman, his property is to be sold, and the proceeds applied to the emancipation of the slave. But when he dies leaving one heir free and another a slave, the whole would go to the one who is free, though he may be more remote, to the exclusion of the bondsman though he be nearer to the deceased. Both the Sunni and Shia' laws accept this principle. But the Sunnis do not recognize the principle of selling the property for utilization of the sale proceeds for the emancipation of the slaves. They hold that under the' circumstance the inheritance escheats to the Bait-ul-Mal.

As the status of slavery does not exist in India (concept of Slavery obsolete by the Act V of 1843), this rule of Muslim Law has only an antiquarian interest.

THEORY O F PROPINQUITY

Propinquity means nearness in blood. In determining the preferential claims of the heirs, the Shias adopt the principle of consanguinity, and ignore those of agency. They prefer the nearest kinsmen to those more remote. The Sunnis, on the other hand, fully recognize the distinction between agnates and cognates. They treat the cognates as "distant kindred", who are neither sharers nor residuaries. The theory of propinquity IS fully recognized by the Shias, but partially by the Sunnis.

Creation of Waqf

1. Muslim law does not prescribe any specific way of creating a 'Waqf'. If the essential elements as described above are fulfilled, a 'Waqf' is created. Though it can be said that a 'Waqf' is usually created in the following ways –
    a. By an act of a living person (inter vivos) – when a person declares the dedication of his property for 'Waqf'. This can also be done while the person is on death bed (marj-ul-maut), in which case, he cannot dedicate more than 1/3 of his property for Waqf.
2. By will – when a person leaves a will in which he dedicates his property after his death. Earlier it was thought that Shia cannot create waqf by will but now it has been approved.
3. Life gifts made which donor labours under mazr-ul-maut, the waqf made during death illness will operate only to the extent of one third of the property without the consent of the heirs of the waqif.
4. Lapse of time frequently renders it difficult or impossible to establish dedication by direct evidence but waqf may be established by evidence of immemorial user.

Legal Incidents of Waqf

1. Dedication to God - The property vests in God in the sense that nobody can claim ownership of it. In Md. Ismail v. Thakur Sabir Ali (1962), Supreme Court held that even in waqf alal aulad, the property is dedicated to God and only the usufructs are used by the descendants.
2. Irrevocability - In India, a waqf once declared and complete, cannot be revoked.
3. Permanent or Perpetual - Perpetuality is an essential element of waqf. Once the property is given to waqf, it remains for the waqf forever. Waqf cannot be of a specified time duration.
4. Inalienable - Since waqf property belongs to God, no human being can alienate it for himself or any other person. It cannot be sold or given away to anybody.

5. Pious or Charitable Use - The usufructs of the waqf property can only be used for pious and charitable purposes. It can also be used for descendants in case of a private waqf.
6. Power of Court's Inspection - The courts have the power to inspect the functioning or management of the waqf property. Misuse of the property of usufructs is a criminal offense as per Wakf Act.1995.

Case Laws

- Karnataka Board of Wakfs v. Mohd. Nazeer Ahmad, (1982):
  - The Karnataka High Court held that the dedication of house by a Muslim for use of all travelers irrespective of religion and status was held not to be a 'Waqf' on the ground that under Muslim law a 'Waqf' should have a religious motive and it should be only for benefit of Muslim community, and if it is secular in character, the charity should be to the poor alone.
- Baqa Ullah Khan v. Ghulam Siddique Khan, (1955):
  - There was no express mention of any ultimate gift to charity, but the Allahabad High Court held that the waqf was valid because an ultimate gift to charity was implied in the very word 'Waqf'.

Valid Objects of Waqf

- Mosque and provisions for Imams to conduct worship.
- Celebrating the birth of Ali Murtaza
- Repairs of Imambaras.
- Maintenance of Khankahs.
- Reading the 'Quran' in public places and also at private houses.
- Maintenance of poor relations and dependant.
- Payment of money to 'Fakirs'.
- Grant to an 'Idgah'.
- Grant to the college and provisions for professors to teach in colleges.
- Bridges and Caravan Sarais.
- Distribution of alms to poor persons, and assistance to the poor to enable them to perform pilgrimage to 'Mecca'.
- Keeping 'Tazias' in the month of 'Moharram', and provisions for camels for religious processions during 'Moharram'.
- Celebrating the death anniversary of the settler and of the members of the family.
- Performance of ceremonies known as 'Kadam Sharif'.

- The construction of a cobat or free boarding house for pilgrims at ‘Mecca’.
- Performing the annual ‘Fatcha’ of the members of his family.
- The following are not recognized as valid objects of the waqf, by the Muslim law.
- Objects prohibited by ‘Islam’, e.g., erecting or maintaining a church or temple.
- A waqf for the repairs of the waqif’s secular property is invalid according to Shia law.
- Providing for the rich exclusively.
- Objects which are uncertain.
- A direction to spend a certain sum of money for feasting ‘Cutchi Memons’ every on the anniversary of the anniversary of the settlor’s death is not valid.

Declaration of gift by the donor

In the case of Md. Hesabuddin v Md. Hesaruddin, where Muslim women transferred her property by the way of Gift or Hiba and the gift-deed was not on the stamp paper it was held to be valid by the Gauhati High Court.

The declaration should also be expressed. A gift made in an unambiguous manner is null and void.

Transfer of possession by the donor and its acceptance by the donee

In the case of Noorjahan v. Muftakhar, the court held that where the declaration of the gift is made by the donor but afterwards till his death all the profits made out of the property is taken by the donor himself the gift is invalid and not effective in nature since the transfer of possession has not taken place.

The mode of delivery of possession is dependent upon the nature of the property. The mode of delivery can be Actual or Constructive.

Hiba-il-iwaz

In the case of Khajoorunissa vs Raushan Begam, the facts were that the father gave one-third of his property to his eldest son in return of Rs.10,000 but the consideration was never paid. It was held that the quantum of consideration is not important, the only thing important is that the consideration must be bona fide.

When the delivery of possession is not necessary:

In the case of Humera Bibi v. Najmunnissa, in this case, was an old lady who used to live with his nephew. She transferred the property to his nephew who was living with her in the same house. However, when the property was given on rent, the rent was collected in the name of the donee. The court held the gift valid.

In the case of Fatma Bibi v. Abdul Rehman, the husband made an oral declaration of transfer of property in the name of his wife. The stepson who was living with the mother challenged the validity of the gift as no delivery of possession was made. The court held that the gift was valid.

Muslim woman wanting maintenance

Controversy regarding CrPC applying to Muslim women

The key topic of contention throughout the years was whether Section 125 applied to a Muslim woman wanting maintenance once her iddat period had ended. The full history of Muslim women's judicial battles for their entitlement to maintenance under Section 125 has been examined in detail further.

Mohd Ahmed Khan v. Shah Bano

Facts: Mohd Ahmed Khan v. Shah Bano (1985) was the beginning of the fight for the right to maintenance. In this case, Shah Bano and Mohd Ahmad Khan decided to get married in Indore in 1932. Mohd Ahmed Khan married another woman who was much younger than him after 14 years of marriage. After marrying his second wife, Ahmed Khan asked Shah Bano and her 5 children to move to a separate residence in 1975. In April 1978, she filed an action for maintenance under Section 125, alleging that she was being denied the Rs 200 in maintenance that her husband had promised her. Shah Bano was separated by her husband in November 1978 after he said "Talaq" three times. In Muslims, such Talaq is irreversible.

In the trial court, the husband argued that Shah Bano was not entitled to support because she was no longer his lawfully married wife. He had previously given her the Mehr amount and taken care of her during her Iddat. The trial court dismissed the husband's argument and directed him to pay her Rs 25 in maintenance each month. Shah Bano petitioned the Madhya Pradesh High Court to raise the maintenance payment from Rs 25 to Rs 179. The Madhya Pradesh High Court approved her appeal. Mohd. Ahmad Khan went to the Supreme Court, upset by the order.

Issues raised

- Whether a divorced Muslim lady is included in the "WIFE" definition?
- Whether it will take precedence over personal law?
- What is the sum payable on divorce? Whether the meaning of Mehr or dower is not summed payable on divorce?
- Whether there is a problem between Section 125 and Muslim Personal Law when it comes to a Muslim husband's need to give maintenance for a divorced wife?

Judgment

The appeal of Mohd Ahmad Khan was dismissed by the Court and ruled that Section 125 is a secular maintenance provision. According to the Apex Court, Section 125(3) of the Code of Criminal Procedure extends to all citizens irrespective of faith, and so Section 125(3) of the Code of Criminal Procedure extends to Muslims without discrimination. The Court went on to say that if there is a dispute between personal law and Section 125, Section 125 takes precedence. It makes it perfectly clear that the provisions of Section 125 and the Muslim Personal Law do not conflict when it comes to the Muslim husband's responsibility to give maintenance for a divorced wife who is unable to support herself.

In this case, the Apex Court correctly held that because a Muslim husband's responsibility to his divorced wife is limited to the extent of 'Iddat,' although this circumstance does not envisage the rule of law stated in Section 125 of the CrPc., 1973, the husband's duty to pay maintenance to the wife stretches further than the iddat period if the wife does not have adequate funds to maintain herself. The court went on to say that this provision, according to Muslim law, was very much against humanity or incorrect because a divorced woman was unable to maintain herself. The payment of Mehar by the husband upon divorce is insufficient to relieve him of his obligation to give the wife maintenance.

After a lengthy legal battle, the Supreme Court eventually decided that if a divorced woman is capable of caring for herself, the husbands' legal obligation ends. However, if the wife is unable to support herself after the Iddat period, she would be entitled to maintenance or alimony under Section 125 of the CrPC.

Post Shah Bano judgment

Muslim fundamentalists were outraged by the decision given in Shah Bano's case, which they saw as being in direct opposition to their religion. The Muslim Women (Protection of Rights of Divorce) Act 1986 was enacted by the then-Congress administration led by Rajiv Gandhi in order to pacify this segment of society. This law overturned the court's decision and formalised the Muslim Law on Divorce,

which barred a Muslim woman from the ability to seek support from her ex-husband. This act's Section 3 states:

- A Muslim lady is only allowed to be maintained within her period of iddat.
- If she has children before or after the divorce, she is allowed to get maintained for a term of two years from the date of the children's birth.
- If her spouse fails to provide for her needs, she is entitled to compensation from the relatives who are supposed to receive her property when she passes away.

It's ironic that the Act is called the Muslim Woman (Protection of Rights on Divorce) Act because it simultaneously deprived Muslim divorced women of any rights given by the Holy Quran.

Following this Adv. Danial Latifi, Shah Bano's counsel, filed a case at the Apex Court challenging the Act's applicability to divorced Muslim women following marriage. As a result, in Danial Latifi v Union of India (2001), the Court decided that Section 125 permits Muslim women seeking maintenance from their husbands for durations further than the Iddat and that any arrangements for the wife's sustenance beyond the Iddat must be established by the husband during the Iddat. It was also done to give regard to the constitutional validity of Section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The legislative provision should be interpreted in such a way that it does not contradict the Indian Constitution's Articles 14, 15, and 21. This case struck the right balance between personal rights and secular obligations.

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