

Rahul IAS Handwritten Notes

Personal Law (Muslim Law)

Marriage

Property

↓
Family

↓

(1) Nikah

(2) Dowry/Mahr

(3) Talak / Divorce

(4) Maintenance

(5) Acknowledgment
of Fraternity

Relationship / Minority

↳ Khyar-ul-bulugh

↳ Hizanath (mother's right
to child)

who is muslim?

↓
Effect of Conversion of a Hindu in Islam

* Dowry

↳ Types/Nature

↓
Dowry and maintenance → 1986 Act

→ It talks only about woman's
maintenance. (in right of
child)

↳ Rights

↓
Cohabitation

↓
Principal of Khilwat-us-sahihah
(Valid settlement)

Right to Lien

for unpaid dowry

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* Nikah — Nature

Process

condition

Consent

Consent

Consentship → Hijab

self

* maintenance of Providence
self

— Khyar-ul-Bulugh = option to avoid the marriage

Q

Types of marriage / condition

* Divorce — Type → mada

Conditional + contingent marriage

* Divorce (Talaq)

→ Legal effects of Talaq

Acknowledgment

Q Is in muslim personal law adoption is allowed?

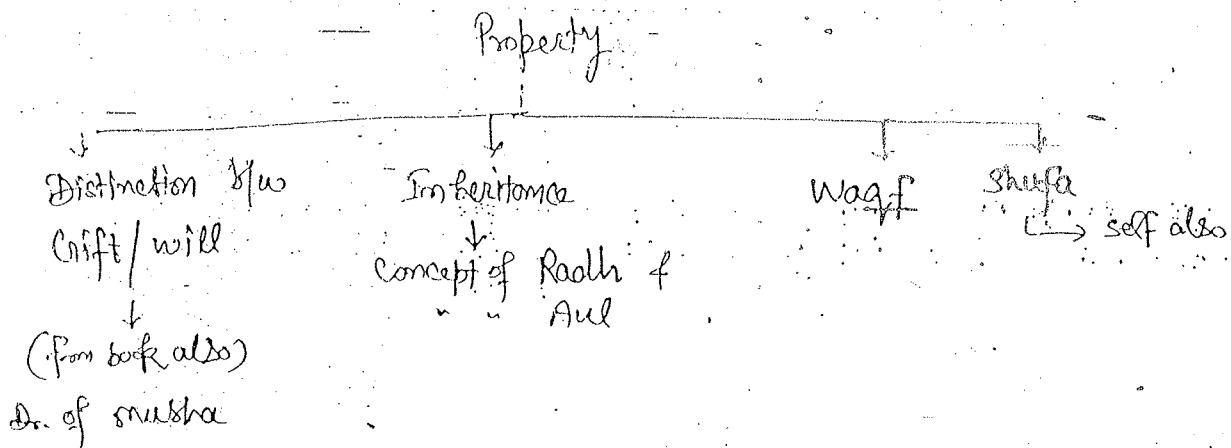
Ans — No, shariat does not allowed it, but shariat not applicable every where.

Own ⇒

Shia/Sunni Hijab maintenance
of Parents

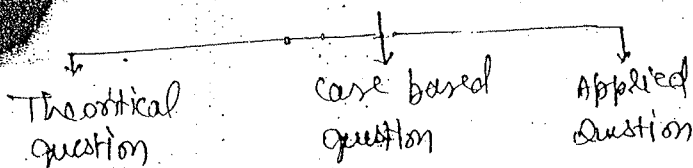
Roots

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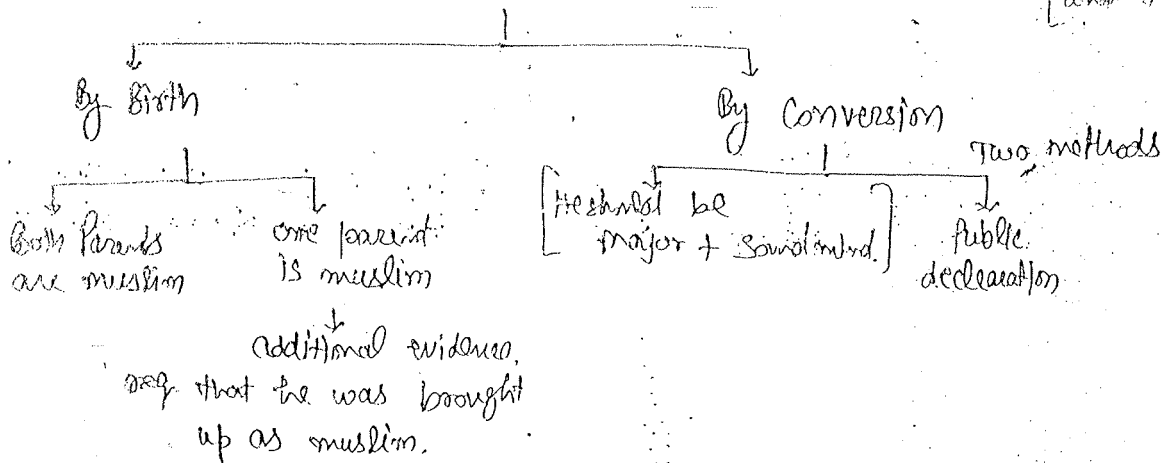
- Books —
- ① Aqul Ahmud
 - ② Khulid Rashid
 - ③ Mulla ⊗
 - ④ Amir Ali ⊗
 - ⑤ Simha

type of question :-



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Who is a muslim



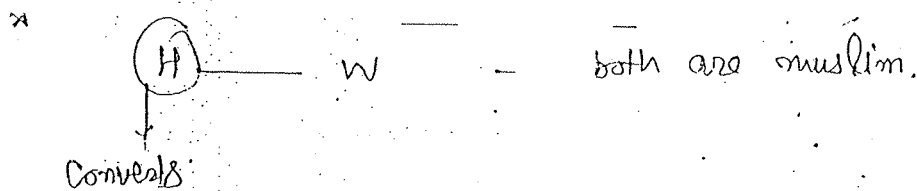
In such a case (one parent is muslim) it shall to examine as to whether the person was brought up as a muslim or not and thus apart from the birth the additional burden is to prove the circumstances in which the child was brought up.

A person may get converted by Public declaration if he publicly renounces his earlier ^{religion} and makes a declaration that he believes that there is one God Alaha and he has faith in prophet Mohammad.

Other method is by going to Mosque. A person may go to the mosque and in the Mohri in the Mosque will make him recite Kalama and giving him muslim name. His name will be entered in the register in the mosque and he will be sign in register.

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- Conversion is not a constitutional act. It is not a legal act. It is a totally social act.
- * A mala fide conversion will be considered as illegal and social consequences like boycott etc can be caused.



As per the Muslim Law marriage will automatical dissolved.

if the muslim wife gets converted to some other religion then the marriage will not per se dissolved. rather the marriage will dissolve only then she had actually convert and has reconverted to her earlier religion.

(e.g. original is hindu, for marriage convert into muslim)

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Q. What is the effect of married Hindu husband getting converted to Islam while the Hindu marriage is subsisting (continue) and after conversion such persons getting into a muslim Marriage?

Ans. What is the effect upon the earlier marriage, nature of subsisting marriage and on conversion?

Ans. - First marriage not to be affected, b/c it is a pre Hindu marriage. It continues.

2nd marriage should be void - b/c in Hindu law 2nd marriage is bigamous off and is void.

* Purpose of 2nd marriage to be void —

— To conserve the right of the 1st wife.

1st Hindu wife has pre-existing right against husband for taking recourse to conversion but on the principle of equity 2nd marriage is void.

{ Hindu marriage Act, 1955, S. 5 -
'Two Hindu' referred for 2nd marriage. →
S. 11 - void marriage HMA
S. 17 -

You can not destruct vested right of a person (Hindu 1st wife) by giving restricted or by misusing the provisions of the Act.

Muslim Law

In this case the main issue was as to what is the consequence of the conversion of a Hindu male married to a Hindu wife, and thereafter during the continuance of earlier marriage is getting married to a muslim wife.

(a) what would be the effect upon the earlier marriage.
 (b) " " " Nature of 2nd marriage.

The voidness of such marriage is clearly declared in S. 5 (1) & w S. 11 Hindu marriage Act and also S. 17 of the Hindu marriage Act. Such marriage & w 'two Hindus' while the existence of an earlier valid marriage shall be void.

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When a man gets converted to Islam during the continuance of earlier marriage he may get the benefit of muslim personal law for all other purposes but not for the purpose of getting into a 2nd marriage. In that matter it is the Hindu marriage Act which will govern the nature of the subsequent marriage as the earlier existing marriage under the Hindu marriage Act which continues to govern under the earlier marriage.

It was also held that a person can not be allowed to one personal law to defeat the mandates of another personal law. It is true that all personal laws are equal and neither is superior to other.

Still in the specific facts of a case one can be restricted to prevent its misuse.

Even though muslim personal law allows four marriages, the husband in such a case for the purposes of 2nd marriage will continue to be governed by the Hindu marriage Act if the earlier Hindu marriage continues to exist.

It was also held that the 2nd marriage while the earlier marriage continues to exist is

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irreputable and unjust and on that principle also it shall be void in reference to the Hindu marriage Act.

Regarding the effect upon the earlier marriage the Court held that there is no effect excepting that the earlier Hindu wife gets the right to divorce up 13(1)(2) of The Hindu marriage Act.

Comment - (not in this case elaborately but in Sarla Moolgand case)

The Technical Hurdle with respect to the above interpretation is that the word 'Two Hindu' has been used in sections 5 (1) & 11 and 3.17 and the reference is to the 2nd marriage whereas in the present case the parties to the 2nd marriage actually are two Muslims and therefore a question arises as to whether these provisions will be applicable in the present case. The answer to this lies in the rule of principle of Interpretation that if there is an ambiguity the Interpretation shall be purposive. In the present case if the Husband is allowed to give a narrow interpretation or literal Interpretation to the words 'Two Hindus' and thus escape his responsibilities under the Hindu marriage Act then that

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amount to very spirit of S-5 (1), 11 and 17. The words 'Two Hindu' in the present circumstances shall be interpreted liberally and in the real spirit —

Even if the subsequent marriage was b/w two Muslims, on the principles of equity & Justice the 2nd marriage shall be void if amounts to a defeat of the rights of the earlier of Hindu wife.

Sarla Mudgal (Smt.) President Kalgani & others
v. U.O.I 1995, SC (2 Judge)

By Kuldip Singh J.

⇒ Imp. case for uniform civil code → (Ad. 44 consti)

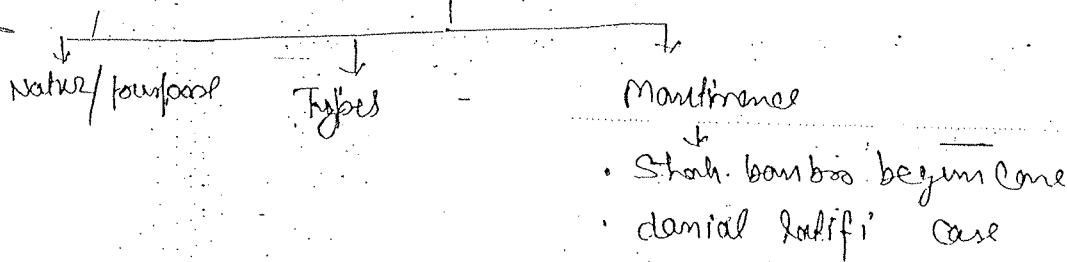
* earlier marriage would not get dissolved itself by conversion and after 2nd marriage.

reason — for void

- ① That the 2nd marriage is unjust, inequitable
- ② word void in S. 494 is ^{to be} construed to be wider for claims, and not limited only to S-5 v/w 11, 17.
- ③ Earlier ~~the~~ marriage was governed by Hindu m. r. and 1st wife has rights from it. and subsequent marriage will govern it.
- ④ word 'Two Hindu' can be read liberally.

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Dower (Mahr)



* It is some kind of consideration. It is mark of respect.

Nikahnama → Mahnamā (the amount and nature of Dower is specified)

* If nikahnama is not signed and or Dower is not specified then also Dower will be there.

and it may get fixed by Kazi Shab.

* Dower is a natural corollary or legal incident.

* Dower will automatically come in the moment of Nikah, without bargaining on Dower. Can get it fixed by court.

* without dower, there can not be any marriage.

* Dower is b/s of marriage, marriage not b/s of Dower.

* On the moment of 'Kabal' i.e. Right to Dower is automatically vested in woman.

It is not the claim of Right of Dower, but it is purely Right to Dower.

* Prompt Dower — may claim immediately after marriage or later on when she wants.

Defter Dower — may demand on violation of condition

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* Earlier it was consideration but now it is only in the sense of consideration not in the consideration as in contract.

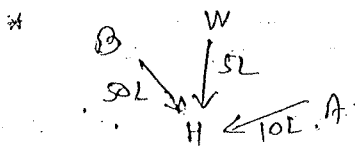
* Nature of Dower →

Secured debt means some charge on pty etc. like mortgage etc.

but in nikha, Dower always is unsecured ^{movable debt} in nikhmana.
↓
actionable claim

but Husband by love and affection may secure it by promise that by sell of pty you will be paid.

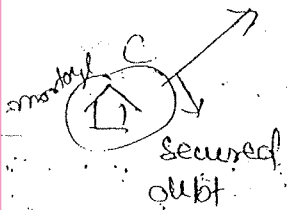
* after death of the husband, wife can claim Dower from husband's pty.



* wife's claim is not better than any other claim.

* all will claim equally.
not special treatment for w.

* c's claim is preferable over all b/c c has given secured debt.



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Dower is considered to be a natural legal incident to any Muslim Nikah, even if the parties have not expressly agreed for the Dower i.e. Even if the Dower is unspecified by the parties, it will be considered to be necessarily incidental upon the Nikah. It is considered to be a promise to pay some amount or to give some pty and in the Shias it can be even the promises to some services to the wife. And if the husband is not capable then it can be a promise to give some Dotes (دوتے). It can be even a promise to teach the Quran to the wife.

The upper limit of Dower is Shias is 500 Drahams

This was the Dower paid in the marriage of Fatima the daughter of Prophet Mohd.)

In Sunnis there is no upper limit but the lower limit is: 10 Drahams in the Hanafi Sunnis and 3 Drahams in the Maliki Sunnis.

⇒ Sunnis → Four sects (1) Hanafis (3) Hambali
(2) Malikis (4) Shafei

The Dower as was held in Abdul

Abdul Kadir v. Salima, Allahabad H.C. 1886

by Mahmood J.

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① - is a consideration for marriage.

Similarly in

Smt. Nasra Begum v. Rizwan Ali, 1980, All HC held that Dower is consideration for the conjugal relationship.

However it was also held that Dower is not essentially a consideration for ^{the} a contract as such.

Mulla has opined the Dower is essentially is a consideration for a marriage contract.

However it must be observed that Dower cannot be considered to be the consideration for a contract in ordinary sense. Dower is not the cause for marriage but (rather) marriage is the cause for Dower that is to say it is not that since the Husband promises to pay the Dower, the wife promise to marry him, rather to the contrary since the marriage has been solemnized b/w the parties the Dower has to naturally follow i.e. even if the parties not agreed for Dower, the Dower amount is implicit as an unspecified Dower. Marriage being a contractual relationship, Dower can be considered to be the consideration for that contract.

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but the has some larger purposes also —

- (a) It is a mark of respect by the husband to the wife.
- (b) It acts as a deterrent upon the husband's start to divorce the wife.
- (c) It gives the basic guarantee to the wife for her subsistence upon the dissolution of the marriage.

Dower is so essential that even if before the solemnization of marriage if the wife had promised not to claim dower she can still after marriage claim Dower.

{ * If after marriage she by declaration that I do not want dower then she can not turn back. }
 relinquishes her right

Thus Dower despite be a consideration for marriage contract, can not be considered to be only a consideration. It has certain other purposes also.

⇒ Right to Dower originates the moment the marriage has been solemnized and not before that. but Right to claim Dower would depend upon the nature of the Dower. —

If it is Prompt Dower (Mahr-e-muajjal)

then right to claim Dower also originates the moment the marriage was solemnized. but in the

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Cases of Deferred Dower (nahr-e-mu'ajjal)

Then even though the right to Dower originates the moment the marriage was solemnized, the right to claim Dower will originate only when the condition on which the Dower has been deferred has been fulfilled.

Dower as an Unsecured Debt -

13/10/12

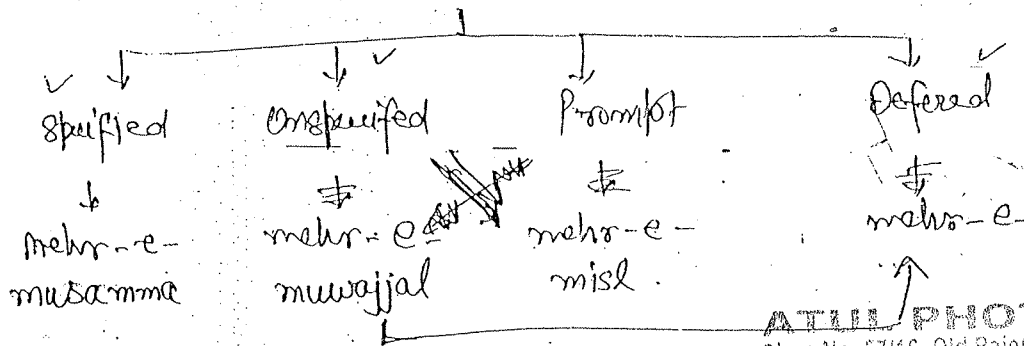
Nature of Dower

Dower claim is in the form of an unsecured money claim, i.e. it is a kind of debt that the husband has towards the wife and the wife can file a civil suit subject to certain conditions to claim the debt. It is unsecured as normally there is no separate property allocated or a charge created for the purpose of satisfying that claim. The wife's position is as good as the position of any other creditor who may have given money loan to the husband.

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However, if there is any other secured creditor his claim will be preferred upon the claim of the wife.

Types of Dower



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(1) In mehr-e-musamma the Dower amount is fixed at the time of Nikha or it may be fixed even before the Nikha though it becomes effective from the date of Nikha.

Dower if not fixed at the time of the nikha or before that then it may be fixed by mutual agreement even after the Nikha has been performed.

If it is so fixed by mutual agreement it will still be called specified Dower.

(2) An unspecified Dower is where the parties have not fixed the Dower at the time of the Nikha or thereafter. In such a case also since the Dower is a natural incident of Nikha, Dower has to be there.

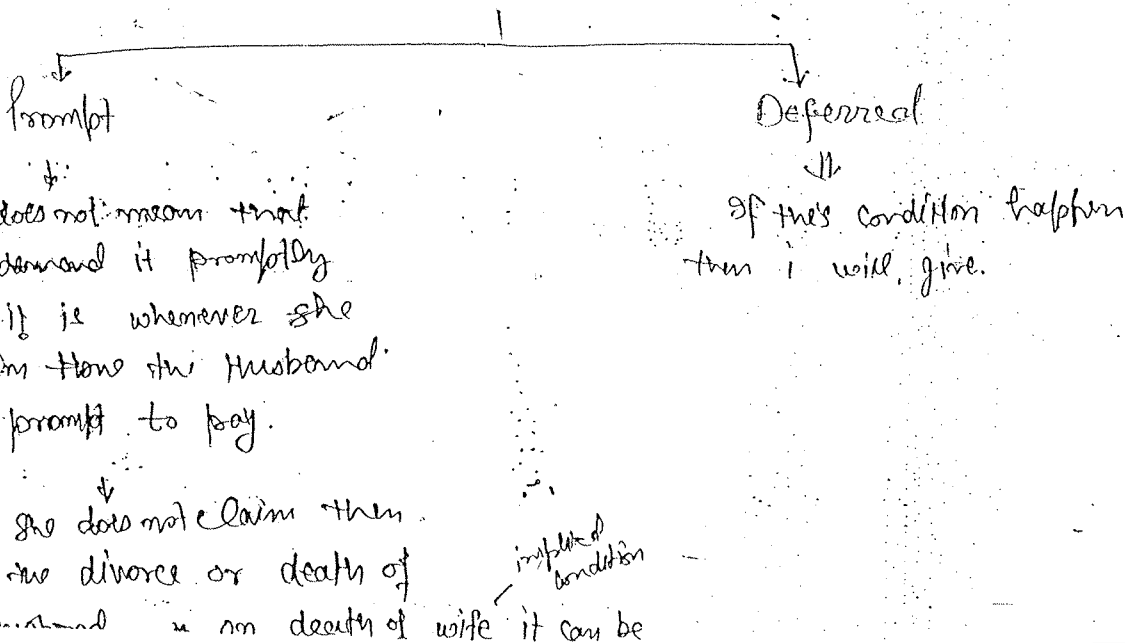
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in the Nikah but it can be got fixed from the court or by the Kazi. The various considerations on which the Dower amount will be fixed will be —

- (a) The family traditions i.e. in the family of the lady ^{earlier} How much Dower had been paid. Fixed. (husband's family not married)
- (b) The capabilities and the intellect of the wife and also the amount of Dower that may have been fixed in the wife's family for a woman for same capability or intellect.
- (c) Though the husband's financial status is not as important but the practically his financial status is also taken into consideration.

a. until not fixed it is unfixed but on the date when fixed it converts to specified dower.

Unspecified Dower is also called customary or proper Dower.



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(3) In prompt Dower the wife has choice to claim Dower at any time after the marriage. The promptness of ~~the~~ Dower lies in the fact that the Dower is payable or on the demand of the wife promptly.

The parties by mutual agreement can convert after the marriage Prompt Dower into Deferred Dower.

If the Prompt Dower is not paid to the wife on demand then, if the marriage was not yet consummated the wife may refuse to ^(to stay together) Cohabit with the husband and the husband will still be liable to maintain her. If the marriage was consummated then the wife may file a civil suit for her claim of Dower. In such cases if the husband files a suit for Restitution of Conjugal rights then the wife may counter claim Dower and the court may pass a / Conditional Decree of restitution conditional upon the payment of Dower.

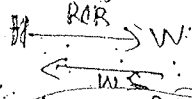
Principle of valid retirement → for Consummation

Count take presumption that they had sexual intercourse when they cohabit.

* after consummation wife does not have right to refuse cohabit.

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If marriage consummated



claimant for dower

Counter claim
Og & A

⇒ there is 2 decree, one decree conditional to other.

Court can pass decree of RCR, Conditioned upon payment of Dower.

↓
marriage was not consummated

↓
W has right to refuse to cohabit.

H $\xrightarrow{RCR}$ W

not counter claim but (defence) only w.s. that my dower is not paid, so I have right to refuse cohabit.

↓
Court may pass conditional decree (on payment) or may dismiss the suit.

↓
Consummated

H $\xrightarrow{RCR}$ W

W has not right to refuse.

she can claim dower only.

There is two coA in one suit
So it is counter claim.

↓

There is 2 decree in single suit.

[Two order, for restitution and for dower]

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(4) Deferred Dower (mehr-e-mujjal)

In the cases of Deferred Dower, the parties have fixed that Dower shall be paid on the date the a particular condition is fulfilled.

For Inst - The Dissolution of marriage or when the husband gets into 2nd marriage or when the H does any UnIslamic activity.

A Deferred Dower can be converted into a prompt dower subsequently by a mutual agreement.

The wife can also relinquish her Dower claim voluntarily.

If the nature of Dower is not fixed though the amount may have been fixed then what should be the nature of Dower?

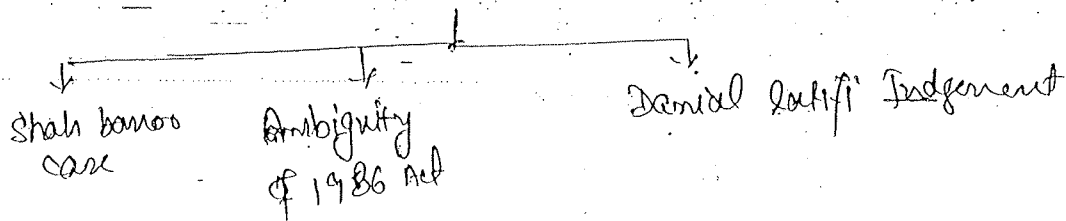
Ans - In the shias in such a case the whole Dower becomes prompt. but In the sunnis the proportion of what dower will be prompt and what will be deferred would depend upon the position of the wife and her requirement - as well as the local customs. The husband's financial status and also the total quantum of Dower will be examined.

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However according to the Allahabad and the Bombay H.C.s half the Dowry amount should be prompt and half should be deferred generally.

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Distinction b/w Dower and maintenance



Sh Mohd. Ahmed Khan v. Shah Bano Begum, 1985 SC (5 Judge)
Judgment delivered by Y. V. Chandra Chaud J.

Issues -

- (1) whether the Cr.Pc. applies upon a muslim woman also? (S. 125)
- (2) Does the payment of Dower amount to the payment of maintenance also? i.e. what is the distinction b/w Dower and maintenance?
- (3) If it is what should be the period for maintenance for muslim wife under the Cr.Pc.?

* S. 125 CrPc is a social provision and it prevents suffering of wife and it is speedy.

If it does not apply to muslim women while applies on Hindu wife then it is unreasonable classification b/w them and violation of Art 14 of the constitution.

* In muslim law - wife can get the maintenance after divorce ~~for~~ ^{for} Iddat. period.

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It will also be discriminatory to muslim woman.
muslim law does not say that mahrnamah will not be given after iddat period. So Cr.P.C will come to an action, and prevail on personal law.

* M.L. does not prohibit that mahrnamah will be given after iddat period.

* Distinction - Three liabilities

(1) for Dowry

(2) for mahrnamah

(3) ^{small} expenses (kharcha-e-ban-dan)

→ not necessary to agree, if agreement is already there then necessary.

* Purpose of Dowry is constructive (binding). while mahrnamah's purpose is to survive for wife. So both are diff concepts.

Str

① The court held that S.125 CrPc is a secular provision and hence it has to apply upon all wife/wives belonging to any religion moreover, the social welfare purpose implied in S.125 CrPc and also the speedier proceedings conducted
S.125 CrPc should be equally made available to a muslim wife.

If she is deprived of that benefit then it will amount to unreasonable classification

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and violation of Art 14 of Const. The word 'wife' used in s-125 should be any wife belonging to any religion.

(3) Issue -

Regarding the duration of maintenance after divorce Court held that the purpose of s-125 CrPc is to prevent destitution (extreme poverty) and ~~vagromy~~ ^{vagromy} ~~vagromy~~ (homeless). and therefore a full benefit should be given also to a muslim woman.

Moreover, the CrPc provides for such maintenance up till the remarriage of divorced wife. It is an enabling provision and it serves a socio-individual purpose whereas the muslim personal law declares that divorced wife should be given maintenance up till Iddat but it nowhere prohibits the giving of maintenance beyond Iddat and therefore that ~~more~~ provision which serves the socio-individual purpose better shall be applicable and hence like in the cases of other women, a muslim divorced woman should be given maintenance until she remarriage.

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(5) Distinction b/w Dower & maintenance—

Regarding the distinction b/w Dower and maintenance (on divorce) the land held that the point of origin of right to Dower is a point of time when marriage solemnized whereas the point of origin on maintenance (on divorce) is ^{on} the time of divorce.

Also Dower is a mark of respect for the wife and has the constructive purpose to bind the parties in the marriage whereas maintenance is based upon the factum of conjugal break down and hence these two are two distinct concepts and a mere payment of Dower would not amount also to a payment of maintenance.

W $\left[\begin{array}{l} \text{Against S.125 CrPc there will always Revision not} \\ \text{appeal.} \end{array} \right]$

* Mahr is ~~not~~ consequence of marriage. Marriage is not the consequence of Mahr.

If you find that Mahr will be given at divorce, then it is not the consequence of Divorce but it already consequence of Nikah from initial stage.

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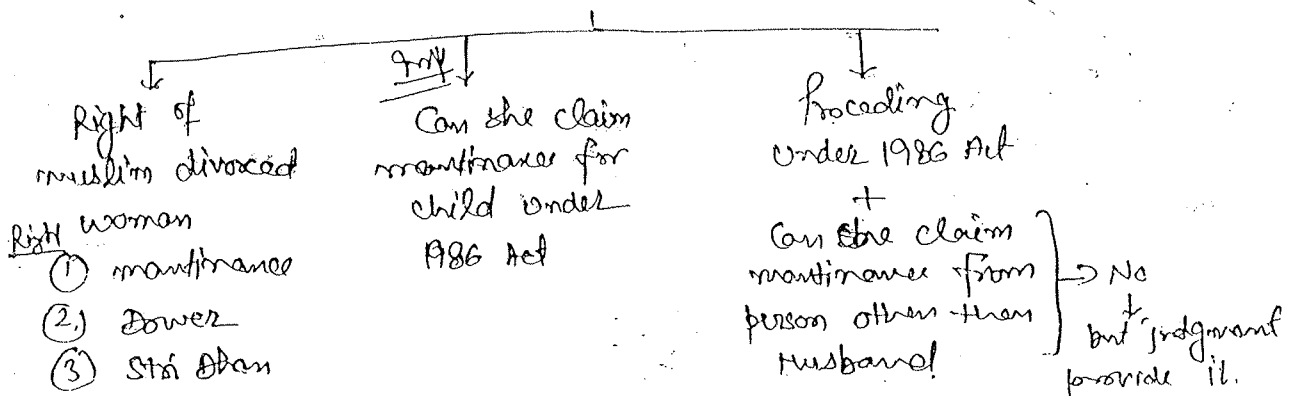
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Conflict of Shahano judgment with

1986 Act

* If on the 1st hearing H & W both put an application not that to apply S. 125 CrPc. then CrPc apply otherwise not.

1986 Act



Q Does the 1986 Act undo Shahano judgement?

Ans - Not in Totality.

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1986 Act -

Divorced woman → who actually was married
Under muslim law.

Sir

Issue 1

It is provided in S. 5 to the 1986 Act that if on the date of 1st hearing the applicant and the respondent under the Act files separate or joint affidavits of declaration that they want the proceedings of the CrPc 125 to

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Apply then the Mag. will conduct the proceedings under CrPc or else he will continue under the 1986 Act.

Its

Comment -

However since the J.M who would conduct the proceeding would be the same. It would not be of a material consequence as the Mag. can ensure under the 1986 Act also that the proceedings are taken in a special manner and the purposes of S.125 CrPc do not get defeated simply b/c the proceedings are being conducted under the 1986 Act.

Shabana Bano v. Imran Khan 2010 SC

Divorced muslim women can file direct application under Sec. 125 CrPc without going into 1986 Act. in family court.

Family Courts Act 1984 - S. 7(1), Exp. (f), ss. 20, 3 and 24d
→ It provides - Notwithstanding

* Family Court has the direct jurisdiction to try the any pendent suit of maintenance.

* of any woman.

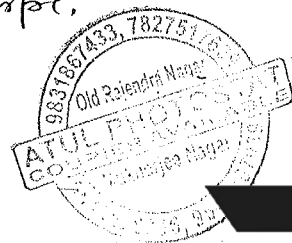
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The Court in this case held that in S.20 Family Courts Act there is an explicit notwithstanding clause wherein it is declared that Family Court will have original jurisdiction to try any suit pertaining to matrimonial matter and by virtue of S.7 ^{Family Court Act 1984} Ex(p)f it would also include maintenance proceedings.

Thus the court held that despite the prohibition of S.5 of 1986 Act the muslim woman can without complying S.5 directly file a petition before the Family Court. However

However the above should not be deemed to make S.5 of 1986 Act redundant (useless) & rather it is only with respect to the Family Court that requirements of S.5 is bypassed. and with respect to S.125 CrPc if an application is filed before a J.M then the above judgment will not apply and S.5 has to be applicable.

J.M
→ 1986 Act → but on app. of S.125 CrPc.
of family court → direct U/s 125 CrPc.

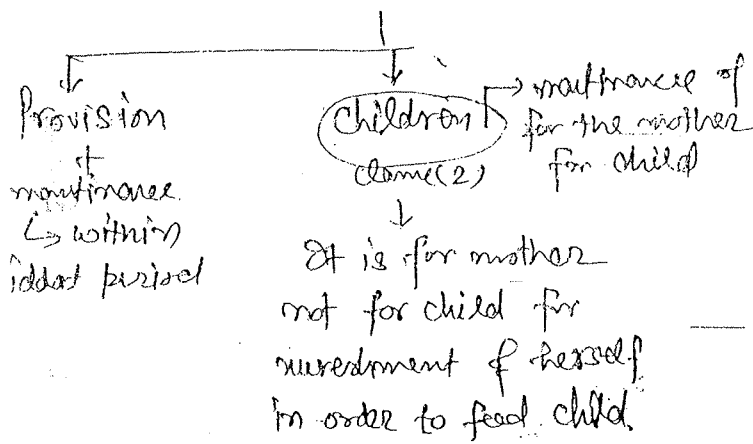


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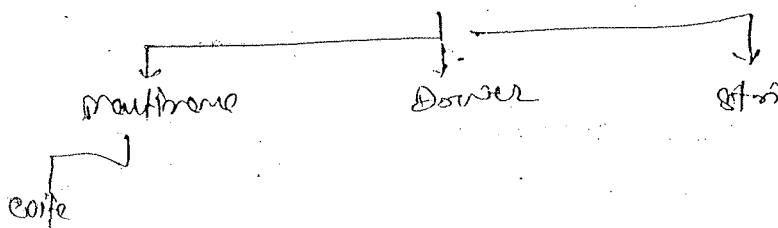
Issue (2) -

Maintenance -

S. 3, 1986 Act -



* child can claim the his right of maintenance in other law.



In S. 3 (b) the wife has been given the right to claim maintenance for maintaining herself in order to be able to maintain her child upto 2 years of age. The Act is with respect to rights of muslim women and therefore the rights of the women has to be protected by the Act. The child's right to claim maintenance from his father is a distinct right and.

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is separate from its mother's right to claim maintenance for her husband.

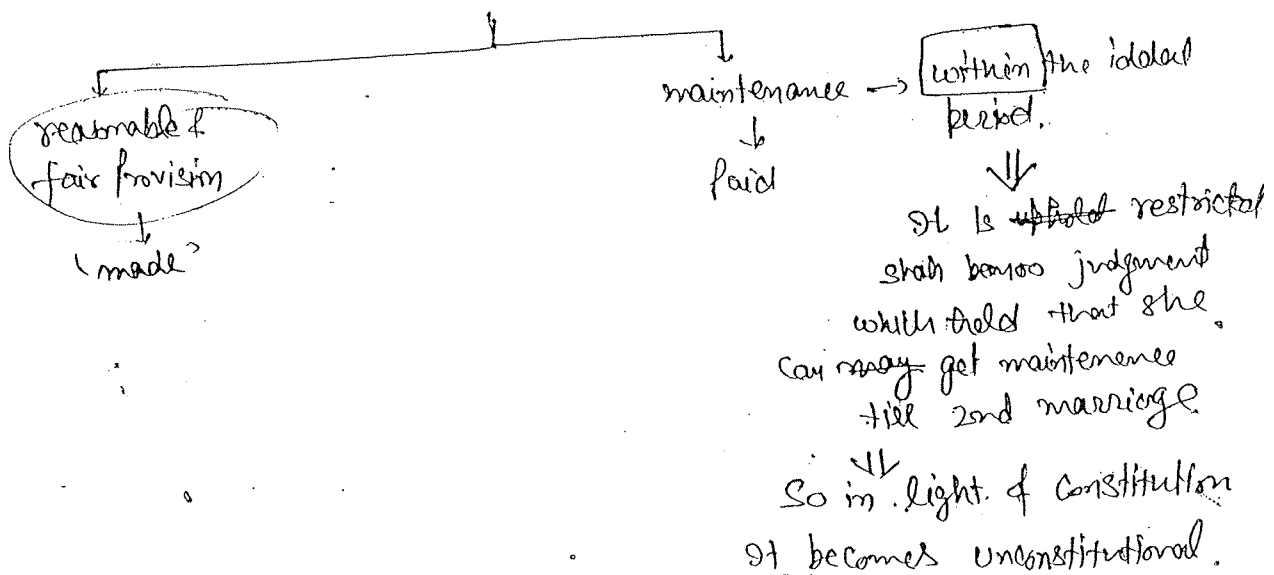
The Act does not cover a situation of the child claiming maintenance for her itself through mother. Section in S. 3(1)(b) also the maintenance is claimed by the wife for her own maintenance. This is an additional maintenance that she requires as she has to additionally maintain herself to be able to maintain the child; for eg. To feed the child upto the age of two years.

Noor Saba Khatoon v. Mohd. Qasim, 1997 SC child can claim up to 125 crps.

Issue 3 —

Maintenance —

S. 3(1)(a) —



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word 'within' has given liberal interpretation and meaning of 'within' is that that maintenance should start within Iddat period.

By this way SC save this Act to become unconstitutional.

Danial Hatifi v. U.O.I, 2001 SC, (5 Judge)
Judgment delivered by

In this case the court was faced with the question as to whether the use of the word 'within' in S.3(1)(a) would mean that the maintenance has to be provided only for the Iddat period or even beyond the Iddat period. The court held that where there is an ambiguity in provision, that is two interpretations are possible and one of them would render the ^{statute or} constitution unconstitutional and the other would bring it in line. Then that interpretation shall be adopted which makes it constitutional.

The word 'within' was interpreted by the court ^{to} mean that the husband has to make sure that the ^{re & fair} provision was made within the Iddat period and also the maintenance is paid to her before the Iddat period gets over. That does not

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mean that the provisions or the maintenance shall not be for a period beyond 1ddat. Here restricted — interpretation would make the Act unconstitutional whereas a liberal interpretation brings it within the line in Constitution and also with the Cr.P.C.

Accordingly the Court finally held that maintenance and reasonable & fair provision shall be for entire period until she gets remarried.

* SC does not hold S.5 unconstitutional even if restricted the provision of S.125 Cr.P.C. bcs it is more beneficial purpose of the woman.

S.3(2)

S.3(2) — Arrest for non payment of fine.

It is called 'distress arrest warrant'.

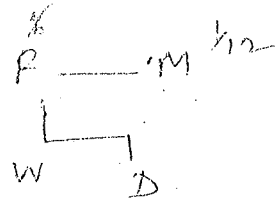
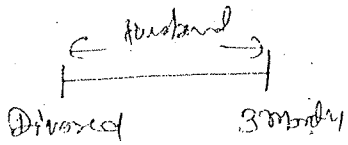
→ appears before mag. and mag. asks that 'why should not you put in jail?' if not explain then may be order

for jail.

It is for every default.

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S.4 -

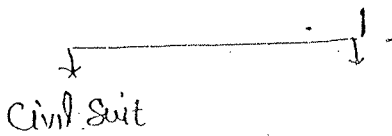


after it, if she would have died on the date of the divorce the legal heir (relative) would pay in certain order →

H, child, parents etc

15/10/12

when Dower is not paid the rights of muslim woman —



Remission of Dower

⇒ Actual Dower for she is entitled to receive → self

Rights — In the cases where the Dower has not been paid

- ① to a muslim wife, she has right to file a civil suit against the husband in his life time and if he has died then against the legal heirs of the husband.

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- (2) She can refuse to cohabit with the husband if the Dower has not been paid on demand.
- (3) In the case of the death of the husband or in case of divorce, she has the right to lien upon the husband's property.

Right to civil suit

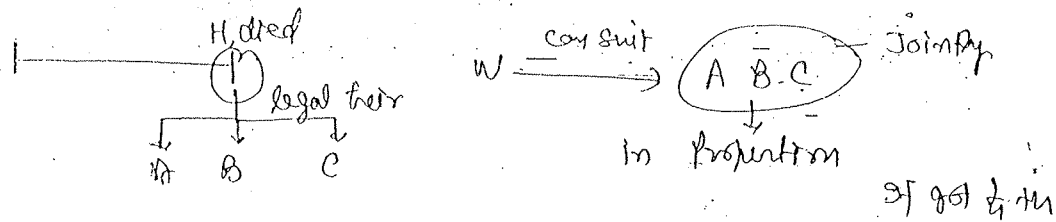
→ Art 113, Limit Act

She can bring a civil suit within 3 years from the date of demand or if the marriage has been dissolved by the death or the divorced then within 3 years of the such dissolution.

The husband will be personally liable to pay the amount to the plaintiff wife as it is a personal debt to be satisfied to the husband. Upon his death it will be the legal heirs who will be liable to pay the amount but their liability will be only to the extent of the property that they have received from the deceased ⁱⁿ inheritance and also only in the respective proportion in which they have received the share.

- normally ^{on} dissolution of marriage
- on case of deferred dower → when on any condition it converts into prompt dower (eg other mikhra) then it for dissolution of marriage within 3 years.

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* W is itself a legal heir.
and she has to adjust her share
for dower.

W : A : B : C
1 : 1 : 1 : 1

Sir -

When H dies and has left behind legal heirs A, B, C & W. Then each of these heirs will be liable for the dower only out of the total property received by them or her in succession from the deceased.

However, in that also the total dower claim has to be divided in the respective proportions in which A, B, C & W may have been allotted the shares. Here W herself is the wife and therefore she has the dower claim and being a legal heir she has also received a particular share on succession. The deduction will be done in the respective proportion from her own share also i.e. the proportionate Dower claim would be adjusted against her own share that she receives on succession and the remaining amount she would

Rahul IAS Handwritten Notes

get from the other legal tiers.

Right to refuse cohabitation

Valid retirement → * on demand
* moral impediment (restriction)
* Physical "
* Religious "

Siv - The right to refuse cohabitation is to be exercised by the wife only after she has made an explicit demand for Dower and the dower has not been paid by the husband. The refusal to cohabitation can be done only during the existence of marriage as it is only then that the wife is legally bound to cohabit with the husband.

However if the marriage was consummated then this right is not available. This right will be normally exercised in the cases where the Dower is in the nature of prompt Dower and the Dower has been demanded by the wife.

However, there may be circumstances wherein the Dower is deferred upon some condition to be fulfilled during the existence of marriage and in such case also if the dower has not been paid on demand despite the condition being fulfilled

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the above right can be exercised.

In a suit for restitution of conjugal rights (RCR) — the respondent wife in such cases can take a valid and effective defence on the above ground.

The B.O. proving the fact that the marriage was not consummated primarily lies upon the respondent wife but for that purpose she simply has to raise the pleading in a W.S. where upon the plaintiff husband will prove the circumstances in which they had stayed together and in ~~it~~ through such circumstances he will prove that there was a possibility of they are having had sexual intercourse. upon such prove the court will raise the presumption of valid retirement i.e. [Khilwaat-us-Sahlah] → This presumption is only raised in Hanafi and Maliki schools.

i.e. the court will presume that the marriage had been consummated thereafter the burden will shift upon the respondent wife to prove the facts suggesting that there was no sexual intercourse.

For that purpose she can prove that there was a physical impediment (obstruction) for e.g. —

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impotency of either of them or illness etc or she can prove the fact that there was some moral impediment the wife being in her menstruation cycle or the wife being in Nifis period (i.e. the period before the delivery of a child)

she can also prove the religious or legal impediment
For eg - they were on Hazz or into any other such religions at where in sexual intercourse is prohibited

once either of these circumstances proved by her the presumption of valid retinment is done away with and again it will be for the husband to prove the actual sexual intercourse in order to prove the consummation of marriage.

Q X, a muslim was married to W, a muslim woman the amount of Dower was not specified and also its nature was not specified, after a brief cohabitation the wife deserted the husband. The Husband X filed a suit claiming Restitution, she takes a defence that Dower was not paid on demand. decide?

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Ans - * In this case dower will be prompt and $\frac{1}{2}$ or whole according to shiah and sunni, and wife has duty to cohabit w/s brief cohabitation already being done.
So R of conj. Right on condition can be passed. and wife does not have right to refuse to cohabit but can only counter claim. for dower in the w.s. It is the presumption w/s 114 IEA will cease. Court may presume and it is a rebuttable presumption.

Ans -

Issues - The main issues to be determined in the given case are -

- ① whether the Dower not being specified and neither its nature being fixed, the wife could ^{equally} claim the Dower.
- ② whether despite the brief cohabitation the respondent wife could refuse cohabitation on dower not being paid.

with respect to the 1st Issue, In the shiahs the dower will be fully prompt dower and in the sunnis it will be half prompt and half deferred as per Allahabad and Bombay H.C., if the dower has not been fixed. Thus in either of the cases the respondent

Rahul IAS Handwritten Notes

was entitled to claim the Dowry, the amount of which could be ~~it~~ got fixed from the court.

With respect to the 2nd Issue, the fact that there had been a brief Cohabitation would raise the presumption of ~~Khilnat~~^{shikah} ~~us-sate~~ (valid retirement) i.e. the presumption of a marriage being consummated. The spouses having stayed together in such circumstances wherein sexual intercourse was possible; the court will raise the above presumption which is rebuttable by the respondent.

The respondent in the present case has not proved any physical, legal or moral impediment to the sexual intercourse, as per the facts on record and hence the marriage will be deemed to have been consummated. The same will be the case in the ~~shikah~~ ^{shikah} ~~same~~ and the other Sunni schools by virtue of S. 114 I.E.A.

The right to refuse Cohabitation on Dowry not being paid is available only if the marriage was not consummated, which is not there in the present case and hence the defence of the respondent wife would fail. Though she could have claimed it in a separate civil suit or a counter claim ~~to~~ in the same suit.

Rahul IAS Handwritten Notes

Accordingly the respondent's defence would not be allowed.

Shirkah

Ans - The defence of the respondent would fail as even though both in the shiah and sunni law she was entitled to claim dower, in the former the whole dower presumed to be prompt and in the latter half being prompt, she can not refuse cohabitation as the marriage was already consummated through the brief cohabitation.

In the Hanafi's and the Maliki's the presumption of valid retirement will apply due to the brief cohabitation and not having been rebutted by the respondent the marriage will be deemed to be consummated. In the shiahs and the other sects of sunnis valid retirement will not apply but the presumption of consummation can be raised under sec. 114 IEA in the given facts.

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Right to Lien

- * possession of husband's pty either movable or immovable, H gives it voluntarily to wife.
- * The moment H dies or divorced his wife the right to lien of the property till dower paid.
- * It is presumption that possession of wife was continued and existing with free and consent of H.
- * It is not total possession but continue the possession.

usufruct → benefit

- * She can not sell ^{or tot} the pty. L.H. can bring suit on her.
 then R to lien not will continue.
- * If she disposed ~~the~~ then right to sue.
- * She is accountable for profit from pty. L.H. can examine the profit.
- * Actually the Right to Lien against legal heirs.
- * The moment H died, the title of pty vested to his L.H. immediately.
- * L.H. may together willing to satisfied her dower from pty or partition of pty to satisfy dower.
- * She does not have this right against creditor.
X, Y loan → H, then X, Y, W are on same fatwa are creditor.
- * In case of mortgage, pty can be vacated by W, if mortgagee has first to suit on pty, after that dower will be paid.

Rahul IAS Handwritten Notes

16/10/12

Right to Lien

Right to Lien is the muslim wife's right to retain her husband's property after his death or upon divorce in lieu of unpaid Dower. The wife has a ^{personal} claim against the husband for the dower amount but if upon divorce or death of the husband the Dower remains unpaid then the wife has the right to continue with the possession of his property. The right is not to acquire possession rather it is to retain and continue with the possession. Therefore it is necessary that at the time of divorce or the death of the husband the wife was already in the possession of some part of the H and the position had been acquired by her with the express or implied consent of the Husband.

It is only then that upon the divorce or death the wife can continue the possession.

Upon the death of the Husband the right is essentially against the legal heirs as the moment the husband dies the property gets vested in his legal heirs to the extent of their respective shares. She can retain the possession as long as the legal heirs do not pay her the dower.

Rahul IAS Handwritten Notes

claim out of the property that they may have acquired in succession or as long as she gets her dower claim satisfied out of the income of the said property.

The property that the wife retains as lien is not in totality vested in her i.e. she does not get an absolute title to the property and hence she can not transfer the property by an absolute ~~alienation~~ alienation and if she does so she will lose her right to lien and now the L.H.s will get the right to have the declaration of the alienation^{alienation} to be void and to acquire the possession of the property by themselves. She can not now file a suit for ~~her~~ acquiring the possession. She will however not lose a right to the dower amount and she can still file a civil suit against the legal heirs claiming the dower from the property that they have acquired on succession.

However, out of the total claim, the amount that she may have already obtained during her lien will be adjusted against her total claim.

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The wife herself on the death of the husband is a legal heir to him and therefore if she ^{has} made an alienation then the alienation will be binding upon her to the extent of her share provided it is severable.

The wife exercising the right to lien however has the right to file a suit and reacquire the possession from trespasser who may have dispossessed her.

The wife has to give the accounts of the income and expenses of the pty that she may have incurred with respect to the property she has possession in the exercise of lien.

If she misappropriates the income or is not able to properly a/c for it then right to lien can be cancelled.

* Right to lien is against L.H. but not against creditors.

Sur-ar-Nisa — In this Islamic text the H has been enjoined to give ^{reasonable} ~~favorable~~ treatment to wife & children but neither in this text or nor else where is a preference given the wife's claim upon the other creditors.

Rahul IAS Handwritten Notes

In Tyabji's "Muhammadian law" it has been suggested that a widow by her lien does not have a priority upon the other creditors.

Major, however has the priority upon his (Husband) debts.

Dower has a priority upon bequest or inheritance but not upon the other creditor's claim or the funeral expenses.

However, if the husband himself has created a charge for the wife's dower claim upon some immovable propy then her dower debts becomes a secured debt and therefore the wife will have a better claim against the unsecured creditors.

Maina Bibi v. Chaudhri Vakil Ahmad, (1924 P.C)

Facts ① H died in 1890 at the time of his death W was in possession of his property.

② In 1902 the legal heirs of H filed the suit against her for possession. W opposed the suit on the ground that the property was gifted to her by her husband and ⁱⁿ the alternative she claimed a right to lien for an unpaid dower claim.

The court 1903 passed a decree in favour of the plaintiff's conditional upon their making the payment

Rahul IAS Handwritten Notes

of dower claim within 6 months of the decree.

The dower amount was not paid by the decree holders and W continued in possession.

Thereafter W executed two gift deeds and gave the possession of the said property to A & B and thus thereby she transferred absolutely the title to the property.

In 1915 the L.H. again filed a suit for cancellation (of gift deed) and possession and they claimed that they are willing to pay the dower amount.

The court held that the W has the peaceful possession of the property was in the hands of W in the exercise of right to lien and since after the trial court's decree the dower amount was not paid, she continued to have the R. to lien.

However she did not acquire on account of failure of the heirs to pay the dower an absolute title to the property.

The court further held that she did have the right to continue the possession in her lien upon the property. The earlier decree will not act as Resjudicata upon the present suit. The earlier decree was only to the extent that if the legal heirs pay the dower amount to her within 6 months

Rahul IAS Handwritten Notes

she will give up the possession of the property to them or else she will continue in the possession for her exercise of R to lien. The decree never give in an absolute title to the property and therefore what she had was still only the limited R to lien. and accordingly any absolute alienation would be void.

Q Is a dower claim of the wife is heritable or transferable?

Q Is a right to lien heritable & transferable?

Ans - for Book

The right to dower is a right vested in the wife the moment she gets married and the amount is in the form of a credit against the husband. Thus if she dies having left behind an unclaimed dower the right to claim will be inherited by her L.H. and they can file a suit against H for the money claim. So R to dower is heritable.

Q Can it be transferred within life time of wife?

Since dower is a purely personal claim by the wife personally against the husband it should not be allowed to be transferred to the 3rd person in the life time of the wife.

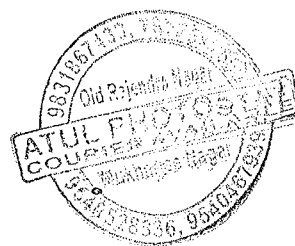
Rahul IAS Handwritten Notes

Transferability of Lien

If the husband is dead and thereafter she is exercising the right to Lien then the sanctity of dower as may have been ^{of} the H & W when H existed will ^{get} reduced to mean a money claim and the principles of equity & justice would require that what ever normal legal incidents happened in the case of money claim or right to Lien should be incidental in such a case also. Therefore the right to Lien should be transferable as well as it should be heritable.

The Allahabad and Maysoor H.C. are of the same view and that is the current juristic opinion.

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Rahul IAS Handwritten Notes

Remission of Dower (^{gift} Hiba-e-mahr)

If the wife is adult (age of 15 years) and of a sound mind at the time of remission of dower then she can expressly in writing with her free consent relinquish her dower claim.

The relinquishment may be either conditional or unconditional. A conditional relinquishment shall not have un-Islamic conditions.

If she can relinquish the dower upon against her husband then upon his death she may relinquish against his legal heir also.

Rahul IAS Handwritten Notes

Nikah

(1) Nature of Nikah

(2) Procedure and essentials

↳ Guidelines — Tabr
Kayan-ul-Bulugh

(3) Effect of prohibition of child marriage Act, 2006

(4) Prohibitions on marriage — applied question may be asked

(i)

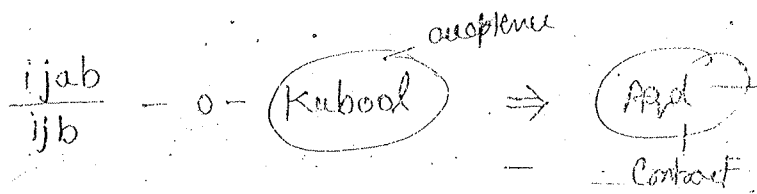
Absolute prohibition Relative Proh.

↓

(ii) Types → valid/void/irregular
↳ muta marriage in shiah

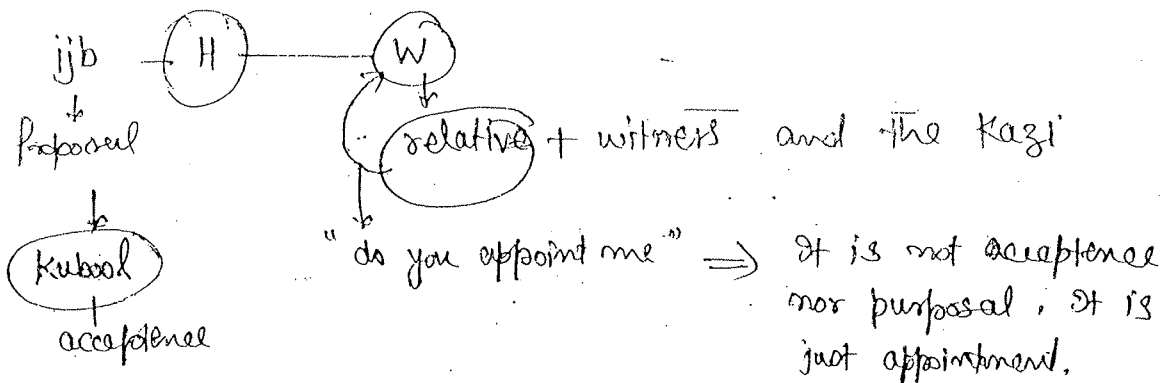
(iii) Conditional marriage

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It is contractual nature of Nikah.

Summi Nikah



$\hookrightarrow$ Agd - when the ijb accepted then Nikah is performed.

* Nikah has socio purpose. It has religious aspect.

It is not a mere contract but the process of Nikah is contract.

sn - Nature of Nikah -

A Nikah is based upon the process of ijb-o-kabool i.e. the offer formally has to made by the husband and there has to be an express acceptance of the offer or by offer by wife or an authorised agent of the wife. Therefore the essential process of Nikah is essentially contractual. Moreover as a general rule at

Rahul IAS Handwritten Notes

The time of offer and acceptance the dowry amount has to be stated before the parties to the marriage.

Mulla has strongly supported the view that Nikha is essentially a contract. The 3-C also in *Amima v. Hassan Koya*, 2003 SC 4th Para, has held that a muslim marriage "is a contract ~~unlike~~ unlike the Hindu law where it is a sacrament"

There is no denial to the fact that in procedural form and also in some elements of its substance a muslim Nikha is contractual. However, it needs to be examined whether a muslim Nikha can be compared to an ordinary contract in all its elements.

⊗ The supporters its being a contract have emphasised upon the essential requirement of the Nikha nama and Mahr nama in a written form, the requirement of Dowry as a consideration and also the free consent of the parties.

It is also required that the Nikha should not have conditions which are opposed to Islamic policy.

In the case of a Nikha however, through the guardians the marriage of minors (less than 15 years)

Rahul IAS Handwritten Notes

or unsound person can be performed and excepting some cases where ^{such} marriage can be repudiated () the marriage is ~~void~~ and valid and enforceable. whereas in the case of contracts a minor's agreement will be void ab initio even if contracted by the guardians and there would not be any question of repudiation or ratification by the minor upon attaining majority.

Even regarding the dower it can be said that the dower is not simply a consideration rather it has larger purpose of being mark of respect to wife and to act as a deterrent to the husband's power of divorce.

The Doctrine of Frustration applies in a contract but does not exist explicitly in the Nikha. Though there is no direct specification of frustration of marriage in a Nikha, the courts have devised the mechanism to granting divorce on the ground of ~~irretrievable break~~

irretrievable break down of marriage.

However this concept is not to be found in muslim personal law.

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Contracts can be permanent or of temporary nature, whereas Nikha has to be invariably of a permanent nature. Excepting Muta Nikha which is for a temporary nature.

Unlike in the law of contract the concept of novation is not to be found in a muslim Nikha.

The concept of Damages is applicable in Contract. will not be found in Nikha excepting that the concept of maintenance, divorce, Restitution of conjugal rights are to be found. Thus a muslim Nikha can not be said to be a pure contract in its entirety in substance though it is essentially contractual in its procedure.

Rahul IAS Handwritten Notes

17/10/12

Essential Requirement for muslim Nikha :-

- ① The marriage should be performed in same sitting.
The focus is essentially not upon the parties actually been present before each other though in practical circumstances it

However, the essence of same sitting is continuity of transaction i.e. there may be cases where the Nikha is performed on the telephone or through the internet — In such cases the parties are not actually present before each other still if the transaction can be proved to be the same then the Nikha will be valid. The real test is whether the offer and acceptance was made in the same frame of mind of the parties.

The continuity of event has to be examined in the circumstances of the case.

In the cases of internet & telephonic Nikha if the intention to marry is manifest then the marriage will be valid. However the marriage will may be irregular in sumis if witnesses are required and in the absence of such witnesses

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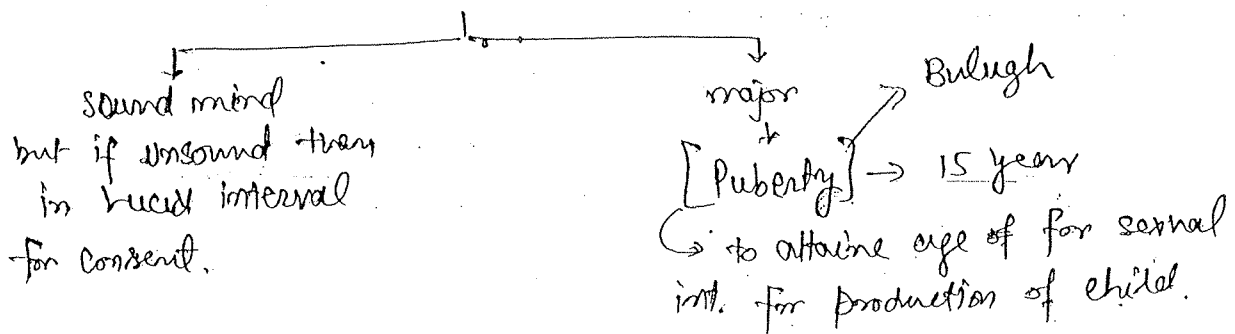
in such cases it will be irregular.

- (2) In the Sunni law two adult male witnesses to be present for nikah or one adult male, two female req. (one male essentially req.)
In shiah no witness required at the time of marriage.

If the witnesses are insufficient or not present at all then the marriage will be irregular in Sunnis. In shiah it will be valid.

- (3) The offer & acceptance should be certain & clear and not ambiguous, the words should be specific and should manifest a clear intention to marry. The marriage should not be out of jest (mats).

(4) Competency -

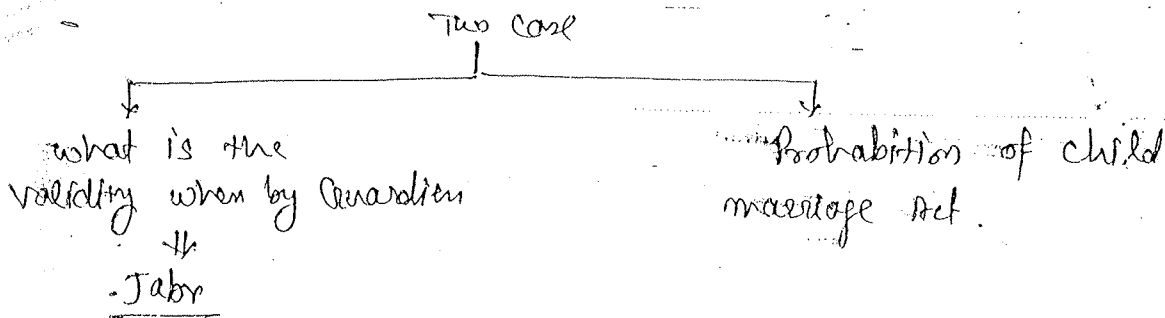


Both the spouses should be of the age of Puberty (15yr) if they gave the consent themselves. or if they are minors (< 15yr) then the guardians can give the consent.

also they should both be of sound mind if they gave the consent themselves and if they are

Rahul IAS Handwritten Notes

unsound then the consent should have given during the Lucid Interval period (when normal).



⑤ The consent should be a free consent i.e. there should not be coercion involved. However in the Hanafi sunnis if the marriage are performed in coercion and thereafter rectification has been done then it will be valid but in the other sunnis and shiahs it will be void.

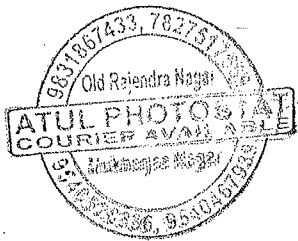
⑥ If the marriage has been performed by fraud then if after the fraud became known to the parties the marriage has not been consummated then it will be voidable.

⑦ If the marriage is performed under a mistake of fact of both the parties then it will be void.

Rahul IAS Handwritten Notes

- Q Can a Guardian get the child married? → Yes
 Is such marriage binding upon child and on become major then can the child avoid the marriage.
 → (The option of Puberty). i.e. Khyal-ul-bulugh.

Khyar
 Khyal-ul-bulugh :-



18/10/12

Guardian
 ↓
 is < 15 year

→ to rectify
 [Option of Puberty]
 → Khyal ul bulugh

Saghir < 7 year

Sariri. ≥ 7 < 15

Bulugh ≥ 15

Age of Puberty
 { for female = 9 year
 " male = 12 year

Guardian in marriage → Jabr

Shiah (Guardian)

Father/G. father
 how high & over

* If the father is alive
 then father will capable
 to getting the child into
 marriage

Any other
 Guardian
 ↓
 Nikha is not valid
 till attain the age
 of majority
 ↓
 on majority she
 can rectify



Rahul IAS Handwritten Notes

In the Shiahs the father or Grand father how high so ever can give the Consent for the marriage of the minor and infact as per the personal law once such marriage has been performed it can not be repudiated by the minor upon attaining majority (In such cases there is no option of puberty subject to 1989 Act). However if the marriage has been performed by any other guardian then the marriage is not considered to be an existing marriage unless upon attaining majority the minor concerned ratifies the marriage either expressly or by conduct.

* one case when minor ratify → after puberty, male pay dowry or female demand it etc. then it will be valid, cannot turn.

However if the father or the Grand father got the marriage performed by fraud or negligence then such marriage can be voided.

In the Shiahs when the marriage performed by other guardians the need for option of puberty would not be there, ^{as} unless ratified then no marriage and if once ratified upon attaining 15 years it will be deemed as if the parties himself has given the consent and after such consent

Rahul IAS Handwritten Notes

he cannot turn back to avoid the marriage.

Aqd Fazili - (on unnecessary contract)

- The nearer relative alive and not given consent and nor approved the marriage but distanced relative given consent then marriage will be void. applies on shia and sunni also.

⇒ In the presence of nearer guardian a remote guardian can not give the consent for the marriage and hence the marriage will be void or non-existent. However, it will become valid once the minor upon attaining majority approves the marriage.

Sunni -

In sunnis if the father or C.F. shows his consent then the marriage is valid and can not be repudiated subject to 1939 Act.

It can be repudiated when it was done by fraudently or negligently.

Sequence of Guardian - (in Sunni)

After the F & C.F. the other relatives who can give consent for marriage in sequence are as follows -

Rahul IAS Handwritten Notes

- (a) It is the brother.
- (b) Paternal uncle
- (c) The mother.
- (d) Maternal uncle + aunt (other, ~~mom~~) and any other relatives on the mother's side.
- (e) state

* In which there is no such sequence but Aqd Fasuli rule will apply.

The marriages performed by either of the other relatives will be considered to be a valid marriage provided Aqd Fasuli does not apply and in such cases the minor has option of puberty upon attaining age of 15 years.

Kayar-ul-bulugh

In order to attain stability in marriage it is essential that the marriage should be performed by the parties with their mutual consent and thus the general rule in Muslim law is that even if the guardian has the marriage got performed during minority. The party shall have the choice to avoid the marriage when he attains majority (15 years). However it is considered that the father or paternal G.P. how high so ever

Rahul IAS Handwritten Notes

would be the best Judges of the interest of the child and therefore the rule is that in such cases the child can not avoid the marriage even if it attains majority this rule is the same as in shiahs as well as the sunnis.

However with respect to female Shiahs and sunni the rule has got altered by The 1939 Muslim Dissolution of marriage Act S. 2(VII)

According to the above provision a female can avoid the marriage contracted by her father or any other guardian during her minority. but the condition is that she can avoid the marriage only from 15 year upto the age of 18 years. and that too if the marriage was not consummated.

* Even in P. case, Dismissal of marriage suit or

If After attaining 15 years the woman had cohabited with the Husband then the presumption of valid settlement and Consummation will apply and the option of puberty will be lost unless the presumption has been rebutted. The exercise of the option of puberty by the female would be a ground for obtaining a decree for divorce. as per the 1939 Act.

Rahul IAS Handwritten Notes

In the case of males in the Sumis regarding the marriage by F/C.F. the rule is the same but the other guardians have contracted the marriage and Agd Fazuli does not apply. Then option of Puberty is available i.e. upon attaining the age of 15 y the marriage can be annulled by the male provided he has not consummated the marriage after becoming major and has not paid dower. and also has not done any such conduct which may result into an acceptance of the marriage.

⇒ It is essential that upon exercising the option of puberty the party must obtain an order from the court in that regard.

If after attaining age of 15 yrs ^{by the wife} the husband has forcefully had sexual intercourse or cohabitation (even if fraudulently) then the female ~~have~~ still have the option of puberty. Same apply for male also.

After attaining 15 years the male can ~~at any~~ exercise option of puberty at any time (no limit as female).

Rahul IAS Handwritten Notes

- * Prohibition of child marriage Act 2006, prohibit the child marriage and it has nowhere maintained that it will not apply if on Hindu or muslim law, it means it has overriding effect on both personal law.

Act 2006 -

3.2 - child $\rightarrow$ < 18 female, < 21 year male.

child marriage — either of the party is minor.

minor $\rightarrow$ Provision under majority Act.

- * marriage is voidable at the option of ^{any} minor party. minor can file a suit for avoid the marriage through guardian.
- * upon attaining the majority within 2 year, the should be exercised, after it option will be lapsed. In case of male also. (18+2)
- * It is a secular law, it is not sure that it apply on concept of Khyar-ul-bulugh or not but it is a secular law.
- * only female ^{child} get maintenance even if it is less in age. and it can not get.
- * 3.20 of Hindu marriage Act 1955-

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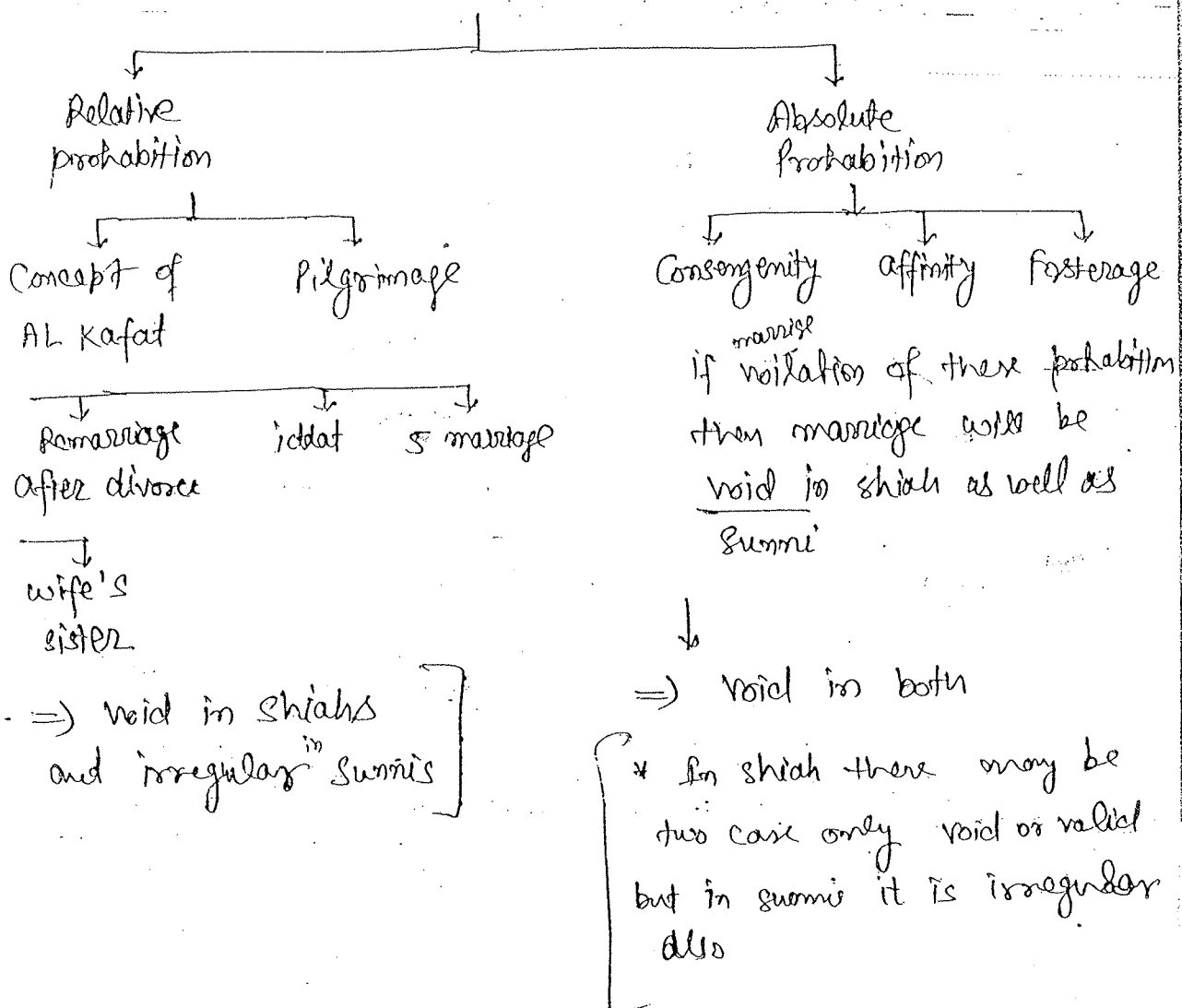
The 2006 Prohibition of Child Marriage Act directly affects certain rules of Khyar-ul-Bulugh. For inst - As per the 2006 Act the marriage if female is < 18 years and or the male is < 21 years it will be a child marriage and will be voidable whereas in muslim personal law a marriage in which spouses are 15 years will be valid.

As per the muslim personal law in the case of female the marriage can be avoided only up till the age of < 18 years commencing from the age of puberty provided the marriage has not been consummated. whereas ~~the~~ as per the 2006 Act the marriage can be avoided earlier ^(< 15) age also through the guardian, and can be avoided up till 2 years from the age of majority. ~~whereas~~ and also it can be avoided even if the marriage was consummated.

It is nowhere stated in 2006 Act that the Act marriage is not applicable upon the muslims rather being a secular provision and aimed at social welfare and equity it shall be applicable upon all religions and hence it will affect the concept of khyar-ul-bulugh.

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Prohibitions upon Marriage



AL Kafat :- The marriage should be performed b/w family.

It is marriage b/w families of equal socio-economic status. The sunni is ^{being} not followed but in the shiah it is being followed occasionally.

* Even if it is violated the marriage is being considered to valid these days.

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Pilgrimage :- If the spouses are on Haj then if they are wearing Athram then the marriage cannot be performed. It is in shiah it will be void and in sunnis it will be irregular.

Re-marriage after divorce :-

① H-W - married

Zina = Sin = Haj

② Divorce

* If without nikkah they stay as in marriage then it is Zina.

③ iddat

④ W - H,

⑤ Consummate 2nd marriage → not necessary consummated but only cohabitation is sufficient

⑥ Divorce

although somewhat emphasis on consummation.

⑦ iddat

⑧ H-W - again

* If W does not get into 2nd marriage then it will also be zina again even entire process performed.

If the parties did not get married, 2nd time at all though the process had been fulfilled it will be called no marriage and cohabitation will be a sin de Zina. in both shiahs & sunnis.

However if the 2nd marriage was actually performed formally b/w the parties but the process was

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either not performed at all or was performed with irregularities. In summis it will be irregular and in shrahs it will be void.

Iddat

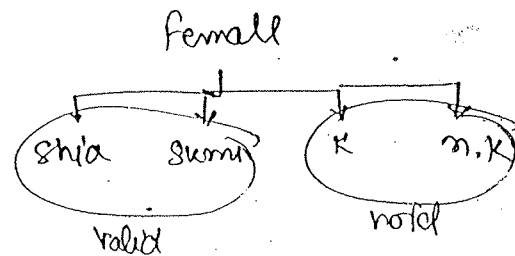
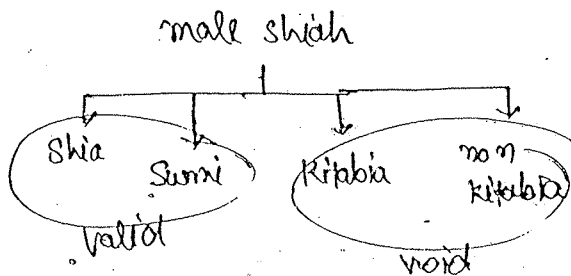
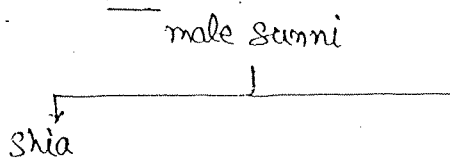
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Muslim Law

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20/10/12

Inter-religious marriage :-

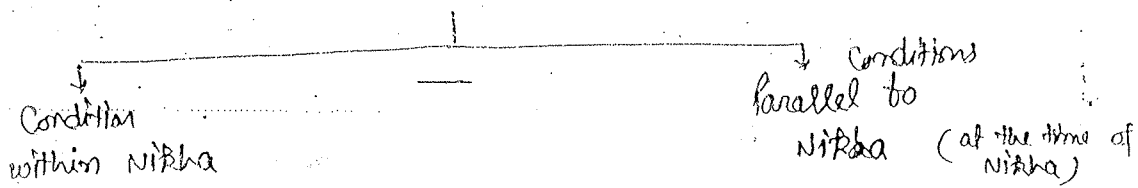


shia M - shia F

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Conditions in marriage

Nikah



A Nikah has to be presently enforceable and there can not be a Nikah wherein the intention is to postpone the happening of Nikah to a future event. In such cases the intention of the parties is not to finalise the Nikah wherein it made conditional upon happening or non-happening of future event.

In such cases the intention of the party is not to finalise the Nikah on the date of performance of the Nikah and hence the Nikah will be the void Nikah. The acceptance in the Nikah has to be a present and Nikah has to be valid and applicable from the dt of acceptance & not from a future date. These conditions are called conditions within the Nikah and as such as would render the Nikah itself to be void.

However, there may be conditions which are not intended to affect the coming into existence of the Nikah as such rather which are parallel to the marriage agreement and which do not

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that the enforceability of the Nikha as such. If such conditions are violated during the existence of the marriage then the affected spouse may bring a civil action against the other spouse but the Nikha as such does not get affected.

The parallel marriage agreements are such as do not directly make the Nikha Conditional rather the validity and enforceability of ^{such} agreement would depend upon the fact as to whether the agreement is opposed to Islamic policy, public policy or is unreasonable or inequitable & unjust.

- (1) The H shall not prevent the wife from visiting her relatives — valid, enforceable
- (2) The H shall maintain the children of her wife from her husband. — valid
- (3) The H shall pay a fixed amount of ^{kharcha + Pandan} Kharchay Pandan — valid
- (4) The H & W shall reside together at a particular place — valid
- (5) The H shall not enter into crime, intoxication or relations with other women — valid
- (6) The H & W shall never live together — void
- (7) The W cannot claim maintenance from H — void

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(7) The H & W will not mutually

— void

(8) The wife shall not obtain fardat — void —

(9) " " " never demand dower

→ if after the Nikha relinquish — valid

but if it is at the time of performing M. — void

(10) The H shall not remove the wife from the conjugal Home without her consent — valid

(11) A part of the dower is prompt & defer — valid

(12) The H shall not remain away from conjugal Home without informing wife — valid

(13) The H shall not marry without wife's consent — valid

(14) " " " never get into 2nd marriage — valid

Islam does not ~~get~~ ^{make} mandatory to perform 4 marriage
It only permits.

Javed, ^{if other} v. St. of Haryana, 2003 SC → Constitution

The muslim male getting into 4 marriages is not mandatory for him as per Islam rather muslim personal law merely enables him and declares that if such marriage have been done then it will not be void.

Thus if a man declares that he will get into only one marriage then declaration of condition will be valid.

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(15)

Rights on violation of condition

Civil suit

Refuse to cohabit

↓
irrespective that marriage
is consummated or not.

Talag

Under Muslim personal
law

Dissolution of marriage
in statutory law,
(Divorce under 1939 Act)

↓
FASKH

Talag-ul-sunnat

Talag-ul-Biddat / Bain / Bidai

Talag-i-Tafweed (over)

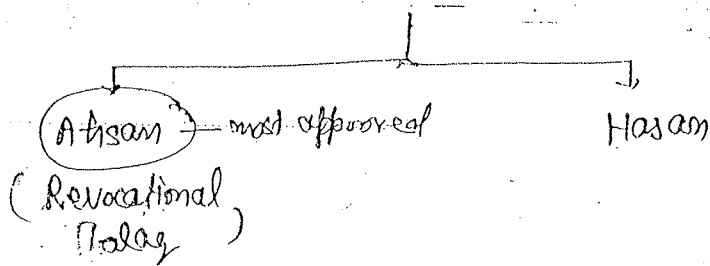
Khula + mubarat

Ila + ~~Za~~ Zehar (over)

Lian → Judicial Talag in
(over) Muslim law by wife

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(1) Talag-ul-Sunnat prophet Mohd. approved it



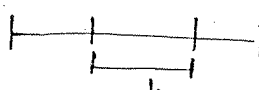
(2) Talag-ul-Biddat - (S. time)

(3) Talag-e-Tafweed (Delegated Talag)

(4) Khula & Mubarat (Mutual Talag)

(5) Ila & Zihar (husband put an oath, wife like sister)

TOHR - It is period.

 during woman menstruation cycle

when conceive a child $\Rightarrow$ when woman is Pure

It is the period called Tuhr.

Talag-ul-Sunnat - (Ahsan)

Pronouncement must be in woman's pure period.
of Talag

means in Tuhr period. only one time sufficient.

If pronounced in Tuhr period and ~~for~~ not have sexual intercourse and next two Tuhr they not have sexual intercourse then ∞ Pronouncement of Talag is

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- automatically done, no need for again declaration.
- No ~~have~~ need for iddat. It is revocable and it can be done within 3 tuhr period.

Hasan -

~~There~~ Three consecutive pronouncement in consecutive three Tuhr period. then iddat period will start.

refrain from consumation is a condition in both type.

- * This talag will be final on 3rd pronouncement.

It is also revocable but not while the iddat going on.

Sir

In Ahsan Talag the pronouncement of the Talag has to be done only once during the Tuhr period of the wife and thereafter no more pronouncement are required rather the Husband has to refrain from cohabiting with the wife for a period of three consecutive Tuhrs. Upon the completion of the 3rd Tuhr including the first in which pronouncement was made, the Talag automatically becomes final and thereafter the Talag becomes irrevocable also.

Incidentally the iddat of the wife also commences with the pronouncement on 1st Tuhr and the iddat completes the day then the divorce becomes final.

at the completion of the 3rd Tuhr. During the

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Continuance of the iddat while 3 consecutive Tuhrs period. The Talag was revokable and that could be done by a public declaration by the husband or by resuming cohabitation.

On the other hand in the Hasan Talag the pronouncement like in Ashan in Tuhrs period and thereafter the Husband has to refrain from cohabitation as well as in the next two consecutive Tuhrs he has to make the pronouncement and thus with the 3rd pronouncement the Talag becomes final. If in between the Husband cohabits with the wife or he makes a declaration to that effect or he misses out one of the pronouncement then the declaration is said to have been revoked and thereafter fresh three pronouncements will be required.

In Hasan Talag the iddat starts only after the 3rd pronouncement has been made and Talag has become final. During iddat in Hasan Talag the Talag is no more revokable. Hasan Talag is considered to be a less approved form of Talag as compared to Ashan. Both in Hasan & Ashan the need for pronouncement is in Tuhrs

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would not be there if the woman was staying away from the husband or she was not subject to menstruation cycle.

The subsequent period or 'pronouncement' will be counted will be three lunar months.

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M: 9831867433, 7827517669, 8750886721.

Talaq-ul-Biddat :-

* Pronouncement of Talaq thrice. → Talaq, Talaq, Talaq

It is not approved form of Talaq, but it is mostly used.

Sir

This is not an approved form of Talaq and it is mostly followed in the Hanafi sunni though the other muslim also may follow this also, depending upon the customs in family. In this form Talaq is pronounced consecutively thrice and the practical requirement is believed to be that there should be a break of breath b/w the three pronouncement but the law does not required it. It can be either pronouncing the word 'Talaq' thrice in one sequence or it can be pronouncing the sentence "I give you talaq" three time consequently.

The juristic and judicial tilt is that such form of Talaq being completely arbitrary and unreasonable.

The husband shall prove that there are some reasonable

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ground for Talag and that he had made efforts to reconcile before pronouncement.

It was held in
Syed Rashed Ahmed v. Musammal Anessa Khatoun
(P.C. 1932)

This form of Talag is valid provided it is not given arbitrarily.

Rehmatullah v. St of U.P. (1994 All HC)

Held that this form of Talag is Unconstitutional. However in appeal the S.C. held that talag to be valid and constitutional provided that some reasonable ground for Talag; efforts were made to reconcile and also there was an intention to give the Talag.

Khula & Mubarat :- → (by mutual consent)

↓ ↓

wife proposes any of them
willing to give can propose and
dower claim no need for dower claim

Khula — Khula is a kind of divorce where in the wife proposes the divorce and thereafter the husband agrees to it. Here the proposal by the wife has to be accompanied by her proposal to give up her dower claim thus a Khula Talag can not be without a consideration and the consideration

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has to be in the form of the wife giving up her dower-claim. The parties should be adult & of a sound mind and there shall be an intention of divorce by the parties and the consent shall be free consent.

On the other hand in Mubarat the proposal of divorce can come from by either of the parties and the divorce need not have any consideration as such i.e. a Mubarat Talag can be even without consideration and hence it is called a case of mutual release whereas Khula is called a case of redemption. In Khula Talag, once the relinquishment of dower has been done and the divorce finalised, the wife can not thereafter claim the dower.

In Khula the consideration has to follow.

From the wife whereas in mubarat either there will be no consideration.

-- or if there is consideration then it can follow from either of parties or both. Iddat has to be followed in both the Talag.

Both in Shia & Sunnis Khula and Mubarat are permissible but in Shias a special rule prevails i.e. the during the Iddat in case of Khula Talag if the wife claims a dower then the husband gets the right to revoke the

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④ Ila and Zehar.

ILA -

Ila - The H takes an oath, "I will not have sexual intercourse with you". H should be major (≥ 15), and sound mind. He should be refrain from cohabitation for 4 months. In these 4 months ^{if he is} by declaration or ^{the} by resume cohabitation then it amounts revocation.

at

In Hanafis $\rightarrow$ automatically (no need to court)
others $\rightarrow$ need for court order

* It Ila is not being followed in India.

Zehar - husband compares his wife with the woman in his family with whom he got complete prohibition. It is sin. The repentance can be done in 3 ways.

- ① by fasting for 60 days
- ② by providing foods for 60 people
- ③ or releasing one slave.

If this three not done by him and four month has been lapsed, then wife has right to obtain divorce from court.

The stress It is essential that there should have been two witnesses present at time of when the comparison was made.

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⑤ Talaq - e - Tafweez

It is a form of delegated Talaq, i.e. the husband with his free consent provided he is major & sound mind, makes a declaration - he either unconditionally or some condition enables his wife to give him divorce. Here actually the right to divorce was that of the husband but the H has delegated his power to his wife thus when the wife gives divorce to the husband will be deemed that the H himself given the divorce. Conditions like - The husband doing no Islamic activity or getting into another marriage can be the conditions upon which the husband may delegate the power of divorce to the wife. The wife will have to obtain divorce from court on violation.

Once the delegation has been given to the wife then generally it is considered not to be revocable. However if the intention to make it revocable was there manifest at the time of delegating, then the power can be revoked.

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⑥ Lian Talag -

" Talag can be obtain ~~from~~ by wife from H. in muslim law. — ground is

① false charge of adultery

② Impotency

for this ground it is required to be proved that the husband was adult and sane when he leveled the charge and also the charge was proved to be false then on that ground the wife can claim divorce from the husband.

when a suit for divorce is filed by the wife on that above ground then before the trial gets over the husband may admit that there was a false charge made by him and he regrets that then in such cases the court ~~will~~ ^{may} refuse to grant the divorce.

Formalities of divorce

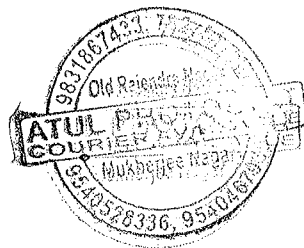
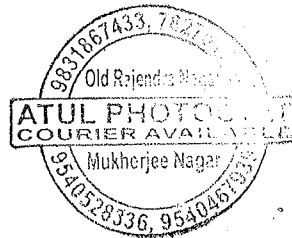
① In shia the two adult male witnesses to be present at the time of divorce and the pronouncement of divorce in the shia ~~also~~ should be oral and in Arabic. where in sunni it can be in any form and no witness required the intention is more important. It is not essential that the divorce

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should be communicated to wife or she is present—

(2) If the divorce is given during intoxication or compulsion or by fraud or by out of jest (खिल्ला)

That the general rule is that the divorce is not considered to be valid but in the Hanafi school it is valid excepting case of intoxication where it is a case of involuntary intoxication then it is ~~invalid~~ void.



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21/10/12

Dissolution of muslim marriage Act, 1939

S.3 - H missing for 4 years

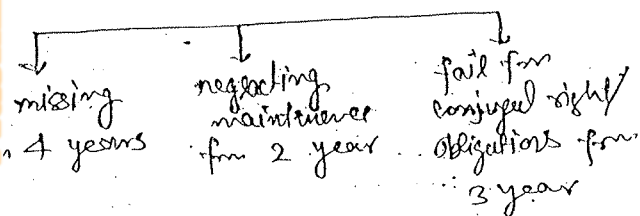
S.3 - also proviso (b).

legal fiction → on date of the filing of the plaint who is the legal heirs if H died on this date.

proviso (b) - from the date of passing of decree if it not presented then it confirm the dissolution of marriage.

* Notice will be served to — Brother
+ paternal uncle

grounds -



S.2 (4) - marital obligation → cohabitation, maintenance, sexual intercourse

Sin The husband upon marriage has certain conjugal obligations towards the wife which includes cohabiting with the wife, showing affection and care of the wife, and also providing her the maintenance as far as maintenance is concerned Clause (2) already covers that situation and therefore what would fall under clause is the husband not indulging into sexual act

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with the wife for the last 3 years and not having any affection for the wife for the last 3 years.

S.2 (iii) sentence for 7 years from appellate court. (Korresca).

S.2 (iv) - If ~~the~~ impotent at the time of marriage and if he is wife still now. on the filing of app. by wife.
then —

Impotency - Impotency can be a ground of divorce by the wife, if she proved that the respondent husband was impotent from the date of marriage and continues to impotent still. In such a case court will grant the divorce.

If that be the case if the court will grant the divorce but court will allow also one year period of period if respondent puts an application in that respect.

— and within such one year if the respondent is able to prove on medical evidence the fact that he is no more impotent then the court shall not pass the decree. for

Impotency is the physical incapacity of a person to have a sexual intercourse. it may happen b/c of some medical reasons or even some physiological reason.

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To be impotent it is not required to prove that the party was incapable of having an effective sexual intercourse so as to reproduce children.

Impotency lies in the fact that the party concerned is incapable of having penetration needed for sexual intercourse. If the parties is capable of having penetration then irrespective of whether he is able to sexually satisfy the opposite party or to reproduce children, he will not be deemed to be impotent.

There may be some psychological reasons for impotency. For inst - The husband may not be in a position to have sexual int with one of his wife. b/c of some psychological reason though he may be capable of doing so with other wife. Even then with that respective wife he will be called impotent. In the suit of divorce on the ground of impotency the essential examination is whether the H is capable having of sexual intercourse with petitioner wife and not in general. #

~~that the H is~~

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Margu — Marg-ul-maut

marg — चीनरी

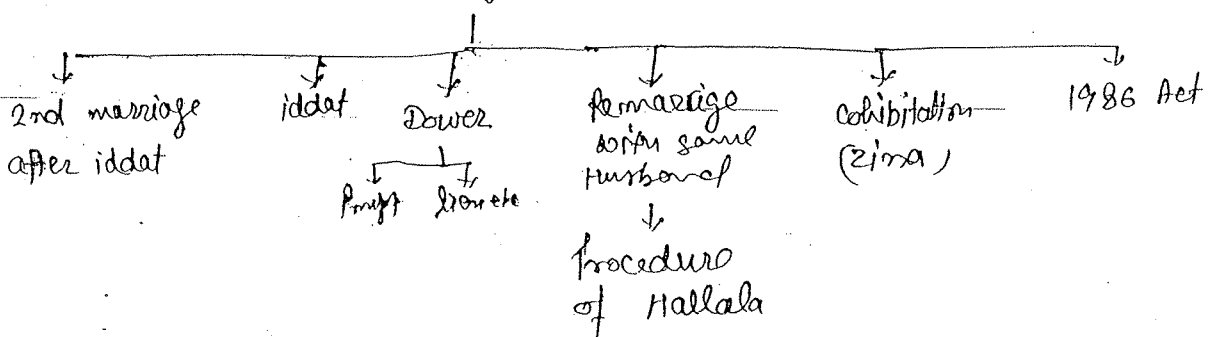
— Marg-ul-maut → death bed illness.

During death bed illness if the husband gives divorce to the wife in an irrevocable form then in the Sunnis if the H dies ~~at~~ during the iddat period the wife will get property in heretence.

In the shias the above period is one year period from the date of divorce.

But neither in these case will the husband gets any inheritance from his wife if she dies after the divorce.

Legal incidence of divorce



↓
Marg-ul-maut.

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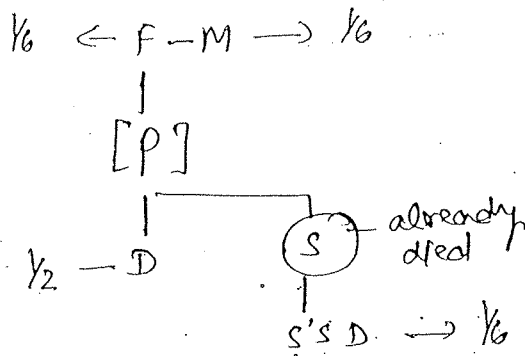
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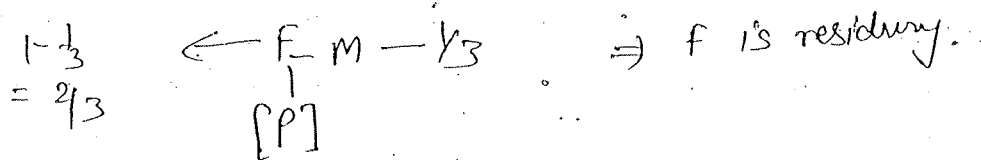
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Inheritance

① The propositus (the person who dies) dies leaving behind the father, the mother, the daughter, son's daughter.



② Propositus has left behind father & mother.



① Heritable property — whenever the propositus dies his entire property will not go in succession rather some deductions have to be made —

(a) The funeral expenses

(b) The expenses of the probet

(c) The ptg given by will

(d) the claim of the creditors, including the dower claim.

(e) the payment due upon the medical expenses in his treatment before death if any.

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(f) The wages to be given to a person for the personal services that he may have given to the deceased within the last 3 months of his death.

Out of the left qty of Propositus the above will be deducted and thereafter what remains will be the heritable property.

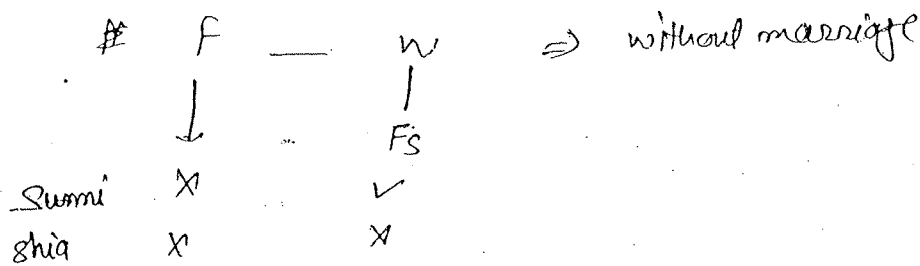
(2) Intestestacy will take place immediately upon the death of the propositus and it will not take place in absence. abeyance. (अवस्था) अवेय-अवस्था.

The finality circumstance for the purpose of during the calculation has to be examined as on the date when the propositus had died.

(3) In the muslim law there is no concept of ancestral qty or coparcenary qty and hence there is no question of birth right of a person in the muslim law. There is no concept of Joint tenancy in M.L. rather when a person dies he leaves behind his absolute property. Since there is no concept of joint qty or undivided coparcenary interest in muslim law the concept of notional partition as is applicable in the Hindu law will not apply upon the muslim law.

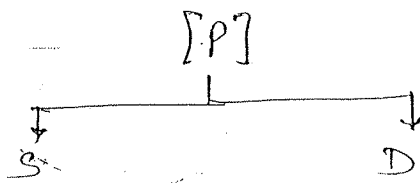
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- (4) The illegitimate child in the sunnis will acquire property in inheritance only from the mother or the relatives of the mother but not from the father. whereas in shias the illegitimate child will not get any neither from father nor by mother.



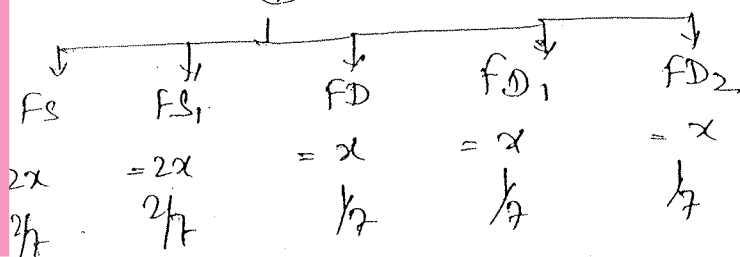
- (5) If a male & a female at the same footing are the legal heir as residuaries then the male should get double the amount that the female gets.

residuary → whose share is not fixed. and gets left after succession.



both are residuaries

(F) died

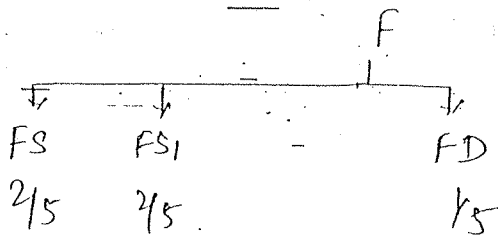


⇒ they are all residuaries

$$7x = 1$$

$$x = \frac{1}{7}$$

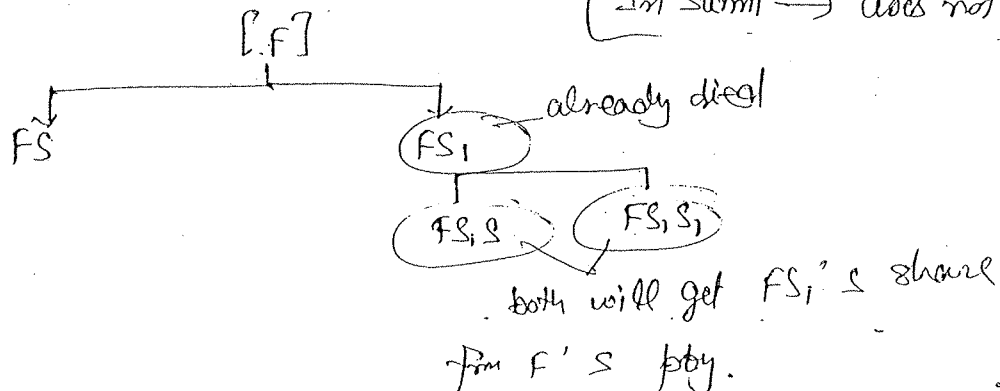
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⑥ Principal of Primogeniture :- (gene-sons)

Primogeniture relates to a preference in succession to an elder son, the elder son in the sunni's does not get any diff preference but in the shias he gets some preference not in the property of the father as such rather in certain things belonging to the father, for inst - the right of father, The wearing apparel of father, horse of father, Quran of father and sword. but as such being an elder son he will not get any extra share in the property.

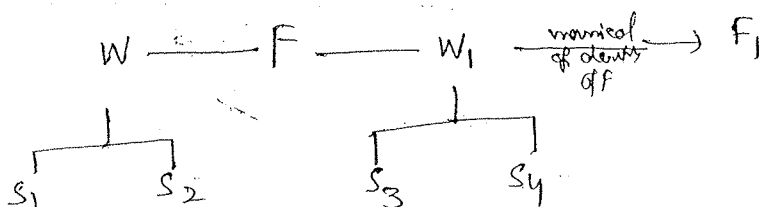
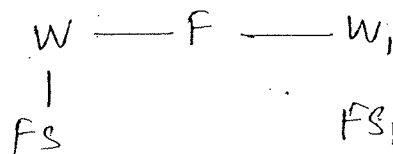
⑦ Doctrine of Representation :- In shias → apply In sunni → does not



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Doctrine of Representation means that if a person in higher generation — has died then his branch will be represented by the generations below him — and hence his share will passed down to next generation. In the shia's the Doctrine applies but not in the sunnis. Thus in the sunnis if upon the death upon the [P] the L.H does not have a collateral with of the same generation then he will take away the entire property and the property will not go to the other branch.

⑧ Step Relations —



$\begin{array}{c} F \\ | \\ [P] \end{array}$ $\begin{array}{c} \text{---} \\ | \\ FS \end{array}$

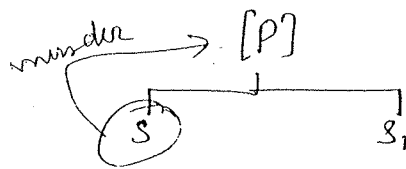
$\Rightarrow$ closer relationship with F compared to Brother.

- (a) In the line of ascendants and descendants the nearer relation will exclude the further.
- (b) In the Hanafi (Sunnis) school the murderer of the testator is excluded from succession

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from the pty of [P] irrespective whether the death was caused ~~incident~~ intentionally, accidentally, incidentally, negligently.

However in the shias succession will not be allowed to murderer only if the death was caused intentionally.



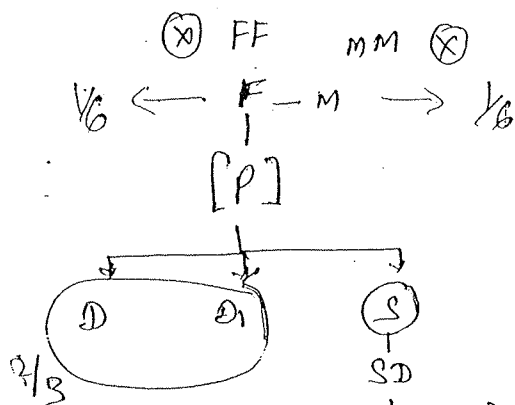
⇒ Sunni — nothing will get
Shia — if intentionally then will not get, otherwise get.

In certain customary laws prevalent in some partes of India the daughter is excluded from succession.

e.g. The Gujars, Backwardals in J&K

the daughter will not be given anything.

The [P] has left behind F.



SD will not get b/c there is two Daughters of [P] which excludes SD.

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Muslim Law

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29/10/12

Acknowledgement

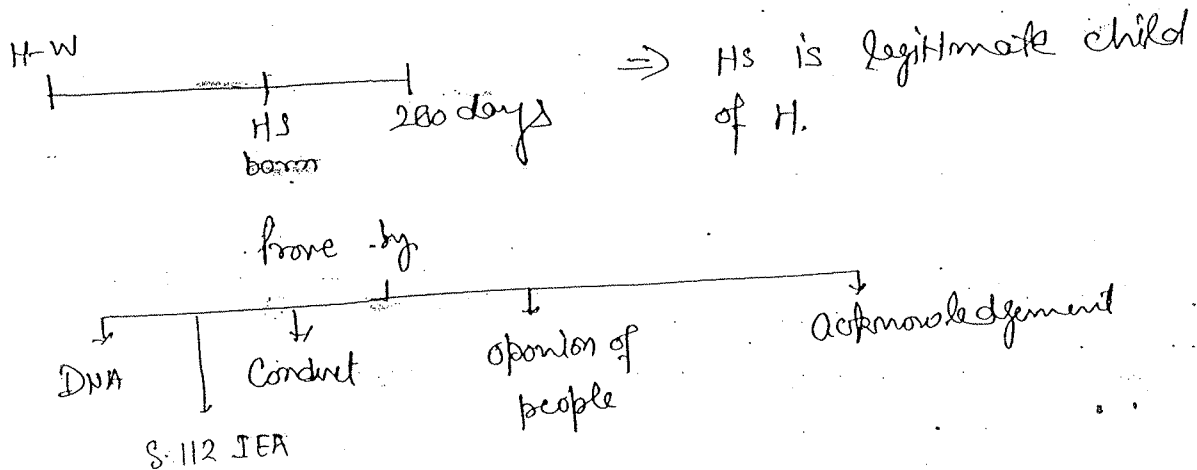
Q Diff b/w Acknowledgement & adoption?

H — W
|
HS

HS files suit for declaration that H is my father and I am his legitimate child.

[Paternity]

To prove paternity under S. 112 IEA.



Whenever there is an uncertainty about the paternity of a child the child as a petitioner can prove that he is a legitimate child of respondent by proving that the conduct of the respondent, opinion of 3rd persons, the conclusive prove of S. 112 IEA, scientific test like DNA examination or by proving an acknowledgment of paternity expressly or by conduct by the respondent father.

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Acknowledgment is a declaration of the fact that the concerned person is a legitimate child of the person who makes the declaration. Acknowledgment amounts to a declaration and on acceptance of legitimacy of the child.

* If H makes declaration that HS is my child that it is a declaration that HS is a legitimate child of H.

Muslim Law

* Paternity of the child is uncertain. If other person claims that he is the original father of that child.

The essential conditions for a valid acknowledgment are -

① That the paternity of the child should be uncertain as, if the paternity is known then a 3rd person can not acquire paternity by merely making a declaration to that effect.

② It should not be proved that that the child was an illegitimate child of the person who made the declaration. - one can not convert illegitimacy into legitimacy by a mere declaration or by conduct.

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- ③ There should be an age gap at least $12\frac{1}{2}$ years b/w the person ~~stating~~ acknowledging and the person acknowledged.
- ④ The child upon attaining majority (age of puberty, 15y) should not have repudiated (rejected) the acknowledgment.
→ (this condition not in Hindu law)

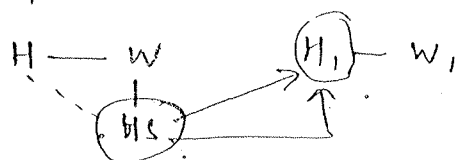
Legal incidents of Acknowledgment :-

- ① The child gets the right to inheritance from the father's property.
- ② gets the right to maintenance.
- ③ Acknowledgment of the Paternity will also amount to an acknowledgment of a lawful marriage with the mother of the child.

H ----- W
 |
 S → proved, then S's legitimate father will be the husband (lawful) of W.

Diff b/w Acknowledgment & Adoption :-

- * Adoption is not a declaration but it is a procedure.
- * It is case of lawful test of paternity.



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In adoption the paternity of the child may be (often) and is generally known — at least — this much is certain that the child is not the child of the person who is adopting, thus in adoption the paternity of the child is transferred by mutual consent of the parents. A formal giving and taking of child takes place from the natural parents to the adoptive parents. Adoption is rather a process by which the ^{maternity} ~~parenthood~~ transferred for all legal purposes.

Acknowledgment is on the other hand is mere declaration of paternity of own's child and for Acknowledgment the paternity should be uncertain.

whereas in adoption paternity may be certain.

In adoption the adopted child acquires legal rights in the adoptive family from the day of adoption but in acknowledgment the rights are already vested, it is mere declaration of paternity and hence a declaration of the existing legal rights.

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Q Does muslim personal law allows adoption?

Ans - No, it is only in customary practices where the shariat Act does not apply that adoption may be permissible.

* If a muslim makes a declaration that in the matter of adoption shariat Act apply over customary practices of adoption and it applies in general.

Muslim personal law as such does not permit adoption however there may be customary practices under which adoption may be a lawful practice.

As per the shariat Act 1937, the muslim personal law will apply upon the whole of India excepting J&K and therefore all the rules and principles of muslim personal law will be binding upon the muslims in India notwithstanding any customary practices.

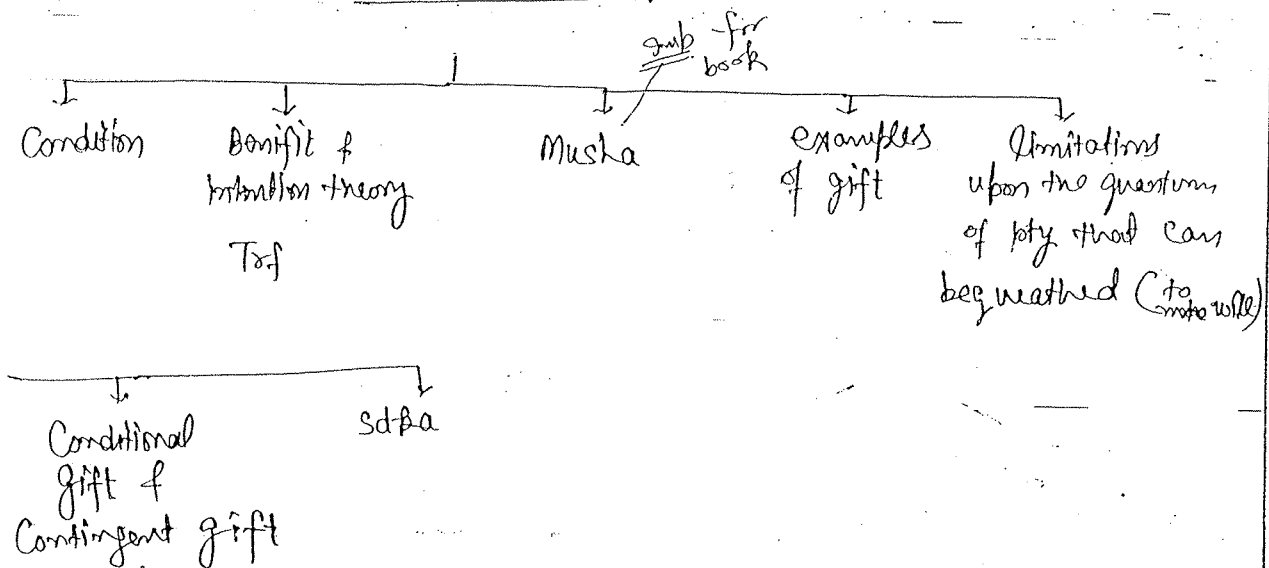
S. 2 of the Act makes an express declaration about the subjects upon which the above overriding effect will take place. However in this list the topic adoption is not mentioned and therefore despite the application of shariat Act of a

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customary practices of adoption exist then adoption can be lawfully practised. nevertheless as per s.3 of a declaration regarding adoption as specified there under has been made then even on the matters of adoption the concerned declarant along with his minor children and their descendants will be bound by Shariat Act and therefore adoption will not be permissible thereafter for that family.

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Gift / will



Condition of Gift & will :- (legal implications)

① when does a will or gift take effect.

who make will → legator / testator
 in whose favour → legatee / testatee

Gift who make → Donor
 in whose fv → Donee

* will will take effect on the date of the death of the legator.

The gift will take effect immediately on the date of making of the gift.

② Regarding Religion —
 for — will —

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The legator should be a muslim at the time when he made the will and subsequent to the making of the will even if he converts to another religion the will will not get affected.

The donor in order to take the advantage of muslim personal law on the matters of gift should have been a muslim at the time of making of the gift.

* TPA will not apply muslim. S. 129 TPA.

In the case of a gift S. 128 TPA clearly declares that the TPA will not apply upon the muslims. and therefore if the donor was the muslim at time of making of gift, the gift will be valid and will take effect even if the conditions of the TPA are not fulfilled.

A subsequent conversion of the donor to some other religion will not affect the gift at all as the gift ~~the~~ becomes final the moment has been made.

⇒ The donee or legatee may be of any religion, provided that the gift/will ~~not~~ will not be used for unislamic purpose.

There is no limitation on the religion of the donee or legatee. provided it is not for unislamic purposes.

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③ Competency of the Parties :-

The Donor or the legator should be a major (18) and of a sound mind at the time when the gift or the will was made.

The Donee or the legatee can be any person (minor or unsound etc).

④ The consent of the party concerned should be a free consent.

in will → no consent required / not consent on death.

in gift → consent is required.

The Donor and the Legator must make the gift or the will with their free consent and similarly the Donee and the legatee should also give the free consent to the gift or the will. The consent of the legatee has to be examined (obtained) at the time when the legator dies and will opens.

The Requirement of Immediate Transfer of the Gifted Property :-

in muslim law

Gift = Hiba
will = wasiyat

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for a valid gift in a muslim law there has to be an immediate tof of the property and. therefore if the donor intence that the gift shall take effect on a future date then the gift will be void.

Benefit and Intention theory :-

In order to make the gift valid and immediately effective the giftal pty shall be immediately transferred

However there may be cases where the immediate tof of the subject matter may not be possible

For inst - the gift of some immovable pty or the gift of usufruct (benefits).

In such cases the Intention or the benefit theory will apply.

For inst - The Donor does some such conduct by which the intention of the Donor to make the transfer is manifest. For eg. he may make a declaration in that regard, he may handover the keys of the pty, he may give instructions to his Agents regarding the transfer etc.

In the cases of gift of Income he may make a directive to the person concerned in that regard and the gift will finally take effect

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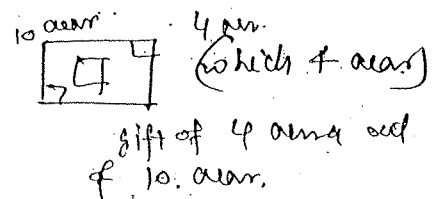
when the income starts accruing to the Donee.

Exceptions

However in the following cases there is no need for immediate transfer of the gifted property.

- ① when the Donor and the Donee are residing in the same house and the house has been gifted.
- ② The Gift by one spouse to another spouse.
- ③ Gift by the guardian to the ward.
- ④ gift of a property of which the donee is already in possession.
- ⑤ The gift to an unsound person^{or to a female}, no need to make a person. tof.

Mushaa (مشا)



Mushaa or Hiba - bil - musha means saay which means confusion. Hiba - bil - musha is an undivided share in property to the donee.

Musha → confusion of pty undivided

Gift of musha / Hiba - bil - musha → undivided share in property.

The prohibition against

Musha is applicable in the Hanafies (sunni) i.e. if the pty is divisible then it must be

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First divided and then only it shall be transferred.

If ~~without~~ without dividing the ~~pty~~ the musha has been gifted then the gift will be irregular in the Hanafi Sunnis.

However if the gifted pty is indivisible then the gift can be made and musha is allowed.

for eg. The gift of right to use the stagers,

" " beathing ghat.

" to pass through pty etc.

Exception of Musha

30/10/12

A gift of musha can be made even without dividing a divisible property if gift has been made to co-heir.

(2) when a gift is made by a person of his share in the Zamindari.

(3) when the gift is of one's share in a Ltd. company.

(4) when the gift is of free hold property in a commercial town.

Even though the prohibition against musha is applicable in Hanafis the prohibition is not being

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followed at present in the Hanafi's.

It is generally considered the person who holds ~~pty~~ ^{pty} has full rights to dispose of the ~~pty~~ ^{pty} in whatever manner he may want to and the prohibition of Mushka goes against the right to dispose off property.

Examples of Gift :-

- ① The gift of an actionable claim. (some money claim, can file a suit). — present existing right, ^{called} valid.
- ② Gift of the right to ~~redeem~~ ^{redeem} ~~pty~~ ^{pty}, Equity of redemption. (like mortgage)
- ③ The gift of any ~~pty~~ ^{pty} which will arise in future — void
- ④ The gift of spec successionists. (after death be a legal heir) ($\therefore$ The right to ~~pty~~ ^{pty} possible and ~~accepted~~ ^{accepted} to get and the gift of that ~~pty~~ ^{pty}). — speculation to succession.

Spec successionist is a mere chance to succeed to some ~~pty~~ ^{pty} upon the death of someone or upon partition of some ~~pty~~ ^{pty}. Presently the Donor is not the owner of that ~~pty~~ ^{pty}. It is a mere speculation that he may succeed to acquire a title to that ~~pty~~ ^{pty}. The ~~pty~~ ^{pty} does not at present exist in the hands of

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the donor and hence the gifted ptg can not be actually be gifted at present (lack of title) and also it can not be transferred to the donee and hence the gift is void.

(5) The gift of the right to claim Dower.

— void, it is a personal claim but if she dies then it can be, while right to Dower can be top.

The right to claim dower during the continuance of marriage is purely personal claim of the wife and hence she can not top the claim to 3rd person and it is void.

(but she can gift to Husband only. Hiba-e-mehar)
(surrenderment of dower)

(6) Gift of services — void

Will

Concept of Retiable distribution

In the muslim personal law the Quran itself fixes the shares of the various legal heirs and as per the muslim personal law there is no concept of coparcenary rather any ptg owned

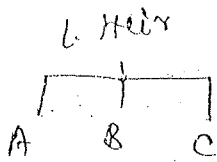
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by the muslim will be is absolute seprate pty and therefore he will be free to dispose off the pty in his life time but a will does not take effect in his life time rather it takes effect upon the death of the legator. At the same time the rights get vested also in the legal heirs and therefore a balance has been drawn b/w the rights of the legal heirs and the legatee.

In the sunnis the Propositus (legator) can not dispose off any part of his pty to a legal heir by will unless the other legal heirs give their consent upon the death of legator and if the legatee is a non heir then $\frac{1}{3}$ rd of the total pty can be gifted without the consent of the legal heirs but for any pty beyond $\frac{1}{3}$ rd the legal heirs consent has to be taken as such.

In the shias the upper limit of the pty which can bequeathed without the consent of the L.H. is $\frac{1}{3}$ rd irrespective of whether the legatee is L.H. or non heir.

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X - non heir

and total pty will to X.

X can claim $\frac{1}{3}$ without consent

if they all give consent then

he is eligible to acquire pty.

In sunni $\Rightarrow$

if only one gives consent then

$\frac{1}{3}$ + C's share and A, B's share

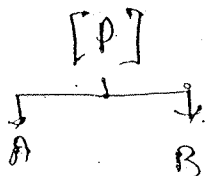
will remain unaffected.

If X is L.H. $\rightarrow \frac{1}{3}$ + his own share.

In shia $\Rightarrow$

cannot get be a legal heir or non heir $\frac{1}{3}$ rd can get only.

* In sunni if will in fav of 2 non heir and other L.H. has not given consent.



by will - $\frac{1}{6}$ $\frac{1}{3}$

but non heir can claim only $\frac{1}{3}$ of total.

So out of $\frac{1}{3}$ rd of whole pty it will be retable distribution b/w A & B.

$\frac{1}{3}$ rd in 1:2

$$A = \frac{1}{6} \quad A:B = 1:2$$

$$B = \frac{1}{3}$$

A made will in fav of B, C, D

$$\frac{1}{4}, \frac{1}{3}, \frac{1}{8}$$

$$\frac{\frac{1}{4} + \frac{1}{3} + \frac{1}{8}}{\frac{6}{24} + \frac{8}{24} + \frac{3}{24}} = \frac{17}{24}$$

$$\text{Sunni} = \frac{17}{24} \quad \frac{\frac{1}{4} + \frac{1}{3}}{\frac{3}{12} + \frac{4}{12}} = \frac{7}{12}$$

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D will not get any thing b/c of L.H and have not given consent. and total will divide

$$\frac{1}{4} : \frac{1}{3} = \frac{3:4}{B:C} \Rightarrow B = \frac{3}{7} \times \frac{1}{3} \quad C = \frac{4}{7} \times \frac{1}{3}$$

whenever in the summi's the will gives the pty to more than one legatee and it is found that all of them are the non heirs then upon the death of the legator if no consent is given by the L.H then the legatee will get a maximum of $\frac{1}{3}$ rd of the total pty of the legator and for that purpose the ~~retable~~ distribution has to be done b/w the various legatees out of the total of the $\frac{1}{3}$ rd pty of legator for that the $\frac{1}{3}$ rd of said total pty shall be divided proportionally b/w the various legatees.

Shia - In the shias the concept of retable distribution does not apply rather the doctrine of Preferential treatment apply.

If the legator has made a will in favour of more than one person then irrespective of whether these persons are L.H or non heir the total of $\frac{1}{3}$ rd can be given to the legatees if the other legal heirs do not consent.

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preferential treatment $\rightarrow$ If will made in fuy of A, B, C, or $\frac{1}{3}, \frac{1}{6}, \frac{1}{6}$ respectively. without consent. $\Rightarrow$ non their can get only $\frac{1}{3}$ rd of total. according to treatment 1st will get $\frac{1}{3}$ rd and if some remain then to 2nd then to 3rd out of $\frac{1}{3}$ rd. A get in this $\frac{1}{3}$ rd, C, D will get nothing.

$$\begin{array}{l} \text{2) } A - \frac{1}{6} \\ B - \frac{1}{3} \\ C - \frac{1}{6} \end{array} \quad \begin{array}{l} A \text{ get} = \frac{1}{6} \\ B \text{ get} = \frac{1}{6} \\ C = \text{nothing} \end{array} \quad \left. \vphantom{\begin{array}{l} A - \frac{1}{6} \\ B - \frac{1}{3} \\ C - \frac{1}{6} \end{array}} \right\} \rightarrow \frac{1}{3} \text{rd}$$

A is totally satisfy, B partly, C nothing.

Exception - If legator gives in will

A - $\frac{1}{3}$, B - $\frac{1}{3}$, C - $\frac{1}{3}$ only in this condition.

~~the~~ preferential treatment will not apply.

the C will get $\frac{1}{3}$ rd and A, B will not get anything.

In the case of preferential treatment the legatee whose name appear first in the will or the legatee in whose fuy the 1st will has been made shall be preferred and out of $\frac{1}{3}$ rd of the total py his claim shall be satisfied

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first thereafter if something remains out of good then sequentially the claims of the other legatee will be satisfied by one by one.

However if various legatees have been each given good out of total pty in the same will or in the subsequent will then it is believed that the intention of the legator was to revoke the wills sequentially i.e. will revoke in earlier name.

Hence good of the pty given to legatee whose name appears the last or in whose fyg the last has been made.

Conditional Gift :-

- ① If a gift has been made with some condition upon the corpus of the gift then the gift is valid but the condition is void.

Corpus



Property itself

usu-fruct



income/benefit from pty (e.g. rent of house)

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- ② Under the sunni law the gift of a mere usufruct is not allowed whereas in the shia law the gift of usufruct as life interest is permissible.

estate → prop + income, usufruct → only income

- ③ Both in the sunni as well as shia law the donor can reserve for himself the income of the prop for his life time.

e.g. A has gifted Cooper as well as usufruct and put condition income for one possession to you after death benefit to you also.

Contingent Gift

Both in the shia & sunni law if gift has been made in such a manner that the donor has made the taking of effect of the gift conditional upon the happening of some future event then the gift not being intended to be a present gift will be void.

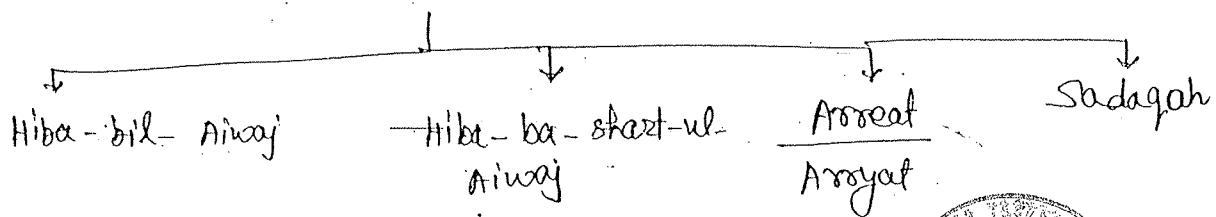
However in shia law the contingent gift of Rukba Rukba is valid.

e.g. If A tells B that my house is your Rukba i.e. if I die and you survive me then the house is yours then gift is valid.

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Contingent gift generally void.

Topics (for short note) by book also



death bed gift = Hiba-ba-marj-ul-mawth.



Hiba-bil-aiway :-

(1) Hiba-bil-Aiway is like a ^{sale} sell, the vendee (donee) has already made some consideration to the vendor (donor) and in return the vendor (donor) makes a gift to the donee. In Hiba-bil-aiway unlike a normal Hiba there should first be the payment of some consideration without any agreement by the donee to the donor and thereafter the donor in lieu of that consideration makes the gift to the donee.

Unlike the requirements of an ordinary gift it is not required in the case of Hiba-bil-aiway that the donor shall give the ^{top} of the gifted thing to the donee. The giving of the consideration by donee is must but thereafter the donor may

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merely promise to give a gift in lieu of the consideration and an actual delivery is not a must. (implied delivery not required)

However such gifts needs to be registered and a mere oral promise will not be sufficient.

once the registration has been done it becomes irrevocable.

The gift of musha even in a divisible qty is permissible. (in Hanafi and also others).

② In Hiba-ba-shart-ul-aiway the donor and the donee are under an agreement that the donor will make the gift presently to the donee and in return of that as per the agreement the donee will give something to the donor in future.

③ In such a gift the donor has to deliver the possession of the qty to the donee at present.

④ Musha can not be gifted under this form of gift.

⑤ Initially Hiba-ba-shart-ul-aiway is ~~not~~ a mere gift but later on when the aiway is performed it becomes a sale.

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31/10/12

Sadaqah

It is a gift with the religious motive and the corpus as well as the usufruct gifted by donor. Once the gift has been made and possession has been delivered it becomes irrevocable. The gift of Sadaqah can be made even to poor persons for charity.

It can be made jointly to two or more persons as well. The donee can use and consume both the corpus and the usufruct. Unlike a normal gift in the gift of Sadaqah an express acceptance by the donee is not required.

The diff b/w Sadaqah and waqf is that even though in both the gift is made for religious and charitable purposes. In waqf the corpus of the gift can not be consumed whereas in Sadaqah the corpus as well as usufruct both can be consumed.

Arreah or Arreyat :-

It is a gift mainly for charitable purposes. The ownership of the property is not transferred rather only the usufruct i.e. only the right to enjoy the benefits of the property is transferred. Upon the death of the

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donee the pty will revert back to the donor or if the donor is dead then to his L.H. It is a gift without any consideration and broadly it is like a license.

In Azyat also an express acceptance by the donee is not required. also it is not essential that the donor should be is the age of majority. (18).

Gift during Marj-ul-maut

or
Hiba-i-Marj-ul-maut

A gift made during marj-ul-maut will acquire some characteristics of a will as well. such a gift has to be expressly made by the donor and has to expressly accepted by the donee.

However, even if the possession of the gifted pty has been transferred the gift will actually take effect i.e. the title will get transferred to the donee only upon the death of the donor like a will.

The gift will be valid only to the extent of 1/3rd of the total pty of the donor if the donor is a shia irrespective of whether the donee is heir or a non heir without the consent of L.H.

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In the gumma's the gift will be valid to the extent of good only if the donee is non harm and if the L.H. then it (gift) will be the extent to the consent of L.H.

1
Donatio Mortis Causa → Gift of movable property
→ from book

Examples of Gift made to particular donee → from book

Concept of Life Interest and Life estate → book for v.p

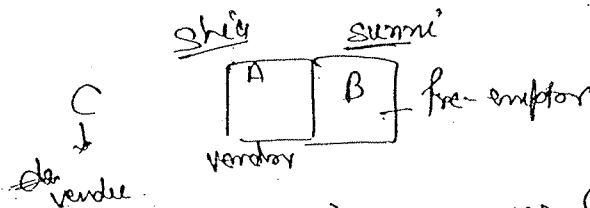
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Hog, Shufa

Right to Pre-emption :-

The right to pre-emption is related to immovable pty. If an owner of some immovable pty has the pre-emptory right to purchase the adjacent pty if the neighbour is willing to sell it to some 3rd person.

[Vicinage - neighbourhood]



⇒ narrower law will apply always.
Shia law will apply.

Pre-emption under the Muslim law is basically the right of the owner of some immovable pty adjacent to the pty of the vendor (seller) to re-purchase the sold pty from the vendee (purchaser) for the same consideration for which the vendee had purchased it from the vendor. The basic principle behind pre-emption is the continuity of peaceful enjoyment of pty without any unnecessary interference by any stranger becoming one neighbour.

wherever, a person sells some pty his neighbour has the preferential right to purchase the

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pty. The concept has been taken from the Roman law and ~~not~~ was brought to India by Mughals.

The pre-emptory right can be exercised only in persons by the pre-emptor against the vendee and the right can not ~~be~~ be transferred to a 3rd person.

The purchase by the pre-emptor has to be done for the same consideration for which the vendee has purchased the pty.

The right to pre-emption is considered to be an intrusion upon the right to pty of the vendor and the vendee. The vendor being the owner of the pty has an absolute right to lawfully dispose of the pty and the vendee also has the absolute right to lawfully purchase the pty.

However, upon a neighbour exercising the right to pre-emption such right of the vendor and the vendee gets affected, and therefore it has been held in

Bhav Ram v. Baijnath, 1962 SC

that the concept of pre-emption shall be given restricted application. Pre-emption shall not be allowed

in the cases of near vicinage, i.e. a near neighbourhood.

It is called Shafi-i-JAR.

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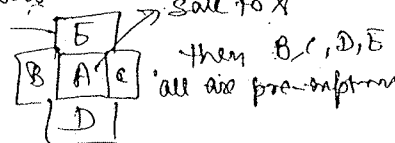
Before this judgment in the sunnis even a mean mileage was sufficient for pre-emption, however now not neither in the sunnis nor in the shias is such pre-emption allowed.

Shafi-i-sharik :-

Both in the shia & sunnis if the vendor & vendee are shafi-i-sharik i.e. they are co-sharers in inheritance and they have acquired the pty from someone in inheritance then the pre-emptory right can be exercised.

However in the shias the pre-emptory right even in the case of shafi-i-sharik will apply only if there are two or less than two pre-emptors.

Costars



In the sunnis and not in shia pre-emption not allowed even in the case of shafi-i-khelit.
(Some kind of attachment)

If the pre-emptor is the neighbour who is a participator along with the vendor in some common benefit or amity (facility) in a substantive sense with the vendor in respect of the land of the vendor

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then pre-emption can be claimed. However the connection has to be tangible.

— e.g. — If wall of both houses are adjacent then it is not tangible connection. b/c it is only a collateral support only not else.

→ Pre-emption can not be exercised against the Govt, not even against an adjacent a waqf pty.

→ Pre-emption applies only in the cases of sale and exchange of the pty. It does not apply in the cases of gift, will, lease, tenancy, inheritance etc.

Three demands

Procedure for claiming pre-emption

Pre-emption can be claim by the procedure of 3 demand.

① Talab - i - ~~mus~~ munasibat — The demand of pre-emption can not be made unless the sale has been completed, unless sale has been registered and the pty has been transferred to the vendee.

If a demand is made before that it will be called pre-mature demand. and the demand will fail.

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The demand shall be made immediately after the information of the sale has been received by the pre-emptor without any unreasonable delay. It can be made either orally or in writing either personally by the pre-emptor or through an agent. Witnesses are not required at the time of 1st demand but evidence has to be given in the civil suit later that the first demand has been made. The declaration in the demand should be explicit about the willingness of the pre-emptor to repurchase the thing from the vendee.

- ② Talab-i-ishad / ishād
Talab-i-Taqreeer / Takreeer

This is a confirmation by the pre-emptor of his 1st demand. The 2nd demand shall be made within reasonable time after the 1st demand and the first demand has to be repeated in the 2nd demand in the same terms, but it shall be specified that this is the 2nd demand and that the 1st demand was properly made. It is essential that two adult male (or 1 m 2 F) shall be present at the time of 2nd demand. It is not essential that

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the pre-emptor shall pay the money to the vendee — either he must express his willingness to pay the money.

(3) Talab-i-Tamluk :- After the 2nd demand has been made if the repurchase has not been allowed by the vendee then the ^{pre-emptor} vendor within one year of the 1st transfer of possession to the vendee can file a civil suit claiming his pre-emptory right to repurchase and in the plaint he has to state that he has already made the two demands and despite that the repurchase has not been allowed and also that he is willing to purchase the same consideration.

[^{1/2} Art 97 of ILA → 1 year period,]

It has to be proved that the right to pre-emption of the plaintiff existed at the time when he made the earlier demands also at the time when sale was done and also at the time when the suit was filed.

⇒ The vendee can be a person belonging to any religion according to the Allahabad and Patna H.C. but according to Bombay & Calcutta H.C. the vendee shall be a muslim. However, according to all.

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These H.C. The vendor and the pre-emptor both shall be muslims. in order to allow the right to pre-emption to be exercised.

If the vendor and the P.E

- ① $\begin{array}{c} \text{Vendor} \\ \text{Shia} \end{array} + \begin{array}{c} \text{P. E} \\ \text{Shia} \end{array} = \text{Shia} \quad \text{--- shefr-i-sharik}$
- ② $\begin{array}{c} \text{Vendor} \\ \text{Sunni} \end{array} + \begin{array}{c} \text{P. E} \\ \text{Sunni} \end{array} = \text{Sunni}$
- ③ $\begin{array}{c} \text{Vendor} \\ \text{Shia} \end{array} + \begin{array}{c} \text{P. E} \\ \text{Sunni} \end{array} = \text{Shia}$
- ④ $\begin{array}{c} \text{Vendor} \\ \text{Sunni} \end{array} + \begin{array}{c} \text{P. E} \\ \text{Shia} \end{array} = \text{Shia}$

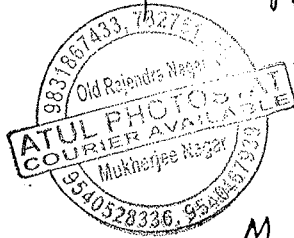
In such cases the doctrine of Reciprocity will apply and whichever is the ~~not~~ narrower law will be applicable.

⇒ The right to Haq Shufa is not lost merely b/s the pre-emptor had earlier refused to purchase the pty. Estoppel does not apply b/s earlier the right was not exercised before sale and registration and it is not amount

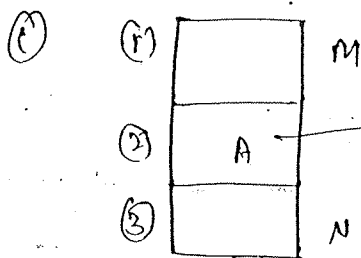
The right to pre-emption arises only after the vendor has already sold the pty to the vendee and the sale has been registered. Thus at the time when the pre-emptor refused

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As purchase earlier he did not actually relinquish his right to pre-empt, it is only when the pty was actually sold and the sale was registered that then the right to pre-empt arose to him and hence the doctrine of estoppel does not apply against him.



Example -



sells to C

M, N claims pre-emption against A.

⇒ If they are only vicinage then none get

⇒ If co-shares then can get.

Share Ram are applies.

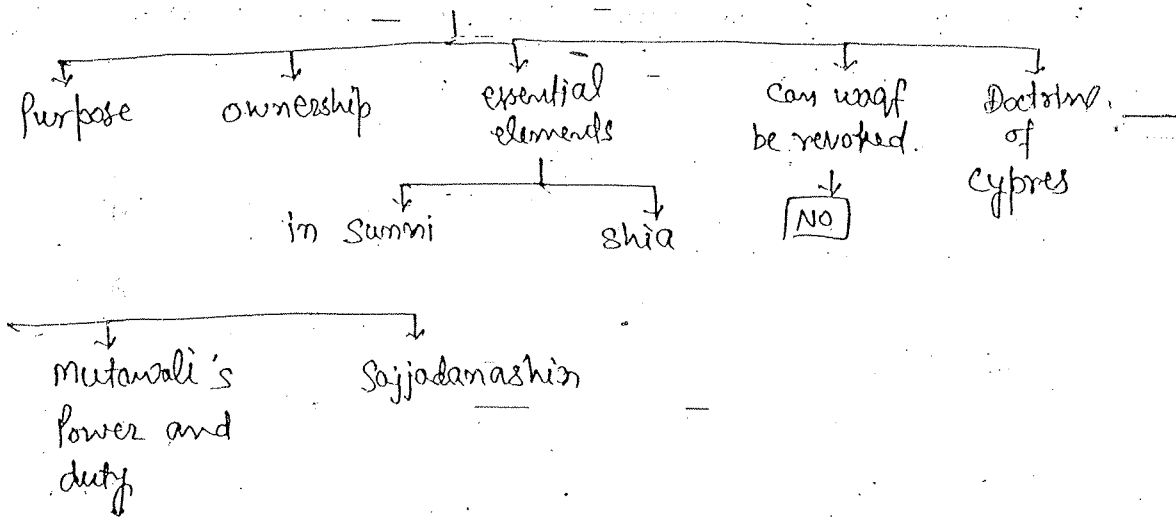
(2) If M has got passage through A's land. shafi-i-khalit.

here in the shia law neither will get the benefit. as it is a case of shafi-i-khalit and not shafi-i-sharik. but in the sunni law the claim of M will succeed as he has got an aminity which he shares with the vendor A. as far as N is concerned he had a near collateral support to his wall from the land of A and hence he is not shafi-i-khalit.

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Waqf

1/11/2012



* Purpose of waqf → religious or charitable

owner → God

mutawali → manager of the pty (secular head)

pty may be movable or immovable → eg. Kuran

Sajjadamashin → head like mutawali but only for religious purpose and more powerful than mutawali

Diff b/w Trust & waqf → in trust ownership is trust owner but in waqf God is owner of the pty

waqf can not be done for non Islamic or anti-Islamic purpose. and the pty has to be dedicated to God.

and he is not more owner.

* cypres → eg pty for library has fulfilled and now mutawali has the power to use the pty for other purpose.

eg ② Musafir Khana on road, road blocked and purpose get defected then the pty may be use for other purpose.

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Waqf —

Waqf is primarily the pty which has been dedicated in the name of God for the purpose of any religious or any secular benefit to the people as per S. 2 of the Muslim Waqf Validating Act ¹⁹¹³ 1913 a waqf is a permanent dedication by a muslim of any pty for any purposes recognized by the muslim law to be religious, charitable or pious (for you ancestors).

The property of a waqf can be movable or immovable and with the creation of waqf the wakif would lose his title to the property and the property goes under the title of the God, after having created the waqf the wakif can not reacquire the title for himself. (Waqf void)

Once the waqf created, it is mutawali who manages the waqf and appropriates its income and manages the expenses for the purpose of the waqf. If the waqf has some religious functions then the Sajjadanashi is the spiritual or religious head of the waqf who manages the religious affairs of the waqf, the same person can be appointed as both as mutawali and sajjadanashi.

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The waqf can be created orally or in writing but as per the Registration Act if the property involved is 100 Rs or more then registration is compulsory and thus for practical purposes the waqf should be in writing and registered.

The intention of the wakif to create the waqf and also the purpose of the waqf should be explicit.

Purposes -

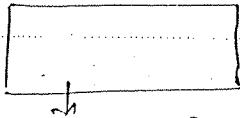
The purpose should be either religious, pious or charitable and should not be opposed to Islam. (e.g. can not waqf for Temple or some other religion).

Any waqf created for an unislamic purpose will be void. If the wakif has created a waqf which is partly valid and partly void then it has to be examined whether the property has been clearly demarcated for the valid or void purpose or not. If the demarcation is clear then for the valid purpose the waqf will take effect but for the invalid purpose the waqf will be void and will not take effect.

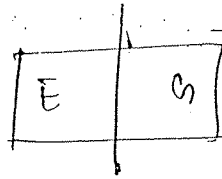
However if the demarcation is not clear then the entire property will go for

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the waqf for the valid purpose.



one part — for education
2nd " — for gambling
and not dismantled
then whole for waqf



then only Ed part
valid not void.

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Shop No. 57/16, Old Rajendra Nagar Market,
Delhi-110060
M: 9831867433, 7827517669, 8750886721.

Doctrine of Cypres :-

The purpose specified by the wakif shall be strictly followed by mutawali. However due to change in circumstances or due to any other reason it may be impossible to use that waqf for the purpose specified and in such circumstances the waqf does not get abolished as such rather the mutawali can put the waqf to some such use which is broadly in keeping with the purpose of the waqf.

eg ① musafir khana (Rest house) can be converted if the need arises into an oldage home.

② A school can be converted in other purpose but not in masjid bcs the original purpose was charitable. It can be converted in madarssa or any other charitable purpose.

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Ex. Purpose of waqf :-

- Muslim Law**
- (1) A building dedicated for mosque — valid
 - (2) Piece of land for graveyard — " "
 - (3) House for Travellers — " "
 - (4) A place for the marriage of the poor — " "
 - (5) Education of the poor — " "
 - (6) Dedicating a pty the income of which will be used for maintenance for some religious place or for providing food to the poor people or for giving alms (qat) to the fakirs — valid
 - (7) A place for educational Institution — valid
 - (8) " " body of pilgrims — " "
 - (9) " " the public reading of the Quran coupled with the distribution of alms — valid
 - (10) A place for providing benefit for rich people only — void
 - (11) A place dedicated for a church or a Temple — void
(but in charity it may be for other religion also)

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(12) waqf for uncertain purpose — void

Q Can the wakif retain the usufruct of the waqf for himself.

Ans — In sharia — the waqf becomes itself becomes void.

but in sunni if he has retained it for his life time or for the purpose of payment of his debt upon his death then it is valid.

* The pty dedicated should be permanent.

It can not be that waqf can be done only for usufruct the corpus shall have to be dedicated.

Essential requirement of a valid waqf in the Sunnis !—

① The wakif must be a major i.e. above 18 and of sound mind and should be a muslim at the time of creation of a waqf.

② The pty should be permanently dedicated and if it is not expressly specified then the court shall presumed that the pty has been permanently dedicated unless the contrary is proved. If it is proved that it was temporary then waqf will be void.

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③ the pty can be movable or immovable.

④ waqf can be created by a long user of the property.

e.g- (2 over land by mosque is used for several years and wakif (or owner of the land) has ~~not~~ never opposed it then it becomes the pmt of waqf)

for that purpose there has to be an existing waqf and over and above the waqf pty the adjoining land also has been used then waqf for that adjoining land also will be created.

⑤ waqf once created can not be revoked, and if there is any declaration to that effect then the waqf will be void.

However if the waqf was created by the will then the testator (legtor) is always free to revoke the will before his death.

⑥ if the waqf was created by a will during marj-ul-maut then the waqf will take effect only to the extent of $\frac{1}{3}$ rd of the total pty of the wakif. if the other heirs do not consent.

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In shias the conditions for the valid waqf are the same as in Sunnis excepting that the waqf should be absolute and unconditional and the pty should be absolutely transferred along with the usufruct. Unlike the Sunnis in the shias the wakif can not retain the usufruct for himself.

Mutawalli :-

A mutawalli is the manager of the waqf pty. He is considered to be the secular head of the waqf pty. Unlike a trustee in a trust the mutawalli is not the trust owner. The ownership is vested in the God and he is only the manager. It is his duty and power to appropriate the income of the waqf and to spend the money properly to serve the purpose of the waqf.

In order to be a mutawalli the person is of sound mind, age of majority (18) and should be a muslim.

A woman is normally is not appointed as a mutawalli but if there are no religious functions involved then she can be appointed.

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The mutawali is appointed either by the wakif himself or by the executors of the wakif.

The Court also can appoint the mutawali but while appointing the mutawali the Court will take into consideration the wishes of the wakif. It will also take into account the fact that as a general rule the limial male student, descendants of the wakif shall be appointed as the mutawali. However, this is not a binding principle and the court may appoint any good person also as mutawali.

The mutawali himself also may while on the death bed appoint a successor mutawali and

normally the court will not interfere in such appointment until it finds that the successor mutawali would not be proper for that wakf.

In the cases of large local pty involved in the wakf for eg. big graveyard or mosque.

A Congregation or a group of local people can together manage the wakf.

Removal of mutawali :-

Once the mutawali appointed he shall not normally be removed but if he starts claiming his own title to the wakf pty or starts

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misappropriation of the waqf then he can be removed by the wakif himself or even the Court can remove him.

S. 64 of the waqf Act 1995 says power of Court to remove mutawali.

Power & duties of mutawali —

- ① The mutawali is like a trustee but he is not actually a trust owner.
- ② He can file a suit for the protection of the waqf property.
- ③ He can employ agents for the performance of his functions.
- ④ He can alienate or bring about changes in the waqf ~~prop~~ for the cases of urgent necessities in the waqf deed allows him to do so — — or he has taken the permission of the court.
- ⑤ He may borrow money for the purpose of waqf with the permission of the court.
- ⑥ He may lease the waqf land for agricultural purposes for a max 3 years period, and for non agricultural purposes he can

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do so for 1 year even without the permission of the court.

(8) Unless the waqf deed expressly ~~does~~ exclude the beneficiary ^{of the waqf}, can claim the accounts of mutawali and can file a civil suit for it as well.

(9) The mutawali gets remuneration i.e. salary and he can apply to the court for an enhancement of salary to the court.

Distinction b/w mutawali & sajjadnashi

The mutawali is the manager and the secular head of the waqf whereas the sajjadnashi is the religious or the spiritual head of the waqf.

All the religious functions of the waqf has to be performed by the sajjadnashi and he can even incur debts for that purpose and he can bind the mutawali by that. The mutawali can not interfere in the religious functions of the sajjadnashi. The same person can be both the mutawali and the sajjadnashi, but a woman can not be sajjadnashi.

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Distinction b/w Public waqf & Private waqf

Private waqf → waqf - alal - aulad

A public waqf is basically a waqf for the purpose of the benefit of the public in general but a private waqf is a waqf for the benefit of the family of the wakif i.e. the pty. has been dedicated for the benefit of his own generations.

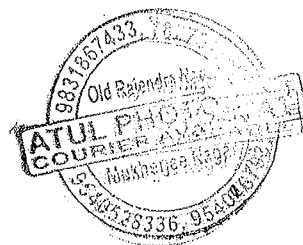
Generally in muslim law such waqf is not permitted and the waqf will be void. However, as per the 1939 Act the waqf will be valid even if it has been created for the benefit of the family provided the wakif has retained some portion of income of pty for the use of general public.

The diff b/w waqf & trust

& Hiba

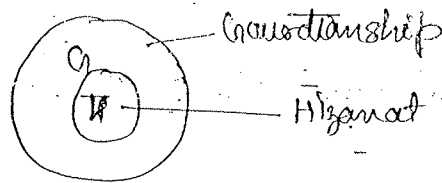
The details of 1995 waqf Act (short note)

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Hizanat :-



Hizanat is related to custody of the child, it is not related to natural guardian (Father, if he is not then C.F.) but for

Hizanat relates to the custody of the child upto a particular age.

For inst - for the shias the custody of the child for male upto the age of 2 years and for a female upto the age of 7 years. will be that of the mother and similarly in the Sunnis for a male upto the age of 7 years.

and for a female up to the age of 15 years the custody is that of the mother i.e. to say that the custody of the child irrespective of the guardianship will be that of the mother and in her absence it will be of some other woman in a sequence.

Hizanat basically is the guardianship of the body of the child for the day to day purposes and for a better upbringing of the child this called

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Wilayat-e-nafs, the guardianship of a child in such a case will always be that of a legal guardian for inst- the father or the paternal grand father but the custody will be with the mother or any other woman who has authorised to have the custody.

The mother will lose her right to Hizanat if she gets married to someone else or if she starts living an immoral life or if she gets so much engaged in her activities that she is not able to take care of the child. or if she falls ill and the illness is such as she becomes incapable ^{or dies} of taking care of the child then the Hizanat will pass on to the next guardian i.e. woman is capable of Hizanat of the child.

Sequence :-

- ① mother's mother how high so ever, father's mother
- ② how high so ever, full sister, uterine sister, full sister's daughter, uterine's sister's daughter, full maternal aunt, uterine maternal aunt, full paternal aunt (3m)

Consine sister is mother →

In the above list the Consine sister's daughter or co si's daughter has not been

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specified, on this mulla says that it is an accidental slip and the word consinmen sister should be read after the word full sister and the word consinmen's sister's daughter should be read after the word full sister's daughter.

The above list has to be strictly followed and in the presence of nearer relative the remoter one can not have the Higamat (Custody) of the child. In fact even though the father is a natural legal guardian of the child, even he can not have the custody of the child in the presence of either of the above women.

If neither of the above a woman exist then the custody will be pass on to the male members.
(It can be changed by the court on the application by natural guardian to change Higamat to other women).

sequence :-

Father, nearest paternal Cr. F., full brother, consinmen brother, full brother's son, son or son of full brother of the father, ~~son of the full brother of father's full father~~ full brother of father, full son of the full brother of the father.

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Hizamt is only about the custody of the child whereas guardianship is broader term and includes the guardianship of the pty, also marriage of the child.

Such is of 4 categories.

- ① Natural or legal guardian.
- ② The testamentary guardians — (by will) —
- ③ Guardians appointed by the court
- ④ Defacto guardian — (if court does not appoint guardian but the person can appoint suo moto guardian for the benefit of the child)

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Muslim Law

Rahul IAS Handwritten Notes

Muslim Law



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Muslim Law