

PUNJAB REVENUE ACADEMY  
BOARD OF REVENUE, PUNJAB



# Shariat Law of Inheritance & Ushr Law

Punjab Revenue  
Academy

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# SOURCES

## 1. Sources of Muslim Law

The main sources of Muslim Law are :

(a) Quran (b) Ahadis and Sunna (c) Ijmaa (d) Qiyas (e) Custom \* (f) Judicial Precedents (g) Legislation.

### (a) Koran (Quran):

The sacred Koran represents the communications addressed by Allah to the Prophet, through His messenger Gabriel. It deals with the institutions of public prayer, fasting, pilgrimage, prohibition of wine and also topics on marriage, divorce, inheritance, etc. Koran is the final authority. It has 110 chapters. 6237 verses.

For Allah's commandments, the technical name is "Shariat". It means the road to the watering place. Hence, this is the path to be followed. Shariat refers to all human actions, it is the code of duties and injunctions.

### There are five categories:

- (i) Fard (shall be done) e.g., daily prayers.
- (ii) Haram (Prohibited): e.g., Wine.
- (iii) Mandub (advised to do): e.g., additional prayers.
- (iv) Makruh (advised not to do): e.g... Not to eat certain kinds of fish,
- (v) Jaiz : left to the individuals to do.

Further, the name for Muslim law is Fiqh. Literally it means "intelligence". It deals with legal questions. It includes the rights and duties derived from the Koran, Fiqh is the science of Muslim jurisprudence.

### (b) Ahadis and Sunna:

Ahadis = Traditions. Sunna - the trodden path, the practice of the Prophet.

During his own time, when the Prophet sat as judge, his rulings contained the 'revelation' of the Koran. After, his demise, his practices and sayings became the guiding star. Sunna was the practice of the Prophet; and Ahadis were the traditions and precepts. These Ahadis are recorded and are authoritative sources. Bukari has recorded about 7000 such traditions.

Sunna is also a source of law, In fact, it completes and explains the Koran, in cases of conflicts. Sunna is a record of the practices of the Prophet, His decisions and sayings. Even silent answers were Sunna.

He had said "**My words are not contrary to the words of God, but the word of God can contradict mine**". The Koran and the Sunna form the basic roots of Islamic law.

**(c) tjmaa:**

It is the "consensus of opinion" among the learned in the Muslim community. It is the majority view among the scholars. New problems of law were resolved by this process. Thus it became a communal legislation by the great authorities. When there was no principle on any point a special effort was made by scholars to solve the issue in individual cases this was Ijtihad, This was based on equity, public interest and sound precedent. Each school had its own "Ijtihads".

The Shia accept only the Ijmaa i.e., practices of the family of the Prophet. But Hanafi's accept the Ijtihad also.

**(d) Qiyas:**

' Means "analogical deduction". Here, conclusions are drawn from analogical reasoning. Opinions of judges and scholars were called fatawas. Fatawa Alamgiri is well known.

**(e) Custom:**

There were many customs during the pre-Islamic period.

The prophet had approved a number of them. Some of them continued with his tacit consent and these became part of Ijma. These gained legal status in course of time. However, 1937 Shariat Act was made to apply only the Shariat and not the customs.

**(f) Judicial Precedents:**

Decisions of courts have to some extent contributed to Muslim law.

**(g) Legislation:**

The Prophet was the supreme maker of law; hence no one can make Muslim law. In case any change is made it is considered as an invasion. In spite of this there are a number of Acts.

1. The Mussaiman Wakf Validating Act 1913.
2. The Child Marriage Restraint Act 1929.
3. The Shariat Act 1937.
4. Dissolution of Muslim Marriage Act 1939.

**(h) Other Sources:**

Elements of Roman Law, Custom in other countries. Equitable doctrines etc, are also considered as minor sources of Muslim law.

**2. Shariat Act of 1937:**

This is the most important and a far reaching enactment of 1937 containing 6 sections. It became operative from 7th October 1937. It aims at restoring the law of (Islam to all Muslim communities residing in India. *All customs contrary to the Shariat are void.* The Shariat Act is applicable to both Shia and Sunni schools. It does not define the word Muslim. It is applicable to all kinds of property except agricultural land, testamentary succession in certain communities, and charities other than Wakfs.

It declares that all questions relating to (a) interstate succession, (b) property obtained under a contract or gift, (c) marriage, (d) dissolution of marriage, (e) maintenance, (f) dower, (g) guardianship and (h) trusts, must be solved according to Muslim personal Law. **Here all customs against the Shariat Act are abrogated. The exceptions are: Agricultural land.**

The Act provides that if a person belonging to a community whose custom regarding adoption, wills and legacies prevail; makes a declaration, he will thereafter be governed in all respects by Mohammedan law. To this category belong certain communities in Punjab and Khojas in Bombay.

E.g: A Khoja can by custom will away the whole of his property, but if he makes a declaration as above he loses his right and is governed by Mohammedan law. It further provides that the District Judge may on a petition made by a Muslim married woman, dissolve a marriage on any ground recognised by Muslim personal law i.e., Shariat. The Shariat Act repeated a Calcutta decision, *Burham Vs. Khodaya*.

But this has been abrogated by the Muslim Dissolution of Marriage Act of 1939. Hence suit can be filed before the courts lower to District Court i.e., in the Munsiffs Courts.

In conclusion, Shariat is the word of Allah. The Shariat Act has increased the importance of "Shariat", as a divine source to Muslims in all their spheres of activities.

### **3. 'Shis' and 'Sunni' Schools Shia means "faction."**

After the death of the Prophet, in 632 A.D., the question of who is to be the successor came up. People who followed AH, the son-in-law of the Prophet, considering him as the successor in temporal and religious matter, formed the school called as "Shia".

Those who believed in election to the office of the Prophet formed a separate school called the "Sunni" school. Abu Baker, father of Prophets junior wife Ashaya Begam became the first Khalif. *Differences between the Schools*.

The fundamental difference is the doctrine of imamat (leadership). According to Shia the imam is by divine right. He is the descendent of the Prophet. This spiritual headship marks the vital difference between the two schools.

In using the different sources of Muslim law, there is a difference.

Koran is the original source for both schools. The Sunnis refer to the traditional interpretation (tafsir): the Shias use the Koran but rely on the imam for his revelations.

Sunnis refer to the decisions of Caliphs "Ijmaa" to supplement Koran. But, the Shias reject this source,

The development of law gave birth to many Sunni schools. Hanafi, Maliki, Shafei, Hanabali etc.

The schools under Shia are: Ithna Ashari, ismailis, Zaidis.  
Majority in India are Sunni Muslims. Mostly they belong to Hanafi School.

## MARRIAGE

### 4. Marriage (Nikah):

Nikah is a contract for the legalisation of intercourse and the procreation of children'. Ameer Ali defines marriage as institution ordained for the protection of society, and in order that human beings may guard themselves from foulness and unchastity'.

In *Abdul Khadir Vs Salima*, the court held that the marriage is not a sacrament but purely a civil contract.

The marriages are remarkable for their extreme simplicity.

#### Formalities:

Declaration or offer on the one side.

Acceptance by the other.

Presence of witnesses.

The words must indicate with reasonable certainty that a marriage has been contracted. The proposal and acceptance **must be in one meeting**.

### 5. Valid Nikah:

**Capacity:** Every Muslim of sound mind who has attained majority can enter into a contract of marriage. The majority is obtained at puberty. This is fixed at 12 for a boy and 9 for a girl. On behalf of the minors marriage consent may be given by the guardians.

If the Muslim is married during his minority with the consent of the guardian, the minor has a right to repudiate such marriage on attaining majority, This is called the *Option of Puberty*.

In the case of a girl married during her minority, she can get the marriage dissolved if she can prove that:



- (a) she was married during her minority with the consent given by .father or guardian.
- (b) that the marriage took place before she attained the age of 15 and
- (c) that the marriage has **not been consummated**

A boy who is married during his minority may also exercise his option of puberty.

In 1929, the Child Marriage Restraint Act was made, and according to it the minimum age is fixed at 21 to the boy and 18 to the girl.

**(ii) Disabilities:**

(a) **Number:** A Muslim can take any number of wife& subject to a maximum of 4, But a Muslim women can marry on|y one husband. If a Muslim marries the 5th wife, such a marriage is irregular.

(b) Persons belonging to different Muslim sects may inter-marry. Each spouse retains the status of marriage, that is, the school is retained. The Hanafi Muslim may marry a Kithabiyya. But a Muslim woman cannot marry except a Muslim. Kithabiyya means persons be longing to any *divine book*, that is, it refers to Christians (Bible), Jews or a fire-worshipper.

(e) **Relationship:** Blood relationship is the third restriction. A Musjim is prohibited from marrying persons who are connected by blood. Ex.: His mother, his daughter, his sister, his niece, his aunts etc. If this rule is violated the marriage becomes void. The other restriction is prohibition on grounds of affinity. A man is prohibited from marrying certain persons who are relations by affinity example ascendants or descendants of his wife. If this rule is violated the marriage is void,

(HI) **Fosterage:** A Muslim should not marry his foster mother, or her daughter or his foster sister; the marriage becomes void.

**(iv) Unlawful conjunctions:** The Muslim is prohibited from taking two wives at the same time who are related by blood, affinity or fosterage. That is, a man cannot marry two sisters at the same time.

**(v) Idda or Iddat** (meaning: Numeration): When a marriage is dissolved by "death or divorce the wife is prohibited from marrying for certain specified time. This period is called Idda. The object of Idda is to ascertain whether the wife is pregnant or not.. In fact, every system of personal law has prescribed such a period of 'waiting'. It is a continence imposed on the ground of getting her secluded and making her abstain from luxuries.

After consummation of marriage if the marriage is dissolved by divorce the duration of Idda is three courses (months) or, if the woman is pregnant, till delivery. But if the marriage is dissolved by death of the husband, the period of Idda is 4 months and 10 days or if the woman is pregnant; until delivery,

If the marriage is not consummated Idda is to be observed in case of death but not in case of divorce. A marriage with a woman under Idda is prohibited. Exception: Marriage with divorced husband.

**(vi) Dower:**

Dower is essential [Refef: Dower (Mehtar)] (iii) *Other conditions* : Certain prohibitions have been imposed as in the doctrine of equality. Some rules of prudence have also been imposed.

**(vii) Consequences of Valid Marriage:**

1. The spouses get the status as husband and wife; The children are legitimate and get a right in the property.
2. Wife gets the right to Mehtar when marriage is completed.
3. Wife gets the right to maintenance.
4. Wife should follow "Iddat."

5. Wife and husband may retain the sect even after marriage.
6. Wife or husband cannot after divorce marry certain relations.

## 6. Classification of Marriage:

Marriages are classified into valid, void and irregular marriages.

### 1. Valid Marriage: (Sahih)

If all the legal conditions are fulfilled there is a valid marriage.

### 2. Void Marriage: (Batil)

This is not a marriage at all. Violation of rules of blood relationship, affinity or fosterage results in making the marriage void.

The children are not legitimate and there is no process to legalise such a union, The marriage with the wife of another is also void.

The void marriage is an unlawful connection which produces no mutual rights and obligations between the parties. Hence no question of dower unless there has been consummation. **If one dies the other cannot inherit the property. The marriage is void *ab-initio*.**

### 3. Irregular Marriage: (Fasid)

If the prohibitions of the marriage which are perpetual are violated the marriage becomes void. But if a temporary prohibition is violated it becomes irregular.

The marriage without witnesses. Or

- (a) the marriage with a woman under Idda.
- (b) The marriage prohibited on the ground of religion, i.e., non-kitabiyyah.
- (c) Marriage with 5th wife
- (d) The marriage with two sisters etc.

**The children of irregular marriage are legitimate.**

## 7. Muta Marriage (Temporary Marriage):

Muta literally means 'enjoyment or use'. Hence, Muta marriage is a marriage for pleasure. It is a marriage for a fixed period, for a certain.

. award paid to the woman. This was prevalent even during the time of Prophet, but, now, all schools of law, except the Ashari Shite, have made this unlawful.

This type of marriage was justified as it was useful in times of war or on travel. It was condemned later by Omar Khalif. In India this is not common. It is in Persia and Arabia.

### Essentials:

According to Ahari Shite Law a Muta is a marriage, for a fixed period i.e., it may be for a day, a month, a year or number of years. The essentials can be understood under the following:

1. The form.
2. The subject
3. The period
4. The dower

1. *The Form:* There must be a proper contract. Therefore, offer and acceptance are necessary.

2. **The Subject:** A man (Muslim) might contract Muta with a Muslim, Christian, Jewish or a fire worshipping woman but not with the follower of any other religion. Relations prohibited by affinity cannot contract in Muta marriage. A man may contract Muta with any number of women. In *Jafri Bibi's* case the Privy Council declared that where a co-habitation commenced with a Muta and there was no evidence as to the term, the presumption was that the Muta continued during the entire period of co-habitation.

**3. The Period:** The period may be for one day, one month, one year or for a number of years. A Muta terminates by efflux of time or by death. On the expiry of the term he may make a gift and terminate the contract (with or without wife's consent).

**4. Mehar (Dower):** Is a necessary condition of Muta. If it is not specified the agreement is void. If the marriage is consummated she is entitled to the entire amount, if not, only to half the mehar. In case the wife leaves the husband before the period, he is entitled to deduct proportionately.

**5. Consequences:** The children born out of Muta marriage are legitimate and are entitled to inherit. A Muta wife is not entitled to maintenance because the word wife does not, in reality, take a Muta wife. The remedy is S. 125 Cr. P.C. Iddat is for two courses. No inheritance. No question of divorce arises.

## **8. Mehar (Kanya Shulka):**

In Muslim law of marriage, mehar is essential. In a way it adds to the prestige of wife. It may be money or immovable property.

**In Abdul Khadir Vs Salima,** the court upheld the right of the wife to mehar if the marriage had been consummated.

**1. Nature:** The claim of the wife or widow for the unpaid portion of Mehar is an unsecured debt. It is an actionable claim. It is due from the husband or his estate. She may recover or the heirs may recover, If the husband refuses to pay prompt dower the guardian may refuse to send the minor wife to the husband's place.

The wife may refuse to the husband, his conjugal rights. After consummation the husband cannot refuse to pay the mehar.

**2. Legal Status:** Mehar is not only the right of the wife, it adds to her prestige and saves her in times of distress, or on divorce or death of husband. Further, it acts, as a check on the power of husband's right to "talak". Mehar may be definite "fixed" or indefinite ("not fixed").

**Definite:** Mehar may be fixed orally or in writing (meharnama); it may be fixed, before, during or soon after marriage.

**indefinite:** Generally mehar is fixed as above, but if not so fixed at the time of marriage, the wife may get the amount fixed through court.

Mehar may be any amount; or immovable property or usufruct of property like rent etc. Any increase in amount or property is allowed but reduction is void.

### 3. Two kinds'. Prompt mehar and deferred mehar.

**Prompt mehar:** Husband agrees to pay immediately, as per marriage contract. If he so agrees, it becomes payable when the wife demands. She may claim the amount with interest or refuse consummation.

**Deferred Mehar:** In the marriage contract, the amount or property is fixed as mehar, but if it is to be given when marriage is dissolved or on the happening of a contingent event, it is called deferred mehar. If wife dies, her heirs may claim, the mehar. On husband's death or divorce, she may sue and recover.

### 4. Widow's Right to Retention:

**Mehar is a personal right of the widow.** As such she has a right to hold the property until the amount is fully paid. This is called the right to retention of property. The leading case is **Mina Bibi Vs. Chowdri Ahmad:**

He died leaving his wife W who took possession of H's property. After a few years, some heirs of H filed a suit for their share in the property.

The trial court decreed possession of property to the heirs, but fixed certain sums to be paid by them to W towards her mehar. No money was paid. W gifted the property to K. **Held gift was bad.** But, W had the right to retain the property until the mehar amount was fully paid. As she had .gifted, she has no possession, Hence, heirs need not pay.

### 5. Essentials of Right to Retention:

- (i) Wife should be in possession of property with consent of husband.
- (ii) She may exercise this right against the heirs of the deceased husband,
- (iii) She is entitled to the use or benefits of property like rents etc., when she is in possession.
- (iv) She has no title to property ; hence she cannot transfer or sell.

The Supreme Court in *Kapur Chand Vs Khader Unnissa* has held that

the widow has no right to transfer or sell the property,

## 9. Divorce:

The Prophet said 'With Allah, the most detestable of all things permitted is Divorce'. *Classification: Divorce*

- (i) By death of a spouse,
- (ii) By husband:
  - (a) Talaq (repudiation)
  - (b) Ila (vow of continence)
  - (c) Zihsr (injurious assimilation)
- (iii) By the wife :
  - (a) Talaq-e-Tafwid (delegation of power to divorce).
- (iv) By common consent :
  - (a) Khul (redemption)
  - (b) Mubaraa (Mutual freeing).
- (v) By Judicial process :
  - (a) Lian (mutual imprecation)
  - (b) Faskh (Judicial rescission)
  - (c) Under Muslim Marriage Dissolution Act 1939.

## 10. Talaq:

**Means literally to release an animal from a tether i.e., to free the wife from the bondage of marriage.**

**Hence in law Talaq is an absolute power of the husband to divorce his wife at all times.**

The Muslim husband must be of sound mind. The divorce operates from the date of pronouncement of Talaq. The presence of wife is necessary; giving of notice is not essential. The words must clearly indicate the intention to dissolve the marriage. He may declare 'I divorce my wife, X forever and render her haram for me',

Hanaf i Law prescribes no form. But according to Asharl Law, Talaq must be **in the presence** of two male witnesses.

There are different types of Talaqs.

Talaq may be revocable or irrevocable. Revocable is approved form. Irrevocable is disapproved form,

### **(/) Approved farms (Talaq ul Sunnst):**

**1. Talaq ehsan:** One pronouncement of Talaq is made by husband during the period of Tuhr (purity) i.e., when she is between two ments.

rual courses, plus abstinence during 'Idda'. This may be revoked during Idda i.e., three months from the date of declaration. It may be express or implied. Redemption of conjugal relationship is implied revocation. After the period of Idda, the divorce becomes irrevocable. Talaq is a cruel word. Hence, repetition is not necessary.

**2. Hasan Form:** This is an approved form. There are three successive pronouncements during three consecutive periods of Tuhr with abstinence thereof.

#### **The procedure is:**

- (i)** During Tuhr, the husband pronounces Talaq.
- (ii)** During the second period of Tuhr, he pronounces again Talaq—there should be complete abstinence by husband,



- (iii) After this, during the third period of Tuhr he pronounces Talaq.

**This is final and binding. Divorce becomes complete and irrevocable.**

### **Disapproved forms**

#### **1. Triple declaration:**

Three declarations made during Tuhr.

In one sentence Talaq Talaq Talaq. It is lawful though it is sinful according to Hanafi. Other schools do not approve this form.

Jurist Ameer Ali, says King Humayun seems to have initiated this as, it was advantageous to him.

#### **2. Single irrevocable declaration:** This is also not approved.

#### **Legal effect:**

- (i) When divorce is irrevocable marital intercourse becomes unlawful.
- (ii) If the husband or wife dies during Idda with revocation each is entitled to inherit from the other.
- (iii) If the divorce is irrevocable neither of them can inherit from the other.
- (iv) Wife is entitled to maintenance during *Idda*.

### **11. Zihar:**

Zihar is a form of divorce by the husband. It means injurious assimilation. This is very rare in India and of no practical importance.

Here the husband swears that 'to me the wife is like the back of my mother' or she is my sister. If he intends to revoke this declaration, he, must pay money by way of expiation or fast for a certain period.

If he abstains for four months, the wife may get a decree of divorce from the court.

This was in existence in pre-Islamic Arabia, It is an archaic form of oath.

Tyabji says that Zihar has no significance in Indian law courts. But, Sn. 2

of the Shariat Act 1937 has recognised Zihar.

**ILA:** Husband takes oath to abstain from sexual intercourse. He should follow this for four months. Among Shia's, the Ithna Asharia school, the wife should get a decree of divorce to be effective.

## **12. Khul and Mubaraa:**

These refer to dissolution of marriage by common consent. The Fatawa Alamgiri says when spouses cannot perform their duties, the woman could release herself by giving up some property, i.e., consideration. In return, the husband gives her a "Khula". This results in dissolution of marriage,

### **Conditions:**

- (i) Mutual consent of husband and wife, essential.
- (ii) Some iwad (consideration) should pass from wife to husband.

If the desire comes from the wife it is Khul (to take off).

But, if divorce is made by mutual aversion (or consent) it is mubaraa (freeing mutually). In Khul, the wife begs to be released and the husband agrees for a consideration. In Mubaraa both agree and hence, each is happy being rid of the other.

Certain formalities are to be observed according to Hanafi Law and Ithna Ashari Law. The husband proposes the dissolution of the marriage and the wife accepts in the same meeting. No form is prescribed. This contract dissolves the marriage.

Similarly in respect of consideration, in Khul, the wife makes some compensation to the husband or gives up a part of her Mahr. Legal effects :

- (i) The marriage becomes dissolved.
- (ii) Idda is to be observed wife and **children have a right to maintenance,**

### 13. Dissolution of Muslim Marriages Act 1939:

This Act was passed in 1939 to enable a Muslim married woman to get a divorce decree by filing a suit against her husband, as earlier there was no such law to enable wife to get a decree except for impotency of husband or imputation of unchastity to wife by her husband.

Further it aims at removing doubts as to the effects of conversion of a Muslim woman on her marriage tie. The Act became operative from 17-3-1939.

#### **Apostacy:**

Before this Act, apostacy from Islam,, dissolved the marriage. But Sn. 4 of this provided that either renunciation of Islam or conversion to any other religion by the wife, *will not* ipso facto dissolve the marriage.

However apostacy of the Muslim husband operates as a complete and immediate dissolution of marriage, It provides for the following grounds to the wife:

- (i) Husband's whereabouts unknown for above four years
- (ii) Husband's failure to maintain his wife for-two years (Hi) Impotency of the husband
- (iii) His insanity
- (iv) His cruelty
- (v) Imprisonment of husband for seven years
- (vi) Failure to observe marital Obligations
- (vii) Any other ground recognised by Muslim law

#### **Grounds Explained:**

(i) **Unheard of:** If husband is unheard of for four years or more, his wife may file a suit, and, get a decree. This comes into operation after six months and marriage gets dissolved. If the husband within this six months, presents himself, and agrees to fulfil marital responsibilities the court may not dissolve the marriage.

(ii) **Maintenance:** if the husband fails to maintain his wife for two years or more, the wife may file a suit. If for a reasonable cause, the wife is living separately for two years, the court may give a decree.

(iii) **Impotency;** Before 1939, this was also a ground for dissolution of marriage. The Act has retained this ground.

(iv) **'Insanity:** If the husband is suffering from insanity, leprosy or venereal disease, the wife may get a decree. The duration is not fixed -by the Act. The court decides.

(v) **Cruelty:** This is another ground. It may be physical or mental. Attributing unchastity and scolding again and again with vulgar language, is mental cruelty. The court decides what is cruelty.

(vi) **Imprisonment:** If the husband is convicted for seven years or more, and confirmed by the highest appellate court, the wife may claim for a decree.

(vii) **Marital duties:** If the husband for three years has failed to follow marital duties, the wife may get a decree.

**viii) Other grounds:**

- a. False allegation of unchastity to wife
- b. Option of puberty

-----these are also available to the wife.

A decree may be granted to the wife on proof of anyone of the above grounds.

**14. ACKNOWLEDGEMENT OF PATERNITY (IQRAR):**

**Legitimacy is a status which results from certain facts but legitimation is a process which creates a status which did not exist before.**

In a 'proper sense there is .no legitimation under Muslim law. In fact an acknowledgement is a declaration of legitimacy and it does not refer to legitimation. Hence an illegitimate cannot be made legitimate under Muslim law.

**15. Legitimation per subsequence Matrimoniam:**

(Legitimation by subsequent marriage of the parents of the child) of Roman law is not known to Muslim law. Iqrar: But Muslim law recognises Iqrar ( Acknowledgement of paternity) It has three incidents:.'. (i) Unknown paternity (ii) Child must not be illegitimate, (iii) There must be nothing to rebut presumption.

**(i) Unknown paternity:** That is, if the paternity of the child is not certain. The leading case: **Mohammad Allahabad Vs. Mohammad Ismail.**

A claiming to be the eldest son of G brought a suit against Ismail and his 3 sisters for his rights in certain villages. Ismail and his 3 sisters were born to Mothi Begum after her marriage to G. But A was born to her at a time when it was unknown, who-the father of A was. G during his life time had acknowledged A as his legitimate son. It was held:

- (a) That there was no proof of paternity of A.
- (b) That it was not proved that A was by illicit intercourse.

Therefore it was held: That A was legitimate and he had a right to inherit.

**(ii)** It must not be illegitimate: According to Muslim law there is no legitimation. Hence an illegitimate son cannot be acknowledged to make him legitimate. The principles of Roman law relating to birth per subsequent matrimoniam are not applicable. The leading case is: **Sadiq Hussain Vs. Hashim Ali.**

In this case the Privy Council held that acknowledgement by the

- (c) That there was no proof of paternity of A.
- (d) That it was not proved that A was by illicit intercourse.
- (e) Therefore it was held: That A was legitimate and he had a right to inherit.

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In this case the Privy Council held that acknowledgement by the Muslim father of the child as his son is substantive evidence relating to the legitimacy, and hence, the child was legitimate.

- (iii)** There must be nothing to rebut the presumption of paternity.

- a. The parties must be such as to be so related as father, wife and child in conformity with the presumption of paternity.
- b. Marriage must be possible between the father and mother of the child.
- c. The person acknowledged must not be the child of an illicit intercourse; and 'd. There must not be any disclaimer or repudiation by the father.

**The leading case is: *Habibur Rehman Chowdary Vs. A/taf Chowdary,***

A was the daughter's son of the Nawab. N one person H son of Cohen .sued A and claimed that the Nawab had married Cohen. Hence, he claimed his share as son. Held neither marriage nor acknowledgement was proved and hence, A failed.

Acknowledgement may be express or implied.

**Effects:** Acknowledgement has the legal effect of making the child legitimate and has the legal effect of the acknowledgement of the wife also. A valid acknowledgement gives rights of inheritance to the children and to the wife. An acknowledgement is **not revocable**.

## MAINTENANCE

### 16. MAINTENANCE:

It is called 'Nafaqu', It means food, raiment and lodging. The causes that make one person to maintain another are:

- (a) Marriage
- (ii) Relationship
- (iii) Property

The higher obligation arises on marriage. Hence maintenance of wife and children is a primary obligation.

#### **Wife's right to maintenance:**

She is entitled to maintenance from her husband even though she may have the means and even if her husband has no means, It is said that wife is the ASL means (root) and child is FAR means branch). Husband should maintain his wife after puberty. She must be obedient at all times. In addition to legal maintenance he may have to provide for other special allowances. An agreement to allow the first wife to live with her parents and to pay her maintenance is valid.

**Polygamy is permissive in Islam:** Art. 25 of Constitution is not violated. However Cr.

P. C, Sn, 125 may be applied, if the husband takes a second wife or keeps a mistress. She is entitled to maintenance.

*Right to sue;* She can sue if the husband refuses to maintain. The court may make an order not above Rs, 500 per month, under Cr. P.C, The right to maintenance ceases on the death of husband. Wife is entitled during Idda that is 4 months and 10 days, or if she is pregnant (at the time of the death of the husband), until she delivers of the child.

**Shaw Banu's Case :** In this case, the Muslim husband H an advocate, divorced his wife Shaw Banu by declaring Talaq, when the wife sued for maintenance under Sn. 125 Cr, P.

**C.** The Supreme Court held that she was entitled to maintenance irrespective of the personal laws of the spouses. The Parliament almost neutralised this decision by passing an Act: The Muslim Women (Protection of Rights in Divorce) Act 1986.

Sn. 3 of this Act prevents a Muslim woman from seeking remedy under Sn. 125 Cr. P.C. The Act further provides that the affected Muslim woman should claim maintenance from her relatives in the first instance, and from the Wakf Board if need be i.e., when the relatives are unable to maintain her.

*Failure to maintain:* If a husband fails to maintain or neglects for two years, the wife is entitled to dissolution of her marriage under the Dissolution of Muslim Marriage Act 1939. But, she has no right to maintenance, for her life time,

In respect of children, father should maintain the sons till they attain puberty and the daughters until they are married.

## GUARDIANSHIP (**Wilaya**)

### **17. Guardianship (Wilaya):**

Guardianship may be in respect of:

(a) the person (b) the property and (c) marriage. There is guardianship in respect of a person. But in Islamic law, guardian for property is rarely appointed because the executor is the guardian to the property. Marriage guardian is called.

Wall.

**Types:**

1. Natural Guardian
2. Testamentary Guardian
3. Court Guardian
4. De facto Guardian

**1. Guardian of Minor:**

Minority is at three stages:

- (i) A person is a minor under 15; according to Mohammedan Law.
- (ii) A person under 18 is a minor according to the Indian Majority Act, and
- (iii) A person under 21 is a minor under the Court of Wards Act. In Mohammedan Law, minors under 15 can act independently in respect of marriage, dower and divorce, in other respects it is 18 years (male or female).

Application: An application for the appointment of the guardian of the person or of the property or of both, must be made to the court under the Guardians and Wards Act 1890. The court must take into consideration:

- (a) The welfare of the minor
- (b) The law to which the minor is subject.
- (c) The age, the sex of the minor and the character and capacity of the guardian and also the wishes of the deceased parent.
- (d) Preferences of minor, if any and appoints the guardian.

It is the duty of the guardian to take care of the welfare supervision education, protection and progress 'of the boy or girl. Father, on his death father's father is the natural guardian according the Muslim law.

**Mother:** The custody belongs to mother upto the age of 7 if a male and upto puberty in respect of a female child (Hanafi Law). The leading case is



*Imambandi Vs. Muisaddit* was declared that the father .is the legal guardian, if he is dead, the executor is the legal guardian. *The mother is entitled only to the custody of the person. She is notthe natural guardian.*

Hence, if father and mother live together, the husband cannot take away the minor. The mother also cannot take away without the permission of her husband i.e., father's supervision continues.

A minor cannot be appointed as a guardian (rare exception in the case of his own wife or child).

If -the mother (widow) or a female guardian is married to a person not related to the child, she is disqualified. Similarly adultery, immorality or neglect of the minor are disqualifications.

**In Zynabi Vs. Mohamed Ghouse :** Zynabi the wife (W) and her husband Mohamed Ghouse (H) lived separately in Madras. There were 3 daughters of ages 7, 5 and 3 and one son aged 7 ½ years, H took a second wife but the marriage was dissolved. All the children were with W. One day H came and took two children by force. Thereupon W filed a petition for custody under the Guardian and Wards Act. Held W entitled to the custody of her children.

**Other Relations:** In the absence of mother the following are entitled to custody in order of priority. Mother's mother, father's mother, full sister and other female relations including aunts. If such a female marries a stranger, she loses her preference.

Failing the above persons, the following male relations are entitled to custody on priority basis.

(i) The father, (ii) Nearest paternal grand father, (iii) Full brother, (iv) Consanguine brother.

The general rule is 'no male is entitled to custody over a female minor unless he is related to her by blood, i.e., he must be within the prohibited degrees'.

An illegitimate child upto 7 years of age must be under its mother, after that, it is left to its option.

## 2. Guardianship of Property:

Guardians : The father is the legal guardian. Failing him

(i) Father's executor (ii) Father's father (iii) Paternal grandfather's executor.

*Court Guardians:* Failing legal guardians, the court may appoint a guardian, either the mother or some other person whom the court thinks fit under the circumstances.

**De facto Guardian:** He may intermeddle with the property of the minor. He will be only a custodian. He has no rights but only obligations.

**Immovable Property:** The legal guardian should not sell it except for double the value or

where it is necessary for the maintenance of the minor. A court guardian cannot sell or mortgage without the permission of the court.

A *de facto* guardian has no right at all. The leading case is *Imambindi Vs. Mutsaddi*. Z had two children (minors). She conveyed certain shares (of herself and of children) of value Rs. 10,000 to P. Held by Ameer Ali J that mother had no power to alienate as she was not the legal guardian.

Other leading cases : (i) Venkamma Naidu Vs. Chisty, (ii) Kharag Narayan Vs. Hameeda Khatoon.

In Venkamma Naidu's case, the mother as<sup>1</sup> guardian of a minor, executed a sale-deed of immovable properties. Held, the sale was void.

**Movable property:** The legal guardian has the power to charge the movable property for the necessity of the minor, such as food, clothing, shelter etc. Court guardians have larger powers, in respect of movable property the *de facto* guardian has powers similar to a legal guardian.

## GIFT (HIBA)

### 18. Gift (Hiba):

#### Definition:

A gift or hiba is a transfer of property, made immediately, and without any exchange, by one person to another, and accepted by or on behalf of the latter (Mutfa), Gift is a wide term, but Hiba is much narrower. As the object of Hiba is to earn love and affection. The Prophet had recognised it.

*Essentials:* There are three essentials:

(i) Declaration of the gift by the donor (ijab) (ii) Acceptance by the donee (qabul) (iii) Delivery of possession of the gift property (qabda)

All these must be complied with

**Formalities:** Writing is not essential under Muslim law, to make a gift of movable or immovable property. Sns. 123-129 of the transfer of property Act state that a gift of immovable property must be in writing and must be registered.' *But gift by the Muslims is exempted* (Sn. 129). It may not be in writing; if in writing it may not have been attested; if attested it may not have been registered. Even then the gift is valid.

**(i) Declaration:** A Muslim making a gift, must be of sound mind. He must not be a minor. A gift to an unborn person is void. A gift with intent to defraud the creditors is *voidable* at the option of the creditors.

A gift may be made to an heir, it may extend to the whole of the donor's property or interest} but it must be made during his life-time.

*Acceptance by the donee* (Kabul): it is essential that the donee must.

**(ii)** accept the gift made by the donor. The acceptance may be express or tacit. The gift becomes void, if not accepted by the donee.

**(iii) Delivery of possession:** Delivery of the possession of the movable or immovable property is an essential requisite to complete the gift. Without delivery the gift becomes void. The delivery may be actual, or constructive. The donor must divest himself of the possession of the gift-property, to complete the gift. Registration, (though not necessary) will not cure the want of delivery of the gift property.

**Immovable property:** When a donor who is in possession of his immovable property makes a gift of it to the donee he must vacate his property and deliver the same to the donee. When both the donor and the donee are in possession, there must be some overt act by the donor to show that he has divested himself of that property. Giving possession (Quabda) is essential.

M executed a gift deed in favour of her son S. Both M and S were living in the house and S continued to live after making the gift deed and municipal taxes were paid by S. Held, there was delivery of possession.

The leading case is *Nawab Amjad Ali Khan Vs. Md. Begam*. The Nawab of Adam province had given by hiba his houses and villages to the sons of P. But, he had retained the usufruct (use) of the property. Question was, whether the hiba was valid or not. The Privy Council held that the hiba was valid. Another case: *Md. Abdul Ghani Khan Vs. Fakrjahan Begam*.

**Revocation of Gift:** A gift made by the donor may be revoked by him at any time, but before the delivery of possession of the property. But, if possession is delivered, the gift cannot be revoked.

A gift cannot be revoked in the following cases:

1. Gift by a husband to his wife and vice versa.
2. Donee within prohibited degree of the donor.
3. Death of donee.
4. Gift property passing out of donee by sale, gift etc.
5. Gift property is lost or destroyed.
6. Property converted to other forms.
7. Donor receiving something in exchange (Hiba bil iwaz).
8. Property given to religious or charitable purposes.

### **Oh, 6.2 Hiba bil iwaz:**

In Islamic law, hiba is the absolute gift of the corpus (Ayn) of the property without any return.

Hiba bil iwaz is a transaction consisting of two separate and distinct parts.

- (i) Hiba—Original gift by the donor to the donee and
- (ii) Iwaz—Return gift by the donee to the donor.
- (iii) Therefore Hiba bil iwaz means 'gift with return'.

Eg.: A makes a gift of his horse to B, B makes a gift of his camel to A. All the formalities of the law of hiba are followed. The transaction becomes Hiba bil iwaz. Two conditions must be fulfilled:

- (i) There must be the actual consideration (iwaz) paid by the donee,
- (ii) The donor must have acted with bonafide

intention to divest himself of the property and to vest that in the donee.

The consideration may be adequate or not. A copy of Koran, a prayer carpet are good considerations.

This transaction is in reality a sale. Hence, in Hiba bil iwaz giving of possession is not essential. Even an undivided share (mushaa) may be transferred under this.

M executed a deed in favour of his wife W giving her some immovable property in lieu of her dower. Held, this was Hiba bil iwaz and hence valid, even though possession had not been given to the wife (Mohamad Yousoff Vs Ammal).

There are two kinds : True Hiba bil iwaz has two acts : Hiba and return iwaz. While making the gift the iwaz is not mentioned.

In Indian Hiba bil iwaz: There is only one transaction a gift followed by a return. It is a sort of an exchange and this has created a great confusion,

### **Oh.6.3. Hib bi shardul iwaz:**

If gift is made with stipulation (shart) for a return (twaz), the transaction is called 'HSI' [Hiba bi shardul iwaz.] But Hiba bil iwaz (HBI) is a voluntary gift followed by voluntary return. In HSI the gift itself is made with a stipulation. All formalities of a hiba should be followed. If delivery of possession is given the gift cannot be revoked. Eg.: D makes a gift of a house to S. He puts S in possession. As per law, S gives his fine horse to D and D accepts it. D now purports to sell the house to T. The sale is void. This is not in vogue in India,

### **Oh.6.4, Marzul Maut (Death bed gift) J**

Marzul Maut is a gift of an amphibious nature. It is not exactly a gift nor a legacy. In Muslim law the rules are to be taken from the law of gifts and the law of wills.

Marzul Maut means 'the disease death'. The person under disease must have apprehension of death or cause of death.

#### **Conditions:**

- (i) It must cause apprehension of death in the mind of the person.
- (ii) There must be some external indication of a serious illness. The above is a question of fact. (iii) The illness must cause the death.

Gift takes place only when the donor dies. If the donor lives after making the gift, the question may be whether it is an ordinary valid gift or not.

The gift must have been made under pressure of imminent death. The crucial test is the subjective apprehension of death in the mind of the donor.

The nature of the illness cannot be specified with exactitude. If a person had suffered for a year, he had become familiar with the disease, therefore his gift will not be marzul maut (Hedaya).

#### **Essentials:**

- (i) The gift must satisfy all the formalities of Hiba. Delivery of possession is necessary. If no delivery is given the gift is void, (ii) It must satisfy all the restrictions laid down for wills.

**Hence:**

- (a) Not more than the bequeathable third can be given.
- (b) No gift can be made to an heir if the other heirs do not consent. *Cases; Ibrahim Gulam Ariff Vs. Saiboo Safia Begam Vs. Abdul Razak,*

**Areerat:**

This is defined as the grant of a licence to take and to enjoy the usufruct (use) of the property or thing.

Hiba is a simple gift made without consideration. In areerat, there is no transfer of the ownership of the property, but only the temporary usufruct or use or enjoyment of the property is given. The donor may revoke at any time. There is no iwaz (return gift). Areerat of rent of a building is an example.

**Sadaquah:**

This is a gift made by the donor with a view to acquiring religious merit "in the sight of the Lord". Delivery of possession is essential. Mushaa (undivided interest) cannot be given.

Sadaquah once given, is not revocable. In Sadaquah the Corpus (property) may be used up; but, in Wakf, only the income is utilised and the corpus is preserved, for Sadaquah delivery of possession is essential-Wakf can be created by declaration (Nabi Hussain Vs. Gajadhar Singh).

**Mushaa:**

(Undivided Share) Mushaa comes from Shuyuu, which means "confusion", Mushaa is "undivided share in the property, movable or immovable. Gift of mushaa in the property is valid according to Muhammedan law,

K, the owner of a house, gifts his house to G, and also his right to use a staircase which he.

(K) was using jointly with the adjoining owner. Held the mushaa was valid. *Kasim Russian Vs. Shariffunnissa.*

Gift of mushaa in a property which is divisible is irregular (fasid), and not void, it can be regularised by making the partition and delivering of the share property to the donee.

In the following circumstances a gift of undivided share (mushaa) is valid even if partition and delivery are not made.

- (i) Gift by one coheir to another,
- (ii) Gift of a share in zamindari.
- (iii) Gift of property situated in large commercial areas etc.

**Limitation:**

1. Mushaa does not apply to progressive societies, It does not apply when there is consideration.

## **LIFE ESTATE**

**19. life Interests:**

In life estate its creation is done with the transfer of the corpus of the property to a certain person with certain limitations as to its use and alienation. In this sense life estate in Mohammedan law is unknown. However life interests are known to Mohammedan law in the following forms,

- (a) By family Wakfs, (b) By wills, (c) By the rule in Nawab Umjad Ali Khan's case, (d) By the law of gifts as in Amjad Khan Vs. Ashraf Khan, (e) Family settlement.

The most common among all these in India is the rule in *Amjad Khan Vs. Ashraff Khan*. The Privy Council in Humeeda's case held that life estate was strange to Mohammedan usage and therefore it was an unusual transaction, in a later case *Abdul Gafar Vs. Nizamuddin* the court held that life rents as a kind of estate was unknown to Islamic law. These decisions had led to various interpretations and life interest was understood as 'gift with a condition.' The conditions were bad and therefore void but the gift was good. Hence it was held that if A gives to B a life interest in a certain property subject to some condition, the condition was bad. and B took it absolutely.

According to tyabji who is the leading authority on Muslim law:

- (i) Corpus is different from use.
- (ii) Hiba is the transfer of corpus.



(Hi) Life interest is the transfer of the use and *not of the corpus* or property and therefore it is valid.

This has been accepted and followed in a number of cases :

- (a) Sardar Newezash Ali Khan case
- (b) Anjuman Begaum Vs. Nawab Asif Khadir
- (c) Sheik Mustanabi Vs. Sheik Bikar Sahib.

**The leading case is:  
Amjad Khan Vs. Ashraf Khan:**

Hanafi husband A, executed a deed and made a gift of his entire property to his wife W. He divided the property into two parts i.e., 1/3rd and 2/3rds. W was to remain in possession of 1/3rd and she could alienate that property. But, as to 2/3rds property she had no power to alienate, but had only possession for her life-time. After her death the entire property (1/3rd-t-2/3rds) was to revert to the collaterals of A. A and W died. Thereupon Ws brother B claimed the whole property; he stated that there was a condition,

but the condition was bad and void and therefore the gift was valid. This was opposed by A's collaterals.

The matter was decided by a division bench consisting of judges Ashworth and Wazid Hassan. Both gave different reasons but ultimately came to the same conclusion, that Ws brother B was entitled.

J. Ashworth held : Muslim law permitted separation of corpus from use.

On examining the text and the cases he held that a man may retain but cannot transfer a life interest. A life interest can only be created by transferring the corpus and retaining the use.

A gift of a life interest is a gift of a whole interest (1/3rd-i- 2/3rd). He therefore held that W, the wife took an absolute interest. The gift had been perfected by delivery of possession, by A to W.

Wazir Hussain J, reasoned thus : The gift deed created a life interest in favour of W, and it was valid. But as on the date of the suit, W had died, her interest had ended. Hence, her heirs took her interest.

Their Lordships of the Privy Council accepted Wazir Hassan's conclusion and held that W acquired life interest in the property and also power of

alienation over 1/3rd.

The Privy Council expressed no opinion regarding the life estate. Hence Amjad Khan Vs. Ahraff Khan has created a finding in favour of the validity of life interests.

**The decision has two propositions:**

- (i) That the life interest cannot be enlarged or changed to absolute interest,
- (ii) The validity of life interest in Muslim law is an open question.

## PREEMPTION

### 20. Preemption (Shufaa):

The law of preemption is essentially a part of Muslim Law, The Muslim judges introduced this in India. It is based on Islamic text. It was introduced with a view to preventing a stranger, among co-sharers and neighbours who is likely to cause both inconvenience and vexation.

**Definition:** It is a right which the owner of an immovable property possesses to acquire by purchase another immovable property, which has been sold to another person (Mulla).

**(i) Essentials:**

**(a)** The preemptor must tie the owner of the immovable property and

**(b)** There must be a sale of certain properties, not his own. The preemptor must stand in certain relationship, to the vendor in respect of property sold,

**(c)**

**Govinda Dayal's Case:** This is the leading case on the topic, Here the preemptor P and the vendor V were Muslims. But the purchasers were Hindus. The question was whether in such a case the right of preemption could be enforced against a non-Muslim.

The court decided that there was a right of preemption. Justice Mittar held that it was a repurchase not, from the vendor but from the purchaser. Justice Mohammsd held: that the presumption is not a right, to repurchase: that the right of preemption was a right of substitution and not of repurchase. It also held that ns should make the demands after the "sale" is completed, but not before (Radhakisarv Vs. Shridar). The sale must be under the Transfer of Property Act and registration is essential. Hence, the demand is to be made after registration;

**(v) Right when lost,**

**(a)** The right is lost by acquiescence or waiver. This means not following the necessary formalities.

**(b)** The preemption is lost if the preemptor dies after the first two demands, but before filing a suit. But if he dies pending a suit his legal representative may be brought on record.

**(c) Release:** The right is lost if the preemptor releases after taking some consideration.

where preemption was based on custom, it becomes part of law of the land. Hence the law of preemption founded on Islamic law is not void as being unconstitutional.

**(ii)** Preemptors'. They may be;

**(a)** A co-sharer in the property.

**(b)** A participator in immunities, that is, a person having a right of way etc.

**(c)** A neighbour or owner of adjoining property,

**(Hi) Right when arises** The right arises in case of sale or exchange.

**(iv) Formalities:** The necessary formality is known as the 3 demands,

**(a)** The first demand—Talabi Muwa sibat. The preemptor must assert his claim immediately on hearing of the sale. Witnesses are not necessary.

The delay in this is construed as an election not to preempt. The delay of 12 hours was considered as bad. Hence is not allowed.

**(b)** The second demand—Talabi Ish-had : The preemptor must without any delay make the second demand. He must refer to the first demand in the presence of two witnesses and also the vendor or the purchaser.

**(c)** The third demand—Talabi Tamlik: This is not a demand but actually taking legal action. If the claim is not considered then a suit may be brought. This is Talabi Tamlik. The period of limitation is one year. According to the Supreme Court a Mohammedans should make the demands after the "sale" is completed, but not before {FJadhakisan Vs. Shridar). The sale must be under the Transfer of Property Act and registration is essential. Hence, the demand is to be made after registration.

**(v) Right when lost:**

**(a)** The right is lost by acquiescence or waiver. This means not following the necessary formalities.

**(b)** The preemption is lost if the preemptor dies after the first two demands, but before filing a suit. But if he dies pending a suit his legal representative may be brought on record.

**(c) Release:** The right is lost if the preemptor releases after taking some consideration.

**(vi) Legal effect:**

The preemptor stands in all respects in the shoes of the buyer and takes the property subject to equities/if any. The ownership in the land is transferred to the preemptor, only when possession is given to him. The decision of the court must specify giving deductions in respect of the extent of the property, cost etc.

## WAKF

### 21. WAKF:

Ameei<sup>1</sup> Ali opines that Wakf is the most important branch of Muslim law as it is interwoven with the entire religious life and social economy of Muslims.

Wakf means 'detention'. According to Muslim law it means (i) inalienable lands used for charitable purposes and (ij) pious endowments.

The origin of Wakf can be traced to the impulse of Muslims to do charitable deeds i.e., to endow property 'in the way of God'. The objects were to pay the mosque staffs and to endow schools and hospitals; to better the lot of the poor etc.

**Wakf defined:** Wakf is the tying-up of the substance of the property in the ownership of the founder (Wakif) and the usufruct (use) for a charitable purpose.

The Wakf Act 1913 defines wakf. According to it, it means the permanent dedication by a Muslim, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable.

**Essentials of Wakf:**

- (a) The motive is always religious. It is a temporal trust.
  - (b) It is endowment made in perpetuity, In the eye of law after endowment the property belongs to God. i.e., the property becomes immobilised and hence further transfer cannot be made. Dedication should be complete and permanent.
  - (c) The Wakif (the founder of the particular wakf) is not entitled to take any benefit in the wakf property. A wakf may be created in favour of the settler's family, children and descendants.
  - (d) Any property capable of being endowed in perpetuity to the wakf can be the subject matter. It may be movable or immovable.<sup>27</sup>
  - (e) **The Mutawalii is a mere manager.** The Wakf property is not vested in him. (In trust the property vests in the trustee).
- The Wakf cannot be contingent or conditional. It is not revocable. It cannot be for a limited period
- (f) or temporary in nature.
  - (g) Making of a wakf: Any Muslim, who has attained majority and is of sound mind can make a Wakf. It cannot be made for an illegal purpose, or to defeat the creditors.

Object: According to the Mussalman Wakf Validating Act 1913 the ultimate object must be reserved for the poor. This overrules the decision of the Privy Council: *Abu I Fata Mohamad Ishak Vs. Rusomy Chowdhry*, In this case, two:

(h) Muslims made a Wakf and they themselves became the first Mutawallis. The entire benefit was to go to their children and then from generation to generation until the total extinction of the family. Then it would go to the poor.

The Privy Council had held this wakf was invalid, as the object was family aggrandisement. This decision was negated in India by the Act of 1913. Hence, a family wakf can be created, and the benefit to the poor can be postponed (Sn. 4 of the Act).

### **Other objects:**

(i) Burning lamps at the mosque, (ii) The maintenance of Khankah. (iii) Repairs to imambaras. (iv) Colleges, schools etc.

Wakf is invalid if the object is to maintain a church or a temple or utter strangers. Wakf is void for uncertainty. Hence, a Wakf for 'Dttaram' was void.

**Registration:** Every Wakf should be in writing and registered at the office of the Wakfs Board. The Mutawalii should make an application to the Board, with a copy of the Wakf deed, furnishing details of the Wakf; it should be duly signed by the Mutawalii. The Board may register the Wakf.

**Mutawalii:** He is the manager. The Wakf property is not vested in him. His appointment, powers and functions are governed by the Wakf Act 1954.

## **22. MUTAWALII:**

According to the Wakf Act 1954, a Mutawalii is a person appointed either verbally or under any Wakf deed or instrument or by the State Wakf Board. Any person or committee managing or administering any Wakf property is also a Mutawalii as per the Act. Mutawalii is a manager. The Wakf property will not vest in him. It vests in Allah.

All matters relating to the appointment, powers, functions etc. of the Mutawalii are governed by the Wakf Act 1954.

*Scheme:* The Central Govt. has constituted a Central Wakf Council to., advise the State Wakf Boards on the working and administration of the Wakfs. The State Wakf Board is formed in each State in India. Its composition powers and

functions are defined. The Mutawalii, exercises his powers as per the directions of the Board, which controls him.

**Powers and Functions:**

(i) To register the Wakf with the State Wakf Board, furnishing the required details.

(ii) *Budget:* The Mutawalii should prepare the budget and submit to the Board. He shall maintain regular accounts of the financial year as per the directions of the Board. These shall be audited, and the Board may examine the Audit report.

(iii) **Duties:** (a) To carry out the directions of the Board.

(b) To furnish information and file return as required by the Board.

(c) He has no right to transfer any immovable property by way of sale, gift, mortgage or exchange. He may lease out subject to Board's directives.

(d) To pay from Wakf property certain expenses properly incurred.

**Removal:** The Board may remove a Mutawalii

(a) If he is convicted by a criminal court

(b) If he misappropriates the Wakf property or

(c) If he is of unsound mind or is infirm etc.

**Penalties:**

If the Mutawalii fails to perform his duties in respect of registration, furnishing accounts, discharging public dues etc., he may be punished by the court with a penalty upto Rs. 1,000.

**23. Sajjadanashan:**

"Sajjada" means the carpet used for prayer by the Muslims, 'Nashin' means "sitting". Hence, the Sajjadanashin takes precedence on the carpet during prayers. The office is spiritual and he has certain spiritual functions to perform.

He has a special status as a spiritual preceptor, and is higher than a Mutawalli.

He is the head of a *Khankah*. He teaches religious doctrines and rules of life, he is the manager with administrative powers.

There are many Khankahs in various places in India.

A Khankha develops like this ; A Sufi or dervish settles down in a place, he attains sufficient importance. His life teachings attract disciplines who construct lodgements. This takia grows into Khankah. After the sufi dies, his grave becomes a shrine and a place of pilgrimage.

Generally the founder is the first Sajjadanashin and on his death, the spiritual line is continued by succession. The 'court has powers to remove him for proved misconduct: He has a right, to receive a share of the offerings.

#### **24. Takia (Tomb) Dargah:**

Takia literally means a resting place at a burial ground or a tomb. It may be a platform, in the graveyard, where prayers are offered,

A fakir who has abandoned worldly life, may reside in a place, leading a saintly life and teaching the gospel of Muslim religion to his disciples. On his death, he is buried and a tomb is built. Prayers are offered at the tomb.

Takia is recognised by law as a religious institution. An endowment to takia is valid (Mohiuddin Vs. Sayid Uddin). In India, this institution is called Dargah and when it assumes importance it becomes a Takia or Kankah,

#### **25. Imambara:**

This is a private place of worship set apart by a Muslim belonging to the Ithna Asrari Shiite faith. It is a place for the performance of certain religious ceremonies like Muharram and others. This may be the subject of a Wakf, It is a private Wakf.



This is exclusively used by the owner and the members of his family. The public are not allowed except with the permission of the owner. '

A Hindu cannot create imambara under a private endowment. (Mundaria Vs. Shyam Sunder).

## WILLS

### 26. Vasiyyatnama:

Vasiyyatnama is the document which embodies the "will" of the testator. Vasiyya means the "will" of the testator. The "*Hedaya*" is the leading authority on Wills. A 'will' is a divine institution. (According to Bukhan, the tradition demands that a Muslim who has properties, should not sleep even for two nights without writing a will)

### 27. Essentials: (i) Form;

A "will" may be oral or in writing. If it is oral, the burden of proof is heavy. If in writing, it need not be signed and if signed, it need not be attested (Koran). What is essential is that the "intention" must be clear.

#### (ii) Capacity:

Every Muslim, who is of sound mind is entitled to make a will. He must not be a minor. A Muslim attains majority at 15, But, according to the Indian Majority Act, he attains majority at 18, to make a will.

A will made under coercion, undue influence or fraud is invalid.

#### (iii) Restrictions: There are two main restrictions,

(a) He should not bequeath more than one third of his net estate. This is called the "bequeathable third", and,

(b) He should not bequeath to his own heirs. (However, the bequest is valid, if other heirs give their consent on the death of the testator)  
The will fails if these restrictions are not followed,

#### (iv) Object:

The will is invalid if the will is opposed to Islam, Hence, a will to build a Hindu temple, a Christian Church or a Jewish Synagogue, is void,

**(v) Bequests:**

Under a will no Muslim may bequeath more than one-third of his net estate. The subject of the bequest must be in existence at the time of the testator's death. The bequest may be the corpus, or the usufruct or both.

If the bequest exceeds one-third of the estate, the consent of the heirs is necessary to take effect. Bequest may be made to *pious purposes*,

**(vi) Legatee:**

A bequest may be made in favour of any person, irrespective of his religion. It may be made to an institution, or for a religious charitable object not opposed to Islam, A legatee who has killed the testator is disqualified.

**(vii) Revocation:**

Expressly or impliedly, the testator may revoke a bequest, e.g. if A makes a will bequeathing his farm house to B and later sells it to C\* there is implied revocation.

if the testator makes a second will, the first will is superseded. If the same thing is given to two different persons in the same will, then the bequest is to be shared equally.

**(viii) Registration:**

A Muslim "will" may be *sril* or *in writing*. If in writing **no registration is necessary (optional)**.

Under the Special Marriage Act 1954, if a Muslim registers his marriage with the marriage officer, he will be governed by the Indian Succession Act 1925. Under this he need not follow the bequeathable third rule.

**28. Bequeathable third rule:**

Under Muslim law, "will" (Vasiyya) is a divine institution. The "Hedaya" is the leading authoritative text on Muslim will. The document (will) is called Vasiyyatnama.

The will may be oral or in writing. It may be made by a Muslim who has attained majority (18 years), and who is of sound mind and understanding.

One major restriction imposed is on the bequest that may be made by the testator. This is called "bequeathable third."

**According to Bukhari the origin is as follows:**

The messenger of God "The Prophet", used to visit Abi Waqqas. Abi was sick and desired to bequeath his vast property. He had only one daughter as heir, He asked the messenger, whether he could bequeath two-third or half his property. The messenger answered "Bequeath one-third" only.

(There seems to be the influence of Roman law for this rule.)

### **Distribution:**

When the testator dies, funeral expenses, debts and other charges are to be met first. Then in the residue one third is the "bequeathable third." E.g., Rahman dies leaving 2 lakh Rupees. The funeral expenses, debts and others account for Rs. 80,000. Hence the balance is Rs. 1, 20,000 the bequeathable third is Rs. 40,000. Any bequeath above this amount is void (unless all the heirs agree.)

## **INHERITANCE (Faraid)**

### **29. Inheritance:**

"Learn the laws of Inheritance and teach them (to the people) for they are one half of useful knowledge"—Prophet.

According to Tyabji the law of inheritance is admirable for its completeness and for its success in selecting the persons on whom the property devolved. Sir William Jones opines that these laws are excellent, for any question may be rapidly and correctly answered.

The leading text is "SIRAJIYYAH" (the interpretation of the Koran) Mostly muslims in India are SUNNIs.

### **30. Sunni Law *Me in Principles:***

- (i) The spouse (husband or wife as the case may be) is an heir.
- (ii) Females and cognates are eligible to inherit.
- (iii) Parents and ascendants may inherit even if there are male descendants.
- (iv) Female is given one half of the share of the male.

The main features of the inheritance are: Classes of heirs : ' There are *three*

principal classes and *four* subsidiary classes.

### **Three Principal Classes:**

i. Koranic heirs (sharers) ii. Agnatic heirs (residuaries) iii. Uterine heirs (distant kindred)

### **Four Subsidiary Classes:**

i. Successor by contract ii, Acknowledged kinsman, iii. Sole legatee, iv. Escheat,

The principal heirs include all the blood relations. The succession is class I, first, then class II, and then class III.

The subsidiary heirs succeed thereafter in the order of classification.

**(i) Property:** (Mairi) No distinction is made between movable and immovable properties, joint and separate property. For purposes of inheritance, the property, is one and the same and includes the corpus and the usufruct (use).

**(ii)** There is no birth right as in Hindu law. There is no special successions (chance of succession) in Muslim law. The death of the owner (propositus) decides the succession.

**(iii) Rights of Males and Females:** Males and females have, in Muslim law, the right of inheritance. If a father dies leaving a son and daughter, the son gets two shares and the daughter one share, Widow estate is unknown to Muslim law,

**(iv)** The Doctrine of Representation is not recognised by Muslim law. According to Sirajiyah, "the nearest of blood must take." Whoever is related to the deceased shall not inherit while that person is living.

If A dies leaving his son Muhammad and, also Hussain, the son of the predeceased Basheer, Muhammad excludes Hussain. Both schools have recognised this.

(Many have opined that this is very unsatisfactory in India, But Pakistan has abolished this).

### 31. Class-as of Heirs (Sunni law) There are three principal heirs:

Class I [Koranic Heirs (Sharers) Class II Agnatic Heirs (Residuaries) Class III Uterine Heirs (Distant Kindred)

Subsidiary : Class IV Successor by

Contract Class V Acknowledged

Kinsman

Class VI Sole Legatee<sup>1</sup>

Class VII The State by Escheat Succession is according to order, stated above. The property of the deceased goes to class I, then to Class II and then to class III and so on.

#### Principal Heirs:

#### Class I (The Koranic Heirs) Sharers:

To this belong the close relatives of the deceased. There are twelve relations:

(1) Husband, (2) wife, (3) father, (4) true grandfather, (5) mother, (6) true grandmother, (7) daughter, (8) son's daughter, (9) full sister, (10) consanguine sister, (11) uterine brother, (12) uterine sister. (In this there are 8 females.)

Principle to be followed is as follows:

From the whole, of the property of the deceased, a slice is given to the above Koranic heirs. - Then the residue (which is the bulk) goes to the residuaries (called tribal heirs)

E.g: A dies leaving his widow W and a son S, Here W is a Koranic heir and gets 1/8 of the estate. The son is class II heir and gets 7/8.

Class II:

#### Agnatic Heirs:

These are "near male agnates", also called (wrongly) residuaries:

There are three groups :

Group 1: Son, son's son (how low so ever)

Group 2: Father, true grandfather.

Group 3: Full brother, full sister, consanguine brother and sister, full brother's son etc.

#### Principles:

Agnate heirs succeed when after giving a share to the Koranic heirs (Class I), a residue is left. In fact this residue is the bulk of the property.

(i) The shares are given on priority basis :

The rule of *el Jabari* is first to the order, next to the degree and then to the strength of the blood.,

Class II: Uterine heirs: These are called "distant kindred." According to Sirajiyah A distant kinsman is every relation who is neither a sharer nor a residuary."

i

There are three groups in this:

Group 1: Descendants-

Group 2: Ascendants

Group 3: Collaterals

The order of succession is, when there are no Koranic and Agnatic heirs the uterine heirs succeed.

### **32. AWL and Radd (Increase and "returns")**

The Prophet has said "Learn the laws of Inheritance and teach them, for they are one half of useful knowledge."

Though the law of inheritance is admirable and any question can be answered-correctly and rapidly, there are two circumstances called Awl and Radd, where, there are some difficulties.

The classes of heirs in Muslim law (Sunni) are class I: Koranic heirs; class II: Agnatic heirs and class III: Uterine heirs. Then, there are four subsidiary classes.

In the Koranic heirs, and Agnatic heirs in so far as the sharers are concerned, fractions are allowed. This poses three circumstances;

#### **(i) Equal to Unity**

Example: If A dies leaving father, mother, and two daughters, the shares will be : father  $\frac{1}{6}$ , mother  $\frac{1}{6}$ , two daughters :  $\frac{2}{3}$  Hence  $\frac{1}{6} + \frac{1}{6} + \frac{2}{3} = 1$ . Here no difficulty arises.

#### **(ii) More than Unity (Awl)**

Example: Husband  $1/2$ , two sisters  $2/3$ . The total of this would be  $1/2 + 2/3 = 7/6$ . This is more than one and hence, the difficulty is resolved as follows:

increase the denominator (this is awt) to make it equal to the sum of the numerators," Keeping the numerators as they are, the shares are to be reduced proportionately. 'Husband  $1/2 = 3/6$  (Multiplying by 3)

2 daughters  $2/3 = 4/6$  (Multiplying by 2) The total of the numerators is  $3+4=7$ . In this  $3+4=7$ , divide both sides by seven  $3/7+4/7=7/7=1$ . Hence, the shares are husband  $3/7$ , 2 daughters  $4/7$ .

**(iii) Less than Unity: (Radd)**

When the total of shares is less than one, and there are no heirs in class II, the residue returns to the Koranic heirs (Radd = returns).

E.g., mother  $1/6$ , daughter  $1/2$ .

The total  $1/6 + 1/2$  is  $2/3$  which means there is still  $1/3$  which returns. Hence, M =  $1/6$

D =  $1/2 = 3/6$  (Multiplying by 3) Total of numerators  $1 + 3 = 4$ . Dividing both sides by 4  $1/4 + 3/4 = 4/4 = 1$ . Hence mother  $1/4$  and daughter  $3/4$ .

### 33. Shia Law of Inheritance:

The main principles are as follows : (Ithna Ashari School of Jurisprudence).

1. Classification of heirs:

- (a) Nasab (relationship by blood)
- (b) Sahab (relationship by special cause) e.g.: Marriage etc.
- (a) Nasab is of two classes (i) Koranic heirs and (ii) Agnates and Cognates:

**Sahab is of two classes:**

- (i) Spouse (Status)
- (ii) Wala special legal relationship e.g., escheat. The heirs under Nasab are:

**Class 1:**

- (i) Parents
- (ii) Children and lineal

## Descendants Class 2:

- (i) Grand parents
- (ii) Brothers and sisters and their descendants.

## Class 3: Paternal uncles:

Maternal uncles and aunts and their ascendants and descendants.

Heirs under Nasab are: 1. Koranic heirs

(i) Husband:  $1/2$  if there are no children  $1/4$  if there are children.

(ii) Wife:  $1/4$  if there are no children  $1/8$  if there are children, (if there are more wives they share the above noted  $1/4$  or  $1/8$  equally). (Note ; In the absence of all other heirs the husband or wife, takes the entire share)

(iii) Father, mother: They take  $1/6$  each (iv) Daughter:  $1/2$  of the share of the son (v) Grand children: To find out the quantum of shares by the grand children, when their parents are dead, the law recognises no *representation* and stirpital succession.

**Examples: (i)** P has two sons A and B. B dies leaving his son C. If P dies, A excludes "C" as B is dead and 'C' is not allowed to represent, This is in both Shia and Sunni Schools.

B (Deceased)

**(ii)** P has two, sons A and B, A dies leaving his son C, and B dies leaving his sons D and E.

A (Deceased)

B (Deceased)

When P dies C gets  $1/2$  share; D and E together get  $1/2$  moiety i.e.,  $1/4$  each. Here *there is no representation but only a stirpital succession*. It is only the "koranic share" that comes to the descendants.



### **Class H Heirs:**

1. Ascendants (Collaterals not included)
2. Collaterals
3. Ancestors with Collaterals.

### **Class III heirs:**

In the absence of class I and II heirs, class III heirs inherit, Tyabji has given a summary of the rules:

- (i) Koranic share is to be given first to the surviving spouse,
- (ii) The residue is divided in order of priority.

Group B: Paternal and maternal uncles and aunts of the deceased.

Their descendants how low soever. Paternal and maternal uncles of the deceased's father and mother. Their descendants how low soever.

Group D: Here each group has priority over the next group.

## **MISCELLANEOUS TOPICS**

### **34. Hedaya (= Guide) (Survni law)**

It is the authoritative legal text of Muslim law in India. In Hanafi law "Hedaya" and "Fatava Alamgin" are two paramount "authorities" and are followed.

The author of Hedaya is Shaik Burhan al-Din Marghinani who lived in the 12th century. He hailed from Marghinan, a small town in Turkey. The author had written a book "Bidaya." The commentary on this is Hedaya. This is in Arabic. This was translated into Persian by four Maulvis. This was translated into English by Charles Hamilton, and, this is often referred to by the courts and the Bar in India. This is a world famous text or authority on Muslim law.

Hedaya deals with almost all topics of Muslim law: Wills (Vasiyyat), Pre-emption (Shufaa), Gifts (Hiba), Marriage (Nikah), Dower (Mehtar), Divorce (Talak) etc.

### **35. "Mohammedan" defined:**

Any person who professes Mohammedan religion (Islam) is a "Mohammedan" (Mulla). Islam means "**surrender to Allah.**"

### **Acquisition:**

- (i) By birth
- (ii) By conversion.

**Tests:** it is not necessary, according to the courts, that the person should follow any particular rites or ceremonies. Enough if he acknowledged that

- (i) there is but one God
- (iii) that Mohammed is His Prophet.

The trading communities: Khojas (means respectable person), Bohoras (means merchant) and Memons (believer), in Maharashtra and Gujarat are Muslims. The leading case is *Naranikai Vs. Farakkal*,

### **36. Apostacy and Conversion:**

Definition: Renunciation by Muslim of his religion is called "Apostacy" (Ridda). When a person embraces Islam, it is called "conversion".

Apostacy was, at one time, a treason; the punishment was life imprisonment and in extreme cases, death penalty. Of course, this was subject to a number of exceptions. Apostacy is no longer a treason or a punishable offence.

### **37. Apostacy and Marital Status:**

**(i) Apostacy by the Husband:** His marriage with his Muslim wife is dissolved. Apostacy may be made expressly or by implicit conduct.

**Apostacy by the wife;** Mere Apostacy by the wife, will not dissolve the marriage with her Muslim husband, But, according to Muslim law, apostacy by the wife operated as dissolution of marriage. In fact, this was the way open to her to get rid of her husband ! With the passing of the Dissolution of Muslim.

Marriage Act 1939, apostacy does not dissolve the marriage. In *Khambatta Vs Khambatta* a Muslim married in Christian form. The wife became a convert to Mohammedanism. The husband divorced her by Talaq. The Bombay High Court held that the divorce was valid, as the *Lex domici Hi* was the religion of the parties: Muslim law.

Conversion of non- Muslim husband to Islam ;,This will not dissolve his

marriage, A Christian husband, cannot dissolve his marriage by embracing Islam.

(vii) Conversion of non-Muslim wife to Islam; This will not *ipso facto* dissolve the marriage. Hence a Hindu, Christian, Jew or Zoroastrian wife cannot dissolve the marriage by conversion. In Robaba Khanum Vs Irani (Bombay case) W a Zoroastrian wife married H in Persia according to Zoroastrian rites. Two sons were born to them. She, then embraced Islam and offered Islam to her husband. H refused. W filed a suit for dissolution of the marriage. Held, W cannot dissolve the marriage by conversion.

## **REFERECE SECTION**

### **Muslim Personal Law (Shariat) Application Act, 1937 An Act to make provision for the application of the Muslim Personal Law (Shariat) to Muslims [Fn. 1]**

**WHEREAS it is expedient to make provision for the  
application of the Muslim Personal Law (Shariat) to Muslims  
[Fn. 2];**

#### **It is hereby enacted as follows: - .Statement of Object**

For several years past it has been the cherished desire of the Muslims of British India that Customary Law should in no case take the place of Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform. The Jamiat- ul-Ulema-i-Hind, the greatest Moslem religious body has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure to this effect. Customary Law is a misnomer in as much as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in the future that certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so-called Customary Law is simply disgraceful. All the Muslim Women Organisations have therefore condemned the Customary Law as it adversely affects their rights. They demand that the Muslim Personal Law (Shariat) should be made applicable to them.

2. The introduction of Muslim Personal Law will automatically raise

them to the position to which they are naturally entitled. In addition to this present measure, if enacted, would have very salutary effect on society because it would ensure certainty and definiteness in the mutual rights and obligations of the public. Muslim Personal Law (Shariat) exists in the form of a veritable code and is too well known to admit of any doubt or to entail any great labour in the shape of research which is the chief feature of Customary Law.

## **1 . Short title and extent.-**

**(1)** This Act may be called the Muslim Personal Law (Shariat) application Act, 1937.

**(2)** It extends to the whole of India except <sup>[1]</sup> the territories which, immediately before the 1st November, 1956, were comprised in Part B States <sup>[2]</sup>.

**2. Application of personal law to Muslims.-** Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).