Void and Voidable marriages (sections 11 and 12)

NULLITY OF MARRIAGE [Sections 11 and 12]

Marriage under the Act is the voluntary union of one man with one woman to the exclusion of all others, satisfied by the solemnisation of the marriage. There are three types of marriages under this Act,

1. Valid,
2. Void and
3. Voidable.

This distinction relates to the pre-marriage impediments to marriage which are clearly enunciated in Section 5 of the Act. If absolute impediments exist, a marriage is void ab initio. Section 11 deals with void marriages. If relative impediments exist, a marriage is voidable. Section 12 deals with voidable marriages. All other marriages which are not covered by these two Sections are valid.

VOID MARRIAGES [Section 11]

A Void Marriage contravenes some tenet which is envisaged as basic to the institution of the marriage. Section 11 states that any marriage solemnized at the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party be so declared by a decree of nullity if it contravenes any of the conditions specified in clauses (1), (4) and (5) of Sections.

Thus a marriage will be void ab initio,

1. if any party to marriage has a spouse living at the time of the marriage [Section 5(1)]
2. if the parties are within the degree of prohibited relationship unless the custom or usage governing each of them permits such a marriage [Section 5(4)]
3. If the parties are sapindas of each other, unless the custom or usage

governing each of them permits such a marriage [Section 5(5)]. **Provision is prospective but decree of court has retrospective operation,** Section 11 of this Act is prospective in nature. It is only applicable to marriages solemnized after the commencement of HINDU MARREAGE ACT, 1955. It is not applicable to marriages solemnized before the commencement of the HINDU MARREAGE ACT, that is before 18th **May, 1955**, though such marriages may be void. But the decree of nullity passed in the case of a void marriage has retrospective operation. It annuls the marriage not from the date of its passing but from the date of the solemnization of marriage.

Effect of a Void Marriage, The expression "Void Marriage" is simply a convenient phrase. A Void Marriage is no marriage. It is void since its inception. A void marriage does not alter or affect the status of the parties nor does it create any rights and obligations between the parties which normally arise from a valid marriage. The relationship of husband and wife does not come into existence from a void marriage. The position of the wife of a void marriage is not better than concubine. The issues from a void marriage are illegitimate unless legitimized by law (as per, Section 16, HINDU MARREAGE ACT) in some way.

In **M.M. Malhotra Verses. UOI**, the Apex Court observed that the marriages covered by Section 11 are void ipso jure, that is, void from the very inception and have to be ignored as not existing in law at all if and when such a question arises. Although the Section permits a formal declaration to be made on the presentation of the petition, it is not essential to obtain in advance such a formal declaration from a court in a proceeding commenced for the purpose. If one withdraws from the society of the other, the other party has no right to the restitution of conjugal rights. If one of them marries again, he or she is not guilty of bigamy and the validity of later marriage is not affected because of the first so called marriage.

"On a petition presented by either Party thereto", It is only the parties to marriage who can move a petition for the declaration of nullity of marriage. The first wife, during the subsistence of whose marriage the husband takes second wife, has no right to move for declaration of nullity of the subsequent marriage under this Section. However, there is nothing in the Section or any other provision of any law to debar a person affected by an illegal marriage **from filing a regular suit in a civil court for its declaration as void,** if such party was affected by such marriage. There can be a civil suit by a person for declaration that the marriage of A with B was a nullity and for consequential relief's under the Specific Relief Act, 1963, if

the Plaintiff has any cause of action for such relief. In **Uma Shanker Verses. Radha Devi**, the Patna High Court ruled that the first wife could obtain perpetual injunction to prevent second marriage of her husband under Section 9 of the Civil Procedure Code and Section 54 of the Specific Relief Act. **VOIDABLE MARRIAGES [Section** 12]

A marriage which can be annulled or avoided at the option of one or both the parties is known as a voidable marriage. A voidable marriage remains valid and binding and continues to subsist for all purposes, unless a decree is passed by the court annulling the same on any of the grounds mentioned in the Section. Section 12 is both retrospective and prospective unlike Section 11 which is only prospective.

Section 12 reads as follows,

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

(a) that the marriage has not been consummated owing to the impotence of the respondent, or

(b) that the marriage is in contravention of the condition specified in clause (2) of section 5, or

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

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

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

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

1. the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered, or
2. the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered,

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

1. that the petitioner was at the time of the marriage ignorant of the facts alleged,
2. that proceedings have been instituted in the case of a marriage solemnised before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage, and
3. that marital intercourse with the consent of the petitioner has not taken pJace since the discovery by the petitioner of the existence of the said ground."

Grounds for Voidability of a Marriage, A decree of nullity can be granted under Section 12 only on the grounds mentioned in the Section and not merely because the parties to the marriage cannot live happily together for any domestic reasons. The court must look only to the provisions of the Act and see whether the requirements of Section 12 are satisfied and whether there are any grounds for refusing relief under Section 23(1). This section lays down four grounds on which a Hindu marriage becomes voidable. These are,

1. Inability of the respondent to consummate the marriage on account of his or her impotency.
2. Respondents incapacity to consent or suffering from a mental disorder [Section 5(2)]
3. Consent of the petitioner being obtained by fraud or force.
4. Concealment of Pre-marriage pregnancy by the respondent.

Restitution of Conjugal Rights (Section 9)

RESTITUTION OF CONJUGAL RIGHTS

The expression "restitution of conjugal rights" in the normal sense means restoration of conjugal rights which were enjoyed by the parties previously. The text of Hindu law recognised the principle "let mutual fidelity continue until death." Hindu law enjoined on the spouses to have the society of each other. While the old Hindu law stressed on the wife's implicit obedience to her husband, it did not lay down any procedure for compelling her to return to her husband against her will. It became necessary to find some remedies and procedures so as to see the marriage tie intact and would not be disturbed by some petty quarrels between the spouses. As a measure of positive relief in the form of restitution of conjugal rights, Section 9 of the HINDU MARREAGE ACT grants statutory recognition to the right of the couple to have consortium of each other. Anyone spouse leaving the other without just cause and excuse would be proceeded against by the other in a court of law praying for a decree of restitution of conjugal rights. The concept of the existence of the court's power to give this relief was borrowed from English law. It must be noted here that this is the only positive relief under the Hindu Marriage Act while other remedies tend to weaken or disrupt marriage.

Section 9, HINDU MARREAGE ACT reads as under, "When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

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

Foundation of this Right, It is the well settled principled of law that the foundation of the right to bring a suit for restitution of conjugal rights is the fundamental right of matrimonial law that one spouse is entitled to the society and comfort of the other spouse and where either of the spouses has abandoned or withdrawn from the society of the other without reasonable excuse or just cause there should be a decree for restitution of conjugal rights.

Pre-requisites for grant of Restitution of Conjugal Rights

(1) The respondent has withdrawn from the society of the petitioner.

(2) The withdrawal by the respondent party is without a reasonable excuse.

(3) The court is satisfied that the statements made in the petition are true.

(4) There is no legal ground for refusing to grant application. Withdrawal from the Society, The expression, "society" used in this Section should be understood as marital cohabitation that is to say that the husband cherishing and supporting his wife as a husband should do and a wife rendering duties as a housewife. Though they may not live under the same roof yet there would be cohabitation in the wider sense of the term if they fulfil the mutual duties to each other as husband and wife.

The expression "withdrawal from the society of the other" involves a mental process besides physical separation. It means withdrawal from the totality of conjugal relationship, such as refiisal to stay together, refusal to give comfort to other, refusal to have marital intercourse and refusal to discharge matrimonial obligations. Where the husband throws out or leave a wife who is guilty of matrimonial offence (adultery, cruelty or apostasy), it can not be said that she has withdrawn from the society of the husband. The reason is that she has not left the husband on her own. Withdrawal by the respondent takes place when the respondent does it voluntarily. In cases where husband compelled his wife to leave the matrimonial home is not withdrawal by the wife from the husband's society.

Desertion and Withdrawal from the Society, In the case of judicial separation under Section 1.0 read with Section 13 "desertion" has to be proved. The word "desertion" is not used in Section 9. The quality of permanence is one of the essential elements which differentiates "desertion" from "withdrawal from the society". Failure to render conjugal duties, refusal to stay together or of marital

intercourse with the other spouse, would normally constitute withdrawal from the society of the other spouse.

Petitioner must have bona fide Intention, The decree of divorce grantable under Section 13(1 A)(2) is a consequence of the decree of the restitution of conjugal rights. Where it finds that the mind of the petitioner is stuffed more with the idea of divorce than regaining comfort consortium then the court may refuse this relief. If the petitioner wants to use the decree as a stepping stone for divorce in the long run, the court may refuse to grant this decree because the object of the petitioner is not to restore living together. There must be a bona fide desire to resume cohabitation. Restitution will be refused where the petition is not bona fide or filed with an ulterior motive or where it will be unjust to pass a decree.

In **Sushil Kumari Dang Verses. Prem Kumar,** where a petition for restitution of conjugal right is filed by the husband and the husband also accuses the wife of adulterous conduct, the court held that these two claims cannot stand side by side. They are incompatible. The mere fact that seven days after the decree of the restitution by lower court the husband moved another petition for judicial separation, shows the extent of his sincerity and the interest in keeping the wife with him. Observing thus, the Delhi High Court set aside the decree of restitution which was granted by the lower court.

Effect of non compliance of Decree of Restitution, Order 21 Rules 32 and 33 of the CPC lay down the procedure for the execution of the decree for the restitution of conjugal rights. If the party against whom a decree is passed will-fully disobeys it, the decree may be enforced by the attachment of his property. He or she cannot be detained in the civil prison for that. If the party does not obey even after the attachment of property the decree can be used as a device to obtain divorce.

WITHDRAWAL WITHOUT REASONABLE EXCUSE

If the withdrawal by one spouse from the society of the other is founded on a reasonable excuse no decree can be passed under this Section. The expression "reasonable excuse" is not defined in the Act. The grounds on which judicial separation or nullity of marriage or divorce under Section 10,12 or 13 of this Act can be taken as reasonable excuses within the meaning of the Section but the court may consider any other ground as a ground just or sufficient as reasonable excuse on the part of respondent to live separately from the other spouse.

What would be a reasonable excuse cannot be reduced to a formula and would vary with time and circumstances and will have to be determined by the Court in each individual case in the light of the features peculiar to it. It cannot be said that a reasonable excuse cannot exist except in the form of a ground recognised by the Act as valid for judicial separation or for divorce. Something less than such a ground of a matrimonial offence may, therefore, amount to a "reasonable excuse" within the meaning of Section 9 (1) of the Act.

Burden of Proof, By the explanation added to the Section, the burden of proving existence of justification or reasonable excuse has been placed on the person against whom, the allegation of withdrawal is made. The Section unequivocally indicates that once the factum of withdrawal from society by one of the spouses is proved, the reasonableness of the withdrawal has to be proved by the withdrawing spouse.

Cases of reasonable excuse

In the following circumstances the courts held that there was a reasonable excuse for the respondent to withdraw from the society of the petitioner and for the reason restitution was refused,

(1) Marriage was not solemnized in accordance with the customary rites.
(2) The petitioner is guilty of physical and mental cruelty.
(3) The petitioner is guilty of persistent neglect of the respondent and continued to be indifferent towards the respondent.
(4) The petitioner was impotent towards the respondent.
(5) The petitioner has another wife living.
(6) The husband was living with the widow of his brother.
(7) The petitioner is living with a concubine.
(8) Husband's false accusation of adultery or immorality.
(9) The petitioner is himself guilty of deserting the respondent.
(10) The petitioner has committed adultery.

Cases of absence of reasonable excuse

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(1) There is an agreement between the parties to live separately, such an agreement, whether ante-nuptial or post nuptial is opposed to public policy.
(2) The husband did not come to fetch his wife.
(3) There is too much difference of age between the parties.
(4) The wife does not like the place of employment of the husband.
(5) The husband cannot provide the wife the comforts which she is being given by her parents in their home.
(6) The husband refuses to live with her in her parental place.
(7) The husband is not maintaining a high standard of living.
(8) The husband doubted the chastity of the wife, although there was no piece of evidence to prove it.
Resumption of cohabitation, Where the parties have resumed cohabitation the petition for restitution of conjugal rights is not maintainable. Even if the parties are living separately and their circumstances prove that the establishment of a new matrimonial home is not possible, still there can be resumption of cohabitation by resumption of intercourse. But the resumption of cohabitation depends upon the intention of the parties. Mere acts of sexual intercourse may not be decisive of such an intention. Where a spouse has withdrawn and later made bona fide attempts to resume cohabitation but the other spouse refused, it was held that the spouse who initially withdrew from the society was entitled to a decree for restitution of conjugal rights as the original wrong was sought to be rectified by a bona fide offer to resume cohabitation. If that offer is not bona fide there can be no question of resumption of cohabitation.

Judicial Separation [sections 10 and 13 (IA)]

GROUNDS FOR JUDICIAL SEPARATION [Section 10(1)]
Judicial separation is temporary suspension of marital rights between the spouses as a result of decree passed by the Court on any one of the grounds mentioned in the Section. Section 10(1) provides that either party to Marriage may present a petition praying for a decree of judicial separation on any of the grounds specified in Section 13(1) and in case of wife besides the above ground she can have additional grounds available as mentioned in Section 13(2) of the Act. Thus, it is Manifest that the grounds for judicial separation and divorce are virtually the same. Whatever the grounds of divorce under Section 13(1) and (2 have been laid down, they have been similarly adopted in Section 10. Thus under Section 10 now the grounds of judicial separation are,
(1) Adultery, Under the Marriage Laws (Amendment) Act, 1976, the expression "living in adultery" has been dispensed with and it has been replace* by a simple requirement of adultery, that is, where the other party has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse. And thus, even a single act of adultery may be sufficient now for the relief under this head.
(2) Cruelty, Cruelty is a ground for matrimonial reliefs under all matrimonial laws. Where the other party has treated the petitioner with cruelty, the petitioner can claim the relief of judicial separation. The term cruelty is nowhere defined, nor is it capable of any definition. It has no parameters, it is subjective and relative. It would differ from place to place, from person to person and would also vary depending upon social and cultural backgrounds of the parties.
(3) Desertion, Judicial separation may be granted where the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. The expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the wilful neglect of the petitioner by the other party to the marriage.
(4) Unsoundness of Mind, To get relief on this ground the petitioner has to .prove that, (1) the respondent has been incurably of unsound mind or, has been suffering continuously or intermittently from mental disorder of and (2) the nature and degree of the disease is such that the petitioner cannot reasonably be expected to live with the respondent. **Both the elements must be established for the grant of the relief.** The expression 'mental disorder' means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind, and includes schizophrenia. Further, the expression psychopathic disorder means a persistent disorder or disability of mind which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment.
(5) Conversion/Apostasy, If a party to Marriage has renounced the Hindu religion and embraced some other religion, it is a ground for the other party to petition for judicial separation. If a person leaves the Hindu religion to embrace some other religion that he goes out of the fold of the definition of Hindu as given under Section 2 of the Act, then he is said to have converted himself.
(6) Virulent and Incurable Leprosy, One of the grounds for Judicial separation is that the respondent has been suffering from a virulent and incurable form of leprosy. The expression 'Virulent' has been interpreted as Malignant or Venomous.
(7) **Venereal Disease,** Judicial separation is obtainable if the respondent has been suffering from venereal disease in a communicable form.
(8) Renunciation of World, Under Hindu law renouncing from the worldly affairs by entering any religious order amounts to civil death and it may amount to desertion of the petitioner.

(9) Presumed death (Missing Spouse), A person may present a petition for judicial separation on the ground that the other party to the marriage has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of him or her had that other party been alive.

ADDITIONAL GROUNDS TO WIFE TO CLAIM DECREE

The Section has further laid down additional grounds to wife to claim decree for the judicial separation on the ground of,

(1) Bigamy, In the case of a marriage solemnized before the commencement of this Act, a wife is entitled to present a petition for judicial separation on the ground (a) that the respondent husband had married again before the commencement of the Act or (b) that any other wife of the respondent husband to whom he was married before such commencement was alive at the time of the solemnization of the marriage of the petitioner with the respondent. A petition by a wife for judicial separation will lie on either of the these grounds provided that the other wife is alive at the time of the presentation of the petition.

(2) Rape, Sodomy or Bestiality, A wife can seek judicial separation on the ground that since the solemnization of the marriage the husband has been guilty of rape, sodomy or bestiality.

(3) Non-resumption of Cohabitation after decree or Order of Maintenance, A wife can seek judicial separation where a suit under Section 18, HINDU ADOPTION AND MAINTENANCE ACT or in a proceeding under Section 125 Cr.P.C., a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards.

(4) Option of Puberty (Repudiation of the Marriage), If a girl is married before she completes the age of 15 years she is given an option to repudiate that marriage after completing the age of 15 years. This option must be exercised before attaining the age of 18 years. The Act provides no particular form of repudiation. It may be by, filing a petition or by an overt act. If she has exercised this option to repudiate her marriage she can petition for judicial separation or divorce on this ground after completing 18 years of age.

Divorce [sections 13(1), (2), 13(1A), 13A, 13B]

THEORIES OF DIVORCE

(1) Divorce at Will theory

As per this theory one can divorce one's spouse whenever one pleases. Hindu marriage Act does not recognize this theory. Muslim law recognizes this theory and a husband at his free will, without consulting anybody can divorce his wife.

(2) Frustration of Marriage Theory

Without there being any marital offence if marriage is frustrated when one of the spouses is suffering from any physical ailment or mental unsoundness of mind, or changed his religion or has renounced the world or has disappeared for a very long period. In such a case the other spouse should be free to put an end to the marriage by getting divorce. This theory has been followed by the HINDU MARREAGE ACT, 1955 as follows,

(1) Section I3(l)(3), Incurably of unsound mind or mental disorder.
(2) Section 13(l)(4), Virulent and incurable leprosy.
(3) Section 13(l)(5), Venereal disease in a communicable form.
(4) Section 13(l)(6), Renounced the world by entering any religious order.

Offence or Guilt or Fault Theory

According to this theory when one of the spouses commits a matrimonial offence, the other may seek divorce from the delinquent spouse. The expression matrimonial offence is important, it includes (1) adultery (2) desertion (3) cruelty (4) Rape (5) sodomy (6) Bestiality (7) Refusal to obey court's order to pay maintenance to the wife (8) Marrying an underage person. This implies that there should be personal injury to the marital relations of the spouses. **This theory implies that one party is guilty and the other is innocent. But if the aggrieved party condones the act of the guilty party, no divorce can be granted.**

According to the English Law of Doctrine of Recrimination, if both the parties independent of one another have committed matrimonial offence the marriage should not be dissolved. The guilt theory is criticized on the basis that it recognizes divorce only on certain (above mentioned) grounds. Some more grounds are recognized which led to the renaming of guilt theory as fault theory. The grounds like insanity and epilepsy are added to the list. Thus, if one of the parties ha$ some fault in him or her, marriage could be dissolved whether that fault is his or her deliberate or unintentional act.

(4) Mutual Consent Theory

Divorce by mutual consent means that the case is not like usual ones wherein one party petitions against the other for divorce and the other party resists the same. Here both the parties make a joint petition to the court for divorce between them. They genuinely desire to get rid of each other and they part amicably for good. If divorce is not given their life would be spoiled and it would result in moral degradation. If divorce by mutual consent is given the parties will not wash their dirty linen in public.

There are unfounded objections against this type of divorce that consent of the unwilling party would be obtained by force, fraud or some other contrivance, and this is a divorce by collusion. But both these arguments and doubts are unfounded. **Every collusion is no doubt by consent but every consent does not mean collusion. Collusion is a secret agreement for a fraudulent purpose, it is a secret agreement by two or more persons to obtain an unlawful object.** Collusion is different from compulsion. Compulsion occurs when one party can dominate the will of the other. The Hindu Marriage Act now

permits divorce by mutal consent under Section 13B. One may well say that from an unbreakable bondage under the Smritis, a Hindu Marriage has been transferred under the Hindu Marriage Act into a consensual union between one man and one woman. Everything static must drop and die and ideas of marriage and divorce are no exception.

(5) Irretrievable Breakdown Theory

A marriage is a union of husband and wife for the whole life, but it may happen that their relations might be strained and they would like to live away from each other. It is to be remembered that owing to their sexual relations, interdependence and social censure it is difficult for them to live without each other for a long time. Therefore there must be some stronger reason for them to live apart and get divorce. There should be complete absence of emotional attachment between them and there must develop intense hatred and acrimony between them, so much so, that their marriage is only in name, a dead one or like a shell sans substance. It is now beyond the hope of salvage. It is therefore an irretrievable breakdown of marriage.

The breakdown of marriage is defined as "such failure in the matrimonial relationship or circumstances so adverse to that relation that no reasonable probability remains for the spouses to live together as husband and wife." If a marriage has broken down beyond all possibilities of repair, then it should be brought to an end, without looking into the causes of breakdown and without fixing any responsibility on either party. Such marriage should be dissolved even if one of the parties to the marriage does not desire it. The empty shell is to be destroyed with the maximum fairness and minimum bitterness, distress and humiliation.

In **Yousuf Verses. Sowramina**, the learned judge said, "While there is no rose which has no thorns but if what you hold is all thorn and no rose, better throw it away. The ground for divorce is not conjugal guilt but breakdown of marriage." In some countries, grounds like "incompatibility of temperament", "profound and lasting disruption", etc. have been added which helped in claiming divorce under the breakdown theory. Sometimes the determination of the question whether in fact a marriage has broken down or not is left to the courts. At other times, the legislature lays down the criterion of breakdown of a marriage and if that is established, the courts have no option but to dissolve the marriage. For instance, the petitioner must show that before the presentation of the petition he has been living separate from the respondent for a specified period *[as per,* Section

The Law Commission of India in its Seventy first Report (Reforms of the Grounds for Divorce) has recommended that irretrievable breakdown of marriage should be made a ground of divorce for Hindus. It suggests the period of three years' separation as a criterion of breakdown. But its recommendation have not been implemented so far.

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Question. 3. What are the grounds of divorce under the Hindu Marriage Act?
Answer. Under the Hindu Marriage Act, divorce can be obtained by one spouse through court on the ground of following types of conduct or circumstances of the other spouse,
(1) adultery,
(2) treating with cruelty,
(3) desertion for at least 2 years,
(4) conversion to another religion (of the other spouse),
(5) incurable insanity or mental disorder,
(6) incurable and virulent leprosy,
(7) venereal disease in a communicable form (not contacted from the petitioning spouse),
(8) renouncing the world and becoming a Sanyasi,
(9) not being heard of for seven years,
(10) non-resumption of cohabitation after a decree of judicial separation, for at least one year,
(11) non-compliance with a decree of restitution of conjugal rights for at least one year,
(12) husband being guilty of rape or unnatural sex after marriage,
(13) husband failing to pay the wife maintenance ordered by a court, and
(14) mutual consent. Besides this, there can be customary divorce.

Option of Puberty

Repudiation of Marriage (Option of Puberty), Section 13(2)(4)

This clause confers on girls who have been married before attaining the age of 15 years, a right of repudiation. **Consummation of marriage is immaterial here.** Under this clause a wife can get divorce if (1) at the time of her marriage she was below the age of 15 years, and **(2)** after that, but before attaining the age of 18 years, she has repudiated the marriage.
The Act or the Section does not prescribe or lay down any procedure for repudiation of marriage. The fact of repudiation has to be proved therefore by the wife. The clause only gives a right of repudiation as therein mentioned but the petition for dissolution of marriage on this ground is maintainable by her after completing 18 years of age. **This clause was added by the Amending Act of 1976.** There was no such right prior to the Amendment. Thus, if she has exercised this option to repudiate her marriage she can petition for divorce on this ground. One important point must be noted that the Act indirectly accepts that a minor's marriage is not void (though penal). Because, if it was void, the question of allowing a divorce should not arise.

Mutual Consent

DIVORCE BY MUTUAL CONSENT [Section 13B]

Section 13B is in pari materia with Section 28 of the Special Marriage Act, 1954. This provision was not made originally in the HINDU MARREAGE ACT. It was inserted by the Marriage Law (Amendment) Act, 1976. The provision is retrospective as well as prospective from the commencement. Hence parties to a marriage whether solemnized before or after the Amending Act can avail themselves to this provision.

Section 13B reads as follows,

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

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

Compromise by itself does not dissolve the marriage, If both the parties have agreed to dissolve their marriage, they may do so in an amicable manner which is certainly a more civilized and cultured way than by quarrelling between themselves in a court. They may petition together under Section 13B in a district court that they may be granted a decree of divorce. The parties have to get it processed in a Matrimonial court. Even proceedings before a Panchayat does not effect divorce.

Hindu Marriage Act, 1955, sections.24 and 25

RIGHT TO MAINTENANCE **OF A HINDU WIFE**

In the present Chapter, right of maintenance of a Hindu wife is to be discussed at length. Three different types of provisions regarding maintenance to a wife have been provided in three different piece of legislation,

(1) Hindu Marriage Act, 1955, Sections 24 and 25.
(2) Hindu Adoption and Maintenance Act, 1956, Section 18.
(3) Code of Criminal Procedure, 1973, Section 125.

Object of Section 24, HINDU MARREAGE ACT **1955,** This provision is intended to sustain the indigent Party (wife or husband) during litigation for any of the reliefs under the HINDU MARREAGE ACT. This right arises with the start of the proceedings and ends with the proceedings under the HINDU MARREAGE ACT. The award of maintenance under Section 18, HINDU ADOPTION AND MAINTENANCE ACT creates no bar for filing an application under Section 24, HINDU MARREAGE ACT. The only limitation is that the maintenance awarded under Section 18, HINDU ADOPTION AND MAINTENANCE ACT should be kept in view while passing an order under Section 24, HINDU MARREAGE ACT.

Object of Section 25, HINDU MARREAGE ACT**, 1955,** This Section confers discretionary power upon the Court to grant a right on either spouse to claim permanent alimony and maintenance when a decree is passed granting any substantial Matrimonial relief under the HINDU MARREAGE ACT. The Supreme Court held that the right of Maintenance under Section 25, HINDU MARREAGE ACT depended on the Court passing a decree of the kind envisaged under Sections 9 to 14 of the HINDU MARREAGE ACT.

Section 24 and Section 25, HINDU MARREAGE ACT **are distinct,** These two Sections of the HINDU MARREAGE ACT are independent and distinct of each other. The former grants maintenance pendente lite whereas the latter makes provision for the grant of permanent alimony. The dismissal of an earlier application under Section 24 of the Act does not affect the application under Section 25 of the Act.

Object of Section 18, HINDU ADOPTION AND MAINTENANCE ACT**,** A Hindu wife has a right to get maintenance from her husband for her entire life. The obligation to maintain a wife is personal in character, and arises from the very existence of the relation between the parties. Section 18, HINDU ADOPTION AND MAINTENANCE ACT substantially reiterates that right. The forum for Application under this Section is Civil Court, and not the matrimonial court under the HINDU MARREAGE ACT.

Is there any Inconsistency between Sec. 25, HINDU MARREAGE ACT **and Sec. 18** HINDU ADOPTION AND MAINTENANCE ACT**?,**

There is no inconsistency between these two different provisions. The jurisdiction vested in the court under both the enactment is separate and distinct. The Supreme Court in **Chand Dhawan Verses. Jawaharlal Dhavvan,** (1993) 3 SCC 406 makes it manifest that claim of maintenance under Section 25 is awardable when the marriage is "diseased or broken" as an ancillary or incidental remedy to the strained marital status due to passing of a decree for restitution of conjugal rights, or of judicial separation in favour of or against her or of nullity or divorce with or without her consent. Where there is no disruption of marital status by Court's intervention under the HINDU MARREAGE ACT, she is entitled to claim maintenance under Section 18, HINDU ADOPTION AND MAINTENANCE ACT.

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Object of Section 125, Cr.P.C., This is a summary remedy to provide maintenance to an indigent wife in order to save her from starvation or vagarancy. The wife who is getting maintenance under Section 125, Cr.P.C. certainly has a right to approach to the Civil Court under HINDU ADOPTION AND MAINTENANCE ACT for reasonable sum of maintenance to be awarded to her. The scope of Section 18 HINDU ADOPTION AND MAINTENANCE ACT is wider than Section 125, Cr.P.C. But Section 125, Cr.P.C. is provided as a speedier remedy than the remedy under Section 18 HINDU ADOPTION AND MAINTENANCE ACT.

Section 25, HINDU MARREAGE ACT **and Section 125, Cr.P.C.,** A wife is entitled to apply for maintenance under Section 125, CrPC also. As the proceedings under the HINDU MARREAGE ACT and the CrPC differ in their nature, both the remedies can be pursued simultaneously.

Right to claim maintenance under the HINDU MARREAGE ACT is an independent right and is not controlled by the Hindu Adoption and Maintenance Act whereas the provisions of maintenance in the CrPC and the HINDU ADOPTION AND MAINTENANCE ACT are independent reliefs. Under Hindu Marriage Act, either spouse can seek maintenance whereas, under the CrPC and HINDU ADOPTION AND MAINTENANCE ACT only the wife can claim maintenance.

Right to Maintenance is a Substantive and Continuing Right, The Hindu law cast a duty on the husband to maintain the wife. The amount of maintenance, whether it is fixed by a decree or agreement is liable to be increased or diminished, whenever there is a change of circumstances as would justify a change in the rate. The Hindu law recognised that the right of maintenance is a substantive and continuing right and the quantum of maintenance was variable from time to time.

The Hindu Adoptions and Maintenance Act, 1956

CAPACITY OF A FEMALE HINDU TO TAKE IN ADOPTION[5] Section 8 makes a radical change in the old Hindu law under which a woman had no right to take in adoption at all during the lifetime of the husband without his express consent. Even in such a case the adoption would be the husband's act and not the wife's and she could be only an agent on his behalf. The question of adoption by an unmarried female Hindu was unimaginable. This Act confers oh the female Hindu a right to adopt for herself. Section 8 reads as follows,

"Any female Hindu—(a) who is of sound mind, (b) "who is not a minor, and (c) who is not married, or if married,—(1) -whose marriage has been dissolved, or (2) whose husband is dead, or (Hi) has completely and finally renounced the world, or (4) has ceased to be a Hindu, or (5) has been declared by a court of competent jurisdiction to be of unsound mind, has the capacity to take a son or daughter in adoption, "

In the case of a man, the right is subject to the vetoing power of the wife or wives as the consent of wife or wives is necessary, but in the case of woman that right can be exercised absolutely during the period of her maidenhood, divorce-hood, widowhood and conditionally during the continuance of marriage if her husband has renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. *During the Continuance of Marriage the wife has no right to adopt except where the husband is suffering from any of the disabilities.*

Thus the wife assumes independent power of adopting a child where the husband has (a) completely and finally renounced the world, which means that he has become Sanyasi, or (b) has become a convert by embracing other religion like Christianity and Islam, or (c) has been declared to be of unsound mind by a court of competent jurisdiction. It may be noted that such a declaration must actually be obtained, merely on the basis of unsoundness of mind of the husband, the wife does not acquire the competence to adopt a child independently.

Adoption by the Divorcee, A divorcee can adopt a child in her own right and in such a case the divorced husband stands in no relation to the child at all. However, if the divorcee later marries, the husband is in the position **of step father** to the adopted child whereas the female adopting will in her own right be the adoptive mother of the child. .

Adoption by the Widow, Formerly, a widow tould not adopt without the consent and express authority of her deceased husband or in some cases without the consent of her sapindas. But the Act removes any such bar to an adoption by a widow. Moreover, formerly a woman could adopt only to her husband but now she can adopt for herself.

Section 8 recognizes the right of a Hindu Widow to'adopt a son or daughter to herself in her own right. But such adoption will not only be to herself but also to her (deceased) husband. The effect of adoption by a widow of a son or daughter will be to clothe the adopted son or daughter with all the rights of a natural born son or daughter in the adoptive family and to create all the ties of the child in

the. family (Section 12). The result is that for all purposes (subject to rules laid down > in Section 12) the adoptee in effect becomes the son or daughter not only of the widow but of her deceased husband as well. The adoptee acquires the same status as that of a natural-born child with all the consequences and incidents of that status. **As such, the deceased husband becomes the adoptive father of the child adopted and not a step father.**

It is to be noted that on adoption by a widow, the adopted son becomes the son of the deceased adoptive father and the position under the old Hindu law as regards ties in the adoptive family is not changed, **Ankush Narayan Verses. Janabai,** AIR 1966 Bom 174. The provision that a widow can now adopt a son or daughter to herself in her own right **only indicates** the unequivocal right and freedom of the widow to adopt without the express consent and authority of the deceased husband or the consent of sapindas.

Adoption by Married woman during the subsistence of Marriage (in the lifetime of her husband), A married woman cannot adopt at all during the subsistence of the marriage except when her husband has completely and finally renounced the world, or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. If the husband is not under such disqualification the wife cannot adopt even with the consent of the husband whereas the husband can adopt with the consent of the wife, **Sitabai Verses. Ramachandra,** (1969) 2 SCC 544.

CHANGED POSITION OF LAW AFTER 2010 AMENDMENT

The newly enacted Section 8 reads as under,

"Any female Hindu who is of sound mind and is not a minor has the capacity W take a son or daughter in adoption,

Provided that, if she has a husband living, she shall not adopt a son or daughter except **with, the consent of her husband** unless the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind."

Section 18 HINDU ADOPTION AND MAINTENANCE ACT, 1956, which deals with the maintenance and separate residence of a wife provides as follows —
(1) "Subject to the provisions of tills Section, a Hindu wife whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime". Section 18(1) is of a mandatory nature and lays down that every Hindu wife must be maintained by her husband throughout her life. The condition precedent for the application, of Section 18(1) will be that the woman must be legally married to the man against whom she is seeking its enforcement.
(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance,—
(a) *Desertion/Neglect*, If he is guilty of desertion, that is, of abandoning her without reasonable cause and without her consent or against her wish, or wilfully neglecting her,
(b) *Cruelty*, If he has treated her, with such cruelty as to cause reasonable apprehension in her mind that it will be harmful or injurious to Iiv6 with her husband. In Kamla Jain Verses Rathnavelu, the husband by his conduct made it evidently clear that she was not wanted in the house and her presence was prevented by him. It was held that this amounted to cruelty and justified her living separately. The burden of proof that the husband treated her with the cruelty is on the wife,
(c) *Leprosy*, If he is suffering from a virulent form of leprosy,
(d) *Bigamy*, If he has any other wife living. It is immaterial that the claimant is the first wife or second wife of the husband. A wife is entitled to maintenance and separate residence under this clause where the former wife is alive and it is not necessary that the latter should have been or is living with the husband [Kalawanti Verses Relen]. It is also essential that both the marriages of the husband are valid,
(e) *Concubinage*, If he keeps-a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere,
(f) *Conversion*, If he was ceased to be a Hindu by conversion to another[1] religion,
(g) *Residuary provisions*, If there is any other cause justifying her living separately. It is submitted that all those cases where the court may refuse husband's petition of restitution of conjugal right will be covered under this clause entitling a wife to claim separate residence and maintenance from the husband.
(3) Disqualification from maintenance, A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be Hindu by conversion to another religion.
Thus, it will be seen that sub-section (1) reiterates the principle of pure Hindu Law that a wife is entitled to be maintained by her husband whether he possesses property or not. The maintenance of a

wife by her husband is a matter of personal obligation arising from the very existence of the, relation, and quite independent of the possession of the husband of any property ancestral or self-acquired. There is an absolute right vested in Hindu wife to be maintained by her husband and this maintenance is dependent on her living with him and discharging the duties as wife. The wife will also be entitled to claim maintenance while living separately from her husband, if any of the conditions laid down in Section 18(2) is fulfilled. She is entitled to maintenance so far as she is Hindu and chaste.
The husband shall not be absolved from his liability to maintain his wife simply because he has ceased to be Hindu. Section 18(3) takes away the right of wife to claim maintenance if she ceases to be Hindu by conversion to another religion. The effect of husband ceasing to be Hindu would be that the wife would be entitled to separate residence and claim for maintenance.

Impediments to the Adoption of a Son, Section ELEVEN (1)

Impediments to the Adoption of a Son, Section ELEVEN (1)
If a son is to be adopted, the adoptive father or mother must have no living son, grandson (son's son) or great grandson (son's son's son), whether natural or adopted. The word **"living"** at the time of adoption, is significant because under the old law a child in the womb was considered a child in existence for some purposes. But under the present Act, it is only when a son or grandson etc. is living at the time of the adoption that the right to adopt cannot be exercised. Hence, subsequent birth of a son, cannot invalidate the adoption of a son. A person can adoption in the presence of a **stepson** also because he is not a son by legitimate blood relationship. It is necessary that the son or grandson or great grandson whose presence bars adoption must be a Hindu. If he has **ceased to be a Hindu** by apostasy to a non-Hindu religion, his existence does not bar adoption. Though existence of an **illegitimate son** is not a bar to the adoption of a son the existence of a son out of a void or voidable marriage or out of marriage which is dissolved by a decree of divorce, acts as an impediment to the person taking in adoption as in those cases the sons are considered legitimate under Section 16 HINDU MARREAGE ACT.
(2) Impediments to the Adoption of a Daughter, Section ll(2)
The adoption of a daughter is an innovation made by the Act. Under the old law it was not permissible. If the adoption is to be made of a daughter the adoptive father or mother must not have a Hindu daughter or son's daughter living at the time of adoption. The existence of a **stepdaughter** or step granddaughter is not a bar to the adoption of a daughter. The daughter or granddaughter must be a Hindu. If she is **converted** to a non-Hindu religion then her father or mother may adopt a daughter. The fact that the daughter or granddaughter is **married or not,** is not material. Existence of an Illegitimate daughter is not, however, a bar to a male or even a female Hindu taking a daughter in adoption, although the illegitimate daughter is entitled under the Hindu Succession Act to succeed to the property of the mother. However, the existence of a daughter who is to be deemed to be legitimate daughter of the parents by operation of Section 16 of the HINDU MARREAGE ACT, 1955, would be a bar to the father's or mother's right to take a daughter in adoption.
(3) Age-gap between Adopter and Adoptee, Section ll(3) & (4)
If the adopter and the adoptee belong to the same sex, there is no rule relating to the age-gap between them. But if the adopter and the adopted child belong to the opposite sexes, the adopter must be 21 years older than the adopted child. The rule is mandatory and is not subject to variation by any custom or usage to the contrary. It is a condition of precaution, lest the institution of adoption be turned into an institution of ulterior purposes and corruption.
Illustration, 1. A, a Hindu male of 25 years of age adopted a daughter of 14 years of age. The adoption is invalid as A (adoptive father) is not twenty-one years older than the female adoptee.

2. A, a Hindu male of 25 years of age adopted S, a son of 14 years of age. The adoption is valid because in a case where the adopter and the adoptee are of the same sex the condition regarding the disparity in age is not at all applicable.

(4) Simultaneous Adoption Prohibited, Section ll(5)

A child can not at the same time be the son or daughter of two or more adoptive fathers or mothers. Whereas Section 10(2) prohibits the giving or taking in adoption of a person already adopted this clause removes the possibility of the simultaneous adoption of the child by two or more persons. An adoption by a husband and wife together is not a case of joint adoption. It is adoption by the husband only. They constitute one family. There would be a case of joint adoption if there are two or more adoptive fathers, or two or more adoptive mothers, or two or more adoptive families. Under the old law also similar prohibition was in force.

(5) Giving and taking of the Child, Section 11 (6)

This clause states in express terms that there must be actual giving and taking of the child with intent to transfer the child from the family of its birth to the family of its adoption. The physical act of giving and receiving was absolutely necessary (sine qua non) for the validity of an adoption under the law as it existed before coming into force of the present Act, and the position under the Act is identical. The Section, however, does not prescribe any particular mode or manner for the act of giving and taking. What is essential that there should be some overt act to signify delivery of the child from one family to another. Where the act of giving and taking is lacking, the adoption is invalid and there is no scope for applying the doctrine of factum valet. The requirement of the Act of giving and taking is necessary not only in the case of a minor but also in the case of an adult where adoption of an adult is perimssible, Dhanraj Verses. Suraj Bai. The onus lies on the plaintiff to prove the adoption, namely giving and taking.

(6) Ceremony of Datta Homam not necessary, Proviso to Section ll(6)

The law of adoption is made manifestly secular and temporal by rendering the Datta Homam non-essential. Performance of 'Datta Homam' was imperative under Shastric Hindu law but after the commencement of the HINDU ADOPTION AND MAINTENANCE ACT, it is not necessary to be performed, **Guradas Verses. Rasaranjan**. Even when Datta Homam is performed, the adoption should be taken to have been made when the actual giving and taking had taken place and not when the religious ceremony is performed. To prove valid adoption, it would be necessary to bring on records that there has been an actual giving and taking ceremony.

The Hindu Minority and Guardianship Act, 1956

NATURAL GUARDIANS OF A HINDU MINOR[1] (Sections 6 and 7)
THREE NATURAL GUARDIANS, SECTION 6
The natural guardian is a person who becomes so by reason of the natural relationship with the minor. A natural guardian nurtures a child and he does not, in this matter, require the support of any court's order for the purpose. Section 6 enumerates three natural guardians, father, mother and husband. They have the guardianship of the person or property or of both of the minor.
Section 6 runs as follows,
"The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are,
(a) in the case of a boy or an unmarried girl — the father, and after him, the mother, provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother,
(b) in the case of an illegitimate boy or an illegitimate unmarried girl — the mother, and after her, the father,
(c) in the case of a married girl — the husband,
Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this Section —
(a) if he has ceased to be a Hindu, or
(b) if he has completely and finally renounced the world by becoming a hermi *(Vanaprasthd)* or an ascetic *(yati* or *sanyasi).*
Explanation, In this Section, the expressions 'father' and 'mother' do not include a step-father and a step-mother."
Section 6(a), "The father, and after him, the mother"
Normally, when the father is alive, he is the natural guardian and it is only after him that the mother becomes the natural guardian. There can, however, be an exceptional case where the minor can be legally represented by the mother as the natural guardian even though the father may be alive.
In **Jijabai Verses. Pathan Khan**, the father and mother had fallen out and the mother was living separately for over 20 years. It was the mother who was actually managing the affairs of her minor daughter, who was under her care and protection. The Supreme Court observed that it is no doubt true that the father was alive but he was not taking any interest in the affairs of the minor and it was as

good as if he was non-existent so far as the minor was concerned. In the peculiar circumstances, the father should be treated as if non-existent, and, therefore, the mother could be considered as the natural guardian of the minor's person as well as property.
In **Githa Hariharan Verses. RBI**, the Supreme Court observed that the word "after" need not necessarily mean "after the life time". In the context in which it appears in Section 6(a), it means, "in the absence of, the word "absence" therein referring to the father's absence from the care of the minor's property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be absent and the mother being a recognized natural guardian, can act validly on behalf of the minor as the guardian.

PART II -MUSLIM LAW

Question. 2. State the consequences (legal effects) that follow from the divorce under Mohammedan Law.
Answer. The following consequences emerge from a valid divorce,—
1. Iddat, The wife is bound to observe *Iddat* after the divorce. The duration *of Iddat of divorce* is three months from the date of divorce or if the wife is pregnant at the time, till her delivery. It is not binding on her (wife) to observe *Iddat* if the marriage was not consummated.
2. Maintenance, The husband has to maintain his wife during the period *of Iddat.* If she does not observe *Iddat,* husband is not obliged to maintain her.
3. Another marriage,
(1) After the completion *of Iddat,* either of the parties can marry again.
(2) Before the completion of *Iddat,* wife cannot contract a valid marriage with another person if the marriage was consummated, otherwise she is free to marry immediately without observing *Iddat.*
(3) Before the period *of Iddat,* husband cannot validly marry a fifth wife.
(4) The parties can even remarry themselves if divorce was pronounced in a revocable form. But if the divorce was effected by *three* pronouncement of Talaq by the husband remarriage between the divorced couple is not possible, unless and until,
(a) The wife observes *Iddat,*
(b) After the expiry of Iddat, she marries a second husband,
(c) The intervening marriage is *actually* consummated, (valid retirement is not sufficient here), and
(d) The second husband either dies or divorces her. This matter has now become controversial.
4. Dower, If the marriage was consummated, the wife becomes entitled to get whole of unpaid dower both prompt and deferred immediately. If the marriage was not consummated, only half of the specified dower.
5. Inheritance,
(1) If the divorce is revocable and either of the parties died before the completion *of Iddat* period the other is entitled to succeed to him or her in the capacity of husband or wife.
(2) If the divorce is irrevocable, mutual right of inheritance ceases.
(3) In case of divorce pronounced during husband's death-illness the right to inherit continues till *Iddat,*

(4) There is no right of inheritance in any case after the expiry *of the Iddat.*
6. Cohabitation become unlawful, If the divorce is irrevocable, sexual intercourse between the divorced couple is unlawful and the children born of such unlawful cohabitation are illegitimate. They cannot be legitimated even by acknowledgment. In Rashid Ahmad Verses Anisa Khatun, Ghiyasuddin, a Sunni husband divorced his wife by pronouncing three Talaqs. The wife was not present at the time of pronouncements and the words of talaqs were pronounced by him under the undue influence of his father. The couple continued to cohabit even after the pronouncements of *talaqs* without formally remarrying. The wife did not in the meantime marry with some other person. Five children were born to them after the resumption of cohabitation. It was held by the Privy Council that since the wife did not remarry another person, the bar to remarriage was not removed. Besides this, there was no proof of any regular remarriage between the divorced couple. The children were, therefore, held to be illegitimate and the children and the widow were not entitled to inherit the properties of the deceased Ghiyasuddin.
But if after the divorce effected by three pronouncements by the husband, the divorced couple remarry without the intervening marriage, such remarriage is merely irregular and not void, and therefore the offspring born of such remarriage are legitimate [Khadija Verses Muhammad.0

SOURCES OF MUSLIM LAW
Sources of law signifies the original materials where the contents of that law are to be found and are made available for people at large. Sources of Muslim law may be classified into two categories,
(A) The Primary (Shariah) Sources, Primary sources of Muslim law are those which the Prophet himself directed to be the sources of Muslim law. These are, (1) The Quran, (2) Sunnah or Hadith (Traditions), (3) The Ijma and (4) Qiyas. These sources are of highest quality and importance in their respective order of merit. The whole of Muslim personal law is based on the primary sources. They are also called the formal sources of Muslim law.
(B) The Secondary (Extraneous) Sources, These are those sources which are developments on the foundations laid down by the primary sources. These are, (1) Customs (Urf), (2) Judicial precedents, (3) Legislation and (4) Justice, equity and good conscience. These sources explain and modify the primary sources of Muslim personal law according to the changing needs of the Islamic society.
(1) THE QURAN
The primary source of Muslim law is revelation which has been of two kinds-express and implied. The Quran is composed of such express revelations as were made in the very words of God to Mohammed when he was bestowed with the office of the Prophet and Messenger of God. The Quran is the first source of Muslim law in point of time as well as in importance. It deals with variety of subjects and very small part of its comes into the domain of law. Basically it is mixture of religion, law and morality. Religion, law and morality are, at some places, mixed in such a manner that it is difficult to separate them. Even the non-legal texts of the Quran which deal with morality and conscience have an effect on the legal science of Islam.

Sources of Muslim Law

(2) SUNNAH OR HADITH (The Traditions)
Just as the Quran is the express revelation on Prophet Mohammad, the Sunnah are implied revelations in the precepts, sayings and actions of the Prophet, not written down in his lifetime, but preserved by traditions and handed down by authorised agents. Whatever the Prophet said or did without reference

to God is treated as his traditions and considered to be the second source of Muslim law. Where the words of God could not supply an authority for a given rule of law, 'Prophet's own word's and deeds' were treated as an authority because it is believed that even his own saying is derived from God. Sunnah means the model behaviour of the Prophet. The narrations of "What the Prophet said, did or tacitly allowed" is called Hadith. These traditions, however, were not reduced to writing during the lifetime of Mohammad. They have been preserved as traditions handed down from generation to generation by authorised persons.

(3) THE IJMA (Consensus of Opinions)

Ijma means the consensus of the companions and followers of the Prophet. Abdur Rahim defines it as "the agreement of the jurists among the followers of Mohammed in a particular age on a particular question." After the death of the Prophet, as the expansion of the Islamic influence took place, a large number of new situations and new problems cropped up which would not be decided by reference only to Quran and Hadith. The jurists then took the recourse to the principle *of Ijma*, that is, the consensus of opinion of jurists on any question. The authority *of Ijma*, as a source of law is based upon tradition, "My followers can never agree upon what is wrong". But the jurists were not free to give the decisions without any basis. They had to justify their opinions in the light of some well settled principles already given in the Quran or the traditions. Public policy, interest of the community and equity were also taken into account as the basis for a new explanation of law.

Ijma has made a worthy contribution to Islamic law since it has made possible changes to suit the needs of changing times and usages, and inasmuch as it has been influenced by the opinions of jurists in all cases not provided for in the Quran or the traditions, or where these provisions were not explict. In the opinion of Abdur Rahim, there is one serious defect in the rules regarding Ijma. It is the omission to provide a definite and workable machinery for the selection of the jurists who are qualified to take part in Ijma, and for ascertaining, collecting and preserving the results of their deliberations in an authoritative form.

(4) THE QIYAS (Analogical Deductions)

Qiyas or analogy is a process of deduction by which the law of a text is applied to cases which though not covered by the language, and governed by the reasons of the text. If there was any problem before the society on which the former three texts were silent then Qiyas was applied to get the law. It was a method of comparing the problem of society with a similar problem for which solution was given in the texts. Compared with other three primary sources of Islamic law, the Qiyas is of much lesser significance. Though it occupies a place next to the Quran, Sunna and Ijma, yet it is considered subsidiary to all these sources of Islamic law. The reason is that with respect to analogical deductions, one cannot be certain that they are what the law giver intended, such deductions resting as they do upon the application of human reasons which is always liable to err.

Nikah - conditions for validity

ABSOLUTE (MANDATORY) PROHIBITIONS

Absolute prohibitions in the marriage are mandatory in nature. A marriage contracted in violation of any of the absolute prohibitions is null and void under all the schools of Muslim law. For a valid marriage, therefore, there must be absence of prohibited relationship between the parties. There is an absolute prohibition for a Muslim to marry a person who is within his or her 'prohibited relationship'. Two persons are said to be within 'prohibited relationship' if they are related to each other by (1) consanguinity, (2) affinity, or (3) fosterage.

(1) Consanguinity (Relation by blood)

Under consanguinity or blood-relationship, a Muslim cannot marry with any of his (or her) following relations,

(a) One's own ascendant or descendant, how highsoever.

(b) Descendants of one's father and (or) mother how lowsoever.

(c) Brothers or sisters of one's ascendants how highsoever.

One's own ascendants and descendants, Father and mother of a person are his (her) ascendants. Ascendants of higher degree from the side of father are father's father, father's father's father, etc., how highsoever. Similarly, ascendants of higher degree from the side of mother are mother's mother and mother's mother's mother etc., how highsoever. Sons and daughters of a person are his (her) descendants. Descendants of lower degree are son's son or daughter's son etc. how lowsoever.

Descendants of one's Father and (or) Mother, The descendants of one's father and mother are one's real brothers and sisters. Descendant in the lower degree of one's parents are his own sons and daughters and also the sons and daughters of his real brother or sister. A man is prohibited to marry not only his real (full) sister but also his *uterine* and *consanguine* sisters. Similarly, a woman cannot many her real (full) uterine and the consanguine brother. A man is prohibited to many also the descendants *(that is* daughter's daughter or son's daughter) of his *uterine* or *consanguine* brother or sister, just as he is prohibited to many the descendants of his real brother or sister.

Note—There is, however, no prohibition in the marriage of cousins-brother and sister. That is to say, *Chachere, Mamere, Phuphere* or *Mausere* brother and sister can lawfully many each other.

Brothers or Sisters of one's Ascendants, A man is prohibited to marry the sisters of his father or mother. Thus a man cannot marry his *Booa (Phuphi)* or his *Mausi (Khald).* A woman cannot many her paternal or maternal uncle *(Chacha* or *Mamc).* A man is also prohibited to many the *Booa or Mausi* of either of his parents. A woman is prohibited to many *Chacha* or *Mama* of her parents.
Note—It is to be noted that there is no prohibition in marrying the wife of one's parent's brother. Thus, a man can lawfully many his divorced or widowed *Mami* or *Chachi.*

(2) Affinity (Relation by marriage)

Affinity means nearness. It is created through marriage. On the basis of affinity one cannot marry with any of the following relations,
(a) Ascendant or descendant of one's wife (or husband).
(b) Wife (or husband) of one's ascendant or descendant.

The ascendant or the descendant of one's wife (or husband), A man is prohibited to marry his wife's mother or wife's mother's mother of any higher degree. A woman is prohibited to marry her husband's father or husband's father's father of any higher degree. A man is also prohibited to marry his wife's daughter or wife's grand daughter how lowsoever. Similarly, a woman cannot marry her husband's son or husband's great grand son, how lowsoever.
Note—A man can marry the descendant of his wife if his own marriage with the wife has not been consummated.

Wife (or Husband) of any ascendant or descendants, A man is prohibited to marry the wife of his father or grand-father of any higher degree. Similarly a woman cannot many the husband of her mother or husband of her grand-mother etc. It is to be noted that here, the prohibition includes restriction in the marriage of a man with his step-mother *(that is* the other wives of his father, if any, other than his real mother). A man is also prohibited to many the wife of his son, or wife of the grandson of any lower degree. Similarly, a woman is prohibited to marry the husband of her daughter or the husband of her grand daughter of any lower degree.

(3) Fosterage **(Relation by Milk)**

Where a child, under the age of two years, has sucked the milk of any woman (other than its own mother) such a woman is called the foster-mother of that child. Although there is no blood-relationship between that woman and the child yet, she is treated as the real mother of that child for purposes of prohibitions in the marriage. The reason behind this rule is that breast-feeding to any child, necessary for child's life and development, is regarded as the act of giving birth to that child.

Any one who is prohibited on the ground of consanguinity and affinity is also **prohibited by reason of fosterage.** For example, a man is prohibited to marry his foster-mother, foster-mother's daughter etc. But there are certain exceptional foster-relations, with whom a marriage is not prohibited under *Sunni law.* For example, under *Sunni law* there is no prohibition in marrying sister's foster-mother, foster-sister's mother, foster-brother's sister etc.
Note—The prohibition on the ground of fosterage has almost become outdated because in most of the families of Indian Muslims, this relationship is now not in practice.

3

Nikah - classification and types

MUTA MARRIAGES

The word Muta literally means 'enjoyment', and in its legal context it may be rendered, according to Heffening, as 'Marriage for pleasure'. Muta may be defined as a temporary union of male and female for specified duration, on payment of some consideration. It is a temporary marriage for a fixed period for a certain reward paid to the woman. The specified period may be a day, a month, or a year or a term of years.

Origin of Muta Marriages, In the earlier days of Islam, when the Arabs had to live away from their homes for a considerably long period either on account of wars or on trade-journeys, they used to satisfy their sex-desires through prostitutes. In order to avoid the development of prostitution in the society and to confer legitimacy upon children of such unions, temporary marriage was recognized and permitted by the Prophet for sometime. The institution of Muta was fairly common in Arabia both before or at the time of the Prophet. But later on, when he felt that this concession was being exploited, he prohibited it absolutely.

Essentials of Muta Marriages

The Muta Marriages must be contracted according to the rules prescribed by Ithna Asharia law. The essentials of such a union are four, the form, the subject, the period and the dower. A Muta marriage contracted against any of the following legal conditions is an unlawful union,

(1) The Form, As regards the form, there must be a proper contract, declaration and acceptance are necessary. The parties must have attained the age of puberty and must be of sound mind. The consent of both the parties must be free. There must not exist any prohibited degree of relationship between the parties.

(2) The Subject, As regards the 'subject', a Shia male may contract Muta marriage with a Muslim, Christian, Jewish or a fire-worshipping woman but not with the follower of any other religion. Muta marriage with a Hindu woman is void. The rule of limiting the number of wives to four as regards regular marriages, does not apply to Muta marriage (Baillie). A Shia male may contact Muta marriage with any number of women. A female Shia is not free to contact Muta with a non-Muslim.
(3) The Term, The period for which the Muta is being contracted, must be clearly specified. As a matter of fact, the fundamental difference between a Muta and a Nikah is that, in a marriage if its period has been specified the marriage becomes a Muta, whereas a marriage without any specific period is always a Nikah. Hie use of the word 'Muta' in itself does not render a marriage temporary. If a Muta form of marriage has been contracted but its duration has not been specified, it is regarded as a permanent marriage (Nikah). Where two persons having marriage under the Muta form for a fixed period continue to live as husband and wife beyond the expiry of that period or till the death of the husband, the presumption in the absence of evidence to the contrary will be that marriage has been extended.

Nikah – Dower

The Dower (Maher), The dower (consideration) must be specified at the time of the contract. When the term and the dower have been fixed, the contract is valid. If the term is fixed, but the dower is not specified, the contract is void. But **if the dower is specified and the term is not fixed, the contract, though void as Muta, may operate as a "Permanent Marriage.** It must be noted that specification of the dower is necessary for the validity of a Muta form of marriage but it is not essential for a permanent marriage (Nikah).
Legal incidents, The following are the legal incidents of muta marriage,
1. No mutual rights of inheritance between parties are created. But if there is an express stipulation that there should be mutual or unilateral right of inheritance, then this agreement will be enforced and effective.
2. The children born out of such marriages are legitimate and have the right of inheritance from both the parents.
3. The marriage is dissolved *ipso facto* on the expiry of the fixed period or j by mutual consent or by death of the either party.
4. Divorce is not recognised in *muta* marriage. The husband may, if he likes, \ make a gift of the unexpired period to the wife which is called *Hiba-i-muddat.* If the wife leaves the husband before the term, he may deduct a, proportionate part of the dower.
5. If the marriage is consummated, the wife is entitled to get full dower, if \ the marriage is not consummated she is entitled to half dower. A Muta wife does not forfeit her dower on the ground of infidelity so long as it does not prevent her from being at her husband's disposal.

6. The wife is not entitled to maintenance under Shia Law because according to the *Shara-i-at-Islam* the name of the wife does not in reality apply to a woman contracted in *muta*, but she may claim maintenance under Section 125 CrPC.
7. There is no minimum time for duration of *muta* marriage.
8. There is no limit to the number of wives.
9. The husband is not bound to provide residence to the *muta* wife.
10. The *muta* wife is required to observe *Iddat* in case of death of her husband for a period of four months and ten days. In case of pregnancy this period is to be extended till delivery. The period *of Iddat* in case of termination *of muta* otherwise than by the death of the husband is two courses if she was menstruating and forty-five days if she was not menstruating. Where there has been no cohabitation, *Iddat* is not necessary.

Divorce - Khula

DIVORCE BY MUTUAL CONSENT (Khula and Mubarat) Both Khula and Mubarat are divorce by common consent but in Mubarat no consideration passes from the wife to the husband. Both under Khula and Mubarat there is no need for specifying any reason for the divorce. It takes place if the wife (in the case of Khula) or the wife and husband together (in the case of Mubarat) decide to separate on a no fault/no blame basis. Resort to Khula (and to a lesser degree, Mubarat) as a mode of dissolution of marriagfc is quite common in India. It may be noted that divorce by Mubarat is very near to the provisions of divorce by mutual consent under Section 24, Special Marriage Act, 1954 or under Section 13B, Hindu Marriage Act, 1955.

Khula (Redemption, Divorce at the request of wife)

Khula is the mode of dissolution of marriage when the wife does not want to continue with marital tie. Khula or redemption literally means "to lay down". In law it means laying down by a husband of his right and authority over his wife. The wife proposes to her husband for dissolution of the marriage. This may or may not accompany her offer to give something in return. Generally, the wife offers to give up her claim to dower (Mahr). Thus, Khula is a divorce which proceeds from the wife which the husband cannot refuse subject only to reasonable negotiation with regard to what the wife has offered to give him in return. In Mst Bilquis Ikram Verses. Najmal Ikram, it was said that under the Muslim law the wife is entitled to Khula as of right if she satisfies the conscience of the Court that it will otherwise mean forcing her into a hateful union.

Khula has been aptly defined by their Lordships of the Judicial Committee in Moonshee-Buzlu-ul-Raheem Verses. Lateefutoon-Nisa, "A divorce by Khula is a divorce with the consent and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her

release from the marriage tie. It signifies an arrangement entered into for the purpose of dissolving a connubial connection in lieu of compensation paid by the wife to her husband out of her property. Khula in fact is thus a right of divorce purchased by wife from her husband."

Essentials of a valid Khula

1. Competence of the Parties, The husband and wife must be of sound mind and have attained the age of puberty (fifteen years). A minor or insane or insane husband or wife cannot lawfully effect *Khula.* The guardian of a minor husband may not validly effect Khula on his behalf.

2. Free Consent, The offer and the acceptance of Khula must be made with the free consent of the parties. But under Hanafi law a Khula under compulsion or in the state of intoxication is also valid. But, under all other schools including Shia law, without free consent of the parties, the Khula is not valid.

3. Formalities, There is an offer by the wife to release her form the matrimonial tie. The offer is made to the husband. The offer for Khula must also be accepted by the husband. Until the offer is accepted, the divorce is not complete and it may be revoked by the wife. But once the offer has been accepted, the divorce is complete and becomes irrevocable. Offer and acceptance may either be oral or in writing. The offer and acceptance must be made at one sitting *that is* at one place of meeting. Under Sunni law the presence of witnesses is not necessary. But under Shia law the offer and acceptance of Khula must be made in presence of two competent-witnesses. Further, under Shia law, the Khula is revocable by wife during *Iddat.*

4. Consideration, For her release, the wife has to pay something to the husband as compensation. Any sum of money or property may be settled as consideration for Khula. There is no maximum or minimum limit as is in the case of dower. But once this consideration has been settled, it cannot be increased.

Generally the wife relinquishes claim of her dower for her release or for her Khula. She may relinquish her full dower or only a part of it. Where the dower has already been paid to the wife, the wife may give to the husband some money or property. As a general rule, the exchange or consideration is to be paid immediately to the husband. But the parties may agree for the payment of consideration on a future date. In the Khula the marriage dissolves as soon as the proposal has been accepted even if the payment of consideration has been postponed. Therefore, if she does not pay the consideration to husband, the divorce is valid. In such cases, the husband may sue the wife for the recovery of that amount.

Mubarat (Mutual release)

Mubarat is also a divorce by Mutual consent of the husband and wife. In Khula the wife alone is desirous of separation and makes the offer, whereas in Mubarat both the parties are equally willing to dissolve the marriage. Therefore, in Mubarat the offer for separation may come either from husband or from wife to be accepted by the other. The essential feature of a divorce by Mubarat is the willingness of both the parties to get rid of each other, therefore, it is not very relevant as to who takes the initiative. Another significant point in the Mubarat from of divorce is that because both the parties are equally interested in the dissolution of marriage, no party is legally required to compensate the other by giving some consideration.

Legal Consequences of Khula and Mubarat

The legal effects of a valid Khula or Mubarat are the same as that of a divorce by any other method. The wife is required to observe iddat and is also entitled to be maintained by the husband during the period of iddat. After completion of Khula or Mubarat, the marriage dissolves and cohabitation between the parties becomes unlawful.

DISTINCTION BETWEEN KHULA AND MUBARAT

FIRST,
In KHULA, There is Redemption of the contract of marriage where as in MUBARAT, Mutual release from the marital tie.

SECOND,
In KHULA, Offer comes from the wife, husband accepts. where as in MUBARAT, Any party may make the offer, the other side accepts.

THIRD,
In KHULA, Consideration passes from wife to husband where as in MUBARAT, No question of consideration.

FOURTH,
In KHULA, Aversion is on the side of the wife where as in MUBARAT Mutual aversion is there.

Divorce – Judicial

JUDICIAL DIVORCE (FASKH) (The Dissolution of Muslim Marriage Act, 1939)

Despite the Quranic injunction and the traditions of the Prophet, the Anglo-Indian Courts had denied to Muslim woman the rights of dissolution available to them under the Shariat. Before 1939, a Muslim wife could seek her divorce by a judicial decree only on the ground of,
(a) Option of puberty (Khyar-ul-Bulugh),
(b) impotency of the husband,
(c) Lian that is false charge of adultery by the husband against her.
On the other hand, the husband need not go to the court at all as all the forms of divorce (Talaq, Ilia, Zihar, Khula or Mubarat) depend solely upon his will. The classical Hanafi law of divorce was causing great hardships as it consisted no provision whereby a Hanafi wife could seek divorce on such grounds as disappearance of the husband, his long imprisonment, his neglect of matrimonial obligations etc. Finding no other way to get rid of undesired marital bonds, many Muslim women felt compelled by their circumstances to renounce their faith.
But now, the Dissolution of the Muslim Marriages Act, 1939 has introduced a revolutionary change in this respect and had restored to her, right of divorce granted to her under Shariat. It is applicable to all Muslim woman irrespective of their school to which they belong. **Section 2 of the Act contains nine grounds on the basis of any one of which a wife married under Muslim law, may filed a petition**

for divorce. The grounds for matrimonial relief under Section 2 of the Act are available only to the wife, not to the husband. This is because the Muslim law has already given an absolute right to the husband to divorce his wife without judicial intervention and without any reason. The words used by Section 2 of the Act are a "woman married under Muslim law" and not a "Muslim Woman". **This protects women who have already abjured Islam in the hope of getting their marriage dissolved and are thus no longer Muslims,** they also can get their marriage dissolved on any of the grounds given in the Act.

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husband to divorce his wife without judicial intervention and without any reason. The words used by Section 2 of the Act are a "woman married under Muslim law" and not a "Muslim Woman". **This protects women who have already abjured Islam in the hope of getting their marriage dissolved and are thus no longer Muslims,** they also can get their marriage dissolved on any of the grounds given in the Act.

Grounds for Judicial Divorce by Wife, Section 2

Section 2 of the Dissolution of Muslim Marriages Act, 1939 provides that a woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the grounds enumerated therein. The specified grounds are as under,

(1) Absence of Husband, If the whereabouts of the husband are not known for a period of four years a woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage, but, a decree passed on this ground will not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period, and satisfied the Court that he is prepared to perform his conjugal duties, the court must set aside the said decree.

(2) Failure to maintain, If the husband has neglected or has failed to provide for her maintenance for a period of two years, a married Muslim woman can obtain a decree for the divorce.

(3) Imprisonment of husband, If the husband has been sentenced to imprisonment for a period of seven years or upward the wife is entitled to decree of the Court dissolving her marriage, but no decree can be passed on this ground unless the sentence has become final.

(4) Failure to perform marital obligations, If the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years, the wife can get her marriage dissolved by means of a decree.

(5) Impotency of husband, If the husband was impotent at the time of the marriage and continues to be so, the wife is entitled to judicial divorce for the dissolution of her marriage.

(6) Insanity, leprosy or venereal disease, If the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease the wife may claim a judicial divorce under the Act.

(7) Repudation of marriage by wife (option of puberty), If she, having been given in marriage by her father or other guardian before attaining the age of 15 years, repudiated the marriage before attaining the age of 18 years and the marriage is not consummated, she is entitled to a decree of divorce.

(8) Cruelty of husband, Judicial divorce may also be claimed by a Muslim wife, if the husband treats her with cruelty, that is to say,

(a) habitually assaults her or makes her life miserable by cruelty or bad conduct even if such conducts does not amount to physical ill-treatment.

(b) associates with women of ill-repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her from exercising her legal right over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(0 if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran.

(ix) Grounds of dissolution recognised by Mohammaden Law, The wife is also entitled to a decree for the dissolution of her marriage on any other ground which is recognised as valid for the dissolution of marriage under Muslim law. For example, under this clause, a wife may seek her divorce by judicial decree on the ground of false charge of adultery against her (Lian).

Thus, while giving some additional grounds of divorce to a Muslim wife, the Act has not affected her right of divorce on the ground already available under Muslim law. In **Muhammad Usman Verses Sainaba Umma,** the Court has held that Section 2(9) is a residuary ground where courts have an area of discretion and freedom to dissolve the marriage. This clause has been interpreted to mean that if a wife finds that it is impossible for her to continue the marriage and that her marital life has totally been broken down then she should not be compelled to live with the husband for want to any defined ground for divorce. Where the court is satisfied that marital relations between have actually been broken down beyond reasonable doubt, the Court may include any reason or ground for giving relief to wife.

DISTINCTION BETWEEN MUTA AND NIKAH

FIRST,
MUTA is a temporary marriage where as NIKAH is a permanent marriage.

SECOND,
In MUTA, Basically the object is pleasure where as NIKAH is a socio-religious union.

THIRD,
MUTA is Recognised by Shias only where as NIKAH is Recognised by Shias and Sunnis both.

FOURTH,
In MUTA, Period is fixed by agreement. Being a temporary arrangement a fixed period is its essential ingredient where as NIKAH is essentially a union for life, subject to divorce. Fixation of period shifts it to the former category.

FIFTH,
In MUTA, Dower must be specified otherwise it is a void agreement, for it is a *quidi pro quo for a sort time services of the woman* where as in NIKAH, Dower may be implied if not specified. it Does

not become void if no dower specified. the idea is that the woman may get it anytime during the life-long duration.

SIXTH,
An unconsummated *Muta* would entitle the wife to one-half dower only. Whether consummated or not, where as *Nikah* entitles the wife to full dower—both prompt and deferred.

SEVENTH,
In MUTA, there is No minimum limit to dower it depends on terms of contract where as in NIKAH, Hanafi law Recognizes a minimum limit often *dirhams.*

EIGHTH,
In MUTA, *Ipso facto* termination of thejg contract on expiry of the term (period) THAT IS No formality of termination required. Time-limit is the limit of relationship where as in NIKAH, No such automatic termination, as no time-limit is fixed.

NINTH,
In MUTA, Earlier termination is possible by paying the wife the *hibba-i-muddat, THAT IS THE* gift for the unexpired period where as in NIKAH, No question of 'earlier' termination, for the term 'earlier' is, relative to time-limit. Dissolution of marriage is of course possible.

TENTH,
In MUTA, Divorce is not recognised where as in NIKAH, Divorce is recognised for the purpose of dissolution.

ELEVENTH,
In MUTA there is No provision for maintenance of the wife, for she is not regarded as dependent (Shia Law) where as Wife by *Nikah* is entitled to maintenance.

TWELFTH,
In MUTA THERE IS No right of inheritance to the wife or husband in respect of each other's property where as in NIKAH, Reciprocal right of inheritance exists.

THIRTEENTH,
No limit to number of wives In MUTA where as in NIKAH, Number is fixed at four only.

SIMILARITIES BETWEEN MUTA AND NIKAH

FIRST,
The children are legitimate.

SECOND,
Children have right of inheritance.

THIRD,
Wife is entitled to maintenance under section 125 of criminal procedure.

Conversion – Its impact

QUESTION. **2 What is a Muta marriage? How does it arise among the Muslims? What are its legal incidents? Distinguish it from Nikah.**

Answer. Muta marriage, Muta marriage is a kind of "temporary marriage" recognised in the Shia School of Muslim Law. The term 'Muta' implies 'enjoyment' or 'use' *Muta marriage is a marriage for a temporary but a fixed period specify ing dower.* It is not recognised in Sunni Law because according to that school the marriage contract should not be restricted in its duration and the words used at the time of proposal and acceptance must denote an immediate *and permanent union.* Thus under Sunni Law a marriage specifically declared for a limited period is void but under Shia Law such marriage is valid. The specified period may be a day, a week, a fortnight, a month or year.

Origin of Muta marriage, Amongst the pre-Islamic Arabs, certain women entertained men in their own tents, neither party acquiring any right over the other, the woman could dismiss the man at any time she choose. Muta marriage, however, differs from this pre-Islamic institution. This marriage was prevalent in Arabia before and at the time of the Prophet. But all schools of Muslim Law except Ithna Asharia (Shias) are agreed that the Prophet declared such marriage as unlawful. This old Arabian custom was justified as being useful in times of war and on travels. **Essentials of Muta marriage**

1. The *period* during which the union is to last should *be fixed* at the time when the Muta is contracted. It may be for a day, a month, a year or for a number of years.
2. Some dower should *be specified* in the contract. If the term of cohabitation is not specified but the dower is fixed the contract would be void as Muta but valid as *Nikah.* But if dower is not specified, neither Muta nor Nikah will ensue, *that is* the contract will be void.
3. The rule of limiting the number of wives to four as regards regular marriages, does not apply to Muta marriage.
4. Where two persons having married under the *Muta* form for a fixed period continue to live as husband and wife beyond the expiry of that period or till the death of the husband, the presumption in the absence of evidence to the contrary will be that the term of marriage had been extended till the period of cohabitation.
5. The parties must have attained the age of puberty and they must be of sound mind.
6. The consent of both the parties must be free consent.
7. They should not be within prohibited degrees of relationship.
8. A Shia male can contract muta marriage with a Muslim woman, a *Kitabia* woman (Christian or Jewish) or a fireworshipping woman *(majusiyya),* but he cannot contract Muta marriage with a woman following any other religion. A Shia female cannot contract Muta with a non-Muslim.
9. There must be offer made by one of the parties to such a marriage and acceptance by the other party.
10. No witness is necessary at the time of marriage. Legal Incidents of Muta Mtowagr^
1. No mutual rights of *inheritance* between parties are created. It is still a moot point as to whether an express stipulation that there should be mutual or unilateral rights of inheritance would be valid or not.
2. The children born out of such marriage are *legitimate* and have right of inheritance from both the parents.
3. The marriage is *dissolved ipso facto* on the expiry of the fixed period or earlier by mutual consent.
4. *Divorce is not recognised*^ Muta marriage. The husband may, if he likes, make a gift of the ilnexpired period to the wife which is called *Hiba-i-muddat.* The Muta marriage may be dissolved on the death of either of the parties or on the expiration of the specified period or on the release of the unexpired period by the husband *(Hiba-i-muddat).*
5. If the marriage is consummated, the wife is *entitled to get full dower.* If the marriage is not consummated, she is entitled to half dower.
6. The *muta* wife is not entitled to *maintenance* under Muslim law, but she may claim maintenance under Section 125 CrPC.
7. There is no *minimum time* for duration of Muta marriage.
8. There is no limit as to the *number of muta wives.*
9. The husband is not bound to provide *residence* to the Muta wife.
10. The Muta wife is required to observe *Iddat* in case of death of her husband for a period of four months and ten days. In case of pregnancy this period is to be extended till delivery. In the case of dissolution (not by death) *Iddat* is necessary only if the marriage has been consummated. In this case the period is two menstrual courses if she is in menstruation and forty-five days if she is not menstruating.
11. A Muta wife does not forfeit her dower on the ground of infidelity so long as it does not prevent her from being at her husband's disposal.
Nikah and Muta distinguished
1. *Muta* is a temporary union, while *Nikah* is permanent until dissolved by divorce or death.
2. *Muta* is recognised among the Shias and never among Sunnis. *Nikah* is recognised in both the sects.
3. *Muta* marriage terminates *ipso facto* on the expiry of the stipulated term, there is no such stipulation in *Nikah.*
4. Divorce is not recognisedin *Muta* marriage. It is fully recognised in *Nikah.* A *Muta* husband may get rid of his Muta wife by *hiba-i-muddat*
5. In *Muta* marriage, if it is unconsummated, the wife is entitled to only half of the dower while in *Nikah* she gets full dower, no matter the marriage is consummated or not.

6. *Muta* wife is not entitled to maintenance, under Muslim law (though she is entitled to claim maintenance under Section 125 CrPC. In *Nikah* she is entitled to maintenance.
7. No minimum limit of dower is prescribed for Muta Marriage, which exists under Sunni law in *Nikah* marriage.
8. Dower must be specified, otherwise Muta marriage is void. It may be implied in *Nikah* if not specified.
9. *Muta* marriage does not create any liabilities except those specified in contract for marriage. It does not give rise to reciprocal right of inheritance to the wife and the husband, while *Nikah* does create rights and liabilities.

QUESTION. **3 What are the legal consequences of a valid marriage? Enumerate.**

Answer. A marriage is valid if it satisfies the following requirements,
1. A proposal by one party and its acceptance by the other.
2. The consent of parties is free.
3. Proposal and acceptance must have taken place at one meeting and before the requisite number of witnesses. The parties to the marriage must be Muslims, major and of sound mind.
4. The parties must have capacity to contract marriage, /'. *e.*, (a) of sound mind, and (b) major. If they are minor or lunatic, their guardians can give consent on their behalf.
5. There should be no impediment to marriage on the ground of consanguinity, affinity, fosterage and polyandry. **Legal consequences**
1. Mutual rights and obligations.
2. Rights of husband and duties of the wife.
3. Rights of wife and duties of thehusband.

1. Mutual Rights and obligations
(1) The parties become entitled to inherit one another.
(2) Sexual intercourse is legalised.
(3) Prohibited degree and relationships are created between the parties.
(4) Lawful conditions between them become binding on them.

2. Rights of husband and duties of the wife
(1) She is bound to observe strict conjugal fidelity, *that is* , the husband has the right to enjoy all the benefits of marital life.
(2) She is bound to allow her husband to have sexual intercourse with her, with due regard to her own health, decency and place.
(3) She is bound to obey his just commands.
(4) She is bound to reside in his house and to observe *par da* if necessary.
(5) She is bound to observe *Iddat*, ort death or divorce.
It should be noted here that she incurs no penalty for adultery but she forfeits her maintenance under Section 125 CrPC. She is not under obligation to suckle her own children. It is the father who should arrange for the feeding of the children.

Rights of the wife and duties of the husband
(1) The wife is entitled to maintenance from her husband with due consideration of his capacity. She is not deprived of this right even if she is able to maintain herself out of her property so long as she is undivorced, obedient and chaste.
(2) She is entitled to equal treatment and separate sleeping apartment, in case there are more than one wives.
(3) She is entitled to get her dower and to refuse cohabitation if prompt dower is not paid provided marriage is not consummated.
(4) She is entitled to visit and be visited by her blood relations within the prohibited degrees at least once a year and her parents and children from her former husband with a reasonable frequency.
(5) She is entitled to refuse to live with him if he keeps an idol worshipping or fireworshipping concubine in the same house with her, and to claim maintenance notwithstanding such refusal.
(6) She becomes entitled to the use of an apartment from which she may exclude all other persons except her husband.

Remedies to which the husband is entitled against a disobedient wife
1. Divorce, The husband can dissolve the marriage tie.

2. Refusal of maintenance, He can refuse maintenance to her.
3. Civil suit for the restitution of conjugal rights.

Remedies to which the wife is entitled against her husband.

1. Civil suit for maintenance, She can institute a civil suit for maintenance.
2. She may refuse to live with him if there is imminent danger to her person.
3. She can claim maintenance also under Section 125, CrPC and Muslim Women Act, 1986.

APOSTASY [Section 4]

Apostasy means renouncing or giving up one's religion. Before 1939 if either of the party to a marriage renounced Islam, the marriage dissolved immediately whether the renunciation of Islam was by husband or by wife. But after the commencement of the Dissolution of Muslim Marriages Act, 1939 law on this point has been modified by Section 4 of this Act. The present law relating to the effects of apostasy by husband or wife, may be discussed as under,

(a) Apostasy by Husband, If a Muslim husband renounces Islam the marriage dissolves immediately. Section 4 of the 1939 Act does not apply to apostasy by a husband. The result is that apostasy by the husband is still governed by the old law under which renunciation of Islam by the husband operates as immediate dissolution of the marriage and the wife ceases to be a Muslim wife of ttiat husband. As such, wife is then not governed by Muslim law and is free to marry to another person without waiting for the Iddat period.

(b) Apostasy by Wife, If a Muslim wife renounces Islam, the marriage is not dissolved. The apostasy by a Muslim wife does not operate as immediate dissolution of the marriage. She continues to be a wife married under Muslim law. Moreover, even after renouncing Islam, if the wife wants, she may obtain a decree for the dissolution of her marriage on any of the grounds specified in Section 2 of the Act. **Exception,** Where the wife was a converted Muslim at the time of her marriage, and such converted Muslim wife renounces Islam and again embraces her original religion, then the marriage dissolves immediately. Thus, an apostasy by a converted Muslim wife results in the immediate dissolution of her marriage.

PUBERTY

OPTION OF PUBERTY (Khyar-ul-Bulugh)

Legal Position under Muslim Personal Law
Under Muslim law, a minor on attaining the age of puberty, has a right to approve or disapprove the marriage contracted by a guardian who was neither father nor paternal grandfather. This is called the 'option of puberty'. In other words, marriage of a minor contracted by any person other than minor's father or grand-father, is voidable at the option of such minor. If a person, on attaining puberty, chooses to repudiate the marriage by exercising his right of 'option of puberty' the marriage is dissolved with immediate effect. On the other hand, if the minor, on attaining puberty, opts to approve the marriage, it is considered to be a valid marriage since its very beginning. However, the exercise of

this right is not compulsory, the minor, on attaining puberty, may or may not exercise this right. Where a person has not exercised the right of option of puberty after becoming adult, it is presumed that he or she has approved the marriage contracted during minority. But, under *Shia* law a minor's marriage must be approved by the minor on attaining puberty. According to *Shia* law, therefore, unless the minor on attaining majority, expressly ratifies the marriage, it is no marriage at all in the eyes of law.

Legal Position under Section 2(7) of the Act of 1939

This ground for the dissolution of marriage is not based on any 'fault' of the husband. It is an independent provision under which a marriage is voidable at the option of the wife. Under this Section a wife is entitled to sue for dissolution of her marriage on the ground that,

(1) she was given in marriage by her father or any other guardian before she attained the age of 15 years,

(2) The marriage had not been consummated, and

(3) That she had repudiated the marriage before she attained the age of 18.

This right was also available to the wife under the old law. But this Act has made following changes in the law of option of puberty by a wife,

(a) Under the old law, option of puberty was not available where the minor's marriage was contracted by father or father's father. But now a wife may exercise this right even if she was given in marriage by her father or father's father.

(b) Under the old law, the option of puberty by a wife was to be exercised by her immediately after attaining the age of puberty. Now the Act provides that a wife can exercise this right upto the age of 18 years, provided the marriage is not consummated earlier.

(c) Under the old law, option can be exercised by those minor females on attaining puberty, whose marriage had been contracted before she attained puberty. But after the Act, option can be exercised in cases of marriage contracted before the wife attains the age of 15 years.

Rules Relating to "Option of Puberty"

1. The 'option of puberty' can not be exercised by husband if his marriage was contracted by father or grandfather. However, in exceptional cases, where it is proved that father or the grandfather had contracted the marriage either fraudulently or negligently, the minor has a right to repudiate the marriage on attaining puberty.

2. A wife can exercise option of puberty even if her marriage was contracted by her father or grand-father. Before 1939, a Muslim wife was not entitled to exercise option of puberty if the marriage was contracted by father or grand-father. But the Dissolution of Muslim Marriage Act, 1939, has now modified the law in regard to the 'option of puberty' by a wife. Section 2(7) of this Act provides that a Muslim wife is entitled to obtain a decree for the dissolution of her marriage on the ground that her marriage was contracted by her father or any other guardian during her minority *(that is* when she was under the age of 15 years). At present, a Muslim wife has an absolute right of the option of puberty and she can repudiate her marriage even if it was contracted by her father or grandfather.

3. The option must be exercised by a wife immediately after the attainment of puberty. If there is an unreasonable delay in the exercise of the option, her right is lost. However, under Section 2(7) of the Dissolution of Muslim Marriage Act, 1939 a Muslim wife has a right to exercise this option till she attains the age of eighteen years. If she fails to exercise the right after attaining the age of eighteen years, it may be considered as unreasonable delay and her right may be lost. But in the case of a husband, the option continues till he approves the marriage either expressly or impliedly. Payment of dower to the wife or cohabitation with her, is regarded as implied approval of the marriage by a husband.

4. When consummation takes place, the husband's right of option is lost because consummation is regarded as implied consent. The 'option of puberty' of a wife is also lost after the consummation provided it was not (1) before attainment of her age of puberty, or (2) against her consent.

5. The marriage does not dissolve merely by the exercise of option of puberty. Confirmation by court is necessary for dissolution of marriage. However, only a formal approval by the court is sufficient, decree is not necessary.