

B.A. LL.B. III SEMESTER

Family Law-I (Paper II)

Unit-3

DIVORCE

Nature and Classification

The phenomenon of the breaking up of the marital tie between the two spouses is known as dissolution of Marriage. After the dissolution of marriage, the two spouses get separated and are free to marry any third person of their choice. Islamic law has recognised and regularized the institution of dissolution of marriage.

Among ancient Arabs dissolution of marriage was very easy and of frequent occurrence. Husbands possessed an unlimited power to dissolve the marital tie. They could, not only, divorce their wives at any time with or without reason but also revoke their divorce again and again as many times as they preferred. They could, if they were so inclined, swear that they would have no intercourse with their wives, though still living with them. A woman, if absolutely separated, was probably free to remarry but she could not do so until some time, called the period of Iddat, has passed. It was to ascertain the legitimacy of the child. But it was not a strict rule. Sometimes a pregnant wife was divorced and was married to another person under an agreement. The period of Iddat, in case of death of the husband, was one year.

The Prophet of Islam (SAW) looked upon these customs with extreme disapproval and regarded these practices as calculated to undermine the foundation of society. He, therefore, sought to regulate the institution of dissolution of marriage with due response to all the legal, social and psychological factors. The Prophet (SAW),

infact, moulded the minds of Arabs to higher objectives of life. He made it clear to the human society for all times to come that:

With Allah, the most detestable of all things permitted is divorce.

Even though the Quran recognises the right to divorce, it recognises it only with numerous injunctions to observe justice, fairplay, generosity and kindness.

Aameer Ali in Spirit of Islam (P. 244) says: ‘The reforms of Mohammad (SAW) marked a new departure in the history of Eastern Legislation. He restrained the power of divorce possessed by the husband. He gave the woman the right of obtaining a separation on reasonable grounds. He went so far as practically forbid the exercise of divorce by men without the intervention of arbitrators.’

Islam discourages divorce in principle and permits it only when it becomes absolutely impossible for the parties to live in peace and harmony. In case of differences, which may lead to divorce, the Quran enjoins reconciliation before separation in the following words: “And if ye fear a beach between husband and wife, send a judge out of his and another from her family if they are desirous of agreement. God will effect a reconciliation between them: for god is knowing and apprised of all”. (Quran 4:35)

A close examination of the institution of dissolution of marriage would reveal that Islamic law has put many restrictions on the exercise of power to dissolve marriage and affords opportunities to the parties for an amicable settlement if so desired.

Classification

Following is the classification of dissolution of marriage:

- A) By the death of a spouse**
- B) By the act of the parties**
 - I. By the husband**
 - 1. Talak (Repudiation)**
 - 2. Ila (Vow of continence)**
 - 3. Zihar (Injurious assimilation)**
 - II. By the wife**
 - 1. Talak-e-Tafwid (Delegated divorce)**

III. By common consent

- 1. Khula (Redemption)**
- 2. Mubara'at (Mutual freeing)**

C. By judicial process

- 1. Lian (Mutual Imprecation)**
- 2. Faskh (Judicial Rescission)**

By the death of the Spouse

The death of the husband or the wife operates in law as dissolution of marriage.

BY THE ACT OF PARTIES

This can be discussed under two heads:

1. Dissolution by the act of husband.
2. By the act of wife.
3. By common consent

BY THE HUSBAND

The husband can dissolve the marriage by various modes.

- I. Talaq
- II. Ila (Vow of Continence)
- III. Zihar (Injurious Assimilation)

I. Talaq (Repudiation):

It comes from a root 'tallaqa', which means to release from a tether. In its literal sense this Arabic word (talaq) means 'taking off any tie or restraint' and in law it signifies the absolute power, which the husband possesses, of divorcing his wife.

Any Muslim who is of sound mind and who has attained puberty may pronounce Talaq:

- a. By himself;
- b. Through an agent, or
- c. Through any person including the wife empowered to pronounce talaq (delegated divorce).

The Sunnis recognise written talaq which may be in two forms:

- (a) Manifest talaq;
- (b) Unusual talaq nama.

When the talaqnama is properly written so as to be legible and clearly indicating to whom and by whom it is addressed it is in the customary form. This is known as manifest talaq. The deed may be executed in the presence of Qadi, the wife's father or any other relation or witnesses. If the deed is in customary and manifest form the intention of divorce is presumed. If the talaqnama is not subscribed in the aforementioned manner, it is termed to be in usual form and the intention to divorce has to be proved.

A talaq under Shia law must be pronounced orally in the presence of two male competent witnesses. A talaq communicated in writing is not valid, unless the husband is physically incapable of pronouncing it.

Kinds of Talaq

- a. Talaq-al-Sunnat**
- b. Talaq-al-biddat**

a.Talaq-al-Sunnat

It is known as Talaq-al-Sunnat because it is in conformity with the dictates of the Prophet (SAW). The Talaq-al-Sunnat has two forms:

1. Ahsan (the most approved)

2. Hasan (approved)

Talaq-e-Ahsan:

Talaq-e-Ahsan is a single pronouncement in the period of Tuhr, (that is, purity, when the woman is free from her menstrual courses), followed by abstinence from sexual intercourse during that period of purity as well as during the whole period of Iddat. The requirement of purity is not applicable when the wife has passed the age of menstruation, or the parties have been away from each other for a long time or when the marriage has not been consummated.

The advantage of this form of talaq is that it can be revoked at any time before the completion of the period of Iddat and thus hasty and thoughtless divorces can be prevented. The period of Iddat is three months from the date of declaration or if the woman is pregnant until delivery. The revocation may be by express words or by conduct.

Talaq-e-Hasan:

This is also an approved form but less approved than Ahsan form. It consists of three successive pronouncements during three consecutive periods of purity (Tuhr). If the wife has crossed the age of menstruation, then the pronouncement of talaq may be made after the interval of 30 days between the successive pronouncements. When the third pronouncement is made, the talaq becomes final and irrevocable.

In Talaq-e-Hasan when husband declares talaq third time the marriage stands dissolved irrevocably and the remarriage becomes impossible unless wife lawfully marries another husband and that other husband lawfully divorces her after the marriage has been actually consummated. But the Prophet(SAW) has made an end to the barbarous practice of divorcing a wife and taking her back several times in order to ill treat her.

b.Talaq-al-biddat

In this form three pronouncements are made in a single Tuhr, either in one sentence, e.g., “I divorce thee triply or thrice” or in three sentences, e.g., “I divorce

thee, I divorce thee, I divorce thee”. The moment the pronouncement is made the marriage stands dissolved irrevocably. When a single irrevocable pronouncement of divorce is made in the period of purity this also results in irrevocable dissolution of marriage. This form is also called Talaq-ul-Bain and may be given in writing. The triple pronouncement is not essential for talaq-ul-bida, if the intention is clear.

II. Ila (Vow of Contenance)

The term ‘Ila’ literally means ‘oath’ or ‘vow’. According to Abdur Rahim Principles of Mohammedan Jurisprudence (Pg. 338), in some cases the conduct of the husband will have the effect of repudiation, though he did not use the word Talaq or any other expression with the intention of dissolving the marriage. This is when he swears that he will have nothing to do with his wife and in pursuance of such oath abstains from her society for four months. This form of divorce is known as Ila. The husband may revoke the oath by resumption of marital life. After the expiry of four months, in Hanafi law the marriage is dissolved without legal process. The Shafis and the Shias hold that this does not result in Talaq, but merely gives the wife the right of judicial divorce.

III. Zihar

The term ‘Zihar’ is derived from ‘Zuhar’ the back. This is an inchoate divorce. In this form the husband swears that to him the wife is like the *back of his mother, or sister, or any other woman within the degrees of prohibited relationship*. If he intends to revoke this declaration, he has to pay money by way of expiation or fast for a certain period. After the oath has been taken the wife has the right to go to the court and obtain divorce or restitution of conjugal rights on expiation.

BY THE WIFE

The husband in Muslim law has the power to delegate his own right of pronouncing Talaq to some third person or to the wife herself. The person to whom the power is thus delegated may then pronounce the divorce accordingly. Such a delegation of power is called ‘tafwid’. The husband may delegate the power absolutely or conditionally, temporarily or permanently. A permanent delegation of power is revocable but a temporary delegation of power is not. The delegation

must be made distinctly in favour of the person to whom the power is delegated and the purpose of delegation must be clearly stated.

A stipulation that, under certain specified conditions, the wife can pronounce divorce upon herself has been held to be valid, provided first, that the option is not absolute and unconditional and secondly, that the conditions are reasonable and not opposed to public policy. This doctrine of delegated divorce is peculiar to the Muslim Law, and has no parallel in other systems. Fyzee says: 'This form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of any court and is now beginning to be fairly common in India.'

DIVORCE BY COMMON CONSENT

Divorce by common consent has two forms:

- a. Khula (Redemption)
- b. Mubara'at (Mutual freeing)

Khula (Redemption)

The word Khula literally means to put off. In law it is lying down by a husband of his right and authority over his wife for an exchange. Khula has the authority of Quran (2:229).

The leading case on Khula is *Moonshe Bazul Raheem v. Luteef-ut-oon-Nissa*, (1861) 8. MIM, 879) where their lordships of the Privy Council observed: "A divorce by Khula is a divorce with the consent, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case, the terms of the bargain are a matter of arrangement between the husband and the wife, may: as the consideration release her dower and other rights, or make any other agreement for the benefit of the husband".

The essential conditions of Khula are:

- i. Common consent of Husband and Wife;

ii. some return or consideration (iwaz) from the wife to husband, if she desires to separate her husband through such divorce.

Mubara'a (Mutual Freeing)

The word 'mubara' denotes the act of freeing each other by mutual consent. In the words of Fyzee, "in the case of Khula, the wife begs to be released and the husband agrees for a certain consideration, which is usually a part or whole of the dower; while in mubara'a apparently both are happy at the prospect of getting rid of each other".

The offer in a mubara'a divorce may proceed from the wife, or it may proceed from the husband but once it is accepted, the dissolution is complete and it operates as a single irrevocable divorce. Among the Sunnis when the parties to marriage enter into mubara'a, all mutual rights and obligations come to an end. The Shia law is stringent. It requires that both the parties must find the marital relationship to be irksome in a bonafide manner.

The main distinction between a Khula and mubara'a is that in the former the aversion is on the side of the wife and she desires a separation but in the later the aversion is mutual and both sides desire separation. Secondly, in a divorce by Khula some consideration must be given by the wife to the husband for her release from the marital tie. It is in effect an offer from the wife for her release on payment of a compensation. On the other hand, in a divorce by mubara'a no compensation is given by the wife to the husband for her release from the marital tie because both are happy at the prospect of getting rid of each other.

DIVORCE BY JUDICIAL PROCESS

1.Lian (Mutual Imprecation)

2.Faskh (Judicial Rescission)

Lian (Mutual Imprecation)

Lian means a testimony confirmed by oath and accompanied with imprecation. Divorce by mutual imprecation is mentioned in the Quran and is supported by

the traditions of the Prophet (SAW). The law of Islam punishes the offenses of adultery (Zina) severely and so it takes serious view of an imputation of unchastity against a married woman. It is reported that a man from the Ansar accused his wife of adultery. The Prophet (SAW) thereupon asked them both to take an oath. Then he ordered them to be separated from each other. If a husband accused his wife of infidelity, he was liable to punishment for defaming his wife unless he proved his allegation. If there was no proof forthcoming, the procedure of lian was adopted.

A husband accuses his wife of adultery, but is unable to prove the allegation. The wife in such a case is entitled to sue for the dissolution of the marriage. At the hearing of the suit, the husband has two alternatives:

1. He may retract the charges. If this is done at or before the commencement of the hearing but not after the close of evidence or the end of the trial, the wife is not entitled to a dissolution.
2. To persist in his attitude, whereby he will be required to accuse his wife on oath. The form of oath is, "The curse of god be upon him if he was liar when he cast at her the charge of adultery".

The wife then must be called upon either to admit the truth of imputation or to deny it on oath coupled with an imprecation in these terms "The wrath of God be upon me if he be a true speaker of the adultery of wife he has cast upon me". If the wife takes the oath, the Qazi must believe her, and pronounce a divorce.

Faskh (Judicial Annulment)

The word 'faskh' means annulment or abrogation. It comes from a root, which means 'to annul or to rescind'. Hence it refers to the power of the Muslim Qazi to annul a marriage on the application of the wife. It may be defined as the dissolution or rescission of the contract of marriage by judicial decree. The law of faskh is founded upon the Quranic injunctions and the traditions of the Prophet(SAW). The Quranic verse runs thus: "If ye fear a breach between the husband and the wife, send a judge out of his and another from her family; if they are desirous of agreement. God will effect a reconciliation between them; for God is knowing and appraised of all". (Quran 6:35)

B.A. LL.B. III SEMESTER

Family Law-I (Paper II)

UNIT-2

DOWER

DEFINITION AND NATURE OF DOWER

Dower is one of the important components of marriage under Muslim Law. One of the salient features of Muslim Marriages is the right of the wife to receive, and the liability of the husband to make available to her, what is known as dower.

Unfortunately, the Islamic concept of Mahar has been widely misunderstood. Those who are obsessed with the contractual element in the Muslim concept of marriage, regard it as “Consideration”. Those who are more familiar with ‘dowry’ confuse it with the same. The fact is that Mehar is neither ‘consideration’ nor dowry; it has a unique position of its own. To understand the Muslim concept of dower thoroughly let us go through some of the definitions of dower by eminent jurists of Islamic law.

According to Tyabji: “Dower or *mahar* is a sum that becomes payable by the husband to the wife on marriage, either by agreement between parties or by operation of law.”

Abdur Rahim defines it as dower is either a sum of money or other form of property to which the wife becomes entitled by marriage. It is an obligation imposed by law on the husband and as a mark of respect for the wife.

According to Baillie, Dower is not the exchange or consideration given by the man to the woman for entering into the contract; but an effect to the contract imposed by the law on her husband and as a token of respect to its subject, the woman.

Justice Mahmood defines dower as follows:

“Dower under the Mohammadan law is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage, even where no dower is expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife. Dower may be regarded as a consideration for connubial intercourse by way of analogy to the contract or sale.”

If dower were a consideration it would always be prompt and specified; but the law allows deferred dower which is payable on the dissolution of marriage. And even when it is not expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife. The law provides that dower can be fixed before, at the time of or after the marriage. Dower is, therefore, different from consideration. It is in fact an effect to the contract imposed by law on the husband as a token of respect to its subject, the wife.

Lord Parker in the case of *Hamira Bibi v. Zubaida Bibi*, (1916) 431 A299, also points out that Dower is an essential incident under the Mohammadan law to the status of Marriage, to such an extent this is so that when it is unspecified at the time the marriage is contracted the law declares that it must be adjudged on definite principles.

In *Nasra Begum v. Rijwan Ali*, AIR (1980) All 118 at P 120, The court held that where there has been an agreement between the parties at the time of their marriage with regard to the amount of dower payable by the husband between the husband and wife for payment of dower the amount becomes recoverable under agreement.

The true nature of dower can be found in the Quran itself. Quran uses the word *Sudaqat* (plural of *Sudaqah*) for dower. *Sudaqah* is a derivative of *Sidiq* which means truth, regularity and friendship. Dower in this Quranic sense is the symbol of truthfulness and regularity of the friendship of the husband and the wife. Dower is to strengthen cooperation between the spouses and add to the dignity of women.

CLASSIFICATION OF DOWER

Dower may be either specified or unspecified. If the dower is specified then, again, it may be asked that when it is payable. There are following kinds of dower in Islam.

1. Specified dower
2. Unspecified dower.

Specified dower may again be divided into: (a) Prompt dower & (b) Deferred dower.

Specified dower (al-Mahr al-Musamma):

The dower which the parties to a marriage may fix by stipulation is called specified dower. Usually the dower is fixed at the time of marriage and the Qazi performing the ceremony enters the amount in the register; or else there may be a regular contract with numerous conditions. The sum may be fixed either at the time of marriage or later. The amount of dower may be fixed by the father if the son is minor or of unsound mind and a father's contract on behalf of a minor son is binding on the minor. In the Hanafi School the rule is that the dower as fixed by the father is binding on the son and the father has no personal liability to pay it. But among the Shias the rule is that if the son has no means to pay it, the father is liable.

Where the amount has been specified the husband will be compelled to pay whole of it, however excessive it may seem to the court, having regard to husband's means. But in the Oudh and Jammu and Kashmir due to local legislation's, only a reasonable amount will be decreed if the court deems the amount to be excessive or fictitious.

At what time and in what proportion is the amount payable. On this basis dower has been classified as (i) Prompt and (ii) deferred.

Prompt Dower:

Prompt dower is payable immediately after the marriage, if demanded by the wife. The prompt dower may be realised by the wife at any time before or after the

consummation of the marriage. The consummation of marriage or living with the husband is not necessary condition for claiming it. The demand should be specified and not conditional or ambiguous; the payment of prompt dower may be postponed until there is an actual demand by the wife. The wife may refuse to live with her husband so long as the prompt dower is not paid.

Deferred Dower:

The technical term for deferred dower is *Muwajjal*. The term *Muwajjal* Means delayed or deferred and comes from a root which means to delay or postpone. The deferred dower is payable on the termination of marriage by death or divorce. It has not become prompt by the demand of the wife during the continuation of marriage. But if there is any agreement as to the payment of deferred dower earlier than the dissolution of marriage, such an agreement would be valid and binding.

The wife, though not entitled to demand payment of deferred dower (unless otherwise stipulated), but the husband can treat it as prompt and pay or transfer the property in lieu of it. Such a transfer will not be void as a fraudulent preference unless actual insolvency is involved.

The interest of the wife in the deferred dower is a vested one and not a contingent one. It is not liable to be displaced by the happening of any event, not even on her own death and as such her heir can claim the money if she dies.

Unspecified Dower (Mahr- Al- Mithal):

Where the dower is specified, it has to be paid accordingly. But where the dower has not been settled at the time of marriage or after, what are the principles upon which the amount of dower is to be determined?

The customary or proper dower of woman is to be fixed with reference to the social position of her father's family and her own personal qualification. The *Hedaya* lays down the importance of the rule that her age, beauty, fortune, understanding and virtue must be taken into consideration. The Islamic law, therefore, safeguards the rights of a wife and attempts to ensure her an economic status consonant with her own social standing. Therefore, the circumstances which have to be taken into consideration in determining the amount of proper dower are:

1.the position of the wife's family ; 2.the personal qualifications of the wife ; and
3.the dower settled on her female paternal relations.

ENFORCEMENT OF DOWER

The claim of the wife or widow for unpaid portion of dower is an unsecured debt due to her from her husband or his estate, respectively. It ranks rateably with unsecured debts and is actionable claim. During her life time the wife can recover the debt herself from the estate of the deceased. The heirs of the wife including the husband become entitled to her dower of pre- deceased husband.

When the prompt dower is not paid the wife can refuse conjugal rights to the husband and non-payment of the prompt dower is a firm defence against the husband's suit for restitution of conjugal rights. Not only this, if on account of non-payment of dower, the wife is living separately from her husband, he is bound to maintain her. The wife can also file a suit against the husband for the recovery of the dower debt. The period of limitation for a suit to recover 'prompt dower' is three years from the date when the dower is demanded and refused or where during the continuance of the marriage no such demand has been made, when the marriage is dissolved by death or by divorce.

The non-payment of deferred dower by its very nature cannot confer the right of refusal on the wife to live with the husband. The rights to enforcement arise only on dissolution of marriage or on the happening of a specified event, the period of limitation or suit to recover deferred dower is three years from the date when marriage is dissolved by death or divorce.

The widow is entitled along with other creditors of her deceased husband to have it satisfied out of his estate. In the case of Kapoor Chanad v. Kadar-un-nisa, 1953 AIR 413, 1950 SCR 747, Supreme Court observed: The wife is like any other creditor of the husband and cannot, therefore, claim priority for the dower debt over other creditors. The widow's claim for dower debt has priority over the other claims of the other heirs. The heirs of the deceased husband are not personally liable for the dower debt of the widow. The liability of an heir is to be measured not by his interest in the estate but by the assets which come to his hands.

Widow's Right of Retention

A widow can claim her dower even after death of her husband out of his estate. In this respect a right is given to the widow, known as widow's right of retention. Literally speaking the right of retention is the act of withholding what one has in his hands by virtue of some right, as where a creditor pays his own claim out of the debtor's property that comes into his hands as representative of the debtor. Similarly the Muslim law gives the widow, whose dower remains unpaid a special right to enforce her demand called as the Widow's right of retention. This right subsists until her dower is paid off either by husband's heirs or is satisfied from the usufruct of the property that she holds.

The right of retention arises for the first time on the death of her husband. The widow becomes the creditor of the estate of her deceased husband for her unpaid dower. Until it is paid she has the right to retain possession of the property of which she has lawfully obtained possession. Such possession must be initially obtained by the widow on the ground of her claim for dower.

The widow's right to retain the possession of the property in lieu of her dower is not in the nature of regular charge mortgage or lien. It is in essence a personal right as against heirs and creditors of the husband to enforce her right. The right to hold property does not give the widow any title to the property. The widow can simply retain the possession and appropriate the usufruct till her dower is satisfied and in case the widow is dispossessed wrongfully the right to recover possession is available to her under specified relief Act.

The widow in possession of her deceased husband estate in lieu of dower is bound to account to other heirs of her husband for the rents and profits received by her out of the estate. The right of retention does not give the right to alienate property by sale, mortgage, gift or otherwise for the satisfaction of her dower debt. An alienation made by the widow to the extent of her own share is valid and it does not affect the shares of other heirs.

The other heirs also have the right of alienating their shares in the estate and if they alienate them, the alienation will be valid but the alienee will take the property subject to the widow's right of dower debt and he cannot disturb her possession.

The widow right of retention is capable of descending to the heirs of the widow on her death. There was a diversity of judicial opinion as to whether the right to retain possession of the property by a widow in lieu of dower was heritable. But the conflict was finally resolved by the Supreme Court by holding that the right to hold possession is heritable. This was held in Kapoor Chanad v. Kadar-un-nisa, (1953) S.C. R. 413.

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Family Law-I (Paper II)

Unit-3

MAINTENANCE

Maintenance (*nafaqah*) to Women under Muslim law

Nafaqah means maintenance or provision for support. According to Hedaya, *Nafaqah includes* 'all those things which are necessary to the support of life, such as food, clothes and lodging. '

The social role assigned to man and woman by Islam within the family emanate from one simple but profound reality that the two are equal but of dissimilar nature and the social harmony demands no similar role from both.

In the sphere of rights and obligations Islam maintains a balance, it is not like a pro-male or pro-female law. In short, it is pro-humane and balanced. Hence if the husband fails to provide adequate maintenance provision for wife, she can lawfully refuse to live with the husband. Similarly if the wife refuses or fails to live with the husband, the latter is no longer bound to support her.

Maintenance to Wife

The husband has to maintain his wife during the subsistence of marriage and during the period of wife's Iddah. It makes no difference whether the wife is a Muslimah or kitabiyah, rich or kitabiyah, rich or poor, young or old, and virgin or otherwise. It shall be due even when intimacy is not possible with the wife due to her old age etc. If

consummation of marriage is not possible solely on account of some defect in the husband, maintenance is incumbent on him. Thus wife shall be entitled to get her maintenance even when the husband is impotent or too ill to be intimate with her. If the husband is a minor then maintenance shall be realized from his property if he has any or from his father if he has undertaken the liability for the payment of same.

It is the absolute right of the wife that the husband should maintain her even when she is destitute while she is earning.

If a wife leaves her husband's home against his wishes, a refractory wife, an unchaste wife and also a wife who apostises, loses her right to maintenance. A wife shall not become disentitled to maintenance when it is the conduct of the husband that forces her to leave him and live apart from him.

Again if a husband has more than one wives, each of them can claim a separate apartment and refuse to live with another wife. Under such circumstances she can claim separate maintenance and also the dissolution of marriage if the husband fails to provide it for her.

Further she will retain her right to maintenance even on apostacy provided she converted to a revealed religion, that is Christianity or Judaism.

Widows Maintenance

Under Islamic law a widow is an heir to the husband and succeeds to a part of his estate. Besides Quranic directive is to the effect of one year maintenance for her under an obligatory bequest of the husband. It provides; Surah Baqara (II):240;

"Such of you shall die and leave wives ought to bequeath to them a year's maintenance."

Consequences of non-maintenance:

If she fails to get maintenance, the *Qadhi* can authorize her to raise a loan on the husband's credit for her support. The wife can also use such portion of her husband's property as may be necessary, even without an order by the *Qadhi*.

On the husband's failure to maintain his wife for a considerable time the marriage can be dissolved; however because of poverty or any other cause not under his own control, it is advisable not to dissolve the marriage but to live with cooperation and tolerance.

Arrears of Maintenance:

Where maintenance has been decreed by the *Qadhi* or husband has agreed to that, the wife can claim arrears of maintenance. But the arrears of maintenance can also be claimed even without a *Qadhi's* order. The wife can release the husband from payment of past arrears but not from future obligation. The release for the future shall be effective for only the next one month.

Divorcee's Maintenance

For the period of *Iddat* wife is entitled to use husband's board and lodging and claim maintenance from him. Quran Provides, (Sura Talaq:1 &2):

"When ye divorce women, divorce them at their prescribed periods. And count (accurately) their prescribed period (*Iddat*). And fear your Lord and turn them not out of their houses, nor shall they themselves leave, except when they are guilty of open lewdness.

And when they fulfill their term appointed, either take them back on equitable terms, or part with them on equitable terms."

In Islam wife inherits property from her relatives and also can own her separate property. She can after marriage dissolution maintain herself out of that property and also claim it from her parents or those relatives who can inherit her property or could have inherited her property when she has no property.

A divorcee will be entitled to maintenance during *iddat* period in the following situations [according to Fatawa-i-Alamgiri]:

- a. The wife has sought separation on just grounds
- b. The third person has become the cause of separation as in *lian*
- c. The husband has become apostate
- d. The husband has had intercourse with the wife's mother
- e. The wife got marriage dissolved because of the husband's impotency
- f. The minor wife repudiated marriage by exercise of option of puberty
- g. The marriage was dissolved on the ground of option of *ghaiyer kafu* (inequality)
- h. The marriage was dissolved through *khul*

The cases enumerated by the Fatawa-i-Alamgiri in which maintenance is not payable to the divorced women are:

- a. The marriage has been dissolved because of the wife's defects
- b. The wife was divorced because of her refractoriness
- c. The apostate wife even if having returned to faith during *iddat*
- d. When the right of wife to maintenance had already got suspended during marriage for some cause

The period of *iddat* will be counted from the moment the wife has been divorced or the divorce has been granted. It will continue during the time three regular consecutive menstruation periods of the divorced woman are over. In case of a pregnant woman it will continue upto delivery of the child or till the termination of pregnancy. Where a wife has been divorced in her absence she would be entitled to maintenance until she becomes aware of the divorce and for three months after the information reaches her.

Maintenance agreements:

A wife may secure a valid agreement from her husband to give her separate maintenance in proper cases as:

- I. ill-treatment
- II. dis-agreement
- III. her not being able to get on with another wife of the husband
- IV. he would maintain her in the house of her parents or
- V. any such agreement as may be but not against public policy

In view of this principle agreement for (*kharcha-e-pandan*) personal allowance are valid.

But any agreement for future separation providing that the husband would give some maintenance to the wife in the event of future separation at the instance of the wife is opposed to public policy and void. Likewise an agreement in the marriage contract that the wife would not be entitled to maintenance is void. But an agreement would be valid if a condition to that effect is made in the event of khul or mubara.

Maintenance of Divorcee under, The Muslim Women (Protection of Rights on Divorce) Act, 1986

For better understanding of Maintenance of Divorcee under, The Muslim Women (Protection of Rights on Divorce) Act, 1986, we have to discuss the maintenance of wives under Cr.P.C.

Maintenance of wives under Cr.P.C

Under section 125-128 of Cr.P.C, 1973, an order of maintenance can, therefore be passed in favour of a wife, if:

- a. the wife is unable to maintain herself
- b. the husband has sufficient means
- c. the husband has neglected or refused to maintain her
- d. the wife had not refused to live with the husband except for a sufficient cause.
- e. The husband having contracted a second marriage or keeping a mistress and the wife refusing to live with him
- f. The wife not living in adultery

- g. The husband and wife not living separately by mutual consent
- h. The wife has not remarried after the dissolution of marriage

Under Islamic law, it may be noted again, a wife is entitled to maintenance irrespective of her financial position. A Muslim who has sufficient means of her own to support herself can, therefore, not claim maintenance under the provisions of the new code, but she can agitate her claim under Muslim Law in a civil court.

Under the code, even a divorced woman is entitled to claim maintenance from her husband. Any order regarding maintenance of such a divorced woman can be cancelled in the following circumstances:

- a. If the wife remarries after divorce
- b. The woman has been divorced by her husband, and that she has received, whether before or after the date of such divorce, the whole of the sum, which under any customary or personal law applicable to the parties was payable on such divorce.
- c. The woman has obtained the divorce from her husband and that she has voluntarily surrendered the right to maintenance after divorce.

A plain reading of section 127(3)(b) of Cr.P.C shows that if the husband has paid off either before or after the date of order under sec.125, the sum which is already payable by the husband to the wife under any customary or personal law of the parties, the Magistrate, if satisfied about it, shall cancel the order, passed by him. However, this provision has been the subject of conflicting interpretations.

The Supreme Court for the first time, was faced with the question of the construction of sec. 127(3)(b), in Bai Tahira vs. Ali Hussain, AIR 1976 SC 362; In this case the husband Ali Hussain divorced his wife in 1962. A compromise was made in respect of properties and the amount payable to her by way of Mahr and Iddat money. A clause in the compromise deed provided:

“The plaintiff declares that she has now no claim or right whatever against the defendant or against the estate or properties of the defendant.”

But after coming into force of the code, 1973, she claimed maintenance under section 125. Krishna Ayer. J. made the following observations:

“Payment of Mahr money as customary discharge is within the cognizance of that provisions, sec. 127(3)(b). The key thought is adequacy of payment which will take reasonable care of her maintenance. The payment of illusory amounts by way of customary or personal law requirement will be considered in the reduction of maintenance rate but cannot annihilate that role unless it is reasonable substitute... The whole scheme of section 127(3)(b) is manifestly to recognize the substitute maintenance arrangement by lump sum payment organized by the custom of the community or the personal law of the parties. There must be a rationale relation between the sum to be so paid and its potential as provision for maintenance, to interpret otherwise is to stultify the project... The proposition, therefore is that no husband can claim under section 125 towards a divorced wife except on proof of payment of a sum stipulated by customary or personal law whose quantum is more or less sufficient to do duty for maintenance allowance.”

Thus the conflict between the Islamic law and code of 1973, was sought to be resolved by the insertion of clause (b) to sub section (3) of section 127, through its judgement in Bai Tahira.

In *Ishak Chandra vs. Myamatbi & Ors.*, 1980 Cr.L.J 1180 (Bomb), some significant issues came for consideration:

- i. Whether the provisions of section 125 are inconsistent with the provisions of the Shariat Act, 1937;
- ii. whether Shariat Act, 1937 being a special law should prevail over the general provisions of the new code.

It was held: "The Muslim Personal Law, (Shariat Act, 1937) does not lay down any special rules but merely lays down certain norms or rules as regards applicability of Muslim Personal law to Muslims. Under section 125 of the Cr.P.C has granted an additional rights to a divorced Muslim woman for receiving maintenance allowance even beyond the period of iddat...The additional benefit or right does not conflict with the right which is already conferred upon her under Muslim Personal Law. In these circumstances the Shariat Act or any other Personal Law cannot control the said right nor the provisions of the said Act can be imported into section 125 of the Cr.P.C for defeating the right conferred by section 125."

It is submitted that the view that there is no conflict between the provisions of Muslim Personal Law and section 125, is not correct. The court has limited its logic to only one aspect of the problem, that is, the right of woman, saying that conferring the additional right is not in conflict with the principles of Islamic law. The court has failed to look into another important aspect, that is, the liability of the husband. The husband under Islamic law is under no obligation to maintain his divorced wife beyond Iddat while under section 125 he is bound to maintain her even beyond iddat.

Mohd. Ahmad Khan vs. Shah Bano Begum, AIR 1985 SC 945; Explaining the scope of the provisions of section 125, Y.Y.Chandrachud, C.J. who wrote the judgement for the Constitution Bench of five judges, observes: "We are not concerned here with the broad and general question whether a husband is liable to maintain wife, which includes a divorced wife, in all circumstances and at all the events, that is not the subject matter of section 125. That section deals with cases in which a person who is possessed of sufficient means neglects or refuses to maintain, amongst others, his wife unable to maintain herself. Since the Muslim Personal Law, which limits the husbands liability to provide for the maintenance of divorced wife to the period of Iddat, does not countenance the situation envisaged by section 125 it would be wrong to hold that the Muslim husband according to his personal

law, is not under an obligation to provide maintenance, beyond the period of iddat, to his divorced wife who is unable to maintain herself..."

The Supreme Court made an attempt to prove that this view is in consonance with Quranic provisions; below mentioned;

"For divorced woman maintenance (should be provided) as reasonable. This is a duty on the righteous." [Quran 2:241]

"Thus doth God made clear his signs to you: in order that you may understand." [Quran 2:242]

The main objections raised against the approach of Supreme Court were based on the following grounds:

1. The Islamically unqualified persons could not take up the task of interpreting the Quran into their own hands.
2. The judges have misinterpreted the Quranic provisions against the Spirit of Islamic Concept of marriage.
3. Even if there is some need for gearing up the Islamic law to meet the present day circumstances, it could be accomplished through Ijtihad by the Muslim Community itself.

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

No sooner the Supreme Court pronounced the decision in Shah Bano Case there came the demand from the Muslim Community to undo the effect of the same. The Govt. of India soon realizing the gravity of the situation introduced a Bill in the Parliament, to make a separate law for the protection of Sharia, which ultimately led to the Muslim Women (Protection of Rights on Divorce) Act, 1986.

The provisions of the Cr. P.C. relating to maintenance of women whose marriage is subsisting, children and parents, continue to apply to Muslims even after the enforcement of the present Act. The deserted wives, children and parents can still take the benefit of the provisions of sections 125-128 of Cr. P. C that provide a speedier remedy for the problems of non-maintenance. The application of the Act 1986 is,

therefore, limited only to the matters regarding rights of Muslim women on divorce.

The Act, pursuant to this definition, applies only to women married according to Muslim law and not to those Muslim women married according to any other law like Special Marriage Act, 1954. Similarly, the Act, 1986 applies only to those Muslim women whose marriage has been dissolved in accordance with the Muslim Law.

Section 3 of the Act, 1986, provides that on Divorce a woman shall be entitled to:

- a. A reasonable and fair provision and ,maintenance to be made and paid to her within the Iddat period by her former husband.
- b. Where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective date of birth of such children.
- c. An amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and
- d. All the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or husband or any relatives of the husband or his friends.

Section 5 of the Act, provides that if a divorced woman and her husband declare by affidavit or by any declaration in writing, either jointly or separately, that instead of the Muslim Women Act, 1986, they would prefer to be governed by the provisions of sections 125-128 of Cr.P.C , same provision shall be applied to them.

Danial Latifi vs. U.O.I, (2001) 7 SCC 740; in this case a writ petition under Article 32 was made challenging the constitutional validity of the Act,1986. The petitioners contention was that by making section 125 of the Cr.P.C inapplicable to the Muslim Women, discriminates against them. The argument was that section 125 Cr.P.C gave protection to all women irrespective of their religion. Then came the Act of 1986, with

the 'inevitable effect to nullify the law declared by the Supreme Court in Shah Bano.'

In conclusion it was held:-

1. A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well, extending beyond the iddat period; and must be made by him within the iddat period, in terms of section 3(1)(a) of the Act.
2. His liability under section 3 to pay maintenance is not confined to iddat period.
3. A divorced Muslim Woman, not remarried and unable to maintain herself after iddat period can proceed, under section 4 against her relatives who are liable to maintain her in proportion to the properties which they would inherit from her. If none of them is liable to maintain her, the magistrate may direct the State Wakaf Board to pay.
4. Provisions of the Act do not offend Articles 14, 15 & 21 of the Constitution.

In *Shabana Bano vs. Imran Khan*, 2009 STPL (web) 251 SC; appellant Shabana Bano filed a petition under section 125 Cr.P.C. Preliminary objections were raised by the respondent that appellant has already been divorced on 20.8.2004 in accordance with the Muslim Law. Thus, under the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986, appellant is not entitled to any maintenance after divorce and after the expiry of the iddat period.

The Supreme Court observed, 'we respectfully abide by what has been stated therein...we have carefully analysed the same and come to the conclusion that the Act actually and in reality codifies what was stated in Shah Bano's case...Cumulative reading of the relevant portions of judgments of this court in *Danial Latifi* and *Iqbal Bano* would make it crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. Thus being a beneficial piece of legislation, the benefit

thereof must accrue to the divorced Muslim woman.' Further it was said that "even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under section 125 of the Cr.P.C after the expiry of period of iddat also, as long as she does not remarry."

B.A. LL.B. III SEMESTER

Family Law-I (Paper II)

Unit-2

MARRIAGE

NATURE OF MUSLIM MARRIAGE

The institution of marriage is recognised by all civilized societies. Marriage regulates the conduct and behavior of men and women when they start living as husband and wife. The marriage confers a legal and social status, with rights and responsibilities, on the parties who enter into it.

Islam also recognises the institution of marriage usually termed as '*Nikah*'. Islam condemns unchastity in emphatic terms and strictly prohibits the illicit relations. This institution of marriage has been ordained for the protection of society and in order that human beings may guard themselves from foulness and unchastity.

There is a popular misconception that no religious significance or social solemnity is attached to Muslim Marriage and that it is a mere civil contract. Even Justice Mehmood says that Marriage among Mohammedans is not a sacrament but purely a civil contract. Of course, Islam does not consider marriage as a sacrament in the religious sense of the term. However the Prophet (SAW) did describe '*Nikah*' (Marriage) as his Sunnah; and those who know the socio religious significance of Sunnah as recognised by Muslims can well understand what marriage means to a follower of Islam. The Quran too does not consider marriage as ordinary contract.

Marriage itself, as a concept is not merely a contract. The presence of the following elements determines its contractual character.

- Proposal and Acceptance
- Consideration (dower, under misconception so treated)
- Ante and post-nuptial agreements as in other contracts
- Alteration, modification or revocation of these ante and post-nuptial agreements
- Breach of contract (divorce)
- Option of puberty (Minor's contract).

On the basis of these facts Justice Mahmood in the case of Abdul Kadir v. Salima, (1866) AII 149, had concluded that contract of marriage is similar to a contract of sale. But, in the famous case of Anis Begam v. Muhammad Istefa, (1933) 55 AII 743, Chief Justice Sir Shah Sulaiman observed:

“Marriage (in Islam) is not regarded as a mere civil contract, but a religious sacrament”.

Further the Muslim Marriage is not merely a civil contract because:

- While a civil contract, it cannot be made contingent on a future event, and
- Unlike civil contract it cannot be for a limited time (Mutta marriage is an exception and not a rule)
- Maher (Dower) is not the same as consideration in a contract of sale.

Though being contractual in form the true nature of marriage is not confined to this aspect alone. It is a devotional act (Ibadat) as well. Some of the sayings of the Prophet (SAW) may be considered in this connection:

‘He who marries completes half his religion; it now rests with him to complete other half by leading a virtuous life in constant fear of God’.

‘There are three persons whom the Almighty himself has undertaken to help-

a. He who seeks to buy his freedom;

b. He who marries with the view to secure his charity; and

c. He who gifts in the cause of Allah.’

‘There is no “mockery” in Islam’.

In this context Muslim marriage ceases to look as purely a civil contract or only a means to procreate children. Marriage is for the solace of life.

Thus in the words of Abdul Rahim “The Muhammadan jurists regard the institution of marriage as partaking both of the nature of Ibadat or devotional act and ‘Mauamlat’ or dealings among men”.

In order to have a clear understanding of the institution of marriage in Islam three aspects, which are also evident from the above discussion, must be considered. These are:

- a. Legal aspects,
- b. Social aspects, and
- c. Religious aspects.

1. Legal aspect:

Juristically, marriage is a contract and as such has three characteristics:

- a) There can be no marriage without consent.
- b) Provision is made for its breach.
- c) The terms of marriage contract are within legal limits capable of being altered to suit individual cases.

2. Social aspect:

In its social aspect, Islamic law gives a high status to women after marriage. Restrictions are placed upon unlimited polygamy as an instrument to maintain order in society.

3. Religious aspect:

Quranic injunctions recognise in Islam, marriage as the basis of society. It is a sacred covenant. It is the Sunnah of the Prophet (SAW) specially enjoined. Prophet taught that nobility of character is the best reason for marrying a woman.

Hence we can say that Muslim marriage partakes of the nature both of Ibadat (devotional act) and Mauamlat (worldly affairs). Therefore, a Muslim marriage is both a civil contract and sacrament.

ESSENTIAL CONDITIONS OF A VALID MARRIAGE

The following are main essentials for a valid marriage:

1. Proposal (*Ijab*)

It is necessary that there should be declaration of proposal on the part of one.

2. Acceptance (*Qubul*)

Such proposal of marriage should be accepted by her or by her guardians or by other party on her behalf as the case may be. It was observed in Ghulam Kubra v. Mohammad Shafi, AIR 1941 Pesh 23, by Mahmood J. that a man or someone on his behalf or a woman or someone on her behalf should agree to marriage at one meeting and the agreement should be witnessed by two adult witnesses.

The proposal and acceptance must be made in unequivocal terms. These should be unambiguous and must denote a permanent and immediate rather than a temporary and deferred relation.

3. Consent

Under all the schools of Muslim law a boy who is of sound mind and has attained puberty can freely marry personally and without anybody's consent. Shafi or Shia major girl cannot marry without a guardian. Under Hanafi and Ithna Ashari law a girl of sound mind and having attained puberty can also freely marry personally and without the consent of her guardian. A boy or a girl who can freely marry personally can lawfully act through others. However, the consent of such boy or girl for his or her marriage must be obtained. Without it the marriage will be void, unless he or she satisfies it.

Category of persons who are incompetent to marry freely and need the consent of a 'marriage guardian' for that purpose.

i) Insane person

An insane person cannot marry without a guardian. Under none of the schools of Muslim law can an insane person (male or female, major or minor) contract marriage without the consent and intervention of his or her marriage guardian.

Again, under none of the schools of Muslim law can the marriage of a minor person take place without the consent of his or her marriage guardian.

Further more it may be pointed out that the marriage guardian of an insane person can contract such person's marriage with or without his or her consent. The marriage guardian of a minor can also contract a marriage on his or her behalf with or without his or her consent.

ii) *Minors marriage*

A minor Muslim can marry with the help of a guardian.

A minor contracted in marriage by the guardian for marriage has the right of repudiating or ratifying the marriage contract on attaining puberty. This right of the minor is known as option of puberty (Khyar-ul-bulugh).

Option of puberty is available in all cases where the 'marriage guardian' other than father and grandfather contracted the marriage of the minor. Where the marriage was contracted by the father or grandfather option of puberty is not available. But in exceptional cases the option of puberty is available even where marriage was contracted by father or grandfather. Such exceptional circumstances are:

- a. Where the conduct of the marriage guardian was fraudulent or negligent.
- b. Where an improper 'Maher' was agreed upon.
- c. Where the marriage is to the manifest disadvantage of the minor.

However, by the dissolution of Muslim marriages Act, 1939, the disability of the minor to exercise option of puberty, in case his marriage guardian was father or grandfather, has been removed.

The option can be exercised immediately after attaining puberty.

4. Witnesses

According to Sunni Hanafi Law, at least two adult witnesses are required at the time of solemnisation of marriage. As per Shia Law, the witnesses are not essential.

5. Capacity to Marry

In Islamic law there are two basic attributes of legal competence to contract a marriage:

- a. Sound mind, and
- b. Puberty (Majority).

Every Muslim who is of sound mind and has attained the age of puberty may enter into a valid marriage contract. The word puberty requires some explanation.

In Muslim law puberty and majority are one and the same. Puberty means age when a boy or a girl becomes capable of begetting or bearing children. It is generally presumed that a person who has completed the fifteenth year of his age has attained puberty. However, the law has recognised the possibility of attaining puberty by a boy or a girl before the age of fifteen years. The earliest age of puberty for a boy is generally twelve years and for a girl it is nine years.

Limitations to a Valid Marriage

There are following main limitations to the unfettered capacity of a Muslim to marry any person of the opposite sex. The prohibition may be on the grounds of:

- i. Number
- ii. Religion
- iii. Relationship
- iv. Fosterage
- v. Unlawful conjunction
- vi. Iddat

1. Number

As to the plurality of husbands or wives, the rule in Islamic law is that a Muslim man may marry any number of wives, not exceeding four, but a Muslim woman can marry only one husband. If a Muslim marries a fifth wife, such marriage is not void, but irregular; whereas if a Muslim woman marries a second husband she is liable for bigamy.

2. Religion

A man in Hanafī law may marry a Muslim woman or *Kitabiyya* but a Muslim woman cannot marry anyone except a Muslim. *Kitabiyya* means a woman believing in a revealed religion possessing a Divine Book. Hanafī law prohibits a man from marrying a fire worshipper or an Idolatress.

3. Relationship

Consanguinity (blood relations): If a person contracts marriage with anyone of the following, such marriage will be void (Batil) on the ground of Consanguinity.

- i. His mother or grandmother how high so-ever.
- ii. His daughter or granddaughter how low so-ever.
- iii. His sister, whether full, consanguine
- iv. His niece or great niece how low so-ever.
- v. His aunt or great aunt how high so-ever, paternal or maternal.

Affinity: A Muslim is prohibited to marry with the following, with whom he has relationship of affinity. Such marriage is void.

- i. Ascendants or descendents of his wife, and
- ii. The wife of any ascendant or descendent.

4. Fosterage

A Muslim man cannot marry his foster mother, her daughter or his foster sister. A marriage forbidden by reason of fosterage is void.

5. Unlawful conjunction

A man is forbidden to have two wives at the same time so related to each other by consanguinity, affinity or fosterage that they could not have lawfully inter-married

with each other if they had been of different sexes. The bar of two marriages renders a marriage irregular, not void.

6. Iddat

In case of divorce Iddat period is three courses, or if the woman is pregnant, it is till delivery. If the marriage is dissolved by death, the period of Iddat is four months and ten days or in case the woman is pregnant, it is till delivery, whichever is longer. In Muslim law when a marriage is dissolved by death or divorce, the woman is prohibited from marrying within a specified time. This period is called Iddat.

If the marriage is not consummated, Iddat has to be observed in case of death, but not in case of divorce. Marriage with a woman undergoing Iddat is irregular but not void.

LEGAL EFFECTS OF VALID MARRIAGE

The legal effects of a valid marriage are as:

1. The wife becomes entitled to get maintenance from her husband.
2. The husband becomes entitled to exercise marital authority over his wife. He can also put restraints on the movement of his wife in a reasonable manner.
3. The sexual intercourse between the spouses becomes lawful. The children born out of the wedlock becomes legitimate.
4. The wife gets or becomes entitled to dower.
5. The prohibition regarding marriage due to the rules of affinity comes into operation.
6. Such marriage creates the right of inheritance.
7. If any agreement is entered into or by the parties of marriage at the time of the marriage or afterwards, its stipulations comes into operation provided they are not contrary to law.
8. The status of a woman is not changed. She remains subject to her own pre-marital school of law.

CLASSIFICATION OF MARRIAGE AND LEGAL EFFECTS OF VALID, VOID AND IRREGULAR MARRIAGE

On the basis of the fulfillment of certain essentials/requirements of a valid marriage, under Muslim law marriage have been classified into three classes:

1. Valid (Sahih)
2. Void (Batil)
3. Irregular (Fasid)

1. Valid marriage:

A marriage, which conforms in all with the law, is termed as Sahih, that is, correct. For a marriage to be valid it is necessary that there should be no prohibitions affecting the parties. Now, prohibitions may be perpetual, or temporary. If the prohibition is perpetual, the marriage is void. If it is temporary, the marriage is irregular.

2. Void marriages:

A marriage, which has no legal results, is termed *Batil* or Void. A marriage forbidden by the rules of blood relationship, affinity or fosterage and some other prohibited marriages are void. The issue of a void marriage is illegitimate. A void marriage being unlawful produces no mutual rights and obligations between parties, the illegality of such Unions commences from the date when the contracts are entered into and the marriage is considered as totally non-existing in fact as well as in law.

3. Irregular marriages:

A Union between a man and a woman may be either lawful or unlawful. Unlawfulness may be either absolute or relative. If the unlawfulness is absolute, the marriage is void. If it is relative, we have an irregular marriage. The following marriages have been considered irregular:

- A marriage without witness;
- A marriage with a woman undergoing Iddat;

- A marriage prohibited by reason of difference of religion;
- A marriage contrary to the rules of unlawful conjunction;
- A marriage with a fifth wife.

The Ithna Ansari and the Ismaili schools of law do not recognise this distinction between void and irregular marriages. They treat a marriage either valid or void. The above-mentioned marriages before them will be void.