

Muslim Law

Unit-I

Introduction

The Muslim Law or Islam Law (or the Law of Allah) is a part of Family Law. It is a personal law and a branch of civil law that is applied by courts in regard to family matters when the parties are Muslims.

- Muslim Law is called Sharia (Shariah or Syariah) in Arabic.
- Fiqh = understanding of details and refers to the inferences drawn by scholars
- Sharia = Refers to the principles that lie behind the fiqh.
- The word 'Muslim' is derived from the word 'Islam' and signifies a person who adopts the faith of Islam.
- Muslim Law in general draws no distinction between religious life and secular life

Origin of Muslim Law

Muslim Law or the Islamic Law is believed to have been originated from the divine. The Divine communicated it to Prophet Muhammad who prescribed them in Quran. In the later days, the disciples of Prophet Muhammad (or Muslim jurists) have refined and polished these principles. The provisions of Quran are vast and dealt with almost all aspects of human life.

Scholars describe the word *sharia* as an archaic Arabic word denoting "pathway to be followed", or "path to the water hole". The latter definition comes from the fact that the path to water is the whole way of life in an arid desert environment.

Shariah, also spelled **Sharia**, the fundamental religious concept of Islam, namely its law, systematized during the 2nd and 3rd centuries of the Muslim era (8th–9th centuries).

Total and unqualified submission to the will of Allah (God) is the fundamental tenet of Islam: Islamic law is therefore the expression of Allah's command for Muslim society and, in application, constitutes a system of duties that are incumbent upon a Muslim by virtue of his religious belief. Known as the *Shari'ah* (literally, "the path leading to the watering place"), the law constitutes a divinely ordained path of conduct that guides Muslims toward a practical expression of religious conviction in this world and the goal of divine favour in the world to come.

Who is Muslim?

By birth

Who is Muslim?

By conversion

A **Muslim** is a person who follows the religion of Islam. From the point of law, the Court is interested if the person.

There are two ways in which a person can be regarded a Muslim.

1. **Muslim by Birth** –
 - a. Believes in one God and
 - b. Prophet-hood of Muhammad

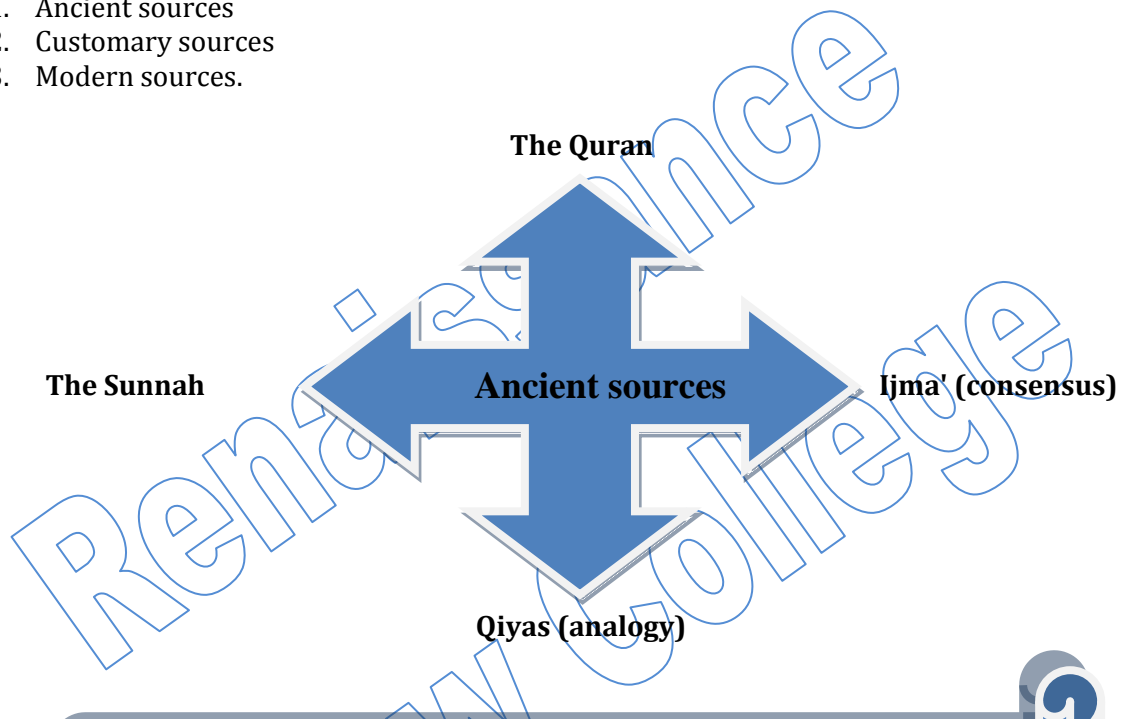
2. **Muslim by Conversion** –
 - a. Converts by profession of Islam.
 - b. Converts by formal ceremony.

These two points are the minimum and fundamental rules for a person to be called a Muslim.

Sources of Muslim law

The Islamic law is referred to as “Sharia”. Islam has given the most comprehensive legal system to mankind. Islam has its own personal, civil, criminal, evidence and international law. There are two types of sources under Muslim law, they are:-

1. Ancient sources
2. Customary sources
3. Modern sources.



The Quran

Muslims believe the [Quran](#) to be the direct words of Allah, as revealed to and transmitted by the Prophet Muhammad. All sources of Islamic law must be in essential agreement with the Quran, the most fundamental source of Islamic knowledge. When the Quran itself does not speak directly or in detail about a certain subject, Muslims only then turn to alternative sources of Islamic law

I.) The Quran:

Since the text of the Quran is held to be the very word of Almighty God Himself, it almost goes without saying that the Quran is not only a source of Sharia but the primary material source.

It is criticised that Quran is not a code of law because of two main reasons. Firstly, it is argued that

Quran is rather a moral code determining ones way of life. Secondly, it is also said that Quran is not a code of law as out of its 6219 verses, no more than about 600 deal with specifically legal matters. However, one must remember that, unlike western legal systems, the Sharia makes no distinction between religious and civil matters; it is the codification of God's Law, and it concerns itself with every aspect of legal, social, political and religious life. Secondly, information is judged by its quality not quantity. It is the Quran that identifies six specific crimes against religion i.e. **“hadd punishments”**. The Quranic legislation also covers a range of other topics, e.g. homicide, marriage, divorce and inheritance. There is an authentic hadith of the Prophet that **“he who knows the law of inheritance is possessed of half the knowledge of the world”**. But if we look at the Quran, the complete outline of the law of inheritance is encapsulated within only three verses (11, 12 and 176) of **Surah Al-Nisa** and Ijma and Qiyas, which give the details of succession, derive their authority from these three verses only. No description, however, can fully capture the great importance of the Quran to Muslims. Objectively, it is the foundation and framework of Islamic law, and its primary material source.

The Sunnah

Sunnah is the traditions or known practices of the Prophet Muhammad, many of which have been recorded in the volumes of [Hadith](#) literature. The resources include many things that he said, did, or agreed to and he lived his life according to the Quran, putting the Quran into practice in his own life. During his lifetime, the Prophet's family and companions observed him and shared with others exactly what they had seen in his words and behaviors i.e. how he performed ablutions, how he prayed, and how he performed many other acts of worship. People also asked the Prophet directly for rulings on various matters, and he would pronounce his judgment. All of these details were passed on and recorded, to be referred to in future legal rulings. Many issues concerning personal conduct, community and family relations, political matters, etc. were addressed during the time of the Prophet, decided by him, and recorded. The Sunnah can thus clarify details of what is stated generally in the Quran.

II.) The Sunna:

The Sunna is the second most important source of Islamic law. It comprises the practices and precedents set by the Prophet Muhammad himself. The authority of the Sunna is derived from the text of the Quran. Because the circumstances of each revelation were thought necessary to correct interpretation, it was imperative to gather as many traditions as possible about the actions of the Prophet to fully understand the Quran.

The Sunna clarifies the ambiguities of the Quran. The Quranic injunction is sometimes implicit; the Sunnah makes it explicit by providing essential ingredients and details. The details of the acts of

prayer, fasting, alms-giving and pilgrimage were all illustrated by the Sunna of the Prophet. Again, it was established by the Sunna that a killer cannot inherit from the property of his victim. Thus, for answers to many problems to which the Quran offers no solution jurists turn to the second source of Islamic Law. For, according to the Quran itself, Prophet Muhammad was not only in possession of the Book; he was also endowed with Wisdom.

But the wide legislative role of the Sunna cannot overcome that of the Quran because it lacks originality in itself; rather it is just the elaborations of the Quran put into the practice by the Prophet. The Words of the "Quran" are of "divine" origin while the words of the "Hadith" are words of the "Prophet" reported by people. And it is obvious that divine words have the utmost precedence. Secondly, after the death of the Prophet, it was not earlier than two and a half centuries that the written hadith compilation from religious scholars came onto the scene and a lot of fabrication took place into that period. But Quran is the only book of Allah which has not been distorted and thus it is the only reliable source of Islamic law. There is an authentic tradition of the Holy Prophet (p.b.u.h) in which he is reported to have said that if you find any tradition of mine contrary to the instructions of Quran, then leave my tradition and follow the Quran.

Ijma' (consensus)

In situations when Muslims have not been able to find a specific legal ruling in the Quran or Sunnah, the consensus of the community is sought (or at least the consensus of the legal scholars within the community). The Prophet Muhammad once said that his community (i.e. the Muslim community) would never agree on an error.

III.) Ijma:

Ijma represents the third source of Islamic law which is more like delegated legislation. It is defined as the consensus of the jurists of a certain period over a religious matter. It is considered a sufficient means for action because the Prophet of Islam said, "**My community will not agree on an error**".

A good illustration for the principle of Ijma occurred right after the death of the Prophet: no guidance was available on who would now be the political leader. The election of Abu Bakr to the post of caliph by the votes of the people was the first manifestation of Ijma. Today there are many schools of law in the Muslim community. For them the doctrine of consensus was a source of harmony.

However, the formation of different schools of law also had an adverse effect on the instrument of Ijma. In the course of time, it became impossible to obtain a consensus on a given problem just by asking all those learned in Islamic law. There was no organisation that represented all jurists, and as a result Ijma has come to be determined by looking into the past. Thus, unlike Quran, the authority of Ijma for legal innovation is very limited and that is why it ranks lower than the Holy Quran.

Qiyas (analogy)

In cases when something needs a legal ruling, but has not been clearly addressed in the other sources, judges may use analogy, reasoning, and legal precedent to decide new case law. This is often the case when a general principle can be applied to new situations.

IV.) Qiyas:

Qiyas is essentially a tool of interpretation and is not a mean to alter the existing law but can only be used to find a legal principle in conformity with Quran and Sunna for a new factual situation. Ijtihad means “individual reasoning”. It involves both the knowledge of the rules of Islamic law and the exercise of one’s judgment; even Qiyas would be impossible if jurists were not allowed to apply their own reasoning.

An example of this procedure can be found in the prohibition of alcohol. The drinking of wine is one of the Quranic crimes against religion. With the appearances of other alcoholic drinks unknown to early Islam the jurists extended the prohibition of wine to include such drinks by analogical deduction from the Quranic ruling.

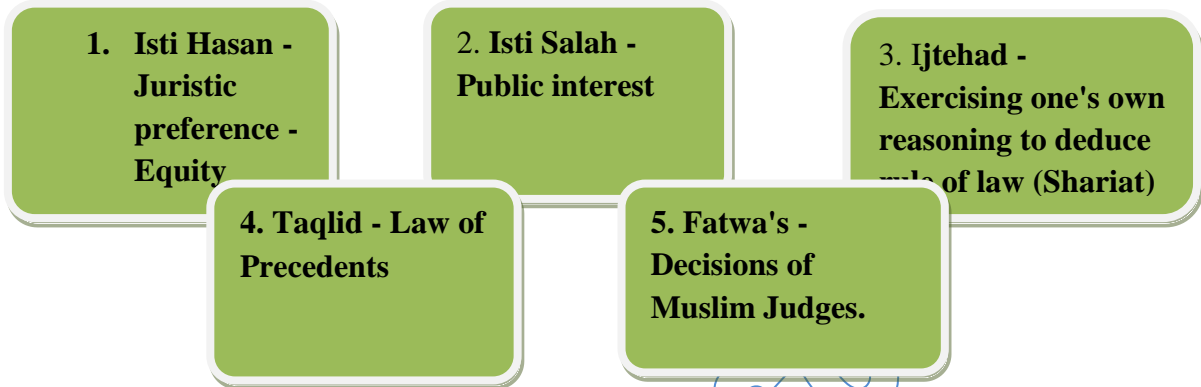
However, this source of law also has its weaknesses. Firstly, it ranks below because it derives its authority from the Quran. Human reason was not to be exercised independently but rather in accordance with the Divine Will as manifested in the Quran. Secondly, Ijtihad has been a controversial subject in Islamic history. Once the schools of Islamic law had been firmly established, the prevailing opinion was that that the privilege of Ijtihad was restricted to the great scholars of Islamic law, like for instance the founders of the schools of Islamic law. Thus, there is a strong opinion law that by the 10th century all main principles of Islamic law had been settled and therefore “the gates of Ijtihad” had been closed. Thus, it is noticeable that it is subordinate to Quran because Quran is an ever illuminating source of Islamic law but Qiyas/Ijtihad is just a matter of past now.

2. Customary source

In its early stage, Islamic jurisprudence was heavily inspired from prevailing customary law e.g. the practices of the Caliphs, the decisions of the judges and the traditions of the people. But even then, Quran acted as a mentor guiding the people. For instance, Caliph Abu Bakr made alms payment compulsory in the light of the Quran; the Qazis i.e. judges did equity by seeking guidance from Quranic verses; and it was under Verse 3 of **Surah Al-Nisa** that the customary right of unlimited polygamy was curtailed only to a maximum of four wives. Thus, the supremacy of Quran as a primary Islamic source got fully established in that epoch.

3. Modern sources

In addition to the above main Sources of Law, we find that the law is occasionally supplemented by other principles also. The following can be summarized.



(a) Isti Hasan - Juristic preference - Equity

Imam Abu Hanifa adopted the principle of Isti Hasan for the relief from absolute dependence on analogical reasoning. Isti Hasan literally means liberal construction or juristic preference or what we call today as law of equity. This term was used to express liberty of laying down such rule as may be necessary and the special circumstances may require. The objection taken against it is that it left an almost uncontrolled discretion in the exposition of the law.

(b) Isti Salah- Public interest

Imam Malik, who will be presently mentioned as the founder of a school of Sunni law, also felt the necessity of surer test for the development of law on right lines than the use of analogy. He approved the introduction of Isti Salah (public interest) in preference to Isti Hasan. He laid down that ordinarily, analogy was used to expand law but if it appears that a rule indicated by analogy is opposed to general utility then Isti Salah (principles of public interest) should be resorted to. Under this system, rule of law pointed out by analogy could not be set aside either: (i) on the opinion of the individual expert of the law or (ii) with reference merely to the circumstances of particular case: it could be disregarded only if it would be harmful to the public in general.

(c) Ijtehad - Exercising one's own reasoning to deduce rule of law (Shariat)

When Quran and Hadis did not disclose the precise line to follow, Ijtehad came to be born. Ijtehad means independent judgement or considered opinions of individuals or exercising one's own reasoning to deduce a rule of Shariat. As a method of reasoning in law, Ijtehad of prophet tersely has gained almost equal footing with the first four founders of the law. In deducing Ijtehad, Quran and Hadis cannot be over looked but exigency of time and public interest were also to be borne in mind. Where a legal principle is silent, Ijtehad can be used with advantage.

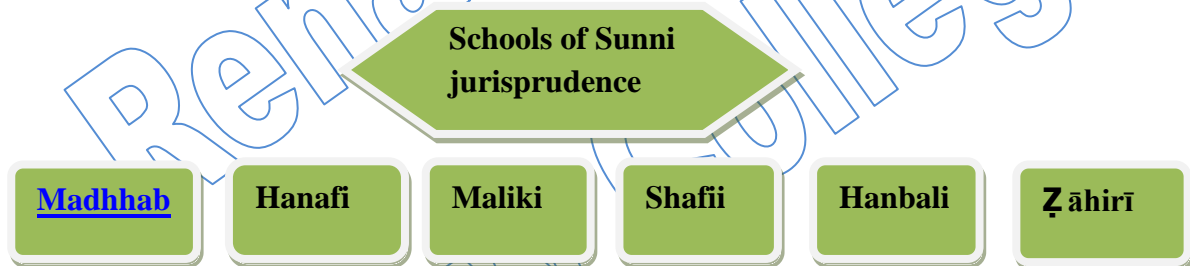
But Ijtehad was the privilege of great scholars or Mujtahids. The authority of the Mujtahids (great scholars) based not on his holding any office in the State but is derived purely from the learning and reputation of the individuals. The qualifications of the Mujtahids consists of a complete knowledge of Quran i.e., he should know the sacred text by heart and should be able to say when and where each verse was revealed and he should also have a perfect knowledge of all the traditions (Sunna-Hadis) and all the branches of the science of law. He should, besides, be a man of austere piety. In short, the qualifications required are such that as far as the Sunni Law is concerned, after the death of Ibne Hanbal (856 after Christ) there have been no recognised Mujtahids. With the end of Mujtahids, the doors of Ijtehad no longer remained open. This is known as the **closure of the golden gate of Ijtehad - Bab-al ijtehad.**

(d) Taqlid - Law of Precedents

After Ijtehad or rather on the closure of the Gates of Ijtehad, a parallel doctrine of Taqlid (Law of precedents) came to be in existence. Under Taqlid (literally, imitation) means following opinions of another person without knowledge of the Authority or the authority for such opinion, a Muslim had to follow the Law; every Muslim in the street could not be learned in the rules of Shariat, being ignorant, he was asked to follow the opinions of those who knew better. Those who knew better (Ulemas) were denied independence of judgement in any vital matter. Hence, the vicious circle of Taqlid (imitation - Law of Precedents).

(e) Fatwas - Decisions of Muslim Judges

As already aforesaid, the Law sent down by Allah by direct revelations is recorded in Quran and what is sent down by him is recorded in Sunna/Sunnat of Prophet of Islam. Even the King has no authority to make law and therefore, the Muslim Kings called upon the Muslim scholars to guide them in the matter of Law. The opinions tendered by Muslim Jurists to King were accepted by King of enforce the Law in the territory of his kingdom. Therefore, the opinions of Muslim Jurists were always held in high regard. With the advent of time, even the ordinary Muslims would turn to such jurist and ask for his opinion. Such opinion of Muslim Jurist is referred to as Fatwas. In India, during the Seventeenth Century A.D. when Mughal Emperor Aurangazeb came in power, he appointed Shaykh Nizam Burhanpuri and four others to prepare a compilation of Fatwas. Accordingly, they sent questionnaire various juris-consults and Muftis. Their Replies are the collection of Fatwas, popularly known as Fatwa-e-Alamigir. However, Fatwas are not source of law.



Madhhab

Madhhab is an Islamic term that refers to a school of thought or religious jurisprudence within Sunni Islam. Several of the Sahaba had a unique school of jurisprudence, but these schools were gradually consolidated or discarded so that there are currently four recognized schools. The differences between these schools of thought manifest in some practical and philosophical differences. Sunnis generally do not identify themselves with a particular school of thought, simply calling themselves "Sunnis", but the populations in certain regions will often - whether intentionally or unintentionally - follow the views of one school while respecting others.

Hanafi

The Hanafi school was founded by Abu Hanifa an-Nu'man. It is followed by Muslims in the Levant, Central Asia, Afghanistan, Pakistan, India, Bangladesh, Western Lower Egypt, Iraq, Turkey, the Balkans and by most of Russia's Muslim community. There are movements within this school such as Barelvis, Deobandis, and the Tablighi Jamaat, which are all concentrated in South Asia and in most parts of India.

Maliki

Maliki school was founded by Malik ibn Anas. It is followed by Muslims in North Africa, West Africa, the United Arab Emirates, Kuwait, in parts of Saudi Arabia and in Upper Egypt. The Murabitun World

Movement follows this school as well. In the past, it was also followed in parts of Europe under Islamic rule, particularly Islamic Spain and the Emirate of Sicily.

Shafii

The Shafii school was founded by Muhammad ibn Idris ash-Shafi'i. It is followed by Muslims in Eastern Lower Egypt, Somalia, Jordan, Palestine, Saudi Arabia, Indonesia, Thailand, Singapore, Philippines, Yemen, Kurdistan, Kerala (Mappilas) and is officially followed by the governments of Brunei and Malaysia.

Hanbali

The Hanbali school was founded by Ahmad ibn Hanbal. It is followed by Muslims in Qatar, most of Saudi Arabia and minority communities in Syria and Iraq. The majority of the Salafist movement claims to follow this school.

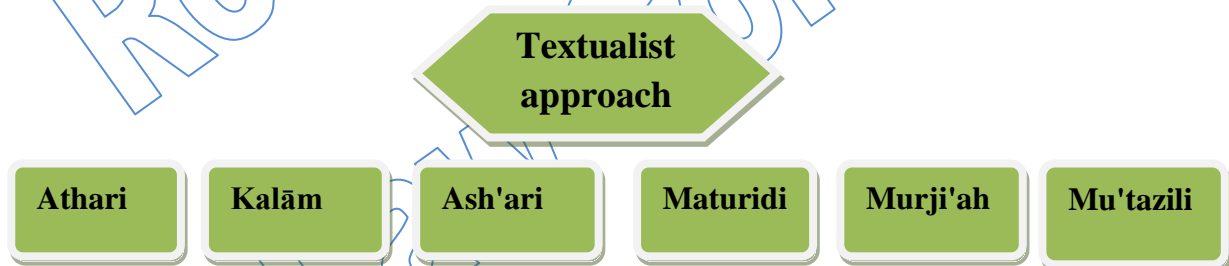
Lāhiri

The Lāhiri school was founded by Dawud al-Zahiri. It is followed by minority communities in Morocco and Pakistan. In the past, it was also followed by the majority of Muslims in Mesopotamia, Portugal, the Balearic Islands, North Africa and parts of Spain.

Overview of the major schools and branches of Islam

Schools of theology, *Aqidah* and Islamic theology

Aqidah is an Islamic term meaning "creed" or "belief". Any religious belief system, or creed, can be considered an example of *aqidah*. However, this term has taken a significant technical usage in Muslim history and theology, denoting those matters over which Muslims hold conviction. The term is usually translated as "theology". Such traditions are divisions orthogonal to sectarian divisions of Islam, and a Mu'tazili may for example, belong to Jafari, Zaidi or even Hanafi School of jurisprudence.



Athari

The Athari school derives its name from the Arabic word *Athar*, meaning "narrations". The Athari creed is to avoid delving into extensive theological speculation. They use the Qur'an, the Sunnah, and sayings of the Sahaba - seeing this as the middle path where the attributes of Allah are accepted without questioning 'how' they are. Ahmad bin Hanbal is regarded as the leader of the Athari school of creed. Athari is generally synonymous with Salafi. The central aspect of Athari theology is its definition of Tawhid, meaning literally unification or asserting the oneness of Allah.

Kalām

Kalām is the Islamic philosophy of seeking theological principles through dialectic. In Arabic, the word literally means "speech/words". A scholar of *kalām* is referred to as *amutakallim* (Muslim theologian; plural *mutakallimūn*). There are many schools of Kalam, the main ones being the Ash'ari and Maturidi schools in Sunni Islam.

Ash'ari

Ash'ari is a school of early Islamic philosophy founded in the 10th century by Abu al-Hasan al-Ash'ari. It was instrumental in drastically changing the direction of Islam and laid the groundwork to "shut the door of ijtihad" centuries later in the Ottoman Empire.^[citation needed] The Asharite view was that comprehension of the unique nature and characteristics of God were beyond human capability.

Maturidi

A Maturidi is one who follows Abu Mansur Al Maturidi's theology, which is a close variant of the Ash'ari school. Points which differ are the nature of belief and the place of human reason. The Maturidis state that belief (*iman*) does not increase nor decrease but remains static; it is piety (*taqwa*) which increases and decreases. The Ash'aris say that belief does in fact increase and decrease. The Maturidis say that the unaided human mind is able to find out that some of the more major sins such as alcohol or murder are evil without the help of revelation. The Ash'aris say that the unaided human mind is unable to know if something is good or evil, lawful or unlawful, without divine revelation.

Murji'ah

Murji'ah (Arabic:) is an early Islamic school whose followers are known in English as "Murjites" or "Murji'ites" (المرجئون). During the early centuries of Islam, Muslim thought encountered a multitude of influences from various ethnic and philosophical groups that it absorbed. Murji'ah emerged as a theological school that was opposed to the Kharijites on questions related to early controversies regarding sin and definitions of what is a true Muslim.

They advocated the idea of "delayed judgement". Only God can judge who is a true Muslim and who is not, and no one else can judge another as an infidel (*kafir*). Therefore, all Muslims should consider all other Muslims as true and faithful believers, and look to Allah to judge everyone during the last judgment. This theology promoted tolerance of Umayyads and converts to Islam who appeared half-hearted in their obedience. The Murjite opinion would eventually dominate that of the Kharijites.

The Murjites exited the way of the Sunnis when they declared that no Muslim would enter the hellfire, no matter what his sins. This contradicts the traditional Sunni belief that some Muslims will enter the hellfire temporarily. Therefore the Murjites are classified as *Ahlul Bid'ah* or "People of Innovation" by Sunnis, particularly Salafis.

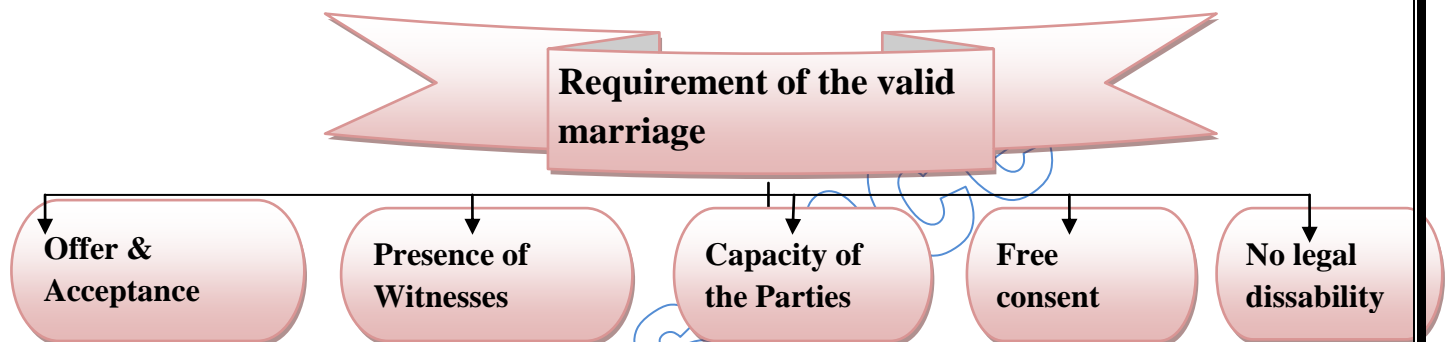
Mu'tazili

Mu'tazili theology originated in the 8th century in al-Basrah when Wasil ibn Ata left the teaching lessons of Hasan al-Basri after a theological dispute. He and his followers expanded on the logic and rationalism of Greek philosophy, seeking to combine them with Islamic doctrines and show that the two were inherently compatible. The Mu'tazili debated philosophical questions such as whether the Qur'an was created or eternal, whether evil was created by God, the issue of predestination versus free will, whether God's attributes in the Qur'an were to be interpreted allegorically or literally, and whether sinning believers would have eternal punishment in hell.

UNIT-II

MARRIAGE

Marriage is a civil contract between a man and a woman who is lawfully eligible to be his wife with the objective of joint life and breeding.



1. Offer & Acceptance

Marriage in Islamic law is a contract that is concluded by an offer made by one party and an acceptance given by the other. No particular form of words is required so long as the intention to conclude of marriage is clear. Under the Muslim law for the validity of a marriage there must be a proposal and acceptance at the same meeting. The proposal and acceptance must both be expressed at one meeting; a proposal made at one meeting and acceptance made at another meeting does not make a valid Muslim marriage. Neither writing nor any religious ceremony is essential.

Under the Sunni law, the proposal and acceptance must be made in the presence of two male Muslims who are of sound mind and have attained puberty or one male and two female witnesses who are sane, adult and Muslim. Absence of witnesses does not render marriage void but make it void able.

Under the Shia law witnesses are not necessary at the time of marriage. The proposal and acceptance need not be made in writing. Where the offer and acceptance are reduced into writing, the document is called 'Nikah nama or Kabin-nama.

The 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 female witnesses, who must be sane and adult Muslim.

2. Presence of Witnesses

Hanafi, Shafi and Hanbali schools require two adult male witnesses or one male plus two females. However, in Maliki and Ithna Ashari's law the presence of witnesses is recommended but not mandatory, provided that in Maliki law sufficient publicity is given to the marriage.

3. Capacity of the Parties

Every Muslim of sound mind who has attained puberty, may enter into a contract of marriage. Puberty means the age at which a person becomes adult (capable of performing sexual intercourse and procreation of children). A person is presumed to have attained the age of puberty on the completion of 15 years. So the boy and girl who has attained puberty can validly contract a marriage. A marriage under Muslim law is perfectly valid if the parties have attained puberty and satisfied all other conditions specified by the law.

According to the child marriage restraint act 1929, a marriage of male below 21 years of age and female below 18 years of age is child marriage. The act prohibits such marriage. The Act prescribes that for a valid marriage the minimum age for male is 21 and female is 18. The parties who are violating the provisions of Child Marriage Restraint Act are liable to be punished. Thus if two Muslims marry before attaining the age prescribed under the child marriage restraint Act they are liable to be punished. However the marriage between two Muslims who have attained puberty is valid though they have violated the provisions of Child Marriage Restraint Act.

4. Free Consent

Free consent of the parties is absolutely necessary for a valid marriage. If there is no free consent a Muslim marriage is void. Under the Muslim Law, a marriage of a Mohammedan who is of sound mind and has attained puberty is void, if it is brought about without his consent. The marriage of a girl who has attained puberty and is of sound mind would be void if her consent is not obtained. When the consent to the marriage has been obtained by force or fraud, the marriage will be invalid, unless it is ratified. When a marriage was consummated against the will of the women, the marriage is void. The person who has been defrauded can repudiate the marriage.

Lunatics and minors who has not attained puberty may be validly contracted by their respective guardians. A minor is incompetent to give valid consent. The right to contract a minor in marriage belongs successively to the following persons:

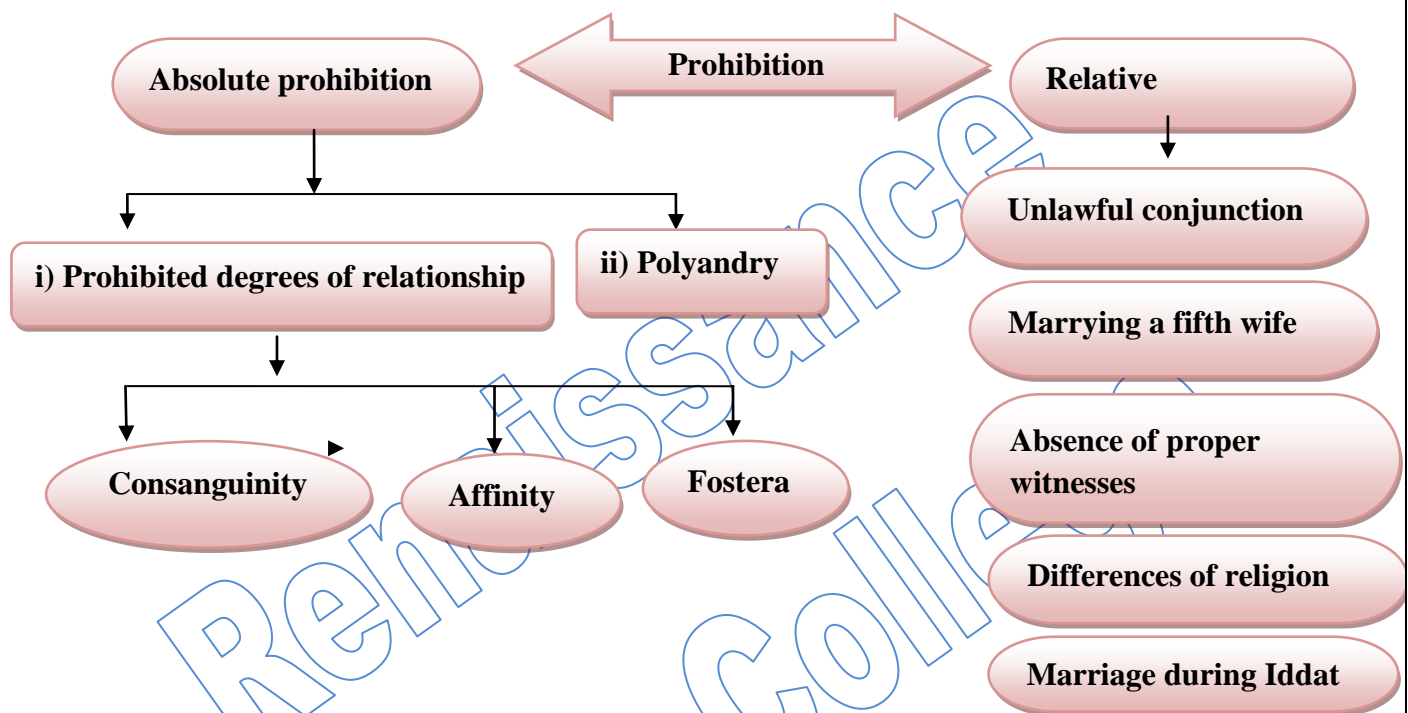
- i) Father
- ii) Paternal Grand Father (h.h.s-How high soever)
- iii) Brother and other male relations on the fathers side
- iv) Mother
- v) The maternal uncle or aunt and other maternal relations.

Under the Shia law only the father and the paternal grand father are recognized as guardian for contracting marriage of a minor.

If a minor, whether male or female, be contracted in marriage by a remoter guardian, while a nearer guardian is present and available and such nearer guardian does not give consent to the marriage, the marriage is void. But if the parties ratify it after attaining puberty, it will be valid. However if the nearer guardian be absent at such a distance as precludes him from acting, the marriage contracted by the remoter is also lawful.

5. No Legal disability

Under Muslim Law, marriage under certain circumstances is prohibited or not permitted. The prohibitions can be classified into two classes:



a. Absolute Prohibition

1) Prohibited degrees of relationship

Under the Muslim law marriage between persons who come within the blood relationship, or certain other relationship is prohibited. The prohibited relationships are the following:

(a) **Consanguinity** - Consanguinity means blood relationship and a prohibits a man from marrying the following females

1. His mother or grandmother (however high so ever)
2. His daughter or granddaughter (how low so ever)
3. His sister whether full blood half blood or uterine blood
4. His niece or great niece (how low so ever)
5. His aunt (father's sister or mother's sister) or great aunt (how high so ever)

A marriage with a woman who comes within the relationship of consanguinity is absolutely void. Children born out of that wed-lock are illegitimate.

(b) **Affinity** - A man is prohibited from marrying certain female relatives due to nearness of relationship. A man is prohibited from marrying

1. His wife's mother grandmother (however high so ever)
2. His wife's daughter or granddaughter (how low so ever)
3. His father's wife or paternal grandfather's wife (how high so ever)

4. Wife of one's own son or son's son or daughter's son (how low so ever)

A marriage with a woman comes within the relationship by affinity is void.

(c) **Fosterage**- It means the milk relationship. When a child is breast-fed/suckled by a woman other than its own mother, she becomes the foster mother of the child. A man is prohibited from marrying certain persons having foster relationship. According to Shia jurists fosterage includes the same limits of relationship prohibitive to marriage as consanguinity. A man may not marry the following females:

1.His foster-mother or grandmother (however high so ever)

2.His foster-sister (daughter of foster mother)

However Sunnis do not follow the same. Under the Sunni law, there are certain exceptions to the general rule of prohibition on the ground of fosterage and a valid marriage may be contracted with:

1.Sister's foster mother, or

2.Foster'-sister's mother, or

3.Foster-son's sister, or

4.Foster-brother's sister.

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

2) Polyandry

Polyandry means marrying more than one husband. Polyandry is a form of polygamy in which a woman is having more than one husband at the same time. Under Muslim law Polyandry is prohibited and a married woman cannot marry second time so long as the first marriage subsists and the husband is alive.If a woman violated this prohibition and contracted a second marriage ,the marriage is void and the woman is liable to be punished for bigamy under section 494 of the Indian Penal Code.

B) Relative prohibition

Under Muslim Law, there are certain prohibitions, which are not absolute but only relative, and marriage in violation of such relative prohibitions will only be irregular and not void and at the moment when the irregularity is removed the prohibition ends and the marriage becomes valid. The following are the relative prohibitions.

1) Unlawful conjunction

A man is prohibited from marrying two wives at the same time if they are related to each other by consanguinity, affinity or fosterage, which they could not have lawfully intermarried with each other if they had been of different sexes. Thus a Muslim cannot marry his wife's sister while the wife is alive. But he can make the marriage valid by marrying his wife's sister after the death or divorce of his first wife. Marriage with two such wives is an Unlawful conjunction. Under sunni law a marriage in violation of the rule of unlawful conjunction is not void but only irregular. However under Shia law, a marriage in violation of the rule of unlawful conjunction is void. Under the Shia Law, a Muslim may marry his wife's aunt, but he cannot marry his wife's niece without her permission.

2) Marrying a fifth wife (Polygamy).

Muslim law permits polygamy (Marrying more than one wife) with a restriction of maximum four wives. So a Musalman can have four wives at the same time. If he marries a fifth wife when he has already four, the marriage is not void, but merely irregular. But the fifth marriage can be made valid after the death or divorce of any one of the four wives of his earlier marriages. Under the shia law marriage with the fifth wife is void.

In India no Muslim marrying under or getting his marriage registered under The Special Marriage Act, 1954,can marry a second wife during the lifetime of his spouse.

3) Absence of proper witnesses

A marriage must be contracted within the presence of proper and competent witnesses. Under the Sunni law at least two male or one male and two female witnesses must be present to testify that the contract was properly entered into between the parties. The witnesses must be of sound mind, adult and Muslim. A marriage without witnesses is irregular.

Under the Shia law the presence of witnesses is not necessary. The marriage is contracted by the spouses themselves or their guardians in private are held valid. The absence of witnesses does not render the marriage void but only invalid.

4) Differences of religion (Marriage with non-muslim)

The law with regard to marriage with a non-Muslim is different under Sunni law and Shia law. Under Sunni law a male can marry a Muslim female or a Kitabia (a person who believes in a revealed religion possessing a Divine Book viz Christianity and Judaism). A Sunni muslim male can validly marry a jews or christian female. But he cannot marry an idolatress or a fire-worshiper. A marriage, with an idolatress or a fire worshiper is merely irregular and not void.

A Muslim woman cannot marry a Kitabia /non-Muslim man. A marriage of a Muslim female with a non-Muslim male, whether he is a Christian, or a Jew or an idolator or a Fire-Worshiper is not void but irregular. According to Mulla, a marriage between a Muslim woman and Non-Muslim male is irregular. But according to Fyzee, such a marriage is totally void.

Under Shia Law a marriage with a non-muslim is void. Both the spouses are required to be Muslims. The marriage of Sunni male with a Shia female is void. A marriage of a Muslim female with a non-Muslim male, whether he be a Christian, or a Jew or an idolator or a Fire-Worshiper is void under Shia Law.

In India a marriage between a Muslim and a non-Muslim can only take place under The Special Marriage Act, 1954. If a muslim male marries and registers under the Special Marriage Act, 1954, he cannot marry a second wife during the subsistence of the first marriage.

A marriage of a Muslim female with a non-Muslim male, whether he be a Christian, or a Jew or an idolator or a Fire-Worshiper is void under Shia Law.

5) Marriage during Iddat

Under Muslim law, a woman who is undergoing iddat is prohibited from marrying during that period. Iddat is the period during which it is incumbent upon a woman, whose marriage has been dissolved by divorce or death of her husband to remain in seclusion, and to abstain from marrying another husband. The purpose behind that is to ascertain whether she is pregnant by earlier husband, so as to avoid confusion of the parentage of the child.

The period of Iddat is prescribed as under:

1. In case termination marriage by divorce- three lunar months or three menstrual courses.
2. In case of widow- 4 months and 10 days.
3. In case the woman is pregnant - till the delivery.

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

Khair-ul-Balgh (Option of Puberty)

In traditional law no minimum age is laid down for marriage. However, in Hanafi law, a girl who is contracted in marriage during her infancy may on attaining puberty repudiate the marriage. This “**option of puberty**” is found neither in the Quran nor in the Sunna, but is based on juristic opinions in the various schools. A woman retains this right until she becomes aware of the marriage and assents to it. However, the woman does not possess this option if the guardian who contracted her marriage was her father or paternal grandfather.

When a minor has been contracted in marriage by the father or father’s father, the contract of marriage is valid and binding and it cannot be annulled by the minor on attaining puberty. But if a marriage is contracted for a minor by any guardian other than the father or father’s father, the minor has the right to repudiate such marriage on majority. This right is called Khair-ul-Balgh which means Option of Puberty.

When a minor wife’s right of repudiation should be exercised within a reasonable time after attaining puberty and failing which would result in the loss of such right. The right is lost if she after having attained puberty permits the marriage to be consummated. If the consummation was without her consent the right of repudiation will not be lost.

The dissolution of Muslim marriage act 1939 has considerably modified the law of option of puberty. Prior to the Act the marriage is contracted for a minor girl by the father or grandfather, the minor has no right to repudiate such marriage on majority. But according to sec2(7) of the act if the marriage is contracted for a minor girl by the father or grandfather can also obtain a decree for divorce from the court if the following conditions are satisfied.

- The marriage took place before the age of fifteen years
- She repudiated the marriage before attaining the age of eighteen years.
- The marriage has not been consummated

The other Sunni schools recognize this option of “**Khiyar**” in the area of jest and duress. A person who was induced into performing the marriage, for instance through threat, can rescind the contract by this option.

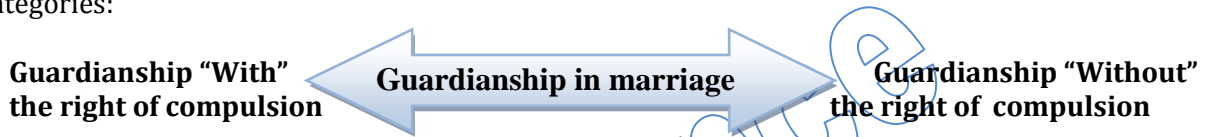
According to Hanafi law, guardian has no power when the child reaches the age of puberty. In “**Saima Waheed’s case**”, a major woman married a man of her own choice. His father filed a suit to secure his daughter’s custody. It was held, in accordance with the Hanafi law, that a marriage, of a major girl, without the guardian’s consent is not invalid.

The same decision was reached in the Indian case of “**Abdul Ahad v. Shah Begum**”. Here, a wife claimed to have repudiated her marriage. The girl’s Wali was her uncle who happened to be the groom’s father. The court held that this is a settled principle of law in Islamic law that once the girl becomes major, she has the absolute right to contract the marriage and this right cannot be exercised by anyone else including the father of the girl.

In the Indian subcontinent, Child Marriage Restraint Act 1929 is used to restrain child marriages. This Act is still in operation in all three countries, with a variety of different amendments. In India, the Child Marriage Restraint (Amendment) Act 1978 sets the minimum age to 18 and 21 years for females and males respectively. In Pakistan, the 1929 Act was amended by S.12(1)(a) MFLO 1961 and the minimum age are now 16 years old for the woman and 18 years old for the man. In Bangladesh, the minimum ages stipulated have been 18 years old for the woman and 21 years old for the man since the Child Marriage Restraint (Amendment) Ordinance 1984.

Guardianship in marriage

According to Sunni schools, marriage guardian shall be agnates. In the absence of agnates, guardianship shall be vested in relatives according to proximity; otherwise it will be vested in the Head of the State. In the Ithna Ashari, the guardian is indispensable in order for the marriage of minors and majors of defective or no legal capacity to be valid. Guardianship in marriage falls under two categories:

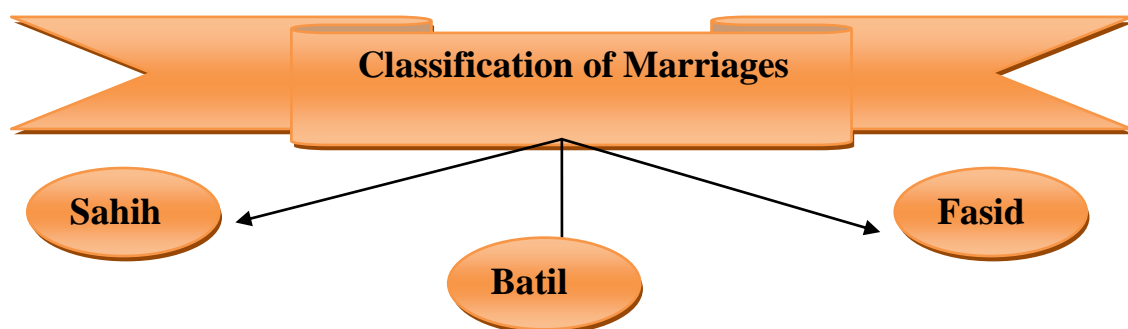


- **Guardianship “With” the right of compulsion**, which is exercised over a person of no or limited legal capacity wherein the guardian may conclude a marriage contract which is valid and takes effect without the consent or acceptance of the ward;
- **Guardianship “Without” the right of compulsion**, which is exercised when the woman possess the full legal capacity but delegates the conclusion of her marriage to a guardian.

Islamic law also requires the parties to a marriage contract to have the capacity to enter into the contract. According to Hanafi and Ithna Ashari's any sane adult, whether male or female, has the capacity to conclude his or her own contract of marriage. According to traditional Islamic law, majority is attained at the onset of physical puberty. There is an irrefutable presumption of law that no female below the age of nine and no male below the age of 12 has attained majority and an equally irrefutable presumption that by the age of 15, majority has been reached by both sexes.

The right of a female to contract her own marriage is, however, not absolute according to Hanafi doctrine. Her guardian may seek dissolution of the marriage if she marries a man who is not her equal according to the law. Equality is determined with regard to piety, lineage, wealth and occupation. However, the right of the guardian to dissolve the marriage lapses if the woman becomes pregnant.

In Maliki, Shafi and Hanbali law a virgin woman may never conclude her own marriage contract. In Maliki law the hierarchy of marriage guardians follows strictly the order of succession. Accordingly, the son of the woman ranks before her father. In Hanbali law the guardian having first priority is the father, followed as in Maliki law by the paternal grandfather and the other agnatic kinsman. The woman only becomes capable of contracting herself in marriage when she ceases to be a virgin by reason of a consummated marriage or an illicit sexual relationship.



There are three types of marriages in Sunni schools:-

1. **Sahih** - Firstly, there is “Sahih” marriage which is fully valid and effective. Under such a marriage, sexual intercourse is lawful and the woman is entitled to both dower and maintenance.
2. **Batil** Secondly, there is a “Batil” (void) marriage. Under such a marriage, no rights or obligations exist between the parties. Parties would be guilty of zina, save where the parties were unaware of the fact that the marriage was void. If a marriage is affected by a permanent impediment, then the marriage is declared void. The permanent impediments arise:
 - Under the bar arising from relationship of blood, a man may not marry any ascendant or descendant, any descendant of his father or mother, or the immediate child of any ascendant, nor may a woman marry any corresponding male.
 - Under the bar of fosterage, two persons who were suckled by the same foster-mother are permanently barred from marrying each other.
 - The bar of affinity arises from marriage, so a man may not marry the former wife of any ascendant or descendant, or any ascendant or descendant of a former wife with whom he actually had consummated his marriage.
 - Under the bar of polyandry, i.e. when a woman contracts a second marriage during the subsistence of her first marriage.
3. **Fasid** - Thirdly, there is a “Fasid” (irregular) marriage, which is middle way out. This is also no marriage, but can be regularized in certain conditions. Under such a marriage, no zina is committed and a dower is payable. An irregular marriage arises from temporary impediments, which occur when:
 - There is an absence of witnesses.
 - A woman who is already married.
 - A woman who is still observing the idda period.
 - A woman whom he has triply repudiated, unless she has married another man and that marriage has been terminated.
 - A man may not marry at the same time two sisters or a mother and her daughter.
 - A man who already has four wives may not validly marry a fifth.
 - A Muslim man may contract marriage with a non-Muslim woman provided she is a khitabiyah.
 - A Muslim woman, on the other hand, may only validly contract marriage with a Muslim man.
 - According to the non-Hanafi schools of Sunni law, a marriage concluded by a woman herself without a guardian is also invalid as is a marriage concluded by a person performing haj.
 - According to Maliki law, a person who is in a state of death sickness is prohibited from marriage.

The Effects of Impediments to Marriage

The presence of an impediment to marriage may render the marriage either void or irregular. The impediments that have the potential to render a marriage void are those that are permanent and those where the impediment, although of a temporary nature, is one that the parties themselves have no power to remove such as if the woman is married to another man. Where any other impediment exists, the marriage is not void but irregular. If the marriage is irregular certain effects flow from it:

- The parties may not be found guilty of zina.
- Any children born out of the union will be held to be legitimate.
- When the parties separate, and separate they must, the woman must observe an idda period.

A marriage, which may be held to be potentially void, will be regarded as irregular if the parties have

acted in good faith, i.e. they were unaware of the existence of the impediment. This is the only instance where Islamic law recognises ignorance of the law as a defence.

Incidents of a Muslim Marriage

Marriage has its own specific incidents and effects. The law defines the rights and duties of husband and wife, some of which are mutual and some of which are peculiar to one or the other of the parties:

- Mutual Rights – Legitimacy of children, inheritance, sexual intercourse.
- Rights of the Wife (Maintenance).
- Rights of the Husband (Polygamy).

Muta marriage

The Shia Law recognizes two kinds of marriage, namely (1) permanent, and (2) muta (literally means enjoyment or use) or temporary. The fundamental difference between the two is that in former the term is not specified while in the later it is. Sunnis do not recognize such marriage. Muta Marriage is an ancient Arabian custom.

A shia male may contract a muta marriage with kitabia woman (professing Muslim, Christian or Jewish religion) or even with a woman who is fire-worshipper but not with a woman following any other religion. But a shia woman may not contract a muta marriage with a non-Muslim.

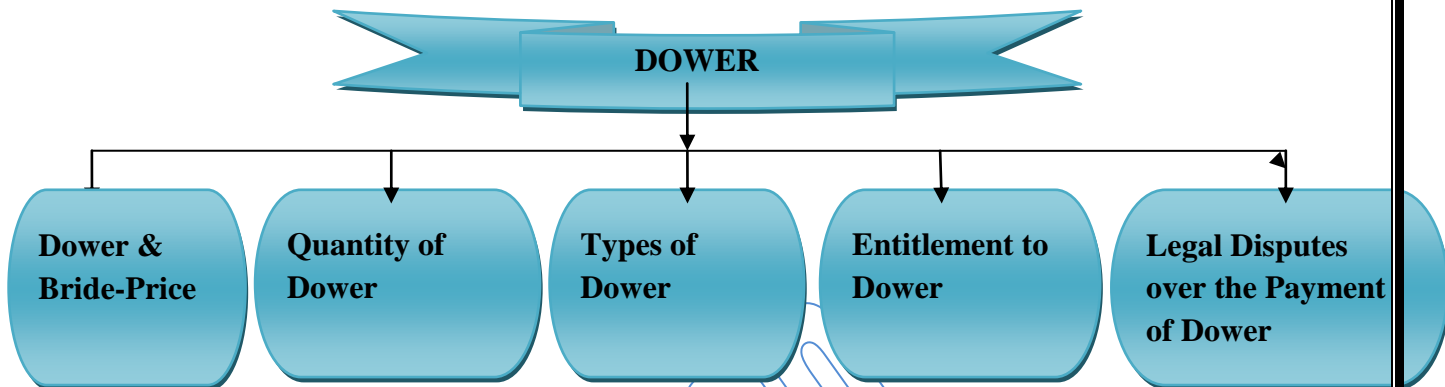
A Shia male can contract any number of muta marriages. All the requisite formalities of marriage, such as of offer and acceptance, have to be observed in the muta marriage. It is essential to the validity of muta marriage that:-

- (1) the period of cohabitation should be fixed (a day, a month, year , years) and that
- (2) some dower should be specified otherwise marriage will be void. If the period is not specified , though dower is specified, it should be considered as a permanent union, even if the parties call it a muta.

That main incidents of muta marriage are:

1. No mutual rights of inheritance created between the spouses, but children considered legitimate and capable of inheriting from both parents. Thus, a muta marriage is different from prostitution and it is not a marriage for pleasure or a marriage of convenience.
2. Wife is not entitled to maintenance (unless specified). However, she is entitled to maintenance as a wife under the Cr. P.C.
3. If marriage is not consummated, the wife is entitled to only half of the dower. If consummated, then full dower.
4. On the expiry of the term of marriage, if the marriage has been consummated, the wife is required to undergo iddat to three courses.
5. Husband has the right to refuse procreation i.e. izl.
6. Marriage come to end *ipso facto* on the expiry the term, unless extended. Husband and wife do not have a right of divorce, but he can terminate the union earlier by making a “gift of the term”(hiba-i-muddat). In that case, the wife is entitled to full dower. The wife has a right to leave the husband before the expiry of the term of the muta marriage; if she does so, the husband has a right to deduct the proportionate part of the dower for the unexpired period.

7. If there is evidence of the term for which the muta marriage was fixed and cohabitation continues after that term, muta marriage stands extended for the whole period of cohabitation. And, the children conceived during the extended period shall be legitimate.



Dower is a sum of money or property which becomes payable by the husband to the wife as an effect of marriage. In Surah Al-Nisa, Verse 4, the Quran says: "And give the women (on marriage) their dower as a free gift".

According to both Sunnis and Shias, the dower may consist of anything that can be valued in money, is useful and ritually clean. Therefore, the dower may be land, building, cattle, crops, chattels etc. The property given as dower must be reasonably specified. A vague dower, e.g. "an animal" or "a house" shall not be valid, without however invalidating the marriage contract itself.

i. Dower & Bride-

Dower is a unique feature of a Muslim marriage. But contrary to a widely held misconception in the West, it is not a bride-price. Although, in the pre-Islamic period a bride price was paid to the bride's father, but the requirement of dower itself is one of the most significant reforms affected by the Quran. According to the Hanafi Jurist Al Kamal, dower is there to underline the prestige of the marriage, it is not a consideration like a price, and otherwise it would have been set as a prior condition.

Dower is not a precondition to marriage. It is mentioned in Surah Baqara, Verse 236, that: "**It is no sin for you if ye divorce woman while yet ye have not touched them nor appointed unto them a portion (dower)**". This means that there is no sin if no dower is paid and the woman is divorced, before consummation. Since divorce can only occur after a valid marriage contract, this shows that dower is not a precondition to marriage.

It is also different from a bride price because a bride price was paid to the father of the bride, but dower, on the other hand, is an inalienable and imprescriptible right of the wife. It is inalienable in that it is taken for granted even if it is not expressly stated in the contract. If the husband makes a condition in the marriage contract that no dower will be paid, this shall be void but not the remaining contract. It is imprescriptible in that the wife shall not lose her entitlement to it through prescription alone.

ii. Quantity of Dower

Classical jurists set no higher limit for the dower. But there is no such unanimity on the minimum dower. The Shafis, Hanbalis and the Shias maintain that there is no such limit. However, the Malikis set a quarter dinar of gold or three dirhams of silver as the minimal dower, by analogy with the Sharia limit for punishable theft. A dirham weighs 2.97 grammes. The Hanafi doctrine maintains that the minimal dower shall be 10 dirhams, citing the authority of a tradition of the Prophet to that effect, a tradition whose authenticity is disputed by other schools. The Shia's say that what was given to Bibi Ayesha should be the minimum limit.

iii. Types of Dower

The parties may stipulate an amount to be paid as dower in the marriage itself. This is called specified dower, and it may be reduced or increased by mutual consultation. Provided that the husband is sane and major, the addition shall be binding on him under three conditions:

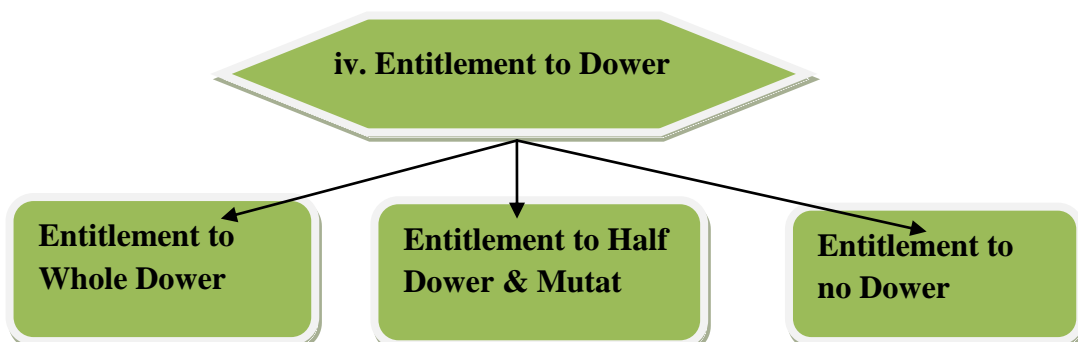
- It has to be determinate, i.e. if a husband says to his wife, **"I have added to your dower"** without further specification, no addition shall be valid.
- It occurs while they still live together, i.e. no divorce or separation.
- That it is accepted, at the same sitting where it has been offered.

Likewise, a wife possessing full legal capacity may discharge her husband, subsequent to the marriage contract, of all or any part of her specified dower. It shall be valid if the husband accepts it or keeps silent, and void if rejected. However, if waiving off occurred due to pressure, i.e. threat or on husband's death bed, then it will not be valid. Unlike increase, no guardian of the minor wife has the power to reduce her specified dower.

But if no dower is specified or if the contract expressly states that there shall be no dower payable, the wife is nevertheless entitled to receive dower, i.e. the proper dower. The Sunni and Shias agree that the proper dower is to be calculated by taking into account the amount of dower received by comparable members of the wife's family such as her sisters or cousins. Her personal attributes are also relevant: her virginity, age, education, beauty and so on.

The specified dower is further sub-classified into **"prompt"** or **"deferred"** dower. The parties may agree between themselves when the dower shall be paid. If it is payable immediately at the conclusion of the marriage contract marriage it is called prompt dower. Dower will be deferred if it is payable some time later, otherwise it shall become payable immediately on the earlier of two events: death or divorce. If the marriage contract is silent on the type of dower it is presumed that it will be prompt.

iv. Entitlement to Dower



a. Entitlement to Whole Dower:

It is unanimously agreed by the Sunnis that the whole dower shall become due to the wife on the occurrence of either of two events:

- The actual consummation of marriage;
- The death of either spouse before consummation.

If it is the wife who dies, her heirs can claim it from the husband. All the jurists agree that the whole dower shall be due to the wife if the husband dies by natural causes or murder by a third party, or if the husband himself kills the wife. With the exception of Hanafis, all the other schools agree that the wife shall lose her entitlement to any dower if she killed her husband before consummation.

The Shias have a different view. According to them, if the husband dies before consummation without having specified a dower then nothing is payable to the wife.

b. Entitlement to Half Dower & Mutat:

Jurists deduce the following conditions for half the dower to be paid:

- That marriage is under a valid contract and the dower is specified;
- That divorce occurs before consummation and due to an act of husband, other than his exercising the option of puberty or recovery from insanity.

It should be remembered that only the stipulated dower shall be halved and any additions which were made to it after the marriage contract shall be dropped altogether.

However, if no dower has been fixed in the contract, then the wife is entitled to a mut'at, i.e. a gift of consideration. Under Hanafi law, it consists of three articles of dress or of their value provided that the value shall not be less than 5 dirhams. The Sunnis in general hold that the mut'a is regulated by the circumstances of both husband and wife. The Shias stick to the Quranic text and consider the circumstances of the husband only.

c. Entitlement to no Dower:

No dower, whether specified or proper, shall be due to the wife if:

- The marriage is dissolved by the husband before consummation through exercising his option of puberty or recovery from insanity, as in such a case, the very contract of marriage is declared null and void.
- If the marriage is dissolved before actual consummation by a lawful/ unlawful act of the wife. Lawful acts include option of puberty, recovering from insanity, or taking khula. Unlawful acts include apostasy.

v. Legal Disputes over the Payment of Dower:

There are a number of legal disputes which relate to the payment of dower. The first relates to the amount of dower. Recently, there has been a trend for very large Maher sums to be announced. There are probably three reasons for this trend:

- 1.) The brides' family often demand high Mehar sums for status purpose.
- 2.) In many cases the bridegrooms themselves encourage the insertion of large Maher sums for their own aggrandisement.
- 3.) A large dower sum can be viewed as insurance for the wife against the possibility of an unjustified divorce by the husband or his early death.

However, in certain cases, apart from that publicity agreement, there is also a private agreement for a lesser sum agreed between the parties. The same dispute arose in "**Nasir Ahmad v. Asmat Jehan**", and it was held that the real dower payable would be that agreed in private because this is the only agreement really intended to be enforced by both the parties.

The second dispute relates to the refusal of conjugal relations. In Pakistan and Bangladesh, under **S.10 MFLO 1961**, if no details of the mode of payment of dower are specified, then the dower would be presumed prompt and payable on demand. Therefore, can a Muslim wife whose prompt dower has not been paid is entitled to refuse consummation of the marriage?\

This question was answered in “**Abdul Kadir v. Salima**”, where a Muslim wife refused conjugal relations on non-payment of dower after consummation had earlier occurred. The court found that the wife has lost her right to refusal once consummation had earlier occurred. The decision was based on the views of Hanafi Disciples rather than on the view of Abu Hanifa.

The same issue arose in a recent Indian case of “**Rabia Khatoon v. Muhammad Ahmad**”. The court did acknowledge that under the classical Hanafi law, the wife may refuse to live with her husband on non-payment of dower even after consummation. However, due to policy and social grounds, the court still stuck to their old position of Hanafi Disciples. Thus, the husband was granted his claim of restitution of conjugal relations in addition to the order of paying his wife the outstanding dower.

However, the position in Pakistan changed with the case of “**Rahim Jan v. Muhammad**”. Here, the High Court had to decide whether, in Hanafi law, the wife is entitled, even after consummation, to refuse to live with her husband when her prompt dower has not been paid. It was said that “**Abdul Kadir’s case**” comments are obiter. It was, therefore, firmly held that even after consummation the wife retains the right to refuse the performance of marital obligations till the prompt dower is paid.

The third dispute relates to the remission of dower by the wife. It is obvious that remission would only be valid if it is made by free consent and not due to coercion. In “**Shah Banu Begum v. Iftikhar Muhammad**”, the wife had remitted the dower so as to prevent the husband from taking a lover. It was held that the waiver was void and of no effect.

The fourth dispute relates to unpaid dower. Generally, an unpaid dower represents an unpaid debt and the wife may sue to enforce payment. The widow has a right to retain possession of the deceased husband’s property until the dower debt is paid to her. In “**Maina Bibi v. Chaudhri Vakil**”, a widow remained in possession of certain property that was claimed by the deceased’s heirs. The wife defended on the ground of her unpaid dower. The judge found that the wife has the right to possession unless the heirs pay her the unpaid dower.

Iddat

In Islam, **iddah** or **iddat** is the period a woman must observe after the death of her spouse or after a divorce, during which she may not marry another man. Its purpose is to ensure that the male parent of any offspring produced after the cessation of a nikah (marriage) would be known. The length of **iddah** varies according to a number of circumstances.

The **iddah** of a woman divorced by her husband is three monthly periods, unless she is pregnant in which case the **iddah** lasts until she gives birth, or unless the marriage was not consummated in which case there is no **iddah**, or unless she does not menstruate, in which case "the scholars say that she should observe an **iddah** of a full year, nine months for pregnancy and three months for **iddah**."

For a woman whose husband has died, the **iddah** is four lunar months and ten days after the death of their husbands, whether or not the marriage was consummated. The period, four months and ten days after the death of a spouse, is calculated on the number of menses that a woman has.

Islamic scholars consider this directive to be a balance between mourning of husband's death and protecting the widow from criticism that she might be subjected to from remarrying too quickly after her husband’s death. This is also to ascertain whether a woman is pregnant or not, since four and a half months is half the length of a normal pregnancy.

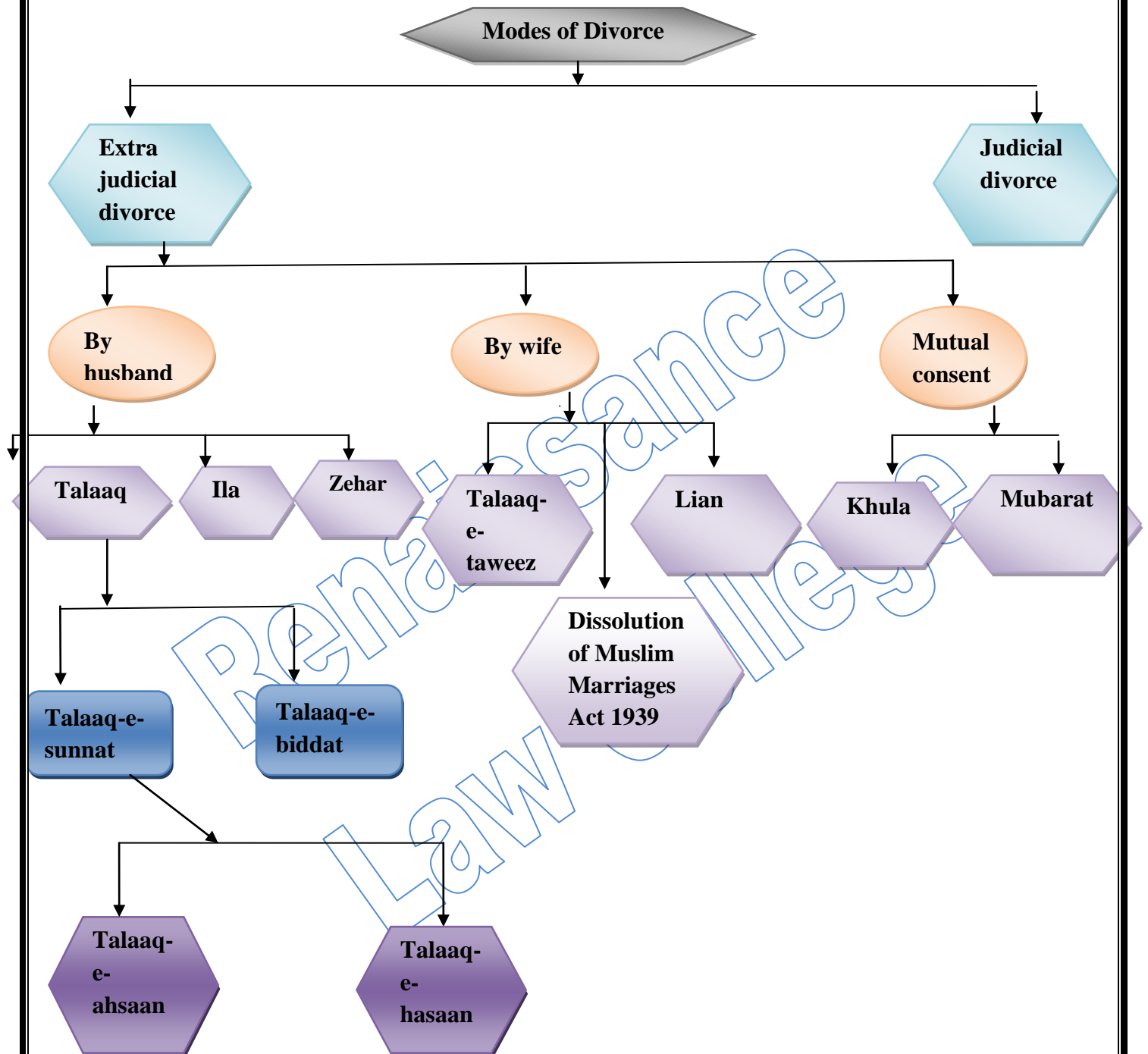
Husbands should make a will in favor of their wives for the provision of one year’s residence and maintenance, unless the wives themselves leave the house or take any other similar step.



Divorce

The Concept of Divorce under Muslim Law

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 is done by talaq. But he may also divorce by Ila, and Zihar which differ from talaq only in form, not in substance. A wife cannot divorce her husband of her own accord. She can divorce the husband only when the husband has delegated such a right to her or under an agreement. Under an agreement the wife may divorce her husband either by Khula or Mubarat. Before 1939, a Muslim wife had no right to seek divorce except on the ground of false charges of adultery, insanity or impotency of the husband. But the Dissolution of Muslim Marriages Act 1939 lays down several other grounds on the basis of which a Muslim wife may get her divorce decree passed by the order of the court.

There are two categories of divorce under the Muslim law:

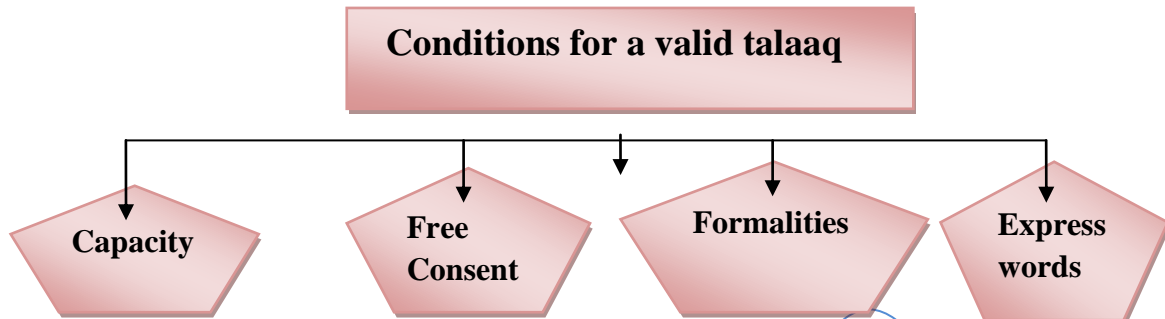
- 1.) Extra judicial divorce, and
- 2.) Judicial divorce

1) **Extra judicial divorce** -The category of extra judicial divorce can be further subdivided into three types, namely:-

- a. **By husband**- talaq, ila, and zihar.
- b. **By wife**- talaq-i-tafweez, lian.
- c. **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.

1. **Talaq:** Talaq in its primitive sense means dismissal. In its literal meaning, it means "setting free", "letting loose", or taking off any "ties or restraint". In Muslim Law it means freedom from the bondage of marriage and not from any other bondage. In legal sense it means dissolution of marriage by husband using appropriate words. In other words talaq is repudiation of marriage by the husband in accordance with the procedure laid down by the law. The following verse is in support of the husband's authority to pronounce unilateral divorce is often cited: "Men are maintainers of women, because Allah has made some of them to excel others and because they spend out of their property (on their maintenance and dower). When the husband exercises his right to pronounce divorce, technically this is known as talaq. The most remarkable feature of Muslim law of talaq is that all the schools of the Sunnis and the Shias recognize it differing only in some details. In Muslim world, so widespread has been the talaq that even the Imams practiced it. The absolute power of a Muslim husband of divorcing his wife unilaterally, without assigning any reason, literally at his whim, even in a jest or in a state of intoxication, and without recourse to the court, and even in the absence of the wife, is recognized in modern India. All that is necessary is that the husband should pronounce talaq; how he does it, when he does it, or in what he does it is not very essential. In **Hannefa v. Pathummal**, Khalid, J., termed this as "monstrosity". Among the Sunnis, talaq may be express, implied, contingent constructive or even delegated. The Shias recognize only the express and the delegated forms of talaq.



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:

- a. Talaaq-e-sunnat,
- b. Talaaq-e-biddat.

Talaaq-e-sunnat has two forms:

- i) Talaaq-e-ahasan (Most approved)
- ii) Talaaq-e-hasan (Less approved).

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

i) **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 of 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 be revoked at any time before the completion of the period of iddat, thus hasty, thoughtless divorce can be prevented. The revocation may be 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 misled 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”

ii) The hasan talaq: In this the husband is required to pronounce the formula of talaq three times 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 talaq, 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 talaq, 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.

b. Talaq-i-Biddat: It came into vogue during the second century of Islam. It has two forms:

(i) the triple declaration of talaq 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 talaq is not recognized by the Shias. This form of divorce is condemned. It is considered heretical, because of its irrevocability.

2. Ila: Besides talaq, 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.

3. 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:

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.”

1. **Khula-** 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 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.
2. **Mubarat** - In mubarat both, the husband and the wife, are happy to get rid of each other. Among the Sunnis when the parties to marriage enter into a mubarat all mutual rights and obligations come to an end. The Shia law is stringent though. It requires that both the parties must bona fide find the marital relationship to be irksome and cumbersome. Among the Sunnis no specific form is laid down, but the Shias insist on a proper form. The Shias insist that the word mubarat should be followed by the word talaq, otherwise no divorce would result. They also insist that the pronouncement must be in Arabic unless the parties are incapable of pronouncing the Arabic words. Intention to dissolve the marriage should be clearly expressed. Among both, Shias and Sunnis, mubarat is irrevocable. Other requirements are the same as in khula and the wife must undergo the period of iddat and in both the divorce is essentially an act of the parties, and no intervention by the court is required.

Divorce by wife:

The divorce by wife can be categorized under three categories:

- (i) Talaq-i-tafweez
- (ii) Lian
- (iii) By Dissolution of Muslim Marriages Act 1939.

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

2. **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.

3. **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 there under:

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

- i) 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.
- ii) 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.
- iii) 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.
- iv) 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.
- v) 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 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.

vi) If the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal 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. Venereal 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.

•vii) 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;

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

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

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

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

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

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

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

In **Syed Ziauddin v. Parvez Sultana**, Parvez Sultana was a science graduate and she wanted to take admission in a college for medical studies. She needed money for her studies. Syed Ziauddin promised to give her money provided she married him. She did. Later she filed for divorce for non-fulfillment of promise on the part of the husband. The court granted her divorce on the ground of cruelty. Thus we see the court's attitude of attributing a wider meaning to the expression cruelty. In **Zubaida Begum v. Sardar Shah**, a case from Lahore High Court, the husband sold the ornaments of the wife with her consent. It was submitted that the husband's conduct does not amount to cruelty.

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

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

Irretrievable Breakdown: Divorce on the basis of irretrievable breakdown of marriage has come into existence in Muslim Law through the judicial interpretation of certain provisions of Muslim law. In 1945 in **Umar Bibi v. Md. Din**, it was argued that the wife hated her husband so much that she could not possibly live with him and there was total incompatibility of temperaments. On these grounds the court refused to grant a decree of divorce. But twenty five years later in **Neorbibi v. Pir Bux**, again an attempt was made to grant divorce on the ground of irretrievable breakdown of marriage. This time the court granted the divorce. Thus in Muslim law of modern India, there are two breakdown grounds for divorce:

(a) non-payment of maintenance by the husband even if the failure has resulted due to the conduct of the wife,

(b) where there is total irreconcilability between the spouses.

Unit III

Guardianship

The source of law of guardianship and custody are certain verses in the Koran and a few ahadis. The Koran, the alladis and other authorities on Muslim law emphatically speak of the guardianship of the property of the minor; the guardianship of the person is a mere inference. We would discuss the law of guardianship of custody as under:



To this list, we may add the de facto guardian who has been discussed by the Muslim authorities under the head, fizuli, and who has practically no position in the Muslim law of modern India.

1. Natural Guardians:

The Muslim law-givers and jurists do not use the expression “natural guardian”, but it seems to be clear that in all schools of both the Sunnis and the Shias, the father is recognized as guardian which term in the context is equivalent to natural guardian, and the mother in all schools of Muslim law is not recognized as a guardian, natural or otherwise, even after the death of the father. Since the mother is not the legal guardian of her minor children, she has no right to enter into a contract to alienate the minor’s property.

The question of her being the natural guardian during the life time of the father does not arise. The father’s right of guardianship exists even when the mother, or any other female, is entitled to the custody of the minor.

The father’s right to control the education and religion of minor children is recognized. He also has the right to control the upbringing and the movement of his minor children. So long as the father is alive, he is the sole and supreme guardian of his minor children.

The father’s right of guardianship extends only over his minor legitimate children. He is neither entitled to guardianship nor to custody of his minor illegitimate children at any time, even after the death of the mother, though it is a different matter that he may be appointed as guardian by the court. In Muslim law, the mother is not a natural guardian even of her minor illegitimate children, but she is entitled to their custody.

Among the Sunnis, the father is the only natural guardian of the minor children. After the death of the father, the guardianship passes on to his executor. Among the Shias, after the father, the guardianship belongs to the grandfather, even if the father has appointed an executor; the executor of the father becomes the guardian only in the absence of the grandfather.

It appears that the Shias consider the father as a natural guardian, and in his absence the grandfather is considered to be the natural guardian. No other person can be a natural guardian, not even the

brother. In the absence of the grandfather, the guardianship belongs to the grandfather's executor, if any.

A minor cannot be represented by the grandfather when father is alive.

2. Testamentary Guardian:

Among the Sunnis, the father has full power of making a testamentary appointment of guardian. In the absence of the father and his executor, the grandfather has the power of appointing a testamentary guardian.

Among the Shias, the father's appointment of testamentary guardian is valid only if the grandfather is not alive. The grandfather, too, has the power of appointing a testamentary guardian. No other person has any power of making an appointment of a testamentary guardian.

Among both the Shias and the Sunnis, the mother has no power of appointing a testamentary guardian of her children. It is only in two cases in which the mother can appoint a testamentary guardian of the property of her minor children, both legitimate and illegitimate viz., first when she has been appointed a general executrix by the Will of the child's father, she can appoint an executor by her Will, and secondly, she can appoint an executor in respect of her own property which will devolve after her death on her children.

The first exception is more apparent than real: any executor of the father has the power to appoint an executor by his Will: this provision applies to all executors. The latter exception, too, has little significance, since every person is free to appoint an executor of his or her own property.

The mother can be appointed a testamentary guardian or executor by the father, or by the grandfather, whenever he can exercise this power. Among the Sunnis, the appointment of a non-Muslim mother as testamentary guardian is valid, but among the Shias such an appointment is not valid, as they hold the view that a non-Muslim cannot be a guardian of the person as well as the property of a minor.

According to all Muslim authorities, a non-Muslim alien cannot be appointed as a testamentary guardian; if such an appointment is made it is null and void. It seems that the appointment of non-Muslim fellow-subject (zimmi) is valid, though it may be set aside by the kazi. According to the Malikis and the Shafii law, a zimmi can be validly appointed testamentary guardian of the property of the minor, but not of the person of the minor. The Shias also take the same view.

The Durr-ul-Muhtar states that 'if a minor, a bondman, non-Muslim or a fasik (reprobate), is appointed as 'a testamentary guardian, and then he should be replaced by the Kazi. But any act done by them before their removal, will be valid.

Further, if disability ceases to exist before their removal, they cannot be removed. The Fatwai Alamgiri also takes this view, but holds that the appointment of a minor or insane person as guardian is void, and, therefore, any act done by them before or after his removal will be void and non-effective.

There is some controversy among the Muslim jurists on the point whether a person, who was a minor at the time of his appointment but who ceased to be so before his removal, can be removed on the ground that when his appointment was made, he was unqualified. It appears that when two persons are appointed as guardians, and one of them is disqualified, the other can act as guardian.

The Muslim jurists of all schools agree that a profligate, i.e., a person who bears in public walk of life a notoriously bad character, cannot be appointed as guardian. However, all acts done by such a person before his removal are valid and binding unless found to be contrary to the interest of the minor.

Acceptance of the appointment of testamentary guardianship is necessary, though acceptance may be express or implied. But once the guardianship is accepted, it cannot be renounced save with the permission of the court.

Muslim law does not lay down any specific formalities for the appointment of testamentary guardians. Appointment may be made in writing or orally. In every case the intention to appoint a testamentary guardian must be clear and unequivocal.

A testamentary deposition made by a testator may be invalid, but appointment of the testamentary guardian of minor children will be valid. The appointment of the executor may be general or particular.

The testator must have the capacity to make the Will at the time when it was executed. This means that the testator should be major, of sound mind, i.e., at the time of execution of the Will he should be in full possession of his senses.

The executor of the testamentary guardian is designated variously by Muslim law-givers, indicating his position and powers. He is commonly called, wasi or guardian. He is also called amin, i.e., a trustee. He is also termed as kaim-mukam, i.e., the personal representative of the testator.

As in other systems of law, it is the duty of the executor under Muslim law to administer the estate and assets of the testator, to carry out the wishes of the testator with utmost fidelity, and to act as guardian of the minor children whenever he is appointed as a testamentary guardian.

3. Guardian appointed by the Court(De Facto guardian):

On the failure of the natural guardians and testamentary guardians, the kazi was entrusted with the power of appointment of guardian of a Muslim minor. In modern India, the Muslim law of appointment of guardians by the Kazi stands abrogated.

Now the matter is governed by the Guardians and Wards Act, 1890. This Act applies to the appointment of guardians of all minors belonging to any community. The High Court's also have inherent powers of appointment of guardians, though the power is exercised sparingly.

Under the Guardians and Wards Act, 1890, the power of appointing or declaring any person as guardian is conferred on the District Court. The District Court may appoint or declare any person as guardian of a minor child's person as well as property whenever it considers it necessary for the welfare of the minor, taking into consideration the age, sex, wishes, of the child as well as the wishes of the parents and the personal law of the minor.

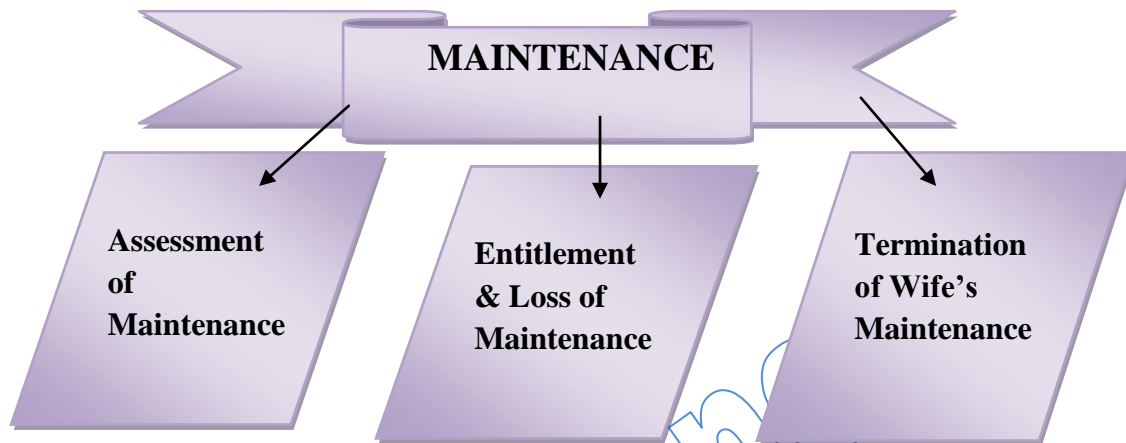
In *Rahima v. Sabujaness*, the Gauhati High Court said that when mother had remarried after the death of her husband, she should not be appointed a guardian of her minor daughter. The paternal grandmother would be a preferable guardian and the court appointed her accordingly, M. Sharma, J. said:

The disqualification to be a guardian is, if the mother married second time. As regards the mother or a female guardian, marriage to a person not related to the child within the prohibited degrees is a bar to guardianship.

It is further provided that the mother does not lose the custody of her infant children merely because she is no longer the wife of her former husband, but where she marries a second husband, the custody of such children normally belongs to her former husband.

In that case other relations failing the mother, by absence or disqualification, the following female relations are entitled to custody in order of priority—

- (i) Mother's mother, how high so ever,
- (ii) Father's mother, how high so ever and
- (iii) Full sister and other female relations including aunts.



Maintenance consists of the provisions of accommodation, food, and clothing. It is a lawful right of the wife under a valid marriage irrespective of her means or religion. The entitlement of the wife to maintenance derives its authority from the Quran, Prophet's tradition and consensus. In **Surah Al-Nisa, Verse 34**, The Quran says: *"Men are the protectors and maintainers of women because God has given the one more (strength) than the other, and because they support them from their means"*.

I.) Assessment of Maintenance:

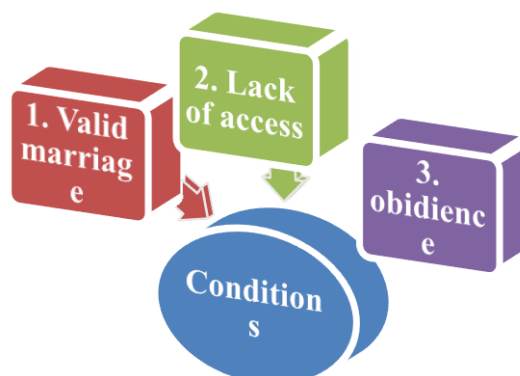
The scale of maintenance was not discussed in The Holy Quran or the Sunna, but it was rather left to juristic opinions. It is calculated in **Hanafi, Maliki and Hanbali** law as the mean between the resources of the husband and the previous living standard of the wife. However, **Shafis** and **Shia's** fix it according to the means of the husband alone.

The husband is required to provide the wife with a house that is safe both structurally and in location and is free from any other members of his families, including other co-wives. The only exception is that the husband can require his wife to live with infant children of his previous marriage, although Shia school differs.

The right to be maintained belongs to the wife even if she is wealthy and her husband poor. When the husband has no means at all, this is a misfortune that has to be shared by the wife.

II.) Entitlement & Loss of Maintenance:

Maintenance shall be due to the wife during the subsistence of a marriage if all the following conditions are fulfilled:



1. A Valid Marriage – In a Batil (void) or Fasid (irregular) marriage, the wife shall not be entitled to maintenance, since the husband has no lawful right of access to her. The wife shall also lose her right to maintenance if she apostasies because apostasy renders the marriage contract void.

2. Lack of Access – It is tamkeen, i.e. availability of the wife for her husband, and not the marriage itself, that makes maintenance the right of the wife, this right shall be lost if the husband is denied access to the wife at all lawful times. Thus, a woman in jail is not entitled to maintenance, even if she is innocent and consummation has occurred. The same rule applies for a kidnapped wife.

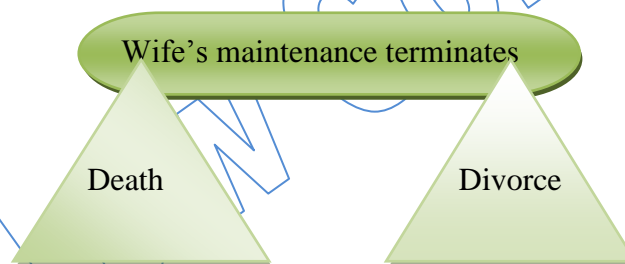
3. Obedience – A disobedient wife has no right to maintenance. The husband’s duty to maintain begins when the wife submits her to husband. If the wife declares herself ready to start cohabiting with the husband, he is to maintain her even if she is living in the house of her guardian, as she has done everything she could. Even a minor husband is obliged to maintain his wife, if he is of an age where consummation is possible.

Sharia defines a disobedient wife as a woman who leaves the matrimonial home without a lawful excuse. The Shias consider as a lawful excuse, wife visiting her sick father who needs her to stay with him, having nobody else to look after him, even if the husband denied permission. Both Sunnis and Shias agree that there will be no maintenance for a wife who goes to work without the husband’s permission. The disobedient wife’s lost right to maintenance shall be revived on the removal of the cause.

Similarly, the wife’s maintenance shall be suspended if she travels, unaccompanied by her husband. The wife is bound to travel with her husband to whatever he wishes, provided that she is safe and unless otherwise stipulated in the marriage contract.

However, if the wife disobeys her husband for some lawful reason, then the right to maintenance does not extinguish. Non-payment of prompt dower is a reasonable ground for a wife to refuse to live with her husband e.g. “**Rahim Jan v. Muhammad**”.

III.) Termination of Wife’s Maintenance:



Regarding divorce, all schools agree that if the divorce is “revocable”, the wife is entitled to maintenance throughout the idda, because repudiation is a matter in the husband’s hands and wife still remains under his control.

If, however, the divorce is “irrevocable”, then only Hanafis allow maintenance during idda. The Malikis states that such a woman is entitled to full maintenance only when she is actually pregnant. If she is non-pregnant, then the wife is entitled to lodging only during the idda.

All schools agree that a divorced Muslim woman is entitled to no maintenance after the idda period, the rationale being that these women would normally return to their natural family or would remarry. However, if a man wants to provide maintenance for the rest of her life is not preventing from doing so by any provision of Muslim law. This area has been a subject of considerable reforms.

Surah Al-Baqara, Verse 236 provides that Mutat is payable in deserving cases as a matter of goodwill and of custom. However, this remedy is not a general entitlement. Various Muslim states have incorporated the Mutat payments in their statutes. In Syria, Jordan and Egypt, the law agree on the principles in general but they differ on the amount payable. Generally, the wife will be entitled to

Mutat, on repudiation by the husband after consummation, as compensation for an arbitrary talaq i.e. if it is proven to a qadi that the husband exercised talaq without a lawful justification. In Syria, the amount payable should not be in excess of the amount of maintenance for her equals for three years. In Jordan, the amount is equivalent of the maintenance due to her for a year. In Egypt, the amount is equivalent of the maintenance due to her for two years.

In South Asia, rather on Mutat, reforms have taken place on the wife's right of maintenance itself. In India, **S.2(2) DMMA 1939** allows Muslim women to seek divorce if her husband fails to maintain her for two years. However, in India, the reforms started with the coming of **S.125 of the Code of Criminal Procedure 1973** in which the definition of a wife, entitled to maintenance, also included an unmarried "divorcee".

In the controversial case of "**Shah Banu**", a Muslim husband drove his wife, an old lady, out of the house after contracting a second marriage. She filed a petition for maintenance under the 1973 Code. The husband gave the respondent an irrevocable talaq and his defence to the lady's claim for maintenance was that she had ceased to be his wife. The Supreme Court confirmed the High Court's decision that she was entitled to maintenance.

The Supreme Court stated that there is inadequate proof to support the proposition that a Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, "who is unable to maintain herself". The court said that the true position is that the classical Islamic law provides no maintenance, with the expiration of idda, for a divorcee who "can" maintain herself. However, if she "cannot" maintain herself, then she can take recourse to S.125. The court supported this proposition with the **Surah Baqara, Verse 236 and 241-42** which provided that for divorced woman, maintenance should be provided on a reasonable scale and this was a duty on the righteous Muslim.

The decision in this case was opposed by various Muslim scholars. Mahmood argued that once the idda period is over, it is the duty of the wife's natural parents to maintain her. In his view women were being treated too favourably by the law and that the basic principles of Muslim law were being violated in the process.

However, I disagree with his views. The Supreme Court did nothing than to reflect the true Islamic position. Though one may say that it's unfair to force an ex-husband to maintain his ex-wife till death, but conversely it is equally unfair to let a woman die on the streets that has on other means of survival. It is not correct to say that Muslim law is being violated, because the above mentioned Quranic verses themselves say that divorced women should be provided maintenance on a reasonable scale and it is not unfair to the husband because the scale of reasonable payment is judged according to the means of the husband alone, i.e. a poor ex-husband should pay less for maintenance and a rich ex-husband should pay more. It is very harsh to say that this decision favours women heavily just because of the fact that the decision hits the pockets of many Muslim husbands.

In explicit reaction to this case, the Muslim Woman (Protection of Rights on Divorce) Act 1986 was promulgated. This has done precisely what its name suggests and has proved rather beneficial to divorced Muslim wives who were unable to maintain themselves appropriately after the idda.

S.3 of 1986 Act offers a more or less instant remedy today to any divorced Muslim wife in India who, at the end of the idda period, finds that her ex-husband has not made reasonable provisions for her future maintenance. After this Act, there are a number of High Court cases which supports the view that the divorcing husband remains liable for his former wife's welfare. Only the very few cases go the other way.

In **Ali v. Sufaira**, the judge again turned to the Quranic text and said that **Surah 2, verse 236-37 and 241-42** makes it clear that any Muslim must give a reasonable amount by way of gift or maintenance to the divorced lady and they are not limited to the period of idda. It was therefore held that under S.3(1)(a) of the Act a divorcee is entitled to maintenance for the period of idda as well as a reasonable and fair provision for her future.

Contrastingly, in **Usman Khan v. Fathimunnisa Begum**, the judge examined the precise wording of S.3(1)(a) in particular the phrase "within the idda period" and concluded that the husband is not liable

to make reasonable and fair provisions beyond idda period. However, the decision in this case seemed faulty ignoring the intention behind the 1986 Act and the idealistic spirit of the Quranic provisions. Under the Quranic law Mutat is payable in deserving cases only and not unconditionally to every female divorcee. The cloak under the 1986 Act gives an absolute right to all divorcees irrespective of the circumstances.

In **Pakistan and Bangladesh S.9 MFLO 1961** places an obligation on the Muslim husband to maintain his wife(s) during marriage. The socio religious problems of maintenance are same, but in Pakistani law a divorcee is no longer a wife and therefore gets no maintenance beyond idda. Neither the Pakistani law makers nor the Pakistani courts had considered the matter in any depth and the current situation is that the burden of maintaining divorced women is normally borne by the natural family, rather than the divorcing husband or his family.

However, Bangladesh also seems to follow India. In **Md. Hefzur Rahman v. Shamsun Nahar**, it was held that a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the idda till she remarries.

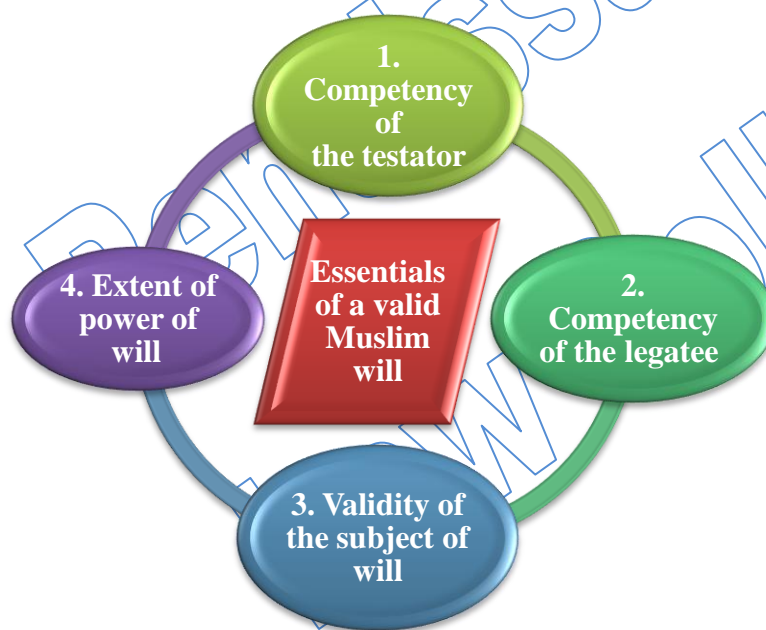
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UNIT IV

WILL

Will is the Anglo Mohammedan word for Wasiyat. Generally, Wasiyat means will, but also has other meanings. It may signify a moral exhortation, a specific legacy, or the capacity of the executor. In general, a will means a document containing the desire, regarding how a person wants to utilize or divide his property, after he is dead. According to **section 2(h) of Indian Succession Act 1925**, Will is the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

For a Muslim, Wasiyat is a divine institution because it is regulated by Quran. It offers to the testator a means to change the course of inheritance to certain extent and to recognize the value of those relatives who are excluded from inheritance or strangers who might have helped him in life or in last moments. Prophet Mohammad has declared that this power is not unrestricted and should not be exercised to the injury of the lawful heirs.



1. Competency of the testator (who can make the will)

Any Muslim, including a man or a woman, who is major and is of sound mind can make a will. Regarding wills, the age of majority is governed by Indian Majority Act. A will made by a minor is invalid but it can be validated by ratification after he attains majority. A person of unsound mind is not competent to make a will and a will made by such a person is invalid. A will made by a person while of sound mind, who later becomes of unsound

mind, becomes invalid.

In **Abdul Manan Khan vs Mirtuza Khan AIR 1991**, Patna HC held that any Mohammedan having a sound mind and not a minor may make a valid will to dispose off the property. So far as a deed is concerned, no formality or a particular form is required in law for the purpose of creating a valid will. An unequivocal expression by the testator serves the purpose.

Will of a person committing suicide - Under Sunni Law the will of a person committing suicide is valid. Under Shia law, a will made by the person who has done any act towards committing suicide is invalid but if the will is made before doing of any act towards committing suicide, it is valid.

2. Competency of the legatee

Any person capable of holding property may be the legatee under a will. Thus, sex, age, creed, or religion are no bar. However, no one can be made the beneficial owner of the shares against his will, therefore, to complete the transfer, the legatee must give his express or implied consent to accepting the legacy.

An institution can be a legatee. A non-muslim can be a legatee if he is not an enemy of Islam and is not hostile towards Islam. In Sunni law, a testator's murderer cannot be a legatee. In Shia law, if the act of the murderer was an accident, he can be a legatee otherwise not.

Unborn person - In Sunni Law, a child born within 6 months of the date of making of the will is considered to be in existence and is a valid legatee. In Shia law, the period is 10 months, which is the maximum period of gestation.

Bequest for a charitable object is valid.

3. Validity of the subject of will - To be able to will a property, it must be -

- a. capable of being transferred.
- b. in existence at the time of testator's death even if it is not in existence at the time of making will. Thus, a bequest cannot be made of anything that is to be performed or produced in future.
- c. in the ownership of the testator.

A bequest that is to take effect only upon any uncertain event happening is a contingent bequest, and is void. However, a bequest with a condition that derogates from its completeness is valid and will take effect as if the condition did not exist. For example, a grant is made to X for his life and then it is stipulated to go to Y after death of X. In this case, X will get the grant completely and Y will get nothing. Thus, a bequest of life estate is not valid either under Shia or Sunni Law.

4. Extent of power of will - The testamentary power of a muslim is limited in two ways -

a. Limitations as regards to person - The general rule is laid down in **Ghulam Mohammad vs Ghulam Hussain 1932 by Allahbad HC**, that a bequest in favour of a heir is not valid unless the other heirs consent to the bequest after the death of the testator. Whether a person is a heir or not is determined at the time of testator's death. Under Shia law, a testator may bequest a heir as long as it does not exceed one third of his property and no consent of other heirs is required. In **Hussaini Begam vs Mohammad Mehdi 1927**, it was held that if all the property was bequested to one heir and other were not given anything, the bequest was void in its entirety.

b. Limitations as regard to the amount - The general principle is that a muslim is not allowed to will more than 1/3rd of his property after taking out funeral charges and debt. However, under Hanafi law, it may be valid if heirs give the consent after the death of the testator. In Shia law, such consent can be taken either before or after the death. Another exception is that if the testator has no heir, he can will any amount. The govt. cannot act as an heir to the heirless person.

Differences between Shia and Sunni Law on Will

Sunni Law	Shia Law
Bequest to an heir without consent of other heirs is invalid.	Bequest up to 1/3 of the property is valid even without consent.
Bequest to unborn child is valid if the child is born within 6 months of making the will.	Valid if the child is born within 10 months of making the will.
Bequest to unborn child is valid if the child is born within 6 months of making the will.	Valid if the child is born within 10 months of making the will.
Legatee who causes death even by accident is incapable of receiving.	Legatee who causes death by accident is capable.

For a bequest of more than 1/3 to a non-heir, the consent of heir must be obtained after the death of testator.	Heir's consent may be obtained before or after death.
Will of a person committing suicide is valid.	Valid only if the will is made before the person does any act towards committing suicide.
Recognizes rate able distribution.	Does not recognize rate able distribution.
If the legatee dies before testator, the legacy lapses and goes back to the testator.	The legacy lapses only if the legatee dies without heirs otherwise, it goes to legatee's heirs.
Legatee must accept the legacy after the death of the testator.	Legatee can accept the legacy even before the death of the testator.

Differences between Will and Gift

Gift	Will
It is an immediate transfer of right or interest.	It is a transfer after death.
Delivery of possession is necessary.	Delivery of possession is not necessary.
Subject of gift must exist at the time of making gift.	Subject of will must exist at the time of death of the testator.
Right of donor is unrestricted.	It is limited up to 1/3rd of the property.
Cannot be revoked.	Can be revoked by making another will.

Gift

Gift is a generic term that includes all transfers of property without consideration. In India, Gift is considered equivalent to Hiba but technically, Gift has a much wider scope than Hiba. The word Hiba literally means, the donation of a thing from which the donee may derive a benefit. It must be immediate and complete. The most essential element of Hiba is the declaration, "I have given".

As per Hedaya, Hiba is defined technically as, "unconditional transfer of property, made immediately and without any exchange or consideration, by one person to another and accepted by or on behalf of the latter".

According to Fyzee, Hiba is the immediate and unqualified transfer of the corpus of the property without any return.

The gift of the corpus of a thing is called Hiba and the gift of only the usufructs of a property is called Ariya.

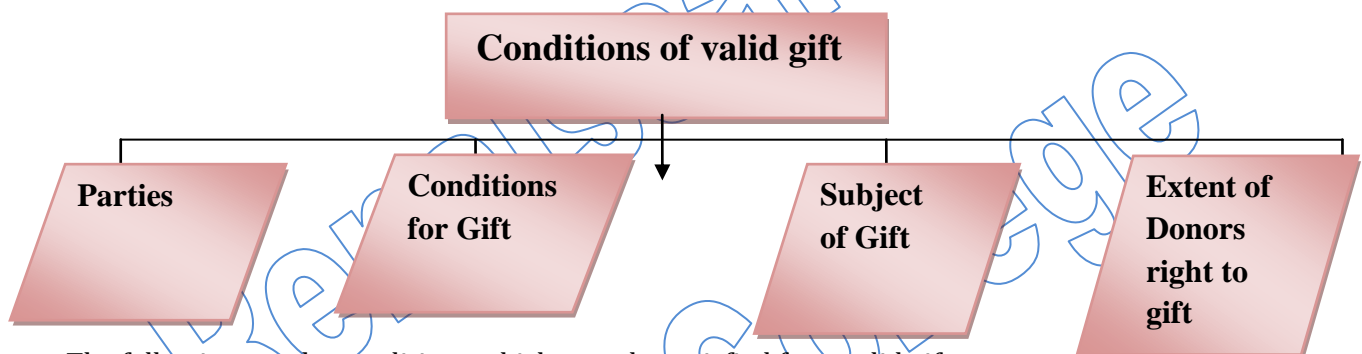


Since muslim law views the law of Gift as a part of law of contract, there must be an offer (izab), an acceptance (qabul), and transfer (qabza). In **Smt Hussenabi vs Husensab Hasan AIR 1989 Kar**, a

grandfather made an offer of gift to his grandchildren. He also accepted the offer on behalf of minor grandchildren. However, no express or implied acceptance was made by a major grandson. Karnataka HC held that since the three elements of the gift were not present in the case of the major grandchild, the gift was not valid. It was valid in regards to the minor grandchildren.

Thus, the following are the essentials of a valid gift -

1. **A declaration by the donor** - There must be a clear and unambiguous intention of the donor to make a gift.
2. **Acceptance by the donee** - A gift is void if the donee has not given his acceptance. Legal guardian may accept on behalf of a minor.
3. **Delivery of possession by the donor and taking of the possession by the donee**- In Muslim law the term possession means only such possession as the nature of the subject is capable of. Thus, the real test of the delivery of possession is to see who - whether the donor or the donee - reaps the benefits of the property. If the donor is reaping the benefit then the delivery is not done and the gift is invalid.



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

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

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

- i) Must have attained the age of majority - Governed by Indian Majority Act 1875.
- ii) Must be of sound mind and have understanding of the transaction.
- iii) Must be free of any fraudulent or coercive advice as well as undue influence.
- iv) Must have ownership over the property to be transferred by way of gift.

A gift by a married woman is valid and is subjected to same legal rules and consequences. A gift by a pardanashin woman is also valid but in case of a dispute the burden of proof that the transaction was not conducted by coercion or undue influence is on the donee.

Gift by a person in insolvent circumstances is valid provided that it is bona fide and not merely intended to defraud the creditors.

b. **Conditions for Donee (who can receive)**

- i) Any person capable of holding property, which includes a juristic person, may be the donee of a gift. A muslim may also make a lawful gift to a non-muslim.
- ii) Donee must be in existence at the time of giving the gift. In case of a minor or lunatic, the possession must be given to the legal guardian otherwise the gift is void.
- iii) Gift to an unborn person is void. However, gift of future usufructs to an unborn person is valid provided that the donee is in being when the interest opens out for heirs.

2. Conditions for Gift (What can be gifted) -

- a. It must be designable under the term mal.
- b. It must be in existence at the time when the gift is made. Thus, gift of anything that is to be made in future is void.
- c. The donor must possess the gift.

Muslim law recognizes the difference between the corpus and the usufructs of a property. Corpus, or Ayn, means the absolute right of ownership of the property which is heritable and is unlimited in point of time, while, usufructs, or Manafi, means the right to use and enjoy the property. It is limited and is not heritable. The gift of the corpus of a thing is called Hiba and the gift of only the usufructs of a property is called Ariya.

In **Nawazish Ali Khan vs Ali Raza Khan AIR 1984**, it was held that gift of usufructs is valid in Muslim law and that the gift of corpus is subject to any such limitations imposed due to usufructs being gifted to someone else. It further held that gift of life interest is valid and it doesn't automatically enlarge into gift of corpus. This ruling is applicable to both Shia and Sunni.

3. Subject of Gift - The general principle is that the subject of a gift can be -

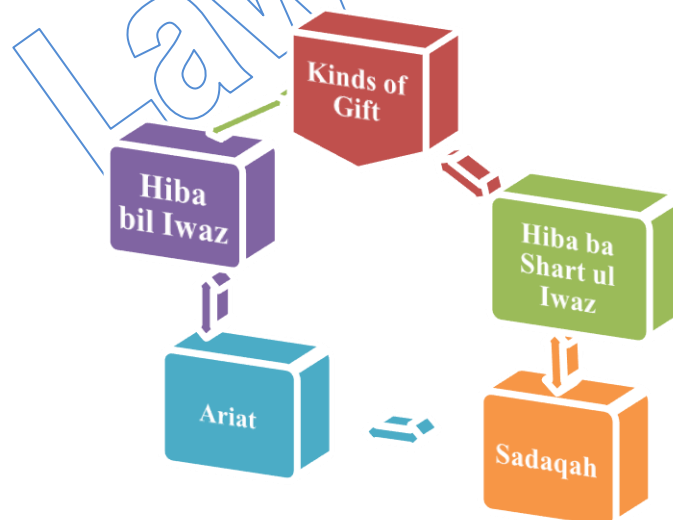
- a. anything over which dominion or right of property may be exercised.
- b. anything which may be reduced to possession.
- c. anything which exists either as a specific entity or as an enforceable right.
- d. anything which comes within the meaning of the word mal.

In **Rahim Bux vs Mohd. Hasen 1883**, it was held that gift of services is not valid because it does not exist at the time of making the gift.

Gift of an indivisible property can be made to more than one persons.

4. Extent of Donors right to gift - General rule is that a donors right to gift is unrestricted.

In **Ranee Khajoorunissa vs Mst Roushan Jahan 1876**, it was recognized by the privy council that a donor may gift all or any portion of his property even if it adversely affects the expectant heirs. However, there is one exception that the right of gift of a person on death bed (Marz ul maut) is restricted in following ways - He cannot gift more than one third of his property and he cannot gift it to any of his heirs.



Kinds of Gift

There are several variations of Hiba. For example, Hiba bil Iwaz, Hiba ba Shart ul Iwaz, Sadaqah, and Ariat.

Hiba Bil Iwaz - Hiba means gift and Iwaz means consideration. Hiba Bil Iwaz means gift for consideration already received. It is thus a transaction made up of two mutual or reciprocal gifts between two persons. One gift from donor to donee and one from donee to donor. The gift and return gift are independent transactions which together make up Hiba bil Iwaz.

In India, it was introduced as a device for affecting a gift of Mushaa in a property capable of division. So a Hiba Bil Iwaz is a gift for consideration and in reality it is a sale. Thus, registration of the gift is necessary and the delivery of possession is not essential and prohibition against Mushaa does not exist. The following are requisites of Hiba bil Iwaz –

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

In **Khajoorunissa vs Raushan Begam 1876**, held that adequacy of the consideration is not the question. As long as the consideration is bona fide, it is valid no matter even if it is insufficient.

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

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

Hiba ba Shartul Iwaz - Shart means stipulation and Hiba ba Shart ul Iwaz means a gift made with a stipulation for return. Unlike in Hiba bil Iwaz, the payment of consideration is postponed. Since the payment of consideration is not immediate the delivery of possession is essential. The transaction becomes final immediately upon delivery. When the consideration is paid, it assumes the character of a sale and is subject to presumption (Shufa). As in sale, either party can return the subject of the sale in case of a defect. It has the following requisites –

1. Delivery of possession is necessary.
2. It is revocable until the Iwaz is paid.
3. It becomes irrevocable after the payment of Iwaz.
4. Transaction when completed by payment of Iwaz, assumes the character of a sale.

In general, Hiba bil Iwaz and Hiba ba Shart ul Iwaz are similar in the sense that they are both gifts for a return and the gifts must be made in compliance with all the rules relating to simple gifts.

Ariat - An ariat, the grant of some limited interest in respect of the use or usufruct of some property or right.

Where a gift of any property or right is made without consideration with the object of acquiring religious merit, it is called sadaqah.

Sadaqah or Saddka- It is an Islamic term that means "voluntary charity". This concept encompasses any act of giving out of compassion, love, friendship (fraternity), religious duty or generosity. Sadaqah is not restricted to giving part of our wealth or material possessions or any special deed of righteousness. Islam considers all good deeds as sadaqah that increase our eeman.

To be able to enjoy Allah's tremendous rewards for every sadaqah that we give, we need to observe the following teachings:

1. Sadaqah must be done sincerely for the pleasure of Allah and not out of riya' (show off) to gain praise or recognition from others.
2. It is better to conceal what we give or do as sadaqah.
3. Sadaqah must be from halal (lawful) source.
4. Begin charity with your dependents.
5. Not to delay giving of sadaqah nor show lethargy or negligence in giving sadaqah.
6. Do not count the sadaqah you give.

7. Seek only the desire to see Allah, which is the supreme success in Paradise. Do not expect favor or reward from any person for the sadaqah you give.

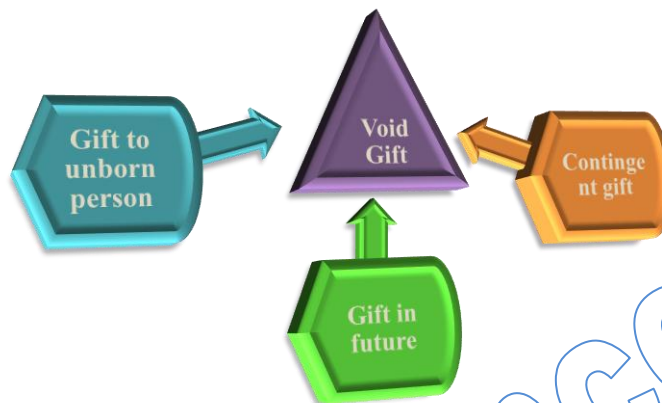
Differences between Hiba, Hiba bil Iwaz, and Hiba ba Shart ul Iwaz -

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

Exceptions in delivery of possession

The following are the cases where deliver of possession by the donor to the donee is not required - Gift by a father to his minor or lunatic son. In **Mohd Hesabuddin vs Mohd. Hesaruddin AIR 1984**, the donee was looking after the donor, his mother while other sons were neglecting her. The donor gifted the land to the donee and the donee subsequently changed the name on the land records. It was held that it was a valid gift even though there was no delivery of land.

1. When the donor and the donee reside in the same house which is to be gifted. In such a case, departure of the donor from the house is not required.
2. Gift by husband to wife or vice versa. The delivery of possession is not required if the donor had a real and bona fide intention of making the gift.
3. Gift by one co-sharer to other. Bona fide intention to gift is required.
4. Part delivery - Where there is evidence that some of the properties in a gift were delivered, the delivery of the rest may be inferred.
5. Zamindari villages - Delivery is not required where the gift includes parcels of land in zamindari if the physical possession is impossible. Such gift may be completed by mutation of names and transfer of rents and incomes.
6. Subject matter in occupation of tenant - If a tenant is occupying the property the gift may be affected by change in ownership records and by a request to the tenant to attorn the donee.
7. Incorporeal rights - The gift may be completed by any appropriate method of transferring all the control that the nature of the gift admits from the donor to the donee. Thus, a gift of govt. promissory note may be affected by endorsement and delivery to the donee.
8. Where the donee is in possession - Where the donee is already in possession of the property, delivery is not required. However, if the property is in adverse possession of the donee, the gift is not valid unless either the donor recovers the possession and delivers it to donee or does all that is in his power to let the donee take the possession.



Void Gifts

The following gifts are void:-

1. **Gift to unborn person.** But a gift of life interest in favor on an unborn person is valid if he comes into existence when such interest opens out.
2. **Gifts in future** - A thing that is to come into existence in future cannot be made. Thus, a gift of a crop that will come up in future is void.
3. **Contingent gift** - A gift that takes affect after the happening of a contingency is void. Thus a gift by A to B if A does not get a male heir is void.

Gift with a condition

A gift must always be unconditional. When a gift is made with a condition that obstructs its completeness, the gift is valid but the condition becomes void. Thus, if A gifts B his house on a condition that B will not sell it or B will sell it only to C, the condition is void and B takes full rights of the house.

Mushaa (Hiba bil mushaa)

Mushaa means undivided share in a property. The gift of undivided share in an indivisible property is valid under all schools but there is no unanimity of opinion amongst different schools about gift of undivided share in a property that is divisible. In Shafai and Ithna Asharia laws it is valid if the donor withdraws his control over the property in favor of the donee. But under Hanafi law, such a gift is invalid unless it is separated and delivered to the donee.

Illustration

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

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

In case of **Kashim Hussain vs Sharif Unnisa 1883**, A gifted his house to B along with the right to use a staircase, which was being used by C as well. This gift was held valid because staircase is indivisible.

Revocation of a Gift

Under muslim law, all volutary transactions are revocable and so under Hanafi law a gift is also generally revocable, though it is held to be abominable. In Shia law, a gift can be revoked by mere

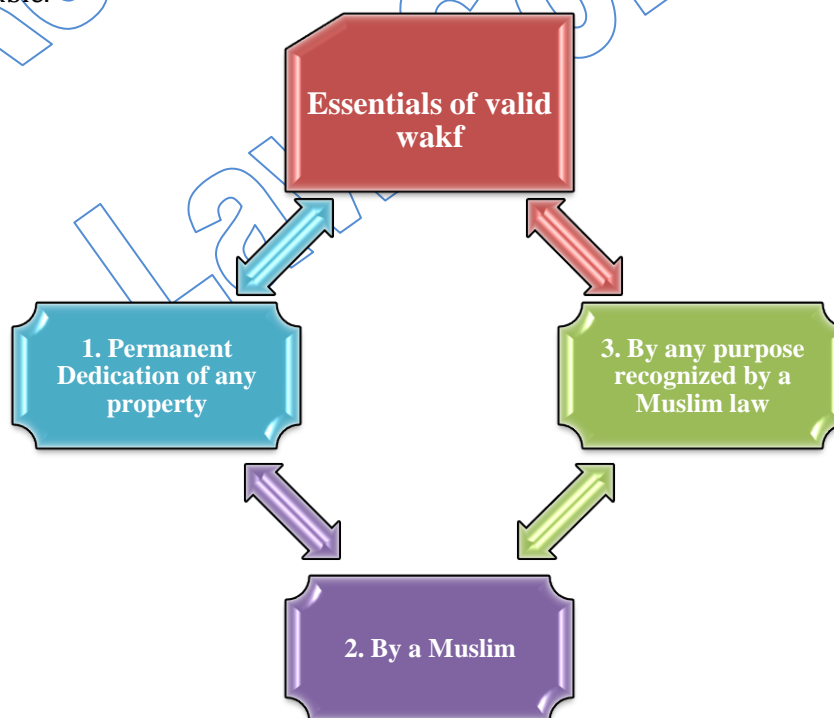
declaration while in Sunni law, it can be revoked only by the intervention of the court of law or by the consent of the donee.

The following gifts, however, are absolutely irrevocable –

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

Wakf

Literal meaning of Wakf is detention, stoppage, or tying up as observed in **M Kazim vs A Asghar Ali AIR 1932**. Technically, it means a dedication of some specific property for a pious purpose or secession of pious purposes. As defined by Muslim jurists such as Abu Hanifa, Wakf 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, in the manner of a rate or commodity loan. 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."



Essentials of a valid Wakf

1. **Permanent Dedication of any property** - There are actually three aspects in this requirement. There must be a dedication, the dedication must be permanent, and the dedication can be of the property. There is no prescribed form of dedication. It can be

written or oral but it must be clear to convey the intention of dedication. According to Abu Yusuf, whose word is followed in India, mere declaration of dedication is sufficient for completion of Wakf. Neither delivery of possession or appointment of Mutawalli is necessary.

The dedication must be permanent. A temporary dedication such as for a period of 10 years or until death of someone is invalid.

The subject of Wakf can be any tangible property (mal) which can be used without being consumed. In **Abdul Sakur vs Abu Bakkar 1930**, it was held that there are no restrictions as long as the property can be used without being consumed and thus, a valid Wakf can be created not only of immovable property but also of movable property such as shares of a company or even money. Some subjects that Hanafi law recognizes are immovable property, accessories to immovable property, or books.

The subject of the Wakf must be in the ownership of the dedicator, wakif. One cannot dedicate someone else's property.

2. By a Muslim - A Wakf can only be created by a Muslim. Further, the person must have attained the age of majority as per Indian Majority Act and should be of sound mind.

3. For any purpose recognized by Muslim Law - The purpose is also called the object of Wakf and it can be any purpose recognized as religious, pious, or charitable, as per Muslim Law. It is not necessary that a person must name a specific purpose. He can also declare that the property may be used for any welfare works permitted by Shariat. In **Zulfiqar Ali vs Nabi Bux**, the settlers of a Wakf provided that the income of certain shops was to be applied firstly to the upkeep of the mosque and then the residue, if any, to the remuneration of the mutawalli. It was held to be valid however, it was also pointed out that if a provision of remuneration was created before the upkeep of the mosque, it would have been invalid.

The following are some of the objects that have been held valid in several cases - Mosques and provisions of Imam to conduct worship, celebrating birth of Ali Murtaza, repairs of Imambaras, maintenance of Khanqahs, burning lamps in mosques, payment of money to fakirs, grant to an idgah, grant to colleges and professors to teach in colleges, bridges and caravan sarais.

In **Kunhamutty vs Ahman Musaliar AIR 1935**, Madras HC held that if there are no alms, the performing of ceremonies for the benefit of the departed soul is not a valid object.

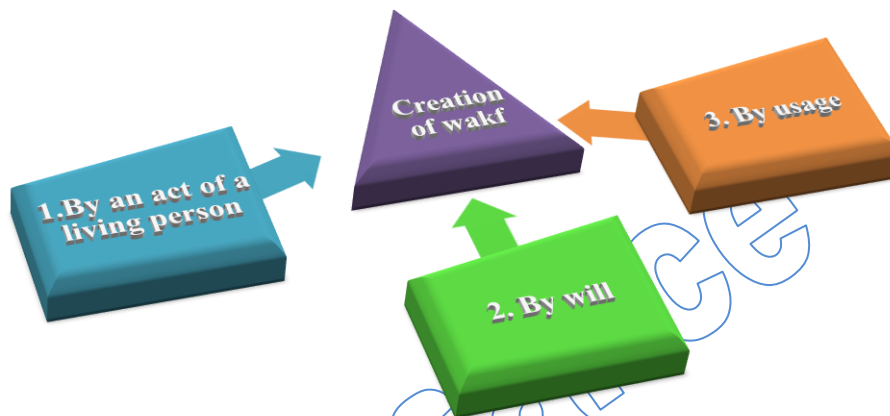
Some other invalid objects are - building or maintaining temple or church, providing for the rich exclusively, objects which is uncertain.

Shia Law related to Wakf

Shia Law - Besides the above requirements, Shia law imposes some more requirements for a valid Wakf. There are -

1. Delivery of possession to the first person in whose favour the Wakf has been created is essential.
2. Dedication must be absolute and unconditional.

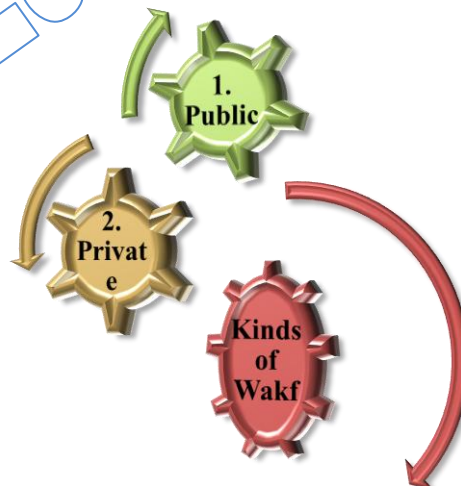
3. The property must be completely taken away from the wakif. It means that the wakif cannot keep or reserve any benefit or interest, or even the usufructs of the dedicated property.



Creation of Wakf

Muslim law does not prescribe any specific way of creating a Wakf. If the essential elements as described above are fulfilled, a Wakf is created. Though it can be said that a Wakf is usually created in the following ways -

1. **By an act of a living person (inter vivos)** - when a person declares his dedication of his property for Wakf. 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 Wakf.
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 Wakf by will but now it has been approved.
3. **By Usage** - when a property has been in use for charitable or religious purpose for time immemorial, it is deemed to belong to Wakf. No declaration is necessary and Wakf is inferred.



a. Public -As the name suggests, a public Wakf is for the general religious and charitable purposes while a private Wakf is for the creators own family and descendants and is technically called **Wakf alal**

aulad. It was earlier considered that to constitute a valid wakf there must be a complete dedication of the property to God and thus private wakf was not at all possible.

b. **Private** - However, this view is not tenable now and a private wakf can be created subject to certain limitation after Wakf Validating Act 1913. This acts allows a private wakf to be created for one's descendants provided that the ultimate benefits are reserved for charity. Muslim Law treats both public and private wakfs alike. Both types of wakf are created in perpetuity and the property becomes inalienable.

Wakf alal aulad

can a wakf be created for one's family?

Wakf on one's children and thereafter on the poor is a valid wakf according to all the Muslim Schools of Jurisprudence. This is because, under the Mohammedan Law, the word charity has a much wider meaning and includes provisions made for one's own children and descendants. Charity to one's kith and kin is a high act of merit and a provision for one's family or descendants, to prevent their falling into indigence, is also an act of charity. The special features of wakf-alal-aulad is that only the members of the wakif's family should be supported out of the income and revenue of the wakf property. Like other wakfs, wakf alal-aulad is governed by Muhammadan Law, which makes no distinction between the wakfs either in point of sanctity or the legal incidents that follow on their creation. Wakf alal aulad is, in the eye of the law, Divine property and when the rights of the wakif are extinguished, it becomes the property of God and the advantage accrues to His creatures. Like the public wakf, a wakf-alal-aulad can under no circumstances fail, and when the line of descendant becomes extinct, the entire corpus goes to charity.

The institution of private wakf is traced to the prophet himself who created a benefaction for the support of his daughter and her descendants and, in fact, placed it in the same category as a dedication to a mosque.

Thus, it is clear that a wakf can be created for one's own family. However, the ultimate benefit must be for some purpose which is recognized as pious, religious or charitable by Islam.

Quasi public Wakf

Sometimes a third kind of wakf is also identified. In a Quasi public wakf, the primary object of which is partly to provide for the benefit of particular individuals or class of individuals which may be the settler's family, and partly to public, so they are partly public and partly private.

Contingent Wakf

A wakf, the creation of which depends on some event happening is called a contingent wakf and is invalid. For example, if a person creates a wakf saying that his property should be dedicated to god if he dies childless is an invalid wakf. Under shia law also, a wakf depending on certain contingencies is invalid.

In **Khaliluddin vs Shri Ram 1934**, a muslim executed a deed for creating a wakf, which contained a direction that until payment of specified debt by him, no proceeding under the wakfnama shall be

enforceable. It was held that it does not impose any condition on the creation of the wakf and so it is valid.

Conditional Wakf

If a condition is imposed that when the property dedicated is mismanaged, it should be divided amongst the heirs of the wakf, or that the wakif has a right to revoke the wakf in future, such a wakf would be invalid. But a direction to pay debts, or to pay for improvements, repairs or expansion of the wakf property or conditions relating to the appointment of Mutawalli would not invalidate the wakf. In case of a conditional wakf, it depends upon the wakif to revoke the illegal condition and to make the wakf valid, otherwise it would remain invalid.

Completion of wakf

The formation of a wakf is complete when a mutawalli is first appointed for the wakf. The mutawalli can be a third person or the wakif himself. When a third person is appointed as mutawalli, mere declaration of the appointment and endowment by the wakif is enough. If the wakif appoints himself as the first mutawalli, the only requirement is that the transaction should be bona fide. There is no need for physical possession or transfer of property from his name as owner to his name as mutawalli. In both the cases, however, mere intention of setting aside the property for wakf is not enough. A declaration to that effect is also required.

In **Garib Das vs M A Hamid AIR 1970**, it was held that in cases where founder of the wakf himself is the first mutawalli, it is not necessary that the property should be transferred from the name of the donor as the owner in his own name as mutawalli.

Shia law -

1. Delivery of possession to the mutawalli is required for completion when the first mutawalli is a third person.
2. Even when the owner himself is the first mutawalli, the character of the ownership must be changed from owner to mutawalli in public register.

Legal Consequences (Legal Incidents) of Wakf

Once a wakf is complete, the following are the consequences -

1. **Dedication to God** - The property vests in God in the sense that no body can claim ownership of it. In **Md. Ismail vs Thakur Sabir Ali AIR 1962**, SC held that even in wakf alal aulad, the property is dedicated to God and only the usufructs are used by the descendants.
2. **Irrevocable** - In India, a wakf once declared and complete, cannot be revoked. The wakif cannot get his property back in his name or in any other's name.
3. **Permanent or Perpetual** - Perpetuity is an essential element of wakf. Once the property is given to wakf, it remains for the wakf for ever. Wakf cannot be of a specified time duration. In **Mst Peeran vs Hafiz Mohammad**, it was held by Allahbad HC that the wakf of a house built on a land leased for a fixed term was invalid.
4. **Inalienable** - Since Wakf 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 wakf property can only be used for pious and charitable purpose. It can also be used for descendants in case of a private wakf.
6. **Extinction of the right of wakif** - The wakif loses all rights, even to the usufructs, of the property. He cannot claim any benefits from that property.
7. **Power of court's inspection** - The courts have the power to inspect the functioning or management of the wakf property. Misuse of the property of usufructs is a criminal offence as per Wakf Act.1995.

Revocation of Wakf

In India, once a valid wakf is created it cannot be revoked because nobody has the power to divest God of His ownership of a property. It can neither be given back to the wakif nor can it be sold to someone else, without court's permission.

A wakf created inter vivos is irrevocable. If the wakif puts a condition of revocability, the wakf is invalid. However, if the wakf has not yet come into existence, it can be canceled. Thus, a testamentary wakf can be canceled by the owner himself before his death by making a new will. Further, wakf created on death bed is valid only up till 1/3 of the wakif's property. Beyond that, it is invalid and the property does not go to wakf but goes to heirs instead.

Mutawalli

Mutawalli is nothing but the manager of a wakf. He is not the owner or even a trustee of the property. He is only a superintendent whose job is to see that the usufructs of the property are being utilized for valid purpose as desired by the wakif. He has to see that the intended beneficiaries are indeed getting the benefits. Thus, he only has a limited control over the usufructs. In **Ahmad Arif vs Wealth Tax Commissioner AIR 1971, SC** held that a mutawalli has no power to sell, mortgage, or lease wakf property without prior permission of the court or unless that power is explicitly provided to the mutawalli in wakfnama.

Who can be a mutawalli

A person who is a major, of sound mind, and who is capable of performing the functions of the wakf as desired by the wakif can be appointed as a mutawalli. A male or female of any religion can be appointed. If religious duties are a part of the wakf, then a female or a non-muslim cannot be appointed.

In **Shahar Bano vs Aga Mohammad 1907**, Privy council held that there is no legal restriction on a woman becoming a mutawalli if the duties of the wakf do not involve religious activities.

Who can appoint a mutawalli

Generally, the wakif appoints a mutawalli. He can also appoint himself as a mutawalli. If a wakf is created without appointing a mutawalli, in India, the wakf is considered valid and the wakif becomes the first mutawalli in Sunni law but according to **Shia law**, even though the wakf remains valid, it has

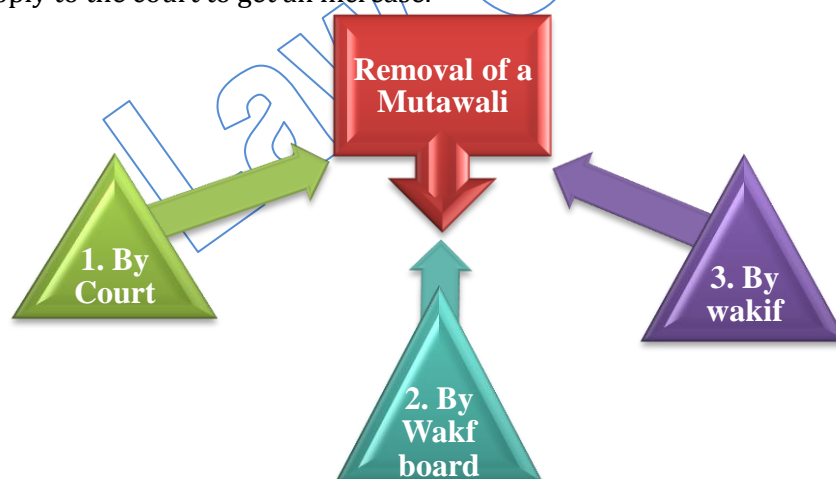
to be administered by the beneficiaries. The wakif also has the power to lay down the rules to appoint a mutawalli. The following is the order in which the power to nominate the mutawalli transfers if the earlier one fails –

1. founder
2. executor of founder
3. mutawalli on his death bed
4. the court, which should follow the guidelines -
 1. it should not disregard the directions of the settler but public interest must be given more importance.
 2. preference should be given to the family member of the wakif instead of utter stranger.

Powers of a mutawalli

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

1. He has the power to utilize the usufructs as he may deem fit in the best interest of the purpose of the wakf. He can take all reasonable actions in good faith to ensure that the intended beneficiaries are benefited by the wakf. Unlike a trustee, he is not an owner of the property so he cannot sell the property. However, the wakif may give such rights to the mutawalli by explicitly mentioning them in wakfnama.
2. He can get a right to sell or borrow money by taking permission from the court upon appropriate grounds or if there is an urgent necessity.
3. He is competent to file a suit to protect the interests of the wakf.
4. He can lease the property for agricultural purpose for less than three years and for non-agricultural purpose for less than one year. He can exceed the term by permission of the court.
5. He is entitled to remuneration as provided by the wakif. If the remuneration is too small, he can apply to the court to get an increase.



Generally, once a mutawalli is duly appointed, he cannot be removed by the wakif. However, a mutawalli can be removed in the following situations –

1. **By court** -
 1. if he misappropriates wakf property.
 2. even after having sufficient funds, does not repair wakf premises and wakf falls into disrepair.

3. knowingly or intentionally causes damage or loss to wakf property. In **Bibi Sadique Fatima vs Mahmood Hasan AIR 1978**, SC held that using wakf money to buy property in wife's name is such breach of trust as is sufficient ground for removal of mutawalli.
4. he becomes insolvent.
2. **By wakf board** - Under section 64 of Wakf Act 1995, the Wakf board can remove mutawalli from his office under the conditions mentioned therein.
3. **By the wakif** - As per Abu Yusuf, whose view is followed in India, even if the wakif has not reserved the right to remove the mutawalli in wakf deed, he can still remove the mutawalli.

Gift of Mushaa: The Hanafi Doctrine of Mushaa

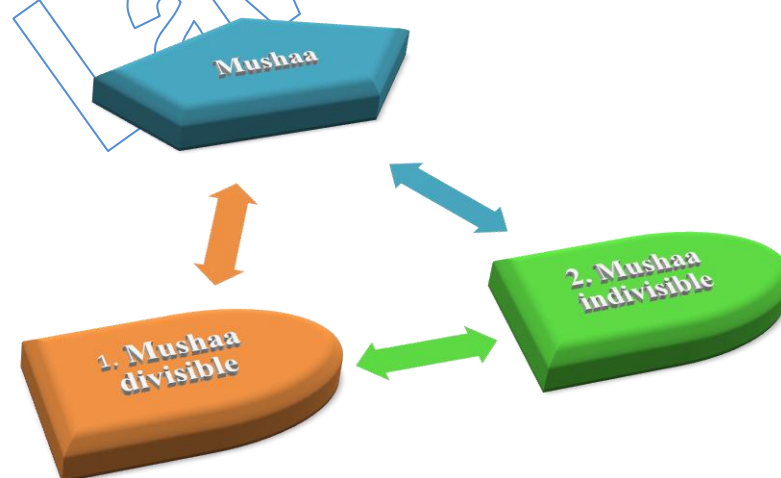
The word Mushaa has been derived from the Arabic word Shuyua which literally means 'confusion'. Under Muslim law, Mushaa signifies an undivided share in a joint property. Mushaa is therefore, a co-owned or joint property.

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.....”



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:

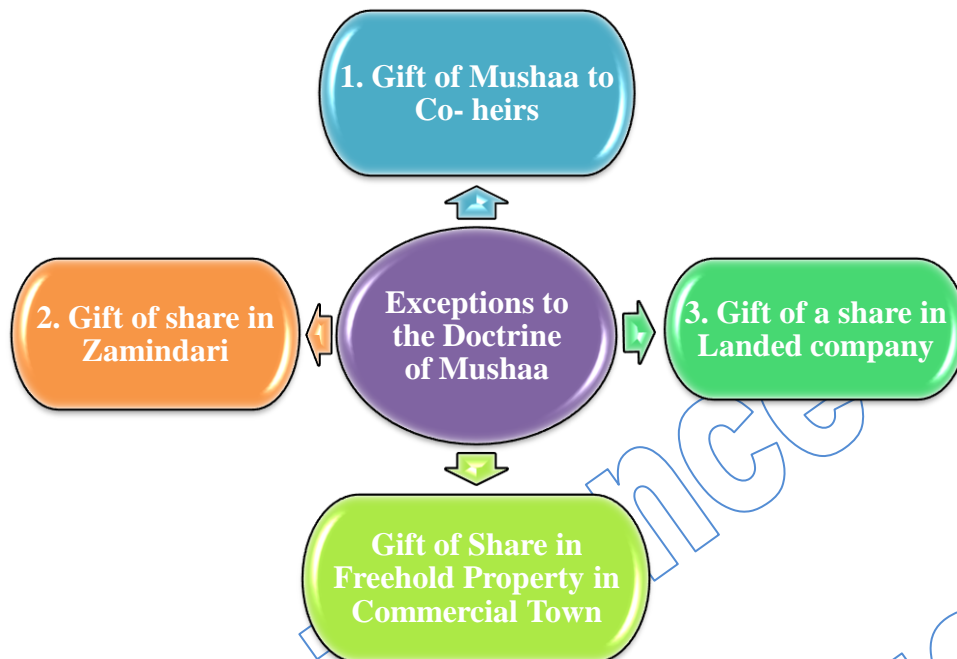
Under Hanafi law, gift of Mushaa-divisible property is irregular (fasid) if made without partition. A co-owned piece of land, house or a garden, is Mushaa-divisible. The land may be divided and the specific share may be separated by a visible mark of identification.

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 recognise the doctrine of Mushaa. Under the Shia law, a gift of a share of divisible joint property is valid even if made without partition.

Doctrine of Pre-Emption

The Nature of Pre-Emption:

The right of pre-emption is in the nature of an easement, and is annexed to the land under Muslim law. The right comes into existence on the sale of the adjacent property. The right to pre-emption is not a right to a re-purchase, either from the vendor or from the vendee, but is simply a right of substitution, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of the rights and obligations arising from the sale.

It is rather anomalous that the right of pre-emption is not recognised in Madras. The reason given by the Madras High Court for refusing to recognise the right of pre-emption amongst Muslims is that it places a restriction on the liberty of a person to transfer property, and is, therefore, opposed to justice, equity and good conscience. (*Ibrahim v. Muni Mir Uddin*, (1870) 6 M.H.C. 26)

Object of Pre-Emption:

The object of the rule of pre-emption is to prevent the inconvenience which may result to families and communities from the introduction of a disagreeable stranger as a coparcener or near neighbour.

Pre-Emption by Contract

The right of pre-emption may also be created by contract. In construing the terms of such a contract, the Court will give effect to the intention of the parties as expressed therein. In the absence of a contract to the contrary, it will be presumed that a contract for preemption will be governed by the Hanafi law, and all the formalities are to be observed before a valid claim for pre-emption can be made. Where a right of pre-emption is based on a contract, a Muslim cosharer is entitled to pre-emption even against a Hindu purchaser. [*Sitaram v. Jiaul Hasan*, (1921) 48 I.A. 475]

To whom Applied

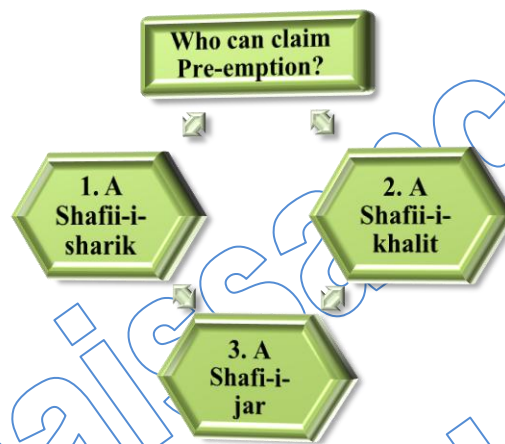
The doctrine of pre-emption is applicable to all Muslims in general. Applicability to Hindus as well. The law of pre-emption is applied to Hindus also:-

- (i) by legislation, as in the Punjab and Oudh, where there are general territorial enactments;

- (ii) by custom, as in Bihar and certain parts of Gujarat; or
- (iii) when there is a contract between the parties that the law should apply.

In the Mofussil of Bombay, under regulation IV of 1827, (which does not mention pre-emption or any other topic of Muslim law as expressly applicable to the Muslims), the law of pre-emption can be applicable on the principles of justice, equity and good conscience, or on the ground of custom.

But it has been held in Mahomed Beg Amni Beg. & Anr. v. Narayan Meghaji Patil & Ors., (1916) I.L.R. 40 Bom. 358, that pre-emption is opposed to justice, equity and good conscience. So, it can apply only on the ground of custom.



Who can Claim Pre-Emption?

According to the Muhammadan law, the right of pre-emption appertains to the following persons:

1. **A Shafii-i-sharik**, i.e., co-sharer or partner in the property sold.
2. **A Shafii-i-khalit**, i.e., a partner in the amenities and appendages of the property (such as the right to water and roads, or common access). These are persons connected with the property sold either as holders of dominant or servient heritages, or as sharing a common right.
3. **A Shafi-i-jar**, i.e., an owner of neighbouring immovable property. This right of pre-emption on the ground of vicinage does not extend to estates of large magnitude such as villages and zamindaris, but is confined to houses, gardens and small parcels of land.

Shia Law

By Shia law, the only persons entitled to the right of pre-emption are co-sharers and that too, if the number of co-sharers does not exceed two.

Sect of Either Party how Far Material

If both the vendor and the pre-emptor belong to the same school, being either Sunnis or Shias, the law of that school applies, the law of the vendee being always immaterial. According to the Allahabad High Court, when one of them is a Shia, the Shia law will apply. According to the Calcutta High Court, the law of the pre-emptor prevails, in case the vendor and the pre-emptor do not belong to the same school of Muslim law.

Thus, if the vendor is a Sunni and the pre-emptor is a Shia, then according to the Allahabad High Court, the right of pre-emption is to be determined by the Shia law. If the vendor is a Shia and the pre-

emptor is a Sunni, then also, according to the Allahabad High Court, the point is to be decided according to the Shia law, but according to the High Court of Calcutta, in such cases, the rights are to be determined by the Sunni law. The personal law of the purchaser is immaterial in such cases. It would not, therefore, be quite correct to say that the law of preemption in force in India is the pure Sunni law of pre-emption.

Constitutional Validity of Pre-Emption

It has been held by the High Courts of Rajasthan, Madhya Bharat and Hyderabad that pre-emption on the ground of vicinage (see 3 above) is void after 26th January, 1950, as it imposes an unreasonable restriction on the fundamental right guaranteed under Article 19(1) (f) of the Constitution. However, pre-emption as between co-sharers (see 1 above) and owners of dominant and servient heritages (see 2 above) is saved by Article 19(5) of the Constitution.

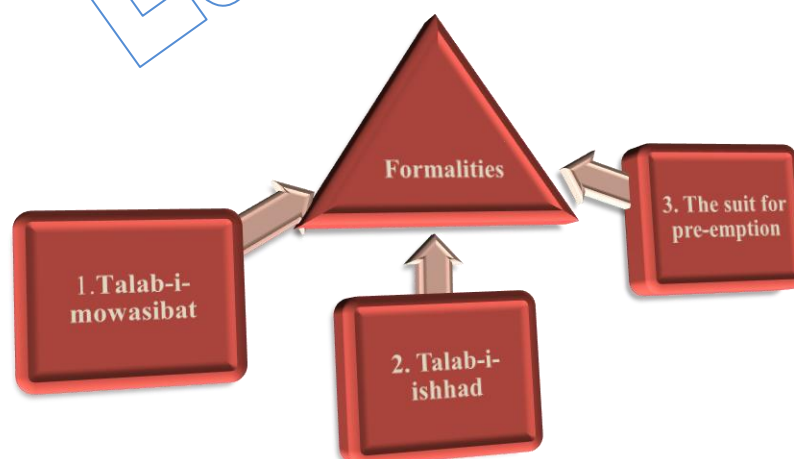
The Bombay, Allahabad and Patna High Courts have, however, taken a different view and upheld the constitutional validity of preemption by all the three classes of persons mentioned above. However, the Supreme Court has now approved the view taken by the Rajasthan High Court (above).

The Supreme Court has observed that “the right of pre-emption is an incident of property and attaches to the land itself. (Audh Singh v. Gajadhar Jaipuria, AIR 1954 S. C., 417)

In the above case, the Supreme Court held that where the right of pre-emption rests upon custom, it becomes the *lex loci* or the law of the place, and the right of pre-emption attaches to the properties situated in that place.

The Allahabad High Court has also observed in *Jagmohan Prasad v. B. B. Singh*, “Where we have the existence of a right of pre-emption without specifying how that right is to be enforced or exercised, or without laying down the full particulars of that custom, the presumption is that the right of pre-emption is in accordance with the rights allowed by Muhammadan Law. This view has been laid down in a number of cases. These cases have also been followed in subsequent cases.”

A Division Bench of the Bombay High Court has also observed that the law of pre-emption continued to be valid law even after the enactment of the Constitution, and that it had not been rendered void by Art. 13 read with Art. 19(1) (f) of the Constitution of India. (*Bhimrao Eknath v. P. Ramkrishan*, AIR 1960 Bom. 552)



In order that a claim for pre-emption should be held to be valid, no particular formula is necessary, provided the claim is unequivocally asserted.

But, under the Sunni law, certain formalities are strictly to be observed. No person is entitled to a right of pre-emption, unless he or his manager, or any other person previously authorised by him in his behalf, has made the following three demands, viz.

1. **Talab-i-mowasibat**, i.e., immediate demand (or demand of jumping), which is not effective unless it is followed by a formal claim by talab-i-ishhad (-below-). Talab-i-mowasibat is an announcement by one entitled to pre-empt, of his intention of making the claim. This announcement is to be made immediately on his receiving information of the sale, but after (and not before) the sale is completed.

2. **Talab-i-ishhad**, i.e., demand with invocation of witnesses. The talab-i-mowasibat (demand of jumping) is of no effect, unless it is followed by a formal claim, which is called talab-i-ishhad (demand with invocation of witnesses), in which the pre-emptor must:-

(1) affirm his intention to assert his right of pre-emption, referring expressly to his having made the 'demand of jumping' and

(2) make a formal demand —

(i) either in the presence of the buyer or the seller, or on the premises which are the subject of sale, and

(ii) in the presence of at least two witnesses, specially called to bear witness to this demand. Any unreasonable delay in making this second demand will defeat the pre-emptor's right.

The Muhammadan law relating to demand before filing a suit for pre-emption is of a highly technical nature.

The suit for pre-emption- Thus, talab-i-mowasibat is the first demand and talab-i-ishhad is the second demand. The third formality consists of the institution of the suit for pre-emption. Both the talabs are conditions precedent to the exercise of the right of pre-emption.

The talab-i-mowasibat (or first demand) should be made as soon as the fact of the sale is known to the claimant. Any unreasonable or unnecessary delay will be construed as an election not to pre-empt. (Shaikh Mohammad Rafiq v. Khalilur Rahman and anr. (1972) 11 S.C. W.R. 102)

Tender of Price not Essential:

It is not necessary to the validity of a claim of pre-emption that the pre-emptor should tender the price at the time of talab-i-ishhad.

3. Suit: The third formality is the institution of a suit for pre-emption.

UNIT V

**Parentage and
Acknowledgement**

Where the paternity of a child, i.e., its legitimate descent from its father, cannot be proved by establishing a marriage between its parents at the time of its conception or birth, such marriage and legitimate descent may be established by "acknowledgement".

An acknowledgement of paternity need not be express. Such an acknowledgement may be presumed from the fact that one person has habitually and openly treated another as his legitimate child. As observed by the Privy Council, "It has been decided in several cases that there need not be proof of an express acknowledgement, but that an acknowledgement of children by a Muhammadan as his sons may be inferred from his having openly treated them as such." (Muhammad Azmat v. Lalli Begum 1881 9 I.A. 8)

Paternity of a child is established if the child is born during continuance of a valid marriage or within 280 days of its dissolution, the mother remaining unmarried.

Maternity of a child is established in the woman who gives birth to the child; it is immaterial whether the child is an offspring of a valid or irregular marriage, or even of a fornication or adultery.

**Principle of the Doctrine of Legitimacy by
Acknowledgement**

This is a special mode prescribed by Muhammadan law for establishing the legitimacy of a child and the marriage of its mother. Since a marriage among Muslims may be constituted without any ceremony, the existence of a marriage in a particular case may be an open question. If no direct proof of such marriage is available, indirect proof may be relied upon. Acknowledgment of legitimacy of a child is one of the kinds of indirect proof.

Thus, under certain conditions, if a Muslim acknowledges a child to be his legitimate child, the paternity of that child is established in him. But the doctrine applies only to cases where the fact of an alleged marriage is an uncertainty.

It cannot be availed of to legitimise a child who is known to be illegitimate. The doctrine of legitimacy by acknowledgement proceeds entirely upon an assumption of legitimacy and establishment of legitimacy by the force of such acknowledgement.

**Conditions of a Valid
Acknowledgement of Legitimacy**

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

1. The acknowledger must possess the legal capacity for entering into a valid contract.
2. The acknowledgement must not be merely of sonship, but of legitimate sonship.

3. The ages of the acknowledger and the acknowledged must be such as to admit of the relation of parentage, i.e., the acknowledger must be at least twelve-and-a-half years older than the person acknowledged.

4. The person to be acknowledged must not be the offspring of intercourse which would be punishable under Muhammadan law, e.g., adultery, incest or fornication.

5. The parentage of the person to be acknowledged must not be unknown, i.e., the child to be acknowledged must be known to be the child of some other person.

6. The acknowledged person must believe himself (or herself) to be the acknowledger's child, and the child must verify (or at least must not repudiate) the acknowledgement.

7. The acknowledger should be one who could have lawfully been the husband of the mother of the child, when it was begotten. Thus, where there is direct proof that there was no marriage between the man and the mother of the child, or that if there was such a marriage between them, it would have been void, and then the presumption of legitimacy cannot be raised by acknowledgement, however strong such presumption may be. (Rashid Ahmed v. Anisa Khatun, (1932) 34 Bom L.R. 475 PC. 59 I.A. 21)

In Rashid Ahmed's case, A, a Muslim, divorced his wife B, by three pronouncements of talak, but afterwards, continued to cohabit with her, and to treat her as his wife for fifteen years. During this period, five children were born to them, all of whom he treated as his legitimate children.

However, the Privy Council held that the children were illegitimate. In this case of divorce by three pronouncements, before A and B could remarry, B should have been married to another man in the interval and divorced by that man.

As there was no proof of such marriage with another man and a divorce by him, a presumption of remarriage between A and B could not be raised, and hence, the children were held to be illegitimate, and could not inherit from their father.

The observations of the Allahabad High Court on acknowledgement of paternity in Muhammad Allahabad v. Muhammad Ismail (1888-10- All. 289) are relevant. In that case, the Court observed:

"The Muhammadan law of acknowledgement of parentage, with its legitimating effect, has no reference whatsoever to cases in which the illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible (as in the case of an incestuous intercourse or an adulterous connection), or by reason of a marriage, necessary to render the child legitimate, being disproved.

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

Inheritance and succession

Nature of the Heritable Property

Heritable property is that property which is available to the legal heirs for inheritance. After the death of a Muslim, his properties are utilised for the payment of funeral expenses, debts and the legacies i.e.

wills, if any. After these payments, the remaining property is called heritable property. Under Muslim law, every kind of property may be a heritable property.

For purposes of inheritance, Muslim law does not make any distinction between corpus and usufruct or, between movable and immovable, or, corporeal and incorporeal property. Under English law, there is some difference in the inheritance of movable and immovable property.

But, under Muslim law there is no such distinction; any property, which was in the ownership of the deceased at the moment of his death, may be the subject-matter of inheritance.

Shia Law:

Under the Shia law, a childless widow is entitled to get her share (1/4) in the inheritance only from the movable property left by her deceased husband.

Joint or Ancestral Property

The concept of a joint family or of coparcenaries property (as is recognised under Hindu law) is not known to Muslims. Whenever a Muslim dies, his properties devolve on his heirs in definite share of which each heir becomes an absolute owner. Subsequently, upon the death of such heir, his properties are again inherited by his legal heirs, and this process continues.

Thus, unlike Hindu law, there is no provision for any ancestral or joint-family property. Accordingly, under Muslim law of inheritance, no distinction has been made between self-acquired and ancestral property. All properties, whether acquired by a Muslim himself or inherited by his ancestors, are regarded as an individual property and, may be inherited by his legal heirs.

No Birth-Right

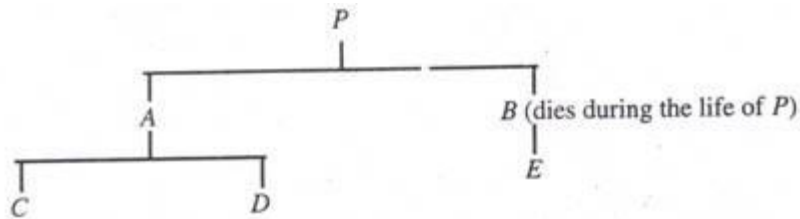
Inheritance opens only after the death of a Muslim. No person may be an heir of a living person (Nemoest haeres viventis). Therefore, unless a person dies, his heirs have no interest in his properties. Unlike Hindu law, the Muslim law of inheritance does not recognise the concept of 'right by birth' (Janmaswatvavad).

Under Muslim law, an heir does not possess any right at all before the death of an ancestor. It is only the death of a Muslim which gives the right of inheritance to his legal heirs.

As a matter of fact, unless a person dies, his relatives are not his legal heirs; they are simply his heir-apparent and have merely a 'chance of succession, (spes successions). If such an heir-apparent survives a Muslim, he becomes his legal heir and the right of inheritance accrues to him. If the heir-apparent does not survive a Muslim, he cannot be regarded an heir and has no right to inherit the property.

Doctrine of Representation

Doctrine of representation is a well known principle recognised by the Roman, English and Hindu laws of inheritance. Under the principle of representation, as is recognised by these systems of laws, the son of a predeceased son represents his father for purposes of inheritance. The doctrine of representation may be explained with the help of the diagram given below. P has two sons A and B. A has got two sons C and D and B has a son E.



During the life of P, his family members are his two sons (A and B), and three grandsons (C, D and E). Unfortunately, B pre-deceases P, i.e. B dies before the death of P. Subsequently, when P also dies, the sole surviving members of the family of P are A and three grandsons, C, D and E.

Under the doctrine of representation, E will represent his pre-deceased father B and would be entitled to inherit the properties of P in the same manner as B would have inherited had he been alive at the time of P's death.

But, Muslim law does not recognise the doctrine of representation. Under Muslim law, the nearer excludes the remoter. Accordingly, in the illustration given above, E will be totally excluded from inheriting the properties of P. Both, under Shia as well as under Sunni law, E has no right to inherit the properties of P. The result is that E cannot take the plea that he represents his pre-deceased father (B) and should be substituted in his place.

Under Muslim law, the nearer heir totally excludes a remoter heir from inheritance. That is to say, if there are two heirs who claim inheritance from a common ancestor, the heir who is nearer (in degree) to the deceased, would exclude the heir who is remoter. Thus, between A and E, A will totally exclude E because A is nearer to P in degree whereas, E belongs to the second degree of generation. The Muslim jurists justify the reason for denying the right of representation on the ground that a person has not even an inchoate right to the property of his ancestor until the death of that ancestor.

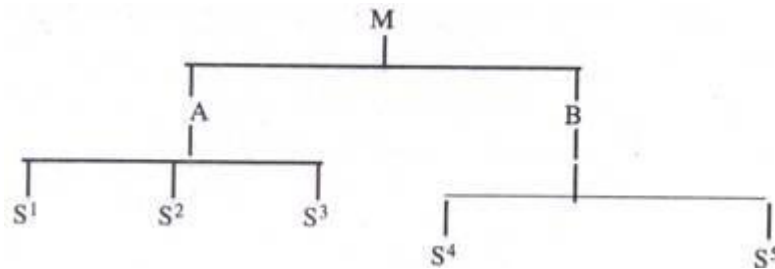
Accordingly, they argue that there can be no claim through a deceased person in whom no right could have been vested by any possibility. But, it may be submitted that non-recognition of principles of representation under the Muslim law of inheritance, seems to be unreasonable and harsh. It is cruel that a son, whose father is dead, is unable to inherit the properties of his grandfather together with his uncle.

Per-Capita and Per-Strip Distribution

Succession among the heirs of the same class but belonging to different branches may either be per-capita or per-strips. In a per-capita distribution, the succession is according to the 'number of heirs' (i.e. heads). Among them the estate is equally divided; therefore, each heir gets equal quantity of property from the heritable assets of the deceased.

On the other hand, in a per strip distribution, the several heirs who belong to different branches, get their share only from that property which is available to the branch to which they belong. In other words, in the stripital succession, the quantum of property available to each heir depends on the property available to his branch rather than the number of all the heirs.

Under Sunni law, the distribution of the assets is per-capita. That is to say an heir does not in any respect represent the branch from which he inherits. The per-capita distribution may be illustrated by the following diagram.



M has got two sons A and B. A has three sons, S¹, S² and S³. B has two sons S⁴ and S⁵. When M dies there are two branches of succession, one of A and the other of B. Suppose, A and B both die before the death of M so that the sole surviving heirs of M are his five grandsons.

Now, under the per-capita scheme of distribution (as recognised under Sunni law) the total number of claimants (heirs) is five and the heritable property would be equally divided among all of them irrespective of the branch to which an heir belongs.

Therefore, each of them would get 1/5 of the total assets of M. It may be noted that under Sunni law the principle of representation is recognised neither in the matter of determining the claim of an heir, nor in determining the quantum of share of each heir.

Shia Law:

Under the Shia law, if there are several heirs of the same class but they descend from different branches, the distribution among them is per strip. That is to say, the quantum of property inherited by each of them depends upon the property available to that particular branch to which they belong. In the above-mentioned illustration, A and B constitute two branches, each having 1/2 of M's property. Both, A and B pre-decease M.

But, the quantum of property available to each of their branch would remain the same. Therefore, the surviving heirs of A namely, S¹, S², S³ would get equal shares out of 1/2 which is quantum of property available to the branch of A. Thus S¹, S² and S³ would get 1/6 each. Similarly, the quantum of property available to the branch of B is also 1/2 but the descendants from this branch are only two. Accordingly, the 1/2 property of B would be equally shared by S⁴ and S⁵.

Therefore, S⁴ and S⁵ would get 1/4 each. It is significant to note that for a limited purpose of calculating the share of each heir, the Shia law accepts the principle of representation. Moreover, under the Shia law this rule is applicable for determining the quantum of share also of the descendants of a pre-deceased daughter, pre-deceased brother, pre-deceased sister or that of a pre-deceased aunt.

Female's Right of Inheritance

Males and females have equal rights of inheritance. Upon the death of a Muslim, if his heirs include also the females then, male and female heirs inherit the properties simultaneously. Males have no preferential right of inheritance over the females, but normally the share of a male is double the share of a female.

In other words, although there is no difference between male and female heir in so far as their respective rights of inheritance is concerned but generally the quantum of property inherited by a female heir is half of the property given to a male of equal status (degree).

The principle that normally the share of a male is double the share of a female has some justification. Under Muslim law, while a female heir gets (or hopes to get in future) an additional money or property as her Mehr and maintenance from her husband, her male counterpart gets none of the two benefits. Moreover, the male heir is primarily liable for the maintenance of his children whereas, the female heir may have this liability only in an extraordinary case.

A Child in the Womb

A child in the womb of its mother is competent to inherit provided it is born alive. A child in embryo is regarded as a living person and, as such, the property vests immediately in that child. But, if such a child in the womb is not born alive, the share already vested in it is divested and, it is presumed as if there was no such heir (in the womb) at all.

(8) Primogeniture:

Primogeniture is a principle of inheritance under which the eldest son of the deceased enjoys certain special privileges. Muslim law does not recognise the rule of primogeniture and all sons are treated equally.

However, under the Shia law, the eldest son has an exclusive right to inherit his father's garments, sword, ring and the copy of Quran, provided that such eldest son is of sound mind and the father has left certain other properties besides these articles.

Step-Children

The step-children are not entitled to inherit the properties of their step-parents. Similarly, the step-parents too do not inherit from step-children. For example, where a Muslim H marries a widow W having a son from her previous husband, the son is a stepson of H, who is step-father of this son.

The step-father and step-son (or daughter) cannot inherit each other's properties. That step-child is competent to inherit from its natural father or natural mother. Similarly, the natural father and natural mother can inherit from their natural sons or daughters.

However, the step-brothers (or sisters) can inherit each other's properties. Thus, in the illustration given above, if a son (or daughter) is born out of the marriage of H and W, the newly born child would be a step-brother (or sister) of the son from wife's previous husband.

These sons or daughters are competent to inherit each other's property. The step-brothers or sisters may either be, uterine or consanguine. Muslim law provides for mutual rights of inheritance between uterine and consanguine brothers or sisters.

Simultaneous Death of two Heirs

When two or more persons die in such a circumstance that it is not ascertainable as to who died first (i.e. who survived whom) then, both of them cease to be an heir for each other. In other words, where two or more heirs die simultaneously and, it is not possible to establish as to who died first then under Muslim law, all the heirs are presumed to have died just at one moment. The result is that such heirs are regarded as if they did not exist at all; the inheritance opens omitting these heirs.

For example, A and B are each other's legal heirs in such a manner that after the death of any one of them, the surviving person would inherit the property of the deceased one. But, both A and B die simultaneously say, in an aero plane crash, and it could not be established as to who survived whom. Under Muslim law, neither A would inherit B nor B would inherit A.

Thus, the legal heirs of A would inherit A's property as if there was no B at all. Similarly, the heirs of B would inherit B's property as if A did not exist at all?

Missing Persons



According to the texts of Hanafi law, a missing person was supposed to have been dead only after ninety years from the date of his birth; till then the inheritance of his properties did not open. But, now this rule has been superseded by Sec. 108 of the Indian Evidence Act, 1872 which provides as under:

"When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it".

Accordingly, where a Muslim is missing for at least seven years and if it could not be proved that he (or she) was alive then, that person is legally presumed to be dead and the inheritance of his (or her) properties opens.

It has been held by the courts that Hanafi rule of ninety years of life of a missing person was only a rule of evidence and not any rule of succession; therefore, this Hanafi rule must be taken as superseded by the provisions of Indian Evidence Act 1872.

Escheat



Where a deceased Muslim has no legal heir under Muslim law, his properties are inherited by Government through the process of escheat. State is regarded as the ultimate heir of every deceased.

**Marriage under the Special
Marriage Act, 1954**



Where a Muslim contracts his marriage under the Special Marriage Act, 1954, he ceases to be a Muslim for purposes of inheritance. Accordingly, after the death of such a Muslim his (or her) properties do not devolve under Muslim law of inheritance. The inheritance of the properties of such Muslims is governed by the provisions of the Indian Succession Act, 1925 and Muslim law of inheritance is not applicable.