

# **FAMILY LAW-II**

## **MUSLIM LAW**

### **Complete Question and Answer Bank**

<b>LL.B. (3 Years Programme) - Semester II</b>
<b>Course: Family Law-II (Muslim Law)</b>
Prepared unit-wise as per syllabus, previous-year questions and case-law material
Designed for comfortable reading on iPad/Tablets and print-friendly revision

#### **Syllabus at a Glance**

---

**Unit I: Foundations of Muslim Law**

**Unit II: Marriage, Dower and Divorce**

**Unit III: Guardianship, Hizanat, Parentage, Legitimacy  
and Acknowledgement**

**Unit IV: Maintenance (Nafaqah)**

**Unit V: Will and Inheritance**

**Unit VI: Pre-emption, Gift and Waqf**

## Unit I: Foundations of Muslim Law

Advent, Development, Sources, Schools and the Shariat Act. This section covers topics such as the advent of Islam and development of Islamic law, schools and sources of Islamic law, The Muslim Personal Law (Shariat) Application Act, 1937. It explains the constitutional position of personal laws in India, including the judicial treatment of Article 13 and Article 372.

**Muslim law** is not merely a set of private rules governing marriage, divorce, inheritance and family relations. It is historically connected with the religious, moral and social order of Islam. In India, however, Muslim **personal law** operates within a **constitutional legal system**, where **personal law**, statutory reform and constitutional values interact with each other. The study of **Muslim law** therefore requires attention to its religious sources, juristic development, schools of interpretation and statutory application.

### Preliminary Concept: Who is a Muslim?

For the application of Muslim personal law, a person may be Muslim by birth or by conversion. A Muslim by birth is ordinarily one born into the faith and professing the essential belief in one God and the prophethood of Muhammad. A person may also become Muslim by conversion, either by a clear profession of Islam or by a formal ceremony recognised by the community. This point is relevant because the application of Muslim personal law depends upon the religious status of the parties in matters such as marriage, dower, divorce and succession.

**Question 1. Discuss the advent of Islam and the development of Islamic law.**

### Introduction

Islam arose in Arabia in the seventh century. The **Prophet Muhammad**, born in **571 A.D.**, became the central religious and social figure through whom the revelations of Allah were communicated to mankind. The first revelation is traditionally understood to have come through the angel Jibril or Gabriel. The Arabic expression of faith, **La ilaha illallah Muhammadur Rasulullah**, expresses the foundation of Islam: there is no God but Allah, and Muhammad is His messenger.

### Arabia before Islam

Before Islam, Arabia was largely a **tribal society**. The desert conditions limited agriculture, and many Arab communities lived as traders and nomads. Tribal loyalty, **customary practices** and local usages strongly influenced social life. Islam

introduced a unifying religious and moral framework that gradually transformed these scattered tribal practices into an organised **legal and ethical order**.

### **The Meccan and Medinan Phases**

The early phase of Islam began in **Mecca**, where the Prophet preached monotheism and moral reform. As opposition increased, the Prophet migrated from **Mecca** to **Medina** in **622 A.D.** This migration is known as **Hijra**. The Islamic calendar begins from this event. In **Medina**, the Prophet not only acted as a religious guide but also formed a political and social community known as the **Umma**. Thus, Islam moved from a purely religious movement to a community with legal, political and social organisation.

### **Revelation and the Formation of Legal Norms**

The legal order of Islam developed from two broad forms of guidance. The direct revelation became the **Quran**. The indirect guidance consisted of the sayings, conduct and approvals of the Prophet, which later became known as **Sunna** or **Hadith**. These sources supplied rules regarding worship, morality, family relations, property, succession, crime, contract and social conduct.

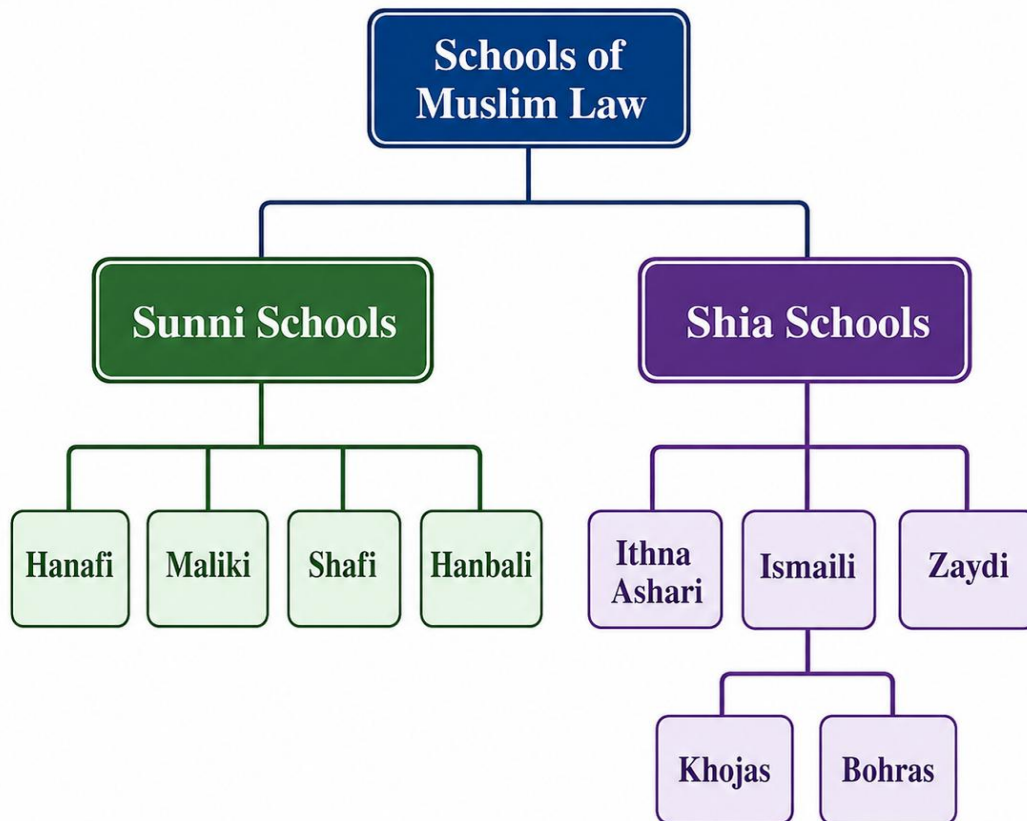
### **Caliphate and Juristic Development**

After the death of the Prophet, the issue of leadership arose. The **Sunni** tradition recognised the early Caliphs, beginning with Abu Bakr, while the **Shia** tradition gave central importance to Ali and the line of Imams. Political differences gradually acquired theological and legal significance. During the period of the **Caliphate**, jurists interpreted the Quran and Sunna to meet new situations. This led to the growth of **Fiqh**, which means the human understanding of **Sharia**.

### **Development of Schools of Law**

As Islamic rule expanded beyond Arabia, jurists in different regions applied the basic sources of law to new social and legal problems. This resulted in the formation of recognised schools of law. Among Sunnis, the major schools are **Hanafi, Maliki, Shafi** and **Hanbali**. Among Shias, the important schools include **Ithna Ashari, Ismaili** (subdivided into **Khojas** and **Bohras**) and **Zaydi**. These schools do not represent different religions; they represent different juristic methods within Islam.

## Schools of Muslim Law and Sub-schools



### Conclusion

The development of Islamic law shows a gradual movement from **revelation** to **interpretation**, and from moral command to juristic system. Its foundations lie in the Quran and Sunna, but its detailed legal structure was shaped by jurists, schools of law, custom, legislation and judicial **interpretation**. In India, Muslim law continues to operate as **personal law**, subject to statutory changes and constitutional scrutiny in appropriate cases.

**Question 2. Discuss the various sources of Muslim law in detail.**

### Introduction

The **sources of Muslim law** may be understood as the authorities from which rules of Islamic law are derived. Classical Muslim jurists distinguished between **primary sources**, which form the core of Sharia, and **secondary** or supplementary sources, which assist in applying the law to changing circumstances.

## Primary Sources

### 1. Quran

The **Quran** is the first and **highest source** of Muslim law. It is believed to contain the words of Allah revealed to the Prophet. Although the **Quran** is not a code in the modern legislative sense, it contains binding principles on worship, morality, marriage, divorce, inheritance, charity, contract and social justice. Its legal verses form the foundation from which many rules of Muslim personal law are derived.

### 2. Sunna and Hadith

**Sunna** means the practice, conduct and approved way of the Prophet. **Hadith** refers to the recorded sayings, actions and approvals of the Prophet. Where the Quran is silent or requires explanation, the **Sunna** supplies guidance. It gives practical meaning to Quranic principles and is therefore an indispensable source of Islamic law.

### 3. Ijma → consensus eg - Abu Bakr = first Caliph

**Ijma** means **consensus** of jurists. It developed as a source because, after the Prophet, new situations arose for which no direct textual answer was available. When qualified jurists agreed on a legal rule, that **consensus** acquired authority. **Ijma** reflects the collective juristic understanding of the Muslim community.

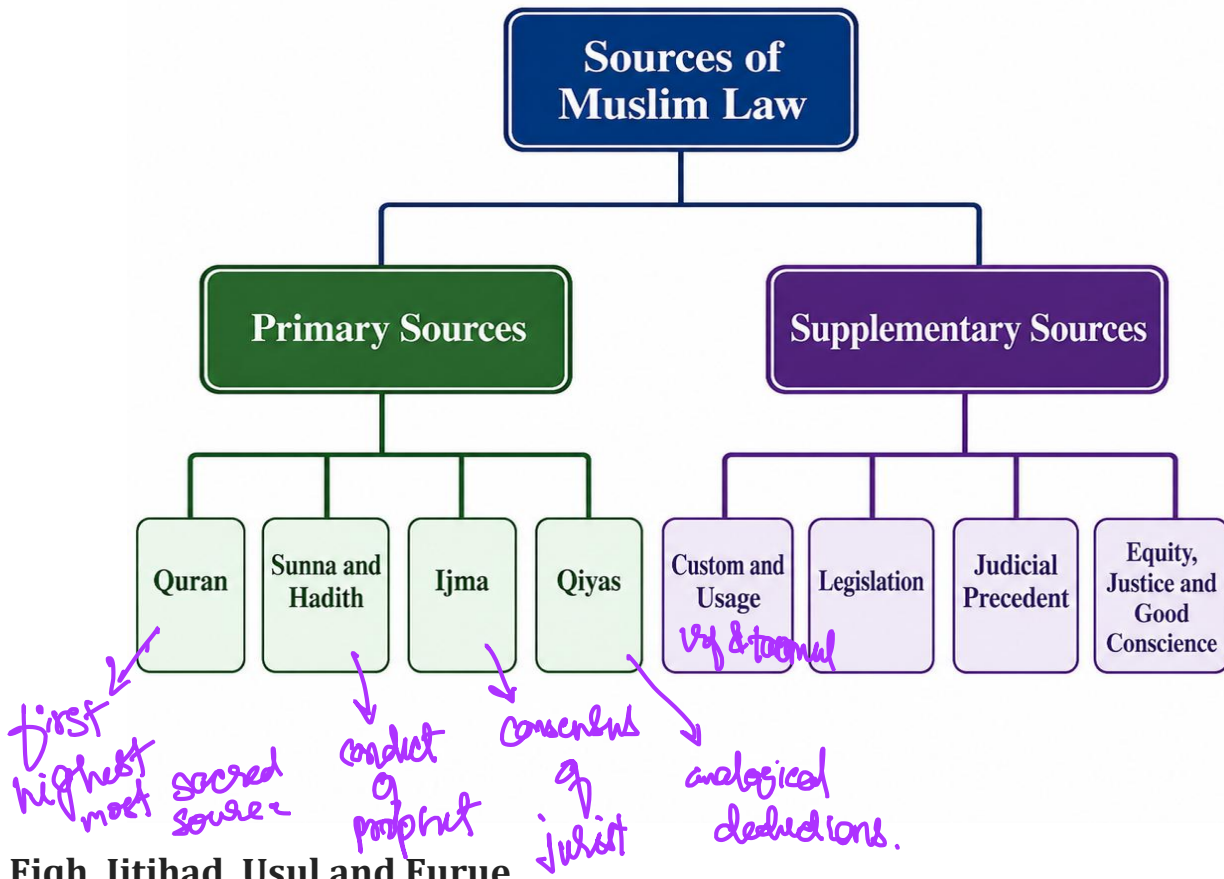
4. Qiyas → analogical deduction → Prohibition of wine due to prohibition of other similar intoxicants that give rise to mischief

**Qiyas** means **analogical deduction**. It is used when a rule for a new case is derived by analogy from an existing rule found in the Quran, Sunna or Ijma. The underlying reason or effective cause of the original rule is applied to the new situation. **Qiyas** enables Islamic law to remain connected with its textual sources while responding to new facts.

## Supplementary Sources

Other sources also influence Muslim law, particularly where the primary sources do not provide a direct answer. These include **custom**, usage, **legislation**, **judicial precedent**, **equity**, **justice and good conscience**. In India, **legislation** and **judicial precedent** have played a significant role because Muslim personal law operates within a modern legal system.

# Sources of Muslim Law



## Fiqh, Ijtihad, Usul and Furue

**Fiqh** is the human understanding of Sharia. **Ijtihad** is the process of juristic reasoning by which scholars derive rules from the sources. **Usul** refers to the roots or basic principles of law, whereas **Furue** refers to the branches or substantive rules that govern particular legal matters. This distinction shows that Muslim law has both a spiritual foundation and a juristic method.

## Illustrations of the Working of Sources

The Quran is not a modern statute, yet it supplies foundational legal rules. A clear illustration is the law of inheritance, where the Quranic scheme is principally associated with verses 11, 12 and 176 of Surah al-Nisa. Similarly, the Sunna explains and applies Quranic principles in practical matters. Classical jurists also treated the rule that a killer cannot inherit from the person killed as an illustration of how prophetic guidance affected succession.

*4:11 and 4:12 chapters in Quran about women*

*4:11, 4:12, 4:176.*

Source or method	Meaning	Illustration
<u>Ijma</u>	Consensus of qualified jurists on a legal question.	The acceptance of <u>Abu Bakr</u> as the first Caliph is commonly discussed as an early political example of consensus.

<u>Qiyas</u>	Analogical deduction from an existing rule to a new case.	The prohibition of wine was extended by analogy to intoxicants producing the same mischief.
<u>Isti Hasan</u>	Juristic preference or equitable departure from strict analogy. <i>eg- theft during a famine</i>	Used to avoid hardship where literal analogy would produce an inequitable result. <i>→ not immoral.</i>
<u>Isti Salah</u>	Public interest or general utility. <i>eg- establishment of prisons, wearing seat belts. etc</i>	A rule indicated by analogy may be adjusted where public welfare requires a different approach.
Taqlid	Following settled juristic opinions after the classical age of independent reasoning.	Ordinary believers and later jurists followed recognised schools instead of reopening every question.
Fatwa	<u>Legal opinion given by a qualified jurist or mufti.</u>	Fatwas historically guided rulers and courts; in India, compilations of juristic opinions acquired persuasive value.

### Classification of Acts

Islamic jurisprudence classifies human acts according to moral and legal value. *Namaz. → fast in Ramadhan alcohol consumption*

**Obligatory** acts must be performed; **recommended** acts are meritorious but not compulsory; **permitted** acts are left to individual choice; **disapproved** acts are discouraged; and **prohibited** acts must not be done. This classification shows the close connection between law and morality in Islamic legal thought.

*→ Zina = adultery.*

### Conclusion

The sources of Muslim law form a layered system. The Quran and Sunna provide the foundation; Ijma and Qiyas develop the law through juristic reasoning; and supplementary sources assist in adapting the law to social life. The Indian legal system has further shaped Muslim law through statutes and judicial decisions.

### Question 3. Explain the schools of Muslim law and their significance.

#### Introduction

*It has historical roots after battle of Karbala*

**Schools of Muslim law** are juristic traditions that developed for interpreting and applying Islamic legal sources. ~~They arose because jurists differed in method, emphasis and reasoning while remaining within the broad framework of Islam.~~ The principal division is between **Sunni** and **Shia** schools.

*Sunni = election Caliph*

#### Sunni Schools

*Shia = blood of Prophet (Aci)*

The Sunni schools recognise the authority of the **Quran, Sunna, Ijma and Qiyas**. They accept the early Caliphs before Ali and treat the Caliphate as a political institution. The four major Sunni schools are as follows:

- ① **Hanafi School:** Founded by Abu Hanifa, it is known for its use of reason, analogy and juristic preference. It is the most widely followed school among Indian Muslims.
- ② **Maliki School:** Founded by Malik ibn Anas, it gives importance to the practice of the people of Medina.
- ③ **Shafi School:** Founded by Imam Shafi, it systematised the principles of Islamic jurisprudence and gave a structured place to Quran, Sunna, Ijma and Qiyas.
- ④ **Hanbali School:** Founded by Ahmad ibn Hanbal, it adopts a stricter textual approach and gives great importance to Hadith.

## Shia Schools

The Shia schools give special importance to Ali and the Imams. They do not accept the first three Caliphs in the same manner as Sunnis. Their legal reasoning is shaped by the doctrine of Imamate and the authority of the Imam. The principal Shia schools include Ithna Ashari, Ismaili and Zaydi.

## Importance of Schools in Personal Law

The school to which a person belongs may affect rules of **marriage, dower, divorce**, guardianship, **inheritance**, gifts, wakf and pre-emption. For example, Sunni law classifies heirs in a manner different from Shia law, and Shia law recognises Muta marriage whereas Sunni law does not. Thus, schools are not merely historical divisions; they have practical legal consequences.

## Conclusion

Sunni → witness - nikah  
Shia → divorce

The schools of Muslim law show the richness of Islamic jurisprudence. They preserve unity in basic faith while allowing diversity in legal method. In India, the **Hanafi school** has historically had wide application, but courts may apply the rules of the particular school to which the parties belong when such distinction is legally material.

**Question 4. Explain the Muslim Personal Law (Shariat) Application Act, 1937 and its importance.**

## Introduction

The **Muslim Personal Law (Shariat) Application Act, 1937** is one of the most important statutory enactments in Indian Muslim law. Its object was to ensure that, in specified matters, Muslims are governed by Muslim personal law rather than contrary customs or usages. Before the Act, several communities followed local or

case law - *Roshan Ismail vs Shiv Mukh (PC)*  
*Roshan Ali vs Asghar Ali (PC)*

customary practices even in matters of family law. The Act gave statutory recognition to the application of **Shariat** in the matters mentioned in it.

### Purpose of the Act

The Act was enacted to remove uncertainty created by the application of customs in matters where Muslim personal law was intended to apply. It made Muslim personal law the **rule of decision** in specified subjects when the parties are Muslims. The Act therefore **did not codify** the whole of Muslim law; it declared the applicability of Shariat in listed matters.

### Matters Covered v/s 2

The principal areas covered by the Act include **intestate succession**, special property of females, **marriage**, **dissolution of marriage**, talaq, ila, zihar, lian, khula, mubaraat, **maintenance**, **dower**, **guardianship**, **gifts**, **trusts** and **wakfs**. The emphasis of the Act is that in these matters, Muslim personal law should prevail over inconsistent custom or usage.

### Effect on Customary Law

The main effect of the Act is to **displace custom** in the matters covered by it. Where the Act applies, a party cannot ordinarily rely on a contrary custom to avoid the application of Muslim personal law. This was a major **legal reform** because it reduced the influence of local practices that were inconsistent with Shariat principles.

### Not a Complete Code

The Act is **not a complete code** of Muslim law. It does not contain detailed provisions on every subject. Instead, it states that Muslim personal law shall apply to certain matters. The actual content of the law is still drawn from the classical sources, schools of law, statutory modifications and judicial decisions.

#### Statutory Precision: Scope of Section 2

Section 2 of the Shariat Act declares that, notwithstanding any custom or usage to the contrary, Muslim personal law applies to specified matters such as intestate succession, special property of females, marriage, dissolution of marriage, maintenance, dower, guardianship, gifts, trusts and wakfs.

The Act is therefore declaratory in form. It does not reproduce every rule of Muslim law, but identifies the personal-law field in which Shariat is to be applied as the rule of decision.

### Importance

The importance of the Act lies in its declaration that Shariat, rather than custom, shall govern Muslims in specified personal matters. It is also important in

**constitutional litigation** because courts have considered whether provisions or practices recognised through personal law or statute may be examined under **fundamental rights**.

## Conclusion

The Shariat Act, 1937 marks an important shift from customary diversity to legal uniformity within the specified sphere of Muslim personal law. It preserved the religious character of Muslim personal law while giving it **statutory recognition** in British India and thereafter in independent India.

**Question 5. Discuss the constitutional position of personal laws in India with reference to leading cases.**

## Introduction

Personal laws in India govern matters such as marriage, divorce, succession, maintenance, guardianship and adoption among different religious communities. A central constitutional question has been whether uncodified **personal laws** are “laws” within the meaning of **Article 13**, and whether they can be tested directly on the touchstone of **fundamental rights**.

### Article 13 and Article 372

**Article 13(3)** defines “law” to include ordinances, orders, bye-laws, rules, regulations, notifications, customs and usages having the force of law. **Article 372** continues pre-Constitution laws in force until altered, repealed or amended by a competent authority. The difficulty arises because personal laws are often ancient religious or customary systems and not always enacted legislation.

#### **State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84**

**Facts:** The Bombay Prevention of Hindu Bigamous Marriages Act was challenged on the ground that it interfered with religious and personal law rights. The case raised the broader issue of whether personal law could be treated as “law” under Article 13.

**Issue:** Whether personal laws fall within the expression “laws in force” for the purpose of Part III of the Constitution.

**Held:** The Bombay High Court held that personal laws were not included in “laws in force” under Article 13 in the same manner as statutory law.

**Principle:** This case became the classical authority for the view that uncodified personal law is not directly tested under Article 13 as ordinary legislation is tested.

### **Krishna Singh v. Mathura Ahir, AIR 1980 SC 707**

**Facts:** The dispute concerned the application of personal law and custom in relation to religious office and succession.

**Issue:** Whether fundamental rights under Part III could be applied directly to personal laws and customary religious rules.

**Held:** The Supreme Court observed that Part III does not apply to personal laws in the same manner as it applies to statutory law.

**Principle:** The decision reaffirmed the cautious approach of courts in applying fundamental rights directly to uncodified personal laws.

### **Ahmedabad Women Action Group v. Union of India, AIR 1997 SC 3614**

**Facts:** Public interest petitions challenged various provisions and practices in personal laws, including Muslim law relating to polygamy, unilateral talaq and inheritance.

**Issue:** Whether courts should declare certain personal law provisions unconstitutional for violating Articles 14 and 15.

**Held:** The Supreme Court declined to undertake wide reform of personal laws through judicial directions and treated the matter as one involving legislative policy.

**Principle:** The case shows judicial restraint in matters of broad personal law reform, especially where complex policy and religious questions are involved.

## **Shayara Bano and the Change in Approach**

The later decision in **Shayara Bano v. Union of India** marked a significant development. The Supreme Court set aside the practice of **talaq-e-biddat** by a majority. One strand of reasoning treated the practice as **manifestly arbitrary**, particularly because it allowed an instant and irrevocable dissolution of marriage by unilateral pronouncement. This decision shows that where a personal law practice has statutory recognition or operates in a manner inconsistent with constitutional values, the court may intervene.

## **Codified Personal Law**

Where personal law is **codified** by legislation, it assumes a **statutory form** and can be examined as enacted law. However, mere **codification does not necessarily erase the personal law character of the subject**. The legal position therefore depends on the nature of the rule, the form in which it appears, and the constitutional challenge raised against it.

## **Conclusion**

The constitutional position of personal laws in India is nuanced. Earlier cases adopted restraint and treated uncodified personal law as outside the ordinary operation of Article 13. Later developments show that statutory recognition of a

personal law practice, or a practice that seriously conflicts with **constitutional morality**, may invite **judicial review**. The relationship between personal law and fundamental rights is therefore not static; it continues to evolve through legislation and constitutional adjudication.

## Unit II: Marriage, Dower and Divorce

This unit explains the juristic character of **Muslim marriage**, the classification of marriages, the legal consequences of valid, void and irregular marriages, the special position of muta marriage, the doctrine of **dower**, the modes of **divorce** and the statutory protection created by the **Dissolution of Muslim Marriages Act, 1939** and the **Muslim Women (Protection of Rights on Marriage) Act, 2019**.

Topics covered here include Concept of Nikah; essential requirements; classification of marriage; legal effects of valid, void and irregular marriage; muta marriage; dower; talaq and modes of divorce; dissolution of marriage under the Dissolution of Muslim Marriages Act, 1939; legal effects of divorce; and the Muslim Women (Protection of Rights on Marriage) Act, 2019.

**Question 6. Explain the concept of Nikah under Muslim law. Discuss its definition, object, nature and essential requirements.**

### Introduction

**Nikah** is the legal institution through which the relationship of husband and wife is created under Muslim law. It is not treated as a sacrament in the same manner in which classical Hindu law historically viewed marriage. Muslim jurists generally describe marriage as a **civil contract**, but it is a contract with a **social, moral and religious dimension** because it legalises sexual relations, regulates family life, fixes rights and obligations, and provides a lawful foundation for legitimacy and inheritance.

### Meaning and Definition

The word Nikah literally denotes **union or conjunction**. In legal usage, it means a contract for the **legalisation of sexual intercourse** and the **procreation of children**. It also creates mutual rights and duties between the spouses. The contractual nature is visible from the requirement of **proposal, acceptance, capacity** of parties, **witnesses** in Sunni law, and **dower**. At the same time, the institution is not merely commercial, because it is connected with family, status, legitimacy and social order.

### Objects of Nikah

- ✓ 1. To establish a lawful matrimonial relationship between a man and a woman.
- ✓ 2. To regulate sexual relations within a legally recognised framework.
- ✓ 3. To provide legitimacy to children born of the union.

- ✓ 4. To create mutual rights and obligations between husband and wife, including cohabitation, maintenance, dower and marital consortium.
5. To organise family life and preserve moral and social order.

## Nature of Muslim Marriage

Muslim marriage is commonly described as a **civil contract**. This description is important because the marriage comes into existence through offer and acceptance (qubul), and the parties must possess legal capacity. However, it should not be understood as an ordinary commercial contract. It is a contract of a **special character** because it affects status, family relations, legitimacy, maintenance, inheritance and dissolution of marriage.

## Essential Requirements of a Valid Nikah

1. There must be a clear proposal or ijab made by or on behalf of one party.
2. There must be an acceptance or qubul by or on behalf of the other party.
3. The proposal and acceptance must take place at one meeting and must correspond with each other.
4. The parties must be competent to marry. They must be Muslim, of sound mind and must have attained puberty or must be represented by a lawful guardian (wali).
5. There must be no legal prohibition such as prohibited relationship by consanguinity, affinity or fosterage.
6. In Sunni law, the presence of witnesses is generally required. The usual rule is two male witnesses, or one male and two female witnesses. Shia law does not insist upon witnesses as an essential condition in the same manner.
7. Dower or mahr is an incident of marriage. Even if it is not expressly fixed at the time of marriage, the wife remains entitled to proper dower.

## Conclusion

Nikah under Muslim law therefore combines contractual consent with legal status. It is founded upon proposal and acceptance, but its consequences extend beyond the parties because it determines legitimacy, maintenance, inheritance and the lawful structure of family life.

**Question 7. Discuss the classification of Muslim marriage and explain the legal effects of valid, void and irregular marriage. How does a sahih nikah differ from a batil nikah?**

## Introduction

Muslim law classifies marriage mainly into **valid**, **void** and **irregular** marriages. The distinction is important because the legal consequences of each category are different. A **valid** marriage creates full matrimonial rights, a **void** marriage creates no legal relationship, and an **irregular** marriage is defective but capable of being made **valid** when the impediment is removed.

Sahih      Batil      Fasid.  
 ↑            ↑            ↑

## Classification of Marriage

### 1. Valid Marriage or Sahih Nikah

A valid marriage is one which fulfils all essential requirements of Muslim law. The parties are competent, consent is lawfully given, there is no prohibited relationship, and the formal requirements are satisfied. A sahih nikah creates a lawful status of husband and wife.

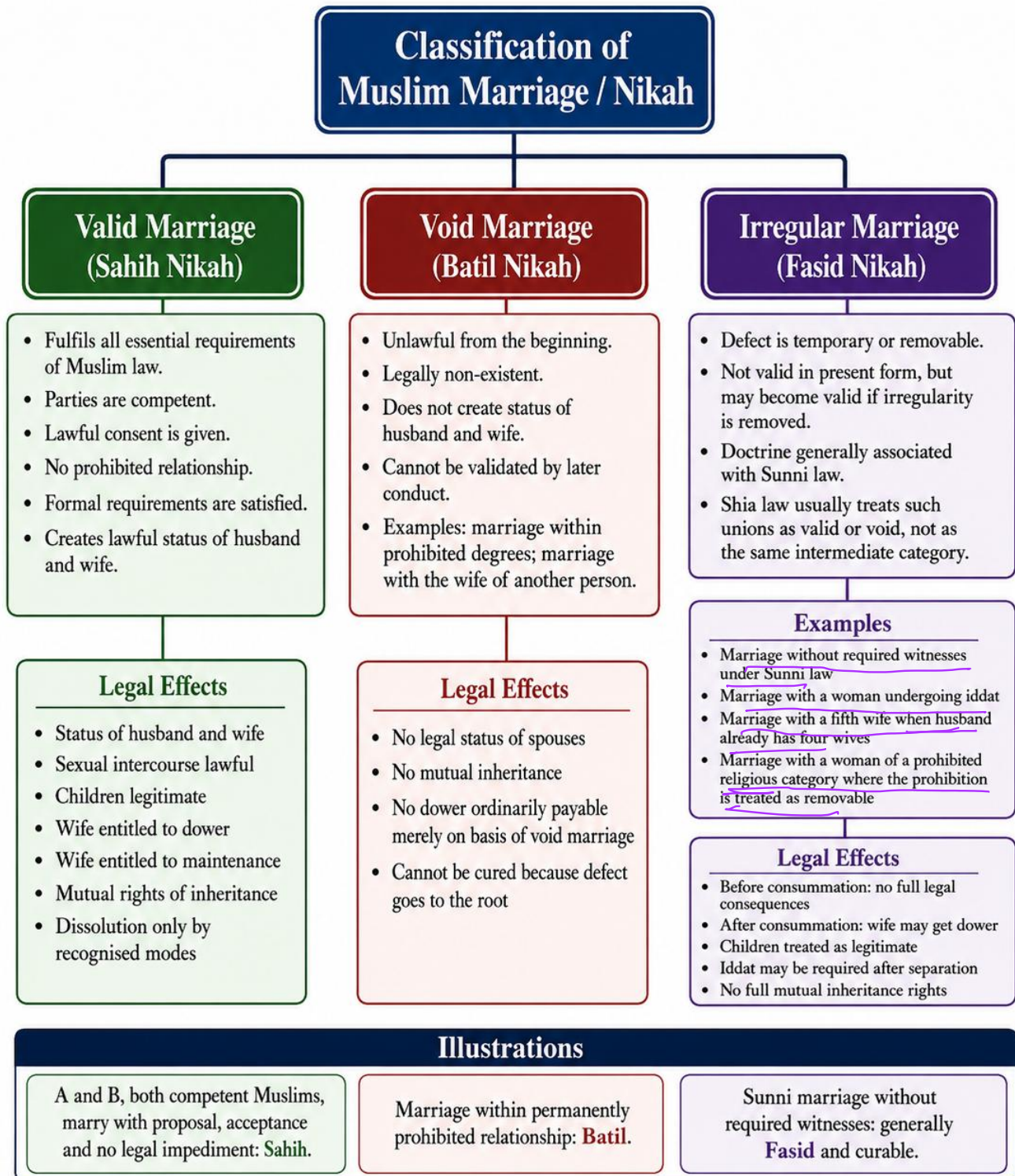
### 2. Void Marriage or Batil Nikah

A void marriage is one which is unlawful from the very beginning. It is not merely defective; it is legally non-existent. It does not create the status of husband and wife and cannot be validated by subsequent conduct. Examples include marriage within prohibited degrees of relationship or marriage with the wife of another person.

### 3. Irregular Marriage or Fasid Nikah

An irregular marriage is one where the defect is temporary or removable. It is not valid in its existing condition, but it may become valid if the irregularity is removed. The doctrine of irregular marriage is generally associated with **Sunni law**. **Shia law** usually treats such marriages either as valid or void and does not recognise the same intermediate category in the same way.

# Classification of Muslim Marriage (Nikah)



## Examples of Irregular Marriage

*Fasid examples*

- A marriage contracted without the required witnesses under Sunni law.
- A marriage with a woman undergoing iddat.
- A marriage with a fifth wife when the husband already has four wives.
- A marriage with a woman belonging to a prohibited religious category, where the prohibition is treated as removable under the applicable doctrine.

## Legal Effects of Valid Marriage

### Illustrations: Valid, Void and Irregular Marriage

If A and B, both competent Muslims, marry with proposal, acceptance and no legal impediment, the marriage is sahih and creates full matrimonial consequences.

If A marries a woman who is within a permanently prohibited degree of relationship, the marriage is batil because the prohibition goes to the root of the union.

If a Sunni marriage takes place without the required witnesses, the defect is generally treated as fasid and may be cured according to Sunni doctrine.

- The spouses acquire the legal status of husband and wife.
- Sexual intercourse becomes lawful.
- Children born from marriage are legitimate.
- The wife becomes entitled to dower.
- The wife becomes entitled to maintenance, subject to the ordinary rules of Muslim law.
- Mutual rights of inheritance arise between the spouses.
- The marriage can be dissolved only through legally recognised modes of divorce or dissolution.

## Legal Effects of Void Marriage

- No legal status of husband and wife is created.
- No mutual rights of inheritance arise.
- No dower is ordinarily payable merely on the basis of a void marriage, though separate factual questions may arise if there has been cohabitation under a mistaken belief.
- The union cannot be validated by removal of an impediment because the defect goes to the root of the marriage.

## Legal Effects of Irregular Marriage

An irregular marriage does not create full legal consequences before consummation. After consummation, however, certain consequences arise in order to protect the woman and children. The wife may become entitled to dower; children born of the union are treated as legitimate; and iddat may be required after separation. But the spouses do not acquire full mutual rights of inheritance merely because of an irregular marriage.

## Sahih and Batil Compared

Basis	Sahih Nikah	Batil Nikah
Legal nature	Completely valid marriage	Void and legally non-existent marriage
Status	Creates status of husband and wife	Creates no marital status
Dower	Wife is entitled to dower	No ordinary dower consequence merely from void marriage
Children	Children are legitimate	Legitimacy does not arise from the void union as such
Inheritance	Mutual inheritance arises	No mutual inheritance arises

Validation	No question of validation because it is already valid	Cannot be cured by subsequent conduct
------------	---	---------------------------------------

## Conclusion

The classification of marriages under Muslim law reflects a graded approach to legal validity. A sahih marriage is fully operative, a batil marriage is void from inception, and a fasid marriage occupies an intermediate position where certain consequences may arise, especially after consummation, but the defect must be removed before the marriage can become fully valid.

### Question 8. Explain Muta marriage and distinguish it from Nikah.

## Introduction

Muta marriage is a form of temporary marriage recognised in Ithna Ashari Shia law. It is not recognised by Sunni law. Unlike ordinary nikah, which is intended to create a continuing marital relationship, muta is contracted for a fixed period and for a specified consideration.

## Meaning of Muta

The word muta means enjoyment. In law, it denotes a temporary marriage for a fixed period. The period may be one day to even few years, but the duration must be specified. Consideration, commonly described as dower in this context, is also essential. At the expiry of the period, the relationship comes to an end automatically without the need for talaq.

## Essential Requirements

- The parties must be competent to contract the relationship.
- The period of cohabitation must be fixed.
- The dower or consideration must be specified.
- The relationship must not be prohibited by rules of consanguinity, affinity or fosterage.
- The form is recognised by Shia law, that too Ithana Ashari subschool only but not by Sunni law.

men → firewoorshiper → Parsi ✓  
 Kitabiya → Jew/Christian ✓  
 Idol worshiper → X Hindus

## Legal Effects

- The relationship terminates automatically at the expiry of the fixed period.
- No talaq is necessary for its termination.
- Children born out of a valid muta are legitimate.
- The woman is entitled to the stipulated dower, subject to the rules applicable to the facts.
- Ordinary mutual inheritance between the parties does not arise unless a valid stipulation is recognised under the applicable school.

sahih ← conversion ← fasid irregular

women → any other religion man (Beetri)

∴ Interfaith marriage especially women → special marriage act.

## Distinction between Nikah and Muta

*Contract marriage.*

Basis	Nikah	Muta ( <i>Term marriage</i> )
Duration	Generally permanent and continuing until dissolved by law	Temporary and for a fixed period
Recognition	Recognised generally under Muslim law	Recognised by Ithna Ashari Shia law; not recognised by Sunni law
Dower	Dower is an incident of marriage and may be prompt, deferred or proper	Specification of consideration is essential
Termination	Requires <u>talaq</u> , dissolution by court or other recognised mode	Ends <u>automatically on expiry of term</u>
Inheritance	Mutual inheritance ordinarily arises in a valid nikah	Ordinary mutual inheritance does not arise in the same manner
Purpose	Creates a <u>continuing</u> matrimonial status	Creates a <u>temporary</u> marital relationship

## Conclusion

Muta marriage is therefore a distinct Shia institution. Its essential feature is temporariness. It should not be confused with ordinary nikah, which creates a continuing family status and gives rise to fuller matrimonial consequences.

**Question 9. What is dower or mahr? Explain its nature, kinds, enforcement and remedies for non-payment.**

## Introduction

**Dower**, known as **mahr**, is one of the most important legal incidents of Muslim marriage. It is a sum of money or property which the wife is entitled to receive from the husband in consideration of marriage. It is **not a bride-price**. It is a legal obligation imposed upon the husband and operates as a mark of respect for the wife and as a form of **financial security**.

## Meaning and Nature

Mahr may be fixed before marriage, at the time of marriage or after marriage. If no amount is fixed, the wife is still entitled to proper dower, known as mahr-i-misl. The obligation to pay dower arises by operation of law from the marriage itself. It is enforceable as a debt against the husband, and after his death it may be claimed against his estate subject to the ordinary rules governing debts and administration of estates.

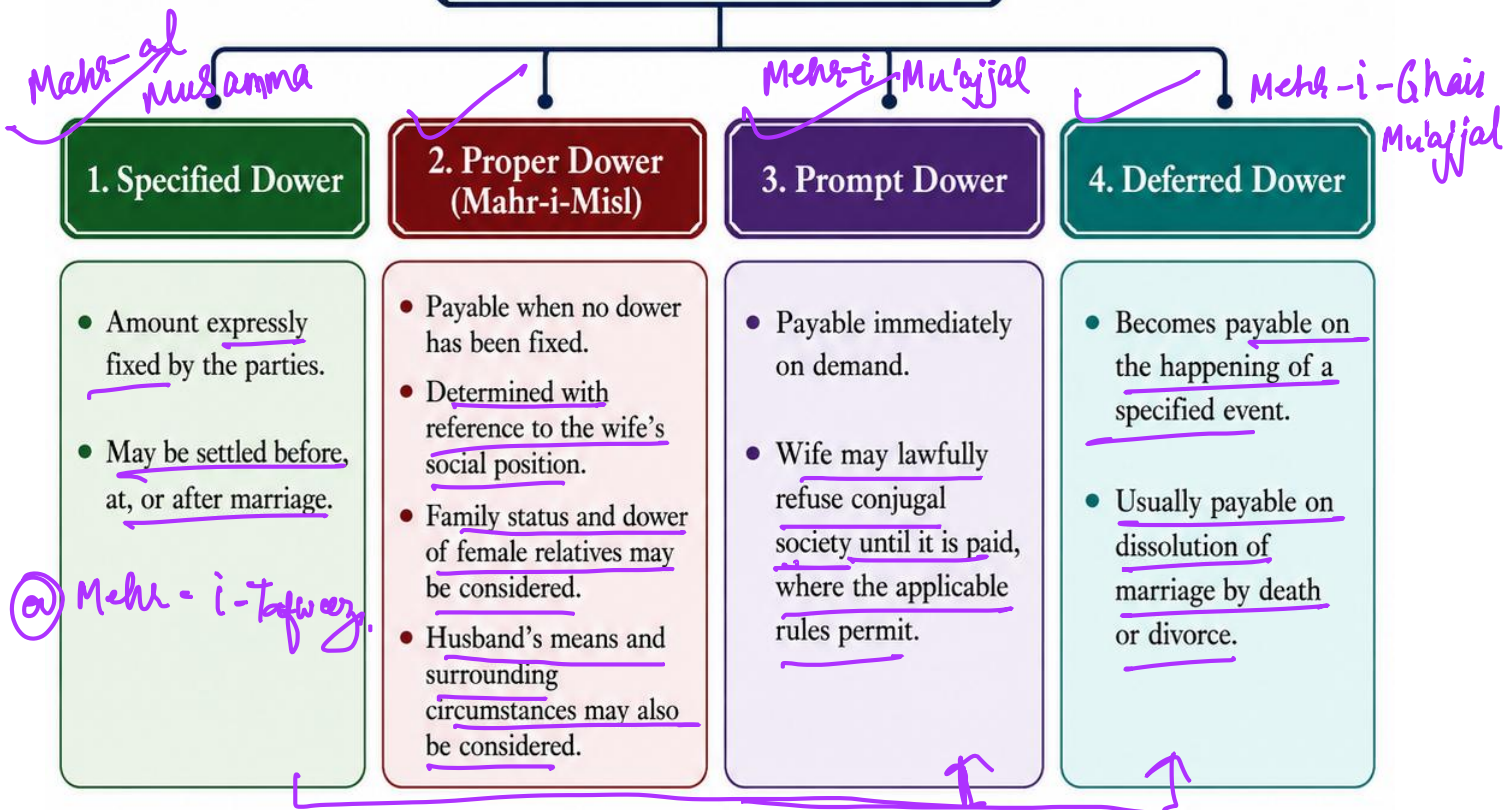
## Kinds of Dower

### 1. Specified Dower



# Kinds of Dower (Mehr / Mahr)

## Kinds of Dower / Mehr



## Illustrations

1

If total mahr is Rs. 2,00,000 and Rs. 50,000 is prompt, the wife may demand that part immediately. If Rs. 1,50,000 is deferred, it becomes payable on the agreed event, commonly death or divorce.

2

If no amount is fixed at all, the wife does not lose her right to mahr. The court may determine Mahr-i-Misl by considering family status, comparable dower of female relatives, and the circumstances of the parties.



❖ Dower is an essential incident of Muslim marriage and a mark of respect for the wife. ❖

## Rights of the Wife in Respect of Dower

- She may sue for recovery of unpaid dower as a debt.
- She may claim prompt dower on demand.
- In certain circumstances, she may retain possession of her deceased husband's property until her dower debt is satisfied.
- Her right to dower is not destroyed merely because divorce has taken place.

- Section 5 of the Dissolution of Muslim Marriages Act, 1939 preserves the right of a married woman to dower on dissolution of marriage.

**Maina Bibi v. Chaudhry Vakil Ahmad, AIR 1925 PC 63**

**Facts:** A Muslim widow was in possession of property belonging to her deceased husband and claimed a right to retain possession until her unpaid dower was satisfied.

**Issue:** Whether a Muslim widow in peaceful possession of her husband's property could retain it in lieu of unpaid dower.

**Held:** The Privy Council recognised that a widow peacefully occupying her husband's property may retain possession until her mahr debt is paid, but the right is not ownership and is not the same as a mortgage.

**Principle:** The right of retention is a possessory protection for unpaid dower; it does not create full ownership in the widow.

**Kapoor Chand v. Kader Unnisa Begum, AIR 1953 SC 413**

**Facts:** A widow claimed priority for her unpaid dower debt against other unsecured creditors of her deceased husband's estate.

**Issue:** Whether a widow's claim for dower has priority over other contractual debts of the deceased husband.

**Held:** The Supreme Court held that dower is in the nature of a debt but does not enjoy priority over other unsecured creditors merely because it is dower.

**Principle:** Dower is enforceable as a debt, but it is not a preferential debt unless a separate legal basis for priority exists.

## Conclusion

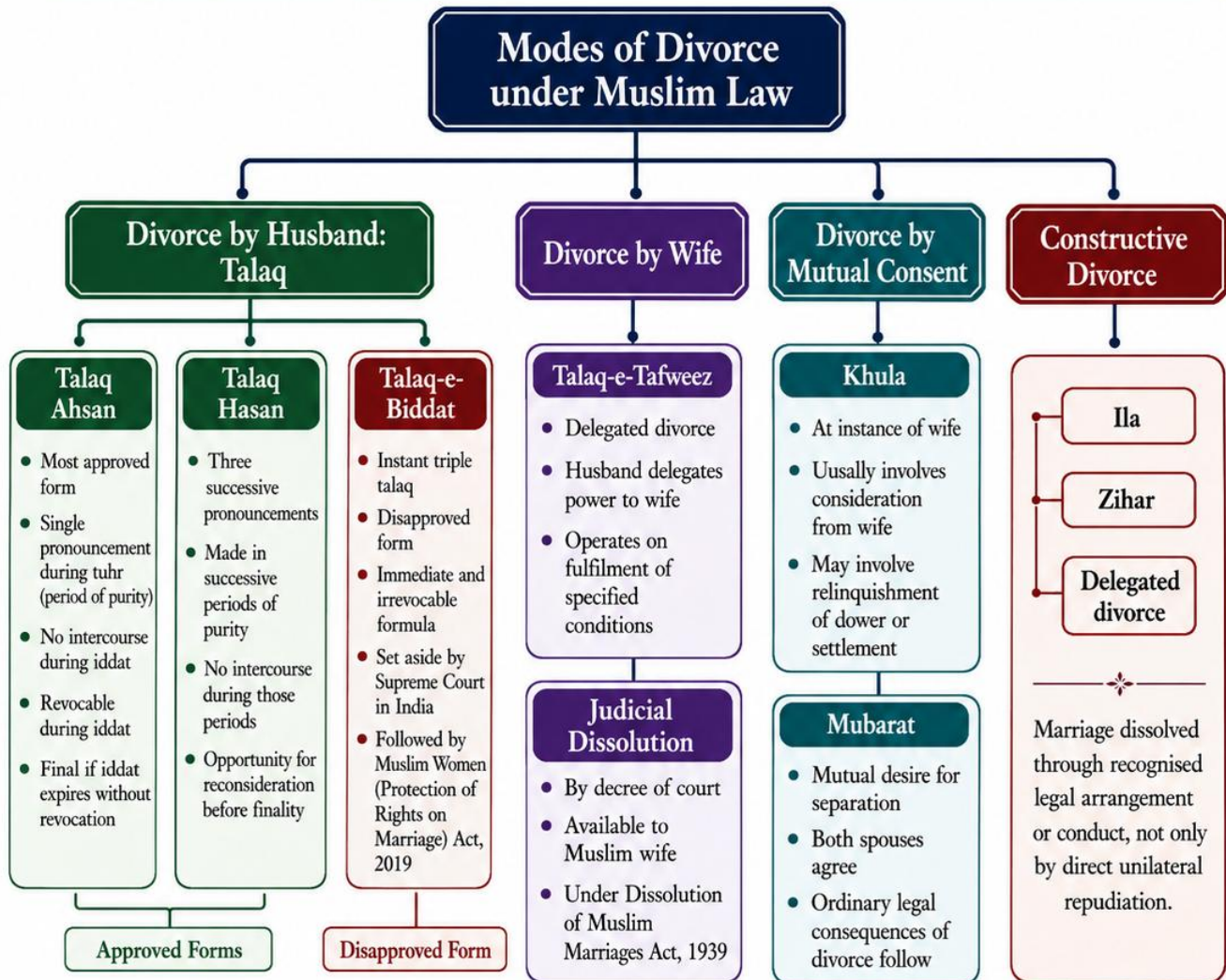
Mahr is thus a legal incident of marriage and an enforceable financial right of the wife. It is not a mere ceremonial promise. The law protects the wife by recognising prompt dower, deferred dower, proper dower and remedies for non-payment, while also treating the claim as a debt governed by ordinary principles where the husband's estate is involved.

**Question 10. Discuss the various modes of divorce under Muslim law, including talaq, constructive divorce and dissolution by mutual consent.**







## Introduction

Muslim law recognises several modes through which a marriage may be dissolved. Some forms are initiated by the husband, some by the wife, some by mutual agreement, and some by judicial decree. This variety reflects the contractual nature of marriage and the need to provide lawful methods for ending a matrimonial relationship when its continuation has become impossible or unjust.

# Modes of Divorce / Talaq under Muslim Law



## Legal Effects of Divorce

-  Marital tie is dissolved according to the nature of divorce
-  Iddat becomes necessary where law requires
-  Dower becomes payable according to whether it is prompt, deferred or otherwise due
-  Wife's right to maintenance or provision depends on personal law, statutory law and judicial interpretation
-  Remarriage between the parties depends on revocability or finality of divorce
-  Children's legitimacy and accrued rights are not destroyed by divorce

## Divorce by Husband

Talaq by husband is the repudiation of marriage by the husband in accordance with Muslim law. Conventionally, men being considered the biologically superior were having greater opinion in matters of separation of marital ties. Classical law

recognises different forms of talaq. The important distinction is between approved forms and disapproved forms.

### 1. Talaq Ahsan *(approved form)*

Talaq Ahsan is considered the most approved form. It consists of a single pronouncement during a period of purity, followed by abstinence from sexual intercourse during iddat. Revocation is possible during iddat. If iddat expires without revocation, the divorce becomes final. *tukh*

### 2. Talaq Hasan *(approved form)*

Talaq Hasan consists of three successive pronouncements made during successive periods of purity, with no intercourse during those periods. It also allows opportunity for reconsideration before finality. *→ tukh*

### 3. Talaq-e-Biddat

Talaq-e-biddat, also called instant triple talaq, is a disapproved form in which divorce is sought to be effected immediately by three pronouncements or by a formula producing instantaneous and irrevocable divorce. Its legal validity in India was set aside by the Supreme Court and later Parliament enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019.

## Divorce by Wife

### 1. Talaq-e-Tafweez

Talaq-e-tafweez is a delegated divorce. The husband may delegate to the wife the power to pronounce divorce upon the happening of specified conditions. When the conditions are fulfilled and the wife exercises the delegated power, the divorce operates according to the terms of delegation. *→ eg. if husband marries another woman.*

### 2. Judicial Dissolution

A Muslim wife may obtain dissolution by decree of court under the Dissolution of Muslim Marriages Act, 1939. This statutory mode is discussed separately in the next answer.

## Divorce by Mutual Consent

### 1. Khula

Khula is a form of dissolution at the instance of the wife, usually with consideration moving from the wife to the husband, such as relinquishment of dower or some other settlement. It is based on the principle that if the wife cannot continue in the marriage, an agreed separation may be effected. *husband has to agree for separation*

### 2. Mubarat

Mubarat is dissolution by mutual consent where both husband and wife desire separation. Unlike khula, the desire to separate is mutual from both sides. Once accepted, it results in dissolution and the ordinary legal consequences of divorce follow.

## Constructive Divorce

The expression constructive divorce is generally used for modes where the marriage is brought to an end not merely by a direct unilateral pronouncement in the ordinary form of talaq, but through legal arrangements or conduct recognised as producing dissolution. **Ila**, **zihar** and **delegated divorce** are often discussed in this context in classical accounts. These forms show that Muslim law recognises not only direct repudiation but also other juridical routes by which marriage may be dissolved.

## Legal Effects of Divorce

- The marital tie is dissolved according to the nature of the divorce.
- Iddat becomes necessary in cases where the law requires it.
- Dower becomes payable according to whether it is prompt, deferred or otherwise due.
- The wife's right to claim legally recognised maintenance or provision is governed by personal law, statutory law and judicial interpretation.
- Remarriage between the parties may be affected by the nature of the divorce and the rules relating to revocability or finality.
- Children's legitimacy and rights already accrued are not destroyed by divorce.

## Conclusion

The law of divorce under Muslim law is not confined to a single formula. It includes approved forms of talaq, mutual dissolution through khula and mubarat, delegated divorce, and judicial dissolution. Modern Indian law has also intervened to invalidate instant triple talaq and to protect the rights of Muslim women in marriage and divorce.

**Question 11. Discuss the constitutional validity of talaq-e-biddat and explain the salient features of the Muslim Women (Protection of Rights on Marriage) Act, 2019.**

## Introduction

Talaq-e-biddat, popularly known as instant triple talaq, was one of the most controversial forms of divorce under Muslim personal law. It purported to dissolve the marriage immediately and irrevocably by a single pronouncement of triple talaq. The Supreme Court examined its validity in *Shayara Bano v. Union of India*,

and Parliament later enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019.

### **Shayara Bano v. Union of India, (2017) 9 SCC 1**

**Facts:** Shayara Bano challenged the practice of talaq-e-biddat after her husband divorced her by pronouncing triple talaq. The challenge raised questions of equality, dignity, religious freedom and the constitutional status of the practice.

**Issue:** Whether talaq-e-biddat was protected as an essential religious practice and whether it could stand in the light of constitutional principles.

**Held:** By a majority of 3:2, the Supreme Court set aside the practice of talaq-e-biddat. The majority treated the practice as manifestly arbitrary and not protected in a manner that could save it from constitutional scrutiny.

**Principle:** Instant triple talaq is not a legally valid mode of divorce in India. The judgment became the immediate foundation for statutory intervention through the 2019 Act.

## **Reasoning and Significance**

The significance of the decision lies in its insistence that a form of divorce which produces instantaneous and irrevocable civil consequences cannot be sustained merely because it is claimed as part of personal law. The majority view treated the practice as arbitrary because it allowed the marital tie to be broken capriciously and without opportunity for reconciliation.

### **Muslim Women (Protection of Rights on Marriage) Act, 2019**

The 2019 Act was enacted to protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq. It gives statutory form to the invalidation of instant talaq and creates consequences for its pronouncement.

#### **Salient Features of the Act**

1. The Act applies to married Muslim women and prohibits the pronouncement of talaq by a Muslim husband in the form covered by the Act.
2. Section 3 declares that any pronouncement of talaq by words, spoken or written, or in electronic form or in any other manner, shall be void and illegal.
3. Section 4 makes pronouncement of such talaq punishable with imprisonment which may extend to three years and with fine.
4. Section 5 gives the married Muslim woman a right to subsistence allowance for herself and dependent children, the amount to be determined by the Magistrate.
5. Section 6 provides that a married Muslim woman is entitled to custody of her minor children in such a manner as may be determined by the Magistrate.

6. Section 7 deals with cognizability, compoundability and bail. Bail is not to be granted unless the Magistrate hears the married Muslim woman and is satisfied that reasonable grounds exist.

## Conclusion

The legal position after Shayara Bano and the 2019 Act is clear: talaq-e-biddat has no legal effect as a divorce. The statutory scheme treats its pronouncement as void and illegal, while also providing subsistence allowance and custody protection to the married Muslim woman.

**Question 12. What is Faskh? Discuss the grounds of divorce available to a Muslim woman under the Dissolution of Muslim Marriages Act, 1939.**

## Introduction

Faskh means dissolution of marriage by judicial authority. In Muslim law, the wife's right to obtain dissolution was historically narrower than the husband's unilateral power of talaq. The Dissolution of Muslim Marriages Act, 1939 was enacted to consolidate and clarify the grounds on which a woman married under Muslim law may obtain a decree for dissolution of marriage.

→ wife approaches Qazi & appoints

Qazi  
as  
arbitrator  
for

dissolut<sup>n</sup> of  
marriage

## Object of the Act

The Act was enacted to remove doubts regarding the rights of Muslim women to seek dissolution and to clarify that the renunciation of Islam by a married Muslim woman does not by itself dissolve her marriage. The statute provides definite grounds on which a court may grant dissolution.

## Grounds under Section 2

1. The whereabouts of the husband have not been known for a period of four years.
2. The husband has neglected or failed to provide maintenance for a period of two years.
3. The husband has been sentenced to imprisonment for seven years or upwards.
4. The husband has failed to perform, without reasonable cause, his marital obligations for a period of three years.
5. The husband was impotent at the time of marriage and continues to be so.
6. The husband has been insane for two years or is suffering from a virulent venereal disease.
7. The wife, having been given in marriage by her father or guardian before attaining fifteen years, repudiates the marriage before attaining eighteen years,

provided the marriage has not been consummated. This is commonly connected with the option of puberty.

8. The husband treats her with cruelty.

9. Any other ground which is recognised as valid for dissolution of marriage under Muslim law.

## Cruelty under the Act

Cruelty is not confined to physical violence. It includes conduct making matrimonial life unsafe or oppressive. The statutory language includes habitual assault, cruelty of conduct, association with women of evil repute, forcing the wife to lead an immoral life, obstruction in religious practice, unequal treatment where the husband has more wives, and disposal or prevention of enjoyment of the wife's property.

## Notice to Heirs When Husband Is Missing

Where dissolution is sought on the ground that the husband's whereabouts have not been known for four years, the Act requires notice to persons who would have been the husband's heirs if he had died on the date of the plaint. The paternal uncle and brother, if any, are to be cited even if they are not heirs.

## Effect of Conversion (Apostasy)

Section 4 provides that renunciation of Islam by a married Muslim woman or her conversion to another faith shall not by itself dissolve the marriage. However, after such renunciation or conversion, she may obtain dissolution on any of the grounds mentioned in Section 2. The provision does not apply in the same way to a woman who had converted to Islam from another faith and re-embraces her former faith.

## Right to Dower Preserved

Section 5 expressly protects the wife's right to dower. Nothing in the Act affects any right which a married woman may have under Muslim law to her dower or any part of it on dissolution of marriage.

### Illustration: Option of Puberty under the 1939 Act

A girl given in marriage by her guardian before she attained fifteen may repudiate the marriage before attaining eighteen, provided the marriage has not been consummated. This statutory ground gives legal form to the classical doctrine of khiyar-ul-bulugh.

## Conclusion

option of puberty →

The Dissolution of Muslim Marriages Act, 1939 is a central statute in the law of Muslim divorce. It gives judicial form to the wife's right to seek release from marriage on defined grounds and preserves her independent right to dower.

### Question 13. Discuss the differences between Sunni and Shia law with respect to Nikah, Talaq and Mahr.

#### Introduction

Although the broad foundation of Muslim family law is common, Sunni and Shia schools differ on several doctrinal details. The differences are important in relation to marriage formalities, temporary marriage, witnesses, modes of divorce and certain incidents of dower.

#### Differences Relating to Nikah

- In Sunni law, witnesses are generally required for a valid marriage. In Shia law, witnesses are not treated as an essential requirement for the validity of nikah in the same manner.
- Sunni law does not recognise muta marriage. Ithna Ashari Shia law recognises muta as a temporary marriage for a fixed period and specified consideration.
- Sunni law recognises the category of irregular marriage or fasid marriage. Shia law generally does not treat fasid marriage in the same intermediate manner; a marriage is usually valid or void.
- The consequences of certain prohibited or defective marriages may therefore differ according to the school applicable to the parties.

#### Differences Relating to Talaq

- Sunni law historically recognised several forms of talaq including talaq ahsan, talaq hasan and talaq-e-biddat, though talaq-e-biddat has been set aside by Honorable Supreme Court in India and made void and illegal by statute.
- Shia law generally insists on stricter formal requirements for talaq, including pronouncement in Arabic where possible and the presence of competent witnesses according to the applicable doctrine.
- The Shia never gave recognition to instantaneous triple talaq, now illegal known as talaq-e-biddat. It was prevalent only in Sunni school.

#### Differences Relating to Mahr

- Both Sunni and Shia law recognise dower as an essential incident of marriage.
- In both systems, the wife may be entitled to proper dower when no amount is fixed.
- Differences may arise in details of maximum or customary amounts, proof and incidents depending upon the school and facts, but the core principle remains that mahr is a legally enforceable obligation of the husband.

#### Conclusion

The distinction between Sunni and Shia law is most visible in the recognition of muta, the treatment of witnesses, the category of irregular marriage and formal requirements relating to divorce. At the same time, both systems recognise marriage as a legal institution and dower as a significant financial right of the wife.

### Question 14. Write short notes on Mahr-i-Misl, constructive divorce and legal effects of fasid marriage.

#### Mahr-i-Misl

Mahr-i-misl means proper dower. It becomes relevant when no amount of dower has been specified. The wife does not lose her right merely because the parties failed to fix the amount. The court or authority determining proper dower may consider the social position of the wife, the dower fixed for female members of her father's family, the husband's financial position, the wife's age, beauty, education and other relevant circumstances. It is a legal device to ensure that dower remains enforceable even in the absence of express stipulation.

#### Constructive Divorce

Constructive divorce refers to forms of dissolution where the marriage comes to an end through legal effect recognised by Muslim law rather than through an ordinary direct pronouncement of talaq alone. Delegated divorce, ila and zihar are often discussed under this broad idea. The importance of the concept lies in showing that dissolution under Muslim law is not limited to one form of husband-initiated talaq.

Ila / Zihar

#### Legal Effects of Fasid Marriage

A fasid marriage is irregular, not void from the beginning. Before consummation, it produces very limited consequences. After consummation, certain consequences arise to protect the parties and children. The wife becomes entitled to dower, iddat may be required after separation, and children are treated as legitimate. However, it does not create the full legal consequences of a valid marriage, particularly in relation to mutual inheritance. The irregularity may be removed, and once removed, the marriage may become valid according to the applicable Sunni doctrine.

#### Conclusion

These three topics show the practical character of Muslim matrimonial law. Mahr-i-misl protects the wife's financial right, constructive divorce recognises juridical forms of dissolution, and the doctrine of fasid marriage prevents harsh consequences where a marriage is defective but not inherently void.

## Unit III: Guardianship, Hizanat, Parentage, Legitimacy and Acknowledgement

This unit deals with the personal-law rules governing the status of a child, the legal relationship between a child and parents, and the protection of minors through guardianship and custody. In Muslim law, questions of legitimacy, paternity, acknowledgement and guardianship are closely connected because the civil status of a child determines rights of maintenance, inheritance, custody and family identity.

This unit deals with parentage, legitimacy, acknowledgement of paternity, the distinction between acknowledgement and adoption, guardianship, and kinds of guardianship. It also incorporates leading authorities such as *Habibur Rahman v. Altaf Ali*, *Imambandi v. Mutsaddi*, *Shabnam Hashmi v. Union of India* and important custody decisions on the welfare of the minor.

**Question 15. Explain the concepts of parentage, maternity, paternity and legitimacy under Muslim law. What are the special rules regarding legitimacy?**

### Introduction

The concepts of parentage and legitimacy are central to Muslim family law because they determine the legal status of a child within the family. Legitimacy is not merely a moral or social idea; it affects inheritance, maintenance, guardianship, family name and civil rights. Legitimacy and parentage under Muslim law are closely related to marriage, because a child is generally considered legitimate only when the child is born from a lawful matrimonial relationship.

### Meaning of Parentage, Maternity and Paternity

Parentage means the legal relationship between the father or mother and the child. It is the foundation upon which the child claims civil and family rights. Maternity means the relationship of the child with the mother. Paternity means fatherhood and refers to the legal relationship between the father and the child.

Under Muslim law, maternity is usually easier to establish because it is connected with birth. Paternity, however, depends upon the existence of a lawful marriage, direct proof, or a valid acknowledgement where direct proof is not available.

### Legitimacy under Muslim Law

Legitimacy means the status of a child as being born from a lawful wedlock. A child born to a woman and man lawfully married to each other is legitimate. The

↑ valid retirement

requirement of lawful marriage is important because Muslim law does not recognise legitimacy merely on the basis of biological fatherhood if the relationship itself is unlawful.

The basic rule is that the father and mother of the child must have been married to each other at the time of conception. If there is a lawful and direct marriage between the parents, the child is legitimate. If there is no lawful marriage, the child cannot acquire legitimacy merely because the biological relationship is asserted.

### Ways in Which Legitimacy May Be Established

Mode	Explanation
Direct proof of marriage ✓✓	If the marriage of the father and mother is directly proved, the child born from that union is treated as legitimate.
Indirect proof or presumption ✓✓	Where direct proof is not available, marriage may be presumed from circumstances such as long cohabitation and treatment of the woman as wife. <i>valid retirement.</i>
Acknowledgement of paternity ✓✓	Where the fact of marriage is uncertain but not disproved, acknowledgement may operate as a mode of establishing legitimacy.

### Special Rules Regarding Legitimacy

1. Legitimacy proceeds upon the assumption of a lawful marriage. The law prefers legitimacy where lawful marriage may reasonably be presumed.
2. Direct proof of marriage is not the only method. Muslim law allows indirect proof where the surrounding circumstances justify an inference of marriage.
3. Long and open cohabitation may support a presumption of marriage, provided the relationship is not shown to be unlawful.
4. Acknowledgement of paternity may establish legitimacy where marriage is uncertain, but it cannot create legitimacy where the alleged marriage is impossible or conclusively disproved.
5. A child born of zina cannot be made legitimate by acknowledgement because acknowledgement cannot transform an unlawful relationship into a lawful marriage.
6. Where the mother was within prohibited degrees, or where a valid marriage between the parents was legally impossible, acknowledgement cannot confer legitimacy.
7. The legitimacy of a child may be rebutted where the facts show that lawful marriage between the parents could not have existed.

### Presumptions Relating to Legitimacy

A child born after six months of marriage is generally considered legitimate. If a child is born within the period treated as legally significant by the applicable school, acknowledgement by the father may affect the question of legitimacy. The precise operation of these rules depends upon the school of Muslim law and the facts showing access, marriage and possibility of paternity.

*Sybil*  
*Chaudhary By 9*  
**Habibur Rahman v. Altaf Ali, AIR 1922 PC 59**

*Anglo -*  
**Facts:** The plaintiff claimed to be the legitimate son of the Nawab and asserted that he was born to **Mozelle Cohen**. The claim depended upon whether there had been a marriage and whether there was a proper acknowledgement of legitimacy.

*- Jewish*  
**Issue:** Whether acknowledgement could establish legitimacy when the alleged marriage itself was not proved and appeared to be disproved by the evidence.

*to get*  
**Held:** The Privy Council held that acknowledgement cannot confer legitimacy when no marriage is proved and the facts show that the alleged lawful relationship did not exist.

*Ezra*  
*Hospital*  
**Principle:** Acknowledgement is a rule of evidence in favour of legitimacy only where marriage is possible or uncertain. It cannot legitimate a child where the lawful marriage itself is disproved.

*founder (Calcutta)*  
**Conclusion**

*Abdub Subhan Chaudhary → Nawab of*  
*Bayra*  
*(North Bangladesh)*  
Muslim law treats legitimacy as a legal consequence of lawful marriage. The rules of presumption and acknowledgement are designed to protect the status of a child where the marital relationship can reasonably be inferred. They do not, however, permit the creation of legitimacy in defiance of facts or in cases where lawful marriage was legally impossible.

**Question 16. What is acknowledgement of paternity under Muslim law? Explain the conditions and legal effects of a valid acknowledgement.**

**Introduction**

Acknowledgement of paternity is an important doctrine in Muslim law. It is not a method of adoption and it is not a device for creating a new family relationship where none can legally exist. It is a rule by which the law recognises an existing legitimate relationship where direct proof of marriage or paternity is not available but the circumstances permit such a relationship to be presumed.

**Meaning and Nature**

An acknowledgement may be express or implied. It may be made by words or conduct. A man may expressly acknowledge another person as his lawful child, or he may treat the person as such in a manner from which acknowledgement can be inferred. An acknowledgement once validly made by the father cannot be

disproved by him, nor can he later repudiate it, provided the legal requirements are satisfied.

The doctrine rests on the presumption that a lawful marriage existed between the parents, even though direct evidence of marriage is not available. For this reason, acknowledgement has evidentiary value; it does not create paternity by fiction.

### Conditions of a Valid Acknowledgement

Condition	Explanation
Not merely sonship	The acknowledgement must not merely say that the person is a son in affection or social description. It must indicate legitimate sonship.
Difference of age	The ages of the parties must make the relationship possible. The usual requirement is that the acknowledger must be sufficiently older to make the relationship naturally possible; the classical formulation often refers to a difference of at least twelve and a half years.
No known paternity of another	The child acknowledged must not be known to be the child of another person.
No legal impossibility	There must be no proof that the parents could not have been lawfully married.
Capacity of acknowledger	The acknowledger must be competent, adult and sane.
Assent of acknowledged person	Where the acknowledged person is adult, the acknowledgement must not be rejected and should be accepted expressly or impliedly.
Intention to confer legitimacy	The acknowledgement must be made with an intention to recognise legitimate status, not merely to show affection or charity.

### Legal Effects of Acknowledgement

8. It raises a presumption of lawful marriage between the parents where marriage is possible and not disproved.
9. It establishes the child as legitimate for purposes of family status.
10. It creates rights connected with legitimacy, including inheritance and maintenance, subject to the general law.
11. It binds the acknowledger once validly made and cannot be withdrawn merely because the acknowledger changes his mind.
12. It does not operate where the relationship is proved to be unlawful or impossible.

**Habibur Rahman v. Altaf Ali**

**Issue:** Whether acknowledgement of paternity could succeed where the alleged marriage of the parents had not been established.

**Held:** The claim failed because the alleged marriage was not proved and the facts did not permit a valid presumption of lawful wedlock.

**Principle:** A valid acknowledgement presupposes the possibility of a lawful marriage; it cannot override a proved absence of marriage.

### Conclusion

Acknowledgement of paternity under Muslim law is a protective doctrine. It prevents a child from being deprived of status merely because formal proof of marriage is not available. At the same time, it preserves the requirement of lawful marriage by refusing to recognise acknowledgement where legitimacy is legally impossible.

### Question 17. Distinguish between adoption and acknowledgement of paternity under Muslim law.

#### Introduction

Adoption and acknowledgement may appear similar because both concern the status of a child in a family. In law, however, they are fundamentally different. Adoption generally involves the transplantation of a child from one family to another. Acknowledgement, on the other hand, is a recognition of an existing legitimate relationship with one's own child.

Basis	Adoption	Acknowledgement of paternity
Nature	Adoption creates a legal parent-child relationship by taking a child into a family.	Acknowledgement recognises an existing legitimate relationship; it does not create a new relationship.
Recognition in Muslim law	<u>Traditional Muslim personal law does not recognise adoption in the same manner as Hindu law.</u>	Acknowledgement is recognised by Muslim law.
Object	The object of adoption is to bring a child into the adoptive family.	The object is to remove doubts about paternity and legitimacy.
Child concerned	The adopted child <u>may be someone else's biological child.</u>	The acknowledged child <u>must be capable of being the acknowledger's lawful child.</u>
Effect on natural family	In systems recognising full adoption, the child may be transplanted into another family.	Acknowledgement does not <u>transplant the child; it confirms lawful parentage.</u>
Conditions	Adoption depends upon the statutory law under which it is made.	Acknowledgement depends upon possibility of lawful marriage, age difference, capacity, assent and absence of known paternity in another.

Right of Muslim to adopt

### **Shabnam Hashmi v. Union of India, AIR 2014 SC 1281**

**Facts:** The petitioner sought recognition of the right to adopt and to be adopted as a fundamental right, irrespective of religion, caste or creed.

**Issue:** Whether the right to adopt could be declared a fundamental right and how statutory adoption under the Juvenile Justice framework operates in relation to personal laws.

**Held:** The Supreme Court recognised that the Juvenile Justice legislation enables adoption irrespective of religion. However, it did not declare the right to adopt as a fundamental right under Article 21 at that stage.

**Principle:** Statutory adoption under secular law can operate independently of personal-law limitations, but traditional Muslim law does not treat adoption as equivalent to biological parentage or acknowledgement of paternity.

JJA Act  
2000

## Conclusion

Acknowledgement is rooted in the Muslim law of legitimacy, while adoption belongs to a different legal idea. Acknowledgement confirms a lawful relationship that could have existed; adoption brings a child into a family through statutory or recognised legal procedure. Therefore, the two doctrines must not be treated as interchangeable.

**Question 18. Define guardianship under Muslim law. Explain the kinds of guardianship and the persons who may act as guardians of a minor's person and property.**

## Introduction

A minor is legally incapable of fully protecting his or her own person, property and interests. Guardianship is therefore the legal institution through which an adult is entrusted with the care of the minor or the management of the minor's property. In Muslim law, guardianship is known as walayat, while custody of a young child is commonly discussed under the doctrine of hizanat.

## Meaning of Guardian

A guardian is a person who has the authority and duty to care for the person of a minor, the property of a minor, or both. A guardian may be understood as an individual who has legal authority over the minor's person or property, and in the traditional law of marriage as a person having authority to give a minor in marriage where the law permits.

## Kinds of Guardianship

Kind of guardianship	Meaning
----------------------	---------

Guardianship of person	Authority relating to the care, custody, protection, upbringing and welfare of the minor.
Guardianship of property	Authority to manage, preserve and protect the minor's property.
Guardianship in marriage	Authority to give a minor in marriage in accordance with personal-law rules.
Natural or legal guardianship	Guardianship arising by operation of law, primarily in favour of the father.
Testamentary guardianship	Guardianship appointed by will.
Court-appointed guardianship	Guardianship created by order of court, especially under the Guardians and Wards Act, 1890.
De facto guardianship	A person who in fact looks after the minor or the minor's property without being a legal guardian.

### **Legal Guardians of Property**

The following persons are traditionally treated as legal guardians of a minor's property in Muslim law:

1. Father
2. Executor of the father
3. Executor of the father's executor
4. Father's father
5. Executor of the father's father
6. Executor of the last named executor

This order reflects the traditional preference for paternal authority in matters of property. The mother is not treated as the natural guardian of the property under classical Muslim law, though her role in custody and welfare of the child is separately recognised.

### **Testamentary and Statutory Guardians**

A testamentary guardian is appointed by will. A statutory or court-appointed guardian is appointed by the court under the Guardians and Wards Act, 1890. The court's power is guided by the welfare of the minor and not merely by technical personal-law preference.

### **De Facto Guardian**

A de facto guardian is a person who has taken charge of the minor or the minor's property without legal appointment. A de facto guardian of a Muslim minor has no

power to transfer any right or interest in the minor's immovable property. Such an alienation is void and does not bind the minor.

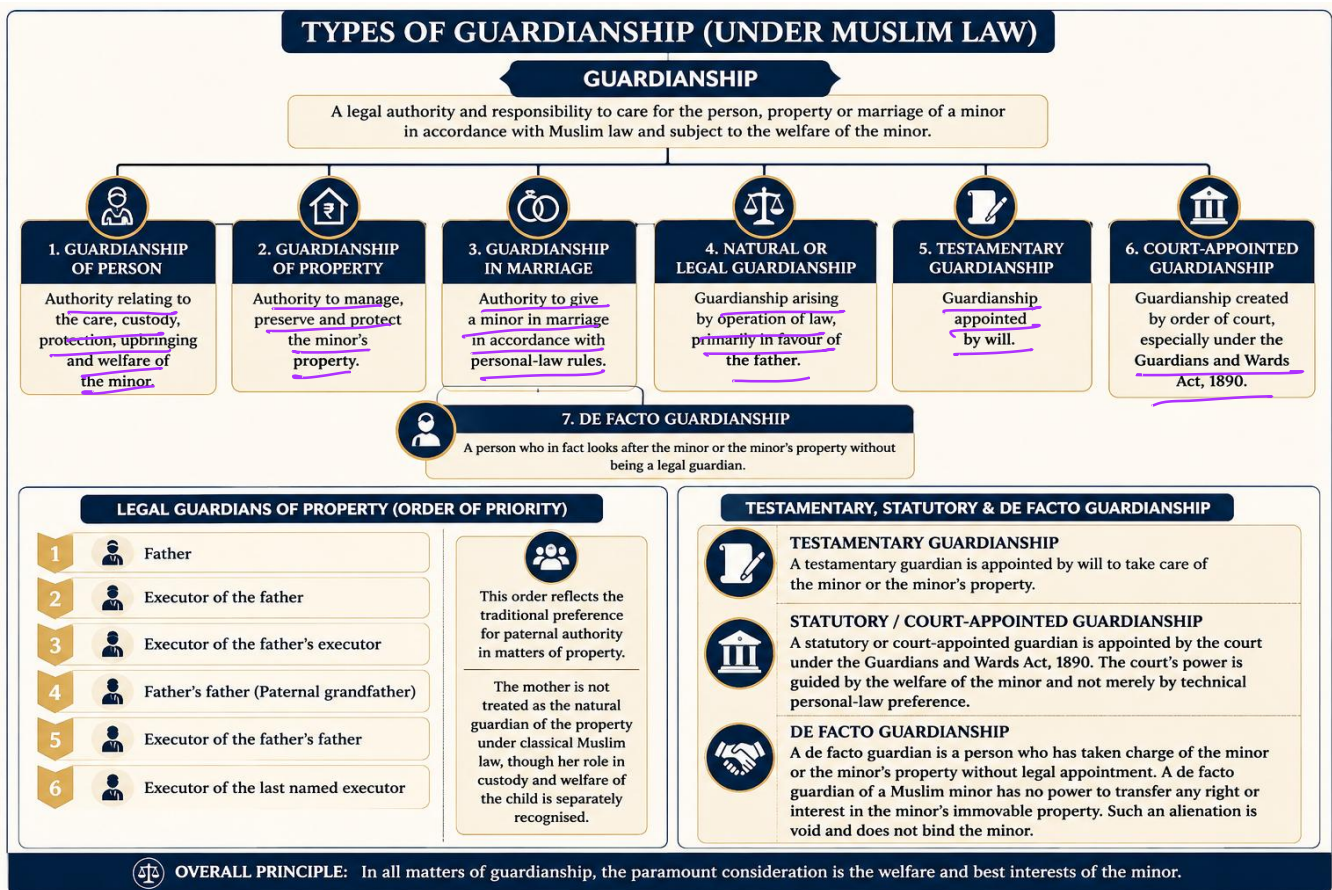
**Imambandi v. Mutsaddi, AIR 1918 PC 11**

**Facts:** The Privy Council considered the position of a person who was in actual management of a minor's property without being a lawful guardian.

**Issue:** Whether a de facto guardian could validly transfer the immovable property of a Muslim minor.

**Held:** A de facto guardian has no authority to transfer the minor's immovable property.

**Principle:** Actual management of a minor's property does not create legal authority to alienate that property. Muslim law restricts such powers to lawful guardians.



**Welfare of the Minor**

Although Muslim law identifies persons who may act as guardians, modern adjudication gives decisive importance to the welfare of the child. Courts consider health, education, moral upbringing, emotional security, age, sex, wishes of the child where relevant, and the surrounding circumstances. The personal-law rule is therefore applied in a manner consistent with the child's welfare.

**Conclusion**

Guardianship under Muslim law is not a single concept. It includes guardianship of person, property and marriage. The father occupies a primary position in legal guardianship, especially in property matters, but custody and welfare principles

recognise the role of the mother and other female relatives. The controlling consideration in modern law is the welfare and best interest of the minor.

**Question 19. Explain the doctrine of Hizanat. Discuss the mother's right of custody under Muslim law and the circumstances in which such right may be lost.**

## Introduction

Hizanat means the right of custody of a minor child. It concerns the care, protection, upbringing and physical custody of the child during tender years. Muslim law distinguishes between guardianship and custody. The father may be the natural guardian, especially of property, but the mother is generally given a preferential right to custody during the child's early years because of the child's need for maternal care.

**Nature of Hizanat = Custody of child.**

The right of hizanat is not an absolute proprietary right of the mother or the father. It is a right coupled with a duty. Its foundation is the welfare of the child. The child is not treated as an object of parental ownership. The person having custody must provide affection, protection, moral training and physical care.

## Mother's Right of Custody

Under the Hanafi rule, the mother is entitled to custody of a male child until the child completes the age of seven years and of a female child until she attains puberty. Other schools differ in details, but the underlying principle remains that young children require maternal care during tender years.

School or rule	Position regarding custody
Hanafi rule M7 Fpuberty	Mother has custody of a male child until seven years and of a female child until puberty.
Shia Ithna Ashari rule M2 F7	Mother has custody of a male child until two years and of a female child until seven years; thereafter father's custody is recognised.
Shafi rule M&F chose parent	The mother's custody is recognised until the child reaches the age at which the child can choose between parents.
General modern approach	The welfare of the child controls the final decision, even where personal-law rules identify preferred custodians.

## Female Relatives Entitled to Hizanat after the Mother

If the mother is absent or disqualified, the law recognises an order of female relatives who may be entitled to custody. The list includes the mother's mother,

father's mother, full sister, uterine sister, consanguine sister, daughters of such sisters, maternal aunts and paternal aunts, subject to school-specific variations and the welfare of the child.

### Disqualifications of the Mother

The mother may lose the right of custody if her conduct or circumstances are inconsistent with the welfare of the child. The following situations may affect the mother's right of custody:

- If she is living an immoral life.
- If she neglects proper care of the child.
- If she changes residence in a manner that prevents the father from exercising lawful supervision.
- If she marries a person not related to the child within prohibited degrees, particularly a stranger, because the child may not receive proper treatment.
- If she ceases to be fit for custody in the opinion of the court.

### Welfare of the Child as the Controlling Principle

Modern courts do not decide custody as a mechanical contest between the father and the mother. They consider the total welfare of the child. Welfare includes not only money or physical comfort but also moral and ethical upbringing, education, emotional security, and the child's normal development.

#### **Sakina Begum v. Malka Ara Begum, AIR 1948 All 198**

**Facts:** The custody of a child was in dispute between the father and mother. The child was of tender age and the mother's ability to care for the child was considered.

**Issue:** Whether the mother's remarriage and surrounding circumstances justified denial of custody.

**Held:** The court recognised that the mother had a preferential claim to custody where the child's welfare supported such custody.

**Principle:** The mother's right of hizanat is not lost merely by technical objection; the child's welfare and actual circumstances must be considered.

#### **Rehan Fatima v. Syed Badiuddin Parvez, AIR 1984 AP 1**

**Issue:** Whether the father's claim as guardian should prevail over the mother's custody of a child of tender age.

**Held:** The court held that for a child of tender years, the mother is ordinarily better suited to rear the child unless facts show that custody with her would be harmful.

**Principle:** Hizanat is governed by the welfare of the child, not by rigid assertion of parental superiority.

## Conclusion

Hizanat gives legal recognition to the need of a child for maternal care during tender years. It operates alongside, and not in total contradiction to, the father's role as guardian. The modern law harmonises personal-law rules with the welfare principle, ensuring that custody serves the child's development rather than parental entitlement alone.

**Question 20. Write a short note on guardianship in marriage under Muslim law.**

## Meaning

Guardianship in marriage is traditionally called jabar. It refers to the authority of a lawful guardian to give a minor in marriage. This authority is connected with the protection of the minor's person and property and was historically recognised because a minor lacks capacity to make matrimonial decisions independently.

## Persons Entitled to Act as Marriage Guardians

The persons who may act as guardians in marriage include the father, the father's father, full brother and other male relations on the father's side in the order of inheritance. In their absence, the mother and certain maternal relations may be relevant, followed by the court.

## Option of Puberty

The authority of a guardian in marriage is not without limitation. Muslim law recognises the doctrine of option of puberty, under which a minor married during minority may, in appropriate circumstances, repudiate the marriage on attaining puberty. This doctrine protects the minor from being permanently bound by a matrimonial arrangement made before maturity.

## Modern Perspective

The traditional doctrine must now be understood with reference to statutory protections relating to child marriage, consent, age and welfare. Courts increasingly emphasise dignity, autonomy and welfare rather than merely formal guardian authority.

## Conclusion

Guardianship in marriage reflects a historical personal-law institution, but its operation is controlled by modern principles of welfare, consent, statutory protection and personal liberty.

## Unit IV: Maintenance (Nafaqah)

This unit deals with the legal idea of **maintenance**, known in Islamic law as **nafaqah**. Maintenance is not merely a charitable payment. It is a legal obligation arising out of defined relationships, especially marriage, parenthood and filial responsibility. In Muslim law, the duty to maintain may arise under personal law, under statutory criminal procedure, under the Muslim Women (Protection of Rights on Divorce) Act, 1986, and under protective legislation such as the Protection of Women from Domestic Violence Act, 2005.

The discussion below follows the syllabus topics of maintenance of wife, children, aged and infirm parents, maintenance of divorced women under the Code of Criminal Procedure, 1973, maintenance under the Muslim Women (Protection of Rights on Divorce) Act, 1986, and relevant provisions under the Domestic Violence Act. It also incorporates leading authorities, especially Mohd. Ahmed Khan v. Shah Bano Begum, Danial Latifi v. Union of India, and Shabana Bano v. Imran Khan.

**Question 21. Define maintenance under Muslim law. Who are the persons entitled to maintenance?**

### Meaning of Maintenance

The Islamic legal term for maintenance is **nafaqah**. It denotes financial support required for the basic needs of a person who is legally entitled to be maintained. Maintenance includes support for food, clothing, lodging and other essential requirements of livelihood. In the family-law sense, it is the legal means by which dependent members of a family are protected against destitution.

Maintenance under Muslim law is connected with family obligations. A Muslim husband is bound to maintain his wife during marriage. A father is bound to maintain his minor children within the limits recognised by law. Children may be bound to maintain poor and aged parents. A divorced Muslim woman may claim certain rights during the period of iddat and, in appropriate statutory circumstances, beyond it.

### Persons Entitled to Maintenance

Person entitled	Legal position
Wife	A wife is entitled to maintenance from her husband during the subsistence of a valid marriage, provided she fulfils the conditions recognised by Muslim law.
Children	Minor sons and unmarried daughters are entitled to maintenance from the father according to personal-law rules. Modern statutory remedies may also protect children.

*maintenance food, cloth shelter, if not dissolution of Muslim marriage Act, 1986*

*2(i) within 3 months.*

① → 125 CrPC  
 ② → Muslim Women Protection  
 on Divorce 1986  
 Div Act Sec. 20

Parents	Poor and aged or infirm parents may claim maintenance from children who have means. The duty is treated as a family obligation.
Divorced Muslim woman	She is entitled to rights under Muslim personal law, Section 125 CrPC in appropriate circumstances, and the Muslim Women (Protection of Rights on Divorce) Act, 1986.

### Nature of the Obligation

Zin after iddat family adopt her to get her property

The duty of maintenance is both **personal and legal**. It is personal because it arises from the relationship between the parties. It is legal because the obligation may be enforced through courts or statutory authorities. The modern law has also treated maintenance as part of social justice, especially where a person who cannot maintain herself or himself would otherwise be exposed to destitution.

↓ Zin  
 State waqf

## Question 22. Discuss the wife's right to maintenance under Muslim law.

### General Rule

Under Muslim law, the husband is bound to maintain his wife during a valid marriage. This obligation includes food, clothing, residence and other reasonable requirements according to the position and means of the parties. The obligation does not depend merely on the wife's poverty; it flows from the marital relationship itself.

### Conditions for Wife's Maintenance

The wife's right to maintenance is ordinarily connected with her readiness to perform marital obligations and to live with her husband, unless she has a lawful justification for living separately. Maintenance may be denied in certain situations where the wife refuses to live with the husband without lawful excuse, deserts him, elopes, is disobedient to reasonable commands, or refuses access to herself without a valid cause.

- The wife must be in a **valid marital relationship** with the husband.
- She must not refuse to live with him **without lawful excuse**.
- She must not be guilty of conduct that, under Muslim law, disentitles her from claiming maintenance.
- If she lives separately for a legally sufficient reason, such as cruelty or circumstances making cohabitation unsafe or unreasonable, the right to maintenance may continue.

### Maintenance During Iddat

If a wife is divorced after consummation, she is entitled to maintenance during the period of **iddat**. If the marriage is dissolved before consummation, the right to maintenance during iddat depends on the nature of the marriage and the circumstances recognised by law. The idea behind iddat maintenance is that the marital bond produces certain post-divorce obligations for a limited period.

### Effect of Husband's Second Marriage

Where the husband contracts another marriage and the first wife has a just cause to live separately, she may still claim maintenance. The law does not compel a wife to live in circumstances that the court considers unreasonable or injurious to her dignity and welfare.

#### **Begum Subanu alias Saira Banu v. A.M. Abdul Gafoor**

**Facts:** The wife refused to live with her husband after he contracted another marriage. The question arose whether such refusal deprived her of maintenance.

**Issue:** Whether the husband's second marriage gave the wife a sufficient reason to live separately and still claim maintenance.

**Held:** The Supreme Court treated the husband's second marriage as a relevant circumstance and held that the wife could not be denied maintenance merely because she did not live with him after such second marriage.

**Principle:** A wife who has a justifiable reason to live separately is not automatically disentitled from maintenance. The husband's personal law right to contract another marriage does not destroy the court's power to protect the first wife from destitution.

### Conclusion

*Daniel Latifi*

The wife's right to maintenance under Muslim law is therefore not a mere moral expectation. It is a structured legal right arising from marriage. At the same time, the right is regulated by the conduct of the parties, the validity of the marriage, and the existence of lawful cause for separate residence.

**Question 23. Discuss the maintenance of children and parents under Muslim law.**

### Maintenance of Children

The father is primarily responsible for maintaining his children. The obligation is especially clear in relation to minor children who cannot maintain themselves. A father is bound to maintain his sons till puberty and daughters till marriage, subject to recognised limitations. Where the father is unable and the mother has independent means, the mother may be required to support the child in appropriate circumstances, with possible recovery from the father when he becomes able.

Child	Personal-law position
Minor son	The father is bound to maintain the son until he attains puberty or becomes capable of maintaining himself.
Daughter	The father is bound to maintain the daughter until marriage.
Adult child	An adult child who is capable of earning is generally not entitled to claim maintenance merely as of right.
Disabled or incapable child	Where the child cannot maintain himself or herself because of disability or incapacity, the obligation may continue according to the circumstances and applicable law.

### Noor Saba Khatoon v. Mohammad Quasim

**Facts:** The issue concerned the maintenance of minor children born to a divorced Muslim woman and the effect of the Muslim Women (Protection of Rights on Divorce) Act, 1986.

**Issue:** Whether the father's obligation to maintain minor children was restricted by the provisions dealing with maintenance for children under the 1986 Act.

**Held:** The Supreme Court held that the right of minor children to claim maintenance from their father is not destroyed merely because the mother is a divorced Muslim woman. The statutory scheme cannot be read in a manner that deprives minor children of their independent right to maintenance.

**Principle:** The child's right to maintenance is an independent right. The law protecting divorced Muslim women does not extinguish the father's obligation towards minor children.

### Maintenance of Parents

Muslim law recognises the obligation of children to maintain parents who are poor, aged or infirm. The obligation is ordinarily imposed on children who have means. The duty is not based on inheritance alone; it arises from the family relationship and the moral-legal expectation that parents should not be left without support.

- A poor father or mother may claim maintenance from children who have sufficient means.
- The obligation may extend to aged or infirm parents who are unable to support themselves.
- Where more than one child has means, the burden may be distributed according to capacity and legal principles applicable to the facts.

### Conclusion

The law of maintenance of children and parents shows that Muslim family law is not confined to rights between husband and wife. It also recognises

intergenerational duties within the family. These duties are now reinforced by statutory remedies that protect vulnerable dependants against neglect.

## Question 24. Explain the maintenance rights of a divorced Muslim woman under Section 125 of the Code of Criminal Procedure, 1973.

### Section 125 as a Measure of Social Justice

Section 125 of the Code of Criminal Procedure, 1973 is a secular remedy for preventing destitution. It enables a wife, child or parent who is unable to maintain himself or herself to claim maintenance from a person who has sufficient means but neglects or refuses to maintain. The provision is not based on the religion of the parties. Its object is to prevent vagrancy and provide a quick remedy to persons who cannot maintain themselves.

### Divorced Muslim Woman and Section 125

The central controversy was whether a divorced Muslim woman could claim maintenance under Section 125 CrPC after divorce. The leading authority on this point is Mohd. Ahmed Khan v. Shah Bano Begum. The Supreme Court treated Section 125 as a secular provision and held that it applies to a divorced Muslim woman who has not remarried and is unable to maintain herself.

*1932 marriage  
1975 driven out  
1978 applied for maintenance*

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

**Facts:** Shah Bano Begum was married to Mohd. Ahmed Khan in 1932. Five children were born from the marriage. In 1975, she was driven out of the matrimonial home. In 1978, she filed an application under Section 125 CrPC claiming maintenance. During the proceedings, the husband pronounced divorce and argued that his liability was confined to the iddat period and to payment of mahr. The Magistrate granted maintenance, and the High Court enhanced the amount.

**Issue:** Whether Section 125 CrPC applies to a divorced Muslim woman who has not remarried, and whether payment of mahr or maintenance during iddat absolves the husband from liability under Section 125.

**Held:** The Supreme Court held that Section 125 CrPC applies to a divorced Muslim woman who has not remarried and is unable to maintain herself. It also held that mahr is not a sum payable on divorce so as to automatically absolve the husband from liability under Section 125.

**Principle:** Section 125 CrPC is a secular provision of social justice. The husband's personal-law plea cannot defeat the statutory remedy when the divorced woman satisfies the requirements of Section 125.

### Mahr and Section 127 CrPC

A major argument in Shah Bano was that payment of mahr should bring the husband within Section 127 CrPC and discharge his liability. The Court rejected this broad argument. Mahr is an incident of marriage and an obligation under

Muslim law. It cannot be treated as a universal substitute for statutory maintenance where the divorced woman remains unable to maintain herself.

## Conclusion

Section 125 CrPC thus operates as a protective statutory remedy. It does not abolish Muslim personal law, but it prevents personal-law arguments from being used to defeat a minimum legal obligation towards a destitute divorced woman who has not remarried.

**Question 25. Critically examine the Muslim Women (Protection of Rights on Divorce) Act, 1986 and its constitutional validity.**

### Background of the 1986 Act

The Muslim Women (Protection of Rights on Divorce) Act, 1986 was enacted after the decision in **Shah Bano**. The Act was intended to specify the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands. It deals with reasonable and fair provision and maintenance, mahr or dower, return of properties, maintenance of children for a limited period, and post-iddat support through relatives or the Wakf Board in defined circumstances.

### Important Statutory Provisions

Provision	Substance
Section 3(1)(a)	A divorced Muslim woman is entitled to reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband.
Section 3(1)(b)	Where she maintains children born before or after divorce, the former husband must make and pay reasonable and fair provision and maintenance for the children for two years from their respective dates of birth.
Section 3(1)(c)	She is entitled to an amount equal to the mahr or dower agreed to be paid to her.
Section 3(1)(d)	She is entitled to return of properties given to her before, at or after marriage by relatives, friends, husband or the husband's relatives or friends.
Section 4	If she has not remarried and cannot maintain herself after iddat, the Magistrate may direct her relatives who would inherit her property to maintain her; in default, the Wakf Board may be directed to pay.
Section 5	The parties may opt to be governed by Sections 125 to 128 CrPC, subject to the statutory procedure.

### Constitutional Challenge

The constitutional validity of the Act was challenged in **Danial Latifi v. Union of India**. The challenge was based on the argument that the Act deprived divorced

Muslim women of rights available under Section 125 CrPC and therefore violated constitutional guarantees of equality and life with dignity. The Supreme Court upheld the Act, but did so by giving it a beneficial interpretation.

### **Danial Latifi v. Union of India, (2001) 7 SCC 740**

**Facts:** After the Shah Bano decision, Parliament enacted the Muslim Women (Protection of Rights on Divorce) Act, 1986. The validity of the Act was challenged on the ground that it reduced the rights of divorced Muslim women and confined the husband's liability only to the iddat period.

**Issue:** Whether the Muslim Women (Protection of Rights on Divorce) Act, 1986 was constitutionally valid, and whether the husband's liability under Section 3 was confined only to maintenance during iddat.

**Held:** The Supreme Court upheld the constitutional validity of the Act. It interpreted Section 3 to mean that a Muslim husband must make a reasonable and fair provision and maintenance for the future of the divorced wife within the iddat period. The liability must be discharged within iddat, but the provision made can extend beyond iddat.

**Principle:** The Act survives constitutional scrutiny because it is read as protecting, not destroying, the divorced woman's right to a fair and reasonable provision for her future. The timing of payment is within iddat; the benefit is not necessarily confined to iddat.

### **Effect of the Decision**

The decision in Danial Latifi harmonised the Act with constitutional values. It avoided an interpretation that would have left divorced Muslim women without meaningful support after iddat. The Court treated the expression "reasonable and fair provision and maintenance" as broad enough to include a fair arrangement for the woman's future needs, having regard to her needs, the standard of life enjoyed during marriage, and the means of the former husband.

### **Conclusion**

The 1986 Act must therefore be understood through the interpretation given in Danial Latifi. It does not merely provide maintenance for the iddat period. It requires the former husband to make and pay, within the iddat period, a reasonable and fair provision that may sustain the divorced woman beyond that period.

**Question 26: Discuss the relationship between Section 125 CrPC and the Muslim Women (Protection of Rights on Divorce) Act, 1986 with reference to Shabana Bano v. Imran Khan.**

### **Continuing Importance of Section 125 CrPC**

Although the 1986 Act created a special statutory framework for divorced Muslim women, Section 125 CrPC has continued to remain important as a secular remedy against destitution. The question repeatedly arose whether a divorced Muslim

woman could still claim maintenance under Section 125 after the expiry of the iddat period. The Supreme Court answered this question in **Shabana Bano v. Imran Khan**.

### **Shabana Bano v. Imran Khan, AIR 2010 SC 305**

**Facts:** Shabana Bano married Imran Khan according to Muslim rites. She alleged cruelty and neglect and filed a petition under Section 125 CrPC claiming maintenance. The husband claimed that he had divorced her and argued that, after expiry of iddat, she was not entitled to maintenance under Section 125. The Family Court limited maintenance and the High Court dismissed her revision.

**Issue:** Whether a divorced Muslim woman can claim maintenance under Section 125 CrPC after expiry of the iddat period, so long as she has not remarried.

**Held:** The Supreme Court held that even if a Muslim woman has been divorced, she is entitled to claim maintenance from her husband under Section 125 CrPC after the expiry of iddat, provided she has not remarried and is unable to maintain herself.

**Principle:** A divorced Muslim woman is not left remediless after iddat. Section 125 CrPC may be invoked so long as the statutory conditions are satisfied and she has not remarried.

### **Legal Position Emerging from the Cases**

Case	Legal contribution
Shah Bano ✓	Section 125 CrPC applies to a divorced Muslim woman who has not remarried. Mahr does not by itself defeat the claim.
Danial Latifi ✓	The 1986 Act is <u>valid</u> because <u>reasonable and fair provision</u> made within iddat may extend to the future beyond iddat.
Shabana Bano ✓	A <u>divorced Muslim woman may claim maintenance under Section 125 CrPC after expiry of iddat if she has not remarried and cannot maintain herself.</u>

### **Conclusion**

The modern legal position does not treat Muslim personal law, Section 125 CrPC and the 1986 Act as isolated compartments. They are interpreted in a manner that prevents destitution and preserves the dignity of the divorced woman. The decisions in Shah Bano, Danial Latifi and Shabana Bano together form the core of this development.

### Current Legal Development: Mohd Abdul Samad v. State of Telangana, Criminal Appeal No. 2842 of 2024

**Facts:** The husband resisted a maintenance claim on the ground that a divorced Muslim woman should proceed under the Muslim Women (Protection of Rights on Divorce) Act, 1986 rather than Section 125 CrPC.

**Issue:** Whether the 1986 Act bars a divorced Muslim woman from invoking Section 125 CrPC.

**Held:** The Supreme Court held that Section 125 CrPC remains available to Muslim women, including divorced Muslim women. The 1986 Act does not substitute or exclude the secular remedy.

**Principle:** Section 125 CrPC, the 1986 Act and the 2019 Act operate as protective remedies in their respective fields; the woman is not to be left remediless or forced into a narrower remedy.

### Question 27. Explain the relevant provisions for maintenance under the Protection of Women from Domestic Violence Act, 2005.

#### Statutory Precision: Domestic Violence Act Remedies

Section 20 of the Protection of Women from Domestic Violence Act, 2005 empowers the Magistrate to grant monetary relief to meet expenses and losses suffered by the aggrieved woman and her children. Such relief may include loss of earnings, medical expenses, damage to property and maintenance.

The remedy is civil in character and is not confined to divorce. It may operate alongside personal-law and CrPC remedies when the factual foundation of domestic violence is present.

#### Purpose of the Domestic Violence Act

The Protection of Women from Domestic Violence Act, 2005 is a secular protective statute. It applies to women in domestic relationships and provides civil remedies against domestic violence, including economic abuse. Its relevance to Muslim Law lies in the fact that a Muslim woman, like any other woman, may seek statutory protection where the facts disclose domestic violence or economic deprivation.

#### Monetary Relief under Section 20

Section 20 empowers the Magistrate to grant **monetary relief** to meet the expenses incurred and losses suffered by the aggrieved woman and her children as a result of domestic violence. The relief may include loss of earnings, medical expenses, loss caused by destruction or removal of property, and maintenance for the aggrieved woman and her children. Such maintenance may be in addition to an order under Section 125 CrPC or any other law.

#### Nature of Relief

- The relief must be **adequate, fair and reasonable**.

- It must be consistent with the **standard of living** to which the aggrieved woman is accustomed.
- The Magistrate may order either a **lump sum payment** or **monthly payments**, depending on the circumstances.
- The remedy is protective and civil in character, and it can operate alongside other maintenance remedies where the law permits.

### Relationship with Muslim Law

The Domestic Violence Act does not replace Muslim personal law. It provides an additional protective remedy where a woman suffers domestic violence, including economic abuse. Therefore, a Muslim woman may have remedies under personal law, under Section 125 CrPC, under the 1986 Act if she is divorced, and under the Domestic Violence Act if the statutory conditions are satisfied.

### Conclusion

The Domestic Violence Act expands the protective framework for women by recognising economic abuse and by allowing monetary relief. In the context of Muslim Law, it demonstrates that personal-law rights and secular protective remedies can coexist, each serving a distinct legal function.

**Question 28. Write short notes on maintenance during iddat and maintenance after divorce.**

#### Maintenance During Iddat

The period of **iddat** is the waiting period observed by a Muslim woman after divorce or death of the husband. Under Muslim law, a divorced woman is generally entitled to maintenance during iddat where the marriage has been consummated. The 1986 Act also recognises iddat as an important period for determining the timing of the husband's obligation to make and pay reasonable and fair provision and maintenance.

#### Maintenance After Divorce

The modern law does not treat divorce as an event that automatically leaves a woman without remedy. After divorce, the woman's rights may arise under different legal sources. Under the 1986 Act, the former husband must make and pay reasonable and fair provision and maintenance within iddat. Under Danial Latifi, this provision may relate to the woman's future needs beyond iddat. Under Shabana Bano, Section 125 CrPC may also be available after iddat if the divorced woman has not remarried and is unable to maintain herself.

## Conclusion

Maintenance during iddat and maintenance after divorce must therefore be distinguished but not separated in a rigid manner. Iddat is important for the timing of certain obligations, but the law, as interpreted by the Supreme Court, does not permit a divorced Muslim woman's protection to vanish merely because the iddat period has expired.

Daniel Latifi →  
Shabnam Bano

## Unit V: Will and Inheritance

This unit deals with two closely connected branches of Muslim personal law: **wasiyat**, or testamentary disposition, and **inheritance**, or succession to the estate of a deceased Muslim. A will operates after the death of the testator, while inheritance arises by operation of law when a Muslim dies leaving property. The law therefore balances two ideas: the freedom of a Muslim to make a limited testamentary disposition and the mandatory distribution of the estate among heirs after death.

The syllabus specifically includes the meaning of will, the difference between will and gift, will made during death-bed illness, general principles of inheritance, and the classes of heirs under the Sunni and Shia schools. The following answers are framed around these topics and the previous-year pattern of questions on **wasiyat**, the **bequeathable one-third**, and **Sunni and Shia inheritance**.

**Question 29. What is meant by will or wasiyat under Muslim law? Explain its nature and essential conditions.**

### Meaning of Will

A **will**, known in Muslim law as **wasiyat**, is a legal declaration by which a person expresses an intention regarding the disposition of his or her property after death. It is different from a transfer during lifetime because it does not operate immediately. Its operation begins only on the death of the testator.

A will is classically described as the legal declaration of the intention of a testator with respect to property which he desires to be carried into effect after his death. The essential idea is therefore posthumous disposition. A will is not a contract and does not create present ownership in favour of the legatee during the lifetime of the testator. → one who makes will → beneficiary of gift

#### Classical Understanding

According to the statement attributed to Tyabji, a will is the conferment of the right of property in a specific thing, or in a profit or advantage, to take effect on the death of the testator. This captures two essential features of wasiyat: it concerns property or benefit, and it operates only after death.

### Essential Conditions of a Valid Will

Under Muslim law, the validity of a will depends upon the capacity of the testator, the competence of the legatee, the lawfulness of the subject matter, the testamentary limit, and the free intention of the person making the will.

- ① • **Competence of the testator:** The person making the will must be major and of sound mind. The will must be the product of a conscious and free intention.
- ② • **Competence of the legatee:** The person in whose favour the will is made must be capable of receiving the benefit. The legatee may be a person or an institution recognised by law.
- ③ • **Lawful subject matter:** The property or benefit bequeathed must be capable of lawful disposition and must belong to the testator at the relevant time.
- ④ • **Operation after death:** The disposition must be intended to take effect after the death of the testator. *inheritance rules in Sharia → Fara'id rule*
- ⑤ • **Testamentary limit:** A Muslim cannot ordinarily bequeath more than one-third of the net estate after funeral expenses and debts, unless the heirs give valid consent. *Bequeathable third rule*
- ⑥ • **Free and voluntary intention:** The will must not be the result of fraud, coercion, undue influence, or incapacity.

## Capacity of the Legatee and Acceptance

A legatee may be Muslim or non-Muslim, male or female, major or minor, sane or of unsound mind, provided the legatee is capable of taking the benefit. If the bequest is made in favour of an institution, the institution must exist when the will takes effect. Acceptance by the legatee is also material and is ordinarily relevant after the death of the testator, because the will is ambulatory during the testator's lifetime.

Point	Legal position
<u>Legatee may be non-Muslim</u>	Muslim law does not require that the legatee must be Muslim. After the property vests, the personal law applicable to the legatee may govern later dealings.
<u>Minor or person of unsound mind</u>	Such a person may be a legatee because the <u>capacity required is capacity to receive</u> , not capacity to contract.
<u>Existence of legatee</u>	The legatee must exist when the will takes effect. <u>A non-existent institution cannot ordinarily take under a will.</u>
<u>Consent of legatee</u>	<u>Acceptance may be express or implied and is significant after the death of the testator.</u>

## Form of Will

No particular form is necessary for a Muslim will. It may be written or oral, provided the intention is clear and the required legal conditions are satisfied. However, where a will is relied upon in legal proceedings, proof of its execution and of the testator's capacity becomes important. A written document is therefore safer, but writing is not the source of the legal validity of wasiyat.

## Modes of Expression and Revocation

A Muslim will may be oral, written or, where the testator is unable to speak and write, made by signs. An oral will is legally possible, but the burden of proving it is heavy because the court must be satisfied about the testator's intention, capacity and the circumstances in which the declaration was made. A will remains revocable during the testator's lifetime. Revocation may be express, or it may be implied where the testator deals with the subject matter in a manner inconsistent with the continuance of the bequest, such as by selling or gifting away the very property bequeathed.

## Conclusion

Wasiyat is a limited testamentary power under Muslim law. It allows a Muslim to make a disposition after death, but it does not permit the testator to defeat the fixed scheme of inheritance. The rule of one-third and the restrictions relating to heirs preserve the balance between individual intention and the rights of legal heirs.

### Question 30. Distinguish between will and gift under Muslim law.

A will and a gift both involve transfer of beneficial interest, but they operate in fundamentally different ways. A **gift or hiba** is a transfer during lifetime, while a **will or wasiyat** is a disposition intended to operate only after death.

Point of distinction	Will / Wasiyat	Gift / Hiba
Time of operation	It operates after the death of the testator.	It operates during the lifetime of the donor.
Nature	It is a testamentary disposition.	It is an inter vivos transfer.
Revocability	It is generally revocable during the lifetime of the testator.	Once a valid gift is completed by declaration, acceptance and delivery of possession, revocation is restricted.
Possession	Delivery of possession is not an essential condition for a will.	Delivery of possession is generally an essential condition of a valid hiba.
Extent of property	Ordinarily limited to one-third of the net estate without heirs' consent.	A Muslim may gift the whole of his property during lifetime, subject to the validity of the transaction.
Consent of heirs	Consent may be necessary where the bequest exceeds one-third or is made to an heir according to the applicable school.	Consent of heirs is not ordinarily required merely because the donor makes a lifetime gift.
Effect on inheritance	It operates before inheritance distribution, but only within the allowed limits.	If validly completed during lifetime, the gifted property no longer forms part of the donor's estate.

### Core Distinction

A will is a post-death disposition and is controlled by the law of succession. A gift is a present transfer and is controlled by the rules of hiba. This is why a will is restricted by the one-third rule, while a completed lifetime gift is not governed by the same testamentary limitation.

### Question 31. Explain the bequeathable one-third under Muslim law.

#### Illustrations: Bequeathable One-third

If a Muslim dies leaving property worth Rs. 9,00,000 after funeral expenses and debts, the ordinary testamentary power without heirs' consent is limited to Rs. 3,00,000.

If the will gives Rs. 5,00,000 to a stranger, the excess Rs. 2,00,000 is ineffective unless the heirs consent after the testator's death.

A bequest to an heir is generally ineffective without the consent of the other heirs, because the object is to prevent a testator from disturbing the scheme of inheritance by favouring one heir over others.

#### Meaning of the Rule

The rule of the **bequeathable one-third** is one of the most important limitations on testamentary power under Muslim law. After payment of funeral expenses and debts, a Muslim may ordinarily dispose of only **one-third** of the remaining estate by will. The remaining two-thirds are preserved for the legal heirs according to the rules of inheritance.

This rule prevents a testator from defeating the shares of heirs by making excessive testamentary dispositions. It also reflects the idea that inheritance in Muslim law is not merely a matter of individual choice but a legal scheme imposed upon the estate after death.

#### Consent of Heirs

A bequest exceeding one-third is not automatically void in every situation. It may become valid if the heirs whose shares are affected give valid consent. Under the Sunni position, such consent must generally be given after the death of the testator, because the heirs acquire their rights only when succession opens. Under the Shia position, consent may be given either before or after the death of the testator.

#### Illustration: Operation of the one-third rule

If a Muslim dies leaving a net estate of Rs. 9,00,000 after funeral expenses and debts, the ordinary bequeathable limit is Rs. 3,00,000. A bequest of Rs. 2,50,000 to a stranger is generally valid if other conditions are satisfied. A bequest of Rs. 5,00,000 operates only up to Rs. 3,00,000 unless the heirs whose shares are affected validly consent to the excess.

Situation	Legal effect
Bequest up to one-third to a stranger	Generally valid if other conditions of a valid will are satisfied.
Bequest exceeding one-third	Valid only to the extent of one-third unless the heirs consent to the excess.

Bequest to an heir under Sunni law	Requires consent of other heirs; consent is ordinarily relevant after the testator's death.
Bequest to an heir under Shia law	Under the Ithna Ashari position, a bequest to an heir up to one-third may be valid without consent; excess requires consent.

### Yasin Imam v. Shahra Bano

**Held:** It was held that, under Sunni law, consent of heirs to a bequest must be effective after the death of the testator. Consent given during the lifetime of the testator does not have the same legal effect because the heirs' rights arise only on death.

## Conclusion

The one-third rule is the central restriction on Muslim testamentary power. It protects heirs against disinheritance while still allowing the testator a limited sphere for charity, affection, or personal preference.

### Question 32. What is marz-ul-maut? Discuss the legal effect of a disposition made during death-bed illness.

#### Illustration: Death-bed Disposition

If a person suffering from a serious illness, with a real apprehension of death, transfers almost the whole property by gift and then dies from that illness, the transaction is examined as a marz-ul-maut disposition.

Such a disposition partakes of the character of both gift and will. It is therefore subject to the restrictions applicable to death-bed transfers, including the one-third limitation unless the heirs consent.

### Meaning of Marz-ul-Maut

**Marz-ul-maut** means death-bed illness. It refers to an illness which creates an apprehension of death in the mind of the person and is followed by death. In Muslim law, dispositions made during such illness are treated with caution because a person close to death may attempt to alter the normal course of inheritance by making gifts or other transfers.

### Essential Elements

The essential elements of marz-ul-maut are the existence of an illness, apprehension of death, inability or serious limitation in attending ordinary avocations, and death resulting from the illness or danger. The doctrine is not attracted merely because a person is old or sick. The illness must be of such a character that death is reasonably apprehended and actually follows.

- There must be a **malady or illness** creating apprehension of death.
- The apprehension of death must exist in the mind of the sick person.

- The illness must be serious enough to affect ordinary activities.
- Death must follow from that illness or from the danger contemplated.

### Effect on Gifts and Testamentary Dispositions

A gift made during marz-ul-maut is treated differently from an ordinary lifetime gift. Although it may appear to be a gift, the law treats it substantially like a testamentary disposition because it is made in the shadow of death. Therefore, such a gift is generally subject to the restrictions applicable to wills, especially the rule of **one-third** and the protection of heirs.

Type of disposition	Legal treatment
Ordinary gift during health	Operates as hiba if declaration, acceptance and delivery of possession are proved.
Gift during marz-ul-maut	Treated like a death-bed disposition and generally controlled by testamentary limitations.
Will made before death	Operates after death and is subject to the one-third rule.
Disposition exceeding one-third	Requires consent of heirs where their inheritance rights are affected.

#### Distinction from Ordinary Gift

Gift inter vivos is different from a gift causa mortis. A gift made in lifetime is irrevocable after completion, while a death-bed gift is treated more like a will because it is made in contemplation of death and may affect the estate available to heirs.

### Conclusion

The doctrine of marz-ul-maut is designed to prevent the law of inheritance from being defeated by transactions made at the edge of death. It preserves the rights of heirs while recognising genuine dispositions within the limits permitted by Muslim law.

**Question 33. Explain the general principles of inheritance under Muslim law.**

#### Meaning and Opening of Succession

Inheritance is the devolution of the estate of a deceased person upon those who are legally entitled to succeed. Under Muslim law, inheritance opens only on the **death** of the person whose estate is in question. No heir has a vested right in the property of a living person. During the lifetime of the owner, a prospective heir has only a chance of succession, not a legal title.

The estate available for inheritance is not the gross property left by the deceased. Funeral expenses, debts and valid testamentary dispositions are first dealt with;

thereafter the remaining property is distributed among the heirs according to the applicable school of Muslim law.

### Important General Principles

- **No birthright:** A child does not acquire an interest in ancestral property merely by birth. The concept differs from the traditional Hindu coparcenary system.
- **Succession opens on death:** Rights of heirs arise only when the propositus dies.
- **No joint family property:** Muslim law does not recognise a joint family estate in the Hindu coparcenary sense.
- **Vested inheritance:** Once succession opens, the heirs obtain defined shares in the estate, subject to payment of debts and other prior obligations.
- **No distinction between ancestral and self-acquired property:** For the purpose of succession, the property is distributed according to the rules of Muslim inheritance.
- **Male and female heirs both inherit:** Muslim law recognises female heirs, although their shares may differ according to the rules of the applicable school.
- **Illegitimate child:** The rules differ between schools. Under Sunni law, an illegitimate child may inherit from the mother, while under Shia law mutual inheritance is not recognised in the same way.

### Order Before Distribution

Stage	Matter to be dealt with
First	Funeral expenses and necessary expenses connected with death.
Second	Debts and obligations of the deceased.
Third	Valid will, generally within the bequeathable one-third.
Fourth	Distribution of the residue among legal heirs according to Sunni or Shia rules.

### Principle of Representation

The principle of representation deals with the question whether the descendants of a predeceased heir can step into the place of that heir. Sunni law generally does not recognise the doctrine of representation in the same way, while Shia law recognises it in a limited manner for ascertaining the shares of descendants. This difference is one of the important distinctions between the two systems of inheritance.

### Conclusion

Muslim inheritance law is a structured scheme of succession. It is not based on survivorship or birthright, but on the opening of succession at death and distribution among recognised heirs according to fixed legal rules.

### Question 34. Describe the classes of heirs under Sunni law of inheritance.

#### Three Main Classes

Under Sunni law, heirs are traditionally divided into three principal classes: **sharers**, **residuaries**, and **distant kindred**. The distribution of the estate generally begins by allotting the fixed shares of the sharers. The residue then passes to the residuaries. Distant kindred inherit only when there are no sharers or residuaries entitled in the manner recognised by law.

#### Principal and Subsidiary Classes

Sunni inheritance law first looks to the principal or related heirs. These are the blood relatives and the surviving spouse who take under the recognised scheme of sharers, residuaries and distant kindred. Subsidiary classes are considered only when the principal classes do not exhaust the field in the required manner.

Category	Classes included	Role in succession
Principal classes	Sharers, residuaries and distant kindred.	They form the ordinary scheme of distribution among related heirs and spouses.
Subsidiary classes	Successor by contract, acknowledged kinsman, universal legatee and the State.	They are considered where the principal classes do not provide a claimant in the recognised manner.

#### The Twelve Sunni Sharers

The classical Sunni list of sharers consists of twelve heirs: husband, wife, father, true grandfather, mother, true grandmother, daughter, son's daughter how low soever, full sister, consanguine sister, uterine brother and uterine sister. Among them, husband and wife are related by marriage, while the remaining sharers are related by blood.

Sharer	Basic share position
Husband	One-half if the deceased wife leaves no child or child of a son; one-fourth if such descendants exist.
Wife or wives	One-fourth if the deceased husband leaves no child or child of a son; one-eighth if such descendants exist. Multiple widows share this fraction among themselves.
Daughter	One-half if alone; two or more daughters take two-thirds collectively; with a son she becomes residuary and the male takes double the female share.

Mother	Usually one-sixth where children or certain siblings exist; otherwise her share may be larger according to the applicable combination of heirs.
--------	---

## Illustrations of Distribution

If a deceased Muslim leaves a mother and a son, the mother takes one-sixth as a sharer and the son takes the remaining five-sixths as residuary. If a deceased wife leaves a husband and children, the husband takes one-fourth. If there are no children or children of a son, he takes one-half. These illustrations show the sequence: first determine the sharers, then distribute the residue to residuaries if any.

Class	Meaning	Examples
Sharers	Heirs who are entitled to fixed fractional shares in the estate.	Husband, wife, father, mother, daughter, son's daughter, full sister, consanguine sister, uterine brother or sister, true grandfather and true grandmother.
Residuaries	Heirs who take the residue after the shares of sharers have been allotted.	Son, son's son, father in certain situations, brother, paternal uncle and other agnatic relations according to priority.
Distant kindred	Blood relations who are neither sharers nor residuaries but may inherit in the absence of nearer recognised heirs.	Daughter's children, children of daughters of sons, maternal relations and other distant relatives recognised by the rules.

### Sharers

Sharers are heirs whose shares are specified by law. They take first in the order of distribution. Their shares may vary according to the presence or absence of other heirs. For example, the husband may take one-half or one-fourth depending on whether the deceased wife has children. A daughter may take one-half if alone, but where there are sons, she does not take as a fixed sharer in the same manner and the rule of male and female shares applies according to the applicable principles.

### Residuaries

Residuaries take what remains after the sharers have received their fixed shares. If there are no sharers, residuaries may take the whole estate. Sunni law gives great importance to agnatic relationships in identifying residuaries. A nearer residuary excludes a more remote residuary.

### Residuaries and Shifting of Status

Residuaries are mainly agnatic heirs. The order commonly includes son, son's son how low soever, father, true grandfather, full brother, consanguine brother, sons of such brothers, paternal uncles and their male descendants according to priority. Some heirs who are ordinarily sharers may shift into the class of residuaries in

defined situations. A daughter becomes residuary when she co-exists with a son; a son's daughter may become residuary with a son's son; full and consanguine sisters may become residuaries in the presence of a daughter or son's daughter. Father and true grandfather may, in certain combinations, inherit both as sharers and residuaries.

### Distant Kindred

Distant kindred inherit when the estate is not exhausted by sharers and there are no residuaries entitled to take. This class includes certain blood relations who do not fall within the first two classes. Their position is therefore subsidiary to sharers and residuaries.

#### Aul and Radd in Sunni Inheritance

**Aul** applies where the total of fixed shares exceeds the estate, requiring proportionate reduction. **Radd** applies where residue remains after sharers are allotted their shares and there is no residuary to take it; the residue is returned to sharers according to the recognised rules.

## Conclusion

The Sunni scheme of inheritance is built around the movement from fixed shares to residue and then to distant kindred. This structure gives certainty to succession while allowing the estate to be fully distributed among recognised heirs.

**Question 35. Describe the classes of heirs under Shia law of inheritance and distinguish them from the Sunni scheme.**

### Basic Structure of Shia Inheritance

Shia law classifies heirs primarily by **classes and degrees**. The estate is distributed among the nearest class of heirs, and the existence of heirs in a prior class excludes heirs in a later class. This approach differs from the Sunni scheme, which begins with sharers, residuaries and distant kindred.

### Classes of Heirs by Consanguinity

Class	Heirs included	Effect
Class I	Parents, children, and lineal descendants.	They exclude the heirs of the second and third classes.
Class II	Grandparents, brothers, sisters, and descendants of brothers and sisters.	They inherit only when Class I heirs are absent.
Class III	Paternal and maternal uncles and aunts, and their descendants.	They inherit only when the first two classes are absent.

### Heirs by Marriage

The husband and wife inherit as heirs by marriage. They are not excluded merely because heirs by blood are present. Their shares are worked out according to the rules applicable to the situation.

### Important Features of Shia Succession

- The nearer heir generally excludes the more remote heir within the same line.
- The first class excludes the second, and the second excludes the third.
- Representation is recognised in a limited manner for determining the shares of descendants.
- The Shia scheme does not adopt the Sunni division of heirs into sharers, residuaries and distant kindred in the same way.

Point	Sunni law	Shia law
Primary classification	Sharers, residuaries and distant kindred.	Classes and degrees of heirs.
Role of residuaries	Residuaries are central to the Sunni scheme.	The doctrine of residuaries is not used in the same manner.
Representation	Generally not recognised in the same form.	Recognised in a limited manner for descendants.
Exclusion	A nearer residuary or heir may exclude remote heirs according to Sunni rules.	A prior class excludes later classes, and nearer degrees exclude remoter degrees.

### Conclusion

The Shia law of inheritance is more class-based, while Sunni law is more category-based. The difference is not merely terminological; it affects the order in which heirs are called and the manner in which the estate is distributed.

### Question 36. Write short notes on the doctrines of Aul and Radd.

#### Numerical Illustrations: Aul and Radd

**Aul:** If the husband is entitled to one-half and two full sisters are collectively entitled to two-thirds, the total becomes seven-sixths, which exceeds the estate. The shares are therefore proportionately reduced so that the estate is exhausted without exceeding unity.

**Radd:** If the fixed sharers together take less than the estate and no residuary heir is available, the residue may return to the sharers according to the applicable school. The treatment of the spouse and the exact method may differ between Sunni and Shia law.

### Doctrine of Aul

The doctrine of **Aul** applies where the total of the fixed shares of sharers exceeds the estate available for distribution. In such a situation, the shares cannot be given in full. The law therefore reduces the shares proportionately so that the whole estate can be distributed without exceeding the available property.

For example, where the prescribed shares together amount to more than the estate, the denominator is increased and each sharer takes a proportionately reduced share. The doctrine preserves the relative entitlement of the sharers while adjusting the mathematical distribution to the size of the estate.

## Doctrine of Radd

The doctrine of **Radd**, or return, applies in the opposite situation. After the fixed shares have been allotted, there may be a residue left and no residuary heir available to take it. In such a case, the residue is returned to the sharers according to recognised principles. The exact operation may differ between Sunni and Shia law.

Doctrine	When it applies	Effect
Aul	When total shares exceed the estate.	Shares are proportionately reduced.
Radd	When residue remains and there is no residuary to take it.	Residue is returned to sharers according to recognised rules.

## Conclusion

Aul and Radd are corrective doctrines. Aul deals with excess claims over the estate; Radd deals with surplus after allotment of fixed shares. Together, they show that Muslim inheritance law is not merely a list of fractional shares but a complete scheme for distribution.

**Question 37. Explain the administration of the estate of a deceased Muslim and the order of payments before inheritance.**

### Meaning of Administration of Estate

Administration of estate means the process by which the property and liabilities of a deceased person are identified, obligations are discharged, and the remaining estate is distributed among the legal heirs. The estate of a deceased Muslim is applied successively to payment of funeral expenses, debts, valid legacies and then inheritance.

### Order of Payments

Order	Payment or distribution
1	Funeral expenses and expenses connected with the last illness, where legally recognised.
2	Expenses of judicial proceedings for probate or letters of administration, where applicable.
3	Wages for services rendered to the deceased within the recognised period, where applicable.
4	Debts of the deceased according to their legal priority.

5	Legacies not exceeding the bequeathable one-third.
6	Distribution of the residue among heirs according to Muslim law.

## Liability of Heirs

Heirs are not personally liable for the debts of the deceased beyond the estate inherited by them. Their liability is limited to the extent of property or share received from the deceased. The estate is the primary fund for payment of debts, and inheritance is distributed only after prior obligations are dealt with.

## Conclusion

The administration of estate links the law of will with the law of inheritance. It ensures that debts and valid obligations are respected before heirs receive their shares. The heirs do not inherit a burden beyond the estate, but they take the estate subject to lawful prior claims.

## Unit VI: Pre-emption, Gift and Waqf

This unit deals with the law of pre-emption (shufa), gifts (hiba), the doctrine of musha, hiba-bil-iwaz, hiba-ba-shartul-iwaz, sadaqah, waqf, kinds of waqf, appointment and powers of mutawalli, and related institutional concepts such as mosque, sajjadanashin, khanqah, takiya and doctrine of cypres.

**Question 38. Define pre-emption or Shufa. Discuss its nature, object, source and legal basis under Muslim law.**

The right of **pre-emption**, known in Muslim law as **shufa**, is a right by which a person acquires a **preferential claim** to purchase an immovable property which has been sold to another person. The right is not a general right to prevent a sale. It arises only after a **valid sale** is completed and enables the pre-emptor to step into the position of the buyer on the same terms on which the property was sold.

### Meaning and object

The doctrine developed in a social setting where the entry of a stranger into a compact residential, agricultural or co-ownership arrangement could disturb peace, convenience and enjoyment of property. Its object is therefore to prevent inconvenience caused by the introduction of a stranger among co-sharers or neighbours and to preserve the integrity of common or adjoining property.

### Nature of the right

- **A weak right:** The right of pre-emption is traditionally described as a weak right because it can be defeated by lawful means before it is perfected.
- **A right of substitution:** The pre-emptor does not challenge the sale itself. He seeks to substitute himself for the purchaser.
- **A right arising after sale:** The right is not complete before sale. It arises when the sale becomes legally complete.
- **A right attached to property:** The right is connected with ownership or enjoyment of immovable property and not with a mere personal wish to purchase.

### Sources of the law

The right may arise from Muslim personal law, custom, statute or contract. Under Muslim law it is known as shufa. In India, its application has often depended upon local custom and statutory recognition in addition to personal law. Courts have also

examined its constitutional validity where the right was claimed on the ground of mere neighbourhood or vicinage.

### **Bishan Singh v. Khazan Singh, AIR 1958 SC 838**

**Facts:** The dispute concerned land sold to purchasers, followed by competing claims of pre-emption. The litigation required the Court to explain the juridical character of the right.

**Issue:** Whether the right of pre-emption gives an independent title or merely a preferential right to acquire property sold to another.

**Held:** The Supreme Court treated pre-emption as a right of substitution. The pre-emptor is entitled to be placed in the position of the vendee, but only by fulfilling the conditions attached to the right.

**Principle:** The case is commonly relied upon for the proposition that pre-emption is a weak right and that preference is its essential element.

### **Bhau Ram v. Baij Nath Singh, AIR 1962 SC 1476**

**Facts:** The challenge concerned pre-emption based on vicinage, that is, on the ground of being an owner of neighbouring property.

**Issue:** Whether a law of pre-emption based merely on neighbourhood could constitutionally restrict the owner and purchaser in dealing with property.

**Held:** The Supreme Court held that pre-emption based on vicinage imposed an unreasonable restriction and could not be sustained in that form, whereas claims based on co-sharership stood on a different footing.

**Principle:** The decision narrows the constitutional space for pre-emption based merely on neighbourhood.

## **Question 39. What are the circumstances in which the right of pre-emption arises? Who may claim it under Muslim law?**

### **Illustration: Classes of Pre-emptors**

If A and B are co-sharers in land and A sells his share to X, B may claim pre-emption as a co-sharer, provided the formal demands are made in time.

If C owns adjoining land but is not a co-sharer, C may claim only if the applicable law recognises his class and no superior pre-emptor has a better claim.

The right is lost if the pre-emptor acquiesces in the sale, fails to make the required demands, or otherwise abandons the claim.

### **Circumstances giving rise to the right**

The right of pre-emption arises when immovable property is sold and another person, by reason of co-ownership, participation in appendages, or neighbourhood recognised by the applicable law, claims a preferential right to purchase the property. The right ordinarily does not arise from gift, lease, mortgage, inheritance, sadaqah or waqf, because these transactions do not have the character of an ordinary sale for price.

- **Existence of immovable property:** The property must be of a kind to which the doctrine applies.
- **Valid sale:** There must be a sale; a mere agreement to sell is insufficient.
- **Completion of sale:** The claim ordinarily matures only when the sale becomes complete according to law.
- **Recognised relationship with property:** The pre-emptor must fall within a recognised class such as co-sharer or participant in appendages.

### Classes of pre-emptors under Sunni law

Class	Description	Illustration
Shafi-i-sharik	A co-sharer in the property sold.	One co-owner sells his share in a house; the other co-owner claims pre-emption.
Shafi-i-khalit	A participant in appendages or immunities, such as a right of way or right to water.	Owners using a common passage or water source.
Shafi-i-jar	An owner of adjoining property, where such ground is recognised.	A neighbouring owner claiming due to contiguity.

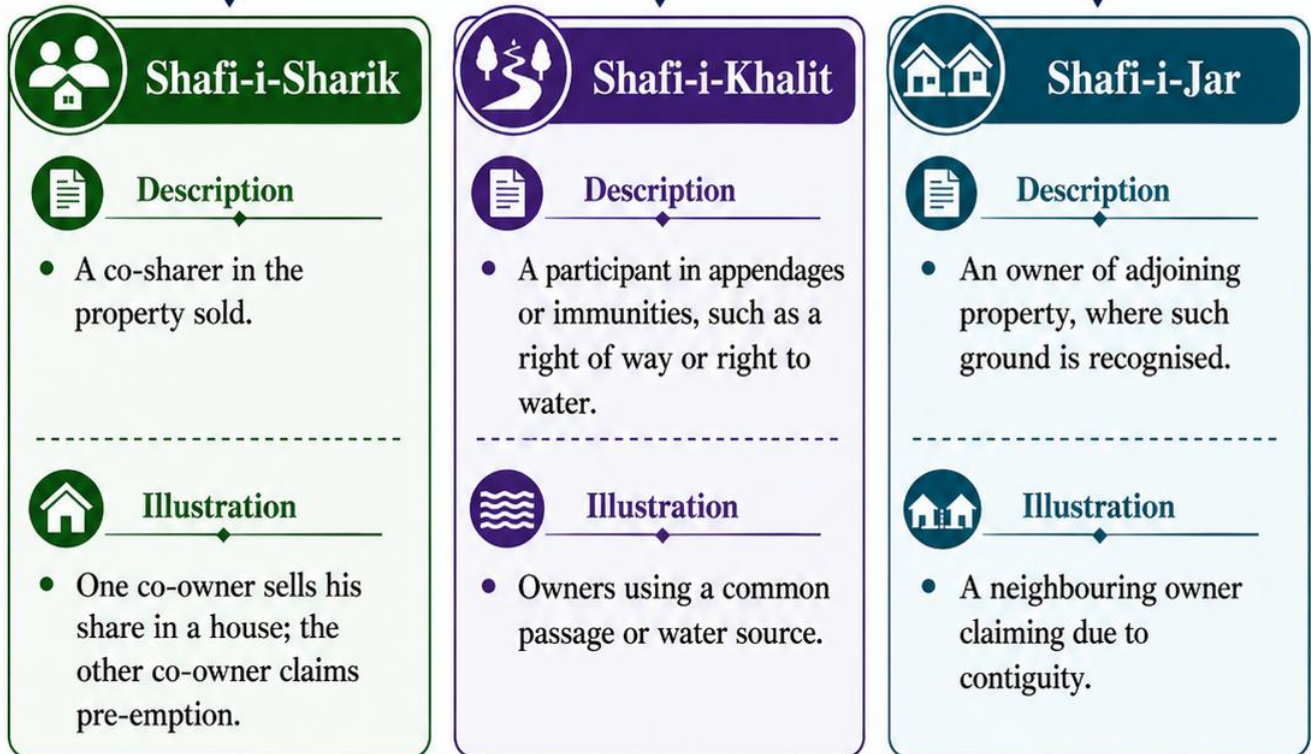
### Position under Shia law

Under Shia law, the right is narrower. It is generally recognised in favour of co-sharers in property and not in favour of a mere neighbour. The stricter approach reflects the view that a proprietary right should not be displaced merely because a person owns adjoining property.



# Classes of Pre-Emptors under Muslim Law

## Classes of Pre-Emptors under Sunni Law



## Position under Shia Law



- Under Shia law, the right is narrower. It is generally recognised in favour of co-sharers in property and not in favour of a mere neighbour. The stricter approach reflects the view that a proprietary right should not be displaced merely because a person owns adjoining property.

## Core Idea



- Sunni law recognises three classes of pre-emptors in a descending order of preference, whereas Shia law generally confines the right more narrowly to co-sharers.

### Persons who cannot claim

- A tenant or trespasser cannot claim pre-emption merely because he is in possession.
- A person who does not possess the required legal relationship with the property cannot claim the right.

- A claimant who waives, releases, acquiesces in the sale, or fails to make the required demands loses the right.

**Ram Saran Lall v. Mst. Domini Kuer, AIR 1961 SC 1747**

**Facts:** The claim for pre-emption depended upon when a sale deed could be treated as complete. The relevant demands had been made before completion of registration.

**Issue:** Whether the sale was complete before registration so as to support a claim of pre-emption.

**Held:** The Supreme Court held that, for the purpose of the claim before it, the sale became complete only when registration was complete; the demand made earlier was premature and the claim failed.

**Principle:** The case is important for the principle that timing of the demand is crucial in pre-emption.

### Question 40. Explain the essential formalities for enforcement of the right of pre-emption.

The right of pre-emption is not self-executing. Even where the claimant belongs to a recognised class, he must assert his right strictly according to the formal requirements of Muslim law. These requirements are called talab, meaning demand.

#### First demand: Talab-i-Muwasabat

The first demand is the immediate demand. As soon as the pre-emptor receives information of the sale, he must assert that he claims his right of pre-emption. No fixed form of words is necessary, but the intention must be clear, prompt and unambiguous. Unreasonable delay is treated as acquiescence.

#### Second demand: Talab-i-Ishhad

The second demand is a demand with witnesses. After the first demand, the pre-emptor must repeat the claim as soon as possible, preferably in the presence of witnesses, and ordinarily in the presence of the vendor, vendee or at the property itself. This formal demand gives certainty to the assertion of the right.

#### Consequences of non-compliance

Failure to perform the demands, unreasonable delay, waiver, release, acquiescence, death of the pre-emptor before suit in certain situations, or loss of the superior status on which the claim was based may defeat the right.

Formal requirement	Purpose	Effect of failure
Talab-i-Muwasabat	Immediate assertion after knowledge of sale.	Delay may amount to waiver.
Talab-i-Ishhad	Formal demand before witnesses.	Claim may fail if the formality is not observed.

Suit for pre-emption	Judicial enforcement of substitution.	Delay or loss of status may defeat the claim.
----------------------	---------------------------------------	---

## Loss of the right

- **Acquiescence:** The right may be lost if the pre-emptor knowingly accepts or remains silent in a manner inconsistent with the claim.
- **Waiver or release:** The right may be relinquished, expressly or impliedly.
- **Death of the pre-emptor:** Succession to the claim may depend on whether the applicable Sunni or Shia rule recognises continuation by heirs.
- **Loss of qualifying status:** If the claimant ceases to be a co-sharer or otherwise loses the legal basis for the claim, the right may fail.

## Question 41. Define gift or Hiba. Discuss the essentials of a valid gift under Muslim law.

### Illustrations: Delivery of Possession in Hiba

A gift of a house is ordinarily completed by delivery of possession, mutation or other conduct showing transfer of control, depending on the nature of property.

Where donor and donee live in the same house, a formal physical departure may not always be necessary if the donor clearly divests ownership and the donee's possession is established.

Where a father gifts property to a minor child, delivery may be satisfied by the father's own possession on behalf of the minor, provided the intention to transfer is clear.

**Hiba** is a transfer of property made immediately and **without consideration** by one person to another, and accepted by or on behalf of the donee. Muslim law treats hiba as a voluntary transfer **inter vivos**. It is distinct from a will because it operates during the lifetime of the donor and not after death.

### Meaning and character

A hiba is not a contract of sale and does not require consideration. It is an immediate conferment of ownership. The donor must intend to divest himself of ownership and confer ownership upon the donee. The donee must accept the gift and must receive possession, either actually or constructively.

### Statutory Position and Capacity of Parties

Chapter VII of the Transfer of Property Act, 1882 does not displace the rules of Muhammadan law relating to gifts. Section 129 preserves the application of Muslim rules of hiba. Therefore, the validity of a Muslim gift is primarily tested by the personal-law requirements of declaration, acceptance and delivery of possession.

Point	Position
-------	----------

Donor	Must be Muslim, major, of sound mind, owner of the property and acting with free consent. A pardanashin donor's transaction requires careful proof of independent understanding and absence of undue influence.
Donee	May be Muslim or non-Muslim, male or female, major or minor, and may even be of unsound mind if the gift is accepted and possession is taken through a competent guardian.
Child in womb	A gift to an unborn person is generally invalid, but a gift to a child in the womb is recognised if the child is born alive within the legally recognised period.
Dead person	A gift to a dead person is not a hiba because there is no living donee capable of receiving ownership.

## Essentials of a valid hiba

Essential	Explanation
Declaration by donor	The donor must clearly express an intention to make a gift. The declaration may be oral or written.
Acceptance by donee	The donee, or someone competent on behalf of the donee, must accept the gift.
Delivery of possession	The subject of the gift must be delivered to the donee. Delivery may be actual or constructive depending on the nature of property.

## Capacity of parties

- **Donor:** The donor must be a Muslim of sound mind, major and owner of the property gifted.
- **Donee:** The donee may be any person capable of holding property. A minor may receive a gift through a guardian.
- **Subject matter:** The property must be capable of ownership and transfer. It may be movable or immovable, corporeal or certain incorporeal rights recognised by law.

## Delivery of possession

Delivery of possession is central to a completed hiba. If the property is capable of physical possession, actual delivery is ordinarily expected. If physical delivery is impracticable, constructive possession may suffice. For property in the possession of a tenant, mortgagee or lessee, symbolic or constructive delivery may be sufficient where the donor has done all that he can to transfer control.

## Constructive Delivery and Revocation

Actual physical delivery is not required in every case. If the donor and donee live in the same house, an overt act clearly showing transfer of control may be sufficient. If the property is in the possession of a tenant, mortgagee or licensee, delivery of title deeds, mutation, attornment or other acts placing the donee in legal control may amount to constructive delivery. Before delivery of possession a gift is

revocable. After completion by delivery, revocation is not effected by a bare declaration and is subject to recognised limitations. Gifts between spouses, gifts to relations within prohibited degrees, death of either party, transfer by the donee to a third person and destruction or change of the property are among situations in which revocation is restricted or unavailable.

### **Abdul Rahim v. Sk. Abdul Zabar, Supreme Court, 2009**

**Facts:** A Muslim father executed a gift of land in favour of one son and steps were taken for mutation. Another son questioned the gift on the ground that possession had not been delivered.

**Issue:** Whether the gift failed for want of actual physical delivery of possession.

**Held:** The Supreme Court reiterated that constructive delivery may be sufficient where the donor has done what is possible in the circumstances and the donee is placed in legal control.

**Principle:** For immovable property, delivery of possession is judged with reference to the nature of the property and the circumstances of the parties.

### **Mahboob Sahab v. Syed Ismail, (1995) 3 SCC 693**

**Facts:** The dispute concerned an alleged oral gift under Muslim law and whether acceptance and delivery of possession had been established.

**Issue:** Whether the alleged oral gift was valid without proof of acceptance and delivery of possession.

**Held:** The Supreme Court held that the alleged gift was not proved where acceptance and delivery of possession were not established.

**Principle:** A mere assertion of gift is insufficient; the three essentials of hiba must be proved.

**Question 42. Explain the doctrine of Musha. Discuss its exceptions and its relation with Hiba-bil-Iwaz and Hiba-ba-Shartul-Iwaz.**

### **Doctrine of Musha**

Musha means an undivided share in property. The doctrine states that where a gift is made of an undivided share in property which is capable of division, the gift is ordinarily irregular unless the share is separated and possession is delivered. The doctrine is based on the difficulty of giving possession of an undivided share in divisible property.

### **When the doctrine applies**

The doctrine applies where the subject of gift is an undivided share and the property is capable of division. If the property cannot conveniently be divided, or if the nature of the property makes separation impracticable, the doctrine is relaxed.

## Exceptions to the doctrine

- Gift by one co-heir to another.
- Gift of a share in zamindari or taluka where partition is not practically required.
- Gift of a share in a commercial town or property not easily divisible.
- Gift of a share in a company.
- Gift where the donor and donee are in joint possession and the act sufficiently transfers beneficial enjoyment.
- Gift by husband to wife or wife to husband where circumstances show intention and acceptance.

# Types of Gift / Hiba under Muslim Law

## 1. Major Types of Hiba

**Hiba-bil-Iwaz**

- Literally means a gift with exchange.
- In India, it is often treated as a transaction resembling sale because consideration is present.
- Iwaz or return forms part of the transaction itself.
- Delivery of possession is not treated with the same strictness as in a pure hiba when the transaction substantially assumes the character of exchange.
- Generally irrevocable once exchange is complete.

**Hiba-ba-Shart-ul-Iwaz**

- Gift made with a stipulation for return.
- It begins as a gift, but if the stipulated return is made, it assumes features of exchange.
- Iwaz is stipulated as a condition.
- Delivery of possession remains important at the gift stage.
- Revocable before completion of the stipulated return, subject to rules.

**Sadaqah**

- Gift made with the object of acquiring religious merit.
- Its essential character is charitable or pious.
- Like hiba, it requires delivery of possession.
- Unlike an ordinary hiba, once completed by delivery it is not revocable.

### Difference between Hiba-bil-Iwaz and Hiba-ba-Shart-ul-Iwaz

Aspect	Hiba-bil-Iwaz	Hiba-ba-Shart-ul-Iwaz
Nature	Gift with exchange; in India often resembles sale.	Gift subject to a condition of return.
Return	Iwaz forms part of the transaction.	Iwaz is stipulated as a condition.
Possession	Less strictly treated in Indian form resembling sale.	Delivery of possession is necessary at gift stage.
Revocability	Generally irrevocable once exchange is complete.	Revocable before completion of stipulated return, subject to rules.

## 2. Minor Types of Hiba (Usufruct / Partial Ownership)

**Ariyat**

- Gratuitous grant of the use or usufruct of property.
- Ownership remains with the grantor.
- The transferee gets only the right to use and enjoy.

**Hiba-bil-Musha**

- Gift of an undivided share in property.
- It concerns partial or undivided ownership.
- The doctrine of musha addresses gifts of unpartitioned shares.

**Hiba-al-Umra**

- Gift connected with the life of the donee or donor.
- Traditionally associated with enjoyment for life.
- It is treated as a recognised special form of gift.

**Hiba-al-Ruqba**

- Gift connected with survivorship.
- The benefit is linked to who survives the other.
- It is another recognised special form of hiba.

### Core Idea of Hiba

A hiba is a voluntary transfer of property under Muslim law. Different forms of hiba vary according to the presence of return, charitable purpose, usufruct, partial ownership, life interest or survivorship.

## Types of Hiba

### 1. Hiba-bil-Iwaz

Hiba-bil-iwaz literally means a gift with exchange. In India it is generally treated as a transaction resembling sale, because consideration is present. Unlike a pure hiba,

delivery of possession is not always treated with the same strictness where the transaction has substantially assumed the character of exchange.

## 2. Hiba-ba-Shartul-Iwaz

Hiba-ba-shartul-iwaz is a gift made with a stipulation for return. It begins as a gift, but if the stipulated return is made, it assumes features of exchange. Delivery of possession remains important at the stage of gift. It differs from hiba-bil-iwaz because the return is stipulated as a condition, whereas in hiba-bil-iwaz the exchange is involved in the transaction itself.

Basis	Hiba-bil-Iwaz	Hiba-ba-Shartul-Iwaz
Nature	Gift with exchange; in India often resembles sale.	Gift subject to a condition of return.
Return	Iwaz forms part of the transaction.	Iwaz is stipulated as a condition.
Possession	Less strictly treated in Indian form resembling sale.	Delivery of possession is necessary at gift stage.
Revocability	Generally irrevocable once exchange is complete.	Revocable before completion of stipulated return, subject to rules.

## 3. Sadaqah

Sadaqah is a gift made with the object of acquiring religious merit. Like hiba, it requires delivery of possession; unlike hiba, once completed by delivery it is not revocable. Its essential character is charitable or pious, rather than merely private transfer.

## 4. Minor Types of Hiba (Usufruct & Partial ownership)

- a. Ariyat
- b. Hiba-bil Musha
- c. Hiba-al Umra
- d. Hiba al-Ruqba

### Connection with death-bed gifts

A gift made during **marz-ul-maut** or death-illness is treated with caution because it may operate as a device to defeat heirs. Where the donor dies of that illness, such a gift is generally restricted by rules comparable to testamentary limitations, especially the one-third limitation unless heirs consent.

**Question 43. Define Wakf. Explain its essentials, objects and modes of creation.**

### Current Statutory Note: Waqf Act and 2025 Amendment

The Waqf Act, 1995 remains the principal central legislation governing waqf administration. India Code now reflects amendments made by the Waqf (Amendment) Act, 2025, including provisions such as filing details of waqf on a portal and database.

For a textbook discussion of Muslim law, the classical essentials of waqf remain important: permanent dedication, a lawful object recognised by Muslim law, and divestment of ownership for religious, pious or charitable purposes. The statutory framework adds rules of registration, administration, supervision and record management.

**Wakf** is a permanent dedication of property for a purpose recognised by Muslim law as religious, pious or charitable. The ownership of the property is treated as withdrawn from ordinary private ownership and dedicated to a recognised purpose. The person who creates the wakf is called the **wakif**, and the person who manages it is called the **mutawalli**.

## Meaning

*↳ Mutawalli uses usufruct to extend the objects of wakf.*

Classical Muslim law regards waqf as detention of the corpus and application of the usufruct or benefit to religious, pious or charitable purposes. The corpus is preserved, while the income or benefit is used for the object of dedication.

## Essentials of valid wakf

### Property, Conditions and Completion

The property dedicated must belong to the wakif and must be capable of beneficial enjoyment. The dedication must be permanent and the object must be religious, pious or charitable. A condition reserving a power of revocation, or directing that the property should return to heirs on mismanagement, is inconsistent with the idea of permanent dedication. On the other hand, directions for repair, improvement, payment of debts connected with the wakf, or appointment of mutawalli do not necessarily defeat the wakf. Where the founder appoints himself as the first mutawalli, a bona fide declaration may complete the dedication without a formal transfer of possession from himself as owner to himself as mutawalli.

Essential	Explanation
Permanent dedication	The dedication must not be temporary or uncertain.
Competent wakif	The wakif must be competent and must own the property.
Recognised object	The object must be religious, pious or charitable according to Muslim law.
Certainty of property	The property dedicated must be identifiable.
Irrevocability	Once validly created, the wakf cannot ordinarily be revoked.

### Objects of wakf

- Maintenance of mosques, imambaras, graveyards and religious institutions.
- Education, relief of poverty, medical aid, inns, sarais and public utility objects.
- Maintenance of the founder's family where the ultimate benefit is reserved for a religious, pious or charitable purpose, subject to statutory recognition.

- Religious processions, observances, feeding of poor persons and other charitable purposes recognised by Muslim law.

## Modes of creation

- **Inter vivos:** The wakf may be created during the lifetime of the wakif by declaration or deed.
- **By will:** A testamentary wakf may be created by will and is subject to rules governing testamentary disposition.
- **By long user:** Traditional law recognised wakf by long user in suitable cases; however, modern statutory amendments have altered this area.

### Current statutory position

The syllabus refers to the Waqf Act, 1995. The law has since undergone amendment. Official Central Waqf Council materials list the Waqf (Amendment) Act, 2025 and the renamed Unified Waqf Management, Empowerment, Efficiency and Development Act, 1995. Government explanatory material states that the 2025 changes aim to improve registration, management, technology use and governance of waqf properties.

### Janjeera Khatun v. Muhammad Fageerulla, AIR 1922 Cal 429

**Facts:** A wakf deed was executed, and after the wakif's death disputes arose regarding validity, possession, mutawalliship and whether the wakf was affected by death-illness or transfer formalities.

**Issue:** Whether a valid wakf had been created and whether the absence of transfer of physical possession defeated it.

**Held:** The Court treated creation of wakf as not requiring the same transfer of possession as an ordinary gift. It also examined the death-illness issue and the need for consent where the whole property is dealt with in marz-ul-maut.

#### Principle

The case is useful for distinguishing wakf from gift and for understanding wakf created in death-illness.

### Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry, Privy Council, 1894

**Facts:** A family endowment purported to dedicate property substantially for the benefit of descendants, with an ultimate charitable purpose.

**Issue:** Whether such a family wakf was valid under the then-prevailing interpretation of Muslim law.

**Held:** The Privy Council took a restrictive view and treated the charitable gift as too remote or illusory. This decision later led to statutory intervention through wakf validating legislation.

**Principle:** The case explains the background to statutory recognition of waqf-alal-aulad.

## Question 44. Discuss the kinds of Wakf and the distinction between public Wakf and private Wakf.

### Public and private wakf

A public wakf is created for public religious, pious or charitable purposes, such as a mosque, school, graveyard, hospital or feeding of poor persons. A private wakf, commonly called waqf-alal-aulad, is created substantially for the benefit of the settlor's family and descendants, with an ultimate benefit reserved for a recognised charitable or religious purpose.

Kind of wakf	Meaning	Key feature
Public wakf	Wakf for public religious or charitable objects.	Benefit is public or community oriented.
Waqf-alal-aulad	Family wakf for descendants with ultimate charitable object.	Recognised by validating statutes subject to conditions.
Conditional wakf	Wakf depending on a condition.	Invalid if condition defeats permanence or certainty.
Contingent wakf	Wakf dependent on future uncertain event.	Generally invalid if the dedication is not immediate.
Testamentary wakf	Wakf created by will.	Subject to testamentary limits.
Wakf in death-illness	Wakf created during marz-ul-maut.	Subject to restrictions similar to death-bed transactions.

### Waqf-alal-aulad

Waqf-alal-aulad occupies an important place in Indo-Muslim law. It allows a founder to provide for descendants while preserving the ultimate character of dedication to a religious, pious or charitable purpose. The restrictive approach of the Privy Council in Abul Fata led to statutory correction through wakf validating legislation, which recognised family wakfs where the ultimate charitable object exists.

### Shia and Sunni distinction

Point	Shia law	Sunni law
Vesting of property	Property is often described as vesting in beneficiaries.	Property is traditionally treated as vested in God.
Support for settlor	Wakf may not support wakif except in limited cases.	A wakf may reserve maintenance for the wakif in appropriate cases.
Failure of object	If the object fails, property may revert as per applicable rules.	If the object fails, benefit may be applied through cypres or related doctrines depending on circumstances.

### Doctrine of Cypres

The doctrine of cypris is applied where the original charitable object cannot be carried out. The court applies the property or income to an object as near as possible to the original charitable intention, provided that a general charitable intention is found. It prevents failure of a charitable dedication merely because the precise mode stated by the wakif has become impossible or impracticable.

### Question 45. Who is a Mutawalli? Explain his appointment, powers, duties and removal.

A **mutawalli** is the manager or superintendent of a wakf. He is not the owner of the wakf property. His position is **fiduciary**. He administers the property, applies the income according to the objects of the wakf, protects the corpus and performs duties imposed by the wakf deed and law.

#### Appointment of mutawalli

- **By the founder:** The wakif may appoint the first mutawalli in the wakf deed.
- **By executor or successor:** Where the deed provides for succession, appointment may be made accordingly.
- **By court:** If no valid appointment is made, or the office becomes vacant, the court may appoint a mutawalli having regard to the wishes of the founder, the interest of the wakf and the fitness of the candidate.

#### Who may be appointed

A person of sound mind and capable of administering the property may be appointed. A non-Muslim or woman may be appointed where the duties are secular and managerial. Where the office involves spiritual or religious functions, personal qualification may become relevant.

#### Powers of mutawalli

- To manage the wakf property and collect income.
- To apply income according to the object of the wakf.
- To maintain accounts and preserve records.
- To institute proceedings to protect the wakf property.
- To lease or deal with property only within the limits of law, the wakf deed and court or statutory permission where required.

#### Duties of mutawalli

- To preserve the corpus of the wakf.
- To act honestly and faithfully in the interest of the wakf.

- To avoid personal benefits inconsistent with the office.
- To maintain the property and prevent waste or encroachment.
- To comply with statutory obligations of registration, accounts and supervision.

### Removal of mutawalli

A mutawalli may be removed for breach of trust, mismanagement, neglect of duty, misappropriation, adverse claim to wakf property, incapacity, conviction involving moral turpitude, or persistent failure to obey lawful directions. The object of removal is not punishment alone, but protection of the wakf and its beneficiaries.

#### **Fazal Sheikh v. Abdur Rahman, AIR 1991 Gauhati 71**

**Facts:** A person was managing wakf property and performing functions of management without a formal appointment being fully established.

**Issue:** Whether such a person could be treated as a mutawalli for purposes connected with management and accountability.

**Held:** The Court recognised that a person who in fact manages wakf property may be treated as a mutawalli in substance for relevant purposes.

**Principle:** The office is assessed by the duties actually performed as well as by formal title.

### **Question 46. Write short notes on Mosque, Sajjadanashin, Khanqah, Takiya and Mujawar.**

#### **Mosque**

A mosque is a place dedicated for Muslim worship. Once a mosque is validly dedicated, the dedication is ordinarily permanent. The right to offer prayer in a mosque belongs to Muslims who are entitled to worship according to its religious character. A private prayer room does not necessarily become a public mosque unless dedication to the public or community is established.

#### **Sajjadanashin**

A sajjadanashin is the spiritual head connected with a dargah or khanqah. The office may carry spiritual functions and also managerial responsibilities. His status may be higher than that of a mere mutawalli when religious leadership, spiritual succession and management of offerings are attached to the office.

#### **Khanqah**

A khanqah is a religious institution associated with Sufi tradition, spiritual instruction, residence of disciples and devotional practice. Whether an institution is a khanqah depends upon its history, user, religious purpose and mode of management.

## **Takiya**

A takiya is a place of rest, retreat or religious assembly associated with Muslim religious or devotional life. It may be connected with a faqir, saintly person or religious establishment and may be treated as wakf property where dedication is proved.

## **Mujawar**

A mujawar is a person attached to a shrine or dargah who performs services such as lighting lamps, maintaining the place, receiving visitors, reciting prayers or assisting in rituals. He is generally a servant or functionary of the institution and not necessarily the owner or mutawalli of the property.