FAMILY LAW

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UNIT- I

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(a) Institution of Marriage under Hindu Law

Forms of Marriage

The Hindu marriage, which was considered to be a religious duty and a sacrament under the Hindu Marriage Act, 1955, which came into force on 18th May, 1955. The enactment is exhaustive. The marriage rites completed by **Saptapadior the walking of seven steps before the consecrated fire creates a religious tie** and this religious tie when once created, cannot be broken.

The law contained in the Act is applicable to Hindus of every sect- Lingayats, Brahmas and Arya Samajists as well. It is applicable to all Hindus and the term Hindu in the present context has been interpreted in wider connotation so as to include Jains, Sikhs and Buddhas as well as to the converts from other religions.

The classical Eight Forms of marriage according to Manu and several other Dharma Shastra. Vasiṣṭha and Apastamba, which is followed in South India lists only 6:–

- **Brahma-marriage,** father gives away his daughter for procreation and performing the duties that must be performed together by a householder, after having investigated the bridegroom's family, character, learning, and health, and after having given to the bride ornaments according to his ability.
- **Arṣa-marriage,** the bridegroom shall present to the father of the bride a bull and a cow to defray expenses.
- **Daiva-marriage**, the father gives her to an officiating priest, who is performing a śrauta-sacrifice.
- **Gāndharva-marriage**, a young couple unite themselves through love, without the involvement of the parents.
- **Asura-marriage,** in which the bride is "bought". It must be understood that, at this rite, a regular sale of the bride must take place. If a suitor merely gives presents to the bride, that is not an Asura-marriage.
- **Rākṣasa-marriage,** If the bridegroom and his friends abduct the bride after having overcome by force her father or relations.

VOID MARRIAGES

Following are the grounds which shall render a marriage void:

1. **Bigamy**:The first condition for valid Hindu marriage is that none of the parties to the marriage shall have a spouse living it the time of their marriage. If either of them has a spouse alive from an earlier marriage, their subsequent marriage is no marriage in the eyes of law. It is *void ab initio and non est*, i.e. non existent.

2. Persons falling within degrees of prohibited relationships: Section 3(g) of the Hindu Marriage Act, 1955 defines 'degrees of prohibited relationships. It provides as follows:

At the same time, no two descendants of a common ancestor can marry each other unless they or either of them is removed more than 3 degrees from the common ancestor, if relationship is traced through mother, and more than 5 degrees if relationship is being traced through father.

3. Sapinda Relationships: Section 3(f) defines 'Sapinda relationship':Sapinda consists of two words. Sa means 'same' whereas pinda means the rice ball which a Hindu offers to his ancestors at Shraddha ceremony. One offers pinda to his father, grandfather, great grandfather and so on upto sixth degree on paternal side; and to his mother, mother's father, mother's father's father on maternal side. Section 18 of Hindu Marriage Act provides punishment if marriage is performed by the parties who are sapinda of each other or within the degrees of prohibited relationship.

VOIDABLE MARRIAGE

A marriage which can be annulled or avoided at the option of one or both the parties is known as a voidable marriage. Section 12 of Hindu Marriage Act contains relevant provisions of Voidable Marriage. This section lays down four grounds on which a Hindu marriage becomes voidable. These are:

1. **Inability of the respondent to consummate the marriage on account of his or her impotency:** Consummation of marriages means full and normal sexual intercourse between married people. A marriage is consummated by sexual intercourse.It may arise from a physical defect in either partner or from a psychological barrier amounting to invisible repugnance on the part of one to sexual relations with that partner. Sterility is irrelevant and does not imply impotency. Absence of uterus in the body of the one's female partner does not amount to impotency but the absence of a proper vagina would mean impotency. Similarly, organic malformation making a woman sexless would means impotency. Thus, impotency means practical impossibility of consummation of marriage. Sexual intercourse which is incomplete occasionally does not amount to impotency.
2. **Respondent's incapacity to consent or suffering from a mental disorder.**
3. **Consent of the petitioner being obtained by fraud or force:** For marriage the consent of the parties concerned must be free. Section 12 (1) (c) provides that a marriage is voidable on the ground that the consent of the petitioner or of the guardian has been

obtained by force or fraud. After the Child Marriage Restraint Act the consent of guardian has become irrelevant as the minimum marriageable age was set 21 years and 18 years for grooms and bride.

Provided no petition for annulling a marriage:

(1) If the petition presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered [Section 12(2)(a)(i)]; or

(2) The petitioners 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 [Section 12(2)(a)(ii)].

Force: The word Force is not defined by the Act. But it may include all cases of compulsion, coercion or duress. However, mere pressure or strong advice, persuasion etc., will not amount to force.

Fraud: This section does not speak of fraud 'in any general way or every misrepresentation or concealment which may be fraudulent' but 'fraud as to the nature of the ceremony' or 'as to any material fact or circumstance concerning the respondent'.

The clause prior to its amendment by the Amending Act of 1976, did not contain the words 'or' is to any material fact or circumstance concerning the respondent. The operation of the clause was considerably extended so as to include within its ambit any material fact or circumstance concerning the respondent. Whether a misrepresentation or false statement or concealment is as to any such material fact, must to a large extent depend on the facts and circumstance of the case. However, it must be something vital, touching or affecting the respondent and such as had definitely induced or influenced consent. The petitioner must show that; but for such false representation or statement or concealment he or she would not have married the respondent.

Some important grounds of fraud:

1. Nature of ceremony,

2. Identity of the party,
3. Concealment of disease,
4. Concealment of religion or caste,
5. Concealment of previous marriage,
6. Concealment of unchastity,
7. Concealment of illegitimacy,
8. Concealment of age,
9. Petitioner's father's fraud,
10. Concealment of financial status and nature of employment.

A petition for nullity must be filed within one year of the discovery of fraud or cessation of force. This condition is mandatory.

4. Pre-marriage Pregnancy [Section 12(1)(d)]: Section 12(1) (d) provides that a marriage is voidable on the ground that the respondent was at the time of the marriage pregnant by some person other than the petitioner. Section 12(1)(d) is to be read with Section 12(2)(b) which lays down three further conditions which are to be satisfied in order to avail of the remedy under Section 12(1)(d). These are:

1. That at the time of the marriage the petitioner was ignorant of the facts alleged;
2. That the petitioner has started proceedings under Section 12 within one year of the marriage; and
3. That the petitioner did not have, with his consent, marital intercourse with his wife ever since he discovered that the wife was pregnant by some other person.

Ingredients of Section:

(1) The respondent was pregnant at the time of marriage.

(2) The respondent was pregnant from a person other than the petitioner.

(3) The petitioner was ignorant of this fact at the time of marriage.

(4) The proceeding is started within one year of the marriage.

(5) Absence of marital intercourse by the petitioner husband with his wife since such discovery.

If the girl becomes pregnant by some person before her marriage and subsequently the same fellow marries her the section has no application. If the bride becomes pregnant by some other person than her husband after marriage the section has no relevance.

In *NishitKumar Biswas* v.*Smt. Anjali Biswas*[1],where a bride gave birth to a mature child within 167 days from the date of marriage, it was held that it was for the wife to raise a reasonable doubt that she was pregnant by the person who became her husband.

b. Matrimonial Remedies

i. Restitution of Conjugal Rights: Right to stay together (Section 9): If either the husband or the wife, without reasonable excuses, withdraws from the society of the other, the aggrieved party may approach the Court for restitution of conjugal rights. The decree of restitution of conjugal rights cannot be executed by forcing the party who has withdrawn from the society from the other to stay with the person who institutes Petition for restitution. The decree can be executed only by attachment of the properties of the judgment debtor. However, if the decree of restitution of conjugal right is not honored for a period of more than one year, subsequent to the date of the decree, it becomes a ground for divorce.

ii. Judicial Separation(Section 10): Either party to the marriage may present a petition on any of the grounds stated in the provisions for*divorce*, praying for a decree of judicial separation. A judicial separation is a legal way to stay separate from the spouse, without obtaining a decree of divorce. A judicially separated spouse cannot be given a meaning to include a spouse merely living separately, and who has not obtained a decree for judicial separation. In case, there has been no resumption of cohabitation between the parties to the marriage for a period of one year or upwards, after the passing of the decree for judicial separation, it shall be a ground for a divorce

iii. Dissolution of Marriage: Forms of Divorce, Grounds

Grounds for Divorce Under Hindu Marriage Act

The Hindu Marriage 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***

[1]AIR 1968 Cal 105.

fault grounds in section 13(2) on which wife alone could seek 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 breakdown of marriage. ***The 1976 amendment Act inserted two additional fault grounds of divorce for wife & a new section 13B for divorce by mutual consent.***

The various grounds on which a decree of divorce can be obtained are as follows-

(i) Adultery: While adultery may not have been recognized as a criminal offence in all countries, the matrimonial offence of adultery or the fault ground of adultery is recognized in most. Adultery means consensual sexual relationship of a man with the wife of another man without the consent of the latter is said to comment adultery in India. If someone 'lives in adultery', the partner can file a divorce. Even under the Shastric Hindu law, where divorce had not been recognized, adultery was condemned in the most unequivocal terms. There is no clear definition of the matrimonial offence of adultery. Last August, ***Joseph Shine judgment***, a 41-year-old Indian businessman living in Italy, petitioned the Supreme Court to strike down the law. He argued that it discriminated against men by only holding them liable for extra-marital relationships, while treating women like objects. Adultery is no more a criminal offence but it continues to be ground for divorce.Though initially a divorce could be granted only if such spouse was living in adultery, by the Marriage Laws Amendment Act, 1976, the present position under the Hindu Marriage Act is that it considers even the single act of adultery enough for the decree of divorce[iii]. The offence of adultery may be proved by:

- Circumstantial evidence
- Contracting venereal disease

(ii) Cruelty: The concept of cruelty is a changing concept. The modern concept of cruelty includes both mental and physical cruelty. Acts of cruelty are behavioral manifestations stimulated by different factors in the life of spouses, and their surroundings and therefore; each case has to be decided on the basis of its own set of facts. While physical cruelty is easy to determine, it is difficult to say what mental cruelty consists of. Perhaps, mental cruelty is lack of such conjugal kindness, which inflicts pain of such a degree and duration that it adversely affects

the health, mental or bodily, of the spouse on whom it is inflicted. In ***Pravin Mehta*** **v.*InderjeetMehta*[2]**the court has defined mental cruelty as 'the state of mind.'

Some Instances of Cruelty are as follows–

- false accusations of adultery or unchastity
- demand of dowry
- refusal to have marital intercourse/children
- Impotency
- birth of child
- Drunkenness
- threat to commit suicide
- wife's writing false complaints to employer of the husband
- incompatibility of temperament
- irretrievable breakdown of marriage

The following do not amount to cruelty-

- ordinary wear & tear of married life

(iii)Desertion: Desertion means the rejection by one party of all the obligations of marriage- the permanent forsaking or abandonment of one spouse by the other without any reasonable cause and without the consent of the other. It means a total repudiation of marital obligation.

- The factum of separation
- *animus deserdendi* (intention to desert)
- desertion without any reasonable cause
- desertion without consent of other party

The statutory period of two years must have run out before a petition is presented. In ***BipinChanderJaisinghbhai Shah*v.*Prabhawati***[3]the Supreme Court held that where the

[2]**(**Civil appeal 3930 of 2002**).**

respondent leaves the matrimonial home with an intention to desert, he will not be guilty of desertion if subsequently he shows an inclination to return & is prevented from doing so by the petitioner.

(iv) **Conversion:** When the other party has ceased to be Hindu by conversion to any other religion for e.g. Islam, Christianity, Judaism, Zoroastrianism, a divorce can be granted.

(v) Insanity: Insanity as a ground of divorce has the following two requirements-
(a) The respondent has been incurably of unsound mind
(b) The respondent has been 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.

(vi) Leprosy: Contagiousness of leprosy and repulsive outward manifestations are responsible for creating a psychology where man not only shuns the company of lepers but looks at them scornfully. Thus, it is provided as a ground for divorce. The onus of proving this is on the petitioner.

(vii) Venereal Disease: At present, it is a ground for divorce if it is communicable by nature- irrespective of the period for which the respondent has suffered from it. The ground is made out if it is shown that the disease is in communicable form & it is not necessary that it should have been communicated to the petitioner (even if done innocently).

(viii)Renunciation: "Renunciation of the world" is a ground for divorce only under Hindu law, as renunciation of the world is a typical Hindu notion.

(ix) Presumption of Death: Under the Act, a person is presumed to be dead, if he/she has not been heard of as being alive for a period of at least seven years. The burden of proof that the whereabouts of the respondent are not known for the requisite period is on the petitioner under all the matrimonial laws. A decree of divorce granted under this clause is valid & effective even

[3]1957 AIR 176.

if it subsequently transpires that the respondent was in fact alive at the time when the decree was passed.

Wife's Special Grounds for Divorce

Besides the grounds enumerated above, a wife has been provided four additional grounds of divorce under Section 13(2) of the Hindu Marriage Act, 1955. These are as follows-

(1) **Pre-Act Polygamous Marriage**: This clause states the ground for divorce as, "That the husband has another wife from before the commencement of the Act, alive at the time of the solemnization of the marriage of the petitioner.

(2) **Rape, Sodomy Or Bestiality**: Under this clause, a divorce petition can be presented if the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

(3) **Non-Resumption Of Cohabitation After A Decree/Order Of Maintenance:** If a wife has obtained an order of maintenance in proceedings under Section 125, Cr.P.C., 1973 or a decree under Section 18, Hindu Adoption & Maintenance Act, 1956 & cohabitation has not been resumed between parties after one year or upwards, then this is a valid ground for suing for divorce.

(4) Repudiation Of Marriage: This provision provides a ground for divorce to the wife when the marriage was solemnized before she attained the age of fifteen years, and she has repudiated the marriage, but before the age of eighteen. Such repudiation may be express (written or spoken words) or may be implied from the conduct of the wife (left husband & refused to come back). Moreover, this right (added by the 1976 amendment) has only a retrospective effect i.e. it can be invoked irrespective of the fact that the marriage was solemnized before or after such amendment.

Irretrievable Breakdown Of Marriage

Under Hindu Marriage Act, 1955 primarily there are three theories under which divorce is granted:

(i) Guilt theory or Fault theory,

(ii) Consent theory,

(iii) Supervening circumstances theory.

iv. Divorce by Mutual Consent v. Irretrievable Breakdown as a Ground for Dissolution

The Irretrievable breakdown theory of divorce is the fourth and the most controversial theory in legal jurisprudence, based on the principle that marriage is a union of two persons based on love affection and respect for each other. If any of these is hampered due to any reason and if the matrimonial relation between the spouses reaches to such an extent from where it becomes completely irreparable, that is a point where neither of the spouse can live peacefully with each other and acquire the benefits of a matrimonial relations, than it is better to dissolve the marriage as now there is no point of stretching such a dead relationship, which exist only in name and not in reality[x].

The breakdown of relationship is presumed de facto. The fact that parties to marriage are living separately for reasonably longer period of time (say two or three years), with any reasonable cause (like cruelty, adultery, desertion) or even without any reasonable cause (which shows the unwillingness of the parties or even of one of the party to live together) and all their attempts to reunite failed, it will be presumed by law that relationship is dead now. Recently the Supreme Court ***Naveen Kohli* v. *Neelu Kohli***[4]has recommended an amendment to the Hindu Marriage Act, whereby either spouse can cite irretrievable breakdown of marriage as a reason to seek divorce.

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[4] (Appeal (civil) 812 of 2004).

Unit-II: Muslim Marriage and Dissolution of Marriage

a. Nikah (Muslim Marriage)

i. Definition, Object and Nature

ii. Essentials for Validity

iii. Obligations Arising out of Marriage – under Classical and Statutory Law

b. Dissolution of Marriage

a. Talaq: Concept and Modes

b. Grounds:

i. Under Statutory Law:

Dissolution of the Muslim Marriage Act, 1939

(a) <u>Nikah</u>

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***. 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, friend s and government, preached and practiced by the Prophet himself. 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. As a result of a valid marriage, sexual intercourse between the couple becomes legal. The children born of the union are legitimate.

(ii) Essentials of validity

A marriage is valid (***Sahih***) if it is recognized by the courts as lawful. Following conditions must be fulfilled in a valid **Muslim marriage**:

(1) **Competent**: At the time of marriage, both the parties i.e. the boy and the girl, must be competent to enter into the contract of marriage. The parties are competent if they are—

(a)Of the age of puberty,

(b) Of sound mind, and

(c) Muslims.

For purposes of marriage, dower and divorce, the age of majority under Muslim law is is considered to be equal to the ***age of puberty***. Age of puberty is an age at which a person is supposed to acquire the sexual competency. Keeping in view the practical difficulty of ascertaining the age of puberty by physical features, the courts have presumed that the age of puberty is acquired on the completion of fifteen years. In ***Mst. Atika Begum* v.*Mohd. Ibrahim***[5], the Privy Council has laid down a clear law about the age of puberty in following words:

> *"According to Mohammedan law a girl becomes major on the happening of either of the two events: (i) the completion of her 15th year or (ii) on her attainment of a state of puberty at an earlier period."*

The same rule may be applicable in respect of the age of a boy. Thus, it may be said that in the absence of any evidence to the contrary, a Muslim, is presumed to have attained puberty at the age of fifteen years.

(2) **Consent of the parties, or of their guardians, must be a free consent.**

(3) The required formalities are duly completed;

(4) There must not be any prohibition or impediment in contracting the marriage.

(iii) **Obligations arising out of Marriage**

- As per the Muslim Marriage Law, the ***husband is bound to provide for the maintenance of the wife*** by way of food, clothing, lodging, and all such things as may be needed to support life ***so long as the wife is not a minor incapable of consummation, is faithful, lives with him and obeys his reasonable orders, even if the wife has the means to support herself and the husband does not.***

[5]AIR 1968 PC 259.

- The husband also has a ***duty to provide for the children begotten of such marriage.*** Any terms and conditions stipulated in the marriage contract must be observed.

- The wife is entitled to ***Dower or Mahr, a sum of money or other property from the husband as a mark of respect for the wife, the amount of which may be settled before or after marriage, and payable either on demand or on the dissolution of marriage by death or divorce*** (although different schools and sects have different rules regarding conditions of payment for the same and how or when the wife forfeits her right to the same).
- They can inherit property from each other. However, ***neither the husband nor the wife acquires any right over each other's property simply by reason of the marriage***.

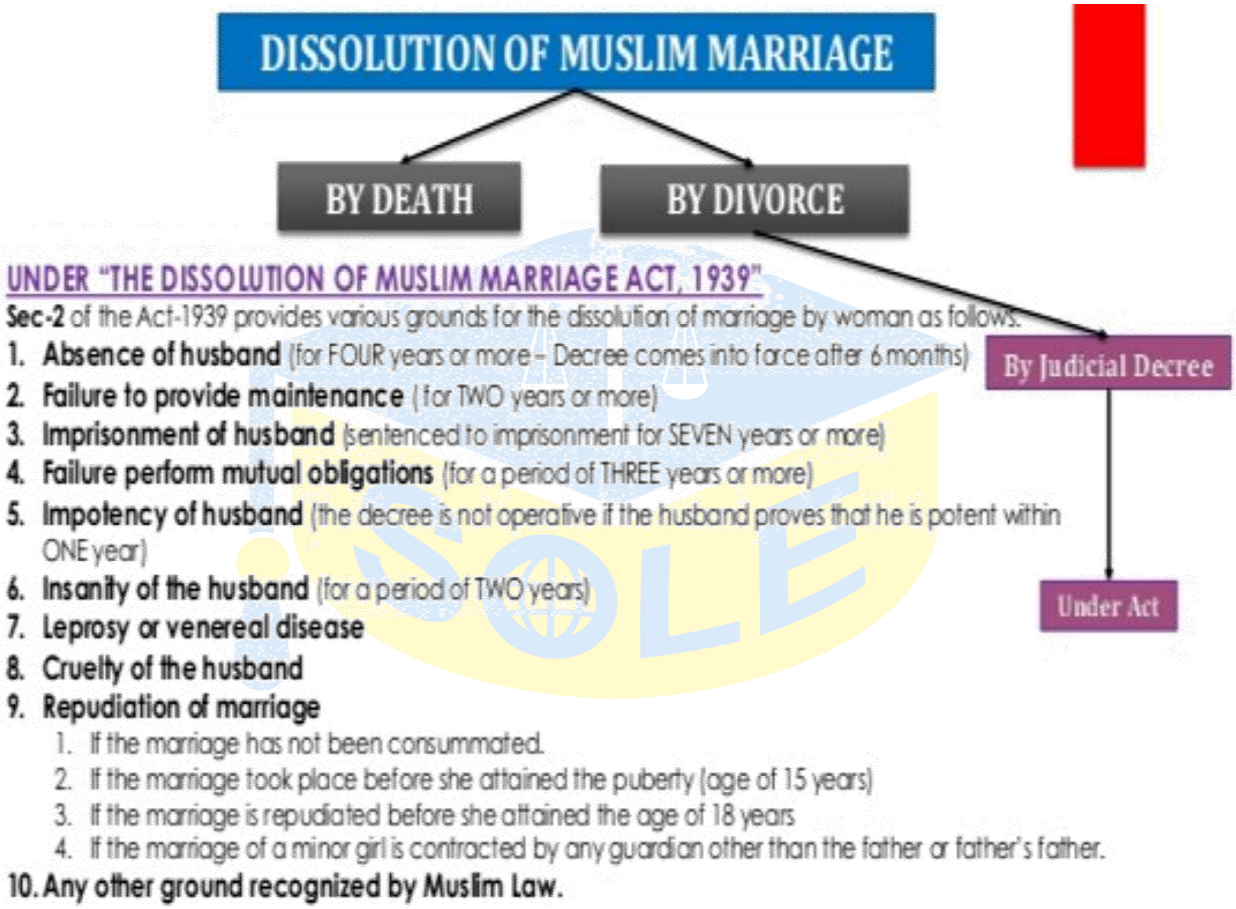
b. DISSOLUTION OF MARRIAGE

Talaq: Concepts and Modes

- As per the Muslim marriage law divorce is permitted under Islam and can be initiated by either parties.
- The Quran forbids a man from seeking pretexts for divorcing his wife if she is obedient and faithful to him. The Prophet curtailed the unbridled power of divorce by the husband and provided the same right to the wife to be exercised on reasonable grounds. The same has been provided for in The Dissolution of Muslim Marriages Act, 1939.
- Divorce was permitted by the Prophet but not encouraged. The marriage can also be dissolved by mutual consent. The grounds and rules of divorce vary for different sects.
- A minor married by his or her lawful guardian, other than the father or father's father, can repudiate the marriage upon attaining puberty.
- After divorce, cohabitation between the couple becomes illegal and once the divorce is final, they cannot inherit property from each other. The amount of Mahr remaining, if any, becomes payable. The wife is entitled to maintenance during the period of iddat.
- Remarriage between the couple is possible only if the divorced wife observes iddat, remarries and the second marriage is consummated and voluntarily dissolved by the second husband and the wife observes iddat again.

- Islam dictates that a Muslim man has the liberty to divorce and remarry the same woman twice. However, if he decides to dissolve the marriage for the third time, he can only remarry the same woman if she first marries another man, consummates the marriage, and only if the man dies or willingly asks for divorce, can the woman go back to her first husband and remarry him.

Grounds of Talaq under Muslim Marriage Act, 1939



Unit-III: Adoption& Maintenance

a. Adoption:

(i) Nature

(ii) Law on adoption

(iii) Inter Country Adoption

b. Adoption: Conditions and Effect

(i) Ceremonies

(ii) Capability

(iii) Effect

c. Maintenance

(i) Entitlement

(ii) Enforcement

(iii) Maintenance Rights of Muslim Women

(iv) Maintenance under the Code of Criminal Procedure, 1973

a. Adoption: Nature; Law on Adoption and Inter-country Adoption

The **Hindu Adoption and Maintenance Act, 1956** reflects the principles of equality and social justice by removing several (though not all) gender based discriminatory provisions. This Act deals with topics such as capacity to adopt, capacity to give in adoption, effect of adoption, gender bias and such others.

i. Entitlement

Capacity to Adopt: In this Act, it is said that any adult Hindu male who is of sound mind can adopt a child. If the said man is married, the consent of the wife is necessary (**Section 7**). Likewise, a female adult Hindu of sound mind could adopt a child if she is:

1. Unmarried
2. Divorced
3. Widowed or
4. Her husband suffers from certain disabilities
    1. Ceased to be a Hindu
    2. Has renounced the World
    3. Has been declared to be of unsound mind by the court (**Section 8**)

Capacity to give in Adoption: Only the father, the mother or the guardian can make the decision of giving a child in adoption. The father can give the child in adoption only with the consent of the mother, unlessthe mother has ceased to be a Hindu, has renounced the world or is of unsound mind. 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. (Section 9)

The Guardianship and Wards Act, 1890

The Guardians and Wards Act, 1890 was a law to supersede all other laws regarding the same. It became the only non-religious universal law regarding the guardianship of a child, applicable to all of India except the state of Jammu and Kashmir. This law is particularly outlined for Muslims, Christians, Parsis and Jews as their personal laws don't allow for full adoption, but only guardianship. It applies to all children regardless of race or creed.

It was stated that any child who had not completed 18 years of age was to be a minor. This child would be appointed guardians by the court or any other appointed authority. They would decide who would take place as the said child's guardian or by removing another as a guardian. Unlike in the procedures given in the Hindu Adoption and Maintenance Act, 1956, where a person once adopted has a single set of parent, here a minor and his property could have more than one guardian. It was required under these cases of guardianship that the court use its discretionary power and considered the interests of the minor. His/her age, sex, religion, the compatibility

quotient with the guardian, the death of the parent, etc. must be taken into consideration. The minor's preference may also be taken into consideration.

Juvenile Justice Act, 2000

The right to adopt a child - till now restricted to Hindus, Buddhists and Jains - now extends to Muslims, Christians, Jews, Parsis and all other communities. In a landmark judgment, the Supreme Court ruled that any person can adopt a child under the Juvenile Justice (Care and Protection of Children) Act 2000 irrespective of religion he or she follows and even if the personal laws of the particular religion does not permit it.

"The JJ Act 2000 is a secular law enabling any person, irrespective of the religion he professes, to take a child in adoption. It is akin to the Special Marriage Act 1954, which enables any person living in India to get married under that Act, irrespective of the religion he follows. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute," ruled a bench headed by Chief Justice P. Sathasivam.

Inter-country Adoption

Inter-country adoption is the process by which you:

1. Adopt a child from a country other than your own through permanent legal means; and
2. Bring that child to your country of residence to live with you permanently.

Inter-country adoption is similar to domestic adoption. Both consist of the legal transfer of parental rights and responsibilities from a child's birth parent(s) or other guardian to a new parent or parents.

Lakshmi Kant Pandey's case[6] is the most important in the area of inter-country adoption. In 1982, a petition was filed under Article 32 of the Constitution by advocate Lakshmi Kant Pandey alleging malpractices and trafficking of children by social organizations and voluntary agencies that offer Indian children for adoption overseas. The petition was filed on the basis of a report in the foreign magazine called "The Mail". The petitioner accordingly sought relief restraining Indian based private agencies "from carrying out further activity of routing children for adoption abroad" and directing the Government of India, the Indian Council of Child Welfare and the

[6]1984 AIR 469.

Indian Council of Social Welfare to carry out their obligations in the matter of adoption of Indian children by foreign parents. By an order- dated 6.2.1984 the Supreme Court laid down detailed principles and norms to be followed for the adoption of children by the people overseas.

The Supreme Court of India has laid down that every application from a foreigner/NRI/PIO (as applicable) desiring to adopt a child must be sponsored by a social or child welfare agency recognized or licensed by the Government or a Department of the Foreign Govt. to sponsor such cases in the country in which the foreigner is resident. The foreign agency should also be an agency 'authorized' by CARA, Ministry of Social Justice & Empowerment, Govt. of India. No application by a foreigner/NRI/PIO for taking a child in adoption should be entertained directly by any social or child welfare agency in India.

b. Adoption: Conditions and Effect

Important Points under Adoption

When once a child has been adopted, that child severs all ties with his natural family. All the right and obligations of natural born children fall on him. All laws relating to the adoptive parents and/or step parents can be seen in ss. 12, 13 and 14 of the Hindu Maintenance and Adoption Act of 1956. In this context, an issue came up. The case of Sawan Ram v.Kalavati7, brought out the question as to whether, in the case of adoption by a widow, would the adopted child be deemed to be the child of the deceased husband as well, so as to be his heir. The Supreme Court held that the adoption would not only be by the female, but also to her deceased husband. This argument was based on the words found in s. 5(1) of the Act.

1. The adoptions once made by the parents cannot be cancelled by the parents, nor can the adopted child renounce the adoptive family and go back to his/her birth parents. Adoption is generally held to be permanent in nature, with neither parties going back on their words. This has been stated in ***section 15*** of The Act. But care has to be taken that the adoption referred to in this section is a valid adoption.
2. Though after the enactment of the Act, the gender discrimination has been eliminated but it exist. A married female cannot adopt, not even with the husband's consent, unless her

[7]AIR 1967 SC 1761.

husband dies or suffers from any disability or renounces the world or so. On the other hand, a husband may adopt with the consent of the wife. Similarly, in the matter of a giving a child in adoption, the Hindu male enjoys broader rights than a corresponding female.

3. The Guardians and Wards Act, 1890 was a law to supersede all other laws regarding the same. It became the only non-religious universal law regarding the guardianship of a child, applicable to all of India except the state of Jammu and Kashmir. This law is particularly outlined for Muslims, Christians, Parsis and Jews as their personal laws don't allow for full adoption, but only guardianship. It applies to all children regardless of race or creed.

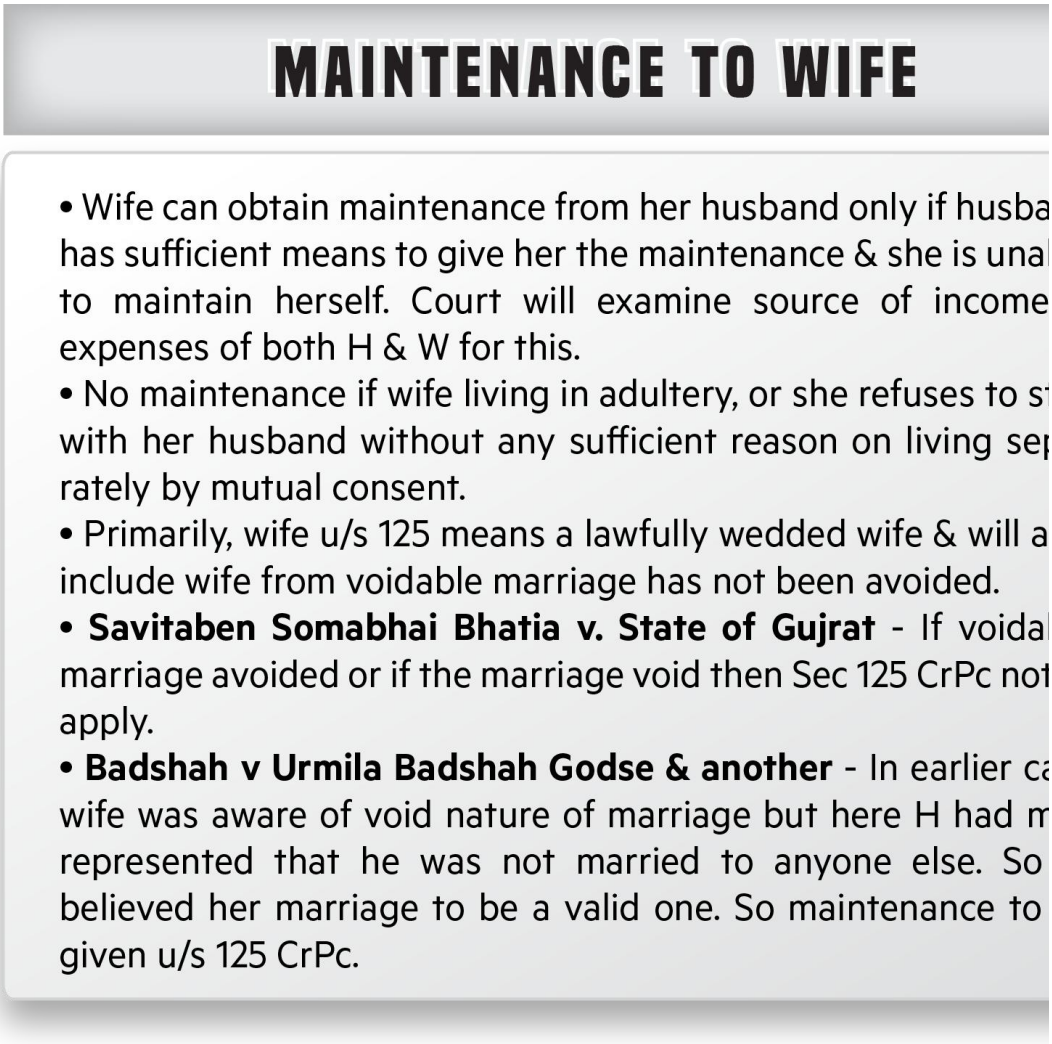
There are a few rules in Islam surrounding the **concept of Adoption:**

- An adopted child retains his or her own biological family name (surname) and does not change his or her name to match that of the adoptive family.
- An adopted child inherits from his or her biological parents, not automatically from the adoptive parents.
- If the child is provided with property/wealth from the biological family, adoptive parents are commanded to take care and not intermingle that property/wealth with their own. They serve merely as trustees.

There is no specific statute enabling or regulating adoption among Christians in India. In the absence of a statutory or customary adoption recognized by courts, foster children are not treated in law as children. On death of the foster parents, their estate is distributed among legal heirs of the intestate, to the detriment of foster children. Christians in India can adopt children by resort to section 41 of the Juvenile Justice (Care and Protection of Children) Act 2006 read with the Guidelines and Rules issued by various State Governments.

c. Maintenance

Maintenance under Section 125 CRPC



Under the section 18(1) of **the Hindu Adoption and Maintenance Act, 1956** wife is entitled to maintenance by her husband for lifetime i.e. she will be given maintenance until she dies or her husband dies. Under section 18 of this Act a Hindu wife is entitled to live separately from her husband without canceling her right to claim maintenance. The grounds under which she can live separately are:-

(1) Husband is guilty of desertion

(2) The Husband has treated her with cruelty

(3) The husband is suffering from a virulent form of leprosy

(4)The husband has any other wife living.

(5) The husband keeps a concubine elsewhere

(6) The Husband has ceased to be a Hindu by conversion to another religion and

(7) if there is any other cause justifying living separately

But there are two bars which will prevent a wife from claiming maintenance from her husband i.e. (i) if she is unchaste or (ii) if she ceases to be a Hindu by conversion to another religion.

In Muslim law, wife is preferred over all the other persons (even the young children & other necessitous relations). However, the woman's right and husband's obligation exists only if the wife remains faithful to her husband and obeys all his reasonable orders. Nonetheless, the wife does not lose the right to maintenance if she refuses access to her husband on legal grounds such as her illness or if the marriage cannot be consummated i.e. cannot be concluded by the sexual intercourse because of her old age, illness, his minority or faulty organ. However if the wife being too young for sexual intercourse, lives with her parents, she does not possess any right for maintenance.

The wife also possess the right to claim maintenance on the account of a pre/ante- nuptial agreement i.e. maintenance in the event of ill treatment. Along with this, the wife also gets the privilege of being entitled to a special allowance called Kharch-i-pandan, guzara under such agreement. Muslim law provides provisions for the right to maintenance if the wife stays separately due to cruel behavior or non-payment of prompt dower. But a wife cannot claim any maintenance during widowhood or Iddat because of her entitlement to inheritance.

Prior to the landmark judgment of Supreme Court in Shah Bano case8, Divorced Muslim women did not have right to maintenance. This in the point of fact handicapped the situation of Muslim women as the husband according to Muslim law possesses the Authority to divorce from his wife whenever he wants whereas the woman lack this right. Hence, the said case led to the enactment of Muslim women (protection of rights on divorce) Act, 1986 which enables a divorced Muslim to have a reasonable and fair provision of maintenance from her husband and from the relatives who are entitled her property after her death after Iddat.

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.

[8] *Mohd. Ahmed Khan* v. *Shah Bano Begum*, 1986 (2) SCC 556.

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 Section 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. 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.

Unit -IV: Emerging trends in Family Law

. Emerging trends:

i. Surrogacy

ii. Live-in Relationship

iii. IVF

iv. Domestic Violence

v. Same Sex Marriage

Emerging Trends

(i) **Surrogacy:** In 2015, at which time the Indian government passed new regulations on the surrogacy process. Today, Indian surrogacy laws make it illegal for foreign intended parents to complete a surrogacy in India. The only people who can complete a commercial surrogacy in

India today are Indian intended parents who have been married for at least five years. The ban on foreign intended parents in 2015 was only the start of legislation regulating surrogacy. In December 2018, after almost two years of debate, an Indian surrogacy law was passed that:

- Made commercial surrogacy illegal
- Only allows altruistic surrogacy for needy, infertile Indian couples
- Requires intended parents to be married for five years and have a doctor's certificate of their infertility
- Restricts women to being surrogates only once, and only if they are a close relative of the intended parents, are married and have a biological child
- Bans single parents, homosexuals and live-in couples from surrogacy

b. Live in relationship: There is no law binding the partners together, and subsequently, either of the partners can walk out of the relationship, as and when they wish to do so. There is no legal definition of live-in relationship, and therefore, the legal status of such type of relations is also unconfirmed. The right to maintenance in a live-in relationship is decided by the court by the Domestic Violence Act and the individual facts of the case. Though the common man is still hesitant in accepting this kind of relationship, the Protection of Women from Domestic Violence Act provides for the protection and maintenance thereby granting the right of alimony to an aggrieved live-in partner. The right of maintenance is available to wives under all personal laws in India. However, none of the religions recognize and accept live-in relationships. Since no remedy is granted to women involved in a live-in relationship, Indian Courts have widened the scope of maintenance under the Criminal Procedure Code. Therefore, Section- 125 of the Criminal Procedure Code has been provided to give a legal right of maintenance to lady partners in or out of a marriage. The Domestic Violence Act was enforced as an attempt to protect women from abusive (physical, mental, verbal or economic) marital relationships. However, as per Section- 2 (f), it not only applies to a married couple, but also to a 'relationship in nature of marriage' Partners living together for a long time may have kids together. However, live-in couples are not allowed to adopt kids as per the Guidelines Governing the Adoption of Children as notified by the Central Adoption Resource Authority.

Partners living together for a long time may have kids together. However, live-in couples are not allowed to adopt kids as per the Guidelines Governing the Adoption of Children as notified by the Central Adoption Resource Authority.

Inheritance rights of children are mentioned in Section- 16 of the Hindu Marriage Act, where the legal status of legitimacy is provided even to illegitimate children (those born out of marriage) for the sole purpose of inheritance. Therefore, inheritance rights have been granted to children born out of a live-in relationship. These rights are available in both ancestral and self-bought properties.

Woman and her child in a live-in relationship cannot be threatened with economic abuse. Of course, although this has more relevance to property ownership and the Hindu Marriage Act, it is gratifying to know that children born out relationships which are not akin to marriage can also have property rights.

c. IVF: The Medical Council of India, a statutory body set up by the government, in exercising its power to make regulations, published the Code of Medical Ethics Regulations, 2002, also called the Medical Council (Professional conduct, Etiquette, and Ethics) Regulations, 2002. It enumerates various responsibilities, duties, powers, and rights of a medical practitioner and holds them accountable for their actions. Codes under the regulation also apply to medical practitioners at IVF clinics.

- Every medical practitioner is directed, under the code, to maintain a thorough record of every patient treated by them. In case of IVF treatment involving a donor, the identity of the donor is to be kept a secret by the clinic and the clinic is to obtain the reproductive material from a donor bank. The medical practitioner must share with the commissioning patients every detail about the donor, except those that can identify them.
- Only a qualified medical professional is allowed to pursue modern medicine and practice medical science. All prescriptions, certificates, and money receipts given to patients must contain the registration number accorded to him/her by the State Medical Council/Medical Council of India. The registration number must also be displayed on the clinic.
- For any medical procedure, the medical practitioner must make a full disclosure regarding the risks and benefits of the procedure, and only after obtaining an informed

consent may the medical practitioner perform the procedure. Written consent of the patient commissioning IVF treatment is required before the procedure is conducted.

- The Code enumerates a list of 'Misconducts' by medical practitioners, which attract penalty and disciplinary action. But the list is not exhaustive. The Medical Council of India, or the State Medical Council, are in no way precluded from dealing with any other manner of professional misconduct.

Most countries have strict laws regulating this branch of medical science. But developing countries where such practices are still unpopular lack the required legislation. In India, there are currently no laws to govern ART. The Indian Council of Medical Research (ICMR) issued some non-binding guidelines called the National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005 that define certain issues. The guidelines outline the physical requirements of an ART clinic, Qualifications and training of the ART team, procedure to screen patients, requirements for a surrogate mother, preservation and utilization of embryos, accreditation authority, the rights of children born through ART, legal issues involved, responsibilities of the clinics, and desirable practices, etc. The guidelines lay down the format for consent forms required for ART and provide for establishing a National Database for Human Fertility and a National Accreditation Committee and a National Advisory Committee.

iv. Domestic Violence:*The Protection of Women from Domestic Violence Act (PWDVA), instituted in 2005*, is a legislation aimed at protecting women from violence in domestic relationships.

1. The definition of **domestic violence** is well written and wide-ranging and holistic. It covers, mental as well as physical abuse, and also *threats* to do the same. Any form of harassment, coercion, harm to health, safety, limb or well-being is covered. Additionally, there are specific definitions for the following:
2. **The definition of "aggrieved person"** includes any woman who is or has been in a domestic relationship with the respondent and who alleges to have been subjected to domestic violence by them. (See Section 2(a) of the PWDVA).

3. **Physical abuse:** Defined as act or conduct that is of such a nature as to *cause bodily pain, harm, or danger to life, limb or health or impair the health or development of the aggrieved person'.* Physical abuse also includes assault, criminal intimidation and criminal force.
4. **Sexual abuse**: The legislation defines this as conduct of "sexual nature" that '*abuses, humiliates, degrades or otherwise violates the dignity of a woman.'*
5. Verbal and emotional abuse: Insults/ ridicule of any form, including those with regard to inability to have a male child, as well as repeated threats
6. **Economic abuse:** Categorized as including deprivation of financial resources required for survival of the victim and her children, the disposing of any assets which the victim has an interest/stake in and prohibition/restriction of financial resources which the victim is used to while in the domestic relationship.
7. **The definition of "respondent"** includes any adult male who has been or is in a domestic relationship with the aggrieved woman, and against whom the woman has sought a relief or any male or female relative of the husband or male partner of a married woman or a woman in a relationship in the nature of marriage.
8. **The definition of "domestic relationship"** is any relationship 2 persons have lived together in a shared household and these people are: related by consanguinity (blood relations)
    a. related by marriage.
    b. Though a relationship in the nature of marriage (which would include live-in relationships)
    c. Through adoption
    d. Are family members living in a joint family
2. **The definition of "child"** is any person below the age of eighteen years, and also includes foster, adopted, or step child.
3. **Victim resources:** Under the Act, victims should be provided with adequate medical facilities, counselling and shelter homes as well as legal aid when required.
4. **Protection Officers: Section 9:** Under the Act, Protection Officers should be appointed by the government in every district, who preferably should be women, and should be qualified. The duties of the Protection Officer include filing a domestic incident report,

providing shelter homes, medical facilities and legal aid for the victims, and ensuring that protection orders issued against the respondents are carried out.

5. **Protection orders: Section 18:** Protection orders for the victim's safety can be issues against the respondent, and includes for when he commits violence, aid or abets it, enters any place which the victim frequents or attempts to communicate with her, restricts any form of assets of the victim or causes violence to people of interest to the victim.
6. **Residence: Section 19:** The magistrate may choose to restrict the respondent from the place of residence of both the parties if they feel that it is for the safety of the victim. Additionally, the respondent cannot evict the victim from the place of residence.
7. **Monetary relief: Section 20:** The respondent has to provide relief to the victim to compensate for loss, including loss of earnings, medical expenses, any expenses incurred due to loss of property by destruction, damage or removal, and maintenance of the victim and her children.
8. **Custody of children: Section 21:** Custody of children should be granted to the victim as required, with visiting rights to the respondent if necessary.

Same sex marriages: Although the criminal nature of Section 377 has been absolved but there is no provision which provides for same sex marriages in Civil Law and personal law so without an amendment in Special Marriage Act or a new law for same, this is not possible in India yet.

Unit-V: Joint Hindu Family

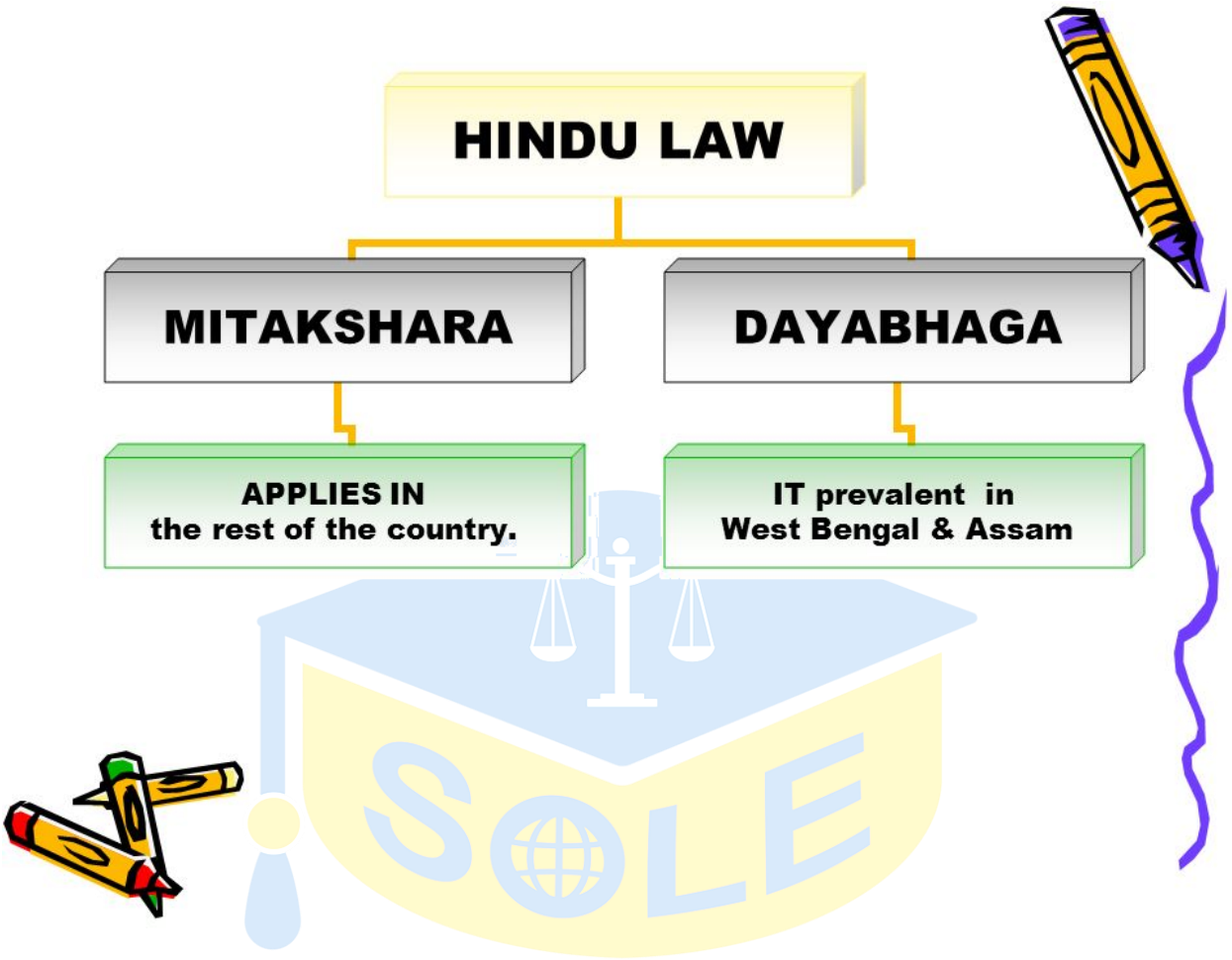
a. Mitakshara and Dayabhaga Schools

Formation and Incident under the Coparcenary Property under Dayabhaga and Mitakshara: Extent and Mode of Succession

c. Karta of Joint Family: Position, Powers and Privileges

d. Debts: Doctrine of Pious Obligation

a. **Mitakshara and Dayabhaga Schools: Formation and Incident under the Coparcenary Property under Dayabhaga and Mitakshara**



Differences between Mitakshara and Dayabhaga School

Mitakshara	Dayabhaga
1. As regards Joint Property: • Right to property of the Coparcener arises by birth	• Right to property of the C er arises by death
• Son is a co-owner with the father of the ancestral property	• Son has no right to ancest erty during father's life tim
• Father has the restricted power of alienation of ancestral property	• Father has the absolute alienation of ancestral prop
• On death of the member the property will fall on other members on rule of survivorship	• On death of the holde property, the property will t legal heirs on rule of inher succession
• The members of the joint family cannot dispose of their shares while undivided	• Any members of the joi may sell or give away his sh when undivided. dispose shares while undivided.

The Mitakshara School of Hindu law is prevalent and applicable throughout India except parts of the state of West Bengal

Following are the salient features

1. In Mitakshara ownership of property vests in the family as such and not in any member of the family.
2. It recognizes two modes of devolution of property, one for joint family and the other for the individual.
3. While the family can and does own property which is joint, there is no bar on its member owning separate properties of their own.
4. Where the deceased is a coparcener of a joint undivided family, his undivided interest in this coparcenary devolves by survivorship on the other coparceners.
5. In respect of self acquired and individual property and not family property, the same passes to his heirs by succession.

6. Every male or female (after 2005 Amendment of Hindu Succession Act 2005*) member born into the family acquires an interest in the property by birth. The family continues on the death of any member of the family including that of the common ancestor or the Karta. The interest of each coparcener fluctuates by births and deaths in the family.

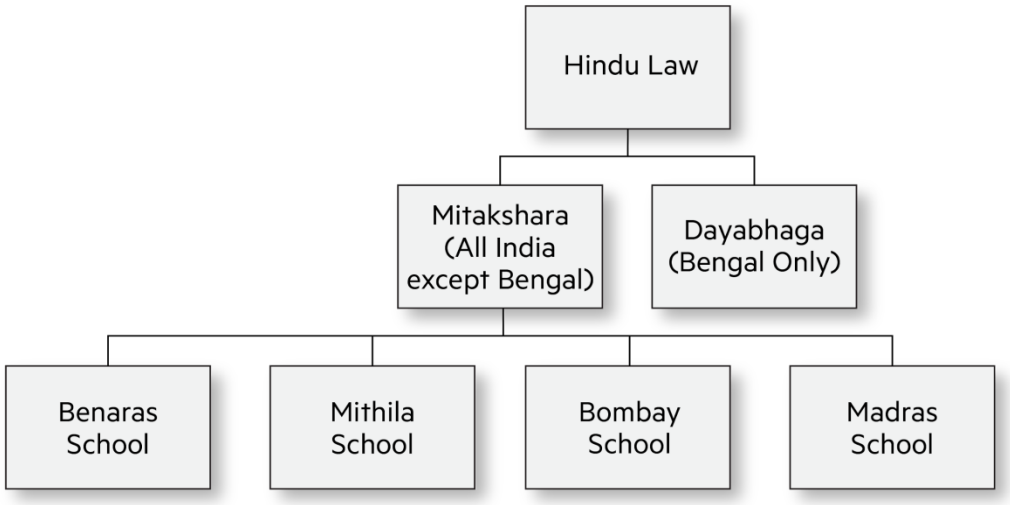
The Dayabhaga law is prevalent in the State of West Bengal and not in any other part of India. Following are its features

1. In Dayabhaga ownership of property vests in the father as such and not in any member of the family. It don't distinguish between self-acquired property and family property
2. The father is in exclusive possession of the property and on his death the property is passes on to legal heir by succession
3. A Son is not a coparcener by birth and do not get any interest in property
4. Female cannot be coparceners in Mitakshara family till 2005* However in Dayabhaga on death of the father, his legal heirs, both male and female become co owners.
5. Any inheritance after death of the father, the tax will be based on share of income of assesse and not as of an HUF, though they may be members (case law Biswa R. Sarvadhikai and Bani Rani Rudra)

Mitakshara Schools

Coparcenery is the feature of Mitakshara school and each son acquires on birth an equal interest with his father in all ancestral property held by the father and on death of father the son takes the property not as his heir but by survivorship. The essence of Coparcenery is Community of Interest and Unity of Possession. Here "Aggregate Ownership" is in existence and on partition

Schools of Hindu Law



b. KARTA OF JOINT FAMILY

Who can be Karta

- Senior male member:
- Junior male member: with the consent of all other coparceners and they can withdraw their consent any time.
- Female members: the SC in Commr. Of Income Tax v. Seth Govind Ram 1966 SC 2 , after reviewing the Hindu texts, held – only the coparcener can be Karta, as female is not a coparcener she can not be Karta.
- After coming into force of Amendment Act of 2005, a woman is now a coparcener, the bar of her becoming a Karta should also be no longer there.

c. **DEBTS:**

The doctrine of Pious Obligation: The concept of pious obligation has its origin in Dharmashastras, according to which non-payment of debt is a sin which results in unbearable sufferings in the next world. Hence the debts must be paid off in all circumstances provided it was not for immoral and illegal purposes. Vrihaspati has said, *"If the father is no longer alive the debt must be paid by his sons*. The father's debt must be paid first of all, and after that a man's own debts, but a debt contracted by the paternal grandfather must always be paid before these two events.

The father's debts on being proved, must be paid by the sons as if their own, the grandfather's debt must be paid by his son's son without interest, but the son of a grandson need pay it at all. Sons shall not be made to pay (a debt incurred by their father) for spirituous liquor, for idle gift, for promises made under influence of love or wrath, or for surety ship, nor the balance of a fine or toll liquidated in part by their father. Yajyavalkya says, "A son has not to pay in this world father's debt incurred for spirituous liquor, for gratification of lust or gambling, nor a fine, nor what remains unpaid of a toll; nor idle gifts." But in case of debts for purposes other than the

above, on the death of the father, or on his going abroad, or suffering from some incurable disease, the debt contracted by him would be payable by his sons and grandsons.

The Mitakshara has presented the entire proposition in stronger words. According to it when the father has gone abroad or is suffering from some incurable disease, the liability to pay the debt contracted by him would lie on the sons and grandsons irrespective of the fact that the father had no property. There are reasons for fixing this liability on sons and grandsons. The liability to pay the debt is in the order, viz., in absence of father the son and in absence of son the grandson.

It is worth noting that the doctrine of pious obligation does not extend the liability to females notwithstanding she has been given a share in the joint family property on partition. Where the wife gets a share on partition between husband, sons and herself, still she would not be under any obligations to pay the debt of the ancestor (father).

Unit-VI: Partition

a. Meaning, Division of Right and Division of Property

b. Persons Entitled to Demand Partition

c. Partition how Effected; Suit for Partition

d. Reopening of Partition; Re-union

a. Meaning, Division of Right and Division of Property

The Hindu Succession Act, 1956 governs the partition in Hindu Joint Family. This process begins with the filing of a partition suit in India. Under the above-mentioned law of property in India, you will find that whenever we decide to divide property,

- On mutual negotiation on how it shall be done;
- Or there is a dispute which you need to take to the court.

The court considers the claims and their rights on the property. So, as to pass an order giving each shareholder the deserving portion, as per the partition act, India.

Everyone at the time of their birth automatically gets a share in the joint family property. However, a person has a share in the property up to three degrees of ancestors (i.e. his father, grandfather, and great-grandfather). Such property is termed as ancestral property. The property partition law for a joint family in India states that an ancestral property can be divided on the basis of making a family partition agreement. This is subject to the personal laws of inheritance where Hindus, Muslims, and Christians have different standings under family property division. The people who have a share in the ancestral property, are a direct lineal descendant of a common ancestor, up to three degrees next to the common male ancestor.

The jointly owned ancestral property can be divided following the property division law in India or you can reach a conclusion of dividing property through negotiation. People who have a portion in the ancestral property are called coparceners. In other words, they are co-owners of the property. A coparcenary includes the eldest member of a family and three generations, where a member of the coparcenary can later sell their portion to a third party. Also, a coparcener can file

a suit asking partition action of the coparcenary property, by filing a deed of partition between co-owners, but not a member. Today, even a daughter, as a coparcener, can demand the partition of a house or business or any property that belonged to her father.

Firstly, in India, the division of property happens when two or more people have joint ownership. This has to be in some immovable ancestral or parental property like a house or a plot or land, etc. Where either of the persons or both of them want to own their share of property separately. Then arises the need for the partition of property. Once the families decide to separately claim their portions in the disputed property, a partition suit is filed. Well, when a party or parties claiming rights over a piece of land or building files a case in the court in the essence of which the property dispute in family arose, this is partition suit definition. If the family members are happily ready to negotiate about the property partition, then one needs to formulate a partition deed following the property or land partition act.

Partition means a numerical division of property and bringing a Hindu Joint family to an end. The joint family ceases to be joint and transforms into a nuclear family after partition. In a coparcenary, the coparceners hold the property as one common unit, partition means the fixing of the shares of each coparcener.

According to the Mitakshara Law, it is the adjustment of the diverse interests regarding the whole, by distributing them into particular portions of the aggregate. Types of partition as per Mitakshara law:

- **De jure Partition**

Dejure partition brings the severance of status or interest. This happens when the community of interest is broken, either at the instance of one of the coparcener or by the agreement of all the coparceners. In such a partition, the shares become clearly demarcated and are no longer fluctuating.

- **De facto Partition**

This is a partition by metes and bonds. This happens when the unity of possession is broken. It is only after the de facto partition, the respective shares of the coparceners become their exclusive shares.

In the Mitakshara school, partition simply means the severance of status or interest. It does not mean that a partition is affected only after the division of property in specific shares. A definite and unequivocal intention of a coparcener to separate himself from the family is all necessary to affect partition. Thus, a partition is deemed to be complete by the severance of the status that is de jure partition.

In the case of a coparcener, a severance of status is enough, and his subsequent demise would not disentitle his legal representatives to claim his share. But for females, the entitlement arises only when the partition takes place by metes and bounds and not just by the severance of the status. However, if the partition takes place and she though entitled, is not given a share, she is empowered to reopen the partition and claim her share. The only detriment here is that, if the female dies before the partition has been affected, her share does not pass to her legal representatives, but remains in the common pool of the joint family property.
On and from the commencement of the Hindu Succession Act (Amendment) Act 2005, the daughter of the coparcener shall be by birth, the coparcener in her own right, have the same rights in the coparcenary property, and will be subjected to the same liabilities as she would have, if she had been a son. Thus, she will be counted as a coparcener herself without any reference to her marital status. This amendment is however prospective in application and does not benefit daughters where an undivided coparcener dies prior to the amendment.

Types of Partition

There are two types of partition:

Total partition

In total partition, the whole property of a Hindu Undivided Family undergoes a total division of property and the same will be divided in between all the coparceners and family cease to exist as a Hindu Undivided Family.

Partial partition

Partial partition can be made when some of the members go out on partition & other members continue as being a member of the family. In such a partition, the rest of the coparceners maintain the joint status with respect to the remaining property.

b. Persons Entitled to demand Partition- Section 6

Before 2005 Amendment:

Section 6 of the Hindu Succession Act, 1956 prior to 2005 amendment stated that only male members who descended from a common ancestor such as sons, grandsons and great grandsons could be the coparceners by birth of the ancestral property and could demand partition in a HUF. At that point of time, daughters or other female members (granddaughters and great granddaughters) were excluded from this right.

After 2005 Amendment

However, this Section 6 of the Hindu Succession Act, 1956 was amended in 2005 to include daughter as equal shareholders in the ancestral property by birth along with the male members. The following will be the rights and duties of the daughter post 2005 amendment:

(i) by birth become a coparcener in the same manner as a son,

(ii) have the same rights in the coparcenary property as she would have had if she had been a son,

(iii) be subject to the same liabilities in respect of the coparcenary property as that of a son

(iv) be entitled to demand a partition of the HUF.

The Supreme Court in ***Prakash &Ors*v. *Phulavati&Ors.***[9], held that the amendment to the HSA is prospective and is applicable to a living daughter of a living coparcener as on 9 September 2005 (i.e. at the commencement of the Amendment Act), irrespective of when such daughter was born provided that any disposition or alienation including partitions which may have taken place before 20 December 2004 as per law applicable prior to the said date will remain unaffected.

c. Partition how effected: Suit for Partition

[9]Supreme Civil Appeal No. 7217 of 2013.

Every coparcener in the coparcenary has the right to ask for partition provided that he should be a major and of sound mind. The demand of the coparcener to seek partition whether reasonable or not, if manifested clearly can never be ignored by the Karta and he is bound to comply with it.

It defines the respective portions of the property to each party claiming their right over it. A deed of partition also needs the approval by the Court. It is an official document created either by the order of the Court or through the negotiation by the parties. This new partition deed must be registered at the office of the Sub-Registrar to give it a legal and binding effect. Next, register and execute it on a stamp paper in a clear and unambiguous manner. It specifies the share of each person and the date of the partition property. However, if the families still need to settle this in the court, then they need to file a suit of partition in Court, where the case proceedings take place.

- File a partition suit in the court which has jurisdiction over the area location of the property.
- The court first determines whether the person who has filed the suit has a rightful claim on the property or not.
- It may order to conduct for an inquiry and pass a preliminary or initial decision for appointment of a Commissioner who evaluates the property in dispute and submits a report.
- Later, the court addresses the inspection report determining the share of each co-owner on the basis of this report. Also, assess how to divide property according to each co-owner's share.
- This invites more discussion till either, court presents a negotiation point or both the parties themselves reach a conclusion for settling the family partition disputes.
- After establishing the share, no additional inquiry is needed. The court may grant individual ownership of the respective portions of the property to the co-owners.

Property settlement means reaching a conclusion by the parties regarding the property dispute through court settlement or mutual negotiation.

The official document of such settlement is property settlement deed. It must be duly signed by both the parties with the seal of the authority.

d. Reopening and Reunion of Partition

There are two necessary conditions of partition, which brings about the severance of the joint status or interest.

The formation of intention to separate.
The declaration of an intention to separate. The declaration involves the expression of intention plus communication of the intention to sever. The declaration of intention that actually severs the status can be verbal or in writing, but it must be clear and unambiguous. The unequivocal communication of intention must be the conscious and informed act of the coparcener.

1. Father, son, grandson,
2. great-grandson,
3. son conceived at the time of partition but born after partition,
4. adopted son,
5. minor coparcener,
6. absent coparcener,
7. alienee, and
8. daughters not only have a right to call for partition but are also entitled a share on partition at the same time.

Remember

- A father has a superior right to ask for partition. He cannot only affect a partition between himself and his sons, but can also impose a partition on his sons inter se. In exercise of the power of the father to call for partition, the consent of sons is immaterial.
- But the father while exercising such power must act bona fide. If the division made by him is unequal, fraudulent or biased, partition can be reopened.
- With respect to the minor's share, the father retains his control as a guardian. However, the minor's share after partition would constitute as his personal property and even the father has no right to alienate it without court's permission. The minor coparcener cannot

avoid the partition affected by his father, till he attains majority. He can, however, repudiate it after attaining majority.

- The son born out of the void or voidable marriages is a legitimate child of the parents and is statutorily entitled to inherit their separate property, but he cannot inherit from any other relation of the parents.

Since, section 8 of the Hindu Succession Act, 1956 makes no distinction between the separated son and undivided sons in the matter of succession to the separate property of Mitakshara Hindu, it is to be noted that, if there are other sons to father which have separated from him, then they can also claim to inherit father's separate property along with the undivided after born sons. But where a coparcener who has relinquished his share in the partition, the son begotten after the renunciation can't claim status of a coparcener, as his father can no longer be regarded as a part of the coparcenary.

There is another category of the members of the joint family who have no right to partition, but if partition takes place, they are entitled to share.

Reopening of partition

Under the Shastric law, Manu says 'once a partition is made, once a damsel is given in marriage and once a gift is made is irrevocable and irretraceable.'

The principle is that "shares are divided only once. "A partition is generally irrevocable. The logic behind is that erstwhile coparceners hold their shares as their separate and exclusive property, they may enter into transactions relating to them, so as to create valid titles in favour of even third parties.

It may become imperative in certain situations to have redistribution of the properties in order to prevent gross injustice to the members of the family. However, a plea that the partition was unfair cannot be countenanced when the facts show that it has been undertaken after due and proper deliberations. Thus, when readjustment of properties is not possible the entire partition has to be reopened.

A partition can be reopened under the following circumstances-

(a) Fraud

Fraudulent distribution of properties, unless the person affected by the fraud acquiesces in with full knowledge of all material facts. A partition may be reopened, if any coparcener has obtained an unfair advantage in the division of the property by fraud upon the other coparceners. A coparcener may conceal the Joint Family Property at the time of partition, to gain an unjust and undue advantage over the others; the partition can thus be reopened on the discovery of fraud. However, fraud cannot be added as a ground at a later stage of trial and also if no fraud pleaded initially in the plaint, the plea cannot be allowed to be changed belatedly that the partition was fraudulent.

(b) Son in womb or conceived and born after partition

Sons, grandsons and great grandsons have a right to partition. With respect to the son conceived at the time of partition but born after partition, Hindu law equates a person in a womb to a person in existence. The partition should be postponed till the birth of the child if the pregnancy is known, but if the coparceners do not agree with the delay, then the share equal to the share of the coparceners should be reserved. But in cases where no share of the posthumous child is reserved, then he can demand for the reopening of partition after his birth through any representation. The right of such a son depends upon whether his father has taken a share for himself at the time of partition from his sons-

- When the father has not taken a share for himself, the after born son has a right to get the partition reopened.

- But when the father has taken or reserved a share for himself, the after born son becomes a coparcener with his father such son born after the partition is entitled to have the partition reopened, but in lieu thereof he is entitled, after the father's death, to inherit not only the share allotted to the father on partition, but also the separate property of the father.

(c) Adopted son

According to **Section 12** of the Hindu Adoption and Maintenance Act, 1956 adopted sons have the same right to partition as that of the natural son. Even, if after his adoption, a son is born to a father, then also shares of adopted sons and natural sons will be equal. Thus, an adopted son is entitled to reopen the partition.

(d) Disqualified Coparcener

Persons suffering from any defect which disqualifies them from inheriting are equally disentitled to a share on partition. Various grounds of disqualification were recognised by the Hindu law, such as congenital and incurable blindness, insanity, deafness, dumbness, virulent and incurable leprosy and other incurable diseases that made sexual intercourse impossible. All these grounds except congenital lunacy or insanity have now ceased to exist as a part of the Mitakshara law by virtue of the Hindu Inheritance (Removal of Disabilities) Act,1928. Further, if a member of the family has not a congenital disqualification, but later becomes insane, he will not be deprived of his interest. The disqualified coparcener who neither has a right to call for partition nor is entitled to a share, after recovering from his disqualification can call for the reopening of the partition.

(e) Absentee Coparcener

A coparcener absent at the time of partition, who has a share in the coparcenary, has a right to call for the reopening of the partition if the partition has taken place in his absence.

(f) Minor coparcener

In partition, the right of the minor coparcener is as same as that of the major coparcener. A minor is a person of immature intellect and the court has the duty to protect his rights by acting as parens patriae. If minor's interests are prejudiced by the Karta by squandering the Joint Family Property, the minor's guardian or the next friend of the guardian may file the suit for partition on behalf of the minor.

The reopening of partition can also be affected when some properties were left out, either by mistake or deliberately or when some properties which have been earlier lost or seized were discovered.

Unit-VII: Principles of Inheritance under Hindu and Muslim Law

a. The Hindu Succession Act, 1956 General Rules of Succession of a Hindu Male and Female dying Intestate under the Hindu Succession Act

b. Stridhan and Women's Estate

c. Principles of Inheritance under Muslim Law (Sunni Law)

a. The Hindu Succession Act, 1956 General Rules of Succession of a Hindu Male and Female dying Intestate under the Hindu Succession Act

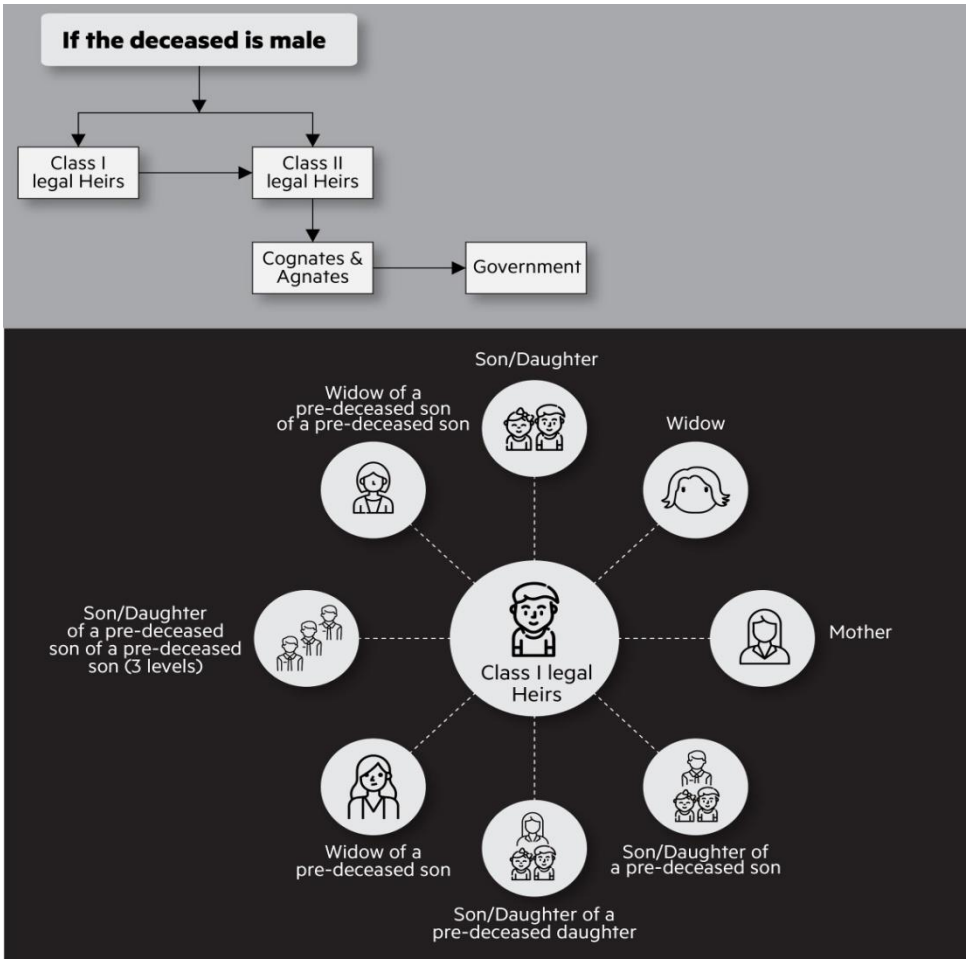
Hindu Male and Female dying Intestate: The Hindu Succession Act, 1956 ("the Act") also covers non-testamentary succession of not only Hindus, but also of Buddhists, Jains and Sikhs, still contains a lacuna with regards to self-acquired properties of women. Section 15 of the Act envisages a definite and uniform scheme of succession of property of a Hindu female who dies intestate. Section 16 of the Act sets out the order of succession of the heirs of the Hindu female and is to be read along with Section 15 of the Act setting out the general rules of succession.

The term '**property**' although not specifically defined by the Act for the purpose of Section 15 of the Act, means the property of the deceased Hindu female heritable under the Act. It ***includes both movable and/ or immovable properties owned and acquired by a Hindu female by virtue of inheritance or at partition or by gift or by purchase. The Section does not differentiate between the property inherited by a Hindu female and the self-acquired property of a Hindu female.*** It only prescribes that if property is inherited from the husband or father-in-law, it would go to her husband's heirs and if the property is inherited from her father or mother, in that case, in the absence of her issues, the property would not go to her husband or his heirs but to the heirs of her father.

As per the present position of law a deceased widow her property would devolve in the second category i.e. to her husband's heirs. Thus, in case the mother of her husband is alive, the deceased Hindu female entire self-acquired property would devolve on her mother-in-law. If the mother-in-law is also not alive, it would devolve as per the rules laid down in the case of a Hindu male dying intestate.

Thus, if the father of her deceased husband is alive, the next in line to inherit the property will be her father-in-law, and if the father-in-law is also not alive, then her property would devolve on the brother and sister of the deceased husband. Thus, the entire self-acquired property of the Hindu female would vest in the brothers and sisters of the of the pre-deceased husband and not that of the Hindu female even if she has siblings that are alive.

Therefore, where a Hindu female dies intestate leaving behind her self-acquired property and in case where her heirs in the first category fail, her property would devolve totally upon her husband's heirs who may be very remotely related or probably even unaware of each other's existence. if the husband pre-deceases her and in the absence of any issues, her property devolves on her husband's heirs. Her paternal and maternal heirs do not inherit her property, but the relations of her husband would inherit in the capacity as her husband's heirs, irrelevant of what relationship they shared.



b. Stridhan and Women's Estate

Stridhan: **Be**fore 1956 the property of woman was divided into two heads- stridhan and women's estate. The Hindu Woman's Right to Property Act, 1937 conferred some new rights of inheritance on certain Hindu females which had the effect of increasing the bulk of woman's estate. Section 14 of Hindu Succession Act, 1956 has abolished woman's estate.

The word stridhan is composed of two words: Stri(woman) and Dhana (Property). The word means the property belonging to a woman or woman's property. This is the etymological sense but the word has a technical meaning given in law. Thus conjunctively these two words imply that property over which a woman has an absolute ownership.

According to Smritikars, the stridhan constituted those properties which woman received by way of gift from relatives which include mostly movable property such as ornaments, dresses and jewellery though sometimes house or land was also given as gift. The gift made to her by strangers at the time of ceremony of marriage or at the time of bridal procession also constituted stridhan.In effecting Partition, if as an absolute gift or interest in a share is given to a woman whether during her maidenhood, marriage or widowhood the same amounts to her Stridhan. Property inherited by a woman becomes her Stridhan or property acquired by a woman by mechanical arts or by her own exertions during maidenhood, subsistence of marriage and during widowhood is Streedhan. Property obtained by a woman by compromise or family arrangement where there is no presumption of her taking only a life interest, becomes her Stridhan.

For a married woman Stridhan falls under two heads:

- The saudayika(gifts of love and affection) – gifts received by a woman from relations on both sides (parents and in-laws).
- The non-saudayika– all other types of Stridhan such as gifts from stranger, property acquired by self-exertion or the mechanical arts.

According to Section 14 of the Hindu Succession Act, 1956 property obtained by a woman from the following sources is her absolute property (unless contrary is mentioned in the terms of device, gift, decree, order or award)

Property acquired-

- by inheritance
- By device –through will or a settlement
- At a partition
- In lieu of maintenance
- By gift
- By personal Skill or exertion
- Purchase and prescription –with the help of her own funds
- Acquired in any other manner- property received under a decree or award, or through adverse possession

In the case of ***Pratibha Rani* v. *Suraj Kumar***[10]the Supreme Court enlisted the following to constitute Stridhan-

- Gifts made before the **nuptial fire**
- Gifts made at the **bridal procession,** i.e. while the bride is being led from her residence of her parents to that of her husband.
- Gifts made in token of love, that is, those made by her father-in-law and mother-in-law and those made at the time of the bride making obeisance at the feet of elders.
- Gifts made by the **father** of the bride
- Gifts made by the **mother** of the bride
- Gifts made by the **brother** of the bride.

Property purchased with stridhan- In all schools of Hindu law, it is a well settled law that the properties purchased with stridhan, or with the savings of stridhan, as well as accumulations and savings of income of stridhan constitute stridhan.

a) Property acquired by compromise-In Hindu law, there is no presumption that a woman who obtains property under a compromise takes it as a limited estate. Property obtained by woman under compromise whereunder she gives up her rights to stridhan is stridhan.
b) Property obtained by adverse possession- In all schools of Hindu law, it is a settled law that any property that a woman acquires at any stage of her life by adverse possession is her stridhan.
c) Property obtained in lieu of maintenance- Under all schools of Hindu law, the payments made to a Hindu female in lump sum or periodically for her maintenance and all the arrears of such maintenance constitute her stridhan. Similarly, all movable and immovable properties transferred to her by way of an absolute gift in lieu of maintenance constitute stridhan.
d) Property obtained by inheritance- A Hindu female can inherit property from her parent's or husband's side. Mitakshara considered all inherited property as stridhan but Privy Council held such property as woman's estate[6] According to Bombay school, the property inherited by a woman from females is stridhan. After the coming into force of Hindu Succession Act, 1956, she takes all inherited property as her stridhan.

1. **Share obtained on partition-** In the Mitakshara jurisdiction including Bombay and Dayabhaga school, it is an established view that the share obtained on partition is not

[10]1985 AIR 628, 1985 SCR (3) 191.

stridhan but woman's estate[8]. This property is now stridhan after coming into force of Hindu Succession Act, 1956.

According to Section 14(1) of Hindu Succession Act,1956 Any property possessed by Hindu female, whether acquired before or after commencement of this Act shall be held by her as full owner and not as a limited owner. As per Section 14(2), retains power of any person or court to give limited estate to a woman in the same manner as limited estate may be given to any other person.

The Hindu Succession Act, 1956 has abrogated the law relating to Stridhan which existed prior to the incorporation of Section 14 in the Act. Section 14 provided that every property which was in possession of a Hindu female at the time of the enforcement of the Act, whether acquired prior to or subsequent to the Act, became her absolute property. Sub-section (2) of Section 14 of Hindu Succession Act, 1956 lays down that if a gift, will or any instrument, decree or order of a civil court or award grants only a restricted estate to a Hindu female. In absence of such intention, the woman's grant will be her absolute property. The old law relating to the order of succession has been replaced and new law includes females as well. As per Section 15 of the Act, every property validly in her possession became her stridhan, a full uniform law of succession to such property had become essential. Thus, on the death of a Hindu female intestate, her stridhan devolved according to the section 15 and 16.

c. **Principles of Inheritance under Muslim Law (Sunni Law)**

Principles of Inheritance amongstMuslim: The Muslim Law of Succession is a combination of four sources i.e. the Holy Quran, Sunna (practice of prophet), Ijma, (Consensus of the learned men of the community over the decision over a particular subject matter), Qiya (deductions based on analogy on what is right and just in accordance with good principles). Muslim law recognises two types of heirs, firstly, sharers, the ones who are entitled to certain share in the deceased's property and secondly, Residuaries, the ones who would take up the share in the property that is left over after the sharers have taken their part.

Under the Indian legislative scheme, the rules that govern inheritance under the Muslim law depend on the kind of property involved. In cases of Non-testamentary succession, the Muslim Personal Law (Shariat) Application Act, 1937 gets applied. On the other hand, in case of a person who dies testate i.e. one who has created his will before death, the inheritance is governed under the relevant Muslim Shariat Law as applicable to the Shias and the Sunnis. In cases where the subject matter of property is an immovable property which is situated in the state of West Bengal or comes within the jurisdiction of Madras or Bombay High Court, the Muslims shall be

bound by the Indian Succession Act, 1925. This exception is only for the purposes of testamentary succession.

It is noteworthy that the Muslim law does not make any strict distinction between any two or more type of properties such as movable and immovable, corporeal and incorporeal etc. Since there is no such distinction between different kinds of properties, therefore, on the event of death of a person, every such property which was within the ambit of ownership of the deceased person shall become a subject matter of inheritance. The amount of property that shall become the subject matter of inheritance and is made available to the legal heirs to inherit shall be determined after making certain appropriations. Such appropriations may include expenses paid in lieu of funeral, debts, legacies, wills etc. After making all these payments, the left over property shall be termed as the inheritable property.

Principles governing rules of inheritance of joint or ancestral property: Unlike Hindu law, there is no provision of distinction between individual i.e. self acquired or ancestral property. Each and every property that remains within the ownership of an individual can be inherited by his successors. Whenever a Muslim dies, all his property whether acquired by him during his lifetime or inherited from his ancestors can be inherited by his legal heirs. Subsequently, on the death of every such legal heir, his inherited property plus the property acquired by him during his lifetime shall be transferred to his heirs.

Birthright: The principle of Hindu law of inheritance of *Janmaswatvad*does not find place in the Muslim law of inheritance. The question of inheritance of property in Muslim law comes only after the death of a person. Any child born into a Muslim family does not get his right to property on his birth. In fact no such person holds becomes a legal heir and therefore holds no right till the time of death of the ancestor. If an heir lives even after the death of the ancestor, he becomes a legal heir and is therefore entitled to a share in property. However, if the apparent heir does not survive his ancestor, then no such right of inheritance or share in the property shall exist.

Doctrine of representation states that if during the lifetime of an ancestor, any of his or her legal heirs die, but the latter's heirs still survive, then such heirs shall become entitled to a share in the property as now they shall be representing their immediate generation. Doctrine of

Representation finds its recognition in the Roman, English and Hindu laws of inheritance. However, this doctrine of representation does not find its place in the Muslim law of inheritance.

Manner of Distribution: Under the Muslim law, distribution of property can be made in two ways, firstly per capita or per strip distribution. Per – Capita distribution method is majorly used in the Sunni law. According to this method, the estate left over by the ancestors gets equally distributed among the heirs. Therefore, the share of each person depends on the number of heirs. The heir does not represent the branch from which he inherits.

On the other hand, per strip distribution method is recognised in the Shia law. According to this method of property inheritance, the property gets distributed among the heirs according to the strip they belong to. Hence the quantum of their inheritance also depends upon the branch and the number of persons that belong to the branch.
It is noteworthy that the Shia law recognises the principle of representation for a limited purpose of calculating the extent of share of each person. Moreover, under the Shia law this rule is applicable for determining the quantum of share of the descendants of a pre-deceased daughter, pre-deceased brother, pre-deceased sister or that of a pre-deceased aunt.
Right of Females in inheritance of property: Muslim does not create any distinction between the rights of men and women. On the death of their ancestor, nothing can prevent both girl and boy child to become the legal heirs of inheritable property. Preferential rights do not exist. However, it is generally found that the quantum of share of female heir is half of that of the male heirs. The justification available to this distinction under Muslim law is that the female shall upon marriage receive mehr and maintenance from her husband whereas males will have only the property of the ancestors for inheritance. Also, males have the duty of maintaining their wife and children.
Rights of inheritance of a child in womb: Under Muslim Law, a child in the womb shall only be entitled to the share in property if he or she is born alive. In case if he is born dead then the share vested in him shall cease to exist and it shall be presumed that it never existed.

Rights of a childless widow and widow: Under the Shia law, a Muslim widow who does not have any children shall be entitled to inherit one – fourth share of the movable property

belonging to her deceased husband. However, a widow with children or childless widow is entitled to one – eighth of the deceased husband's property. In cases where a Muslim man gets married during a period when he is suffering from some mental illness and dies without consummating the marriage, the widow shall not be entitled to any right over her dead husband's property.

Rights of the step children: The rights of the step children do not extend to inherit the property of their step – parents. However, the step brother can inherit property from their step sister or brother.

Escheat: In cases where a person dies without any heir then, the property of such a person shall go to the government. The state is considered as the ultimate heir of every deceased.

Unit-VIII: Muslim Law of Property

a. Hiba: Concept, Formalities, Capacity, Revocability

b. Wasiyat: Concept, Formalities.

c. Waqf

a. Hiba: Concept, Formalities, Capacity, Revocability

Hiba: Since muslim law views the law of Gift as a part of law of contract, there must be an offer (**izab**), an acceptance (**qabul**), and transfer (**qabza**). In ***Smt.Hussenabi and ors.*****v.*****Husensab Hasan Sab and Ors.***[11]a grandfather made an offer of gift to his grandchildren. He also accepted

[11] AIR 1989 Kant 218.

the offer on behalf of minor grandchildren. However, no express of implied acceptance was made by a major grandson. Thus, the following are the essentials of a valid gift-

1. **A declaration by the donor**: There must be a clear and unambiguous intention of the donor to make a gift. Declaration is a statement which signifies the intention of transferor that he intends to make a gift. A declaration can be oral or written. The donor may declare the gift of any kind of property either orally or by written means.
2. The declaration made by the donor should be clear. A declaration of Gift in ambiguous words is void. In ***Maimuna Bibi and Anr.*****v. *Rasool Mian and Ors,***[12]it was held that while oral gift is permissible under Muslim law, to constitute a valid gift it is necessary that donor should divest himself completely of all ownership and dominion over subject of gift. His intention should be in express and clear words. According to Macnaghten, "*A gift cannot be implied. It must be express and unequivocal, and the intention of donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void when he continues to exercise any act of ownership over it.*"

The declaration should be free from all the impediments such as inducement, threat, coercion, duress or promise and should be made with a bona fide intention.

1. **Acceptance by the donee**: A gift is void if the donee has not given his acceptance. Legal guardian may accept on behalf of a minor. Donee can be a person from any religious background. Hiba in favor of a minor or a female is also valid. Child in the mother's womb is a competent done provided it is born alive within 6 months from the date of declaration. Juristic person are also capable of being a donee and a gift can be made in their favor too. On behalf of a minor or an insane person, any guardian as mentioned under the provisions of Muslim law can accept that gift. These include:

   Father

   Father's Executor

   Paternal Grand-Father

[12] AIR 1991 Pat 203.

Paternal Grand Father's Executor.

2. **Delivery of possession by the donor and taking of the possession by the done**: In Muslim law the term possession means only such possession as the nature of the subject is capable of. Thus, the real test of the delivery of possession is to see who – whether the donor or the donee – reaps the benefits of the property. If the donor is reaping the benefit then the delivery is not done and the gift is invalid.

3. The mode of delivery of possession depends completely upon the nature of property. A delivery of possession may either be:

- Actual
- Constructive

Actual Delivery of Possession: Where the property is physically handed over to the donee, the delivery of possession is actual. Generally, only tangible properties can be delivered to the done. A tangible property may be movable or immovable. Under Muslim law, where the mutation proceedings have started but the physical possession cannot be given and the donor dies, the gift fails for the want of delivery of possession[xviii]. However, in such cases if it is proved that although, the mutation was not complete and the done has already taken the possession of the property, the gift was held to be valid.

Constructive Delivery of Possession: Constructive delivery of possession is sufficient to constitute a valid gift in the following two situations:

- Where the Property is intangible, i.e. it cannot be perceived through senses.
- Where the property is tangible, but its actual or physical delivery is not possible.

Under Muslim law, Registration is neither necessary, nor sufficient to validate the gifts of immovable property. A hiba of movable or immovable property is valid whether it is oral or in writing; whether it is attested or registered or not, provided that the delivery of possession has taken place according to the rules of Muslim Law.

Constitutional Validity of Hiba

The question of whether the first exemption was constitutionally valid in regards to the right to equality (article 14 of the Indian Constitution) was rather rapidly solved by the Courts, validating the disposition on the grounds of 'reasonable classification.

It is enough to say that it is now well settled by a series of decisions of this Court that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation, and in order to pass the test of permissible classification, two conditions must be fulfilled, namely:

(1) That the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and,

(2) That differentia must have a rational relation to the object sought to be achieved by the statute in question.

The classification may be founded on different bases such as, geographical, or according to objects or occupations and the like. The decisions of this Court further establish that there is a presumption in favor of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional guarantee; that it must be presumed that the legislature understands and correctly appreciates the needs of its own people and that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds; and further that the legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.

It is well known that there are fundamental differences between the religion and customs of the Mahomedans and those of others, and, therefore the rules of Mahomedan law regarding gift are based on reasonable classification and the provision of Section 129 of the Transfer of Property Act exempting Mahomedans from certain provisions of that Act is not hit by Article 14 of the Constitution.

The most essential element of Hiba is the declaration, "I have given". As per Hedaya, Hiba is defined technically as:

"*Unconditional transfer of existing property made immediately and without any exchange or consideration, by one person to another and accepted by or on behalf of the latter*".

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

According to the Shariat law, a person can only leave one-third of their property to anyone they wish. The remaining two-thirds will, by law, go to their heir or heirs, equally shared between them.

b. Wasiyat: Concept, Formalities.

Muslim Will/Wasiyat: Muslim law does not allow a property to be bequeathed to an unborn child. However, in case the mother is pregnant with the child, and is born within six months of the death of the person making the will, the child has all rights to inherit it. Other considerations that are induced by the Muslim Law include:

a.A person can bequeath a property, even if he does not possess it at the time of writing the will, but has it in his possession at the time of death. (If not, of course, the will becomes null and void).
b.An individual cannot lay any conditions or requests on the bequeaths. The bequests have to be unconditional.
c.However, one can make an alternative bequest, stating that in case a person (the heir) is not alive, another heir (heir-2) will get his assets.
Muslim law decrees that a person can cancel the will at his convenience without giving any reasons, anytime before his death. Another way of cancelling the will is to bequeath the property to someone other than the heir who was mentioned in the first will. The last will that an individual makes becomes his final will, and will be taken into account at the time of death. At the time of making the will, an individual needs to pick the persons who might execute his will. The request is taken into account at the time of disposal of assets. The person picked as an executor of the will has the right to dispose off the assets as specified in the will.

c.Waqf

Waqf means detention of a property so that its produce or income may always be available for religious or charitable purposes. When a waqf is created, the property is detained or, is 'tied up' forever and thereafter becomes non-transferable. Meaning and various types of waqf are defined in this project. There is an object behind making a waqf. Office of Mutawalli (manager) is very important. There are many modes to create waqf, which are dealt with in this project. Waqf is binding and enforceable by law, it has legal consequences which are dealt with in this project. The law of waqf is "the most important branch of Mohammedan Law for it is interwoven with the entire religious, social, and economic life of Muslims.

Waqf: The essential conditions for a valid waqf are as follow:

1. Permanent dedication: The dedication of waqf property must be permanent and Wqif himself must divot of such property and gave it for any purpose recognized by Muslim law, like religious, pious or charitable. If the wakf is made for limited period it won't be a valid wakf and also there should be no condition or contingency attached otherwise it will become invalid. The motive behind Wakf is always religious. When a Wakf is constituted, it is presumed that a gift of some property has been made in favor of God. This is ensured through a legal fiction that waqf property becomes the property of God.

2. Competency of the Waqif: The person who constitutes the waqf of his properties is called the 'founder of waqf or, Waqif. The waqif must be a competent person at the time of dedicating the property in waqf. For being a competent waqif a person must possess the capacity, as well as the right to constitute the waqf. As regards capacity of a Muslim for making a waqf, there are only two requirements: (i) soundness of mind and, (ii) majority.

3. Waqf by Non-Muslims: The dedicator must profess Islam i.e., believes in the principles of Islam', he need not be a Muslim by religion. The Madras and Nagpur High Courts have held that a non-Muslim can also create a valid waqf provided the object of waqf is not against the principles of Islam. Patna High Court has also held that a valid waqf may be constituted by a non- Muslim. However, according to Patna High Court a non-Muslim waqf may constitute only a public waqf; a non-Muslim cannot create any private waqf (e.g. an Imambara).

Generally, there are two types of wakf:

1. Public Waqf

2. Private Waqf

An essential for the validity of waqf is that the dedication should be for a purpose recognised as religious, pious or charitable, under Musalman Kaw.

On basis of decided cases and the text of eminent Mohammedan Jurists, certain objects which had been declared to be valid objects of wakf are:-

1. Mosque and provisions for Imamas to conduct worship.
2. Celebrating the birth of Ali Murtaza
3. Repairs of Imambaras.
4. Maintenance of Khankahs.
5. Reading the Koran in public places and also at private houses.
6. Maintenance of poor relations and dependant.
7. Payment of money to Fakirs.
8. Grant to an Idgah.
9. Grant to the college and provisions for professors to teach in colleges.
10. Bridges and Caravan Sarais.
11. Distribution of alms to poor persons, and assistance to the poor to enable them to perform pilgrimage to Mecca.
12. Keeping Tazias in the month of Moharram, and provisions for camels and Duldul for religious processions during Moharram.
13. Celebrating the death anniversary of the settler and of the members of the family.
14. Performance of ceremonies known as Kadam Sharif.
15. The construction of a Cobat or free boarding house for pilgrims at Mecca.
16. Performing the annual Fateha of the members of his family.
17. A Durgahor or shrine of a Pir which has long been held in veneration by the public.

The following are not recognized as valid objects of waqf, by the Musalman law.
1. Objects prohibited by Islam, e.g. erecting or maintaining a church or temple.
2. Providing for the rich exclusively.

3. Objects which are uncertain.

4. A direction to spend a certain sum of money for feasting CutchiMemons every on the anniversary of the anniversary of the settler's death is not valid.

- ***Surbhi Aggarwal***
(Founder & CEO, School of Legal Education)

Thankyou