**Ahmednagar Jilha Maratha Vidya Prasarak Samaj's**

## NEW LAW COLLEGE, AHMEDNAGAR

# FAMILY LAW-I

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**STUDY MATERIAL**

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# 1 MODULE 01 INTRODUCTION TO HINDU AND MUSLIM LAW

## 1.1 NATURE OF HINDU LAW

It is not law as understood in modern times. It is not passed by any legislature. It is supposed to be of divine origin, being derived from the Vedas which are the revelations of the God himself. It is a branch of Dharma. i.e. the duties and rules of conduct. It is therefore "what is followed by those learned in the Vedas, and what is approved by the conscience of the virtuous, which are exempt from hatred and inordinate affection". (Manusmriti)The Hindu law as commonly understood, is a set of rules contained in several Sanskrit books, which the Sanskiritists consider as books of authority on the law governing the Hindus. Today however, the picture is different, large portion of Hindu law has now been codified. Mixture of Codified and Un-codified Law

Codification is mainly found in the following four Acts:

1. The Hindu Marriage Act,1955
2. The Hindu Minority and Guardianship Act, 1956
3. The Hindu Adoption and Maintenance Act, 1956
4. The Hindu Succession Act, 1956

## 1.2. APPLICATION OF HINDU LAW

**1 Hindu by Religion**: In this category two types of persons fall –

a) Those who are originally Hindus, Jains, Sikhs or Buddhist by religion, and

b) Those who are converts or reconverts to Hindu, Jain, Sikhs or Buddhist religion

c) Converts and Reconverts to Hinduism

Converts and Reconverts are also Hindus. SC, in the case of ***Peerumal v Poonuswami AIR 1971***, has held that a person can be a Hindu if after expressing the intention of becoming a Hindu, follows the customs of the caste, tribe, or community, and the community accepts him. In ***Mohandas vs. Dewaswan*** board AIR 1975, Kerala HC has held that a mere declaration and actions are enough for becoming a Hindu.

## 2. Hindu by Birth

A Child whose both parents were Hindus, Sikhs, Jains or Buddhists at the time of his birth, is regarded as Hindu. A person will be Hindu if at the time of his birth one of the parents was Hindu and the child is brought up as a member of the tribe, community, group or family to which Hindu parent belonged at the time of his birth.

## 3. Who are not Muslims, Christians, Parsis or Jews:

Any person who is not a Muslim, Christian, Parsi or Jew and who is not governed by any other law, is governed by Hindu law, unless it is proved that Hindu law is not applicable to such a person

## UNDER THE CODIFIED LAW:

Section 2 of the Hindu Marriage Act 1955, provides that the Act applies to the persons listed below (and similar provisions are also made in the other enactments of Hindu Law) –

**1. Application of Act** – This Act applies –

a) To any person who is Hindu by religion in any of its forms of development, including a *Virashaiva, a Lingayat or a follower* of the *Brahmo, Prarthana* or *Arya Samaj;*

b) To any person who is a Buddhist, Jaina or Sikh by religion; and

c) to any other person domiciled in the territories to which this Act extends, who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

*Explanation* – The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be –

a) Any child, legitimate, or illegitimate, both of whose parents are Hindus, Buddhists, Jains or Sikhs by religion;

b) any child, legitimate, or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion, and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and

c) any person who is a convert or re-convert to the Hindu, Buddhist, Jain or Sikh religion.

2. Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Schedule Tribes within the meaning of clause (25) of Article 366 of the Constitution, *unless* the Central Government, by notification in the Official Gazette, otherwise directs.

3. The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

## PERSON TO WHOM HINDU LAW APPLIES (UNCODIFIED LAW):

1. Hindus by birth and also to Hindus by conversion in any of its forms or developments including Brahmans, Arya Shamanists etc.

2. Illegitimate children whose parents are Hindus.

3. Illegitimate children born of a Christian father and a Hindu mother and brought up as Hindus.

4. Buddhists, Jains, Sikhs and Nambudry Brahmans except, so far such law is varied by custom and to lingayats who are considered as Shudras.

5. Sons of Hindu dancing girls of Naik caste converted to Mohammedanism where the sons are taken into the family of Hindu grandparents and are brought up as Hindus.

7. Brahmos and Arya Samajists, and to Santhals of Chhota Nagpur, and also to Santhals of Manbhum except so far as it is not varied by custom.

8. A Hindu who has made a declaration that he is not Hindu for the purpose of Special Marriage Act 1872, and

9. A person who is born a Hindu and has not renounced the Hindu religion, does not cease to be a Hindu merely because he departs

10. A Hindu by birth who having renounced Hinduism, has reverted to it after performing the religious rites of expiation and repentance, or even without a formal ritual or re-conversion when he was recognized as a Hindu by the community

## 1.3. SOURCES OF HINDU LAW

The phrase "source of law" has several connotations. Authority which issues rules of conduct which are recognized by Courts as binding The maker of law Social conditions which inspires the making of law for the governance of the conditions 'cause of law': the material from which the rules and laws are known 'evidence of law' and it is in this sense that the expression 'source of law' is accepted in Jurisprudence. It is important to study the sources of law because in every personal legal system only that rules is law which has place in its sources. A rule not laid down or not recognized in the sources is not a rule in that legal system.

## ANCIENT SOURCES

1. Sruti
2. Smriti
3. Digests and Commentaries
4. Puranas
5. Customs

## MODERN SOURCES

1. Justice, equity and good conscience
2. Precedent
3. Legislation.

## ANCIENT SOURCES

## SRUTI

The word is derived from the root “sru” which means to hear, Sruti literally means "what is heard". The srutis are believed to contain the very words of god. It is believed that the rishis and munis had reached the height of spirituality where they were revealed the knowledge of Vedas. They are supposed to be the divine utterances to be found in the four Vedas Thus, srutis include the four Vedas - rig, yajur, sam, and athrava along with their brahmanas. The brahmanas are like the appendices to the Vedas.

Vedas primarily contain theories about sacrifices, rituals, and customs. Some people believe that Vedas contain no specific laws, while some believe that the laws have to be inferred from the complete text of the Vedas. Srutis are believed to be the ultimate sources of law, in the sense of rules of human conduct.

## SMRITI

Smriti literally means that which was remembered. Both sruti and Smriti refers to the utterances and precepts of the god, which have been heard and remembered respectively, and handed down by the Rishis (sages) from generation to generation. Traditionally, Smritis contain those portions of the Srutis which the sages forgot in their original form and the idea whereby they wrote in their own language with the help of their memory. Thus, the basis of the Smritis is Srutis but they are human works.

The number of Smriti writers is almost impossible to determine but some of the noted Smriti writers enumerated by Yajnavalkya (sage from Mithila and a major figure in the Upanishads) are Manu, Atri, Vishnu, Harita, Yajnavalkya, Yama, Katyayana, Brihaspati, Parashar, Vyas, Shankh, Daksha, Gautama, Shatatapa, Vasishtha, etc.

The rules laid down in Smritis can be divided into three categories viz.

1. Achar (relating to morality),

2. Vyavahar (signifying procedural and substantive rules which the King or the State applied for settling disputes in the adjudication of justice) and

3.Prayaschit (signifying the penal provision for commission of a wrong).

**Shyam Sunder Prasad Singh V. State of Bihar (1980) Supp. S.C.C. 720)**

The Supreme Court has observed that if there is divergence of opinion among the Smritis, the court should consult the prevailing practice among the people, while decoding a case. If there is a clear usage to the contrary, the Smriti must yield to such usage.

## DIGEST AND COMMENTRIES

After Srutis came the era of commentators and digests. Commentaries (Tika or Bhashya) and Digests (Nibandhs) covered a period of more than thousand years. All the Smritis did not agree with one another in all respects, and this conflict led to several interpretations put upon them. This in turn gave rise to commentaries called Nibandhas. Nibandhas are nothing but the interpretations put on the Smritis by various commentators.

However, it is interesting to note that these commentators did not merely interpret the Smriti, but they also recited the customs and usages which the commentators found prevailing among them. In other words, while professing to interpret the ideas laid down in the Smriti, these commentators introduced modifications in order to bring it into harmony with the current usages. Some of the commentaries were, manubhashya, manutika, and mitakshara. While the most important digest is Jimutvahan's Dayabhag that is applicable in the Bengal and Asam area. The authority of the several commentators varied in different parts of India, giving rise to what are known as the different schools of Hindu Law. Broadly speaking there are two Schools, the Mitakshara School and the Dayabhaga School.

## PURANAS

The Puranas are also a source of Hindu Law. The Puranas are codes which illustrate the law by instances of its application.

## CUSTOM

Custom may be defined as a habitual course of conduct generally observed in a community. The Sanskrit equivalent of custom is Sadachara, which means " the approved usage" or "the usage of the virtuous man". Custom is thus a rule which, as a result of very long usage, has obtained the force of law in a particular community or in a particular district.

## KINDS OF CUSTOM

1. Local Custom
2. Class/Caste Custom
3. Family Custom
4. Business/ Trade Custom

## ESSENTIAL OF VALID CUSTOM

1. It must be ancient
2. It must be Certain
3. It must be Reasonable
4. It must be Continuous
5. Must not be opposed to public policy
6. Must not be opposed to any law

## PROOF OF CUSTOM

The burden of proving a custom is on the person who alleges it. Usually, customs are proved by instances. In the case of ***Prakash vs Parmeshwari***, it was held that one instance does not prove a custom. However, in the case of ***Ujagar vs Jeo***, it was held that if a custom has been

brought to notice of the court repeated, no further proof is required. Existence of a custom can also be proved through documentary evidence.

## MODERN SOURCES

## JUSTICE, EQUITY AND GOOD CONSCIENCE

Equity means fairness in dealing. Modern judicial systems greatly rely on being impartial. True justice can only be delivered through equity and good conscience. In a situation where no rule is given, a sense of 'reasonableness' must prevail. Occasionally it might happen that a dispute comes before a Court which cannot be settled by the application of any existing rule in any of the sources available. Such a situation may be rare but it is possible because not every kind of fact situation which arises can have a corresponding law governing it. The Courts cannot refuse to the settle the dispute in the absence of law and they are under an obligation to decide such a case also. For determining such cases, the Courts rely upon the basic values, norms and standards of fair play and propriety. In terminology, this is known as principles of justice, equity and good conscience. They may also be termed as Natural law. This principle in our country has enjoyed the status of a source of law since the 18th century when the British administration made it clear that in the absence of a rule, the above principle shall be applied. In Kenchava V. Girimalappa (1924) the Privy Council held that a murderer was disqualified from succeeding to the property of the victim. Thus, a rules of English law founded on public policy, was applied to a Hindu on grounds of justice, equity and good conscience. Now, this disqualification is statutorily recognized in the Hind Succession Act, 1956.

## PRECEDENT/ JUDICIAL DECISIONS

After the establishment of British rule, the hierarchy of Courts was established. The doctrine of precedent based on the principle of treating like cases alike was established. The courts had to ascertain and administer the personal law of the Hindus in various matters, such as marriage, adoption, succession and so on. The commentaries are often silent on several points, and the judges have filled in these blanks whilst deciding cases coming cases coming before them. As a result of the British rule in India, judicial precedents became necessary and useful guides in the application of Hindu law. Thus, today no lawyer will be seen referring to the

original text of Hindu law, as he would find all his requirements in the Law Reports. The progress that Hindu law has made in the 19th and 20th centuries is entirely due to the rulings of the courts. The decisions of these Courts have often superseded the Commentaries. As precedents, these decisions have a binding force. Today, the judgment of SC is binding on all courts across India and the judgment of HC is binding on all courts in that state, except where they have been modified or altered by the Supreme Court whose decisions are binding on all the Courts except for itself.

## LEGISLATION

Legislations are Acts of Parliament which have been playing a profound role in the formation of Hindu law. After India achieved independence, some important aspects of Hindu Law have been codified. After codification, any point dealt with by the codified law is final. The enactment overrides all prior law, whether based on custom or otherwise unless an express saving is provided for in the enactment itself. In matters not specifically covered by the codified law, the old textual law contains to have application. In modern society, this is the only way to bring in new laws. The Hindu Law Committee, appointed in 1941, recommended that this branch of the law should be codified in gradual stages.

However, the most important enactments were those which came in 1955 and 1956, which were amended in 1976, 1994 (Maharashtra State) and 2005.

## 1.4. SCHOOLS OF HINDU LAW

The Hindu scriptures were not uniformly interpreted by the Hindu scholars, and this gave rise to diverging opinions on the interpretations of particular text. Colebrook, the European scholar of Hindu law, spoke of this divergence as representing schools of Hindu Law. The works which was received universally became the subject of subsequent commentaries. The commentatotor put his own gloss on the ancient text, and his authority, having been receive in one and rejected in another part of India results in to schools.

## MITAKSHARA

Literal meaning of word Mitakshara is a concise work. It is a running commentary on the code of Yajnavalka smriti. It has been written by an eleventh century jurist by the name of Vijnaneshwar, and prevails in all parts of India except in Bengal it is orthodox school of Hindu law. It is subdivided into four schools prevailing in different parts of India.

These different schools have the same fundamental principles, but differ in matters of details, especially with reference to the topics of adoption and inheritance. These four Mitakshara sub schools are as follows

| **Name of School** | **Area of Application** |
|---|---|
| The Banaras School | Northern India |
| The Mithila School | Bihar |
| The Dravida or Madras School | Southern India |
| The Maharashtra or Bombay School | Western India |

## DAYABHAGA

It is followed mainly in Bengal. It is not a commentary on any particular code, but is a digest of all the codes. It has been written by Jimutavahana, who lived sometime in the twelfth century. It is reformist School of Hindu law. It is not divided in to any sub-schools. On all those matters on which Dayabhaga School was silent Mitakshara School will prevail. The Mitakshara and Dayabhaga Schools differed on important issues as regards the rules of inheritance.

However, this branch of the law is now codified by the Hindu Succession Act, 1956, which has dissolved the differences between the two. The main divergence between the two in matters connected with the joint family system has now been diluted further after the 2005 Amendment of the Hindu Succession Act, which has abolished the gender inequality which existed prior to the said amendment.

## EFFECT OF MIGRATION

When a Hindu Family migrates from one state to another state, the law draws a presumption that it carries with is its personal law, i.e. the laws and customs prevailing in the State from which it came. The presumption can, however, be rebutted, by showing that such a family has adopted the law and usages of the new sate where it has settled down

## DEVELOPMENT AND NATURE OF MUSLIM LAW

**"To those not born and bred within the pale of Islam, the study of Muslim Law is usually attended with great difficulties."**

**-SYED AMEER ALI**

## DEVELOPMENT OF MOHAMMED LAW IN INDIA

Mughal Emperors being Hanafis, the Hanafi law was administered in India till the establishment of the British rule. The British applied Mohammedan law as a branch of personal law to those who belongs to the Muslim religion, in accordance with principle of their own school or Sub-school. In all suits, regarding inheritance, succession, marriage, caste and other usages or Institutions the laws of the Quran, in accordance with opinion of the maulvis where invariably adhered to in the case of Muslims. With the changing social conditions, the need for a change in some of these laws became apparent. on the one hand, certain portions of the law were abolished, such as the banning of slavery and forfeiture of rights on apostasy.

Similarly, certain portions of the customary law were altered to make the original rules of Islamic law applicable. The Wakf Act, 1913, was enacted on these lines. Today, the Law of Marriage, Divorce, Dower, Legitimacy, Guardianship, Wakf, Wills and Gift and Inheritance among Muslims is uniform all over India. The Shariat Act of 1937 abrogated custom, and restored to Muslims their own personal law in almost all cases. Thus, Mohammad Law, as applied in India, is the Shariat, as modified by the principles of English Common law and equity.

## APPLICATION OF MUSLIM LAW

Like Hindu law, Mohammadan law is a personal law, Unlike territorial laws it does not apply to all persons in a given state our country, it applies only to those persons who answer a given description- Muslims weather they are so by birth by birth or by conversion. To be a Muslim is to profess Islam i.e. to acknowledge that there is no God but God (i.e. there is only one God), and Mohammed is his prophet. **"La ilahi ill lil lah Mohammad ur Rasul Allah"**

Profession of the faith of Islam (i.e., belief in the unity of God) and the mission of Muhammad as a prophet or messenger of God are necessary and sufficient for establishing that a person is a Mohammadan by birth or by conversion. It is not necessary that he should observe any particular rights or ceremonies. A person who is born a Muslim remains a Muslim until he renounces the religion by an unequivocal renunciation of Islam. The mere adoption of some Hindu forms of worship does not amount to the renunciation of religion. An illegitimate son of a Hindu by a Muslim woman, who is brought up as a Hindu, may be regarded as a Hindu, though his mother is a Muslim.

Mohammedan law applies to –

- Muslim by birth, and
- Muslim by religion i.e. persons who have become converts to Islam

In India, Mohammedan law is applied as a branch of personal law to the Muslims in matters relating to Inheritance, Succession, Wills, Gifts, Wakfs, Marriage, Dower, Divorce, Paternity and Guardianship. In other matters the general laws of the land as for instance the law of Torts, The Indian Penal Code, the Indian Contract Act, etc. apply

The Courts in India apply those rules of Mohammad law which have been expressly directed to be applied to Muslims except in so far as they are abrogated by the Indian legislature. ( Thus, for instance, the rule of Muslim law that a convert from Islam is to be excluded from inheritance is abolished by the Freedom of Religion Act, 1850) Which, though not expressly directed to be applied, are not excluded by the Indian legislature, either expressly or by implication. These rules are applied as a matter of equity justice and good conscience. No rules of Mohammedan law that have not been expressly directed to be appointed can be applied if they have been abolished, either expressly or by necessary implication.

Thus, for instance, rules of Mohammedan law which regards to pre-emption are not applied in UP and Punjab, because there are special acts dealing with these topics in those states. Similarly, the rules of Mohammadan Criminal law are the Islamic law of Evidence, are not applied; rather the matter is governed by the Indian Penal Code and the Indian Evidence Act. In the mofussil areas of the erstwhile State of Bombay (now Maharashtra and Gujarat) the law to be applied in the trial of Suits was to be Acts of Parliament and Regulations of Government applicable to the case; in their absence, the usage of the country in which the suit arose was to be applied; if none such appeared, the law of the defendant and in the absence of any specific law and usage, justice, equity and good conscience alone would govern the case [Section 26 Bombay Regulation of 1827 (Regulation IV)]

## THE SHARIAT APPLICATION ACT, 1937

The place of the different enactments authorizing and regulating the application of Muslim law to Muslims in the different states of India is now taken by the Muslim personal law Shariat Application Act 1937. Word Shariat is derived from word Sharia it means "Islamic Canonical law based on the teaching of the Quran and the traditions of the Prophet (Hadith and Sunna) prescribing both religious and secular duties and sometimes retributive penalties for law breaking".

The object of the Act is as its preamble states to make provision for the application of the Muslim personal law "Shariat" to Muslims in India. The Act came into force on 7th October 1937. As per this Act, notwithstanding any customer usage to the contrary in all questions save questions relating to agricultural land regarding Intestate succession, Special property of females, including personal property inherited obtained under contract or gift or any other provision of personal law marriage, dissolution of marriage including Talakila, Zihar, Lian, Khula and mubarat, maintenance, Dower, Guardianship, Gift, Trust and Trust properties and work other than charities and religious endowments Muslim Personal law Shariat is to apply to all cases where the parties are Muslims (Section 2)

It will be seen that the matters enumerated above together constitute practically the whole branch of personal law and hence the Act is called the Muslim personal law application Act. The scope and purpose of section 2 of the Act is to abrogate custom and usage in so far as they have

displaced the rules of Muslim law. Wills and legacies are dealt with in section 3. As regards questions relating to Pre-emption the old law is left untouched by the Act. By mentioning ila and Zihar amongst the modes of dissolution of marriage, the Act seeks, it seems, to revive these modes of divorce. Another important point to note is that charitable and religious institutions are excluded from the scope of the Act.

**Noor Jahan V. E Tiscenko, AIR 1941 Cal, 582** Calcutta High Court has held that as regards marriage and divorce the Shariat Act requires the courts to apply Muslim law only if both the parties are Muslims. If, therefore only one of them is a Muslim the Act will not apply.

**Ashraf Ali V. Mohammed Ali AIR 1947 Bombay 122** The Bombay High Court has held that testamentary trust and testamentary work are covered by section 2 of the Act and therefore involving such trust and Wakfs, and Section 3 of the Act is not applicable in such cases Under Section 3 of the Act any person who satisfies the prescribed authority-that he is a Muslim, andhe is competent to contract within the meaning of section 11 of the Indian Contract Act 1872 and that he is a resident of India can, by declaration in the prescribed form filed before the prescribed authority declared that he desires to obtain the benefit of this Act, and thereafter, the Provisions of Section 2 apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated above, adoption wills and legacies were also specified. Provisions is also made for an appeal if the prescribed authority refuses accept such a declaration. It will be seen that Section 3 refers to adoption wheels and legacies. The provisions of this section may be called persuasive, unlike the provisions of section 2, which are obviously coercive.

Whereas the purpose of Section 2 is to abrogate customs and usages, in so far as these have displaced the rules of Muslim law. Section 3 does not invalidate the customs relating to adoptions, wills and legacies. It only provides an option to any person affected by this customs to abandon them and adopt Muslim law. Section 4 of the Act then empowers the state governments to make rules to carry out the purpose of the Act. Section 6 repealed certain Acts, to the extent that they permit inconsistent customs.

## EFFECT OF APOSTACY (CONVERSION) FROM ISLAM (EFFECT ON SUCCESSION)

A Convert from Islam does not lose his right of inheritance because of freedom of religion Act, 1850. A Hindu cannot succeed to the estate of a Muslim. Therefore, if a Hindu, with a Hindu wife and children embraces Islam, and marries a Muslim wife, his property will pass on his death to his Muslim wife, and not to his Hindu wife and children

## EFFECT ON MARRIAGE

If a Muslim husband renounces Islam, his marriage with his Muslim wife is dissolved ipso facto.. As regards the Muslim wife, the mere renunciation of Islam by her does not ipso facto dissolve the marriage. A conversion by a Muslim wife who was born a Muslim into Christianity does not, by itself dissolve her marriage. However, if the wife had been converted to Islam from some other faith, and she re-embraces her former faith, the marriage is dissolved.

## EFFECT OF CONVERSION TO ISLAM

On conversion to Islam, Converts, no matter what their previous religion may have been, must be taken, at that movement, to have renounced their former religion and personal law, and to have substituted, in its place, the Muslim religion and so much of the personal law as necessarily flows from that religion. Thus, an Indian Christian domiciled in India can, after his conversion to Islam, legally contract a second marriage with a Muslim women while his former marriage with a Christian women is still subsisting. A Muslim married a Christian women in the Christian form. The wife became a convert to Islam and the husband divorced her by Talak. It is valid. The Succession of property a convert to the Muslim religion would be governed by Muslim law, and not by the Indian Succession Act. The property of a Hindu converts to Islam will devolve according to Muslim law. But in all cases, the conversion must be bonafide, and not a colorable one, i.e. not a conversion with the sole purpose of evading the personal law to which such person is subject.

## SCHOOLS OF MUSLIM LAW

There are two schools of Muslim law Shia and Sunni. The division was caused due to difference which was wholly political Mohhmmad, the Prophet died in 632 A.D. without leaving any Male issue and on his death quarrel arose as to the succession of Imamate. i.e. the title of the spiritual and temporal headship of the Islam, after him. One group the Sunnis, advocated the principle of election in choosing the Imam. The shias on other hand believe that the prophet had appointed Ali as his successor. Thus, the divergence between the two groups of sects was chiefly political and dynastic. Doctrinal and legal differences began to grow only in Course of time. The Sunnis base their doctrine on the entirety of the traditions, and regard the concordant decisions of the successive Imams and of the general body of jurist as supplementing the koranic rules and as equal in authority to them.

The Shias, on the other hand rejects, not only the decisions of the jurists, but also all traditions not handed down by Ali or his immediate decedents-i.e. those who had seen the prophet and held discourses with him.

## SCHOOLS OF MUSLIM LAW

## SUNNI SCHOOL

1. Hanafi School Abu Hanafee.(A.H. 80 to 150)
2. Maliki School Malik-bin-Anas(A.H. 95 to 175)
3. Shaffie School Muhammad bin Idris Shaffie (A.H.150 to 204)
4. Hanbali School The Ahmad bin Hanbal (A.H.150 to 204

## HANAFI SCHOOL

Hanafi School is the first and the most popular schools in Muslim law. Before being named Hanafi, this school was known as Koofa School which was based on the name of the city of Koofa in Iraq. Later, this school was renamed as Hanafi School based on the name of its founder Abu Hanafee. The Hanafi School relied on the customs and decisions of the Muslim community. Thus, Hanafi School codified the precedent which is prevalent during that time among the Muslim community In Hanafi School, Hedaya is the most important and authoritative book which was created over a period of 13 years by Ali bin Abu Baker al Marghinani. This book provides laws on various aspects except for the law of inheritance. Lord Warren Hasting tries to

translate the Hedaya to English. He appointed many Muslim Scholars to translate the book. This school became widely spread in various territories, as a result, the majority of Muslims in countries such as India, Pakistan, Syria, and Turkey belong to Hanafi School.

In India, since the majority of Muslims are from Hanafi School, the Courts decide the case of a Sunni Muslim as per the Hanafi School unless it is specified that they belong to other schools.

## MALIKI SCHOOL

This school gets its name from Malik-bin-Anas, he was the Mufti of Madeena. During his period the Khoofa was considered as the capital of Muslim Khaleefa where Imam Abu Haneefa and his disciples flourished with Hanafi Schools. He discovered about 8000 traditions of Prophet but complied only about 2000 of them. In India, there are no followers of this school but when the Dissolution of Muslim Marriage Act, 1939 came in the picture, some of the laws and provision of this school was taken in account as they are giving more rights to the women than any other school. In Hanafi School, if the women not get any news of her husband, she has to wait till 7 years for Dissolution of the marriage, whereas in Maliki School the women have to wait 2 years for Dissolution of the Marriage.

## SHAAFI SCHOOL

The Shaffie School gets its name on the name of Muhammad bin Idris Shaffie, his period was between 767 AD to 820 AD. He was the student of Imam Malik of Madeena. Then he started working with the disciples of Imam Abu Haneefa and went to Khoofa. He conclude the idea's and the theories of Hanafi School and Maliki School in a friendly manner. The Imam Shaffie was considered as one of the greatest jurist of Islam. He created the classical theory of the Shaffie Islamic Jurisprudence. According to this school, they considered Ijma'a as the important source of the Muslim law and provide validity to the customs of the Islam. The main contribution of Shaffie School is the Quiyas or Analogy. The followers of Shafie School are spread in Egypt, Southern Arabia, South East Asia, Indonesia and Malaysia.

## HANBALI SCHOOL

The Ahmad bin Hanbal is the founder of the Hanbali School. When the Imam Shafie left for Baghdad, he declared that the Ahmad bin Hanbal was the only one after him who is the better jurist after him. The followers of Hanbali school found in Syria, Phalastine and Saudi Arabia.

## PRESUMPTION

Unless the contrary is shown, it is to be presumed that parties to a suit or proceeding are Sunnis of the Hanafi School. **Baftun v. Bilaiti Khanun (1903 30 Cal. 683)** The Calcutta High Court held that,In India, "there is a presumption that the parties are Sunnis, to which a great majority of the Muslims of this country belongs."

## SHIYA SCHOOLS

1. **ITHANA ASHARI SCHOOL**
2. **ISMAILIS SCHOOL**
3. **ZAIDAY SCHOOL**

## ITHANA ASHARI SCHOOL

These schools are based on the following of Ithna-Ashari laws. The followers of these schools are mostly found in Iraq and Iran. In India also there is the majority of the Shia Muslims, who follows the principles of the Ithna-Asharis School. They are considered political quietists. This school is considered as the most dominant school of the Shia Muslims. The people who follow the Ithna Asharis school believe that the last of the Imams disappeared and to be returning as Mehdi(Messiah).

## ISMAILIS SCHOOL

According to Ismailis school, in India there are two groups, the Khojas or Western Ismailis represents the followers of the present Aga Khan, Whom they considered as the 49th Imam in the line of Prophet, and the Bohoras i.e. the Western Ismailis are divided into Daudis and Sulaymanis. The Bohoras and Khojas of Mumbai are considered as the followers of this school. It is considered that the follower of these schools has special knowledge of religious doctrine.

## ZAIDAY SCHOOL

The followers of this school are not found in India but are maximum in number in South Arabia. This sect. of the shia school is the most dominant among all in Yemen. The followers of these schools are considered as political activism.

## OTHER SCHOOLS

1. **IBADI SCHOOL**
2. **AHMEDIYA SCHOOL**

## IBADI SCHOOL

Ibadi is a school which belongs neither to the Shia nor Sunni sect and this school claim that its history traces back to the times of 4th Khaleefa Ali. The Ibadi school gives more preference to the Quran and they do not give the Sunna much importance. This school has its followers in Oman. One of the most important points about this school is that besides the Quran, it has provided principal consideration to Ijtihad (personal reasoning) which has been partially accepted by the Sunnis and has been completely rejected by the Shias.

## AHMADIYA SCHOOL

The followers of Ahmadiya school claim to be Muslims but they do not follow Prophet Muhammed. This school has a recent origin and they are followers of one Ahmed who was alive in the 19th century. This school is said to have a British-Indian origin and Mirza Ghulam Khadiani is the founder of this school, who served the British Government. Even though this school claims to be a follower of Islam, none of the Muslim Government has accepted them as Muslims because they believe this school's faith is completely against the faith of Muslims. The Khadiyan village which is situated in Punjab in India is said to be the birthplace of Ahmed and thus it is their holy place and the followers are also known as Kadhiyani. There is no authoritative book of this school and because its origin is also recent, it has no recognition by the other authoritative books of Islam.

## PRESUMPTION

As most Shias are Ithna-Asharis, the presumption is that a Shia is governed by the Ithna-Ashari law (**Akbar ali V. Mohammad Ali (1932) 34 Bom.L.R.655**)

## APPLICABILITY OF LAW OF DIFFERENT SCHOOLS

When parties to the suits are Muslims of the same school, the law of that school will apply If belongs to different school, the law of defendant will apply The law changes with the change of school. Succession will be governed by the law of school possessed by him at the time of his death.

## CONCLUSION

Muslim law is governed by the teachings of the Quran and the Prophet Mohammad. There have been many different schools which follow their own interpretations of these teachings on points on which the Quran is silent. Muslim law is governed by the teachings of the Quran and the Prophet Mohammad. There have been many different schools which follow their own interpretations of these teachings on points on which the Quran is silent. While the major schools of Muslims can be divided under the two sects of Shia schools and Sunni schools, even the schools under these sects have been further divided into various schools. Each school has its own beliefs and practices and because is no set rule regarding the matters on which the Quran is silent, one school cannot be said to be better positioned than the other schools and thus even though there are many schools in Muslim law, they all lead to one path. Thus, the teachings of these schools can be compared to different paths which all lead to the same destination.

## SOURCES OF MUSLIM LAW

1. **QURAN**
2. **SUNNA (TRADITIONS OF THE PROPHET)**
3. **IJMA'A**
4. **QUIYAS**
5. **JUDICIAL DECISIONS**

6. **LEGISLATION**

7. **JUSTICE,EQUITY AND GOOD CONSCIENCE**

## QURAN

According to the Muslim belief, the *Qur'an* is the sacred book which was revealed from Allah to the Prophet Muhammad from 610 to 632 A.D, amounting to a period of 23 years. In terms of content and structure, the *Qur'an* contains 114 chapters, which are called *suras* in Arabic. The suras contain 6236 verses, which are called *ayahs* in Arabic. The *Qur'an* was revealed over two periods which are known as Meccan and Medinan. The majority of *suras* with a theological character were revealed during the Meccan period. By way of contrast, those revealed during Medinan period predominately contain *ayahs* of a political, social and legal character. There are a total of 200 verses related to legal rulings in the *Qur'an* and these may be classified as follows:

1. 70 verses on family and inheritance law
2. 70 verses on obligations and contracts
3. 30 verses on criminal law
4. 20 verses on procedure.

## SUNNA (TRADITIONS OF THE PROPHET)

The word Sunna means the 'path' and it is the practice and the precedents of the Prophet. It is the proper practical application of the basic principles of Islam embodied in the holy Qur-an. Qur-an and Sunna are the basic sources of Muslim law. Sunnas are traditional stories transmitted from the Prophet Muhammad called *Hadiths*. The memorisation and transmission of the *Sunna* in literary form is characterised as *Hadith*. The term *Hadith* which means 'occurring, taking place' represents the 'report' of the Prophet Muhammad's *Sunna*. This sources of law handed over to the Muslim community through rightful disciples of the Prophet  The first collection of Hadis and Sunna was Mu-atha of Imam Malik. (died AD 754). This book is considered as most authentic book of Hadiths. He collected about 10,000 traditions of the Prophet. He omitted 8000 of these 10,000 and the Mu-atha in its final form contains only about 2000 traditions.

## IJMA'A

The word Ijma'a means consensus. It is the unchallenged agreement of all Jurists of Islam of a particular period on a question of law. Its authority is based on a well known Hadis "My people will never agree on what is wrong". According to Imam Shafie, legal knowledge derived from Ijma'a . The jurists therefore took recourse to the principle of Ijma'a or consensus of opinions. Ijma'a is source of law because of this saying of Qur-an that 'to be followed is the path of the men of faith' and the Prophet's saying that "My people will never agree on what is wrong" The election of first Khaleefa Abu baker was the first instance of Ijma'a. Ijma'a once established cannot be repealed and no question of overruling of Ijma'a. Thus Ijma'a already establish through schools of law is the unchallenged source of law.

## QUIYAS

The Arabic word Quiyas means analogy. It is analogical deduction or the argument from the known to the unknown. It does not purport to create a new law but merely to apply old established principles to new circumstances. This is reasoning by analogy. Quiyas is more a principal of interpretation than a source of law. Ijithihad (Personal reasoning) lsthihsan (Juristic preference) Ikhthilaf (disagreement) are other principles of interpretation of Muslim law

## JUDICIAL DECISIONS (FATAWAS)

The decisions of the Indian Courts and the Privy Council have considerably influenced the tenets of Muslim Law. Fatwas or opinions of judges and Muftis in the light of facts of the case are important, as they have been instrumental in the development and enrichment of the principles of the Muslim Law. The most famous collection of Fatwas in India is Fatawa-i-Alamgiri, which was complied in Aurangzeb's time. In ***Vishwa lochan madan v. Union of India (7th July 2014 SC)*** Fatawas are not binding.

## LEGISLATION

The following are some legislative enactment which have considerably altered or modified the Islamic law.

1. The Kazis Act, 1880

2. The Guardian and Wards Act, 1890
3. The Musalman Wakf Validating Act, 1923, 1930
4. The Muslim Personal Law (Shariat) Application Act, 1937
5. The Dissolution of Muslim Marriage Act, 1939
6. The Wakf Act, 1954
7. The Public Wakfs (Extention) of Limitation Act, 1959
8. The Wakf (Amendment) Act, 1984
9. The Muslim Women (Protection of Rights on Divorce) Act, 1986
10. The Muslim Women (Protection of Rights on Marriage) Act, 2019

## JUSTICE, EQUITY AND GOOD CONSCIENCE

Where there is a conflict of opinion, and there is no specific rule to guide court, the Court follows that opinion which is more in accordance with justice, equity and good conscience **(Aziz Bano v. Muhammad 1925 47 All. 823)** Where the law analogically deduced is inadaptable to the present needs of the society, or where its rigid application would result in hardship to the public, rules of equity could be applied. Abu Hanifa, the great jurist, called this 'Isthihasan' (Juristic Preference)

## MODULE 02 MARRIAGE AND MATRIMONIAL RELIEFS UNDER HINDU LAW

## MARRIAGE

## EVOLUTION AND CONCEPT OF THE INSTITUTION OF MARRIAGE

To regulates the sex relationship. If it remains unregulated only maternity will be known therefore to determine the paternity of children concept of marriage is evolved. It confers status on parties to the marriage.

## NATURE AND FORMS OF MARRIAGE UNDER ANCIENT HINDU LAW

## HINDU MARRIAGE: A SACRAMENT OR A CIVIL CONTRACT

For a Hindu, marriage is a Samskara. It is the last of the ten sacrament. Performed to purify the body from inherited taint. It is more of a religious necessity and less of a physical luxury. a marriage is " the union of flesh with flesh and bone with bone."It is indissoluble union. As long as husband is alive, the wife is enjoyed to regard him as her God. Wife is declared to be half the body of her husband (Ardhangini) Who shares with him equally the fruits of all his acts, good or bad. The concept of Hindu marriage as a Sacrament continues even after Hindu Marriage Act. Hindu marriage is also a Contract. As per Manu, ceremony of Kanyadan fulfills all the requirements of a Gift. Hindu marriage is not only a sacrament but also a contract. Under the ancient uncodified Hindu Law, a Hindu marriage was not only a sacrament, but also a Contract (Purshottamadas v. Purshottamadas , Bhagwati Saran Singh v. Parmeshwari Nandan Singh Muthuswami v. Masilamani , Anjona Dasi v Ghose)

## ANCIENT FORMS OF MARRIAGE

## BRAHMA

In this form of marriage, the father gave the bride away in marriage without receiving any consideration from the bridegroom.

## DAIVA

A young girl was given to a person who officiated as a priest at a sacrifice performed by the girl's father in lieu of the dakshina payble to the priest.

## ARSHA

It required the bridegroom to diliver one or two pairs of cows to the bride's father. At the time of marriage, the cows were given back to the bridegroom along with the bride.

## PRAJAPTYA

It is similar to Brahma form, except that it was not necessary for the bridegroom to be batchelor.

## ASURA

The father of the bride was given some kind of monetary consideration for the marriage. As per the ancient text " where a man marries a girl for gladdening her father by money, it is called asura marriage.". This form of marriage was almost a marriage by sale, because it amounts to a sale of daughter by the father.

## GANDHARVA

Where the union was brought about by amorous desires or by a wish for domestic comfort, and mutual consent of the parties. Similar to what may be called " a love marriage" in modern times

## RAKSHASHA

This form of marriage was preceded by rape or the abduction of a virgin in times of war. This kind of marriage was effected by a forcible capture of the girl after her relative had been killed or wounded in the war.

## PAISHACHA

A form of a marriage between the girl and a man who had committed the crime of ravishing a girl while she was asleep or intoxicated. In such case the man was obliged to marry that girl as per the canons of Hindu law. Out of the above eight forms of marriage, the first four are the approved forms, whereas the last four are unapproved forms of marriage. Not recognized by The Hindu Marriage Act, it only laid down certain conditions which are essential for a valid Hindu Marriage.

## HINDU MARRIAGE ACT, 1955

This Act does not define the concept of Marriage. It only lays down the essential conditions for a valid marriage. Section 5 of the Act lays down five conditions for a valid marriage. The law relating to valid marriage can be studies under section 5,7,8,11,12,17 and 18.

## ESSENTIALS OF VALID MARRIAGE

1) **BOTH THE PARTIES MUST BE A HINDU**
2) **BIAGAMY**
3) **MENTAL CAPACITY**
4) **AGE**
5) **PROHIBITED DEGREES OF RELATIONSHIP**
6) **SAPINDAS RELATIONSHIP**
7) **CEREMONIES OF MARRIAGE (SEC.7)**
8) **REGISTRATION OF MARRIAGE (SEC.8)**
9) **CONSENT (SEC.12 (1) (C))**

## BOTH THE PARTIES MUST BE HINDU (Sec.5)

**5. Condition for a Hindu Marriage.-** *A marriage may be solemnized between any* ***two Hindus****,*

Hindu Marriage Act,1955 is applicable to Hindus only therefore the first condition of valid marriage is both the parties must be Hindu. Section 2 of the Act specifies who is Hindu for the purpose of application of this Act.

**This Act applies –**

a) to any person who is Hindu by religion in any of its forms of development, including a *Virashaiva, a Lingayat or a follower* of the *Brahmo, Prarthana* or *Arya Samaj;*

b) to any person who is a Buddhist, Jaina or Sikh by religion; and

c) to any other person domiciled in the territories to which this Act extends, who is not a Muslim, Christian, Parsi or Jew by religion,

Unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein, if this Act had not been passed.

***Explanation –*** The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be –

a) any child, legitimate, or illegitimate, both of whose parents are Hindus, Buddhists, Jains or Sikhs by religion;

b) any child, legitimate, or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion, and

who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and

c) any person who is a convert or re-convert to the Hindu, Buddhist, Jain or Sikh religion.

**2.** Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Schedule Tribes within the meaning of clause (25) of Article 366 of the Constitution, *unless* the Central Government, by notification in the Official Gazette, otherwise directs.

**3.** The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

Contravention of this condition will make such marriage void. A marriage between Hindu and a Non-Hindu under this Act is Void

**G.S. RAJ V. BANDARU PAVANI (AIR 2009 SC 1085)**

## BIAGAMY Sec. 5 (i)

**5. Condition for a Hindu Marriage.-** *A marriage may be solemnized between any **two Hindus**, if the following conditions are fulfilled, namely:*

(i) *neither party has a spouse living at the time of the marriage*

This Clause establishes the rule of monogamy, and prohibits polygamy, which was permitted before the Act came into force. It also prohibits polyandry, which was prohibited by the ancient Hindu law also. Monogamy means that one is permitted to have only one wife or one husband at a time. In other words parties proposed to marry with each other must not be already married or if married their spouse must not be living or there must be a valid divorce between them.

**Contravention of this condition will make such marriage void. (Sec.11)**

***11. Nullity of marriage and divorce- Void marriages.***- *Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, against the other party be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses(i), (iv) and (v), Section 5.*

**Contravention of this condition will also results in to penal offence (Sec.17)**

**17. Punishment of Bigamy.-** Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of Sections 494 and 495 of the Indian Penal Code (45 of 1860) shall apply accordingly.

**Sec. 494. Marrying again during lifetime of husband or wife-**

Whoever, having a husband or wife **living**, marries in any case in which such marriage is **void** by reason of its taking place during the life of such husband or wife, shall be punished with

**imprisonment** of either description for a term which may **extend** to **seven years**, and shall also be liable to **fine.**

**Exception-** this section does not extend to any person whose marriage with such husband or wife has been **declared void by a Court of competent jurisdiction**.

Nor to any person who contracts a marriage during the life of a former husband or wife, if such a husband or wife, at the time of **subsequent marriage**, shall have been **continually absent** from such person for the space of **seven years**, and Shall not have been **heard of** by such person as being **alive within that time** (7 Years) provided the person contracting such subsequent marriage shall, **before** such marriage takes place, **inform** the person **with whom** such marriage is contracted of the **real state of facts** so far as the same are within his or her knowledge.

**Sec. 495 Same offence with concealment of former marriage from person with whom subsequent marriage is contracted-** shall be punished with **imprisonment** of either description for a term which may **extend** to **ten years**, and shall also be liable to **fine.**

However, as per **Sec. 198** of **Criminal Procedure Code, 1973**, No Court shall take **cognizance** of this offence except upon a **complaint** made by some person **aggrieved** by the offence. If the aggrieved person is **wife**, complaint can be made on her behalf by her **father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister** or with the **leave of the court**, by **any other person** related to her by **blood, marriage or adoption**

## MENTAL CAPACITY Sec. 5 (ii) (a) (b) (c)

**5. Condition for a Hindu Marriage.-** *A marriage may be solemnized between any **two Hindus**, if the following conditions are fulfilled, namely:*

(ii) at the time of the marriage, neither party,-

(a) is incapable of giving a valid consent of it in consequence of unsoundness of mind; or

**Every kind of "unsoundness of mind" is not covered**

**It may not be persistent or continuous**

(b) though capable of giving a valid consent has been suffering from mental disorder of such a kind or to such an extent as to be **unfit for marriage** and the **procreation of children**; or

(c) has been subject to recurrent attacks of insanity or epilepsy;

**These mental conditions relates to pre-marriage and not post marriage conditions.**

**The burden of proof is on the petitioner in all cases.**

**Contravention of this condition will make such marriage voidable at the option of the party. (Sec.12(1) (b))**

**12. Voidable Marriages.-**(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:-

(b) that the marriage is in contravention of the condition specified in clause (ii) of Section 5;

## AGE Sec. 5 (iii)

**5. Condition for a Hindu Marriage.-** *A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:*

*(iii) the **bridegroom** has completed the age of **twenty one** years and the **bride** the age of **eighteen** years at the time of the marriage;*

**The Child Marriage Restraint Act, 1929**

15 or Bride and 18 for Bridegroom. Child marriage was neither valid nor voidable. Once performed they were perfectly valid. However both the Husband and wife are liable to be punished with imprisonment or fine or both.

**The Child Marriage Restraint (Amendment) Act,1978**

Raises the minimum ages of marriage to 18 for girls and 21 for boys

However, the marriage performed in violation of this condition is valid.

**The prohibition of Child Marriage Act, 2006**

Repealed earlier Act of 1929,

Secular law made applicable to all communities. The ages were retained i.e. 21 and 18. Makes Child marriage Voidable and in some cases void. Voidable at the option of the Child. Void if the child in taken away from the custody of lawful guardian/abducted/kidnapped/Sold/trafficked Section 9 and 10 prescribes punishments. To adult male marrying a minor girl, rigorous imprisonment up to two years, or fine up to one lakh rupees or both..Two any person who performs, conducts, directs or abets such marriage.

## NATURE OF SAME SEX MARRIAGE

**Arunkumar and Sreeja v. The Inspector General of Registration, Chennai (22.04.2019 Madras HC, Madurai Bench)**

Marriage Solemanized between a male and a trans women, both professing Hindu religion, is a valid marriage in terms of Sec. 5 of the Hindu Marriage Act,1955. The expression 'bride' occurring in Sec. 5 of the Act, will have to include within its meaning not only a women but also a transwomen. Court refuse to accept the meaning of word 'Bride' given in Oxford Advance Learners's Dictionery of Current English The term 'Bride' can only refer to a "Women on her wedding day".Here the Sreeja is a transgender and not a women. It would also include an intersex person/transgender person who identifies herself as women. The only consideration is how the person perceives herself

**National Legal Services Authority v. Union of India (2014) 5 SCC 438**

SC upheld the transgender persons right to decide their self identified gender. The Govts directed to grant legal recognition of their gender identity such as male, female or third gender This path breaking Judgement has been cited with approval in the nine judges bench of SC in

**Justice K.S. Puttaswamy v. UOI (2017) 10 SCC 1**

**Navtej Singh Johar v. UOI (2018) 10 SCC1**

**Shafin Jahan v. Asokan K.M. (2018) 16 SCC 368**

The right to marry a person of one's choice was held to be integral to Right to life U/A 21 of the Constitution of India

**Naz Foundation v. Govt. of NCT of Delhi (2009)**

Delhi HC held Sec. 377 of IPC void so far as it criminalizes private consensual sex between two adults.

**Suresh Kumar Koushal v. Naz Foundation (2014) 1 SCC 1**

Uphold the constitutional validity of Sec. 377 of IPC that criminalizes carnal intercourse 'against the order of nature', refused to accept the Judgement of Delhi High Court in Naz Foundation.

## PROHIBITED RELATIONSHIP Sec. 5 (iv)

**5. Condition for a Hindu Marriage.-** *A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:*

(iv) the parties are not within the **degrees of prohibited relationship** unless the **custom or usage** governing each of them **permits** of a marriage between the two;

## CUSTIM AND USAGES (SEC.3(a))

In this Act, unless the context otherwise requires,-

(a) the expression "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;

This clause prohibit a marriage between persons who are within the **degrees of prohibited relationship**. Except such marriage is allowed by the **custom and usages** of both the parties.

The Custom and usages must satisfy the criterion laid down is **Sec, 3 (a)** of the Act.

Degrees of Prohibited relationships are those as defined U/S **3(g)** of the Act.

## DEGREES OF PROHIBITED RELATIONSHIP (SEC.3(g))

Two persons are said to be within the "degrees of prohibited relationship"-

(i) if one is a lineal ascendant of the other; or

The lineal ascendant means an ancestor in the unbroken line of ascent.

There is no limit of degrees.

(ii) if one was the wife or husband of a lineal ascendant or descendant of the other; or

One cannot marry the wife or husband of one's lineal ascendant or descendant. E.g. 'P' cannot marry his father's wife (Stepmother), grandfathers wife. Similarly he cannot marry the wife of his son or of son's son whether a widow or divorcee. In case of females also, e.g. She cannot marry with Mother's husband or daughter's husband.

(iii) if one was the **wife** of the **brother** or of the **father's or mother's brother** or of the **grandfather's or grandmother's brother** or the other; or

(iv) if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters.

Explanation.- for the purposes of clauses (f) and (g) relationship includes-

(I) relationship by **half** or **uterine blood** as well as by **full blood**;

(ii) **illegitimate** blood relationship as well as **legitimate**;

(iii) relationship by **adoption** as well as by **blood**; and all terms of relationship in those clauses shall be construed accordingly.

**3. Definitions.-** In this Act, unless the context otherwise requires,-

(c)"full blood" and "half blood"- two persons are said to be related to each other by full blood when they are **descended** from a **common ancestor** by the **same wife** and by half blood when they are descended from a common ancestor but by **different wives;**

(d)"uterine blood" - two persons are said to be related to each other by uterine blood when they are **descended from a common ancestor** but by **different husbands**.

Explanation.- In Clauses (c) and (d) "ancestor" includes the father and "ancestress“ the mother;

## SAPINDA RELATIONSHIP Sec. 5 (iv)

**5. Condition for a Hindu Marriage.-** *A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:*

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

## SAPINDAS RELATIONSHIP (SEC.3(f))

In this Act, unless the context otherwise requires,-(f) (i)"Sapinda relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation;

(ii) two persons are said to be "sapinda" of each other if one is a lineal ascendant of the other within the limits of sapinda relationship, or if they have a common lineal ascendant who is within the limits of sapinda relationship with reference to each of them;

X denotes the person concerned, F demotes the Father, M denotes the Mother, MF stands for his mother’s father and so on…

As per the above rules, the sapinda relationship of X extends upto MF (three generations) on the mother’s side, and upto FFFF (five generations) on the father’s side. It will be seen that in both cases, X is counted as the first generation.

## THEORIES OF SAPINDA RELATIONSHIP

In the ancient Hindu Law, two theories of sapinda relationship were propounded

## OBLATION THEORY

The Hindus believes in ancestor worship and offer pinda-dan to their departed ancestors. Every year in the shardha fortnight, offereings are made to departed ancestors. These offering are mainly in the form of pinda. The pinda literally means ball. The pinda is usually made from rice. The rule is that one offer one full pinda each of his paternal ancestors and one full pinda each to his two maternal ancestors. One also offers one divided pinda each to his three next paternal ancestors and one divided pinda each to his two next maternal ancestors. Thus, he is connected by pinda dan to the six ancestors on the paternal side and the four ancestors on the maternal side and is sapinda to them. When two persons offer pindas to the same ancestor, they are also sapindas to each other

## PARTICLES OF THE SAME BODY THEORY.

This theory was propounded by Vijnaneshwara. He changed the meaning of pinda from ball to particles of the same body. According to him the sapinda relationship arises between two persons on account of their being connected by particles of one body. All those who are of the same blood are related to each other. Such definition of sapinda is too wide as such relationship can exist in eternal circles of birth.It may exist upto 10,20 or 100 or more generations, so long as one can trace his descent through a male or female to a comman ancestor or ancestress. Vijnaneshwara proceeded to limit it by saying that it existed upto seventh degree on the father's side, and upto fifth degree on the mothers side

## CEREMONIES OF MARRIAGE Sec. 7

**7. *Ceremonies for a Hindu marriage.-****(1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.*

*(2) Where such rites and ceremonies include the saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.*

The Act gives statutory recognition to Saptapadi But it doesn't make saptapadi an obligatory one. Ceremony means customary rites and ceremonies of either party to the marriage. It consist of **Kanyadan**, formal giving away and acceptance of the bride before the sacred fire and

recitation of Vedic mantras. The **Saptapadi:** the taking of the seven steps by both before the sacred fire.

**SITABAI V. VITHABAI (1958 NLJ, 10)**

Where it is shown to the court that a marriage has in fact taken place, this gives rise to a dual presumption, viz., that all the legal formalities of the marriage have been complied with, and also that all the necessary ceremonies have been performed. It would be for persons who challenge the validity of such a marriage to rebut these presumptions.

## INNOVATION OF NEW CEREMONIES

Ordinarily no one, not even a community, organization or movement is free to alter, vary or create a ceremony at one's pleasure.

| | |
|---|---|
| Arya Marriage Validation Act, 1937 | Vedic Marriage |
| Anand Marriage Act, 1909 | Sikh Marriage |

**DEVANI V. CHINDAVARAM AIR 1954 Mad 657**

In Tamil Nadu, an association known as Anti-Purohit Organization or Self-Respectors cult exists for more than 50 years. Its objective is to do away with the traditional rites and ceremonies prevailing among the Hindus. The Organization has innovated simple rites and ceremonies. Marriages performed by help of these rites and ceremonies are known named as Surya-mariyathai or Seerthiruththa marriages. In such marriage the relatives and friends of the bride and bridegroom and respected persons of the locality are invited.

The couple s introduced to guest. In their presence the simple ceremony of exchanging garlands and rings between the couple take place. The marriage was held void because no one can alter personal law. After this decision Sec. 7-A was inserted by an amendment, which came into force on 17/1/68. It applies to those marriages only which are performed in the State of Tamil Nadu.

**S NAGLINGAM V. SIVAGAMI (2001) 7 SCC 487**

The result of this statutory modification is that a mere execution of a document by the spouses that they have become husband and wife or a declaration in the presence of friends and other persons will confer the status of husband and wife on the parties (Sec. 7-A (1) (a)) Presence of priest is not necessary

## REGISTRATION OF MARRIAGE Sec. 8

**8. Registration of Hindu Marriages.-***(1) For the purpose of* ***facilitating the proof*** *of Hindu marriages, the* ***State Government may make rules*** *providing that the parties to any such marriage may have the* ***particulars relating to their marriage*** *entered in such* ***manner*** *and subject to such* ***condition*** *as may be* ***prescribed*** *in a* ***Hindu Marriage Register*** *kept for the purpose.*

**The Maharashtra Regulation of Marriage Bureaus and Registration of Marriages Act, 1998**

**The Maharashtra Regulation of Marriage Bureaus and Registration of Marriages Rules, 1999**

**SEEMA V. ASHWANI KUMAR AIR 2006 1158**

Registration of marriages falls within the ambit of expression "vital statistics" as provided in Entry 30, List-3, of 7th Schedule of the Constitution. Therefore, marriage of all citizens of India belonging to various religions should be made compulsorily registrable in the States where they are solemnized.

**SEEMA V. ASHWANI KUMAR 2008 (1) SCC 180**

In this case Supreme Court has given direction to all State and Union Territories to file compliance report. The court had further granted a period of three months for the compliance

## DIVORCE

## THEORIES OF DIVORCE

## FAULT THEORY

## MUTUAL CONSENT THEORY

## IRRETRIEVABLE BREAKDOWN OF MARRIAGE THEORY

## FAULT THEORY SEC 13 2 (1) (1)

Under the **Fault** theory or the **offences** theory or the **guilt** theory, Marriage can be dissolved only when **either** party to the marriage has **committed** a **matrimonial wrong**. It is necessary to have a **guilty** and an innocent party, and the only **innocent party** can seek the **remedy** of divorce. However, the most striking feature and the **drawback** is that if **both parties** have been at **fault**, there is **no remedy** available.

## MUTUAL CONSENT THEORY SEC 13 B

The underlying rationale is that since two persons can marry by their free will, they should also be allowed to move out of the relationship of their own free will. However, critics of this theory say that this approach will promote immorality as it will lead to hasty divorces and parties would dissolve their marriage even if there were slight incompatibility of temperament.

## IRRETRIEVABLE BREAKDOWN OF MARRIAGE THEORY 13 1 A

The breakdown of marriage is defined as "such **failure** in the matrimonial relationships or such circumstances **adverse** to that relationship that no **reasonable probability** remains for the **spouses** again **living together** as husband & wife." Such marriage **should be dissolved** with maximum **fairness** & minimum **bitterness, distress** & **humiliation.**

## GROUNDS OF DIVORCE

All the **three theories of divorce** are recognized by Act & divorce can be obtained on the basis of **any one of them.** The **Act, 1955** originally, based divorce on the fault theory, and enshrined nine fault grounds in **Section 13(1)** on which either the husband or wife could sue for divorce, and two fault grounds in **Section 13(2)** on which wife alone could seek the divorce. In **1964**, by an amendment, certain clauses of Section 13(1) were amended in the form of Section 13(1A), thus recognizing **two grounds** of the breakdown of the marriage. The **1976** amendment

Act inserted **two additional fault grounds** of divorce for **wife** & a new section **13B** for divorce by **mutual consent**.

**13. Divorce-** (1) Any **marriage** solemnized, whether **before or after** the commencement of the Act, may, on a **petition** presented by **either** the husband or the wife, be dissolved by a **decree of divorce** on the ground that the **other party**-

## GROUNDS AVAILABLE TO BOTH

## ADULTERY

(i) has, **after the solemnization of the marriage** had **voluntary sexual intercourse** with any person **other than his or her spouse**; or

A Wife living in adultery is not entitle to maintenance

Sec.125 (4) of Cr.Pc. & 18 (2) of HAMA, 1956

**JOSEPH SHINE V. UNION OF INDIA 27TH SEP.2018 SC**

Adultery though not offence under Sec. 497 of IPC it is still a ground of Divorce.

## CRUELTY

(ia) has, **after** the solemnization of the **marriage**, treated the **petitioner with cruelty**; or

## DESERTION

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

## CONVERSION

**(ii) has ceased to be a Hindu by conversion to another religion ; or**

## MENTAL CAPACITY

(iii) has been **incurably** of **unsound mind**, or has **suffering** continuously or intermittently from **mental disorder** of such a **kind** and to such an **extent** that the **petitioner** cannot **reasonably be expected to live** with the **respondent**.

Explanation- In this clause-

(a) the expression **"mental disorder"** means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and include schizophrenia;

(b) the expression **"psychopathic disorder"** means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party and whether or not it requires or is susceptible to medical treatment; or

## LEPROCY

(iv) has been suffering from a virulent and incurable form of leprosy; or

**VENERAL DISEASE**

v) Has been suffering from veneral disease in a communicable form; or

## RENOUNCIATION OF WORLD

(vi) has renounced the world by entering any religious order; or

## NOT BEEN HEARD OF

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive

**13. Divorce-** (1-A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground-

## FAILURE OF JUDICIAL SEPARATION

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

## FAILURE OF RESTITUTION OF CONJUGAL RIGHTS

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upward after the passing of a decree of restitution of conjugal rights in a proceeding to which they were parties.

## GROUNDS AVAILABLE TO WIFE ONLY 13(2)

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground-

**BIGAMY**

(i) in case of marriage solemnized **before the commencement** of this Act, that the husband had **married again** before such commencement or that any **other wife** of the husband married before such commencement was **alive** at the **time of solemnization** of the **marriage of the petitioner**; provided that in **either case** the **other wife is alive** at the **time of the presentation** of the petition.

## RAPE, SODOMY OR BESTIALITY

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality;

## NON RESUMPTION OF COHABITATION AFTER ORDER OF MAINTANANCE

Order for maintenance either civil or criminal is passed against the husband and since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

## REPUDIATION OF MARRIAGE

iv) That the marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

## ALTERNATE RELEIF IN DIVORCE PROCEEDINGS (SEC.13-A)

If any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in **clauses (ii), (vi) and (vii) of sub-section (1) of Section 13**, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation.

**Clauses (ii), (vi) and (vii) of sub-section (1) of Section 13**,

**CONVERSION (13(1) (ii))**

**RENOUNCIATION OF THE WORLD (13(1) (vi))**

**NOT HEARD OF (13(1) (vii))**

## DIVORCE BY MUTUAL CONSENT (SEC.13-B)

(1) **Subject** to the **provisions of this Act** a petition for **dissolution of marriage** by a **decree of divorce** may be presented to the **District Court** by **both the parties to a marriage together,** whether such marriage was solemnized before or after the commencement of the **Marriage Laws (Amendment) Act, 1976**, on the ground that they have been **living separately** for a period of **one year or more**, that they have **not been able to live together** and that they have **mutually** agreed that the **marriage** should be **dissolved**.

(2) On the **motion of both the parties** made earlier than **six months after** the date of the **presentation of the petition** referred to in sub-section (1) and **not later** than **eighteen months** after the said date, if the petition is **not withdrawn** in the mean time, the **Court shall**, on being satisfied, after **hearing the parties** and after making such **inquiry** as it thinks fit, that a **marriage has been solemnized** and that the **averments** in the **petition are true**, pass a **decree of divorce** declaring the **marriage to be dissolved** with effect from the **date of the decree.**

## REQUIREMENTS (SEC.13-B)

1. Joint petition by both the parties
2. Should wait at least for six months after petition
3. Should make joint motion before expiry of eighteen months from petition to the court for passing of decree
4. They may withdraw their petition during this time
5. After hearing of the parties and due inquiry court shall pass a decree

## GROUNDS OF PETITION (SEC.13-B)

1. Parties are living separately for the period of one year or more before petition is filed
2. They have not been able to live together
3. They mutually agreed that the marriage should be dissolved
4. Courts are not suppose to inquire into the reasons as to why the Parties are not able to live together and why they want a divorce

**Sureshta Devi V. Om Prakash 1991 (2) SCC 25**

If one of the parties to the petition withdraws consent then, the court get no Jurisdiction to pass the decree. mutual consent should continue till passing of the decree, it is not necessary that parties should be living under separate roofs. They might be living in the same house but not as husband and wife. They have not been able to live together means that there is a state of complete breakdown of marriage.

**D. S. Narula V. Meenakshi Nangia AIR 2012 SC 2890**

If circumstances so warrant cooling period of six months can be waived.

**Amardeep Singh V. Harveen Kaur SEP. 12, 2017**

The minimum period of six months stipulated for a motion for passing decree of divorce on the basis of mutual consent is not mandatory and can be relaxed in any exceptional situations.

## CUSTOMARY DIVORCE

**29. Savings.**

(2) **Nothing** contained in **this Act** shall be **deemed to affect** any **right recognized by custom** or conferred by any **special enactment** to obtain the **dissolution of a Hindu Marriage,** whether solemnized **before or after** the commencement of this Act.

1. Customary grounds and modes of divorce are continued by Sec. 29 (2)
2. Grounds of divorce available under special enactments are also continued.
3. Divorce under custom is available unless a particular ground or mode of divorce was found to be contrary to public policy or morality

***Shakuntalabai v. Kulkarni 1989 sc 1309*** The Supreme Court said that ancient and unbro**k**en custom of divorce would be recognized and a valid marriage could be dissolved by customary mode of divorce. To such divorces no provisions of Hindu marriage Act, 1955 applies.

***Gurdit V. AngreJ 1968 SC 142*** A custom recognizing divorce must fulfill all the tests of valid custom

***Chukna v. Lacuma 1969 sc 605*** The customary divorce may be obtained through the agency of gram panchayat or caste tribunal or caste panchayat, by private act of parties, orally or in writing, or under an agreement oral or written, such as tyag-patra or farkatnama (sulenama)

**Subramani v. Chandralekha air 2005 SC 485** Dissolution of marriage by custom must be specifically pleaded and established by person propounding such custom. Custom prevailing in the community of parties is must .

## NO DIVORCE WITHIN ONE YEAR OF MARRIAGE

**14. No petition for divorce to be presented within one year of marriage.-**

(1) Notwithstanding anything contained in this Act, **it shall not be competent for any Court** to entertain any petition for **dissolution of marriage** by a **decree of divorce**, unless at the date of the presentation of the petition **one year has elapsed** since the **date of the marriage**:

## EXCEPTION TO SEC 14 (1)

1. court may, upon application made to it allow a petition to be presented before one year in accordance with such rules as may be made by the High Court

2. the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent

3. if petitioner obtained leave to present the petition by any mis-representation or concealment of the nature of the case decree shall not have effect until after the expiry of one year or may dismiss the petition

4. The court may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said one year upon the same or substantially the same facts as those alleged in support of the petition so dismissed. **(PROVISO To 14 (1 ) )**

5. The court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said one year. **14 (2 )**

## WHEN DIVORCED PERSONS REMARRY SEC. 15

**15. Divorced persons. When may marry again.**- When a marriage has been dissolved by a decree of divorce and either there is **no right of appeal against the decree** or, if there is such a right of appeal, the **time for appealing has expired without an appeal** having been presented, or an **appeal has been presented** but has been **dismissed**, it shall be **lawful** for **either party** to the **marriage** to **marry again**.

## OTHER MATRIMONIAL RELIEFS

1. Nullity of marriage;
2. Judicial separation;
3. Repudiation of marriage;
4. Restitution of conjugal rights;
5. Other reliefs granted by a court in matrimonial proceedings (other than maintenance);
6. Bar to matrimonial reliefs
7. Jurisdiction of courts: under the Hindu Marriage Act 1955 and the Family Courts Act 1984

## NULLITY OF MARRIAGE

1. The law of nullity relates to the pre-marriage impediments to marriage
2. Such impediments relates to capacity to marry
3. If it exist, parties can not marry each other
4. Still they marry, their marriage may not be valid.
5. These impediments are divided into two.
6. Absolute impediments and Relative impediments.
7. If absolute impediments exist, a marriage is void ab initio
8. If relative impediments exist, a marriage is viodable.

## VOID MARRIAGE (SEC. 11)

1. A void-marriage is no marriage
2. It is a marriage which does not exist from its beginning
3. No legal consequences flow from a void marriage
4. Such as Status, Rights and obligations, inheritance etc.

**11. Nullity of marriage and divorce- Void marriages.**- Any marriage solemnized **after the commencement of this Act** shall be **null and void** and **may**, on a **petition** presented by **either party thereto**, against the **other party** be so declared by a **decree of nullity** if it **contravenes** any one of the conditions specified in **clauses (i), (iv) and (v), Section 5.**

In respect of Void Marriages no decree of Court is Necessary. Even if the petition is filed for nullity, court merely makes judicial declaration of existing fact that the marriage is null and void. However petition can only be made by either party to the marriage. Where a marriage is void, because a person has taken a second wife, his first wife being alive, the first wife cannot petition u/s 11. Only Second wife can petition u/s 11. because she was a party to

the void marriage, the first wife has no such right. But the first wife may bring a declaratory suit u/s 9 of CPC read with S. 34 of Specific Relief Act, 1963.

## GROUNDS OF VOID MARRIAGE (SEC. 11)

If marriage is solemnized in **contravention** of any one of the conditions specified in **clauses (i), (iv) and (v), Section 5.**

1. **Bigamous Marriage (Sec.5 (i))**
2. **The Parties are within the Prohibited degrees of relationship (Sec.5 (iv))**
3. **The Parties are Sapindas to each other (Sec.5 (v))**

Apart from Sec. 11 there are other three grounds of Void Marriages.

1. If both the parties to the marriage are not Hindus **(Sec. 1(2) read with Sec. 5)**
2. If proper ceremonies of marriage have not been performed **(Sec.7)**
3. If marriage is performed in violation of **Sec. 15** ( it requires a divorced person to marry after period of appeal is over.

## VOIDABLE MARRIAGE (SEC. 12)

1. A voidable marriage is a perfectly valid marriage so long as it is not avoided
2. It can be avoided only on a petition of one of the parties to the marriage
3. If the parties does not petition for annulment the marriage remain valid
4. If one of the parties dies before annulment, no one can challenge the marriage
5. So long as it is not avoided, all the legal consequences of a valid marriage flow from it.
6. But once it is challenged and declared as void, the decree will have a retrospective effect, from the date of the marriage

7. The marriage is deemed to have been void for all purposes from its inception and parties are deemed to have never been husband and wife and children are deemed to have been illegitimate.

## GROUNDS OF VOIDABLE MARRIAGE

**Sec. 12. Voidable Marriages.-**(1) Any marriage solemnized, whether **before or after** the commencement of this Act, shall be voidable and may be annulled by a **decree of nullity** on any of the following grounds, namely:-

(a) that the marriage has **not been consummated** owing to the **impotency** of the respondent; or

## IMPONTENCY (Sec. 12 (1) (a))

Consummation of marriage means full and normal sexual intercourse between married persons after their marriage. Impotency is the lack or absence of capacity to consummate a marriage by an act of normal, natural and complete intercourse. Impotency as a state of mental or physical condition, which makes consummation a practical impossibility. In 42 Corpus Juris Secundum the term has been held to be synonymous with incapacity for sexual intercourse.

**Digvijay Singh V. Pratap Kumari AIR 1970 SC 137** According to the Supreme Court, a party must be held to be impotent if his or her mental or physical condition makes consummation of the marriage impossible.

**Laxmi V. Babulal AIR 1973 Raj 39**

**Shevanti V. Bhaurav AIR 1971 MP 168**

Sterility is different from impotency and a sterile person is not necessarily impotent.

## MENTAL CAPACITY (Sec. 12 (1) (b))

**12. Voidable Marriages** (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:-

(b) that the marriage is in contravention of the condition specified in clause (ii) of Section 5; or

Sec. 5 (ii) at the time of the marriage, neither party,-

(a) is incapable of giving a valid consent of it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity or epilepsy;

## CONSENT BY FORCE OR FRAUD (Sec. 12 (1) (c))

(c) that the **consent of the petitioner**, or where the consent of the **guardian** in marriage of the petitioner was required under Section 5 as it stood immediately before the commencement of the **Child Marriage Restraint (Amendment) Act, 1978**, the consent of such guardian was obtained by **force or by fraud** as to the **nature of the ceremony** or as to any **material fact** or **circumstance** concerning the respondent; or

2) Notwithstanding anything contained in sub-section (1),

no petition for annulling a marriage

(a) on the ground specified in clause (c) of sub-section (1) shall be entertained if-

(i) the petition is presented **more than one year** after the force had **ceased to operate** or, as the case may be, the fraud had been **discovered** ; or

(ii) the petitioner has, **with his or her full consent, lived with the other party** to the marriage as husband or wife **after the force had ceased to operate** or, as the case may be, the fraud had been **discovered**;

**The requirement of this ground are :**

1. Consent of the petitioner was obtained by force or fraud
2. The petition must be presented within one year of the discovery of force or fraud and

3. The petitioner must not have with his or her consent lived with the respondent as husband or wife, as the case may be, after the discovery of fraud or cessation of force.

## PRE MARRIAGE PREGNANCY (Sec. 12 (1) (d))

(d) that the respondent was at the time of the marriage **pregnant by some person other than the petitioner.**

2) Notwithstanding anything contained in sub-section (1), **no petition** for annulling a marriage

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied-

(i) that the **petitioner** was at the time of the marriage **ignorant** of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnized **before the commencement** of this Act **within one year** of such commencement and in the case of marriages solemnized **after such commencement** within **one year** from the date of the marriage; and

(iii) that **marital intercourse** with the **consent** of the petitioner **has not taken** place since the **discovery by the petitioner** of the existence of the said ground.

## LEGITIMACY OF CHILDREN (SEC. 16)

(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, **shall be legitimate**, whether such a child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of the marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their **legitimate child** notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, **other than the parents**, in any case, where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

## RESTITUTION OF CONJUGAL RIGHTS (SEC.9)

**9. Restitution of conjugal rights.**-

1. When **either** the husband or the wife has, **without reasonable excuse**,
2. **withdrawn from the society** of the other, the **aggrieved party** may apply,
3. by **petition to the district court,** for restitution of conjugal rights and the court,
4. on being **satisfied of the truth of the statements** made in such petition and that **there is no legal ground** why the application **should not be granted,**
5. **may decree restitution of conjugal rights** accordingly.

## MEANING OF CONJUGAL RIGHTS

Conjugal means Matrimonial or Marital. Restitution means restoring to a party through decree of court, what has been lost. Restoration of a marital rights of a party which were lost to it It connotes two ideas:

1. Right of the couple to have each other's society
2. Right to marital intercourse

## REQUIRMENT OF SEC 9

- **VALID MARRIAGE BETWEEN HUSBAND AND WIFE OR VIODABLE BUT NOT RESCINDED**
- **WITHDRAWAL FROM THE SOCIETY**

Means cessation of cohabitation by a voluntary act of respondent. Withdrawal means not from the company of the other but from the conjugal relationship Refusal to stay together, to have marital intercourse

**Tirath Kaur V. Kripal Singh 1964, Surinder V. Gurdeep, 1973, Kailashwati V Ayodhya Prakash 1977 P&H** The Punjab high court held that the wife's refusal to give up her job at the instance of the husband amount to withdrawal from the society of the husband

**Shanti Nigam V. R.C. Nigam 1971 ALJ 67 (All. HC)** Mere refusal of the wife to resign her job at the instance of the husband is not a sufficient ground for granting a decree in favor of the husband, as the wife's taking up of a job even contrary to the wishes of the husband would not amount to withdrawing from the society

**Pravinben V. Sureshbhai 1975 Guj N.R. Radhakrishnan V. Dhanlaxmi, 1975 Mad, Mirchumal V. Devi 1977 Raj** The Gujrat, Madras and Rajasthan High Courts observed that the proposition that the wife must always stay under the roof of the husband might have been right in the past, but, it is no longer true in the modern times, and in all circumstances. Just because the wife is working at a different place, it cannot amount to withdrawal from the Husbands society

## REQUIRMENT OF SEC 9

## WITHOUT REASONABLE EXCUSE OR CAUSE

- Not laid down by Sec. 9
- To be decided by the court on the basis of facts and circumstances of each case.
- On the basis of discretionary powers
- One cause may be held reasonable in one case or the same cause may not held reasonable in another case

| | |
|---|---|
| Chand Narain V. Saroj AIR 1975 Raj 88 | Husbands conduct in insisting on wife to take to Non-vegetarian food and drinking amounts to cruelty |
| Gurdial Kaur V. Mukund Singh AIR 1967 Pun | Husband contracting a second marriage in |

| | |
|---|---|
| 397 | violation of law is a sufficient cause |
| Mohinder Singh V. Preet Kaur 1981 HLR 321 | Husband became blind after six months of marriage held as reasonable |
| Vijay Kumar V. Suman 1996 HLR 24 | Persistent demand for dowry causing physical or mental torture |

- **THE COURTS SATISFACTION AS TO THE TRUTH OF THE STATEMENTS MADE IN THE PETETON**
- **NO LEGAL GROUND EXIST FOR REFUSING THE DECREE**

## BURDEN OF PROOF

**Explanation**- Where a question arises whether there has been **reasonable excuse** for withdrawal from the society, the **burden of proving** reasonable excuse **shall** be on the **person who has withdrawn** from the society.

## EXECUTION OF DECREE (O-21 R-32 OF CPC)

If a respondent has willfully failed to obey such a decree after being given an opportunity to do so, the court may, in execution of the same, attach the property of the respondent, and if within a year after such attachment, the decree has not been complied with, the attached property may be sold and out of the sale proceeds, the court may award such compensation to the petitioner as it may thinks fit. Where the petitioner is the wife and not the husband, the court may make an order that if the decree is not obeyed within a specified time, the respondent shall make such periodical payments to the petitioner as the court think reasonable

## LEGAL EFFECT OF DECREE

If the cohabitation is not resumed between the parties with in the period of one year or more after passing of decree of restitution of conjugal right, then it becomes a distinct ground of divorce U/S 13 (1-A) (ii)

## CONSTITUTIONAL VALIDITY OF SEC.9

**T. Sareetaha V. T. Venkatta Subbaiah AIR 1983 AP 356** Andhra Pradesh High Court held that it constitute the grossest form of violation of an individual's right to privacy It denies the women her free choice whether, when and how she is to become the vehicle for the procreation of another human being. It deprives a women of control over her choice.

**Harvinder Kaur V. Harmander Singh AIR 1984 Del 66** The Delhi High Court holds a different view and observes that the section is constitutional. The object of restitution is cohabitation and not merely sexual intercourse It aims at stabilizing the marriage and encouraging reconciliation. Parties can seek divorce if not come together.

**Saroj Rani V. Sudershan Kumar AIR 1984 SC 1562.**This controversy was set at rest by the Supreme Court holding Sec. 9 as not violative to Constitution. It serves the social purpose as an aid to the prevention of break-up in a marriage. If the cohabitation is not resumed within one year the it becomes ground for divorce.

**Ojaswa Pathak & Mayank Gupta V. Union of India**

A PIL filed by two students of Gujrat National Law University Challenged the constitutional validity of Sec.9 on the ground that it violates Art.15(1) It is based on feudal English law and treat women as chattel or personal property of husband (Pending in Supreme Court)

## JUDICIAL SEPARATION (SEC.10)

**10. Judicial separation.-** (1) **Either** party to a marriage, whether solemnized **before or after** the commencement of this Act, may present a **petition** praying for a **decree** for **judicial separation** on any of the **grounds** specified in **sub-section (1) of Section 13**, and in the case of a **wife** also on any of the grounds specified in **sub-section (2)** thereof, as grounds on which a petition for divorce might have been presented.

(2) Where a **decree** for judicial separation has been **passed,** it shall **no longer be obligatory** for the **petitioner** to **cohabit** with the **respondent**, but the court **may,** on the **application by petition of either party** and on being **satisfied of the truth of the statement** made in such petition, **rescind the decree** if it considers it **just and reasonable** to do so.

## MEANING OF JUDICIAL SEPARATION

Parties to the marriage are at liberty to **live separately** by the **order of court Rights** and **obligations** remain **suspended** during the **period of separation** Judicial Separation is a **step prior to a divorce**. The purpose of judicial separation is **to provide an opportunity** to the parties to **reconcile** their difference. Judicial separation means **severance of connection** among the spouses by order of the Court, the severance of connection among the spouses is **temporary** It does **not affect the status** of the parties as Husband and wife. **relief** to the aggrieved spouse to **live separately** from the spouse who is **guilty of the matrimonial offence,** by the orders of the **Court** without **dissolving** the marriage, **completely** and forever.

## REQUIRMENT OF SEC 10

Either party to the marriage can file a petition for judicial separation. Whether Marriage is solemnized before or after commencement of the Hindu Marriage Act, 1955. After a decree, they are not bound to cohabit with each other. Some matrimonial rights and obligation, however, continue to subsist

## GROUNDS OF JUDICIAL SEPARATION

- Grounds on which a petition for divorce might have been presented. Sec.13 (1) & 13(2)
- Grounds Available to both husband and wife Sec.13(1)
- Grounds available to wife only Sec.13(2)

## GROUNDS AVAILABLE TO BOTH HUSBAND AND WIFE

***Under Section 13(1), judicial separation may be sought on the following grounds:***

1. **Adultery:** If other spouse had a voluntary sexual intercourse with any person other than his or her spouse after solemnization of marriage.
2. **Cruelty:** If after solemnization of marriage, one of the spouse treats the other with cruelty.

**3. Desertion:** If the other party has deserted the spouse for a continuous period of 2 years without any reasonable ground immediately preceding the presentation of the petition.

**4. Conversion:** If one of the spouses has ceased to be a Hindu.

**5. Insanity:** If the other party is of unsound mind or has been suffering continuously from mental disorder of such a kind and to such an extent that the petitioner cannot live with the other party.

**6. Leprosy:** If the other party has been suffering from a virulent and incurable form of leprosy.

**7. Venereal disease:** If the other party has been suffering from venereal disease in a communicable form.

**8. Renounced the world:** If the other spouse has renounced the world by entering any religious order.

**9. Has not been heard alive for seven years.**

## GROUNDS AVAILABLE TO WIFE ONLY Sec. 13(2)

***Judicial separation may be sought on the following additional grounds by wife only:***

**1. Husband has more than one wife living:** If the husband **had married before** the commencement of the Act and **after the commencement** of the Act has **again remarried either** of the **wives** can present a **suit** for **judicial separation** provided the **other wife** is **alive** at the **time** of presentation of the **petition**.

**2. Rape, Sodomy or Bestiality:** If a man is guilty of offense like rape, sodomy or bestiality, the wife can present a petition for judicial separation.

**3. Marriage before the age of fifteen years:** If the marriage of women was solemnized before attaining 15 years of age, on her attainment of 15 years she could repudiate it but before attaining the age of 18 years.

## RESCISSION OF DECREE

*Court **may,** on the **application by petition of either party** and on being **satisfied of the truth of the statement** made in such petition, **rescind the decree** if it considers it **just and reasonable** to do so.*

## LEGAL EFFECT OF DECREE

1. If the cohabitation is not resumed between the parties with in the period of one year or more then it becomes a distinct ground of divorce U/S 13 (1-A) (i)
2. Neither party can contract another marriage
3. A marriage after separation and before divorce amounts to bigamy
4. Intercourse by a man with his wife during separation is an offence of rape (IPC Sec. 376-B)
5. Wife's right to maintenance, custody of children may be decided by the court.
6. Right to succession continues to exist.

## JURISDICTION OF COURTS: UNDER THE HINDU MARRIAGE ACT 1955 AND THE FAMILY COURTS ACT 1984

## THE HINDU MARRIAGE ACT 1955

## JURISDICTION AND PROCEDURE

1. Court to which petition shall be presented
2. Contents and verification of Petitions
3. Application of Code of Civil Procedure 19m8
4. Power to transfer petitions in certain cases
5. Special provision relating to trial and disposal of petitions under the Act
6. Documentary evidence
7. Proceedings to be in camera and may not be printed or published

## COURT TO WHICH PETITION SHALL BE PRESENTED SEC.19

**Every petition under this Act** shall be presented to the **District Court** within the **local limits** of whose **ordinary original civil jurisdiction**:

(i) the **marriage** was **solemnized**, or

(ii) the **respondent**, at the time of the presentation of the petition, **resides**, or

(iii) the **parties to the marriage** last **resided together**, or

(iv) the **petitioner** is **residing** at the time of the presentation of the petition,

in a case **where the respondent** is at that time, **residing outside** the territories to which this Act extends, or **has not been heard of as being alive** for a period of **seven years or more** by those persons who would **naturally have heard of him** if he were alive.

## DISTRICT COURT SEC. l (b)

(b)**"District Court"** means, in any area for which there is a **City Civil Court**, that Court, and in any other area the **principal Civil Court** of original jurisdiction, and includes any **other civil court** which may be **specified by the State Government,** by **notification** in the **Official Gazette**, as having **jurisdiction** in respect of **matters** dealt with in **this Act**

## CONTENTS AND VERIFICATION OF PETITIONS SEC.2m

(1) Every petition presented under this Act shall state as distinctly as the nature of the case permits the **facts on which the claims to relief is founded** and, **except** in a petition under **Section 11**, shall also state that **there is no collusion** between the petitioner and the other party to the marriage.[**SECTION 11- PETITION OF NULLITY OF MARRIAGE]**

(2) The **statements contained in every petition** under this Act shall be **verified by the petitioner** or some other **competent person** in the manner required by **law for the verification of plaints**, and may, at the hearing, be referred to as evidence.

## APPLICATION OF CODE OF CIVIL PROCEDURE 1908 SEC.21

**Subject to the other provisions** contained in **this Act** and to such **rules as the High Court may make** in this behalf **all proceedings under this Act** shall be regulated, as far as may be, by the **Code of Civil Procedure, 1908**.[**BOMBAY HIGH COURT HINDU MARRIAGE RULES, 196O ]**

## POWER TO TRANSFER PETITIONS IN CERTAIN CASES SEC.21-A

(1)Where-

(a) a **petition** under this Act has been presented to a **District Court** having jurisdiction by a party to marriage praying for a decree for a **judicial separation** under Section 1m or of a decree of **divorce** under Section 1l; and

(b) **another petition** under this Act has been presented **thereafter** by the **other party to the marriage** praying for a decree for **judicial separation** under Section 1m or for a decree of **divorce** under Section 1l on any ground, whether in the **same District Court or in a different District Court**, in the **same State or in a different State**, the petitions shall be dealt with as specified in **sub-section (2)**.

(2) In a case where sub-section (1) applies,-

(a) if the petitions are presented to the **same District Court**, **both** the petitions shall be **tried and heard together** by that **District Court**;

(b) if the petition are presented to **different District Courts**, the petition presented **later shall be transferred** to the District Court in which the **earlier petition** was presented and **both** the petitions shall be **heard** and **disposed of together** by the **district court** in which the **earlier** petition was presented.

## SPECIAL PROVISION RELATING TO TRIAL AND DISPOSAL OF PETITIONS UNDER THE ACT.SEC.21-B

(1) The trial of a petition under this Act, shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(2) Every petition under this Act shall be tried as expeditiously as possible, and Endeavour shall be made to conclude the trial within six months from the date of service of notice of the petition on the respondent.

(l) Every appeal under this Act shall be heard as expeditiously as possible, and Endeavour shall be made to conclude the hearing within three months from the date of service of notice of appeal on the respondent.

## DOCUMENTARY EVIDENCE SEC.21-C

Notwithstanding anything in any enactment to the contrary, no document shall be inadmissible in evidence in any proceeding at the trial of a petition under this Act on the ground that it is not duly stamped or registered.

## PROCEEDINGS TO BE IN CAMERA AND MAY NOT BE PRINTED OR PUBLISHED SEC.22

(1) Every proceedings under this Act shall be conducted in camera and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees.

## BAR TO MATRIMONIAL RELIEF SEC.23

(1) In any proceeding under this Act, whether defended or not, if the Court is satisfied that-

(a) any of the grounds for granting relief exists and the petitioner except in cases where the relief is sought by him on the grounds specified in sub-clause (a), sub clause (b) and sub-clause (c) of clause (ii) of Section i is not any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

## TAKING ADVANTAGE OF ONE'S OWN WRONG OR DISABILITY SEC.23 (1) (a)

- one who comes to equity must come with clean hand
- one should not take advantage of his own wrong

- Burden of proof is on petitioner to show that he is not taking advantage of his own wrong
- E.g. if the respondent contracted veneral disease from the petitioner the petitioner cannot get divorce on this ground
- if the cruelty of the husband result into withdrawal of society by wife etc.

***Ashok v. Shabanam 1989 del 121*** Where the husband harassed his wife for dowry and abandoned her, he cannot be granted a decree of divorce on the ground of desertion as it will amount to taking advantage of his own wrong**.**

## EXCEPTION

By virtue of 197O amendment this section does not apply to petitions for nullity of marriage on the ground of respondent's insanity. Section i (ii) (a) (b) (c)

(1) In any proceeding under this Act, whether defended or not, if the Court is satisfied that-

(b) where the ground of the petition is the ground specified in clause (i) of subsection (1) of Section 1l, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground or the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

## ACCESSORY, CONNIVANCE AND CONDONATION SEC.23 (1) (b)

This bar will attracted only when petition is filed on the ground of Adultery or cruelty.

**ACCESSORY - person who helps in commission of wrong full act**

**CONNIVANCE- active consent**

**CONDONATION- to condone the wrong full act in case of cruelty**

(1) In any proceeding under this Act, whether defended or not, if the Court is satisfied that-

(bb) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence, and

(c) the petition not being a petition presented under section 11 is not presented or prosecuted in collusion with the respondent, and

(d) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the court shall decree such relief accordingly.

## FREE CONSENT,COLLUSION, DELAY AND OTHER LEGAL GROUND SEC.23(1) (bb) (c) (d) (e)

**FREE CONSENT- Divorce by mutual consent**

**COLLUSION- Arrangement or understanding, not applicable to nullity**

**DELAY – must not be unnecessary or improper**

**OTHER LEGAL GROUND**

## RECONCILIATION [SEC.23 (2)]

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the Court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavor to bring about a reconciliation between the parties:

Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv), clause (v), clause (vi) or clause (vii), of sub-section (1) of Section 1l.

## CONVERSION, UNSOUND MIND, LEPROSY, VENERAL DISEASE, RENOUNCED THE WORLD , AND NOT BEEN HEARD OF

(l) For the purpose of aiding the Court in bringing about such reconciliation, the court may, if the parties so desire or if the Court thinks it just and proper so to do adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the

parties in this behalf or to any person nominated by the Court if the parties fail to name any person,

with directions to report to the Court as to whether reconciliation can be and has been effected and the court shall in disposing of the proceeding have due regard to the report.

## COPY OF DECREE OF DIVORCE SEC.23 (4)

In every case where a marriage is dissolved by a decree of divorce, the court passing the decree shall give a copy thereof free of cost to each of the parties.

## RELIEF FOR RESPONDENT IN DIVORCE AND OTHER PROCEEDINGS SEC.23A

In any proceedings for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground; and if the petitioner's adultery, cruelty or desertion is proved,

the Court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground.

## OTHER RELIEFS GRANTED BY A COURT IN MATRIMONIAL PROCEEDINGS SEC.27

**27. Disposal of property**.-In any proceeding under this Act, the Court may make such provisions in the decree as it deems just and proper with respect to any property presented at or about the time of marriage, which may belong jointly to both the husband and the wife

## APPEALS FROM DECREES AND ORDERS SEC.28

(1) All decrees made by Court in any proceeding under this Act shall, subject to the provisions of sub-section (l), be appealable as decrees of the Court made in the exercise of its original civil jurisdiction and every such appeal shall lie to the Court to which appeals ordinarily lie from the decisions of the Court given in the exercise of its original civil jurisdiction.

(2) Orders made by the Court in any proceedings under this Act, under Section 2i or Section 2O shall, subject to the provisions of sub-section (l), be appealable if they are not interim orders and every such appeal shall lie to the Court to which appeals ordinarily lie from the decisions of the Court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on subject of costs only.

(4) Every appeal under this section shall be preferred within a period of thirty days from the date of the decree or order.

## ENFORCEMENT OF DECREES AND ORDERS SEC.28 A

All decrees and orders made by the Court in any proceeding under this Act, shall be enforced in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction for the time being enforced.

## FAMILY COURTS ACT 1984

## JURISDICTION UNDER FAMILY COURTS ACT 1984

Sec. 7 Of the Family Courts Act 1984 Provides for the Jurisdiction of family court Exercise all the Jurisdiction exercisable by and district court established under any law in respect of following matters. A suit or proceeding between parties to the marriage for a-

1. **Decree of nullity**
2. **Restitution of con1ugal rights**
3. **Judicial separation**
4. **Dissolution of marriage**

A suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person. A suit or proceeding between parties to the marriage with respect to property of the parties or of either of them. A suit or proceeding for an order or in1unction in circumstances arising out of a matrimonial relationship. A suit or proceeding for a declaration for legitimacy of any person. A suit or proceeding for maintenance. A suit or

proceeding in relation to the guardianship of any person or the custody of or access to any minor. Jurisdiction exercisable by Judicial magistrate first class under Cr.Pc Chapter-IX relating to maintenance of children parents and wives. Such other Jurisdiction ordered by any other statute

## MODULE 03 MARRIAGE AND MATRIMONIAL RELIEFS UNDER MUSLIM LAW

## MUSLIM MARRIAGE

1. Pre-Qura'nic background,
2. Definition of nikah,
3. Nature and classification of marriages
4. Essentials and formalities of a valid marriage,
5. Legal effects of a valid marriage,
6. Muta marriage,
7. Stipulation in marriage contract;
8. Guardianship in marriage with reference to Shias and Sunnis

## DEFINITION AND NATURE

Marriage in Islam, or Nikah, is not a sacrament (as in Hinduism), but a civil contract between a man and woman to live as husband and wife. Muslim marriage is also a devotional act, i.e., ibadat. The Prophet is reported to have said that marriage is obligatory (wajib) for every physically fit Muslim, that marriage is equal to jehad (holy war) and that he who marries completes half his religion, while the other half is completed by leading a virtuous life. Marriage

in Islam is a Sunnat, i.e., part of the practices, teachings, specific words, habits, customs and way of life, in dealing with family, friends and government, preached and practiced by the Prophet himself. Singlehood, monasticism and celibacy are forbidden under Islam.

## ESSENTIALS AND FORMALITIES OF A VALID MARRIAGE

According to the Muslim marriage law there are no prescribed ceremonies or formalities or special rites and rituals to solemnise a Nikah. Certain legal and reasonable conditions, which are not opposed to the spirit of Islam, may be appended to the contract at the time of marriage. But, the following requirements are compulsory

## PRAPOSAL AND ACCEPTANCE

There should be a Proposal **ijab** and an acceptance **qubul** Both of which must be expressed at one meeting and in the Presence of two male or one male and two female witnesses. it is important both the proposal and acceptance must be expressed at one meeting. A proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage. The usual form of proposal " I have married myself to you, and that of acceptance is " I have consented". Words of proposal and acceptance must be uttered by the contracting Parties or their agents in each other's presence and hearing, and in the Presence of two male or one male and two female witnesses. Who must be sane and adult Muslims, and the whole transaction must be completed at one meeting.

## CAPACITY TO CONTRACT MARRIAGE

The Parties to the marriage should have either the capacity to marry or the capacity to be married. Persons who are not of sound mind or who have no attained Puberty, can be contracted in marriage by their respective guardians. Under Muslim law, every Muslim who is of sound mind and who has attained Puberty has the capacity to marry

## AGE OF MAJORITY

Under Muslim law age is attained at Puberty. it is to be noted that the Provisions of the Indian majority Act, 1875, do not apply to matters relating to marriage, dower and divorce. Thus a Muslim become competent to enter into a contract of marriage when, being of sound mind he or she attains Puberty, even if he or she is under eighteen years. Under Muslim law in the matters of marriage, dower and divorce, puberty and majority is one and the same.

## MEANING OF PUBERTY

Under the Hanafi law, puberty in a minor of either sex, is presumed to have been attained on completion on the fifteen year. in the case of Shia female, the age of puberty begins with menstruation. Puberty means a period of life at which persons become capable of begetting or bearing children. Puberty in the females usually commences at the thirteenth or fourteenth year in India. The hedaya had laid down that the earliest period for a boy is twelve years, and that for a girl nine years. It has been held by their lordship of the prevy council, with reference to a girl in a case under the shia law that the age of puberty is nine. Sadiq Ali V. Jai ishor But under Muslim law puberty is presumed, in the absence of evidence, on the completion of the age of fifteen years.

Indian Majority Act left entirely untouched the Muslim law of marriage, The child marriage restraint act 1929 though secular does not make child marriage void but provides punishments for violating its provisions

**Impact of Prohibition of Child Marriage Act, 2006**

**Shafin Jahan v Asokan K M April 9 2o18 SC** 16 year old Muslim girl moved the court challenging the kerla high court decision to send her to a women's shelter home terming the marriage invalid because she was not of a legal marriageable age. The court held such marriage as valid.

## CAPACITY TO BE MARRIED

A minor or lunatic may be contracted in marriage by his or her guardian for marriage

## GUARDIANSHIP IN MARRIAGE JABAR

A minor one who not attained the age of puberty can be validly contracted in marriage by his or her guardian. The order of guardianship for the purpose of marriage is as follows.

1. **Father**
2. **Paternal grandfather, how highsoever**
3. **Brother and other maternal relatives, as per order f inheritance**
4. **Mother**
5. **Other maternal relations with in the prohibited degrees**
6. **The government**

## SHIA LAW

The only guardian recognized by shia law are the father and the paternal grandfather, how highsoever. A marriage brought about by a person other than these guardians is wholly ineffective, unless it is ratified by the minor on attaining majority.

## EFFECT OF APOSTACY ON THE RIGHT OF GUARDIANSHIP

An apostate i.e. a person who has renounced the Muslim religion has no right to contract his infant daughter, who is a Muslim, into marriage with another. This rule has been abrogated by the freedom of religion Act, 195o, no law or usage can inflict on any person who renounces his religion, any forfeiture of rights or property.

**Gul Mohammad V. Mussammat Wazir**

The power to contract a minor in marriage is a right within the meaning of the Act, and it is not forfeited by conversion from Islam.

## OPTION OF PUBERTY

A Muslim minor can be contracted in marriage by his or her guardian. But in such a case, the minor may choose, on attaining puberty, either to ratify the marriage or to repudiate it. This option is called as option of puberty. When the minors marriage is contracted by the father or the paternal grandfather, it is valid and binding upon the minor, it cannot be repudiated, unless it is shown that the father or grandfather has acted for the manifest disadvantage of the minor.

**Dissolution of Muslim marriage Act, 1939 (Sec. 2 vii)**

A wife is entitled to the dissolution of her marriage if she proves the following facts, via She was given in marriage by her father or other guardian. The marriage has not been consummated. The marriage took place before she attained the age of fifteen years and. She has repudiated the marriage before attaining the age of eighteen years, if the marriage is contracted by any other guardian, the minor has the option to repudiate the marriage on attaining puberty without specifying any reason for doing so.

## WHEN OPTION OF PUBERTY IS EXERCISED

BY THE WIFE immediately on attaining puberty and being informed of the marriage and of her right to repudiate it.

BY THE HUSBAND at any time before he ratifies the marriage, either by payment of the dower or by cohabitation otherwise the right to repudiate the marriage is lost.

## ABSENCE OF IMPEBEMENTS

The third essential of Muslim marriage is that there should be no impediments or prohibitions to the marriage of the parties. These impediments are of two kinds, absolute which makes marriage void. Relative makes marriage invalid or irregular, but not void.

## ABSOLUTE IMPEDEMENTS

1. Polyandry
2. Consanguinity
3. Affinity
4. Fosterage

## RELATIVE IMPEDEMENTS

1. Marrying a fifth wife
2. Absence of proper witnesses
3. Difference of religion
4. unlawful conjunction
5. Women undergoing iddat.

## ABSOLUTE IMPEDEMENTS

### 1. POLYANDRY

Married women cannot contract a second marriage during the subsistence of the first marriage. Muslim law forbids polyandry, although it recognizes polygamy to the extent that a Muslim may have as many as four wives at a time. A marriage with a women, whose husband is alive and who has not been divorced by him, is void. Under Muslim law, a wife cannot have more than one husband at a time, whereas the male is at liberty to have as many as four wives at a time

### 2. CONSANGUINITY

No valid marriage can be contracted with the

- Ascendants i.e. mother or grandmother how highsoever

- Descendants i.e. daughter or granddaughter how highsoever
- Relations of the second rank e.g. brothers or sisters and their descendants and
- paternal and maternal uncles and aunts, how highsoever
- A marriage with a women prohibited by reason of consanguinity is altogether void.

### 3. AFFINITY

A man cannot contract a valid marriage with his wife's mother or grandmother how highsoever. His wife's daughter or granddaughter how highsoever, if his marriage with the wife is consummated. His father's wife or any other ascendants wife and His son or any other lineal descendants wife.

### 4. FOSTERAGE

The action of bringing up a child that is not one's own by birth. Therefore under Muslim law women suckling will be the foster mother of the child suckled and her husband causing that milk into her will be the child's foster father. The act of suckling is regarded as equal to the act of procreation. Therefore a marriage is prohibited due to fosterage as well as by consanguinity or affinity. A marriage which is prohibited by reason of fosterage is totally void.

## RELATIVE IMPEDEMENTS

### 1. MARRYING A FIFTH WIFE

A marriage with a fifth wife by a person having four wives is invalid. However these impediments may be removed by the simple solution of divorcing one of the wives.

### 2. ABSENCE OF PROPER WITNESSES

A marriage contracted in the absence of witnesses is invalid. The defect is regarded as arising from accidental circumstances, and can be remedied by subsequent confirmation in the presence of witnesses. Under Shia law presence of witness is not necessary

### 3. DIFFERENCE OF RELIGION

According to Shia law both the spouses must be Muslim. If either of them is non Muslim it is unlawful. According to Sunni law, A Muslim male can validly marry, not only a Muslim women but also a kitabia. If he marries an idolatress or fire-worshiper, the marriage is not altogether void, it is merely irregular. The irregularity can be removed by conversion. A Muslim female can validly marry a Muslim alone. if she marries a non-Muslim it is void.

## 4. UNLAWFUL CONJUNCTION

A Muslim is forbidden to have two wives at the same time so related to each other, That if either of them had been a male, they would have been prohibited from marrying with each other e.g. two sisters. This impediment is known as unlawful conjunction. This impediment can be removed by divorcing one of the wife or after death of either

## 5. WOMEN UNDERGOING IDDAT

A marriage with a women undergoing iddat of her previous marriage is not void but irregular

## DEFINITION OF IDDAT

Iddat is a period of chastity which Muslim women is bound to observe after the dissolution of her marriage by the death of her husband or by divorce, before she can lawfully marry again. This is the period of continence imposed on the women on the termination of the marriage in the interest of certainty of paternity. The abstinence is imposed on her to ascertain whether she is pregnant by the husband, so as to avoid confusion of the parentage. This is a period by the completion of which a new marriage is rendered lawful. The primary object of iddat is to impose a restraint on the marriage of the wife for a certain time.

## DURATION OF IDDAT

## IDDAT OF DEATH

If the marriage of the women dissolved due to the death of the husband, If the women is pregnant at that time for four months and ten days or until delivery whichever period is longer, in the other cases for four months and ten days. The iddat of death commences from the date of the husband's death. if the information of the husband's death does not reach the wife until after the expiration of the period of iddat, she is not bound to observe iddat. The women is bound to observe the period of iddat whether the marriage is consummated or not if the marriage is dissolved by death

## IDDAT OF DIVORCE

If the marriage of the women is dissolved by the divorce, Iddat of the divorce lasts for three menstrual periods. if the divorced wife is not subject to menstruation for any reason other than gestation, the period of iddat lasts for three lunar months. If she is pregnant at the time, the iddat lasts until delivery, irrespective of whether the period is shorter or longer than three months. It commences from the date of divorce. if information of divorce does not reach the wife

until after the expiration of the period of iddat, she is not bound to observe iddat of divorce, and she is free to marry immediately. Muslim women protection of rights on divorce Act, 198o, the iddat period with reference to divorced women, is defined to be Three menstrual courses after the divorce- if she is subject to menstruation. Three lunar months after her divorce- if she is not subject to menstruation and if she is pregnant at the time of divorce- the period between the divorce and the delivery of the child or the termination of the pregnancy, whichever is earlier.

## WOMEN'S RIGHT DURING IDDAT

- The wife is entitled to lodging in husbands house during iddat
- She is also entitled to maintenance during the iddat of divorce.

## FORMALITIES

The Nikah is read by a Kazi who recites the marriage sermon (extracts from the Quran and Hadis), There may be exchange of gifts, prayers are offered by the guests for the health and happiness of the couple, and additional Maulvis from both sides may be present. But these customary practices among Indian Muslims may differ among different sects and are not essential legal requirements. Registration of marriage is not compulsory, though this may cause difficulties later with regard to proving the marriage.

## DIFFERENCE BETWEEN VOID ( BATIL) AND INVALID ( FASID) MARRIAGES

In Muslim law marriages are of three kinds

- **Sahih**- true, which is a completed valid contract
- **Batil**- bad in its foundation, and one which is completely void agreement, and
- **Fasid**- irregular, or one which is good in its foundation but unlawful in its attributes.

In batil and fasid marriages there are no mutual rights of inheritance between husband and wife. The following are three points of difference between a void and invalid marriage

## AS TO MEANING

A batil marriage is altogether illegal, and does not create any civil rights and obligations between the parties. In such cases, there is neither dower, nor iddat, nor legitimacy of the children. Therefore, a marriage which is prohibited on the ground of consanguinity, affinity or fosterage is void. Similarly a marriage with a wife who is the lawful wife of another is void. An

irregular marriage on other hand is good in its foundation, but unlawful in its attributes because of the lack of some formality or the existence of some impediments. The lack of formality may subsequently be made up, or the impediments may subsequently be removed. in other words, such a marriage is not unlawful in itself.

Thus, in a marriage-

- Without witnesses
- Without the guardian's consent
- With a fifth wife
- With a women undergoing iddat
- With an idolator or fire-worshipper
- With a women so related to the if one of them had been a male, they could not have lawfully inter-married.

## AS TO THEIR LEGAL EFFECT

Batil marriage creates no civil right or obligations between the parties, but after consummation, the wife becomes entitled to customary dower only. A fasid marriage has no legal effect before consummation. Even after consummation the husband or wife have no mutual rights of inheritance between themselves. But the issue of such marriage is legitimate. If consummation has taken place, the wife is entitled to-dower proper or specified whichever is less and bound to observe iddat.

## AS TO ISSUE OF MARRIAGES

The issue of void batil marriage is illegitimate, those of a fasid irregular marriage are legitimate.

## LEGAL INCIDENTS OF A VALID MUSLIM MARRIAGE

A valid Muslim marriage confers upon the wife the rights of-

- Dower
- Maintenance
- Suitable matrimonial residence
- Equal affection and impartiality, if she has a co-wife, and
- Right to the society, and up-bringing of her infant children, even in case of divorce.

## IT IMPOSES UPON THE WIFE THE OBLIGATIONS-

- To be faithful and obedient to her husband
- To admit him to sexual intercourse, due regard being had to health and decency
- To suckle her own children
- To observe iddat
- If two Muslims marry under the **Special Marriage Act, 1954**, they would be govern by the law laid down in **that act** and **not by the provisions of this law.**

## MUTA MARRIAGE

## DEFINITION

The word "muta" literally means enjoyment or use in its legal context it means a temporary marriage, i.e. a marriage, whose duration is fixed by an agreement between the parties. The institution of muta marriage was quite common both before and at the tome of the prophet. It now appears that, initially this custom was tolerated by the prophet, but he declared such union as unlawful. of the four major schools of Muslim law in India, this ancient Arabian custom of muta marriage is not recognized by three schools, namely the Hanafi, Shafie and the ismaili schools. It is only ithna ashari school that recognizes such a kind of marriage.

The followers of this school constitute very small section of Muslims in India, and even amongst them, the institution is almost absolute, with the result that muta is now acceptable to a very microscopic minority of Muslims in India. Under the Sunni law, a marriage contract should not be restricted in its duration, and the words used at the time of proposal and acceptance must denote an immediate and permanent union. But the ithna ashari law recognizes two kinds of marriages, one permanent and the other temporary or muta. A muta marriage may be for a day, month, year or a number of years. But it is essential to the validity of a muta marriage that The period for which the relationship is to last should be fixed at the time when the muta marriage is contracted, and Some dower should be specified in the contract. If the term of cohabitation is not specified, but the dower is fixed, the contract would be void as a muta, although it may operate as a permanent marriage, but in the converse case, that is, if the term is specified, but the dower is not fixed, the contract would be void. A shia male may contract a muta marriage with a women professing the Muslim, the Christian or the jewish religion, or even with a fire worshiper, but not with a women following any other religion. A shia female can contract a muta marriage only with a Muslim.

## CHARACTERISTICS MUTA MARRIAGE

The period of cohabitation must be fixed. If it is not fixed, the contract would be valid as a permanent marriage, but void as a muta marriage. The contract comes to an end at the termination of the fixed period, unless it is renewed by the consent of both the parties. Some dower must be fixed, if it is not fixed, the contract is void. A shia male can contract a muta marriage with a kitabia or with a fire worshipper. But a shia women cannot contract a muta marriage with a non-Muslim.

## LEGAL INCIDENTS OF MUTA MARRIAGE

It does not confer on the wife or husband, mutual rights of inheritance, but children conceived, while it exist, are legitimate and capable of inheriting from both the parents. If the muta marriage is not consummated the wife is entitled to half the dower If the marriage is consummated the wife is entitled to full dower, even if the husband puts an end the marriage before the expiry of the fixed term. If the wife leaves the husband before the expiry of the fixed term, she is entitled to a proportionate dower only. A muta marriage does not entitle the wife to maintenance under her personal law. The number of wives is not restricted to four, as in the case of a permanent marriage. A muta marriage is dissolved ipso facto by the expiry of the fixed term. it may be noted that no right of divorce is recognized in the case of such a marriage, although as stated earlier, the husband can, at his will put an end the marriage.

## DISSOLUTION OF MUTA MARRIAGE

A muta marriage is dissolved automatically by the expiry of the fixed term, or
At any time, by the husband “making a gift of the term” hiba-i-muddat to the wife, even before the expiry of the fixed term.

## SUIT FOR RESTITITION OF CONJUGAL RIGHTS

If, without any lawful cause a wife ceases to cohabit with her husband, he may sue her for restitution of conjugal rights. However, a husband is not entitled to a decree of restitution , if the marriage, though consummated, was an irregular marriage during the period of iddat or if the marriage took place during the minority of wife and has been validly repudiated by her. Cruelty by husband is a valid defense in suit for restitution of conjugal rights. **Moonshee Buzloor Ruheem v Shumsoonisa 1867** Agreement made before marriage by which it is provided that the wife would be at liberty to live with her parents after marriage is void, and does not afford an

answer to a suit for restitution of conjugal rights **Abdul v Hussenbi 1904** Agreement to allow a second wife to live in a separate house and to give her a maintenance allowance, is not void and can be enforced. **Sakina fauq v Samshad khan 1936** A false charge of adultery by a husband against his wife is a good ground for refusing a decree for restitution of conjugal rights. **Mussamat Maqboolan v Ramzan 1927** If the husband has been expelled from the caste, the wife is not bound to live with him, and a decree for restitution of conjugal rights will not be granted to the husband. **Bai jina v kharwa jina 1907**

## TALAQ

1. Kinds of talaq,
2. Divorce under Dissolution of Muslim Marriage Act,1939
3. Remarriage;
4. Iddat: its rationale, utility and periods;
5. Prohibition to marry in certain cases

## NATURE AND KINDS OF TALAK

In Muslim law, although matrimony is a civil contract, the husband usually en1oys special privileges, and the wife suffers corresponding disabilities, the wife sometimes remains at her husband's mercy owing to polygamy and the inequality of the law of divorce.

SUPERIOR RIGHT OF HUSBAND

The privilege en1oyed by the husband are mainly two, firstly, he can divorce his wife without any misbehavior on her part and without assigning any cause. He can have four wives at a time, whereas Muslim women can have only one husband at a time.

DISABILITIES UFFERED BY WIFE

She cannot divorce herself from her husband, except by obtaining a decree of a Civil Court. Secondly she cannot have more than one husband

## MEANING OF TALAK

Talaq/divorce is considered to be a sin which is unforgiveable in the eyes and based on Quran; it is very much clear that Allah discourages divorce and encourages the continuation of marriage. However, if it becomes impossible to resolve disputes between the husband and wife

then the Holy Quran itself provides for the procedure to be followed for the dissolution of marriage in an amicable manner that too with a possibility of revocation of the same

## TALAQ-UL-SUNNAT

This form of Talaq is based on the Prophet's tradition (Sunna) and as such is considered as most approved form of Talaq. Wherein there is a possibility of revoking the effects of this evil. It is also called as revocable Talaq for the reason that Talaq does not become final at once and there always remain a possibility of compromise between the husband and wife. Only this kind of Talaq was in practice during the life of the Prophet. This mode of Talaq is recognized both by Sunnis as well as by the Shia's. Talaq-ul-Sunnat may be pronounced either in **Ahsan** or in the **Hasan** form

### 1. Talaq-Ahsan:-

This is the most proper form of repudiation of marriage. The reason is twofold: First, there is possibility of revoking the pronouncement before expiry of the Iddat period. Secondly, the evil words of Talaq are to be uttered only once. Being an evil, it is preferred that these words are not repeated. In the Ahsan Talaq there is a single declaration during the period of purity followed by no revocation by husband for three successive period of purity. In this form, the following formalities are required:

(a) the husband has to make a single pronouncement of Talaq during the Tuhr of the wife

**Tuhr** is the period of wife's purity i.e. **a period between two menstruations.** As such, the period of Tuhr is the period during which cohabitation is possible. But if a woman is not subjected to menstruation, either because of old age or due to pregnancy, a Talaq against her may be pronounced any time.

(b) After this single pronouncement, the wife is to observe an Iddat of three monthly courses.

If she is pregnant at the time of pronouncement the Iddat is, till the delivery of the child. During the period of Iddat there should be no revocation of Talaq by the husband. Revocation may be express or implied. Cohabitation with the wife is an implied revocation of Talaq. If the cohabitation takes place even once during this period, the Talaq is revoked and it is presumed

that the husband has reconciled with the wife. When the period of Iddat expires and the husband does not revoke the Talaq either expressly or through consummation, the Talaq becomes Irrevocable and final

## II. Talaq Hasan (Proper):

This Talaq is also regarded to be the proper and approved form of Talaq. In this form too, there is a provision for revocation. But it is not the best mode because evil words of Talaq are to be pronounced three times in the successive Tuhrs. The formalities required under this form are as under:

(a) The husband has to make a single declaration of Talaq in a period of 'Tuhr.
(b) In the next Tuhr, there is another single pronouncement for the second time.

It is significant to note that the first and second pronouncements may be revoked by the husband. If he does so, either expressly or by resuming conjugal relations, the words of Talaq become ineffective as if no Talaq was made at all.

(c) But, if no revocation is made after the first or second declaration then lastly the husband is to make the third pronouncement in the third period of purity (Tuhr). As soon as this third declaration is made, the Talaq becomes irrevocable and the marriage dissolves and the wife has to observe the required Iddat.

## TALAQ-UL-BIDAAT (IRREVOCABLE):

This Talaq is also known as Talaq-ul-Bain. It is a disapproved mode of divorce. A peculiar feature of this Talaq is that it becomes effective as soon as the words are pronounced and there is no possibility of reconciliation between the parties. The Prophet never approved a Talaq in which there was no opportunity for reconciliation. A Sunni husband, who wants to divorce his wife irrevocably, may do so in any of the following manners:

(a) The husband may make three pronouncements in a period of purity (Tuhr) saying: "I divorce thee, I divorce thee, and I divorce thee". He may declare his triple Talaq even in one sentence saying: "I divorce thee thrice", or "I pronounce my first, second and third Talaq.

(b) The husband may make only one declaration in a period of purity expressing his intention to divorce the wife irrevocably saying: "I divorce thee irrevocably" or "I divorce thee in Bain"

## Ila-

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

## Zihar

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

- She may go to the court to get a decree of judicial divorce
- She may ask the court to grant the decree of restitution of conjugal rights.

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

- The husband observes fast for a period of two months, or,
- He provides food at least sixty people, or, He frees a slave.

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

## DIVORCE BY MUTUAL AGREEMENT

## KHULA AND MUBARAT

They are two forms of divorce by mutual consent but in either of them, the wife has to part with her dower or a part of some other property. The word khula, in its original sense means "to draw" or "dig up" or "to take off" such as taking off one's clothes or garments. It is said that

the spouses are like clothes to each other and when they take khula each takes off his or her clothes, i.e., they get rid of each other. In law it is said is said to signify an agreement between the spouses for dissolving a connubial union in lieu of compensation paid by the wife to her husband out of her property.

Although consideration for Khula is essential, the actual release of the dower or delivery of property constituting the consideration is not a condition precedent for the validity of the khula. Once the husband gives his consent, it results in an irrevocable divorce.

The husband has no power of cancelling the 'khul' on the ground that the consideration has not been paid. The consideration can be anything; usually it is mahr, the whole or part of it.

But it may be any property though not illusory.

In **mubarat**, the outstanding feature is that both the parties desire divorce. Thus, the proposal may emanate from either side. In mubarat both, the husband and the wife are happy to get rid of each other .Among the Sunnis when the parties to marriage enter into a mubarat all mutual rights and obligations come to an end.

## DIVORCE BY WIFE

- **Talaaq-i-tafweez**
- **Lian**
- **By Dissolution of Muslim Marriages Act 1939.**

## TALAA-I-TAFWEEZ

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

## LIAN

If the husband levels false charges of unchastity or adultery against his wife then this amounts to character assassination and the wife has got the right to ask for divorce on these grounds. Such a mode of divorce is called Lian. However, it is only a voluntary and aggressive charge of adultery made by the husband which, if false, would entitle the wife to get the wife to get the decree of divorce on the ground of Lian.

Where a wife hurts the feelings of her husband with her behavior and the husband hits back an allegation of infidelity against her, then what the husband says in response to the bad behavior of the wife, cannot be used by the wife as a false charge of adultery and no divorce is to be granted under Lian. This was held in the case of **Nurjahan v. Kazim Ali** by the Calcutta High Court

## DISSOLUTION OF MUSLIM MARRIAGES ACT 1939:

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

**Section 2 of the Act runs as under**

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

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

**That the husband treats her with cruelty**

- Habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment,
- Associates with women of ill-repute or leads an infamous life, or
- Attempts to force her to lead an immoral life, or Disposes of her property or prevents her exercising her legal rights over it, or
- Obstructs her in the observance of her religious profession or practice, or
- If he has more than one wife, does not treat her equitably in accordance with the injunctions of the Holy Quran.

## IRRETRIEVABLE BREAKDOWN

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

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

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

## REMARRIAGE WITH DIVORCED WIFE

After iddat the parties can marry with each other, except when divorce given by a triple pronouncement of talak. In that case, before they can remarry the wife must be married to another person in the interval. Such a marriage should be consummated, and thereafter, she should be divorced by him. This concept is called as Nikah Halala.

**Rashid Ahmed v. Anisha khatun** 1932 14 Bom In this case a Hanafi Muslim divorced his wife by three successive pronouncements. Subsequently, he re-married her. it was held by the Bombay high court that the re-marriage was not valid. Unless the wife married another person,

the marriage was consummated, and thereafter dissolved. In the absence of proof of such marriage with another person and the dissolution of such marriage, a presumption of remarriage cannot be raised.

Hence, the children born after the pronouncement of divorce were held to be illegitimate, and therefore, not entitled to inherit from the father. Presently this practice of **Nikah Halala** along with the practice of polygamy among Muslim community was challenged before Supreme Court to declare it as offence. In **Sameena Begum V. Union of India WP. No. 222 of 2018** along with **WP 202, 227, and 235 of 2018 Ashwini Kumar Upadhyay v. Union of India**

## MODULE 04 MARRIAGE AND MATRIMONIAL RELIEFS AMONG PARSIS, CHRISTIANS AND UNDER THE SPECIAL MARRIAGE ACT 1954

## THE INDIAN CHRISTIAN MARRIAGE ACT, 1872

## ESSENTIALS MARRIAGE OF INDIAN CHRISTIANS

- **ANY TWO PERSONS**
- **AGE**
- **BIGAMY**
- **MENTAL CAPACITY**
- **PROHIBITED RELATIONSHIP**

### 1. ANY INDIAN CHRISTIANS

**60. On what conditions marriages of Indian Christians may be certified.—**Every marriage between Indian Christians applying for a certificate, shall, without the preliminary notice required under Part III, be certified under this Part, if the following conditions be fulfilled, and not otherwise:—

### 2. AGE

The age of the man intending to be a married shall not be under twenty-one years, and the age of the woman intending to be married shall not be under eighteen years

### 3. NEITHER PARTY HAS A SPOUSE LIVING [BIGAMY]

Neither of the persons intending to be married shall have a wife or husband still living

## IN THE PRESENCE OF A LICENSED PERSON

In the presence of a person licensed under section 9, and of at least two credible witnesses other than such person, each of the parties shall say to the other "I call upon these persons here present to witness that. 1, *A. B.*, in the presence of Almighty God, and in the name of our Lord Jesus Christ, do take thee, *C. D.*, to be my lawful wedded wife [*or* husband]" or words to the like effect

## LICENSING OF PERSONS [SEC.9]

The State Government may grant a license to any Christian, either by name or as holding any office for the time being, authorizing him to grant certificates of marriage between Indian Christians. Any such license may be revoked by the authority by which it was granted, and every such grant or revocation shall be notified in the Official Gazette.

## MARRIAGE NOTICE BOOK AND PUBLICATION [SEC.6]

The Marriage Officer shall keep all notices given under Sec. 5 with the records of his office and shall also forthwith enter a true copy of every such notice in a book prescribed for that purpose, to be called the Marriage Notice Book, and such book shall be open for inspection at all reasonable times, without fee, by any person desirous of inspecting the same.

The Marriage Officer shall cause every such notice to be published by affixing a copy thereof to some conspicuous place in his office. Where either of the parties to an intended marriage is not permanently residing within the local limits of the district of the Marriage Officer to whom the notice has been given under Sec. 5, the Marriage Officer shall also cause a copy of such notice to be transmitted to the Marriage Officer of the district within whose limits such party is permanently residing, and that Marriage Officer shall thereupon cause a copy thereof to be affixed to some conspicuous place in his office.

## OBJECTION TO MARRIAGE [SEC.7]

Any person may, before the expiration of thirty days from the date on which any such notice has been published under sub-section (2) of Sec. 6, object to the marriage on the ground that it would contravene one or more of the conditions specified in Sec.4.

After the expiration of thirty days from the date on which notice of an intended marriage has been published under sub-section (2) of Sec. 6, the marriage may be solemnized, unless it has been previously objected to under sub-section (1). The nature of the objection shall be recorded in writing by the Marriage Officer in the Marriage Notice Book, be read over and explained if necessary, to the person making the objection and shall be signed by him or on his behalf.

## PROCEDURE ON RECEIPT OF OBJECTION [SEC.8]

If an objection is made under Sec. 7 to an intended marriage the Marriage Officer shall not solemnize the marriage until he has inquired into the matter of the objection and is satisfied that it ought not to prevent the solemnization of the marriage or the objection is withdraw by the person making it; but the Marriage Officer shall not take more than thirty days from the date of the objection for the purpose of inquiring into the matter of the objection and arriving at a decision.

If the Marriage Officer upholds the objection and refuses to solemnize the marriage, either party to the intended marriage may, within a period of thirty days from the date of such refusal, prefer an appeal to the District Court within the local limits of whose jurisdiction the Marriage Officer has his office, and the decision of the District Court on such appeal shall be final, and the Marriage Officer shall act in conformity with the decision of the Court.

## POWERS OF MARRIAGE OFFICERS IN RESPECT OF INQUIRIES [SEC.9]

For the purpose of any inquiry under Sec.8, the Marriage Officer shall have all the powers vested in a Civil Court under the Code of Civil Procedure, 1908(5 of 1908), when trying a suit in respect of the following matters, namely:

(a) summoning and enforcing the attendance of witnesses and examining them on oath;

(b) discovery and inspection;
(c) compelling the production of documents;
(d) reception of evidence on affidavits; and

(e)issuing commissions for the examination of witnesses; and any proceeding before the Marriage Officer shall be deemed to be a judicial proceeding within the meaning of Sec.193 of the Indian Penal Code(45 of 1960).

If it appears to the Marriage Officer that the objection made to an intended marriage is not reasonable and has not been made in good faith he may impose on the person objecting costs, by way of compensation not exceeding one thousand rupees, and award the whole, or any part thereof to the parties to the intended marriage, and any order of costs so made may be executed in the same manner as a decree passed by the District Court within the local limits of whose jurisdiction the Marriage Officer has his office.

## PROCEDURE ON RECEIPT OF OBJECTION BY MARRIAGE OFFICER ABROAD [SEC.10]

Where an objection is made under Sec.7 to a Marriage Officer in the State of Jammu and Kashmir in respect of an intended marriage in the State and the Marriage Officer, after making such inquiry into the matter as he thinks fit, entertains a doubt in respect thereof, he shall not solemnize the marriage but shall transmit the record with such statement respecting the matter as he thinks fit to the Central Government, and the Central Government, after making such inquiry into the matter and after obtaining such advice as it thinks fit, shall give its decision thereon in writing to the Marriage Officer shall act in conformity with the decision of the Central Government.

## DECLARATION BY PARTIES AND WITNESSES [SEC.11]

Before the marriage is solemnized the parties and three witnesses shall, in the presence of the Marriage Officer, sign a declaration in the Form specified in the Third Schedule to this Act, and the declaration shall be countersigned by the Marriage Officer.

## PLACE AND FORM OF SOLEMNIZATION [SEC.12]

The marriage may be solemnized at the office of the Marriage Officer or at such other place within a reasonable distance therefrom as the parties may desire, and upon such conditions and the payments of such additional fees as may be prescribed.

The marriage may be solemnized in any form which the parties may choose to adopt: Provided that it shall not be complete and binding on the parties unless each party says to the other in the presence of the Marriage Officer and the three witnessess and in any language understood by the parties,- "I (A) take thee (B), to be my lawful wife (or husband)"

## CERTIFICATE OF MARRIAGE [SEC.13]

When the marriage has been solemnized the Marriage Officer shall enter a certificate thereof in the Form specified in the Fourth Schedule in a book to be kept by him for that purpose and to be called the Marriage Certificate Book and such certificate shall be signed by the parties to the marriage and the three witnesses.

On a certificate being entered in the Marriage Certificate Book by the Marriage Officer, the certificate shall be deemed to be conclusive evidence of the fact that a marriage under this Act has been solemnized and that all formalities respecting the signatures of witnesses have been complied with.

## NEW NOTICE WHEN MARRIAGE NOT SOLEMNIZED WITHIN THREE MONTHS [SEC.14]

Whenever a marriage is not solemnized within three calendar months from the date on which notice thereof has been given to the Marriage Officer as required by Sec. 5 or where an appeal has been filed under sub-section (2) of Sec.8, within three months from the date of the decision of the District Court on such appeal or where the record of a case has been transmitted to the Central Government under Sec.10, within three months from the date of decision of the Central Government, the notice and all other proceedings arising there from shall be deemed to have lapsed, and no marriage Officer shall solemnize the marriage until a new notice has been given in the manner laid down in this Act

## REGISTRATION OF MARRIAGE CELEBRATED IN OTHER FORMS [SEC.15]

Any marriage celebrated, whether before or after the commencement of this Act, other than a marriage solemnized under the Special Marriage Act, 1872 or under this Act, may be

registered under this Chapter by a Marriage Officer in the territories to which this Act extends if the following conditions are fulfilled, namely:

(a) a ceremony of marriage has been performed between the parties and they have been living together as husband and wife ever since
(b) neither party has at the time of registration more than one spouse living;
(c) neither party is an idiot or a lunatic at the time of registration:
(d) the parties have completed the age of twenty-one year at the time of registration;
(e) the parties are not within the degrees of prohibited relationship:

Provided that in case of a marriage celebrated before the commencement of this Act, this condition shall be subject to any law, custom or usage having the force of law governing each of them which permits of a marriage between the two; and
(f) the parties have been residing within the district of the Marriage Officer for a period of not less than thirty days immediately preceding the date on which the application is made to him for registration of the marriage.

## PROCEDURE FOR REGISTRATION [SEC.16]

Upon receipt of an application signed by both the parties to the marriage for the registration of their under this chapter,
the Marriage Officer shall give public notice thereof in such manner as may be prescribed and after allowing a period of thirty days for objection and after hearing any objection received within that period, shall,
if satisfied that all the conditions mentioned in Sec. 15 are fulfilled, enter a certificate of the marriage in the Marriage Certificate Book in the Form specified in the Fifth Schedule and such certificate shall be signed by the parties to the marriage and by three witnesses.

## APPEALS FROM ORDERS UNDER SEC. 16 [SEC.17]

Any person aggrieved by any order of a Marriage Officer refusing to register a marriage under this Chapter may, within thirty days from the date of order, appeal against that order to the District Court within the local limits of whose jurisdiction the Marriage Officer has his office, and the decision of the District Court on such appeal shall be final, and the Marriage Officer to whom the application was made shall act in conformity with such decision.

## EFFECT OF REGISTRATION OF MARRIAGE UNDER THIS CHAPTER [SEC.18]

Subject to the provisions contained in sub-section (2) of Sec.24 where a certificate of marriage has been finally entered in the Marriage Certificate Book under this Chapter, the marriage shall, as from the date of such entry, be deemed to be a marriage solemnized under this Act, and all children born after the date of the ceremony of marriage (whose names shall also be entered in the Marriage Certificate Book) shall in all respects be deemed to be and always to have been the legitimate children of their parents:

Provided that nothing contained in this section shall be construed as conferring upon any such children any rights in or to the property of any person other than their parents in any case where, but for the passing of this Act, such children would have been incapable of possessing or acquiring any such rights by reason of their not being the legitimate children of their parents.

## CONSEQUENCES OF MARRIAGE UNDER THIS ACT [SEC.19 TO 21-A]

**19. Effect of marriage on member of undivided family**- The marriage solemnized under this Act of any member of an undivided family who professes the Hindu, Buddhist, Sikh or Jain religion shall be deemed to effect his severance from such family.

**20. Rights and disabilities not affected by Act**.- Subject to the provisions of Sec. 19, any person whose marriage is solemnized under this Act, shall have the same rights and shall be subject to the same disabilities in regard to the right of succession to any property as a person to whom the Caste Disabilities Removal Act, 1850 (21 of 1850), applies.

**21. Succession to property of parties married under Act.**- Notwithstanding any restrictions contained in the Indian Succession Act,1925 (39 of 1925), with respect to its application to members of certain communities, succession to the property of any person whose marriage is solemnized under this Act and to the property of the issue of such marriage shall be regulated by the provisions of the said Act and for the purposes of this section that Act shall have effect as if Chapter III of Part V (Special Rules for Parsi Intestates) had been omitted therefrom.

**21-A. Special provision in certain cases** .- Where the marriage is solemnized under this Act of any person who professes the Hindu, Buddhist, Sikh or Jain religion with a person who professes

the Hindu, Buddhish, Sikh or Jain religion. Secs. 19 and 21 shall not apply and so much of Sec. 20 as creates a disability shall also not apply.

## SPECIAL MARRIAGE ACT 1954

## ESSENTIALS OF A VALID MARRIAGE SEC.4

**ANY TWO PERSONS**

**BIGAMY**

**MENTAL CAPACITY**

**AGE**

**PROHIBITED RELATIONSHIP**

### 1. ANY TWO PERSONS

Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled namely:

### 2. NEITHER PARTY HAS A SPOUSE LIVING [BIGAMY]

### 3. MENTAL CAPACITY

Neither party- (i) is incapable of giving a valid consent to it in consequence of unsoundness of mind, or (ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(iii) has been subject to recurrent attacks of insanity or epilepsy

### 4. AGE

Male has completed the age of twenty-one years and the female the age of eighteen years

### 5. PROHIBITED RELATIONSHIP

The parties are not within the degrees of prohibited relationship: Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship

## SEC. 2 (B) "DEGREES OF PROHIBITED RELATIONSHIP"

A man and any of the persons mentioned in Part I of the First Schedule and a woman and any of the persons mentioned in Part II of the said Schedules are within the degrees of prohibited relationship.

**Explanation I**.- Relationship includes relationship by half or uterine blood as well as by full blood, illegitimate, legitimate as well as by adoption

## NOTICES OF INTENDED MARRIAGE [Sec.5]

When a marriage is intended to be solemnized under this Act, the parties of the marriage shall give notice thereof in writing in the Form specified in the Second Schedule to the Marriage Officer of the district in which at least one of the parties to the marriage has resided for a period of not less than thirty days immediately preceding the date on which such notice is given.

## MARRIAGE NOTICE BOOK AND PUBLICATION [SEC.6]

The Marriage Officer shall keep all notices given under Sec. 5 with the records of his office and shall also forthwith enter a true copy of every such notice in a book prescribed for that purpose, to be called the Marriage Notice Book, and such book shall be open for inspection at all reasonable times, without fee, by any person desirous of inspecting the same. The Marriage Officer shall cause every such notice to be published by affixing a copy thereof to some conspicuous place in his office.

Where either of the parties to an intended marriage is not permanently residing within the local limits of the district of the Marriage Officer to whom the notice has been given under Sec. 5, the Marriage Officer shall also cause a copy of such notice to be transmitted to the Marriage Officer of the district within whose limits such party is permanently residing, and that Marriage Officer shall thereupon cause a copy thereof to be affixed to some conspicuous place in his office.

## OBJECTION TO MARRIAGE [SEC.7]

Any person may, before the expiration of thirty days from the date on which any such notice has been published under sub-section (2) of Sec. 6, object to the marriage on the ground that it would contravene one or more of the conditions specified in Sec.4.

After the expiration of thirty days from the date on which notice of an intended marriage has been published under sub-section (2) of Sec. 6, the marriage may be solemnized, unless it has been previously objected to under sub-section (1). The nature of the objection shall be

recorded in writing by the Marriage Officer in the Marriage Notice Book, be read over and explained if necessary, to the person making the objection and shall be signed by him or on his behalf.

## PROCEDURE ON RECEIPT OF OBJECTION [SEC.8]

If an objection is made under Sec. 7 to an intended marriage the Marriage Officer shall not solemnize the marriage until he has inquired into the matter of the objection and is satisfied that it ought not to prevent the solemnization of the marriage or the objection is withdraw by the person making it; but the Marriage Officer shall not take more than thirty days from the date of the objection for the purpose of inquiring into the matter of the objection and arriving at a decision.

If the Marriage Officer upholds the objection and refuses to solemnize the marriage, either party to the intended marriage may, within a period of thirty days from the date of such refusal, prefer an appeal to the District Court within the local limits of whose jurisdiction the Marriage Officer has his office, and the decision of the District Court on such appeal shall be final, and the Marriage Officer shall act in conformity with the decision of the Court.

## POWERS OF MARRIAGE OFFICERS IN RESPECT OF INQUIRIES [SEC.9]

For the purpose of any inquiry under Sec.8, the Marriage Officer shall have all the powers vested in a Civil Court under the Code of Civil Procedure, 1908(5 of 1908), when trying a suit in respect of the following matters, namely:

(a) summoning and enforcing the attendance of witnesses and examining them on oath;

(b) discovery and inspection;

(c) compelling the production of documents;

(d) reception of evidence on affidavits; and

(e)issuing commissions for the examination of witnesses; and any proceeding before the Marriage Officer shall be deemed to be a judicial proceeding within the meaning of Sec.193 of the Indian Penal Code(45 of 1960).

If it appears to the Marriage Officer that the objection made to an intended marriage is not reasonable and has not been made in good faith he may impose on the person objecting costs, by way of compensation not exceeding one thousand rupees, and award the whole, or any

part thereof to the parties to the intended marriage, and any order of costs so made may be executed in the same manner as a decree passed by the District Court within the local limits of whose jurisdiction the Marriage Officer has his office.

## PROCEDURE ON RECEIPT OF OBJECTION BY MARRIAGE OFFICER ABROAD [SEC.10]

Where an objection is made under Sec.7 to a Marriage Officer in the State of Jammu and Kashmir in respect of an intended marriage in the State and the Marriage Officer, after making such inquiry into the matter as he thinks fit, entertains a doubt in respect thereof, he shall not solemnize the marriage but shall transmit the record with such statement respecting the matter as he thinks fit to the Central Government, and the Central Government, after making such inquiry into the matter and after obtaining such advice as it thinks fit, shall give its decision thereon in writing to the Marriage Officer shall act in conformity with the decision of the Central Government.

## DECLARATION BY PARTIES AND WITNESSES [SEC.11]

Before the marriage is solemnized the parties and three witnesses shall, in the presence of the Marriage Officer, sign a declaration in the Form specified in the Third Schedule to this Act, and the declaration shall be countersigned by the Marriage Officer.

## PLACE AND FORM OF SOLEMNIZATION [SEC.12]

The marriage may be solemnized at the office of the Marriage Officer or at such other place within a reasonable distance therefrom as the parties may desire, and upon such conditions and the payments of such additional fees as may be prescribed. The marriage may be solemnized in any form which the parties may choose to adopt: Provided that it shall not be complete and binding on the parties unless each party says to the other in the presence of the Marriage Officer and the three witnessess and in any language understood by the parties,- "I (A) take thee (B), to be my lawful wife (or husband)"

## CERTIFICATE OF MARRIAGE [SEC.13]

When the marriage has been solemnized the Marriage Officer shall enter a certificate thereof in the Form specified in the Fourth Schedule in a book to be kept by him for that purpose

and to be called the Marriage Certificate Book and such certificate shall be signed by the parties to the marriage and the three witnesses.

On a certificate being entered in the Marriage Certificate Book by the Marriage Officer, the certificate shall be deemed to be conclusive evidence of the fact that a marriage under this Act has been solemnized and that all formalities respecting the signatures of witnesses have been complied with.

## NEW NOTICE WHEN MARRIAGE NOT SOLEMNIZED WITHIN THREE MONTHS [SEC.14]

Whenever a marriage is not solemnized within three calender months from the date on which notice thereof has been given to the Marriage Officer as required by Sec. 5 or where an appeal has been filed under sub-section (2) of Sec.8, within three months from the date of the decision of the District Court on such appeal or where the record of a case has been transmitted to the Central Government under Sec.10, within three months from the date of decision of the Central Government, the notice and all other proceedings arising therefrom shall be deemed to have lapsed, and no marriage Officer shall solemnize the marriage until a new notice has been given in the manner laid down in this Act

## REGISTRATION OF MARRIAGE CELEBRATED IN OTHER FORMS [SEC.15]

Any marriage celebrated, whether before or after the commencement of this Act, other than a marriage solemnized under the Special Marriage Act, 1872 or under this Act, may be registered under this Chapter by a Marriage Officer in the territories to which this Act extends if the following conditions are fulfilled, namely:

(a) a ceremony of marriage has been performed between the parties and they have been living together as husband and wife ever since

(b) neither party has at the time of registration more than one spouse living;

(c) neither party is an idiot or a lunatic at the time of registration:

(d) the parties have completed the age of twenty-one year at the time of registration;

(e) the parties are not within the degrees of prohibited relationship:

Provided that in case of a marriage celebrated before the commencement of this Act, this condition shall be subject to any law, custom or usage having the force of law governing each of them which permits of a marriage between the two; and

(f) the parties have been residing within the district of the Marriage Officer for a period of not less than thirty days immediately preceding the date on which the application is made to him for registration of the marriage.

## PROCEDURE FOR REGISTRATION [SEC.16]

Upon receipt of an application signed by both the parties to the marriage for the registration of their under this chapter, the Marriage Officer shall give public notice thereof in such manner as may be prescribed and after allowing a period of thirty days for objection and after hearing any objection received within that period, shall, if satisfied that all the conditions mentioned in Sec. 15 are fulfilled, enter a certificate of the marriage in the Marriage Certificate Book in the Form specified in the Fifth Schedule and such certificate shall be signed by the parties to the marriage and by three witnesses.

## APPEALS FROM ORDERS UNDER SEC. 16 [SEC.17]

Any person aggrieved by any order of a Marriage Officer refusing to register a marriage under this Chapter may, within thirty days from the date of order, appeal against that order to the District Court within the local limits of whose jurisdiction the Marriage Officer has his office, and the decision of the District Court on such appeal shall be final, and the Marriage Officer to whom the application was made shall act in conformity with such decision.

## EFFECT OF REGISTRATION OF MARRIAGE UNDER THIS CHAPTER [SEC.18]

Subject to the provisions contained in sub-section (2) of Sec.24 where a certificate of marriage has been finally entered in the Marriage Certificate Book under this Chapter, the marriage shall, as from the date of such entry, be deemed to be a marriage solemnized under this Act, and all children born after the date of the ceremony of marriage (whose names shall also be entered in the Marriage Certificate Book) shall in all respects be deemed to be and always to have been the legitimate children of their parents:

Provided that nothing contained in this section shall be construed as conferring upon any such children any rights in or to the property of any person other than their parents in any

case where, but for the passing of this Act, such children would have been incapable of possessing or acquiring any such rights by reason of their not being the legitimate children of their parents.

## CONSEQUENCES OF MARRIAGE UNDER THIS ACT [SEC.19 TO 21-A]

**19. Effect of marriage on member of undivided family-** The marriage solemnized under this Act of any member of an undivided family who professes the Hindu, Buddhist, Sikh or Jain religion shall be deemed to effect his severance from such family.

**20. Rights and disabilities not affected by Act**.- Subject to the provisions of Sec. 19, any person whose marriage is solemnized under this Act, shall have the same rights and shall be subject to the same disabilities in regard to the right of succession to any property as a person to whom the Caste Disabilities Removal Act, 1850 (21 of 1850), applies.

**21. Succession to property of parties married under Act.-** Notwithstanding any restrictions contained in the Indian Succession Act,1925 (39 of 1925), with respect to its application to members of certain communities, succession to the property of any person whose marriage is solemnized under this Act and to the property of the issue of such marriage shall be regulated by the provisions of the said Act and for the purposes of this section that Act shall have effect as if Chapter III of Part V (Special Rules for Parsi Intestates) had been omitted there from.

**21-A. Special provision in certain cases .-** Where the marriage is solemnized under this Act of any person who professes the Hindu, Buddhist, Sikh or Jain religion with a person who professes the Hindu, Buddhish, Sikh or Jain religion. Secs. 19 and 21 shall not apply and so much of Sec. 20 as creates a disability shall also not apply.

## MODULE 05 ALIMONY AND MAINTENANCE

## MAINTENANCE UNDER HINDU LAW

The right to claim maintenance is a right recognized under different laws in India, each one is different from other in main and another particulars. The child, wife, aged parents, divorced wife, other near relations must obtain some subsistence for themselves. Maintenance in most cases is due to the fact of marriage. Under the Hindu maintenance laws, there are 2 types of maintenance that can be claimed by the wife. When the wife files a maintenance petition the burden to declare his income shifts to the husband, who has the right to defend the maintenance petition

## THE HINDU MARRIAGE ACT, 1955

### 1.Interim Maintenance:

### 24. Maintenance pendente lite and expenses of proceedings.-

Where in **any proceeding** under **this Act** it appears to the Court that **either the wife or the husband**, as the case may be, has **no independent income** sufficient for her or his support and the **necessary expenses** of the **proceeding**, it may, on the application of the wife or the husband, **order the respondent** to pay the petitioner the **expenses of the proceeding** such sum as, having **regard** to the **petitioner's own income** and the **income of the respondent**, it may seem to the **Court to be reasonable.**

### 2. Permanent Maintenance:

Permanent maintenance is paid by the husband to his wife in case of divorce, and the amount is determined through a maintenance petition filed through a **divorce law lawyer in India**. Section 25 of the Act states that the court can order the husband to pay maintenance to his wife in form of a lump sum or monthly amount for her lifetime. However, the wife may not be eligible for maintenance if there are any changes in her circumstances

**25. Permanent alimony and maintenance.-**(1) **Any court** exercising jurisdiction under **this Act** may, at the **time of passing any decree** or at any time **subsequent thereto**, on **application** made to it for the purposes by **either the wife or the husband**, as the case may be, order that the **respondent shall pay to the applicant** for her or his **maintenance and support** such **gross sum** or such **monthly** or **periodical sum for a term not exceeding the life of the applicant** as, having regard to the **respondent's own income and other property of the applicant, the conduct of the parties and other circumstances of the case**, it may seem to the Court to **be just**, and any **such payment** may be **secured**, if necessary, **by a charge** on the **immoveable property of the respondent**

(2) If the Court is satisfied that there is a **change in the circumstances of either party** at any time after it has made an order under sub-section (1), it may at the instance of either party, **vary, modify or rescind** any such order in such manner as the court may deem just.

(3) If the Court is satisfied that the **party** in whose favour an order has been made under this Section has **re-married or**, if **such party is the wife**, that she has **not remained chaste** or if such party is the **husband**, that he has had **sexual intercourse with any woman outside wedlock**, it may at the instance of the other party **vary, modify or rescind** any such order in such manner as the **court may deem just**.

## THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

**Maintenance of wife Sec. 18**
**Maintenance of widowed daughter-in-law Sec. 19**
**Maintenance of children and aged parents Sec. 20**
**Dependents defined Sec. 21**
**Maintenance of dependents Sec. 22**

## WHAT IS MAINTENANCE

The dictionary meaning of the term maintenance is **support or sustenance**.

Sec.3 (b) "maintenance" includes-

(i) in all cases, provision for **food, clothing, residence, education** and **medical attendance** and **treatment**;

(ii) in the case of an **unmarried daughter** also the **reasonable expenses** of and incident to her **marriage**

## MAINTENANCE OF WIFE SEC. 18

(1) Subject to the provisions of this section, a Hindu wife, whether **married before or after** the commencement of this Act, shall be **entitled to be maintained** by **her husband during her lifetime**.

(2) A Hindu **wife** shall be entitled to **live separately** from her husband **without forfeiting her claim** to maintenance,-

(a) if he is guilty of **desertion**, that is to say, of **abandoning** her **without reasonable cause** and **without** her **consent** or **against her wish**, or of willfully **neglecting** her

(b) if he has treated her with **such cruelty** as to cause a reasonable **apprehension** in her mind that it will be **harmful** or **injurious** to live with her husband

(c) if he is suffering from a virulent form of **leprosy**

(d) if he has **any other wife living**

(e) if he **keeps a concubine** in the **same house** in which his wife is living or **habitually resides** with a **concubine elsewhere**

(f) if he has **ceased to be a Hindu** by **conversion** to another religion;

(g) if there is any **other cause justifying her living separately.**

(3) A Hindu **wife** shall **not be entitled to separate residence and maintenance** from her husband if she is **unchaste or ceases to be a Hindu** by **conversion** to another religion.

## MAINTENANCE OF WIDOWED DAUGHTER-IN-LAW SEC. 19

(1) A Hindu **wife**, whether **married before or after the commencement** of this Act, shall be **entitled to be maintained after the death of her husband** by her **father-in-law**.

Provided and to the extent that **she is unable to maintain herself out of her own earnings** or **other property** or, where **she has no property of her own**, is **unable to obtain maintenance**-

(a) from the **estate** of her **husband** or her **father** or **mother**, or

(b) from her **son or daughter**, if any, or **his or her estate**.

(2) Any **obligation** under sub-section (1) shall **not be enforceable** if the father in law has **not the means to do so** from any **coparcenary property** in his possession out of which the **daughter-in-law has not obtained any share**, and any such obligation shall **cease on the remarriage** of the daughter-in-law.

## MAINTENANCE OF CHILDREN AND AGED PARENTS SEC. 20

(1) Subject to the provisions of this section **a Hindu** is bound, **during his or her lifetime**, to maintain his or her legitimate or illegitimate **children** and his or her aged or infirm **parents**.

(2) A legitimate or illegitimate **child may claim maintenance** from his or her father or mother so long as the child is a **minor**.

(3) The obligation of a person to maintain his or her aged or infirm **parent** or **daughter who is unmarried** extends in so far as the parent or the unmarried daughter, as the case may be, is **unable to maintain himself or herself out of his or her own earnings or other property**

*Explanation*- In this section **"parent"** includes a **childless stepmother**.

## MAINTENANCE OF DEPENDENTS SEC. 22

(1) **Subject** to the provisions of **sub-section (2)**, the **heirs** of a **deceased** Hindu are bound to maintain the **dependents of the deceased** out of the **estate inherited by them from the deceased.**

(2) Where a **dependent** has **not obtained**, by **testamentary or intestate succession**, any **share** in the estate of a Hindu **dying** after the commencement of this Act, the **dependent shall be entitled**, subject to the provisions of this Act, to **maintenance** from those **who take the estate**.

(3) The **liability** of each of the persons **who take** the estate **shall be in proportion** to the value of the share or part of the estate **taken by him or her**.

(4) **Notwithstanding** anything contained in sub-section (2) or sub-section (3), **no person who is himself or herself a dependent** shall be **liable** to **contribute to the maintenance of others**, if he or she has **obtained a share or part**, the **value of which** is, or would, if the **liability to contribute** were enforced, become **less than** what would be **awarded** to him or her by way of **maintenance** under this Act.

## DEPENDENTS DEFINED SEC. 21

For the purposes of this Chapter **"dependents“** mean the following **relatives of the deceased**

(i) his or her father;

(ii) his or her mother;

(iii) his widow, so long as she does not remarry;

(iv) his or her **son** or the **son of his predeceased son** or the **son of a predeceased son of his predeceased son**, so long as he is a **minor**; provided and **to the extent** that he is **unable to obtain maintenance**, in the case of a **grandson** from **his father's or mother's estate,** and in the case of a **great-grandson**, from the **estate** of his **father or mother or father's father or father's mother**;

(v) his or her **unmarried daughter** or the unmarried daughter of **his predeceased son** or the unmarried daughter of **a predeceased son of his predeceased son**, so long as she **remains unmarried**; provided and to the extent that she is **unable** to obtain maintenance, in the case of a **grand daughter** from her father's or mother's estate and in the case of a **great-grand daughter** from the **estate** of her father or mother or father's father or father's mother;

(vi) his **widowed daughter**; provided and to the extent that **she is unable to obtain maintenance**-

(a) from the **estate** of her **husband**; or

(b) from her **son or daughter**, if any, or his or her **estate**; or

(c) from her **father-in-law** or his **father** or the **estate of either of them;**

(vii) any **widow of his son** or of a **son of his predeceased son**, so long as she **does not remarry**; provided and to the extent that she is **unable to obtain maintenance** from her **husband's estate**, or from her **son or daughter**, if any, or **his or her estate**; or in the case of a **grandson's widow,** also from her **father-in law's estate**;

(viii) his or her **minor illegitimate son**, so long as he **remains a minor**;

(xi) his or her **illegitimate daughter**, so long as she **remains unmarried.**

**Amount of maintenance Sec. 23**

**Claimant should be a Hindu Sec. 24**

**Amount may be altered on change of circumstances Sec. 25**

**Debts to have priority Sec. 26**

**Maintenance when to be a charge Sec. 27**

**Effect of transfer of property on right of maintenance Sec. 27**

## AMOUNT OF MAINTENANCE SEC. 23

(1) It shall be in the **discretion of the court** to **determine** whether any, and if so what, **maintenance** shall be **awarded** under the provisions of this Act, and in doing so, the **court shall** have **due regard** to the **consideration** set out in **sub-section (2) or sub-section (3)**, as the case may be, so far as they are applicable.

(2) In **determining** the **amount of maintenance**, if any, to be awarded to a **wife, children or aged or infirm parents** under this Act, regard shall be had to-

(a) the **position** and **status** of the parties;

(b) the **reasonable wants** of the claimant;

(c) if the claimant is **living separately**, whether the claimant is **justified in doing so**;

(d) the **value of the claimant's property** and any **income derived from such property**, or from the claimant's **own earning** or from any **other source**;

(e) the **number of persons entitled** to maintenance under this Act.

(3) In **determining the amount of maintenance**, if any, to be **awarded to a dependent** under this Act, regard shall be had to-

(a) the **net value** of the **estate** of the **deceased** after providing for the **payment of his debts**;

(b) the **provision**, if any, made under a **will of the deceased** in respect, of the **dependent**;

(c) the **degree of relationship** between the two;

(d) the **reasonable wants** of the dependent;

(e) the **past relations** between the **dependent** and the **deceased**;

(f) the **value of the property** of the dependent and any **income derived** from **such property**, or from his or her **earnings** or from any **other source**

(g) the **number of dependents** entitled to maintenance under this Act.

## CLAIMANT SHOULD BE A HINDU SEC. 24

**No person** shall be **entitled to claim maintenance** under this Chapter if he or she has **ceased to be a Hindu by conversion to another religion**.

## AMOUNT MAY BE ALTERED ON CHANGE OF CIRCUMSTANCES SEC. 25

The **amount of maintenance**, whether **fixed by a decree of court** or by **agreement** either **before or after** the **commencement** of this **Act**, may be **altered subsequently** if there is a **material change** in the **circumstances justifying such alteration**.

## DEBTS TO HAVE PRIORITY SEC. 26

**Subject to** the provisions contained in **Section 27 debts of every description** contracted or payable by the **deceased shall have priority** over the claims of his **dependents for maintenance** under this Act.

## MAINTENANCE WHEN TO BE A CHARGE SEC. 27

A **dependent's claim** for **maintenance** under this Act shall **not be a charge** on the **estate of the deceased** or **any portion** thereof, **unless** one has been **created by the will** of the deceased, by a **decree of court**, by **agreement** between the dependent and the owner of the estate or portion, or **otherwise**.

## EFFECT OF TRANSFER OF PROPERTY ON RIGHT OF MAINTENANCE SEC. 28

Where a **dependent has a right** to receive maintenance out of an estate and **such estate** or any part thereof is **transferred,** the **right to receive maintenance** may be **enforced against the transferee** if the transferee **has notice of the right** or if the transfer is **gratuitous**; but **not** against the transferee for **consideration** and **without notice** of the **right.**

## MAINTENANCE UNDER MUSLIM LAW

The child, wife, aged parents, divorced wife, other near relations must obtain some subsistence for themselves.

## MEANING OF MAINTENANCE

Maintenance under Muslim Law known as ‘Nafqah’ means amount spent by a man on his family to provide for food, shelter, clothing, lodging and other essential requirements for livelihood. A muslim husband has obligation to maintain his wife during the subsistence of marriage.

## PERSONS ENTITLED TO MAINTENANCE

I) Maintenance of Wife

II) Maintenance of Children

III) Maintenance of Parents, and

IV) Other relations

## MAINTENANCE OF WIFE

## PERSONAL LAW

## DURING MARRIAGE

It is incumbent on a husband to maintain his wife, whether she is Muslim or Kitabiya, poor or rich, enjoyed or unenjoyed, young or old. However the wife is too young for matrimonial intercourse she has no right to maintenance from her husband, whether she is living in his house or with her parents. Where the marriage is valid and the wife is capable to render marital intercourse it‘s the husband‘s duty to maintain his wife even though she may have means to maintain herself. But if she unjustifiably refuses to cohabit with her husband then she loses her right for maintenance. She is not however entitled to past maintenance. Maintenance is payable from the date of the decree unless the claim is based on specific agreement. The right of maintenance would also be lost if the wife refuses to obey the reasonable commands of the Husband but not so if disobedience is justified by circumstances or if she is forced to leave husband‘s house on account of cruelty, so that of the husband refuses to maintain his wife without any lawful reasons/causes the wife may sue him for maintenance.

To summaries, the wife loose the right to maintenance in the following circumstances:-

a) She is minor, incapable of consummation.

b) Refuse free access to the husband at all reasonable times.

c) Is disobedient.

d) Never visited his house.

e) Refuses to cohabit with him without reasonable excuse.

f) Abandon conjugal home without reasonable reasons.

g) Deserts him.

h) Elopes with another person.

## MAINTENANCE AFTER TALAK

After divorce the Mahomedan wife is entitled to maintenance during the time period of Iddat and also for the time, if any, that elapsed after the expiry of the period of Iddat and her receiving notice of Talak. After expiry of the period Iddat the enforceability of the order of maintenance ceases. Suit by divorced for Hiba-jewels lies where the wife resides. The wife is entitled to sue for maintenance at her normal place of residence at the time of divorce and the place where she receives the notice thereof.

A widow is not entitled to maintenance out of the estate of her late husband in addition to what she is entitled to by inheritance or under his will.

## BY AGREEMENT

The husband and wife or their guardian may enter into agreement whereby the wife is entitled to recover maintenance from her husband, on the happening of some special event such as ill- treatment, disagreement, husband‘s second marriage etc. but the agreement in the marriage contract that the wife would not be entitled to maintenance is void.

The key consideration is that the agreement should not be opposed to the public policy and Muslim Law. An agreement between a Muslim and his first wife, made after his marriage with a second wife, providing for certain maintenance for her if she could not in future get on with the second wife, was held not void on the ground of the public policy.

Followings are the valid conditions for an agreement:

a. If the husband treats the wife with cruelty then the wife has a right to separate residence and maintained to meet it.

b. If he brings subsequent wife and the previous wife is unable to with her, she will get maintenance allowance to live separately or even at her father‘s house.

c. If he brings his other wife to the matrimonial home, she will reside at her father‘s home and he will give her maintenance.

d. In case of disagreement with each other, he will give her maintenance for her separate residence.

## MAINTENANCE OF CHILDREN

The father is not bound to provide separate maintenance for a minor or an unmarried daughter who refuses to live with him without reasonable cause. An adult son need not to be maintained unless he his infirm. The father is not bound to maintain a child who is capable of being maintained out of his or her own property. If the father is poor or infirm then the mother is bound to maintain the children. And failing her it is the duty of the parental grandfather.

## MAINTENANCE UNDER THE CODE OF CRIMINAL PROCEDURE 1973

Wife's right to maintenance were incorporated in the Code of Criminal Procedure 1898. These provisions were made applicable to all the Indian wives irrespective of any religion or caste. It is to be noted that under Section 488 of Cr.P.C. of 1898, the wife's right to maintenance depended upon the continuance of her married status. Therefore, it could be defeated by the husband by divorcing her unilaterally as under the Muslim Personal Law, or by obtaining a decree of divorce against her under the other systems of law. To remove this hardship, the joint committee recommended that the benefit of the provisions regarding maintenance should be extended to a divorced woman, so long as she has not remarried after the divorce which was accepted by the legislature. The legislature took. a drastic step and an amendment in Criminal Procedure Code came into being in 1973. Later, under the new Criminal Procedure Code of 1973, Section 125 empowered the Magistrates to order the husband to provide maintenance to the wives. The provision was extended to 'divorced wives' also.

Under section 125, a divorced Muslim wife, who has not remarried can make an application to the Magistrate for seeking a maintenance order against the husband provided she is unable to maintain herself and her former husband despite having sufficient means neglects or refuses to maintain her. On her application, the Magistrate can order the former husband to pay her a monthly allowance. If the order is not complied with, the Magistrate can issue warrants in the manner provided for levying fines. Further non compliance results in imprisonment up to one month or till due payment, if made earlier. But, under section 127 (3) (b), such an order has to be

cancelled or modified on the proof that she has received in full from her former husband the sum which under the Personal Law is payable on such divorce.

The provisions of the Criminal Procedure Code, 1973 constitute a piece of legislation which aims to help deserted wife and other relations and require the husband to pay a monthly sum to enable them to live in the society.

**Mohd. Ahmed v. Shah Bano Begum,. AIR 1985 SC 945**

Shah Bano, 62-year-old Muslim women was married to Ahmad Khan who had pronounced *talaq* or divorce against her. Since she could not maintain herself and her 5 children, she had approached the court under section 125 of the Code of Criminal Procedure (Cr.P.C.) which imposes a duty upon the husband to provide for his divorced wife, in case she is unable to provide for herself. Her husband relied on the argument that the issue would fall under the purview of Muslim personal law and as per Muslim personal law, he would only be liable to pay maintenance for the *iddat* period along with the return of the *mehr*. The case, however, was decided in favor of Shah Bano and it was held that Muslims were not excluded from exercising their rights accruing from secular laws. In this case, the Supreme Court attempting to ensure continuing respect for Muslim women's claim to equal treatment, regardless of their membership into a particular religion.

However, the Muslim orthodoxy severely condemned it. They saw this case, which had created a breakthrough for Muslim women to address their grievances as an encroachment into the Muslim Shariat Law that they were bound by.

## The Muslim Women Act (Protection of Rights on Divorce), 1986

The then Rajiv Gandhi government legislated the Muslim Women Act (Protection of Rights on Divorce), 1986 to gain the support of Muslim voters in an increasingly hostile political climate. The Act is declaratory and codifies important pre-existing rules of Muslim Law. The Act makes provision for: Maintenance of a divorced Muslim wife during and after the period of Iddat, for enforcing her claim to unpaid dower and other exclusive properties. It was enforceable against the former Husband, relatives and the Waqf Board. The Act had provisions that in essence went against the decision by the court in Shah Bano.

The bill had exempted Muslim women from availing reliefs under section 125 of the Cr.P.C, which had been used to override Muslim. The section also stipulates that if after the

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

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

For instances, the Act does not empower the woman to avail maintenance after the lapsing of the period of Iddat since there are words such as 'within'. Secondly, the Act also espouses the restricted application of the secular provision of Section 125 of the Cr.P.C. to divorced Muslim women.

**DANIEL LATIFI V UNION OF INDIA AIR (2001) SC 3958**

The lawyer in the Shah Bano case filed a writ petition under Article 32 challenging the constitutional validity of the Act. In this judgment, the Supreme Court upheld the validity of the Act after coming to a compromise but decided that the secular provision for maintenance would be applied equally to the Muslim community. Sections 3 and 4 were interpreted liberally and it was stated that a divorced Muslim woman is entitled to reasonable and sufficient provision for livelihood along with maintenance. However, this maintenance was held to not be limited to the Iddat period, and a Muslim wife is also eligible to be paid maintenance for a period beyond *iddat* through her life until she has remarried. The case had first analysed the preamble of the Act, the *Shah Bano* case and ultimately upheld the validity of the Act. The court had stated that the 'reasonable' and 'fair' provisions for the future included maintenance extended beyond the *iddat*, but had to be paid by the husband within the *iddat* period in terms of Section 3(1)(a) of the Act.

Further, under Section 4 of the Act, the divorced wife may also proceed against her relatives who are liable to maintain her in proportion to the properties which they inherit from her after her death. This includes her children and parents. If none of these relatives has means of maintaining her, the duty would shift to the State's Waqf Board, wherein the court may order the

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

**SHAMIM BANO V ASHRAF KHAN 2014 CR. LJ 4818.**

This case is a milestone towards protecting the rights of Muslim women as it interprets Section 125 of the Code of Criminal Procedure to be universally applicable to women regardless of the dicta of personal laws on the matter. Taking the lead from the popular Shah Bano case, the Supreme Court of India held that Section 125 would apply to Muslim women, and they would be entitled to maintenance irrespective of Mahomedan law's views on the matter. In the Shamim Bano case, the court had considered for the first time that if it made joint petition mandatory, there would be a gross miscarriage of justice putting additional pressure on the woman who was already at a vulnerable position due to the social pressures and legal pressures (in addition to financial insecurity) that accrues from divorce. In this particular case the court realized that if the application under Section 125 were not accepted, Shamim Bano would be remediless as the Magistrate's order only ensured her Mahr and did not give her any maintenance. Thus, the court reasoned that Section 125 parameters should be applied in order to prevent any further and future travesty of justice.

## MAINTENANCE UNDER CHRISTIAN LAW

A Christian woman can claim maintenance from her spouse through criminal proceeding or/and civil proceeding. Interested parties may pursue both criminal and civil proceedings, simultaneously, as there is no legal bar to it. In criminal proceedings, the religion of the parties does not matter at all, unlike in civil proceedings. Section 36 of the Indian Divorce Act, 1869 (IDA) are similar to S.24 of HM ACT. However S. 36 of IDA differs in the respect that the maintenance pendente lite and interim maintenance can only be claimed by the wife and not by the husband. If a divorced Christian wife cannot support her in the post divorce period she need not worry as a remedy is in store for her in law.

Under S.37 of the Indian Divorce Act, 1869, she can apply for alimony/ maintenance in a civil court or High Court and, husband will be liable to pay her alimony such sum, as the court may order, till her lifetime. The Indian Divorce Act, 1869 which is only applicable to those persons who practice the Christianity religion inter alia governs maintenance rights of a Christian wife. The provisions are the same as those under the Parsi law and the same considerations are applied in granting maintenance, both alimony pendente lite and permanent maintenance. The provisions of the Indian Divorce Act, 1869, are produced herein covered under part IX -S.36 - S.38. The power of order monthly or weekly payments: In every such case, the Court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable: Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part as to the Court seems fit.

Under section 38 of the Indian Divorce Act, 1869, in all cases in which the Court makes any decree or order for alimony, it may direct the same to be paid either to the wife herself, or to any trustee on her behalf to be approved by the Court, and may impose any terms or restrictions which to the Court seem expedient, and may from time to time appoint a new trustee, if it appears to the Court expedient so to do.

In **Divyananda v. Jayarai** two Roman Catholic entered into Suyamaryadhai form of marriage and lived together as husband and wife for period of 5 months in the course of which the wife conceived a child. The Court rejected the petition of the woman as she was not a legally wedded wife. The Court held that being Christian, their marriage in accordance to Hindu customs without any conversion was void ab-initio and hence the woman was not a wife in the eye of law. As such the woman could not claim maintenance U/S 125 of, although her children illegitimate would be entitled to maintenance U/S. 125.

## MAINTENANCE UNDER PARSI LAW

Parsi can claim maintenance from the spouse through criminal proceedings or/ and civil proceedings. Interested parties may pursue both criminal and civil proceedings, simultaneously as there is no legal bar to it. In the criminal proceedings the religion of the parties doesn't matter

at all unlike the civil proceedings. If the Husband refuses to pay maintenance, wife can inform the court that the Husband is refusing to pay maintenance even after the order of the court. The court can then sentence the Husband to imprisonment unless he agrees to pay. The Husband can be detained in the jail so long as he does not pay. The Parsi Marriage and Divorce Act, 1936 speaks about the right of wife to maintenance-both alimony pendente lite and permanent alimony. The maximum amount can be decreed by court as alimony during the time a matrimonial suit is pending in court is one-fifth of the husband's net income.

In fixing the permanent maintenance, the court will determine what is just, bearing in mind the ability of husband, wife's own assets and conduct of the parties and this order will remain in force as long as wife remains chaste and unmarried. In case of pendent lite and interim maintenance sections 39 of the Parsi Marriage and Divorce Act, 1936 (PMDA) is similar to S.24 of HM ACT. S.40. of Parsi Marriage and Divorce Act says that the defendant shall pay to the plaintiff for her or his maintenance and support, such gross sum or such monthly or periodical sum, for a term not exceeding the life of the plaintiff as having regard to the defendants own income and other property, if any, the income and other property of the plaintiff, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the movable or immovable property of the defendant.

The Court if it is satisfied it may, at the instance of either party, vary, modify or rescind any such order in such manner as the Court may deem just and if the Court is satisfied that the partly in whose favour, an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he had sexual intercourse with any woman outside wedlock, it may, at the instance of the other party, vary, modify or rescind any such order in such manner as the Court may deem just.

## MAINTENANCE UNDER SPECIAL MARRIAGE ACT, 1954

**36. Alimony pendente lite**.

Where in any proceeding under Chapter V or Chapter VI it appears to the District Court that the wife has no independent income sufficient for her support and the necessary expenses of the proceeding, it may, on the application of the wife, order the husband to pay to her the

expenses of the proceeding, and weekly or monthly during the proceeding such sum as having regard to the husband's income, it may seem to the Court to be reasonable.

**37. Permanent alimony and maintenance**.

(1) Any Court exercising jurisdiction under Chapter V or Chapter VI may, at the time of passing any decree or at any time subsequent to the decree, on application made to it for the purpose, order that the husband shall secure to the wife for her maintenance and support, if necessary, by a charge on the husband's property, such gross sum or such monthly or periodical payment of money for a term not exceeding her life, as having regard to her own property, if any, her husband's property and ability, the conduct of the parties and other circumstances of the case it may seem to the Court to be just.

(2) If the District Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner

as it may seem to the Court to be just.

(3) If the District Court is satisfied that the wife in whose favour an order has been made under this section has remarried or is not leading a chaste life, it may, at the instance of the husband vary, modify or rescind any such order and in such manner as the Court may deem just.

## MAINTENANCE UNDER CODE OF CRIMINAL PROCEDURE 1973

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

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

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

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

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

(d) His father or mother, unable to maintain himself or herself It should be kept in view that the provision relating to maintenance under any personal law is distinct and separate.

There is no conflict between the two provisions. A person may sue for maintenance under s.125 of CrPC. If a person has already obtained maintenance order under his or her personal law,

the magistrate while fixing the amount of maintenance may take that into consideration while fixing the quantum of maintenance under the Code.

But he cannot be ousted of his jurisdiction. The basis of the relief, under the concerned section is the refusal or neglect to maintain his wife, children, father or mother by a person who has sufficient means to maintain them. The burden of proof is on him to show that he has no sufficient means to maintain and to provide maintenance.

Section 125 gives a statutory recognition to the moral, legal and fundamental duty of a man to maintain his wife, children and aged parents. Although this section also benefits a distressed father, the main thrust of this section to assist women and children.

Article 15(3) of the Indian constitution envisaged that the state can make special provision for woman and children.

Section 125 is also along the lines of Art.39 of the Indian Constitution that states that the State shall direct its policy towards ensuring that all citizens both men and women have equal access to means of livelihood and children and youths are given facilities opportunities in conditions of freedom and dignity.

At the time of enactment of this code section 125 is intended to be applicable to all irrespective of their personal Laws although maintenance is a Civil remedy yet it has been made a part of this Code to have a quick remedy and proceedings and S.125 is not a trail as non-payment of maintenance is not a criminal offence.

The word any person u/s. 125 includes a person belongs to the undivided family although the proceedings strictly against the individual concern and not the undivided family. However, the Magistrate may take into consideration the joint family property is determining the amount of maintenance that should be payable by such person..; it also includes a person, a father, an adult son and a married daughter. But not include a mother or a wife or an unmarried daughter.

## MAINTENANCE UNDER PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

Section 20. Monetary reliefs :- (1) While disposing of an application under sub sec. (1) of Sec. 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses

incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but not limited to, -

(a) the loss of earnings;

(b) the medical expenses;

(c) the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and

(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under Sec. 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.

(2) The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.

(3) The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require.

(4) The Magistrate shall send a copy of the order for monetary relief made under sub-sec. (1) to the parties to the application and to the in charge of the police station within the local limits of whose jurisdiction the respondent resides.

(5) The respondent shall pay the monetary relief granted to the aggrieved person within the period specified in the order under sub-sec.(1).

(6) Upon the failure on the part of the respondent to make payment in terms of the order under sub-sec. (1), the Magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person or to deposit with the Court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent.

## MAINTENANCE UNDER THE MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS ACT, 2007

Section 4 Of the Act deals with Maintenance of Parents and Senior Citizens.

Sec.4. Maintenance Of Parents And Senior Citizens :- (1) A senior citizen including parent who is unable to maintain himself from his own earning or out of the property owned by him, shall be entitled to make an application under Section 5 in case of-

(i) parent or grand-parent, against one or more of his children not being a minor;

(ii) a childless senior citizen, against such of his relative referred to in clause (g) of Section 2.

(2) The obligation of the children or relative, as the case may be, to maintain a senior citizen extends to the needs of such citizen so that senior citizen may lead a normal life.

(3) The obligation of the children to maintain his or her parent extends to the needs of such parent either father or mother or both, as the case may be, so that such parent may lead a normal life.

(4) Any person being a relative of a senior citizen and having sufficient means shall maintain such senior citizen provided he is in possession of the property of such senior citizen or he would inherit the property of such senior citizen:

Provided that where more than one relatives are entitled to inherit the property of a senior citizen, the maintenance shall be payable by such relative in the proportion in which they would inherit his property.

***Manish Jain vs. Akanksha Jain II (2017) DMC 106 (SC)*** The order passed by High Court of Delhi whereby interim maintenance of Rs. 60,000/- per month was granted to the respondent wife under Section 24 of HMA in addition to Rs. 10,000/- per month which the appellant-husband was already paying by way of interim maintenance to the respondent-wife in the proceedings under the DV Act was challenged before the Supreme Court of India.

The Apex Court while reducing the quantum of maintenance under Section 24 of the HMA Act held that the maintenance *pendente lite* granted under HMA would be in addition to the amount paid under the proceedings of DV Act.

**Rajat Johar Vs. Divya Johar 2017 SCC OnLine Del 11790**

A learned Single Judge of High Court of Delhi held that „the monetary relief as provided under the DV Act is different from maintenance, which can be in addition to an order of maintenance under Section 125 of Cr.P.C. or any other law, and can be granted to meet the expenses incurred and losses suffered by the aggrieved person and child of the aggrieved person as a result of the domestic violence."

**Prakash Babulal Dangi vs. The State of Maharashtra and Ors. 2017 SCC OnLine Bom 8897** the High Court of Bombay held that maintenance can be awarded both under the DV Act as well as under Section 125 of Cr.P.C.

**R D V. B D 31.07.2019 HIGH COURT OF DELHI**

As far as maintenance is concerned, granting maintenance under Domestic Violence Act is not a bar

## MODULE 06 LAW ON ADOPTION AND GUARDIANSHIP:

## ADOPTION

## ADOPTION UNDER HINDU LAW

Adoption is a process by which a person takes someone into custody and all the legal rights of a legitimate biological child is transferred to him. In other words it is legal affiliation of a child. The object of adoption is twofold: the first one undoubtedly being religious as it offers and heir to the adopter who can fulfill the funeral obligations and the second being secular, to secure an heir and perpetuate the adopter's name. Relationship of the child is severed legally from his/her biological parents. Child becomes the lawful child of his/her adoptive parents. All the rights, privileges and responsibilities post adoption are similar to that in case of a biological child.

## THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

**5. Adoptions to be regulated by this Chapter**- (1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void.

(2) An adoption which is void shall neither create any rights in the adoptive family in favour of any person which he or she could not have acquired except by reason of the adoption, nor destroy the rights of any person in the family of his or her birth.

## ESSENTIALS OF VALID ADOPTION SEC.6

**6. Requisites of a valid adoption**- No adoption shall be valid unless- (i) the person adopting has the capacity, and also the right, to take in adoption;

(ii) the person giving in adoption has the capacity to do so;

(iii) the person adopted is capable of being taken in adoption; and

(iv) the adoption is made in compliance with the other conditions mentioned in this Chapter.

## CAPACITY OF A MALE HINDU TO TAKE IN ADOPTION SEC.7

Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption.

Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

*Explanation*-If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso.

## CAPACITY OF A FEMALE HINDU TO TAKE IN ADOPTION SEC.8

Any female Hindu-

(a) who is of sound mind,

(b) who is not a minor, and

(c) who is not married, or if married,

whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind, has the capacity to take a son or daughter in adoption.

## PERSONS CAPABLE OF GIVING IN ADOPTION SEC.9

(1) No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption.

(2) Subject to the provisions of sub-section (3) and sub-section (4), the father, if alive, shall alone have the right to give in adoption, but such right shall not be exercised save with the consent of

the mother unless the mother has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

(3) The mother may give the child in adoption if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

(4) Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself.

(5) Before granting permission to a guardian under sub-section (4) the court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person has made or given or agreed to make or give to the applicant any payment or reward in consideration of the adoption except such as the court may sanction.

*Explanation*- For the purposes of this section-

(i) the expressions "father" and "mother" do not include an adoptive father and an adoptive mother,

(i-a) "guardian" means a person having the care of the person of a child or of both his person and property and includes-

(a) a guardian appointed by will of the child's father or mother; and

(b) a guardian appointed or declared by a court; and

(ii) "court" means the city or civil court or a district court within the local limits or whose jurisdiction the child to be adopted ordinarily resides.

(b) a guardian appointed or declared by a court; and

(ii) "court" means the city or civil court or a district court within the local limits or whose jurisdiction the child to be adopted ordinarily resides.

## PERSONS WHO MAY BE ADOPTED SEC.10

No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely-

(i) he or she is a Hindu;

(ii) he or she has not already been adopted;

(iii) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;

(iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

## OTHER CONDITIONS FOR A VALID ADOPTION SEC. 11

In every adoption, the following conditions must be complied with:

(i) if any adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(ii) if the adoption is of a daughter the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;

(iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;

(v) the same child may not be adopted simultaneously by two or more persons;

(vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up to the family of its adoption.

Provided that the performance of *datta homan,* shall not be essential to the validity of an adoption.

## EFFECT OF ADOPTIONS SEC. 12

An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family.

Provided that-

(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption.

## RIGHT OF ADOPTIVE PARENTS TO DISPOSE OF THEIR PROPERTIES SEC. 13

Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer *inter vivos* or by will

## DETERMINATION OF ADOPTIVE MOTHER IN CERTAIN CASES SEC. 14

(1) Where a Hindu who has a wife living adopts a child she shall be deemed to be the adoptive mother.

(2) Where an adoption has been made with the consent of more than one wife, the senior most in marriage among them shall be deemed to be the adoptive mother and the others to be stepmothers.

(3) Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be the stepmother of the adopted child.

(4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the stepfather of the adopted child.

## VALID ADOPTION NOT TO BE CANCELLED SEC. 15

No adoption which had been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth.

## PRESUMPTION AS TO REGISTERED DOCUMENTS RELATING TO ADOPTION SEC. 16

Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.

**PROHIBITION OF CERTAIN PAYMENTS SEC. 17**

(1) No person shall receive or agree to receive any payment or other reward in consideration of the adoption of any person, and no person shall make or give or agree to make or give to any other person any payment or reward the receipt of which is prohibited by this section.

## JUVENILE JUSTICE ACT OF 2000,

The Juvenile Justice (Care and Protection of Children) Act, 2000 and The Amendment Act, 2006 guarantees rights to an adopted child as recognized under international obligations by all Hague member countries. The JJ Act, 2000, however did not define 'adoption' and it is only by the amendment of 2006 that the meaning thereof came to be expressed in the following terms:

This is a significant move considering till then, adoption by non-Hindus was guided by the **Guardian and Wards Act, 1890**. Minority such as Christians, Muslims or Parsis did not recognize adoption hence the adoptive parents had to remain as guardians to their adopted children as per the Guardian and Wards Act, 1890.

*S.2(aa)-'adoption' means the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship".* The amendment emphasized that adoption under this legislation would allow an adopted child to become the "legitimate child of his adoptive parents, with the rights, privileges and responsibilities attached to the relationship.

In exercise of the rule making power vested by **Section 68** of the JJ Act, 2000, the JJ Rules, 2007 were enacted, which now stand repealed by a fresh set of Guidelines published by Notification dated 24.6.2011 of the Ministry of Women and Child Development, Government of India under **Section 41(3)** of the JJ Act. As a matter of fact, by virtue of the provisions of Rule 33(2) it is the Guidelines of 2011 notified under **Section 41(3)** of the JJ Act which will now govern all matters pertaining to inter-country adoptions virtually conferring on the said Guidelines a statutory flavour and sanction.

## INTER-COUNTRY ADOPTION

The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter country Adoption (Hague Adoption Convention) protects children and their families against the risks of illegal, irregular, premature or ill-prepared adoptions abroad.

This Convention, which operates through a system of national Central Authorities, reinforces the UN Convention on the Rights of the Child (Art. 21) and seeks to ensure that inter country adoptions are made in the best interests of the child and with respect for his or her fundamental rights. It also seeks to prevent the abduction, the sale of, or traffic in children. India became signatory to this convention in the year 2003

**In Re Rasiklal Chhaganlal Mehta AIR 1982 Guj. 193** Court held that inter-country adoptions under **Sec 9(4) of the Hindu Adoptions and Maintenance Act, 1956** should be legally valid under the laws of both the countries. The adoptive parents must fulfill the requirement of law of adoptions in their country and must have the requisite permission to adopt from the appropriate authority thereby ensuring that the child would not suffer in immigration and obtaining nationality in the adoptive parents' country.

**LAXMI KANT PANDEY V. UNION OF INDIA** The Supreme Court of India in a public interest litigation had framed the guidelines governing inter-country adoptions for the benefit of the Government of India. A regulatory body, i.e., Central Adoption Resource Agency (for short 'CARA') was recommended and accordingly set up by the Government of India in the year 1989. Court further laid down following guidelines for in-country and inter-country adoptions to be read and applied in consonance with Guidelines of 2011:

*(i) All the concerned Agencies viz RIPA, Specialized Adoption Agencies, SARA, ARC, AFAA to scrupulously follow the Guidelines which have been laid down in 2011*

*(ii) Though there is no specific number mentioned in the Guidelines as to the number of Indian parents to whom the child should be shown, within a period of 3/4 weeks, the child should be shown to as many Indian parents as possible and, secondly, at a time, the child should be shown only to one parent and not multiple number of parents as has been done in the present case.*

*(iii) Only if the child is not accepted by Indian parents and the Adoption Agencies on account of their experience come to conclusion that the child is not likely to be taken in adoption by Indian parents then, in that case, it should be shown to foreign parents.*

*(iv) When the child is shown to the foreign parents, it should be shown in the list of priorities which are mentioned in the said Guidelines.*

*(vi) ARC and SARA should work not in conflict but in coordination with CARA, it being the Centralized Nodal Agency.*

## CENTRAL ADOPTION RESOURCE AUTHORITY (CARA)

It is an Autonomous Body under the Ministry of Women and Child Development, Government of India and is responsible for both in-country and inter-country adoptions in India.

**The CARA Guidelines** requires that every application from a foreigner wishing to adopt a child must be sponsored by a social or child welfare agency recognized or licensed by the government of the country in which the foreigner is resident.

The agency should be recognized by CARA.

The CARA guidelines depict in the beginning that it encourages in country adoption rather than inter-country adoption and only where the child finds no suitable home in the country, trans-national adoption would be considered.

The guidelines also provide that all Child Care Institutions (CCI) must be registered under the provisions laid down under the **Juvenile Justice (Care and Protection of Children) Amendment Act, 2006** as per **Section-34 (3)**.

The State Government shall recognize suitable CCI's as specialized adoption agencies under **Section 41(4)** of the **Juvenile Justice Amendment Act, 2006.** The specialized adoption agencies can turn into agencies for inter-country adoption only when they have proper infrastructure for normal adoptable children as well as children with special needs, and have quality child care services. In addition to these, they must comply with all the requirements of CARA.

## WHO ARE ADOPTABLE FOR INTER-COUNTRY ADOPTION

As per CARA guidelines and the Juvenile Justice (Care and Protection) Amendment Act 2006, only three types of children are recognized as adoptable. These include children who are orphans and are already under the care of some specialized adoption agency, abandoned and those who are surrendered. In case of an abandoned child below two years, such declaration shall be done within a period of sixty days from the time the child is found. For an abandoned child above two years of age, such a declaration shall be done within the period of four months.

In case of a surrendered child, two months reconsideration time shall be given to the biological parent or parents after surrender before declaring the child legally free for adoption.

Rule 8(5) prescribes priorities for rehabilitation of a child and it is mentioned that preference has to be given for placing a child in in-country adoption and the ratio of in-country adoption to inter-country adoption shall be 80:20 of total adoptions processed annually by a RIPA, excluding special needs children. Rule 8(6) mentions the order of priority which is to be followed in cases of inter-country adoptions,

which is as under:-

(i) Non Resident Indian (NRI)

(ii) Overseas Citizen of India (OCI)

(iii) Persons of Indian Origin (PIO)

(iv) Foreign Nationals

Rule 31 speaks about power of the State Government to constitute a Committee to be known as the Adoption Recommendation Committee (ARC) to scrutinize and issue a Recommendation Certificate for placement of a child in inter-country adoption.

## GUARDIANSHIP

## HINDU MINORITY AND GUARDIANSHIP ACT, 1956

(i) Guardianship of person of minors,
(ii) Guardianship of the property of minors, and
(iii) De facto guardians, and
(iv) Guardians by affinity.

According to Section 4 of Hindu Minority and Guardianship Act, 1956

"Guardian" means a person having the care of a person of a minor or of his property or of both the person and his property. This includes:

i. natural guardian
ii. a guardian appointed by the will of a natural guardian (testamentary guardian)
iii. a guardian appointed or declared by court, and
iv. a person empowered to act as such by the order of Court of Wards.

## GUARDIANSHIP OF THE MINOR CHILDREN

Under the Hindu Minority and Guardianship Act, 1956, S. 4(a), minor means a person who has not completed the age of eighteen years. A minor is considered to be a person who is physically and intellectually imperfect and immature and hence needs someone's protection.

## NATURAL GUARDIANS

Section 4 (c) of the Hindu Minority and Guardianship Act, 1956 the expression natural guardian refers to the father and after him the mother of the Minor. The natural guardian of wife is her husband. Section 6 of Act provides that the natural guardian consists of the three types of person:-

In **Essakkayal nadder v. Sreedharan Babu, AIR 1992 Ker 200** The mother of the minor was dead, but the father was not residing with his children, he is still alive, has not ceased to be a Hindu or renounced the world and has not been declared unfit. This does not authorize any other person to assume the role of natural guardian and alienate the minor's property..

**1. Father**: Section 6(a)

A father is the natural guardian in a case of a boy or unmarried girl, firstly the father and later mother is the guardian of a minor. Provided that upto age of five year mother is generally the natural guardian of a child

2. **Mother**: Section 6(b)

The mother is the guardian of the minor illegitimate boy and an illegitimate unmarried girl, even if the father is alive and after her, the father. If the mother ceases to be a Hindu, her right of natural guardianship remains the same. The position also remains the same in case of an adopted child and not a natural born child.

In a case **Jajabhai v. Pathankhan AIR 1971 SC 315** where a mother and father had fallen out and were living separately and the minor daughter was under the care and protection of her mother, the mother could be considered as the natural guardian of minor girl.

In **Gita Hariharan v. Reserve Bank of India AIR 1999 SC 1149** , The Supreme Court has held that under certain circumstances, even when the father is alive mother can act as a natural guardian. The term 'after' used in Section 6(a) has been interpreted as 'in absence of' instead 'after the life-time'.

3. **Husband**: Husband is the guardian of his minor wife.

## TESTAMENTARY GUARDIANS

Under Section 9, Hindu Minority and Guardianship Act, testamentary guardian can be appointed only by a will. The guardian of a minor girl will cease to be the guardian of her person on her marriage, and the guardianship cannot revive even if she becomes a widow while a minor. It is necessary for the testamentary guardian to accept 'the guardianship.

Acceptance may be express or implied. A testamentary guardian may refuse to accept the appointment or may disclaim it, but once he accepts, he cannot refuse to act or resign except with the permission of the court. Under the Hindu Minority and Guardianship Act, 1956, testamentary power of appointing a guardian has now been conferred on both parents.'

The father may appoint a testamentary guardian but if mother survives him, his testamentary appointment will be ineffective and the mother will be the natural guardian. If mother appoints testamentary guardian, her appointee will become the testamentary guardian and father's appointment will continue to be ineffective. If mother does not appoint, father's appointee will become the guardian. It seems that a Hindu father cannot appoint a guardian. of his minor illegitimate children even when he is entitled to act as their natural. guardian, as S. 9(1) confers testamentary power on him in respect of legitimate children. In respect of illegitimate children, Section 9(4) confers such power on the mother alone.

## GUARDIANS APPOINTED BY THE COURT

Where the court is satisfied that it is for the Welfare of minor that an order should be made appointing a Guardian of his person or property or both, the court may make an order under the Guardians and Wards Act, 1890 appointing a guardian. In appointing or declaring a person as the Guardian of a minor Welfare of the minor shall be the Paramount consideration.

**Mohini v. Virendra, AIR 1977 SC 1359** The Hindu Minority and Guardianship Act is supplementary to and not in derogation to Guardians and Wards Act. The guardian appointed by the court is known as certificated guardian. Powers of certificated guardians are controlled by the Guardians and Wards Act, 1890. There are a very few acts which he can perform without the prior permission of the court. In the ultimate analysis his powers are co-extensive with the powers of the sovereign and he may do all those things (though with the permission of the court) which the sovereign has power to do. A certificated guardian from the date of his appointment is under the supervision, guidance and control of the court.

## DE FACTO GUARDIAN

Section 11 of the Hindu Minority and Guardianship Act, 1956 deals with De Facto Guardian. Section 11 of the said act prohibits a de facto Guardian to deal with minors property. According to Section 11 of the Act, no person shall be entitled to dispose of, or deal with, the property of Hindu minor merely on the ground of his or her being the de facto guardian of the minor.

In other words, a de facto guardian is a person who is not a legal guardian, who has no authority in law to act as such but nonetheless he himself has assumed, the management of the property of the child as though he were a guardian. De facto guardianship is a concept where past acts result in present status. The term literally means 'from that which has been done. 'The de facto guardian was recognized in Hindu law as early as 1856.

The Privy Council in **Hanuman Prasad Singh and Ors v. Bhaguati Prasad Singh and Ors (1897) ILR 19 All 357** said that 'under Hindu law, the right of a bona fide incumbrancer, who has taken a de facto guardian a charge of land, created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not affected by the want of union of the de facto with the de jure title. Section 11 says that a de facto guardian is not entitled to dispose or deal with the property of the minor merely on the ground of his being the de facto guardian. There is controversy regarding the status of a de facto guardian. It is now well settled that de facto guardian does not have the right to assume debt, or to gift a minor's property, or to make reference to arbitration.

## CUSTODY OF A MINOR

The Hindu Minority and Guardianship Act, 1956 provided father to be the natural guardian of the minor and after him, mother shall be the guardian. The Act provided that:

(1) In case of a minor boy or unmarried minor girl, the natural guardian is the father, and 'after' him, the mother; and

(2) The **custody of a minor** who has not completed the age of five years shall 'ordinarily' be with the mother.

**Gita Hariharan v. Reserve Bank of India (1999) 2 SCC 228**

The constitutional validity of the above section 6 (a) was challenged in this case. It was contended that giving father preference over mother was discrimination on the basis of sex under article 14 of the constitution of India. The Supreme Court looked into the scheme of the statute to see if the mother was disentitled to be a guardian in the presence of father. The Supreme Court said that the term "after" must not be understood as after the life time of father but in the absence

of father. The welfare of the child is of supreme importance. The court further held that; the word absence can be understood as total apathy or negligence by the father towards the child. Thus, it was made clear that a mother could be the natural guardian of the child even during the lifetime of the father.

Section 13 of the Hindu Minority and Guardianship Act, 1956 says that in giving the child of custody or while appointing a guardian for him or her, the welfare of the child should be given supreme importance. And if the court finds that giving the child under someone's custody will be detrimental to the child then it will refrain from doing so and no person shall be appointed as a guardian to the minor. The underlying principle in the case of custody and guardianship is the welfare of child. But for non- Hindu children, the court's authority to intervene in furtherance of the welfare principle is subordinated to that of the father, as the natural guardian. The Hindu Marriage Act, 1955 also provides for the custody of children. Section 26 of the Act authorizes courts to give interim orders in cases related to custody, education of minor children *et al* with their consonance. The court under this section is also authorized to revoke any such order previously passed.

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