UNIT – I: SOURCES AND SCHOOLS OF PERSONAL LAWS

Application of various Personal Laws:

In India we have a system of personal law apart from the general laws. A personal law applies for instance to those who profess a particular religion, for example Hindu Law applicable to Hindus; Mohammedan Law applicable to Muslims; Christian Law applicable to Christians and so on. Personal Law operates only in that narrow field which has not yet been covered by a corresponding territorial law. In 1772 Warren Hastings enacted that in all suits regarding "inheritance, marriage, caste and other religious usages and institutions, the law of the Koran with respect to Mohammedans and the law of the Shastras with respect to Gentoos shall be invariably adhered to". This policy was rigidly adhered to and this provision was reiterated in later regulations. As a result of this policy at the present day Hindus are governed by the Hindu Personal Law and Mohammedans are governed by their own personal law in regard to the matters like Marriage, Matrimonial reliefs, Succession, Guardianship, Adoption, Maintenance, Gifts and Wills, Wakfs, Pre-emption etc.,

Likewise, the Hindus are governed by the following four major Acts:

- The Hindu Marriage Act, 1955
- The Hindu Adoptions and Maintenance Act, 1956
- The Hindu Minority and Guardianship Act, 1956
- The Hindu Succession Act, 1956

The Muslims are governed by the following Acts:

- The Shariat Application Act, 1937
- The Mussalman Wakf Validating Act, 1913
- The Dissolution of Muslim Marriage Act, 1939
- The Wakf Act
- The Muslim Women (Protection of Rights on Divorce) Act, 1986

The applicable Christian Laws are the following:

- The Christian Marriage Act, 1872
- The Indian Divorce Act, 1869

All the Laws with recent amendments in some of the abovementioned acts are the governing personal laws of the respective religious groups.

Sources of Hindu Law:

Sources can be broadly classified into two: Traditional Sources and Modern Sources

Sources of Hindu Law	
Traditional Sources	**Modern Sources**
The Vedas	**Justice, Equity and Good conscience**
The Smritis	**Precedent**
Digests of Hindu Law	**Legislation**
Customs	

Traditional Sources:

The Vedas:

Veda means Knowledge. There are four Vedas: Rig; Yajur; Sama and Atharvana. The four Vedas are the fountain-head of Hindu religion and law.

Rig Veda:

The oldest of them is the Rig Veda Samhita (Collection of Hymn Veda). It consists of 1028 hymns arranged into ten mandala (groups) some of which are sub-divided into smaller groups the compilation of each group being ascribed to some renowned saintly poet-priest (Rishi) of ancient times.

Yajur Veda:

Yajur Veda (sacrificial veda) is a liturgical arrangement of part of the hymns of the Rig Veda, with additions, for intoning in the appropriate manner at sacrificial ceremonies. This veda contains passages in prose containing explanations and directions for the guidance of the priests. It is grouped in two parts which are known as the "Black Yaju" (Taittiriya Samhita) and White Yaju (Vajasaneya Samhita).

Sama Veda:

The third veda Sama Veda (Chant Veda) is also a liturgical arrangement of some of the hymns of the Rig Veda and is intended to be chanted at particular sacrifices in which the juice of the Soma plant was the principle offering.

Atharvana Veda:

The fourth and the last Veda, Atharvana Veda, has some hymns from the Rig Veda along with original hymns of the same kind and consists chiefly of incantations, spells, charms and exorcisms.

The Vedic Religion as depicted in the Vedas is extremely simple, consisting of worship of trinity of Gods, the Fire-God Agni, the Rain-God-Indra and the Sun-God Surya. The Vedas do not contain rules of law in a connected form. There are, however, Vedic passages dealing with such topics as marriage, different kinds of sons, adoption, partirion, inheritance and Stridhana. The hymns of the Rig Veda as to marriage are used even to this day. The approximate period of Vedas is computed by historians to be 4000-1000 B.C. The period between Vedas and Smritis is marked with the development of Custom.

The Smritis:

Next to the Vedas, the Smritis are the most important source of Hindu Law. The early Smritis were termed as Dharma Sutras (800-200 B.C.). They were mostly in prose form and were written by the teachers expounding Vedas for the sake of their students. There are four smritis. Manu Smriti, Yagnavalkya Smriti, Narada Smriti, Brihaspati Smriti.

Manu Smriti:

The oldest Smriti is the Manusmriti. The Code of Manu in its present form of 2694 slokas dates from 200 B.C. The Code deals with many matters, but the part bearing upon law deals with the subject under 18 titles. They are, debts, pledges, sales, deposits, partnership, gifts, wages, agreements, boundary disputes, master and servant, husband and wife, partition and inheritance, betting and gambling, assault, defamation, theft, robbery and adultery.

The Yagnavalkya Smriti:

It contains 1010 slokas which is divided into Achara (Ritual); Vyvahara (Secular); and Prayaschitta (Expiation), Kandas or Parts. The chapter on marriage is found in Achara Kanda. In secular law the code deals with courts, procedure, ordeals, debts, pledges, partition, 12 kinds of sons, sales, defamation, assault, theft and adultery.

The Narada Smriti:

Narada Smriti recognized the power of the kings to make laws without going beyond the injunctions of Vedas. He gave paramountacy to custom even overriding sacred Laws. He was liberal in dealing with women and sudras.

The Brihaspati Smriti:

The Smriti of Brihaspati is fragmentary and has had to be complied from the reference to that smriti in various commentaries on other smritis. Since Brihaspati is referred to as smritikarta by yagnavalkya, the smritis of Brihaspati must be older than the Yagnavalkya Smriti.

Digests of Hindu Law:

Several Digests and Commentaries were written on smritis during the period between 700-1700 A.D. Some of them can be noted here under.

On Manu Smriti:

Medhatithi had written Manubhashya (895-900 A.D.)

Govinda Raja had written Manutika (1100 A.D.)

Kulluka Bhatta had written Manavonta Muktavali (1250 A.D.)

On Yagnavalkya Smriti:

Vijnaneswara had written the famous commentary Mithakshara (1100 A.D.)

Vijna ruph had written Balakrida (900 A.D.)

Apararka had written Aparaditya (1200 A.D.)

Customs as a source of Hindu Law:

Authority of Custom:

Manu recognized custom to be transcendant law: Acharaha Paramodharmaha. Yagnavalkya defines custom as "That which a person practices whether it is Dharma or not, because it is the usage of the country". He definitely says that a person should not practice even what is ordained by the Smriti if it is opposed to custom. The Privy Council also recognized the supreme authority of custom in Hindu Law.

Kinds of Custom:

❖ Local Custom: This is a custom prevailing in a particular locality. The Ramnad Case case dealt with a custom of this kind. In the Dravida country it was proved in that case that widows can adopt but that they can do so only with the consent of the deceased husbands sapindas in accordance with local custom.

❖ Family Custom: A custom may govern only one particular family. The system of Zamindar is a glaring example for family custom.

❖ Caste Custom: There are some customs which prevail among particular castes, e.g., Brahmins, Sudras etc. Thus in the law of adoption, among Brahmins a Homam is necessary for adoption but among Sudras giving and taking of the boy is sufficient.

Essentials of Custom:

A valid custom has to satisfy the following legal requirements:

❖ Antiquity: A valid custom should be ancient. In Ramalakshmi v. Sivanatha, the Privy Council observed:

"It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable and it is further essential that they should be established to be so by clear and unambiguous evidence".

❖ Certainity: The evidence must establish unambiguously the usage set up. When the evidence is conflicting, a uniform custom cannot be established.

❖ Reasonableness: Unreasonable customs which are contrary to public policy are rejected by courts. A custom of polyandry allowing a woman to re-marry during the lifetime of her husband was held to be immoral.

Discontinuance:

Family customs which are applicable only to particular families may be discontinued. Disuse puts an end to them. But a local custom is not put an end by non-user.

Modern Sources:

Justice, Equity and Good Conscience:

It was ordained by smritis that any decision should be arrived based upon Yukthi or Nyaya. These aspects amply cover under Ancient law the modern concept of justice, equity and good conscience. The common law tradition of applying the principle of "justice, equity and good conscience". When the law is silent on a given point was conveniently applied by the Britishers in their administration of justice in India. Afterwards the Supreme Court of India recognized that in the absence of any rule of Hindu Law the courts have authority to decide cases on the principle of "justice, equity and good conscience".

Precedent:

Binding nature of previous judicial decisions on a subsequent similar case is of modern origin came into vogue during British period. The principle of Stare decisis is applied by the Indian Courts. The decisions of the Supreme Court are binding upon all courts except upon itself and of the High Court on all its sub-ordinate courts.

Legislation:

Legislation is a vital source of modern Hindu law. During British period, only very few legislations were passed touching personal laws of Hindus, in tune with the British policy of non-interference in the matters of personal status of native Indians.

Sources of Muslim Law

A votary of Islam recognizes only one God and acknowledges Mohammed as His Prophet. The children of such person are mahomedans. When only one parent is a mahomedan, the upbringing of the child in the mahomedan faith makes the mahomedan law applicable to the child. There can be conversion to Islam and such converts are governed by Mahomedan Law.

There are four sources of Muslim Law:

- ❖ The Quran;
- ❖ Sunna;
- ❖ Ijmaa; and
- ❖ Qiyas.

(a) The Quran:

The Quran is the scripture of the Muslims and is of divine origin. It contains 6000 verses revealed to the Prophet by the angel Gabriel as the message of God. About 80 verses of the Quran deal with legal matters such as inheritance, guardianship, marriage, divorce, prohibition of usury etc. Since the Quran represents the voice of God its authority is paramount.

(b) Sunna (Tradition):

Sunna consists of the precedents or usage of the prophet. They deal more with the principles of Islamic religion rather than with positive law. The Sunna being divinely inspired ranks equal to the Quran.

(c) Ijmaa:

Ijmaa is the consensus of the jurists. The efficacy of Ijmaa is based upon the following text: "God will not allow his choosen people to agree on an error". Ijmaa has validity so long as it is not opposed to Quran or to the Sunna.

(d) Qiyas:

Qiyas is analogical deduction from the comparison of the other three sources. The Shias, one of the sects of Mahomedans, do not accept the binding authority of Qiyas as a source of law.

Place of custom in Mahomedan Law:

Custom as such has not been enumerated among the sources of Mahomendan Law. However, when mass conversions took place in India, the convert6s were allowed to follow their pre-existing law in matters relating to inheritance. Customary law was superseded by the Shariat Act, 1937. This means that contrary custom displacing the Shariat is swept away.

SCHOOLS OF HINDU LAW

Origin of the Schools of Hindu Law:

Different Schools of Hindu Law arose as a result of various commentaries on the smritis. The authority of the Vedas and the Smritis is accepted throughout India. The Smritis, however, have been the subject-matter of commentaries by eminent scholars in different parts of the country. These commentaries seem to have imported local customs into the sacred texts by a process of interpretation. These customs being different in different parts of the country. It is in this way because of the varying authority of the commentators in different parts of the India, schools of law arose among Hindus.

Mithakshara and Dayabhaga Schools:

There are two main schools. Mithakshara School and Dayabhaga School. The Dayabhaga School is confined to Bengal and it takes its name after the work entitled the Dayabhaga written by Jimutavahana. The Dayabhaga is, in fact, only a chapter of a larger work of that author, but this chapter alone is now extant. The rest of India follows the Mithakshara School which was written by Vijnaneswara as a commentary on the Yagnavalkya Smriti. The Mithakshara (which means measured words) is regarded as authority even in Bengal in regard to all matters on which there is no contradictory opinion expressed in the Dayabhaga. The Mithakshara School is usually subdivided into four schools, namely, the Dravida School, the Maharashtra School, the Benaras School and the Mithila School.

Sub-Schools of the Mithakshara:

The Mithakshara School may be sub-divided into four schools:

Dravida School:

In addition to the Mithakshara, in southern India certain law books are treated as of great authorities. They are Parasara Madhaviya, Smritichandrika, Saraswativilasa and Vyavahara Nimaya.

Parasara Madhaviya:

This great work written by Madhavacharya as a commentary on Parasara Smriti. The great Acharya was the guru and minister of Bukka and Harihara who were the founders of Vijayanagar Dynasty.

Smritichandrika:

This work by Devanna Bhatta deals with the subject of inheritance. It was also composed during the Vijayanagar Dynasty. It is a Nibanda or Digest of Law.

Saraswati vilasa:

This was the work of the great ruler Parataparudra Deva, who belonged to the Gajapathy Dynasty and ruled orissa between 1497-1539. The probable date of SaraswatiVilasa is 1515. The Gajapathy rulers of Orissa were hostile to Vijayanagar. Krishna Deva Raya of the Vijayanagar Dynasty married the daughter of Gajapathy (Tukka Devi alias Jaganmohini) in 1516 and brought that hostility to an end.

Vyavahara Nimaya:

This is the work of Varadaraja who lived in the 17th century.

Maharashtra School:

In addition to the Mithakshara, the Bombay School attaches great importance to the following works. They are Vyavahara Mayukha and Nirnaya Sindhu.

Vyavahara Mayukha:

Mayhuka means a Ray. The author of Mayukha was Nilakanda Bhatta. The Vyavaha Mayukha is the part dealing with secular law. The entire work is an encyclopaedia of religious and civil law and was composed between 1610 and 1645.

Nirnaya Sindhu:

This was composed in 1612 by Kamalakara, who was the son of Nilakanda Bhatta's paternal uncle.

Benaras School:

The Benaras School recognizes the following as authoritative in addition to Mithakshara. They are Viramitrodaya and Nirnaya Sindhu.

Viramitrodaya:

the author of this digest is Mitra Misra, who composed it between 1610-1640. The Viramitrodaya holds in western India a high position. The Viramitrodaya is properly receivable as an exposition of what may have been left doubtful by the Mithakshara and declaratory of the law of the Benaras School.

Nirnaya Sindhu:

This work is received as an authority not only in western India but also in the Benaras School.

Mithila School:

The important authorities of this School are: Vivada Chintamani, Vivada Ratnakara and Madanaparijata.

Vivada Chintamani:

This is a Nibanda work of Vachaspati Misra and was written under the patronage of King Bairavendra of Mithila in the 15th century.

Vivada Ratnakara:

This is a Nibanda work written by Chandeswara, who was the Chief Judge and Minister of king Harasimhadeva of Mithila. It was composed in the 14th century.

Madanaparijatha:

This was composed under the patronage of king Madanapala. It was composed between 1360 and 1390 by Visweswarabhatta, who was also the author of Subodhini, a commentary on the Mithakshara.

Differences between Mithakshara and Dayabhaga Schools:

- **Joint Family:** Under the Mithakshara the father's power are qualified by the son's equal right by birth. But, there is no right by birth under Dayabhaga. The father has uncontrolled power of alienation over the family property.
- **Survivorship:** Brothers who have inherited property from their father have a right of survivorship in the Mithakshara joint family. The Dayabhaga does not recognize any right of survivorship.
- **Widow's Rights:** When one of the brothers dies, his widow can succeed to his share under the Dayabhaga but under the Mithakshara her rights are excluded by the right of survivorship of the brothers. The widow can then have only a right to maintenance.
- **Sapinda Heirship:** The relationship of Sapinda arises according to Mithakshara by community of blood. Under the Dayabhaga it arises by means of Pinda offerings to deceased ancestors.

Effect of migration from one sub-school to another sub-school:

Hindu Law being a system of personal law, it attaches to a person even he shifts from one place to another. So, if a Hindu migrates from a place comprised in one sub-school to another place where a different sub-school of law prevails he carries his personal law with him. In Balwantrao v. Bajirao, parties from Poona had settled down in Central Provinces. The Privy Council held that it was not the Benaras School but the Maharashtra School of Law that would apply to such a case.

SCHOOLS OF MAHOMEDAN LAW

The Mahomedan brotherhood split into two great sects on the death of the Prophet which occurred in 632 A.D. The Prophet was both temporal ruler (Caliph) and the Supreme Preceptor (Imam). On his death, father-in-law, Abu Bakkar was elected as the first Caliph. The supporters of the principle of filling the office by election came to be called as Sunnis. The opponents of this procedure regarded the office as not open to election. It had to devolve on Ali (Son-in-law of the Prophet) who was his nearest relation as paternal uncle's son. The supporters of succession to the office by inheritance to the prophet are known as Shias.

In the field of law a separate Shia School was founded by their sixth Imam Jafar-as-Sadik. The Shias accept only such traditions of the Prophet as have been endorsed by the Prophet's household. They do not accept Qiyas as a source of law. In the field of intestate succession there are radical differences between the Shias and the Sunnis. The Shias are in a majority in Persia (Iran). In India they are in a minority.

Sub-Schools among Sunnis:

The Sunnis are the preponderant majority among Muslims in India. The presumption in India is that a mahomedan is governed by the Sunni School of Law (Hanafi Sub-School). The Sunni School is sub-divided into four schools as follows.

a. Hanafi School: This school is named after the great jurist Abu Hanifa (699-767 A.D.) who was a pupil of Jafar-as-Sadiq, founder of the Shia School. It was founded in Kufa (which is now modern Iraq). The doctrines of the Hanafi School were elaborated in the Hedaya. During the period of Aurangazeb, the Sunni doctrines were collected in the Fatwa-i-Alamgiri. this was translated into English by Bailee and is known as Bailee's digest.

b. Maliki School: Malik-ibn-Anas (713-795 A.D.) founded a School attaching great importance Ijmaa as a source of law. He propounded his doctrines in his great work Kitab-at-Muwatta.

c. Shafei School: Muhammad-ibn-Idrisash-Shafei (767-820 A.D.) a pupil of Malik-ibn-Anas, founded this School in Egypt. He gives greater prominence to Ijmaa even than Malik.

d. Hanbali School: Ahmed-ibn-Hanbal (780-855 A.D.) a pupil of Shadei founded this School. He was born at Baghdad and his followers are to be found largely in Syria and Palestine.

e. The Jafari School (Ithna Ashari School): The founder, Imam Jafar was the 6th Imam of the Shias and he died in 765 A.D. The 11th Imam in the line of succession died in 873 A.D. His son, aged 5, entered a cave near their house and was never seen again. He was to be the 12th Imam. The followers of this School believe that the 12th Imam who disappeard will one day re-appear. this School, thus, came to be called the Ithna Ashari School or School of Twelvers. The Shias belong to this School.

In India the Sunnis belong either to the Hanafi or the Shafei School. The Shias follow the Ithna Ashari School. The Maliki and Hanbali Schools have no followers in India.

UNIT II: LAW ON MARRIAGE

Marriage is a sacred institution; it is the very foundation of a stable family and civilized society. There are, however, certain prerequisites and conditions for a valid marriage. All personal laws lay down certain conditions which need to be complied with to enter into or solemnize a legal marriage.

Conditions for a valid marriage:

Under Hindu Law:

Under the Hindu Marriage Act, 1955, the following are the conditions for a valid marriage:

Sec 5: Conditions for a Hindu Marriage.

A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

i. Neither party has a living spouse at the time of the marriage;

ii. At the time of the marriage, neither party-

a) Is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

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

c) Has been subject to recurrent attacks of insanity;

iii. The bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of marriage;

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

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

It is significant to note that vide section 2(1)(b) of the Hindu Marriage Act, 1955, it is pointed out that 'this Act applies to any person who is a Buddhist, Jaina or Sikh by religion. The term "Hindu" is comprehensive and includes Bhuddhists, Jains and Sikhs. Infact, explanation II to Article 25 of the Constitution, which provides for freedom of religion, elucidates that the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina and Buddhist religion. In this context, a reference may be made of a Public Interest Litigation (PIL) filed by a Sikh seeking Amendment in the Constitution to declare that the Sikh community should be out of the purview of the Hindu Marriage Act, 1955. The Supreme Court Bench headed by Chief Justice K.G. Balakrishnan, however turned down the petition. The court held that it cannot entertain the subject as it has to be looked into by the appropriate authority in the government.

Section.7: Ceremonies for a Hindu Marriage:

A Hindu Marriage may be solemnized in accordance with the customary rites and ceremonies of either party and it has been further pointed out that, where such rites and ceremonies include the saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes binding and complete when the seventh step is taken.

Registration of Marriage:

There is no provision for compulsory registration of a marriage under the Hindu Marriage Act, 1955. Section 8 of the Hindu Marriage Act, 1955 makes registration optional and Sec 8(5) specifically states that validity of any marriage is not affected by failure to register it. But, in a recent judgment by the Supreme Court in Seema v. Ashwani Kumar AIR 2006 SC 1158, the court has issued directions that the marriages of all persons who are citizens of India belonging to various religions, should be made compulsorily registrable in their respective states where the marriage is solemnized. If the marriage is registered, the dispute concerning solemnization of marriage is avoided; it protects the women's rights relating to marriage to a greater extent; it has great evidentiary value in the matters of custody of children, rights of children, and the age of parties to the marriage. The Supreme Court has directed the states and the Central Government to take concrete steps in this direction.

While the Special Marriage Act, 1954, provides for registration of marriages, s.16 thereof, which refers to procedure for registration does not require publication of the factum of marriage in a newspaper for the purpose of registration. Under Section 15 of this Act parties required to have completed the age 21 at the time of registration of the marriage. The Registrar cannot refuse to register a marriage on the ground that the marriage of the parties was solemnized when one of the parties was below the age of 21. If the parties are 21, the registrar has to register it as it was held in Baljit Kaur Boparai v. State of Punjab, (2009) I DMC 28 (P&H – DB).

Marriage under Muslim Law:

Marriage or Nikah, according to Muslim Law, is 'defined to be a contract which has for its object the procreation and legalizing of children'. Thus a Muslim marriage is a contract and its object is (a) procreation, and (b) legalizing children. There is no formality nor any religious ceremony required for a marriage. Since, marriage in Islam is a contract, the usual conditions necessary to constitute a valid contract are to be fulfilled.

Conditions for Valid Marriage:

The essential requirements for a valid Muslim marriage are capacity to contract marriage, proposal and acceptance, and absence of any impediment to the marriage.

Capacity for Marriage:

Every Muslim who is of sound mind and who has attained puberty has the capacity to marry. Marriage of such person without his/her consent is void. Persons who not of sound mind or have not attained puberty can be contracted in marriage by their guardians. Further, a Muslim woman cannot marry any man who is not a Muslim. As to a man marrying a non-Muslim woman, while a Sunni Mohammedan if she is a Kitabia but a Shia Mohammedan cannot marry even a Kitabia. If the parties have become Muslim by conversion before the marriage, then there is no bar.

Proposal and Acceptance:

There should be a proposal ijab, and an acceptance qubul of the proposal. The proposal and acceptance has to be made either by or on behalf of the parties. This has to be done in the presence and hearing of two male, or one male and two female, witnesses who must be sane and adult Mohammedans. It is significant to note that the proposal and acceptance must both be expressed at one meeting; a proposal at one meeting and its acceptance at another does not constitute a valid marriage.

Impediments to a valid marriage:

The following are the impediments or prohibitions to a valid Muslim marriage, viz.:

i. A married woman cannot contract another marriage while her husband is alive and the marriage is subsisting. Such marriage is void.

ii. The bar of consanguinity renders a marriage void. The following are the prohibited relationships of consanguinity, viz., a man cannot marry his:

a) Ascendants, for e.g., mother or grandmother, how highsoever;

b) Descendants, for e.g., daughter or grand-daughter, how lowsoever;

c) His sister, whether full, consanguine or uterine;

d) His niece or great niece, how lowsoever;

e) His aunt or great aunt, how highsoever, whether paternal or maternal.

Such marriage if contracted is void.

iii. Marriage is also prohibited on ground of affinity. Thus, a man cannot marry:

a) His wife's mother, or grandmother, how highsoever;

b) His wife's daughter or grand-daughter, how lowsoever, if his marriage with his wife is consummated;

c) His father's wife or any other ascendant's wife; and

d) His son's or any other lineal descendant's wife.

Such marriage if contracted would be void.

iv. Fosterage is another impediment to a valid Muslim marriage.

While the above-mentioned bars would render a marriage void, certain prohibitions are only relative in nature, and would render a marriage only as irregular. These are marriage with a fifth wife, marriage without proper witnesses, marriage when there is a difference of religion, unlawful conjunction, or marriage with a woman undergoing iddat.

Muta Marriage:

The word 'muta' literally means 'enjoyment, use'. It is a marriage for pleasure' for a fixed period of time, also known as temporary marriage. The institution of muta, which was fairly common in Arabian before and at the time of the prophet, is now not recognized by any school of Muslim law in India, except the Ithna Ashari or Shia School. In practice, however, the institution of muta marriage is almost obsolete in India.

Essentials of Muta Marriage:

There are four essentials of muta,viz.

i. Form, i.e., proper contract which means declaration and acceptance;

ii. Subject., i.e., a man can contract a muta marriage with a woman professing the Mahomedan, Christian or Jewish religion or even with a fireshipper, but not with a woman following any other religion. A Shia woman, however, cannot contract a muta with a non-Muslim. Relations prohibited by affinity are also unlawful in such marriage;

iii. Term, which means that the period of cohabitation should be fixed, which may be a day, a month, a year or a term of years; and

iv. Dower.

Dower:

Dower is the amount payable by the husband to the wife in consideration of the marriage. It may be prompt or deferred. Prompt dower is payable on demand unless otherwise stated at time of the marriage, the entire dower is presumed to be prompt dower. This is so under the Shia Law. But under the Sunni Law it is usual to regard half as prompt dower and half as deferred dower but there is no hard and fast rule and the courts may treat a reasonable part of the entire dower as Prompt Dower. Masthan Sahib v. Assan Bibi, 23 Mad.371 (FB). The wife may refuse to consummate the marriage, until prompt dower is paid. Even after consummation, if prompt dower is not paid on demand, the wife may refuse further sexual intercourse. A suit by the husband for restitution of conjugal rights in such a case would be decreed conditionally, i.e., subject to the payment of the prompt dower within a time fixed by the court.

Deferred Dower is payable on the dissolution of the marriage. The husband under Mahomedan in Law enjoys an absolute power of divorcing the wife without assigning any person. To deter him from exercising that right arbitrarily, deferred dower is usually fixed rather high. If there is no divorce, deferred dower becomes payable only on the death of the husband. It can be recovered within three years of the death of the husband. Otherwise the claim becomes barred by limitation. But if she is in possession of her husband's property for satisfying her claim to dower, there is no bar of limitation and she can realize her claim from the income of that property.

Related case laws:

Beebee Bachun v. Sheikh Hamid, 14 MIA 377.

Mt.Haliman v. Md. Manir, AIR 1971 Pat.385.

Sabir Hussain v. Ferzhand Khan, 1938 PC 80.

Marriage under Christian Law:

Under the Christian Marriage Act, 1872, the conditions for certification of a marriage of Indian Christians have been provided in sec 60 of the Act. These are:

1) The age of the man intending to be married shall not be under twenty-one years and the age of the woman intending to be married shall not be under eighteen years of age;

2) Neither of the persons intending to be married shall have a husband or wife living;

3) In the presence of a person licensed under sec 9, and of at least two credible witnesses other than such person, each of the parties shall say to the other-

'I call upon these persons here present to witness that I, AB, in the presence of Almighty God, and in the name of our Lord Jesus Christ, do take thee, CD, to be my lawful wedded wife or husband' or words to the like effect.

Void, Voidable, Irregular Marriage:

A marriage, which is not valid, may be void or voidable. A void marriage is one which has no legal status. The courts regard such marriage as never having

Marriage under the Special Marriage Act:

Any two persons (irrespective of their religion) can marry under the Special Marriage Act, 1954. Section 4 of the Special Marriage Act, 1954 lays down conditions for solemnization of special marriages. It states that:

1) neither party should have a husband or wife living;

2) neither party is an idiot or a lunatic;

3) the bridegroom must have completed the age of 21 and the bride the age of 18 years;

4) the parties are not within the degree of prohibited relationship which are enumerated in the first schedule of the Act;

5) Where the marriage is solemnized outside the territories to which the Act applies, both parties should be citizens of and domiciled within the territories to which the Act applies.

The marriage under the Special Marriage Act is a civil marriage by registration. The certificate of the Marriage Officer that this has been done is conclusive evidence of the factum of marriage under the Act. The parties applying for registration should have been residing within the jurisdictional area of the Marriage Officer for not less than 30 days immediately prior to their application. They should have completed the age of 21 years at the time of registration. The effect of registration under this Act is that the marriage would be deemed to have been solemnized under this Act.

Void, Voidable, Irregular Marriage:

A marriage, which is not valid, may be void or voidable. A void marriage is one which has no legal status. The court regard such marriage as never having taken place and no rights and obligations ensue. It is void ab initio, i.e., right from its inception. Hence, the parties are at liberty to contract another marriage without seeking a decree of nullity of the first so-called marriage. A voidable marriage on the other hand, is a marriage which is binding and valid, and continues to subsist for all purposes until a decree is passed by the court annulling the same. Thus, so long as such decree is not obtained, the parties enjoy all the rights and obligations which go with the status of marriage. A remarriage by any one of the parties without a decree of nullity is illegal as it would amount to bigamy.

Statutory position regarding Void, Voidable and Irregular Marriage:

The position regarding void, voidable and irregular marriage under the different personal laws are as follows:

Hindu Law:

A marriage solemnized in contravention of the following conditions is void under the Hindu Marriage Act, 1955, when:

i. Either party has a living spouse living at the time of marriage;

ii. Parties are within the degrees of prohibited relationship, unless custom or usage governing them permits such marriage;

iii. The parties are sapindas of each other, unless custom or usage permits such marriage.

A marriage is voidable under the Hindu Marriage Act, 1955 under the following conditions, viz:

i. The marriage has not been consummated owing to the impotence of the respondent; or

ii. Any of the parties is incapable of giving a valid consent because of unsoundness of mind, or though capable of giving a valid consent, has been suffering from mental disorder to such an extent as to be unfit for marriage and procreation of children, or has been suffering from recurrent attacks of insanity;

iii. The consent to the marriage has been obtained from force or fraud;

iv. The respondent was pregnant at the time of marriage by some person other than the petitioner.

Muslim Law:

Under the Muslim Law, a marriage, which is not sahih, i.e., valid, may be either batil, i.e., void, or fasid, i.e., irregular.

Batil:

Such marriage being void, does not create any rights or obligations, and the children born of such union are illegitimate. A marriage will be void if the parties to the marriage are within the prohibited degrees of relationship, i.e., prohibited by reasons of consanguinity, affinity or fosterage. A marriage with the wife of another man or remarriage with the divorced wife when the legal bar still exists, is also void. A wife has no right to dower unless there has been consummation, in which case she is entitled to customary dower. Besides, if one of the parties dies, the other is not entitled to inherit from the deceased.

Fasid:

Such marriage is irregular because of the lack of some formality, or the existence of some impediment which can be rectified. Since the irregularity is capable of being removed, the marriage is not unlawful in itself. Marriage in the following circumstances is fasid, viz., a marriage that is:

i. Without witnesses;

ii. With the fifth wife by a person having four wives;

iii. With a woman undergoing iddat;

iv. Prohibited by reason of difference of religion;

v. With a woman so related to the wife, that if one of them had been a male, they could not have lawfully intermarried.

In the above situations, the prohibitions against such marriages is temporary or relative or accidental, and can be thus rectified:

i. By subsequent acknowledgement before witnesses;

ii. By divorcing one of the four wives;

iii. By expiration of the iddat period;

iv. By the woman becoming a convert to Islam, Christianity or Jewish religion, or the husband adopting Islam;

v. By the man divorcing the wife who constitutes the obstacle.

In Chand Patel v. Bismillah Begum, the issue was whether a person professing Muslim faith who contracts second marriage with wife's sister during the subsistence of the earlier marriage is obliged to pay maintenance to such woman under the provisions of the Sec 125 of the Cr PC. The court held that such a marriage was not void but only irregular; if it is a temporarily prohibited marriage and could always become lawful by death of first wife or by husband divorcing the first wife.

An irregular marriage may be terminated by either party, either before or after consummation. It has no legal effect before consummation. If, however, consummation has taken place, then:

i. The wife is entitled to dower, either prompt or specified, whichever is less;

ii. She is bound to observe iddat, the duration of which, in case of both divorce or death, is three courses;

iii. Children born of the marriage are legitimate.

It is significant to note that an irregular marriage, even if consummated, does not create mutual rights of inheritance between the parties.

Christian Law:

Under the Indian Divorce Act, 1869, a marriage may be declared null and void on the following grounds, viz:

i. The respondent was impotent at the time of marriage and at the time of institution of the suit;

ii. The parties are within prohibited degree of consanguinity or affinity;

iii. Either party was a lunatic or idiot at the time of marriage;

iv. The former husband or the wife of either party was living at the time of the marriage and the earlier marriage was subsisting.

Special Marriage Act, 1954:

Under the Special Marriage Act, 1954, a marriage is null and void under Sec 4 read with Sec 24, if:

i. It is in violation of the minimum age requirement, which is 21 years for a boy and 18 years for a girl;

ii. There is another spouse living;

iii. The parties are within prohibited degrees of relationship, unless custom or usage permits such marriage;

iv. Any of the parties is incapable of giving a valid consent due to unsoundness of mind, or though capable of giving consent, is suffering from mental disorder of such kind as to be unfit for marriage or procreation of children, or has been subject to recurrent attacks of insanity;

v. The respondent was impotent at the time of marriage and at the time of filing of the suit.

A marriage under the Special Marriage Act, 1954 is voidable if the same has not been consummated owing to willful refusal of the respondent, or the respondent was pregnant by some person other than the petitioner, or the consent of either party to the marriage was obtained by coercion or fraud.

UNIT – III LAW ON DIVORCE AND MAINTENANCE

Divorce is the golden key to the cage of marriage. The term 'divorce' comes from the Latin word divortium which means to turn aside; to separate. It is the legal cessation of a matrimonial bond. Divorce means putting an end to the marriage by dissolution of marital relations. The parties can no longer be husband and wife. The grounds on which the divorce is taken in accordance with Sec 13 of the Hindu Marriage Act, 1955 is as follows:

Under Hindu Law:

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

i. Has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

ia. Has, after the solemnization of the marriage, treated the petitioner with cruelty; or

ib. Has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition

ii. Has ceased to be a Hindu by conversion to another religion; or

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

iv. Has been suffering from a virulent and incurable form of leprosy; or

v. Has been suffering from venereal disease in a communicable form; or

vi. Has renounced the world by entering any religious order; or

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

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

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

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

Section 13 (2): A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,-

i. in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner.

Provided that in either case the other wife is alive at the time of the presentation of the petition, or

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

iii. that in a suit under section 18 of the Hindu Marriage Act, 1956, or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 or under the corresponding section 488 of the Code of Criminal Procedure, 1898, a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards;

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

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

Section 13-B: Divorce by mutual consent: 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 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, and that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

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 enquiry 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.

It is significant to note that after the Act came into force, a marriage can be dissolved only under the provisions of this Act or exceptionally, under custom permitting divorce. No marriage can be dissolved by "an arrangement to live separately". It may be pointed out further that there can be no divorce for consideration even if the parties agree to it. Thus where there were no grounds for divorce under sec 13 nor there a petition for divorce by mutual consent under section 13-B, the Orissa High Court order dissolving a marriage on the husband paying Rs.10 lakhs to the wife and the wife consenting to it, was set aside in appeal by the Supreme Court in a case Sanjeeta Das v. Tapan Kumar Mohanty, (2010) II DMC 568 SC. The court observed:

"No court can assume jurisdiction to dissolve a Hindu marriage simply on the basis of the consent of the parties de hors the grounds enumerated under sec 13 of the Act, unless of course the consenting parties proceed under sec 13-B of the Act".

Dissolution of marriage through panchayat as per custom prevailing in that area and in that community cannot be a ground for granting a divorce decree under sec 13 of the Act.

Divorce under Muslim Law:

A contract of marriage under the Muslim law may be dissolved:

i. by the husband at his will, i.e., talaq;
ii. by the wife under a power delegated to her, i.e.,talaq-i-tafweez;
iii. by mutual consent of the husband and wife, i.e., khula and mubara'at; and
iv. by judicial decree under the Dissolution of Muslim Marriage Act, 1939.

Talaq in its original sense means repudiation, or rejection, but under Muslim law, it means a release from the marriage tie. It is a generic name for all kinds of divorce, but is particularly applied to the repudiation by or on behalf of the husband. Any Mahomedan of sound mind, who has attained puberty, may divorce his wife whenever he desires, without assigning any cause. A talaq pronounced under compulsion or intoxication or fraud is also effective under Sunni law void under Shia law. A talaq may be effected either orally, by spoken words or in written document called talaqnama.

Forms of Talaq:

Talaq-us-sunnat:

This means talaq as sanctioned by the sunnat or according to the traditions laid down by the prophet. These can be of two types. One is Talaq ahasan and the other os Talaq hasan.

Talaq ahasan:

This is the most proper method of divorce. The requirements of this form are:

a) The husband must make a single pronouncement of divorce.

b) This pronouncement must be made during a tuhr (period between menstruation).

c) The husband must abstain from sexual intercourse for the period of iddat.

A pronouncement made in the ahasan form is revocable during iddat. Such revocation may be either in express words or implied. Cohabitation is an implied revocation. After the expiration of iddat, the divorce becomes irrevocable.

Talaq hasan:

This is the proper method of divorce but not the most proper method. The requirements of this talaq are:

a) There are three pronouncements of talaq made during successive tuhrs.

b) There must be abstinence from sexual intercourse until the third pronouncement.

Talaq-ul-biddat:

Talaq-ul-biddat is one of the disapproved forms of talaq. The essential feature of this talaq is its irrevocability. It is of two kinds. One is talaq-ul-bain and another one is talaq-i-bain. The three pronouncements should be made in within one tuhr. These pronouncements may be made either in one sentence or in separate sentences. The triple repetition is not a necessary condition of talaq-ul-biddat, and the intention to render talaq irrevocable may be expressed even by a single declaration. Thus, if a man says 'I have divorced you by a talaq-ul-bain (irrevocable) divorce' the talaq is talaq-ul-biddat, and it will take effect immediately. The Shia law does not recognize the validity of this form of talaq. As a general rule, the effect of an irrevocable divorce is that the mutual rights of inheritance between the husband and wife immediately cease. But where an irrevocable divorce is given during the husband's death-illness and he dies before the expiry of iddat.

Ila:

Ila or vow of abstinence is another form of divorce. It is a species of constructive divorce, which is effected by abstinence from sexual intercourse for a period of not less than four months pursuant to a vow. Ila may be cancelled by the husband by resuming intercourse with his wife within the period period to which it refers, provided he has not already completed four months of abstinence. This form of divorce is more or less obsolete now.

Zihar:

Zihar is a form of inchoate divorce. If the husband compares his wife to any of his female relations within such prohibited degrees as renders marriage with such person as unlawful, the wife has a right to withdraw from him until he has performed penance. If the husband does not expiate, the wife has a right to apply for a judicial divorce.

Talaq-i-tafwid (Delegated Divorce):

A husband, under the Mahomedan law, has the power to delegate his own right of pronouncing divorce to some third person or to the wife herself. This power could be delegated either absolutely or conditionally, for a particular period, or permanently. A temporary delegation of the power is irrevocable, but a permanent delegation may be revoked.

Khula and Mubara'at:

A marriage may also be dissolved by agreement between the husband and wife. A dissolution of the marriage by agreement may take the form of khula or mubara'at.

Khula:

Khula is a divorce with the consent, and at the instance of the wife. 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 essential features of khula are:

i. there is an offer from the wife;

ii. the offer is accompanied by some consideration or compensation by the wife to the husband in lieu of her release from the marital bond;

iii. the offer must be accepted by the husband.

Mubara'at:

Like khula, mubara'at is also a form of divorce where marriage is dissolved by agreement between the parties. The difference between the two is that in khula, the aversion is on the side of the wife and she desires a separation, whereas in mubara'at the aversions is mutual and both the parties desire a separation. It takes place in the form of bilateral agreement between the husband and wife without the intervention of the court.

Li'an (False Charge of Adultery):

Adultery is a very grave offence under Islamic law. It therefore takes a serious view of an imputation of unchastity against a married woman. If a Muslim husband charges his wife with adultery and the charge is false, the wife has a right to seek divorce on that ground. She has a right to file a regular suit for dissolution of marriage and a mere application to the court is not sufficient. The marriage continues until the decree is passed.

Judicial Divorce:

Unlike the husband, a wife has no absolute right to divorce her husband. She can, however, seek a divorce under certain conditions and grounds through a court.

Prior to Shariat Act:

Prior to Shariat Act, i.e., the Muslim Personal Law, the wife could sue the husband for divorce on the following grounds, viz:

i. Impotence: It had to be proved that:

a) The wife was a virgin at the date of filing the suit.

b) The husband was impotent at the time of marriage.

c) The wife had no knowledge of his impotency at the time of marriage; and

d) The husband was unable to consummate the marriage during the one year during which period the case was to be adjourned.

ii. Li'an, i.e., false charge of adultery.

Divorce under the Dissolution of Muslim Marriage Act, 1939:

The statutory ground for divorce available to a Muslim wife are contained in the Dissolution of Muslim Marriage Act, 1939 (a Muslim husband does not need any ground as such to divorce his wife. Section 2 of this Act states:

Grounds for decree for dissolution of marriage:

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 following grounds, namely:

i. that the whereabouts of the husband have not been known for a perinderod of four years;

ii. that the husband has neglected or has failed to provide for her maintenance for a period of 2 years;

iii. that the husband has been sentenced to imprisonment for a period of 7 years or upwards;

iv. that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

v. that the husband was impotent at the time of the marriage and continues to be so;

vi. that the husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease;

vii. that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years; provided that the marriage has not been consummated;

viii. that the husband treats her with cruelty, that is to say-

a) habitually assaults her and makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment; or

b) associate with women of evil repute or leads an infamous life; or

c) attempts to force her to lead an immoral life; or

d) dispose of her property or prevents her exercising her legal rights over it; or

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

f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;

ix. On any other ground which is recognized as valid for the dissolution of marriages under Muslim Law. Provided that:

a) no decree shall be passed on ground (iii) until the sentence has become final;

b) a decree passed on ground (i) shall 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 satisfies the court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and

c) before passing a decree on ground (v) the court shall, on application by the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

The above is the legal position on grounds statutorily provided for seeking a divorce. Apart from these grounds, where one party files a petition against the other, Muslim law provides for divorce by mutual consent as well.

Christian Law:

The Indian Divorce Act, 1869, which has been substantially amended in 2001, provides for divorce on the following grounds.

Section 10. Grounds for Dissolution of Marriage – (1) any marriage solemnized whether before or after the commencement of the Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent-

i) has committed adultery;

ii) has ceased to be a Christian by conversion to another religion; or

iii) has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; or

iv) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or

v) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or

vi) 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 the respondent if the respondent had been alive; or

vii) has willfully refused to consummate the marriage and the marriage has not therefore been consummated; or

viii) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; or

ix) has deserted the petitioner for at least two years immediately preceding the presentation of the petition; or

x) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent;

(2) A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

The provision of section 10(2) giving exclusive grounds for divorce to wife was challenged as being violative of the right to equality under Article 14 of the Constitution, in Anil Kumar v. Union of India, 1994 (2) HLR 111SC, the court held that in view of a woman's general vulnerable physical and social condition, in this country specially, there is nothing offensive about it.

Divorce under the Special Marriage Act, 1954:

Grounds of Divorce (s.27): Either husband or wife can file a petition for divorce on the ground that the respondent:

1. had voluntary sexual intercourse with a third person.
2. is undergoing sentence of imprisonment for seven years or more for an offence under the IPC.
3. had deserted the petitioner for two years prior to the petition;
4. has treated the petitioner with cruelty;
5. has been incurably of unsound mind or suffering from mental disorder to such an extent that petitioner cannot be reasonably expected to live with the respondent;
6. has been suffering from venereal disease in a communicable form;
7. has been suffering from leprosy, the disease not having been contracted from the petitioner;
8. has not been heard of as being alive for seven years or more;
9. has not resumed cohabitation for 1 year or more after the passing of a decree for judicial separation against the respondent;
10. has failed to comply with a decree for restitution of conjugal rights for one year or more.

Special grounds for wife:

i) husband being guilty of rape, sodomy or bestiality;

ii) though order for separate maintenance was passed against husband, he has not resumed cohabitation for one year or upwards.

Divorce by mutual consent:

Divorce by mutual consent is also possible under the Special Marriage Act, 1954. If the husband and wife are living separately for one year or more and are not able to live together, then they may mutually agree that the marriage should be dissolved. A petition for divorce may be presented by both the parties stating these facts. Then they should wait for six months. Thereafter before the expiry of 18 months from the date of the petition, they should jointly move the court for a decree. The court may, thereupon, pass a decree declaring the marriage to be dissolved with effect from the date of the decree.

Judicial separation:

Judicial separation is one of the matrimonial reliefs provided under the personal law statutes. Unlike divorce, a decree of judicial separation does not put an to the marriage. The legal relationship of husband and wife subsists and the parties cannot remarry.

Hindu Law:

It is pertinent to note that prior the Marriage Laws (Amendment) Act, 1976 the grounds for judicial separation were different from those for divorce. But after the amendment the grounds for both the reliefs are identical.

Under section 10 of the Hindu Marriage Act, 1955:

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

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

Thus, (a) the grounds for judicial separation and divorce are common; (b) the parties are under no obligation to cohabit after the decree; (c) the decree may be rescinded.

Since a decree of separation does not irretrievably snap the legal tie and chances of rapprochement are still kept alive, the courts, with deep concern over the increasing number of divorce cases and its impact on the parties, the children, the family and the society at large, sometimes grant a decree of judicial separation instead of divorce sought, depending of course on the circumstances of the case. Manisha Tyagi v. Deepak Kumar, AIR 2010 SC1042 is a recent significant judgment of the apex court on the issue.

Muslim Law:

The relief of judicial separation does not exist under Muslim Law.

Christian Law:

The only statute which has retained some distinction between the grounds for judicial separation and divorce is the Indian Divorce Act, 1869. Prior to the Indian Divorce (Amendment) Act, 2001, the grounds for divorce were very limited. The same have been considerably enlarged and brought almost at par with the Hindu Marriage Act, 1955. As regards judicial separation, the amendment has not made any significant change except that 'the grounds which were earlier available only for judicial separation, are now available for divorce as well. However, the other grounds now available for divorce, after the amendment, are not incorporated as grounds for judicial separation'. Under sec.22 of the Indian Divorce Act, 1869, a husband or wife may obtain a decree for judicial separation on the ground of adultery or cruelty or desertion for two years upwards.

Special Marriage Act, 1954:

The position under the Special Marriage Act, 1954 is the same under the Hindu Marriage Act, 1955, and the grounds for separation and divorce are common.

Restitution of Conjugal Rights:

Restitution of Conjugal Rights is one of the various reliefs available to spouses under the Hindu Marriage Act, 1955, the Special Marriage Act, 1954, the Indian Divorce Act, 1869, and the Parsi Marriage and Divorce Act, 1936.

Restitution of Conjugal Rights under the Hindu Marriage Act, 1955.

Section 9. Restitution of Conjugal Rights: 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 is there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

The idea for providing for restitution by a court decree is to preserve the marriage tie as far as possible, by enabling the court to intervene and enjoin upon the withdrawing party to join the other. The conditions to be satisfied for obtaining such decree are:

i) The other spouse has withdrawn from the society of the petitioner.

ii) There is no reasonable excuse for such withdrawal. Should the respondent allege reasonable excuse, the burden of proof lies on him/her.

iii) The court's satisfaction as to the truth of the statements made in the petition.

iv) No legal grounds exist for refusing the decree.

It is significant to note that in 1983-84, the constitutional validity of sec.9 of the Hindu Marriage Act, 1955 became a subject matter of debate as a result of the Andhra Pradesh High Court judgment in Sareetha v. Venkata Subbaiah. Choudary J. termed the provision of restitution as 'uncivilised', 'barbarours', 'engine of oppression' and assailed s.9 as being violative of Arts. 14,19 and 21 of the Constitution of India.

Restitution of Conjugal Rights under Muslim Law:

The Muslim law does not specifically and statutorily provide for the matrimonial relief of restitution of conjugal rights. However, 'where a wife, without lawful cause ceases to cohabit with her husband, the husband may sue the wife for restitution of conjugal rights', and similarly 'the wife has the right to demand the fulfillment by the husband of his marital duties'. Generally, however, it is the husband who brings the suit for restitution because of the dominant position of the husband, specially in regard to divorce. His right is not absolute and the wife has her defenses where a husband files a suit for restitution. Cruelty is a very strong defence.

In Moonshee Buzloor Ruheem v. Shumsoonnissa Begum, the court held that a suit for restitution of conjugal rights would lie in a civil court by a Muslim husband to enforce his marital rights; but if there were cruelty to a degree rendering it unsafe for her to return to his dominion, or if there were cruelty to a degree rendering it unsafe for her to return to his dominion, or if there were a gross failure on his part to perform the obligations imposed on him by the marriage contract, the court would be justified in refusing such relief.

Restitution of Conjugal Rights under Christian Law:

Section 32. Petition for restitution of conjugal rights: When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, either wife, or husband 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 is there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Section 33. Answer to Petition: Nothing shall be pleaded in answer to a petition for restitution of conjugal rights, which would not be ground for a suit for judicial separation or for a decree for nullity of marriage.

Restitution of Conjugal Rights under the Special Marriage Act, 1954:

The procedure and the grounds for applying before the court are similar to that of the Hindu Marriage Act, 1955.

Section 22. Restitution of Conjugal Rights: 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 is there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Court's jurisdiction and procedure under the Hindu Marriage Act, 1955:

Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original jurisdiction civil jurisdiction the marriage was solemnized or the husband and wife reside or last resided together.

Previously the district court which had jurisdiction was the one within whose jurisdiction the marriage was solemnized or the parties to the marriage last resided together or both husband and wife reside. This is so even now. It was doubtful whether a petition could be filed in the district court within whose jurisdiction the respondent only was residing. It was held in Gomathi v. Natarajan, AIR 1973 Mad.271, that though s.19 was silent on this point, under the provisions of the Civil Procedure Code the court had the jurisdiction in such a case. Section 19 is now explicit on this point and the court has jurisdiction in such a case under s.19 itself. [Sec.19(ii)].

Further, the amended Section makes it clear that when the respondent has not been heard of for 7 years or is residing outside the territories to which the Hindu Marriage Act, 1955 extends (i.e., outside India) the court within whose jurisdiction the petitioner resides can entertain the petition.

In Camera Proceedings:

Section 22 of the Hindu Marriage Act, 1955 provides for proceedings to be in camera and may not be printed or published.

Previously the proceedings were to be conducted in camera, if either party so desired or if the court so thought fit to do. Now this requirement is dropped and the proceedings to be in camera in every case irrespective of whether the parties so desire or not. It is desirable that the public should be excluded from the court-hall at once when proceedings are being conducted under this Act as such proceedings involve the "washing of dirty linen by the parties".

MAINTENANCE:

Maintenance refers to payments which a husband is under an obligation to make to a wife either during the subsistence of the marriage or upon separation or divorce, under certain circumstances. The liability of the husband flows from the bond of matrimony. A wife is entitled to claim maintenance under the personal laws as well as under the provisions of the Code of Criminal Procedure, 1973. While under the personal laws an application for maintenance can be made only if there are, or have been, matrimonial proceedings under the Act, in case of Code of Criminal Procedure, 1973 there need not be any matrimonial litigation and yet the wife may seek maintenance. The statutory position under the different laws is as follows:

Hindu Law:

In Hindu law, there are two statutes which provide for maintenance, viz., the Hindu Marriage Act, 1955 and the Hindu Adoptions and Maintenance Act, 1956.

Maintenance under the Hindu Marriage Act, 1955:

Sec 24 of the Act states: Maintenance pendente lite and expenses of proceedings: where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioners own income and the income of the respondent, it may seem to the court to be reasonable.

[Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be. Inserted by the Marriage Laws (Amendment) Act, 2001]

It is significant to note that the words used in sec.24 are "where in any proceedings under the Act". Thus it could be proceedings for any relief. Proceedings for maintenance pendente lite are not dependent on the merits of the main case. Thus, in Sandeep Kumar v. State of Jharkhand, AIR 2004 Jhar 23 where a husband had filed a petition under sec. 12 of the Act for declaration that the marriage was null and void, his plea that no maintenance under sec. 24 could be ordered was rejected. The court held that so far as sec. 24 is concerned the wife's right to seek maintenance is not affected and it is immaterial whether the main petition is under sec.12 or it is under sec.13.

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

Maintenance under the Hindu Adoptions and Maintenance Act, 1956:

A Hindu wife has the advantage of an additional statute viz., the Hindu Adoptions and Maintenance Act, 1956. Under s.18 of this Act a Hindu wife is entitled to live separately from her husband without forfeiting her claim to maintenance, provided her separate living is justified which means that the husband:

i) Is guilty of desertion;

ii) Has treated her with cruelty;

iii) Is suffering from a virulent form of leprosy;

iv) Has any other wife living;

v) Keeps a concubine in the same house, or is living or habitually resides with a concubine elsewhere;

vi) Has ceased to be Hindu by conversion to another religion; or

vii) If there is any other cause justifying living separately.

The section provides two specific bars which would disentitle a wife from claiming maintenance under this Act, viz., if she is inchaste or if she ceases to be a Hindu by conversion to another religion.

Maintenance under Muslim Law:

The personal law statutes governing a Muslim woman's right to maintenance are the Dissolution of Muslim Marriage Act, 1939 and the Muslim Women (Protection of Rights on Divorce) Act, 1986. The former Act provides for grounds under which a woman married under the Muslim law can seek dissolution of the marriage. One of the grounds provided is that the husband has neglected or has failed to provide for her maintenance for a period of two years. The latter Act, as its very title indicates, makes provision for protection of rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands, which includes right of maintenance as well.

As is evident from the above statutory provisions, maintenance could be interim or permanent. Interim or pendent lite maintenance is payable to meet the applicant's financial needs pending litigation as well as the litigation expenses. Permanent alimony is an amount fixed at the time of the passing of the decree or thereafter. This amount can be varied on the application of the parties if there is a change in the circumstances of the parties.

There is no limit as to the amount which may be awarded by way of maintenance which depends on the circumstances of each case.

Maintenance under Christian Law:

Provisions for maintenance under the Christian law are contained in the Indian Divorce Act, 1869 as amended in 2001. The relevant sections are:

Sec 36. Alimony Pendente Lite: in any suit under this Act, whether it be instituted by a husband or a wife, and whether or not she has obtained an order of protection, [the wife may present a petition for expenses of the proceedings and alimony pending the suit].

Such petition shall be served on the husband, and the court, on being satisfied of the truth of the statements therein contained, may make such order on the husband [for payment to the wife of expenses of the proceedings and alimony pending the suit] as it may deem just.

Provided that the petition for the expenses of the proceedings and alimony pending the suit shall, as far as possible, be disposed of within sixty days of service of such petition on the husband].

Sec.37. Power to order permanent alimony: [where a decree of dissolution of the marriage or a decree of judicial separation is obtained by the wife, the District Court may order that the husband shall], to the satisfaction of the court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as having regard to her fort une (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable, and for that purpose may cause a proper instrument to be executed by all necessary parties.

Power to order monthly or weekly payments: In every such case the court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the court may think reasonable.

Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the court court seems fit.

Section 38: Court may direct payment of alimony to wife or to her trustees: in all cases in which the court makes any decree or order for alimony it may direct the same to be paid either to the wife herself or to any trustee on her behalf to be approved by the Court and may impose any terms or restrictions which to the court seem expedient and may from time to time appoint a new trustee if it appears to the court expedient so to do.

Maintenance under the Criminal Procedure Code, 1973:

Apart from the personal laws, the Code of Criminal Procedure, 1973 also provides for maintenance of wives. Unlike the personal laws belonging to particular religions, the provisions of the Code of Criminal Procedure, 1973 are applicable to all irrespective of religion. Relief under this Code is speedy and is available irrespective of whether or not any matrimonial proceedings are pending. The salient features of section 125 are:

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i) A wife includes a divorced wife.

ii) Only lawful wife is entitled to maintenance under this section.

iii) A wife may seek maintenance even without any matrimonial litigation.

iv) She may stay separate if there are sufficient grounds justifying that and yet get maintenance.

v) There must be neglect or refusal on the part of the husband to maintain her.

vi) Wife must be unable to maintain herself.

vii) The court can grant interim maintenance also.

viii) The amount may be varied or cancelled if there is change in circumstances.

ix) In certain situations a wife may be debarred from claiming maintenance.

x) Her right terminates on remarriage.

xi) The proceedings are summary and on.

At the outset it may be pointed out that under this section a woman cannot stake the claim for past maintenance. The court has jurisdiction under sec 125 of the Code of Criminal Procedure only to direct payment of future maintenance i.e., maintenance from the date of application. Maintenance under this provision may be ordered from the date of the order or from the date of application. It would depend on the facts and circumstances of the case. Thus in Dilip Kumar v. State of U.P., AIR 2010 (NOC) 897 (All), where an application for maintenance remained pending for 21 years due to the husband's delayed tactics, it was held that he was liable to pay from the date of wife's application. A wife seeking maintenance under this section has to prove neglect on the part of the husband to maintain her.

Maintenance of Children:

The obligation of parents to maintain children arises both out of blood relationship as well as moral duty, which is reinforced by statutory provisions. Almost every society recognizes the duty of a parent to maintain his child so long as he is a minor or unable to maintain himself. The degree and extent of such obligation varies from society to society and from time to time.

Children in India are entitled to be maintained under two sets of laws, viz., i) their personal law; ii) the secular law, which is the Code of Criminal Procedure, 1973.

Personal Laws:

Hindu Law:

There are two personal law statutes amongst the Hindus whereunder children are entitled to claim maintenance. These are the Hindu Marriage Act, 1955 and the Hindu Adoptions and Maintenance Act, 1956.

The Hindu Marriage Act, 1955:

The Hindu Marriage Act, 1955 is primarily a statute governing matrimonial relations and providing reliefs to parties but children being an integral component of matrimony, the Act makes provisions to safeguard the interests of the children of marriage. Sec 26 of the Act says:

Section 26. Custody of Children:

In any proceeding under this Act, the court may, from time to time pass such interim orders and make such provisions as it may deem just and proper with respect to the custody, maintenance and education of minor children.

Apart from sec 26, the court may grant maintenance for children also on an application by the wife under ss. 24 and 25 of the Act.

Hindu Adoptions and Maintenance Act, 1956:

Section 20 of the Act states:

Sec.20. Maintenance of Children and Aged Parents: (1) a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children.

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

(3) The obligation of a person to maintain his or her daughter who is unmarried extends in so far as the unmarried daughter is unable to maintain herself out of her own earnings or other property.

The maintenance provisions under the Hindu Adoptions and Maintenance Act, 1956 are wider than the Hindu Marriage Act, 1955 as (i) under the Hindu Marriage Act, 1955, children may seek maintenance only when their parents are litigating in a court under the provisions of that Act; (ii) under the Hindu Marriage Act, 1955 there is no specific provision for the maintenance of an unmarried adult daughter.

Maintenance under Muslim Law:

A Muslim father is under an obligation to maintain his sons until they have attained the age of puberty which is 15. In case of daughters, the liability extends till they are married. A father is not bound to maintain his adult sons unless they are disabled by infirmity or disease. The fact is that the children are in the custody of their mother during their infancy, does not relieve the father of his obligation to maintain them. But the father is not bound to maintain a child who is capable of being maintained out of his or her own property. If the father is poor, and incapable of earning by his own earning by his own labour, the mother, if she is in easy circumstances, is bound to maintain her children as the father would be. If the father is poor or infirm, and the mother also is poor, the obligation to maintain the children lies on the grandfather, provided he is in easy circumstances.

Maintenance under other Personal Laws:

The matrimonial law applicable to Christians i.e., Indian Divorce Act, 1869 also contain provisions for the custody, maintenance and education of minor children (ss.41-44). The Special Marriage Act, 1954 (sec.38) which is applicable to all persons who marry under its provisions irrespective of caste, religion or creed, also provides for interim or final orders in regard to maintenance, custody and education of children. It is important to note that maintenance for minor children under these laws can be awarded only when there is a matrimonial litigation between the parties to the marriage, under their respective personal laws. Unlike the Hindu Adoptions and Maintenance Act, 1956 there is no law entitling children to an independent right to seek maintenance against their parents.

Maintenance under the Code of Criminal Procedure:

Apart from the maintenance provisions under personal laws mentioned above, children are entitled to maintenance under the provisions of the Code of Criminal Procedure, 1973 (Part IX, ss.125-128) as well. The child is entitled to claim maintenance under the code independently of any matrimonial litigation between the parents. The proceedings are swift and summary. After the Amendment of 2001, the ceiling of Rs. 500 has been done away with, besides, explicit provision for interim relief has also been incorporated.

Maintenance for Husbands:

Introduction:

With the change in the socio-economic conditions of society where more and more wives are working and earning, it has come to be realized that the husbands too may, at times, need to be maintained by their wives. Consequently, some laws make provision for maintenance of husbands.

Statutory Provisions:

Hindu Law:

(a) The Hindu Marriage Act, 1955: Sec 25 of the Hindu Marriage Act, 1955 states:

Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support, such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant...

The provision is the same under sec 24 of the Act, which provides for maintenance pendente lite or litigation expenses.

(b) Hindu Adoptions and Maintenance Act, 1956

The Hindu Adoptions and Maintenance Act, 1956 makes no provision for the maintenance of husbands.

Under Muslim Law:

There is no provision for maintenance of the by the wife under Muslim Law.

Under Christian Law:

Under the Indian Divorce Act, 1869, only a wife may claim alimony from the husband (ss. 36 and 37). Even the Amendment Act of 2001 has not made any change in this regard.

Under the Special Marriage Act, 1954:

This Act also does not provide for maintenance for the husband. Sections 36 and 37 refer only to a wife's right to alimony pendent lite and permanent alimony.

Under the Code of Criminal Procedure, 1973:

The Code of Criminal Procedure, also makes no provision for maintenance of a husband. While it specifically refers to wife, children and parents, there is no mention of a husband anywhere in the code which provides for maintenance.

Maintenance of parents:

If the duty of supporting the infant children is necessary to be enforced for the preservation of our race, that of maintaining aged persons is equally necessary to be enforced for his happiness. The moral duty to maintain parents is recognized by all people. However, so far as law is concerned, the position and extent of such liability varies from community to community. As in case of wives and children, provisions for maintenance of parents exist under some personal laws as also under the Code of Criminal Procedure, 1973, which is a secular legislation and is applicable to members of all communities. Apart from that, there is the recently enacted Act , the Maintenance and Welfare of Parents and Senior Citizens Act, 2007.

Under the Hindu Law:

The Hindu Adoptions and maintenance Act, 1956 is the first personal law statute in India which imposes an obligation on the children to maintain their parents. As is evident from the wording of the section, the obligation to maintain parents is not confined to sons only and daughters also have an equal duty towards parents. Under the old law it was only the sons who had the duty to maintain their parents. The reasons were obvious. The sons alone inherited properties. The daughters neither inherited nor had any other income of their own by way of personal earnings. With the changing times, the law has recognized that daughters also should have a duty to maintain parents.

Under the Hindu Adoptions and Maintenance Act, 1956, mother and father both have an equal right to claim maintenance from their children. The section explicitly refers to step-mother also. However, it is only a childless step-mother who can claim maintenance. If she has her own children, she has to proceed against them. (Sec.20 of the Hindu Adoptions and Maintenance Act, 1956). It is important to note that only those parents who are financially unable to maintain themselves from any source, are entitled to seek maintenance under this Act. This section makes no reference to the capacity of the children or child against whom maintenance is sought. In fact, the word used is 'bound' to maintain. This is in contrast to the provisions under the Code of Criminal Procedure, 1973 where the liability is imposed only on a person who has sufficient means.

Under the Muslim Law:

Children have a duty to maintain their aged parents even under the Muslim Law in the following lines.

Section 371. Maintenance of Parents: (1) children in easy circumstances are bound to maintain their poor parents, although the latter may be able to earn something for themselves.

(2) A son though in straightened circumstances is bound to maintain his mother, if the mother is poor, though she may not be infirm.

(3) A son, was though poor, is earning something, is bound to support his father who earns nothing.

Under Christian Law:

The Christians have no personal laws providing for maintenance for the parents. Parents who wish to seek maintenance have to apply under the Code of Criminal Procedure, 1973.

Apart from the personal laws the secular laws like the Code of Criminal Procedure, 1973 and the Maintenance and Welfare of parents and Senior Citizens Act, 2007 also have provisions for their maintenance and welfare. These are secular laws and thus applicable to all irrespective of the religion of the claimant or non-claimant.

UNIT – IV LAW ON LEGITIMACY OF CHILDREN AND ADOPTION

Legitimation of Children of Void and Voidable Marriages:

The conditions for a void marriage are laid down under all personal law statutes. While breach of some conditions is considered more serious and the marriage is rendered void, non-compliance of others renders a marriage voidable only. The basic distinction between the a void and voidable marriage is that while in the former there is no legal status conferred on the parties and the marriage is void ab initio., right from inception, in the latter, all rights and obligations of matrimony subsist until the marriage is annulled by the court. Besides, a void marriage may be declared a nullity at the instance of either party, but in case of voidable marriage, the decree of annulment can be made by the court at the instance of the aggrieved party.

Under the Hindu Law:

As regards the status of children, while children of voidable marriage were legitimate, those born out of void marriage were considered to be illegitimate under the Hindu Marriage Act, 1955, (prior to 1976), unless the parties to such marriage obtain a decree of annulment in respect of the marriage. In other words, if any of the parties to the marriage do not choose to make a petition under sec 11, the children of such marriage remain illegitimate, and if any of the parties to such marriage dies before any such decree is passed, the children would not be protected.

In Thulasi Ammal v. Gowri Ammal, AIR 1964 Mad 118, suit by the second wife of a deceased and her minor daughter against the children by the first wife for partition of the estate of the deceased , it was held that the second marriage was void since it had taken place after the Hindu Marriage Act, 1955 came into force, and the first wife being alive, the deceased could not have taken the second wife; it was also held that the child by the second wife was illegitimate and could not be regarded as legitimate under sec 16 of the Act, since marriage was not declared void on a petition under sec 11. However, children of void and voidable marriage, which has been annulled by a decree, were deemed to be the legitimate children of such properties 'for the purpose of inheriting their parent's property'.

Though the provision contained in sec 16 aimed at protecting the rights of children whose parents' marriage suffered from a legal flaw, it did not serve this purpose as children could be legitimated only if the parents obtained a decree of nullity. If the parents failed to go to court for such decree, the children remained illegitimate.

This provision was criticized in several judgments, as it appeared to be inconsistent with the intention of the legislature, which obviously was not to render children of a void marriage illegitimate if a decree to that effect was not obtained. This issue was deliberated by the law commission and recommended revision of sec 16 of the Hindu Marriage Act, 1955. In 1976, the section was amended by the Marriage Laws (Amendment) Act, 1976. Consequent to the amendment, the position under the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 is that, notwithstanding that no decree of nullity has been obtained in the case of a void or voidable marriage, the children would be deemed to be legitimate as if the marriage was valid.

At the outset it may be mentioned that the constitutional validity of this section was challenged in P.E.K.Kalliani Amma v. K.Devi, AIR 1996 SC 1963, wherein the Supreme Court held that s.16 is not ultra vires the Constitution. In view of the legal fiction contained in s.16, the illegitimate children, for all practical purposes, including succession to the property of their parents, have to be treated as legitimate, property rights, however are limited to the properties of the parents.

A mention may be made of a few cases on the point. In Rameshwari Devi v. State of Bihar, AIR 2000 SC 735, the Supreme Court acknowledged children born of a legally valid marriage and children born of a void marriage on an equal status. Likewise, in G.Nirmalamma v. G.Seethapathi, AIR 2001 AP 104, where the

marriage was void as it took place during the subsistence of the earlier marriage of the deceased with the mother of the son, it was held that the son has to be equated with the sons of the earlier marriage, as legal heirs under ss.8, 10 and the schedule annexed to the Hindu Succession Act, 1956. The son, according to the court, has to be treated as coparcener of property held by the father whether the property was originally joint family property or not. The only limitation being that during the lifetime of the father, son of a void marriage is not entitled to seek a partition.

Kangavalli v. Saroja, AIR 2002 Mad 73, reiterated the position that while a wife of a void marriage has no right to the property of her deceased husband, the children have an equal right along with the legitimate children.

Bharatha Matha v. R.Vijaya Ranganathan, AIR 2010 SC 2685, is a very judgment on the issue of property rights of children born of a live-in-relationship. To state the facts: 'R' the alleged wife in a live-in-relationship was already married to 'A' and while that marriage was subsisting, she entered into a live-in-relationship with one 'M'. After the death of 'M', property disputes ensued and it was argued that due to long live-in-relationship the marriage between 'R' and 'M' should be presumed and hence the children born of that relationship would be the legitimate children of 'R' and 'M' and therefore, entitled to coparcenary property of their father viz. 'M'. It was held that in this case no presumption of marriage on the basis of long cohabitation could be drawn as 'R' was already in married state when she started living with 'M'. Hence, the children born to them would be illegitimate and the question of inheritance of coparcenary property by them could not arise. Fiction of legitimacy created by sec 16 is limited only to the extent of rights in the property of the parents, the court held.

In Shahaji Kisan Asme v. Sitaram Konde Asme, AIR 2010 Bom 24, which was a case of inheritance, it was held that as per the provision of sec 16(3) of the Hindu Marriage Act,1955, the illegitimate children are entitled to inherit property of their parents alone and parents does not include grandparents.

Under Muslim Law:

Muslim law does not recognize legitimation, and a child who is clearly illegitimate under the law cannot be conferred a status of legitimacy. A child can, however, be acknowledged legitimate in certain situations viz., where:

i) paternity of the child is either not known or is not established beyond doubt;

ii) it is not proved that the child is the offspring of illicit intercourse (zina); and

iii) the circumstances are such that marriage between the acknowledger and the mother is not an impossibility.

This is known as the doctrine of acknowledgement of paternity. A valid acknowledgement is not revocable and gives rights of inheritance to the child. This doctrine of acknowledgement of paternity is, however, different from legitimation as provided under the other personal laws.

Under Christian Law:

Under the Indian Divorce Act, 1869, children of marriages annulled on ground of bigamy contracted in good faith and with full belief of the parties that the former spouse was dead, or on the ground of insanity, are entitled to succeed in the same manner as legitimate children, to the estate of the parent who, at the time of the marriage was competent to contract. Thus, if the father is incompetent to enter into a marriage because of insanity or because of his former wife was alive, then the children will succeed only to the mother and not to the father. This is a very unfair and illogical provision. It does not confer status of legitimacy, but only a concession under certain situations, to succeed to the estate of a parent who is competent to contract the marriage.

It is pertinent to note that children born of a marriage which is void for reasons other than the two mentioned above, have no legal status at all. Thus children born of a marriage within prohibited degrees of consanguinity or affinity, or of a marriage where the husband is impotent, are not covered by sec 21 of the Indian Divorce Act, 1869 and therefore do not enjoy status of even partial legitimacy like children of bigamous marriage or a marriage which is void for reasons of insanity. Even the amendment of the Act in 2001 has not made any change in the original provision.

Need for review in view of Protection of Women from Domestic Violence Act, 2005:

It is significant to note that the Protection of Women from Domestic Violence Act, 2005, recognizes live-in- relationships "in the nature of marriage" and protects the rights of women and children under that relationship. Section 16 of the Hindu Marriage Act, 1955 needs to be reviewed in view of this. In fact the courts have already started recognizing the status of children born in such relationship.

LAW OF ADOPTION

Introduction:

Adoption is the institutionalized practice through which an individual belonging by birth to one kinship group acquires new kinship ties that are socially and legally defined as equivalent to the congenital ties. These new ties supersede the old ones either wholly or in part. The custom and practice of adoption is not a recent one, though the object of adopting a child has varied from humanitarian motive of caring and bringing up a neglected or destitute child, to a natural desire for a son as an object of affection, a caretaker in old age, and an heir after death.

In India, adoption has been recognized for centuries, but being a part of personal laws, there is no uniformity among the different communities. The variations range from treating an adopted child exactly like a natural born child, to not recognizing the status of adoption at all.

Adoption under Hindu Law:

Hindu Law is the only law which recognizes adoption in the true sense of taking of a son as a substitute for a natural born one. The reason for this is partly due to the belief that a son is dispensable for spiritual as well as material welfare of the family, particularly that of the father. In Bal Gangadhar Tilak v. Shrinivas Pandit, 42 IA 135, P.154, the Privy Council observed that adoption among the Hindus is necessary not only for the continuation of the childless father's name, but also as religious means to make those obligations and sacrifices which would permit the soul of the deceased (father) passing from Hades to Paradise. Similarly, in Amarendra Mansingh v. Sanatan Singh, 60 IA 242, the Privy Council observed: 'the foundation of the Brahmanical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites.'

It is significant to note, however, that only a son could fulfil the role of 'deliverer' from hell. The adoption of a daughter was thus not legally recognized though it was permissible where custom allowed it. Adoptions made prior to the enactment of the Hindu Adoptions and Maintenance Act, 1956 were governed by customs and the burden of proving the validity of an adoption was on the person claiming it. Prior, to the Act adoption of a female was not known.

In Binapani Samanta v. Sambhu Mandal, AIR 2010 (NOC) 466 (Cal). The lady challenged the probate of will on the ground that she was the adopted daughter of the deceased who died intestate and the probate was fraudulent. She however failed to discharge the burden of proof of the validity of adoption. It was held, therefore, that she could not challenge the probate.

Hindu Adoptions and Maintenance Act, 1956:

The Hindu Law on adoption has undergone radical changes after the enactment of the Hindu Adoptions and Maintenance Act, 1956. The Act is prospective and not applicable to pre-Act adoptions. Nagireddi Lakshmi v. Nagireddi Nagaraju, AIR 2005 AP 17.

Salient features, analysis and cases:

Salient features and some pertinent issues and cases under the Act are as follows:

Old law vis-à-vis new law: Significant changes in the Act are as follows:

i) Females have been given a right to take and give in adoption.

ii) A female whose husband is living can adopt with his consent.

iii) A widow can adopt to herself unlike earlier law where she could adopt only to her deceased husband.

iv) A married male Hindu who wants to adopt has to take consent of the wife/wives.

v) A female may also be adopted which was permissible under pre-Act law.

vi) Only a major can adopt; prior to the Act even a minor who had reached the age of discretion could adopt.

Capacity to adopt:

Any adult male Hindu of sound mind may adopt a child. If he is a married man, he needs to take his wife's consent. Such consent, however, is not required if his wife is of unsound mind, or has renounced the world, or has ceased to be a Hindu by conversion. If a person has more than one wife at the time of adoption, the consent of all of them is necessary, unless they are suffering from any of the disabilities mentioned above. (sec.7 of the Hindu Adoptions and Maintenance Act, 1956.)

Prior to the Personal Laws (Amendment) Act, 2010, a female adult Hindu of sound mind could adopt a child under the following situations, viz., she is:

i) Unmarried;

ii) Divorced;

iii) Widowed; or

iv) Her husband suffers from certain disabilities viz., he has:

a) Ceased to be a Hindu;

b) Has renounced the world: or

c) Has been declared to be of unsound mind by a court.

After the above mentioned Amendment Act, however, a female's right to adopt has been brought at par with the male's right.

Capacity to give in Adoption:

As regards the capacity of persons who could give in adoption, the Act prior to 2010 provided that if the father was alive, then he alone could give in adoption, though the mother's consent was required. Such consent was not required if the mother was of unsound mind, or had renounced the world, or had ceased to be a Hindu. However, if the father was not alive or suffered from any of these legal disabilities, then the mother had a right to give the child in adoption. Where both the parents are dead, or are legally incompetent to give

in adoption, then in that case, the guardian [According to the personal Law (Amendment) Act, 2010, sec.9(i-a): A 'guardian'means a person having the care of person and/or property of the child and includes a person so appointed by the will of eth child's mother or father, or by the court.'] of the child may give the child in adoption with the previous permission of the court, to any person, including the guardian himself. Before granting such permission to a guardian, the court has to satisfy itself that:

i) The adoption is for the welfare of the child;

ii) The child's wishes have been ascertained;

iii) There is no financial consideration in the transaction.

Who can be adopted:

The Hindu Adoptions and Maintenance Act, 1956 also provides that a person who is to be adopted should be a Hindu and normally below the age of 15 and unmarried, unless there is a custom or usage applicable to the parties which permits adoption of those who have completed the age of 15 or those who are married (sec. 10 of the Hindu Adoptions and Maintenance Act, 1956), also the child to be adopted should not have been already adopted.

The Act also contains some other conditions for a valid adoption. A person, who has a Hindu son, son's son or son's son's son, either by blood or by adoption, cannot adopt a son. Likewise, a person who has a daughter or son's daughter cannot adopt a daughter. In case the adopter and the adoptee belong to opposite gender, the Act requires an age difference of 21 years. Thus, if a male wants to adopt a female, he must be at least 21 years older than the child to be adopted. Similarly, a female wishing to adopt a male child must be 21 years older than the child to be adopted (sec 11 of the Hindu Adoptions and Maintenance Act, 1956).

In Hanmant Laxman Salunke v. Shrirang Narayan Kanse AIR 2006 Bom 123, while a custom permitting adoption of a child over 15 years was established but the age difference between the adoptive mother and the adopted son was less than 21 years. This condition being mandatory its breach was held to be fatal to the adoption. The Act does not require the performance of any formal ceremonies, like Dutta Homam. The only requirement is the actual giving and taking of the child with the intention to transfer the child from the family of its birth from the family who adopts.

Effect of Adoption:

Upon adoption, the adoptive child severs all his connections with the natural family and becomes part and parcel of the adoptive family with effect from the date of adoption. All rights and obligations of a natural born child of the family fall on him. However, there are three exceptions to this, viz,:

i) The child cannot marry any person whom he or she could not have married had he/she not been taken in adoption.

ii) Any property vesting in the adopted child before adoption continues to vest in him subject to obligation, if any, attaching with the ownership of the property, including the obligations to maintain relations of his or her birth.

iii) The adoptive child cannot divest any person of any estate which vested in him or her before adoption.

The adoption does not deprive the adopter of the power to dispose of his or her property by transfer inter vivos (between living persons, or by will).

UNIT – V LAW ON MINORITY AND GUARDIANSHIP

LEGISLATION:

Hindu Minority and Guardianship Act, 1956

Guardians and Wards Act, 1890

Indian Majority Act, 1875

Minority:

A minor is one who has not completed the age of 18 years.

Natural Guardians and their powers:

In the case of a boy or an unmarried girl, the father and after him the mother is the natural guardian. A minor under 5 years of age should ordinarily be in the custody of the minor. "Father" and "Mother" do not include step-father and step-mother. In the case of illegitimate children the mother is the guardian. For a married girl, the husband is the guardian. When a child is given in adoption, the adoptive father and after him the adoptive mother becomes the guardian.

The powers of the natural guardian are given under Sec 8 of the Hindu Minority and Guardianship Act, 1956. A guardian cannot by his covenants make the minor personally liable. He cannot without the previous permission of the court:

1) Mortgage or charge or sell, gift or exchange the immovable property of the minor.
2) Lease for a term exceeding five years or one year beyond the minor's attainment of majority. Permission for such alienations will be given by a court only in case of necessity or benefit to the minor. Subject to this, the guardian can do all acts necessary or reasonable and proper for the benefit of the minor and of his estate.

Testamentary Guardians:

According to sec 9 of the Hindu Minority and Guardianship Act, 1956, the father can appoint a guardian for his minor children by his will. Such an appointment does not take effect if the father predeceases the mother. The surviving mother can also appoint by her will a guardian for the children. If she does not do so the appointment made under the father's will revives. The testamentary guardian has all the powers of the natural guardian subject to the directions in the will. In the case of the minor girls, the rights of the testamentary guardian ceases on her marriage. A minor cannot be guardian of the property of another minor.

Court Guardians:

The Guardians and Wards Act, 1890 provides for the appointment of guardians for the person or property of a minor by the court. Disputes over the right of guardianship may be resolved under this Act. When appointing a guardian the court is required to have regard to the age, sex and religion of the minor and the wishes of the any deceased parent. An appointment under this Act supersedes the rights of a natural guardian. A guardian of the person of a minor married female is not appointed by the court unless the husband is unfit and no guardian of the person of minor is appointed unless the father is found to be unfit. The welfare of the minor is to be safeguarded by the court in appointing a guardian under this Act. The guardian has to look to the support, comfort and education of the ward. A guardian is not being appointed in respect of the minor's undivided interest in joint family property when the management is in the hands of an adult member of the family.

De facto Guardian:

A de facto guardian is one who is actually looking after the minor's welfare though he has no right to the guardianship. Such de facto guardianship does not entitle the guardian to deal with the property of the minor. The Law Commission, vide its Report in 1989 (133rd Report, 'Removal of Discrimination Against Women in matters relating to Guardianship and Custody of Minor Children,' 1989) had made various recommendations and suggestions to remove gender discrimination in this respect, and had also laid down guidelines for the courts. It recommended equal right of guardianship and custody for the mother. Pursuant to the law commission recommendations as also opinions expressed in various judgements and by jurists and academicians, section 19 of this Act has been amended by the Personal Laws (Amendment) Act, 2010. Now, vide clause (b) of section 19 the right of the mother has been brought at par with the father; hence if the mother or father are alive and fit to be guardians, no other person can be appointed or declared as guardian of a minor's person or property. A reference to some earlier cases, would however be of interest. It is also significant to note that there has been no change in the provision of section 6 of the Hindu Minority and Guardianship Act, 1956 which is glaringly discriminatory.

A very significant judgment was delivered by the Supreme Court in Geetha Hariharan v. Reserve Bank of India and Vandhana Shiva v. J. Bandhopadhyaya, AIR 1999 SC 1149, where sec 6(a) of the Hindu Minority and Guardianship Act, 1956, and sec 19(b) of the Guardians and Wards Act, 1890, were challenged as being violative of Arts. 14 and 15 of the Constitution of India, since the mother is relegated to an inferior position.

In Geetha Hariharan, the parents of a minor applied to the Reserve Bank of India for relief bonds in the name of their son. In the application, they stated that the mother would act as the guardian of the child for purposes of investments made with the money. Accordingly, in the prescribed form, the mother signed as the guardian. The bank refused to entertain the application, and asked the parents to produce the application form signed by the father, or a certificate of guardianship from a competent authority, in favour of the mother. Against this, the mother filed a petition in the court.

In Vandhana Shiva, divorce proceedings were already pending and the father prayed for the custody of their son. He, allegedly, was repeatedly writing to the petitioner asserting that he being the only natural guardian of the child, no decision pertaining to the child should be taken without his permission. The petitioner, consequently, moved the Supreme Court challenging the abovementioned provisions of the Hindu Minority and Guardianship Act, 1956 and the Guardians and Wards Act, 1890, as being unconstitutional.

Hearing both the petitions together, the Court observed that the wording of sec 6(a) of the Hindu Minority and Guardianship Act, 1956 – the father and after him the mother – do give an impression that the mother can act as a guardian only after the lifetime of the father. However, instead of striking down this section, as also sec. 19(b) of the Guardians and Wards Act, 1890 as unconstitutional, it chose to constue them in a manner, in which they would not offend the constitutional mandate of equality and non-discrimination. According to the court, the Constitution of India, which came into being in the year 1950, prohibits gender discrimination, and the Hindu Minority and Guardianship Act, 1956 came six years later. The Parliament could not have intended 'to transgress the constitutional limits or ignore the fundamental rights as guaranteed by the Constitution of India, which essentially prohibits discrimination on grounds of sex.'

Adopting the rule of harmonious construction, it held that after the word 'after' in sec 6(a) of the Hindu Minority and Guardianship Act, 1956 need not necessarily mean 'after the lifetime' but, in the absence of.' If the father is not in charge of actual affairs of the minor, either because of his indifference, or by virtue of mutual understanding between the parents, or because of some physical or mental incapacity, or he is staying away from the place where the mother and the minor are living, then, in all such situations, the father can be considered as 'absent' under the provisions of the abovementioned statutes, and the mother, who in any case is a recognized natural guardian, can act validly on behalf of the minor as the guardian. The predominant consideration in every case, however, would be the welfare of the child.

This ruling of the Supreme Court will solve problems of many mothers, who are practically in charge of the affairs of their minor children, and who face harassment and embarrassment from various authorities, who insist on father's signatures. However, a question which still remains open is, what if the father and the mother, along with the child, are living together and the father is not 'absent' within the meaning of the term as defined by the court? Did the court intend to give complete equality to both the parents in the matter of guardianship, in which case it would mean either/or, mother/father? However, since the court in the present case, has delved only on the interpretation of the word 'after', the primary clause under which the mother would be the guardian, only 'after' the father, still stands. The only change the judgment has made, is that it has given an extended meaning to the word 'after' to include several situations. It has not conferred equal guardianship right on the mother.

GUARDIANSHIP UNDER MUSLIM LAW:

Under the Muslim Law, a father enjoys a more dominant position in regard to custody and guardianship of children. Even, when the mother has custody over the child, the father has a right of supervision and control. As remarked by the Privy Council, in Imambandi v. Mutsaddi, 45 IA 73, pp 83-84:

It is perfectly clear that under the Mahomedan Law the mother is entitled only to the custody of the person of her minor child up to certain age according to the sex of the child. But she is not the natural guardian; the father alone or, if he be dead, his executor (under the Sunni Law) is the legal; guardian.

Under the Shia law, a mother's right to the custody of her minor children, i.e., hizanat extends until a son is two years old, and the daughter attains the age of seven. Under the hanafi law, a mother is entitled to the custody of her son till he reaches the age of seven, and in case of daughter, till she attains puberty. The mother's right continues, even if she is divorced from the father of the child, unless she remarries, in which case the custody belongs to the father. This, however, is not a rigid rule and the court can deviate, if the welfare of the child so demands. Where, there is conflict in the application of the provision of personal law, and the Guardians and Wards Act. 1890, the later will prevail.

As remarked by the court in Poolakkal Ayisakutty v. P.A.Samad, AIR 2005 Ker 68,p.70:

Principles exported by personal law cannot be read in isolation and divorced from the Guardians and Wards Act. The overriding consideration is welfare of the child and the personal law would yield to the provisions of the Act.

In Md Khalid v. Zeenat Parvin, AIR 1998 All 252, and Abdul Khalam v. Akhtari Bibi, AIR 1988 Ori 279, the father claimed that under their personal law, they had a preferential right over the custody of their minor children. The court negative this contention, and held that even though as a natural guardian, the father may have prima facie right to the minor's custody, this may be negative, if the infants welfare lies in keeping him with the mother. Children cannot be treated as chattel or property, over whom legal rights should be asserted, the court emphasized.

A mother, who marries a stranger, is not disqualified to have custody of the child. In Irfan Ahmad Shaikh v. Mumtaz, a custody of a female child was given to the mother. The mother's marriage with the child's father was dissolved, and she remarried a person, who was not within the prohibited degree of relationship to the child. The court, nonetheless, gave custody to the mother; the child had also expressed a desire to remain with the mother.

Elucidating the general rule of Islamic law, under which a mother who remarries a stranger is disqualified to have custody of minor of her child, the court remarked that:

The Muslim law is not taking 'any pedantic view of the matter'. The law does not laid down that in any circumstances and at any cost the mother would be disqualified for the custody of the child, the moment she gets remarried. There is no dogmatic insistence that the child must remain with the father even against the wishes of the child and the moment the mother gets remarried to a stranger. According to the court, Muslim law has not only laid down a general rule, but has also, in different matters, provided for exceptional circumstances to be met with. In the matter of custody, it had never ignored the wishes of a minor child who is of the age of discretion. The custody of the illegitimate children belongs to the mother and her relations.

STATUTORY MATERIALS:

- The Hindu Marriage Act, 1955
- The Hindu Adoptions and Maintenance Act, 1956
- The Hindu Minority and Guardianship Act, 1956
- The Special Marriage Act, 1954
- The Guardians and Wards Act, 1890
- The Shariat Application Act, 1937
- The Dissolution of Muslim Marriage Act, 1939
- The Muslim Women (Protection of Rights on Divorce) Act, 1986
- The Christian Marriage Act, 1872
- The Indian Divorce Act, 1869
- The Family Courts Act, 1984
- Prohibition of Child Marriage Act, 2006

BOOKS PRESCRIBED:

- Hindu Law - Mulla
- Hindu Law - N.R. Raghavachari
- Family Law - Dr. Paras Diwan
- Outlines of Muhammadan Law - Fyzee
- Family Law - I - Kusum

BOOKS FOR REFERENCE:

- Principles of Muhammadan Law - Mulla
- Hindu Law and Usage - Mayne
- Hindu Law - Mitra

FAMILY LAW – I

MODEL QUESTION PAPER

PART – A (2 x 12 =24 marks)

Answer any TWO of the following:

1. "The purpose of the Hindu Marriage Act, 1955 is to introduce uniform rules of marriage to all Hindus" – elucidate.
2. Explain the different ways by which a Muslim husband divorce his wife.
3. Discuss the various conditions for a valid marriage under the Special Marriage Act, 1954.

PART – B (2 x 7 = 14 marks)

Answer any TWO of the following:

4. The Hindu Adoptions and Maintenance Act, 1956, has liberalized the Law of Adoption".

   Discuss.
5. Explain the changes made in the Law of Guardianship by the Hindu Minority and Guardianship Act, 1956.
6. State the concept of dower under Mahomedan Law.

PART – C (5 x 4 = 20 marks)

7. Write short notes on any FIVE of the following:
   a. Sources of Hindu Law.
   b. Desertion.
   c. Acknowledgement of Paternity.
   d. Doctrine of Relation Back.
   e. Guardianship under Muslim Law
   f. Minister of Religion.
   g. Zihar

PART – C (2 x 6 = 12 marks)

Answer any TWO of the following:

8. A Hindu female of thirty years adopts a boy of thirteen years. Examine the validity of adoption.
9. A Muslim marries his wife's elder sister during the existence of a valid first marriage. Decide the validity of the second marriage.
10. A Hindu marries his father's sister's daughter, who embraces Buddhism, under the Act of 1954. Is the marriage valid?

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Answer Key for Model Question Paper

Answer to Question No. 1:

Changes effected after the passing of the Hindu Marriage Act, 1955 in the marriage of Hindus in the light of the conditions for a valid marriage to be explained.

Sec 5: Conditions for a Hindu Marriage.

A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

i. Neither party has a living spouse at the time of the marriage;

ii. At the time of the marriage, neither party-

   a. Is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

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

   c. Has been subject to recurrent attacks of insanity;

iii. The bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of marriage;

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

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

The conditions to be explained along with the comparison of pre-Act and post-Act marriage of Hindus.

Answer to Question No.2:

Talaq in its original sense means repudiation, or rejection, but under Muslim law, it means a release from the marriage tie. It is a generic name for all kinds of divorce, but is particularly applied to the repudiation by or on behalf of the husband. Any Mahomedan of sound mind, who has attained puberty, may divorce his wife whenever he desires, without assigning any cause. A talaq pronounced under compulsion or intoxication or fraud is also effective under Sunni law void under Shia law. A talaq may be effected either orally, by spoken words or in written document called talaqnama.

Forms of Talaq:

Talaq-us-sunnat:

This means talaq as sanctioned by the sunnat or according to the traditions laid down by the prophet. These can be of two types. One is Talaq ahasan and the other os Talaq hasan.

Talaq ahasan:

This is the most proper method of divorce. The requirements of this form are:

a) The husband must make a single pronouncement of divorce.

b) This pronouncement must be made during a tuhr (period between menstruation).

c) The husband must abstain from sexual intercourse for the period of iddat.

A pronouncement made in the ahasan form is revocable during iddat. Such revocation may be either in express words or implied. Cohabitation is an implied revocation. After the expiration of iddat, the divorce becomes irrevocable.

Talaq hasan:

This is the proper method of divorce but not the most proper method. The requirements of this talaq are:

a) There are three pronouncements of talaq made during successive tuhrs.

b) There must be abstinence from sexual intercourse until the third pronouncement.

Talaq-ul-biddat:

Talaq-ul-biddat is one of the disapproved forms of talaq. The essential feature of this talaq is its irrevocability. It is of two kinds. One is talaq-ul-bain and another one is talaq-i-bain. The three pronouncements should be made in within one tuhr. These pronouncements may be made either in one sentence or in separate sentences. The triple repetition is not a necessary condition of talaq-ul-biddat, and the intention to render talaq irrevocable may be expressed even by a single declaration. Thus, if a man says 'I have divorced you by a talaq-ul-bain (irrevocable) divorce' the talaq is talaq-ul-biddat, and it will take effect immediately. The Shia law does not recognize the validity of this form of talaq. As a general rule, the effect of an irrevocable divorce is that the mutual rights of inheritance between the husband and wife immediately cease. But where an irrevocable divorce is given during the husband's death-illness and he dies before the expiry of iddat.

Each form of Talaq should be explained elaborately along with necessary case laws.

Answer to Question No. 3:

Marriage under the Special Marriage Act:

Any two persons (irrespective of their religion) can marry under the Special Marriage Act, 1954. Section 4 of the Special Marriage Act, 1954 lays down conditions for solemnization of special marriages. It states that:

1) neither party should have a husband or wife living;

2) neither party is an idiot or a lunatic;

3) the bridegroom must have completed the age of 21 and the bride the age of 18 years;

4) the parties are not within the degree of prohibited relationship which are enumerated in the first schedule of the Act;

5) Where the marriage is solemnized outside the territories to which the Act applies, both parties should be citizens of and domiciled within the territories to which the Act applies.

The marriage under the Special Marriage Act is a civil marriage by registration. The certificate of the Marriage Officer that this has been done is conclusive evidence of the factum of marriage under the Act. The parties applying for registration should have been residing within the jurisdictional area of the Marriage Officer for not less than 30 days immediately prior to their application. They should have completed the age of 21 years at the time of registration. The effect of registration under this Act is that the marriage would be deemed to have been solemnized under this Act.

Conditions for a valid marriage should be explained along with illustrations and case laws. The procedure to be adopted for registration of marriage to be explained elaborately.

Answer to question No. 4:

Hindu Law is the only law which recognizes adoption in the true sense of taking of a son as a substitute for a natural born one. The reason for this is partly due to the belief that a son is dispensable for spiritual as well as material welfare of the family, particularly that of the father. In Bal Gangadhar Tilak v. Shrinivas Pandit, 42 IA 135, P.154, the Privy Council observed that adoption among the Hindus is necessary not only for the continuation of the childless father's name, but also as religious means to make those obligations and sacrifices which would permit the soul of the deceased (father) passing from Hades to Paradise. Similarly, in Amarendra Mansingh v. Sanatan Singh, 60 IA 242, the Privy Council observed: 'the foundation of the Brahmanical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites.'

It is significant to note, however, that only a son could fulfil the role of 'deliverer' from hell. The adoption of a daughter was thus not legally recognized though it was permissible where custom allowed it. Adoptions made prior to the enactment of the Hindu Adoptions and Maintenance Act, 1956 were governed by customs and the burden of proving the validity of an adoption was on the person claiming it. Prior, to the Act adoption of a female was not known.

In Binapani Samanta v. Sambhu Mandal, AIR 2010 (NOC) 466 (Cal). The lady challenged the probate of will on the ground that she was the adopted daughter of the deceased who died intestate and the probate was fraudulent. She however failed to discharge the burden of proof of the validity of adoption. It was held, therefore, that she could not challenge the probate.

Hindu Adoptions and Maintenance Act, 1956:

The Hindu Law on adoption has undergone radical changes after the enactment of the Hindu Adoptions and Maintenance Act, 1956. The Act is prospective and not applicable to pre-Act adoptions. Nagireddi Lakshmi v. Nagireddi Nagaraju, AIR 2005 AP 17.

Salient features, analysis and cases:

Salient features and some pertinent issues and cases under the Act are as follows:

Old law vis-a-vis new law: Significant changes in the Act are as follows:

i) Females have been given a right to take and give in adoption.

ii) A female whose husband is living can adopt with his consent.

iii) A widow can adopt to herself unlike earlier law where she could adopt only to her deceased husband.

iv) A married male Hindu who wants to adopt has to take consent of the wife/wives.

v) A female may also be adopted which was permissible under pre-Act law.

vi) Only a major can adopt; prior to the Act even a minor who had reached the age of discretion could adopt.

Requisites for a valid adoption to be explained along with decided case laws.

Answer to Question No. 5:

The Hindu Minority and Guardianship Act, 1956 which provides for the definition for 'Minor' and 'Guardian' and the different kinds of guardians under various sections.

Natural Guardians and their powers:

In the case of a boy or an unmarried girl, the father and after him the mother is the natural guardian. A minor under 5 years of age should ordinarily be in the custody of the minor. "Father" and "Mother" do not include step-father and step-mother. In the case of illegitimate children the mother is the guardian. For a married girl, the husband is the guardian. When a child is given in adoption, the adoptive father and after him the adoptive mother becomes the guardian.

The powers of the natural guardian are given under Sec 8 of the Hindu Minority and Guardianship Act, 1956. A guardian cannot by his covenants make the minor personally liable. He cannot without the previous permission of the court:

1) Mortgage or charge or sell, gift or exchange the immovable property of the minor.

2) Lease for a term exceeding five years or one year beyond the minor's attainment of majority. Permission for such alienations will be given by a court only in case of necessity or benefit to the minor. Subject to this, the guardian can do all acts necessary or reasonable and proper for the benefit of the minor and of his estate.

Testamentary Guardians:

According to sec 9 of the Hindu Minority and Guardianship Act, 1956, the father can appoint a guardian for his minor children by his will. Such an appointment does not take effect if the father predeceases the mother. The surviving mother can also appoint by her will a guardian for the children. If she does not do so the appointment made under the father's will revives. The testamentary guardian has all the powers of the natural guardian subject to the directions in the will. In the case of the minor girls, the rights of the testamentary guardian ceases on her marriage. A minor cannot be guardian of the property of another minor.

Court Guardians:

The Guardians and Wards Act, 1890 provides for the appointment of guardians for the person or property of a minor by the court. Disputes over the right of guardianship may be resolved under this Act. When appointing a guardian the court is required to have regard to the age, sex and religion of the minor and the wishes of the any deceased parent. An appointment under this Act supersedes the rights of a natural guardian. A guardian of the person of a minor married female is not appointed by the court unless the husband is unfit and no guardian of the person of minor is appointed unless the father is found to be unfit. The welfare of the minor is to be safeguarded by the court in appointing a guardian under this Act. The guardian has to look to the support, comfort and education of the ward. A guardian is not being appointed in respect of the minor's undivided interest in joint family property when the management is in the hands of an adult member of the family.

De facto Guardian:

A de facto guardian is one who is actually looking after the minor's welfare though he has no right to the guardianship. Such de facto guardianship does not entitle the guardian to deal with the property of the minor. The Law Commission, vide its Report in 1989 (133rd Report, 'Removal of Discrimination Against Women in matters relating to Guardianship and Custody of Minor Children,' 1989) had made various recommendations and suggestions to remove gender discrimination in this respect, and had also laid down guidelines for the courts. It recommended equal right of guardianship and custody for the mother. Pursuant to the law commission recommendations as also opinions expressed in various judgements and by jurists and academicians, section 19 of this Act has been amended by the Personal Laws (Amendment) Act, 2010. Now, vide clause (b) of section 19 the right of the mother has been brought at par with the father; hence if the mother or father are alive and fit to be guardians, no other person can be appointed or declared as guardian of

a minor's person or property. A reference to some earlier cases, would however be of interest. It is also significant to note that there has been no change in the provision of section 6 of the Hindu Minority and Guardianship Act, 1956 which is glaringly discriminatory.

A very significant judgment was delivered by the Supreme Court in Geetha Hariharan v. Reserve Bank of India and Vandhana Shiva v. J. Bandhopadhyaya, AIR 1999 SC 1149, where sec 6(a) of the Hindu Minority and Guardianship Act, 1956, and sec 19(b) of the Guardians and Wards Act, 1890, were challenged as being violative of Arts. 14 and 15 of the Constitution of India, since the mother is relegated to an inferior position. The case laws relating to guardianship and the provisions to be explained elaborately.

Answer to Question No. 6:

Dower:

Dower is the amount payable by the husband to the wife in consideration of the marriage. It may be prompt or deferred. Prompt dower is payable on demand unless otherwise stated at time of the marriage, the entire dower is presumed to be prompt dower. This is so under the Shia Law. But under the Sunni Law it is usual to regard half as prompt dower and half as deferred dower but there is no hard and fast rule and the courts may treat a reasonable part of the entire dower as Prompt Dower. Masthan Sahib v. Assan Bibi, 23 Mad.371 (FB). The wife may refuse to consummate the marriage, until prompt dower is paid. Even after consummation, if prompt dower is not paid on demand, the wife may refuse further sexual intercourse. A suit by the husband for restitution of conjugal rights in such a case would be decreed conditionally, i.e., subject to the payment of the prompt dower within a time fixed by the court.

Deferred Dower is payable on the dissolution of the marriage. The husband under Mahomedan in Law enjoys an absolute power of divorcing the wife without assigning any person. To deter him from exercising that right arbitrarily, deferred dower is usually fixed rather high. If there is no divorce, deferred dower becomes payable only on the death of the husband. It can be recovered within three years of the death of the husband. Otherwise the claim becomes barred by limitation. But if she is in possession of her husband's property for satisfying her claim to dower, there is no bar of limitation and she can realize her claim from the income of that property.

Related case laws:

Beebee Bachun v. Sheikh Hamid, 14 MIA 377.

Mt.Haliman v. Md. Manir, AIR 1971 Pat.385.

Sabir Hussain v. Ferzhand Khan, 1938 PC 80. The case laws to be explained with reference to the type of dower under which they had been decided.

Answer to Question No.7:

a) Sources of Hindu Law:

Sources can be broadly classified into two: Traditional Sources and Modern Sources.

Sources of Hindu Law	
Traditional Sources	**Modern Sources**
The Vedas	**Justice, Equity and Good conscience**
The Smritis	**Precedent**
Digests of Hindu Law	**Legislation**
Customs	

The explanation about each sources to be given.

b) Desertion:

The nature of desertion as a matrimonial offence was elaborately expounded by Sinha, J, in Bipinchandra v. Prabhavathi, AIR 1957 SC 176. For desertion to be established in law it should be proved that so far as deserting spouse is concerned there is 1) Factum of separation, living apart and away from the deserted spouse, and 2) Animus deserendi, an intention to bring cohabitation to an end permanently. Some other supported cases like Lachman v. Meena, AIR 1964 SC 40 and Ranganayaki v. Arunagiri, AIR 1993 Mad.174 to be mentioned.

c) Acknowledgement of Paternity:

Muslim law does not recognize legitimation, and a child who is clearly illegitimate under the law cannot be conferred a status of legitimacy. A child can, however, be acknowledged legitimate in certain situations viz., where:

i) paternity of the child is either not known or is not established beyond doubt;

ii) it is not proved that the child is the offspring of illicit intercourse (zina); and

iii) the circumstances are such that marriage between the acknowledger and the mother is not an impossibility.- Explain the circumstances.

This is known as the doctrine of acknowledgement of paternity. A valid acknowledgement is not revocable and gives rights of inheritance to the child. This doctrine of acknowledgement of paternity is, however, different from legitimation as provided under the other personal laws.

d) Doctrine of Relation Back:

When an adoption is made by a widow to her deceased husband, by a legal fiction the adopted son is treated as a posthumous son of the deceased. So the adoption relates back to the death of the adoptive father. As son he can claim the property of the adoptive father. This was clearly decided by the Privy Council in Pratap Singh v. Agar Singhji, 1918 (46) IA 97. (case laws to be explained.)

Hindu Law is the only law which recognizes adoption in the true sense of taking of a son as a substitute for a natural born one. The reason for this is partly due to the belief that a son is dispensable for spiritual as well as material welfare of the family, particularly that of the father. In Bal Gangadhar Tilak v. Shrinivas Pandit, 42 IA 135, P.154, the Privy Council observed that adoption among the Hindus is necessary not only for the continuation of the childless father's name, but also as religious means to make those obligations and sacrifices which would permit the soul of the deceased (father) passing from Hades to Paradise. Similarly, in Amarendra Mansingh v. Sanatan Singh, 60 IA 242, the Privy Council observed: 'the foundation of the Brahmanical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites.'

e) Guardianship under Muslim Law:

Under the Muslim Law, a father enjoys a more dominant position in regard to custody and guardianship of children. Even, when the mother has custody over the child, the father has a right of supervision and control. As remarked by the Privy Council, in Imambandi v. Mutsaddi, 45 IA 73, pp 83-84:

It is perfectly clear that under the Mahomedan Law the mother is entitled only to the custody of the person of her minor child up to certain age according to the sex of the child. But she is not the natural guardian; the father alone or, if he be dead, his executor (under the Sunni Law) is the legal; guardian.

Under the Shia law, a mother's right to the custody of her minor children, i.e., hizanat extends until a son is two years old, and the daughter attains the age of seven. Under the hanafi law, a mother is entitled to the custody of her son till he reaches the age of seven, and in case of daughter, till she attains puberty. The mother's right continues, even if she is divorced from the father of the child, unless she remarries, in which case the custody belongs to the father. This, however, is not a rigid rule and the court can deviate, if the welfare of the child so demands. Where, there is conflict in the application of the provision of personal law, and the Guardians and Wards Act. 1890, the later will prevail.

f) Minister of Religion:

Under the Indian Christian Marriage Act, 1872, a minister of Religion may be licensed to solemnize marriages. Those who have received Episcopal ordination and clergymen of the Church of Scotland can solemnize marriages under the Act. The procedure to be adopted by the Minister of Religion for solemnizing marriage to be explained.

g) Zihar:

Zihar is a form of inchoate divorce. If the husband compares his wife to any of his female relations within such prohibited degrees as renders marriage with such person as unlawful, the wife has a right to withdraw from him until he has performed penance. If the husband does not expiate, the wife has a right to apply for a judicial divorce.

Answer to Question No. 8:

Under s.11(iv) the adopting mother should be at least 21 years older than the person to be adopted. This condition is not satisfied and so the adoption is void.

Answer to Question No. 9:

A Mahomedan has already a wife who is related to the bride as sister or aunt or niece. Two women thus related should not be the wives of a Mahomedan at the same time. This is the bar of unlawful conjunction. It makes the marriage irregular. Of course, if he divorces the wife who is in unlawful conjunction, this irregularity will no longer vitiate the marriage. Under the Shia Law, he can marry his wife's aunt. He cannot marry the wife's niece except with his wife's permission. In other cases, the law of unlawful conjunction renders the marriage void.

Answer to Question No.10:

Under the Act of 1954, a man and his father's sister's daughter are in prohibited degrees of relationship. This fact is not altered though the girl embraces Buddhism. So the marriage would be void.