

Muslim Law

(Family Law II)

Ching Vera

Q1) Is "personal law" a law?

Ans) Yes.

Q2) Does constitution recognize "personal law"?

Ans) Yes in article 13(3).



Article 13(3) in Constitution of India

(3) In this article, unless the context otherwise requires,-

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

All personal laws have force of law. Hindu Law, Muslim law, Christian law, Parsi law, Jewish law all have force of law.

Q.3) Old laws are redundant & obsolete?
Centuries old personal laws are still applicable?

Ans 3) Article 372 ↴

Article 372 in Constitution of India

372. Continuance in force of existing laws and their adaptation

(1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority.

Q.4) All the laws in force does it include personal laws?

→ This matter was discussed in the following case.

→ In Re: Amina (1992)
Bombay High Court.

Q.5)

Personal Laws

Codified

Uncodified.

If personal law is codified does it remain personal law or it becomes legislative law (or) enacted law?

→ This was discussed in Bajaya (NS) Gopikabai & Anr (1978) SC

⇓
" Mere codification will not remove the tag of personal law "

Q 6) Personal laws in contradiction with FRs are void?

Sant Ram (11) Lakh Singh
(1965) SC

Customary law in derogation with FRs is also void like legislative enactments

Q.7) A Muslim can marry 4 wives.
Is it not against Right to Equality?

→ Ahmedabad Women Action Group

vs

VOI (1997) SC

→ This was PIL.

→ Polygamy in Muslim law is against
article 14 & 15.

→ Polygamy is unconstitutional?

→ Unilateral power of husband to divorce. is against article 13, 14 & 15.

→ Polygamy of Muslim husband isn't cruelty on her existing wife?

Court said ↓

Isn't this job of legislature?

We're dismissing these PILs.

Article 13. (Part III) of constitution is not applicable on personal law. & customary law.



“Krishna Singh (vs) Mathura Ahir
(1980) SC”

→ Do not apply fundamental rights to personal laws & customary laws.

State of Bombay (ve) Narasim Appa
Mali

(1952) BHC



"The framers of the constitution wanted to leave the personal law outside the ambit of Part III of the constitution.

They must be aware that these personal laws needed to be reformed in many material particulars.

In fact they wanted to abolish these different personal laws.

They therefore advocated a UCC U/A 44
Yet, they did not wish that provisions of
personal laws be challenged for reasons
of infringing FRs & so intend to include
personal law within definition of law."

Recent change in Mindset of Supreme
Court with respect to
personal laws

Shayara Bano (vs) UOI (2017) SC

→ Talaq-e-biddat → made unconstitutional.

Independent Thought (vs) UOI (2017) SC

→ Marital intercourse with girl less than 18 years of age is rape.

→ How can one discriminate married and unmarried woman?

→ This is also against POCSO.

→ Petitioner challenged the exception 2 of Section 375 of IPC which exempted marital rape of a girl child aged 15 to 18 years.

→ This is secular judgement applies to all religions.

→ sexual intercourse without consent for child aged 15 to 18 is actionable.

"Advent of Islam"

Mohammad born on 19th April 571 AD



Father died before his birth.



Brought up by mother but she died when he was young.



Later Brought up by grandfather he too died.



Finally his uncle brought him up, he too died soon.



Ultimately grew up as an orphan

Prophet was ~35 years old he married a
widow Khadija.



He had 2 sons both died at early age.



He had 4 daughters.



Fatema was youngest daughter.
She married Ali.



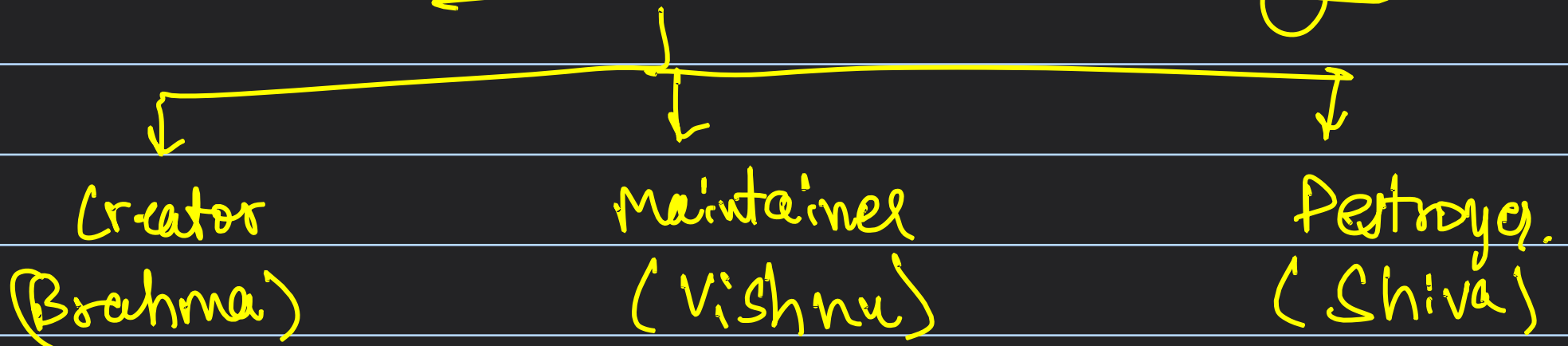
Fatema died 6 months after Prophet's
death

Arabic law recognizes only Agnates.

No recognition of Cognates.

First revelation about Allah came to
Mohammad. Revelation is called 'wahi'.
Revelation was via Gabriel.

In Hindu there is Trinity



there are myriads of gods in Hinduism.

In Islam there is only one God Allah.

First Kalima -

Laa - ilaha Il - lal - laha Muhammad
Rasululla

There is no other God but Allah
Mohammad is the messenger of Allah.

Q) Muslim law could not be amended or codified
why?

Ans) Because it is law made by Allah and revealed to Mohammed. How can humans change or amend it?

There were 5 companions of prophet.

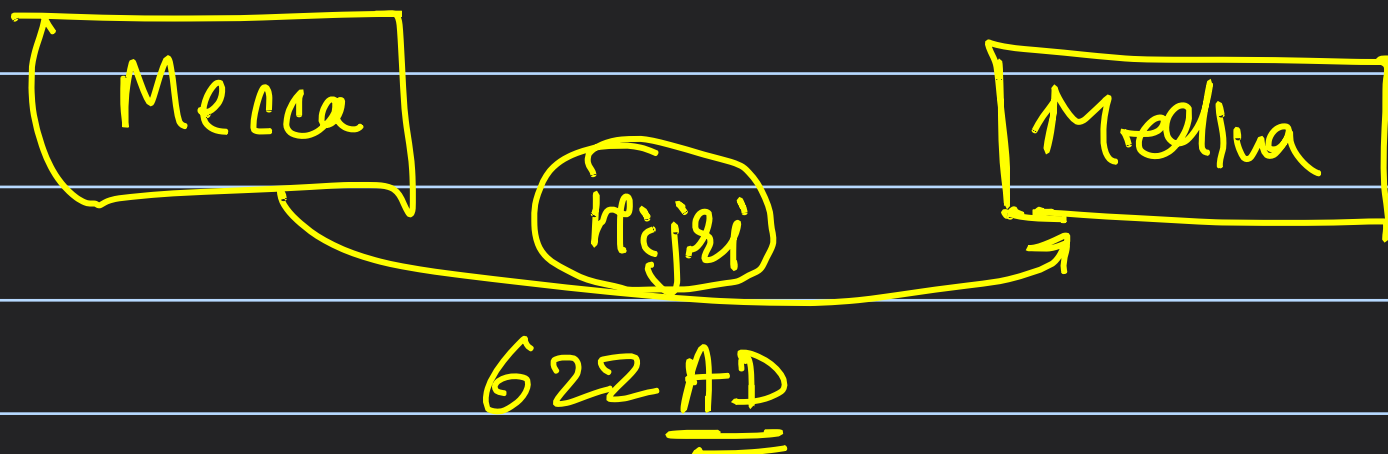
- ① Khadija (Wife of Prophet)
- ② Warrakka (A Blind scholar)
- ③ Abu - Baker (father in law of prophet i.e. father of Khadija)
- ④ Ali (Husband of Fatema; daughter of Prophet)
- ⑤ Omar

Phase I of Islam

→ Prophet became popular among people.

→ Rulers were observing this and wanted to get him killed.

Prophet travelled from Mecca to Medina in 622 AD this journey is called Hijri



This is beginning of Islamic Calendar.

AH 1 → means 1 year after Hijri
i.e. 623 AD.

AH 10 → means 10 years after Hijri
i.e. 632 AD.

AH → "Anno Hagirae" = in the year of Hijra.

When Prophet reached Medina he
formed a political organisation called
"Umma"

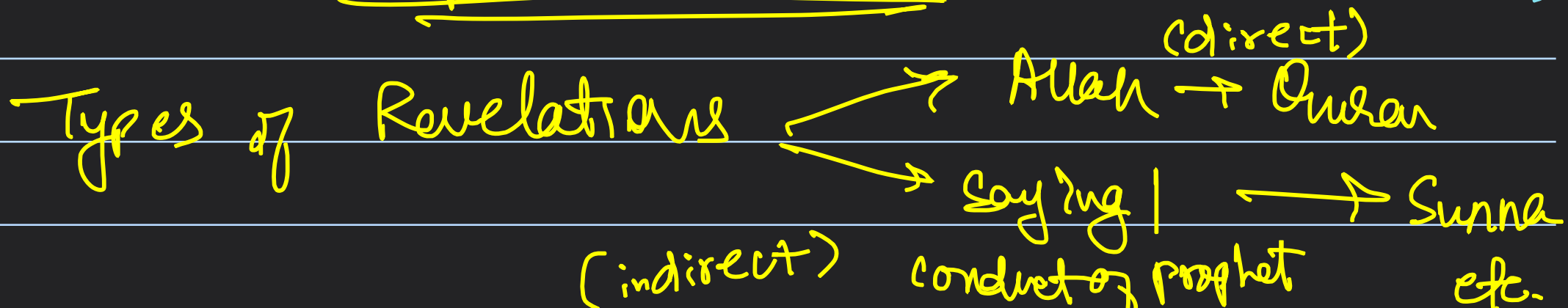
→ Meccans followed Prophet to
Medina and tried to attack him.

Prophet defeated Meccans.
He conquered both Mecca & Medina

Last confrontation was with Christians

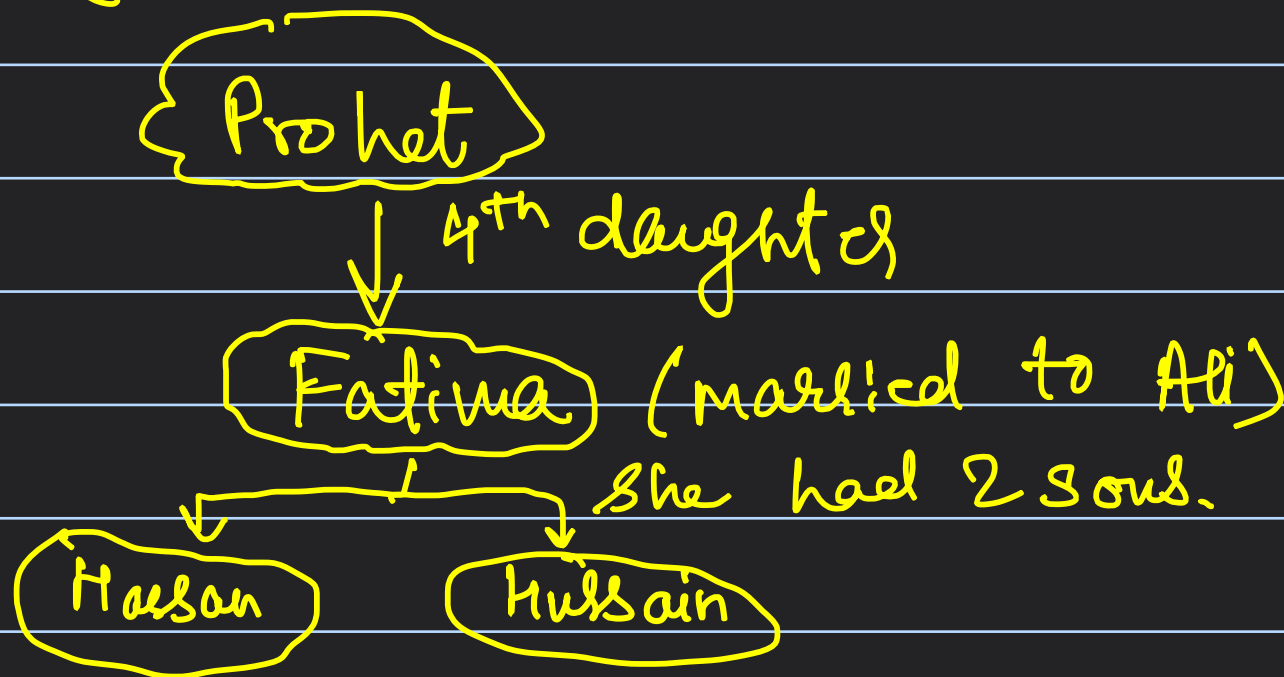
Prophet was victorious again.
Everything was under his umbrella
now, both Mecca & Medina.

Prophet's Death (Phase II of Islam)



Muslim is a person who follows above two. (Direct & indirect revelations)

This was world of agnates & prophet didn't have sons, he had only daughters



Now the issue arose: — There was no successor.

One group said we won't allow cognates to be successor

Another group believed that when we have Prophet's lineage why to go for someone other?

Do elections between 5 companions

(They were dominant group)

Prophet's blood is there in Fatima's sons. so temporarily make their father 'Ali' the successor



They kept doing elections
and chose who came
to be known as "Caliph"

Note - Caliph \neq Prophet.



"Abu Bakr" became the
first Caliph. (ابوبکر)

He was Prophet's father in
law.



Caliph means a person
who looks after



Abu Bakr remained Caliph
for 2 years and then died



Then again by election,
"Umar" became second
Caliph. He was later
assassinated.



Next Caliph was 'Osman'

During, Osman's time
as Caliph, the holy
Quran was compiled
the way we see it today.

He was also assassinated



Fourth Caliph was 'Ali'

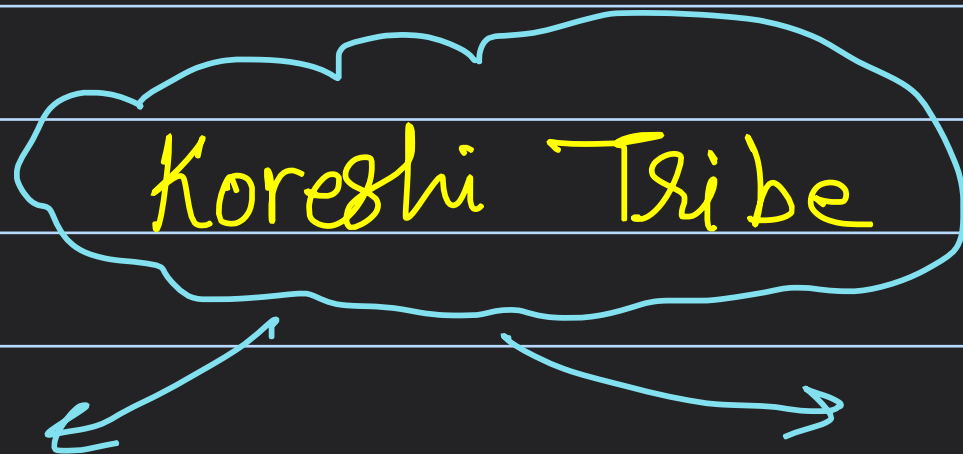
(father of Hassan & Husain
and husband of Fatima)

Ali was also assassinated



→ Hassan said I don't want
to be Caliph.

→ Husain said why not?
Why should we feel &
quit?



Ommayads.
(Election)

Hashmites.
(Ali)

DNA



Battle of Karbala

↓
Grandsons i.e. Hassan &
Hussain died. This day is
lamented as Muharram

⇓
Enmity between the two factions
of Korshi Tribe deepened.

Proponents of Elections
became Sunnis
(Supported by Muawias)

Believers of pure blood.
or DNA became Shias

Summary

Sunnis



Recognize 3 Caliphs
before Ali



Abu Bakr is
first Caliph



Consolidⁿ of Caliphate
as political model of

Shias.



Belived in Imam
and not Caliph



Ali is first
Imam



Karbala as a
symbol of

unity & order



Saudi Arabia

Turkey

Egypt

Indonesia

Pakistan

Bangladesh

Jordan

UAE

Malaysia

Qatar

Kuwait

85% total

injustice, resistance
and moral legitimacy.



Iran

Iraq

Azerbaijan

Bahrain

15% total

About Arabic Life

Arabia was a desert.



Therefore there wasn't much agriculture taking place.



Arabs

mostly traders and nomads.

Caliphs

① Abu Bakr

② Omar

③ Osman

④ Ali.

compiled Quran? *
as it is today

→ Shial don't recognize these 3 first Caliphs.

Phase III of Islam

After Battle of Karbala

there was strong rivalry between Shias & Sunnis.

Ommayyad's dynasty began. The head of Ommayyad was Muavia.

After death of Muavia election stopped and hereditary succession began for Caliphate, within Ommayyads.

14 Caliphs came via Hereditary
in Ommayad dynasty
→ Then Ommayads were defeated by
Abbasids dynasty.

Abbasids declared themselves as
spiritual leader of Muslims.



SCHOOLS OF LAW
NOW DEVELOPED.

Schools of Sunnis

① Hanafi

② Maliki

③ Shafi

④ Hanbali

School of Shia

① Zaydis

② Ithna Asharis

③ Ismailis

Word 'Imam' comes into being and is recognised.

Phase IV of Islam (Period of propagation)

"1258 A.D." Mongols attack India.



Abbasids are attacked and their entire family is killed.

37th Caliph was an Abbasid, he is killed with his family in Bagdad.



Caliphate was given to Sunni "Abdul Kasim"

Abdul Kasim became Caliph.



He was in Cairo (Egypt)
Therefore power shifted from Baghdad (Iraq)
to Cairo (Egypt)

Rise of Ottoman Empire (Turkey)



It had famous ruler Salim I



Islam became 2nd most common religion
in world. 1st was Christianity. Jump next 2
pages...

FUN FACT

SKIP for exams

28 July 1914

World War I started.

Britain, France
Japan, Russia, Italy

Allied Powers
(won)

VS

Germany, Austria,
Hungary, Bulgaria
Ottoman Empire.

Central Powers
(lost)

1919 - 1920

→ Hindus including Congress
supported Khilafat movement.
started by Ali Brothers.

Mohammed Ali

Shaukat Ali^o

All India Khilafat Committee formed
in 1919. with president M.K. Gandhi



Non-cooperation
movement.



Still Caliph remained only in
control of Turkey. All other holy places
of Muslims throughout world were
lost in a treaty with Allied Powers.
Weakening Islamic hegemony in world

British broke Ottoman Empire



When Ottoman Empire was formed and became powerful, the Mayor of Mecca gave the keys of Kaba to "Ottoman Empire".

Ottoman Empire at that time was headed in Turkey by.
"Constantinople"

∴ Constantinople became spiritual head by controlling Kaba.

One progressive, liberal came into power
— in Turkey.

He was "Mustafa Kemal Atatürk"
(1927)

↓
He initiated movement to
abolish Caliphate.

That's why we don't have Caliphs now.

Lecture Doubt clearing session

Etymology of word 'Muslim' & 'Islam'

Both are Arabic words

Muslim = means "one who submits to God"

Islam = means "submission"

Five Pillars of Islam or Religious
Commandments to be called as
Muslim.

① Shahadah - declaration of faith.
as in First Kalima.

There is no other god but Allah.
Mohammed is his messenger.

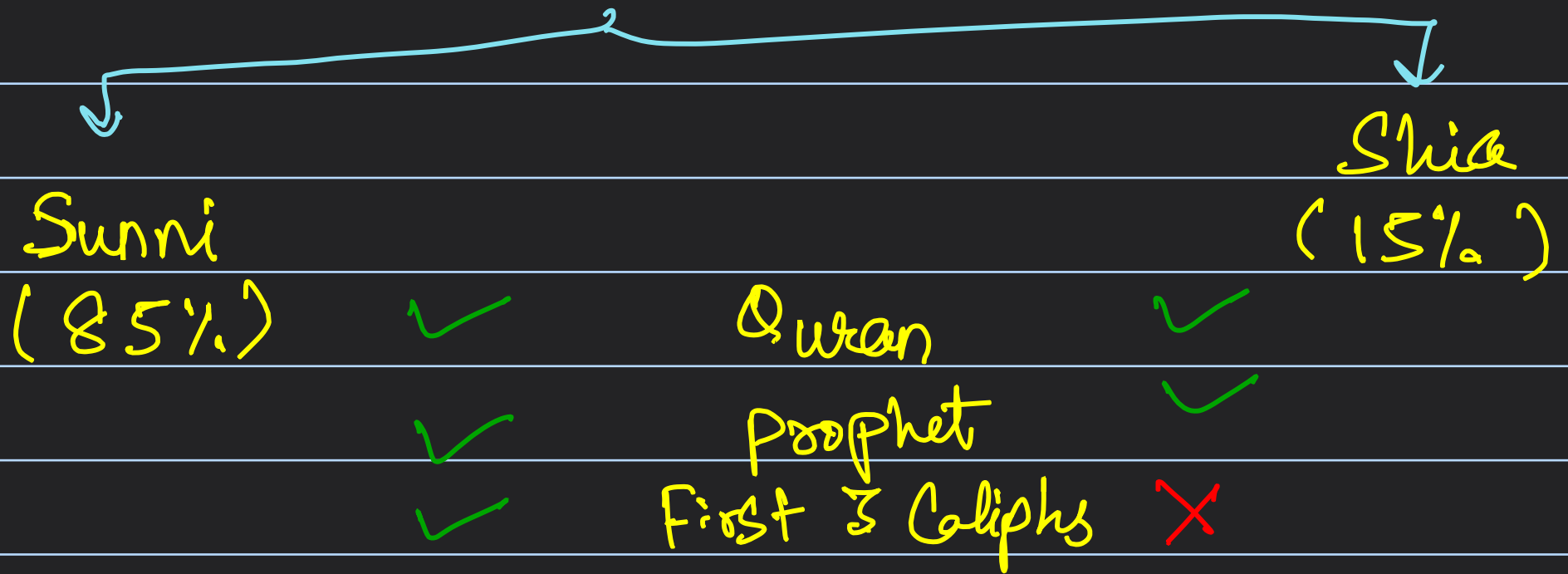
② Salat — Five prayers a day.

③ Zakat — Give 2.5% savings to poor and needy.

④ Sawm — Purification by fasting during Ramadhan or Ramadan.

⑤ Hajj — One must go to pilgrimage to Mecca & Medina if economically viable.

Islam



Shariat ≠ Law

||

Code of conduct.

||

way of life.



Pathway to heaven
(سبيل)

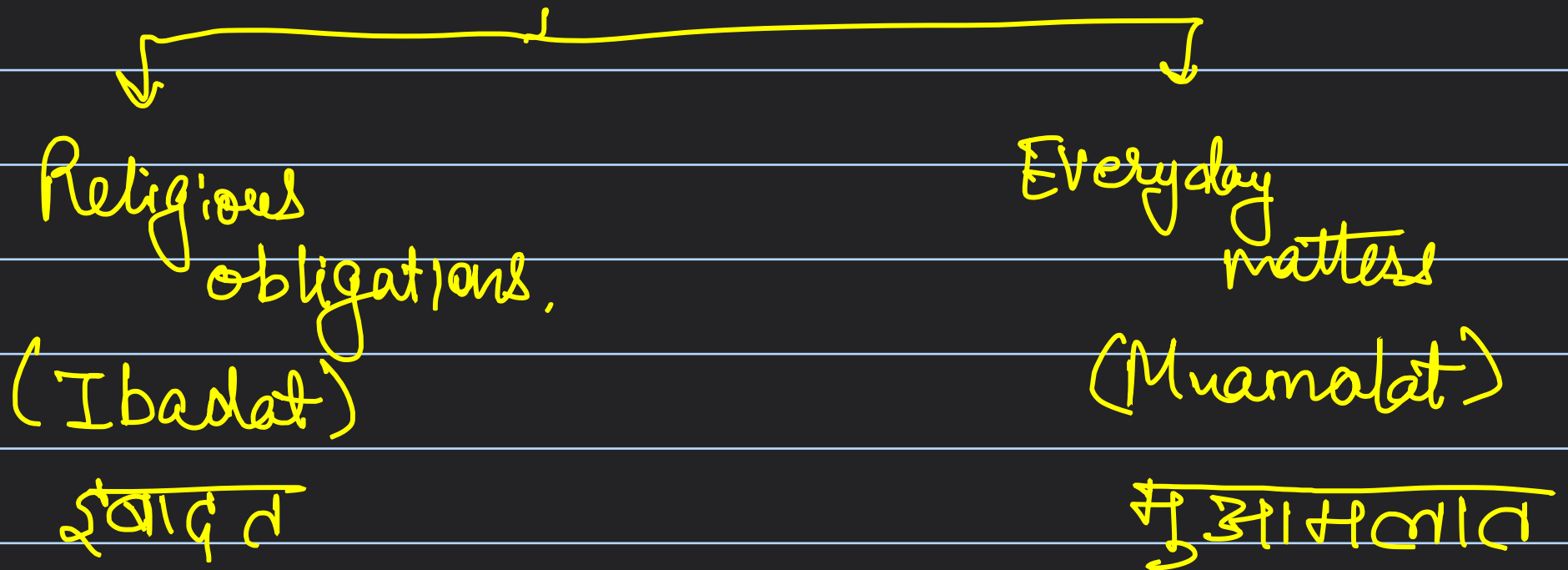
Shariat deals with morality, jurisprudence, economics, politics. related to Islam.

Shariat is also called Kanoon-e-Islami.

Shariat deal with law to some extent but it is not merely law.

Al-Sharia \Rightarrow All Shariat aspects were given by Allah. It is inform of verses called "Ayat"

Shariat



Example of Morality in Islam -

Zina → sexual intercourse without marriage
it is considered unlawful in
Islam.

A theological aspect associated with morality and punishment in Islam

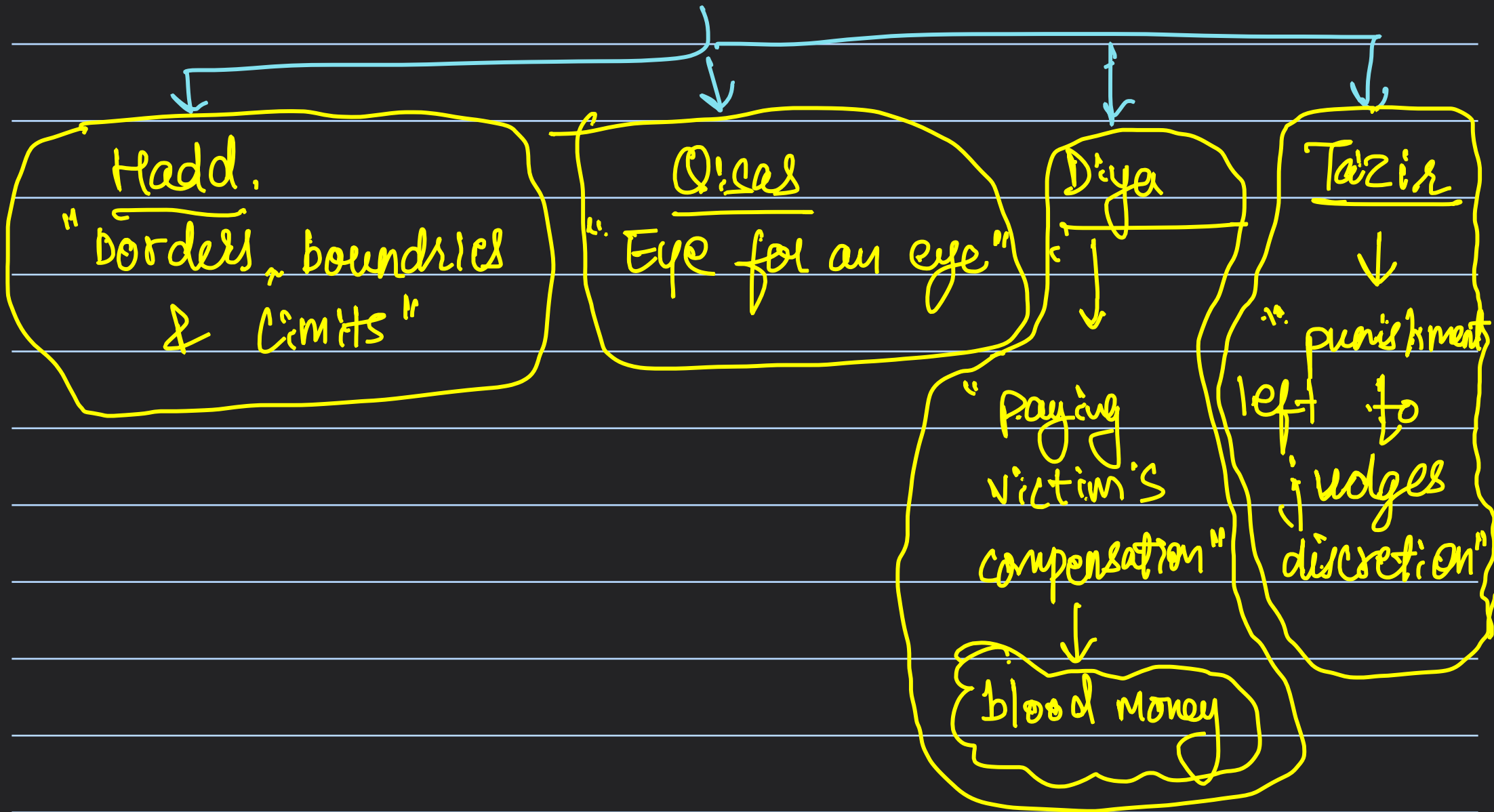


If anyone commits "Zina"



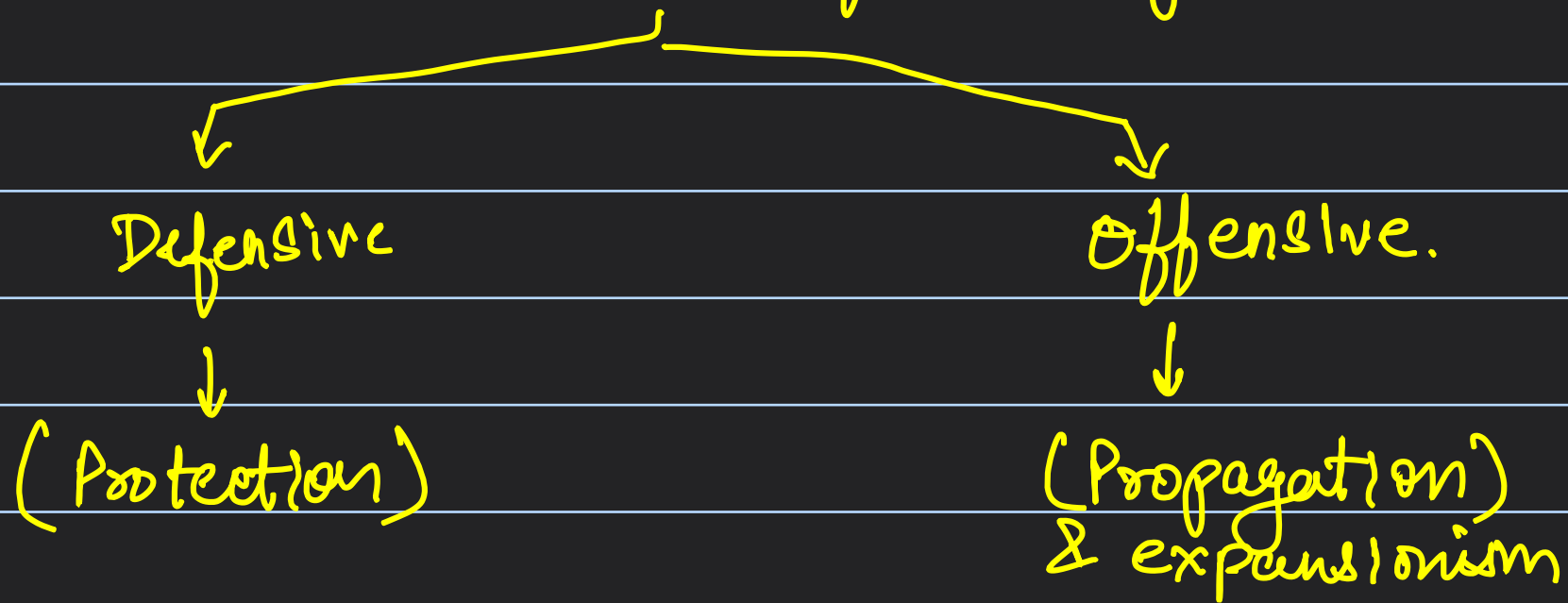
hershe shall not have right to live says Allah and shall be stoned to death. Zina is considered 'Haram' i.e. unacceptable to its core.

Types of punishment in Classical Islamic law



Military Jurisprudence

* Jihad. → A war for religion



* Christianity → Crusades

* Hinduism → Fights for Mahajanpads
(when Aryans came)

* Jews → Halaka
& Maccabean revolt

Hudna → a temporary pause between a war.

∴ Criminal & Military Jurisprudence is interwoven with theological morality

Marital Jurisprudence

Nikah = Marriage.



For the first time the concept of Nikah was something that separated marriage from divinity and made it more contractual in nature.

Talaq = Divorce.



Mubarat = Mutual consent was first progressive divorce in world.
(similar to 13B in HMA, 1955)

Mehar = Mark of respect & not money payable at divorce.

Ⓢ Dower

— Supreme Court in Shah Bano case.

Negativity about polygamy —

Islam allows upto 4 wives.

Prophet said to maintain all wives equally.

If Hindu Marriage Act, 1955 did not pass, Hindus could have infinite wives. Monogamy in Hinduism is due to codification.

A UCC is must for country like India.

Hajj - Tawaf is done i.e. movement around Kaba. in Mecca.

Eid -

There are 2 types of Eid.

→ Eid-ul-Fitr → fasting & purification

→ Eid-ul-Zuha (or) Eid-ul-Adha

↳ eid of sacrifice. (goat sacrifice)

↳ "to mark willingness of Prophet Ibrahim to sacrifice his son."

Economic Jurisprudence

Zakat → donate 2.5% of your earnings to welfare of poor.

Wakf → giving property in the name of Allah, while living or upon death. (Donation is wrong word for wakf)

Riba → You're not allowed to take interest
Followers do not do Fixed Deposits.

"Law of Inheritance"

One of the most advanced ways of inheritance in its time.

example - Elderly, woman, young all get a share.

→ No gender discrimination (males get a greater share but unlike Mitakshara women do get a share)

→ Old aging people should get a share as per Quranic interpretation.

"Dress Code"

Woman should be modestly dressed.
There is no mention of burka. Woman's exterior shall not appear.

Hijab = veil. covering head, chest and body.

Shariat says woman must be modestly dressed.

"Food"

Dhabiah →
also called
Zabihah

It is the prescribed method of slaughter for halal animals.

except sea animals which are exempted from this.

"Halal" ↓

Cut animals veins & arteries but keep spinal cord intact.

Prohibitions in dietary habits ↓

Disallowed

X

Eating Pigs.

(source of tapeworms)

X

Animal killed with blunt weapon

X

Animal that was already dead.

"Hygiene"

- Long nails prohibited.
- Mustache in males prohibited (food adheres to it while eating)
- Clean hands and legs before prayers.
- Circumcising of male offspring.
- Abstinence of sexual intercourse during time woman is menstruating.

Customs

- Use of right hand for eating
- Uttering "Bismillah" before eating.

→ Adab → means good manners.

Prophet says I abhor people who use improper language

" An Ayat reads -

The best among you are those who have the best manners, are clean and have high character"

Greeting - Salam Aleikum
(Peace be upon you)

← → Wa-alaikum Salam
(and peace be upon you too)

"speak Adhan in Right ear of a new born child"

With Shariat there are numerous guidelines that has multiple dimensions touching various aspects of life.

Lecture
1

"Sources of Muslim Law"

Fiqh → is the human understanding of
↳ "intelligence" Sharia.

it is Islamic jurisprudence.

When Quran or Sunna is silent on
a subject matter, a scholar (Faqih)
decides whether an action is good (white)
or immoral (black)

* White acts → Must do, its a sin if you omit
such act. eg - doing namaz 5 times
a day. ⇒ wajib (Fardh or Farz)

* Recommended acts → Good if you do it, no problem in case you omit.
eg - extra prayers.
↓

Mandub.

* Allowed / undecided acts → acts that are allowed or undecided. Left undecided and upto individual choice.

eg - eating more food than required
↓

Mubah

* Not recommended acts → shouldn't do,
but not the biggest form of sin.
eg- Not cutting nails. Not staying
clean and tidy.

⇓
Makruh

* "Black acts" → shouldn't be done at any
cost. example → Zina.

⇓
"Haram"

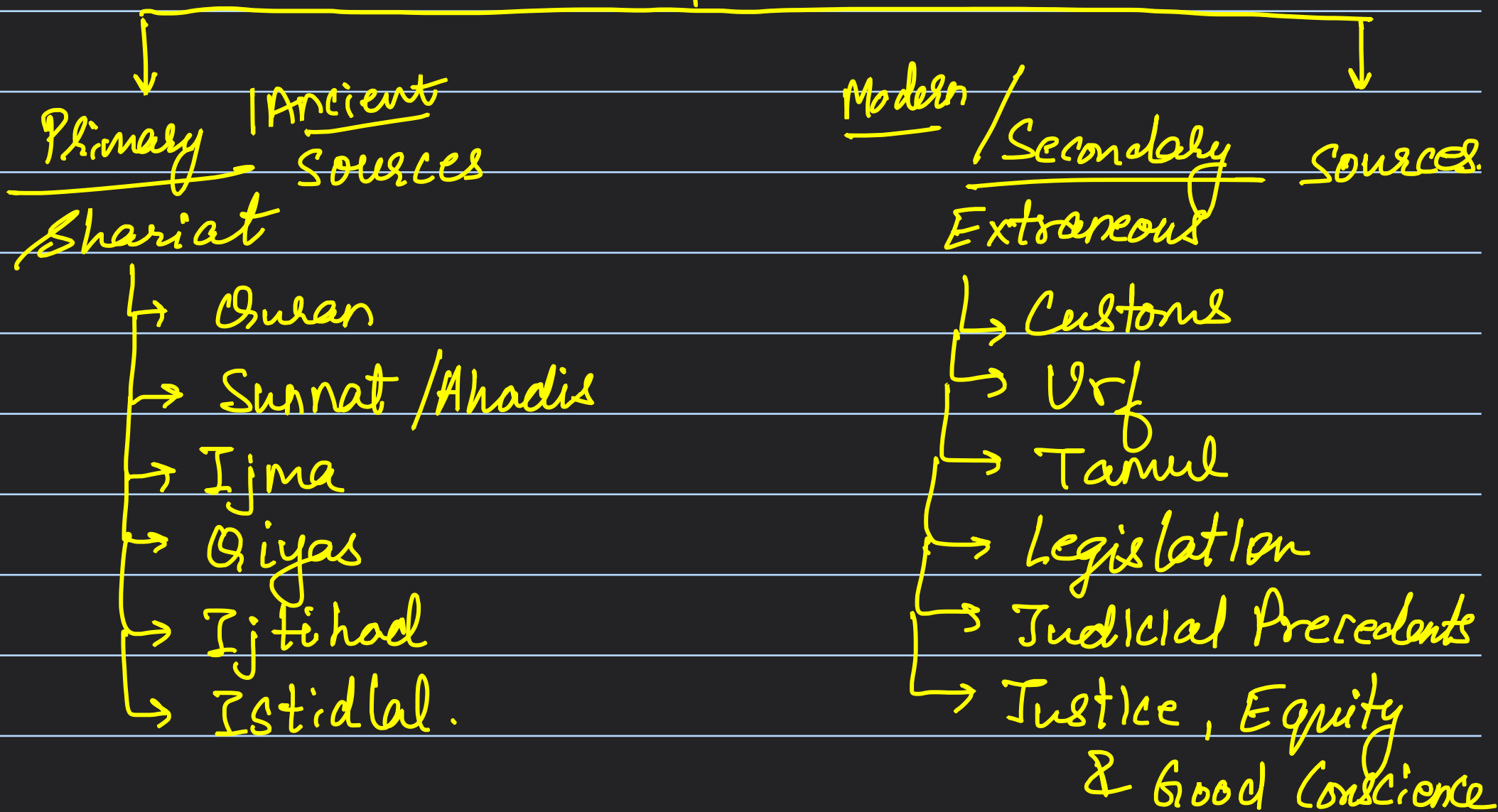
Ijtihad → is the human interpretation
of Sharia. The process of developing
a Fiqh.

Usul → Fiq that deals with ethos.
Roots of Muslim law.
Basic principles

Furu → Substantive law.
Injunctions.

eg- you will be stoned if you do
Zina.

Sources of Muslim Law



Q) Why don't we codify muslim law?

Ans) Basic source is direct word of Allah (Quran) and word of Chosen one (Sunna).

How can it be codified?

Quran

Quran (قرآن) Qoran (قران) Kuran (قر) Koran
is derived from Arabic word "Qura"
meaning "what ought to be read"

Quran came to the Prophet as revelations through angel Gabriel directly from Allah.

These prophecies came to Prophet as "Wahi". The first Wahi came to prophet in 609 A.D. These Wahi continued for 23 years.

These prophecies were taught to disciples as his preachings.

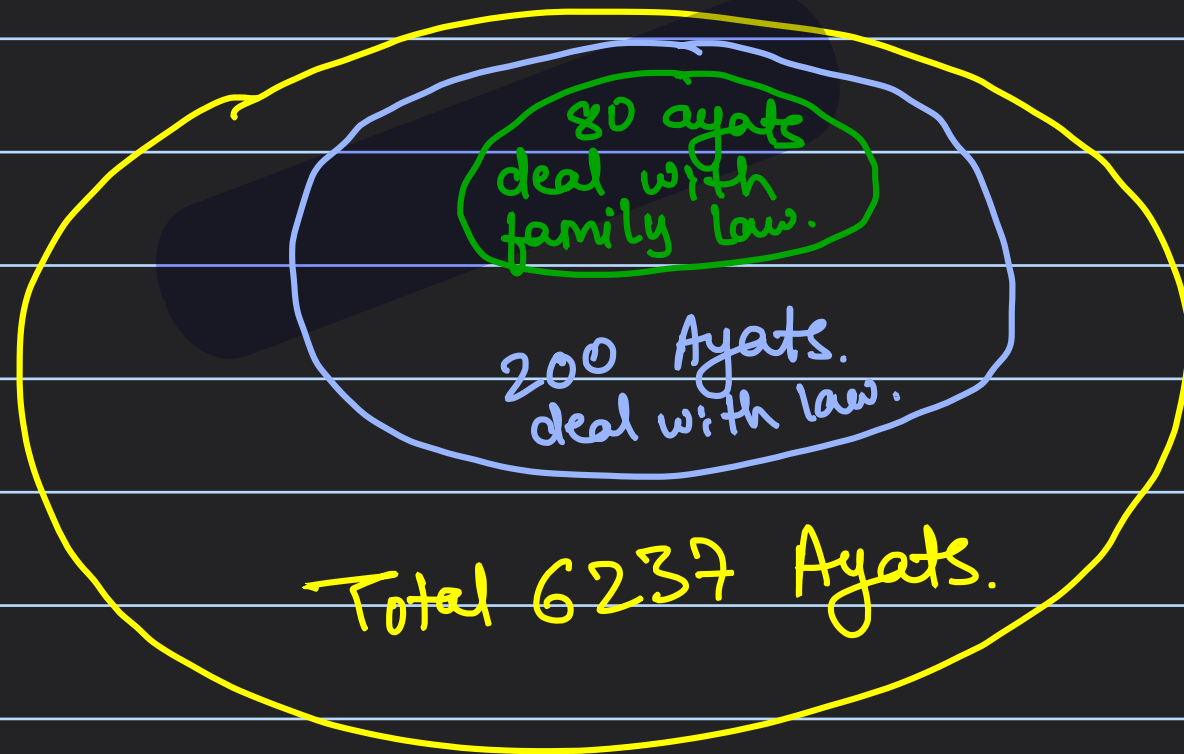
They were written in palm leaves, animal skin etc.

After Prophet's death, few attempts were done to compile all these preachings. The best being the one used even today and made during the time of third Caliph (Osman).

There are 6237 verses (also called as ayats) and there are 114 chapters (also called sura)

Chapter	Deals with.
Surah Al-Fatiha	God i.e. Allah
Surat un nisa	Woman
Surat ul noor	Rules regarding home life
Surat ul tolaq	Rules for divorce.

Out of total 6237 ayats. only 200 deal with law. Out of these 200 ayats only 80 deal with family law.



The Quranic revelations already existed
Quran is a code of conduct not a law.

It is a body of rules from which certain laws are derived.

In Hinduism Vedas eg- Rigvedas are meta-physical. On the other hand Quran is metaphysical as well as Muamlat. (Ibadat + Muamlat)

↓
daily practices.

Salient Features of Holy Quran —

→ It is of divine origin

→ It is believed that these were the words of Allah himself which were conveyed to the world by Prophet.

→ It is therefore unchangeable and its authority is uncontested.

→ It is described as "Al-furqan" meaning it reveals the truth from falsehood; the right from wrong.

→ It is fundamental source of muslim law and islamic jurisprudence. It is fountainhead of all muslim laws.

→ It is in form of verses called ayats

There are 6237 ayats in 114 chapters called Sura. It is systematically arranged topicwise replete with respective titles.

→ First Sura is in praise of Allah, that he is all just & righteous. He always shows right from wrong.

→ Each chapter deals with a specific topic. (see the table on page 70)

→ It is mixture of law, morality and conduct.

→ It is widely believed that part dealing

with conduct and law was revealed at Medina and part dealing with theology and pure religion were revealed at Mecca.

→ Religion, Morality and law are separable in some places and inseparable in most places.

→ Breakup

→ Ibadat + Muamalat

↓
makes it a day to day compedium of living an islamic life.

→ Various aspects of legal rules.

eg- removes social evils such as child infanticide, gambling etc.

→ Daily life rules interwoven with law.

eg- anyone commits Zina i.e. adultery, it is not only most detested but person committing it should be stoned to death.

↳ Typical example of mixture of law and morality.

→ Only 80 verses deal with family law therefore it lays basic principles but is not a complete code.

→ For some matters we need to dwell on other sources. (secondary sources).

→ Courts while applying law doesn't make its own construction and interpretations.



Case law — Aga Mohammad Jaffer

vs
Kulsum Bibi (1897) PC

Principle — Since Quranic law was straight

from words of Allah, it was not open to judge to construe it in any manner that is against the dictates of Quran.

"Sunna"

→ Sunna literally means "a path" or "a way of action"

→ From pre-islamic Arab world, had the concept of Sunna. It is Arab legacy to Islam.

→ In pre-islamic Arabia, the tribes had their own Sunna, Islam took this concept of Sunna and applied this concept to Prophet and later Caliphs.

→ Sunna can be a body of traditions coming from Prophet, from his companions, from successor of companions, theological leaders of companions.

→ The most important Sunna is one coming from household of Prophet.

→ Sunna consists of utterances, deeds, practices and even the silence of the Prophet.

Sometimes they were unspoken approvals for any course of conduct of Prophet

→ Since there is only one God and one chosen one, therefore Sunna of Prophet is divine.

→ Sunnat-ul-Qawliyah (or) Sunnat-ul-Qual is spoken word of Prophet.

→ Sunnat-ul-Filliyyah (or) Sunnat-ul-Fail is conduct or behavior of Prophet.

→ Sunnat-ul-Taqririyyah (or) Sunnat-ul-Taqrir is implied approval by silence for pre-Islamic customs and practices.

"Hadis" (or) "Hadith" (singular)

(or) "Ahadis" (plural)

Q) How is Sunna different from Hadith or Ahadis?

Ans) Hadis is occurrence or incidence or instance.

Sunna is rule of law derived from such occurrence

Q) How is Sunna different from Quran?

Ans) The Holy Quran contains the very word of Allah

The Sunna contains deeds, actions, approvals, disapprovals and practices followed by the Prophet.

Some Islamic scholars consider many Sunna as spurious.

List of accepted Sunnas that are approved widely —

(A) Considered credible and authentic by Sunnis.

(i) Sahih - al - Bukhari

(ii) Ibn - e - majah

(iii) Abu Dawud.

(iv) Tirmidhi

(v) Nasai

(vi) Sahih Muslim

⇒ Together called Kutub al -
Sittah.

i.e. the authentic six

(B) Considered reliable by Shias, who only trust word
of prophet and his blood —

(i) Al - Kafi

(ii) Tahdib - ul - Ahkam

"Quran + Sunna of Prophet"



these two are unchallengable
in all schools of Muslim.

"Traditions" have order of priority and
importance as follows —

- (i) Companions
- (ii) Successors of companions.
- (iii) Successor of successors.

Traditions —

- (i) Ahadis-i-Mutwatih (universally accepted)
- (ii) Ahadis-i-Mashoor (popular traditions narrated by companions; majority or mass acceptance except a few like Shias)
- (iii) Ahadis-i-Ahad (localised acceptance)

⇒ Traditions → passed from generations

↓
not written anywhere initially

↓
"Muwatta" was first systematic compendium of traditions that was written.

→ Traditions -

Shias - follow traditions that come from Prophet's household. ⇔ Ahl al-Bayt.

Sunnis - follow traditions of all of the following:
Caliph + successors + successor of successors
① ② ③

"Ijma"

"Ijma" means "opinion of the learned."



"Consensus of the jurists"

Ijma is derived ultimately from Sunna.

There's a saying in Urdu - "دُنیا - کہ - جُبان
سُدا - کہ - جُبان"
↓

"what the world says is what the God
says"

"Qibla & Sunna look to the past
Ijma & Qi:yas look to the future of Islamic

"Jurisprudence"

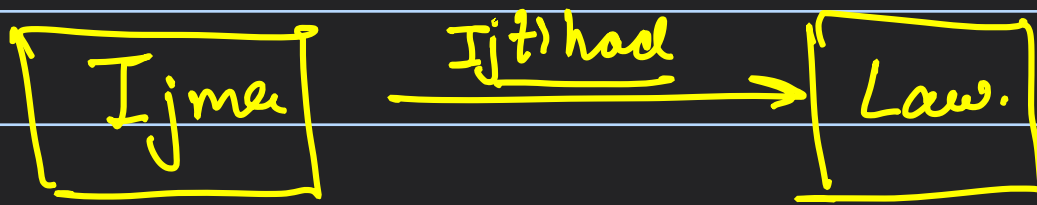
— Asaf Ali Asghar Fyzee.

A famous Islamic jurist from India.

Ijma is applied where there is no reference in Quran & Sunna or there is only an implied reference and needs to be clarified.

Foundation of Islamic law is Quran and Sunna
Ijma is a superstructure built on that foundation.

The process of making law from "Ijma" is called Ijtihad.



Islamic Jurists are called "Mujtahids"

Criteria to be a Mujtahid —

- ① Knowledge of Quran
- ② Knowledge of Sunna of Prophet

Ijma is not creation of law out of Islam.

Who's Ijma will be most authoritative —

- ① Ijma of the Companions. (because they were contemporaries of the Prophet)

② Ijma of the founders of the subschools.

③ Modern day jurists (learned scholars)

(See here "Fiqh" i.e. the human understanding of Sharia developed largely from Ijma)

Ijma has played a huge role in applicability of Holy Quran, and to cope with the growth and progress of Islamic society.

Quran and Sunna of Prophet are static

However, Ijma is not static and it played vital role in development of Islamic law by allowing flexibility and dynamicism.

When companions and founders of subschools deceased, the later jurists were not considered as much reliable in their interpretations.

After 10th century therefore Ijma was abandoned.

Ijma is a huge source of Islamic law only based on conditions that they come from — respectable, authoritative and most widely acceptable jurists.

"Qiyas"

Qiya is arabic word means "to measure"
meaning "to draw an analogy".

Qiyas therefore means analogical deductions.

One Hadith of the Prophet goes as follows -

Chief Justice of Yemen was to be appointed

Prophet was interviewing a person called
"Mouad" for this appointment.

Prophet asked what will you base your
decisions on?

Mouad replied - The holy Quran

Prophet said "if you don't find the reason there, then?"

Mouad replied - the on your Sunna.

Prophet asked "if you even don't find the decision making logic there, then?"

Mouad replied to this saying "then I will depend on my own reasoning".

Many Jurists later questioned the validity of Qiyas as a source of law. They contended how can one rely on other's reasoning and judgement?

Therefore many subschools do not recognize "Qiyas" and outright reject it.

Example - Shia subschool reject Qiyas.

They believe rule of Islam can come only from Imams apart from Allah and Prophet.

"Qiyas" lies low in the hierarchy of reliability

Quran
Sunna of Prophet > Ijma > Qiyas.
(J, E, GC)

Human reasoning can be wrong, therefore Qiyas is a weak source of Muslim law.

Abdul Rahim a jurist defines Qiyas as follows -

"Qiyas is a process of deduction by which law of a text is applied to cases though not covered by their language are governed by the reason of their text."

"Customs"

also called "Urf" or "Taamul"

When role of customs is personal law is called.
write about all personal laws.

↳ Hindus.

↳ Muslim.

Customary law is more effect than the legislative law. This is because customary law is widely accepted. law.

Customary law has universal acceptability, In customary law the society gives punishment in case of infringement. On the other hand in legislative law, legislation gives the punishment.

Customs are so much important as a law that it is even recognised by our constitution in article 13 (see here)

Hindu law



heavily relies on customary laws.



Criteria -

reasonable, continuous, ancient
certain,

not against constitution

not immoral,

Muslim law



relies more on Quranic & Hadith based laws rather than customs



How can customs go above the word of Allah?

PC Judgement

Hindu Law

Muslim Law

Collector of Machurai vs Mutoo Ramalingam (1868) PC.

Roshan Ali vs Ashgar Ali (1929) PC



Held - customs in muslim

law overrides sacred law.



Mohd. ISmail vs Sheo Mukh (1913) PC

Abdul vs Sona (1913) PC

Held - Custom overrides sacred law.

In Islam Custom is more important than Quran?

Hindu law case was acceptable but the
these muslim law precedents were unaccepta-
-ble.

Converted Muslims example - Hindu converted
to Islam.



Followed ^{hindu} customary laws for → division of land
Succession.

followed islamic customary law for example for
polygamy.

They applied both customary laws.
PC accepted this because according to above precedents customary laws overrides sacred law.

Muslims were angry with this — "How can you allow customs to override word of God?"

(There was also Khilafat movement going on.)



The British passed Shariat Act as a result of this.

Shariat Act laid that no customs can override 10 basic things of Islam.

Things common to all jurists of Islam:-

All recognize ① Quran ② Sunna ③ Ijma & ④ Qiyas
There's no role of customs in Islam
Customs are important in Hindu law.

Prophet did not repeal the customs of pre-Islamic Arabia.

He retained all pre-Islamic Arabic customs that were not in derogation with Islam.

Many jurists say that pre-islamic Arabic customary laws must be retained if they're good and not in contradiction with muslim law.

All jurists agree that customs actually supplement the sacred law.

Which custom shall be allowed to be retained? The evil customs that are immoral as per islam are rejected outright.

Only customs that are in line with the holy Quran are acceptable.

Who will decide whether a custom is in accordance with Quran and Prophet's Sunna?

↳ "Ijma" plays a crucial role in deciding whether a custom shall prevail.

Countries like Arabia, Iraq, etc. allow local customs provided they do not contradict Holy Quran.

Most Islamic countries have codified law and do recognize customs.

Ottoman Empire had "Ottoman Code." as their law, it also laid that if custom is authoritative, its public use is conclusive then it can be treated as a customary law.

Four conditions for muslim customs to be acceptable. Unanimously agreed by all jurist, including Fyree, Abdur Rahim etc.

4 conditions -

- ① Custom must be continuous and certain
- ② it must be universal
- ③ Should be reasonable
- ④ Shouldn't be against Holy Quran & Sunna of

the Prophet.

Q) Does customs in Islam need to be ancient?

Ans) Abdus Rohim says, Muslim law is relatively new law, therefore even if the origin of a custom is in living memory, it must not be disallowed.

Customs in Hindus and Muslims differ on this ground, where Hindu customs are expected to be ancient.

The three judgements of PC stated above were unpalatable to all traditionalist Muslims.

The Britishers had to pass Shariat Act, 1937.
The 1937 Shariat Act abolished most of the
Customs.

Shariat Act, 1937 Section (2) ↘

The following section shall be substituted, namely:

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

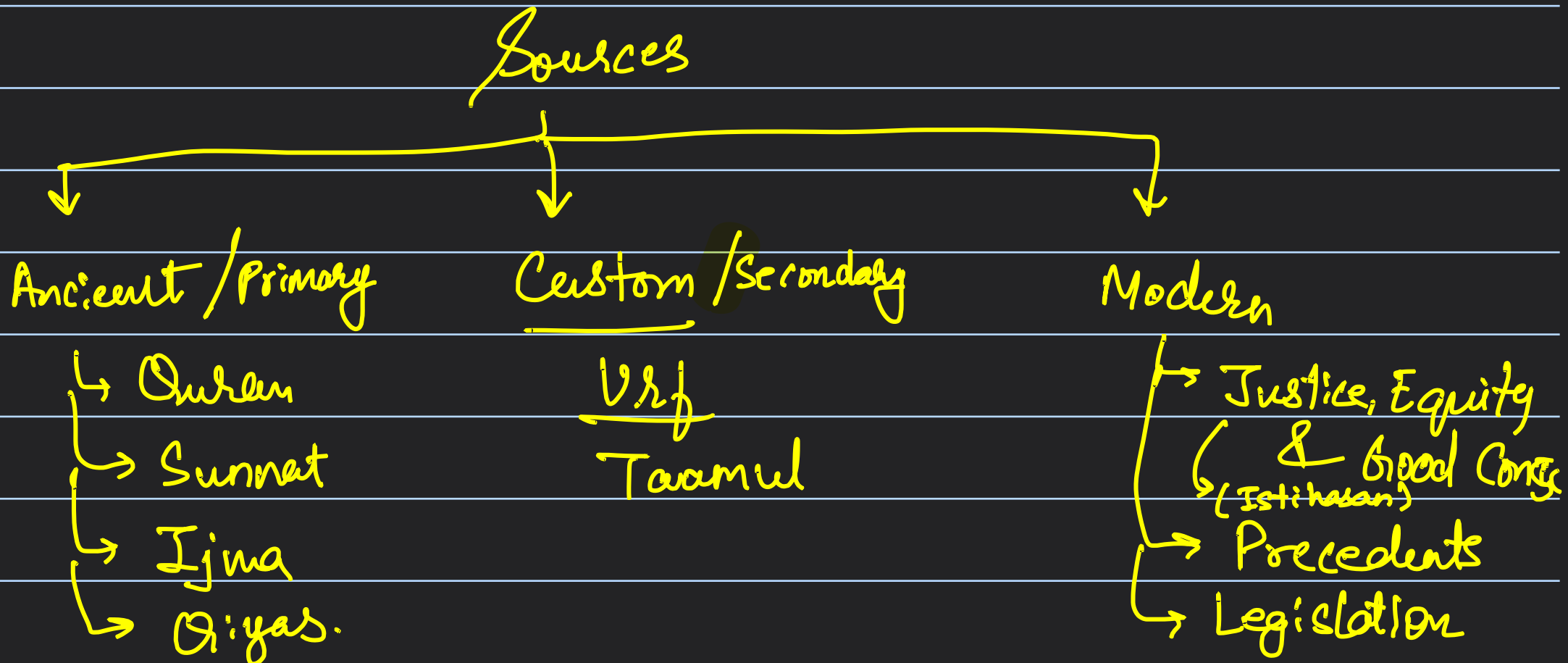
[Vide Kerala Act 42 of 1963, s. 3.]



No customs or usages applicable for these 10 cases
underlined. Only Shariat codified law applicable here.

Only 'wills', 'adoptions' and 'legacies' allow customs.

Sheriat Act was not applicable in J&K until 2007. Before 2007 J&K's muslim personal law relied only on customs & usages.



Justice, Equity and Good Conscience is inherent in all personal laws.

Hindu law, Christian law, Muslim law all have the spirit of Justice, Equity and Good Conscience.

J, E, GC is not a concept that was gifted to Indian subcontinent by the Crown. It was always there in form of value system of Hindu as well as Muslim personal law.

When there were no specific rules to guide the court, the court applied J, E, & G.C.



Case law: - Aziz Bano (VS) Mohammad (1925)
Allahabad HC.

→ "When there's nothing to guide the court, the court should be guided by what Allah has said, your Godly spirit and since Allah is Just. You should always land up following J, E & G.C."

Istihason is the islamic word for J, E & G.C

"Precedents"

Precedents have never been a very important part of muslim law.

Judges were normally Kazis (or) Quazis.

Precedents in muslim law are not the Judicial Precedents as found in English common law.

Many orders are given in form of Fatwas. Fatwas are not source of law.

There are many important 'Fatwas'.

One most important 'fatwa' which has gone long way is 'Fatwa' of Aurangzeb that has helped clarifying and improving Muslim law.

Aurangzeb's treatise is one of the biggest source of Sunni Law. This treatise was known as Fatwa-i-Alamgiri.

There are many treatise on fatwa but most commonly cited are "Fatwa-i-Alamgiri" and "Hedaya"

Precedents in muslim law is not same as Judicial Precedents in common law.

"Legislation"

Legislation is very difficult in Islam because the basic doctrine is that the word of God i.e. Allah is the law.

The first law that effected the muslim law was Shariat Act, 1937.

British did not interfere with personal laws of any community.

There were many enactments in Hindu law example - law to prevent Sati.

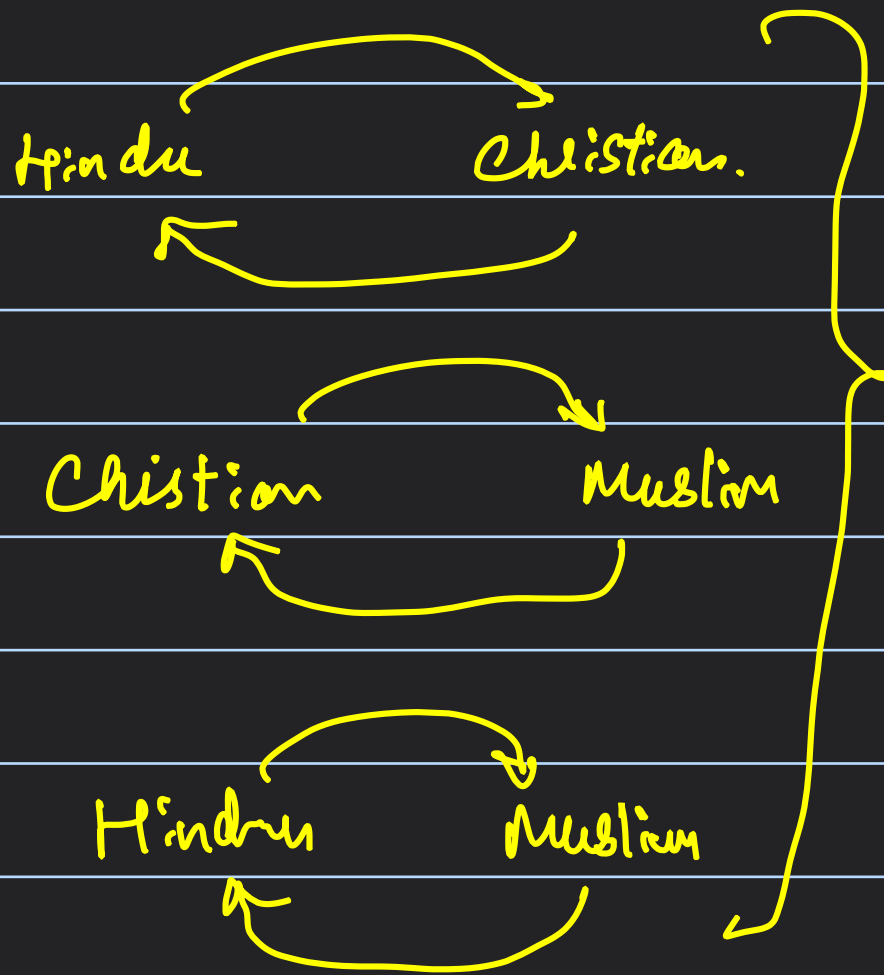
Hindu enactments were social reformist laws.

Law regarding muslim law did not exist.

Acts Affecting Muslim law —

① Caste Disability Removal Act —

conversion from one religion to another preserved the rights before conversion.



CASTE DISABILITY

REMOVAL ACT



Preserved rights before
conversion

② Indian Evidence Act, 1872 —

Concept of legitimacy in section 112.
Child born even on next day of marriage

was legitimate child as per IEA, 1872.

This was in contrast to muslim law which required minimum 6 months.

③ Indian Majority Act, 1875 —

As per IMA, 1875 majority was attained at age 18 years.

Muslim law considered age of puberty as age of majority.

④ Child Marriage Restraint Act, 1929 —

In Shia law age of puberty was the age at which marriage was allowed.

In Hanafi law valid age to marry was 15 years

CMRA, 1929 used age of majority from IMA, 1872 i.e. 18 years as age of valid marriage.

Even today there is a tug of war between the Prohibition of Child Marriage Act, 2006 and Hindu law. Hindu law is amended to be in line with PoCM Act. However, Muslim law is not amended.

PoCM, 2006 is a secular law.

age 21 male. } valid marriage age.
age 18 female }

④ Special Marriage Act →

Muslim solemnising marriage as per SMA. SMA related provisions will apply to such marriage which are in variance with Muslim law.

~ 25 years ago educated Muslim girls started preferring SMA over Nikah, to bypass polygamy by husband. To such family all provisions of SMA applied which was a secular law.

In Muslim law due to these challenges it is always difficult to apply legislation.

Mussalman Wakf Validating Act, 1913

Muslim Personal Law (Shariat) Application Act, 1937

Dissolution of Muslim Marriages Act, 1939

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

 Waqf Act, 1995

Waqf (Amendment) Act, 2013

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

Legislations in Muslim Law -

Case Law - Abul Fata Mohd. Ishak (vs) Russomoy Dhar

1894) Chowdhury

There was uproar regarding family Wakf's declared illegal in this judgement of Privy Council

↳ Muslim Wakf Validating Act, 1913 was passed to fix the erroneous PC judgement.

⇒ Converted Muslims (or) Muslim converts used Muslim customs partially which was disliked

by conservationists in Muslim society.

↳ after long dilly dallying over this matter, the decided to appease Muslims in 1937 by passing Shariat Application Act in line with divide and rule policy.

⇒ Should Britishers be given credit for any Muslim legislation passed by them in good faith without any personal agenda?

↳ Yes!

Dissolution of Muslim Marriage Act, 1939.

⇒ This was good enactment. It did not bring any new ground for divorce. However, they crystallized every ground properly to make divorce in Muslims a codified enactment.

⇒ Certain parts of Shariat Act is not in consonance with our constitution especially right to equality and right to life.

This leads to a constant tug of war between secularists and advocates of muslim law.

Case law - ① Mohd. Ahmed Khan (vs) Shah Bano Begum (1985) SC

Secular law of CrP.C. (Sec 125) was used by respondent to claim maintenance. Conservative Muslims saw it as attack on Shariat.

② Sorla Mudgal vs UOI (1995) SC
↳ Conversion for polygamy legal?

③ Lily Thomas vs UOI (2000) SC
↳ Prosecution of a Hindu converted to Islam on his contracting second marriage doesn't violate freedom of religion

④ Daniel Latifi & Anr vs UOI (2001)

- on of future of divorced wife; even beyond iddat period.
↳ Muslim husband must make reasonable & fair provision

⑤ Shebnam Hashmi vs UOI (2014) SC

↳ Right of a Muslim to Adopt a Child.

⑥ Shayara Bano vs UOI (Triple Talak case)
↳ Talak-e-biddat declared void and SC asked
legislation to make a law to criminalise
talak-e-biddat.

Article 44 DPSP ⇒ UCC

↳ Shah Bano } SC has recognised the
↳ Sarla Mudgal } need of UCC.

RULES FOR INTERPRETATION OF MUSLIM LAW-

While administering Muslim law, the court
shall not put its own construction on the

Holy Quran, in contradiction to the rulings of the commentators on Islam.

① \Rightarrow If the old jurists of Islam has given an express ruling court should not give its own construction over it. which is in contraention to the old express rulings.

② \Rightarrow where both schools of muslim law are equivocal, court must not give its own separate interpretation or ruling.

\hookrightarrow Case law - Aga Mohd. Jaffer

(vs)

Kulsum Bibi (1895) PC.

② ⇒ No court should juxtapose legal jurisprudence (common law or roman law) over any aspect given in Quran.

④ ⇒ Court must not deduce new rule of laws from Holy Quran. Already many Ijmas and Qiyas exist. Every line of Quran is already interpreted over the years by many jurists

↳ Case law: - Bagar Ali (vs) Anjuman
(1982) Allahabad HC.

⑤ ⇒ Do we have to follow Islamic texts blindly?

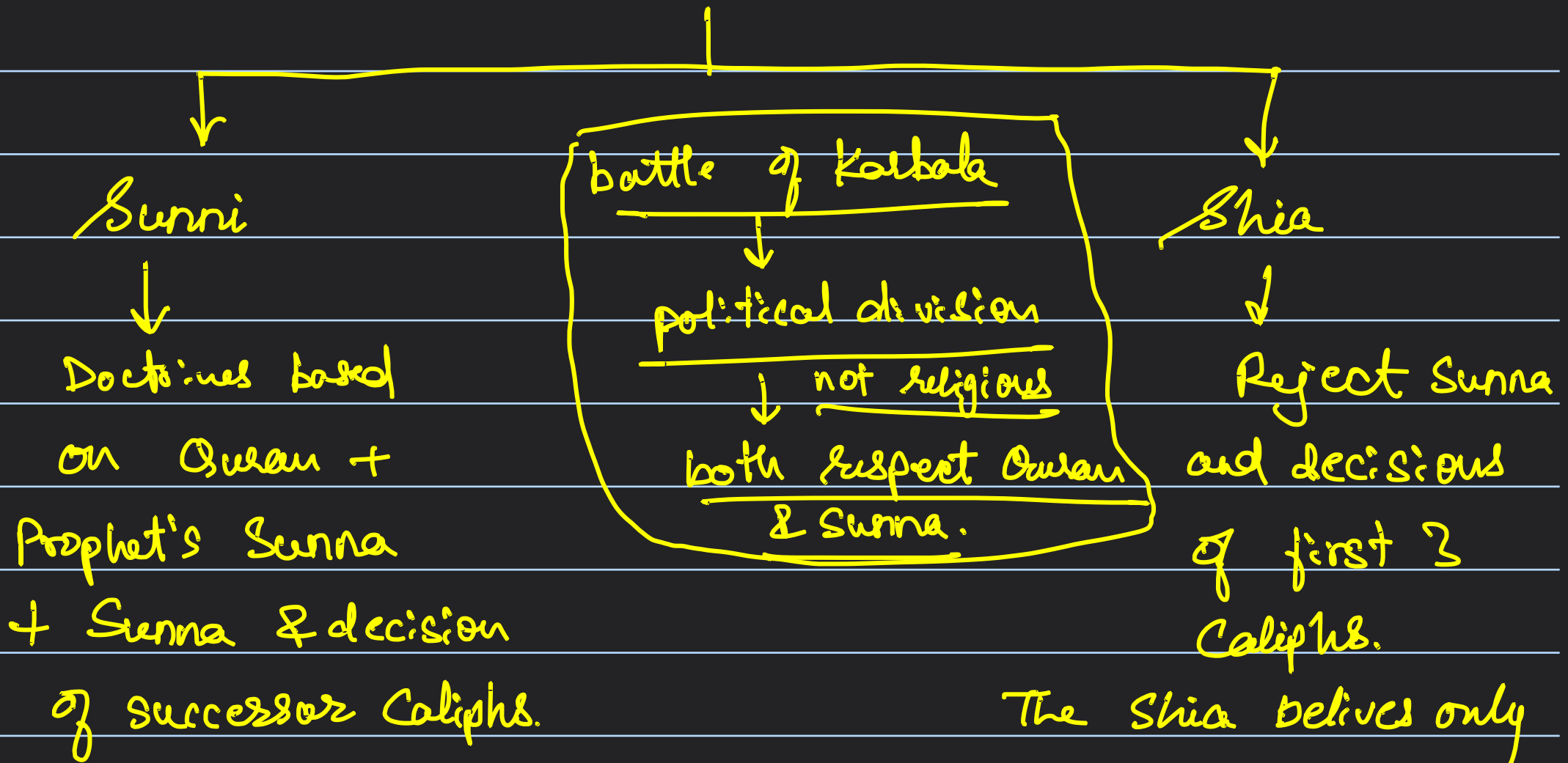
↳ Case law:- Ashraf ali vs Mohd. Ali

Held - Muslim Jurisprudence is not static.

Justice is to be delivered without going against Quranic reading and understanding of Islam.

Modern courts will be tempted to apply principles of modernity which is unsuitable for Muslim law.

School or Subschools of Muslim Law.



The Shia believes only in principles emanating from prophet's household.

Subschools of Shias & Sunnis.

Sunni School

- Hanafi (Abu Hanifa)
- Maliki (Malik - Ibn Anas)
- Shaafi (Shaafi)
- Hanbali (Hanbal)

Shia School

- Ithna Asharia
- Ismailis
 - Khojas
 - Bohras.
- Zaidys.

Sunni Schools

- ① Hanafi - majority sunnis in India. Progressive, Qiyas is recognised. Fatwa-i- Alauddin & Hedaya were used by Qazis in India to interpret law in Hanafi School in India.

Caselaw - Baqatun (vs) Bilaiti Khanum (1903)
Calcutta HC.

Principle - most Indian Muslims are Sunnis that too
of Hanafi subschool.

② Maliki - similar to Hanafi. They also rely on
systematic reasoning. Liberal.

③ Shaaafi - Depend more on Ijma.

④ Hanbali - relied on Hadith. incidents of prophets.
Almost extinct. school

Snia schools -

① Ithna Ashari -

Majority Shia in India are Ithna Ashari. The follow text called Sharaya-ul-Islam.

Caselaw - Akbar Ali (vs) Mohd. Ali (1932)
Bombay HC.

Principle - Indian Shia Muslims are governed by Ithna Ashari Law.

② Ismailis → Khojas
→ Boharas.

③ Zaidys - not found in India. They are found in Saudi Arabia.

Change of School Possible?

Case law -

Hayat-un-Nissa (vs) Mohd. PC

Held - A muslim may renounce one school in favour of another.

Does marriage change the school?

Case law -

Nasrat (vs) Hanidan (1882) Allahabad HC.

Held - Muslim marriage doesn't change school of husband or wife.
(a) same sub school → that school applies.

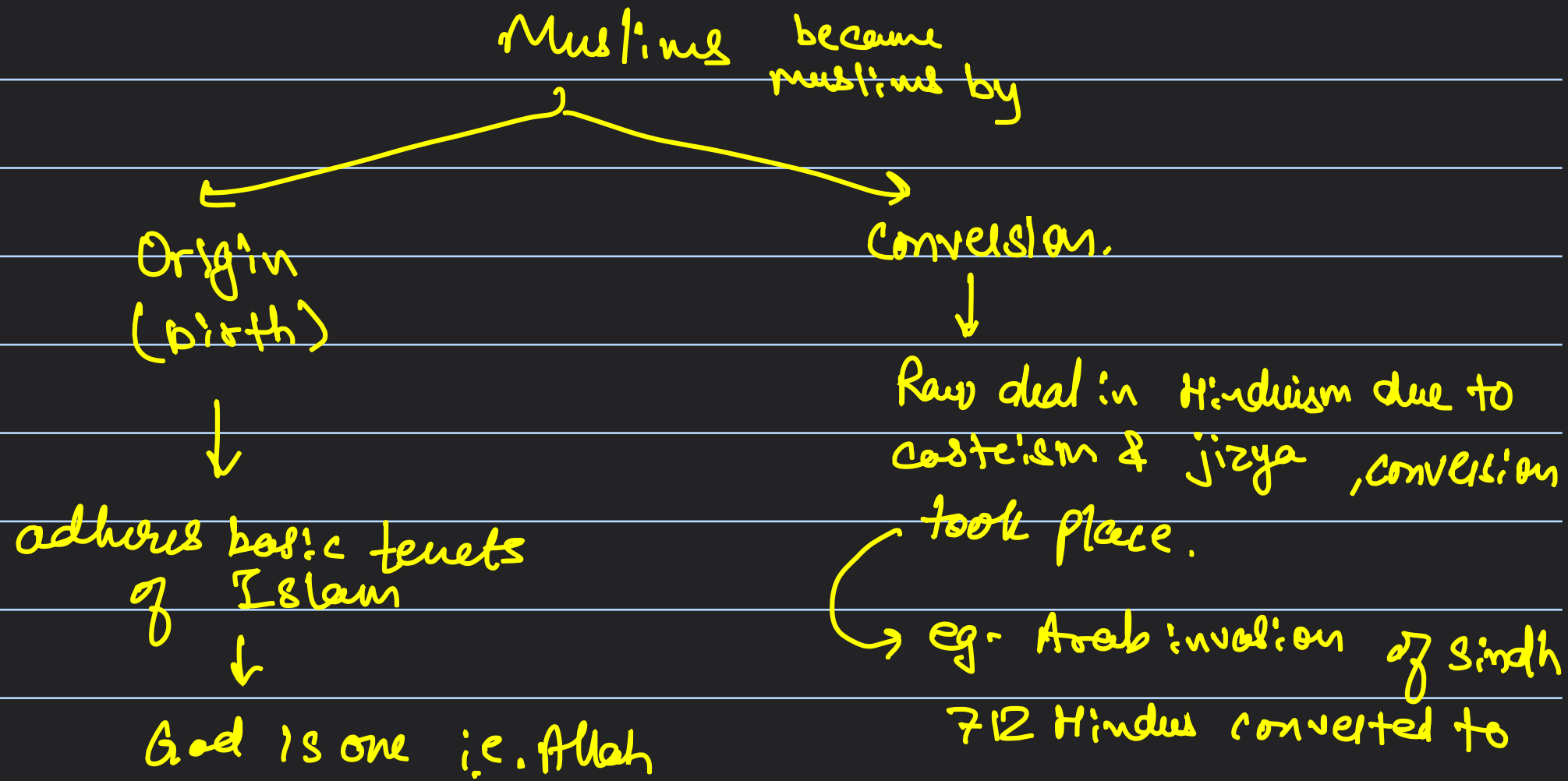
(b) if different subschools in a suit, the law of subschool of defendant will apply.

(c) Conversion from one school to another in good faith, that come into effect immediately

(d) Person dies in one school, and legal heirs have adopted another school. In this case school of deceased will apply

Who is a Muslim?

Hindus have -ve definition (those who are not muslim, jew, farsi etc.). Definition of Hindu is not straightforward.



His prophet is Mohamamad.



acceptance of Kalma
become important

Islam. They became Khojas

⇒ only criteria for conversion.

go to mosque, read a Kalma,

you get a new name, name
added to a register and sign is done in front



one needs to follow the tenets
of Islam to be called a muslim.



Syed Ameer Ali & Neil Baillie.

and many other jurists accept that
even if child is raised as muslim,
he/she is a muslim

old rule - one takes father's religion.
this rule is now obsolete.

In India most conversions are "malafide" to follow the custom of polygamy.

Precedents on "Malafide conversions are invalid" —

① Skinner vs Orde (1871)

Christian lady & man \Rightarrow live-in relation.

were unable to marry as Christians.

They were actually Hindus converted to Christians.

were unable to marry as Christians so decided to convert to Islam.

It was a fraud upon law.

Such conversion is fraud on religion.
or fraud on society. Not valid conversion.

② In Re Ram Kumari (1891) Calcutta HC.

Ram Kumari a Hindu married woman who wanted to get rid of her husband. She adopted Islam assuming this will automatically dissolve her marriage.

After adopting Islam, she married again thinking her first marriage was no longer valid.

She was prosecuted and held guilty for bigamy.

③ Rakeyabibi vs Anil Kumar (1948)
Calcutta HC.

When conversion is a mock conversion, it is a fraud upon law. When any conversion is used to prejudice anyone else's right, it is not proper for a court to give it a legal colour.

Here too a woman converted to Islam to get rid of her husband while she was Hindu earlier

Apostasy does not invalidate a marriage

④ Resham Bibi vs Khuda Bakhsh (1938)
Lahore HC.

Muslim wife's apostasy dissolves her marriage?

List of all above cases \Rightarrow you cannot use religion to play fraud on anyone's rights.

⑤ Sarla Mudgal vs UOI (1995) SC.

Review taken up in

\rightarrow ⑥ Lily Thomas vs UOI (2000) SC.

Some Privy Council Judgements stating that upon conversion from one religion to another, one may renounce old personal law (or) may continue with old law along with new law.



Path breaking landmark Judgements

⇒ Abraham (vs) Abraham (1863) PC

⇒ Mohd. Ismail (vs) Lal Shromukh (1912) PC

Lecture on Shariat Act

⇒ Collector of Madurai (vs) Mutoo Ramalingam
(1868) Privy Council.

Privy Council judgements created huge
controversy —

(A) Custom overrides sacred law

(B) The converts were allowed to follow
both laws before and after conversion.

Britishers even went to extent to pass laws that governed a converted person by both old & new customary laws.

Laws that allowed this to happen —

- ① The Bombay Regulation 1827
- ② Madras Civil Courts Act 1873.
- ③ Oudh Laws Act 1875
- ④ The Punjab Law Act 1872.
- ⑤ The Central Provinces Laws Act 1875
- ⑥ Ajmer Laws Regulation Act 1877.

Converts started following customs (old and new) as per their liking.

This was detested by conservatives.

There was huge discontent due to this.

Initially the Britishers were ignorant of this. However, later due to revolts taking place from time to time in various places, they realised, that it will be suicidal to have Britishers against them.

Divide and rule was their only way of survival.

It was more of a political move of Britishers to pass the "Shariat Application Act" 1937.

Shariat Application Act, 1937

Muslims by birth were already following Sharia. However, converts were following different customs (old & new).

Shariat Application Act, 1937 brought about uniformity in Muslim customary laws for both Muslims by birth & converts. Thereby bringing them under one umbrella.

Muslim Personal Law (Shariat) Application Act, 1937

10 matters mandatory

Section 2

- ① Intestate Succession
- ② Special Property of Females
- ③ marriage
- ④ dissolution marriage
 - talaq
 - ila
 - zihar
 - lian
 - khula
 - mubarat
- ⑤ maintenance
- ⑥ Dowry
- ⑦ Guardianship.
- ⑧ Gifts (Hiba)
- ⑨ trust & trust properties

2 matter discretionary

Section 3

- ① Adoptions
- ② Wills
- ③ Legacies.

⑩ wakfs.

Is Shariat Act Retrospective?

C. Mohd. Yunus (vs) Syedunissa (1962) SC

Yes it is retrospective.

Since it was applicable on pending suits, the intention of legislature appears to be applied retrospectively.

Effects of 1937 Shariat Act —

① Customs got repealed

② Provides statutory recognition to the rule of Islam.

Muslim Converts in India —

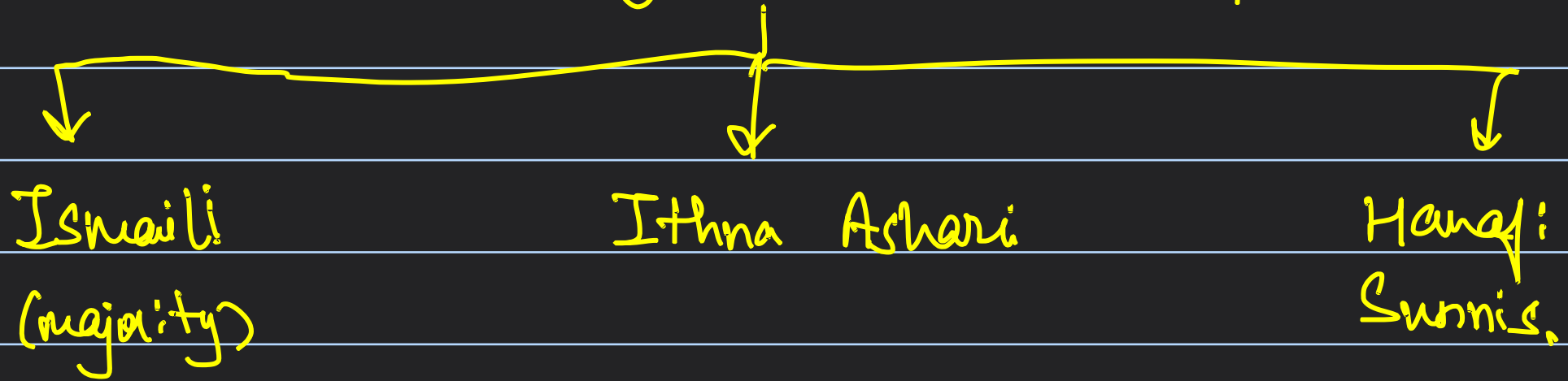
① Khojas

History of Khojas —

They were originally Sindhus living in Kutch. On Arab invasion of Sindh, en-masse conversions took place. Their king, Aga Khan at the time is considered head of Khojas. He is also called Hazar - Imam

They have a religious book called Desavatas that has several Hindu elements.

- Khojas in India Today



② Bohras

History of Bohras -

They were initially Hindus and presently they're all Ismailis. There are a few Sunni Bohras too, but mostly are Ismailis. They are mostly

present in Gujarat. They are among most richest traders. They are there in Bombay & Gujarat.

Their Holy book is known as "Da'a'im al-Islam" (The pillars of Islam).

All the aspects of Bohras are covered by Shariat now.

② Memons

Demography & History →

They were also originally Hindus. Prominent memons include Malai Memons found mostly in

Mumbai now delays, they are also in Porbandar, Kathiawad etc. Kutchi Memons are found in region of Gulf of Kutch in Gujarat.

Before 1920, they relied on Hindu law of succession and Muslim law in other matters. However, Cutchi Memon Act, 1920 was passed which made them follow Islam in all matters. However, this was kept discretionary for them. Later Shariat Act 1937 brought them under umbrella of Islamic Jurisprudence. Later, Cutchi Memons Act, 1938 made it clear that they will now be governed by

Muslim law of succession.

④ Mapillas

History of Mapillas -

Mapillas played a crucial role in Freedom struggle. They are found in South India.

Mupilla Rebellion or

can skip for exams

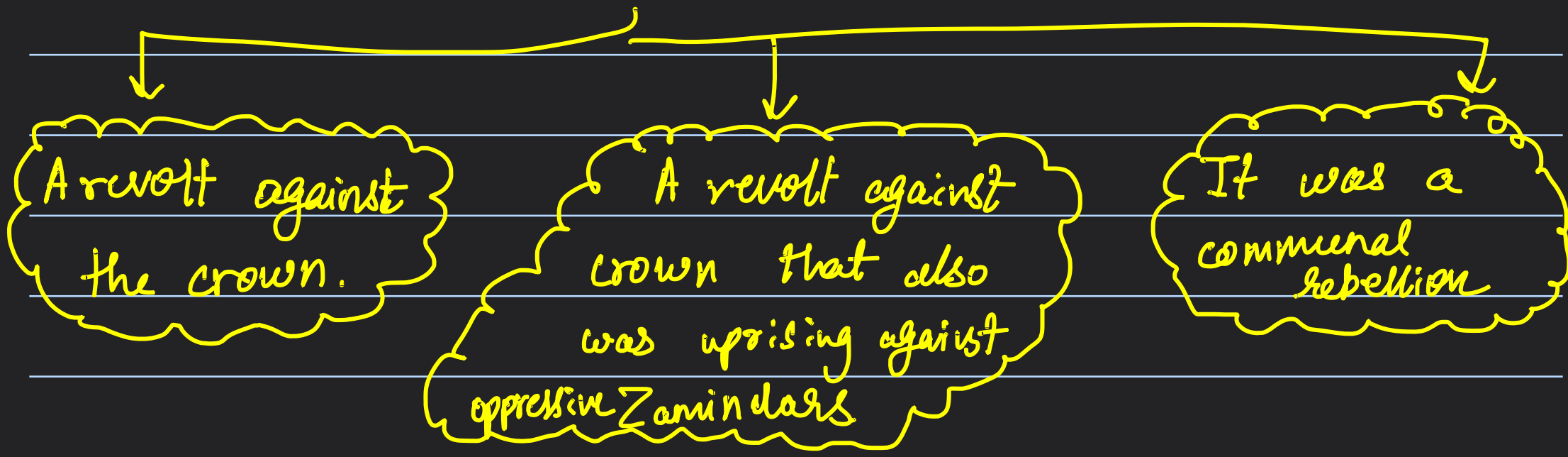
Moplah Rebellion

Historians, based on their ideology have divided opinion on this rebellion.

Moplah Rebellion was an extension of Khilafat movement.

It was initially supported by ~MK Gandhi, Shaukat Ali, Hasrat Mohani, Abdul Kalam Azad etc. However, all rebellion turned into communal riots, these figures distanced themselves from this rebellion.

Diverse Opinions of Historians on Moplah Rebellion



Arab traders came to Kerala in 7th century. These Arab traders were located in Coastal area. They permanently settled in India and married local women.

Therefore they were called Mupilla.

മുപ്പിൾ = Son in law
in Malayalam

During Mupilla rebellion what started as agitation against Britishers and Zamindars got converted into a genocide of Hindus.

People with criminal mindset such as, Veriyamkunnath Kunjahamad Haji and Ali Musliyar with their hate speeches made the revolt communal in nature.

More than 10,000 people died in these revolts.

C. Gopal Menon (the then Deputy Collector of Malabar)
B. R. Ambedkar
Annie Besant

→ All described the rebellion as a Hindu Genocide.

B.R. Ambedkar in "Pakistan or The Partition of India" described that according to the rebels of Moplah, India was "Darul Harab" under British regime and it was their duty to fight against them.

Their intention was to throw away British rule and establish a Islamic rule inspired by Turkish Ottoman regime type mindset.

However, Hindus were forcefully converted, and there was barbaric activity such as killing pregnant Hindu women.

This communal violence was one sided barbarism as per Ambedkar.

Customary laws in Mapillas -

Initially Mapilla's had customs in variance with Muslim law.

In 1918, Mapilla Succession Act brought their succession laws in line with Sharia.

1937 Shariat act finally sealed the fate and now all Mapillas are governed by Shariat law.

⑤ Punjab & Haryana

In Punjab, there was Punjab Laws Act, where section 5 allowed certain tribe to be governed by their customary law.

Shariat Act Section 6 repealed this law.
Therefore in 1937 they came under one
umbrella of Islamic law.

In Haryana, there was Meo Tribes who
were originally Hindus. Till date they have
many customary laws. However, they can
legally follow customary laws in matters
of "wills", "Adoption" & "legacy".

All other customs are governed by Applⁿ
of Shariat Act, 1937.

Meo Tribe is also called Mevat because
they originate from Mevat.

⑥ Jammu & Kashmir

Since Muslim Personal Law (Shariat) Application Act, 1937 was not applicable to J&K, they had their own customary laws.

Acts that made customary laws irrelevant in J&K —

① Shri Pratap J&K Laws Consolidation Act, 1920
↳ Succession was brought as per Mohammedian law.

② After J&K Reorganisation Act, 2019, the central Shariat Act was also extended to State of J&K.

③ J&K Muslim Personal Law (Shariat) Application Act, 2007.

↳ this act did not make any exception as 1937 (all India Act) where "succession", "wills" & "legacies" were left out of 2007 J&K Act used as broader term to apply shariat for all custom practices.

"Marriage" (or) "Nikah"

Marriage = sacrament. in Hindus, Christians etc.

Marriage = contract in Islam

→ No concept of divorce. This was added upon codification.

→ It recognizes divorce in its ancient form.

Marriage is a way to avoid sexual promiscuity.

Right to Equality (Article 14-18)
in Indian Constitution

↓
Article 14

↓
Article 15

(Equality before law)

(Prohibition of discrimination)

Men & women (husband & wife)
be given equal treatment in
society (in marital relation)

Marriage in all laws are treated as sacrament.

In Islamic law as contract,

↳ making it secular and progressive
as compared to other religions.

Husband (Zawj)]
Wife (Zawaja)] → Contract ⇒ Nikah

The contractual roots to muslim marriage lies in pre-islamic Arab customary laws.

Pre-islamic Arabia had the concept of purchase of a bride

At that time, the man would buy the prospective bride from her guardian. This contractual element of Nikah therefore arose from pre-islamic Arabia.

Later, on advent of islam, it was realised that why there should there be consent of the guardian. Let there be consent of the woman and the man.

How has judiciary view at Nikah?

→ Abdul Kadir vs Salima (1886) Allahabad HC.
(Full Bench Judgement)



Judge Mahmood said — "A muslim marriage is purely a civil contract, that has a proposal and an acceptance. All the rights that any law of contract would create arise immediately and simultaneously."

He went on to say — "Marriage among Mohammedians is not a sacrament, but a purely civil contract"

Many jurists however do not agree to this. example Syed Ameer Ali observed that many elements of contract are missing in "Nikah".

Is muslim marriage completely contractual or
it even has elements of sacrament?

Anis Begum vs Mohd. Istafa (1933) Allahabad
HC.

Marriage in muslims is contractual, it lacks any
ceremony, yet the divinity part is inherent.

Therefore muslim marriage is "purely secular"
and inherently "religious"

Purely Secular → Muamalat.

Inherently Religious → Ibadat.

"Reform of Muslim Personal Law" a article by Justice V.K. Krishna Iyer.



"The impression that muslim marriage is purely contractual is a fallacy. It is as sacred as any personal law marriage."

Although superficially it appears to be a contract, it is actually an Ibadat. (sacred).

- There can be no marriage w/o woman's consent.
- No other religion offers a woman pecuniary benefit as a mark of respect. (Dower).

⇒ Allahabad HC in Abdul Kadir vs Salima (1886)

& Hon'ble SC in Mohd. Ahmed Khan vs Shah Bano Begum (1985) and many other judgements has reiterated that Mehr is a mark of respect as well as security for a woman.

Muslim marriage is never criticized, however divorce has been highly contentious.

Divorce was an evil that Prophet had to accept unhappily. He said of all detestable things made by Allah, the most detestable is divorce.

The biggest challenge in Islam was to prevent sexual promiscuity, and to ensure status of a wife.

Best he could do is what he did. else customary Arabs would've never accepted Islam.

There were several tribes in pre-Islamic Arabia all having their own customs.

However, denigration of woman was common in all tribes.

Islam brought respect to woman for first time in Arabia. The first step was woman's consent in a marriage. unlike

pre-islamic Arabia, where consent was given by the woman/girl's father.

Therefore muslim marriage must be seen from test of reasonability.

What about possibility of having upto four wives?

↳ Quran says to treat all wives equitably. There's a Sunna of the Prophet. where upon questioning "How do we treat our wives?" the Prophet says that "You must treat all your wives equitably whether they are one, two, three or four."

Prophet replied in this manner.

Which was arguably misinterpreted by men to mean they must have four wives. It is nowhere mentioned that a man should have four wives.

Many progressive Islamic countries eg - Turkey, Tunisia, Albania, Kosovo, Kyrgyzstan, Tajikistan, Turkmenistan & Uzbekistan have illegalised polygamy.

Countries like Azerbaijan recognizes only one marriage to be valid. Meaning one can marry two wives but only first marriage is legally recognised, for second marriage to

be legally valid, the first must be dissolved

The prophet's Sunna was permissive in nature, which was treated by men as mandatory or directive in nature.

In Hinduism there was both Polygyny and Polyandry.

Polygyny - King Dasharath in Ramayana famously had 3 wives Kausalya, Kaikayi and Sumitra.

Polyandry — Draupadi in Mahabharata was married to five Pandava brothers.

→ Though this was recognised by not all tribes / cultures in Hindus, but it did exist.

→ Kings did multiple marriages to form strategic alliances.

→ Codification in 1955 made polygamy illegal in Hindus.

→ Christianity does not allow bigamy. Therefore, Britishers introduced the

illegality of bigamy in India through IPC.

→ The glasses through which we see marriage in personal laws has been give to us by present day modernism, constitution and statutory enactments.

Obligations of wife in Islam -

① To be faithful to husband. (Cheating on husband is Zina for which punishment is Stoning to death.)

② She has to allow sexual intercourse which

will be as per Shariat. Shariat lays down certain restraints that has to be followed.

③ She will suckle her children.

④ She must observe iddat. (also called idda.)

"Iddat"

Iddat is the period of chastity which a woman must observe as per Shariat after dissolution of marriage.

A muslim woman's marriage is

dissolved by —

(i) Death of husband

(ii) Divorce

A divorced woman in Islam can marry again provided she observes iddat.

Reason behind iddat — To ensure that there is no confusion of paternity

A widow or divorced woman has to undergo a period of sexual abstinence before she is allowed to remarry.

The word Iddat is not defined in any codified law.

However, period of iddat is defined in — "Muslim Woman Protection of Rights on Divorce Act, 1986" (iddat by divorce only)

- (A) 3 menstrual courses after divorce (or)
- (B) If she's achieved menopause, then 3 lunar months. (3 x 28 days) (or)
- (C) If she's enceinte (i.e. pregnant) at the time of divorce then period between divorce and delivery of child or abortion.

Syed Ameer Ali a muslim jurist defines iddat

as an interval which a woman is bound to observe with sexual abstinence between the termination by death or divorce of one matrimonial alliance and commencement of another.

Sociological importance of Iddat and its effect —

① Wife cannot marry during iddat period.

② Wife is entitled to maintenance during iddat period only as per muslim law. (Unlike Hindu law where permanent Alimony & maintenance is available and widow can also live with Joint Hindu Family.) However, under

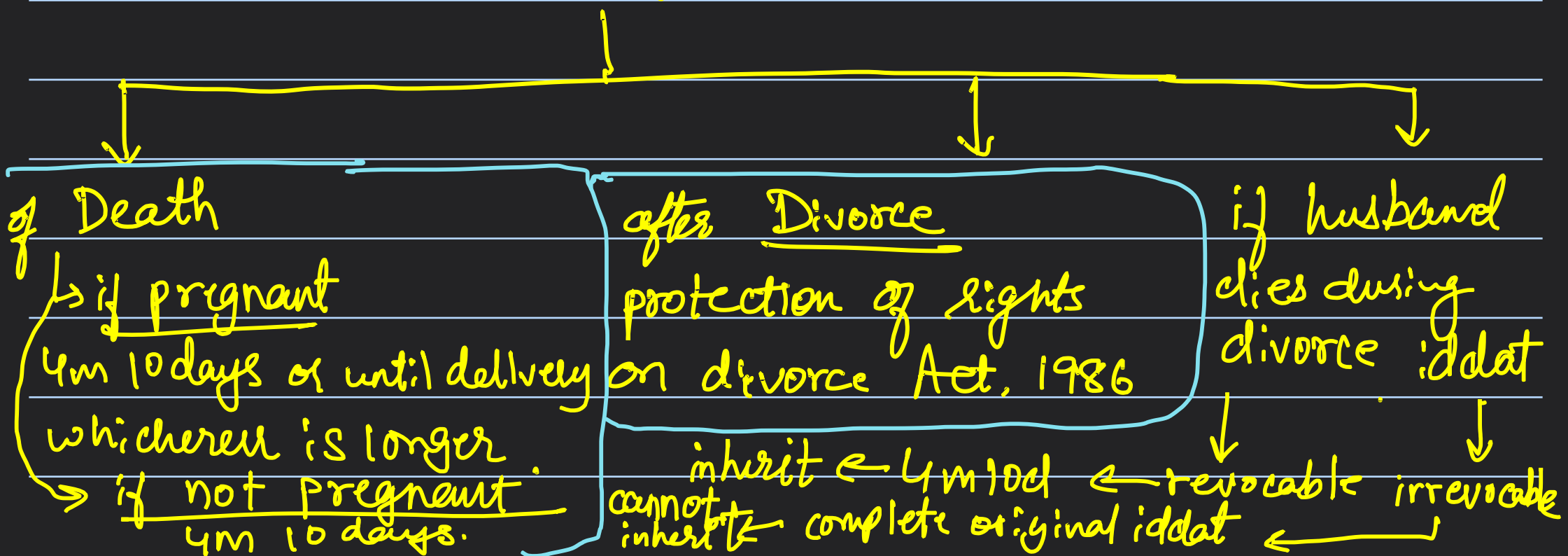
Secular law like CrPC Sec 125 maintenance is available for longer period.

③ If there was any deferred Dower, she is entitled to it during this period.

④ Iddat is only obligatory for women. However, if a man who already has four wives divorces one of them by a revocable divorce, he cannot marry another woman until the divorced wife's iddat period expires, because the marriage subsists during iddat and he may revoke the divorce.

⑤ If husband is having death illness such as cancer, AIDS etc. and he gives talaq. If he dies before 3 months i.e. before iddat period has expired, the wife will get her share from his estate.

Iddat



Iddat of Death is longer than Iddat after Divorce.

Q) When iddat of Death commence?

Ans) On the day of death.

Q) What if information of death is received later?

Ans) the iddat period begins from date of death not from date of communication or knowledge of death.

Suppose wife comes to know about husband's death after 5 months of death. Does she need to observe Iddat? → NO!

Q) If there was no consummation of marriage and there is death of the husband.

In such case is iddat required to be observed?

Ans) Yes. Consummation will have no bearing on observance of iddat. Upon death of husband how can it be ensured whether consummation took place?

In Hinduism there are about 8 types of marriage - Pishaj marriage, Rakhsa marriage, Gandharva marriage etc.

In Muslim law there is one and only type of marriage i.e. "Nikah."

However only one sub-sect of Shias recognizes "Muta marriage".

"Muta Marriage"

→ In muslims every sexual unions must be preceded by a marriage.

→ There can be no keeps, no concubine, no mistresses.

→ Muta Marriage is recognised only by Ithna Ashari subsect of Shias.

→ Muta marriage is called as temporary marriage by many jurists, it is however a misnomer.

→ Muta marriage is actually a term marriage.

Q) Why no one else but Ithna Ashari's recognize Muta marriage?

Ans) Muta marriage has all characteristics of a muslim marriage i.e. a civil contract having offer and acceptance.

Muta was a pre-islamic custom.

→ Ithna Ashari were mostly traders. They

had to stay away from their family for their business. Prophet had great detestation for sexual unions without marriage.

→ There was no concept of prostitution.

→ Prophet was aware about this custom and wasn't happy about it.

He showed his displeasure in his end days towards this custom.

→ Upon Prophet's death, Caliph Omar banned Muta customs.

→ Shias do not recognize the 3 Caliphs, including Omar. Therefore Ithna Asharis

continued with "Muta marriage" as a custom.

→ If prophet would have banned it, it wouldn't exist. However, it was banned by Caliph Omar.

Q) How many Muta marriage is possible?

Ans) Nikah is possible with only four wives but with Muta marriage the limit of four can be crossed.

Q) With whom a man can observe Muta marriage?

Ans) ✓ ① Muslim

✓ ② Kitabiyas. (Christian, Jews)

✓ ③ Fire worshipers (Parsis)

Disallowed ✓

X Idol worshipers (Hindus including Sikhs)

Q) Can guardian object to Muta?

Ans) → If a woman is major, even if she is virgin, guardian's consent is not required for Muta marriage.

→ Only if girl is a minor, guardian's consent is required.

Q) What's difference between Muta & Nikah

Ans) Muta is term marriage, Nikah is a marriage without a defined term.

Q) What can be the term?

It can be a day, few days, months, years etc.

Q) What if term is not specified?

↳ Sohrat Singh vs Jafri Bibi (1914) PC

↓
if term is not specified, then it cannot be a Muta marriage, in that case it is Nikah.

Shahzada Qanun (ve) Fakhaz Jahan (1953)
Hyderabad.

→ where term is not mentioned, the marriage is Niskah and not Muta.

Muslim jurists especially Fysee and Syed Ameer Ali reject the above judgements. They believe that "intention" is very important in Niskah.

Q) Basic difference in Niskah & Muta marriage —

Ans) Niskah	Muta marriage
(i) Succession is involved.	There is no succession

(i) wife is entitled to maintenance.

No maintenance entitlement unless previously asked to be added to terms of marriage, in that case also be enforceable by CrP

(ii) Marriage is consummated or not, full dower is to be paid.

If consummation has not occurred, then wife is entitled to half dower

If consummation occurred then wife is entitled to full dower

If wife leaves early, she gets proportionate dower.

(iv) Iddat is to be observed

If consummation does not happen, iddat is not required else it is required to be observed for 3 months

(v)

Any children born will be legitimate children, they will inherit the property of parents.

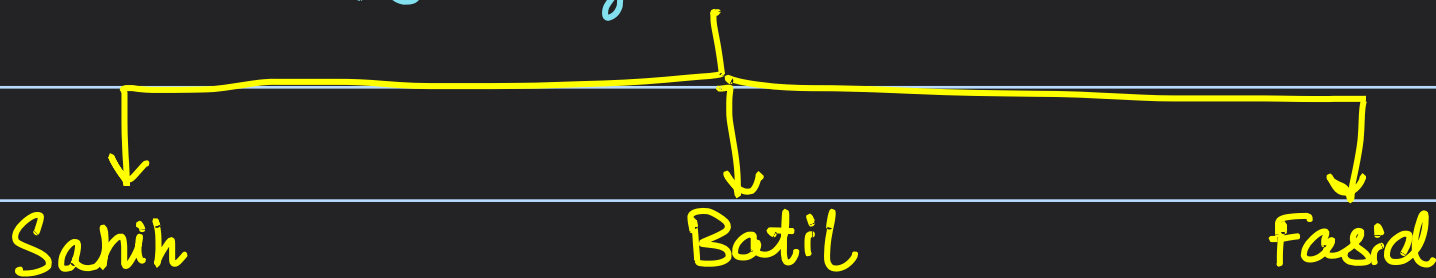
(vi)

If husband leaves before completion of 'term' the 'term' is considered to be

gifted. This is called "Hiba-i-muddat" (gift of term).

Even upon consummation if full dower is paid and husband leaves before completion of term, husband can gift the term and wife's consent is not required for this.

Types of Marriage



valid

void ab-initio.

irregular

Shia

you can't call it
voidable

Sunni

Q) Are ceremonies important (like Hindu law eg sec 7 HMA)

Ans) Marriage can be valid even without ceremonies,
Solemnisation needs no ceremonies.

Ijab
proposal



Qubul
acceptance

it should be in
one meeting

→ This is only requirement for Shia marriage.

→ In Sunni marriage witnesses are also required.

2 adult males (or)
1 adult male & 2 adult females } as witness

Q) A marriage without witness is invalid or not?

Ans) A marriage without witness is "fasid" marriage i.e. irregular marriage, it can be set right afterwards when witness ratify the marriage.

Q) Are there any specifications for Ijab & Qubul?

Ans) Yes!

① It must be unequivocal.

② It must be uttered in one meeting.

"Words of proposal and acceptance must be uttered by the contracting parties or their agents in each other's presence and hearing in presence of 2 male @ 1 male and 2 female witnesses who must be sane and adult muslims and whole transaction must be completed at one meeting"

- Ronald Wilson.

Digest on Anglo Mohemmadian Law.

Above passage has become basis of many judgements

Illustration

① "H says in presence of 2 male witnesses M and N that "I have married W." Later W reviews the communication and accepts.

This is not a valid nikah as entire transaction is not in a single transaction."

② "H sends messenger to W and W reads the letter in presence of 2 male witnesses X and Y.

"Will you marry?"
W concurs. This is a valid nikah.

Common procedure of nikkah followed in India —

All subschools and sects have a designated person by a Kazi. This designated person is well versed with muslim law.

Two such persons are appointed with two or more witnesses, by the contracting parties.

A deed is made called "Nikkahnama"

or "Kobitnama" which contains terms including —

(i) how much will be dowry.

(ii) clause for prohibiting second marriage

The Kazi appoints a designated person ^{who} reads out the amount of Mehr (Dowry) being proposed

and asks the woman if she agrees to marry.
The designated person proposes and woman
may say "Qubul hai"

Mahr can be anything — money, property,
a promise to teach Quran etc.

Witness must be muslims, in some judgements non-muslims
are accepted as witnesses.

Is the consent of boy and girl
enough for "nikah" or even consent
of guardian (wali) required?

In Shias consent of wali is not required unless parties are incompetent (minor/insane).

Consent of wali (guardian) becomes necessary only when parties are incompetent
eg - one or both of them are minor
one of them is insane etc.

In Sunnis, consent of guardian depends on the sub-school.

Some schools do recognize the consent of wali.
For example - Shafi and Maliki sub-schools
of Sunnis both require that the

consent of girl must be conveyed by a wali.

In Hanafi, the girl can give her own consent directly ignoring the wali, if she is competent (major & sane)

Is a Quazi or Mullah required to do "Nikah"?

Precedent - { Rahima vs Saburjannissa (1996)
Guwahati High Court }

Held - There is no recognized customary law that says a Mullah or Qazi is required to be present to perform a "nikah"

In Hindu solemnization of marriage involve customs such as saptapadi which is done in presence of a priest who chants mantras. Saptapadi is a mandatory requirement, the presence of priest is not a legal requirement.

Is Registration of Marriages necessary?

Historically, enactments for registration of marriages existed specifically for Muslims. —

→ Bengal Mohammedan Marriages & Divorce Registration Act, 1876.

→ At that time Bengal included today's West Bengal, Orissa, Assam, Bihar.

↓
Registration of marriages was mandatory for Muslims.

When Assam separated, Assam Muslim Marriage & Divorce Registration Act, 1935

Orissa's Act with same name came about in 1947.

Registration of marriage is a state subject.

Seema vs Aswani Kumar (2006) SC

↳ has laid that registration of marriage is a must irrespective of personal law.

Nikahnama is not registration of marriage
Nikahnama can form basis of registration
of marriage.

If marriage is not registered doesn't
mean marriage is invalid or irregular.

In Shias a boy and girl can do nikah
in absence of witness, Wali or even a
Mullah.

Only requirement is - Ijab, Qubul & Dower

If a husband in such case denies a marriage
later, there can be problems.

Therefore, if a man and woman who are muslim and co-habiting, marriage can be "presumed".

CONCEPT OF PRESUMPTION OF MARRIAGE

In Islam, there is no recognition to the concept of live-in relationship.

If there is a continuous and prolonged cohabitation of a man and a woman, then "presumption of marriage" can be assumed.

In what conditions or situations, presumption of marriage can be alleged?

(A) Precedent - Mohd. Amin vs Vakil Ahmad.
(1952) SC.

There are total 3 grounds we will discuss later in this

Presumption of marriage can be assumed where there is prolonged and continuous co-habitation and it is established and there is no legal impediment against the

marriage. (eg- prohibited relations on cohabitation cannot be presumed to be a nikah)

In Hindus if a man a woman is cohabiting, there is still a need of proving ceremonies to presume a marriage.

When we use the word personal law for marriages, we assume both man and woman belong to same religion. If they belong to different religions, we do not discuss their marriage from personal law,

point of view, instead a reliance on Special Marriage Act is done.

It is important to note that people belonging to same religious faith can go for special marriage Act. (SMA), 1954.

Two muslims can marry each other under SMA rather than nikkah. A muslim man marrying under SMA, cannot do bigamy as per law.

Several progressive muslims, do prefer Special Marriage Act over nikkah even for marriage with a muslim.

In 1976, there was amendment in SMA, 1954 which introduced section 21A.

Sec 21A allows Hindus marrying under SMA to retain their status within a Hindu family and be governed by Hindu Succession Act, 1956.*

If muslims marry under SMA, 1956.

↓ (A)
bigamy becomes unlawful

↓ (B)
maintenance goes under sec 125 CrPc (sec 144 BNSS)

↓ (C)
Succession goes under Indian Succession Act.

It means, on marriage under SMA, all secular laws start governing instead of personal laws.

In case of parents of different religious faith marry as per SMA, 1954, as the act is secular, the child's religion is determined by —

① Parental agreement

② Follow father's faith or mother's faith based on how he/she has been raised.

③ Children on turning 18 have liberty to

choose their own faith.

Inheritance in Interfaith marriages Under SMA -

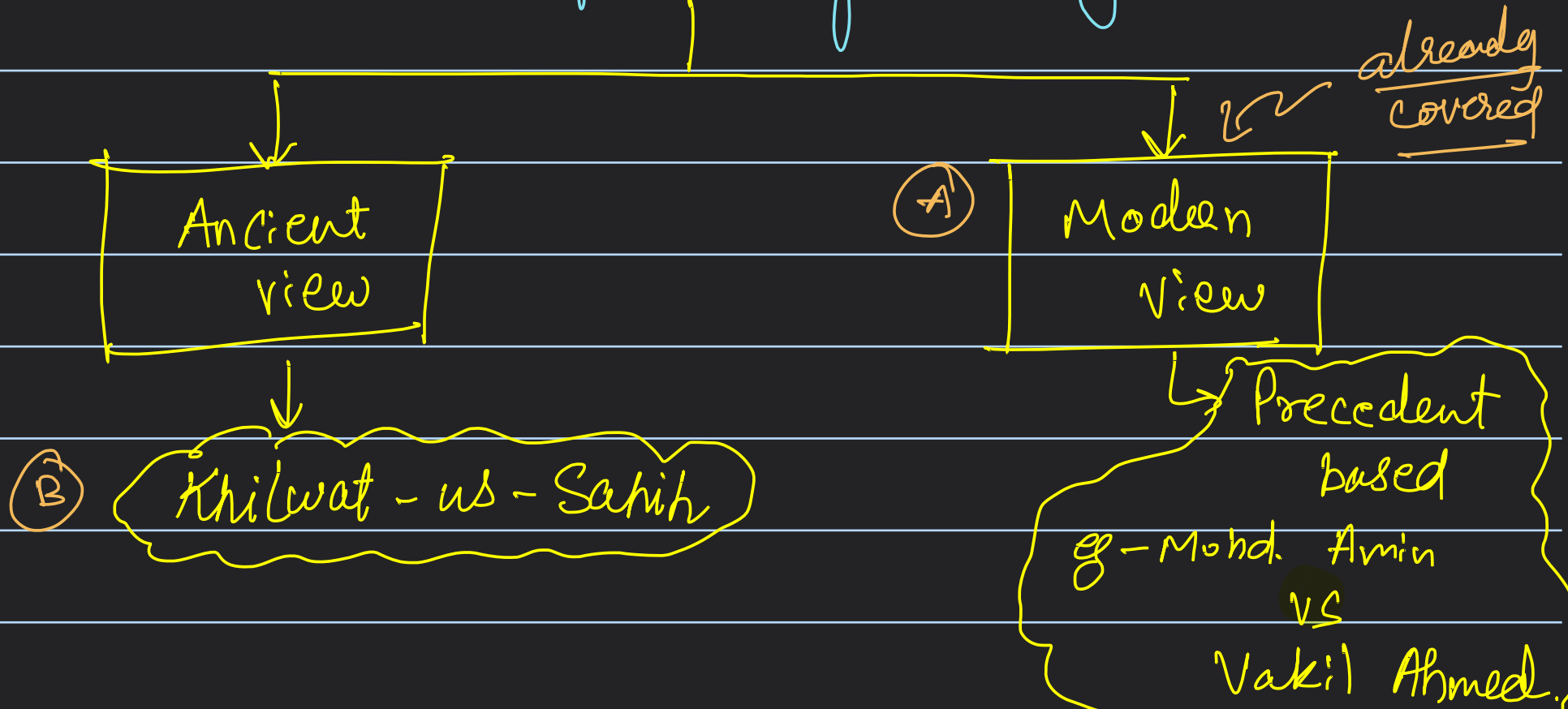
* If a Hindu marries a non-Hindu under SMA, in this case, the inheritance is governed by Indian Succession Act, 1925 and not personal laws.

Therefore the Hindu's right in Joint Hindu Estate ceases to exist until the death of his/her father.

Upon the death of father, such a Hindu can inherit both ancestral or independent property of father.

You can make an analogy that upon entering a marriage with a non-Hindu under SMA, the inheritance rights of Hindu in Joint family estate or in father's ancestral property are converted from right on birth/survivorship to right on spiritual obligation (pinda daan). means right will arise only upon death of the father.

Presumption of Marriage



(B) Khilwat-us-Sahih. —

Whenever parties that have no impediments, if they retire into nuptial chambers, then

it raises the presumption of consummation of marriage.

Impediments to "Khilwat - us - Sahih" i.e. exceptions to presumption of marriage —

① During observance of fast of Ramadhan (Ramzan), during Ramzan, the mind is supposed to be kept clean and therefore presumption of consummation of marriage is not assumed during this time.

② If man or woman is suffering from an illness which makes sexual intercourse impossible.

③ When a third person is present, even if he/she is blind, such presumption is not made.

NOTE - Shi'as believe in presumption of marriage if and only if actual consummation has taken place.

There is no such presumption merely due to retirement into nuptial chamber in Shi'as.

Why there is so much hue and cry about a valid retirement?

Because, once you take a presumption of consummation, many rights come into play —

① Dower — should now be decided.

② Paternity

③ Iddat

④ Maintenance (of wife)

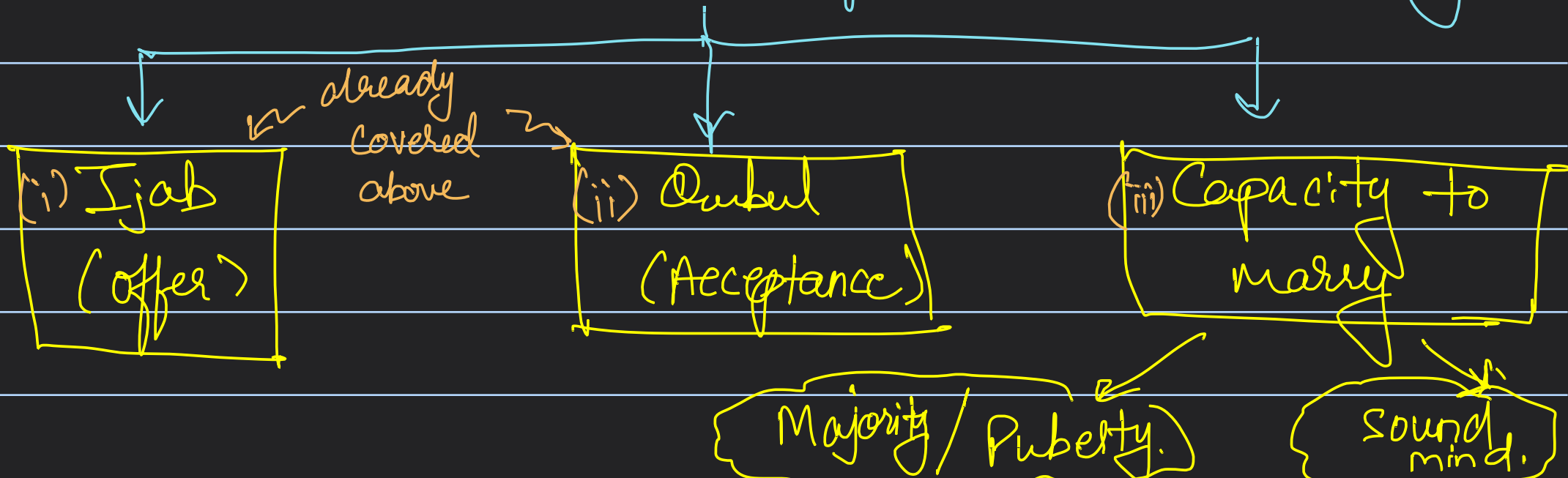
⑤ Prohibition of husband for bringing fifth wife.

→ All these effects of presumption are described and recognized in Fatwa-e-Alamgiri

Hanafi & Malikis (Sunni schools) follow and recognize presumption of consummation

Shias donot recognize this presumption loosely except if consummation has actually taken place.

Essentials of a Valid Marriage



(iii) Capacity to marry →

(i) Majority

→ In muslim concept of majority means puberty.

→ In India majority is defined by Indian majority Act, 1857

Male → 18 years.

Female → 15 years.

→ The Prohibition of Child Marriage Act 2006. (POCM, 2006) ⇒ Secular law

Male valid age for marriage → 21 years.

Female's valid age for marriage → 18 years.

2021 Amendment Bill is proposing to make legal age of marriage 21 years for both genders.

In islam majority = puberty, = ability to reproduce

Hanafis treat 15 years as age of puberty

Nawab Sadig, Ali Khan

vs

Jai Kishori & Ors. (1928)

Privy Council

girl was 9 yrs and menstruating

boy was 12 yrs.

→ both were shial



they were held to be competent to marry.

Indian Majority Act does not apply to —

- ① Marriage
- ② Divorce
- & ③ Mehr.

POCSO Act \Rightarrow Majority above 18 years.

JJ Act \Rightarrow if minor is married, his custody will be with government until the child achieves majority.

Independent thought \Rightarrow intercourse with a
vs VOI married minor is a rape.

Hindu Law }
(2001 amend) Christian Law } All have valid age of
Parsi Law } marriage in congruence with
Prevention of Child Marriage
Act.

Only conflict is with Muslim Personal
Law!

Kamru vs State of Haryana.
(2014)

Punjab & Haryana HC

Held — Muslim law = special law.

POCM Act = general law.

as laid in

Special law > general law.

precedent
cited

Age as per Muslim personal law must prevail as valid age for Muslim marriage & not age as per POCM Act.

U.P. State Electricity Board

vs

Harishankar Jain (1978) SC

Dichotomy of views
about valid age of marriage

Muslim Personal
law prevails.

POCM Act
prevails.

① Yunus Khan vs State of Haryana.
(P&H HC) 2014

① Mohd. Riyad vs State
Police Chief. 2018
(Kerala HC

② Mohd. Shamim vs State of Haryana.
(P&H HC) 2019.

Divisional Bench)

POCM Act of 2006 does
not affect Muslim law.

Muslim marriages in
contravention with POCM
Act of 2006 will be
held voidable at the

Option of aggrieved party

② Mohd. Abbas vs
Chief Secretary, Govt of
Tamil Nadu (2015)
(Madras HC)

③ N. Rasu vs State
(2017)
Madras HC Divisional bench

④ R. Amin Sheikh vs State
of W.B.
(2016) Calcutta HC

⑤ Yunus bhai Usman bhai
Sheikh vs State
of Gujarat (2016)
Gujarat HC.

⑥ Jaspreet Kaur vs State of Punjab
P&H HC (2021)

→ Now even P&H HC
says article 21 cannot
be contravened. Therefore,
POCM Act supercedes Muslim Law.

⑤ Moidutty Musliyar vs State of Kerala (2024).
Kerala HC.

Latest position by Hon'ble Supreme court

① Independent though vs VOI. —
Sexual intercourse with girl below 18 years of age is rape. Even if marriage is valid under personal law.

② Guidelines issued by D.Y. Chandrachud
→ Protection of minors prevails over religious practices.

→ Child marriage violates Article 21

✓
③ Society for Enlightenment & Voluntary Action
vs UOI (2024) → ongoing.

→ whether POCSO, 2006 will prevail over Personal laws is a question that requires legislative consideration.

The conflicting views of various HCs are noted by the apex court.

② Soundness of mind —

Consent of Wahi is required for Ijab / Qubul in case of person who is insane or of unsound mind.

Hedaya a classic text followed by Hanafi subschool says that

"Qubul (acceptance) must be through consent, no guardian (Wahi) not even a King can force a person into giving consent for his/her own marriage".

Both Shias & Sunnis are at ad idem on the above point.

Guardian (Wahi) — who can give consent for marriage of minor or person of unsound mind.

	Shia	Sunni
who can be a guardian (Wahi)	<ul style="list-style-type: none">• Father.• Paternal Grand Father	<ul style="list-style-type: none">• Father• Paternal Grand father• Brother & other paternal relatives• Mother

→ In Shias if minor is married by consent of any one other than Father or Paternal Grandfather, then such minor has to ratify the marriage or nikah upon attaining majority.

→ In Sunnis, the list of allowed guardians to give consent of minor's marriage is broader. It includes not only father and paternal grandfather but also brother and other paternal relatives, mother or even the government.

Shias → age of marriage → achievement of puberty.
Hanafi law → age of marriage = 15 years.
→ Conventional view

There is Dichotomy on views of Hon'ble SC & Shia as well as Hanafi personal customs.

If guardian (Wahi) commits apostasy. (i.e. converts to another religion) →

In muslim guardian who converts to another religion has no right to give consent of.

marriage of minor girl.

Apostasy takes away all religious rights of a muslim.

But according to Freedom of Religion Act, 1850 even a person who renounces his religion retains the right to give consent to a minor's marriage.

→ Gul Mohd. vs Mussammatt Wazir (1901)
Privy Council

Option of Puberty —

Khyar-ul-Bulugh

It is an important aspect of guardianship

In Islam minor was allowed to repudiate her marriage in certain conditions.

If a minor's marriage is consented by wali against the child's ultimate welfare, then such child has option to repudiate the marriage upon achieving puberty.

Dissolution of Muslim Marriage Act, 1939 was a forward looking act. Option of puberty was

covered in it.

In fact, Hindu marriage Act has in a way borrowed this concept under section 13 → "Grounds of divorce exclusively available to women".



Section 13(2)(iv)

which reads as given in next page



✓ + HMA, 1955 → sec 13(2)(iv)

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

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

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had commenced with him at the time of the solemnization of the marriage of the petitioner, or that the husband had since the solemnization of the marriage, been guilty of rape, sodomy or incest;

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

Explanation.—This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).]

Sec 2(vii)

THE DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939

2. Grounds for decree for dissolution of marriage.—A woman married under Muslim law shall be entitle to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely: —

- (i) that the whereabouts of the husband have not been known for a period of four years;
- (ii) that the husband has neglected or has failed to provide for her maintenance for a period of four years;
- (iii) that the husband has been sentenced by a court of law to imprisonment for a period of seven years or upwards;
- (iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
- (v) that the husband was impotent at the time of the marriage and continues to be so;
- (vi) that the husband has been insane for a period of two years or is suffering from a violent and incurable mental disorder;

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years :

Provided that the marriage has not been consummated ;

In Shia → Father (or) Paternal Grandfather
can be Wali

In Sunnis → Father, Paternal Grandfather,
brother and paternal relatives
(or) Mother can be Wali

only marriage of minor by a Wali is
valid. Anyone other than a valid Guardian
cannot give consent for marriage of minor.

If anyone else gives consent such marriage
is void ab-initio.

In ancient muslim law, even a male could repudiate a marriage before he ratified the marriage i.e. paid dower or consummated

Aziz Baro vs. Mohd. (1925)
Allahabad HC.

→ FACTS — Shia girl given away in marriage by father to a Sunni husband.

ISSUE — Does she have option to repudiate the marriage

Held - Why not?

If she considers marriage repugnant or against her interest she has all right to repudiate marriage on puberty.

Can there be other grounds for repudiation of marriage?

→ { Zubeda Begum vs Wazir Mohd. (1940)
Chief Court of Karachi

Issue - Can there be more grounds to repudiation of marriage?

eg - husband is convicted for theft,
he is a convicted criminal,
he is enticing other women for criminal
purposes etc.

All above reasons can be grounds of repudiation
of marriage by a girl during her option
of puberty

Is a court decree required for repudiation
of marriage?

Mafizuddin Mandal vs Rahima Bibi (1933)

Calcutta High Court.

declaratory order atleast is advisable.

A decree is not necessarily required. but a declaratory order is safe to have to avoid future disputes and confusions.

What is the effect of (Khyar-ul bulugh) option of puberty?

① In Khyar-ul-bulugh since the marriage is repudiated by a minor upon attaining puberty given that consummation has not taken place.

Therefore, Iddat is not required.

② Upon repudiation, all inheritance rights of husband on wife and vice-versa are extinguished.

Difference in Shia & Sunni marriage —

Shia	Sunni
Both boy & girl should be muslim else marriage is unlawful.	Muslim female cannot marry a non-muslim. (It will be a batil marriage)
Only Muta marriage allows a muslim man to marry a Kitabiyah (Jew/Christian)	A muslim man can marry a muslim woman or a Kitabiyah (Jew/Christian) or even a

or Fire worshiper (Parsi)

They cannot marry idol worshiper

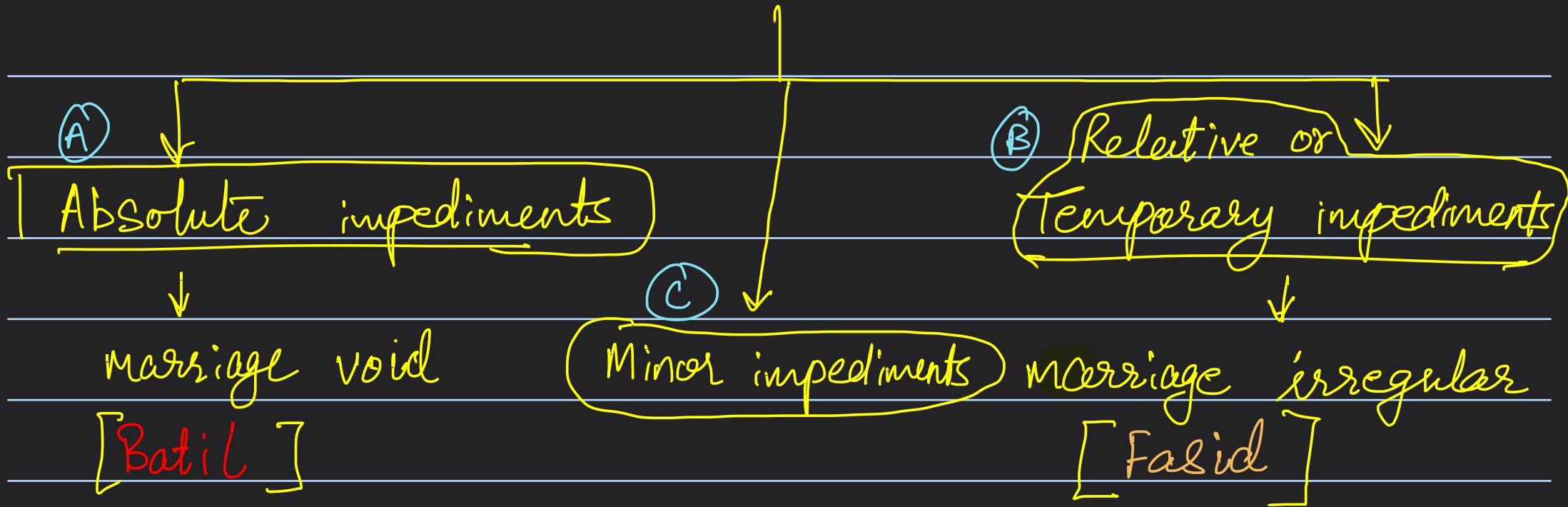
idol worshiper (Hindu)

A muslim man marrying a Hindu woman is fasid (irregular) marriage

It can be made sahi (regular) if she converts to islamic faith

Next topic - Impediments to marriage i.e. hurdles or hindrances to marriage in Muslim law.

IMPEDIMENTS TO MARRIAGE



(A) ABSOLUTE IMPEDIMENTS —

- ① Consanguinity — related by blood.
- ② Affinity — relative but not by blood.
- ③ Fosterage — breast fed.

Verse from Holy Quran —

(Chapter 2) "Surah An-Nisa" ↴

"Marry not women which your father had as a wife for this is uncleanness and evil."

You are forbidden to marry your mothers, your daughters, your sisters and your aunts both from your father's and your mother's side, your brother's daughters and your sister's daughters, your mother who has given you birth and your foster mothers, your wife's mothers, step daughters born of your wives with whom you have cohabited.*

You are also prohibited to marry two sisters simultaneously^{***} and to marry woman that are already married.^{***} "

This sums up entire law.

In Hindu law (even uncodified) there is degrees of prohibited relationships.

Sapinda relationship.
(uncodified)

Prohibited relationships
(codified)

→ 5 degrees from father's side

→ 3 degrees from mother's side.

① Consanguinity (related by blood)

Ascendents

Descendents

Mother

Daughter

Grand mother

Grand daughters.

Mother's sister

Father's sister

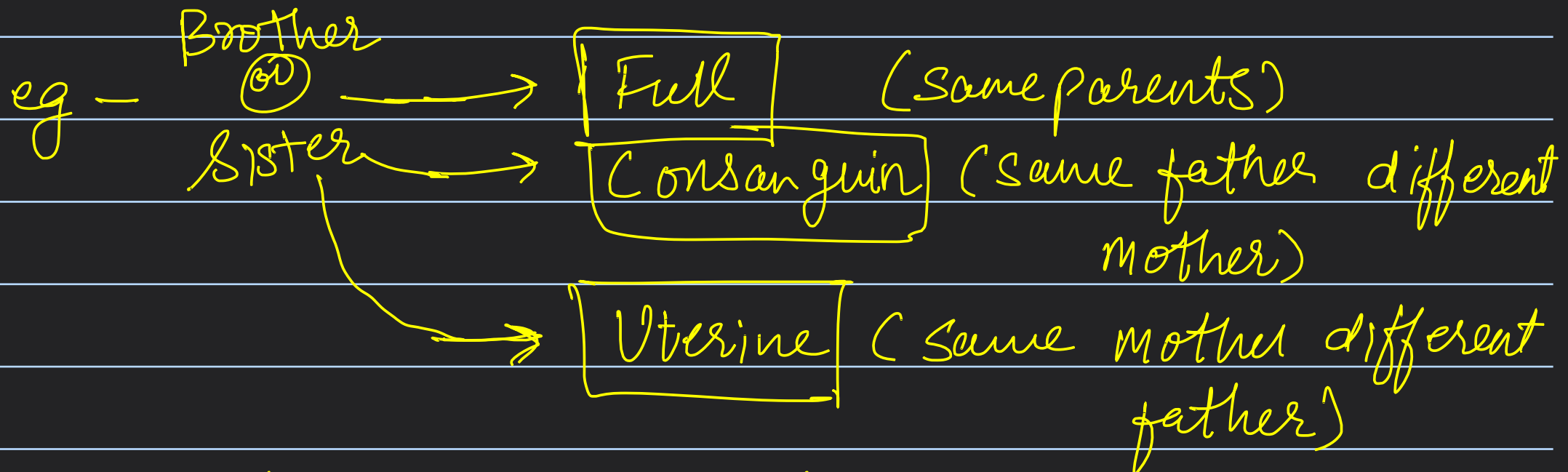
Father's father's sister
etc.

however low soever

however high soever

are prohibited

Collateral relations



→ A sister who is far relative is allowed. She should have both parents different.

Marrriage with any of the above is **Batil** marriage i.e. void.

② Affinity - relative but not by blood are even prohibited.

Example -

→ Spouses of children.

↳ son's wife.

↳ daughter's husband.

→ wife's relations

↳ wife's mother

Such relations are prohibited in almost all personal laws. In fact Special Marriage Act gives a list of prohibited relations in First Schedule.

Only the classification is different
in Hindu law blood relatives are dealt
with as "Sapindas" and wife's relations
are dealt via "Prohibited relationships"

* Step daughter born of wives with whom
you have cohabited is a prohibited
relation (affinity) for marriage.

→ It means that if there was no
cohabitation ever, then marriage is
not-disallowed with step-daughter of such wife.

** If a woman that is already married, contracts a second marriage without dissolving the first, in such case the second marriage is a batil (void) marriage.

↳ Polygamy is allowed. Polyandry is not.



Article 14 & 21 violation is argued time and again.

Supreme Court is expecting legislature to come up with a form of Uniform Civil Code.

War was the central in all civilizations in ancient times.

↓
Society was therefore patriarchal.

↓
Most religions did not approve Polyandry.

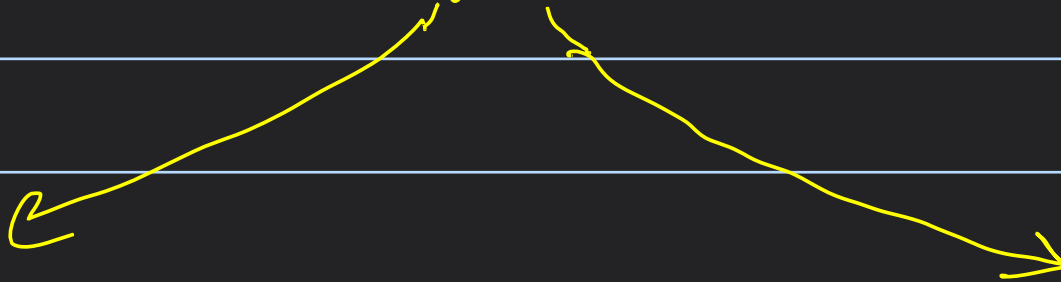
↓
Islam treated Polyandry as "batil"

Major concern with polyandry is the question of parentage of child.

③ Fosterage —

Prophet lost her mother too early, therefore he knew the value of a foster mother.

When a woman is recognised as a foster mother?



Shi'ah



foster mother is one who suckles the young.

Sunni



foster mother is one who takes care.



foster-mother is equivalent to biological mother and therefore all prohibited relations come into play.



cannot marry her mother or daughter



can marry her mother or daughter.

(B) RELATIVE OR TEMPORARY IMPEDIMENTS —

- ① Marrying a 5th wife.
- ② Unlawful conjunction

① Marrying a 5th wife becomes a fasid marriage. It becomes regular (sahi) on giving talaq to any one wife.

Divorce is not easy in Islam contrary to popular belief —

→ It shouldn't happen without a cause, as per Prophet.

→ Parents must come and reconcile first and mediate

→ It requires Mehe to be given.

→ Intention to have a 5th wife is not a valid ground for talaq with existing wife.

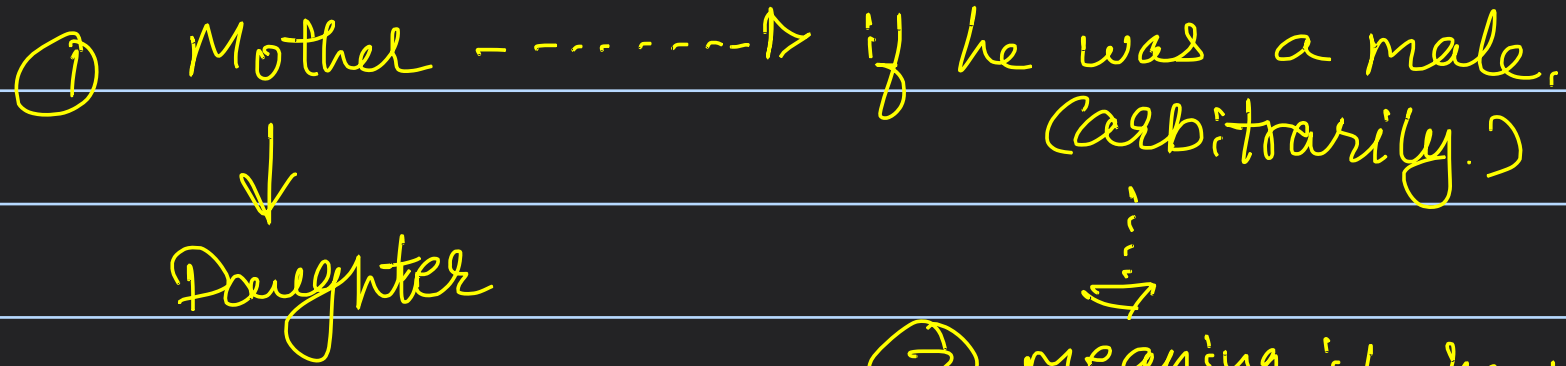
~~***~~ Unlawful conjunction —

Unlawful conjunction refers to prohibition of marrying two women simultaneously who are so closely related by blood, affinity or fosterage that if either one were male, they could not marry (eg — two sisters, an aunt and niece).

Such marriage is not just batil but haram.

Illustration —

(2)



③ meaning if he was
a father

④ father & daughter cannot
marry

∴ One cannot marry mother and
her daughter simultaneously.

Marriages arising from unlawful conjunction are fasid
in Sunnis & batil in Shias.

If a muslim married a woman and later marries her sister while the woman is alive and not divorced.



In such case the marriage is within the ambit of "Unlawful conjunction"



Such marriage is "fasid" (irregular) in sunnis "death of" or "divorce with" first wife.
↳ it becomes regular upon

Is a child is born out of the second marriage (fasid) legitimate?

Above question was encountered in. —

Rahiman Bibi Saheba by Agent Syed Yusuf

vs.

Mahboob Bibi Saheba & Ors. (1937)

Madras High Court

→ The muslim law has proclivity to give legitimacy to children.

It doesn't incline to bastardization of children

In this case marriage was "fasid" but child was held

legitimate.

③ MINOR IMPEDIMENTS —

There was "Doctrine of Equality" in marriage in ancient Islamic law.

i.e. person of equal or similar social status ideally could marry.

There was a concept of Kafa'ah
The Qur'ani had a power to rescind a marriage in certain cases.

For example — if a minor girl runs away with a servant of family, then Quazi could annul such marriage, provided it is not consummated

→ Social status } especially of men was
→ Economic status } considered important in all
 faiths. in ancient times.

What are the differences between Shia & Sunni law of marriage.

Sunni



• marriage in absence of

Shia.



• marriage in absence

witness is "fasid"

of witness is "sahi"
(witness are not necessary)

• Male can marry muslim woman or a Kitabiya

• marriage with non muslim female is batil (except Muta marriage)

• Unlawful conjunction. applies strictly. cannot marry wife's aunt or wife's niece.

• Can marry wife's aunt and if wife allows even with his wife's niece.

• Marriage can be Batil, Fasid or Sahi

• Marriage can be Batil or Sahi

(Black or white)

Every impediment that is fasid in Sunni law is treated as Batil in Shia Law

• Legal Guardian (Wahi) includes -

- father
- paternal grandfather
- brother & agnates
- mother.

• Legal Guardian (Wahi) includes -

- father
- paternal grandfather

• Muta marriage is

• Muta marriage is

can be recognized

recognised by Ithna
Asharis.

Marriage under SMA is not called nikah.

All effects and incidents of SMA will
apply —

i) Monogamy.

ii) Secular laws will apply.

iii) Succession by Indian succession Act.

They ceased to be governed by muslim personal law.

In 2005 — All India Muslim Personal Law Board. (AIMPLB) gave the model "nikahnama" in Bhopal Declaration.



"Nikahnama" → model code of ideal muslim marriage.

- ① Advises against dowry.
- ② Advises against gifts. Keep nikah a simple

affair. Nikah is not an occasion to blow your trumpet in society.

③ Duty of husband not only to feed his wife — but also to give her a house and medical treatment. He should look after her material needs. He should not depend on her money even if she is affluent.

④ Wife should be allowed to meet her parents, her siblings and there should be no obstacles on her. Obstacles on her is haram.

⑤ They came down heavily on talaq, e biddat.
even before Shaira Bano case.

DOWER OR MEHR OR MEHAR

ORIGIN OF DOWER —

Pre Islamic Arabia had two forms
of marriage

Beena

→ wife would live in her father's
home. she wouldn't go to her

Baal.

wife would accompany
her husband to her

comparable to
"Asura" marriage
in Hindu
law.

marital home.



she was given a gift
called "Sadaq"

marital home.



her parents were given
gift called as "Mehr"

Sadaq & Mehr became part of
marriage and instead of giving it to wali
it was then given to wife.

Mehr is part of muslim marriage.
It is as integral as Ijab & Qubul.

Prophet was strongly against pre Islamic practise of buying a woman. He brought in concept of 'nikah' and included the idea of Meher as gift to woman (not as a consideration to her parents).

Dinshaw Mulla in his book and Justice Mahmood in his judgement have called "Meher" as consideration in a civil contract.

Subwannisaj vs S. Shaikh (1934)
Calcutta High Court



Mehar is purely a consideration in a civil contract of marriage.

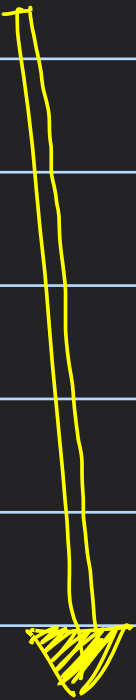
A judge at High Court of Madras Sir Abdul Rahim says Mehar is not consideration but an obligation laid down by Islam as a "mark of respect" for woman.

Sir Abdul Rahim's definition of Mehar is more correct because although nikah is a civil contract it does have an element of divinity.

Shah Bano case judgement also referred to Mehr as a "mark of respect" to women.

Remember dowry is not dower.

The Dowry Prohibition Act. explicitly excludes Mehr or Dower.



The Dowry Prohibition Act, 1961
(Act No. 28 of 1961)
with
(Maintenance of Lists of Presents to the Bride
and Bridegroom) Rules, 1985

1990

An Act to prohibit the giving or taking of dowry

Be it enacted by Parliament in the Twelfth Year of the Republic of India as follows :

1. **Short title, extent and commencement.**---

- (1) This Act may be called the Dowry Prohibition Act, 1961.
- (2) It extends to the whole of India except the State of Jammu and Kashmir.
- (3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

2. **Definition of "dowry".**-in this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly---

- (a) by one party to a marriage to the other party to the marriage; or
- (b) by the persons of either party to a marriage or by any other person, to either party to the marriage or to any other person;

at or before [or any time after the marriages] [in connection with the marriage of said parties but does not include] dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.

[5***]

Explanation II.-The expression "valuable security" has the same meaning as in Sec. 30 of the Indian Penal Code (45 of 1860).

State Amendment

Haryana.-Substitution of Sec. 2 of Parliament Act 28 of 1961.-For Sec. 2 of the Dowry Prohibition Act, 1961, the following section shall be substituted, namely :

"2. Definitions.-In this Act, unless the context otherwise requires-

(i) "dowry" means any property or valuable security given or agreed to be given either directly or indirectly-

- (a) by one party to a marriage to the other party to the marriage; or
- (b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person ;

at or before or after the marriage as consideration for the marriage of the said parties, but does not include dower or mahr in case of person to whom the Muslim Personal Law (Shariat) applies.

is a secular act

Dowry can be demanded by women too.

(eg in North East)

Giving & taking dowry is an offence, even in muslims.

Mond. Ahmed Khan vs Shah Bano Begum
(1985) Supreme Court

→ whether Dower or Mehar can be taken as customary law obligation payable at the time of divorce?

It was held that - money payable at the time of divorce is a money paid in sadness and very ethos of dower is happiness. Dower is mark of respect at the occasion of happiness.

Hence customary money payable at the time of divorce does not include Mehr.

Mewa Khori (or) Kharcha-i-Pandaan

मेवा खोरी

खर्चा इ पांडान

it is pocket allowance. ↳ betel leaf allowance

If ones declared is Mewa Khori (or) Kharcha-i-Pandaan recurring and enforceable?



Nawab Khwaja Muhammad Khan

vs

Nawab Husaini Begam (1910)

Privy Council.

→ Held that Husaini Begam could recover her kharcha - i - Fandaan from her father - in - law despite not being party to the agreement.

also cited often as a contract law case as exception to privity of contract

When is Mehr to be paid?

→ { At the time of marriage @
After the marriage.

settled in ↓

Kapoor Chand vs Kedarunissa
(1950) Supreme Court

Who fixes Mehr?

→ { Mutual consent. → Mehr-i-Tafweez.
An arbitrator → Mehr-i-Takkin.

Can Mehr be increased after marriage?

Yes.

What is Quantum of Mehr.

→ All India Muslim Personal Law Board
recommends —

a) Quantum of Mehr should be much more than paying capacity of husband. It will act as a deterrent for talaq.

b) Don't take money, take gold or silver as Mehr to adjust for inflation.

Is there any minimum and maximum limit to Dower?

→ There is no maximum limit,

Mehr can be anything it can be any property, movable, immovable or even a promise to teach Quran.

Hanafis & Malikis have laid down minimum for Mehr

↳ 10 Dirham \approx 250 Indian Rupee
as on 26/4/26.

Is there any written document mentioning Mehr?

→ Yes, it's called "Mehrnama"

If someone gives an immovable property say a plot of land as Mehr without a registered deed. Can the woman lawfully possess such property.

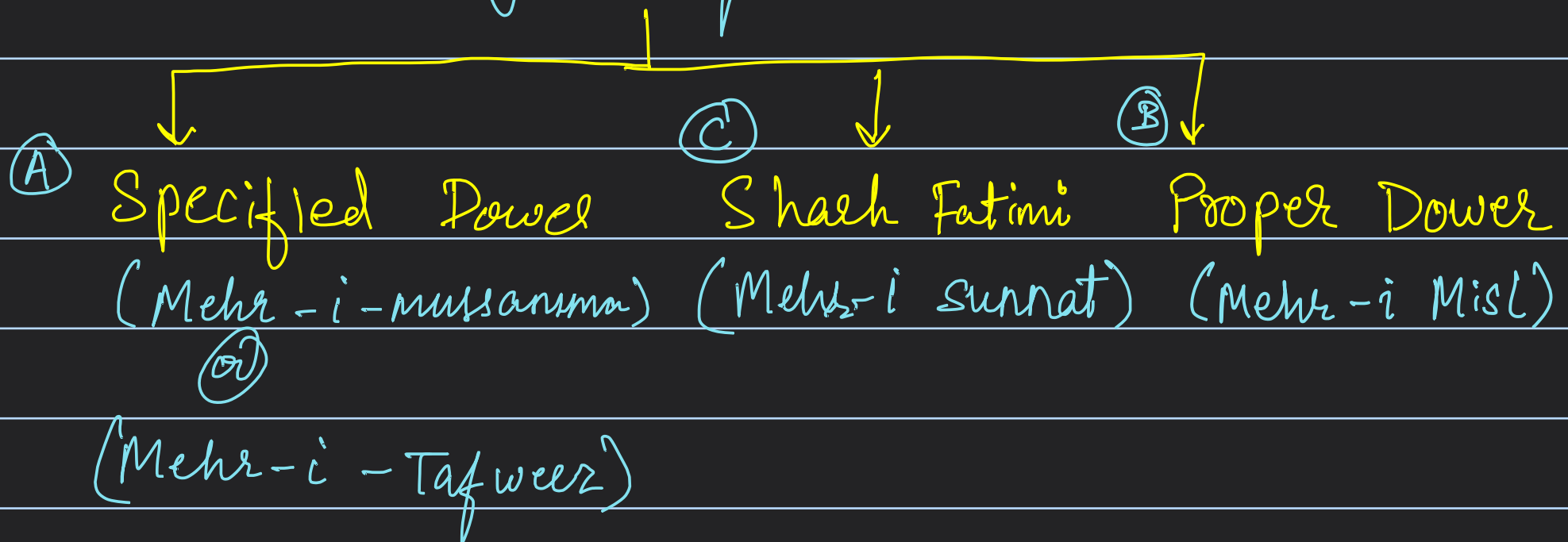
→ Yes. Section 53A of TPA applies.

↓
"Doctrine of Part Performance"
↓

Seller (transferor) cannot evict the buyer (transferee)

who has taken possession and performed their part even if formal sale is not done.

Types of Dowry



- ↳ Prompt (Mehr-i Mu'ajjal)
- ↳ Deferred. (Mehr-i Mu'akhar)

Ⓐ Specified Dower -

Dower of a minor or a person of unsound mind, who is liable to pay?

Who will be the surety?

Father or son?



Sunnis



Dower fixed by father is binding on son.

Father is not surety & cannot be sued if unpaid by son.

Shias



In case son is unable to pay, then father has to pay. Father is liable.

Can a woman refuse Dowry?

Ithna Ashari — woman can deny Mehr

Hanafis — give 10 Dirhams even if woman denies.

Can she remit complete or part of Dowry in favour of husband or his legal heirs?

Yes she can. but remission must not be under coercion. Remission can be conditional eg - demand for usufruct

Wife can also make Dower contingent.

example - give me rent generated from this property and I will give away the Dower.

In Specified Dower, how much is the ratio of Prompt to Specified Dower.

→ It is mentioned in Mehrnama

If it is unwritten then -

→ Shias → regard all of it as prompt.

→ Sunnis → regard 50% as prompt & 50% as deferred.

In disputes where ratio is not decided.
court has laid varying views.

Some HCs say to go as per customs.

Some HCs say entire should be treated as prompt.

If prompt dower is unpaid, wife can stop cohabitation and even Restitution will be difficult for husband.

Hidaye & Fatwa-e-daugiri also mentions that wife has the right to deny her body. (avoid sexual intercourse) to her husband if Mehr-i-Muajjal is unpaid.

Court may give contingent decrees of restitution of conjugal rights, where court may order restitution to wife subject to condition that she receives Mehr-i Muajjal (prompt dower).

(B) Proper Dower —

Also called Mehr-i Misl.

Mehr-i Misl depends on qualities of a woman —

- i) How well placed is her family (social position of father)
- ii) How is her educational qualification.
- iii) How is her personal beauty.

Sunnis — rely on Mehr-i Misl given to the "female paternal relations" as a benchmark to determine how much Mehr-i Misl to give to the girl.

If no Mehr-i Misl is given in person's family in past. When Mehr is proper i.e. unspecified the matter may go to court in case of dispute. Court will analyse the social standard of the girl's father to determine it.

Shias - The upper limit for proper dower is 500 Dirham for Shias.

© Sharh Fatimi -

Also called Mehr-i Sunnat.

It was the Mehr given by the prophet himself during nikah of her daughter "Fatema".

Therefore it is highly regarded, preferred and followed by Shia community.

When is Dower confirmed to be given?

There are 3 circumstances under which wife is entitled to Dower especially in Hanafi law -

- ① Consummation
- ② Valid retirement. (Shias don't recognize this)
- ③ Death of either wife or husband even if consummation has not occurred.

Dower is the property of wife irrespective of type. She can use it as per her will.

Once dower is confirmed, it cannot be revoked. Even in case of gross misconduct example even if she commits apostasy, in that case too, dower cannot be taken back or revoked.

A deferred dower too is to be given, even if she commits adultery.

Sir Abdul Rahim, Ameer Ali and Fyzee all are equivocal on this.

Even if she murders her husband, dower remains her property.

Devolution of Dower on death of woman -

Dower is bequeathable property it devolves upon her legal heirs upon her death.

Rider of 50% in Hanafi Law -

If consummation has not occurred, then only 50% of specified dower needs to be given.

Where the dower is proper (unspecified) only a present needs to be given.

Dower as a 'debt' -

Once the dower is confirmed, it becomes vested in the wife. 'vested' in the context of "Transfer of Property Act" (TPA)

→ She has 100% rights over it.

→ Recovery of dower is an actionable claim

→ it can be recovered and assigned to anyone.

Dower is a debt. Is it a secured debt or

an unsecured debt?



It is treated as unsecured debt.

If wife is in possession of her husband's property, she has right to retain husband's property until she is paid her dower that is due.

It is recoverable from husband's estate even by her legal heirs upon her death.

If husband's property is devolved on his death, can it be recovered from legal heirs?

Dower cannot be usually recovered from legal heirs. However, if the deceased husband's property is devolved upon his legal heirs, then such property can be charged for unpaid dower.

Kapoor Chand vs. Kadarunissa (1950)
Supreme Court

→ Held -

- ① The widow is like any other creditor of the husband, standing in queue and cannot claim priority over any other creditors

② However, dower debt is preferential over the claims of legal heirs

③ Heirs of husband are not liable to pay from their own property but if any property of husband has devolved upon heirs, then they have to pay out of that estate.

The woman in possession of husband's property can continue possessing it if dower is not paid up but she cannot alienate it. She only has "right of retention".

While husband is alive and marriage is subsisting she cannot practise her right to retention.

Maina Bibi vs Vakil Ahmad (1924)

Privy Council.

Facts - Maina Bibi becomes a widow in 1870.

→ Legal heirs in 1902 said that they did not get their share.

→ Maina Bibi said she is practicing her right to retention. because dower wasn't paid up.

→ In 1903 court passed a decree stating that legal heirs can pay dower to Maina Bibi and distribute the property among heirs.

→ This dower was not paid by legal heirs and hence Maina Bibi continued to enjoy the retention

ie. she continued possessing the property.*

→ In 1907 widow (Maima Bibi) gifted that property to her near and dear ones.

→ The legal heirs went to court challenging this gift.

Held — The Privy Council held that widow could practise her right to retention but she under no circumstances can alienate the deceased husband's estate in lieu of dower.

Also, the wife should exercise her right to possession lawfully i.e. without force or fraud.

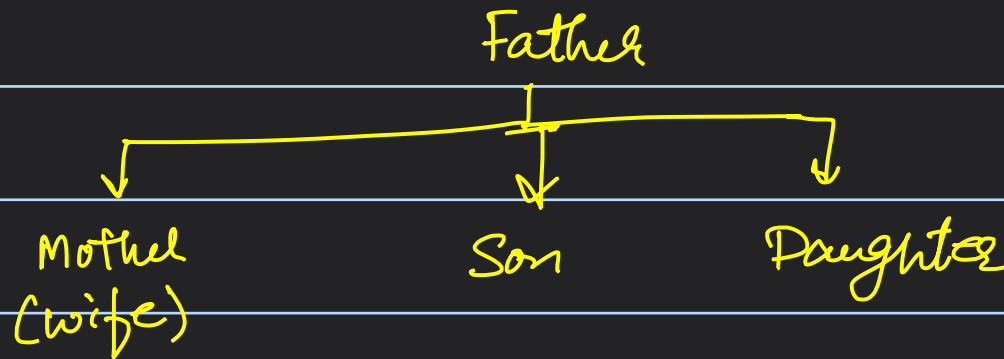
She can be dispossessed if she is proven to use force, fraud or coercion to retain that property.

If she is dispossessed by her legal heirs, then she can file a suit within 6 months (limitation act applies) to repossess the property.

Wife of a deceased husband is eligible for dower but she is also his legal heir.

She is therefore also available for usufruct apart from share as a legal heir. The usufruct given for unpaid dower cannot be clubbed with her share in husband's estate as a legal heir.

Suppose husband dies leaving behind her wife and one son and one daughter



before calculating their shares in estate, it is important to first make provision for any unpaid dowry to the wife (mother) of the deceased.

The mother has to keep account of all income generated from the estate. Example if it is rented out to someone,

Example if unpaid dowry is 1 lakh rupee,

and property is rented to ₹ 30,000 a month. in such case, mother can keep three months rent as usufruct such that only ₹ 10,000 dower remains unpaid.

It is mother's duty to render the account. in such case. Court expects widow to maintain account.

Right to possession doesn't bar a woman to file a suit for unpaid dower.

* If in a suit of dispossession, court passes a decree stating that dower must be paid to disposers the widow. If after such decree, dower is unpaid, then widow is not barred to file subsequent suit.

Resjudicata doesnot apply to her.

Jurisdiction — Which court is competent to hear matters related to dower?

↳ Muslim Woman Protection to Rights on Divorce Act, 1986 - sec. 3 mandates these matters to be adjudicated by — Magistrate Court

DIVORCE

In the words of the Prophet himself —
“ The most detestable of all permitted things in this world is — ‘Divorce’ . ”

→ With the advent of personal rights & constitutional right to equality, the divorce is always in the eye of the storm.

→ All islamic law is woman centric, only in case of divorce the situation tilts in the favour of the husband.

Words from holy Quran state that -

"Men are maintainers of women"

→ Nikah cannot happen without consent of women
Power is a mark of respect for woman

Divorce gives predominant position to a muslim man. Man was considered superior - physically and mentally as per jurists of earlier times.

→ The fact that Prophet calls divorce the most detestable among all permitted things itself reflects that nikah is not merely a civil contract there is also an associated spiritual aspect to it.

→ Muslim marriages involve 'Muamalat' as well as 'Ibadat'

→ Polygyny allowed but polyandry disallowed is one ground of disparity among genders.

→ There was no need of a court decree for a man to pronounce 'talaq'.

→ 1939 Sheriat Act gave woman grounds to approach the court for divorce for which we must give the devil its due.

→ Unlike the popular belief, talaq cannot take place without reasonable cause.

Quran says talaq cannot happen "arbitrarily"

→ There cannot be talaq without attempts of reconciliation as per Quran.

2007 Bombay High Court (Aurangabad Bench)

↳ Talaq was set aside due to absence of attempt of reconciliation.

Najmun bee vs Sikanabe, Rehman (2004)

Bombay High Court

→ Man cannot divorce at will -

There must be reasonable cause and attempts to reconcile.

Dilshad Begam vs Ahmad Khan (2007)

Bombay High Court

→ Divorce was in front of witness but it was set aside as there was no reconciliation.

Shamim Ara vs State of Uttar Pradesh.
(2002) Supreme Court

→ Talaq in whatever form must be for reasonable cause and must be preceded by attempts of reconciliation by arbitrators chosen by both the parties.

→ Talaq can be set aside by a court.

→ If a decree setting aside talaq is not respected, the woman can execute civil remedies like attachment of property of husband.

→ Quran does not sanction arbitrary talaq.

→ Hindu law, Parsi law, Christian law etc. did not recognise divorce in its ancient form. It came into recognition through codification.

Islam on the other hand had the concept of talaq in ancient times.

→ In ancient muslim law there are 7 types of dissolution of marriage

Indian Muslim law i.e. Sheriat Act of 1937 recognised all these 7 types of dissolution of marriage. —

① Talaaq.

② Ila.

③ Zihar

④ Khulla

⑤ Mubaraat

⑥ Lian

⑦ Judicial divorce (Turkaf or Furqat)

TYPES OF DIVORCE -

① Unilateral divorce at the instance of -

(a) Husband

(b) Wife.

② Mutual Consent

③ Judicial Divorce

① Talag - needs reasonable cause and reconciliation attempt.

→ No court intervention or decree is needed.

→ Divorce by this way is private act of husband

→ Talag word comes from "Tallaka" arabic word meaning 'to release'.

→ All subschools of Shias & Sunnis recognize talag.

Who can give talaq?

Every muslim male having a sound mind and achieved puberty can give talaq.

Fatwa-i-Alamgiri says that Wali can pronounce talaq for a minor in cases of dire need.

It further says that any talaq given in jest or sport or slip of tongue is binding.

Prophet ones said not to do jest in the following—

i) Marriage

ii) Divorce

iii) Manumission — freeing a slave.

Therefore a talaq by slip of tongue is binding.
Nikah halala is to be observed to remedy in such
case.

In Sunnis it is believed that talaq given by
voluntary intoxication is binding. Example on
consumption of alcohol on free will, if talaq
is given, it is binding.

On the other hand, if talaq is given in
the state of involuntary intoxication or delirium,
such talaq is invalid. This is accepted by
all subschools and all jurists.

Shias do not believe in talaq without intention.

Therefore, Shias do not recognize talaq given under intoxication (both voluntary & involuntary) as well as talaq under compulsion, fraud or misrepresentation. Talaaq given in jest is also not valid with Shias.

In Shias "intent" is a crucial factor for talaaq to be valid.

What are formalities of talaaq?

Sunni school does not insist on any formality for talaaq.

Shias require presence of 1 male competent witness or 1 male 2 female witness for talaaq to be valid.

this is exactly opposite of nikah

→ "Manifest talaq," - in sunnis is clear written pronouncement in presence of a Quazi. leaving no room of doubt. Even if communication to wife is pending, such talaq is said to be complete.

→ If the words of pronouncement of talaq are ambiguous, then the "intention" is seen.

→ Talaq should not be necessarily pronounced in the presence of the wife. There is no need of notice of divorce and there is no need to address it to her.

Means even if a person says that I _____ give talaq to _____ then it is binding even in absence of wife. It can be communicated to her later.

What are rights of women upon talaq -

- ① Maintenance
- ② Deferred Dower immediately.

What are duties or obligation of wife upon talaq
She has to observe "iddat" period.

What are the types of talaq in Sunnis -

- ① Express
- ② Implied.

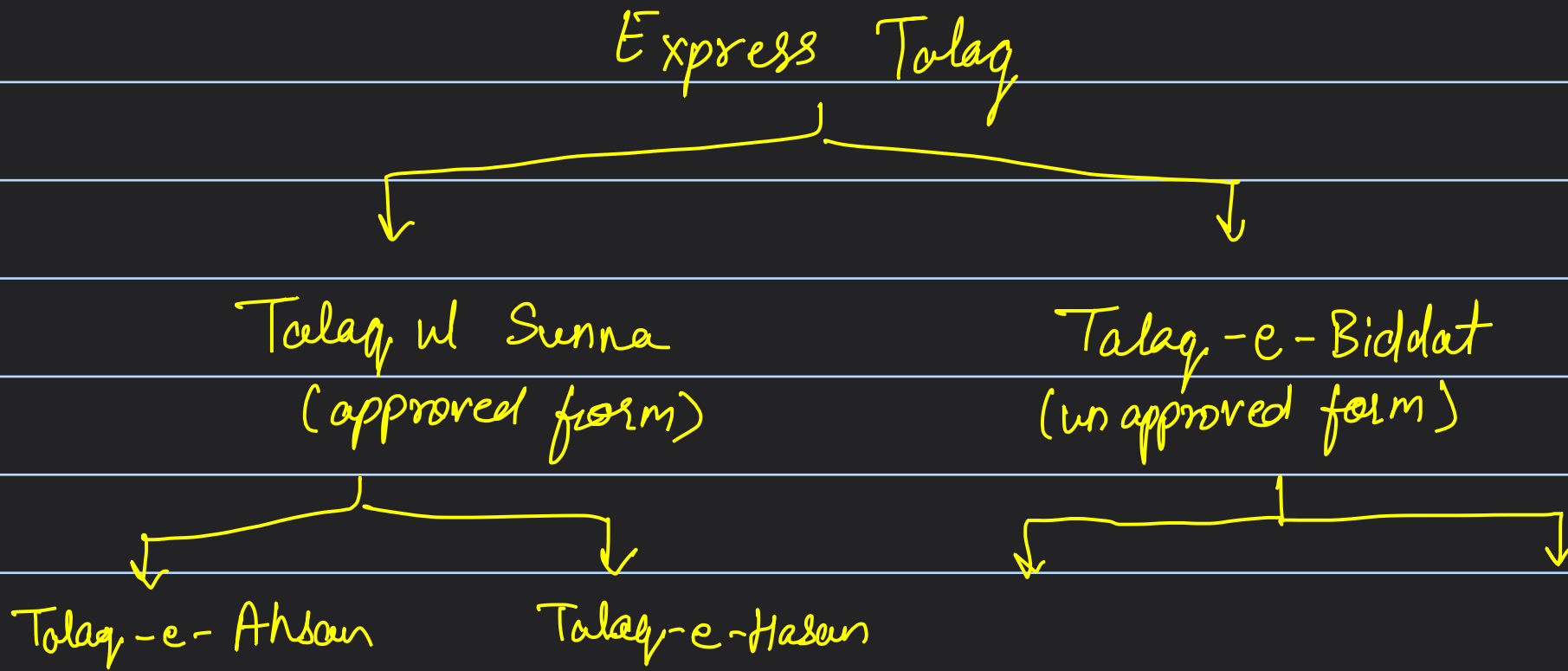
③ Contingent.

④ Constructive.

⑤ Delegated

Shias recognize only Express & Delegated.

① Express - Clear, unequivocal, intentional words



→ Recognized by all schools

→ Approved by the Prophet

→ revocable -

3 months available to revoke

it by conduct example -

resumption of sexual intercourse.

→ Never recognized by Shias.

→ came after 7th century.

→ irrevocable.

→ now unconstitutional & criminalized

First case holding Talag-ul-Biddat as unconstitutional and violative of article 14, 15 & 21

Rahmat Ullah & Khatoon Nisa vs State of UP. (1993)
Allahabad High Court

→ Justice H.N. Tilhari held Talag-e biddat sinful, unconstitutional and violative of Quran

Above case did not get much attention nor there was any political will to bring any legislation.

Later in...

Shayara Bano vs UOI (2017) Supreme Court

↳ 5 Judges constitutional bench.

Decision → 3 : 2

Dissenting
↳ Justice Jagdish Singh Khosla (CJI)
↳ Justice Abdul Nazeer

Violative of Art. 14,
15 and 21

Reasoning by Court →

Triple Talaq is part of personal law.
It comes under article 25 - Right to religion

21 Islamic Countries including Pakistan & Bangladesh have banned it already.

→ 92% of Muslim Women in India wanted it to be banned.

→ It goes against women empowerment and propagates dominance of men in society.

→ It gives men a unilateral and arbitrary right to divorce wives without ostensible reason.

→ The Constitution of country gives no less right to equality to any gender.

→ Banning triple talaq was in parallel with Constitution makers intention to have a UCC in the country.

Aftermath - Religious groups took it as interference into Rights of Minorities.

Judgement instructed legislature to come up with laws to discourage this form of talaq.

This led to formation and enactment of "The Muslim Woman (Protection of Rights on Marriage) Act, 2019" [1st July 2019]



This Act banned only talaq-ul-biddat and even criminalised it.

Effect - Talaq-ul-biddat will be -

(i) void

(ii) an offence of criminal nature

(iii) Talaq in form of whatsapp, email or any other instant form was held illegal and a cognizable offence meaning police can arrest a person for this offence without a warrant.

Who can file complaint for triple talaq?

Wife or any of her blood relatives or relatives by marriage.

What is the punishment involved?

A jail term of 3 years. Bail can be granted by Magistrate only after hearing aggrieved woman if she agrees on bail.

Grant of such bail would depend on the woman whom the accused was giving divorce.

What are the rights of complainant?

Woman is entitled to custody of minor children and is also permitted to seek maintenance under this Act.

What was the Quranic rationale behind Shayara Bano judgement?

- Talaq is most detestable of all permissible things.
- If talaq is unavoidable, husband will use sense of justice (Adl) and rationality (Maquliat).

Supreme court passed this judgement after going into the spirit of Holy Quran.

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

→ Applicability since —

The Act is retrospective having its effect from 19/9/2018. when first ordinance was passed related to this subject matter.

It recognizes electronic form of communication as per interpretation of IT Act., 2000.

Jurisdiction of this act — Judicial Magistrate First Class (JMI) where the muslim woman resides.

Section 3 → Talaq - e biddat and other form of talaq are void.

Section 4 → Punishment for any muslim husband who pronounces such form of talaq.

Term 3 year + Fine

Section 5 → talks about "subsistence allowance" to the woman and children.

Section 6 → Custody of child will be with woman

Section 7 → offence is cognizable (there will be FIR)

there may be arrest without warrant

FIR can be registered by a woman aggrieved or any relative by blood or by marriage.

Offence is compoundable at the instance of wife with permission of court.

Bail — This is neitherailable nor non-ailable.

It is a contingent bail. It is bail at woman's behest.

Cons of this Act — (1) The complainant has to stay with the accused without a divorce and cannot remarry

(2) There is no-provision for reconciliation something which even Quran talks about.

(3) There is a possibility of weaponisation of this

Act against husband

④ When talaq-ul-sunna is possible as a revocable divorce, this act makes a familial mistake a crime.

⑤ Making provision for subsistence allowance and bail at the behest of women puts man at a situation where reconciliation is replaced by deterrence.