

Unit I

Mohammedan Law : Origin, Development, Sources, Schools, Application, Interpretation & Conversion

** Origin of Muslim Law **

The place of Muslim law's origin is Arabia where Mohammad promulgated Islam. Muslim law originates from divinity. It is that law which is established by a communication from God with reference to man's act, expressive either of demand or indifference on his part or being merely declaratory. The entire system of Muslim law, as well as of theology, ritual and private ethics have been built upon two foundations -

- i) the Quran
- ii) the Traditions (Sunnah and ahadith)

1) The Quran

- i) Divine Communication & revelation - The Quran is the divine communication and revelation to the Prophet of Islam. It is the first and great legislative code of Islam.
- ii) It is declared to be revealed to Prophet at different times in various portions during the last twenty years of his life. The Quran is Al-Furqan i.e. the one showing truth from falsehood, right from wrong.
- iii) Wilson : Anglo Mohammedan Law - Wilson is of the opinion that Quran has the emanations of Mohammed's own brain, under conditions of abnormal strain and excitement, as he concentrated his attention on the problems that came one after the another to be solved by him.
- iv) Criticism of Wilson's view - The view expressed by Wilson does not hold good because the distinction between Quran and Sunnah has been expressed beyond doubt. Moreover, the language of Quran is almost different from Hadith or as spoken in Arab.

2. Traditions - Sunnah and Ahadis

- i) Acceptance of Book of God - After the death of Prophet, the Quran was accepted as a Book of God as an all sufficient guide for this world. It was reverently remembered, recited, written down, studied and obeyed.
- ii) Traditions introduced by practice of Prophet - The conquest of the world outside Arabia brought Muslims to face with new problems. These problems were solved by a process of interpretation by the companions of the Prophet by means of life of Prophet and memories of the sayings of the Prophet.
- iii) Hadis - There are varying texts of the traditions (Hadis) according to the Prophet's saying and doing and when it comes to their application, different schools of law emerge with their own characteristics.

* Shariat : The word Shariat literally means "the road to the watering place or the path to be followed". Quran, Sunna, Hadis, Ijma and Qiyas form the body of Muslim common law known as Shariat. It is used to denote the whole of Muslim religious law. It includes all human acts and its regulation. It is not law in modern sense, but contains an infallible guide to ethics.

Religious Injunctions under Shariat :-

Farz i.e. duties which are strictly enjoined on Muslim
(prayers five times a day)

Haram i.e. acts which are strictly forbidden to Muslims
(wine)

Mundub i.e. things which are advised to Muslims to do
(additional prayers or id)

akruk i.e. things which are advised to Muslims not to do
(certain kinds of fish)

5. Taiz i.e. things about which Islam is indifferent / legal / valid (travelling on sea/air)

* Fiqh: Fiqh literally means "intelligence". It implies the exercise of intelligence in deciding a point of law in the absence of a binding command from the Quran. Fyzee defines it as "knowledge of one's rights and obligations derived from the Quran or the Sunna of the Prophet or the consensus of opinion among the learned (Ijma) or analogical deduction (Qiyas)".

The classical theory of Fiqh was formulated as a system first by Imam Shafi which is universally accepted by Islamic scholars. Schacht in his book "Origin and Development of Islamic Jurisprudence" states that the spirit of law in Islam is religious and ethical. It draws its inspiration from the Quran and the teaching of Prophet Mohammad but the content of law is based upon pre-Islamic customs and usage.

* Difference between Shariat and Fiqh

Shariat

Fiqh

- | | |
|--|---|
| i) Shariat embraces all human actions within its ambit | i) Fiqh deals with legal acts alone |
| ii) Shariat reminds about revelation and that knowledge which no one could have possessed except for Quran/Hadis | ii) The power of reasoning is the chief factor |
| iii) God and Prophet laid down the path of Shariat | iii) The whole structure is created by human agency |
| iv) The grades of approval or disapproval are various. | iv) The action is legal or illegal, permissible or not permissible. |

** Development of Muslim Law **

The process of development of Muslim law may be divided into five periods.

The period of Quranic Percepts (622-623 A.D)	The period of Orthodox Khilafat (632-661 A.D)	The period of theoretical study & Collection	The period of evolution of Ijtihad and Taqlid	5th Period (1924 A.D present)
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First Period: The Period of Quranic percepts (rule about behave/think)

- i) The flight of Prophet i.e. Hijra marks the beginning of Muslim era. The Prophet took the complete responsibility as a sovereign, first over the city of Madina and ultimately over Arabia. Prophet ruled Mecca after defeating it with his followers.
- ii) Madinah Surahs & Meccan Surahs - Madinah Surahs gives guidance to a growing social and political community and Prophet is an example as law-gives and reformer. - Meccan Surahs gives guidance to the individual soul and Prophet as an example of warner.

iii) Judicial Decisions and Traditions of Prophet came into existence during this period. to show something.

- i) Wahi (Inspiration): a) Zahir (manifest) Quran (words of God)
- b) Batin (implied) Hadis (actions, sayings, teachings, judicial decisions of the Prophet)

2nd Period: The period of Orthodox Khilafat (following old traditions, i) death of Prophet & division of Muslim community - The Prophet died without any son and without appointing any successor. The Muslim community was divided into two groups to decide regarding the successor. One group

was headed by Prophet's daughter Fatima and other group was headed by Ayesha (widow of Prophet and daughter of Abu Bakar)

ii) Contentions of groups: Prophet's daughter Fatima's ^{group} contended that Ali (cousin and son-in-law of Prophet) was the rightful successor of Prophet whereas the other group demanded election

iii) Election and Caliph: The successor of Prophet was elected by way of elections and Abu Bakar became the first Khalifa or Caliph followed by Umar and Uthman and Ali. Shias hold that Ali was the first caliph and others were not rightful successors.

iv) Period of Sunnah: This period ended with the assassination of Ali followed by accession of Muavia and the beginning of Umayyad Dynasty. This period is also known as period of sunnah as close adherence was kept to the conduct and sayings of the Prophet.

v) A collection of whole Quran was made and put in writing under the third Caliph Uthman.

vi) Period: The period of theoretical study and collection

i) Importance of Traditions: During the reign of Umayyads traditions as source of law was realized. The Commandments and Prohibitions of God that were borne in the hearts of men drew their origin from Book of God and from the doing and sayings of the Prophet. With the increase in traditions, it became necessary to make collections and to separate those which were authentic from those which were of doubtful authority.

ii) Collections of Traditions: The first collection of traditions was made by Abu - Ibn - Shurab - az - zuhri. The collection made by Abdul Malik Ibn Juraiji was arranged not

according to subjects but according to the name of the companions and were thus called Masnads.
 Malik Ibn Anas was the one who arranged and classified traditions according to subjects which was called Musannaf.

iii) Defeat of Umayyads and Emergence of schools:
 Umayyads were defeated and was taken by Abbasides of Baghdad. where learned men of Islam studied Islamic Jurisprudence. The four schools of Sunni law emerged :-

- a) Hanafi School - named after Imam Abu Hanifa (669-767 A.D.). was the most liberal school as it relied on the principles of Qiyas
- b) Maliki School - named after Malik-Ibn-Anas (713-795)
 It gives importance to the traditions of the Prophet & Imam
- c) Shafi School - founded by Mohammad-ash-Shafi (767-820)
 It gives importance to the doctrine of Qiyas
- d) Hanbali School - founded by Imam Ahmad Ibn Hanbal (780-855). He adhered to principles of Hadis.

th Period: Period of evolution of Ijtihad and Taqlid (upto 1924 AD)

- i) Jurists interpretation and Emergence of Doctrines - The interpretation by jurists continued and led to the emergence of two parallel doctrines i.e Ijtihad and Taqlid
- a) Ijtihad - studying intensely to arrive at a sound opinion or judgment (forming one's own opinion) - person following it were known as Mujtahide
- b) Taqlid - following the opinion of another person without knowledge of the authority for such opinion (man is street being ignorant follow the opinions of those who knew it).

During this period, the growth and development

of law was stopped
th Period: 1924 AD to the present day

i) Abolition of Caliphate - This was the modern period wherein Caliphate was abolished. There was no Caliph to execute and enforce Shariat.

ii) Shariat as a moral and religious code of conduct - Shariat lost its juristic sanction and was codified in modern Islamic countries like Tunisia, Turkey, Egypt, etc.

Sources of Muslim Law

SOURCES

PRIMARY

1. Quran
2. Sunnat
3. Ijmas
4. Qiyas

SECONDARY

1. Urf / Custom
2. Judicial Decisions
3. Legislation
4. Justice, Equity and good conscience

* Primary Sources

1. Quran -

- i) The word Quran is derived from the Arabic word Quam which means to read.
- ii) Divine communication and revelation to Prophet - 1st source
- iii) Structure - 114 Chapters ^(Suras), 6666 verses (Ayat), 200 verses are concerned with legal principles, 80 verses are concerned with marriage, dowry, divorce and inheritance.
- iv) Portion of Quran - Madina - legal principles (revealed to Prophet) Mecca - philosophy of life & Islamic religion
- v) Collection of portions - Abu Bakar first time collected and arranged the various passages of Quran. It was ordered and revised by Umar, the third Caliph.
- vi) Arrangement of Book - Zaid, Abdullah, Said, Abdur Rahman. The work was collected and presented to Khalifa who caused a number of copies to be made and sent them to different centres of Islam.
- vii) Doctrine of Repeal - Naksh means 'to delete'. It means repeal of a legal provision by another legal provision. (the application is repealed but text remains)
- viii) Aga Mohammad Jaffer v. Kooloom Beebee - PC held that

where a passage of Quran has been interpreted in particular manner in the ^(guidance) Hedaya and ^(personal lead/prayer) Imama, it was not open to the courts to construe the same in different manner.

2. The Sunnat and Ahadis (Traditions)

i) Revelations (Wahi) - Zahir (manifested) Quran

Batin (internal) opinions of Prophet

Absence of Revelation - Prophet exercised his own judgment

- Inspired by God.

- doing, allowed by Prophet - Sunnat

ii) Sunna - model behaviour of the Prophet.

Hadis - narrations of what Prophet did/allowed. It was not reduced to writing during the lifetime of Mohammad

Hadis < Khabar-al wahid - confirmed by one person (weak)
confirmed by several declarations (strong)

iii) Traditions < Sunnat < (a) fail (did) & gaul (enjoined by words)

Ahadis (c) tuqis (things done in presence w/o disapproval)

- i-mutwatis - public & universal

- i-mashhoor - known to majority - not universal

- c-wahid - depends on isolated individuals

iv) Compilation of Hadis - The companions of the Prophet used to take Sunnah as binding authority and were very anxious to learn it by heart for themselves and for the purpose of further transmission.

Eg: Anas bin Malik - servant of Prophet at Madina - ^{noted} points of what Prophet said during his discourse & other occasions - read them to Prophet - corrected - fair note was made.

iv) Misconception - 1st - orally transmitted & not recorded during the period of Prophet & 2nd - The sense uttered by the Prophet could change during oral transmission. Misconception was due to misunderstanding of the term 'Haddathar' (it was reported to us) → not oral but referring w/o of authors.

ii) Ijma
 1) Defⁿ:- Sir Abdul Rahim - "agreement of the jurists among the followers of Prophet Mohammad in a particular age on a particular question of law".

ii) Essentials :-

a) The consensus - jurists are of the view that unanimity is a pre-requisite for Ijma. Any dissent - no Ijma, some jurists hold that Ijma could be constituted by majority.

* Stages - 1 people express views

2 discussions and debates

3 dropping differences & agreeing on one point.

b) The jurists - opinions of experts are admissible. Since jurists being the experts, therefore only their opinions are relevant for Ijma. Opinions could be required for matters such as the rites of marriage, rules of divorce, etc.

c) Jurists of a particular period - Ijma of one age may be reversed by subsequent Ijma of the same age. Similarly, Ijma of one age may be superseded by Ijma of a subsequent age. But that of companions cannot be reversed.

d) Jurists to be Muslims -

e) Consensus on a religious matter - fact / law

Quran based on

Prophet's revelation

Govt. of Muslims

having representative capacity.

iii) Repeal - means abrogation of the legal effect of a text by another text. Ijma - not a text - cannot repeal Quran / Sunnah.

iv) Kinds .

a) Ijma of the companions of the Prophet - unrepealable, accepted by all,

b) Ijma of Jurists - divergent opinions

c) Ijma of People; regular dealings

no. of jurists
 procedure
 majority / unanimous

4) Qiyas

i) Meaning - Qiyas means reasoning by analogy from Quran, Sunnah and the Ijma.

ii) Conditions for the validity of Qiyas:-

- a) Original source from which Qiyas is deduced must be capable of being extended.
- b) Original order of the Quran or Hadith to which the process of Qiyas is applied should not have been repealed.
- c) Result of Qiyas should not be inconsistent with any verse of Quran or established Sunnah.
- d) Qiyas should be applied to ascertain a point of law and not to determine the meaning of words used.
- e) The deduction must not be such as to involve a change in the law embodied in the text.

iii) Non-Acceptance - Qiyas is of no value to persons belonging to the school of Ahmad-Ibn-Hanbal. The Shias also do not accept Qiyas because they are of the opinion that if law need to be enlarged it must be by Imam and no one else. The Shafis also regard Ijtihad and Qiyas as contradictory to their own views.

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 ** Application of Muslim Law

MUSLIM LAW

Muslims by birth

Muslims by conversion

1) Muslim by birth -

- a) Person born in Muslim faith and has never been proved to have adopted any other religion - is a Muslim
- b) Presumption of Sunnis - where it is not shown nor alleged that parties are Shias, there is a presumption that they are Sunnis, to which sects the great majority of the Muslims of this country belong. - is/are Muslim
- c) Renounce sect / sub-sect - Every adult Muslim, whether male or female may renounce the doctrines of the sect or sub-sect to which he or she belongs and adopt the tenets of the other sect or sub-sect and he or she shall thenceforth be governed by the law of the new sect or sub-sect.

2) Muslims by conversion - The converts to Islamic faith must be considered to have substituted the religion of Islam from the previous religion.

- i) Person subject to Muslim Law - When the question is whether a person is a Muslim/not, it will be decided in accordance with the tenets of the particular sect which he professes. If his conduct / belief does not conform - the court will apply law in accordance to justice, equity and good conscience.
- ii) Choice of Law when parties are not to the same sect - same sect - same Law, different sect - law of defendant will apply.
- iii) Muslim Law applies to Non-Muslims - For instance, a

married woman who renounces Islam and converts to a other religion cease to be a muslim But under section of Dissolution of Muslim Marriage Act 1939, such a woman who renounces Islam may obtain a decree for the dissolution of her marriage on any grounds mentioned 3.2 of this Act.

** Interpretation of Muslim Law **

1. Interpretation of Quran - It is the duty of the court see how the text under consideration has been interpreted by the Muslim Jurists of recognised merit and authority and the exposition of the jurists who are regarded authoritative should be followed.

Aga Mohammad Taffer Khan v. Kookom Beebee

The PC held that where a passage of Quran has been interpreted in a particular manner both in Hedaya (work on Sunni Law) and in Imamia (work on Shia Law) is not open to the court to construe the same in different manner.

2. Interpretation of Hadis - When there is difference of opinion among the Muslim jurists, the point in dispute cannot be decided by the court itself but reliance should be placed on the opinion of recognised jurists and in case of divergence - on their comparative authority.

3. Interpretation of Hanafi Law - Abu Hanifa and his disciples Abu Yusuf and Imam Mohammad. All agree on a point of difficulty, in case of difference of opinion, the general rule is:

- i) Difference b/t AH and AY+IM - AY+IM prevails
- ii) ———— " ———— AH and IM - AY prevail (opinion of Imam Mohammad)
- iii) All three different - AY prevail
- iv) Conflict + no rule to guide court - opinion based on Justice, Equity & Good Conscience

- * Interpretation of old Arabic words and terms. - Many of the old Arabic words have now acquired new significance in India and so in interpreting the old text they should be taken in the old sense and meaning. If it is not possible to follow the letter of the original Islamic law, the spirit of law should be kept in view, and the principles underlying it should be adhered to as far as possible.
- * Duty of Court in interpreting Muslim law - When a great Muslim jurist has construed a particular precept of Muslim law in a particular way, the interpretation should be followed without referring back to original authorities. This makes Muslim law certain.
- * Doctrine of 'stare decisis'. - It would be dangerous for a Court to go back upon a course of decisions and not to adhere to well recognised principles. Precedents should be followed.

** Conversion to Islam **

* Who may convert?

A non-Muslim who has attained majority and is of sound mind may embrace Islam in any of two modes:

- a) he may simply declare that he believes in the oneness of God and the Prophetic character of Mohammad; or
- b) he may go to a mosque, to a person who is well versed in Islamic theology (Alim) where he utters Kalma (Lailaha-ill-Allah Muham-mad-us Rasoolullah) before Imam, whereupon he is given a Muslim name by the Imam.

The conversion should be a bonafide one.

Rikhya Bibi v. Anil Kumar, a Hindu woman accepted Islam in order to get rid of her Hindu husband (impotent).

It was held that her conversion to Islam was colourable and was effected with intent to commit a fraud upon the law and was therefore invalid and ineffective.

* Conversion to Islam and marital rights.

Conversion may take place :-

- a) In a country subject to Muslim law
- b) In a country where the Law of Islam is not the law of the land.

In the first case, when one of the parties embraces Islam, he should offer Islam to the other spouse, and the latter refuses, the marriage can be dissolved.

In the second case, the marriage is automatically dissolved after the lapse of a period of three months after the adoption of Islam by one of the spouses.

In India, the spouse who has become a convert to Islam can sue for divorce or a declaration of dissolution of marriage on the ground that the other spouse has refused to adopt the Muslim religion.

Cases: Sarla Mudgal v. Union of India (1995) 3 SCC 61

The Supreme Court held that the second marriage of a Hindu husband after conversion to Islam with his first wife still living would be invalid. The second marriage would be void under Section 494 of IPC and the apostate husband would be guilty of bigamy.

Lily Thomas v. Union of India AIR 2000 SC 1946

Facts: Hindu wife files a complaint under Section 494 on the ground that during the subsistence of the marriage, her husband had married a second wife under some religion after converting to that religion.

Held: A bigamous marriage is an offence under Section 494.

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read with Section 494. Change of religion does not dissolve the marriage performed u/HMA. Apostasy does not bring to an end the civil obligation or the matrimonial bond but it is a ground for divorce u/s 13 as well as a ground for judicial separation u/s 10 of HMA.

* Effect on Marriage on conversion by :-

i) Muslim husband :- his marriage with his wife is dissolved ipso facto (by that very fact/act). Apostasy

Expressed Implied

I renounce

using

Islam

disrespectful words

ii) Both (H & W) convert to other faith
- marriage remains intact

ii) Muslim wife :- not dissolve ipso-facto. She is however entitled to a decree for the dissolution of her marriage. u/s 4 of Dissolution of Muslim Marriage Act, 1939.

iii) Woman previously from other faith embracing Islam and re-converting to the same faith - marriage dissolved ipso-facto. (Eg - muslim man - Jain woman - converts to Islam, woman ^{re-embraces} reconverts to Jain) (but converts to Christianity marriage not dissolved) (S-4-NA)

iv) Christian man marrying a muslim after conversion - J.J. Chandra v. Abinash (1939) 2 Cal. 12. Christian man converts to Islam, marries a muslim. His previous marriage is valid because u/ML marriage of a muslim with a christian woman (Kitabia) is permitted.

* Conversion to Islam and Rights of Inheritance

i) According to the strict Muhammadan Law, difference of religion is a bar to inheritance. But, by the application of the Freedom of Religion Act, 1850, a convert from Islam does not lose his right of inheritance. (Kitabia - one who believes in Christianity or Judaism)

ii) A Hindu cannot succeed to the estate of a Muslim.
 Eg. Chandra Sek Chedabaram v. Ma Nyion ILR (1928) 6 Ran 243
 Hindu man with wife & children embraced Islam & married a muslim wife, his property will pass to his muslim wife and children and not to his Hindu wife & children.

* Apostasy of guardian

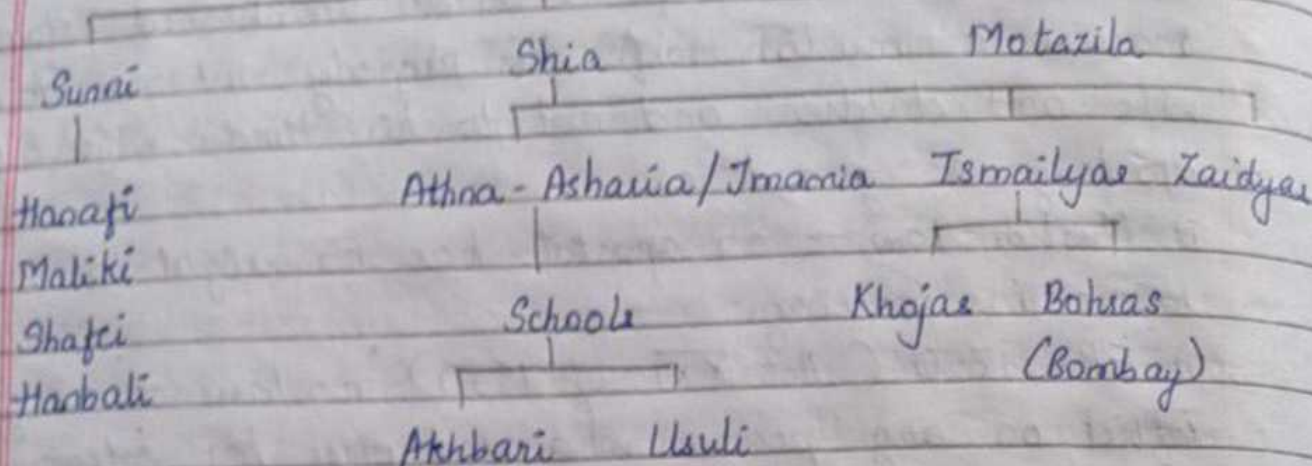
i) Muslim law → an apostate has no right to contract a minor in marriage.

ii) FRA, 1850 (Act XXI of 1850) no law or usage shall inflict on any person who renounces his religion any forfeiture of rights or property.

* Effect of renunciation of Islam on Marriage - When a muslim married couple renounce Islam and embrace another religion their marriage remains intact and is not dissolved.

Jain - Islam - Jain - Christianity

*** Schools of Muslim Law Sects



* Introduction

(The Period of Orthodox Khilafat)

- 1) Death of Prophet and division of Muslim community
- 2) Contentions of the group
- 3) Election and Caliph
- 4) Fatima (widow) - ^{daughters} ~~Sunnis~~ ^{Shias}, Ayesha (widow) - Sunnis.

* Sunnis

- Doctrine based on traditions
- regards decisions of Imams & jurists

Shias

- reject traditions not handed by Ali
- reject decisions

* Sunni Schools

1) Hanafi School (Kufa School)

- Founder - Abu Hanifa an-Numan Ibn Thabit

- Jurists at the time of Abu Hanifa - Hijaz - upholders of traditions belonged to → Iraq - upholders of private opinion

- Reasoning and deduction ability - He was an analytical mind and had clarity of mind and great argumentative talent.
- Title of "upholder of private judgment" and the appellation

"the Great Imam"

- Contribution - laid down the theories & principles of Muslim jurisprudence - reinforced doctrine of Qiyas - propounder of Istihsan (equity) which literally means approbation and been translated as liberal construction or juristic preference
- Abu Hanifa and his two disciples - Abu Yusuf & Imam Mo-ad Ash-Shaybani - developed the thought of their master
- Abu Yusuf - more reliance on traditions, but changed opinion frequently - inconsistent
- Imam Mohammad - disciple of AH, AH, used other traditions for supporting own reasoning - analogy
- Representation - Iraq, Syria, Afghanistan, sub-continent India & Turkish Central Asia.

(B) Maliki School

- Founder - Malik Ibn Anas, a great jurist, Madina, city high juristic traditions (jurist & traditionalist)
- Emphasis on Quran & Sunna; Ijma - when traditions into conflict with each other (of the Mujtahids)
- Contribution - Kitab-al-Muwatta systematised law, M a record of his teachings compiled by his disciple
- Representation - North Africa, Central, West Africa & Spain, eastern coastal areas of Arabia, Morocco.

(C) Shafi School

- Founder - Mohammad Ibn Idris - ash Shafi, Baghdad → Ca
- pupil of Malik Ibn Anas
- Traditional bound & systematic - created distinction rules coming from traditions of Prophet & systematic reasoning, but blend both
- Contributions - founder of classical theory of Mujtahids of usul, perfected doctrine of ijmas - Kitab-al-umum Mukhtsar - composed by his disciples.
(summary of doctrine of Shafi)

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- Representations - lower Egypt, Hejra, South Arabia, East Africa, some parts of Iraq & Asia.
 - (a) Hanbali School
 - Founder - Abu Abdullah Ahmed Ibn Hanbal
 - pupil of Imam Shafi
 - Shafi's doctrine failed to satisfy the orthodox and the fanatics among the traditionalists - not agree to human reasoning - relied on traditions of Prophet; less importance to Imams
 - Contribution - Author of treatises - Musnad al Imam Hanbal, Taat-ul-Rasul, Kitab-ul-Mal, Muwaffak. wrote exhaustive book on Hanbali doctrines, Ibn Taymiyya & others wrote on Siyas & Sgaria.
 - Representations - Saudi Arabia & Qatar.

* Shia Schools

- Founder - Imam Jafar As Sadik, 6th Imam of Imamias
- Shias - do not accept any tradition that does not emanate from the household of Prophet particularly Ali.
- do not accept Qiyas (valid only when Imam could not ~~be~~ be consulted)
- Fourth Imam - Zaynul Abidin - dies - son Zayd - Imam (Zaydis)
- Sixth Imam - Jafar, majority of Shias followed Musa Kazim (known as Ithna Ashari school), minority followed Ismail (elder son of Jafar) (known as Ismailis)
- Majority - Iraq, Syria, Lebanon, & Pakistan
- Minority - Central Asia, East Africa, South Arabia -

Unit II: Marriage, Mahr, Dissolution of Marriage, Guardian-ship

** Marriage **

* Introduction

Marriage i.e. Nikah in pre-Islamic Arabia meant different forms of sex-relationship between a man and a woman established on certain terms. Under the Muslim Law, marriage is considered to be a civil contract.

* Definition / Meaning

The word Nikah is an Arabic word that means union of the sexes.

In Baillie's Digest, marriage has been defined to be a contract for the purpose of legalising sexual intercourse and procreation of children.

* Nature of Muslim Marriage

1) Marriage as a civil contract - proposal (ijab) from one party and acceptance (Qubul), capacity to contract marriage (free consent), repudiation of contract (guardian contract marriage), ante-nuptial/post-nuptial agreement, Breach of marriage contract.

2) Abdul Kadir v. Salima (1886) 8 All. 149

Justice Mahmood - Marriage - not sacrament but civil consecration of vows from Quran - ibadat (devotional act)

3) Marriage as religious sacrament - Though sacramental nature of marriage is considered as an orthodox view but it is also supported by the judiciary.

4) Anis Begum v. Mohammad Istafa (1933) 55 APP 743

- held muslim marriage is both a civil contract and a religious sacrament.

5) Muslim marriage not as a civil contract - cannot be made contingent on future event, cannot be made for limited time (muta marriage), contract of resale - resell wife cannot divorce her husband - if a part of dower

unpaid.

* Essentials of Muslim Marriage

① Proposal and Acceptance - M- ijab-o- qabool i.e. declaration and acceptance

- Man / behalf & Woman / behalf - agree to $\bar{M}$ 1 meeting
- custom - 2 witnesses - woman - dowry amount paid agt - witnessed by 2 adult witnesses
- + 1 relative ↓
- yea → man + 3 people → Gazi - asks man for
- * Rashida khatun = Sk. I. A. ... - 2 r
- ↓ - 1 M

* Rashida Khatoon v. S.K. Islam AIR 2005 Ori. 57

- man - assuring lady for M - cohabits - child - lady claims status of wife - Qⁿ - validity of Muslim Marriage?
 - Held, proposal, acceptance, presence & hearing of witnesses
- Sane

proposal at 1 meeting & acceptance at other - not valid M

- instant case - assurance to marry - not valid.
- Sunnā - witnesses - 2M / 1M + 1F - sane adult / irregular
- Shi'a - ————

Shia - $\frac{11}{12}$ - not necessary at M bts at dissolⁿ - minor
Free will & consent - Absence - invalid - Unless ratified - minor
Impotent - Part -

② Free will & consent - A
Competent Parties

-) Age of marriage - $\leftarrow$ sound mind
attained puberty
understand nature

- ii) Puberty - age at which a person becomes capable of performing sexual intercourse and procreating children.

- Hanafi - completing 15 years, ^{Imam} Shia - female - menstruation
- ~~Mazhari~~ ^{Shafi} ~~Maliki~~ ^{Hanbali}

iii) capacity to be pregnant - B - 12 yrs, G - 9 yrs, in absence of evidence - 15 yrs

iii) capacity to be married. — puberty
sound mind.

minor / lunatic - guardian

v) Guardianship in M (Abs) - minor w/o guardian - nullity
- Order - £/intentional 65/14

- Order - f / paternal GF / brother & other paternal relatives

m / maternal relatives / Govt.

Shias - f/paternal GF.

* Option of Puberty - (Khayar-ul-bulugh)
 - Meaning - minor contracted in M by guardian - minor on attaining puberty may choose ^{to satisfy} _{to repudiate}
 - Traditional law on option of puberty - Minor's m contracted by F/g m-valid and binding, not repudiated, unless acted wickedly / disadvantage. Disability removed by the Dissolution of Muslim Marriages Act, 1939.

* Time of option by the female - where a minor girl is given in marriage by her father / paternal GF, U/S 2(vii) DOMA, she is entitled to dissolution of m, if she proves
 i) she was given in marriage by her father / paternal GF
 ii) m - not consummated
 iii) m - before attaining 15 years
 iv) m - repudiated before attaining 18 years.

* if M - by other guardian - no reasons required for repudiation
 - Shia :- M by f/gf - valid; others - ineffective unless ratified

* Option when to be exercised -
 - By wife - immediately on attaining puberty & being informed of the marriage and of her right to repudiate it.
 - By husband - ~~before~~ after attaining puberty and before satisfying the marriage ^{express declaration of} _{dower paid}

* Aziz Baro v. Muhammad 1925 ^{cohabitation} AU. 823
 - Shia minor girl married to Sunni by father - attained puberty - m - repugnant to her religious feelings.
 - Held - right to repudiate

* Confirmation by civil court - M - not dissolved ipso-facto

*) No Legal Disability / Absence of Impediments (prohibited)

Absolute (void - Batil)	Relative (Invalid - Fasid) (Till the time bar exists)	Prohibitory	Discretionary
① Polyandry - Woman cannot marry - 2nd time - Kharabata x Kharabata - J-Christian - M - G, Muslim - to convert - to domicile in India - to stay by G - to M - K - Farsi - to go - dissolution of M?	① Unlawful conjunction - Muslim Males - cannot marry two women who are so interrelated - if 1-mar - Eg - 2 sisters, aunt & niece - avoid confusion - kindred (dual relation) - removing prohibition - divorce	- Polyandry - Muslim woman marrying non-Muslim	- Pregnant - Prohibited - Divorced - Pilgrimage
② Consanguinity (Qurabat) - blood relationship - man cannot marry - M/GM (ascendants) - D/GA (descendants) - Sis - full consanguine - common M + F - uncle - common M, mother - diff F - niece / great N - aunt (P/M) / GA	② Marrying 5th wife - removing prohibition		
③ Affinity (Mushaarafat) - man cannot marry - wife's m/gm - wife's d/gd (M - with wife is consummated) - wife of father / GF - wife of son / ss / ds	③ Absence of proper witnesses: - Sunnis - satisfied by confirmation in presence of witnesses - Shias		* Legal Effect - Batil - no civil rights / obligations - if consum - void - Fasid - no rights / obligations - if consum - proper specified - less - (i) iddat
④ Fosterage (Riza) - suckling other woman than mother - foster-mother - man cannot marry - fm / fs - Exception - Sunni - sister fm, fs-m, fsoni-s, fbro-s	④ Difference of religion [Kitabia] - valid - Idolaters / fire worshippers - removing prohibition - embrace Islam - female - can marry only a muslim - void	- Sunni - irregular - Shia - void - Muta man - allowed with FW/K	

⑤ Woman undergoing Iddat

- Defⁿ of Iddat - Iddat - period of chastity - bound to be observed by Muslim woman ^{death} ~~divorce~~ before lawfully marrying again. (Sunni - irregular, Shia - void)
- Purpose → to ascertain pregnancy of wife
to avoid confusion of parentage.
- Duration - Widowhood - 4 mths 10 days
 - pregnant - 4 M 10 d until delivery - longer
 - commences - info reached - no info 4/10 - No is

② Divorce → 3 menstrual periods - menstruation 3 lunar months - not menstruation pregnant - until delivery

③ Irregular Marriage - M - consumm - duration - 3 mths

- Rights of wife - maintenance & residence
 - husband with 4 wives cannot marry 5th until completion of iddat
 - ~~death~~ death - inherit other's property.

* Valid Retiement (Khulwat - Us - Sahiba) = consummation

- husband & wife - alone → privacy
 no physical
 no moral
 no legal bar

- Legal Effect → confirmation of mehr
 establishment of paternity
 observing iddat

wife's rt to maintenance & residence during iddat
 bar of marriage with wife's sister.

* Kinds of Marriages

valid (Sahih)	Legal Effect	Kid leg
void (Batil)	yes	
irregular (Fasid)	no - C - custom	leg
	Before C - no	
	After C - yes	

* Muta Marriage → means - enjoyment / use v/Shias

- legal - temporary marriage
- Who may contract - Shia Male - Muslim, Christian, Jew, worshipper

- Essentials - Time fixed } Effect - Female - Muslim
 None - } -

- legal incidents - no mutual rights of inheritance - interest
- children - legitimate - inherit from parents
- marriage dissolves on expiry of fixed period
- divorce - not recognised in muta mar.
- husband may make a gift of unexpired period - hiba-i-muddat - wife leaves before
- dower is deducted
- M $\begin{cases} \text{consummated} & \text{wife - full dower - iddat - death} \\ \text{not consummated} & \text{half dower} \end{cases}$ otherwise 45D
- Maintenance 1/125 APC
- no limit to no. of wives

	Muta	Nikah
1. Time	fixed	not
2. Sects	Shias	Shias + Sunnis
3. dissolution	expiry of period	divorce / death
4. Mutual right of inheritance	no	yes
5. Divorce	no	yes
Children	legitimate	yes
Consummation	non-c - half dower	legitimate
Maintenance	no	c/n/c - full dower
		yes

Dower (Mahr)

- * Intro :- Pre-Islamic Arabia - marriage - not developed, sex-relationships - vague, temporary relations, men - despoiled, turned them out helpless and without any means - Sh. daughter/sister in return to daughter/sister of the c. Beena - husband visited the wife but did not bring her home - wife was called Sadiga & gift given to wife Sadag (dowry) - Sadag is gift to wife, mahr was gift compensation to wife's parents (baal marriage).
- * Defⁿ :- Mahr - sum that becomes payable by the husband to the wife on marriage, either by agreement between the parties or by operation of law.
- Ameer Ali - Dower is a consideration which belongs absolutely to wife.

ILR (1886) 8 ALJ 149

Abdul Kadir v. Salima, Justice Mahmood has said Dower under the Muslim law is a sum of money & property promised by the husband to be paid & delivered to the wife in consideration of marriage and even when no dower is expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife.

* Nature of Dower

introduced by Prophet Mohammad - obligatory in every marriage - similar to donatio propter nuptias (gift/settlement made before the marriage)

- 1) Contract for dower v. Contract for sale (wife - price - dower - price)

Abdul Kadir v. Salima, Dower - consideration for co-itus intercourse, it to resist as long dower remains unpaid - it to lien over the goods sold w/o possession as long as price is paid, surrender to husband = delivery

2) Dower as a consideration for conjugal intercourse
 Smt. Nasra Begum v. Rizwan Ali, Allahabad HC - int to claim prompt dower proceeds cohabitation.

3) Dower - as an essential incident & fundamental feature of marriage - dower fixed/not - entitled to dower.
 Hassina Bibi v. Zubaida Bibi, Dower - essential - if unpaid it must be adjudged on definite principle.

* Object of Dower

- i) to impose an obligation on the husband as mark of respect of the wife.

ii) to place a check on the capricious use of divorce on the part of husband.

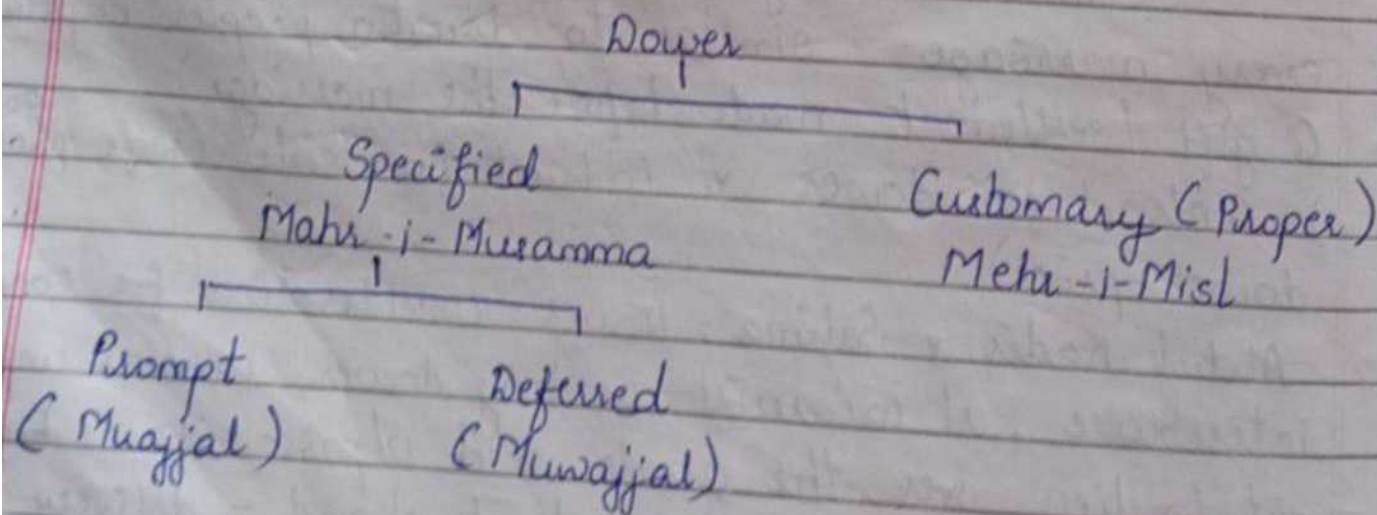
iii) to provide for her subsistence after the dissolution of her marriage, so that she may not become helpless after the death of the husband or termination of marriage by divorce.

* Fixation of Mehr

gold / silver so that the rights of woman are fully protected in the event of fall in the value / currencies.

* Increase / Decrease of Dower - Husband increase after marriage - girl on attaining puberty - relinquish Mehr (free consent).
 Hibe - e - Mehr)

* Kinds of Dower



1. Specified Dower - Stated in the marriage contract
 - settled before / at / after marriage
 - minor - guardian fix dower
 - Sunnis - not less than 10 dirhams (10-19R) 2019
 - Maliki - 3 dirhams
 - Shia - no min. amount

Not in a position to pay 100 - teach Quran

- i) Prompt :- payable immediately after marriage on demand
 - wife can refuse - conjugal domicile of husband
 - if consummated - wife cannot refuse CR - ^{conditional} divorce
 - husband enforce conjugal rights after payment of F
 - P.O.1 → 3 years (A.113 LA)

- ii) Deferred - payable on dissolution of marriage ^{death} _{divorce}
 - deferred payable before - if agreement
 - widow relinquish st of dower at husband's ^{funeral}
 - vested interest

2. Customary (Proper) Dower - amount not fixed in marriage, marriage - with a condition that wife will not claim dower - wife entitled to proper dower
- Determination of Proper Dower

- a) personal qualifications of wife - age, beauty, understanding
- b) social position of her father's family
- c) dower given to her female paternal relations
- d) Economic condⁿ of her husband
- e) Circumstances of time

- Highest Limit of Mehar - Sunnis - no limit

Shias - 500 D. (Fatima).

* Wife's right on non-payment of Dower

- 1) Refusal to cohabit - man - not consummated - good d^r
- 2) Right to dower as a debt ^(unsecured) - along with other credits

M dies - widow, son, 2 daughters (7/32) = 700

3200 RM 1/8th = 400 (son share - 7/16 = 1400)

3) Right to retain possession in lieu of unpaid dower -
 NO ^{of} retention during continuance of marriage -
 comes after death / divorce

- Actual Possession -

- not a mortgage

- can sue heirs

- rt of retention

heritable } One view - personal rt.

transferable } Other view - exercised by heirs

Eg: Muslim dies → widow & brother → claim share pay his share of M.
 ↓
 possession of husband's property
 ↓
 sells property
 ↓
 Effect - only widow's share is passed
 brother need not pay share to widow

Divorce / Talak

* Intro :-

Islam - 1st religion to recognise the termination of marriage by way of divorce - D-disliked by Prophet as it was most hateful before the Almighty God, it prevented conjugal happiness and interfered with proper bringing up of children

* Meaning :-

- D - translated as repudiation which means to release or free from bondage of marriage
- U/Islamic law, D/T signifies absolute unilateral power of husband to divorce wife anytime without assigning reasons

* Conditions

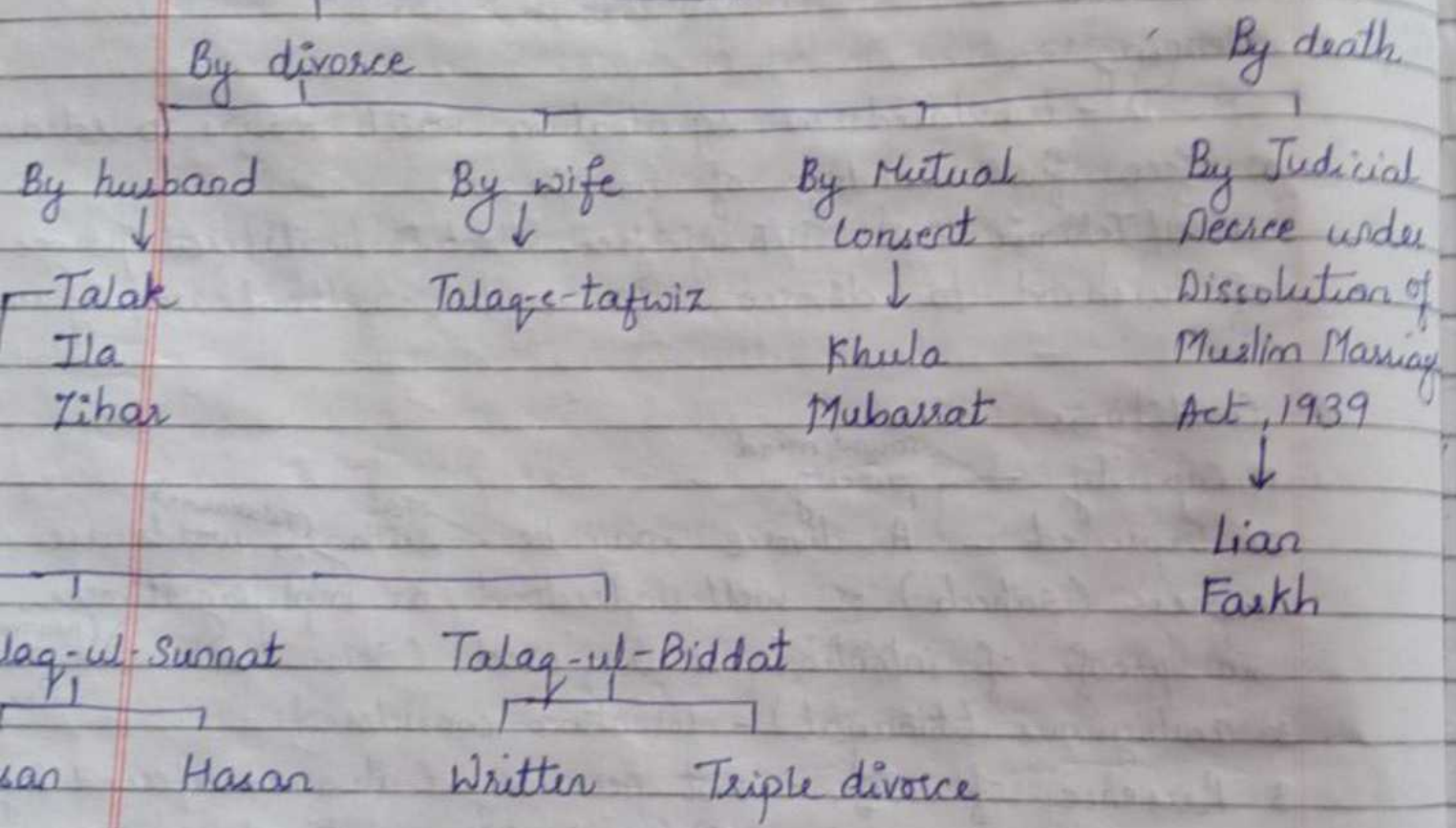
1. Capacity ← sound mind
puberty
2. Expressed - A divorce may be ← oral writing (Talaknama), words are express (sahch) or well-understood as implying divorce. no proof of intention is required. (Shia-2 witness) (pronounced & communicated in writing)
3. Ambiguous (kinayat) - Intention considered.
3. Presence of wife - not necessary (absence - referred by name - otherwise invalid) (Effect from date of knowledge of wife)
4. Talag pronounced under voluntary intoxication - void - Shias effective - Sunni involuntary / forcible - not recognised - Shafi ineffective

* Contingent divorce -

- Muslim husband can authorize his wife to dissolve marriage on the happening of certain contingencies.
- Contingency - reasonable
- Bachhoo v. Bismillah - husband agree to pay maintenance

within a specified time and in default the writing of deed in respect thereof operate as a divorce. Held, a divorce may be pronounced as to come into effect not immediately but at some future time, contingent on the happening of some specified future event.

* Forms / Classification of Dissolution of Marriage



* By Husband

① Talaq

1. Talaq-ul-Sunnat - (in accordance with the traditions of Prophet)
 - Ihsan - most approved form - means best / very proper
 - single pronouncement
 - single sentence
 - state of purity (tuba)
 - abstain from sexual intercourse for iddat period
 - marriage not consummated - allowed in menstruation

- Hasan - means 'good' / proper
- triple ^{successive} pronouncement
- menstruating wife - $\leftarrow \begin{matrix} 1P - tuhr \\ 2P - tuhr \\ 3P - tuhr \end{matrix}$

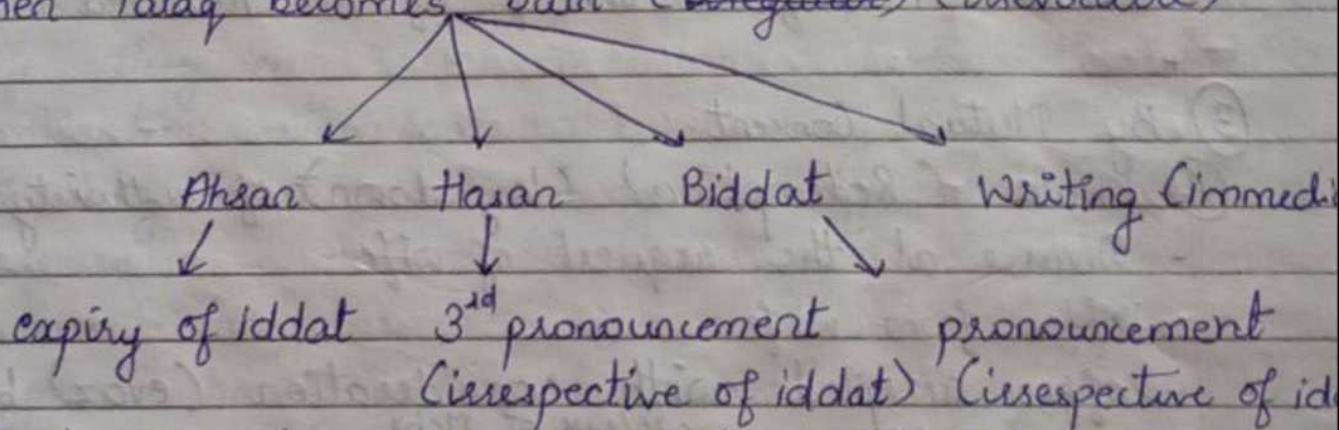
- non-menstruating wife - pronounce - 30 days
- abstain from sexual intercourse for iddat period

2. Talag-ul-Biddat - disapproved / sinful / irregular - introduced by omeyyads to escape strictness of law (Hanafis) (Sunnis) - Accept, shias & Malikis - do not accept.

- three pronouncements during a single tuhr in 1 / three separate sentences

- single pronouncement during a single tuhr indicating intention irrevocable to dissolve marriage

* When Talag becomes bain (irregular) (irrevocable)



* Rashid Ahmed v. Anisa Khatun 1932 PC 25

G - triple talag - before witnesses, wife absent, 4 later talagnama executed - triple divorce given - no re-marriage b/t parties. Husband & wife lived together 5 children born - G - treated wife & children - legitimate. Held as illegitimate. triple divorce effective.

(B) Ila (Vow of Continence)

- Husband $\leftarrow \begin{matrix} \text{age of majority} \\ \text{sound mind} \end{matrix}$
- swears by God / takes a vow - no sexual intercourse
- abstains from sexual intercourse
- Cancellation of Ila - resume intercourse, verbal removal, etc.

① Zihar (Injurious Assimilation)

- Husband $\leftarrow$ ^{sound mind} age of puberty
- compares wife to mother / sister / female in prohibited
- Wife $\leftarrow$ ^{refuse intercourse} apply to court $\leftarrow$ ^{penance} divorce $\leftarrow$ ^{free from slave} fasting 2 mths, feeding 60 poor
- if wrong doing continues - wife - claim - judicial separation

② By wife (Talaq-e-tafweez) (Delegated divorce)

- delegating power of repudiation to wife / 3rd person - T-E-T
- agt. made $\leftarrow$ ^{before} marriage - wife - liberty - to divorce herself from her husband under certain specified conditions - eg. husband marries 2nd wife / fails to maintain her
- noteworthy - wife does not divorce her husband, but divorces herself on behalf of her husband

③ By Mutual Consent

④ Khula (Redemption) (lay down of authority by husb-^{over wife})

- Divorce at the request of wife
- offer from wife
- offer accepted with consideration (craz) by husband
- consideration $\leftarrow$ ^{release of Mehar} any agt. for husband's benefit
- consideration unpaid - divorce valid, husb. sue wife
- husband $\leftarrow$ ^{sound mind} age of puberty (adult)

⑤ Mubarat (Mutual Release)

- both sides desire separation
- offer from either side - accepted - irrevocable divorce

⑥ By Judicial Decree under Dissolution of Muslim Marriage Act, 1938

⑦ Liar (False Charge of Adultery)

- Husb $\leftarrow$ ^{sane} adult charges wife $\leftarrow$ ^{sane} adult of adultery / denies

- iv) Failure to perform marital obligations - 3 yrs who ^{consent} ^{cause}
- v) Impotency of husband - at the time of marriage + continuous
- vi) Insanity, leprosy or venereal disease - insane - 2 years
- vii) Repudiation of marriage by wife - before 15, repudiates before 18, marriage by father/guardian, not consummated
- viii) Cruelty of husband - habitually assaults, life miserable,
 - associate with women of ill-repute
 - forces/attempt - lead immoral life
 - disposing her property - no st.
 - more wives - no equitable treatment
 - obstructs - religious profession/practice
- ix) Grounds of dissolution recognised by Mohammedan law - Ila, Zihar, Khula, Mubarat and Tafreez, Li'an

* Legal Consequences of Divorce

- 1) Entitled to contract another marriage - woman ^{cons - 1838} ^{not cons - 1850}
- 2) ^{Wife's st. to} Dowry - marriage consummated - whole of dowry ^{prompt} ^{deferred}
 marriage not - " - half of amount
- 3) Mutual st. of inheritance cease after divorce because irrevocable
- 4) Cohabitation - unlawful, children - illegitimate
- 5) Remarriage - unlawful - halala
- 6) Maintenance during iddat of divorce but not death

Age of Puberty = Age of Majority (Marriage, Consent, Divorce)

* Guardianship *

* Defⁿ :- Guardians & Wards Act defines guardian as "a person having the care of the person of a minor or of his property or of both his person and his property."

* Meaning :- Guardianship (Wilayat) connotes the guardianship of a minor.

Who is a minor - one who has not attained the age of majority i.e. 18 as per Indian Majority Act, 1875, 21 if guardian is appointed.

* Appointment of guardian

1) By Court

- When court is satisfied that it is for the welfare of minor - order for appointing guardian $\left\{ \begin{array}{l} \text{person} \\ \text{property} \end{array} \right\}$ both, court app

- joint guardian - S.15(1) Guardians & Wards Act, 1890
any one dies - other continues to be a guardian. If the superintendence of property of minor assumed v/court of Wards then $\left\{ \begin{array}{l} \text{guardian not appointed v/G&WA (property)} \\ \text{" " " " (person)} \end{array} \right\}$

2) State Government are also empowered to appoint Court of Wards - constitute ward courts - regulating, constitution and working and power of Court of Wards.

3) Provisions :-

- S.6, 19, 21 G&WA, Court not interfere to appoint a guardian where guardian of minor $\left\{ \begin{array}{l} \text{person} \\ \text{property} \end{array} \right\}$ appointed under a will. - Removal of guardian - not performing his duties properly.

- S.20, Duty on guardian to deal with the ward's property carefully and honestly.

- S.21, Minor not act as guardian of other minor

- S.24, S.25, S.26, of & custody of child - support, health, ed

- S.27 - Duties & Limitation on powers of guardian - deal minor's property - man of ordinary prudence - approval of Court for disposing

- S.30 - Prior approval of Court for disposing minor's prop.
- S.31 - Procedure for obtaining the sanction of the Court
- S.33 - Seek advice / opinion of Court - management of ward's property
- S.41 - Ceasing to be a guardian. ← death
major
mar.
- Welfare of child to be considered.
 - age, sex & religion of minor
 - character and capacity of proposed guardian
 - nearness of kin to the minor / relations
 - wish of deceased parent

** Kinds of guardianship.

- 1) Guardianship in Marriage (Tabar)
- 2) Guardianship of person of the minor for custody (Hizanat)
- 3) Guardianship of property
 - a) De facto Guardianship
 - b) De Jure Guardianship / Legal / Natural
 - c) Certified Guardianship / By Court

1) Guardianship in marriage (Tabar)

- essentials of marriage - attained puberty - minor - mar. contracted by guardian (jabr)
- cannot be appointed by Court / nor by a will
- persons entitled v/Sunnis - f, ff, full brother - male relations m, maternal relations, qazi / Court.
- v/Shias - f, ff.

2) Guardianship of person of the minor for custody (Hizanat).

- 1) Mother ←

Hanafi - 7Y	F Puberty
Shia - 2Y	7Y

, right of mother even if divorced but is n

- Failing her, ^①MIM, ^②FM, ^③ES, ^④US, ^⑤CS, MA, PA

- Female's right to custody when forfeited

- i) she leads an immoral life (adultery, prostitute)
- ii) she neglects to take proper care of the child
- iii) during the subsistence of marriage, she goes and resides at a distance from the father's place
- iv) she marries a person not related to the child within prohibited degrees

B) Other male relations - ^①F, ^②BF, ^③FB, ^④CB, ^⑤FB of F, ^⑥CB of F, ^⑦Son of F

- Illegitimate child - 7 years - with mother - afterwards - election
- Power of Court to interfere

C) Husband - entitled custody of wife → puberty → mother entitled for custody

3) Guardianship of Minor's Property -

A) Legal guardian / de jure / natural guardian

- person entitled - i) father
- ii) executor (Wasi) appointed by father
- iii) father's father
- iv) executor (Wasi) appointed by ff

- No Legal guardian - Court appoint

- Alienation by legal guardian € ^{movable - urgent necessity} ^{immovable -}

- i) debts of deceased - no other means of paying th
- ii) minor - no means of livelihood, sale - necessary - maintenance
- iii) double the price of the property obtained
- iv) expenses exceed the income of the property
- v) property falling into decay
- vi) property - usurped, guardian fears - no chance of fair restitution
- vii) legacies are to be paid, no other means of paying

B) Guardian appointed by Court / Certified Guardian

- Absence of LG - Court appoints - CG ^{protect & preserve}
- (remained) - For Minor welfare - mother, will of father considered

Powers :- Alienation of immovable property with court's permission
 i) charge ii) mortgage iii) transfer by ^{sale} gift iv) exchange
 v) lease - ^{more than 5 yrs} _{more than 1 yr} beyond the date - ward ceases to be a minor
 (granted ^{permission} → in case of necessity / evident advantage)
 - Alienation of movable property - sell / pledge goods
 for minor's necessities ^{food, clothing, nursing}

C) De Facto guardian

- Neither LG nor CG, puts voluntarily in charge of property
- mere custodian - no other rights
- Who can be DFG - except father & father's father (mother, bro, uncle)
- Alienation - no power - void
- Alienation of MP - allowed

D) Testamentary guardian (Quran)

- F/FF - competent to make will for son/guardian
- u/Shia - TG - major, sane, professor of Islam, good character

Gift (Hiba)

Date: / / Page no:

* Introduction

Under Muslim Law, a person is allowed to lawfully make a gift of his property to another during his life time (inter vivos) or he may transfer it by way of will which will take effect after his death (Testamentary disposition)

* Definition

A gift is an 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

* Meaning

H- donation of a thing from which the donee may derive benefit

* Requisites of gift :-

1. Parties - donor - makes the gift, donee - takes something as gift

← age of majority
sound mind
free from influence
ownership

- gift by pardaashia lady is valid

- donee - any person capable of holding property, includes juristic person, - no bar of sex, age, creed or religion

- gift in favor of non-muslim - donee - existence at the time of making the gift - if minor/lunatic - possession must be handed over to the legal guardian.

Eg:- D desires to make a gift of an imp to M, a minor. D must handover possession to M's father, legal guardian.

a) Unborn persons - Gift - void, minor - valid

→ Gift of usufruct - in being when interest of (at: to enjoy use & advantages of another's prop)
in womb - valid - born in 6 months

2. Subject of a gift - General Principle :-

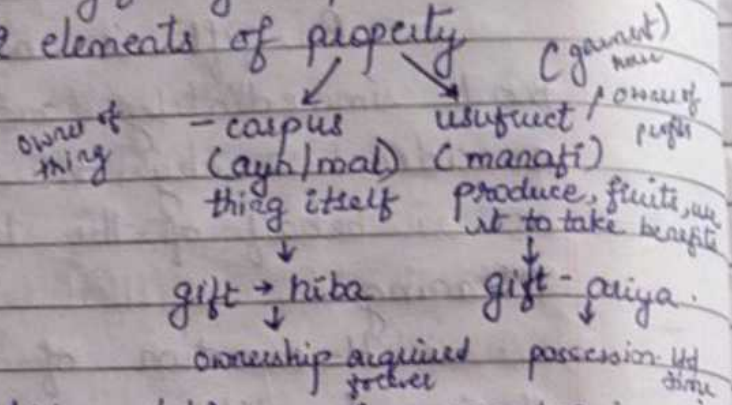
- anything over which dominion / act of property - exercise
- anything which can be reduced to possession; or

- anything which exists either as ^{specific entity} or as an enforceable right
- anything which comes within the meaning of the word 'mal'

- a property to be valid subject of gift :-

- designated v/ term mal
- property - existence - future produced = void
- donor must possess it - gift by trespasser = void

* gift of life interest - 2 elements of property



- * gift of services - not valid - delivery of possession is required
- * gift of incorporeal property & actionable claims - (NI.)
- * gift of equity of redemption - (Crt. to take one's own property on payment of mortgage money)
- * gift of property held adversely to the donor - ^{obtain possession} ^{delivery} ^{doing everything to enable donee to obtain possession}

- * gift of property not in existence - void
- * gift to 2/more persons - ^{divisible - portion decided - valid} ^{indivisible - valid}

3. Extent - make to anyone of anything - whole / part
 except in case of marz-ul-maut ^{cannot gift more than} ^{cannot be in favor of an heir}

4. Formalities

- declaration by the donor
- acceptance by the donee
- delivery of possession by the donor & taking of possession by the donee

- money - actually transferred
- IMP - donor leave property, donee enters - Exception ^{G - father to minor / guardian} ^{G - donor / donee live in same}

Kinds of property - M/IM

C/IC

M/IM

re-propria patentes

re-aliena - lease, mortgage

Date: / /

Page no: /

* Void Gifts

Unborn
Future property
Contingent

with condⁿ - gift - valid, condⁿ - void

Mushaa - undivided share in a property (sagyu)

share in a property

Hanafi - irregular

Shafi - valid, Shia valid

capable of division

incapable of division

decide portion + deliver - valid

valid (house + staircase)

Exceptions:-

i) Gift by 1 heir to another - mother, son, daughter

ii) - " - co-share/other in zamindari - sh to receive/collect definite share

iii) - " - co. - valid - gift share in house

iv)

* Kinds of Hiba

1. Sadaghuah - acquire merit in the sight of the Lord + recompense in next world - transfer + delivery - irrevocable

2. Hiba-bil-awaz

③ Hiba-bil-shaitul-awaz

type of ownership - for consideration w/o condition

- no express stipulation for return

- nature of sale

- gift on receiving something in exchange

- express stipulation

- exchange is condition

type of possession - not necessary

- necessary

- property is divisible - lawful

- irregular

- no

- yes, but becomes irrevocable - delivery by donee of awaz donor

4. Aqiqat

* Revocation - by donor before delivery of possession

Husband & wife - revoke

blood relation - not revoke Surris - revoke after delivery

exception

Husband to wife donor, donee present agree - dead

Pre-Emption (Shuffa) ^(adding)

Defⁿ:- Rt of P.E → right to acquire by compulsory purchase in certain cases, immovable property in preference to all other persons.

- Rt of one person to acquire another immovable property that has been sold to some other person

Object:- prevent the inconvenience which may result to families & communities from the introduction of a disagreeable stranger as a coparcener / near neighbour

Nature - Easement - annexed to the land

- comes into existence upon sale of adjacent property

- Not a Rt to re-purchase

- Rt to of substitution - placed in position of vendee

Who can claim pre-emption?

Shias - Class I

Class I - Shafi-i-sharik - co-sharer / partner in the property sold

II - Shafi-i-Khalit - partner in amenities / appendages - ^{at to water road}

III - Shafi-i-jar - owner of neighbouring imp. (house, garden)

When it arises? - valid, complete, bonafide sale - completion of sale.

- imp.

- purchaser is himself pre-emptor, property equally divided b/w purchaser & pre-emptor

- by contract - b/w Hindus & Muslims - valid

Methods - 3 demands - U/Sunnis

1. Talab-i-mowasibat - immediate demand followed by formal claim i.e. talab-i-ishhad - An announcement made of intention of making the claim - to be made immediately on receiving information of the sale but after sale is completed.

2. Talab-i-ishhad - i.e. demand with invocation of witnesses pre-emptor should -

i) affirm his intention to assert his Rt -

ii) make formal demand -

a) in presence of buyer / seller / premise - subject of sale

b) ——— 2 witnesses, delay defeat the Rt (1st - 2nd claim)

iii) quit - institution of a suit
v/Shias - 1 demand.

Constitutional validity - Class III - Raj, Hyd. - void after 26/1/1950 - unreasonable restriction on the fundamental right v/A. 19(1)(f); Class I & II saved by Art. 19(5) - Bom, Allah, Patna - valid - SC approved Raj.

[Rt. when lost?] - death - v/Sunnis during pendency. v/Shias - legal heirs
- release - waives it in favor of vendee - compromise.
- fail - acquiescence in sale. (making no demand)
- pre-emptor joins with non pre-emptor as co-plfs.

[Rt. when not lost?] - before sale, pre-emptor refused to buy property
- by previous notice of sale

Difference -	Sunnis	Shias
[who can claim]	- co-shares, participators	- co-shares (2)
Rt to sue -	- extinguishes on death during pendency	- continues to heirs
Abatement of price -	yes	- no
No. of demands -	3	- 1

Case Govind Dayal v. Inayatullah

Facts:- Muslim sold IMP to Hindu, Another Muslim claimed

Held:- applicable on ground of equity

Application* Difference of religion - vendor - Muslim, vendee - Muslim - (Sunni)
sect / school → both → Sunnis, both → Shias, Sunni? Shias
reason - reciprocal reciprocal

Ver. Pre-
→ Shia - Sunni - Allah Shia law
↓ Calcutta law
→ [Sunni] [Shia] - [Shia law apply.]
owner

F - father
TGF - True Grand Father
TGM - True Grand Mother
H - husband

D - Daughter
S - Son
FB - Full Brother
CB - Consanguine Brother
Page no: _____
Date: _____

* Sharers (Quranic Heirs)

Relative	Share	Condition
1) Husband/ Wife = $\frac{1}{8}$ (Children) $\frac{1}{4}$ (No children)	$\frac{1}{4}$ $\frac{1}{2}$	$\rightarrow$ son / child of a son $\rightarrow$ no child / no child of a son
2) Father (Sharer) $\rightarrow$ (Residuary)	$\frac{1}{6}$	$\rightarrow$ child / child of a son $\rightarrow$ no child / child of a son If only F & D $\rightarrow$ sharer $\rightarrow$ residuary
3) True Grandfather	$\frac{1}{6}$	$\rightarrow$ inherit only in absence of father
4) Mother $\rightarrow$	$\frac{1}{6}$ $\frac{1}{3}$	$\rightarrow$ (i) child / child of a son or $\rightarrow$ (ii) 2 / more B / S or 1 / no B / S $\rightarrow$ (i) no child / child of a son $\rightarrow$ (ii) H / W & F - $\frac{1}{3}$ from remain after deduction of H / W estate
5) True Grandmother (1 / more)	$\frac{1}{6}$	$\rightarrow$ MGM - no mother & no nearer TGM $\rightarrow$ PGM - no M / F, nearer TGM
6) Daughter (Sharer) $\rightarrow$ Residuary	$\frac{1}{2}$	$\rightarrow$ (i) no son $\rightarrow$ (ii) if there is son *
- 2 / more Daughters	$\frac{2}{3}$	$\rightarrow$ no son
7) Son's Daughter (1) - more than 1	$\frac{1}{2}$ $\frac{2}{3}$	$\rightarrow$ - inherits only when there is $\rightarrow$ no son, daughter
	$\frac{1}{2} \rightarrow$ $\frac{1}{6} \rightarrow$	$\rightarrow$ - only 1 D & Son's D
8) Full Sister (1) - more than 1	$\frac{1}{2}$ $\frac{2}{3}$	$\rightarrow$ - no child / child of a son / F $\rightarrow$ TGF / FB
9) Consanguine Sister - (Residuary with CB)	$\frac{2}{3}$ $\frac{1}{2}$ $\frac{2}{3}$	$\rightarrow$ - inherits in absence of FS & C & above (8) mentioned relatives
10) Uterine Brother & sister	(1) $\rightarrow$ $\frac{1}{6}$ (more than 1 = $\frac{1}{3}$)	$\rightarrow$ - inherit in absence of child / child of a son / F / TGF

Parentage, Legitimacy & Acknowledgement Page no. _____

* Parentage - relation of parent to their children

Maternity Paternity

- legal relation - legal relation
b/t mother & child b/t father & child

- determines - determines s & i
succession & inheritance of father's
of mother's estate estate

Established

- Sunnis - woman giving birth

marriage otherwise legitimate, inherit from mother

- no paternity of illegitimate child

Shias - born out of wedlock - illegitimate
otherwise - illegitimate

Established - by marriage → irregular
→ valid
but not void

* Legitimacy

Gohar Begum v. Suggi AIR 1960 SC 93

- distinction made b/t child born out of a lawful union
child ——— " ——— unlawful ———

- held O/Hanafi - woman gives birth - mother marriage
otherwise

v/Ithna Ashari - ——— " ——— - mother - marriage

(a) Special Rules regarding presumption of legitimacy:-

i) child born within 6 months of marriage - illegitimate
unless father acknowledges it

ii) child born after 6 months of marriage - legitimate
unless father disclaims - liar

iii) child born after dissolution of marriage - legitimate

- v/Shia - born within 10 lunar months

- v/Hanafi - ——— " ——— 2 lunar years

- v/Shafi & Maliki - ——— " ——— 4 lunar years

b) Legitimacy when conclusively presumed (S.112 of IEA)

The fact that any person born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

- Legitimacy & Legitimation
 fact of being legitimate process of conferring legitimacy

* Acknowledgement

- Meaning - method whereby marriage between parents and legitimate descent can be established as a matter of substantive law for the purpose of inheritance.
- Necessity - not required when there is direct proof of marriage.
- Basic principle -